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DEPARTMENT OF WATER RESOURCES

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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) **MOTION FOR RECONSIDERATION**
FEDERAL ON-STREAM RESERVOIRS IN) **AND MEMORANDUM IN SUPPORT**
WATER DISTRICT 63)
)
)
_____)

COMES NOW, the Boise Project Board of Control, by and through its counsel of record, Barker Rosholt & Simpson, LLP, and hereby moves the Director, pursuant to IDAPA 37.01.01.740.02.a, and for the reasons set forth below, to reconsider the Amended Final Order issued by the Director on October 20, 2015.

In this motion the Boise Project Board of Control (“Boise Project”) requests the Director to reconsider the decision made in his Amended Order in light of the SRBA court rulings that are directly contrary to the conclusions of law made by the Director. In addition, the Boise Project requests that the Director address a number of factual findings that have been omitted from the decision, even though undisputed, or not contested, because the finding are material to the determination of the issues in the contested case. The Boise Project further requests that certain Conclusions of Law in the Amended Final Order be revised or added in order to recognize the omitted Findings of Fact.

I. The Amended Final Order is in Error for Failing to Address and to Abide by the Special Master’s Decision in the SRBA Proceeding

The Director issued a Final Order on October 15, 2015. The Director followed this up with an Amended Final Order on October 20, 2015. When the Final Order and the Amended Final Order were issued, a decision had been released by Special Master Booth in Consolidated Subcase 63-33732, *et al.* involving the late claims filed by the Bureau of Reclamation and the Boise Project Board of Control for the right to fill Lucky Peak, Arrowrock, and Anderson Ranch Reservoirs following flood control releases. In that decision, the Special Master held, contrary to the legal conclusions reached in the Amended Final Order, that “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.” *Memorandum Decision and Order Granting Ditch Companies’ and Boise Project’s Motions for Summary Judgment*, p. 7, consolidated subcase nos. 63-33732, *et al.*, October 9, 2015 (“Memorandum Decision”). The SRBA decision further recognized that the water put to beneficial use under these decreed water rights was the water that is stored in the reservoirs following flood control releases. *Id.*, p. 35. Additionally the Court held that this water was captured under the existing water rights and the priority date for these water rights is significant for the right to capture and store water in the reservoir. *Id.*, pp. 7-8. The Court also rejected the notion argued by the State and the attorney general that the storage water rights are “satisfied” by “paper fill.” *Id.*, pp. 35-36, fn. 21.

Accordingly, the SRBA Special Master held that there is no need for a second water right to “refill” the reservoirs following flood releases because the right to do so is an inherent aspect of the existing water rights, hence fill must be carried out under the priority of those water rights. The legal conclusions of the SRBA Court are contrary to the legal conclusions reached by the

Director in the Final Order and Amended Final Order. Particularly, see conclusions of law ¶¶ 28-33.

The Director was no doubt aware that the Special Master's decision had been released because on the same day he issued the Final Order, the Director wrote a memorandum to the Governor and his staff dated October 15, 2015, explaining his Final Order and referencing specifically the decision reached by Special Master Booth. *See* Exhibit A attached hereto. Indeed, the Director recognized the "overlap" between the decision reached by the Special Master and the decision that the Director had issued. Nevertheless, the Order and Amended Final Order do not even deign to address the decision issued by the SRBA Court. In fact, the only explanation we have from the Director is his characterization of the decision issued by the Special Master and his dismissive reference to the Special Master's decision not getting into the "intricacies" about the accounting program. *Id.*

The difficulty with the approach taken by the Director which must be rectified is that the Director has asserted unto himself the judicial power of the Courts and at the same time has failed to even take into consideration the Court's explanation of the property associated with these water rights. For example, as the Special Master opinion explains:

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 as a 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 water rights."

See Memorandum Decision, p. 33, subcase 63-33732, *et al.*

Rather than relying on the SRBA Court's legal determination of what was necessary to be counted, the Director has seized for himself the right to make that legal determination.

