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Docket No. 44745-2017

In the Supreme Court of the State of Idaho

IN THE MATTER OF ACCOUNTING FOR DISTRIBUTION OF WATER TO THE FEDERAL ON-STREAM RESERVOIRS IN WATER DISTRICT 63 BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES.

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/Respondents,

v.

BOISE PROJECT BOARD OF CONTROL and NEW YORK IRRIGATION DISTRICT,

Petitioners/Appellants-Cross Respondents,

v.

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

Respondents/Respondents,

and

SUEZ WATER IDAHO INC.,
Intervenor-Respondent/Respondent-Cross Appellant.

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SUPREME COURT
COURT OF APPEALS

RESPONSE BRIEF AND OPENING BRIEF ON CROSS APPEAL OF RESPONDENT - CROSS APPELLANT SUEZ
(Boise Project Appeal)

Appeal from the District Court of the Fifth Judicial District of
The State of Idaho, in and for the County of Twin Falls,
Honorable Eric J. Wildman, Presiding

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STATEMENT OF THE CASE

Briefs and Parties

The parties in this appeal are Intervenor-Respondent/Respondent-Cross Appellant Suez Water Idaho Inc. ("Suez"),[1] Petitioners/Appellants-Cross Respondents Boise Project Board of Control and New York Irrigation District (collectively "Boise Project"), Petitioners/Respondents Ballentyne Ditch Company *et al.* (collectively "Ditch Companies"), and Respondents/ Respondents Idaho Department of Water Resources ("Department") and Gary Spackman ("Director") (together "IDWR"). Boise Project and the Ditch Companies are referred to collectively as "Irrigators."[2]

The water rights at issue are held by the U.S. Bureau of Reclamation ("Bureau") for the benefit of the Irrigators. The Bureau owns Arrowrock and Anderson Ranch reservoirs and the U.S. Army Corps of Engineers ("Corps") owns Lucky Peak, all of which are operated as a coordinated system.[3] Neither federal agency nor the United States is a party to the contested case, the judicial review, or these appeals.

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[1] Suez employs a slash to distinguish party designation below from party designation on appeal.

[2] Citations to the District Court Record are indicated by "R." followed by bates numbers. Citations to the Agency Record are indicated by "A.R." followed by bates numbers. Citations to transcripts are indicated by "Tr." followed by the date of the hearing and page and line numbers. Citations to exhibits in the Agency Record are indicated by "Ex." followed by the exhibit number and bates number. Citations to Officially Noticed Documents in the Agency Record are indicated by "O.N.D." followed by the folder and document name (set off with slashes) followed by bates numbers. Some documents appear multiple times in the District Court Record and/or Agency Record. Citations to documents will include only one record citation. Other record citations may be found in the index set out in Addendum A to this brief.

[3] Although the Bureau holds legal title to the storage rights, the Corps alone dictates flood control and refill operations on all three reservoirs during the storage season. See discussion in *IDWR Brief* at 12-16, 52-55.

Three appeals have been filed from the decision below. To reduce the burden on the Court and the parties, Suez is filing substantively identical briefs in each appeal. This is Suez's combined response brief on appeal and opening brief on cross appeal in Appeal No. 44745-2017. This brief responds to *Boise Project Board of Control's Appellant's Brief* ("*BP Brief*") in No. 44745-2017 filed on May 26, 2017 by Boise Project. It also responds to *Appellants' Opening Brief* ("*DC Brief*") in Appeal No. 44677-2016 filed on May 26, 2017 by the Ditch Companies. In addition, it responds to *IDWR Appellants' Brief* ("*IDWR Brief*") in No. 44746-2017 filed by IDWR on May 26, 2017.

Nature of the Case

Before the Court are questions concerning the Director's accounting for four storage rights ("Storage Rights") associated with three federal reservoirs on the Boise River and its tributaries.[4] The Court's answers to these seemingly obscure accounting questions will determine whether the State of Idaho controls the appropriation and distribution of its public waters, or whether the federal government dictates who gets water and when.

For as long as there has been any formal accounting or administration of the Storage Rights, water has been allocated by IDWR to the federal on-stream reservoirs on the basis of one fill of storable inflow under priority and additional refill not under priority as needed if water is available beyond the needs of all other water users then in priority.[5] IDWR has described this

[4] The term "Storage Rights" refers to the four storage water rights decreed by the SRBA Court for storage in three federal on-stream reservoirs in Basin 63 (Nos. 63-303, 63-3613, 63-3614, and 63-3618). The Storage Rights total 1,072,811 acre-feet of storage. A summary and copies of the decrees are set out in Suez's brief to the District Court (R. 000655-64). In the briefing below, the Storage Rights sometimes have been referred to as "Base Rights" (to distinguish them from "Late Claims" that are not at issue in this appeal).

[5] Suez sometimes employs the term "free river" to describe when there is sufficient water available to accommodate non-priority refill without injury to others. (This picks up on language

accounting methodology as based on "paper fill." Paper fill means that all storable inflow (*i.e.*, water entering the reservoirs to which no other user is entitled) accrues to the Storage Rights and that the rights are filled (aka satisfied) when their volume limits are reached. At that point, the reservoirs will be physically full only if no storable inflow was bypassed or subsequently released.

Now this Court is asked to determine the propriety of this long-standing practice. The Irrigators urge that it be replaced by a "contents-based" or similar form of accounting. (See section III at page 21.) This would allow the reservoirs to fill, spill, and refill without any volume limit, all under right of priority (*i.e.*, to the detriment of other water users), until the end of the storage season when federal government deems the reservoirs to have reached maximum physical contents. At that time, according to the Irrigators, only the water remaining in the reservoirs counts toward filling the Storage Rights.

The accounting methodologies urged by the Director and the Irrigators carry profoundly different policy implications going to the core of the prior appropriation doctrine. If, as the Irrigators urge, the federal government is allowed to control all water flowing into the reservoirs under priority until it declares its water right is satisfied at the end of the storage season it may, in effect, ignore the volume limits stated on its water rights and thereby diminish the rights held by existing and future junior appropriators. As a result, the Director's authority to distribute water under the prior appropriation doctrine would be overridden, junior rights would suffer, future development would be impaired, water would flow unused to other states, and the constitutional mandate to maximize the beneficial use of the State's water would be frustrated. If on, the other hand, IDWR's accounting methodology is upheld, the status quo will remain in

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employed in Colorado water cases.) The Department and the District Court prefer the "excess water"

effect and the Storage Rights and existing and future junior appropriators will continue to have their rights satisfied according to their priorities.

At the end of the day, this case is about Idaho water rights, not federal reservoir operations, contracts, or policies.

Course of Proceedings

This appeal is the sequel to the appeal of the District Court's decision on Basin-Wide Issue 17,[6] decided by this Court in *A&B Irrigation Dist. v. State* (*Basin-Wide Issue 17*) ("*BW-17*"), 157 Idaho 385, 336 P.3d 792 (2014) (Burdick, C.J.).

That case addressed this basin-wide inquiry: "Does Idaho law require a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control?" *BW-17*, 157 Idaho at 390, 336 P.3d at 797. In other words, once a storage right has been satisfied, may the holder vacate stored water for flood control—or any other non-beneficial purpose—and then fill again under the same right of priority?

In Basin-Wide 17, the District Court found that a remark authorizing multiple fills of a water right under priority is not only not "required" but would be contrary to law. *Wildman BW-17* at 13 (O.N.D. \BWI-17\91017\20130320_Memorandum Decision\ at 001422). That, of course, is a no brainer. No one contests that a water right may be satisfied only once in a season, after which it is no longer in priority. For storage rights, this is commonly expressed as the one-fill rule. As this Court recognized, the harder and more important question is, how is the first fill determined for storage rights? That is, what water counts toward the satisfaction of the right?

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terminology. This semantic choice is inconsequential.

[6] *Basin-Wide Issue 17* ("*Wildman BW-17*"), Idaho Dist. Ct., Fifth Jud. Dist. (Memorandum Decision Mar. 20, 2013) (Wildman, J.) (O.N.D. \BWI-17\91017\20130320_Memorandum Decision\ at 001410 to 001426).

The District Court declined to answer that accounting question in Basin-Wide 17, recognizing it to be a mixed question of fact and law involving the expertise of the Director and not suited to resolution in the context of a purely law-based basin-wide ruling. This Court agreed.[7]

Although agreeing with the District Court that it was premature to address the accounting question, this Court found that the District Court's framing of the basin-wide question was an abuse of the District Court's discretion because it "was not a question anyone appears to have wanted answered." *BW-17*, 157 Idaho at 392, 336 P.3d at 799.[8] In effect, the Court kicked the matter back to IDWR—where it belonged all along.[9]

At the time of this Court's decision in *BW-17*, the Director already had initiated (and then stayed) an administrative proceeding to address the very accounting question which this Court ruled was within the Director's discretion to decide.[10] Thereafter, the Director lifted his stay and

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[7] *BW-17*, 157 Idaho at 392, 336 P.3d at 799 ("[T]he question of when a storage water right is filled presents a mixed question of fact and law . . . . [D]etermining when a water right is filled requires the development of a factual record.").

[8] The District Court was blamed for answering the wrong question, yet the question it answered was virtually identical to the question presented by the petitioners. The only change was to add the words "under priority" to make clear that the question is whether the second fill may occur to the detriment of other users.

[9] In doing so, the Court took the time to reject the Irrigators' assertion that the "Director's discretionary functions do not include the ability to determine when a water right is satisfied." *BW-17*, 157 Idaho at 392, 336 P.3d at 799. The Court held: "In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user. However, it is within the Director's discretion to determine when that number has been met for each individual decree." *BW-17*, 157 Idaho at 394, 336 P.3d at 801. "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." *BW-17*, 157 Idaho at 394, 336 P.3d at 801. "This Court has also recognized the need for the Director's specialized expertise in certain areas of water law." *BW-17*, 157 Idaho at 394, 336 P.3d at 801.

[10] The Director initiated two contested cases on October 24, 2013—one for Boise River's federal reservoirs (Basin 63) and another for federal reservoirs on the upper Snake River (Basin 01). The Director later stayed these proceedings pending resolution of the *BW-17* litigation. The stays were lifted

proceeded with the Contested Case, utilizing the guidance provided in *BW-17*. The result was his *Amended Final Order* ("*Spackman Order*") (A.R. 001230-1311) issued on October 20, 2015, followed by his *Order Denying Petitions for Reconsideration* ("*Spackman Reconsideration Denial*") (A.R. 1401-35) issued on November 19, 2015. These are the decisions at issue in this appeal.

The Irrigators sought judicial review of these orders. Suez filed a *Notice of Appearance*, R. 000052-54, and participated in the proceedings. The District Court issued both its *Memorandum Decision and Order* ("*Wildman Decision*") (R. 001052-75) and its final *Judgment* (R. 001049-51) on September 1, 2016. Its *Order Denying Rehearing* ("*Wildman Rehearing Denial*") (R. 001161-67) was issued on November 14, 2016.

Three appeals to this Court were filed—one by Boise Project (No. 44745), one by the Ditch Companies (No. 44677), and one by IDWR (No. 44746). Suez is a respondent in all three. In addition, Suez cross-appealed in the Irrigators' two appeals. The Court denied Suez's motions to consolidate the three appeals.

Statement of Facts

Suez adopts the statement of facts set out in IDWR's opening brief in Appeal No. 44746-2017).

ISSUES PRESENTED

In addition to the issues identified by the other parties, Suez presents the following issues.

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after the Court's *BW-17* decision and the District Court's subsequent determination that no further judicial proceedings were required. The upper Snake proceeding was quickly resolved to the satisfaction of all parties based on the approval of late claims in the SRBA confirming subordinated rights held by the reservoir operators to refill after the first fill. Efforts, supported by Suez, to resolve the Basin 63 litigation along similar lines failed. The contested case for Basin 63 ("Contested Case") is the subject of this appeal.

Additional issues presented on appeal

1. Is the Director's method for crediting all physically and legally available water to the Storage Rights consistent with and compelled by Idaho's prior appropriation doctrine and the maximum use doctrine? [Yes]

2. Should the Irrigators' request for attorney fees be denied? [Yes]

3. Should Suez's be awarded attorney fees on appeal? [Yes]

Issues presented on cross-appeal

4. Under Idaho's prior appropriation doctrine and the maximum use doctrine, are holders of on-stream storage rights entitled, even in the absence of a remark or other express authorization on the face of the water right, to store and put to beneficial use "excess water" after the water right has been satisfied once when sufficient water is available also to satisfy all other water rights then in priority? [Yes]

5. Should this authority to take "excess" water without harming others be viewed as part of or pursuant to the storage right? [Yes]

ARGUMENT

I. STANDARD OF REVIEW

Suez concurs with the explanation of the standard of review set out in *IDWR Brief* at 35.

II. INTRODUCTION

The federal government manages its Boise River reservoirs both to control flooding and to store water for beneficial uses. (In addition, the federal reservoirs play a role in federal environmental responsibilities, notably providing water for instream flows and endangered salmon.) The objectives of flood control and storing water for beneficial use are diametrically

opposed. Maximizing storage for beneficial use calls for maintaining the reservoirs as full as possible; optimal flood control would leave reservoirs nearly empty.

A sound balance between these conflicting purposes has been achieved with remarkable success for many decades. The federal government deserves credit for a masterful job in the face of competing interests and uncertain knowledge.

Each November 1 (upon the conclusion of the irrigation season), the federal agencies begin storing all water legally and physically available (*i.e.*, storable inflow). They can do this, because their storage rights have no flow rate limits—they take it all.[11] In a dry year, they physically capture every drop available all the way through the storage season. The reservoirs may still not fill. In wet years, the federal government's goal changes at some point during the winter from storing as much as possible to maintaining sufficient empty reservoir space so it can capture predicted runoff without releasing more than 6,500 cfs measured at Boise's Glenwood Bridge.

As the senior user during the non-irrigation season, the federal government is entitled to continue storing water under priority until its rights are satisfied, or until more senior natural flow water rights "turn on" in late spring at the beginning of the irrigation season. After the Storage Rights have been filled on paper, the Director's accounting system allows reservoirs to top off with non-priority refill. Then, at the end of the storage season, all water in the reservoirs is allocated to the spaceholders. How it got there (priority fill or non-priority refill) does not matter. All stored water now belongs to the spaceholders under their contract rights, and no one else can call for it.

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[11] That does not leave the Boise River dry. A block of water stored under the Lucky Peak right is available for release for streamflow maintenance purposes. *See*, *Subcase 63-03618* ("*Lucky Peak Decision*"), at 2, Idaho Dist. Ct., Fifth Jud. Dist. (Memorandum Decision Sept. 23, 2008) (Melanson, J.) (O.N.D. \63-3618\20080923_ Memorandum Decision and Order on Cross-Mtn for SJ\ at 001532-68).

The Director's accounting system—built on the prior appropriation doctrine's one-fill rule—incentivizes the federal government to capture as much water as possible as early as possible, and to release enough water to avoid flooding and no more. The incentive derives from the fact that the federal government and its spaceholders shoulder the small risk of failure to refill after reservoir evacuation. The federal government releases water for flood control based on its own determination knowing that it can later refill its reservoirs later with excess water. This maximizes the amount of water physically stored in the reservoirs when the water is abundant and demand is low, while leaving as much water as possible flowing in the river to meet the needs of other users when water is scarcer.

The Irrigators agreed to this—in a bargain allowing all three reservoirs to be operated for flood control—when they signed on for the construction of Lucky Peak. As a result, they received even more irrigation water than they had before, vastly improving the reliability of their water supply. They also received concessions in their repayment obligations. Yet now they call for an entirely different approach, one that lets them have their cake and eat it, too.

They say the Storage Rights should not be deemed satisfied until the reservoirs achieve maximum physical fill at the end of the storage season.[12] They say this should be the case even if the reservoirs have filled, released, bypassed, and filled again with far more than the volume of water stated on the Storage Rights. The effect would be to convert storage rights for a set volume into unlimited rights capable of displacing existing junior rights and blocking future development. In other words, the Irrigators would shift the risk of refilling after flood control to

[12] The Irrigators' "contents-based" approach appears to have emerged as their preferred methodology, though they continue speak of other approaches that carry similar flaws. See discussion in section III at page 21.

parties who have no control over the reservoirs, allowing the federal government to make up any refill shortage out of other people's water rights.

