

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

IN THE MATTER OF ACCOUNTING)	RESPONSE TO BOISE PROJECT
FOR DISTRIBUTION OF WATER)	BOARD OF CONTROL’S
TO THE FEDERAL ON-STREAM)	DOCUMENT REQUEST AND
RESERVOIRS IN WATER)	REQUESTS FOR DISCLOSURE
DISTRICT 63)	
_____)	

BACKGROUND

The Director (“Director”) of the Idaho Department of Water Resources (“Department”) initiated this contested case “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 Water District 63.” *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference* (Oct. 24, 2013) (“Notice”), at 6. The Director concluded it is necessary

...to develop formal administrative records fully documenting: (1) how and why water is “counted” or “credited” to the water rights for reservoirs pursuant to the existing accounting methods and procedures; (2) the origin, adoption, and development of the existing accounting methods and procedures in; and (3) appropriate changes, if any to the existing procedures as they may relate to federal flood control operations.

Id. at 5.

The Director requested a memorandum from staff (“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.” *Order Lifting Stay and Notice of Status Conference* (Sep. 10, 2014), at 2; *Scheduling Order; Notice of Hearing; Order Authorizing Discovery* (Oct. 15, 2014) (“Scheduling Order”), at 2. The Director also stated the Department would “provide an overview of the documents the Department believes are relevant to this proceeding and will explain how the documents may be reviewed,” and that “[i]f parties wish to serve additional document requests upon the Department, they may submit requests.” *Scheduling Order* at 2. The Director ordered that the Staff Memo was due on November 4, 2014. *Id.* at 1.

On October 28, 2014, the Boise Project Board of Control (“Boise Project”) filed with the Department *Boise Project Board of Control’s Document Request* (“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* (“Disclosure Request”). The Department also received *Pre-Hearing Motions Submitted by the Ditch Companies*¹ (“Pre-Hearing Motions”); *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”).

The Staff Memo and accompanying document overview (“Document Overview”) were issued on November 4, 2014.² The Document Overview identified categories of documents “that may be relevant to this proceeding” but also stated it was “not intended to restrict the parties to these documents.” *Document Overview* at 1. The Document Overview explained the documents may be reviewed online via the websites of the Department and the Snake River Basin Adjudication (“SRBA”), and/or in hard copy form at the Department’s state office in Boise and/or the Water District 63 office in Star. *Id.* at 1-2. The Document Overview also stated that additional documents would be made available for review online, *Document Overview* at 2, and many documents have been posted on the Department’s webpage for this proceeding.

BOISE PROJECT’S DOCUMENT REQUEST

Prior to issuance of the Staff Memo and Document Overview, the Boise Project filed a document request asserting certain documents “should clearly be included” in the then-pending Document Overview. *Document Request* at 2. The Boise Project also requested that the Department “produce and provide references to” certain other documents described in thirteen enumerated paragraphs. *Id.* at 2-4.

The documents identified in the Document Overview include many of the documents requested by the Boise Project; many of these documents are and have been available for online review on the Department’s “Water Right Research” webpage and on the SRBA website. *Document Overview* at 1-2. The Department has posted many other documents on the webpage for this proceeding. *See id.* at 2 (“The Department has copies of some of these documents and will make these copies available on the Department’s website.”).

¹ The ditch companies represented by this filing and collectively referred to herein as “Ditch Companies” are 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.

² These documents are available for review on the Department’s webpage for this proceeding, “Water District 63 Contested Case.” *See* <http://www.idwr.idaho.gov/news/issues/WD63/default.htm>.

Some of the documents described in the Document Request were not included in the Document Overview, and/or were not posted on the webpage for this proceeding. The Department recognizes the Boise Project (and other parties) may wish to introduce additional documents into the record and has not limited this proceeding to documents described in the Document Overview. *See Document Overview* at 1 (“This listing is not intended to restrict the parties to these documents but rather to notify the parties of potentially relevant documents.”). The Department also notified the parties that files of the Department and Water District 63 are and have been open to review and inspection for purposes of identifying any additional documents the parties may deem relevant. *See, e.g., Status Conference Audio* (Oct. 7, 2014)³; *Document Request* at 1 (“What the Department currently believes is relevant and what the other parties may believe are relevant may turn out to be very different things.”).

I. Response Regarding the Document Overview.

The Boise Project identified four categories of documents it asserted “should clearly be included” in the then-pending Document Overview. *Document Request* at 2. Each category is discussed below.

