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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

)
) Subcase Nos. See Attachment A
)

) **STATE OF IDAHO'S RESPONSE**
) **TO SURFACE WATER**
) **COALITION'S MOTION TO STAY**
) **PROCEEDINGS ON "REFILL"**
) **REMARK OBJECTIONS**
)

The State of Idaho ("State"), by and through its counsel of record, hereby responds to the *Surface Water Coalition's Motion To Stay Proceedings On "Refill" Remark Objections*, filed on October 10, 2012 ("Motion"). The *Motion* should be denied because it seeks to resolve procedural matters that are already pending before the

Presiding Judge under the motion to consolidate filed in Subcase No. 00-91017 (“Basin-Wide Issue 17”). Further, unless the Coalition demonstrates its “refill” objections are limited to the same carefully circumscribed “refill” issue designated in Basin-Wide Issue 17; this Court should deny the *Motion* because it would unnecessarily delay resolution of issues that are beyond the scope of Basin-Wide Issue 17.¹

PROCEDURAL HISTORY

Subcase Nos. 01-2064 (American Falls) and 01-2068 (Palisades) involve license-based claims for water rights to store water in Bureau of Reclamation (“Bureau”) reservoirs.² The Bureau’s SRBA claims asserted the licensed quantities of the American Falls and Palisades water rights “include the right to refill under the priority date of this water right to satisfy the United States’ storage contracts.” *Second Affidavit of Michael C. Orr* (Jun. 19, 2012), Exhibits 13 – 14. The Director’s Reports in Subcase Nos. 01-2064 and 01-2068 recommended that the Bureau’s claim to open-ended “rights to refill” under the licensed priorities be denied.

The Bureau objected to the Director’s Reports, asserting the “quantity” elements of the partial decrees for American Falls and Palisades water rights should include the following “refill” remark: “This water right includes the right to refill under the priority date of this water right to satisfy the United States’ storage contracts.” *See Order Designating Basin-Wide Issue* (Sept. 21, 2012) (“*BWI 17 Order*”), at 3-4. While all members of the Surface Water Coalition also filed objections, only one of them – Minidoka Irrigation District – expressly identified “refill” as an issue, and even then only

¹ The Coalition’s *Motion* does not seek to stay resolution of the objections filed by the City of Pocatello and Idaho Power Company, which are also set for trial on December 10. *Order Granting Motion To Amend Amended Trial Schedule and 2nd Amended Trial Schedule* (Oct. 1, 2012).

² The American Falls claim is based on water right license no. R-269 and the Palisades claim is based on water right license no. R-670. *Affidavit Of Michael C. Orr* (Feb. 21, 2012), Exhibit 30, Exhibit 60.

raised the issue in general terms: “Water right should include the right to refill the reservoir in priority.”³ The objections filed by the other members of the Coalition did not reference or mention “refill” at all.⁴

“The State of Idaho disagreed with the language of the United States’ proposed refill remark [and] proffered [an] alternative remark.” *BWI 17 Order* at 4. This Special Master determined the American Falls and Palisades licenses “contained no such remark” and held the State’s proposed “refill” remark was not necessary to define or efficiently administer the American Falls and Palisades water rights. *Order On Motions For Partial Summary Judgment* (Jul. 27, 2012) (“*Summary Judgment Order*”), at 18.⁵ The United States viewed the Special Master’s reasoning as having “effectively precluded the United States’ proposed [refill] remark as well. . . . As a result, the United States views the Court’s Order as effectively ruling that no refill remark is appropriate and fully resolving the ‘refill’ issue.” *The United States’ Motion For Issuance Of Special Master’s Recommendation As To Refill Issue* (Aug. 20, 2012), at 2. The United States thus stated it “no longer supports” the refill remark sought by its objection, and “withdraws its request for that remark.” *Id.* at 2 n.1; *see also Order Granting United States’ Motion, Certification, And Partial Special Master Report And Recommendation* (Aug. 21, 2012), at 2 (“the United States withdrew its request for that remark”).⁶

³ “Standard Form 1 Objections” filed in Subcase Nos. 1-2064 and 1-2068 on April 19, 2007, by Minidoka Irrigation District, at 3.

