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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

)
) Subcase Nos. See Attachment A
)

) **REPLY IN SUPPORT OF STATE**
) **OF IDAHO'S MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
)

The State of Idaho, by and through its counsel of record, hereby submits its reply
in support of the *State Of Idaho's Motion For Partial Summary Judgment* (Feb. 21, 2012)
("Motion").

ARGUMENT

I. PIONEER CONTROLS THE CITY OF POCATELLO'S CLAIMS.

The First count of the State's *Motion* seeks a ruling that *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007) controls the question of the City of Pocatello's ownership interest in the water right for Palisades reservoir.¹ In Subcase No. 01-2068Y, the City has presented a competing ownership claim that also asserts several non-irrigation "purposes of use" for its Palisades storage allotment. The City opposes the first count of the State's *Motion* on the ground that the *Pioneer* decision "is controlling legal authority . . . only in relation to irrigation rights and interests." *City's Brief* at 3 (internal quotation marks and citation omitted). This argument is incorrect because the *Pioneer* rule by its terms is not limited to irrigation entities: "it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right." *Pioneer*, 144 Idaho at 115, 157 P.3d at 609 (underlining added).

The fact that *Pioneer* applied this rule only in the irrigation context presented in that particular case does not mean the legal principle applies only in such contexts. The *Pioneer* rule is based upon beneficial use principles, which are not limited to irrigation uses. Thus, the plain language of the *Pioneer* rule confirms it is controlling authority for the City's claim.

It follows that the City's separate claim to ownership of the Palisades water right must be dismissed, just as the competing ownership claims were dismissed in *Pioneer*.

¹ The first count of the State's *Motion* seeks the following ruling:

The Idaho Supreme Court's decision in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), is controlling authority for purposes of determining the ownership interest the City of Pocatello may have in storage water right no. 01-2068 (Palisades Reservoir).

Motion at 2.

The fact that the City has asserted additional purposes of use under its competing claim is insufficient to preserve it in the face of the *Pioneer* rule. *Pioneer* foreclosed such competing claims as a matter of law, and therefore the City must find some other avenue to pursue its claim that the partial decree for the Palisades water right must include additional purposes of use.

The only remaining question is whether the City holds an interest in the Palisades water right under the *Pioneer* rule, which the State's *Motion* does not seek to resolve. Thus, the State is entitled to judgment as a matter of law on the first count of its *Motion*.

II. THE PARTIAL DECREES SHOULD OMIT ANY REFERENCE TO THE EAGLE DECREES.

The second count of the State's *Motion* seeks a ruling that the partial decrees for the American Falls and Palisades water rights "should not include any reference" to the *Eagle Decrees*.² The Coalition opposes this part of the State's *Motion*.

The Coalition's briefing on this issue in its response memorandum is minimal, presumably because the Coalition filed a cross-motion for summary judgment seeking remarks expressly referencing the *Eagle Decrees* and a substantial supporting brief, only three days after filing the *SWC Response* to the State's *Motion*.³ To the extent the Coalition relies on its briefing in support of its summary judgment motion for purposes of opposing the State's *Motion*, the State incorporates herein by this reference the *State Of*

² The second count of the State's *Motion* seeks a ruling as follows:

The partial decrees for storage water rights nos. 01-2064 (American Falls Reservoir) and 01-2068 (Palisades Reservoir) should not include any reference to *Burley Irrigation Dist. v. Eagle* (Idaho 5th Jud. Dist., Jul 10, 1968) and/or *Aberdeen-Springfield Canal Co. v. Eagle* (Idaho 7th Jud. Dist., Mar. 12, 1969), and/or to the stipulations and/or supplemental decrees entered therein.

Motion at 2.

³ See *Surface Water Coalition's Motion For Partial Summary Judgment* (Apr. 19, 2012); *Memorandum In Support Of Surface Water Coalition's Motion For Partial Summary Judgment* (Apr. 19, 2012).

Idaho's Response To Surface Water Coalition's Motion For Partial Summary Judgment (Jun. 8, 2012). The *SWC Response's* relatively brief arguments opposing the State's *Motion* are addressed below.

The Coalition argues that the State did not object to the *Eagle Decree* reference in the Director's recommendations and therefore "has no legal standing to seek summary judgment on that issue at this time." *SWC Response* at 42. The Coalition offers no legal support for this contention and ignores the fact that the State filed responses to other parties' objections to the Director's *Eagle Decree* remarks.⁴ See Idaho Code § 42-1412(3) ("The notice of claim, objections, and responses to objections, shall identify the issues to be heard for water rights acquired under state law."). The State clearly has standing to pursue its *Motion*, particularly given the Coalition filed a cross-motion for summary judgment on the *Eagle Decrees*.

The Coalition also argues that remarks referencing the *Eagle Decrees* are required as a matter of law because the *Eagle Decrees* were binding on the Watermaster. *SWC Response* at 43. This argument ignores the Presiding Judge's ruling that the *Eagle Decrees* merely provided for water to be delivered to the holder of an unadjudicated claim until it was finally adjudicated – such as in the SRBA. *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 4.⁵ In short, the *Eagle Decrees* were simply placeholders: "[T]he watermaster was not joined for purposes of adjudicating or confirming the underlying validity of any of the elements

⁴ For instance, the United States' objections raised the issue of the *Eagle Decrees* remarks, and the State responded to the United States' objections. See, e.g., *Standard Form 1 Objection, Subcase No. 01-2064* (United States) (Apr. 19, 2007); *Standard Form 2 Response To Objection, Subcase No. 01-2064* (State of Idaho) (Jun. 8, 2007).

⁵ This decision was entered in Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025 (Minidoka Power Rights); 1-2068 and 1-4054 (Palisades Power Rights).

of the unadjudicated water right,” *id.*, and the *Eagle Decrees* “did not adjudicate any water rights or other administrative provisions.” *Id.* at 5 (bold omitted). The *Eagle Decrees* were binding on the Watermaster only for a “limited purpose,” *id.* at 12, and the Coalition’s attempt to bootstrap this limited purpose into a requirement to incorporate the administrative provisions of the *Eagle Decrees* into the partial decrees should be rejected.⁶

The Coalition also argues the provisions of the *Eagle Decrees* “directly relate to water right administration, not just a potential contract dispute.” *SWC Response* at 44. This contention has been repeatedly rejected by this Special Master and the Presiding Judge in the Minidoka and Palisades power rights subcases,⁷ as the State explained in its opening brief and its response to the Coalition’s summary judgment motion.⁸ *See also The United States Response In Partial Opposition To The State Of Idaho’s Motion For Partial Summary Judgment* (Apr. 16, 2012) (“*Bureau Response to State*”), at 2-3 (“As the State points out, the Presiding Judge has recognized that the Eagle Decrees neither adjudicated any water rights, nor any administrative provisions. . . . the Eagle Decrees can provide no meaningful guidance regarding the storage water rights addressed by the State’s Motion.”).

The Coalition’s argument also ignores the legal distinction between state law-based water rights to divert natural flow into a reservoir, and contract rights to an allocation of the water after it has been diverted into the reservoir. As discussed in the

⁶ *See also State Of Idaho’s Response To Surface Water Coalition’s Motion For Partial Summary Judgment* (Jun. 8, 2012) (“*State’s Response to SWC Motion*”), at 19-22.

⁷ Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025 (Minidoka Power Rights); 1-2068 and 1-4054 (Palisades Power Rights).

⁸ *See Memorandum In Support Of State Of Idaho’s Motion For partial Summary Judgment* (Feb. 21, 2012) (*State’s Opening Brief*), at 10-15; *State’s Response to SWC Motion*, at 23-31.

State's response to the Coalition's summary judgment motion, the *Eagle Decrees* address contract storage rights, not the water rights at issue in this subcase.⁹ See also *Bureau Response to State* at 3 ("the storage rights at issue in this proceeding were not addressed in the *Eagle* proceedings"). This important distinction is recognized in water rights administration in Water District No.1.¹⁰ It is also well established in Idaho law and should not be called into question by incorporating the *Eagle Decrees* or the Palisades Contracts¹¹ into the partial decrees for the American Falls and Palisades water rights.

The Coalition attempts to avoid these conclusions, arguing "these cases are entirely distinguishable from the power rights [subcases], since [under *Pioneer*] the Coalition and other spaceholders hold equitable title and state law property right interests to the storage water rights, not just rights based upon contract." *SWC Response* at 44. This argument fails because the spaceholders' *Pioneer* interest will be adequately reflected by an appropriate remark, either pursuant to the parties' stipulation¹² or as a matter of law under *Pioneer*. Including additional remarks simply on the basis of *Pioneer* would imply the spaceholders have an additional ownership interest in the water rights, something beyond that recognized in the *Pioneer* decision. *Pioneer* provides no support for incorporating the *Eagle Decrees* or the Palisades Contracts into the partial decrees – to the contrary, in *Pioneer* the Idaho Supreme Court declined to require that the

⁹ See *State Of Idaho's Response To Surface Water Coalition's Motion For Partial Summary Judgment* (Jun. 8, 2012), at 49-58.

¹⁰ Thompson Aff., Exhibit 41 at 348 (Olenichak Depo., con'd) (Mar. 23, 2012) (agreeing that the exhibits to the *Eagle Decree* are "part of storage contract administration rather than natural flow water rights administration").

¹¹ The "Palisades Contracts" are a group of "more than 50 formal contracts . . . entered into by the USBOR and various water users in the Upper Snake River Basin" in connection with the Palisades Dam and Reservoir Project. *Memorandum Decision And Order On Challenge* (Feb. 9, 2011), at 8 (Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025 (Minidoka Power Rights); 1-2068 and 1-4054 (Palisades Power Rights)).

¹² All parties except the City of Pocatello stipulated to a remark reciting the language approved by the Idaho Supreme Court in *Pioneer*. *Stipulation To Resolve Certain Objections* (Jan. 26, 2012), at 4-6.

partial decrees identifying the placeholders and the quantity of stored water to which they were entitled under their contracts. *Pioneer*, 107 Idaho at 115-16, 157 P.3d at 609-10.

The State is entitled to summary judgment on the second count of its *Motion*.

III. THIS COURT SHOULD DECLINE TO CONSIDER OR ADOPT THE REMARKS PROPOSED IN THE BUREAU'S RESPONSE TO THE COALITION'S MOTION.

The State normally would be required to confine the scope of this reply brief to the issues raised by the State's *Motion* and the responses thereto. *See Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005) ("this Court will not consider arguments raised for the first time in the appellant's reply brief"). Strict adherence to this rule, however, could prejudice the State with respect to an express request for relief that the Bureau has put before this Court in an argument opposing the Coalition's request for summary judgment, without filing a separate motion of its own. The State therefore turns briefly to the Bureau's request for relief even though it is outside the scope of this reply brief.

The Bureau argues against the remarks sought by the Coalition's summary judgment motion, but then goes beyond the scope of that motion (and the State's) by proposing entirely new and different remarks based on the Palisades Contracts. *United States Response To SWC's Motion For Partial Summary Judgment* (Jun. 7, 2012) ("*Bureau Response to SWC*"), at 7-9. The Bureau asserts: "The Court should adopt the exchange remarks proposed by the United States," *id.* at 7, and that it would be proper for the Court to do so, even in the absence of a corresponding motion by the United States. *Id.* at 9 n.7. The United States explained that it had not filed a separate summary judgment motion because doing so might disrupt the briefing schedule, and the United States would not object if parties addressed the newly proposed remarks in their reply

briefs, and in any event “a cross-motion is not necessary for this Court to adopt the proposed remarks for summary judgment.” *Id.*

None of these arguments excuses the Bureau’s failure to file an appropriate summary judgment motion. The contention that the United States could not have filed a summary judgment motion proposing its remarks without disrupting the schedule simply cannot be credited: the Coalition successfully filed such a motion, supported by a substantial affidavit and a detailed brief, without any such disruption. Even after that, there was still an opportunity for the Bureau to file a motion, or at least notify the other parties that it desired to, because the parties discussed and stipulated to a schedule extension. *United States Unopposed Motion To Reset Schedule* (May 1, 2012). The Bureau did not take advantage of this opportunity, either, and cannot creditably argue that it should be excused from filing its own motion because there was no time to do so.

