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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. 01-00217, 01-00218,
) 01-04024, and 01-04025
) (Minidoka Power Rights)

)
) Subcase Nos. 01-02068 and 01-04054
) (Palisades Power Rights)

)
) **MEMORANDUM IN SUPPORT OF**
) **MOTION FOR PROTECTIVE ORDER**
) **AND MOTION TO LIFT STAY OF**
) **BRIEFING SCHEDULE**
)

The State of Idaho, by and through the undersigned deputy attorney general, hereby submits its *Memorandum in Support of Motion for Protective Order and Motion to Lift Stay of Briefing Schedule*.

I. INTRODUCTION

The State seeks a protective order against all further discovery related to the issues pending on summary judgment. The pending motions were filed in accordance with the trial schedule agreed-to by the parties and ordered by the Court. Parties opposing the motions have had substantial notice of the summary judgment deadlines and were free to conduct discovery accordingly. Those certain parties which now seek to continue the summary judgment deadlines have failed to comply with the requirements of I.R.C.P. 56(f), which sets forth the procedures and standards by which a party may be excused from meeting its summary judgment response deadlines. Those parties have also failed to avail themselves of the opportunity to conduct any discovery in these subcases despite having substantial notice of the summary judgment deadlines. The pending motions for summary judgment are ripe for resolution and should not be frustrated by untimely and immaterial discovery.

A. THERE WAS AN AGREED DEADLINE FOR SUMMARY JUDGMENT.

On November 4, 2008, pursuant to the direction of the Special Master, several parties in the above-captioned subcases met at the Idaho Department of Water Resources (IDWR) office. At the meeting, the parties discussed the trial schedules for the Minidoka, Palisades, and American Falls subcase groups and arrived at a tentative schedule. *See Scheduling Proposal* (Nov. 19, 2008). The United States submitted the schedule discussed at the November 4, 2008 meeting for the Court's consideration, while the State submitted an alternative schedule. *See Proposed Scheduling Order* (Nov. 19, 2008). Both schedules contemplated that motions for summary judgment in the Minidoka Power Rights subcases would be filed by June 4, 2009.

B. THE COURT GAVE NOTICE OF THE DEADLINE FOR SUMMARY JUDGMENT.

After hearing arguments on the proposed schedules on November 20, 2008, the Court

issued its own trial schedule that included the following summary judgment and discovery deadlines in the Minidoka Power Rights subcases:

June 4, 2009	Deadline to file motions for summary judgment and briefs
July 2, 2009	Deadline to file response briefs
July 23, 2009	Deadline to file reply briefs
August 13, 2009	Close of written discovery
August 20, 2009	Hearing on motions for summary judgment

See Trial Schedule Order (Feb. 4, 2009). The Court asked the parties “for any suggestions or comments they may have to the attached draft ‘Trial Schedule Orders’ during the January 29th teleconference” *Request for Comments, Re: Draft Trial Schedule Orders* at 2 (Jan. 13, 2009).

On April 17, 2009, the parties attended their first settlement conference related to the objections to the “historic practices hydropower remark”¹ in the above-captioned subcases. At the outset of the first settlement conference, the parties agreed to attend a second settlement conference and to amend the existing trial schedules to accommodate the second conference. *See Settlement Conference Report* (Apr. 22, 2009). On June 26, 2009, the parties attended the second settlement conference, after which the parties agreed that the historic practices hydropower remark issue was ripe for summary judgment: “[T]his Settlement Moderator and the parties recommend that a Scheduling Conference should be set in order to establish an immediate Summary Judgment Deadline to resolve these issues in the event that a settlement is not

¹ *See e.g., Director’s Report*, Subcase No. 01-00217 (“The appropriator shall exercise this right in a manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes. The appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights.”)

reached.” *Second Settlement Conference Report* at 2 (June 29, 2009).

C. THE COURT EXTENDED THE SUMMARY JUDGMENT DEADLINE UPON REQUEST BY THE PARTIES

On July 1, 2009, the Court amended the trial schedules, including the summary judgment and discovery deadlines in the Minidoka Power Rights subcases as follows:

August 18, 2009	Deadline to file motions for summary judgment and briefs
September 15, 2009	Deadline to file response briefs
October 6, 2009	Deadline to file reply briefs
October 27, 2009	Close of written discovery
November 12, 2009	Hearing on motions for summary judgment

See Amended Trial Schedule Order (July 1, 2009).

