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SEP 28 2015

**DEPARTMENT OF
WATER RESOURCES**

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

**CITY OF BOISE'S POST-HEARING
BRIEF**

In accordance with the Idaho Department of Water Resources' Director's invitation to submit post-hearing briefing at the conclusion of the hearing in this matter, the City of Boise ("City"), by and through its attorneys of record, Perkins Coie LLP, hereby submits the following post-hearing brief.

In the October 22, 2013, Notice of Contested Case and Formal Proceedings, and Notice of Status Conference, the Director defined the issue for hearing as:

TO ADDRESS AND RESOLVE CONCERNS WITH AND/OR
OBJECTIONS TO HOW WATER IS COUNTED OR
CREDITED TOWARD THE FILL OF WATER RIGHTS FOR
THE FEDERAL ON-STREAM RESERVOIRS PURSUANT TO
EXISTING PROCEDURES OF ACCOUNTING IN WATER
DISTRICT 63

The May 20, 2015 Fifth Amended Scheduling Order; Notice of Hearing further stated "[t]he fundamental question in this proceeding is how water is counted or credited towards the fill of a water right." *Id.* at p. 2. As articulated in the City's Statements of Concern filed on December 3, 2013, and further described by the Environmental Manager for the City of Boise, Mr. Steve Burgos, at the hearing in this matter, the issue of how water is credited towards the fill of water rights for the federal on-stream reservoirs is of major import for the City.

The City holds numerous water rights with points of diversion in Water District 63 and thus the water right accounting method for Water District 63 has the potential to significantly impact how and when the City is able to exercise its water rights. Of particular concern to the City is the ability of the U.S. Bureau of Reclamation (“BOR”) to continue to provide winter maintenance stream flows on the Boise River. Boise River flows impact the operation of the City’s wastewater treatment facilities, related compliance with National Pollutant Discharge Elimination System (“NPDES”) permits, and the loss or fluctuations of flow impact the City’s aesthetic, economic, recreational, cultural, wildlife and tourism interests. In addition, the Boise River reservoirs provide important flood control operations that protect lives and property along the Boise River. The City has a continued interest in ensuring that the BOR and Army Corps’ of Engineers (“Corps”) operate the reservoirs to effectively prevent flooding.

The evidence and testimony at the hearing revealed two primary facts with regard to the Department’s accounting program for Water District 63. First, there is no apparent legitimate dispute that the Department’s accounting program for Water District 63 was imported from Water District 01, modified, and later adopted for Water District 63 in approximately 1986. Second, there is no apparent legitimate dispute that the Department’s accounting program for Water District 63 counts water released for flood control against the BOR’s storage rights, regardless of whether or not beneficial use of that water occurs after release.

These two facts came as a surprise to the City, and the City is dumbfounded that they did not surface in the Snake River Basin Adjudication—particularly in the 2009 Lucky Peak subcase. To the extent that the City has indicated a preference for the continued use of the Department’s accounting system in previous filings in this matter, the City must now retract such statements based on the evidence and testimony presented at the hearing.

Although the testimony and evidence at the hearing supports the Water District 63 accounting system as described in the testimony of Bob Sutter and Liz Cresto, the testimony and evidence presented at the hearing also support the fact that water rights have not been historically administered in Water District 63 in accordance with, or using the same assumptions, as the

Department's accounting system. Former Water District 63 Watermaster Lee Sisco and current Watermaster Rex Barrie both testified that water has been administered and delivered with the general understanding that water released for flood control does not count against BOR's storage rights for irrigation and streamflow maintenance, and that water stored after flood control releases is stored pursuant to a valid existing water right in priority.

Uncontroverted evidence was presented that the BOR and the Corps manage and operate the Boise reservoir system in compliance with the Water Control Manual for Boise River Reservoirs that received substantial input and at least tacit approval by the Department when it was developed. Uncontroverted evidence was presented that the Department issued a Moratorium Order for new water rights in the Boise River, based on a finding that the water in the Boise system is fully allocated, and that the exercise of some Boise River junior water rights are conditioned on water being released for flood control—which shows that the Department has administered the system under the assumption that the River is fully allocated. Some evidence was presented that the water that fills the reservoirs after flood control releases is stored without a water right, and is therefore available for future appropriation, which appears to directly contradict the moratorium, and suggests that the State has allowed unauthorized storage of water to occur for many years without alerting anyone.

In sum, evidence and testimony at the hearing show that there is a disconnect between the Department's accounting program and the historical administration and understanding of storage water rights in Water District 63. The City is confident, based on testimony presented at the hearing by Dave Shaw and others, that the Department can modify the Water District 63 accounting program to be consistent with historical practices and administration.

DATED: September 28, 2015

PERKINS COIE LLP

By: 

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 28, 2015, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the rules of procedure, to the following person(s):

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