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DEPARTMENT OF  
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF ACCOUNTING FOR  
DISTRIBUTION OF WATER TO THE  
FEDERAL ON-STREAM RESERVOIRS IN  
WATER DISTRICT 63

**RESPONSE TO DEPARTMENT'S  
STAFF MEMO**

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## I. INTRODUCTION

On September 10, 2014, Director Gary Spackman requested a staff analysis describing and explaining the Idaho Department of Water Resources' ("IDWR" or "Department") accounting principles and methodologies for federal on-stream storage water rights in Water District 63. On November 4, 2014 Liz Cresto, Technical Hydrologist for the Department, provided that response in the form of a Memorandum to Director Gary Spackman ("*Staff Memo*"). This is the response of United Water Idaho Inc. ("United Water") to the *Staff Memo*.

United Water commends the *Staff Memo*'s thoughtful and comprehensive explanation of the Department's accounting principles and methodologies for storage water rights associated with federal on-stream reservoirs in Water District 63. The *Staff Memo* confirms that the Department consistently has followed the principles of the "one-fill rule" based on "storable inflow," even if that terminology has not been employed.

Equally important, it documents that federal reservoirs in Basin 63 (and elsewhere) have operated efficiently and successfully under the *status quo*, which has allowed reservoirs to refill after flood control releases on a regular basis without injuring junior rights. In short, the system works, and there is no reason to change it.

The *Staff Memo* was submitted as a technical memorandum. It is not a legal memorandum on the principles of Idaho's Prior Appropriation Doctrine underlying the Department's accounting methodologies. United Water endorses the *Staff Memo* and contends the principles and methodologies it describes are consistent with and mandated by the Prior Appropriation Doctrine.

In its brief to the Idaho Supreme Court on appeal of the SRBA District Court's decision in the Basin-Wide Issue 17 litigation, United Water addressed these fundamental principles and set out extensive authority from Idaho and other prior appropriation states. *Brief of Respondent United Water Idaho Inc. ("Appellate Brief")* at 21-41, Idaho S. Ct. Docket Nos. 40974-2013 and 40975-2013 (Oct. 23, 2013). United Water is providing a copy of its *Appellate Brief* by separate affidavit and hereby incorporates by reference that brief into this response.

Ultimately, the Idaho Supreme Court did not rule on these issues. Instead, it emphasized the important role played by the Director's considerable expertise on the subject of administration:

This Court has also recognized the need for the Director's specialized expertise in certain areas of water law. For example, when analyzing the Director's duties in the context of groundwater pumping levels, this Court stated, "Because of the need for highly technical expertise to accurately measure complex ground water data the legislature has delegated to the IDWA the function of ascertaining reasonable pumping levels." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). This Court also recognized the Director's broad powers and expertise in administering water rights in the context of granting applications for extensions of time. When holding that the Director properly granted a water right extension application, the Court noted that "[h]e cannot, in other words, be made to predict the future with powers other than his own reason and judgment" and "we ordinarily must vest the findings of the state engineer with the presumption of correctness." *Keller v. Magic Water Co.*, 92 Idaho 276, 282, 441 P.2d 725, 731 (1968). The Court further explained that:

[T]he state engineer is the expert on the spot, and we are constrained to realize the converse, that judges are not super engineers. The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state, and we must extend to his determinations and judgment, weight on appeal.

*Id.* at 283, 441 P.2d 725, 732 (internal citations and quotations omitted).

*A&B Irrigation Dist. v. State*, 157 Idaho 385, 336 P.3d 792, 801 (2014).

To be sure, this deference is not a *carte blanche*. As the Court said: “[T]he Director cannot distribute water however he pleases at any time in any way; he must follow the law.” *A&B Irrigation Dist*, 336 P.3d at 800. As the *Staff Memo* shows, however, the Director and those before him have followed the law. The accounting principles described therein are entirely consistent with Idaho’s Prior Appropriation Doctrine, in particular the “one-fill,” “paper fill,” “storable inflow,” and “free river” concepts.

