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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. Attachment A

**SURFACE WATER
COALITION'S MOTION TO
STAY PROCEEDINGS ON
"REFILL" REMARK
OBJECTIONS & SUPPORTING
POINTS AND AUTHORITIES**

**MOTION FOR EXPEDITED
HEARING**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal

Company and Twin Falls Canal Company, (hereinafter collectively referred to as the “Surface Water Coalition,” “Coalition, or “SWC”), by and through counsel of record and pursuant to Administrative Order #1 and I.R.C.P. 7(b)(1), hereby submit this *Joint Motion to Stay Proceedings on “Refill” Remark Objections & Supporting Points and Authorities / Motion for Expedited Hearing*. The Special Master should stay the litigation on the “refill” remark objections currently pending in the Basin 01 subcases for the reasons described below.

PROCEDURAL HISTORY

The procedural history is set forth in the Special Master’s July 27, 2012 *Order on Motions for Partial Summary Judgment* (“Order”). See *Order* at 1-3. Importantly, several parties objected to IDWR’s failure to include proper remarks on the recommendations for the storage water rights at American Falls and Palisades Reservoirs.¹ The State of Idaho then filed a motion for partial summary judgment requesting a “refill” subordination remark. The Court denied the State’s motion, holding “the SWC correctly point out the State has no one-fill rule.” *Order* at 18. The Court further concluded that the “State’s refill remark is not necessary to define and/or efficiently administer the American Falls and Palisades Reservoir irrigation storage rights.” *Id.* The Court issued an initial partial recommendation on August 21, 2012, concluding that “[n]o refill remark is necessary to define and/or efficiently administer the American Falls and Palisades irrigation storage rights.”² See *Order Granting United States’ Motion, Certification, and Partial Special Master Report and Recommendation* at 2.

¹ The United States Bureau of Reclamation (“Reclamation”), A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company all filed objections to the “remarks and conditions” portion of the storage water right recommendations.

² Reclamation filed a motion seeking the partial recommendation. See *The United States’ Motion for Issuance of Special Master’s Recommendation on Refill Issue*. Reclamation alleged that it no longer supported its original claimed refill remark and that it would withdraw such a request. *U.S. Motion* at 2, n. 1. Regardless of the language in the motion, Reclamation has not formally withdrawn any objections with the Court’s authorization, nor can it without the spaceholders’ consent. Notably, the Surface Water Coalition, as entities holding beneficial and equitable title to the storage water rights, still have pending objections to the “remarks.” Accordingly,

At that time the parties were negotiating remaining issues on the storage water rights, which culminated in the filing of a global *Stipulation* on September 25, 2012.³ Accordingly, as of the end of August and early September, all remaining issues in the storage subcases were being addressed through: 1) the negotiations over the stipulation; or 2) a potential motion to alter or amend / challenge process on the partial recommendation.⁴

On September 14, 2012, the Court amended its partial recommendation on the refill issue and clarified “the Special Master did not intend to hold that *no* refill is necessary to define and/or efficiently administer the rights, only that the State’s proposed refill remark is not necessary.” *See Amended Order Granting United States’ Motion, Certification, and Partial Special Master Report and Recommendation* at 2 (emphasis in original). Accordingly, the Coalition’s outstanding objections regarding the lack of a “refill” remark remain at issue and subject to the trial schedule, a marked change from the procedural landscape that existed when the Special Master issued his initial partial recommendation on August 21, 2012.⁵

Concurrent with the summary judgment proceedings in the Basin 01 subcases, irrigation districts and water users in Basins 63 and 65 (“Petitioners”) filed a petition with the Presiding Judge requesting the designation of a basin-wide issue concerning “refill.” *See Petition to Designate Basin-Wide Issue* (Subcase no. 00-91017, June 8, 2012). The Court granted the petition and designated the following basin-wide issue: “Does Idaho law require a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control?” *Order*

Reclamation’s actions do not and cannot solely dispose of the storage water rights without the consent of the equitable title holders.

³ The parties and IDWR held an informal negotiation session on August 23, 2012. The negotiations were successful and resulted in the *Stipulation*. The parties have scheduled another negotiation session on the “refill” remark issue to be held on October 24, 2012.

