

DANIEL V. STEENSON (ISB #4332)  
S. BRYCE FARRIS (ISB #5636)  
SAWTOOTH LAW OFFICES, PLLC  
1101 W. River St., Ste. 110, P.O. Box 7985  
Boise, Idaho 83707  
Tel: (208) 629-7447  
Fax: (208) 629-7559  
Email: [dan@sawtoothlaw.com](mailto:dan@sawtoothlaw.com)  
Email: [bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)

RECEIVED  
OCT 02 2014  
DEPARTMENT OF  
WATER RESOURCES

*Attorneys for Ditch Companies*

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

**AFFIDAVIT OF COUNSEL**

STATE OF IDAHO    )  
                          )ss.  
County of Ada        )

S. BRYCE FARRIS, being first duly sworn upon oath, deposes and says:

1. That I am one of the attorneys of record for (“Ditch Companies”) in the above-titled matter.

2. I make this Affidavit based upon personal knowledge of the documents and facts of this case.

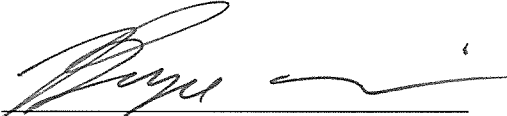
3. Attached hereto as Exhibit A is a true and correct copy of the power-point presentation provided by Director Gary Spackman, to the Natural Resources Interim Committee on

September 17, 2014. This document and the agenda for said presentation can also be found at <http://legislature.idaho.gov/sessioninfo/2014/interim/resources.htm>.

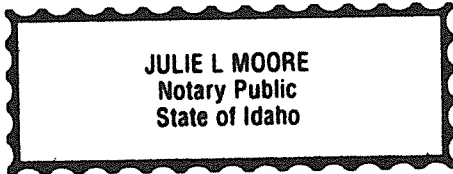
Further you affiant sayeth naught.

DATED this 2nd day of October, 2014.

SAWTOOTH LAW OFFICES, PLLC

By:   
S. Bryce Farris

SUBSCRIBED AND SWORN TO BEFORE ME this 2<sup>nd</sup> day of October, 2014.



Julie L. Moore  
NOTARY PUBLIC for Idaho  
Residing at: Boise, Idaho  
My Commission Expires: 2-27-2020

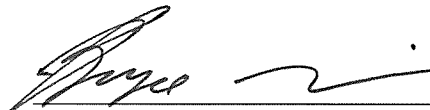
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of October, 2014, I served the foregoing to the following and by the method indicated below:

