

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

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DEPARTMENT OF
WATER RESOURCES

Attorneys for Boise Project Board of Control

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase Nos. 01-10614, 01-10615, 01-10616,
01-10617, 01-10618, 01-10620, 01-10621,
01-10622, 01-10623, 21-13161, 37-22806,
63-33732, 63-33733, 63-33734, 63-33737,
63-33738, 65-23531 and 65-23532

**BOISE PROJECT BOARD OF CONTROL'S
SCHEDULING PROPOSAL**

On September 10, 2014, the Court entered an Order requiring the parties to submit either a stipulated proposal or to file their own proposals for scheduling. The Boise Project Board of Control hereby submits this proposed scheduling order.

This Court recognized at the status conference in September some of the interrelated issues associated with these late claims and the concurrent administrative proceedings initiated on its own volition by the Idaho Department of Water Resources. However, the perspective of the space holders in Basin 63 bears repeating simply because the State of Idaho apparently views these proceedings as surplusage. They are far from that.

1916, the very first year that Arrowrock Dam was in operation. Basin 63 reservoirs have always been operated to “fill” the reservoirs under existing storage water rights before and after flood control. No second water rights to “refill” Basin 63 reservoirs following flood control releases have ever been issued to necessary.

These late claims in Basin 63 are necessitated by the State’s apparent position that existing storage rights do not entitle storage right holders to fill reservoirs following flood control releases, despite the fact that the State never asserted in Basin 63 subcase proceedings that there was no right to fill Basin 63 reservoirs following flood control releases under the existing storage water rights until long after those rights were partially decreed. The State’s latent position has created significant uncertainty regarding the nature and extent of existing storage what rights in Basin 63, which makes this issue ripe for determination by this Court.

In its decision on Basin-Wide 17, the Idaho Supreme Court acknowledged that the director has an administrative role to play in counting the fulfillment of storage water rights. However, the Court also was very clear that that administrative discretion is bound by the prior appropriation doctrine and that the director’s duty to administer water using his technical expertise is governed by the decrees. As the Supreme Court ruled, “In short, the director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user.”

The Supreme Court’s decision puts the legal issue in very clear terms. Is water released for flood control to protect downstream life and property “used” by the senior appropriator? Basin 63 storage space holders hold equitable title to the water behind the storage reservoirs. *U.S. v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). The space holders do not “use” water released for flood control. Instead, flood control benefits the State as a whole and

the people who own property along the Boise River. In fact, the Department of Water Resources made that clear in a 1974 report requesting additional flood control releases from the Boise River reservoirs. Exhibit 5, Affidavit of Shelley Davis (December 20, 2012).

If water released from Basin 63 reservoirs for flood control purposes is not used by Basin 63 storage water right holders, then the late claims filed in this subcase are not necessary, and are duplicative of existing Basin 63 storage rights. Consequently, this issue must be addressed by the Court.

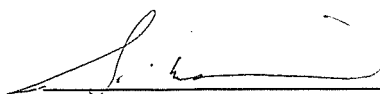
The Department of Water Resources' contested case proceeding relates to the Department's administrative methods of counting fulfillment and distribution Basin 63 storage rights. As explained by the Idaho Supreme Court, the Department's methods of administering Basin 63 storage rights must comport with the nature and extent of those rights and the prior appropriation doctrine.

Consequently, rather than stay these proceedings until the outcome of the contested case, the Boise Project Board of Control proposes that the Court separate the late claims for Basin 63 and Basin 01, and then address the underlying legal issue. A period of up to three months for discovery would be appropriate. The issue can then be addressed through summary judgment, which will determine the need for the Court to proceed with its consideration of the late claims.

This procedure would allow the parties to move forward with this case without undue delay, focus the issues as directed by the Supreme Court, and then incorporate the outcome of the contested case.

Dated this 10th day of October, 2014.

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2014, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S SCHEDULING PROPOSAL** by the method indicated below, and addressed to each of the following:

Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P. O. Box 2707
Twin Falls, ID 83303-2707

☐ Hand Delivery
☒ U.S. Mail, postage prepaid
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Copies to the following:

LAWRENCE G. WASDEN
Attorney General, State of Idaho
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
MICHAEL C. ORR
Deputy Attorney General
P. O. Box 83720
Boise, ID 83720-0098

☐ Hand Delivery
☒ U.S. Mail, postage prepaid
☐ Facsimile
☐ Overnight Mail

DANIEL STEENSON
S. BRYCE FARRIS
Sawtooth Law Offices PLLC
101 W. River Street, Suite 110
P. O. Box 7985
Boise, ID 83707

☐ Hand Delivery
☒ U.S. Mail, postage prepaid
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JERRY R. RIGBY
Rigby Andrus Rigby
25 N. 2nd East
P.O. Box 250
Rexburg, ID 83440-0250

☐ Hand Delivery
☒ U.S. Mail, postage prepaid
☐ Facsimile
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MICHAEL P. LAWRENCE
Givens Pursley
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

☐ Hand Delivery
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SARAH A. KLAHN
Mitra Pemberton White, et al.
Kittredge Building, Suite 500
511 16th Street
Denver, CO 80202

☐ Hand Delivery
☒ U.S. Mail, postage prepaid
☐ Facsimile
☐ Overnight Mail

W. KENT FLETCHER
Fletcher Law Office
1200 Overland Road
P.O. Box 248
Burley, ID 83318-0248

☐ Hand Delivery
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DAVID GEHLERT
U.S. Department of Justice
999 18th Street
South Terrace, Suite 370
Denver, CO 80202

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ROGER LING
P.O. Box 623
Rupert, ID 83350-0623

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U.S. Department of Justice
Environment & Nat'l Resources
550 W. Fort Street, MSC 033
Boise, ID 83724

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U.S. Bureau of Reclamation
Regional Director, PN Region
1150 N. Curtis Road, Suite 100
Boise, ID 83706-1234

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Director of IDWR
P.O. Box 83720
Boise, ID 83720-0098

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Shelley M. Davis