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Re: Subcase No. 63-3618
Lucky Peak Reservoir**Date:** February 20, 2008
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Clerk of the Court

February 20, 2008

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Message:

Please find attached for filing with the Court:

1. Motion to Strike, or in the Alternative, Rule 56(f) Motion, and
2. Notice of Hearing

Copy to follow by U.S. Mail to be conformed. Thank you.

PLEASE DELIVER IMMEDIATELY

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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

Subcase No. 63-3618
(Lucky Peak Reservoir)

MOTION TO STRIKE, OR IN THE
ALTERNATIVE, RULE 56(F) MOTION

COME NOW Pioneer Irrigation District and Settlers Irrigation District
(hereinafter the "Districts"), by and through undersigned counsel, and respectfully move this
Court for an order striking the Affidavit of Robert J. Sutter, the Third Affidavit of David A.
Jarvis (including the attachment thereto), and all related argument first advanced on or about
February 15, 2008, by the United States in its reply brief in support of the motion for summary
judgment.

Alternatively, if the Court determines it is proper to consider the delinquently-submitted testimony, issues and argument with respect to the pending motions for summary judgment, the Districts respectfully request the scheduled hearing on the motions for summary judgment be postponed pursuant to Rules 56(c) and 56(f), Idaho Rules of Civil Procedure, to permit the Districts an adequate opportunity to depose the recently-disclosed affiant/witness and to respond, via sur-reply, to said testimony, issues and argument.

This Motion is made and based upon the following:

1. On or about October 12, 2007, the Districts, the United States, and the other parties to this case filed their motions for summary judgment, including their supporting affidavits; thereafter, on or about November 14, 2007, each party to this subcase filed their responses to motions for summary judgment, including any responsive/supplemental affidavits. Finally, on or about February 15, 2008, replies were filed. All filings were made by the parties in accordance with the scheduling orders of this Court. Pursuant to the most recent Second Order Amending Schedule Deadlines, entered December 11, 2007, hearing on the parties' motions for summary judgment is currently scheduled on March 6, 2008, at 1:30 p.m.

2. More than four months following the filing of its opening brief, the United States filed the following documents in support of its reply brief in support of its motion for summary judgment: the Affidavit of Robert J. Sutter and the Third Affidavit of David A. Jarvis. The Districts submit it is proper for this Court to strike said affidavits and attachments thereto, together with the related argument set forth in the United States reply memorandum.¹ The identity of and testimony of Mr. Sutter was never disclosed to the Districts prior to its receipt of

¹ The relevant argument is set forth at pages 2 (final sentence of the second full paragraph), p. 5 (last 4 sentences of footnote 3), 9-13 (Section III), and 10 (final sentence of the Conclusion).

the United States' reply memorandum, even at the instance of discovery and deposition requests and proceedings related to the testimony and subject matter of his late-disclosed testimony.² In addition, the Third Affidavit of David A. Jarvis, a paralegal providing contract services for the government, principally attaches a copy of Attorney General Opinion No. 87-6, dated July 31, 1987. The United States asserts this attorney general opinion supports an argument first advanced by its reply memorandum to the effect a portion of the highly relevant Idaho Minimum Stream Flow Act is unconstitutional. The United States' opening brief, response brief, and related testimony is void of any reference to the identity of or testimony of Mr. Sutter, and is devoid of any argument to the effect any portion of the Idaho Minimum Stream Flow Act should be deemed unconstitutional or to any reference to or citation to Attorney General Opinion No. 87-6.

3. It is important to note that the affidavits, attached Attorney General Opinion, and argument at issue were not supplemental to earlier factual showings or argument advanced by the United States, rather the affidavits, attachments and argument present new and different witness/affiant testimony, factual information and legal argument, in violation of the time limits set forth in Rule 56(c), Idaho Rules of Civil Procedure, and its presentation in this fashion significantly prejudices the Districts in that they are precluded from responding to legal

² Upon receipt of the Affidavit of Mary Mellema, filed by the United States with its response brief, the Districts requested and conducted the deposition of Mary Mellema, as well as the Rule 30(b)(6) deposition of the United States representative most knowledgeable concerning the administration of and compliance with the contracts at issue in this case. See Notice of Deposition Duces Tecum of Mary Mellema (December 19, 2007), and Notice of Rule 30(b)(6), Idaho Rules of Civil procedure, Deposition Duces Tecum (December 19, 2007). As is discussed in the District's reply brief in support of their motion for summary judgment, it was discovered during the course of Ms. Mellema's deposition, that she lacked personal knowledge of significant issues which were referenced in her affidavit, and had never reviewed any of the contracts relevant to this case. See Pioneer Irrigation District's and Settlers Irrigation District's Reply Brief, pp. 11-15 (February 14, 2008). The United States now improperly attempts to cure these significant deficiencies with the delinquently-disclosed affidavit testimony of Mr. Sutter.

arguments and/or to depose Mr. Sutter to contradict his statements. *See Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 6, 981 P.2d 236, 241 (1999). Furthermore, the United States made no showing of good cause for failing to comply with the time limits of Rule 56(c). *Id.* The conduct of the United States clearly places the Districts at a disadvantage, as there is no procedure in the state of Idaho for sur-reply, and time remaining prior to the currently-scheduled hearing on the motions for summary judgment does not permit deposition of (including the time for completion of the transcript) Mr. Sutter.

