

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

IN THE MATTER OF EXPANSION OF THE)
BOISE RIVER WATER DISTRICT NO. 63)
UPSTREAM OF LUCKY PEAK DAM)
_____)

PRELIMINARY ORDER

The Director (“Director”) of the Idaho Department of Water Resources (“Department” or “IDWR”) is required by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). Idaho Code § 42-604 provides the Director with discretion in determining how these mandatory districts shall be structured, allowing the Director to create new districts, revise existing districts, or even abolish districts, as the Director finds necessary for the efficient distribution of water resources. *Id.* The requirement to create or revise the boundaries of water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree.

On March 19 and 27, 2013, the Department conducted public information meetings in Mountain Home and Idaho City regarding the potential expansion of Water District No. 63 in the Boise River Basin to include an area to administer water rights from the Boise River and tributaries above Lucky Peak Dam.

On August 27, 2013, the Department conducted a public hearing in Boise, Idaho regarding the proposed expansion of the water district. The hearing provided information to water users and an opportunity for public testimony, including written testimony, regarding expansion of the water district.

FINDINGS OF FACT

1. The majority of the large natural flow water rights in the Boise River Basin and the most senior water rights in the basin divert from the Boise River below Lucky Peak Dam for irrigation and other uses to serve lands located in Ada and Canyon Counties. Surface water rights diverting from the Boise River and tributaries below Lucky Peak Dam have been actively regulated by Water District No. 63 for decades to distribute the limited supply of water that is normally available during the irrigation season.

2. Water rights diverting from the Boise River and tributaries upstream of Lucky Peak Dam have not been regulated by Water District No. 63.

3. As the Snake River Basin Adjudication (“SRBA”) is nearing completion, water rights in many areas within the Snake River Basin are being administered through water districts created pursuant to chapter 6, title 42, Idaho Code.

4. On February 22, 2011, the SRBA District Court issued an order authorizing the Director to distribute water pursuant to chapter 6, title 42, Idaho Code, in accordance with the Director's Reports and partial decrees that have superseded the Director's Reports within Administrative Basin 63. Administrative Basin 63 includes the entire Boise River drainage basin. The District Court's Order found that "interim administration of surface water rights in IDWR Administrative Basin 63 in accordance with the Partial Decrees for water rights is reasonably necessary to efficiently administer water rights and to protect senior water rights."

5. On August 2, 2013, the Director signed a notice proposing the expansion of Water District No. 63 pursuant to the provisions of Idaho Code § 42-604. The notice was sent by regular U.S. Mail on August 6, 2013 to each surface water right holder within Administrative Basin 63 above Lucky Peak Dam, except in-stream stock water rights and holders of water rights located within Water District No. 63-S, Smith Creek and tributaries. The notice was sent by regular U.S. Mail on August 13, 2013 to each surface water right holder within Administrative Basin 63 below Lucky Peak Dam, except, in-stream stock water rights. The notice described the proposed expansion of the district, the reasons therefore, and the time and place for a hearing to be held on August 27, 2013 concerning the proposed expansion of the water district. The notice also provided a time period within which written comments on the proposed action would be accepted.

6. The Director's notice mailed to water right holders on August 6 and 13, 2013 specifically proposed expansion of Water District No. 63 to include surface water rights diverted from the Boise River, forks and tributary creeks in the area above Lucky Peak Dam, excluding water rights from Smith Creek and tributaries which are already included in Water District No. 63-S, as shown on the map in Attachment A of this order. The notice explained that expansion of the water district is necessary to ensure proper administration of water uses, and to protect existing senior priority water rights from injury.

7. On August 27, 2013, commencing at approximately 3:00 p.m. at the Best Western Vista Inn, 2645 Airport Way, Boise, Idaho, Jeff Peppersack, IDWR Water Allocations Bureau Chief, presided as hearing officer over a public hearing concerning the proposed expansion of the water district. Approximately 60 people attended the hearing.

