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**MAY 26 2017**

**SUPREME COURT  
COURT OF APPEALS**

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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

BALLENTYNE DITCH COMPANY; BOISE  
VALLEY IRRIGATION DITCH COMPANY;  
CANYON COUNTY WATER COMPANY;  
EUREKA WATER COMPANY; FARMERS' CO-  
OPERATIVE DITCH COMPANY; MIDDLETON  
MILL DITCH COMPANY; MIDDLETON  
IRRIGATION ASSOCIATION, INC.; NAMPA &  
MERIDIAN IRRIGATION DISTRICT; NEW DRY  
CREEK DITCH COMPANY; PIONEER DITCH  
COMPANY; PIONEER IRRIGATION DISTRICT;  
SETTLERS IRRIGATION DISTRICT; SOUTH  
BOISE WATER COMPANY; and THURMAN MILL  
DITCH COMPANY;

Petitioners-Appellants-  
Cross Respondents,

and

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

Petitioners,

vs.

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

Respondents,

and

SUEZ WATER IDAHO, INC.,

Intervenor-Respondent-  
Cross Appellant.

**SUPREME COURT DOCKET  
No. 44677-2016**

**Case No. CV-WA-2015-21376**  
(Consolidated Ada County Case  
No. CV-WA-2015-21391)

**APPELLANTS' OPENING BRIEF**

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On appeal from the Snake River Basin Adjudication, District Court of the Fifth Judicial District  
of the State of Idaho, in and for the County of Twin Falls,  
Honorable Eric J. Wildman, Presiding<sup>1</sup>

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<sup>1</sup> This matter was reassigned to Honorable Eric J. Wildman of the Fifth Judicial District on December 22, 2015, by the Clerk of the Court for Ada County pursuant to *Idaho Supreme Court Administrative Order*, dated December 9, 2009. R. 000023.

## TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE.....	1
A. Nature of the Case.....	1
B. Course of Proceedings and Disposition .....	4
1. Initiation of Contested Case.....	4
2. Pending Late Claims and SRBA Decisions .....	4
3. Director’s Rush to Proceed with the Contested Case .....	6
4. Judicial Review Proceedings Before the District Court .....	7
C. Statement of Facts.....	9
1. Flood Control and Beneficial Use Storage Under the Boise River Reservoirs Operating Plan .....	9
a. Appropriation of Boise River Flows, <i>Stewart</i> and <i>Bryan Decrees</i> , Arrowrock Reservoir and Storage Contracts (1864-1929).....	10
b. Formulation of the Reservoir Operating Plan, Anderson Ranch Reservoir Authorization and Storage Water Right (1937-1956).....	11
c. Lucky Peak Reservoir Authorization.....	16
d. “Interim” and “Ultimate” Reservoir Operating Plans (1946-1953).....	19
e. Final Approval and Implementation of the Plan: 1953 Agreement, 1954 Supplemental Contracts, Congressional Authorization, 1956 Manual .....	20
f. Lucky Peak Storage Rights, Contracts and the Reservoir Operating Plan .....	25
g. IDWR’s 1974 Report and Revision of the Reservoir Operating Plan .....	28
h. The 1985 Water Control Manual .....	29
2. Storage in the Boise River Reservoirs During Flood Control Season .....	33
3. Administration of Boise River Reservoir Storage Water Rights .....	35
4. Storage Water Right Accounting During Flood Control Operations.....	38
5. Water Users Experience and Reliance on Storage.....	42
II. ISSUES PRESENTED ON APPEAL.....	42
III. STANDARD OF REVIEW .....	43
IV. ARGUMENT.....	44
A. Storage Water Rights Are Not “Filled” or “Satisfied” by Water that is Released for Flood Control Purposes.....	44
1. The Director’s <i>Order</i> is Inconsistent with and Undermines Beneficial Use Storage and Flood Control Under the Reservoir Operating Plan.....	44
2. The District Court Erred By Disregarding the Reservoir Operating Plan .....	47

3.	The Reservoir Operating Plan Assures Reservoir Fill Pursuant to the Reservoir Water Rights During Flood Control Operations .....	49
4.	The Decrees for the Boise River Reservoir Storage Rights Do Not Invalidate the Reservoir Operating Plan .....	50
5.	Storage Water Rights Entitle the Right Holders to Retain Water in Storage Until it is Needed for Beneficial Use .....	51
6.	There is No “Store It or Lose It” Principle in Idaho Law .....	57
7.	Junior Water Rights are Not Entitled to Water that is Stored During Flood Control Operations .....	59
8.	Junior Appropriators Do Not “Forego” Diversions or “Let Water Pass” Under the Reservoir Operating Plan .....	61
9.	IDWR’s Accounting Program does not “Credit” to Reservoir Storage Rights All Water “Diverted” by the Reservoir .....	63
10.	IDWR’s Accounting Program Does Not Dictate that “Paper Fill” Constitutes “Filling” and “Satisfaction of the Boise River Reservoir Storage Rights .....	65
11.	Water District 63 Watermasters Have Never Administered Storage Rights as if They Were “Filled” or “Satisfied by Flood Control Releases .....	67
12.	The Director’s <i>Order</i> Deprives the Spaceholders of the Beneficial Use of Their Storage Water Rights and Their Storage Contracts .....	68
B.	The Contested Case Process Was Procedurally Flawed and Suffered Continuously From Result-Oriented Bias .....	69
1.	The Contested Case Failed to Comply with the Formal Rulemaking Requirements of the Idaho Administrative Procedure Act.....	70
a.	The Contested Case has Wide Coverage and General Applicability.....	70
b.	The Contested Case Operates Only in Future Cases, Prescribes Legal Standards, Expresses New Policy of IDWR and Interprets Law and Policy.....	71
2.	The Director Erred in Failing to Stay the Contested Case Pending Resolution of the Late Claims by the SRBA.....	73
3.	The Director Violated His Duties and Exceeded His Authority as the Hearing Officer, and Violated the Due Process Rights of the Ditch Companies by Failing to Provide a Fair and Impartial Tribunal.....	74
a.	The Director’s Conduct and Active Participation at Hearing was Biased and Evidenced a Predetermined Result .....	75
b.	IDWR’s Advocacy-Based Hearing Participation Was Improper .....	81
c.	Cresto Testimony Exceeding the Scope of Her Staff Memorandum Was Improper and Further Demonstrated IDWR and Director Bias.....	82
d.	The Director’s Use of Rule 602 Official Notice Was Improper and Prejudicial...84	
C.	Attorney’s Fees and Costs .....	86
V.	CONCLUSION.....	89

## TABLE OF AUTHORITIES

	Page(s)
<b><u>CASES</u></b>	
<i>A&amp;B Irr. Dist. v. IDWR</i> , 153 Idaho 500, 284 P.3d 225 (2012).....	50
<i>A&amp;B Irr. Dist. v. State</i> , 157 Idaho 385, 336 P.3d 792 (2014).....	48, 54, 73, 74
<i>Aberdeen-Springfield Canal Co. v. Peiper</i> , 133 Idaho 82, 982 P.2d 917 (1999) .....	75
<i>American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources</i> 143 Idaho 862, 154 P.3d 433 (2007).....	69
<i>Anderson v. Dewey</i> , 82 Idaho 173, 350 P.2d 173 (1960).....	48, 50
<i>Arrow Transportation Co. v. Idaho Pub. Utilities Comm’n</i> , 85 Idaho 307, 379 P.2d 422 (1963).....	87
<i>Asarco, Inc. v. State of Idaho</i> , 138 Idaho 719, 69 P.3d 139 (2003).....	70, 71, 72
<i>Beecher v. Cassia Creek Irr. Co., Inc.</i> , 66 Idaho 1, 154 P.2d 507 (1944) .....	59, 62
<i>Castaneda v. Brighton Corp.</i> , 130 Idaho 923 (1998) .....	79
<i>City of Osburn v. Randel</i> , 152 Idaho 906, 277 P.3d 353 (2012).....	75
<i>Clark v. Klein</i> , 137 Idaho 154, 45 P.3d 810 (2002) .....	83
<i>Eacret v. Bonner County</i> , 139 Idaho 780, 86 P.3d 494 (2004).....	75, 76, 80
<i>Easterling v. Kendall</i> , 159 Idaho 902, 367 P.3d 1214 (2016) .....	83
<i>Hutchinson v. Watson Slough Ditch Co.</i> , 16 Idaho 484, 101 P. 1059 (1909).....	62
<i>Knutson v. Huggins</i> , 62 Idaho 662, 115 P.2d 421 (1941).....	62
<i>Marcia T. Turner, LLC v. City of Twin Falls</i> , 144 Idaho 203, 159 P.3d 840 (2007).....	75
<i>Marshall v. Jerrico, Inc.</i> , 446 U.S. 238 (1980).....	75
<i>McGinnes v. Stanfield</i> , 6 Idaho 372, 55 P. 1020 (1898) .....	57
<i>Morgan v. Udy</i> , 58 Idaho 670, 79 P.2d 295 (1938) .....	52
<i>Nettleton v. Higginson</i> , 98 Idaho 87, 558 P.2d 1048 (1977) .....	68, 69
<i>Rangen, Inc. v. Idaho Dept. of Water Res. (In re Fourth Mitigation Plan)</i> , 160 Idaho, 251, 371 P.3d 305 (2016).....	43
<i>Rayl v. Salmon River Canal Co.</i> , 66 Idaho 199, 157 P.2d 76 (1945) .....	54
<i>State v. U.S.</i> , 134 Idaho 106, 996 P.2d 806 (2000).....	52
<i>Syringa Networks, LLC v. Idaho Dept. of Admin.</i> , 159 Idaho 813, 367 P.3d 208 (2016) .....	87
<i>United States v. American Ditch Assoc.</i> , 2 F.Supp. 867 (D. Idaho 1933) .....	58
<i>United States v. Pioneer Irr. District</i> , 144 Idaho 106, 157 P.3d 600 (2007) .....	54, 55
<i>United States v. Puerto Rico</i> , 287 F.3d 212 (1 <sup>st</sup> Cir. 2002) .....	73

<i>Washington Cnty. Irr. Dist. v. Talboy</i> , 55 Idaho 382, 43 P.2d 943 (1935).....	54
--	----

## **STATUTES**

33 U.S. CODE ANNOTATED § 701 .....	17
43 U.S. CODE § 485 .....	12
IDAHO CODE § 12-117.....	86, 89
IDAHO CODE § 42-1401B .....	81
IDAHO CODE § 42-1412.....	73
IDAHO CODE § 42-201 .....	49, 87
IDAHO CODE § 42-202 .....	69
IDAHO CODE § 42-222 .....	58
IDAHO CODE § 42-223 .....	58
IDAHO CODE § 42-401 (now IDAHO CODE § 43-401) .....	15, 16
IDAHO CODE § 42-603 .....	61
IDAHO CODE § 42-607 .....	65, 69
IDAHO CODE § 43-401 .....	15, 16
IDAHO CODE § 55-101 .....	68
IDAHO CODE § 67-5201 .....	70, 79, 83
IDAHO CODE § 67-5253 .....	79

## **OTHER AUTHORITIES**

Black’s Law Dictionary (9th ed. 2009).....	54
Concise Oxford American Dictionary (2006).....	54
Kinney on Irrigation and Water Rights, 2d Ed. ....	54

## **RULES**

Idaho Code of Judicial Conduct Canon 1 .....	80
Idaho Code of Judicial Conduct Canon 2 .....	80
Idaho Code of Judicial Conduct Canon 3 .....	80
Idaho Code of Judicial Conduct Canon 4 .....	80
Idaho Rule of Civil Procedure 26 .....	83
Idaho Rule of Evidence 201.....	85
IDAPA 37.01.01.007 .....	79, 83
IDAPA 37.01.01.015 .....	79, 83
IDAPA 37.01.01.052 .....	83

IDAPA 37.01.01.150 .....	81
IDAPA 37.01.01.157 .....	81
IDAPA 37.01.01.417 .....	79
IDAPA 37.01.01.600 .....	81



COME NOW Petitioners/Appellants/the Ditch Companies,<sup>2</sup> by and through undersigned counsel of record, and hereby submit this *Appellants' Opening Brief* in the above titled matter.

## **I. STATEMENT OF THE CASE**

### **A. Nature of the Case**

This case concerns the right to store water in Arrowrock, Anderson Ranch and Lucky Peak Reservoirs (“Boise River Reservoirs” or “Reservoirs”) during and following flood control operations. The case comes to the Court in a year of historic runoff into, and flood control releases through, the Boise Valley.<sup>3</sup>

Since the mid-1950s, the Boise River Reservoirs have been operated as a system for beneficial use storage and flood control purposes pursuant to a plan developed and implemented through congressional authorization, and collaboration, approval and agreement among the Bureau of Reclamation (“BOR” or “Bureau”), the Army Corps of Engineers (“Corps”), the State of Idaho (“State”), the Idaho Department of Water Resources (“IDWR” or “Department”), Boise Valley water users, and other local interests. Under the plan, during flood control operations reservoir vacant space is maintained in the Boise River Reservoirs to capture high runoff and control the release of water to the Boise River flowing through the highly developed and

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<sup>2</sup> The “Ditch Companies” include the following irrigation districts and canal companies which hold storage space and are the beneficial owners of the storage water rights in all three of the Boise River Reservoirs: 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>3</sup> See Idaho Public Television, Idaho in Session, Governor Live, *Governor Press Conference* (April 19, 2017) regarding 2017 flooding, available at: <http://idahoptv.org/insession/gov.cfm>. Note that the Director advocates that BOR and the Corps increase flood control releases to vacate more space in the Boise River Reservoirs, which is the same water that the Director contends satisfies and fills the reservoir storage water rights.

populated areas of the Boise Valley. As runoff and the risk of flooding subsides, the need for vacant reservoir space declines, and water is increasingly stored for beneficial use, until the Reservoirs reach “maximum fill.” At that point, the reservoir storage rights are “filled,” and the stored water is allocated to the Ditch Companies and other reservoir spaceholders in accordance with their respective rights to reservoir storage. The reservoir storage rights have been administered by Boise River Watermasters and used by the Boise Valley landowners in this manner since the reservoir system was completed in accordance with the reservoir operating plan.

According to the theory of IDWR, affirmed by Judge Wildman, water released for flood control from the Boise River Reservoirs is the Ditch Companies’ stored water flowing past their headgates when no one in the Boise Valley can use the water to irrigate their farms, subdivisions, parks, etc.—land that will need stored water later during the summer and fall. According to IDWR’s theory, once the storage rights are “filled” and “satisfied” by water released for flood control, the Ditch Companies have no water right to store the water that safely fills the Boise River Reservoirs as flood control releases subside, and that same water is subject to new water right applications and the delivery demands of junior water right holders.

In a year like the current one when runoff vastly exceeds the storage capacity of Boise River Reservoirs, IDWR’s theory could mean that landowners in the Boise Valley have no right to use most or any of the water that is stored in the Boise River Reservoirs when they are physically filled at the end of flood control operations.

IDWR and Judge Wildman arrived at this absurd conclusion by:

1. Disregarding the undisputed fact that, under the reservoir operating plan: water cannot be stored in reservoir space that must be kept open for flood control; water released to

maintain that open space is not available for storage or beneficial use, and water is stored for beneficial use to fulfill the reservoir storage rights as the risk of flooding subsides and the need for vacant reservoir space declines;

2. Disregarding the undisputed testimony of Boise River Watermasters and water users who explained that the reservoir storage rights have been administered, used and relied upon with the understanding that the water stored in the Boise River Reservoirs during flood control operations is stored pursuant to the reservoir storage rights;

3. Imputing to the Boise River Reservoirs storage water rights a “store it or lose it” principle found nowhere in Idaho law;

4. Elevating IDWR’s “paper fill” accounting “term of convenience” above common sense, actual reservoir operations, and storage right administration, to support IDWR’s theory that flood control releases fill” and “satisfy” reservoir storage rights;

5. Elevating junior rights above senior storage rights to justify the administration of senior rights to satisfy junior rights;

6. Disregarding SRBA Special Master Booth’s decision in which he confirmed that the water that fills the Boise River Reservoirs during flood control operations is stored pursuant to the established/existing reservoir storage water rights;

7. The Director initiating a Contested Case in which he transgressed his role as a hearing officer and denied the water users’ due process rights by, among other things, prejudging the outcome of the case and engaging in ex parte discussions with IDWR witnesses during hearing to prepare their testimony; and

8. Judge Wildman dismissing the Director’s transgressions and due process violations in the Contested Case as “unavailing” and unimportant.

In order to preserve the coordinated use of the Boise River Reservoirs for beneficial use storage and flood control, this Court must reject IDWR's theory. Furthermore, to restore the integrity of the contested case process, the Court should not acquiesce to the Director's biased and unconstitutional conduct of the Contested Case proceeding.

## **B. Course of Proceedings and Disposition**

### **1. Initiation of Contested Case**

On October 22, 2013, the Director *sua sponte* issued a *Notice of Contested Case* ("Notice") ostensibly to address concerns about IDWR's method of crediting water toward the "fill" of the Boise River Reservoirs water rights, and to develop a record to document "how and why existing accounting procedures 'count' or 'credit' water towards the satisfaction or 'fill' of the water rights for the federal on-stream reservoirs in . . . Water District 63" because there is no such formal record, and the informal IDWR records that do exist are "scattered and incomplete." ("Contested Case"). AR. 000002, 000004.

The *Notice* ordered Water District 63 water right owners that have concerns about how IDWR credits water to Boise River Reservoirs storage rights to submit statements of concern to the Department. AR. 000007. The Director's transmittal letter serving the *Notice* stated: "Your participation is not mandatory but any decision made in the proceeding will be binding upon all water users that received notice of this proceeding." AR. 000001.

### **2. Pending Late Claims and SRBA Decisions**

The Director denied the Ditch Companies' numerous requests to stay the Contested Case pending the outcome of Late Claims that BOR and the Boise Project Board of Control ("Boise Project") filed in the Snake River Basin Adjudication ("SRBA") in January 2013, nearly nine months *before* the Director initiated the Contested Case. The Late Claims sought to store additional water in each of the Boise River Reservoirs in response to the State's assertion in

Basin-Wide Issue 17 that flood control releases “fill” and “satisfy” the existing reservoir storage rights, so that water filling the Reservoirs after flood control releases cannot be stored or used under the existing reservoir water rights. The SRBA granted leave to file the claims, and consolidated them into *SRBA Consolidated Subcase Nos. 63-33732, et al.* (“Late Claims”).

IDWR recommended denial of the Late Claims, and the State objected to the claims to support IDWR’s recommendation. The Ditch Companies objected to the Late Claims, asserting that the claims were precluded by the existing storage rights. On July 2, 2015, the Ditch Companies filed a motion for summary judgment asserting that the Late Claims were not legally cognizable because flood control releases cannot be stored to “satisfy” the existing reservoir water rights, and the water sought to be appropriated by the Late Claims was already appropriated and stored under the existing rights.

The Director’s refusal to stay the Contested Case forced the Ditch Companies to simultaneously litigate the Late Claims and the Contested Case. *Before* the Director issued a final order in the Contested Case, Special Master Booth, on October 9, 2015, issued a *Memorandum Decision and Order Granting Ditch Companies’ and Boise Project’s Motion for Summary Judgment and Special Master’s Recommendation of Disallowance of Claims in SRBA Consolidated Subcase Nos. 63-33732, et al.* (“Recommendation”). AR. 001344-89.<sup>4</sup>

Special Master Booth concluded that the Late Claims were not necessary because “the ‘irrigation storage’ component of the existing water rights is the right to store the water contained in the Boise River Reservoirs at the time of maximum physical fill.” AR. 001350. Special Master Booth held that water released for flood control purposes does not “fill” or “satisfy” the existing water rights, and that the water stored in the reservoirs at the conclusion of

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<sup>4</sup> For ease of reference, the *Recommendation* is attached hereto as **Appendix 1**.

flood control operations is already appropriated and stored under the existing reservoir rights. Consequently, Special Master Booth recommended denial of the Late Claims. AR. 001350, 001351, 001378.

The water rights the Director put at issue in the Contested Case (right nos. 63-303, 63-3613, 63-3614, and 63-3618) are the same water rights the Special Master determined are not “satisfied” by “paper fill.” A few days after Special Master Booth’s *Recommendation*, the Director issued his *Final Order* and an *Amended Final Order* in the Contested Case, in which he held the opposite of Special Master Booth, deciding that water released for flood control “satisfies” the existing storage rights, all without mentioning Special Master Booth’s *Recommendation*. AR. 001230.

