

Albert P. Barker, ISB #2867  
 Shelley M. Davis, ISB #6788  
**BARKER ROSHOLT & SIMPSON LLP**  
 1010 W. Jefferson St., Ste. 102  
 P.O. Box 2139  
 Boise, ID 83701-2139  
 Telephone: (208) 336-0700  
 Facsimile: (208) 344-6034  
*Attorneys for Boise Project Board of Control*

Charles F. McDevitt, ISB #835  
**MCDEVITT & MILLER, PLLC**  
 420 W. BANNOCK  
 P.O. Box 2564  
 Boise, ID 83701  
 Tel: (208) 343-7500  
 Fax: (208) 336-6912  
*Attorney for New York Irr. Dist.*

Daniel V. Steenson, ISB #4332  
 S. Bryce Farris, ISB #5636  
 Andrew J. Waldera, ISB #6608  
**SAWTOOTH LAW OFFICES, PLLC**  
 1101 W. River St., Ste. 110  
 P.O. Box 7985  
 Boise, ID 83707  
 Tel: (208) 629-7447  
 Fax: (208) 629-7559  
*Attorneys for the Ditch Companies*

Jerry A. Kiser, ISB #3719  
**Attorney at Law**  
 P.O. Box 8389  
 Boise, ID 83707  
 Tel: (208) 861-4657  
*Attorney for Farmers Union Ditch Co*

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 )  
 )

**MEMORANDUM IN OPPOSITION  
 TO UNITED WATER'S MOTION IN  
 LIMINE**

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COMES NOW, the Boise Project Board of Control, New York Irrigation District and the Ditch Companies, by and through their respective counsel of record, and hereby submit this Memorandum in Opposition to United Water's Motion in Limine, pursuant to the Idaho Department of Water Resources Rule of Procedure 37.01.01.270.02. For the reasons set forth in the argument below, United Water's Motion should be denied.

## ARGUMENT

The Department's Rule of Evidence 37.01.01.600 provides that "[e]vidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." The Director, in his Notice Initiating Contested case defined the question to be addressed in this proceeding. The purpose as defined by the Director is:

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.

See Notice at p. 6. The Boise Project, New York Irrigation District and the Ditch Companies have identified certain documents relating to water rights and permits held by United Water Idaho, Inc., which United Water contends are not relevant to the purposes of this contested case. These parties disagree.

The matter to be addressed is the existing procedures of accounting in Water District 63. Three of the four water rights that are addressed in the exhibits to which United Water objections include a condition on the exercise of the right limiting each to be exercised only during times when water is being released for flood control. Water right nos. 63-31409, 63-00169F, and 63-00243E contain the following condition:

The right holder shall exercise this right only when authorized by a separate the District 63 watermaster when the Boise River is on flood release below Lucky Peak dam/outlet. Flood releases shall be determined based upon the Memorandum of Agreement Between the Department of Army and the Department of Interior for Flood Control Operations of the Boise River Reservoirs, dated November 20, 1953, contracts with Reclamation contract holders in the Boise River reservoirs, the Water Control Manual for Boise River Reservoirs, dated April 1985, and any modifications adopted pursuant to the procedures required in these documents and federal laws. The right holder shall not seek, directly or indirectly, any change to

the flood control operations in the 1985 Water Control Manual for Boise River Reservoirs.

The fourth water right permit no. 63-12055 does not include this condition. However, as the 1994 Tuthill Memo, 1994 Information Submission, and the June 2002 Beneficial Use Field Report all recognized, a similar condition was contemplated. The testimony of certified water right examiner Edward Squires, is relevant because he further supports the common understanding of the fully appropriated Boise River water supply and that new rights on the Boise be conditioned accordingly to limit the right to divert water only when the Boise River was spilling flood water at Lucky Peak. *See* Attachment A, Affidavit of Edward Squires.

In his Notice initiating the contested case, the Director concluded that:

It is necessary, for purposes of identifying and resolving concerns with and objections to the existing accounting methods and procedures in Water District 1 and Water District 63 to develop formal administrative records full 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 (sic); and (3) appropriate changes, if any, to the existing procedures as they may relate to federal flood control operations.

*See* Notice at p. 5. The documents and witness that United Water objects to in its Motion are necessary to develop the formal administrative record and to address “appropriate changes, if any, to the existing procedures as they may relate to federal flood control operations.” *Id.*

Elizabeth Cresto, the Department’s expert witness in this proceeding, stated that these flood release conditions are not currently incorporated into the accounting system but that the Department believes they should be. *See* Attachment B, Excerpt of Deposition of Elizabeth Cresto. The lack of inclusion of these conditions in the automated accounting process constitutes a “concern....[with] the existing procedures of accounting in Water District 63,” and is clearly relevant to the question posed by the Director. *See* Notice, p. 5. United Water’s Motion seeks to

prevent the parties and the Department from correcting this oversight in the accounting program relating to conditions during flood control events and how exercise of such water rights affects accrual of the storage rights. The water right conditions and testimony to which United Water objects exist for a reason. They are consistent with IDWR's prior and longstanding determination of the fully appropriated status of the Boise River, and are relevant to that showing. The authenticity of the documents cannot be challenged, nor can the sworn testimony of Mr. Squires. The water right conditions have a direct bearing on the Department's current accounting practices, as confirmed by Ms. Cresto.

