

COPY

RECEIVED  
FEB 09 2012  
DEPARTMENT OF  
WATER RESOURCES

LAWRENCE G. WASDEN  
Attorney General

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

MICHAEL C. ORR (ISB # 6720)  
Deputy Attorney General  
Natural Resources Division  
700 West Jefferson Street Room 210  
P.O. Box 44449  
Boise, ID 83711-4449  
Telephone: (208) 334-2400  
Facsimile: (208) 854-8072

*Attorneys for the State of Idaho*

**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. 83-7017, 83-7028, 83-7029,  
) 83-11873, 83-11874, 83-11875, 83-11876  
) and 83-11877  
)

) **STATE OF IDAHO'S MOTION FOR**  
) **CLARIFICATION OF ORDER**  
) **GRANTING MOTION TO WITHDRAW**  
)

The State of Idaho, by and through its counsel of record, hereby moves for clarification of the *Order Granting Motion To Withdraw*, entered in the above-captioned subcases on January 23, 2012 ("*Order*"). The State requests clarification that the *Order's* dismissal "without prejudice" of the claimant's *Motion To File Late Notices of Claim* does not exempt the United States from the requirement to file claims for water rights for

the Dworshak project that were established prior to the commencement of the SRBA. The grounds for such a clarification are discussed below.

The United States, acting through the Army Corps of Engineers (“USACE”), filed a *Motion To File Late Notices of Claim* in these subcases on November 22, 2011, and this Court set a hearing on the motion for February 21, 2012. *Order*.<sup>1</sup> On December 1, 2011, this Court issued its *Order Closing Claims Taking In Basins 23, 24, 25, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86* (“*Closure Order*”). The *Closure Order* provided that subject only to limited exceptions that do not apply here, “claims taking in Basins . . . 83 . . . is closed. No late claims will be accepted for filing in Basins . . . 83 . . . except as expressly provided by this *Order*.” *Closure Order* at 4.<sup>2</sup>

Subsequently, on January 23, 2012, the USACE filed the *U.S. Army Corps of Engineers’ Motion to Withdraw Standard Forms 4*, asserting the SF-4s had been submitted “simply as a matter of comity,” *U.S. Army Corps of Engineers’ Motion to Withdraw Standard Forms 4* at 3 (“*Motion To Withdraw*”), and the USACE “did not intend” to claim or assert in the SRBA any “water rights associated with the Dworshak Dam and Reservoir Project.” *Order* at 1. The USACE did not seek dismissal without prejudice or leave to amend, did not assert that “an additional late claim(s) is required to resolve the related water rights,” *Closure Order* at 4 n.1, and did not otherwise represent or suggest that it had any plans to file more claims (or “comity” notices) for the Dworshak project in the future. *See generally Motion To Withdraw*. On the same date,

---

<sup>1</sup> The State intended to oppose the *Motion To File Late Notices of Claim* at the February 21 hearing to the extent the USACE continued to characterize the SF-4s as “comity” notices rather than water right claims, and also intended to file a short memorandum explaining the State’s position prior to the hearing.

<sup>2</sup> This Court subsequently made a few amendments to the *Closure Order* that have no bearing on these subcases. *Amended Order Closing Claims Taking in Basins 23, 24, 25, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86* (Jan. 3, 2012).

this Court granted the *Withdrawal Motion*, and dismissed “without prejudice” the USACE’s *Motion To File Late Notices of Claim*. *Order* at 1.

Since this Court had already closed Basin 83 for purposes of filing any further claims or late claims, *Closure Order* at 4, the *Order*’s dismissal “without prejudice” of the USACE’s *Motion To File Late Notices of Claim* could be interpreted to mean that the USACE is not or was not required to claim in the SRBA any water rights for uses of water at the Dworshak project prior to the SRBA’s commencement. As discussed below, such an interpretation would create tension with other provisions of law, and the *Order* should be clarified to avoid the potential for ambiguity and confusion in the future.

The SRBA is a general adjudication under Idaho law, Idaho Code §§ 42-1406A-1407, and a comprehensive water right adjudication within the meaning of the McCarran Amendment, 43 U.S.C. § 666.<sup>3</sup> Thus, the United States has waived its sovereign immunity and been joined as a party in the SRBA, and is bound by its decrees. *See U.S.*

---

<sup>3</sup> The McCarran Amendment provides as follows:

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

43 U.S.C. § 666.

v. *Idaho ex rel. Director, Idaho Dept. of Water Resources*, 508 U.S. 1, 8 (1993) (accepting the proposition that pursuant to the McCarran Amendment, the United States has submitted to substantive and adjective Idaho law for purposes of the SRBA).

