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; et al.;
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)

APPENDICES TO THE APPELLANTS' OPENING BRIEF

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

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Docket No. 44677-2016

Appellants' Opening Brief

APPENDIX 1

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

In Re SRBA	Subcase Nos. 63-33732 (Consolidated Subcase no. 63-33737), 63-33733 (Consolidated subcase no. 63-33738), and 63-33734
Case No. 39576	**MEMORANDUM DECISION AND ORDER GRANTING DITCH COMPANIES' AND BOISE PROJECT'S MOTIONS FOR SUMMARY JUDGMENT**
	ORDER DISMISSING STATE OF IDAHO'S AND UNITED WATER IDAHO'S CROSS-MOTIONS FOR SUMMARY JUDGMENT
	ORDER DISMISSING BOISE PROJECT'S MOTION IN LIMINE
	ORDER DISMISSING BOISE PROJECT'S MOTION TO STRIKE
	RECOMMENDATION ON BOISE PROJECT'S MOTION FOR SANCTIONS
	RECOMMENDATION ON STATE OF IDAHO'S MOTION FOR AWARD OF REASONABLE ATTORNEY FEES PURSUANT TO RULE 11(A)(1)
	SPECIAL MASTER'S RECOMMENDATION OF DISALLOWANCE OF CLAIMS

I. APPEARANCES

Albert P. Barker, Barker Rosholt & Simpson, LLP, Boise, Idaho, for Boise Project Board of Control.

Daniel V. Steenson, Sawtooth Law Offices, PLLC, Boise, Idaho, for 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 (hereinafter collectively referred to as "Ditch Companies").

Michael C. Orr, Deputy Attorney General, Natural Resources Division, Boise, Idaho, for the State of Idaho.

Michael P. Lawrence, Givens Pursley, LLP, Boise, Idaho, for United Water Idaho Inc.

David W. Gehlert, United States Department of Justice, Denver, Colorado, for United States of America, Department of Interior, Bureau of Reclamation.

II. ORAL ARGUMENTS

Oral arguments were heard in these matters as follows:

August 4, 2015, hearing on Ditch Companies' and Boise Project's *Motions for Summary Judgment*.

September 8, 2015, hearing on State of Idaho's and United Water's *Cross-Motions for Summary Judgment*; hearing on Boise Project's *Motion to Strike*, *Motion for Sanctions*, and *Motion in Limine*.

September 29, 2015, hearing on the State of Idaho's *Motion for Award of Reasonable Attorney Fees Pursuant to Rule 11(A)(1)*.

III. INTRODUCTION

A. Ditch Companies' and Boise Project's Motions for Summary Judgment.

In most years, the amount of water produced in the Boise River drainage upstream from Arrowrock Reservoir, Anderson Ranch Reservoir, and Lucky Peak Reservoir (collectively the "Boise River Reservoirs") exceeds the physical capacity of the

reservoirs and exceeds the volume of water that may be stored under the existing storage water rights[1] for the Boise River Reservoirs. 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.

The above-captioned claims filed by the United States Bureau of Reclamation ("Bureau") and the Boise Project Board of Control ("Boise Project") seek judicial recognition of beneficial use[2] water rights for the storage of such water that exceeds the annual quantity of the existing storage rights. However, the summary judgment motions filed by the Ditch Companies and the Boise Project,[3] seek to answer the threshold question of whether the water that forms the basis of the claims was already being stored pursuant to the existing storage rights and hence the claims fail for the reason that such stored water cannot simultaneously be authorized under the existing storage rights and be the basis for beneficial use water rights. The answer to this threshold question, the movants argue, requires a determination of what water is stored under the existing storage rights and what water is not. The State's position is that the existing storage rights are for all water that is "physically and legally available for storage," beginning on November 1 of each year, until the cumulative total of the daily inflows of such water equals the

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[1] The existing storage water rights are: Arrowrock 63-303, 271,600 AFY (January 13, 1911 priority) and 63-3613, 15,000 AFY (June 25, 1938 priority) (total capacity of Arrowrock Reservoir is 286,600 AF when filled to elevation 3216 on the upstream face of the dam); Anderson Ranch 63-3614, 493,161 AFY (December 9, 1940 priority) (total capacity of Anderson Ranch Reservoir is 493,161 AF when filled to elevation 4196 on the upstream face of the dam); Lucky Peak 63-3618, 293,050 AFY (April 12, 1963 priority) (total capacity of Lucky Peak Reservoir is 293,050 AF when filled to elevation 3055 on the upstream face of the dam).

[2] Under the beneficial use method of appropriation, sometimes called the Constitutional method, a water right could be perfected by diverting unappropriated water and applying it to beneficial use. In 1971 the Idaho legislature changed the law so as to eliminate this method of water right appropriation.

[3] The United States, Department of Interior, Bureau of Reclamation, has not filed any briefing regarding the Ditch Companies' and the Boise Project's motions for summary judgment nor did they participate in oral argument. However the United States informed the court that they are in agreement with the position put forth by the Ditch Companies and the Boise Project.

quantity of the existing storage right.[4] "Physically available" means water that actually enters a particular reservoir, or water that would enter such reservoir but for being retained in an upstream reservoir. *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) ("*Cresto Aff.*") ¶ 14. "Legally available," according to the State, means physically available water minus water that must be passed through the reservoir to satisfy a downstream senior water right and minus storage released from an upstream reservoir. *Cresto Aff.* ¶ 15.

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. Stated differently, the use of the term "legally available" as used by the State only looks to the body of law of competing property interests and the relative priority thereof and does not include the body of law governing the congressionally approved reservoir operating plan that has been developed and implemented by the Bureau of Reclamation, the Corps of Engineers, the State of Idaho, and the Boise River water users for over 60 years. 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.

The Ditch Companies and the Boise Project, on the other hand, argue that the existing storage rights are not, and have not ever, been a right to capture and store water in reservoir space that cannot be utilized. Such space is required to be left vacant to capture runoff that would otherwise cause downstream flooding. The Boise River Reservoirs are operated for two purposes: (1) to store water - to be subsequently used for beneficial purposes - that is produced by the basin at a time when the supply exceeds the demand (i.e. the non-irrigation season which is generally November 1 through March 31); and (2) to prevent downstream flooding by means of forecasting runoff, maintaining adequate vacant space in the reservoirs as dictated by the rule curves of the Water

[4] This is the State's position on the merits of the question. The State's primary position is that the matters sought to be resolved in the summary judgment motion cannot be decided by the SRBA Court in the context of the above-captioned subcases, but rather the issues involved herein can only be resolved through an administrative proceeding before the Idaho Department of Water Resources.

Control Manual[5], and then using such vacant space to regulate reservoir releases below a level that is deemed to cause flooding.[6] The Ditch Companies and the Boise Project assert that water that is released from the reservoirs as required by the rule curves to maintain adequate vacant space - such water then flowing past the downstream diversion works and headgates of the various irrigation entities at a time of year when the water cannot be beneficially used - is not water that was stored pursuant to the "irrigation storage" components of the existing storage rights.

The position taken by the State appears to have its origins in the accounting system implemented for Boise River water rights by the Idaho Department of Water Resources in 1986. Under the 1986 accounting system, water entering the Boise River Reservoirs is calculated on a daily basis and then attributed to one of two different accounts, starting with the accounts for the respective existing storage rights, until the cumulative total of "legally and physically" available water equals the storage quantity specified in existing storage right licenses/decrees. *Cresto Aff.* ¶ 12. Thereafter, such daily "legally and physically" available inflows are attributed to an account denominated as "unaccounted for storage." *Id.*, ¶ 22. Unlike the accounts for the respective existing storage rights, the "unaccounted for storage" account has no limit regarding how much water may be attributed thereto. *Id.*

Prior to the implementation of the daily accounting system in 1986, the storage component of the existing storage rights was accounted for with an annual accounting that occurred when the reservoirs reach maximum physical fill. *Cresto Aff.* ¶ 18. The point in time at which the Boise River Reservoirs reach maximum physical fill varies from year to year and coincides with the point in time at which discharges are reduced to the amount of actual irrigation requirements (i.e. the rule curves require zero vacant space) and the inflows are providing no more water than is being demanded by the senior natural flow irrigation water rights of the Stewart and Bryan Decrees. For example, in 1970 maximum physical fill was determined to have occurred on June 30, and in 1971

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[5] Water Control Manual for Boise River Reservoirs, U.S. Army Corps of Engineers, Walla Walla District (April 1985), attached as Exhibit E to the *Affidavit of Robert J Sutter* (filed July 2, 2015).
[6] The flood control objective is defined as no more than 6,500 cfs at the Glenwood Gauge near Eagle Island.

maximum physical fill occurred on July 13. *Fifth Affidavit of Michael C. Orr*, Exs. 69, 72.

The State repeatedly argues that the only issue to be resolved regarding the above-captioned late claims is "whether the claimant actually applied the quantity of water claimed, to the claimed use, at the time and place claimed." *State of Idaho's Scheduling Proposal* (Oct. 10, 2014) at 6. The State argues that any other issue, and especially the issue raised by the Ditch Companies and the Boise Project regarding whether the claims are "necessary," cannot be answered in these proceedings. This Special Master disagrees.

The purpose of the claims filed by the Bureau and the Boise Project is simply to make sure that the water contained in the Boise River Reservoirs at the time of maximum physical fill (i.e. the water that is actually used during the irrigation season) is properly stored pursuant to a valid water right. Under the legal theory of the State, and under the legal theory set forth in the *Director's Report*, in a year in which water is passed through or released for purposes of keeping the vacant space in the Boise River Reservoirs in compliance with the rule curves of the Water Control Manual, some or all of the water therein contained at the time of maximum physical fill is not stored pursuant to any water right. The legal theory of the Ditch Companies and the Boise Project, on the other hand, is that the water contained in the Boise River Reservoirs at the time of maximum physical fill is the water stored pursuant to the existing storage rights and water that entered and was passed through or released prior to the time of maximum physical fill is not water stored pursuant to the existing storage rights. If the water contained in the Boise River Reservoirs at the time of maximum physical fill is stored pursuant to the existing storage rights, then the same water cannot form the basis of a claim under the Constitutional method of appropriation.

The question sought to be answered by the Ditch Companies and the Boise Project involves a question of law. The recommendation of disallowance in the *Director's Report* is based upon the conclusion of law that the water used for beneficial purposes in a flood control year is stored pursuant to historic practice rather than stored pursuant to the existing storage rights. The State argues that the question of what portion

of the total reservoir inflows in a flood control year is covered by the existing storage rights is purely a question of accounting which only the Director can answer. But the Director has already given his answer to this question in the *Director's Report*, and any party to the SRBA may challenge this legal conclusion by filing an objection to the *Director's Report*.[7]

For the reasons set forth herein, this Special Master finds and concludes that the view of the Ditch Companies, the Boise Project, and the Bureau is the correct view – i.e. the "irrigation storage" component of the existing storage rights is the right to store the water contained in the Boise River Reservoirs at the time of maximum physical fill. Because the above-captioned claims are for water that is stored subsequent to the satisfaction of the existing storage rights, and because there are no appreciable amounts stored after the date of maximum physical fill, this Special Master recommends that the water right claims be decreed disallowed.

The holding in this *Decision* 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 priority date for the previously decreed water rights has significance only with respect to the right to capture and store water in the Boise River Reservoirs to be subsequently used for the intended beneficial uses. Once such water has been captured and stored pursuant to a valid water right, there is no competing demand by junior water rights with respect to the "irrigation (and other uses) from storage" component of the

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[7]Actually, this Special Master knows of no reason why some person or entity who is not currently a party to these subcases would be foreclosed from challenging this legal issue in a motion to alter or amend pursuant to SRBA Administrative Order 1 (13).

right. Water stored in a reservoir pursuant to a valid water right is not available for use by other water rights, senior or junior, and hence it is not the priority date that protects the right to use such water; rather the priority date protects the right to capture and store such water. The priority date of a storage right protects the right to accumulate and store the water in the first place. The State's legal theory essentially makes the priority date meaningless in a flood control year. It is apparently not much comfort to the Bureau and the water users for the State to point out that the "excess flows" (according to the State's theory) have historically been made available to fulfill the "irrigation (and other uses) from storage" component of the existing storage rights. 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.

B. State of Idaho's Cross-Motion for Summary Judgment.

In the Ditch Companies' *Response in Opposition to the State of Idaho's Cross-Motion for Summary Judgment*, the Ditch Companies succinctly state the difference between the competing motions for summary judgment:

> There are two basic questions now pending before the Court on summary judgment in this matter – (1) that posed by the Ditch Companies and the Boise Project []: Are the pending late claims necessary or do the existing storage rights authorize filling of the reservoirs after flood control releases?; and (2) that posed by the State of Idaho: Are the pending late claims supportable/provable if they are deemed necessary? The State's Cross Motion goes to the merits of the late claims themselves, while the Ditch Companies' and Boise Project's prior Motion for Summary Judgment [] addresses the threshold legal question concerning the impact, if any, flood control releases has upon the existing storage rights; a question posed in an effort to determine if the late claims are needed.

