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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	**PRE-HEARING MOTIONS SUBMITTED BY THE DITCH COMPANIES**

COME NOW, 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, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company (hereinafter collectively known as "Ditch Companies"), by and through their counsel, Sawtooth Law Offices, PLLC, and pursuant to the *Scheduling Order; Notice of Hearing; Order Authorizing Discovery* dated October 14, 2014, submit the following *Motions* for consideration. These *Motions* are supported by the documents already part of this record for this matter and oral argument on all *Motions* contained

herein, as well as any motion filed by other parties, is requested pursuant to IDAPA 37.01.01.565. The Ditch Companies specifically reserve the right to file additional motions and/or seek additional relief as this Contested Case proceeds and as issues may develop.[1]

I. MOTION FOR RECONSIDERATION OF MOTION TO DISQUALIFY AND/OR MOTION TO APPOINT AN INDEPENDENT HEARING OFFICER.

On October 2, 2014, the Ditch Companies filed a *Motion to Disqualify* the Director from presiding in this matter. The following day, October 3, 2014, the Director issued an *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer*. Yet, this issue was still an issue raised and addressed in the list of issues provided by the Director at the status conference on October 7, 2014. The Ditch Companies move for the reconsideration of the *Motion to Disqualify* and also move to appoint an independent hearing officer.

In the *Order Denying the Motion to Disqualify*, and at the status conference on October 7, 2014, the Director stated that disqualification and/or appointment of an independent hearing officer is not appropriate because the Director is the agency head and an independent hearing officer can only issue a recommended or preliminary order which is reviewed by the Director. *Order*, pg. 4. However, the Director and/or his predecessor has appointed independent hearing officers in other contested cases, including, but not limited to Justice Gerald Schroeder, to preside over contested cases concerning calls in the Eastern Snake Plain. Such an independent hearing officer can objectively determine the issues raised, address the legal questions which may be raised and

[1] At the Status Conference on October 7, 2014 the Director identified several procedural and other issues which have been raised by the parties and then set a deadline of October 28, 2014 to file motions regarding these issues. However, given the fact that the deadline for the "staff memo" is not until November 4, 2014, additional issues may arise from said staff memo or during the course of these proceedings and additional motions may be necessary and relevant. Thus, Ditch Companies reserve the right to file additional motions and raise additional issues, procedural or otherwise, as this matter progresses.

determine the evidence to be considered/admitted , all of which creates the administrative record. There are judges with senior judge status within Ada County, already on the State of Idaho's payroll, which are experienced in addressing such issues of law, evidence and the like. Accordingly, the Ditch Companies move for the Director to reconsider his denial of the Motion to Disqualify and to appoint an independent hearing officer even if said hearing officer can only issue a recommended or preliminary order which is reviewed by the Director.

The *Order Denying the Motion to Disqualify* also denied the motion based upon cause and stated that the "Director's participation in discussions and presentations related to this matter have been entirely appropriate." *Order*, pg. 6 The *Order* cited to case law which provided that an administrative official is presumed to be objective and "mere proof [he or] she has take a public position, or as expressed strong views . . . cannot overcome the presumption." *Id.* However, while the Ditch Companies have provided documentation of the Director's public views to a legislative committee, it is also clear from the Director's presentation which references settlement discussions that the Director has been part of private, ex parte discussions which involve settlement and other matters. Ex parte discussions, and the fact that such ex parte discussions are inappropriate, were raised by the Ditch Companies' *Motion* and there was no discussion of such in the *Order Denying the Motion to Disqualify*. Such communication is believed to be more than simply public views on the issues but rather private communications with other parties, non-parties and Legislators, and which include settlement negotiations and proposals. At this point, only the Director is privy to the full extent of such communications but this is certainly an issue that must be addressed and which warrants the appointment of an independent hearing officer.

