

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

) Subcase Nos. 65-23531 and 65-23532
)
) **ORDER DENYING STATE OF IDAHO'S**
) **MOTION TO STRIKE THE AFFIDAVIT**
) **OF ANDREW J. WALDERA**
)
) **ORDER DENYING THE BUREAU OF**
) **RECLAMATION'S MOTION TO ALTER**
) **OR AMEND**
)
) **ORDER GRANTING IN PART AND**
) **DENYING IN PART BLACK CANYON**
) **IRRIGATION DISTRICT'S MOTION TO**
) **ALTER OR AMEND**
)
) **ORDER GRANTING IN PART AND**
) **DENYING IN PART THE STATE OF**
) **IDAHO'S MOTION TO ALTER OR**
) **AMEND**

**I. ORDER DENYING STATE OF IDAHO'S MOTION TO
STRIKE THE AFFIDAVIT OF ANDREW J. WALDERA**

**A. Legal Standard Applicable to the Submission of Affidavits in Connection
With a Motion to Alter or Amend (AO1 § 13(a)) Filed by a Party to the
Subcase.**

The State argues that it is improper for a party to submit additional evidence in the form of an affidavit in support of a motion to alter or amend a special master's recommendation filed pursuant AO1 § 13(a). The State asserts that the applicable legal

standard is that “the tribunal is limited to the existing record” and that a motion to alter or amend pursuant to AO1 § 13(a) “does not contemplate the admission of new or additional evidence to advance new legal theories or relitigate the merits of a case.” *State of Idaho’s Motion to Strike* (Feb. 10, 2016) at 1-2, citing ***Order on Challenge (Consolidated Issues)*** of “*Facility Volume*” Issue and “*Additional Evidence*” Issue, Subcase Nos. 36-02708 et al., at 30 (Dec. 29, 1999). As explained below, the limitations on the introduction of additional evidence set forth in the *Facility Volume* subcases are not applicable given the procedural posture of the above-captioned subcases.

The *Facility Volume* subcases rely on the detailed analysis previously done in the ***Memorandum Decision and Order on Challenge***, Subcase Nos. 36-00061 et al., at 20-29 (Sept. 27, 1999). Therein, the SRBA District Court stated the issue as: “What standard should a special master apply to determine if a nonparty to a subcase should be allowed to introduce additional evidence in conjunction with a motion to alter or amend the findings of fact contained in a special master’s report?” *Id.* at 21. In those subcases, the North Snake Ground Water District (“NSGWD”) first entered the subcases pursuant to AO1 § 13(a) which allows any party to the adjudication not previously a party to the subcase to seek to alter or amend the special master’s findings and conclusions. The *Notice of Challenge* filed by the NSGWD requested that the Court remand the subcases to the special master for the purpose of taking additional evidence on the previously unlitigated issue of whether the recommended water right quantities reflect beneficial use for sprinkler irrigation rather than flood irrigation. ***Memorandum Decision and Order on Challenge*** at 3. In its analysis, the Court noted that “allowing the NSGWD to introduce additional evidence after the Special Master has issued his recommendation would, as a practical matter, necessitate holding a completely new trial. *Id.* at 25. In the ***Memorandum Decision and Order on Challenge***, the SRBA District Court stated that I.R.C.P. 59(e) is not applicable but instructive regarding the appropriate standard for allowing a nonparty to a subcase to submit additional evidence in connection with a motion to alter or amend under AO1 § 13(a). ***Memorandum Decision and Order on Challenge*** at 26. Ultimately, the Court held that I.R.C.P. 52(b) best addressed the question regarding the submission of additional evidence by a party first entering a subcase at the motion to alter or amend stage of the proceedings. *Id.* at 27.

