

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.

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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,

vs.

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

Petitioners-Respondents,

vs.

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

Respondents-Appellants,

and

Supreme Court Docket No. 44746-2017

Ada County District Court No. CVWA-2015-  
21376 (Consolidated Ada County No.  
CVWA-2015-21391)

**IDWR APPELLANTS' BRIEF**

SUEZ WATER IDAHO, INC.,

Intervenor-Respondent.

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**IDWR APPELLANTS' BRIEF**

Appeal from the District Court of the Fourth Judicial District for Ada County  
Honorable Eric J. Wildman, Presiding

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
I. STATEMENT OF THE CASE .....	1
A. NATURE OF THE CASE .....	1
B. PROCEDURAL BACKGROUND .....	5
C. STATEMENT OF FACTS .....	7
1. The Federal Reservoirs.....	7
2. The Decreed Storage Rights.....	9
3. Federal Flood Control Operations.....	12
4. The Water District 63 Accounting System. ....	18
5. The Accrual Methodology. ....	22
6. The Unaccounted for Storage Methodology and the “Day of Allocation.” .....	23
7. “Unaccounted for Storage” Is a Measure of Excess Natural Flow Rather Than a “Distribution” of Water.....	26
II. ISSUES ON APPEAL .....	30
III. ARGUMENT .....	32
A. SUMMARY OF ARGUMENT .....	32
B. STANDARD OF REVIEW .....	35
C. THIS CASE PRESENTS A QUESTION OF PRIORITY ADMINISTRATION THAT IS STATUTORILY COMMITTED TO THE DIRECTOR. ....	36
D. THE DIRECTOR FOUND THAT THE WATER DISTRICT 63 ACCOUNTING SYSTEM RESOLVES THE PRIORITY ADMINISTRATION CONUNDRUM AND DILEMMA THAT FEDERAL FLOOD CONTROL OPERATIONS CREATE IN THE BOISE RIVER BASIN. ....	37
E. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE UNACCOUNTED FOR STORAGE METHODOLOGY IS CONTRARY TO LAW. ....	40
1. The Director Found That “Unaccounted for Storage” Is a Measure of Excess Water Physically Captured in the Reservoir System Rather Than a “Distribution” of Water.....	41
2. The Unaccounted for Storage Methodology Allows the BOR to Replace “Priority Water” the Corps Releases for Flood Control Purposes With Excess Water Captured During Flood Control “Refill” Operations. ....	44
3. The District Court’s Conclusion That Idaho Code § 42-201(2) Prohibits Ancillary Use of Excess Water in Water District 63 Is Contrary to the Doctrine of Maximum Beneficial Use. ....	47
4. The District Court’s Interpretation of Idaho Code § 42-201(2) Assumes That Idaho Law Allows for Unquantified Water Rights to All “Excess” Flows. ....	50
5. The District Court’s Interpretation of Idaho Code § 42-201(2) Would Make Federal Flood Control Release Decisions the Basis for Distributing Water in Water District 63.....	52
F. THE DIRECTOR’S ACCOUNTING ORDER DID NOT PREJUDICE THE LATE CLAIMS PENDING IN THE SRBA. ....	55

1. The Director Lacks Authority to Make Determinations of the Nature and Extent of the Unproven Late Claims Pending in the SRBA. ....	55
2. The Director May Not Make Priority Distributions to the Unproven Late Claims Pending in the SRBA. ....	56
3. The Irrigation Organizations Have Never Been Injured by the Water District 63 Accounting System. ....	56
4. The Question of Whether the Late Claims Have Been Proven Was Not Before the Director in This Proceeding. ....	59
G. THE DISTRICT COURT ERRED BY SETTING ASIDE AND REMANDING IN PART. ....	59
IV. CONCLUSION.....	60

## TABLE OF AUTHORITIES

### Cases

<i>A&amp;B Irr. Dist. v. ICL</i> , 131 Idaho 411, 416, 958 P.2d 568, 573 (1997) .....	passim
<i>AFRD2 v. IDWR</i> , 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) .....	38
<i>Almo Water Co. v. Darrington</i> , 95 Idaho 16, 21, 501 P.2d 700, 705 (1972) .....	42, 56
<i>Bray v. Pioneer Irr. Dist.</i> , 144 Idaho 116, 118, 157 P.3d 610, 612 (2007) .....	55, 60
<i>IGWA v. IDWR</i> , 160 Idaho 119, 129, 369 P.3d 897, 907 (2016).....	passim
<i>In re SRBA, Case No. 39576, Subcase No. 00-91017</i> , 157 Idaho 385, 394, 336 P.3d 792, 801 (2014).....	passim
<i>Kerner v. Johnson</i> , 99 Idaho 433, 438, 583 P.2d 360, 365 (1978).....	3
<i>Lee v. Hanford</i> , 21 Idaho 327, 332, 121 P. 558, 560 (1912) .....	52, 54
<i>N. Snake Ground Water Dist. v. IDWR</i> , 160 Idaho 518, 522, 376 P.3d 722, 726 (2016) .....	35, 40
<i>Nelson v. Big Lost River Irr. Dist.</i> , 148 Idaho 157, 159, 219 P.3d 804, 806 (2009) .....	18, 42, 58
<i>Nettleton v. Higginson</i> , 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) .....	passim
<i>State v. ICL</i> , 131 Idaho at 333, 334, 955 P.2d at 1112, 1113 (1998).....	4, 34, 47
<i>Stickney v. Hanrahan</i> , 7 Idaho 424, 435, 63 P. 189, 192 (1900).....	49
<i>United States v. Pioneer Irr. Dist.</i> , 144 Idaho 106, 115, 157 P.3d 600, 609 (2007) .....	9, 42
<i>Van Camp v. Emery</i> 13 Idaho 202, 208, 89 P. 752, 754 (1907) .....	52
<i>Village of Peck v. Dennison</i> , 92 Idaho 747, 750, 450 P.2d 310, 313 (1970).....	51
<i>Wilder Irrigation Dist. Bd. of Dirs. v. Jorgensen</i> , 64 Idaho 538, 548, 136 P.2d 461, 465 (1943).....	46

### Statutes

33 U.S.C. § 701a-1 .....	8
43 U.S.C. § 383.....	8
Idaho Code § 42-101 .....	49
Idaho Code § 42-1411(2).....	10
Idaho Code § 42-1411(2)(c) .....	9
Idaho Code § 42-1412(6).....	10
Idaho Code § 42-201 .....	30
Idaho Code § 42-201(2).....	passim
Idaho Code § 42-203A(5).....	58
Idaho Code § 42-602 .....	18, 32, 38
Idaho Code § 42-607 .....	56
Idaho Code § 42-801 .....	18
Idaho Code § 67-5279(3) .....	35, 40

### Rules

IRE 201(d) .....	11
IRE 201(f).....	11

### Treatises

Mark Fiege, <i>IRRIGATED EDEN: THE MAKING OF AN AGRICULTURAL LANDSCAPE IN THE AMERICAN WEST</i> (1999, Univ. of Wash. Press) at 100, 101 .....	42
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### Constitutional Provisions

Idaho Const. Art. XV § 3.....	58
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## I. STATEMENT OF THE CASE

### A. NATURE OF THE CASE.

This is an appeal from a judicial review proceeding initiated by the “Ditch Companies,”<sup>1</sup> the Boise Project Board of Control, and New York Irrigation District (collectively, “Irrigation Organizations”). The Irrigation Organizations petitioned the District Court for review of the *Amended Final Order* (“*Final Order*”) issued by the Director of the Idaho Department of Water Resources (“Department”) on October 20, 2015. The *Final Order* addresses how the Director “distribut[es] water to federal on-stream reservoirs in Water District 63.” R. 001053.<sup>2</sup> The District Court affirmed the *Final Order* in part and set aside and remanded in part. R. 001074. The Director and the Department request that this Court affirm the *Final Order* in full because the District Court substituted its own factual findings for those of the Director and erred as a matter of law in holding that the capture and use of excess water is contrary to Idaho law. If not corrected, the District Court’s errors will cede state control of the use, distribution, and development of Idaho’s water resources to the federal government.

Like many water disputes, this case is complex because while prior appropriation principles are easily articulated in the abstract, applying those principles in a large water district that has three on-stream federal reservoirs and a highly variable water supply is not a simple

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<sup>1</sup> The “Ditch Companies” are: Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers’ Co-Operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & 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.

<sup>2</sup> Citations to the record in this brief will use the following formats: “R.” and “A.R.” for the District Court and Agency records, respectively, followed by bates numbers; transcripts are cited as “Tr.” followed by the date of the hearing, and the page and line numbers; exhibits in the Agency Record are cited as “Ex.” followed by the exhibit number and bates number; “Officially Noticed Documents” in the Agency Record are cited as “Off’l. Not.” followed by the folder and document names, and the bates number.

task.<sup>3</sup> Unlike typical water disputes, however, this appeal does not implicate or involve the allocation of water in times of shortage. Rather, it is concerned with exactly the opposite question: how to allocate water when there is too much rather than too little—when the risk is flooding rather than scarcity. See A.R. 001304 (“By definition, the need for flood control exists when there is too much water.”) (underlining in original).

In flood years, the federal reservoirs on the Boise River<sup>4</sup> are operated for two conflicting purposes: flood control and irrigation storage.<sup>5</sup> Flood control requires emptying the reservoirs to prevent flooding, while irrigation storage requires filling the reservoirs to provide a supply of stored water. This creates an administrative dilemma for the Director because the state water rights for the reservoirs do not authorize storing or releasing water for flood control purposes.

Resolving the problems created by federal flood control operations at the Boise River reservoirs is a question of administration. The question is how to administer the water supply when it is artificially regulated and water is released rather than stored at the discretion of the United States Army Corps of Engineers (“Corps”). This question is statutorily committed to the Director, and in resolving it he must distribute water in priority while also ensuring the maximum beneficial use and least waste of the resource. See In re SRBA, Case No. 39576, Subcase No. 00-91017, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) (“*BWI-17*”) (“as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director”). Resolving this administrative question requires application of the Director’s specialized technical expertise. See *id.* (“[T]he state engineer is the

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<sup>3</sup> See A.R. 001266 (“An on-stream reservoir alters the stream affecting the administration of all rights on the source. Accordingly, some methodology is required to implement priority administration of affected rights.”) (quoting In re SRBA, Case No. 39576, Subcase No. 00-91017, 157 Idaho 385, 388, 336 P.3d 792, 795 (2014)).

<sup>4</sup> Water District 63 is coextensive with the Boise River basin.

<sup>5</sup> See A.R. 001242 (“Flood control use directly conflicts with all of the other system uses to some degree.”) (quoting *Water Control Manual for Boise River Reservoirs*).

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 . . . .”) (citation omitted).

The Director made extensive and detailed factual findings regarding federal flood control operations, the Water District 63 accounting system, and historic practices of administering water rights and allocating stored water to Placeholder<sup>6</sup> storage accounts. The Director concluded on the basis of these findings that the Water District 63 accounting system distributes water in accordance with Idaho’s prior appropriation doctrine while also accommodating the Corps’ flood control operations and the contractual storage allocation practices of the United States Bureau of Reclamation (“BOR”). Equally important, the Director found that the Water District 63 accounting system does not allow federal flood control practices to dictate or interfere with the use, distribution, and development of Idaho’s water resources under the prior appropriation doctrine. The Director also concluded the Water District 63 accounting system has never caused injury to the Placeholder and is consistent with historic practices of administration in the Boise River Basin.

Contrary to the Director’s factual findings, the District Court found that the Water District 63 accounting system consists of two separate systems of “distributing” water: one based on water rights, and one based on “historic practices.” R. 001057-58. The District Court upheld the first (hereinafter, the “Accrual Methodology”), but set aside the second (the “Unaccounted for Storage Methodology”) as contrary to law. While the District Court’s understanding of the

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<sup>6</sup> “Placeholder” are the water delivery entities that have contracts with the federal government for “water storage space in the reservoir in return for the repayment of a proportional share of the construction costs.” *Kerner v. Johnson*, 99 Idaho 433, 438, 583 P.2d 360, 365 (1978); *see also* A.R. 001237 (“irrigation organizations that have contracted for storage in the reservoir system”).

Accrual Methodology is consistent with the Director's findings,<sup>7</sup> the District Court's characterization of the purpose and operation of the Unaccounted for Storage Methodology conflicts with the Director's factual findings and the substantial evidence upon which the Director relied. Rather than "distributing" water, the Director found that in high water years the Unaccounted for Storage Methodology allows the Corps to capture and retain in the reservoirs excess flood water not needed by any water right on the system and, after flood control operations end, allows the BOR to use the excess water—the "unaccounted for storage"—as a replacement for "priority water"<sup>8</sup> released by the Corps earlier in the year for flood control purposes.

The District Court erred in transforming the administrative question of the Unaccounted for Storage Methodology (which is statutorily committed to the Director) into a water rights question to be resolved in the first instance by the courts. The District Court did this by disregarding the Director's findings and substituting its own unsupported findings as to the purpose, structure, and operation of the Unaccounted for Storage Methodology. Consequently, the Unaccounted for Storage Methodology the District Court rejected was *not* the methodology the Director described, but rather an entirely different methodology of its own creation.

The District Court then erred as a matter of law by concluding that Idaho Code § 42-201(2) prohibits the Director from allowing the ancillary use of excess water, when it happens to be available, by those already holding water rights. *See State v. ICL*, 131 Idaho at 333, 334, 955 P.2d at 1112, 1113 (1998) (approving a historical practice of using excess water "even though there is no water right in the 'excess' water itself."). The District Court's interpretation of Idaho

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<sup>7</sup> The Department uses a computerized accounting system in distributing water in Water District 63, and the Accrual Methodology is largely defined by algorithms coded into the computer program. A.R. 001258-70. The Accrual Methodology is the subject of the Irrigation Organizations' appeals (case nos. 44677 and 44746).

<sup>8</sup> R. 001056-57 ("The distribution of priority water to these reservoirs occurs pursuant to water rights.")

Code § 42-201(2) conflicts with “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” IGWA v. IDWR, 160 Idaho 119, 129, 369 P.3d 897, 907 (2016). If not corrected, the District Court’s decision would impermissibly allow a priority to attach to all excess flood waters in the Boise River Basin in favor of the BOR, year in and year out, regardless of how much stored water the BOR’s Spaceholders actually need or apply to beneficial use. See A&B Irr. Dist. v. ICL, 131 Idaho 411, 416, 958 P.2d 568, 573 (1997) (“there cannot be a prior relation to excess water”). The District Court’s rejection of the Unaccounted for Storage Methodology, if not corrected, would subordinate Idaho’s prior appropriation doctrine to flood control decisions made by the Corps and the BOR.

The Unaccounted for Storage Methodology allows excess flood water to be captured and beneficially used or carried over in the reservoirs, but assigns to the reservoir system operator—the United States—the risk of a failure to physically fill the reservoir system as a result of flood control releases, A.R. 001247, 001279, 001303, consistent with the longstanding practice in Water District 63 and other basins. A.R. 001262. It is a common-sense approach to addressing a problem that only arises in high water years when the Corps releases “priority water” to prevent flooding later in the season, and promotes the maximum beneficial use and least waste of Idaho’s water. It preserves state sovereignty over the distribution, use, and development of Idaho’s water, A.R. 001291-93, 001279, 001291-93, 001301-02, 001307, 001416, 001423, while accommodating federal flood control operations. For these reasons, the Director and the Department request that this Court affirm the *Final Order*.

## **B. PROCEDURAL BACKGROUND**

The Director initiated the contested case underlying this appeal in October 2013, to address “concerns with and/or objections to how water is counted or credited toward the fill of

water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in water district 63.” R. 001053; A.R. 000007.<sup>9</sup> These accounting procedures had become an issue in “Basin-Wide Issue 17,” a Snake River Basin Adjudication (“SRBA”) proceeding commenced at the request of the Irrigation Organizations and several other irrigation entities to address whether “Idaho law require[s] a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control.” BWI-17, 157 Idaho at 387, 336 P.3d at 795.

