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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 REQUIRING
 MEASURING DEVICES AND
 CONTROLLING WORKS FOR
 DIVERSIONS IN WATER DISTRICT NO.
 63, BOISE RIVER AND TRIBUTARIES

**PETITION FOR RECONSIDERATION
 AND/OR PETITION FOR
 CLARIFICATION OF FINAL ORDER**

COME NOW Richard Stull and Steven Cummings (“Stull and Cummings”), by and through their counsel, McHugh Bromley, PLLC, and hereby petition the Idaho Department of Water Resources (“IDWR” or “Department”) to reconsider and/or clarify its August 20, 2014 *Final Order In the Matter of Requiring Measuring Devices and Controlling Works for Diversions in Water District No. 63, Boise River and Tributaries* (“Final Order”).¹ This petition for reconsideration and/or clarification (“Petition”) is filed in accordance with Department Rules of Procedure 740 and 770. IDAPA 37.01.01.740, .770. Stull and Cummings respectfully request the Director reconsider and/or clarify that the schedule set forth in the Final Order for installation of measuring devices not affect their ability to seek priority administration of surface water rights in the Mores Creek drainage.

¹ While the Final Order was signed by the Director on August 15, 2014, the Final Order was served on August 20, 2014. *Compare Final Order at 5 with Certificate of Service, Final Order at 6.*

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Stull And Cummings Were Decreed Senior-Priority Water Rights Within The Mores Creek Drainage

Richard Stull and Steven Cummings were decreed the following surface water rights by the Snake River Basin Adjudication (“SRBA”) District Court in 2005, for irrigation purposes above Lucky Peak Dam:

	Owner	Source	Priority	Diversion Rate (cfs)
63-317B	Richard Stull	Robie Creek; tributary to Mores Creek	04/31/1896	0.22
63-30310	Steven Cummings	Robie Creek; tributary to Mores Creek	04/01/1896	0.22
63-15101	Steven Cummings	Mitchell Creek; tributary to Mores Creek	06/02/1966	0.17

B. SRBA Interim Administration

On January 4, 2011, the State of Idaho moved the SRBA District Court for “interim administration” of surface water rights in Basin 63, “in accordance with partial decrees issued by the SRBA District Court.” *Motion for Interim Administration of Surface Water Rights in Basin 63*, p. 1 (SRBA subcase no. 00-92021-63) (“Motion for Interim Administration”). As stated in the Motion:

Surface water rights in much of Basin 63 are currently being administered using historic decrees and other historic water right records. An order granting interim administration of surface water rights in Basin 63 is necessary so that the Idaho Department of Water Resources can transition from administration per the historic records to administration per the more recent SRBA partial decrees. Administration based upon the partial decrees is necessary to protect senior water rights.

Id. at 2.

On February 22, 2011, the SRBA District Court granted the State’s Motion, entering its *Order Granting State of Idaho’s Motion for Interim Administration of Surface Water Rights in Basin 63*. According to the Court:

Interim administration of surface water rights in IDWR Basin 63 in accordance with the *Partial Decrees* for water rights is reasonably necessary to efficiently administer water rights and to protect senior water rights.

Basin 63 is a nearly completed basin. At present, surface rights in much of the basin are being administered according to historic decrees and water right records. SRBA *Partial Decrees* reflect the most accurate and up-to-date records of water rights in Basin 63. Therefore the Court finds it appropriate for such rights to be distributed according to the *Partial Decrees*.

The inclusion of decreed water rights into existing water districts in Basin 63 will provide current watermasters with the ability to administer, regulate and enforce water rights in accordance with the *Partial Decrees* issued in the SRBA.

Order Granting Interim Administration at 3.²

C. IDWR Expansion Of Water District No. 63 To Include Tributaries To The Boise River Above Lucky Peak Dam

On August 2, 2013, IDWR began the process of expanding Water District No. 63 to include administration of surface water sources above Lucky Peak Dam. *Notice of Public Hearing In the Matter of Expansion of the Boise River Water District No. 63 Upstream of Lucky Peak Dam* (“Notice of Public Meeting”). A map attached to the Notice of Public Meeting depicted the Boise River drainage, above and below Lucky Peak Dam. The Notice of Public Meeting was sent to Stull and Cummings. A public meeting was held on August 27, 2013 at the Vista Inn Best Western in Boise, Idaho. Stull attended the public meeting. As evidenced by his verbal comments at the public meeting, and later seen in his written comments – on file with IDWR – Stull was in favor of expanding Water District 63. Stull’s written comments, sent in an email that was marked received by IDWR on September 9, 2013, state as follows: “I’m in favor

² On August 26, 2014, the Honorable Eric J. Wildman signed the SRBA *Final Unified Decree*.

on expanding the Boise Water District to include Robie Creek as soon as possible. . . . I would personally like to see us included into the water district with the 2014 irrigation season instead of the proposed date of 2015 or 2016.”

