

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF EXCHANGE OF) WATER RIGHT NO. 2-2339 IN THE NAME) OF UNITED WATER IDAHO, INC.) _____)	PRELIMINARY ORDER EXTENDING EXCHANGE AND AMENDING CONDITIONS OF APPROVAL
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United Water Idaho, Inc. (United Water) petitioned the Idaho Department of Water Resources (IDWR) to amend its approval of an exchange of Snake River water with Boise River water approved by IDWR on July 22, 1999.

The exchange approved by IDWR authorized United Water to divert up to 11.0 cfs of water out-of-priority from the Boise River for municipal purposes under water right permit no. 63-12055 (priority date of September 8, 1993) under the following conditions: (1) The U.S. Bureau of Reclamation (Bureau) is releasing storage water from Boise River Reservoirs to improve downstream passage conditions for salmon and steelhead in the lower Snake River; (2) the flow rate diverted by United Water cannot exceed the flow rate being released by the Bureau of Reclamation; (3) Water right no. 2-2339 is deliverable under a priority date of December 7, 1964 from the Snake River; and (4) United Water will forego diversion from the Snake River under water right no. 2-2339 of at least the flow rate United Water diverts from the Boise River.

Because of the unique nature of the exchange, IDWR placed the following condition on the exchange approval:

This exchange is effective for up to five (5) years from the date of the approval unless extended by the Director or rescinded for cause by the Director.

The five-year approval of the exchange ended on July 22, 2004. United Water petitioned IDWR to extend the exchange indefinitely unless rescinded for cause.

On April 26, 2004, IDWR approved a similar exchange for United Water. The order approving the exchange did not limit the exchange to a term of years. The exchange contained conditions not found in the exchange approved on July 22, 1999. Both exchanges authorize diversion of Boise River surface water when Boise River storage water is being released for flow augmentation. As a result, to the extent possible, the conditions of the two exchanges should be identical.

ORDER

IT IS HEREBY ORDERED that the Order, dated July 22, 1999, approving an exchange of Boise River water with Snake River water right no. 2-2339 is **Amended**, and the following are conditions of approval that now apply to the exchange:

1. The water right holder's diversion from the Boise River under the Exchange shall occur only during times when the United States Bureau of Reclamation (Bureau) is providing flow augmentation water from Boise River reservoirs pursuant to the NOAA Fisheries flow augmentation program. The water right holder shall not divert from the Snake River under water right no. 2-2339 during any calendar year it diverts water from the Boise River as authorized by the Exchange. Leaving water in the Snake River that would have been diverted under water right no. 2-2339 replaces a like amount of water at the mouth of the Boise River that the water right holder diverts from the Boise River pursuant to this Exchange. The water right holder's Boise River diversions under this Exchange shall be:

- a. used solely for irrigation purposes within the water right holder's service area;
- b. controlled by the Boise River Watermaster. The Boise River and its tributaries are currently designated as Basin 63 in the Departments records. The water right holder shall install controlling works approved by the Department and the Boise River Watermaster;
- c. measured through the use of weirs and totalizing flow meters, as approved by the Department and the Boise River Watermaster, as well as through the use of any additional means of measurement that may be approved or required by the Department and the Boise River Watermaster, and records of such measurements shall accurately document: diversion rate, volume for identifiable time periods, time periods of diversion, and data to confirm that the water diverted was used solely for irrigation purposes; and
- d. reported annually to the Department and the Boise River Watermaster on or before November 1, of each year, which reports shall include, at a minimum, the measurement data and records specified in the preceding paragraph, and also shall include any additional data or records specified by the conditions of this Exchange or by a future order of the Department related to measurement and reporting.

2. The water right holder's diversions from the Boise River under this Exchange shall not exceed the lesser of parts a or b below, and a total annual diversion volume of 2,745.0 acre-feet of water:

- a. the instantaneous rate or volume of the Bureau's Boise River reservoir releases for the NOAA Fisheries flow augmentation program; or

- b. the instantaneous rate at which water is available in priority under the Snake River water right and is being delivered in the Snake River and administered in accordance with Idaho law to the confluence of the Boise and the Snake Rivers, not to exceed 11.0 cfs.

