

Daniel V. Steenson, ISB No. 4332
 S. Bryce Farris, ISB No. 5636
 Andrew J. Waldera, ISB No. 6608
SAWTOOTH LAW OFFICES, PLLC
 1101 W. River Street, Suite 110
 P.O. Box 7985
 Boise, Idaho 83707
 Tel: (208) 629-7447
 Fax: (208) 629-7559
 dan@sawtoothlaw.com
 bryce@sawtoothlaw.com
 andy@sawtoothlaw.com

District Court - SRBA
 Fifth Judicial District
 In Re: Administrative Appeals
 County of Twin Falls - State of Idaho

DEC - 6 2016

By _____ Clerk
 _____ Deputy Clerk

Attorneys for Appellant Ditch Companies

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Supreme Court No. 44677

BALLENTYNE DITCH COMPANY; BOISE VALLEY IRRIGATION DITCH COMPANY; CANYON COUNTY WATER COMPANY; EUREKA WATER COMPANY; FARMERS' CO-OPERATIVE DITCH COMPANY; MIDDLETON MILL DITCH COMPANY; MIDDLETON IRRIGATION ASSOCIATION, INC.; NAMPA & MERIDIAN IRRIGATION DISTRICT; NEW DRY CREEK DITCH COMPANY; PIONEER DITCH COMPANY; PIONEER IRRIGATION DISTRICT; SETTLERS IRRIGATION DISTRICT; SOUTH BOISE WATER COMPANY; and THURMAN MILL DITCH COMPANY;

Petitioners/Appellants,

vs.

BOISE PROJECT BOARD OF CONTROL, and NEW YORK IRRIGATION DISTRICT,

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES; and GARY SPACKMAN, in his capacity as the Director of the Idaho Department of Water Resources;

Case No. CV-WA-2015-21376
 (Consolidated Ada County Case
 No. CV-WA-2015-21391)

DITCH COMPANIES' NOTICE OF APPEAL

RECEIVED
 IDAHO SUPREME COURT
 COURT OF APPEALS
 2016 DEC - 08 9:23

FILED - ORIGINAL

DEC - 8 2016

Supreme Court _____ Court of Appeals _____
 Entered on ATS by log.

Respondents,
and
SUEZ WATER IDAHO, INC.,
Intervenor/Respondent.

IN THE MATTER OF ACCOUNTING FOR
DISTRIBUTION OF WATER TO THE
FEDERAL ON-STREAM RESERVOIRS IN
WATER DISTRICT 63 BEFORE THE
IDAHO DEPARTMENT OF WATER
RESOURCES

TO: THE PARTIES AND THEIR COUNSEL OF RECORD AND THE CLERK OF THE
COURT IN THE ABOVE-CAPTIONED ACTION

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Petitioners/Appellants, Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company ("Ditch Companies" or "Appellants"), appeal against the above-named Respondents to the Idaho Supreme Court from the portions of the district court's September 1, 2016 *Memorandum Decision and Order*, September 1, 2016 *Judgment*, and November 14, 2016 *Order Denying Rehearing*, entered in the above-captioned action, which affirmed, in part, the October 20, 2015 *Amended Final Order* issued by the Director of the Idaho Department of Water Resources ("Director" and "IDWR"), *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* ("*Contested Case*"). Copies of the *Orders* and *Judgment* being appealed are attached to this notice.

This *IS NOT* an expedited appeal pursuant to Idaho Appellate Rule 12.2.

2. The Ditch Companies have a right to appeal to the Idaho Supreme Court and the *Orders and Judgment* described in Paragraph 1 above are appealable under and pursuant to Idaho Rule of Civil Procedure 54(a) and Idaho Appellate Rule 11(a)(2).

