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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

Case No. 39576

**JOINT REPLY IN SUPPORT OF JOINT
MOTION TO MODIFY PARTIAL
DECREES FOR PURPOSE OF
DIVERSION RATE AND "RESET"
ADMINISTRATIVE REMARKS**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively "Surface Water Coalition" or "Coalition"), and the City of Pocatello (hereinafter collectively referred to as the "parties"), by and through their undersigned attorneys of record, and pursuant to Administrative Order 1 and Rule 60(b)(6) of the Idaho Rules of Civil Procedure, hereby submit this reply in support of the *Joint Motion to Modify Partial Decrees ("Joint Motion")*.

This reply addresses points raised by the Attorney General's Office in the *State of Idaho's Consolidated Response to Joint Motion ("Response")* filed with the Court on December 20, 2019.

INTRODUCTION

The federal reservoirs in the Upper Snake River Basin store approximately 4 million acre-feet. The reservoir system spans two states (Idaho and Wyoming) and is administered and managed by state (Idaho Department of Water Resources ("IDWR") and Water District 01) and federal (U.S. Bureau of Reclamation and U.S. Army Corps of Engineers) agencies. The reservoir system supports the largest irrigated basin in the State of Idaho and is integral to the state's economy and social fabric. The history of the reservoirs' development and integration into water right administration with the SRBA decrees is complicated to say the least.

Although the Basin 01 storage water rights were largely defined by a stipulation filed by various parties, including the State of Idaho, in early 2015, the "period of use" element was only listed as "1/1 to 12/31" with no clarifying remarks. Although the period of use was consistent with how IDWR recommended storage water rights throughout the state, this timeframe for an "annual storage volume" did not reflect actual reservoir management and water right administration. Consequently, the parties were left with an unanswered question, or a missing piece of the puzzle for defining the water rights efficiently and with certainty. That question was the subject of formal mediation and nearly two years of informal negotiation by the joint movants.

The *Joint Motion* and the State's *Response* demonstrate that the history of the Water District 01 "reset" issue is fraught with watermaster changes, interim stipulations, procedural gymnastics, and complicated positioning over United States and Tribal sovereignty, vested water

rights, and limitations on the authority of the Director of IDWR (“Director”) in interpreting and administering the storage water rights’ period of use element. Importantly, the State “does not oppose” the proposal to define September 15th as the “reset” date for the storage rights’ annual volume period of use, nor the proposal to limit diversions under the Lake Walcott storage water right to 2,500 CFS during the period from September 15th to October 15th. *Response* at 2-3 (emphasis in original). Despite its non-opposition to the merits of the settlement, the State raises concerns to re-opening the partial decrees and incorrectly asserts that the Director has unilateral administrative authority to alter the plain language of a decree. In essence, the State is more concerned with the procedural avenue rather than the substance of what is requested by the parties. Moreover, the State refuses to recognize “unique and compelling” circumstances related to these water rights which support the irrigation of over 1 million acres in southern and eastern Idaho.

Contrary to the State’s position, granting the *Joint Motion* will not undermine “finality” or create a pathway for others to reopen partial decrees as a way to resolve future administration disputes. As recognized by this Court and the Idaho Supreme Court, decrees can only be reopened according to the facts of each case and “unique and compelling circumstances” that justify relief under I.R.C.P. 60(b). Ensuring “finality” in the storage water rights decrees and the “reset” period to clarify the “period of use” element meets that standard. The parties with the substantive interests at stake have come to this Court to ensure finality and prevent future litigation. The settlement accomplishes that goal and provides a solution to a complicated system of storage water rights administration that will also provide consistency across federal reservoir operations.

Decreeing the solution provides the necessary certainty and finality that all parties desire and does not open a “pandora’s box” to future motions with the Court. While the State is rightly concerned about finality of the SRBA decree, it fails to recognize the important question in this case and why decreeing the “reset” provision is critical to the definition and efficient administration of the Basin 01 storage water rights.

