

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR
EXCHANGE OF WATER NO. 75007 IN
THE NAME OF IDAHO WATER
RESOURCE BOARD AND U.S. BUREAU
OF RECLAMATION

**AMENDED PRELIMINARY
ORDER AUTHORIZING
EXCHANGE**

This matter having come before the Department of Water Resources (“Department”) as a petition to reconsider a preliminary order authorizing the exchange of water, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. On August 12, 2008, the Idaho Water Resource Board (“Board” or “applicant”) and U.S. Bureau of Reclamation (“Reclamation” or “co-applicant”) filed application for exchange of water no. 75007 (“exchange”). The applicants propose to replace water released from storage for flow augmentation purposes in the upper Snake River basin pursuant to Idaho Code § 42-1763B and the terms of the Snake River Water Rights Agreement of 2004 with water stored in Cascade Reservoir, in the Payette River basin, under water right no. 65-2927A. Under the proposed exchange, the applicant will release up to 2,800 acre-feet of water per year from Cascade Reservoir to augment flows in the Snake River and retain an equal volume of water in the upper Snake River basin upstream from Milner Dam that would otherwise be released for flow augmentation purposes.
2. Water right 65-2927A authorizes Reclamation to store 697,500 acre-feet in Cascade Reservoir for irrigation and power uses. The 2,800 acre-feet of water referenced in the exchange is dedicated under contract to Black Canyon Irrigation District (“BCID”). The Board proposes to acquire and lease the BCID water from the State Water District No. 65 rental pool and deliver it to the Snake River as provided in the Memorandum of Agreement No. 1425-08MA1S7123 (“MOA”) between Reclamation and the Board. The exchange proposes a limited period extending through December 31, 2034, in accordance with Idaho Code § 42-1763B.
3. The purpose of the exchange is to allow the Board to use the 2,800 acre-feet of water from the upper Snake River basin for other purposes.
4. The application for exchange does not identify the water right under which water will be stored in the upper Snake River basin.
5. Tamarack Resort LLC filed and then withdrew a protest to the exchange. Tamarack Resort LLC is not a party in this proceeding.

6. A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (“protestants”) protested the application.

7. On June 2, 2009, the applicant, co-applicant, and protestants entered into a stipulation that resolves the protests, provided Reclamation exchanges only uncontracted water in its reservoirs in the upper Snake River basin with that acquired by the Board from BCID and approval of the exchange is conditioned accordingly.

8. Idaho Code § 42-240 provides as follows:

(1) Any person holding a right for the use of surface water may make application to the director of the department of water resources to exchange water authorized to be diverted under the right with the same or a different source, or with water authorized to be diverted under one (1) or more other rights from the same source or another surface water source. If the application proposes an exchange with water under another water right, the application shall be accompanied by an agreement in writing subscribed by the person proposing the exchange and each person or organization owning rights to water with whom the exchange is proposed to be made.

(2) The application shall be upon forms furnished by the department and shall contain such information as shall enable the director to determine the nature of the proposed exchange, and shall be accompanied by the statutory filing fee provided under section 42-221, Idaho Code, for an application to change a vested water right.

(3) Upon receipt of the application, it shall be the duty of the director to examine the same and, if otherwise proper, to cause notice of the proposed exchange to be published in the same manner as applications under section 42-203A, Idaho Code. The notice shall fully describe the nature of the proposed exchange of water and shall advise that anyone who wishes to protest shall file notice of protest in accordance with the provisions of section 42-203A, Idaho Code.

(4) Upon the receipt of any protest it shall be the duty of the director to investigate the same and to conduct a hearing thereon. The director shall also advise the watermaster of the district in which the exchange is proposed, if a district exists, and the watermaster shall notify the director of the watermaster’s recommendations on the application. The director shall not take final action on the application or exchange until the director has received the recommendations of the watermaster, including recommended conditions necessary for the exchange of water to be properly administered and regulated.

(5) The director shall examine all the evidence and available information and shall approve the exchange in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the exchange does not constitute an enlargement in use of the original right or rights, the exchange is consistent with the conservation of water resources within the state of Idaho, the exchange is in the local public interest as defined in section 42-202B, Idaho Code, and the exchange will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates. Unless otherwise provided in a written agreement between the applicant and other right holders, the

director shall condition approval of an exchange so that the exchange will not be operative during times when water is not available to satisfy the exchange, and that during these times the right to use water automatically reverts to the place of use authorized under the water rights. A copy of the approved application for exchange shall be provided to the applicant and the watermaster, and the applicant shall be authorized upon receipt thereof to make the exchange in accordance with the conditions set forth by the director. Should an approved exchange thereafter be discontinued, the applicant or the applicant's successor in interest must so notify the director and the district watermaster.

(6) In the absence of a contrary agreement by the parties to an exchange, when the director has approved a right to exchange storage water for the natural flow of a stream or other water supply, the storage water shall be delivered in preference to any exchange rights subsequently approved using the same storage water right.

(7) Any person or persons feeling themselves aggrieved by a final order or final action of the director under this section may, if a protest was filed and hearing held thereon, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If no protest was filed and no hearing held, the applicant may request a hearing pursuant to section 42-1701A(3), Idaho Code, for the purpose of contesting the action of the director and may seek judicial review of the final order of the director following the hearing pursuant to section 42-1701A(4), Idaho Code.