As the Supreme Court instructed in the Basin Wide 17 decision, the law authorizes the Director to distribute water in the water districts in accordance with the prior appropriation doctrine. *A & B Irrigation Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014), citing Idaho Code § 42-602. The Court went on to explain **“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.

Under the constitution of the State of Idaho, the judicial power to determine the meaning of the law is vested in the Courts. Idaho Constitution Article 5, § 2. As the Idaho Supreme Court has stated:

It is fundamental that the judiciary has the ultimate responsibility to construe legislative language to determine the law.

Mason v. Donnelly Club, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001), citing *J.R. Simplot Co. v. Tax Commission*, 120 Idaho 849, 852, 820 P.2d 1206, 1210 (19991), and *Marbury v. Madison*, 5 U.S. (1 CRANCH 137), 177 LED 60, 73 1803. In *Marbury v. Madison*, the United States Supreme Court explained, “it is emphatically the province and duty of the Judicial Department to say what the law is.” For over two centuries, it has been well established in the jurisprudence of the United States that it is the judiciary’s responsibility to determine the law and, as the Supreme Court directed in Basin Wide 17, it is the Director’s obligation to follow the law as enunciated by the Courts. As the United States Supreme Court recently explained, there is a “core administrative-law principal that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.” *Utility Air Regulatory Group v. EPA*, 134 US 2427, p. 2446 (2014).

There is simply no authority for the Director to ignore the determinations of the Special Master or any other member of the judiciary. Accordingly, the Amended Final Order must be

reconsidered and rewritten so that the Director adopts and abides by the legal conclusions as determined by the judiciary. The Idaho Supreme Court has held long ago that is beyond the power of the state engineer (now the Director) to determine the legal rights and responsibilities associated with the water rights. That is the duty of the judiciary, not the state engineer or director. Thus, in very clear language, the court has stated as follows:

The power and the duties of the engineer with reference to hearing the contest and cancelling the permit are pure matters of administration. He is in no way authorized to decide or determine what rights, if any, the permit holder has acquired under the permit, or by virtue of any acts taken in connection with the construction of the works authorized by the permit, or the diversion or appropriation of water in connection therewith.

Twin Falls Canal Co. v. Huff, 58 Idaho 587, 595, 76 P.2d 923, 926 (1938).

Here, the Director has doubly overstepped his authority, first by attempting to interpret the legal rights associated with the water rights acquired by permit and by judicial decree, and second by ignoring the determination of the courts as to what those legal rights entitle the parties to do. Since the entire Amended Final Order rests on the mistaken legal conclusion that the water right is satisfied by the concept of “paper fill,” the entire decision must be rewritten to acknowledge the decision of the Court and to recognize that the storage rights are not “satisfied” until the day of maximum fill in the reservoirs.

II. The Following Findings of Fact Must be Amended and/or Added to the Director’s Findings of Fact

Following are undisputed facts that require revision, or that were omitted from among the findings made in the Amended Final Order. The Boise Project requests that the specific findings of fact set forth below be amended in the Amended Final Oder, or that certain additional findings be added to the Director’s Amended Order, upon this Motion for Reconsideration.

Amend Finding of Fact # 3 to add:

The partial decrees for the storage water rights all established a volume of storage based upon an elevation on the upstream face of each dam (Lucky Peak el. 3055, Arrowrock el. 3216, Anderson Ranch el. 4196). The quantity element remark regarding flood storage on the Lucky Peak and Arrowrock rights allows storage above those elevations for additional storage in flood circumstances. Ex. 2015.

Amend Finding of Fact # 17 to add:

The State acted as the representative of the water users in these negotiations. Ex. 2053, p. 21.

Paragraphs 19 and 20 of the Findings of Fact in the Amended Final Order address the 1974 Boise River Flood Control Management report, authored by IDWR employee Bob Sutter. Ex. 2182. This report was authored by Mr. Sutter, and that it was drafted at the request of Governor Andrus, and further that the “study’s ‘principal recommendation’ was that the 1956 Manual and the 1953 MOA should be revised.” Amended Final Order, p. 12, ¶ 19. The next paragraph states that “[g]eneral agreement on the need to revise and improve the 1956 Manual led to a multi-year effort to develop a new manual,” and goes on to find that the multi-year effort “culminated in the publication of the Corps’ *Water Control Manual for Boise River Reservoirs*...in April of 1985.” *Id.* at ¶ 20. These findings omit key testimony of Mr. Sutter relating to the State’s role in development of the Manual.

