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DEPARTMENT OF
WATER RESOURCES

Attorneys for United Water Idaho Inc.

**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

**UNITED WATER'S COMBINED
RESPONSE TO PETITIONS FOR
RECONSIDERATION**

INTRODUCTION

On October 20, 2015, Director Gary Spackman issued his *Amended Final Order* in the above-captioned matter. On November 3, 2015, the Ditch Companies¹ filed *Ditch Companies' Petition for Reconsideration* and the Boise Project Board of Control ("Boise Project") filed its *Motion for Reconsideration and Memorandum in Support* (together, the "*Petitions for Reconsideration*"). United Water Idaho Inc. ("United Water" or "UWID") addresses both in this *Combined Response to Petitions for Reconsideration*.

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, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

In their *Petitions for Reconsideration*, the Boise Project and the Ditch Companies (“Petitioners”) contend the Director must (1) add to or change the *Amended Final Order’s* findings of fact and conclusions of law, and (2) apply the reasoning set forth in the October 9, 2015 *Memorandum Decision and Order Granting Ditch Companies’ and Boise Project’s Motions for Summary Judgment, et al.* (“*Special Master’s Decision*”) issued by Special Master Booth in SRBA subcase nos. 63-33732, *et al.*

The *Petitions for Reconsideration* should be denied because the Director’s findings and conclusions in the *Amended Final Order* correctly state the law and are based on substantial and competent evidence in the record. Also, the Director is not bound by the *Special Master’s Decision* because it is not a final order of the SRBA Court affecting the storage rights at issue here, and it is wrong.

ARGUMENT

I. THE AMENDED FINAL ORDER IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE IN THE RECORD.

The *Amended Final Order’s* findings of fact are amply supported by substantial and competent evidence in the record and, in turn, those findings support its conclusions of law. The Director need not, and should not, add to or change the *Amended Final Order* to include findings or conclusions requested by the Ditch Companies and the Boise Project.

The Petitioners’ requests to amend findings and conclusions are akin to motions to amend findings or conclusions under Rule 52(b) of the Idaho Rules of Civil Procedure (“IRCP”). Under that rule, a motion to amend findings or conclusions “is addressed to the sound discretion of the trial court.” *Bair v. Barron*, 97 Idaho 26, 32, 539 P.2d 578, 584 (1975) (internal footnote omitted). “[T]he decision of the trial court denying the motion will not be disturbed on appeal

where the court's findings are supported by competent and substantial evidence." *Johnson v. Edwards*, 113 Idaho 660, 662, 747 P.2d 69, 71 (1987).

In this administrative proceeding, the Director is entitled to the same standard of deference based on "competent and substantial evidence." *See, e.g., Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011) ("The Court does not substitute its judgment as to the weight of the evidence presented, but rather defers to the agency's findings of fact as long as they are supported by substantial and competent evidence.").

This standard is required by Idaho Code § 67-5259, which in relevant part states:

(1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. . . .

(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole;
- or
- (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5259 (emphasis added). *See also Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77-78 (2011); *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

Substantial and competent evidence "is relevant evidence that a reasonable mind might accept to support a conclusion." *Chisholm v. IDWR*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005). In addition:

Substantial evidence is less than a preponderance of evidence, but more than a mere scintilla. Substantial evidence need not be uncontradicted, nor does it need to necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder.

Chisholm, 142 Idaho at 164, 125 P.3d at 520.

In short, the Director's duty is to ensure that his findings, inferences, conclusions, or decisions are supported by substantial and competent evidence in the record, but not necessarily uncontradicted evidence. The Director has fulfilled this duty, as demonstrated throughout the hundreds of findings and conclusions contained in his seventy-nine page *Amended Final Order*. The Director's decision is presumed to be correct. *Chisholm*, 142 Idaho at 162, 125 P.3d at 518 (“A strong presumption of validity favors an agency's actions.”).

Here, the Ditch Companies and Boise Project ask the Director to re-weigh conflicting evidence and reject his own judgment as to the weight of that evidence. But the Director need not, and should not, substitute their judgment for his own. As the presiding officer in this proceeding, the Director alone is entitled to evaluate conflicting evidence. His evaluation of conflicting evidence will not be second-guessed so long as his findings are not “clearly erroneous,” even if someone else (including a reviewing court) “might have reached a different conclusion.” *Chisholm*, 142 Idaho at 162, 125 P.3d at 518.

The Director is not obligated to add findings or make conclusions that are not necessary to support his decision. See *Pullin v. Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979) (assigning no error in failure to consider other possible theories). The Ditch Companies' and Boise Project's proposed changes to the *Amended Final Order's* already-lengthy findings and conclusions are not necessary for the Director to fully discharge his duty to “cover the essential facts and propositions of law that laid a basis for [his] decision.” *Bair*, 97 Idaho at 32, 539 P.2d

at 584 (affirming trial court's denial of motion to amend or make additional findings).² Their challenges to the *Amended Final Order's* findings and conclusions should be denied.

