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Attorneys for the Ditch Companies

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

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;

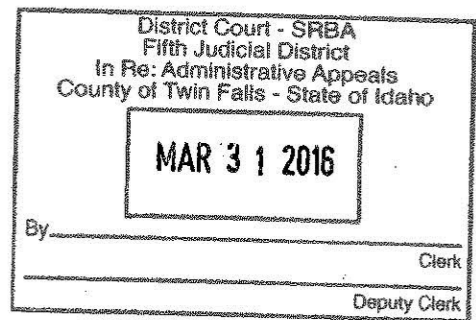
Petitioners,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES; and GARY SPACKMAN, in his
capacity as the Director of the Idaho Department of
Water Resources;

Respondents.

IN THE MATTER OF ACCOUNTING FOR
DISTRIBUTION OF WATER TO THE FEDERAL
ON-STREAM RESERVOIRS IN WATER
DISTRICT 63



Case No. CV-WA-2015-21376
(Consolidated Ada County Case
No. CV-WA-2015-21391)

**DITCH COMPANIES' REPLY IN
SUPPORT OF MOTION TO STAY**

COME NOW Petitioners 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 (the "Ditch Companies"), by and through their attorneys of record, Sawtooth Law Offices, PLLC, and submit this *Reply in Support of Motion to Stay*.

I. INTRODUCTION

The Ditch Companies' *Motion to Stay* asks the Court to defer its consideration of the Ditch Companies' *Petition for Judicial Review of the Amended Final Order* issued by the Director of the Idaho Department of Water Resources ("IDWR") in the above-captioned proceeding (hereinafter, the "Contested Case") pending the outcome of the late claims in Consolidated Subcase Nos. 63-33732, et al. (hereinafter, the "Late Claims Subcases").

The subject of the Late Claims Subcases is the legal entitlement of the Bureau of Reclamation ("BOR"), the Ditch Companies and the Boise Project Board of Control ("Boise Project") to store water in the Arrowrock, Anderson Ranch and Lucky Peak Reservoirs ("Boise River Reservoirs") following flood control releases. In his October 9, 2015 *Memorandum Decision and Order Granting Ditch Companies' and Boise Project's Motion for Summary Judgment, Special Master's Recommendation of Disallowance of Claims* ("Summary Judgment Decision"), and his February 26, 2016 *Order Denying Motions to Alter or Amend*, Special Master Booth determined that the water filling the reservoirs after flood control releases has been appropriated by and is stored pursuant to the existing reservoir storage water rights, so that the late claims to store the same water are neither legally cognizable nor necessary to authorize such

storage. The Special Master's decision confirms that the existing storage water rights provide the legal basis for accounting and distributing water stored in the Boise River Reservoirs following flood control releases.

Special Master Booth unequivocally rejected the legal position advocated by the Director, the State of Idaho and Suez Water Idaho, Inc. ("Suez" fka "United Water") that water released from the Boise River Reservoirs for flood control purposes "satisfies" the reservoir water rights, so that the actual, physical storage of water in the reservoirs after flood control releases occurs without a water right, subject to the delivery demands of existing junior water rights and future appropriations of water. Nonetheless, in the Contested Case initiated by the Director after the late claims were filed, ostensibly to address the basis and propriety of IDWR's methods for accounting for the distribution of water to the Boise River Reservoir storage water rights, the Director ignored the Special Master's decision, and attempted to validate the legal position the Special Master rejected. In direct opposition to the Special Master, the Director reiterated his legal position, and stated that he would administer Boise River Reservoir storage rights on that basis.

While this issue was pending before Special Master Booth, the Director should have stayed the Contested Case, as repeatedly requested by the Ditch Companies and the Boise Project. When the Special Master resolved the issue in his *Summary Judgment Decision*, the Director should have abided or at least acknowledged and considered the Special Master's decision before issuing his own *Amended Final Order* on October 20, 2015, in which he attempted to validate the legal position he, the State and Suez have advocated, and which the Special Master thoroughly rejected. The propriety of the IDWR's accounting method must be predicated upon a correct understanding of the legal entitlement to store water, whether it is

stored under the existing storage water rights, under the late claims or under some other legal authority. As Special Master Booth succinctly put it: “Before determining how to account for something one must know what is being counted.” *Summary Judgment Decision* at 33.¹

In their responses to the Ditch Companies’ *Motion to Stay*, IDWR and Suez acknowledge that the two proceedings involve the “same central question” and suggest that the Court consider them as “companion cases” or in parallel in order to reduce the “possibility of inconsistent decisions.” However, procedural and substantive differences between the two actions prevent the Contested Case appeal and the Late Claims Subcases from being consolidated or considered and processed by the SRBA court as companions or in parallel. *See Euclid Ave. Trust v. City of Boise*, 146 Idaho 306, 309, 193 P.3d 853, 856 (2008) (generally, civil actions and administrative appeals may not be combined because they are processed differently by the courts, based on factual records developed differently, and subject to different standards of review.). Under these circumstances, the appropriate course within the sound discretion of the Court is to stay the Contested Case proceeding, so that the Court may give due consideration to the Special Master’s determination of the legal entitlement to store water in the Boise River Reservoirs following flood control releases.

II. ARGUMENT

A. **The Special Master Squarely and Properly Determined that the Existing Storage Water Rights Provide the Legal Basis for Storage After Flood Control Releases**

The Director, the State and Suez did not want Special Master Booth to determine whether water that fills the Boise River Reservoirs after flood control releases is stored pursuant to the

¹ “At oral argument on the State’s Motion to Alter or Amend, counsel for the State agreed that the accounting system does not define the water rights.” *Order Denying Motions to Alter or Amend* at 29-30.

existing storage rights. They hoped to reserve that decision for the Director, through the Contested Case he initiated. Much of their briefing to the Special Master attempted to convince him to turn away from the issue. In response to the Ditch Companies' *Motion to Stay*, IDWR and Suez argue again that the Late Claims Subcases are not the appropriate forum for the Special Master to resolve this issue.

The issue was squarely before and decided by Special Master Booth in the Late Claim Subcases. On January 31, 2013, BOR filed "belt and suspenders" late claims for storage in the Boise River Reservoirs in response to the Director's opinion as previously advocated by the State of Idaho and Suez to make up for the alleged "deficiency" in the storage rights. *U.S. Memorandum in Support of SF4 Motions to File Late Notices of Claim, Late Claim Subcases* at 2-4, 7-8; *see also, State of Idaho's Response to Motions for Summary Judgment, Late Claim Subcases* at 45 (explaining that the late claims are "supplemental rights" to provide "an additional appropriation of water to make up a deficiency in supply from an existing water right.""). Based on the State's legal premise, the late claims sought additional, supplemental rights to store and use the water that fills the reservoirs after flood control releases.

The Ditch Companies have always maintained that water is stored in the reservoirs pursuant to the existing storage rights after flood control releases are made in accordance with the State and congressionally approved plan that has governed the use of the Boise River Reservoirs for flood control and beneficial use storage for over 60 years. The Ditch Companies have always disputed the contentions that flood control releases "satisfy" the Boise River Reservoir storage rights, that the existing Boise River Reservoir storage water rights are "deficient" as alleged by the Director, the State and Suez, and that additional later priority water rights are needed to authorize storage of water in the reservoirs following flood control releases.

See Ditch Companies' *Standard Form 1 Objection, Late Claim Subcases*, filed March 20, 2014, at 3.

