

IN THE SUPREME COURT OF THE STATE OF IDAHO
Supreme Court Docket No. 44745-2017

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

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,

v.

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

Petitioners-Appellants,

v.

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

Respondents,

and

SUEZ WATER IDAHO, INC.,

Intervenor-Respondent-Cross Appellant.

IDWR RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding
Ada County District Court Case No. CV-WA-2015-21376
(Consolidated Ada County Case No. CV-WA-2015-21391)

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I. STATEMENT OF THE CASE¹

A. NATURE OF THE CASE

This is an appeal from a judicial review proceeding in which the District Court affirmed the Idaho Department of Water Resources' ("Department") methodology for determining when the decreed water rights for the federal on-stream reservoirs in Water District 63 (the "Decreed Storage Rights")² are satisfied. [R. 001056-65](#).³ This methodology is known as the "Accrual Methodology." The Decreed Storage Rights are decreed with fixed annual quantities that, as this Court has held, must be distributed "in priority." *In re SRBA, Case No. 39576, Subcase No. 00-91017, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014)* ("Basin-Wide Issue 17" or "BWI-17"). The Accrual Methodology is the tool the Department uses to distribute water "in priority" pursuant to the elements of the Decreed Storage Rights.

¹ The Statement of the Case in this appeal (Supreme Court Docket No. 44745) is substantially similar to the Statement of the Case in the parallel appeal filed by the Boise Project Board of Control (Supreme Court Docket No. 44677). However, the Argument section is tailored to address the Boise Project Board of Control's specific arguments.

² The Decreed Storage Rights are water right nos. 63-303, 63-3613, 63-3614, and 63-3618. Partial decrees for these water rights were issued in the Snake River Basin Adjudication. [R. 001056](#).

³ Citations to the record herein will use the following formats: "R." and "A.R." for the District Court and Agency records, respectively, followed by bates numbers; transcripts are cited as "Tr." followed by the date of the hearing, and the page and line numbers; exhibits in the Agency Record are cited as "Ex." followed by the exhibit number and bates number; "Officially Noticed Documents" in the Agency Record are cited as "Off'l. Not." followed by the folder and document names, and the bates number.

In this appeal, the Boise Project Board of Control (“Board of Control”) asserts that in flood control years, the determination of when the Decreed Storage Rights are satisfied should be based on federal flood control operations rather than by distributing water “in priority” pursuant to water right decrees.⁴ As the District Court recognized, accepting the Board of Control’s argument would cede control of the use, distribution, and development of Idaho’s water to the Federal Government. [R. 001061-62](#). This is because the Decreed Storage Rights are held by the United States, and each right encumbers all river flows until it is satisfied.⁵ Under the Board of Control’s arguments, therefore, the Federal Government would hold open-ended, unquantified water rights to command all flows in excess of senior diversions until the flood runoff ends and federal flood control operations conclude. This Court has consistently rejected claims to command such open-ended quantities of water as contrary to law.

The Board of Control’s appeal arises from the fact that federal flood control operations “directly conflict” with the storage of water for irrigation and other purposes because flood control requires releasing water rather than storing it. [A.R. 001242](#) (quoting the *Water Control Manual for Boise River Reservoirs*). This conflict in turn creates a “conundrum” and “dilemma” for priority water rights administration, as the District Court and the Director recognized. [R. 001164-65](#); [A.R. 001291](#). The Board of Control and other reservoir system “Spaceholders”⁶

⁴ “The decrees give the Director a quantity he must provide to each water user in priority.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#).

⁵ Except flows required to satisfy senior water rights.

recognized the conflict many years ago and addressed it in their federal storage contracts with the Bureau of Reclamation (“BOR”). Those contracts provide that Lucky Peak storage will be used to replace flood control releases from Arrowrock and Anderson Ranch, [Ex. 2100 at 002170-71](#), and that any flood control-caused shortfall in Lucky Peak storage will be “deducted” from Lucky Peak Spaceholders’ storage accounts. [Ex. 2112 at 002311](#).

The Board of Control now argues, however, that the conflict between flood control operations and irrigation storage should be addressed by interpreting the Decreed Storage Rights as open-ended entitlements to all flow in excess of senior diversions in each and every flood year. Junior water rights would not be authorized to divert until the Corps declares that flood control operations have concluded. This would subordinate the prior appropriation doctrine as established by Idaho law to federal flood control operations and shift flood control risks the Board of Control expressly accepted to other water right holders.

The Water District 63 water distribution accounting system, including the Accrual Methodology, resolves the priority administration “conundrum” and “dilemma” by accommodating federal flood control operations without allowing them to dictate or interfere with priority administration of water rights under Idaho’s prior appropriation doctrine. The Accrual Methodology distributes water according to the elements of licensed and decreed water

⁶ “Spaceholders” are the water delivery entities, such as irrigation districts and canal companies, that have contracts with the federal government for “water storage space in the reservoir in return for the repayment of a proportional share of the construction costs.” *Kerner v. Johnson*, 99 Idaho 433, 438, 583 P.2d 360, 365 (1978); see [A.R. 001237](#) (“irrigation organizations that have contracted for storage in the reservoir system”).

rights, and the “Unaccounted for Storage Methodology”⁷ allows the BOR to replace “priority water”⁸ released by the United States Army Corps of Engineers (“Corps”) for flood control purposes with excess water captured during flood control “refill” operations. The Accrual Methodology is integral to resolving the priority administration “conundrum” and “dilemma” created by federal flood control operations, and it is undisputed that the Spaceholders “have never suffered a water shortage” as a result of how water is distributed under the Water District 63 accounting system. [A.R. 001285](#).

The Board of Control’s challenges to the Accrual Methodology reduce to collateral attacks on the Decreed Storage Rights that, if accepted, “severely undermine the purpose of the [Snake River Basin Adjudication (“SRBA”)] and create uncertainty in water rights adjudicated in that process.” [IGWA v. IDWR, 160 Idaho 119, 128, 369 P.3d 897, 906 \(2016\)](#). The Board of Control’s arguments are also a direct attack on the prior appropriation doctrine as established by Idaho law. The Director must distribute water according to water right decrees and Idaho’s prior appropriation doctrine rather than federal flood control operations.

The Director initiated the contested case proceeding underlying this appeal to give interested parties an administrative forum in which to address their concerns with and objections

⁷ The Department has argued in its related appeal that the District Court’s findings regarding operation of the Unaccounted for Storage Methodology are contrary to the Director’s findings and that the District Court erred in concluding the Unaccounted for Storage Methodology is contrary to law. The Department incorporates herein by reference the arguments in the *IDWR Appellants’ Brief* in the Department’s appeal (Idaho Supreme Court Docket No. 44746-2017).

⁸ “Priority water” is the water distributed to the reservoirs pursuant to the Decreed Storage Rights. [R. 001058-59](#).

to the Water District 63 accounting system. The Board of Control argue that the contested case was procedurally defective and deprived them of due process. These arguments mischaracterize the contested case proceeding and the record, and, in many instances, are contrary to the Department’s Rules of Procedure and Idaho law.

The Department respectfully requests that the Court affirm the District Court’s conclusion that the Accrual Methodology is consistent with the Decreed Storage Rights and the prior appropriation doctrine. The Department also requests that the Court affirm the District Court’s determination that the Board of Control’s procedural arguments lack merit.

B. STATEMENT OF FACTS

1. The Decreed Storage Rights

The United States and various irrigation entities filed a number of storage water right claims in the SRBA for the Boise River Reservoirs.⁹ [*United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 108, 157 P.3d 600, 602 \(2007\)](#). Partial decrees were issued for four claims—the Decreed Storage Rights—in 2007, 2008, and 2009.¹⁰ [A.R. 001234-36](#); [R. 001056](#). The Decreed Storage Rights were decreed in the name of the United States (acting through the BOR) and with the “*Pioneer* remark,” which provides that “title to the use of the water is held by consumers or

⁹ Water District 63 is coextensive with the Boise River Basin, also known as “Basin 63.”

¹⁰ The SRBA’s *Final Unified Decree* was signed August 25, 2014. Attached hereto as [Addendum A](#) are copies of the text of the *Final Unified Decree* (i.e. pages 1-15). The Department requests that the Court take judicial notice of the *Final Unified Decree* pursuant to [I.R.E. 201\(d\)](#).

users of the water.” [R. 001056](#); [A.R. 001235](#); [Pioneer Irr. Dist., 144 Idaho at 115, 157 P.3d at](#)

[609](#). The elements of the Decreed Storage Rights were decreed as follows ([Ex. 2015](#)):

Water Right	Point of Diversion & Source	Quantity (AFY)	Priority	Purpose of Use	Period of Use
63-303	Arrowrock Dam - Boise R.	271,600	01/13/1911	Irrigation Storage Irrigation from Storage	01/01 – 12/31 03/15 – 11/15
63-3613	Arrowrock Dam - Boise R.	15,000	06/25/1938	Irrigation Storage Irrigation from Storage	01/01 – 12/31 03/15 – 11/15
63-3614	Anderson Ranch Dam – S. Fork Boise R.	493,161	12/09/1940	Irrigation Storage Irrigation from Storage Industrial Storage Industrial from Storage Power Storage Power from Storage Municipal Storage Municipal from Storage	01/01 – 12/31 03/15 – 11/15 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31
63-3618	Lucky Peak Dam - Boise R.	293,050	04/12/1963	Irrigation Storage Irrigation from Storage Recreation Storage Streamflow Maintenance Storage Streamflow Maintenance from Storage	01/01 – 12/31 03/15 – 11/15 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31

In addition to the standard elements of a water right decreed in the SRBA, [Idaho Code §§ 42-1411\(2\), 42-1412\(6\)](#), the partial decrees for the Lucky Peak water right and one of the two Arrowrock rights¹¹ include remarks recognizing limited storage of water for flood control purposes.¹² The partial decree for the Lucky Peak water right also includes a remark

¹¹ Arrowrock has two water rights because the dam was raised five feet in the mid-1930s. [A.R. 001237](#).

¹² The Lucky Peak water right includes a remark stating the reservoir “has 13,950 acre feet of capacity for flood control purposes in addition to the volume of water authorized for storage under this right.” [Ex. 2015 at 000722](#). One of the two Arrowrock water rights includes a remark

memorializing the BOR's 1954 flood control "Guarantee" to Arrowrock and Anderson Ranch Spaceholders that, if those reservoirs fail to fill as a result of flood control releases, Lucky Peak storage will be used to replace any resulting shortfall in Spaceholder storage account allocations from Arrowrock and Anderson Ranch reservoirs. See [A.R. 001240](#) (stating "there shall be made available" to Arrowrock and Anderson Ranch Spaceholders "water accrued to storage rights in Lucky Peak"). The Lucky Peak remark states that "[t]he storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the [BOR]." [A.R. 001235-36](#); [Ex. 2015 at 000723](#).¹³

These remarks constitute the only references in the partial decrees for the Decreed Storage Rights to any of the historical documents the Board of Control asserts are relevant. [BPBOC Brief at 33](#). The partial decrees do not reference the 1953 *Memorandum of Agreement Between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs*, the Corps' 1956 *Reservoir Regulation Manual for Boise River Reservoirs*, the Corps' 1985 *Water Control Manual for Boise River Reservoirs*, or the 1985

stating the BOR "may temporarily store water" in the reservoir's "surcharge" capacity "during flood events or emergency operations." [Ex. 2015 at 000718](#).

¹³ Also at issue in the Lucky Peak subcase was the operation of the Water District 63 accounting system in flood control years. [A.R. 001262-63](#); see also [Off'1 Not.\63-3618\20080219 Aff of RSutter](#) (explaining operation of the Water District 63 accounting system in flood control years); [Off'1 Not.\63-3618\20080219 Reply Brief in Support of US Mtn for SJ at 10-13](#) (making arguments based on the Sutter Affidavit); [Off'1 Not.\63-3618\20080605 Sur-Reply Memo In Support of PID & SID Mtn for SJ at 13-22](#) (making arguments based on the Sutter Affidavit and deposition regarding operation of the accounting system in flood control years).

Memorandum of Understanding for Confirmation, Ratification, and Adoption of Water Control Manual for Boise River Reservoirs between the Corps and the BOR. [R. 001063](#); [Ex. 2015](#).

No water rights authorizing “flood control” or “refill” have been licensed or decreed for the Boise River Reservoirs.¹⁴ After Basin-Wide Issue 17 arose, the United States and the Board of Control filed “motions to file late claims for separate beneficial use rights to address refill” for all three Boise River Reservoirs. [Off’l Not.\BWI-17\91017\20130320_Memorandum Decision at 001419 n.7](#). These “refill” late claims remain pending in the SRBA. [R. 001056](#).

2. Reservoir Operations

Arrowrock, Anderson Ranch, and Lucky Peak are “on-stream” reservoirs created by dams that span the riverbed. [A.R. 000002 n.1](#); [R. 001058](#). ““An on-stream reservoir alters the stream affecting the administration of all rights on the source.”” [BWI-17, 157 Idaho at 388, 336 P.3d at, 795](#) (citation omitted). Each dam is operated so that “[t]he entire natural flow of the stream has been diverted and stored and becomes subject to controlled releases.” [A.R. 001238](#);

¹⁴ In 1983 the United States did file a statutory beneficial use-based claim for “refill or second fill” of Arrowrock Reservoir with the Department, pursuant to Idaho Code § 42-243. [A.R. 001255](#); see [Off’l Not.\63-5262\19830630_63-5262 Claim to a Water Right at 000003](#) (“Remarks: Claim is for . . . refill or second fill of reservoir capacity”). The BOR’s SRBA claim for “refill” (no. 63-5262) was disallowed in 2003. [Off’l Not.\63-5262\20030424_63-5262 Final Order Disallowing WR Claims at 000009](#). In 2006, the United States filed amended SRBA claims for American Falls and Palisades reservoirs that sought priority “refill” remarks. See [BWI-17, 157 Idaho at 388, 336 P.3d at 795](#) (“This water right includes the right to refill under the priority date of this water right to satisfy the United States’ storage contracts”). While the United States’ SRBA claims for the Boise River Reservoirs also were pending in 2006, the United States did not file amended claims for priority “refill” of the Boise River Reservoirs. Copies of the 2006 “refill” claims for American Falls and Palisades are attached hereto as [Addendum B](#). The Department moves the Court to take judicial notice of these amended claims filed in the SRBA pursuant to I.R.E. 201(d).

[Off\1 Not.\63-3618\20080923_Memorandum Decision and Order on Cross-Mtn for SJ at 001553](#); *see id.* at [001550](#) (“the entire flow of [the] river is diverted and then artificially released”); [R. 001058](#) (“Each dam consists of a river-wide diversion structure that captures and regulates the entire flow of the river”).

The Corps and the BOR operate the dams and reservoirs to divert, store, and release water for multiple purposes, including purposes not authorized in the Decreed Storage Rights, such as flood control. [R. 001057](#); [A.R. 001242-48](#). The BOR and the Corps store water according to their operational objectives rather than according to the elements of the Decreed Storage Rights. *See, e.g.*, [A.R. 001246](#) (“the BOR and the Corps physically store water in the reservoir system without regard to which reservoir is in priority”); [A.R.001295](#) (referring to “the federal practice of storing water without regard to the elements of the water rights”); [Ex. 2 at 000028](#) (“[The BOR and the Corps] store water in whatever space in the reservoir system best fits their overall operational objectives”). As a result, “the water stored under the priority date of one reservoir’s water right may be physically stored in a different reservoir.” *Id.*

3. The Water District 63 Accounting System

The District Court recognized that the Water District 63 accounting system is “fairly complex,” and “broadly summarize[d]” it in a few sentences. [R. 001057](#). The District Court acknowledged “[t]he Director’s findings are of course more nuanced,” [R. 001058](#), and the “nuances” are important in considering the Board of Control’s arguments.

The Water District 63 accounting system accounts for all diversions of the available natural flow supply within the district each day, according to the elements of licensed and

decreed water rights. [A.R. 001264-67](#).¹⁵ The Accrual Methodology is a small, albeit significant, part of the Water District 63 accounting system, and is defined by the same principles and procedures that apply in distributing natural flow to all diversions in the district. *Id.* Water rights diverting from the same source are not administered in isolation from each other, and the Decreed Storage Rights are no exception. See [In re Snake River Basin Water Sys., 115 Idaho 1, 7, 764 P.2d 78, 84 \(1988\)](#) (“by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights.”) (quoting United States Senate Report on the “McCarran Amendment,” 43 U.S.C. § 666) (italics omitted). In order to understand the Accrual Methodology, it is necessary to understand the basic principles and procedures of the Water District 63 accounting system. [A.R. 001264-67](#).

a. Basic Principles and Procedures

The Water District 63 accounting system quantifies “‘natural flow availability and use’ and also ‘track[s] storage use.’” [A.R. 001264](#) (citation omitted). Diversions of “natural flow” and “stored water” must be accounted separately,¹⁶ and the distinction between the two is

¹⁵ The Water District 63 accounting system does not govern, control, or dictate federal reservoir system operations, [A.R. 001271 & n.41](#), and has no effect at all on flood control operations. The BOR views flood control operations as “entirely independent of the water rights system.” [A.R. 001301](#); see [Off’l Not.\BWI-17\ 91017—201301111US Response Brief on BWI 17 at 001213](#) (same). The BOR has also asserted that the outcome of the “refill” question “will have no effect on [BOR’s] flood control operations.” *Id.*

¹⁶ See, e.g., [Nelson v. Big Lost River Irrigation Dist., 148 Idaho 157, 163, 219 P.3d 804, 810 \(2009\)](#) (“the watermaster must determine the relative amounts of natural flow and storage water at the various diversion points on the river.”).

fundamental to the Water District 63 accounting system. *Id.* “Natural flow” is the water that would be present in the river absent reservoir operations and diversions. *Id.*¹⁷ “Stored water” is the water in excess of the computed natural flow. *Id.* Diversions of natural flow are accounted to licensed or decreed water rights. *Id.* Diversions in excess of the natural flow available under the priorities of the applicable water rights are charged against storage accounts, which are defined by BOR storage contracts. *Id.*; [A.R. 001267](#). These procedures are largely automated in two separate but related computer programs: the water rights accounting program, and the storage program. [A.R. 001264](#).

The water rights accounting program determines the natural flow supply available for distribution in the district each day, and accounts for all diversions within the district. *Id.* The natural flow supply cannot be determined by simply measuring the flow in the river, however, because the Boise River Reservoirs fully regulate the river system and modify the natural runoff regime. *See* [BWI-17, 157 Idaho at 388, 336 P.3d at 795](#) (citation omitted) (“An on-stream reservoir alters the stream affecting the administration of all rights on the source.”). The daily natural flow supply is determined, therefore, by dividing the river into thirteen “reaches,” and computing the natural flow supply via the “reach gain equation.” *Id.* The reach gain equation determines the natural flow within each reach by measuring the reach’s inflow, outflow, diversions, and (if applicable) reservoir evaporation and change in reservoir content within the

¹⁷ *See* [IDAPA 37.02.03.010.07](#) (**Natural Flow**. Water or the right to use water that exists in a spring, stream, river, or aquifer at a certain time and which is not the result of the storage of water flowing at a previous time.”) (bold in original).

reach. *Id.* The reach gains (or losses) for all reaches are summed from upstream to downstream, and the natural flow available for distribution to the diversions within a given reach is the sum of that reach’s gain (or loss) plus all upstream reach gains (or losses). *Id.*

After determining the natural flow supply available within each reach of the river on a given day, the water rights accounting program distributes to each licensed or decreed point of diversion the amount of natural flow diverted under the priority date and quantity elements of the diverter’s licensed or decreed water right(s). [A.R. 001264-65](#).¹⁸ Any diversion in excess of the quantity of natural flow available under the licensed or decreed water right(s) is charged as a use of stored water, and debited from the diverter’s storage water account. *Id.*¹⁹

The storage program determines how much stored water is allocated to each storage account. [A.R. 001264](#). Storage account allocations are made once a year, on the “Day of Allocation”—that is, after the reservoir system has reached its maximum total physical content for the year and the natural flow supply is no longer sufficient to satisfy demand under all licensed and decreed water rights diverting from the river. [A.R. 001267-69](#), [001270](#).²⁰ On the

¹⁸ Distributions are also made in accordance with any other applicable limitations in the water right, such as annual diversion volume limits, periods of use, etc. [A.R. 001265](#).

¹⁹ Early-season charges against storage accounts are “cancelled” on the “Day of Allocation” if the diversions occurred when water was being released from Lucky Peak for flood control purposes, or if the reservoir system has filled to full capacity. [A.R. 001265](#), [001271](#), [001283](#).

²⁰ The “Day of Allocation” occurs when three requirements have been met: (1) no more water is accruing to the Decreed Storage Rights; (2) diversion demand equals or exceeds the natural flow supply; and (3) the reservoir system has reached its maximum content. [A.R. 001267-68](#).

“Day of Allocation” the storage program allocates all of the water in the reservoir system to Spaceholders’ storage accounts, according to the terms of their storage contracts with the BOR. [A.R. 001267-68, 001270-71](#).

b. The Accrual Methodology for the Decreed Storage Rights

The Accrual Methodology uses the same principles to determine distributions of natural flow pursuant to the Decreed Storage Rights as are used for all other licensed and decreed water rights. Thus, the amount of natural flow available for diversion under each Decreed Storage Right is not determined by simply measuring reservoir “inflows,” but rather by the “reach gain equation” methodology. [A.R. 001266](#).²¹ The Accrual Methodology “accrues”—distributes—to each Decreed Storage Right, on a daily basis, all natural flow computed to be available under the priority of the Decreed Storage Right at its decreed point of diversion—the dam. *Id.* *All* natural flow available in priority is distributed because the Decreed Storage Rights are not limited by diversion rates, and each dam physically diverts the entire flow of the river into the reservoir, where it is thereafter subject to regulation and controlled releases by the BOR and/or the Corps. [R. 001058; A.R. 001238](#). The dams “therefore divert the entire flow of the river that is available in priority at any given time.” [R. 001061](#). Under this methodology, accruals to a Decreed Storage Right continue until the cumulative accruals for the year have reached the annual volume

²¹ In the early part of the year, the natural flow available for diversion under the priority of a Decreed Storage Right may be the same as the amount of physical “inflow” to its reservoir, because the Decreed Storage Rights are not limited by diversion rates and authorize diversions to storage year-round. [R. 001060-61; Ex. 2015](#). As a result, the natural flow computed to be available for diversion under a Decreed Storage Right before senior irrigation water rights begin diverting may, in some circumstances, be the same as the physical “inflow” to the reservoir.

of the quantity element. [A.R. 001266, 001293-94](#). When this occurs, the Decreed Storage Right is deemed satisfied and no longer in priority, and no natural flow is accrued to the Decreed Storage Right until the volume is “reset” and accruals begin for the next year. *Id.*²²

Importantly, the Accrual Methodology is not based on measuring the “physical fill” or storage contents of the reservoirs, and cumulative accruals of priority water are not reduced when the BOR or the Corps release water from the reservoir (for any reason). [A.R. 001266](#); *see* [R. 001060](#) (“While the Director distributes priority water to the dams pursuant to the reservoir water rights, it is the federal government that decides how to store and release that water.”). As a result, a Decreed Storage Right can be satisfied either before or after the BOR or the Corps allow the reservoir to physically fill with water. [A.R. 001266](#). This is what is meant by the term “paper fill.” *Id.* “Paper fill” simply means the Decreed Storage Right is no longer “in priority.” *Id.* The term does not mean the reservoir has physically filled or that physical storage of water in the reservoir must stop. *See generally* [A.R. 001266-68, 001270](#) (describing “unaccounted for storage” and storage account allocation procedures).

