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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 CSRBA	Subcase Nos. 95-18274
Case No. 49576	**KOOTENAI PROPERTIES, INC.'S RESPONSE TO IRRIGATORS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Kootenai Properties, Inc. ("KPI"), a co-claimant and objector in the above-referenced subcase, and pursuant to the *Proposed Order on Stipulation to Amend Briefing*, the *Stipulation to Amend Briefing Schedule* (Jan. 15, 2026), the Court's Administrative Order No. 1, and I.R.C.P. 56, hereby files this response to the *Irrigators' Motion for Summary Judgment*. This response is further supported by the *Declaration of Rand Wichman* ("*Wichman Dec.*") and attached exhibits filed together herewith, as well as KPI's *Motion for Summary Judgment* and supporting materials filed in this subcase on December 19, 2025.

For the reasons set forth below, KPI respectfully requests the Special Master deny the Irrigators' motion.

INTRODUCTION

The Irrigators' motion asks the Special Master to recommend water right claim no. 95-18274 as a matter of law. Yet, the Irrigators do not have any supporting facts to show the water right was ever properly appropriated under Idaho law. Instead, the Irrigators rely upon IDWR's Supplemental Director's Report which admits that the "Department relied on the decreed rights as evidence of historic beneficial use of 560.3 AF." Since the existing partial decrees cannot be used to decree an "additional" or "second" water right in the CSRBA, the Special Master cannot grant the Irrigators' motion.

Moreover, as the issue involves questions of water right administration that have not yet occurred, there is no legal basis for the Court to grant the Irrigators' motion. At a minimum, based on the record before the Court, the water right cannot be summarily recommended for partial decree, and the Irrigators' summary judgment motion should be denied accordingly.

STATEMENT OF FACTS

1. The Irrigators allege that "Chilco Reservoir is full at the beginning of the irrigation season." KPI objects to this statement as it is not supported by admissible evidence. *See* I.R.C.P. 56(c)(2). This statement is overly broad and not consistent with the *Declaration of Dan Hoisington.* Mr. Hoisington declared that the reservoir was always at full storage capacity prior the beginning of each irrigation season during the time he was responsible for maintenance and operation of the reservoir from 1987 until 2014. *See Hoisington Dec.* at 1-2, ¶¶ 4-5. Accordingly, whether the reservoir was always full prior to 1987 or after 2014 is unknown, and the Irrigators have not established that as an "undisputed fact" with admissible evidence. *See*

I.R.C.P. 56(c)(2). Further, the term "irrigation season" is not defined. As noted in Rand Wichman's declaration, if the reference is to March 15th, then Chilo Lake Reservoir has been full on that date in the years Mr. Wichman has been involved in operations, 2023-2025. *See Wichman Dec.* at 2-3. However, if the reference is intended to mean the month of "May," when the gate valve is typically first opened, then there are times when the reservoir is slightly less than full pool, as evidenced by no overflow occurring over the spillway. *See Wichman Dec.* at 3-4, ¶ 7.

2. The "irrigation release valve" is not always "on throughout the irrigation season to provide storage water to the Chilco Mill and privately irrigated lands." *See Wichman Dec* at 4, ¶ 8. If the term "irrigation season" refers to the existing partial decrees' season of use (March 15 – November 15), the "irrigation release valve" has never been on throughout that entire period during 2023-2025. *See id.* The valve is typically opened in May and closed in October. *See Wichman Dec.* at 3, ¶ 7. For example, in 2025 the value was opened on May 19th and closed on October 17th. *See id.* Since KPI holds decreed water rights for "wildlife storage," "recreation storage," and "aesthetic storage" totaling 305 acre-feet, or 54% of all decreed storage rights to the reservoir, at a minimum it is KPI's position that the other water right holders do not have a right to deplete the reservoir below 214 acre-feet. Once the overflow of the reservoir stops, additional inflow to the reservoir is used to "offset" losses due to infiltration, seepage and evaporation. *See Wichman Dec.* at 3, ¶ 6. Early withdrawals that occur when the reservoir is full and overflow is going over the spillway (typically in May, sometimes in June) are not diminished by the infiltration and seepage losses. *See id.*

3. The Notice of Claim for Water Right No. 95-18274 does not establish that "all inflow is captured to satisfy the Chilco storage rights." The statement appears to be a legal

argument or interpretation regarding water right administration. The decreed storage water rights for Chilco Reservoir speak for themselves and the claim at issue in this subcase does not establish that fact. KPI agrees that water flowing from Chilco Creek during the irrigation season of March 15th through November 15th is physically captured or stored in the reservoir. *See Wichman Dec.* at ___.