These issues are exacerbated by the fact that this Contested Case was initiated by the Director over a year ago, and once it became a Contested Case the Director is prohibited from ex parte communications even if it has been stayed for nearly a year. It is not as if the Director just initiated the Contested Case a month ago and has expressed some public views on it. Idaho Code § 67-5253 specifically forbids such communication and provides "a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication." A similar prohibition against ex parte communication, "unless required for the disposition of a matter specifically authorized by statute to be done ex parte", is provided in IDAPA 37.01.01.417. Thus, to eliminate any and all notions of impropriety it is necessary for the Director to appoint an independent hearing officer.

II. MOTION FOR DISCLOSURE OF ALL EX PARTE COMMUNICATION BETWEEN THE DIRECTOR AND IDWR BETWEEN OCTOBER 22, 2013 (Initiation of the Contested Case) AND THE DATE OF THIS MOTION.

In the alternative that the Director does not appoint an independent hearing officer, the Ditch Companies move the Director to disclose any and all ex parte communications between the Director and/or IDWR between the date this Contested Case was initiated, October 22, 2013 and the date of this *Motion*. Such communications include, but are not limited to, any and all communications, in writing or in person with other parties (or those participating) to this Contested Case, Legislators or non-parties. This *Motion* also requests any and all discussions with the State of Idaho and Attorney General's Office which are not representing the Director or IDWR. Again, the Ditch Companies have referred the Director to a presentation made to a legislative committee and which referenced private settlement discussion, but only the Director and IDWR are privy to and fully aware of the

extent of such ex parte communications and parties to this Contested Case should also be made aware of those discussions.

III. MOTION TO DISMISS/STAY

The Director has initiated this Contested Case on his own and no party has sought to have a Contested Case initiated. Furthermore, neither the SRBA Court or the Idaho Supreme Court have ordered the Director to initiate a Contested Case thereby forcing the water users in Basin 63 into litigation. Thus, there has been no determination of urgency in addressing the issue.

At the same time, and as the Director is well aware late claims filed by the Bureau of Reclamation and the Boise Project Board of Control are pending before the SRBA Court. These late claims are necessitated by the position raised by the State of Idaho and others that existing storage water rights do not entitle storage right holders to fill reservoirs following flood control releases, despite the fact that the State never asserted in Basin 63 subcase proceedings that there was no right to fill Basin 63 reservoirs following flood control releases under the existing storage water rights until long after those rights were partially decreed. If water released from Basin 63 reservoirs for flood control purposes is not used by Basin 63 storage water right holders, then the late claims pending before the SRBA Court are not necessary, and are duplicative of existing Basin 63 storage rights. In short, the issue which the Idaho Supreme Court and SRBA Court defined as the more important issue, "whether water released for flood control purposes counts toward the initial fill of a water right", is before the SRBA Court as part of the late claims. The SRBA Court has not indicated whether and how it will address the issue but until and if the SRBA Court declines to address the issue the Director should not proceed with his own contested case on the very same issue.

The Idaho Supreme Court in Basin Wide 17 acknowledged that the Director has an

administrative role to play in counting the fulfillment of storage water rights. 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. If the SRBA Court determines that the late claims are unnecessary because the existing decrees for the Basin 63 reservoirs entitle storage right holders to fill reservoirs following flood control releases then there is no need for the Contested Case as the Director is bound to administer water according to those decrees. If, on the other hand, the SRBA Court determines that the late claims are necessary then the resolution of those late claims may result in additional decrees which allow the Basin 63 reservoirs to fill reservoirs following flood control releases. Again, the Director would be bound to administer water according to those decrees and again this Contested Case would become unnecessary. Either way, the Director should dismiss this Contested Case, or at the very least stay the contested case, until the resolution of the late claims by the SRBA Court. If the Director dismisses the Contested Case then there is still a possibility that a party may initiate a contested case following the resolution of the late claims depending upon the outcome.

