

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

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 DEPARTMENT OF
 WATER RESOURCES

Attorneys for Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District, and Boise-Kuna Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO

IN THE MATTER OF ACCOUNTING)	
FOR DISTRIBUTION OF WATER TO)	MOTION TO DISMISS CONTESTED
THE FEDERAL ON-STREAM)	CASE PROCEEDINGS AND
RESERVOIRS IN WATER)	INITIATE NEGOTIATED
DISTRICT 63)	RULEMAKING AND
)	MEMORANDUM IN SUPPORT

COMES NOW, the Boise Project Board of Control, the Wilder Irrigation District, the Boise-Kuna Irrigation District, and the Big Bend Irrigation District (collectively “the Boise Project and Districts”), and in conformance with the Director’s October 14, 2014, Scheduling Order; Notice of Hearing; Order Authorizing Discovery, hereby submits this Motion to Dismiss Contested Case Proceedings and Initiate Formal Rulemaking and Memorandum in Support.

I. PERTINENT PROCEDURAL AND FACTUAL HISTORY

The Director, on October 23, 2013, purported to initiate a contested case by issuing a Notice of Contested Case and Formal Proceedings, and Notice of Status Conference. In doing so, the Director found "[t]he existing accounting processes in Water District 1 and Water District 63 have become the subject of controversy as a result of concerns and objections expressed by the Bureau of Reclamation ('Bureau') and some storage water users." He went on to conclude "it is

**MOTION TO DISMISS CONTESTED CASE PROCEEDINGS AND INITIATE
 NEGOTIATED RULEMAKING AND MEMORANDUM IN SUPPORT**

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necessary to initiate contested cases for the purpose of resolving the objections to existing accounting processes for the distribution of water to the on-stream reservoirs in Water District 1 and Water District 63." *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference ("Notice of Contested Case")*, October 23, 2013, p. 1. The Notice does not identify the form or substance of the "objections" relied upon by the Director to support this conclusion. Certain questions have been raised about the Department's unwritten accounting procedures for Water District 63 with the Department of Water Resources and Director as a result of on-going Snake River Basin Adjudication proceedings for storage water rights in Basins 01 and 63, but no objections were filed by the Bureau of Reclamation, or any other storage right holder when the Contested Case was initiated. In fact, many of the equitable title holders of the water rights had pleaded with the Director at the first status conference for an explanation of how the accounting system worked and what was the legal basis for its creation, a request that the Department has not answered. Some even said that they did not know if they had objections absent the missing explanation.

The Notice of Contested Case made the following relevant observation:

No formal administrative record has been developed to document how and why existing accounting procedures 'count' or 'credit' water towards the satisfaction or 'fill' of the water rights for the federal on-stream reservoirs in Water District 1 or those in Water District 63. The existing 'records' on these matters are scattered and incomplete. It is therefore desirable to develop administrative records fully documenting how and why existing accounting methods and procedures 'count' or 'credit' water towards the water rights for the federal on-stream reservoirs in Water District 1 and also in Water District 63.

Notice of Contested Case, p.3. In other words, the Department has a rule in place for accounting for storage water rights without the necessary administrative procedure to support it. The Notice then directed interested water users to submit "statements of concern" on or before December 4, 2013, in advance of a status conference scheduled and held on December 6, 2013.

Various interested holders and users of storage water rights in Basins 01 and 63 submitted Statements of Concern in conformance with the Director's order. The Statements of Concern outlined common and differing questions and concerns about the manner in which the Director counts water entering reservoirs against the fill of storage water rights, but also raised a number of concerns about the procedural process that the Director had chosen to address the concerns raised regarding fill. Importantly, the United States Department of Justice Environment and Natural Resources Division, for the Bureau of Reclamation notified the Director by a letter dated December 4, 2013, that Reclamation would not be participating in the contested case proceedings. Reclamation stated that "the Government is under no obligation to [participate] and the United States would not be bound by the results because the contested cases do not meet the requirements of the McCarran Amendment, 43 U.S.C. § 666. At a minimum, the contested cases are premature in the absence of an adjudication of the underlying rights."

