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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. (See Attachment A)
	)	
Case No. 39576	)	STATE OF IDAHO'S CONSOLIDATED
	)	RESPONSE TO JOINT MOTION TO
	)	MODIFY PARTIAL DECREES FOR
	)	PURPOSE OF DIVERSION RATE AND
	)	"RESET" ADMINISTRATIVE REMARKS
	)	

The State of Idaho ("State"), by and through its attorneys of record and pursuant to this Court's *Order Granting Joint Motion to Amend Briefing Schedule and Hearing Schedule* (Dec. 13, 2019), hereby submits its response to the *Joint Motion to Modify Partial Decrees for Purpose of Diversion Rate and "Reset" Administrative Remarks* ("Joint Motion"), which was filed on October 30, 2019. The State opposes the *Joint*

Motion's request for relief under Rule 60(b)(6) of the Idaho Rules of Civil Procedure, and requests that the *Joint Motion* be denied.¹

INTRODUCTION

It is important, for purposes of understanding the State's position and arguments in this brief, to emphasize here that the State does not oppose the substantive elements of the "reset" settlement to which the Coalition, the Tribes, and the United States² have agreed. Specifically, the State does not oppose defining September 15th as the annual

¹ The *Joint Motion* was filed jointly by thirty-five parties. *Joint Motion* at 1-2 & n.1. The two supporting briefs filed by the seven irrigation entities identified as the "Surface Water Coalition," and the Shoshone-Bannock Tribes ("Tribes") are referenced herein as "*SWC Brief*" and "*Tribes' Brief*," respectively. While these two briefs make overlapping arguments, they also diverge insofar as the Tribes "present certain additional arguments specific to the Tribes." *Tribes' Brief* at 2. This consolidated response addresses both the *SWC Brief* and the *Tribes' Brief*. None of the other twenty-seven parties to the *Joint Motion* chose to file supporting briefs, and the United States did not join the *Joint Motion*. If any of these other parties, or the United States, files a response or reply brief in support of the *Joint Motion*, the State reserves the right to request that it be given an opportunity to respond in writing to any new or additional assertions or arguments raised by the other parties.

² While two different agencies of the United States have roles in the "reset" dispute, it appears that both agencies support the "reset" settlement. The United States Bureau of Indian Affairs ("BIA") holds in trust, for the benefit of the Tribes, federal contracts for storage in American Falls Reservoir and Palisades Reservoir. *Declaration of Michael C. Orr in Support of Consolidated response to Joint Motion to Modify Partial Decrees for Purpose of Diversion Rate and "Rest" Administrative Remarks* ("Orr Dec."), Exhibit 20 at 14. BIA is participating in the contested case pending before the Idaho Department of Water Resources ("IDWR") regarding "reset" and has agreed to the terms of the proposed "reset" settlement. *Declaration of Travis L. Thompson in Support of Joint Motion to Modify Partial Decrees for Purpose of Diversion Rate and "Rest" Administrative Remarks* ("Thompson Dec."), Exhibit H. BIA did not join the *Joint Motion*, however, and is not the legal title holder of any of the storage water rights in question. The legal title holder of the storage water rights, the United States Bureau of Reclamation ("Reclamation"), did not appear in the contested case but informally informed the Director of IDWR that Reclamation supports the "reset" settlement. *Orr Dec.*, Ex. 25. The Tribes have asserted that the United States "is agreeing to a flow limitation of a decreed water right." *Tribes' Brief* at 11-12.

“reset” date for the upper Snake River basin (“Upper Snake Basin”). *Joint Motion* at 4. The State also does not oppose the parties’ agreement to limit diversions under the United States’ storage water right for Lake Walcott (1-219) to 2,500 CFS during the period from September 15th to October 15th. *Id.* at 3-4.

What the State opposes, rather, is the proposed procedure for achieving these objectives—that is, re-opening the *Final Unified Decree* and the individual partial decrees for the purpose of resolving a dispute over administration of those decrees. The agreed-upon “reset” date and diversion rate limitation can and should be set out in a stipulation to be submitted to the Director of the Idaho Department of Water Resources in the pending contested case addressing “reset.” This would provide the basis for the parties to the contested case to jointly move the Director for an order instructing the Watermaster to “reset” on the specified date and also to limit diversions under the Lake Walcott storage water right to 2,500 CFS during the period from September 15th to October 15th. Such an order would be well within the Director’s authority and would provide the substantive “reset” resolution to which the parties have agreed.

Despite the availability of this remedy, the *Joint Motion* instead invokes Rule 60(b)(6) and asks this Court to re-open the *Final Unified Decree* and the partial decrees for the on-stream reservoirs in the Upper Snake Basin. This raises a host of issues of concern to the State, including, first and foremost, the potential to gravely undermine the finality of the SRBA, as well as that of other pending and future general stream adjudications.

FACTUAL/PROCEDURAL BACKGROUND

An understanding of the origin, nature, and procedural history of the “reset” issue is important for this Court’s consideration of the *Joint Motion*. While the “reset” issue has a long history in both the SRBA and in administrative proceedings before the Idaho Department of Water Resources (“IDWR” or “Department”), the briefs submitted by the Coalition and the Tribes do not fully explain the nature and history of the “reset” issue. The State therefore submits the following discussion of the factual and procedural background that led to the filing of the *Joint Motion*.

I. “Reset” is a Dispute Over Priority Administration of Decreed Rights.

The *Joint Motion* was filed pursuant to an interim stipulation among the parties to a contested case currently pending (although stayed) before the Director of the IDWR.³ The subject of that contested case is a dispute over the specific date to “reset” accounted accruals towards the annual volumes of the storage water rights for the on-stream reservoirs in the Upper Snake Basin.⁴ “The *reset date* determines the annual period natural flow can be distributed to previously filled reservoir water rights,” and “[t]he primary purpose of the *reset date*” is that it signals when the reservoir water rights are “allowed to come back into priority ahead of other junior water rights[.]”⁵

³ *SWC Brief* at 7; *Tribes’ Brief* at 11. *Thompson Dec.*, Exhibit H.

⁴ *SWC Brief* at 7; *Tribes’ Brief* at 11; *Thompson Dec.*, Exs. B & D.

⁵ *Memorandum from Tony Olenichak, Water District #1 Program Manager to Gary Spackman, Idaho Department of Water Resources Director* at 2 (Dec. 1, 2017) (“*Staff Memorandum*”) (italics in original). A copy of the *Staff Memorandum* is appended to the *Thompson Dec.* as Exhibit C. The author of the *Staff Memorandum* is now the Watermaster of Water District 01.

The significance of the “reset” date lies in the fact that the “Quantity” elements of the partial decrees for the Upper Snake Basin’s on-stream reservoir storage water rights are quantified in terms of annual volumes (acre-feet per year, or AFY) that are not limited by diversion rates.⁶ While this allows maximum storage of any water available under the priorities of the storage water rights, it also means that no natural flow is legally available for junior priority water rights when a storage water right is in priority.

The irrigation water rights of Milner Irrigation District (1-17) and American Falls Reservoir District No. 2 (1-6) are both junior in priority to the United States’ storage water right for Lake Walcott (1-219).⁷ Thus, after the storage water rights are “reset” and “allowed to come back into priority,” no natural flow is legally available for irrigation use by Milner and AFRD#2 for water rights nos. 1-17 and 1-6, until accounted accruals to the United States’ storage water right for Lake Walcott (water right no. 1-219) have reached the annual volume of 95,200 AFY.⁸

It is this tension between the Lake Walcott storage water right and the relatively junior irrigation rights of Milner and AFRD#2 that has driven the “reset” dispute. The core of the “reset” dispute is the question of whether late-season natural flow will be

⁶ Copies of the *Partial Decrees* for the onstream reservoirs in the Upper Snake River Basin, as amended in 2017, are provided in Exhibit 1 to the *Orr Dec.*

⁷ Lake Walcott storage water right 1-219 has a priority date of December 14, 1909. *Orr Dec.*, Ex. 1. Milner’s irrigation water right 1-17 has a priority date of November 14, 1916. Irrigation water right 1-6, which is held by the United States for the benefit and use of AFRD#2, has a priority date of March 30, 1921. Copies of the *Partial Decrees* for irrigation water rights 1-17 and 1-6 are provided in Exhibit 2 to the *Orr Dec.*

⁸ *Staff Memorandum* at 2, 4.

stored under the Lake Walcott storage water right, or diverted and used under the junior natural flow rights of Milner and AFRD#2.⁹

Milner and AFRD#2 have favored a “reset” date that falls late in or after the irrigation season, such as November 1 or November 16,¹⁰ because that allows them to divert late-season natural flow under their relatively junior water rights, rather than using storage water. The Tribes, in contrast, have favored a “reset” date that falls earlier in the season, such as September 15 or October 1, which allows the late-season natural flow to be stored for use in the next irrigation season.¹¹ This is the underlying dispute that has driven the “reset issue,” and ultimately led to the filing of the *Joint Motion*. The proposal to limit diversions under the Lake Walcott storage water right emerged during the contested case proceedings, solely for the purpose of resolving the administrative dispute over “reset.” The Director’s Report for the Lake Walcott storage water right did not include a diversion rate limitation, and in subsequent SRBA proceedings no party sought to include a diversion rate limitation in the Lake Walcott storage water right.

⁹ See, e.g., *Reporter’s Transcript, Monthly Status Conference* (May 16, 2017) at 10 (“So it’s only a question of how the reservoir rights interface with the AFRD No. 2 and Milner water rights.”). Excerpted pages of this transcript, and all other transcripts cited in this brief, are provided in Exhibit 4 to the *Orr Dec.* See also *Tribes’ Brief* at 9 n.10 (identifying the AFRD#2, Milner, and Lake Walcott water rights as the “three water rights that are most important to understanding the reason for conflict on the storage reset issue”)

¹⁰ *Surface Water Coalition’s Joint Motion to Decree General Provision* at 2 (May 15, 2017). A copy of this motion is provided in Exhibit 15 to the *Orr Dec.*

¹¹ See, e.g., *Tribes’ Brief* at 8 (referring to a “storage season” that begins on “October 1”).

II. The Background of the “Reset” Dispute

a. Lake Walcott Storage Water Right No. 1-219

Lake Walcott storage water right 1-219 was decreed in the SRBA on August 17, 2016, pursuant to a stipulated settlement submitted to this Court in January 2015 (“*Basin 1 Stipulation*”).¹² As previously discussed, the “Quantity” element of the partial decree for this storage water right is quantified in terms of annual volume (95,200 AFY) and is not limited by a diversion rate.

In 1913, the Lake Walcott storage water right was decreed for “2,500 second-feet” rather than an annual volume, and in 1921 was licensed for “2,500 cubic feet per second” rather than an annual volume.¹³ The United States’ SRBA claim for the Lake Walcott storage water right also claimed a “Total Quantity Appropriated” of “2500.00 C.F.S.”¹⁴

In 2005, the Department prepared “preliminary” recommendations that the Lake Walcott storage water right be decreed for an annual volume (either 21,500 AFY or 41,700 AFY) and without a limiting diversion rate. The United States responded with a “Notice of Error” describing “the changes” the United States sought “in the proposed recommendation.”¹⁵ The United States asserted the “[q]uantity is 2500 cfs as decreed in

¹² The *Motion for Order Decreeing Water Rights* of January 30, 2015, included a copy of the *Basin 1 Stipulation*. Copies of both are provided in Exhibit 3 to the *Orr Dec.* This Court issued the partial decrees proposed by the *Basin 1 Stipulation* on August 17, 2016. *Orr Dec.*, Ex. 6. Most were amended on March 29, 2017, to correct minor clerical errors that are not relevant to the issues raised by the *Joint Motion*. *Orr Dec.*, Ex. 1.

¹³ *Thompson Dec.*, Ex. K; Ex. J at 6.

¹⁴ A copy of the claim is in Exhibit 7 to *Orr Dec.*

¹⁵ Copies of the “preliminary” recommendations and the “Notice of Error” are provided in Exhibit 8 to *Orr Dec.*

the Foster Decree,” and “[t]his right should be recognized as previously decreed and licensed for 2500 cfs.”

Ultimately, the Department recommended that the Lake Walcott storage water right be decreed for an annual volume of 41,700 AFY, with no diversion rate limitation.¹⁶ Many parties, including the United States and various members of the Surface Water Coalition, filed objections and responses, but none took issue with the recommendation to decree the Lake Walcott storage water right for an annual volume and without a diversion rate limitation.¹⁷

The Water District 01 water right accounting system incorporated a 2,500 CFS diversion rate limitation for the Lake Walcott storage water right during the period from 1978 to 2010. In 2011, after the filing of the Director’s Report and objections regarding the Lake Walcott storage water right but before issuance of the partial decree, the 2,500 CFS limitation was removed from the Water District 01 water right accounting system.¹⁸

b. “Reset” in Water Rights Administration in Water District 01.

