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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 No. 27-11375
	)	
	)	
Case No. 39576	)	STATE OF IDAHO'S MOTION TO
	)	STRIKE AND BASIN 27 RESPONSE IN
	)	OPPOSITION AND CLARIFICATION
	)	OF CONCERNS

The State of Idaho ("State"), by and through its counsel of record, hereby submits this motion to strike the *Response Brief in Opposition to the Parties' Blackfoot River Equitable Adjustment Settlement Agreement Pursuant to the 1990 Fort Hall Indian Water Rights Settlement Agreement Revised October 17, 2012* filed December 12, 2012 ("Response in Opposition"), and the *Clarification of Basin 27 Water Users' Settlement Agreement "Concerns"* filed on December 21, 2012 ("Clarification of Concerns") in the above captioned subcase.

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BACKGROUND

The issue before the Court relates to paragraph x.d. of water right no. 27-11375. As part of the 1990 Fort Hall Indian Water Rights Agreement, the Shoshone-Bannock Tribes, the United States, the Committee of Nine, and the State of Idaho (hereinafter collectively referred to as the “Signatory Parties”), stipulated that “persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA will continue to receive that full legal entitlement under state law” (hereinafter referred to as “Basin 27 Water Users”). The Signatory Parties further stipulated that, in the event diversions under the Basin 27 Users’ water rights exceeded 45,000 acre-feet per year (“AFY”), the Signatory Parties would negotiate an “equitable adjustment” to water right no. 27-11375. The Signatory Parties have litigated and negotiated issues related to the equitable adjustment for the better part of a decade. As reported to the Court during the December 18, 2012 status conference, the efforts of the Signatory Parties and their technical consultants have, at long last, resulted in an agreement as to the form of an equitable adjustment to water right no. 27-11375 in the event diversions under the Basin 27 water rights protected by the 1990 Fort Hall Indian Water Rights Agreement exceed 45,000 AFY in a given year.¹ The Signatory Parties have also developed a comprehensive Blackfoot River Management Plan, as contemplated by Article 8.3 of the 1990 Fort Hall Indian Water Rights Agreement.

Although the 1990 Fort Hall Indian Water Rights Agreement requires only the Signatory Parties to negotiate an equitable adjustment, the Signatory Parties included the affected Basin 27 Water Users in their negotiations, through their designated Advisory Board (“Advisory Board”). In keeping with this effort, the Signatory Parties presented preliminary drafts of the proposed

¹ To date, it has not been proven that the Basin 27 Water Users’ Blackfoot natural flow diversions ever exceeded 45,000 AFY. The State reserves the right to contest the extent of the Basin 27 Water Users’ Blackfoot natural flow diversions in this subcase and any other future legal proceedings.

Blackfoot River Equitable Adjustment Settlement Agreement to the Advisory Board in September 2012, October 2012, and December 2012. Despite efforts to reach consensus on the equitable adjustment agreement, the Signatory Parties and the Advisory Board have reached an impasse.

During the December 18, 2012 status conference hearing in this subcase, the Signatory Parties informed the Court that they have reached agreement on the form and content of the Blackfoot River Equitable Adjustment Settlement Agreement and of their intention to file a motion with the Court for approval of the Agreement. This Court's *Order Setting Procedure on Proposed Settlement re: Equitable Adjustment* dated December 19, 2012 requires that the Parties file a joint motion asking this Court to accept the proposed Blackfoot Equitable Adjustment Settlement Agreement and stating the legal justification for the Court's acceptance of the Agreement by January 31, 2013. Those who object to the Agreement filed by the Signatory Parties may then file an objection to the joint motion on or before February 14, 2013, with oral argument on the joint motion to be held February 22, 2013.

ARGUMENT

Pursuant to I.R.C.P. 12(f), the State requests that the Court strike the Response in Opposition and the Clarification of Concerns filed by the Advisory Board. The grounds for this are: (1) The Advisory Board is not authorized to represent the interests of the Basin 27 water users in this matter; and (2) The pleadings seek to prematurely oppose a settlement agreement that has yet to be submitted to the Court.

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A. The Court Should Strike the Response in Opposition and the Clarification of Concerns Because the Advisory Board Has No Authority to Represent the Interests of the Basin 27 Water Users

The Advisory Board represented to the Parties that it was authorized to represent the Basin 27 water users in negotiations regarding the Blackfoot Equitable Adjustment Settlement Agreement. In reliance on this representation, the Signatory Parties negotiated in good faith with the Advisory Board and provided the Advisory Board proposed settlement documents, and technical information pertaining to the equitable adjustment. These documents were provided to the Advisory Board subject to the confidentiality provisions of Idaho Rule of Evidence 408.