The Bureau’s representation that it will not object to other parties addressing its proposed remarks through reply briefing, *Bureau Response To SWC Motion* at 8 n.9, is also unavailing. The other parties, including the State, are entitled to significantly more notice and opportunity to respond to the proposed remarks than reply briefing allows. A major proposal such as the remarks urged by the United States should not be put before this Court as an afterthought in a brief responding to a summary judgment motion, particularly when a related summary judgment motion filed by an entirely different party is also pending.

Further, the authority the Bureau has offered to support its contention that this Court should grant the affirmative relief sought by the Bureau’s briefing is not persuasive. Only one of the two cases cited by the Bureau was an Idaho decision,

KGF Development LLC v. City of Ketchum, 149 Idaho 524, 236 P.3d 1284 (2010), and it was not an SRBA case. The SRBA is a general stream adjudication under chapter 14, title 42, Idaho Code, which means it presents “unique circumstances” and is governed by specialized statutory procedures and rules. *In re SRBA Case No. 39576*, 128 Idaho 246, 254-55, 912 P.2d 614, 622-23 (1995). Further, as this case demonstrates, in the SRBA any proposal to include specific remarks in a partial decree is often the trigger for intense dispute over matters of language, form, interpretation, and effect.

Whatever the *KGF* decision may mean with regard to deciding legal issues outside the SRBA in the absence of a motion, it is of considerably less assistance and weight with respect to the question of granting the specific affirmative relief of inserting complex remarks in a partial decree simply on the basis of a brief opposing summary judgment – particularly under the circumstances of this proceeding, as discussed above. The Ninth Circuit case cited by the Bureau is even further removed from the SRBA and even less persuasive, particularly given its acknowledgment that granting summary judgment in the absence of a motion is “a close question” that requires careful consideration. *Kassbaum v. Steppenwolf Productions, Inc.* 236 F.3d 487, 494-95 (2000) (internal quotation marks and citation omitted).

Finally, even if this Court determines it is appropriate to consider whether to grant the Bureau’s informal request to insert its proposed remarks in the partial decrees, this Court should decline to do so. The Bureau’s proposed remarks are simply interpretations of provisions of the Palisades Contracts that are incorporated into the *Eagle Decrees*. They reflect nothing more than the same private contractual obligations and arrangements

that this Special Master and the Presiding Judge have previously determined should not be incorporated into water right decrees:

[I]t needs to be pointed out that it is beyond the scope of the authority and function of the watermaster and/or IDWR to resolve private contract disputes as part of their administrative duties. . . . The watermaster and IDWR are not responsible for getting in the middle of private contract disputes. The contract dispute needs to be resolved in the appropriate forum.¹³

Thus, the Court should reject the Bureau's argument that the proposed remarks are harmless because they merely "provide notice" of the existence of the Palisades Contracts. *Bureau Response To SWC* at 9. Partial decrees represent enforceable property interests and legal rights. They are not bulletin boards and should not be casually decreed as a convenient means to "provide notice." Incorporating the Bureau's remarks into the partial decrees will elevate purely private contractual interests to the level of an interest in a state law-based water right, binding the Watermaster, IDWR and all other water users to those private agreements. In any event, remarks that simply "provide notice" of private contractual arrangements regarding stored water allocations and reservoir operations are not necessary to define, clarify or administer the water rights to divert natural flow. Idaho Code § 42-1411(2)(j); *see also Order Denying Request For Attorney's Fees And Costs, Subcase No. 37-21112* (May 4, 2012), at 4 (holding partial decrees should not include remarks "unless . . . determined to be absolutely necessary.").

Thus, the Bureau's contention that its proposed remarks should be incorporated into the partial decrees to "provide guidance for administering the water rights" is

¹³ *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011), at 14 (Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025 (Minidoka Power Rights); 1-2068 and 1-4054 (Palisades Power Rights); *see also Order Granting Motions For Summary Judgment and Special Master Report And Recommendation* (Mar. 25, 2010); *Order Denying Joint Motion To Alter Or Amend* (Jul. 29, 2010); *Memorandum Decision And Order On Challenge* (Feb. 9, 2011). These decisions and the argument herein they are offered to support are discussed in the State's opening summary judgment brief, filed February 21, 2012, and its June 8, 2012, brief in response to the Coalition's summary judgment motion.

contrary to law—and also to the Bureau’s previous (and correct) position that such contract-based provisions “can provide no meaningful guidance regarding the storage water rights addressed by the State’s Motion.” *Bureau Response to State* at 2-3.¹⁴ The Bureau’s remarks simply paraphrase or interpret the same provisions of the Palisades Contracts that were incorporated into the *Eagle Decrees* as a “common plan” or “administrative provisions.” See, e.g., *Memorandum In Support Of Surface Water Coalition’s Joint Motion For Partial Summary Judgment* (Apr. 19, 2012), at 7-10. The fact that the Bureau’s alternative remarks do not expressly reference the *Eagle Decrees* and paraphrase rather than directly quote the Palisades Contracts does not save them. They remain nothing more than expressions of the same private contracts arrangements governing the allocation of stored water that were previously rejected by this Special Master and the Presiding Judge.

The State therefore requests that this Court decline to consider the Bureau’s request to adopt its proposed remarks, or alternatively reject that request on the merits.

IV. THE NARROW ISSUE PRESENTED BY THE STATE’S *MOTION* IS A THRESHOLD QUESTION OF LAW.

The principal issue raised by the *State’s Motion* is a fundamental question of the quantity of water that may be diverted in priority under a water right. The third count of the State’s *Motion* proposes the following two-sentence remark:

¹⁴ The Bureau correctly argued in its response to the State’s *Motion*:

As the State points out, the Presiding Judge has recognized that the *Eagle Decrees* neither adjudicated any water rights, nor any administrative provisions. . . . the storage rights at issue in this proceeding were not addressed in the *Eagle* proceedings the *Eagle Decrees* can provide no meaningful guidance regarding the storage water rights addressed by the State’s Motion. . . .

Bureau Response to State at 2-3.

This right is filled for a given irrigation season when the total quantity of water that has been accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.

Motion at 2. The State through this language seeks to resolve a pivotal substantive dispute over the scope of the American Falls and Palisades water rights. The State seeks to confirm that (1) the decreed “quantity” elements of the American Falls and Palisades water rights are limits on the amount of water that may be diverted in priority under the rights; and (2) the “quantity” elements do not prohibit additional diversions into the reservoirs, so long as no other water rights are injured.

The Coalition and the Bureau oppose the State’s *Motion* because it seeks to confirm that priority diversions under the American Falls and Palisades water rights are limited to the annual volumes recited in the “quantity” elements of the partial decrees. The Coalition and the Bureau assert that the annual volumes recited in the “quantity” elements of the Director’s Reports are not limits on priority diversions into the reservoirs, and the water rights are in priority whenever the reservoirs are not physically full—regardless of the quantity that has actually been diverted into the reservoirs over the course of the season.

The Coalition and the Bureau seek to disguise this fundamentally flawed position through distraction and misdirection, making complicated assertions and arguments on a wide array of concerns and issues such as “paper” fill vs. “physical” fill, Water District No. 1’s water right accounting programs, flood control operations and the “availability” of stored water under spaceholder storage contracts, and a myriad of other issues. Whatever relevance these arguments may have with respect to the collection of various

issues that have come to be lumped under the catch-all, “refill”— a term that does not even appear in the language proposed by the State’s *Motion*—they cannot change the fact that the principal purpose of the State’s *Motion* is to resolve a dispute over a threshold question of law: whether or not there is a specific, quantifiable, and legally enforceable limit on the amount of water that may be diverted in priority under the American Falls and Palisades water rights.

This language proposed by the State’s remark would do two things: (1) it would confirm that the decreed “quantity” elements of the American Falls and Palisades water rights are limits on the amount of water that may be diverted in priority under the rights; and (2) it would confirm that the “quantity” elements do not prohibit additional diversions into the reservoirs, so long as no other water rights are injured.

V. THE STATE’S *MOTION* IS BASED ON ESTABLISHED IDAHO LAW.

A. Idaho Law Requires That Water Rights Be Decreed With A Specific And Enforceable Limit On The Quantity That May Be Diverted In Priority.

The Coalition argues “the State can point to no statute, rule, or case” supporting this language, *SWC Response* at 50, 54, and the Bureau similarly argues the remark “lacks legal foundation” and “is directed at an issue which has yet to be addressed by the judiciary.” *Bureau Response To State’s Motion* at 3. In fact, the State’s *Motion* is rooted in the basic elements of prior appropriation doctrine and settled legal principles Idaho courts have repeatedly affirmed.

“Quantity” is a fundamental element of a water right, with the same status and significance as the priority date. Idaho Code § 42-1411(2); *see Memorandum Decision And Order On Challenge, Subcase Nos. 74-15051, et al (“High Flow” Claims) (“Lemhi High Flows Order”)*, at 17 (stating that quantity and priority are the “essential

elements””) (quoting *State v. ICL*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998)). The decreed “quantity” of a right to divert natural flow for storage purposes states the “annual volume of diversion of water.” Idaho Code § 42-1411(2)(c); *see also* IDAPA37.03.08.035(iv) (“The quantity of water to be diverted shall be listed as a rate of flow in cubic feet per second and/or as a volume to be stored in acre-feet per year.”).

The Idaho Supreme Court has confirmed that Idaho water rights must be defined “in terms of quantity of water per year.” *A&B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573; *Lemhi High Flows Order* at 10. The water right must define “a specific quantity of water.” *Matter of Gen. Determination of Rights to Use of Surface & Ground Waters of Payette River Drainage Basin*, 107 Idaho 221, 225-26, 687 P.2d 1348, 1352-53 (1984). This requirement “is essential to the establishment and granting of a water right.” *A&B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573; *Lemhi High Flows Order* at 10. Language that effectively eliminates the quantity element “vitiates the existence of a legal water right.” *State v. ICL*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998).

The “quantity” of a water right limits the amount of water that may be diverted in priority:

If the defendant, who lives above plaintiff, is entitled to a priority for 45 inches of water, he may unquestionably divert that quantity, but, when he has once done so, he may not dam the stream below or hinder or impede the flow of the remaining stream Whatever amount of water defendant shows himself entitled to . . . as a prior right . . . beyond that he cannot go

Van Camp v. Emery, 13 Idaho 202, 89 P. 752, 754 (1907). “The right of appellant to the waters of the Portneuf river for mill purposes was limited to the quantity of water reasonably necessary to operate the mill.” *Union Grain & Elevator Co. v. McCammon Ditch Co.*, 41 Idaho 216, 240 P. 443, 445 (1925); *see also Keller v. Magic Water Co.*, 92

Idaho 276, 284, 441 P.2d 725, 733 (1968) (“one may lawfully divert . . . if the quantity . . . is within the limits of his right”); *see also* Idaho Code § 42-220 (“Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein”). Limiting priority diversions to the “quantity” of a water right is fundamental to the beneficial use principles underpinning the prior appropriation doctrine as established by Idaho law. *See Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 587-88, 494 P.2d 1029, 1031-32 (1972) (“That policy . . . prohibits appellant from diverting more water than necessary for the beneficial purpose regardless of alleged seniority in right through priority in time.”); *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475, 485-86 (1943) (“The quantity of water to which a person is entitled . . . is limited to the amount applied to a beneficial use”); Idaho Code § 42-1402 (“The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed”).

Further, “[a]n increase in the volume of water diverted is an enlargement and is not allowed under I.C. § 42-1425.” *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (internal quotation marks and citation omitted). Likewise, “there is *per se* injury to junior water rights holders anytime an enlargement receives priority.” *Id.* (internal quotation marks and citation omitted); *see also Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001) (“Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use”). “Whatever may be decreed to either party, the other is clearly entitled to have the amount of water left for him flow in an unobstructed manner.” *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752, 754 (1907).