“Reset” is a water right accounting procedure that has been used by Water District 01 since approximately 1978, when Water District 01 began to account for all diversions of natural flow and storage water on a year-round basis. Previously, Water District 01 had only accounted for and regulated diversions during the “regulation” season, which typically began after the reservoirs had filled or reached peak storage for the year. Prior

¹⁶ A copy of the Director’s report is in Exhibit 9 to the *Orr Dec.*

¹⁷ The objections and responses are not linked on the Court’s website, but can be viewed by using the “Water Right Research” utility on IDWR’s website.
<https://idwr.idaho.gov/apps/ExtSearch/WRAJSearch/WRADJSearch.aspx>.

¹⁸ *Staff Memorandum* at 4.

to 1978, there was little or no accounting or regulation of diversions outside of the “regulation” season.¹⁹

The shift to year-round accounting and regulation of all diversions marked “[t]he end of an era” in Water District 01,²⁰ and required the Watermaster to make administrative determinations that had never been necessary under the “regulation” season system, including but not limited to: (1) when each of the storage water rights had accrued its full annual volume, i.e., “filled”²¹; and (2) when the storage water rights could begin accruing storage again for the next season, i.e., the “reset” date.²² To support the new system of administration, in 1978 Water District 01 also implemented a computerized system of water rights accounting.²³ In the years since 1978, this

¹⁹ *Staff Memorandum* at 2.

²⁰ *Water Distribution and Hydrometric Work, District No. 01, Snake River, Idaho, 1978* at 2 (“1978 Black Book”). Copies of excerpted pages of the 1978 Black Book are provided in Exhibit 10 to the *Orr Dec.*

²¹ Under the Water District 01 water right accounting system, the “fill” of Upper Snake Basin on-stream storage water rights is measured by accounted “accruals” rather than by the “physical fill” of the reservoirs. *Basin 1 Stipulation* at 4.

²² *Staff Memorandum* at 3. “Reset” is also part of the water right accounting systems used in Water Districts 63 (Boise River Basin) and 65 (Payette River Basin).

²³ *1978 Black Book* at 2. The computer system (along with an improved network of gages to measure streamflows and diversions) provided the capability to handle the large volume of streamflow and diversion data that must be collected and processed in order to implement daily, year-round accounting of all diversions in the Upper Snake Basin. The computer system was not (and is not) the basis or authority for determining how the storage water rights must be administered. It simply encodes and executes the Watermaster’s and Director’s accounting instructions. The computer system itself has always been nothing more than an accounting tool to assist the Watermaster, as supervised by the Director, in distributing water in accordance with the prior appropriation doctrine as established by Idaho law. Idaho Code § 42-602; *see also In re SRBA, Subcase No. 00-91017 (“BWI 17”),* 157 Idaho 385, 393, 336 P.3d 792, 800 (2014).

accounting system has used several different “reset” dates, but the “reset” date has always been in the late summer or fall.²⁴

c. Water District 01 “Reset” in the SRBA.

The “reset” dispute grew out of the “refill” litigation. The Water District 01 water right accounting system was challenged in the proceedings on “Basin-Wide Issue 17,” which was designated to address the question of whether the storage water rights included a priority right to “refill” reservoir space that had been vacated for flood control purposes.²⁵ The water right accounting dispute that arose in Basin-Wide Issue 17 was the principle reason the United States and the Surface Water Coalition filed “Late Claims” for beneficial-use based storage water rights for the on-stream reservoirs in the Upper Snake Basin.²⁶

These Late Claims, and also the license- and decree-based claims for storage water rights for the same reservoirs (“Base Rights”), were resolved through the *Basin 1 Stipulation*. The agreed-upon forms of the partial decrees for both the Late Claims (also called the “Enlargement Rights”) and the Base Rights were included in the *Basin 1*

(“[A]s long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.”) (brackets added).

²⁴ *Staff Memorandum* at 3.

²⁵ *BWI 17*, 157 Idaho at 387, 336 P.3d at 794. This Court held that the challenges to the Director’s method of accounting for the distribution of water to decreed water rights were beyond the scope of Basin-Wide Issue 17, and the Idaho Supreme Court agreed. *Id.* at 392-94, 336 P.3d at 799-801.

²⁶ *The United States’ Memorandum in Support of Standard Form 4 Motions to File Late Notices of Claim, SRBA Subcases 01-10620 et al.* at 1-5 (Jan. 31, 2013); *[Surface Water Coalition’s] Memorandum in Support of Motion to File Late Notices of Claim, SRBA Subcases 01-10614, et al.* at 1-5 (Jan. 31, 2013). Copies of excerpted pages of these memoranda are provided in Exhibit 11 to the *Orr Dec.*

Stipulation and the motion. Neither the *Basin 1 Stipulation* nor the proposed partial decrees included a “reset” remark, and the proposed partial decree for the Lake Walcott Base Right (1-219) was quantified solely in terms of an annual volume (95,200 AFY), without a diversion rate limitation. The partial decrees proposed by the *Basin 1 Stipulation* were intended to be “a full and final resolution” of the storage water rights for the on-stream reservoirs in the Upper Snake Basin.²⁷

The *Basin 1 Stipulation* included a provision resolving the dispute that had arisen over the water right accounting system’s method of determining accruals towards the annual volumes of the storage water rights—that is, the method for determining which flows “count,” and when the annual volumes have been satisfied.²⁸ Moreover, and like the stipulation that resulted in the more-recent settlement of the Basin 63 Late Claims and several appeals to the Idaho Supreme Court regarding the Water District 63 water rights

²⁷ *Basin 1 Stipulation* at 2.

²⁸ The *Basin 1 Stipulation* provides, in pertinent part, as follows:

. . . all natural flow arising upstream from the decreed points of diversion of a Storage Water Right, after subtracting the natural flow delivered to water rights with identical or earlier priorities, will be accrued ^[footnote omitted] towards the annual volumes set forth in the ‘Quantity’ element of the Storage Water Right The amount of water accrued towards the annual volume set for the in the ‘Quantity’ element of a Storage Water Right will not be determined or adjusted on the basis of reservoir contents or on the basis of releases from the reservoir(s).

Basin 1 Stipulation at 4. As used here, the term “accrued” refers to “accounting accruals rather than to increases in the volume of water physically stored in the reservoir(s),” and “accrued” water is “water that has been ‘counted’ or ‘credited’ for purposes of distributing natural flow to a reservoir storage water rights “in accordance with its decreed elements.” *Id.* at n.4.

accounting system (“*Basin 63 Stipulation*”), the *Basin 1 Stipulation* called for the filing of a Rule 60(b)(6) motion to modify the partial decrees for certain Base Rights that had already been decreed—water rights nos. 21-2154, 21-2161, and 21-12946 (Henrys Lake).²⁹ Similar to the Rule 60(b)(6) motion filed pursuant to the *Basin 63 Stipulation*, the Rule 60(b)(6) motion filed pursuant to the *Basin 1 Stipulation* sought to include in the previously-decreed Base Rights the same combined volume limitation remark that was in the proposed partial decree for the Henrys Lake Enlargement Right (21-13193). This motion was filed and granted.³⁰

Unlike the *Basin 63 Stipulation*, however, the *Basin 1 Stipulation* did not define a “reset” date or include a “reset” provision.³¹ The proposed partial decrees were issued, pursuant to the stipulation and certain “error corrections” to which the parties agreed, without any objections and without any “reset” provisions.³² Most of the partial decrees were issued on August 17, 2016, although some were issued earlier and amended on that date.³³

²⁹ *Basin 1 Stipulation* at 3-4 & Attachment C. The stipulation that resulted in settlement of the Basin 63 Late Claims (“*Basin 63 Stipulation*”) was attached to the *Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-3614, and 63-3618* (Feb. 19, 2019). A copy of this motion and the attached *Basin 63 Stipulation* is provided in Exhibit 12 to the *Orr Dec.*

³⁰ Copies of the Rule 60(b)(6) motion and this Court’s orders regarding it are provided in Exhibit 13 to the *Orr Dec.*

³¹ *Reporter’s Transcript, SRBA Subcases 1-219, et al., Status Conference* (Aug. 4, 2016) at 8.

³² *Id.* at 8-10.

³³ *Orr Dec.*, Ex. 6.

The Tribes did not participate in Basin-Wide Issue 17 or the Late Claim subcases, and did not participate in the settlement that led to the *Basin 1 Stipulation*. The Tribes did not object to the *Basin 1 Stipulation* or issuance of the proposed partial decrees, even though the settlement resulted in partial decrees being issued for the Base Rights for American Falls and Palisades Reservoirs.³⁴ Neither the Tribes nor any other party filed any appeals of the partial decrees issued by this Court.

The lack of a “reset” provision in the *Basin 1 Stipulation* and the partial decrees does not appear to be the result of an oversight. The significance of the accounting system’s “reset” date had been recognized long before the Basin 1 settlement.³⁵ The question of “reset” date was also a subject of negotiations involving the State, the Spaceholders,³⁶ the United States, and the Tribes before the partial decrees were issued.³⁷

³⁴ The Tribes have identified their federal contract rights for storage space in American Falls and Palisades Reservoirs as the basis of their interest in “reset” and the *Joint Motion. Tribes’ Brief* at 6-7 & n.5

³⁵ See, e.g., *Staff Memorandum* at 3 (discussing the reasons for changes to the “reset” date during the period from 1978 to 1997); *id.* at 4 (stating that the Lake Walcott storage water right’s “2500 cfs limit was removed from the water right accounting in 2011,” and that this “prevented or delayed the distribution of natural flow to Milner Irrigation District’s and AFRD2’s junior water rights until the senior Lake Walcott water right’s annual volume was completely satisfied, usually occurring sometime in October.”)

³⁶ For current purposes, the term “Spaceholders” refers to the members of the Surface Water Coalition and other irrigation entities that hold contracts for storage space in the United States’ reservoirs. *Kerner v. Johnson*, 99 Idaho 433, 438, 583 P.2d 360, 365 (1978).

³⁷ *Reporter’s Transcript, SRBA Subcases 1-219, et al., Status Conference* (Aug. 4, 2016) at 4, 7-8 (stating that “the reset issue” was discussed in the status conference of July 12, 2016, and that a proposed “reset” provision had been provided to the United States and the Tribes).

Even so, and for reasons not explained on the record, “reset” was not addressed in the *Basin 1 Stipulation* or the partial decrees.³⁸

The “reset” negotiations continued for almost a year (July 2016 to May 2017), including long after the partial decrees were issued, even though the parties, IDWR, and this Court repeatedly recognized that the “reset” issue needed to be resolved as quickly as possible.³⁹ In a series of status conferences during this period, the parties regularly updated this Court regarding the “reset” negotiations, but did not place any post-judgment motions or other requests for relief before the Court, until after court-ordered mediation efforts had failed.⁴⁰

Finally, during the status conference of February 21, 2017, counsel for the United States informed the Court that the parties had been unable to resolve the “reset” issue and suggested “trying a short mediation period” of sixty (60) days.⁴¹ Counsel for the State said that “from the State’s perspective, this has been going on a long time and we would

³⁸ See, e.g., *Reporter’s Transcript, SRBA Subcases 1-219, et al., Status Conference* (Aug. 4, 2016) at 8 (“although the reset is not part of the stipulation it is something that we need to do as these rights are getting decreed to make sure we’ve got a comprehensive solution to all the problems”).

³⁹ *Reporter’s Transcript, SRBA Subcases 1-219, et al., Status Conference* (Aug. 4, 2016) at 4, 7-8; *Reporter’s Transcript, SRBA Subcases 1-219, et al., Status Conference* (Sep. 12, 2016) at 4-6; *Reporter’s Transcript, In Re: SRBA & CSRBA, Monthly Status Conference* (Oct. 25, 2016) at 2, 9-15; *Reporter’s Transcript, In Re: SRBA & CSRBA, Monthly Status Conference* (Dec. 20, 2016) at 31-39; *Reporter’s Transcript, In Re: SRBA & CSRBA, Monthly Status Conference* (Feb. 21, 2017) at 12-20; *Reporter’s Transcript, In Re: SRBA, Monthly Status Conference* (May 16, 2017) 4-13. Copies of excerpted pages of these transcripts are provided in Exhibit 4 to the *Orr Dec.*

⁴⁰ *Id.*

⁴¹ *Reporter’s Transcript, Monthly Status Conference* at 16 (Feb. 21, 2017).

like to see some closure.”⁴² State’s counsel also stated “we’re agreeable to the idea of a mediated settlement” provided that “it be for a fixed period of no longer than 60 days, and that the 60-day period be marked by a time for parties to file any appropriate motions” if settlement was not achieved.⁴³ The other parties agreed to this proposal, and while IDWR’s counsel said the Department “would prefer to have this issue resolved quicker,” the 60-day mediation proposal was acceptable to IDWR.⁴⁴ The Tribes did not appear at the hearing.⁴⁵

This Court put the mediation “on a fast track” and gave the parties ten days to identify a mediator followed by sixty days to complete mediation and/or file any post-judgment motions.⁴⁶ This Court also set May 16, 2017, as the deadline for filing any post-judgment motions, specifying that any such motions “should be made pursuant to and in accordance with the appropriate Idaho Rules of Civil Procedure.”⁴⁷ The mediator issued a *Mediation Report* on April 14, 2017, stating “the parties did not reach a settlement,” but that there remained “a realistic possibility of a settlement” either through continued mediation or negotiations among the parties.⁴⁸

⁴² *Id.* at 17.