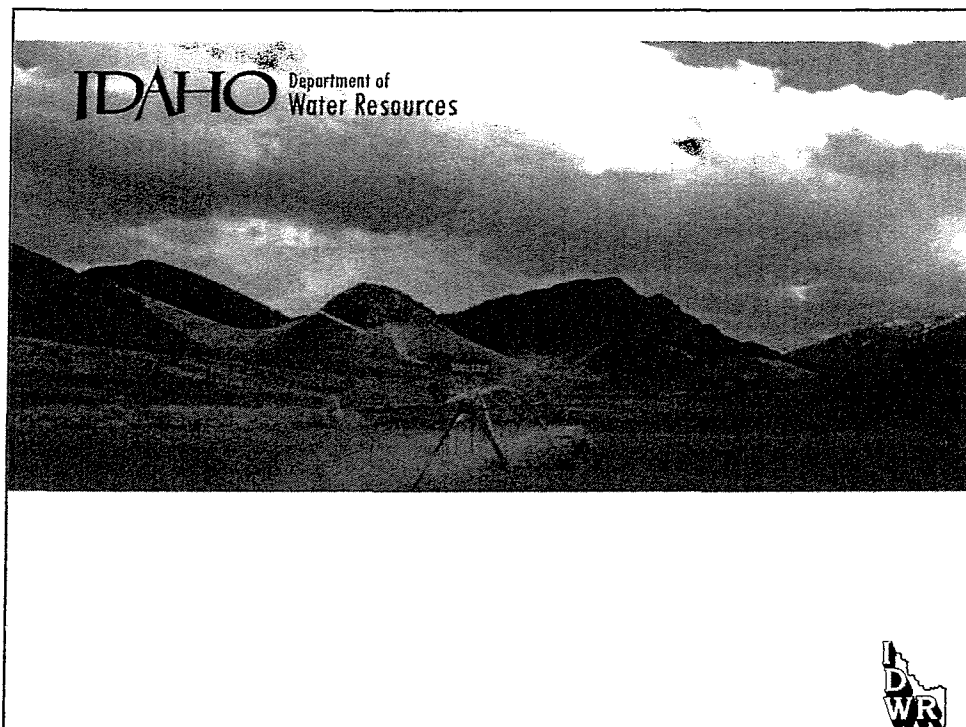
Erika E. Malmén PERKINS COIE LLP 111 West Jefferson St., Ste. 500 Boise, ID 83702-5391 <a href="mailto:emalmén@perkinscoie.com">emalmén@perkinscoie.com</a>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Peter R. Anderson TROUT UNLIMITED 910 W. Main St., Ste. 342 Boise, ID 83702 <a href="mailto:panderson@tu.org">panderson@tu.org</a>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Scott L. Campbell  Andrew J. Waldera  MOFFATT THOMAS BARRETT ROCK &amp;  FIELDS, CHRTD  PO Box 829  Boise, ID 83701  <a href="mailto:slc@moffatt.com">slc@moffatt.com</a>  <a href="mailto:ajw@moffatt.com">ajw@moffatt.com</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>David Gehlert, Esq.  US Dept. Of Justice  Denver Field Office  999 18<sup>th</sup> Street, South Terrace, Ste. 370  Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>James C. Tucker, Esq.  Idaho Power Company  PO Box 70  Boise, ID 83702  <a href="mailto:jamestucker@idahopower.com">jamestucker@idahopower.com</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>Albert Barker  Shelley M. Davis  BARKER ROSHOLT &amp; SIMPSON, LLP  PO Box 2139  Boise, ID 83701-2139  <a href="mailto:apb@idahowaters.com">apb@idahowaters.com</a>  <a href="mailto:smd@idahowaters.com">smd@idahowaters.com</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>Chas. F. McDevitt  Dean J. Miller  Celeste K. Miller  McDEVITT &amp; MILLER, LLP  PO Box 2564  Boise, ID 83701  <a href="mailto:chas@mcdevitt-miller.com">chas@mcdevitt-miller.com</a>  <a href="mailto:joe@mcdevitt-miller.com">joe@mcdevitt-miller.com</a>  <a href="mailto:ck@mcdevitt-miller.com">ck@mcdevitt-miller.com</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>Jerry A. Kiser  PO Box 8389  Boise, ID 83707  <a href="mailto:jkiser@cableone.net">jkiser@cableone.net</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>

<p>John K. Simpson  Travis L. Thompson  Paul L. Arrington  BARKER ROSHOLT &amp; SIMPSON LLP  195 River Vista Place, Ste. 204  Twin Falls, ID 83301-3029  <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>  <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a>  <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher  FLETCHER LAW OFFICE  PO Box 248  Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>Rex Barrie  Watermaster  Water District 63  PO Box 767  Star, ID 83669  <a href="mailto:waterdistrict63@qwestoffice.net">waterdistrict63@qwestoffice.net</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>Ron Shurtleff  Watermaster  Water District 65  102 N. Main St.  Payette, ID 83661</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Email</p>
<p>Michael P. Lawrence  GIVENS PURSLEY  PO Box 2720  Boise, ID 83701-2720  <a href="mailto:bms@msbtlaw.com">bms@msbtlaw.com</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>Bruce Smith  MOORE SMITH  950 W. Bannock St., Ste. 520  Boise, ID 83702-5716  <a href="mailto:mpl@givenspursley.com">mpl@givenspursley.com</a></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>

