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MAR 03 2008

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

Case No. 39576

Subcase No: 63-03618

**PARTICIPANTS' RESPONSE TO
PIONEER AND SETTLERS IRRIGATION
DISTRICTS' MOTION TO STRIKE**

Participants City of Boise and Ada County ("Participants"), body politics of the State of Idaho, by and through their counsel of record, Perkins Coie LLP, submit the following Response to Pioneer Irrigation District and Settlers Irrigation Districts' ("Districts") Motion to Strike.

I. INTRODUCTION

The Districts move this Court to strike certain portions of Participants' February 15, 2008 Reply in Support of Participants' Motion for Summary Judgment ("Participants' Reply") in regard to federal authorizations for Lucky Peak, procedural requirements in the Minimum Stream Flow Act, Chapter 15, Title 42 Idaho Code ("MSFA"), and the Affidavit of Sherri Pillow. Alternatively, the Districts request that the hearing on the motions for summary judgment be

postponed to accommodate sur-reply. On February 25, 2008, Participants were served with the Districts' Motion to Strike. The Districts served the United States with a similar motion on or about February 20, 2008. The Districts' timing for serving this Motion to Strike is entirely unjustified given their service to the United States five (5) days earlier. The Districts have not provided a justification for wanting five additional days to serve Participants with a similar motion directed against Participants' Reply.

Participants' arguments of which the Districts complain were raised by the Districts in their briefs. Federal authorizations for Lucky Peak and the MSFA have been central to the Districts' arguments in this case. Therefore, it is only proper for Participants to address these issues. Participants' Reply is directly responsive to arguments advanced by the Districts and supplements and expands arguments made by Participants in prior briefs. (The Districts' arguments in regard to federal authorizations can be found in the Memorandum in Support of Pioneer Irrigation District's and Settlers Irrigation District's Motion for Summary Judgment ("Districts' Opening Brief") at 5-10 & 13-20; Pioneer and Settlers' Response to City of Boise and Ada County's Motion for Summary Judgment ("Districts' Response Brief") at 19-23; Pioneer Irrigation District's and Settlers Irrigation District's Reply Brief ("Districts' Reply Brief") at 6-11. The Districts' arguments in regard to the MSFA can be found in the Districts' Opening Brief at 27-32; Districts' Response Brief at 7-16; Districts' Reply Brief at 18-24. Participants' arguments in regard to federal authorizations can be found in the Memorandum in Support of Motion for Summary Judgment ("Participant's Opening Brief") at 16-17, Participants' Response to Objectors' Motion for Summary Judgment ("Participants' Response Brief") at 4, and Reply Memorandum in Support of Participants' Motion for Summary Judgment ("Participants' Reply Brief") at 10-13. Participants' arguments in regard to the MSFA can be found in Participants' Opening Brief at 14-16, Participants' Response Brief at 2-3, and Participants' Reply Brief at 3-10.

II. ARGUMENT

A. This Court Must Deny the Districts' Motion to Strike.

This Court has discretion in determining whether to grant a motion to strike. *See Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 6, 981 P.2d 236, 241 (1999). However, motions to strike are generally disfavored. *Sun v. Board of Trustees*, 429 F.Supp.2d 1002, 1030 (C.D. Ill. 2006), *aff'd* 473 F.3d 799 (7th Cir.), *cert. denied*, 127 S.Ct. 2941 (2007); *Western Pub. Co., Inc. v. Mindgames, Inc.*, 944 F.Supp. 754, 755 n.1 (E.D. Wis. 1996).

The Districts allege Participants violated Rule 56(c), Idaho Rules of Civil Procedure ("IRCP"). *Districts' Motion to Strike* at 3. However, IRCP 56(c) provides in relevant part that opposing affidavits be submitted "at least 14 days prior to the date of hearing." The subject matter complained of in the Districts' Motion to Strike is allegedly contained in Participants Reply filed on February 15, 2008. Therefore, the fourteen day time frame required by IRCP 56 (c) has been met, in any event, by Participants.

