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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 DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**RECLAMATION'S PETITION FOR HEARING REGARDING THE DIRECTOR'S AMENDED ORDER OF MAY 2, 2005**

COMES NOW the U. S. Department of the Interior, Bureau of Reclamation ("Reclamation"), by and through its attorney, Kathleen Marion Carr, Office of the Field Solicitor, pursuant to Idaho Code Section 42-1701A(3), and IDAPA 37.01.01.740.02 (a) and (b), submits this Petition for Hearing of the Director's Amended Order issued by the Director of the Idaho Department of Water Resources ("IDWR") May 2, 2005. Reclamation is aggrieved by this Amended Order as set forth herein.

BACKGROUND

The seven above named captioned entities (Surface Coalition) filed a letter with the Director of IDWR on January 14, 2005 requesting delivery of water to their senior natural flow

rights and contractual entitlements to Reclamation storage.[1] On February 3, 2005, the Idaho Ground Water Appropriators, Inc. (IGWA) filed its petition to intervene in this proceeding.

On February 14, 2005, the Director issued an initial Order and, among other things, made certain initial determinations and granted IGWA's petition to intervene. On March 7, 2005, Reclamation petitioned to intervene.[2] On April 6, 2005, the Director issued an Order granting Reclamation's petition to intervene. The Director determined that Reclamation has a direct and substantial interest in this matter. On April 19, 2005, the Director issued an Order that he amended on May 2, 2005 (Amended Order) wherein he made findings of fact and conclusions of law regarding the Surface Coalition's delivery call.

In this Amended Order, the Director found that Reclamation holds decreed and licensed surface water rights for American Falls and Palisades Reservoirs for irrigation and incidental power generation. *See Amended Order* ¶ 68, p. 15. For American Falls Reservoir, Reclamation holds a license for 1.8 million acre feet of water. For Palisades Reservoir, Reclamation holds a license for 1.4 million acre feet. *Id.* The Director also enumerated the contractual entitlements the irrigation entities hold for a combined total of 2,320,636 acre feet of storage space from Reclamation's American Falls and Palisades Reservoirs. *See Amended Order* ¶ 70, p. 15-16.

The Director ruled that the Surface Coalition's natural flow rights and its contractual entitlements to Reclamation storage should be combined together when determining injury of the "total supply of water" needed for beneficial use for irrigation. *See Amended Order* at ¶ 44-48,

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[1]In the Snake River Basin Adjudication (SRBA), the district court has determined that Reclamation holds legal title to the irrigation component of its water rights. The SRBA court found that the irrigation entities hold beneficial or equitable title of their contractual entitlement to Reclamation Project storage in trust for the landholders who have put the storage water to beneficial use. *See* SRBA, Subcase 91-63, *Final Order on Cross-Motions for Summary Judgment,* (SRBA D.Ct. Idaho Jan. &, 2005) (on appeal).

[2]Reclamation filed a petition to intervene as a party; however, Reclamation has not made a delivery call for water under its storage water rights.

pp. 42-43. The Director then determined that depletion of a water right is not a material injury. *See Amended Order* at ¶ 47, p.43. Material injury, he concluded, is fact specific and must be determined in accordance with IDWR's Conjunctive Management Rule 42. *Id.*

The Director also found injury will occur when a junior right holder intercepts water that interferes with the exercise of the senior primary and supplemental water rights that could be beneficially used. *See Amended Order* at ¶ 45, p.42-43. Utilizing the Department's ground water model, the Director found that the ground water depletions are reducing (1) natural flow water availability, (2) Reclamation's reservoir storage supply, and (3) Reclamation's carryover storage. *Amended Order* at ¶¶ 82 & 83, p. 18. The Director found the effect was as if ground water users were utilizing storage water that otherwise could contribute to filling American Falls Reservoir. *Id.*

The Director determined that the Surface Coalition's "reasonably likely shortages" for the 2005 irrigation season are 27,700 acre feet. *Amended Order* ¶ 117, p. 26. This is based on a presumption that three of the surface entities will use all their carryover storage from 2004 and the other four will only carry over limited amounts from 2005 to 2006. *Id.* The Director determined "reasonably likely material injury" by adding "the sum of the shortages" per entity to the entity's shortfall in "predicted carryover." *Amended Order* at ¶ 120, p. 27. This method resulted in a combined 133,400 acre feet of material injury for all the Surface Coalition entities in 2005. *Amended Order* at ¶ 120, p. 27; ¶ 52, p. 44.