On July 31, 2009, the Court held a scheduling conference. At no point during the scheduling conference did any party seek to amend or to continue the pending summary judgment deadlines.

D. BOTH THE STATE AND THE BUREAU OF RECLAMATION COMPLIED WITH THE COURT DEADLINE.

On August 18, 2009, the State of Idaho filed a motion for partial summary judgment and the affidavit of Anthony Olenichak in support thereof. On that same date, the claimant in the above-captioned subcases, the United States Bureau of Reclamation, filed a separate motion for partial summary judgment and the affidavit of David Jarvis in support thereof. Both motions seek the same relief—i.e., inclusion of a remark acceptable to the claimant of the right.

E. THE PARTIES AND THE COURT AGREED TO A NEW EXTENDED DEADLINE.

Following the filing of the summary judgment motions, attorneys John K. Simpson and C. Thomas Arkoosh requested that the State’s affiant, Anthony Olenichak, be made available for

deposition. As a matter of courtesy, the State agreed to make Mr. Olenichak available for a deposition, but expressed its concern that the motions for summary judgment not be significantly delayed. On September 16, 2009, the following attorneys attended the deposition of Mr. Olenichak: John K. Simpson, C. Thomas Arkoosh, James C. Tucker, David I. Stanish, Garrick L. Baxter, Robert Wood, David W. Gehlert, and Candice M. McHugh. In order to accommodate the Olenichak deposition, the State agreed to extend the response brief filing deadline to September 25, 2009 and the Court amended the trial schedule accordingly. *See 2nd Amended Trial Schedule Order* (Sept. 18, 2009).

At the deposition of Mr. Olenichak, Mr. Arkoosh and Mr. Simpson requested an opportunity to depose an IDWR policy-maker regarding the remarks at issue on summary judgment. On September 18, 2009, IDWR offered to make available for deposition former IDWR Director David Tuthill, who had first-hand knowledge of the Director's Report and the remark language at issue on summary judgment. *See Aff. of David I. Stanish*, Attachment I. On that same date, Mr. Arkoosh requested that three additional deponents be made available:

When can the Director be available to speak on behalf of the Department concerning Department policy; when can Lyle be available to speak on behalf of WD 1 concerning WD1 policy? Would there be a third person available who can say what the State of Idaho policy is?

Aff. of David I. Stanish, Attachment II. Mr. Arkoosh provided no written rationale for the relevance of the three additional depositions.

F. THE CONTINUANCE OF BRIEFING ON THE SUMMARY JUDGMENT ISSUES.

On September 23, 2009, the Court *sua sponte* issued an order staying the summary judgment response briefing schedule pending an October 6, 2009 status conference. The Court noted:

C. Thomas Arkoosh called the SRBA Court on September 23, 2009, to request an extension of time in the deadline to file response briefs. However, the court's calendar cannot accommodate a hearing on this request until October 6, 2009.

IN THE INTEREST OF FAIRNESS,

THEREFORE IT IS ORDERED that the deadline to file response briefs is stayed pending the hearing on Mr. Arkoosh's request now set on Tuesday, October 6, 2009 at 11 a.m.

Order Staying Response Deadline Pending October 6, 2009 Status Conference at 1 (Sept. 23, 2009).

The State was not provided any notice of the particular nature of, or particular grounds for, the continuation sought by Mr. Arkoosh during the September 23, 2009 phone call. The State was also not provided any opportunity to respond to the merits of the continuation sought by Mr. Arkoosh.

On September 22, 2009, the Court issued an order setting a status conference for October 6, 2009, apparently to discuss Mr. Arkoosh's desire for a continuation of the summary judgment briefing schedule. As of the date of these motions, Mr. Arkoosh has not filed any pleadings setting forth the basis for the requested continuation or the particular relief requested.

II. DISCUSSION

The State seeks a protective order against any further discovery related to the issues raised on summary judgment pending the Court's disposition of the motions. In addition, the State seeks an order reinstating the briefing schedule to allow the pending motions to be heard according to the agreed-to schedule.

As grounds for this motion, the State asserts that its motion for summary judgment involves a question of law that, if resolved in the State's favor, will be dispositive of the historic practices hydropower remark issue. Further, the State asserts that parties opposing the motion

have had a full and fair opportunity to conduct discovery and that the current requests for deposition are solely for delay.