ARGUMENT

I. The *Joint Motion* was Filed Within a Reasonable Time and Demonstrates Unique and Compelling Circumstances.

The SRBA Court may relieve a party from a final judgment for “any...reason that justifies relief.” I.R.C.P. 60(b)(6). A motion made under this equitable rule must be made within a reasonable time, but “[t]here is no express time limit for an independent action to relieve a party from judgment.” I.R.C.P. 60(c)(1); *Waller v. Dept. of Health & Welfare*, 146 Idaho 234, 239-240 (2008). Any motion under Rule 60(b)(6) “presents a discretionary decision for the trial court.” *See Eden v. State*, 164 Idaho 241, 248, 429 P.3d 129, 136 (2018). Although the court is vested with broad discretion, it “is limited and may be granted only on a showing of unique and compelling circumstances justifying relief.” *Id.* Moreover, granting such relief “is applicable whenever ‘such action is appropriate to accomplish justice.’” *Id.*; *First Security Bank of Idaho, N.A. v. Stauffer*, 112 Idaho 133, 143, 730 P.2d 1053, 1063 (1986).

The State’s claim that the *Joint Motion* was not filed within a reasonable time can be summarily addressed. First, the Court’s order related to the unsuccessful mediation did not set an immutable deadline precluding the present *Joint Motion*. The State wrongly argues that the parties “essentially agreed” that a reasonable time for filing the motion was within sixty days after the start of the mediation in early 2017. *Response* at 28. To the contrary, the parties did not modify the “reasonable” time period standard under Rule 60(c)(1), and the Court readily

acknowledged that a future filing under Rule 60(b) could be made, and that it was not “prejudg[ing]” any such motion. *See Order Sua Sponte Dismissing Motion Without Prejudice* at 6-7 (Subcase Nos. 01-219 et al., May 18, 2017). The State’s *Response* glosses over this key point.

Although the parties did not reach a mediated settlement in the spring of 2017, former Judge Melanson specifically noted, “I believe there is still a realistic possibility of a settlement whether by further mediation or perhaps among the parties without further mediation.” *See Mediator’s Report* (Subcase Nos. 01-219 et al, Apr. 13, 2017). Ultimately the parties achieved what Judge Melanson foresaw and the parties reached the present settlement without formal mediation. The fact that the parties worked diligently in good faith between early 2018 and the fall of 2019 should be commended, and not held against them as the State’s argument now suggests.

The State relies solely on anecdotal argument and fails to cite a single case that would support its “unreasonable time” claim. Based on the Director’s recent change of administration and the inherent complexities of negotiating settlements between spaceholders and sovereign entities, the *Joint Motion* was filed within a reasonable time under the circumstances. Moreover, the fact the Lake Walcott storage water right was recommended and decreed without a diversion rate (similar to all other storage water rights for federal reservoirs in Basin 01) is not dispositive as to a reasonable time for filing a Rule 60(b) motion. The ramifications of the diversion rate issue were not fully understood, particularly in light of changing reset dates by Water District 01, and that the accounting program was altered in 2011 prior this Court partially decreeing water right 1-219 in 2016.

Next, the State wrongly accuses the parties of intentionally leaving the “reset” issue out of the *Basin 1 Stipulation* in 2015. To the contrary, the issue was not resolved at the time and the parties did not have the Shoshone-Bannock Tribes at the table. Following the approval of the stipulation and the decrees, the “reset” issue was actively negotiated by the parties, including two sovereign entities, the United States and the Tribes. The parties worked diligently and pursued settlement in good faith. Although the negotiations spanned several months, the fact remains that a settlement was achieved, which is the goal in any dispute resolution process. While the State faults the parties for not addressing the “reset” issue as part of the earlier stipulation, that does not prove the current motion was filed in an unreasonable time pursuant to governing Idaho law.

Finally, the “reasonable time” here is not atypical given the issues involved, particularly when examined against similar cases involving storage water rights to federal reservoirs. Notably, the base storage water right decrees in Basin 63 were reopened 12 years after being decreed pursuant to a motion filed by the State of Idaho. *See Order Granting Motion to Alter or Amend Partial Decrees (“Basin 63 Order”)* (Subcase Nos. 63-303 et al., July 19, 2019). The Basin 63 base storage water rights were originally decreed in June 2007, yet because of the “unique and compelling circumstances,” the nearly 12-year delay warranted relief from judgment. *See id.*

Here, the Basin 01 storage water rights were decreed in August 2016. Further, it was only after a 2017 change in the Director’s administrative instruction to the Water District 01 Watermaster to delay storage reset in priority until January 1st that the parties were able to reach interim resolutions on the “reset” issue, and ultimately enter into the current settlement.