After a Decreed Storage Right has been satisfied for the year (“filled on paper”), its priority may not be exercised to curtail junior appropriators, but additional storage of water is allowed if there is empty space in the reservoir system and there is water in excess of diversion demand under downstream water rights. [A.R. 001266-67](#). The Accrual Methodology and

²² Accruals can also cease before a Decreed Storage Right is satisfied if the natural flow supply has diminished to the point that no more natural flow is available under the priority of the Decreed Storage Right. [A.R. 001266, A.R. 001267 n.38; 001293-94](#).

“paper fill” apply only to priority administration of the Decreed Storage Rights with respect to other licensed and decreed water rights in Water District 63. They do not determine how much water is allocated to Spaceholder storage accounts on the “Day of Allocation.” [A.R. 001260, 001267-70.](#)

c. The Unaccounted for Storage Methodology

The Water District 63 accounting system tracks and reports the physical storage of water after the Decreed Storage Rights have been satisfied as “unaccounted for storage.” [A.R. 001267, 001410; Ex. 1 at 000009.](#) The Unaccounted for Storage Methodology is entirely different from the Accrual Methodology. In contrast to the Accrual Methodology, the Unaccounted for Storage Methodology is controlled by reservoir system operations and “physical fill.” [A.R. 001261, 001263, 001267, 001408-09 n.5, 001410, 001414 n.9, 001422 & n.14.](#)

“Unaccounted for storage” is a natural flow parameter in the water rights accounting program that serves as a proxy for tracking how much excess water—that is, water not needed to satisfy any water right diverting upstream from the Middleton gage²³—has been physically captured in the reservoir system. “Unaccounted for storage” is not a measurement of reservoir system “inflows,” but rather is a computation based on measurements made at the Middleton gage near the City of Middleton, far downstream from the reservoirs. [Ex. 1 at 000004-05, 000009; Tr., Aug. 28, 2015, p.444, ll. 9-17.](#) If the measured flow at the Middleton gage is less

²³ The Middleton gage is the downstream end of the regulated portion of Water District 63 diversions. Diversions downstream from Middleton are measured and accounted for, but not regulated, because return flows below Middleton have historically been sufficient to satisfy all water rights. [Tr., Aug. 27, 2015, p.222, ll.217-18; Tr., Sep. 10, 2015, p.1375, ll.13-14.](#)

than the excess natural flow that should be present after distributions have been made to all licensed and decreed water rights on the system, it is assumed that the excess was physically retained somewhere in the federal reservoir system—which is exactly what happens during flood control “refill” operations. [R. 001093-95, 001102; Ex. 1 at 000004-05, 000009](#).²⁴ This deficit in the natural flow computed for the Middleton gage is reported in the daily accounting system printouts as “UNACCT STOR,” which is an abbreviation for “unaccounted for storage.” [A.R.001408-09 n.5, 001410; Ex. 1 at 000004-05, 000009; see also, e.g., Ex. 2201 at 004026](#) (accounting printout).

The amount of excess water the Corps captures in the reservoir system during the flood control “refill” period—i.e., “unaccounted for storage”—is highly variable. It depends entirely on the Corps’ runoff forecasts, how much “priority water” the Corps releases during the “evacuation” period, *see* [A.R. 001244](#) (referring to “the forecasted volume of runoff” and “Spring Evacuation Requirements”), and the relative amounts of excess water the Corps chooses to store or “bypass” as the “refill” period progresses.²⁵ *See* [A.R. 001306](#) (“The uncontroverted evidence establishes that, from April 1 until the end of flood control operations ... the reservoirs

²⁴ This assumption is sound because the system accounts for all diversions downstream from Lucky Peak. The assumption is also verified through an annual reconciliation procedure that compares actual reservoir system contents with computed contents. [Tr., Aug. 27, 2015, p. 209, ll. 3-15](#).

²⁵ “Bypass” water is water that was physically diverted and stored. As the Director found: “Bypass does not mean that the inflow is not diverted into the reservoir; it means the amount of water released is adjusted to satisfy the goal of maintaining a constant storage volume or controlling the rate at which storage increases.” [A.R. 001243](#).

refill at whatever rate the Corps, in consultation with the BOR, deems prudent.”). As a result, the amount of “unaccounted for storage” the Corps captures in the reservoir system in flood control years is unpredictable. It can vary by hundreds of thousands of acre-feet even among years that have the same or similar volumes of runoff during the flood control “refill” period. See [R. 001097](#) (comparing flood runoff volumes with “unaccounted for storage” volumes).

On the “Day of Allocation”—which falls after flood control operations have concluded—the storage program allocates all of the water in the reservoirs to Spaceholder storage accounts pursuant to federal storage contracts and BOR instructions, without regard to whether water was stored “in priority” under a Decreed Storage Right or is “unaccounted for storage.” [A.R. 001248-49](#), [001260](#), [001267-68](#), [001270-71](#), [001273](#), [001275-76](#), [001293](#), [001297](#).²⁶ In effect, the distinction between priority water and “unaccounted for storage” is erased on the “Day of Allocation,” and the BOR is allowed to substitute excess flood water captured by the Corps during flood control “refill” operations for priority water that the Corps released earlier. [A.R. 001267](#), [001273](#), [001276-77](#), [001293](#), [001296-97](#), [001421-22](#).

The Director found that the Unaccounted for Storage Methodology is consistent with the longstanding practice of replacing water the Corps releases for flood control purposes with

²⁶ If the Corps has not succeeded in “refilling” the reservoir system to within 73,950 acre-feet of full capacity, the available water is first assigned or credited to the individual reservoirs in order of their priorities, i.e., any shortfall is assigned to Lucky Peak. [A.R. 001261](#), [001267](#). This is not a priority distribution of natural flow but rather a contractual storage allocation procedure used to fulfill the BOR’s “Guarantee” to Arrowrock and Anderson Ranch spaceholders that Lucky Peak water will be used to replace any flood control-caused losses from their reservoirs. [A.R. 001240](#), [001247](#), [001261](#), [001275](#). This procedure is consistent with the BOR’s pre-1986 storage allocation practices. [A.R. 001251-52](#).

excess flood waters captured during the “refill” phase of federal flood control operations. *See* [A.R.001276](#) (“The [*Water Control Manual for Boise River Reservoirs*] assumes that flood flows captured in the reservoir system during ‘refill’ operations will be available for allocation to storage spaceholders after the conclusion of flood control operations”); [A.R. 001296](#) (“The coordinated system of flood control operations, in short, is based on substituting flood water for previously stored irrigation water released during flood control operations.”); [A.R. 001421](#) (“The reservoir operations plan contemplated that excess flood water captured during the “refill” period would replace—that is, would be substituted for—any stored or storable water released during flood control operations.”); *Id.* (“Substituting excess water that would otherwise have caused flooding for stored or storable water released to make reservoir space available for flood control purposes is an element of the reservoir operations plan to which the spaceholders and the BOR agreed.”).

4. The Conflict Between Flood Control and Storage

The Director determined the Unaccounted for Storage Methodology is integral to resolving the priority administration “conundrum,” [R.001164-65](#), and “dilemma” created by the conflict between flood control operations and storage. *See* [A.R. 001291](#) (“The Water District 63 water right accounting system resolves the dilemma by accounting for the distribution of natural flow according to decreed water rights and the allocation of stored water according to federal contracts in a manner consistent with coordinated reservoir system operations.”). The conflict arises from the fact that Arrowrock and Anderson Ranch projects were congressionally authorized primarily to store water for irrigation use and are owned and operated by the BOR.

[R. 001055](#); [A.R. 001237-38](#); [Ex. 2053 at 001636-37, 001641-42](#). The Lucky Peak project, in contrast, was authorized primarily for flood control purposes and is owned and operated by the Corps. [R. 001055-56](#); [A.R. 001238](#); [Ex. 2053 at 001642](#); [Ex. 2096 at 002137, 002146](#).

The Corps and the BOR have coordinated the operations of their respective reservoirs since 1956 so that all three reservoirs are used for *both* flood control and storage. [A.R. 001238-49](#). Flood control operations directly conflict with storage because flood control operations require releasing water rather than storing it. As stated by the Corps in its 1985 *Water Control Manual for Boise River Reservoirs*:

Flood control use directly conflicts with all of the other system uses to some degree. Optimum flood control protection possible with the system would require the reservoirs be maintained empty and available to control floodwaters. . . . Optimum irrigation use would require that the system be maintained as full as possible to provide carryover storage water for the drought years. . . . the key conflict is that of flood control versus refill

[A.R. 001242](#) (quoting *Water Control Manual for Boise River Reservoirs*); *see* [R. 001057](#)

(“operation of the dams for purposes such as flood control may conflict with the reservoir water rights”); [R. 001063 n.9](#) (referring to “the apparent conflict” between storage water right administration and flood control operations).

The Corps and the BOR manage and minimize the conflict by operating all three reservoirs for flood control purposes until the flood runoff ends in spring or early summer. *See* [A.R. 001243-47](#) (describing flood control operations). The Corps is in charge of flood control operations and allows the reservoir system to “refill” during the last phase of flood control

operations. *Id.*; see [A.R. 001293](#) (“the reservoir system will physically ‘refill’ as high flows recede and the risk of flooding diminishes”).

Under this system of coordinated reservoir operations, the BOR and the Corps made storage secondary and subject to flood control operations. See [BPBOC Brief at 32](#) (referring to “the methodology to anticipate runoff and to evaluate or leave open reservoir space so that so that the reservoirs can capture runoff after flood control releases to maximize storage”). The Corps decides whether water will be released from the reservoir system during flood control operations, which begin after the irrigation season and “continue until the Corps determines there is no longer a risk of exceeding the flood control objective downstream from Lucky Peak.” [A.R. 001243](#).²⁷ This does not happen until the end of the flood control “refill” period, which can be as early as May or as late as July. [A.R. 001243](#), [001245](#). “Refill” is itself a flood control operation,²⁸ and reservoir system “refill” occurs only when and to the extent the Corps deems permissible in light of the flood risk. The Director found that “the Corps controls the amount of water released from the reservoirs pursuant to the [*Water Control Manual for Boise River*

²⁷ The “flood control objective downstream from Lucky Peak,” [A.R. 001243](#), is to prevent flows at the Glenwood Bridge from exceeding 6,500 CFS, [A.R. 001239](#), [001244](#), [001245](#); [Ex. 2005 at 000418](#). Lucky Peak Dam is “the control point for managing overall reservoir system content,” [A.R. 001292](#), and the Corps has “final authority” over whether water will be released from Lucky Peak for flood control purposes, [A.R. 001243](#).

²⁸ “Refill” is the last of three “somewhat overlapping” sequential periods that define the flood control season, [A.R. 001244-45](#), and “is ‘normally the most difficult and critical of the three flood control periods,’” [A.R. 001245](#) (quoting *Water Control Manual for Boise River Reservoirs*).

Reservoir]'s Refill Requirements. During this period, the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent.” [A.R. 001306](#).²⁹

The risk inherent in this system of operations is that the Corps may not be able to fully “refill” the reservoir system if too much water is released early in the season, and/or the amount of runoff available for storage as the risk of flooding subsides turns out to be less than was forecasted. See [BPBOC Brief at 10](#) (referring to ““reservoir refill risk””) (citation omitted). When “this method of operation” was originally proposed, Boise River irrigators opposed it because they “fear[ed] it might jeopardize the storage of water for irrigation.” [Ex. 2088 at 002083](#); [Ex. 2053 at 001644](#).

The BOR and the Corps consciously decided to make storage secondary to flood control. [Ex. 2038 at 001364](#) (“The above-designated 983,000 acre-feet or any part in storage at the end of each flood season will be primarily considered as available for irrigation except as such amount must be reduced by evacuation requirements for flood control.”). Arrowrock and Anderson Ranch Spaceholders (i.e., the irrigation districts represented by the Board of Control) consented to flood control operations after the Corps and the BOR agreed in 1953 that if Arrowrock or Anderson Ranch Reservoirs were “not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights to the extent of the space thus remaining unfilled at the end of the storage season.” [A.R. 001239](#); [Ex. 2038 at 001369](#); [Off’l Not.\63-3618\20080923 Memorandum](#)

²⁹ “At the end of flood control operations, the Corps turns operational control over to the BOR,” [A.R. 001243](#).

[Decision and Order on Cross-Mtn for SJ at 001537](#). Supplemental storage contracts for Arrowrock and Anderson Ranch executed in 1954 thus included an express “Guarantee” by the BOR that Lucky Peak storage would be used to replace flood control releases from Arrowrock and Anderson Ranch Reservoirs. [A.R. 001239-40](#); [Ex. 2100 at 002169-71](#); [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001537](#).³⁰

The SRBA Court ordered in 2008 that this “Guarantee” be reflected in a remark in the Lucky Peak water right to memorialize that “the BOR has historically administered the flood evacuation from Anderson Ranch and Arrowrock Reservoirs into Lucky Peak as being paramount,” and Arrowrock and Anderson Ranch Spaceholders “have an interest in the storage space in Lucky Peak” that is “paramount to all other rights to storage space in Lucky Peak.”

[Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001565](#); [A.R. 001235-36](#); *see* [Ex. 2015 at 000723](#) (partial decree for Lucky Peak water right).

Thus, if flood control operations result in a shortfall to Arrowrock and Anderson Ranch Spaceholders’ storage accounts, they are made whole with storage from Lucky Peak.

Lucky Peak Spaceholders (such as most of the “Ditch Companies”³¹) consented to flood control operations when the BOR began contracting Lucky Peak storage in 1965. These “water

³⁰ In addition, the Spaceholders’ repayment costs and O&M charges were re-allocated so the Spaceholders would not bear the financial burden of “nonreimbursable” flood control operations. [Ex. 2071 at 001928, 001931](#); *see* [Ex. 2100 at 002171](#) (contract referring to cost allocation report).

³¹ The “Ditch Companies” are: 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

service contracts” expressly recognized that flood control was the “primary purpose” of the Lucky Peak project. [Ex. 2112 at 002310](#). The contracts provided that Lucky Peak storage was “[s]ubject to such operation for flood control,” that the Corps would release water “as required for flood control,” and that “such discharged water shall be deducted from any stored water held to the credit of the Contractor.” [Ex. 2112 at 002310-11](#). These provisions were retained when the Lucky Peak “water service contracts” were converted to “repayment” contracts in 2005. [Ex. 2190 at 003990-91](#); [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001544-45](#); [see A.R. 001238](#) (“the 71,017 acre-feet of Lucky Peak storage contracted for irrigation use is ‘[s]ubject to operations for flood control’”) (citation omitted). The SRBA Court held that when the irrigation entities entered into these contracts they acknowledged “that the reservoir could be used for purposes other than irrigation.” [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001564](#).

C. PROCEDURAL BACKGROUND

The Director initiated the contested case underlying this appeal in October 2013 to address “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.” [A.R. 000007](#). These accounting procedures became an issue in the Basin-

& 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.

Wide Issue 17 proceedings. See [R.001068](#) (“The controversy became manifest in SRBA Basin-Wide Issue 17”).

The Director initiated the contested case after the SRBA Court issued its Basin-Wide Issue 17 decision, because the BOR, Board of Control, Ditch Companies, and others continued to express concerns with the accounting procedures. [A.R. 001232](#); [A.R. 001263](#); see [R. 001069](#) (“The controversy continues . . .”). At the request of parties, the Director stayed the contested case pending the outcome of the appeals of Basin-Wide Issue 17 to this Court. [A.R. 001232](#). This Court subsequently held that the decision of “[w]hich accounting method to employ” in determining when a storage water right is satisfied is “within the Director’s discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#). Some of the parties to the “refill beneficial use claims still pending in the SRBA” asked the District Court “to stay processing those claims pending a decision by the Director in this contested case proceeding[.]” [A.R. 000095](#). Given this Court’s decision “and the parties’ request to stay the beneficial use claims,” the Director lifted the stay of the contested case proceeding. *Id.*

The contested case lasted more than two years, and included extensive discovery, pre-hearing motions, a five-day hearing, and post-hearing briefs. [A.R. 000001-1435](#). The Board of Control and the Ditch Companies asserted throughout the contested case that the BOR’s decreed storage rights must be administered as being “in priority” until flood control “refill” operations have concluded. [A.R. 001306](#), [001413](#), [001416](#), [001423](#). The Director issued the *Amended Final Order* on October 20, 2015, and the *Order Denying Petitions for Reconsideration* on

November 19, 2015 (collectively, “Final Order”). [A.R. 001230](#); [A.R. 001401](#). The Director found that the Water District 63 accounting system distributes water in priority on the basis of the Decreed Storage Rights rather than flood control operations, and ordered that the Accrual Methodology remain in place. [A.R. 001308](#).

The Ditch Companies and Board of Control filed petitions for judicial review of the Final Order in Ada County District Court on December 17, 2015. [R. 001054](#). The petitions were reassigned to the District Court³² and consolidated on December 30, 2015. [R. 000056](#). On September 1, 2016, the District Court issued a *Memorandum Decision and Order*, affirming the Accrual Methodology, rejecting procedural error arguments concerning the contested case proceeding, and setting aside and remanding the Final Order in part. [R. 001052](#), [001074](#). The Department, the Ditch Companies, the Board of Control, and Suez Water Idaho, Inc. (“Suez”) filed petitions for rehearing on various aspects of the District Court’s decision, [R. 001076](#), [001084](#), [001146](#), which the District Court denied in its *Order Denying Rehearing*. [R. 001161](#). The Ditch Companies and Board of Control filed appeals to this Court, Suez filed cross-appeals, and the Department filed a separate appeal. [R. 001168](#), [001214](#), [001344](#), [001390](#), [001517](#).

³² Petitions for judicial review of decisions of the Department are reassigned to the SRBA Court pursuant to this Court’s December 9, 2009 Administrative Order, *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights*.

II. ADDITIONAL ISSUES ON APPEAL

Pursuant to Idaho Appellate Rule 35(b)(4), the Department identifies the following additional issues presented on appeal:

- A. Whether the Board of Control's arguments are collateral attacks on partial decrees issued in the SRBA;
- B. Whether the prior appropriation doctrine as established by Idaho law should be subordinated to federal flood control operations;
- C. Whether legal control of the distribution, use, and development of Idaho's water should remain in the State of Idaho or be ceded to the Federal Government;
- D. Whether the Board of Control's arguments, if accepted, would extend the priorities of the Decreed Storage Rights to encumber all water in the Boise River Basin in excess of diversions under senior rights in years the Corps releases water from the Boise River Reservoirs for flood control purposes;
- E. Whether the Board of Control's procedural arguments lack merit; and
- F. Whether the Department is entitled to attorney fees.

III. STANDARD OF REVIEW

When reviewing the decision of a district court acting in its appellate capacity under the Idaho Administrative Procedure Act, this Court reviews the district court’s decision “to determine whether it correctly decided the issues presented to it,” but reviews the agency record “independently of the district court's decision.” [Rangen, Inc. v. IDWR, 160 Idaho 251, 255, 371 P.3d 305, 309 \(2016\)](#). The agency’s factual determinations “are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.” *Id.* This Court reviews questions of law de novo. [Vickers v. Lowe, 150 Idaho 439, 442, 247 P.3d 666, 669 \(2011\)](#).

This Court affirms the agency action unless this Court finds the agency’s findings, inferences, conclusions, or decisions are: in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; not supported by substantial evidence on the record as a whole; or arbitrary, capricious, or an abuse of discretion. [Idaho Code § 67-5279\(3\)](#). Even if one of these conditions is met, this Court will still affirm the agency action “unless substantial rights of the appellant have been prejudiced.” [Idaho Code § 67-5279\(4\)](#). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. [Idaho Code § 67-5279\(3\)](#).

IV. ARGUMENT

A. **THE ACCRUAL METHODOLOGY IS CONSISTENT WITH THE DECREED STORAGE RIGHTS AND IDAHO'S PRIOR APPROPRIATION DOCTRINE**

The Director must distribute water “in accordance with the prior appropriation doctrine.” [Idaho Code § 42-602](#); [BWI-17, 157 Idaho at 392-94; 336 P.3d at 799-801](#). Each partial decree for the Decreed Storage Rights defines “a quantity [the Director] must provide to each water user in priority.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#). The partial decrees are “conclusive as to the nature and extent” of the Decreed Storage Rights, and are binding on the Director and all parties to the SRBA. [Final Unified Decree at Addendum A, pp.7, 9, 13](#); [Idaho Code § 42-1420](#). The Accrual Methodology is consistent with the Decreed Storage Rights and the prior appropriation doctrine as established by Idaho law.

At each of the dams, the entire flow of the river is physically diverted into a reservoir, and made subject to controlled releases by the BOR and/or the Corps. [R. 001058](#); [A.R. 001238, 001292](#). The dams “therefore divert the entire flow of the river that is available in priority at any given time.” [R. 001061](#). Accordingly, the Accrual Methodology distributes to each Decreed Storage Right, on a daily basis, all natural flow computed to be available under the priority of the right at its decreed point of diversion—the dam. [A.R. 001266-67](#); [R. 001058-59](#). This is consistent with the partial decrees for the Decreed Storage Rights because the quantity element of each right is defined as an annual volume that is not limited by a diversion rate, and each partial decree authorizes diversions to storage year-round. [Ex. 2015](#); [R. 001060-61](#); [A.R. 001289](#).

It is necessary to distribute water to the Decreed Storage Rights on the basis of the amount of natural flow *computed* to be available in priority rather than by simply measuring reservoir “inflow” because “[a]n on-stream reservoir alters the stream affecting the administration of all rights on the source.” [A.R. 001291](#) (citation omitted). Some of the “inflow” to a reservoir may include natural flow that is not available under the priority of the Decreed Storage Right. Further, because the Boise River Reservoirs are on the same river system, the “inflow” to one reservoir may include stored water released from an upstream reservoir. [A.R. 001287-88, 001291](#); see *Nelson v. Big Lost River Irrigation Dist.*, [148 Idaho 157, 159, 219 P.3d 804, 806 \(2009\)](#) (“When the Irrigation District's storage water is in the river, it may be comingled with natural flow water.”). In addition, “the BOR and the Corps physically store water in the reservoir system without regard to which reservoir is in priority,” [A.R. 001246](#); see [A.R.001295](#) (similar), and as result the water stored under the priority date of a downstream reservoir’s water right may be physically stored in an upstream reservoir, [Ex. 2 at 000028](#).