  
S. Bryce Farris

# EXHIBIT A

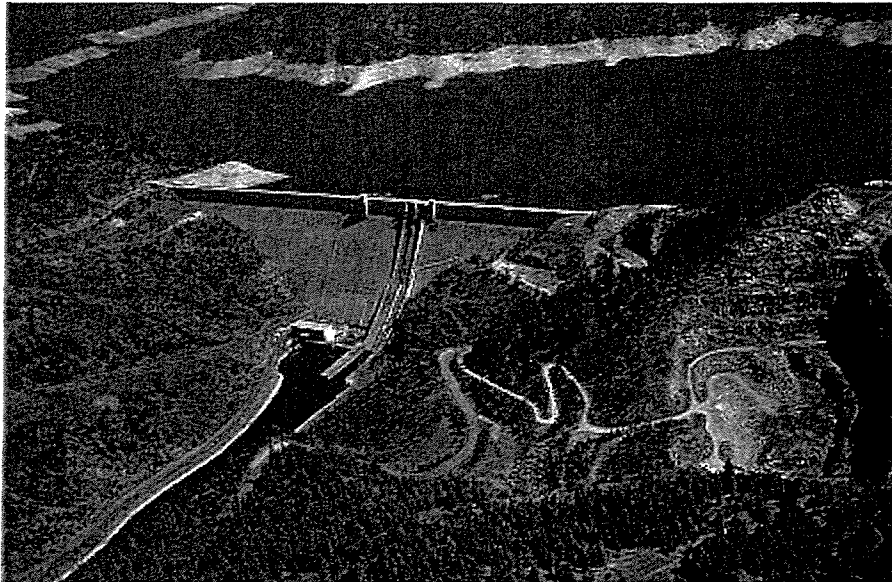


Snake River Adjudication  
Basin Wide Issue no. 17

*“Does Idaho Law Require a  
Remark Authorizing Storage  
Rights to ‘Refill’, Under Priority,  
Space Vacated for Flood  
Control”?*

## Snake River Adjudication Basin Wide Issue no. 17

Federal On-Stream Reservoirs Are Required  
Under Federal Law To Be Operated For Flood  
Control Purposes.



## Snake River Adjudication Basin Wide Issue no. 17

- Dworshak Reservoir was constructed for flood control.
- The federal government refuses to obtain a water right for storage and releases from storage from Dworshak Reservoir asserting that storage and release of storage for flood control is not subject to state regulation.
- The state of Idaho does not determine the timing of federal flood control releases or the timing of physical fill in the reservoir after a flood control release except as it may affect other water rights.

## Snake River Adjudication Basin Wide Issue no. 17

- When is *“space vacated for flood control”*?
  - On stream reservoir
  - Lots of snow in the mountains – empty reservoir space will not hold the spring runoff
  - Reservoir content is usually high at the beginning of the storage season.
  - **Remember – lots of water!**



## Snake River Adjudication Basin Wide Issue no. 17

- When is storage water **not** “*vacated for flood control*”?
  - Off-stream reservoir
  - Low or average snow pack years
  - Low storage in reservoir at beginning of storage season

## Snake River Adjudication Basin Wide Issue no. 17

- Most sizable on-stream reservoirs storing water for irrigation are owned or managed by the federal government – a few are owned by private entities.
- US Bureau of Reclamation holds water rights to store and deliver water for irrigation –required by federal law.
- Irrigation companies and irrigation districts contracted with Bureau for storage water in the reservoirs to be beneficially used for irrigation.

## Snake River Adjudication Basin Wide Issue no. 17

- Some reservoirs were built for flood control.
- There is no state water right for storage or release of storage for flood control – this is a federally dictated operation.
- Bureau must attempt to (1) store enough water to deliver to the contract spaceholders their storage allocations, but also (2) empty the reservoirs to make room for the predicted runoff resulting from a high snowpack or significant precipitation.