This is fair, the Irrigators say, because juniors are inferior—they must survive on whatever leftovers the federal government allows them. This is a dangerous and unlawful proposition. Juniors, like Suez, may be later in line.[13] But they have a place in line. Juniors are entitled to their priorities, too, once the seniors' rights have been filled once. The junior's place in line is a property right as surely as is the senior's. The Irrigators' proposition that they are entitled to take and keep taking, under right of priority, devalues the property of all juniors and effectively ties up all unappropriated water. If the Storage Rights' only limit is to end the storage season with no more water than their reservoirs can hold, that is no limit at all. It renders the one-fill rule meaningless.

This matters if the federal government vacates more space than necessary (either by miscalculation or change in policy) and there is not enough water to top off the reservoirs without hurting other users. That rarely happens today.[14] But the reservoir operators shoulder

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[13] Suez holds two Boise River surface water permits with priority dates relatively junior to the Storage Rights. Suez also holds a number of decreed Boise River rights with priority dates senior to the Storage Rights. In addition, Suez is a contract spaceholder in Anderson Ranch and Lucky Peak. Of course, Suez also owns many ground water rights. Thus, Suez does not look at this issue through the single lens of a storage water user.

[14] At the hearing, Ms. Cresto testified that in 1989 the three reservoirs failed to physically fill due to flood control by more than the 60,000 acre-feet of "cushion" provided by the Bureau, and therefore the Lucky Peak spaceholders received less than full allocations. Tr. 8/28/15, pp. 534-36 (explaining Ex. 1019 at 000220). *See also* Ex. 1020 at 000242 (Ms. Cresto's presentation displaying the amount of total system shortfall experienced since 1985 due to flood control). However, even though not all of the Lucky Peak storage was completely filled in 1989, the record shows that spaceholders suffered no shortage that year. This conclusion is apparent because there was substantial Lucky Peak carryover—that is, storage water still unused—at the end of the 1989 irrigation season. *See*, O.N.D. \WD63 Black Books\Book 1989\ at 007738 (showing 106,596 acre-feet of Lucky Peak carryover at end of 1989 irrigation season). This was confirmed by water users who testified at the Contested Case hearing, none of whom could recall receiving less than their full allocations in flood control years.

that risk (which discourages them from letting it happen more often). Irrigators say the risk should be shifted to others. Doing so would effectively subordinate juniors to an unlimited storage right—irrespective of the volume stated on the face of the right. That is wrong.

It is also unnecessary. During "flood control periods," the Corps decides whether to store, release previously stored water, and/or bypass inflowing water based on periodically updated runoff forecasts. Even under the Director's accounting method, these operations almost always result in the reservoirs' becoming nearly completely physically full by the end of the storage season. In wet years like this one, flooding is a problem, but refill is not.

Simply put, the Director's accounting system allows reservoir operators to fill, evacuate, and refill. But refill beyond the volume stated in the Storage Rights does not occur under right of priority. The Director spelled this out in the 79-page *Spackman Order*. The District Court distilled it into four points:

> 1.) All natural flow entering the reservoir that is available is available in priority is accrued to the reservoir right.
>
> 2.) When the amount of natural flow that has entered the reservoir in priority equals the quantity element of the reservoir right, the right is deemed satisfied.
>
> 3.) Natural flow that continues to enter the reservoir thereafter is identified as "unaccounted for storage" if it is excess water not needed to satisfy other water rights on the system.
>
> 4.) Natural flow identified as "unaccounted for storage" may be stored in the reservoir and distributed to irrigators with historic

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Failure to nearly completely top off a reservoir in a wet year (which is extraordinarily rare) does not equate to irrigators being short of water. As a practical matter, irrigators do not call for all of their storage in wet years. Indeed, as long as records have been kept, no Boise River irrigator been ever come up short in a wet year (a year in which flood releases occurred). "The record further establishes that coordinated flood control operations have been occurring as necessary since 1955, yet none of the water users who testified in this proceeding could recall a flood control year when they received less than a full storage allotment. One even admitted that flood control releases 'put a smile on your face' because 'you were in pretty good shape if they were doing that.'" *Spackman Order* at 74 ¶ 54 (A.R. 1303).

practices, but not pursuant to a water right.

Wildman Decision at 6-7 (R. 1057-58) (citations omitted).

The first point is the "storable inflow" concept.[15] Storable inflow is shorthand for water that is physically and legally available for storage in a reservoir under a particular water right.

The second point is known as "paper fill," a term the Director employs to underscore that the thing that is filled is the water right, irrespective of whether the reservoir is physically full. The key point of paper fill is that the right holder is entitled to only one annual fill of its storage right under right of priority. "In priority" (aka "under priority") is shorthand for the right to take water under one's water right even when juniors go unsatisfied.

The third point is the "excess water" principle.[16] This means that, even after paper fill, an on-stream reservoir operator may top off its reservoir with additional water so long as there is sufficient flow to satisfy junior users as well. Such stored excess water is deemed "unaccounted for storage" in the arcane terminology of the Department's accounting system.

The fourth point is simply another aspect of the excess water principle. Saying that "unaccounted for storage" is not stored "pursuant to a water right" simply means that such water does not accrue to the Storage Right. It cannot "accrue" to those rights, if they already have been filled. Consequently, the excess water is not stored pursuant the quantity or priority of that right.

It bears emphasis, however, that while the excess water is not taken "pursuant" to the storage right's quantity or priority elements, the right to take excess water is very much related to

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[15] The Director did not employ that terminology. Instead, he spoke of "stored or storable water." That is the same thing.

[16] The District Court defines "excess water" as "water not required by any water right on the system." *Wildman Decision* at 14 (R. 1065). In other words, it is unappropriated water. Judge Melanson said the same thing. *In re SRBA Case No. 39576, Subcase Nos. 74-15051 et al.* ("*Lemhi High Flows*"), Memorandum Decision and Order on Challenge, at 25 (Idaho Dist. Ct. for the 5th Judicial Dist., Jan. 3, 2012) (http://srba.state.id.us/srba7.htm) (Wildman, J.) ("high flows are therefore unappropriated water").

and dependent upon the storage right. It is because the federal government holds valid on-stream storage rights that it is allowed to take excess water.

The District Court affirmed the Director on the first two points (one fill based on storable inflow), but not on the third and fourth (dealing with excess water). The Irrigators challenge the Director on all four points. IDWR's appeal and Suez's cross appeal challenge only the District Court's rejection of the third and fourth points.

III. THE IRRIGATORS OFFER THREE CONFLICTING ACCOUNTING METHODS, NONE OF WHICH WORK.

The Irrigators criticize the Director's accounting methodology, but present no cogent and consistent methodology of their own. Instead, at various places in their briefing, they appear to contemplate three fundamentally different approaches, without apparent recognition that these are in conflict with each other:[17]

1. "Contents-based accounting," which postpones IDWR's accounting until the end of the storage season and then counts the Storage Rights as satisfied based on the maximum reservoir contents.

2. "On/off accounting," which allows the federal government to determine when it is storing water under priority and when it is not (allowing it to "turn off" accrual whenever it is bypassing or evacuating water for flood control). No bypassed water counts toward filling the right. If the operator is storing some but not all of the inflow, only water physically stored would accrue to the right. Unlike contents-based accounting (which happens at the end of the storage season), on/off accounting could occur on an ongoing, real-time basis.

[17] For example, the Ditch Companies discuss contents-based accounting in connection with the testimony of Lee Sisco (in *DC Brief* at 35-36, 39-40), later endorsing this approach. "Actual, physical storage of water for beneficial use is the true measure of a storage water right." *DC Brief* at 51. Yet, in the same paragraph, they seem to endorse a beneficial use accounting approach. *DC Brief* at 51 ("the right to retain water in the Boise River Reservoirs until it is needed for beneficial use is fundamental to the legal entitlement to store water under the storage rights"). Likewise, the Ditch Companies assert a contents-based approach on grounds that "[a]ctual, physical storage of water for beneficial use is the true measure of a storage water right." *DC Brief* at 51. Meanwhile, the Boise Project contends that the United States should be able to "declare when they are storing water" (*i.e.*, on/off accounting) by citing to a stipulated condition in a refill right decreed in the Upper Snake River. *BP Brief* at 55 n.2.

3. "Beneficial use accounting," in which water accrues to the storage right only if it is ultimately released and applied to a beneficial use. It is unclear when this accounting would occur.

The contents-based accounting approach equates to no accounting at all. At the end of the storage season, there is never more water in the reservoir than the reservoir can hold. This proposal simply describes what occurred prior the Department's adoption of the computerized accounting system in 1986. See Tr. 8/28/15, pp. 370-71 (Sutter testifying "When the reservoirs physically reached the maximum content, that was the water that was then considered having been stored [pursuant to the reservoir storage rights] in that reservoir to be allocated to the various water users in the reservoir."). For reasons discussed below, contents-based accounting is not consistent with the Storage Rights' decrees, the prior appropriation doctrine, or Idaho's maximum use doctrine. In a nutshell, it would eviscerate the Storage Rights' quantity elements to the disadvantage of junior water rights.

The on/off approach is an odd one for the Irrigators to suggest, because it does not fully address the problem they say exists. It would allow them to store more water than the quantity stated on their rights (by turning off the accounting switch during flood control releases). But it would not "subtract" previously stored water that is later released for flood control.

For example, assume a reservoir owner has a ten acre-foot reservoir and a storage water right authorizing ten acre-feet of storage per year. The on/off switch would work to the advantage of the reservoir owner if he or she physically stored eight acre-feet under priority, then for a period of time bypassed all inflows so only eight acre-feet remained in storage, and then (at a time of his or her choosing) stored the final two acre-feet under priority to reach ten acre-feet physically stored—thus fully satisfying the right under priority.

But that hypothetical is anomalous. It involved no flood release (*i.e.*, evacuation of stored water to reduce the reservoir level). Suppose, instead, that the reservoir owner stored eight acre-feet of water under priority. Then he or she released two acre-feet of stored water, resulting in only six acre-feet physically stored. The accounting switch would be "off" during the flood release, so any water entering the reservoir during the drawdown of the reservoir would not count. But simply turning the accrual switch off would not subtract previously stored water that was released. Thus, the reservoir operator would have 4 acre-feet of space left to fill in the reservoir but only two acre-feet authorized to divert under priority. In other words, the on/off switch works with respect to bypassing water when no water is being stored, but not if water already stored is evacuated—which happens at least as frequently as bypassing. *See*, *e.g.*, Ex. 1019 at 000227.

In any event, the on-off accounting method also violates Idaho law for many of the same reasons the contents-based method does.

The third approach suggested by Irrigators—beneficial use accounting—is probably the most flawed and unworkable of all. It has the same legal defects as the others, but is also administratively unworkable.

IDWR's accounting needs to be ongoing in real-time (or close to it) so the Department can determine which rights are in priority at all times throughout the year. Contents-based accounting is problematical, because it postpones accounting until the end of the storage season.[18] But beneficial use accounting is even worse. It postpones accounting even later, to when it can be determined whether the stored water was actually put to beneficial use. This may

[18] "Contents based accounting 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." *Spackman Order* at 55, ¶184 (A.R. 001284).

be months or years after the water is diverted to storage. Indeed, just because water is stored does not mean it will ever be beneficially used. During high water years, it is likely that the water will be held over as carry-over storage, which may then be released during flood control operations the following year. Thus, under this approach, would accounting ever occur to determine whether the right has been satisfied? Beneficial use is critical to the establishment of a water right, but it has nothing to do with accounting for the satisfaction of established water rights.

IV. IDWR'S ACCOUNTING SYSTEM CORRECTLY INCORPORATES THE ONE-FILL, STORABLE INFLOW, AND PAPER-FILL PRINCIPLES.

A. The one-fill rule has long been part of the prior appropriation doctrine.

In its Basin-Wide 17 ruling, the District Court recognized that the one-fill rule applies in Idaho.[19] On appeal, this Court described that as a "relatively straightforward question," but that it "was not a question anyone appears to have wanted answered." *BW-17*, 157 Idaho at 392, 336 P.3d at 799. It should be answered now, and the answer is clear: The one-fill principle has long been recognized as part and parcel of the prior appropriation doctrine.

As far back as 1912, it was deemed black letter law in Kinney's treatise:

> As in the case with other rights acquired under the Arid Region Doctrine of appropriation, the rule of priority governs, and it is held that the reservoir having the prior right is entitled to fill the same first from the flow of the stream to the full extent of the capacity of the appropriation made therefor. But having once during any one season filled such reservoir, a later appropriation or a subsequent reservoir may take the surplus of the water flowing in the stream, after the prior reservoir has been once filled.

[19] "The assertion that a senior storage right holder can 'fill,' or 'satisfy,' his water right multiple times under priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law." *Wildman BW-17* at 9 (O.N.D. \BWI-17\91017\20130320_Memorandum Decision\ at 001418).

1 *Kinney on Irrigation*, 2nd ed. § 845, p. 1,484 (1912) (emphasis supplied).

The Irrigators do not dispute this elementary principle. Knowing they cannot strike at its heart, Irrigators pay lip service to the one-fill rule, while urging a methodology that neuters it. Whether that will be allowed is the "more important" question identified by this Court in *BW-17*, 157 Idaho at 390, 336 P.3d at 797.

B. The Director has broad power to control the distribution of water, so long as he exercises his discretion within the bounds of the law.

In *BW-17*, this Court spoke of the Director's broad power and discretion in administering water rights under Idaho law:

> Idaho Code section 42-602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. That statute gives the Director a clear legal duty to distribute water. However, the details of the performance of the duty are left to the director's discretion. Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.
>
> ... Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

BW-17, 157 Idaho at 393-94, 336 P.3d at 800-01 (quotation marks and citation omitted).

In some respects, the Director's discretion is broad. For example, the Director has set the annual accounting period for the Storage Rights on November 1 of each year. *Spackman Order* at 40 ¶ 118 (A.R. 1269). That was a wise call, but is not one compelled by the prior

appropriation doctrine or the Storage Rights' decrees (which state periods of use for storage of "01-01 to 12-31").[20]

However, the Director's discretion is not unbounded. As this Court said, "the Director cannot distribute water however he pleases at any time in any way; he must follow the law." *BW-17*, 157 Idaho at 393, 336 P.3d at 800. In the decisions on appeal here, the Director carefully laid out the reasons that the accounting system that has been in place for decades falls within the bounds of Idaho's prior appropriation doctrine.[21] Suez contends it not only is consistent with the prior appropriation doctrine, but is required by it. Consequently, the Director's use of that system should be upheld.

Where the Director has exercised his discretion, he has done so thoughtfully, transparently, and with full explanation. For example, the Irrigators rely heavily on former Watermaster Lee Sisco's testimony and affidavits to support positions contrary to the Director's express findings and conclusions. *See, e.g., DC Brief* at 33-41 (asserting that the Storage Rights always have been considered satisfied on the day of maximum physical reservoir fill, and irrespective of the Department's computerized accounting system implemented in 1986). Mr. Sisco, however, admitted during his testimony that he would "disregard" the Department's accounting system's determination that a water right was in priority. Tr. 8/31/15, pp. 880-81.

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[20] This allows reservoirs to begin storing as soon as water is available after the irrigation season ends, rather than waiting for January 1. No one has questioned this common-sense exercise of discretion.

[21] "In sum, the Department's method of accruing natural flow toward the satisfaction of the storage water rights accords with the prior appropriation doctrine because it implements established diversion and priority principles without impairing the beneficial use of water stored in the reservoirs. It does so in a way that incentivizes storage, accommodates coordinated reservoir operations, avoids enlarging the storage water rights, and permits the longstanding practice of storing excess natural flow to continue." *Spackman Order* at 69 ¶ 41 (A.R. 1297). At the hearing leading to the Director's decision, former IDWR Directors Kenneth Dunn, Karl Dreher, and David Tuthill testified that the current accounting system's methodologies were used during each of their tenures as Director. Tr. 8/27/15, pp. 238-41 (Dunn); Tr. 8/27/15, pp. 263-64 (Dreher); Tr. 8/31/15, pp. 649-52 (Tuthill).

See also Tr. 8/31/15, p. 904, ll. 11-18 (the Director overruling an objection to further questioning of Mr. Sisco's admission that he disregarded the accounting system).[22] Watermasters distribute water in water districts as "supervised by the director," who is ultimately responsible for the distribution of water "in accordance with the prior appropriation doctrine." Idaho Code § 42-602. *See also* Idaho Code § 42-607 ("It shall be the duty of said watermaster to distribute the waters of the public stream . . . under the direction of the department of water resources . . . .). Given Mr. Sisco's admitted disregard for the Director's supervision, the Director rightly gave little weight to Mr. Sisco's testimony that, in his view, the Department's accounting system was inconsistent with the Water Control Manual, or that the availability of unappropriated water is dependent on federal flood control operations. *Spackman Order* at 48 ¶ 154 (A.R. 001277 ¶ 154).[23]

C. The Director correctly affirmed the one-fill, storable inflow, and paper-fill principles.

The storable inflow principle requires that if water is coming into a reservoir and is "in priority" under the associated storage water right, it counts towards the fill of the storage right. The term "in priority" simply means that the storage right has not yet been satisfied and the

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[22] "Well, let me tell you, Mr. Steenson, because what I've heard Mr. Sisco say, is that he didn't adhere to the accounting system, and that he disregarded the accounting system. And this line of questioning is particularly germane and central to what we're talking about. And if it has to be brought out by cross-examination, either through Mr. Baxter, or by me, we will get to the bottom of it. Overruled." Tr. 8/31/15, p. 904, ll. 11-18.