Thus, Idaho law requires that the “quantity” element establish the amount of water appropriated with certainty, and not be “vague and fluctuating”: “[I]f the decree awards an uncertain amount of water to one appropriator whose needs are vague and fluctuating, it is likely that he will waste water and yet have the power to prevent others from putting the surplus to any beneficial use.” *Village of Peck v. Denison*, 92 Idaho 747, 750, 450 P.2d 310, 313 (1969). “The quantity of water decreed to an appropriator . . . should be definite and certain.” *Reno v. Richards*, 32 Idaho 1, 178 P. 81, 86 (1918). It is vital for the court “to establish exactly how much water to which one is entitled.” *Savage Lateral Ditch Water Users Assn v. Pulley*, 125 Idaho 237, 243, 869 P.2d 554, 560 (1993). In decreeing water rights it is essential “to fix the date of the appropriation . . . and the amount of water.” *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073, 1080 (1915).

These principles and requirements apply to water rights to divert the public waters of the state into storage reservoirs: “One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right.” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007); *see also* Idaho Code § 42-202(3) (“the applicant shall specify in acre feet the quantity of such flood or winterflow waters which he intends to store”). These principles also apply in the SRBA. An SRBA claim to divert natural flow into storage must describe “the quantity of water claimed” in terms of “the annual diversion volume . . . in acre-feet per year.” Idaho Code § 42-1409(c)(i); *see also* IDAPA 37.03.01.060.02.F.iv (“the amount of water stored shall be listed in af per annum”). The Director’s Report “must determin[e] . . . the quantity of water used.” *State v. Hagerman Water Right Owners*,

Inc., 130 Idaho 736, 741, 947 P.2d 409, 414 (1997); Idaho Code § 42-1411(2)(c). The partial decree must firmly define the “quantity” of water that may be diverted in priority. Idaho Code §§ 42-1402, 42-1411(2)(c), 42-1412(6).

B. Idaho Law Requires That Water Rights Be Decreed With A Specific And Enforceable Limit On The Quantity That May Be Diverted In Priority.

The State’s *Motion* relies upon the legal principles discussed above. The first sentence of the State’s proposed remark simply reiterates the rule that the decreed “quantity” of a water right is limit on priority diversion under the right: “This right is filled for a given irrigation season when the total quantity of water that has been accumulated to storage under this right equals the decreed quantity.” *Motion* at 2. The legal rule that priority diversions are limited to the decreed “quantity” necessarily means that further diversions are not entitled to priority and permissible only if they do not injure other water rights, and this is reiterated in the second sentence: “Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.” *Motion* at 2. The second sentence is also important in that it validates the historic practice of allowing surplus flows in excess of established rights to be stored in the reservoirs provided juniors water rights have also been filled.¹⁵ Thus, the second sentence precludes challenges to historic “refill” practices, and ensures that they can continue.

There is no merit in the contentions of the Coalition and the Bureau that the State’s *Motion* lacks a foundation in Idaho law. The Coalition’s related assertion that through its *Motion* “the State would like to undo the prior appropriation doctrine,” *SWC Response* at 63, is also entirely without basis. The State’s *Motion* is firmly grounded in

¹⁵ The Coalition’s incorrect contention that validating historic practice requires recognition of a priority right to divert more than the decreed “quantity” is discussed in a subsequent section.

the most fundamental principles of the prior appropriation doctrine as established by Idaho law, including the two “essential elements” of an Idaho water right: quantity and priority. *Lemhi High Flows Order* at 17 (quoting *ICL*, 131 Idaho at 333, 955 P.2d at 1112).

The State’s *Motion* is also consistent with the Director’s recommendations for the American Falls and Palisades water rights. For both water rights, the Director recommended the “quantity” element be decreed as an annual volume in acre-feet: “AFY,” or Acre-Feet per Year.¹⁶ The State’s *Motion* would confirm that the “AFY” figures in the “quantity” elements of the partial decrees are to be understood as annual limits on priority diversions under these rights. This result is not only consistent with Idaho law, it gives proper effect to the plain meaning of the term “acre feet per year.”

The Coalition argues that this result amounts to a “collateral attack” on the licenses for the American Falls and Palisades water rights because the licenses do not expressly bar “refill.” *SWC Response* at 47, 51, 52. This argument ignores the fact that the State’s *Motion* does not expressly bar “refill,” either. In fact, the term “refill” does not appear in the State’s proposed remark:

This right is filled for a given irrigation season when the total quantity of water that has been accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.¹⁷

¹⁶ The Director’s “quantity” recommendation in Subcase No. 01-2064 was “1672590.00 AFY,” and “1200000.00 AFY” in Subcase No. 01-2068.

¹⁷ *Motion* at 2.

The term “refill” is too ambiguous and imprecise for such purposes: it can mean any number of things to different people, depending on the context.¹⁸ The State’s *Motion* also does not seek a judicial interpretation of the term “refill,” nor does it attempt to resolve all of the varied issues that can arise under the general umbrella of “refill.” The collection of factual and legal issues, interest and views that bear on “refill” is too often referenced simply as “the refill issue,” as if they comprised a single, discrete, and well-defined question, which they clearly do not—as demonstrated by the many additional issues in the Coalition’s response briefing, the amicus filings, and the *Petition To Designate Basin-Wide Issue, Subcase No. 00-91017* (Jun. 11, 2012).

None of these other questions and issues need to be addressed to resolve the State’s *Motion*, which seeks only to resolve a narrow legal question under familiar principles of Idaho water law. The State’s *Motion* presents a threshold matter that is just one of the many potential issues falling within the broad range of the term “refill.” The State’s *Motion* seeks only a ruling that the decreed “quantities” of the American Falls and Palisades water rights are enforceable annual limits on the amount of water that may be diverted in priority under the rights, and that, consistent with historic practice, the reservoirs may store additional water after their “quantity” limits are reached, but only if no other water rights are injured thereby.

Contrary to the Coalition’s assertions, this request is not a collateral attack on the licenses but rather a reaffirmation of what they plainly state:

¹⁸ See *State’s Opening Brief* at 16-17 (discussing the ambiguity of the term “refill”); see also Orr Aff., Exhibit 9 at 118-19 (transcript of “Deposition of Anthony Olenichak, February 9, 2012) (discussing ambiguity of “refill”); see also *Affidavit of Ron Shurtleff, Basin 65 Watermaster* (Jun. 8, 2012) (filed with *Motion For Leave To File Amicus Brief: State Of Idaho’s Motion Concerning ‘Refill’ Of Bureau Of Reclamation Storage Rights* (Jun. 8, 2012)), at 2 ¶ 3. The affidavit of Watermaster Shurtleff filed by Amici on June 8, 2012 should not be confused with his subsequent affidavit dated June 18, 2012, which the State filed on June 19, 2012.

the amount of water to which such right is entitled and hereby confirmed . . . is limited to . . . and shall not exceed 1,800,000 acre feet per annum [American Falls]¹⁹

the amount of water so stored and to which such right is entitled and confirmed . . . is limited to . . . and shall not exceed 1,200,000 acre-feet per year [Palisades]²⁰

Thus, the licenses expressly limit diversions in priority to a maximum annual volume, and the Director plainly recognized this fact in recommending that the “quantity” elements be decreed in similar terms: “acre-feet per year.” The State’s *Motion* does not collaterally attack the licenses.

It is the Coalition, rather, that mounts such collateral attacks. The Coalition asserts “the [American Falls] license does not restrict Reclamation from ‘refilling’ the reservoir beyond the total volume in a single year,” *SWC Response* at 8, despite the above-quoted language that explicitly states the licenses are “limited to” and “shall not exceed” the annual volumes. *See also SWC Response* at 9 (“the [Palisades] license does not restrict Reclamation from “refilling” the reservoir beyond the total volume in a single year”). The Coalition’s argument that the licenses do not limit priority diversions to a maximum annual volume is an attempt to enlarge the appropriations by securing priority rights that are not limited to their decreed annual volumes. Indeed, as discussed below, the Coalition seeks to have the rights decreed without any meaningful or enforceable “quantity” limit at all.

VI. THE COALITION’S ASSERTED PRIORITY RIGHT TO CONTINUOUS “PHYSICAL FILL” OF THE RESERVOIRS IS CONTRARY TO IDAHO LAW.

A. A Priority Right To Ongoing “Physical Fill” Of A Reservoir Is An Un-Quantified Right And Contrary To Idaho Law.

¹⁹ Orr Aff., Exhibit 30 (License R-269/01-2064) (underlining added).

²⁰ Orr Aff., Exhibit 60 (License No. R-670/01-2068) (underlining added).

The basis of the Coalition's opposition to the State's *Motion* is the contention that priority diversions under the American Falls and Palisades water rights are not limited by the licensed quantities, *SWC Response* at 8 ("the [American Falls] license does not restrict Reclamation from 'refilling' beyond the total volume in a single year"),²¹ even though both licenses stated the "amount" of the rights as a "per annum" or "per year" acre-foot figure, and that the "amount" of water to which the rights were entitled was "limited to" and "shall not exceed" those yearly volumes.²² Rather, the Coalition contends the water rights authorize priority diversions whenever there is any empty space in the reservoirs – regardless of how much water has actually been diverted under the rights. The Coalition argues that the American Falls and Palisades water rights authorize priority diversions as needed "to achieve the maximum physical fill" of the reservoirs, *SWC Response* at 54, and to repeatedly "refill" the reservoirs throughout the year, subject only to "the physical constraints of available reservoir space." *Id.* at 64; *see also id.* at 66 ("If water can be distributed to 'refill' available space, such as the American Falls example, there is no 'excess' water, it is appropriated for use under the storage water rights.").

In short, the Coalition argues the American Falls and Palisades water rights are priority entitlement to continuous "physical fill" of the reservoirs and opposes the State's *Motion* as a move to subordinate the "lawful physical fill" of the water rights. *SWC Response* at 2; *see also id.* at 36-37 (arguing the State's *Motion* "would permanently subordinate the physical fill of Reclamation's storage"); *id.* at 46 ("In a move to

²¹ *See also SWC Response* at 9 ("the [Palisades] license does not restrict Reclamation from 'refilling' beyond the total volume in a single year").

²² Orr Aff., Exhibits 30 and 60.

completely subordinate the physical fill”). The Coalition has cited no legal authority supporting its theory that the American Falls and Palisades water rights are priority entitlements to an ongoing “physical fill” of reservoir space, or to continuous, open-ended priority diversions as needed to keep the reservoirs physically full.

It is the Coalition’s theory, not the State’s, that defies the prior appropriation doctrine as established by Idaho law, one of the most basic tenets of which is that the “quantity” element of a water right establishes a limit on priority diversions. Once that quantity has been reached, the right is no longer in priority, and further diversions into storage are permissible only if other water rights are not injured. Under the Coalition’s theory, the American Falls and Palisades water rights are priority entitlements to continue diverting (and, if necessary, curtailing junior water rights) without regard to how much water has actually been diverted into the reservoirs. They have no firm “quantity” that the Watermaster or other water users can enforce, and no legal protection for junior appropriators. They become *de facto* un-quantified water rights.

Under Idaho law, un-quantified water rights are a nullity that may not be decreed. As previously discussed, water rights must be defined “in terms of quantity of water per year.” *A&B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573, and this requirement “is essential to the establishment and granting of a water right.” *A&B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573; *Lemhi High Flows Order* at 10. Language that effectively eliminates the quantity element “vitiates the existence of a legal water right.” *ICL*, 131 Idaho at 333, 955 P.2d at 1112.