## II. THE ONE-FILL RULE

In his Basin-Wide Issue 17 decision, Presiding SRBA Judge Wildman ruled that the one-fill rule applies in Idaho. “The assertion that a senior storage right holder can ‘fill,’ or ‘satisfy,’ his water right multiple times under priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law.” In *Re SRBA, Case No. 39576, Subcase 00-91017, Memorandum Decision* at 9. (SRBA Ct. Mar. 20, 2013).

On appeal, the Idaho Supreme Court characterized this issue as a “relatively straightforward question”:

The question the SRBA court designated and answered was the relatively straightforward question of whether a storage water right holder whose right has been satisfied once may refill that right in priority following flood control releases.

*A&B Irrigation Dist*, 336 P.3d at 799 (emphasis supplied).

The Idaho Supreme Court paraphrased Judge Wildman’s answer to that question this way:

[T]he SRBA court concluded that a remark was not necessary because a storage water right that has been filled or satisfied cannot refill under priority before affected junior appropriators satisfy their water rights once. . . .

...

The SRBA court ultimately held that a remark was not necessary under Idaho law because under the prior appropriation doctrine, a storage water right holder could not refill its right under priority once that right had already been satisfied once.

*A&B Irrigation Dist.*, 336 P.3d at 797 (emphasis supplied).

In short, Judge Wildman ruled that a storage right holder gets only one fill in priority.

But, for purposes of the Basin-Wide Issue, Judge Wildman declined to define what water counts toward the first fill. That, he said, would have to come later:

The SRBA court determined that this accounting methodology was an administrative function which should be addressed on a case-by-case basis on a fully developed factual record and where the IDWR is a party.

*A&B Irrigation Dist.*, 336 P.3d at 799.

That time has come. The *Staff Memo* provides a sound and adequate basis for the Department to confirm that the *status quo*, which the Department has adhered to all these many years without objection, is consistent with and compelled by the Prior Appropriation Doctrine. Moreover, it works. The occasions are rare indeed when there has been insufficient water to provide for both refill and junior diversions.

On appeal, the Idaho Supreme Court ruled on a procedural technicality that the basin-wide issue was improperly designated. *A&B Irrigation Dist.*, 336 P.3d at 799. Accordingly, the Court never reached the merits—either as to the question that Judge Wildman answered or the one he did not. The Court, however, did not suggest any disagreement with Judge Wildman’s ruling on the “straightforward” observation that storage water rights can fill only once under priority. *A&B Irrigation Dist.*, 336 P.3d at 799. Indeed, the Court held that “as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty”

when he exercises his discretion in directing and controlling the distribution of water. *A&B Irrigation Dist.*, 336 P.3d at 800.

The accounting procedures described in the *Staff Memo* follow the one-fill rule endorsed by Judge Wildman:

Once the reservoir's cumulative accrual has reached the annual volume limit, the reservoir water right can no longer accrue additional natural flow to its water right in the water rights accounting[,] and natural flow can begin to be distributed to junior water rights.

*Staff Memo* at 6.

Without calling it by name, the *Staff Memo* includes the one-fill rule among the "major concepts and procedures in the water rights accounting":

6. Natural flow distributed to on-stream reservoir water rights are limited by the amount of natural flow that was available or that would have been available if not for impoundment by an upstream reservoir and by the reservoir's annual volume limitation. The on-stream reservoir water rights do not have a flow rate limits [sic].

*Staff Memo* at 3, 4 (emphases added).

As United Water's *Appellate Brief* at 21-25 describes in detail, the one-fill rule has been part and parcel of Prior Appropriation Doctrine followed in the western states for more than 100 years. It is followed not only in Idaho but has been embraced by Colorado, Wyoming, Montana, and Washington. Each of these has recognized that it is compelled by the Prior Appropriation Doctrine itself. Not a single prior appropriation state, including Idaho, has rejected the one-fill rule.