8. The hearing officer initiated the meeting by explaining the hearing process. A Department representative, Tim Luke, gave a presentation that described the existing district and proposed expansion area for Water District No. 63, the rights and uses proposed to be included in the district, the reasons for expansion, and features and operation of a water district. Reasons given for expansion of the water district included the following:

- expand administration of surface water rights to the entire Boise River Basin in order to provide equitable administration of rights for the whole basin and protect senior priority rights;
- address delivery calls in all areas of Administrative Basin 63;
- assure water rights are diverted in priority;
- assure diversions are within water right limits;
- address unauthorized uses;
- assist IDWR to maintain current/accurate water right records (ownership, diversion descriptions, and transfer application review).

9. Mr. Luke also presented information regarding potential water measurement requirements and a proposed schedule in which measurement requirements and administration of water might be implemented for the proposed expansion area. The proposed schedule would initiate administration in the first one to two years to the South, North and Middle Fork Boise River drainages with expansion into the Grimes Creek and Mores Creek drainages after several years. However, Mr. Luke suggested that an advisory committee for the water district could meet to consider an appropriate implementation plan for the proposed expansion area based on the needs and time required to develop priorities for administration, adopt operational resolutions, inventory diversions, and hire deputy watermasters as needed.

10. Mr. Luke also presented information regarding water rights that may be excluded from the proposed expansion area of the water district. Typically most or all water rights are included but domestic, stock water and other small diversions may be excluded from measuring device requirements and/or from assessments or may be subjected to minimum assessments. In-stream stock water rights were proposed to be excluded from the expansion area in Water District No. 63. Exclusion of domestic and stock water rights from measuring device requirements and assessments would be consistent with the historic practice of Water District No. 63 below Lucky Peak Dam.

11. Persons attending the hearing were provided opportunity to make oral statements for the record. In addition, the hearing officer held the record open through September 10, 2013 to receive written testimony.

12. Fifteen people, either representing themselves or water user entities, made oral statements for the record at the hearing. Written comments were submitted at the hearing representing three different water user entities. After the hearing, written comments were submitted by eight individuals or entities prior to the September 10, 2013 deadline. About two thirds of the oral and written comments were from water users diverting water below Lucky Peak Dam, with the rest diverting above the dam.

13. In general, oral and written comments from water users diverting water below Lucky Peak Dam were in favor of expansion of the water district to ensure equitable administration of all water rights within the basin and to protect senior water rights in times of water shortage.

14. Oral and written comments from water users diverting water above Lucky Peak Dam were varied with some comments supporting expansion as a means to provide regulation on tributary creeks; some comments objecting to expansion due to concerns about assessment or measuring device fees, or potential curtailment of their water rights; and some comments understanding the reasons for expansion but expressing no position for or against it. The Mountain Home Irrigation District ("MHID") provided both oral and written comments against their inclusion in the proposed expansion area.

15. MHID delivers water for irrigation use to water users located mostly in Elmore County in Administrative Basin 61. MHID owns natural flow and storage water rights for irrigation use from Canyon Creek, Long Tom Creek and Rattlesnake Creek within Administrative Basin 61. MHID also owns the following natural flow and storage water rights from Cat Creek and Little Camas Creek, which are tributary to the South Fork Boise River in Administrative Basin 63 above Lucky Peak Dam:

<u>Water Right</u>	<u>Priority Date</u>	<u>Source</u>	<u>Rate</u>	<u>Storage Volume</u>
63-19893	June 1, 1894	Little Camas Creek	19.00 cfs	9,120.0 acre-feet
63-2188	Dec. 28, 1911	Cat Creek	2.84 cfs	1,380.1 acre-feet
63-20139	May 20, 1912	Little Camas Creek		22,910.0 acre-feet
63-2214	Feb. 1, 1913	Cat Creek	1.80 cfs	874.7 acre-feet

16. MHID's storage facility in Administrative Basin 63 is Little Camas Reservoir with a total capacity of 22,910.0 acre-feet. Water is conveyed from Little Camas Reservoir through an aqueduct into Long Tom Creek and into MHID's distribution system. Overflow from Little Camas Reservoir flows into Little Camas Creek to Anderson Ranch Reservoir on the South Fork Boise River.