The Coalition attempts to avoid this conclusion by arguing that even under their “physical fill” theory, “the quantity element of the storage rights is still defined.” *See*

SWC Response at 64. Defined, perhaps, but legally meaningless. The Coalition’s theory of priority “physical fill” allows water to be diverted in priority subject only to “the physical constraints of available reservoir space.” *Id.* The “quantity” of the water right is reduced from an enforceable element to a meaningless artifact, allowing the Bureau to divert more than the annual volume recited in the decreed “quantity.” “An increase in the volume of water diverted is an enlargement and is not allowed under I.C. § 42–1425.” *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (internal quotation marks and citation omitted). Likewise, “there is *per se* injury to junior water rights holders anytime an enlargement receives priority.” *Id.*

The Coalition’s argument contemplates water rights that have no specific and definite limit on the scope of the appropriation that can be enforced by the Watermaster or other water users, and no legal protection for junior appropriators. This result is at odds with basic prior appropriation principles. For instance, under the Coalition’s theory, the fact that the partial decree for an irrigation water right recited a “quantity” of 100 cfs would be meaningless, because diversions would not be limited to diverting 100 cfs in priority. The appropriator would be free to divert more, and also to curtail junior water user in order to obtain more than 100 cfs. The “quantity” element limits a priority right to divert a specified annual volume of into a reservoir just as surely as it limits a priority right to a “cfs” diversion rate. *See Uhrig v. Coffin*, 72 Idaho 271, 275, 240 P.2d 480, 482 (1952) (“There is no difference in principle between ‘an appropriation measured by quantity and an appropriation measured by time.’ Kin.Irr. § 177 et seq.”) Priority is important, but it is not unlimited, and quantity is just as important. *See Lemhi High*

Flows Order at 17 (stating that quantity and priority are the “essential elements” of a water right) (quoting *ICL*, 131 Idaho at 333, 955 P.2d at 1112).

The Coalition’s argument that there is still a number recited in the “quantity” element of the partial decrees even under its theory of priority “physical fill” elevates form over substance. Under Idaho law the “quantity” element must define an enforceable legal limit on priority diversions, but under the Coalition’s theory the decreed “quantity” is reduced to a meaningless artifact. Idaho law prohibits the establishment of such an unquantified water right.

B. A Priority Right To Ongoing “Physical Fill” Of A Reservoir Would Effectively Federalize The Upper Snake River.

The Coalition’s theory that the American Falls and Palisades water rights are open-ended, priority entitlements to maintain the “physical fill” of the reservoirs would also have the effect of federalizing the management of much of the Snake River. The American Falls and Palisades reservoirs are federal projects and their operations are governed by federal law.²³ The State has no authority over releases from the reservoirs:²⁴ such releases are under the Bureau’s control and discretion, subject to the requirements of federal law and federal contracts. Releases create “available reservoir space,” *SWC Response* at 64, which would put the Bureau’s water rights back in priority under the Coalition’s “physical fill” theory. Since the Watermaster lacks authority to regulate the Bureau’s reservoir releases, the Coalition’s “physical fill” theory effectively removes the

²³ See generally Second Orr Aff., Exhibit 26 (“A Description of Bureau of Reclamation System Operations Above Milner Dam”) (Bur. of Rec.) (Jan. 1996); *id.* Exhibit 25 (“A Description of Bureau of Reclamation System Operation of the Boise and Payette Rivers”) (Bur. of Rec.) (Nov. 1996) (revised Dec. 1997).

²⁴ The sole exception to this rule is state law can require releases sufficient to satisfy prior rights, see *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 42, 674 P.2d 1036, 1041 (Ct. App. 1983) (referring to “the amount Hulet must release at his dam in order to satisfy Nahas’ prior right”), because federal law requires the Bureau to “proceed in conformity” with “the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder.” 43 U.S.C. § 383 (Reclamation Act of 1902, section 8); see also *id.* § 666 (McCarran Amendment).

Bureau's water rights from priority regulation by the Watermaster. The quantity of water released, rather than the quantity diverted, becomes the measure of the right to divert in priority—and the basis for curtailing junior water users. The fact that federal law governs releases American Falls and Palisades thus means federal law would govern priority diversions as well.

Further, under such a regime, the owner of a large on-stream reservoir could, through careful management of releases, maintain “available reservoir space”—and thus maintain the reservoir's water right in priority—for extended periods despite having diverted far more than the annual volume recited in the “quantity” element. A similar concern led the Department's to recommend in Subcase No. 63-303 that the Bureau's previously decreed right to divert 8,000 cfs to storage in Arrowrock be partially decreed in the SRBA with an “annual volume” of 271,600 acre-feet rather than a continuous diversion rate. Former Director David Tuthill explained the reasoning: “we have used the policy throughout the state for these large reservoirs that they get one fill under their priority – more can be stored if water is available to fill all priorities. This prevents a senior reservoir from continuing to fill and release all season long.”²⁵

This confirms that the Coalition's continuous “physical fill” theory opens the door for the reservoir water rights to effectively monopolize much of the flow of the upper Snake River, or commandeer it for federal purposes. Under the Coalition's continuous “physical fill” regime, the Bureau could maintain the American Falls and Palisades water rights in priority by “continuing to fill and release all season long.” The regulation of state law-based water rights should not be so lightly handed over to federal authorities,

²⁵ Second Orr Aff., Exhibit 3 at 1, 4 (underlining added).

but that is the unavoidable implication of the Coalition's argument that the reservoir water rights are in priority whenever the reservoirs are not "physically full."

Equally troubling, the Coalition's continuous "physical fill" theory removes a critical incentive for the Bureau (or any other reservoir owner) to conserve and husband the resource. An enforceable quantitative limit on the amount of water that may be diverted in priority automatically provides a strong incentive for an appropriator to carefully manage water use, because the right will go out of priority at some point. But under the Coalition's "physical fill" theory, unwise or even profligate use of water is rewarded, because the right comes back into priority as soon as there is "available reservoir space." *SWC Response* at 64. Such a result conflicts with "[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (internal quotation marks and citation omitted).

VII. THE STATE'S *MOTION* IS NOT A "ONE-FILL RULE."

The Coalition and the United States attempt to avoid these conclusions by characterizing the State's *Motion* as seeking recognition of a novel legal doctrine they term the "'one-fill' rule." See, e.g., *SWC Response* at 3 ("Idaho does not have a 'one-fill' rule"); *id.* at 50, 51 ("one fill"); *Bureau Response to State's Motion* at 3 ("the State's third request is directed at an issue which has yet to be addressed by the judiciary"). It is not clear from the briefing of the Coalition and the Bureau what the contours of the alleged "one-fill rule" are,²⁶ but it is clear that the State's *Motion* does not recite a "one fill" rule

²⁶ The term "one-fill rule" suggests a prohibition against physically filling a reservoir more than once in a season, something the State's *Motion* does not address or prohibit. The State's *Motion* addresses the question of the quantity that may be diverted in priority, and would not bar the Bureau from physically filling or "refilling" the reservoir. It would simply prevent the Bureau from curtailing juniors once it has

or seek recognition of any new legal principles. To the contrary, the State's *Motion* asks this Court to apply and confirm the established rule in Idaho that the "quantity" element of a water right defines the limit of priority diversions under that right.

VIII. THE COALITION'S "PAPER FILL" ARGUMENTS SEEK TO UNDERMINE PRIOR APPROPRIATION PRINCIPLES OF IDAHO LAW.

The Coalition also argues the State's *Motion* is based on "a 'paper fill' procedure that does not reflect actual water in the reservoirs," *SWC Response* at 2, and "seeks to decree this 'paper fill' procedure." *Id.* at 36-37. The Coalition asserts the "entire motion rests upon the faulty premise that 'paper' or 'accounting' fill is the same as the physical diversion and actual storage of water." *Id.* at 46. In a related argument, the Coalition and the Bureau both assert the State's *Motion* relies upon, or seeks to decree, the computerized water right accounting program used in Water District No. 1 to account for natural flow diversions.²⁷ *SWC Response* at 3 ("the State relies upon . . . a computer accounting program"); *Bureau Response To State* at 3 ("the State . . . would decree a portion of the complex system used for administration and accounting of those water rights"). These arguments fail as a matter of plain language and because they are based on the flawed theory of priority "physical fill."

diverted the decreed annual volume recited in the "quantity" element. This is also the probable intent of the statement in the Department's Watermaster Handbook that "[r]eservoirs are allowed to fill only once an irrigation season unless otherwise specified on the water right or determined by the Director." Orr Aff., Exhibit 8 at 20. The general rule the Department has followed is to allow reservoirs to physically fill and "refill": the legal limitation is on the quantity of priority diversions under the water right, not the physical filling of a reservoir. The "one-fill rule" as described by the Coalition and the Bureau would appear to be a rule barring the physical filling of a reservoir more than once a season, while the State's *Motion* addresses the separate question of whether the "quantity" elements of the American Falls and Palisades water rights are legal limits on priority diversions under the rights.

²⁷ A separate program handles the accounting for allocations and distributions of the stored water in the Bureau's reservoirs. Orr Aff., Exhibit 9 at 34 (Oleichak Depo) (Feb. 9, 2012); *see also* Second Orr Aff., Exhibit 9 at 2 (*Affidavit of Robert J. Sutter, Subcase No. 63-3618* (Feb. 14, 2008)).

The contentions that the State's *Motion* seeks to decree "paper fill" and the accounting program ignore and mischaracterize the plain language of the *Motion*. The State's *Motion* does not include the terms "paper fill," "accounting program," or any materially similar term. What the State's *Motion* does expressly seek, as previously discussed, is a ruling confirming that the "quantity" elements of the American Falls and Palisades water establish enforceable annual volume limits on priority diversions under those rights, and also confirmation that the historic practice of storing additional water in the reservoirs, provided no other water rights are injured, may continue.

The Coalition's "paper fill" or "accounting fill" argument is just another way of asserting that the American Falls and Palisades water rights are priority entitlements to continuous "physical fill" of the reservoir space. *See, e.g., SWC Response* at 2 ("The State asks this Court . . . to subordinate physical fill . . . in favor of a 'paper fill'"); *id.* at 47 ("This distinction between accounting fill and physical fill is critical for these subcases"); *id.* at 53 ("the State fails to distinguish between its definition of 'fill' as the accounting or physical fill in the reservoirs").

While the Coalition's assaults on "paper fill" and the "accounting program" are relentless and permeate its brief, all these arguments fail as a matter of law for one reason: they are predicated on the Coalition's flawed assertion that American Falls and Palisades water rights include a priority entitlement to keep the reservoirs perpetually full, regardless of how much water has to be diverted to ensure this "physical fill." As previously discussed, this contention flies in the face of one of the most basic precepts of Idaho water law: that a water right must be defined "in terms of quantity of water per

year,” which is “essential to the establishment and granting of a water right.” *A&B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573.

“Paper fill” is simply a term that describes this fundamental principle of prior appropriation as implemented in the accounting program. A reservoir water right has filled “on paper” means the annual volume limit on priority diversions has been reached,²⁸ and therefore the right is no longer in priority.²⁹ For all of the Coalition’s many and varied denunciations of “paper fill,” it is an entirely unremarkable concept that reflects basic Idaho law.

For the same reasons, there is no merit in the Coalition’s repeated criticisms of “paper fill” and the accounting programs for “not reflect[ing] actual water in the reservoirs,” *SWC Response* at 2, failing to “accurately portray actual reservoir contents,” *id.* at 32-33, not “match[ing] reality,” *id.* at 35, and other similar allegations. The water right accounting program was never intended as tracking systems to monitor reservoir contents, but rather to account for natural flow diversions in accordance with Idaho law.³⁰

As previously discussed, under Idaho law a water right to divert natural flow into a reservoir has “filled” and is no longer in priority after diversions have reached the annual volume limit established by the “quantity” element. The Bureau has authority to release stored water as it sees fit, and often does before priority diversions have reached

²⁸ Orr Aff., Exhibit 9 at 21-22 (Olenichak Depo.) (Feb. 9, 2012) (stating American Falls would be “filled on paper” when “there was enough water, natural flow, available to fill the entire 1,672,590 acre-feet”) *see also* Second Orr Aff., Exhibit 9 at 2-3 (Sutter Aff.) (“The accumulated amount of storage credited to each reservoir storage right is often termed ‘paper fill’”).

²⁹ Orr Aff., Exhibit 9 at 33-34 (Olenichak Depo.) (Feb. 9, 2012) (After the storage rights have filled [on paper in the accounting program], the natural flow that’s coming down through the system is not allocated to any of those priorities, because they’ve met their maximum volume accrual, and it would go to fill perhaps a junior priority after that point”).