Despite the Advisory Board's previous representations that it was authorized to negotiate with the Parties on the equitable adjustment, Mr. Marvin Yancey, who is a member of the Advisory Board, stated at the December 18, 2012 status conference hearing in this subcase: "My understanding of the advisory board from the meetings, from our annual meetings, the advisory board was set up to work with and give approval to the Blackfoot River Management Plan and not for the equitable adjustment agreement. . . . So I believe that our authority was to agree to the Blackfoot River Management Plan for our users, not to agree to the equitable adjustment for our users." *Transcript, December 18, 2012 Status Conference Subcase No. 27-11375* p. 41, L. 20 to p. 42, L. 5. If, as Mr. Yancey stated, the Advisory Board was only empowered to represent the other Basin 27 water users in the drafting and implementation of the Blackfoot River Management Plan, then they are not authorized to represent their interests or their opinions to the Court on the Blackfoot Equitable Adjustment Settlement Agreement.

This lack of concrete authority was further illustrated during the status conference when counsel for another Basin 27 water user denied the Advisory Board represented his client's interests in the negotiations and appeared to have been unaware that the Advisory Board was

participating in negotiations with the Signatory Parties. *Transcript, December 18, 2012 Status Conference Subcase No. 27-11375* p. 37, Ls. 5-9. Thus, the Advisory Board, should not be permitted to submit pleadings on behalf of the Basin 27 Water Users.

Moreover, even if the Advisory Board had authority to represent the Basin 27 Water Users, such representation would have to be through a licensed attorney not through the individual Advisory Board members. Idaho law precludes anyone other than a licensed attorney from representing someone other than him or herself. I.C. §§ 3-104, 420. This Court has previously ruled that subchapter “S” corporations and partnerships are not entitled to *pro se* representation by a non-lawyer in the SRBA. *In re SRBA, Case No. 39576, Order Denying Paul Nettleton’s Request to Represent a Limited Partnership; and Order Rescheduling Hearing* (Aug. 20, 1993); *In re SRBA, Case No. 39576, Subcase Nos. 34-00057 and 34-00058, Order Denying Gordon Fulton’s Request to Represent Subchapter “S” Corporation* (February 2, 1994). Similarly, non-lawyer members of the Advisory Board are not entitled to represent the Basin 27 water users either individually or as a group in this subcase.

Because the Advisory Board has no clear authority to represent the interests or opinions of the Basin 27 water users, the State requests that the Court strike the Response in Opposition and the Clarification of Concerns.

B. The Court Should Strike the Response in Opposition and the Clarification of Concerns Because They Are Premature

The filing of the Response in Opposition and the Clarification of Concerns is premature. First, these documents attempt to place before the Court a settlement proposal that has not yet been submitted to the Court. Until a settlement proposal is submitted to the Court, with the Signatory Parties’ signatures, there is nothing in the record to which to object. The Advisory Board is preemptively opposing a yet to be submitted settlement agreement. The document filed

with the Response in Opposition is not a final settlement agreement, but rather is merely a draft settlement document.

Additionally, the Advisory Board and Mr. Yancey have filed draft settlement documents with the Court without providing any of the relevant technical data or historical context. Presenting draft confidential settlement proposals to the Court in this manner is prejudicial to the Signatory Parties who drafted the proposals in consideration of both a vast amount of information generated by technical consultants and first-hand knowledge of the original signatories' intent in negotiating the Fort Hall Agreement.

This Court's *Order Setting Procedure on Proposed Settlement re: Equitable Adjustment* dated December 19, 2012 ("Order") states the Parties shall file a joint motion asking the Court to accept the proposed settlement agreement and stating reasons therefor by January 31, 2013. Order at 2. Those who object to the proposed settlement may then file an objection to the joint motion on or before February 14, 2013. *Id.* At that time, it will be appropriate for the Basin 27 water users to support or oppose the proposed settlement, as they choose, either individually, or through counsel. The Response in Opposition and Clarification of Concerns were filed prematurely and fall outside the Court's Order. Therefore, the State requests that the Court strike the Response in Opposition and the Clarification of Concerns.

CONCLUSION

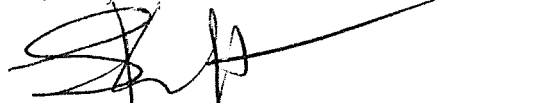
While the State fully supports and encourages the participation of the Basin 27 Water Users in this proceeding, the filing of this motion is necessary to ensure the record in this matter is properly developed. This Court's Order establishes the appropriate procedure for supporting or opposing the settlement agreement and ensures that all parties will have a full and fair opportunity to submit admissible evidence and argument on the merits of the proposed Blackfoot

Equitable Adjustment Settlement Agreement. Therefore, the State respectfully requests that the Court grant its motion to strike the Response in Opposition and the Clarification of Concerns.

Respectfully submitted this 3rd day of January 2013.

LAWRENCE WASDEN
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CLIVE J. STRONG
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SHASTA KILMINSTER-HADLEY
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of January 2013, I caused a true and correct copy of the foregoing STATE OF IDAHO'S MOTION TO STRIKE to be filed with the Court and served on the following parties by the indicated methods:

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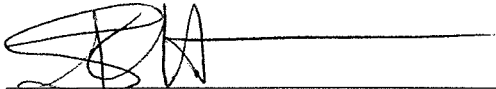
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