

**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 63)
_____)

**ORDER DENYING
PRE-HEARING MOTIONS**

BACKGROUND

On October 24, 2013, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued a *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference* (“Notice”) in the above referenced matter announcing his decision to initiate a contested case and formal proceedings regarding accounting for the distribution of water to the federal on-stream reservoirs in Water District 63. The Director issued a cover letter (“Cover Letter”) along with the Notice.

On December 27, 2013, the Director signed an order staying the matter pending a decision by the Idaho Supreme Court in the case involving Basin-Wide Issue No. 17. The Court issued its decision in that case on August 4, 2014. *In re SRBA*, 157 Idaho 385, 336 P.3d 792 (2014). On September 10, 2014, the Director issued an *Order Lifting Stay and Notice of Status Conference* which lifted the December 27, 2013, stay; set the matter for a status conference; and notified the parties the Director would request a Department staff memorandum (“Staff Memo”) explaining: (1) how and why water is counted or credited to the water rights for reservoirs in Basin 63 pursuant to the existing accounting methods and procedures; and (2) the origin, adoption, and development of the existing accounting methods and procedures in Water District 63.

On October 2, 2014, a *Motion to Disqualify* was filed by 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, South Boise Water Company, and Thurman Mill Ditch Company (hereinafter collectively referred to as “Ditch Companies”). On October 3, 2014, the Director issued the *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer* which denied the Ditch Companies’ motion and established the Director will be the presiding officer in this contested case proceeding.

On October 7, 2014, the Director held a status conference in which participants agreed upon a hearing schedule. On October 14, 2014, the Director issued a *Scheduling Order; Notice*

of Hearing; Order Authorizing Discovery (“Scheduling Order”) which required parties to file pre-hearing motions by October 28, 2014; set a deadline of November 4, 2014, for the Staff Memo; set deadlines for responses and replies to responses to the Staff Memo; and set a hearing date for February 2-4 and 9, 2015.¹

On October 28, 2014, the Boise Project Board of Control, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District (“hereinafter collectively referred to as “Boise Project and Districts”) filed with the Department a *Motion to Dismiss Contested Case Proceedings and Initiate Negotiated Rulemaking and Memorandum in Support* (“Motion to Dismiss”).² The Department also received *Pre-Hearing Motions Submitted by the Ditch Companies* (“Pre-Hearing Motions”); *City of Boise’s Joinder in Three Pre-Hearing Motions Submitted by the Ditch Companies: Motion to Dismiss/Stay; Motion to Further Define the Issue Addressed in this Contested Case; and Motion to Modify Scheduling Order* (City of Boise’s Joinder”); *Pre-Hearing Motions Submitted by the New York Irrigation District* (“New York Irrigation District’s Joinder”), and *Pioneer Irrigation District’s Joinder in Pre-Hearing Motions Submitted by the Ditch Companies* (“Pioneer Irrigation District’s Joinder”). United Water Idaho, Inc., filed a *Response to Pre-Hearing Motions* on November 12, 2014.

ANALYSIS

I. Boise Project and Districts’ Motion to Dismiss

The Boise Project and Districts assert three arguments in support of their Motion to Dismiss: 1) the issues to be addressed by the Director are subject to formal rulemaking, 2) an administrative contested case cannot bind the United States Bureau of Reclamation (“Bureau”), and 3) this proceeding does not qualify as a contested case under the Department’s rules of procedure.

A. Issues to be addressed in this contested case proceeding are not subject to formal rulemaking.

The Boise Project and Districts assert that, pursuant to *Asarco Inc. v. State*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003), issues to be addressed in this contested case proceeding require formal rulemaking. The Director disagrees. The facts underlying this contested case are distinctly different from underlying facts presented in *Asarco*: 1) the case is not controlling and 2) even applying the six-part test set forth in the case, rulemaking is not required

¹ On November 20, 2014, the Director issued an *Amended Scheduling Order* at the request of certain parties extending the deadline to file responses to the Staff Memo to December 19, 2014, and extending the deadline to file replies to responses to the Staff Memo to January 9, 2015. All other deadlines remained the same.

² The Department also received *Boise Project Board of Control’s Document Request and Boise Project Board of Control’s Request for Disclosure of Ex Parte Contacts and Prior Statements by the Director and Staff Concerning the Issue of Storage Accounting*. These filings will be addressed by separate order.

1. *Asarco* is not controlling.

In *Asarco*, the Idaho Supreme Court considered the process by which the Idaho Department of Environmental Quality (“DEQ”) developed a Total Maximum Daily Load (“TMDL”), a numerical limit on the total allowable discharge, for lead, zinc, and cadmium in the Coeur d’Alene River Basin. *Id.* at 721, 69 P.3d at 141. The DEQ established specific TMDLs for the Coeur d’Alene River Basin, but did so without promulgating rules. Numerous mining companies challenged the TMDL, arguing the TMDL was not a properly promulgated rule and was void. On appeal, the Court adopted a six part test to determine when an agency action requires formal rulemaking: (1) does the action have wide coverage, (2) is the action applied generally and uniformly, (3) does the action operate only in future cases, (4) does the action prescribe a legal standard or directive not otherwise provided by the enabling statute, (5) does the action express agency policy not previously expressed, and (6) is the action an interpretation of law or general policy. *Id.* at 723, 69 P.3d at 143. The Court concluded the TMDL satisfied all six of these criteria and that the TMDL was void for DEQ’s failure to comply with the rulemaking process set forth in the Idaho Administrative Procedure Act (“IDAPA”). *Id.* at 725, 69 P.3d at 145.

