

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
MCDEVITT & MILLER, PLLC
P.O. Box 1543
Boise, ID 83701
Telephone: (208) 412-5250
chas@mcdevitt.org
Attorney for New York Irr. Dist.

**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.

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

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

**REPLY MEMORANDUM IN
SUPPORT OF DITCH COMPANIES'
MOTION TO STAY**

The Boise Project Board of Control, (“Boise Project”) and New York Irrigation District (“New York”), by and through their undersigned counsel, hereby submit this Reply Memorandum in Support of the Ditch Companies’ Motion to Stay these proceedings subject to a

determination being made in consolidated sub-cases 63-33732, *et seq*, concerning the property interests that are subject to accounting by the Director of the Idaho Department of Water Resources.

I. INTRODUCTION

The Boise Project and New York support the Motion to Stay filed by the Ditch Companies. Without a stay an analysis of the Director's accounting methodology is meaningless since it is not known what is to be counted. At this stage in the two parallel proceedings the Director has determined to place water that fills the reservoirs after flood control in the "unaccounted for storage" column, while the Special Master has determined that the same water is already appropriated under the existing water rights, leading to the inescapable conclusion that it is the water released for flood control that should be placed in the "unaccounted for storage" column, if the Director's current accounting methodology can even survive.¹ Determining the legal property interests of Reclamation in the existing storage water rights must necessarily be done first, or the Director's accounting is being scrutinized in a vacuum. Proceeding simultaneously in both proceedings, with two separate records and two separate standards of review, leaves the parties in the dangerous predicament of once again finding itself with inconsistent determinations. For this reason the parties to the Director's contested case proceeding moved him on multiple occasion to stay those proceedings until the late claims were resolved, and on each occasion the motions and requests were denied. For the following reasons, this petition for judicial review of the Director's Basin 63 accounting contested case should be stayed.

¹ The Boise Project maintains the position that the accounting program was illegally adopted and implemented because the adoption of such a program is subject to rulemaking. *Asarco v. State*, 138 Idaho 719, 723 (2003).

II. ARGUMENT

The State and Suez improperly assert that the Ditch Companies' Motion to Stay requires this Court to determine when Reclamation's Basin 63 storage water rights fill. That is not what is being argued. Rather, the late claims are intended to determine what property interest has already been appropriated under the existing water rights, and whether the beneficial use late claims should be decreed to supply the water that has historically been used by the Boise basin irrigators. Once that determination has been reached in the late claims, it is then appropriate to take the next step and determination whether the Director's accounting program properly accounts for the property interests of the Boise basin irrigators.

The parties to the Director's contested case made repeated requests that the Director either dismiss the proceeding and properly initiate rulemaking, or stay the proceedings pending the outcome of the this Court's resolution of the late claims. The Boise Project first sought to dismiss the contested case and initiate rulemaking in October 28, 2014. R. 00208-221. On the same day the Ditch Companies filed their pre-hearing motions including a motion to dismiss or stay the proceedings arguing that depending on the outcome of this Court's resolution of the late claims, the accounting program may or may not have required modification, but until those claims were resolved it whether the accounting program properly accounts for storage water in Basin 63 could not be resolved. R. 000259-262. The Director, in denying the Motions simply held that the Ditch Companies were incorrect when they asserted that the question "of whether water released for flood control purposes counts toward the fill of a water right is before the SRBA Court as part of the late claims" and instead held that the question of "whether flood control releases count towards the fill of a water right is for the Director to decide." R. 000348. This holding is directly contradicted by *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 595, 76 P.2d

923 (1938), which held that the Director “is in no way authorized to decide or determine what rights, if any, the permit holder has acquired under the permit, or by virtue of any acts taken in connection with the construction of the works authorized by the permit, or the diversion or appropriation of water in connection therewith.” *Id.* The legal property interests represented by Reclamation’s existing rights, or whether the late claims are necessary and Reclamation and the Boise Project have made the necessary showing of appropriation are for this Court to determine. Only then is appropriate to determine whether the Director’s accounting program puts the right water in the right column.

At the first status conference held by this Court subsequent to the Supreme Court’s ruling on the Basin Wide 17 appeal, this Court recognized that the proceedings in the late claims and the Director’s contested case are interdependent, and that a determination needed to be made about which came first. See Respondents’ Response to Ditch Companies’ Motion to Stay, Ex. A, 9/9/14 Tr., p. 11, l. 21-22, l. 2 (hereinafter “Ex. A., Tr.”). The Court queried counsel for the state asking “are we getting into a situation where, depending on what the outcome is, the director’s methodology of the late claims may not be necessary?” *Id.* To which counsel for the state conceded that “if we get there, I think from our point of view that would be the case,” but that the state intended to address the scope of the late claims in a dispositive motion, which it did and which is now on challenge before this Court. Ex. A., Tr., p. 12, ll. 3-4.

Counsel for Suez, also stated that the issues were definitely overlapping and that the outcome of either case would affect the other. He stated “I guess I would suggest that not only the contested cases affect the refill claims, but perhaps it goes the other way as well. If the refill claim cases are resolved, perhaps that affects how the department’s proceedings would proceed.” Ex. A., Tr., p. 21, ll. 11-15. The only participant at this Court’s status conference after the

Supreme Court's decision in Basin Wide 17 who argued that both cases should proceed simultaneously was the Department's counsel, who is not a party to the late claims. He stated that the Department didn't "necessarily agree that there's overlap, and I also don't agree that a decision from the director as to the contested proceedings will be done in any proper timely time frame." Ex. A., Tr., p. 17, ll. 7-10. It is telling that the Department's counsel, who represented the Director as an advisor and also served as the investigatory attorney for the Department leading up to the Basin 63 accounting contested case, was the only party who disagreed that at least one case or the other should be stayed in order to avoid inconsistent determinations.