³⁰ Orr Aff., Exhibit 9 at 102 (Olenichak Depo.) (Feb. 9, 2012) (“the way the water right accounting works is that it keeps track of every water [right?], distributes it to natural flow, storage accounts”); Second Orr Aff., Exhibit 9 at 2-3 (Sutter Aff.) (“The Accounting Program only accounts for the fill of the reservoir storage right.”). The Bureau keeps track of actual reservoir contents, and this information is readily available in the familiar “teacup” diagrams on the Bureau’s website. Second Orr Aff., Exhibit 27.

the annual volume limit.³¹ In such case, the water right “fills on paper”—i.e., is no longer in priority—even though the reservoir itself is not physically full.³² This is the logical and lawful outcome of accounting for priority diversions as required by prior appropriation doctrine as established by Idaho law. The Coalition’s condemnation of this result is contrary to Idaho law. The Coalition’s criticisms of “paper fill” and the “accounting program” are misplaced for the same reasons.

Thus, even if the State’s *Motion* relied on the accounting program or the concept of “paper fill” as legal authority or sought to “decree” either of these things, it would be consistent with Idaho law. But the State’s *Motion* does not rely or seek to decree “paper fill” or the accounting programs. The State’s *Motion* relies on the basic prior appropriation principle that the annual volume stated in the “quantity” element means something, and limits priority diversions.

IX. ALL INFLOW AT AMERICAN FALLS AND PALISADES IS PHYSICALLY DIVERTED INTO THE RESERVOIRS AND CONTROLLED BY THE BUREAU.

The Coalition and the Bureau also oppose the State’s *Motion* on the ground it allegedly requires that diversions be counted towards the “fill” of the American Falls and Palisades water rights “whether [the water] is actually stored or not.” *Bureau’s Response To State* at 3; *see also SWC Response* at 32 (“regardless of whether or not the water was physically stored in the system”). These objections are based on assertions that water “passing through” a reservoir, *Bureau’s Response To State* at 3, or released from a

³¹ Second Orr Aff., Exhibit 9 at 4 (Sutter Aff.) (“When storage is released for flood control, the paper fill of each reservoir in the Accounting Program is not affected, and continues to increase until each reservoir fills to 100 percent of its storage right.”)

³² Orr Aff., Exhibit 9 at 16-17 (Olenichak Depo.) (Feb. 9, 2012) (“After the water right has accrued its volume of storage, the physical contents sometimes are not the same as what we’ve accounted for on paper that’s accrued to the right because of the operations undertaken by the Bureau of Reclamation”).

reservoir for operational purposes such as flood control, *SWC Response* at 3, should not be counted towards the annual volume that may be diverted in priority. The Bureau claims there is “no legal authority” for counting such diversions towards the annual priority volume, and that doing so impairs the Bureau’s “discretion in deciding how to exercise its water rights.” *Bureau Response To State* at 3-4. The Coalition similarly argues “there is no basis” to count diversions of water ultimately released operations purpose towards the annual volume limit because such water “is not available to the spaceholder.” *SWC Response* at 36 n.16.

These arguments are in part just another facet of the Coalition’s overarching theory that the American Falls and Palisades water rights represent priority entitlements to continuous “physical fill” of the reservoirs, and to that extent are unavailing as a matter of law for reasons previously discussed. But even looking past this problem, the arguments of the Bureau and the Coalition ignore Idaho law and misrepresent the facts.

The American Falls and Palisades dams are river-wide structures and form large reservoirs that extend far upstream.³³ Just as at Lucky Peak Dam, at American Falls and Palisades, “the entire flow of [the] river is diverted and then artificially released.” *Memorandum Decision And Order on Cross-Motions For Summary Judgment Re: Bureau Of Reclamation Streamflow Maintenance Claim, Subcase No. 63-03618 (Lucky Peak Reservoir)* (Sept. 23, 2008), at 19; *see also id.* at 22 (“the entire flow of the natural stream has been diverted and stored and become subject to controlled releases”).³⁴ The reality at American Falls and Palisades dam is that both physically divert all inflow into

³³ Thompson Aff., Exhibit 41 at 350 (Olenichak Depo., con’d) (Mar. 23, 2012).

³⁴ Orr Aff., Exhibits 63-64 (Google Earth® images of American Falls and Palisades reservoirs); *see also* Second Orr. Aff., Exhibit 26 at 12-13 (photographs of American Falls and Palisades reservoirs).

the reservoirs,³⁵ putting the entire flow of river at those points under the Bureau's exclusive physical control.

The contention the Bureau has "discretion" to not "exercise" its water rights and can allow water to simply "pass through" the reservoirs without "actually being stored" ignores this physical reality, and confuses diversions with releases. The design of the American Falls and Palisades projects means the water rights are being exercised at all times, because these bank-to-bank dams are intended to, and do, continuously divert all inflow into the reservoirs and transform the river into large artificial lakes. The Bureau has essentially no "discretion" over the "exercise" of its rights to divert natural flow into these reservoirs. This fact is a result of the projects' design,³⁶ not water right administration.

X. THE "QUANTITY" OF WATER DIVERTED IN PRIORITY UNDER THE AMERICAN FALLS AND PALISADES WATER RIGHTS IS MEASURED BY DIVERSIONS OF NATURAL FLOW, NOT RELEASES OF STORED WATER.

While the Bureau has no ability to stop "exercising" its right to divert, it has considerable discretion over releases from the reservoirs, and carefully manages releases, which serve a number of purposes, including storage use by spaceholders, flood control, and various other objectives. Releases are the means by which the Bureau manages the

³⁵ Thompson Aff., Exhibit 41 at 350-55 (Olenichak Depo., con'd) (Mar. 23, 2012).

³⁶ Of course, the Bureau could have chosen to construct off-stream reservoirs and diverted into them via headgates and canals rather than building river-wide dams and large in-stream reservoirs. In that situation it would have been possible for the Bureau to choose not to "exercise" its water rights by simply closing the headgates and ceasing diversions. The Bureau forfeited this discretion when it decided to develop large in-stream reservoirs at American Falls and Palisades that by design divert all inflow on a continuous basis. But this choice also conferred considerable benefits: reduced reservoir construction costs, more efficient diversions, and the ability to use the natural bed of the Snake River as the primary means of distributing stored water to spaceholders, rather than building a large canal for that purpose. The Bureau should not now be heard to complain about a lack of "discretion" over the "exercise" its water rights that is of its own making and that has provided the Bureau and the spaceholders with the considerable advantages of in-stream reservoirs.

levels and contents of the reservoirs. References to “passing water through” a reservoir are simply shorthand that means the reservoir is not gaining (its overall contents are not increasing) because the Bureau, pursuant to its exclusive operational authority and discretion, is releasing enough water to offset inflow, which is often the case during the flood control period.³⁷ In other words, “passing water through” the reservoir is an exercise of the Bureau’s operational discretion to release stored water, not an decision to forgo diverting natural flow into the reservoir—which is a choice the Bureau simply does not have.

Thus, the assertion that water “passed through” the reservoirs should not be counted toward the annual volume limits is in effect an argument to make releases of stored water from the reservoirs the basis for administering diversions of natural flow into the reservoirs: either by allowing priority “refill” of the evacuated space, or by “not charging” such releases against the annual volume limit in the first place. *SWC Response* at 36 n.16. In either case, the basic rationale is the water released from the reservoir is no longer available for spaceholder use, *id.*, and therefore the Bureau and the spaceholders are entitled to a priority right to divert enough water to “physically fill” the reservoir, or at least recoup the releases. *Id.*

This argument fails as a matter of law because in Idaho, diversions define the extent of the priority allotment. Under Idaho law, the “quantity” of a water right is measured by diversions. *See Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029, 1032 (1972) (“waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use”); Idaho Code § 42-110 (“shall be entitled to such quantity measured at the point of diversion”); *id.* § 42-701 (requiring appropriators

³⁷ Thompson Aff., Exhibit 41 at 350-55 (Olenichak Depo., con’d) (Mar. 23, 2012).

construct and maintain measuring devices to assist “in determining the amount of water that may be diverted”); IDAPA 37.03.08.035.03.b.iv (“the quantity of water to be diverted”). Idaho law thus requires that all of the inflow actually diverted into the American Falls and Palisades reservoirs under their priorities be counted towards the annual volume limit.

Thus, the Bureau and the Coalition are factually and legally incorrect in contending there is no legal authority to support counting water “passed through” the reservoirs towards the annual volume limit on priority diversions under their water rights. No water is simply “passed through” without first being diverted into the reservoir and physically held by the Bureau, subject to its exclusive control; and under Idaho law the measure of whether a water right has received its decreed “quantity” is made on the basis of diversions. Further, accounting for releases of stored water from the reservoirs is legally and factually distinct issue that does not implicate the water rights to divert natural flow into the reservoirs, as discussed below.

The Bureau’s authority to control the reservoirs and releases of stored water, and a spaceholder’s rights to an allocation of the water stored in a Bureau reservoir, are private contractual matters, not water right matters. Once water has been diverted from a natural stream into a reservoir “it [i]s no longer ‘public water’ subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3),” but rather is “water ‘appropriated for sale, rental or distribution’ in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution.” *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943, 945 (1935). While such stored water is “impressed with the

public trust to apply it to a beneficial use,” it is “[t]he property of the appropriators and owners of the reservoir.” *Id.*

This distinction is also recognized in the Idaho Code: “Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator.” Idaho Code § 42-110; *also compare chapter 6, title 42 Idaho Code* (“Distribution Of Water Among Appropriators”) *with chapter 8, title 42, Idaho Code* (“Distribution Of Stored Water”). Water District No. 1 also recognizes the differences between the legal regimes that govern the distribution of natural flow under state law-based water rights versus the allocation of stored water under private contracts. Water District No. 1 Program Manager Tony Olenichak confirmed in his deposition that “the distribution of the water that accrues to a reservoir storage right is controlled by the contracts between the Bureau and the spaceholders,” *Thompson Aff.*, Ex. 41, p.332, ll. 9012, and that “[a]dministering the reservoir rights . . . is a separate thing than accounting for individual storage use.” *Id.*, p.337, ll. 22-25.

A water right to divert natural flow into a reservoir does not factor into the distribution and allocation of the water after it has actually been physically diverted into the reservoir. While state law-based water rights govern the distribution of natural flow, the allocation and distribution of water that has been diverted into a federal reservoir pursuant to a valid water right is a private matter between the Bureau and its spaceholders, governed by private contractual provisions and applicable federal law. There is no basis in fact or law for the contention that the quantity of the American Falls and Palisades water rights should be measured by the Bureau’s releases or the resulting

“availability” of stored water for spaceholder use rather than by natural flow diversions into the reservoirs. Allocating natural flow to reservoirs is legally and factually distinct from distributing stored water to spaceholders.

For the same reasons, there is no merit in the Bureau’s contention that it is “penalized” by counting all water actually diverted into and held in the reservoirs when the Bureau subsequently decides to release some of the water for operations purposes rather than for spaceholder use. *Bureau Response to State* at 3. Operational releases of stored water and its distribution to spaceholders are matters of federal law and contracts, not state water rights. The Bureau is no more “penalized” by being limited to the decreed quantity of its right to divert in priority than is any other water right holder. To the contrary, to accept that Bureau’s argument that it should be allowed to divert an enlarged quantity in priority would give it a favored or elevated status and essentially excuse it from complying with a basic legal requirement that applies across the board to all other water right holders.

XI. RELEASES OF STORED WATER FOR FLOOD CONTROL PURPOSES ARE MATTERS OF FEDERAL LAW AND THE BUREAU’S CONTRACTS.

The Coalition also argues that water released for operations purposes such as flood control should not be counted towards the annual volume limit on priority diversions because such water “is not available to the spaceholder for later irrigation use.” *SWC Response* at 36 n.16. This argument is flawed for several reasons. First, it assumes that the releases from the reservoir are the measure of the annual volume limit on priority diversions: As previously explained, the quantity of a priority right is the measured by diversions, not releases.