The Director initiated the contested case after the SRBA District Court issued its Basin-Wide Issue 17 decision, because the BOR and the Irrigation Organizations “continued to express concerns with and objections to existing accounting methods and procedures in Water District 63.” A.R. 001232; see also A.R. 001263 (“The Water District 63 accounting programs became a subject of dispute in the 2012 proceedings that led to *Basin-Wide Issue 17*. . . which in turn led to this proceeding.”). At the request of the Irrigation Organizations and other parties, the Director stayed the contested case pending the appeals of the District Court’s decision in Basin-Wide Issue 17 to this Court. A.R. 001232. The Director lifted the stay after this Court held that the decision of “[w]hich accounting method to employ” in determining when a storage water right is satisfied is “within the Director’s discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.” BWI-17, 157 Idaho at 394, 336 P.3d at 801.

The contested case lasted more than two years, and included extensive discovery, pre-hearing motions, a five-day hearing, and post-hearing briefs. A.R. 000001-1435. The Irrigation Organizations asserted throughout the contested case that the BOR’s decreed storage rights must be administered as being “in priority” until flood control “refill” operations have concluded.

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<sup>9</sup> The District Court’s *Memorandum Decision and Order* incorrectly states that the contested case was initiated in 2014. R. 001053.

A.R. 001306, 001413, 001416, 001423. The Director issued the *Final Order* on October 20, 2015, and an *Order Denying Petitions for Reconsideration* on November 19, 2015. A.R. 001230; A.R. 001401. The Director found that the Water District 63 accounting system distributes water in priority on the basis of the BOR's decreed storage rights rather than flood control operations, and ordered the current method of accounting for the satisfaction or "fill" of the BOR's decreed storage rights to remain in place. A.R. 001308.

The Irrigation Organizations filed petitions for judicial review of the *Final Order* in Ada County District Court on December 17, 2015. R. 001054. The petitions were reassigned to the SRBA District Court and consolidated on December 30, 2015. R. 000056. The District Court issued a *Memorandum Decision and Order* on September 1, 2016 that affirmed the *Final Order* in part, and set aside and remanded in part. R. 001052, 001074. The Department, the Irrigation Organizations, and Suez Water Idaho, Inc. ("Suez") filed petitions for rehearing on various aspects of the District Court's decision, R. 001076, 001080, 001084, which the District Court denied in its *Order Denying Rehearing*. R. 001161. The Irrigation Organizations filed appeals to which Suez filed cross-appeals, and the Department filed this separate appeal. R. 001168, 001214, 001344, 001390, 001517.

## **C. STATEMENT OF FACTS**

### **1. The Federal Reservoirs.**

There are three federal reservoir projects on the Boise River: Arrowrock, Anderson Ranch, and Lucky Peak. R. 001055-56; A.R. 001236-38. Arrowrock was completed in 1915 and is located on the main stem of the Boise River. *Id.* Anderson Ranch was completed in 1950 and is located on the South Fork of the Boise River, upstream of Arrowrock. *Id.* Lucky Peak was completed in 1955 and is located on the main stem immediately downstream from Arrowrock. *Id.*

The Arrowrock and Anderson Ranch projects were authorized under federal reclamation law exclusively or primarily for irrigation storage purposes, and are operated by the BOR. R. 001055; A.R. 001237-38; Ex. 2053 at 001636-37, 001641-42. The Lucky Peak project, in contrast, was authorized under the 1946 Flood Control Act as a flood control project to be operated by the Corps. R. 001055-56; A.R. 001238; Ex. 2053 at 001642; *see also* Ex. 2096 at 002137, 002146 (“Flood Control Act of 1946”). While the Corps and the BOR coordinate the operations of their respective reservoirs, A.R. 001238-49, the Corps and the BOR have very different responsibilities. *See* A.R. 001241 (referring to the “division of federal responsibilities” between the Corps and the BOR, and “the BOR’s goal of assuring maximum reservoir refill” versus “the Corps’ goal of more adequate flood control”).

The BOR’s primary mission is to facilitate irrigation. The BOR “is responsible for ‘meet[ing] the reservoirs’ storage contract obligations . . . and ensur[ing] that downstream demand water is supplied in a usable manner.” A. R. 001241 (quoting *Water Control Manual for Boise River Reservoirs*) (brackets and ellipsis in Director’s order). The BOR holds the state water rights and the Placeholder storage contracts for all of the reservoirs, including Lucky Peak. A.R. 001235; Ex. 2015. The BOR is required by Section 8 of the 1902 Reclamation Act to conform to state laws “relating to the control, appropriation, use, or distribution of water used in irrigation.” 43 U.S.C. § 383.

The Corps’ primary mission, in contrast, is flood control. *See, e.g.,* 33 U.S.C. § 701a-1 (“Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the Department of the Army under the direction of the Secretary of the Army and supervision of the Chief of Engineers”). The Corps “‘is responsible for using storage space within the system for flood control to protect downstream life and property.’” A.R. 001241 (quoting *Water Control Manual*

for Boise River Reservoirs). The Corps does not hold water rights for any of its reservoirs in Idaho, and Congress has not expressly made the Corps' flood control operations subject to the 1902 Reclamation Act's requirement of conforming with state water law.

## 2. The Decreed Storage Rights.

Multiple water right claims were filed in the SRBA for Arrowrock, Anderson Ranch, and Lucky Peak. Four license-based claims were decreed in 2007, 2008, and 2009 in the name of the United States acting through the BOR (the "Decreed Storage Rights"). The Decreed Storage Rights include this Court's *Pioneer* remark, which states that "title to the use of the water is held by the consumers or users of the water." R. 001056; A.R. 001234-36; Ex. 2015; *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). The priorities, quantities, and purposes and periods of use of the reservoir water rights were decreed as follows:

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

The "quantity" elements of the *Partial Decrees* are defined as annual volumes (acre-feet per year, or "AFY") that are not limited by a diversion rate (cubic feet per second, or "CFS"). R. 001060-61; A.R. 001235-36; see also Idaho Code § 42-1411(2)(c) ("storage in acre-feet per

year”). This allows the on-stream reservoirs to store their full volumes as quickly as possible when flows are high, thereby minimizing conflict between storage operations and junior water rights. [R. 001064-65](#); [000676](#), [000699-700](#); [A.R. 001266](#), [001288](#), [001295](#), [001422-23](#). But it also means that no water is legally available for diversion under junior water rights until the Decreed Storage Rights are satisfied. *Id.*<sup>10</sup> The determination of *when* the Decreed Storage Rights are satisfied each year is therefore key to priority administration in Water District 63. It was the core administrative question in the contested case before the Director: When is the quantity of each water right satisfied?

In addition to the standard elements of a water right decreed in the SRBA, [Idaho Code §§ 42-1411\(2\)](#), [42-1412\(6\)](#), the four *Partial Decrees* contain two references to federal flood control operations. [A.R. 001235-36](#). The *Partial Decree* for the Lucky Peak water right includes a remark stating “[t]he storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation.” [A.R. 001235-36](#); [Ex. 2015 at 000723](#).<sup>11</sup> This provision memorializes the BOR’s 1954 “Guarantee” to Arrowrock and Anderson Ranch Spaceholders that if the reservoir system fails to refill as a result of flood control operations, Lucky Peak storage would be used to replace any flood control

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<sup>10</sup> In this respect the Decreed Storage Rights differ significantly from water rights for direct diversion to immediate use, which are quantified in terms of a diversion rate expressed in CFS. Even when a senior direct diversion water right is diverting its full decreed quantity, there is often sufficient flow in the river for juniors to also divert under the priorities of their decreed water rights. This is never the case as long as the Decreed Storage Rights remain “in priority” because they are not limited by diversion rates.

<sup>11</sup> This flood control remark was decreed by the SRBA District Court in the subcase addressing the United States’ Lucky Peak water right claim. [Memorandum Decision on Order for Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, Subcase No. 63-3618 \(Lucky Peak Reservoir\) \(Sep. 23, 2008\) \(“Lucky Peak Decision”\)](#) at 33-36 ([Off’l Not.\63-3618\20080923\\_Memorandum Decision and Order on Cross-Mtn for SJ at 001564-67](#)). The Water District 63 accounting system was also at issue in the Lucky Peak subcase. [A.R. 001262-63](#); *see also* [A.R. 001238-40](#), [001247](#), [001251 n.22](#), [001262-63](#), [001292](#), [001294](#) (citing or discussing the *Lucky Peak Decision*). A copy of the *Lucky Peak Decision* is in the Agency Record at [Off’l Not.\63-3618\20080923\\_Memorandum Decision and Order on Cross-Mtn for SJ](#).

releases from their reservoirs. A.R. 001240. The *Partial Decree* for one of the two Arrowrock water rights<sup>12</sup> includes a remark authorizing the BOR to “temporarily store water” in the reservoir’s “surcharge” capacity “during flood events or emergency operations.” A.R. 001236; Ex. 2015 at 000718.

These remarks constitute the only references in the Decreed Storage Rights to any of the various documents that the Irrigation Organizations collectively termed the “reservoir operating plan.” R. 001170; A.R. 001301. For instance, the Decreed Storage Rights do not reference the 1953 *Memorandum of Agreement Between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs*, the Corps’ 1956 *Reservoir Regulation Manual for Boise River Reservoirs*, the Corps’ 1985 *Water Control Manual for Boise River Reservoirs*, or the 1985 *Memorandum of Understanding for Confirmation, Ratification, and Adoption of Water Control Manual for Boise River Reservoirs* between the Corps and the BOR. R. 001063; Ex. 2015.

No water rights authorizing “flood control” or “refill” have been licensed or decreed for the reservoirs, although in 1983 the United States did file a statutory beneficial use-based claim for “refill or second fill” of Arrowrock Reservoir with the Department, pursuant to Idaho Code § 42-243. A.R. 001255; see also Off’l Not.\63-5262\19830630 63-5262 Claim to a Water Right at 000003 (“Remarks: Claim is for . . . refill or second fill of reservoir capacity”). The SRBA claim based on this statutory beneficial-use claim (no. 63-5262) was disallowed in 2003. Off’l Not.\63-5262\20030424 63-5262 Final Order Disallowing WR Claims at 000009.<sup>13</sup> Not until

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<sup>12</sup> Arrowrock has two water rights because the dam was raised five feet in the mid-1930s. A.R. 001237.

<sup>13</sup> In 2006, the United States filed amended SRBA claims for American Falls and Palisades reservoirs that sought priority “refill” remarks. *See BWI-17, 157 Idaho at 388, 336 P.3d at 795* (“This water right includes the right to refill under the priority date of this water right to satisfy the United States’ storage contracts”). Copies of the 2006 “refill” claims for American Falls and Palisades are attached as Addendum A. The Department moves the Court to take judicial notice of these amended claims filed in the SRBA pursuant to IRE 201(d). “Judicial notice may be taken at any stage of the proceeding.” IRE 201(f). While the United States’ SRBA claims for the Boise River

**IDWR APPELLANTS’ BRIEF – Page 11**

Basin-Wide Issue 17 arose did the United States and the Boise Project Board of Control file “motions to file late claims for separate beneficial use rights to address refill” for all three reservoirs. Off’l Not.\BWI-17\91017\20130320 Memorandum Decision at 001419 n.7. These “refill” late claims remain pending in the SRBA. R. 001056.

### **3. Federal Flood Control Operations.**

#### **A. Flood Control Agreements.**

The Corps and the BOR have for many years coordinated their operations so that all three reservoirs are used for *both* flood control and irrigation storage. A.R. 001238-49; see also Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ (“Lucky Peak Decision”) at 001535-37, 001543-44. This creates problems because flood control objectives often conflict with irrigation storage objectives. As stated by the Corps in its 1985 *Water Control Manual for Boise River Reservoirs*:

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

A.R. 001242 (quoting *Water Control Manual for Boise River Reservoirs*); see also R. 001057 (“operation of the dams for purposes such as flood control may conflict with the reservoir water rights”); R. 001063 n.9 (referring to “the apparent conflict” between storage water right administration and flood control operations).

Arrowrock and Anderson Ranch Spaceholders nonetheless consented to flood control operations at their reservoirs, on two conditions: (1) a “Guarantee” that water stored in Lucky Peak would be used to replace any flood control losses from Arrowrock and Anderson Ranch,

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reservoirs also were pending at that same time, the United States did not file amended claims for priority “refill” of the Boise River reservoirs.

A.R. 001239-40; Lucky Peak Decision at 6-7, and (2) a re-allocation of project repayment and O&M costs so that Arrowrock and Anderson Ranch Spaceholders would not bear the financial burden of flood control operations. A.R. 001273 n.42; Ex. 2071 at 001931, 001944; Ex. 2100 at 002171, 002183-84; Ex. 2190 at 003963; Ex. 2101 at 000508.<sup>14</sup> When the BOR subsequently made Lucky Peak storage available to Spaceholders, the contracts provided that Lucky Peak storage was “subject to such operation for flood control,” recognized that the Corps would release water “as required for flood control,” and provided that “such discharged water shall be deducted from any stored water held to the credit of the Contractor.” Ex. 2112 at 002310-11; *see also* A.R. 001238 (“the 71,017 acre-feet of Lucky Peak storage contracted for irrigation use is ‘[s]ubject to operations for flood control’”) (citation omitted) 001257, 001268, 001273, 001276 (referring to reductions in Lucky Peak storage allocations due to flood control operations).<sup>15</sup> The “Guarantee” to use Lucky Peak storage to protect Arrowrock and Anderson Ranch Spaceholders from flood control releases was decreed as a “remark” in the Lucky Peak water right in 2008. A.R. 001235-36; Ex. 2015 at 000723; Lucky Peak Decision at 33-36.

B. Flood Control Operations.

The Corps achieves its flood control objectives by filling and vacating reservoir space according to runoff forecasts and flood storage allocation diagrams known as “rule curves.” A.R. 001239. The Corps uses the “rule curves” to determine how much reservoir system space should be reserved to control the forecasted runoff. A.R. 001243-45, 001249. Flood control operations start at the end of the irrigation season, when “the Corps assumes ‘final authority’ to order releases from the three reservoirs for flood control purposes,” and “continue until the

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<sup>14</sup> Spaceholders are not required to reimburse the federal government for project construction costs and O&M charges allocated to flood control operations. Flood control costs and charges are born by all taxpayers.

<sup>15</sup> The flood control provisions of the original Lucky Peak “water service” contracts were retained when they were converted to Spaceholder contracts in 2005. Ex. 2190 at 003990-91; Lucky Peak Decision at 13-14.

Corps determines there is no longer a risk of exceeding the flood control objective downstream from Lucky Peak.” A.R. 001243.<sup>16</sup> This does not happen until the end of the flood control “refill” period. A.R. 001245.

In high water years, the Corps releases water for flood control purposes throughout the flood control season. R. 001061-62; A.R. 001243-47. Flood control releases take two different forms: “evacuations” and “bypasses.” A.R. 001243. The difference between the two types of releases is that “evacuations” result in a decrease in the overall storage content of the system, while “bypasses” do not. *Id.*

In winter and spring of high water years, the Corps typically releases more water than is flowing into the reservoir system, i.e., reservoir space is “evacuated.” A.R. 001244-45, 001248-49. The evacuated reservoir space is reserved “to control floodwaters” that have been forecasted by the Corps and the BOR. A.R. 001242 (quoting *Water Control Manual for Boise River Reservoirs*). Later in the season, the Corps gradually “shifts” its Lucky Peak releases from “evacuations” to “bypasses,” and as a result the reservoir system gradually “refills,” but only when and at the rate the Corps deems permissible in light of the remaining snowpack, weather forecasts, runoff predictions, and the “rule curves.” A.R. 001245.

“Refill,” in other words, is a flood control operation conducted by the Corps. “Refill” is the last of the three “somewhat overlapping” sequential periods that together define the flood control season, A.R. 001244-45, and “is ‘normally the most difficult and critical of the three flood control periods.’” A.R. 001245 (quoting *Water Control Manual for Boise River Reservoirs*). The “refill” period is as much a part of the Corps’ flood control operations as the

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<sup>16</sup> The “flood control objective downstream from Lucky Peak,” A.R. 001243, is to prevent flows at the Glenwood Bridge from exceeding 6,500 CFS. A.R. 001239, 001244, 001245; Ex. 2005 at 000418. Lucky Peak Dam is “the control point for managing overall reservoir system content.” A.R. 001292. Releases from the two upstream BOR reservoirs can change the distribution of stored water within the reservoir system, but cannot reduce the overall volume of stored water. A.R. 001429-30.