Accordingly, after the Presiding Judge referred the Late Claim Subcases to Special Master Booth, the Ditch Companies filed a motion for summary judgment to demonstrate that the existing storage rights are not deficient as alleged by the Director, the State and Suez, and as implied by the late claims, and that the water filling the Boise River Reservoirs after flood control releases is stored pursuant to the reservoir storage rights. Consequently, such water is not unappropriated, and additional later priority water rights are neither cognizable nor necessary to authorize storage following flood control releases.

Special Master Booth recognized that this issue was squarely before him in the Late Claims Subcases:

[T]he summary judgment motions filed by the Ditch Companies and the Boise Project seek to answer the threshold question of whether the water that forms the basis of the claims was already being stored pursuant to the existing storage rights and hence the claims fail for the reason that such stored water cannot simultaneously be authorized under the existing storage rights and be the basis for beneficial use water rights.

Summary Judgment Decision, p. 3.

The State repeatedly argues that the only issue to be resolved regarding the above captioned late claims is "whether the claimant actually applied the quantity of water claimed, to the claimed use, at the time and place claimed." State of Idaho's Scheduling Proposal (Oct. 10, 2014) at 6. The State argues that any other issue, and especially the issue raised by the Ditch Companies and the Boise Project regarding whether the claims are "necessary," cannot be answered in these proceedings. This Special Master disagrees.

The purpose of the claims filed by the Bureau and the Boise Project is simply to make sure that the water contained in the Boise River Reservoirs at the time of maximum physical fill (i.e. the water that is actually used during the irrigation season) is properly stored pursuant to a valid water right. Under the legal theory of the State, and under the legal theory set forth in the Director's Report, in a year in which water is passed through or released for purposes of keeping the vacant space in the Boise River Reservoirs in compliance with the rule curves of the Water Control Manual, some or all of the water therein

contained at the time of maximum physical fill is not stored pursuant to any water right. The legal theory of the Ditch Companies and the Boise Project, on the other hand, is that the water contained in the Boise River Reservoirs at the time of maximum physical fill is the water stored pursuant to the existing storage rights and water that entered and was passed through or released prior to the time of maximum physical fill is not water stored pursuant to the existing storage rights. If the water contained in the Boise River Reservoirs at the time of maximum physical fill is stored pursuant to the existing storage rights, then the same water cannot form the basis of a claim under the Constitutional method of appropriation.

Id., p. 6.

In these Subcases, the issue raised by the Ditch Companies and the Boise Project goes directly to the question of whether the water stored in the Boise River Reservoirs was subject to being appropriated. If the water stored in the Boise River Reservoirs after flood control releases is stored pursuant to the existing storage rights, it is not subject to being appropriated.

Order Denying Motions to Alter or Amend, p. 3.

With regard to the legal authorization to store the water that ends up in the Boise River Reservoirs at the time of maximum physical fill, there are three possibilities presented in these Subcases. Such water is either: (1) "historical practice" water (as recommended by the Director); (2) water appropriated under the Constitutional method (which is what is claimed in the above-captioned claims); or (3) "existing storage right" water (as asserted by the Ditch Companies and the Boise Project in their *Motions for Summary Judgment*). The rebuttable presumption set forth in the *Director's Report* is that, in a flood control year, the water in the Boise River Reservoirs at the time of maximum physical fill is "historical practice" water (or some combination of "historic practice" water and "existing storage right" water if less than all of the water initially stored under the existing storage rights is released to maintain vacant flood control space). The inference of that presumption is that the water in the Boise River Reservoirs at the time of maximum physical fill is neither "existing storage right" water nor "Constitutional method" water. The objecting parties (the Bureau, the Ditch Companies and the Boise Project) have the burden of going forward with evidence to rebut the presumption in the Director's Report.

Summary Judgment Decision, pp. 10-11.

[T]he Partial Decrees for the existing storage rights are silent regarding a question that must be answered in order to determine whether there is any unappropriated water that might form the basis of the above-captioned claims. That question is: In any year where reservoir inflows exceed the quantity elements of the respective existing storage rights, what portion of such water

is attributable to the existing storage rights? This is not a question of accounting procedure; rather it is a question as to the nature of the existing storage rights. In other words, while measurement and accounting methodologies are left to the sound discretion of the director, the question sought to be answered by the Ditch Companies and the Boise Project relates to “what to count?” rather than “how to count it?”

The question of “how” to make an accounting of something cannot yield the answer of “what” to count. This is backwards. Before determining how to account for something one must know what is being counted. Accordingly, it cannot be said that the Director’s discretionary decision of “how” to account for the existing storage rights is determinative of what portion of the annual reservoir inflows are stored under the authority of the existing storage rights. The State asserts that it is not necessary for the Court to determine one way or the other regarding what water is stored under the existing storage rights. This Special Master disagrees. The above-captioned claims either are, or are not, for the same water authorized to be stored under the existing storage rights. If the claims are for the same water, they fail. It would be a futile endeavor to engage in additional fact finding and legal analysis if the claims fail upon the answer to the basic question of whether they are claims to water already stored under the existing storage rights.

Id., pp. 33-34.

Special Master Booth concluded that the late claims are not legally cognizable or necessary because “the irrigation storage component of the *existing water rights* is the right to store the water contained in the Boise Reservoirs at the time of maximum physical fill,” and the water put to beneficial use under the *existing water rights* is the water that is stored in the reservoirs following flood control releases. *Memorandum Decision*, pp. 7, 8, and 35 (emphasis added).

Based upon the file and record herein, and as explained in this Decision, this Special Master finds and concludes that the water that is contained in the Boise River Reservoirs at the time of maximum physical fill is water that is authorized to be stored under the existing storage rights. Accordingly, because none of the water contained in the Boise River Reservoirs at the time of maximum physical fill could have been appropriated under the Constitutional method of appropriation, the above-captioned late claims should be decreed disallowed.

Id. at 11.

B. Basin-Wide Issue 17 Does Not Confer Authority to the Director to Define Water Rights and Such Authority Remains with the SRBA Court

Both IDWR and Suez reference the holding by the Idaho Supreme Court in Basin-Wide Issue 17 that the Director has authority to account for water rights and then suggest that this somehow limits the issues being addressed by the Late Claims Subcases. There is no dispute that the Idaho Supreme Court in Basin-Wide Issue 17 acknowledged that the Director has an administrative role to play in counting the fulfillment of storage water rights. *In Re SRBA, Case No. 39576, Subcase No. 00-91017*, 157 Idaho 385, 336 P.3d 792 (2014). However, the Court also was very clear that said administrative discretion is bound by the prior appropriation doctrine and the Director's duty to administer water is governed by the decrees. *Id.* More specifically, the Court went on to state that "this means that the Director cannot distribute water however he pleases at any time in any way; *he must follow the law.*" *Id.* at 393, 336 P.3d at 800 (emphasis added). The law which must be followed includes the orders and decrees of the SRBA Court concerning water rights because it is the SRBA Court that is charged with determining the elements of water rights and issuing decreed water rights.

As stated by Special Master Booth in the Late Claims Subcases:

[T]he issues as to "what is the property?" and "how to account for the property?" are not the same. The accounting is left to the Idaho Department of Water Resources, but a determination of "what is the property?" is answerable by the SRBA Court and making such a determination is compatible with the holding in Basin-Wide Issue 17.

See Memorandum Decision, p. 21.