Reservoir operations, in short, mask the natural flow supply and do not conform to the priorities of the Decreed Storage Rights. “Accordingly, some methodology is required to implement priority administration of affected rights.” [A.R. 001291](#) (citation omitted). This is why it is necessary to distribute the natural flow computed to be available at the Decreed Storage Rights’ points of diversion based on a number of streamflow parameters, rather than by simply measuring reservoir “inflows.” [A.R. 001264-67](#); see [A.R. 001264](#) (“Natural flow is the water that would be present in the river ‘absent reservoir operations and diversions’”) (citation omitted). The Accrual Methodology allows the Director to factor out reservoir operations for

purposes of distributing the available natural flow supply in accordance with the elements of the Decreed Storage Rights, as well as the elements of all other licensed and decreed water rights diverting from the river. [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#) (recognizing “the need for the Director’s expertise”). This Court has long recognized that appropriators diverting downstream from an on-stream reservoir have rights “at their headgates to the amount of water to which they are entitled under their appropriations as if the same would have naturally flowed in the stream prior to the construction” of the reservoir. [Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 396, 283 P. 522, 526 \(1929\)](#).

The Accrual Methodology is also consistent with the statutory requirement of measuring a distribution of water at the point of diversion, which this Court has repeatedly confirmed. [R. 001058 & n.6](#); *see Idaho Code § 42-110* (stating that water right holders “shall be entitled to such quantity measured at the point of diversion”); [Glenn Dale Ranches, Inc. v. Shaub, 94 Idaho 585, 588, 494 P.2d 1029, 1032 \(1972\)](#) (“waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use”); [Stickney v. Hanrahan, 7 Idaho 424, 435, 63 P. 189, 192 \(1900\)](#) (“The necessity of measuring to each claimant, at the point of diversion from the natural stream, the waters appropriated and used by him, is apparent”).³³ The dams are the decreed points of diversion and physically divert all streamflow into the reservoirs, [R. 001056](#),

³³ The *Stewart* and *Bryan Decrees*, which decreed the Boise Project’s natural flow water rights, also require distributions to be measured at the point of diversion. [Ex. 2021 at 000791](#) (*Stewart Decree*); [Ex. 2023 at 000791](#) (*Bryan Decree*).

[001058](#); [A.R. 001238](#), [001292](#), including “the entire flow of the river that is available in priority at any given time.” [R. 001061](#).

The fact that the Corps or the BOR sometimes release priority water for purposes not authorized in the Decreed Storage Rights (such as flood control) does not change the fact that the water was diverted into the reservoirs and made subject to the exclusive physical control of the Corps and/or the BOR. *See* [R. 001060](#) (“it is the federal government that decides how to store and release water. . . . What the federal government chooses to do does not change the fact that the Director distributed the water in priority and to the point of diversion authorized under the reservoir water right”). It is the responsibility of the appropriator to make beneficial use of water actually diverted and distributed to the appropriator under the priority of a water right. *See* [R. 001059](#) (“it is the appropriator who is tasked with applying [water] to beneficial use”); [Rayl v. Salmon River Canal Co.](#), *66 Idaho 199, 209, 157 P.2d 76, 80 (1945)* (“Each user must apply his water to a beneficial use and is solely responsible therefor”).

Deeming each Decreed Storage Right to be “satisfied” and no longer “in priority” when cumulative accruals reach the decreed annual volume, [A.R. 001266-67](#), is also consistent with the quantity elements of the Decreed Storage Rights and Idaho’s prior appropriation doctrine. *See* [R. 001064-65](#) (“the Director’s determination to deem the right satisfied is consistent with the partial decree”). An appropriator holding a “prior right” to a decreed quantity of water “may unquestionably divert that quantity, but when he has done so” the priority of the water right may not be asserted over a larger volume of water “under any other pretext[.]” [Van Camp v. Emery](#), *13 Idaho 202, 208, 89 P. 752, 754 (1907)*. Extending priority to diversions in excess of the

decreed volume would constitute an enlargement and *per se* injury to junior appropriators. *See City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (“An increase in the volume of water diverted is an enlargement” and “there is *per se* injury to junior water rights holders anytime an enlargement receives priority.”) (italics in original) (citation omitted); *see also Barron v. IDWR*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001) (“Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use.”).

The Accrual Methodology distributes the decreed quantities of the Decreed Storage Rights according to their decreed priorities and consistent with the fact that each dam physically diverts the entire flow of the river into a reservoir, including “the entire flow of the river that is available in priority at any given time.” [R. 001061](#). The Accrual Methodology is consistent with the statutory requirement that the Director (rather than reservoir operators) has “direction and control of the distribution of water from all natural water sources within a water district.” [Idaho Code § 42-602](#). The Accrual Methodology is consistent with the statutory requirement that “control” of the state’s water “shall be in the state” rather than the federal government, and that “in providing for its use, [the state] shall equally guard all the various interests involved.” [Idaho Code § 42-101](#).³⁴ The Accrual Methodology thus distributes water “in accordance with the prior appropriation doctrine” as established by Idaho law. [Idaho Code § 42-602](#). The District Court was correct in affirming the Accrual Methodology. *See* [R.001065](#) (“The Director’s finding is

³⁴ The Board of Control does not object to how the Accrual Methodology works in “non-flood years.” [A.R. 001277](#). The Board of Control essentially seeks two different methods of priority administration, depending upon the water supply.

therefore consistent with both the prior appropriation doctrine and the subject decrees. It must be affirmed.”).

B. THE BOARD OF CONTROL’S OBJECTIONS TO THE ACCRUAL METHODOLOGY LACK MERIT

1. The Accrual Methodology Is Not Based on a “Paper Fill/One-Fill Rule”

The Board of Control asserts the Accrual Methodology is based on a “paper fill/one-fill’ accounting rule.” *BPBOC Brief at 1-2, 38*. The Board of Control has not supported these assertions with record citations; and a review of the Director’s Final Order confirms that he did not find or conclude the Accrual Methodology implements or uses a “one-fill’ rule” or a “paper fill’ rule.” See [A.R. 001230-001311 \(Final Order\)](#); [A.R. 001401-001435 \(Order Denying Petitions for Reconsideration\)](#). The term “paper fill” does not appear in the program code or printouts. [A.R. 001266 n.36, 001268, 001411](#). “Paper fill” is not a rule or standard but rather a term of convenience used in recognition of the fact that, as a result of reservoir operations, a Decreed Storage Right can be satisfied even if its reservoir has not physically filled to full capacity. [A.R. 001426](#); [Ex. 1 at 000008](#). Further, the District Court in affirming the Accrual Methodology implicitly rejected the Board of Control’s argument that the Water District 63 accounting system is based on a “one-fill’ accounting rule.” See [R. 001165](#) (“The Court reemphasizes that its ruling in this case in no way relies on precedent established in other states regarding the so-called ‘one-fill rule.’”).

Rather, and as previously explained, the Accrual Methodology distributes water according to the elements of the partial decrees for the Decreed Storage Rights, in accordance

with well-established principles of the prior appropriation doctrine. The Accrual Methodology is based on a straightforward application of basic principles of the prior appropriation doctrine and the elements of the partial decrees, not a “paper fill/one-fill’ accounting rule.”

The fact that the Accrual Methodology does not take flood control operations into account for purposes of distributing “priority water” is not because of a “rule” of “one-fill” or “paper fill,” but rather because the partial decrees do not require or authorize flood control-based administration. Other partial decrees confirm this conclusion. The partial decrees for some other water rights *do* include provisions requiring or authorizing flood control-based administration, as the Board of Control admits, [BPBOC Brief at 13](#), and the Director recognized that the subject water rights must administered in accordance with these flood control provisions. [A.R. 001308](#). By administering water rights according to the elements of partial decrees, the Director is not creating a “rule” but simply performing his “clear legal duty” to distribute water in accordance with the prior appropriation doctrine. [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#) (citation omitted).

2. The Accrual Methodology Distributes “Wet Water”

The Board of Control argues the Accrual Methodology is contrary to law because it distributes “paper” water rather than “wet” water. [BPBOC Brief at 1, 30, 61](#). These assertions are contrary to the record. The Accrual Methodology distributes water based on measurements of “wet water”: each river reach’s inflow, outflow, diversions, and (if applicable) reservoir evaporation and change in reservoir content. [A.R. 001264-65](#). The Accrual Methodology quantifies and distributes the “wet water” actually flowing in the river, not “paper water.”

The Director found that the term “paper fill” simply means a Decreed Storage Right is no longer “in priority.” [A.R. 001266](#). The term does not mean a reservoir has physically filled, does not mean that physical storage of water in a reservoir must stop, and has no relevance or application in allocating water to Spaceholder storage accounts on the “Day of Allocation.” *See generally* [A.R. 001266-68](#), [001270](#) (describing “unaccounted for storage” and storage account allocation procedures).

Moreover, the Director found that on the “Day of Allocation,” the storage program allocates all of the “wet” water physically stored in the reservoirs to Spaceholder storage accounts pursuant to federal storage contracts and BOR instructions, without regard to whether the water was stored “in priority” under a Decreed Storage Right or is “unaccounted for storage.” [A.R. 001248-49](#), [001260](#), [001267-68](#), [001270-71](#), [001273](#), [001275-76](#), [001293](#), [001297](#).³⁵ In effect, the distinction between priority water and “unaccounted for storage” is erased on the “Day of Allocation,” and the BOR is allowed to substitute excess flood water captured by the Corps during flood control “refill” operations for priority water that the Corps released earlier. [A.R. 001267](#), [001273](#), [001276-77](#), [001293](#), [001296-97](#), [001421-22](#).

The Director specifically found that “Spaceholders in the storage reservoirs have never suffered a water shortage as a result [of] the existing water rights accounting and storage

³⁵ As previously discussed, the available water is first assigned or credited to the individual reservoirs in order of their priorities, i.e., any shortfall is assigned to Lucky Peak if the Corps has not “refilled” the reservoir system to within 73,950 acre-feet of full capacity. [A.R. 001261](#), [001267](#). This is not a priority distribution of natural flow but rather a contractual allocation of storage pursuant to the BOR’s 1954 “Guarantee” to Arrowrock and Anderson Ranch spaceholders. [A.R. 001240](#), [001247](#), [001261](#), [001275](#).

allocations program.” [A.R. 001285](#). The Director also found that “any risk of insufficient water supply and resulting reduction of crop production or crop failure is the result of insufficient water supply during drought years and is not the result of a deficiency in total storage physically held in the Boise River on-stream reservoirs after flood control releases.” *Id.* The Director further found that “[i]n years of flood control releases, the reservoir spaceholders have had enough storage water to irrigate their crops.” *Id.*³⁶ The Director also found that the Water District 63 accounting system accommodates and complements coordinated reservoir operations by, among other things, allowing the BOR to allocate “‘wet’ water to the spaceholders.” [A.R. 001297, 001303](#).

3. The Unaccounted for Storage Methodology Is Consistent with This Court’s “Excess” Water Decisions and the Principle of Maximizing Beneficial Use of Idaho’s Water

The Board of Control asserts that “unaccounted for storage” is a raw measurement of cumulative reservoir “inflows” after “paper fill” and the District Court was correct in concluding the Unaccounted for Storage Methodology is contrary to law. [BPBOC Brief at 21, 35-37](#). This contention is contrary to the Director’s factual finding that “unaccounted for storage” is determined by physical storage rather than “inflows.” This factual error, which the District

³⁶ The Director found that, with one exception, all Boise River Reservoir Spaceholders have received full storage account allocations in all flood control release years since the Department began using the Water District 63 accounting system in 1986. The exception was 1989, when Lucky Peak Spaceholders received less-than-full storage account allocations. In all other flood control years, the 60,000 acre-foot “buffer” of uncontracted streamflow maintenance storage provided by the *Water Control Manual for Boise River Reservoirs* has been sufficient to fully protect Lucky Peak Spaceholders against flood control releases. [A. R. 001245; 001247; 001263;001268; 001270; 001273; 001276; 001303](#).

Court also made, *see* [R. 001058, 001065](#) (stating that “unaccounted for storage” is a measure of the excess natural flow that “enters” the reservoirs), is key to understanding why the District Court erred in concluding the Unaccounted for Storage Methodology is contrary to law.

The Director specifically found that “unaccounted for storage” is limited to the water that is physically stored, held, or captured in the reservoirs, which is much less than the “inflows” after “paper fill.” [A.R. 001267, 001270, 001278, 001410, 001414 n.9, 001422; R. 001093-94.](#) These findings are supported by substantial evidence in the record, which confirms “unaccounted for storage” is not measured by and does not quantify reservoir “inflows.” Rather, it is a computed number based on measurements made at the Middleton gage, which is far downstream from the reservoirs. “Unaccounted for storage” is defined in the computer program code as natural flow in excess of the diversion demand under all licensed and decreed water rights that based on diversion data *should* have flowed past Middleton, but that actual flow measurements show did *not* flow past Middleton. It is assumed that this “missing” excess water was captured in the reservoir system during flood control “refill” operations—which is almost always the case. [Ex. 1 at 000004-05, 00009; Tr., Aug. 28, 2015, p.444, ll. 9-17; R. 001093-95, 001102; A.R.001408-09 n.5, 001410; Ex. 2201.](#)

Accordingly, the amount of excess water captured in the reservoir system during the “refill” period of flood control operations—i.e., “unaccounted for storage”—is not determined by “inflows” but rather is entirely a function of the Corps’ runoff forecasts, how much “priority water” the Corps releases during the “evacuation” period, *see* [A.R. 001244](#) (referring to “the forecasted volume of runoff” and “Spring Evacuation Requirements”), and the relative amounts

of excess water the Corps chooses to store or “bypass” as the “refill” period progresses. See [A.R. 001306](#) (“The uncontroverted evidence establishes that, from April 1 until the end of flood control operations, the Corps controls the amount of water released from the reservoirs pursuant to the Water Control Manual’s Refill Requirements. During this period, the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent.”). As a result, the amount of “unaccounted for storage” is unpredictable and highly variable. It can vary by hundreds of thousands of acre-feet, even among years that have the same or similar volumes of runoff during the flood control “refill” period. See [R. 001097](#) (comparing flood runoff volumes with “unaccounted for storage” volumes).

The “unaccounted for storage” is not considered to be stored “under priority” for two reasons: (1) by its very definition as a coded algorithm in the computed program, “unaccounted for storage” is water that was excess to diversion demand under all licensed and decreed water rights; and (2) the quantity of excess water physically stored during flood control “refill” operations storage is highly variable and entirely dependent on the Corps’ flood control decisions. Thus, “unaccounted for storage” is “not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right.” [A & B Irr. Dist. v. ICL, 131 Idaho 411, 416, 958 P.2d 568, 573 \(1997\)](#); see *id.* (“Consequently there cannot be a prior relation to excess water.”).

The Unaccounted for Storage Methodology and the storage program allow the BOR to allocate the “unaccounted for storage” to Spaceholder storage accounts as a replacement for “priority water” the Corps released for flood control purposes. [A.R. 001267, 001273, 001276-](#)

[77](#), [001293](#), [001296-97](#), [001421-22](#). This procedure does not injure any water rights, because by definition “unaccounted for storage” is water in excess of the diversion demand under all water rights. This procedure is also consistent with this Court’s holding that Idaho law authorizes ancillary use of excess water, when it happens to be available, by those already holding water rights. See *State v. ICL*, [131 Idaho at 333, 334, 955 P.2d at 1112, 1113 \(1998\)](#) (approving a historical practice of using excess water “even though there is no water right in the ‘excess’ water itself.”). The Unaccounted for Storage Methodology also is consistent with “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” [IGWA, 160 Idaho at 129, 369 P.3d at 907](#).

4. Distributions of Water Must Be Measured at the Decreed Point of Diversion

The Board of Control argues the District Court erred in holding that distributions of water pursuant to the Decreed Storage Rights must be measured at their points of diversion—the dams—because Idaho Code § 42-110 “does not explicitly refer to dams,” and because “no storage dam” was involved in this Court’s decisions in *Stickney* and *Glenn Dale Ranches, Inc.* [BPBOC Brief at 23-24](#). This argument ignores the plain language of Idaho Code § 42-110.

Idaho Code § 42-110 expressly provides that the “entitlement” established by a water right for “any ditch, canal or conduit, or other works for the diversion and carriage of water” shall “be measured at the point of diversion.” [Idaho Code § 42-110](#). This language plainly encompasses diversion works such as the federal dams, which divert water from the natural stream into large artificial lakes that inundate thousands of acres above each dam, and “use the

bed of a stream, or a natural water course” below the dams “for the purpose of carrying stored water” to the BOR’s contractors. [Idaho Code § 42-801](#).

This Court also spoke in broad language when it held in *Stickney* that “[t]he necessity of measuring to each claimant, at the point of diversion from the natural stream, the waters appropriated and used by him, is apparent.” [Stickney, 7 Idaho at 435, 63 P. at 192](#). This unqualified holding was not limited to any particular type(s) of diversion works, and was based on the fundamental principle that “[i]t is against the spirit and policy of our constitution and laws, as well as contrary to public policy, to permit the wasting of our waters.” *Id.* This Court spoke in the same unqualified language and relied on the same fundamental principle in *Glenn Dale Ranches, Inc.* See [Glenn Dale Ranches, Inc., 94 Idaho at 588, 494 P.2d at 1032](#) (“water appropriated will be measured for their sufficiency from the point of diversion, not the place of use”).

The Board of Control’s contention that “flood control releases provide a public benefit and do *not* involve waste,” [BPBOC Brief at 24](#) (emphasis in original), is irrelevant. This contention does not change the fact that the dams are the decreed points of diversion and physically divert “the entire flow of the river that is available in priority at any given time.” [R. 001061](#). It also does not change the fact that the Decreed Storage Rights do not include flood control as a “purpose of use,” and do not provide for flood control-based administration. [Ex. 2015](#); see [R. 001063 n. 9](#) (“The Court is not implying that an on-stream reservoir should be operated void of flood control measures. Rather, issues regarding the apparent conflict between

the administration of a storage right in light of flood control measures need to be raised and addressed when the storage right is being adjudicated.”).

Also irrelevant is the Board of Control’s contention that “storage water delivered to the Boise Project is measured at the head of the New York Canal” rather than at the place of use. [BPBOC Brief at 24](#). The Director must distribute “priority water” according to the elements of the partial decrees, and the New York Canal is not identified as a “point of diversion” in any of the Decreed Storage Rights. [Ex. 2015](#). As the District Court noted, “[t]he partial decrees do not identify the downstream points of diversion at which the irrigation organizations re-divert stored water released from the reservoir system.” [R. 001058 n.6](#); *see* [Ex. 2015](#) (partial decrees). The partial decrees also do not identify the quantities of stored water held by the Board of Control’s irrigation districts and other Spaceholders pursuant to their federal storage contracts. [Ex. 2015](#); [Pioneer Irr. Dist., 144 Idaho at 116, 157 P.3d at 610](#). Thus, even if use of stored water was also the measure of the natural flow available “in priority” under the Decreed Storage Rights—which it is not³⁷—the partial decrees do not provide the information necessary to distribute stored water to Spaceholders. That information is provided, rather, by the Spaceholders’ federal storage contracts and the instructions of the BOR. [A.R. 001243, 001252, 001267-68, 001270, 001275](#); *see* [Pioneer Irr. Dist., 144 Idaho at 115, 157 P.3d at 609](#) (“in the quantities and/or percentages specified in the contracts”).

³⁷ As discussed in a following section, Spaceholders’ use of stored water is *not* the measure of distributions of “priority water” pursuant to the Decreed Storage Rights.

5. This Court Did Not Issue an Accounting “Directive” in Basin-Wide Issue 17

The Board of Control argues that in Basin-Wide Issue 17 this Court issued a “directive” to the Director to count only the water actually applied to the beneficial use when distributing water to appropriators. See [BPBOC Brief at 34](#) (“the Director simply counts how much water a person has **used**”) (quoting [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#)) (bold emphasis added by Board of Control). This argument takes one statement out of context and turns the Basin-Wide Issue 17 decision on its head. The statement quoted by the Board of Control is a single passage in the paragraph summarizing the Court’s principle holding—that the Director must distribute water “in priority,” but which accounting method to employ “is within the Director’s discretion,” and “the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#).

The Board of Control made the same “directive” argument to the District Court. [R. 000349](#). The District Court rejected it and similar arguments “that the Director should not accrue against the reservoir water rights water that is distributed to the dams in priority but is released by the federal government for some other purpose than irrigation.” [R. 001061](#). The District Court recognized that at their “core” such arguments are “no different than arguing the reservoir water rights should be measured at the authorized place of use, or by how much water is actually used to satisfy the purpose of use, instead of at the point of diversion,” and “similar arguments have been rejected many times as contrary to Idaho’s prior appropriation doctrine.” [Id.](#)

The District Court was correct. Had this Court intended to issue a “directive” in the Basin-Wide Issue 17 decision overriding the longstanding statutory requirement of measuring

distributions at the point of diversion, and overturning over a century of decisions affirming that principle, it would have done so unambiguously. The Board of Control’s argument that this Court issued an accounting “directive” to the Director, [BPBOC Brief at 34](#), is contrary to the plain language and clear intent of this Court’s Basin-Wide Issue 17 decision.

6. Spaceholder Diversions of Stored Water Are Not the Measure of Priority Distributions Pursuant to the Decreed Storage Rights

The Board of Control asserts its objections to the Accrual Methodology are consistent with the requirement of measuring distributions at the point of diversion, because “the storage water delivered to the Boise Project is measured at the head of the New York Canal, not the ultimate place of use on a field.” [BPBOC Brief at 24](#). This argument incorrectly equates licensed and decreed water rights with federal storage contracts.

Each of the Decreed Storage Rights defines an annual volume that must be distributed “in priority.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#). Thus, the Director must identify and distribute the “priority water.” [R. 001057](#). As this Court implicitly recognized in the *Pioneer* decision, however, the distribution of “priority water” pursuant to the Decreed Storage Rights and the distribution of stored water pursuant to Spaceholders’ storage contracts with the BOR are two different things. This Court agreed with the BOR’s argument that “the contracts between the United States and the irrigation entities define which organizations receive water and the quantity they may receive,” and that these contractual rights “have been administered successfully” without being reflected in water right licenses or decrees. [Pioneer Irr. Dist., 144](#)

[Idaho at 116, 157 P.3d at 610](#). This Court thus declined the Spaceholders’ request to have their contractual storage allocations set forth in the partial decrees for the Decreed Storage Rights. *Id.*

The legal and administrative distinctions between the Decreed Storage Rights and federal storage contracts that this Court recognized in *Pioneer* are rooted in basic principles of water distribution under Idaho’s prior appropriation doctrine. The Decreed Storage Rights are water rights for “rental, sale or distribution” under the Idaho Constitution, as this Court also recognized in *Pioneer*. See [Pioneer Irr. Dist., 144 Idaho at 114, 157 P.3d at 608](#) (citing and quoting [Idaho Const., Art. XV § 4](#)); [Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 806, 252 P.3d 71, 87 \(2011\)](#) (“The framers of our Constitution evidently meant to distinguish settlers who procure a water right under a sale, rental, or distribution, from that class of water users who procure their water right by appropriation and diversion directly from the natural stream.”) (citation omitted). While the BOR holds legal title to the Decreed Storage Rights, “the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities,” and releases stored water to the Spaceholders, who in turn re-divert the stored water out of the river and deliver it to the “consumers or users of the water.” [Pioneer Irr. Dist., 144 Idaho at 115, 157 P.3d at 609](#).