“evacuation” period that occurs earlier in the season. A.R. 001243-45, 001407 & n.4. The difference is that while “evacuation” operations involve releasing more water from Lucky Peak than is flowing into the reservoir system in anticipation of the flood, “refill” operations involve releasing less water from Lucky Peak than is flowing into the system (i.e., “bypasses”); hence the reservoir system slowly “refills.” A.R. 001244-45. In both cases, however, the Corps’ flood control release decisions determine when and how much water will be physically stored in the reservoir system.

Thus, “refill” occurs only when and to the extent the Corps deems permissible in light of the flood risk. As the Director found: “The uncontroverted evidence establishes that, from April 1 until the end of flood control operations, the Corps controls the amount of water released from the reservoirs pursuant to the Water Control Manual’s Refill Requirements. During this period, the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent.” A.R. 001306.

“At the end of flood control operations, the Corps turns operational control over to the BOR,” A.R. 001243, and the BOR allocates all of the water in the reservoir system to Spaceholder storage accounts according to the Spaceholders’ contracts. A.R. 001247-48, 001260-61, 001263, 001267-68, 001276. The day this occurs is referred to as the “day of allocation.” A.R. 001248. In effect, on the “day of allocation”, the BOR replaces “priority water” the Corps may have released earlier for flood control purposes with excess flood water the Corps captures during flood control “refill” operations. *See* A.R. 001296 (“the coordinated reservoir system operating plan has always contemplated that in flood control years, some of the water stored for irrigation purposes may be released for flood control purposes during the period from the late fall to the early summer, and the lost storage would be replaced with water captured during the flood runoff”); R. 001163 (“Historically, the United States has been refilling the

reservoirs . . . to compensate for obligatory flood control releases.”). After the irrigation season ends, “flood control operations begin again” and the Corps resumes control of releasing water from the reservoir system. A.R. 001243.

In non-flood years, water need not be released for flood control purposes. R. 001062 n.8. Consequently there are no “refill” operations in non-flood years. “Refill” is an issue only when runoff forecast is so high that the Corps deems it necessary to release water rather than store it to prevent or minimize flooding later in the year. No one has challenged how the Water District 63 accounting system works in “non-flood control years.” A.R. 001277.

C. Flood Control Operations vs. Priority Administration.

In high water years, federal flood control operations create a priority administration “conundrum,” R. 001164-65, or “dilemma.” A.R. 001261 n.32, 001291. This problem arises from the fact that during flood control operations, the Corps stores and releases water on an unpredictable “pick and choose” or “wait and see” basis. R. 001062-63 & n.9. These operational decisions are out of the Director’s control. *See* R. 001060 (“it is the federal government that decides how to store and release that water”); *id.* at 001062 (“Only the federal government has authority to operate the dams.”). In storing and releasing water, the Corps ignores the priorities of the Decreed Storage Rights, A.R. 001246, 001265, 001295, and assumes that the only water available for use by water rights holders is the water the Corps chooses to release for flood control purposes. R. 001164-65.

The District Court recognized that making priority administration of water rights dependent on this system of flood control operations would be impracticable and contrary to Idaho’s prior appropriation doctrine. *See* R. 001062 (“aside from being contrary to the prior appropriation doctrine and decrees, this would cripple the Director’s ability to effectively distribute water under our system of water rights administration.”). As the District Court asked,

“[h]ow is the Director to distribute and administer to other water rights on the system in the interim” if the satisfaction of the Decreed Storage Rights is determined by the Corps’ flood control decisions? *Id.* The District Court also answered this question: “Effectively, he cannot, and the system of priority water right administration breaks down.” *Id.*

The District Court also recognized that making priority administration subject to or dependent on the Corps’ flood control decisions “would effectively transfer water right distribution in the basin from the Director to the federal government.” R. 001062. “The Director would be unable to deem the reservoir water rights satisfied and/or distribute water to junior users until the federal government says he can.” *Id.* This would also have the effect of putting the federal government in a position to dictate or control future development of the water resources of the Boise River Basin, as the Director recognized. *See* A.R. 001279 (“Under such a system, however, the priorities of the BOR’s reservoir water rights could be exercised or asserted to block, condition, and/or control future use and development of excess flood water.”).

The Department has allowed the storage of excess flood water during “refill” operations, and its subsequent allocation to Spaceholders, because this does not interfere with any water rights, maximizes beneficial use of the resource, allows the BOR to substitute excess flood water for priority water previously released for flood control purposes, and accommodates federal flood control operations without allowing them to dictate or interfere with priority administration under Idaho law. A.R. 001261-62, 001267-69, 001270-71, 001273, 001276-77, 001291-93, 001295, 001304-06, 001307-08, 001421-22. The Water District 63 accounting system was adopted in 1986 and incorporated this common-sense solution to the flood control “conundrum.” R. 001164-65. This allows longstanding federal flood control and storage allocation practices to continue without permitting them to control the distribution and development of the state’s water resources. A.R. 001293, 001295, 001296, 001298, 001305.

#### **4. The Water District 63 Accounting System.**

The Idaho Code requires the Director to distribute the natural flow supply in Water District 63 among all appropriators in accordance with the priorities and quantities of their water rights, [Idaho Code § 42-602](#); [BWI-17](#), [157 Idaho at 393](#), [336 P.3d at 800](#), and to regulate diversions of stored water released from the federal reservoirs in accordance with federal contracts. [Idaho Code § 42-801](#); *see also Nelson v. Big Lost River Irr. Dist.*, [148 Idaho 157](#), [159, 219 P.3d 804, 806 \(2009\)](#) (citing Idaho Code § 42-801). The Water District 63 accounting system includes a set of computational tools developed to assist the Director in performing these duties. [A.R. 001264](#), [001236 n.35](#), [001411 n.7](#). The Water District 63 accounting system was adopted in 1986, and introduced year-round water accounting. [A.R. 001249](#), [001257](#), [001265-66](#), [001276](#), [001407-08](#), [001425 & n.16](#).

Prior to 1986, the storage water rights for the federal reservoirs in Water District 63 were rarely if ever administered “in priority,” because priority administration took place only during the “canal regulation” season. [A.R. 001249-50](#), [001257](#), [001404](#). The canal regulation season did not begin until irrigators with water rights senior in priority to the United States’ storage water rights began calling for water. [A.R. 001249-57](#), [001404](#). Flood control evacuation and “refill” operations had ended, and the reservoirs had reached “maximum storage,” before the canal regulation season even began. [A.R. 001250-52](#); [001275](#). On the day of “maximum storage,” the BOR allocated all of the water in the federal reservoir system to the Spaceholders’ storage accounts according to their contracts. [A.R. 001251-53](#); [A.R. 001257](#), [001275](#); [Exs. 2123, 2124, 2126, 2146](#).<sup>17</sup> This method of allocating water to Spaceholder storage accounts was

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<sup>17</sup> *See also* Off’l Not.IDWR Doc List-Attachment A: [16 19690806](#), [20 19700720](#), [23 19710716](#), [24 19710727](#), [26 19720713](#), [28 19730615](#), [49 19750721](#), [54 19760628](#), [64 19780714](#), [67 19790620](#) (BOR memoranda).

incorporated into the Water District 63 accounting system (i.e., the “day of allocation”) and remains in place today. A.R. 001248, 001260, 001267-68, 001271,001273-76, 001293.

While the Department began work on an accounting system for Water District 63 prior to 1986, the Department’s practice was not to implement accounting systems until requested by the water districts. A.R. 001258. In 1986, the new watermaster (a former Department employee) requested that the Department provide Water District 63 with a computerized accounting system similar to the system previously adopted in Water District 1 (the Snake River and its surface tributaries upstream from Milner Dam). *Id.*

In Water District 1, there are also several federal reservoirs operated for the conflicting purposes of flood control and irrigation storage. A.R. 001258 & n.29. The resulting priority administration “dilemma” had been resolved in Water District 1 by crediting “all available natural flow to the reservoirs according to priority of right” and then “allowing the reservoir to refill as long as there is water in excess of all other rights.” A.R. 001261 n. 32.<sup>18</sup> The “second fill” was “defined as unaccounted for storage” and “credited back to the reservoirs pursuant to the instructions of the storage right holder, i.e., the Bureau of Reclamation.” *Id.*

The same basic approach was adopted in the Water District 63 accounting system. A.R. 001258-71, 001425. The Water District 63 accounting system was designed to “track[] the amount of natural flow stored during the refill phase of a flood operation as ‘unaccounted for’ storage,” so that “[w]hen the accumulation of ‘unaccounted for’ storage ends, the flood operation is completed.” A.R. 001263 (citation omitted). Thus, “at the end of a flood operation, ideally the amount of ‘unaccounted for’ storage will be equal to the amount of storage

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<sup>18</sup> As former Director Stephen Allred explained in a 1979 Committee of Nine meeting: “Once a right has filled on paper, even if the water has been released and additional space is available, the priorities of the reservoirs are considered to be no longer in effect.” A.R. 001425 n.16. The Director also initiated a contested case regarding the accounting procedures in Water District 1 following the District Court’s decision in the Basin-Wide Issue 17 proceedings, A.R. 001232, but that matter was resolved through a settlement agreement. A.R. 001234 n.4.

released for flood control so that the amount of water physically stored in the reservoirs will be equal to the paper fill.” *Id.* (citation omitted). Then, through the operation of a “storage program” maintained by the Department, the BOR allocates all of the water in the reservoir system to Spaceholder storage accounts in accordance with the Spaceholders’ contracts. A.R. 001267-69, 001270. This allows the BOR to replace “priority water” previously released by the Corps for flood control purposes with excess flood water captured during the flood control “refill” period, without allowing the Corps’ flood control decisions to interfere with or dictate the distribution of water pursuant to Idaho’s prior appropriation doctrine. A.R. 001296.

The Water District 63 accounting system was implemented with the consent and cooperation of the BOR and the water users in Water District 63. A.R. 001258-59. The Department provided the watermaster, at his request, with a paper explaining the Accrual Methodology and the Unaccounted for Storage Methodology. A.R. 001259-61. This paper was also forwarded to the BOR’s Boise Project Superintendent, who in turn forwarded it to the BOR’s Field Solicitor. A.R. 001259.<sup>19</sup>

While the Water District 63 accounting system’s various computer programs and files have been continuously updated and refined since the system was adopted in 1986, the same basic procedures for distributing natural flow and allocating stored water have remained in place since 1986. A.R. 001263, 001271-76. These programs and procedures do not define water rights or establish legal principles; they are tools used by the Director in distributing water in accordance with Idaho’s prior appropriation doctrine. A.R. 001264, 001265 n.35, 001271 n.41, 001411 n.7; *see also* BWI-17, 157 Idaho at 393, 336 P.3d at 800 (distinguishing “determining water rights, and therefore property rights” from “just distributing water”). “From a water user

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<sup>19</sup> The Boise Project Superintendent had attended the 1979 Committee of Nine meeting at which former Director Allred explained the Water District 1 accounting system. R. 000476-77 & n. 20, 000687-88 & n.20; A.R. 001426 n.17.

standpoint,” the Water District 63 accounting system “resulted in little if any change in water distributions and storage allocations” after being adopted in 1986. A.R. 001276; *see also* 001275 (“would not have changed the experience of those water users pre-1986 as opposed to after 1986.”) (citation omitted).

There was no objection to the Water District 63 accounting system until 2012, when water users in Water District 63 “expressed concerns that the accounting systems had been changed or re-interpreted to subordinate the reservoir water rights and/or to provide that flood control ‘refill’ occurred without a water right.” A.R. 001274. The water users’ concerns arose from “the ‘refill’ remark the State proposed in SRBA subcases for the American Falls and Palisades reservoir water rights as an alternative to ‘refill’ remark proposed by the BOR.” A.R. 001275; *see* BWI-17, 157 Idaho at 388, 336 P.3d at 795 (discussing “refill” remarks). The remark proposed by the State in those proceedings, however, “was consistent with water distribution and water rights administration in Water District 63 since 1986,” A.R. 001275, and the Spaceholders did not allege they had been injured by the Water District 63 accounting system. *See* BWI-17, 157 Idaho at 392, 336 P.3d at 799 (“no injury alleged”).

The Irrigation Organizations in this case also did not allege the Water District 63 accounting system resulted in them receiving less water than the amounts to which they are entitled under their natural flow water rights and storage contracts. The Director specifically found that the Spaceholders “have never suffered a water shortage” as a result of the Water District 63 accounting system. A.R. 001285.

The Director also found that “there is limited potential for future appropriation of the ‘refill’ water” because of the unreliable nature of flood flows. A.R. 001278. The Director found that the “unaccounted for storage consists of excess flows captured in the reservoir system on the receding end of the flood period in high water years,” and “[t]hese flood waters have

remained unappropriated since coordinated reservoir operations began with Lucky Peak in the mid-to late 1950s—approximately 60 years.” *Id.* The Director found that these excess flood flows “have remained unappropriated because they are not dependable: some years are flood years, some years are not, and even in flood years, the flood period ends relatively early in the year.” *Id.*

##### **5. The Accrual Methodology.**

Under the Accrual Methodology, “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)” to the reservoir water right, “until the cumulative total reaches the water right’s annual volume limit.” A.R. 001266.<sup>20</sup> The Accrual Methodology focuses solely on priority administration in accordance with the elements of the Decreed Storage Rights and Idaho’s prior appropriation doctrine. R. 001056-65; A.R. 001259, 001264-67, 001269-70, 001271 n.41, 001286-98. The Accrual Methodology ignores federal flood control operations and the “physical fill” of the reservoirs, and does not measure or determine how much water is allocated to individual Placeholder storage accounts. R. 001058-65; A.R. 001260, 001266, 001260-70, 001271 n.41, 001290-93, 001417, 001419, 001420, 001428.

The Director found, and the District Court agreed, that the Accrual Methodology is consistent with the Decreed Storage Rights and Idaho’s prior appropriation doctrine. R. 001058-64. Indeed, because Decreed Storage Rights are not limited by diversion rates, the Accrual Methodology is *necessary* to prevent the federal government from exercising the Decreed

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<sup>20</sup> Under this methodology, “[a]ccruals are a ‘computed number based on the reach gain equation that counts toward the water right for that particular reservoir when it’s in priority.’” A.R. 001266 (citation omitted). While “the ‘computed number’ is obtained by summing a series of physical measurements, computed accrual is ‘not an amount of water that you can actually measure, such as reservoir inflow, but rather is a ‘calculated’ quantity.” *Id.* (citation omitted).

Storage Rights to effectively take command of the use, distribution, and development of the water resources of the Boise River Basin. R. 001061-62; A.R. 001278-79, 001281, 001284, 001423. Because the Decreed Storage Rights are not limited by diversion rates, they command the river while “in priority,” which means that leaving it to the Corps or the BOR to decide when a Decreed Storage Right is being “exercised” would also put them in control of deciding whether and when water is available for diversion under junior water rights. R. 000700-01; *see also* R. 001063 n.9 (“Allowing a senior storage right holder to determine when to store water when the storage right is otherwise in priority turns over distribution control from the Director to the senior right holder.”). It was largely for this reason that the Accrual Methodology was adopted in the Water District 63 accounting system, and had previously been adopted in the Water District 1 accounting system. A.R. 001261 & n.32.

#### **6. The Unaccounted for Storage Methodology and the “Day of Allocation.”**

The Unaccounted for Storage Methodology is entirely different from the Accrual Methodology, but complements it. In contrast to the Accrual Methodology, the Unaccounted for Storage Methodology is controlled by reservoir system operations and “physical fill.” A.R. 001261, 001263, 001267, 001408-09 n.5, 001410, 001414 n.9, 001422 & n.14. “Unaccounted for storage” is a natural flow parameter in the accounting program that serves as proxy for tracking how much excess water—that is, water not needed to satisfy any water rights—is physically captured in the reservoir system. *Id.* “Unaccounted for storage” occurs when the Corps releases “priority water”<sup>21</sup> to make reservoir space available to control flood waters later in the year, which are captured in the empty reservoir space. A.R. 001244-45, 001261, 001263, 001270, 001273, 001293. The flood control space is “refilled” at the Corps’ discretion during the final period of flood control operations. A.R. 001242-43, 001245, 001306.

