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DEPARTMENT OF  
WATER RESOURCES

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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  
STATEMENT OF CONCERN**

Pioneer Irrigation District ("Pioneer"), by and through undersigned counsel of record and pursuant to the Idaho Department of Water Resources' ("Department") Notice of Contested Case and Formal Proceedings, And Notice of Status Conference ("Notice"), dated October 22, 2013, hereby submits this Statement of Concern.

**I.  
BACKGROUND**

The Department's Notice traces the genesis of Snake River Basin Adjudication Basin-Wide Issue 17 regarding the issue of priority "refill" of reservoir space vacated for flood

control or other non-irrigation use-based operational purposes. The SRBA Court's Memorandum Decision, filed March 20, 2013, is now on appeal before the Idaho Supreme Court in Docket Nos. 40974-2013 (appeal by various water users known as the "Surface Water Coalition") and 40975-2013 (appeal by the Boise Project Board of Control).

As Pioneer has discussed in prior briefing in the context of Basin-Wide Issue 17, the "refill" question cannot logically be addressed absent a determination of what constitutes initial "fill" as a threshold matter. This is because one cannot, and need not, "refill" what has not been "filled" in the first place. Despite failing to address the question of initial fill in its Memorandum Decision, the SRBA Court also deemed the question of initial "fill" to be the "more important issue." Memorandum Decision, p. 11.

As the Department's Notice acknowledges, the aligned water users, including Pioneer, are concerned that the Department's reservoir accounting system is based upon a "paper fill" rather than "physical fill" methodology. Depending upon how the accounting system is calibrated, a paper fill-based accounting system may not properly track or adjust (credit) irrigation storage water accounts for water released from the on-stream reservoirs for non-irrigation purposes (such as flood control or other operational-related needs).

## **II. ISSUES OF CONCERN**

### **A. Preliminary Note**

The discussion/listing of issues below is preliminary only, and Pioneer reserves the right to identify additional issues and concerns as they come to light throughout the course of this proceeding. Further the issues/concerns discussed herein are based upon Pioneer's current (and admittedly rudimentary) understanding of the Department's irrigation storage accounting system. As Pioneer noted in its Opening Brief before the SRBA Court in the Basin-Wide

Issue 17 proceeding, its concerns and criticisms are based upon its “understanding of the State’s present reservoir accounting program” that is seemingly predicated upon “the concept of paper fill” (the concept that considers a reservoir full “once reservoir inflows during the storage season match the capacity of the reservoir”). Opening Brief, filed December 21, 2012, p. 9. Pioneer’s current “paper fill”-based understanding of the Department’s reservoir accounting program is a product of informal discussions with Department personnel, discussions with other concerned water users, and prior briefing submitted in the Basin-Wide Issue 17 proceeding (and the Basin 01 precursor proceedings) by the State of Idaho.

Whether Pioneer’s understanding of the functioning of the Department’s accounting program is correct remains to be seen. Regardless, Pioneer anticipates that issues raised at the outset of this contested case proceeding will evolve as the details of the Department’s accounting methodologies emerge.

**B. Pioneer’s Accounting Issues/Concerns**

**1. Operational Releases (Including Flood Control)**

To the extent it does otherwise, the Department’s reservoir storage accounting methodology should be based upon the physical fill of irrigation storage space to ensure that storage water is available—in priority—for end irrigation beneficial use. End beneficial use is the true measure of a water right under Idaho law. Diversion and storage, alone, are not. *See, e.g., American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 880, 154 P.3d 433 (2007) (“Storage water is water held in a reservoir and is intended to assist the holder of the water right in meeting their decreed needs”; “Concurrent with the right to use water in Idaho ‘first in time,’ is the obligation to put that water to beneficial use”); *see also, U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 113, 157 P.3d 600 (2007) (“Without the diversion by the irrigation districts and beneficial use of water for irrigation purposes by the irrigators,

valid water rights for the reservoirs would not exist under Idaho law. The beneficial use theme is consistent with federal law . . . beneficial use shall be the basis, measure, and limit of the right”; “In Idaho the appropriator must apply the water to beneficial use in order to have a valid water right . . . Beneficial use is enmeshed in the nature of a water right”). Therefore, satisfaction (*i.e.*, “fill”) of the “irrigation from storage” element (and the express quantity decreed to that element) of the Basin 63 storage water rights stored in Lucky Peak, Arrowrock, and Anderson Ranch Reservoirs requires the storage and physical availability of water for on-the-ground irrigation use. Otherwise, the “irrigation from storage” element of the rights goes un-filled and remains in priority.