A. OPPOSING PARTIES HAVE FAILED TO COMPLY WITH THE REQUIREMENTS OF I.R.C.P. 56(f).

Mr. Arkoosh apparently intends to argue that he needs additional time in order to conduct depositions. Mr. Arkoosh has failed, however, to provide the affidavits required to support a continuation under I.R.C.P. 56(f). A party is only entitled to a continuation if “it appear[s] *from the affidavits* of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition.” I.R.C.P. 56(f) (emphasis added). As of the date of this motion, no party has filed any motion, application, or affidavit seeking or justifying a continuation of the pending motions for summary judgment. Absent any such pleadings, any further continuation of these proceedings fails to satisfy the requirements of I.R.C.P. 56(f) and must therefore be denied. *See Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989) (“A party may not simply assert that discovery is necessary and thereby overturn summary judgment when it failed to comply with the requirement of [F.R.C.P.] 56(f) to set out reasons for the need for discovery in an affidavit.”); *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006). Any further delay absent compliance with I.R.C.P. 56(f) is prejudicial to the State’s rights to have its motion for summary judgment heard in a timely fashion.

B. There Is Good Cause to Stay Discovery on the Issues Raised on Summary Judgment and to Hold the Parties to the Briefing Schedule that They Agreed To.

The parties had a full and fair opportunity to conduct discovery prior to the filing of the pending motions for summary judgment, and therefore, they should not now be permitted to obstruct resolution of those motions with untimely discovery requests. The purpose of an

I.R.C.P. 56(f) motion is to prevent opposing parties from being prejudiced by premature or expeditious summary judgment filings; it is not intended to excuse opposing parties' failure to diligently pursue their discovery. *See U.S. ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 426 (8th Cir. 2002) (finding that the purpose of F.R.C.P. 56(f) "is to provide an additional safeguard against an improvident or premature grant of summary judgment . . .") (citations omitted); 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2740 (3d. ed 1998) ("The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective."); *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) ("A movant cannot complain if it fails diligently to pursue discovery before summary judgment."). Here, the parties have had ample opportunity to pursue discovery prior to the agreed-upon summary judgment deadlines.

Nearly two years after the Directors' Report was filed in these subcases, the parties arrived at tentative trial schedules for the Minidoka, Palisades, and American Falls subcase groups. *See Scheduling Proposal* (Nov. 19, 2008). The Court heard oral argument on the tentative trial schedules as well as the alternative trial schedules proposed by the State. At that hearing, the State made clear its desire to file motions for summary judgment. The Court issued proposed briefing schedules and the Court gave the parties an opportunity to comment thereon. *See Request for Comments, Re: Draft Trial Schedule Orders* at 2 (Jan. 13, 2009). No party raised any objection to the schedule deadlines. Thus, all parties have known for nearly a year that the summary judgment deadlines were approaching, yet they took no action to conduct discovery.

All parties similarly supported the *Amended Trial Schedule Order*. Following the first

settlement conference on April 17, 2009, the parties agreed to attend a second settlement conference and to amend the existing trial schedules to accommodate the second conference. *See Settlement Conference Report* (Apr. 22, 2009). No objections were raised to the State's *Motion to Reset Trial Schedule*, and the Court entered its *Amended Trial Schedule Order*.

Following the second settlement conference on June 26, 2009, all parties stated their intention that the issues should proceed to summary judgment without delay: "[T]his Settlement Moderator and the parties recommend that a Scheduling Conference should be set in order to establish an immediate Summary Judgment Deadline to resolve these issues in the event that a settlement is not reached." *Second Settlement Conference Report* at 2 (June 29, 2009). No mention was made of any need to delay the schedule for purposes of conducting discovery. Furthermore, no party sought discovery even though they were on notice as to the deadlines.

On July 28, 2009, the United States and the State submitted a stipulation to the parties containing the remark language currently at issue on summary judgment. Having received no final agreement on the remark language, the United States and the State moved forward with their summary judgment motions as contemplated by the parties and by the Court's scheduling order. *See Second Settlement Conference Report* at 2 (June 29, 2009).

Only after the filing of the summary judgment motions did certain parties opposing the motions indicate an interest in conducting discovery. Initially, their request was limited to the deposition of Anthony Olenichak, the affiant offered in support of the State's motion. As a matter of courtesy, the State agreed to accommodate the opposing parties' desire to depose Mr. Olenichak. The State also agreed to a 10-day extension of the response brief filing deadline in order to accommodate Mr. Olenichak's deposition. *See Motion to Amend Trial Schedule* (Sept. 16, 2009); *Second Amended Trial Schedule Order* (Sept. 22, 2009). No mention was made of the

need for further discovery prior to Mr. Olenichak's deposition.

