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

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, and TWIN FALLS CANAL COMPANY	**RECLAMATION'S POST-HEARING REBUTTAL BRIEF**

COMES NOW the U.S. Bureau of Reclamation, by and through counsel of record and submits its Post-Hearing Rebuttal Brief pursuant to the Hearing Officer's oral order of February 5, 2008.

DISCUSSION

I. ARGUMENTS AGAINST CARRYOVER ARE UNCONVINCING.

A. The Director Is Not Authorized To Reallocate Risk Between Senior and Junior Water Users for Purposes of Determining What Constitutes a Reasonable Amount of Carryover Storage.

The parties agree that the present dispute regarding reasonable carryover is, in reality, a dispute about reapportionment of risk between senior and junior water users. Pocatello concedes this point: "The dispute in this case is designed to *apportion risk between senior surface rights and junior ground water users* by reference to the doctrine of maximum utilization and optimum

use, and by the terms provided in the CMR [conjunctive management rules]." *City of Pocatello's Proposed Findings of Fact and Conclusions of Law* (*Pocatello FF/CL*) at 38 (emphasis added). The parties disagree, however, on the legitimacy of the Director's apportionment, or re-apportionment, of risk. Pocatello argues that maximum utilization, optimum use, and the conjunctive management rules allow the Director to engage in risk reallocation for purposes of imposing limits on carryover storage.

Pocatello's argument lacks support in Idaho law. No Idaho case law provides a central authority, such as the Director, the discretion to limit carryover storage based on imprecise utilitarian notions of maximum utilization and optimum use. While the conjunctive management rules allow the Director to limit carryover, they do so only to the extent the Director determines that carryover is *not* necessary to satisfy "future needs" of the senior water users. Indeed, the Director's discretion is limited to determining "whether carryover water is reasonably necessary for future needs." *American Falls Reservoir Dist. # 2 v. Idaho Dep't of Water Resources,* 143 Idaho 862, 880 (2007). It is this future-needs inquiry—and not a reapportionment-of-risk approach—that the Director must use for purposes of determining whether carryover storage should be limited and thus denied to senior water users.

B. Pocatello's "Likely-to-Suffer-Injury" Argument Holds the Director to an Impossible Standard.

Turning the standard described in the conjunctive management rules on its head, Pocatello argues that the Director cannot require mitigation for carryover "until it becomes clear that the seniors *are likely to* suffer injury without that amount." *City of Pocatello's Post-Trial Brief* (*Pocatello Br.*) at 17 (emphasis original). This argument holds the Director to an impossible standard; the Director cannot predict whether senior water users *are likely to suffer injury* in the future due to lack of carryover because he cannot predict the timing and severity of

future drought years. It is one thing to acknowledge the Director's limited ability to predict water shortages during the current irrigation season based on April 1st Heise flows; in that instance, the Director is aided by knowledge of present snowpack conditions, spring runoff flows, and reservoir fill. It is quite another to require the Director to demonstrate prescience with respect to conditions in future years. Even IGWA agrees such prediction is impossible: "Because of the significant variability of weather patterns from year to year, it is impossible to predict with any certainty what future carry-over needs may or may not be from year to year." *IGWA's Post Hearing Brief* (*IGWA Br.*) at 49.

Because the Director is unable to determine, in this case, the future water needs of the senior surface water users, limits on carryover cannot be imposed pursuant to Idaho law. To do otherwise would constitute limiting carryover based not on a determination of future needs, as required by *AFRD # 2* and the conjunctive management rules but rather on the impermissible basis of risk reallocation. As argued previously, market mechanisms, not the Director, are better suited to reallocate risk among water users.

C. Threats of Economic and Sociological Impacts Are Exaggerated and Create a False "Either-Or" Situation.

In its brief, IGWA raises fears of "economic and sociological impacts" if ground water users are required to mitigate for shortages to carryover. *IGWA Br.* at 50. IGWA further posits a false "either-or" scenario: either full curtailment of junior ground water users occurs or no curtailment occurs. IGWA seizes upon the extreme worst-case scenario—large-scale curtailment of junior ground water pumpers—to support its argument that it should not be obliged to remedy carryover shortfalls.