The distribution of “priority water” to the reservoirs pursuant to the elements of the Decreed Storage Rights is legally and factually distinct from the distribution of “stored water” to the Spaceholders’ headgates pursuant to storage contract entitlements. The distribution of “priority water” is also distinct from the Spaceholders’ delivery of “stored water” to the fields of the “consumers or users of the water” pursuant to the Spaceholders’ shares, bylaws, etc. Compare [Chapter 6, Title 42, Idaho Code](#) (“Distribution of Water Among Appropriators”) with

[Chapter 8, Title 42 Idaho Code](#) (“Distribution of Stored Water”) and [Chapter 9, Title 42, Idaho Code](#) (“Distribution of Water To Consumers”).

Diversions of natural flow and stored water must therefore be accounted separately. *See Nelson, 148 Idaho at 163, 219 P.3d at 810* (“the watermaster must determine the relative amounts of natural flow and storage water at the various diversion points on the river. If that determination is not made, an appropriator of the natural flow may receive some of the Irrigation District’s storage water”). It would be contrary to law to account for Spaceholders’ diversions of stored water as if they were distributions of natural flow to the Decreed Storage Rights. *See id.* (“Treating the Plaintiffs [landowners who received storage water from Mackay Reservoir] as if they were appropriators of the storage water would be contrary to the law.”).

Further, using Spaceholders’ stored water diversions as the measure of satisfaction of the Decreed Storage Rights would mean that the Decreed Storage Rights are not satisfied until the Spaceholders have diverted—i.e. completely exhausted—their annual storage allocations. In most years this does not happen because there is usually “carryover” in the reservoirs at the end of the irrigation season. *See AFRD2 v. IDWR, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007)* (“Carryover is the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water.”). Thus, the Decreed Storage Rights would remain “in priority” throughout the entirety of the season in most years—and in all flood years, which inevitably result in substantial carryover. No junior priority water rights would be entitled to divert because the Decreed Storage Rights are not limited by diversion rates, and

command all flows not required by seniors until the Decreed Storage Rights are deemed satisfied.

In sum, stored water distributions are a measure of the BOR's fulfillment of its storage contracts with the Spaceholders, not a measure of the "priority water" the Director must distribute to the reservoirs pursuant to the Decreed Storage Rights. The Board of Control's argument that Spaceholder diversions of stored water should be the measure of distributions to the Decreed Storage Rights is contrary to the partial decrees, the *Pioneer* decision, the prior appropriation doctrine, and would enlarge priority administration of the Decreed Storage Rights to the detriment of junior priority water right holders.

7. Flood Control Released-Based Accounting Is Incompatible with the Decreed Storage Rights

The Board of Control argues the District Court erred in concluding that flood control release-based accounting "would cripple the Director's ability to distribute water under our system of water rights administration." [R. 001062](#); see [R. 001164-65](#) (referring to the priority administration "conundrum" created by federal flood control operations). The Board of Control argues "flood control releases are readily calculable" because the Director "knows the reservoir elevation" and "how much water is diverted" by senior appropriators downstream of the reservoirs. [BPBOC Brief at 30-31](#). This argument is contrary to the Director's factual findings.

The Board of Control's argument incorrectly equates flood control releases with "reservoir elevation"—that is, with a decrease in the amount of water physically stored in a reservoir. The Director found, however, that the Corps' flood control releases cannot be

identified or quantified by simply measuring “the volume of water physically stored in the reservoir system.” [A.R. 001243](#). The Director found that the Corps’ flood control releases “can take the form of either ‘bypasses’ or ‘evacuations,’” but only “evacuations” result in a decrease in the volume of water physically stored in the reservoirs. *Id.* During “bypasses,” water is released for flood control purposes “at a rate less than or equal to the rate of system inflow,” and thus the volume of stored water is “maintain[ed] or “increase[s] at a controlled rate.” *Id.* “Bypass” releases predominate during the “refill” period of flood control operations, when “the operation shifts from evacuating to filling or ‘refilling’ vacant space.” [A.R. 001245](#).³⁸ Contrary to the Board of Control’s argument, flood control releases do not and cannot be identified or quantified by measuring decreases in “reservoir elevation.” [BPBOC Brief at 31](#).

As the District Court correctly determined, “[o]nly the [federal government knows]” the purposes for which it releases water from the reservoirs, and “it may be months before [the Director] knows whether that water is released to the irrigators or released for some other purposes.” [R. 001062](#). “[T]he Director has no way of knowing whether water he distributes to the dams will ultimately be released to irrigators, or whether it will be released for some other purpose (i.e., flood control, dam maintenance, endanger[ed] species, etc.)” [R. 001061](#) (parenthetical in original). These determinations are “made by the federal government and are out of the Director’s control.” *Id.* As the District Court recognized, release-based water right

³⁸ The Director found that the “refill” period “is ‘normally the most difficult and most critical of the three flood control periods.’” [A.R. 001245](#) (quoting *Water Control Manual for Boise River Reservoirs*).

administration is incompatible with the Decreed Storage Rights: “How is the Director to distribute and administer to other water rights on the system in the interim if he does not know whether the reservoir water rights are, or are not, satisfied? Effectively, he cannot, and the system of priority water right distribution breaks down.” *Id.*

The Director’s findings support the District Court’s conclusions. The Director found that the Decreed Storage Rights, like almost all other irrigation storage water rights, authorize diversions every day of the year,³⁹ and the Accrual Methodology is based on year-round accounting of water distributions on a daily basis. [A.R. 001265](#), [001276](#). The Director found that the Corps and the BOR do not make daily accountings of the volume of flood control releases from the reservoir system. [A.R. 001246](#). Rather, the BOR makes retrospective determinations of the overall volume of water released at the end of the flood control season, and categorizes the releases as flood control, salmon augmentation flow, and various operational loss designations. *Id.* The Director found that the BOR has discretion to categorize releases during the flood control period as releases for “flood control” or salmon flow augmentation (or other operational purposes), or to “feather” the two into each other; and may make after-the-fact changes to its initial accounting of these releases. *Id.*

The Director found that these end-of-season federal accountings of flood control releases are not part of the Water District 63 accounting system, do not distinguish releases for flood control purposes from releases necessary to satisfy downstream water rights, and may or may not

³⁹ Water rights for direct diversion to irrigation use are typically decreed to authorize diversions only during fixed dates during the irrigation season.

be communicated to the Department. *Id.* Thus, as the Director found, taking flood control releases into account for purposes of determining satisfaction of the Decreed Storage Rights “is incompatible with year-round accounting and would essentially preclude day-to-day accounting and administration of water rights in Water District 63 until after flood control operations had ended and the reservoir system had reached its maximum contents.” [A.R. 001284](#).

None of this is changed by the fact that the Director “knows what the demands of seniors are” and “how much water is released from the reservoir.” [BPBOC Brief at 30](#). Moreover, water often is stored for irrigation supply purposes only to be subsequently released for flood control purposes,⁴⁰ and excusing or “zeroing out” the actual storage of this water and allowing subsequent “refill” storage (under priority) would violate the quantity elements of the Decreed Storage Rights. [A.R. 001281-82](#). The District Court agreed: “if the ‘first in’ water and any subsequent ‘refill’ are both considered part of the water right then the decreed quantity element is exceeded.” [R. 001165](#). The District Court was correct in concluding that flood control operations create a priority administration “conundrum,” [R. 001164-65](#), and that flood control release-based accounting “would cripple the Director’s ability to distribute water under our system of water rights administration.” [R. 001062](#).

⁴⁰ This includes “carryover,” which often is released to for flood control purposes. [A.R. 001248-49](#) (“to the extent the volume of carryover exceeds an applicable system flood control space requirement, the excess water will be evacuated for flood control purposes”).

8. “Physical Fill” Administration of the Decreed Water Rights Would Be Contrary to the Prior Appropriation Doctrine as Established by Idaho Law

The Board of Control argues the Accrual Methodology is contrary to the Decreed Storage Rights because it is not based on measuring “physical fill” and “storage.” *See, e.g., BPBOC Brief at 29* (“physically filled and stored”). This argument conflicts with the plain language of the partial decrees, and fundamental principles of the prior appropriation doctrine as established by Idaho law. It also conflicts with the system of coordinated reservoir operations to which the Spaceholders expressly agreed.

a. The Reservoir Capacity Remarks Do Not Require “Physical Fill” Administration

The Board of Control argues that the reservoir “capacity” remarks in the quantity elements of the Decreed Storage Rights mean they “cannot be satisfied or ‘filled’ by counting inflows that pass through or are released for flood control,” and “[t]he only way the volumes of the face of the decrees can be ‘filled,’ as described in the decree, is if water is physically filled and stored to the designated elevation on the upstream face of the dam.” *BPBOC Brief at 29*.

This is not what the remarks state, however. They are simply declarative statements of each reservoir’s storage capacity when physically filled to a certain specified elevation. *Ex. 2015 at 000716, 000718, 000720, 000722*. The Board of Control reads too much into these statements by arguing that they were also meant to address “inflows that pass through or are released for flood control,” and to define when the Decreed Storage Rights have been “filled.” *BPBOC Brief at 29*. Other remarks in the partial decrees, and the Board of Control’s own briefing, confirm this conclusion.

The partial decrees for the Decreed Storage Rights expressly address flood control operations when necessary. As previously discussed, two of the partial decrees include remarks authorizing storage of water for flood control purposes. One of the two Arrowrock water rights includes a remark stating the BOR “may temporarily store water” in the reservoir’s “surcharge” capacity “during flood events or emergency operations.” [Ex. 2015 at 000718](#). The Lucky Peak water right includes a remark stating the reservoir “has 13,950 acre feet of capacity for flood control purposes in addition to the volume of water authorized for storage under this right.” [Ex. 2015 at 000722](#).

The Lucky Peak water right also includes a remark specifically authorizing the use of Lucky Peak storage to replace flood control releases from Arrowrock and Anderson Ranch Reservoirs. *See* [Ex. 2015 at 000723](#) (“The storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs”); [A.R. 001235-36](#) (same); [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001566](#) (same). The SRBA Court ordered that this remark be included in the partial decree for the Lucky Peak water right because “the BOR has historically administered the flood evacuation from Anderson Ranch and Arrowrock Reservoirs into Lucky Peak as being paramount,” and Arrowrock and Anderson Ranch Spaceholders therefore “have an interest in the storage space in Lucky Peak” that is “paramount to all other rights to storage space in Lucky Peak.” [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001565](#).

Other water rights also have remarks or conditions addressing administration in light of flood control operations, when necessary. For instance, as the Board of Control points out in its brief, some water rights in Water District 63 include conditions “limiting the exercise of the right” to time when of flood control releases made pursuant to the *Water Control Manual for Boise River Reservoirs* and a 1953 agreement between the Corps and the BOR regarding “Flood Control Operation of Boise River Reservoirs.” [*BPBOC Brief at 13.*](#)

Addressing federal flood control operations in water right licenses and decrees is nothing new, and requirements for administration in light of flood control operations have been stated in clear and unambiguous language when necessary—including in the partial decrees for the Decreed Storage Rights. This confirms that the Board of Control reads too much into the limited language of the reservoir “capacity” remarks in the partial decrees for the Decreed Storage Rights.

Indeed, the Board of Control’s interpretation of the “capacity” remarks would bring the partial decrees into conflict with the system of coordinated reservoir operations to which the Spaceholders expressly agreed. The Board of Control’s interpretation of the partial decrees links priority administration and satisfaction of each individual Decreed Storage Right to its decreed reservoir. This interpretation would require physically filling each reservoir in order of the priorities of their individual water rights—i.e., Arrowrock first, Anderson Ranch second, Lucky Peak third. This approach would directly conflict with the coordinated plan of reservoirs operations under which the reservoirs are treated as a system rather than as individual facilities, and “the BOR and the Corps physically store water in the reservoir system without regard to

which reservoir is in priority.” [A.R. 001246](#); *see* [A.R.001295](#) (referring to “the federal practice of storing water without regard to the elements of the water rights”); [Ex. 2 at 000028](#) (“[The BOR and the Corps] store water in whatever space in the reservoir system best fits their overall operational objectives”).

b. “Physical Fill” Administration Is Contrary to Priority Administration

Each of the partial decrees for the Decreed Storage Rights gives the Director a quantity of water—an annual volume not limited by a diversion rate—that must be distributed “in priority.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#); *see id.* (“a number that the Director must fill in priority”). Thus, as stated by the District Court, the Director must identify and distribute the “priority water.” [R. 001057](#).

The “priority water” available for diversion under the Decreed Storage Rights flows to the dams over a period of months at varying rates determined by the snowpack and the weather. The “priority water” available for diversion under the Decreed Storage Rights on any given day is a function of the natural flow supply and the relative priorities of the water rights for diversions taking place at various locations along the river. *See In re Snake River Basin Water Sys., 115 Idaho at 7, 764 P.2d at 84* (“by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights”) (citation omitted); [Nevada v. United States, 463 U.S. 110, 140 \(1983\)](#) (“each water rights claim by its ‘very nature raise[s] issues inter se as to all such parties for the determination of one claim necessarily affects the amount available for the other claims.’”) (citation omitted).

The availability of “priority water” has nothing to do with whether or when the Boise River Reservoirs are “physically filled” in years of flood control releases. [BPBOC Brief at 29](#). In years of flood control releases, the reservoirs are “physically filled” on the basis of the runoff forecasts, “rule curves,” and operational decisions made by the Corps. See [A.R. 001306](#) (“The uncontroverted evidence establishes that . . . the Corps controls the amount of water released from the reservoirs the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent.”). The quantity of water in the reservoirs when they are “physically filled” is not a measure of the natural flow supply or “priority water.” The quantity of water in the reservoirs when they are “physically filled,” rather, is a measure of operational decisions made by the Corps.⁴¹

Measuring the satisfaction of the Decreed Storage Rights by whether the reservoirs are “physically filled,” [BPBOC Brief at 29](#), would replace priority administration under Idaho’s prior appropriation doctrine with flood control-based administration based on federal law. [A.R. 001279](#), [001284](#), [001307](#). As the District Court held, this “would effectively transfer water right distribution in the basin from the Director to the federal government” because “[t]he Director would be unable to deem the reservoir water rights satisfied and/or distribute water to junior users until the federal government says he can.” [R. 001062](#).

⁴¹ During the flood control season, the Corps has authority to decide whether water will be released from Lucky Peak Dam. [A.R. 001243](#). Lucky Peak Dam is “the control point for managing overall reservoir system content.” [A.R. 001292](#).

Under Idaho’s prior appropriation doctrine, “control” of Idaho’s water “shall be in the state, which, in providing for its use, shall equally guard all of the various interests involved.” [Idaho Code § 42-101](#). Nothing in the prior appropriation doctrine authorizes replacing priority administration with administration based on federal flood control operations, or allowing the federal government to usurp the Director’s exclusive “direction and control” over the distribution of water to Idaho water rights. [Idaho Code § 42-602](#). As even the BOR has asserted, federal flood control operations are “entirely independent of the water rights system.” [R. 001301; Off’l Not.\BWI-17\ 91017—201301111US Response Brief on BWI 17 at 001212-13](#).⁴² Thus, unless a water right license or decree specifically provides otherwise, federal flood control operations cannot be a basis for identifying “priority water” or distributing water “in priority.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#). The Board of Control’s argument that the Decreed Storage Rights are satisfied only when the reservoirs have “physically filled” would replace priority administration under Idaho law with flood control-based administration under federal law.

c. “Physical Fill” Administration Would Transform the Decreed Storage Rights Into Open-Ended Appropriations of All Excess Flood Water

Making satisfaction of the Decreed Storage Rights dependent on when the reservoirs are “physically filled,” [BPBOC Brief at 29](#), would mean that the Decreed Storage Rights remain “in priority” until the end of the Corps’ flood control operations—that is, until the end of the flood

⁴² Section 8 of the 1902 Reclamation Act provides that BOR “shall proceed in conformity with” state law regarding the “control, appropriation, distribution or use of water for irrigation.” [43 U.S.C. § 383](#).

runoff period. The Decreed Storage Rights would therefore encumber any and all flood water in the Boise River Basin year in and year out because the Decreed Storage Rights are not limited by diversions rates and would command all flood flows⁴³ as long as they remain “in priority.” This result would be contrary to Idaho’s prior appropriation doctrine because “[t]here cannot be a prior relation to excess water.” [A & B Irr. Dist. v. ICL, 131 Idaho at 416, 958 P.2d at 573](#); *see id.* (“Excess flow is not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right.”); [Village of Peck v. Dennison, 92 Idaho 747, 750, 450 P.2d 310, 313 \(1970\)](#) (“if the decree awards an uncertain amount of water to one appropriator whose needs are vague and fluctuating, it is likely that he will waste water and yet have the power to prevent others from putting the surplus to any beneficial use”).

An appropriator holding a “prior right” to a decreed quantity of water “may unquestionably divert that quantity, but when he has done so” the priority of the water right may not be asserted over a larger volume of water “under any other pretext[.]” [Van Camp, 13 Idaho at 208, 89 P. at 754](#). An appropriator may not command any and all flows in a river, year in and year out, to support a much smaller appropriation. *See* [A & B Irr. Dist. v. ICL, 131 Idaho at 416, 958 P.2d at 573](#) (“[t]here cannot be a prior relation to excess water”); *see also* [IGWA, 160 Idaho at 133, 369 P.3d at 911](#) (“The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate.”) (brackets in original) (citation omitted).

⁴³ I.e., any flows in excess of diversions under senior water rights.

This limitation on the exercise of priority is crucial to “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” [IGWA, 160 Idaho at 129, 369 P.3d at 907](#) (citation omitted). If it is not enforced, “[t]here might be a great surplus of water in the stream” and yet a senior appropriator “would have a cause of action to prevent such an appropriation [of the surplus].” [Id. at 134, 369 P.3d at 911](#); see [Lee v. Hanford, 21 Idaho 327, 332, 121 P. 558, 560 \(1912\)](#) (“such surplus and overflow of water would be wasted . . . and the right to appropriate public unused waters of the state would be denied”); [Idaho Const. Art. XV § 3](#) (“The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . .”).

9. The Water District 63 Accounting System Allows Juniors Appropriators to Divert Flood Control Releases

The Board of Control argues the Water District 63 accounting system is contrary to the principle that a senior appropriator must permit juniors to use water the senior does not need, because allegedly the accounting “does not allow a junior natural flow user to divert flood control release water.” [BPBOC Brief at 27](#). This argument ignores the practice of “storage cancelling,” which is necessary for the Director to distribute water in accordance with the prior appropriation doctrine in years the Corps releases water for flood control purposes.

As previously discussed, the Decreed Storage Rights are not limited by diversion rates, and therefore authorize the storage of all flows not required by downstream senior water rights until the Decreed Storage Rights are satisfied. Still, the Corps or the BOR often release water in excess of downstream senior demand before the Decreed Storage Rights are satisfied. The

additional releases may be made for purposes authorized under the Decreed Storage Rights—such as irrigation, streamflow maintenance, municipal/industrial, or power—or for other purposes, such as flood control, salmon augmentation flows, or operational purposes such as dam repair or maintenance. The Director does not know in advance how the BOR will ultimately account for such releases, however, [R. 001061](#); [A.R. 001246](#), and he also does not know whether the Corps will succeed in fully refilling the reservoirs in flood control years—not even the Corps can predict that. Every year is different, and the timing and volume of runoff can vary greatly even within a few weeks.

The BOR’s storage allocation practices and the Corps’ flood control operations, however, do not suspend or override the Director’s “clear legal duty” duty to distribute water in accordance with the prior appropriation doctrine. [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#) (citation omitted); *see also* [R. 001060](#) (“While the Director distributes priority water to the dams pursuant to the reservoirs water rights, it is the federal government that decides how to store and release that water.”). Thus, until the Decreed Storage Rights are satisfied, the accounting algorithm charges junior diversions downstream of Lucky Peak as uses of “stored water” released from the reservoirs. Any “charges” against storage accounts for diversions of water the BOR subsequently identifies as flood control releases are “cancelled” on the “Day of Allocation.”⁴⁴ This procedure is known as “storage cancelling.” [A.R. 001265](#), [001267](#), [001271](#),

⁴⁴ If the BOR determines that the Corps’ flood control releases result in a failure to fully refill the reservoirs that exceeds 60,000 acre-feet, Lucky Peak storage accounts are reduced on a *pro-rata* basis to offset any shortfall in excess of the 60,000 acre-feet. This is consistent with the Spaceholders’ storage contracts.

[001280](#), [001283-84](#), [001428-29](#); [Ex. 1 at 000011](#). The end result is that junior diversions of water the BOR identifies as flood control releases are accounted as diversions of natural flow under the junior water rights. [A.R. 001283-84](#).

The accounting system, therefore, is consistent with the principle that a senior appropriator must permit juniors to use water the senior does not need. [Joyce Livestock Co. v. U.S. 144 Idaho 1, 15, 186 P.3d 502, 516 \(2007\)](#). The Board of Control's argument also incorrectly equates the accounting algorithm to a definition of water rights. The accounting program is simply a tool to assist the Director in distributing water. The fact that junior diversions of water the BOR subsequently categorizes as flood control releases are temporarily charged as uses of stored water is not a definition of the junior water rights. It is an accounting procedure necessitated by the Corps' flood control operations and the BOR's retrospective, end-of season storage accounting conventions, and does not result in regulation or curtailment of juniors. The Director must perform his "clear legal duty" to distribute water in accordance with the prior appropriation doctrine despite the Corps' flood control operations and the BOR's accounting practices. [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#).⁴⁵

⁴⁵ "Storage cancelling" is also the subject of the Board of Control's assertion that the *Water Control Manual for Boise River Reservoirs* provides that flood control releases are "surplus" water that cannot be accrued towards the satisfaction of the Decreed Storage Rights. [BPBOC Brief at 12, 27, 32](#). The Director found the relevant passage of the *Water Control Manual for Boise River Reservoirs* pertains to the practice of "storage cancelling" rather than to distributing water according to the priorities of licensed and decreed water rights. [A.R. 001279-80](#). The Board of Control's related argument that the Department drafted this and other sections of the *Water Control Manual for Boise River Reservoirs*, [BPBOC Brief at 12, 27](#), is not supported by the record. The Director found that "the evidence is unclear as to exactly which portions of the [*Water Control Manual for Boise River Reservoirs*] were drafted by the Department." [A.R.](#)

10. Arguments That the Decreed Storage Rights Must Be Administered According to “Historical Documents” Are Collateral Attacks on Partial Decrees Issued in the SRBA

The Board of Control asserts the District Court erred in rejecting arguments of the Board of Control (and the Ditch Companies) that the Director should distribute water on the basis of a number of “historical documents other than the partial decrees.” *BPBOC Brief at 33* (quoting [R. 001063](#)). The District Court did not err and the Board of Control’s arguments are collateral attacks on the partial decrees.