On February 26, 2016, Special Master Booth denied motions by the State and Suez Water Idaho (“Suez”) to alter or amend his *Recommendation*. He reiterated that IDWR’s “accounting system does not define the existing storage water rights.” R. 000271-72.<sup>5</sup>

### **3. Director’s Rush to Proceed with the Contested Case**

The Ditch Companies and Boise Project filed various pre-hearing motions and made various objections to the Director’s initiation and conduct of the Contested Case. For example, the Ditch Companies sought disqualification of the Director as hearing officer (AR. 000100); stay of the Contested Case pending the outcome of the Late Claims (AR. 000255); clarification of the Director’s use of “official notice” (AR. 000869); dismissal for failure (and inability) to join BOR (AR. 000255); improper use of staff memoranda (AR. 000526); IDWR participation as

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<sup>5</sup> For ease of reference, the *Order Denying Motions to Alter or Amend* is attached hereto as **Appendix 2**.

an adversarial party (AR. 000869); and limitation on IDWR “expert” witness testimony (AR. 000859). The Director rejected each of these requests/objections.<sup>6</sup>

The Ditch Companies understood from the Director’s *Notice* that it was not their burden to present a record to explain IDWR’s accounting procedures. The primary record the Director and IDWR presented for this purpose was a November 4, 2014 Memorandum the Director asked IDWR employee Elizabeth Cresto (“Cresto”) to prepare. AR. 000094-95. Eventually, the Contested Case proceeding was held over the course of five days, after which the Director issued his *Final Order* and *Amended Final Order* (hereinafter “*Order*”). AR. 001230. The Ditch Companies and Boise Project filed petitions for reconsideration, which the Director denied. AR. 001331, 001313, and 001401.

#### **4. Judicial Review Proceedings Before the District Court**

The Ditch Companies and the Boise Project filed petitions for judicial review of the Director’s *Order* in the Contested Case on December 17, 2015. AR. 001450; 001436. The Ditch Companies filed a *Motion to Stay* judicial review of the Contested Case in order to allow Judge Wildman to review Special Master Booth’s Late Claims *Recommendation*, which was also pending before the SRBA, to promote judicial economy and to prevent inconsistent decisions. R. 000110. Although Judge Wildman denied the motion to stay, he reset the hearings for the Contested Case and Late Claims for the same day, indicating that “if the cases are to be appealed to the Supreme Court, they equally should not go up piecemeal.” Tr. 4/5/16 62:4-8.

Judge Wildman issued a *Memorandum Decision and Order and Judgment* on September 1, 2016 (hereinafter “*MDO*”). R. 001052; 001049. The *MDO* upheld the Director’s Contested Case *Order* concerning the accrual to the reservoir water rights all of the natural flow

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<sup>6</sup> The foregoing is not an exhaustive list of the Ditch Companies’ motions, concerns, and objections as are discussed further later herein.

entering the reservoir that is available in priority, denied all the procedural arguments raised by the Ditch Companies and Boise Project, and held that the Director erred in determining that the United States and water users have not acquired a vested water right in the water stored in the Boise River Reservoirs following flood control releases. R. 001052.

In the Late Claims case, Judge Wildman determined that Special Master Booth did not have authority to decide the Ditch Companies' summary judgment motion. *See Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master, SRBA Consolidated Subcase Nos. 63-33732, et al.*<sup>7</sup> He did not address the substance or merits Special Master Booth's findings and *Recommendation. Id.*

Eight days later on September 9, 2016, IDWR filed a *Petition for Rehearing*. R. 001076.<sup>8</sup> The Ditch Companies and Boise Project (jointly), and Suez subsequently filed their own *Petitions for Rehearing*. R. 001214; 001344. On November 14, 2016, Judge Wildman issued an *Order Denying Rehearing*. R. 001161.

The Ditch Companies, Boise Project, and IDWR timely filed *Notices of Appeal*. R. 001168; 001214; 001344. Suez did not file a notice of appeal, but instead filed a *Notice of Cross-Appeal* in the appeals filed by the Ditch Companies and the Boise Project. R. 001390; 001517.

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<sup>7</sup> For ease of reference, the *Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master* (September 1, 2016), *In Re SRBA Consolidated Subcase Nos. 63-33732, et al.* is attached hereto as **Appendix 3**.

<sup>8</sup> IDWR's *Petition for Rehearing*, and now subsequent appeal to this Court, concerns Sections IV.C and IV.D of the *MDO*. R. 001065-68 (App. 1). The Ditch Companies' *Petition for Rehearing*, and now subsequent appeal to this Court, concerns Sections IV.A, IV.B and V. of the *MDO. Id.*, 001058-65, 001068-73.



### **C. Statement of Facts**

A clear and thorough understanding of the operation of the Boise River Reservoirs for beneficial use storage and flood control, and the actual administration of Boise River Reservoir storage water rights, is critically important for the Court's review of this appeal. These facts are discussed in significant detail below to provide the Court that understanding. While the record is voluminous, the Court should pay particular attention to the following: (1) *Affidavit of Boise River Watermaster Lee Sisco* (Ex. 2008); (2) *Affidavit of Bob Sutter* (Ex. 2182); (3) Dr. Jennifer Stevens' *History of Boise River Reservoir Operations, 1912-1995* (Ex. 2053); (4) H.R. Doc No 916, 76<sup>th</sup> Cong, 3d Sess. (1940) (Ex. 2027); (5) September 21, 1953 Revised Allocation and Repayment Report for the Boise Project (Ex. 2071); (6) 1953 Agreement between BOR and the Corps (Ex. 2038); (7) 1954 supplemental contracts (Ex. 2100); (8) Public Law 660 (1954) (Ex. 2101); (9) IDWR 1974 Report (Ex. 2182); and (10) 1985 Water Control Manual for Boise River Reservoirs (Ex. 2183).

#### **1. Flood Control and Beneficial Use Storage Under the Boise River Reservoirs Operating Plan**

Since the mid-1950s, the Boise River Reservoirs have been operated as a system for storage and flood control purposes pursuant to a plan developed and implemented through congressional authorization, and collaboration, approval and agreement among BOR, the Corps, the State, IDWR, Boise Valley water users, and other local interests. Boise River Reservoirs storage water rights were established in conjunction with the development of the reservoir system and the plan under which it is operated. The appropriation of storage water rights provided the basis for contracts with BOR under which water users financed reservoir construction, acquired storage space, and established the right to receive water stored in that space for irrigation use. These water rights, storage contracts, the reservoir system and the plan

under which it is operated have provided a secure water supply for over 300,000 acres of land in the Boise Valley over the last 100 years.<sup>9</sup>

**a. Appropriation of Boise River Flows, *Stewart* and *Bryan* Decrees, Arrowrock Reservoir and Storage Contracts (1864-1929)**

Water rights exceeding Boise River summertime flows were appropriated between 1864 and 1904, and in 1906 were decreed in the *Stewart Decree*. Ex. 2021; Ex. 2008, 000472-73; and Ex. 2011. Litigation over the delivery of water to *Stewart Decree* rights as Boise River flows declined during the irrigation season was resolved by an order entered in 1919, requiring distribution of natural flows on the basis of 75% and 60% cuts in priority order. Ex. 2022. River flows were adequate to meet additional irrigation demand only during the spring runoff. Water rights to these “flood waters” were appropriated between 1894 and 1914, and later decreed in the 1929 *Bryan Decree* (aka Flood Water Suit). Ex. 2023.

To meet the need for additional water, Boise Valley water users sought the assistance of the U.S. Reclamation Service (now BOR), shortly after it was created by the 1902 Reclamation Act. Construction of the first dam on the Boise River, Arrowrock Reservoir (“Arrowrock”), was authorized on January 6, 1911, to store spring runoff to provide supplemental water during the irrigation season as natural flows declined. Ex. 2033. Water right license no. 7180 established a January 13, 1911 priority for the right to store water in Arrowrock. Ex. 2023, 000836. Construction of Arrowrock Dam on the Middle Fork of the Boise River began in 1911 and construction was completed in 1915. Ex. 2056.

Irrigation districts entered into contracts with BOR to acquire rights to water stored in Arrowrock as the reservoir was being completed. *See, e.g.*, Ex. 2058, 001762-63, ¶ 6. Each

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<sup>9</sup> Additional historical context and detail are provided in Dr. Jennifer Stevens’ report entitled *History of Boise River Reservoir Operations, 1912-1995* (“*Stevens Report*”). Ex. 2053.

district was required to apportion to lands within their boundaries the right to receive water stored in the Arrowrock, as well as a proportionate part of the cost of constructing the reservoir. *Id.*, 001765-70, ¶¶ 10-12. The 1911 storage water right for Arrowrock was subsequently decreed in the 1929 *Bryan Decree* with other “flood water rights.” Ex. 2023.<sup>10</sup>

**b. Formulation of the Reservoir Operating Plan, Anderson Ranch Reservoir Authorization and Storage Water Right (1937-1956)<sup>11</sup>**

Arrowrock was authorized for irrigation use only, though beginning in 1916 it was operated incidentally to reduce flooding by releasing water in anticipation of high spring runoff to the extent possible without impairing irrigation storage. Exs. 2060. By the 1930s, Boise River water users, BOR, and the Corps acknowledged the need for another reservoir to store additional irrigation water and prevent flooding. While construction of a new reservoir at Twin Springs was considered, a plan for coordinated use of Arrowrock and the proposed reservoir for flood control and irrigation storage was formulated. At a joint public hearing in Boise on September 8, 1937, the Corps and BOR received public testimony regarding Boise Valley flooding. Ex. 2065, 001831. In November 1938, the Corps produced a report in consultation with the Boise River Watermaster and the Manager of the Boise Project evaluating the potential to reduce flooding through joint operation of Arrowrock and the proposed Twin Springs Reservoir. *Id.* The report concluded that flooding could be reduced by reserving space in Twin Springs for flood control use. *Id.*

In a June 28, 1939 report, BOR described the core elements of the plan: (1) using runoff forecasts to reserve reservoir space for flood control; and (2) filling the reserved space with spring runoff for irrigation as the need to manage spring runoff to prevent flooding declined:

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<sup>10</sup> The *Stewart* and *Bryan Decree* orders and rights are discussed in Exhibits 2033 and 2010.

<sup>11</sup> Historical context and detail are provided in *Stevens Report*. Ex. 2053, 001638-1642.

Storage Capacity Required to Control Floods.

6. If the Twin Springs and Arrowrock reservoirs are to be operated for flood control purposes *some part of the storage capacity would need be reserved in nearly every year for flood control purposes and permitted to fill only as needed to reduce the flood discharge or as the remaining snow may justify reduction in reserved capacity.*

Operation of Reservoirs for Flood Control.

12. It is possible, by means of snow surveys and data on winter precipitation, to make fairly reliable forecasts of the volume of flood runoff from the Boise River . . . *[I]t will be necessary to reserve the adopted flood control space in advance of the flood season of every year and store no water therein during the flood period, except as needed to reduce the discharges below the Boise Project diversion dam. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.*

Use of flood control storage for irrigation.

17. *In operating the reservoirs for flood control purposes, it is desired to avoid undue impairment of their value for irrigation purposes. In years of very high runoff, there is no question that the flood control storage will be filled in securing the desired reduction in flood peaks. Water thus stored in the flood control reserve will be subsequently released for irrigation.*

Ex. 2070, 001919, 001922, 001922-23, and 001925 (emphasis added).

While this coordinated reservoir operating plan was being formulated, Congress considered and passed the Reclamation Project Act of 1939 (“1939 Act”). Act of Aug. 4, 1939, ch 418, 53 Stat. 1187 *et seq.*, codified at 43 U.S.C. § 485. Section 9(a) of the 1939 Act authorizes the Secretary of Interior to investigate the feasibility and cost of reclamation projects, and to report his findings to the President and Congress. 43 U.S.C. § 485h(a). If the Secretary’s cost determination does not exceed estimated project benefits for uses including irrigation, power and flood control, then the project “shall be deemed authorized and may be undertaken by the Secretary” without further congressional authorization. *Id.* Section 9(b) of the 1939 Act authorizes the Secretary to allocate part of the cost of a reclamation project to flood control in consultation with the Corps’ Chief of Engineers and the Secretary of War, and to operate the project for flood control to the extent of the allocation. 43 U.S.C. § 485h(b).

By 1940, the Corps and BOR determined that a reservoir on the South Fork of the Boise River at the Anderson Ranch site would be more beneficial than a reservoir at the Twin Springs location on the Middle Fork. On June 25, 1940, Interior Secretary Ickes submitted to President Roosevelt a BOR report proposing to substitute Anderson Ranch Reservoir for Twin Springs as a “multi-purpose project” to “provide a supplemental water supply for 340,000 acres of irrigated lands in the Boise Valley,” power generation, and “a large measure of flood control throughout the Boise Valley.” Ex. 2027, 000857-58. Secretary Ickes informed the President that the project was feasible, economically beneficial and that cost repayment “can be anticipated with assurance.” *Id.* Anderson Ranch Reservoir (“Anderson Ranch”) was therefore authorized for construction under Section 9 of the 1939 Act. Secretary Ickes explained that: “[t]he supplemental water supply to be provided by the proposed development is greatly needed [in the Boise Valley] to prevent crop losses in practically every year.” The President authorized Secretary Ickes to proceed due to the “urgent need for a supplemental water supply for the Boise Valley.” *Id.*, 000856.

The report the Interior Secretary submitted to the President and to Congress (H.R. Doc No 916, 76<sup>th</sup> Cong, 3d Sess (1940)) described the proposed plan for reservoir operations:

*Operation of reservoirs for flood control...* Early in the history of Arrowrock Reservoir operations, earnest efforts were made to provide a larger measure of flood control, storage being vacated in some degree for that purpose. ***In one or two instances, the changes in run-off conditions developed rapidly and resulted in an unfilled reservoir and subsequent irrigation shortage. The need of the reservoir’s entire capacity every year for irrigation makes it imperative to avoid this.***

The run-off at the Anderson Ranch Dam site averages about 40 percent of the inflow to the Arrowrock Reservoir. To obtain the maximum possible flood-control benefits from storage, the Anderson Ranch Reservoir should be operated with the Arrowrock Reservoir. In these studies such a joint operation is presumed. . .

It is possible, by means of snow surveys and data on winter precipitation, to make fairly reliable forecasts of the volume of flood run-off from the Boise River. However, flood damage on Boise River is largely a function of the peak rate of

discharge and the momentary rates of discharge are influenced by climatic conditions while the snow is melting and cannot be accurately predicted. ***To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of storage capacity indicated by the run-off forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.***

*Id.*, 000884 (emphasis added).

The Corps also submitted a report to Congress in 1940 (H.R. Doc No 957, 3d Sess (1940)) pursuant to the Flood Control Act of 1938 (52 Stat. 1215), which also explained:

***The tentative plan of storage operation provides that the jointly used storage will be held available for flood control during the spring months when run-off of flood proportions is predicted on the basis of snow surveys. Run-off from melting snows would then be stored for later use for irrigation.***

Ex. 2028, 000905 (emphasis added).

On December 9, 1940, BOR filed with the Idaho Department of Reclamation (now IDWR) a permit application to construct Anderson Ranch and to appropriate a water right to store 500,000 acre-feet per annum for irrigation and power uses. Ex. 2029, 000910-11. The Secretary of Interior's report to President Roosevelt and Congress (H.R. Doc No 916), explaining the reservoir operating plan for irrigation storage and flood control, was filed with the permit application. *Id.*, 000923. IDWR approved the permit on February 25, 1941. *Id.*, 000911.

On January 28, 1941, in support of the permit application, BOR filed with IDWR a summary of terms of contracts for Anderson Ranch storage that were under consideration by several Boise Valley irrigation districts. *Id.*, 000917. The 1941 contracts allotted each district space in Anderson Ranch to store water for supplemental irrigation use, in exchange for the districts' agreement to repay the costs of constructing the reservoir in proportion to their allotted space. *Id.*, 000999-1003, Arts. 10-13. The contracts required BOR to release to the districts their contractual proportions "of ***the stored water actually available*** from said reservoir [each]

year for irrigation purposes.” *Id.*, 001003, Art. 13 (emphasis added). The contracts further provided that the districts may holdover unused storage from one year to the next (aka “carryover storage”). *Id.*, 001005-1009, Art. 18.

Regarding flood control, the contracts provided that “45,000 acre-feet of empty storage space shall be kept available in the Anderson Ranch and Arrowrock Reservoirs for control of flash floods,” with preference for maintaining such empty space in Arrowrock Reservoir, because Arrowrock collected runoff from the largest portion of the upper Boise River watershed. *Id.*, 001007-1008, Art. 18(d), (e). The contracts provided that water stored in Arrowrock or Deer Flat Reservoirs under the priorities of the water rights for those reservoirs may be temporarily held in Anderson Ranch, or vice versa, without affecting the districts’ rights to the water in the respective reservoirs. Accounting for this practice is an example of what later became known as “paper fill,” whereby a reservoir water right may be accounted for as “filled” by storage physically held in another reservoir. Ex. 2008, 000476-477, Art. 14. The contracts reflect the plan for operating the reservoirs jointly for irrigation storage and flood control by vacating storage capacity on the basis of run-off forecasts to control flood flow, and then filling the reservoir as the flood risk subsides. Ex. 2029, 001009, Art. 18(g).

As required by Idaho Code Section 42-401 (Ex. 2026, now IDAHO CODE § 43-401), the irrigation districts submitted to IDWR surveys, examinations, maps, plans, and cost estimates, with district board minutes and copies of the proposed Anderson Ranch spaceholder contracts for IDWR’s review and approval. Ex. 2029, 000922-58. Pursuant to the statute, the IDWR Commissioner examined the information and filed with the district approval reports, stating *inter alia*, that the districts’ acquisition of storage in conjunction with the use of the reservoirs for irrigation storage and flood control “will be a great asset to the water users who are to be

benefitted, as well as to the people at large in this part of the State.” *Id.*, 000952; *see also*, *id.*, 000949-50, 000959-60, 000975-76, 000986. The irrigation districts subsequently held elections as required by Idaho Code Section 42-401 (now 43-401) authorizing the districts to execute the contracts. The districts apportioned their respective Anderson Ranch storage water entitlements and repayment obligations to the lands within their boundaries, and filed proof of the apportionment with IDWR. *Id.*, 000925-35.

Construction of Anderson Ranch Dam began in August 1941. Ex. 2186, 003750. BOR submitted proof of completion of works in February 1951 showing that 315,079 acre-feet of water had been stored in 1950, and identifying the place of use as the 275,766 acres of land that were entitled under BOR contracts to receive Anderson Ranch stored water as a supplemental water supply for irrigation. Ex. 2029, 000987-94. The Department requested and BOR provided, a list of the thirteen irrigation districts and canal companies that by 1956 had entered into contracts for Anderson Ranch storage, along with representative contracts with the different irrigation entities. *Id.*, 000995. BOR submitted proof of beneficial use in February 1956 demonstrating storage of the full reservoir capacity of 493,161 acre-feet for use on “all lands having storage rights in Anderson Ranch Reservoir pursuant to repayment contracts.” *Id.*, 001044-51. On the basis of that proof, the State Reclamation Engineer issued a license on December 17, 1956, for storage of 493,161 acre-feet of water in Anderson Ranch for use on the lands under contract that BOR identified in its proof of completion. *Id.*, 001052-55.

**c. Lucky Peak Reservoir Authorization<sup>12</sup>**

Extraordinarily high flows in 1943 flooded about 30,000 acres of agricultural, urban and suburban property in the Boise Valley. Ex. 2082. In October of 1943, congressional committees

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<sup>12</sup> Historical context and detail are provided in *Stevens Report*. Ex. 2053, 001643-48.



requested that the Board of Engineers for Rivers and Harbors review the Corps' 1940 report in House Document 957 to identify additional flood control improvement opportunities.

In 1944 Congress passed a Flood Control Act declaring policy "to recognize the interests and rights of the States in determining the development of the watersheds within their borders." 33 U.S.C.A. § 701-1. The Act further declared that flood control projects shall "not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes." 33 U.S.C.A. § 701-1(b). To effectuate this policy, the Act required the Department of the Army to consult and cooperate with the states in which flood control projects were proposed to provide affected states and the Department of the Interior an opportunity to submit written comments and recommendations on the Corps' reports to Congress, and to submit the states' comments and recommendations with the report. 33 U.S.C.A. § 701-1(a). The Act also required the Department of the Interior to consult with states and the Department of the Army concerning proposed reclamation projects for irrigation purposes, and provided that, if either the Secretary of the Army or an affected state objected, the project would not be deemed authorized unless approved by a congressional act. 33 U.S.C.A. § 701-1(c).

The Board of Engineers prepared the report the congressional committees requested in 1943. In March 1946, the Corps notified interested parties of the opportunity to submit comments to the report. Ex. 2089, 002089-108. A copy of the draft report was lodged with IDWR for its review. *Id.* The long list of parties to whom notice was sent included the Idaho Congressional delegation, Idaho Governor Williams, IDWR, county and city officials, and Boise River water users. *Id.*, 002092-108.