Despite the opposing parties' agreement that their response briefs would be due on September 25, 2009, Mr. Arkoosh and Mr. Simpson changed their mind. At the Olenichak deposition, they requested additional depositions of those with further knowledge of government policy. Despite the lack of relevance of such testimony, IDWR offered to make available former IDWR Director David Tuthill, who has first-hand knowledge of the Director's Report and the remark language at issue on summary judgment. Mr. Arkoosh, however, decided that he wanted more. Instead of deposing Mr. Tuthill, Mr. Arkoosh now is seeking to depose policy-makers at IDWR, the State of Idaho, and Water District No. 1:

When can the Director be available to speak on behalf of the Department concerning Department policy; when can Lyle be available to speak on behalf of WD 1 concerning WD1 policy? Would there be a third person available who can say what the State of Idaho policy is?

Aff. of David I. Stanish, Attachment II. No grounds for the request are set forth in this communication, let alone in an affidavit as required by I.R.C.P. 56(f). Mr. Arkoosh's failure to follow the Rules of Civil Procedure is prejudicing the State's efforts to have its motions for summary judgment heard.

None of the opposing parties pursued discovery on either the United States or the State in these proceedings prior to the deadline for filing motions for summary judgment. Accordingly, they cannot show good cause for a continuance under I.R.C.P. 56(f). *See Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) ("A movant cannot complain if it fails diligently to pursue discovery before summary judgment."); *Mangum v. Action Collection Service, Inc.*, No. CV-05-507, 2006 WL 2224067, at *3 (D. Idaho Aug. 2, 2006) ("Of course, a Rule 56(f) motion should not be granted when the non-moving party has failed to diligently pursue

discovery of the evidence.”). Interestingly enough, the depositions now sought are not even targeted at the claimant of the water rights, the United States. They are targeted at a non-party, IDWR, and a fellow objector, the State. Thus, there can be no rationale basis for a continuance with respect to the United States’ motion for summary judgment.

The movants’ summary judgment timing and approach was entirely consistent with the parties’ expectations. Again, the parties agreed that summary judgment was due: “[T]his Settlement Moderator and the parties recommend that a Scheduling Conference should be set in order to establish an immediate Summary Judgment Deadline to resolve these issues in the event that a settlement is not reached.” *Second Settlement Conference Report* at 2 (June 29, 2009). Yet, Mr. Arkoosh now seeks to change the schedule that he has supported and agreed to. His failure to conduct discovery in a timely manner is not grounds for granting relief under I.R.C.P. 56(f). *See* 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2741 (3d. ed 1998) (“[A] request for relief under Rule 56(f) is extremely unlikely to succeed when the party seeking the delay has failed to take advantage of discovery.”).

C. THE INFORMATION SOUGHT THROUGH THE PROPOSED DEPOSITIONS IS IMMATERIAL TO THE ISSUES RAISED ON SUMMARY JUDGMENT.

A party “who invokes the protection of Rule 56(f) must do so in good faith by affirmatively demonstrating why he cannot respond to a movant’s affidavits . . . and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant’s showing of the absence of a genuine issue of fact.” *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380 (2005) (quotation and citation omitted). Furthermore, the party seeking to continue summary judgment proceedings “has the burden of setting out what further discovery would reveal that is essential to justify their opposition, making clear what

information is sought and how it would preclude summary judgment.” *Id.* (quotation and citation omitted); *see also Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006) (movant under F.R.C.P. 56(f) must identify by affidavit “the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment”) (citations omitted); *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 797 (8th Cir. 1996) (“To fall under the protection of [F.R.C.P.] 56, a party must articulate what additional discovery is necessary and how it is relevant to the opposition of the pending motion for summary judgment.”). A party shall neither “simply assert that discovery is necessary,” *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989), nor be permitted “to satisfy a . . . speculative hope of finding some evidence [through discovery] that might tend to support a complaint.” *Id.* (citations omitted).

The issues raised on summary judgment in these subcases are legal questions. The United States has moved for summary judgment proposing a limiting remark to be included in its hydropower water rights at Minidoka and Palisades dams. Certain parties now seek to delay the summary judgment briefings by arguing that no such remark should be included, or in the alternative, that the remark should be less restrictive. Under either argument, however, the issues remain the same: May a water right claimant voluntarily limit the exercise of its water right, or may objecting parties force the claimant to accept more than it desires?