Second, the legal authorization for the Bureau to release water for operational purposes such as flood control arises from federal law and the Bureau's spaceholder contracts, not the water rights for American Falls and Palisades reservoirs, and the watermaster has no authority to control or regulate such releases. The Coalition's argument incorrectly assumes that state law and state water rights govern flood control operations and other such releases.

Moreover, in their contracts with the Bureau, the spaceholders knowingly and voluntarily accepted the risk that the Bureau's flood control responsibilities would in some years result in less than a full storage allocation. While in most years the Bureau is successful in the difficult task of simultaneously fulfilling its competing responsibilities as to irrigation storage and flood control,³⁸ it is inevitable that in some years the reservoirs will not physically fill as a result of flood control releases. The contracts between the Bureau and the spaceholders expressly recognize this fact and allocate the risk of such shortfalls among the reservoirs and the spaceholders.³⁹ In short, the Bureau and the spaceholders were aware of the risks of flood control and contractually accounted for them. The Coalition's argument would shift this risk to junior water rights holders who were not parties to the contracts by allowing flood control releases to effectively

³⁸ Second Orr Aff., Exhibit 26 at 28 ("A Description of Bureau of Reclamation System Operations Above Milner Dam) (Bur. of Rec.) (Jan. 1996) (discussing the balancing reservoir operations to meet both flood control and storage needs and "[o]rdinarily, it is possible to maintain a high probability" of meeting both).

³⁹ See Orr Aff., Exhibit 9 at 39 (Olenichak Depo.) (Feb. 9, 2012) ("Generally, in a flood control situation, it's 75 percent of the shortage goes to Palisades, 25 percent goes to Jackson, because I believe that's the way it's written into the contracts or that's the Bureau of Reclamation's policy for flood control."); *id.*, Exhibit 50 at 28 (*Eagle Decree* at Exhibit B) ("If losses do result [from flood control], these shall be prorated equally over all space in the reservoir"); *id.*, Exhibit 61 at 4 ¶ 6 (Letter from R.J. Newall, Regional Director, Bureau of Reclamation, to John E. Kelly, Chairman, Committee of Nine) (Dec. 7, 1948) ("All contracts for Palisades space will necessarily be made subject to that plan [for flood control operations]"); *id.*, Exhibit 66 at 9 (Minidoka Irrigation District contract) ("In the event Palisades Reservoir fails to fill during any storage season by reason of such flood control operations, the amount of shortage so attributable shall be prorated equally over all space . . . and shall be charged against all stored water . . . carried over from prior irrigation seasons").

enlarge the annual volume that may be diverted in priority under the American Falls and Palisades water rights.

It should also be remembered that while the Bureau's flood control operations in some years prevent the reservoirs from physically filling, flood control operations have historically been a net benefit to the spaceholders. A significant portion of the cost of constructing, operating and maintaining the dams and the reservoirs has been allocated to flood control and hydropower operations,⁴⁰ which effectively reduced the spaceholders' construction repayment obligations and their O&M charges. In short, the spaceholders accepted the small risk of occasional storage shortfalls in exchange for significantly reduced payment obligations. The Coalition fails to recognize this fact and tries to have it both ways: reduced payments and a full stored water supply each year.

XII. THE PARTIAL DECREE ENTERED IN SUBCASE NO. 1-6 DOES NOT AUTHORIZE STORAGE OR "REFILL" USE.

The Coalition alternatively argues that even if the "quantity" elements of the American Falls and Palisades water rights are annual volume limits on priority diversions under those rights, the Bureau has a separate right to priority "refill" of the American Falls reservoir under the water right originally licensed under License No. 15134, and recently decreed in the Bureau's name in Subcase No. 1-6. *See, e.g., SWC Response* at 32, 53, 59, 72. The Bureau has not made this argument.

The Coalition's argument cannot be squared with the plain language of the partial decree entered in Subcase No. 1-6: the only "Purpose of Use" for which the right was decreed is "Irrigation." There is no authorization to divert water for storage purposes, nor

⁴⁰ Orr Aff., Exhibit 53 at 6 (U.S. House of Representatives Document No. 720) (81st Congress, 2d Sess.) (\$22,733,300 of total Palisades construction cost allocated to flood control); Second Orr Aff., Exhibit 26 at 15-16 ("A Description of Bureau of Reclamation System Operations Above Milner Dam") (Bur. of Rec.) (Jan. 1996) (discussing the allocation of construction and annual operating costs).

any reference to storage in the “purpose of use” element.⁴¹ In contrast, the “purpose of use” element of the American Falls reservoir in Subcase No. 01-2064 authorizes diversions for “Irrigation Storage,” “Irrigation From Storage,” “Power Storage,” and “Power From Storage.”⁴²

Further, the American Falls reservoir recommendation in Subcase No. 01-2064 identifies “American Falls Reservoir” as the “place of use” for “Irrigation Storage” and “Power Storage.”⁴³ The only “place of use” identified in the partial decree entered in Subcase No. 1-6 is the area “within the boundary of American Falls Reservoir District No. 2.”⁴⁴ There is no reference to American Falls Reservoir in the “place of use” element of the partial decree entered in Subcase No. 1-6.

Finally, the “quantity” element of Water Right No. 1-6 was recommended and decreed as a diversion rate of 1,700 cfs rather than as an annual acre-foot volume. Under the general stream adjudication provisions of the Idaho Code, the “quantity” of a water right to divert for storage use is stated as an “annual volume of diversion of water.” Idaho Code § 42-1411(2)(c); *see also* IDAPA 37.03.08.035.03.b.iv (“The quantity of water to be diverted shall be listed as a rate of flow in cubic feet per second and/or as a volume to be stored in acre-feet per year.”).

The elements of the partial decree in Subcase No. 1-6 simply do not authorize diversions of natural flow into American Falls reservoir for storage purposes. The Coalition’s argument that Subcase No. 1-6 decreed a right to priority “refill” of storage

⁴¹ *Partial Decree, Subcase No. 01-0006* (May 1, 2012).

⁴² Director’s Report, *Subcase No. 01-2064*.

⁴³ Director’s Report, *Subcase No. 01-2064*.

⁴⁴ *Partial Decree, Subcase No. 01-0006* (May 1, 2012).

space at American Falls reservoir finds no support in the operative elements of the partial decree.

The principal basis for the Coalition's argument that the partial decree entered in Subcase No. 1-6 establishes a right to priority "refill" of American Falls reservoir storage space is a lengthy remark included in the decree by stipulation of the parties.⁴⁵ *SWC Response* at 9. American Falls Reservoir District No. 2 ("AFRD2") was the only member of the Coalition that was a party to Subcase No. 1-6. The dispute in that subcase began when AFRD2 objected to a remark recommended by the Director which interpreted a passage in the *Eagle Decrees*. The parties eventually settled by agreeing to an Amended Director's Recommendation that simply adopted the *Eagle Decree* language without attempting to interpret it: this is the remark in the partial decree.⁴⁶

Had the settlement also been intended to establish that the remark conferred a right to priority "refill" of storage space in American Falls reservoir, or any right to divert

⁴⁵ The remark states in full as follows:

The right to divert as natural flow during each irrigation season under this water right, having a March 30, 1921, priority, as follows: From May 1 of each irrigation season continuing during that season so long as there is natural flow available for that priority, the first 1,700 cubic feet per second of flow to be available one-half (1/2) to American Falls Reservoir District No. 2 and one-half (1/2) to American Falls Reservoir, except that in any year in which American Falls Reservoir is full to capacity on April 30 or fills after that date, taking into account any water that may be temporarily stored to its credit in upstream reservoirs, all water diverted by American Falls Reservoir District No. 2 within the maximum of 1,700 cubic feet per second during the year prior to the initial storage draft on American Falls Reservoir after the reservoir finally fills in that year shall be considered as natural flow under water right No. 1-6. Nothing herein shall prevent American Falls Reservoir District No. 2 from diverting water under said license prior to May 1 of a given irrigation season but all such diversions shall be charged as storage in the event the reservoir is not full on April 30 of that season or does not fill after April 30 of that season.

⁴⁶ The *Eagle Decrees* language included in the partial decree in Subcase No. 1-6 was developed to settle a long-running dispute between AFRD2 and all the other spaceholders in American Falls reservoir over the distribution of natural flow between two Bureau water rights of the same priority date: a right to store water in American Falls reservoir (Subcase No. 1-2064; License No. R-269), and a right divert for irrigation purposes via AFRD2's Milner-Gooding Canal (Subcase No. 1-6; License No. 15134). The general historic background of this dispute is set forth in *Am. Falls Res. Dist. No. 2. v. Crandall*, 82 F.2d 973 (9th Cir. 1936), and *Am. Falls Res. Dist. No. 2. v. Crandall*, 85 F.2d 864 (9th Cir. 1936). Neither of these decisions discusses storage "refill."

for storage purposes, this would have been more clearly stated—particularly given that there is absolutely no suggestion of any right to divert to storage in any of the other elements of the partial decree. Further, had the other members of the Coalition viewed the *Eagle Decree* remark at the center of the Subcase No. 1-6 dispute as establishing such a right, they would certainly have filed objections or responses in Subcase No. 1-6, or moved to participate. That subcase remained pending until well after the State filed its *Motion* in these subcases, but the other members of the Coalition made no attempt to join the proceedings. The Coalition’s reliance on the remark in the partial decree in Subcase No. 1-6 is simply a post-hoc attempt to reinterpret a settlement that included no provision for a right to divert water to American Falls reservoir storage space, much less any right of priority “refill” of such space.

The Coalition alternatively argues that the decreed remark in Subcase No. 1-6 establishes a right to priority “refill” of storage space in American Falls reservoir because in a 1970 letter to Watermaster Art Larsen, State Reclamation Engineer R. Keith Higginson instructed the Watermaster as follows:

Once filled each season, American Falls Reservoir should not be allowed to refill at the expense of junior users, except for the storage right provided under Water License No. 15134. Once American Falls Reservoir has filled either physically or with upstream credits, storage should be restricted subject to filling all junior rights.⁴⁷

Water License No. 15134, which Mr. Higginson characterized as a “storage right,” is the underlying license for the claim decreed in Subcase No. 1-6. The Coalition argues this letter means the partial decree entered in Subcase No. 1-6 must also be interpreted as establishing a right to priority “refill” of American Falls storage space. This argument faces several insurmountable hurdles.

⁴⁷ Orr Aff., Exhibit 49.

First, as discussed above, the decreed “purposes of use” in Subcase No. 1-6 are limited to “irrigation,” the “place of use” does not include American Falls reservoir, and the “quantity” is not stated as a annual storage volume. Regardless of what Mr. Higginson stated in 1970 about Water License No. 15134, in 2012 this Court decreed Subcase No. 1-6 without any authorization to divert water into storage at American Falls reservoir.⁴⁸

Second, Mr. Higginson explained in the 1970 letter that his interpretation of Water License No. 15134 was based on a passage from the *Eagle Decrees*, but the passage he quoted is not part of the remark decreed in Subcase No. 1-6.⁴⁹ Thus, Mr. Higginson’s determination that Water License No. 15134 was a “storage right” rested entirely on the *Eagle Decrees*. But as the Presiding Judge explained in affirming this Special Master, the *Eagle Decrees* “did not adjudicate any water rights or other administrative provisions.” *Memorandum Decision And Order On Motion To Alter Or Amend Judgment, I.R.C.P. 59(e)* (May 17, 2011) at 5 (bold omitted). Mr. Higginson simply erred to the extent he concluded that the quoted passage from the *Eagle Decrees* adjudicated a “storage right” under Water License No. 15134.⁵⁰ The Coalition’s reliance on Mr. Higginson’s incorrect legal opinion regarding the nature of Water License No. 15134 is unavailing for purposes of this subcase.⁵¹

⁴⁸ The members of the Coalition have been, or reasonably should have been, aware of the 1970 letter long before Subcase No. 1-6 was decreed and long before the State filed its *Motion* in these subcases. The letter is among the documents in the “1-2064 Backfile Water Right File” in the “Related Documents” on the Department’s website under Subcase No. 01-2064. The State also produced a copy of the letter in discovery proceedings in Subcase No. 1-6.