As in the above-discussed subcases 63-00061 et al., in the *Facility Volume* subcases the NSGWD, which was previously a nonparty, entered the subcases for the first time through the filing of a motion to alter or amend pursuant to AO1 § 13(a). The original parties to the *Facility Volume* subcases had filed objections in April and May 1993. After several years of proceedings before the special master, including a trial, the NSGWD first entered the subcase by filing its motion to alter or amend in September 1998. In connection with its *Motion to Alter or Amend*, the NSGWD lodged the affidavits of Brett Rowley and David Shaw. Among other things, the NSGWD alleged that the special master failed to consider the actual beneficial use and/or partial forfeiture of the water right. The special master stated: "These issues relate to the quantity element of the water rights. Quantity was never in dispute for any of these rights." ***Order Denying Motion to Alter or Amend; Order Denying Motion to File Late Objections***, Subcase No. 36-2708 (Jan. 27, 1999) at 6. In other words, the previous nonparty, the NSGWD, entered the subcase for the first time via a motion to alter or amend and sought to introduce new evidence in support of a new issue. The special master refused to consider the additional evidence. His decision was upheld on challenge before the presiding judge.

The procedural posture of the instant subcases relative to the admission of the *Affidavit of Andrew J. Waldera* is very different from the above-described subcases involving the NSGWD. Black Canyon is not entering these subcases for the first time via a motion to alter or amend pursuant to AO1 § 13(a), nor is Black Canyon seeking to support new legal issues with the information set forth in the *Affidavit of Andrew J. Waldera*. Accordingly, this Special Master holds that the *Facility Volume* subcases are not controlling in this situation.

Counsel for Black Canyon asserts that I.R.C.P. 11(a)(2)(B) applies in this situation. This Special Master agrees. Under Rule 11(a)(2)(B) the court should consider any new facts presented by the moving party. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990). Accordingly, the State's *Motion to Strike the Affidavit of Andrew J. Waldera* on the grounds that additional evidence cannot be submitted in connection with a motion to alter or amend pursuant to AO1 § 13(a) is **denied**.

B. Relevancy of Exhibit A to the Affidavit of Andrew J. Waldera.

The State asserts that Exhibit A to the *Affidavit of Andrew J. Waldera* is not relevant and is therefore inadmissible under I.R.E 402. Specifically, the State asserts that Exhibit A “has no tendency to make it more or less probable that the Bureau actually diverted and beneficially used the claimed volumes of water in 1965” *State of Idaho’s Motion to Strike the Affidavit of Andrew J. Waldera* (Feb. 10, 2016) at 4.

Black Canyon does not offer Exhibit A to the *Affidavit of Andrew J. Waldera* for the purpose of showing diversion and beneficial use of the claimed volumes of water in 1965; rather Exhibit A is offered to demonstrate the current view of the IDWR regarding whether water that is released from or passed through the Reservoirs in order to maintain vacant reservoir space counts as having been stored pursuant to the existing storage rights. In these proceedings, Black Canyon asked that summary judgment be granted to the non-moving party, asserting that the water rights represented by the above-captioned claims never came into existence for the reason that the water claimed by the Bureau to have been appropriated in 1965 was not subject to appropriation because it was already appropriated, stored, and beneficially used under the existing storage rights. This Special Master declined to opine on this issue, stating:

In contrast to the related Basin 63 subcases, the Director’s Report for the above-captioned subcases does not provide any indication regarding the view of the Idaho Department of Water Resources as to whether the water contained in Cascade and Deadwood Reservoirs at the time of maximum physical fill (in a year in which water is released or bypassed for purposes of maintaining vacant Reservoir space) is, or is not, stored pursuant to the existing storage rights.

Memorandum Decision and Order Granting in Part and Dismissing in Parts State of Idaho’s Motion for Summary Judgment (Nov. 19, 2015) at 8 (“**Order**”). Black Canyon asserts that although the *Director’s Report* provides no information as to the opinion of the IDWR regarding this question, the record in these subcases makes it clear that the IDWR is of the opinion that the existing storage rights authorize the storage of water that must be released for purposes of maintaining requisite vacant Reservoir space and the fact that such water might not be stored until such time as it can be used is irrelevant to whether such water is considered to have been stored for purposes of accruals counting

towards the annual volume limit of the water right. However, for purposes of making the

ORDER DENYING STATE’S MOTION TO STRIKE THE AFFIDAVIT OF ANDREW J. WALDERA
ORDER DENYING THE BUREAU’S MOTION TO ALTER OR AMEND
ORDER GRANTING IN PART AND DENYING IN PART BLACK CANYON’S MOTION TO ALTER OR AMEND
ORDER GRANTING IN PART AND DENYING IN PART STATE’S MOTION TO ALTER OR AMEND

record clear in this regard, counsel for Black Canyon filed the *Affidavit of Andrew J. Waldera*, including the Exhibit A attached thereto. The State does not assert that Exhibit A is irrelevant to the purpose for which it was offered. Accordingly, the State's evidentiary objection seeking exclusion of Exhibit A on relevancy grounds is **denied**.