There are key differences between *Asarco* and circumstances presented in this matter. As discussed above, *Asarco* addressed agency creation of a wholly new numerical standard. In the contested case before the Department, the agency is not creating numerical standards. The numerical standards—the quantity elements of water rights—were determined by the Snake River Basin Adjudication (“SRBA”) Court. The Department does not propose to change or modify the decreed quantities of the water rights at issue in this proceeding, nor could it do so. Rather, this contested case addresses parties’ concerns with and/or objections to methods and procedures employed by the Department to determine when the numerical limit—the decreed quantity—has accrued to federal on-stream reservoirs in Water District 63. *See Notice* at 6.

Further, *Asarco* did not address any challenges to DEQ’s methods and procedures for determining when the numerical limit—the TMDL—had been reached. *Asarco* did not hold that DEQ was required to promulgate rules to establish the methods and procedures for measuring and monitoring the TMDL quantification. *Asarco* does not require the Director to promulgate rules to address water users’ concerns and/or objections to existing accounting methods and procedures employed by the Director to determine when sufficient water has been distributed to federal on-stream reservoirs in Water District 63 to satisfy the numerical limits in this case the decreed quantities of the storage water rights. This interpretation is confirmed by *State v. Alford*, 139 Idaho 595, 596, 83 P.3d 139, 140 (Ct. App. 2004), where the Court of Appeals was faced with the Idaho State Police’s approval of the use of the Alco-Sensor III for breath testing in a case where the defendant was charged with driving under the influence (“DUI”). The DUI statute already prescribed the legal standard limiting an individual’s alcohol concentration. *Id.* at 598, 83 P.3d at 142. *Alford* alleged the Idaho State Police failed to comply with IDAPA’s rulemaking procedures when it included the Alco-Sensor III on its list of “Conforming Products List of Evidential Breath Measurement Devices.” *Id.* at 597, 83 P.3d at 141. The Court held that the Idaho State Police properly carried out a statutory duty to authorize the use of certain breath-testing equipment by law enforcement agencies and that in doing so, it identified equipment it found to be suitable for such purpose. *Id.* at 598, 83 P.3d at 142.

Here, Chapter 6 of Title 42 of the Idaho Code governs “Distribution of Water Among Appropriators.” Idaho Code § 42-602 – 42-619. Idaho Code expressly and specifically authorizes and requires the Director, and the watermasters as supervised by the Director, to distribute water among appropriators and to regulate their diversions in accordance with the prior appropriation doctrine as established by Idaho law. *Notice* at 4-6 (citing and quoting provisions Idaho Code §§ 42-602 – 42-619). These statutory mandates are “clear and executive.” *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). Further, “the details of the performance of the duty are left to the director’s discretion.” *Id.* The Director’s duty to distribute water was recently confirmed by the Idaho Supreme Court. *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800. The Court stated:

Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. That statute gives the Director a clear legal duty to distribute water. However, the details of the performance of the duty are left to the director's discretion. Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.

Id. (citations and quotations omitted). The Court went on to discuss cases recognizing the Director’s discretion to direct and control the distribution of water, concluding:

Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

Id. (citations and quotations omitted). The process of addressing and resolving waters users’ concerns and objections to the existing methods and procedures of accounting for distributions to the federal on-stream reservoirs in Water District 63 is directly related to the Director’s exercise of his technical expertise and his statutory authority and discretion to distribute water to, and regulate diversions by, the federal on-stream reservoirs in Water District 63. *See id.* at 394, 336 P.3d at 801. Similar to the situation in *Alford*, decisions resulting from this contested case proceeding may assist the Director in carrying out his statutory duty to distribute water in accordance with the prior appropriation doctrine. The decisions do not require rulemaking.

This contested case proceeding will provide an opportunity for parties to identify their concerns with and/or objections to existing methods and procedures of counting/crediting water to federal on-stream reservoirs in Water District 63. Developing a record on these existing methods and procedures is not a *post hoc* attempt to justify them, but rather is necessary to inform the water users of how the existing system works. SRBA proceedings and filings in this case establish there is a lack of understanding of how the existing system works. Without a record explaining how water is counted/credited to the reservoirs at issue under existing methods and procedures, the water users will not be able to identify the concerns or objections they have

to the existing system. The Director routinely addresses similar questions through orders rather than rulemaking. See *Final Order Regarding Instructions to Watermaster*, In the Matter of Water Right No. 1-6 (Feb. 11, 2013); *Final Order Regarding Measuring and Reporting the "Average Daily Flow" as Measured at the Murphy Gaging Station*, In the Matter of Distributing Water to Water Right Nos. 02-100, 02-201, 02-223, 02-224, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, and 37-20710 (Oct. 27, 2014); *Final Order Regarding Instruction to the Watermasters for Water District Nos. 1 and 27 (Blackfoot River Water Management Plan)*, In the Matter of Administration of Water in Water District Nos. 1 and 27 (July 22, 2013); *Final Order Regarding Administration*, In the Matter of Water Right Nos. 03-2018, 03-10246, and 03-10247 (June 28, 2013).