II. THE AMENDED FINAL ORDER CORRECTLY INTERPRETS THE FEDERAL STORAGE WATER RIGHTS DECREED BY THE SRBA COURT CONSISTENT WITH IDAHO'S PRIOR APPROPRIATION DOCTRINE AND WITHOUT REGARD TO THE SPECIAL MASTER'S DECISION.

The Director correctly did not consider the *Special Master's Decision* in the *Amended Final Order*. The Director's findings and conclusions in the *Amended Final Order* reflect the proper application of Idaho's prior appropriation doctrine to the water right decrees at issue in this proceeding. *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) ("as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty"). The *Special Master's Decision*, on the other hand, does not properly address the storage rights at issue here or apply Idaho's prior appropriation doctrine, and it is not a final order of the SRBA Court in any event.

The water rights at issue in this proceeding are the federal on-stream storage right nos. 63-303, 63-3613, 63-3614, and 63-3618. *Amended Final Order* at 5-6. The Director's duty is to administer water according to the elements set forth in the water right decrees for those rights. *In re SRBA*, 157 Idaho at 393-94, 336 P.3d at 800-01 ("the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed").

² In particular, there is no reason to include findings or conclusions requested by the Boise Project concerning United Water's water rights. *Boise Project's Motion for Reconsideration and Memorandum in Support*, pp. 9-11. As United Water has repeatedly argued, its water rights are clearly outside the scope of this proceeding because they are not federal on-stream storage water rights. Nevertheless, over United Water's repeated objections, the Director allowed the introduction of evidence at the hearing that is related to United Water's water rights. Now the Boise Project seeks to have the Director make findings and conclusions related to that evidence, even though the Director stated during the hearing that such evidence would not be considered with respect to how United Water's permits should be licensed. United Water continues to object to evidence related to United Water's water rights, and any findings or conclusions related thereto, including without limitation the proposed findings and conclusions proposed by the Boise Project. United Water continues to insist that the Director make no findings, conclusions, or orders in this proceeding that would affect United Water's water rights.

See also *A & B Irr. Dist. v. IDWR*, 153 Idaho 500, 514, 284 P.3d 225, 239 (2012) (upholding the Director’s action based on a “plain reading of the SRBA partial decree”). Those elements were not changed by the *Special Master’s Decision*.

The *Special Master’s Decision* was entered in SRBA subcase nos. 63-33732, *et al.* (subcases involving late storage claims that the Special Master recommended be disallowed), and not in the subcases for the federal on-stream storage water rights at issue in this proceeding—nos. 63-303, 63-3613, 63-3614, and 63-3618. The federal storage rights at issue here were partially decreed by the SRBA Court in 2007, 2008, and 2009, and those partial decrees have remained unchallenged and unchanged since the SRBA Court first issued them. Those partial decrees were incorporated into the SRBA Court’s August 26, 2014 *Final Unified Decree*, which was “conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987.” *Final Unified Decree*, p. 9 (emphasis added). The partial decrees have not been set aside by the SRBA Court, and the water rights were not included in the Court’s *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* (Aug. 26, 2014), which provided for continued processing of and SRBA Court jurisdiction over only certain specifically-listed pending subcases.

In short, the Director’s *Amended Final Order* correctly addresses the storage water rights reflected in the partial decrees issued for the federal on-stream reservoirs in 2007, 2008, and 2009, which describe the nature and extent of the water rights the Director is required to administer in accordance with Idaho law. I.C. § 42-1420(1); *A & B Irr. Dist. v. Idaho Dep’t Of Water Res.*, 153 Idaho 500, 515, 284 P.3d 225, 240 (2012) (“A decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.”).

In addition, the Director did not err in failing to consider the *Special Master's Decision* in the *Amended Final Order* because the *Special Master's Decision* does not constitute a final decision of the SRBA Court. It was issued in the context of a summary judgment proceeding and in the form of a Special Master's recommendation and report to the SRBA Court's Presiding Judge. It is not a final order of the Court because the Presiding Judge must review it prior to entering a decree. SRBA *Administrative Order 1* ("AOI") § 14.b. In addition, it may be challenged to SRBA Presiding Judge Wildman for *de novo* review. AOI § 13 (authorizing a *Notice of Challenge* to the Presiding Judge of a Special Master's Recommendation); *In re SRBA*, 149 Idaho 532, 537, 237 P.3d 1, 6 (2010) (summary judgment is freely reviewed on appeal because there can be only a question of law and no genuine issue of material fact); *In re SRBA, Case No. 39576, Subcase nos. 36-2080, et al., Order on Challenge*, p. 12 (Apr. 25, 2003) ("this Court's standard of review of a special master's ruling on a motion for summary [judgment] is the same standard that this Court would apply if this Court were ruling on the same motion").

In sum, the Director is not bound by the *Special Master's Decision* because it is not a final order of the SRBA Court that defines the federal storage water rights at issue in this administrative proceeding. The *Special Master's Decision* does not properly apply Idaho's prior appropriation doctrine in any case. Accordingly, the *Amended Final Order* need not and should not be amended to address it.

For the foregoing reasons, the Director should deny the *Petitions for Reconsideration*.

Respectfully submitted this 17th day of November, 2015.

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of November, 2015, the foregoing was filed, served, and copied as follows:

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