When prudent reservoir management requires the release of stored water supplies for flood control or other non-irrigation-related reasons, the irrigation storage space vacated must be re-filled in priority to protect the integrity of the “irrigation from storage” right. A reservoir accounting system debiting water from an irrigation storage account as though it had been used for irrigation purposes effectively takes that water from the end user and impermissibly diminishes the value of that real property right. *See, e.g.*, IDAHO CODE § 55-101; *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048 (1977) (both confirming that water rights are real property rights under Idaho law); *see also, American Falls Reservoir Dist. No. 2*, 143 Idaho at 878 and IDAHO CODE § 42-202 (both extending the same real property right protections to storage-based water rights).

Though the Notice requests the parties to “include an explanation of the [accounting] modification[s] they wish to have considered in this proceeding” (Notice, p. 6), Pioneer does not feel it can meaningfully do so at this time. One must fully understand the

accounting system at issue before one can suggest modifications. Indeed, the Department's

Notice states that:

[N]o formal administrative record has been developed to document how and why accounting procedures 'count' or 'credit' water towards satisfaction or 'fill' of the water rights for the federal on-stream reservoirs in . . . Water District 63 . . . The existing 'records' on these matters are scattered and incomplete.

Notice, p. 3. Therein lies the problem. However, correction of the "flood control/operational release" issue should be fairly straightforward.

To the extent the Department currently debits irrigation storage accounts for water stored and later released for non-irrigation purposes, it should stop doing so. Instead, any irrigation storage water shortfalls created by operational releases should be physically refilled under priority to keep the "irrigation from storage" water rights whole. This method of accounting will, in turn, ensure physical water availability for the irrigation purposes through which the senior "irrigation from storage" water rights were historically developed and perfected.

To be clear, Pioneer does not advocate for a scenario whereby senior storage rights are allowed to fill multiple times under priority before a junior water right (storage or otherwise) is satisfied once. Instead, once a senior storage right fills it falls out of priority. However, a senior storage water right is not filled until the full quantity of water earmarked for end beneficial use (*i.e.*, "irrigation from storage") is stored **and** physically available for that end use.

## **2. Pass Through Releases**

As Pioneer understands it, and as the Department's Notice seemingly confirms, the Department considers every drop of water flowing into a reservoir to be diverted to storage. *See* Notice, pp. 1-2. Pioneer disagrees. Instead, Pioneer believes that water can be, and is at

times, contemporaneously passed through a reservoir. This “pass through” occurs when the quantity of water released from a reservoir matches the quantity of water flowing into the reservoir at its upstream boundary.

Pioneer acknowledges that the water molecules released at the dam (the downstream terminus of the reservoir) are not the same water molecules flowing into the upstream/leading edge of the facility, but the practical effect is the same. There is no net storage of water when the quantity of reservoir releases match the quantity of reservoir inflows.

To the extent that the Department’s accounting methodology fails to recognize the contemporaneous passage of water through a reservoir, opting instead to treat all water flowing into a reservoir as “stored,” that methodology should be revised. The practical fact of the matter (if not the strictly physical fact of the matter) is that not all water flowing into the upstream reaches of a reservoir is “stored.” A paper-based storage accounting method measured solely in terms of reservoir inflows ignores physical fill and actual, net storage. This can prematurely (and impermissibly, in Pioneer’s opinion) deactivate the priority of senior storage rights, effectively subordinating them to all other existing (and potentially future) junior water rights.

As discussed in Section II.B.1 above, the concept of “paper fill” is a fatally flawed construct because water rights are ultimately defined and measured by their specific purposes of end use. Again, end beneficial use is the true basis, measure, and limit of water rights under both Idaho and federal reclamation law. *See American Falls Reservoir Dist. No. 2* and *Pioneer Irr. Dist.*, above. If stored water is not available for end use, then the storage water right is rendered meaningless.

### III. CONCLUSION

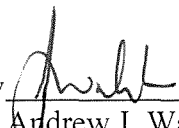
Pioneer reiterates the difficulty in identifying storage water right accounting issues of concern and objections, let alone proposing modifications capable of addressing the enumerated concerns, at this stage of the proceeding. This is because Pioneer's understanding of the Department's accounting methodologies is likely incomplete. Presumably, Pioneer is not alone in this regard given the stated purposes of this proceeding:

[T]o develop formal administrative records fully documenting:  
(1) how and why water is "counted" or "credited" to the water rights for reservoirs pursuant to the existing accounting methods and procedures; (2) the origin, adoption, and development of the existing accounting methods and procedures in [place]; and  
(3) appropriate changes, if any to the existing procedures as they may relate to federal flood control operations.

Notice, p. 5. Consequently, this Statement is preliminary only, and subject to change as this proceeding progresses.

DATED this 4<sup>th</sup> day of December, 2013.

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