C. Excludability of Exhibit A Pursuant to I.R.E. 408.

The State asserts that Exhibit A to the *Affidavit of Andrew J. Waldera* should be excluded from evidence pursuant to I.R.E. 408, which requires exclusion of "[e]vidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim" The State points out that the PowerPoint presentation that comprises Exhibit A includes a notation stating: "Subject to IRE 408." The State also asserts that the PowerPoint presentation that comprises Exhibit A "contains a series of statements made in negotiations to compromise the [above-captioned claims]" *State of Idaho's Motion to Strike* at 3.

Black Canyon argues that the PowerPoint presentation is not excludable under I.R.E. 408 because it was prepared and presented by the IDWR during a meeting of the Basin 65 advisory committee and the Payette River Water Users Association and, because the IDWR is not a party to the Snake River Basin Adjudication, it is not capable of compromising the water right claims at issue. *Black Canyon's Response in Opposition to the State of Idaho's Motion to Strike* at 11. In addition, Black Canyon argues that the PowerPoint presentation is not excludable because it was not proffered to prove any actionable liability on the part of the IDWR. *Id.* at 12. Black Canyon also asserts that the PowerPoint presentation was shown at a public meeting whose attendees included dozens of non-parties and that two of the parties (The Bureau and Suez) were not present at the public meeting at which the PowerPoint presentation was given. Black Canyon points out settlement negotiations are impossible at a meeting where the claimant of the above-captioned water rights (the Bureau) was not present at the meeting.

The decision of whether to admit or exclude evidence that relates to offers of compromise is left to the discretion of the trial court. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986). I.R.E. 408 operates to exclude evidence of compromise and offers of

compromise which is offered to prove liability or invalidity of a claim; and it is within the discretion of the trial court whether to admit evidence offered for another purpose. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

The PowerPoint presentation attached as Exhibit A to the *Affidavit of Andrew J. Waldera* was not offered to prove the validity or invalidity of the above-captioned claims; rather it was offered to demonstrate how the State agency responsible for water right accounting (IDWR) viewed the nature of the existing storage rights for purposes of conducting its accounting. Because the PowerPoint presentation was offered for a purpose other than a purpose which would require exclusion under I.R.E. 408, this Special Master, in an exercise of discretion, **denies** the State's motion to exclude Exhibit A.

II. ANALYSIS OF THE BUREAU'S AND BLACK CANYON'S MOTIONS REGARDING THE PRECLUSIVE EFFECT OF THE PAYETTE ADJUDICATION

The Bureau and Black Canyon seek alteration and amendment of the **Order** filed in the above-captioned subcases on November 19, 2015. Specifically, the Bureau and Black Canyon assert that this Special Master erred in concluding that the doctrine of *res judicata* (also known as claim preclusion) prevents the Bureau from prosecuting the above-captioned claims in the Snake River Basin Adjudication. In the **Order**, this Special Master held:

[T]o the extent the water rights represented by the above-captioned claims ever came into existence, such water rights were decreed as forfeited in the Payette Adjudication and are barred from being claimed in the SRBA under the principle of *res judicata*.

Id. at 9 (footnote omitted). This holding that the subject water rights (if they ever came into existence) had been decreed as forfeited (i.e. disallowed) in the Payette Adjudication is based upon the *Partial Decree Pursuant to Rule 54(b) I.R.C.P.* which decreed the uncontested portions of the *Proposed Findings of Water Rights in the Payette River Drainage Basin* (filed April 26, 1979). Conclusion of Law No. 1 of the *Proposed Findings* states:

This recommended decree includes all of the rights established before October 19, 1977 to the waters of the Payette River and its tributaries including groundwater, and upon its adoption supercedes all prior judgments of the Court. Any water user who heretofore diverted surface water or groundwater from within the boundaries as described in Exhibit 1, or who owns lands to which previously established rights were appurtenant and who, upon being joined to this action, failed to claim such water rights has forfeited such rights as provided in Section 42-1411, Idaho Code.