⁴³ *Id.* at 17-18.

⁴⁴ *Id.* at 18.

⁴⁵ The Tribes also did not appear at any of the status conferences discussed above.

⁴⁶ *Id.* at 19; *Order on Meditation; Order Setting Status Conference* (Feb. 22, 2017). A copy of this order is provided in Exhibit 14 to the *Orr Dec.*

⁴⁷ *Order on Meditation; Order Setting Status Conference* at 2.

⁴⁸ *Orr Dec.*, Ex. 14.

On May 15, 2017, the day before the deadline for filing post-judgment motions, the Surface Water Coalition filed a *Joint Motion to Decree General Provision*. This motion requested that this Court decree a “general provision” for Basin 1 establishing a general “reset” date of November 16, but also authorizing the storage water rights for American Falls, Palisades, and Jackson Lake Reservoirs to be “reset” anytime between October 1 and November 15.⁴⁹

At the next day’s status conference, this Court expressed concerns about the procedure for addressing the Coalition’s motion for a general provision.⁵⁰ Two days later, this Court issued an order *sua sponte* dismissing the Coalition’s motion without prejudice, stating that it lacked “power” and “jurisdiction” to hear or determine the issues raised in the Coalition’s motion, because final judgments had been entered and the time

⁴⁹ *Orr Dec.*, Ex. 15. The motion also requested that the “general provision” address administration of AFRD#2’s irrigation water right 1-6. This Court had issued a partial decree for water right 1-6 in 2012, in the name of the United States, for the use and benefit of AFRD#2. *Orr Dec.*, Ex. 2. The partial decree includes a complex administrative provision that resulted from a stipulation. In 2013, the Surface Water Coalition attempted to bring this water right back into the SRBA via one of its Late Claims for “refill” storage. This Court denied the motion to file that claim on grounds that the water right had already been decreed. *Order Denying Motion to File Notice of Late Claim, Subcase No. 01-10619* (Jun. 4, 2013). (A copy of this order is provided in Exhibit 16 to the *Orr Dec.*) The Director subsequently issued a final order addressing the history, interpretation, and administration of the administrative provision in the partial decree for water right 1-6. *Final Order Regarding Instructions to Water District 01 Watermaster, In the Matter of Water Right No. 1-6* (Feb. 11, 2013). (A copy of this order is provided in Exhibit 17 to the *Orr Dec.*) The Surface Water Coalition did not seek to intervene in that proceeding, and neither the United States nor AFRD#2 sought judicial review of the Director’s order.

⁵⁰ *Reporter’s Transcript, Monthly Status Conference* at 8-9, 11-13 (May 16, 2017).

for appeals had passed. The order further stated that “[a]ll issues raised by the objections were resolved via the stipulation of the parties dated January 30, 2015.”⁵¹

The order also explained that “the parties agreed that any post-judgment motions should be filed within a time certain” if mediation was not successful,⁵² and that the *Order on Mediation* had included a provision calling for any post-judgment motions to be filed by May 16, 2017, expressly requiring that “*[t]he post-judgment motions should be made pursuant to and in accordance with the appropriate Idaho Rules of Civil Procedure.*”⁵³ The Court stated that this language contemplated a motion under a rule “such as Idaho Rule of Procedure 60(b),” but “the Surface Water Coalition has not filed pursuant to any Idaho Rule of Civil Procedure.”⁵⁴ Even so, this Court dismissed the Coalition’s motion without prejudice, and left the door open for the Coalition “to refile” its motion in the appropriate subcases, so long as the Coalition “first take[s] the appropriate steps to set aside the *Final Unified Decree* and reopen the subcases consistent with the Idaho Rules of Civil Procedure.”⁵⁵

d. The Contested Case Regarding “Reset.”

The Coalition, however, did not refile its “reset” motion under Rule 60(b). Instead, Milner Irrigation District sent a letter to the Director and the Watermaster for

⁵¹ *Order Dismissing Sua Sponte Motion Without Prejudice, SRBA Subcase Nos. 1-219, et al.* at 3-5 (May 18, 2017). A copy of this order is provided in Exhibit 18 to the *Orr Dec.*

⁵² *Id.* at 5.

⁵³ *Id.* at 5 (italics in original) (quoting *Order on Mediation*).

⁵⁴ *Id.*

⁵⁵ *Id.* at 6-7.

Water District 01 that challenged the existing “reset” date of September 15 as unauthorized by the partial decrees for the reservoir storage water rights.⁵⁶ Milner alleged that the September 15 “reset” date interfered with Milner’s water right (1-17) by taking natural flow that historically had been distributed to Milner rather than being stored under the Lake Walcott storage water right.⁵⁷ Milner requested that the Director distribute to Milner “the appropriate natural flow as required by Idaho law.”

The Director responded by issuing a notice of a contested case and setting a deadline for petitions to intervene.⁵⁸ Subsequently, outside of the contested case but in light of the issues raised therein, the Director sent a letter of instruction to the Watermaster of Water District 01 instructing the Watermaster to “reset” the storage water rights on January 1, 2018. While the Coalition and the Tribes put much emphasis on this letter, it was neither an order issued in the contested case, nor a definitive interpretation of the partial decrees for the storage water rights.⁵⁹ Subsequently, the Tribes and a

⁵⁶ A copy of this letter is appended to the *Thompson Dec.* as Exhibit B.

⁵⁷ *Id.* at 2.

⁵⁸ A copy of this notice is appended to the *Thompson Dec.* as Exhibit D.

⁵⁹ The letter does not appear on the docket for the contested case. *IDWR Docket #P-WRA-2017-002 (Petition Regarding Storage Reset in Water District 01 filed by Milner Irrigation District)*. (This docket is available for viewing online at <https://idwr.idaho.gov/legal-actions/administrative-actions/milner-petition.html>, and a printed copy of this docket is provided in Exhibit 19 to the *Orr Dec.*). The letter stated, in pertinent part, as follows:

Water District 01 staff reset the onstream Snake River storage water rights . . . on September 15, 2017. . . . The question of how the season of use defined by the [storage water right] decrees interacts with a reset date earlier than January 1 is the subject of a contested case now pending before the Director. . . . Without having received evidence in the contested case to

number of other parties, including the United States Bureau of Indian Affairs (“BIA”),⁶⁰ were granted intervention. The United States Bureau of Reclamation (“Reclamation”)—the holder of legal title to most of the storage water rights, the owner and operator of most of the on-reservoirs in the Upper Snake Basin, and a key participant in the “reset” negotiations—however, did not intervene or otherwise become a party to the contested case.

The contested case has been pending before the Director for the last two years, and included opportunities for each party to submit statements of the issues, and responses to other parties’ statements of the issues.⁶¹ After considering these submissions, the Director identified a “threshold” question of law raised by the parties’ issue statements and responses: “whether the plain language of the of the ‘period of use’ element of the storage water right partial decrees for federal onstream reservoirs in Water

determine when a reset date might be appropriate, the Director must consult the four corners of the storage right decrees to determine the season of use for these rights. The decrees identify a season of use of January 1 through December 31. As a result, the Water District 01 should not have reset the reservoir rights to start accruing again prior to January 1. . . . This letter instructs you to characterize any flow accrued to the Snake River Reservoirs subsequent to September 15, 2017, as natural flow that was available for diversion by junior water rights. Delivery of water to satisfy the onstream Snake River Reservoir water rights shall begin on January 1, 2018.

Thompson Dec., Exhibit A at 1-2.

⁶⁰ The BIA holds in trust, for the benefit of the Tribes, federal contracts for storage in American Falls Reservoir and Palisades Reservoir. *Orr Dec.*, Ex. 20 at 14.

⁶¹ *Orr Dec.*, Ex. 19 (docket); *Order Requesting Staff Memorandum*; *Order Adopting deadlines*; *Notice of Status Conference*; *Notice of Hearing* (Nov. 20, 2017). A copy of this order is provided in Exhibit 21 to the *Orr Dec.*

District 01 that specifies ‘1/1 to 12/31’ as the time period for ‘irrigation storage’ requires that the reset date for those rights be January 1.”⁶²

The Director established a briefing schedule that provided opportunities for all parties to submit both an opening and response brief on the “threshold” question.⁶³ The Coalition, the Tribes, and a number of other parties submitted opening briefs and response briefs.⁶⁴ All of the parties’ briefs, with the possible exception of the Coalition’s, took the position that the decreed “period of use” for “irrigation storage” did not require a “reset” date of January 1.⁶⁵ Even the Coalition argued, however, that the decreed “period of use” should not govern “reset” because “this case is unique given the circumstances and history of the storage water rights’ appropriation and administration.”⁶⁶

⁶² *Order Re: Statements of Issues and Responses; Order Adopting Deadlines; Amended Notice of Status Conference* at 4 (Jan. 3, 2018) A copy of this order is provided in Exhibit 22 to the *Orr Dec.* See also *Surface Water Coalition’s Statement of Issues* at 2 (discussing the decreed “period of use” of “1/1 to 12/31”); *Shoshone-Bannock Tribes’ Statement of Issues and Memorandum of Points and Authorities* at 4, 10 (similar); *Surface Water Coalition’s Responses to Parties’ Statements of Issues* at 4 (similar); *Shoshone-Bannock Tribes’ Response to Statements of Issues Filed by Other Parties* at 2-5 (similar). Copies of excerpted pages of these briefs are is provided in Exhibit 23 *Orr Dec.*

⁶³ *Orr Dec.*, Ex. 22.

⁶⁴ *Orr Dec.*, Ex. 19.

⁶⁵ *Orr Dec.*, Ex. 5. For instance, Aberdeen-Springfield Canal Company’s response brief summarized the parties’ views in the “threshold” question as follows:

To summarize, some of the common legal positions in the opening briefs include: (1) the ‘period of use’ element does not prescribe a ‘reset date’; (2) the decrees do not set forth a ‘reset date’; (3) the Director has discretion to determine the ‘reset date’; and (4) historic practices . . . provide guideposts for the Director to exercise his discretion and determining an appropriate reset date.

The Director has not issued a decision on the “threshold” question of whether the partial decrees require a “reset” date of January 1, because soon after submitting briefs the parties entered into a series of interim stipulations. Among other things, the interim stipulations requested that the Director stay the proceedings and withhold any decision on the “threshold” question while the parties attempted to negotiate a settlement of their “reset” dispute.⁶⁷ *SWC Brief* at 6-7. Several of the interim stipulations also included requests that, while the contested case remained pending, “reset” would take place on dates the parties had agreed upon.⁶⁸ The Director ultimately granted all of these requests, including the parties’ request to limit diversions under the Lake Walcott storage water right (1-219) to 2,500 CFS during the period from September 15, 2018 to October 15, 2018.⁶⁹

However, when in 2019 the parties again requested that the Director limit diversions under the Lake Walcott storage water right to 2,500 CFS from September 15 to October 15,⁷⁰ “the Department expressed reluctance to approve this stipulation until it

⁶⁶ *Orr Dec.*, Ex. 5 (Coalition’s response brief).

⁶⁷ *Stipulated Motion for Stay* (Feb. 7, 2018); *Stipulated Motion to Extend Stay and Vacate Hearing Date* ((Mar. 2, 2018); *Stipulated Motion to Extend Stay and Schedule Status Conference* (Mar. 20, 2018); *Interim Stipulation and Motion for Order to Approve* (May 23, 2018); *Stipulation and Joint Motion for Order Approving Stipulations/Joint Motion for Stay* (Apr. 17, 2019); *Interim 2019 Stipulation and Joint Motion for Order Approving Stipulation/Joint Motion for Stay* (Aug. 23, 2019). Copies of these interim stipulations, and the Director’s orders, are provided in Exhibit 24 to the *Orr Aff.*

⁶⁸ *Interim Stipulation and Motion for Order to Approve* (May 23, 2018); *Stipulation and Joint Motion for Order Approving Stipulations/Joint Motion for Stay* (Apr. 17, 2019); *Interim 2019 Stipulation and Joint Motion for Order Approving Stipulation/Joint Motion for Stay* (Aug. 23, 2019).

