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*Attorneys for Respondents*

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

IN THE MATTER OF ACCOUNTING FOR  
DISTRIBUTION OF WATER TO THE  
FEDERAL ON-STREAM RESERVOIRS IN  
WATER DISTRICT 63 BEFORE THE  
IDAHO DEPARTMENT OF WATER  
RESOURCES.

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BALLENTYNE DITCH COMPANY; BOISE  
VALLEY IRRIGATION DITCH  
COMPANY; CANYON COUNTY WATER  
COMPANY; EUREKA WATER  
COMPANY; FARMERS' CO-OPERATIVE  
DITCH COMPANY; MIDDLETON MILL  
DITCH COMPANY; MIDDLETON  
IRRIGATION ASSOCIATION, INC.;  
NAMPA & MERIDIAN IRRIGATION  
DISTRICT; NEW DRY CREEK DITCH  
COMPANY; PIONEER DITCH COMPANY;  
PIONEER IRRIGATION DISTRICT;

Supreme Court Docket No. 44677-2016

Ada County District Court No. CVWA-2015-  
21376 (Consolidated Ada County No.  
CVWA-2015-21391)

**DEPARTMENT'S STATEMENT IN  
OPPOSITION TO MOTION TO  
SUSPEND APPEAL AND VACATE  
ORAL ARGUMENT**

SETTLERS IRRIGATION DISTRICT;  
SOUTH BOISE WATER COMPANY; and  
THURMAN MILL DITCH COMPANY,

Petitioners-Appellants,

vs.

BOISE PROJECT BOARD OF CONTROL,  
and NEW YORK IRRIGATION DISTRICT,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN, in  
his capacity as the Director of the Idaho  
Department of Water Resources,

Respondents,

and

SUEZ WATER IDAHO, INC.,

Intervenor-Respondent-Cross-Appellant.

Respondents the Idaho Department of Water Resources and Gary Spackman, in his capacity as Director of the Idaho Department of Water Resources (collectively, "Department"), by and through their attorneys of record, and pursuant to Idaho Appellate Rule 32(d),<sup>1</sup> hereby submit their statement in opposition to the *Joint Motion to Suspend Appeal and to Vacate Oral Argument* ("Motion") filed in this appeal by the "Ditch Companies," the Boise Project Board of

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<sup>1</sup> Idaho Appellate Rule 32(d) provides in pertinent part that "[a]ny party may file a brief or statement in opposition to the motion within 14 days from service of the motion."

Control, and New York Irrigation District (collectively “irrigation organizations”) on April 18, 2018. The Department respectfully requests that this Court deny the *Motion*.<sup>2</sup>

**1. The “Joint Motion” Does Not Speak for the Department.**

The *Motion* is styled a “Joint” motion and while a careful reading reveals that it is a unilateral request submitted by the irrigation organizations, the motion incorrectly suggests that all parties to this appeal agree it should be suspended because, allegedly, settlement is within sight.<sup>3</sup> To be clear: the Department did *not* join the *Motion*, *disagrees* with the *Motion*’s assertions that settlement is within sight, and *opposes* the *Motion*’s request for suspension of this appeal and vacatur of the oral argument set for May 7, 2018. The *Motion* attempts to unilaterally obtain a stay of proceedings to which the Department has been clear that it will not agree. The Department respectfully requests that the *Motion* be denied and that oral argument proceed as scheduled under this Court’s orders.

**2. The Parties Have Not Resolved Their Disputes and No Settlement is Within Sight.**

The thrust of the *Motion* is that the parties have by and large achieved a settlement in principle that fully resolves all disputes in this appeal, and also resolves disputes in pending

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<sup>2</sup> The irrigation organizations filed substantially identical motions to suspend proceedings in the related appeals pending under Idaho Supreme Court docket nos. 44745-2017 and 44746-2017. The Department is filing statements in opposition in those appeals that are substantially identical to the Department’s opposition to the *Motion* in the instant appeal.

<sup>3</sup> The *Motion* presumes to speak for all parties to this appeal. *See Motion* at 1 (“Preparing for and presenting oral argument at this time will interrupt the parties’ attention and progress toward a negotiated resolution of this matter.”); *id.* at 2 (“providing the parties further time to globally resolve a complicated suite of matters . . . furthers the interests of judicial economy.”).

