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DEPARTMENT OF
WATER RESOURCES

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Attorneys for the Ditch Companies

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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; NEW DRY CREEK DITCH COMPANY; PIONEER DITCH COMPANY; PIONEER IRRIGATION DISTRICT; SETTLERS IRRIGATION DISTRICT; SOUTH BOISE WATER COMPANY; and THURMAN MILL DITCH COMPANY;

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES; and GARY SPACKMAN, in his capacity as the Director of the Idaho Department of Water Resources;

Respondents.

IN THE MATTER OF ACCOUNTING FOR DISTRIBUTION OF WATER TO THE FEDERAL ON-STREAM RESERVOIRS IN WATER DISTRICT 63

Case No. _____

DITCH COMPANIES' PETITION FOR JUDICIAL REVIEW

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, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company (collectively, the "Ditch Companies") submit this Petition for Judicial Review ("Petition") pursuant to Idaho Code Sections 42-1701A and 67-5270 and Rule 84 of the Idaho Rules of Civil Procedure.

1. This Petition requests judicial review of the *Amended Final Order* issued by the Director of the Idaho Department of Water Resources ("Director" and "IDWR") on October 20, 2015, *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* (hereinafter the "*Contested Case*"). The Ditch Companies and the Boise Project Board of Control timely filed Petitions for Reconsideration on November 3, 2015, and on November 19, 2015, the Director issued an *Order Denying Petitions for Reconsideration*. The *Amended Final Order* became a Final Order of IDWR on the service date of the order denying petitions for reconsideration, subjecting the October 20, 2015 *Amended Final Order* to a petition for judicial review pursuant to Idaho Code Section 67-5270. The Ditch Companies have timely filed this Petition pursuant to Idaho Code Section 67-5273.

2. This Court is the proper venue under Idaho Code Section 67-5272 because: (a) the hearing before IDWR was held in Boise, Ada County, Idaho; (b) the Final Order was issued by the Director in Boise, Ada County, Idaho; (c) many of the Ditch Companies/Petitioners operate principal places of business in Ada County, Idaho; and (d) the real property interests or

storage water rights involved with this *Contested Case* and which are the subject of this action are located, at least in part, in Ada County, Idaho.

3. Pursuant to the Idaho Supreme Court's *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order Dated December 9, 2009*, issued on July 1, 2010, this case should be reassigned to the presiding judge of the Snake River Basin Adjudication ("SRBA") District Court for further proceedings.

4. The *Contested Case* hearing was held before IDWR on August 27, 28, 31, and September 9 and 10, 2015, in Boise, Idaho. The hearing was recorded by M&M Court Reporting, 101 S. Capitol Blvd., Suite 503, Boise, Idaho 83702, (208) 345-9611.

5. The Ditch Companies submit the following initial issues for judicial review:

(a) The Director exceeded his authority by *sua sponte* initiating this *Contested Case*.

(b) IDWR's internal adoption and use of the water right accounting program to determine and administer the "satisfaction" of Boise River Reservoir storage water rights violates the formal rulemaking requirements of the Idaho Administrative Procedure Act because the accounting program affects the legal rights and property interests of the Ditch Companies and their patrons, and the *Contested Case* was an improper post hoc attempt to validate the improper adoption and use of the same.

(c) The Director erred by failing to stay this matter pending the resolution of the claims for water rights in SRBA Consolidated Subcase Nos. 63-33732, *et al.*, which are pending before the SRBA Court, and which were pending prior to the Director's *sua sponte* initiation of the *Contested Case*.

(d) The Director erred by failing to stay or dismiss this matter because an indispensable and necessary party, the United States Bureau of Reclamation, titled holder of storage water rights which were the subject of the *Contested Case*, was not a party to or bound by the *Contested Case*.

(e) The Director violated his duties and exceeded his authority as the hearing officer, and violated the due process rights of the Ditch Companies by failing to provide a fair, impartial and equitable hearing in the *Contested Case*. In particular:

(1) The Director erred by failing to properly define the issues to be addressed by the *Contested Case*.

(2) The Director erred by denying the Ditch Companies' requests that he disqualify himself as the hearing officer and appoint an independent hearing officer.

(3) The Director erred by presenting witness testimony and documentary evidence; cross-examining witnesses; engaging in *ex parte* discussions with IDWR witnesses, staff and legal counsel concerning the testimony and evidence presented during the hearing; and gathering evidence and guiding and/or directing IDWR witness testimony and exhibits.

(4) The Director erred by allowing IDWR to participate as a party (and, particularly, an adversarial party) in the *Contested Case*.

(5) The Director erred by allowing Elizabeth Cresto to testify and provide evidence as an expert witness regarding matters not identified in any expert disclosure, and which were beyond the scope of her "Staff Memorandum" and her expert witness deposition.