[23] "While Sisco referenced the Water Control Manual in testifying that he 'disregarded' the water right accounting, for reasons previously discussed that testimony does not support a conclusion that the Water District 63 accounting programs were or are inconsistent with the Water Control Manual. Sisco's testimony that the only unappropriated flows in the Boise River system are those released in flood control operations pursuant to the Water Control Manual is incorrect from a factual standpoint. The existence of unappropriated high flows in flood control years is a product of the snowpack. Flood control operations, in short, are a response to unappropriated high flows, not the cause of them." *Spackman Order* at 48 ¶ 154 (A.R. 1277).

reservoir inflow is legally available to store, *i.e.*, is not required to be bypassed for delivery to downstream water rights who have a better priority.[24]

In short, if water is there and available to store, the storage right holder is expected to store it. If a storage right holder decides to bypass storable inflow, or stores it and later releases some of it for whatever reason, that does not reduce or otherwise affect the right's accrued fill.

Without calling it "storable inflow," the *Spackman Order* confirms that the principle is embedded in IDWR's water rights accounting system:

> Under the accrual procedures of the Water District 63 water rights accounting program, any natural flow available under the priority of an on-stream reservoir water right at its point of diversion (the dam), or that would have been available at the dam if the water had not been stored in an upstream reservoir, is accrued (distributed) toward the satisfaction of the reservoir's water right until the cumulative total reaches the water right's annual volume limit.

Spackman Order at 37 ¶ 106 (A.R. 1266).

Counting all "storable inflow" toward fill of a storage water right is frequently described as "paper fill"—a term employed by the Director. Thus, the term "paper fill" is simply shorthand for the combination of "one-fill" and "storable inflow." The term "paper fill" has been described as a "term of convenience to describe the cumulative amount of natural flow accrued to a reservoir water right in the water rights accounting." A.R. 000277.[25]

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[24] The storable inflow principle described here is identical to the storable inflow concept used in Colorado: "Storable inflow is the amount of water that is physically and legally available for storage in a reservoir under a particular water right." Colorado Division of Water Resources, *General Administration Guidelines for Reservoirs* at 9 (Oct. 2011) (reproduced in Exhibit A to Suez's response brief in Basin-Wide 17 (O.N.D. \BW-17\40974-40975-40976\20131024_Brief of Respondents UWI (40974 & 40975)\ at 168-95).

[25] The quoted text is from the November 4, 2014 memorandum ("*Staff Memo*") prepared at the Director's request by Liz Cresto, Technical Hydrologist, IDWR's current Hydrology Section Supervisor and operator of the Department's accounting system. The *Staff Memo* is in the record at A.R. 000270-82, and also as Ex. 1 at 000001-13). The *Spackman Order* relied primarily on the *Staff Memo* and the

Paper fill stands in contrast to physical fill. Physical fill is a function of reservoir operations that are controlled, in this case, by the federal government. It is not a water right concept, and it should and must have nothing to do with accounting for the fill of the Storage Rights under Idaho law.

The Director's accounting system incorporates the fundamental principles of one-fill, storable inflow, and paper fill. The District Court upheld these principles as "consistent with both the prior appropriation doctrine and the subject decrees." *Wildman Decision* at 14 (R. at 001065). This Court should do the same. *Keller v. Magic Water Co.*, 92 Idaho 276, 283, 441 P.2d 725, 732 (1968) (McFadden, J.) (citations omitted) ("the 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.") (citations and internal quotations omitted)

D. The is no reason to look beyond the face of the decrees, which state a volume limit and make no provision for excluding water released for other purposes.

Idaho Code § 42-602 requires the Director to "distribute water in water districts in accordance with the prior appropriation doctrine." This Court has said that doing so "require[s] the Director to interpret . . . partial decrees." *Rangen, Inc. v. IDWR* ("*Rangen I*"), 159 Idaho 798, 809, 367 P.3d 193, 204 (2016) (J. Jones, C.J.) (dealing with the finality of decrees).

There is no ambiguity on the face of the Storage Rights' decrees. Each clearly states the annual volume of water allowed to be stored under priority. Flood control is not an authorized

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testimony of Ms. Cresto, as well as evidence introduced through Robert Sutter, IDWR's former Hydrology Section Manager and author of the Department's accounting system. Such evidence constitutes substantial evidence supporting the *Spackman Order's* findings and conclusions.

purpose of use in any of the Storage Rights. There is no provision that flood control releases are not part of the authorized quantity. And there is nothing in the prior appropriation doctrine that suggests the decrees should be read in that way. Accordingly, there is no need to pore over the mountains of extrinsic documents in the record in search of a basis to read such an exception into the Storage Rights. *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 266, 297 P.3d 222, 229 (2012) (Horton, J.) ("Parol evidence may be considered to aid a trial court in determining the intent of the drafter of a document if an ambiguity exists."); *Rangen I*, 159 Idaho at 807, 367 P.3d at 202 ("Idaho courts interpret water decrees using the same interpretation rules that apply to contracts.").[26]

The vast majority of documents the Irrigators put in the record and rely on in their briefing address matters of federal reservoir operations and agreements between federal agencies and/or their contract spaceholders. The federal reservoir operations are not explicitly or implicitly adopted by or incorporated into the Storage Rights' decrees, which clearly and unambiguously set forth the elements of the water rights required under Idaho law.[27]

Ironically, many of the documents offered by the Irrigators simply document their bargain with the federal government, by which they accepted the risk of non-refill due to flood

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[26] In *Rangen I*, the Court agreed with the Director's and the District Court's conclusions that the source and point of diversion elements in Rangen's partial decrees are not latently ambiguous. Among other things, this Court agreed with the Director that, "if Rangen truly believed that Martin-Curren Tunnel was the common name for the entire spring complex," it should have sought that to be spelled out in the decree. *Rangen I*, 159 Idaho at 808, 367 P.3d at 203. In addition, the Court agreed with the District Court's observation that "adopting Rangen's perspective would render its partial decrees less, rather than more, clear." *Rangen I*, 159 Idaho at 808, 367 P.3d at 203. Likewise, in this case, had the Bureau (or the Irrigators) truly believed there was a right to priority refill in the Storage Rights, they should have asserted such a right in their SRBA claims and sought a corresponding remark in their decrees (as the Bureau did in Basin 01).

[27] The only reference to a federal contract is the reference in the Lucky Peak decree. It recognizes the so-called "guarantee" whereby Anderson Ranch and Arrowrock spaceholders are entitled to use Lucky Peak water if flood control operations reduce the amount of water available. R. 000663.

control. Before Lucky Peak, the Arrowrock and Anderson Ranch reservoirs were operated solely for irrigation.[28] In his 1953 report to the Secretary of Interior, the Bureau Commissioner explained that the new proposed "flood control operating agreement provides for the joint use of the space in the three Federal reservoirs on the Boise River for irrigation and flood control, such joint use not being permissible under existing governing arrangements for Anderson Ranch and Arrowrock." Ex. 2037 at 001357-58 (emphasis added) (quoted in *DC Brief* at 20). *See also* Ex. 2071 at 001931-33 ("The Boise Project was initially considered only in relation to irrigation. With the passage of time, however, the functions of power and flood control came to be recognized as significant partners.") (quoted in *DC Brief* at 21).

Initially, the Corps' flood control desires were hamstrung because the "Irrigationists oppose this method of operation as they fear it might jeopardize the storage of water for irrigation." Corps' 1946 Report to the House Committee on Flood Control (Ex. 2088 at 002083) (quoted in *DC Brief* at 18).

Ultimately, the spaceholders found merit in the federal government's desire to operate the reservoirs for flood control. In addition to providing more irrigation storage water via Lucky Peak, the deal resulted in the re-allocation of construction costs so that a portion of the costs associated with flood control would not have to be paid by the irrigation spaceholders. *See DC Brief* at 19 (citing Ex. 2078). It bears emphasis that the Arrowrock and Anderson Ranch spaceholders were offered this re-allocation of costs in consideration of their agreement that the reservoirs be used for flood control. Ex. 2100 at 002169 (1954 supplemental contract

[28] As noted by the District Court, Arrowrock Dam originally "was authorized for the sole purpose of storing runoff during high flow periods for irrigation purposes," while Anderson Ranch Dam originally "was authorized 'as a multi-purpose structure for the benefit of irrigation, flood control and power," although the Bureau "recognized that irrigation is the primary use of the reservoir." *Wildman Decision* at 4 (R. at 001055) (internal quotation marks and citation omitted).

recognizing joint use of reservoirs for flood control and irrigation and "attendant reduction in the amount of construction costs . . . otherwise allocable to irrigation").

Thus, the Irrigators got the benefit of their bargain. Now they seek to shift the burden they accepted to others.

But this is really beside the point. This case is not about the federal government's reservoir operations or its agreements between agencies or with spaceholders. This case is about water rights administration under the laws of Idaho. Federal policies and agreements do not trump Idaho law in that regard.

E. The paper-fill principle is necessary to prevent enlargement.

The Director correctly observed that the paper-fill principle (*i.e.*, one fill of storable inflow) is necessary to properly administer the Storage Rights. *Spackman Order* at 66 ¶ 32 (A.R. 001295). Paper fill prevents impermissible enlargement of the Storage Rights' elements by limiting priority diversions to the decreed quantities of the water rights. *Spackman Order* at 66 ¶ 33 (A.R. 1295).

Multiple fills of a water right, in priority, is an enlargement of the right. This Court has held that enlargement constitutes *per se* injury. "An increase in the volume of water diverted is an enlargement . . . ." *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (Eismann, J.) (quoting *Fremont–Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (Schroeder, J.)). "[T]here is *per se* injury to junior water rights holders anytime an enlargement receives priority. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Id.* (citation omitted). *See also Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001) (Walters, J.)

("Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use.").

The Ditch Companies contend that "[a]ctual, physical storage of water for beneficial use is the true measure of a storage water right." *DC Brief* at 51. This statement is wrong. A reservoir operator cannot be allowed to store, release, and store more water such that actual storage of water under priority exceeds the volume limit on the storage water right. Thus, the Irrigators' contents-based accounting proposal (as well as its on/off and beneficial use permutations) is contrary to law. It would violate the one-fill rule by allowing the storage of more water than authorized under the Storage Rights' partial decrees.

For example, suppose that mid-way through the storage season, the Boise River reservoirs (which have a right to store roughly one million acre-feet of water) have physically stored all 750,000 acre-feet of storable inflow. Then water is released until the reservoir level drops to 400,000 acre-feet (a release of 350,000 acre-feet previously stored, plus even more water that is simply bypassed during the release phase). Then suppose that, by the end of the storage season, the reservoirs store another 600,000 acre-feet and successfully top off at 1,000,000 acre-feet. All told, they would have physically stored over 1,350,000 acre-feet during the storage season (750,000 originally stored, plus 600,000 stored later, plus whatever water was bypassed), an amount well in excess of their decrees.

The Irrigators are untroubled by this.[29] The way they figure it, they can never be in excess of their decrees, because, at the end of the storage season there will never be more water

[29] This example was discussed by the Ditch Companies' expert witness Dave Shaw at the Contested Case hearing. A.R., Tr. Vol. V, pp. 1519-20. Here is the colloquy between Suez and the expert: "Doesn't that exceed the quantity limits of storage water rights?" "No, because they've only have a million acre-feet in storage." "But they've stored 1.3 million acre-feet." "But not for beneficial use. They stored a million acre-feet for beneficial use."

in the reservoirs than they can hold. That renders the quantity element meaningless.

This Court has not had occasion to deal with this quantity issue in the context of storage refill. But it has been clear and consistent that quantity matters.

As early as 1912, this Court overturned a decree for all the water of a stream, explaining that "in this arid country. . . such would be a waste and misappropriation." *Lee v. Hanford*, 21 Idaho 327, 330, 121 P. 558, 560 (1912) (Stewart, C.J.). "The decree in this case is uncertain, and ineffectual because of such uncertainty, and fails to decree the waters involved in this case in accordance with the actual appropriation made." *Lee*, 21 Idaho at 332, 121 P. at 560. Absent a clear and fixed quantity, "such surplus and overflow of water [beyond the amount awarded to the senior appropriator] would be wasted, and would be of no avail whatever, and the right to appropriate public unused waters of the state would be denied." *Lee*, 21 Idaho at 332, 121 P. at 560.

In a 1969 case, it said again that "vague and fluctuating" quantities do not fit under the prior appropriation doctrine.

> This Court has imposed the measurement requirement as a corollary to the basic policy of the conservation of water resources for beneficial use. [Citing the Idaho Constitution and Water Code.] The Court has required such a measurement when the decree is intended to settle the rights of various appropriators who claim and use fluctuating amounts of water from the same source. Thus, 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. [Reference to cases rejecting decrees for unspecified amounts.] The practice condemned by these cases was not simply the issuance of unmeasured decrees but that of awarding to one competing appropriator more water than he could beneficially use. These cases express a policy against waste irrespective of the technical legal error found to have permitted it.

Village of Peck v. Denison, 92 Idaho 747, 750-51, 450 P.2d 310, 313-14 (1969) (McQuade, J.) (emphasis added).

That hits the nail on the head. If the federal government is allowed to store, release, and store again without limit, it is "likely that that [it] will waste water and yet have the power to prevent others from putting the surplus to any beneficial use." *Id.*

The Irrigators' proposed methodologies would take away the Director's authority under Idaho Code 42-602 to administer the State's public waters in the Boise River according to their stated quantities, and effectively abdicate that authority to the federal reservoir operators, empowering them to injure juniors at will. That is not permissible. As this Court said in *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (Ailshie, C.J.), "A prior appropriator of the water of a stream may divert and use the amount of water to which he is legally entitled, but, when he has once done so, he may not dam the stream below him, or hinder or impede the flow of the remaining waters of the stream to the headgate of the next appropriator."

The Court also has put it this way: "[T]he elimination of all of the elements of a water right, particularly the essential elements of priority date and quantity, vitiates the existence of a legal water right . . . ." *A&B Irrigation Dist. v. Idaho Conservation League* ("*ICL II*"), 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) (Silak, J.). The Irrigators' proposals would allow the federal government to take any quantity it chooses, thereby vitiating the quantity element of their decreed rights. The *ICL II* Court recognized that taking unspecified amounts of excess water during free river conditions is one thing. But taking water under right of priority with no meaningful quantity limit does not fit within the prior appropriation system.[30]

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[30] This is not to say that a water right could not expressly provide for a specified quantity of additional fill. An express provision to that effect would not be "vague and fluctuating" (in the words of *Village of Peck*). But such a right would need to pass muster under the all other aspect of Idaho law, including lawful diversion, beneficial use, and the local public interest, to be created in the first place.

The Irrigators' approach would effectively, and impermissibly, give the federal government a priority entitlement to take as much of the Boise River's unappropriated waters as they wish. But the federal government has no right to impair existing rights in this way, nor to prevent future appropriations. Idaho Const. art. 15, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied"); *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982) ("The right to appropriate unappropriated water is guaranteed by article XV, section 3 of the Idaho Constitution").

F. The paper-fill principle ensures the maximum beneficial use of Idaho's water.

The Director explained in his decision that paper fill is essential to ensuring the fullest use of Idaho's water.

> This methodology also creates an incentive to store water when it is most readily available and least in demand by other appropriators—i.e., prior to irrigation season. This incentive is in keeping with the longstanding policy of the law to encourage the most efficient and least wasteful use of the waters of the state. It is also consistent with the opportunistic role storage water rights have in Idaho water law. The purpose of storage is to capture high flows in times of plenty for later use, when the natural flow supply dwindles.

Spackman Order at 66 ¶ 32 (R. 1295) (internal quotation marks and citations omitted).

If the untrammeled federal control sought by the Irrigators is allowed, the risk of not refilling will be shifted to juniors, thereby diminishing the seniors' incentive to store early. The likely result will be less water stored during the winter/spring storage season (when water is abundant and competing demand is low) and more water will be stored later in the season (when demand may outstrip supply). The net result is apparent: Less water will be put to beneficial use in Idaho and more unused water will flow downstream and out-of-state.