⁴ *See generally* “Standard Form 1 Objections” filed in Subcase Nos. 1-2064 and 1-2068 on April 19, 2007, by North Side Canal Company, Twin Falls Canal Company, Milner Irrigation District, Burley Irrigation District, Minidoka Irrigation District, Falls Irrigation District, A&B Irrigation District and American Falls Reservoir District No. 2.

⁵ While this Special Master also stated “the State has no one-fill rule,” *id.*, the Presiding Judge has held “the issue of fill is purely a matter of administration,” while “priority refill . . . is directly related to the quantity element of a water right.” *BWI 17 Order* at 6.

⁶ Although the Special Master initially granted the United States’ motion for entry of “a Special Master’s recommendation holding that no refill remark is necessary to define or effectively administer these water

Thus, the only “refill” issue that remains in these subcases is the issue(s) raised by the Coalition’s “‘refill’ remark objections.” *Motion* at 4; *see also Stipulation* (Sept. 25, 2012), at 6 ¶ 11.⁷ The Coalition’s “refill” remark objections do not propose any “refill” remarks or otherwise illuminate the “refill” issue: as previously discussed, the term “refill” appears in only one of the objections, and none of them assert a “refill” remark is necessary. Nothing in the Coalition’s other filings in these subcases clarify the nature or scope of the Coalition’s undisclosed “refill” remark or the “refill” issues contemplated by the Coalition’s objections. The specific “refill” matters the Coalition seeks to raise through its objections have never been disclosed.

In contrast, the Presiding Judge’s order designating Basin-Wide Issue 17 identified the “the crux of the issue” in that proceeding as “whether Idaho law authorizes the refill of a storage right, *under priority*, where water diverted under that right is released for flood control.” *Order Designating Basin-Wide Issue* (Sept. 21, 2012) (“*BWI 17 Order*”), at 7 (*italics in original*). The Presiding Judge carefully delineated the “refill” issue as follows: “Does Idaho law require a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control?” *Id.* This issue designation is the “primary reason” the Coalition seeks to stay proceedings on its “refill” objections in these subcases. *Motion* at 4.

rights,” *The United States’ Motion For Issuance Of Special Master’s Recommendation As To Refill Issue* at 2 (underlining added), the Special Master subsequently amended the partial recommendation and limited it to the “refill” remark proposed by the State’s summary judgment motion. *See Order Granting United States’ Motion, Certification, And Partial Special Master Report And Recommendation* (Aug. 21, 2012); *Amended Order Granting United States’ Motion, Certification, And Partial Special Master Report And Recommendation* (Sept. 14, 2012).

⁷ The *Stipulation* states, in pertinent part, that it constitutes “a complete resolution of the water right elements and remarks,” except for “the objections filed by Northside and Twin Falls canal companies, and A&B, Burley, Falls, Milner, and Minidoka irrigation districts . . . concerning a ‘refill’ remark for 1-2064, 1-2068, 1-10042, and 1-10043.” *Stipulation* at 6 ¶ 11.

ARGUMENT

I. The Same Procedural Questions Raised By The Coalition's Motion Are Pending Before The Presiding Judge.

The *Motion* should be denied because it seeks to resolve the same procedural matters that remain pending before the Presiding Judge under the *Motion To Consolidate Issue Regarding "Refill" Of Bureau Of Reclamation Storage Rights, Basin-Wide Issue 17, Subcase No. 00-91017* (Jul. 11, 2012) ("*Motion to Consolidate*"). The *Motion to Consolidate* requested that the Presiding Judge issue "an order separating the storage reservoir 'refill' issue now pending in Basin 01 proceedings, and consolidating the same" into Basin-Wide Issue 17. *Motion to Consolidate* at 2. Like the Coalition's *Motion*, the *Motion to Consolidate* argued that ending further proceedings on "the 'refill' issue" in these subcases is "the most expeditious and financially prudent path to resolution, while also minimizing the risk of conflicting decisions." *Id.* In short, the Coalition's *Motion* and the *Motion to Consolidate* rely on the same arguments and require resolution of the same procedural questions.