## Snake River Adjudication Basin Wide Issue no. 17

Contracts of spaceholders who are entitled to stored water in reservoirs operated for flood control can have their storage allotments reduced during years of releases from reservoirs to empty space for flood control. This is requirement of the spaceholder's contracts and an inherent risk the spaceholders assume in relying on storage water from an on-stream reservoir that must be operated for flood control. Flood control comes first!

## Snake River Adjudication Basin Wide Issue no. 17

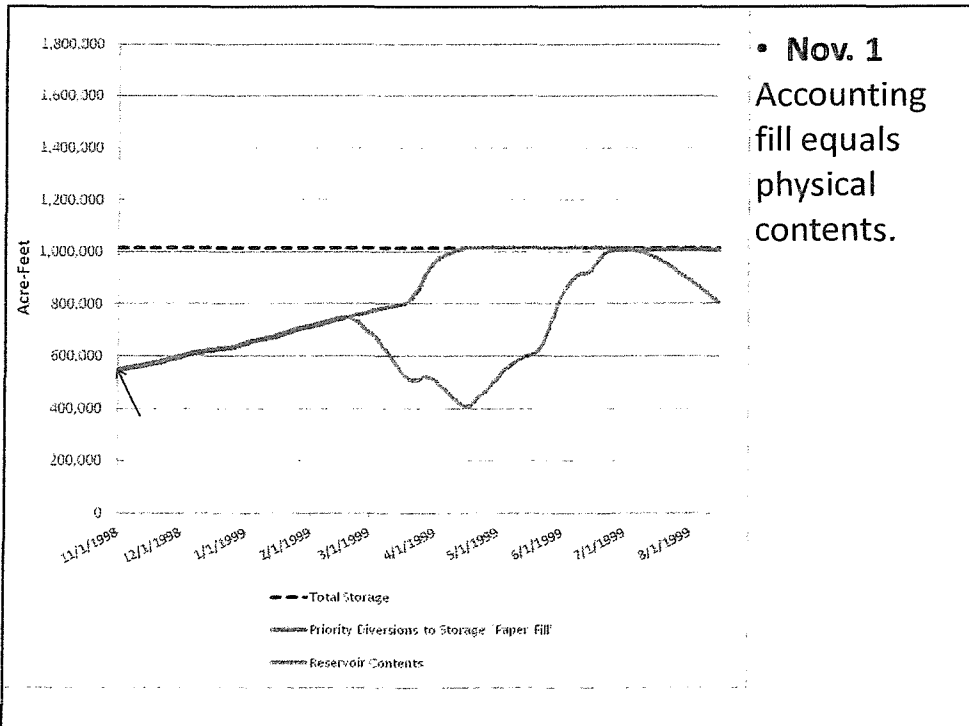
- Regardless of whether there is a right to “refill” the reservoir space emptied to capture future flood water, the empty space may not refill.
- Why?
- Because the reservoir space is often emptied months ahead of the runoff. As a result, flood control operation is somewhere between a predictive and a best-guess science. Using various data models, the Bureau tries to predict what the water flows to the reservoir will be in the future. The predictions are inaccurate.