⁴ This does not include the outstanding ownership objections concerning the City of Pocatello and Idaho Power Company. *See Stipulation* at 6, ¶ 11.

⁵ Consequently, the Coalition and State of Idaho filed a joint motion to amend the trial schedule to accommodate outstanding discovery requests. The Court granted the motion. *See Order Granting Motion to Amend Amended Trial Schedule and 2nd Amended Trial Schedule* (Oct. 1, 2012).

Designating Basin-Wide Issue at 7 (Subcase No. 00-91017, Sept. 21, 2012) (“*BW 17 Order*”).

The Court set a briefing schedule and a hearing on the petition for January 4, 2013.

Currently, the State of Idaho has outstanding discovery requests propounded on the seven individual Coalition entities and Reclamation. *See Notices of Service of State of Idaho’s Discovery Requests* (July 31, 2012). In addition, the North Side Canal Company has outstanding discovery requests propounded on the State of Idaho. *See Notice of Service of NSCC’s Discovery Requests* (August 2, 2012). Although the Coalition and State have agreed to a modified discovery schedule, the trial on the “refill” remarks objections is still set to begin in two months.

ARGUMENT

I. **Proceedings on the “Refill” Remark Objections Should be Stayed Pending Resolution of Basin-Wide Issue 17.**

The primary reason to stay the proceedings on the “refill” remark objections in the Basin 01 subcases is the Presiding Judge’s recent designation of Basin-Wide Issue 17. In his order, Judge Wildman observed the following:

The Court agrees with the Petitioners that the legal issue pertaining to the ability to refill storage water rights under priority when water diverted under a storage right is released for flood control is broadly significant and affects many storage rights throughout the State. . . .

The Court further finds that the issue raised by the Petitioners is better resolved as a basin-wide issue. The storage refill issue is fundamentally an issue of law. . . . Having this Court address the Petitioners’ issue in a basin-wide proceeding also avoids the potential of the same issue being litigated in multiple unrelated subcases before the Special Masters. *Hearing the Petitioners’ issue in a basin-wide proceeding will therefore promote a timelier and more efficient litigation process for the parties and the Court.* And in the setting of a basin-wide issue, all parties interested in the issue of storage refill will be able to equally participate and advocate their respective positions in one setting.

BW 17 Order at 4-5 (emphasis added).

Since the Court has already determined that the “refill” issue is better resolved “as a basin-wide issue,” the Special Master should defer and stay further proceedings in the individual Basin 01 subcases. There is no basis to risk the potential of having the same issue “litigated in multiple unrelated subcases before the Special Masters.”

As described above, the Coalition, State of Idaho, and Reclamation all have pending discovery obligations. In addition, the trial on the “refill” remark objections is set to begin in approximately two months, and less than one month before the oral argument scheduled in the Basin Wide 17 proceeding. Rather than force the parties and the Court to proceed with costly and timely discovery, depositions, and a trial, it would be more efficient and economical to address the issue in a single forum before the Presiding Judge. Moreover, with the hearing on the basin-wide issue scheduled for January 4th, it makes little sense to forge ahead to trial in the Basin 01 subcases in December. The situation is analogous to a judicial review case pending in district court.

For example, in litigation over conjunctive administration in the Surface Water Coalition delivery call, the district court stayed judicial review of IDWR’s administrative orders where the outcome could be affected by a pending Supreme Court decision. *See Order Granting Motion for Stay at 2 (IGWA et al. v. Spackman*, Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-2010-382, December 10, 2010). Also, the facts here are analogous to a case where another action is pending. Although Idaho’s civil rules allow for a dismissal in that situation (I.R.C.P. 12(b)(8)), courts have also stayed actions pending the outcome of another related proceeding. *See e.g., Zaleha v. Rosholt, Robertson & Tucker Chtd.*, 927 P.2d 925, 928, 129 Idaho 532 (Ct. App. 1996). Since the result of the trial over the “refill” remark objections trial may be affected by the outcome of the Basin-Wide 17 proceeding, the Special Master should stay the matter.

In sum, the interests of judicial economy support having the matter addressed in a single basin-wide proceeding and will avoid the problem identified by the Presiding Judge (i.e. “the same issue being litigated in multiple unrelated subcases before the Special Masters.”). The Special Master should stay the litigation on the “refill” remarks objections until the Basin-Wide 17 proceeding is completed.