Finally, issues have been raised at the status conference, and as part of the Director's list of pre-hearing issues, as to the binding effect of this Contested Case on the United States Bureau of Reclamation ("Bureau") which holds title to the storage water rights for the Basin 63 reservoirs. The Bureau provided a letter indicating it was not bound by this Contested Case as it was not a proper proceeding under the McCarran Amendment. There has been no determination as to whether the Bureau is bound even though IDWR stated at the status conference that it was believed that the Bureau was bound. The statements by IDWR and the Director at the status conference, however, are in direct contradiction to case law which provides that the Bureau is not bound by an

administrative proceedings such as this Contested Case because this administrative proceeding is not a "suit" under the McCarran Amendment. *See United States v. Puerto Rico*, 287 F.3d 212 (1st Cir. 2002) (holding that a purely administrative proceeding is not a "suit" contemplated by the McCarran Amendment). In *United States v. Puerto Rico*, the court stated "[t]o accept that the right to a limited APA-type of judicial review suffices to convert a purely administrative proceeding into a suit would compel the absurd conclusion that *all* administrative proceedings are suits and that no purely administrative proceedings exist. We cannot endorse so radical a proposition." *Id.* at 219. The court also diffused any suggestion that the McCarran Amendment waives sovereign immunity to administrative proceedings concerning the administration of water rights and stated "[t]o be sure, the McCarran Amendment does contain a reference to the 'administration of [water use] rights,' but read in context, these words grammatically refer to suits for the administration of such rights, and so fail to broaden the scope of waiver." *Id.* at 218, note 5. Under such interpretation and case law, the Contested Case initiated by the Director, which is subject to judicial review under the IDAPA, would not constitute a "suit" under the McCarran Amendment and thus the titled owner of the storage water rights would not be subject to the administrative proceeding. As such, the Director would be forcing parties to litigate issues which may not be binding on the Bureau. At a minimum, such an important issue needs to be resolved before the parties are forced to expend significant time and expense litigating issues and thus the issue should be resolved before the Director proceeds any further with the Contested Case.

What is clear is that the Bureau is bound by the proceedings before the SRBA Court concerning the Bureau's own "late" claims. It does not make sense to proceed with a Contested Case which may not effect the titled owner of the storage water right when instead the issue which the

SRBA Court and the Idaho Supreme Court indicated is the "more important" issue is before the SRBA Court and which is going to be binding upon the Bureau. In other words, until the SRBA Court specifically declines to address the issue as part of the "late" claims there is no basis to proceed with a Contested Case given the uncertainty of whether the Bureau is bound.

This Contested Case should be dismissed and/or stayed until the late claims are resolved by the SRBA Court so that the Director can have a clear understanding of the decrees which it is bound to administer according to. The issue must be addressed by the SRBA Court, the Bureau is squarely before SBBA Court and bound by its decisions, and there is no need to proceed on an unnecessary and expensive parallel track until the issues concerning the late claims, and whether the claims are even necessary, are resolved.

IV. MOTION TO FURTHER DEFINE THE ISSUE ADDRESSED IN THIS CONTESTED CASE.

In the alternative the Director is unwilling to dismiss the Contested Case, the Ditch Companies seek to have the issue addressed in this Contested Case to be further defined according to the issue raised by the Idaho Supreme Court. The *Scheduling Order* attempts to define the issue addressed in this Contested Case as "how water is counted or credited toward the fill of water rights." *Scheduling Order*, pg. 3. However, the "more important" question stated by the SRBA Court and discussed by the Idaho Supreme Court is whether "'water that is diverted and stored under a storage right counted towards the quantity of that right if it is used by the reservoir operator for flood control purposes.'" *In re SRBA, Case No. 39576, Subcase 00-91017 (Basin Wide 17) Nos. 40974 and 40975, 2014 WL 3810591* (Idaho Aug. 4, 2014), pg. 7. The Idaho Supreme Court went on to state the issue as follows:

-"The question deals with the quantity element of a water right and essentially asks whether

a water right includes the right to refill in priority **following flood control** or other releases." *Id.* pg. 8;