While some documents encompassed by the Boise Project’s four categories were not included in the Document Overview, “relevant” documents are not limited to those identified in the Document Overview. *See Document Overview* at 1 (“This listing is not intended to restrict the parties to these documents”). The Boise Project (and any other party) may seek to submit into the record additional documents from the files of the Department or Water District 63 that are identified as relevant.

1. “Department’s 1974 Flood Report, including all communications between the Department, the Governor’s office, the Bureau of Reclamation, and the Corps of Engineers.” *Document Request* at 2.

Presumably the “Department’s 1974 Flood Report” referenced by the Boise Project is the Department’s “Review of Boise River Flood Control Management,” dated November 1974. The Department has made this document available for review on the webpage for this proceeding. No communications pertaining to this document were identified in the Department’s review of the water distribution and accounting records for Water District 63.

2. “Communications between the Department, the Bureau of Reclamation, and the Corps on the Boise River Water Control Manual.” *Document Request* at 2.

Presumably the “Boise River Water Control Manual” referenced by the Boise Project is the Corps of Engineers’ “Water Control Manual for Boise River Reservoirs” (Apr. 1985). The Department has made this document available for review. One

³ The Department requests that parties wishing to review and inspect its files and/or those of Water District 63 make an appointment so any file review and inspection can be arranged. Please contact Kimi White by electronic mail at kimi.white@idwr.idaho.gov.

“communication” pertaining to this document was identified in the Department’s review of the water distribution and accounting records for Water District 63, and this document has been posted on the webpage for this proceeding (“Letter from IDWR to the US Army Corps of Engineers – April 2, 1981.”).

3. “Documents concerning the Department and Water Board’s determinations that the Boise River is fully appropriated.” *Document Request* at 2.

While the Department is unsure of the particulars of the referenced “determinations that the Boise River is fully appropriated,” the records available for online review on the Department and SRBA websites may contain such documents. Moratorium Orders related to Basin 63 can be found on the Department’s webpage.⁴ Application processing memos related to Basin 63 can be found on the Department’s Basin 63 contested case webpage. The files of the Department (which includes files of the Idaho Water Resource Board) and Water District 63 are also open to review and inspection for purposes of identifying such documents. Further, all revisions of the Idaho State Water Plan are available for review on the Department’s website,⁵ as are the comprehensive plans for individual basins.⁶

4. “Documents concerning the basis for provisions for water quantity on the Boise River storage rights, including from the License files pre-dating the SRBA.” *Document Request* at 2.

The Document Overview identified several categories of documents that may include documents “concerning the basis for provisions for water quantity on the Boise River storage rights, including from the License files pre-dating the SRBA,” including but not limited to the Department’s water right files, and SRBA claims, recommendations, partial decrees, etc. Many or most of these documents are available for review online. The files of the Department are also open to review and inspection for purposes of identifying such documents.

II. Responses to Enumerated Document Requests.

The Boise Project also requested that the Department “produce and provide references to” certain other documents described in thirteen enumerated paragraphs. *Document Request* at 2-4. The Department’s responses are provided below. As discussed above, the Department previously notified the parties that files of the Department and Water District 63 have been and remain open for review and inspection

⁴ The URL for the moratorium order webpage is:
http://www.idwr.idaho.gov/WaterManagement/orders/Moratorium/orders_moratorium.htm.

⁵ The URL for the “State Water Plan” webpage is:
http://www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/State_Planning.htm.

⁶ The URL for the “Comprehensive Basin Planning” webpage is:
http://www.idwr.idaho.gov/waterboard/WaterPlanning/CompBasinPlanning/Comp_Basin_Plans.htm.

by the parties for purposes of identifying documents they may consider relevant to these requests and this proceeding.

Document Request No. 1: “[Documents concerning] [h]istoric releases of water for flood control and reservoir fill following flood control at the three on-river reservoirs on the Boise River, from the first year of operations of Arrowrock in 1916 to the most recent water year, 2014.” *Document Request* at 2.