Not only is this an obvious emotional argument intended to play upon fears of economic and sociological devastation, but it ignores the range of more realistic outcomes. For instance, in

2005 and 2007, junior ground water users faced the possibility of curtailment to satisfy senior surface rights at issue in this case. Instead, the ground water users chose to purchase replacement water through a combination of rental pool leases, dry-year lease agreements, and below-Milner water exchanges. *See, e.g.*, Exhibit 4143. Consequently, there was no curtailment; there was instead an exchange of money for water.

This outcome conforms to the expert opinion of IGWA's economist, who indicated that when a rational junior user is faced with the threat of curtailment, he will take "measures" to acquire water if the economics of his operation justify continued use. *See John Church Dep.* at 32-43, 48-52. IGWA's own witness in this case belie its argument. Junior users, adept at using market mechanisms, will act in a rational manner to avoid curtailment.

Likewise, its own expert witness contradicts Pocatello's argument that "public health and safety" would be impacted if its wells were curtailed. *See Pocatello Br.* at 2. Gregg Sullivan, Pocatello's expert witness, agreed that the City "has more than adequate storage" to satisfy any foreseeable curtailment:

> MR. FLETCHER: You would agree that one big difference between the City of Pocatello and the members of IGWA is that the City owns storage that could be used for mitigation, correct, and IGWA does not?
>
> MR. SULLIVAN: That's a difference.
>
> Q: Big difference. And in fact, as the orders now stand, as far as any injury determination that's been made, Pocatello has more than adequate storage to satisfy any injury determination levied against Pocatello; isn't that right?
>
> A: I think you could probably say that based on their current demand.

H. Tr. Vol. XIV, at 2780 (ll. 24-25), 2781 (ll. 1-10). Based on the testimony of its own expert, the health and safety of Pocatello's residents was never threatened by curtailment since it has

approximately 50,000 acre-feet storage water in Palisades Reservoir. H. Tr. Vol. XIV, at 2751 (ll. 2-3).

Pocatello obviously has sufficient water to mitigate for its own depletions. It has 50,000 acre-feet of storage water that it does not need, except for mitigation. In fact, Pocatello has never put the storage water to beneficial use and does not even have the infrastructure to deliver storage water from Palisades to the City of Pocatello. H. Tr. Vol. XIV, at 2892 (ll. 10-25), at 2893 (ll. 1-9). On the one hand, junior ground water users could use Pocatello's storage water; senior surface water users could use Pocatello's storage water; and Idaho Power Company could use Pocatello's storage water. On the other, Pocatello, according to its expert, "is trying to figure out how they might use that water." H. Tr. Vol. XIV, at 2754 (ll. 11-12). That is a luxury no one else in the upper basin can afford.

By siding with IGWA in this case, Pocatello seeks to minimize its future mitigation obligations and thus free up more of its "mitigation" water for marketing to others. This position ignores the promises Pocatello made when it first acquired the 50,000 acre-feet of space in Palisades. According to the information contained in Exhibits 7004, 7009, 7010, and 7011, Pocatello purchased the space in Palisades to replace its depletions to the Snake River caused by its ground water pumping and also to allow for the City's future growth and ground water development. In 1995, Pocatello submitted a mitigation plan consistent with these earlier promises. Exhibit 9720. However, approximately one week after the trial began in this case, on January 24, 2008, Pocatello withdrew its mitigation plan. Exhibit 3063. The question remains whether Pocatello should profit from this type of legal maneuvering.

D. Several of IGWA's and Pocatello's Arguments Are Misdirected.

(1) *Seniors-Increase-Own-Risk Argument.* In its brief, Pocatello blames the senior water users for contributing to their own increased risk of future water shortages. *Pocatello Br.* at 5. Pocatello claims that when senior water users divert their storage water for irrigation uses (and thereby reduce their carryover storage), they increase their risk of future water shortage. *Id.* While true, this assertion does not logically lead to the conclusion that junior users should be able to thrust additional risk of future water shortages onto the senior right holders by intercepting and depleting water otherwise destined to fulfill senior storage rights. Such an argument is no different than saying that, because the senior withdraws money from his savings account (and thereby increases his risk of future financial shortage), everyone should be able to withdraw money from the senior's account.

