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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

**REPLY TO RESPONSES TO
DEPARTMENT'S
STAFF MEMO**

INTRODUCTION

On September 10, 2014, Director Gary Spackman requested a staff analysis describing and explaining the Idaho Department of Water Resources' ("IDWR" or "Department") accounting principles and methodologies for federal on-stream storage water rights in Water District 63.

On November 4, 2014 Liz Cresto, Technical Hydrologist for the Department, provided that report in the form of a Memorandum ("*Staff Memo*").

On January 26, 2015, pursuant to the Director's *Third Amended Scheduling Order*, United Water Idaho Inc. ("United Water" or "UWID") filed its *Response to Department's Staff Memo* ("*UWID's Response*"). *UWID's Response* also incorporated by reference the more

detailed analysis of the law contained in United Water’s brief to the Idaho Supreme Court in the Basin-Wide Issue 17 litigation. *Brief of Respondent United Water Idaho Inc. (“Appellate Brief”)* at 21-41, Idaho S. Ct. Docket Nos. 40974-2013 and 40975-2013 (Oct. 23, 2013). A copy of that brief was submitted by affidavit simultaneously with *UWID’s Response*.

On that same date, the Boise Project Board of Control (“Boise Project”) filed *Boise Project Board of Control’s Response to Staff Memorandum (“Boise Project’s Response”)*, and the Ditch Companies,¹ Pioneer Irrigation District, New York Irrigation District, and Farmers Union Ditch Company (collectively, “Ballentyne”) filed their *Joint Objections and Preliminary Response to November 4, 2014 Staff Memorandum and Response Deadline (“Joint Response”)*. The Boise Project and Ballentyne are referred to collectively as the “Irrigation Entities.”

Pursuant to the Director’s *Third Amended Scheduling Order*, this is United Water’s reply to the *Boise Project’s Response* and the *Joint Response*.

ARGUMENT

The *Boise Project’s Response* and the *Joint Response* make no attempt to analyze the substance of the storage water rights accounting principles and methodologies described in the *Staff Memo*. Neither brief cites any facts or legal authority to show that the *Staff Memo* does not accurately describe the Department’s accounting principles and methodologies, or, more importantly, that they are inconsistent with the Prior Appropriation Doctrine.

Instead, the Boise Project contends that the *Staff Memo* does not adequately describe how or why the Department’s accounting principles and methodologies exist, and does not address or

¹ The Ditch Companies are 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, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

explain certain topics of apparent concern to the Boise Project. *Boise Project's Response* at 2-5. Similarly, Ballentyne asserts that the *Staff Memo's* description of accounting principles and methodologies is, among other things: “incomplete and erroneous,” *Joint Response* at 6; inconsistent with Water District 63 reservoir operations and water rights administration, *Joint Response* at 6; and “inconsistent with state law,” *Joint Response* at 8.

These complaints are baseless. As explained in *United Water's Response*, the *Staff Memo* is a technical memorandum that contains a detailed and understandable explanation of the Department's accounting principles and methodologies for storage water rights in Water District 63. *United Water Response* at 3. It is not a legal memorandum intended to describe how the Prior Appropriation Doctrine works or how the Department's accounting principles or methodologies must operate to be lawful. Contrary to other parties' assertions, it does not “contain[] legal conclusions regarding storage water rights, storage contracts, and the circumstances under which they are ‘satisfied.’” *Joint Response* at 5. It is simply an agency staff memorandum on the subject of water rights accounting which contains “generally recognized technical or scientific facts within the agency's specialized knowledge.” IDAPA 37.01.01.602. It explains the nuts and bolts of how the Department accounts for storage water rights in Water District 63—a subject matter that is within the Director's discretion to sort out in accordance with the law.

Our Supreme Court recently noted that the Director has “broad powers to direct and control distribution of water from all natural water sources within water districts.” *A&B Irrigation Dist. v. State*, 157 Idaho 385, 336 P.3d 792, 800 (2014) (citing Idaho Code § 42-602). Of course, “the Director cannot distribute water however he pleases at any time in any way; he must follow the law.” *A&B Irrigation Dist.*, 336 P.3d at 800. But “as long as the Director

distributes water in accordance with prior appropriation, he meets his clear legal duty” when he exercises his discretion in directing and controlling the distribution of water. *A&B Irrigation Dist.*, 336 P.3d at 800. “[T]he details of the performance of the duty are left to the director’s discretion.” *A&B Irrigation Dist.*, 336 P.3d at 800.