Former Idaho Code § 42-1411 read as follows:

42-1411. DECREE – FORFEITURE OF RIGHT. – The decree shall be conclusive as to the rights of all existing claimants upon the water system which shall lawfully embrace any determination. When a decree has been entered, any water user who has been joined and who failed to appear and submit proof of his claim as provided in the act shall be barred and estopped from subsequently asserting any right theretofore acquired upon the waters included within the proceedings, and shall be held to have forfeited all rights to any water theretofore claimed.

Idaho Session Laws, Ch 279, p. 832 (1969).

A. The Water Rights Represented by the Above-Captioned Claim Numbers Could Not Have Been Claimed in the Payette Adjudication.

The Bureau and Black Canyon assert that claim preclusion does not apply to the above-captioned claims because such claims could not have been brought in the Payette Adjudication and claims which could not have been brought in the initial proceeding cannot be barred in the subsequent proceeding. *U.S. Motion to Alter or Amend* at 2, citing *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 226, 999 P.2d 877, 881 (1999), *Black Canyon's Motion to Alter or Amend* at 14.. The Bureau and Black Canyon assert that it was not until after 1992 that the IDWR began to take the position that the existing storage rights (in flood control years) are legally filled (i.e. filled "on paper") before the reservoirs are physically filled. The Bureau and Black Canyon argue that prior to this change in circumstances there was no basis to assert a claim to an additional water right that would ensure that the water stored in the reservoirs at the time of maximum physical fill is stored pursuant to a valid water right. Stated differently, prior to 1992 there was no

basis to conclude that the physical contents of the Reservoirs at the time of maximum physical fill was not stored pursuant to the existing storage rights.

This Special Master agrees with the Bureau and Black Canyon that prior to 1992, and at all times relevant to the filing of claims in the Payette Adjudication, there was no basis upon which the beneficial use water right claims represented by the above-captioned claim numbers could have been made. The record in these subcases demonstrates that beginning in 1993¹ the IDWR adopted a new accounting procedure for use on the Payette River system. Part of the newly adopted accounting procedure was that “natural flow will be allocated to reservoir rights regardless of whether physical storage actually occurs.” *Memorandum From Bob Sutter* (dated March 19, 1993) at 3, attached as Exhibit M-02 to the *Affidavit of Chas F. McDevitt in Response to State’s Motion for Summary Judgment* (filed September 18, 2015). From these undisputed facts (i.e. that the accounting procedures were “new” and that natural flow “will be” allocated to reservoir water rights whether stored or not) this Special Master draws the inference that prior to the adoption of the new accounting procedures in 1993 the existing storage rights for Cascade and Deadwood Reservoirs were considered satisfied by the contents of the Reservoirs at the time of maximum physical fill. Further support of this finding is found in the *Affidavit of Jerrold D. Gregg in Response to the State of Idaho’s Motion for Summary Judgment* (filed September 18, 2015). Therein Mr. Gregg states that “for decades” Cascade and Deadwood Reservoirs have been operated in “a manner in which required flood control space is not available to store water for beneficial use purposes, and where beneficial use storage is accomplished during the later stages of flood control operations.” *Id.* ¶ 9. Also supporting this finding are the Affidavits of Dennis Lammey, Mike Wagner, and John Hartman. For example, Mr Lammey, who has farmed land within the Black Canyon Irrigation District since 1970, states that upon “physical fill of the Reservoir, the Bureau of Reclamation in conjunction with the Watermaster of Water

¹ The 1992 irrigation season was used to test the new accounting procedures. See *Memorandum From Bob Sutter* (dated March 19, 1993) at 3-4, attached as Exhibit M-02 to the *Affidavit of Chas F. McDevitt in Response to State’s Motion for Summary Judgment* (filed September 18, 2015).
ORDER DENYING STATE’S MOTION TO STRIKE THE AFFIDAVIT OF ANDREW J. WALDERA
ORDER DENYING THE BUREAU’S MOTION TO ALTER OR AMEND
ORDER GRANTING IN PART AND DENYING IN PART BLACK CANYON’S MOTION TO ALTER OR AMEND
ORDER GRANTING IN PART AND DENYING IN PART STATE’S MOTION TO ALTER OR AMEND

District 65 (before the Water District was created the Bureau did this independently) would allocate water to the storage rights in priority.” *Affidavit of Dennis Lammey in Response to Summary Judgment Motion of the State of Idaho* (filed September 18, 2015) ¶ 7.