2. Even applying the *Asarco* factors, rulemaking is not required.

Any decision issued as a result of this contested case will not satisfy the *Asarco* six-part test. First, any such decision will not have wide coverage because it will not apply to "a large segment of the general public." *Id.* at 723, 69 P.3d at 143. This proceeding will consider how water accrues to satisfy water rights for only three reservoirs, which are owned and operated by a single entity, the United States government. The fact that many irrigators in Water District 63 have rights to storage from the reservoirs does not mean this proceeding has "wide coverage." Individual water users' storage allocations and deliveries are determined by contracts, not by the reservoir water rights. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 115-16, 157 P.3d 600, 609-610 (2007). Storage deliveries to water users are not distributions to reservoir water rights under Chapter 6 of Title 42 but rather storage allocations governed by the contracts and Chapters 8 and 9 of Title 42. Because any decision will apply only to a "narrow select group," it will not satisfy the first *Asarco* factor. *Id.* at 723, 69 P.3d at 143.

Second, while the Director also commenced a similar proceeding in Water District 01 because of similar concerns raised in that basin, the Director specifically created separate proceedings because "there are significant differences between the two districts, their reservoir systems, and their accounting processes." *Notice* at 1. For example, while all of the federal on-stream reservoirs in Water District 63 are authorized and operated for flood control purposes, see *Water Control Manual For Boise River Reservoirs* (Corps) (Apr. 1985), only three of the seven federal on-stream reservoirs in Water District 1 are authorized and operated for flood control: Palisades, Jackson Lake, and Ririe reservoirs. See *Reservoir Regulation Manual For Palisades Reservoir* (Corps) (Nov. 1958); *Standing Operating Procedures, Reservoir Regulation, Ririe Dam, Willow Creek, Idaho, Ririe Project, Idaho* (Corps) (Feb. 1978). Further, flood control standards and operations at each authorized federal reservoir are tailored to the reservoir and/or the particular reservoir system, and governed by specific or individualized authorities, including federal legislation, operational flood control agreements between the Bureau and the Corps, and contracts between the Bureau and water users. There are other important differences between the federal dams in Water District 01 and Water District 63, including differences in operational plans, storage contracts, and physical differences in the location of the storage reservoirs in relation to the other reservoirs. Contrary to the Boise Project's, Districts', and Ditch Companies' assertion, it cannot be assumed that results reached in this basin will be extrapolated to other basins. This contested case applies only to the three federal on-stream reservoirs in Water

District 63. Given these facts, the outcome will not be “applied generally and uniformly” and thus will not satisfy the second factor. *Asarco*, 138 Idaho at 723, 69 P.3d at 143.

The third factor is not satisfied because this contested case proceeding does not “operate only prospectively.” *Id.* Part of the intent of this proceeding is to examine the existing water district operations and provide information on the methods and procedures of counting/crediting water to federal on-stream reservoirs in Water District 63. While any decision may have some prospective application, it will not “only” operate prospectively. *Id.*

The fourth factor is also not satisfied. In this contested case, the Director is exercising his legal duty to distribute water pursuant to the prior appropriation doctrine, not prescribing a legal standard. *See Alford*, 139 Idaho at 596, 83 P.3d at 140. The legal standards at issue are the quantity elements of the storage water rights, which were decreed by the SRBA Court. This proceeding does not, and cannot, seek any change in that legal standard.³ This proceeding is intended to address concerns and objections to existing methods and procedures used by the Director to determine when those legal standards have been met. This proceeding will not prescribe any new legal standards.

Unless the Director decides to modify the water accounting procedures, the fifth factor will not be satisfied as the Director will not be expressing an “agency policy not previously expressed.” *Asarco*, 138 Idaho at 723, 69 P.3d at 143. Existing records document and explain the water accounting process. For example, the 1986 watermaster report stated that a computerized accounting system had been implemented at the watermaster’s request, and a 1987 document prepared by Department staff entitled Water Delivery Accounting Boise River WD-63 describes the procedures used in the Water District 63 water accounting program, including how water is accrued to on-stream reservoir water rights in Water District 63. *See also Deposition of Robert J. Sutter*, Vol. II (April 16, 2008); *Deposition of Robert J. Sutter*, Vol. I (March 28, 2008); and *Affidavit of Robert J. Sutter* (Feb. 12, 2008). The current water distribution procedures have been in place since 1986 and do not represent “new agency policy.” *Asarco*, 138 Idaho at 724, 69 P.3d at 144.

