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DEPARTMENT OF
 WATER RESOURCES

U.S. Department of the Interior, Bureau of Reclamation

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

**IN THE MATTER OF DISTRIBUTION)
 OF WATER TO VARIOUS WATER RIGHTS)
 HELD BY OR FOR THE BENEFIT OF)
 A&B IRRIGATION DISTRICT, AMERICAN) RECLAMATION'S
 FALLS RESERVOIR DISTRICT #2, BURLEY) PROPOSED FINDINGS OF
 IRRIGATION DISTRICT, MILNER) FACT AND CONCLUSIONS
 IRRIGATION DISTRICT, MINIDOKA) OF LAW
 IRRIGATION DISTRICT, NORTH SIDE)
 CANAL COMPANY, and TWIN FALLS)
 CANAL COMPANY)
 _____)
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The Department of Interior, Bureau of Reclamation (Reclamation), through its counsel of record, Kathleen Marion Carr, Office of the Field Solicitor, hereby submits Reclamation's Proposed Findings of Fact and Conclusions of Law. For the sake of brevity, Reclamation has limited its proposed findings and conclusions to the issues raised in *Reclamation's Trial Brief* and *Reclamation's Post-Hearing Brief*.

FINDINGS OF FACT

1. The Upper Snake River Basin, which is the area located above Milner Dam on the Snake River, has historically been prone to severe and extended droughts, which have included the droughts of the early 1930's, 1987 to 1994, and 2000 to early 2005. *Exhibit 7001, Report of the Regional Director, p. 5-6; Exhibit 7001, Substantiating Report, p. 6; Tr. Vol. V, p. 937, LL. 22-25, p. 938, LL. 1-5.* It is reasonable to expect that

the region will continue to be plagued by droughts in the future. *Id*; *Tr. Vol. II, p.311, L. 13.*

2. During the last two decades the Upper Snake River Basin has experienced increased variability in terms of water supply as measured at the Heise gauge. *Pre-Filed Expert Testimony of David A. Raff, Ph.D., p. 9-10, Figure 6.* Because of this increased variability, it is reasonable to expect that the upper basin will experience more severe and prolonged droughts. *Id. Tr. Vol. II, p. 498, LL. 21-25.*

3. Approximately 142,000 acre-feet per of latent ground water depletions have yet to manifest themselves in the Snake River, but when they do, they will further reduce flows in the Snake River by nearly 142,000 acre-feet per annum. *Pre-Filed Expert Testimony of Patrick C. McGrane, P.E., pp. 7-8; Tr. Vol. VII, p. 1424, LL. 14-23.*

4. Because of the region's propensity for prolonged and severe droughts, recent increased variability, and latent ground water depletions, it is reasonable to conclude that water supply conditions will continue to deteriorate in the Upper Snake River Basin, thus placing greater stress on surface-irrigated farms and the storage reservoir system.

5. The use of carryover storage has long been relied upon by surface water users in the Upper Snake River Basin as a means of offsetting the risk and severity of future prolonged droughts. *See e.g., Exhibit 7006; Exhibit 7008; and Act of September 30, 1950, P. L. 864, 64 Sta. 1083.*

6. The drought of the 1930's, which caused significant crop losses and millions of dollars of lost revenues, exposed a serious lack of adequate carryover reservoir space in the Upper Snake River Basin. *Exhibit No. 7001, Report of the Regional Director, p. 5.*

7. Palisades Reservoir was constructed primarily for the purpose of providing carryover storage to the surface-water irrigators in the upper basin for multiple years. *Exhibit 7008, p. 15.*

8. The beneficial use of storing carryover water in Palisades Reservoir was subsequently confirmed by the State Engineer and Idaho Legislature during the water right licensing process for the reservoir. *Exhibits 7013, 7015, and 7016.*

9. Palisades represents an expression of public policy by federal, state, and local officials that carryover storage in the Upper Snake River Basin is both necessary and beneficial. The public and private financial commitment to carryover storage in the upper basin was significant give the fact that Palisades, with an active capacity of 1.2 million acre-feet, is second in size only to American Falls. *Tr. Vol. VI, p. 1179, LL. 21-22, p. 1180, LL. 23-25.*