On May 13, 1946, the Corps submitted the report to the House Committee on Flood Control, with the Corps' recommendation for construction of Lucky Peak Reservoir ("Lucky Peak"). Ex. 2088. The report contained the following excerpted findings and recommendations:

4. To supply additional water for irrigation, provide storage for flood control and develop hydroelectric power, the Bureau of Reclamation has under construction Anderson Ranch Reservoir . . . The storage has been allocated 212,500 acre-feet for flood control, an equal amount for irrigation, . . . ***In operation of the flood control storage on the basis of flood forecasts from snow surveys largely financed by local interests, increased storage for irrigation will be realized. The project contemplates coordinated operation of the Arrowrock and Anderson Ranch Reservoirs. The district engineer finds that use of the storage to maximum advantage, including flood control, would require drawdown of the reservoirs early in the year and refilling on the basis of runoff forecasts. Irrigationists oppose this method of operation as they fear that it might jeopardize the storage of water for irrigation. Hence, no definite agreement has been made for the use of Arrowrock storage for flood control . . .***

9. The district engineer . . . presents a plan in the interest of flood control, irrigation and hydroelectric power development which provides for construction of Lucky Peak Reservoir on Boise River with dam site about 10 miles above Boise. . . ***The plan also provides for . . . operation as a system, in accordance with runoff forecasts, of the storage space in Anderson Ranch, Arrowrock and Lucky Peak Reservoirs in the combined interest of flood control, irrigation and power.***

10. The district engineer finds that ***with this added reservoir and use of an adequate factor of safety in forecasting runoff, additional storage space in Anderson Ranch and Arrowrock Reservoirs can be used for flood control when needed without endangering the irrigation water supply and that additional water for irrigation would be made available thereby. He proposes to furnish this supplemental water to the irrigationists who use Arrowrock Reservoir water as a recompense for the proposed flood control use of that reservoir . . .***

12. The district engineer recommends that . . . initiation of the proposed construction be conditioned upon obtaining satisfactory assurances from interested water users that, in consideration of the irrigation benefits to be derived from the additional storage in Lucky Peak Reservoir, they will agree to use of Anderson Ranch and Arrowrock Reservoirs for flood control as proposed in the present report of the district engineer . . .

14. Local interests were advised of the nature of the report of division engineer and afforded an opportunity to present additional information to the Board. No communications have been received.

*Id.*, 002083, 002085-87 (emphasis added).

On July 24, 1946, Congress authorized construction of Lucky Peak dam as part of the Flood Control Act of 1946 “substantially in accordance with the recommendations of the Chief of Engineers in his report dated May 13, 1946.” Ex. 2096, 002146.

**d. “Interim” and “Ultimate” Reservoir Operating Plans (1946-1953)<sup>13</sup>**

With Lucky Peak authorized and Anderson Ranch construction ongoing, BOR, the Corps, IDWR, and Boise River water users met several times from September 1946 to September 1952, to collaboratively develop an “interim plan” for joint operation of Arrowrock and Anderson Ranch Reservoirs prior to completion of Lucky Peak, and the “ultimate plan” for operation of all three reservoirs after completion of Lucky Peak as a system for irrigation storage and flood control as contemplated by the previously-discussed reports to the President and Congress (H.R. Doc Nos 916 and 957). Ex. 2078; Ex. 2035, 001306-08, 001343-45. BOR’s initial outline of the interim and ultimate plans included operating the reservoirs on a “forecast basis” during the “flood season of each year” to reduce flows below Diversion Dam (the headworks of the New York Canal) to 6,500 cfs. Reservoir space would be evacuated only to the extent deemed necessary to meet the 6,500 cfs flood control objective. BOR would operate Arrowrock and Anderson Ranch, and the Corps would operate Lucky Peak once completed. Implementing the ultimate reservoir operating plan required: (1) prior submission to Congress of a supplemental report explaining the plan and reallocating Arrowrock and Anderson Ranch costs to irrigation storage, flood control and power generation; and (2) “agreements with all water users having space in Arrowrock and Anderson Ranch accepting the ultimate operating plan.” Ex. 2078, 002029-36. The collaboration resulted in interim operating plans issued in 1948 and 1951

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<sup>13</sup> Historical context and detail are provided in *Stevens Report*. Ex. 2053, 001643-51.

(Ex. 2099; Ex. 2034), and the “ultimate” reservoir operating plan that has governed reservoir operations from the early 1950s to the present.

e. **Final Approval and Implementation of the Plan: 1953 Agreement, 1954 Supplemental Contracts, Congressional Authorization, 1956 Manual<sup>14</sup>**

By 1953 the “ultimate” reservoir operating plan that had been in development since the late 1930s was ready for final approval; first by agreement between BOR and the Corps setting forth the elements of the plan, second by agreements between BOR and the Arrowrock and Anderson Ranch spaceholders, and finally by congressional authorization. The Commissioner of Reclamation (BOR) recommended that the Secretary of Interior sign the agreement with the Corps, explaining the “actions dependent on the execution of this agreement:”

1. The presentation of the operating plan to the several water users’ organizations having irrigation storage rights in Arrowrock and Anderson Ranch reservoirs for formal acceptance by means of contracts supplemental to the existing contracts defining those storage rights. . .

3. The completion of a revised allocation report for the Boise Project, this revised report to be presented to the Congress along with the flood control operating plan as supporting documents . . .

The flood control operating agreement provides for the joint use of the space in the three Federal reservoirs on the Boise River for irrigation and flood control, such joint use not being permissible under existing governing arrangements for Anderson Ranch and Arrowrock. ***The operating plan is the key to various succeeding actions, and without such a joint use the desired measure of flood control cannot be achieved.*** . .

. . .

***The proposed operating plan has been discussed with the State Reclamation Engineer [IDWR] and the Boise Project Board of Control, a group representing the major water users’ organization of the Boise Valley, and tentative agreement has been reached with them.*** The operating plan, by its terms will become effective only when the affected water users’ organization have given formal approval to it and after its transmission to the Congress.

Ex. 2037, 001357-59 (emphasis added).

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<sup>14</sup> Historical context and detail are provided in *Stevens Report*. Ex. 2053, 001648-51.

On September 21, 1953, BOR issued a Revised Allocation and Repayment Report for the Boise Project pursuant to Sections 7 and 9 of the Reclamation Project Act of 1939 and the 1946 Flood Control Act, respectively. Ex. 2071. The report supplemented the Secretary of Interior's June 25, 1940 finding of feasibility in House Document No. 916 to "provide an authoritative basis for the operation of [Anderson Ranch and Arrowrock Reservoirs] in conjunction with Lucky Peak for flood control purposes on a system basis." *Id.*, 001930-31. The report summarized the authorization and construction of the Boise River Reservoirs, and the development of the reservoir operating plan in the 1953 Agreement:

#### PLAN OF OPERATION

The Boise Project was initially considered only in relation to irrigation. With the passage of time, however, the functions of power and flood control came to be recognized as significant partners. . .

By the time it became evident that these reservoirs would not provide adequate irrigation water, the concept of multiple-purpose development had begun to take root. It was therefore only natural, when attention was turned to additional storage in the 1930 decade, that consideration should also be given to the possibility of using that storage for other ***complementary purposes***, namely: flood control and power . . . during the eleven intervening years between authorization and completion [of Anderson Ranch Reservoir], other significant changes occurred. The first of these was the authorization of Lucky Peak Reservoir for construction by the Corps of Engineers. . . The second event of significance involved a basic change in the concept of multiple-purposes operation. ***There was a growing realization that the uses of reservoir space in that area for irrigation and flood control were complementary rather than competitive. This realization opened up the possibility of using space jointly for each purpose, rather than requiring exclusive reservations for each purpose.***

Studies of operating plans made jointly by the Corps of Engineers and the Bureau of Reclamation were focused in this direction with the result that it is now proposed to use 418,000 acre-feet of active space in Anderson Ranch Reservoir, the 285,000 acre-feet in Arrowrock and the 280,000 acre-feet in Lucky Peak Reservoir jointly for irrigation and flood control. ***A copy of the agreement providing for such operation is attached.*** . .

Thus, facilities originally undertaken solely for irrigation have been converted to multiple-purpose uses by making necessary additions and by improving plans for using them.

*Id.*, 001931-33 (emphasis added).

The November 20, 1953 Agreement between BOR and the Corps (“1953 Agreement”) (Ex. 2038) contains the following essential terms of the reservoir operating plan for joint use of the Boise River Reservoirs for irrigation storage and flood control:

- Allocating up to 983,000 acre-feet of storage space in the reservoir system as needed for flood control during the flood control season (*id.*, 001363-64, Art. 3);
- Using forecasts of snowmelt runoff into the reservoir system and operational “rule curves” attached to the Agreement during the flood control season (January 1 through July 31) to determine, allocate, and attain the volume of reservoir space (*i.e.*, “flood control space”) necessary to capture runoff and control reservoir releases to prevent Boise River flows below Diversion Dam from exceeding 6,500 cfs to the extent possible (*id.*, 001365-68, Art. 6a-c);
- Factoring the diversion of water into the New York Canal into the determination of the quantity of water to be released from Lucky Peak (*id.*, 001365, Art. 6a);
- Prescribing the sequence of flood control releases from the reservoirs, and the reverse of that sequence for filling the reservoirs for irrigation storage (*id.*, 001368-69, Art. 6d);
- Filling the reservoirs for irrigation use in accordance with the forecasts and the rule curves by the end of the flood control season (*id.*, 001369-70, Art. 6e); and
- Making up for shortfalls in filling Arrowrock and Anderson Ranch storage rights due to flood control releases with water stored in Lucky Peak at the conclusion of the flood control season under the Lucky Peak storage right (*id.*, 001368-69, Art. 6d).

The 1953 Agreement provides the spaceholders the express assurance that: “No reregulation of storage or annual exchange of storage as provided in this plan shall, however, deprive any entity of water accruing to it under existing rights in Arrowrock, Anderson Ranch and Lake Lowell Reservoirs.” *Id.*, 001364, Art. 4. Article 7 of the 1953 Agreement allows BOR and the Corps to modify the operating plan’s provisions for determining flood control space requirements and reservoir releases after consultation with the State Reclamation Engineer (IDWR), the Boise River Watermaster and the Boise Project. Article 7 further provides: “[N]o modification which would affect in any substantial way any storage rights in the reservoir system and Lake Lowell, shall be made without the concurrence of all entities having rights in the reservoir system and Lake Lowell.” *Id.*, 001372.

Article 9 of the 1953 Agreement provides that it will not become effective until it is accepted by all Arrowrock and Anderson Ranch spaceholders, and a revised allocation report “supplemental to the report and finding of June 25, 1940, by the Secretary of the Interior (H.R. Doc No 916, 76<sup>th</sup> Cong, 3d Sess.), reflecting the flood control benefits based on the operating plan herein set forth, has been transmitted to the Congress.” *Id.*, 001373.

In a December 9, 1953 joint press release, BOR and the Corps summarized the reservoir operating plan, as it had been developed since the late 1930s with the added assurance of storage in Lucky Peak if Arrowrock and Anderson Ranch did not completely fill:

The operating plan calls for the three reservoirs to be managed as one system, with water storage and release based on a forecast of runoff in the watersheds above the dams. ***Water will be released in advance of the spring snowmelt flood to provide flood control. Water will be captured on recession of the flood peak to supply irrigation requirements. In the event that Arrowrock and Anderson Ranch reservoirs cannot supply irrigation needs by reason of having evacuated water for flood control in excess of refill, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights, to the extent of the space in those reservoirs remaining unfilled, but not to exceed the amount evacuated for flood control. . .***

The authorization of Lucky Peak contemplated that it would permit the existing two reservoirs, Anderson Ranch and Arrowrock, when operated in conjunction with Lucky Peak, to provide not only a desired degree of flood control in the Boise Valley, but also to insure a firm supply of water for irrigators, and in numerous years supplemental water would be available. However, the joint use at times of the entire capacities in Arrowrock and Anderson Ranch Reservoirs for flood control and irrigation was not envisioned prior to the authorization of Lucky Peak Reservoir. Therefore, ***the matter must be submitted to the Congress.***

Ex. 2103 (emphasis added).

During 1953, BOR negotiated terms for supplemental contracts to approve the reservoir operating plan with the Arrowrock and Anderson Ranch spaceholders. In December 1953, BOR delivered to the spaceholders draft supplemental contracts, the November 20, 1953 Agreement, and resolutions authorizing the spaceholders to enter into the supplemental agreements after approval by the Secretary of the Interior. Ex. 2039, 001388-89. After the spaceholders passed

the necessary resolutions in early 1954, and the Secretary of the Interior approved the draft supplemental contracts, BOR transmitted the supplemental contracts to the spaceholders with the 1953 Agreement attached as Exhibit A. During the summer of 1954, BOR entered into supplemental contracts with 15 Arrowrock and/or Anderson Ranch spaceholders (8 irrigation districts and 7 canal companies), in which they assented to the reservoir operating plan contained in the 1953 Agreement. Ex. 2100.

The 1954 supplemental contracts define the “storage season” for the Reservoirs as October 1 through the following year “when no more water is available for storage therein” and the “flood control period” as January 1 through July 31. *Id.*, 002169, Art. 5. The 1954 contracts:

- Require BOR to operate the reservoirs jointly for irrigation storage and flood control in accordance with the operating plan in the 1953 Agreement (*id.*, 002169-70, Art. 6(a));
- Substitute the reservoir operating plan of the 1953 Agreement for the flood control plan in the Anderson Ranch storage contracts (*id.*, 002169-70, Art. 6(a) & (b));
- Guarantee that any shortfall in filling the spaceholders’ storage rights in Arrowrock and Anderson Ranch Reservoirs due to flood control operations will be made up from “water accrued to storage rights in Lucky Peak Reservoir” (*id.*, 002170-71, Art. 7);
- Make the supplemental contracts effective “only when an allocation report for the Boise Project, supplemental to the report and finding of June 25, 1940 covering Anderson Ranch Dam (H.R. Doc No 916, 76th Cong) reflecting the flood control benefits based on the operating plan . . . has been presented to Congress and become operative” (*id.*, 002171, Art. 8 (a)); and
- Make the supplemental contracts effective so long as the water accruing to Lucky Peak storage rights is provided to cover shortfalls in filling the spaceholders’ storage rights in Arrowrock and Anderson Ranch Reservoirs pursuant to article 7 (*id.*, 002171).

On August 24, 1954, after all the supplemental contracts were signed, Congress passed Public Law 660 (introduced in the Senate by Idaho Senator Dworshak as S.B. 3420) authorizing the Secretary of the Interior to operate the Boise River Reservoirs in accordance with the reservoir operating plan in the 1953 Agreement, and to allocate Arrowrock and Anderson Ranch Reservoir costs to irrigation, power and flood control accordingly. Ex. 2101.



In 1956, the Corps issued the Reservoir Regulation Manual for Boise River Reservoirs to provide information, criteria and procedures for operation of the Boise River Reservoirs system as required by the 1953 Agreement. Ex. 2104. The 1953 Agreement remains in effect today. The Boise River Reservoirs were operated pursuant to the reservoir operating plan in the 1953 Agreement and the 1956 Manual for 30 years, until the plan was modified and the Manual was updated and replaced in 1985.

**f. Lucky Peak Storage Rights, Contracts and the Reservoir Operating Plan<sup>15</sup>**

Lucky Peak dam was completed in December 1957. Ex. 2186, 003751. Storage began during construction in 1954. The Corps was not required to obtain a water right to construct or operate Lucky Peak Reservoir for flood control. BOR filed a water right permit application with IDWR in 1957, to store and deliver water from Lucky Peak for irrigation use. Ex. 2030, 001056-59. The reservoir operating plan in the 1953 Agreement was an important factor in IDWR's processing of the permit application. The application proposed an exchange, whereby water would be diverted from the South Fork of the Boise River and delivered through a tunnel to the Hillcrest Division of the Mountain Home Project in the Mountain Home area. The permit application was protested by several Boise Valley irrigation districts and canal companies, alleging potential injury to their *Bryan Decree* "flood water rights," and interference with the storage of water under the reservoir operating plan of the 1953 Agreement. *Id.*, 001061-68. IDWR took no action on the permit until after the protests were resolved by agreement between BOR and the protestants and the filing of a new permit application in 1963 which confined the supplemental use of Lucky Peak stored water to lands in the Boise Valley with existing water

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<sup>15</sup> Historical context and detail are provided in *Stevens Report*. Ex. 2053, 001652-54.

rights. *Id.*, 001074-76. The spaceholders withdrew their protests, and IDWR approved the permit application on March 20, 1964. *Id.*, 001077-78.

After IDWR approved the permit application in 1964, BOR entered water service contracts pursuant to Section 8 of the Flood Control Act of 1946 with several Boise Valley irrigation districts and canal companies for storage in Lucky Peak. Ex. 2112. Eighteen contracts were entered by 1968. Ex. 2115, 002331. Like the Anderson Ranch contracts, the Lucky Peak contracts entitled the contractors to defined proportions of the water that was actually stored in Lucky Peak, and allowed the contractors to “hold over” unused storage from one year to the next (aka “carryover storage”). Ex. 2112, 002305, 002310-12. The contracts identified BOR’s approved permit to store water in Lucky Peak, acknowledged that Lucky Peak is operated primarily for flood control pursuant to the 1953 Agreement, and provided that:

Subject to such operation for flood control, the United States will operate Lucky Peak Dam and Reservoir so as ***to store under existing storage rights all available water***, and during each irrigation season, the United States will make available to the Contractor for irrigation the Contractor’s proportionate share of the stored water that accrues in each year to the active capacity of the Reservoir, together with any stored water that may have been carried over in the Contractor’s share of such active capacity from prior water years.

*Id.*, 002310 (emphasis added).

Under the contracts, in a year of below normal runoff when storage releases are not required to create the flood control space needed to capture runoff to prevent flooding, Lucky Peak storage available to the contractors consists of carryover from the prior water year (November 1 to October 31), plus runoff stored during the current water year. In a flood control year when it is necessary to release carryover storage to create the required flood control space, carryover from the prior year is reduced by the amount released, and Lucky Peak storage available to the contractors would consist of remaining carryover, if any, plus runoff captured during flood control operations. All water in Lucky Peak after flood control releases is

accounted for as new storage or “new fill.” *Id.*, 002310-11. The Lucky Peak contractors were thus entitled to water stored in the reservoir “under existing storage rights” after flood control releases on “recession of the flood peak to supply irrigation requirements,” subject to the possibility that their entitlements would not be completely filled by the end of flood control operations due to: (1) forecasting errors or unforeseen runoff conditions; and (2) the assignment of Lucky Peak storage to make up for shortages in Arrowrock and Anderson Ranch. Ex. 2103.

The Lucky Peak water right remained in permit stage for several decades, until it was finally licensed in 2002. The reservoir operating plan continued to be a factor in the development of the Lucky Peak water right. Extensions of time were granted while BOR, the Corps, and IDWR conducted various studies related to the use of uncontracted Lucky Peak storage space and modification of the reservoir operating plan. Ex. 2030, 001079-136. These studies included the Boise Project Power and Modification Study, which was used in the selection of new criteria for the revised reservoir operating plan that was adopted in 1982. *Id.*, 001090-136.<sup>16</sup> After that study was completed and the reservoir operating plan was revised, BOR filed an application to amend the permit to add streamflow maintenance as the purpose of use for the uncontracted storage, and submitted proof of beneficial use. *Id.*, 001163-64. IDWR performed a beneficial use examination in 2002 after the Lucky Peak permit was claimed in the SRBA. *Id.*, 001165-68. IDWR’s analysis confirmed its longstanding position that “flood control cannot be recognized as a beneficial use.” *Id.*, 001172, 001124-25. IDWR staff considered the operation of Boise River Reservoirs under the reservoir operating plan, including a 1955 Corps report from IDWR’s Lucky Peak dam safety file, which explains:

To permit more effective use of all storage space, the operation of the three dams in the Boise River Basin is coordinated to provide as much as 983,000 acre-feet of

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<sup>16</sup> See also, *Stevens Report*. Ex. 2053.

flood control space on a forecast basis with all three reservoirs refilled at the end of the flood season for irrigation.

*Id.*, 001206.

To secure the Lucky Peak contractors' long-term rights to storage in Lucky Peak, the Lucky Peak water service contracts were converted to repayment contracts in 2005 after BOR analyzed and vetted the contract conversion through a public NEPA process. Ex. 2190, 003982-4002. The repayment contracts require that Lucky Peak be operated pursuant to the 1953 Agreement, the 1954 supplemental contracts, and the 1985 Water Control Manual for Boise River Reservoirs, and retained the understanding of the water service contracts regarding the relationship between flood control operations on the storage of water pursuant to "existing storage rights" for use by the Lucky Peak spaceholders. *Id.*, 003990-91.

**g. IDWR's 1974 Report and Revision of the Reservoir Operating Plan<sup>17</sup>**

In May 1974, in response to landowner complaints over recent Boise River flooding, Governor Andrus requested that IDWR review reservoir operations to determine whether changes could be made to decrease the risk of flooding downstream from Lucky Peak Dam.<sup>18</sup> Ex. 2181, 003631, ¶ 7. In response to the Governor's request, IDWR produced a report in November 1974, prepared by IDWR Water Resource Engineer Bob Sutter ("Sutter") in consultation with BOR and the Corps, evaluating the effectiveness of reservoir operations under the 1953 Agreement and the 1956 Manual in preventing flooding and filling the reservoirs for irrigation storage ("1974 Report"). Ex. 2182. The 1974 Report used the terms "refill" and "fill" interchangeably to mean the annual filling of the Boise River Reservoirs during flood control operations for irrigation and other beneficial uses. Ex. 2181, 003631-32, ¶ 8.

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<sup>17</sup> Historical context and detail are provided in the *Stevens Report*. Ex. 2053, 001660-82.