3. The Ditch Companies present the following preliminary list of issues on appeal, while reserving the right to raise additional issues as they deem necessary:

a. The district court erred in sections IV. A. and IV. B. of its *Memorandum Decision and Order* by affirming the Director's erroneous legal conclusion that water required to be released from Arrowrock, Anderson Ranch and Lucky Peak Reservoirs ("Boise River Reservoirs" or "reservoirs") for flood control purposes "fills" or "satisfies" the existing reservoir storage rights, so that water stored in the reservoirs after flood control releases and beneficially used by the Ditch Companies is not stored or used pursuant to those water rights.

b. The Director's decision to use IDWR's water right accounting program to implement the aforementioned legal conclusion to treat the existing water rights for the Boise River Reservoirs as "filled" or "satisfied" by water that is released for flood control violates constitutional or statutory provisions, exceeds the Director's statutory authority, is arbitrary, capricious, an abuse of discretion, and is not supported by substantial and competent evidence on the record as a whole because:

(1) It conflicts with and undermines the congressionally-authorized operating plan for the Boise River Reservoirs ("reservoir operating plan") developed and approved by the United States Bureau of Reclamation (the "Bureau"), the United States Army Corps of Engineers, the State of Idaho, and the storage spaceholders under which the reservoirs have been jointly operated for beneficial use storage and flood control since the 1950s (*i.e.*, operated in a manner that both minimizes the risks of downstream flooding and property

damage, and maximizes the physical storage of water for beneficial use).

(2) It conflicts with and undermines the storage water rights and the spaceholders' storage contracts which are based on the actual storage of water in the reservoirs pursuant to the storage water rights in accordance with the reservoir operating plan.

(3) It divests or subordinates the Ditch Companies' storage rights without due process of law and constitutes an unconstitutional taking of the Ditch Companies' water rights and contract rights.

(4) It is contrary to the historic administration of the Boise River Reservoir storage water rights by Boise River watermasters and the actual storage, delivery and beneficial use of water stored in the reservoirs.

(5) The Director erred by disregarding and/or rejecting the testimony of Water District 63 watermasters and water users that the storage of water in the Boise River Reservoirs following flood control releases has occurred and continues to occur pursuant to the reservoir storage rights, under the priorities of those rights, and is not subject to the delivery demands of junior water rights and future appropriations of water.

(6) The Director erred by disregarding and/or rejecting the testimony of Water District 63 watermasters that they have not and do not administer Boise River Reservoir storage water rights as "filled" or "satisfied" by water that is released for flood control at the point of "paper fill" under IDWR's water right accounting program.

(7) The Director erred by disregarding the June 4, 2015 *Affidavit of Robert J. Sutter*, the author of IDWR's water right accounting program.

c. The district court erred in section IV. of its *Memorandum Decision and Order* by refusing to consider the reservoir operating plan in its review of the Director's legal

conclusion that the existing water rights for the Boise River Reservoirs are “filled” or “satisfied” by water that is released for flood control.

d. The district court erred in section V. of its *Memorandum Decision and Order* by affirming the following unlawful procedures in the Director’s conduct of the *Contested Case*:

(1) The Director exceeded his authority by *sua sponte* initiating the *Contested Case*.

(2) The *Contested Case* was an improper post hoc attempt to validate IDWR’s prior, internal adoption and use of the water right accounting program to determine the “satisfaction” of Boise River Reservoir storage water rights without complying with the formal rulemaking requirements of the Idaho Administrative Procedure Act.

(3) The Director erred by failing to stay the *Contested Case* pending the resolution of the claims for water rights in SRBA Consolidated Subcase Nos. 63-33732, *et al.*, which are pending before the SRBA Court, and which were pending prior to the Director’s *sua sponte* initiation of the *Contested Case*.

(4) The Director erred by failing to stay or dismiss the *Contested Case* because an indispensable and necessary party, the Bureau, titled holder of storage water rights which were the subject of the *Contested Case*, was not a party to or bound by the *Contested Case*.

(5) The Director violated his duties and exceeded his authority as the hearing officer, and violated the due process rights of the Ditch Companies by failing to provide a fair, impartial and equitable hearing in the *Contested Case*.

(6) The Director erred by failing to properly define the issues to be addressed by the *Contested Case*.

(7) The Director erred by denying the Ditch Companies' requests that he disqualify himself as the hearing officer and appoint an independent hearing officer.

(8) The Director erred by presenting witness testimony and documentary evidence; cross-examining witnesses; engaging in *ex parte* discussions with IDWR witnesses, staff and legal counsel concerning the testimony and evidence presented during the hearing; and gathering evidence and guiding and/or directing IDWR witness testimony and exhibits.

(9) The Director erred by allowing IDWR to participate as a party (and, particularly, an adversarial party) in the *Contested Case*.