17. MHID provided reasons that its rights should not be included in Water District No. 63 as follows:

- its "...water sources are no longer physically and hydrologically part of the Boise River System..." because water is diverted and used outside of the Boise River Basin;
- its water rights are senior to downstream users and there is little possibility that the MHID rights would be curtailed in the event of a water shortage;
- MHID already regulates the delivery of its water rights to its water users, so inclusion in Water District No. 63 would subject the MHID water users to duplicative fees and regulation.

18. The Little Camas Creek Basin is a small drainage basin, approximately 45 square miles, flowing into Anderson Ranch Reservoir on the South Fork Boise River. Aside from the MHID water rights, the following irrigation rights divert water from Little Camas Creek, or from springs tributary to Little Camas Creek:

<u>Water Right</u>	<u>Priority Date</u>	<u>Source</u>	<u>Rate</u>	<u>Storage Volume</u>
63-31776	June 1, 1888	Little Camas Creek	0.83 cfs	
63-2245	July 16, 1914	Little Camas Creek	0.60 cfs	
63-10272	Oct. 28, 1984	Little Camas Creek		380 acre-feet

There are also several small domestic or stockwater rights that divert water from the Little Camas Creek Basin.

19. Storage water rights for Arrowrock Reservoir (water right no. 63-303, priority date January 13, 1911) and Lake Lowell (63-301A, priority date December 14, 1903), diverted from the Boise River below the MHID diversions, have priority dates that are senior to three of the four MHID storage rights for Little Camas Reservoir.

20. Storage water rights for Arrowrock Reservoir and Lake Lowell fill early most every year. As an example, during the period between 2000 and 2013, the Arrowrock Reservoir storage right no. 63-303 filled no later than April 21 and most years filled by March 30.

21. Water right records of the Department list numerous natural flow water rights for irrigation use from the Boise River that are senior to some or all of MHID's natural flow water rights in Administrative Basin 63.

22. During the period between 2000 and 2013, a natural flow water right with a June 1, 1894 priority date in the Boise River Basin would have been cut as early as June 16. During the same period, natural flow water rights with priority dates of December 28, 1911 or February 1, 1913 would have been cut as early as April 15.

23. MHID's natural flow rights would likely be in priority during spring runoff in most years. Because of its location in the upper reaches of the Boise River Basin, spring runoff flows in Little Camas Creek diminish quickly and are likely unavailable to fill MHID's natural flow water rights, even if they remain in priority. It is not clear from existing records to what extent, if any, the MHID water rights from the Boise River Basin would need to be curtailed to satisfy downstream senior water rights in the Boise River Basin.

24. MHID natural flow and storage water rights diverted from Canyon Creek, Long Tom Creek and Rattlesnake Creek are included in Water District No. 61A in Administrative Basin 61. Water District 61A submitted a letter to the Department on September 17, 2013 stating that assessments for MHID include water right nos. 63-2188, 63-2214, 63-19893 and 63-20139 from the Little Camas Creek Basin. The letter further stated that those water rights are part of Water District No. 61A operations and water delivery.

25. The sources of water and points of diversion for MHID's water right nos. 63-2188, 63-2214, 63-19893 and 63-20139 from the Little Camas Creek Basin are not presently within the boundaries of Water District No. 61A or Water District No. 63.

ANALYSIS OF MHID OBJECTIONS

MHID argues that water diverted from the Little Camas Creek Basin "...is no longer physically or hydrologically part of the Boise River System..." because the water is diverted and used outside of the Boise River Basin. The purpose of a water district is to distribute water to water users in accordance with the prior appropriation doctrine. The question to be addressed by a watermaster in a water district is not whether the water is diverted and used outside of the basin, but when the water can be diverted in priority with other water rights in the water district. The Water District No. 61A watermaster is not currently responsible for regulating MHID's diversions from the Little Camas Creek Basin in priority with other Boise River Basin water rights.