Amend Findings of Fact # 19 to add:

The Idaho Department of Water Resources, through Mr. Robertson and Mr. Sutter, originated in their work on the 1974 Boise River Flood Control Management Report the refill assurances of 98 percent, 95 percent and 90 percent that are included in

the 1985 Water Control Manual at section 7-05. Sutter, Tr. 417, l. 2-p. 417, l. 15, Tr. 425, l. 23-426, l. 8; Ex. 2186. Mr. Sutter also testified that the purpose of the 1974 Report “was simply a review of what was being done and looking at what possibly could be done to prevent what potentially happened, I think it was probably ’74, from happening[.]” Sutter, Tr. 411, ll. 16-19. In drafting the recommendations of the 1974 report, “we were always very sensitive that it needed to also provide equal or greater assurance of refill for water supply, including irrigators and streamflow maintenance.” Sutter, Tr. 411, l. 25-412, l. 4. The State of Idaho, through either Mr. Sutter or Mr. Robertson remained involved in the development of the new Water Control Manual. Sutter, Tr. 424, l. 20-425, l. 7.

Add: the State’s 1974 Report was the impetus and basis for the revisions to the Water Control Manual. Sutter, Tr. 459, ll. 14-17.

Amend Finding of Fact #20 to add:

Mr. Sutter and Director Dunn agreed that “the Water Control Manual was a ‘joint effort’ by the Corps, Bureau of Reclamation, and the State.” Ex. 3001, Sutter, Tr. 458.

Mr. Sutter that “Alan Robertson went to the [manual revision] meetings and was informed of everything and provided advice and guidance, because it was really necessary to get the Department of Water Resources’ blessing on this.” Sutter, Tr. 459, ll. 14-17. Mr. Sutter further stated that the Department ultimately did give its blessing to the manual. Sutter, Tr. 460, l. 2.

Director Dunn confirmed that the Department had worked in conjunction with the federal agencies to develop the manual. Dunn, Tr. 249, ll. 2-20; Ex. 3001. Mr. Sisco confirmed the Department was a joint author of the Manual and the Department used it as

part of its administration of water rights for the Boise River reservoirs. Sisco, Tr. 921, l. 16-922, l. 25; Ex. 3001.

Strike “a small portion of.” The testimony does not establish that only a small portion of the 1985 Boise River Water Control Manual was drafted by the State.

Amend Finding of Fact #42 to add:

The storage allocation report can and has been run prior to the Day of Allocation. Barrie, Tr. 1361, l. 16-1362, l. 2.

Amend Finding of Fact #51 to add:

Ms. Cresto’s analysis in Exhibit 3 does not show that water was released from the reservoirs to satisfy the junior users identified in Ex. 3, nor that water diverted by juniors was water that would otherwise have been stored in the reservoirs. Cresto, Tr. 156-159, 217-219, and 222-223.

Amend Finding of Fact #76 by adding Finding of Fact #76a:

The idea of “satisfaction” of the water right by “paper fill” was first introduced into Basin 63 by the accounting program. Before that time, the concept of paper fill did not exist. Sutter Tr. 414, l. 14-415, l.6; tr. 497, ll. 13-17; Dunn, p. 243, l. 23-p. 244, l. 18. According to the testimony of former Directors this concept of “paper fill” was based upon an unwritten statewide “policy” handed down in Basin 01 by Director Allred. Tuthill, Tr. 658, l. 7-659, l. 6; Dreher, Tr. 267, l. 25-267, l. 9, Tr. 277, l. 9-279, l. 9. The water users were not at that time, nor were they through subsequent Water District 63 meetings, informed that that their rights were considered full and “out of priority” until the Basin Wide 17 proceedings. Barrie, Tr. 1357, l. 18-1358, l. 16; Case, Tr. 1041, ll. 9-12; Murgoitio, Tr. 1074, ll. 12-14.

