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DEPARTMENT OF
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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. 63-303, 63-3613, 63-3614, and 63-3618
	)	
No. 39576	)	STATE OF IDAHO'S REPLY BRIEF RE: CITY
	)	OF BOISE'S RESPONSE TO MOTION TO
	)	ALTER OR AMEND PARTIAL DECREES
	)	FOR WATER RIGHT NOS. 63-303, 63-3613,
	)	63-3614, and 63-3618
	)	

INTRODUCTION

The State of Idaho ("State"), by and through its attorneys of record, and pursuant to SRBA Administrative Order 1, the Idaho Rules of Civil Procedure, and this Court's *Notice Vacating and Resetting Hearing* (Apr. 5, 2019), hereby submits this reply in support of the *Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-3614, and*

63-3618, which was filed by the State on February 19, 2019 (“*State’s Motion*”).¹ In this reply brief, the State only addresses the City of Boise’s *Response to Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-3614, and 63-3618* (Mar. 13, 2019) (“*Response*”). The State replies to the City of Boise’s separate *Motion to Participate* in subcases 63-33732, 63-33733, 63-33734, 63-33737, 63-33738, 63-33734A, and 63-33734B in a separate brief, filed herewith.²

PROCEDURAL BACKGROUND

Water right nos. 63-303, 63-3613, 63-3614, and 63-3618 (the “Base Rights”) were decreed in the SRBA ten or more years ago. *Response* at 2-3. Some years later, a dispute arose in the SRBA regarding whether “Idaho law require[s] a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control?” *In re SRBA Case No. 39576, Subcase No. 00-91017*, 157 Idaho 385, 387, 336 P.3d 792, 794 (2014). Among other things, this dispute led to the filing of “late claims” for what were essentially “refill” water rights for certain federal reservoirs in Basins 01, 21, 37, 63, and 65.

¹ While the State filed three motions on February 19, 2019, this reply addresses only one of the three: the *Motion to Alter or Amend Partial Decrees for Water Rights Nos. 63-303, 63-3613, 63-3614, and 63-3618*. For purpose of this reply brief, the term “*State’s Motion*” does not include or refer to the other two motions filed by the State on February 19, 2019, which requested that this Court issue partial decrees for water right nos. 63-33734A and 63-33734B, and disallow water right claim nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738 (i.e., the “Late Claims”).

² The State is also filing separate reply briefs to address responses to the State’s *Motion to Alter or Amend Partial Decrees for Water Rights Nos. 63-303, 63-3613, 63-3614, and 63-3618* filed by the cities of Mountain Home and Pocatello, and the “Coalition of Cities.” The State is also filing a separate reply brief to address the City of Mountain Home’s motion to participate in the Late Claims, and a separate motion to strike the City of Mountain Home’s SF-1 “Objections” in subcase nos. 63-33734A and 63-33734B.

The resulting subcases in Basins 01, 21, and 37 were resolved by settlements. The late claims in the Basin 63 and 65 subcases became the subject of extensive discovery, litigation, and negotiation. No settlement was reached in the Basin 65 subcases, and ultimately those late claims were decreed as disallowed. The negotiations in the Basin 63 subcases—subcase nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738 (the “Late Claims”)—resulted in a *Stipulation* that was executed by all of the parties of record. The *Stipulation*, if fully implemented, will resolve the Late Claims, and also the pending appeals of this Court’s judicial review decision regarding IDWR’s water right accounting procedures for Water District 63 (Boise Basin).³

Among other things, the *Stipulation* calls for the State to file a motion to alter or amend the existing partial decrees for the Base Rights. *State’s Motion* at 3-4; *Stipulation* at 4-5.⁴ The *State’s Motion* requests that two administrative remarks be added to the partial decrees for the Base Rights: a “combined use” remark and a “reset” remark. *Id.* at 2. These provisions are the same as the “combined use” and “reset” remarks that the parties to the Late Claims have agreed should be included in the partial decrees for water right nos. 63-33734A and 63-33734B. *Id.* at 4.

The *Stipulation* also requires the State to file separate but related motions to decree water right nos. 63-33734A and 63-33734B, and to disallow the Late Claims. *State’s Motion* at 3-4;

³ This procedural background is recounted in detail in the “Procedural Background” section of the *State of Idaho’s Reply Brief re: City of Mountain Home’s Motion to Participate in “Late Claims,”* filed herewith in subcase nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), 63-33734, 63-33734A, and 63-33734B. The “Procedural Background” section of that brief is incorporated into this brief by reference as if set forth fully herein.

⁴ A copy of the *Stipulation* is appended to the *Motion* as “Exhibit 1.”

Stipulation at 4-5. The City of Boise's *Response* asserts that these motions "require[] the re-opening of the reservoir base rights." *Response* at 2. This assertion is incorrect. While the *Stipulation* required the filing of the *State's Motion* to alter or amend the Base Rights, the *Stipulation* does not require the granting of that motion as a condition of decreeing rights 63-33734A and 63-33734B. And, the State's motions to decree water rights 63-33734A and 63-33734B do not require that the Base Rights be re-opened. The only relief sought by these motions is that water rights 63-33734A and 63-33734B be decreed as proposed, and that the claims for water right nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738 be disallowed.