In sum, there is wide agreement that a storage water right is entitled to fill only once in priority. The water rights and storage accounting procedures described in the *Staff Memo* are consistent with this principle.

### III. STORABLE INFLOW AND PAPER FILL

The one-fill rule is what the Idaho Supreme Court called the “straightforward question”—which Judge Wildman answered in the affirmative. As both Judge Wildman and the Idaho Supreme Court recognized, the more important question is, how is “fill” determined? In other words, what water counts toward that single fill?

In the Basin Wide Issue 17 litigation, Judge Wildman and the Idaho Supreme Court specifically declined to answer that question in the absence of a factual record that could be developed through an administrative process such as this contested case. *A&B Irrigation Dist.*, 336 P.3d at 799; *Memorandum Decision* at 11-12.

Now is the time to address that question, and the *Staff Memo* does just that. The *Staff Memo* makes it clear that, under the Department’s water rights accounting methodology, water is accrued to an on-stream storage water right using the “storable inflow” and “paper fill” principles discussed in United Water’s *Appellate Brief* at 25-39. Without calling it “storable inflow,” the *Staff Memo* describes the concept this way:

Any natural flow, that is available or would be available if not for upstream storage, and in priority at the point-of-diversion (dam), is accrued toward the satisfaction of the on-stream reservoir water rights.

*Staff Memo* at 5-6.<sup>1</sup> Put another way:

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<sup>1</sup> We find the phrase “or would be available if not for upstream storage” potentially confusing. A word of explanation may be appropriate. We understand the reference to upstream storage is intended to reflect the practice of allowing storage of a storage right associated with a downstream reservoir in an upstream reservoir. This is a standard practice on the Boise River. It enhances efficiency, causes no injury, and is perfectly proper under the Prior Appropriation Doctrine. In other words, the quoted phrase is simply meant to say that water stored by a storage right holder counts toward fill of the right whether it is stored in the downstream reservoir or the upstream reservoir. A clearer way to make the point might be this:

Any natural flow that is available at the point-of-diversion (dam)—or would have been available if it had not been stored upstream by that storage right holder—and is in priority is accrued toward the satisfaction of the on-stream reservoir water right.



Any natural flow that is available and in priority at the point of diversion is accrued towards the reservoir right until the annual volume limit has been met.

*Staff Memo* at 6. And another way:

The water rights accounting accrues natural flow that is both available (or that would be available if not for upstream storage) and in priority at the point-of-diversion toward the satisfaction of the reservoir right.

*Staff Memo* at 6.

These concepts, by the way, are identical to the “storable inflow” concept used in Colorado. “Storable inflow is the amount of water that is physically and legally available for storage in a reservoir under a particular water right.” Colorado Division of Water Resources, *General Administration Guidelines for Reservoirs* at 9 (Oct. 2011) (reproduced in Exhibit A to United Water’s *Appellate Brief*).

In other words, storable inflow means that if water is coming into a reservoir, and it is legally available to store (*i.e.*, “in priority” to the storage right holder), the right holder is expected to store it. She may not say, “Well, I think I’ll just let this water pass and then take my fill later.” The storable inflow rule mandates that if the water is physically and legally available and she does not store it, it nonetheless counts toward her storage water right’s fill. Similarly, if she stores water and later releases some of it—for whatever reason—that does not reduce or otherwise affect the right’s accrued fill.

Counting all storable inflow toward fill of a storage water right is frequently described as “paper fill.” “The term *paper fill* has been used as a term of convenience to describe the cumulative amount of natural flow accrued to a reservoir water right in the water rights accounting.” *Staff Memo* at 8 (emphasis in original). Thus, “paper fill” reflects both of these

concepts: (1) all storable inflow counts toward filling the right whether it is captured or not, and (2) releasing previously captured water does not reduce the accrued fill.