(Modifications are required to Conclusion of Law #56, as a failure to include these undisputed facts in the Findings of Fact.)

Amend Finding of Fact #90 to add:

Henley understood Tuthill's letter to refer to temporarily storing Mores Creek water in Lucky Peak for delivery to Lake Lowell. Henley, Tr. P. 1170, l. 1-p. 1171, l. 2. Ex. 7.

Amend Finding of Fact #158 to add:

There are seven moratorium orders that have determined that the Boise River is fully appropriated and that "[p]ersons wishing to file applications for permit in this area should be advised of the limited season of use and possible denial of the permit." Ex. 3002-3008.

Add an additional Finding of Fact #159a to include:

It has been a longstanding practice on the Boise River to condition surface water rights in order to limit those rights take water only when water is being released for flood control purposes from Lucky Peak Dam. Sisco, Tr. 863, ll. 12-22. The purpose for those conditions is that the only water that is available for appropriation on the Boise River is the water that is released for flood control, and not the "unaccounted for storage" that refills the space evacuated for flood control releases. Exs. 3012, 3013, 3021, 3022, 3023, and 3041.

Add an additional Finding of Fact # 159b to include:

Mr. Tuthill, confirmed that the Boise River has been under a moratorium for new appropriations since at least 1977, stating that "[d]uring certain portions of the year, yes, I think these documents do reflect the full appropriation." Tuthill, Tr. 670, l. 25-671, l. 1.

Exs. 3002-3008. He also agreed that, generally, the full finding of full appropriation coincides with the time of year when no flood control releases are being made from the Boise River reservoirs. Tuthill, Tr. 671, ll. 10-17.

Add an additional Finding of Fact # 159c to include:

Mr. Dreher, also confirmed that “under most conditions” the Boise River is fully appropriated. Dreher, Tr. 290, ll. 18-20. Mr. Dreher also reviewed exhibit 3012, a water right report for water right permit no. 63-31409 which contains, in pertinent part, the following condition:

The water right holder shall exercise this right only when authorized by the District 63 watermaster when the Boise River is on flood release below Lucky Peak dam/outlet. Flood releases shall be determined based upon the Memorandum of Agreement between the Department of Army and the Department of Interior for Flood Control Operations of the Boise River Reservoirs, dated November 20, 1953, contracts with the Reclamation contract holders in the Boise River reservoirs, the Water Control Manual for Boise River Reservoirs, dated April 1985, and any modifications adopted pursuant to the procedures required in the documents and federal laws. The right holder shall not seek, directly or indirectly, any change to the flood control operations in the 1985 Water Control Manual for Boise River Reservoirs.

Ex. 3012. Mr. Dreher explained that the purpose for such a condition, stating, “I understand the concern in a system that’s deemed fully appropriated under most circumstances, that you have to make a showing at the permit stage, that there is water to appropriate.” Dreher, Tr. 290, ll. 7-11.

Add an additional Finding of Fact 159d to include:

Ms. Cresto confirmed that nothing currently in the water right accounting program would assist the watermaster in administering such a condition. Cresto, Tr. 503, l. 12-505, l. 21. She that it would be appropriate to include a command in the water right accounting that would assist the watermaster to administer the condition. *Id.*

Add an additional Finding of Fact 159e to include:

Mr. Squires testified that “there is no available water for appropriation above Star on the Boise River, without some sort of mitigation, or, you know, purchase of a water right, or something like that.” Squires, Tr. 1008, ll. 15-18. Mr. Squires also explained the recommendation in his beneficial use field report, exhibit 3041, that the water right be licensed “for use any time surplus water is available on the Boise River (Lucky Peak spilling),” that he made the recommendation because “it was a flood right” and “that no additional water rights were available for appropriation above Star on the Boise River.” Squires, Tr. 1002, l. 25-1003, l. 6; Ex. 3041.