The potential for mismanagement is significant. The Storage Rights have no flow rate limits. This entitles them to store, under priority, all the water entering the reservoirs until the rights are satisfied. Juniors may take anything left over (water bypassed or evacuated), but they may take nothing under their priorities until the senior storage rights are satisfied. The Director's accounting methodology incentivizes the federal government to store early and to avoid unnecessary bypass and evacuation. Because the storage right holder bears the risk of refill under the current accounting system, the federal government is incentivized to dial it in just right. If agencies were to change the rule curves to favor a different federal policy (enhanced flood protection, endangered species, or what have you) that leaves the reservoirs short of water, they must do so on their own dime. Under the Director's accounting, the government would not be allowed to make up any shortfall out of the water rights of juniors.

The accounting system in place today works. Reservoirs fill in wet years without injury to others. It is a marvelously efficient system that maximizes the beneficial use of Idaho's water. Changing that would disrupt the equilibrium that has served Idaho so well and violate the maximum use doctrine.

This doctrine is on par with other bedrock principles of the prior appropriation doctrine. "The purpose of the one-fill rule is to promote the beneficial use of water." A. Dan Tarlock, *Law of Water Rights and Resources* § 5:39 (2007). Though the phrase "maximum use doctrine" is of recent vintage, the core principles are nearly as ancient as the prior appropriation doctrine itself.

In a 1904 case dealing with the duty of water, the Idaho Supreme Court noted that the prior appropriation doctrine cares not just about diversion and beneficial use, but also about efficiency. *Abbot v. Reedy*, 9 Idaho 577, 581, 75 P. 764, 765 (1904) (Ailshie, J.) ("The inquiry was, therefore, not what he had used, but how much was actually necessary.").

In a seminal 1907 decision, the Court noted that a senior may not take his water inefficiently so as to deprive others:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much by proper application.

Van Camp, 13 Idaho at 208, 89 P. at 754 (senior upstream user not entitled to dam stream to subirrigate a meadow resulting in reduced stream flows to junior downstream headgates).

In 1909 the Court ruled that a canal company cannot cut off deliveries to users on the system that are more expensive to serve. By applying water to beneficial use, those users bring themselves within the constitutional protection accorded to user of water provided under a sale, rental, or distribution. The Court said, "The theory of the law is that the public waters of this state shall be subjected to the highest and greatest duty." *Niday v. Barker,* 16 Idaho 73, 79, 101 P. 254, 256 (1909) (Ailshie, J.) (citing *Van Camp*).

In the same year, the Court allowed a prior decree to be re-opened to examine whether senior appropriators really needed as much water as they had been awarded. *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.,* 16 Idaho 525, 102 P. 481 (1909) (Ailshie, J.). The Court emphasized, "It is the policy of the laws of this state, and it has been so declared from time to time by this court, to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes." *Farmers' Co-operative*, 16 Idaho at 535, 102 P. at 483. "One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water." *Farmers' Co-operative*, 16 Idaho at 536, 102 P. at 484.

In 1912, the U.S. Supreme Court, applying Idaho law, handed down the most celebrated maximum use case of all. In *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912), a German immigrant installed a waterwheel driven by the current of the Snake River to raise irrigation water to his farm. Sometime thereafter, Milner Dam was built. When the placid water behind the dam stilled Schodde's waterwheels, he sued the junior appropriator. The U.S. Supreme Court affirmed the Ninth Circuit's ruling that, while the senior's priority is entitled to protection, he may not use that seniority to impair all other development of the Snake River. No doubt Schodde's waterwheel was a brilliant engineering feat. And it was efficient, so far as Schodde was concerned. But it was deeply inefficient, so far as the resource as a whole was concerned.

As the *Schodde* Court said, "If the plaintiff were permitted to own the current of the stream appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he could control and own. . . . It is clear than in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated." *Schodde*, 224 U.S. at 120. The U.S. Supreme Court cited one of its earlier cases in concluding that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *Schodde*, 224 U.S. at 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)). *Schodde* has particular meaning here. The absence of a rate limit for the Storage Rights enables the federal government to control the entire river until the rights are satisfied. The sideboards inherent in the paper fill principle are a critical constraint on the federal power.

In the same year as *Schodde*, the Idaho Supreme Court held that extending priority to "all the waters that flow" during the high runoff period is contrary to the constitutional principle that

right to appropriate unappropriated flows may never be denied:

> To say that the respondents are entitled to all the waters that flow in the stream, when there is more water flowing at some seasons of the year than respondents are able to divert and apply to a beneficial use, would deny the right of appropriation by any other person, notwithstanding the fact that the respondents were not diverting or applying the excess to a beneficial use.

Lee v. Hanford, 21 Idaho 327, 331, 121 P. 558, 560 (1912) (Stewart, C.J.).

This Court held in a 1915 water right transfer case that the quantity transferred is limited to the amount previously put to beneficial use. This principle—which seems obvious enough today—was grounded in the Court's recognition that the policy of maximum beneficial use is embedded in the prior appropriation doctrine. "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes." *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) (Budge, J.)

In 1931, a federal district court ruled that the Twin Falls Canal Company may not compel upstream users to pay for construction of Milner dam, even if they benefit from the increase in water elevation. Doing so would "result in such a monopoly as to work disastrous consequences to the public." *Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 49 F.2d 632, 635 (D. Idaho 1931). The court said this result was compelled by *Schodde*. *Twin Falls* at 636.

In 1954, the Ninth Circuit, applying Idaho law, rejected a nuisance claim by a farmer who complained that an upstream reservoir increased the flow below the dam thus interfering with his ability to ford the stream. "In our opinion, the *Schodde* case supplies a complete answer to appellant's contentions." *Johnson v. Utah Power & Light Co.*, 215 F.2d 814, 816 (9th Cir. 1954).

In 1957, the Court addressed the maximum use doctrine in the context of adverse possession of a water right. In *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957) (Taylor, J.), the senior irrigation district sought to enjoin an upstream diversion. The Court rejected the defendant's claim of adverse possession, holding that the ditch rider for the irrigation district allowed the upstream diversion only in years when the downstream reservoir did not need the water in order to achieve a single fill. The Court premised its ruling on the policy of maximum use. "It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources." *Mountain Home*, 79 Idaho at 442, 319 P.2d at 968 (citing *Van Camp*, *Farmers' Cooperative*, *Duffy*, *et al.*). It described this as a "constitutional policy" that is also grounded in statute. *Id.*

In a 1960 case, the Court held: "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) (Smith, J.) (holding that one party may discharge its irrigation waste into the drainage ditch of another party where that artificial channel substituted for the original channel by which the wastewater would have been returned to natural flows).

In 1964, the Court reiterated that "it is the policy of the law to prevent waste and to secure the maximum beneficial use of the waters of the state." *Ward v. Kidd*, 87 Idaho 216, 226-273, 92 P.2d 183, 190 (1964) (Taylor, J.).

In 1969, the Court articulated the principle that a water right must have a measurable quantity that is not vague and fluctuating.

> This Court has imposed the measurement requirement as a corollary to the basic policy of the conservation of water resources for beneficial use. [Citing the Idaho Constitution and Water Code.] The Court has required such a measurement when the decree is intended to settle the rights of various appropriators who claim and use fluctuating amounts of water from the same source.

> Thus, 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. [Reference to cases rejecting decrees for unspecified amounts.] The practice condemned by these cases was not simply the issuance of unmeasured decrees but that of awarding to one competing appropriator more water than he could beneficially use. These cases express a policy against waste irrespective of the technical legal error found to have permitted it.

Village of Peck v. Denison, 92 Idaho 747, 750-51, 450 P.2d 310, 313-14 (1969) (McQuade, J.) (emphasis added). Though not expressed in terms of maximum use, the above-quoted holding in *Village of Peck* regarding "a policy against waste" dovetail with the doctrine of maximum use.

In 1973, the Court upheld a constitutional challenge to the reasonable pumping level restrictions in Idaho's Ground Water Act. "We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, § 7." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (Shepard, J.) Accordingly, "senior appropriators are not necessarily entitled to maintenance of historic pumping levels." *Id.*

In 1977, the Court invoked the principle of maximum use in holding that the statute authorizing state water masters to allocate water during times of shortage with preferences for decreed, permitted, and licensed water rights did not work a deprivation of property as to holders of non-adjudicated constitutional use water rights. "The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources." *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) (Donaldson, J.).

In 1982, the Court upheld—on the basis of "optimum development" and "maximum use"—a statutory distinction (eliminated in 1978) between treatment of domestic and other

wells. "The decision as to how the optimum development of water resources in the State of Idaho can best be achieved is a policy decision exclusively within the province of the legislature. The legislature was therefore free to give special consideration to the position of domestic water users in enacting legislation to implement the policy of 'optimum development.'" *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) (Bistline, J.).[31] The Court continued:

> Furthermore, it is clearly state policy that water be put to its maximum use and benefit. That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution.

Parker, 103 Idaho at 513, 650 P.2d at 655 (citing *Poole* and Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 2 (1968)).

In 1985, the Court invoked the policy of maximum use in holding that a prescriptive easement for drainage does not entitle the owner to engage in unnecessarily wasteful irrigation practices. "Regardless of how long such practices had continued, or whether easements had been acquired to discharge certain volumes of water across a lower property, those wasteful practices would contravene the public policy of this state. That policy 'is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Merrill v. Penrod*, 109 Idaho 46, 55, 704 P.2d 950, 959 (Ct. App. 1985) (Swanstrom, J.) (quoting *Poole*).

In 1990, the Court reiterated that our arid conditions compel maximum use of our water resources. "Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. 'The policy of the law of this State is to secure the

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[31] In other words, where the Legislature has expressed its view on the optimal development of water, that decision controls. Thus, if the Legislature declared that storage rights are entitled to priority refill, that action—at least prospectively so as to avoid a taking—would be given effect. But the Legislature has not so provided. To the contrary, it has given both direction and discretion to the Director to deliver water under the laws of Idaho. Here, the Director has fulfilled that legislatively assigned duty, determining that the one fill and storable inflow principles best implement the constitutional mandate for maximum use or optimal development.

maximum use and benefit, and least wasteful use, of its water resources.'" *Kunz v. Utah Power & Light Co. ("Kunz II")*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) (Bakes, C.J.) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.) (the policy of seeking maximum use of the State's water resources justifies not holding reservoir and canal operators strictly liable for flood damage).

In a 1997 basin-wide decision, the Court recognized partial forfeiture of water rights, which it found was compelled by the longstanding goal of maximum use. "The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing maximum use and benefit of our natural water resources." *State v. Hagerman Water Right Owners (Basin-Wide Issue 10) ("BW-10")*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) (Schroeder, J.) (quoting *Nettleton* and citing *Kunz II*).

In the same year, the Court extended the ruling in *Kunz II* (which limited the liability of irrigation dam owners) to dams constructed for wildlife and other purposes. As in *Kunz II*, the Court based its ruling on the policy of maximum use. "It has been the policy of this State to secure the maximum use and benefit of its water resources." *Stott v. Finney*, 130 Idaho 894, 896, 950 P.2d 709, 711 (1997) (Walters, J.).

The *ICL I* and *ICL II* cases[32] decided in 1998 (discussed below above in section V.C at page 60) do not speak in terms of maximum or optimal use. But their recognition that excess water may be diverted by water right holders without benefit of priority is in keeping with the doctrine's goal of putting all Idaho water to use.

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[32] *A&B Irrigation Dist. v. Idaho Conservation League (Basin-Wide Issue No. 5) ("ICL I")*, 131 Idaho 411, 958 P.2d 568 (1998) (McDevitt, J.); *A&B Irrigation Dist. v. Idaho Conservation League ("ICL II")*, 131 Idaho 329, 955 P.2d 1108 (1998) (Silak, J.).

In another 1998 case, the Court recognized a federal reserved water right for stock watering to benefit permittees on federal lands. *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.) (Basin-Wide Issue 9). The Court noted that the purpose of the federal reservation was to ensure that the water would be available for use "by whichever member of the public happens at any time to have the grazing permit for the lands" thereby preventing private appropriations whereby "individuals could monopolize the water." *United States v. State*, 131 Idaho at 471, 959 P2d at 452. "To hold otherwise would be in contravention of the policy of this state 'to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *United States v. State*, 131 Idaho at 472, 959 P2d at 453 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.)).

In 1999, the Court carved out an exception to the forfeiture principle for Carey Act irrigators. In noting that forfeiture is not favored, the Court relied on the "state policy of securing the maximum use and benefit of its water resources." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (Silak, J.) (quoting *BW-10*, which, in turn, quoted *Nettleton*).

In 2007, the Court upheld the constitutionality of the Department's Conjunctive Management Rules which were expressly premised on an integration of the prior appropriation doctrine and "the principle of optimum use of Idaho's water." *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD2*"), 143 Idaho 862, 867, 154 P.3d 433, 438 (2007) (Trout, J.). The Court again recited its earlier observation that there is a "'fundamental difference' between 'the diversion and use of water from a flowing stream and a reservoir.'" *AFRD2*, 143 Idaho at 880, 154 P.3d at 451 (quoting *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) (Givens, J.). The *AFRD2* Court went on to recognize the Department's authority to

determine, in the context of a conjunctive use delivery call, when use of a water right is "reasonable." *AFRD2*, 143 Idaho at 876-77, 154 P.3d at 447-48 (citing *Schodde*). The Court continued: "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *AFRD2*, 143 Idaho at 880, 154 P.3d at 451.

In 2011, the Court employed the maximum use doctrine in upholding the Director's conjunctive management curtailment order.

> There is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest. . . . The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (Eismann, C.J.) (citing *Niday*, *Farmers' Cooperative*, *Poole*, and *Parker*).[33]

In 2013, the Court invoked the policy of maximum use in upholding the right of an irrigator to condemn a pipeline easement in order to reduce conveyance losses. The Court reiterated that it is "this State's policy to secure the maximum use and benefit, and least wasteful use, of its water resources." *Telford Lands LLC v. Cain*, 154 Idaho 981, 987, 303 P.3d 1237, 1243 (2013) (Eismann, J.) (quoting *Poole*).

Last year, the Court upheld the Director's conjunctive management curtailment order in which the Director relied on the maximum use doctrine in avoiding curtailments beyond a "trim

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[33] Citing *Schodde* and *AFRD2*, the Court left undisturbed (because ground water users failed to challenge it) the district court's determination that "the Director had not abused his discretion" in not requiring spring users change their means of diversion. This reinforces the conclusion that the Director has discretion and is entitled to a measure of deference in administering water rights under the maximum use doctrine.

line." "Additionally, the Director relied on the policy of promoting the optimum development of the State's water resources enunciated in Article XV, section 7 of the Idaho Constitution and this Court's decision in *Clear Springs,* where we stated that '[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Rangen, Inc. v. IDWR* ("*Rangen II*"), 160 Idaho 119, 129, 369 P.3d 897, 907 (2016) (J. Jones, C.J.) (brackets original).[34] "As we recently stated in *Clear Springs,* the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy in Idaho." *Rangen II*, 160 Idaho 131, 369 P.3d 909 (citing *Clear Springs*, *Niday*, *Farmers' Co-operative*, and *Poole*). "[A]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." *Rangen II*, 160 Idaho 129, 369 P.3d 907 (quoting IDAPA 37.03.11.020.03).[35] The Court also expounded on the importance of *Schodde* and *Van Camp*. *Rangen II*, 160 Idaho 132-34, 369 P.3d 910-12.

That was a long exposition, but necessary to demonstrate how deeply etched this doctrine is in our Constitution, statutes, and case law. This maximum use principle is of great import here. By their very nature, on-stream reservoirs control the entire river. The only quantity limit is their annual volume. This gives storage rights both the ability and the obligation to capture all

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[34] *Rangen II* is sometimes referred to as *IGWA v. IDWR*. IGWA is included in the "In the Matter of" portion the caption, but Rangen is the plaintiff-appellant. Another Rangen case, *Rangen, Inc. v. IDWR* ("*Rangen I*"), 159 Idaho 798, 367 P.3d 193 (2016) (J. Jones, J.), deals with the finality of decrees and does not implicate the maximum use doctrine. A third case deals with a mitigation plan addressing the same delivery call. *Rangen, Inc. v. IDWR* ("*Rangen III*"), 160 Idaho 251, 371 P.3d 305 (2016) (J. Jones, J.)