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<sup>21</sup> R. 001056-57 (“The distribution of priority water to these reservoirs occurs pursuant to water rights.”).

Even in flood years, the natural flow entering the reservoir system eventually declines to the point that it no longer satisfies downstream irrigation demand. A.R. 001248. At this point, flood control “refill” operations have ended, the reservoir system has reached “maximum physical fill,” and for the rest of the season, irrigators need stored water to supplement the dwindling natural flow supply. A.R. 001247-48, 001260-61, 001263, 001270-71, 001275. The Corps transfers “operational control” and “responsibility for releases from the reservoir system” to the BOR, A.R. 001243, 001247, and it allocates the water in the reservoir system to its Spaceholders’ storage accounts. A.R. 001248-49, 001260, 001267-68, 001270-71, 001273, 001275-76, 001293, 001297; Ex. 1 at 000010-11. This is the “day of allocation.”<sup>22</sup>

In flood years, “a significant portion of the water stored during the flood control ‘refill’ period may consist of ‘unaccounted for storage,’” and on the “day of allocation” the “‘unaccounted for storage’ is credited back to the reservoirs in order of priority.” A.R. 001267 (citation omitted); 001273.<sup>23</sup> The “storage program” is run and allocates all of the water in the reservoir system to Spaceholder storage accounts in accordance with their federal contracts and the BOR’s instructions, with no distinction drawn between “priority water” and “unaccounted for storage.” A.R. 001264, 001267-69, 001270-71, 001273, 001275, 001276. This procedure allows Spaceholders “to receive full storage allocations despite reservoir system flood control operations,” A.R. 001267, provided the Corps has captured enough excess water during the flood control “refill” period to offset its previous releases of “priority water.”<sup>24</sup> R. 001060 (“While the

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<sup>22</sup> The “day of allocation” is defined by three requirements: (1) water has stopped accruing to the Decreed Storage Rights in the accounting system; (2) diversion demand is equal to or greater than the available natural flow; and (3) the reservoir system has reached its maximum total physical content. A.R. 001267-68. Thus, “unaccounted for storage” occurs only before the “day of allocation.”

<sup>23</sup> In practice, priority rarely applies in crediting the “unaccounted for storage” back to the reservoirs, because all Spaceholders in all of the reservoirs get full storage account allocations as long as the Corps “refilled” the reservoir system to within 73,950 acre-feet of full capacity, which it has done in every year since 1986 except one—1989.

<sup>24</sup> Spaceholders’ storage account allocations have always been determined in this way. Before the Water District 63 accounting system was adopted, “spaceholder storage allocations were determined by the BOR on the basis of the **IDWR APPELLANTS’ BRIEF – Page 24**

Director distributes priority water to the dams pursuant to the reservoir water rights, it is the federal government that decides how to store and release that water.”). If the BOR determines that the Corps’ flood control operations have resulted in a “failure to fill” the system, i.e., if flood control operations have left more than 73,950 acre-feet of empty space in the reservoir system, the BOR reduces or “charges” Lucky Peak Spaceholder storage accounts *pro rata* for the amount by which the “failure to fill” exceeds 73,950 acre-feet.<sup>25</sup> A.R. 001267-68, 001270; Ex. 1 at 000009-10.<sup>26</sup>

The Unaccounted for Storage Methodology thus allows the BOR to use excess flood water captured in the reservoir system during the flood control “refill” period as a replacement or substitute for water previously released by the Corps for federal flood control purposes, 001296-97, 001307, 001421-22, as the BOR has done since Lucky Peak was completed in 1955. A.R. 001251-52, 001273, 001275-76, 001293, 001296-98, 001308; see also R. 001163 (“Historically,

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physical contents of the reservoir system on or near the date of maximum storage in the system, which was also on or near the date when regulation began, and after the conclusion of flood control operations.” A.R. 001257; see also A.R. 001249-50 (“when the natural flow supply dropped below water users’ demands”); 001251 (“maximum storage”). While in the years before 1986 this was known as the start of the “canal regulation” period rather than as the “day of allocation,” A.R. 001249-50, 001257, the basic idea has always been the same: Spaceholder storage account allocations are not determined until flood control operations have ended, and at that point all of the water in the reservoir system is allocated to Spaceholder storage accounts according to the BOR’s contracts and instructions. A.R. 001251-52, 001267-69, 001270, 0012934.

<sup>25</sup> The “73,950 acre-feet” standard is the sum of the 13,950 acre-feet of flood control “surcharge” capacity in Arrowrock (which is usually kept empty), and the 60,000 acre-feet charged to the BOR’s “streamflow maintenance” account rather than to Spaceholder accounts when the Corps does not succeed in filling the reservoir system during the “refill” period of flood control operations. A.R. 001245 & n.15, 001268 n.39.

<sup>26</sup> “Storage cancelling” also takes place on the “day of allocation.” “Storage cancelling” is a flood year procedure that “excuses” or “cancels” any charges that water users incur for diverting out of priority or in excess of their natural flow water rights during the period before the “day of allocation.” A.R. 001265, 001267, 001270-71, 001279-80, 001283-84, 001428-29 & n.19; Ex. 1 at 000011. These charges are “cancelled” on the “day of allocation” if the Corps has filled the reservoir system to within 73,950 acre-feet of full capacity. This procedure is consistent with the Spaceholders’ storage contracts, A.R. 001268 & n.39, 001245, 001247, 001254 n.26; Ex. 4 at 000093-94, and ensures Spaceholders have full storage account allocations when irrigators begin relying on stored water to supplement the diminishing natural flow supply—provided the Corps has not released too much water for flood control purposes and caused a “failure to fill.” A.R. 001245, 001247, 001251, 001273, 001276, 001279, 001302.

the United States has been refilling the reservoirs to satisfy its contractual obligations to the spaceholders to compensate for obligatory flood control releases.”).

The Unaccounted for Storage Methodology is integral to the Water District 63 accounting system’s framework for resolving the priority administration “conundrum,” R. 001165, and “dilemma,” A.R. 001261 n.32, 001291, created by federal flood control operations. By distributing natural flow according to the elements of licensed and decreed water rights (the Accrual Methodology) and allowing water in excess of all water rights to be stored and later allocated to Spaceholders to replace flood control releases (the Unaccounted for Storage Methodology), the Water District 63 accounting system accommodates federal flood control operations and storage allocation practices without allowing them to interfere with or dictate the use and distribution of Idaho’s water in accordance with Idaho’s prior appropriation doctrine. A.R. 001261 & n.32, 001271 & n.41, 001273, 001275-76, 001291-93, 001295, 001296, 001297, 001298, 001305, 001307-08.

**7. “Unaccounted for Storage” Is a Measure of Excess Natural Flow Rather Than a “Distribution” of Water.**

Contrary to the District Court’s view, the Unaccounted for Storage Methodology does not “distribute” water. *See* R. 001065 (characterizing “unaccounted for storage” as a “continued distribution of water to the reservoirs”). By definition, “unaccounted for storage” is a measure of the excess natural flow remaining after all “distributions” have been made. *See* Ex. 1 at 000009 (“This amount of surplus natural flow *that could not be distributed to a water right* (but now resides physically in the reservoirs system) accrues to the unallocated storage (UNACCT STOR) in the water rights accounting.”) (italics and underlining added) (parentheticals in original).<sup>27</sup>

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<sup>27</sup> “UNACCT STOR” is the name of the field in the accounting program printouts where the acre-foot volume of “unaccounted storage” to date is reported. *See, e.g., Ex. 2201* (accounting printouts). While the term “unallocated storage” is sometimes used, the two terms “mean the same thing.” Ex. 1 at 000004 n.3; see also A.R. 001270, 001274 (“‘unaccounted for storage’ or ‘unallocated storage’”).

“Distributions” to the reservoirs are made to each reservoir individually, according to decreed priorities. A.R. 001266 & n.36, 001408-09 & n.5. “Unaccounted for storage” is reported as a single quantity for “the reservoir system” as a whole rather than being apportioned among the individual reservoirs, and “is not associated with or credited to any water right.” A.R. 001267; Ex. 1 at 000009.<sup>28</sup> Further, “distributions” to the reservoirs are made based on measurements and computations at the dams, A.R. 001266, while “unaccounted for storage” is determined on the basis of measurements and computations at the Middleton gage near the City of Middleton, far downstream from the reservoirs. Ex. 1 at 000004-05, 000009; Tr., Aug. 28, 2015, p.444, ll. 9-17.

“Unaccounted for storage” is based on the flows at the Middleton gage because it is the downstream end of the regulated portion of Water District 63. R. 001101; A.R. 001246, 001268; Ex. 1 at 000003, 000009; see also Tr., Aug. 28, 2015, p.606, l.25; id., p.609, l.12 (referring to Middleton as the “control point on the river”). Diversions below the Middleton gage are not regulated (although they are tracked and quantified in the accounting system) because historically the water supply below Middleton has exceeded diversion demands. Tr., Aug. 27, 2015, p.222, ll.217-18 (“But typically, return flows satisfied rights below Middleton”); Tr., Sep. 10, 2015, p.1375, ll.13-14 (“below the Middleton gauge, we have a large amount of return flows from the drains coming back into the system.”).

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<sup>28</sup> Each of the Decreed Storage Rights authorizes the storage of water in one particular reservoir, A.R. 001290, and no water rights have been claimed, licensed, or decreed for “the reservoir system” as a whole. Nonetheless, the Corps and the BOR operate the reservoirs as a unified system and frequently store water decreed to a particular reservoir in a different reservoir(s). A.R. 001246, 001265. The Director found that the Water District 63 accounting system accommodates this system of operations, without letting it dictate priority administration, by accounting for the satisfaction of each Decreed Storage Right independently from the “physical fill” of its particular reservoir. A.R. 001260, 001266-67, 001292, 001295; see also Off’l Not.BWI-17\91017\20130320 Memorandum Decision at 001418 (“The Court notes that the term ‘fill’ may be used to describe (1) a reservoir physically filling with water, or (2) the decreed volume of a storage water right being satisfied”). Physically storing water according to the decreed elements of the reservoir water rights would generally result “in Arrowrock filling first, Anderson Ranch second, and Lucky Peak last.”

The “unaccounted for storage” algorithm computes how much remaining natural flow, if any, should be present at the Middleton gage each day after distributions have been made to all upstream water rights, and compares this computed value to the actual flow measured at the Middleton gage. If the measured flow at the Middleton gage is less than the excess natural flow that should be present, it is assumed that the excess was physically retained somewhere in the federal reservoir system—which is exactly what happens during flood control “refill” operations. R. 001093-95, 001102; Ex. 1 at 000004-05, 000009.<sup>29</sup> This deficit in the expected natural flow at the Middleton gage is reported in the daily accounting system printouts as “UNACCT STOR,” which is an abbreviation for “unaccounted for storage.” A.R.001408-09 n.5, 001410; Ex. 1 at 000004-05, 000009; see also, e.g., Ex. 2201 at 004026 (accounting printout).

Since the Water District 63 accounting system was adopted in 1986, there has been only one flood control year in which Spaceholders did not receive full storage account allocations as a result of a flood control-caused “failure to fill”—1989. In that year, the BOR charged its “streamflow maintenance” account for the first 60,000 acre-feet of the flood control-caused “failure to fill,” and charged the balance to all Lucky Peak storage account on a *pro rata* basis, as provided in the Lucky Peak contracts. A.R. 001247, 001268, 001285.<sup>30</sup> In the years before the Water District 63 accounting system was adopted, in contrast, Lucky Peak storage accounts were

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<sup>29</sup> This assumption is sound because the system accounts for all diversions downstream from Lucky Peak. The assumption is also verified through an annual reconciliation procedure that compares actual reservoir system contents with computed contents. Tr., Aug. 27, p. 209, ll. 3-15.

<sup>30</sup> The 60,000 acre-foot “buffer” arose out of the BOR’s decision in the early 1980s to dedicate the “uncontracted space” to “streamflow maintenance.” A.R. 001254 n.25; Lucky Peak Decision at 9. The BOR’s decision concerned the Corps because it meant “that if ‘the system failed to fill’ as a result of flood control operations, irrigators ‘would now have to share the shortages, whereas historically they have not.’” A.R. 001254 n.26 (quoting letter from the Corps to the BOR). The Corps and BOR resolved their differences by agreeing that the first 60,000 acre-feet of any flood control-caused “failure to fill” the reservoir system would be charged to the BOR’s “streamflow maintenance” account, and any “failure to fill” in excess of 60,000 acre-feet would be charged *pro-rata* against all Lucky Peak storage accounts. A.R. 001254 n. 26. This agreement was incorporated into the Corps’ *Water Control Manual for Boise River Reservoirs*, A.R. 001245, 001247; Lucky Peak Decision at 12, 34, and into the “storage program” that allocates water to Spaceholder storage accounts on the “day of allocation.” A.R. 001234, 001268, 001270, 001273, 001276, 001286, 001303.

frequently charged for flood control-caused “failures to fill.” A.R. 001251-52; *see also* Exs. 2123, 2124, 2126 (BOR memoranda); Off’l Not.IDWR Doc List-Attachment A: 16 19690806, 20 19700720, 23 19710716, 24 19710727, 26 19720713, 49 19750721, 54 19760628, 64 19780714, 67 19790620 (BOR memoranda).

## II. ISSUES ON APPEAL

A. Whether the District Court erred in its findings and conclusions related to “unaccounted for storage,” including:

- i. Whether the District Court erred by adopting a definition and quantification of “Unaccounted for Storage” that is contrary to the Director’s factual findings regarding the same, and contrary to the Director’s factual findings regarding the purpose, structure, and operation of the Water District 63 accounting system’s methodology for determining “unaccounted for storage”;
- ii. Whether the District Court erred in determining that by computing the amount of “unaccounted for storage” captured in the Boise River reservoir system during the “refill” period of federal flood control operations, the Director is “distributing” water pursuant to chapter 6 of Title 42, Idaho Code;
- iii. Whether the District Court erred in concluding that the “unaccounted for storage” methodology of the Water District 63 accounting system is contrary to law;
- iv. Whether the District Court erred in interpreting Idaho Code § 42-201 as prohibiting the Director from recognizing a longstanding practice of allowing the storage, and subsequent allocation to water users, of excess or high flow flood waters that are captured in the reservoir without injury to any water rights;
- v. Whether the District Court erred in determining that “unaccounted for storage” must be “protected” from future appropriations by a water right.

B. Whether the District Court in erred in setting aside in part and remanding in part the Director’s *Final Order*, including:

- i. Whether the District Court erred in determining that the interests of the United States and its contractors in un-adjudicated and disputed beneficial use-based water right claims that are pending in the SRBA are prejudiced by the Water District 63 accounting system;
- ii. Whether the District Court erred in concluding the Director erred when he did not “recognize that the United States and/or the irrigators have a valid legal right to, or vested property interest in, water identified as unaccounted for storage.”;
- iii. Whether the District Court’s remand to the Director exceeds his authority by requiring the Director to resolve disputed questions of the nature and extent of beneficial use-based water right claims that are pending in the SRBA.

### III. ARGUMENT

#### A. SUMMARY OF ARGUMENT

This case presents technical questions of water administration in a complex factual setting. These questions arise only in flood years, when the Corps releases water rather than storing it, based on the Corps' runoff forecasts and the "rule curves." This federal system of water management is fundamentally incompatible with priority administration under Idaho water law. Resolving the priority administration conundrum and dilemma that flood control creates (while also ensuring maximum use and minimum waste of water) presents questions that fall squarely within the legal authority and technical expertise of the Director—the "State Engineer." *See In re SRBA, Case No. 39576, Subcase No. 00-91017, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) ("BWI-17")* ("[T]he state engineer is the expert on the spot . . .") (internal quotation marks and citation omitted) (brackets in *BWI-17*).