More recently, in the *Order Denying Motions to Alter or Amend*, Special Master Booth reiterated that "the accounting system does not define the existing storage water rights." *Order Denying Motions to Alter or Amend*, pp. 29-30. The storage water rights, which are property rights, cannot be modified, limited or diminished by the Director's post hoc determinations of

accounting procedures. Those accounting procedures and the administrative role of the Director cannot dictate what those property rights are, but rather must follow what the judiciary (in this case, the SRBA Court) defines as the property right. In other words:

Before determining how to account for something one must know what is being counted. Accordingly, it cannot be said that the Director's discretionary decision of "how" to account for the existing storage rights is determinative of what portion of the annual reservoir inflows are stored under the authority of the existing storage rights.

See Memorandum Decision, p. 33. The Court must determine the "what" and define the property right before it can address the accounting. Thus, the Court should stay the Contested Case and address the water rights, which include the existing storage rights, at issue in the Late Claims Subcases. Then, after the Court has fully considered the questions of law and determinations rendered by Special Master Booth, the Court can determine how to best proceed with the Contested Case.

C. The Parties and the Claims Have Enough in Common to Warrant the Requested Stay

IDWR suggests that the Contested Case and the Late Claims Subcases don't have enough in common to warrant a stay because the parties and the issues are not all "precisely identical." IDWR misses the point, and contradicts its own recognition that the two proceedings involve the "same central question," which would justify considering them as "companion cases" or in parallel in order to reduce the "possibility of inconsistent decisions."

The Ditch Companies are not suggesting that the claims and parties are "precisely identical," nor do they need to be for the Court to exercise its discretion under Idaho Rule of Civil Procedure 84(m) and Idaho Code Section 67-5274 to defer its consideration of the Contested Case appeal. The Ditch Companies have, for example, raised several procedural errors committed by the Director in his conduct of the Contested Case, none of which were at

issue in the Late Claim Subcases. These issues are not are not the basis for the Ditch Companies' *Motion to Stay*. However, the issues squarely addressed by this Court's Special Master are common or similar enough for this Court to exercise its discretion and address the Special Master's determinations before proceeding with the Contested Case.

With regard to parties, there is no dispute that the parties are not identical. Indeed, BOR, the titled owner of the existing storage water rights, is not a party to the Contested Case, but clearly is a party to the Late Claims Subcases. This further illustrates the Ditch Companies' position that the proper forum to address the legal question is in the Late Claims Subcases in which BOR is a party and where legal question of what is the property right is addressed. The Ditch Companies have contended that BOR is a necessary party to the Contested Case, something the Director rejected, and thus the issue should be addressed in the previously pending Late Claims Subcases where BOR is a party.

IDWR then suggests that it is not a party to the Late Claims Subcases. Although IDWR is not a named party to the Late Claims Subcases, the State and IDWR are one and the same for these two proceedings. Indeed, when the Boise Project sought to take the deposition of the State in the Late Claims Subcases pursuant to Rule 30(b)(6) of the Idaho Rules of Civil Procedure, the State produced Deputy Director Mathew Weaver. *See Late Claims' Record; Second Affidavit of Albert P. Barker in Support of Motion for Summary Judgment*, Exhibit 16, pp. 15-17 (dated July 28, 2015). For the Court's ease of reference a copy of selected excerpts of said transcript are attached to this *Reply* as Exhibit 1. During his deposition in the Contested Case, Mr. Weaver (who, incidentally, was defended by State Deputy Attorney General Michael Orr) testified that the recommendation issued by the Director for the late claims was made with the input and consideration of Deputy Attorney General Clive Strong. *See Late Claims' Record; Amended*

Affidavit of Daniel V. Steenson, Ex. BB, pp. 383-386 (dated July 13, 2015). For the Court's ease of reference a copy of selected excerpts of said transcript are attached to this *Reply* as Exhibit 2. For IDWR to now argue that a stay should not be issued because it is not a party to the SRBA Late Claims Subcases is without merit.

D. There is No Prejudice if the Contested Case is Stayed

Without using the word "prejudice," and after contending the accounting program at issue in the Contested Case is the same accounting program it "has employed in Water District 63 for decades," IDWR suggests that there is an immediate need for the Contested Case to proceed in order to allow the Director to fulfill its duty to administer water rights. *IDWR Response*, p. 7. However, IDWR has not suggested any prejudice if this Court stays the Contested Case in order to determine and answer the legal questions raised in the Late Claims Subcases. Again, the Director *sua sponte* initiated the Contested Case without any request from any parties or direction from any courts. When asked early on in the Contested Case whether he intended to proceed with the Contested Case even if no one participated, the Director stated it would proceed even if none of the parties agreed to participate. Tr. at 50:4-24 (10/7/14 Status Conference). The Director's rush to proceed with the Contested Case was not based on any request from a party or determination that the status quo would not suffice until the Late Claims Subcases were resolved. Moreover, when directly asked why he felt the need to proceed with the Contested Case hearing prior to the Late Claims Subcases pending before the SRBA Court, the Director responded as follows:

MR. WALDERA: And that doesn't answer the question. What's the rush to have it done before?

THE HEARING OFFICER: *I don't think I have to answer that question.*

MR. WALDERA: But you recognize there's late claims, and that has issues that are very similar before them in front of the SRBA court?

THE HEARING OFFICER: Well, I think there are issues that are in front of the SRBA Court that are somewhat related, but they are different issues.

MR. WALDERA: You feel compelled to have this resolved before then?

HEARING OFFICER: I feel compelled to hold the hearing and issue a decision.

MR. WALDERA: Well, I guess, again, we've renewed that motion to stay, because I think it's unnecessary and it's a waste at this point, based on the fact there's dual tracks. The late claim was pending before this contested case. I'm just making that record.

Tr. at 58:9-59:12 (8/14/15 Prehearing Conf.) (emphasis added).

Despite what IDWR suggests, there have been no arguments or showing that there is a need to rush to complete the Contested Case or that anyone would be prejudiced by the stay of the Contested Case. To the contrary, with the exception of Suez, all parties to the Contested Case oppose the Contested Case proceeding moving forward. Indeed, other than the Director's own attempt to circumvent and usurp the authority and jurisdiction of the SRBA Court by initiating this Contested Case and attempting to decide the legal question clearly before the SRBA Court, there is no rush to proceed with the Contested Case.² Judicial economy, fear of inconsistent decisions, and having the legal question of "what is the property?" answered by judiciary/SRBA Court responsible for determining the nature and extent of water rights before one can consider "how to count the property" far outweigh the consideration of accounting methodology which has been employed for decades. As Special Master Booth correctly noted:

² IDWR suggests that the fact that the Director has rushed to usurp the authority of the SRBA Court and the hearing on the Contested Case is scheduled before the hearing in the Late Claims has some bearing on this *Motion*. However, the timing of the hearing is not germane to this *Motion*. Rather the timing of the two proceedings, and the fact that the Late Claims were pending before the this Court, and before the Director *sua sponte* initiated this Contested Case is a factor in determining whether the later initiated proceeding should be stayed. The Director cannot circumvent the authority of the judiciary simply by initiated an administrative proceeding and winning the race to have the matter heard by this Court.

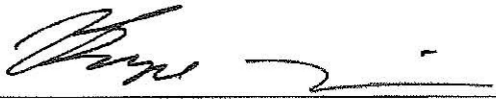
"[t]he question of 'how' to make an accounting of something cannot yield the answer of 'what' to count. This is backwards. Before determining how to account for something one must know what is being counted." Memorandum Decision, p. 33 (emphasis added).