The *Motion to Consolidate* may well dispose of the questions presented by the Coalition's *Motion*. At a minimum, it would be premature for this Special Master to decide the Coalition's *Motion* without benefit of the guidance of the Presiding Judge's decision on the *Motion to Consolidate*. The Coalition's *Motion* should be denied because it raises procedural questions that are already pending before the Presiding Judge.

II. The Motion Would Unnecessarily Stay Issues That Are Beyond The Scope Of Basin-Wide Issue 17.

The Coalition's *Motion* seeks a stay of the litigation on the 'refill' remark objections currently pending in the Basin 01 subcases," *Motion* at 1, but fails to provide

any explanation or description of the nature or scope of the remark(s) the Coalition intends to seek, or the “refill” issues the Coalition’s objections seek to raise. This is no small matter, as none of the Coalition’s objections assert a “refill” remark is necessary, and only one objection (filed by Minidoka Irrigation District) even mentions “refill.” At no point in these subcases has the Coalition proposed or described a “refill” remark or clarified the issues raised by its generic “refill” objections.

These proceedings are past the point where the Coalition may seek a stay without explaining the nature and scope of the particular “refill” issue(s) the Coalition’s objections raise, and without describing the remark the Coalition seeks. The United States’ objection and the State’s summary judgment motion both proposed specific alternative “refill” remarks. *BWI 17 Order* at 3-4. The Presiding Judge’s order designating Basin-Wide Issue 17 carefully defined the precise “refill” issue to be resolved in those proceedings. *Id.* at 5, 7. The records in these proceedings and in Basin-Wide Issue 17 demonstrate that a number of different issues and remarks can fall under the general label of “refill.” The Coalition’s “refill” objections, however, remain vague and undefined.

Under these circumstances, the Coalition must do more than offer conclusory assertions that “the ‘refill’ issue” in these subcases should be indefinitely stayed. *Motion* at 4-5. The Coalition must explain with specificity what issue(s) its objections raise, and why staying those specific issues is appropriate. Simply referring vaguely to “the ‘refill’ issue” and Basin-Wide Issue 17 is no longer sufficient for these purposes.

These conclusions find support in the Presiding Judge’s order designating Basin-Wide Issue 17. The *Motion* asserts the “primary reason to stay the proceedings on the

‘refill’ remark objections . . . is the Presiding Judge’s recent designation of Basin-Wide Issue 17,” *Motion* at 4, but fails to recognize that the Presiding Judge expressly limited the designated issue to refill “under priority,” and to “space vacated by flood control.” *BWI 17 Order* at 5, 7. The Presiding Judge emphasized “the crux of the issue” was refill “*under priority*,” *id.* at 5 (italics in original), and specifically declined to consider the United States’ request “to expand the issue to include all operation[al] water releases . . . other than irrigation.” *Id.* at 7. The Presiding Judge also denied the Coalition’s request to include additional questions “which . . . pertain to how a storage right is initially filled.” *Id.* at 6.

The Coalition’s “refill” objections are not limited to refill “under priority” or to “flood control,” and allow the Coalition to raise and litigate “refill” issues other than the limited issue in the Presiding Judge designated in Basin-Wide Issue 17. Further, the *Motion* seeks to stay all alleged issues that may arise in “the litigation on the ‘refill’ remark objections currently pending in the Basin 01 subcases,” *Motion* at 1, without qualification or limitation. The plain language of the *Motion* and the Coalition’s vague “refill” remark objections go well beyond the scope of the limited “refill” issue the Presiding Judge carefully defined in Basin-Wide Issue 17. The *Motion* would stay matters outside of Basin-Wide Issue 17 that need not be further delayed.

For instance, there is no need to delay resolution of the question of whether the Coalition’s objections involve collateral attacks on the quantities of the previously licensed water rights for American Falls and Palisades. *BWI 17 Order* at 6 (“the issue of priority refill . . . is directly related to the quantity element of a water right”). Subcase Nos. 1-2064 and 1-2068 are license-based claims, and the underlying water right licenses

do not contain “refill” remarks. *See Affidavit of Michael C. Orr* (Feb. 21, 2012), Exhibit 30 (American Falls license) & Exhibit 60 (Palisades license); *see also Summary Judgment Order* at 18 (rejecting “the State’s refill remark” in part because “[t]he licenses for the American Falls and Palisades Reservoirs contained no such remark”). Because the Coalition’s “refill” remark objections are not limited to the purely legal question defined in Basin-Wide Issue 17, there is no reason to stay the issue of whether the Coalition’s objections would impermissibly enlarge the American Falls and Palisades water right licenses.