Considering the negotiations involved two sovereign entities, the United States and the Shoshone-Bannock Tribes, reaching a settlement in less than two years is not unreasonable.¹

Moreover, like the Basin 63 storage water rights, the current motion presents “unique and compelling circumstances” concerning storage water rights in Basin 01. In the *Basin 63 Order*, the Court found several instances that qualified as unique and compelling circumstances. First, this Court found the “complexity and length of [the federal reservoir “fill” and/or “refill”] litigation” unique and compelling enough to warrant modifying the partial decrees. It was not just that the issue had been litigated, but that the “complexity of the issue” could inherently attract extended litigation. Therefore, an issue, if complex enough in and of itself, could present unique and compelling circumstances absent protracted litigation.² The Basin 01 “reset” issue is no different. Indeed, it could be argued that the administration and operation of the Basin 01 reservoir system, with reservoirs spanning two states and multiple water rights (including “winter water savings” priority, hydropower water rights, other storage parameters) is far more complex than Basin 63 (a system of only three reservoirs).

The proposed settlement would proactively address these concerns without the need for extended litigation costing the parties and the State valuable time and resources. The “reset” stipulation will result in a comprehensive resolution of both the judicial and administrative proceedings. Regardless, this Court should not precondition a finding of “unique and compelling circumstances” upon the length of litigation prior to filing a Rule 60(b)(6) motion, but on the respective potential for conflict. Proactive settlement that conserves legal resources on complex

¹ By comparison, the settlement in Basin 63 was reached almost five (5) years after the litigation was initiated in 2013. Despite being involved in similar negotiations on similar issues, the State refuses to acknowledge the complexities of negotiating with multiple federal agencies as well as a sovereign Indian Tribe for purposes of its present *Response*.

² The State admits as much by conceding any order issued by the Director may be challenged in District Court, thereby foreshadowing a drawn-out court battle. *Response* at 38, fn. 90, 91.

issues like “reset” should not be excluded from a Rule 60(b)(6) motion because the parties resolved the matter before proceeding through multiple administrative and judicial cases. Further, settlements should be the favored resolution as they produce one of the most efficient results. *See e.g. Conley v. Whittlesey*, 126 Idaho 630, 633, 888 P.2d 804, 807 (Ct. App. 1995).

This Court also found that it was “unique and compelling” that the *Basin 63 Stipulation* “[did] not seek a wholesale reopening of the Base Rights.” *Order* at 4. The Court approved the proposed “limited and narrow amendments to the Base Rights so that they may be...efficient[ly] administered.” *Id.* The Court also found “the proposed amendment to be unopposed by any other water user in the basin.” *Id.* (emphasis added). Here, the proposed remarks are necessary for the efficient administration of the involved rights in conjunction with the recently decreed base and “refill” storage water rights. Next, the motion does not propose a “wholesale” reopening of the decrees. Finally, the proposed changes are unopposed by any other water user in the basin. Just the opposite, the motion has widespread support amongst the United States, Tribes, and a variety of spaceholders throughout Basin 01. The State, who is not a spaceholder and holds no storage water rights, is the sole objector to the motion. Yet, even in its *Response* the State does oppose the substance of the “reset” stipulation. Consequently, the end result is supported and unopposed.

In sum, the Parties filed the *Joint Motion* within a reasonable time considering the complexity of the issue at hand and the sovereignty of the United States and Shoshone-Bannock Tribes. The *Joint Motion* sets forth unique and compelling circumstances that warrant the requested relief under the rule’s standard. Reaching a settlement prior to extended litigation should not be discounted, and granting the motion will provide the certainty all parties and

government agencies seek. The Court should grant the *Joint Motion*, and amend the partial decrees as contained therein.

II. The *Joint Motion* Does Not Undermine Finality.

The State's primary objection to the *Joint Motion* is that the requested relief would undermine "finality" of the SRBA. *Response* at 29-39. The Coalition is cognizant of how essential finality is for water right decrees. *See Eden v. State*, 164 Idaho 241, 253, 429 P.3d 129, 141 (2018) (quoting *State v. Nelson*, 131 Idaho 12, 16 951 P.2d 943, 947 (1998)). However, it is for that reason that granting the motion is critical for efficient and certain administration of the storage water rights.

Contrary to the State's position, the "reset" issue and the remarks necessary for the efficient administration of storage water rights in Basin 01 is no garden-variety administrative dispute. How storage water rights are administered, including together with the late "refill" water right claims that were recently decreed in Basin 01, is predicated upon resetting the base storage water rights' annual volume in the fall. The Water District 01 Watermaster changed that reset date at least four (4) times between 1978 and 2011. Leaving the decree "silent" on this issue, as the State prefers, is not in anyone's interest.