Like any other person or entity “asserting rights to use water under state law,” or “claiming a right to use water pursuant to federal law,” the United States is required to file an SRBA notice of claim (or a negotiated agreement) in order to obtain a water right. *Commencement Order* (Nov. 19, 1987), at 6-7. Failure to do so waives any claim the United States may have to a water right established under federal law prior to the date of the commencement of the SRBA:

The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system except that the following described water rights shall not be lost by failure to file a notice of claim: . . . (e) a claim to a water right established under federal law, if the priority of the right claimed is later than and junior to the date of entry of the order commencing the general adjudication.

Idaho Code § 42-1420. For these reasons, the USACE’s withdrawal of its late claims SF-4s after this Court had closed Basin 83 for purposes of filing further claims means that as a matter of State and Federal law, the United States has waived any claims it may have for water rights at the Dworshak project that were established prior to November 19, 1987 and not claimed in the SRBA.

The *Order*’s dismissal “without prejudice” of the USACE’s *Motion To File Late Notices of Claim*, however, can be interpreted to mean the USACE has not waived such claims, or that the USACE will not be bound by the final SRBA decree. Thus, the *Order* creates potential ambiguities on important points of State and Federal law, and could have the effect of limiting the scope and effect of the SRBA decree. These are by no

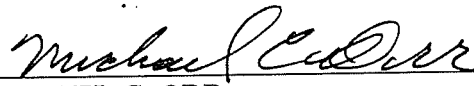
means negligible considerations when one considers the size of the Dworshak project and the potential water rights claims the USACE previously asserted.<sup>4</sup>

Accordingly, the State requests that the *Order* be clarified to confirm that the United States has waived and is foreclosed from filing additional claims for water rights for the Dworshak project that were established prior to the commencement date of the SRBA.

The State requests oral argument on this motion if it is opposed, and also that this Court set a hearing date and briefing schedule.

Respectfully submitted this 8<sup>th</sup> day of February, 2012.

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

  
MICHAEL C. ORR  
Deputy Attorney General

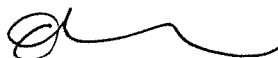
---

<sup>4</sup> For instance, the USACE's SF-4 for Subcase No. 83-11874 asserted the "use and control" of 12,000 cfs at Dworshak Dam for power purposes. Dworshak Dam is a 717 foot structure (only two other dams in the United States are taller), and forms a reservoir with a gross storage capacity of 3,453,000 acre-feet. <http://www.nww.usace.army.mil/html/pub/pi/flood/dworshak.htm>.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8<sup>th</sup> day of February, 2012, I caused a true and correct copy of the STATE OF IDAHO'S MOTION FOR CLARIFICATION OF ORDER GRANTING MOTION TO WITHDRAW to be served on the following parties by the indicated methods:

|                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                |
|------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Original:<br><br>Clerk of the SRBA Court<br>253 Third Avenue North<br>P.O. Box 2707<br>Twin Falls, Idaho 83303-2707                                  | <input type="checkbox"/> U.S. Mail<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Certified Mail, Return Receipt Requested<br><input type="checkbox"/> Overnight Mail<br><input checked="" type="checkbox"/> Facsimile: 208-736-2121<br><input type="checkbox"/> E-mail:                                |
| Copies:<br><br>United States of America<br>Dept. of Defense – Dept. of Army<br>Corps of Engineers<br>201 N. Third Ave.<br>Walla Walla, WA 99362-1876 | <input checked="" type="checkbox"/> U.S. Mail<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Certified Mail, Return Receipt Requested<br><input type="checkbox"/> Overnight Mail<br><input type="checkbox"/> Facsimile:<br><input type="checkbox"/> E-mail:                                             |
| United States Dept. of Justice<br>Environment & Natural Resources<br>550 W. Fort St. MSC 033<br>Boise, ID 83724                                      | <input checked="" type="checkbox"/> U.S. Mail<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Certified Mail, Return Receipt Requested<br><input type="checkbox"/> Overnight Mail<br><input type="checkbox"/> Facsimile:<br><input type="checkbox"/> E-mail:                                             |
| Director of IDWR<br>PO Box 83720<br>Boise, ID 83720-0098                                                                                             | <input type="checkbox"/> U.S. Mail<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Certified Mail, Return Receipt Requested<br><input type="checkbox"/> Overnight Mail<br><input checked="" type="checkbox"/> Statehouse Mail<br><input type="checkbox"/> Facsimile:<br><input type="checkbox"/> E-mail: |

  
\_\_\_\_\_  
Olga L. Valdivia  
Legal Assistant