4. “It is well accepted that raising of new issues and submission of new facts in reply briefs is improper.” *Schwartz v. Upper Deck Company*, 183 F.R.D. 672, 682 (S.D.Cal. 1999), *citing Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996), *cert. denied*, 522 U.S. 808, 118 S.Ct. 48, 139 L.Ed.2d 14 (1997). In circumstances, such as the present case, where the party provides no justification and seeks no Court approval to submit new issues and testimony with its reply, it is appropriate for the Court to strike the affidavits and related testimony and argument first advanced by the reply. As Chief District Judge B. Lynn Winmill recently wrote:

Plaintiffs have moved to strike a Supplemental Affidavit of Blake Hall (filed with defendants’ Reply Brief), and a portion of the Reply Brief pertaining to arguments regarding Idaho Code § 6-904A. While it was not necessary for the Court to reach the issue concerning that Idaho statute, *it is nevertheless improper to submit new arguments, and new affidavits, with a reply brief without justification and without Court approval. See Fort Hall Landowners Alliance v. BIA*, CV-99-52-E-BLW (D. Idaho July 9, 2007). *The Court can find no justification here and so will grant the motion to strike.*

Decoria v. County of Jefferson, 2007 WL 4287481 (D. Idaho December 3, 2007); *see also McDaniel v. Mississippi Baptist Medical Center*, 869 F. Supp. 445, 453 (S.D.Miss. 1994) (“In the interest of fairness, Defendant should not be allowed to raise new grounds for the first time in rebuttal to which Plaintiff will not have the opportunity to provide an adequate response”);

Corson and Gruman Co. v. Nat'l Labor Relations Board, 899 F.2d 47, 51 (C.A.D.C. 1990) ("We require petitioners and appellants to raise all of their arguments in the opening brief to prevent "sandbagging" of appellees and respondents and to provide opposing counsel the chance to respond"). Similarly, in the case at issue, the United States has improperly advanced new testimony, issues and legal argument with its reply, has provided no justification, and has sought no approval from this Court; therefore an order granting the motion to strike is appropriate in this case.

5. In the alternative, in the event this Court determines it is appropriate to consider the testimony and argument first presented by the United States with its reply memorandum, the Districts respectfully submit it is appropriate, pursuant to Rules 56(c) and 56(f) of the Idaho Rules of Civil Procedure, to continue the hearing currently scheduled on the parties' motions for summary judgment to provide the Districts with the opportunity to depose Mr. Sutter, and to respond to the new positions advanced by the United States. In the alternative to granting a motion to strike, and in circumstances where a party is permitted to present new evidence, issues or argument with a reply brief, the Court "should not consider the new evidence without giving the [opposing party] an opportunity to respond." *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996); *see also Green v. Baca*, 219 F.R.D. 485, 487 (C.D. Cal. 2003); *State v. Rubbermaid Inc.*, 129 Idaho 353, 924 P.2d 615 (1996) (where a party submits additional issues by its reply memorandum, the opposing party is permitted to request a continuance pursuant to I.R.C.P. 56(c) and/or submit additional affidavits to contest the issues pursuant to I.R.C.P. 56(f).

On the basis of the foregoing, the Districts respectfully request this Court grant its motion to strike, or in the alternative, continue the hearing on the parties' motions for summary

judgment to permit them to depose Mr. Sutter and respond, via sur-reply, to the new testimony, issues and legal argument advanced by the United States' reply brief.

DATED this 20th day of February, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell - Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20~~th~~th day of February, 2008, I caused a true and correct copy of the foregoing **MOTION TO STRIKE, OR IN THE ALTERNATIVE, RULE 56(f) MOTION** to be served by the method indicated below, and addressed to the following:

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Director
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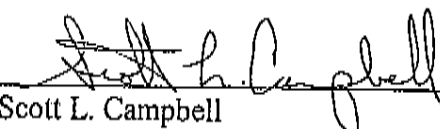
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OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA,
Case No. 39576

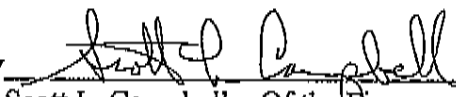
Subcase No. 63-3618
(Lucky Peak Reservoir)

NOTICE OF HEARING

PLEASE TAKE NOTICE that Pioneer Irrigation District and Settlers Irrigation District, by and through their undersigned counsel, will call for hearing its Motion to Strike, or in the Alternative Rule, 56(f) Motion, in the above-captioned Court, on Tuesday, March 4, 2008, at 1:30 p.m., or as soon thereafter as counsel can be heard at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. Telephone participation will be available for the hearing by calling 1-918-583-3445 and entering code 406128 when prompted.

DATED this 20th day of February, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Scott L. Campbell – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

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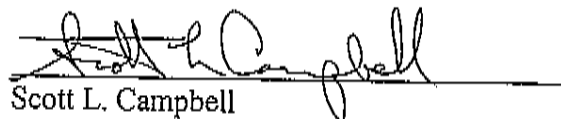
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