<sup>18</sup> Reservoir operations from 1956 to 1974 are discussed in the *Stevens Report*. Ex. 2053, 001654-60.

The 1974 Report found that: operational changes were warranted because urban encroachment along the Boise River increased the potential for economic damage from flooding; improved methods of runoff forecasting were available, and the 1953 Agreement's "rule curves" governing reservoir operations during the flood control season provided greater assurance of reservoir refill than flood prevention. *Id.* The 1974 Report evaluated changing reservoir operations to increase the vacant flood control space during the early phases of the flood control season to capture more peak runoff and thereby improve the ability to control reservoir releases to meet the 6,500 cfs flood control objective. Such a change could increase the risk that the reservoirs will not be filled by the end of flood control operations by delaying the timing of reservoir refill so that less is stored during the early "evacuation period" of flood control operations, with more being stored later during the "refill period." *Id.*, 003632-33, ¶ 9.

The 1974 Report concluded that reservoir operations could be modified in such a manner without significantly reducing refill assurances, and recommended that BOR, the Corps and IDWR conduct additional studies and jointly prepare revisions to the 1953 Agreement and the 1956 Manual. *Id.*, 003633, ¶ 10.

#### **h. The 1985 Water Control Manual**

IDWR's 1974 Report became the basis of a multi-year effort by BOR, the Corps and IDWR which resulted in revision of the reservoir operating plan in the 1953 Agreement, and adoption of a new manual in 1985, entitled "Water Control Manual for Boise River Reservoirs" ("Water Control Manual" or "1985 Manual"). *Id.*, 003633-35, ¶¶ 11, 12. Early in the revision process a "plan of study" was developed, stating:

This plan of study is to serve as a guide for a coordinated local, State, and Federal effort to develop a new and improved Boise River regulation plan, manual, and agreement . . . The primary participants of this study will be the Idaho Department of Water Resources, U.S. Bureau of Reclamation, and the U.S. Army Corps of Engineers.

Ex. 2183, 003712-13. IDWR employee Sutter, who wrote IDWR's 1974 Report and participated in the preparation and review of the 1985 Manual, explained that his supervisor: "Alan Robertson went to the meetings [with BOR and the Corps] and was informed of everything and provided advice and guidance, because it was really necessary to get the Department of Water Resources' blessing on this." Tr. 8/28/15 459:14-17. As explained by former IDWR Director Higginson:

In 1974 Governor Andrus requested [IDWR] to evaluate flood control management of the Boise River system. A report was issued in November of that year recommending several changes for improving Boise River flood control operations. ***As a direct result of this report, a new Water Control Manual for Boise River reservoirs was finalized in April, 1985. Although issued by the Corps of Engineers, this manual was a joint effort by the Corps, Bureau of Reclamation and [IDWR].***

The new manual represents several years of effort to adapt current technology and data to today's conditions and needs, all of which have changed since the first operating manual was issued in 1956.

Ex. 2171 (emphasis added).

After the Water Control Manual was completed in April 1985, BOR and the Corps entered into a Memorandum of Understanding ("1985 MOU") adopting the 1985 Manual as an "integral part" of the 1953 Agreement to "constitute the current operating plan and procedures until further changed or modified by the parties in accordance with Article 7" of the 1953 Agreement. Ex. 2045, 001460. The 1985 MOU explained that BOR and the Corps agreed to revise the reservoir operating plan "after consultation with the State of Idaho, Boise River Watermaster, and Project Manager of the Boise Project Board of Control." *Id.*, 001459. The Water Control Manual explains: "The Memorandum of Understanding is a supplement to the Agreement, which does not change its terms, but rather incorporates a new operating agreement under Article 7 of the 20 November 1953 agreement." Ex. 2186, 003747.

The 1985 Manual retains the longstanding reservoir operating principle as explained to and approved by Congress, Boise River Reservoir spaceholders, and the State beginning in the 1930s:

***To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of storage capacity indicated by the run-off forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.***

Ex. 2027, 000884 (H.R. Doc No 916, 76<sup>th</sup> Cong, 3d Sess (1940) (authorizing construction of Anderson Ranch Reservoir)) (emphasis added). On November 30, 1987, IDWR Director Higginson explained:

***[The new manual] contains new rule curves and procedures aimed at providing greater flood protection through early season operations and increased assurance of refill for irrigation during the late runoff season. We feel that the new manual responds well to current conditions on the Boise River and provides a balance between flood protection and refill of storage.***

Ex. 2171 (emphasis added).

Though updated, the linchpins of the revised reservoir operating plan continued to be:

- The 6,500 cfs flood control objective at Glenwood gage which can be exceeded if an emergency exists or is anticipated (Ex. 2186, 003796-97);
- Lucky Peak releases between 6,500 cfs and 10,300 cfs during normal flood control operations between January 1 and July 31, depending on the volume of irrigation diversions pursuant to established senior natural flow water rights between Lucky Peak Dam and the Glenwood gage (*id.*, 003768-70, 003797);
- Updated methods and procedures for forecasting the timing and volume of inflows from runoff into the reservoir system (*id.*, 003779);
- New rule curves to define flood control space requirements based on reservoir inflow forecasts (*id.*, 003799, 003832 (Plate 7-1)); and
- Updated methods for scheduling releases to maintain required flood control spaces (*id.*, 003788, 003793).

*See also*, Ex. 2181, 003634-35, ¶ 12.

The Water Control Manual divides the “flood control season” (end of irrigation season to maximum reservoir fill) into three phases of operation: “winter space requirements” (November 1 through March 1); “spring evacuation requirements” (January 1 through March 31); and “refill requirements” (April 1 through July 31). Ex. 2004, 000352, ¶ 16. The Manual allows for temporary violations of the criteria when unpredictable runoff events occur, and exceedance of the 6,500 cfs flood control objective at Glenwood Bridge when there are exceptionally heavy snowpacks and large increases in runoff volumes. *Id.*

During the “winter space requirements” phase (November 1 to March 31), the 1985 Manual requires that minimum flood control spaces be maintained, regardless of forecasted runoff, to control unexpected runoff from snowmelt and precipitation on frozen ground. Ex. 2004, 000352-53, ¶ 17. Generally, reservoir releases are not required during the winter months to meet the prescribed minimum space requirements (*id.*), unless there are exceptional runoff conditions, as explained in 1987 by IDWR Director Higginson:

To illustrate the need for this space, the December 1964 flood produced almost 200,000 acre-feet of runoff in one week, and had there been no reservoir space available, would have resulted in a peak flow of 44,000 cfs through Boise. Such a flood today would cause more than 400 million dollars in damages. To protect against such an event, current criteria call for a minimum of 300,000 acre-feet of empty reservoir space during November and December.

Ex. 2171, 003352.

Generally, from January 1 through the conclusion of flood control operations (including the refill phase) runoff forecasts are used in conjunction with the rule curves to determine the volume of reservoir space that must remain vacant to capture forecasted runoff, and the volume of reservoir space in which reservoir inflows may be stored. Ex. 2181, 003632-33, ¶ 9. This procedure represents the balance between flood control and reservoir fill described by IDWR Higginson, providing: “[H]igh levels of assurance that (1) Boise River flows will not, to the



extent possible, exceed the flood control objective of 6,500 cfs, and (2) the reservoirs will be refilled at the conclusion of flood control operations pursuant to reservoir storage water rights.”

Ex. 2181, 003635, ¶ 13; *see also*, Ex. 2004, 000349-50, ¶¶ 6, 7; AR. 001242-43, ¶¶ 23, 24; AR. 001279, ¶ 163.<sup>19</sup>

## **2. Storage in the Boise River Reservoirs During Flood Control Season**

The operation of the Boise River Reservoirs for beneficial use storage and flood control pursuant to the reservoir operating plan was described by Mary Mellema (BOR) (“Mellema”) (Ex. 2004; Tr. 8/31/15 705-766), Sutter (Ex. 2181, 003628-29, 003634-36, ¶¶ 4, 12-14; Tr. 8/28/15 386-428) and Lee Sisco (former Boise River Watermaster) (“Sisco”) (Ex. 2008, 000478-82, ¶¶ 16-22).

Sutter, author of the 1974 Report, participant in the development of the 1985 Water Control Manual, and author of the IDWR’s computerized water right accounting program, explained how water is stored for beneficial use during flood control operations:

4. Reservoir Operations Overview. . . . Because the reservoir system stores water for irrigation and other uses during the spring runoff season, the reservoir operating plan is also designed to ensure that the reservoirs will be filled during flood control operations to store water pursuant to established rights. Joint operation of the reservoir system for flood control and beneficial use storage is accomplished through the use of the runoff forecasts, rule curves, and scheduled reservoir releases. Under the reservoir operating plan, as forecasted inflows decline, less flood control space is required, and inflows are increasingly retained and added to reservoir contents until the danger of flooding has passed and the reservoirs are filled or nearly filled. ***After the flood risk has passed, the water stored in the reservoir system at the point of maximum fill is allocated among the reservoir storage water rights according to their priorities, and is available for delivery to those who are entitled to use the stored water for irrigation and other beneficial uses.***

5. Storage Water Right Accrual During Flood Control Operations. Water cannot be stored in Boise River Reservoir space that is required to be vacant during flood control

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<sup>19</sup> For additional explanation of flood control operations under the Water Control Manual, *see* Ex. 2181, 003632-34, ¶¶ 9-11; Ex. 2008, 000478-82, ¶¶ 16-22; and Ex. 2004, 000349-56, ¶¶ 4-26.

operations. ***Reservoir inflows that must be released to maintain required flood control spaces are therefore not available to physically fill storage space. Reservoir space becomes available for physical storage only as flood space requirements decline in accordance with the established reservoir operating plan. Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled.***

Ex. 2181, 003628-29, ¶¶ 4, 5 (emphasis added). See also, Ex. 2004, 000351-52, ¶ 14, (Mellema: flood control space is not available for storage).

Similarly, Sisco, Boise River Watermaster from 1986 to 2008, explained:

Reservoir space that is required to be kept open for flood control purposes is not available to physically store water for irrigation or any other beneficial use, until that space is no longer required for flood control purposes. Water that is required by the Water Control Manual to be released from the reservoir system to maintain required flood control spaces is not available for beneficial use storage under reservoir storage water rights, and is not treated as delivered to spaceholders for beneficial use under storage water rights. During flood control operations, reservoir inflows are physically stored for beneficial use as flood space requirements decline, and reservoir space that becomes available for beneficial use storage is physically filled with water. During flood control operations, I worked with the BOR and the Corps to make every effort to fill reservoir space with water following flood control releases to fulfill existing storage rights and spaceholder contracts. Until reservoir space that is available for storage is physically filled, storage rights remain in effect and are physically filled in priority with all other Boise River water rights. When the reservoirs reach maximum physical fill at the conclusion of flood control operations, the storage rights have likewise reached maximum fill, and the water that has been physically stored pursuant to the storage water rights is allocated to the spaceholders' storage accounts.

*Id.*, 000481, ¶ 20.

In the Contested Case proceeding that is the subject of this appeal, the Director found:

25. The Water Control Manual's Water Control Plan specifies ***the amount of space that must be left vacant at various times during flood control operations***, as well as the distribution of this vacant space among the three on-stream reservoirs. For present purposes, the total amount of reservoir system ***storage space that must be left vacant*** at any given time of year, and its distribution among the individual reservoirs, is termed the "system flood control space requirement."

26. Throughout the year, the reservoir system is generally operated ***to store as much water as possible without violating the system flood control space requirement. Ensuring that the required amount of reservoir space is empty at the times prescribed by the Water Control Manual often requires the release of water that could otherwise be stored in the reservoir system for later use.*** These flood control releases can take the form of either "bypasses" or "evacuations."

AR. 001243 (emphasis added).

The Director described reservoir releases as either “evacuations,” which reduce the volume of water in the reservoirs, or “bypasses,” which do not, and explained that the effect of either type of release is ***“less water being physically stored than would have been stored absent the need to meet the system flood control space requirement.”*** AR. 001243-44, ¶¶ 27-29 (emphasis added). He then explained that when “Refill Requirements” govern reservoir operations from April 1 through July 31:

[T]he ***operation shifts from evacuating to filling or “refilling” vacant space in the reservoir system.*** This is “normally is the most difficult and most critical of the three flood control periods” . . . because ***prematurely filling the reservoir system increases flood risk, but also because failing to fill the reservoir system reduces the supply of stored water available for later use.***

AR. 001245, ¶ 13d (emphasis added).

### **3. Administration of Boise River Reservoir Storage Water Rights**

The Boise River Watermaster is responsible for the administration of Water District 63 water rights, which includes distributing and accounting for the distribution of water to the Boise River Reservoir storage water rights. Ex. 2008, 000470-71, ¶ 3. The current Boise River Watermaster is Rex Barrie (“Barrie”). His predecessor, Sisco was the Boise River Watermaster for 22 years, from 1986 to 2008. Sisco’s predecessors were Henry Koelling (“Koelling”) and Roy Musselman. *Id.*, 000469-70, ¶ 2; Tr. 8/28/15 364:17-25.

Historically, BOR, the Boise Project and the Watermaster worked closely together (working in the same building) on Boise River water management. *Id.*, 367:11-368:1. BOR provided water measurement data and other technical information, and the Watermaster made the water distribution and administration calculations by hand. Sutter explained that “it was an amazing process . . . but very, very time consuming.” *Id.*, 368:6-369:7. The Boise River

Watermaster evaluated the physical contents of the Boise River Reservoirs to determine the point at which the reservoir water rights were filled. Sutter testified:

**Q. With regard to reservoir storage rights, *do you know how Mr. Musselman determined at what point in the year they had filled?***

**A. *He used the physical fill of the reservoirs.*** And I think this was also done in conjunction with the Bureau of Reclamation. I'm not quite sure of the interaction because, as I said, *they were so close together, they probably just got together and talked about it and came up with the fill of the reservoirs based on physical contents.*

**Q. *And when you say "based on physical contents," what do you mean?***

**A. *When the reservoirs physically reached the maximum content, that was the water that was then considered having been stored in that reservoir to be allocated to the various water users in the reservoir.***

**Q. *And do you mean that it was -- the water was considered to have been stored in the reservoir pursuant to the reservoir storage water rights?***

**A. *Yes.***

...

**Q. *So to summarize, then, the water that fills the reservoirs pursuant to the storage rights, at the point of maximum fill, was allocated to the spaceholders in proportion to their contract entitlements; correct?***

**A. *Correct.***

*Id.*, 370:16-372:16 (emphasis added).

Prior to 1986, Watermaster Koelling determined and reported the "total available" storage in the reservoir system based on the physical reservoir contents at the time of maximum storage (*i.e.*, maximum reservoir fill). That figure would equal total measured contents at that time, or be less if spaceholders had used storage prior to that time. Tr. 8/31/15 851:18-853:13; Ex. 2009, 000558. During Koelling's tenure, the water he accounted for as "total available" storage was stored under the priority of the storage water rights, and rights junior to the storage rights were not entitled to delivery of water ahead of the storage rights. Tr. 8/31/15 854-855;

Tr. 8/28/15 418:4-15. This was also the case during Sisco's tenure as Watermaster, as explained during Sisco's live hearing testimony and in his affidavit. Tr. 8/31/15 855:5-9; Ex. 2008.

Sisco explained that all water physically stored in and released from the Boise River Reservoirs for beneficial use is stored and delivered pursuant to the decreed existing storage rights for the reservoirs. Ex. 2008, 000473, ¶ 8. Sisco further explained:

19. As Watermaster, I understood that the water physically stored in the Boise River Reservoirs as a result of this flood control procedure was stored pursuant to the reservoir storage water rights. The release of water from the reservoirs to attain required flood control spaces did not affect the accrual of physically stored water to reservoir storage rights. Mr. Koelling [the previous Watermaster] and I each administered storage water rights based on this understanding. We each accounted for the accrual of water physically stored in the reservoirs at the point of maximum reservoir fill to the reservoir storage water rights according to their priority dates.

20. During my experience in Boise River water right administration, no spaceholder, Watermaster, or IDWR employee advised me that they considered water that was released from the Boise River Reservoirs for flood control purposes as a release of water that had been stored for beneficial use pursuant to a storage water right. Flood control use of the reservoir system does not require a water right, or constitute storage or storage use under any of the storage water rights for the Boise River Reservoirs.

*Id.*, 000480-81.

Sisco's successor, current Boise River Watermaster Barrie, reviewed and agrees with the statements in Sisco's Affidavit and administers water rights consistent with those statements.

*Id.*, 1343:10-1344:11. Barrie emphasized that spaceholders are entitled to the water that is physically stored in the reservoirs. *Id.*, 1358:24-1359:12. "Reservoir inflows that are required to fill storage rights during flood control operations are never released to deliver water to water rights that are junior to the Boise River Reservoir storage rights." Ex. 2008, 000482, ¶ 21; *see also*, Tr. 9/10/15 1374:2-1375:5. There is no evidence that water that would otherwise be stored to fill the Boise River Reservoirs has ever been released from the reservoirs to fulfill water rights that are junior to the reservoir storage rights. Tr. 8/27/15 158:4-159:11.

Boise River flows from the upper Boise River watershed are available for additional/junior appropriation only during flood control operations when water is released for flood control purposes. Ex. 2008, 000475, ¶ 12. Watermaster Sisco recommended and IDWR included conditions in permits issued for new appropriations of water from the upper Boise River watershed to notify junior right holders that water is available for their diversions only during flood control operations— when spring runoff conditions from the Upper Boise River watershed exceed: (a) irrigation demand by diversions with *Stewart* and *Bryan Decree* water rights, and (b) the physical filling demand of the Boise River Reservoirs pursuant to storage water rights in accordance with the reservoir operating plan. *Id.*

#### **4. Storage Water Right Accounting During Flood Control Operations**

The computerized accounting system that IDWR uses to account for the accrual of water to the Boise River Reservoir storage water rights was developed for the Boise River by Sutter and Alan Robertson, and implemented at Sisco’s request when he became the Boise River Watermaster in 1986. Ex. 2181, 003630-31, ¶ 6, 003637, ¶ 18; Ex. 2008, 000482-83, ¶ 23. Koelling felt that his longhand method of accounting was adequate, but Sisco felt it might be more efficient for a computerized system to make the calculations. Ex. 2008, 000482-83, ¶ 23. Sutter and Sisco explained the methodology of the accounting system. Ex. 2181, 003630-31 ¶ 6, 003637-39, ¶¶ 18-21; Ex. 2008, 000482-89, ¶¶ 23-32.

Sutter explained that “the net effect of the accounting procedure is to accrue to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecast and rule curve procedures of the Water Control Manual.” Ex. 2181, 003638-39, ¶ 21.

[T]he water right accounting program confirms that reservoir storage rights are fulfilled as inflows physically refill reservoir storage spaces during flood control operations. After flood control operations are concluded and the reservoirs have reached maximum fill, stored water is allocated to the existing storage water rights, confirming that filling

the reservoirs for beneficial use storage pursuant to reservoir storage rights is not completed until maximum reservoir fill is achieved.

*Id.*, 003631, ¶ 6.

In Sisco's words:

As was the case during [Watermaster] Koelling's tenure, all the water actually, physically stored in the reservoirs at the conclusion of flood control operations has been stored pursuant to the reservoir storage rights, and allocated to the storage accounts of the spaceholders.

Ex. 2008, 000489, ¶ 32.

The accounting system protects the established storage rights, and does not penalize spaceholders for the use of the reservoir system for flood control purposes to protect downstream lands from flooding.

*Id.*, 000488, ¶ 31.

The only significant change implemented through the adoption of the computerized accounting system was to account for the accrual of water to the reservoirs based on source and priority, rather than priority alone. Ex. 2008, 000483-84, ¶ 24. This was an administrative decision to properly account for the storage of water *as between the reservoir storage rights* that could have been implemented without the accounting system. *Id.* Adoption of the accounting system did not make any other change to the administration of Boise River storage water rights, or the accrual of physically stored water to those rights. *Id.*

As an accounting tool, the accounting system does not itself determine how water rights are administered. *Id.*, 000484, ¶ 25. The accounting system does not affect required flood control spaces, storage volumes (*i.e.*, reservoir contents), reservoir system releases or any other aspect of reservoir operations during the flood control season pursuant to the Water Control Manual. *Id.*; *see also*, Ex. 2004, 000356, ¶ 27. Specifically, the "paper fill" methodology of the water right accounting program did not change reservoir operations, reservoir refill, or water right administration. Ex. 2181, 003638, ¶ 20. Physical filling of reservoir system storage spaces

and water rights continued as required by the Water Control Manual's runoff forecasts, rule curve and release procedures. *Id.* The accounting system was not intended or used to treat reservoir storage rights as "satisfied" at the point of "paper fill" when, in fact, vacant spaces remained due to flood control releases over which the spaceholders had no control. Nor was it the intent or effect of the accounting system to treat water as being stored for beneficial use without a water right, or allowing junior water rights (or future appropriations) to call for the release of water that was required by the Water Control Manual to be stored to fill reservoir storage spaces and water rights. Ex. 2008, 000488-89, ¶ 32.

Sutter explained that the adoption of the water right accounting program did not alter "the accrual of water to storage pursuant to the reservoir operating plan of the Water Control Manual."