Add an additional Finding of Fact #159f to include:

Mr. Sisco, after a review of exhibit 2017, a watermaster recommendation for water right no. 63-12055 stating that “no diversion will take place under this right unless the river is in flood control” was made because “basically the [Boise River] system is overappropriated as we speak.” Tr. 864, ll. 6-7; Ex. 2017. This was his standard condition when asked for his opinion by the Department on the approval of a new application for appropriation from the Boise River. Sisco, Tr. 863, ll. 12-22. He was never advised by the Department that such a condition was not appropriate. Sisco, Tr. 864, ll. 12-20.

Amend Finding of Fact #165 to add:

There is no dispute that this section of the Water Control Manual was written by Department employees. Sutter, Tr. 484, l. 23-485, l. 12. Cresto, Tr. 1471, ll. 13-23. Ex. 2186.

Amend Finding of Fact #166 to add:

Under the water rights accounting program water released for flood control is charged to storage right holders. Water released for flood control prior to paper fill is only available to storage right holders and it is accrued against the storage accounts. Shaw, Tr. 1491. Storage water released prior to “paper fill” is not available for natural flow users unless they have a storage account. *Id.* Additionally, the simplistic explanation of “storage cancelling” does not comport with the explanation of storage cancellation and provided by Ms. Cresto. Cresto, Tr. 177, l. 1-181, l. 15.

Amend Finding of Fact #170 to address mischaracterization:

The Findings of Fact at paragraph 170 mischaracterize the testimony of Mr. Shaw regarding the alternative method of .accounting proposed. Shaw, Tr. 1520. These Findings of Fact also mischaracterizes the flood control rule curve decisions described by Mary Mellema and set forth in the Water Control Manual.

Paragraph 171 of the Findings of fact states that the spaceholders attempted to justify contents based accounting on the basis that the water was not beneficially used, but the Amended Final Order failed to make specific findings concerning the testimony demonstrating that water released for flood control is not and cannot be beneficially used for the “from storage” components of the storage water rights.

Add a new Finding of Fact #171a to include:

A number of witnesses testified to the fact that water that is passed through the system and released for flood control is not and cannot be beneficially used by the contract spaceholders. Page, Tr. 970, l. 15-p. 971, l. 5; Sisco, Tr. 866, ll. 8-11; Murgotio, Tr. 1076, ll. 8-14; Durrant, Tr. 1185, ll. 4-17; Platt, Tr. 1246, ll. 10-25. The Boise

Project's only source of Boise River water is the New York canal. Once it passes the headgate if it is not available to be put to beneficial use. The water that is put to beneficial use is the water stored after flood releases and put on the fields. Murgoitio, Tr. 1071, ll. 4-11, 1082, ll. 7-16.

III. The Following Conclusions of Law Must be Amended to Reflect the Undisputed Testimony in the Record

As a result of the omitted or incomplete Findings of Fact, as set forth above, the Boise Project Board of Control, in addition to its' request in Part I above, requests that the following specific amendments or revisions be made to the Conclusion of Law in the Amended Final Order.

Conclusion of Law #56 should be amended:

The Amended Final Order fails to disclose the authority for storage without a water right.

Conclusion of Law #58 should be amended:

The record does not support Conclusion of Law #58 which opines that "the potential for future appropriations is very limited because "refill" water consists of unreliable flood waters that are difficult to appropriate" and the further justification that no such appropriation has occurred since coordinated operations of the Boise River reservoir system began in 1957. *See Order, Conclusion of Law #58.*

When asked "[i]f somebody were able to appropriate the new water that's filling the reservoir, that affects the ability of the reservoir to refill if it's operated under the rule curves?" Sutter, Tr. 457, ll. 9-12, Mr. Sutter agreed "I would concede that if somehow the refill were not – the current procedure take that unaccounted-for storage and credits it back to the reservoirs in order of priority, and if for some reason that were not done, I guess if we gave it to California or something, it would affect their refill." Sutter, Tr. 457,

ll. 13-18. Mr. Shaw reiterated the concern that the “unaccounted for storage” because it is stored without a water right, is at risk of future appropriation. Shaw, Tr. 1496, ll. 2-25; Platt, Tr. 1246, l. 19-1248, l. 7.