Despite this injury calculation, the Director ordered the ground water users to only provide 27,700 acre feet of replacement water in 2005 or to curtail February 27, 1979 priority and junior water rights. *Amended Order*, ¶ 1, p. 45; ¶5, p. 46. The Director stated that the

required mitigation water, if not all produced in 2005, would remain an obligation for future years until either replaced or Reclamation fills all the storage space attributed to the entities. *Amended Order,* ¶ 6, p. 46. The Director required the ground water users to file replacement water plans for the 27,700 acre feet by April 29, 2005. *Amended Order*, ¶ 9, p. 46.

IGWA submitted its Initial Plan for Replacement Water on April 29, 2005 for 27,700 acre feet for 2005.[3] The Director approved IGWA's replacement water plan on May 6, 2005, provided that IGWA submits additional information to correct deficiencies the Director identified with its plan. *See Order Regarding IGWA Replacement Water Plan* (May 6, 2005), pp. 12-13. Similarly, both the J.R. Simplot Company and the Water Resource Coalition filed replacement water plans, and the Director approved both of these plans on May 6, 2005. *See Orders Regarding Water Resource Coalition Replacement Water Plan* and *Regarding Simplot Replacement Water Request* (May 6, 2005).

CONTESTED ISSUES[4]

I. Factual Determinations Made without a Hearing

Reclamation is aggrieved by the Director's Amended Order because he formulated findings of fact without first undertaking a process to allow the parties to identify, fully develop, and contest the factual issues in dispute. The Director has not yet fully disclosed the documents and information relied upon or considered for his findings and conclusions. *See* Letter from

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[3] Reclamation filed a protest to this plan on May 6, 2005 because the Conjunctive Management Rules do not provide for the "replacement water plan" procedure set out in the Amended Order. However, Reclamation stated it would not protest the implementation of the initial 27,700 acre feet of replacement water, but reserved the ability to contest the factual and legal basis for the amount in either the contested case or in IGWA's mitigation hearing process. *See Reclamation's Protest to Idaho Ground Water Appropriators' Initial Plan for Providing Replacement Water* (filed May 6, 2005).

[4] Because Reclamation has not made a call and its water rights are only implicated collaterally in this suit, Reclamation does not waive, and it specifically reserves, the right to make any and all claims and defenses that it would have in an original action involving its water rights.

IDWR Director Karl Dreher to Josephine Beeman, Esq. (May 11, 2005). Review and analysis of the information and documentation relied upon by the Director is necessary so Reclamation can better assess the validity, or invalidity, of the findings and conclusions. Therefore, Reclamation requests a hearing in order for the data and the factual record to be fully and accurately developed.

II. The Director has Wrongly Construed Reclamation Storage Rights as Merely Supplemental Irrigation Rights.

Reclamation has been aggrieved because the Director has viewed Reclamation's water rights as merely supplemental rights for the Surface Coalition's natural flow water rights for irrigation. Amended Order ¶ 16, p. 34. While Reclamation certainly provides irrigation water to members of the Surface Coalition under various contracts, the exercise of American Falls and Palisades Reservoirs provides project water for other purposes (such as power generation). These purposes are impacted by changes in reservoir levels, meaning that measuring "total water supply" at irrigation entity headgates is an incomplete method when calculating injury to Reclamation's storage rights.

Further, under Idaho law, Reclamation's storage rights are independent of, and not dependent upon, a direct or natural flow water right. *See generally Cottonwood Water & Light Co, Ltd.*, 29 Idaho 761, 162 P.242 (1916); *cf. Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208 (1945) ("There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir."). While the exact delineation of Reclamation's ownership interest in its irrigation water rights is currently unsettled, the Director cannot reallocate Reclamation's storage supplies even if Reclamation only holds legal title to the project storage

rights.[5] *See Ward v. Kidd*, 87 Idaho 216, 227, 392 P.2d 183, 190 (1964).[6]

Once the irrigation season commences, Reclamation's property interest becomes burdened by the contractual entitlement of each irrigation entity with which Reclamation has contracts. Consistent with the terms of the Reclamation contract, the irrigation entity may determine how and when to use its contractual entitlement to stored project storage. This discretion rests with the irrigation entity, subject to the terms of its Reclamation contract, rather than with the Director. By not separating the Surface Coalition's natural flow rights from Reclamation's storage rights, the Director has blurred important distinctions between the two. As explained more below, this combined method underestimates material injury at the expense of Reclamation's senior storage rights.

III. The Director has Wrongly Concluded Depletion Does Not Equate to Material Injury.

In Conclusions of Law 47 and 45, the Director determines that depletion of a water right does not equate to injury because material injury is highly fact specific and dependent upon the amount of water actually needed for irrigation. Amended Order ¶¶ 45,47, pp. 42-43. This position is contrary to Idaho's prior appropriation doctrine. *See Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994) (holding Director must administer water rights according to Idaho's Constitution and prior appropriation doctrine — "first in time is first in right").

