

DEC 17 2015

DEPARTMENT OF WATER RESOURCES

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

**BOISE PROJECT BOARD OF CONTROL,
and NEW YORK IRRIGATION DISTRICT,**

Petitioners,

vs.

**THE IDAHO DEPARTMENT OF WATER
RESOURCES, AND DIRECTOR GARY
SPACKMAN**

Respondents.

CASE NO. CV- _____

Fee Category L.3: \$221.00

**NOTICE OF APPEAL AND PETITION
FOR JUDICIAL REVIEW OF FINAL
AGENCY ACTION**

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

COME NOW, the Petitioners, the Boise Project Board of Control (“Boise Project”), by and through its counsel of record, the law firm Barker Rosholt & Simpson, LLP, and the New York Irrigation District (“NYID”), by and through its counsel, Charles McDevitt of the law firm McDevitt & Miller, PLLC, and hereby file this Petition seeking judicial review of a final agency action of the Director of the Idaho Department of Water Resources.

STATEMENT OF THE CASE

1. This Petition is a civil action filed pursuant to Idaho Code §§ 67-5270 and 67-5279 seeking judicial review of the Amended Final Order entered by the Director of the Department of Water Resources on November 19, 2015, in the above-referenced contested case.

2. A five-day hearing was held before the Director, who sat as the hearing officer in the matter, on August 27, 28, and 31st and September 9th and 10th, 2015.

JURISDICTION AND VENUE

3. This petition is authorized by Idaho Code §§ 67-5270 and 67-5279.

4. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A and 67-6272.

5. Venue lies in this Court pursuant to Idaho Code § 67-5272 and the Snake River Basin Adjudication Court's July 1, 2010, *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order dated December 9, 2009*. Petitioner Boise Project's primary place of business lies in Ada County, Idaho, and the Idaho Department of Water Resources' Amended Final Order on challenge in this action was issued in Ada County, Idaho.

6. Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009 "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The SRBA Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. The Petitioners have attached a copy of the SRBA Court's *Notice of Reassignment* form for the convenience of the clerk.

7. The Director's Amended Final Order was issued on October 20, 2015. The Boise Project timely filed a Petition for Reconsideration on November 3, 2015. On November 19, 2015, the Director issued an Order Denying Petitions for Reconsideration. The Director's Amended Final Order is a final agency action subject to review pursuant to Idaho Code § 67-5270(3).

PARTIES

8. Petitioner Boise Project is a duly organized operating entity for four Idaho Irrigation Districts and one Oregon Irrigation District, operating in the State of Idaho.

9. Petitioner NYID is a duly organized Irrigation District operating under the laws of the State of Idaho.

10. Respondent, Idaho Department of Water Resources is a state agency with its main office located at 322 E. Front Street, Boise, Idaho. Respondent, Gary Spackman, is the Director of the Idaho Department of Water Resources.

STATEMENT OF INITIAL ISSUES

11. Petitioners assert the following issues on judicial review:
- a. Whether the Director committed reversible error by addressing the issue of accounting for Basin 63 in a contested case rather than as a rulemaking?
 - b. Whether the Director committed reversible error by *sua sponte* initiating a contested case where no petitioner sought to have the issue addressed by the Department and where the Director continued the case after the noticed parties petitioned to have the contested case dismissed as improperly brought?

c. Whether the Director committed reversible error by transforming the contested case, as it was initially characterized, into a “fact finding hearing” where no authority exists for initiating such a matter before the Department?

d. Whether the Director committed reversible error by convening the contested case proceeding for the impermissible purpose of creating a *post-hoc* record for a decision improperly implemented in 1984?

e. Whether the Director committed reversible error by taking “judicial notice” of documents and records in the Department files without providing adequate notice prior to or during the hearing of which specific records would be consulted and relied upon in the Director’s decision?

f. Whether the Department’s purported implementation of the accounting program in 1984, without notice or opportunity for comment by affected storage water rights holders, prejudiced a substantial right of the Petitioners and whether the Director’s Amended Final Order confirming the action prejudices a substantial right of the Petitioners?

g. Whether the 1984 accounting program, as currently interpreted by the Department or Director, constitutes a rule unlawfully adopted in violation of the Administrative Procedures Act.

h. Whether the Director’s Denial of the Petitioners’ Motion to Appoint Independent Hearing Officer constitutes reversible error?

i. Whether the Director’s numerous public and private statements of his support and approval of the existing accounting program, the ultimate issue in the contested case, required his disqualification as hearing officer in the contested case for cause?

j. Whether the Director committed reversible error by his failure to disclose all of his *ex parte* contacts and all of his public and private statements of support for the existing accounting program?

k. Whether the Director's determination that the Bureau of Reclamation, who declined to participate in the contested case, would nevertheless be bound by the Director's determination in the Amended Final Order was clearly erroneous and procedurally was the result of an improper predetermination of the ultimate issue by the Director?

l. Whether the Director improperly denied admission of relevant evidence during the course of the contested case hearing, prejudicing a substantial right of the Petitioners and constituting reversible error?

m. Whether the Director committed reversible error when acting in his role as the Hearing Officer he improperly conferred with counsel for the Department and witnesses of the Department during and before the hearing, and directed or consulted with Department counsel and staff concerning preparation of exhibits during the course of the hearing, prejudicing a substantial right of the Petitioners?

