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Adjudication Bureau

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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 Exhibit A
	)	
Case No. 39576	)	STATE OF IDAHO'S MOTION FOR PERMISSIVE
	)	REVIEW OF SPECIAL MASTER'S SEPTEMBER 13, 1996,
	)	SECOND AMENDED ORDER ON SUMMARY JUDGMENT
_____	)	AND MEMORANDUM IN SUPPORT

DESCRIPTIVE SUMMARY

This document is the *State of Idaho's Motion for Permissive Review of Special Master's September 13, 1996, Second Amended Order on Summary Judgment and Memorandum in Support.*¹

¹ The State of Idaho is appearing in its sovereign capacity and in its proprietary capacity on behalf of those agencies that filed claims in the Snake River Basin Adjudication: Idaho Department of Transportation, Idaho Department of Fish and Game, Idaho Department of Parks and Recreation, Idaho Department of Lands, Idaho Department of Health and Welfare, Idaho Board of Education, Idaho Water Resource Board, and Idaho Division of Military.

MOTION

The State of Idaho moves the Court to grant permissive review of the Special Master's September 13, 1996, *Second Amended Order on Summary Judgment* ("Order"). This motion is based on Rule 11.d. of the SRBA Administrative Order 1 ("AO1") which provides for permissive review of a Special Master's interlocutory determination by the Presiding Judge "where the interlocutory determination involves a controlling question of law as to which there are substantial grounds for difference of opinion and in which immediate consideration of the determination may advance the orderly resolution of the litigation."

Special Master Haemmerle's September 13, 1996, *Second Amended Order on Summary Judgment* ("Order") held that "the priority date and amount of water one is entitled to use vests at the time an appropriation is complete. . . . Absent a claim of forfeiture, abandonment, adverse possession, or estoppel, a reduction in beneficial use after a water right vests is not a basis upon which a water right may be lost or reduced." *Order* at 8. The Order further held that "where a claimed element matches a previously decreed element, regardless of whether the Director's Report states a different element, the court finds that there is no question of material fact and summary judgment will be granted to those elements as a matter of law." *Order* at 14. The Order also holds that parties to the SRBA are collaterally estopped by the *New International Mortgage Decree* even though neither they nor their predecessors and interests were parties to that decree.

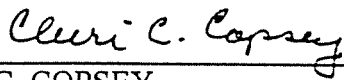
In summary, the State of Idaho contends that the Special Master erred as a matter of law in several ways. The Order is wrong in its application of the statutory requirements for establishing and decreeing actual beneficial use (Idaho Code § 42-1402); the burdens of proof for

establishing a claimed water right; the application of *res judicata* and collateral estoppel to non-parties; the ruling as to the role of the Director in investigating and recommending decreed rights; the effect of the New International Decree; and the relationship between beneficial use, reasonable beneficial use and forfeiture.

These matters clearly involve significant issues in these subcases and the entire SRBA. Moreover, they involve controlling questions of law as to which there are substantial grounds for difference of opinion and of which immediate consideration of the determination would advance the resolution of these subcases and the entire SRBA. Therefore, immediate appeal is appropriate and this Court should grant this motion.

DATED this 27th day of September, 1996.

ALAN G. LANCE
Attorney General



CHERI C. COPSEY
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 27th day of September, 1996, I served a true and correct copy of the foregoing STATE OF IDAHO'S MOTION FOR PERMISSIVE REVIEW OF SPECIAL MASTER'S SEPTEMBER 13, 1996, SECOND AMENDED ORDER ON SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT by placing the same in the United States mail, postage prepaid, to the following:

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EXHIBIT A

Subcase Nos:

36-00003A
36-00003C
36-00003E
36-00003F
36-00034B
36-00035J
36-00039C
36-00039E
36-00039J
36-00039N
36-00047
36-00061
36-00062
36-00063
36-00064B
36-00079
36-00085A
36-00086C
36-00092
36-00103F
36-00106
36-00108B
36-10283B
36-10409