Id., at 1. Stated differently, the Ditch Companies and the Boise Project are seeking a judicial determination that the water that is beneficially used under the "irrigation from storage" component of the existing storage rights is the same water that is stored pursuant to the "irrigation storage" component (i.e. the water that is physically in the reservoirs at

the time of maximum physical fill), and hence such water, having been stored pursuant to the existing storage rights, cannot form the basis of the above-captioned claims (i.e. the claims are not necessary). The State and United Water, on the other hand, argue that in a flood control year, where inflows are assigned to the "unaccounted for storage" account, the water that was stored pursuant to the existing storage rights, in an amount equal to the "unaccounted for storage," is released from Lucky Peak and sent down the Boise River at a time of year when it cannot be used under the "irrigation from storage" components of the existing storage rights; and subsequently, the water that is in the reservoirs at the time of maximum physical fill, which is the water that is beneficially used pursuant to the "irrigation from storage" component of the existing storage rights, is unappropriated water to which the Bureau and the water users have no property interest. The State's *Cross-Motion for Summary Judgment* seeks a judicial determination that the Bureau and the water users have not appropriated this "unaccounted for storage" water under the Constitutional method of appropriation prior to the date this method expired in 1971.

For the reason that the Ditch Companies' and Boise Project's motions for summary judgement are herein granted, the issues raised by the State and United Water regarding whether the "post paper-fill" water has been appropriated under the Constitutional method of appropriation become moot and therefore will not be addressed (See Section VII. below).

IV. THE DIRECTOR'S REPORT

The *Director's Report* for the above-captioned claims recommends that the claims be disallowed and states the reason for disallowance as follows:

> The use of floodwaters captured in evacuated flood control space in on-stream reservoirs in Basin 63 for irrigation and other beneficial purposes is a historical practice. The Department recommends that the historical practice be recognized by the SRBA through a general provision.

Director's Report for Late Claims, filed December 31, 2013. By statute, a director's report constitutes *prima facie* evidence of the nature and extent of a water right acquired under state law and therefore constitutes a rebuttable evidentiary presumption. I.C. § 42-1411 (4)-(5); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-746, 947

P.2d 409, 418 (1997). The objecting party has the burden of going forward with evidence to rebut the director's report as to all issues raised by the objection. I.C. § 42-1411 (5).

The *Director's Report* for the above-captioned claims directly provides two things: (1) an ultimate conclusion (that the claims should be disallowed); and (2) the reason for disallowance being that the water claimed is not appropriable because it has been stored pursuant to "historic practice." Indirectly, the following can be inferred from the *Director's Report*: (1) that water has been and is captured in the Boise River Reservoirs following flood control releases; (2) that such water has been and is put to beneficial use; and (3) that in a flood control year, all or part of the water in the Boise River Reservoirs at the time of maximum physical fill is water that is lawfully stored and beneficially used pursuant to "historical practice."

The phrase "historic practice" under Idaho law is a term of art. *In State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998), the Idaho Supreme Court held that under circumstances of long-standing historical practice, so-called "excess" water may be lawfully used, but there is no property right for the use of such water. The Court further held that the lawful "extra-water right" use of such water may be recognized in a general provision if necessary for the efficient administration of water rights. *Id.*, at 334-335.

With regard to the legal authorization to store the water that ends up in the Boise River Reservoirs at the time of maximum physical fill, there are three possibilities presented in these subcases. Such water is either: (1) "historical practice" water (as recommended by the Director); (2) water appropriated under the Constitutional method (which is what is claimed in the above-captioned claims); or (3) "existing storage right" water (as asserted by the Ditch Companies and the Boise Project in their *Motions for Summary Judgment*). The rebuttable presumption set forth in the *Director's Report* is that, in a flood control year, the water in the Boise River Reservoirs at the time of maximum physical fill is "historical practice" water (or some combination of "historic practice" water and "existing storage right" water if less than all of the water initially stored under the existing storage rights is released to maintain vacant flood control space). The inference of that presumption is that the water in the Boise River Reservoirs

at the time of maximum physical fill is neither "existing storage right" water nor "Constitutional method" water. The objecting parties (the Bureau, the Ditch Companies and the Boise Project) have the burden of going forward with evidence to rebut the presumption in the *Director's Report*.[8]

Based upon the file and record herein, and as explained in this *Decision*, this Special Master finds and concludes that the water that is contained in the Boise River Reservoirs at the time of maximum physical fill is water that is authorized to be stored under the existing storage rights. Accordingly, because none of the water contained in the Boise River Reservoirs at the time of maximum physical fill could have been appropriated under the Constitutional method of appropriation, the above-captioned late claims should be decreed disallowed.

V. STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment must be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, a summary judgment motion is typically denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho at 272, 869 P.2d at 1367.

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[8] The *prima facie* presumption of correctness of the Director's Report is applied to the facts contained therein. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 746, 947 P.2d 400 (1997). The conclusion in the Director's Report that "historic practice" provides the authorization to store water in the Boise River Reservoirs following flood control releases is not a determination of fact but rather it is a legal conclusion. This Special Master is not aware of any legal authority under which a legal conclusion by the Idaho Department of Water Resources is presumed to be correct.

However, these standards differ where cases, such as this one, are tried to courts in the absence of a jury. See, e.g., *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008) (citations omitted). In those instances, the court as the trier of fact need not draw inferences in favor of the non-moving party; and the court is free to draw its own "most probable" conclusions in the face of conflicting facts. *Id.* ("[W]here the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. When an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.").

VI. ANALYSIS OF DITCH COMPANIES' AND BOISE PROJECT'S MOTIONS FOR SUMMARY JUDGMENT

A. The Quantity Element of the Existing Storage Rights Cannot be Exceeded.

United Water and the State argue that the Ditch Companies and the Boise Project claim the right to store all water that enters the reservoir and is legally available to store (what United Water calls "storable inflow") thereby obtaining the full quantity of the existing storage rights and then, after such water is released for the purpose of complying with the rule curves of the Water Control Manual, to refill the reservoir under the existing storage rights. *United Water's Brief in Opposition* at 28-29. Simply stated, United Water and the State are arguing that the amount of water that can be stored under the existing storage rights is limited by the quantity element of the existing storage rights and that the Ditch Companies and the Boise Project are seeking to exceed the quantity elements of the existing storage rights.

United Water and the State are correct in their assertion that the quantity element of the existing storage right cannot be exceeded for water that is stored pursuant to such

rights. The problem with their argument, however, is that they are building a "straw-man" contention and attributing it to the Ditch Companies and the Boise Project. The Ditch Companies and the Boise Project do not contend that the quantity element of the existing storage rights can be exceeded for water stored thereunder. Rather they simply contend that the water that is stored pursuant to the existing storage rights is the water that is physically in the Boise River Reservoirs[9] at the time of maximum physical fill. Stated differently, the Ditch Companies and the Boise Project do not claim that the existing storage rights allow the capture and storage (and release) of all "storable inflow" for purposes of filling the existing storage rights and thereafter the capture and storage of all remaining flows for purposes of filling the reservoir.

1. The Basis of the State's Argument that the Existing Storage Rights are for all "Physically and Legally" Available Water.

The basis of the State's contention that all "physically and legally" available inflow counts toward the existing storage rights (whether it can be stored or not) apparently stems from the accounting procedures used by the Idaho Department of Water Resources since 1986. A detailed description of those accounting procedures is set forth in a *Memorandum* authored by Elizabeth Cresto, Technical Hydrologist for the Idaho Department of Water Resources, dated November 4, 2014, and attached as Exhibit "C" to the *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) ("*Cresto Memo*"). The Boise River system of diversions, storage, measurement, and water rights is highly complex, and the accounting system utilized by the Boise River Watermaster and the Idaho Department of Water Resources to keep track of it all is commensurately complicated. With respect to the three on-stream Boise River Reservoirs, accounting of the water that is attributable to the existing storage rights is even more complicated by the fact that the volume of water that passes through the reservoir points of diversion (i.e. the dams) is typically greater than both the annual volume limitation for the existing storage rights and the physical capacity of the reservoirs. These differences are succinctly stated by Robert

[9] Recognizing that reservoir operations allow the cross-storage of water within the reservoir system.

J. Sutter, former Water Resource Engineer, Hydrology Section, Idaho Department of Water Resources:

> The water right accounting program was designed to account for all Boise River diversions whether the diversion is an instream dam, or a canal, or other riverbank-side diversion (to which we referred as "direct diversions" in the Water Control Manual). However, additional accounting procedures were required to properly account for several distinguishing characteristics of the storage water in the Boise River Reservoirs. It can be assumed that all water diverted by a direct diversion is diverted for beneficial use pursuant to the water rights(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 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.

Affidavit of Robert J. Sutter (filed July 2, 2015) ¶ 19. For the reason that more water passes through the Boise River Reservoirs than can be stored, the accounting system implemented in 1986 set up two separate accounts for each reservoir to which inflows could be allocated: (1) an account for each of the respective existing storage rights; and (2) accounts denominated as "unaccounted for storage." Because reservoir inflows are measured/calculated and attributed to one of these accounts on a daily basis, such inflows necessarily have to be first attributed to the accounts for the existing storage rights. This is because the respective existing storage right accounts are limited by the annual volume of the water rights, whereas the "unaccounted for storage" account is unlimited. If water were attributed to the "unaccounted for storage" account first, there is nothing that would trip the accounting system to begin filling the existing storage right account. In order for the accounting system to recognize the water in the reservoir at the time of maximum physical fill as "existing storage right" water, and any water that

previously entered and exited the reservoir as "unaccounted for storage," the daily measurements would have to be attributed to the appropriate accounts retrospectively on or after the time of maximum physical fill.

The record in these subcases demonstrates that although the water right accounting system allocates inflows first to the existing storage rights and thereafter to the "unaccounted for storage" account, there is also an accounting adjustment made after maximum physical fill to reallocate the accounts to reflect that the water that is ultimately retained in the reservoirs is the "existing storage right" water that will be used for its intended beneficial purpose. Engineer Sutter explains it this way:

> 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 [sic] 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.
>
> 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 turn informs the storage right holders of the amount of storage that is available to them for ensuring [sic] irrigation season.

Id., ¶¶ 20-21 (emphasis added). As explained above by Engineer Sutter, in years when more water enters the reservoirs than can be retained therein, there is a period of time during the year where the accounting system considers the existing storage rights to be filled and subsequent inflows are attributed to the "unaccounted for storage" account.

However, this period of time ends on the day of allocation[10] when "the water physically stored in the reservoirs, including the 'unaccounted for storage,' is allocated to reservoir storage rights." *Id.* The differentiation between "existing storage right" water and "unaccounted for storage" water does not continue past the day of allocation. This process provides the retrospective accounting necessary for the accounting system to recognize that the water that is put to beneficial use is the water that is physically stored in the reservoir on the day of maximum physical fill; such retrospective accounting being necessary under a system that accounts daily for inflows and necessarily attributes them first to the existing storage rights and next to the "unaccounted for storage" account.

The State relies on the accounting system to demonstrate that the existing storage rights are for the "legally and physically" available water that first enters the reservoirs. Another way of stating this argument is that the accounting system defines the existing storage water rights. It does not. But even if the accounting system defines the existing storage water rights, the State's analysis ignores a very important part of the accounting system – i.e. on the day of allocation the "unaccounted for storage" water is considered to be "existing storage right" water and then first allocated to the existing storage water rights and then to the individual spaceholders accordingly. At the end of this annual accounting system, on the day of allocation, water that is accounted for as "existing storage right" water does not exceed the annual volume of the respective existing storage rights.

[10] It should be noted that the term "allocate" as used by Engineer Sutter describes two separate accounting processes. One is the "allocation" of inflows and/or stored water to the respective water accounts (i.e. "existing storage right" or "unaccounted for storage"); and secondly the term is used to describe the process of allocating the water stored in the reservoirs (whatever amount that may be) to the respective spaceholders. It should also be noted that the spaceholder allocation process does not provide a partial allocation to the spaceholders of "existing storage right" water (if any) and another allocation of "unaccounted for storage" water. Rather the water physically stored in the reservoirs is all treated as "existing storage right" water and allocated to spaceholders accordingly.

2. The Basis of United Water's Argument that the Existing Storage Rights are for all "Physically and Legally" Available Water.

United Water also asserts that all "storable inflow"[11] counts towards the existing storage rights irrespective of whether such inflow can be stored or must be released/bypassed for flood control or other purposes. United Water bases this argument on one of the fundamental premises of the prior appropriation doctrine, i.e that junior appropriators are protected from wrongful or wasteful acts by seniors. *United Water's Brief in Opposition* at 28, citing *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907).

United Water's argument is likely correct when applied to a hypothetical situation involving a reservoir operated for the sole purpose of water storage. But with respect to the Boise River Reservoirs, which are operated under a legal obligation to use reservoir space to regulate downstream flows to prevent flooding, United Water's argument is misplaced. In a hypothetical situation involving a "storage only" reservoir operation, it seems unlikely that Idaho law would allow the reservoir operator to voluntarily release or bypass otherwise storable inflow (for whatever reason) during a time of year when there is no demand for it by juniors and subsequently store water at a time when juniors could use such water. In such a situation, the voluntary action of the reservoir operator (even if such voluntary action was for the purpose of flood control) would injure the hypothetical juniors and would likely not be permitted under Idaho law. However, this hypothetical scenario is inapplicable to the Boise River Reservoirs. The Bureau and the Corps of Engineers are legally obligated to operate the Boise River Reservoirs for flood control purposes. The effect of this is that available storage capacity of the Boise River Reservoirs is not fixed but rather it fluctuates in accordance with the rule curves of the Water Control Manual. 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.

B. The Issue Sought to be Resolved in the Ditch Companies' Motion for Summary Judgment is not Precluded by the Holding in Basin-Wide Issue 17.