The District Court held that the partial decrees “are conclusive as to the nature and extent of use” pursuant to [Idaho Code § 42-1420\(1\)](#), and “are plain and unambiguous. There is no reason to resort to extraneous documents to interpret how water is distributed under the decrees.” [R. 001063](#); *see* [R. 001064](#) (“Therefore the documents will not be considered.”). The District Court also held that, consistent with this Court’s decision in *Rangen, Inc. v. IDWR*, [159 Idaho 798, 806, 367 P.3d 193, 201 \(2016\)](#), the Board of Control and the Ditch Companies had the “opportunity and responsibility” to raise in the SRBA any claim that the historical documents were necessary to define or administer the Decreed Storage Rights, “and are now precluded from raising the issue for the first time in a proceeding outside the SRBA.” [R. 001064](#). This holding was also consistent with this Court’s holdings that “[f]inality in water rights is essential” and allowing collateral attacks on SRBA partial decrees “would severely undermine the purpose of

[001424-25](#). The Director further found that “[o]n the whole, the evidence indicates” the Department drafted, at most, “between three and five pages of a very large document of several hundred pages.” [A.R. 001425](#).

the SRBA and create uncertainty in water rights adjudicated in that process.” [IGWA, 160 Idaho at 128, 369 P.3d at 906](#) (citation omitted).

The Board of Control’s argument that the historical documents “were not offered to contradict the partial decree[s]” lacks credibility. [BPBOC Brief at 34](#). The partial decrees are “conclusive as to the natural and extent” of the Decreed Storage Rights. [Idaho Code § 42-1420\(1\)](#); [Final Unified Decree at Addendum A, pp.7, 9](#), and the Decreed Storage Rights must “be administered . . . in accordance” with the partial decrees, [Final Unified Decree at Addendum A, p.13](#). By definition, it contradicts the partial decrees to argue that the Decreed Storage Rights are defined or must be administered on the basis of historical documents that are not incorporated or referenced in the partial decrees.

The Board of Control, the Ditch Companies, other Spaceholders, and/or the United States could have and should have sought administrative provisions addressing the “historical documents” in the SRBA. And they *did*. In the SRBA subcase proceedings on the BOR’s claim for the Lucky Peak water right, the Spaceholders put the same historical documents before the Court, and requested recognition of the BOR’s 1954 “Guarantee” to Arrowrock and Anderson Ranch spaceholders that Lucky Peak storage would be used to replace flood control releases from their reservoirs. [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001535-45](#). The SRBA District therefore ordered that the Lucky Peak partial decree would include a “remark” reflecting the 1954 “Guarantee.” [Id. at 001566](#); [A.R. 001238-39, 001247, 001262-63, 001273, 001275, 001297, 001301](#). Any further water right claims based on the “historical documents” cited by the Board of Control are precluded.

Moreover, the Board of Control's arguments in this case that the Decreed Storage Rights must be administered according to historical records and/or federal flood control operations not referenced in the partial decrees are collateral attacks on the partial decrees. See Rangen, Inc., 159 Idaho at 806, 367 P.3d at 201 (holding that "[a]ny interpretation of Rangen's partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments" and would be "an impermissible collateral attack on the decrees"); IGWA, 160 Idaho at 128, 369 P.3d at 906 ("Allowing IGWA to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process").

11. The Director Found That the Water District 63 Accounting System Is Consistent With Past and Present Reservoir Operations and Accommodates Federal Flood Control Operations

The Director examined and took testimony on the historical documents offered by the Board of Control and the Ditch Companies in examining the history of the construction and operation of the Boise River Reservoirs and the present and past administration of the Decreed Storage Rights. A.R. 001238-63, 001271-77. The Director made extensive and detailed findings on these subjects. Id. The Director found that the record did not support the Spaceholders' arguments that the Decreed Storage Rights had historically been interpreted or administered as authorizing priority "refill" of reservoir space vacated for flood control purposes. A.R. 001257.

The Director also found that the Water District 63 accounting system is consistent with, but not governed by, the Corps' *Water Control Manual for Boise River Reservoirs*. [A.R. 001276-77](#).⁴⁶

The Director further found that the Water District 63 accounting system resolves the priority administration “dilemma” created by the system of coordinated reservoir system operations for the conflicting purposes of flood control and irrigation storage. [A.R. 001291](#). The Director found that the accounting system accommodates federal flood control operations and storage allocation practices without letting them dictate or interfere with the distribution, use, or development of Idaho’s water under the prior appropriation doctrine. [A.R. 001293](#), [001295](#), [001296](#), [001297](#), [001293](#), [001305](#). These findings are supported by the Director’s detailed consideration of substantial evidence and must be upheld on appeal. [Idaho Code § 67-5279](#). As this Court has recognized, complex questions of priority administration fall squarely within the core area of the Directory’s statutory authority and specialized technical expertise:

[T]he state engineer is the expert on the spot, and we are constrained to realize the converse, that judges are not super engineers. The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state, and we must extend to his determinations and judgment, weight on appeal.

[BWI-17](#), 157 Idaho at 394, 336 P.3d at 801 (citation omitted.)

⁴⁶ The *Water Control Manual for Boise River Reservoirs* expressly recognizes that the measurement, accounting, and distribution of water pursuant to licensed and decreed water rights are matters of state law that fall under the authority of the Director, and the watermaster as supervised by the Director. [Ex. 2005 at 000438](#), [000442](#), [000459](#), [00460](#).

C. THE BOARD OF CONTROL'S PROCEDURAL ARGUMENTS LACK MERIT

The Board of Control raises a number of procedural objections to the initiation and conduct of the contested case proceeding. [BPBOC Brief at 44, 50, 52-61](#). These arguments lack merit as discussed below.

1. The Director Acted Within His Authority By Commencing the Contested Case

The Board of Control argues the Director has “no authority” to initiate a contested case “to create a *post hoc* record” and “defend” the Water District 63 accounting system. [BPBOC Brief at 42, 50](#). While the Board of Control recognizes that “Idaho Code § 42-602 authorizes the Director to determine how to account for water pursuant to the prior appropriation doctrine,” it claims the Director improperly initiated the contested case because no “parties had requested” it and the Director did not issue “an ‘informal determination’” as required by the Department’s Rule of Procedure 104. [Id. at 50-51](#).

a. The Origin of the Accounting Controversy in Water District 63

The Board of Control’s argument that the Director initiated the contested case “to create a *post hoc* record” and “defend” the Water District 63 accounting system ignores the stated purpose of the contested case and the circumstances giving rise to the need for such a proceeding. The Director initiated the contested case for a specific purpose: “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 [in Water District 63] pursuant to existing procedures of accounting.” [A.R. 000007](#). The need for such a proceeding arose out of Basin-Wide Issue 17.

Basin-Wide Issue 17 began with competing “refill” remarks that the BOR and the State of Idaho proposed in the SRBA subcases for American Falls and Palisades reservoirs, which led the Board of Control and others to seek a basin-wide issue on the question of “priority refill.” Id. at 387-88, 336 P.3d at 794-95; A.R. 001230-34. Despite the fact that the SRBA Court explicitly excluded “the issue of fill” as “purely an issue of administration,” BWI-17, 157 Idaho at 389, 336 P.3d at 796 (quoting the SRBA Court), the accounting system was attacked as “a fatally flawed construct” that “impermissibly diminishes real property rights,” Off’l. Not. BWI-17\91017 Pioneer Irrigation District’s Opening Brief, In re SRBA, Subcase No. 00-91017 at 000918-19. The SRBA Court declined to address these arguments and held that questions of accounting for the distribution of water are statutorily committed in the first instance to the Director. Off’l Not. BWI-17\91017 Memorandum Decision, BWI-17, Subcase No. 00-91017 at 001420-21.

The Board of Control and the Surface Water Coalition appealed the SRBA Court’s decision to this Court. BWI-17, 157 Idaho at 387, 336 P.3d at 794. While the appeal was pending, the Director and Department staff continued to receive communications expressing concerns with and objections to the Water District 63 accounting system’s method for determining the satisfaction or “fill” of the Decreed Storage Rights. In April 2013, the Chairman of the Board of Control requested the Director “provide answers” to questions about the accounting methodology, including: “[h]ow do you intend to define ‘fill’ of the storage rights in the Boise? ... Does ‘fill’ include pass-through flood water when inflow equals outflow [or] water that is stored and then released for flood water?” and “[w]hat is the rationale for defining ‘fill’ as you have, and is there any rule, regulation, or written decision explaining this rationale?” A.R.

[000004](#). As the District Court recognized, a “controversy concerning how water is distributed to the federal on-stream reservoirs” in the Boise River Basin “became manifest in SRBA Basin-Wide Issue 17[.]” [R. 001068-69](#); *see* [R. 001069](#) (“The controversy continues as evidenced by various communications and objections received by the Director”). The Director initiated the contested case to resolve this controversy by providing interested parties an administrative forum in which to raise “concerns with and/or objections to how water is counted or credited toward the fill of [the Decreed Storage Rights].” [A.R. 000007](#).

b. The Director Properly Initiated the Contested Case

The Board of Control asserts the Director could not “*sua sponte*” initiate the contested case. [BPBOC Brief at 44, 50](#). The District Court rejected this argument, citing the “broad discretion granted [to the Director] under Idaho Code § 42-602” and the fact that “the Department’s Rules of Procedure expressly grant the Director authority initiate formal proceedings such as a contested case by notice.” [R. 001069](#).

The District Court was correct. [Idaho Code § 42-602](#) gives the Director “broad powers to direct and control distribution of water from all natural water sources within water districts,” including the authority to supervise watermasters for this purpose. [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#). While this statute imposes a “clear legal duty” on the Director to distribute water “in accordance with prior appropriation,” the “details of the performance of the duty are left to the director’s discretion.” *Id.* (quoting [Musser v. Higginson, 125 Idaho 392, 395, 871 P.2d 809, 812 \(1994\)](#)). The Director determined that, to fulfill his statutory duty, it was necessary to initiate a proceeding to address and resolve water users’ concerns with and/or objections to the

Water District 63 accounting system's method of determining when the Decreed Storage Rights are satisfied. *E.g.*, [A.R. 000006](#), [000338](#), [001286–88](#). This determination is well within the statutory authority conferred on the Director to ensure that water is distributed in accordance with the prior appropriation doctrine. [BWI-17, 157 Idaho at 392-94, 336 P.3d at 799-801](#). The District Court agreed, explaining that the Director did not exceed “the broad discretion granted him under Idaho Code 42-602” by “initiating the contested case via notice in furtherance of his duty to distribute and administer water.” [R. 001068-69](#).

The Board of Control's argument that the Director improperly initiated the contested case because no “parties had requested” it and he did not issue “an ‘informal determination,’” [BPBOC Brief at 50-51](#), ignores the plain language of the Department's Rule of Procedure 104 (“Rule 104”). Rule 104 states:

Formal proceedings, which are governed by rules of procedure other than Rules 100 through 103, must be initiated by a document (generally a notice, order or complaint if initiated by the agency) or another pleading listed in Rules 210 through 280 if initiated by another person. Formal proceedings may be initiated by a document from the agency informing the party(ies) that the agency has reached an informal determination that will become final in the absence of further action by the person to whom the correspondence is addressed, provided that the document complies with the requirements of Rules 210 through 280. Formal proceedings can be initiated by the same document that initiates informal proceedings.

[IDAPA 37.01.01.104](#) (emphases added).

The Director initiated the contested case by issuing his *Notice of Contested Case and Formal Proceedings* (“Notice”), citing Rule 104. [A.R. 000007](#). Rule 104 does not state that the

Director may only initiate a contested case if “parties”⁴⁷ request it. [BPBOC Brief at 50](#). Rule 104 only requires the Director initiate a contested case “by a document,” which the Director did via the Notice. Further, the Director is not required to “initiate a formal proceeding by issuing an ‘informal determination’” as the Board of Control asserts. [Id. at 50-51](#). Rule 104 plainly states the Director *may* do so, meaning his decision to initiate a contested case by issuing “an informal determination” is discretionary, not mandatory. *See Rife v. Long*, [127 Idaho 841, 848, 908 P.2d 143, 150 \(1995\)](#) (“This Court has interpreted the meaning of the word ‘may’ appearing in legislation, as having the meaning or expressing the right to exercise discretion. When used in a statute, the word ‘may’ is permissive rather than the imperative or mandatory meaning of ‘must’ or ‘shall.’” (citation omitted)); *see Kimbrough v. Idaho Bd. of Tax Appeals*, [150 Idaho 417, 420, 247 P.3d 644, 647 \(2011\)](#) (“Administrative rules are interpreted the same way as statutes.”). As the District Court stated, it “cannot be said that [the Director] acted contrary to law” in initiating the contested case “as the Department’s Rules of Procedure expressly grant the Director authority to initiate formal proceedings such as a contested case via notice.” [R. 001069](#).

It is not unusual for the Director to initiate contested cases to address water distribution questions pertinent to his statutory duties. In such cases, interested parties, like the Board of

⁴⁷ The Board of Control’s assertion that there were “no parties” to the contested case, [BPBOC Brief at 50-51](#), is belied by its active participation in the underlying proceedings. The Board of Control filed a *Notice of Intent to Participate* in the contested case. [A.R. 000189](#). The Board of Control objected to, and sought changes in, the accounting system’s method of determining satisfaction of the Decreed Storage Rights. *See IDAPA 37.01.01.152* (defining “Petitioners” as “[p]ersons not applicants who . . . ask the agency to . . . take action that will result in the issuance of an order or rule”).

Control here, receive notice and participate to express their views on how the Director should address the question. Sometimes proceedings are informal and sometimes the parties formally join a contested case. The Director's *Order Denying Pre-Hearing Motions* lists a variety of administrative proceedings where the Director has issued orders addressing water users concerns on emergent issues. [A.R. 000339](#). The District Court correctly concluded the Director was well within his authority in initiating the contested case because it addressed an ongoing controversy directly related to his "clear legal duty" to distribute water in Water District 63 "in accordance with prior appropriation." [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#); see [R. 001069](#) ("The Director's decision to initiate the contested case must be affirmed").

c. The Director Did Not Err by Declining to Stay the Contested Case

The Board of Control asserts the Director erred by declining to stay the contested case pending the outcome of the SRBA proceeding in subcase nos. 63-33732, *et al.* [BPBOC Brief at 44](#).⁴⁸ This argument overlooks the Department's Rules of Procedure, the partial decrees for the

⁴⁸ The Board of Control also argues in passing that the Director erred by proceeding with the contested case without BOR's participation. [BPBOC Brief at 43-44](#). The BOR declined to participate in the contested case on grounds that it did not meet the requirements of the McCarran Amendment, 43 U.S.C. § 666. [A.R. 000084](#). The BOR's participation was not necessary for the contested case to proceed, however. The Director has a "clear legal duty" under [Idaho Code § 42-602](#) to distribute water in accordance with the prior appropriation doctrine, [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#), and that duty is not contingent upon whether the BOR (or any party) chooses to participate in administrative proceedings initiated to address their objections to the Water District 63 accounting system. Further, the McCarran Amendment is a waiver of sovereign immunity that only applies in court proceedings that seek relief against the United States. The Notice initiated an administrative proceeding that did not seek relief against or action by any party, but rather addressed challenges to the Director's discharge of his statutory duty to distribute water to the Decreed Storage Rights in accordance with the prior appropriation doctrine as established by Idaho law. [A.R. 000343-47](#). The only

Decreed Storage Rights, the *Final Unified Decree*, this Court’s decision in Basin-Wide Issue 17, and the distinction between the matters at issue in the contested case and the matters at issue in the SRBA proceedings.

The Department’s Rule of Procedure 780 provides the Director broad discretion in considering a request for a stay: “Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final.” [IDAPA 37.01.01.780](#). Construing identical language in [IDAPA 04.11.01.780](#), the Idaho Court of Appeals confirmed “it is within the hearing officer’s discretion to either grant or deny a stay.” [Platz v. State, 154 Idaho 960, 969, 303 P.3d 647, 656 \(Ct. App. 2013\)](#).

The contested case addressed questions of the distribution of water to the Decreed Storage Rights pursuant to their partial decrees. The partial decrees for the Decreed Storage Rights are “conclusive,” [Final Unified Decree at Addendum A, pp.5, 7](#), and were binding on the Director in the contested case. *See id. at 13* (“The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state, and tribal law”). Further, in the Basin-Wide Issue 17 proceedings, this Court agreed with the SRBA Court’s holding that “[d]etermining when a water right is satisfied is within the Director’s discretionary functions.” [BWI-17, 157 Idaho at 392-94, 336 P.3d at 799-801](#). The Director did stay the contested case while Basin-Wide Issue 17 was pending before

effect of the BOR’s decision not to participate was to forfeit its opportunity to have its concerns and objections heard in an administrative proceeding initiated specifically for that purpose. [Laughy v. Idaho Dep’t of Transp., 149 Idaho 867, 874, 243 P.3d 1055, 1062 \(2010\)](#).

this Court, recognizing the appeal “could impact the issues in the contested case for water accounting in WD63.” [A.R. 000088](#). Once Basin-Wide Issue 17 ran its course, however, the Director recognized the question of how water is counted or credited toward the fill of a water right was “squarely before” him. [A.R. 000348](#) (citing [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#)).⁴⁹

The Board of Control’s assertion that the contested case proceeding and the SRBA proceeding are “dual track proceedings” is incorrect. [BPBOC Brief at 46](#). As this Court recognized in Basin-Wide Issue 17, adjudicating water right claims and administering decreed water rights are two different things. [See BWI-17, 157 Idaho at 393, 336 P.3d at 800](#) (distinguishing “determining water rights, and therefore property rights” from “just distributing water”). The contested case was initiated 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.” [A.R. 000007](#). The Director was bound by the partial decrees and did not address the beneficial use-based water right claims pending in the SRBA. [See Bray v. Pioneer Irr. Dist., 144 Idaho 116, 118, 157 P.3d 610, 612 \(2007\)](#) (“All claims arising within the SRBA are within the exclusive jurisdiction of the SRBA.”). The SRBA is not the appropriate forum for water users to seek judicial review of objections to the Water District 63 accounting system. [Idaho Code § 42-1401D](#). Further, the question of whether the beneficial use-based water rights claims should be

⁴⁹ Several parties to the SRBA subcases even argued that the subcases should be stayed pending the outcome of the contested case. [A.R. 000095](#).

decreed in the SRBA has no relation to the Director’s method for determining satisfaction of the water rights already decreed in the SRBA.⁵⁰ [Addendum C, Order Denying Motion for I.R.C.P. 54\(b\) Certificate](#), SRBA Subcase Nos. 63-33732, et al. (Jan. 6, 2017).⁵¹ Should the SRBA Court issue partial decrees for those beneficial use-based water rights claims, the Director will distribute water to those rights in accordance with the partial decrees. See [Final Unified Decree at Addendum A, p.13](#).

d. The Director Is Not Required to Engage in Formal Rulemaking

The Board of Control argues that the Accrual Methodology “is a rule that has to be promulgated under the rulemaking provisions of the APA.” [BPBOC Brief at 38](#). Citing this Court’s decision in [Asarco, Inc. v. State, 138 Idaho 719, 69 P.3d 139 \(2003\)](#), the Board of Control argues that “an agency pronouncement is a rule if it displays the characteristics of a rule, regardless of whether rulemaking was undertaken.” *Id.*

The Board of Control’s argument lacks merit because the Accrual Methodology distributes water pursuant to the elements of Decreed Storage Rights, not a “one-fill” rule, as previously discussed. Furthermore, *Asarco* is factually distinguishable and, even if *Asarco*’s six-part test is applied, the characteristics are not met and rulemaking is not required.

⁵⁰ See [Appendices to the Appellants’ Opening Brief \(Supreme Court Docket No. 44677-2016\) \(May 26, 2017\) \(Ditch Companies’ appeal\), Appendix 3 at 7](#) (“it needs to be emphasized that leave was granted for the filing of beneficial use late claims that were separate and distinct from the previously decreed water rights. . . . The claimants also apparently appreciated this distinction as well when they filed the late claims.”).

⁵¹ A copy of the *Order Denying Motion for I.R.C.P. 54(b) Certificate*, SRBA Subcase Nos. 63-33732, et al. (Jan. 6, 2017) is attached hereto as [Addendum C](#). The Department requests that the Court take judicial notice of this order pursuant to I.R.E. 201(d).

- i. The Accrual Methodology Is Based on the Partial Decrees and Is Necessary to Distribute Water to the Decreed Storage Rights in Accordance with the Prior Appropriation Doctrine

The Board of Control repeatedly and erroneously refers to the Accrual Methodology as a “one-fill rule.” [BPBOC Brief at 38-41](#). At no point did the Director make any findings or conclusions to the effect that the Accrual Methodology is based upon or implements a “one-fill rule.” Rather, the Accrual Methodology distributes water according to the elements of the partial decrees for the Decreed Storage Rights in accordance with well-established principles of the prior appropriation doctrine. The determination of when the Decreed Storage Rights are satisfied is based on the quantity elements of the partial decrees, not a “one-fill rule.”⁵² The District Court affirmed the Accrual Methodology on the same grounds and specifically *not* on the basis of a “one-fill rule.” See [R. 001165](#).

Distributing water in accordance with the elements of decreed water rights and prior appropriation principles that have been repeatedly confirmed by this Court and the Legislature is not tantamount to creating a new “rule.” The Decreed Storage Rights were decreed with annual volumes not limited by diversion rates and authorize year-round diversions for storage purposes up to the limit of that volume. Of the accounting methods proposed, the Accrual Methodology is the only one that distributes water to the Decreed Storage Rights in accordance with the elements

⁵² As the Board of Control recognizes, some water rights in Water District 63 contain remarks subjecting the rights to flood control operations. See [BPBOC Brief at 13](#). The partial decrees for the Decreed Storage Rights contain no such remarks. In utilizing the Accrual Methodology, the Director is distributing water to the Decreed Storage Rights consistent with their partial decrees, not making a rule.

of the partial decrees and the prior appropriation doctrine. [Idaho Code § 42-602](#); [A.R. 001280-84, 001293-1308](#). The District Court affirmed the Accrual Methodology on the same grounds, and specifically *not* on the basis of a “‘one-fill’ rule.” [R. 001165](#).