4. The *Declaration of Ryan Fobes* states that the volume available for diversion at full elevation is estimated at 396.37 acre-feet, not 396.6 acre-feet. The reference in the Irrigators' brief appears to misstate the *Fobes Dec.*

5. KPI disputes the Irrigators' characterization of the use of the water meters on the 8" HDPE pipe. KPI does not dispute that the meters have been installed and were used by the parties during 2025. However, the meters themselves do not "allocate" the stored water if that term implies formal water right administration in any way. Chilco Reservoir is not currently located within an established water district and the water rights and any stored water has not been formally administered by a duly elected watermaster. The meters have been used by KPI and IFG to informally allocate stored water in 2025. *See Wichman Dec.* at 4, ¶ 9. In 2025 the meters had an approximately 1.7% discrepancy between their readings. *See id.*

6. KPI does not dispute the Irrigators' Statement of Fact #6.

STANDARD OF REVIEW

Summary judgment requires the movant to show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *See Martin v. Thelma V. Garrett Living Trust*, 170 Idaho 1, 5, 506 P.3d 237, 241 (2022). The burden of proving the absence of material facts is on the moving party and the Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable

inferences from the record in favor of the nonmoving party. *See id.* When an action is tried without a jury, the Court can rule upon summary judgment despite the possibility of conflicting inferences arising from undisputed evidentiary facts. *See Nettleton v. Canyon Outdoor Media, LLC*, 163 Idaho 70, 73, 408 P.3d 68, 71 (2017).

Summary judgment is not appropriate in a case where there are disputed issues of material fact. *See American Land Title Co. v. Isaak*, 105 Idaho 600, 601, 671 P.2d 1063, 1064 (1983) ("It is axiomatic that summary judgment is improperly granted where any genuine issue of material fact remains unresolved"). Moreover, Rule 56 requires affidavits in support of a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. *See* I.R.C.P. 56(b)(4). A court cannot "hypothecate facts which are absent from the record cognizable under Rule 56." *See Shacocass, Inc. v. Arrington Const. Co.*, 116 Idaho 460, 463, 776 P.2d 469, 472 (Ct. App. 1989).

ARGUMENT

I. The Irrigators' Motion Does Not Conclusively Establish that Water Right No. 95-18274 Should be Partially Decreed as Matter of Law.

The Irrigators' entire case for claim no. 95-18274 is based upon the misplaced theory that the existing water right decrees cannot "fill" past the existing capacity of the reservoir, e.g. 396 acre-feet. Hence, the Irrigators believe that in order for the reservoir to be allowed to continue to "fill" after it is physically full, a "refill" water right claim is necessary. However, this argument does not support a beneficial use water right for claim no 95-18274. Similar to IDWR, the Irrigators have presented no actual evidence to support an additional water right for storage and use with an August 23, 1920 priority date.

As explained in KPI's *Memorandum in Support of Motion for Summary Judgment*, a "constitutional" or "beneficial use" water right claim in the CSRBA must be supported by evidence showing actual diversion and use. *See KPI Memo.* at 6-8. The Idaho Supreme Court has also confirmed that a claim such as no. 95-18274 "require[s] proof 'with definite evidence' that the claimed water was actually diverted and beneficially used at the time." *See Black Canyon Irr. Dist. v. State of Idaho*, 163 Idaho 144, 154, 408 P.3d 899, 909 (2018). Moreover, the Court explained that "[t]his analysis is 'focused purely on the actions of the appropriator[.]'" *Id.*

In this subcase IDWR admittedly only relied upon the existing decreed rights as "evidence of historic beneficial use of 560.3 AF." *See* 706 Report at 6. Stated another way, IDWR has no additional evidence to support a new water right beyond an enlarged use of the existing decrees for seepage and evaporation losses. *See KPI Memo.* at 9-10, 14. The Irrigators have similarly not provided any additional evidence to support a beneficial use water right claim of 659.3 acre-feet with an August 23, 1920 priority date either. The declarations of Mr. Fobes, Mr. Jackman, and Mr. Hoisington contain no information about actual beneficial use pre-dating 1971 that would support such a claim. *See State of Idaho v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000) ("Until 1971, appropriations of water in Idaho could be made two ways . . . Although new appropriations could not be made under the constitutional method after 1971, I.C. § 42-201, the validity of existing constitutional appropriations continues to be recognized").

The existing partial decrees for Chilco Lake Reservoir authorize a total storage volume of 560.3 acre-feet. *See* 706 Report at 5. If the reservoir is physically "full" at approximately 396 acre-feet, the decreed quantities are not satisfied at that point. *See Black Canyon Irr. Dist. v.*

State of Idaho, 163 Idaho 144, 154-55, 408 P.3d 899, 909-10 (2018) ("the decrees authorize specific, measurable quantities of water, not a certain number of reservoir 'fills.' The quantities set forth in the decrees are binding and must control") (emphasis added). Accordingly, vacant space resulting from water that may be subsequently released for downstream use (i.e. irrigation or industrial purposes) can still be filled up to the total volume of the reservoir decrees. In other words, additional water that flows into the reservoir can still be stored to satisfy the existing decrees, up to 164.3 are-feet (divided proportionately to satisfy the decreed quantities of each storage right). No further water right is needed for that diversion into storage and subsequent use. Yet that is entire theory behind the Irrigators' motion, that a "new" water right is needed for this "continuous fill." *See Irrigators' Br.* at 6-7.