III. CONCLUSION

For the reasons stated herein, and those previously set forth by the Ditch Companies, the Ditch Companies respectfully request the SRBA Court issue a stay of the Contested Case upon appropriate terms in order to fully consider, address, and resolve the issues now pending before it in the Late Claims Subcases.

DATED this 31st day of March, 2016.

SAWTOOTH LAW OFFICES, PLLC

By 
S. Bryce Farris
Attorneys for the Ditch Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of March, 2016, I caused a true and correct copy of the foregoing **DITCH COMPANIES' REPLY IN SUPPORT OF MOTION TO STAY** to be served by the method indicated below, and addressed to the following:

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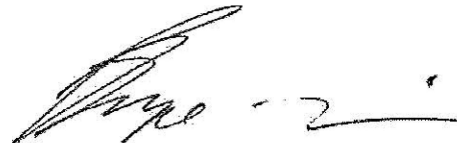
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S. Bryce Farris

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN Re SRBA) Subcase Nos.
Case No. 39576) 63-33737 and
_____) 63-33738

DEPOSITION OF STATE OF IDAHO 30(b)(6) WITNESS, MATHEW
WEAVER

July 17, 2015

REPORTED BY:

COLLEEN P. ZEIMANTZ, CSR 345

Notary Public

Page 2	
1	THE DEPOSITION OF STATE OF IDAHO 30(b)(6)
2	WITNESS, MATHEW WEAVER, was taken on behalf of the Boise
3	Project Board of Control, at the offices of Barker
4	Rosholt & Simpson LLP, located at 1010 W. Jefferson
5	Street, Suite 102, Boise, Idaho, commencing at 9:00
6	a.m., on July 17, 2015, before Colleen P. Zeimantz,
7	Certified Shorthand Reporter and Notary Public within
8	and for the State of Idaho, in the above-entitled
9	matter.
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7	Examination by Mr. Lawrence 135
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12	the State of Idaho Pursuant to Idaho Rule of
13	Civil Procedure 30(b)(6)
14	2 - Copy of IDWR Claims/Rights Not 18
15	Recommended, 12/30/2013, page 5
16	3 - Copy of Email to Garriok Baxter from 20
17	Michael Orr, Subject: Confidential Attorney
18	Work Product - Documents Palisades,
19	07/06/2013, IAGO 70125-03528 and 03529
20	4 - Copy of Appendix A (Copy) Memorandum of 26
21	Agreement between the Department of the Army
22	and the Department of the Interior, for Flood
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5	Discharge Water Year 1965
6	6 - Copy of Results of Snow Surveys of 82 39
7	Year Normal Runoff in Acre Feet
8	7 - Copy of State of Idaho DWR, Letter to 75
9	Charles Blanton from Keith Higginson,
10	11/30/1987, 3 pages
11	8 - Copy of IDWR Letter to Staff from Stephen 93
12	Allred, Re: Boise River Appropriations,
13	07/11/1977
14	9 - Copy of IDWR Letter to Staff from Stephen 93
15	Allred, Re: Boise River Appropriations,
16	01/22/1980
17	10 - Copy of Moratorium Order of Keith 93
18	Higginson, 05/15/1992
19	11 - Copy of Order Amending Moratorium Order 93
20	Dated May 15, 1992
21	12 - Copy of Amended Moratorium Order of 93
22	Keith Higginson, 04/30/1993
23	
24	
25	

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1 THE DEPOSITION OF STATE OF IDAHO 30(b)(6)
2 WITNESS, MATHEW WEAVER, was taken on behalf of the Boise
3 Project Board of Control, at the offices of Barker
4 Rosholt & Simpson LLP, located at 1010 W. Jefferson
5 Street, Suite 102, Boise, Idaho, commencing at 9:00
6 a.m., on July 17, 2015, before Colleen P. Zeimantz,
7 Certified Shorthand Reporter and Notary Public within
8 and for the State of Idaho, in the above-entitled
9 matter.

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2 - Copy of IDWR Claims/Rights Not Recommended, 12/30/2013, page 5	18
3 - Copy of Email to Garrick Baxter from Michael Orr, Subject: Confidential Attorney Work Product - Documents Palisades, 07/06/2013, IAGO 70125-03528 and 03529	20
4 - Copy of Appendix A (Copy) Memorandum of Agreement between the Department of the Army and the Department of the Interior, for Flood Control Operation of Boise River Reservoirs, A-1 through Plate 3	26

