

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company*

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

*Attorneys for American Falls
Reservoir District #2 and Minidoka
Irrigation District*

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF ACCOUNTING FOR
DISTRIBUTION OF WATER TO THE
FEDERAL ON-STREAM RESERVOIRS IN
WATER DISTRICT 1

Docket No. Unassigned

JOINT INITIAL STATEMENT OF ISSUES

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively, the "Surface Water Coalition" or "Coalition"), by and through their attorneys of record, and submit the following initial statement of issues pursuant to the Director's *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference* dated October 22, 2013 ("*Notice*").

The Coalition members submit this "joint" filing solely for the convenience of IDWR and other parties to this proceeding. The individual canal companies and irrigation districts own separate water rights that are administered in Water District 1 and reserve the right to fully participate as individual parties in this proceeding.

INITIAL STATEMENT OF ISSUES

1) Dismissal / Stay

The Coalition submits this proceeding is premature and conflicts with ongoing appeals regarding Basin-Wide Issue 17 currently pending before the Idaho Supreme Court (Docket Nos. 40974-2013 and 40975-2013). The Coalition and the Boise Project Board of Control filed appeals that directly concern the nature and definition of storage water rights in Basins 01 and 63. The issues on appeal directly address whether the SRBA court erred in failing to define “fill” and whether the court erred in concluding the determination of when and whether a storage right is “filled” is purely an administrative function. The Idaho Supreme Court expedited the appeal at the request of the parties and is set to hear oral argument next month (January 24, 2013).

Further, the Coalition’s objections to the Department’s recommendations for certain storage water right claims in Basin 01 remain pending before the SRBA Court and have been stayed until the Basin-Wide Issue 17 case is resolved. How those water rights are ultimately defined for purposes of administration is yet to be resolved by the SRBA Court. *See* I.C. §§ 42-1412(6); 42-1420. In the interests of judicial economy and the fact this entire proceeding could materially change depending upon the outcome of the pending appeals and SRBA litigation, the Director should dismiss or at least stay this matter until the SRBA cases are completed.

Alternatively, the Director should dismiss this proceeding for failing to satisfy the criteria under Rule 104 of the Department’s Rules of Procedure. Although the *Notice* references I.C. § 67-5240 (definition of “contested case”) and Rule 104 (formal proceedings), it is not clear if the *Notice* is the type of document and proceeding contemplated by the rules. For example, the *Notice* does not comply with the referenced Rules 210-280 as there is no application, petition, or complaint to initiate such a proceeding. Moreover, the Director has not cited any authority to show why it is

valid to initiate “contested cases” on matters already pending in another forum (i.e. Basin-Wide 17 appeal and SRBA).

A similar issue was recently addressed by the SRBA District Court in stayed litigation over the Director’s orders in the SWC Delivery Call case. *See generally, IGWA v. Spackman* (Fifth Jud. Dist., Gooding County Dist. Ct., Consolidated Case No. 2010-382). The parties previously agreed to stay appeals of the Director’s methodology orders pending a decision from the Idaho Supreme Court in *A&B Irr. Dist. v. IDWR* (S. Ct. Docket 38181-2010). After waiting 16 months for an appellate decision, the Coalition requested that the stay be lifted.

The other parties in that case, notably IDWR and the Director, opposed the Coalition’s motion to lift the stay. IDWR reasoned:

Until the Idaho Supreme Court has provided the guidance necessary for resolving the issues the Surface Water Coalition wishes to address, the stay should remain in place to avoid addressing issues that may be mooted, to avoid inconsistent determinations by appellate courts on related issues in the context of the Surface Water Coalition’s delivery call, and to avoid an unnecessary multiplicity of proceedings.

IDWR Response to SWC Joint Motion to Lift Stay at 3 (Consolidated Case No. 2010-382).

The District Court accepted IDWR’s argument and denied the request on the grounds that the issues were still pending before the Supreme Court that could affect the outcome of the methodology appeals and that it was in the interest of judicial economy to continue the stay. *See Order Denying Motions to Lift Stay* (Consolidated Case No. 2010-382, November 12, 2013).

The same reasoning applies here. Since the issue of “fill” is pending before the Idaho Supreme Court and may be further addressed by the SRBA Court in the future, a contested case before IDWR is unwarranted and could result in a “moot” proceeding. In the Director’s own words the proceeding should be dismissed or at a minimum stayed “to avoid an unnecessary multiplicity of proceedings.”