Response to Document Request No. 1: The Department is not aware of a standard or accepted definition of what constitutes a flood control release from the federal on-stream reservoirs on the Boise River. Flood control operations at these reservoirs are governed by federal statutes, regulations, manuals, and contracts as interpreted and applied by federal agencies (the Corps of Engineers and the Bureau of Reclamation), and these agencies have not provided the Department with clear or consistent definitions or standards for determining when water has been or is being released for flood control purposes. Further, while this request implies that reservoir fill occurs after flood control operations have ended (“following flood control”) (underlining added), the filling or refilling of space vacated for flood control purposes in the Boise River reservoirs is a part of federal flood control operations.⁷ In response to this request, the Department refers to the documents identified by the Document Overview, many of which are available for review online and/or are available for review in hard copy.⁸ The Department also provides below references to the following documents available for review on the webpage for this proceeding:

- The documents posted under “Federal Documents” and “Depositions” on the webpage for this proceeding
- “Letter from Boise Project Board of Control to IDWR – September 11, 2013”
- “Letter from US Bureau of Reclamation to IDWR – July 22, 2013”
- “Letter from IDWR to Boise Project Board of Control – May 1, 2013”
- “Letter from Boise Project Board of Control to IDWR – April 15, 2013”
- “2008 Boise Water Right Accounting (binder)” “Affidavit of Robert J. Sutter – February 12, 2008” (“*Sutter Aff.*”)
- “2007 Boise Water Right Accounting (binder)”
- “2002 Boise Water Right Accounting (binder)”
- “Letter from IDWR to Boise Project Board of Control – February 2, 1993”
- “1986-1996 Boise River Water Accounting (binder)”
- “Water Delivery Accounting Boise River WD-63 – February 4, 1987”
- “Memorandum of Understanding for Confirmation, Ratification, and Adoption of Water Control Manual: Boise River Reservoirs, Boise River, Idaho – September 25, 1985”

⁷ “Flood control regulation during the refill period (1 April through 31 July) requires the use of snowmelt runoff to refill flood control spaces within the Boise River reservoirs.” *Water Control Manual for Boise River Reservoirs* at 7-11. The vacated reservoir space that fills (or refills) following flood control releases is defined as “flood control space.” *Id.*, Plates 7-1, 7-2, 7-3, and 7-5.

⁸ The Staff Memo also addresses the subject matter of this request.

- “Letter from IDWR to US Bureau of Reclamation – May 19, 1982”
- “IDWR File Memo: Boise River Reservoir Fill and Stored Water Use, and US Bureau of Reclamation Memo: New Method Adopted for Allocation of Boise System Storage – January 23, 1981 and May 3, 1981”
- “IDWR File Notes: Boise River Reservoir Fill – approximately 1981”
- “Boise River Accounting Programs (binder)”
- “Boise River Accounting-General (binder)”
- “Memorandum Re. New Method Adopted for Allocation of Boise System Storage – May 3, 1977”
- “Review of Boise River Flood Control Management – November 1974”
- “Memorandum of Agreement between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs, Idaho – November 20, 1953”
- “Letter from US Office of the Chief of Engineers to the Secretary of the Interior – May 13, 1946”
- “Letter from US Office of the Chief of Engineers to the Chairman of the Committee on Commerce – May 13, 1946”
- “Idaho Reclamation News – June 1, 1945”
- “Letter from the Secretary of the Interior to the President – June 25, 1940”
- “Letter from US Bureau of Reclamation to Secretary of the Interior – June 24, 1940.”

Document Request No. 2: “Documents describing the legal basis for the Department’s determinations of how water should be accounted for in the accounting program.” *Document Request* at 2.

Response to Document Request No. 2: With respect to the Boise Project’s reference to “the accounting program,” two computer programs are used to facilitate water accounting activities in Water District 63: one program accounts for distributions of natural flow and uses of storage water; the other determines federal contractors’ annual storage allocations and the amounts of their season-end storage carryover.⁹ Regarding the “legal basis” for the accounting, the prior appropriation doctrine as established by Idaho law provides the “legal basis” for the watermaster as supervised by the Director to make water accounting determinations. *See, e.g.,* Idaho Code, Title 42, chapters 6 & 8; *In re SRBA*, 157 Idaho 385, 336 P.3d 792 (2014). The Department also provides below references to the following documents available for review on the webpage for this proceeding¹⁰:

- “Letter from IDWR to the US Army Corps of Engineers – April 2, 1981”
- “IDWR File Notes: Boise River Reservoir Fill – March 3, 1981”
- “IDWR File Notes: Boise River Reservoir Fill – approximately 1981”

⁹ *See Staff Memo* at 2, 10-11; *Affidavit of Robert J. Sutter, Subcase No. 63-3618*.

¹⁰ The Staff Memo also addresses the subject matter of this request.