Paper fill can be contrasted with the term “physical fill,” which “has been used to describe the water volume physically held in a reservoir or in the reservoir system.” *Staff Memo* at 8. The term physical fill simply reflects a reservoir’s operational reality. It is not a water right concept, and it has nothing to do with accounting for the fill of water rights. As Judge Wildman noted:

the term “fill” may be used to describe (1) a reservoir physically filling with water, or (2) the decreed volume of a storage water right being satisfied (i.e. when the total quantity that has been accounted to storage equals the decreed quantity). The distinction between the two uses of the term is significant, as there may be situations where the storage water rights associated with a particular reservoir are considered filled or satisfied even though the reservoir has not physically filled with water.

*Memorandum Decision* at 9.

The *Staff Memo* describes several reasons why “[t]he paper fill in each reservoir water right is frequently different than the *physical fill* in each reservoir . . . .” *Staff Memo* at 8 (emphasis original). One of those reasons is that “previously accrued storage is sometimes released from the reservoir system past Middleton.” *Staff Memo* at 8. Storage water passing Middleton includes “[s]torage released as a result of reservoir operations, such as flood control.” *Staff Memo* at 9.<sup>2</sup> Other reasons include deliveries of storage water to diversions (which are not

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<sup>2</sup> The *Staff Memo* contains a discussion explaining the difference between physical fill and paper fill. *Staff Memo* at 8-9. United Water agrees with the thrust of what is said, but suggests that the discussion appears to be incomplete. The main point of the discussion seems to be that if a reservoir achieves paper fill, physical releases or loss of water thereafter will reduce whatever physical fill has been achieved but have no effect on paper fill. That is certainly true. Our concern is with the *Staff Memo*’s conclusion: “The system’s *paper fill* is equal to the system’s *physical fill* adjusted for storage deliveries, water released past Middleton, and for reservoir evaporation.” *Staff Memo* at 8 (emphasis original). This list of differences between paper fill and physical fill does not appear to be complete. The reference to “water released past Middleton” apparently describes water released from storage and not subsequently diverted by any user above Middleton. It should be noted, however, that water released from

tracked in the water rights accounting program where paper fill occurs, but instead are tracked in the Department's storage accounting program) and evaporative losses at the reservoirs. *Staff Memo* at 8. In the end, "[a]ny difference between the accounting accruals (*paper fill*) and the physical content of the reservoir system (*physical fill*) is a result of storage deliveries, and/or releases by the Bureau, and/or reservoir evaporation." *Staff Memo* at 8 (emphasis original).

In sum, paper fill based on storable inflow has nothing to do with whether a reservoir is physically filled. Applied properly, however, the concepts of one-fill, paper fill, storable inflow, and refill under free river conditions (discussed below) further the policies of Idaho's Prior Appropriation Doctrine, particularly "secur[ing] the maximum use and benefit, and least wasteful use, of its water resources." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960)).

Securing maximum use and benefit of our State's water requires recognition that storage rights are different from rights for diversion for immediate application to beneficial use.

There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

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storage for purposes other than delivery (*e.g.*, for flood control) may, in some cases, be lawfully diverted by other downstream users and therefore never reach Middleton. Likewise, such released water could be lost to seepage or evaporation before reaching Middleton. The take-home point is that water released from storage for any purpose or no purpose at all reduces physical fill but has zero impact on the previously accrued paper fill—regardless of whether it reaches Middleton. The quoted statement also appears to be incomplete in that it identifies only things that reduce physical fill. Physical fill is increased, obviously, if a reservoir subsequently refills (whether that be under a separate water right or under free river conditions). For that matter, rainfall on the reservoir will increase physical fill.

*Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945).

In other words, contrary to the immediate use required of rights diverted from natural flow, “[w]ater diverted and stored pursuant to a storage water right need not be put to the end use immediately, but may be stored for a period of time prior to the end use . . . .” *A&B Irrigation Dist.*, 336 P.3d at 796.

