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DISTRICT COURT  
CUSTER COUNTY  
IDAHO

**LAWRENCE G. WASDEN**  
Attorney General

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**CLIVE J. STRONG**  
Deputy Attorney General  
Chief, Natural Resources Division

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DEPARTMENT OF  
WATER RESOURCES

**PHILLIP J. RASSIER, ISB # 1750**  
**GARRICK L. BAXTER, ISB # 6301**  
**CANDICE M. MCHUGH, ISB # 5908**  
Deputy Attorneys General  
Idaho Department of Water Resources  
P.O. Box 83720  
Boise, ID 83720-0098  
Telephone: (208) 287-4800  
Fax: (208) 287-6700

*Attorneys for Defendants*

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER**

DAVE NELSON and LOY PEHRSON, et al., )

**Case No. CV-05-91**

Plaintiffs, )

vs. )

BIG LOST RIVER IRRIGATION DISTRICT, )  
Board of Directors, RICHARD REYNOLDS, )  
CHARLIE HUGGINS, KENT HARWOOD, )  
JOEL ANDERSON, and BRUCE WARNER: )  
IDAHO DEPARTMENT OF WATER )  
RESOURCES and KARL J. DREHER, Director, )

**IDWR RESPONSE TO MOTION  
FOR RECONSIDERATION**

Defendants. )

BIG LOST RIVER IRRIGATION DISTRICT, )

Counter Claimant, )

vs. )

DAVID NELSON and LOY PEHRSON, et al., )

Counter Defendants. )

COME NOW DEFENDANTS, the Idaho Department of Water Resources and Karl J. Dreher, its Director, ("IDWR" or "Department"), and submit this Response to Motion for Reconsideration in response to the Plaintiffs' pending Motion for Reconsideration filed pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B).

## **I. PROCEDURAL HISTORY AND BACKGROUND**

Oral argument occurred on Plaintiffs' Cross Motion for Summary Judgment on October 30, 2006. The Department incorporates herein the procedural history and background set forth in its Response to Plaintiffs' Cross Motion for Summary Judgment dated October 13, 2006.

## **II. ARGUMENT**

After due consideration of the briefs and oral argument in this case, the Court issued its *Opinion, Decision and Order on Defendant Big Lost River Irrigation District's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment* ("Order"). The Court determined that "Rule 40.03.b applies to the distribution of water by the IDWR to appropriators within Water District 34." Order at 12. The Court further held that the "BLRID Board is not mandated to distribute storage water within the BLRID according to watermaster's calculation in Rule 40.03.b." Id. These conclusions are absolutely correct.

The Court's determinations are fully supported by the Court's rationale that "[w]hen the watermaster delivers storage water to the BLRID, according to the statute, the district may distribute its water within the irrigation district according to water distribution policies set by the board." Order at 11. The Court was also correct when it found that if the Court "declared that Rule 40.03.b must be applied by the BLRID Board to water distributed within the BLRID, such a declaration would violate the Board's statutory authority." Id. There is no statutory authority in either Title 42, governing water rights administration, or Title 43, governing irrigation

districts, for the Department to enact a rule that would bind the internal operations of the BLRID Board. Thus, the Department does not have the authority to meddle in an irrigation district board's decision on how to assess its patrons for use of its storage water.

**A. Rule 40.03.b Does Not Apply to the BLRID**

Plaintiffs are in error when they argue that Rule 40.03.b applies to the Board's assessment of storage water released from Mackay Reservoir into the Big Lost River channel. A plain reading of the rule demonstrates that Rule 40, entitled Allocation of Natural Flow, addresses administration of natural flow surface water rights. Rule 40.03.b provides specific direction to the Department and the watermaster for the Water District when calculating conveyance loss for the delivery of impounded water and states:

**03. Assessment of Evaporation and Conveyance Losses to Impounded Water.**

**a.** Evaporation losses from Mackay Reservoir shall be estimated daily by the watermaster by applying correlated evapotranspiration data from the Aberdeen hydromet station to the Mackay Reservoir and shall be assessed to all impounded water. (10-26-94)