-"From the outset the court explicitly declined to address the issue of whether **water released for flood control purposes counts** towards the initial fill of a water right." *Id.* pg. 9;

-The SRBA Court declined "to designate the question of whether **flood control releases count** toward the 'fill' of a water right." *Id.* pg. 10

This is the issue which needs to be addressed as a prerequisite to any consideration of how to account for storage and distribution of water from and through Boise River reservoirs. The essential initial question is"whether water released for flood control purposes counts toward the initial fill of a water right." If this Contested Case is to proceed then this specific question, stated and re-stated by the Idaho Supreme Court, is the question/issue to be addressed at hearing.

V. MOTION TO MODIFY THE SCHEDULING ORDER.

In the alternative that the Director is unwilling dismiss the Contested Case, the schedule adopted by the Director should be modified. Again, this Contested Case has not been requested by any party/participant and no court has ordered the Director to initiate this Contested Case. Yet, the Director has set an expedited schedule which does not allow sufficient time to address the issues or allow sufficient time to perform discovery.

First, the Director needs to address the issues raised herein and in any motions filed by other parties before the parties should proceed with discovery and/or responding to the staff memo. Issues raised in these pre-hearing motions are threshold questions which need appropriate consideration and resolution before the matter proceeds. The parties should be allowed time to respond to motions and then oral argument on the motions before the hearing officer/Director determines the resolution. Then, depending upon how the motions/issues are resolved, the parties can proceed as to the issues.

The resolution of these initial motions should not prevent future motions depending upon the issues raised from the staff memo or during the course of proceedings.

Second, the *Scheduling Order* requires responses/objections to the "staff memo" three weeks following the issuance of the staff memo. The parties should be allowed to perform discovery, informal or otherwise, necessary to address questions or concerns raised in the staff memo before the parties are required to submit responses/objections. While the *Scheduling Order* allows the parties "to serve additional documents requests upon the Department" following the staff memo, there is not enough time to determine the documents/information may be missing and what documents the staff memo may fail to include before the parties are required to submit responses/objections. Without sufficient time to engage in such discovery, the parties are not able to provide sufficient responses/objections in only three weeks time. The schedule should be modified to allow for sufficient time to engage in discovery and request any additional documents before the parties are required to submit objections/responses.

Third, after sufficient time has been provided to address the pre-hearing motions, and after a sufficient amount of time has been allowed to perform discovery or follow up with questions concerning the staff memo then the schedule can provide a deadline to submit issues/objections/responses. There should also be additional time, more than two weeks, to allow parties to address and perform any additional discovery relating to any issues/objection/responses raised by other parties. Then replies, if necessary, can be due.

Fourth, the hearing date for the Contested Case should be vacated and moved so that it allows for ample time to address the issues and perform any necessary discovery. As discussed herein, there has been no request for this Contested Case, no court has ordered the Director to proceed with a Contested Case, and there has been no request or showing that it should be on an expedited track.

If the Contested Case is to proceed, the schedule must be modified to allow a reasonable and sufficient time for the parties, and the hearing officer, to address the issues and perform any necessary discovery. The schedule adopted by the Director must be modified to allow for such and thus the hearing date must be moved back to a date that allows for such time. A hearing date of February 2, 2015 is unreasonable and unnecessary and the Ditch Companies specifically request a continuance of the hearing date for the reasons discussed herein.

CONCLUSION

For the above stated reasons, the Ditch Companies respectfully request grant the motions of the Ditch Companies raised herein and/or the relief sought herein.

DATED this 28th day of October, 2014.

SAWTOOTH LAW OFFICES, PLLC

By: _____
S. Bryce Farris

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October, 2014, I served the foregoing to the following and by the method indicated below:

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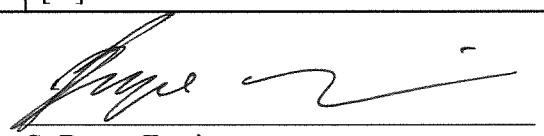

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