Consequently, a reservoir operator may not fill its reservoir at the operator’s convenience. Storage right holders are expected to store water when they can. Typically, filling of storage rights and reservoirs will happen during the non-irrigation season and during the early irrigation season when plenty of water is available. If water available for storage is bypassed, it is likely not then usable by downstream right holders and will flow needlessly out of state—undermining the goal of maximum use of Idaho’s water by Idahoans. If the reservoir operator misses the opportunity to store, or releases water previously stored, then water must be stored later in the season. As explained below, if there is still a free river, this presents no problem. If not, the one-fill rule based on storable inflow mandates that later season storage must not come at the expense of other rights.

This result is compelled by the Prior Appropriation Doctrine which prohibits injury to junior rights by a senior who has received her entitlement to water. “A prior appropriator of the water of a stream may divert and use the amount of water to which he is legally entitled, but, when he has once done so, he may not dam the stream below him, or hinder or impede the flow of the remaining waters of the stream to the headgate of the next appropriator.” *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907).

The Department’s water rights and storage accounting systems described in the *Staff Memo* are consistent with this fundamental prior appropriation principle. “Water right holders

junior to the reservoir rights are not curtailed to make up for storage lost by operational decisions.” *Staff Memo* at 8.

#### IV. REFILL UNDER FREE RIVER CONDITIONS

As discussed in United Water’s *Appellate Brief* at 39-41, the Prior Appropriation Doctrine allows for on-stream reservoirs to physically refill after water is bypassed or released earlier in the storage season—during what often is called “free river” conditions—even without an express refill water right. In other words, a reservoir operator may lawfully top off a reservoir, even after its first paper fill, when doing so impairs no other water right.

“Free river conditions’ occur when there is sufficient natural supply to satisfy all water uses, whether decreed or undecreed, and State Engineer administration is unnecessary for the protection of decreed water rights.” *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139, 1149 n.14 (Colo. 2001). Water users may divert beyond the measure of their decrees during free river conditions because the diversion and storage does not infringe upon the rights of other water users. *City of Westminster v. Church*, 445 P.2d 52, 59 (Colo. 1968).

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 539 n.137 (2006).

Free river conditions allow for physical reservoir refill after storage water rights achieve paper fill:

End of fill marks the date the storage priority achieves its paper fill or when the reservoir goes out-of-priority. It signifies that the reservoir can no longer store water under its original priority. The reservoir, however, may continue to physically store water during free river conditions, under a refill right or under other supplemental priorities including exchanges.

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 547 (2006).

When physical fill of the federal on-stream reservoirs in Basin 63 is less than the paper fill of their associated storage water rights due to flood control or other operational releases, the

reservoirs can and do refill under free river conditions.<sup>3</sup> The United States recognized the right to refill during free river conditions in its briefing on appeal of Judge Wildman’s decision in the Basin-Wide Issue 17 litigation:

As is noted below, in prior briefing no party has disputed Reclamation’s ability to refill its reservoirs; the issue has been whether refill may be done under the priority of Reclamation’s storage water rights. By emphasizing that the issue before the [SRBA] Court is whether “refill” can occur in priority, the Court effectively affirmed that no remark is necessary for “refill” done using water that can be stored without injury to other water rights.

*United States’ Opening Brief on Basin-Wide Issue No. 17*, at 1 n.1 (emphasis added).<sup>4</sup>

The water rights and storage accounting systems described in the *Staff Memo* also recognize this practice in its list of “major concepts”:

9. Water that is physically stored in the reservoir system but not accrued to a reservoir water right . . . can occur when there is natural flow in excess of demand, the reservoir right(s) has been satisfied, and there is space in the reservoir system.

*Staff Memo* at 4-5.

Put another way, “[d]uring times when there is natural flow in excess of demand and there is space in the reservoirs, water may physically be stored in a reservoir, but not accrued to a reservoir right because the right has been satisfied.” *Staff Memo* at 13.

The Department’s water rights accounting system classifies this water as “unallocated storage” because it is water stored without accrual to a specific water right.