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6 - Copy of Results of Snow Surveys of 82 Year Normal Runoff in Acre Feet	38
7 - Copy of State of Idaho DWR, Letter to Charles Blanton from Keith Higginson, 11/30/1987, 3 pages	75
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<p>1 INDEX</p> <p>2 EXHIBITS (Continued)</p> <table><thead><tr><th data-bbox="138 325 714 346">DESCRIPTION</th><th data-bbox="714 325 776 346">PAGE</th></tr></thead><tbody><tr><td data-bbox="138 346 714 409">13 - Copy of Amended Moratorium Order of Keith Higginson, 05/03/1995</td><td data-bbox="714 346 776 409">93</td></tr><tr><td data-bbox="138 409 714 525">14 - Copy of Memorandum, Re: Processing of Applications to Appropriate Water in the Lower Boise River Basin, to Water Management Division from Gary Spackman, 02/22/2008</td><td data-bbox="714 409 776 525">93</td></tr><tr><td data-bbox="138 525 714 609">15 - Copy of Partial Decree Source Snake River Tributary: Columbia River, Page 1, August 16, 2011</td><td data-bbox="714 525 776 609">128</td></tr></tbody></table>	DESCRIPTION	PAGE	13 - Copy of Amended Moratorium Order of Keith Higginson, 05/03/1995	93	14 - Copy of Memorandum, Re: Processing of Applications to Appropriate Water in the Lower Boise River Basin, to Water Management Division from Gary Spackman, 02/22/2008	93	15 - Copy of Partial Decree Source Snake River Tributary: Columbia River, Page 1, August 16, 2011	128	<p>1 calling for attorney/client discussions.</p> <p>2 You don't need to discuss that.</p> <p>3 THE WITNESS: I reviewed the document, Exhibit</p> <p>4 1. I reviewed responses to the Boise Project Board of</p> <p>5 Control second discovery requests to the State of Idaho,</p> <p>6 and to their first discovery requests, and I looked a</p> <p>7 little bit at my deposition, my previous deposition.</p> <p>8 Q. (BY MR. BARKER) Is there anything else that</p> <p>9 you looked at to prepare?</p> <p>10 A. No.</p> <p>11 Q. Did you talk to anyone?</p> <p>12 MR. ORR: The same objection, as far as</p> <p>13 attorney/client.</p> <p>14 THE WITNESS: It is not outside the privileged</p> <p>15 communication.</p> <p>16 Q. (BY MR. BARKER) Okay. So outside the</p> <p>17 privilege communication -- that would be Mr. Orr?</p> <p>18 A. That's right.</p> <p>19 Q. You didn't talk to anybody, besides Mr. Orr?</p> <p>20 MR. ORR: Objection. The same if you talked</p> <p>21 to Mr. Strong, it is also attorney/client privilege.</p> <p>22 THE WITNESS: I did have an exchange with the</p> <p>23 Director last night, letting him know that I wouldn't be</p> <p>24 in the office today, because I would be here, for this</p> <p>25 deposition. And I had a conversation with Garrick</p>
DESCRIPTION	PAGE								
13 - Copy of Amended Moratorium Order of Keith Higginson, 05/03/1995	93								
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15 - Copy of Partial Decree Source Snake River Tributary: Columbia River, Page 1, August 16, 2011	128								
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<p>1 (Exhibit 1 marked.)</p> <p>2 MATHEW WEAVER,</p> <p>3 first duly sworn to tell the truth relating to said</p> <p>4 cause, testified as follows:</p> <p>5 EXAMINATION</p> <p>6 QUESTIONS BY MR. BARKER:</p> <p>7 Q. Exhibit 1 is the Deposition Notice.</p> <p>8 Mr. Weaver, have you had a chance to look over the</p> <p>9 Deposition Notice for the State of Idaho?</p> <p>10 A. I have.</p> <p>11 Q. You understand that you've been, or is it the</p> <p>12 fact that you've been designated as a witness on behalf</p> <p>13 of the State of Idaho to respond to this deposition?</p> <p>14 A. That is my understanding.</p> <p>15 Q. You understand that you have the awesome power</p> <p>16 of the State at your disposal today?</p> <p>17 A. I did not understand that.</p> <p>18 Q. But you understand that you are speaking on</p> <p>19 behalf of the State of Idaho, at least as respect to the</p> <p>20 topics identified in this Notice of deposition?</p> <p>21 A. I do.</p> <p>22 Q. Can you tell me what you did to prepare for</p> <p>23 this deposition, to respond to the topics that are</p> <p>24 identified in the Deposition Notice?</p> <p>25 MR. ORR: And I'll object to the extent it's</p>	<p>1 Baxter last night, relaying the same information to him.</p> <p>2 Q. (BY MR. BARKER) And with Mr. Baxter and with</p> <p>3 Mr. Spackman, you didn't have any substantive</p> <p>4 discussions about the topics to be covered in your</p> <p>5 deposition?</p> <p>6 A. No.</p> <p>7 Q. When did you first start preparing for this</p> <p>8 deposition?</p> <p>9 A. I think -- let's see. Monday, I was in Post</p> <p>10 Falls with you. Tuesday we flew back from Post Falls.</p> <p>11 That night, I had a water user meeting in Payette. I</p> <p>12 was at their advisory meeting.</p> <p>13 I think on the drive home, I maybe had a -- it</p> <p>14 was either on the drive home, or the first thing in the</p> <p>15 morning, I had a voicemail from Clive Strong, indicating</p> <p>16 that I had been designated as the State's witness. So</p> <p>17 that was my first knowledge of it. So I guess,</p> <p>18 Wednesday, I was in the office, and that's the first</p> <p>19 time I started to, I guess, you could say, prepare for</p> <p>20 this.</p> <p>21 Q. And you feel comfortable with that</p> <p>22 preparation, that you are capable of responding to the</p> <p>23 topics on behalf of the State of Idaho, that are</p> <p>24 identified in the Deposition Notice?</p> <p>25 A. Yes.</p>								

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1 Q. Mr. Orr has brought some documents to the
2 deposition that relate to some of the topics. You had a
3 chance to look at that production of documents?
4 MR. ORR: That includes the discovery
5 requests -- or the responses to discovery requests were
6 part of that production.
7 THE WITNESS: Yeah, I reviewed the responses.
8 I did not -- well, that's not true. I'm familiar with
9 many of these documents, and I've looked at them in the
10 past. In preparation this week, for this deposition,
11 the only one that I looked at was the 1974 report by the
12 Department for the Governor.
13 Q. (BY MR. BARKER) Okay. So how was it that you
14 were advised that you were going to be speaking on
15 behalf of the State of Idaho?
16 A. As I said, they -- I think I had a voicemail
17 from Clive Strong, saying that I had been designated.
18 That's how I was advised of it.
19 Q. Do you understand that these subcases, that
20 we're in a deposition on today, involve the late claims
21 for fill of the reservoir following flood control
22 releases in the Boise Basin?
23 A. I do. I'm not clear on which late claims are
24 being covered in the response to the Boise Project Board
25 of Control in reference to that, there is multiple water

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1 rights, and inconsistent list of water rights
2 identified. So I wasn't sure if we were speaking just
3 about the Bureau's late claims, or the Boise Project's
4 late claims, or all of them.
5 Q. Do you understand that they have been
6 consolidated?
7 A. I do.
8 Q. The Bureau's and the Boise Project's late
9 claims have all been consolidated?
10 A. Uh-huh.
11 Q. They all relate to the Arrowrock, Anderson
12 Ranch, Lucky Peak Reservoirs on the Boise River?
13 A. I do.
14 Q. So I guess back to my question. You
15 understand that this is part of a McCarran Act
16 Adjudication?
17 MR. ORR: Objection to the extent it calls for
18 a legal conclusion.
19 THE WITNESS: Yes, and I understand that this
20 is an SRBA case.
21 Q. (BY MR. BARKER) Okay. And the SRBA is an
22 adjudication of water rights?
23 A. That's right.
24 Q. Is this SRBA case covered, in the view of the
25 State, under Chapter 14, Title 42?

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1 MR. ORR: Objection to the extent it calls for
2 a legal conclusion.
3 THE WITNESS: No, I don't know.
4 Q. (BY MR. BARKER) You don't know?
5 Are you aware that in the SRBA proceedings,
6 that the Director is named as the expert for the court?
7 A. I did not know that.
8 Q. Are you aware that in the SRBA proceedings,
9 the Department of Water Resources is also the court's
10 expert?
11 A. I was aware of that role.
12 Q. Did anyone at the Department seek approval of
13 the court for a representative of the Department to act
14 as a representative of a party in this subcase, in these
15 subcases?
16 A. I don't know.
17 Q. You did not?
18 A. I did not.
19 Q. You haven't seen any approval of the court?
20 A. I have not.
21 Q. Are you aware of any situation where any
22 representative of the Department has ever appeared as a
23 representative of the party in the SRBA?
24 A. I'm aware of several instances of that
25 occurring.

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1 Q. Tell me about those instances that you are
2 aware of.
3 A. The two that I recollect is one was Tony
4 Olenichak, and former Director Dave Tuthill.
5 Q. Former Director Dave Tuthill. Okay. Let's
6 talk about Tony Olenichak. Tony Olenichak appeared as a
7 representative of a party in the SRBA?
8 A. That's my understanding.
9 Q. Okay. And what subcase was that?
10 A. I don't know.
11 Q. What was the factual circumstance where that
12 occurred?
13 A. I believe it had to do with AFRD#2's claims in
14 the SRBA.
15 Q. And what role did Mr. Olenichak play in that
16 subcase?
17 A. Other than being a witness for the State?
18 Q. I'm asking. I don't know.
19 A. That's my understanding, he was a witness for
20 the State, or he was the State's representative in that.
21 Q. And did he obtain approval of the court for
22 that?
23 A. I don't know.
24 Q. Did he appear as a witness at trial?
25 A. I don't know. I know he was deposed.