The State argues the issue raised by the Ditch Companies and the Boise Project in their *Motions for Summary Judgment* cannot be resolved in the SRBA for the reason that the answer to the question is solely a matter of accounting which is an administrative function of the Idaho Department of Water Resources. In other words, the State asserts that the ongoing process of accounting by the Idaho Department of Water Resources is determinative of what portions of the annual inflows to the Boise River Reservoirs are stored under the existing water rights and what portions are not; and therefore, the holding in Basin-Wide Issue 17 precludes the SRBA from addressing the issue posed by the Ditch Companies and the Boise Project. For the reasons set forth below, this Special Master determines that the SRBA Court is not so precluded.

There are two separate matters involved in determining when a water right has been satisfied, and the State's argument conflates these two separate matters into one. One of these matters involves a one-time determination of the legal description of the property at issue (in this case the existing storage rights). The other of these matters involves the on-going accounting of flowing water within the constructs of the legal descriptions of the water rights being accounted.

In its decision in Basin-Wide Issue 17, the Idaho Supreme Court stated that the question of when a storage right is filled is a mixed question of law and fact. *In re SRBA*, 157 Idaho 385, 392, 336 P.3d. 792, 799 (2014). The first of these matters (i.e. determining "what is the property?") is the question of law portion of the question. The second of these matters (i.e. the application of accounting to the described property) is the question of fact portion of the question. The *Motions for Summary Judgment* brought by the Ditch Companies and the Boise Project seek only an answer to the first part of the mixed question – what is the property? The nature of the property at issue does not change in relation to the accounting methodology used by the Idaho Department of Water Resources to administer the Boise River water rights according to their relative priorities.

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[11] United Water uses the term "storable inflow" to describe the same concept as what the State calls "legally and physically" available inflows. *United Water's Brief in Opposition* at 26, citing the *Cresto Memo*, p. 6.

The accounting of the Boise River water rights, including the existing storage rights, happens on a daily basis, year in and year out, and involves complicated measurements and calculations. There is no dispute among the parties that this accounting is solely a function of the Idaho Department of Water Resources, reviewable by a court only after having exhausted administrative remedies. The Ditch Companies and the Boise Project are not challenging the accounting side of the mixed question of law and fact. Rather they are simply stating, correctly, that the legal descriptions of the existing storage rights do not describe what portion of the total inflows is authorized to be stored under those rights.

This question does not occur regarding the vast majority of water rights licensed by the Idaho Department of Water Resources or decreed in the SRBA which divert water out of the natural channel. The reason for this is succinctly stated by Engineer Sutter:

> It can be assumed that all water diverted by a direct diversion [meaning a canal or other riverbank-side diversion] is diverted for beneficial use pursuant to the water rights(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 flood control spaces; and (4) natural flows pass through the reservoirs during the irrigation season for downstream diversions with earlier priority water rights.

Affidavit of Robert J. Sutter (filed July 2, 2015) ¶ 19 (emphasis added). Unlike most diversion works, the diversion works for the Boise River Reservoirs do not divert water out of the natural channel; and therefore, the water that passes through the Boise River Reservoirs and dams consists of water that is authorized to be stored pursuant to the existing storage rights and water that is not authorized to be stored pursuant to the existing storage rights. There are two categories of water that flow into the Boise River Reservoirs that cannot be stored under the existing storage rights. One category is water that must be passed through the Boise River Reservoirs for senior downstream diversions. There is no dispute in these subcases regarding this category of water. The legal descriptions of the existing storage rights and the legal descriptions of the senior downstream diversion (i.e. the relative priority dates) provide the framework for the

Idaho Department of Water Resources to account for and administer this category of water that cannot be stored pursuant to the existing storage rights. It is the second category of water that is in dispute – inflows that exceed the annual volume limitation of the existing storage rights. The ***Partial Decrees*** for the existing storage rights do not provide a description of what portion of such water is to be considered stored under the existing storage rights and what portion is not to be so considered.

The above-captioned claims are to this second category of water that cannot be stored pursuant to the existing storage rights. However, the Ditch Companies and the Boise Project are not interested in having a water right to store water that cannot be beneficially used – i.e. the water that must be released pursuant to the rule curves during a time of year when there is no irrigation demand for such water. Rather the Ditch Companies and the Boise Project desire to make sure that the Bureau has water rights to store the water that can actually be used – i.e. the water in the Boise River Reservoirs at the time of maximum physical fill. If the existing storage rights authorize the storage of water that cannot be used, then the above-captioned claims seek judicial recognition of the right to store the water that can be used. But proceeding further down the path toward such judicial recognition makes no sense if the existing storage rights already authorize the storage of water that can be, has been, and is beneficially used. The possible result of failing to ascertain the answer to this question is the issuance of duplicative water right decrees.

The answer to this question cannot be found through an examination of the IDWR's accounting methodologies. That being said, the factual history regarding the accounting of the existing storage rights is relevant in determining what portion of the inflows the parties have historically viewed as being storable under the existing storage rights. All of the parties to the usufructory and ancillary components of the existing storage rights are parties to these subcases – the water users who use the water, the Bureau who stores the water, and the State who owns the water. In addition, the Idaho Department of Water Resources has filed its *Director's Report* which sets forth its current understanding of what inflows are storable under the existing storage rights. The record in these subcases demonstrates that historically all of these entities viewed the

existing storage rights as authorizing the storage of the water that is actually used – i.e. the water in the Boise River Reservoirs at the time of maximum physical fill[12] (See Section VI. C. below). Again, the issues as to "what is the property?" and "how to account for the property?" are not the same. The accounting is left to the Idaho Department of Water Resources, but a determination of "what is the property?" is answerable by the SRBA Court and making such a determination is compatible with the holding in Basin-Wide Issue 17. The historical accounting, both before and after 1986, is relevant only to the extent that it sheds light on the answer to the question of "what is the property?"

C. The Water that is Stored Pursuant to the Existing Storage Rights is the Water that is Physically Stored in the Reservoirs at the Time the Reservoirs Reach Maximum Physical Fill.

The record in these subcases clearly demonstrates the undisputed fact that the existing storage rights were historically considered satisfied at the point in time that the reservoirs reached maximum physical fill, which typically occurred sometime in June or July. The point in time that the reservoirs reached maximum physical fill is closely associated with what is referred to as the day of allocation. In his *Affidavit*, Boise Project Board of Control Project Manager Tim Page describes the day of allocation:

> The final allocation of water to the storage rights, including the rights held by the Boise Project districts in Anderson Ranch and Arrowrock storage, occurs on the day of allocation. That is the day the reservoirs reached maximum physical fill and senior irrigation demand equals or exceeds inflow into the reservoirs and there is no more water available to put into storage. All water that is coming into the river, including the reservoirs, after the day of allocation is water necessary to meet the demands of the natural flow users. On the day of allocation, the physical contents of the reservoirs is fixed.

Affidavit of Tim Page (filed July 2, 2015) ¶ 7. The historical methodology of accounting for accruals to the Boise River Reservoir existing storage rights at the time of maximum physical fill is succinctly stated in the *Memorandum* authored by Elizabeth Cresto, IDWR

[12] The current view of the IDWR and the State appears to be a more recent development.

Technical Hydrologist, dated November 4, 2014, and attached as Exhibit "C" to the *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015). Therein Hydrologist Cresto states:

> Prior to implementation of water rights accounting [in 1986], the watermaster in Water District 63 used hand calculations to distribute water to water right holders in priority. In general, there was a reservoir accrual season (November 1 to April 1, non-regulation season) and an irrigation season (April 1 to October 31, regulation season). Water was distributed according to priorities on a daily basis only during the irrigation season. Accruals to reservoir water rights were not determined on daily but rather on the date of maximum total reservoir fill[6]. The bureau determined the fill of the reservoir rights. On the date of maximum fill, storage was assigned to the most senior right first. Arrowrock received the first allocation up to 100% of its right, the remainder was assigned to Anderson Ranch up to 100% of its right, and any remaining storage was assigned to the Lucky Peak right. Under this scenario, an upstream reservoir could have been credited for natural flow that arose below the reservoir.
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> [fn 6] Memorandum May 3, 1977 To: RO 100, 700, 760 Project Superintendent, SCPO, Boise, Idaho From: 761 Subject: New Method Adopted for Allocation of Boise System Storage.

Id., Ex. C, p. 12. (emphasis added) (cited Memorandum is in the record as Ex. 89 to the *Fifth Affidavit of Michael C. Orr* (filed July 31, 2015)). The *Affidavit of Robert J. Sutter* provides further evidence regarding the determination that the water stored in the reservoir system at the point of maximum physical fill is water stored pursuant to the existing storage rights:

> Reservoir Operations Overview. The average annual volume of inflows into the reservoir system from snowmelt runoff and precipitation exceeds the collective capacity of the Boise River Reservoirs. During high runoff years, inflows from runoff can be two to three times the reservoir capacity. If all reservoir inflows were to be retained in storage to fill the reservoir system in high runoff years, spring runoff could not be controlled, and downstream flooding would occur. A reservoir operating plan has been in effect since 1953 to regulate mainstem Boise River flows to prevent flooding along the Boise River. The plan was revised in 1985 through the development and adoption of the Water Control Manual by the United States Corps of Engineers ("USCE"), the United States Bureau of Reclamation ("USBR") and IDWR. The Boise River flood control plan involves: (1) forecasting the timing and volume of inflows from runoff

into the Boise River Reservoirs ("runoff forecasts"); (2) estimating the volume of reservoir system space that must remain vacant prior to and during the spring runoff period in order to capture inflows and control releases ("flood control space") as established by "rule curves"; and (3) scheduling releases from Lucky Peak Dam to maintain required flood control spaces and not exceed the established flood control objective of 6,500 cfs in the vicinity of the City of Boise ("flood control objective"). 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 had 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.

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 control 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.

Storage Water Right Accounting During Flood Control Operations. A computerized system was developed and adapted in 1986 by myself and the IDWR Hydrology Section Manager Alan Robertson, with the assistance of other IDWR staff, to account for the distribution of water to Boise River water rights and to reservoir storage spaceholders. The accounting system did not alter the above-described principles or the accrual of water to storage pursuant to the reservoir operating plan of the Water Control Manual.

Affidavit of Robert J. Sutter (filed July 2, 2015) ¶¶ 4-6 (emphasis added). The statements in the record of former Boise River Watermaster Lee Sisco (Watermaster from 1986 to

2008) further confirm that the water physically in the Boise River Reservoirs at the time of maximum physical fill is "existing storage right" water. In his *Affidavit*, Mr. Sisco states:

> No IDWR employee ever suggested to me that storage water 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 reservoir prior to maximum physical fill.

Affidavit of Lee Sisco (filed July 2, 2015) ¶ 32. Mr. Sisco also explains how he was trained by his predecessor Henry Koelling.

> [Mr. Koelling] calculated the change in reservoir system contents by subtracting the measured Lucky Peak outflow from the total natural inflow to the reservoir system. If the total natural inflow exceeded outflow, increasing reservoir contents, Mr. Koelling allocated the increase in natural flow to the most senior reservoir right that had not been filled. If outflows exceeded inflows, decreasing reservoir contents, Mr. Koelling reduced the daily allocation of natural flow to the reservoir storage rights accordingly. This analysis enabled the Watermaster, and Bureau and the Boise Project staff to monitor the status of the filling of the storage rights. As explained in paragraph 15 of my first [July 2, 2015] affidavit, <u>at the point of maximum reservoir fill, Mr. Koelling allocated the total combined volume of water that was physically stored in the Boise River Reservoirs to the reservoir storage rights on the basis of their priorities</u>.

Second Affidavit of Lee Sisco (filed August 25, 2015) ¶ 5.[13] In addition to the Bureau, the Idaho Department of Water Resources, and the Watermasters, the water users similarly considered the water in the Boise River Reservoirs at the time of maximum physical fill to be water stored under the existing storage rights. For example, Paul Lloyd Akins, who sits on the Board of Directors of the Farmers Union Ditch Company and farms land served by the Farmers Union canal, states:

> Because in years of flood control releases the Boise River basin had more water available than the reservoir system could hold, Farmers Union

[13] In describing the pre-1986 accounting methodology, the *Cresto Memo* at page 12 states: "Accruals to reservoir water rights were not determined daily [during the non-irrigation season] but rather on the date of maximum total reservoir fill." While Mr. Sisco's description of the pre-1986 accounting methodology differs from Ms. Cresto's description regarding daily accounting during the non-irrigation season, they both agree that the pre-1986 accounting methodology determined existing storage right accruals / allocations at the time of maximum physical fill. The factual discrepancy regarding daily accounting is not material to resolution of the issues presented on summary judgment.

> would expect our full complement of storage water to be available . . . . It was only in years of low snow pack that Farmers Union was concerned over not filling our storage rights. Generally if snow pack produced enough runoff to require flood control releases, Farmers Union would expect its storage rights would be filled after the releases. Farmers Union never believed that in years which the Boise River basin had an overabundance of snow pack and water supply that we could possibly not have fully filled our storage water rights.

Affidavit of Paul Lloyd Akins (filed July 2, 2015) ¶ 4. Another example comes from Boise Project Board of Control Project Manager Tim Page. Mr. Page states:

> No one from the Department of Water Resources, nor the District 63 Watermaster, nor any predecessors of mine ever told me that the [irrigation] districts [Boise Kuna, Big Bend, Nampa & Meridian, New York, and Wilder] have no water right for filling the reservoirs following flood control releases . . . .

Affidavit of Tim Page (filed July 2, 2015) ¶ 12. Former Boise Project Board of Control Project Manager Ken Henley similarly states:

> At no time during my tenure with the Boise Project, including during the roll out of the [1985] water control manual was I or the Boise Project ever told that the storage accounts would be satisfied by counting water that had been released for flood control. To the contrary, I and the Boise Project always understood that the water control manual procedures were designed to ensure that storage water would be physically available to the districts' storage water rights following flood control releases as had always been done.