⁶⁹ *See generally Orr Dec.*, Ex. 19 (docket).

hear[d] the views of Reclamation as the holder of legal title to the Lake Walcott storage right.”⁷¹ Reclamation informally informed IDWR that while Reclamation “support[ed] the effort to have the storage water right modified, provided a judicial order is entered,” Reclamation could not “support the effort formally” without obtaining approval from the Department of the Interior and the Department of Justice.”⁷² Reclamation also stated it “believes that partially subordinating the Lake Walcott right temporarily or permanently requires judicial approval.”⁷³

As a result, the Director declined to approve the parties’ request to limit diversions under the Lake Walcott storage water right in 2019.⁷⁴ The parties therefore submitted “a revised interim stipulation” for “reset” in 2019 that did not include a request to limit diversions under the Lake Walcott storage water right.⁷⁵ The revised interim stipulation requested that the Director stay the contested case “while the Parties pursued the present relief in the SRBA Court.” *Id.* The Director issued an interlocutory order

⁷⁰ *Stipulation and Joint Motion for Order Approving Stipulations/Joint Motion for Stay* at 5 (Apr. 17, 2019).

⁷¹ Letter from Jeremiah I. Williamson, Office of the Solicitor, United States Department of the Interior, to Gary Spackman, Director, Idaho Department of Water Resources at 1 (Jul. 8, 2019). A copy of this letter is provided in Exhibit 25 to the *Orr Dec.*

⁷² *Id.* at 1.

⁷³ *Id.* at 2.

⁷⁴ *SWC Brief* at 7.

⁷⁵ *Interim 2019 Stipulation and Joint Motion for Order Approving Stipulation/Joint Motion for Stay* (Aug. 23, 2019); *see also* Letter from Jeremiah I. Williamson, Office of the Solicitor, United States Department of the Interior, to Gary Spackman, Director, Idaho Department of Water Resources at 1 (Aug. 26, 2019). A copy of this letter is provided in Exhibit 26 to the *Orr Dec.*

accepting the revised interim stipulation and staying the contested case “until issuance of a decision from the SRBA Court in relation to the subordination of Reclamation’s Lake Walcott water right.” *Id.*⁷⁶ The *Joint Motion* was filed with this Court approximately a month and a half later.

ARGUMENT

The State does not oppose the proposal to define September 15 as the “reset” date in the Water District 01 water rights accounting system. The State also does not oppose the proposal to limit diversions under the Lake Walcott storage water right to 2,500 CFS during the period from September 15 to October 15. What the State opposes, rather, is the proposal to re-open the partial decrees in order to achieve these ends. As will be discussed, these ends can be achieved through a stipulated settlement of the contested case that includes the United States’ consent to limit diversions under the Lake Walcott storage water right. Re-opening the partial decrees to address the “reset” issue—which in the end is simply a dispute over priority administration of decreed water rights—is not only unnecessary, but would undermine the finality of the SRBA and any other pending or future general stream adjudication in Idaho.

I. Legal Standards.

Rule 60(b)(6) of the Idaho Rules of Civil Procedure authorizes a court to “relieve a party or its legal representative from a final judgment” for “any other reason that justifies relief.” I.R.C.P. 60(b)(6).⁷⁷ A Rule 60(b)(6) motion must be filed “within a

⁷⁶ *Interlocutory Order Accepting 2019 Settlement and Extending Stay Order* (Sep. 11, 2019). A copy of this order is appended to the *Thompson Dec.* as Exhibit I.

⁷⁷ The word “other” refers to reasons other than those set forth in Rule 60(b) subsections (1) – (5).

reasonable time.” I.R.C.P. 60(c)(1). The question of whether to grant a Rule 60(b)(6) motion is committed to the sound discretion of the trial court. *In Re SRBA Subcase No. 37-000864, Eden v. State*, 164 Idaho 241, 248, 429 P.3d 129, 136 (2018) (“*Eden*”). This discretion, however, “is limited and may be granted only on a showing of unique and compelling circumstances justifying relief,” *id.* at 252, 429 P.3d at 140 (internal quotation marks and citation omitted), and a Rule 60(b)(6) motion may not be used as a substitute for a timely appeal. *In re Jane Doe, I*, 145 Idaho 650, 651, 182 P.3d 707, 708 (2008). The determination of whether to grant a Rule 60(b)(6) motion turns largely on questions of fact to be determined by the trial court. *Eden*, 164 Idaho at 248, 429 P.3d at 136. Further, “[f]inality in water rights is essential.” *Id.* at 253, 429 P.3d at 141 (brackets in original) (internal quotation marks and citation omitted).

This Court has rejected a number of attempts to bring disputes over priority administration of decreed water rights into the SRBA by means such as late claims or a basin-wide issue. In the course of such proceedings, this Court has at times referred to Rule 60(b)(6) as a possible means of bringing an administrative dispute into the SRBA.⁷⁸ To the State’s knowledge, however, this is the first attempt to use Rule 60(b)(6) for such a purpose, and it warrants close scrutiny. For the reasons discussed below, the nature of the “reset” dispute and the facts of this case require that the *Joint Motion* be denied.

⁷⁸ See, e.g., *Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master, Subcases 63-33732, et al.* (“*Basin 63 Challenge Decision*”) at 7 n.4 (Sep. 1, 2016); *Memorandum Decision and Order on Challenges; Final Order Disallowing Water Right Claims, Subcases 665-23531 & 65-23532* (“*Basin 65 Challenge Decision*”) at 5 & n.3 (Oct. 7, 2016). Excerpts of these decisions are provided in Exhibits 27 and 28 to the *Orr Dec.*

II. The Joint Motion Was Not Filed “Within a Reasonable Time.”

The Coalition and the Tribes argue the *Joint Motion* was filed within a “reasonable time,” I.R.C.P. 60(c)(1), ostensibly because they consider the clock to have begun running at some point during the pendency of the contested case before IDWR. The Coalition identifies “the shift in the administration of the subject water rights that occurred at the end of 2017.” *SWC Brief* at 19.⁷⁹ The Tribes point to “the diligent and ongoing efforts of the parties to reach a comprehensive and permanent resolution of this complex administrative litigation.” *Tribes Brief* at 14-15.

These arguments are inconsistent with the relief sought. The *Joint Motion* is not a petition for judicial review of an order issued by the Director, but rather request for relief from a judgment of this Court—specifically, the *Final Unified Decree* and certain partial decrees issued pursuant to the stipulated settlement of the Upper Snake Basin “fill/refill” dispute (“*Basin 1 Stipulation*”).⁸⁰ The relevant event for purposes of determining

⁷⁹ The Coalition’s assertion of a “shift in the administration of the subject water rights” appears to be a reference to the Director’s October 2017 letter to the Watermaster regarding “Reset of Reservoir Water Rights and Recharge.” *Thompson Dec.*, Ex. A. The Coalition’s characterization of this letter as ordering a “shift” to a new system of administration is contrary to the plain language of the letter, which only addressed administration during the period from September 15, 2017, to January 1, 2018. The Coalition’s assertion also ignores the fact that, as requested by the Coalition and other parties, the Director has not yet issued a decision on Milner’s petition or the “threshold” issue. In the interim, “reset” has been done in accordance with the parties’ stipulations. *Affidavit of Anthony S. Olenichak*, filed herewith (“*Olenichak Aff.*”). For the same reasons, there is no merit in the Tribes’ attempt to characterize the Director’s letter as “IDWR’s proposed change in reset accounting.” *Tribes’ Brief* at 20.

⁸⁰ A copy of the *Basin 1 Stipulation* and its attachments is appended to the *Motion for Order Decreeing Water Rights*, a copy of which is provided in Exhibit 3 to the *Orr Dec.* Even if construed as a petition for judicial review pursuant to the Idaho Administrative Procedures Act, the *Joint Motion* would have to be denied because the Director has not issued a final order in the contested case. Idaho Code §§ 67-5270(3), 42-1701A(4).

whether the *Joint Motion* was filed within a “reasonable time,” therefore, is the date of issuance of the partial decrees. As previously discussed, the proposed partial decrees were issued, pursuant to the *Basin 1 Stipulation* and certain “error corrections” to which the parties agreed, on August 17, 2016 (although some were issued earlier). *Orr Dec.*, Ex. 6.⁸¹ The *Joint Motion* was not filed until more than three years later.

This delay is unreasonable under the circumstances of this case. The significance of both the “reset” date and limiting the Lake Walcott storage water right to 2,500 CFS were recognized long before the “refill” and water right accounting litigation that led to the *Basin 1 Stipulation*. *Staff Memorandum* at 2-4. The Coalition and the Tribes do not dispute this fact, and their briefs confirm it. *SWC Brief* at 5-6, 9-12; *Tribes’ Brief* at 17-19.

“Reset” is a water right accounting procedure that determines when a storage water right can begin to “fill,” *Staff Memorandum* at 2, and the *Basin 1 Stipulation* was intended to resolve disputes regarding the “fill and/or ‘refill’” of the storage water rights for the on-stream reservoirs in the Upper Snake River Basin. *Basin 1 Stipulation* at 2. Clearly, the “reset” date issue was relevant to the questions of the “fill” or “refill” of the storage water rights, and could have been addressed in the *Basin 1 Stipulation* and the proposed partial decrees, which were presented to this Court almost five years ago (January 30, 2015). *Orr Dec.*, Ex. 3. Further, the “reset” issue was the subject of negotiations among the Spaceholders, the United States, and the Tribes even before the partial decrees proposed by the *Basin 1 Stipulation* were issued. *Orr Dec.*, Ex. 4. Despite

⁸¹ See also *Reporter’s Transcript, SRBA Subcase Nos. 01-219, et al., Status Conference* (Aug. 4, 2016) at 8-10.

all this, no party objected to, or appealed from, this Court's issuance of the proposed partial decrees without any reference to "reset."

The record does not explain why the "reset" issue was not addressed in the *Basin 1 Stipulation* or the proposed partial decrees, but the circumstances strongly suggest the omission was intentional. See *Reporter's Transcript, SRBA Subcase Nos. 01-219, et al., Status Conference* (Aug. 4, 2016) at 8 ("So although the reset is not part of the stipulation, it is something that we need to do as these rights are getting decreed to make sure that we've got a comprehensive solution to all the problems.").⁸² Rather than address the "reset" issue in the *Basin 1 Stipulation* or the partial decrees, the Spaceholders, the United States, and the Tribes engaged in separate but ultimately unsuccessful attempts to negotiate or mediate a resolution to their "reset" dispute, outside the context of the *Basin 1 Stipulation* and the negotiations that produced the proposed partial decrees.

During the course of the separate "reset" negotiations and mediation, the parties, IDWR, and this Court repeatedly recognized that the "reset" issue needed to be resolved as soon as possible. *Orr Dec.*, Ex. 4. These concerns led to an agreement among the parties that if court-ordered mediation failed, any post-judgment motion had to be filed within sixty days, and this Court ordered that post-judgment motions were to be filed "pursuant to and in accordance with the appropriate Idaho Rules of Civil Procedure." *Reporter's Transcript, SRBA Monthly Status Conference* at 16-20 (Feb. 21, 2017); *Order on Mediation; Order Setting Status Conference* (Feb. 22, 2017).⁸³

⁸² *Orr Dec.*, Ex. 4.

⁸³ *Orr Dec.*, Exs. 4, 14.

In other words, the parties essentially agreed that a “reasonable time” for filing a motion regarding “reset,” I.R.C.P 60(c)(1), was within sixty days after the start of court-ordered mediation. This Court agreed and set May 16, 2017 as the filing deadline. The parties failed to meet this deadline because the Coalition’s May 15, 2017 motion for a “general provision” addressing “reset” was not filed pursuant to “the appropriate Idaho Rules of Civil Procedure.” *Orr Dec.*, Ex. 18. Despite this Court’s invitation for the Coalition to re-file its motion under Rule 60(b)(6) or any other appropriate rule, *id.*, the Coalition took its “reset” arguments to IDWR and requested administrative relief. *Thompson Dec.*, Exs. B & D.

