

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

**BOISE PROJECT BOARD OF
CONTROL INITIAL STATEMENT
OF ISSUES**

On October 24, 2013, the Director served a Notice of a Contested Case and Notice of a Status Conference soliciting statements of concern, objections to and statements in support of how the Department credits or counts water to storage account fill in Basin 63 from Basin 63 water users. The Director also served a similar Notice of a Contested Case in Basin 01, at about the same time.

The Boise Project Board of Control (“Boise Project”) has several serious concerns about the process, timing, and whether a contested case is the appropriate procedural mechanism for resolving the issues surrounding fill of the reservoirs. These concerns can be broken down into several larger categories. We will describe those categories, with individual issues as subparts to each.

ADMINISTRATIVE AND PROCEDURAL

The Contested Case appears designed to address the issue of how to determine when a water right is “filled” for purposes of establishing the water right holders’ legal interest in the water diverted and stored in the reservoirs.

The SRBA Court recognized that this very issue was a matter of Basin Wide significance, when it designated Basin-Wide Issue No. 17. The SRBA Court made it clear that this issue of

how to determine what water a storage right holder had the right to put to beneficial use was not just a matter of interest in an individual basin, but was significant across the entire Snake River Basin. The SRBA Court found the issue to be “broadly significant” and that it “affects many storage rights throughout the State.” Order Designating Basin Wide Issue, Subcase No. 00-91017.

The Director’s Notice bifurcates the issue between Basin 63 and Basin 01, but refers to common “water right accounting procedures that allow for the releases, operations, and management of on-stream storage....”

The Director’s Notice of Contested Case states that the source of the Director’s authority to determine fill arises from existing law, i.e., Title 42, Chapter 6, on distribution of water under the prior appropriation doctrine, including diversion facilities from federal reservoirs that store water appropriated under Idaho water rights. Notice of Contested Case, Conclusions of Law, ¶¶ 1-3.

Accordingly, the issue of determining the rights of water right holders to use water from federal reservoirs involves statements of general applicability to water right holders which, in the Director’s view, implements existing law, including the priority doctrine.

Under these circumstances, the accounting program involves rulemaking as a matter of Idaho law. *Asarco v. State*, 138 Idaho 719, 723 (2003). The *Asarco* decision set out six additional factors to consider, each of which weighs in favor of concluding that establishing accounting rules for the storage reservoirs is subject to formal rulemaking under Idaho law.

Those six factors are:

1. Wide coverage
2. Applied generally and uniformly

3. Applies prospectively
4. Prescribes a legal standard not in the enabling statute
5. Expresses agency policy
6. Interprets law or policy

The SRBA Court and the Department agree that accounting determinations have wide coverage. The Department's Notice and the State's position in Basin Wide 17 suggest that the accounting principles should be widely and uniformly applied, at least within Basin 63 and Basin 01, but also across all administrative Basins. The accounting rules would apply prospectively from the date of adoption or amendment. There is nothing in the statutes relied on by the Department and State that explains how the storage rights are to be "filled." Indeed, the Department claims discretion to make those decisions because of the lack of statutory direction. There is no other written Department policy on filling storage water rights, and the accounting rules set out departmental policy on how the prior appropriation doctrine should be applied to storage rights.

Yet, the Department has never subjected the accounting program or rules to any public process, as the Notice admits. There is admittedly no record to support what it is, how it came to be, and by whose directive. Certainly the Department has never conducted rulemaking of any kind.

The Supreme Court in *Asarco* rejected the notion that a Department could avoid rulemaking just by engaging in a different legal process. Here, the Department's choice to initiate a contested case is at odds with the law and the APA, as the DEQ's decision to create a TMDL governing water quality allocations within a single watershed or basin, without engaging in rulemaking was in *Asarco*.

Because the accounting determination requires rulemaking, the existing accounting program created outside of the rulemaking process by the Department without any public input is void. *Id.* at 725.