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1 Q. And you said, former Director Tuthill appeared
2 as a representative of a party in the SRBA?
3 A. That's my understanding.
4 Q. Was it while he was the Director?
5 A. I believe that's so.
6 Q. Okay. Tell me what that subcase involved.
7 A. I don't know any of the details of that, just
8 that it's my understanding that it occurred.
9 Q. And do you understand he was the
10 representative of the State of Idaho?
11 A. That is my understanding.
12 Q. And do you understand whether or not
13 Mr. Tuthill obtained approval of the court for acting in
14 that capacity?
15 A. I do not know.
16 Q. You understand that the role of the Department
17 in the SRBA is to be a neutral advisor to the court?
18 A. I do understand that.
19 Q. And do you perceive any conflict in acting as
20 a representative of the party, and acting as a neutral
21 in the same subcase?
22 MR. ORR: Objection to the extent it calls for
23 a legal conclusion.
24 THE WITNESS: I'd rely on my legal counsel for
25 that. No one has expressed concern given the fact that

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1 there is precedence for this, I assumed that this was
2 okay. I did not perceive a conflict.
3 Q. (BY MR. BARKER) You did not perceive a
4 conflict?
5 MR. ORR: Objection; asked and answered.
6 Q. (BY MR. BARKER) Is that right?
7 A. Correct.
8 Q. So tell me then, in these subcases, is it the
9 position of the State, that the State and the Department
10 are collaborating?
11 A. I don't believe that that's the position of
12 the State.
13 Q. What is the position of the State with respect
14 to the relationship between the State and the Department
15 in this subcase?
16 A. I don't know. It gets very confusing. I rely
17 heavily on my legal counsel for that.
18 Q. Okay. But you are the State. So the State --
19 A. That's my role here.
20 Q. You are speaking for the State?
21 A. That's right.
22 Q. So what is the position of the State with
23 respect to the relationship between the State and the
24 Department?
25 MR. ORR: Objection; asked and answered.

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1 THE WITNESS: I'm here today on behalf of the
2 State, separate from my role with the Department.
3 Q. (BY MR. BARKER) So how do you go back to the
4 Department, after you've appeared on behalf of the
5 State, and act as a neutral for the Department, for the
6 court?
7 A. To the extent, I guess, that I would have a
8 future role with the court on behalf of the Department,
9 I would have to consider how I proceeded after this.
10 Q. So is there some kind of Chinese wall, where
11 you are no longer allowed to have a relationship with
12 the Department in these subcases?
13 MR. ORR: Objection to the extent it calls for
14 a legal conclusion.
15 THE WITNESS: I don't know. I'm not in
16 adjudication. That's the section at the Department that
17 deals with these SRBA matters. It's not often that I'm
18 involved with adjudication matters. So if it becomes
19 something that I had to deal with in the future, I have
20 to think about how to deal with that.
21 Q. (BY MR. BARKER) But you have been involved in
22 the recommendation of denial of these late claims?
23 A. That's correct.
24 Q. When you were involved in the decisions to
25 deny the late claims, was that in your capacity as a

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1 representative of the Department, or as a representative
2 of the State?
3 A. As a representative of the Department.
4 Q. Okay. So do you know whether the State has
5 any disagreement with the Department's recommendations?
6 A. Well, I don't think that the State has an
7 agreement, or a disagreement with the recommendations.
8 They are not a -- they were not involved in the decision
9 making of that recommendation. And they don't have a
10 position currently on whether that recommendation should
11 move forward or not. But to the extent that it moves
12 forward, they want to participate in that.
13 Q. For what purpose? If they don't have a
14 position on whether it is approved or disapproved, why
15 do they want to participate? Why does the State want to
16 participate?
17 A. Those were late claims filed on the SRBA that
18 need to be based on beneficial use. And I think they
19 want to participate in the matter to ensure the
20 beneficial use is established in the decree of those
21 water rights.
22 Q. So I'm backing up a step. I think you said
23 that the State had no role in the recommendation to
24 disallow?
25 A. That's right.

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<p>1 Q. Is that right?</p> <p>2 I thought in your previous deposition in the</p> <p>3 contested case, you said that Mr. Strong and Mr. Orr</p> <p>4 were involved in that decision; is that --</p> <p>5 A. I would characterize that as saying, they were</p> <p>6 advised of that decision prior to the recommendations</p> <p>7 moving forward. But they didn't have an active role in</p> <p>8 deciding the outcome of that recommendation.</p> <p>9 Q. Did they make recommendations to the</p> <p>10 Department on whether or not it should -- let me</p> <p>11 rephrase the question.</p> <p>12 Did anyone at the State make recommendations</p> <p>13 to the Department as to whether or not the claims should</p> <p>14 be allowed or disallowed?</p> <p>15 A. They did not.</p> <p>16 MR. BARKER: So let me then mark that as an</p> <p>17 exhibit.</p> <p>18 (Exhibit 2 marked.)</p> <p>19 Q. (BY MR. BARKER) So do you recognize what</p> <p>20 we've marked as Exhibit 2?</p> <p>21 A. I do not.</p> <p>22 Q. If you look at the substance of these rights,</p> <p>23 you'll see that the rights that are the subject of these</p> <p>24 late claims, 63-33732, 33733, 33734, 33737, and 33738,</p> <p>25 all relate to claims that the Department disallowed;</p>	<p>1 State.</p> <p>2 Q. Was that the position of the Department?</p> <p>3 A. It was.</p> <p>4 Q. Okay. And so what is the State's position</p> <p>5 with respect to that statement of reason in the</p> <p>6 recommendation for disallowance?</p> <p>7 A. I don't know that it has a position on that</p> <p>8 statement.</p> <p>9 Q. So the State doesn't have the position on</p> <p>10 whether or not that water was put to beneficial use,</p> <p>11 after flood control releases from these three</p> <p>12 reservoirs?</p> <p>13 A. That's correct.</p> <p>14 MR. BARKER: Let me show you then what we'll</p> <p>15 mark as an exhibit.</p> <p>16 (Exhibit 3 marked.)</p> <p>17 Q. (BY MR. BARKER) Before you look at that, let</p> <p>18 me go back to this recommendation of disallowance in</p> <p>19 Exhibit 2.</p> <p>20 Does the State support the Department's</p> <p>21 position that there should be a general provision</p> <p>22 recognizing the historical use of beneficial use</p> <p>23 following flood control?</p> <p>24 MR. ORR: Objection; asked and answered.</p> <p>25 THE WITNESS: It neither supports, nor opposes</p>
Page 19	Page 21
<p>1 right?</p> <p>2 A. I see that.</p> <p>3 Q. And that's what we're talking about here?</p> <p>4 A. I agree.</p> <p>5 Q. These cases?</p> <p>6 A. Yes.</p> <p>7 Q. These subcases?</p> <p>8 A. Yes.</p> <p>9 Q. And there is a reason given for the</p> <p>10 disallowance next to that. Would you read that into the</p> <p>11 record, please? Because it's the same for all five; is</p> <p>12 it not?</p> <p>13 A. It appears to be, yes.</p> <p>14 Q. So just pick one, and read it in.</p> <p>15 A. "The use of flood waters captured in evacuated</p> <p>16 flood control space in on-stream reservoirs in Basin 63</p> <p>17 for irrigation and other beneficial purposes is a</p> <p>18 historical practice. The Department recommends that the</p> <p>19 historical practice be recognized by the SRBA through a</p> <p>20 general provision."</p> <p>21 Q. So is it the position of the State that there</p> <p>22 is a historical practice to use water that's captured in</p> <p>23 flood control after flood control releases for</p> <p>24 beneficial uses?</p> <p>25 A. I don't know that that's the position of the</p>	<p>1 that position.</p> <p>2 Q. (BY MR. BARKER) Does the State have a</p> <p>3 position on what the recommendation should say? Sorry.</p> <p>4 What the general provision should say?</p> <p>5 A. It does not.</p> <p>6 Q. Does the Department?</p> <p>7 A. The --</p> <p>8 Q. Let me rephrase that. You are the State. So</p> <p>9 does the State know if the Department has the position</p> <p>10 on what that general provision should say?</p> <p>11 A. The State is aware that the Department has</p> <p>12 been working with water users in several basins on</p> <p>13 potential language that could be used in the general</p> <p>14 provision, but that nothing has been finalized.</p> <p>15 Q. So then let's look at Exhibit 3. Do you</p> <p>16 recognize Exhibit 3 as a copy of an email from Mr. Orr</p> <p>17 to you, Mr. Baxter, and Ms. Cresto, and Clive Strong?</p> <p>18 A. I see that's what it is.</p> <p>19 Q. Have you seen this email in the past?</p> <p>20 A. It's addressed to me. I suspect I have.</p> <p>21 Although, without reading it, I don't recognize it at</p> <p>22 first blush.</p> <p>23 Q. Okay. Do you see the date of July 6th, 2013?</p> <p>24 A. I do.</p> <p>25 Q. Were you aware that the late claims had been</p>