There is no dispute that the storage rights decreed "1/1 to 12/31" period of use does not align with the administrative practice that had been implemented for over a century. Yet, when faced with no clarifying remarks, the Director ordered the Watermaster to change the reset administration to align with the decrees' season of use elements. *See Ex. D to Thompson Dec.*

Although the late "refill" claims provided a mechanism to have a water right cover the actual practice of refilling storage space that had been vacated for flood control and other purposes, that system of administration was based upon a fall, not a January 1st, reset of the

volume. Identifying a certain reset date in clarifying remarks will provide the finality and certainty to all spaceholders, as well as the State and IDWR, for the foreseeable future. The limitation on the Lake Walcott storage water right (1-219) is part and parcel of that agreed upon date. It would not, as the State suggests, “throw open the door to never-ending, piecemeal readjudication of decreed water rights.” *Response* at 31. Every motion for Rule 60(b) relief must be evaluated on its own merits. The facts here are especially unique given the complex system of reservoirs in Basin 01 which include reservoirs in the State of Wyoming and storage space held by a federal agency for the benefit of the Shoshone-Bannock Tribes. To the Coalition’s knowledge there are no other factually similar circumstances in Idaho that would be subject to a future general stream adjudication with these same issues. Even if there were, this case would highlight the need for the Court and the parties to address this issue in the decree and not leave it open for future debate in a subsequent administrative or judicial forum.

The second aspect of finality is with respect to the enforceability of the parties’ “reset” stipulation. It would be a waste of judicial time and resources to have the years of past mediation, negotiations, and litigation set aside just for the Director to issue a ruling that would be anything but “final.” If the Director were to approve the agreement by administrative order, future Directors would be free to reverse, or otherwise change course on “reset.” This would subject the spaceholders, the United States, and the Tribes to the whims of a state political appointee, and open up the changes to future challenges from non-parties. In fact, the State acknowledges that “[i]f the United States disagrees with the Director’s water distribution instructions and orders, it is free to challenges those instructions and orders.” *Response* at 38, fn. 91.

That being said, the U.S. Bureau of Reclamation is not a party to the Director's contested case and has historically refused to participate in state administrative proceedings unless mandated by the McCarran Amendment. In David Gehlert's December 4, 2013 letter to IDWR, he stated that the "Government is under no obligation to [participate in the Water District 1 and 63 contested cases]...and would not be bound by the results because [they] do not meet the requirements of the McCarran Amendment, 43 U.S.C. § 666." Rather than force that dispute to proceed to litigation in some future forum, the Court could prevent it here altogether by granting the *Joint Motion* supported by the United States. Whereas the State agrees with the substance and result of the "reset" settlement, it makes no sense to force a "procedural" or "technical" fight between two sovereigns. An equitable remedy, such as the parties' Rule 60(b)(6) motion is an appropriate path forward to reach the permanent resolution desired.

Further, unlike the SRBA docket sheet procedure, although the Director provided notice of the contested case, there is no guarantee that this notice would "bind" non-parties or future water right holders to his decision. Leaving that question unanswered creates uncertainty that would undermine the parties' settlement and finality they seek in the definition of the storage water rights.

By lodging its opposition to the *Joint Motion*, the State is setting the stage for prolonged and unnecessary litigation. Instead of acknowledging the narrow and limited implications of re-opening the storage water right decrees to reflect a sound and reasonable solution that the spaceholders, the United States, and Tribes all support, the State is advocating for an uncertain future with potential litigation over the Director's authority to condition and limit a water right held in the name of the United States outside of a binding general stream adjudication. The Coalition urges the Court to avoid taking the State's "bait" and recognize the finality and benefit

of decreeing the “reset” remarks as the final piece of the puzzle necessary for the proper and efficient administration of the Basin 01 storage water rights.

