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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. 63-303, 63-3613, 63-3614, and
63-3618

**RESPONSE TO MOTION TO ALTER OR
AMEND PARTIAL DECREES FOR
WATER RIGHT NOS. 63-303, 63-3613, 63-
3614, AND 63-3618**

COMES NOW the City of Boise (“City” or “Boise”), by and through its attorneys of record, McHugh Bromley, PLLC, and files this *Response to Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-3614, and 63-3618* (“Response”).

On February 19, 2019, the State of Idaho filed three motions: (1) *Motion to Decree Water Right No. 63-33724B and Disallow Water Right Claim Nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738*; (2) *Motion to Decree Water Right No. 63-33734A*; and (3) *Motion to Alter*

or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-3614, and 63-3618

(“Motion to Alter or Amend”) (collectively referred to herein as the “February 19 Motions”).¹

On March 5, 2019, the Court issued a *Notice of Hearing* in the above-captioned subcases, setting a hearing date of May 21, 2019, and ordered the filing of responses to the Motion to Alter or Amend consistent with A.O. 1. The City hereby files this response.

The February 19 Motions are interrelated, in that in order to issue partial decrees for the Boise River reservoir refill water rights, 63-63-33732, 63-33733, 63-33734, 63-33734A, 63-33734B, 63-33737, and 63-33738 (“Late Claims”), it requires the re-opening of the reservoir base rights, 63-303, 63-3613, 63-3614, and 63-3618 (“Base Rights”). As stated in the Motion to Alter or Amend, “This motion is related to the concurrently-filed motions to decree water right nos. 63-33734A and 63-33734B, and should be noticed and considered in conjunction with those motions.” *Motion to Alter or Amend* at 5.

In the SRBA, the City was actively involved in pursuit of nearly two hundred of its own water rights from ground water and surface water in Basin 63, as well as the base right for Lucky Peak, 63-3618 (“Lucky Peak Base Right”). In the litigation involving the Lucky Peak Base Right, the City was an active party. *See Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim*, Subcase No. 63-03618 (September 23, 2008) (“Lucky Peak Decision”); *Reply Memorandum in Support of [City of Boise]’s Motion for Summary Judgment* (February 15, 2008); *Memorandum in Support of Motion for Summary Judgment (City of Boise)* (October 15, 2007); *Motion for Summary Judgment (City of Boise)* (October 15, 2007); *Order Granting Motion to Participate (City of Boise)* (September 5, 2007). The Lucky Peak Base Right was decreed by the Court more than

¹ Filed contemporaneously herewith is the *City of Boise’s Motion to Participate* in SRBA subcase nos. 63-33732, 63-33733, 63-33734, 63-33734A, 63-33734B, 63-33737, and 63-33738.

ten years ago, on December 18, 2008. The Arrowrock base rights, 63-303 and 63-3613, were decreed in 2007, and the Anderson Ranch base right, 63-3614, was decreed in 2009. As a party to the Lucky Peak Base Right, and as the owner of nearly two hundred water rights in Basin 63 that could potentially be affected by the re-opening of the Lucky Peak Base Right, the City files this Response to the Motion to Alter or Amend.

According to the Motion to Alter or Amend, filed pursuant to I.R.C.P. 60(b)(6), the reason for re-opening the Base Rights is to include two conditions. The first condition, to be included in the “Quantity element,” relates to combined use, with inclusion of the water right numbers that are intended to be associated with refill. *Motion to Alter or Amend* at 2. The second condition, to be included in the “Other Provisions element,” relates to storage “reset.” *Id.* According to the State, it is proper to review the Motion to Alter or Amend under I.R.C.P. 60(b)(6), “because addition of the above-described remarks to the partial decrees for [the Base Rights] is a limited amendment and necessary for the efficient administration of the water rights under the proposed settlement of the ongoing disputes over the ‘fill’ and/or ‘refill’ of the storage water rights for on-stream reservoirs in Administrative Basin 63.” *Id.* at 2-3.

The City does not contest whether the Motion to Alter or Amend meets the standards of I.R.C.P. 60(b)(6), as that is the province of the Court in review of its prior judgments. Setting those standards aside, and if the Base Rights are allowed to be re-opened, the City’s interest is to ensure the status quo is maintained, so there is no change as to the interpretation of the Base Rights, how the Base Rights have historically been administered, and how any change to the Base Rights could affect administration.

The City’s interest in maintaining status quo relates directly to its past participation in the Lucky Peak Base Right, evidenced by the City’s support of water for “Streamflow Maintenance

Storage” and “Streamflow Maintenance from Storage.” *Lucky Peak Decision* at 12. There, some parties to the litigation argued the water for Streamflow Maintenance (“SFM”) constituted an in-stream flow water right and should be disallowed. *Id.* at 3. The City took the position that water diverted for SFM was a beneficial use. *Memorandum in Support of Motion for Summary Judgment (City of Boise)* at 12; *Lucky Peak Decision* at 3. Judge Melanson ultimately held water for SFM was diverted, did not constitute an in-stream flow, and should be partially decreed in specific quantities. *Lucky Peak Decision* at 35.

While the addition of language related to combined rights may seem innocuous, the rights that are referenced pertain to the Late Claims, and are new water rights, based on beneficial use, that have not previously been administered as water rights. Therefore, the City wants to ensure that simply listing those existing beneficial uses that would now be recognized as water rights in the “‘Quantity’ element” of the Lucky Peak Base Right will not affect how water has historically been administered. *Motion to Alter or Amend* at 2. Potentially more complicated is the addition of an administration condition in the “‘Other Provisions’ element” of the Lucky Peak Base Right. *Id.* The proposed administrative condition was not previously listed on the face of the Lucky Peak Base Right and is substantive in nature with: (1) specific cut-off dates; (2) defining an “annual time period for accounting;” (3) references to “the day of allocation;” and (4) when “natural flow . . . accru[es].” *Id.*

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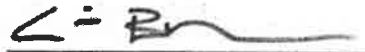
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The City hereby files this Response in order to ensure that it is entitled to fully participate in any and all proceedings that could impact the Lucky Peak Base Right, to which the City was an active party.

RESPECTFULLY SUBMITTED this 12th day of March, 2019.

MCHUGH BROMLEY, PLLC

A handwritten signature in black ink, appearing to read "C. M. Bromley", written over a horizontal line.

CHRIS M. BROMLEY

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CERTIFICATE OF SERVICE

I certify that on this 12th day of March, 2019 I caused to be served a true and correct copy of the foregoing upon the following persons by United States mail and electronic mail:

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