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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

IRRIGATION ENTITIES' JOINT NOTICE OF
ISSUES FOR PRE-HEARING CONFERENCE

COME NOW, the Boise Project Board of Control, New York Irrigation District, Farmers Union Ditch Company, Ltd., and the Ditch Companies (collectively, the "Irrigation Entities"), by and through their undersigned counsel of record and in response to/furtherance of the *Fifth Amended Scheduling Order; Notice of Hearing* (May 20, 2015) and pursuant to Rules of Procedure of the Idaho Department of Water Resources ("Procedure Rules") 52 and 510, and

hereby submit this *Joint Notice of Issues for Pre-Hearing Conference* to promote the orderly conduct and disposition of the above-captioned contested case. The Irrigation Entities deem it necessary for the Presiding Officer to expressly address the issues outlined below in order to avoid inefficiency and waste.

I. PURPOSE OF PRE-HEARING CONFERENCES

Procedure Rule 510 authorizes the Presiding Officer to conduct pre-hearing conferences to, among other things, “formulat[e] or simplify[] the issues . . . arrang[e] for the exchange of proposed exhibits or prepared testimony . . . establish[] procedure at hearings, and address[] other matters that may expedite orderly conduct and disposition of the proceeding.” *Id.*

II. ISSUES REQUIRING CONSIDERATION AND CLARIFICATION

A. Issue to Be Decided:

The Presiding Officer initiated this proceeding to determine “how water is counted or credited toward the fill of water rights” in the federal reservoirs in Basin 63. *See, e.g., Fifth Amended Scheduling Order; Notice of Hearing*, pp. 2-3. The Presiding Officer identified the foregoing as the “key question to be resolved.” *Id.*, p. 3. Further, the Presiding Officer made clear that he would not deviate from this prescribed scope in his Order Denying the Irrigation Entities’ Pre-Hearing Motions, which sought, in part, a determination of whether and to what extent federal flood control operations impact or inform the question of “fill.” *See Order Denying Pre-Hearing Motions*, pp. 14-15.

The Presiding Officer (and by extension, the Idaho Department of Water Resources) in his Notice Initiating Contested Case also called upon Basin 63 water users to raise their “concerns and/or objections” with “how water is counted or credited towards the fill of water rights for the federal on-stream reservoirs” in the basin in light of the “scattered” record of the Department’s accounting procedures. To properly identify their concerns and objections, the

water users must first understand how the Department counts or credits water towards the fill of a water right. Only after that presentation is made, and understanding is gained, can the water users thoughtfully and meaningfully respond to the issues identified by the Presiding Officer for hearing in this matter.

It appears from the Presiding Officer's framing of the issue to be decided, that he intends this proceeding to address and catalogue how the Department "counts or credits" water towards the fill of a storage water right in the federal reservoirs. Thus, it appears that this matter will address the simple mechanics of how the Department counts and credits water through its own, internal accounting program, how numbers are derived, what they represent, and how they are tracked. However, it does not appear that this matter will address the potential legal effect of the administrative accounting process on existing storage water rights (*i.e.*, the legal import of the accounting program numbers/results; whether or how the accounting process comports with the prior appropriation doctrine requirements of Title 42, Chapter 6, Idaho Code; or, as perceived by the Irrigation Entities: whether and to what extent federal flood control operations affect the accrual of water to existing beneficial use storage rights).

Clarification of the scope of this proceeding is therefore requested.

B. Conduct of Hearing—Order of Presentation:

The main purpose of this proceeding as identified by the Presiding Officer is to create a record explaining how water is counted and credited to the federal reservoirs in the basin. Consequently, the Irrigation Entities request that the Department present/proceed first to establish the facts relating to the development and operation of the Basin 63 accounting program (its origins, its operations, and its results). As noted above, only after the accounting mechanism is established can the water users identify their concerns with the same. The Presiding Officer

recognized as much in his *Order Denying Pre-Hearing Motions* (December 16, 2014) at pages 4-5.

The Irrigation Entities request that United Water Idaho, Inc. present its case next given its alignment with the Department's representations concerning the accounting process and positions as demonstrated in its filings both in this matter and in the course of the SRBA Late Claims Subcases (Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734).

The Irrigation Entities request that they proceed after the conclusion of the Department and United Water's presentations.