(2) *The Spills-Past-Milner Argument.* Pocatello argues against having to provide replacement water because, during some years, that water would be unusable and "simply flow over Milner Dam." *Id.* at 6. Pocatello's argument highlights the problem of the variability of surface water supplies. From year to year, the degree of variability is unknown in the Upper Snake River Basin. In any given year, it is possible that winter snowpack totals and spring precipitation will fall to such low levels that reservoirs will not fill; it is also possible that runoff will be so great that flood control operations will require that water be evacuated and released past American Falls Dam resulting in water going over Milner. Pocatello's argument illogically focuses only on the latter scenario and ignores the dry years associated with the variability of weather patterns. For instance, if one knew that next year was going to be very dry and reservoirs would not fill, no one would question the need to provide replacement water; there would be no concerns about water flowing past Milner. The problem, however, is that no one

can reliably predict next year's water supply; next year might be wet, or it might be dry. The question is who should shoulder the burden of the risk of future shortage. Pocatello's argument attempts to steer away from that more problematic question of risk by highlighting only the future wet years—years when flood control releases send water past Milner Dam to spare property and lives in the upper basin—and ignoring the all-too-likely future dry years.

(3) *The Palisades-Planning-Documents Argument.* IGWA points to statements in the Palisades planning documents indicating that the construction of Palisades Reservoir would not eliminate all future water shortages. *IGWA Br.* at 15-17. IGWA then concludes that, because future water shortages were expected, senior water users should be forced to suffer current water shortages without mitigation from junior ground water rights. *Id.* IGWA's argument does not make sense. It is one thing to acknowledge that reservoirs will not prevent all future droughts; that is likely true for every reservoir system. It does not logically follow, however, that junior water users should be exempt from curtailment when those future "expected" droughts occur.

II. FLOW AUGMENTATION IS AN AUTHORIZED USE UNDER STATE LAW.

IGWA and Pocatello both argue that flow augmentation is neither a licensed nor a beneficial use under Idaho law. IGWA cites *United States v. Pioneer Irrigation District,* 157 P.3d 600 (Idaho 2007), for the proposition that the right to the use of the public water can only be claimed where it is applied to a beneficial use in the manner required by law. *IGWA Br.* at 38. Further, both IGWA and Pocatello rely on Idaho Code § 42-1763B to support their argument that flow augmentation is not a beneficial use under Idaho law. *Id.* at 52 (CL); *Pocatello Br.* at 21-22. Both parties err in this legal argument.

Prior to Idaho's ratification of the Nez Perce Agreement (Agreement), Reclamation purchased flow augmentation water through the rental pool[1] pursuant to Idaho Code § 42-1763B. H. Tr. Vol. VII (McGrane) at 1481-82; H. Tr. Vol. VI (Gregg) at 1329-30. The Idaho Legislature enacted § 42-1763B in 1996 specifically to permit Reclamation to acquire water for flow augmentation. 1996 Idaho Sess. 282, § 1.

The Nez Perce Agreement was approved by Congress,[2] the State of Idaho,[3] the Nez Perce Tribe[4] and the SRBA Court.[5] As part of Idaho's approval and implementation of the Agreement, the Idaho Legislature authorized Reclamation to *continue* to carry out the flow augmentation

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[1] Reclamation also has utilized some of its storage dedicated to power for flow augmentation. H. Tr. Vol. VII (McGrane) at 1481-82.

[2] The Nez Perce Agreement, also known as the "Mediator's Term Sheet" (*see* http://www.idwr.idaho.gov/nezperce), was approved by Congress through the Snake River Water Rights Act of 2004, Pub. L. No. 108-447, 118 Stat. 3431-3441 (Dec. 8, 2004). Congress stated in Section 2:

> The purposes of this Act are –
> (1) to resolve some of the largest outstanding issues with respect to the Snake River Basin Adjudication in Idaho in such a manner as to provide important benefits to the United States, the State of Idaho, the Nez Perce Tribe, the allottees, and *citizens of the State*;
> (2) to achieve a fair, equitable, and final settlement of all claims of the Nez Perce Tribe, its members, and allottees to the water of the Snake River Basin within Idaho;
> (3) to authorize, ratify, and confirm the Agreement and this Act; and
> (4) to direct – (A) the Secretary, ... acting through the Bureau of Reclamation .... To perform all of their obligations under the Agreement and this Act; ....