The sixth factor will not be met as any decision issued by the Director will not interpret existing law in the sense discussed in *Asarco*. The SRBA Court has decreed the quantity element of the water rights at issue and the Director is under a statutory duty to distribute that quantity; the existing accounting methods and procedures are an exercise of the Director’s discretion to determine the details of how to perform this executive duty. Even assuming *arguendo* the existing methods/procedures implement or interpret existing law governing the Director’s duty to distribute water, satisfying only one, two or even four factors is not sufficient to satisfy the *Asarco* test. *See Alford*, 139 Idaho at 598, 83 P.3d at 142 (holding that agency action is not a rule when only three of the six *Asarco* factors are met); *see Sons & Daughters of*

³ Water must be distributed in accordance with the prior appropriation doctrine as established by Idaho law, including water rights. *See In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013); *see also In re SRBA*, 157 Idaho at 393-394, 336 P.3d at 800-01. Judicial review is the proper avenue to address any challenge to the Director’s distribution of water as being contrary to or inconsistent with water rights. Idaho Code §§ 67-5270 - 67-5279.

Idaho, Inc. v. Idaho Lottery Comm'n, 142 Idaho 659, 663-64, 132 P.3d 416, 420-21 (2006) (holding that an agency action is not a rule even though four of the six *Asarco* factors are met).

In sum, *Asarco* does not require the Director to address water users' concerns and objections to the existing methods and procedures of accounting for distributions of water to the federal on-stream reservoirs in Water District 63 through rulemaking. The Boise Project and Districts' argument, taken to its logical conclusion, would result in the situation where no watermaster could distribute water in Idaho until the Department promulgates rules related to water distribution. This is contrary to the prior appropriation doctrine. There are numerous different and complex water delivery circumstances that arise in water accounting. To require all of the accounting possibilities to be reduced to writing and implemented through rulemaking is not possible and would prevent the Director from fulfilling his duty to timely distribute water.

B. The United States will be bound by a final order issued in this contested case proceeding.

The Boise Project and Districts, the Ditch Companies, New York Irrigation District, Pioneer Irrigation District, and the City of Boise have moved for a dismissal or a stay of this contested case because the United States has informed the Director that it will not be participating.⁴ *Motion to Dismiss* at 8-10; *Pre-Hearing Motions* at 6-8; *New York Irrigation District's Joinder* at 2; *Pioneer Irrigation District's Joinder* at 2-5; *City of Boise's Joinder* at 1. These parties assert this proceeding is not a qualifying lawsuit under the McCarran Amendment and, therefore, the United States is not bound by it. *Id.* They argue that, because the United States is not bound, this proceeding is a "fruitless enterprise," *Motion to Dismiss* at 9, and any resulting order would be "a nullity." *New York Irrigation District's Joinder* at 2.

The McCarran Amendment does not preclude the United States from being bound by a final order issued in this administrative proceeding because the McCarran Amendment is not applicable here. The McCarran Amendment is simply a waiver of sovereign immunity that provides "[c]onsent . . . to join the United States as a defendant" in certain types of lawsuits. 43 U.S.C. § 666⁵; *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *United States v. Idaho*, 508 U.S. 1, 7-8

⁴ Letter from David Gehlert, Trial Attorney, U.S. Dep't of Justice, to Gary Spackman, Director, Idaho Dep't of Water Resources (Dec. 4, 2013).

⁵ The full text of the McCarran Amendment is as follows:

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(1993). This proceeding is not a lawsuit against the United States but rather an administrative proceeding to address the Director's discharge of his statutory duty to distribute water in accordance with the prior appropriation doctrine as established by Idaho law. The applicable provision of federal law, therefore, is not the McCarran Amendment but rather Section 8 of the 1902 Reclamation Act.

1. The United States will be bound pursuant to Section 8 of the 1902 Reclamation Act.

Section 8 of the 1902 Reclamation Act provides the United States "shall proceed in conformity" with "the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 43 U.S.C. § 383.⁶ Through this provision the United States is bound by Idaho law governing "the distribution of water used in irrigation."

Idaho law does not require or contemplate that "the distribution of water used in irrigation" will be done through lawsuits. To the contrary, under Idaho Code the "distribution of water used in irrigation" is an executive rather than judicial function. Idaho Code § 42-602 provides that the Director has "direction and control of the distribution of water from all natural water sources within a water district" and "[d]istribution of water within water districts . . . shall be accomplished by watermasters as provided in this chapter and supervised by the director." The Idaho Supreme Court recently confirmed this statute confers upon the Director "broad powers to direct and control the distribution of water" and imposes upon the Director "a 'clear legal duty' to distribute water" in accordance with Idaho law. *In re SRBA*, 157 Idaho at 393, 336

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State.

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

43 U.S.C. § 666.

⁶ The full text of the statute is as follows:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C.A. § 383.

