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BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE

STATE OF IDAHO

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

**JOINT OBJECTIONS AND PRELIMINARY
RESPONSE TO NOVEMBER 4, 2014 STAFF
MEMORANDUM AND RESPONSE DEADLINE**

RECEIVED
JAN 26 2015
DEPARTMENT OF
WATER RESOURCES

COME NOW, Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon
County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company,

JOINT OBJECTIONS AND PRELIMINARY RESPONSE TO STAFF MEMORANDUM - Page 1

ORIGINAL

Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company, by and through their counsel, Sawtooth Law Offices, PLLC, New York Irrigation District, by and through its counsel, McDevitt & Miller, LLP, Pioneer Irrigation District, by and through its counsel, Moffatt, Thomas, Barrett, Rock & Fields, Chartered, and Farmers Union Ditch Company, by and through its counsel, Jerry A. Kiser (hereinafter jointly and collectively referred to herein as the "Irrigation Entities"), and pursuant to the *Scheduling Order; Notice of Hearing; Order Authorizing Discovery* dated October 14, 2014, submit this *Preliminary Response* to the Staff Memorandum from Liz Cresto to Gary Spackman, Director, dated November 4, 2014 ("*Staff Memo.*").

A. Procedural Background.

The Director's October 22, 2013 *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference* initiated this contested case and defines the matters to be determined through these proceedings as:

(1) how and why water is "counted" or "credited" to the water rights for reservoirs pursuant to the existing accounting methods and procedures; (2) the origin, adoption, and development of the existing accounting methods and procedures; and (3) appropriate changes, if any to the existing procedures as they may relate to federal flood control operations.

October 22, 2013 Order at 5, ¶6.

On December 23, 2013, the Director stayed this contested case "until after the issuance of a decision by the Idaho Supreme Court in the BWI-17." *Order Staying Proceeding.*

On September 10, 2014, after the Idaho Supreme Court issued its BWI-17 decision, the Director issued an *Order Lifting Stay and Notice of Status Conference*, in which he advised the

parties of the resumption of the contested case and that he was instructing his staff to prepare a memorandum explaining the Department's position regarding the first two issues identified in his *October 22, 2013 Order*:

The Director will also separately request a memorandum from staff pursuant to Rule 602 of the Department's rules of procedure (IDAPA 37.01.01.602) explaining: (1) how and why water is counted or credited to the water rights for reservoirs in Basin 63 pursuant to the existing accounting methods and procedures; and (2) the origin, adoption, and development of the existing accounting methods and procedures in Water District 63.

September 10, 2014 Order at 2.

In his October 14, 2014 *Scheduling Order; Notice of Hearing; Order Authorizing Discovery*, the Director reiterated that the "fundamental question" to be resolved through the hearing in this proceeding is "how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in Water District 63." *October 14, 2014 Order* at 3. The *Order* states: "During the course of the hearing, all parties appearing in this matter will have the opportunity to present information, examine witnesses, and provide argument on issues." *Id.* at 2. The *Order* advises the parties that the Director had requested the *Staff Memo.*, and, without explanation, included a deadline for filing responses to the *Staff Memo.* In order to accommodate settlement discussions, the Director extended the deadline for filing responses until January 26, 2015.

The Director's *Third Amended Scheduling Order* sets February 26, 2015 as the deadline for completing discovery.

As requested by the Director, the *Staff Memo.*, dated November 4, 2014, explains the Department's position regarding the issues the Director has identified for determination through the contested case hearing.

B. Objections and Reservations of Rights

The Director's *September 10, 2014 Order* cites Rule 602 of the Department's Rules of Procedure as the legal authority for his request that the Department's staff prepare the *Staff Memo*. Rule 602 is an evidentiary rule, based on I.C. § 67-5251(4), which provides for the taking of "official notice" of certain facts:

602.OFFICIAL NOTICE -- AGENCY STAFF MEMORANDA (RULE 602).

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho 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 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.

The Director's reliance on Rule 602 indicates that he intends to take official notice of "specific facts or material" in the *Staff Memo*. that he believes qualify as "generally recognized technical or scientific facts within the agency's specialized knowledge." According to the Rule, the parties have the right to receive notice of the official notice the Director intends to take, to then cross-examine staff employees responsible for the *Staff Memo*., and "contest and rebut the facts or material officially noticed." Requiring the parties to respond to the *Staff Memo*. at this point is prejudicial and deprives the parties of these rights because: 1) the Director has not notified the parties that he is taking official notice of any facts or materials; 2) discovery necessary to evaluate the assertions of the *Staff Memo*. is not complete; 3) responsible staff have not been cross-examined; and 4) the hearing at which parties will have the opportunity to contest and rebut any officially noticed

facts or materials is still six weeks off.

The *Staff Memo.* is not a preexisting agency memorandum that merely provides technical information. Rather, the *Staff Memo.* is statement of the Department's position on the issues the Director raised when he initiated this contested case and set it for hearing. It is more akin to a pleading of an interested party than it is to an objective explanation of "generally recognized technical or scientific facts." It contains legal conclusions regarding storage water rights, storage contracts, and the circumstances under which they are "satisfied." As such, it is not clear under what authority the Director can interject into this proceeding the legal conclusions and positions of his own Department on issues to be determined through the hearing and require a response to the Department's position before discovery is complete, a hearing is held, and post hearing briefs are filed.

