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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)
_____)

**BOISE PROJECT BOARD OF
CONTROL'S RESPONSE TO STAFF
MEMORANDUM**

The Boise Project Board of Control hereby responds to the November 4, 2014 Staff Memorandum as required by the Third Amended Scheduling Order in this proceeding. First, the Boise Project remains concerned that the scope of these proceedings is simply to justify the existing program of accounting. The hearing officer indicated in response to those concerns that no decisions have been made on the outcome of this contested case. Thereafter, however, in the Order Denying Pre-Hearing Motions, the hearing officer asserted that the current accounting provisions represent existing policy, and suggested that the proceeding would not modify that policy. Order p. 6. The Staff Memorandum further suggests that the purpose of this proceeding is to justify what was previously adopted as policy as no alternative accounting formulations are proposed.

The Staff Memorandum asserts that it is intended to address two principal questions.
(1) how and why water is counted or credited to water rights for reservoirs in Basin 63 under the

existing accounting methodologies, and (2) how these accounting methods came to be implemented in Basin 63.

The Staff Memorandum answers only a part of the first question, i.e., how the Department goes about accounting for water credited to the reservoirs. The more important question of *why* the accounting is done in this fashion and the legal and technical basis for adopting this method of accounting in the first place is simply assumed in this Staff Memorandum. To compound this problem, the explanation of the origin, adoption, and development of the accounting methodology is sparse at best and incomplete. The explanation of the origin consists of four paragraphs which fail to explain how and why a fundamental change was made to the method of accrual of water to the reservoir storage accounts based on the development of a computerized accounting program.

The Staff Memorandum does not explain how the Department has the authority to implement an accounting program that fundamentally changed the accrual methodology that had been used in Basin 63 for decades. The Staff Memorandum does not explain how and whether any notice was given to the storage right holders of the change in how their storage water rights would be accrued. Having cited none, the hearing officer must conclude that the Department agrees that no notice was given to the water users of this fundamental change. The Staff Memorandum does not explain the legal authority to fundamentally change the method of accrual to storage, without following the notice and comment provisions of rulemaking required under Idaho law.

The Staff Memorandum does not describe the origin of the concept of "paper fill." Nor does the Memorandum describe how the concept of "paper fill" is legally consistent with the concept of "satisfaction" of a water right. The Boise Project has heard numerous references from

the Department that “paper fill” constitutes “satisfaction” of the water right. Yet, the Staff Memorandum does not explain the origin of the concept of “paper fill” as “satisfaction,” but rather merely states it as a fact. If a determination was made that “paper fill” constitutes “satisfaction” of a water right for storage purposes, at the time the accounting program was developed in Basin 63, such a determination is left unstated. It appears to be the conclusion of the Staff Memorandum that the water right accounting program accomplished that change to “paper fill,” yet there is no explanation as to how and why that result came about through the water right accounting program.

Conspicuously absent from the description of accrual of water rights in the Staff Memorandum is an explanation of the fact that, when Arrowrock was originally licensed, it was licensed for a flow rate and not a volume rate. It was only during the SRBA that the Department changed the licensed flow rate for Arrowrock into a quantity. How and why the change was made was not discussed nor was the impact of that change on the accrual of water to the Arrowrock water right discussed. Instead, the Staff Memorandum at page 6 merely states that there is no flow rate on the reservoir rights.

The Staff Memorandum asserts that if reservoir operations and physical contents determinate the satisfaction of state water rights, it could result in federal control of natural flow. The Memorandum does not explain when that determination was made, how it was made, or by whom it was made. It simply states it as a fact without explanation.

The Staff Memorandum does not explain how and under what authority the current water right accounting program determines that the water that refills the reservoir was accrued to the space holder’s right following a flood control or other operational release. It merely states that it was done. The Staff Memorandum does not explain the “why” behind that conclusion.

The Staff Memorandum acknowledges that the Department runs the storage program and yet provides no basis for how the storage program was adopted or the basis for the Department's involvement in running the storage program. All it provides is the *how*, it does not provide the *why*.

Likewise, with the term "storage cancelling," the Staff Memorandum provides *how* the concept works, but it does not provide *why* or *how* this concept originated.

The last section of the Staff Memorandum fails to answer the question posed by the Director: How and why did the existing accounting method and procedures in District 63 come about? The answer in the Staff Memorandum is that an accounting program was developed and exists. The Staff Memorandum recognizes that the existing practice prior to the adoption of the current accounting method was to accrue water to the reservoir storage rights based upon the date of allocation. Apparently someone decided in the 1980s that was no longer how water would be accrued to the reservoir storage rights. There is no explanation given as to *how* and *why* that decision was made.

Completely missing from the Staff Memorandum is a discussion of the history of the development of the accounting program and the efforts by the Department to insist upon greater releases from storage as represented in its 1974 report. No explanation was provided as to whether the Department advised the storage right holders of the impacts to "satisfaction" of their storage rights from increased releases of water for flood control purposes. The Staff Memorandum does not explain whether the Department advised storage right holders that increased flood releases, as advocated by the Department in its 1974 Report, would have increased the likelihood of "paper fill" to the detriment of physical fill.

Nothing in the Staff Memorandum addresses the Department's role in preparing, reviewing, and approving the Boise River Water Control Manual or the flood control rule curves established in conjunction with the water control manual.

Missing from the Staff Memorandum is any record of any effort by the Department to advise the water users of the impacts to their storage rights of adopting the 1974 Flood Control report, the accounting program, or the water control manual.

The Staff Memorandum does not address any of the decisions by the Director to declare the Boise River fully appropriated or the basis for the determination that the Boise River was fully appropriated. There is no mention of the impact of the moratoriums In Basin 63. There is no mention that the Idaho Water Resource Board has also determined, based upon decisions of the Director, that the Boise River is fully appropriated.

Missing from the Staff Memorandum is the fact that the water master for District 63 has consistently advised the Department, when new water rights have been applied for, that no water is available for appropriation in the Boise River unless water is spilling past Lucky Peak. These comments were consistently made by the Boise River Water Master showing his understanding that the water filling the reservoir was accruing to the storage space rather than available for a new appropriation by junior users.

Particularly troubling is the Staff Memorandum's omission of any discussion of these issues and the fact that the Boise Project previously and repeatedly has raised all of these factors with the Department. Yet, the Staff Memorandum failed to address any of these important issues.

Since the Department has chosen not to address any of these issues brought to its attention, the Boise Project will object at the contested case hearing to any effort by the

Department to provide evidence as to any of these issues, since the Boise Project will not have had the opportunity to respond to whatever position the Department chooses to take with respect to these issues.

The Boise Project further joins in the procedural objections and reservations raised by Ballantyne Ditch Co., et al.

Dated this 26th day of January, 2015.

BARKER ROSHOLT & SIMPSON LLP



By: Albert P. Barker
Attorneys for Boise Project Board of Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January, 2015, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S RESPONSE TO STAFF MEMORANDUM** by the method indicated below, and addressed to each of the following:

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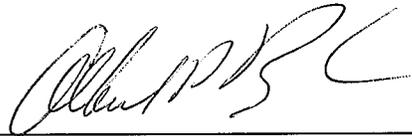
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