118 Stat. 3431-32 (emphasis added). In Section 5, Congress stated, with regard to Reclamation's implementation of flow augmentation, that "the Secretary [through Reclamation] shall take such actions consistent with the Agreement, this Act, and water law of the State as are necessary to carry out the Snake River Flow Component of the Agreement." *Id.* at 3433.

[3] The Idaho Legislature passed and Governor Kempthorne approved House Bills 152 (authorizing the agreement), 153 (providing water for flow augmentation), 154 (establishing minimum stream flows), and 399. 2005 Idaho Sess. Laws 148-150, 400. These bills, among other things, enacted the provisions of the Mediator's Term Sheet, as negotiated by the parties, and amended Idaho Code § 42-1763B. *Id.*

[4] K. Heidi Gudgell et al., *Nez Perce Water Rights Settlement Article: The Nez Perce Tribe's Perspective on the Settlement of its Water Right Claims in the Snake River Basin Adjudication*, 42 IDAHO L. REV. 563, 589 (2006).

[5] *See* discussion *infra* Part III.

program pursuant to state law by acquiring water from the rental pool or water bank. Significantly, the Idaho Legislature specifically rewrote and reauthorized Idaho Code § 42-1763B for this purpose. *See Mediator's Term Sheet* at 18-23; 2005 Idaho Sess. Laws 149, 400 *codified at* I.C. § 42-1763B. The Idaho Legislature also found that the IDWR Director was not required to evaluate the use of flow augmentation under Idaho Code §§ 42-1763 (rentals of water bank water approved by Director) or 42-401 (applications of water for public use) so long as Reclamation rented the water pursuant to § 42-1763B. I.C. § 42-1763B(2)(b).

This reauthorization was deemed sufficient to give Reclamation the ability to provide flow augmentation under state law. Otherwise, the Secretary of the Interior could not have determined, as he did as Trustee for the Tribe, that the Nez Perce Agreement effectively triggered the waivers and releases of the United States' and the Nez Perce Tribe's water right claims in the Snake River Basin Adjudication (SRBA). *See* 72 Fed. Reg. 27325 (May 15, 2007).

Although Reclamation has never stated that it (1) is "appropriating" water for flow augmentation, (2) has filed water right claims in the SRBA for flow augmentation, or (3) has made a call to meet its flow augmentation requirements, IGWA and Pocatello nonetheless argue that Reclamation does not use this water beneficially.[6] The issue of beneficial use, however, is not relevant to determining whether Reclamation may purchase and use rental pool water for flow augmentation. The Idaho Legislature specifically authorizes Reclamation to utilize storage and natural flow water rights as provided by other sections of 42-1763B. If beneficial use were

[6] Specifically, IGWA and Pocatello argne that Idaho Code § 42-1763B(4) provides that flow angmentation is somehow *not* a beneficial use. (IGWA and Pocatello do not appear to challenge the constitutionality of I.C. § 42-1763B.) This section states:

> Nothing in this section shall be construed to alter, or authorize the U.S. bureau of reclamation [sic] to modify in any way its existing contractual obligations, or to constitute a finding by the legislature that the rental or use of storage water or natural flow water rights for flow augmentation for listed anadromous fish or any other species is a beneficial use of water, that it is in the public interest, or whether such use injures existing water rights.

I.C. § 42-1763B. By its terms, this section takes no position on whether the use of water for flow augmentation is a beneficial use.

necessary to lease or rent water, the Legislature would have required it; instead they simply stated: "[T]he legislature authorizes the U.S. bureau of reclamation (sic) to lease storage and natural flow water rights through the state water supply bank and local rental pools under the limited conditions of this section." I.C. § 42-1763B(1). Under this statute, flow augmentation is clearly an authorized use under Idaho law.