IDWR's Director examined how the U.S. Bureau of Reclamation (Reclamation) and the U.S. Army Corps of Engineers (Corps) operated certain reservoirs in Basin 63 and described how that related to water right administration and accounting. Former Director Gary Spackman described the process of how a storage water right is satisfied for purposes of water right administration as follows:

> 23. Accruing to a storage water right all of the natural flow calculated to be available under the priority of the water right is also consistent with the elements of the reservoir water rights and reservoir operations. The reservoir water rights are not limited by diversion rates, they authorize diversions to storage for the entire year, and each is entitled to all natural flow available under its priority until its annual volume has been satisfied. Natural flow distributions to decreed water rights are measured by diversions. Idaho Code § 42-110; *Glen Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029, 1032 (1972), and the reservoir system is operated to physically divert and regulate all flows: . . .
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> * * *
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> 28. Reduced to its most basic operation, the Department's accounting program determines that an on-stream reservoir's storage water right is "satisfied" when the quantity of natural flow diverted by the reservoir in priority equals the total quantity authorized by that reservoir's decreed storage water right. Once a

> storage water right is satisfied, the program determines that right is no longer in priority. Natural flow accrues toward satisfaction of the storage water rights in this manner until all of the storage rights are satisfied or a senior natural flow right comes into priority. This methodology implements three principles of Idaho water law. First a reservoir diverts and stores water when natural flow enters the reservoir. Second, a storage water right is satisfied when the reservoir has diverted, in priority, the total quantity of natural flow stated on the fact of its partial decree. Third, diversion and storage of natural flow in excess of the decreed quantity is permissible if the additional storage does not injure downstream appropriators.

Amended Final Order at 63-65 (emphasis added).[1]

The Irrigators' arguments miss this point made by the Director, confirmed by Supreme Court precedent, and erroneously believe that a new water right is necessary to "ensure all storage right holders have a shared right to 'continuous fill' to satisfy their storage right." *Irrigators' Br.* at 7. The Irrigators mistakenly invite the Special Master to address issues of water right administration, and an interpretation of the prior partial decrees, that is not relevant to the primary adjudication question for water right 95-18274. The Idaho Supreme Court explained a similar situation as follows:

> Even so, the special master strayed beyond this threshold question by, as the district court correctly observed, "delving into the administration of the previously decreed water rights" to conclude the Late Claims were unnecessary as duplicative of the existing rights. This analysis signifies error, as the existing rights were not at issue. Rather, it was the "supplemental beneficial use storage water rights" claimed in the Late Claims that were at issue. In addition, the administration of the existing water rights had no basis in the Director's reports and was raised for the time before the special master.

See Black Canyon Irr. Dist., 163 Idaho at 156-57, 408 P.3d at 911-12.

> Here, the Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user.

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[1] A copy of the Director's order is publicly available on IDWR's website at: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/WD63/WD63-20151020-Amended-Final-Order.pdf

See In Re SRBA Basin-Wide Issue 17, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014).

This is not a case of deciding how to handle excess water that enters a reservoir and is released beyond the stated quantities of the existing water right decrees. Unlike the federal reservoirs at issue in Basin-Wide Issue 17 in the SRBA, where the water rights were satisfied and water had to be released for flood control, this case concerns a reservoir with a reduced capacity that does not require a "second" storage right beyond what has already been decreed. Moreover, whether capacity can be increased to recover the decreed storage volume or other alternatives can be achieved to accomplish the same purpose is beyond the scope of this adjudication.

In short, water right claim 95-18274 must stand on its own, and if there is no evidence of actual diversion and beneficial use, the claim cannot be partially decreed. *See id.*, 163 Idaho at 154, 408 P.3d at 909. At a minimum, the claim cannot be decreed as a matter of law on summary judgment as the Irrigators suggest. *See In re SRBA Basin-Wide Issue 17*, 157 Idaho at 392, 336 P.3d at 799 ("We agree with the Boise Project Board and the SRBA that the question of when a storage water right is filled presents a mixed question of fact and law. Indeed, the complex and historically dense contents of the Shelly Davis affidavit, along with the parties' attempts to prove when a storage right is filled by using reservoir-specific historical practices, support the conclusion that determining when a water right is filled requires the development of a factual record"). Since the Irrigators' motion does not meet the Rule 56 standard, the Special Master should deny it accordingly.

CONCLUSION

The Irrigators have not shown that the Special Master can recommend water right claim 95-18274 as a matter of law. There is no evidence to support actual diversion and beneficial use

of an additional water right in the reservoir with an August 23, 1920 priority. At most, the Court could recognize an enlarged use of the existing decrees to cover seepage and evaporation losses. Since the Irrigators' motion is not supported by admissible evidence demonstrating no genuine issue of material fact, the motion should be denied.

DATED this 20th day of January, 2026.

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/s/ Travis L. Thompson
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2026, I served a true and correct copy of the foregoing *Kootenai Properties Inc.'s Response to Irrigators' Motion for Summary Judgment* on the following by the method indicated:

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