Affidavit of Ken Henley (filed July 2, 2015) ¶ 5. Yet another example is from retired Nampa & Meridian Irrigation District Water Superintendent John P. Anderson who states:

> During my 30-plus years of experience in delivering water to NMID's landowners, as well as my experience as Assistant Boise River Watermaster, I was never informed by another spaceholder, the Boise River Watermaster, my predecessors at NMID or any IDWR employee that: (a) water that was released from the Boise River Reservoirs for flood control purposes was a release of water that had been stored for beneficial use pursuant to a storage water right; (b) water was stored in the Boise River Reservoirs following flood control releases without a water right; or (c) that junior water users were entitled to call for the delivery of water

> that was necessary to fill the Boise River Reservoirs following flood control releases.

Affidavit of John P. Anderson (filed July 2, 2015) ¶ 10. Another example is from Pioneer Irrigation District Superintendent and Assistant Water District 63 Watermaster Mark Zirschky who states:

> It is my understanding, as district Superintendent and as Assistant Boise River Watermaster, that water physically stored after flood control releases by the BOR and the Corps is stored under the BOR's existing storage water rights. During my 23 years of experience with Pioneer, and my 2 years to date as Assistant Boise River Watermaster, I have never been informed by the BOR, IDWR, the Watermaster, or any other Reservoir spaceholder that: (a) water released from, or passed through, the Reservoirs for flood control purposes is debited from spaceholder storage accounts; (b) water stored in the Reservoirs after flood control releases is stored without a valid water right; or (c) that junior water users are entitled to the delivery of post-flood control release Reservoir inflows that are otherwise needed to physically fill the storage spaces evacuated or left open to perform flood control operations. To the contrary, it is my understanding as District Superintendent and Assistant Boise River Watermaster that while junior water users sometimes divert water in the same time period during which the Reservoirs are filling post flood-control releases, those junior diversions are coincidental because Reservoir filling occurs based on "rule curves" in a stepped/gradual fashion. I have not experienced a situation where water has been passed through or released to supply water to junior users when that water was needed to fill the Reservoirs after flood control releases.

Affidavit of Mark Zirschky (filed July 2, 2015) ¶ 14. The undisputed facts in the record indicate that the water stored in the Boise River Reservoirs at the time of maximum physical fill has historically been considered by the Bureau, the Idaho Department of Water Resources, the watermasters, and the water users as having been stored pursuant to the existing storage rights. Given that the annual quantity element of the existing storage rights cannot be exceeded, the inescapable conclusion is that water that is released / bypassed for purposes of maintaining vacant flood control space in the Boise River Reservoirs is <u>not</u> water stored pursuant to the existing storage rights (although it temporarily may be designated as such under the 1986 accounting system during the course of the non-irrigation season).

D. The Water contained in the Reservoirs at the Time of Maximum Physical Fill is not Excess Water to which no Property Interest may Attach; Rather it is the Property of the Bureau of Reclamation.[14]

In years that the amount of water produced in the Boise River drainage upstream from the Boise River Reservoirs exceeds the volume of water that may be stored under the existing storage rights, such excess water must necessarily be released downstream during the non-irrigation season with no beneficial use being made thereof. If the Boise River Reservoirs did not have a flood control function and were operated for the sole objective of irrigation storage, the reservoirs could be filled as early in the non-irrigation season as possible; and once filled any additional water could be released at the same rate it comes in (without regard to downstream flooding that could otherwise be prevented). If such were the case, the water that would ultimately end up in the reservoirs – i.e. the water that is put to the beneficial use of irrigating crops – would be the water that first entered the reservoirs during the non-irrigation season. However, such is not the case.

The Boise River Reservoirs are operated for both flood control and irrigation (and other) storage. As such, the amount of water that the drainage will produce must be forecasted in advance, and sufficient vacant space must left in the reservoirs so as to regulate the downstream flows to meet the flood control objective. Because of this, the reservoirs typically cannot be filled early in the non-irrigation season; rather the timing of the fill is intended to coincide with the point in time when the rule curves of the Water Control Manual require zero vacant space and with the time when the senior natural flow rights (i.e. Stewart and Bryan Decree rights) preclude any further reservoir fill. The result of this dual-purpose operating regime is that the water that ultimately ends up in the Boise River Reservoirs, to be released downstream to meet the demand for beneficial use, is not the first water that first entered the reservoirs; rather it is the water that last entered.

The State's and United Water's theory of the existing storage rights is that the property interest represented by the decrees for the existing storage rights is for the water that first enters the reservoirs irrespective of whether such water can be stored or must be

[14] Subject to the water users' beneficial interest as stated on the ***Partial Decrees*** for the existing storage

released to maintain the vacant space as dictated by the rule curves of the Water Control Manual. The State and United Water go on to assert that any water that is captured in the reservoirs that replaces the water so released is not held pursuant to a property right, but rather it is excess water to which no property interest may attach. (This is essentially the same as the legal conclusion set forth in the *Director's Report* that "historic practice" authorizes the storage of water following flood control releases.) The result of the State's and United Water's theory is that some or all of water that is purportedly stored under the Bureau's property right is passed downstream at a time of year when no beneficial use can be made thereof and the water that is subsequently captured and then released downstream to satisfy irrigation demand is water that was not stored pursuant to a property right.

Water rights are usufructory property rights. The term "usufruct" means the right of the use of a thing (e.g. water) and the right to that which may be produced by the thing, while the physical ownership of the thing is vested in another (in Idaho water is property of the state, I.C. § 42-101), so long as such use does not destroy or injure the thing. The origin of the word "usufruct" is from the Latin words for "use" (usus) and "fruit" (fructus). The storage of water is not a usufructory right in and of itself, i.e. storage is not an independent beneficial use, nor does it produce anything. Rather storage is ancillary to a beneficial use. As such, stored water is the property of the appropriator who is under a legal obligation to apply such stored water to a beneficial use. *Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935).

Under the State's legal theory, the water that first enters the reservoir is stored pursuant to the existing storage right and as such, it becomes the property of the Bureau, impressed with the obligation to apply such water to a beneficial use. But the Bureau cannot satisfy this obligation with respect to any water that cannot be stored or must be released (for purposes of maintaining vacant reservoir space) before it can be beneficially used. The next part of the State's legal theory is that the water that is subsequently captured and stored pursuant to the Bureau's (and/or the Corps of Engineers') obligation to regulate downstream flows (and the Bureau's contract obligations to the spaceholders),

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rights.

to which the State asserts is not property, is the water that is ultimately used for beneficial purposes. Assuming *arguendo* that the State's theory is correct, what is the legal theory that would allow the Bureau of to disregard its obligation to beneficially use the water in which it does have a property interest and substitute it for water in which it does not have a property interest?

The State and United Water argue that the water that is captured in the reservoirs for the purpose of regulating downstream flows to prevent flooding is "excess water"[15] as that phrase was contemplated in *State v. Idaho Conservation League* ("*ICL*"), 131 Idaho 329, 955 P.2d 1108 (1998) and the companion case *A & B Irrigation Dist. v. Idaho Conservation League* ("*A & B*"), 131 Idaho 411, 958 P.2d 568 (1997). In the *Memorandum Decision and Order on Challenge, Subcase Nos. 74-15051, et al.* ("*Lemhi High Flows Claims*") (February 12, 2012) the SRBA Presiding Judge conducted a detailed analysis of the holdings in *ICL* and *A & B* and concluded:

> In A & B, the Idaho Supreme Court held as a matter of law that . . . a general provision [authorizing the use of high flows or excess water] does not create a water right. In ICL, the Idaho Supreme Court upheld the use of such a general provision, for among other reasons, that the general provision did not create a water right.

Memorandum Decision and Order on Challenge, Subcase Nos. 74-15051, et al. at 25. The SRBA Presiding Judge went on to explain that "[s]ince the use of high flow water [pursuant to a general provision] does not create a water right high flows are therefore unappropriated water." *Id.*

United Water asserts that all water captured in the reservoirs after "paper fill" is "excess water" to which no property right may attach because such excess water cannot be decreed as a water right under Idaho law. *United Water's Brief in Opposition* at 35.

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[15] With respect to the State's and United Water's "excess water" theory, the following should be noted: First, it should be noted that the Bureau's obligation to operate the reservoirs to control flooding – which necessarily entails impounding water so as to regulate downstream flows – is not dependent on a state-based water right. Such flood control obligation is created pursuant to the federal legislation and agreements that relate to the Boise River Reservoirs. Second, it should be noted that the impoundment of water by the Bureau solely for the purpose of regulating downstream flows does not in and of itself create a property interest in the water so impounded. Third, it should be noted that there is nothing to prevent the water that is impounded for purposes of regulating downstream flows from coincidentally being impounded pursuant to a state-based proprietary water right.

United Water's view of the law in Idaho regarding excess water is too broad. The holding in *A & B* does not stand for the proposition that "excess water" (whatever that may be) can never be subject to a property right, but rather that a general provision authorizing the use of such "excess water" does not create a water right. In the instant subcases there is no previously decreed or recommended (in a Director's Report) general provision regarding the use of any water that passes through the Boise River Reservoirs that may or may not be "excess water." A general provision, to which *prima facie* weight is statutorily attached, would presumably provide some guidance or criteria on what is, and what is not, "excess water."

United Water's *Brief in Opposition* is not entirely clear on describing what characteristics must be attributed to water for it to be considered "excess water." Is "excess water" any water above and beyond "paper fill"? Is there a necessary component of "excess water" that it vary from year to year due to snowpack amounts, spring temperatures, precipitation, etc.? Fortunately there is no reason presented in these subcases that would require a factual determination of what may be "excess water." This is because so-called "excess water," whatever it may be, is unappropriated water that is subject to appropriation. The Idaho law relied upon by United Water stands for the proposition that a general provision authorizing the use of excess water does not create a water right – not for the proposition that there is some generally recognizable category of water in Idaho called "excess water" that can never be subject to a water right.

The post-appeal procedural history of the recommended general provision at issue in *ICL* illustrates the concept that "excess water" is subject to appropriation as a water right. In the ***Special Master's Report and Recommendation for General Provisions in Basin 57 Designated as Basin-Wide Issue 5-57***, Subcase No. 91-0005-57 (September 11, 2002), Special Master Cushman describes what happened:

> [F]ollowing remand in *State of Idaho v. Idaho Conservation League*, the parties claiming the use of "excess water" under General Provision 2 filed individual late claims for the "excess water" in an attempt to comply with the holding of the Supreme Court. IDWR recommended these late claims in a March 5, 2001, late claims report. . . . The individual late claims for the "excess water" were either uncontested or any objections have now been resolved via SF-5's. . . . Because the "excess water" issue was no longer being pursued as a general provision, this Special Master ordered

> that IDWR prepare a *Supplemental Director's Report* recommending the remaining portions of General Provision 2, if any, that were necessary in light of the individual claims for the "excess water." IDWR filed its *Supplemental Director's Report* on June 19, 2002. According to the *Supplemental Report*, the only remaining portion of General Provision 2 recommended following the filing of the individual late claims is portions of paragraph 5(b), which address the historical practice of rotation irrigation.

Id., at pp. 3-4. The State and United Water argue that the water that is contained in the reservoirs at the time of maximum physical fill is all or part "excess water" (i.e. any amounts attributed to the "unaccounted for storage" account) that is not subject to appropriation. The Ditch Companies and the Boise Project do not primarily counter by asserting that such water is appropriable (which it would be if it were "excess water"); but rather they counter by asserting that the water contained in the Boise River Reservoirs at the time of maximum physical fill is not appropriable because it is water that is stored under the existing storage rights. This Special Master agrees with the Ditch Companies and the Boise Project in this regard. Therefore, the claims of the Bureau and the Boise Project must fail for the reason that the water claimed is not subject to appropriation because it has already been appropriated.

E. The Ditch Companies and the Boise Project are not Collaterally Attacking the *Partial Decrees* for the Existing Storage Rights; However they are Seeking a Collateral Interpretation thereof.

The State and United Water assert that what the Ditch Companies and Boise Project are asking for in their *Motions for Summary Judgment* amounts to an impermissible collateral attack on the existing storage rights and therefore the *Motions* must be denied. For the reasons set forth below, this Special Master concludes that the *Motions* do not collaterally attack the ***Partial Decrees*** for the existing storage rights.

The Ditch Companies and the Boise Project are not asserting that anything on the face of the ***Partial Decrees*** for the existing storage rights means anything other that the plain meaning of the words and numbers set forth thereon. That being said, the Ditch

Companies and the Boise Projects are seeking an interpretation of the ***Partial Decrees*** – i.e. they are seeking a collateral[16] interpretation,[17] not a collateral attack.

The State and United Water cite to the SRBA Court's ***Order Denying Motion to File Late Claims***, Subcase No. 36-16977 (October 2, 2013) (*Rangen*), to support the proposition that the instant *Motions for Summary Judgment* constitute an impermissible collateral attack on the existing storage rights. The Ditch Companies and the Boise Project point out, correctly, that the issue in *Rangen* involved whether a late claim should be granted; whereas in the instant subcases the motions to file late claims have already been granted.