III. ANY PARTY TO THE SRBA IS BOUND BY THE NEZ PERCE AGREEMENT.

A. The Nez Perce Settlement Resolved All the Nez Perce Tribal Claims in the SRBA.

On April 20, 2004, the United States, the State of Idaho, and the Nez Perce Tribe submitted a document entitled the Mediator's Term Sheet (Nez Perce Agreement) to the SRBA Court in consolidated subcases 03-10022 and 67-13701. 72 Fed. Reg. 27325 (May 15, 2007). The Nez Perce Agreement settled all of the Nez Perce and United States' 1,000+ tribal reserved water rights claims in the SRBA, a McCarran Amendment proceeding.

The reserved water right claims involved on-reservation, fishery (Snake River salmon), and instream water right claims throughout the Snake River Basin in Idaho. *Id.* These claims arose from treaties between the Nez Perce Tribe and the United States in 1855 and 1863. Gudgell, *supra,* at 564. Transforming the settlement into a Consent Decree, upon the parties' petition, the Idaho Supreme Court remanded the Tribe's SRBA treaty fishing (instream) water right claims that were on appeal from the SRBA Court (No. 03-10022).[7]

[7] The SRBA Court rejected the Tribe's treaty fishing (instream flow) claims in the SRBA when it held that the fishing rights did not include water to protect Snake River salmon. Gudgell, *supra,* at 564. The Tribe appealed the SRBA court's decision to the Idaho Supreme Court but asked for the case to be stayed when it entered into the settlement discussions that ultimately culminated in the Nez Perce Settlement. *Id.*

B. The SRBA Court Provided SRBA Parties Substantive and Procedural Due Process.

Once the Supreme Court remanded the Nez Perce instream flow claims, the SRBA Court set a scheduling conference for July 19, 2005, for further proceedings on approving all parts of the Consent Decree. *See Order Setting Scheduling Conference for Further Proceedings on Remand and On Joint Motion for Approval of Consent Decrees, and Entry of Scheduling Order for Subcases No. 03-1022 (Instream Flow Claims) and 67-13701 (Springs and Fountains Claims), No. 39576* (SRBA Ct. June 30, 2005). The SRBA Court also required *any* other parties in the SRBA, which included IGWA's members[8] and Pocatello,[9] to come forward at the scheduling conference with any issues regarding the instream flow claims.[10] *Id.* at 2.

Ultimately, after setting scheduling deadlines for objections and responses and/or briefing on the various consolidated subcases,[11] the SRBA issued the Consent Decree with no further appeals permitted. *See Order Approving Consent Decree, No. 39576* (SRBA Ct. Jan. 30, 2007).[12] As a result, all parties to the SRBA, including IGWA's members and Pocatello, are bound by the Nez Perce Agreement. Every party in the SRBA had ample opportunity to participate and to have their objections ruled upon through the SRBA proceedings that led up to adoption of the Consent Decree.

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[8] *See* Exhibit 4614 (partial SRBA decree of one of IGWA's members).

[9] *See* Exhibit 7023 (objection by Pocatello filed in the SRBA).

[10] At the July 19, 2005, status conference, the Shoshone-Bannock Tribes argued that they had been excluded from the Settlement Process and their objections against the Nez Perce Tribe were still outstanding. *See Scheduling Order and Notices of Hearing, Re: Implementation of Nez Perce Settlement Agreement, SRBA Subcases: 03-10022 (instream flow claims), 67-13701 (springs and fountains), 71-10866 (state minimum stream flow) and 92-80 (multiple use)* at 4 (SRBA No. 39576, Aug. 3, 2005).

[11] *See id.*

[12] The SRBA Court decisions can be accessed through internet at http://www.srba.state.id.us/srba7.htm.

IV. THE 1996 STATE WATER PLAN DOES NOT REQUIRE ZERO FLOWS AT MILNER.

IGWA argues that the Idaho State Water Plan[13] allows Reclamation to release water past Milner only in one of two circumstances: flood control operations or flow augmentation. IGWA maintains that releases below Milner may not be permitted in any other circumstance. *See IGWA Br.* at 59-60.