The resulting contested case has been pending before IDWR for more than two years. *Orr. Dec.*, Ex. 19 (docket). At some point during the course of those proceedings, the Coalition and the Tribes apparently decided that the Lake Walcott storage water right should have been decreed with the 2,500 CFS diversion rate limitation of the *Foster Decree* and the state water right license. But the United States had made that assertion previously, in 2005, in its “Notice of Error” response to IDWR’s “preliminary” recommendation for the Lake Walcott storage water right. *Orr. Dec.*, Ex. 8. The United States did not re-assert this objection after the Director’s Report also omitted a diversion rate limitation, *id.*, Ex. 9, and no other objection or response asserted that the Lake Walcott storage water right should be decreed with a 2,500 CFS diversion rate. During the subsequent eleven years of SRBA proceedings regarding the Lake Walcott storage water right, “refill,” water right accounting, the “Late Claims,” and the *Basin 1 Stipulation*, neither the United States nor any other party argued for a diversion rate limitation on the Lake Walcott storage water right. *See, e.g., Orr. Dec.*, Exs. 3, 4, 15.

Under these circumstances, the *Joint Motion* was not filed within a “reasonable time.” I.R.C.P. 60(c)(1). To the contrary, the circumstances show that, three years after issuance of the partial decrees, the parties to the *Joint Motion* simply decided that it would be better if the partial decree for the Lake Walcott storage water right contained a 2,500 CFS diversion rate limitation. These are matters that could have and should have been raised before the partial decrees were issued, in a timely-filed Rule 60(b)(6) motion, or an appeal.

III. The Joint Motion Should Be Denied Because It Undermines Finality.

While the finality of a judgment is important in any judicial proceeding, finality is critical in a general stream adjudication such as the SRBA. The Idaho Supreme Court has repeatedly reaffirmed the principle that “[f]inality in water rights is essential.” *Eden*, 164 Idaho at 253, 429 P.3d at 141 (quoting *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998); see also *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 155, 408 P.3d 899, 910 (2018) (“Finality is for good reason, especially in water law; otherwise, the approximate \$94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures.”).

It is not just the State’s investment in the SRBA that weighs heavily in favor of finality, however. Finality is also critical because while an Idaho water right “is tantamount to a real property right, and is legally protected as such,” it is a right to the use of a dynamic and variable resource, and part of an “interlocking” system in which any one adjudicated right “affects all such rights.” *Eden*, 164 Idaho at 252-53, 429 P.3d at 140-41. In other words, while an Idaho water right must be firmly defined in concrete

legal terms that do not vary, the water resource itself is another matter. Streamflows can and do vary greatly—day to day, month to month, and year to year. This incongruence between the requirement of defining a fixed legal right to make use of a portion of the streamflow (defined mainly by the “priority” and “quantity” elements) vis-à-vis the erratic and often unpredictable nature of the streamflow is inherent to Idaho’s prior appropriation doctrine.

This means that while water rights are fixed by SRBA decrees, “[a]dministering a water right is not a static business.” *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 414, 958 P.2d 568, 571 (1997). As a result, disputes can and do frequently arise among water rights holders, or between water rights holders and the Department, as to how the interlocking water rights on a given stream system should be administered. More often than not, as in this case, the focus of these disputes is the question of which water right is or should be “in priority.” *See, e.g., BWI 17*, 157 Idaho at 390, 336 P.3d at 797 (“As the SRBA court noted, ‘[T]he crux of the issue [is] whether Idaho law authorizes the refill of a storage water right, *under priority*, where water diverted under that right is released for flood control.’”) (quoting this Court’s order designating Basin-Wide Issue 17) (*italics added*).⁸⁴

The SRBA was structured to allow water users to address potential administrative issues and disputes. The statutes governing the SRBA specifically authorized water users to seek to include in their partial decrees any administrative remarks and provisions

⁸⁴ The words “under priority” were italicized in the order of this Court that the Idaho Supreme Court quoted. *See Orr Dec.*, Ex. 30 (excerpts of this Court’s order designating “Basin-Wide Issue 17”).

necessary for efficient administration. Idaho Code §§ 42-1409(k), 42-1411A(13), 42-1412.⁸⁵ Many SRBA claims included such remarks or provisions and IDWR, on its own initiative, recommended many administrative remarks or provisions. Many partial decrees issued by this Court contain such remarks. *See Memorandum Decision and Order on Challenge, Subcases 63-33732, et al.* at 6 (Sep. 1, 2016) (“The SRBA is replete with such examples.”).⁸⁶ The administrative remarks in a partial decree can be numerous and quite detailed—such as those in the partial decrees issued pursuant to the *Basin 1 Stipulation*.

For these reasons, granting the *Joint Motion* would seriously undermine the finality of the SRBA and the partial decrees. Granting the *Joint Motion* would signal that the SRBA and the partial decrees are not that final after all, and any dispute over priority administration not addressed by remarks in the partial decrees potentially constitutes “unique and compelling circumstances” to re-open adjudicated water rights. Granting the *Joint Motion* could throw open the door to never-ending, piecemeal re-adjudication of decreed water rights whenever new administrative disputes arise. For the same reasons, granting the *Joint Motion* will undermine the finality of any currently pending or future general stream adjudication initiated under the Idaho Code, and undermine the incentive for potential claimants in those proceedings to file complete claims, including any

⁸⁵ Claimants can also request or object to “general provisions” that address administration in a given basin. Idaho Code §§ 42-141(3), 42-1412.

⁸⁶ *Orr Dec.*, Ex. 27. Further, as this Court has recognized, “[t]he notion of preserving a historical practice of administration in a decree or general provision is not a new concept. A majority of the provisions pertaining to historical administrative practices implicated in the SRBA were provision that were decreed in prior adjudications.” *Memorandum Decision and Order on Challenges, Subcases 65-23531 & 65-23532* at 8 (Oct. 7, 2016). *Orr Dec.*, Ex. 28.

administrative remarks necessary for administration. Idaho Code §§ 42-1409(1)(k), 42-1411(2)-(3), 42-1412(6).

The considerations are particularly important in this case. The partial decrees were the subject of years of litigation and painstaking negotiations that produced a comprehensive stipulation and numerous administrative remarks—even though the “reset” issue remained unresolved and therefore was not addressed in the *Basin 1 Stipulation* or the partial decrees. Moreover, the Lake Walcott storage water right was recommended and decreed for an annual volume with no diversion rate limitation, even though it had originally been claimed for 2,500 CFS rather than an annual volume, and no appeals were filed. If partial decrees issued under these circumstances are not final and conclusive, *Final Unified Decree* at 7-9, then it is difficult to imagine circumstances in which a partial decree could not be re-opened simply to address a dispute over priority administration.

Granting the SWC’s and the Tribes’ request for this Court to decree a so-called “permanent”⁸⁷ resolution of their administrative dispute would come at a great cost: the “permanence”—i.e., finality—of the SRBA itself. This would undermine rather than ensure “the certainty and finality that is critical for administration” of water rights adjudicated in the SRBA. *SWC Brief* at 11. The *Joint Motion* should be denied because it undermines the finality of the SRBA, the partial decrees, and any other pending or future general stream adjudication in Idaho.

⁸⁷ *SWC Brief* at 7, 9, 15, 17; *Tribes’ Brief* at 2, 3, 11, 15, 17, 23, 25.

IV. The Joint Motion Should Be Denied Because It Undermines IDWR's Statutory Authority to Administer Decreed Water Rights.

It is fundamental in Idaho that once water rights have been decreed, the Director of IDWR is vested with the authority to administer the water rights and to resolve disputes over administration and interpretation of the partial decrees. *In re SRBA Case No. 39576, Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 157 & n.8, 407 P.3d 899, 912 & n.8 (2017); *In re SRBA, Subcase No. 00-91017*, 157 Idaho 385, 392-94, 336 P.3d 792, 799-801 (2014) (“*BWI 17*”); *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 870-72, 154 P.3d 433, 441-43 (2007) (“*AFRD2*”).⁸⁸

The distinction between water rights adjudication and water right administration is statutory. *Compare Chapter 14, Title 42, Idaho Code* (“Adjudication of Water Rights”) with *Chapter 6, Title 42, Idaho Code* (“Distribution of Water Among Appropriators”). Idaho Code § 42-1401D specifically provides that “[r]eview of an agency action of the department of water resources, which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code, shall not be heard in any water rights adjudication proceeding commenced under this chapter.” The Idaho Supreme Court has more than once explained the purposes and benefits of maintaining this distinction between adjudicating water rights and administering water rights. *BWI 17*, 157 Idaho at 393–94, 336 P.3d at 800–01; *AFRD2*, 143 Idaho at 872, 154 P.3d at 443. Granting the *Joint Motion* would undermine this statutory framework and IDWR’s administrative authority, for essentially the same reasons discussed in the previous section.

⁸⁸ Judicial review of the Director’s orders is available pursuant to the provisions of the Idaho Administrative Procedures Act, Idaho Code §§ 67-5270—67-5279.

Granting the *Joint Motion* would also mean that any dispute over priority administration of decreed water rights could potentially be transformed into an SRBA matter, simply by declaring that the dispute can be addressed only by modifying previously decreed water rights. *SWC Brief* at 13-14; *Tribes' Brief* at 2-3. Water users in future administrative disputes could then create the “unique and compelling circumstances” necessary to justify Rule 60(b)(6) relief in the SRBA by “the simple expedient,” *AFRD2*, 143 Idaho at 871, 154 P.3d at 442, of asserting that the administrative dispute requires re-opening of this Court’s partial decrees.

This would undermine IDWR’s administrative authority, erode the statutory distinction between adjudicating water rights and administering water rights, and significantly lower the bar for relief under Rule 60(b)(6). It would also risk transforming the SRBA from a final general stream adjudication into a general water court.

V. **The “Reset” Settlement Can and Should Be Implemented Through an Administrative Order Issued by The Director.**

The Coalition and the Tribes have asserted that because their proposed “reset” settlement involves a request to impose a 2,500 CFS diversion rate limitation on the Lake Walcott storage water right, the settlement can be implemented only by modifying the partial decrees. *SWC Brief* at 13-14; *Tribes' Brief* at 2-3, 4, 21. This assertion is simply incorrect.

The partial decrees are “silent” with respect to “reset,” which means the question of “reset” is “purely one of administration” and therefore committed to the Director.

Memorandum Decision and Order on Challenge & Order of Recommitment to Special

Master, Subcases 63-33732, et al. at 5.⁸⁹ The Director clearly has authority to issue an order adopting the September 15 “reset” date the Coalition and the Tribes seek, and they have not made any persuasive arguments to the contrary.

The Coalition and the Tribes assert, rather, that the Director lacks authority to unilaterally impose a 2,500 CFS diversion rate limitation on the partial decree for Lake Walcott storage water right 1-219. *SWC Brief* at 13-14; *Tribes’ Brief* at 2-3, 4, 21. This is correct but irrelevant, because the Spaceholders, the Tribes, and the United States are free to agree to this limitation, and once there is an agreement, the Director has the authority to order the Watermaster to limit diversions under the Lake Walcott storage water right to the agreed-upon diversion rate.

Under Idaho law, limiting diversions under the Lake Walcott storage water right during the period from September 15 to October 15 so that some natural flow remains available for junior water rights (such as 1-17 and 1-6) is a form of subordination. *See Idaho Power Co. v. State*, 104 Idaho 575, 579, 661 P.2d 741, 745 (1983) (explaining that “subordination” means a water right does “not contain the customary total priority of right,” but rather is “inferior” to junior water rights). The United States also views the proposed diversion rate limitation as “partially subordinating” the Lake Walcott storage water right, *Orr Dec.*, Ex. 25, as does the Director. *See SWC Brief* at 7 (referring to a decision from this Court “in relation to the subordination of Reclamation’s Lake Walcott

⁸⁹ Among other things, the fact that the partial decrees are “silent” with respect to “reset” calls into question the assumption that there must be a single “reset” date for all the storage water rights. It is not clear whether this assumption is correct. It may be permissible or desirable to define different “reset” dates for each reservoirs, or for different groups of reservoirs, similar to the “general provision” the Surface Water Coalition proposed in 2017. *Orr Dec.*, Ex. 15.

storage water right’’) (quoting the Director’s *Interlocutory Order Accepting 2019 Settlement and Extending Stay Order*).

In *Idaho Power Company*, the Court stated “[w]e find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property,” and therefore “a voluntary subordination agreement is not in violation of Idaho’s water law.” *Id.* at 587, 661 P.2d at 753. Thus, and contrary to Reclamation’s “belief,” Idaho law does not require a water right holder to seek “judicial approval” in order to subordinate the water right. *Orr Dec.*, Ex 25. The Spaceholders, the Tribes, and the United States are free to enter into a voluntary agreement that provides for partially subordinating the Lake Walcott storage water right by limiting diversions to 2,500 CFS during the period from September 15 to October 15, i.e., the same diversion rate limitation as that proposed by the *Joint Motion*.