**b.** Conveyance losses in the natural channel shall be proportioned by the watermaster between natural flow and impounded water. The proportioning shall be done on a river reach basis. Impounded water flowing through a river reach that does not have a conveyance loss will not be assessed a loss for that reach. Impounded water flowing through any river reach that does have a conveyance loss will be assessed the proportionate share of the loss for each losing reach through which the impounded water flows. To avoid an iterative accounting procedure, impounded water conveyance loss from the previous day shall be assessed on the current day. (10-26-94)

IDAPA 37.03.12.040.03.b. (emphasis added). The rule stops short of requiring the next step that Plaintiffs insist on, applying the proportioned amount of conveyance loss attributed to impounded water to BLRID patrons on a river reach basis.

**B. The Watermaster Conveys Storage Water Through the Big Lost River Channel That Has Been Already Appropriated by BLRID for Use By BLRID Patrons**

Any storage water held by the BLRID was first diverted and stored under certain water rights prior to being released for use by the patrons of the irrigation district. The BLRID's water delivery method includes the release of its storage water into the Big Lost River channel to be conveyed downstream by the watermaster for distribution to its patrons. Idaho Code 42-801 authorizes the natural river channel to be used by the irrigation district for conveying water downstream to its patrons.

The watermaster for Water District 34, under the direction of the Department, has the authority under I.C. 42-801 to convey the irrigation district's storage water. The watermaster's duty "shall be to adjust the headgates of all ditches not entitled to the stored water, and in such a manner that those having the right to the use of such water shall secure the volume to which they are entitled." I.C. 42-801. As part of his duty to determine how much storage water BLRID has available to deliver to its patrons, the watermaster follows Rule 40.03.b to determine the amount of conveyance loss to be assessed to the natural flow water flowing in the Big Lost River channel and how much conveyance loss must be assessed to the storage water being conveyed through the Big Lost River channel. Although the watermaster is controlling all of the water within the Big Lost River channel, his actions in delivering the two types of water are different. When the watermaster distributes water to the natural flow water rights, he is determining which water rights can be filled in priority to satisfy the needs of the owners of those water rights. For the storage water rights, however, the watermaster at the request of the BLRID delivers a specific volume of water to the points of diversion of the BLRID's patrons. Although the watermaster informs the BLRID how much water flowing in the river is storage water, the BLRID tells the

watermaster how much of that storage water should be delivered to its patrons' points of diversion.

Unlike natural flow water rights that have a specific diversion rate to be delivered under a certain priority, the storage water flowing in the river has already been diverted and is now simply being conveyed pursuant to direction of the owner of the storage water, the BLRID.

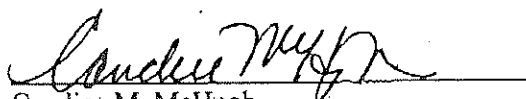
#### IV. CONCLUSION

The Court's conclusion that Rule 40.03.b is unambiguous and does not preclude the BLRID from applying a universal shrink assessment to its patrons is correct and should not be altered. The Court should decline to reconsider its prior Order.

DATED this 15<sup>th</sup> day of December 2006.

LAWRENCE G. WASDEN  
Attorney General  
CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

PHILLIP J. RASSIER  
Deputy Attorney General  
Section Chief, Water Resources

  
Candice M. McHugh  
Deputy Attorney General, IDWR

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho, and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto and by facsimile to the numbers listed below on this 15<sup>th</sup> day of December 2006.

**Document Served: IDWR RESPONSE TO MOTION FOR RECONSIDERATION**

**Attorney for Plaintiffs:**

Gregory W. Moeller  
RIGBY, THATCHER, ANDRUS, RIGBY & MOELLER, Chartered  
P.O. Box 250  
Rexburg, ID 83440  
Fax: (208) 356-0768

**Attorney for Defendants:**

Kent Fletcher  
FLETCHER LAW OFFICE  
P.O. Box 248  
Burley, ID 83318-0248  
Fax: (208) 878-2548

**Attorneys for Amici Curiae:**

Kent W. Foster  
Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
Idaho Falls, ID 83405  
Fax: (208) 523-9518

  
Candice M. McHugh