At the December 6, 2013, status conference most parties in attendance brought to the Director's attention the fact that orders of the SRBA court in the Basin Wide Issue No. 17 proceedings were scheduled to be heard by the Idaho Supreme Court in January, 2014, and requested that the contested case proceedings, at a minimum be stayed until the Idaho Supreme Court had ruled on the SRBA orders. The Director issued his order staying the contested case proceedings on December 27, 2013.

On August 4, 2014, the Idaho Supreme Court issued its Order addressing the SRBA Basin Wide 17 appeal. In that Order the Supreme Court held that the Basin Wide proceeding was improperly designated because it did not address the question that the parties to the proceedings wanted answered and was, therefore, judicially inefficient. *A&B Irr. Dist. v. State (In Re SRBA)*, 2014 Ida. Lexis 203 (Aug. 4, 2014). The Supreme Court also held that determining when a water

is satisfied is within the Director's discretion where he follows Idaho Code § 42-602 and "distributes water in accordance with the prior appropriation doctrine, he meets his clear legal duty. Details are left to the director." *In Re SRBA*, 2014 Ida. Lexis 203, at 22-23. The Court concluded by stating, "[i]n 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." *Id.* at 26.

Thereafter, on September 10, 2014, the Director issued an Order lifting the stay in proceedings and setting a status conference to be held on October 7, 2014. At the status conference the Director provided a list of preliminary issues that he believed the parties had previously raised which should be decided prior to moving forward with the issue of how storage water rights should be filled. This Motion and Memorandum follows.

II. ARGUMENT

A. The Issues to Be Addressed by the Director's Proposed Contested Case Are Subject to Formal Rulemaking, and Not Appropriately Decided in this Contested Case:

In *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003), the Idaho Supreme Court recognized that the Idaho Code § 67-5201(19) definition of an agency "rule" was too broad and issued additional guidance to define when an agency action constitutes a rule. There the Court stated that a rule has "(1) wide coverage, (2) [is] applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy." *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003). If an action of an agency meets the criteria set out above, then it "constitutes a rule requiring rulemaking to be valid." *Id.*

In *Asarco*, the Idaho Department of Environmental Quality (“DEQ”) had developed a TMDL for a water body in conjunction with the Environmental Protection Agency (“EPA”), but had not done so in conformance with I.C. §§ 67-5201, *et seq. Id.* DEQ reasoned it was not required to do so because “it did not implement or interpret existing law in the manner of a rule,” arguing that a TMDL “is an unenforceable planning tool analogous to a comprehensive plan, and also arguing that it “exercised its discretion and purposefully chose not to engage in rulemaking in order to render the TMDL unenforceable.” *Asarco v. State*, 138 Idaho at 722-723, 69 P.3d 139, 142-143 (2003). The Court rejected these arguments, stating

The central problem with DEQ’s argument is the state water quality standards do not provide all of the information or direction necessary for promulgating a TMDL. While the water quality standards serve as a basis for the TMDL calculations, the TMDL requires much more. Under the Idaho Water Quality Act, not only must DEQ identify the pollutants and inventory point and nonpoint sources of pollution, the agency must also analyze why current control strategies are not effective and develop new pollution control strategies for point and nonpoint sources of pollution. In addition, the Idaho Water Quality Act requires DEQ to allocate effluent limitations among point and nonpoint sources of pollution and develop planning processes to monitor and evaluate progress. In making these types of decisions, DEQ is working far outside the scope of the water quality standards alone and is both implementing law and creating policy. Thus, DEQ’s argument that the TMDL implements a rule as opposed to a law is unpersuasive.

Id. at 725, 69 P.3d at 145.