20. No change in reservoir operations, in reservoir refill, or in water right administration resulted from the paper fill methodology of the accounting program. Reservoir inflows were not required to be released, and the water actually stored in the reservoirs was not allocated to storage water rights at the point of paper fill. Physical refill of storage spaces and storage water rights continued as required by to the Water Control Manual's runoff forecast, rule curve and release procedures. For accounting purposes, paper fill is more accurately understood to be a benchmark establishing that the reservoir water rights are entitled to be physically filled by subsequent reservoir inflows.

21. The net effect of this accounting procedure is to accrue to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecast and rule curve procedures of the Water Control Manual. After maximum reservoir fill, the water physically stored in the reservoirs, including the "unaccounted for storage," is allocated to reservoir storage rights, and then to spaceholders with contract-based storage entitlements by the storage allocation program. The storage allocations are input into the water right accounting program. This point in the accounting procedure at which stored water is allocated to storage water rights is referred to as the "day of allocation." These allocations become the basis for the accounting of storage water right use during the irrigation season. The Watermaster is informed of the allocations, and he in in [sic] turn informs the storage right holders of the amount of storage that is available to them for ensuring irrigation season.

Ex. 2181, 003638-39.



Sisco likewise explained that the computerized water right accounting program did not alter the storage or administration of Boise River Reservoir storage rights:

I would not have agreed to the use of the water right accounting program if it had the effect of treating the reservoir water rights as “satisfied” at the point of paper fill in the water right accounting program, treating water as being stored for beneficial use without a water right, or indicating that water rights with priorities junior to the storage rights were entitled to call for the release of water that was required to be stored pursuant to the Water Control Manual in order to fill the reservoir storage spaces and reservoir water rights. This was never the intent or effect of adopting the computerized water right accounting procedure. No IDWR employee ever suggested to me that storage rights were “satisfied,” at the point of paper fill, that storage after paper fill occurred without a water right, that the storage rights were no longer in effect or in priority after the point of paper fill, or that junior rights were entitled to call for release of water from the reservoirs prior to maximum physical fill. It has always been my understanding that beneficial use storage cannot occur without a water right, and that all water physically stored in the reservoirs for beneficial use is stored pursuant to the storage water rights. As was the case during Mr. Koelling’s tenure, all the water actually, physically stored in the reservoirs at the conclusion of flood control operations has been stored pursuant to the reservoir storage rights, and allocated to the storage accounts of the spaceholders.

Ex. 2008, 000488, ¶ 32.

During his live hearing testimony, Sutter confirmed that the adoption of the water right accounting program did not modify reservoir operations pursuant to the Water Control Manual or how water is stored in the reservoirs, and that the rules for water right distribution stayed the same. Tr. 8/28/15 431:3-15, 432:23-433:1. Sutter acknowledged that “according to the flood-control plan, the assurance of refill requires or dictates that that physical space be refilled.” *Id.*, 444:15-17. Notwithstanding the adoption of a different accounting construct, the actual physical storage and delivery of water continued as it had prior to 1986:

Q. Back to my prior question. In terms of physically storing water, apportioning it the storage accounts, and having it be available for water users thereafter, the adoption of the accounting program in 1986 would not have changed the experience of those water users pre-1986 to after 1986 would it?

A. It would not have changed. They had 100 percent fill.

*Id.*, 440:5-13.

## **5. Water Users Experience and Reliance on Storage**

Boise River Reservoir water users have understood that water filling the Boise River Reservoirs following flood control releases is stored pursuant to the reservoir water rights. Ex. 2002, 000296-97, ¶ 10; Ex. 2189, 003917, ¶ 14. They depend heavily upon storage secured by the storage water rights they established, in the reservoir space they paid for. They have relied upon reports of physical reservoir contents to gauge their storage supplies for the upcoming irrigation season. Ex. 2002, 000294-95, ¶ 6. Notice of flood control releases signals to the water users that there will be sufficient natural flow to physically fill the Boise River Reservoirs and storage rights for a full allocation to their storage accounts (which are based on storage water rights). *Id.*, 000295, ¶ 7; Ex. 2189, 003915-16, ¶¶ 10, 11. Prior to BW17, they had never been informed that IDWR or the State considered flood control releases to be releases of their stored water, or that any of the water allocated to their storage accounts had been stored without a water right. Ex. 2002, 000296-97, ¶ 10; Ex. 2189, 003917, ¶ 14.

## **II. ISSUES PRESENTED ON APPEAL**

The Ditch Companies address each of the issues identified in their *Notice of Appeal*. Broadly stated, those issues are:

A. Whether water required to be released from the Boise River Reservoirs for flood control purposes “fills” or “satisfies” the existing reservoir storage rights, so that the water that filling the reservoirs after flood control releases and beneficially used by the Ditch Companies is not stored or used pursuant to those water rights.

B. Whether the Director’s conduct of the Contested Case exceeded his authority, violated his role as hearing officer, and denied the Ditch Companies’ due process rights.

C. Whether the district court erred in Section VI. of its *MDO* by denying the Ditch Companies’ request for attorney’s fees and costs.

D. Whether the Ditch Companies are entitled to attorney's fees and costs on appeal.

### III. STANDARD OF REVIEW

In *Rangen, Inc. v. Idaho Dept. of Water Res. (In re Fourth Mitigation Plan)*, 160 Idaho, 251, 255, 371 P.3d 305, 309 (2016), this Court set forth the standard of review in an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedures Act ("IDAPA") as follows:

"[W]e review the decision of the district court to determine whether it correctly decided the issues presented to it." *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011) [hereinafter "*Clear Springs*"]. However, we review the agency record independently of the district court's decision. *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008). 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." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012). "This Court freely reviews questions of law." *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011).

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.

I.C. § 67-5279 (3); *Clear Springs*, 150 Idaho at 796, 252 P.3d at 77. Even if one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279 (4).

*Id.*

#### IV. ARGUMENT

##### A. Storage Water Rights Are Not “Filled” or “Satisfied” by Water that is Released for Flood Control Purposes

The Director concludes that water released from the Boise River Reservoirs for flood control purposes “fills” and “satisfies” the reservoir water rights, so that the actual, physical storage of water in the reservoirs during flood control operations does not occur pursuant to the existing storage rights, thereby exposing the stored water to the demands of existing junior water rights and future appropriations. Accordingly, the massive volume of water released from the Boise River Reservoirs this year for flood control is the senior storage water of Boise Valley water users, flowing past their headgates when they cannot put the water to beneficial use. The Director’s theory and its untenable consequences are contrary to the legal entitlement of the storage water rights, the purposes and provisions of the reservoir operating plan, the actual operation of the reservoirs for flood control and beneficial use storage, and the actual use and administration of storage water rights in Water District 63.

##### 1. The Director’s *Order* is Inconsistent with and Undermines Beneficial Use Storage and Flood Control Under the Reservoir Operating Plan

Since the 1950s the Boise River Reservoirs have been operated for flood control and beneficial use storage pursuant to a congressionally-approved plan that was collaboratively developed and implemented by BOR, the Corps, the State, IDWR, and Boise Valley water users. The core concept of the reservoir operating plan has always been:

*To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of storage capacity indicated by the run-off forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.*

Ex. 2027, 000884 (emphasis added). While the particulars of the operating plan have evolved over time, this core concept remains the basis for Boise River Reservoirs operations.

The express purpose and effect of the reservoir operating plan is to allow and authorize the Boise River Reservoirs to be used for flood control by reserving and maintaining vacant flood control spaces as necessary in anticipation of peak runoff in order to prevent flooding and resulting economic loss to the populated areas along the Boise River downstream from Lucky Peak, while at the same time providing high levels of assurance that the Reservoirs will be filled to the maximum extent possible for beneficial use storage as the flood risk wanes. The 1953 Agreement, the 1954 supplemental contracts, Public Law 660, and the 1956 and 1985 Water Control Manuals all provide this assurance narratively, which assurance is accomplished through the required use of the forecast-based flood control rule curves.

The reservoir operating plan contains criteria and procedures determining when water must be released to maintain sufficient vacant reservoir space to capture high spring flows and regulate reservoir releases to prevent flooding, and when water may be stored for irrigation and other beneficial uses. Reservoir space required to be kept vacant for flood control purposes is not available to store water for beneficial use until that space is no longer required for flood control. Water released from the reservoir system to maintain required flood control spaces is, therefore, not available for beneficial use storage under reservoir storage water rights. Reservoir space becomes available for beneficial use storage only as flood space requirements decline in accordance with the runoff forecast and rule curve procedures of the reservoir operating plan. As runoff and the risk of flooding decline, flood control space requirements decline, and water is increasingly stored for beneficial use, until the reservoirs reach “maximum fill.” Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled with water that is available for delivery when it is needed during the irrigation season. Consistent with the reservoir operating plan, after the flood risk has passed, the water that is actually physically

stored in the reservoirs at the point of maximum reservoir fill is allocated to the reservoir water rights according to their priorities and to the spaceholders' storage accounts (on what is commonly called the "day of allocation") for supplemental beneficial use as river flows decline during the irrigation season.

The Director's erroneous legal theory that water released for flood control purposes "satisfies" Boise River Reservoir storage rights would leave the Ditch Companies with no protectable water right to store water after those releases are made, and, according to the Director, the water that is supposed to fill the Boise River Reservoirs under the reservoir operating plan "can begin to be distributed to junior water rights." R. 001266 (*Order*). The Director's legal conclusion deprives the Ditch Companies of the refill assurances provided by the congressionally-approved reservoir operating plan that the State helped develop and approve, and upends the plan's carefully-crafted balance between flood control and beneficial use storage in the Boise River Reservoir system.

The plan clearly provides for the beneficial use storage of water entering the Reservoirs during flood control operations as space becomes available, to fulfill the storage water rights and the storage contracts on which those water rights are based. As IDWR Director Higginson explained on November 30, 1987:

***[The new manual] contains new rule curves and procedures aimed at providing greater flood protection through early season operations and increased assurance of refill for irrigation during the late runoff season. We feel that the new manual responds well to current conditions on the Boise River and provides a balance between flood protection and refill of storage.***

Ex. 2171 (emphasis added).

This balance could not have been achieved, and cannot be maintained, if IDWR treats the storage water rights as filled and "satisfied," by the water released for flood control purposes. If IDWR's theory were actually implemented, in 1999 the spaceholders' authorized physical

storage would have ceased at 400,000 acre-feet, with the remaining 600,000 acre-feet of storage unsecured by a water right. In 1997, a year when the reservoirs were nearly emptied to prevent flooding, virtually all of the stored water would have been unsecured by a water right.

Tr. 8/31/15 713-714. This year's (2017's) historic runoff and flood control releases further underscore the untenable consequences of the Director's absurd legal theory.

## **2. The District Court Erred By Disregarding the Reservoir Operating Plan**

The district court characterized the reservoir operating plan as "private agreement" that is "extraneous" to the Director's method of accounting for the storage of water in the Boise River Reservoirs pursuant to the reservoir water rights, and therefore "will not be considered."

R. 001064-65 (*MDO*). The district court's characterization and refusal to consider the plan is clear error.

The district court's characterization of the reservoir operating plan as a mere "private agreement" among federal agencies and storage spaceholders is also clearly contrary to the record. The reservoir operating plan was jointly developed, approved, modified and implemented by BOR, the Corps, and the State (particularly IDWR). The plan was publicly vetted, and ultimately approved by Congress through Public Law 660 (1954) codifying its authorization to operate the Boise River Reservoirs as a system for the dual purposes of flood control and beneficial use storage.

While the Ditch Companies' consent to the plan was a prerequisite to congressional authorization of the coordinated use of the Boise River Reservoirs for beneficial use storage and flood control, their consent did not render the plan a mere private arrangement that the State may disregard in its administration and accounting of Boise River Reservoir storage rights. Indeed, the "Water Control Manual" which has governed Boise River Reservoirs operations since 1985, was prepared in response to the request and recommendations of the Governor of the State of

Idaho and IDWR. Exs. 2137, 2171, 2181, 2182, and 2186. In 1987, IDWR Director Keith Higginson explained:

In 1974 Governor Andrus requested [IDWR] to evaluate flood control management of the Boise River system. A report was issued in November of that year recommending several changes for improving Boise River flood control operations. As a direct result of this report, a new Water Control Manual for Boise River reservoirs was finalized in April, 1985. ***Although issued by the Corps of Engineers, this manual was a joint effort by the Corps, Bureau of Reclamation and [IDWR].***

The new manual . . . ***contains new rule curves and procedures aimed at providing greater flood protection through early season operations and increased assurance of refill for irrigation during the late runoff season. We feel that the new manual responds well to current conditions on the Boise River and provides a balance between flood protection and refill of storage.***

Ex. 2171 (emphasis added).

The Department's *Memorandum in Support of Respondent's Petition for Rehearing* (Sept. 23, 2016) ("*Rehearing Memo*") confirms that the reservoir operating plan governs, and will continue to govern, beneficial use storage in the Boise River Reservoirs:

It is undisputed that the Corps and the BOR have authority under federal law to operate the reservoir system to divert, regulate, and store water during flood control operations . . . Any decision about whether, when, and at what rate water will be physically stored in or released from the reservoir system for flood control purposes "is made by the federal government and is out of the Director's control."

. . .

[T]he Director cannot prevent the Corps and the BOR from operating the reservoirs to capture "unaccounted for storage" during flood control "refill" operations . . . nor would it make sense for the Director to attempt to do so. Diverting, regulating, and storing excess flood flows during the "refill" period is integral to reservoir system flood control operations.

R. 001104-08.<sup>20</sup>

Basin-specific facts and history matter. *See Anderson v. Dewey*, 82 Idaho 173, 350 P.2d 173 (1960) ; *see also, A&B Irr. Dist. v. State*, 157 Idaho 385, 390, 336 P.3d 792, 797 (2014) (the

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<sup>20</sup> *Accord*, R. 001243-45 (wherein the Director confirmed the Water Control Manual's spill and fill operational regime and the refilling of vacant (or vacated) flood control space with waning flood flows as the flood risk wanes).



“legal effect of flood control releases” is a matter of “first impression” in Idaho; one that ought be considered after development of a proper record). The Ditch Companies and the Boise Project presented a robust and undisputed record of the manner in which the Boise River Reservoirs are operated for beneficial use storage and flood control, how Watermasters have administered the storage water rights, the actual use and effect of IDWR’s accounting program, and the beneficial use of stored water by Boise Valley water users. The district court’s disregard for the reservoir operating plan is clear error—particularly when the Department’s most recent rehearing briefing confirms that the “spill and fill” reservoir operating plan defines the timing of beneficial use storage in the Boise Basin.

### **3. The Reservoir Operating Plan Assures Reservoir Fill Pursuant to the Reservoir Water Rights During Flood Control Operations**

Under Idaho law, water cannot be stored for beneficial use without a water right. IDAHO CODE § 42-201(2). Yet, the Director would have the Court believe that the reservoir operating plan was developed and agreed to by BOR, the Corps, IDWR and Boise Valley water users, and approved by Congress, without considering whether there was a water right to store and use the water that fills the reservoirs at the conclusion of flood control operations. The Director suggests that in the six decades since the plan was approved, IDWR and Boise River Watermasters have simply looked the other way as BOR stored, and the irrigators used, millions of acre-feet of water without a water right. The district court probed this improbable proposition:

[W]hat authorization does the United States have to refill the reservoirs once the Department determines that the reservoir storage water rights have been satisfied? . . . according to the Department’s accounting methodology the reservoirs are not being refilled pursuant to a valid water right . . . if the water is not being stored pursuant to a water right then by law it must be considered unappropriated water that is subject to appropriation. As a result, if someone wished to make application for the water otherwise captured for refill what authority would the United States have for continuing the [refill] practice as opposed to making the water available to satisfy a new appropriation?

R. 001163.

There is no basis to suppose, as the Director does, that all of the water users and water management officials involved in developing and implementing the reservoir operating plan over the last 60 years simply overlooked the need for water rights to store water during flood control operations. What good would it do to assure the water users that the Reservoirs would be filled at the conclusion of flood control operations, if the water users had no right to use the stored water?

The record clearly demonstrates that the reservoir operating plan was:

[D]esigned to ensure that the reservoirs will be filled during flood control operations to store water pursuant to established rights . . . the water stored in the reservoir system at the point of maximum fill is allocated among the reservoir storage water rights according to their priorities, and is available for delivery to those who are entitled to use the stored water for irrigation and other beneficial uses.

Ex. 2181, 003629, ¶ 4.

#### **4. The Decrees for the Boise River Reservoir Storage Rights Do Not Invalidate the Reservoir Operating Plan**

The Director and the district court assert the absence of remarks regarding the reservoir operating plan in the partial decrees for the Boise River Reservoir storage rights as a basis for disregarding the plan in the administration of Boise River storage rights. The absence of such remarks in the decrees does not invalidate or otherwise affect the reservoir operating plan or justify water right administration that disregards the actual operation of the Reservoirs. *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 522-23, 284 P.3d 225, 248 (2012) (water right decrees are subject to interpretation like contracts, and not all decrees necessarily contain all aspects of their administration or enforcement within their four corners); *Anderson v. Dewey*, 82 Idaho 173, 181, 350 P.2d 173 (1960) (decrees are construed “in light of the facts in the case, and the law as it existed when the decree was entered”). To the contrary, the Director finally acknowledged in his

*Rehearing Memo* that the reservoir operating plan governs, and will continue to govern, beneficial use storage in the Boise River Reservoirs, and that he has no authority to control or interfere with the diversion and storage of water under the plan. R. 001104-08.

**5. Storage Water Rights Entitle the Right Holders to Retain Water in Storage Until it is Needed for Beneficial Use**

The Director erroneously concludes that water released from the Boise River Reservoirs to maintain open space to manage runoff and prevent downstream flooding is “physically and legally available” for beneficial use storage. His legal theory is based on the erroneous contention that all water entering a reservoir is necessarily diverted by and stored in the reservoir, and must therefore be treated as “filling” and “satisfying” the reservoir’s storage right(s).

The Director ignores the fact that the right to retain water in the Boise River Reservoirs until it is needed for beneficial use is fundamental to the legal entitlement to store water under the storage rights. Actual, physical storage of water for beneficial use is the true measure of a storage water right. Water that cannot be stored and retained until it is needed for beneficial use is not “physically and legally available” for beneficial use storage, and does not “satisfy” a storage water right. The release of water for flood control purposes before it can be beneficially used is not a “choice” of the storage right holders—it is a mandate of the need to use the Boise River Reservoirs to protect Boise Valley land, property and residents from flooding.

The Director’s legal opinion is predicated upon his supposition that: “In legal terms, all natural flow that enters the reservoir system has been ‘diverted.’” R. 001326, ¶¶ 29, 30. To support this premise the Director quotes dictionary definitions of “diverted” (meaning to “turn aside from a direction or course”), and references cases in which it has been observed that on-stream dams “alter the flow of the natural stream by diverting the entire flow into a reservoir.”

*Id.* The definitions and cases cited by the Director do not, however, define the circumstances in which a storage water right is “exercised,” “filled,” or “satisfied,” and they provide no guidance concerning the relationship between flood control and beneficial use storage.

Similarly, the district court concluded that because the Boise River Dams each consist of a “river-wide diversion structure,” they necessarily “capture[] and regulate[] the entire flow of the river.” R. 001058. Because “[t]he dams are themselves the structures into which water is diverted and stored under the reservoir water rights,” and because the reservoir water rights speak in terms of diversion volume only (*i.e.*, there is no diversion rate limitation), the reservoirs “therefore divert the entire flow of the river that is available in priority at any given time.” *Id.*, 001058, 001061.

The Director’s supposition, affirmed by the district court, does not “hold water” (literally or figuratively) for several reasons. Clearly, Idaho law does not treat all water entering the Boise River Reservoirs as legally diverted and stored under a reservoir’s water right. A prime example is reservoir inflow that passes through the Boise River Reservoirs for delivery to downstream senior *Stewart* and *Bryan Decree* water rights. Diversion of water is not itself sufficient to constitute the exercise of a water right. The diversion must be for a beneficial use authorized by a water right. *See, e.g., State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806 (2000) (“Idaho water law generally requires an actual diversion and beneficial use for the existence of a valid water right.”); *see also, Morgan v. Udy*, 58 Idaho 670, 680, 79 P.2d 295 (1938) (“diversion and application to beneficial use” are the “two essentials” in the State of Idaho for a “valid appropriation.”). Water destined for delivery to other water rights is not diverted or stored for beneficial use under a storage water right.

The same is true of water that enters the Boise River Reservoirs but must be released for

flood control purposes. Former IDWR Director David Tuthill acknowledged that flood control use of the Boise River Reservoirs does not require a water right, or constitute use of the established reservoir storage water rights. Tr. 8/31/15 699:5-21; *see also*, Ex. 2008, 000481, ¶ 20. This is because flood control use of the reservoirs does not divert and store water for beneficial use.