SRBA proceedings on the United States' "Late Claims" for beneficial use-based storage water rights in Basin 63.<sup>4</sup> This assertion is incorrect.

While the parties have been attempting to reach a negotiated resolution of these matters for years, no settlement has been reached in fact or in principle. No settlement documents have been executed, and it is an overstatement that "significant progress" has been made in "recent weeks" on the core legal disputes that gave rise to this appeal. *Motion* at 2. The controlling issues of law over which the parties fundamentally disagree and which are currently before this Court on appeal remain unresolved.

For the same reasons, the *Motion* is incorrect in asserting the parties have agreed that "certain matters will need to be addressed and confirmed" by the SRBA Court, and "[c]ertain other matters are expected to be addressed by the Idaho State legislature during the next legislative session." *Id.* There simply is no agreement as to the form of what would be presented to the SRBA Court, nor has there been any agreement on actual legislative language that would further such settlement. The parties remain at odds over basic substantive issues, and for the same reasons have not reached any agreement over the so-called "necessary actions" that allegedly must be undertaken to implement the non-existent settlement. *Id.*

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<sup>4</sup> In 2013, the United States sought and was granted permission to file SRBA "late claims" for beneficial use-based storage water rights in Basin 63, as well as several other administrative basins. See *United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 56, 408 P.3d 52, 54 (2017) ("The subcases concern the United States' late claims (Late Claims) filed in January 2013, which assert 'supplemental beneficial use storage water rights' claims under the constitutional method of appropriation to store water in priority after flood-control releases.") (parenthetical in original).

### **3. Suspending This Appeal Would Prejudice the Department and Undermine Judicial Economy and Efficiency.**

The *Motion* is incorrect in asserting there would be no prejudice to the Department if this appeal is suspended and oral argument is vacated. *Motion* at 3. While this might have been true if the parties had actually reached a settlement in fact or principle, that has not happened. The very contentious disputes at the heart of this appeal remain unresolved, and have cast a cloud over the Department's methods of accounting for the distribution of water in Water District 63. The Department has a "clear legal duty" to distribute water in accordance with the prior appropriation doctrine as established by Idaho law. *In re SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). Fulfilling this duty is a matter of concern to all water right holders, and resolving this appeal as soon as possible is necessary to resolve challenges to the Department's attempt to fulfill its clear legal duty.<sup>5</sup>

For the same reasons, judicial economy and efficiency are best served by denying the *Motion* and allowing oral argument to proceed as scheduled on May 7. While the Department and the Office of the Attorney General are generally supportive of settlements, this case illustrates that in some situations, settlement simply cannot occur until fundamental legal issues are resolved. After years of unsuccessful attempts to achieve a negotiated resolution, the legal disputes at the heart of this appeal remain unresolved and are an impediment to settlement. Resolution of the legal issues in this case would, in fact, assist the parties to the SRBA Late Claim subcases in potentially reaching settlement by providing certainty as to the law.

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<sup>5</sup> Because the District Court held that "unaccounted for storage" is contrary to law, the Department's appeal would have to proceed even if the Ditch Companies and the Boise Project Board of Control dismissed their appeals.

Thus, considerations of judicial economy and efficiency weigh strongly in favor of allowing this appeal to proceed as scheduled so that the legal issues can finally be resolved. Delaying this case would merely prolong the uncertainty governing the Director's "clear legal duty," shroud in doubt the foundation upon which any settlement of the SRBA Late Claims can occur, and allow one side of the negotiation to seek to better its negotiation position.

For the reasons set forth above, the Department respectfully requests that this Court deny the *Motion* and allow oral argument to proceed as scheduled on May 7, 2018.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of April 2018.

LAWRENCE G. WASDEN  
Attorney General

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Deputy Attorney General  
Chief, Natural Resources Division



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GARRICK L. BAXTER  
Deputy Attorney General

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23 day of April 2018, I caused to be served a true and correct copy of the foregoing document by the method(s) indicated:

*Original to:*  
Clerk of the Court  
IDAHO SUPREME COURT  
451 W. State Street  
Boise, ID 83303-2707

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- Hand Delivery
- Overnight Mail
- Facsimile
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