The Director found that these questions are addressed in the Water District 63 accounting system because it accommodates flood control operations and maximizes the beneficial use of water, without allowing flood control operations conducted by the Corps to dictate the use, distribution, and development of Idaho's water resources. The Accrual Methodology ensures that water is distributed in accordance with Idaho's prior appropriation doctrine, Idaho Code § 42-602, while the Unaccounted for Storage Methodology allows the BOR, when allocating water to Placeholder storage accounts after flood control operations have concluded, to replace "priority water" (released by the Corps for flood control purposes) with excess water captured during the flood control "refill" period.

The Director found that the Water District 63 accounting system has been in place in substantially the same form since 1986 and the Placeholder holders have never suffered a water shortage as a result of the accounting system. A.R. 001263, 001271-76, 001285. The Director

concluded that Idaho law allows for the United States to capture excess flood water during flood control “refill” operations, and then replace “priority water” released to vacate flood control space with the excess, provided there is no interference with any water rights, even if no water rights have been decreed for the water identified as “unaccounted for storage.”

The District Court disregarded the Director’s factual findings by analyzing the Accrual Methodology and the Unaccounted for Storage Methodology as separate and independent systems of distributing water rather than interrelated components of a single distribution system. The District Court considered the Unaccounted for Storage Methodology in isolation and found, on the basis of its erroneous and unsupported factual findings, that the Unaccounted for Storage Methodology is contrary to Idaho Code § 42-201(2) because it distributes water to the federal reservoirs pursuant to historic practices rather than water rights, and fails to protect the “unaccounted for storage” from being appropriated in the future.

The District Court erred by disregarding the Director’s detailed and specific findings on a number of administrative questions, including: (1) the technical definition and quantification of “unaccounted for storage” in the Water District 63 accounting program code; (2) the procedures for allocating water to Placeholder storage accounts on the “day of allocation” pursuant to the BOR’s contracts and instructions; and (3) the role of the Unaccounted for Storage Methodology in resolving the priority administration “conundrum” and “dilemma” created by federal flood control operations. The District Court erred by substituting its alternative, unsupported, and incorrect factual findings for the findings of the Director, and by speculating about future appropriations and hypothetical injuries.

These factual errors led the District Court to interpret Idaho Code § 42-201(2) without reference to or consideration of “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” IGWA, 160 Idaho at 129, 369

P.3d at 907 (citation omitted). The District Court’s conclusion that “unaccounted for storage” is contrary to law ignores the principle of maximum use, as well as other fundamental tenets of Idaho’s prior appropriation doctrine, and ignores the reality that by definition excess flood flows are unpredictable and cannot be reliably quantified. It is for this reason that the ancillary use of excess water, when available, is both common and commonly allowed in Idaho, provided it does not injure any water rights. *See State v. ICL*, 131 Idaho at 333, 334, 955 P.2d at 1113 (recognizing that “‘excess’ water may be administered along with existing water rights, even though there is no water right in the ‘excess’ water itself,” when there is “a long-standing system of allowing those who otherwise have water rights . . . to use excess water when it is available.”); *A&B Irr. Dist. v. ICL*, 131 Idaho 411, 417, 958 P.2d 568, 574 (1997) (“Administration of ‘excess’ water is a long standing practice in Idaho”) (Silak, J., concurring and dissenting). The District Court’s decision undermines this longstanding, common-sense practice for administering excess flood water in the Boise River Basin and many other river basins in the state. Even more importantly, the District Court’s legal error, if not reversed, will put the Federal Government in control of the use, distribution, and development of Idaho’s water resources.

The District Court’s factual and legal errors must be corrected because the District Court remanded the case back to the Director with instructions that would require the Director to assume that all excess flows arising upstream of Lucky Peak in each and every year have been appropriated by the United States. This instruction exceeds the scope of this proceeding, and would require the Director to make a determination of the nature and extent of disputed late claims pending in the SRBA. Significantly, it would result in the same unlawful scenario that the District Court foresaw in affirming the Accrual Methodology: the United States would become the *de facto* watermaster of the Boise River, and the ultimate arbiter of future development of the unappropriated excess flows of the Boise River Basin. The Department

therefore respectfully requests that this Court reverse and vacate the District Court's findings and conclusions regarding "unaccounted for storage" and remand this matter to the District Court with instructions to affirm in full the *Final Order*.

## **B. STANDARD OF REVIEW**

In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act ("IDAPA"), this Court reviews the decision of the district court to determine whether it correctly decided the issues presented to it. *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 522, 376 P.3d 722, 726 (2016). This Court reviews the agency record independently of the district court's decision. *Id.* A reviewing court defers to the agency's findings of fact unless they are clearly erroneous, and the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Id.* Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.*

Idaho Code § 67-5279(3) provides that the district court must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. *N. Snake Ground Water Dist.*, 160 Idaho at 522, 376 P.3d at 726. Even if one of these conditions is met, an agency action shall be affirmed unless substantial rights of the petitioner have been prejudiced. *Id.* If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Id.*

**C. THIS CASE PRESENTS A QUESTION OF PRIORITY ADMINISTRATION THAT IS STATUTORILY COMMITTED TO THE DIRECTOR.**

This case presents an administrative conundrum and dilemma created by reservoir system flood control operations. The Boise River Reservoirs are operated for the often-conflicting purposes of flood control and irrigation storage, but the Decreed Storage Rights authorize only irrigation storage—there are no water rights for the flood control operations. Thus, addressing and resolving the flood control “conundrum,” R. 001164-65, and “dilemma,” A.R. 001261 & n.32, 001291, is a purely administrative question that the Legislature has committed to the Director, as this Court has repeatedly confirmed. *See, e.g., BWI-17, 157 Idaho at 394, 336 P.3d at 801* (“[T]he state engineer is the expert on the spot, and we are constrained to realize 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 . . . .”) (citation omitted).

This case also does not involve any allegation of actual or imminent injury to the Spaceholders. It is undisputed that before adoption of the Water District 63 accounting system, the BOR was allowed to allocate all the water in the reservoir system at the end of the flood control “refill” period to Spaceholder storage accounts, and that the Water District 63 accounting system uses the same procedure. A.R. 001260, 001267-68, 001270-71, 001273, 001275-76, 001293. The Director found that the Spaceholders have never suffered a water shortage as a result of the Department’s accounting and distribution methods. R. 001067; A.R. 001263, 001268, 001285, 001297. Indeed, the Water District 63 accounting system was in place from 1986 until 2012 without objection, until Basin-Wide Issue 17, when the Spaceholders asserted that “refill” should be administered “under priority.” BWI-17, 157 Idaho at 387, 336 P.3d at 793. But even then there was “no injury alleged,” id. at 392, 336 P.3d at 799, and no injury was alleged in the proceedings before the Director.

The real dispute, rather, is a question of *priority administration* when the reservoir system is operated for the conflicting purposes of flood control and irrigation storage—whether the water rights decreed for the reservoirs in the SRBA (“Decreed Storage Rights”<sup>31</sup>) remain “in priority” until flood control “refill” operations have concluded. Priority administration has been the crux of the “refill” issue all along. *See BWI-17, 157 Idaho at 390, 336 P.3d at 797* (“As the SRBA court noted, ‘[T]he crux of the issue [is] whether Idaho law authorizes the refill of a storage water right, under priority, where water diverted under that right is released for flood control.’”) The answer to the priority administration question will determine whether the use, distribution, and future development of the water resources of the Boise River Basin will be governed by federal flood control operations or by Idaho’s prior appropriation doctrine.

**D. THE DIRECTOR FOUND THAT THE WATER DISTRICT 63 ACCOUNTING SYSTEM RESOLVES THE PRIORITY ADMINISTRATION CONUNDRUM AND DILEMMA THAT FEDERAL FLOOD CONTROL OPERATIONS CREATE IN THE BOISE RIVER BASIN.**

The administrative problem is rooted in the Corps’ flood control operations, which are based on releasing rather than storing water. Flood control “directly conflicts with all of the other system uses to some degree,” and especially with the objective of storing for irrigation purposes. A.R. 001242.

Flood control operations therefore create a “conundrum” and “dilemma” for priority administration of water rights, as the District Court and the Director recognized. R. 001165; A.R. 001261 n.32, 001291. The “conundrum” and “dilemma” are compounded by the fact that because the Corps and the BOR operate the federal reservoirs as a coordinated system rather than as individual reservoirs, they store and release water without regard for the priorities and place of use of the Decreed Storage Rights. *See, e.g., A.R. 001246* (“the BOR and the Corps physically

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<sup>31</sup> Four water rights were decreed in the SRBA for the federal on-stream reservoirs in Water District 63, as follows: water right nos. 63-303 (Arrowrock), 63-3613 (Arrowrock), 63-3614 (Anderson Ranch), and 63-3618 (Lucky Peak.). R. 001056.

store water in the reservoir system without regard to which reservoir is in priority”); 001295 (referring to “a major complication arising from the coordinated operations, namely the federal practice of storing water without regard to the elements of the water rights”).

Regardless of flood control operations, the Director must distribute water in accordance with Idaho’s prior appropriation doctrine. Idaho Code § 42-602; BWI-17, 157 Idaho at 393, 336 P.3d at 800. This means the Director must distribute water according to water right decrees, *see* BWI-17, 157 Idaho at 394, 336 P.3d at 801 (“The decrees give the Director a quantity he must provide to each water user in priority”), while simultaneously protecting the public’s interest in maximizing beneficial use and minimizing waste. AFRD2 v. IDWR, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) (“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.”); Nettleton v. Higginson, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) (“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.”).

Fulfilling these administrative duties and resolving the priority administration “conundrum” and “dilemma” created by federal flood control operations in Water District 63 requires the Director’s “specialized expertise.” BWI-17, 157 Idaho at 394, 336 P.3d at 801. This Court has repeatedly “recognized the need for the Director’s specialized expertise in certain areas of water law,” and recognized that the Legislature by establishing the technical qualifications for the Director’s position has “reaffirm[ed] the need for the Director to have the technical expertise to properly administer water rights.” *Id.*

The Director applied his technical expertise in this case and made detailed and extensive factual findings regarding various components of priority administration and water use in Water

District 63, such as: (1) the development of federal flood control operations in the Boise River and the specifics of how they are conducted, A.R. 001238-47; (2) priority administration of water rights and contractual administration of storage allocations in Water District 63, both before and after the 1986 adoption of the current accounting system, A.R. 001249-57, 001271-75; and (3) the origin, structure, methods, procedures, and terminology of the Water District 63 accounting system. A.R. 001258-71. The Director found that the Water District 63 accounting system resolves the priority administration vs. flood control conundrum through the combined operation of the Accrual Methodology and the Unaccounted for Storage Methodology:

The Water District 63 accounting system accommodates these assumptions and operates in a manner consistent with the priority administration of the reservoir water rights. Following “paper fill,” [*i.e., the Accrual Methodology*] the Water District 63 accounting system anticipates and allows for physical storage in the reservoir system of excess natural flow, i.e., flows in excess of downstream water demand that would cause flooding if not captured in the reservoirs. [*i.e., the Unaccounted for Storage Methodology*] By tracking the additional storage as “unaccounted for storage” rather than attributing it to the storage water rights, the Water District 63 accounting system avoids violating the rights’ decreed priorities and quantities. Moreover, including the “unaccounted for storage” in the annual volume calculated to be available for (or already used by) storage spaceholders on the “day of allocation” is consistent not only with coordinated reservoir system operations, but historic allocation practices as well.

A.R. 001293 (bracketed italics added).

The Director found, in short, that the Accrual Methodology and the Unaccounted for Storage Methodology are interrelated parts of a system for distributing water in accordance with the prior appropriation doctrine as established by Idaho law. The Director found that this approach ensures water is distributed according to decreed priorities and quantities as required by Idaho law, but also accommodates federal flood control operations and storage contract allocation practices. Flood control operations and storage allocation practices are accommodated, without allowing them to control priority administration, by allowing excess water not needed by any water right holder to be stored during the flood control “refill” period

and used to replace previously released “priority water” during the storage allocation process. A.R. 001261 & n.32, 001271 & n.41, 001273, 001275-77, 001291-93, 001295, 001296, 001297, 001298, 001305, 001307-08; 001421-22. The Director found that this approach is consistent with historic practices in Water District 63, maximizes water use while minimizing waste, prevents federal flood control operations from interfering with or dictating the use, distribution, and development of Idaho’s water resources, and has never injured the Spaceholders. *Id.*

The Director’s findings are supported by substantial evidence in the record, and the Director’s legal conclusions are supported by Idaho law. The *Final Order* should therefore be affirmed in full. Idaho Code § 67–5279(3); N. Snake Ground Water Dist., 160 Idaho at 522, 376 P.3d at 726.

**E. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE UNACCOUNTED FOR STORAGE METHODOLOGY IS CONTRARY TO LAW.**

The District Court erred at the outset of its “Distribution Analysis” by stating that the Director has adopted two separate systems of distributing water to the Boise River reservoirs: one based the Decreed Storage Rights that accrues the water “that is available in priority,” R. 001057, and another that distributes water based on “historic practices” rather than water rights. R. 001058. The District Court found that the second, the Unaccounted for Storage Methodology, is a system for making “continued distribution[s] of water to the reservoirs for storage even after the reservoir water rights have been satisfied.” R. 001065.

This characterization of the Unaccounted for Storage Methodology disregarded the Director’s extensive and detailed factual findings regarding the actual structure and operation of the Water District 63 accounting system, including the correlative roles and purposes of the Accrual Methodology and the Unaccounted for Storage Methodology in resolving the priority administration “conundrum” and “dilemma” created by federal flood control operations. The

District Court's disregard of the Director's factual findings, in turn, led to its incorrect conclusion that the Unaccounted for Storage Methodology is contrary to law. R. 001065.

**1. The Director Found That "Unaccounted for Storage" Is a Measure of Excess Water Physically Captured in the Reservoir System Rather Than a "Distribution" of Water.**

"Unaccounted for storage" is a technical term used in the Department's computerized water distribution accounting. A.R. 001408-10 & n.5; Ex. 1 at 000004-05 & n.3, 000009. It was first used in the accounting programs adopted in Water District 1 in 1978, and is also part of the computerized accounting system subsequently adopted in Water District 63. A.R. 001261 & n.32. The Director found that the term "unaccounted for storage" refers to excess flood waters physically captured in the reservoir system that are not required to satisfy any water rights (including the Decreed Storage Rights). A.R. 001267 & n.37, 001270, 001276, 001278, 001410, 001414 n.9, 001422.<sup>32</sup> This occurs most often during flood control "refill" operations. *Id.*

Further, and directly contrary to the District Court's statements, at no point did the Director find or conclude that the Water District 63 accounting system makes "distributions" of "unaccounted for storage." The Director specifically found, rather, that "distributions" are made to individual water right holders "in accordance with the elements of their water rights," A.R. 001264, and daily "distributions" to the reservoirs are made to each reservoir individually according to decreed priorities. A.R. 001266 & n.36, 001408-09 & n.5. The Director found that "unaccounted for storage," in contrast, is simply "tracked" or "reported" as a single quantity for "the reservoir system" as a whole, that "is not associated with or credited to any water right" or any individual reservoir. A.R. 001267, 001410; Ex. 1 at 000009.

The distinction between "distributing" water versus "tracking" or "reporting" the physical storage of excess water in the reservoir system is both legally and factually significant. The

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<sup>32</sup> See also R. 001065 (referring to "excess water" as "water not required to satisfy any water right on the system").  
**IDWR APPELLANTS' BRIEF – Page 41**

Director can “distribute” natural flow in accordance with the prior appropriation doctrine only if there is a licensed or decreed water right with an administrable priority date and quantity. *See BWI-17*, 157 Idaho at 394, 336 P.3d at 801 (The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority”); *Almo Water Co. v. Darrington*, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972) (stating that a watermaster “is authorized to distribute water only in compliance with applicable decrees”); *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) (“it is evident that a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion”) (citation omitted).<sup>33</sup>

It is undisputed that there are no licensed or decreed water rights for the water that the Water District 63 accounting system identifies as “unaccounted for storage.” Thus, and somewhat ironically, the Water District 63 accounting system does not “distribute” the “unaccounted for storage” for the precisely the same reason that the District Court rejected the Unaccounted for Storage Methodology—there is no water right for the water identified as “unaccounted for storage.” R. 001065-66.