2) Request for Informal Proceedings / Mediation

Rather than force litigation upon the water users as directed in the *Notice*, the Director should first provide an opportunity to resolve any remaining disputes through informal proceedings (IDAPA 37.01.100) and/or mediation. The issue identified in the *Notice* is wide-ranging and affects thousands of water users across the state of Idaho, not just water right holders in Water District 1. The issue deserves a full and fair opportunity to settle outside the context of formal litigation. Although the Director and IDWR participated in settlement negotiations on this matter for several months, the agency refused any changes to the status quo or existing procedures, and instead demanded that any “refill” of the federal storage reservoir water rights be subject to complete subordination to all junior and future water rights. As a result, the prior negotiations were unsuccessful. Given this history, a formal mediator may be appropriate to guide and direct further negotiations. The Coalition would request an order from the Director allowing for informal proceedings or mediation prior to scheduling a contested case.

3) Rulemaking / Service and Due Process

Next, the issue identified in the *Notice* must be addressed through rulemaking as provided by Idaho’s Administrative Procedures Act and applicable rules. *See Asarco v. State*, 138 Idaho 719, 723 (2003). The proper procedure to account for storage water rights in administration affects thousands of water users across the state of Idaho and meets the six factors identified by the Supreme Court in the *Asarco* case.

Further, although the cover letter with the *Notice* states that any decision “will be binding upon all water users that received notice of this proceeding,” there is no confirmation that all water users have been legally served or that the letter constitutes due process under the law. Unlike the docket sheet notice procedures in the SRBA, there is no similar statute or court decision that would

authorize IDWR's procedures in this matter, let alone confirm that the agency has satisfied constitutional notice and due process. Accordingly, it is uncertain whether the contested case will actually "bind" all water users and whether it can even proceed given the defects in how it was initiated. The Director should dismiss the proceeding for that reason as well.

4) Request for Independent Hearing Officer

If the Director refuses to allow for informal proceedings or mediation as identified in Issue #2 above, the Director must appoint an independent hearing officer (not an employee of IDWR) to preside over this matter in order to satisfy the Coalition's constitutional rights to due process. Given the posture of this proceeding the Director's prior stated position, an independent hearing officer must be appointed.

First, as dictated by the *Notice*, this contested case addresses concerns about the "existing" procedures of accounting in Water District 1. The "existing" accounting procedures regarding storage water rights have changed over time and have never been formally adopted by statute or rule. There is no formal policy or record to justify the "existing" procedures or show that they were adopted by a legal procedure in the first place. Starting from the premise of addressing the "existing" procedures that were implemented in 1978 with the advent of a computer program rather than an open and new proceeding where the parties are allowed to present and develop appropriate procedures is biased and unfair to water users, including the Coalition, that have objections or concerns with the "existing" procedures. Accordingly, the entire premise and posture of the *Notice* is slanted and biased towards the agency desires, rather than providing an open and fair forum for the water users.

Next, the Director already declared his and the agency's position with respect to the issue set

forth in the *Notice* in a letter to the Boise Project Board of Control last spring.¹

In sum, based on my own review of the Basin-Wide Issue 17 decision and the State's briefing, my conclusion is that no change is required in existing flood control and "refill" operations in the Basin 63 reservoirs. To the contrary, the SRBA Court's decision confirms the *status quo* and supports the continuation of existing operations.

* * *

No change in the Department's existing administration of the Bureau's storage water rights for the Basin 63 reservoirs is necessary or contemplated. The Basin-Wide 17 decision confirmed the *status quo* and does not require any change in flood control operations in the Basin 63 reservoirs.

Director Spackman Letter to Richard Murgoitio at 4 (May 1, 2013) (emphasis added).

Although the letter refers to the administration of storage water rights in Basin 63, the referenced "status quo" applies to the existing procedures in Water District 1 (Basin 01). Accordingly, based upon the Director's position on the existing procedures, where he previously declared "no change . . . is necessary or contemplated," the Coalition cannot receive a "fair" and "unbiased" hearing in this matter.

If this contested case goes forward, the Director must appoint an independent hearing officer (not an employee of IDWR) to preside over this matter to satisfy the Coalition's constitutional rights to due process. The Coalition reserves the right to file formal motions on this issue if necessary.

5) Consolidation with Water District 63 Case

Given the overlap with the Water District 63 case, as recognized in the *Notice*, the Director should consolidate this matter, at least partially, to address common issues and ensure consistent decisions. The Coalition is filing a motion to intervene in the Water District 63 case as well.

