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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	)	UNITED STATES' RESPONSE TO THE
	)	CORRECTED REPORT ON STATUS OF
	)	STATE OF IDAHO'S OBJECTIONS IN
	)	BASINS 63 AND 73
	)	

The United States hereby responds to the *State of Idaho's Corrected Report on Status of State of Idaho's Objections in Basins 63 and 73* (the *State's Report*), filed October 2, 2003. The State divides the list of subcases into three categories: 1) BLM claims to stockwater made under state law; 2) BLM claims to stockwater made under state and federal law where the State comments that it withdraws its objection to the federal law basis of the claim; and 3) BLM claims to stockwater made under state and federal law where the State comments that its objection continues to the federal law

basis of the claim. The United States addresses each of these categories in order.

The BLM claims to stockwater made under state law are correctly identified by the State as instream flow claims. Pursuant to the stipulation entered between the United States and the State of Idaho resolving the State's objections to such beneficial use claims made on behalf of the BLM for the purpose of stockwatering, these claims should be recommended with a priority date of June 28, 1934. The United States agrees with the State that a Standard Form No. 5 consistent with the settlement stipulation may resolve the objections to these claims.

The remaining subcases are claims made under both state and federal law. The federal law basis for the claims is the executive order Public Water Reserve No. 107. The *State's Report* describes the State's objections to these subcases as either withdrawn or continuing. The United States respectfully disagrees. The State's objections to the BLM water rights based upon PWR 107 were disposed of almost two years ago.

In the late 1990s, 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 e.g.*, Domestic and Stock Water Right Objection, subcase 63-29062, filed April 20, 1999. The State filed a Motion for Summary Judgment, re: subcases 23-10872, *et al.*, on September 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.

Judge Burdick, however, determined that the PWR 107 claims should exist. 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 objections and determined that the decision "constitutes a final disposition of the objections raised in this matter" *Id.* at 36. Further, the Court recognized that the State had objected to "numerous subcases." *Id.* at 3. In disposing of the State's 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 grounds for objection is different from the claim raised in its summary judgment motion.^{1/} "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).

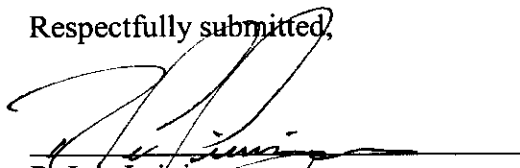
Allowing the State to now prosecute objections to the existence of PWR 107 water rights -- well after the final ruling on summary judgment and the period to appeal that final ruling -- may leave claims perpetually unsettled. In essence, the State will be able to raise new arguments whenever it can devise 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.

^{1/} 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.

Accordingly, the United States respectfully asks the Court to dismiss the State and the State's objections to all of the subcases identified as PWR 107 cases in the *State's Report*, including subcases 63-29070, 63-29142, and 63-73-11911 where the State erroneously refers to its objections as "continu[ing]."

DATED this 14th day of October, 2003.

Respectfully submitted,



R. Lee Leininger
Trial Attorney
United States Department of Justice

CERTIFICATE OF SERVICE

I certify that on this 14 th day of October, 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:

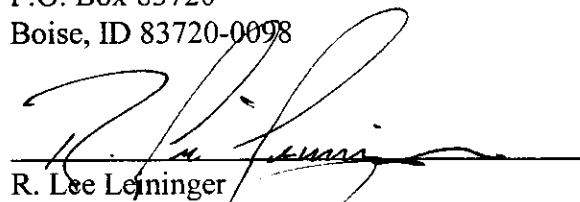
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Attachment A

63-29062	63-30506	73-11245
63-29070	63-30507	73-11255
63-29075	63-30508	73-11371
63-29078	63-30509	73-11405
63-29080	63-30510	73-11447
63-29082	63-30511	73-11449
63-29108	63-30512	73-11451
63-29112	63-30513	73-11453
63-29116	63-30514	73-11643
63-29117	63-30515	73-11645
63-29132	63-30516	73-11647
63-29134	63-30517	73-11649
63-29136	63-30518	73-11694
63-29140	63-30519	73-11886
63-29142	63-30520	73-11889
63-29171	63-30521	73-11890
63-29174	63-30522	73-11896
63-29176	63-30523	73-11899
63-29179	63-30524	73-11901
63-29182	63-30525	73-11902
63-29258	63-30527	73-11911
63-29259	63-30528	73-11918
63-29260	63-30529	
63-29268	63-30530	
63-29271	63-30531	
63-29317	63-30532	
63-29351	73-10456	
63-29511	73-10518	
63-29560	73-10522	
63-29602	73-10524	
63-29687	73-10548	
63-30498	73-10564	
63-30499	73-10572	
63-30500	73-10592	
63-30501	73-10818	
63-30502	73-10848	
63-30503	73-10882	
63-30504	73-10898	
63-30505	73-11179	