There is another factor that differentiates the interpretation being sought in the instant subcase from the attack sought in the *Rangen* subcase. The ***Partial Decrees*** issued in the SRBA for Rangen's water rights differed materially from the previously issued licenses upon which they were based and from Rangen's historical usage. Specifically, in the SRBA the source was decreed as "Martin-Curren Tunnel" whereas the licenses stated "springs tributary to Billingsly Creek," and the point of diversion was decreed as a 10-acre tract rather than the licensed 40-acre tract. In an administrative proceeding before the Idaho Department of Water Resources, Rangen argued that the SRBA ***Partial Decrees*** included water sources in addition to the Martin-Curren Tunnel and sources outside of the decreed 10-acre tract. In other words, Rangen was asserting before the Idaho Department of Water Resources that the ***Partial Decrees*** meant something other than what was set forth within the four corners of the document. The late claim filed in the SRBA by Rangen was admittedly an attempt to protect its historic water use should the Idaho Department of Water Resources rule unfavorably. What is important to note is that the allegations made by Rangen before the Idaho Department of Water Resources and the late claim it was seeking from the SRBA Court were both

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[16] The term "collateral" is used here simply to signify that the interpretation is being sought in the proceedings in the above-captioned subcases rather than the subcases for the existing storage rights.
[17] The use of the term "interpretation" is not meant to connote that there is any ambiguity or unclarity in the ***Partial Decrees*** for the existing storage rights with respect to the issues raised in these subcases; rather the interpretation involves the application of historical fact together with Idaho law to ascertain the answer to a question upon which the ***Partial Decrees*** are silent. The clarification of existing law against which the water right holders are entitled to rely is not a collateral attack on a prior license or decree. ***Memorandum***

designed for the same end – recognition that Rangen's water rights were something other than what was set forth on the face of the ***Partial Decrees*** – i.e. an "attack."

1. The Ditch Companies' and the Boise Project's Interpretation of the Existing Storage Rights.

Unlike Rangen, the Ditch Companies and the Boise Project are not asserting that the ***Partial Decrees*** for the existing storage rights mean something different than what is stated thereon. That being said, the ***Partial Decrees*** for the existing storage rights are silent regarding a question that must be answered in order to determine whether there is any unappropriated water that might form the basis of the above-captioned claims. That question is: In any year where reservoir inflows exceed the quantity elements of the respective existing storage rights, what portion of such water is attributable to the existing storage rights? This is not a question of accounting procedure; rather it is a question as to the nature of the existing storage rights. In other words, while measurement and accounting methodologies are left to the sound discretion of the director,[18] the question sought to be answered by the Ditch Companies and the Boise Project relates to "what to count?" rather than "how to count it?"

The question of "how" to make an accounting of something cannot yield the answer of "what" to count. This is backwards. 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. The State asserts that it is not necessary for the Court to determine one way or the other regarding what water is stored under the existing storage rights. This Special Master disagrees. The above-captioned claims either are, or are not, for the same water authorized to be stored under the existing storage rights. If the claims are for the same water, they fail. It would be a futile endeavor to engage in additional fact finding and legal analysis if the claims fail upon the answer to the basic

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Decision and Order on Cross-Motions for Summary Judgment Re: Streamflow Maintenance Claim, Subcase 63-3618 (Sept 23, 2008) p. 18 (citation omitted).

[18] In re SRBA, 157 Idaho 385, 394, 336 P.3d. 792, 801 (2014)

question of whether they are claims to water already stored under the existing storage rights.

When the Idaho Department of Water Resources designed the accounting system that it implemented in 1986, the designers necessarily had to grapple with the question regarding what portion of the reservoir inflows are attributable to the existing storage rights. As stated by Engineer Sutter:

> [T]he accounting system cannot ultimately treat all reservoir inflows as physically stored for beneficial use. We recognize 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.

Affidavit of Robert J. Sutter ¶ 19. Engineer Sutter goes on to explain that the daily accruals that constitute "paper fill" of the existing storage water rights is not the end of the accounting process. The next step in the accounting process is that "[a]fter maximum reservoir fill, the water physically stored in the reservoirs, including the 'unaccounted for storage,' is allocated to reservoir storage rights." *Id.*, ¶ 21. Hydrology Section Supervisor Cresto explains it this way:

> The "unaccounted for storage" is often used to provide full reservoir allocations so that charges for early-season storage use or the Bureau's flood control releases can be "cancelled."

Affidavit of Elizabeth Anne Cresto (filed July 21, 2105) ¶ 23. Engineer Sutter states that he concurs with the statements in the *Affidavit of Elizabeth Anne Cresto* and elaborates:

> Natural Flow in excess of that needed to satisfy all existing natural flow rights and is physically stored in a reservoir is coded as unaccounted for storage. This unaccounted for storage is credited back to the reservoirs, and if it is insufficient to provide for full reservoir allocations, the unaccounted for storage is assigned to fulfill the reservoir allocations consistent with the original priority dates of the reservoir rights.

Second Affidavit of Robert J. Sutter (filed July 21, 1015) ¶¶ 4 and 6. In other words, under the Boise River accounting system, the "unaccounted for storage" becomes

"existing storage right storage" once it has been assigned or "credited" to be beneficially used pursuant to the "irrigation from storage" element of the existing storage rights.[19] As previously stated, the 1986 accounting system appears to be the basis of the State's argument that the existing storage rights are satisfied by cumulative total of all "physically and legally" available inflows. However, even if the accounting system utilized by Idaho Department of Water Resources can be determinative of the nature of the existing storage rights, the accounting system does not support the State's position. Although the accounting system initially counts such "physically and legally" available water as accruing to the existing storage rights, at the time of maximum physical fill the water that is physically in the reservoirs is placed on the accounts as the water that is stored and beneficially used pursuant to the existing storage rights.

2. The State's and United Water's Interpretation of the Existing Storage Rights.

The State[20] and United Water also argue for a collateral interpretation of the existing storage rights. They argue that the existing storage rights are filled once the sum of daily accruals equals the annual volume limit of the existing storage rights. Thereafter, they argue, actual storage can continue under the existing storage rights, but under the

[19] This practice is also consistent with the accounting for carryover storage. The accounting procedure for carryover storage is described in the paper entitled Water Delivery Accounting, Boise River, WD-63: "Unused prior year storage is assigned as carryover in the following sequence: Lucky Peak. Anderson Ranch, Arrowrock, because use is charged in the reverse order." *Third Affidavit of Michael C. Orr*, Ex. 67. At the beginning of the storage season, the existing storage right accounts do not start at zero – they begin with the carryover amounts. When the existing storage rights are filled on paper, the "unaccounted for storage" does begin at zero. In other words, there is not any "unaccounted for storage" that is carried over to the following year's "unaccounted for storage" account because such "unaccounted for storage" is credited to the existing storage rights at the time of maximum physical fill.

[20] It is a bit challenging to ascertain exactly what the State's position is regarding the answer to the question about what portion of the annual reservoir inflows are authorized to be stored under the existing storage rights. The State is clear regarding its position that the question should not be answered in these proceedings, but as to the substance of the question the State claims on page 38 of the *State's Response* that it "has taken no position" regarding questions of interpretation of the existing storage rights. However, the State spends numerous pages of its briefing describing the development of "paper fill" accounting and how the Ditch Companies and the Boise Project have "mischaracterized" the operation of the Water District 63 accounting procedures. See, e.g., *State's Response* pp. 54-63. It is the understanding of this Special Master that the State would prefer to have an amorphous rather than particularized definition of this aspect of the existing storage rights.

condition that the existing storage rights are "no longer in priority."[21] *State's Response* at 28 and 67, *United Water's Brief in Opposition* at 31-33. Stated differently, the State and United Water argue that the existing storage right annual quantity limit can be exceeded so long as the priority element is ignored. This legal theory is without merit. Furthermore, and in contrast to the legal theory of the Ditch Companies and the Boise Project (i.e. that the existing storage rights authorize the storage of the water in the Reservoirs at the time of maximum physical fill as opposed to authorizing the storage of water that must be released to comply with the rule curves), the legal theory of the State and United Water does constitute an impermissible collateral attack on the existing storage rights. There is nothing in the ***Partial Decrees*** for the existing storage rights that even hints that the quantity element can be exceeded so long as the priority element is ignored. Hence the theory advocated by the State and United Water is more akin to the unsuccessful position taken by Rangen that the partial decrees for its water rights mean something more than what is stated on the face of the decree.

VII. ORDER DISMISSING STATE OF IDAHO'S AND UNITED WATER IDAHO'S CROSS-MOTION FOR SUMMARY JUDGMENT

For the reason that the Ditch Companies' and Boise Project's motions for summary judgement are herein granted, the issues raised by the State regarding whether the "post paper-fill" water has been appropriated under the Constitutional method of appropriation become moot and therefore will not be addressed. Accordingly the *State of Idaho's Cross-Motion for Summary Judgment* is **dismissed**.

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[21] The State's use of the phrase "no longer in priority" in this context is puzzling. Typically when a water right is said to be "no longer in priority" or "out of priority" it means that the demand for water on a source is greater than supply and the junior rights that are "no longer in priority" are no longer receiving any water (absent an approved plan to mitigates damages by out of priority diversions). Under the typical use of the phrase, the existing storage rights would be "no longer in priority" when the natural flow of the river is equal to or less than the demand of senior natural flow rights of the Stewart and Bryan Decrees. When that happens, the existing storage rights are not only "out of priority" but the reservoirs themselves are out of any additional water that may be stored. But the State is not using the phrase to connote the point in time when reservoir storage physically ceases; rather the phrase is being used to describe the time of the year when the existing storage rights are "off" because they have purportedly filled on paper, but natural flow supply is still greater than senior natural flow demand and hence storage continues to occur. In other

VIII. ORDER DISMISSING BOISE PROJECT'S MOTION IN LIMINE

On August 18, 2015, the Boise Project filed a *Motion in Limine* seeking an order precluding the State and United Water from introducing expert witness testimony for the reason that no expert witness was disclosed by either of these parties. Because the trial has been vacated, the *Motion* is moot and is therefore **dismissed.**

IX. ORDER DISMISSING BOISE PROJECT'S MOTION TO STRIKE

On August 18, 2015, the Boise Project filed the *Boise Project's Motion to Strike and Motion for Sanctions* ("*Boise Project's Motion to Strike*"). The *Motion* seeks an order striking the *State of Idaho's Cross-Motion for Summary Judgment*, the *Memorandum in Support* thereof, and the *Fifth Affidavit of Michael C. Orr* on the grounds that the State's *Cross-Motion for Summary Judgment* is directly contrary to the testimony of the State's 30(b)(6) deponent. For the reason that the *State of Idaho's Cross-Motion for Summary Judgment* is herein dismissed, the *Boise Project's Motion to Strike* need not be addressed and is accordingly **dismissed.**

X. RECOMMENDATION ON BOISE PROJECT'S MOTION FOR SANCTIONS

The *Boise Project's Motion to Strike* seeks an order requiring the State to pay the costs associated with responding to the *State of Idaho's Cross-Motion for Summary Judgment*. The basis for the *Motion* is that the State's I.R.C.P. 30(b)(6) witness stated in his deposition testimony that the State had "no position" on whether the late claims should be disallowed and "no position" on whether or not water that is captured in the Boise River Reservoirs following flood control releases is put to beneficial use, but that in all likelihood such water was either put to beneficial use or carried over to the next season. *Boise Project's Motion to Strike* at 1. The Boise Project asserts that these non-positional statements are directly contrary to the *State of Idaho's Cross-Motion for*

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words, the existing storage rights are not considered to be "off" because they are "no longer in priority",

Summary Judgment wherein the State seeks disallowance of the claims. The Boise Project also asserts that the State's non-positional statement regarding whether the water captured in the Boise River Reservoirs following flood control releases is put to beneficial use is contrary to the State's assertion in its *Cross-Motion* that the claimants (Bureau and Boise Project) have admitted that they cannot prove that such post flood-control release water was put to beneficial use.[22]

In analyzing the State's "position" (or lack thereof), the starting point is Idaho Code § 42-1412 (2) which states in relevant part:

> If a party other than the claimant or the objector desires to participate in the proceeding concerning a particular objection, the party shall file a response to the objection that states the position of the party.

I.C. § 42-1412 (2) (emphasis added). The *Responses* filed by the State in these subcases simply have "checked boxes" as to the elements to which the State is responding. The State's *Responses* to not provide any additional information or explanation.[23] In the absence of any additional explanation, the State's *Responses* set forth a position that the State simply agrees with the *Director's Report*. See ***Memorandum Decision and Order on Challenge***, Subcase Nos. 36-00061 et al., (September 27, 1999) p. 16 ("In contested subcases where NSGWD agrees with the Director's Report . . . they can file a Response (Standard Form 2) which, in essence, would state: 'We agree with the Director's Report.'"). As discussed in Section IV above, the *Director's Report* provides two things: (1) an ultimate conclusion (that the claims should be disallowed); and (2) the reason for

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rather they are "off" because the annual volumetric limitation has been met.

[22] The State's legal theory regarding the Claimant's burden of proving beneficial use to support their claims is that the stored water that has historically been beneficially used has been used under the authority of the existing storage rights irrespective of whether the water in the Boise River Reservoirs was stored under the existing storage rights or stored pursuant to "Constitutional method" water rights. In other words, under the State's theory, even though the "existing storage right" water may have been released downstream at a time of year when it cannot be used, the water that replaces the "existing storage right" water is beneficially used under the existing storage rights, just not stored under the existing storage rights. The result of this legal theory is that the claimants would be required to prove additional use (irrigated acreage) beyond that which is authorized under the existing storage rights. See *State's Memo in Support of Cross-Motion* at 52-56.

[23] The document entitled "*Instructions for Filing Responses to Objections to Water Rights in the Snake River Basin Adjudication*" which is an attachment to *SRBA Administrative Order 1, Rules of Procedure*, states: "You may attach any explanation or documentation that you feel is necessary to support your Response."

disallowance being that the water claimed in the late claims is not appropriable because it has been stored pursuant to "historic practice."