The Department cannot resurrect a void action by *post hoc* contested case proceedings. First, because this determination of general applicability of how the priority doctrine should be applied to storage contracts, is a matter for rulemaking, as discussed above. Second, there is no authority for a state agency to create an interpretation that profoundly affects individual property rights, and then search for a record and a reason to support that interpretation.

Such an after the fact justification of the existing accounting program and rules would be entitled to no deference at all under well-established legal principals.

It is impossible to review the basis for the existing accounting program or rules, since there is no administrative record, and the records that do exist are “scattered and incomplete.” The basis for the accounting program has not been fully explained, nor has the Department ever articulated what facts it considered when it adopted this program. *See Jasso v. Camas County*, 151 Idaho 790 (2011).

UNCERTAINTIES

With respect to the “existing” accounting rules, there is a great deal of uncertainty. The Boise Project has repeatedly asked the Department to provide any contemporaneous documents which explain how and why someone at the Department came to the conclusion that certain rights should be filled before other rights and how flood control releases should be treated in the accounting program. Not a single document has been produced. As far as the Boise Project is aware, the only justification is the accounting program. Without knowing the basis for the original decisions, as opposed to the various after the fact arguments made by counsel for the

State in the Basin Wide 17 subcase, it is impossible to adequately comment on the “existing” accounting rules.

The State’s lawyers have argued variously that all water is diverted to storage when it enters the headwaters of the reservoir, and alternatively not until it reaches the dam. Is there a basis in the accounting rules for either argument? Which is it?

The State’s lawyers have variously argued that all water is diverted by the dam, but that only some water diverted is “counted” against the storage right. What waters are counted? Who made that decision to count only some water and why? If some waters are not “counted” then can’t the accounting rules allow other water to be not “counted”?

Who came up with the concept of “paper fill”? And why?

BASIN 63 WATER CONTROL MANUAL

The Department was involved with development of and agreed to the 1985 Water Control Manual for the Boise River. The Water Control Manual provides very detailed provisions for incorporating flood control releases, timing and volume, with refill of the reservoir. The Department has incorporated that manual into many, if not most, of the water rights in Basin 63. How do the generic existing accounting rules relied on by the Department incorporate the policies in the Water Control Manual?

BASIN 01 AND BASIN 63

The Boise Project has been repeatedly told by the Department that the accounting rules can best be explained by the Water District 01 personnel and the water accounting from the Upper Snake will be applied to the Boise in some fashion.

The water users in Water District 01 and the Department have been working for a year (or longer) to set forth explanations for the accounting rules in Basin 01. The water users and the

water master from Water District 63 have had no role in that process. How is it conceivable that definitions currently being adopted by Basin 01 water users will be used to administer Basin 63 water rights?

The Notice sets separate contested cases, because of significant differences between Basin 63 and Basin 01, yet at the same time suggests that the “existing” accounting rules are equally applicable to both Basins. How can the water users in Basin 63 be expected to simply accept what the Basin 01 water master and water user committee has taken so long to develop?

The Notice states that there are significant differences between Basin 63 and Basin 01, yet offers no indication of how, or even if, different accounting rules are appropriate for the two Basins. Since the Department has created two separate subcases, the Department should explain how the two Basins are or should be treated differently in its accounting rules.

THESE PROCEEDINGS

The Boise Project is concerned that the outcome of the proceedings are simply a forgone conclusion to justify the existing accounting rules. Indeed, the attorneys for the State and Department have argued that these rules are required and that, as a matter of law, reservoir space holders must bear the burden of all flood control releases. Since the Director is advised by these same attorneys, it is difficult to see how any different result will be permitted.

If the purpose of the proceedings is to document the “existing” accounting rules then this proceeding violates the APA by manufacturing an after-the-fact justification for a previous decision.

Some Department personnel appear to be so invested in the existing accounting program and rules and they have lobbied hard to keep these rules in place for so long that any effort by the

water users is likely to be futile. As an example, see the accounting explanation from Water District 01, relied on by the State in the Basin Wide proceedings.