It is incorrect to assume, as the District Court apparently did, that “unaccounted for storage” amounts to a *de facto* “distribution.” Rather, “unaccounted for storage” is a natural

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<sup>33</sup> A distribution of “stored water” to “consumers” is another thing entirely, and is determined by the terms of storage contracts rather than licensed or decreed water rights. *See Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609 (“in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations.”); *Compare* Chapter 6, Title 42, Idaho Code (“Distribution of Water Among Appropriators”) to Chapters 8 & 9, Title 42, Idaho Code (“Distribution of Stored Water” and “Distribution of Water to Consumers”); *see also Nelson*, 148 Idaho at 163, 219 P.3d at 810 (“When there is both natural flow and storage water in the river, the watermaster must determine the relative amounts of natural flow and storage water at the various diversion points on the river.”). Differentiating between natural flow and stored water has always been important in preventing and resolving water disputes in Idaho. *See, e.g.,* Mark Fiege, IRRIGATED EDEN: THE MAKING OF AN AGRICULTURAL LANDSCAPE IN THE AMERICAN WEST (1999, Univ. of Wash. Press) at 100, 101 (referring to “the complex relationship between stored water and natural flow,” and the “[c]ontroversy over storage water and natural flow,” in the upper Snake River Basin). Excerpts are attached as Addendum B.

flow supply parameter measured at Middleton that serves as a proxy for the amount of excess water physically captured in the reservoir system during the “refill” period of flood control operations. This is shown by the Staff Memorandum upon which the Director relied. The Staff Memorandum explains that “unaccounted for storage” is computed on a daily basis by comparing computed and measured flows at the Middleton gage. R. 001101; Ex. 1 at 000004-05, 000009. “Unaccounted for storage” is reported when the measured flow at Middleton is less than the “remaining natural flow” predicted by the accounting system. *Id.*; *see also* Tr., Aug. 28, 2015, p.444, ll. 9-17 (“the program expects to see natural flow . . . down at Middleton or someplace, and lo and behold it’s not there . . .”). Thus, the terms “distribution” and “unaccounted for storage” are mutually exclusive: by definition, “unaccounted for storage” cannot occur unless “distributions” have already been made to all licensed and decreed water rights diverting upstream of Middleton. As the Staff Memorandum explained: “This amount of surplus natural flow that could not be distributed to a water right (but now resides physically in the reservoir system) accrues to the unallocated storage (UNACCT STOR) in the water rights accounting.” Ex. 1 at 000009 (italics and underlining added) (parentheticals in original).

Indeed, the water identified as “unaccounted for storage” is not even susceptible of being “distributed” on a priority basis. “Unaccounted for storage” as defined in the Water District 63 accounting program can occur only when: (1) there is natural flow in excess of the water right demand; and (2) there is empty reservoir space in which the excess can be held. A.R. 001410. This means that whether and when “unaccounted for storage” occurs is almost entirely dependent on when and how much water the Corps releases for flood control purposes. The Corps’ flood control release decisions are inherently variable, however, and “not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right.” A & B Irr. Dist. v. ICL, 131 Idaho 411, 416, 958 P.2d 568, 573

(1997); *see, e.g.*, A.R.00001243 (“Starting in November . . . the Corps assumes ‘final authority’ to order releases from the three reservoirs for flood control purposes”); 001306 (“from April 1 until the end of flood control operations, the Corps controls the amount of water released from the reservoirs pursuant to the Water Control Manual’s Refill Requirements. During this period, the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent”). As the District Court itself recognized, making the Corps’ flood control release decisions the basis for priority administration “would cripple the Director’s ability to effectively distribute water” under Idaho’s prior appropriation doctrine, and “would effectively transfer water right distribution in the basin from the Director to the federal government.” R. 001062.<sup>34</sup>

**2. The Unaccounted for Storage Methodology Allows the BOR to Replace “Priority Water” the Corps Releases for Flood Control Purposes With Excess Water Captured During Flood Control “Refill” Operations.**

The Director found that when the BOR allocates water to Placeholder storage accounts on the “day of allocation”—which is always after flood control operations have concluded—all of the water in the reservoirs is allocated to Placeholder storage accounts pursuant to federal storage contracts and BOR instructions, without regard to whether water was stored “in priority.” A.R. 001248-49, 001260, 001267-68, 001270-71, 001273, 001275-76, 001293, 001297.<sup>35</sup> In effect, the distinction between priority water and “unaccounted for storage” is erased on the “day

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<sup>34</sup> If the beneficial use-based late claims pending in the SRBA are ultimately proven and reduced to administrable priorities and quantities, the Director will be able (and required) to distribute water to the resulting water rights in accordance with their elements. But the Unaccounted for Storage Methodology of the Water District 63 accounting system does not define water rights, nor does it identify when or how much of the water claimed was actually applied to beneficial use in the year claimed (1965).

<sup>35</sup> If the Corps has not succeeded in “refilling” the reservoir system to within 73,950 acre-feet of full capacity, the available water is first assigned or credited to the individual reservoirs in order of their priorities, i.e., any shortfall is assigned to Lucky Peak. A.R. 001261, 001267. This is not a priority distribution of natural flow but rather a contractual storage allocation procedure used to fulfill the BOR’s “Guarantee” to Arrowrock and Anderson Ranch spaceholders that Lucky Peak water will be used to replace any flood control-caused losses from their reservoirs. A.R. 001240, 001247, 001261, 001275. This procedure is consistent with the BOR’s pre-1986 storage allocation procedure. A.R. 001251-52.

of allocation,” and the BOR is allowed to substitute excess flood water captured by the Corps during flood control “refill” operations for priority water that the Corps released earlier. A.R. 001267, 001273, 001276-77, 001293, 001296-97, 001421-22.

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

The District Court also recognized that the United States has historically used the water captured during flood control “refill” operations “to compensate” the Spaceholders for flood control releases. R. 001163. Indeed, the BOR’s 1954 “Guarantee” to use Lucky Peak storage to protect Arrowrock and Anderson Ranch Spaceholders from flood control releases was such a compensation or replacement agreement, A.R. 001297, 001421, and was decreed in the form of the flood control “remark” in the Lucky Peak water right (no. 63-3618). A.R. 001235-36; Ex. 2015; Lucky Peak Decision at 33-36.

This Court has recognized that substitutions of water do not violate water rights or injure the Boise River Spaceholders. Wilder Irrigation Dist. Bd. of Dirs. v. Jorgensen, 64 Idaho 538, 548, 551, 136 P.2d 461, 465, 467 (1943) (Ailshie, J., concurring). However, no priority may attach to a substitution of excess water that “is not subject to definition in terms of quantity of water per year” because identifying a firm and definite annual quantity “is essential to the establishment and granting of a water right.” A & B Irr. Dist. v. ICL, 131 Idaho at 416, 958 P.2d at 573; *see also id.* (“Consequently there cannot be a prior relation to excess water.”). The amount of excess water physically captured in the reservoir system during the “refill” period of flood control operations is “not subject to definition in terms of quantity per year” because of the inherently variable nature of the water supply and the Corps’ flood control “evacuation” and “refill” decisions. R. 001061-62; A.R. 001236, 001243, 001245-48, 001306. “Consequently, there cannot be a prior[ity]” attached to the Corps’ flood control “refill” decisions. A & B Irr. Dist. v. ICL, 131 Idaho at 416, 958 P.2d at 573.

The Unaccounted for Storage Methodology allows the BOR to close the gap between the quantity of priority water actually stored in the reservoir system when the Corps finishes evacuating flood control space, and the quantity that would have been available but for the Corps’ flood control releases. *See* A.R. 001263 (“[A]t the end of a flood operation, ideally the amount of ‘unaccounted for’ storage will be equal to the amount of storage released for flood control so that the amount of water physically stored in the reservoirs will be equal to the paper fill.”) (internal quotation marks and citation omitted). This allows Spaceholders to receive the same storage account allocations they would have received if no water had been released for flood control purposes, without allowing federal flood control and storage allocation practices to interfere with or dictate the distribution of water pursuant to the prior appropriation doctrine as

established by Idaho law. A.R. 001261 & n.32, 001267-68, 001270, 001273, 001275-77, 001291-93, 001295-98, 001304-05.

**3. The District Court’s Conclusion That Idaho Code § 42-201(2) Prohibits Ancillary Use of Excess Water in Water District 63 Is Contrary to the Doctrine of Maximum Beneficial Use.**

The District Court’s disregard of the Director’s factual findings led the District Court to conclude, incorrectly, that the Unaccounted for Storage Methodology is “contrary to law.” R. 001065. The District Court held that “the use of water identified as unaccounted for storage without a water right” cannot be reconciled with Idaho Code § 42-201(2), which provides, in pertinent part, “[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.” R. 001065-66; Idaho Code § 42-201(2). The District Court erred by interpreting Idaho Code § 42-201(2) without considering the doctrine of maximum use—that is, without considering the underlying policy and purpose of Idaho water law.

This Court has repeatedly held 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.” IGWA, 160 Idaho at 129, 369 P.3d at 907 (citation omitted). This Court also has recognized that “‘excess’ water may be administered along with existing water rights, even though there is no water right in the ‘excess’ water itself,” when there is “a long-standing system of allowing those who otherwise have water rights . . . to use excess water when it is available.” State v. ICL, 131 Idaho at 333, 334, 955 P.2d at 1113; see also A&B Irr. Dist. v. ICL, 131 Idaho 411, 417, 958 P.2d 568, 574 (1997) (“Administration of ‘excess’ water is a long standing practice in Idaho”) (Silak, J., concurring and dissenting).

These principles are consistent with the fact that a use of excess water “ancillary to existing water rights,” State v. ICL, 131 Idaho at 334, 955 P.2d at 1113, often is by its very

nature “not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right.” A & B Irr. Dist. v. ICL, 131 Idaho at 416, 958 P.2d at 573. But as this Court recognized in the *ICL* decisions, that fact should not also be a bar to continuing a long-standing practice of making ancillary use of excess water, when it happens to be available. This conclusion is consistent with “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” IGWA, 160 Idaho at 129, 369 P.3d at 907.

This common-sense principle applies in this case. As the Director found, the problem in a flood year is not shortage but rather abundance. By definition, flood years are times of “excess” water. *See* A.R. 001302 (“Flood control years are not times of scarcity but rather times of excess flows.”); A.R. 001304 (“It is important to recognize the reservoirs release stored water for flood control purposes only when the forecasted runoff exceeds the available capacity of the reservoir system. By definition, the need for flood control exists when there is too much water.”) (underlining in original).

Further, the Director found that the water supply in Water District 63 is highly variable, *see* A.R. 001236 (“the timing and volume of runoff from the mountain snowpack varies greatly from year to year”), which “can result in damaging floods as well as prolonged droughts.” *Id.* The Director found that the reliable summer flows of the Boise River were fully appropriated many years ago, A.R. 001237, 001278, and that “unaccounted for storage”

consists of excess flows captured in the reservoir system on the receding end of the flood period in high water years when the forecasted runoff volume is greater, often significantly greater, than the capacity of the reservoir system. These excess flows were also unappropriated waters before implementation of the 1986 water rights accounting and storage allocations systems. These flood waters have remained unappropriated since coordinated reservoir operations began with Lucky Peak in the mid-to-late 1950s—approximately 60 years. They have remained unappropriated because they are not dependable: some years are flood years, some are not, and even in flood years, the flood period ends relatively early in the year.

A.R. 001278; *see also* 001304 (similar).

Under these circumstances, the District Court’s interpretation of Idaho Code § 42-201(2) conflicts with the “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” IGWA, 160 Idaho at 129, 369 P.3d at 907. The District Court’s interpretation of the statute means the Director may never allow the ancillary diversion or use of excess water in connection with existing water rights, regardless of how difficult or unlikely it is that anyone would ever be able to perfect an appropriation in the unreliable and unpredictable excess flows. The District Court’s interpretation of Idaho Code § 42-201(2) means that even under such circumstances, the Director must require that the excess water go undiverted and unused—i.e., be wasted. Such an interpretation is contrary to Idaho law. *See* Stickney v. Hanrahan, 7 Idaho 424, 435, 63 P. 189, 192 (1900) (“It is against the spirit and policy of our constitution and laws, as well as contrary to public policy, to permit the wasting of our waters, which are so badly needed for the development and prosperity of the state . . .”).

The District Court’s interpretation of Idaho Code § 42-201(2) must therefore be reversed as contrary to the fundamental principle of “secur[ing] the maximum use and benefit, and least wasteful use” of Idaho’s water resources. IGWA, 160 Idaho at 129, 369 P.3d at 907; *see* A.R. 001308 (“the current water right accounting method is consistent with the prior appropriation doctrine and is the best method for efficiently accounting and distributing water and maximizing water use without waste.”); *see also* Idaho Code § 42-101 (providing “the state . . . shall equally guard all the various interests involved” in the use of the state’s water resources).

The District Court’s apparent view that these beneficial use principles apply only in basins where a “general provision” for excess use was adjudicated prior to the SRBA, R. 001065-66, is also contrary to law. This Court has never recognized such a limitation on the

beneficial use doctrine, even in the *ICL* cases. R. 001166. Nor would it make sense to limit the doctrine so that ancillary use of excess flows can occur in only where a “general provision” was adjudicated before commencement of the SRBA.

**4. The District Court’s Interpretation of Idaho Code § 42-201(2) Assumes That Idaho Law Allows for Unquantified Water Rights to All “Excess” Flows.**

The District Court’s interpretation of Idaho Code § 42-201(2) contemplates that Idaho law allows for perfecting “a vested water right in water identified by [the Director] as ‘unaccounted for storage.’” R. 001068. This interpretation would open the door to decreeing unquantified, open-ended water rights for all excess flows, year in and year out.

As previously discussed, water identified by the Water District 63 accounting system as “unaccounted for storage” is, by definition, any natural flow in excess of that needed to satisfy all water rights and that was physically captured in the reservoir system during flood control “refill” operations. The basic premise of the “unaccounted for storage” algorithm, in short, is that in flood years there is “excess water”—that is, “water not required by any water right on the system.” R. 001065. By rejecting Unaccounted for Storage Methodology, the District Court rejected the very possibility of “excess” water. The District Court’s rejection of the Unaccounted for Storage Methodology implies there is no such thing as “excess” water in the Boise River Basin, and that in every year, including record flood years, all water in excess of licensed and decreed water rights in the Boise River Basin must be deemed to have been appropriated by the BOR.<sup>36</sup> Idaho Code § 42-201(2) does not contemplate or require such an

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<sup>36</sup> This conclusion is confirmed by the District Court’s (incorrect) definition of “unaccounted for storage” as consisting of the excess natural flow “that continues to enter the reservoirs” after the Decreed Storage Rights have been satisfied. R. 001058; see also R. 001065 (“excess natural flow entering a reservoir after the reservoir water right is satisfied”). If “unaccounted for storage” is simply the excess flow that “continues to enter the reservoirs” and the BOR has a “right” to all the “unaccounted for storage,” then by definition the BOR has a “right” to all excess flows that happened to enter the reservoirs. That said, the Department notes that the District Court’s definition of “unaccounted for storage” as consisting of all excess water “that continues to enter the reservoir[s],” R. 001058, conflicts with the Director’s findings. The Director specifically found that “unaccounted for storage” is the excess flow the Corps physically captures and retains in the reservoir system. A.R. 001267 & n.37, 001270, 001276, 001278, 001410. The Director found that the amount of excess water captured and retained in the reservoir

**IDWR APPELLANTS’ BRIEF – Page 50**

interpretation. Indeed, by its terms the statute is intended to limit actions by appropriators rather than to prescribe a methodology of accounting for the distribution of water.

Further, the timing and rate of “refill,” and thus the storage of excess natural flow, is almost entirely dependent on the Corps’ flood control decisions, and is not completed until flood control operations have concluded. See A.R. 001245 (finding that the “rate of refill” depends on “forecasts of the total runoff from the remaining snowmelt, flood control rule curves, space distribution curves, as well as short term projections of reservoir inflow”); 001306 (“The uncontroverted evidence establishes that . . . the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent”).