Here, the Director has initiated a contested case to define the process and create a record to define the Idaho Department of Water Resources “[a]llocation of natural flow water rights, including on-stream reservoir water rights, [that] are computed and distributed by Watermasters using a water right accounting process.” *Notice of Contested Case*, p. 1. More specifically, the Director stated:

The accounting procedures referenced above have become a source of controversy and litigation. During the past year, the Bureau and some water users have questioned or objected to the accounting methodologies and procedures for

'counting' or 'crediting' water towards the satisfaction or 'fill' of the water rights for the federal on-stream reservoirs in Water District 1 and Water District 63. For instance, the Bureau and some water users raised this issue in the Snake River Basin Adjudication ('SRBA') proceedings titled 'Basin-Wide Issue No. 17.' Concerns were expressed that the accounting methods and procedures are based on 'paper fill' but should be based on 'physical fill.' In his order in Basin-Wide Issue No. 17, Judge Wildman recognized that the question of when or how a water right is considered 'filled' is 'an accounting issue which the basin-wide proceeding does not address.' Judge Wildman suggested that the issue should be explored in a forum where the Department is able to participate in the proceeding so that a full factual record can be developed.

Notice of Contested Case, pp. 2-3. Water Districts 1 and 63 cover the Snake River and Boise River Basins. Any determination that might result from the contested case would have wide coverage. Further, it is unlikely that any determination regarding accounting for the fill of water rights in federal on-stream reservoirs in Basins 1 and 63 would not be extrapolated to have far-reaching basin-wide effect, therefore, it is also clear that an order that might result from the contested cases would also be applied generally and uniformly.

The Director also stated in his Notice of Contested of Case that a primary purpose of the contested case is "to develop administrative records fully documenting how and why existing accounting methods and procedures 'count' or 'credit' water towards the water rights for the federal on-stream reservoirs in Water District 1 and Water District 63." *Id.* at 3, (emphasis added.) While the Director states that the proceeding is to address "existing" accounting methods, the record that would be developed to support such a method would have proactive effect, and therefore, the third prong of the *Asarco* criteria, that is it only operate in future cases, is also met.

The Idaho Supreme Court, the SRBA court and the Idaho Department of Water Resources have all confirmed that there is no existing legal standard that determines how and why water is credited toward fill of water rights in federal on-stream reservoirs. The Supreme

Court recognized that no legal guidance currently exists that would answer the question whether water passed for flood control purposes counts toward the fill of a storage water right. It stated:

There is an administrative procedure for fleshing out these factual interpretations if the SRBA court chooses to address the issue of fill on remand. This Court must be especially circumspect when deciding water law issues of first impression with potentially far-reaching consequences. Without a complete factual record and no injury alleged we decline to issue an advisory opinion on whether water stored under a storage right counts toward the fill of that right if it is used by the reservoir operator for flood control purposes.

In Re SRBA, 2014 Ida. LEXIS, p. 20. Based on this statement by the Supreme Court it is clear that the fourth prong of the *Asarco* criteria is also met; the result sought by the Director in the contested case would answer the question of first impression that the Supreme Court could not answer without a developed record for which no other guidance or legal standard under the enabling statute exists.

The Notice of Contested Case recognized that any records supporting the accounting methodology currently used by the Director to determine whether water passed for flood control is counted against a storage right "are scattered and incomplete" and there exists a need to develop a record to determine whether the Departments methodology is complete is appropriate. Notice of Contested Case, p. 3. Therefore the proposed contested case is also intended to "(5) express[] agency policy not previously expressed, and (6) is an interpretation of law or general policy." *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003).

The Notice of Contested case states that the proceeding is intended to achieve three results, "(1) [document] how and why water is 'counted' or 'credited' to the water rights for reservoirs pursuant to the existing accounting methods and procedures; (2) [determine] the origin, adoption, and development of the existing accounting methods and procedures; and (3) [order] appropriate changes, if any to the existing procedures as they may relate to federal flood

control operations.” *Notice of Contested Case*, p. 5. Like the TMDL process that DEQ undertook in *Asarco*, here the Director is undertaking a contested case to “implement new law and policy,” and a contested case is not the appropriate method to accomplish that end.

If the Director undertakes the contested case, rather than adopting a rule in substantial conformance with I.C. § 67-5231, then such an action would be void for failure to comply with state administrative law. *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 725, 69 P.3d 139, 145 (2003). The Boise Project and Districts, therefore, request that the Director dismiss the contested case and instead initiate negotiated rulemaking in accordance with I.C. § 67-5220.