Further, Idaho Code § 42-602 provides the Director “broad powers to direct and control distribution of water from all natural water sources within water districts.” *BWI 17*, 157 Idaho at 393, 336 P.3d at 800 (quoting Idaho Code § 42-602). This statute also specifically authorizes the Director to “supervise” the watermasters for purposes of distributing water in a water district. *See* Idaho Code § 42-602 (“Distribution of water within water districts . . . shall be accomplished by watermasters as supervised by the director.”). The Director thus has authority to instruct the Watermaster to limit diversions under the Lake Walcott storage water right to the rate defined in a voluntary subordination agreement, during the time period defined in the agreement. *See BWI 17*,

157 Idaho at 393, 336 P.3d at 800 (“as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty.”).

In short, so long as the Spaceholders, the Tribes, and the United States enter into an agreement or stipulation providing that diversions under the Lake Walcott storage water right will be limited to 2,500 CFS during the period from September 15 to October 15, i.e., the Director has ample statutory authority to issue an instruction to the Water District 01 Watermaster to limit diversions under the Lake Walcott storage water right to 2,500 CFS during the period from September 15 to October 15. Such an order would be consistent with the prior appropriation doctrine as established by Idaho law, which allows water right holders to voluntarily subordinate their water rights.

The Coalition and the Tribes need only obtain the United States’ consent to impose a 2,500 CFS diversion rate limitation on the Lake Walcott storage water right during the period from September 15 to October 15. Presumably this would not be difficult, because the Coalition and the Tribes have represented that no water users oppose their settlement, *SWC Brief* at 19; *Tribes’ Brief* at 3, 14-15, 17, 25, and that the United States is “a key party that is agreeing to a flow limitation of a decreed water right.” *Tribes’ Brief* at 11-12; *see also id.* at 4 (referring to the United States’ “willingness to collaborate”); *id.* at 21 (“the United States is willing to assist in the compromise of this complex dispute by incorporating a 2,500 cubic feet per second (cfs) flow cap on its Lake Walcott right.”) (parenthetical in original).

The parties to the contested case can then simply present their “reset” stipulation to the Director as a permanent resolution of the contested case (in contrast to the “interim” stipulations previously submitted), and jointly request an order instructing the

Watermaster to use a “reset” date of September 15 and to limit diversion under the Lake Walcott storage water right to 2,500 CFS during the period from September 15 to October 15. Thus, the contested case provides the opportunity for the Coalition and the Tribes to achieve exactly the same substantive relief sought by the *Joint Motion*. This approach would not require re-opening the partial decrees, and would entirely avoid the attendant risk of undermining the finality of the SRBA.⁹⁰

The Coalition’s assertion that “the agreed-upon limitation of a decreed water right cannot be enforced against the United States by means of an administrative order,” *SWC Brief* at 13-14, misconstrues the nature and effect of such an order. Idaho Code § 42-602 authorizes the Director to supervise the Watermaster’s distribution of water to decreed water rights—including to the decreed storage water rights to which the United States holds legal title. In so doing, the Director is not “enforcing” anything against the United States, but rather is discharging his clear legal duty to distribute water in accordance with the prior appropriation doctrine as established by Idaho law, and exercising his statutory authority to supervise the Watermaster. Idaho Code § 42-602; *BWI 17*, 157 Idaho at 393, 336 P.3d at 800.⁹¹

⁹⁰ Even in the unlikely event that the Director were to reject the “reset” stipulation, the Coalition and the Tribes would have the opportunity to seek judicial review of the Director’s final order in this Court. Idaho Code §§ 42-1701A, 67-5270—67-5279.

⁹¹ If the United States disagrees with the Director’s water distribution instructions and orders, it is free to challenge those instructions and orders—but under Idaho Code § 42-1701A and decisions of the Idaho Supreme Court, the United States like any other water right holder must do so within the confines of Idaho law by seeking judicial review pursuant to Idaho Code §§ 67-5270—67-5279. Section 8 of the 1902 Reclamation Act specifically provides that the Secretary of the Interior “shall proceed in conformity with” the “laws of any State . . . relating to the control, appropriation, use or distribution of water used in irrigation[.]” 43 U.S.C. § 383.

Finally, while a stipulated resolution of the “reset” dispute is preferable, the contention that the parties cannot reach a mutually acceptable resolution without re-opening the partial decrees does not mean the parties lack a “remedy.” *Tribes’ Brief* at 4, 14, 19, 20. It simply means that if they cannot reach agreement, it may be necessary for them to litigate the contested case (and subsequent judicial review, if any) to its conclusion. The fact that this may result in a “reset” determination that one or more parties seeks to avoid is not a “unique” or “compelling” circumstance. It is simply a fact of life under priority administration and the prior appropriation doctrine. *See AFRD2*, 143 Idaho at 869, 154 P.3d at 440 (“the principles of the prior appropriation doctrine . . . are more easily stated than applied. These principles become even more difficult, and harsh, in their application in times of drought.”); *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) (“it is obvious that in times of water shortage someone is not going to receive water”).

VI. The Joint Motion is Factually and Legally Distinguishable from the Rule 60(b)(6) Motion Filed and Granted in Basin 63.

In July of this year this Court granted a Rule 60(b)(6) motion filed pursuant to the *Basin 63 Stipulation* (“*Basin 63 Motion*”). *Orr. Dec.*, Exs. 12, 29. The Coalition and the Tribes analogize the *Joint Motion* to the *Basin 63 Motion*, and argue the *Joint Motion* should be granted for the same reasons this Court granted the *Basin 63 Motion*. *SWC Brief* at 16-19; *Tribes’ Brief* at 3 n.2, 24 & n.19. The reservoir “fill and/or refill” dispute in Basin 63 is factually distinguishable from the Upper Snake Basin “reset” dispute, however, and this Court’s order granting the *Basin 63 Motion* provides no support for the *Joint Motion*.

a. The *Joint Motion* is Not Analogous to the Rule 60(b)(6) Motion filed in Basin 63.

The *Basin 63 Motion* was filed, as this Court recognized, “in tandem” with two other motions filed pursuant to the *Basin 63 Stipulation. Order Granting Motion to Alter or Amend Partial Decrees; Order of Amended Partial Decree* at 2 (“*Order Granting Motion to Alter or Amend Partial Decrees*”).⁹² The *Basin 63 Motion* requested “limited amendments to the Base Rights so that they may work in tandem, and be administered consistently, with the two supplemental rights” proposed by the two other motions that were filed at the same time. *Id.* This was necessary because the Basin 63 Base Rights had been decreed years before the *Basin 63 Stipulation* was executed, and therefore did not contain the administrative remarks included in the proposed partial decrees for the proposed supplemental water rights. The *Basin 63 Motion* was proposed “so that [the Base Rights] may be reconciled and administered in conjunction with supplemental rights 63-33734A and B.” *Id.* at 4.

The situation in the Upper Snake Basin is very different. There are no pending Late Claims for supplemental storage water rights, and no motions to decree “supplemental” storage water rights that must be reconciled with any existing water rights. There is no incongruity between the partial decrees for the Base Rights and Enlargement Rights in the Upper Snake Basin issued pursuant to the *Basin 1 Stipulation*.

Indeed, to the extent that scenario ever existed in the Upper Snake Basin, it occurred years ago and was addressed by the Rule 60(b)(6) motion filed pursuant to the *Basin 1 Stipulation*. Partial decrees for some of the Base Rights in the Upper Snake

⁹² A copy of this order is provided in Exhibit 29 to the *Orr Dec.*

Basin—the storage water rights for Henrys Lake—had been issued before the *Basin 1 Stipulation* was finalized, and consequently had to be amended to include “the same combined volume limitation remark” that was proposed for the Enlargement storage water right for Henrys Lake. *Basin 1 Stipulation* at 3-4 & Attachment C. Just as in Basin 63, these amendments were necessary so that the Henrys Lake Base Rights and the Enlargement Right could be reconciled and administered consistently, in tandem. *Orr Dec.*, Ex. 13. This Court granted the Rule 60(b)(6) motion filed in connection with the *Basin 1 Stipulation* and issued amended partial decrees for the Henrys Lake Base Rights. *Id.*

In this case, there is no inconsistency or conflict between the partial decrees for the Enlargement Rights and the Base Rights that needs to be reconciled. The *Joint Motion* is not “analogous” to the *Basin 63 Motion* because the “analogous” Rule 60(b)(6) motion for the Upper Snake Basin settlement was filed and granted years ago. The *Joint Motion* is something entirely new that was not contemplated by the *Basin 1 Stipulation*: a motion filed years after the settlement that seeks to re-open the partial decrees to include administrative remarks and a diversion rate limitation that were not part of the underlying stipulation.

Further, the mere fact that the *Joint Motion* addresses an issue that was addressed in the *Basin 63 Stipulation*—i.e., “reset”—does not justify granting the *Joint Motion*. As previously discussed, the significance of the accounting “reset” date was known long before the “refill” dispute erupted, and the Spaceholders and the United States were actively negotiating the “reset” issue before the partial decrees were issued for the Upper Snake Basin reservoirs. For whatever reason, the decision was made to leave “reset” out

of the *Basin 1 Stipulation* and the partial decrees. The parties to the *Basin 63 Stipulation* simply made a different decision: they included a “reset” provision in the stipulation and the partial decrees.

The Coalition and the Tribes now seem to think the Basin 63 approach was better, and that it was a mistake to not address “reset” in the *Basin 1 Settlement* and the partial decrees for the on-stream reservoirs in the Upper Snake Basin. This *post hoc* determination does not provide grounds for re-opening the partial decrees, and if accepted would have a highly adverse impact on the finality of the SRBA, and any other pending or future general stream adjudication.

b. The “Unique and Compelling Circumstances” That Supported the Rule 60(B)(6) Motion in Basin 63 Are Not Present in This Case.

The *Joint Motion* also does not involve the same “unique and compelling” circumstances” that this Court identified in its order granting the *Basin 63 Motion*. For instance, this Court found unique and compelling circumstances in the “complexity and length” of dispute over “[t]he issue of reservoir ‘fill’ and/or ‘refill’ in Basin 63,” which was “one of the more complex and challenging issues addressed by this Court in the SRBA.” *Order Granting Motion to Alter or Amend Partial Decrees* at 4.

The Upper Snake Basin “reset” dispute, however, is nowhere near as complex as the issue of “reservoir ‘fill’ and/or ‘refill’” referenced in this Court’s order granting the *Basin 63 Motion*. “Reset” is a water right accounting term that simply refers to the annual date when the storage water rights are “allowed to come back into priority ahead of other junior water rights,” *Staff Memorandum* at 2, and the core of the “reset” dispute is the narrow question of whether late-season natural flow will be stored in Lake Walcott or diverted for irrigation by Milner and AFRD#2. The Basin 63 issue of “reservoir ‘fill’

and/or ‘refill,’” in contrast, involved pending SRBA “Late Claims” for supplemental beneficial use-based storage water rights, and also several appeals to the Idaho Supreme Court of this Court’s judicial review of the Director’s final order addressing challenges to the Water District 63 water rights accounting system. The Upper Snake Basin “reset” dispute does not involve any pending Late Claims, or any part of the Water District 01 accounting system other than the “reset” date. The Upper Snake Basin Late Claims and accounting challenges were resolved years ago by the *Basin 1 Stipulation*.

Further, this Court found “unique and compelling circumstances” for the *Basin 63 Motion* in the fact that the *Basin 63 Stipulation* was “comprehensive of both the judicial and administrative proceedings.” *Order Granting Motion to Alter or Amend Partial Decrees* at 4. This was because the *Basin 63 Stipulation* paved the way for resolving the pending SRBA Late Claims, the appeals to the Idaho Supreme Court, and the administrative proceeding underlying the appeals. In contrast, the Upper Snake Basin “reset” dispute does not involve any pending SRBA claims or any appeals to the Idaho Supreme Court. The *Joint Motion* would only resolve a pending administrative proceeding, which unlike the Basin 63 dispute can be fully resolved by an agreed-upon administrative order issued by the Director. The Coalition’s and Tribes’ assertions that the *Joint Motion* would resolve “both judicial and administrative proceedings,” *SWC Brief* at 16; *Tribes’ Brief* at 3, are incorrect. Other than the *Joint Motion*, there are no pending judicial proceedings regarding the “reset” issue. It is a purely administrative matter.

Finally, this Court found “unique and compelling circumstances” in the fact that the *Basin 63 Motion* sought to incorporate into the existing Base Rights the same

administrative remarks included in the *Basin 63 Stipulation* and the proposed partial decrees for the two “supplemental” storage water rights. *Order Granting Motion to Alter or Amend Partial Decrees* at 2, 4-5. The *Joint Motion*, in contrast, is not limited to the Base Rights in the Upper Snake Basin, and does not seek to add administrative remarks that are necessary to reconcile the Base Rights with the Enlargement Rights: they were “reconciled” in 2015 by this Court’s order granting the Rule 60(b)(6) motion to modify the Henrys Lake Base Rights. *Orr Dec.*, Ex. 13. Rather the *Joint Motion* seeks to add entirely new “reset” remarks to all of the Upper Snake Basin storage water rights, and insert a diversion rate limitation into one of the Base Rights. Neither of these proposals is necessary to conform or “reconcile” the Base Rights and the Enlargement Rights.