The alternative “physical fill” and flood control-based methods of administration advocated for by the Board of Control and the Ditch Companies would render the decree elements meaningless and as such, are contrary to the prior appropriation doctrine. *See [Rangen, Inc.](#), 159 Idaho at 807, 367 P.3d at 202* (rejecting decree interpretation that would “render the point of diversion element of a water right meaningless.”). As the District Court determined, adoption of such proposed alternatives “would cripple the Director’s ability to effectively distribute water under our system of water rights administration” because the federal government would be put in control of deciding “whether the reservoir water rights are, or are not, satisfied” and the Director could not “distribute and administer to other water rights on the system in the interim. . . .” [R. 001062](#). Water right distribution would be transferred “in the basin from the Director to the federal government” and “the system of priority water right distribution [would] break[] down.” *Id.* In sum, adoption of the Board of Control’s argument would strip the Director of his ability to distribute water in accordance with the prior appropriation doctrine and vest the authority to determine satisfaction of the Decreed Storage Rights in the federal government.

Furthermore, rulemaking was not necessary for the Department to begin using the Accrual Methodology in 1986 because introducing year-round accounting simply made the BOR’s water rights subject to the same priority administration principles that apply to all water

rights. [A.R. 001257, 001265-66](#).⁵³ Previously, the BOR’s water rights had rarely, if ever, been administered on a priority basis because there was no year-round accounting before 1986. [A.R. 001257](#). The use of a year-round accounting system did not require rulemaking because a water right holder “has no property interest in being free from the State's regulation of water distribution in accordance with the prior appropriation doctrine,” [In re IDWR Amended Final Order Creating Water District No. 170](#), 148 Idaho at 213-14, 220 P.3d at 321-32 (2009), and the Director has a clear legal duty under [Idaho Code § 42-602](#) to distribute water in accordance with the prior appropriation doctrine. [BWI-17](#), 157 Idaho at 393, 336 P.3d at 800.⁵⁴ In performing this duty the Director is specifically authorized to determine the times of year during which “there is a necessity for the use and control of the waters of the district.” [Idaho Code § 42-608\(2\)](#); *see* [Idaho Code § 42-608\(3\)](#) (providing that the watermaster “shall not continue performing services after the necessity therefore shall cease, unless determined necessary by the director”).

- ii. [Asarco Has No Application to This Case Because the Legally Enforceable Standard Has Already Been Established by Court Decree](#)

⁵³ The record belies the Board of Control’s argument that the Water District 63 accounting system was “adopted without notice and comment and years later imposed on the parties in a contested case.” [BPBOC Brief at 38](#). The Director found that the Department began using the Accrual Methodology in 1986 at the request of the watermaster and with the consent and cooperation of the water users and the BOR, [A.R. 001258-63](#), and that the Accrual Methodology has remained the same since it was first used in 1986. [A.R. 001275](#).

⁵⁴ The introduction of year-round accounting had no effect on storage water supplies from a water user standpoint. [A.R. 001275-76](#).

Asarco involved a challenge to a Total Maximum Daily Load (“TMDL”) created by the Idaho Department of Environmental Quality (“DEQ”). [Asarco, 138 Idaho at 721, 69 P.3d at 141](#). The TMDL established “the maximum amount of pollution” for “the Coeur d’Alene River Basin,” *id.*, “a numerical limit or budget for a given water body, based on the sum of allowable pollution.” [Id. at 723, 69 P.3d at 143](#). This Court rejected DEQ’s argument that the TMDL could be established outside of formal rulemaking. [Id. at 725, 69 P.3d at 145](#). This Court held that “[t]he central problem with DEQ’s argument is the state water quality standards do not provide all of the information or direction necessary for promulgating a TMDL. While the water quality standards serve as a basis for the TMDL calculations, the TMDL requires much more.” [Id.](#) In other words, the underlying statutory framework was inadequate to define a TMDL, so DEQ had to create a legally enforceable numerical limit on its own.

Such is not the case here. The adjudication statutes of Idaho Code specifically define the elements that must be included in decreed water rights. [Idaho Code §§ 42-1411, 42-1412](#). The SRBA Court decreed those elements with specificity in the SRBA. [Ex. 2015](#). The elements of the partial decrees define when and how much natural flow the Director must distribute to the Decreed Storage Rights. As with other water rights, the Priority, Quantity, and Period of Use elements define which portion of each year’s natural flow supply is to be distributed to the Decreed Storage Rights. The partial decrees define “quantity” in an annual volume that is not limited by diversion rates, and authorize diversions for storage purposes year-round. [A.R. 0001265](#). By operation of these elements, the Decreed Storage Rights when in priority are entitled to all natural flow other than that required by downstream senior water rights. Unlike in

Asarco, where DEQ had to “establish the maximum amount of pollution” on its own, [138 Idaho at 721, 69 P.3d at 141](#), the Director does not have to create a legally enforceable numerical limit on his own when distributing water to the Decreed Storage Rights. The SRBA Court has provided the information the Director needs to distribute water to the Decreed Storage Rights through the partial decrees and, as previously discussed, the Accrual Methodology is consistent with the partial decrees.

iii. The Accrual Methodology Does Not Qualify as a Rule Under *Asarco*

Even assuming *Asarco* applies to this case, application of the *Asarco* analysis confirms the Accrual Methodology is not a matter for formal rulemaking. As discussed above, the Accrual Methodology does not “prescribe a legal standard or directive not otherwise provided by the enabling statute.” *Id.* Rather, the “legal standard” for determining satisfaction of the Decreed Storage Rights is prescribed by the quantity elements of the partial decrees issued by the SRBA Court. [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#) (“The decrees give the Director a quantity he must provide to each water user in priority.”). As the District Court concluded, “[t]he Director is statutorily authorized to distribute water. The quantitative information he needs to distribute water to the federal on-stream reservoirs in the Boise River Basin is not prescribed by him. It is judicially provided to him in the form of the” partial decrees for the Decreed Storage Rights. [R. 001382](#).⁵⁵

⁵⁵ Further, the elements that must be included in partial decrees are prescribed by statute. See [Idaho Code §§ 42-1411 and 42-1412](#).

For the same reasons, the Accrual Methodology does not “express agency policy not previously expressed.” [Asarco, 138 Idaho at 723, 69 P.3d at 143](#). Distributing water pursuant to the Director’s clear legal duty under Idaho Code § 42-602 and according to the elements of decreed water rights is not a new policy. In addition, the Accrual Methodology does not interpret “law or general policy.” *Id.* The concept of “implementing or interpreting existing law” under *Asarco* refers to when an agency must ‘fill in the blanks’ with substantive legal standards that are missing from the underlying legal authority. *Id.* That is not the case here because the Legislature provided clear statutory standards that the SRBA Court decreed in the elements of the partial decrees. In utilizing the Accrual Methodology, the Director is not interpreting law or policy, but rather fulfilling his duty to distribute water in accordance with the prior appropriation doctrine and consistent with the partial decrees for the Decreed Storage Rights.⁵⁶

Since a number, if not all, of the characteristics of a rule are absent, the Director did not err by declining to undertake formal rulemaking rather than proceeding with the contested case. See [Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 142 Idaho 659, 663-64, 132 P.3d 416, 420-21 \(2006\)](#) (holding that an agency action is not a rule even though four of the *Asarco* characteristics are met).

⁵⁶ As the District Court determined, the Accrual Methodology also “lacks wide coverage” and is not “applied generally and uniformly.” [R. 001072](#). In addition, the Accrual Methodology does not “operate only in future cases.” [Asarco, 138 Idaho at 723, 69 P.3d at 143](#).

2. The Board of Control Was Afforded Due Process

The Board of Control's allegation that it was deprived of due process relies primarily upon mischaracterizing the nature of the contested case proceeding. Further, the Board of Control fails to identify any prejudice resulting from the alleged deprivation of due process. The record shows the Board of Control was afforded due process and simply disagrees with the outcome of the contested case.

Procedural due process requires “there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.” [*Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 \(1999\)](#) (citation omitted). This requirement is met when there is “notice and an opportunity to be heard.” *Id.* (citation omitted). The opportunity to be heard must occur “at a meaningful time and in a meaningful manner.” *Id.* Due process “is not a concept to be applied rigidly in every matter. Rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation.” *Id.* (quotation marks and citation omitted).

The Board of Control contends the contested case was a “prosecution” in which the Department was an “adverse party” and the Director sought to “defend the accounting program.” [*BPBOC Brief* 44-45, 54, 58](#). This contention is contrary to the record. The contested case was initiated specifically to provide the Board of Control (and others) with an administrative proceeding in which to present “concerns with” and “objections to” the Water District 63 accounting system. [A.R. 000007](#).

Moreover, the proceeding lasted more than two years; solicited the Board of Control's "concerns with and/or objections to" the accounting system; included a stay pending Basin-Wide Issue 17; took scheduling requests into consideration; notified the parties of the nature and location of potentially relevant documents (and made many available on the Department's website); provided for pre-hearing motions; allowed for extensive discovery including interrogatories, document production, and depositions; culminated in a five-day hearing with post-hearing briefs; and addressed motions for reconsideration. [A.R. 000001-1435](#). As the District Court held, the Board of Control was "given notice of the contested case and had ample opportunity to present evidence and be heard on [its] arguments," and the Director "properly, and more than adequately, considered those arguments." [R. 001070](#). The Board of Control's concerns and objections to the Water District 63 accounting system were heard "'at a meaningful time and in a meaningful manner'" and it was "not arbitrarily deprived of [its] rights in violation of the state or federal constitutions.'" [Aberdeen-Springfield Canal Co., 133 Idaho at 91, 982 P.2d at 926](#) (citation omitted). The Board of Control simply disagrees with the outcome of the contested case. Against this backdrop, the Board of Control's specific contentions of due process violations will be discussed in turn.

a. The Director's Official Notice Specifically Identified the Noticed Materials and Did Not Prejudice the Board of Control

The Board of Control asserts the Director deprived it of due process because he "refused" to "identify the specific documents that he intended to officially notice." [BPBOC Brief at 44-45](#). This assertion ignores the plain language of Rule 602 and is contrary to the record.

Rule 602 of the Department’s Rules of Procedures requires that, when taking official notice, the Director shall notify parties of “the specific facts or materials noticed and the source of the material noticed.” [IDAPA 37.01.01.602](#).⁵⁷ Consistent with Rule 602, the Director’s notices of documents officially noticed specifically identified the “materials” and their “sources.” [A.R. 000885-87, 000959-61](#).⁵⁸ The Department identified the vast majority of the officially noticed materials as potentially relevant well in advance of the hearing, notified the parties of the locations of the materials, and posted most of the documents on the contested case website. [A.R. 000268-69, 000377, 000678, 000697-701](#); *see also* [R. 001073](#) (“the Director provided the parties with notice of the materials he took official notice of, as well as the sources of the materials prior to the hearing”). The materials officially noticed were public documents available at the Department, the Water District 63 office, the SRBA Court and/or online, and were already known to the Board of Control. *Id.*⁵⁹

⁵⁷ Rule 602 does not require that the Director notify the parties of “specific facts” within “materials noticed.” Rather, Rule 602 allows the Director to notify the parties of either “specific facts *or* material noticed”. [IDAPA 37.01.01.602](#) (emphasis added).

⁵⁸ The Director issued an *Amended Documents Officially Noticed* following the hearing to document his decision at hearing that he would take official notice of documents in the Basin-Wide issue 17 proceedings and also would “refine the broadness or the breadth of” documents described in “the last two bulleted items” set forth in his *Documents Officially Noticed* issued prior to hearing. [Tr., Sept. 10, 2015, p.1600-03](#).

⁵⁹ The officially noticed materials ([A.R. 000268-69, 000377, 000678](#)) include: the Departments files for seven SRBA water right claims for the Boise River Reservoirs (63-303, 63-3613, 63-3614, 63-3618, 63-2158, 63-5261, and 63-5262 - the last three claims were not decreed); the Basin-Wide Issue 17 record; the Water District 63 “Black Books,” Water District 63 water distribution records (including documents that were posted on the contested case website and

The Board of Control also asserts the Director’s official notice process “placed an impossible burden on [it] to prepare for the contested case.” [BPBOC Brief at 45-46](#). This assertion is contrary to the record. The record shows that the historical expert, Dr. Stevens, and the Board of Control’s technical expert, David Shaw, reviewed the officially noticed materials in advance of the hearing. Dr. Stevens stated that she had “reviewed documents identified by the [Department] as relevant to the contested case concerning water rights accounting in Water District 63.” [A.R. 000647](#). In fact, Dr. Stevens’ expert disclosure shows that her extensive review of historic documentation covered a volume of materials far greater than the materials officially noticed by the Department. [A.R. 000647, 000664-75](#). David Shaw testified that he “looked particularly at the daily accounting records that are available” in “some detail. I looked at the . . . FORTRAN code for a couple of the years, reviewed some of the input files . . . some of the support information, some of the background from the [*Water Control Manual for Boise River Reservoirs*]” and “records of the [BOR] and the Geological Survey.” [Tr., Sep. 10, 2015, p. 1463, ll.11-15, 25, p. 1464, l.1.](#)

Moreover, the Board of Control has failed to demonstrate it was prejudiced by the Director’s taking official notice of materials in the contested case. The Director’s reliance on officially noticed materials was almost entirely limited to the Black Books—the reports of water distribution and streamflow records the watermaster is statutorily required to file with the Department each year. [Idaho Code § 42-606](#). The Director referred to the Black Books for

accounting data for the years from 1986 through 2014); and the documents identified in “Attachment A” to IDWR’s Witness, Exhibit And Document List ([A.R. 000697-701](#)).

purposes of resolving disputed questions of fact regarding historic water accounting and water rights administration both before and after the 1986 introduction of the accounting system. [A.R. 001249-53](#), [001255-56](#), [001272-73](#). This conflict arose in part from the testimony of the witnesses Sisco, Stevens, and Barrie, which conflicted with the testimony of other witnesses and admitted exhibits. *Id.* The Board of Control cannot reasonably assert it had no reason to think the Black Books—annual watermaster reports required by law—would be relevant to questions of historic accounting and water rights administration that it raised.

b. There is No Merit in the Board of Control’s Argument That the Director Predetermined the Contested Case and Should Have Disqualified Himself

The Board of Control argues that the Director deprived it of due process by not disqualifying himself because he was biased and had predetermined the outcome of the contested case. [BPBOC Brief at 43-44, 47-48, 52-56](#). In support of this argument, the Board of Control points to the Director’s public statements and his resolution of pre-hearing motions. *Id.* The Board of Control’s argument is contrary to the Department’s Rules of Procedure, Idaho Code, and the record, and reduces to a contention that the Director must have been biased because he did not agree with the Board of Control’s position.

i. The Board of Control’s Disqualification Argument Is Contrary to the Department’s Rules and Idaho Code

The Department’s Rule of Procedure 412 (“Rule 412”) provides that, “[d]isqualification of agency heads, if allowed, will be pursuant to Sections [59-704](#) and [67-5252\(4\), Idaho Code.](#)” [IDAPA 37.01.01.412](#). The Director has sole statutory authority over “direction and control of the distribution of water from all natural sources within a water district,” [Idaho Code § 42-602](#),

and the sole authority to issue final orders in administrative proceedings. [Idaho Code § 42-1701A](#). The Director was the “agency head” because he is the individual “in whom the ultimate legal authority of the agency is vested by any provision of law.” [Idaho Code § 67-5201\(3\)](#); [IDAPA 37.01.01.005.04](#). Under Rule 412, therefore, disqualification of the Director was governed by “[Sections 59-704 and 67-5252\(4\), Idaho Code.](#)” [IDAPA 37.01.01.412](#).

[Idaho Code § 67-5252\(4\)](#) provides that, when disqualification of the agency head “would result in an inability to decide a contested case, the actions of the agency head shall be treated as a conflict of interest under the provisions of [section 59-704, Idaho Code.](#)” As the District Court determined, disqualification of the Director would have resulted in an “inability to decide the contested case in violation of [Idaho Code § 67-5252\(4\)](#)” because the Director is “[t]he individual statutorily charged with distributing water” [R. 001071](#). Indeed, the authority to “direct and control” the distribution of water is statutorily vested in the Director. [Idaho Code § 42-602](#); [BWI-17, 157 Idaho at 392-94, 336 P.3d at 799-801](#). No one but the Director had “ultimate legal authority” to decide the contested case. [IDAPA 37.01.01.005.04](#).⁶⁰

⁶⁰ The Board of Control suggests, without any citation to the record, that the Director “points to the procedures of recommended or preliminary orders” to support his determination that disqualifying himself would result in an inability to decide the contested case. See [BPBOC Brief at 53](#). The Director only pointed to the procedures for review of recommended and preliminary orders in discussing “[t]he legislature’s intent that the Director should not be disqualified without cause.” [A.R. at 000135](#). Regardless, the Director’s authority to delegate review of recommended or preliminary orders to a designee is irrelevant where, as here, a contested case concerns the Director’s authority to distribute water pursuant to [Idaho Code § 42-602](#). As the District Court determined, “[d]elegating this responsibility to an individual outside of the Department, while disqualifying himself from participating in the matter, would be an improper abdication of [the Director’s] duty.” [R. 001071](#).

Rule 412 anticipates such situations by citing to [Idaho Code § 59-704](#). This statute prohibits public officials from deciding matters only if the public officials fail to disclose potential conflicts of interest. See [Idaho Code § 74-404](#) (“A public official shall not take any official action or make a formal decision . . . where he has a conflict of interest and has failed to disclose such conflict.”).

The Director was therefore authorized to decide the contested case provided he disclosed the alleged “conflict of interest.” At the time the Director ruled on the Ditch Companies’ *Motion to Disqualify*, a “conflict of interest” for purposes of [Idaho Code § 59-704](#) was statutorily defined as a “private pecuniary benefit.”⁶¹ No party alleged that the contested case would result in a “private pecuniary benefit” to the Director, any member of his household, or a business with which the Director or a member of his household was “associated.” The allegation, rather, was that the Director was biased and prejudiced because of his “substantial prior involvement” in issues related to the contested case. [A.R. 000102-105](#). The “substantial prior involvement” alleged was the Director’s participation in “settlement discussions” involving the SRBA proceedings and his “presentation to the Interim Natural Resources Committee.” [A.R. 000102-](#)

⁶¹ In 2015, the Idaho Legislature “move[d]” the Ethics in Government Act (Idaho Code § 59-701, et seq.) to Title 74 in recognition of “a need to provide one place for citizens to find laws relating to government transparency.” *Statement of Purpose*, H.R. 90, 63rd Leg., 1st Reg. Sess. (Idaho 2015) (attached hereto as [Addendum D](#)). Idaho Code § 59-704 was still in effect in October 2014 when the Ditch Companies moved for disqualification of the Director, and when the Director issued the *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer*. [A.R. 000100-141](#). Idaho Code § 74-404 superseded Idaho Code § 59-704, and has the same or very similar language.

03. In this appeal, the Board of Control asserts the Director should have disqualified himself for the same reasons. [*BPBOC Brief at 46-47, 53-55*](#).

These allegations of “substantial prior involvement” are not grounds for disqualification of the Director under Rule 412 and Idaho Code §§ 67-5252(4) and 59-704, even if “substantial prior involvement” constituted a “conflict of interest.” [Idaho Code § 67-5252\(4\)](#). Under [Idaho Code § 59-704](#), the remedy for a “conflict of interest” is disclosure, not disqualification. *See* [Idaho Code § 74-404](#) (same). Moreover, the Director’s involvement in settlement efforts and his public presentation to the Committee were already well known to the Board of Control and the other parties. The Board of Control’s argument that the Director erred by not disqualifying himself is contrary to the provisions of the Department’s Rules of Procedure and Idaho Code governing disqualification.

- ii. The Director’s Public Statements Did Not Evidence Bias or Predetermination, Were Made in the Discharge of his Statutory Duties, and Were Properly Disclosed to the Parties

The Board of Control asserts the outcome of the contested case was “preordained” and the Director could not act as an “impartial tribunal.” [*BPBOC Brief at 44, 56*](#). The basis for this assertion is the Director’s presentation to the Idaho Legislature’s Natural Resources Interim Committee in response to its request for information about Basin-Wide Issue 17, and associated questions of flood control, “refill,” and accounting. [*Id. at 46-47, 53-55; A.R. 000909, 000915-949*](#). The Board of Control argues the Director’s presentation “makes it clear that the Director decided that the storage right owners are subject to reduction in storage due to flood control” and

that he “was heavily invested in ensuring that paper fill was upheld, and as such, the impartial tribunal was missing.” [BPBOC Brief at 54-56](#).

This Court has explained that impartiality “does not mean ‘lack of preconception in favor of or against a particular legal view. . . . It also does not mean having ‘no preconceptions on legal issues, but [being] willing to consider views that oppose his preconceptions, and remain[ing] open to persuasion, when the issues arise in a pending case.’” [Marcia T. Turner, LLC v. Twin Falls, 144 Idaho 203, 209, 159 P.3d 840, 846 \(2007\)](#) (citations omitted). Further, and directly contrary to the Board of Control’s contentions:

A decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is ‘not capable of judging a particular controversy fairly on the basis of its own circumstances.’

Id. (citation omitted) (emphasis added).

The Director’s presentation to the Committee fell well within these sideboards. The Director reviewed Basin-Wide Issue 17, the federal on-stream reservoir system, flood control operations, the accounting system, concerns that had been expressed about the accounting, and the possible effects of changing the accounting. [A.R. 000114-119, 000120-130](#). Nothing in this presentation suggested the Director had made up his mind on the issues in the contested case. As the District Court explained, “[t]here are no pledges, promises, or definitive statements of law contained therein. Nothing is said in specific relation to the Boise River System. It is merely a broad overview of the issues raised in Basin-Wide Issue 17 and some of the concerns that surround the distribution of water to federal on-stream reservoirs.” [R. 001070-71](#). At most, the

presentation reflected the fact that the Water District 63 accounting system had been operating for thirty years or more without any complaint until the Board of Control and others initiated Basin-Wide Issue 17. See [BWI-17, 157 Idaho at 392, 336 P.3d at 799](#) (“no injury alleged”).

Further, in responding to the Committee’s request, the Director was simply doing his job. As this Court stated in Basin-Wide Issue 17, the Director as state engineer “is the expert on the spot,” that the “[t]he legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state,” and that the Legislature “has recognized the need for the Director’s expertise.” [Id. at 394, 336 P.3d at 801](#) (citations omitted). The Director’s duties run the gamut from engineering and enforcement to distributing water to the quasi-legislative and the quasi-judicial. [Idaho Code §§ 42-1701\(2\), 42-1701B\(5\)\(a\), 42-602, 42-1702\(4\), 42-1805\(8\)-\(9\)](#). The Director is expected to have and share opinions on policy matters with elected officials to assist them in their duties. See, e.g., [Idaho Code § 42-1704](#) (“any recommendations he may have to make in reference to legislation affecting the department”). He is expected to investigate and develop an opinion on the nature and extent of claimed water rights. [Idaho Code § 42-1411](#). Providing to the Committee the type of information and insight that he is uniquely qualified to provide is part and parcel of the Director’s job.

