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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.: 35-12996, 43-10957, 43-10997, |
|                | ) | 43-11005, 43-11052, 43-11054, 43-11056, 43- |
|                | ) | 11058, 43-11069, 43-11071, 43-111528 43-    |
|                | ) | 11160, 43-11166, 43-11172, 43-11286, 43-    |
|                | ) | 11272                                       |
|                | ) |                                             |
| Case No. 39576 | ) | <b>RESPONSE TO THE STATE OF IDAHO'S</b>     |
|                | ) | <b>MOTION TO WITHDRAW ITS</b>               |
|                | ) | <b>OBJECTIONS</b>                           |
|                | ) |                                             |

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The United States hereby responds to the State of Idaho's Motion to Withdraw its Objections in the above referenced subcases, dated September 26, 2003. These subcases are subject to the Court's Order of August 25, 2003 establishing a summary judgment schedule on the legal issue of whether a homestead entry application pending at the establishment of Public Water Reserve No.

107 (PWR 107) defeats the federal reservation. While the State is certainly entitled to end its participation in the briefing, the “withdrawal” of the State’s objections should not prevent the Special Master from ruling upon this important legal matter.

Quite simply, the State’s motion is a nullity because its objections to water rights based upon PWR 107 were disposed of almost two years ago. In 1997 and 1998, the State filed objections to these and hundreds of other claims made by the United States for stockwater based on PWR 107 and state law. The State alleged that these claims should not exist. *See Domestic and Stock Water Right Objection*, subcase 23-10872, dated September 9, 1998. In his *Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of Recommitment to Special Master Cushman* Consolidated Subcases 23-10872 et al., Joint Submission Subcases 23-10894 et al. (Issued December 28, 2001), Judge Burdick ruled against the State’s objection and determined that the decision “constitutes a final disposition of the objections raised in this matter . . . .” *Id.* at 36.<sup>1/</sup> The State had objected to “numerous subcases.” *Id.* at 3. In disposing of these objections, the Court determined that it had resolved the “significant number of subcases dependant on this ruling.” *Id.* at 36. The Court then certified its ruling as a final judgment under I.R.C.P. 54(b). *Id.*

The State did not appeal the Court’s ruling. Therefore, the State’s claims that the water rights “should not exist” have been finally and completely disposed of. Fundamental principles of *res judicata*, prevent the State from now asserting that it has pending objections, even if the current

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<sup>1/</sup> The issue before Judge Burdick arose from the State’s Motion for Summary Judgment, re: subcases 23-10872, *et al.*, dated Sept. 18, 1998. In its dispositive motion, the State requested that the Court “grant Summary Judgment in favor of the State of Idaho and dismiss the above referenced subcases.” *Id.* at 2.

objection is different from the claim raised in its summary judgment motion.<sup>2/</sup> “The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made.” *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) (citations omitted). Clearly, the State could have litigated its claim that the existence of a homestead entry invalidates a reservation under PWR 107 when it asserted five years ago that these claims should not exist, and filed for summary judgment one year later.

Allowing the State to now prosecute its “objections” to the existence of PWR 107 water rights -- well after the final ruling on summary judgment and the period to appeal that final ruling -- may leave claims perpetually unsettled. In essence, the State will be able to raise new arguments whenever it can devise a new claim to defeat the United States’ water rights. Such an outcome will turn the finality of an order certified under Rule 54(b) on its head.

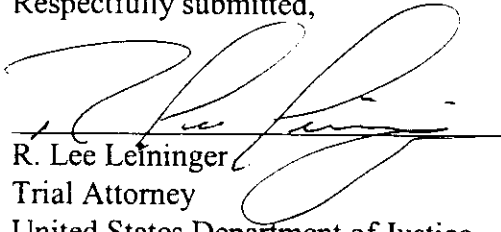
In any case, the State’s pending motion to withdraw its objections should not prevent the Court from ruling on the United States’ Motion for Summary Judgment. The United States understood that the issue raised on summary judgment will assist the Special Master in determining if the claimant has established the *prima facie* elements of its claims based upon federal law pursuant to I.C. § 42-1411(A)(12). The United States, therefore, respectfully asks the Court to rule on its motion and the issue argued therein, notwithstanding the State’s desire to withdraw already resolved objections.

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<sup>2/</sup> The State argued in its September 18, 1998 Motion for Summary Judgment that a spring or water hole that is tributary to a perennial running stream could not be reserved under PWR 107.

DATED this 30<sup>th</sup> day of September, 2003.

Respectfully submitted,



R. Lee Leininger  
Trial Attorney  
United States Department of Justice

### **CERTIFICATE OF SERVICE**

I certify that on this 30<sup>th</sup> day of September, 2003, I served a true and correct copy of foregoing Response to the State of Idaho's Motion to Withdraw Its Objections upon the following individuals by serving as indicated, postage pre-paid, addressed as follows:

**via facsimile transmission:**

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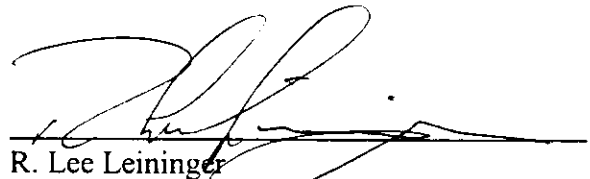
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