The Director has been personally involved in many discussions with water users over potential settlement of the fill and refill Basin Wide 17 case. The Director has also been involved in responding to settlement negotiations. In these circumstances, it is inappropriate for the Director or any other IDWR staff to serve as a neutral, impartial hearing officer. A truly independent hearing officer from outside the Department should be appointed.

In briefing before the SRBA Court, the State's attorneys argued that testimony of Department and Water District staff would be necessary in this proceeding. The State's attorneys argued further that the Director and the Department "must be given an opportunity to fully participate in developing the record and to defend their water right administration and accounting methods." *Reply in Support of State of Idaho's Objection and Motion to Strike*, p. 10 fn 13. (Emphasis added). It appears that the State and Department's attorneys seem to think that this contested case proceeding is all about defending an existing accounting regime, for which there is no adequate record, rather than establishing a full and fair hearing for the space holders. Since the Department is defending itself and since the testimony and possible credibility of Department witnesses may be at issue, it is imperative that an independent hearing officer be appointed.

This is not a run of the mill contested case between two water users over a call, where the Department is indifferent to the outcome, but involves the deep inner workings of the Department's practices and procedures. Hence, it should not be treated as typical contested cases.

DISCOVERY NEEDS

The Department acknowledges there is scant support for its accounting rules and program, at least contemporaneous to adoption. At the outset, the Department should establish the existing Administrative Record for the existing water accounting rules.

The Boise Project made a public records request for records supporting the Department's 1974 Flood Control Report and received nothing created by the Department. The Boise Project will request either as part of the Administrative Record or in formal discovery requests from the Department information about the following:

- A. Department's 1974 Flood Report, including all communications between the Department, the Governor's office, the Bureau of Reclamation, and the Corps of Engineers.
- B. Communications between the Department, the Bureau of Reclamation, and the Corps on the Boise River Water Control Manual.
- C. Documents concerning the Department and Water Board's determinations that the Boise River is fully appropriated.
- D. Documents concerning the basis for the provisions for water quantity on the Boise River storage rights, including from the License files pre-dating the SRBA.

A CONTESTED CASE ON REFILL IS PREMATURE WHILE THE APPEAL IN BASIN WIDE 17 IS PENDING

The appeal of the Basin Wide issue asks the Supreme Court to remand the subcase to the SRBA Court to develop the necessary record to determine whether a remark is necessary on the storage rights, which inevitably requires the SRBA court to define fill and refill of the reservoirs following flood control releases as an element of the water right. Should the Court grant the remand, this entire proceeding will be moot, at huge cost to the water users.

SUMMARY AND CONCLUSIONS

This proceeding is an improperly convened contested case. If fill and refill are not elements of the property right to be decided by the SRBA court, the accounting rules should be determined in negotiated rulemaking, not a contested case.

A contested case cannot “provide an adequate legal justification for the existing accounting rules.

The existing accounting rules cannot be subject to judicial review since there is no contemporaneous record to support them.

The accounting rules and program are rife with uncertainties as to how and why certain decisions were or were not made and by whom. These uncertainties must be explained by the Department before the space holders can be expected to provide comment.

The Department’s role in the Boise River Water Control Manual is left unexplained.

Basin 63 water users are concerned that Basin 01 procedures are being developed in Basin 01 and then imposed by the Department in Basin 63.

The Department does not explain how, if at all, it intends to, or does now, treat the Basins differently for accounting purposes.

These proceedings are rife with conflict between the Department and water users. The Department employees and attorneys should not be placed in the position of determining ultimately whether their own and their predecessors’ decisions are supported. That task should be left to an independent hearing officer.

Significant discovery and/or an administrative record must be developed.

Dated this 4th day of December, 2013.

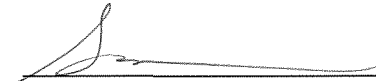
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of December, 2013, I served the foregoing *Boise Project Board of Control Initial Statement of Issues* upon the Director of the Idaho Department of Water Resources by hand delivery.



Shelley M. Davis