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[5]Assuming, *arguendo*, that the Idaho Supreme Court determines that Reclamation only holds legal title in SRBA Subcase 91-63 appeal, legal title still provides the United States with a vested property interest. *See Fulton v. Duro*, 107 Idaho 240, 243 & 247, 687 P.2d 1367, 1370 & 1374 (Ct. App. 1984) (court affirmed the part of district court's order that set aside sheriff's execution of sale when legal title holder's ownership interest was not properly levied through writ of attachment and notice).

[6]In *Ward*, the Supreme Court affirmed a permanent injunction that restrained defendant from appropriating plaintiff's senior water right of up to 1.44 cubic feet per second. The court stated "the plaintiffs' right to the use of the water were valuable rights," and the court found that "the law cannot countenance the invasion of a right merely because it is small." Citing the Idaho Constitution art. 1 § 18, the court in *Ward* found that the holder of a small right is entitled to its protection to the same extent as if it were of greater magnitude. *Id.*

Under Idaho law, senior decreed and licensed water rights may call out junior ground water or surface rights to the extent of the senior's licensed or decreed quantity. *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20, 47 P.2d 916, 919 (1935) (holding water master duty is to distribute water according to rights). Not until a subsequent court proceeding redetermines the quantification of the beneficial use of a water right can the senior's quantity element be adjusted. *See Nettleton v. Higginson*, 98 Idaho 87, 95, 558 P.2d 1048, 1055 (1979) (holding a nonparty to a decree is bound to have his water rights administered in priority until supplemental adjudication occurs).

Due to the multiple beneficial uses of project storage rights and project water, Reclamation suffers a material injury when it is not delivered its licensed and/or decreed amount for its storage purposes — either "irrigation storage" or "power storage." These multiple beneficial uses must be recognized because as the Idaho Supreme Court stated in *Stott v. Finney*, reservoirs are "essential to Idaho's economic well-being." 130 Idaho 894, 896, 950 P.2d 709, 711 (1997). *Stott* emphasized that reservoirs serve other beneficial purposes besides irrigation, such as flood control, power generation, recreation, and providing beneficial environments for fish and wildlife. *Id.*

The Director, therefore, cannot determine that a water right, in and of itself, is not protectable under state law. Reclamation stores its water to the full license amount, and Reclamation and its contractors utilize this water for multiple beneficial uses at different times. Reclamation will suffer material injury when it is not allowed to store all of its licensed or decreed quantities.

IV. The Director Cannot Modify Reclamation's State Court Approved System of Operations.

The Director's findings and conclusions impact water project operations that have previously been reviewed by a state court in the *Eagle Decree*. Once Reclamation stores water under its license the water becomes subject to Reclamation's control. *See Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389-90, 43 P.2d 943, 946 (1935). In *Talboy*, the Supreme Court stated that "[n]o one can make an appropriation from a reservoir or canal for the obvious reason that the waters so stored or conveyed are already diverted and appropriated and are no longer 'public waters.'" Reclamation has relied on the established legal principle of *Talboy* for 70 years. This principle allows Reclamation to both store its full licensed amount and carry out a system of operations[7] that has been confirmed by state law. *See e.g.* 1968 *Eagle Decree (Burley Irrigation Dist. v. Eagle,* No. 21406 (5th Jud. Dist. Twin Falls Cty., Idaho, July 10, 1968). In the *Eagle Decree* the state district court confirmed the water rights, the contracts, and the provisions of the contracts, *id.* at p.19 ¶ 5(a)-(d), and held that together they "constitute a scheme or plan for the administration of the Snake River." *Id.* at p.19, ¶ 4.

The Director's Amended Order impermissibly interferes with this state court approved plan of operations by determining that (1) Reclamation's storage rights are dependent upon the irrigation entities' natural flow rights; (2) storage carryover is limited to an amount determined by the Director; and (3) surface storage supplies can be reallocated to ground water users, thus reducing available storage. *See Amended Order,* Findings of Fact ¶¶ 15, 16, 82, 83, 87, 115-120;

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[7] For more background on the coordinated scheme of federal operations see *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 706 F. Supp. 737 (D. Idaho 1989) *affirmed* by 921 F.2d 232 (9th Cir. 1990); and U.S. BUREAU OF RECLAMATION, "BIOLOGICAL ASSESSMENT FOR RECLAMATION OPERATIONS AND MAINTENANCE IN THE SNAKE RIVER BASIN ABOVE BROWNLEE RESERVOIR" (Nov. 2004).

Conclusions of Law ¶¶16, 49, 45, 46, 48, 51,52. These determinations greatly impair the court approved plan of operations.