Consequently, a water right to “protect” the “unaccounted for storage” from “future appropriation,” as contemplated by the District Court, R. 001163-64, would have to be opened, and encumber all excess flows until the Corps “determines there is no longer a risk of exceeding the flood control objective downstream of Lucky Peak” and “turns operation control over to the BOR.” A.R. 001243. The result would be an “uncertain” water right for a “vague and fluctuating” quantity of water, Village of Peck v. Dennison, 92 Idaho 747, 750, 450 P.2d 310, 313 (1970); see also A.R. 001301-02 (citing Village of Peck), because the amount of water that must be stored, released or bypassed until the Corps deems the flood risk to have passed changes every year. This Court has determined it is “likely” the holder of such a water right “will waste water and yet have the power to prevent others from putting the surplus to any beneficial use.” Village of Peck, 92 Idaho at 750, 450 P.2d at 313; see also Lee v. Hanford, 21

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system is significantly less than the amount of excess water “that continues to enter the reservoirs,” R. 001058, because the Corps “bypasses” much of the excess inflow, and “bypasses” do not increase “unaccounted for storage.” A.R. 001414 n.9, 001422. For this reason, excess inflows to the reservoir system in flood years often exceed the Water District 63 accounting system’s computation of “unaccounted for storage” by hundreds of thousands of acre-feet. R. 001097.

Idaho 327, 332, 121 P. 558, 560 (1912) (“such surplus and overflow of water would be wasted . . . and the right to appropriate public unused waters of the state would be denied”).

A water right of the type contemplated by the District Court would also impermissibly extend priority protection to a volume of water far in excess of that actually applied to beneficial use. *See IGWA, 160 Idaho at 133, 369 P.3d at 911* (“The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate.”); *Van Camp v. Emery* 13 Idaho 202, 208, 89 P. 752, 754 (1907) (“Whatever amount of water defendant shows himself entitled to for the irrigation of his meadows or other lands as a prior right over the plaintiff, the judgment should so decree, but beyond that he cannot go under any other pretext . . .”). The District Court’s interpretation of Idaho Code § 42-201(2) as requiring a water right that “protects” the “unaccounted for storage,” R. 001163-64, failed to harmonize the statute with the fundamental principles of the prior appropriation doctrine as established by Idaho law.

**5. The District Court’s Interpretation of Idaho Code § 42-201(2) Would Make Federal Flood Control Release Decisions the Basis for Distributing Water in Water District 63.**

The District Court recognized that making priority administration contingent on flood control releases and the Corps’ “pick and choose” approach to physically storing water during federal flood control operations would give the federal government legal control over the distribution and development of Idaho’s water. R. 001062-63. The District Court determined that distributing water according to the Corps’ flood control decisions would “cripple the Director’s ability to effectively distribute water under our system of water rights administration” and “effectively transfer water right distribution in the basin from the Director to the federal government.” R. 001062; *see also* R. 001063 n.9 (“Allowing a senior storage right holder to determine when to store water when the storage water right is in priority effectively turns over distribution control from the Director to the senior storage right holder.”).

The Director found that “refill” operations are flood control operations—indeed, the “refill” period is “normally the most difficult and most critical of the three flood control periods,” A.R. 001245 (quoting *Water Control Manual for Boise River Reservoirs*, p. 7-11) (Ex. 2005 at 000427), and the “rate of refill” is subject to and controlled by the Corps’ operational flood control decisions. *Id.*; A.R. 001306.

Flood control “refill” operations are based on the same “pick and choose” or “wait and see” approach to storing water that governs flood control “evacuation” operations, R. 001063 n.9. Even the District Court agreed that this approach is un-administrable, *see* R. 001062 (“the system of priority water right administration breaks down”) and results in federal control of the water system. *See id.* (“would effectively transfer water right distribution in the basin from the Director to the federal government.”). Thus, a water right that “protects” the “unaccounted for storage” during the “refill” period as contemplated by the District Court, R. 001163-64, would be contrary to Idaho law for exactly the same reasons that the District Court concluded that flood control operations cannot be allowed to dictate priority administration during the “evacuation” period.

Making flood control releases rather than diversions the basis for priority administration would “cripple the Director’s ability to effectively distribute water under our system of water rights administration” and “effectively transfer water right distribution in the basin from the Director to the federal government.” R. 001062, 001063 n.9. A water right for “unaccounted for storage” would make federal flood control decisions the basis for distributing water in Water District 63. This, in turn would have the effect of making the Corps the watermaster of the Boise River—as the Director and the District Court recognized. *See* A.R. 001279 (“such a system would make priority administration of state water rights dependent on federal flood control

operations”); R. 001062 (“The Director would be unable to deem the reservoir water rights satisfied and/or distribute water to junior users until the federal government says he can.”).

Further, a water right protecting “unaccounted for storage” as contemplated by the District Court would shift the risk of flood control operations to junior appropriators that have no control over flood control releases, are not the cause of a failure to “refill” the reservoir system, A.R. 001279, and historically have not been curtailed to facilitate “refill.” A.R. 001250, 001273-74. Such a water right would empower the BOR to curtail juniors in flood years to make up for the Corps’ failure to physically fill the reservoir system, even though more than enough excess natural flow was available to do so. *See* A.R. 001284 (“Contents-based accounting would create the real possibility of curtailment of junior water rights in the future . . . .”). It would also impermissibly allow the BOR to exercise or assert the priorities of its water rights “to block, condition, and/or control future use and development of excess flood water.” A.R. 001279; *see IGWA, 160 Idaho at 133, 369 P.3d at 911* (“There might be a great surplus of water in the stream . . . . [but] the plaintiff would have a cause of action to prevent such an appropriation.”) (citation omitted); Lee, 21 Idaho at 332, 121 P. at 560 (“such surplus and overflow of water would be wasted . . . and the right to appropriate public unused waters of the state would be denied”).

As the Director found, and as the BOR asserted in the Basin-Wide Issue 17 proceedings, federal flood control operations are “entirely independent of the water rights system.” A.R. 001301; Off’l Not.\BWI-17\91017\20130111US Response Brief on BW117 at 001213. The Corps does not hold any water rights for the Boise River reservoirs. Flood control decisions made by the Corps should not be the basis for determining the use, distribution, and development of Idaho’s water resources. As even the District Court recognized, “[s]uch a result is contrary to law.” R. 001062. The fact that the United States has decided to operate all of the reservoirs

simultaneously for the conflicting purposes of flood control and irrigation is not justification for recognizing a property right under state law to command all excess flows in the basin, year in and year out.

**F. THE DIRECTOR'S ACCOUNTING ORDER DID NOT PREJUDICE THE LATE CLAIMS PENDING IN THE SRBA.**

The District Court held that the Irrigation Organizations “have substantial rights in their water right claims [the late claims pending in the SRBA]” and “[t]hese rights are prejudiced by the Director’s determination that they have not acquired water rights, via their diversion and use, in water he identified as unaccounted for storage.” R. 001068. This holding was legal error.

**1. The Director Lacks Authority to Make Determinations of the Nature and Extent of the Unproven Late Claims Pending in the SRBA.**

The Director in performing his statutory duty of distributing water pursuant to Idaho Code § 42-602 does not, and legally may not, make determinations of the nature and extent of disputed water right claims that are pending in the SRBA. *See BWI-17, 157 Idaho at 393, 336 P.3d at 800* (distinguishing “determining water rights, and therefore property rights” from “just distributing water”); *Bray v. Pioneer Irr. Dist.*, 144 Idaho 116, 118, 157 P.3d 610, 612 (2007) (“All claims arising within the SRBA are within the exclusive jurisdiction of the SRBA.”). As a matter of law, the fact that the Director made no determination of the nature or extent of the late claims pending in the SRBA could not and did not prejudice the rights of the United States and the water users in their late claims.<sup>37</sup>

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<sup>37</sup> The Department does not concede that the late claims are “substantial rights” for purposes of this proceeding. *See, e.g., Nettleton*, 98 Idaho at 90, 558 P.2d at 1051 (casting doubt on whether an “unproven” claim to a water right based on “constitutional use” is a “significant property interest” for purposes of a due process analysis). But this Court need not reach that question in this case, for reasons discussed above. The Department also notes that while the District Court suggested the pending late claims assert rights to “unaccounted for storage” that was “stored and used by the irrigators for irrigation dating back before 1971,” R. 001068, it is undisputed that “unaccounted for storage” is a technical term of computerized water right accounting first used in 1978 in Water District 1, and that had no meaning or application in Water District 63 before 1986. A.R. 001261. Water claimed to have been beneficially used prior to 1971 cannot be identified by an accounting algorithm that did not even exist before 1971.

**IDWR APPELLANTS’ BRIEF – Page 55**

**2. The Director May Not Make Priority Distributions to the Unproven Late Claims Pending in the SRBA.**

The fact that the Water District 63 accounting system does not make priority distributions to the pending late claims also does not prejudice the late claims. Water must be encumbered by a water right license or decree to be susceptible of priority administration by the Director. See BWI-17, 157 Idaho at 394, 336 P.3d at 801 (“The decrees give the Director a quantity he must provide to each water user in priority.”); Almo Water Co., 95 Idaho at 21, 501 P.2d at 705 (stating that a watermaster “is authorized to distribute water only in compliance with applicable decrees”); Nettleton, 98 Idaho at 91, 558 P.2d at 1052 (“a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion.”) (citation omitted).

The District Court agreed with the Director’s determination that the Decreed Storage Rights do not encumber the water the accounting system reports as “unaccounted for storage.” R. 001058-65. The record is clear there are no licensed or decreed water rights that encumber water identified as “refill” or “unaccounted for storage.” Moreover, the unproven and disputed late claims pending in the SRBA may not be administered in priority as if they were adjudicated water rights. See Nettleton, 98 Idaho at 93, 558 P.2d at 1054 (“In times of shortage one holding an unadjudicated water right stands in a position similar to he who holds the ‘recorded’ water right of the lowest priority date.”) (discussing Idaho Code § 42-607). It would be legal error for the Director to recognize the unproven late claims when making priority-based distributions of water.

**3. The Irrigation Organizations Have Never Been Injured by the Water District 63 Accounting System.**

The Director found that the Water District 63 accounting system has consistently allowed excess natural flow identified as “unaccounted for storage” to be physically captured in the

reservoir system during the flood control “refill” period, provided no other water rights are injured, and allocated to Spaceholder storage accounts to replace “priority water” released for flood control purposes. A.R. 001271-75, 001291-93, 001296-98. The Director also found that the Irrigation Organizations have not suffered any water shortages as a result of the Water District 63 accounting system. A.R. 001285, 001297-98;<sup>38</sup> *see also* R. 001067 (“full storage allocations”).

Further, there is no support in the record for the District Court’s speculation about possible injuries resulting from future appropriations. The Director specifically found that there was no imminent risk of injury to future appropriations—indeed, the Director found that it is very difficult to perfect an appropriation in the inherently unreliable excess flood flows that constitute “unaccounted for storage” or “refill” water, and consequently they have remained unappropriated for many years. A.R. 001278, 001304. The District Court’s speculation about hypothetical future injuries has no support in the record.

Further, the Water District 63 accounting system does not allow juniors to call “unaccounted for storage” water from the reservoir system to satisfy their water rights. Licensed and decreed water rights encumber “natural flow” but not “stored water,” and under the Water District 63 accounting system, the flows that constitute “unaccounted for storage” are “stored water” once they have been captured in the reservoir system. This is because distinguishing “natural flow” from “stored water” is “fundamental in accounting for the distribution of water in Water District 63.” A.R. 001264; *see also* A.R. 001248 (“The Water District 63 water right

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<sup>38</sup> While in 1989 the BOR reduced Lucky Peak Spaceholder storage accounts as a result of flood control releases, this reduction was required by the BOR’s contracts, not the by Water District 63 accounting system. Further, the BOR handled “any failure to fill the reservoir system as a result of flood control releases” in the same way before the Water District 63 accounting system was adopted. The Director found that such a “failure to fill” was “accounted to Lucky Peak, either by ‘disregarding’ its carryover or by charging the shortfall against the ‘uncontracted’ space in Lucky Peak.” A.R. 001251-52, 001257; *see, e.g., Exs. 2123, 2124 2126 (disregarding carryover for purposes of allocating storage to Lucky Peak contract holders).*

accounting and storage allocations programs were implemented in 1986 to assist the Watermaster in this process.”); Nelson, 148 Idaho at 163, 219 P.3d at 810 (“When there is both natural flow and storage water in the river, the watermaster must determine the relative amounts of natural flow and storage water at the various diversion points on the river.”). The accounting system defines “natural flow” as “the flow that would be present in the river ‘absent reservoir operations and diversions,’” while “stored flow is any water in excess of the computed natural flow.” *Id.* “Unaccounted for storage” would not exist “absent reservoir operations,” and therefore is considered to be “stored” water that is not available for distributions to licensed and decreed water rights. Thus, junior water right holders cannot call “unaccounted for storage” out of the reservoir system to satisfy their water rights. Once “unaccounted for storage” has been captured in the reservoir system, there is no risk that it can be called out by junior appropriators.

But this does not mean, as the District Court incorrectly concluded, the Department views “unaccounted for storage” as “not subject to appropriation.” R. 001163. “Unaccounted for storage” is, by definition, excess to all water rights and therefore available for future appropriation until it is captured in the reservoir system. Idaho Const. Art. XV § 3. Future appropriations are not considered or determined in distributing water pursuant to existing water rights, however, but rather are addressed on a case-by-case basis in the permitting and licensing process. *See generally* Chapter 2, Title 42, Idaho Code (“Appropriation of Water—Permits, Certificates, and Licenses—Survey”). It is the permitting and licensing process that addresses questions of whether future appropriations “will reduce the quantity of water under existing water rights” and whether “the water supply itself is insufficient for the purpose for which it is sought to be appropriated.” Idaho Code § 42-203A(5).

**4. The Question of Whether the Late Claims Have Been Proven Was Not Before the Director in This Proceeding.**

The Department agrees with the District Court that, “[i]f proven,” the beneficial use-based late claims pending in the SRBA must be administered in priority pursuant to the partial decrees issued in the SRBA. R. 001164; *see id.* (“provided it can be proven up”). The late claims have not been proven, however, and, the Director’s findings in the administrative contested case regarding the United States’ historic flood control and storage allocations practices do not support a conclusion that quantities of water claimed were actually applied to beneficial use in the claimed years. As this Court stated in the *Nettleton* decision:

Even if upon investigation by the Water Resources Board or some interested person a means of diversion, as claimed by appellant, is discovered, there still remains the unanswered questions concerning the date such diversion of water was put into operation; the amount of water being diverted; the use for which the water is being diverted; and the continuity in time of appellant’s diversion of water.

Nettleton, 98 Idaho at 90, 558 P.2d at 1051.

These questions were not before the Director in this proceeding and have not yet been answered, despite the District Court’s statement that “it seems obvious” that beneficial use of the water captured during flood control “refill” operations “has historically occurred.” R. 001067.

**G. THE DISTRICT COURT ERRED BY SETTING ASIDE AND REMANDING IN PART.**

The District Court erred in setting aside and remanding in part the *Final Order*, R. 001074, for the reasons discussed above. Moreover, the District Court’s remand exceeds the scope of this proceeding and of the Director’s authority. The District Court stated it was reversing and remanding “the Director’s determination that the United States and irrigators have not acquired a vested water right in water identified by him as unaccounted for storage.” R. 001068. This is an IDAPA judicial review case regarding water distribution rather than an adjudication, however, and the Director has no authority to make determinations of the nature or

extent of the unproven and disputed late claims pending in the SRBA. See BWI-17, 157 Idaho at 393, 336 P.3d at 800 (distinguishing “determining water rights, and therefore property rights” from “just distributing water”); Bray, 144 Idaho at 118, 157 P.3d at 612 (“All claims arising within the SRBA are within the exclusive jurisdiction of the SRBA”). The District Court erred as a matter of law by remanding to the Director questions that were not before the Director and that exceed the scope of this proceeding, and by essentially requiring the Director to adjudicate the unproven and disputed late claims that remain pending in the SRBA.

