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DEPARTMENT OF WATER RESOURCES

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

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

Petitioners,

vs.

**THE IDAHO DEPARTMENT OF WATER
RESOURCES, AND DIRECTOR GARY
SPACKMAN**

Respondents.

CASE NO. CV-WA-2015-21376
(consolidated with Ada County
CV-WA-2015-21391)

**OBJECTION TO AGENCY RECORD
AND MOTION TO AUGMENT**

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

COME NOW, the Petitioners, the Boise Project Board of Control (“Boise Project”), by and through its counsel of record Barker Rosholt & Simpson, LLP, and the New York Irrigation District (“NYID”), by and through its counsel, Charles McDevitt McDevitt & Miller, PLLC, and pursuant to I.R.C.P. 84(j) and I.C. §§ 67-5248, 67-5249, 67-5251 and 67-5275 hereby submits their Objections to the agency record in the above-referenced proceedings.

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OBJECTION AND ARGUMENT IN SUPPORT

Idaho Code § 67-5248(a)(2) provides that the findings of fact of the presiding officer in a contested order “must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.” Further:

Parties shall be notified of the **specific facts or material noticed** and source thereof, including any staff memoranda and data. Notice should be provided **either before or during the hearing, and must be provided before the issuance of any order** that is based in whole or in part on facts or material noticed. Parties must be afforded a timely and meaningful opportunity to contest and rebut the facts or material so noticed.

I.C. § 67-5251 (emphasis added). The Agency record supplied by the Idaho Department of Water Resources for the above-referenced contested case contains numerous examples of records that it contends are “officially noticed” documents, however, the documents were either not referenced at all by the Director in his final order, or if they were, the portions of the officially noticed documents relied upon by the Director were not disclosed prior to or during the course of the contested case hearing. The Director failed to provide adequate notice of what portions of the voluminous “officially noticed” documents he intended to or did rely upon, so those documents should be stricken from the agency record. This inadequate identification of the specific portions of officially noticed documents that the Director relied upon to form the findings in his Contested Case Order, meant that the parties were not afforded an adequate opportunity to rebut the facts or materials proposed to be relied upon.

The Boise Project and New York request that the following materials be stricken from the record:

- All materials contained in the electronic file titled “63-303” under the designation of “Officially Noticed Docs.”

- All materials contained in the electronic file titled “63-2158” under the designation of “Officially Noticed Docs.”

- All materials contained in the electronic file titled “63-3613” under the designation of “Officially Noticed Docs.”

- All materials contained in the electronic file titled “63-3614” under the designation of “Officially Noticed Docs.”

- All materials contained in the electronic file titled “63-3618” under the designation of “Officially Noticed Docs.”

- All materials contained in the electronic file titled “63-5261” under the designation of “Officially Noticed Docs.”

- All materials contained in the electronic file titled “63-5262” under the designation of “Officially Noticed Docs.”

- All materials contained in the electronic file titled “BWI-17” under the designation of “Officially Noticed Docs.”

The inclusion in the record of all of the pleadings and other materials that were created as a result of litigation before the SRBA Court referred to as Basin Wide 17, cited above as the file titled “BWI-17” came about in the waning minutes of the contested case hearing where the parties were arguing the appropriateness of admitting a single brief from that proceeding that was offered for admission by United Water (Suez). The Director, without notice of what in that entire record the Director might take into consideration, determined to officially notice “those documents in Basinwide 17 to the extent they’re relevant. All the parties know what they are.” See Tr. Vol. 5, p. 1601, ll. 1-3. Seeking further clarification the following exchange took place.

MR. BARKER: Does that include the entire record in Basinwide 17 as part of your official notice?

THE HEARING OFFICER: Sure.

MR. BARKER: Is that what you're saying you're going to do?

THE HEARING OFFICER: Yeah.

MR. BARKER: Are you going to tell us what parts you're going to look at?

THE HEARING OFFICER: The parties are familiar with the record, Mr. Barker.

Id., ll. 13-22.

This kitchen sink approach does not meet the standard necessary to support inclusion of entire categories of documents as officially noticed and part of the agency record and certainly did not provide the parties "a timely and meaningful opportunity to contest and rebut the facts or material so noticed." I.C. § 67-5251. Similarly, proposing that voluminous complete Idaho Department of Water Resources backfiles for seven separate water rights can be officially noticed without regard to what, if any, portions of the files and documents were referenced or relied upon by the Director fails to meet the standard set forth at I.C. § 67-5251. Because the Director did not demonstrate with specificity which portions of these vast quantities of officially noticed documents were relied upon prior to or during the course of the contested case proceedings, they are not properly a part of the agency record.