Basin-Wide Issue 17 also does not require or support staying the question of whether the Coalition’s objections to the Director’s license-based recommendations are inadequate to the extent they rely on “historical practices.” *See Order Deconsolidating Subcase 00-92026 And Order Of Recommitment To Special Masters, Consolidated Subcase No. 00-92026* (Jul. 1, 2008), at 3 (Presumably, if historical practices of administration, without a supporting legal doctrine, were to be controlling a significant purpose of the adjudication would be undermined.”). For the same reason, there is no need to delay consideration of whether the Coalition’s objections are collateral attacks on this Court’s previous orders disallowing the Bureau’s claims for “refill” water rights at American Falls and Palisades based on historic administration.⁸

Further, the Coalition has signaled that it views “the ‘refill’ issue” as including questions that “pertain to how a storage right is initially filled.” *BWI 17 Order* at 6. Such questions are outside the scope of Basin-Wide Issue 17, and there is no point in delaying

⁸ In Subcase nos. 01-4052 and 01-4056 the Bureau claimed “refill” rights at American Falls and Palisades based on historic beneficial use, pursuant to Idaho Code § 42-243. *See Second Affidavit Of Michael C. Orr* at Exhibit 19 (American Falls; Subcase No. 01-4052) & Exhibit 21 (Palisades; Subcase No. 01-4056). The Director recommended these historic use “refill” claims be disallowed, and this Court entered orders disallowing the claims on November 19, 2009 (01-4056) and May 3, 2011 (01-4052).

resolution of the question of whether the Coalition's "refill" objections are improper attempts to seek judicial review in the SRBA of the Director's administration of water rights. *See id.* ("the issue of fill is purely an issue of administration").

The State agrees the "refill" question designated in Basin-Wide Issue 17 should be resolved in that proceeding and not in these subcases. The Coalition's *Motion*, however, is not limited to the question designated in Basin-Wide Issue 17, but rather seeks to stay any and all "refill" issues that could conceivably arise under the Coalition's objections. Such a stay would be overbroad and unnecessary, and would not serve judicial economy or efficiency.

This Special Master should deny the *Motion* unless the Coalition is willing to come forward and clearly state what "refill" issues its objections seek to raise and resolve. If the Coalition's objections are limited to the issue designated in Basin-Wide Issue 17, then the Coalition should clearly say so and if it does the stay should be granted. If the Coalition's objections raise or contemplate other issues, those matters need not be stayed and should be resolved under the existing schedule. The time for vague and elusive answers to these basic questions has passed, and the Coalition must provide clear and unambiguous answers demonstrating that a stay is appropriate.⁹

CONCLUSION

For the reasons discussed herein, the State respectfully requests that this Special Master deny the Coalition's *Motion*.

⁹ Under the current trial schedule, the Coalition was already required to identify and clarify the trial issues raised by its "refill" objections within the next few weeks. *See Order Granting Motion To Amend Amended Trial Schedule and 2nd Amended Trial Schedule* (Oct. 1, 2012) at 1 (pre-trial statements due November 20; pre-trial hearing on November 29). Requiring the Coalition to provide such a clarification to obtain a stay of trial will not prejudice the Coalition, but would only oblige it to carry its burden under the *Motion*.

Respectfully submitted this 16th day of October 2012.

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ATTACHMENT A

01-02064
01-02064A
01-02064E
01-02064F
01-02064L
01-10042
01-10042A
01-10042B
01-10053A
01-10190
(American Falls Subcases)

01-02068
01-02068D
01-02068E
01-02068F
01-02068M
01-02068Y
01-10043
01-10043A
01-10043E
01-10191
01-10389
(Palisades Subcases)