Conclusions of Law #69 and #70 should be amended:

There was no testimony of an instance where the Department disagreed with the decisions of the Corps and Reclamation in flood control releases from the Boise Reservoir systems under the Water Control Manual.

“Concerns” have been expressed within the Department over the release of water from Anderson Ranch to Arrowrock for fisheries purposes. However, these releases are made pursuant to an agreement between the State of Idaho, Fish & Game, and Reclamation. There is no evidence that this agreement has ever been violated by Reclamation. Cresto, Tr. 519, l. 7-523, l. 13, Mellema, Tr. 763, ll. 10-18, Ex. 2186.

CONCLUSION

For the reasons set forth above, in order to correct the incomplete or erroneous findings set forth in the Amended Final Order, the Boise Project Board of Control requests that the Director GRANT this Motion and make the requested corrections and revisions to the Amended Final Order.

Dated this 3rd day of November, 2015.

BARKER ROSHOLT & SIMPSON LLP


By: Shelley M. Davis
Attorneys for Boise Project Board of Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November, 2015, I caused to be served a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION** by the method indicated below, and addressed to each of the following:

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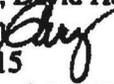
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Shelley M. Davis

EXHIBIT A

MEMORANDUM

To: Governor Otter, David Hensley, Stephen Goodson
From: Gary Spackman 
Date: October 15 2015
Re: **Decision Determining How Water Rights for Boise River Storage are Satisfied and How Reservoirs are Refilled After Flood Control Releases**

The Idaho Supreme Court, in its decision addressing Basin Wide Issue 17 (fill/refill of storage) held that the Director of IDWR was vested with the responsibility and authority to determine when a water right for storage has been satisfied and that the Director has discretion in the determining how the right has been satisfied provided the Director complies with the principles of prior appropriation. The Court also held that the determination is a mixed matter of complex fact and law, and that the Director is to apply his technical expertise in determining the complexities.

As a result of the Court's decision, I conducted a five day fact finding hearing during the end of August and the first of September. Today I issued a decision determining how the Director accounts for satisfaction of on-stream Boise River storage water rights.

The decision determines the following:

- The current computerized method of accounting has consistently been employed since 1986.
- The computerized accounting method accrues to the "storage for " irrigation and other uses component of the water right all water captured in the impoundment of the reservoir, regardless of whether the water is physically held in the reservoir, or whether it is impounded and then bypassed downstream.
- The accounting recognizes flexible operation of the reservoirs as one reservoir system, allowing physical storage in one reservoir but credited to a water right in a different reservoir.
- When the quantity of water that could have been physically stored in the reservoir in priority has flowed into the reservoir and has been impounded, the storage water right is satisfied.
- If water has been released for flood control or other operational purposes, the empty space can be refilled with runoff after all junior water rights are satisfied. IDWR will support addition of a remark in the base storage water rights to recognize the opportunity to refill and to protect the storage space holders from someone asserting that the Bureau of Reclamation is storing water without a water right.
- From 1986 to the present, in years of flood control operations, the holders of space in the Boise River Reservoirs have always received their full allocations, except in 1989, which was an anomaly in operation. The holders of space in Arrowrock and Anderson Ranch (Board of Control) entities would never have their allotments reduced until the Bureau of Reclamation misjudges the refill by the entire space in Lucky Peak.

As a footnote, Special Master Ted Booth issued decision on October 9, 2015 that overlaps, to some degree, my decision. The matter in front of Booth was to address whether there was factual justification to recognize beneficial use claims in addition to the base storage water rights decreed from 2007-2009. Booth held there was no additional beneficial use, but that the decreed water rights should be administered when the reservoirs are at their maximum content. Booth's decision did not address the intricacies of how water rights for storage were to be accounted for on a daily basis.