IGWA is simply incorrect in its assertion that releases below Milner are contrary to the State Water Plan. The State Water Plan provides that "[t]he exercise of water rights above Milner has and may reduce the flow at the dam to zero." 1996 State Water Plan, Policy 5B, at 17. The State Water Plan does not require zero flows past Milner; it merely recognizes that in some circumstances there may not be any flow passing Milner.

In addition, this issue is currently pending before the SRBA Court. The State of Idaho has filed a claim (No. 02-200), to which IGWA alluded, that would limit flows to zero at Milner. The SRBA Court is the correct forum to decide the "zero flow at Milner" issue because, once a claim is filed, the SRBA Court has exclusive jurisdiction over the issues and the parties. *See Walker v. Big Lost River Irrigation Dist.*, 124 Idaho 78, 81 (1993) (all claims arising within the SRBA are within the exclusive jurisdiction of the SRBA Court).

V. RECLAMATION, AS AN AGGRIEVED PARTY, REPRESENTS THE INTERESTS OF ALL OF ITS CONTRACTORS.

Pocatello alleges that Reclamation's interests are "coterminous with the SWC contract-holders." *Pocatello FOF/COL* at 44. Pocatello argues that, since Reclamation did not place a call, Reclamation is only entitled to the relief to which the SWC is entitled. *Id.* IGWA raised

[13] *See* http://www.idwr.idaho.gov/waterboard/planning/comprehensive%20planning.htm (click on "current" state water plan).

similar issues at the hearing in its motion to strike Reclamation as a party. H. Tr. Vol. V at 1079-88.

The standard that governs parties to contested case hearings is Idaho § 42-1701A. It provides:

> Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, *any person aggrieved by any action of the director*, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter *shall be entitled to a hearing before the director to contest the action.*

I.C. § 42-1701A(3) (emphasis added).

Under this standard, Reclamation is aggrieved and is entitled to hearing upon the Director's May 2nd Amended Order. Although Reclamation did not join the SWC in making a call to protect its storage rights, the legal and factual interests that it seeks to protect in this case are distinct from those of the SWC.[14] For instance, Reclamation has at least 54 contractors in addition to members of the SWC who own space in its Upper Snake Reservoirs for storage and carryover water. H. Tr. Vol. VI (Gregg) at 1238, ll. 2-6. Groundwater depletions could affect the fill of storage and carryover for *all* Reclamation contractors and could affect Reclamation's power operations and flow augmentation program as well. Patrick C. McGrane, Expert Report at 8-12.

[14] Reclamation filed its Petition to Intervene on March 7, 2005, explaining that these other interests were not adequately represented by the existing parties. *See Petition to Intervene* at 5-6 (filed Mar. 7, 2005). The Director correctly granted Reclamation's intervention on April 6, 2005, pursuant to IDAPA 37.01.01353. *See Order on Petitions to Intervene and Denying Motion for Summary Judgment; Renewed Request for Information; and Request for Briefs* at 2 (IDWR April 6, 2005). Subsequently, the Director issued the May 2, 2005, Amended Order and stated that anyone "aggrieved" by his decision could file a petition for hearing. *See Amended Order,* 48 (IDWR May 2, 2005). Reclamation timely filed a petition on May 17, 2005, as provided by IDAPA 37.01.01.230.01(a)-(e). *See Reclamation's Petition for Hearing Regarding the Director's Amended Order of May 2, 2005* (May 17, 2005).

As a consequence, legal determinations in this case could effectively reduce the quantity of water that Reclamation is able to store and/or carryover. If Reclamation is not legally able to represent their interests, each one of Reclamation's contractors will need to participate the next time a call is made to protect their own storage and carryover water interests.

CONCLUSION

For the reasons set forth above and as provided in *Reclamation's Post-Hearing Brief,* the Director's limitations on carryover are unreasonable.

DATED this 7th day of March 2008.

Kathleen Marion Carr

CERTIFICATE OF SERVICE

The undersigned certifies that on the 7 day of March 2008, a true and correct copy of **Reclamation's Post-Hearing Rebuttal Brief** was served on the following person(s) as shown below:

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