The Board of Control’s arguments ignore all this and would have the Director approach every contentious water matter with an utterly empty mind: no information and no preconceptions whatsoever. This is not realistic and contravenes the statutorily defined duties and qualifications required of the Director. The District Court agreed: “The restraints the

Petitioners seek to impose on the Director exceed those required by law.” [R. 001070](#). Moreover, and contrary to the Board of Control’s repeated mischaracterization of the contested case as an effort by the Department to “defend” the accounting system, the contested case proceeding was initiated to provide an opportunity to raise objections to how the Director performs his statutory duty of distributing water in accordance with the prior appropriation doctrine.

The Board of Control’s argument that the Director erred by failing to disclose “all his communications on the topic of ‘paper fill’” erroneously characterizes the Director’s communications as “*ex parte*.” [BPBOC Brief at 46](#). Rule 417 of the Department’s Rules of Procedure only requires disclosure of contacts the Director may have had with *parties* to the contested case proceeding *once the Director became presiding officer*. [IDAPA 37.01.01.417](#). As the Director explained in the *Response to Boise Project Board of Control’s Document Requests and Requests for Disclosure*, “contacts the Director has had with legislators, legislative groups, representatives of the government of the State of Idaho, or other non-parties are not *ex parte* communications and do not violate the Idaho Administrative Procedure Act nor the Idaho Constitution.” [A.R. 000387](#). The Director correctly determined he was not required to disclose all such communications.

Further, “[i]n an exercise of full transparency” the Director committed to disclose all “non-privileged written documents and communications related to the” contested case proceeding responsive to the Board of Control’s requests for disclosure. [Id.](#) Thereafter, the Director posted several responsive documents to the Department’s website for the contested case proceeding under the heading “Communication Documents.” These documents are included in

the record on appeal and contained in the electronic folder labeled “Communication Documents.”

The Director’s resolution of pre-hearing motions and disclosure requests demonstrates the Director was not biased and did not predetermine the outcome of the contested case. In his response to the Ditch Companies’ *Motion to Disqualify*, the Director stated “that he has not pre-judged issues that he may be asked to decide.” [A.R. 000137](#). In the *Response to Boise Project Board of Control’s Document Request and Requests for Disclosure*, the Director stated that he remained “committed to obtaining a full understanding of the objections to the current water right accounting,” would “provide a full and fair hearing,” and was “fully capable of judging this particular controversy fairly on the basis of its own circumstances.” [A.R. 000388](#).

The Director’s orders are the true test of the Board of Control’s bias and predetermination arguments.⁶² The Director issued detailed, reasoned orders that carefully considered the arguments and evidence, and the applicable law, in regard to their pre-hearing motions and the ultimate issues in the contested case. [A.R. 000132-41](#), [000335-52](#), [000377-91](#), [001230-1311](#),

⁶² The Board of Control takes one statement out of context from a prehearing order in an attempt to support their argument that the Director was biased and deprived them of due process. Specifically, the Board of Control points to the Director’s statement that “[m]uch of the information sought to be introduced by the Irrigation Entities is likely irrelevant to this proceeding.” [BPBOC Brief at 46](#). The Board of Control fails to acknowledge that the Director made this statement in his *Order Denying United Water’s Motion in Limine*, right before he denied the request to exclude exhibits the Board of Control sought to introduce at hearing. [A.R. at 000892](#). The Director determined that “[t]he information must be evaluated as it is presented in the administrative hearing so that its relevancy can be considered in the proper context.” *Id.* The Director did not deprive the Board of Control of due process by declining to grant a request to exclude its proposed exhibits from introduction at hearing.

[001401-35](#). The Board of Control’s arguments reduce to a contention that the Director must have predetermined the issues because he did not agree with assertions that the accounting system is unlawful and must be changed. The fact that the Director did not agree with the Board of Control’s arguments does not mean he predetermined the issues or deprived the Board of Control of due process. As the District Court stated: “The Director’s *Final Order* demonstrates that he properly, and more than adequately, considered those arguments [of the Board of Control and the Ditch Companies].” [R. 0010170](#).

c. The Contested Case was Not a Prosecution and the Department Did Not Take an Adversarial Position

The Board of Control mischaracterizes the contested case proceeding as “prosecutorial” and alleges the Department “was an adverse party.” [BPBOC Brief at 4, 58-60](#). In the Board of Control’s view, the Director violated its due process rights simply by conducting an administrative proceeding that did not begin with the unquestioned premise that the Decreed Storage Rights are “property rights” to the water stored in the reservoir system on the date the reservoirs are “physically filled.” [Id. at 29, 37](#). The Board of Control’s assertions overlook the stated purpose of the contested case, the Department’s Rules of Procedure, and mischaracterize the record.

The Director initiated the contested case under the authority of [Idaho Code § 67-5240](#) and [IDAPA 37.01.01.104](#) with the Notice. The stated purpose was to provide an administrative forum in which the Board of Control (and others) could raise “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.” [A.R. 000007](#).

The Notice was not “prosecutorial” and did not “charge” any person or entity with an “act or omission” under [IDAPA 37.01.01.153](#), and did not seek any relief or the imposition of a penalty against any person or entity. Rather, the Notice determined the contested case was “necessary, for purposes of identifying and resolving concerns with and objections to the existing accounting methods,” [A.R. 000006](#), and the Director notified all potentially interested persons and parties that “[y]our participation is not mandatory,” [A.R. 000001](#).

The Board of Control incorrectly relies upon the Attorney General’s IDAPA rules in an attempt support the allegation that the contested case was “prosecutorial.” See [BPBOC Brief at 4, 58-60](#). The Attorney General’s rules have no application in Department proceedings because the Department has specifically “declined” to adopt the rules. [IDAPA 37.01.01.050](#); see [IDAPA 04.01.01.001.02](#) (providing that the Attorney General’s apply “unless the state agency by rule affirmatively declines to adopt this chapter, in whole or in part”); see also [Idaho Code § 67-5206\(5\)\(a\)](#) (demonstrating the Attorney General’s Procedural Rules do not “supersede” the Department’s Rules of Procedure which became effective July 1, 1993).

Even if the Attorney General’s rules applied to the contested case, the Board of Control’s reliance upon the rules is misplaced. The Attorney General’s Rule 423 does not support the Board of Control’s arguments that 1) Department’s counsel could not advise the Director during the contested case, 2) Department’s counsel could not confer with agency staff during the contested case, or 3) Department staff could not communicate with the Director during the contested case. [BPBOC Brief at 4, 58-60](#). As the District Court determined, the rule only

applies when there is “investigation or prosecution of a *complaint*.” [R. 001073](#) (emphasis added). Rule 423 is titled “Procedures After Issuance of a Complaint and Before the Agency Head’s Consideration of the Complaint.” [IDAPA 04.11.01.423](#). The rule states that “no agency attorney involved in the investigation or prosecution of a *complaint* shall discuss the substance of the complaint ex parte with the agency head. . . .” [IDAPA 04.11.01.423.02.a](#) (emphasis added). The rule also states that “no agency attorney assigned to advise or assist the agency head . . . shall discuss the substance of the *complaint* ex parte with . . . agency staff involved in the prosecution or investigation of the *complaint*.” [IDAPA 04.11.01.423.02.b](#) (emphasis added). The rule prohibits “agency staff involved in the prosecution of the *complaint*” from discussing “the substance of the *complaint* ex parte with the agency head. . . .” [IDAPA 04.11.01.423.03.a](#). All of these statements demonstrate that Rule 423 only applies when there is a complaint at issue, which was not the circumstance in the contested case because no person was charged “with acts or omissions under law administered by the” Department. See [IDAPA 04.11.01.240.01](#) (defining “Complaint”).⁶³

The Board of Control’s argument that the Attorney General’s Rule 424 supports the argument that the Director could not discuss the contested case “with the agency attorney or

⁶³ The District Court did not “overlook[.]” the Attorney General’s Rule 420.01 in concluding that Rule 423 “is inapplicable” to the contested case because there was no complaint at issue. [BPBOC Brief at 58](#); [R. 001073](#). Rule 420.01’s explanation that the “prosecutorial function includes . . . presentation of evidence or argument and briefing on the record in a formal contested case proceeding,” [IDAPA 04.11.01.420.01](#), does not change that Rule 423 only applies when a complaint is at issue.

staff” also lacks merit. [BPBOC Brief at 60](#). Rule 424 only applies to “hearing officers,” not the Director who is the agency head and “presiding officer.” See [IDAPA 37.01.01.411](#). Further, the Attorney General’s Rule 417 does not apply Rule 424 to the “presiding officer” as the Board of Control asserts. [BPBOC Brief at 60](#). Rule 417 only requires the presiding officer disclose ex parte communications “with any party.” [IDAPA 04.11.01.417](#) (emphasis added). The Department’s counsel and Department staff are not parties to the contested case.⁶⁴

The Board of Control contends the Department “made it clear” it “was an adverse party in the contested case” because it identified Cresto, the Department staff who prepared the staff memorandum addressing the existing accounting methods and procedures in Water District 63, as an expert witness. [BPBOC Brief at 44-45](#). The Board of Control ignores the plain language of the Department’s Rules of Procedure 157 which specifically provides that agency staff “may appear at the hearing or argument, introduce evidence, examine witnesses, make and argue

⁶⁴ The Board of Control’s repeated assertions that the Director failed to disclose “ex parte” communications with the Department’s counsel and staff “as required by law,” [BPBOC Brief at 4, 45, 49 n.11, 57, 60](#), erroneously characterize the Department’s counsel and staff as parties to the contested case. The Department’s Rule of Procedure 417 only requires the Director must disclose communications “regarding any substantive issue in the contested case with any party . . .” [IDAPA 37.01.01.417](#) (emphasis added). Similarly, [Idaho Code § 67-5253](#) prohibits communications “regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication.” (emphasis added). The Department’s counsel and Department staff are not parties to the contested case. See [IDAPA 37.01.01.150](#). Further, as the Board of Control acknowledges, [BPBOC Brief at 49](#), the communications the Director had with Department staff Cresto were disclosed at hearing. See [Tr., Sept. 10, 2015, p.1585-86, 1588-89](#). As the District Court explained, “the topic of this discussion was revealed and put on the record, and the [Board of Control] had the opportunity to cross examine Mrs. Cresto regarding that discussion.” [R. 001072](#). “Therefore there is no prejudice or harm to the [Board of Control], and their due process argument is unavailing.” [Id.](#)

motions, state positions, and otherwise fully participate in hearings or arguments.” [IDAPA 37.01.01.157](#) (emphasis added). The Department was not transformed into an “adverse party” simply because Cresto prepared a memorandum and presented testimony at hearing that did not align with the Board of Control’s position. Similarly, the Director’s reliance upon Cresto’s memorandum and testimony in the Final Order does not demonstrate any violation of due process. See [BPBOC Brief at 60](#). The Board of Control had an opportunity to cross-examine Cresto at hearing regarding her memorandum as required by the Department’s Rule of Procedure 602. See [IDAPA 37.01.01.602](#) (explaining that staff employees responsible for staff memoranda “shall be made available for cross-examination.”). The Board of Control also had an opportunity to cross-examine Cresto regarding her rebuttal testimony and exhibit, including the data and methods she used in preparing it. [Tr., Sept. 31, 2015, p.1559-79, 1585-88; R. 0010172](#). The Board of Control was afforded due process. It simply disagrees with the outcome of the contested case.

The Board of Control’s due process arguments are rooted in its rejection of the decisions of the SRBA Court and this Court in Basin-Wide Issue 17. In that proceeding, the Board of Control argued “the Director’s discretionary functions do not include the ability to determine when a water right is satisfied” because “water rights are property rights” and the Decreed Storage Rights represent property rights to remain in priority until the end of the flood control “refill” period. [BWI-17, 157 Idaho at 392-93, 336 P.3d at 799-800](#). The SRBA Court and this Court rejected this argument, holding the Decreed Storage Rights are “a property right to a certain amount of water: a number that the Director must fill in priority to each user. However, it

is within the Director's discretion to determine when that number has been met for each individual decree." [Id. at 394, 336 P.3d at 801.](#)

The Board of Control never accepted this decision. From the outset of the contested case, the Board of Control challenged the Director's authority to address "the issue of fill." [Id. at 392, 336 P.3d at 797.](#) The Board of Control resisted the Director's attempt to provide an administrative proceeding in which to address objections to accounting system. The Board of Control had challenged the accounting system in virtually every forum except an administrative proceeding. Regardless of the Board of Control's assertions, the contested case was not a "prosecution" and the Department was not an "adverse" party. Again, Idaho Code § [42-602](#) imposes a "clear legal duty" on the Director to distribute water "in accordance with prior appropriation," and the "details of the performance of the duty are left to the director's discretion." [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#) (quoting [Musser, 125 Idaho at 395, 871 P.2d at 812](#)). The Director properly determined that, to fulfill his statutory duty, it was necessary to initiate a proceeding to address and resolve water users' concerns with and/or objections to the Water District 63 accounting system's method of determining when the Decreed Storage Rights are satisfied. *E.g.*, [A.R. 000006, 000338, 001286-88.](#)

d. The Department's Response to Sisco's Testimony Was Not Improper and Did Not Deprive the Board of Control of Due Process

In support of its due process argument, the Board of Control points to the Department's response to a matter that arose during the hearing involving the testimony of former watermaster Sisco. [BPBOC Brief at 48-49, 59.](#) At hearing, Sisco testified that the computerized water right

accounting programs were used to administer water rights during his tenure. [Tr., Aug. 31, 2015, p.893, ll.15-18, p.927, ll.10-25](#). He testified that Department hydrologist Cresto regularly provided him with water right accounting reports, and that he relied on the reports for purposes of water accounting and water right administration. [Tr., Aug. 31, 2015, p.940, ll.6-17](#). Sisco testified that the "basic" water right accounting program is "sound," [Tr., Aug. 31, 2015, p.941, l.8](#), and that with one exception he administered water rights in accordance with the water right accounting system. [Tr., Aug. 31, 2015, p.894, ll.9-11](#).

The "exception," Sisco testified, was that he would "disregard" the water right accounting system's determination of distribution priorities when the reservoir system was "backfilling" after flood control releases, and curtail junior water rights during the "backfill" or "refill" period. [Tr., Aug. 31, 2015, p.880, ll.22-25, p.881 ll.1-3, p.894, ll.9-11, p.941, ll.3-18](#). Sisco's testimony regarding this "exception" raised the possibility that he had either not adhered to his statutory duty as watermaster to distribute water in accordance with the prior appropriation doctrine "as supervised by the director," [Idaho Code § 42-602](#); see [Almo Water Co. v. Darrington, 95 Idaho 16, 21, 501 P.2d 700, 705 \(1972\)](#), or did not understand the water right accounting system well enough to know that he had not really created an exception.⁶⁵

⁶⁵ Indeed, although Sisco testified that he followed the water right accounting system but for this "exception," Sisco was unable to point to a specific example when this exception occurred ([Tr., Aug. 31, 2015, p.893, l.25, p.894, ll.1-17](#)), testified he was unsure if he remembered correctly how the water right accounting system accounts for flood control ([Tr., Aug. 31, 2015, p.894, ll.4-5](#)), admitted he did not understand some of the terminology and nuances associated with the computerized accounting ([Tr., Aug. 31, 2015, p.905, ll.3-16](#)), and testified he did not understand "what this unaccounted for storage was," ([Tr., Aug. 31, 2015, p.906, ll.10-11](#)). The Director found that the records of the water district do not support Sisco's testimony. [A.R. 001272](#). The

The Director was appropriately concerned with Sisco's testimony because the water right accounting system is the tool the Director uses to comply with his statutory duty to administer water rights consistent with the water right decrees and a former watermaster had just testified he had ignored the system. During a break, the Director looked for a Department employee who could locate a copy of a "form that the watermaster submits to the Director representing" that the deliveries of water he reports to the Director are "true and correct." [Tr., Aug. 31, 2015, p.943, ll.8-12.](#)⁶⁶ However, the Director was unable to find the Department employee or the form. [Tr., Aug. 31, 2015, p.943, ll.16-17.](#)

The Board of Control asserts that the Director's response to Sisco's testimony "illustrates" he was "incapable" of being an "impartial decision maker in the contested case." [BPBOC Brief at 57.](#) The fact that the Director looked for a Department employee to see if he could locate a copy of the form does not demonstrate the Director was biased against the Board of Control or lacked impartiality. Rather, the Director's response demonstrates he was concerned with the credibility of Sisco's testimony and concerned that a former watermaster had possibly disregarded the tool the Director uses to comply with his statutory duty to administer water rights consistent with water right decrees. Further, as the District Court determined, the Director's response to Sisco's testimony did not "prejudice or harm" the Board of Control

Director found that, while Sisco may have believed he created a flood control "exception" to the accounting system, his specific description of the "exception" was actually the normal operation of the system. [A.R. 001273.](#)

⁶⁶ This form is distinct from the Black Books.

because the Director was unable to find the Department employee or the form. [R. 001072](#). The Director also did not rely upon the form in the Final Order.

D. THE BOARD OF CONTROL IS NOT ENTITLED TO ATTORNEY FEES

The Board of Control argues it is entitled to attorney fees pursuant to Idaho Code § 12-117(1). [Idaho Code § 12-117\(1\)](#) states the Court “shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.” The Board of Control asserts it is entitled to attorney fees because 1) the Director declined to undertake formal rulemaking, 2) “denied that he was interpreting or implementing existing law,” 3) “justified his final order as necessary to implement important elements of Idaho water law,” 4) and “violated the procedural rules for consulting with witnesses and the Department.” [BPBOC Brief at 61](#).

The Board of Control’s assertions lack merit. The Director properly declined to undertake formal rulemaking because distributing water in accordance with the elements of the Decreed Storage Rights and prior appropriation doctrine does not equate to implementing a new “rule.” The Legislature provided clear statutory standards that the SRBA Court decreed in the elements of the partial decrees for the Decreed Storage Rights. In utilizing the Accrual Methodology, the Director is not interpreting law or policy, but rather fulfilling his duty to distribute water in accordance with the prior appropriation doctrine and consistent with the partial decrees for the Decreed Storage Rights. Further, the Board of Control’s argument that the Director could not consult with Department staff during hearing relies upon rules that are either inapplicable to administrative proceedings before the Department or prohibit communications

with parties to the contested case, not the Department's counsel or staff who are not parties. The Board of Control is not entitled to attorney fees.

E. THE DEPARTMENT IS ENTITLED TO REASONABLE ATTORNEY FEES

The Board of Control's arguments regarding the Accrual Methodology reduce to collateral attacks on the Decreed Storage Rights and a direct attack on the prior appropriation doctrine as established by Idaho law. The Board of Control's arguments that the contested case proceeding was procedurally defective and deprived them of due process mischaracterize the proceeding and the record and overlook the Department's Rules of Procedure and Idaho law. The Board of Control has failed to demonstrate any prejudice to a substantial right. Accordingly, the Board of Control's arguments are without a reasonable basis in fact or law. Because the Department has been forced to expend time and expense to defend against this appeal that lacks any basis in fact or law, the Court should award the Department reasonable attorney fees pursuant to Idaho Code § 12-117(1).

V. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court affirm the District Court's conclusion that the Accrual Methodology is consistent with the partial decrees for the Decreed Storage Rights and the prior appropriation doctrine. The Department also requests that the Court affirm the District Court's determination that the Board of Control's procedural arguments are unavailing. Finally, the Department requests that the Court deny the

Board of Control's request for attorney fees, but award the Department reasonable attorney fees pursuant to Idaho Code § 12-117(1).

RESPECTFULLY SUBMITTED this 1st day of August 2017.

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division



GARRICK L. BAXTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August 2017, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:

Clerk of the Court
IDAHO SUPREME COURT
451 W. State Street
Boise, ID 83702

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- Hand Delivery
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ADDENDUM A
to
IDWR RESPONDENTS' BRIEF
Filed on August 1, 2017

Boise Project Board of Control, et al. v. IDWR;
Supreme Court Docket No. 44745-2017

ORIGINAL

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Boise, ID 83720-0098

Chief Natural Resources Division
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Environment & Natural Resources Div.
550 West Fort Street, MSC 033
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DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
AUG 26 2014	
By _____	Clerk
_____	Deputy Clerk

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)	
)	
)	FINAL UNIFIED DECREE
Case No. 39576)	
)	
_____)	

I. PROCEDURE

On June 17, 1987, the State of Idaho, ex rel. A. Kenneth Dunn in his official capacity as Director of the Idaho Department of Water Resources, filed a petition in the above-entitled Court seeking commencement of a "general adjudication inter se of all rights arising under state or federal law to the use of surface and ground waters from the Snake River basin water system and for the administration of such rights." *Petition* at 2. On November 19, 1987, this Court issued its *Commencement Order* thereby initiating the above-entitled general stream adjudication of all rights to the use of the waters of the Snake River Basin within the State of

Idaho pursuant to Idaho Code § 42-1406A (Supp. 1987).¹ The *Commencement Order* adopted by reference this Court's October 14, 1987, *Memorandum Opinion on Commencement of Adjudication* as "further findings of fact and further conclusions of law as permitted by I.R.C.P. 52(a)." *Commencement Order* at 4.

As set forth in the *Memorandum Opinion on Commencement of Adjudication*, Idaho Code § 42-1406A (Supp. 1987) required that the adjudication be commenced within the terms of the McCarran Amendment, 43 U.S.C. § 666. This Court determined that for the adjudication to come within the terms of the McCarran Amendment the entire Snake River Basin water system within the State of Idaho had to be adjudicated. This Court defined the entire Snake River Basin water system within Idaho as follows:

Beginning at the point where the southern boundary line of the state of Idaho meets the western boundary line of the state of Idaho, then following the western boundary of the state north to the northern boundary of the Clearwater Basin, in Idaho, in section 36, T. 36 N., R. 6 W., B.M., then following the northern watershed divide of the Clearwater River Basin north and east to the eastern boundary of the state of Idaho in section 4, T. 42 N., R. 11 E., B.M., then following the eastern boundary of the state southeast to the northern boundary of the Bear River Basin in section 35, T. 10 S., R. 46 E., B.M., then following the northern watershed divide of the Bear River Basin, in Idaho, southwest to the southern boundary of the state of Idaho in section 26, T. 16 S., R. 28 E., B.M., then following the southern boundary line of the state of Idaho west to the point of beginning.

Commencement Order at 5. A map showing the boundaries of the Snake River Basin water system is attached for illustrative purposes as Attachment 1, as required by Idaho Code § 42-1413 (2003). The following counties are wholly located within the boundaries of the Snake River Basin water system:

Ada	Canyon	Idaho	Owyhee
Adams	Clark	Jefferson	Payette

¹ Idaho Code § 42-1406A was added by section 1 of chapter 18, 1985 Idaho Sess. L. at 28. Section 42-1406A was subsequently amended by section 11 of chapter 454, 1994 Idaho Sess. L. at 1452-53, and now appears as an uncodified law in the 1994 Idaho Session Laws.