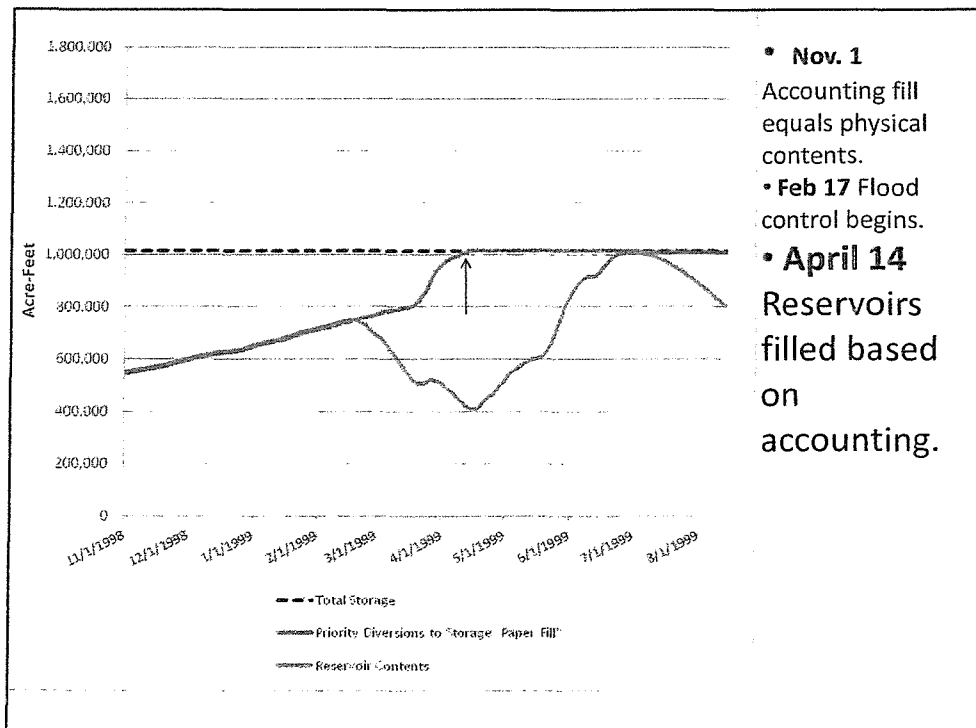
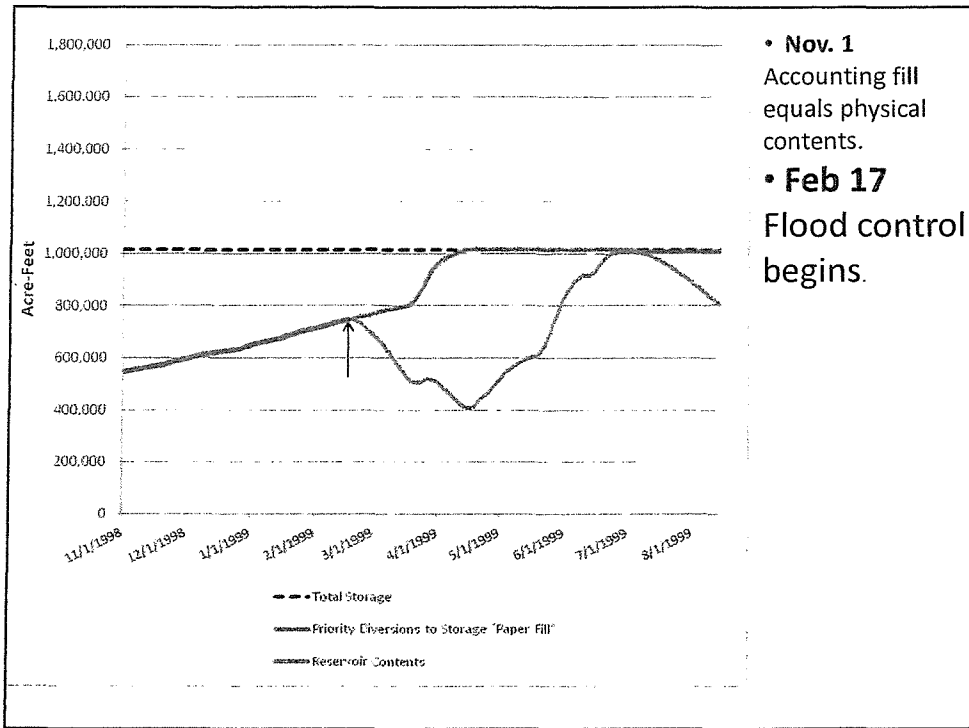
## Snake River Adjudication Basin Wide Issue no. 17

