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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF ACCOUNTING FOR DISTRIBUTION OF WATER TO THE FEDERAL ON-STREAM RESERVOIRS IN WATER DISTRICT 63	**PIONEER IRRIGATION DISTRICT'S JOINDER IN PRE-HEARING MOTIONS SUBMITTED BY THE DITCH COMPANIES**

Pioneer Irrigation District ("Pioneer"), by and through undersigned counsel of record and pursuant to the Idaho Department of Water Resources' ("Department") *Scheduling Order; Notice of Hearing; Order Authorizing Discovery*, dated October 14, 2014, hereby joins in the entirety of the *Pre-Hearing Motions Submitted by the Ditch Companies* ("Motions"), dated October 28, 2014, and incorporates the arguments contained therein fully by incorporation by reference herein.

I.
INTRODUCTION

In addition to the issues raised in the above-referenced Motions, Pioneer particularly questions the utility of this proceeding because of the Department's seeming inability to join (and, therefore, bind) the United States Bureau of Reclamation ("BOR"). BOR, as title owner of the real property at issue (storage water rights; *see, e.g.*, Idaho Code Section 55-101), is an indispensable party whose absence cannot be overlooked. Consequently, Pioneer offers supplemental argument on the issue of the BOR's sovereign immunity, and respectfully requests that this proceeding be dismissed for the Department's failure (and inability) to join an indispensable party.

II.
ARGUMENT

As noted during the Department's October 7, 2014 status conference, BOR and the Department harbor very different opinions regarding whether the Bureau is bound by this proceeding. For its part, BOR has informed the Department that this proceeding is not binding upon it absent an express waiver of the agency's sovereign immunity. The Department, on the other hand, announced its opinion that the BOR is bound. While the Department did not elaborate on, or otherwise disclose, the grounds upon which it believes the BOR is bound by this proceeding during the status conference, the Department presumably relies upon the McCarran Amendment for its position. To the extent this presumption is correct, the Department's reliance upon the McCarran Amendment is misplaced.

In *U.S. v. Puerto Rico*, 287 F.3d 212 (1st Cir. 2002), the First Circuit Court of Appeals had occasion to review the nature and scope of the McCarran Amendment's waiver of sovereign immunity in the context of an administrative water rights proceeding. At issue was

whether the Commonwealth of Puerto Rico, through its Department of Natural and Environmental Resources ("DNER"), could compel the United States Navy to participate in an administrative proceeding concerning the Navy's ongoing diversion and use of water from the Rio Blanco. Puerto Rico's chief argument was that the McCarran Amendment divested the United States of its sovereign immunity in the context of the administrative proceeding. The First Circuit Court of Appeals roundly rejected the commonwealth's argument.

The First Circuit Court of Appeals held that the waiver contained in the McCarran Amendment applies in a judicial proceeding context only; it does not extend to purely administrative proceedings. *Puerto Rico*, 287 F.3d at 218. In so holding, the First Circuit Court of Appeals relied on the plain language of the Amendment, and its repeated use of the term "suit" (a legal term of art with a particularized meaning implicating judicial proceedings), together with other judicial forum-related terms (such as "defendant," "necessary party," and "the court having jurisdiction"). *Id.*

The First Circuit Court of Appeals also rejected Puerto Rico's arguments under *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), whereby the commonwealth attempted to apply the McCarran Amendment in an administrative proceeding context. Central to the Court's rejection of the commonwealth's *Oregon*-based arguments were the facts that Puerto Rico's administrative proceeding: (1) did not involve any judicial interface or the comprehensive general adjudication of the Rio Blanco; (2) terminated in a final order of the Secretary (the "agency head" of DNER); and (3) contained a right to only APA-style judicial review, constrained to limited appellate review of the Secretary's decision based upon the record fixed during the DNER proceeding. *Puerto Rico*, 287 F.3d at 219-20. The Court was particularly blunt in its treatment of Puerto Rico's judicial review argument:

> [The commonwealth's] suggested conclusion—that this right of judicial review transmogrifies the underlying proceeding into a suit—does not hold water . . . To accept that the right to a limited APA-type of judicial review suffices to convert a purely administrative proceeding into a suit would compel the absurd conclusion that *all* administrative proceedings are suits and that no purely administrative proceedings exist. We cannot endorse so radical a proposition.

Id. at 220 (emphasis in original).

Additionally, the First Circuit Court of Appeals rejected the notion that the McCarran Amendment's sovereign immunity waiver extended to administrative proceedings involving the use of adjudicated water rights. After conceding that the Amendment does reference the "administration of [water use] rights," the Court reviewed the Amendment as a whole, concluding that: "[when] read in context, these words grammatically refer to suits for the administration of such rights." *Puerto Rico*, 287 F.3d, at 218, n. 5. Therefore, the presence of the terms alone "fail to broaden the scope of the waiver." *Id.*

The First Circuit Court of Appeals' analysis of the limited scope of the waiver contained in the McCarran Amendment applies equally in this purely administrative proceeding. The Director expressly initiated this proceeding under Idaho Code Section 67-5240 and IDAPA 37.01.01.104 (the Department's own *administrative* "Rules of Procedure"). *See Notice of Contested Case and Formal Proceedings, and Notice of Status Conference*, dated October 22, 2013, p. 6. The Director likewise has decided that he (like the Secretary in *Puerto Rico*) will be the ultimate decision-maker in this proceeding by operation of Idaho Code Sections 67-5244(3) and -5245(7), via issuance of his final *administrative* order. *See Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer*, dated October 3, 2014, p. 4; *see also*, IDAPA 37.01.01.740.01. Finally, the only judicial interface available in this matter is the

same, limited APA-type right of judicial review at issue in *Puerto Rico*. *See* IDAPA 37.01.01.790 and 791.

In the parlance of the First Circuit Court of Appeals:

> There is simply no persuasive evidence that the repeated use of the word "suit" by the drafters of the McCarran Amendment was either a linguistic accident or an awkward attempt to convey a meaning different from the norm.

Puerto Rico, 287 F.3d, at 220. Because this contested case proceeding likewise is not a "suit," rather it is purely an administrative proceeding (and, in fact, a peculiar creature of the Director's own unilateral creation), the waiver of sovereign immunity contained in the McCarran Amendment does not apply.

III.
CONCLUSION

For the foregoing, the utility and effect of this proceeding is suspect at best. Pioneer, therefore, requests that this proceeding be dismissed in its entirety for the Department's failure (and inability) to join an indispensable party.

DATED this 28th day of October, 2014.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October, 2014, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT'S JOINDER IN PRE-HEARING MOTIONS SUBMITTED BY THE DITCH COMPANIES** to be served by the method indicated below, and addressed to the following:

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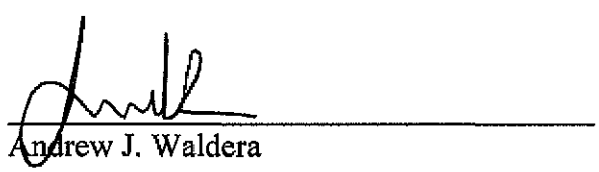

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