MHID argues that its water rights are senior to downstream water rights in the Boise River Basin and the need for regulation is unlikely. The MHID storage rights would likely not be curtailed for storage during the non-irrigation season; however, because the MHID water rights are not the most senior rights, its potential diversion of water for storage and natural flow during the irrigation season may need to be regulated in some years.

Lastly, MHID argues that its inclusion in Water District No. 63 would result in duplicative fees and regulation for its water users. The argument is not convincing because there are

other irrigation districts in Water District No. 63 that deliver water to water users. The fees and regulation of the irrigation districts are intended for maintenance and delivery of water through the various canals and laterals owned by the irrigation districts and are not duplicative. An argument not made by MHID is that the Water District No. 61A watermaster could be responsible for some of the regulatory duties associated with distribution of water from the Boise River Basin. For example, the Water District No. 61A watermaster addresses delivery of the MHID water from the Boise River Basin once it is injected into Long Tom Creek in Water District 61A. The Water District No. 61A watermaster could also address unauthorized uses of the water and assist IDWR to maintain current and accurate water right records. Because the MHID water rights are diverted from the Boise River Basin and conveyed to a separate basin, there would be some overlap in the duties related to the distribution of water by watermasters in each water district.

The Director has some discretion in the way water districts may be divided within a water supply pursuant to Idaho Code § 42-604. In this case, exclusion of the MHID water rights or water rights within the Little Camas Creek Basin from Water District No. 63 is not justified since diversion of those rights may affect senior downstream water rights in the Boise River Basin at some times. However, creation of a sub-district for the Little Camas Basin within Water District No. 63 can provide the necessary regulation while also providing an opportunity for water users to control costs for the limited regulation that may be necessary in the Little Camas Creek Basin. A sub-district for the Little Camas Creek Basin within Water District No. 63 should be conditioned to coordinate with the Water District No. 63 watermaster to provide for distribution of water in priority with other water rights in the Boise River Basin. A watermaster within the sub-district should be required to provide proper measurement and control of diversions as necessary to accomplish such regulation.

CONCLUSIONS OF LAW

1. Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. *See* Idaho Code §§ 42-101, 42-103, and 42-226.

2. The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602 et seq.

3. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. Idaho Code § 42-604 authorizes the Director to form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation.

The Director may also revise the boundaries of a water district, abolish a water district, or combine two or more water districts, by entry of an order, if such action is required in order to properly administer uses of the water resource.

5. Idaho Code § 42-605 provides that water users of a water district may choose a committee to serve as advisors to the director and the watermaster in matters pertaining to the distribution of water within the district and to carry out policies as set forth by the water users.

6. Idaho Code § 42-1417 provides that the district court having jurisdiction over a general water rights adjudication may authorize the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with Director's Reports filed with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the Director's Reports.

7. All of the surface water rights claimed in the Snake River Basin Adjudication (SRBA) and within the Department's Administrative Basin 63 have been partially decreed or reported to the SRBA District Court. The SRBA District Court has authorized interim administration of water rights in Basin 63 pursuant to chapter 6, title 42, Idaho Code.

8. Idaho Code § 42-113 provides that a water right permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock.

9. A water district is a quasi-governmental entity that is locally controlled. The Department oversees its operation to insure compliance with Idaho Code and to insure that water rights are being delivered by the watermaster according to the prior appropriation doctrine. Most decisions within the water district, including the budget, assessments, election of the watermaster, and the watermaster's salary are determined by the water users within the district.

10. Some of the testimony against the expansion raised concerns about costs for assessments or measuring devices. At the public hearing IDWR staff enumerated reasons for the proposed expansion of the water district, including those reasons identified in Finding 8 of this order. Proper regulation requires oversight by a watermaster and lockable/controllable works and measuring devices for regulation of diversions.

11. Measurement and reporting of diversions within the proposed expansion area of the water district is necessary for the proper distribution of water within the water district in accordance with the prior appropriation doctrine. The Director should issue a separate order requiring installation of measuring devices and controlling works for water right diversions within the expansion area of the district.

