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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

Case No. 39576

Subcase Nos. 63-02529 63-03323
63-03324 63-10435

MOTION TO STRIKE

Claimants Pioneer Irrigation District, Jerry L. Tlucek, Mary Lou Tlucek, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek, through undersigned counsel of record, hereby file this Motion to Strike pursuant to Idaho Rule of Civil Procedure 56(e), Idaho Rules of Evidence 401 and 402, and Rule 1 of this Court's Administrative Order 1. The Claimants respectfully request that the Court strike the following references to and discussions of soils by the State of Idaho, on the grounds that the soil types present at a particular place of use

are not relevant to whether IDWR has the legal authority to impose annual diversion volume limitations on these water rights, given that IDWR did not investigate soils as part of its investigation of these claims in the SRBA and that soils are not a component of IDWR's standard that forms the basis for the annual diversion volume limitations:

- Section I.iii.d, in its entirety, on pp. 7-8 of the State of Idaho's Brief in Response to Claimants' Motion for Summary Judgment, wherein the State discusses "problem soils" at the place of use for water rights 63-3323 and 63-3324 and excerpts a discussion of soils from the deposition of the Claimants' expert witness Terry Scanlan;
- Paragraph 5 of, and Attachment II to, Idaho Exhibit 11: Affidavit of David J. Barber Dated March 25, 2009, wherein the State attaches excerpts and exhibits from the deposition of Terry Scanlan related to soils; and
- The statement on p. 19 of the State's Brief in Response that, "[h]e [Terry Scanlan] also acknowledged that the place of use for water right nos. 63-03323 and 63-03324 has significant impairments related to the shallow soils and other factors that limit irrigation."

This Motion is supported by the Affidavit of Dylan B. Lawrence (the "Lawrence Affidavit"), the Second Affidavit of Dylan B. Lawrence (the "Second Lawrence Affidavit"), and the remainder of the record in this proceeding.

The Claimants respectfully request a hearing on this Motion.

**I.
LEGAL ANALYSIS**

A. Discussion Of Applicable Legal Standards

The Claimants file this Motion in the context of summary judgment proceedings to address the validity of IDWR's inclusion of new annual diversion volume limitations on previously licensed water rights that did not include such limitations. With respect to such summary judgment proceedings, Idaho Rule of Civil Procedure 56(e) provides, in pertinent part, that "[s]upporting and opposing affidavits . . . shall set forth such facts as would be *admissible in evidence*." I.R.C.P. 56(e) (emphasis added). The Idaho Supreme Court "ha[s] held that the question of admissibility of affidavits under Idaho Rule of Civil Procedure 56(e) is a threshold question to be analyzed *before* applying the liberal construction and reasonable inferences rules required when reviewing motions for summary judgment." *Shane v. Blair*, 139 Idaho 126, 128 (2003) (emphasis added) (citing *Rhodehouse v. Stutts*, 125 Idaho 208, 211 (1994)). "The trial court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible." *Id.* (citing *Dulaney v. St. Alphonsus Reg. Med. Ctr.*, 137 Idaho 160, 163 (2002)).

"Evidence which is not relevant is not admissible." I.R.E. 402. In addition, evidence is relevant only if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." I.R.E. 401.

The court's rulings on questions of evidence will be reviewed under an abuse of discretion standard. *Id.* Therefore, a reviewing court will examine whether this court (1) perceived the issue as one of discretion, (2) acted within the boundaries of its discretion and

consistent with applicable legal standards, and (3) reached its decision by exercise of reason.

Sun Valley Shopping Ctr. v. Idaho Power Co., 119 Idaho 87, 94 (1991).

B. The State's References To And Discussions Of Soils Are Not Relevant To Whether IDWR Has Authority To Impose Annual Diversion Volume Limitations On These Water Rights

Simply put, the above-enumerated references to and discussions of soil types that appear in the State's materials are not relevant to these summary judgment proceedings. As agreed upon by the parties, and as approved by this Court, the issue to be addressed in this consolidated summary judgment proceeding is whether IDWR has the legal authority to include new annual diversion volume limitations in the SRBA on previously licensed water rights that did not include such limitations. (*See* Joint Stip. and Mot. for Order Governing Consol. Proc., p. 2; Order Granting Joint Stip. and Mot. for Order Governing Consol. Proc.)

It is undisputed that when it prepared the Director's Reports for these water rights, IDWR did not investigate the soils at the places of use. This is confirmed by Idaho Exhibit 9: Affidavit of Jan Shurte Dated March 11, 2009, Paragraphs 3(b), 4(c), 5(c), and 6(b), in which Ms. Shurte affirmatively states that SRBA field examinations were not conducted on these water rights.

It is also undisputed that the annual diversion volume limitations imposed by IDWR on three of these four water rights is based upon IDWR's standard of 4.5 acre-feet per acre per year of irrigation in the Treasure Valley. In this regard, Director Tuthill specifically testified during his deposition that there are three components to this standard--climate, crops, and irrigation efficiency—as reflected in the following exchange during his deposition:

Q. [by Mr. Lawrence] So my recollection, based on that, is that there are maybe three components to the 4.5-acre-foot-per-acre standard: Climate, an assumption about a crop, and irrigation efficiency which you have already referenced.

Is that a fair summary of the components of the 4.5 acre-foot standard?

A. [by Mr. Tuthill] Yes.

Tuthill Dep., p. 43, LL. 6-13, attached as Exhibit B to the Second Lawrence Affidavit.

In fact, soils were never discussed as a factor in the 4.5 AFA standard, either in the deposition of Director Tuthill in this proceeding, or in the deposition of Director Tuthill on the same issue in subcase 63-3174. (See Second Lawrence Aff., ¶¶ 4-6, Exs. C-E.) Similarly, neither Ms. Shurte's affidavit, nor the Affidavit of Jeff Peppersack Dated March 11, 2009 (Idaho Exhibit 10)—the specific purpose of which is to describe IDWR's 4.5 AFA standard—mention soils.

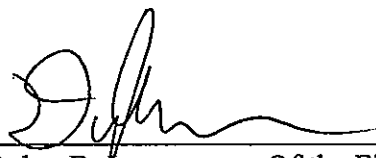
Therefore, soils are totally irrelevant to the propriety of IDWR's annual diversion volume limitations in these subcases. This is simply a factual issue that the State is attempting to manufacture in order to survive summary judgment.

II. CONCLUSION

Evidence presented through affidavit is only admissible for summary judgment purposes if it is admissible pursuant to the Idaho Rules of Evidence. Here, the State has offered evidence and discussion of soils at the place of use for two of these water rights. However, the record demonstrates that soils (i) were not investigated by IDWR as part of its SRBA claim investigation process for these water rights, and (ii) are not part of IDWR's 4.5 AFA standard that forms the basis for the majority of the annual diversion volume limitations. Under these circumstances, the soils at the place of use for these water rights is totally irrelevant to the Court's ruling in this case. Therefore, the Claimants respectfully request that the Court strike and refrain from considering the above-enumerated references to and discussions of soils by the State.

DATED this 2nd day of April, 2009.

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 2009, I caused a true and correct copy of the foregoing **MOTION TO STRIKE** to be served by the method indicated below, and addressed to the following:

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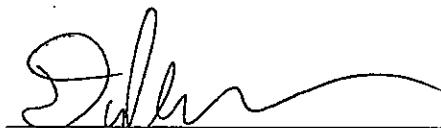
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