The Boise Project asserts that I.R.C.P. 11(a)(1) authorizes imposing sanctions including the payment of costs incurred in responding to the *State's Cross-Motion for Summary Judgment* which is inconsistent with the testimony of the State's 30(b)(6) deponent. The imposition of such sanctions is committed to the discretion of the trial court. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1990). Abuse of discretion is evaluated based upon three factors: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether it acted within the boundaries of its discretion and consistently with applicable legal principles; and (3) whether it reached its decision through an exercise of reason. *Id.*

A. Analysis of Sanctions Regarding the Statement of the 30(b)(6) Deponent that the State has no Position as to Whether the Claims Should be Disallowed or Not.

The purpose of the discovery rules in the Idaho Rules of Civil Procedure is to facilitate fair and expedient fact gathering. *Edmunds v. Kraner, M.D.*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006). The State's 30(b)(6) deponent stated that "the State [does not have] an agreement, or a disagreement with the recommendations [in the Director's Report]" and that "[the State does not] have a position currently on whether that recommendation should move forward or not." *30(b)(6) Deposition Transcript*, p. 16 (reproduced in *Boise Project's Motion to Strike* at 4). The assertion of the 30(b)(6) deponent to the effect that the State has no position on whether the claims should be disallowed or not is not a matter of fact subject to being discovered under the discovery rules; rather it is a position regarding the ultimate disposition of the above-captioned claims. The Boise Project is correct in its assessment that this statement of position made by the 30(b)(6) deponent is inconsistent with the relief sought in the *State's Cross-Motion for Summary Judgment*. The deponent's statement of position is also inconsistent with the *Response* filed by the State which takes a position of agreeing with the *Director's Report* (that the claims should be disallowed for reason of water storage under "historic

practice"). However, the State's position in its *Response* is consistent with its *Cross-Motion for Summary Judgment* at least as to the ultimate disposition of disallowance of the claims.[24] Despite the inconsistencies, the Boise Project cannot be heard to have been "sandbagged" by the State's filing of its *Cross-Motion for Summary Judgment*. The Boise Project has known since the time it received notice of the State's *Responses* that the State sought disallowance of the claims. In accordance with the foregoing, and in an exercise of reason and within the boundaries of discretion, this Special Master concludes that the inconsistencies between the State's *Response*, the testimony of the State's 30(b)(6) deponent, and the *State's Cross-Motion for Summary Judgment*, should not be sanctioned as to the costs incurred by the Boise Project in responding to the *Cross-Motion*.

B. Analysis of Sanctions Regarding the Statement of the 30(b)(6) Deponent that the State has no Position as to Whether or Not Water Captured in the Reservoirs After Flood-Control Releases was put to Beneficial Use.

Another "no-position" statement by the 30(b)(6) deponent that the Boise Project asserts is inconsistent with the *State's Cross-Motion for Summary Judgment* is in effect that the State has no position on whether the water captured in the Boise River Reservoirs following flood control releases has been put to beneficial use. *30(b)(6) Deposition Transcript*, p. 18 (reproduced in *Boise Project's Motion to Strike* at 5). The disagreement between the State and the Boise Project regarding the question of whether or not the water contained in the Boise River Reservoirs at the time of maximum physical fill in a flood-control year has been put to beneficial use is not a disagreement as to facts. There is not a factual dispute that such water has historically been put to beneficial use; rather the disagreement is in regard to whether such use occurred under the "irrigation from storage" component of the existing storage rights or whether the same use could be the beneficial use that forms the basis of the above-captioned claims. The State's legal theory is that the beneficial use of the water in the Boise River Reservoirs at the time of

[24] In its *Motion for Summary Judgment*, the State lists four reasons that the late claims should be disallowed, none of which are that the post flood-control release water was stored pursuant to "historic practice" as is asserted in the *Director's Report*.

maximum physical fill, in a year in which water was previously released to be in compliance with the rule curves of the Water Control Manual, always occurs under the existing storage rights even though the "existing storage right" water was released from the Boise River Reservoirs before it could be used.[25] The Boise Project, on the other hand, asserts that the ancillary property right under which water is stored goes hand in glove with the usufructory property right under which such water is beneficially used. In other words, water beneficially used under the existing storage rights can only be water that is stored under the existing storage rights; and if water is stored under some authorization other than the existing storage rights, then the beneficial use of such water may properly be the basis of the above-captioned claims.

The State's 30(b)(6) deponent did not opine as to whether the beneficially used water was used pursuant to the existing storage rights or otherwise. Again, there is not a factual dispute that the water in the Boise River Reservoirs at the time of maximum physical fill has been put to beneficial use; rather there is a legal dispute as to whether such use can lead to the creation of a water right under the Constitutional method of appropriation. Therefore, irrespective of the answer to this legal issue, the deponent's cautiously circumspect answer is consistent with the legal position taken by the State in its *Cross-Motion*.

In accordance with the foregoing, and in an exercise of reason and within the boundaries of discretion, this Special Master concludes that the alleged inconsistencies between the testimony of the State's 30(b)(6) deponent and the *State's Cross-Motion for Summary Judgment* should not be sanctioned as to the costs incurred by the Boise Project in responding to the *Cross-Motion*. Therefore, this Special Master **recommends** that the SRBA District Court enter a final order denying the Boise Project's and Ditch Companies'[26] motion for sanctions.

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[25] At oral argument on the *State of Idaho's Motion for Protective Order* (held July 14, 2015), Deputy Attorney General Garrick Baxter stated: "Originally when the Department tried to go through and investigate the beneficial use claims, we came to the conclusion that we were unable to see additional beneficial use beyond what is taking place under what we've referred to as the existing storage water rights and so they were disallowed." *Reporter's Transcript, Motion for Protective Order on Behalf of the State of Idaho*, p. 6, ll. 1-6.

[26] On August 18, 2015, the Ditch Companies filed a joinder in the Boise Project's *Motion to Strike*.

XI. RECOMMENDATION ON STATE OF IDAHO'S MOTION FOR AWARD OF REASONABLE ATTORNEY FEES PURSUANT TO RULE 11(A)(1)

On August 25, 2015, the State filed a *Motion for Award of Reasonable Attorney Fees Pursuant to Rule 11(A)(1)* ("*Rule 11 Motion*") seeking an award of the costs of reasonable attorney fees incurred in responding to the Boise Project's August 18, 2015, *Motion to Strike and Motion for Sanctions*. The basis of the State's *Rule 11 Motion* is the assertion that the relief sought in the *Boise Project's Motion to Strike* is not authorized by the Rules under which it was brought – i.e. that the Boise Project failed to make a reasonable investigation into the applicable law regarding its *Motion to Strike*.

Specifically, the State asserts that the Boise Project, prior to filing its *Motion to Strike*, failed to ascertain: (1) that Rule 11 only authorizes the striking of a filing for failure to be signed (and the *State's Cross-Motion* was signed); (2) that under Rule 37, only "pleadings" may be stricken (and a motion for summary judgment is not a pleading); and (3) that under Idaho law a motion to strike a motion for summary judgment is not cognizable under *McPheters v. Maile*, 138 Idaho 391, 396, 64 P.3d 317 322 (2003).

The Boise Project responds that the State is bound by the testimony of its 30(b)(6) deponent (citing *CUMIS Insurance Society v. Massey*, 155 Idaho 942, 947, 318 P.3d 932, 937 (2014)); that the July 14, 2015 bench order denying the *State of Idaho's Motion for Protective Order* is the type of order contemplated under I.R.C.P. 37(b)(2); that the State's 30(b)(6) deponent provided evasive answers in violation of that bench order; that such violation is sanctionable under I.R.C.P. 37(b)(2)(B) and 37(e); and that such sanctions include striking or excluding anything that is at odds with that testimony of the 30(b)(6) deponent.

As is ordered in Section VII above, the *State of Idaho's Cross-Motion for Summary Judgment* is dismissed for the reason that the issues raised therein do not need to be addressed given the disposition of the Ditch Companies' and Boise Project's *Motions for Summary Judgment*. It would be improper for this Special Master to engage in a detailed hypothetical analysis of whether the *State of Idaho's Cross-Motion for*

Summary Judgment and accompanying *Fifth Affidavit of Michael C. Orr* would or would not be subject to being stricken under the different legal analysis provided by the parties. That being said, the Boise Project, in its *Motion to Strike*, is making an allegation that the testimony of the State's 30(b)(6) deponent is at odds with the position taken by the State in its *Cross-Motion for Summary Judgment*; that the State is purposefully being obfuscatory in its role as Respondent in these subcases, and that such conduct is sanctionable under the Idaho Rules of Civil Procedure. In the absence of conducting a detailed legal analysis of a moot question (i.e. can the *State of Idaho's Cross-Motion* be stricken?), the only question is whether the Boise Project met the minimum requirement of reasonable inquiry and has a good faith argument of what the law is or should be with respect to this question.

In accordance with the foregoing, and in an exercise of reason and within the boundaries of discretion, this Special Master finds, based on the file and record herein, and upon the comments made at oral argument on this matter, that the legal theories under which the Boise Project filed its *Motion to Strike* demonstrate the requisite "reasonableness" as is required under I.R.C.P. 11(a)(1), and that such *Motion* was made in good faith. Therefore, this Special Master **recommends** that the SRBA District Court enter a final order denying the State of Idaho's and United Water's[27] *Motion for Sanctions*.

XII. ORDERS AND RECOMMENDATIONS

In accordance with the foregoing, the *Motion for Summary Judgment* filed by the Ditch Companies and the Boise Project are **granted**. The *Cross-Motion for Summary Judgment* filed by the State **is dismissed**. The *Motion in Limine* filed by the Boise Project is **dismissed**. The *Motion to Strike* filed by the Boise Project is **dismissed**.

IT IS RECOMMENDED that the SRBA District Court enter a final order, pursuant to I.R.C.P. 54(b), disallowing the above-captioned water right claims.

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[27] On September 2, 2015, United Water filed a joinder in the State's *Motion for Sanctions*.

IT IS FURTHER RECOMMENDED that the SRBA District Court enter final order denying the Boise Project's motion for sanctions and the State of Idaho's motion for sanctions.

Dated _____

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

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MEMORANDUM DECISION AND RECOMMENDATION
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Docket No. 44677-2016

Appellants' Opening Brief

APPENDIX 2

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

In Re SRBA	) Subcase Nos. 63-33732 (Consolidated
	) Subcase no. 63-33737), 63-33733
Case No. 39576	) (Consolidated subcase no. 63-33738),
	) and 63-33734
	)
	) **ORDER DENYING MOTIONS TO**
	) **ALTER OR AMEND**
	)

I. ANALYSIS OF GENERAL ALLEGATIONS OF ERROR

A. There is a Justiciable Controversy.

In their respective *Motions to Alter or Amend Special Master's Recommendation* the State and Suez Water Idaho Inc.[1] assert that the above-captioned claims should be disallowed solely on the grounds of mootness because all of the motions for summary judgment filed by the parties seek disallowance of the claims. While recognizing that the motions for summary judgment filed by the Ditch Companies and the Boise Project relied on entirely different reasoning as compared to the motions for summary judgment filed by the State and Suez, the State nevertheless asserts that those differences are meaningless under circumstances where all parties seek the same end result. The State

[1] Suez Idaho Water Inc., FKA United Water Idaho Inc. ("Suez"), filed both a *Motion to Alter or Amend Special Master's Recommendation* (filed November 20, 2015) and a *Notice of Participation in State of Idaho's Motion to Alter or Amend* (filed December 14, 2015). In its *Notice of Participation*, Suez states that it supports the *State's Motion*. Therefore, references herein to assertions made by the State also include the same assertion made by Suez although not expressly stated.

argues that because the parties seek the same end result there is no adversity and hence no justiciable controversy.

While it is true that the parties have all argued for disallowance of the claims, the end result sought by the Boise Project and the Ditch Companies is that the water stored in the Boise River Reservoirs after flood control releases is stored pursuant to a property (water) right (whether it be under the existing storage rights or, alternatively, under the above-captioned claims); whereas the end result sought by the State is that the water stored in the Boise River Reservoirs after flood control releases is not stored pursuant to a property (water) right. Stated differently, the penultimate result sought by the parties (disallowance of the claims) is the same, but the ultimate result is very, very different. Accordingly, the *State's Motion* that the above-captioned claims be recommended disallowed on the grounds of mootness or lack of justiciable controversy is **denied.**

B. The *Recommendation* Does Not Exceed the Authority Set Forth in the *Orders of Reference.*

The State argues that the ***Orders of Reference***[2] issued by the Presiding Judge do not provide for the authority to address the "threshold" issue presented by the Ditch Companies' and the Boise Project's motions for summary judgment. The ***Orders of Reference*** direct this Special Master to "conduct all further proceedings necessary to issue a recommendation consistent with the Court's ***Summary Judgment Order***." The ***Summary Judgment Order***[3] resolved the issue of whether the claims filed by the "Irrigation Entities" must be disallowed as a matter of law "based upon the Idaho Supreme Court's analysis in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007)." *Id.* In the ***Summary Judgment Order***, the Presiding Judge stated that "the claimants must establish the two essentials for obtaining a water right under the constitutional method – diversion and application of the water to beneficial use." *Id.* at 5.

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[2] The Presiding Judge issued the following *Orders of Reference* in these subcases: ***Order of Consolidation; Order of Reference***, Subcase No. 63-33732 (Consolidated Subcase No. 63-33737) (Jan. 9, 2015) (Arrowrock); ***Order of Consolidation; Order of Reference***, Subcase No. 63-33733 (Consolidated Subcase No. 63-33738) (Jan. 9, 2015) (Anderson Ranch); ***Order of Consolidation; Order of Reference***, Subcase No. 63-33734 (Jan. 9, 2015) (Lucky Peak).