[35] In this passage, the Court quoted from IDWR's conjunctive management rule. The Court made clear, however, that the principle of maximum use has its roots not just in the rule but in the Idaho Constitution. "The Director did not treat either [the rule or the Idaho Constitution] as directly granting him discretion to apply a trim line. Instead, the Director recognized, correctly, that each source merely restated a broader understanding of Idaho law . . . ." *Rangen II*, 160 Idaho at 132, 369 P.3d at 910.

legally available water when they can, as early in the storage season as possible.

> There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

Rayl v. Salmon River Canal Co., 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) (Givens, J.).

These fundamental attributes of storage rights dictate that an on-stream reservoir operator is not allowed to fill its reservoir at its convenience. To the extent possible, on-stream reservoirs fill before or very early in the irrigation season when plenty of water is available. *Spackman Order* at 66 ¶ 32 (A.R. 1295). When storable inflow is released or bypassed during periods of abundance and low demand, it provides little, if any, benefit to Idaho water users. Instead, it flows out-of-state.

If the federal reservoir operators were allowed to determine when and how much water should be counted toward the fill of the Storage Rights, the federal government could decide to forego capturing storable inflow during the non-irrigation season and instead store water later, depriving juniors of its use. This would not further the policy of maximizing beneficial use of the State's water resources.

The Director's accounting system, which requires the Storage Rights to take the water when it is legally available or run the risk that it may not be available later, conforms to the bedrock principle of maximum beneficial use.

G. The paper-fill principle ensures that the State, not the federal government, will maintain control over Idaho's water.

The Director and the District Court found that IDWR's paper fill accounting methodology ensures State control over water. The Irrigators' proposals would do the opposite.

> Moreover, by giving federal dam operators the authority to decide when their reservoir water rights are satisfied, Shaw's [the Irrigators'] proposal effectively cedes the Director's authority to federal agencies.

Spackman Order at 78 ¶ 70 (A.R. 1307).

> [Departure from paper fill] would cripple the Director's ability to effectively distribute water under our system of water rights administration. . . .
>
> It would effectively transfer water right distribution in the basin from the Director to the federal government.

Wildman Decision at 11 (R. 1062).

The reason is simple. If storable water that is bypassed or released by the federal government for non-beneficial uses does not count toward the storage right and the federal government may make up any shortfall at the expense of other water rights, the federal government becomes the entity that distributes Idaho's water. Incentivized as it is today, the federal government has done a commendable job of managing the federal reservoirs. But if it is allowed to declare what storable water counts toward fill, it would be free to adopt new rule curves or new environmental policies that increase bypasses and releases from its reservoirs for non-beneficial uses without regard to the harm done to other water rights.

But Idaho's Constitution does not cede control over Idaho's water to the federal government, trusting that it will make the right choices for Idaho. Instead, it regards the maximum use of Idaho's waters as so vital that this public resource must be administered by the State under the prior appropriation doctrine. These constitutional mandates cannot be reconciled with the Irrigators' call for abandonment of the one fill / storable inflow principle.

No one disputes that flood control is an important function. That is why federal taxpayers paid to build Lucky Peak. That is why the federal government entered into agreements with the spaceholders to re-configure the operation of all three reservoirs to add a flood control component. That is why spaceholders were compensated. The flood control regime is a good thing, and it will continue irrespective of this Court's decision.[36] But federal decisions over flood control do not diminish other people's water rights. Specifically, those releases do not increase the extent to which the federal government may store water under priority.

The Irrigators contend that flood control releases are "mandatory."[37] If so, it is a mandate that they agreed to. But that is beside the point. The timing and amount of specific flood control releases are at the discretion of the reservoir operator—in this case, the federal government—and that they are not dictated by any law that overrides state water rights.

The Irrigators' arguments hint, but never actually assert, that this case involves the federal pre-emption of state law. *See, e.g., DC Brief* at 87 ("IDWR's position conflicts with the congressionally-authorized operating plan for the Boise River Reservoirs . . . ."). To be clear,

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[36] These releases serve a vital public purpose that is authorized—and to some extent demanded—by state and federal law. Even where the owner/operator of an on-stream reservoir holds no storage right for flood control purposes, the owner/operator nonetheless has a right and obligation to release water for flood control purposes. In the case of federal reservoirs, this duty arises under federal statutes governing the reservoir. Such a duty also arises under Idaho common law, which requires all owners and operators to operate reservoirs reasonably. That obligation may arise where (as here with the federal reservoirs) one assumes a duty of flood control. *Kunz v. Utah Power & Light Co.* ("*Kunz I*"), 526 F.2d 500 (9th Cir. 1975) (power company found to have assumed duty of flood control). In *Kunz II* (discussed above), this Court responded to certified questions from the Ninth Circuit. It held that the power company operating Stewart Dam is not subject to strict liability, but is "held to a standard of reasonableness, *i.e.*, negligence" in operating the dam. *Kunz II*, 117 Idaho at 906, 792 P.2d at 931. Indeed, this holding was predicated on the maximum use doctrine. More recently, this Court confirmed that even reservoir operators that do not affirmatively assume a duty of flood control are nevertheless held to a reasonable duty of care. *Burgess v. Salmon River Canal Co., Ltd.*, 119 Idaho 299, 305, 805 P.2d 1223, 1229 (1991) (McDevitt, J.).

[37] *See, e.g.*, *BP Brief* at 62. *See also DC Brief* at 51 ("The release of water for flood control purposes before it can be beneficially used is not a 'choice' of the storage right holders—it is a mandate . . . .").

this case begins and ends with Idaho law, not federal law. This case involves IDWR's administration of state-law based water rights decreed by the SRBA Court according to Idaho's prior appropriation doctrine. Granted, the Congress authorized the construction of the Boise River dams, the purposes for which they could be operated, and the methods of paying for such facilities. But that is the extent to which congressional action matters to this case. Importantly, the Irrigators point to no federal law usurping Idaho's appropriation laws. Congress never passed one.

H. Water rights are quantified on the basis of beneficial use at the time of their creation, not at the time of their distribution.

The Irrigators urge that the current accounting system be reprogrammed so that the amount of water accrued to the Storage Rights is reduced by the amount of water evacuated or bypassed during flood control operations. They observe that such water is not applied by them to beneficial use. From that correct premise, they leap to the incorrect conclusion that water not beneficially used does not count toward fill.

Evaluation of the extent of beneficial use is a bedrock principle. It is fundamental to establishing a water right. Specifically, beneficial use is evaluated at the time of permitting, licensing, transfer, exchange, lease, rental, adjudication, delivery call, or forfeiture proceeding. *See*, *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912) (Stewart, C.J.). But beneficial use has nothing to do with the Director's responsibility to distribute established water rights to water right holders. Indeed, at the time of distribution, the Director has no way of knowing or controlling what the user will do with the water.

The Director's responsibility under Idaho Code § 42-602 is to "distribute water in water districts in accordance with the prior appropriation doctrine." The Director distributes water based on each right's priority and quantity. For those elements, the Director looks to the decree.

"[D]ecree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." *Rangen II*, 160 Idaho at 127, 369 P.3d at 905 (citing Idaho Code § 42–1420(1)).

> [T]he Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user. However, it is within the Director's discretion to determine when that number has been met for each individual decree.

BW-17, 157 Idaho at 394, 336 P.3d at 801 (emphasis added).

The Ditch Companies contend, "Diversion of water is not itself sufficient to constitute the exercise of a water right. The diversion must be for a beneficial use authorized by a water right." *DC Brief* at 52. It certainly is true that diversion and beneficial use are the hallmarks of an existing valid water right under Idaho law. But this case is not about whether water rights are valid—no one disputes the Storage Rights' existence or validity. That was determined by the SRBA Court nearly a decade ago.

Simply put, it is not the Director's job to ensure that water diverted under a water right is put to beneficial use. After water is distributed, it is up to the water right holder (acting through the spaceholders) to husband that water. If the right holder for whatever reason fails to beneficially use water distributed to it, the right holder will suffer whatever consequences occur. If the consequence is that its reservoir is no longer full, the storage right holder is not entitled to demand make-up water at the expense of others.

Indeed, when water is diverted to storage, it may be held in storage for years. At the time of diversion to storage, the Director cannot know whether it will be released for flood control

years hence. Thus, accounting for storage water right accrual based on later beneficial use is unworkable.

It is also unfair. It is unfair because other water users cannot be expected to make up the shortfall caused by the acts of the right holder. For example, if Suez needed to dispose of water held in one of its storage tanks that was contaminated by an evil doer, that disposal would be for the public good. But that would not entitle Suez to take more water than it is entitled to under its water rights in order to refill its storage tank. Likewise, releasing water for flood control may be praiseworthy. But a praiseworthy act does not entitle a good Samaritan to take someone else's water to make him whole.

In support of their beneficial use argument, the Irrigators cite *Morgan v. Udy*, 58 Idaho 670, 680, 79 P.2d 295, 299 (1938) (Givens, J.) and *State v. United States,* 134 Idaho 106, 111, 996 P.2d 806, 811 (2000) (Kidwell, J.). *DC Brief* at 52. But these cases discuss the subject of diversion and beneficial use only in the context of perfecting, not administering, an appropriation.[38]

Of course, continued beneficial use is necessary to avoid forfeiture of a water right. Idaho Code § 42–222(2). But this case is not about whether the Storage Rights have been forfeited. This case is about how the Director counts water toward the fill of the Storage Rights.

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[38] The Ditch Companies' citation to *State v. United States* is particularly misplaced with respect to their argument that the "[d]iversion of water is not itself sufficient to constitute the exercise of a water right," and that "[t]he diversion must be for a beneficial use authorized by a water right." *DC Brief* at 52. The issue in *State v. United States* was whether a non-diversionary water right for wildlife may be established by the constitutional method. That has nothing to do with the subject at hand. *Morgan* merely recited that diversion and beneficial use are the "two essentials" for a valid appropriation and that a valid appropriation may be established by diversion and beneficial use even though the appropriator has "only a temporary and revocable way of conveyance for his water"). *Morgan*, 58 Idaho at 680, 79 P.2d at 299.

He does this properly by counting how much water is physically and legally available under the Storage Rights. Whether the water is later put to beneficial use does not change the distribution.

V. HOLDERS OF STORAGE RIGHTS WHOSE RIGHTS HAVE BEEN SATISFIED MAY TAKE EXCESS WATER AS NEEDED TO FILL THEIR RESERVOIRS.

Suez urges the Court to reverse the District Court's rejection of the Director's finding on excess water. The Director concluded that, in accordance with longstanding practice, the Storage Rights are authorized, to the extent needed, to store excess water (though not under priority) after paper fill. Once lawfully stored, that water belongs to the spaceholders, and no junior or senior can call for its release.

A. Storage of excess water is a longstanding practice.

For as long as there has been an accounting system, the Department has allowed on-stream reservoirs to capture water above and beyond the first fill of the water right during free river conditions (in which no one else is injured).[39] (See footnote 21 at page 26.) When such excess water is stored, the accounting system calls it "unaccounted for storage" or "unallocated storage."[40]

The *Spackman Order* confirms that IDWR's accounting system allows the historical practice of refilling reservoir space with "excess flows" after the Storage Rights are satisfied once:

> It is undisputed that the Department's longstanding policy has been to allow the on-stream reservoirs to refill the space evacuated for flood control if it can be done without injury to other appropriators. Both the Idaho Supreme Court and the SRBA

[39] Dr. Tuthill and Mr. Dreher testified that the storage of excess water does not require express authorization. Dr. Tuthill testified that the Storage Rights provide the basis for storing excess water under free river conditions. Tr. 8/31/15, p. 691, ll. 19-24. Mr. Dreher described the long-standing practice of allowing refill without injury to others as "implied" in the original right. Tr. 8/27/15, p. 279, ll. 2-17.

[40] The terms "unaccounted for" and "unallocated" are synonymous. See *IDWR Brief* at 26 n.27.

> District Court have approved the recognition of historical practices related to the diversion and use of "excess flows" through general provisions in the SRBA insofar as the there is no resulting injury to other appropriators and the use is consistent with historical practice. These cases support the conclusion that the historical practice of the use of excess flows to fill the on-stream reservoirs in Water District 63 is appropriate where there is no resulting injury to other appropriators.

Spackman Order at 67 ¶ 34 (A.R. 1296) (citations omitted).

Notwithstanding the "unaccounted for" terminology,[41] all water stored in the reservoir system is accounted for and accrues to the benefit of the spaceholders. *Spackman Order* at 38 ¶111 (A.R. 1267) ("The 'unaccounted for storage' is credited back to the reservoirs in order of priority on the 'day of allocation,' and otherwise made available to storage water users."). This allocation of "unacounted for" storage is done using the Department's storage program, which is a separate program from the water rights accounting program.[42]

None of this is news.[43] In February 2008, during the SRBA litigation involving the streamflow maintenance portion of Lucky Peak's Storage Right (No. 63-3618), the United States explained to the SRBA Court:

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[41] The "unaccounted for" terminology is confusing and unfortunate. It would have been easier to understand if the computer programmers had simply labeled this "stored excess water."

[42] "The amount of stored water allocated to water users' storage accounts each year is calculated by the storage program." *Spackman Order* at 38 ¶ 112 (A.R. 1267). "Two separate but related computer programs are used in the accounting process: the water rights accounting program and the storage program." *Spackman Order* at 35 ¶ 98 (A.R. 1264).

[43] For decades, the Irrigators knew or should have known that they had been refilling with excess water during flood control years. In 1987, IDWR Director Kenneth Dunn prepared a paper explaining that the Department's computerized accounting program incorporated this methodology. This paper was sent to the Watermaster and was then circulated to the Bureau. Ex. 4 at 000087-98. It explains, among other things, how "[a]ccrual occurs by assigning natural flows at each reservoir in order of the respective [Storage Right] priorities," how "[f]lood control releases . . . do not affect accrual," how "[a]ctual storage may continue to occur after the storage rights are filled 'on paper'," and how "[t]he second fill, called 'unaccounted for storage,' may, but usually does not, result in a total system fill." Ex. 4 at 000093. It also explains that "[t]he volume stored per annum, beginning on 1 November of each year, cannot exceed the volume specified by the water right or the physical capacity of the reservoir unless all subsequent

> After the reservoir rights have filled on paper, that refill water is designated as "unaccounted for" storage. As the reservoirs begin to refill, the "unaccounted for" storage account continues to be credited on paper as long as excess natural flow is available to the system. The reservoirs remain filled on paper for the duration of the season.
>
> Ideally, the reservoirs capture enough "unaccounted for" storage to match the paper fill in the accounting system. In some years, however, more water is released for flood control than is subsequently captured from the run off. When that happens, the shortfall is termed "failure to refill due to flood control[.]"

Reply Brief in Support of the United States' Motion for Summary Judgment ("*US Reply*") at 11-12 (O.N.D. \63-3618\20080219_Reply Brief in Spprt of US Mtn for SJ\ at 001323-24). The attorneys for the Ditch Companies and the Boise Project participated in the Lucky Peak proceedings on behalf of some of the same clients they represent in this judicial review. *US Reply*, Certificate of Service (O.N.D. \63-3618\20080219_Reply Brief in Spprt of US Mtn for SJ\ at 001327). The ins and outs of IDWR's accounting system were on full display in the Lucky Peak proceeding (which was pending prior to the issuance of the Storage Rights' decrees), undercutting any claims of ignorance by the Irrigators now.

Allowing storage of water under free river conditions, and allocating it to the spaceholders, has worked well since computerized accounting began in 1986, with only one year (1989) resulting in a shortfall of water to the irrigation spaceholders in Lucky Peak as a result of flood control operations. (See footnote 14 at page 18.) In that year, irrigation spaceholders with senior rights in Arrowrock and Anderson Ranch received their full allocations.

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rights have been met." Ex. 4 at 000091. The Department also communicated the excess water refill concept directly to the Boise Project. Ex. 7 at 000110 (letter from IDWR Western Regional Manager David Tuthill to Boise Project Board of Control Manager Kenneth Henley describing how "each water right is allowed to be filled under its priority one time only. Subsequent filling can occur only if all other storage rights on the system have been filled and all natural flow water rights are being satisfied.").

The only spaceholders potentially affected in 1989 were those tied to junior water rights in Lucky Peak, because that water has always been intended to be "make up" water in case flood control operations reduced the amount of water available for irrigation in Anderson Ranch and Arrowrock reservoirs. In the Lucky Peak streamflow maintenance case, the SRBA Court described how this arrangement was agreed to by the federal government and its contracted spaceholders:

> The [1953] MOA also provided:
>
> > In the event Anderson Ranch or Arrowrock Reservoirs are 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 but not to exceed the amount evacuated for flood control.
>
> [1953 MOA] at 10.

