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DEPARTMENT OF  
WATER RESOURCES

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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 | ) | <b>RECLAMATION'S RESPONSE</b>   |
| RESERVOIR DISTRICT #2, BURLEY       | ) | <b>TO IGWA AND POCATELLO'S</b>  |
| IRRIGATION DISTRICT, MILNER IRRIGA- | ) | <b>MEMORANDUM OF EXCEPTIONS</b> |
| TION DISTRICT, MINIDOKA IRRIGATION  | ) |                                 |
| DISTRICT, NORTH SIDE CANAL COMPANY, | ) |                                 |
| and TWIN FALLS CANAL COMPANY        | ) |                                 |
| _____                               | ) |                                 |

COMES NOW the U.S. Bureau of Reclamation, by and through counsel of record and submits its response to IGWA and the City of Pocatello's Memorandums of Exceptions to the Recommended Order issued by the Department pursuant to I.C. § 67-5243 and Rule of Procedure 720.02.

**INTRODUCTION**

On April 29, 2008, the Hearing Officer issued his *Opinion Constituting Findings of Fact, Conclusions of Law, and Recommendation* (hereafter *Recommended Order*). Reclamation, the Surface Water Coalition and the Idaho Ground Water Users (IGWA) filed petitions for reconsideration of certain issues and/or filed exceptions to that Hearing Officer's recommended decision. The City of Pocatello responded to the Surface Water Coalition's and Reclamation's

petitions. On June 10, 2008, the Hearing Officer issued his *Order Regarding Objections to Recommended Order*. The Hearing Officer accepted two minor modifications in regards to river operations, but neither change affected a recommendation in the *Recommended Order*. Subsequent to the Hearing Officer issuing the June 10, 2008 *Order*, the Surface Water Coalition filed its Exceptions to the Hearing Officer's *Recommended Order* on June 16, 2008, and the City of Pocatello and IGWA both filed their Memorandums in Support of their Exceptions on June 24, 2008. See *IGWA's Memorandum In Support of its Exceptions to Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* and *Pocatello's Memorandum of Exceptions to the Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*. Review of recommended orders by the Agency Head is provided by Idaho Code § 67-5244.

## DISCUSSION

IGWA takes exception to the following issues, among others, and wishes the Director to modify the *Recommended Order* as they so provide; Reclamation responds to each accordingly. In addition, Reclamation responds to Pocatello's Exception to carryover storage as provided in 5 below.

**1. Aquifer Equilibrium** – IGWA states that the Director should reject the proposition in Finding of Fact No. 80 that the Snake River Plain aquifer is “close to dynamic equilibrium” because it is at or near equilibrium and IGWA cites Dreher and McGrane's testimony for this proposition. *IGWA's Memorandum in Support of its Exceptions to Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (hereafter *IGWA's Exception Memorandum*) at 11.

Reclamation responds and incorporates its *Trial Brief* at 13 and its *Post Hearing Brief* at 6-7. Reclamation agrees with the Hearing Officer's assessment that 10 percent of the total steady-state depletions from latent ground water pumping have yet to be realized. See the Hearing Officer's *Recommended Order* at 12. These impacts will reduce the Snake River flows by at least 142,000 acre feet per annum. See also *Expert Witness Report of Patrick C. McGrane, P.E.*, at pp. 7-8 as incorporated into *McGrane's Expert Testimony* at p. 2. The Eastern Snake River Plain Aquifer will not be at equilibrium until those impacts are absorbed at some time in the future –possibly as long as 100 years from now. *Id.* at 5-6; *Recommended Order* at 12.

**2. Source of Supply (Reach Gains)** – IGWA asserts that groundwater pumping is only responsible for the depletions that result in material injury to senior water right holders, and that ground water pumping does not affect surface supplies since, according to IGWA, their supply is composed of snow melt and spring run off. *IGWA's Exception Memorandum* at 12. IGWA acknowledges that ground water pumping could affect surface supplies fed through reach gains in the Blackfoot to Neeley reach, but they state those reach gains could only be a source of supply to the “two” senior water rights owned by TFCC and NSCC since those entities would use any of the supply that would become available. *Id.* at 12-13.

