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

BALLENTYNE DITCH COMPANY; BOISE VALLEY
IRRIGATION DITCH COMPANY; CANYON COUNTY
WATER COMPANY; EUREKA WATER COMPANY;
FARMERS' CO-OPERATIVE DITCH COMPANY;
MIDDLETON MILL DITCH COMPANY; MIDDLETON
IRRIGATION ASSOCIATION, INC.; NAMPA &
MERIDIAN IRRIGATION DISTRICT; NEW DRY
CREEK DITCH COMPANY; PIONEER DITCH
COMPANY; PIONEER IRRIGATION DISTRICT;
SETTLERS IRRIGATION DISTRICT; SOUTH BOISE
WATER COMPANY; and THURMAN MILL DITCH
COMPANY;

Petitioners,

vs.

BOISE PROJECT BOARD OF CONTROL, and NEW
YORK IRRIGATION DISTRICT,

Petitioners,

vs.

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

Respondents.

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

**DITCH COMPANIES'
OBJECTION TO AGENCY
RECORD LODGED BY IDWR**

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

COME NOW, Petitioners Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company (collectively the "Ditch Companies") by and through their undersigned counsel of record, and pursuant to Rule 84(j) of the Idaho Rules of Civil Procedure, Paragraph 9 of the *Procedural Order Governing Judicial Review of the Final Order of Director of the Idaho Department of Water Resources*, dated December 23, 2015, issued in this matter, and the *Notice of Lodging of Agency Record and Transcript with the Agency*, dated December 24, 2015, object to the Agency Record lodged in this matter. The basis for this Objection is that the Agency Record includes voluminous amounts documents which were not introduced or admitted into evidence at the Hearing for this Contested Case and were instead improperly "officially noticed" by the Presiding Officer.

**I.
INTRODUCTION / BACKGROUND**

On September 10, 2014, the Presiding Officer tasked the Department with preparing a report pursuant to Rule 602 of the Department's Rules of Procedure. *See Order Lifting Stay and Notice of Status Conference* (September 10, 2014); IDAPA 37.01.01.602. Rule 602 provides the following:

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho¹ and of generally recognized **technical or scientific facts** within the agency's specialized knowledge. Parties shall be notified of the **specific facts or material** noticed and the source of the material

¹ Judicial Notice under Rule 201 of the Idaho Rules of Evidence requires, *inter alia*, facts to be "capable of accurate and ready determination" and identification of "specific documents or items that were so noticed" and an opportunity to be heard.

noticed, including any agency staff memoranda and data. Notice that official notice will be taken should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed. **Parties must be given an opportunity to contest and rebut the facts or material officially noticed.** When the presiding officer proposes to notice agency staff memoranda or agency staff reports, responsible staff employees or agents shall be made available for cross-examination if any party timely requests their availability.

IDAPA 37.01.01.602 (emphasis added).

On November 4, 2014, and in response to the Presiding Officer's request for a 602 report, Elizabeth Cresto issued a *Technical Memorandum* which identified a limited record of two documents she relied on (identified at footnote nos. 7 and 8 of her memorandum). On June 19, 2015, the Presiding Officer submitted a *Disclosure of Expert Witness for IDWR* which disclosed Ms. Cresto as IDWR's expert, and indicated that her testimony would include only those matters provided in Ms. Cresto's *Technical Memorandum*. The Presiding Officer's expert witness disclosure **did not** identify any additional documents which would be noticed as part of Ms. Cresto's report or testimony.²

On August 19, 2015, one week before the Hearing in this matter, the Presiding Officer submitted a document titled "*Documents Officially Noticed.*" Copies of the documents listed in the *Documents Officially Noticed* were not provided to the parties but rather the disclosure indicated that they could be accessed through the Department and SRBA's websites, or that the paper files could be reviewed in the Department's state office in Boise upon request.