In accordance with these undisputed evidentiary facts and the inferences drawn therefrom, this Special Master concludes that at all times relevant to the filing of water right claims in the Payette Adjudication there was no basis upon which the Bureau could have claimed the water rights that are represented by the above-captioned claim numbers.

B. Unclaimed Water Rights Were Decreed Disallowed in the Payette Adjudication.

As explained below, despite making the above factual findings, and reaching the conclusion that the subject water rights could not have been claimed in the Payette Adjudication, this Special Master concludes that such claims cannot now be made in the Snake River Basin Adjudication.

On April 21, 1970, District Judge Gilbert C. Norris issued an *Order of Joinder* in the Payette Adjudication, Gem County Case No. 3667, which directed the United States of America (and others) to “be made a party to this action and to file with the State Reclamation Engineer . . . a Notice of Claim to a Water Right for any water right which they may have . . . for the purpose of determining any claim they may have to a water right for the use of the surface or ground waters of the Payette River Drainage Basin” *Order of Joinder* (filed April 21, 1970) at 2 (emphasis added). The Bureau complied with the *Order of Joinder* and filed its claims for the existing storage rights for Cascade and Deadwood Reservoirs. The Bureau did not claim (nor could it have claimed) the existence of the water rights represented by the above-captioned claims. Several years later, Judge Doolittle issued the *Partial Decree Pursuant to Rule 54(b) I.R.C.P.* which stated that it “includes all of the rights established before October 19, 1977 to the waters of the Payette River and its tributaries” *Id.* (emphasis added). The *Partial Decree* was predicated upon former Idaho Code § 42-1411 which states in part that such “decree shall be conclusive as to the rights of all existing claimants upon the water system” Idaho Session Laws, Ch. 279, p. 832 (1969) (emphasis added). In short, the *Partial*

Decree issued by Judge Doolittle relates to all water rights (established before October 19, 1977) of all existing claimants upon the water system (of which the Bureau was one).

The Bureau and Black Canyon assert that Judge Doolittle's ruling and former Idaho Code § 42-1411 are inapplicable to the water right claims at issue here. This Special Master disagrees. The combination of Judge Doolittle's ruling and former Idaho Code § 42-1411 provided the finality necessary in a general stream adjudication by describing the universe of water rights existing as of the specified date and within the specified geographical area and declaring that there are no water rights outside of such described universe.

In accordance with the foregoing, the Bureau's and Black Canyon's motions to alter or amend are **denied**.

III. ANALYSIS OF BLACK CANYON'S MOTION TO ALTER OR AMEND REGARDING THE EFFECT OF FLOOD CONTROL RELEASES ON THE BUREAU'S EXISTING STORAGE RIGHTS

Black Canyon seeks alteration or amendment of the *Order* with regard to the following issue as stated by Black Canyon: "What effect if any, do flood control releases have on the BOR's existing storage rights?" *Black Canyon's Motion to Alter or Amend* at 2. Stated differently, the issue upon which Black Canyon seeks an answer is whether the water physically stored in the Reservoirs at the time of maximum physical fill is stored (and subsequently used) under the authority of the existing storage rights and if so, then the water rights represented by the above-captioned claims could never have come into existence because the water was already appropriated and hence not subject to appropriation.