For these reasons, the Irrigation Entities object to the requirement that they respond to the *Staff Memo.* at this time and in this manner. Without waiving this objection, the Irrigation Entities provide this *Preliminary Response* to the *Staff Memo.*, reserving the following rights to submit additional and modified responses to the *Staff Memo.* at a later time during this contested case, and reserving the right to make the following objections:

1. *Discovery is Ongoing.* The deadline for discovery completion is February 26, 2015. The Irrigation Entities are actively engaged in their own investigations and discovery at this time. Accordingly, the Irrigation Entities reserve the right to submit further responses, objections and comments to the *Staff Memo.* based on the results of further investigations and/or discovery related to the assertions contained in the *Staff Memo.*

2. *Reservation of Objections.* This *Preliminary Response* is made subject to all objections as to competence, relevance, materiality, and admissibility of the statements or

information in the *Staff Memo*. All such objections are reserved and may be interposed at the time of the hearing or trial on this matter.

3. *No incidental or implied admissions are intended.* The fact that the Irrigation Entities have not responded to all or part of the *Staff Memo*. should not be taken as an admission that the Irrigation Entities accept any aspect or statement in the *Staff Memo*. Similarly, the fact that the Irrigation Entities have responded to all or part of the *Staff Memo*. is not intended to, and cannot not be construed to be, a waiver by the Irrigation Entities of all or part of any objection to other aspects, characterizations or statements. To the contrary, the Irrigation Entities deny, contest and object to each and every statement or characterization contained in the *Staff Memo*. unless specifically acknowledged and accepted herein.

4. *Burden of Proof.* By responding to or asserting objections or concerns regarding the *Staff Memo.*, the Irrigation Entities do not admit that they bear the burden of disproving the assertions of the *Staff Memo*. To the contrary, any proponent of such assertions bears the burden of proof.

C. Preliminary Responses.

1. The *Staff Memo*. contains assertions and conclusions that are inconsistent with Water District 63 reservoir operations, operating agreements, water rights, water right accounting, water right administration and water right distribution.

2. The *Staff Memo.*'s explanation of Water District 63 water right accounting methods is incomplete and erroneous in several respects, including, but not limited to:

- a. the accounting concept of "paper fill" does not represent a determination that a storage right has been legally or actually "satisfied" or fulfilled - any such determination would be contrary to law, contracts, state-approved procedures governing reservoir

operations, and the actual administration of water rights in Water District 63;

b. the accounting concept of “unallocated” or “unaccounted for” storage does not represent a determination that water is being stored or has been stored without a water right - any such determination would be contrary to law, contracts, state-approved procedures governing reservoir operations, and the actual administration of water rights in Water District 63;

c. the Staff Memo. fails to address the relationship between flood control use and storage use of the Water District 63 reservoirs as established by governing contracts and state-approved procedures;

d. the *Staff Memo.* incorrectly states or implies that storage rights “accrue” and are “satisfied” by reservoir inflows that are passed through or released from the Water District 63 reservoirs for flood control purposes - any such determination would be contrary to law, contracts, state-approved procedures governing reservoir operations, and the actual administration of water rights in Water District 63;

e. the *Staff Memo.* incorrectly characterizes the water right accounting program as independently determining the fulfillment of storage water rights;

f. the *Staff Memo.* does not adequately or accurately explain the function of the storage program and its interrelationship with, bearing on, and reconciliation of the water right accounting program;

3. The *Staff Memo.* fails to identify and consider numerous documents that are relevant to the issues it purports to address.

4. The *Staff Memo.* fails to recognize and consider positions, admissions and acknowledgments of the State of Idaho, IDWR and other parties concerning the historical operations

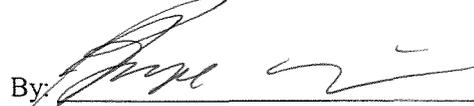
and accounting for the Basin 63 Reservoirs, including but not limited to: (a) statements, admissions and acknowledgments that the Boise River is fully appropriated; and (b) statements, admissions and acknowledgments concerning flood control operations, and the crediting of later stored water to mitigate flood control releases.

5. The *Staff Memo.* fails to recognize and consider positions, admissions and acknowledgments concerning water right applications and transfers in the Boise Basin, including, but not limited to: conditioning certain water right applications (i.e. 63-31409) as being from excess flows and can only be diverted during flood control releases.

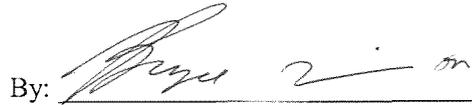
6. The *Staff Memo.* is inconsistent with state law and the Director's duty to administer water rights according to the prior appropriation doctrine.

DATED this 26th day of January, 2015.

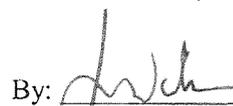
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By: 
S. Bryce Farris
Attorneys for the Ditch Companies

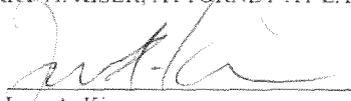
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By:  on behalf of:
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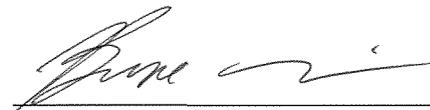
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January, 2015, I served the foregoing to the following and by the method indicated below:

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<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON LLP 195 River Vista Place, Ste. 204 Twin Falls, ID 83301-3029 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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