At the Hearing of this matter, the Department, despite its assertion that it was not a party to the Hearing, presented witnesses, cross-examined others in an adversarial manner, and offered exhibits which it believed to be relevant to this matter. The Department also lodged evidentiary

² Suffice it to say, the Ditch Companies found the Presiding Officer's designation of an expert witness confusing and improper because neither the Presiding Officer, nor the Department of Water Resources were adversarial parties to the contested case (nor could they be).

objections on the record, and went so far as to offer rebuttal witness testimony and exhibits. In fact, the Presiding Officer himself fully participated at the Hearing by examining and consulting with witnesses during the course of the Hearing, and it was the Presiding Officer that submitted the Department's *Disclosure of Expert Witness for IDWR* and the Department's witness and exhibit list. In all, the Department offered nine (9) exhibits which were admitted into the Record for this Contested Case. Despite its non-party characterizations, the Department and the Presiding Officer fully participated at the Hearing and had every opportunity to introduce facts, exhibits, documents and material which if contended to be relevant to the Contested Case.

Notwithstanding the fact that the Department had the opportunity to present testimony and witnesses, and the fact that the Department had the opportunity to identify specific documents, lay proper foundation and then offer, introduce and admit exhibits into the Record which it contended were relevant to the Contested Case, neither the Department or the Presiding Officer offered any of the documents as exhibits or for admission other than the nine exhibits lodged. Instead, the Department improperly chose to create (or augment) its own record under the guise of *Documents Officially Noticed*. After the Hearing, on September 15, 2015, the Presiding Officer issued an "*Amended Documents Officially Noticed*" which states that after the Presiding Officer's "additional review, the Director concludes that certain documents can be identified with more specificity." The various categories of documents referenced in the *Amended Documents Officially Noticed* is summarized as follows:

- (a) A list of various documents provided prior to the Hearing on July 31, 2015 referred to in the Record as "IDWR Doc-List Attachment A";
- (b) A list of documents posted on IDWR's website referred to in the Record as "WD63 Records of Water Distribution";
- (c) Water right back files for various storage water rights and claims which can be accessed through IDWR's website and SRBA claims which can be accessed through the SRBA website (hereinafter "Water Right Back Files");

- (d) Unspecified and vague references to documents in the Department's files which can be available from search the Department's website or can be reviewed at the Department's offices (hereinafter "all IDWR files");
- (e) The annual watermaster reports or "Black Books";
- (f) Unspecified and vague references to the Water District 63 records in possession of the Department (hereinafter "all WD63 records"); and
- (g) The Basin Wide Issue 17 record before the SRBA Court and Idaho Supreme Court (hereinafter "all BW17 files").

Again, none of the documents listed above were marked, identified or offered as exhibits at the Hearing for this matter and many were not copied/scanned until after the Department was charged with creating a Record for appeal. As to whether the copies include all documents which may have been in the Department's files or records no one knows for certain except the Department and even the Department has admitted through the course of this Contested Case that its records are scattered and incomplete. At most, the Presiding Officer's exercise of official notice identified the sources of facts or material he presumably relied upon, but he **failed to further identify "the specific facts or material" culled from the thousands of pages identified** in derogation of Rule 602's requirements.³

II.

OBJECTION TO THE AMENDED DOCUMENTS OFFICIALLY NOTICED

With respect to the documents listed "IDWR Doc List-Attachment A" and the "WD63 Records of Water Distribution" the Presiding Officer/Department took the time and effort to list the documents, could have offered these documents as exhibits, but instead only identified and introduced nine exhibits. The process of identifying, sharing, and introducing exhibits for admission, which then requires some foundation and relevance for admission of the specific

³ The identification requirements of Rule 602 are conjunctive ("and"-based): "Parties shall be notified of the **specific facts or material noticed and the source of the material noticed**, including any agency staff memoranda and data." *Id.* Thus, merely identifying the "sources" of noticed material is not enough. One must identify the "specific facts or material" located within the sources too.

document, was applicable to all of the parties of the Contested Case initiated by the Presiding Officer except the Department. The Department, instead, chose to identify only nine exhibits which it apparently contends were relevant but then has avoided the evidentiary offer and objection gatekeeping function as to the admission of exhibits for all other documents listed in the "IDWR Doc List-Attachment A" and the "WD63 Records of Water Distribution" files. This is an improper use of official/judicial notice.

