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DEPARTMENT OF
WATER RESOURCES

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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	)	Subcase Nos.: 01-02068 &
	)	01-02068Y
Case No. 39576	)	
	)	UNITED STATES' MOTION
	)	TO ALTER OR AMEND
	)	RECOMMENDATION

The United States respectfully moves this Court, pursuant to Administrative Order 1 § 13.a., to alter or amend the SPECIAL MASTER RECOMMENDATION FOR PARTIAL DECREE FOR WATER RIGHT 01-2068 ("Partial Decree") to include the remark mandated by the Idaho Supreme Court in *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) ("*Pioneer*") so that the Partial Decree will be consistent with the Court's ORDER ADOPTING STIPULATION (November 2, 2012) and the Court's Conclusions of Law in its ORDER GRANTING POCATELLO'S MOTION TO FILE POST-TRIAL BRIEF ONE DAY LATE AND SPECIAL MASTER REPORT AND RECOMMENDATION (MARCH 6, 2013) ("Report").

The Special Master's Report concluded that "The United States is entitled to a partial decree adjudicating a water right for claim 01-2068 *as described in the September 25, 2012 Stipulation* and the attached Special Master Recommendation for Partial Decree for Water Right 01-2068."¹ Report at 9 (emphasis added). The September 25, 2012 Stipulation ("Stipulation"), adopted by this Court in its ORDER ADOPTING STIPULATION, provides that the Partial Decrees for Reclamation's reservoir storage water rights would include the remark mandated by *Pioneer* but, but held out the possibility that Water Rights 01- 2064 and 01-2068 could have modified language for the remark in light of the resolution of objections filed by the Idaho Power Company and the City of Pocatello respectively. Stipulation at 4 & n. 4. The Stipulation included a Stipulated Directors Report for water right 01-2068 which included a placeholder noting the need to "[i]nset [an] ownership remark" upon resolution of Pocatello's objections. Stipulation, Exhibit D at 3.

As the United States' arguments acknowledged, the Stipulation contemplated that water right 01-2068 would have a remark addressing ownership and left open the question of whether the remark established by the Idaho Supreme Court would need to be modified. *See* Report at 7-8. The United States argued that because Pocatello had failed to prove an accomplished transfer there was no basis to modify the *Pioneer* remark. *See id.* at 8. This Court's implicitly accepted the United States' argument that no modification of the *Pioneer* remark is appropriate by rejecting Pocatello's contention that there has been an accomplished transfer which expanded the purposes of use for water right 01-2068:

¹ The Court also noted that "entry of such partial decree should be withheld pending final resolution of Basin-Wide Issue 17." Report at 9.

At trial, the evidence established that Pocatello has no diversion or conveyance works of its own to divert water from the Snake River. It was also clear that Pocatello never "diverted" such water except through a rental pool. By participation in a rental pool, Pocatello was able to use its water licensed for irrigation and power uses for non-licensed purposes and places of use. But there is no evidence of an accomplished transfer of water right 01 -1068.

Id. In short, because the Court held that Pocatello's objections to 01-2068 are without merit, there is no basis to modify the *Pioneer* remark.²

The terms of the Stipulation and this Court's Report suggest that the *Pioneer* ownership language was omitted from the Partial Decree due to inadvertence. Nonetheless, even if the absence of the *Pioneer* remark was not inadvertent, the Partial Decree still should be amended to include the remark. Given the Court's holding that Pocatello failed to prove an accomplished transfer, the purposes of use for water right 01-0268 remain irrigation and power. Accordingly, inclusion of the *Pioneer* remark is appropriate.

DATED this 21st day of March, 2013.

Respectfully submitted,



David W. Gehlert

² As the Partial Decree notes, water stored in Palisades Reservoir is also used for power generation. However, that power generation occurs at the Palisades Powerplant owned by the United States. Accordingly, that use does not implicate *Pioneer*.

CERTIFICATE OF SERVICE

I certify that on March 21st, 2013, I served true and correct copies of the foregoing UNITED STATES' MOTION TO ALTER OR AMEND PARTIAL DECREE as follows:

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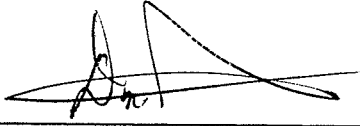
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A handwritten signature in black ink, appearing to read 'David W. Gehlert', is written over a horizontal line.

David W. Gehlert