

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

IN THE MATTER OF ACCOUNTING	)	
FOR DISTRIBUTION OF WATER	)	<b>SCHEDULING ORDER;</b>
TO THE FEDERAL ON-STREAM	)	<b>NOTICE OF HEARING;</b>
RESERVOIRS IN WATER	)	<b>ORDER AUTHORIZING</b>
DISTRICT 63	)	<b>DISCOVERY</b>
_____	)	

On October 7, 2014, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) held a status conference in this matter. The participants agreed to a hearing schedule and addressed certain procedural matters. A question was raised at the status conference regarding how to identify those individuals and entities that wish to participate in the scheduled hearing. The Director will set a deadline of October 21, 2014, for those individuals and entities that wish to participate in the hearing in this matter to submit a Notice of Intent to Participate.<sup>1</sup>

The Director adopts the proposed schedule as discussed at that status conference as follows:

**October 21, 2014** – Deadline for individuals and entities that wish to participate in the hearing to submit a Notice of Intent to Participate

**October 28, 2014** – Deadline for pre-hearing/dispositive motions

**November 4, 2014** – Department staff memo due

**November 11, 2014** – Deadline for responses to pre-hearing/dispositive motions (in accordance with IDAPA 37.01.01.270.02).

**November 25, 2014** – Deadline for responses to Department staff memo

**December 9, 2014** – Deadline for replies to responses to Department staff memo

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<sup>1</sup> United Water Idaho, Inc. (“United Water”), filed a *Notice of Intent to Participate and/or Petition to Intervene* on October 6, 2014. Idaho Power Company (“Idaho Power”) filed *Idaho Power Company Notice [of] Intent to Participate* on December 4, 2013. The Director will accept these documents as appropriate notice of intent to participate and no further filings are necessary for these two entities to participate. The Surface Water Coalition filed a request to intervene in this proceeding on December 3, 2013. No opposition to the request was received. The request to intervene will be addressed by separate order of the Director.

**January 26, 2015** – Prehearing conference and deadline for completion of discovery. The prehearing conference will be held at 2:00 p.m. at the Department’s State Office, located at 322 E. Front Street, 6<sup>th</sup> Floor, Director’s Conference Room. Telephone participation is available by calling 1-215-446-0193 and enter the participant code when prompted: 275568#

**February 2-4 and 9, 2015**– Hearing

### **NOTICE OF HEARING**

The Director hereby provides notice that the hearing set for **February 2-4 and 9, 2015, will begin at 9:00 a.m.**, at the Department’s State Office, located at 322 E. Front Street, 6th Floor Conference Rooms B, C and D, Boise, Idaho. The presiding officer at the hearing will be Director Gary Spackman.

If you plan to offer exhibits for the record at the hearing, note that Rule 606 of the Department’s Rules of Procedure requires that a copy be provided to each party and the presiding officer whose mailing address is P.O. Box 83720, Boise, Idaho 83720-0098.

The hearing will be held in accordance with provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the adopted Rules of Procedure of the Department, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request.

The hearing will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please contact Deborah Gibson at (208) 287-4803, no later than five (5) days prior to the hearing.

During the course of the hearing, all parties appearing in this matter will have the opportunity to present information, examine witnesses, and provide argument on issues.

### **DISCOVERY**

IT IS HEREBY ORDERED that the parties are authorized to conduct and engage in discovery. The Director has requested a staff memorandum to explain (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 existing accounting methods and procedures in Water District 63. The memorandum will provide an overview of the documents the Department believes are relevant to this proceeding and will explain how the documents may be reviewed. If parties wish to serve additional document requests upon the Department, they may submit requests to Deborah Gibson by electronic mail at [deborah.gibson@idwr.idaho.gov](mailto:deborah.gibson@idwr.idaho.gov) or by U.S. Mail at PO Box 83720 Boise, Idaho 83720-0098.