[3] ***Order Granting in Part and Denying in Part Motion for Summary Judgment***, Subcase Nos. 01-10614 et al. (Jan. 9, 2015).

The State argues that this language from the ***Summary Judgment Order*** imposes a limitation that precludes inquiry into any matter that falls outside the scope of the claimant's burden to show the aforementioned two essentials. This Special Master disagrees that the ***Summary Judgment Order*** intended such a limitation. However, assuming *arguendo* that such limitation was so imposed, the State's argument still fails. Under the constitutional method for the appropriation of a water right – wherein the claimant must demonstrate diversion of water and its application to beneficial use – the water so diverted and beneficially used must be water that is subject to appropriation, i.e. water not already appropriated under a prior water right. In *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072, 1074 (1919), the Idaho Supreme Court stated, "When one diverts water hitherto unappropriated and applies it to a beneficial use, his appropriation is complete, and he acquires a right to the use of such water . . . ." *Id.* (emphasis added).

In these subcases, the issue raised by the Ditch Companies and the Boise Project goes directly to the question of whether the water stored in the Boise River Reservoirs was subject to being appropriated. If the water stored in the Boise River Reservoirs after flood control releases is stored pursuant to the existing storage rights, it is not subject to being appropriated.

C. The *Recommendation* Utilized the Correct Summary Judgment Standard.

The State asserts that this Special Master stated an incorrect legal standard regarding the role of a court in ascertaining facts and drawing inferences therefrom in an action where the court rather than a jury is the fact finder. The State also asserts that this Special Master misapplied the correct legal standard. As a starting point, let us first consider what is the appropriate legal standard regarding fact-finding in an action where there is a motion for summary judgment and no jury. The Ditch Companies cite to the following passage from *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982), as a succinct statement of the correct standard:

> This Court has held in the past that even though there are no genuine issues of material facts between the parties "a motion for summary judgment must be denied if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable men might reach different conclusions." ***Such a rule is proper where the matter is to be tried to a jury***, because even though evidentiary facts may be undisputed, those

> evidentiary facts may yield conflicting inferences as to what the ultimate facts of the case are. If such conflicting inferences are possible, then summary judgment would deprive the parties of the right to have the jury make the decision in the matter. ***Nevertheless, where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.***

Ditch Companies' Response to Motion to Alter or Amend Special Master's Recommendation at 13 (citations omitted; emphasis added by Ditch Companies). The passage quoted above discusses three concepts: (1) evidentiary facts; (2) inferences that can be drawn from evidentiary facts; and (3) ultimate facts. The trier of fact is tasked with finding the ultimate facts of the case. The ultimate facts are derived from the evidentiary facts presented to the fact-finder and the inferences that the fact finder draws from those evidentiary facts. With respect to disputed evidentiary facts, it matters not whether the fact finder is the court or a jury – in either case such disputed evidentiary facts must be presented at trial where the fact finder can judge, among other things, the credibility of the witnesses. Conversely, if the evidentiary facts are not in dispute, it does matter whether the fact finder is a court or a jury. If the fact finder is a jury, then summary judgment is improper if the nature of the evidence is such that reasonable people might reach different conclusions based upon the inferences they might draw therefrom. The reason for this is that it is the province of the jury to draw the inferences and reach the conclusions. However, where the court is the fact finder and hence is responsible for drawing inferences from undisputed evidentiary facts, there is no useful purpose for that process to occur in a trial setting and therefore summary judgment is proper.

Based upon the standard set forth in the above-quoted passage from the Idaho Supreme Court, the State is correct in its assertion that this Special Master may not make findings as to the ultimate facts where the evidentiary facts are in dispute. However the State is incorrect in its assertion that this Special Master may not draw inferences from undisputed evidentiary facts.

D. The Legal and Factual Support for the Simple Premise that the Storage Water Put to Beneficial Use is the Same Water Stored Pursuant to the Existing Storage Rights.

The State argues that the ***Recommendation*** does not cite any legal or factual support for the holding in the ***Recommendation*** that the water put to beneficial use is the same water that is stored pursuant to existing storage rights. *State's Motion* at 9, n.13. With respect to the factual support, see section II. A. below.

With respect to the legal support for the conclusion reached in the ***Recommendation***, such support lies in the fundamental nature of the prior appropriation doctrine, which is the legal method for the creation of property rights in water in Idaho. The prior appropriation doctrine is not some abstraction that has been randomly adopted by the Idaho Legislature. To the contrary, the prior appropriation doctrine is deeply rooted in the philosophical concept of private property articulated by John Locke, who explained that when an individual combines his or her labor with unused land or other naturally occurring resources, the result is private ownership. Under the prior appropriation doctrine in Idaho, unused water is available to individuals who can apply their ideas and labor with the goal of producing something of value from the unused and thereby increase their material well-being. John Locke stated: "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common." John Locke, Two Treatises of Government p. 148, § 32 (New Ed., 1824). With respect to the appropriation of water under the prior appropriation doctrine, the "enclosure" is the priority date. The creation of a property right that results from combining a person's ideas, capital, and labor with a previously unused natural resource (e.g. water) is the means by which such combination can survive into the future.

With this concept in mind, it cannot be said that an appropriator of water somehow acquired a property right in water that he or she did not and cannot use (i.e. the water that must be released down the river before it can be beneficially used); but yet cannot acquire a property right in the water that is actually used (i.e. the water in the Boise River Reservoirs at the time of maximum physical fill). The property rights embodied in the ***Partial Decrees*** for the existing storage rights could not have come into

existence without the application of the individual human labor invested by the irrigators and other end users into making productive use of the water. And no property rights could have been created in water that flows down the river, unused. *Ergo* the water that is beneficially used (i.e. the water in the Boise River Reservoirs at the time of maximum physical fill) is the water in which the prior-appropriative property rights pertain. To argue otherwise contravenes the fundamental nature of how property rights in water are created and reduces the prior appropriation doctrine to an ungrounded abstraction.

E. The Factual and Legal Questions Concerning Whether the Claimants are Capable of Carrying Their Burden of Proof Need not be Answered.

The State argues that the claimants of the above-captioned water rights (the Bureau and the Boise Project) are incapable of proving actual beneficial use of water to support the claims because it is undisputed that the amount of stored water subsequently applied to beneficial uses did not exceed the annual quantity of the existing storage rights. *State's Motion* at 16-17. Therefore, the State argues, the above-captioned water rights should be recommended disallowed on this basis and the "threshold" issue posited by the Ditch Companies and the Boise Project need not be answered. The State made this same argument in its *Cross-Motion for Summary Judgment. See State of Idaho's Memorandum in Support of Cross-Motion for Summary Judgment* (filed August 4, 2015) at 49. In the ***Recommendation*** this Special Master determined this issue to be moot and therefore did not address it. The State raises the issue again in its *Motion to Alter or Amend* but does not explain why the previous determination of mootness is incorrect.

This issue raised by the State involves a determination of law regarding the correctness of the State's legal theory that underlies this issue. The State's theory in this regard is that the actual beneficial use of the water stored in the Boise River Reservoirs can only occur under the authority of the existing storage rights irrespective of whether the legal authority to store the water is "historic practice." In other words, the State asserts that the above-captioned claims would have to be proven by showing the beneficial use of water above and beyond the use that annually occurs within the place of use for the existing storage rights. Given the holding in the ***Recommendation***, which is not altered or amended herein, there is no reason to answer this question.

F. The *Recommendation* does not and Should not Determine Whether the Water Stored in the Boise River Reservoirs at the Time of Maximum Physical Fill was Stored "In Priority."

In its *Motion to Alter or Amend*, Suez asserts that the ***Recommendation*** improperly determined that the existing storage rights "remain in priority until the time the Boise River's federal on-stream reservoirs reach their maximum physical contents each year regardless of whether water is released, vacated, or bypassed for flood control purposes." *United Water's Motion to Alter or Amend the Special Master's* ***Recommendation*** (filed November 27, 2015) at 2. Suez further asserts that the ***Recommendation*** states that the water in the Boise River Reservoirs at the time of maximum physical fill is "stored under the existing storage rights" without expressly stating whether such storage occurs "in priority" meaning "to the potential detriment of junior water users." *Id.* at n. 2.

With respect to Suez's assertion that the existing storage rights remain in priority for the entire storage season (i.e. November 1 through the time of maximum physical fill), it should be noted that this assertion is inconsistent[4] with the following statement in the ***Recommendation***: "United Water and the State are correct in their assertion that the quantity element of the existing storage right[s] cannot be exceeded for water that is stored pursuant to such rights." ***Recommendation*** at 12-13.

With respect to Suez's complaint that the ***Recommendation*** does not specify whether the storage of the water contained in the Boise River Reservoirs at the time of maximum physical fill occurs in priority and therefore to the "potential detriment of junior water users," it is beyond the scope of these proceedings for this Special Master to opine regarding possible results of competition for scarce water between junior water users and the existing storage rights. That being said, for purposes of providing a sufficient explanation in response to Suez's complaint that the ***Recommendation*** provides no guidance on when the existing storage rights are "in priority," this Special Master makes the following observations. Priority is the means to allocate scarcity – i.e. it comes into play when the demand on a particular water resource exceeds the supply.

[4] Assuming a year in which flood control operations occur.

As noted by Hydrologist Cresto in her *Affidavit*, "[t]he problem during the flood control period . . . is managing excess flows." *Affidavit of Elizabeth Anne Cresto* ¶ 27. With respect to the Boise River Reservoirs, the accounting system used by IDWR since 1986 often utilizes the concept of priority not to allocate scarcity but rather to dictate to the Bureau and the water users what water IDWR considers to be stored under the existing storage rights (i.e. legally and physically available water beginning November 1) and what water is not stored under the existing storage rights (i.e. the water in the Boise River Reservoirs, in a flood control year, at the time of maximum physical fill).

In the absence of actual competition between junior and senior water rights under conditions of scarcity, a determination of "in priority" or "out of priority" is purely hypothetical or fictional. Accordingly, it would be improper for this Special Master to opine as to whether the storage of the water that is contained in the Boise River Reservoirs at the time of maximum physical fill was hypothetically "in priority" or "out of priority." Presumably, any water that is stored under authority of a senior water right to the actual as opposed to "potential" detriment of a junior water user would necessarily have to count towards the satisfaction of the senior water right. Also, presumably, such stored water would count toward the senior's right irrespective of whether the senior was able to store such water until the time it could be beneficially used; and the risk of such water having to be prematurely released would fall on the senior. But the above-captioned subcases do not present any issues that would require satisfying Suez's complaint by mentioning one way or the other as to whether the storage of such water occurs under a hypothetical priority.

II. ANALYSIS OF SPECIFIC ALLEGATIONS OF ERROR

A. Existing Storage Rights were Historically Considered to be Satisfied at Time of Maximum Physical Fill.

We now turn to the specific instances where the State asserts that this Special Master improperly determined ultimate facts based upon disputed evidentiary facts. The first instance argued by the State is with respect to the point in time at which the existing storage rights were historically considered to be satisfied. This Special Master stated the

ultimate fact thusly: "The record in these subcases clearly demonstrates the undisputed fact that the existing storage rights were historically considered satisfied at the point in time that the reservoirs reached maximum physical fill . . . ." ***Recommendation*** at 21. This ultimate fact was restated on page 26 of the ***Recommendation***: "The undisputed facts in the record indicate that the water stored in the Boise River Reservoirs at the time of maximum physical fill has historically been considered by the Bureau, the Idaho Department of Water Resources, the watermasters, and the water users as having been stored pursuant to the existing storage rights." *Id.* at 26.

The State asserts that the evidentiary facts underlying this conclusion are disputed. Specifically, the State asserts that: "[S]ince 1986, the 'maximum physical fill' of the reservoirs has never been the measure of the satisfaction [of] the existing reservoir water rights . . . ." *State's Motion* at 12, citing *Cresto Aff.* ¶¶ 12-13, 19, 22 & Ex. C at 9-11; *Second Sutter Aff.* ¶¶ 4-6. Before examining the evidentiary facts and inferences that underlie this conclusion it is important to note that the Bureau, the Ditch Companies, and the Boise Project not only have historically viewed the reservoir rights to be satisfied at the time of maximum physical fill, they also presently have this view. Therefore, the only question is whether the State of Idaho through the Idaho Department of Water Resources has historically held this view.

The error alleged by the State is in regard to the historical view of the Idaho Department of Water Resources ("IDWR") "since 1986." However the relevant historical time period regarding the above-captioned claims is prior to 1971, not after 1986. In her *Affidavit*, Hydrologist Cresto states: "Prior to implementation of water rights accounting [in 1986] . . . [a]ccruals to reservoir water rights were not determined on a daily basis but rather on the date of maximum total reservoir fill." *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) (footnote omitted). The inference to be drawn from this statement is that the time period of "prior to implementation of water rights accounting [in 1986]" includes the time period of prior to 1971. There are no evidentiary facts in the record that call into question whether or not during the time period that relates to the above-captioned claims (1965 for the Bureau's claims) that anybody, including IDWR, viewed the existing storage rights as being satisfied by water that was released from the reservoirs for flood control purposes. While IDWR has

adopted a contrary view sometime after 1986, it would be a factually unsupported fiction to retrospectively assign the current view of IDWR to the time period prior to 1971.