P.3d 792, 800 (2014) (citation omitted). “[T]he details of the performance of the duty,” however, “are left to the director’s discretion.” *Id.* (citation omitted).⁷

In short, Section 8 of the 1902 Reclamation Act makes the Director’s water distribution decisions binding on the United States, unless a reviewing court sets the Director’s decision aside and remands it for further proceedings. Idaho Code § 67-5279(2)-(3). Any final order issued in the proceeding will become final and effective against the United States. Idaho Code § 67-5246. The United States waives its right to challenge any order issued in this matter if it fails to seek judicial review within the statutory timeframe provided pursuant to IDAPA. *Erickson v. Idaho Bd. of Registration of Prof’l Engineers & Prof’l Land Surveyors*, 146 Idaho 852, 856-57, 203 P.3d 1251, 1255-56 (2009).⁸

The Boise Project and Districts argues that, only if the Director “undertakes a negotiated rulemaking [and] that rule is adopted by the Idaho legislature . . . would it be a law pertaining to the appropriation, distribution or use of water and [binding on the United States] pursuant to section 8 of the Reclamation Act of 1902.” *Motion to Dismiss* at 10. This argument is not consistent with the plain language of Section 8 or with applicable Idaho law, however. Section 8 of the 1902 Reclamation Act simply requires the United States “to proceed in conformity with [state] laws” regarding the distribution of water for irrigation. 43 U.S.C. § 383. It does not require that state law regarding the distribution of water be implemented through administrative rules adopted by the state legislature, through a lawsuit, or through any other particular means: it leaves to the states the question of how state law will implement the distribution of water for irrigation. Idaho law, as previously discussed, explicitly requires the Director to distribute water in accordance with the prior appropriation doctrine as established under Idaho law, and gives the Director “broad powers to direct and control the distribution of water.” *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800. Further, “the details of the performance of the duty are left to the director’s discretion.” *Id.* (citation omitted). In sum, nothing in Section 8 of the 1902 Reclamation Act or in Idaho law requires the Director to use rulemaking to address and resolve concerns with and/or objections to how water is “counted” or “credited” to the federal on-stream reservoirs in Water District 63. It follows that the United States will be bound by the Director’s decision in this proceeding, regardless of whether the United States chooses to participate, because Section 8 of the 1902 Reclamation Act requires the United States “to proceed in conformity with [state] laws” regarding the distribution of water for irrigation. 43 U.S.C. § 383.

2. The United States is not being sued in the contested case and is not a necessary party.

The parties’ reliance on the McCarran Amendment misconstrues the nature of this proceeding. The McCarran Amendment is simply a waiver of sovereign immunity under which the United States has consented to be joined as a defendant in certain types of lawsuits. 43

⁷ Judicial review of the Director’s water distribution orders is available pursuant to IDAPA. Idaho Code §§ 67-5270 - 67-5279.

⁸ This would also preclude the United States from challenging the Director’s decision in federal court. *See United States v. Hennen*, 300 F.Supp. 256, 264 (holding that a complaint filed in federal court by the United States to enjoin enforcement of an order of the Nevada State Engineer that the United States had not appealed in state court “constitutes a collateral attack on the State Court proceedings” amending and implementing the order).

U.S.C. § 666; *Dugan*, 372 U.S. at 620; *United States v. Idaho*, 508 U.S. at 7-8. This proceeding is not a “lawsuit” as contemplated by the McCarran Amendment, however. The United States has not been named as a “defendant” in this contested case; indeed, there are no “defendants.” Further, this proceeding does not seek relief against any party but rather addresses the Director’s exercise of his statutory authority and discretion to control and direct the distribution of water in accordance with Idaho law, and was initiated specifically to address the parties’ concerns with and/or objections to how water is “counted” or “credited” to the federal on-stream reservoirs in Water District 63 under existing accounting methods and procedures. *Notice* at 1-6. The outcome of this proceeding will not be an award of relief or an order purporting to compel the United States (or any other party) to take action or enjoining it from action. The outcome will be a decision addressing the Director’s exercise of his statutory duty and authority to distribute water in accordance with Idaho law, and concerns and/or objections regarding existing accounting procedures for “counting” or “crediting” water to the federal on-stream reservoirs in Water District 63.

This proceeding therefore provides an opportunity for the parties to receive detailed information on the actual operation of the existing accounting procedures, to specifically identify their concerns with and/or objections to the existing accounting procedures, and to have those concerns and/or objections addressed. *Notice* at 1-6. Clearly, there is a need for this proceeding. The parties have confirmed they do not fully understand the existing accounting system and need further information; they have also asserted they have significant concerns with and/or objections to what they understand the existing accounting procedures to be. *See, e.g., Boise Project Board Of Control Initial Statement Of Issues* (Dec. 4, 2013); *Statement Of Ditch Companies Pursuant To The Notice Of Contested Case For Reservoirs in Water District 63* (Dec. 4, 2013); *Pioneer Irrigation District’s Statement Of Concern* (Dec. 4, 2013); *Farmers Union Ditch Company, Ltd. Statement Of Concern And Objection To Accounting Method* (Dec. 4, 2013). A number of the same parties challenged the existing accounting procedures in the district court and Idaho Supreme Court proceedings on Basin-Wide Issue 17, but the courts declined to resolve the parties’ concerns, holding that the Director has statutory authority to resolve water distribution questions. *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800.

The Director has not required that any party participate in this contested case. The Director must distribute water in accordance with Idaho law, however, regardless of whether the United States or any other party declines to participate. The Director has a statutory duty to distribute water regardless of parties’ participation in this proceeding. *See In re SRBA*, 157 Idaho at 393, 336 P.3d at 800 (holding that the Idaho Code imposes upon the Director “a ‘clear legal duty’ to distribute water” in accordance with Idaho law) (citation omitted); *Cover Letter* (“Your participation is not mandatory but any decision made in the proceedings will be binding upon all water users that received notice of this proceeding”). The Director’s statutory duty to distribute water in accordance with Idaho law, and the exercise of his statutory authority and discretion in performing that duty, are not contingent upon the consent of the United States, or its participation in this contested case. Assertions that the United States is “an essential party” to this proceeding are therefore incorrect. *See New York Irrigation District’s Joinder* at 1 (asserting “the United States of America” is “an essential party”).