VII. The Complexity of Upper Snake Basin Water Rights Administration and Reservoir Operations Does Not Justify Granting The Joint Motion.

The Coalition asserts there are “unique and compelling circumstances” for granting the *Joint Motion* because the administration of the storage water rights for the Upper Snake Basin reservoirs “is unique given their operation and interface with the district’s water rights accounting program.” *Id.* at 8-9. The Coalition also asserts that the Upper Snake Basin reservoirs “serve a multitude of purposes with unique and complicated administrative paradigms.” *Id.* at 15-16. In short, the Coalition asserts there are “unique and compelling circumstances” simply because reservoir operations and storage water rights administration in the Upper Snake Basin are complex and complicated.

Even if these factual assertions are credited, they prove too much. If the history and complexity of reservoir operations and storage water rights administration in the Upper Snake Basin constitute “unique and compelling” circumstances for re-opening the

partial decrees at this time, then these considerations would support re-opening the partial decrees any time in the future when another dispute arises over priority administration. As previously discussed, in the SRBA water users had ample opportunity—and a legal obligation—to bring forward any claims based on a history of water rights administration or operational use of water. Accepting the Coalition’s argument that “history” and “complexity” support re-opening the partial decrees would reduce the SRBA’s “finality” to an illusion.

Further, all of the historical and technical facts constituting the alleged “complexity” of reservoir operations and water rights administration in the Upper Snake Basin were known to the Coalition, the Tribes, and the United States at the time SRBA claims were filed for the storage water rights—and also for years before then. This is confirmed by the Coalition’s and Tribes’ briefs, *SWC Brief* at 4-5, 9-15; *Tribes’ Brief* at 4-5, 17-19, and the record in the contested case. *See, e.g., Staff Memorandum* at 2-4. The Coalition’s assertions that Upper Snake Basin reservoir operations and water rights administration are complex is not new, and has been made in various SRBA proceedings related to the Upper Snake Basin reservoir storage water rights (such as Basin-Wide Issue 17 and the Late Claims, the *Eagle Decree*/Palisades Contracts/“Common Plan” proceedings, the Palisades and Minidoka Power Rights subcases, etc.).

VIII. The Director Did Not Create the “Reset” Dispute.

The Coalition and the Tribes attempt, in various ways, to characterize the “reset” dispute as being triggered by recent actions taken by the Director. The Coalition asserts, for instance, that the Director made an interpretation of the partial decree for the Lake Walcott storage water right that “resulted in a dispute before the Department.” *SWC*

Brief at 3. The Tribes assert that “it was the Director’s initial willingness to implement a new accounting mechanism . . . that created the current dispute.” *Tribes’ Brief* at 23-24. These assertions are contrary to the record, and reverse the actual sequence of events.

The record shows that before the Director took any action with respect to “reset,” Milner Irrigation District sent a letter to the Director challenging the “reset” date in the Upper Snake Basin as unauthorized by the partial decrees and contrary to historic administration, and requesting that the Director distribute natural flow to Milner in accordance with its decreed water right (1-17). *Thompson Dec.*, Ex. B. The Director responded to Milner’s letter by initiating a contested case to address these issues, *Thompson Dec.*, Ex. D, which, as everyone already knew, had been the subject of a dispute between the Spaceholders and the Tribes for some time. *Orr Dec.*, Ex. 4. In light of this request and given that the parties had not yet had an opportunity to present evidence and argument in the contested case, the Director instructed the Watermaster to use a “reset” date of January 1 for the upcoming storage season. *Thompson Dec.*, Ex. A. The Coalition’s assertion that the Director’s letter “resulted in a dispute before the Department,” *SWC Brief* at 3, gets it backwards. The Director’s letter was the result of Milner’s decision to ask the Director to resolve a “reset” dispute that had been going on for some time.

Moreover, the Director’s letter was not an order issued in the contested case, nor was it a definitive “interpretation” of the partial decrees. *Orr Dec.*, Ex. 19; *Thompson Dec.*, Ex. A. The letter was an instruction for water distribution only for the period from September 15, 2017, to January 1, 2018, and implicitly recognized that the final

determination of a “reset” date would be made only after the parties had an opportunity to present evidence and argument. *Thompson Dec.*, Ex. A.

The Tribes’ assertion that the Director “created the current dispute,” *Tribes’ Brief* at 23-24, lacks merit for the same reason. The “current dispute” began long before the Director initiated the contested case, and long before Milner sent its letter to the Director. The “current dispute” was underway even before issuance of the partial decrees proposed by the *Basin 1 Stipulation* submitted to this Court in 2015, as previously discussed. *See, e.g., Orr. Dec.*, Ex. 4 (transcripts of SRBA status conferences).

Finally, the Director has made significant efforts to support the parties’ attempts to resolve their “reset” dispute, by granting their repeated requests for stays, and to withhold any decision on the “threshold” issue of whether the partial decrees require a “reset” date of January 1. The Director has also granted the parties’ requests to have “reset” occur on the dates identified by their interim stipulations. *Orr Dec.*, Ex. 24; *Olenichak Aff.*

IX. The Tribes’ “Additional” Arguments Lack Merit

While the Tribes make many of the same arguments as the Coalition, the Tribes also assert “certain additional arguments specific to the Tribes” that allegedly “support the unique and compelling circumstances that justify the relief sought under Rule 60(b)(6).” *Tribes’ Brief* at 2. All of the “additional argument specific to the Tribes” rely, in one way or another, on the “Fort Hall Agreement” of 1990 (“*Fort Hall Agreement*”).⁹³

⁹³ A copy of the *Fort Hall Agreement* is attached to the *Declaration of Edmund Clay Goodman in Support of Memorandum in Support of Joint Motion to Modify Partial Decrees for Purposes of Diversion Rate and “Reset” Administrative Remarks* (“*Goodman Dec.*”), at Exhibit A (“The 1990 Fort Hall Indian Water Rights Agreement

Article 7.3 of the *Fort Hall Agreement* defines certain “Federal contract storage water rights held in trust by the United States for the benefit of the Tribes.” *Fort Hall Agreement* at 46. These contract storage rights are for “water that accrues” to 2.8059% of the storage space in American Falls Reservoir, and 6.9917% of the storage space in Palisades Reservoir. *Id.*; *Tribes Brief* at 6-7.

According to the Tribes, “the understanding of the Tribes (and the United States) in negotiating and agreeing to the Fort Hall Agreement . . . was that reset accounting for the upper Snake River reservoirs system was being operated in a certain manner and would continue to be operated in that manner” *Tribes’ Brief* at 17 (parenthetical in original). Thus, the Tribes argue, “what was preserved in the Fort Hall Agreement was an expectation-based understanding of how that storage water would be accrued and accounted for from natural flow in the late season each year.” *Tribes’ Brief* at 17-18. This construct underpins all of the “additional arguments specific to the Tribes.” *Tribes Brief* at 2; *see also id.* at 9 (“the settled expectation of the Tribes, in reaching the Fort Hall Agreement . . . is that the system would continue to operate in this manner going forward”); *id.* at 18 (“The Tribes, in negotiating the compromises memorialized in the Fort Hall Agreement, had relied on that longstanding methodology and practice.”); *id.* at 22 (“The Tribes have unique claims based on their reserved water rights and the negotiated settlement formalized in the Fort Hall Agreement.”)

The Tribes’ reliance on this interpretation of the *Fort Hall Agreement* is misplaced for two reasons. The first is that the *Fort Hall Agreement* does not define the

By and Between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, the State of Idaho, the United States, and Certain Water Users.”).

storage water rights that the Director must administer: they are defined, rather, by partial decrees issued by this Court. The second is that the *Fort Hall Agreement* simply does not support the Tribes' assertions and arguments. These points are addressed below.

a. The Partial Decrees for the Storage Water Rights Do Not Incorporate or Reference the *Fort Hall Agreement*.

None of the decreed storage water rights at issue in this case are reserved water rights based on the *Winters* doctrine⁹⁴ or any other federal law. All of these storage water rights were claimed and decreed in the SRBA as state law-based water rights. For example, the Base Rights for American Falls Reservoir and Palisades Reservoir, the reservoirs in which the Tribes have "federal contract storage rights," *Fort Hall Agreement* at 47, were claimed in the name of the United States on the basis of pre-existing state licenses and decrees. *Orr Dec.*, Ex. 31. The partial decrees for these storage water rights are also based on state law. *Id.*, Exs. 1, 6.

The Director must administer these storage water rights, and distribute water to the reservoirs, in accordance with the partial decrees and the prior appropriation doctrine as defined by Idaho law. Idaho Code § 42-602; *BWI 17*, 157 Idaho at 393, 336 P.3d at 800. The partial decrees for American Falls Reservoir and Palisades Reservoir do not include any remarks or conditions that incorporate or reference the *Fort Hall Agreement*, and do not mention the "federal contract storage rights" referenced in the agreement. *Fort Hall Agreement* at 47. There is no Idaho statute or court decision that requires the Director to administer the storage water rights in the Upper Snake Basin on the basis of the *Fort Hall Agreement* or the Tribes' "federal contract storage rights."

⁹⁴ *Winters v. United States*, 207 U.S. 564 (1908).

In short, the Tribes' arguments regarding the *Fort Hall Agreement* are not supported by the partial decrees or Idaho law. The *Fort Hall Agreement* is legally irrelevant to the Director's distribution of water to the on-stream reservoirs and administration of the reservoirs' storage water rights. It would violate the Director's "clear legal duty" under Idaho law, *BWI 17*, 157 Idaho at 393, 336 P.3d at 800, to administer the storage water rights or distribute water to the reservoirs based on the *Fort Hall Agreement* or the Tribes' "federal contract storage rights." *Fort Hall Agreement* at 4.

Further, the *Fort Hall Agreement* does not support the Tribes' assertions regarding the intent of the agreement. The *Fort Hall Agreement* expressly distinguishes the *Winters* doctrine-based "Tribal Water Rights" to be decreed by this Court, *Fort Hall Agreement* at 19-48, from the Tribes' "federal contract storage water rights" for American Falls Reservoir and Palisades Reservoir. *Id.* at 46-47. Despite this, the Tribes and the BIA did not file claims, objections, or responses in the SRBA subcases pertaining to the Base Rights for American Falls Reservoir and Palisades Reservoir, and did not participate in Basin Wide Issue 17, the Late Claims, or the negotiations that produced the *Basin 1 Stipulation*. The Tribes' non-participation in any of the proceedings that implicated the storage water rights and the water rights accounting system casts doubt on the contention that "what was preserved in the Fort Hall Agreement was an expectation-based understanding of how that storage water would be accrued and accounted for from natural flow in the late season each year." *Tribes' Brief* at 17-18. If such expectations existed, then the much larger disputes over "fill/refill," water right accounting, and the Late Claims should have raised even greater concerns.

But even if the Tribes' assertions regarding their understanding of the *Fort Hall Agreement* are taken as true, these assertions would not provide "unique and compelling circumstances" for granting the *Joint Motion*. The same species of argument that the Tribes make here was also made in connection with the Late Claims for Basin 63 and Basin 65. In those proceedings, arguments were made that the Base Rights in those basins should be administered according to historic understandings and practices that were not reflected in the partial decrees. *Orr Dec.*, Exs. 27, 28. This Court held that "such issues need to be raised at the time the affected rights are being adjudicated," *Basin 63 Challenge Decision* at 6, and "[t]he notion of preserving a historical practice of administration in a decree or general provision is not a new concept. A majority of the provisions pertaining to historical administrative practices implicated in the SRBA were provisions that were decreed in prior adjudications." *Basin 65 Challenge Decision* at 8.

In short, there is nothing unique or compelling about assertions that a decreed water right should be administered according to historical practices, agreements or understandings that were not raised at the time the water right was adjudicated. Such arguments have been made repeatedly in the past and in all likelihood will be made again in the future. Thus, granting the *Joint Motion* on the basis of untimely assertions that "reset" should be governed by the "understandings" of the *Fort Hall Agreement* would severely undermine the finality of the SRBA, and other pending and future general stream adjudications.

b. The *Fort Hall Agreement* Does Not Address "Reset."

