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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.: 01-219, 01-02064, <i>et al.</i>
	)	
Case No. 39576	)	THE UNITED STATES' REPLY IN
	)	SUPPORT OF JOINT MOTION TO
	)	MODIFY PARTIAL DECREES FOR
	)	PURPOSE OF DIVERSION RATE AND
	)	"RESET" ADMINISTRATIVE
	)	REMARKS

Background

The parties to the Joint Motion and the United States are before this Court seeking to implement a Stipulation resolving a dispute over the appropriate date for the "reset" of the storage water rights for the Bureau of Reclamation's (Reclamation) reservoirs in the Upper Snake River Basin.¹ The Stipulation is the end result of a protracted period of negotiations among all of the parties holding interests in the storage water rights for the Reclamation reservoirs engaged in protracted negotiations, as well as Reclamation and the Bureau of Indian

¹ The Stipulation is Exhibit G to the Declaration of Travis L. Thompson (Thompson Dec.).

Affairs. Those negotiations demonstrated that there was no uniformity among the water users on a desired reset date because an earlier date favored some contractors and a later date others.

Despite that, the water users and agencies came together and agreed to a Stipulation resolving their dispute. The Stipulation has two substantive components: (1) reset of the accounting for the storage water rights on September 15 and (2) restoration of a historic provision which had limited diversions under the United States' storage water right for Lake Walcott (1-219) to 2,500 cfs from September 15th to October 15th. JOINT MOTION TO MODIFY PARTIAL DECREES FOR PURPOSE OF DIVERSION RATE AND "RESET" ADMINISTRATIVE REMARKS at 3-4 (Joint Motion). Significantly, the State of Idaho does not oppose either of those elements. STATE OF IDAHO'S CONSOLIDATED RESPONSE TO JOINT MOTION TO MODIFY PARTIAL DECREES FOR PURPOSE OF DIVERSION RATE AND "RESET" ADMINISTRATIVE REMARKS at 2-3 (State Resp.). The State, however, opposes the water users implementing the agreement through this Court rather than before the Director.

The United States files this reply memorandum to explain why this Court is the proper forum to review and approve the proposed settlement. According to the State, "[t]he Coalition and the Tribes need only obtain the United States' consent to impose a 2,500 CFS diversion rate limitation on the Lake Walcott storage water right during the period from September 15 to October 15," and the Director will be able to provide relief equivalent to that available before this Court. *See* State Resp. at 37. That is not the case. The Bureau of Reclamation lacks the authority to consent to a diminution of the federal property interest in the Walcott storage right outside of seeking this Court's approval through the Department of Justice. Instead, the United States respectfully requests that this Court implement the Stipulation by granting the Joint Motion.

Argument

Because the United States holds title to the Reclamation storage water rights, imposing a limitation on the ability to divert under the Walcott right is “a disposition of federal property.” *See High Country Citizens’ Alliance v. Norton*, 448 F.Supp.2d 1235, 1248 (D. Colo. 2006). The State does not dispute that the Director lacks authority to modify decreed water rights. *See State Resp.* at 35. Instead, the State argues that the United States need only “consent” to this disposition of federal property and then have the disposition memorialized in an order by the Director.

In *High Country Citizens*, the court struck down an agreement between the Department of the Interior and the State of Colorado in which Interior consented to a reduction of the unquantified federal reserved water right for Black Canyon National Park, because Interior lacked the authority to bind the United States to the diminishment of that federal property interest. 448 F.Supp.2d at 1248. As the *High Country Citizen* court observed, the Department of the Interior lacks authority to “consent” to a reduction of a federal water right. The Constitution vests in Congress the authority to dispose of federal property, U.S. Const. art. IV, § 3, cl. 2, and Congress must therefore act to empower an agency to that end. The need for Congressional action serves to protect the public’s interest in federal property.² *See Gibson v. Chouteau*, 80 U.S. 92, 99 (1871).

In a litigation context, the Court’s review and approval of a proposed resolution provides an independent assessment that the government has not breached its duty to the public. *See United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981). Experience in the SRBA bears this out. The United States, acting through the Department of Justice, routinely resolved

² Because the limitations on the disposition of federal property are imposed by the Constitution and federal law, the State’s assertion that Idaho law does not require judicial approval to subordinate the Walcott storage water right is of no consequence. *Cf. State Resp.* at 36.

litigation over federal water rights by compromising claimed property interests, subject to review and approval by this Court. *See e.g.*, MEMORANDUM DECISION AND ORDER ON CHALLENGE, SUBCASE NOS. 01-217 *et al.* (Feb. 9, 2011).

Here, neither Reclamation, the holder of legal title to the storage water rights at issue, nor the Department of Justice, the sole agency with the ability to authorize compromise of the federal interest in the decreed Walcott storage water right, is a party to the proceeding before the Director. Consequently, the parties to the agreement lack the ability to fully implement the settlement before the Director. In contrast, this Court's authority to implement the settlement is undisputed and the United States joins the water users in asking this Court to grant the subject motion and effectuate the settlement.

Respectfully submitted this 16th day of January, 2020,

A handwritten signature in black ink, appearing to read "David W. Gehlert", written over a horizontal line.

David W. Gehlert

CERTIFICATE OF SERVICE

I certify that on January 16, 2020, I served true and correct copies of the foregoing THE UNITED STATES' REPLY IN SUPPORT OF JOINT MOTION TO MODIFY PARTIAL DECREES FOR PURPOSE OF DIVERSION RATE AND "RESET" ADMINISTRATIVE REMARKS as follows:

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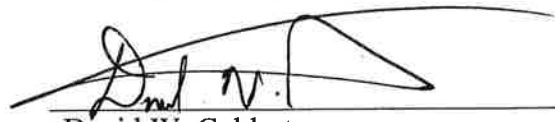
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Attachment A

American Falls Subcases

01-02064
01-02064A
01-02064B
01-02064C
01-02064D
01-02064E
01-02064F
01-02064L
01-10042
01-10042A
01-10042B
01-10053A
01-10190

Palisades Subcases

01-02068
01-02068D
01-02068E
01-02068F
01-02068M
01-02068Y
01-10043
01-10043A
01-10043E
01-10191
01-10389