9. Idaho Code § 42-1763B(3)(c) provides as follows:

In no event shall the release of water under this section cause the water surface of Lake Cascade to be below the elevation required to maintain a storage volume of three hundred thousand (300,000) acre feet, fifty thousand (50,000) acre feet of which is dead space, which is currently estimated to be at an elevation of four thousand eight hundred nine and two-tenths (4,809.2) feet. In addition, the state of Idaho shall pursue a shaping agreement for any uncontracted water released from Lake Cascade under this section.

10. On August 21, 2009, the Department issued Preliminary Order Authorizing Exchange ("preliminary order") in the matter of application for exchange of water no. 75007 pursuant to Idaho Code § 67-5243 and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730).

11. Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a) provides in pertinent part as follows:

Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

12. On September 8, 2009, the Department received a petition for reconsideration ("petition") from the U.S. Bureau of Reclamation ("petitioner"). The petitioner requests changes to

the preliminary order to reflect conditions of the MOA and stipulation and that the exchange is subject to the MOA.

CONCLUSIONS OF LAW

INJURY

1. The proposed exchange will not injure other water rights as long as water rented pursuant to the exchange complies with the provisions of Idaho Code § 42-1763B and the terms of the Snake River Water Rights Agreement of 2004.

ENLARGEMENT

2. The proposed exchange does not constitute an enlargement in use of the original right. To ensure no enlargement occurs, the applicant should be required to keep records of the volume of water released from Cascade Reservoir and the volume of water retained in the upper Snake River basin and should be required to report the information to the Department and applicable water districts.

CONSERVATION OF WATER RESOURCES

3. The proposed exchange is consistent with the conservation of water resources within the state of Idaho.

EFFECTS ON THE LOCAL ECONOMY

4. The release of 2,800 acre-feet of water from Cascade Reservoir for flow augmentation purposes will not adversely affect the economy of the local area.

LOCAL PUBLIC INTEREST

5. The proposed exchange is in the local public interest.

OVERALL

6. The Director of the Department is authorized to approve the exchange, with conditions, in accordance with the provisions of Idaho Code § 42-240(5).

7. The Department should approve Exchange No. 75007 as provided in Idaho Code § 42-240 subject to conditions necessary for the proper administration of the exchange.

8. The Department cannot authorize a change in nature of use, season of use, or place of use for the exchanged water rights through the exchange process. Changes to those elements of exchanged rights must be authorized through the appropriate transfer, Water Supply Bank, or rental pool procedure.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration is **GRANTED** and the Preliminary Order Authorizing Exchange No. 75007 is **AMENDED** subject to the following conditions:

1. The total annual volume of water exchanged shall not exceed 2,800 acre-feet of water stored in accordance with Water Right No. 65-2927A, made available to the Idaho Water Resource Board through the State Water District No. 65 rental pool, and released from Cascade Reservoir in Gov't Lots 1 and 5, Section 26, Township 14 North, Range 3 East, for flow augmentation purposes in the Snake River.

2. The U.S. Bureau of Reclamation shall retain a volume of water in the upper Snake River basin upstream from Milner Dam equal to the volume released for flow augmentation each year pursuant to this exchange. In the event Reclamation makes water available upstream from Milner Dam, the Board shall notify Reclamation no later than June 15 that it wishes to exercise the exchange.

3. This exchange will be regulated by watermasters responsible for the distribution of water among appropriators within water districts. At the time of this approval, the exchanged water rights are within State Water District No. 1, Upper Snake River, and State Water District No. 65, Payette River and tributaries.

4. The U.S. Bureau of Reclamation shall only exchange its uncontracted water stored in its reservoirs in the upper Snake River basin with an equal volume of water acquired and leased by the Idaho Water Resource Board from Black Canyon Irrigation District.

5. To change the nature of use, season of use, or place of use of a water right for beneficial use under this exchange, the Idaho Water Resource Board shall secure authorization through the State Water District No. 1 rental pool.

6. By June 22 of each year during this exchange, the U.S. Bureau of Reclamation shall notify the watermaster of State Water District No. 1 under which water right(s) water is stored in the upper Snake River basin for this exchange.

7. By January 15 of each year after the exchange has been operative, the Idaho Water Resource Board shall submit a report to the Director describing the dates and volumes of water exchanged during the previous calendar year.

8. This exchange will not be operative during times when water is not available to satisfy the exchange. When the exchange is not operative, the right to use water pursuant to the water rights involved in the exchange automatically reverts to the place of use authorized under the water rights.

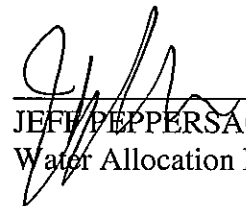
9. This exchange shall comply with the provisions of Idaho Code § 42-1763B and the terms of the Snake River Water Rights Agreement of 2004.

10. Pursuant to Idaho Code § 42-1763B(3)(c), the release of water from Cascade Reservoir pursuant to this exchange shall not cause the water surface of Lake Cascade to be below the elevation required to maintain a storage volume of three hundred thousand (300,000) acre feet, fifty thousand (50,000) acre feet of which is dead space, which is currently estimated to be at an elevation of four thousand eight hundred nine and two-tenths (4,809.2) feet.

11. This exchange is effective from the date of the approval through December 31, 2034, unless extended by the Director or rescinded for cause by the Director.

12. Failure of the Idaho Water Resource Board or the U.S. Bureau of Reclamation to comply with conditions of this exchange is cause for the Director to rescind approval of this exchange.

Dated this 6th day of November, 2009.



JEFF PEPPERSACK, Chief
Water Allocation Bureau