(10) The Director erred by allowing Elizabeth Cresto to testify and provide evidence as an expert witness regarding matters not identified in any expert disclosure, and which were beyond the scope of her "Staff Memorandum" and her expert witness deposition.

(11) The Director erred by relying on documents that were not presented during the hearing or adequately identified as officially noticed as required by IDAPA 37.01.01.602. *See also*, IDAHO CODE § 67-5242(3).

e. The district court erred in section VI. of its of its *Memorandum Decision and Order* by denying the Ditch Companies' request for attorney's fees and costs.

f. The Ditch Companies are entitled to attorney's fees and costs on appeal.

4. The record in the above-captioned matter **HAS NOT** been sealed either in whole or in part.

5. a. The Ditch Companies request the reporter's transcripts on appeal.

(1) The Ditch Companies request the preparation of the following reporter's transcripts in electronic format:

(a) Hearing on the Ditch Companies' *Motion to Stay*, held on April 5, 2016, with Sabrina Vasquez as the Court Reporter; and

(b) Hearing on *Petitions for Judicial Review*, held on July 11, 2016, with Sabrina Vasquez as the Court Reporter (the Ditch Companies request the transcript from the entire hearings before the Court on July 11, 2016, including any portion of the hearing which was before the Court concerning SRBA Subcase Nos. 63-33732, *et al.*).

(2) The Ditch Companies request a copy of the transcripts from the agency proceedings before the Director and IDWR, which were previously included in the record before this Court as identified in the December 24, 2015 *Notice of Lodging Agency Record and Transcript with the Agency*, January 19, 2016 *Notice of Lodging Settled Agency Record with District Court*, and January 19, 2016 *Order Settling the Agency Record and Transcript*.

6. The Ditch Companies request the following documents in the above-captioned matter to be included in the clerk's record in addition to those automatically included under Idaho Appellate Rule 28:

Date	Document Name
12/17/2015	Ditch Companies' Petition for Judicial Review
12/17/2015	Notice of Appeal and Petition for Judicial Review of Final Agency Action (filed by Boise Project Board of Control and New York Irrigation District, Case No. CV-WA-2015-21391 and consolidated on 12/30/2015)
12/22/2015	Notice of Reassignment
12/23/2015	Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources
12/24/2015	Notice of Lodging Agency Record and Transcript with the Agency
12/28/2015	Motion to Consolidate
12/30/2015	Order Consolidating Proceedings
1/7/2016	Objection to Agency Record and Motion to Augment
1/7/2016	Ditch Companies' Objection to Agency Record Lodged by IDWR
1/11/2016	Supplemental Objection to Agency Record and Motion to Augment

1/19/2016	Order Settling the Agency Record and Transcript
1/19/2016	Agency's Certificate of Record
2/4/2016	Order Granting Appearance as Motion to Intervene and Granting Same
3/8/2016	Boise Project Board of Control Petitioner's Brief
3/8/2016	Ditch Companies' Motion to Stay
3/8/2016	Ditch Companies' Memorandum in Support of Motion to Stay
3/8/2016	Ditch Companies' Opening Brief
3/9/2016	Request for Reasonable Attorney Fees and Costs of Judicial Review
3/18/2016	Suez's Brief in Opposition to Ditch Companies' Motion to Stay
3/21/2016	Respondents' Response to Ditch Companies' Motion to Stay
3/29/2016	Reply Memorandum in Support of Ditch Companies' Motion to Stay
3/31/2016	Ditch Companies' Reply in Support of Motion to Stay
4/6/2016	Order Denying Motion to Stay
4/8/2016	Brief for Respondents' IDWR and Gary Spackman
4/8/2016	Intervenor Suez's Response Brief
5/2/2016	Respondents' Certificate of Compliance and Notice of Errata
5/6/2016	Petitioners' Reply Brief
5/6/2016	Ditch Companies' Reply Brief
9/1/2016	Memorandum Decision and Order
9/1/2016	Judgment
9/9/2016	Petition for Rehearing
9/22/2016	Irrigation Entities' Petition for Rehearing
9/22/2016	Petition for Rehearing
9/23/2016	Memorandum in Support of Respondents' Petition for Rehearing
10/6/2016	Suez's Memorandum in Support of Petition for Rehearing
10/6/2016	Memorandum in Support of the Irrigators' Petition for Rehearing
11/14/2016	Order Denying Rehearing