With regard to the Water Right Backfiles, all IDWR files, Black Books, all WD63 files and all BW17 files, the Department again could have identified those specific documents contained within said files and offered said documents for admission at the Hearing. Instead, the Department did not take the time to try to specifically identify facts or documents actually found relevant or relied upon as required by Rule 602, but instead chose to include vague references to the universe of documents which may relate to this matter. The Ditch Companies have had no opportunity to respond to such vague references because in most cases it is not discernable which specific document or fact the Department contends has a semblance of relevance to this Contested Case. It is also not clear whether the Department copied all documents in its files or offices, which are "scattered" as the Department has described them, or whether the Department only copied those documents it contends supports the Department's position.⁴ Indeed, the purpose of identifying documents for admission into the Record, and the purpose of specifically identifying facts which may be judicially noticed, is to provide parties with a fair opportunity to respond or object to the document prior to the issuance of an Order, and most definitely, prior to the creation of the Record. The Presiding Officer cannot create (or re-create) the Record based upon his after-the-fact views of the matter by dumping thousands of pages of materials into a

⁴ Not only has the Department not specifically identified the documents or records in its files which it now intends to make part of the Record for appeal, but the Department previously indicated that it was not a "party" to this Contested Case and thus it would not be subject to any discovery.

black hole labeled "official notice."

The Ditch Companies do not dispute that some of the documents referenced in the *Amended Documents Officially Noticed* may have some relevance to this Contested Case. However, vague references to entire Water Right Backfiles, all IDWR files, Black Books, all WD63 files and all BW17 files, which may include letters, notes or other documents which do not meet hearsay or other evidentiary standards is objectionable. Again, the Department had the opportunity to specifically identify and offer as evidence those documents which it believed were relevant to this Contested Case. It chose not to do so.

In order to create the Record for the appeal in this matter, the Department has now copied/scanned various files. In other words, after the fact, the Department has selectively included in the Record various files and documents which it could have presented, offered or introduced as exhibits in this matter. The fact that the Department is now able to identify, copy/scan and make a record of the *Amended Documents Officially Noticed* demonstrates that the Department could have done so prior to the Hearing in order to provide the parties with an opportunity to respond or object to such documents. If the Department contends that these documents have relevance to the issues presented in this Contested Case then it could have and should have specifically identified those documents and offered them for admittance at the Hearing.

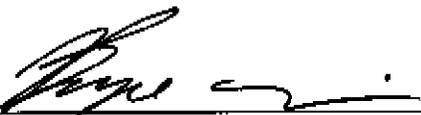
The Presiding Officer and Department apparently thought that only nine documents were relevant to this Contested Case and thus identified, offered and introduced nine exhibits for admission. The remaining documents contained in the *Amended Officially Noticed Documents* are either not relevant in the Presiding Officer and Department's view or the Presiding Officer and/or the Department are intentionally circumventing evidentiary and other standards in order to selectively include documents in the Record. In either case, the parties to this Contested Case

should be afforded the opportunity to consider and object to each specific document rather than the Presiding Officer selectively defining the universe of documents which are part of the Record.

For these reasons, the Ditch Companies object to all documents included in the Record as *Amended Officially Noticed Documents* which the Department selectively copied/scanned and included in the Record.

DATED this 7th day of January, 2016.

SAWTOOTH LAW OFFICES, PLLC

By 

S. Bryce Farris
Attorneys for the Ditch Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January, 2016, I caused a true and correct copy of the foregoing **DITCH COMPANIES' OBJECTION TO AGENCY RECORD LODGED BY IDWR** to be served by the method indicated below, and addressed to the following:

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