This authority was discussed as well by the Director in his *Order Lifting Stay and Notice of Status Conference* (Sept. 10, 2014) and again in his *Order Denying Pre-Hearing Motions* (Dec. 16, 2014). The Director’s broad authority to act within the bounds of the Prior Appropriation Doctrine is front and center to this contested case. But the Irrigation Entities fail to address it. If they contend the technical accounting principles and methodologies described in the *Staff Memo* are illegal, they should say why. Bald declarations of illegality do not advance the discussion.

Instead, they seek to change the subject. The Irrigation Entities provide a litany of observations and rhetorical questions about topics they believe are missing from the *Staff Memo*. This misses the point. If they believe there are additional questions to be answered or issues to be explored, they are free to address them. Indeed, a good place to do so would have been in their responses to the *Staff Memo*. Instead, they posed questions without any explanation of what the answers should be or how they are relevant to this proceeding. This is not argument. This is obfuscation.²

The Irrigation Entities also contend that, under Rule 602 of the Department’s Rules, they cannot be compelled to respond to the *Staff Memo* until they have had an opportunity for further

² To offer a single example, the Boise Project observes that Arrowrock was originally licensed for a flow rate, not the volume limitation decreed by the SRBA Court. *Boise Project’s Response* at 3. Yet they offer no hint as to what bearing that has on the Department’s accounting principles and methodologies. They offer no explanation as to what is wrong with the storage right’s decreed volume. Finally, they offer no thought as to how or why the Department should ignore the decreed volume—which is now *res judicata*.

discovery and to examine the *Staff Memo*'s author. *Joint Response* at 4 and *Boise Project's Response* at 6.

First, it is difficult to understand what light further discovery will shed on the key question (Are the principles and methodologies outlined in the *Staff Memo* in conflict with the Prior Appropriation Doctrine?). That is a question of law. It would seem that the Irrigation Entities could address the question now, if they wanted to.

Second, it is unclear why the Irrigation Entities did not request a short enlargement of the briefing schedule to accommodate further written discovery or depositions.³

Third, the argument is tardy. The issue of responses to the *Staff Memo* has been the subject of conferences and orders for months. The Irrigation Entities have never before objected to having an opportunity to file responses.

Fourth, the argument is wrong. Rule 602 gives parties a right to (1) notice of the staff report before a decision is made, (2) an opportunity to cross-examine agency staff, and (3) an opportunity to rebut the facts in the staff report. The Department has not denied anyone those rights. There may be further discovery.⁴ If, after discovery, a party wishes to rebut any facts in the *Staff Memo*, there is no reason to doubt that they will be afforded an opportunity to do so.

Nothing in Rule 602 precludes the Department from requesting briefing on an issue of law or fact at any time in the course of a proceeding. Usually parties complain when they are not given a sufficient opportunity to respond to something. In contrast, the Irrigation Entities are

³ The Irrigation Entities have now vacated/continued the depositions of Liz Cresto and Mat Weaver, which had been set for this past Friday and today.

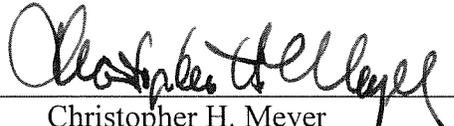
⁴ On February 5, 2015, the Director vacated the hearing (later to be rescheduled for a future date) and suspended the discovery completion deadline, stating that it "will be reestablished to coincide with the timing of the rescheduled hearing" and that "[t]he parties may continue to engage in discovery, including any scheduled depositions." *Fourth Amended Scheduling Order* at 1 (Feb. 5, 2015).

complaining, essentially, that they have been given too many opportunities. There is no Rule of Procedure requiring IDWR to seek written responses (or replies to responses) to staff memoranda prior to hearing. The Director went the extra mile by providing the parties an opportunity to respond to the *Staff Memo* and, in particular, to explain whether the described procedures and methodologies comport with the Prior Appropriation Doctrine. United Water took him up on that. The Irrigation Entities took a powder. That is their choice. But their decision to pass on this opportunity to explain what is legally wrong with the accounting procedures and methodologies carries an obvious implication.

The bottom line is that the *Boise Project's Response* and the *Joint Response* do not articulate any argument as to why or how the Department's accounting principles and methodologies described in the *Staff Memo* constitute an abuse of the Director's discretion or are inconsistent with the Prior Appropriation Doctrine.

Respectfully submitted this 9th day of February, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of February, 2015, the foregoing was filed, served, and copied as follows:

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