

**UNITED STATES DEPARTMENT OF THE INTERIOR**  
**OFFICE OF THE FIELD SOLICITOR**  
**960 BROADWAY, SUITE 400**  
**BOISE, ID 83706**  
**TELEFAX TRANSMISSION**

May 12, 2008

**To: Director Dave Tuthill**  
**Fax No: 287-6700**

**W. Kent Fletcher**  
**Fax No: (208) 878-2548**

**C. Thomas Arkoosh**  
**Fax No: (208) 934-8873**

**John K. Simpson**  
**Fax No: 344-6034**

**Travis Thompson**  
**Fax No: (208) 735-2444**

**Roger Ling**  
**Fax No: (208) 436-6804**

**James Lochhead/Adam T. DeVoe**  
**Fax No: (303) 223-1111**

**IDWR - Southern Regional Office**  
**Fax No: (208)736-3037**

**IDWR - Eastern Regional Office**  
**(208)525-7177**

**Randall Budge/Candice McHugh**  
**Fax No: 208-232-6109**

**Scott L. Campbell**  
**Fax No: 385-5384**

**James Tucker**  
**Fax No: 388-6935**

**Sarah Klahn**  
**(303) 825-5632**

**Michael Gilmore**  
**Fax No: 854-8073**

**Josephine P. Beeman**  
**Fax No. 331-0954**

**Matt Howard**  
**Fax No: 378-5066**

**Terry T. Uhling**  
**Fax No: 389-7464**

**From: Kathleen Marion Carr**  
**208-334-1911/work 208-334-1918/fax**

**Number of Pages to Follow: \_\_\_\_**

***TRANSMISSION NOTICE: This fax is intended only for the addressee(s) shown above. It may contain information that is privileged or otherwise protected from disclosure. Any use of this fax or its contents by persons other than addressee(s) is strictly prohibited. If you received this fax in error, please notify sender immediately to arrange the mailing of the original to us.***

**Comments/Message: Please see attached. kmc**

KATHLEEN MARION CARR  
Office of the Field Solicitor  
960 Broadway Avenue, Suite 400  
Boise, Idaho 83706  
Telephone: (208) 334-1911  
Facsimile: (208) 334-1918

*Attorney and Designated Representative for the  
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 )  
FALLS RESERVOIR DISTRICT #2, )  
BURLEY IRRIGATION DISTRICT, )  
MILNER IRRIGATION DISTRICT, )  
MINIDOKA IRRIGATION DISTRICT, )  
NORTH SIDE CANAL COMPANY, AND )  
TWIN FALLS CANAL COMPANY )

**RECLAMATION'S PETITION  
FOR RECONSIDERATION**

---

The U. S. Bureau of Reclamation, by and through its attorney and duly authorized representative, Kathleen Marion Carr, Office of the Field Solicitor, pursuant to IDAPA 37.01.01.720.02(a), hereby petitions for reconsideration of the *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (hereafter *Opinion*) in the above-captioned contested case proceeding. Without waiving its right to support and/or to take exceptions from this order and/or the Director's final order as provided by 37.01.01.720.02(b), Reclamation seeks to have the Hearing Officer address certain housekeeping matters and potential ambiguities within the *Opinion* to facilitate the parties' briefing of exceptions.

## ISSUES NEEDING CLARIFICATION

### 1. FERC Required Releases Below Milner

On page 16, the *Opinion* states: Reclamation has the responsibility for ... “the management [of storage] water to meet the requirements of the Federal Energy Regulatory Commission [FERC]....” However, it is not Reclamation that must make those particular releases, but Idaho Power. Idaho Power has a FERC-licensed hydropower plant below Milner, and FERC has required the Company to provide certain minimum flows. Idaho Power meets this requirement with water from its American Falls’ storage entitlement and from water rentals when available.

### 2. Incidental Power Releases

In addition, on page 16, the *Opinion* states that Reclamation has the responsibility for ... “some production of electrical power incident to the release of water from storage...” (emphasis added). Reclamation has licenses and decrees for the production of power at Palisades and Minidoka. These are licensed rights for power, and these rights are independent of its licensed rights to store and release water for irrigation. Reclamation may generate power incidental to irrigation releases, but that may not occur in all cases throughout the year. It is inaccurate, therefore, to state that Reclamation only generates power incidental to irrigation releases. It is important to note, however, that there are objections to Reclamation’s power rights in the Snake River Basin Adjudication. This issue will be fully developed and litigated in that proceeding. Therefore, we believe it is fair to state in the *Opinion* simply:

In addition to its obligation to make irrigation deliveries, Reclamation has the responsibility for flood control releases, production of electrical power, and the management of water to meet both the requirements of the Endangered Species Act and the Nez Perce Water Settlement.