In the *Order* this Special Master did not address this question, reasoning that because the *Director's Report* for these claims does not implicate the existing storage rights, there was no basis upon which the question could be answered in these proceedings. In light of the findings and conclusions set forth in Section II. A. above, this reasoning no longer is applicable. In Section II. A. above, in connection with reaching the conclusion that the Bureau could not have filed claims in the Payette Adjudication for the water rights represented by the above-captioned claims, this Special

Master made the factual finding that prior to the adoption of the new accounting procedures in 1993, the existing storage rights for Cascade and Deadwood Reservoirs were considered satisfied by the contents of the Reservoirs at the time of maximum physical fill. This same factual finding also leads to the conclusion that at the time relevant to the alleged creation of the subject water rights (1965), the water claimed by the Bureau to have been appropriated was not subject to appropriation because it had already been appropriated and was being stored in the Reservoirs under the authority of the existing storage rights. Accordingly, Black Canyon's motion to alter or amend is **granted** regarding the issue of whether the water stored in Cascade and Deadwood Reservoirs at the time of maximum physical fill was stored pursuant to the existing storage rights (and therefore water released to maintain vacant reservoir space to be used for flood control was not stored pursuant to the existing storage rights).

IV. ANALYSIS OF THE STATE'S MOTION TO ALTER OR AMEND

A. The Authority Under Which Cascade and Deadwood Reservoirs Are Operated for Flood Control is Immaterial.

The State asserts that the *Order* must be altered or amended so as to recognize that the authority under which the Bureau operated Cascade and Deadwood Reservoirs for flood control purposes is not "mandated" by congress, but rather simply authorized by federal reclamation law. The Bureau argues that this distinction is immaterial for purposes of resolving the water right issues raised in the above-captioned subcases. This Special Master agrees with the Bureau. Accordingly the State's motion to alter or amend in this regard is **denied**.

B. Discussions in the Order Regarding Any Issues Not Decided Need Not Be Removed.

The State seeks alteration or amendment of the *Order* to remove the discussion of any facts that may be relevant to the other issues raised by the parties, but are not material or relevant to the issue of claim preclusion. *State's Motion to Alter or Amend* at 3-4. The State asserts that "[i]f it was unnecessary to decide the State's four alternative arguments, it was also unnecessary to discuss factual matters related to those arguments." *Id.* at 4.

The State characterizes the portions of the *Order* it seeks to remove as *dicta* and then concludes that such unnecessary judicial commentary should be stricken therefrom.

Black Canyon responds by pointing out that the State cites no legal authority for the proposition that *dicta* is inappropriate. To the contrary, Black Canyon argues, “*dicta*, while admittedly not precedential, can serve a valuable and valid persuasive response.” *Black Canyon’s Response* at 6. This Special Master also notes that it was not just the State’s four alternative arguments that were dismissed in the *Order*, but also dismissed was Black Canyon’s request for summary judgment in favor of the non-moving party. The issue upon which Black Canyon sought summary judgment was stated in the *Order* to be “whether the water actually contained in Cascade and Deadwood Reservoirs at the time of maximum physical fill is stored pursuant to the existing storage rights” *Order* at 16. In order to fairly describe and explain why this Special Master found it unnecessary to decide those issues, including the issue raised by Black Canyon, it was proper to briefly describe and discuss those issues.

This Special Master agrees with Black Canyon that there is no legal requirement to leave *dicta* out of a judicial opinion and accordingly the State’s motion to alter or amend in this regard is **denied**.

C. Correction of the Standard of Review.

The State asserts that the standard of review recited in the *Order* needs to be “amended to clarify that the Court is not free to draw conclusions from conflicting facts.” This Special Master agrees that a proper statement of the standard is that the court, in an action to be tried without a jury, may draw inferences not conclusions from undisputed evidentiary facts. The State’s motion to alter or amend is **granted** in this regard.

D. Analysis of State’s Request for the Removal of Specific Portions of the Order.

The State seeks removal of specific portions of the *Order* which it deems to be findings regarding “genuinely disputed and immaterial issues of fact.” *State’s Motion* at 5. These portions of the *Order* are discussed below.

1. Facts From the Affidavits of Ron Shurtleff.

In the section of the **Order** entitled “Introduction” (page 3) there is a block quote taken from the *Affidavit of Ron Shurtleff, Basin 65 Watermaster* (dated June 8, 2012), attached as Ex. M-04 to the *Affidavit of Chas F. McDevitt in Response to State’s Motion for Summary Judgment* (filed September 18, 2015). The State asserts that information quoted from Watermaster Shurtleff’s affidavit conflicts with other information elsewhere in the record, including information contained in another affidavit of Watermaster Shurtleff dated ten days later, or June 18, 2015.² This Special Master acknowledges that there may be inconsistencies between the quoted material and other portions of the record.