12. Administration of water rights, other than in-stream stock water rights, is necessary for the protection of prior surface water rights.

13. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should expand Water District No. 63 to include administration and regulation of surface water rights from the Boise River, its forks and tributary

creeks upstream of Lucky Peak Dam, except water rights included in Water District No. 63-S and in-stream stock water rights.

14. The Little Camas Creek Basin should be designated as a sub-district within Water District No. 63 in order to provide the necessary regulation while also providing an opportunity for water users in the sub-district to control costs for the limited regulation that may be necessary. The sub-district should elect its own watermaster and adopt its own budget for the purpose of water distribution within the sub-district and in priority with other rights in Water District No. 63, to include measurement, reporting and regulation of water diversions in coordination with the watermaster of Water District No. 63. The sub-district should provide for the adequate distribution of water in accordance with Idaho law and guidance from the Director and should not be subject to future assessments from Water District No. 63 for purposes of water distribution within that sub-district. If the sub-district is not satisfactorily measuring, reporting, and distributing water within the sub-district and in priority with other rights in Water District No. 63, the sub-district may be dissolved and water users will become subject to future assessments for costs associated with oversight by the Water District No. 63 watermaster.

15. An advisory committee for Water District No. 63, to include representatives from the proposed expansion area, should be selected by the water users to discuss and recommend a plan to implement administration and measuring device requirements for the proposed expansion area of Water District No. 63.

ORDER

IT IS HEREBY ORDERED that:

1. Water District No. 63 is expanded to include all surface water rights from the Boise River, its forks and tributary creeks upstream of Lucky Peak Dam, as shown in the map appended hereto as Attachment A, except rights used for in-stream watering of livestock as defined by Idaho Code § 42-113 for which notice of this action was not provided and rights included in Water District No. 63-S.

2. The Little Camas Creek Basin is designated as the Little Camas Creek Basin Sub-district No. 63-C within Water District No. 63 as shown on the map appended hereto as Attachment A. This sub-district shall meet annually to elect a sub-district watermaster and adopt a budget and may select an advisory committee. The sub-district shall be responsible for the distribution of surface water rights within the Little Camas Creek Basin in accordance with Idaho Law and guidance from the Director and in priority with other rights in Water District No. 63 through coordination with the watermaster of Water District No. 63. The Little Camas Creek Basin Sub-district shall not be subject to assessments from Water District No. 63 for purposes of water distribution within the sub-district. If the sub-district is not satisfactorily measuring, reporting, and distributing water within the sub-district and in priority with other rights in Water District No. 63, the sub-district may be dissolved and the water users will become subject to future assessments for costs associated with oversight of the sub-district by the Water District No. 63 watermaster.

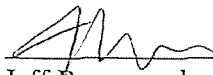
3. The Water District No. 63 annual meeting is held on the first Monday in January. At the annual meeting, the holders of water rights within the district shall elect a watermaster, select an advisory committee to include representatives from the expanded area, and set a budget for operating the district.

4. The watermaster for Water District No. 63 shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

- a. Measure, collect, and record the diversions under water rights;
- b. Administer and enforce the water rights in priority and as conditioned for each right and;
- c. Curtail unauthorized or excessive diversions as necessary (i.e., any diversion without a water right or in excess of the elements or conditions of a water right).
- d. Consult with and coordinate the work activities of deputy watermasters, and coordinate with the elected and appointed watermaster for the Little Camas Creek Sub-district.