- “Boise River Accounting-General (binder)”
- “Review of Boise River Flood Control Management – November 1974”
- “Memorandum of Agreement between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs, Idaho – November 20, 1953”
- “Summary Judgment Motion, Subcase 63-3618 – June 19, 2008”
- “Description of Bureau of Reclamation System Operation of the Boise and Payette Rivers – November 1996, revised December 1997”
- “Water Control Manual for Boise River Reservoirs – April 1985”

Document Request No. 3: “All communications between the Department and Reclamation or any space holders in the Boise concerning the Department’s accounting program.” *Document Request* at 2.

Response to Document Request No. 3: To the extent this request seeks “communications . . . concerning” the two computer programs used to facilitate water accounting activities in Water District 63, most such communications have been informal and/or have not been documented/recorded.¹¹ The Department also provides below references to the following documents available for review on the webpage for this proceeding:

- “Letter from US Bureau of Reclamation to IDWR – July 22, 2013”
- “Letter from IDWR to Boise Project Board of Control – May 1, 2013”
- “Letter from US Bureau of Reclamation to Settlers Irrigation District – July 19, 1995”
- “Letter from IDWR to Boise Project Board of Control – February 2, 1993”
- “1986 WD63 Watermaster Report, page 1 – 1986”

Document Request No. 4: “All documents concerning the legal and factual basis for storage in the reservoirs and allocation to storage accounts on the day of allocation following flood control releases in the Boise River.” *Document Request* at 2.

Response to Document Request No. 4: There are potentially a great many documents that “concern” the “legal and factual basis for storage in the reservoirs” and/or “allocation to storage accounts.” The Department refers the Boise Project to documents identified in the Staff Memo and the Document Overview and posted on the webpage for this proceeding.

Document Request No. 5: “All documents explaining the extent to which the accounting program developed in Basin 01 was incorporated into the accounting program in Basin 63.” *Document Request* at 3.

¹¹ See, e.g., *Deposition of Robert J. Sutter, Vol. I, Subcase No. 63-3618 (Lucky Peak Reservoir)* (Mar. 28, 2008), at 55-66; *Deposition of Jerrold D. Gregg, Vols. I & II, Subcase No. 63-3618 (Lucky Peak Reservoir)* (Jan. 30-31, 2008), at 102.

Response to Document Request No. 5: The Department refers the Boise Project to the following documents which are available for review on the webpage for this proceeding: “Water Delivery Accounting Boise River WD-63 – February 4, 1987,” “*Deposition of Robert J. Sutter (Volume I)* – March 28, 2008,” and “*Deposition of Robert J. Sutter (Volume II)* – April 16, 2008.”¹²

Document Request No. 6: “All documents indicating efforts by the Department to explain the Basin 63 accounting program, including how water is allocated to storage accounts.” *Document Request* at 3.

Response to Document Request No. 6: Most communications between and among the Department, the Watermaster, the Bureau of Reclamation, and spaceholders pertaining to water accounting in Water District 63 since 1986, including the allocation of storage water to spaceholder accounts, have been informal and/or have not been documented or recorded. The Department provides below references to letters responding to accounting concerns expressed by the Boise Project, which are available for review on the webpage for this proceeding:

- “Letter from IDWR to Boise Project Board of Control – May 1, 2013”
- “Letter from IDWR to Boise Project Board of Control – February 2, 1993”

Document Request No. 7: “All communications from the Department to the Idaho Water Resources Board concerning each of the moratoria on granting new water rights in Basin 63 and the determination that the Boise River above Lucky Peak Dam is fully appropriated.”

Response to Document Request No. 7: No communications referencing water right “moratoria” or “full appropriation” of the Boise River above Lucky Peak Dam were identified in the Department’s review of the water distribution and accounting records for Water District 63.

Document Request No. 8: “All documents describing the mitigation required of applicants for new water rights on the Boise River subsequent to the Basin 63 moratoria.” *Document Request* at 3.

Response to Document Request No. 8: The Department refers the Boise Project to Application Processing Memo No. 59.

Document Request No. 9: “All documents related to the Department’s review of flood control rule curves in Basin 63, whether based on the Boise River Water Control Manual or otherwise.” *Document Request* at 3.

¹² The Staff Memo also addresses the subject matter of this request.

Response to Document Request No. 9: The Department refers the Boise Project to the 1974 report entitled “Review of Boise River Flood Control Management” and the 1985 “Water Control Manual for Boise River Reservoirs.”