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)
_____)

CONTINUED DEPOSITION OF MATHEW WEAVER

March 18, 2015

VOLUME II, PAGES 240 - 483

REPORTED BY:

COLLEEN P. ZEIMANTZ, CSR 345

Notary Public

DC003528

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<p>1 THE CONTINUED DEPOSITION OF MATHEW WEAVER was 2 taken on behalf of the Ditch Companies, at the 3 Department of Water Resources, at 322 East Front Street, 4 6th Floor, Boise, Idaho, commencing at 9:05 a.m., on 5 March 18, 2015, before Colleen P. Zeimantz, Certified 6 Shorthand Reporter and Notary Public within and for the 7 State of Idaho, in the above-entitled matter. 8 APPEARANCES: 9 For the Nampa/Meridian Irrigation District, Irrigation 10 Districts and Ditch Companies: 11 SAWTOOTH LAW OFFICES, PLLC 12 BY MR. DANIEL V. STEENSON 13 BY MR. S. BRYCE FARRIS 14 BY MR. ANDREW J. WALDERA 15 1101 W. River Street, Suite 110 16 P.O. Box 7985 17 Boise, Idaho 83707 18 dan@sawtoothlaw.com 19 bryce@sawtoothlaw.com 20 For Trout Unlimited: 21 TROUT UNLIMITED 22 BY MR. PETER R. ANDERSON 23 910 W. Main Street, Suite 342 24 Boise, Idaho 83702 25 panderson@tu.org</p>	<p>1 APPEARANCES (Continued): 2 For Farmers Union Ditch Company: 3 BY MR. JERRY A. KISER 4 Attorney at Law 5 1365 N. Orchard Street, Suite 216 6 P.O. Box 8389 7 Boise, Idaho 83707 8 jkiser@cableone.net 9 For the Department of Water Resources: 10 Office of Attorney General 11 Deputy Attorney General, Natural Resources 12 BY MR. MICHAEL C. ORR 13 700 W. State Street, 2nd Floor 14 P.O. Box 83720 15 Boise, Idaho 83720-0010 16 michael.orr@ag.idaho.gov 17 18 19 20 21 22 23 24 25</p>
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<p>1 APPEARANCES (Continued): 2 For Boise Project Board of Control: 3 BARKER ROSHOLT & SIMPSON, LLP 4 BY MS. SHELLEY M. DAVIS 5 1010 West Jefferson Street, Suite 102 6 P.O. Box 2139 7 Boise, Idaho 83701-2139 8 smd@idahowaters.com 9 For the City of Boise: 10 PERKINS COIE, LLP 11 BY MS. ERIKA E. MALMEN 12 1111 W. Jefferson, Suite 500 13 P.O. Box 737 14 Boise, Idaho 83701-0737 15 emalmen@perkinscoie.com 16 For United Water Idaho: 17 GIVENS PURSLEY, LLP 18 BY MR. MICHAEL P. LAWRENCE 19 601 W. Bannock 20 P.O. Box 3720 21 Boise, Idaho 83701 22 michael.lawrence@givenspursley.com 23 24 25</p>	<p>1 I N D E X 2 TESTIMONY OF MATHEW WEAVER PAGE 3 Examination by Mr. Steenson (Continued) 247 4 Examination by Mr. Farris 378 5 Examination by Ms. Davis 394 6 Examination by Mr. Kiser 406 7 Examination by Mr. Waldera 408 8 Examination by Ms. Malmen 431 9 Examination by Mr. Anderson 442 10 Examination by Mr. Lawrence 455 11 Examination by Mr. Orr 467 12 Further Examination by Mr. Steenson 474 13 E X H I B I T S 14 DESCRIPTION PAGE 15 114 - Copy of Email Memorandum to Shelley 246 16 Keen from Dave Tuthill, Re: Recommendations 17 for Licensing of Water Right No. 63-03618, 18 Dated 06/27/2002 19 115 - Copy of LexisNexis Copy of Supreme 246 20 Court of Idaho 66 Idaho 1;154 P.2d 507; 1944 21 Ida. LEXIS 56, 7 pages 22 116 - Copy of Table Contents of IDAPA 37 246 23 Title 03 Chapter 02, 37.03.02 - Beneficial 24 Use Examination Rules 25</p>

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1 Q. What have been your discussions with the
2 Director about this contested case? And let's, again,
3 work backwards, starting with during the lunch hour.
4 Did you discuss your deposition with the Director during
5 the lunch hour?
6 A. Today?
7 Q. Yes.
8 A. I did not.
9 Q. Did you discuss your deposition, or this
10 contested case with the Director prior to the deposition
11 today?
12 A. Yes.
13 Q. What were those discussions, and when?
14 A. I think -- was it last Tuesday? It was the
15 first day of my deposition. He and I talked at the
16 conclusion of that day.
17 Q. Do you recall what the substance of the
18 discussion was?
19 A. I do recall that we talked about -- well,
20 there was a line of questioning in the first day of my
21 deposition that had to do, I guess, with the sentiments
22 of -- I don't remember how it was put. But that there
23 was motivation somehow involved with this, based on the
24 need for attorneys to have work, if you recall that line
25 of questioning.