The Presiding Officer (the Director of the Idaho Department of Water Resources) *sua sponte* initiated this matter. Therefore, it stands to reason that his agency proceed to establish its record first. The Department's initiation of this contested case proceeding, coupled with its apparent desire to issue an order determining or validating the agency's water right accounting process is most analogous to an "Applicant" in this matter under Procedure Rule 151. It then follows that the Irrigation Entities are most analogous to "Protestants" under Procedure Rule 155.

In addition to presentation ordering, the Irrigation Entities seek direction regarding in-hearing schedule, specifically whether the Presiding Office intends for the hearing to commence at 9:00 am and conclude at 5:00 pm on each day identified for hearing, and whether it is intended that lunch breaks be provided each day. The Irrigation Entities also request provision of a separate room where they can meet with witnesses, store exhibits, and otherwise meet during breaks. Additionally, clarification concerning what imaging/display technology will be available for exhibit use is requested.

C. Status of the Administrative Record:

Based on prior orders in this matter, there presently is no formal, existing record on the creation and implementation of the Department's accounting program/process in Basin 63. *See, e.g., Notice of Contested Case and Formal Proceedings, and Notice of Status Conference* (October 22, 2013), p. 3, ¶ 6. The Presiding Officer tasked the Department with preparing a Rule 602 report explaining how and why the Department's current accounting program was developed in Basin 63, which report was received from Liz Cresto on November 4, 2014. *See Order Lifting Stay and Notice of Status Conference* (September 10, 2014); *see also, Technical Memorandum* from Cresto to Spackman, dated November 4, 2014. The Rule 602 report identified only a very limited record in this matter, represented by two documents identified at footnote nos. 7 and 8.

Because there is no preexisting record in this matter, the Irrigation Entities request a determination of what the record in this matter consists under Procedure Rule 650.02. It appears that formal notices, orders, and motions of the parties and the Presiding Officer are part of the record pursuant to Procedure Rule 650.02(a), (b), (c), and (f). It likewise appears that Ms. Cresto's *Technical Memorandum*, dated November 4, 2014, is also part of the record under Procedure Rule 650.02(h). However, it seems that the larger creation of a record in this matter has yet to occur under Procedure Rule 650.02(d) and (e). To the extent the Presiding Officer has taken official notice of anything in this matter for record creation purposes under Procedure Rule 650.02(i), the Irrigation Entities seek formal identification of any such "official notice" requests, and the outcome of those requests (*i.e.*, what documents or items, if any, has the Presiding Officer taken "official notice" of for record purposes?).

The Irrigation Entities submit that it is incumbent on the parties (including the Department) to seek formal admission of those documents, items, and/or testimony that they

desire be part of the record of this matter at hearing so that the same can be formally catalogued and objected to as the parties deem necessary.

D. Exhibit Management and Numbering:

Regarding exhibits, the Presiding Officer made reference to the same under Procedure Rule 606 in his *Fifth Amended Scheduling Order; Notice of Hearing*. See *id.*, p. 2. The Presiding Officer also required that “a copy” of a party’s exhibits “be provided to each party and the presiding officer.” *Id.* The Order, however, did not address medium (paper or electronic) or identification numbering.

The Irrigation Entities suggest that all parties who intend to offer exhibits be assigned prefixes and numbers. For example, the Ditch Companies could be “DC 1 – DC xxxx”; the Boise Project Board of Control could be “BC 1 – xxxx”; and so on. As for medium (paper or electronic), the parties should discuss their preferences during the pre-hearing conference.

E. Stipulated Facts:

Does the Presiding Officer desire the parties to submit lists of stipulated facts?

F. Burden of Proof:

The procedural posture of this proceeding is somewhat unique. It seems from Section II.B., above, that the Department bears the burden of proof regarding the definition, scope, nature, origins, and implementation of its water right accounting program, and that the Irrigation Entities bear the burden of identifying concerns and rebuttal to the extent any exist. The Irrigation Entities request that the Presiding Officer provide guidance concerning which party he believes bears the burden of proof on the issues identified by the Director in the Notice initiating this contested case.

G. Status of the Department in this Proceeding:

In an email dated February 11, 2015, IDWR Deputy Attorney General Garrick Baxter clearly stated that the Department was “not a party” in this proceeding:

The Department is not a party to the contested case proceeding but is the agency with authority to determine the contested case. IDAPA 37.01.01.005.02. As the Department is not a party to the contested case proceeding, the Department is not required to respond to discovery requests but will provide information responsive to the requests as it will be helpful in development of the record in this proceeding.