Unallocated storage is the natural flow physically captured

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<sup>3</sup> If is also possible that a storage right holder may obtain a second fill under a separate water right for refill, subject to whatever priority and conditions are stated on such right.

<sup>4</sup> The State of Idaho said much the same thing. “A remark authorizing storage refill using excess or surplus flows and that would not impair other water rights would be consistent with Idaho law, but not required to validate and continue historic administration and practice, which routinely allows such refill.” *State of Idaho’s Opening Brief* at 2 n.1.

in a reservoir that could not be distributed to a water right. Unallocated storage occurs when there is water in excess of demand and there is space available in the reservoirs. . . . This amount of surplus natural flow that could not be distributed to a water right (but now resides physically in the reservoir system) accrues to the unallocated storage (UNACCT STOR) in the water rights accounting.

*Staff Memo* at 9.

Despite its water rights accounting classification, this “unallocated storage” is allocated to the storage spaceholders using the Department’s storage program, which “is a separate program from the water rights accounting program.” *Staff Memo* at 10. “The purpose of the storage program is to allocate storage water to the individual spaceholders . . . .” *Staff Memo* at 10. The storage program determines individual spaceholders’ storage allocations after “the maximum physical total reservoir system contents has occurred.” *Staff Memo* at 11. The physical reservoir contents, of course, include the water classified as unallocated storage (*i.e.*, the natural flow physically captured in a reservoir that could not be distributed to a storage water right because the right already has reached paper fill).

In sum, consistent with the Prior Appropriation Doctrine, the water rights accounting and storage accounting programs described in the *Staff Memo* allow the federal dam operators in Basin 63 to physically refill reservoirs under free river conditions after releasing water for flood control or other operational reasons.

## **V. CONCLUSION**

The water rights and storage accounting programs described in the *Staff Memo* are consistent with the one-fill, storable inflow, paper fill, and free river principles of the Prior Appropriation Doctrine. These principles allow the federal dam operators in Basin 63 to physically refill reservoirs after releasing water for flood control or other operational purposes,

while at the same time protecting junior water rights and the State's interest in administering—and maximizing—the use of the water resource.

These principles are part and parcel of the Prior Appropriation Doctrine. They require the federal dam operators fill their reservoirs under their storage water rights when, and to the fullest extent that, water is physically and legally available for storage under those rights. If storable inflow must be released or bypassed for flood control, environmental goals, or other operational reasons, the dam operators can and do refill their reservoirs under free river conditions after the storage rights achieve paper fill.

These mechanisms further the State's maximum use policy by ensuring that federal dam operators manage flood control and other operational releases in ways that do not injure other water users. The alternative, in which dam operators could refill in priority at the expense of other users, would allow reservoir operators to forego storage of water when it is plentiful and available early in the storage season. In Basin 63, this would effectively turn control of the Boise River over to the federal government. As the *Staff Memo* said: "If reservoir operations and physical contents determined the satisfaction of state water rights it could result in federal control of the distribution of natural flow to state water rights." *Staff Memo* at 7-8. Idaho's Prior Appropriation Doctrine, as implemented in the water rights and storage accounting procedures described in the *Staff Memo*, does not allow this.

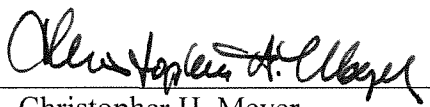
The *status quo* accounting regime is lawful and has served Idaho well. The practical reality is that storage right holders in Basin 63 have done quite well under the *status quo*, refilling after flood control operations successfully for many decades without complaint. Importantly, they have accomplished this while respecting the priorities of the handful of junior rights with which they share the river.



Departure from the *status quo* would serve no useful purpose, would unconstitutionally impair the property rights of junior diverters, would cede control of Idaho's surface water resources to the federal government, would impair the maximum utilization of water resources, and would violate the Prior Appropriation Doctrine.

Respectfully submitted this 26<sup>th</sup> day of January, 2015.

GIVENS PURSLEY LLP

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**CERTIFICATE OF SERVICE**

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