The parties requested again at the pre-hearing conference held approximately two weeks before the contested case hearing commenced that the Director stay the proceedings. The Director denied even considering the matter stating "Do you want to talk about a stay? I'll tell you right now, I won't stay this proceeding. The Supreme Court said it was my responsibility to address the issue of when a water right is satisfied. And I've been given that assignment, and I intend to through with the hearing." R. Tr. 8/14/15 Prehearing Conf., p. 57, ll. 7-12. It's unclear based on the Supreme Court's decision in Basin Wide 17 to which the Director was referring, what he interpreted from that decision that would amount to an assignment. It is also demonstrates the Director's intent to ignore the continuing questions of the property interests represented by the existing storage water rights.

Reclamation and the Boise Project filed their late claims for beneficial use in the storage water entering the reservoirs after flood control releases in January, 2013. The Director initiated the contested case proceedings in Basin 01 and 63 in October 2013. Dispositive summary judgment motions were filed by the Ditch Companies, the Boise Project and the State of Idaho in July, 2015. Oral argument on the competing summary judgment motions was heard on August 4,

2015 and September 8, 2015. The Director's contested case was heard in late August and early September 2015. Special Master Booth issued his Memorandum Decision on the cross motions for summary judgment on October 9, 2015. The Director issued his Amended Final Order on the Basin 63 accounting contested case on October 20, 2015, without any mention of the Special Master's Memorandum Decision on the late claims, and determining inconsistently that the water that enters the reservoirs after flood control releases is unappropriated water that is distributed to the Reclamation contract holders on the day of allocation with no protection of a water right or the priority associated therewith. This is the exact opposite determination that was made by Special Master Booth in regards to Reclamation existing water rights. In response to the Boise Project's Motion for Reconsideration, the Director in denying the request simply determined that the Special Master's Memorandum Decision was not binding on him. R.001402-1403.

The Boise Project and New York argued to this Court in its Petitioner's Brief that Idaho law expressly imbues the Idaho courts with the authority to determine the legal interests represented in a water right, not the Director. See Petitioner's Brief, pp. 67-68. The Director erroneously interpreted the Supreme Court's decision in Basin Wide 17 as assigning him a mandate to determine the storage right holders' property interests. That is not the case. In its decision the Court recognized that the Director had a certain amount of discretion, but explained, "In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user." *A&B Irrigation Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014). No mandate was issued to go forth and *sua sponte* convene a contested case to determine the legal property interests of the right holders, nor could such a mandate have issued. The Supreme Court has long held that it is beyond the power of the state engineer (now

the Director) to determine the legal rights and responsibilities associated with the water rights.

Twin Falls Canal Co. v. Huff, 58 Idaho 587, 595, 76 P.2d 923 (1938).

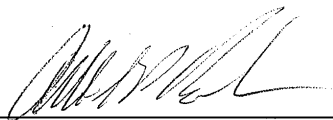
III. CONCLUSION

As they have been forced to do since October 2013, the parties to the contested case and late claims are once again in the precarious position of having before this Court two separate cases, with two separate records, and diametrically opposed decisions concerning the property rights represented by Reclamation's storage rights in the Basin 63 reservoirs. Only after this Court has determined what property interests are represented in those rights, and whether the beneficial use claims were properly recommended disallowed and under what theory, is it appropriate for this Court to determine whether the Director's accounting program, as applied to these rights, is lawful and proper. For this reason the Boise Project Board of Control and New York Irrigation District respectfully request that this Court's grant the Ditch Companies' Motion to Stay the pending judicial review of the Director's Amended Final Order in the Basin 63 Accounting Contested Case.


Dated this 29th day of March, 2016.

BARKER ROSHOLT & SIMPSON LLP

MCDEVITT & MILLER, PLLC



By: Albert P. Barker
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 29^h day of March, 2016, I caused to be served a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO STAY** the method indicated below, and addressed to each of the following:

Original Filed with the Clerk of the SRBA Court, via Facsimile.

Ballentyne Ditch Company	<u> X </u>	Hand Delivery
Boise Valley Irrigation	<u> </u>	U.S. Mail, postage prepaid
Canyon County Water Company	<u> </u>	Facsimile
Eureka Water Company	<u> </u>	Overnight Mail
Farmers' Co-Operative Ditch	<u> X </u>	Email
Middleton Irrigation Assn. Inc.		
Middleton Mill Ditch Company		
Nampa & Meridian Irrigation		
New Dry Creek Ditch Company		
Pioneer Ditch Company		
Pioneer Irrigation District		
Settlers Irrigation District		
South Boise Water Company		
Thurman Mill Ditch Company		

Represented by:

ANDREW J. WALDERA
DANIEL V. STEENSON
S. BRYCE FARRIS
SAWTOOTH LAW OFFICES, PLLC
1101 W. RIVER STREET, SUITE 110
P.O. BOX 7985
BOISE, ID 83707

SUEZ WATER IDAHO, INC.

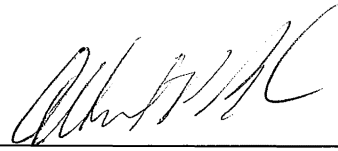
Represented by:

MICHAEL P. LAWRENCE
601 W. BANNOCK STREET
BOISE, ID 83701-2720

<u> </u>	Hand Delivery
<u> X </u>	U.S. Mail, postage prepaid
<u> </u>	Facsimile
<u> </u>	Overnight Mail
<u> X </u>	Email

IDWR AND GARY SPACKMAN
Represented by:
GARRICK L. BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO – IDWR
P.O. BOX 83720
BOISE, ID 83720-0098

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



Albert P. Barker