#### IV. CONCLUSION

The Department respectfully requests, for the reasons discussed herein, that this Court reverse the District Court’s order setting aside in part and remanding in part the *Final Order*, and affirm the *Final Order* in full.

RESPECTFULLY SUBMITTED this 26<sup>TH</sup> day of May 2017.

LAWRENCE G. WASDEN  
Attorney General

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

  
\_\_\_\_\_  
GARRICK L. BAXTER  
Deputy Attorney General

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of May 2017, I caused to be served a true and correct copy of the foregoing document by the method(s) indicated:

*Original to:*  
Clerk of the Court  
IDAHO SUPREME COURT  
451 W. State Street  
Boise, ID 83303-2707

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

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S. Bryce Farris  
Andrew Waldera  
SAWTOOTH LAW OFFICES, PLLC  
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\_\_\_\_\_  
Garrick L. Baxter  
Deputy Attorney General

# **Addendum A**

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

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

CIVIL CASE NUMBER: 39576

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

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

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

2. Date of Priority: JULY 28, 1939

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

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

4. Point of Diversion:

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

5. Description of diverting works: PALISADES DAM

6. Water is used for the following purposes:

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

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

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

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

9. Non-irrigation uses:

DOMESTIC AND POWER

10. Place of Use:

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

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

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

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

13. Other Water Rights Used: 01-10043

14. Remarks:

15. Basis of Claim: LICENSE

16. Signature (s)

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

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

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

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

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

Signature of Authorized Agent [Handwritten Signature]

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

Date 12/1/2006

State of Idaho )  
County of Ada )

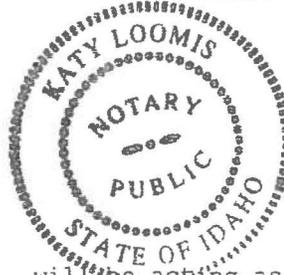
Subscribed and sworn (or affirmed) before me this 1<sup>st</sup> day of December 2006.

Notary Public SEAL Katy Loomis

Residing at Boise, Idaho

My Commission Expires 10/17/2009

Katy Loomis Please Print Name



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

Signature \_\_\_\_\_

Address \_\_\_\_\_

Date \_\_\_\_\_

Last Name \_\_\_\_\_ Ident. Number \_\_\_\_\_

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

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

CIVIL CASE NUMBER: 39576

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

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

1. Name: UNITED STATES AMERICA, ACTING THROUGH 208-378-5306  
Address: REGIONAL DIRECTOR, P.N. REGION ATTN: PN-3100  
BUREAU OF RECLAMATION  
1150 NORTH CURTIS  
BOISE, ID 83706-1234
2. Date of Priority: MAR 30, 1921  
  
156,830 AFY of this right shall be administered under a priority date of  
03/29/1921.
3. Source: SNAKE RIVER Trib. to: COLUMBIA RIVER
4. Point of Diversion:  

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
07S	31E	30	SW	SE			POWER
5. Description of diverting works:  
  
AMERICAN FALLS DAM
6. Water is used for the following purposes:  

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION STORAGE	01/01	12/31			1,700,000.00
IRRIGATION FROM STORAGE	03/15	11/15			1,700,000.00
POWER STORAGE	01/01	12/31			1,700,000.00
POWER FROM STORAGE	01/01	12/31			1,700,000.00
7. Total Quantity Appropriated is:  
C.F.S. (and/or) 1,700,000.00 A.F.A.

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

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

9. Non-irrigation uses:

DOMESTIC AND POWER

10. Place of Use:

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

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

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

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

13. Other Water Rights Used:

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

14. Remarks:

15. Basis of Claim: LICENSE

16. Signature (s)

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

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

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

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

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

Signature of Authorized Agent [Handwritten Signature]

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

Date 12/1/2006

State of Idaho )  
                          )  
County of Ada    )

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

Notary Public SEAL Katy Loomis

Residing at Boise, Idaho

My Commission Expires 10/17/2009

Katy Loomis Please Print Name



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

Signature \_\_\_\_\_

Address \_\_\_\_\_

Date \_\_\_\_\_

Last Name \_\_\_\_\_ Ident. Number \_\_\_\_\_

# **Addendum B**

*The Making of an Agricultural  
Landscape in the American West*

# IRRIGATED EDEN



MARK FIEGE

*Foreword by William Cronon*

# **Irrigated Eden**

The Making of an Agricultural Landscape  
in the American West

**MARK FIEGE**

*Foreword by William Cronon*

UNIVERSITY OF WASHINGTON PRESS  
SEATTLE & LONDON

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out of antagonism, the FPIA matured into an agency of community accord.<sup>26</sup>

Cooperative organization thus became essential to stable water allocation on the upper Snake. The Rexburg decree and prioritization of water rights alone would not have established peaceable or equitable water distribution. A watermaster still had to reconcile an idealized system with an erratic, complicated river. Prior appropriation recognized that a stream's total available water supply fluctuated, but beyond that, the list of prioritized rights represented water abstracted from nature, from its spatial context and from its hydrology. The Snake as a whole did not simply rise and fall in volume; because of groundwater levels, rainfall on various parts of the watershed, and "return flow" (surface or underground water that flowed into the river from canals and fields), the river fluctuated in particular reaches of its channel. Thus a watermaster still had to match the priority list with this dynamic stream, something that he could never accomplish perfectly. To the extent that real water did not correlate with water rights, there would be cause for quarrels. In particular, the most vulnerable irrigators—those with the latest rights, and those in the Blackfoot vicinity especially—would have reason to challenge the allocations. But on the upper Snake River, the FPIA and the extralegal system of temporary transfers forestalled such conflict. During crisis, irrigators did not necessarily have to resort to judges or lawsuits to get water.

Upper valley irrigators did not find themselves living completely without conflict, however. Even as they worked out differences among themselves they had to confront a more serious threat to amicable water distribution. This threat came from Jackson Lake dam, the waters of Jackson Lake reservoir, and the recipients of that stored water: the farmers of the Minidoka and Twin Falls projects.

Water managers intended the dam to regulate a dynamic river: the structure captured the Snake's spring flood and created a tremendous water reserve that, when finally released, counteracted the July or August drop in the river's volume. But *regulate* is not the best word to describe what Jackson Lake dam and reservoir did to the Snake, because the stored water actually complicated the river's hydrology and thus the irrigators' water allocation systems. In the Snake's channel, reservoir

water intended for Minidoka and Twin Falls mixed with water that normally flowed there. Water distribution now became even more difficult than before, because upper valley irrigators—those around Rigby, Idaho Falls, and Blackfoot—had to distinguish not only between chronological rights but between two kinds of water: stored water and natural flow. The problem of physically allocating the two intermixed categories of water led to conflict between irrigators around Rigby, Idaho Falls, and Blackfoot (natural flow users) and those in the vicinity of Minidoka and Twin Falls (stored water users).

Abstractly, the differences between stored water and natural flow were quite stark. Stored water—the reservoir—resembled a resource that people stockpiled; relatively motionless, it sat within a sort of container. Groups of downstream irrigators held prioritized rights to the stored water, but these rights did not function the same way that natural flow rights did. Irrigators exercised their natural flow rights at the specific places where they actually diverted water from a stream into ditches or canals. In contrast, users of stored water legally acquired that water at the reservoir, not at the headgates of their canals. But the strongest distinction between the two categories appeared in the different ways that irrigators measured them. Irrigators expressed their stored water rights in terms of a static measure, acre-feet; they represented natural flow rights as cubic feet per second (cfs) a figure that accounted for motion as well as volume.<sup>27</sup>

The problem for water managers—state, local, and federal officials—was keeping track of the two types of water as they flowed together in the Snake. The officials had to distinguish stored water from natural flow, both in the reservoir itself and in the river's channel; they had to distribute water to upper valley irrigators with natural flow rights and at the same time shunt water through the river for more than 300 miles to stored water users at Minidoka and Twin Falls. The engineer A. E. Robinson summed up the problem in a 1912 report. "On the face of it," he wrote,

it would seem to be a simple problem to divert a certain amount from a reservoir into the head of a stream, and take it out down below undiminished except for losses due to natural causes, and at the same time allow persons holding rights to the natural flow to draw the water to which they were enti-

tled. But actual solution of the problem depends upon so many unknown quantities that the equitable distribution of water becomes one demanding a great amount of hard work and clear thinking.

The challenge that Robinson and other water managers faced was nothing less than a variation on the basic problem of reconciling the ideal, schematic, legal river and the real, complicated stream.<sup>28</sup>

The difficulties began at Jackson Lake. Here reservoir water sat within a container, but the container was not exactly like a bottle or tank—it was not closed and impervious. Rather, the reservoir water was subject to uncontrollable, and to a certain extent unmeasurable, hydrological processes. Pooled in Jackson Lake, water both evaporated and seeped into the ground. When the Reclamation Service drew the reservoir down, the "bank storage" seeped back in. The precise quantities of evaporation and bank storage, moreover, varied according to hydrological conditions. Cloudy weather inhibited evaporation; clear skies boosted it. Drought and low water lessened bank storage; abundant precipitation and a full reservoir increased it. These conditions presented water managers with nearly irresolvable problems. Did evaporation and bank storage come from stored water or natural flow? If both, what percentage did each type of water contribute? What was the evaporation and bank storage in the natural Jackson Lake, the lake prior to the dam? How did the reservoir affect this natural evaporation and bank storage? Such questions were virtually impossible to answer because both stored water and natural flow mixed together in the reservoir.<sup>29</sup>

Transporting stored water through the Snake's channel magnified the problem of water allocation. One difficulty typically developed around July. At this time, the natural flow of the river began to decrease. Irrigators in the vicinity of Rigby, Idaho Falls, and Blackfoot now had to confront the fact of scarcity. Their Snake—the natural flow—was receding in its bed. Yet this diminution was not obvious. Hot July weather usually compelled the downstream Minidoka-Twin Falls irrigators to request formally their reservoir supply; just when the natural flow was decreasing, the Reclamation Service opened the gates at Jackson Lake dam, and stored water surged down the river. Consequently, around Rigby, Idaho Falls, or Blackfoot, the Snake's total volume might not be falling at all. Indeed, the stored water might actually cause the river to

rise. But the irrigators of Rigby, Idaho Falls, and Blackfoot did not understand the complex relationship between stored water and natural flow. They looked at the full Snake and refused to believe the water managers who told them that their portion of the river—the natural flow—was decreasing, that priority would have to be implemented and headgates closed. It simply did not make sense to these natural flow irrigators that they should be deprived of water when the river was so full.<sup>30</sup>

And the problems did not end here. Water managers had to account for fluctuations in stored water and natural flow as the two kinds of water ran through the Snake. Along its course, the river lost water to evaporation and seepage. The amount of loss depended on an array of factors, including quantity and speed. The greater the volume of water, for example, the greater the loss. These fluctuations baffled water managers and made allocation difficult. To which category—stored water or natural flow—did the loss apply? What percentage of loss could be attributed to each?<sup>31</sup>

Water managers had an equally difficult time assessing gains in the Snake's volume. Gains came not simply from springs or a high water table but from return flow, the source of which was unclear. Return flow consisted largely of irrigation water (originally natural flow) that seeped back into the Snake from canals, ditches, and fields in the area surrounding Rigby, Idaho Falls, and Blackfoot. But return flow also consisted of stored water that, after its release, was lost in transit and that eventually trickled back into the river's channel. Water managers faced enormous problems tracing return flow to its source and then crediting it to stored water or natural flow. But to make matters worse, geography and time further confused the task. For example, did return flow from stored water loss seep back into the river in time for the water managers to credit it to the stored water users, or did it finally make its way back into the river after the irrigation season had ended? Or did return flow from upstream canals enter the river too far downstream for the natural flow irrigators to make use of it? Water managers could not readily reconcile return flow in two columns on a ledger sheet. They could not easily match the legal river's abstract quantities with the mysteries of the real Snake.

Nevertheless, they had to make the attempt. Each year water managers compiled measurements from the limited number of gauging stations

on the Snake River and then made informed approximations of the losses and gains to stored water and natural flow. Their calculations generally favored the natural flow users. During the 1910s, water managers typically estimated an overall 5 to 10 percent loss of stored water between Moran gauging station, just below Jackson Lake dam, and Blackfoot station, downstream from the headgates of the last upper valley canals.<sup>32</sup>

Natural flow irrigators in the upper valley had no objections to the water managers' methods—as long as the river carried ample water. But with drought and water scarcity, they changed their minds and began to find fault with the system. In particular, natural flow irrigators with the latest rights, especially those in the Blackfoot area, offered the greatest objection to the official accounting of the Snake. When water grew scarce and the natural flow of the river fell, water managers began to close headgates of canals with late rights. Starting with the last water right, they cut off each successive older right, closing headgates as necessary to supply the canals with the earliest rights. Irrigators with late rights now had reason to question the calculations, and they argued that the Snake actually carried more natural flow than the managers had figured. Anger increased in proportion to the diminishing water, and once again headgates became points of contention.<sup>33</sup>

Controversy over stored water and natural flow involved numerous groups, organizations, and overlapping government agencies. The Reclamation Service (renamed the U.S. Bureau of Reclamation in 1923) operated Jackson Lake dam and reservoir for the Minidoka-Twin Falls irrigators. The U.S. Geological Survey maintained stream gauges along the Snake, which it used to collect data on the river's flow. Beginning in 1909, the Idaho state engineer appointed a special deputy to control and allocate stored water that flowed from Jackson Lake. Until 1910, a court-appointed watermaster regulated the natural flow of the Snake in the area covered by the Rexburg decree; starting in 1911, water users in this area (designated Water District 36 in 1915) elected their watermaster. Meanwhile, irrigators around Minidoka and Twin Falls had their own watermaster. In addition to the official water agencies and administrators, grass-roots organizations formed. The FPIA was one such group; there would be still others. These entities gradually worked toward the creation of an extralegal, cooperative management system—eventually embodied in the Snake River Committee of Nine—that attempted to

resolve the technical problems of dividing and distributing stored water and natural flow.<sup>34</sup>

The conflict that led to the formation of the Committee of Nine developed as early as 1911. In late July of that year, the Reclamation Service adjusted the gates at Jackson Lake dam to flush 10,000 cfs of water from the reservoir. As the reservoir level fell, the discharge gradually decreased to 1,800 cfs, until at last the delivery to the Twin Falls and Minidoka projects was complete. The dam tenders then partially closed the gates, allowing only the calculated natural flow—1,000 cfs—to pass over the dam. As the Snake drastically fell in volume from the peak stored water discharge, "reports . . . circulated the upper valley," said D. G. Martin, "to the effect that the Government had closed its gates at Jackson Lake entirely and was not allowing any water to escape into the stream." The upper valley farmers' perception, however mistaken, revealed their fear that Jackson Lake dam and its operators deprived them of their natural flow rights.<sup>35</sup>

A similar scenario unfolded in the summer of 1914. In July the river fell as it usually did, but this time it dropped lower and more suddenly than in other years. On July 19, the Reclamation Service opened the gates at Jackson Lake dam, allowing stored water to pass into the Snake. Shortly thereafter, the state engineer's special deputy and his assistants began to close upper valley canals holding late rights. Natural flow irrigators now observed, and rebelled against, the apparent paradox of headgate closures while the river still carried plenty of water overall. Special deputy W. O. Cotton reported that these irrigators "could not understand why they were cut so much more this year than ever before, and so sure were they that there was some error somewhere that they were protecting their rights with military force." Cotton did not explain what this military force entailed, but his statement probably referred to angry farmers guarding headgates along the Snake.<sup>36</sup>

As the crisis deepened, water managers appealed to the FPIA for help. Cotton reported that he arranged with the FPIA officers to "lay this matter before them and see if we could not secure their cooperation in holding some of the canals to the amount to which they were entitled." At the meeting, representatives of canals holding late water rights—the Farmers' Friend, Rudy, Snake River Valley, and others—voiced their belief that the natural flow was not falling as rapidly as Cotton had calculated.