Lucky Peak Decision at 6 (O.N.D. \63-3618\ 20080923_Memorandum Decision and Order on Cross-Mtn for SJ\ at 001537) (emphasis supplied).[44]

The Lucky Peak spaceholders agreed to this. Their contracts with the federal government specifically provide that their entitlements may be affected by the flood control purpose of the reservoir:

> Subject to operations for flood control, the United States will operate the Project so as to store under existing storage rights all available water, and during each irrigation season, the Contracting Officer will make available to the Contractor for irrigation the

[44] The "1953 MOA" is the Memorandum of Agreement for Flood Control Operation of the Boise River Reservoirs, dated November 20, 1953, between the U.S. Department of the Army and the U.S. Department of the Interior. A copy is in the record at Ex. 2100 at 002174-84. The 1953 MOA is incorporated into many if not all subsequent spaceholder contracts. *See, e.g.,* Ex. 2100 at 002170 (page 3 of the Supplemental Contract, dated June 17, 1954, between U.S. Department of the Interior and Nampa & Meridian Irrigation District ("1954 NMID Contract")); Ex. 2190 at 003961 (page 3 of Supplemental Contract, dated August 3, 1954, between U.S. Department of the Interior and Pioneer Irrigation District ("1954 Pioneer Contract").

> Contractor's proportionate share of the stored water that accrues in each year to the active capacity of the Reservoir, together with any stored water that may have been carried over in the Contractor's share of such active capacity from prior water years.

Ex. 2190 at 003990-91 (Repayment Contract for Lucky Peak, at 8-0) (emphasis supplied).

The bottom line is that there is no evidence that spaceholders have ever been without water due to accounting using the one-fill, storable inflow, paper fill, free river refill principles. Not that this matters. The law is the same whether the Irrigators suffer a shortage or not. But they have not.

In any event, IDWR's accounting system cannot be blamed for any real or hypothetical failure to completely physically fill the reservoirs after complete paper fill is achieved. The reason why is obvious: If sufficient storable inflow reaches the reservoirs to achieve paper fill of the associated Storage Rights, there must have been enough water to satisfy the Storage Rights. In fact, spaceholders take heart when paper fill is achieved because it signals that it is a wet year. Reservoirs fill in wet years.

> When paper fill was accruing, we knew that was going—there was enough water going through the system, that when it reached maximum fill, we knew that we were going to have a full storage season.

Tr. 9/9/2015, p. 1043, ll. 2-5 (testimony of Vernon E. Case).

The Irrigators object to free river refill water because such refill does not occur under the Storage Rights' original priority dates. But that is of no consequence. So long as refill occurs, it hardly matters to the spaceholders whether the water was captured in priority or not. Once the water is stored, it is theirs and no one else may call for its release.

B. Allowing storage of excess water is compelled by Idaho's maximum use doctrine.

While Idaho's prior appropriation doctrine insists on strict application of the rules of quantity and priority, it is founded as well on the principle of maximum beneficial use of water. Accordingly, rather than letting water run unused down the river and out of state, a reservoir operator may lawfully top off a reservoir, even after its first paper fill, when doing so impairs no other water right. This is why, as a practical matter, the Irrigators have suffered nothing under the Department's administration of the principles of one-fill, storable inflow, and paper fill over the last 30 years. (See footnote 14 at page 18.)

The maximum use doctrine is constitutionally based and integral to the prior appropriation doctrine. It has guided this Court's application of the prior appropriation doctrine for over a century. (See discussion in section IV.F beginning on page 36.) Accordingly, Idaho's statutes and precedents should be read in its light.

If the historic practice of storing excess water upon which the Department has built and applied its accounting system in this basin and throughout Idaho is overturned, water that could be stored will go unused. And reservoir operators will be forced to scramble to justify the second fill which they have always taken.

One might wonder, by the way, why the Irrigators do not support the Director's position. The reason is Machiavellian. They seek to eliminate a practice that benefits them in order to create an argument that they must be awarded rights in priority that would benefit them even more.[45]

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[45] In contrast, the United States recognized that, if it does not have a right to priority refill, it has a right to excess water refill. In its briefing to this Court in the Basin-Wide Issue 17 litigation, it said: "[N]o party has disputed Reclamation's ability to refill its reservoirs; the issue has been whether refill may be done under the priority of Reclamation's storage water rights. By emphasizing that the issue before the [SRBA] Court is whether "refill" can occur in priority, the Court effectively affirmed that no

As discussed above, unlimited refill under priority will eliminate the incentive to avoid waste, will block future development of water rights, cause more water to flow unused to downstream states, and, as a practical matter, turn over control of the river to the federal government. This is not maximum use. Storing excess water, on the other hand, furthers maximum use and avoids the problems created by the Irrigators' proposals.

C. This Court has recognized the principle that the diversion of excess water by water right holders is not contrary to statute or the prior appropriation doctrine.

In *ICL II*, this Court upheld a general provision authorizing water right holders to divert water during high flow periods in excess of the quantities allowed under their decrees. The Court found the general provision was necessary for the efficient administration of water rights in the Reynolds Creek Basin, noting that it "describe[d] a long-standing system of allowing those who otherwise have water rights in the Reynolds Creek Basin to use excess water when it is available." *ICL II*, 131 Idaho at 334, 955 P.2d at 113. However, the Court also held that the provision did not establish a water right in the excess water because "General Provision 2 does not set forth a priority date, quantity, legal description of the place of use, nor any of the other elements of a water right." *ICL II*, 131 Idaho at 333, 955 P.2d at 112.[46]

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remark is necessary for "refill" done using water that can be stored without injury to other water rights." *United States' Opening Brief on Basin-Wide Issue No. 17* at 1 n.1 (O.N.D. \BW-17\91017\20121221_US Opening Brief on BWI 17\ at 000990).

[46] *ICL II* was a companion case to *ICL I*. In *ICL I*, the Director of IDWR included various general provisions (addressing administrative issues broadly applicable to all water rights) in the Director's Reports for three test basins. The SRBA Court designated a basin-wide issue to consider the appropriateness of the general provisions. It then struck the provisions as unnecessary to define or efficiently administer water rights. The Idaho Supreme Court (opinion by Justice McDevitt) reversed as to the provision on firefighting (holding that was an appropriate general provision), but upheld the District Court in striking the general provisions for stock watering and excess water. On reconsideration (opinion by Justice Walters), the Court remanded for further proceedings concerning general provisions on the season of use and conjunctive management. Unlike *ICL II*, the excess water provision in *ICL I* was a "generic" provision that would have authorized all irrigation users to take "additional flows" beyond the quantity stated in their water rights so long "all other water rights . . . can be satisfied." *ICL I*, 131 Idaho

This is exactly what Suez is urging here. Refill after the first fill of an on-stream storage right is authorized as part of or ancillary to the storage right where there is sufficient water to also satisfy junior appropriators. But that well established practice does not equate to a water right to divert under priority.

The District Court brushed aside *ICL II*, holding that it and another district court decision[47] were "factually distinguishable" because they involved stipulations and "were not the result of rulings on the merits." *Wildman Decision* at 15 (R. 1066). The District Court should not have given short shrift to the holding in *ICL II*. In that case, this Court recognized that the general provision "describe[d] a longstanding system of allowing those who otherwise have excess water rights in the Reynolds Creek Basin to use excess water when it is available." *ICL II*, 131 Idaho at 334, 955 P.2d at 113. It is true that the general provision was traceable to a stipulation of the parties in a prior general adjudication. And it is true that litigants are allowed—within limits—to work out terms allocating property rights between themselves that do not conform to how the law might allocate those interests. For example, a party might agree to a lesser quantity or to a subordination in order to resolve a disputed water right. But there are limits. A court cannot decree water rights whose terms violate either a statute or the core principles of the prior appropriation doctrine.

419-20, 958 P.2d 576-77. This Court agreed with the SRBA Court that "the provision regarding excess water was not legally necessary." *ICL I*, 131 Idaho at 416, 958 P.2d at 573. "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." *ICL I*, 131 Idaho 416, 958 P.2d 573. To be clear, the Court did not reject the principle that excess flows taken can be diverted by right holders. Rather, the Court said that such diversions are not under priority of the water right. "Use of 'excess water' cannot be decreed as a water right." *ICL I*, 131 Idaho 416, 958 P.2d 573. Accordingly, there was no need of the general provision.

[47] For similar reasons, the District Court also found inapplicable its own decision of January 3, 2012 in *Lemhi High Flows* (dealing with the right to take excess "high flows" in the Lemhi Basin).

Idaho Code § 42-201(2) prohibits diversion without a water right (with specific exceptions). We must assume that this Court's decision in *ICL II* and the SRBA Court's decision in *Lemhi Highs Flows* allowed no such thing. The only way to reach that conclusion is to read those decisions as approving diversions of excess water that, even though not under priority, were pursuant or ancillary to valid water rights. In other words, *ICL II* necessarily and implicitly recognizes that of the historic practice of allowing diversion of excess water, not under priority, by existing water right holders does not violate Idaho law. A person with no water right at all as no such authority.

D. Storage of excess water is undertaken in accordance with the storage right.

The District Court found that the portion of IDWR's accounting program authorizing "unaccounted for storage" was unlawful. The District Court said this was improper because "under the Director's methodology neither the diversion nor the use of water identified as unaccounted for storage occurs pursuant to a water right." *Wildman Decision* at 14 (R. 1065).

In one sense, storage of excess water is not "pursuant" to the storage water right, because it is not based on the quantity and priority elements of the storage right and the amount stored does not accrue to the right (which has already been filled). In another sense, however, it is pursuant to the right in that only the holder of a valid on-stream storage right is entitled to store excess water.

A person cannot simply build a reservoir and begin to store excess water without a water right. Doing that would be diverting water without a water right. In contrast, the federal government is authorized to store excess water specifically because it holds lawful on-stream storage rights. Whether that is best described as "pursuant to" the storage right or "appurtenant," "ancillary," "inherent in," "implied by," in "accordance with" the right does not matter.

Whatever it is called, it is lawfully stored because of and based on the storage rights authorizing the first fill.

E. Storage of excess water storage does not violate Idaho Code § 42-201(2).

In the same vein, the District Court found that allowing the storage of excess water based on historic practice violated Idaho Code § 42-201(2). *Wildman Decision* at 14 (R. 1065). That statute provides, "No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid right to do so, or apply it to purposes for which no valid water right exists."

As noted in the previous section, excess water may only be diverted by those who hold valid on-stream storage rights. Here, the Bureau has water rights—the Storage Rights—and this Court has ruled that, under Idaho law, the holder of a valid water right may use excess water ancillary to their water right so long as no other water rights are injured thereby. *ICL II*, 131 Idaho at 334, 955 P.2d at 113 (upholding a general provision authorizing existing water right holders to divert water during high flow periods in excess of the quantities allowed under their decrees). Accordingly, there is no violation of the statute.

In other words, the statute prohibits the diversion and use of excess water by persons who hold no water rights. It does not prohibit recognition of the longstanding practice allowing excess water refill ancillary to a valid on-stream storage water right.

It makes no sense to read the statute as the Irrigators propose (*i.e.,* as prohibiting the storage of excess water ancillary to the Storage Rights). *See, e.g., DC Brief* at 49 ("Under Idaho law, water cannot be stored for beneficial use without a water right."); *BP Brief* at 36 ("'unaccounted for storage' . . . does not comport with Idaho law") (both citing Idaho Code § 42-201(2)). Subsection (2) of Idaho Code § 42-201 was enacted in 1986. 1986 Idaho Sess. Laws,

ch. 313 § 2. It is implausible that the Department would choose to implement its accounting system at the same time as the Legislature adopted Subsection (2) if that law's provisions would have rendered the accounting system illegal as alleged by the Irrigators.

In the *Wildman Rehearing Denial*, the District Court stood by its decision, but for reasons other than Idaho Code § 42-201(2). Indeed, the *Wildman Rehearing Denial* drops any mention of the statute. The District Court's alternative reasons for rejecting the Director's "unaccounted for storage" principles are discussed in turn below.

F. Excess water is unappropriated water that is available for appropriation by others.

The District Court stated that the Director's approach under "unaccounted for storage" does not protect the storage right holder from someone later appropriating the excess water. "The Court is unaware of any authority that would allow it to cloak 'unaccounted for storage' with the protections of a water right so as to preclude future appropriation." *Wildman Rehearing Denial* at 4 (R. 1164). That is true. Storage of excess water does not bar future appropriations. And that is precisely the point. Other users, such as Suez, have made subsequent appropriations—and have invested millions of dollars in treatment systems that, to some extent, rely on those subsequent appropriations.

To be clear, neither Suez nor anyone else may "appropriate" water physically stored under the Storage Rights in any given year. Once the water is stored, it is not available for appropriation. It is owned by the right holder.

On the other hand, that excess water can be appropriated by others prospectively. After all, it is simply unappropriated water.[48] Idaho law allows both for the appropriation of excess

[48] Excess water is simply unappropriated water that, like all of Idaho's unappropriated water, is subject to appropriation. 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 . . . .").

water and the capture and use of excess water ancillary to existing storage water rights (so long as the latter is done consistent with the purposes and conditions stated on the face of the rights and without injury to any other water rights). If no one else has appropriated it, it remains unappropriated, excess water, and reservoir operators are free to take it. If someone else appropriates it, then it is no longer excess water and those junior priorities must be honored by the senior once the senior's right is filled.

In this way, Idaho's water resources are maximized without conflicting with flood control obligations or Idaho statutes.

This does not mean that the storage right holders are powerless to protect themselves from new users coming on line. All they need to do is file a permit application for a second fill. Curiously, they refuse to do.[49] Instead, they argue (in a separate "late claims" case that it not before this Court) that they are entitled to backdated beneficial use claims that are senior to other users who have secured their place in the priority system.

To recap this critical point, the Director's accounting system has always allowed storage of excess (*i.e.*, unappropriated) water beyond the Storage Rights' paper fill. But this is not done under right of priority. Anyone—the Storage Rights holder and other users—may appropriate that excess water at any time. If the Storage Rights holders do not feel confident that the supply of excess water will continue to be sufficient, all they need do is seek a permit (and later a license) to secure their place in line against future appropriators. Irrigators could have done this simple task—and still could. Instead, they have pursued this litigation, whose goal is to leapfrog ahead of those who have played by the rules of the priority system.

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[49] Alternatively, they could agree to a settlement along the lines of the late claims for refill approved to by all parties in the Basin 01, Upper Snake River federal reservoir late claims. These subordinated late claims have the same practical effect as a new junior appropriation.

G. The Irrigators' suggestion that there is no unappropriated water other than what the federal government chooses to release is mistaken.

In the Irrigators' view, the only unappropriated waters in the Boise River are those released from Lucky Peak during flood control operations. *See, e.g.*, *DC Brief* at 38 ("Boise River flows from the upper Boise River watershed are available for additional/junior appropriation only during flood control operations when water is released for flood control purposes."). In other words, the Irrigators contend that the federal government—not the State of Idaho—has sole authority to determine the timing and amounts of Idaho's unappropriated public waters in the Boise River. This Court should not agree to turn control of Idaho's waters over to the federal government.

The Irrigators point to remarks included in certain junior water rights to support their arguments that the Storage Rights include priority refill entitlements and that "junior water rights are not entitled to water that is stored during flood control operations." *See, e.g., DC Brief* at 59. Their logic is backward. Assuming such remarks mean what the Irrigators say they mean (which is a matter of debate), they actually support the conclusion that the Storage Rights have no right to refill under priority. That is because the remarks would be unnecessary if the Storage Rights remained under priority until the date of maximum physical fill regardless of how much water had been released for flood control. In such a case, the Storage Rights would be entitled to divert water at the expense of junior water rights under run-of-the-mill priority administration. They would need no special remark purporting to limit the exercise of junior water rights to Lucky Peak flood releases.

Moreover, the existence of such remarks on some rights simply does not mean that they reflect a legal principle arrived at or imposed by the Department. Contrary to the Irrigators'

suggestion, the Department has not included such remarks as a matter of course on all junior water rights. *See, e.g., DC Brief* at 59 ("the Department has long conditioned junior surface water rights . . . by limiting their use to times of flood control releases.") Suez, for example, holds a 1993 priority water right permit (no. 63-12055) with no such condition. Suez's 2001 priority water right permit (No. 63-31409) includes a condition only because Suez agreed to it to settle a protest. Just because Suez elected to agree to a condition urged by a protestant in order to resolve litigation does not mean that Suez agrees that the only water available for appropriation is water released from Lucky Peak, or that IDWR believes that to be the case either. Clearly, IDWR does not. *Spackman Order* at 48 ¶ 154 (A.R. 1277) ("Sisco's testimony that the only unappropriated flows in the Boise River system are those released in flood control operations pursuant to the Water Control Manual is incorrect from a factual standpoint.").