¹ As the agency head the Director represents IDWR and speaks for all staff that could preside over this matter as well. Accordingly, no staff member could preside and provide a fair and meaningful opportunity for a hearing.

First, the U.S. Bureau of Reclamation (Reclamation), as legal title holder to certain storage water rights in Basins 01 and 63, may participate in both proceedings. If the placeholders from Basin 01 and 63, including the Coalition, must reimburse Reclamation for its participation in these cases, then the Director should allow for the most efficient and cost-saving process as possible. The water users should not be forced to pay for two separate cases addressing the same or similar issues. The Director can avoid this by providing for a consolidated or partially consolidated process.

Next, where there are issues that overlap and are applicable to both basins, the parties should present and develop the case in a uniform fashion, to ensure the most efficient use of time and resources, and to avoid inconsistent decisions. Further, where there are common issues those should be addressed in a single decision, not through multiple administrative cases subject to different appeal proceedings, etc. Certainly if there are sub-issues unique to a particular basin those can be addressed by the relevant parties accordingly. If the case proceeds the Coalition requests the Director to allow for consolidation or partial consolidation.

6) Accounting Program Update / Draft Policy Manual

The Coalition understands that Water Districts 1 and 63 have switched, or are in the process of switching, to a new accounting model program. In addition, Water District 1 is in the process of developing a new policy manual which addresses various inputs, including the very issue identified in the *Notice*. That process is ongoing and it is unclear how the issue in the *Notice* relates to or will impact that process. It is the Coalition's position that the Director has no basis to single out one issue in the new policy manual and set it for contested proceedings without fully addressing all of the issues in an open and comprehensive manner.

Therefore, it may be appropriate to identify and address additional issues raised in the manual as part of this proceeding to ensure a comprehensive review of the procedures used to

distribute water to water rights in Water District 1. The Director should allow for the identification of additional issues and concerns with other procedures as well. Moreover, if there are other issues in the draft policy manual that warrant rulemaking, those should be addressed through that procedure as well.

7) Issues with Existing Procedures

The Coalition submits the existing procedures to account for “fill” of storage water rights do not comply with Idaho law. The concept of “paper” fill and subordination to all junior and future water rights if actual “wet” water is not available to satisfy the water right’s beneficial use is unlawful and must be corrected. The Coalition’s position on this issue has been documented in the Basin-Wide 17 and Basin 01 subcase litigation in the SRBA. Additional issues may be raised and identified as discovered in this proceeding.

8) Discovery / Freedom of Information Act Request

If the Director refuses to dismiss or stay this proceeding, the Coalition requests a fair opportunity to conduct discovery and ensure all discoverable information is produced by Water District 1, IDWR, and other necessary parties and agencies. Further, the Coalition will have to file a Freedom of Information Act (FOIA) request with the U.S. Bureau of Reclamation which will likely take several months to complete and review. The Coalition requests a full and fair schedule to ensure this information can be collected, reviewed, and presented as part of this proceeding.

9) Reservation of Rights

The Coalition reserves the right to identify additional issues, statements of concern, and objections as discovered in this proceeding. The Coalition further reserves the right to file any relevant motions regarding the issues identified above. Finally, the Coalition reserves all rights to initiate separate judicial proceedings if necessary.

DATED this 4th day of December, 2013.

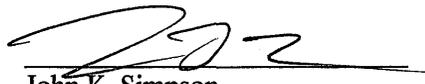
FLETCHER LAW OFFICE



W. Kent Fletcher

*Attorneys for American Falls Reservoir
District #2 and Minidoka Irrigation District*

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson

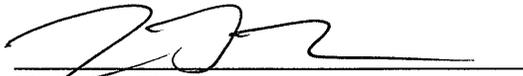
Travis L. Thompson
Paul L. Arrington

*Attorneys for A&B Irrigation District, Burley
Irrigation District and Milner Irrigation District,
North Side Canal Company, and Twin Falls Canal
Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2013, I served a copy of the foregoing **JOINT STATEMENT OF INITIAL ISSUES** by electronic and U.S. Mail to the following:

Director Gary Spackman
Deborah Gibson
IDWR
322 E. Front St.
Boise, Idaho 83720-0098
gary.spackman@idwr.idaho.gov
deborah.gibson@idwr.idaho.gov



Travis L. Thompson