The McCarran Amendment does not alter this conclusion because it simply waives the sovereign immunity of the United States when it is “a necessary party.” 43 U.S.C. § 666(a). The

United States is “a necessary party” under the McCarran Amendment only if the proceeding is an action “against the sovereign.” In *Dugan*, the Supreme Court’s first decision interpreting the McCarran Amendment, the Court discussed the standards for determining whether a suit is “against” the United States for sovereign immunity purposes.

The general rule is that a suit is against the sovereign if “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration” . . . or if the effect of the judgment would be “to restrain the Government from acting, or to compel it to act.”

Dugan, 372 U.S. at 620 (citations omitted). As previously discussed, the object of this contested case is the Director’s performance of his statutory duty to direct and control the distribution of water in accordance with Idaho law, specifically with regard to existing accounting methods and procedures applicable to the federal on-stream reservoirs in Water District 63. The Director in distributing water does not and may not determine the water rights of appropriators; rather he must distribute water in accordance with licensed and decreed water rights. *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800. Further, the Director’s decision in this proceeding will not “expend itself on the public treasury or domain, or interfere with the public administration,” and will not have the effect of “restrain[ing] the Government from acting” or “compel[ing] it to act.” *Dugan*, 372 U.S. at 620. This contested case, therefore, is not an action “against the sovereign” for purposes of the McCarran Amendment, *id.*, and thus, the United States is not “a necessary party.” See *Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 37, 607 P.2d 1084, 1091 (1980) (“it is not necessary for H.U.D. to be a party since no relief need be granted against it to resolve this case”); *Taylor v. Lytle*, 26 Idaho 97, 141 P. 92, 94 (1914) (“A ‘necessary party’ is universally held to be one without whom the cause cannot proceed to final determination”).

3. The McCarran Amendment does not require that water be distributed by filing lawsuits against the United States.

The parties’ McCarran Amendment arguments (and the United States’ letter) presume the McCarran Amendment is more than simply a waiver of sovereign immunity, i.e., that it also affirmatively requires state law to implement the distribution of water only through judicial proceedings that qualify as “suits” under the McCarran Amendment. No such requirement appears in the plan language of the McCarran Amendment, however. 43 U.S.C. § 666. Indeed, the federal court cited in the United States’ letter rejected the argument that the McCarran Amendment affirmatively establishes “the exclusive avenue of review for water rights disputes involving the United States.” *South Delta Water Agency v. U.S. Dep’t of Interior*, 767 F.2d 531, 541 (9th Cir. 1985). The federal court held, rather, that the McCarran Amendment “was a response to particular state court water rights suits . . . not an attempt to resolve the whole field of water rights litigation.” *Id.* at 542. The intent of the McCarran Amendment was limited. See Senate Report No. 755, *supra*, at 9 (attaching a letter from Senator McCarran to Senator Magnuson that explained the legislation “is not intended to be used for any purpose other than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.”). Further, interpreting the McCarran Amendment as requiring the Director to distribute water to federal reservoirs only by filing a lawsuit against the United States conflicts with the directive in Section 8 of the 1902 Reclamation Act that the United States must “proceed in conformity” with state laws “relating to the control,

appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder.” 43 U.S.C. § 383. The McCarran Amendment, however, was intended to expand rather than limit the scope and effect of Section 8 of the 1902 Reclamation Act. The legislative history of the McCarran Amendment confirms that the United States’ prior assertions of sovereign immunity in state water right adjudications was viewed as contrary to the intent of Section 8 of the 1902 Reclamation Act, and the McCarran Amendment was enacted in large part to remedy “the evils” of this practice. Senate Report No. 755, *supra*, at 2-5. Consistent with this history, the United States Supreme Court in *United States v. Idaho* rejected an interpretation of the McCarran Amendment that would have allowed the United States “to argue for a special federal rule defeating established state-law rules We do not believe that Congress intended to create such a legal no-man’s land in enacting the McCarran Amendment.” 508 U.S. at 7.

C. This proceeding qualifies as a contested case under the Department’s rules of procedure.

The Department’s rule of procedure 104 (“Rule 104”) provides, in relevant part:

Formal proceedings, which are governed by rules of procedure other than Rules 100 through 103, must be initiated by a document (generally a notice, order or complaint if initiated by the agency) or another pleading listed in Rules 210 through 280 if initiated by another person. Formal proceedings 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 whom the correspondence is addressed, provided that the document complies with the requirements of Rules 210 through 280.

IDAPA 37.01.01.104. The Boise Project and Districts imply this proceeding does not qualify as a contested case under Rule 104 because “there is no informal determination that will become final in the absence of further action.” *Motion to Dismiss* at 10. However, use of the word “may” in Rule 104 indicates that, while formal proceedings may be initiated by a document from the agency indicating the agency has reached an informal determination that will become final in the absence of further action, such action is not required. Rather, Rule 104 only requires that formal proceedings “must be initiated by a document” and allows that document to be a notice by the agency.