² At the March 1, 2016, oral argument on motions to alter or amend, counsel for the State described the alleged conflict thusly:

So in the June 8th affidavit, which is quoted in the recommendation, Mr. Shurtleff says that water entering the reservoirs after flood control releases is, quote, stored in conformance with the priority of the original storage rights in the reservoir, end quote.

Shurtleff’s affidavit from ten days later says the storage water rights are, quote, no longer in priority after the quantities of water diverted to the reservoirs under the water right reaches the annual volume decreed by the court, end quote.

If the rights are no longer in priority, they cannot be storing water in conformance with their priority. These two statements from the same witness in the same month are inconsistent.

Reporter’s Transcript pp 43-44. It should be noted that the record in these proceedings reveals that the phrase “out of priority” (sometimes stated as “no longer in priority”) is used to connote two entirely different things. In one use of the phrase, water rights are said to be “out of priority” once the volume of water diverted (whether stored or not) equals the annual volume limit of the right. In this context, the phrase “out of priority” is synonymous with “filled” or “satisfied.” The statement quoted by counsel for the State from Watermaster Shurtleff’s June 18, 2015 *Affidavit* provides an example of this meaning of the phrase “out of priority.” In a different usage, the phrase “out of priority” describes the situation where the demand for water from a source exceeds the supply and the junior rights can no longer divert because they are “out of priority.” An example of this usage of the phrase is found in the *Affidavit of Robert J. Sutter* dated February 12, 2008, wherein he states: “As natural flow recedes, [the Boise River] reservoir storage rights (which are generally later in time than irrigation natural flow rights) go out of priority, and reservoirs stop accruing stored water. Reservoir storage rights go out of priority typically sometime between April 1 and July 31, depending on the magnitude of runoff.” *Second Affidavit of Michael C. Orr* Ex. 34. Succinctly stated, the event that triggers the former type of “out of priority” is that the accounting system has determined the volume of a storage right to have been filled; whereas the triggering event for the latter type of “out of priority” is demand exceeding supply (i.e. scarcity).

The purpose of this block quote was to provide any potential reader of the **Order** with some background information and context regarding the issues raised in the State's summary judgment motion and Black Canyon's opposing request for summary judgment in favor of the non-moving party. Usage of the quote was not intended to elevate the particular facts asserted therein over other facts in the record, nor was it intended to be a factual "finding" that resolved a disputed issue of fact. The quoted material relates to the operation of the IDWR's water right accounting procedures. All parties to this action, including the State of Idaho, agree that such accounting procedures do not define water rights.³ As such, the quoted information is immaterial to the issues decided in the **Order**. Accordingly, the State's motion to alter or amend is **granted** via means of acknowledgement of the alleged inconsistencies in the factual record, a finding of immateriality to the issues decided in the **Order**, and the statement that the block quote is not a "finding" resolving any disputed issue of fact.

2. Facts from the Affidavits of Robert J. Sutter.

Also in the section of the **Order** entitled "Introduction" (page 4) there is a quote taken from the *Affidavit of Robert J. Sutter* which was filed on July 2, 2015 in subcase nos. 63-33732 et al. The quote describes the IDWR's accounting system in Basin 63 as it is understood by Engineer Sutter. This Special Master simply noted that the Basin 63 accounting system is "similar" to the Basin 65 accounting system. **Order** at 3. The State asserts that information quoted from Engineer Sutter's affidavit conflicts with other information elsewhere in the record, including information contained in another affidavit of Engineer Sutter from a few years prior, dated February 12, 2008 (*Second Affidavit of Michael C. Orr* Ex. 34) and a Memorandum authored by Engineer Sutter dated March 19, 1993 (*Second Affidavit of Michael C. Orr* Ex. 37). The State also complains that the *Affidavit of Robert J. Sutter* from which the quote was taken is not in the record in these subcases. Black Canyon argues that the reference to the *Affidavit* filed in subcase nos.

³ At oral argument on motions to alter or amend, counsel for the State said: "[W]ater rights accounting . . . is a method for administering water rights. It's not a method for decreeing water rights. It doesn't create, define, or alter water rights." *Reporter's Transcript* of the March 1, 2016, hearing on Motions to Alter or Amend. As a *de jure* proposition, counsel for the State is absolutely correct; however what is left out of this statement is that as a *de facto* proposition, water rights accounting by the administrative agency of the State with the authority to administer water rights can, as a practical matter, define water rights.

