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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

REPLY IN SUPPORT OF 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 Reply in Support of Motion to Strike, in accordance with Idaho Rule of Civil Procedure 7(b)(3) and Rule 1 of this Court's Administrative Order 1.

1. In the State of Idaho's Brief in Opposition to Motion to Strike, the State again asserts that a trial is necessary to address the accuracy and appropriateness of IDWR's 4.5

acre-feet per acre per year standard. (State's Br. in Opp., pp. 4-5.) As the Claimants have explained, they disagree with this assertion. (*See, e.g.*, Claimants' Resp. in Opp. of March 26, 2009, p. 9.) However, even if a trial *were* necessary, it would not involve consideration of soils, for the reasons already explained in the Claimants' Motion to Strike. In short, soils is not a component of the 4.5 AFA standard, so there would be no possible avenue for consideration of soils during such a trial. Soils are, therefore, irrelevant under Idaho Rules of Evidence 401 and 402.

2. The State implies that consideration of soils is relevant because the Claimants have somehow invited consideration of soils. (State's Br. in Opp., pp. 5-6.) The fact that Claimants are challenging the inclusion of new limitations on licensed water rights does not somehow convert the topic of soils from an irrelevant one to a relevant one.

3. In order to manufacture a factual issue to survive summary judgment, the State misdescribes the Claimants' position and arguments in this matter. In particular, the State asserts that, "[t]he claimants have put in issue the factual claim that they can use more than 4.5 afa on their own land." (*Id.*) To be clear, the Claimants' have not made representations one way or the other in these summary judgment proceedings as to their particular ability to use water in excess of the 4.5 AFA standard. Thus far, the Claimants' primary argument has been that Idaho Code Section 42-220 and this Court's Facility Volume decision prohibit IDWR from including new restrictions on licensed water rights, regardless of the accuracy of the 4.5 AFA standard.

4. On page 6 of its Brief in Opposition, the State includes a quote from the case of *Venedillin v. Costco Wholesale Corp.*, 140 Idaho 416, 433 (2004),¹ to the effect that, "one may not successfully complain of errors one has acquiesced in, or invited." The State's reliance

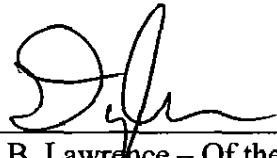
¹ The State's citation indicates that the quote appears at 140 Idaho 416, 434. The proper citation is 140 Idaho 416, 433.

upon this quote is misguided for multiple reasons. First, as explained, the Claimants have never “invited” soils into these proceedings. Second, at this point, the Claimants are not “complain[ing]” on appeal about an “error” made by a lower court, as was the case in *Venedillin*. They simply seek confirmation from this Court that consideration of soils is not relevant to the disposition of their summary judgment motion. Third, it is notable that the sentence immediately preceding the quote relied upon by the State reads, “[n]evertheless, *because of the particular facts of this case*, Costco’s conduct constitutes invited error.” *Id.* (emphasis added). Simply put, the State has not established or explained why a case that by its very terms was decided on its “particular facts” should have any bearing on the proceeding currently before this Court.

DATED this 14th day of April, 2009.

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By



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of April, 2009, I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO STRIKE** to be served by the method indicated below, and addressed to the following:

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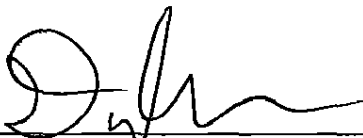
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Date: April 14, 2009

Re: Subcase Nos. 63-02529, 63-03323, 63-03324, and
63-10435
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