Even if water released for flood control purposes is in some sense “diverted,” the Director’s own findings recognize that water released for flood control purposes is not “stored.” He explained that releasing water to maintain required vacant flood control space in the reservoir system results in *“less water being physically stored than would have been stored absent the need to meet the system flood control space requirement.”* R. 001244, ¶ 29 (emphasis added). *“Ensuring that the required amount of reservoir space is empty at the times prescribed by the Water Control Manual often requires the release of water that could otherwise be stored in the reservoir system for later use.”* R. 001243, ¶ 26 (emphasis added).

Unlike direct, natural flow diversions from a river to the place of use through a canal or other conveyance, the “exercise” or “satisfaction” of storage water rights cannot be evaluated in terms of diversion alone. As Sutter explained:

It can be assumed that all water diverted by a direct diversion is diverted for beneficial use pursuant to the water right(s) for that diversion. This assumption does not apply to the Boise River Reservoirs because: (1) they have no diversion works to limit inflows to the volumes of water they store for beneficial use; (2) they have insufficient capacity to store the full volumes of inflows they receive during most years; (3) they are not allowed to store inflows that must be released to maintain required flood control spaces; and (4) natural flows pass through the reservoirs during the irrigation season for downstream diversions with earlier priority water rights. Consequently, the accounting system cannot ultimately treat all reservoir inflows as physically stored for beneficial use. We recognized that, during flood control operations, the water right accounting program accrued to storage water rights inflows that could not be physically stored during flood control operations, and showed the reservoirs as full on paper when vacant flood control spaces continued to be maintained pursuant to the Water Control Manual’s rule curves.

Ex. 2181, 003638, ¶ 19.

“Store,” as a verb, means “to keep or accumulate (something) for future use,” and “storage” means “the action or method of storing something for future use.” The Concise Oxford American Dictionary 896 (2006), accord Black’s Law Dictionary 1556 (9th ed. 2009) (defining “store” as “to keep (goods, etc.) in safekeeping for future delivery in an unchanged condition”). As explained in Kinney on Irrigation and Water Rights, 2d Ed., Vol. II, Sec. 844, p. 1178:

‘Storage’ may be defined as the temporary accumulation, conservation, or the storage of water for future use, as distinguished from either ‘direct irrigation’ or ‘immediate use’. . . The impounding or the storage of water in reservoirs is not in and of itself a beneficial use of the water. ‘Storage’ is not a use. The storage is merely an incident of the means of making the use occurring between the diversion and the application. Storage, therefore, like diversion and the conducting of the water to the place of use, is but a “means to an end.” The appropriation is not made for the mere purpose of storage; it is made for the irrigation of lands or for some other useful or beneficial purpose.

“A storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse by means of a diversion structure such as a dam.” *A&B Irr. Dist. v. State*, 157 Idaho 385, 389, 336 P.3d 792, 796 (2014); (citing *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935)). The Ditch Companies acquired storage in the Boise River Reservoirs to supplement their natural flow supplies. *See, id.* at 157, Idaho at 389 (“Storage water is water held in a reservoir and intended to assist the holders of the water right in meeting their decreed needs.”) “[T]he very purpose of storage is to retain and hold for subsequent use.” *Id.* at 390-391 (quoting *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945)).

In *United States v. Pioneer*, 144 Idaho 106; 157 P.3d 600 (2007), this Court affirmed water users’ ownership interests in the reservoir storage rights, and explained the central role of beneficial use under both federal reclamation law and Idaho water law:

Without the diversion by the irrigation districts and beneficial use of water for irrigation purposes by the irrigators, valid water rights for the reservoirs would not exist under Idaho law. The beneficial use theme is consistent with federal law. The Reclamation Act provides that “the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right.”

*Id.* at 144 Idaho at 110.

A common theme throughout these cases is the recognition of the connection between beneficial use of water and ownership rights. The underlying principle of the state law, which requires application of the water to beneficial use before a water right is perfected, is the same. In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation. *Basinger*, 36 Idaho at 598, 211 P. at 1086-87; I.C. §§ 42-217 & 42-219. The requirement of beneficial use is repeatedly referred to throughout the Idaho Code. Beneficial use is enmeshed in the nature of a water right, which is explained in I.C. § 42-101 . . .

*Id.* at 113.

There are several phrases used in the Idaho Constitution and the Idaho Code that signify that the beneficial users have an interest that is stronger than mere contractual expectancy. The Idaho Constitution provides that when water is appropriated or used for agriculture purposes, “such person . . . shall not thereafter, without his consent, be deprived of the annual use of the same.” IDAHO CONSTITUTION art. XV § 4. This notion of a perpetual right is reiterated in the Idaho Code, which states, the “right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure . . . to pay the ordinary charges or assessments.” I.C. § 42-220.

*Id.* at 114.

The mere passage of water through a reservoir without the opportunity to retain the water until it can be put to beneficial use, does not and cannot “satisfy” a storage water right. Special Master Booth recognized this in his *Recommendation* rejecting the legal conclusion the Director advocates in his *Order*:

Because the dams that impound the water in the Boise River Reservoirs are physically located in the stream channel, all of the water produced upstream therefrom necessarily must pass through the reservoir(s) and dam(s). Of the total quantity that is produced in the basin each year, some of the water is stored to fruition (i.e. such time as it may be released downstream to be used for irrigation and other beneficial uses), and some of the water must be passed downstream, unused, at

a time of year when there is no demand for it.

AR. 001346 (*Recommendation*; see also, App. 1).

The State's use of the term "legally available" pertains only to whether the water is legally available to be stored. The term does not pertain to whether there is any space in the Boise River Reservoirs that may be legally available. Obviously in order to store water in a reservoir there must be both legally available water and legally available space . . . Under the reservoir operating plan, water may not legally be stored in reservoir space during the time that such space is dedicated to flood control.

*Id.*, 001347 (underlining in original).

The holding in this *Recommendation* is based upon one simple premise:

The water that is beneficially used pursuant to the previously decreed water rights for the Boise River Reservoirs is the same water that is stored pursuant thereto. Stated differently, the right to beneficially use the water, and the ancillary right to accumulate and store the water until such time as it can be used, is the same right to the same water. To hold otherwise would result in two untenable propositions: (1) the water right holder, in a flood control year, necessarily has to breach its obligation to apply the "stored" water to its beneficial purpose; and (2) the water right holder has no protectable property right in the water that is accumulated in the Boise River Reservoirs (as the rule curves allow) that has historically been used for such beneficial purpose.

. . .

The point is, without the ability to capture water in the Boise River Reservoirs, under a protectable priority-based property right, and store such captured water until such time as the same may be used, the Bureau and the water users are left with little to no means to ensure that the water historically used for beneficial purposes can continue to be used into the future.

*Id.*, 001350-51 (underline in original).

Water cannot be stored in reservoir space that is required to be vacant during flood control operations. Consequently, reservoir inflows that must be released to maintain required flood control spaces are not "physically and legally available" for beneficial use storage. Water is not stored for beneficial use simply because it enters a reservoir. Water that is required to be released for flood control purposes is not stored for beneficial use, just as water that is required to be released to downstream senior water rights is not stored pursuant to storage water rights.



The water users must have the opportunity to retain water in the Boise River Reservoirs until it is needed for beneficial use. Releasing water for flood control purposes is not a discretionary “choice,” or use of water by the operators or the spaceholders of the Boise River Reservoirs: it is a non-discretionary mandate of the State-approved reservoir operating plan to protect the Boise Valley from potentially severe economic losses due to flooding.

## **6. There is No “Store It or Lose It” Principle in Idaho Law**

The Director and Suez fabricate a “store it or lose it” principle to justify their attempt to deprive reservoir spaceholders of stored water during flood control operations. There is no such principle in Idaho law. To the contrary, it is a well-settled tenet of Idaho’s prior appropriation doctrine that an appropriator has the right to determine whether and when to divert water within the parameters of a water right:

Priority of appropriation having been established, as well as the amount of the water appropriated, and the beneficial use thereof, it seems to us that the functions of the court under the statute have reached their limit. For the court to dictate the manner in which the appropriator shall use the water so appropriated, so long as it is adapted to a useful or beneficial purpose, is going beyond its province. . . We are of the opinion that, so long as the appropriator of water applies the same to a beneficial or useful purpose, *he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used.*

*McGinnes v. Stanfield*, 6 Idaho 372, 374-75, 55 P. 1020, 1021 (1898) (emphasis added). This is because needs and ability to use (among other factors) are variable; thus, it is unrealistic and inappropriate to require storage right holder to divert and retain all reservoir inflows for beneficial use. Instead:

A water right is the right, in due order of priority and *within the maximum appropriated, to use the amount of water which reasonably suffices for the owner’s needs at any particular time. The factors variable, the amount is variable, not only season to season, but any day by day, even hour by hour.* Consequently, it is obvious *the court cannot justly prescribe any fixed schedule.* It must be left to the honest judgment of the [water right] owner in application, subject to control by the court’s watermaster, who interferes in any the owner’s abuse, and prescribes limits for immediate use.

*United States v. American Ditch Assoc.*, 2 F.Supp. 867, 869 (D. Idaho 1933) (emphasis added).

In Idaho, a water right is subject to forfeiture for failure to use the water for period of five years. IDAHO CODE § 42-222(2). In water rights parlance, this is commonly referred to the “use it or lose it” principle. However, Idaho Code Section 42-223(6) provides that: “No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control.” The obvious rationale for this defense to forfeiture is that a water user cannot be expected to use water that he or she is prevented from using, and should not be penalized for such nonuse by the loss of a water right.

The same rationale applies to the release of water from the Boise River Reservoirs during flood control operations to protect the Boise Valley from flooding. Reservoir operators and Boise Valley water users have no control over the timing, rate or volume of runoff into the Boise River Reservoirs, especially during periods of high runoff such as the Boise Valley is experiencing this year. If the Reservoirs were filled during these high runoff periods, the Boise Valley would be subject to catastrophic flooding. No one expects or wants this to happen. Instead, careful and coordinated discretion is used to divert and store water for end beneficial use only when it is safe and legally permissible to do so.

Treating Boise River Reservoir storage water rights as “filled” and “satisfied” with water that cannot be stored, so that there is no water right to store water when the Reservoirs are safely filled as the risk of flooding subsides, deprives storage right holders of their discretion to determine whether and when to store water, and impermissibly penalizes them for a circumstance over which they have no control. A reservoir operator cannot be compelled to store water under this contrived “store it or lose it principle,” and at the same time be compelled to release the water to prevent flooding. Special Master Booth observed: “Reservoir space that

must be left vacant for flood control operations cannot be used during such times, and the failure to store water in this unavailable space cannot be considered as a wrongful or wasteful act.”

R. 001360 (*Recommendation; see also*, App. 1).

**7. Junior Water Rights are Not Entitled to Water that is Stored During Flood Control Operations**

Idaho law and the record in this case agree that junior appropriators take a water source as they find it at the time of their appropriation. *See, e.g., Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 12, 154 P.2d 507, 510 (1944) (“Each junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under conditions as they existed at the time the appropriation was made.”). The Boise River Reservoirs and their operations formed the backdrop against which junior appropriators secured their later in time rights in the valley, just as the Bureau took the river system as it found it in 1911, 1940, and 1955, when perfecting its storage rights in the face of the *Stewart* and *Bryan Decrees*.

Recognizing this legal framework, and the fact that surface water in the Boise River Basin upstream of Lucky Peak Dam has been considered fully appropriated since 1977, the Department has long conditioned junior surface water rights accordingly by limiting their use to times of flood control releases. *See, e.g.*, Ex. 2008, 000474-75, ¶¶ 11-12; *see also*, Exs. 3003, 3004, 3005, 3006, 3007, 3008, 3012, and 3013.

While there are several styles of “flood control” use remarks used by the Department in Basin 63, Condition No. 908 is a good example:

The right holder shall exercise this right only when authorized by the District 63 watermaster when the Boise River is on flood release below Lucky Peak dam/outlet. Flood releases shall be determined based upon the Memorandum of Agreement Between the Department of Army and the Department of Interior for Flood Control Operations of Boise River Reservoirs, dated November 20, 1953, contracts with Reclamation contract holders in the Boise River reservoirs, the Water Control Manual for Boise River Reservoirs, dated April 1985, and any modifications adopted pursuant to the procedures required in these documents and federal laws. The right

holder shall not seek, directly or indirectly, any change to the flood control operations in the 1985 Water Control Manual for Boise River Reservoirs.

Ex. 3012.

As noted by former long-time Boise River Watermaster Sisco, flood control release-related remarks were included on junior water rights “to ensure that appropriators of new Boise River water rights [were] notified that water available for their diversions” was of “limited” duration and supply. Ex. 2008, 000475, ¶ 12. Sisco repeatedly made clear that junior water rights would be served “only during flood control operations” given the “fully appropriated” status of the River. *Id.*, 000474-75, ¶¶ 11-12. Sisco’s junior applicant admonition comports with the same understanding of Edward Squires (“Squires”), a registered professional geologist, hydrologist, and long-time certified water rights field examiner in Basin 63. Ex. 3040, 004256-57, ¶¶ 2-3. For example, Squires conducted the beneficial use/licensing field examination for permit no. 63-12055. *Id.*, 004257, ¶ 4. When recommending the licensure of permit no. 63-12055, Squires recommended that the same be licensed “for use anytime surplus water is available on the Boise River (Lucky Peak spilling).” *Id.* Squires explained that the reason for his comment was due to his professional understanding that the Boise River was fully appropriated, and that the only water available for junior water rights was that passed through the Boise River Reservoir system for flood control purposes. *Id.*, 004257-58, ¶ 5.

The above-described flood control use water right remarks employed by the Department constitute express acknowledgement and concession that BOR’s existing storage rights authorize “refill.” If they did not, the need for such later-in-time water right remarks would not exist. Instead, the water right remarks exist to protect priority “refill” of BOR’s storage rights because the reservoir operating plan formed the backdrop against which all other junior water rights came onto the system—able to divert water only when flood control releases are being made (*i.e.*,

when BOR has no choice but to release water, or pass it through, to comply with required flood space reservations).

**8. Junior Appropriators Do Not “Forego” Diversions or “Let Water Pass” Under the Reservoir Operating Plan**

The district court’s decision was based in part on an unfounded concern that junior water right holders in the Boise Valley may be required to “forego” their diversions of water in favor of filling the Reservoirs under the senior storage rights during flood control operations.

R. 001059-60. This concern elevates junior rights above senior storage rights, and is not based in fact or law.

First, flood control releases are a consequence of too much water, not too little—there is no priority “distribution” of water during flood control releases because there is no “scarcity” to administer against. Thus, junior diversions are not curtailed during flood control releases. *See* IDAHO CODE § 42-603 (“distribution” of water occurs through the watermaster’s adjustment of headgates “when in times of scarcity” it is necessary to do so to supply senior rights); Ex. 2, 000025-26 (“The problem during the flood control period, both before and after 1986, is managing excess flows. Water right priority determines distributions during times of shortage . . . While priorities are recognized during flood control operations under the current system, there is typically no need for regulation or enforcement because all water rights are satisfied during high flow periods.”).

Second, there is no appreciable universe of junior appropriators upstream of the reservoirs, and those that do exist have not been administered subject to downstream senior water rights anyway. AR. 001236, 001253, and 001304 (Findings of Fact 5 and 60, and Conclusion of Law 58). And, as a practical geographical matter, downstream juniors never “let water pass” during flood control operations provided they have a valid right to divert the

releases. *See, e.g., Knutson v. Huggins*, 62 Idaho 662, 668-89, 115 P.2d 421, 424 (1941), quoting *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909) (when a senior appropriator is not using their full entitlement, or any at all, the unused water is considered unappropriated and may be used by juniors “for such period of time” as the senior is letting it flow past unused); *see also*, Ex. 3012.

Third, flood control releases are available for diversion by junior appropriators as a general matter; they are appropriated by existing juniors when flood control releases occur; and the water is/can be available both up and downstream of the Reservoirs given the prescribed communications of the reservoir operating plan and IDWR’s existing capability of real time tracking of the timing and quantity of flood control releases. Ex. 3012 (water right report for permit no. 63-31409); Ex. 3040 (*Squires Aff.*); and Ex. 2008, 000475 (*Sisco Aff.*), ¶ 12; and Ex. 2186, 003801-03, 003818-25 (Express Water Control Manual provisions re watermaster communications); *see also, e.g., Knutson, supra*.

Fourth, at most the opportunity for juniors to divert water during flood control releases might be delayed in the case of evacuations of previously stored water. The diversion and use of bypass water (that which was not retained and stored, but is passed through the system nearly contemporaneously) is not delayed, and any delay is insignificant given the dearth of upstream juniors. Further, any delay is consistent with Idaho law where juniors take a stream as they find it at the time of their appropriation. *Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 12, 154 P.2d 507, 510 (1944) (*i.e.*, subject to preexisting reservoir flood control operations). Also, flood control water evacuated post storage is a boon to juniors because it is water made available for their use that would not otherwise be available in a non-flood control year when it would remain in the Reservoirs until used by the Ditch Companies and the Boise Project.

Juniors forego nothing. Rather, senior storage right holders forego storage of water released for flood control for the greater good of flood control in the Boise Valley, based on the refill assurances provided by the reservoir operating plan. There is no conflict between flood control and beneficial use storage under the reservoir operating plan. The plan “balances” the dual objectives through the reasonable assurances given the Ditch Companies and the Boise Project that, in exchange for letting the early flood waters pass by, they would be kept whole through the diversion, storage, and use of the later runoff flows. Ex. 2171, 003351 (emphasis added) (Director Higgenson wrote about the “new rule curves and procedures aimed at providing greater flood protection through early season operations *and* increased assurance of refill for irrigation during the late runoff season . . . the new manual . . . provides a balance between flood protection and refill of storage.”). IDWR and the district court are now putting multipurpose reservoir operations back into conflict by ignoring the core “spill and fill” premise of the plan, sacrificing senior water rights along the way, and calling into question the continued wisdom of those operations going forward if BOR is forced to store early flood control water in a more “fill and spill” manner.

**9. IDWR’s Accounting Program does not “Credit” to Reservoir Storage Rights All Water “Diverted” by the Reservoir**

The district court upheld the Director’s finding that IDWR’s accounting program “accrues” to each of the Boise River Reservoir water rights “all natural flow entering the reservoir that is available in priority,” based on the principle that the quantity element of a water right is necessarily measured at the point of diversion. R. 001058-59. According to Judge Wildman, water diverted by a dam to store water in a reservoir must be “distributed” and “accrued” to the water right for the reservoir. Judge Wildman referred to the “plain language” of the partial decree for the Anderson Ranch water right to support this conclusion. *Id.*, 001060.

The district court's conclusion is clearly contradicted by the actual operation of the Boise River Reservoirs and IDWR's accounting method under which water stored in one reservoir is accrued to the water right for another reservoir. This is what was originally meant by "paper fill" of a water right. Coordinated use of the Boise River Reservoirs for flood control and beneficial use storage includes storing water in one reservoir under another reservoir's water right. Ex. 2008, 000476-77, ¶ 14. This has been the case since Anderson Ranch Reservoir was planned and constructed during the 1940s.

Anderson Ranch Dam is not identified as a point of diversion in the SRBA decree for the Arrowrock Reservoir storage water right. Neither the Arrowrock partial decree nor the Anderson Ranch partial decree mentions the decades' long reservoir operation practice of storing water in Anderson Ranch under the Arrowrock water right. Ex. 2015, 002338 and 002342, respectively. Obviously Anderson Ranch Dam does not divert water into Arrowrock Reservoir, and the water stored in Anderson Ranch Reservoir under the Arrowrock water right is not measured at the Arrowrock point of diversion.

Yet, IDWR's accounting program accrues to the Arrowrock storage right water diverted by Anderson Ranch Dam and physically stored in Anderson Ranch Reservoir. That water is not then accrued to the Anderson Ranch water right. While this is consistent with Boise River Reservoir operations and IDWR's accounting program, it is completely inconsistent with IDWR's *post hoc* theory (adopted by Judge Wildman) that water diverted by a dam and measured at that point of diversion must be accrued to the water right for the reservoir into which the water is diverted.

If the district court's holding that water diverted by each Boise River Reservoir dam and measured at that point of diversion must be accrued to the water right for that reservoir, storage



of water in one reservoir under another reservoir's water right must be discontinued, IDWR's accounting method must be adjusted accordingly, and the effectiveness of reservoir operations in preventing flooding and storing water for beneficial use will be significantly diminished.

**10. IDWR's Accounting Program Does Not Dictate that "Paper Fill" Constitutes "Filling" and "Satisfaction of the Boise River Reservoir Storage Rights"**

It is undisputed that IDWR's accounting program does not define the storage water rights. The program does not divert, store or distribute water to water users, or administer water rights in Water District 63. These things are done by water users and watermasters operating in the real world (versus the theoretical world of IDWR's computer program). The program is not the law, and it is not the Watermaster. It is a tool for the Boise River Watermaster's use in administering water rights in accordance with applicable law.