ORDER DENYING STATE'S MOTION TO STRIKE THE AFFIDAVIT OF ANDREW J. WALDERA Page 14 of 16
ORDER DENYING THE BUREAU'S MOTION TO ALTER OR AMEND
ORDER GRANTING IN PART AND DENYING IN PART BLACK CANYON'S MOTION TO ALTER OR AMEND
ORDER GRANTING IN PART AND DENYING IN PART STATE'S MOTION TO ALTER OR AMEND

63-33732 et al. is proper pursuant to I.R.E. 201(c), which allows a court to take “judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case” *Id.*

The record in these subcases contains much information that originated from Engineer Sutter, including an *Affidavit* dated February 12, 2008, filed in subcase 63-3618 (*Second Affidavit of Michael C. Orr* Ex. 34), a Memorandum dated March 19, 1993 (*Second Affidavit of Michael C. Orr* Ex. 37), the Transcript of the Deposition of Robert J. Sutter, Vol. 1, taken in subcase 63-3618, dated March 28, 2008 (*Second Affidavit of Michael C. Orr* Ex. 31), and the Transcript of the Deposition of Robert J. Sutter, Vol. 2, taken in subcase 63-3618, dated April 16, 2008 (*Second Affidavit of Michael C. Orr* Ex. 32). Given the volume of material the State has put into the record that originated with Engineer Sutter, and pursuant to I.R.E. 201, this Special Master concludes it is proper to take judicial notice of the *Affidavit of Robert J. Sutter* filed in the related subcase nos. 63-33732 et al.

However, this Special Master acknowledges that there may be inconsistencies between the quoted material and other portions of the record. Again, the purpose of the quote from the *Affidavit of Robert J. Sutter* was to provide any potential reader of the **Order** with some background information and context regarding the issues raised in the State’s summary judgment motion and Black Canyon’s opposing request for summary judgment in favor of the non-moving party. Usage of the quote was not intended to elevate the particular facts asserted therein over other facts in the record, nor was it intended to be a factual “finding” that resolved a disputed issue of fact. Accordingly, the State’s motion to alter or amend is **granted** via means of acknowledgement of the alleged inconsistencies in the factual record, a finding of immateriality to the issues decided in the **Order**, and the statement that the quoted material is not a “finding” resolving any disputed issue of fact.

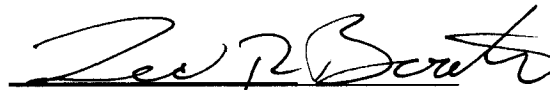
IV. ORDER AND AMENDED RECOMMENDATION

In accordance with the foregoing, the *State of Idaho’s Motion to Strike the Affidavit of Andrew J. Waldera* is **denied**. The motions to alter or amend filed by the Bureau and Black Canyon regarding the preclusive effect of the Payette Adjudication are

denied. Black Canyon's motion to alter or amend regarding the issue of whether or not the water stored in Cascade and Deadwood Reservoirs at the time of maximum physical fill was stored pursuant to the existing storage rights is **granted.** The motion to alter or amend filed by the State is **granted in part and denied in part** as is set forth herein.

The previously issued *Special Master's Recommendation* recommending disallowance of the above-captioned claims on the grounds that any such water rights (to the extent ever came into existence) were decreed as forfeited in the Payette Adjudication is hereby amended to include an additional basis for disallowance, namely that the water claimed to have been appropriated by the Bureau in 1965 was not subject to appropriation because it had already been appropriated through the existing storage rights.

Dated April 22, 2016



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO STRIKE AND ORDER ON MOTIONS TO ALTER OR AMEND was mailed on April 22, 2016, with sufficient first-class postage to the following:

ANDREW J WALDERA
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

CHARLES F MC DEVITT
PO BOX 1543
BOISE, ID 83701-1543
Phone: 208-412-5250

CHIEF NATURAL RESOURCES DIV
OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720-0010
Phone: 208-334-2400

MICHAEL P LAWRENCE
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