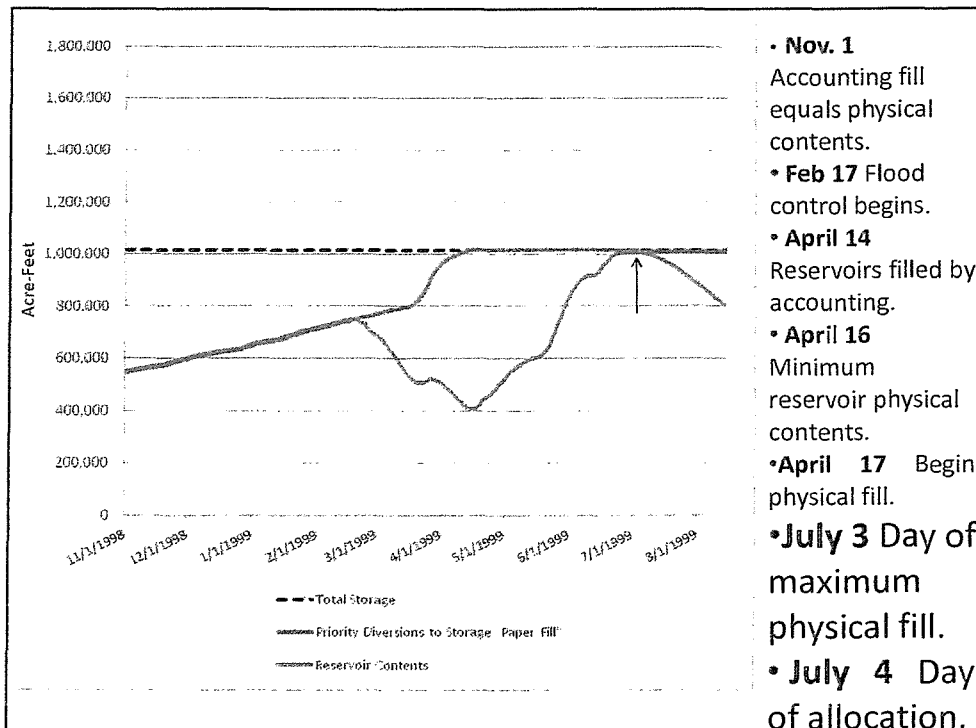
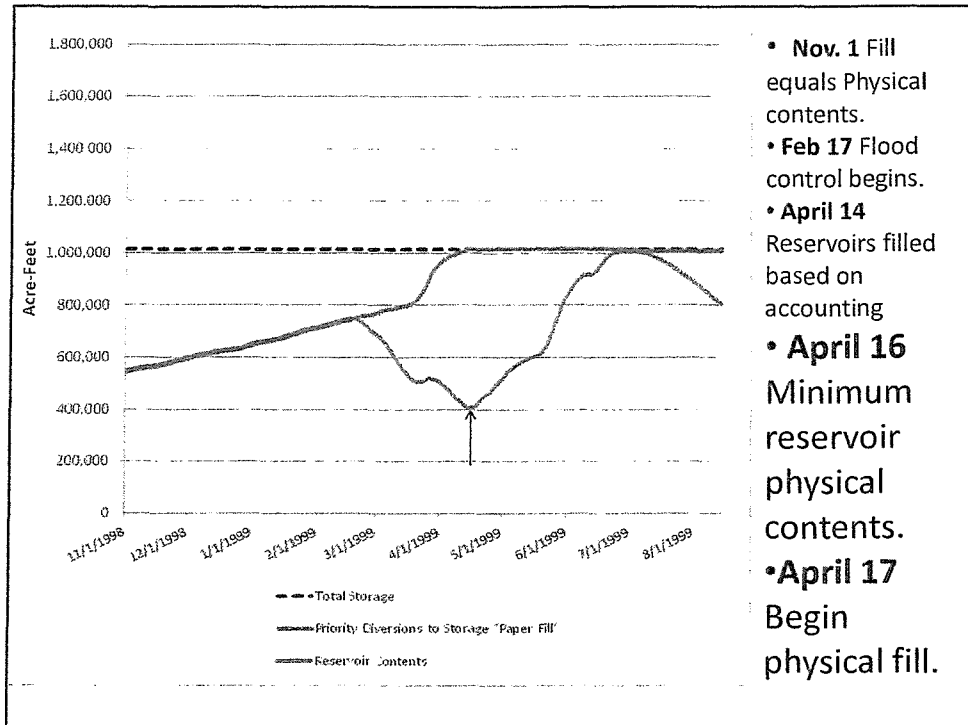
- Factors that contribute to the predictive uncertainty:
  - How much snow is there?
  - How full are the reservoirs?
  - What is the long term precipitation forecast?
  - What is the long term temperature forecast?
  - What is the soil moisture?
  - Are there comparable years?
  - What will the water demand be?
  - What are the risks of flooding vs. risks of not supplying sufficient irrigation water?