The Director’s Cover Letter states:

The [Department] is serving you with the enclosed document because you are a holder of a water right describing a point of diversion within Water District 63 (Boise River). Water users in Water District 63 recently raised some concerns about how current water right accounting processes determine when a storage water right is filled. The original concerns were raised by holders of rights to water stored in the federally owned on-stream storage reservoirs. Some of the issues are now before the Department for determination.

The Department has decided to commence a formal proceeding to address the concerns about how the water right accounting determines when a storage water right is filled. If you wish to participate in the formal proceeding, please attend

the status conference as noticed in the enclosed document. Your participation is not mandatory but any decision made in the proceeding will be binding upon all water users that received notice of this proceeding.

The Notice explains that the Director “concludes it is necessary to initiate contested cases for the purpose of resolving objections to the existing accounting processes for the distribution of water to the on-stream reservoirs in [Water District 63].” *Notice* at 1. The Director’s Cover Letter and Notice constitute an appropriate “notice” of formal proceedings as required by Rule 104. This proceeding qualifies as a contested case under the Department’s rules of procedure.

II. Motions filed by the Ditch Companies

This order will address the following motions set forth in the Ditch Companies’ Pre-Hearing Motions: 1) motion for reconsideration, 2) motion to dismiss/stay, and 3) motion to further define the issue addressed in this contested case.⁹

A. Motion for Reconsideration

As stated above, on October 2, 2014, the Ditch Companies filed with the Department a *Motion to Disqualify*. On October 3, 2014, the Director issued the *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer* which denied the Ditch Companies’ motion and established the Director will be the presiding officer in this contested case proceeding. The Ditch Companies now move for reconsideration of their *Motion to Disqualify*. *Pre-Hearing Motions* at 2.

Pursuant to Rule 711 of the Department’s rules of procedure, the Director may review his interlocutory *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer* upon petition by any party or person affected by the order. In support of their motion for reconsideration, the Ditch Companies assert that “the Director and/or his predecessor has appointed independent hearing officers in other contested cases,” and the Director should “appoint an independent hearing officer even if said hearing officer can only issue a

⁹ The Ditch Companies also “move the Director to disclose any and all ex parte communications . . . between the date this Contested Case was initiated, October 22, 2013 and [October 28, 2014].” *Pre-Hearing Motions* at 4. This motion will be addressed in the separate order which will address the *Boise Project Board of Control’s Request for Disclosure of Ex Parte Contacts and Prior Statements by the Director and Staff Concerning the Issue of Storage Accounting*. The Ditch Companies also request that the Director modify the scheduling order. *Id.* at 9-11. This motion was addressed by an *Amended Scheduling Order* issued by the Director on November 20, 2014, and need not be addressed here. The City of Boise joined in the Ditch Companies’ motion to dismiss/stay, motion to further define the issue addressed in this contested case, and motion to modify scheduling order. *City of Boise’s Joinder* at 1. The New York Irrigation District joined in all motions filed by the Ditch Companies and requested dismissal of this contested case “based upon the failure of the Department and Director to have jurisdiction over the United States of America, a necessary and essential party.” *New York Irrigation District’s Joinder* at 3. Pioneer Irrigation District joined in all motions filed by the Ditch Companies and also requested this proceeding be dismissed for the Department’s failure to join the United States as a party. *Pioneer Irrigation District’s Joinder* at 1-2. The Director disagrees that the United States is a necessary party for reasons set forth in section I.B of this order in response to arguments advanced by the Boise Project and Districts. Accordingly, the Director will deny motions by the New York and Pioneer Irrigation Districts to dismiss this contested case.

recommended or preliminary order which is reviewed by the Director.” *Pre-Hearing Motions* at 2-3. The Ditch Companies also assert that, because the Director has been involved in discussions regarding issues that may be presented in this contested case proceeding, an independent hearing officer should be appointed. *Id.* at 3.

The Director has reviewed and considered the Ditch Companies’ motion for reconsideration. The fact that independent hearing officers have been appointed in other contested cases does not mandate appointment of an independent hearing officer in this proceeding. For reasons set forth in the *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer*, the Director declines to rescind, alter, or amend that interlocutory order and will deny the Ditch Companies’ motion for reconsideration.

B. Motion to Dismiss/Stay

Late claims filed by the Bureau and Boise Project are currently pending before the SRBA Court. The Ditch Companies state:

In short, the issue which the Idaho Supreme Court and SRBA Court defined as the more important issue, “whether water released for flood control purposes counts toward the initial fill of a water right”, is before the SRBA Court as part of the late claims. The SRBA Court has not indicated whether and how it will address the issue but until and if the SRBA Court declines to address the issue the Director should not proceed with his own contested case on the very same issue.

Pre-Hearing Motions at 5. The Ditch Companies conclude the Director should dismiss or stay this contested case proceeding “until resolution of the late claims by the SRBA Court.”¹⁰ *Id.* at 6.