Contrary to the Irrigators' insinuations, junior water rights are not to blame when the Bureau and Corps fail to physically fill the reservoirs after flood control. The fact that flood control occurs means that there is too much water for the reservoirs to hold—any failure to physically fill in such years is the result of the federal government's calculations. Tr. 8/28/15, pp. 356-57. Junior water rights do not negatively affect storage or flood control. In fact, they can assist flood control by diverting water out of the Boise River, thereby reducing the amount of water in the channel. This is no different than how the New York Canal is used. *See DC Brief* at 22 (noting that the 1953 Agreement requires "[f]actoring the diversion of water into the New York Canal into the determination of the quantity of water to be released from Lucky Peak [for flood control].")

In any case, this case is not about how junior water rights are appropriated and administered or what their elements and conditions might mean. It is about the administration of

the Storage Rights according to their elements and conditions. The bottom line is that the Storage Rights are not entitled to take under priority and without limit all water flowing in the Boise River not called by a senior right.

H. Storage of excess water does not present a conundrum.

The District Court expressed concern that the Director's accounting system provision for excess flows creates a "conundrum" for the administration of rights.[50] There is no conundrum about what can be appropriated. The "first-in" water (storable inflow stored under the first fill of the water right) is fully protected as part of the storage right holder's water right—unless and until the right holder decides to release the water for purposes other than its beneficial use. No other right holder may "call" for such water. But, of course, if previously stored water is released for flood control or other non-beneficial uses, other right holders may divert that water pursuant to their priorities.

The "second-in" water (excess water stored after the first fill of the water right) is also fully protected—just as much so as the first-in right—once it is lawfully stored. To be sure, it is not taken "under priority." But if excess water is lawfully stored, it is owned and controlled by the right holder just like the first-in water. The right holder alone may decide when and whether to release it, or it may hold the water over for another year.

I. Storing excess water is not a violation of a water right's quantity element.

The District Court concluded that "if the 'first in' water and any subsequent 'refill' are both considered part of the water then the decreed quantity element is exceeded." *Wildman Rehearing Denial* at 5 (R. 1165). Not so. The water right states a quantity and a priority date.

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[50] "It['']s herein that lies the conundrum. Indeed if the water is counted as part of the reservoir rights then it would not be subject to appropriation or use by another. If it is not counted against the reservoir rights the converse is true." *Wildman Rehearing Denial* at 5 (R. 1065).

Those two elements go together. The quantity element only limits the amount of water that may be taken under right of priority. Taking excess water not under priority is not subject to and does not violate the quantity limit. *ICL I*, 131 Idaho at 416, 958 P.2d at 573 ("Excess flow is not subject to definition in terms of quantity of water . . . ."

VI. THE DIRECTOR'S CONCLUSION REGARDING PAPER FILL AND EXCESS WATER IS CONSISTENT WITH OTHER PRIOR APPROPRIATION STATES.

The principle that storage right holders are limited to one paper fill but may take additional water beyond their first fill during free river conditions is broadly recognized in other prior appropriation states, most notably Colorado.[51]

The term "free river conditions" has been used to describe the situation "when natural supply rendered official administration unnecessary." *N. Sterling Irrigation Dist. v. Simpson*, 202 P.3d 1207, 1209 (Colo. 2009).

> "'Free river conditions' occur when there is sufficient natural supply to satisfy all water uses, whether decreed or undecreed, and State Engineer administration is unnecessary for the protection of decreed water rights." *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1149 n.14 (Colo. 2001). Water users may divert beyond the measure of their decrees during free river conditions because the diversion and storage does not infringe upon the rights of other water users. *City of Westminster v. Church*, 445 P.2d 52, 59 (Colo. 1968).

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 539 n.137 (2006).

The Director was careful to base his decision solely on Idaho law, as was the District Court. "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.'" *Wildman Rehearing Denial* at

[51] The same is true for the maximum use doctrine. *See, e.g.*, Jeffrey C. Fereday & Michael C. Creamer, *The Maximum Use Doctrine and its Relevance to Water Rights Administration in Idaho's Lower Boise River Basin*, 47 Idaho L. Rev. 67 (2010).

5 (R. 1165). Indeed, there is ample law in Idaho to resolve the questions presented without resort to out-of-state authority.

On the other hand, if the Court looked beyond Idaho law it would find that our state's longstanding implementation of the one-fill rule is consistent with that in other prior appropriation states. The Supreme Courts of Colorado, Wyoming, Montana, and Washington have so ruled.[52] No appellate decision in any prior appropriation state has rejected the one-fill rule or the right to take excess water beyond the first fill. Austin Hamre, *When You've Had Your Fill: A Review of the One-Fill Rule*, 27 Colo. Lawyer 95 (1998). These cases and other out-of-state authorities are discussed at length in Suez's (then United Water Idaho's) brief to this Court in the Basin-Wide 17 appeal at 21-35 (O.N.D. \BW-17\40974-40975-40976\20131024_Brief of Respondents UWI (40974 & 40975)\ at 140-54).

Of course, these authorities are not law in Idaho. But in the past this Court has not hesitated to look to the common law of those states on the subject of the prior appropriation doctrine. For example, in *Public Utilities Comm'n v. Natatorium Co.*, 36 Idaho 287, 211 P. 533, 540 (1922) (Rice, C.J., dissenting), it was observed that the riparian rights doctrine embraced in some western states (*e.g.*, California) is in contrast to the "antagonistic doctrine of water rights founded upon appropriation, which is generally known as the Colorado system. Idaho, early in its history, adopted the Colorado system." See also, Samuel C. Wiel, *Water Rights in the*

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[52] *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 98 P. 729 (Colo. 1908); *Orchard City Irrigation Dist. v. Whitten*, 361 P.2d 130, 135 (Colo. 1961); *North Sterling Irrigation Dist. v. Simpson*, 202 P.3d 1207, 1211 (Colo. 2009); *Bd. of County Comm'rs of County of Arapahoe v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840, 851 (Colo. 1992); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 40 n.13 (Colo. 1996); *Federal Land Bank v. Morris*, 116 P.2d 1007, 1011 (Mont. 1941); *City of Westminster v. Church*, 445 P.2d 52, 58 (Colo. 1968); *Bagnell v. Lemery*, 657 P.2d 608 (Mont. 1983); see, Anne MacKinnon, *Historic and Future Challenges in Western Water Law: The Case of Wyoming*, 6 Wyo. L. Rev. 291 (2006); Casey S. Funk, Basic Storage 101, 9 U. Denver L. Rev. 519, 539n.137 (2006).

Western States (3rd ed.) § 167, p. 185, *et seq.* (1911) (referring to the prior appropriation doctrine as the "Colorado doctrine"). Just as Idaho has looked to other prior appropriation states, the courts of those states routinely cite Idaho precedent on water rights matters.

In any event, the Court may be assured that the Director's approach does not put Idaho at odds with its sister prior appropriation states.

VII. THE IRRIGATORS' ALLEGATIONS OF PROCEDURAL AND DUE PROCESS ERRORS ARE MERITLESS.

Irrigators contend that an array of perceived procedural and due process violations turned the Contested Case into a "procedural morass." *BP Brief* at 42. The District Court found these allegations meritless. Irrigators press them again in their appeals. Suez expects that IDWR will provide a comprehensive response, as it did below. Here, Suez highlights some of the key points and broader considerations.

A. The Director was not required to engage in rulemaking.

(1) Irrigators complain that the Director provided too much process.

The Director initiated two contested cases—this Contested Case for the accounting system that governs the federal on-stream storage water rights in the Boise River basin, and another for the accounting system that governs such rights in the Upper Snake River. (See footnote 10 at page 13.) Irrigators contend that the Director had no authority to proceed in this manner and instead should have imitated a rulemaking.

The Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 to 67-5292, provides a variety of mechanisms for agencies to make decisions as they carry out their statutory and constitutional duties. One is formal rulemaking, Idaho Code §§ 67-5201(9), 67-5201(19), 67-5201(20), 67-5220 to 67-5231. Another is adjudication via the contested case process, Idaho Code §§ 67-5240 to 67-5254. There are others, too, such as written interpretations of rules,

Idaho Code § 67-5201(19)(iv), and declaratory rulings, Idaho Code §§ 67-5201(19)(ii), 67-5232, 67-5255.

Compared to rulemaking, the contested case approach provides far more extensive opportunities for interested parties to make their case before the agency. *See* Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 294 (1993) (describing rulemaking as having "comparatively minimal due process requirements"). For example, unlike rulemaking, contested case proceedings provide for a full evidentiary hearing "afford[ing] all parties the opportunity to respond and present evidence and argument on all issues," Idaho Code § 67-5242(3)(b), including "such cross-examination as may be necessary." Idaho Code § 67-5242(3)(a). In rulemaking, interested persons ordinarily are limited to submission of written comments. Idaho Code § 67-5222.

Given the complex factual histories associated with the accounting systems and associated water rights in Basins 01 and 63, the Director decided that separate contested cases for the two basins made sense. He was not obligated to proceed this way, of course. He could have chosen to frame the question more broadly and engage in a rulemaking. Instead, he chose a forum that provides full-blown litigation-style opportunities for parties to make their case.

Thus, Irrigators' argument boils down to complaining that they were given too much process. It is difficult to fathom how this could have harmed Irrigators. A party complaining under the IAPA must show that "substantial rights of the appellant have been prejudiced." Idaho Code § 67-5279(4). One is reminded of the failed appeal in *Angstman v. City of Boise,* 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (Walters, C.J.) ("Angstman's contention does not demonstrate that he was denied due process, but rather, that he was subjected to too much process.").

The Director's choice of procedure did not deprive the Irrigators of input. It gave them maximum input. Complaining about this is pointless.

B. *Asarco* is not on point.

In support of their contention that rulemaking was required, Irrigators rely primarily on *Asarco, Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003) (Trout, C.J.), the seminal Idaho case explaining when an informal agency action is a "rule" that requires rulemaking. *See BP Brief* at 38-41; *DC Brief* at 70-72.

Asarco, however, addressed a fundamentally different situation than is presented here. In *Asarco*, the Idaho Department of Environmental Quality ("IDEQ") established first-time-ever numerical limitations for the total maximum daily load ("TMDLs") for specified pollutants in the Coeur d'Alene River without going through formal rulemaking or any IAPA public procedure. *Asarco*, 138 Idaho at 721-22, 69 P.3d at 141-22.

This is key. *Asarco* did not involve a choice between rulemaking and a contested case—both of which provide a formal structure for interested parties to engage in the agency's decision-making process. In *Asarco*, the agency bypassed rulemaking and issued the TMDLs without formal "notice and comment" procedures. Here, in contrast, the Director selected a forum with even more public process than rulemaking.

In *Asarco*, the agency's choice was more limited. Its options were: rulemaking or administrative fiat (*i.e.*, a decision without any formal IAPA process). As a practical matter, there was no contested case option. The dischargers were unknown, because there was no existing discharge limit. Thus, IDEQ could not identify the present dischargers (much less future ones) and make them parties to a contested case. The only practical way to establish a legally binding "budget" or "load" for all current and future dischargers was by rule or by fiat.

Presented with this choice, IDEQ chose fiat. The Court came down hard on IDEQ, ruling that the agency must proceed by rulemaking if the action fits the meaning of a rule. Acting by fiat amounted to an end run around formal rulemaking that denied affected persons a structured means of participating in the decision-making process.[53]

Consequently, *Asarco* is not on point here. *Asarco* comes into play where an agency acts informally by administrative fiat to promulgate what amounts to a rule of general applicability. Here, because the Director initiated a contested case to address the accounting system, any *Asarco* argument is mooted.

Common sense demands this conclusion. The IAPA provides a range of procedural choices. Where both rulemaking and contested case procedures are available, the Director has discretion to select the one that makes sense. Only where the agency acts by administrative fiat bypassing all formal IAPA procedures need one struggle with the "is it a rule or not?" analysis devised by the Court in *Asarco*.

Generally speaking, agencies are accorded broad discretion in choosing between rulemaking and adjudication. "Most agency-administered statutes confer on the agency power to issue rules and power to adjudicate cases, leaving the agency with discretion to choose any combination of rulemaking and adjudication it prefers." Richard J. Pierce, Jr., 1 *Administrative Law Treatise* § 6.9 at 374 (Aspen 4th ed. 2002)). "In short, if an agency statutorily authorized to proceed by rulemaking and adjudication wishes to pursue a policy, it is up to that agency to

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[53] Curiously, the Idaho Legislature did not think what IDEQ did was such a bad thing. It promptly overrode the *Asarco* decision as to TMDLs. H.B. 458, 2003 Idaho Sess. Laws, ch. 351 (codified at Idaho Code § 39-3611(2)). *See*, Dale D. Goble, *News from the States*, 29 Admin. & Reg. L. News 25, 26 (2003).

decide whether it will issue a rule or rely on administrative adjudication." M. Elizabeth Magill, *Agency Choice in Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1409 (2004).[54]

There may be some circumstances in which a court may overturn an agency decision over the forum it selects to make policy. But that would not be governed by the *Asarco* criteria. Instances in which courts have found an abuse of discretion arise "in very limited circumstances—where the agency is departing from a previously established rule and the retroactive application of the new rule would be especially burdensome." Magill at 1408.

In this case, the Director's determination to adhere to longstanding accounting practices[55] in a trial-like forum in which every affected entity was given a seat at the table[56] is hardly a situation that could justify judicial second-guessing of the Director's choice of procedures.

C. In any event, rulemaking is not required under *Asarco's* six-factor test.

Even if the Court were to apply the six-factor test in *Asarco*, rulemaking is not obligatory. In *Asarco*, the Court ruled that where an agency action of general applicability satisfies all six tests or "characteristics" of a rule, the agency may not execute that action by administrative fiat, but must follow rulemaking procedures. The Director and the District Court

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[54] The seminal case on agency choice between rulemaking and adjudication is *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."). In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the U.S. Supreme Court reaffirmed the *Chenery* principle, holding that an agency's choice between the two formats is subject to review only on an abuse of discretion basis. And that happens rarely. "The Court has not even suggested that a court can constrain an agency's choice between rulemaking and adjudication since *Bell Aerospace*." Pierce, 1 Administrative Law § 6.9 at 382 (Aspen 4th ed. 2002).

[55] The Contested Case was initiated "for the purpose of resolving objections to the existing accounting processes." Notice of Contested Case, at 1 (A.R. 000002).

[56] IDWR notified every water right holder in Basin 63 of the Contested Case. Cover letter from Gary Spackman (A.R. 000001); Certificate of Service for Notice of Contested Case (A.R. 000010-34).

reasoned that because the accounting methodologies at issue apply to a discrete handful of water rights, they involved agency action of "particular applicability"[57] rather than of "general applicability."[58] *Wildman Decision* at 21 (R. 001072).

The Director's decision to employ a contested case to evaluate longstanding accounting procedures applicable to four specific water rights does not satisfy *Asarco's* six "characteristics" of a rule.[59] As the District Court correctly ruled, because this case involved the application of law to the facts surrounding particular water rights, the Director's decision will not be applied "generally and uniformly" or have "wide coverage." *Wildman Decision* at 21 (R. 001072). Nor does it prescribe a "legal standard or directive not otherwise provided by the enabling statute." After all, the Director is statutorily authorized to distribute water according to the Storage Rights' decrees (which provide the standards for how much water to deliver in priority). *Wildman Decision* at 21 (R. 001072).[60]

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[57] The IAPA provides: "'Contested case' means a proceeding which results in the issuance of an order." Idaho Code § 67-5201(6). "'Order' means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." Idaho Code § 67-5201(12) (emphasis added)).

[58] Rulemaking "means the process for formulation, adoption, amendment or repeal of a rule," Idaho Code § 67-5201(20), and a "rule" is "the whole or a part of an agency statement of general applicability . . . ." Idaho Code § 67-5201(19) (emphasis added).

[59] "[T]his Court adopts the reasoning of the district court and considers the following characteristics of agency action indicative of a rule: (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy." *Asarco*, 138 Idaho at 723, 69 P.3d at 143.

[60] The Ditch Companies incorrectly state that "[t]he district court only addressed the first two [*Asarco*] factors, 'general applicability' and 'wide coverage." *DC Brief* at 70. The District Court, in fact, also addressed whether the Director's decision "prescribe[s] a legal standard or directive not otherwise provided by the enabling statute." *Wildman Decision* at 21 (R. 001072). In any case, as the District Court correctly noted, "[t]he six *Asarco* characteristics are listed in the conjunctive, so the lack of one seals the deal." *Id. See also State v. Alford*, 139 Idaho 595, 598, 83 P.3d 139, 142 (Ct. App. 2004) (Perry, J.) (holding that rulemaking was not required because "[w]hile the first three [*Asarco*] factors may be present, none of the last three apply in this case.").