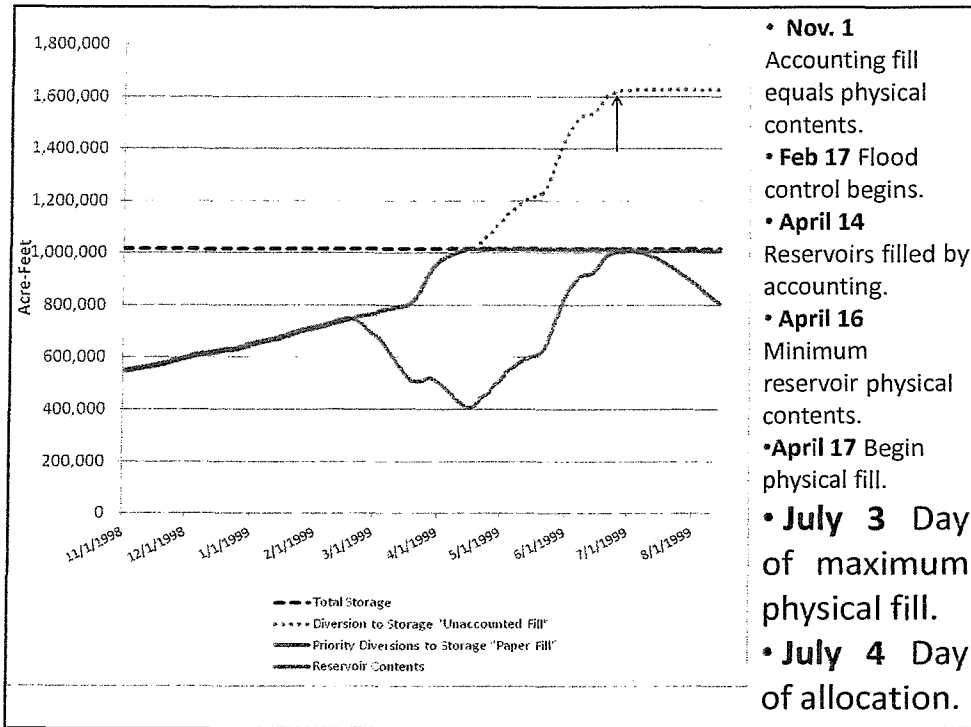
## Snake River Adjudication Basin Wide Issue no. 17

- How does the Director account for a water right that authorizes storage for irrigation, but does not authorize use for flood control?
- **There is abundant water in the system!**









## Snake River Adjudication Basin Wide Issue no. 17

Any empty space in the reservoir at the time of maximum physical fill is the result of the inaccurate prediction of how much storage water must be dumped out of the reservoir to create empty reservoirs for flood control.