⁴⁹ Compare Orr Aff., Exhibit 49 with *Partial Decree, Subcase No. 01-0006* (May 1, 2012).

⁵⁰ Orr Aff., Exhibit 49.

⁵¹ Even if the *Eagle Decrees* had constituted a binding general adjudication (which they did not, as previously discussed), Mr. Higginson misinterpreted them. As discussed in the State’s opening brief, *Eagle Decrees* provided that Water License No. 15134 would be effective as a “storage right” only if the United

Finally, the Coalition's argument amounts to a collateral attack on the decree of disallowal entered in Subcase No. 01-0284. In that subcase the Bureau filed a separate claim for a storage right based on Water License No. 15134.⁵² The Director recommended the claim be disallowed, and this Court agreed, entering a final order disallowing the claim in 2009.⁵³ The Coalition may not now collaterally attack that disallowance by indirectly seeking the same "storage right" through the remark in the partial decree in Subcase No. 1-6.

XIII. THE COALITION'S HISTORIC ADMINISTRATION ARGUMENTS FAIL AS A MATTER OF LAW.

The Coalition also repeatedly asserts that the American Falls and Palisades water rights are entitled to priority "refill" because that has been the historic practice. *See SWC Response* at 66 n.34, 71-74. While the State disagrees that such has been the "historic practice," the simple and conclusive answer to the Coalition's argument is that it would fail as a matter of law even if the Coalition's factual assertions were correct.

As discussed in pages 36-38 of the *State's Opening Brief*, former SRBA Presiding Judge Melanson held in Consolidated Subcase No. 00-92026 that "historical practices" do not constitute "a separate legal basis for modifying existing rights and requiring that the historical method of administration be continued. . . . if historical practices of administration, without a supporting legal doctrine, were to be controlling a significant purpose of the adjudication would be undermined." *Order Deconsolidating Subcase 00-*

States applied for and obtained an amendment authorizing storage diversions under the license, and no such amendment was sought or approved. *State's Opening Brief* at 42-34 n.98.

⁵² Second Orr Aff., Exhibit 11 at 1-2, 4 (Subcase No. 01-0284, "backfile" documents including notice of claim and notice of error).

⁵³ *Final Order Disallowing Water Right Claim, Subcase No. 01-00284* (Mar. 24, 2009).

92026 *And Order Of Recommitment To Special Masters, Consolidated Subcase No. 00-92026* (Jul. 1, 2008), at 3.

The Coalition has offered no “supporting legal doctrine” for its historic practices argument, and as previously discussed, there is no support in Idaho law for the Coalition’s theories of priority rights to continuous “physical fill” and or “refill.” These concepts are foreign to Idaho law, at odds with prior appropriation principles, and would enlarge the previously licensed quantities of the American Falls and Palisades water rights. Thus, even if it were assumed, *arguendo*, that historically the American Falls or Palisades reservoirs had consistently “refilled” under their licensed priorities (which they have not), that fact would be insufficient as a matter of law to validate such a practice through an SRBA decree. The Coalition’s historic practice assertions and arguments are simply irrelevant.

XIV. THE AMERICAN FALLS AND PALISADES WATER RIGHTS HAVE BEEN ADMINISTERED CONSISTENTLY WITH THE STATE’S MOTION SINCE AT LEAST 1970.

The Coalition’s historic practice assertions also ignore the undisputed facts. To begin with, the State’s *Motion* is fully consistent with Water District No. 1’s current administration of the American Falls and Palisades water rights. Water District No. 1 Program Manager Tony Olenichak repeatedly confirmed this fact during his deposition.⁵⁴ Indeed, he assisted in developing the State’s proposed remark,⁵⁵ and did not think it could be materially improved.⁵⁶ He confirmed that including the proposed remark in the partial decrees would not injure their priorities, would not change how they are

⁵⁴ See, e.g., Orr Aff., Exhibit 9 at 28-29, 30, 104, 116, 128-29.

⁵⁵ Orr Aff., Exhibit 9 at 58.

⁵⁶ Orr Aff., Exhibit 9 at 53.

administered or have been administered since at least 1978.⁵⁷ Mr. Olenichak also testified that the priority “refill” theory of the Coalition would require changes in current administration, and “potentially we would be filling the 1921 priority [American Falls] or the 1939 [Palisades] during the entire peak runoff period, which could prevent any water rights junior to those priorities from diverting water for as long as we’re refilling previously evacuated space.”⁵⁸

For all of the Coalition’s argumentative bluster that the State’s *Motion* is contrary to historic practice, the undisputed fact remains that since at least 1970, the water rights for the American Falls and Palisades reservoirs have been administered under the principles confirmed in the State’s *Motion*. In that year, as previously discussed, Watermaster Art Larsen sought guidance from State Reclamation Engineer R. Keith Higginson on whether American Falls reservoir should be allowed to “refill” under the 1921 priority of the license—that is, whether junior water rights should be curtailed to provide water in excess of the licensed quantity. Mr. Higginson replied with an unambiguous “No”: “Once filled each season, American Falls Reservoir should not be allowed to refill at the expense of junior water users.”⁵⁹

Once American Falls Reservoir has been filled either physically or with upstream credits, storage should be restricted to filling all junior rights. Therefore, the practice of filling American Falls Reservoir with a subsequent drawdown and then calling on water in other reservoirs to refill American Falls, should not be allowed to continue.⁶⁰

⁵⁷ Orr Aff., Exhibit 9 at 29, 117.

⁵⁸ Orr Aff., Exhibit 9 at 30-31.

⁵⁹ *Affidavit Of Michael C. Orr* (Feb. 21, 201) (“Orr Aff.”), Exhibit 49 at 1-2 (Letter from R. Keith Higginson, State Reclamation Engineer, to Mr. Art Larsen, Watermaster, Water District No. 36) (Mar. 6, 1970).

⁶⁰ *Id.* The Bureau’s District Counsel B.E. Stoutemyer had reached the same conclusion some thirty-six years earlier. In a August 24, 1934 letter to the Chief Engineer addressing the question of priority “refill,” Stoutemyer said:

This principle was expressly reaffirmed in the 1978 watermaster's report, which discussed a number of improvements to Water District No. 1 administration and procedures: "Each of the reservoir rights can be filled only to the maximum volume specified in the right. . . . This prevents a second fill at the expense of later rights,"⁶¹ but allowed the reservoir to refill "as long as there is water in excess of all other rights."⁶² In a 1979 Committee of Nine meeting, Director Stephen Allred explained to the water users and representative of the Bureau: "Once a right is filled on paper, even if water has been released and additional space is available, the priorities of the reservoirs are considered to no longer be in effect."⁶³

These principles have remained a part of Water District No. 1's administration of the American Falls and Palisades water rights up to the present day, as Mr. Olenichak repeatedly confirmed. The meaning of these undisputed facts is clear: the State's *Motion*, which is firmly rooted in settled principles of Idaho law, would validate and continue forty-plus years of administration of the American Falls and Palisades water rights. The question of whether the "quantity" elements of the American Falls and Palisades reservoirs are enforceable limits on priority diversions under those rights was expressly

the state officers administering the Snake river will no doubt be governed by the amount set out in the Woodville decree and would decline to close down any headgates of any later reservoirs after the American Falls reservoir has received its decreed amount of 1,700,000 acre-feet. . . . in my opinion we could not secure more than 1,800,000 acre-feet under our priority of 1921

Orr Aff., Exhibit 59 at 1. Like the license, the Woodville Decree had also defined the American Falls water right as in terms of a quantity "per annum." Orr Aff., Exhibit 16 at 27 ("Woodville Decree").

⁶¹ Orr Aff., Exhibit 51 at 15 (WATER DISTRIBUTION AND HYDROMETRIC WORK, DISTRICT NO. 01, SNAKE RIVER, IDAHO, 1978).

⁶² *Id.* at 30. The updates were part of a water-user driven response to the 1977 drought, which had exposed a number of problems in administrative practices and procedures. See *State of Idaho's Memorandum In Support Of Motion For Partial Summary Judgment* (Feb. 21, 2012) ("State's Opening Brief"), at 43.

⁶³ Orr Aff., Exhibit 52 at 1 (Minutes Of Committee Of Nine Meeting) (Sept. 21, 1979).

raised before the State Reclamation Engineer in 1970 and he resolved it consistently with the principles that the State seeks to confirm through its *Motion*. In 1978 the next Director specifically confirmed and explained this resolution in a public meeting attended by representatives of the Coalition and the Bureau.

The Coalition recognizes these historic facts in an indirect way, by arguing that the 1978 modernization of Water District No. 1's administration and accounting practices created the current "paper fill" and "paper accounting" systems that are the focus of much of the Coalition's briefing. *SWC Response* at 30-35. The Coalition attempts to minimize the significance of the last 42 years of administration by characterizing the events of 1978 as something like a shadowy conspiracy to abandon prior appropriation in favor of a nefarious scheme to implement a computerized accounting system based on the smoke and mirrors of "paper accounting" and "paper fill" rather than actual "physical fill." See *SWC Response* at 32 ("Instead of recognizing the physical contents of a reservoir for purposes of distributing water to the storage rights, the accounting program 'charged' all water to the storage rights in the non-irrigation season, regardless of whether or not the water was physically stored in the system.").

The facts, of course, are much less dramatic. The drought of 1977 exposed or magnified problems in administrative practices and procedures, and a number of water user organizations pushed for corrective actions and updates to administrative procedures and equipment. These included an updated inventory of water rights and diversions and implementation of computerized water rights accounting.⁶⁴ These actions were proposed, undertaken, and explained in the full light of day, with water user buy-in, and the

⁶⁴ *State's Opening Brief* at 43-44; Orr Aff., Exhibits 51-52.

Bureau's knowledge and acquiescence.⁶⁵ These steps included specific public re-affirmation by the Director of the principle that reservoir water rights are no longer in priority after they have reached their annual diversion volume, but can still divert additional water if no other water rights are injured.⁶⁶ The Coalition's attempt to portray the events of 1978 as an unlawful scheme to replace prior appropriation with computer programs that was implemented behind the water users' backs has no support in the record.

Even the system of "paper" accounting that is the target of so much of the Coalition's criticism pre-dates the 1978 implementation of computer accounting. "Paper" accounting was firmly in place in 1968 at the latest, because it was (and remains) necessary to effectuate certain provisions of the Palisades Contracts. As stated in the Bureau's 1968 "Status Report – Workings Of Palisades Water Savings Agreement" (U.S. Bur. of Reclamation, Aug. 5, 1968): "there is a strict paper accounting of water accruals to individual reservoirs by priority dates."⁶⁷

In short, nothing in the State's *Motion* is new or novel, and water rights administration in Water District No. 1 has since 1970 been guided by the same legal principles that the State seeks to confirm in its *Motion*. Further, as the Watermasters for Water District No. 63 and Water District No. 65 and the Department's Technical

⁶⁵ See, e.g., Orr Aff., Exhibit 51 (1978 Watermaster Report explaining the changes); *id.*, Exhibit 52 (Committee of Nine minutes, including attendance sheets).

⁶⁶ Orr Aff., Exhibit 52 (Committee of Nine minutes).

⁶⁷ Orr Aff., Exhibit 49 at 8 ("Summary" page). The 1968 *Eagle Decree* also confirms that the concept of "paper fill" pre-dates the accounting program and is part of the "common plan" of reservoir operations the Coalition so strongly supports. See Orr Aff., Exhibit 50 at 2 ("... in any year in which American Falls Reservoir is full to capacity on April 30 or fills after that date, taking into account any water that may be stored to its credit in upstream reservoirs . . .") (underlining added). The 1970 letter of State Reclamation Engineer Higginson provides further confirmation that "paper fill" was nothing new in 1978. See Orr Aff., Exhibit 49 at 1 ("Once American Falls Reservoir has filled either physically or with upstream credits, storage should be restricted to filling all junior rights.") (underlining added).