Bingham	Clearwater	Jerome	Teton
Blaine	Custer	Lemhi	Twin Falls
Boise	Elmore	Lewis	Valley
Bonneville	Fremont	Lincoln	Washington
Butte	Gem	Madison	
Camas	Gooding	Minidoka	

Commencement Order at 5. The following counties are partly located within the boundaries of the Snake River Basin water system:

Bannock	Nez Perce
Caribou	Oneida
Cassia	Power
Latah	Shoshone

Id. at 6.

The *Commencement Order* also determined that “all classes of water uses . . . within the water system [must] be adjudicated as part of the Snake River Basin adjudication.” *Id.* At 6. On January 17, 1989, however, this Court entered its *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses* that allowed claimants of *de minimis* domestic and stock water rights, as defined in Idaho Code § 42-1401A(5) and (12) (Supp. 1988), to elect to defer adjudication of their claims; provided, all such claimants “shall be joined as parties in this proceeding and will be bound by all decrees entered in this case, including the final decree.” *Findings of Fact* at 3.

The *Commencement Order* directed the Director of the Idaho Department of Water Resources (“Director”): 1) to investigate the water system as provided in Idaho Code § 42-1410 (Supp. 1987); 2) to prepare the notice of order commencing a general adjudication containing that information required by Idaho Code § 42-1408A(1) (Supp. 1987); 3) to serve notice of the order commencing a general adjudication in accordance with chapter 14, title 42, Idaho Code; and 4) to file with this Court affidavits and other documents stating the

persons served with a notice of order commencing the adjudication. *Commencement Order* at 7-8.

Based upon the claims submitted; the files and records of the Idaho Department of Water Resources and the Court; the examination of the ditches, diversions, lands irrigated, and other uses of water within the water system; the Director's Reports and evidence herein, this Court enters the following findings of fact and conclusions of law:

II. FINDINGS OF FACT

1. All requirements for joinder of the United States as a party under state and federal law, including but not limited to 43 U.S.C. § 666, have been satisfied.
2. The Nez Perce Tribe participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Notice of Claim to a Water Right Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance* (March 18, 1993).
3. The Northwestern Band of the Shoshoni Nation participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Partial Protective Filing by the Northwestern Band of the Shoshoni Nation of Notices of Claim for Water Rights Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance on Behalf of the Northwestern Band of the Shoshoni Nation* (March 22, 1993).
4. The Shoshone-Bannock Tribes sought and were granted intervention in this proceeding. *Order Granting Permissive Intervention by the Shoshone-Bannock Tribes* (April 12, 1993).

5. The Shoshone-Paiute Tribes of the Duck Valley Indian Reservation sought and were granted intervention in this proceeding. *Motion to Intervene and Request for Expedited Hearing* (SRBA Consolidated Subcase No. 51-12756, Jan. 12, 1999); *Order Granting Tribes' Motion to Intervene, Order Requiring Written Status Reports and Order for Scheduling Conference Reports* (SRBA Subcases Nos. 51-12756 et al., Dec. 6, 1999).

6. The Director served notice of the commencement of the Snake River Basin Adjudication ("SRBA") in accordance with chapter 14, title 42, Idaho Code and the orders of this Court. This included service of the notice of commencement on the State of Idaho and the United States; service of the notice of commencement on all other persons by publication; service of the notice of commencement by posting in each county courthouse, county recorder's office and county assessor's office in which any part of the water system is located; service of the notice of commencement by mail on each person listed as owning real property on the real property assessment roll within the boundaries of the Snake River Basin water system; and filing of a copy of the notice of commencement in the office of the county recorder in each county in which any part of the water system is located.

7. In addition to the steps taken in paragraph 6, the Idaho Department of Water Resources also served notices of commencement on persons who may have used water within the water system, but were not listed as owners of real property. The sources of information the Idaho Department of Water Resources reviewed for this purpose were: 1) water right records of the Idaho Department of Water Resources for each basin wholly or partly within the water system; 2) cooperating farm/ranch operator records of the United States Department of Agriculture, Agricultural Stabilization and Conservation Service for each basin wholly or partly within the water system; and 3) mining claim records on federal

land of the United States Department of Interior, Bureau of Land Management for each basin wholly or partly within the water system.

8. The Director has completed an examination of the Snake River Basin water system and submitted Director's Reports to this Court in conformance with the requirements of chapter 14, title 42, Idaho Code and the orders of this Court.

9. As required by title 42, chapter 14, Idaho Code and this Court's orders, claims to water rights arising under state or federal law to the use of the surface and ground waters from the Snake River Basin water system have been adjudicated resulting in the issuance of partial decrees that have been certified as final pursuant to I.R.C.P. 54(b).²

10. Idaho Code § 42-1412(8) (2003) provides that: "Upon resolution of all objections to water rights acquired under state law, to water rights established under federal law, and to general provisions, and after entry of partial decree(s), the district court shall combine all partial decrees and the general provisions into a final decree." The Court finds that the conditions of Idaho Code § 42-1412(8) (2003) have been met with respect to the water rights identified in Attachments 2, 4, 5 and 6 and the general provisions in Attachment 3, enabling the Court to issue this Final Unified Decree.

III. CONCLUSIONS OF LAW

1. The SRBA is a general stream adjudication *inter se* of all water rights arising under state or federal law to the use of surface and ground waters from the Snake River Basin water system and for the administration of such rights.

2. The State of Idaho is a party to this proceeding.

² At the time of entry of this Final Unified Decree there are a total of 103 subcases pending final resolution. A separate *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* is being entered contemporaneously herewith, which provides for the continued processing of the subcases listed therein.

3. The Director was withdrawn as a party to this proceeding in 1994. Idaho Code § 42-1401B (2003); *State of Idaho, ex rel. Higginson v. United States*, 128 Idaho 246, 256-57, 912 P.2d 614, 624-25 (1995).

4. The United States is a party to this proceeding under 43 U.S.C. § 666.

5. This Final Unified Decree is conclusive as to the nature and extent of all rights of the United States to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, including, but not limited to, water rights held by the United States in trust for any Indian tribe, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

6. The Nez Perce Tribe, the Northwestern Band of the Shoshoni Nation, the Shoshone-Bannock Tribes, and the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation are parties to this proceeding.

7. The *Consent Decree Approving Entry of Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe and the Nez Perce Tribe to the Use of Water in the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resources Board* with its six attachments dated January 30, 2007 ("*Nez Perce Consent Decree*"), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Nez Perce Consent Decree* is conclusive as to the nature and extent of all rights of the Nez Perce Tribe to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

8. The *Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, dated August 13, 2014 (“*Shoshone-Bannock Consent Decree*”), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Bannock Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Bannock Tribes to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

9. The *Revised Consent Decree Approving Entry of Partial Decrees Determining the Rights of the United States as Trustee for the benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho* with its three attachments, dated December 12, 2006 (“*Shoshone-Paiute Consent Decree*”), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Paiute Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

10. This Final Unified Decree is conclusive as to the nature and extent of all rights of the Northwestern Band of the Shoshoni Nation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

11. Claimants in each of the SRBA basins received notice of the commencement of the SRBA in accordance with chapter 14, title 42, Idaho Code and orders of this Court. These notice procedures satisfy constitutional due process requirements. *LU Ranching Co. v. U.S.*, 138 Idaho 606 (2003).

IV. ORDER

NOW THEREFORE this Court ORDERS, ADJUDGES AND DECREES as follows:

1. This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987, except the following described water rights shall not be lost by failure to file a notice of claim, as provided in Idaho Code § 42-1420 (2003):

- a. Any domestic and stock water right, as defined in Idaho Code § 42-111 (1990), Idaho Code § 42-1401A(5) (1990), and Idaho Code § 42-1401A(12) (1990), the adjudication of which was deferred in accordance with this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*;
- b. A water right application for permit filed under chapters 2 or 15, title 42, Idaho Code;
- c. A water right permit issued under chapters 2 or 15, title 42, Idaho Code, unless the Director required the permit holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code;
- d. A water right license issued under chapters 2 or 15, title 42, Idaho Code, if proof of beneficial use was not filed with the Department of Water Resources

before November 19, 1987, unless the Director required the license holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code; and

- e. A claim to a water right under federal law, if the priority of the right claimed is later than November 18, 1987.

All other water rights with a priority before November 19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed.³ Any water rights with a priority date subsequent to November 18, 1987, were not required to be claimed in the SRBA, but to the extent any such water rights were claimed in the SRBA and a partial decree issued, the partial decree is conclusive as to the nature and extent of the right.

2. All partial decrees issued by this Court are set forth in Attachments 2 and 4 to this Final Unified Decree and are incorporated herein by reference.

3. Attachment 2 consists of a name index and a copy of all partial decrees issued by this Court.

4. General provisions decreed by this Court are set forth in Attachment 3 to this Final Unified Decree and are incorporated herein by reference.

5. Attachment 4 consists of the federal and tribal reserved water rights partially decreed and/or otherwise memorialized in a consent decree issued in conjunction with the approval of a federal reserved water right settlement, including all consent decrees and all attachments thereto; all partial decrees issued by this Court as part of the respective settlements; and all Federal, State and/or Tribal legislation necessary to enact and approve the water right settlements. In the case of any conflict between this Final Unified Decree and the partial

³ Excepting those claim numbers listed in the *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* entered contemporaneously herewith.

consent decrees approving reserved water right settlements, the partial consent decrees approving the reserved water right settlements as set forth in Attachment 4 shall control.

6. All claims to water rights filed in this proceeding that were decreed disallowed by this Court are set forth in Attachment 5 to this Final Unified Decree and are incorporated herein by reference.

7. The water right numbers for those water rights of record with the Idaho Department of Water Resources that were required to be claimed but were not claimed in this proceeding and therefore were decreed disallowed by this Court are set forth in Attachment 6 and are incorporated herein by reference. The portion of any disallowed water right that was deferrable pursuant to this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* is not affected by this paragraph.

8. This Final Unified Decree is binding against all persons including any persons that deferred filing of domestic and/or stock water claims pursuant to this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*, which is set forth in Attachment 7 to this Final Unified Decree and is incorporated herein by reference.

9. The adjudication of deferred domestic and stock water claims and the administration of such rights prior to their adjudication shall be governed by this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* and applicable state law.

10. All water rights based on beneficial uses, licenses, permits, posted notices, and statutory claims required to be claimed in this proceeding are superseded by this Final

Unified Decree. Provided, however, this Final Unified Decree does not supercede the third-party beneficiary contractual rights conferred on certain classes of water rights pursuant to the "Contract to Implement Chapter 259, Sess. Law 1983" as authorized by 1983 Idaho Sess. Laws 689 and codified as Idaho Code § 61-540 (2002). The scope of third-party beneficiaries and contract rights are defined in this Court's *Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2*. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011) included as Attachment 9.

11. All prior water right decrees and general provisions within the Snake River Basin water system are superseded by this Final Unified Decree except as expressly provided otherwise by partial decree or general provisions of this Court.

12. This Final Unified Decree shall not be construed to define, limit or otherwise affect the apportionment of benefits to lands within an irrigation district pursuant to chapter 7, title 43, Idaho Code.

13. This Final Unified Decree shall not be construed to supersede or affect otherwise the following: 1) any administrative changes to the elements of a water right completed after the entry of a partial decree but prior to the entry of this Final Unified Decree; or 2) elements of a water right defined by a license where, in accordance with Idaho Code § 42-1421(3) (2003), a partial decree was issued based on a permit prior to the issuance of the license.

14. The time period for determining forfeiture of a partial decree based upon state law shall be measured from the date of issuance of the partial decree by this Court and not from the date of this Final Unified Decree. State law regarding forfeiture does not apply to partial decrees based upon federal law.

15. The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state and tribal law, including the administrative provisions set forth in the federal reserved water right settlement agreements in Attachment 4.

16. Nothing in this Final Unified Decree shall be interpreted or construed as exempting the holder of a decreed water right based on state law from exercising or changing such right in compliance with applicable Idaho law.

17. This Court retains jurisdiction of this proceeding to: a) resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources; b) adjudicate any domestic or stock water rights deferred under this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*; and c) enter partial decrees, orders of disallowance, or other final determination for the pending subcases listed in the *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* entered contemporaneously herewith. Any order amending or modifying this Final Unified Decree, including the attachments hereto, will be entered on the register of action for Civil Case No. 39576 in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, and will be filed with the Idaho Department of Water Resources in lieu of issuing an Amended Final Unified Decree. Attachment 8 contains instructions on how to access any orders amending this Final Unified Decree.

18. The incorporation by reference of partial decrees and orders of this Court contained in the Attachments to this Final Unified Decree does not constitute a reissuance of such partial decrees and orders.

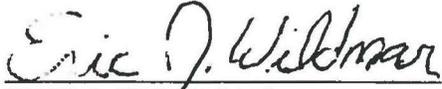
19. This Final Unified Decree, including the entirety of Attachments 1 through 10 listed below, shall be entered in the records of the clerk of the District Court for the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

- | | |
|---------------|--|
| Attachment 1 | Snake River Basin Water System Map. |
| Attachment 2 | Partially Decreed Water Rights, including a name index, consisting of 770 pages. |
| Attachment 3 | General Provisions, consisting of 113 pages. |
| Attachment 4 | Federal and Tribal Reserved Water Right Settlements, including all Consent Decrees and all Attachments thereto, all Partial Decrees issued by this Court as part of the Respective Settlements, and all Federal, State and/or Tribal Legislation Necessary to Enact and Approve the Water Right Settlements consisting of 2,857 pages. |
| Attachment 5 | List of Water Right Numbers for Filed Water Right Claims Decreed as Disallowed consisting of 66 pages. |
| Attachment 6 | List of Water Right Numbers for Unclaimed Water Rights Decreed as Disallowed consisting of 24 pages. |
| Attachment 7 | June 28, 2012, <i>Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims</i> consisting of 6 pages. |
| Attachment 8 | Instructions on Searching the Final Unified Decree consisting of 5 pages. |
| Attachment 9 | <i>Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011).</i> |
| Attachment 10 | <i>Register of Actions</i> , Twin Falls County Case No. 39576 (i.e., SRBA Main Case). |

20. A certified paper and electronic copy of the entire Final Unified Decree shall be provided to the Director. The Director shall record the Final Unified Decree excluding all

Attachments other than Attachments 7 and 8 in the office of the county recorder of each county in which the place of use or point of diversion of any individual decreed water right in the Final Unified Decree is located. The Director shall maintain a copy of the Final Unified Decree for public inspection.

DATED this 25th day of August, 2014.


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

ADDENDUM B

to

IDWR RESPONDENTS' BRIEF

Filed on August 1, 2017

Boise Project Board of Control, et al. v. IDWR;

Supreme Court Docket No. 44745-2017

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A01-02064
Date Received:
Receipt No:
Received By: _____

RECEIVED

DEC 1 2006

DEPARTMENT OF
WATER RESOURCES

AMENDED NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: UNITED STATES AMERICA, ACTING THROUGH 208-378-5306
Address: REGIONAL DIRECTOR, P.N. REGION ATTN: PN-3100
BUREAU OF RECLAMATION
1150 NORTH CURTIS
BOISE, ID 83706-1234

2. Date of Priority: MAR 30, 1921

156,830 AFY of this right shall be administered under a priority date of
03/29/1921.

3. Source: SNAKE RIVER Trib. to: COLUMBIA RIVER

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
07S	31E	30	SW	SE			POWER

5. Description of diverting works:

AMERICAN FALLS DAM

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION STORAGE	01/01	12/31			1,700,000.00
IRRIGATION FROM STORAGE	03/15	11/15			1,700,000.00
POWER STORAGE	01/01	12/31			1,700,000.00
POWER FROM STORAGE	01/01	12/31			1,700,000.00

7. Total Quantity Appropriated is:

C.F.S. (and/or) 1,700,000.00 A.F.A.

This water right includes the right to refill under the priority date of
this water right to satisfy United States' storage contracts.

8. Total consumptive use is 1,700,000.0 Acre Feet Per Annum.

9. Non-irrigation uses:

DOMESTIC AND POWER

10. Place of Use:

Place of use for irrigation storage is American Falls Reservoir; provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam when determined by the watermaster, Committee of Nine, and the Bureau of Reclamation that such temporary storage will promote the conservation of storage water upstream of Milner Dam.

Place of use for irrigation from storage is within the following counties: Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, and Elmore.

11. Place of use in counties: Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, and Elmore.

12. Do you own the property listed above as place of use? NO

13. Other Water Rights Used:

01-04052, 01-02040, 01-10042, 01-10053, 01-00284

14. Remarks:

15. Basis of Claim: LICENSE

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A01-02068
Date Received:
Receipt No:
Received By: _____

DEC 1 2006
EXHIBIT
WATER RIGHTS

AMENDED NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: UNITED STATES AMERICA, ACTING THROUGH 208-378-5306
Address: REGIONAL DIRECTOR, P.N. REGION ATTN: PN-3100
BUREAU OF RECLAMATION
1150 NORTH CURTIS
BOISE, ID 83706-1234

2. Date of Priority: JULY 28, 1939

259,600 AFY of this right shall be administered under a priority date of
03/29/1921.

3. Source: SNAKE RIVER Trib. to: COLUMBIA RIVER

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4		Lot	County
01S	45E	17	NE	NE		BONNEVILLE
01S	45E	17	NW	NE		BONNEVILLE
01S	45E	17	SE	NE		BONNEVILLE
01S	45E	17	SW	NE		BONNEVILLE

5. Description of diverting works: PALISADES DAM

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION STORAGE	01/01	12/31			1,200,000.00
IRRIGATION FROM STORAGE	03/15	11/15			1,200,000.00
POWER STORAGE	01/01	12/31			1,200,000.00
POWER FROM STORAGE	01/01	12/31			1,200,000.00

7. Total Quantity Appropriated is:
C.F.S. (and/or) 1,200,000.00 A.F.A.

This water right includes the right to refill under the priority date of
this water right to satisfy United States' storage contracts.

8. Total consumptive use is 1,200,000.0 Acre Feet Per Annum.

9. Non-irrigation uses:

DOMESTIC AND POWER

10. Place of Use:

Place of use for irrigation storage is Palisades Reservoir; provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam when determined by the watermaster, Committee of Nine, and the Bureau of Reclamation that such temporary storage will promote the conservation of storage water upstream of Milner Dam.

Place of use for irrigation from storage is within the following counties: Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, and Elmore.

11. Place of use in counties: Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, and Elmore.

12. Do you own the property listed above as place of use? NO

13. Other Water Rights Used: 01-10043

14. Remarks:

15. Basis of Claim: LICENSE

16. Signature (s)

(a.) By signing below, I/We acknowledge that I/We have received, read, and understand the form entitled How you will receive notice in the Snake River Basin Adjudication. (b.) I/We do wish to receive and pay a small annual fee for monthly copies of the docket sheet.

For Organizations: I do solemnly swear or affirm that I am Area Manager of
Title

Snake River Area Office Bureau of Reclamation, that I have signed the foregoing
Organization

document in the space below as Area Manager of Snake River Area Office Bureau of Reclamation
Title Organization

and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent [Handwritten Signature]

Title and Organization Area Manager, Snake River Area Office Bureau of Reclamation

Date 12/1/2006

State of Idaho)
County of Ada)

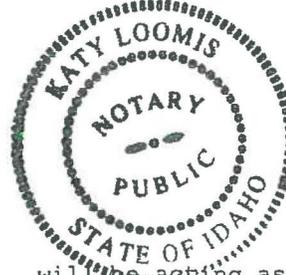
Subscribed and sworn (or affirmed) before me this 1st day of December 2006.

Notary Public SEAL Katy Loomis

Residing at Boise, Idaho

My Commission Expires 10/17/2009

Katy Loomis Please Print Name



17. Notice of Appearance:
Notice is hereby given that I, _____ will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed blow.

Signature _____

Address _____

Date _____

Last Name _____ Ident. Number _____

ADDENDUM C

to

IDWR RESPONDENTS' BRIEF

Filed on August 1, 2017

Boise Project Board of Control, et al. v. IDWR;

Supreme Court Docket No. 44745-2017

II. ANALYSIS

The Ditch Companies ask the Court to certify the *Memorandum Decision* as a final and appealable judgment under Rule 54(b). The Court in an exercise of its discretion declines to do so. In denying the *Motion*, the Court first finds that the Court did not direct entry of a final judgment as to any of the claims involved in the above-captioned subcases. That is, the Court did not enter a *Partial Decree* either allowing or disallowing any of the water right claims involved. Therefore, the *Memorandum Decision* is an interlocutory order. The Court next finds that the movants did not timely seek appeal of the *Memorandum Decision* by permission under Idaho Appellate Rule 12. Moving for a Rule 54(b) certification is not a substitute for timely seeking appeal by permission of an interlocutory order under Idaho Appellate Rule 12.

Finally, the Court is unable to make a determination under Rule 54(b) that there is no just reason for delay. The State of Idaho raised numerous issues in the summary judgment proceedings before the Special Master. The Special Master failed to reach any of these issues due to the limited scope of his ruling. As a result, the only issue the Court would be certifying as final for purposes of appeal pertains to the proper jurisdiction for resolving disputes implicating the scope of decreed water rights. The substantive issue regarding the scope of the decreed reservoir rights is at issue in the administrative cases currently on appeal. Depending on the outcome of the appeal the reservoir right holders can determine whether or not to further pursue the late claims. Therefore, while it may promote judicial economy to motion the Special Master to stay the late claim proceedings pending the outcome of the administrative appeal, it would not promote judicial economy to create a situation potentially requiring further appeals once the issues raised by the State have been ruled on.

Therefore, the Court will deny the *Motion* and recommit the subcases to the Special Master for further proceedings.

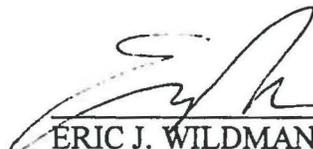
III.
ORDER

THEREFORE, BASED ON THE FOREGOING THE FOLLOWING ARE HEREBY ORDERED:

1. The *Motion for Rule 54(b) Certification* is **denied**.
2. The subcases are recommitted to the Special Master for further proceedings consistent with the Court's *Memorandum Decision*.

IT IS SO ORDERED.

DATED: January 6, 2017


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION FOR I.R.C.P. 54(B) CERTIFICATE was mailed on January 06, 2017, with sufficient first-class postage to the following:

ALBERT P BARKER
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

ANDREW J WALDERA
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

CHIEF NATURAL RESOURCES DIV
OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720-0010
Phone: 208-334-2400

CHRISTOPHER H MEYER
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Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

ORDER

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Deputy Clerk



ADDENDUM D

to

IDWR RESPONDENTS' BRIEF

Filed on August 1, 2017

Boise Project Board of Control, et al. v. IDWR;

Supreme Court Docket No. 44745-2017

STATEMENT OF PURPOSE

RS23319

Recognizing a need to provide one place for citizens to find laws relating to government transparency, this bill moves existing public record, open meeting, ethics in government, and prohibition against contracts with officers statutes into a new title called Transparent and Ethical Government.

FISCAL NOTE

There is no fiscal impact.

Contact:

Cally Younger
Office of the Governor
(208) 334-2100

Statement of Purpose / Fiscal Note

H0090