## ISSUE TO BE ADDRESSED AT HEARING

In the October 22, 2013, *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference*, 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 WATER  
DISTRICT 63

At 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. The Director declines to modify the scope of this proceeding at this time. The fundamental question in this proceeding is how water is counted or credited towards the fill of a water right. This is the question certain parties to Basin-Wide Issue 17 sought to have answered and which remains unanswered. *In re SRBA*, 40974, 2014 WL 3810591 at \* 1-2 (Idaho Aug. 4, 2014). The Idaho Supreme Court recognized that the key question is how water rights are filled or satisfied and spent considerable time discussing this topic:

We agree with the Boise Project Board and the SRBA that the question of when a storage water right is filled presents a mixed question of fact and law. Indeed, the complex and historically dense contents of the Shelley Davis affidavit, along with the parties' attempts to prove when a storage water right is filled by using reservoir-specific historical practices, support the conclusion that determining when a water right is filled requires the development of a factual record. There is an administrative procedure for fleshing out these factual interpretations if the SRBA court chooses to address the issue of fill on remand.

*In re SRBA*, 40974, 2014 WL 3810591 at \*6 (Idaho Aug. 4, 2014).

The Court considered and rejected the argument advanced by certain water users that the "Director's discretionary functions do not include the ability to determine when a water right is satisfied." *Id.* at \*7. The Court stated, "This Court has recognized the Director's discretion to direct and control the administration of water in accordance with the prior appropriation doctrine. ... And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied." *Id.* at \*8. This question of how water is counted or credited toward the fill of water rights is the key question to be resolved and is the question that should be addressed in this proceeding.

Dated this 14<sup>th</sup> day of October 2014.

  
GARY SPACKMAN  
Director

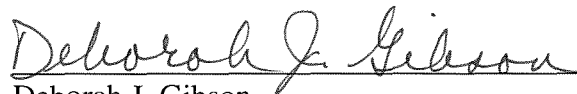
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14<sup>th</sup> day of October 2014, I served the foregoing *Scheduling Order; Notice of Hearing; Order Authorizing Discovery* to the following and by the method indicated below:

<p>Erika E. Malmen                  PERKINS COIE LLP                  1111 West Jefferson St., Ste 500                  Boise, ID 83702-5391  <a href="mailto:emalmen@perkinscoie.com">emalmen@perkinscoie.com</a></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  <a href="mailto:panderson@tu.org">panderson@tu.org</a></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 &amp; FIELDS, CHRTD                  P.O. Box 829                  Boise, ID 83701  <a href="mailto:slc@moffatt.com">slc@moffatt.com</a>  <a href="mailto:ajw@moffatt.com">ajw@moffatt.com</a></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 18<sup>th</sup> Street, South Terrace                  Suite 370                  Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></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  <a href="mailto:jamestucker@idahopower.com">jamestucker@idahopower.com</a></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>Daniel V. Steenson  S. Bryce Farris  Sawtooth Law Offices, PLLC  P.O. Box 7985  Boise, ID 83707  <a href="mailto:dan@sawtoothlaw.com">dan@sawtoothlaw.com</a>  <a href="mailto:bryce@sawtoothlaw.com">bryce@sawtoothlaw.com</a></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>Albert P. Barker  Shelley M. Davis  BARKER ROSHOLT &amp; SIMPSON, LLP  P.O. Box 2139  Boise, ID 83701-2139  <a href="mailto:apb@idahowaters.com">apb@idahowaters.com</a>  <a href="mailto:smd@idahowaters.com">smd@idahowaters.com</a></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>Chas. F. McDevitt  Dean J. Miller  Celeste K. Miller  McDEVITT &amp; MILLER, LLP  P.O. Box 2564  Boise, ID 83701  <a href="mailto:chas@mcdevitt-miller.com">chas@mcdevitt-miller.com</a>  <a href="mailto:joe@mcdevitt-miller.com">joe@mcdevitt-miller.com</a>  <a href="mailto:ck@mcdevitt-miller.com">ck@mcdevitt-miller.com</a></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>Jerry A. Kiser  P.O. Box 8389  Boise, ID 83707  <a href="mailto:jkiser@cableone.net">jkiser@cableone.net</a></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>John K. Simpson  Travis L. Thompson  Paul L. Arrington  BARKER ROSHOLT &amp; SIMPSON LLP  195 River Vista Place, Ste 204  Twin Falls, Idaho 83301-3029  <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>  <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a>  <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a></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>W. Kent Fletcher  FLETCHER LAW OFFICE  P.O. Box 248  Burley, Idaho 83318  wkf@pmt.org</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>Rex Barrie  Watermaster  Water District 63  P.O. Box 767  Star, ID 83669</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 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, certified, 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</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 type="checkbox"/> Email
<p>Bruce Smith  Moore Smith  950 W. Bannock St. Ste 520  Boise, ID 83702-5716</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 type="checkbox"/> Email



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