(6) The Director erred by relying on documents that were not presented during the hearing or adequately identified as officially noticed as required by IDAPA 37.01.01.602. *See also*, IDAHO CODE § 67-5242(3).

(f) The Director erred by concluding as a matter of law that water required to be released from Arrowrock, Anderson Ranch and Lucky Peak Reservoirs (the "Boise River Reservoirs") for flood control purposes is legally and physically available for beneficial use storage pursuant to the reservoir storage rights, and therefore "fills" or "satisfies" those water rights.

(g) The Director erred by concluding as a matter of law that all water that enters the Boise River Reservoirs is diverted and stored for purposes of water right accounting and administration, and is subject to priority distribution to either a storage water right or a natural flow water right.

(h) The Director erred by concluding as a matter of law that, after flood control releases, the filling of the Boise River Reservoirs occurs without a water right, under no priority, and is subject to the delivery demands of existing junior water rights and future appropriations of water.

(i) The Director's use of the water right accounting program pursuant to the aforementioned legal conclusions ((f)-(h)) is arbitrary and capricious because it conflicts with and undermines the congressionally-authorized operating plan for the Boise River Reservoirs developed and approved by the Bureau of Reclamation, the Corps of Engineers, the State of Idaho, and the water user spaceholders under which the Boise River Reservoirs have been jointly operated for beneficial use storage and flood control (*i.e.*, operated in a manner that both

minimizes the risks of downstream flooding and property damage, and maximizes the physical storage of water for end beneficial use).

(j) The Director's use of the water right accounting program pursuant to the aforementioned legal conclusions ((f)-(h)) is arbitrary and capricious because it conflicts with and undermines the storage water rights and the spaceholders' storage contracts which are based on the actual storage of water in the reservoirs pursuant to the storage water rights in accordance with the reservoir operating plan.

(k) The Director's use of the water right accounting program pursuant to the aforementioned legal conclusions ((f)-(h)) is arbitrary and capricious because it divests or subordinates the Ditch Companies' storage rights without due process of law and constitutes an unconstitutional taking of the Ditch Companies' water rights and contract rights.

(l) The Director's use of the water right accounting program pursuant to the aforementioned legal conclusions ((f)-(h)) is arbitrary and capricious because it is contrary to the historic administration of the Boise River Reservoir storage water rights by Boise River watermasters and the actual storage, delivery and beneficial use of water stored in the reservoirs.

(m) The Director's decision is not supported by substantial and competent evidence because, among other things:

(1) The Director erred by disregarding and/or rejecting the testimony of Water District 63 watermasters and water users that the storage of water in the Boise River Reservoirs following flood control releases has occurred and continues to occur pursuant to the reservoir storage rights, under the priorities of those rights, and is not subject to the delivery demands of junior water rights and future appropriations of water.

(2) The Director erred by disregarding and/or rejecting the testimony of Water District 63 watermasters that they have not and do not administer Boise River Reservoir storage water rights to be "satisfied" at the point of "paper fill" under the water right accounting program.

(3) The Director erred by disregarding the June 4, 2015 Affidavit of Robert J. Sutter, the author of IDWR's water right accounting program, submitted by the Ditch Companies and part of the administrative record.

(n) The Director erred by disregarding the October 9, 2015 *Memorandum Decision and Order Granting Ditch Companies' and Boise Projects' Motion for Summary Judgment and Special Master's Recommendation of Disallowance of Claims* issued in SRBA Consolidated Subcase Nos. 63-33732, *et al.*, by Special Master Theodore Booth.

(o) The Director exceeded his authority by attempting to define the Ditch Companies' storage water rights, including when water rights are "legally and physically" available.

6. Pursuant to Idaho Rule of Civil Procedure 84(d)(5), the Ditch Companies reserve the right to assert additional issues and/or clarify or further specify the issues for judicial review stated in this Petition or which become later discovered. A final statement of issues will be contained in the Ditch Companies' opening brief submitted in support of this Petition.

7. The undersigned attorney certifies as follows:

(a) Service of this Petition has been made on IDWR and the parties to the *Contested Case*.

(b) A transcript of the hearing was previously requested and has already been prepared by M&M Court Reporting. The Ditch Companies have paid for the transcript.

(c) IDWR has been paid the estimated fee for preparation of the agency record.

(d) Pursuant to *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order Dated December 9, 2009*, issued July 1, 2010, a courtesy copy of this Petition has been served with the SRBA District Court at P.O. Box 2707, Twin Falls, Idaho 83303-2707.

DATED this 17th day of December, 2015.

SAWTOOTH LAW OFFICES, PLLC

By _____
Daniel V. Steenson
Attorneys for the Ditch Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December, 2015, I caused a true and correct copy of the foregoing **DITCH COMPANIES' PETITION FOR JUDICIAL REVIEW** to be served by the method indicated below, and addressed to the following:

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