Director Dreher found that reach gains are a source of supply to surface water users and that ground water pumping can greatly affect reach gains. See *May 2, 2005 Amended Order* at FOF ¶ 25, 26, 27, 77, 81, 82 and 83. The Hearing Officer confirmed that ground water pumping has affected the quantity and timing of water available to surface water users through decreasing reach gains. *Recommended Order* at 29. The Hearing Officer also found that ground water users are causing natural flow rights to be exhausted earlier, and this correspondingly requires the surface water users to access storage water earlier and longer thereby reducing carryover storage

to which the surface users are entitled. *Id.* at 30. Reclamation Expert and Hydrologist Patrick C. McGrane testified that ground water pumping depletes the Snake River and its reach gains above Minidoka Dam by approximately 1,379,000 acre feet per year. *Pre-Filed Expert Testimony of Patrick C. McGrane, P.E.* at pp. 7-8.

IGWA's arguments are intended to mislead because there is more than substantial evidence and expert testimony to prove that groundwater users are intercepting reach gains – a surface water supply – that the surface user's would utilize if available. Moreover, if ground water users were curtailed, these reach gains would satisfy more than just the two senior rights of TFCC and NSCC given that ground water users are intercepting 1,379,000 acre feet of water per year that would accrue to the Snake River as reach gains. *See Surface Water Coalition's Expert Report*, Table ES-1 at pp. ES-23 to ES-24 for coalition's water rights and amounts.

**3. Reservoir Fill** – IGWA argues that inflow to Palisades and Jackson Lake Reservoirs cannot be physically affected by ground water pumping because there are no reach gains accruing to the river above these reservoirs that could be intercepted by the ground water pumpers. *IGWA's Exception Memorandum* at 13. The Hearing Officer correctly found, however, that Reclamation's Reservoirs are operated as a system and that the reservoirs fill in priority. *Recommended Opinion* at p. 5, and *see Gregg Testimony* at Hearing Tr. Vol. VI, at pp.1200-1204 & 1210. If ground water users intercept water that would otherwise accrue as reach gains to fill American Falls Reservoir, more water will need to be sent downstream from upstream reservoirs to fill American Falls or other senior storage space. *Id.* Thus, ground water pumping on the ESPA can affect, directly and indirectly, junior priority reservoirs and junior reservoir space. Reclamation also incorporates herein its *Trial Brief* at 13 which discusses how Reclamation could have stored additional reach gains in its reservoirs if it had been available.

**4. Reasonable Carryover** – IGWA argues circuitously that reasonable carryover should be zero, but if it is not determined to be zero, it should be at least zero in those multiple-years or prolonged droughts. *IGWA’s Exception Memorandum* at 14. To support their argument, IGWA cites Reclamation’s dam planning studies and historical accounting records to show that any other determination would “expand the historical use and expectation [of] storage water” by Reclamation’s contractors. *Id.* at 15.

IGWA’s argument is neither supported by history nor by the substantial evidence in the record. Reclamation incorporates herein its *Trial Brief* at 7-13 and its *Post-Hearing Brief* at 3-19 where Reclamation lays out, among other things, the purpose of storage reservoirs and for carrying-over water. Storage reservoirs are constructed for future years’ needs and, particularly, Palisades Reservoir was constructed for carryover to provide water for long drought periods. *Id.* *See also Tr. Vol. VI*, at pp. 1227-1229 (Gregg Testifying about reservoirs built as insurance against drought periods); *Tr. Vol. II*, at p. 320, L. 15-17 (Dreher testifying that storage was developed for future needs); *and see Tr. Vol. II*, at p. 309-10, L. 25-5 (Dreher testifying that carryover storage is needed for future droughts as well as to supplement shortages of natural flow rights); Recommended Order at 60 (Palisades was constructed to prevent disasters during shortages).

**5. Beneficial Use of Carryover Water.** The City of Pocatello states that *United States v. Pioneer* established that storage in and of itself is not a beneficial use. *See Pocatello’s Memorandum of Exceptions to the Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at 19. Similarly, IGWA argues that carryover storage is not a “water right” and storage is not a beneficial use of water. *IGWA’s Exception Memorandum* at 16-17.

Reclamation responds to both the City of Pocatello's and IGWA's arguments by incorporating its *Post Hearing Brief* at 3-19, *Post Hearing Rebuttal Brief* at 1-3, and its *Trial Brief* at 6-10. Pocatello and IGWA are correct insofar as the Idaho Supreme Court stated in *Pioneer* that there is "no dispute [Reclamation] does not beneficially use the water for irrigation. It manages and operates the storage facilities." 144 Idaho 106 at 110 (2007).