The Court in *Idaho Power Co. v. State, By and Through Dept. of Water Res.*, 104 Idaho 575, 661 P.2d 741 (Idaho 1983) held that a holder of a water right may voluntarily limit its right. *Id.* at 587, 661 P.2d at 753 (“We find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property.”). Yet, the opposing parties seek to turn the current motions for summary

judgment into an inquisition about future State policy:

Let me see if I can state this clearly enough for you. I am not simply interested in the language in the presently recommended Director's report, but the present Director's policy of what is necessary for administration and what he may or may not be bound by. Tony's deposition simply revealed that he takes the elements of the water rights, puts them into the accounting program and delivers water. He receives the decrees from the Department. Therefore, the current Director's perspective is relevant, not redundant; nor a waste of time. As we all know, a Director's policy can change from Director to Director. One only needs to look at how the past and current Director have addressed the applicability of the Ground Water Act to pre-1951 rights to see that this could be viewed as a moving target.

Aff of David I. Stanish, Attachment III.

Speculation of what State agencies may do in the future is irrelevant to the question before the SRBA Court—i.e., whether the United States may limit its own water rights. That is a legal question properly decided on summary judgment. To the extent that the opposing parties wish to argue that the United States does not have that right to do so, they are free to make that argument in their response briefs.

Furthermore, administrative issues such those that the opposing parties seek to examine in the proposed depositions are simply not before the SRBA Court. The purpose of SRBA is to determine the nature and extent of water rights; it is not to administer them. To the extent that the opposing parties seek to bind the deponents to administrative positions that may arise in the future, this is simply not the forum. As a result, the policy positions of the various deponents are immaterial to the issue of whether the United States may agree to impose a limitation on its hydropower water rights. That issue is the issue before the Court, and it is an issue of law not policy.

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D. ANY CRITICAL INFORMATION SOUGHT THROUGH THE DEPOSITION OF THE WATER DISTRICT NO. 1 WATERMASTER OR THE IDWR DIRECTOR HAS ALREADY BEEN MADE AVAILABLE.

While the State disputes that there are any facts in dispute, Idaho case law under I.R.C.P. 26(c) recognizes that a trial court does not abuse its discretion when it enters a protective order against a deposition absent some showing that the deponent "had critical information unavailable from another source." *Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 363, 956 P.2d 674, 680 (1998). Here, the parties have already deposed Deputy Watermaster Anthony Olenichak.² The additional deposition of state officials would be duplicative and overly burdensome. Furthermore, the opposing parties cannot show good cause for why deposing a State official or the Director would provide critical information relevant to the legal questions before the court. As such, no purpose would be served by conducting further depositions related to the pending motion for summary judgment.³

III. CONCLUSION

The State as well as the claimant United States Bureau of Reclamation are entitled to have their motions for partial summary judgment heard in a timely manner in accordance with the Idaho Rules of Civil Procedure. I.R.C.P. 56(f) does not permit a continuance where the opposing parties fail to conduct discovery in a diligent manner. The State and IDWR have made available those deponents that have first-hand knowledge of both the Director's Report and the

² IDWR also made available former IDWR Director Tuthill. Opposing parties failed, however, to avail themselves of the opportunity to depose him.

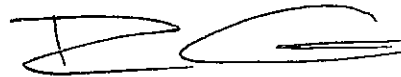
³ To the extent that opposing parties seek to continue the deposition of Mr. Olenichak, the State asserts that Mr. Olenichak was made available for a full day of deposition. The parties' failure to complete any inquiry of Mr. Olenichak is of their own making. They failed to have a court reporter available at the time set for the deposition, which delayed the deposition two and a half hours. In addition, the parties then obtained a court reporter that was unable to continue the deposition past the end of business, despite Mr. Olenichak willingness to extend his availability.

historic use remarks; yet, Mr. Arkoosh has indicated an intent to depose high-ranking government officials on matters wholly irrelevant to the motions for summary judgment. The Court should stay all further discovery related to the issues pending on summary judgment and should reinstate the briefing schedule.

RESPECTFULLY SUBMITTED this 1st day of October 2009.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read 'D. Stanish', with a horizontal line extending to the right.

DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 1st day of October 2009, I caused to be served the original and copies of the **MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND MOTION TO LIFT STAY OF BRIEFING SCHEDULE** on the following persons by the methods indicated:

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Represented by:

US DEPARTMENT OF JUSTICE

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BOISE, ID 83720-0098

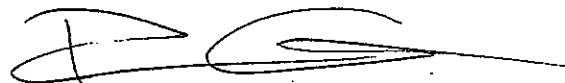
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