7. Not applicable.

8. I certify that:

a. A copy of this *Notice of Appeal* has been served on each reporter of whom

a transcript has been requested as named below at the address set out below:

Sabrina Vasquez, Court Reporter
25 Northridge Way
Jerome, ID 83338

- b. The estimated fee for preparation of the reporter's transcripts has been paid.
- c. The estimated fee for preparation of the clerk's record has been paid.
- d. The appellate filing fee has been paid.
- e. Service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

RESPECTFULLY submitted this 5th day of December, 2016.

SAWTOOTH LAW OFFICES, PLLC

By *Daniel Steenson*
Daniel V. Steenson
Attorneys for the Ditch Companies

State of Idaho
County of Twin Falls ss.
I hereby certify the foregoing to be a
full, true and correct copy of the
original on file in the above entitled
action.

KRISTINA GLASCOCK
CLERK OF THE DISTRICT
COURT
By *Julie Murphy*
Deputy Clerk



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2016, I caused a true and correct copy of the foregoing **DITCH COMPANIES' NOTICE OF APPEAL** to be served by the method indicated below, and addressed to the following:

Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 3rd Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707
Facsimile: (208) 736-2121

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Copies to:

Lawrence G. Wasden
Attorney General
STATE OF IDAHO
P.O. Box 83720
Boise, ID 83720

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Electronic / CM-ECF

Garrick L. Baxter
Deputy Attorney General
STATE OF IDAHO - IDWR
P.O. Box 83720
Boise, ID 83720
Facsimile: (208) 287-6700
E-Mail: garrick.baxter@idwr.idaho.gov

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Electronic / CM-ECF

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720
Facsimile: (208) 287-6700

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Electronic / CM-ECF

Albert P. Barker
Shelley M. Davis
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, ID 83701-2139
Facsimile: (208) 344-6034
E-Mail: apb@idahowaters.com
smd@idahowaters.com

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Electronic / CM-ECF

Michael P. Lawrence
GIVENS PURSLEY, LLP
601 W. Bannock St.
P.O. Box 2720
Boise, ID 83701-2720
Facsimile: (208) 388-1300
E-Mail: mpl@givenspursley.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

Erika E. Malmen
PERKINS COIE, LLP
1111 W. Jefferson Street, Suite 500
P.O. Box 737
Boise, ID 83701-0737
Facsimile: 343-3232
E-Mail: emalmen@perkinscoie.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

David W. Gehlert
U.S. DEPARTMENT OF JUSTICE
999 18th Street
South Terrace - Suite 370
Denver, CO 80202
Facsimile: (303) 844-1350
E-Mail: David.Gehlert@usdoj.gov

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

James C. Tucker
IDAHO POWER COMPANY
1221 W. Idaho St.
P.O. Box 70
Boise, ID 83707
Facsimile: (208) 433-2807
E-Mail: jamestucker@idahopower.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

Charles F. McDevitt
MCDEVITT & MILLER, LLP
420 W. Bannock
P.O. Box 1543
Boise, ID 83701
E-Mail: chas@mcdevitt.org

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

Jerry A. Kiser
Attorney at Law
P.O. Box 8389
Boise, ID 83707
E-Mail: jkiser@cableone.net

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, ID 83301-3029
Facsimile: (208) 735-2444
E-Mail: tlt@idahowaters.com
pla@idahowaters.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

W. Kent Fletcher
FLETCHER LAW OFFICE
1200 Overland Ave.
P.O. Box 248
Burley, ID 83318
Facsimile: (208) 878-2548
E-Mail: wkf@pmt.org

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

Rex R. Barrie
WATERMASTER WATER DISTRICT 63
10769 West State Street
P.O. Box 767
Star, ID 83669
Facsimile: (208) 908-5481


U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

Ron Shurtleff
WATERMASTER WATER DISTRICT 65
102 N. Main Street
Payette, ID 83661
Facsimile: 642-1042
E-Mail: waterdist65@srvinet.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF

Sabrina Vasquez
25 Northridge Way
Jerome, ID 83338

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic / CM-ECF



Daniel V. Steenson