First, as already discussed above, Reclamation's storage rights are independent of the irrigation entities' natural flow rights. Any reduction in storage due to this improper linkage causes Reclamation's project operations to be diminished.

Second, the Director's determination that carryover of storage water is limited to one year is also contrary to this scheme of operations, and to Idaho law. *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 201, 157 P. 2d 76, 77 (1945); *see Cottonwood Water & Light Co, Ltd.*, 29 Idaho 761, 162 P.242 (1916). In *Rayl,* the court dismissed an appellant's argument that an irrigation organization or individual appropriators could not carryover storage. The court noted that "such custom is too well entrenched in the concept of our water law" and held storage could be carried over for subsequent years. *Rayl*, 66 Idaho at 201. The court added:

> There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. . . . [T]he very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

Rayl, 66 Idaho at 208, 157 P.2d at 80. Also, the Director instructing entities to utilize all of their storage water and limiting carryover to one year is likely to reduce available storage supplies for Reclamation's other operational purposes, potentially including, compliance with the Upper Snake River component of the Nez Perce settlement.

Finally, the Director may not reallocate natural flow <u>prior</u> to its storage by allowing junior water right holders to intercept it to the detriment of the senior storage rights when the seniors are in priority. Similarly, the Director may not reallocate reservoir supplies <u>after</u> storage occurs by either diminishing an irrigation entity's carryover supplies or by improperly

accounting for storage supplies. These determinations are contrary to the confirmed contracts, and are a detriment to Reclamation project operations. *See e.g.* 1968 *Eagle Decree (Burley Irrigation Dist. v. Eagle,* No. 21406 (5th Jud. Dist. Twin Falls Cty., Idaho, July 10, 1968), at p.19.

V. The Director Cannot Modify the Ground Water Users Mitigation Obligation without a Hearing

In his Amended Order, the Director has reduced material injury to an amount less than the licensed and decreed right amount, and has allowed groundwater users to provide mitigation below that which the Director determined represents the injury level. To properly provide procedural and substantive due process to parties with a protected property interest, Idaho's Conjunctive Management Rules[8] must be interpreted to provide proper procedures in association with any mitigation plan formation or modification. *See Gay v. County Commissioners,* 103 Idaho 626, 651 P.2d 560, 562-63 (Id Ct. App. 1982) (right to present and rebut evidence are fundamental elements of procedural due process); *Farris v. Twin Falls,* 81 Idaho 583, 347 P.2d 996 (1959) (substantive due process requires of proceedings that deprive one of life, liberty or property to not be so inadequate to be characterized as arbitrary).

Thus, once a mitigation plan is approved, the mitigation requirements must remain a vested obligation until the junior water user either satisfies the mitigation requirement or submits an amended mitigation plan for hearing. The Director, by executive fiat, cannot forgive a ground water user's mitigation obligation without running afoul of procedural and substantive due process protections. Any change in mitigation obligations must come through a process that provides the parties with a meaningful opportunity to be heard.

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[8] See IDAPA §§ 37.03.11.41.03 (order to curtail effective until such order is revoked or modified), and 37.03.11.43.02 (upon receipt of a proposed mitigation plan the Director will provide notice and hold a hearing if necessary under the procedural provisions of I.C. § 42-222). Reclamation does not concede that the Conjunctive Management Rules necessarily limit or restrict the formulation of appropriate relief in this matter.

VI. Reclamation Reserves the Right to Raise Additional Factual and Legal issues

Reclamation reserves the right to raise additional legal and factual issues for hearing in this matter.

RELIEF REQUESTED

Based on the foregoing, Reclamation requests a hearing pursuant to Idaho Code Section 42-1701A(3), and IDAPA 37.01.01.740.02 (a) and (b), at which Reclamation can fully address all relevant factual and legal issues associated with the Amended Order.

Dated this 17 day of May, 2005.

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

By Kathleen Marion Carr
KATHLEEN MARION CARR

CERTIFICATE OF SERVICE

The undersigned certifies that on them 17TH day of May 2005, a true and correct copy of **RECLAMATION'S PETITION FOR HEARING REGARDING THE DIRECTOR'S AMENDED ORDER OF MAY 2, 2005** was served on the following person(s) as shown below:

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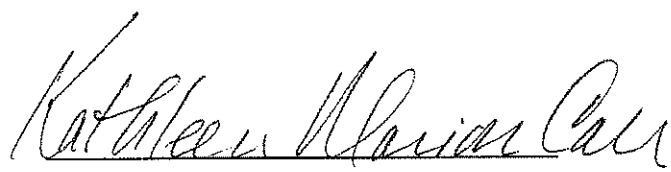

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