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MESSAGE:

Please see the attached Reply to State of Idaho's Response to Motion to Expedite Hearings

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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 No. 00-91017
)
) REPLY TO STATE OF IDAHO'S
) RESPONSE TO MOTION TO
) EXPEDITE HEARINGS
)
)

I. INTRODUCTION

The Black Canyon Irrigation District, New York Irrigation District, Pioneer Irrigation District, Payette River Water Users' Association, and the Boise Project Board of Control ("Petitioners"), by and through their respective counsel of record, hereby submit this Reply to the State of Idaho's Response to the Petitioners Motions to Expedite the

hearing of the Petition to Designate Basin Wide Issue and Motion to Consolidate. In its Response, the State makes a substantial effort to argue that expeditious designation of the Basin Wide Issue and consolidation of the “refill” question is not necessary because the proposed Basin Wide Issue posed by the Petitioners is something very different than the question posed by the State in its Motion for Summary Judgment heard on July 12, 2012, in sub-case no. 01-2064. This Reply is intended only to refute this position of the State. All other matters addressed in the State’s Response will be addressed at oral argument.

II. ARGUMENT

In the proceedings on the Motion to File Amicus Brief in the Basin 01 sub-cases, the Petitioners were allowed the opportunity to file their initial Amicus Brief, which the State opposed in substance under the guise of making a procedural objection.¹ The Special Master granted the Motion for Leave to File the Amicus Brief, but after a request by the State for further clarification, denied the Petitioners an opportunity to reply to the State’s substantive opposition to its argument, which included at least 300 pages of affidavit exhibits.² Therefore, the Summary Judgment proceedings, which could decide the refill issue that clearly has the potential to affect statewide administration and management of all storage water rights in the state, will be decided on an incomplete record, without the Petitioners or other affected parties having an opportunity to defend their rights.

The opening position on “refill” of the State of Idaho in its initial brief for Summary Judgment states:

Idaho law requires that storage “refill” be subordinate to all existing and future water rights because priority “refill” would result in decreeing unquantified, open-end rights to “excess” water. The State’s “refill” remark

¹ See State Idaho’s Response to Motion For Leave to File Amicus Brief, filed in the Basin 01 sub-cases June 20, 2012.

² See Order Clarifying Order on Amicus Motions, Sub-cases 01-2064, et al., date June 27, 2012.

satisfies Idaho law and is consistent with historic reservoir operations and water rights administration.³

In response to this startling position the Petitioners filed their Petition to Designate Basin Wide Issue requesting that this Court take up the question, “[d]oes Idaho law require a remark authorizing storage rights to ‘refill’ space vacated for flood control?” When one compares the State’s position in its opposition to the Motions to Expedite, and the basin wide issue identified by Petitioners, it becomes evident that the State’s argument that its summary judgment motion and the Petition do not present the same issue for resolution lacks merit.⁴

Alternatively, the State takes the position that even if the proposed basin wide issue and the State’s summary judgment motion regarding “refill” do present the same issue, then “[a]ll potentially interested parties will have the opportunity to seek modification of the Special Master’s decision, and to challenge it before the Presiding Judge, if they disagree with it or believe it prejudices their interests.”⁵ In Footnote 12 in the State’s Response to the Motions to Expedite the State admits that the Petitioners are confined to the incomplete record created in the Basin 01 proceedings, but then argues that is appropriate given Petitioners’ failure to become engaged earlier in the Basin 01 proceedings.⁶

First, this Court should take note of the State’s Motion for Summary Judgment filed in January 2012, wherein the State points out that between 2007 and January 2012 the parties to those sub-cases participated in private “protracted negotiations,” and that as of

³See Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment, sub-cases 01-2064 et al, February 21, 2012., p. 3.

⁴See State of Idaho’s Response to Motions to Expedite, p. 12.

⁵Id.

⁶Id.

January 2012, “the factual record, and the law of the case ha[d] been sufficiently developed that the summary judgment issues,” were then capable of being decided on summary judgment.⁷ The State then described the summary judgment motion issues as “threshold matters that must be addressed to establish an orderly and efficient path for developing and resolving any remaining points of dispute.”⁸ The State’s own representations undermine its’ argument that the Petitioners were dilatory and waited until the “11th hour” to make their concerns known. The State did not articulate its troubling “refill” position until it filed its memorandum in support of the Motion for Summary Judgment on February 21, 2012.

Second, the Petitioners in their Motion to Consolidate provided sixteen examples from the State of Idaho’s briefing on Summary Judgment and in the Amicus proceedings which demonstrate that the issues to be resolved on Summary Judgment in the Basin 01 proceedings, and the Basin Wide Issue proposed in this proceeding are not significantly different. A review of the State’s position on summary judgment and in the Amicus proceeding in the Basin 01 sub-cases demonstrates that the Petitioners’ concerns about the potential impacts resulting from the Special Master’s determination on summary judgment are not “speculative” but will have concrete impacts on the administration of Petitioners’ water rights in Basins 63 and 65.⁹

Furthermore, the State’s argument that taking up the Petition to Designate Basin Wide Issue and the Motion to Consolidate expeditiously undermines the docket sheet process fails. The Petitioners’ have provided notice of both the Motion to Consolidate and the Motions to Expedite consideration of both the Petition to Designate and the Motion to

⁷ See State of Idaho’s Motion for Summary Judgment, sub-cases 01-2064, et al, filed January 25, 2012, p. 3.

⁸ *Id.*

⁹ State of Idaho’s Response to Motions to Expedite, p. 13.

Consolidate to all parties listed for service on the docket sheet certificate of mailing. In fact, since the Petition to Designate was filed nine (9) Notices of Intent to Participate, representing thirty (30) parties have been filed in the action. Significantly more parties than those to the Basin 01 sub-cases have made their intent to participate in this Basin Wide Issue known, should it be designated, and the State's argument that expeditious consideration is unwarranted lacks merit.

Expeditious designation of the Basin Wide Issue will provide all potentially interested parties an opportunity to be heard on the "refill" issue before the matter is decided in only the context of the Basin 01 sub-cases on the limited record allowed to be developed there. The "refill" issue raised in the context of the Basin 01 sub-cases does not pose only speculative harm, but has the concrete potential to undermine administration of already decreed storage water rights in Basins 63 and 65. Lastly, the procedural history as articulated by the State demonstrates that Petitioners were not dilatory in their attention to this issue. The State did not articulate its position concerning this issue until it filed its Summary Judgment memo in the Basin 01 sub-cases in late February 2012.

For these reasons, Petitioners request that this Court Grant the Motions to Expedite and take up the Petition to Designate Basin Wide Issue and the Motion to Consolidate at this time.

Dated this 26th day of July, 2012.

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A handwritten signature in black ink, appearing to read "Scott L. Campbell", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2012, I served a true and correct copy of the foregoing **REPLY TO STATE OF IDAHO'S RESPONSE TO MOTIONS TO EXPEDITE** on the person(s) listed below, by facsimile, and electronic mail if available. Filed with the SRBA Court via Facsimile:

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