However, the *Pioneer* decision established that title to irrigation storage water is split between the United States and the beneficial user of the irrigation portion of the right. *See* 144 Idaho at 115. The Supreme Court determined that, since the United States did not ultimately put the irrigation storage water to beneficial use, it could not hold sole title to that portion of the water right. *Id.*

Nonetheless, the Supreme Court stated that, based upon "the United States Supreme Court cases, the Reclamation Act, the Idaho Constitution, Idaho statutory and case law, it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right." *Id.* To reflect the Court's analysis, it required a remark on the ownership element of Reclamation's storage rights for Anderson Ranch, Lucky Peak and Arrowrock Reservoirs. *Id.* This remark provided that "title to the use of the [irrigation storage] water is held by the consumers or users of the [irrigation storage] water... in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled" to receive that irrigation storage. *Id.*

Beneficial use of Reclamation's reservoirs' underlying storage was confirmed by the State Engineer when he issued reservoir licenses to the United States, and, in the case of Palisades Reservoir, by the Idaho Legislature when it amended the law to allow Palisades to be licensed for storage. *See Reclamation Exhibits* 7013, 7015, and 7016.

IGWA also argues that allowing carryover water for future use is akin to providing storage users a privilege given only to municipalities, i.e., the right to hold water for reasonably anticipated future needs. *IGWA's Exception Memorandum* at 16. Conjunctive Management Rule 42.01(g) provides, however, that “a holder of a surface storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.” The federal contracts also allow the surface entities to carryover water as provided by the terms of those contracts, *see H. Tr. Vol VI*, at p.1228 LL. 5-14 (Gregg testifying about carryover contract provisions to assure water supplies for future dry years).

**6. Power Production** - IGWA argues that allowing hydropower rights to benefit at the expense of irrigated agriculture violates the prior appropriation doctrine since they allege that the hydropower rights are junior and subordinate to the irrigation rights. *IGWA's Exception Memorandum* at 20. The issue of power subordination is being litigated in the SRBA and will be decided there where it will be well briefed by all parties.

**7. Water Leases** – IGWA argues that the Director should make a specific finding that leasing water to a third party, regardless of what the third party uses the water for cannot shift any burden to the ground water users. *IGWA's Exception Memorandum* at 21-22. As described at the hearing, water leased for flow augmentation is provided to meet Endangered Species Act (ESA) commitments agreed to by the State of Idaho. Excusing junior ground water pumpers from mitigating for such leases unfairly shifts the burden to surface water users to meet the State's commitments under the Nez Perce Water Rights Settlement Agreement and the ESA. *H. Tr. Vol. VI* at pp. 1229-1234, and *see Reclamation's Post-hearing Rebuttal Brief* at pp. 7-11.

**8. Evaporation** – IGWA asserts that evaporation on storage should not be attributable to them since evaporation does not bear any relationship to ground water pumping. *IGWA's*

*Exception Memorandum* at 23. Evaporation is a part of the reservoir accounting program and is fairly assessed against all storage space to reflect actual reservoir capacities. *See H. Tr. Vol. V*, at p. 914 LL 2-11 (Swank testifying about “shrink” applied to storage to account for evaporation) and *see H. Tr. Vol. V*, at p. 980, LL. 13-17. If IGWA provides water in real time and according to actual injury, there would be little to any evaporation attributed to their in season contribution. However, to provide that IGWA should provide less mitigation/replacement water to make up for evaporation that would occur in the future, unfairly shifts the risk again to the surface water users.

### CONCLUSION

For the foregoing reasons, Reclamation responds to IGWA and the City of Pocatello’s Exceptions filed on the Hearing Officer’s Recommended Order.

Submitted this 18 day of July, 2008.

U.S. BUREAU OF RECLAMATION

  
KATHLEEN MARION CARR

## CERTIFICATE OF SERVICE

The undersigned certifies that on the 18 day of July 2008, a true and correct copy of *Reclamation's Response to IGWA and Pocatello's Memorandum of Exceptions* was served on the following person(s) as shown below:

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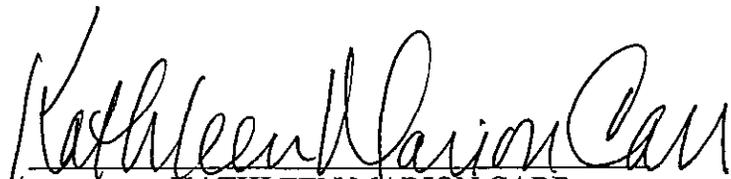
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