Finally, as will be shown below, there is no factual or legal basis for the Districts' Motion to Strike for it complains of Participants' responses to arguments initially advanced by the Districts and the Participants are entitled to respond and supplement their arguments. Participants have consistently advanced arguments against the Districts' assertions in regard to federal authorizations and the MSFA and therefore arguments contained in Participants' Reply are proper.

B. The Districts' Central Arguments in this Case Revolve Around Federal Authorization and the MSFA and Therefore Participants are Entitled to Respond.

The Districts' two central arguments in this case are the very ones that they assert are improper for Participants' to address. Indeed, the two central arguments advanced by the Districts are that federal authorizations do not provide legal authority for stream flow

maintenance as a beneficial use and that the MSFA procedures must be followed in this case.¹ The Districts so much as concede this point where they state "[p]articipants 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 MSFA is unconstitutional." Motion to Strike at 3 (emphasis added). Participants are simply responding to arguments in regard to a statute deemed "highly relevant" by the Districts themselves.

C. The Affidavit of Sherri Pillow Does Not Present New Information or Argument

The Affidavit of Sherri Pillow ("Pillow Aff.") does not raise new issues or introduce new legal arguments. The Pillow Aff. simply authenticates aerial maps showing the physical boundaries of the Districts in relation to urban areas in the Boise vicinity. These boundaries are fact and therefore proper for judicial notice with or without the Pillow Aff. to support them. The maps were included in Participants' Reply to rebut arguments advanced by the Districts that federal law is instructive of beneficial use. Participants assert that federal law is not relevant or instructive to the issue of beneficial use and the maps serve to supplement this argument.

Most notably, the Districts do not allege that the physical boundaries indicated by the maps are incorrect. The Districts are undoubtedly aware of their own boundaries and identification of the boundaries by Participants does not constitute a "surprise" nor does it prejudice the Districts in any way.

Participants state a well known fact when pointing out 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." Motion to Strike at 3. The Districts appear to argue that the preceding statement has nothing to do with the MSFA. The Districts

¹ Participants do not agree with the issues as characterized by the Districts. Nevertheless, Participants are entitled to respond to arguments asserted by the Districts.

are correct. The boundary maps and the fact that irrigation districts contain vast swaths of residential subdivisions are in response to the Districts' arguments regarding federal authorizations for Lucky Peak. Participants' citation to an Attorney General's Opinion is in direct response to the Districts' argument that adherence to the MSFA procedures is the only way to protect the separation of powers doctrine.

D. Participants' Reference to an Idaho Attorney General's Opinion Regarding Alleged Mandatory Procedures Contained in the MSFA is Proper.

Participants have consistently argued that the MSFA requirements do not apply to the water right at issue. The Districts appear to ignore the issue of initial application of the MSFA and instead focus on the procedural requirements contained therein. Thus, Participants are obliged to respond to the Districts' arguments.

Participants' arguments regarding the constitutionality of provisions in the MSFA are directly responsive to the Districts' argument that the MSFA procedures for legislative approval are the panacea for adherence to the separation of powers doctrine. Participants are well within their rights to respond to the Districts' separation of powers argument with a citation to an Idaho Attorney General's Opinion raising a separation of powers question regarding the very procedures of the MSFA that the Districts espouse. Even if the Districts were allowed another bite at the apple, there is nothing the Districts can argue that will change the fact that an Idaho Attorney General's Opinion has concluded that a portion of the MSFA relied upon by Objectors is unconstitutional.

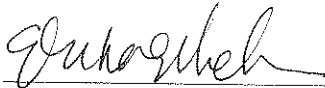
III. CONCLUSION

The arguments advanced by Participants and complained of by the Districts are in response to arguments raised by the Districts and serve to supplement arguments made by Participants in prior briefs. For the reasons setout above, this Court should deny the Districts'

Motion to Strike without a hearing and proceed with the summary judgment hearing on March 6, 2008. Granting the Districts an opportunity to respond via sur-reply does not serve the interests of justice.

DATED: February ^{29th} , 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that, on this 24th day of February, 2008, he/she/they caused to be served on the person(s) listed below in the manner shown:

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