3. At any time when the Exchange would otherwise be in effect, if measured or calculated Boise River flows at the water right holder's point of diversion from the Boise River, are less than 240 cfs, or diversion at the point of diversion would reduce Boise River flows below 240 cfs during the period beginning June 1 and ending February 29, then the Exchange shall be limited to provide for not less than 240 cfs of flow in the Boise River. If measured or calculated Boise River flows at the point of diversion from the Boise River are less than 1,100 cfs, or diversion at the point of diversion would reduce Boise River flows below 1,100 cfs during the period beginning March 1 and ending May 31, then the Exchange shall be limited to provide for not less than 1,100 cfs of flow in the Boise River. Measured or calculated Boise River flows at the point of diversion shall be based on gauged Lucky Peak Dam discharge minus diversion to the New York Canal. If the benchmark stream maintenance flows of 240 cfs (from June 1 to February 29) and 1,100 cfs (from March 1 to May 31) subsequently change, then the water right holder's diversion of Boise River flows will be limited to provide for the new benchmark flows.

4. The Bureau is not expected or required to alter its operations in any way to accommodate the Exchange. The Exchange depends upon the Bureau's release of storage water pursuant only to the Bureau's discretion in fulfilling the terms of Idaho Code § 42-1763B and the NOAA Fisheries flow augmentation program, including the delivery and accounting of such releases by the Boise River Watermaster. The water right holder is not entitled to demand that any of these storage releases occur or that any release occur at any particular time or in any particular amount.

5. The water right holder's diversion and use of water from the Boise River pursuant to this Exchange shall not conflict with applicable water bank rules, including any rules governing the Boise River Rental Pool, and shall not adversely affect the ability of any irrigation entity to rent and receive storage water through the Boise River Rental Pool under such rules, including, without limitation, any irrigation entity's entitlement to benefit from the preference for irrigation uses as specified therein.

6. The water right holder's diversion and use of water from the Boise River pursuant to this Exchange shall be accounted for in the water right holder's portfolio of water rights that may be recognized now or in the future in relation to any approved planning horizon, existing water rights holdings, or future needs volume. The Snake River water right shall not be diverted from alternate points of diversion for the water right holder's ground water rights.

7. Approval of this Exchange by the Department is not part of and does not support the NOAA Fisheries Program, and shall not be construed to be a part of or to support the NOAA Fisheries Program. However, if NOAA Fisheries or any court determines that this Exchange inhibits the Bureau's ability to comply with the flow augmentation program, then Boise River diversions under the Exchange will terminate until such time, if ever, that NOAA Fisheries or

such court determines the Exchange does not inhibit the Bureau's ability to comply with the flow augmentation program.

8. Approval of this Exchange by the Department has no bearing upon the status of claims to Boise River storage water that are or that may be filed in the Snake River Basin Adjudication and has no bearing upon any contract with the Bureau for the storage and use of water in the Boise River reservoirs.

9. The Department monitors the below-Milner Snake River reach at the Murphy gage. At any point the Department, or any future watermaster on this reach, determines all or a portion of the exchanged Snake River water right is out of priority (i.e. that there is an insufficient amount of flow in the Snake River to fill all or a portion of the water right), the Department or the watermaster for the below-Milner Snake River reach will immediately notify the Boise River Watermaster. In turn, the Boise River Watermaster will preclude diversion of a comparable amount of Boise River water under this Exchange as is currently unavailable to fill the exchanged Snake River water right.

10. The water right holder must be a municipal provider under Idaho Law.

11. Point of diversion authorized from the Boise River under this Exchange is described as T3N, R2E, Sec. 14, L7(SENE) (Marden Street Water Treatment Plant).

12. Place of use authorized under this Exchange is within the service area of United Water Idaho Inc. as provided for under Idaho law. The place of use is generally described as within the city limits of Boise and the surrounding service area.

13. Failure of the right holder to comply with conditions of this Exchange is cause for the Director to rescind approval of this Exchange.

Dated this 13th day of June, 2006.



GARY SPACKMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2006, a true and correct copy of the documents described below were placed in the United States mail, postage prepaid and properly addressed to served on the following as noted:

Document(s) Served: Preliminary Order Amending Condition of Approval
Explanatory Information to Accompany a Preliminary Order without a hearing.

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

☒ U.S. Mail, Postage Prepaid
☐ Facsimile
☐ E-mail

WILLIAM C LINAM
PRESIDENT
UNITED WATER IDAHO INC
PO BOX 7488
BOISE ID 83707

☒ U.S. Mail, Postage Prepaid
☐ Facsimile
☐ E-mail

LEE SISCO
WATERMASTER
6616 OVERLAND RD
BOISE ID 83709

☒ U.S. Mail, Postage Prepaid
☐ Facsimile
☐ E-mail


Deborah J. Gibson
Administrative Assistant

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES (To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.