Further, the *Stipulation* is not contingent upon re-opening the Base Rights. While the State posits that re-opening of the Base Rights at this juncture is proper for reasons set forth in the *State's Motion*, the *Stipulation* and ultimate resolution of the Late Claims and the pending appeals do not rise and fall upon re-opening of the Base Rights. The *Stipulation* is only contingent upon this Court issuing partial decrees for water rights nos. 63-33734A and 63-33734B that are "materially consistent" with the form of partial decrees proposed by the State's motions to decree those water rights. *Stipulation* at 6-7. The *Stipulation* contains no language that makes it contingent upon granting the State's *Motion to Alter or Amend Partial Decrees for Water Right nos. 63-303, 63-3613, 63-3613, and 63-3618*. See *id.* (setting forth conditions to be fulfilled for the *Stipulation* to remain effective and binding). The *Stipulation* and the settlement remain intact even if this Court denies the State's motion to "reopen the Base Rights."

The City of Boise ("City") "does not contest whether the [*State's Motion*] meets the standards of I.R.C.P. 60(b)(6)." *Response* at 3. The City's *Response* also does not oppose granting the *State's Motion*, does not articulate any objections to the amendments proposed by

the *State's Motion*, and does not make any argument that the proposed amendments should not be included in the existing partial decrees for the Base Rights. The City's *Response* simply asserts that "the City's interest is to ensure the status quo is maintained." *Response* at 3.

ARGUMENT

The City has not asserted that the *State's Motion* should not be granted, and has provided no reasons for denying the *State's Motion*. If the City sees something in the *State's Motion* that the City believes would injure the City's interests, then the City must identify or articulate the problem. That is the purpose of a "response" brief. But the City's *Response* does no such thing. Rather, it essentially leaves it to the State to shadow-box with whatever vague concerns the City may have with upsetting the "status quo"—a term that is itself inherently ambiguous in this context, as discussed below. At most, the City's *Response* alludes to undefined apprehensions about what the future may hold, without meaningfully addressing the issue before the Court: whether to grant the *State's Motion*. Because the City's *Response* does not provide any cognizable grounds for denying the *State's Motion*, the *State's Motion* should be granted.⁵

One of the principle factual and legal disputes throughout the long course of the Basin 63 "refill" dispute has been what constitutes the "status quo" when it comes to flood control operations, "refill," historic administration, the interpretation of the partial decrees for the Base Rights, and the extent of any beneficial use-based water rights claimed by the United States and the Boise Project Board of Control. These questions were central to the litigation of the Late Claims and the negotiation of the *Stipulation*. They were also central to the administrative,

⁵ SRBA Administrative Order 1 § 6(f) and this Court's scheduling notices provided the City with ample opportunity to consider the *State's Motion* and to identify any objections that the City may have to the proposed amendments to the Base Rights. Having failed to do, the City should be precluded from raising any objections in subsequent proceedings under the *State's Motion*.

judicial review, and appellate proceedings regarding IDWR's water right accounting procedures for Water District 63.

All parties to these proceedings had, and most likely continue to have, different and strongly-held views of what constitutes the "status quo"—including "how the Base Rights have historically been administered" and "interpreted." *Response* at 3. The City is aware of this, having been an active participant in the administrative proceedings regarding the Water District 63 accounting system.⁶

The *Stipulation* did not attempt to resolve the parties' disagreements over what constitutes the "status quo" in these matters. That was exactly the point. Resolving these contentious questions would have required, at a minimum, that both the Late Claims and the pending appeals be litigated to their final conclusion—and even that might not have fully resolved the disputes over the historic "status quo." The *Stipulation* is a negotiated settlement that avoids these disputes by proposing concrete measures to resolve the "refill" dispute without having to define the "status quo."

The City could have remained an active participant in the proceedings on the Water District 63 accounting system, or filed timely objections or responses in the Late Claims proceedings. Either course of action would have allowed the City to present its views of the "status quo" in litigation and in negotiations.

But the time for litigating and negotiating the "status quo" has passed. The question before this Court under the *State's Motion* is not an issue of defining or ensuring the "status quo." The *State's Motion* presents a much more narrow and concrete question. The *State's*

⁶ The City did not participate in the judicial review proceedings regarding the Water District 63 accounting system.

Motion asks this Court to amend the partial decrees for the Base Rights to include two limited, carefully worded administrative remarks negotiated by the parties to the Late Claims and the pending appeals. If the City has objections to what the State has proposed, then the City must come forward and explain its objections. But it has not done so, and the City's interest in "ensur[ing] the status quo is maintained," *Response* at 3, is not a legally or factually sufficient reason for denying the *State's Motion*.

CONCLUSION

For the reasons discussed herein and in the *State's Motion*, the State respectfully requests that this Court grant to the *State's Motion* to amend the Base Rights.

Respectfully submitted this 30th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April 2019, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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