Snake River Adjudication  
Basin Wide Issue no. 17  
Supreme Court Decision

*“Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. That statute gives the Director a clear legal duty to distribute water. However, the details of the performance of the duty are left to the director's discretion. Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.”*

Snake River Adjudication  
Basin Wide Issue no. 17  
Supreme Court Decision

*“Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.”*



## Snake River Adjudication Basin Wide Issue no. 17 Director's Actions

Because of the above decision of the Supreme Court, the Director reactivated administrative contested cases to determine when a water right to store and use water for irrigation is satisfied. The Director anticipates gathering evidence and deciding this issue basin by basin.

## Complaints About Present Accounting

- It forces the storage space holders to take a drink when they are not thirsty
  - When water is being stored in the early winter, the Bureau and the spaceholders predict thirst – water is being physically stored to the satisfaction of the water right and to satisfy the thirst of the user.

## Complaints About Present Accounting

- Thirst?
  - When water is stored in a reservoir there is a perceived need to store the water.
  - When abundant snows dictate that water previously stored because of a perceived need be dumped down the river, some argue that need (or thirst) be determined in hindsight after the initial determination of need, even though the storage component of the water right has been exercised.
  - Should the passage of water downstream for a purpose not defined by a state water right but by federal pre-emption be excused and the satisfaction of the state water right reset to a lesser number?

## Complaints About Present Accounting

- Thirst?
  - The determination of need cannot wait until the end of the storage season or the end of the upcoming irrigation season – there is a right for storage and for use from storage – the storage portion of the right must be accounted for based on the state based water right.

## Complaints about Present Accounting

- We want to be treated like any other water user
  - When any other water user demands water, it is counted against the water right until the water user has diverted the quantity of water authorized by the water right. Under this standard, any time water is being stored, it would be counted against the storage water right. If the right holder decides to dump water from storage, the amount of the right that has been exercised would not be reset. Once the right were satisfied, no more water could be stored. Being treated like any other water user is not the appropriate standard – it would result in reservoirs not physically filling and water flowing downstream and lost to downstream states and the ocean.

## Complaints About Present Accounting

- We want to be treated like any other water user
  - Under the present method of accounting, one could argue the storage right holder receives more than any other water right holder because the storage space refills even after the right has been satisfied.

## Other Fill/Refill Considerations

- Resetting the satisfaction of the right downward to equal physical storage will have the following possible consequences:
  - Will increase the water reliability for some space holders while diminishing the rights of other spaceholders and those holding junior priority water rights. It would upset the historical deliveries of water – Varies from river basin to river basin.

## Other Fill/Refill Considerations

- Resetting the satisfaction of the right downward to equal physical storage will have the following possible consequences:
  - Will allow the Bureau and the larger federal government to have greater control over flood control releases without consequences – including flood control for downstream interests or to satisfy treaties.

## Other Fill/Refill Considerations

- Resetting the satisfaction of the right to equal physical storage will have the following possible consequences:
  - May change the way private and tribal reservoirs are operated to the detriment of natural flow right holders. Some examples are the Chesterfield Reservoir or the Blackfoot Reservoir.

## Other Fill/Refill Considerations

- Resetting the satisfaction of the right to equal physical storage will have the following possible consequences:
  - May change the respective strengths and weaknesses of legal arguments of ground water and surface water users in the ongoing conjunctive management calls. This currently appears to be a major impediment to settlement of the fill/refill issue.

## Other Fill/Refill Considerations

- Resetting the satisfaction of the right to equal physical storage will have the following possible consequences:
  - The determination of how rights are satisfied in each river basin is unique and dependent upon where reservoirs are located, where water is diverted, priorities of the various water rights, whether river reaches gain or lose water, and local customs and practices. This is why the expertise of technical staff and an analysis of each river basin's needs is important to determine water delivery issues on a case-by-case basis.

## Snake River Adjudication Basin Wide Issue no. 17

- There is proposed draft settlement agreement language to establish decreed water rights that would protect the historical practice of filling empty space in reservoirs vacated for flood control while protecting those who have relied on the present method of accounting. This draft language would also ensure that the federal government will be limited in its ability to use its flood control operations to control the river and take water from existing junior priority uses and from future uses.

Questions?