### **3. In Season Replacement of Reasonable Carryover Shortfalls**

On page 65 of the *Opinion*, the Hearing Officer stated that “[Seniors]” are entitled . . . replacement water in the season of material injury.” It is unclear, however, when the replacement water needs to be provided for reasonable carryover. The *Opinion* states on page 29 that “hindrance to reasonable carry-over storage constitutes material injury” and requires mitigation of the amount of reasonable carryover deemed protected (pages 61-64). The *Opinion* also states on page 36 that the Director should determine when the replacement water will be provided. Consistent with the testimony of former Director Dreher, it is Reclamation’s position that replacement water for shortfalls in reasonable carryover needs to occur in the same year that replacement water is provided to fulfill the irrigation entity’s total water supply.

### **4. Methodology in Determining Reasonable Carryover Amount**

Reclamation also believes that the determination of the amount of reasonable carryover replacement water should be consistent with the process outlined by Finding of Fact 119 in Director Dreher’s *Amended Order* of May 2, 2005. It is Reclamation’s belief that this method is better suited for administration of water rights than the steps outlined on page 63-64 of the *Opinion*.


### **5. Accounting of Reasonable Carryover**

If replacement of reasonable carryover occurs within the same year that the injury occurs as described in 3 above, no amendment to the accounting process needs to occur as described on page 36 of the *Opinion*. Since all replacement water is paid in the year of the injury, it moots the sticky issue of holding carryover replacement water in non-existent space.

**CONCLUSION**

Reclamation requests that its *Petition for Reconsideration* be granted to clarify the issues identified above. Reclamation reserves its right to take exceptions to these and other issues as contemplated by 37.01.01.720.02(b) when the Hearing Officer's order is issued.

Dated this 12 day of May, 2008.

  
KATHLEEN MARION CARR

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 12 day of May 2008, a true and correct copy of *Reclamation's Petition for Reconsideration* was served on the following person(s) as shown below:

**Via Hand-Delivery**

Director Dave Tuthill  
Idaho Department of Water Resources  
322 East Front Street  
Boise, ID 83720-0098

Justice Gerald Schroeder  
c/o Victoria Wigle  
Idaho Department of Water Resources  
322 East Front Street  
Boise, ID 83720-0098

**By U.S. Mail Postage Prepaid**

**Randy Budge**  
**Racine Olson Nye Budge & Bailey, Cht.**  
PO Box 1391  
Pocatello, ID 83204-1391

**Candice McHugh**  
**Racine Olson Nye Budge & Bailey, Cht.**  
101 South Capitol Boulevard Suite 208  
Boise, ID 83702

**Sarah A. Klahn**  
**White & Jankosky, LLP**  
511 16<sup>th</sup> Street, Ste. 500  
Denver, CO 80202

**John K. Simpson**  
**Barker Rosholt & Simpson, LLP**  
P. O. Box 2139  
Boise, ID 83701-2139

**John Rosholt**  
**Travis Thompson**  
**Barker Rosholt & Simpson, LLP**  
113 Main St. W, Ste. 303  
Twin Falls, ID 83301-6167

**Roger Ling**  
**Ling Robinson & Walker**  
P. O. Box 396  
Rupert, ID 83350

**Jeffrey C. Fereday**  
**Givens Pursley**  
P. O. Box 2720  
Boise, ID 83701

**James S. Lochhead**  
**Adam T. DeVoe**  
**Brownstein Hyatt & Farber, P.C.**  
410 17<sup>th</sup> St., 22<sup>nd</sup> Floor  
Denver, CO 80202

**W. Kent Fletcher**  
**Fletcher Law Office**  
P. O. Box 248  
Burley, ID 83318

**Michael C. Creamer**  
**Givens Pursely**  
PO Box 2720  
Boise, ID 83701

**C. Thomas Arkoosh**  
**Arkoosh Law Office, Chtd.**  
P. O. Box 32  
Gooding, ID 83330-0032

**James Tucker**  
**Idaho Power Company**  
1221 W. Idaho St.  
Boise ID 83702

**Josephine P. Beeman**  
**Beeman & Associates, P.C.**  
409 West Jefferson Street  
Boise, ID 83702

**Michael S. Gilmore**  
**Deputy Attorney General**  
**State of Idaho**  
PO Box 83720  
Boise, ID 83720

**U.S. Bureau of Reclamation**  
**Matt Howard, PN-3130**  
1150 N. Curtis Road, Ste. 100  
Boise, ID 83706-1234

**Terry T. Uhling, Esq.**  
**J.R. Simplot Company**  
999 Main Street  
Boise, ID 83707

**A. Dean Tranmer**  
**City of Pocatello**  
PO Box 4169  
Pocatello, ID 83201

**Allen Merritt**  
**Cindy Yenter**  
**IDWR**  
1341 Fillmore Street, Suite 200  
Twin Falls, ID 83301-3033

  
**KATHLEEN MARION CARR**