The “Quantity” element of the partial decree for this right is only quantified in terms of an annual volume, and is not limited by a diversion rate. Integral to the “reset” stipulation is the addition of a diversion rate limitation for a defined period – a process that can only be effectuated through the SRBA where the United States is a party. The “reset” stipulation establishes a diversion rate limitation of 2,500 CFS on the Lake Walcott storage water right. The State fails to present any legal basis for the Director to unilaterally modify the 1-219 storage decree by administrative order. With the settlement, the parties, including the Tribes and the U.S. Bureau of Reclamation, have reached a resolution which would bind all claimants through the present Rule 60(b)(6) motion. The State’s recommendation for an administrative process is unlawful, and leaves “reset” open to future litigation.

The State also claims that the spaceholders, the Tribes, and the United States should just enter into an agreement, and allow the Director to limit diversions under the Lake Walcott storage water right to 2,500 CFS during the period from September 15th to October 15th. Again, this hoped for result cannot occur without the United States. While the United States supports the agreement and the *Joint Motion*, it has constitutional objections to submitting its property interests to changes through State administrative proceeding. *See Ex. 25 to Orr Dec.*

Since there is no question that the SRBA Court, through the McCarran Amendment, has the authority to bind the United States, the Tribes, the spaceholders, and IDWR, and all affected parties have agreed to the requested resolution, amending the decrees is necessary to effectuate the remarks and limitations in the settlement. Granting the motion will not undermine the finality of the SRBA decree, but will instead provide certainty and efficient administration in

perpetuity. The Coalition urges the Court to recognize the “unique and compelling” facts of this case and grant the relief requested.

III. The Joint Motion is Similar to the Motion Granted in Basin 63.

The State argues that the Rule 60(b)(6) motion filed in Basin 63 is “legally distinguishable” on the theory that the Basin 63 matter involved the supplemental “refill” water rights that had yet to be decreed. *Response* at 40-41. The State reasons that since there are no pending late claims in Basin 01, then the “reset” remark should not be allowed through a Rule 60(b)(6) motion. *See id.*

Although the Basin 63 base storage rights were reopened to include a “combined volume limitation remark” with the “refill” enlargement claims, the State consciously omits the reference to the Basin 63 “reset” remark that was also added. *See Basin 63 Order* at 3 (citing “reset” remark). In other words, the “reset” remark on the base rights in Basin 63 had nothing to do with the claimed reconciliation with the “refill” claims, yet the State believed it was acceptable to reopen the base right decrees for that purpose.³

The State faults the Basin 01 parties for not including the “reset” remark in the *Basin 01 Stipulation*, but that is a settlement timing objection, nothing more. Certainly, if the Basin 01 parties had resolved “reset” at the time of the stipulation then there would be no dispute with the State now. However, that did not happen. The fact the parties spent the last few years working in good faith to settle the matter is what counts, which the State refuses to acknowledge. Reaching the right result for all involved is the real issue, and the timing of it should not dictate whether or not it is allowed to be implemented.

³ Although the Basin 63 “reset” remark is different than what is proposed for Basin 01, the substance and effect of the provision is similar in that it is a clarifying remark related to the period of use element (1/1 to 12/31) and allows the watermaster to begin distributing water to the storage rights in the fall.

Further, although there are no pending late claims or global accounting program challenges, those reasons are not the only bases to grant a Rule 60(b)(6) motion. The State's argument for these conditions makes no sense and seemingly encourages litigation in order to obtain entry into the SRBA Court. Idaho law has no such requirement and the "unique and compelling" circumstances standard does not require a pending late claim or appeal to the Idaho Supreme Court in order to clarify an element for purposes of efficient and certain administration. *See Response* at 43.

In summary, the Court's decision and standard set forth in the *Basin 63 Order* is similar to the present case and provides a limited and narrow guideline concerning storage water rights in federal reservoirs. Ensuring proper and efficient administration of these water rights should be the focus, particularly when the case involves various sovereigns like the United States and Shoshone-Bannock Tribes. Reservoir operations and administration are complex issues, and decreeing the "reset" provision is a final step to ensure a comprehensive resolution of this matter going forward.

IV. The Uncertainty of Agency Action Favors Granting the Joint Motion.

The State urges the Court to overlook the Director's action in this matter, seeking to de-emphasize actual administration in 2018. *Response* at 45-47. The State essentially claims that since the Director's instruction was not an "order" or "definitive" interpretation of the partial decrees, the Court should turn a blind eye.

The Director's review of the period of use element of the storage water right decrees (1/1 to 12/31) and his resulting instruction to the Watermaster that year highlight the need for decreed certainty from this Court. For the first time in history the Basin 01 storage water rights were not allowed to accrue water in the fall for the following irrigation season. While the conditions of

the water year, including the winter and spring, were such that it did not cause any shortages in storage water supplies, that does not obviate the likely possibility.