Further, the electronic file titled "IDWR Doc List- Attachment A" under the Officially Noticed Docs portion of the record also must be removed. The documents listed there were appended as Attachment A to the Department's Witness, Exhibit and Document List, served on the parties July 31, 2015. In it the Department stated "[t]he following documents may be made part of the record in this matter: Documents listed in attachment A that were taken from files

made available for review by the Bureau of Reclamation and referenced in the ‘Supplement to Document Overview’ (Jun. 18, 2015)[.]” Physical copies of the documents were never made available for review prior to or during the contested case proceedings, nor were they ever introduced during the course of the proceedings, even though counsel for the Department took part as a party to the proceedings, put on its own witnesses and cross examined witnesses. A simple statement by the Department that 95 separate records that were never introduced or referenced in the hearing “may be made part of the record in this matter” is legally insufficient to include them in the record on appeal. Moreover, the Director did not identify in advance of or even in his determination that the records were relied upon, and once again failed to provide the parties with a fair and adequate opportunity to rebut the facts or material there noticed. For this reason the Boise Project and New York also request that those documents contained in the electronic file titled “IDWR Doc List- Attachment A” be removed from the agency record.

The last two files under the “Officially Noticed Documents” titled “WD63 Black Books” and ‘WD63 Records of Water Administration” could have been properly part of the officially noticed documents. However, the Director failed to provide specific information concerning what portions of those officially noticed records he relied upon to reach his determination to meet the requirements of I.C. § 67-5251.

Missing from the record are documents that the Department disclosed in response to a request for disclosure of ex parte information and contacts by the Director. *See* electronic file titled “Record” pp. 222-228. The disclosed ex parte contact documents were published on the web-page created by the Department for the above-referenced contested case (<http://www.idwr.idaho.gov/legal-actions/administrative-actions/WD63-contested-case.html>) under the heading of “Communication Documents,” and included the following documents:

- Basin 63 Fill/Refill Discussion with the Treasure Valley Partnership presentation by Mat Weaver, May 18, 2015
- Email from Rick Yzaguirre to Gary Spackman, May 11, 2015
- Email from Rick Yzaguirre to Gary Spackman re Refill Issue with attachments, May 11, 2015
- Email from Gary Spackman to Deborah Gibson re Basin 63 with attachments, March 27, 2015
- Email from Mathew Weaver to Gary Spackman with attachments, February 24, 2015
- Email from Mathew Weaver to Gary Spackman and Stephen Goodson re Basin 63 refill FAQ with attachments, February 17, 2015
- 2015 Resource Committee Presentation (Gary Spackman), February 5-6, 2015
- Email from Gary Spackman to Stephen Goodson and David Hensley re Draft letter-inquiry from legislators about reservoir fill with attachments, October 21, 2014
- Email from Gary Spackman to Stephen Goodson re fill/refill memo with attachments, September 18, 2014
- Voicemail transcript of message from Albert Barker to Mathew Weaver, March 7, 2014
- Email from Mathew Weaver to Albert Barker re Basin 63 refill matter, March 7, 2014
- Memorandum from Gary Spackman to Governor Otter re reservoir refill, February 20, 2013

The documents are relevant to the issue of whether the Director should have acted as the hearing officer in this matter, and will be relied upon during the judicial review of the several orders issued by the Director in this action, including the Order Denying Motion to Disqualify;

Denying Request for Independent Hearing Officer issued by the Director October 2, 2014. See electronic file titled "Record" pp. 132-141. For this reason the Boise Project and New York request that this Court require the record to be augmented to include those documents listed above.

CONCLUSION

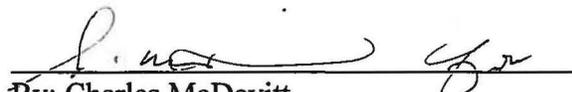
The Director's shotgun approach to taking official notice of entire categories of documents, backfiles of water rights, and entire case files without providing the parties adequate notice of what among those documents he intended to rely upon, either prior to or during the pendency of the contested case hearing does not meet the requirements of I.C. § 67-5251 and are not properly a part of the agency record on appeal. For the reason those documents should therefore be removed from the record. Additionally, those records of the Director's ex parte communications concerning the ultimate issue to be decided in the matter prior to the contested case that were disclosed in response to a Motion brought by the Boise Project Board of Control should be included in the official agency record.

Dated this 7th day of January, 2016.

BARKER ROSHOLT & SIMPSON LLP

MCDEVITT & MILLER, PLLC


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


By: Charles McDevitt
Attorneys for New York Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January, 2016, I caused to be served a true and correct copy of the foregoing **OBJECTION TO RECORD AND MOTION TO AUGMENT** the method indicated below, and addressed to each of the following:

Original Filed with the Clerk of the SRBA Court, via hand delivery.

Copy to Respondent:

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

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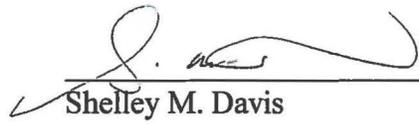
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