B. An Administrative Contested Case Cannot Bind Reclamation and Would Not, Therefore, Resolve the Questions Sought to be Resolved:

As the Director recognized in the Notice of Contested Case, “[t]he Bureau holds legal title to the water rights for the reservoirs and the storage water users hold ‘title to the use of the water.’ *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007.” While the parties potentially affected by the Director’s proposed contested case submitted Statements of Concern, Reclamation instead sent a letter explaining that “the United States will not be participating in the contested cases recently notice for Water Districts 1 and 63. In our view, the Government is under no obligation to do so and the United States would not be bound by the results because the contested cases do not meet the requirements of the McCarran Amendment, 43 U.S.C. § 666.” Counsel with Department of Justice, on behalf of Reclamation, then provided a citation to *South Delta Water Agency v. U.S. Dep’t of Interior*, 767 F.2d 531, 541 (9th Cir. 1985), to support its further statement that the rights must at least be finally adjudicated before it could meaningfully participate in the contested case. Some rights in Water District 1 have not

been adjudicated, and there are pending late claims relating to the issues that the Director wants to address in the contested case that have similarly not been adjudicated.

Reclamation's reticence to participate in the Director's contested case is based in sound law which holds that only a lawsuit presided over by a court with jurisdiction to hear such matters may bind the United States in a matter related to the McCarran Act. In *United States v. Puerto Rico*, 287 F.3d 212, 218 (1st Cir. 2002), that court held:

In crafting the McCarran Amendment, Congress consistently used the word 'suit' to describe matters affected by the statutory waiver of federal sovereign immunity. That word appears no fewer than seven times in a relatively compact statute (most of which has been reproduced above). The word 'suit' has a particularized meaning in legal parlance; it refers specifically to an action in a judicial forum.The presumption is that Congress knew, and purposefully embraced, that particularized meaning when it chose to employ the word in the text of the McCarran Amendment.Nothing in the language or structure of the McCarran Amendment rebuts this presumption. To the contrary, Congress's persistent use of terms such as 'defendant,' 'necessary party,' and 'the court having jurisdiction,' virtually compels the conclusion that the repeated references to suits was fully calculated. It follows that the waiver was meant to apply only to judicial proceedings.

Id. The Director's intention to develop a record in two separate administrative proceedings to explain how and why existing accounting methods and procedures 'count' or 'credit' water towards the water rights for the federal on-stream reservoirs in Water Districts 1 and 63 absent participation by the water right title holders would be a fruitless enterprise.

The Idaho Supreme Court has also held that any action requires “the inclusion of all tributaries of the Snake River in order to obtain jurisdiction over the United States,” pursuant to the legislative and judicial history of the McCarran Amendment. *In Re Snake River Basin Water System*, 115 Idaho 1, 6, 764 P.2d 78, 83 (1988). Even if an administrative contested case could bind Reclamation by its outcome, two separate contested in two separate basins would fail to meet McCarran Amendment muster.

If the Director instead undertakes a negotiated rulemaking with respect to question that needs to be resolved, i.e. whether water passed through federal on-stream reservoirs for flood control counts against storage holders' water rights for irrigation, and that rule is adopted by the Idaho legislature, then it would be a law pertaining to the appropriation, distribution or use of water and the United States would be bound by such law pursuant to section 8 of the Reclamation Act of 1902. *See Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425 (U.S. Dist. Court ED Cal, 1992). For this additional reason, the Boise Project and Districts hereby request that the Director dismiss the Contested Case and initiate negotiated rulemaking to develop the record and answer the questions inherent in the contested case.

C. A Contested Case is Not the Appropriate Procedure to Post Hoc Create a Record to Support Existing Methods and Procedures of the Department:

The Department's procedural rules state that a "[f]ormal proceeding may be initiated by a document from the agency informing the party(ies) that the agency has reached an informal determination that will become final in the absence of further action by the person to the whom the correspondence is addressed, provided that the document complies with the requirement of Rules 210 through 280." IDAPA 37.01.01.104. In this instance, there is no informal determination that will become final in the absence of further action. Instead, the Director has initiated a contested case to "(1) [document] how and why water is 'counted' or 'credited' to the water rights for reservoirs pursuant to the existing accounting methods and procedures; (2) [determine] the origin, adoption, and development of the existing accounting methods and procedures; and (3) [order] appropriate changes, if any to the existing procedures as they may relate to federal flood control operations." *Notice of Contested Case*, p. 5.