Importantly, there is no dispute that the Water District 01 Watermaster changed the “reset” date in the accounting program over time. These changes were made under the supervision of various Directors of IDWR. *See* I.C. § 42-602. Changing that date had real consequences on the distribution of water to the storage water rights and others, including natural flow water rights held by Milner Irrigation District and AFRD#2. Whether the current Director changes his mind (through order or otherwise), or a future Director has a different opinion on the matter, such agency changes underscore the uncertainty of leaving the matter to IDWR’s and the Water District 01 Watermaster’s discretion. As a result, the spaceholders, United States, and Shoshone-Bannock Tribes have come to this Court to remove any doubt and ensure the “reset” administration is not subject to future changes. While the State agrees with the substance of the agreement, it’s preferred administrative remedy does not provide the finality and certainty that only this Court can secure through limited amendment of the partial decrees.

Given the importance of a secure and comprehensive system of administration of the storage water rights in Basin 01, the Coalition urges the Court to grant the *Joint Motion* and provide the necessary equitable relief requested.

CONCLUSION

“Reset” is part and parcel of efficient administration of all storage water rights in Basin 01. Decreeing a reset provision as stipulated to by the Parties represents the last hurdle in ensuring a system of water right administration that will provide certainty and finality. The State, which has no opposition to the terms agreed upon by the parties, and as a result, no direct interest in the outcome, raises only procedural issues that should be denied.

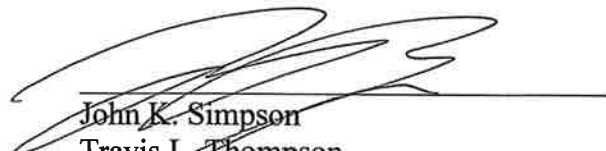
The position taken by the State concerning administrative resolution is not supported by the facts – the United States is not a participant in the administrative proceeding and is unwilling to be bound by an administrative order. As a result, any administrative resolution would likely face legal challenges. On the other hand, the United States is willing to support the resolution agreed upon by the parties if the decrees are judicially amended. Anything short of re-opening the decrees could lead to protracted administrative and judicial litigation. For that reason, this Court alone has the jurisdiction and equitable remedy to effectuate what all spaceholders in Basin 01 seek, a permanent unopposed resolution.

Under the factors this Court set forth in the Basin 63 decision, the parties in this action submitted the *Joint Motion* within a reasonable time and demonstrated “unique and compelling” circumstances that justify reopening the decrees for the limited purpose of inserting the reset language. This narrow and limited alteration to the partial decrees would not undermine finality of the SRBA, and is the clearest avenue to ensure finality of the “reset” stipulation for all water users and stakeholders in the basin, including the United States, the Tribes, and IDWR.

The Coalition respectfully requests that this Court grant the *Joint Motion* and amend the partial decrees accordingly.

DATED this 16th day of January, 2020.

BARKER ROSHOLT & SIMPSON LLP



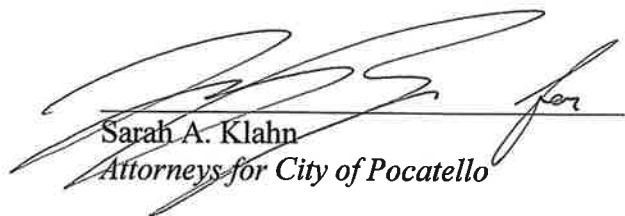
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2020, I served a true and correct copy of the foregoing **JOINT REPLY IN SUPPORT OF JOINT MOTION TO ALTER OR AMEND PARTIAL DECREES FOR PURPOSES OF DIVERSION RATE AND "RESET" ADMINISTRATIVE REMARKS** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

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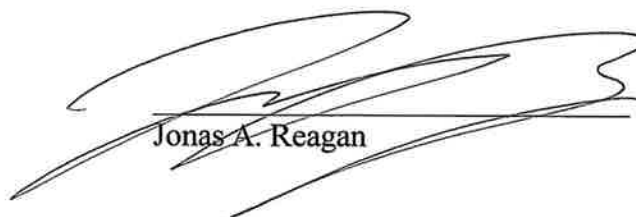
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ATTACHMENT A

01-219
01-2064
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01-10620
01-10621A
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