The Ditch Companies are incorrect that the issue of whether water released for flood control purposes counts toward the initial fill of a water right is before the SRBA Court as part of the late claims. Rather, this issue is squarely before the Director as the Idaho Supreme Court recently explained in the case involving Basin-Wide Issue No. 17. *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800. That decision affirms the Director’s authority to determine how water is counted or credited toward the fill of a water right. *Id.* Accordingly, the question of whether flood control releases count towards the fill of a water right is for the Director to answer. This question is not before the SRBA Court as part of late claims filed by the Bureau or Boise Project. The Director will not dismiss or stay this contested case proceeding.

C. Motion to Further Define Issues

The Ditch Companies assert the question of “whether water released for flood control purposes counts toward the initial fill of a water right” is the question that must be addressed in this contested case “as a prerequisite to any consideration of how to account for storage and distribution of water from and through Boise River reservoirs.” *Pre-Hearing Motions* at 9.

¹⁰ The Ditch Companies also argue the contested case should be dismissed because the Bureau will not be bound by orders issued in this contested case proceeding. *Pre-Hearing Motions* at 6-8. The Director disagrees for reasons set forth in section I.B of this order in response to arguments advanced by the Boise Project and Districts.

In the Notice, the Director defined the issue for hearing as:

TO ADDRESS AND RESOLVE CONCERNS WITH AND/OR OBJECTIONS
TO HOW WATER IS COUNTED OR CREDITED TOWARD THE FILL OF
WATER RIGHTS FOR THE FEDERAL ON-STREAM RESERVOIRS
PURSUANT TO EXISTING PROCEDURES OF ACCOUNTING IN
WATERDISTRICT 63

Notice at 6. In the Scheduling Order, the Director noted that, “[a]t the October 7, 2014, status conference, a request was made for the Director to modify the scope of the proceeding to only address whether flood control releases count against a storage water right.” *Scheduling Order* at 3. The Director declined to modify the scope of this contested case at that time. *Id.* The Director concluded that the question of how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs is the key question to be resolved and is the question that will be addressed in this contested case proceeding. *Id.*

The Ditch Companies are incorrect that the question of whether water released for flood control purposes counts toward the initial fill of a water right must be answered as a prerequisite to any consideration of how to account for storage and distribution of water from and through Boise River reservoirs. The question as framed by the Ditch Companies can only be answered after answering the question of *how* water is counted toward the initial fill of water rights for the federal on-stream reservoirs under existing accounting procedures. The Director will not modify the scope of this contested case proceeding as defined in the Scheduling Order.

ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED that the Boise Project and Districts’ Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED that the Ditch Companies’ motion for reconsideration, motion to dismiss/stay, and motion to further define the issue addressed in this contested case are DENIED.

IT IS FURTHER ORDERED that motions filed by the New York Irrigation District and Pioneer Irrigation District to dismiss this contested case proceeding are DENIED.

Dated this 16th day of December 2014.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of December 2014, I served the foregoing *Order Denying Pre-Hearing Motions* to the following and by the method indicated below:

<p>Erika E. Malmén PERKINS COIE LLP 1111 West Jefferson St., Ste 500 Boise, ID 83702-5391 emalmen@perkinscoie.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Peter R. Anderson TROUT UNLIMITED 910 W. Main St., Ste 342 Boise, ID 83702 panderson@tu.org</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Scott L. Campbell Andrew J. Waldera MOFFATT THOMAS BARRETT ROCK & FIELDS, CHRTD P.O. Box 829 Boise, ID 83701 slc@moffatt.com ajw@moffatt.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>David Gehlert, Esq. U.S. Dept. of Justice Denver Field Office 999 18th Street, South Terrace Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>James C. Tucker, Esq. Idaho Power Company P.O. Box 70 Boise, ID 83702 jamestucker@idahopower.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Daniel V. Steenson S. Bryce Farris Sawtooth Law Offices, PLLC P.O. Box 7985 Boise, ID 83707 dan@sawtoothlaw.com bryce@sawtoothlaw.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Albert P. Barker Shelley M. Davis BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701-2139 apb@idahowaters.com smd@idahowaters.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Chas. F. McDevitt Dean J. Miller Celeste K. Miller McDEVITT & MILLER, LLP P.O. Box 2564 Boise, ID 83701 chas@mcdevitt-miller.com joe@mcdevitt-miller.com ck@mcdevitt-miller.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Jerry A. Kiser P.O. Box 8389 Boise, ID 83707 jkiser@cableone.net</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON LLP 195 River Vista Place, Ste 204 Twin Falls, Idaho 83301-3029 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, Idaho 83318 wkf@pmt.org</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Rex Barrie Watermaster Water District 63 P.O. Box 767 Star, ID 83669 waterdistrict63@qwestoffice.net</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Ron Shurtleff Watermaster Water District 65 102 N. Main St Payette, ID 83661</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<p>Michael P. Lawrence Givens Pursley P.O. Box 2720 Boise, ID 83701-2720 mpl@givenspursley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Bruce Smith Moore Smith 950 W. Bannock St. Ste 520 Boise, ID 83702-5716 bms@msbtlaw.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email



Deborah J. Gibson
Administrative Assistant for the Director
Idaho Department of Water Resources