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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. 01-2064, 01-2064A-F, and L,
) 01-10042, 01-10042A and B, 01-10053A,
) and 01-10190 (American Falls Subcases), and
) 01-2068, 01-2068D-F, M, and Y, 01-10043,
) 01-10043A and E, 01-10191, and 01-10389
) (Palisades Subcases)
)
) **SUR-REPLY TO STATE OF IDAHO'S**
) **REPLY TO REQUEST FOR**
) **CLARIFICATION OF ORDER ON AMICUS**
) **MOTIONS**
)
)
)

The State of Idaho filed a *Reply On Request For Clarification of Order on Amicus
Motions* on June 27, 2012, wherein it states it is entitled to file a "short reply." This reply raises
new arguments and inaccurately characterizes the Amici's Response to the State's Request for
Clarification and requires a further response from Amici.

1. The Amici are not flouting any order of the Special Master by explaining the reasons that the Amici intend to file a reply to the State's *Response to Motion for Leave to File Amicus Brief*. The State's *Request for Clarification* was filed because there is no order prohibiting the Amici from filing a reply brief, and the State seeks such an order. Amici cannot "flout" an order that has not been issued and that the State only hopes will be issued.

2. The State next presumes to inform the court that the Amici intend to oppose the State's Motion for Summary Judgment which is simply not true. Amici filed an eight page brief informing the Special Master that the Basin 63 and 65 storage rights have been partially decreed and of the potential ramifications in Basin 63 and 65 if the Special Master finds that a remark is required on all storage water rights before any refill can occur as a matter of law, as the State argues in these subcases. Amici are in a very different position than the Basin 01 parties because the Amici's storage rights have already gone to decree without any such remark.

The State filed a sixteen page brief opposing the Amici's Motion for Leave to File an Amicus Brief. Accompanying that brief were three affidavits and three inches of exhibits. The State's brief did not limit its argument to the procedural matter before the Special Master concerning leave to file. Rather the State took the opportunity to re-argue its summary judgment positions 1) that refill of reservoirs after operational releases should be subordinated¹; 2) that "the legal question at the heart of the State's Motion certainly has state-wide application," but nevertheless "does not require a basin-wide issue"²; 3) that Reclamation and the Surface Water Coalition are really the parties that are seeking a refill remark³; 4) that despite the State's recognition that the heart of the State's motion has state wide implication, the Amici do not have a cognizable interest in the Basin 01 proceedings because "subordinated refill "is "fully

¹ State of Idaho's Response to Motion for Leave to File Amicus Brief, pp. 8-11.

² *Id.*, p. 10.

³ *Id.*, p. 11, 14.

consistent with water rights administration” in water districts 63 and 65⁴; and 5) that if the Special Master determines that a remark is required in storage water rights to permit refill, then the Amici have administrative remedies available to them.⁵ Because the State’s Response addresses the substantive merits of the Amicus Brief, Amici intend to respond to the excerpts of records from the Basin 63 and 65 cases cited by the State, the State’s mischaracterization of what happened in those proceedings, and to explain to the court how the positions taken by the State in Response to the Amici’s brief would affect the storage right holders in Basins 63 and 65. Amici do not intend to argue the summary judgment position of the State or any other party.

3. The Summary Judgment schedule will not be disrupted and the State is not entitled to the final word in response to the Amici’s brief. The movant in any motion before the court is entitled to a reply in any action. IRCP 7(b)(3)(E). Here the State’s response to the Motion for Leave to File that Amicus Brief addressed the substantive merits of the underlying brief itself, and mis-characterized the Amici’s brief as a memorandum in opposition to its motion for summary judgment. The Amicus Brief expressed the concerns of Basin 63 and 65 storage water right holders if the Special Master determines that a remark is necessary on all storage water rights before any “refill” of a reservoir may occur after operational releases. The State attempted to create a record showing what it characterizes as the impact of its position. As the initial movant in the Amicus proceeding, the Amici are entitled to file a reply brief answering the State’s response. The position of the Amici is strictly as a friend of the court, as the Special Master recognized in his Order on Amicus Motions.

4. The State asserts that the Amici would have administrative remedies if its decrees are undermined by an adverse ruling in the Basin 01 subcases, but has failed to describe what those

⁴ *Id.*, pp. 12-14.

⁵ *Id.*, p. 15.

remedies might be. In the same breath the State alleges that the Basin 63 and 65 storage rights “have had their day in court,”⁶ which suggests that the State takes a position that *res judicata* might apply to any attempts by the Amici to have their decrees recognize the right to “refill” consistent with how the reservoirs operate today, without any remark. Finally, the State argues that if the District Court denies the Amici’s Petition to Designate Basin Wide Issue, such a denial would constitute proof that “the Amici’s claim lacked merit to begin with.”⁷

Under Administrative Order 1, rule 16.a.1, it is appropriate to designate a basin-wide issue if it “materially affects a large number of parties to the adjudication[.]” Here, the State has already admitted that the Basin 01 refill issue could “has state-wide application,”⁸ therefore, it clearly “materially affects a large number of parties to the adjudication[.]” Furthermore, other reasons the District Court has considered when determining whether it is necessary to designate a Basin Wide Issue include, whether failure to do so risks conflicting determinations in separate courts or proceedings resulting in piece-meal administration, whether taking the matter up in a basin-wide proceeding promotes judicial economy, and whether the question or issue to be addressed broadly affects a significant number of water rights. Since the State agrees that the results will have state-wide application, and has suggested that there are administrative remedies or remedies in other courts available to adversely affected storage water right holder, taking up this matter in a basin-wide proceeding seems the appropriate approach, but the Amici will not know whether the court will address it in that matter or not until September, after the record concerning this issue in the Basin 01 proceedings has been created. In any event, whatever the District Court’s determination concerning the designation of a basin-wide issue, the failure to create one does not mean that “the Amici’s claim lacked merit to begin with.”

⁶ Reply on Request for Clarification of Order On Amicus Motions, p. 2.

⁷ *Id.*, p. 3.

⁸ State of Idaho’s Response to Motion for Leave to File Amicus Brief, p. 10.

5. The Amici are not participating in the summary judgment proceedings, but have filed a brief as a friend of the court to inform the court of the state-wide implications of the questions at issue in those motions. The State submitted a substantial amount of additional record in this action and argued upon that record that the Basin 63 and 65 Amici's contentions in the Amicus Brief were not well taken. Amicus is entitled, as the movant, to reply to that response.

THEREFORE, the Amici respectfully request that this Special Master **DENY** the State's request for further relief that it styles its' Request for Clarification of Order On Amicus Motions.

Dated this 27th day of June, 2012.

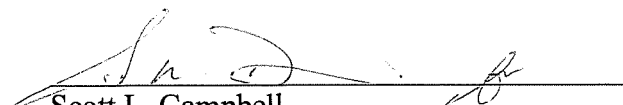
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June, 2012, I served a true and correct copy of the foregoing **SUR-REPLY TO STATE OF IDAHO'S REPLY TO REQUEST FOR CLARIFICATION OF ORDER ON AMICUS MOTIONS** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

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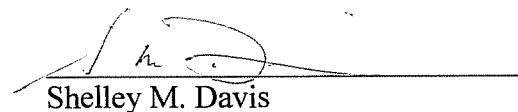
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