Document Request No. 10: “All documents related to the Department’s conclusion in 1974 that inadequate flood control releases were being made from the Boise River reservoirs by the Bureau of Reclamation and/or the Corps of Engineers, including any analysis of the consequences changing the flood control rule curves on physical fill of the reservoirs following flood control.” *Document Request* at 3.

Response to Document Request No. 10: The Department refers the Boise Project to the 1974 report entitled “Review of Boise River Flood Control Management” and the 1985 “Water Control Manual for Boise River Reservoirs.”

Document Request No. 11: “All documents indicating the legal process by which the water accounting rules for Basin 63 were adopted, including all provisions of law, administrative procedure, rules or regulations were followed to adopt the accounting program in Basin 63.” *Document Request* at 3.

Response to Document Request No. 11: The Department refers the Boise Project to responses to requests nos. 3, 5, and 6 (above).

Document Request No. 12: “All documents, including all attorney generals’ opinions or legal opinions, concerning the process by which the accounting program is to be adopted.” *Document Request* at 3.

Response to Document Request No. 12: The reference to an accounting program(s) “to be adopted” is factually incorrect because this proceeding was initiated to address and resolve concerns with and/or objections to certain “existing procedures of accounting” in Water District 63, *Notice* at 6, not to adopt an “accounting program.” The documents concerning the process in this proceeding are orders issued by the Director that are available for review on the webpage for this proceeding.

Document Request No. 13: “All communications to or from the water master in Basin 63 concerning appropriate conditions to place on water rights applied for in Basin 63 junior to the storage rights in Basin 63.” *Document Request* at 4.

Response to Document Request No. 13: No communications responsive to this request were identified in the Department’s review of the water distribution and accounting records for Water District 63.

REQUESTS FOR DISCLOSURE

Boise Project “formally requests that the Director disclose all statements that the Director and the Attorney General’s office have made in public or private concerning” 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 Water District 63. *Disclosure*

Request at 2. Boise Project asserts having these statements “is constitutionally necessary for the [Boise Project] to ensure that these issues are heard by an impartial hearing officer. . . .” *Id.* at 3.

Boise Project also “requests that the Director disclose all ex parte contacts, including the substance of those contacts, made to him by any person or entity, including any legislator, legislative group, and any other representative of the government of the State of Idaho concerning the issue of storage fill.” *Id.* In their Pre-Hearing Motions, the Ditch Companies move the Director to disclose “all ex parte communications. . . in writing or in person with other parties (or those participating) to this Contested Case, Legislators or non-parties. This *Motion* also requests any and all discussions with the State of Idaho and Attorney General’s Office which are not representing the Director or [Department].” *Pre-Hearing Motions* at 4. The New York Irrigation District and Pioneer Irrigation District joined the Ditch Companies in this motion. *New York Irrigation District’s Joinder* at 1; *Pioneer Irrigation District’s Joinder* at 1.

These disclosure requests suggest it is improper for the Director to make public statements concerning issues to be addressed in this proceeding. However, as the Director explained in his October 3, 2014, *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer* at 6, “[a] decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances.” *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 208, 220 P.3d 318, 326 (2009) (quotations omitted); see *Louisiana Ass’n of Indep. Producers & Royalty Owners v. F.E.R.C.*, 958 F.2d 1101, 1113 (D.C. Cir. 1992) (“Agency officials may meet with members of the industry both to facilitate settlement and to maintain the agency’s knowledge of the industry it regulates . . . such informal contacts between agencies and the public are the ‘bread and butter’ of the process of administration and are completely appropriate as they do not frustrate judicial review or raise serious questions of fairness.” (quotations and citations omitted); see also *Ass’n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1154 (D.C. Cir. 1979) (“An agency member may be disqualified from such a proceeding only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking.”); see also *PLMRS Narrowband Corp. v. F.C.C.*, 182 F.3d 995, 1002 (D.C. Cir. 1999) (“In order to avoid trenching upon the agency’s policy prerogatives, therefore, we presume that policymakers approach their quasi-legislative task of rulemaking with an open mind—but not an empty one.”); see also *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1179 (D.C.Cir.1980) (“Agency decision makers are appointed precisely to implement statutory programs, and so inevitably have some policy preconceptions”); see also *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C.Cir.1980) (“An administrative official is presumed to be objective [and] mere proof that [he or] she has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption”). The Director is the executive within the State of Idaho vested with the statutory authority to oversee water right distribution within the state of Idaho. Idaho Code §§ 42-602 and 42-1701.