1 late claims?
2 A. Yes.
3 Q. Is that right, you were involved in those?
4 A. Yes.
5 Q. Okay. Do you recall whether the Director was
6 involved in those?
7 A. In working on what I would call, the proposal,
8 settlement proposal for the late claims.
9 Q. Let's start with the recommendations,
10 themselves.
11 A. Oh, I'm sorry.
12 Q. Did the Director have any involvement with the
13 recommendations?
14 A. The only involvement that I recall is -- and
15 this is the initial recommendations, which we
16 recommended disallow on the refill claims. He did
17 attend meetings. So we would periodically have meetings
18 as an organization; Liz Cresto, myself, Gary, discussing
19 where we were in discussions, where we were in technical
20 analysis, had there been headway or progress? So I
21 would say, that those were mostly data dumps, or
22 informational dumps on our part.
23 As we converged on the decision to disallow
24 the late claims, Gary certainly was brought into that,
25 described why we were getting there. And ultimately, he

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1 Q. Okay. Did you follow-up that with the
2 Director?
3 A. We did discuss that those questions came up.
4 Q. What was his response?
5 A. He seemed unconcerned.
6 Q. Did you discuss any other aspects of your
7 deposition with the Director?
8 A. I'm sure that we did, but I don't remember
9 specifics.
10 Q. Prior to your deposition last Tuesday, did you
11 have discussions with the Director about your upcoming
12 deposition?
13 A. Only with respect to conflicts in some
14 calendar items that he was trying to coordinate.
15 Q. What type of conflicts?
16 A. Well, he was trying to organize meetings that
17 he wanted me to be at, but I wasn't able to be there.
18 So we were discussing my deposition within those
19 calendar items.
20 Q. Did you have discussions about the substance
21 of your deposition, and perhaps the preparation of your
22 deposition?
23 A. I don't recall those, no. No.
24 Q. I believe in your testimony from last week,
25 you discussed your work on the recommendations for the

1 was the one that decided, we didn't have enough
2 evidence, or we didn't have any evidence, perhaps, of
3 beneficial use. So then we were going to recommend
4 disallowed on those.
5 Q. So you actually got to where I was trying to
6 get. So he was actually consulted with, prior to the
7 recommendations being final?
8 A. Yes.
9 Q. And he was the one that made the ultimate
10 decision on those late claims?
11 A. Yes.
12 Q. Was anyone else within the Department
13 consulted as to those late claims, and the finalization
14 of them?
15 A. Because a lot of the analysis leading up to
16 that was technical in nature, it was mostly a work
17 effort on my part, and Liz Cresto's part. But again, as
18 we began to, you know, converge on that December 21st
19 deadline, which I think was the deadline, Carter
20 Fritschele, was the section manager for adjudication was
21 also involved in discussions. And he was the one that
22 was drafting the actual documentations that were made to
23 the court.
24 Q. Was anyone with the State of Idaho consulted
25 prior to those recommendations being finalized?

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<p>1 MR. ORR: Objection; ambiguous.</p> <p>2 THE WITNESS: Other than -- I mean, I've told</p> <p>3 you the --</p> <p>4 Q. (BY MR. FARRIS) Other than the Idaho</p> <p>5 Department of Water Resource personnel?</p> <p>6 A. Yes.</p> <p>7 Q. And who was that?</p> <p>8 A. There were discussions with Clive Strong.</p> <p>9 Q. Who had those discussions, and when?</p> <p>10 A. Well, I don't know when. I was involved in</p> <p>11 some of those discussions.</p> <p>12 Q. Who else was involved in those discussions?</p> <p>13 A. The parties that I've identified.</p> <p>14 Q. So did you have a meeting with the Department</p> <p>15 staff and Mr. Strong?</p> <p>16 A. I can't recall, specifically, if we did or</p> <p>17 not. But whether -- when everyone was there</p> <p>18 comprehensively. But there were meetings in which some</p> <p>19 of those members were there, and Clive was there.</p> <p>20 Q. Do you recall what was discussed?</p> <p>21 A. What was discussed was where the Department</p> <p>22 was headed with those recommendations.</p> <p>23 Q. Was Mr. Strong consulted as to those</p> <p>24 recommendations?</p> <p>25 MR. ORR: Objection; ambiguous.</p>	<p>1 conversations on that, and whether I should attend or</p> <p>2 not.</p> <p>3 Q. Okay. I'm going to try to see if I can break</p> <p>4 this down. You had discussions with the Director on</p> <p>5 Wednesday, regarding the appropriateness of him being</p> <p>6 the Hearing Officer. And I believe, tell me if I'm</p> <p>7 wrong, Wednesday would be March 11th?</p> <p>8 A. I'll just look at my calendar --</p> <p>9 Q. Okay.</p> <p>10 A. -- to get my dates.</p> <p>11 MR. ORR: Objection. It misstates the</p> <p>12 testimony.</p> <p>13 THE WITNESS: So Thursday, March 12th, I have</p> <p>14 a calendar item that says, hold for the meeting with the</p> <p>15 Governor. So Gary and I would have had conversations</p> <p>16 about that meeting on that previous day, Wednesday,</p> <p>17 March 11th.</p> <p>18 Q. (BY MR. FARRIS) And what were the substance</p> <p>19 of those conversations?</p> <p>20 MR. ORR: Objection; asked and answered.</p> <p>21 THE WITNESS: The substance of those</p> <p>22 conversations is that we concluded, that I would not</p> <p>23 attend, since the focus was not going to be on -- our</p> <p>24 understanding, I don't know what was actually discussed.</p> <p>25 I think there was people here who attended those, maybe</p>
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<p>1 THE WITNESS: What do you mean by "consulted"?</p> <p>2 We certainly informed him of them.</p> <p>3 Q. (BY MR. FARRIS) Did he have a reaction or</p> <p>4 response?</p> <p>5 A. I'm sure he did, yes.</p> <p>6 Q. Do you recall what that was?</p> <p>7 A. I don't remember him counseling us against it.</p> <p>8 Q. Have you had discussions with the Director</p> <p>9 about him being the Hearing Officer in this contested</p> <p>10 case?</p> <p>11 A. I have.</p> <p>12 Q. And let's work backwards. When was the last</p> <p>13 time you had that discussion with the Director?</p> <p>14 A. Last Wednesday, I believe, he went to -- or</p> <p>15 Thursday. I can't remember which. He flew to Portland</p> <p>16 for an inner-governmental panel meeting with the Tribes,</p> <p>17 the BIA, and the State. On that same day, the Governor</p> <p>18 was meeting with water users and legislators to</p> <p>19 discuss -- well, what I thought was to discuss the</p> <p>20 refill proposals. But in my discussions with -- I guess</p> <p>21 Stephen Goodson, the -- I had -- it was my</p> <p>22 understanding, that the focus of those meetings were</p> <p>23 changing, and it was going to be one of evaluating the</p> <p>24 appropriateness of the Director being the Hearing</p> <p>25 Officer in the contested case. Gary and I had several</p>	<p>1 not.</p> <p>2 But since the focus and the discussion was not</p> <p>3 going to be on the refill proposal, in the settlement</p> <p>4 discussions up to that point, that it wasn't appropriate</p> <p>5 for me to be there.</p> <p>6 Q. (BY MR. FARRIS) Okay. Other than discussing</p> <p>7 whether or not you should attend the meeting, did you</p> <p>8 discuss the appropriateness of the Director being the</p> <p>9 Hearing Officer?</p> <p>10 A. He and I talked about the fact that that</p> <p>11 was -- we talked about the fact that that was a big</p> <p>12 issue to water users, that he was the Hearing Officer in</p> <p>13 that contested case. And we talked, whether it would</p> <p>14 ultimately help with settlement discussions if he was no</p> <p>15 longer the Hearing Officer on that case.</p> <p>16 Q. Okay. Did you convey those discussions to</p> <p>17 anyone else?</p> <p>18 A. I did not.</p> <p>19 Q. Do you know if he did?</p> <p>20 A. I don't.</p> <p>21 Q. Have you had discussions with the Director</p> <p>22 about the status of the contested case? The current</p> <p>23 status of it being stayed; correct, about how to</p> <p>24 proceed, and where to go from here?</p> <p>25 A. We have had discussions on that.</p>