

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, Big Bend Irrigation District, Wilder Irrigation District, and Boise-Kuna Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO

IN THE MATTER OF ACCOUNTING)	
FOR DISTRIBUTION OF WATER TO)	
THE FEDERAL ON-STREAM)	RESPONSE TO REQUEST FOR
RESERVOIRS IN WATER)	DATES TO SET CONTESTED CASE
DISTRICT 63)	HEARING
)	

COMES NOW, the Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District and Boise-Kuna Irrigation District, parties to the above-entitled contested case, by and through their counsel of record the law firm Barker Rosholt & Simpson, LLP, and hereby submit this Response to the Director’s letter of May 7, 2015, requesting that unavailable dates for the hearing in the above-entitled case be submitted to him on or before May 14, 2015. For the reasons set forth below, these parties believe that it is not yet appropriate to set a hearing in this matter.

I. DISCUSSION

On October 28, 2014, the Boise Project Board of Control filed a request for the production of certain documents in this contested case, and also filed a Request for Disclosure of Ex Parte Contacts and Prior Statements by the Director and Staff Concerning the Issue of

Storage Accounting. On January 12, 2015, the Director served a “Response to Boise Project Board of Control’s Document Request and Requests for Disclosure” (“Response”) to both requests. To the document requests, the Response provided lists of documents that the Department had placed on its website which the Director believed were responsive to the requests. To the request for disclosure of ex parte communications the Response provided two pages of authority that purportedly protected the Director from disclosure of any such communications. Nevertheless, the Response stated that “[i]n 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 in this contested case separately from this Order.” *See* Response, p. 11. The referenced documents have not yet been provided. In the absence of these relevant communications, the Boise Project Board of Control cannot properly prepare to participate in a hearing for the Basin 63 accounting contested case.

The document is not about harassing the Director about presiding as the hearing officer in this proceeding, as intimated in the Response. The requests for statements made by the Director concerning “refill” and the purpose of and need for the accounting system, will allow the Boise Project and other participants to evaluate the need to produce evidence to respond to such statements and to properly prepare for the hearing. The Boise Project is aware of many occasions where the Director has taken the opportunity to express statements about fill, refill, the accounting program and what benefits he perceives it to have. There are undoubtedly many more occasions the parties are unaware of, but that they are entitled and indeed have a due process right to disclosure of statements the Director made about the subject matter of the contested case

before him. It is one thing to say that a public position does or does not result in disqualification. It is quite another to deny the parties the knowledge of what those public statements are. Moreover, the fact that such a statement about the subject matter of the hearing has not been reduced to writing does not mean that such statement is irrelevant or that there is no need for a rebuttal.

Any communications that the Director has received from the public or from legislators must also be included in the record for this action. Agency action must be based on the official agency record. I.C. § 67-5277. Those communications and documents that have been prepared for and resulted from discussions with non-parties to this proceeding cannot be erased from the hearing officer's mind. They could influence the ultimate issues in this case. Without the necessary disclosure of those communications, no one will know.

Additionally, all ex parte communications must be disclosed. Parties to the contested case are entitled as a matter of due process to an impartial tribunal. Impartiality means "the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007), citing *Republican Party of Minn. v. White*, 536 U.S. 765, 775-76, 122 S.Ct. 2528 (2002). The parties are entitled to have the requested ex parte communications and documents produced in order to know whether the Director/Hearing Officer is "not capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.*, citing *Eacret v. Bonner County*, 139 Idaho 780, 785, 86 P.3d 494, 499 (2002), quoting *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Assoc.*, 426 U.S. 482, 493, 96 S.Ct. 2308 (1941).

CONCLUSION

On January 12, 2015, the Director's Response advised that the non-privileged communications and documents that have either been prepared for or resulted from ex parte communications with non-parties to this contested case would be produced. Now the Director has requested dates to hear the contested case. Yet, such communications have not been produced. In order to have a proper record and prepare for hearing in this contested case, the parties to this action are entitled to the requested disclosures. Counsel are submitting their unavailable dates for hearing in this matter today, but request that the Director produce the ex parte communications promised to the parties, and set the hearing date not less than sixty (60) days after such production has been made.

Dated this 14th day of May, 2015.

BARKER ROSHOLT & SIMPSON LLP



By: Shelley M. Davis

Attorneys for Boise Project Board of Control, et al.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of May, 2015, I caused to be served a true and correct copy of the foregoing **RESPONSE TO REQUEST FOR DATES TO SET CONTESTED CASE HEARING** by the method indicated below, and addressed to each of the following:

Original to:

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

Copies to the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



Shelley M. Davis