The proper role of any accounting methodology is to account for the actual storage of water in Water District 63 in conformance with the applicable water rights, well-settled legal principles and the actual, authorized operation of the Boise River Reservoirs for beneficial use storage. Unlike canal diversions, the Director does not control the physical distribution of water into the Boise River Reservoirs in the sense described in Idaho Code Section 42-607. As IDWR acknowledged in its *Rehearing Memo*, the storage of water in the Boise River Reservoirs is governed by the reservoir operating plan. R. 001104-08. The accounting program does not "distribute" water because it is an "after-the-fact . . . tabulation of what [already] happened" concerning the actual diversion and storage of water. Tr. 8/28/15 439:6-440.

There is no dispute regarding the mechanics of IDWR's accounting program. The water right program accrues all water entering the Reservoirs that is not delivered to downstream senior water rights to the existing storage water rights until the volume limit of the storage rights is reached (the so called point of "paper fill" in the water right accounting program), regardless

of whether the water is released for flood control, and regardless of how much water the Reservoirs actually contain. After “paper fill,” the program accrues reservoir inflows *that are actually stored* to an accounting category called “unaccounted for storage.” After “paper fill,” IDWR’s storage accounting reports provided to the Watermaster and the water users show the reservoir water rights as remaining filled, and at the conclusion of flood control operations, when the reservoirs reach their actual maximum filling, the water actually, physically stored in the Reservoirs is credited to the existing reservoir storage water rights and allocated among the storage accounts of the spaceholders who own reservoir space and the right to use the water stored therein. The stored water is delivered from the Reservoirs to the water users, is beneficially used by them, and the water right accounting program accounts for such delivery based on measurements reported by the Boise River Watermaster.

The Department’s accounting program does not disregard the fact that water is actually, physically stored in the Boise River Reservoirs after water has been released for flood control as required by the reservoir operating plan. In testimony ignored by the Director and the district court (but not Special Master Booth), Bob Sutter, author of the accounting program, explained:

Under the reservoir operating plan, as forecasted inflows decline, less flood control space is required, and inflows are increasingly retained and added to reservoir contents until the danger of flooding has passed and the reservoirs are filled or nearly filled. *After the flood risk has passed, the water stored in the reservoir system at the point of maximum fill is allocated among the reservoir storage water rights according to their priorities, and is available for delivery to those who are entitled to use the stored water for irrigation and other beneficial uses.*

5. Storage Water Right Accrual During Flood Control Operations. Water cannot be stored in Boise River Reservoir space that is required to be vacant during flood control operations. Reservoir inflows that must be released to maintain required flood control spaces are therefore not available to physically fill storage space. *Reservoir space becomes available for physical storage only as flood space requirements decline in accordance with the established reservoir operating plan. Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled. . .*

**6. By accruing reservoir inflows to the reservoirs throughout flood control operations, and treating the storage rights as remaining full "on paper," despite flood control releases, the water right accounting program confirms that reservoir storage rights are fulfilled as** inflows physically refill reservoir storage spaces during flood control operations. After flood control operations are concluded and the reservoirs have reached maximum fill, stored water is allocated to the existing storage water rights, confirming that filling the reservoirs for beneficial use storage pursuant to reservoir storage rights is not completed until maximum reservoir fill is achieved. . .

...

**21. The net effect of this accounting procedure is to accrue to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecast and rule curve procedures of the Water Control Manual. After maximum reservoir fill, the water physically stored in the reservoirs, including the "unaccounted for storage," is allocated to reservoir storage rights, and then to placeholders with contract-based storage entitlements by the storage allocation program.** The storage allocations are input into the water right accounting program. This point in the accounting procedure at which stored water is allocated to storage water rights is referred to as the "day of allocation." These allocations become the basis for the accounting of storage water right use during the irrigation season.

Ex. 2181, 003629-31, 003638-39, ¶¶ 4, 5, 6, 21 (emphasis added). *See also*, Ex. 2008, 000482-000489, ¶¶ 23-32; and Tr. 9/10/15 1343.

IDWR's accounting method need not be antithetical to the Boise River Reservoir storage rights and reservoir operations because, in the end, the accounting method credits to the existing storage water rights all water that fills the Reservoirs at the point of maximum storage at the conclusion of flood control operations.

#### **11. Water District 63 Watermasters Have Never Administered Storage Rights as if They Were "Filled" or "Satisfied by Flood Control Releases**

Unlike Special Master Booth, the Director rejected and the district court ignored the testimony of Water District 63 Watermasters explaining that they have never administered Boise River Reservoirs storage water rights as if they were "filled" or "satisfied" and no longer entitled to store water after the theoretical point of "paper fill" in the water right accounting program. Conversely, they have always administered Water District 63 water rights with the understanding that water cannot be stored in the Boise River Reservoirs without a water right, that water stored

in the Boise River Reservoirs after flood control releases is stored pursuant to the storage water rights, and that water is delivered to, and beneficially used by, the water users pursuant to the storage water rights. Water District 63 water users have always had the same understanding.

One of the key witnesses was former Boise River Watermaster Sisco. Prior to becoming Watermaster in 1986, Sisco was Manager of the Watermaster Program for IDWR's Western Region. Former IDWR Director David Tuthill regards Mr. Sisco as the most knowledgeable person as to how Boise River water rights were administered during his tenure.

Tr. 8/31/15 676:9-677:25. Sisco trained current Watermaster Barrie in the Boise River water rights, reservoir operations and the Watermaster's use of IDWR's accounting methodology, and Barrie administers Boise River water rights consistent with that training. *Id.*, 1337:24-1338:13.

Sisco plainly explained his administration of the existing storage rights for over 20 years:

19. As Watermaster, I understood that the water physically stored in the Boise River Reservoirs as a result of this flood control procedure was stored pursuant to the reservoir storage water rights. The release of water from the reservoirs to attain required flood control spaces did not affect the accrual of physically stored water to reservoir storage rights. Mr. Koelling [the previous Watermaster] and I each administered storage water rights based on this understanding. We each accounted for the accrual of water physically stored in the reservoirs at the point of maximum reservoir fill to the reservoir storage water rights according to their priority dates.

...

20. During my experience in Boise River water right administration, no spaceholder, Watermaster, or IDWR employee advised me that they considered water that was released from the Boise River Reservoirs for flood control purposes as a release of water that had been stored for beneficial use pursuant to a storage water right. Flood control use of the reservoir system does not require a water right, or constitute storage or storage use under any of the storage water rights for the Boise River Reservoirs.

Ex. 2008, 000480-81.

## **12. The Director's *Order* Deprives the Spaceholders of the Beneficial Use of Their Storage Water Rights and Their Storage Contracts**

Water rights are real property rights that must be afforded the protection of due process before they may be taken by the state. *See, e.g.*, IDAHO CODE § 55-101; *Nettleton v. Higginson*,

98 Idaho 87, 90, 558 P.2d 1048 (1977). This is particularly true of adjudicated (*i.e.*, judicially proven) water rights, which are owed administrative preference. *See* IDAHO CODE § 42-607; *see also, Nettleton*, 98 Idaho 90. Storage water rights are entitled to the same protection and preference. *See, e.g.*, IDAHO CODE § 42-202 and *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878-80, 154 P.3d 433 (2007).

As previously explained, water that is required by the reservoir operating plan to be released for flood control purposes cannot be stored for beneficial use. “Counting” or “crediting” water that cannot be stored to the “satisfaction” of the Boise River storage water right deprives the spaceholders of the right to store water pursuant to their water rights and storage contracts. Similarly, water that is released from the Reservoirs for flood control purposes cannot be put to beneficial use by the spaceholders either because the water is released prior to the authorized period of use or because there is adequate natural flow to deliver their natural flow water rights. IDWR’s position that beneficial use storage for delivery of stored water to the spaceholders occurs without a water right, and under no priority, subordinates the spaceholders’ storage water rights and storage contracts to all junior water rights and future appropriations. IDWR’s interpretation of its storage water right accounting method thus deprives the spaceholders of their storage water rights and contract rights without due process of law, and constitutes an unconstitutional taking of those rights.

**B. The Contested Case Process Was Procedurally Flawed and Suffered Continuously From Result-Oriented Bias**

Contrary to the findings of the district court, the Ditch Companies submit that the Director’s conduct in this proceeding was far from “innocuous”; that while there was a “hearing,” it was far from a meaningful opportunity to be heard; and that the Director’s conduct was anything but “impartial and disinterested.” R. 001070-72.

The Director voluntarily initiated and conducted a contested case proceeding (parallel administrative litigation) for the result-oriented purposes of defending and affirming the Department's 1986 computerized water rights accounting program. The Director disregarded and circumvented the rulemaking requirements of IDAPA, and his result-oriented bias violated the parties' due process rights.

**1. The Contested Case Failed to Comply with the Formal Rulemaking Requirements of the Idaho Administrative Procedure Act**

The parties moved the Director to dismiss the Contested Case based upon the fact that the Contested Case was rulemaking under the criteria set forth in *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003). The Director denied the motion and incorrectly held that the issues to be resolved in the Contested Case were not subject to formal rulemaking. *See* AR. 000335.

In *Asarco*, this Court explained that the statutory definition of a "rule" under Idaho Code Section 67-5201(19) is too broad to be workable because under the definition "virtually every agency action would constitute a rule requiring rulemaking procedures." *Id.* at 723, 69 P.3d at 143. Therefore, it announced stepped criteria determinative of rulemaking:

[T]he following characteristics of agency action indicative of a rule: (1) wide coverage, (2) [is] applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy.

*Id.*

**a. The Contested Case has Wide Coverage and General Applicability**

The district court only addressed the first two factors, "general applicability" and "wide coverage," set forth in *Asarco*, and characterized the Contested Case as relating only to "the distribution of water to three federal on-stream reservoirs on the Boise River System pursuant to

four specific water rights.” R. 001071. However, the district court failed to appreciate the undisputed testimony at hearing that the Department adopted its accounting protocols to implement its so-called “one-fill rule” *statewide*.

Each of the past Directors who testified on behalf of the Department in the Contested Case confirmed that the accounting program was developed to implement a statewide rule initially developed for the upper Snake River, but later imported into the Boise and Payette River basins as well. Tr. 8/27/15 245:17-246:20; *id.*, 277:9-279:25; Tr. 8/31/15 658:3-659:6 (“rule” established in 1977). Furthermore, the Director justified his decision to employ “paper fill” as “satisfaction” to protect junior water users from the storage right holders and/or the federal government as a general matter—not just in the Boise Basin. AR. 001278. *See also*, Tr. 8/27/15 170:15-171:9.

Nonetheless, the district court held that even though the Director’s *Order* may have broader precedential value it still only applied to four specific Basin 63 water rights. R. 001072. The district court looked only at the end product, and did not take into account the purposes and intent of the calling of the Contested Case. The one-fill rule which formed the foundation for the accounting program is a statewide rule; expressed agency policy not previously expressed, including the Director’s interpretation of law or general policy concerning his obligation to distribute water. Consequently, the Contested Case should have been dismissed and rulemaking instituted pursuant to the criteria set out in *Asarco*, *supra*.

**b. The Contested Case Operates Only in Future Cases, Prescribes Legal Standards, Expresses New Policy of IDWR and Interprets Law and Policy**

While the district court only addressed the first two factors set forth in *Asarco*, the Ditch Companies contend that the remaining factors are applicable for the reasons discussed below.

The Contested Case only operates prospectively to the extent it attempts to limit the satisfaction of the storage water rights in the future. While the Contested Case impacts existing water right holders in the entire Boise Basin, it only impacts them prospectively because the Contested Case does not attempt to adjudicate past years of accounting or to reduce, alter or diminish water available to water users in the past. The *Order* does not apply retroactively.

Regarding the last three factors set forth in *Asarco*, the Director suggested that the Contested Case is nothing more than gathering of “scattered” information and documents concerning the internal adoption and use of the accounting system in Basin 63. However, it is axiomatic that the Director initiated this Contested Case to do much more than simply describe the accounting procedures employed by the Boise River watermasters. Indeed, the Director’s orders throughout this proceeding make it clear that he: (a) prescribed legal standards concerning the satisfaction of storage water rights (*i.e.*, promulgated the one-fill rule); (b) expressed new policies of IDWR concerning the satisfaction of storage water rights, namely that the storage water rights are satisfied at the point of “paper fill” and that no water right exists in order to refill the reservoirs following flood control releases; and (c) clearly interpreted law by using accounting to define the existing storage water rights. The Director used his administrative function as a guise to prescribe legal standards, express policies and interpret law concerning the legal effect of flood control on the existing storage water rights.

For the above-stated reasons, the Contested Case initiated by the Director constitutes rulemaking, and the Director erred by failing to dismiss the Contested Case and instead proceeding under formal rulemaking as required by IDAPA.



## **2. The Director Erred in Failing to Stay the Contested Case Pending Resolution of the Late Claims by the SRBA**

This Court acknowledged that the Director has an administrative role to play in determining the satisfaction of storage water rights. *A&B Irr. Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014). However, this Court was also very clear that said administrative discretion is bound by the prior appropriation doctrine and that the Director’s duty to administer water is governed by the decrees: “the Director cannot distribute water however he pleases at any time in any way; ***he must follow the law.***” *Id.* at 393, 336 P.3d at 800 (emphasis added). The law which must be followed includes the orders and decrees of the SRBA concerning water rights because it is the SRBA that is charged with ultimately determining and decreeing the elements of water rights. *See, e.g.*, IDAHO CODE § 42-1412.

As succinctly put by Special Master Booth in his *Recommendation*:

Before determining how to account for something one must know what is being counted. Accordingly, it cannot be said that the Director’s discretionary decision of “how” to account for the existing storage rights is determinative of what portion of the annual reservoir inflows are stored under the authority of the existing storage rights.

AR. 001376. It follows that it was premature for the Director to initiate and proceed with a contested case concerning water right accounting before the nature and scope of the underlying water rights were firmly defined by the SRBA Court.

The Ditch Companies further pointed out that BOR, the titled owner of the storage water rights, and which sent a letter early in the proceedings that it was not bound by the administrative contested case,<sup>21</sup> would not be participating in the Contested Case, even though BOR was and is

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<sup>21</sup> BOR sent a letter to the Director informing him that BOR would not be participating in the Contested Case because it was under no obligation to do so, and because BOR is not bound by the results of the Contested Case under the McCarran Amendment. *See United States v. Puerto Rico*, 287 F.3d 212 (1<sup>st</sup> Cir. 2002) (holding that a purely administrative proceeding is not a “suit” contemplated by the McCarran Amendment).

a party/claimant in Late Claims case before the SRBA. Yet, the Director proceeded with the Contested Case in a rush to make a pre-determined decision before the Late Claims could be decided by the SRBA.

The Director did not proceed with the Contested Case merely to explain IDWR's internal adoption and use of the accounting system since 1986. Rather, the Director used the accounting program to diminish the property rights of the Ditch Companies and others, and his legal determinations regarding the nature and scope of the existing storage rights should instead be resolved by, and yield to the decision of, the judiciary. *A&B Irr. Dist. v. State*, 157 Idaho at 393, 336 P.3d at 800 ("Thus, the main issue here is whether the Director is determining water rights, and therefore property rights, when he determines that a water right is "filled," or if the Director is just distributing water."). Even the Department now concedes that it cannot determine water rights in the Contested Case, that there is nothing to remand to the Director, and that any water rights decreed in the Late Claims will be incorporated into the accounting system. R. 001111-17.

**3. The Director Violated His Duties and Exceeded His Authority as the Hearing Officer, and Violated the Due Process Rights of the Ditch Companies by Failing to Provide a Fair and Impartial Tribunal**

The manner in which the Contested Case hearing was conducted violated the Ditch Companies' due process rights, and the Ditch Companies' repeated objections went unheard. The Director's bias yielded the result we all expected and appeal today. Accordingly, the Court should disregard any deference ordinarily afforded to the Director and instead answer the legal issue before it. Moreover, should the Court have reason to remand the matter to the Department, the Court should direct the Department to appoint an independent, impartial hearing officer to conduct any further proceedings.

**a. The Director's Conduct and Active Participation at Hearing was Biased and Evidenced a Predetermined Result**

Procedural due process requires that there must be some process to ensure that individuals are not deprived of their rights in violation of the state or federal constitutions. Due process requirements are typically met when one is provided with adequate notice and an opportunity to be heard. *See, e.g., Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (citations omitted). While due process may be a somewhat fluid and “flexible concept,” it is only satisfied where one has the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Id.*

The Ditch Companies concede that there was a multi-day hearing. But that hearing did not provide a meaningful opportunity to be heard. This is because due process entitles one to an impartial and disinterested tribunal. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *see also, Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012). This requirement applies to state administrative agencies as well as the courts. *Eacret*, 139 Idaho at 784, 86 P.3d at 498. Bias of decision-makers is “constitutionally unacceptable,” and reviewing courts are charged with both: (1) assuring impartial decision-making **and** (2) avoiding the mere appearance of (as opposed to actual) impropriety. *Id.*

A decision-maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute he is deciding absent a showing that he is “not capable of judging a controversy fairly on the basis of its own circumstances.” *Eacret*, 139 Idaho at 785, 86 P.3d at 499. Thus, impartiality does not necessarily mean a “lack of preconception in favor of or against a particular legal view.” *Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007). But, showings that a decision-maker:

(1) has made up their mind regarding facts and will not entertain others with an open mind, or (2) will not apply existing law, or (3) has pre-determined the outcome of the hearing prior to its conclusion violates due process-based impartiality requirements. *Eacret*, 139 Idaho at 785-86, 86 P.3d at 499-500.

The Ditch Companies were clearly not heard by an impartial and disinterested tribunal. For example, the Director repeatedly took public positions in support of the Department's water right accounting program, and against the positions of the Ditch Companies and the Boise Project in the Idaho Legislature and elsewhere pre-hearing. *See, e.g.*, AR. 000109.<sup>22</sup> The Director also pre-judged the worth of anticipated irrigation entity evidence as being "likely irrelevant"; which was again reiterated by the Director at hearing. Tr. 8/27/15 23:7-25:13. And, the Director actively supported IDWR's adversarial role when the agency's deputy attorney general was cross-examining a Ditch Company and Boise Project witness Sisco. Tr. 8/31/15 889:15-904:18.

As the Department's adversarial role became more and more contentious over whether Sisco administered the Boise River Reservoirs storage rights in lock-step with the Department's computerized water rights accounting program (which Sisco testified plainly that he did not due to his own practical and legal disagreements over blind use of the program), counsel for the Ditch Companies objected to the Department's line and tone of questioning.

MR. STEENSON:--I'm going to object. The role of Mr. Baxter here is supposed to ask clarifying questions, not to cross-examine witnesses. This sounds to me like

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<sup>22</sup> The Director later confirmed these Legislative contacts. AR. 000386-87 ("The Boise Project is correct that the Director has met with legislators, the Governor's office and water users' groups to keep them apprised of the issues raised in the Water District 63 contested case."). The Director then opined that his communications were not impermissibly "*ex parte*" or otherwise inappropriate given his capacity as hearing officer. However, the Director felt compelled for some reason to assert attorney-client privilege as a means by which to avoid full disclosure of his public contacts and statements. *Id.*

cross-examination of a witness, rather than merely asking to clarify his answers. He's challenging the witness' understanding of these documents. So I object.

THE HEARING OFFICER: *Well, let me tell you, Mr. Steenson, because what I've heard Mr. Sisco say is, that he didn't adhere to the accounting system, and that he disregarded the accounting system.* And this line of questioning is particularly germane and central to what we're talking about. And *if it has to be brought out by cross-examination, either through Mr. Baxter, or by me, we will get to the bottom of it. Overruled.*

*Id.*, 904:4-18 (emphasis added).

The Director's bias and emotion continued. After eliciting testimony regarding Sisco's practice of restricting junior diversions to only those times when flood control releases were being made from Lucky Peak, counsel for United Water Idaho (now Suez) uttered a naked, undefined and unsupported objection which the Director immediately sustained. *Id.*, 909:6-11. Only after counsel for the Ditch Companies requested explanation of the nature of the objection and grounds supporting the same did Suez's counsel and the Director cite and rely upon "relevance" to sustain the objection. *Id.*, 909:12-15.

The Director also undertook his own attempts to impeach Sisco. He called a ten-minute recess after IDWR's first round of cross-examination. *Id.*, 908:14-20. After the Director exited the hearing room with Department counsel and staff (including Cresto and Deputy Director Mat Weaver), he went looking for Department staff member Tim Luke and a copy of a "watermaster report." *Id.*, 942:17-945:25. The Director sought a copy of the form to review its "true and correct" certification block to confront Sisco with the same during his testimony. *Id.* Ultimately, the Director found nothing wrong with his actions during recess because he was unable to find Mr. Luke, unable to locate the form, and, therefore, unable to ask Sisco any questions based on the form. *Id.*, 945:5-25.

The Director's bias again surfaced on the record concerning his *ex parte* contacts with agency witnesses, including the formulation of an IDWR hearing exhibit. Redirect examination

of Cresto exposed the contacts after she previously testified under oath that she did not confer with the Director during the course of the hearing regarding her testimony when, in fact, she had. Compare Tr. 9/10/15 1562:13-23; 1585:8-1586:15; and 1588:21-1589:10.

MR. STEENSON: Q. Okay. *Has the Director conferred with you about your testimony –*

MS. CRESTO: A. *No, I don't believe –*

MR. STEENSON: Q. *–during these days of the hearing.*

MS. CRESTO: A. *I don't believe so.*

...