On October 21, 2013, IDWR issued a *Preliminary Order In the Matter of Expansion of the Boise River Water District No. 63 Upstream of Lucky Peak Dam* (“Preliminary Order”), which became final by operation of law on November 7, 2013. The Preliminary Order recognized that, historically, the watermaster for Water District No. 63 had not regulated surface water diversions above Lucky Peak Dam. *Preliminary Order* at 1. The Preliminary Order concluded that, in order to protect senior water rights, Water District No. 63 should be expanded to include tributaries to the Boise River above Lucky Peak Dam: “Water District No. 63 is expanded to include all surface water rights from the Boise River, its forks and tributary creeks upstream of Lucky Peak Dam, as shown in the map attached hereto as Attachment A” *Id.* at 8. The attached map depicted the surface water drainages above Lucky Peak Dam.

II. ARGUMENT

The basis for the Petition primarily stems from the Final Order’s schedule for installation of measuring devices:

Prior to the diversion of water for the 2016 irrigation season, acceptable measuring devices shall be installed for all diversions from the South Fork Boise River and tributaries . . . by September 1, 2015.

Prior to the diversion of water for the 2017 irrigation season, acceptable measuring devices shall be installed for all diversion from the Middle and North Fork Boise Rivers and tributaries . . . by September 1, 2016.

Prior to the diversion of water for the 2018 irrigation season, acceptable measuring devices shall be installed for all diversions from Mores Creek and tributaries . . . by September 1, 2017.

Final Order at 4 (emphasis added).

While Stull and Cummings view the schedule simply as a means for IDWR to stage its resources to efficiently evaluate measurement device plans, their concern is the Final Order could be interpreted to delay or somehow preclude them from seeking priority administration in the Mores Creek drainage. In order to arrive at its schedule for installation of measuring devices, the Final Order quoted only one section from Title 42, Chapter 7 (“Headgates and Measuring Devices”), but did not quote or cite any provision of the prior appropriation doctrine, as established by Idaho law, relating to administration and/or distribution. The Conclusions of Law did, however, speak to administration and distribution:

Measurement and control of diversions is necessary in Water District No. 63 for the proper distribution of water and administration of water rights. Measurement of diversions provides the following administrative benefits:

- i. Provides ability to regulate all diversions within the district to deliver water to the most senior priority rights during times of water scarcity or shortages, thereby protecting senior priority rights.
- ii. Assurance that water rights are used within their authorized diversion limits and provide ability to regulate rights to authorized diversion limits if such limits are exceeded.
- iii. An equitable, defensible and legal means for determining water user assessments since Idaho law requires that expenses of the water district be based on water delivery.

Final Order at 3.

Nonetheless, the Final Order acknowledged that administration and distribution by a watermaster in a water district only occurs “in part” by installation of measurement devices. *Id.* at 1. To the extent senior-priority surface water users are injured by junior-priority surface water diversions and seek administration, Stull and Cummings seek reconsideration and/or clarification that the Final Order’s schedule for installation of measuring devices should not be interpreted as a bar from priority administration.

III. CONCLUSION

Stull and Cummings interpret the Final Order's schedule for installation of measuring devices as a means for IDWR to efficiently stage its evaluation of measurement plans and oversee installation of measuring devices. Nevertheless, Stull and Cummings respectfully seek reconsideration and/or clarification that the Final Order is limited only to the establishment of a schedule for review and installation of measurement devices, and cannot be used as a means to preclude priority administration of surface water rights in the Mores Creek drainage.

RESPECTFULLY SUBMITTED this 29th day of August, 2014.

MCHUGH BROMLEY, PLLC



CHRIS M. BROMLEY

Attorneys for Richard Stull and Steven Cummings

CERTIFICATE OF SERVICE

I certify that on this 29th day of August, 2014, I caused to be served a true and correct copy of the foregoing by U.S. Mail to:

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098


CHRIS M. BROMLEY