n. Whether the Department or Director committed reversible error when counsel for the Department improperly examined, interviewed and consulted with witnesses he called to the contested case, while also acting as advisory counsel to the Director in his role as the Hearing Officer, during the course of the hearing, in violation of IDAPA 04.11.01.423.02 and prejudicing a substantial right of the Petitioners?

o. Whether the Department and Director committed reversible error when the Director and counsel for the Department improperly participated in discussions with the Director, as the Hearing Officer, and with staff witnesses for the Department, in violation of

IDAPA 04.01.423.02 and 03, and IDAPA 04.01.424, during the course of the contested case hearing, but outside the presence of the parties, and then participated in the drafting of the Director's Amended Final Order without any notice to the parties, prejudicing a substantial right of the Petitioners?

p. Whether the Director committed reversible error when he denied the Petitioners' requests for a stay of the proceedings, due to pending legal actions before the Snake River Basin Adjudication Court, resulting in inconsistent legal determinations and prejudicing a substantial right of the Petitioners?

q. Whether these procedural irregularities violated the due process clauses of the Idaho and United States constitutions?

r. Whether the Director's Amended Final Order and Order Denying Petitions for Reconsideration is arbitrary and capricious, and not supported by substantial evidence?

s. Whether the Director's findings of fact are clearly erroneous in failing to include important undisputed facts?

t. Whether the Director's findings minimizing the important role of the State in reaching the 1953 Memorandum of Agreement, the 1974 Boise River Flood Control Report, and the 1985 Boise River Water Control Manual render these documents meaningless for administration of water rights in the Boise River is supported by substantial evidence?

u. Whether the Director's failure to include important factual findings in the Amended Final Order and Order Denying Petitions for Reconsideration concerning the 1974 Boise River Flood Control Report, the moratorium orders issued by the Department and limitations on the granting of new consumptive water rights in the Boise River constitutes

reversible error, and whether the failure to make such findings was arbitrary, capricious and not supported by substantial evidence?

v. Whether the Director's mischaracterization of what the Boise River Water Control Manual classifies and "surplus" flows of the Boise River constitutes reversible error?

w. Whether the Boise River accounting method as interpreted by the Director's Amended Final Order and Order Denying Petitions for Reconsideration is arbitrary, capricious and not in accordance with law, constituting reversible error?

x. Whether the Director's rejection of proposed alternative accounting methods was arbitrary, capricious and not in accordance with law, constituting reversible error?

y. Whether the Director's use of the contested case proceeding as an effort to define the scope of the property interests of the storage spaceholders' storage water rights, was *ultra vires*, in excess of this authority, arbitrary and capricious and not in accordance with law?

z. Whether the Director's determination that he has the authority under the accounting system to allow diversion of water without a water right and without any statutory authorization is arbitrary and capricious and not in accordance with law?

aa. Whether the Director's refusal to acknowledge and follow the law, as set forth by the courts, including the SRBA Court in his Amended Final Order and Order Denying Petitions for Reconsideration, constitutes reversible error?

bb. Pursuant to Idaho Rule of Civil Procedure 84(d)(5), Petitioners reserve the right to assert additional issues and/or to clarify or further specify the issues for judicial review stated herein or that may be later discovered.

AGENCY RECORD

12. Judicial review is sought of the Director's October 20, 2015, Amended Final Order, and his November 19, 2015, Order Denying Petitions for Reconsideration and all interim Orders including the Notice of Contested Case, Order Lifting Stay, Order Denying Prehearing Motions, issued as of December 16, 2015.

13. A complete transcript was made of the hearing held in this matter, and Petitioners as well as Respondents are already in possession of the transcript, therefore no additional action need be taken on the transcript.

14. Petitioners' request that all documents filed with the Department, all exhibits and recordings of all preliminary hearings and status conferences be included in the agency record.

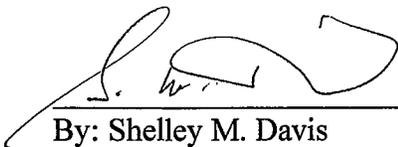
15. The estimated cost of the preparation of the agency record is \$15.00 (Fifteen Dollars) according to the agency, which sum has been paid to the Idaho Department of Water Resources.

16. Service of this Notice of Appeal and Petition for Judicial Review has been made on the Respondents at the time of filing of this Petition.

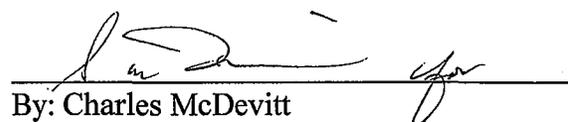
Dated this 17th day of December, 2015

BARKER ROSHOLT & SIMPSON LLP

MCDEVITT & MILLER, PLLC



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



By: Charles McDevitt
Attorneys for New York Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December, 2015, I caused to be served a true and correct copy of the foregoing **NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION** the method indicated below, and addressed to each of the following:

Original Filed with the Clerk of the Ada County Court, via hand delivery.

Copy to Respondent:

Idaho Department of Water Resources	<input checked="" type="checkbox"/>	Hand Delivery
Water Management Division	<input 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 type="checkbox"/>	Email

Courtesy copies to:

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
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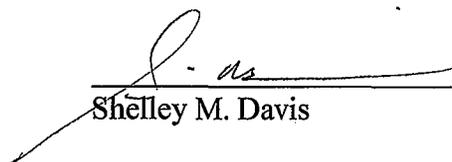
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Shelley M. Davis

ATTACHMENT 1

83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this ____ day of _____, 2010.

CLERK OF THE DISTRICT COURT

By: _____
Deputy Clerk