The Tribes' assertion that "what was preserved in the Fort Hall Agreement was an expectation-based understanding of how that storage water would be accrued and

accounted for from natural flow in the late season each year,” *Tribes’ Brief* at 17-18, also is contrary to the plain language of the *Fort Hall Agreement*. There is nothing in the *Fort Hall Agreement* that addresses or references how storage water “would be accrued and accounted for from natural flow in the late season each year.” This phrase simply does not appear anywhere in the *Fort Hall Agreement*. There also is no provision or passage that can plausibly be interpreted as recognizing, much less “preserving,” any particular method for determining how storage water would be “accrued” or “accounted for” in administering the natural flow of the river.

The absence of any such language from the *Fort Hall Agreement* is significant, because in some places the *Fort Hall Agreement* includes express and sometimes detailed administrative provisions for certain individual water rights, including references to what flows will be “considered” natural flow, and how water will be “charged” or “credited.” *Fort Hall Agreement* at 19-21, 22, 24, 36-38, 39-40, 42, 44, 46. Further, the *Fort Hall Agreement* expressly reflects’ the parties agreement to “continu[e] to administer water rights decreed in the SRBA from the Blackfoot River as [they] have been administered in the past.” *Fort Hall Agreement* at 58. In other words, the parties to the *Fort Hall Agreement* clearly knew how to call for continuing an existing system of water rights administration, if and when such was a term of the settlement. Significantly, there is no similar or comparable passage in the *Fort Hall Agreement* stating that the storage water rights for the on-stream reservoirs will be administered “as they have been administered in the past.”

Rather, the *Fort Hall Agreement* simply provides that “[t]he State shall account for and administer the diversion of water from the Snake River by all water users,

including the United States and the Tribes, in conformance with the SRBA decree.” *Fort Hall Agreement* at 59. The agreement also states that it is not to be “construed or interpreted” to, among other things, “impair or impede the exercise of any civil or regulatory authority of . . . the State,” *Fort Hall Agreement* at 64, 67, authorities that obviously include the distribution of water and administration of decreed water rights as required by the Idaho Code and decisions of Idaho courts. *See, e.g., Nettleton*, 98 Idaho at 91, 558 P.2d at 1052 (“The governmental function in enacting not only I.C. s 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.”).

The *Fort Hall Agreement* further provides that “[t]he United States’ and Tribal water rights confirmed in this agreement shall be final and conclusive as to all parties to the adjudication once the Agreement becomes effective[.]” *Fort Hall Agreement* at 64. Finally, the agreement specifically provides that “[t]his Agreement sets forth all understandings between the parties with respect to water rights and claims to water rights for the Tribes, its members, and its allottees in the Upper Snake River Basin,” and “[t]here are no other understandings—no covenants, promises, agreements, conditions, either oral or written—between the parties other than those contained herein.” *Fort Hall Agreement* at 72 (italics and underlining added).

These passages undermine the Tribes’ contention that the *Fort Hall Agreement* requires or contemplates a certain “reset” procedure or date. They also disprove the Tribes’ contention that the provisions of the *Fort Hall Agreement* regarding the Tribal “Water Bank” and “mitigation” of impacts to existing uses, *Fort Hall Agreement* at 48-49, 69-70, have the effect of defining or requiring a particular “reset” date. *Tribes’ Brief*

at 6-8, 9, 17. These provisions simply do not address “reset” or administration of the storage water rights for the on-stream reservoirs in the Upper Snake Basin. The Tribes’ reliance on these provisions would convert them into *de facto* guarantees of a given “reset” date or procedure, which is contrary to the plain language of the *Fort Hall Agreement* for the reasons discussed above.

Further, the mere fact that the “reset” date ultimately chosen may in some years or circumstances result in less storage water being available for the Tribal Water Bank or mitigation purposes than other possible “reset” dates, does not equate to injury to a water right or a violation of the *Fort Hall Agreement*. Rather, and as previously discussed, it is simply a fact of life under the prior appropriation doctrine and priority administration of state law-based water rights—including those for American Falls Reservoir, Palisades Reservoir, and Ririe Reservoir.⁹⁵

In sum, the parties to the *Fort Hall Agreement* knew when and how to include administrative provisions when necessary to reflect the intent of the settlement. The absence of any provision regarding storage water right “reset” and “accruals”—administrative terminology that was already in use at the time of the *Fort Hall Agreement*—necessarily means that storage water right “reset” and accruals were not part of the settlement. This is confirmed by the fact that the parties expressly agreed the totality of their settlement was set forth in the *Fort Hall Agreement*. The Tribes’ assertion that the *Fort Hall Agreement* “preserved” a “settled” and “expectation-based understanding of how that storage water would be accrued and accounted for from

⁹⁵ Water stored under the storage water right for Ririe Reservoir provides the “mitigation” referenced in the *Fort Hall Agreement*. *Fort Hall Agreement* at 69-70.

natural flow in the late season each year,” *Tribes Brief* at 9, 17-18, is not only without any affirmative support in the *Fort Hall Agreement*, it is at odds with the plain language of the agreement.

c. The Tribes’ Assertion That They May Need to Pursue a “Takings” Claim Incorrectly Assumes The Tribes Have No “Remedy” Other Than a Rule 60(b)(6) Motion, and Misconstrues the Nature of an Idaho Water Right.

The Tribes assert that the *Joint Motion* should be granted because otherwise the Tribes would have no remedy other than to pursue a “takings” claim, presumably against the State of Idaho. *See Tribes Brief* at 22 (asserting there is “a dispute between two sovereign entities—the State of Idaho and the Tribes”). This assertion does not constitute “unique or compelling circumstances,” however, because in fact the Tribes have a remedy in the contested case proceeding.

As previously discussed, the Director can issue an order in the contested case implementing the substantive elements of the “reset” settlement that the parties to the contested case have agreed upon. All that is required is to obtain the United States’ consent to limiting diversions under the Lake Walcott storage water right to 2,500 CFS during the period from September 15 to October 15, and then to present the settlement to the Director. This should be simple and straightforward because, as the Tribes have asserted, the United States already is “agreeing to a flow limitation of a decreed water right.” *Tribes’ Brief* at 11-12; *see also id.* at 4 (referring to the United States’ “willingness to collaborate”); *id.* at 21 (“the United States is willing to assist in the compromise of this complex dispute by incorporating a 2,500 cubic feet per second (cfs) flow cap on its Lake Walcott right.”) (parenthetical in original). This approach will

provide the Tribes with the “remedy” they seek, and avoids the need to re-open the partial decrees.

But even if the United States has not or will not agree to such a diversion rate limitation, it would not mean the Tribes lack a “remedy.” In that case, the Tribes and the Spaceholders could simply continue pursuing their different “reset” theories in the contested case, and the Director would issue a final order on the “reset” issue. Judicial review in this Court would be available for any challenges to the Director’s final order.⁹⁶

Moreover, assertions that the Director’s administration of water rights has the effect of “taking” a property interest are not unique or compelling. To the contrary, this is one of the more common arguments that water right holders assert when they disagree with the Director’s administration. Generally, such arguments reduce to an assertion by one water right holder that their water is or will be distributed to some other water user. That is exactly what the Tribes argue in this case. *See Tribes’ Brief* at 21 (“Among the rights that would have accrued less water would be the Tribes’ storage water rights in American Falls and Palisades.”).

The Tribes’ “storage water rights” are not decreed water rights, however, but rather “federal contract storage rights.” *Fort Hall Agreement* at 4. Moreover, Idaho water rights, such as those decreed for American Falls Reservoir and Palisades Reservoir, are not a guarantee of water, but rather rights to use or store water when the underlying water right is “in priority.” Distributing water to a water right that is “in priority” does

⁹⁶ The availability of the contested case proceeding, and subsequent judicial review, also belies the Tribes’ contention that they are threatened with deprivation of a property interest “without a hearing or other due process protection.” *Tribes’ Brief* at 19.

not “take” anything from a water right that is not “in priority,” and any claim by the Tribes that they have been shortchanged because the storage water rights for American Falls Reservoirs and Palisades Reservoir should have been “in priority” can and should be addressed in the contested case, or through a delivery call by the United States.⁹⁷

Further, the Tribes’ basis for asserting a “takings” claim based on the *Fort Hall Agreement* or “reset” is far from compelling, for reasons discussed above. The plain language of the *Fort Hall Agreement* is clear that did not create, recognize, or confer on the Tribes any property interest in a particular “reset” date or accounting methodology with regard to the storage water rights for the Upper Snake Basin reservoirs.

d. A Rule 60(B)(6) Motion Is Not an Opportunity to Re-Litigate “Water Right Claims.”

Finally, the Tribes argue that the *Joint Motion* should be granted because of “the status of the Tribes (and the United States) as sovereigns” and the “longstanding practice of resolving Indian water right claims through settlement.” *Tribes’ Brief* at 14. In supporting this contention, the Tribes’ characterize “reset” and the contested case as a dispute over their water right “claims.”

“Reset” does not involve any “claims” to water rights, however, but rather decreed water rights. The underlying “claims” were filed, adjudicated, and decreed years ago. The Tribes’ characterization of the “reset” issue as involving their “claims” thus suggests that the Tribes’ real objective is to re-litigate or revisit their original “water right

⁹⁷ There is nothing in the record in this case indicating that the “reset” proceedings have resulted in the Tribes getting less storage water than they would have otherwise. Even in 2018, when “reset” took place on January 1 rather than September 15 of the preceding year, all of the storage water rights were satisfied. *Olenichak Aff.* Since then, “reset” has been done on the dates requested by interim stipulation supported by all the parties to the contested case, including the Tribes. *Id.*

claims.”⁹⁸ *Id.* at 4, 22-23; *see also id.* at 24 (referring to “resolution of the Tribes’ claims through reopening of the Partial Decrees”). Just as a Rule 60(b)(6) motion is not a substitute for an appeal, however, *In re Jane Doe, I*, 145 Idaho at 651, 182 P.3d at 708, it should not be granted simply to provide a second bite at the apple. The Tribes’ attempt to characterize their “reset” arguments as “water right claims” simply confirms that granting the *Joint Motion* will undermine the finality of the SRBA.

Certainly a negotiated resolution of the “reset” dispute is preferable, but the contested case pertains to the administration of water rights decreed by this Court. And, while it is true that the United States and the Tribes are sovereigns, the storage water rights at issue are defined and administered by state law, not federal law. The Director in the contested case is not determining water rights or mediating a dispute by or between “sovereigns,” but rather is addressing a question of priority administration of decreed water rights. The Tribes’ roles in the contested case are that of beneficial users of water stored under state law-based water rights held by the United States in its proprietary rather than sovereign capacity. *See Bd. of Directors of Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461, 467 (1943) (“When the United States acts through the agency of the Secretary of the Interior and under sanction of act of Congress, it does so in a purely *proprietary capacity* and is subject to the same rules and regulations regarding vested property rights as an individual.”) (Ailshie, J., concurring) (*italics in original*).

The Tribes’ argument that their status as “sovereigns” constitutes “unique and compelling circumstances” is tantamount to arguing that different standards should apply

⁹⁸ The *Fort Hall Agreement* defined the Tribes’ “claims.” *See Fort Hall Agreement* at 63 (“In lieu of filing claims on behalf of the Tribes in the SRBA . . . the parties agree to submit this Agreement to the Director.”).

to the Tribes and the United States, even though all of their claims have been fully adjudicated and the water rights in question are based on state law rather than federal law. Accepting this argument would be contrary to Section 8 of the 1902 Reclamation Act, *see* 43 U.S.C. § 383 (providing that the Secretary of the Interior “shall proceed in conformity with” the “laws of any State . . . relating to the control, appropriation, use or distribution of water used in irrigation”). It would also be contrary to the very purpose of the McCarran Amendment’s waiver of sovereign immunity, 43 U.S.C. § 666, which is to ensure that ““each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.”” *California v. United States*, 438 U.S. 645, 678–79 (1978) (quoting the Senate Report on the McCarran Amendment) (italics and underlining added). While the Tribes’ and the United States are “sovereigns,” they stand on exactly the same footing as “each and every owner” when it comes to the adjudication and administration of the state law-based storage water rights for the Upper Snake Basin reservoirs.

CONCLUSION

The *Joint Motion* is untimely, and not supported by unique and compelling circumstances. Granting the *Joint Motion* would severely undermine the finality of the SRBA, and any other pending or future general stream adjudication in Idaho. The substantive elements of the “reset” settlement to which the Spaceholders and the Tribes have agreed can and should be effectuated through and administrative order issued by the Director. The State respectfully requests that the *Joint Motion* be denied.

Respectfully submitted this 20th day of December, 2019.

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

A handwritten signature in black ink, reading "Michael C. Orr", is written over a horizontal line.

MICHAEL C. ORR
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 20th day of December, 2019, I caused the foregoing to be filed with the Court and copies served on the following by the methods indicated:

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MICHAEL C. ORR

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