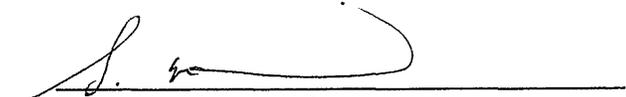
United Water's Motion is directly contrary to item No. 3 in the Notice Initiating Contested case cited above, and undermines the Director's duty in this case to admit evidence in order to avoid frustrating the development of the necessary administrative record in this case.

### **CONCLUSION**

For the foregoing reasons, the Boise Project Board of Control, Ditch Companies, and New York Irrigation District hereby request that the Director deny United Water's Motion in Limine.

Dated this 13<sup>th</sup> day of August, 2015

**BARKER ROSHOLT & SIMPSON LLP**

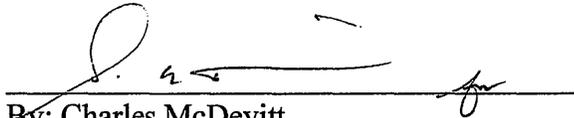
  
By: Shelley M. Davis  
*Attorneys for Boise Project Board of Control*

**SAWTOOTH LAW OFFICES, PLLC**

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By: Andrew J. Waldera  
*Attorneys for Ditch Companies*

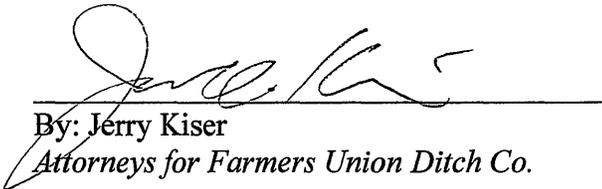
**MCDEVITT & MILLER, PLLC**



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By: Charles McDevitt  
*Attorneys for New York Irrigation District*

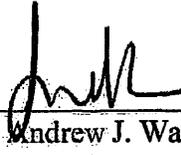
**JERRY KISER, ATTORNEY AT LAW**



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By: Jerry Kiser  
*Attorneys for Farmers Union Ditch Co.*

**SAWTOOTH LAW OFFICES, PLLC**



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By: Andrew J. Waldera  
*Attorneys for Ditch Companies*

**MCDEVITT & MILLER, PLLC**

---

By: Charles McDevitt  
*Attorneys for New York Irrigation District*

**JERRY KISER, ATTORNEY AT LAW**

---

By: Jerry Kiser  
*Attorneys for Farmers Union Ditch Co.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of August, 2015, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO UNITED WATER'S MOTION IN LIMINE** the method indicated below, and addressed to each of the following:

Original to:

Idaho Department of Water Resources	<input checked="" type="checkbox"/> Hand Delivery
Water Management Division	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
322 E. Front Street	<input type="checkbox"/> Facsimile
P.O. Box 83720	<input type="checkbox"/> Overnight Mail
Boise, Idaho 83720-0098	<input checked="" type="checkbox"/> Email

Copies to the following:

Erika E. Malmén	<input type="checkbox"/> Hand Delivery
PERKINS COIE LLP	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
1111 West Jefferson St., Ste. 500	<input type="checkbox"/> Facsimile
Boise, ID 83702-5391	<input type="checkbox"/> Overnight Mail
	<input checked="" type="checkbox"/> Email

David Gehlert, Esq.	<input type="checkbox"/> Hand Delivery
U.S. Dept. of Justice	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
Denver Field Office	<input type="checkbox"/> Facsimile
999 18 <sup>th</sup> Street, South Terrace	<input type="checkbox"/> Overnight Mail
Suite 370	<input checked="" type="checkbox"/> Email
Denver, CO 80202	

James C. Tucker, Esq.	<input type="checkbox"/> Hand Delivery
IDAHO POWER COMPANY	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
P.O. Box 70	<input type="checkbox"/> Facsimile
Boise, ID 83702	<input type="checkbox"/> Overnight Mail
	<input checked="" type="checkbox"/> Email

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

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

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

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

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

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

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

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

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

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

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

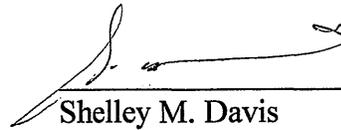
Hand Delivery  
 U.S. Mail, postage prepaid  
 Facsimile  
 Overnight Mail  
 Email

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

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

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

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



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Shelley M. Davis