As part of this role, it is appropriate for the Director to meet with legislators and other water user groups to keep them apprised of issues related to public concern. The Boise Project is correct that the Director has met with legislators, the Governor's office and water users' groups to keep them apprised of the issues raised in the Water District 63 contested case. However, contrary to the Boise Project's suggestion, there is nothing improper in such meetings. The Director's participation in public discussions and presentations related to this matter has been appropriate.

In addition, the Boise Project and Ditch Companies characterize much of the Director's discussions as ex parte communications. The communications are not in fact ex parte. The Department's Rule of Civil Procedure 417 ("Rule 417") provides, in part:

Unless required for the disposition of a matter specifically authorized by statute to be done ex parte, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the contested case with any party, except upon notice and opportunity for all parties to participate in the communication. The presiding officer may communicate ex parte with a party concerning procedural matters (i.e. scheduling). Ex parte communications from members of the general public not associated with any party are not required to be reported by this rule.


IDAPA 37.01.01.417. As this demonstrates, Rule 417 only requires disclosure of contacts the Director had with parties to this contested case proceeding once the Director became the presiding officer. Furthermore, contacts the Director has had with legislators, legislative groups, representatives of the government of the State of Idaho, or other non-parties are not ex parte communications and do not violate the Idaho Administrative Procedure Act nor the Idaho Constitution.

The above discussion was included to address mischaracterizations and misstatements of law made by the Boise Project and the Ditch Companies. In an exercise of full transparency and notwithstanding the above discussion, the Director will provide non-privileged written documents and communications related to the Basin 63 contested case responsive to the Boise Project's and Ditch Companies' requests. The Director will disclose the documents to parties to this contested case separately from this order. With regards to the Boise Project's request for "all oral communications made by the Director" regarding the Basin 63 contested case to "his staff, legislators, the Governor's office, the Attorney General, deputies attorney general, and other state and local agencies", not only is it not possible to provide such oral communications, it is not necessary. As quoted above, "[a] decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances." *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho at 208, 220 P.3d at 326 (quotations omitted).

The Director commenced this contested case in the interest of hearing the complaints of the water users over water right accounting. The water right accounting procedures had become a source of controversy and litigation. The Bureau of Reclamation and some water users questioned the accounting methodologies and procedures used by Water District 63. For instance, the Bureau of Reclamation and some water users raised this issue in the SRBA proceedings titled “Basin-Wide Issue No. 17.”¹³ Concerns were expressed that the existing accounting methods and procedures are based on “paper fill” but should be based on “physical fill.”¹⁴ 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.”¹⁵ 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.¹⁶

The Director commenced this contested case to give water users the opportunity to explain how the accounting should be done if they believe it should be done differently. The Director asked for “statements of the concerns and/or objections” to the current water right accounting. *Notice* at 6. The Director asked water users to provide “an explanation of the modification they wish to have considered in this proceeding” so the Director could consider the objections fully. *Id.* The Director remains committed to obtaining a full understanding of the objections to the current water right accounting and will provide a full and fair hearing. The Director is fully capable of judging this particular controversy fairly on the basis of its own circumstances.

DATED this 9th day of January 2015.


GARY SPACKMAN
Director

¹³ “Does Idaho law require a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control?” *Order Designating Basin-Wide Issue, In re SRBA, Subcase No. 00-91017* (Sep. 21, 2012), at 7.

¹⁴ “[T]he concept of ‘paper fill’ is a fatally flawed construct” that “impermissibly diminishes real property rights.” *Pioneer Irrigation District’s Opening Brief, In re SRBA, Subcase No. 00-91017* (Dec. 12, 2012) at 9-10.

¹⁵ *Order Designating Basin-Wide Issue, In re SRBA, Subcase No. 00-91017* (Sep. 21, 2012) at 11.

¹⁶ *Id.* at 9.


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January 2015, I served the foregoing document to the following and by the method(s) indicated below:

<p>Erika E. Malmen Perkins Coie, LLP 1111 West Jefferson St., Ste 500 Boise, ID 83702-5391 emalmen@perkinscoie.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, certified, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Peter R. Anderson Trout Unlimited 910 W. Main St., Ste 342 Boise, ID 83702 panderson@tu.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, certified, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<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>	<p><input checked="" type="checkbox"/> U.S. Mail, certified, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<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>	<p><input checked="" type="checkbox"/> U.S. Mail, certified, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>James C. Tucker, Esq. Idaho Power Company P.O. Box 70 Boise, ID 83702 jamestucker@idahopower.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, certified, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>

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