The Director has essentially forced any party with an interest in accounting for storage water rights to participate in litigation in order to create a *post hoc* record in an attempt to validate the existing procedures and methods that the Department of Water Resources currently uses account for storage water rights in the federal reservoirs. This does not qualify as a contested case under the Department's own rules and violates the due process rights of the parties to an open forum where the outcome of the proceeded is not preordained. For this additional reason, the Boise Project Board of Control and the Districts request that this matter be dismissed, and instead addressed in a negotiated rulemaking.

III. CONCLUSION

The Boise Project Board of Control, Wilder Irrigation District, Big Bend Irrigation District and Boise-Kuna Irrigation District, for the reasons set forth above, request that the Director dismiss the contested case titled In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63, and replace such proceedings with a negotiated rulemaking intended to address the same concerns encompassed in the contested case. Further, these parties also reserve the right, based on whether the Director grants or denies this Motion, to file additional motions, procedural and substantive, as may be deemed necessary.

Dated this 28th day of October, 2014.

BARKER ROSHOLT & SIMPSON LLP



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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October, 2014, I caused to be served a true and correct copy of the foregoing **MOTION TO DISMISS CONTESTED CASE PROCEEDINGS AND INITIATE NEGOTIATED RULEMAKING AND MEMORANDUM IN SUPPORT** by the method indicated below, and addressed to each of the following:

Original to:

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	<input type="checkbox"/>	Facsimile
P.O. Box 83720	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83720-0098	<input checked="" type="checkbox"/>	Email

Copies to the following:

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
Boise, ID 83702-5391	<input type="checkbox"/>	Overnight Mail
	<input checked="" type="checkbox"/>	Email

Peter R. Anderson	<input type="checkbox"/>	Hand Delivery
TROUT UNLIMITED	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
910 W. Main St., Ste. 342	<input type="checkbox"/>	Facsimile
Boise, ID 83702	<input type="checkbox"/>	Overnight Mail
	<input checked="" type="checkbox"/>	Email

Scott L. Campbell	<input type="checkbox"/>	Hand Delivery
Andrew J. Waldera	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
MOFFATT THOMAS BARRETT	<input type="checkbox"/>	Facsimile
ROCK & FIELDS, CHARTERED	<input type="checkbox"/>	Overnight Mail
P.O. Box 829	<input checked="" type="checkbox"/>	Email
Boise, ID 83701		

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	<input type="checkbox"/>	Overnight Mail
Suite 370	<input checked="" type="checkbox"/>	Email
Denver, CO 80202		

James C. Tucker, Esq.
IDAHO POWER COMPANY
P.O. Box 70
Boise, ID 83702

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

Daniel V. Steenson
S. Bryce Farris
SAWTOOTH LAW OFFICES, PLLC
P.O. Box 7985
Boise, ID 83707

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

Chas. F. McDevitt
Dean J. Miller
Celeste K. Miller
McDEVITT & MILLER, LLP
P.O. Box 2564
Boise, ID 83701

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

Jerry A. Kiser
P.O. Box 8389
Boise, ID 83707

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

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Ste. 204
Twin Falls, ID 83301-3029

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

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, ID 83318

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

Rex Barrie
Watermaster
Water District 63
P.O. Box 767
Star, ID 83669

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

Ron Shurtleff
Watermaster
Water District 65
102 N. Main St.
Payette, ID 83661

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

Michael P. Lawrence
GIVENS PURSLEY
P.O. Box 2720
Boise, ID 83701-2720

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

Bruce Smith
MOORE SMITH
950 W. Bannock St., Ste. 520
Boise, ID 83702-5716

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



Shelley M. Davis