II. Proceedings on the Refill Remark Objections Should be Stayed Given the Court’s Partial Recommendation.

The Court recently issued a partial recommendation regarding the State’s proposed “refill” subordination remark. *See Amended Order Granting United States’ Motion, Certification, and Partial Special Master Report and Recommendation* at 2. The Special Master recommended that the Presiding Judge not adopt the State’s remark and concluded that it is not necessary to define and/or efficiently administer the American Falls and Palisades irrigation storage rights. *See id.* The Court’s decision was limited to the State’s proposed remark and did not resolve the outstanding objections filed by the Coalition and others. Despite this partial recommendation, the Presiding Judge acknowledged “[t]hose recommendations have not yet come before this Court, as the timeframe for parties to the SRBA to file motions to alter or amend the *Amended SMRR*, and subsequently seek a challenge before this Court, has not run.” *See Basin-Wide 17 Order* at 6.

Pursuant to the Court’s rules and the docket sheet notice, a motion to alter or amend the Special Master’s partial recommendation is not due until Monday October 22, 2012. *See* AO1 § 13.a. Although the State of Idaho has represented that it does not intend to file a motion to alter or amend, any other party to the adjudication could file a motion and initiate the challenge process. Given the unique procedural status of the partial recommendation, that is further reason

to stay the present litigation on the outstanding “refill” remark objections.⁶ After all, if a motion to alter or amend is filed, the parties would face the prospect of litigating the remaining objections before the Special Master at the same time of a challenge proceeding before the Presiding Judge. For the reasons described in the *BW 17 Order*, the parties and the Court would be better served if this issue was resolved in a single basin-wide forum.

MOTION FOR EXPEDITED HEARING

Time is of the essence in ruling on this motion. The Coalition and State have agreed to a modified discovery schedule with the deadline to respond to outstanding discovery requests set for November 2, 2012. The discovery deadline coincides close to the opening brief deadline in the Basin-Wide 17 proceeding (November 9, 2012). An expedited hearing and ruling on this motion could avoid costly and time intensive discovery and depositions over the next few weeks. Given these unique circumstances, the Special Master should exercise his discretion and expedite the hearing on this motion.

CONCLUSION

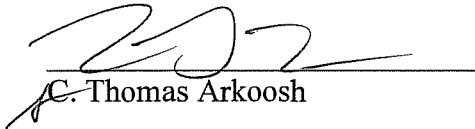
At present, the Coalition and other parties face the prospect of litigating the “refill” issue in three separate forums: 1) a trial in the Basin 01 subcases; 2) a motion to alter or amend the partial recommendation; and 3) the Basin-Wide 17 proceeding. The Presiding Judge has already ruled that the issue should be determined basin-wide, rather than through multiple unrelated subcases before the Special Masters. Given the prospect of costly and timely discovery and what could be an unnecessary trial, it makes sense to stay the litigation over the “refill” remark objections pending the resolution of the Basin-Wide 17 proceeding.

⁶ Any further proceedings on a motion to alter or amend should similarly be stayed in deference to the Basin-Wide 17 proceeding before the Presiding Judge.

In summary, the Special Master should stay further litigation over the “refill” remarks objections until the Presiding Judge concludes the Basin-Wide 17 proceeding. The Coalition respectfully requests oral argument on this motion.

DATED this 10th day of October, 2012.

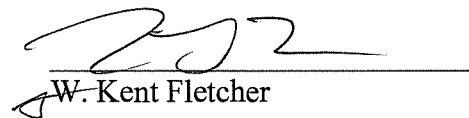
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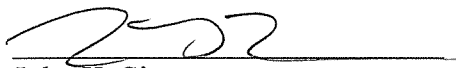
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2012, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S MOTION TO STAY PROCEEDINGS ON REFILL REMARK OBJECTIONS & SUPPORTING POINTS AND AUTHORITIES / MOTION FOR EXPEDITED HEARING** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

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Jackson Lake

01-4055

01-10044

01-10045

01-10045A

01-10045B

01-10196

American Falls Reservoir

01-2064

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01-2064C

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01-10053A

01-10190

Palisades Reservoir

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