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From: Scott L. Campbell **Date:** February 20, 2008
Re: Subcase No. 63-3618 **File No.:** 18946.24
 Lucky Peak Reservoir

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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,
2. *Ex Parte* Motion to Shorten Time for Hearing, and
3. Order Granting *Ex Parte* Motion to Shorten Time for Hearing and Notice of Hearing.

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

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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 Sherri Pillow, and argument first advanced on or
about February 15, 2008, by the City of Boise and Ada County (hereinafter "Participants") in
their 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 respond, via sur-reply, to said testimony, exhibits, issues and argument.

Filed herewith, related hereto, is the District's Motion for Expedited Hearing on this Motion to Strike, or in the Alternative, Rule 56(f) Motion, to allow for hearing on this matter on March 4, 2008, together with the Motion to Strike, or in the Alternative, Rule 56(f) Motion filed by the Districts related to testimony, argument and issues first advanced by the United States reply briefing.

This Motion is made and based upon the following:

1. On or about October 12, 2007, the Districts, the Participants, 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.

2. More than four months following the filing of their opening brief, the Participants filed the following document in support of their reply brief in support of their motion for summary judgment: the Affidavit of Sherri Pillow. The Districts submit it is proper for this Court to strike said affidavit (including the attachments thereto) and the related argument

set forth in the Participants reply memorandum.¹ The identity of, testimony of, and/or affidavit exhibits created by Ms. Pillow were never disclosed to the Districts prior to its receipt of the Participants' reply memorandum. In addition, as was addressed by the Districts' Motion to Strike, or in the Alternative, Rule 56(f) Motion, brought relative to the United States' reply briefing, the Participants also assert for the first time in conjunction with their reply briefing, that an attorney general opinion supports an argument to the effect a portion of the highly relevant Idaho Minimum Stream Flow Act is unconstitutional. *See* Reply Memorandum in Support of Participants' Motion for Summary Judgment, p. 7, n. 5, and 8. The Participants' opening brief, response brief, and related testimony lack any reference to the identity, testimony, or issue raised by the Affidavit of Ms. Pillow, specifically including a suggestion that "vast swaths of the irrigation districts include residential subdivisions, indicating the water is not being used at all and/or not being used for agricultural purposes under federal law," 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 the affidavit, exhibits, and argument at issue in this motion were not supplemental to earlier factual showings or argument advanced by the Participants, rather the affidavit, attachments and argument present new and different witness/affiant testimony, factual information and exhibits and legal argument, in violation of the time limits set forth in Rule 56(c), Idaho Rules of Civil Procedure, and its presentation before the Court in this fashion significantly prejudices the Districts in that they are precluded from responding thereto. *See Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1,

¹ The relevant argument is set forth at page 11 (final 4 sentences of the first partial paragraph); in addition, as is addressed hereinafter, it is proper for the Court to strike the argument set forth at p. 7 (n. 5) and 8 (first paragraph).

6, 981 P.2d 236, 241 (1999). Furthermore, the Participants made no showing of good cause for failing to comply with the time limits of Rule 56(c). *Id.* The conduct of the Participants clearly places the Districts at a disadvantage, as there is no procedure in the state of Idaho for sur-reply.

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) (emphasis added); *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 Participants have improperly

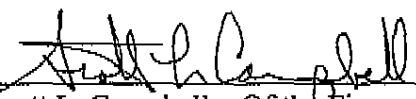
advanced new testimony, issues and legal argument with its reply, have provided no justification, and have sought no approval from this Court; therefore an order granting the motion to strike is appropriate in this case.

5. In the alternative, in the event this Court determines it is appropriate to consider the testimony and argument first presented by the Participants 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 respond to the new positions advanced by the Participants. 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 respond, via sur-reply, to the new testimony, exhibits, issues and legal argument advanced by the Participants' reply brief.

DATED this ~~25th~~ 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ~~25th~~ 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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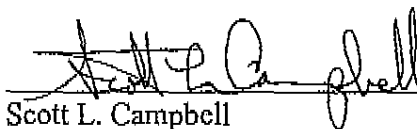
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