

Albert P. Barker, ISB #2867
Shelley M. Davis, ISB #6788
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Boise Project Board of Control

Charles F. McDevitt, ISB #835
CHAS F. MCDEVITT, LAW OFFICE
420 W. BANNOCK
P.O. Box 2564
Boise, ID 83701
Telephone: (208) 343-7500
Facsimile: (208) 336-6912

Attorney for New York Irrigation District

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

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.

THE IDAHO DEPARTMENT OF WATER
RESOURCES, and GARY SPACKMAN, in his

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

NOTICE OF APPEAL

capacity as the Director of the Idaho
Department of Water Resources;

Respondents,

and

SUEZ WATER IDAHO, INC.

Intervenor/Respondent.

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

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 parties, the Boise Project Board of Control and New York Irrigation District, 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 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"), and all interim Orders issued by the Director in that proceeding. Copies of the Orders and Judgment being appealed from are attached to this Notice of Appeal.

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

2. These Appellants have a right to appeal to the Idaho Supreme Court and the Orders and Judgments described in paragraph 1 are appealable final orders pursuant to Idaho Rule of Civil Procedure 54(a) and Idaho Appellate Rule 11(a)(2).

STATEMENT OF INITIAL ISSUES

3. Appellants, Boise Project Board of Control and New York, Irrigation District join in and assert those issues raised by Ballentyne Ditch Company, *et al.*, submitted in their *Notice of Appeal* filed December 6, 2016, and raise the following additional issues on appeal.

a. Whether the district court committed reversible error by failing to overturn the Director's decision to address the issue of accounting for Basin 63 storage water rights in a contested case rather than being undertaken as a rulemaking pursuant to the *ASARCO* factors?

b. Whether the district court committed reversible error by failing to overturn the Director's *sua sponte* initiation of a contested case where no petitioner sought to have the issue addressed by the Department and where the Director continued the case after the noticed parties petitioned to have the contested case dismissed as improperly brought?

c. Whether the district court committed reversible error by failing to overturn the Director's transformation of a "contested case," which represents a dispute among adverse parties as it was initially characterized, into a "fact finding hearing" to support the Director's decision to confirm the accounting program's treatment of storage rights where no authority exists for initiating such a matter before the Department?

d. Whether the district court committed reversible error by failing to overturn the Director's convening of the contested case proceeding for the impermissible purpose of creating a *post-hoc* record to justify a decision improperly made with no record whatsoever?

e. Whether the district court committed reversible error by failing to overturn the Director's taking "judicial notice" of documents and records in the Department files without providing adequate notice prior to or during the contested case hearing of which specific records would be consulted and relied upon in the Director's decision?

f. Whether the district court committed reversible error by failing to overturn the Department's current implementation of the accounting program without notice or opportunity for comment by affected storage water rights holders, which prejudiced a substantial right of the Appellants?

g. Whether the district court committed reversible error in failing to overturn the Director's decision on the grounds that the "one-fill rule" portion of the accounting program, as interpreted by the Director and his predecessors, was a rule unlawfully adopted in violation of the Administrative Procedures Act?

h. Whether the district court committed reversible error in failing to overturn the Director's Denial of the Petitioners' Motion to Appoint Independent Hearing Officer?

i. Whether the district court committed reversible error in failing to overturn the Director's decision because the Director's numerous public and private statements of his support and approval of the existing accounting program, the ultimate issue in the contested case, required his disqualification as hearing officer in the contested case?

j. Whether the district court committed reversible error by failing to overturn the Director's decision because he failed to disclose all of his *ex parte* contacts and all of his public and private statements of support for the existing accounting program?

k. Whether the district court committed reversible error by failing to overturn the Director's decision after the Director, acting in his role as the Hearing Officer, conferred with

counsel for the Department and witnesses of the Department during and before the hearing and for his actions of directing and consulting with Department counsel and staff concerning preparation of exhibits and testimony during the course of the hearing, which thereby prejudiced a substantial right of the Appellants?

l. Whether the district court committed reversible error for failing to overturn the Director's decision after counsel for the Department prosecuted the Department's case, engaged in "hostile" and leading cross examination of the water users witnesses in the manner of an adverse party, examined, interviewed and consulted with witnesses called by the Department to the contested case, while also acting as advisory counsel to the Director in his role as the Hearing Officer during the course of the hearing, in violation of IDAPA 04.11.01.423.02 and thereby prejudicing a substantial right of the Appellants?

m. Whether the district court committed reversible error for failure to overturn the Director's decision after counsel for the Department participated in discussions with the Director, as the Hearing Officer, and with staff witnesses for the Department, in violation of IDAPA 04.01.423.02 and 03, and IDAPA 04.01.424, during the course of the contested case hearing, but outside the presence of the parties, and then participated in the drafting of the Director's Amended Final Order without any notice to the parties, thereby prejudicing a substantial right of the Appellants?

n. Whether the district court committed reversible error for failure to overturn the Director's decision based on these procedural irregularities which violated the due process clauses of the Idaho and United States constitutions?

o. Whether the district court committed reversible error by concluding that the Department's accounting program, which accrues all water entering a reservoir to the water right

when that water cannot be legally stored for beneficial use, is consistent with the prior appropriation doctrine of the State of Idaho?

p. Whether the district court committed reversible error by concluding that the Department's accounting program, regarding accrual of reservoir water rights, is consistent with the partial decrees?

q. Whether the district court committed reversible error when it allowed the Director to ignore or to fail to properly recognize the important role of the State in the 1953 Memorandum of Agreement, the 1974 Boise River Flood Control Report, and the 1985 Boise River Water Control Manual, thereby rendering these documents meaningless for administration of water rights in the Boise River?

r. Whether the district court committed reversible error when it failed to overturn the Director's decision for his failure to omit important factual findings concerning the 1974 Boise River Flood Control Report, the moratorium orders issued by the Department and limitations on the granting of new consumptive water rights in the Boise River?