Subsequently, the Department (under the Presiding Officer’s signature no less) submitted a *Disclosure of Expert Witness for IDWR*, dated June 19, 2015, and an *IDWR Witness, Exhibit, and Document List*, dated July 31, 2015.

If the Department is a party to this proceeding, Procedure Rule 157 limits the agency’s participation to “agency staff” only. Thus, the Irrigation Entities seek identification of what agency staff will be appearing on behalf of the Department and for what purpose.

The Irrigation Entities also seek identification and disclosure of any and all *ex parte* communications between the Presiding Officer (or his identified counsel, Garrick Baxter) and IDWR (including IDWR counsel, whether embedded within the agency itself, or housed in the larger Idaho Attorney General’s Office) under Procedure Rule 417 given the Department’s party status in this proceeding. The Irrigation Entities seek the same with respect to any Presiding Officer (and/or Garrick Baxter) *ex parte* communications with any other party to this proceeding as well.

H. A Stay is Appropriate in this Matter to Avoid Needless Dual Track Litigation:

As the Presiding Officer is aware, the issue regarding what impact, if any, flood control operations/releases have upon the existing federal reservoir storage rights in Basin 63 is currently

before the SRBA Court in Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734. The issue is the subject of cross-motions for summary judgment filed by the Irrigation Entities and the State of Idaho currently pending decision before the SRBA Court. The Irrigation Entities continue to contend that resolution of the flood control impact question is critical to any meaningful consideration and discussion of the Department's water right accounting program. Consequently, proceeding forward with this contested case absent prior decision on the flood control question poses the danger of inconsistent decisions in separate proceedings, and is not judicially efficient.

The Presiding Officer himself announced to water user representatives and Legislative leadership during a meeting held in the House Majority Caucus Room on March 3, 2015, that there were *two available forums* for deciding the water right accounting/flood control impact question: (1) the SRBA Court, under Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734; and (2) this administrative contested case proceeding. There is no question that the "refill" issue was pending before the SRBA Court approximately five months prior to the October 2013 initiation of this proceeding. *Compare, Order Granting Motions to File Late Notice of Claims*; Subcase Nos. 01-10620, *et al.*, — U.S. BOR, dated May 22, 2013, and *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference*, served October 24, 2013.

If the Presiding Officer continues to maintain that federal flood control operations are entirely separate from, and have no bearing upon, the Department's water right accounting program, the Irrigation Entities submit that there is no prejudice to the Department in delaying this proceeding. The Irrigation Entities respectfully submit that dual track litigation is unnecessary and undesirable for all involved, unless a good reason can be articulated. The

Irrigation Entities, therefore, renew their prior motions for stay, and ask that the forthcoming hearing in this matter be vacated and continued to avoid the dual track litigation problem.

I. Preservation of Prior Objections:

The Irrigation Entities, through the submission of this *Joint Notice of Issues for Pre-Hearing Conference*, in no way waive or retract the prior objections and arguments they have raised on the record in this matter. To the contrary, the Irrigation Entities expressly preserve the same, and reserve the right to re-raise those objections and arguments, among others, during the hearing of this matter as they respectively deem appropriate.

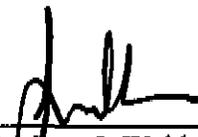
DATED this 13th day of August, 2015.

BARKER ROSHOLT & SIMPSON, LLP

By 
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Attorneys for Boise Project Board
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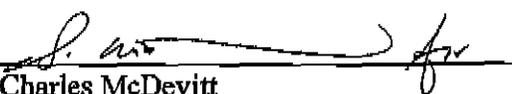
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DATED this 13th day of August, 2015.

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DATED this ____ day of August, 2015.

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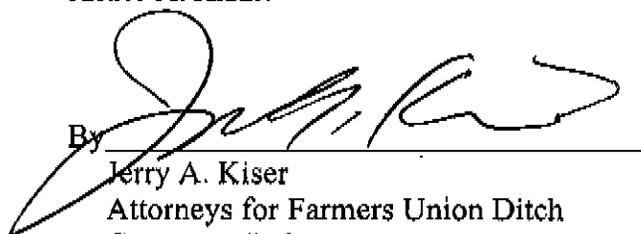
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2015, I caused a true and correct copy of the foregoing **IRRIGATION ENTITIES' JOINT NOTICE OF ISSUES FOR PRE-HEARING CONFERENCE** to be served by the method indicated below, and addressed to the following:

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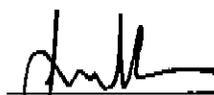
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August 13, 2015

FAX COVER LETTER

RE: In The Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63

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