The Irrigators argue that the Director's decision is generally applicable and has wide coverage because it may have precedential value. *See, e.g., DC Brief* at 71 (concerning potential statewide implementation of the one-fill rule). But the fact that the Director's decision might hold precedential value, or that his reasoning might be applied in other contexts, does not change the fact that this case involves how water is, and for decades has been, distributed to four specific water rights. *See Wildman Decision* at 21 (R. 001072). Equating potential precedential value to "wide coverage" or "general applicability" would unduly hamstring the Director's ability to ever use the contested case procedure. If this Contested Case is required to be decided by rulemaking simply because it may create a precedent, the same would be true for much or all of what the Director does by contested case.

The Boise Project argues that the outcome of the contested case has wide coverage and is generally applicable because the determination of how the Storage Rights are administered "directly affects all water use in the basin." *BP Brief* at 39. It may be that the federal agencies' operation of the three reservoirs, and the Department's accounting of their Storage Rights, implicates the interests of water users on the system more than a typical off-stream diversion. After all, the three reservoirs in question functionally control the river.[61] But that does not mean the Director's decision has wide coverage or general applicability in the rulemaking sense.

This highlights a key difference between this case and the TMDL at issue in *Asarco*. The TMDL in *Asarco* set new numerical limits for an entire river basin that was applicable for the first time to all dischargers. This case, on the other hand, involves a methodology to determine

[61] The Boise River's three federal on-stream dams divert and control all natural flow that enters them, and releases from the reservoirs often consist of comingled storage water and natural flow. Notice of Contested Case, at 1-2 (A.R. 000002-3) ("The diversion structures are large federal dams that impound water and fully regulate the streamflows."). *See also Lucky Peak Decision* at 19 ("the entire flow of the river is diverted and then artificially released) (O.N.D. \63-3618\ 20080923_Memorandum Decision and Order on Cross-Mtn for SJ\ at 001550) .

how existing numerical limits set by decree for four distinct water rights are quantified. That methodology does not apply to any other water rights in Basin 63 (although, presumably, the precedent would apply to a new on-stream storage right). Thus, unlike the basin-wide numerical pollution limit embodied in *Asarco's* TMDL, the Director's decision does not apply to a "large segment of the general public" and thus lacks the requisite "wide coverage." *Asarco*, 138 Idaho at 723, 69 P.3d at 143. Nor does the Director's decision "create additional legal requirements" for everyone. *Alford*, 139 Idaho at 596, 83 P.3d at 140.[62]

Similarly, the Irrigators argue that the outcome expresses agency policy not previously expressed. *See, e.g., DC Brief* at 71. That, of course, is wrong. (See footnote 43 at page 55.)

The Irrigators also argue that the Director's decision operates only prospectively. *DC Brief* at 72. But they undercut that argument with their other arguments that the entire Contested Case was nothing but a *post hoc* validation of IDWR's decades-old accounting system. *See, e.g., DC Brief* at 88 (calling the Contested Case "an intentional and deliberate scheme to *post hoc* validate IDWR's prior, internal adoption and use of the water right accounting program to determine the 'satisfaction' of Boise River Reservoirs storage water rights.").

In sum, at least some of the six factors in *Asarco* are not applicable here. Accordingly, the Contested Case procedure was a reasonable and permissible choice.

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[62] In *Alford*, the Court held that rulemaking was not required "when the Idaho state police approves the methods for determining an individual's alcohol concentration." *Alford*, 139 Idaho at 597, 83 P.3d at 141. The Court reasoned that, in picking the "Alco-Sensor III" to measure breath-alcohol concentration, the Idaho state police simply were carrying out their statutory duty to select "equipment that it found to be suitable for such purpose." *Id.* at 598, 83 P.3d at 142. Similarly here, implementing an accounting system to count the water toward the satisfaction of the Storage Rights is just the Director carrying out his statutory duty to direct and control the distribution of water in Water District 63.

D. The Contested Case provided an impartial and disinterested tribunal.

When the merits fall short in an administrative appeal, a litigants' last resort is sometimes to attack the integrity of the decision-maker. Here, Irrigators complain that the Director was biased and unfair to them, and that he should have disqualified himself. The District Court found no merit in those contentions. *Wildman Decision* at 19 (R. at 001070) ("The presentation on which the Petitioners focus to establish the Director's partiality is, quite frankly, rather innocuous.").

Is there not a disconnect here? Irrigators say the Director should have disqualified himself from the Contested Case and instead initiated a rulemaking. What would that solve? If he could not be trusted to preside fairly over the Contested Case, how is it they think he would perform better in rulemaking? Rulemaking is far more opaque.

What the Irrigators really want is not a different decision-maker, but a different decision. If the Director was biased and unfair, would that not be reflected somewhere in the 79 pages of factual and legal conclusions set out in the *Spackman Order*? The Director did not say, "This was a judgment call. Trust me." The Director's decision was thoroughly grounded in the substantive evidence and the law. It was painstakingly explained, meticulously documented, and based on a voluminous record. If there was bias, the error should be evident in the findings and conclusions. The Irrigators' remedy is to point out where the Director erred on the facts or the law. They have had ample opportunity to do so, and they have fallen short.

It deserves notice that the Irrigators are calling for the disqualification of the agency head himself, not a subordinate and replaceable ordinary hearing officer. This calls for an added measure of caution and common sense. State agencies charged with administering vital government programs are headed by a single director for good reason. That is where the buck

stops.[63] An ordinary hearing officer could be replaced if a legitimate question were raised about his or her independence. At the end of the day, however, contested cases heard by a lower level hearing officer are appealable to the director of the agency. Removing the Director from that statutory appeal process is an extreme proposition.[64]

Perhaps in a routine administrative case (*e.g.*, whether "Petitioner Smith" is entitled to benefits or some such) even the agency head could step aside, if need be. But in a case like this one that involves fundamental policy and legal questions at the very heart of the agency's mission, the agency head has an obligation to put aside whatever predilections he or she may have and decide the case. In such matters, we legitimately expect that the buck will stop with the agency head.

This is not to say that agency heads are exempt from due process requirements. Of course they are not. But there should be compelling evidence of bias before an agency head is found incapable of fulfilling his or her constitutional duty to guide the agency through a critical decision-making process. There is no such evidence here. To the contrary, the *Spackman Decision* is a model of unemotional, and even-handed decision-making in which each of the

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[63] The agency head is not selected because he knows nothing about the subject. The fact that agency heads bring experience to the table does not render them unfit decision-makers. The District Court properly found, "Of course the Director will have some preconceived notions on how the water is and should be distributed to federal on-stream reservoirs in the Boise River System. This is only natural given he is statutorily charged with distributing water to those reservoirs, a task he undertakes yearly." *Wildman Decision* at 19 (R. at 001070).

[64] The Boise Project argues that "[t]he Director need not preside at a hearing as the hearing officer," and that "[t]he hearing officer need not be an employee and can be an independent contractor. *BP Brief* at 53 (citing IDAPA 37.01.01.410). They ignore the fact that no one but the Director has the statutory authority and duty to distribute water. Idaho Code § 42-602. The District Court properly recognized this in determining that the "Director was the appropriate individual to preside over the contested case." *Wildman Decision* at 20 (R. at 001071).

parties' arguments received careful attention and explanation. The Director does not deserve this attack.

E. The Irrigators' other procedural complaints do not entitle them to relief.

This Court also should reject the Irrigators' other procedural complaints. It is apparent that nothing the Director could have done would have satisfied the Irrigators. For example, concerning the officially noticed documents, the Boise Project complains that by "identifying entire classes of documents" instead of specific documents, the Director "placed an impossible burden on [the Irrigators]." *BP Brief* at 45. Imagine, however, if the Director instead had taken official notice of only the specific documents he would later rely upon in his *Amended Final Order*. If that had happened, it is easy to surmise that the Irrigators would now be arguing that the Director pre-judged the outcome of the case because he knew beforehand exactly which documents supported his decision.

In another twist of logic, the Irrigators fault the Department for not following inapplicable administrative rules. The Boise Project repeatedly cites Rules 417, 420, 423, and 424 of IDAPA 04.11.01, Idaho Rules of Administrative Procedure of the Attorney General ("AG Rules"). But these rules do not apply to IDWR contested cases. The AG Rules expressly state that "every state agency will be considered to have adopted the procedural rules of this chapter <u>unless</u> the state agency by rule affirmatively declines to adopt this chapter, in whole or in part." IDAPA 04.11.01.001.02 (emphasis added). The Department has in fact affirmatively declined to adopt the portions of the AG Rules cited by the Boise Project. IDAPA 37.01.01.050 ("The Department and the Board through the promulgation of these rules decline in whole to adopt the contested case portion of the 'Idaho Rules of Administrative Procedure of the Attorney General,' cited as IDAPA 04.11.01.100 through 04.11.01.799.").

There also is no merit to the Boise Project's suggestion that Suez somehow improperly cooperated or coordinated with the Department during the contested case process. *See, e.g., BP Brief* at 45 n.9 ("Not coincidentally, Suez adopted the Department's expert as its own . . . .), 58 ("coordinated with Suez on the presentation of its evidence"). Such allegations are false. Concerning "the Department's expert," it is true that Suez identified Ms. Cresto as a potential witness that it might call at the hearing. A.R. 000752. But so did the Irrigators. A.R. 000735. And, concerning the Department's alleged "coordinat[ion] with Suez on the presentation of its evidence," the record clearly shows that it was the Irrigators who proposed that "the Department's presentation of evidence [at the hearing] should go first; that United Water, who is supporting the Department's position, should go second; and that we [the Irrigators] would go third . . . ." Tr. 8/14/15, p. 15, ll. 15-18. Suez, meanwhile, had suggested that the Department first present its witnesses and exhibits to explain the accounting system, then the Irrigators would present their evidence about their concerns over the accounting system, and then Suez would present third as a "kind of a combined case-in-chief and rebuttal" to the other parties' opening presentations. Tr. 8/14/15, p. 15, ll. 15-18. Try as they might, the Irrigators cannot show that the Contested Case was wrongly initiated, conducted, or decided.

Nor can the Irrigators show that the impairment of any substantial rights. More is required to show the impairment of substantial rights than to recite the words "due process." This Court has explained:

> Procedural due process requires that 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. This requirement is met when the defendant is provided with notice and an opportunity to be heard. The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement. 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.

Aberdeen-Springfield Canal Co. v. Peiper, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (Silak, J.). Here, even if a procedural error had occurred during the Contested Case process, there is no question that the Director "more than adequately" considered the Irrigators' arguments after providing them with ample notice and a meaningful opportunity to be heard. *Wildman Decision* at 19 (R. at 001070).

VIII. SUEZ SHOULD BE AWARDED COSTS AND ATTORNEY FEES, AND THE IRRIGATORS' REQUESTS SHOULD BE DENIED.

In addition to costs, Suez seeks attorney fees on these appeals and cross-appeals under Idaho Code § 12-117(1). To the extent Suez prevails on only a portion of the issues it has presented on appeal and cross-appeal, it seeks attorney fees for the portion of the case on which it prevailed under Idaho Code § 12-117(2). The Irrigators' request for attorney fees should be denied, and Suez should be awarded attorney fees because the positions taken by the Irrigators are without a reasonable basis in fact or law.

Prior to this Court's decision in *BW-17*, one might reasonably say that the central issues presented were ones of first impression. In *BW-17*, however, this Court emphasized "the Director's specialized expertise in certain matters of water law. *BW-17*, 157 Idaho at 394, 336 P.3d at 801. The Court concluded: "Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen method." *Id.* In conducting the Contested Case, the Director did exactly what this Court said he had a duty to do. With the benefit of the Court's guidance in *BW-17* and Director's careful and comprehensive exposition of the law and the facts in his *Spackman Order*, the Irrigators should have recognized that affirming an accounting system that has been in place

for decades was well within the Director's discretion.[65] *See*, *City of Blackfoot v. Spackman*, 162 Idaho 302, 310-11, 396 P.3d 1184, 1192-93 (2017) (Burdick, C.J.).

For reasons set out above, the Irrigators' procedural challenges to the Contested Case are also baseless and unreasonable.

CONCLUSION

Suez urges the Court to uphold IDWR's adherence to its longstanding accounting system, which limits on-stream storage right holders to one annual fill of their water rights based on the storable inflow principle. After paper fill of the Storage Rights, junior water rights come into priority and may not be cut off by the federal government for a second "fill" of the Storage Rights. The Irrigators are unlikely to suffer any shortfall, because the reservoirs may be topped off with excess water.

Refilling with excess water is a win-win practice. It avoids injury to juniors, while it benefits both the storage right holder (by allowing more water to be stored) and other water users (by increasing carryover and thereby reducing the storage of water in priority the following year).

The Irrigators agreed to a great deal when they signed on to the flood control regime facilitated by the construction of Lucky Peak. They should be held to their bargain, which will allow Idaho to continue to develop the greatest use of its water resources for Idahoans.

The Director's accounting under these principles is well within his discretion. Indeed, it is compelled by Idaho's prior appropriation doctrine and the constitutional mandate for maximum use.

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[65] It may be noted that the United States did not even join the Irrigators in these appeals, and it is the holder of the Storage Rights.

Respectfully submitted on August 1, 2017.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
Michael P. Lawrence

Attorneys for Intervenor-Petitioner / Respondent Cross Appellant Suez Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2017, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

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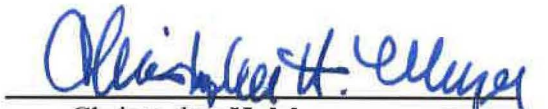

Christopher H. Meyer

ADDENDUM A: INDEX TO SELECTED DOCUMENTS IN RECORD

Date	Proceeding	Actor	Document	Record
10-22-2013 (signed) 10-24-2013 (served)	Contested Case	Director Spackman	Notice of Contested Case and Formal Proceedings, and Notice of Status Conference	A.R. 000002-34
10-23-2013	Contested Case	Director Spackman	Cover letter for Notice of Contested Case	A.R. 000001
10-24-2013	Basin-Wide 17	United Water	Brief to Idaho Supreme Court in Basin-Wide 17	O.N.D. \40974-40975-40976\20131024_Brief of Respondents UWI (40974 & 40975)\ at 140-210
10-15-2015	Contested Case	Director Spackman	Final Order	A.R. 1147-1229
10-20-2015	Contested Case	Director Spackman	Amended Final Order ("Spackman Order")	A.R. 1230-1311 R. 1262-1343 R. 1435-1516
11-19-2015	Contested Case	Director Spackman	Order Denying Petitions for Reconsideration	A.R. 1401-35
12-28-2016	District Court	Suez	Notice of Appearance	R. 52-54
9-1-2016	District Court	Judge Wildman	Memorandum Decision and Order ("Wildman Decision")	R. 1052-75 R. 1180-1203 R. 1225-48 R. 1362-85 R. 1398-1421
9-1-2016	District Court	Judge Wildman	Judgment	R. 1049-51 R. 1204-06 R. 1250-52 R. 1387-89 R. 1423-25
9-9-2016	District Court	IDWR/Director	Petition for Rehearing	R. 1076-79
9-22-2016	District Court	Suez	Petition for Rehearing	R. 1080-83
9-22-2016	District Court	Ditch Companies & Boise Project	Irrigation Entities' Petition for Rehearing	R. 1084-88
11-14-2016	District Court	Judge Wildman	Order Denying Rehearing ("Wildman Rehearing Denial")	R. 1161-67 R. 1207-13 R. 1254-60 R. 1354-60 R. 1427-33
12-6-2016	District Court	Ditch Companies	Ditch Companies' Notice of Appeal (No. 44677)	R. 1168-1213
12-23-2016	District Court	Boise Project	Notice of Appeal (No. 44745)	R. 1214-1343
12-23-2016	District Court	IDWR/Director	Notice of Appeal (No. 44746)	R. 1344-52
12-23-2016	District Court	Suez	Suez's Notice of Cross-Appeal (No. 44677)	R. 1390-1516
1-13-2017	District Court	Suez	Suez's Second Notice of Cross-Appeal (No. 44745)	R. 1517-23
1-24-2017	Idaho Supreme Court	Clerk Kenyon	Order Consolidating Appeal Nos. 44677, 44745 and 44746 for Record and Transcripts Only	R. 1524-27