10. Because the Upper Snake River Basin is expected to endure future droughts of greater severity than what has been experienced during the last eighty years, it is reasonable to conclude that carryover storage is needed to meet the future water needs of the surface-water irrigators. The evidence, in this case, does not demonstrate a reduced need for carryover storage. There was no evidence offered that purported to predict either the timing or severity of future droughts. In light of this lack of evidence and the reasonable likelihood that water conditions in the upper basin will continue to deteriorate, it is reasonable to prepare for the worst and hope for the best. Maintaining adequate carryover storage in the Upper Snake Reservoir System has historically proved to be a prudent and proper means of offsetting future droughts. *See e.g., Exhibit 7008, p. 15; Exhibits 7013, 7015, and 7016; Tr. Vol. VI, p. 1179, LL. 21-22, p. 1180, LL. 23-25.*

11. Reasonable carryover determinations reduce or otherwise limit the amount of water that may be carried over in storage reservoirs. *Tr. Vol. II, p. 312, LL. 3-7.*

12. Reducing carryover has the effect of shifting the risk of future water shortages (and curtailment) from the junior ground water users onto the senior surface water users. *Pre-Filed Expert Testimony of David A. Raff, Ph.D.*

13. Through the use of reasonable carryover determinations, the Director is attempting to “balance” the risk of future water shortages between junior and senior water users. *Tr., Vol. II, p. 312, L. 17.*

14. The Director’s reasonable carryover determinations do not assure for adequate supplies of carryover storage for multiple dry years. Rather they are limited to single-year determinations. *See e.g., Fifth Supplemental Order, Finding of Fact 25 (May 23, 2007).*

15. Use of market processes available in the Upper Snake River Basin have been used by junior ground water users to avoid the risk of curtailment. *See e.g., Exhibit 4143.* These market processes have included use of the Water District 01 Storage Rental Pool, dry-year lease agreements, and facilitated exchanges with below-Milner high-lift pumping rights. *Id.* There is no evidence that these market processes are inadequate to facilitate the reallocation of risk between junior and senior water users absent reasonable carryover limitations.

16. Imposition of “reasonableness” limitations on carryover storage may create adverse unintended consequences. This includes reducing the incentive of junior ground water users to fund future water-supply initiatives and, correspondingly, it increases the burden on senior water users to fund such initiatives. The Legislature, not

the Director, is better suited to allocate incentives and disincentives among water users for purposes of funding future water supply projects.

CONCLUSIONS OF LAW

1. “Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the Director” *AFRD # 2 v. Idaho Dep’t of Water Resources*, 143 Idaho 862, 880 (2007).

2. Under *AFRD # 2*, the Director must determine whether carryover storage is necessary to meet future needs of the senior water right holder. Specifically, *AFRD # 2* recognized there is a line between legitimate reasons to carry over storage water, *i.e.*, for “future needs” versus illegitimate purposes for carrying-over water such as hoarding or waste without regard to future beneficial use of the water. *See e.g.*, *AFRD # 2*, 143 Idaho at 880. The Director was given the task of drawing the line between future-needs storage water versus excess carryover storage. *Id.* Pursuant to *AFRD # 2*, the Director is given discretion to “determine whether carryover water is reasonably necessary for future needs.” *Id.* In this case, the evidence amply demonstrates a need for carryover storage to meet future needs of the senior surface water irrigators in the Upper Snake River Basin.

3. Rule 42 of the Conjunctive Management Rules clearly provides that a storage right holder is entitled to maintain sufficient carryover storage to assure water supplies for multiple dry years:

. . . the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.

IDAPA 37.01.11.042g (emphasis added). Use of the plural “dry years” instead of the singular “dry year” leaves no room for doubt that the purpose of carryover storage, as contemplated by the rules, is to provide insurance water for multiple dry years.

4. Mitigation for shortages to carryover must be made in the year that the shortage occurs. Pursuant to *AFRD #2*, there should be “no unnecessary delays in the delivery of water pursuant to a valid water right.” 143 Idaho at 874. Consequently, when the Director determines that a shortage to a storage right has occurred, there can be no unnecessary delay in delivering water to replace or otherwise satisfy the shortage.

DATED this 26th day of February 2008.

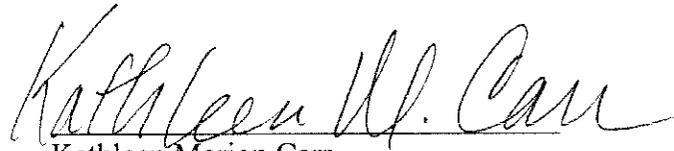

Kathleen Marion Carr

CERTIFICATE OF SERVICE

I hereby certify on this 26th day of February 2008 I caused to be served a true and correct copy of the foregoing **Reclamation's Proposed Findings of Fact and Conclusions of Law** by placing it in U.S. Mail postage prepaid except as otherwise stated below.

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