MR. BAXTER: Q. *First, Ms. Cresto, you were asked a question about conversations between you and the Director. My recollection is that you answered no, that conversations weren't with the Director.*

*Is that right, you answered no?*

MS. CRESTO: A. *Correct.*

MR. BAXTER: Q. *And at the time was it your understanding that you answered no not because there were not conversations between you and the Director, but because those conversations included your attorney, and you thought those conversations might be attorney-client privileged communications?*

MS. CRESTO: A. *That's correct.*

MR. BAXTER: Q. *Okay. So let's just clarify the record. Has the Director sat in or has he had conversations with you, listened to conversations with you about your testimony?*

MS. CRESTO: A. Yes . . . [g]eneral conversations about [] the proceedings or – or, you know, we talked about this [indicating] and whether or not we thought that that was –

MR. BAXTER: Q. *When you're saying "this," you're pointing to –*

MS. CRESTO: A. *–this analysis.*  
To Exhibit 9, the table.

...

MR. STEENSON: Q. *I just want to make sure the record's clear. If I understood you correctly, you've had multiple conversations during the course of these proceedings with*

*the Director, Mr. Spackman, and Mr. Baxter?*

MS. CRESTO: A. *Yes.*

MR. STEENSON: Q. *Concerning the subject matter of these proceedings?*

MS. CRESTO: A. *Yes.*

MR. STEENSON: Q. *And information that has been presented during the course of these proceedings?*

MS. CRESTO: A. *Yes.*

*Id.* (emphasis added).

At a minimum, the Director’s pre-hearing and in-hearing communications with Deputy Attorney General Baxter (IDWR counsel presenting the Department’s case) and Department expert witness Cresto (including input regarding her rebuttal testimony and the creation of Department Exhibit No. 9) violated Procedure Rule 417 (IDAPA 37.01.01.417) and Idaho Code Section 67-5253.<sup>23</sup>

Further, and in many ways, the Director, sitting in his quasi-judicial capacity, was analogous to a member of the Idaho judiciary. This is because, by definition, his Contested Case proceeding necessarily resulted in an order, which, in turn, has the effect of “determining legal rights, duties, privileges, immunities, or other legal interests” of those who were party to the proceeding. *See* IDAPA 37.01.01.007 and .015; *see also*, IDAHO CODE §§ 67-5201(6) and 67-5201(12); *see also*, *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927 (1998) (when statutes require notice and hearing, the matter is a quasi-judicial proceeding). When viewed in

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<sup>23</sup> Procedure Rule 417 and Section 62-5253 both provide that a presiding officer: “shall not communicate, directly or indirectly, regarding any substantive issue in the [proceeding/contested case] with any party, except upon notice and opportunity for all parties to participate in the communication.” *Id.* Procedure Rule 417 further provides that a party to the contested case proceeding “shall not communicate directly or indirectly with the presiding officer or the agency head regarding any substantive issue in the contested case.” IDAPA 37.01.01.417.

the light of his judicial function, the Director's actions violated a number of the canons of the Idaho Code of Judicial Conduct.<sup>24</sup>

Impermissible bias arises when there is a mere “appearance” of the same; actual bias need not be proven. *See, e.g., Eacret*, 139 Idaho at 784, 86 P.3d at 498 (citations omitted; emphasis added) (the reviewing court must, among other things, assure impartial decision-making “and [ ] avoid the *appearance* of impropriety”). The above-discussed examples create the mere appearance of impropriety, regardless of whether there was any actual impropriety. Moreover, the Ditch Companies respectfully submit that the Director's actions, particularly when considered in their totality, crossed the line from mere appearance and amounted to actual impropriety in violation of the parties' due process rights.

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<sup>24</sup> The Ditch Companies' acknowledge that the Director is not a “judge” who is bound by the Idaho Code of Judicial Conduct. However, the canons of the judicial code provide an instructive backdrop against which to compare the Director's behavior in this matter.

Specifically, the Director violated 4 of the 5 canons. The Director violated Canon No. 1 by eroding public (and the Ditch Companies') confidence in the impartiality of the tribunal. The Director violated Canon No. 2 by creating at least the appearance of impropriety—the reasonable perception that his capacity for impartiality was impaired. The Director violated Canon No. 3 by failing to perform his quasi-judicial function without bias or prejudice (again, mere appearance of such bias or prejudice is a violation—this includes the Canon's admonition against making any public statements regarding a pending proceeding). The Director also violated Canon No. 3 by initiating, permitting, and considering *ex parte* communications both pre- and in-hearing, and by failing to voluntarily disclose the same. The Director further violated Canon No. 3 by independently investigating facts outside the evidence at the time (this was done in the context of searching for Mr. Luke and seeking the watermaster certification form; it also occurred in the context of the Director's direct participation in the creation and presentation of Cresto's rebuttal testimony and supporting IDWR Exhibit No. 9). The Director additionally violated Canon No. 3 by failing to disqualify himself when repeatedly requested to do so by the Ditch Companies and the Boise Project (this is because mere appearance of bias, or any “reasonable” question concerning impartiality is grounds for disqualification under the Canon). Finally, the Director violated Canon No. 4 by failing to conduct his extra-judicial activities in a manner that would not breed “reasonable doubt” over his ability to act impartially (*i.e.*, the contents and tenor of the Director's communications with legislators, the Governor's Office, and various water user groups at least “cast reasonable doubt” over his impartiality).



**b. IDWR's Advocacy-Based Hearing Participation Was Improper**

IDWR participated in the Contested Case hearing as an adversarial party. IDWR staff and legal counsel advocated for, and supported the affirmance of, the agency's computerized water rights accounting program. This adversarial and advocacy-based hearing participation exceeded IDWR's authority under Procedure Rules 150, 157, 600, and 602 (IDAPA 37.01.01.150, .157, .600, and .602).

The purpose of IDWR staff participation in Contested Case proceeding before the agency is one of technical expert/assistant similar to what Idaho Code Section 42-1401B provides in the context of general stream adjudications. IDWR staff participation under Procedure Rule 600 is to assist in the formation of the administrative record where that type of support is warranted; namely within the sphere of the agency's "experience, technical competence, and specialized knowledge." IDWR staff participation is not, however, to take on true adversarial party status resulting in zealous advocacy for a certain outcome (except, of course, in the expressly limited circumstances where IDWR is exercising its authority as a "complainant").

When asked about its status in the Contested Case, IDWR took the position (at least initially) that it was not a "party" in the proceeding. AR. 000875. IDWR staff and counsel acted very much otherwise.

For example, IDWR, *under the Director's own signature*, filed an expert witness disclosure and a subsequent lay witness and exhibit list disclosure. See AR. 000641 and 000691, respectively. Counsel for IDWR also presented witnesses through direct and re-direct examination; vigorously cross-examined others; and lodged and actively defended evidentiary objections. See, e.g., Tr. 8/31/15 889:16-908:14; Tr. 9/10/15 1549:1-1561:16; *id.*, 1585:8-1588:17; and Tr. 8/31/15 839:9-840:25. IDWR's presentations and participation at

hearing did not lend mere record clarification, or provide mere technical expertise. Rather, IDWR made a concerted effort to shape a record benefitting the program and its prior adoption.

**c. Cresto Testimony Exceeding the Scope of Her Staff Memorandum Was Improper and Further Demonstrated IDWR and Director Bias**

The record is clear that IDWR participated in this matter as a party who advocated for a particular result. As a party in the proceeding, IDWR should be held to the same standards as any other party when it comes to the nature and scope of the “expert” testimony it disclosed and presented through Cresto.

In his *Fifth Amended Scheduling Order; Notice of Hearing* (May 20, 2015) (AR. 000618), the Director set an expert witness disclosure of June 19, 2015. The order also provided that the disclosure deadline applied to “any experts who may testify for IDWR at hearing.” *Id.*

Consequently, IDWR disclosed Cresto as an “expert who may testify for IDWR at the hearing in this matter.” AR. 000641. IDWR further stated in the disclosure that:

Testimony from this witness will relate to discussion of the November 4, 2014, Memorandum she prepared for the Director on the subject of “Accounting for the distribution of water to the federal on-stream reservoirs in Water District 63.”

*Id.* Based on this disclosure, the Boise Project and the Ditch Companies deposed Cresto in her designated “expert” capacity on July 21, 2015.

During deposition, Cresto was directly asked what, exactly, her opinions were, and what, exactly, she would be testifying to in her expert capacity. *See, e.g.*, Tr. 8/27/2015 60:18-62:13. In response, Cresto testified that the **only** opinions she would offer and testify regarding were those expressed in her November 4, 2014 Technical Memorandum and nothing else. *Id.* Despite this deposition testimony, Cresto offered opinions at hearing far beyond the scope of her technical memorandum, some of which were memorialized in an exhibit (Ex. 9) created during

the course of the hearing based on data plainly in IDWR's possession prehearing.

Tr. 9/10/15 1559:13-1560:20. Moreover, the purported responsive or "rebuttal" nature of the new exhibit and related testimony was to rebut testimony IDWR was aware of well before hearing. *Id.* The exhibit and its corresponding testimony stemmed from, according to Cresto, "a very different analysis" examining Water District 63 water delivery records than she previously performed. *Id.*, 1551:5-19; 1553:12-25; and 1564:7-12.

Among the policy protections afforded by Rule 26(b)(4)(A) is the full and complete disclosure of expert opinion so that adequate opportunity exists for full and fair cross-examination.<sup>25</sup> *See, e.g., Easterling v. Kendall*, 159 Idaho 902, 912, 367 P.3d 1214, 1224 (2016), *quoting Clark v. Klein*, 137 Idaho 154, 158, 45 P.3d 810, 814 (2002) ("Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he [or she] must have some idea of the bases of that opinion and the data relied upon.").

The Boise Project and Ditch Companies objected to all Cresto testimony straying from the subject matter and contents of her November 2014 Technical Memorandum. They did so prehearing in their *Joint Motion in Limine of the Irrigation Entities* (Aug. 13, 2015) (R. 000853 and 000859), and did so throughout Cresto's so-called "rebuttal" testimony. Tr. 9/10/15 1559:13-1561:5. The Director quickly overruled the objections.

Not only was IDWR actively advocating in support of its accounting program (as opposed to merely playing a neutral record "clarification" and development role), but the

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<sup>25</sup> The Ditch Companies acknowledge under Procedure Rule 52 (IDAPA 37.01.01.052) that the Idaho Rules of Civil Procedure do not strictly apply to IDWR contested case proceedings. However, there is no question that the contested case proceedings are quasi-judicial in nature, and result in the issuance of orders affecting the legal rights and interests of the parties. *See* Procedure Rules 7 and 15 (IDAPA 37.01.01.007 and .015); *see also*, IDAHO CODE § 67-5201(6) and (12). In that vein, the procedural and tactical safeguard provisions provided by the civil rules have a bearing in this matter—particularly in the expert witness context.

Director himself played an active role in organizing the rebuttal testimony and exhibit *ex parte*. Compare *id.*, 1561:22-1562:17 (wherein Cresto directly denied “conferring” with the Director during the course of the hearing); 1585:8-1586:15 (wherein Cresto reversed course and admitted to the Director’s direct participation not only in her hearing testimony, but the analysis leading to the creation of IDWR Exhibit 9 and her testimony regarding the same); and 1588:21-1589:10 (Cresto again confirming the Director’s “multiple” *ex parte* communications concerning her testimony in conjunction with IDWR counsel Baxter *throughout* the proceedings, not just during “rebuttal.”). This “rebuttal” testimony exchange viewed in isolation, let alone in conjunction with other hearing behavior, demonstrated: (1) IDWR’s adversarial party status; and (2) the Director’s predetermined and desired hearing outcome—namely aiding and abetting “rebuttal” testimony designed to discredit direct witness testimony undermining IDWR’s case.

**d. The Director’s Use of Rule 602 Official Notice Was Improper and Prejudicial**

The Director exceeded his authority under Procedure Rule 602 (IDAPA 37.01.01.602) and, by extension, Idaho Code Section 67-5242(3) by taking official notice of thousands of pages of documents without adequately identifying the “specific facts or material” relied upon within the documents. The Director’s amorphous “official notice” also allowed IDWR to circumvent the more formal and rigorous hearing exhibit presentation and admission process required of the remaining parties. Abuse of “official notice” procedure was an ongoing concern of the Ditch Companies and the Boise Project. See AR. 000873-74; *see also*, Tr. 8/27/15 27:9-33:20.

Procedure Rule 602 provides, in pertinent part:

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho . . . ***Parties shall be notified of the specific facts or material noticed and the source of the material noticed . . . [and] Parties must be given an opportunity to contest and rebut the facts or material officially noticed.***

IDAPA 37.01.01.602 (emphasis added). Similarly, Idaho Code Section 67-5242(3) provides, in pertinent part that the presiding officer shall “assure that there is a full disclosure of all relevant facts” and “[s]hall afford all parties the opportunity to respond and present evidence and argument on all issues.” Finally, Idaho Rule of Evidence 201, governing use of judicial notice, requires, in pertinent part that facts noticed be either “generally known” within the jurisdiction or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” I.R.E. 201(b). When judicial notice is exercised, Rule 201 requires specific identification of the “documents or items” noticed, and the opportunity to be heard “as to the propriety of taking notice and the tenor of the matter noticed.” I.R.E. 201(c), (d), and (e).

One week prior to the hearing in this matter, the Director issued a document titled: *Documents Officially Noticed*. AR. 000885. The documents identified in the *Documents Officially Noticed* were not provided to the parties or formally entered into the record as exhibits. Instead, the *Documents Officially Noticed* stated that the documents could be found on the IDWR or SRBA websites, or otherwise reviewed in hardcopy at the IDWR state office upon request.

In response to a renewed objection to the Director’s *Documents Officially Noticed* made at hearing (Tr. 8/27/15 27:8-28:20), the Director issued an *Amended Documents Officially Noticed* disclosure **post-hearing** on September 15, 2015 (“*Amended Notice*”). AR. 000959. The *Amended Notice* issued after the Director’s “additional review” and conclusion that “certain documents [could] be identified with more specificity.” *Id.* However, none of the documents listed in the *Amended Notice* were marked, identified or offered as exhibits at the hearing, and many were not copied/scanned until after IDWR was charged with creating a record for appeal to the district court. Whether the copies include all documents which may have been in IDWR’s

files or records no one knows for certain except the IDWR, and even it has admitted through the course of this matter that the agency's records are "scattered and incomplete." AR. 000004

While the *Amended Notice* identified a variety of "sources," it did not specifically identify the "facts or materials" culled from the identified sources. Even at this appellate stage of the proceedings, the Ditch Companies have no firm or express idea regarding what specific facts or materials were used/relied upon by the Director in his decision-making process as is required under Procedure Rule 602. Rather, the Ditch Companies only know that some facts or materials were presumably culled from sources comprising several thousands of pages. Absent specific identification, the Ditch Companies could not possibly begin to frame meaningful objections or offer evidence in rebuttal.

Then, notwithstanding the fact that IDWR had the opportunity to present testimony and witnesses, and the fact that IDWR had the opportunity to identify specific documents, lay proper foundation and then offer, introduce and admit exhibits into the record which it contended were relevant to the Contested Case, neither IDWR, nor the Director offered any of the documents "officially noticed" as exhibits or for admission other than the nine (9) IDWR exhibits lodged. Instead, IDWR improperly chose to create (or augment) its own record under the guise of official/judicial notice.

The parties to this matter should have been afforded the opportunity to consider and object to each specific "fact or material" noticed, rather than the Director leaving those "facts or materials" unidentified and buried within thousands of pages of "source" materials.

### **C. Attorney's Fees and Costs**

Idaho Code Section 12-117(1) provides that in a proceeding where the parties include a state agency and other person or entity the court "shall award the prevailing party reasonable attorney fees, witness fees, and other reasonable expenses, if it finds that the non-prevailing party

acted without a reasonable basis in fact or law.” As a creature of statute, the Director and IDWR are strictly confined to acting consistent with statutes and the administrative rules applicable to the agency. *See Arrow Transportation Co. v. Idaho Pub. Utilities Comm’n*, 85 Idaho 307, 379 P.2d 422 (1963). In *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 159 Idaho 813, 832, 367 P.3d 208, 227 (2016), this Court held that the Director of the Department of Administration did not have the authority to violate the laws and rules governing the agency, and that “doggedly defend[ing]” the violations was unreasonable.

In this case, IDWR’s position conflicts with the congressionally-authorized operating plan for the Boise River Reservoirs developed and approved by BOR, the Corps, the State (including IDWR), and the spaceholders under which the Boise River Reservoirs have been operated for beneficial use storage and flood control. Instead, IDWR unreasonably contends that the water rights accounting program, which was not adopted until 1986, changed the long-standing administration and water right accounting so that water previously stored pursuant to the priorities of the storage water rights is instead stored without a water right, under no priority, subject to all junior water rights and future appropriations. IDWR takes this position despite Idaho Code Section 42-201(2)’s express prohibitions against the diversion and use of water without a water right. Even the district court found that it was reversible error for the Director to suggest that the water users had no vested right in the water stored following flood control releases. Thus, even if one accepts IDWR’s position with regard to the accounting mechanics for argument’s sake, it has been a completely unreasonable position for IDWR and the Director to continuously contend that there is no vested water right in the water stored in the Boise River Reservoirs following flood control.

Additionally, the *sua sponte* initiation of the Contested Case, the unlawful procedural failures, and the conduct of the Director and IDWR during the Contested Case were unreasonable violations of the laws and rules of the Department. The Contested Case was more than just a fact finding exercise seeking to locate and understand scattered and incomplete records; it was an intentional and deliberate scheme to *post hoc* validate IDWR's prior, internal adoption and use of the water right accounting program to determine the "satisfaction" of Boise River Reservoirs storage water rights. Indeed, the record demonstrates that the Director initiated and conducted the Contested Case to justify his predetermined outcome that the water that has historically, actually filled the Boise River Reservoirs is available for distribution to junior water right holders (principally Suez) and future appropriators. The Director participated as both an adversarial party and the Hearing Officer. He met with IDWR witnesses throughout the hearing process to discuss information presented during the hearing, and he helped IDWR witnesses prepare testimony and exhibits. He further assisted IDWR's examination and cross-examination witnesses. The Director disregarded the affidavits and testimony of Sutter and Sisco submitted by the Ditch Companies explaining Boise River Reservoirs operations, storage during flood control operations, and water right administration. He rejected the undisputed testimony of the Boise River Watermasters, Assistant Watermasters, and water users explaining how storage water rights have been administered, both before and after the adoption of the water right accounting program. He specifically rejected Watermaster Sisco's testimony (whom former Director Tuthill testified knows more about Boise River water right administration during his tenure as Watermaster than anyone else), and counseled IDWR's so-called expert in the preparation of testimony designed to rebut and discredit Sisco.



Accordingly, the Ditch Companies submit that the Director and IDWR acted without reasonable basis in fact or law with regard to their positions, decisions and unlawful procedures employed in this Contested Case. The Ditch Companies respectfully request their reasonable attorney's fees and costs incurred in this matter during the Contested Case and on appeal to the district court under Idaho Code Section 12-117. The Ditch Companies contend that the district court erred in denying the Ditch Companies' request for attorney's fees and costs.

Furthermore, and for the same reasons explained *supra*, this Court should also award the Ditch Companies' attorney's fees and costs incurred on appeal to this Court. The Director and IDWR continue to "doggedly defend" the unreasonable positions and procedures employed during this Contested Case, and on appeal, and the Court should also award attorney's fees and costs to the Ditch Companies on appeal under Idaho Code Section 12-117.

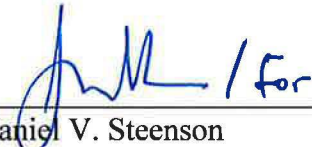
## **V. CONCLUSION**

For the foregoing reasons, the Ditch Companies respectfully request that this Court reverse the Director and the district court's erroneous legal conclusion that flood control releases count against the satisfaction or fill of Boise River Reservoir storage water rights. The Ditch Companies further contend that the Contested Case was procedurally flawed, was anything but fair and impartial and, thus, should the Court remand any portion of this matter back to IDWR for further proceedings that it do so under the requirement that an independent hearing officer (not an IDWR employee) be appointed to preside over the matter. Finally, the Ditch Companies request an award of reasonable attorney's fees and costs from their proceedings before the Director, the district court, and now on appeal to this Court, given the procedural failures, bias

and unreasonable conduct of the Director and the unreasonable legal positions and tactics employed by the Director and IDWR throughout this Contested Case.

RESPECTFULLY DATED and SUBMITTED this 26<sup>th</sup> day of May, 2017.

SAWTOOTH LAW OFFICES, PLLC

By   
Daniel V. Steenson  
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Company, et al.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25<sup>th</sup> day of May, 2017, I caused a true and correct copy of the foregoing APPELLANTS' OPENING BRIEF to be served by the method indicated below, and addressed to the following:

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( ) U.S. Mail, Postage Prepaid  
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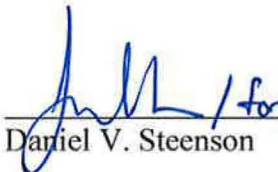
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