4. No portion of the record in this proceeding has been sealed.

ATTORNEY'S FEES

5. The Appellants request an order granting attorney's fees and costs on appeal pursuant to I.C. § 12-117, and Id. R. Civ. P. 54(d)(1).

AGENCY RECORD

6. Ballentyne Ditch Company, *et al.*, have requested the necessary transcripts and records that should be included in the record on review, and these Appellants have no additional requests for additional transcripts or documents to be included in the record.

7. These Appellants have no request for additional documents, charts, or pictures submitted in the proceeding as exhibits to be copied and sent to the Supreme Court.

8. This is not applicable to these Appellants, as no additional transcript preparation has been requested.

Dated this 22nd day of December, 2016.

BARKER ROSHOLT & SIMPSON LLP

CHAS F. MCDEVITT, LAW OFFICE



By: Shelley M. Davis
Attorneys for Boise Project Board of Control



By: Charles McDevitt
Attorney for New York Irrigation District

for bar no. 6788

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd of December 2016, I caused to be served a true and correct copy of the foregoing **NOTICE OF APPEAL** the method indicated below, and addressed to each of the following:

Original Filed with the Clerk:

Clerk of the District Court	<input type="checkbox"/> Hand Delivery
Snake River Basin Adjudication	<input type="checkbox"/> U.S. Mail, postage prepaid
253 3 rd Avenue North	<input type="checkbox"/> Facsimile
P.O. Box 2707	<input checked="" type="checkbox"/> Overnight Mail
Twin Falls, ID 83303-2707	<input type="checkbox"/> Email

Copy to Respondent:

Idaho Department of Water Resources	<input type="checkbox"/> Hand Delivery
Water Management Division	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
322 E. Front Street, 6 th Floor	<input type="checkbox"/> Facsimile
P.O. Box 83720	<input type="checkbox"/> Overnight Mail
Boise, Idaho 83720-0098	<input type="checkbox"/> Email

Courtesy copies to:

Erika E. Malmen	<input type="checkbox"/> Hand Delivery
PERKINS COIE LLP	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
1111 West Jefferson St., Ste. 500	<input type="checkbox"/> Facsimile
P.O. Box 737	<input type="checkbox"/> Overnight Mail
Boise, ID 83701-0737	<input checked="" type="checkbox"/> Email
Email: emalmen@perkinscoie.com	

David Gehlert, Esq.	<input type="checkbox"/> Hand Delivery
U.S. Dept. of Justice	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
Denver Field Office	<input type="checkbox"/> Facsimile
999 18 th Street - South Terrace, St. 370	<input type="checkbox"/> Overnight Mail
Denver, CO 80202	<input checked="" type="checkbox"/> Email
Email: David.Gehlert@usdoj.gov	

James C. Tucker, Esq.	<input type="checkbox"/> Hand Delivery
IDAHO POWER COMPANY	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
P.O. Box 70	<input type="checkbox"/> Facsimile
Boise, ID 83707	<input type="checkbox"/> Overnight Mail
Email: jamestucker@idahopower.com	<input checked="" type="checkbox"/> Email

Chas. F. McDevitt
Dean J. Miller
Celeste K. Miller
McDEVITT & MILLER, LLP
420 W. Bannock
P.O. Box 1543
Boise, ID 83701
Email: chas@mcdevitt.org

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

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

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON LLP
163 Second Avenue West
P.O. Box 63
Twin Falls, ID 83303-0063
Email: tlt@idahowaters.com
pla@idahowaters.com

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

W. Kent Fletcher
FLETCHER LAW OFFICE
1200 Overland Ave.
P.O. Box 248
Burley, ID 83318
Email: wkf@pmt.org

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Rex Barrie
WATERMASTER WATER DISTRICT 63
10769 West State Street
P.O. Box 767
Star, ID 83669
Email: waterdistrict63@qwestoffice.net

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Ron Shurtleff
WATERMASTER WATER DISTRICT 65
102 N. Main St.
Payette, ID 83661
Email: waterdist65@srvinet.com

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Michael P. Lawrence
GIVENS PURSLEY
601 W. Bannock St.
P.O. Box 2720
Boise, ID 83701-2720
Email: mpl@givenspursley.com

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Lawrence G. Wasden
Attorney General
STATE OF IDAHO
P.O. Box 83720
Boise, ID 83720
Email: janet.carter@ag.idaho.gov

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Garrick L. Baxter
Deputy Attorney General
State of Idaho – IDWR
P.O. Box 83720
Boise, ID 83720
Email: garrick.baxter@idwr.idaho.gov

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Sabrina Vasquez
25 Northridge Way
Jerome, ID 83338

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email



Shelley M. Davis