Hydrologist for Basin 63 and Basin 65 affirmed in their affidavits, the State's *Motion* also is consistent with water rights administration in those Districts.⁶⁸

XV. THE COALITION'S CONTENTION THAT THE AMERICAN FALLS WATER RIGHT WAS "REFILLED" IN PRIORITY FOR 40 YEARS PRIOR TO 1970 LACKS SUPPORT IN THE RECORD.

The Coalition is correct that prior to 1970 the American Falls reservoir was allowed to "refill" under the priority of the 1921 license—but only for a relatively brief period, and certainly not for "nearly 40 years," as the Coalition incorrectly asserts. *SWC Response* at 30. As the State documents in its opening brief, over a period of approximately 15 years, from 1954 to 1969, the American Falls reservoir was sometimes allowed to "refill" under the priority of the 1921, even if junior upstream reservoirs upstream had not received their licensed quantities.⁶⁹ It was this practice that prompted Watermaster Art Larsen to seek instructions from State Reclamation Engineer Higginson in 1970, and which was ordered to be discontinued.⁷⁰

The Coalition argues that this "practice" confirms that for the forty years prior to Mr. Higginson's 1970 letter, the American Falls water right license had been interpreted as authorizing "refill" under the 1921 priority of the license, and the water right had been administered accordingly. *SWC Response* at 30-31. This argument lacks support in the record.

It was not until 1954 that the Watermaster first stated in an annual report his opinion that the American Falls water right license authorized "refill" under its 1921

⁶⁸ *Affidavit of Rex R. Barrie, Watermaster, Water District No. 63* (Jun. 19, 2012); *Affidavit of Ron Shurtleff, Watermaster, Water District No. 65* (Jun. 19, 2012); *Affidavit of Elizabeth Anne Cresto* (Jun. 19, 2012).

⁶⁹ *States' Opening Brief* at 42.

⁷⁰ Orr Aff., Exhibit 49 at 1-2 ("the practice of filling American Falls Reservoir with a subsequent drawdown and then calling on water in other reservoirs to refill American Falls, should not be allowed to continue").

priority date.⁷¹ The Coalition has cited no evidence of any person taking such a position prior to 1954, and the State is not aware of any. To the contrary, the question of whether the American Falls license authorized “refill” under its 1921 priority date arose infrequently prior to 1954, and that the reservoir was simply allowed to refill whenever “surplus” or “excess” flows were available for such purposes.⁷² Water District No. 1 currently follows the same practice of allowing “excess” or “surplus” flows to physically “refill” vacated reservoir space,⁷³ or to physically fill space that had not filled before the Bureau reached its annual limit on priority diversions. As previously discussed, and as confirmed by the Water District No. 1 Program Manager, the Watermasters for Water District Nos. 63 and 65, and the Department’s Technical Hydrologist for Basin Nos. 63 and 65, the State’s *Motion* is consistent with this historic practice.

Thus, the Coalition’s “historic practice” argument assumes that the common practice of “refilling” American Falls prior to 1954 on an opportunistic basis by capturing excess and surplus flows also means the license included a right to “refill” the reservoir under the 1921 priority of the license. This reasoning is flawed and was no more true prior to 1954 than it is now. It is one thing to “refill” a reservoir when excess water is available and doing so does not injure other water rights. It is quite another to assert a priority right to divert an amount in excess of the licensed “quantity” that authorizes curtailment of junior water rights to supply the additional water.

Moreover, when the question of whether the American Falls license authorized priority diversion in excess of the licensed quantity did arise in years prior to 1954, the record is contrary to the Coalition’s characterizations. For instance, in a 1934 letter to the

⁷¹ Orr Aff., Exhibit 48 at 2 (1954 annual report).

⁷² *State’s Opening Brief* at 25, 33, 40-41.

⁷³ Orr Aff., Exhibit 9 at 23, 116-17.

Bureau's Chief Engineer, the Bureau's District Counsel B.E. Stoutemyer squarely addressed the question of whether the American Falls license authorized priority diversions in excess of the licensed quantity (which had also been decreed in the Woodville Decree), and concluded it did not:

our decreed right under the Woodville decree for filling American Falls reservoir is 1,700,000 acre-feet the state officers administering the Snake river [sic] will no doubt be governed by the amount set out in the Woodville decree and would decline to close down any headgates of any later reservoirs after the American Falls reservoir has received its decreed amount of 1,700,000 acre-feet. . . . in my opinion we could not secure more than 1,800,000 acre-feet under our priority of 1921 ⁷⁴

Mr. Stoutemyer also pointed out that while the Bureau might be able to obtain a separate right to store additional water at American Falls under the constitutional method by proving actual beneficial use, "the priority of the additional amount would not relate back to 1921."⁷⁵

Further, the water supply investigations and analyses the Bureau performed prior to construction of the Palisades project were based on the assumption that the American Falls water right was limited to its licensed quantity: any amount over that was considered to be part of the "surplus" water supply that would be available to store in Palisades reservoir. These studies and conclusions were an important part of the record the Bureau presented to Congress as justification for Palisades, and upon which Congress relied in authorizing the project.⁷⁶

In sum, the Coalition's argument that the American Falls reservoir was administered with a right to "refill" under the 1921 priority of the underlying license for "for nearly 40 years" prior to 1970, *SWC Response* at 30, has no record support. It relies

⁷⁴ Orr Aff., Exhibit 31 (underlining added).

⁷⁵ Orr Aff., Exhibit 31.

⁷⁶ See *State's Opening Brief* at 25-29 (discussing the Palisades project).

entirely upon the Coalition's attempt to re-characterize the undisputed (and unchallenged) historic practice of "refilling" the reservoir with excess or surplus flows when all water rights were satisfied as a priority right to curtail junior water rights so as to divert more than the licensed quantity. The historic practice of allowing excess and surplus flows to "refill" the reservoir as long as other water rights were not injured is not challenged in this proceeding, as least not to the State's knowledge—the State supports this historic (and current) practice and its *Motion* is consistent with such practice. But the Coalition is simply wrong as a matter of fact and law in arguing that such historic practice means the American Falls and Palisades water rights must be decreed in this proceeding with a priority right to divert as much water as it takes to maintain a continuous "physical fill" of the reservoirs.

XVI. THE STATE'S *MOTION* DID NOT RAISE NEW ISSUES.

The recently admitted amicus curiae parties appear to assert that the question of the priority of reservoir "refill" is something new that has never been raised before in the SRBA, and possibly not in Idaho law generally. *Brief Of Amicus Curiae Re: State Of Idaho's Motion For Partial Summary Judgment Concerning "Refill" Of Bureau Of Reclamation Storage Rights* (Jun. 8, 2012), at 1. The arguments of the Coalition and the Bureau that the Stat's *Motion* has no support in Idaho law echo this assertion. The undisputed record demonstrates that the question of "refill" priority has been recognized for quite some time, and a right to priority "refill" has been through SRBA claims and objections—including a claim in Basin 63.

As previously discussed, the question was squarely presented and addressed in 1970 and again in 1978-79. Further, in 1983 the Bureau filed statutory "refill" claims

with the Department pursuant to Idaho Code § 42-243 for American Falls, Palisades, Island Park and Arrowrock.⁷⁷ These claims were numbered, respectively, as follows: 1-4052, 1-4056, 21-4156 and 63-5262. The Bureau claimed all of these in the SRBA, the Director recommended that all be disallowed, and all were decreed disallowed by this Court.⁷⁸ At least one of the Amici signed a “Notice of Clarification” filed in Consolidated Subcase No. 91-63 stating that they did not seek to re-open the Arrowrock “refill” claim (Subcase No. 63-5262).⁷⁹

The Bureau’s license-based SRBA claims for American Falls (Subcase No. 1-2064) and Palisades (Subcase No. 01-2068) also asserted a “right to refill under the priority date of this water right to satisfy the United States storage contracts” without specifying any corresponding quantity.⁸⁰ The Director did not include these claims in his reports, but rather recommended “quantity” elements defined simply as “AFY,” or acre-feet per year.⁸¹ The Bureau objected, asserting that under the “Quantity” elements, “[t]he following remark should be included: ‘This water right includes the right to refill under the priority date of this water right to satisfy the United States’ storage contracts.’”⁸² Like its original claims, the Bureau’s objections did not quantify the claimed right to priority “refill.” The Bureau’s objections also asserted: “A remark for refill is necessary to preserve the historical practice”⁸³ Minidoka Irrigation District filed similar

⁷⁷ Second Orr Aff., Exhibits 4, 19, 21, 23.

⁷⁸ Subcase Nos. 1-4052, 1-4056, 21-4156 and 63-5262.

⁷⁹ Second Orr Aff., Exhibit 24.

⁸⁰ Second Orr Aff., Exhibit 13 at 1; Exhibit 14 at 1.

⁸¹ The Director’s “quantity” recommendation in Subcase No. 01-2064 was “1672590.00 AFY,” and “1200000.00 AFY” in Subcase No. 01-2068.

⁸² See United States’ Standard Form 1 Objections, Subcase Nos. 01-2064 & 01-2068, at 2 (underlining added).

⁸³ See United States’ Standard Form 1 Objections, Subcase Nos. 01-2064 & 01-2068, at 3-4 (underlining added).

objections, asserting: “Water right should include the right to refill in priority” without recognizing any quantitative limit on such priority diversions.⁸⁴

The parties engaged in protracted settlement negotiations but were unable to fully resolve any of the disputed matters,⁸⁵ and pursuant to this Special Master’s order of December 15, 2011, both the State and the Surface Water Coalition filed statements of the issues after the negotiations concluded. The State identified the “refill” issue as being a question of whether the cumulative quantities of water stored in the reservoirs could “exceed the quantity elements of the storage water rights.”⁸⁶ The Coalition’s statement asserted: “A remark should be added regarding Reclamation’s right to refill the storage under the same priority to satisfy spaceholder contracts.”⁸⁷

These undisputed facts demonstrate that the question of the priority of any right to “refill” is nothing new: it has been addressed and claimed a number of times over the years, including a number of SRBA claims filed by the Bureau (one of which was for Arrowrock in Basin 63) and disallowed by this Court. These facts also demonstrate that in these subcases, the contention that a remark is necessary to address “refill” was not raised by the State. It was the Bureau that first made this assertion, some five years ago, and thereafter the Coalition joined the Bureau in this position.

In short, there was no dispute over whether a “refill” remark was necessary at the time the State filed its *Motion*: the only dispute was over quantity and priority with respect to “refill.” Subsequently, after the State filed its opening brief, the Bureau and

⁸⁴ See Minidoka Irrigation District’s Standard Form 1 Objections, Subcase Nos. 01-2064 & 01-2068, at 3.

⁸⁵ Most of the parties, including the State, the Bureau and the members of Surface Water Coalition, executed a *Stipulation To Resolve Certain Objections* (Jan. 26, 2012), but this document did not address the question of “refill” priority.

⁸⁶ Second Orr Aff., Exhibit 17 at 2.

⁸⁷ Second Orr Aff., Exhibit 18 at 2 (underlining added).

the Coalition appear to have backpedaled somewhat and now may be suggesting that no “refill” remark is necessary. Be that as it may, they have not withdrawn or amended their objections or statements of issues: their positions of record remain that a “refill” remark is necessary to resolve the question of the priority of “refill.” More importantly, there is no question that the central issues of the State’s *Motion*—the definition of “fill” and the priority of “refill”—remain in dispute. They are important issues that must be addressed and resolved regardless of whether a “refill” remark is “necessary.”

CONCLUSION

For the reasons set forth herein, the State requests that its *Motion* be granted in full.

Respectfully submitted this 29th day of June 2012.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



MICHAEL C. ORR
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29TH day of June 2012, I caused the foregoing REPLY IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT to be filed with the Court and true and correct copies served on the following parties by the methods indicated:

1. Original to:

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2. Copies to:

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ATTACHMENT A

01-02064
01-02064A
01-02064E
01-02064F
01-02064L
01-10042
01-10042A
01-10042B
01-10053A
01-10190
(American Falls Subcases)

01-02068
01-02068D
01-02068E
01-02068F
01-02068M
01-02068Y
01-10043
01-10043A
01-10043E
01-10191
01-10389
(Palisades Subcases)