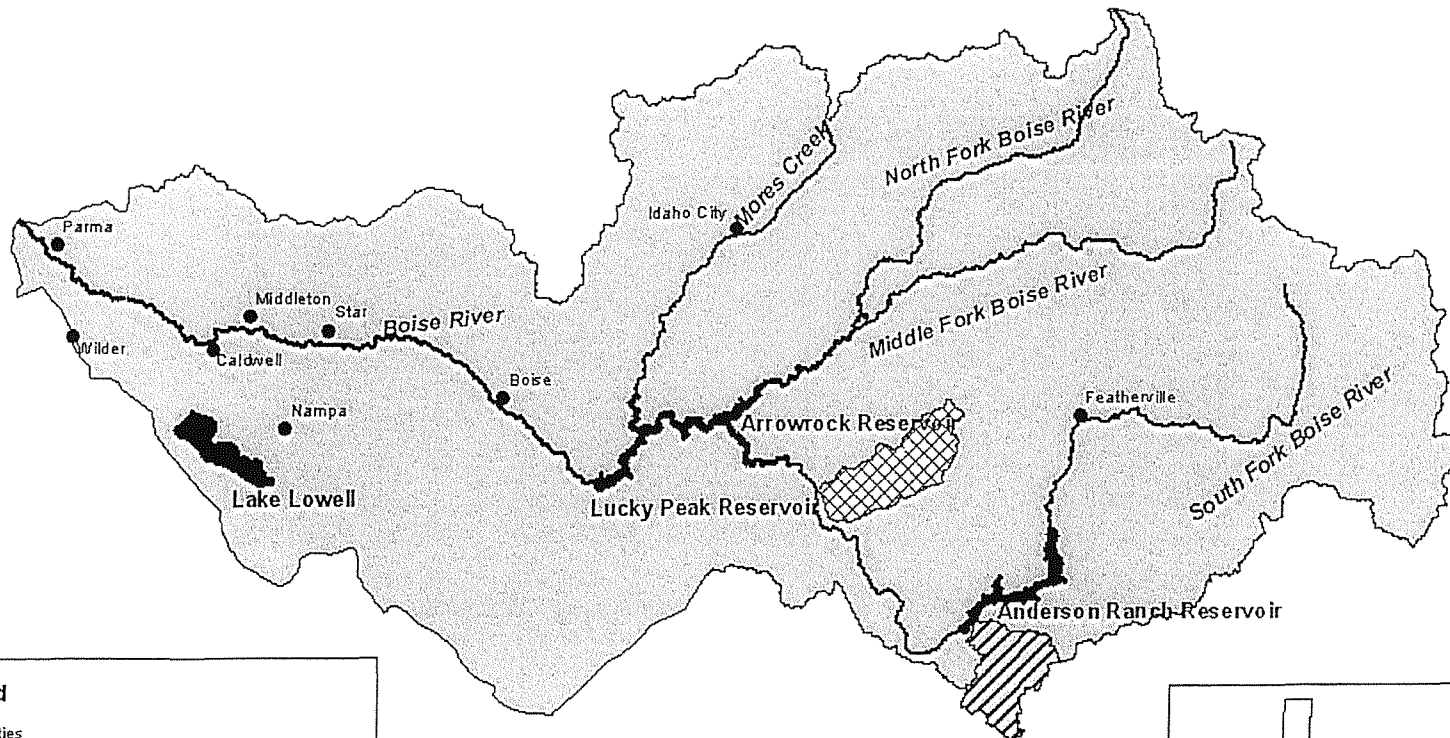
5. The Director shall issue a separate order requiring the installation of measuring devices and controlling works for water right diversions within the expansion area of Water District No. 63. The measuring device order shall be issued some time after the 2014 annual water district meeting to provide time for the water district advisory committee and other water users to work with IDWR toward developing a reasonable water measurement implementation plan.

DATED this 21 day of October, 2013.



Jeff Peppersack
Hearing Officer

Boise River Water District No. 63



Legend

- Cities
- Rivers
- Reservoirs/Lakes
- ▨ Little Camas Creek Sub-district No. 63-C
- ▤ Boise River Water District No. 63
- ▩ Smith Creek Water District No. 63-B (Excluded)

Source: IDWR/agrimm
 Date: 10/17/2013
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2013, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho, and posted on the Department's website: www.idwr.idaho.gov. Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.



Sarah Garceau
Technical Records Specialist
Idaho Department of Water Resources