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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	)	Subcases: 83-07017, 83-07028, 83-07029,
	)	83-11873, 83-11874, 83-11875, 83-11876,
Case 39576	)	and 83-11877
	)	
	)	U.S. ARMY CORPS OF ENGINEERS'
	)	RESPONSE TO STATE OF IDAHO'S
	)	MOTION FOR CLARIFICATION OF
	)	ORDER GRANTING MOTION TO
	)	WITHDRAW STANDARD FORMS 4

On November 17, 2011, the U.S. Army Corps of Engineers ("USACE") filed Standard Form 4 motions in SRBA for the above listed subcases. On January 20, 2012, USACE, through its counsel of record, filed a motion to withdraw those Standard Forms 4. The motion was granted by the SRBA on January 23, 2012. On February 8, 2012, the State of Idaho ("the State") filed a Motion for Clarification of Order Granting Motion to Withdraw. USACE files this response to the State's Motion for Clarification.

The State of Idaho's Motion for Clarification should be denied, as it impermissibly seeks a declaratory judgment on issues that are not ripe and are not necessary to the simple withdrawal of claims made by the United States. The State has requested that the Court clarify its January 23, 2012 Order granting the United States Army Corps of Engineers' Motion to Withdraw Standard Forms 4. The Order dismissed the claims "without prejudice." The State asserts that the Order is unclear because the taking of claims in Basin 83 is closed pursuant to the Court's December 1, 2011 *Order Closing Claims Taking in Basins 23, 24, 25, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86*. The State now seeks to leverage a simple withdrawal of claims into a more complex dispute regarding new legal issues, and asks the Court to enter a declaratory judgment holding 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." *Motion for Clarification* at 5.

As an initial matter, if the State is correct in its assertion that the taking of claims in Basin 83 is closed, and that the exceptions to that closure do not apply, then the issue of whether or not the dismissal is "without prejudice" is moot, and needs no further action. However, the USACE does not object to paragraph 1 of the Order being amended to provide "[T]he *Motions to File Late Notice of Claim* are dismissed with prejudice." But to the extent that the State now is actually seeking a determination of abstract rights to deal with theoretical future circumstances presenting no current controversy, the United States strenuously objects, and the Motion must be denied.¹

¹ In its Motion, the State expresses concern that "[t]he *Order*'s dismissal 'without prejudice' . . . 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." *Motion for Clarification* at 4.

First, the State's attempt to raise a new and significant issue is not timely, as a Rule 59(e) motion "cannot be used to raise issues and offer evidence that in hindsight, the litigant wishes it would have presented prior" to the entry of a ruling. *In re SRBA Case No. 39576*, __ P.3d __, 2012 WL 29338 *4 (Idaho 2012). In its Motion to Withdraw, the United States sought only to withdraw certain claims, and did not ask for any relief on any legal issues. In its Motion, which was served on the State, USACE merely explained that it was withdrawing its claims because of its position that it does not need to assert water rights in this matter.² As noted in the Order, no party filed any response to the Motion to Withdraw. The Court's Order did not address the substantive issue of whether the Corps' legal position is correct, as the Motion at issue was simply one to withdraw the previously filed Standard Forms 4. No substantive legal determination was requested or required in order to simply grant the withdrawal of the claims.

Only in seeking a "clarification" of the Court's Order does the State now attempt to raise and resolve significant issues of law. The State's attempt to raise new issues for resolution is not a timely or proper Motion under I.R.Civ. P. Rule 59(e), and should be denied. *In re SRBA* 2012 WL at *4 ("A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." citing *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir.2000)).

Second, to the extent that the State is seeking a determination of broad and theoretical legal issues, it must be dismissed as unripe. *See Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d

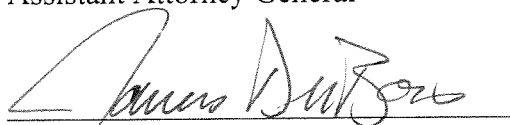
² As the United States explained, the Dworshak Dam and Reservoir Project to which the withdrawn Standard Forms 4 relate was authorized by the Flood Control Act of 1962 (Pub. L. No. 87-874, 76 Stat. 1193) pursuant to an assertion by Congress of the Commerce Clause power, art. I, section 8, clause 3 of the U.S. Constitution. Thus the United States has not asserted water rights in the SRBA in connection with the operation of the Dworshak Project, nor is the use, storage, or control of water in this project for its congressionally authorized purposes amenable to administration by the State of Idaho. Federal use and control of water utilized for the Project involves the exercise of the Commerce Clause Power.

1217, 1220 (2002) (the ripeness doctrine “requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication.”). Here the State raises issues that it might raise at some hypothetical future time if the Corps of Engineers were to seek to file late claims in Basin 83 at some unspecified future date, or if there was some unspecified future conflict regarding water use or rights administered by the State. At this time, there is no real or substantial controversy or a present need for adjudication.

To the extent that the State seeks an amendment to the Court’s Order to provide that the Late Notices of Claim are dismissed “with prejudice,” the United States does not oppose such an amendment. But to the extent the State’s Motion seeks new and substantive determinations from the Court, the Motion is untimely, and the hypothetical issues unripe, and the State’s Motion must be dismissed.

Respectfully submitted this 14th day of March 2012.

IGNACIA S. MORENO
Assistant Attorney General

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JAMES J. DUBOIS
Trial Attorney,
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CERTIFICATE OF MAILING

I certify that on March 14, 2012, I served true and correct copies of the foregoing U.S. ARMY CORPS OF ENGINEERS' RESPONSE TO STATE OF IDAHO'S MOTION FOR CLARIFICATION OF ORDER GRANTING MOTION TO WITHDRAW STANDARD FORMS 4 as follows:

via FedEx mail:

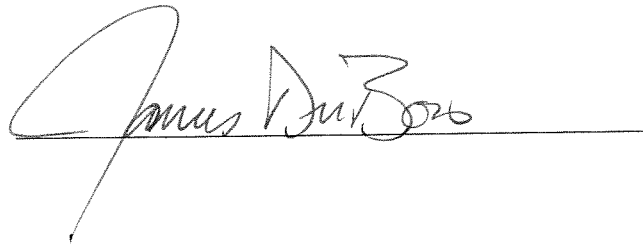
Clerk of the District Court (original + 7 copies)
Snake River Basin Adjudication
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A handwritten signature in black ink, appearing to read "James DuBois", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping underline that extends to the left and then curves back under the name.