The State points to evidentiary facts in Hydrologist Cresto's *Affidavit* and the *Second Affidavit of Robert J. Sutter Sutter* to show that prior to 1986, "there was no priority-based accounting or water rights administration during the 'storage season,' which ended on or near the date of 'maximum physical fill.'" *State's Motion* at 12, citing *Cresto Aff.* ¶ 17-18, 28 & Ex. C at 12; *Second Sutter Aff.* ¶ 7. Apparently, the State is urging that an inference be drawn from this undisputed evidentiary fact to the effect that IDWR did not hold the view (prior to 1971) that the existing storage rights were satisfied by the water actually in the reservoirs at the time of maximum physical fill.

For the following reasons this Special Master can draw no such inference. First, it is not at all clear what the State deems to be significant about the lack of "priority-based accounting" during the storage season. By way of explanation, let us assume the following hypothetical facts: 1) a year in which water is released from a reservoir for flood control purposes during the storage season; 2) the amount of "legally and physically available" water calculated for the reservoir has equaled the quantity of the water right; 3) the reservoir is not physically full; 4) all other water rights on the system are being "satisfied" either because they are receiving water or because they are not demanding water; and 5) water entering the reservoir continues to be captured, albeit "out of priority" as the State uses that term. Under these circumstances, the State insists that the reservoir can legally continue to fill so long as all other junior water rights are getting (or don't want) water. In other words, the State asserts that the existing reservoir rights can continue to fill during times when there is no scarcity. Priority is the system for allocating scarcity. So to say that there is "no priority-based accounting or water rights administration" during a time of the year when there is no scarcity is nonsensical.[5]

[5] The peculiarity of applying priority based accounting and/or administration during a time of plenty is exemplified in the *Affidavit* of Hydrologist Cresto, wherein she states: "The problem during the flood control period . . . is managing excess flows. Water right priority determines distributions during times of shortage, and was not recognized or enforced during the flood control period in years before 1986." *Id.* at ¶ 27 (emphasis added). This begs the question: If priority determines distribution during times of shortage (which it does), then what is the manifestation of priority during the flood control period, which is by definition not a time of shortage?

Whatever the State thinks is the significance of there not having been "priority-based accounting and administration" during times of non-scarcity, this Special Master declines to arrive at the inference that IDWR historically viewed (meaning pre-1986) the existing storage rights to be satisfied by water that was released to make room for anticipated flood waters.

The second reason why this Special Master cannot draw such an inference regarding the historical perspective of IDWR is derived from the State's argument that after 1986, things changed. If the "priority-based accounting and administration" (implemented in 1986) is the basis for "paper-fill" to have become the measure of the satisfaction of the existing storage rights, then it stands to reason that prior to 1986, "paper-fill" was not the measure of the satisfaction of the existing storage rights. Either the nature of the existing storage rights changed in 1986 or it didn't. All the parties, including the State, agree that the method of accounting does not define the nature of the exiting storage rights. In his *Affidavit*, Engineer Sutter states:

> Storage Water Right Accounting During Flood Control Operations. A computerized system was developed and adapted in 1986 by myself and the IDWR Hydrology Section Manager Alan Robertson, with the assistance of other IDWR staff, to account for the distribution of water to Boise River water rights and to reservoir storage spaceholders. The accounting system did not alter the above-described principles or the accrual of water to storage pursuant to the reservoir operating plan of the Water Control Manual.

Affidavit of Robert J. Sutter (filed July 2, 2015) ¶ 6 (emphasis added). The crux of the "threshold" question is whether the water that is claimed by the Bureau to have been appropriated in 1965 was already appropriated under the existing storage rights. The historical view of IDWR is relevant to this inquiry. The State would have us believe that even before 1986 IDWR considered the existing storage rights to be satisfied by water that was released for flood control purposed, just that nobody was counting. In other words, the State seeks to retrospectively project its current view (i.e. post-1986 view) to 1965, even though it agrees that the method of accounting used by IDWR does not define the existing storage rights and even though the evidence in the record from Engineer Sutter is that "[t]he [1986] accounting system did not alter the above-described

principles or the accrual of water to storage pursuant to the reservoir operating plan of the Water Control Manual."

As previously stated, either the nature of the existing storage rights changed in or after 1986 from being satisfied at the time of maximum physical fill to being satisfied upon the accrual of all "legally and physically available" water, or the rights did not change. If there was no change, such non-change cannot be explained by retrospectively applying the current view of IDWR to 1965; and it is beyond the scope of these proceedings to determine if IDWR's 1965 view is applicable to the present.

In accordance with the foregoing, this Special Master declines to alter the factual finding that IDWR historically (meaning at times relevant to the above-captioned claims, i.e. prior to 1971) viewed the existing storage rights to be satisfied at the time of maximum physical fill.

B. It is Not Material Whether there was a Daily Accounting of Water Distributions for the Existing Storage Rights Prior to 1986.

The State argues that this Special Master improperly resolved a disputed issue of material fact by finding that whether or not there was a daily accounting of water distributions for the existing storage rights prior to 1986 is not material to the resolution of the issues presented on summary judgment. *State's Motion* at 13. By way of background, the record in these subcases contains two conflicting descriptions of the daily accounting of the existing storage rights prior to 1986. In Exhibit C to her *Affidavit*, Hydrologist Cresto states (with regard to pre-1986 accounting): "Accruals to reservoir water rights were not determined **daily** . . . ." *Affidavit of Elizabeth Anne Cresto*, Ex. C, p. 12 (emphasis added). However, in his *Affidavit*, Watermaster Sisco, in describing how he was trained by his predecessor Henry Koelling, states: "If outflows [of Lucky Peak] exceeded inflows, decreasing reservoir contents, Mr. Koelling reduced the **daily** allocation of natural flow to the reservoir storage rights accordingly." *Affidavit of Lee Sisco* (filed August 25, 2015) ¶ 5 (emphasis added). This Special Master did not make a factual finding as to whether or not there was any daily accounting (before 1986) of the existing storage rights during the storage season, but rather simply pointed out, in a

footnote, that there appears to be a factual discrepancy in this regard and stated that such factual discrepancy is not material to the issues presented on summary judgment.

If the State is arguing that the fact of whether or not there was a daily accounting during the storage season prior to 1986 is material, it has provided no analysis as to why this would be the case. Accordingly, this Special Master declines to alter the conclusion that no factual findings need be made in this regard for the reason that the answer to the factual question would not change the outcome on summary judgment and is therefore not material.

C. The Statement in the *Recommendation* to the Effect that the Priority Element of a Water Right that has Both a Storage and Use Component has Significance Only with Respect to the Accumulation of Storage and Not Use is Not a Factual Finding.

The State argues that this Special Master improperly resolved disputed material fact in the following passage from the ***Recommendation***:

> The priority date for the previously decreed water rights has significance only with respect to the right to capture and store water in the Boise River Reservoirs to be subsequently used for the intended beneficial uses. Once such water has been captured and stored pursuant to a valid water right, there is no competing demand by junior water rights with respect to the "irrigation (and other uses) from storage" component of the right. Water stored in a reservoir pursuant to a valid water right is not available for use by other water rights, senior or junior, and hence it is not the priority date that protects the right to use such water; rather the priority date protects the right to capture and store such water. The priority date of a storage right protects the right to accumulate and store the water in the first place.

Recommendation at 7-8. As a preliminary matter it should be noted that the above-quoted passage is set forth in the introductory section of the ***Recommendation*** in a subsection that describes the summary judgment motions filed by the Ditch Companies and the Boise Project. The above-quoted passage does not impermissibly resolve a disputed issue of material fact. Rather it does not make any factual findings whatsoever. In the passage, this Special Master was simply making a comparison between the two components of a water right which allows for both the accumulation and storage of water and for the subsequent beneficial use of such water. The accumulation of flows into

storage necessarily must occur within the context of the tabulation of priorities relative to other hydraulically connected water rights. However, once the water is stored, such stored water is not subject to being used by others users under other water rights, and hence the priority element of the water right has no bearing on the **use** of the water previously stored. Perhaps this is stating the obvious, but it is in no way a determination of fact, disputed or otherwise.

In accordance with the foregoing, this Special Master declines to alter the above-quoted statement from the ***Recommendation***.

D. Without a Protectable Priority-Based Property Right, the Bureau and the Water Users are Left with Little to no Means to Ensure the Continued Storage and Use.

The next passage from the ***Recommendation*** that the State says impermissibly resolved disputed issues of material fact is a follows:

> The State's legal theory essentially makes the priority date meaningless in a flood control year. It is apparently not much comfort to the Bureau and the water users for the State to point out that the "excess flows" (according to the State's theory) have historically been made available to fulfill the "irrigation (and other uses) from storage" component of the existing storage rights. 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. at 8 (emphasis in original). Again, it should be noted that the above-quoted passage is set forth in the introductory section of the ***Recommendation*** in a subsection describing the summary judgment motions filed by the Ditch Companies and the Boise Project. There are no factual findings set forth in the above-quoted passage. The State cites to large portions of the record to show that the Bureau and the water users do have the means to ensure that the water that has been historically used for beneficial purposes can continue into the future in the absence of a property right for the capture and storage of water after flood control releases have occurred. However the State does not explain what exactly is the means to be used by the Bureau and the water users. This Special

Master has re-reviewed the sections of the record cited by the State and has not discovered any such means.

In accordance with the foregoing, this Special Master declines to alter the above-quoted statement from the ***Recommendation***.

E. Water Released for Purposes of Maintaining Vacant Reservoir Space for Flood Control Cannot Be Beneficially Used Under the Existing Storage Rights.

The State asserts that the ***Recommendation*** improperly determined that "flood control releases of water stored under the priorities of the decreed reservoir water rights cannot be put to beneficial use for irrigation or any other beneficial use." *State's Motion* at 14. The ***Recommendation*** does not say this. It does, however, say that water released from Lucky Peak for the purpose of maintaining vacant flood control space "cannot be used under the 'irrigation from storage' components of the existing storage rights." *Id.* at 9. The State has mischaracterized this statement from the ***Recommendation*** in two regards. First, the ***Recommendation*** does not state that the water released for flood control purposes was "stored under the priorities of the decreed reservoir water rights." Second, the ***Recommendation*** does not state that such water is forever foreclosed from being beneficially used as it makes its way down the river, but rather that such water cannot be used under the "irrigation from storage" component of the existing storage rights.

To refute the ***Recommendation***, State points to Exhibit C of the *Affidavit of Elizabeth Anne Cresto* at 11-12, and Exhibit E of the *Affidavit of Robert J. Sutter*, at section 7-26. Exhibit E of the *Affidavit of Robert J. Sutter* is the Water Control Manual for Boise River Reservoirs, which states:

> f. Distributions of Irrigation Water. Water rights for direct diversion of flow for irrigation are potentially valid only during the 1 April through 31 October irrigation season. The Boise River watermaster makes a daily calculation of natural (unregulated) flow at one or more locations near these points of diversion to sufficiently estimate the available natural flow supply. The Watermaster then credits the natural flow to appropriate users based on a list of water rights in force provided by the State of Idaho, Department of Water Resources. When the rate of diversion of a user is greater than the credited natural flow, the remainder is charged by the

> Watermaster to the user's stored water supply, or lacking storage, the rate of diversion must be reduced.
>
> In many years flood control regulation extends several weeks into the irrigation season. When Lucky Peak flood control releases are equal to or greater than the demand for irrigation water (all users are receiving an adequate supply), the entire release is considered surplus to the Boise River and the above computation of natural flow diversion by user is not necessary. During this period, no charges are made against stored water supplies.

Id. Simply stated, in some years when flood control releases are being made after the start of the irrigation season, the water so released may be used under the natural flow water rights. This is not inconsistent with the above-statement from the ***Recommendation*** which states that such flood-control released water is not used under the "irrigation from storage" component of the existing storage rights.

The ***Recommendation*** also states that "[in] years that the amount of water produced in the Boise River drainage upstream from the Boise River Reservoirs exceeds the volume of water that may be stored under the existing storage rights, such excess water must necessarily be released downstream during the non-irrigation season with no beneficial use being made thereof." *Id.* at 27. This statement is true for the majority of water that is released for flood-control purposes; with the exception being that in some years there is some overlap between the time of year when such flood control releases are being made and the irrigation season. This Special Master recognizes that there is such an exception. The State has not made clear however, what bearing this exception has on the "threshold" question of whether the water right claims represented by the above-captioned water right numbers are for unappropriated water or whether such water was already appropriated under the existing storage rights.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

F. There is no Dispute Regarding Whether the Boise River Dams Divert Water Out of River Channels.

The State argues that this Special Master erred by resolving the disputed issue of material fact about whether the dams on the Boise River do, or do not, divert water out of

the natural river channel. The problem with the State's argument is that there is no such disputed issue of material fact. The statement in the ***Recommendation*** that the State takes issue with follows a quotation from the *Affidavit of Robert J. Sutter* (filed July 2, 2015) at ¶ 19. In his *Affidavit*, Engineer Sutter explains the difference between a direct diversion (i.e. a canal or other riverbank-side diversion) as compared to the dams for the Boise River Reservoirs. Engineer Sutter states that it can be assumed that all of the water diverted by a direct diversion is diverted for beneficial use, but this assumption does not apply to the Boise River Reservoir dams because, among other things, the diversion works do not limit the flow of water to the volume of water that may be stored for beneficial use. This Special Master was simply elaborating on what engineer Sutter said by pointing out that in the case of a dam and reservoir that is located in the river channel, all of the water that comes down the river channel must necessarily pass through the reservoir and dam, and therefore such water consists of water that is authorized to be stored pursuant to the existing storage rights and water that is not authorized to be stored under the existing storage rights (under conditions where the amount of water exceeds the quantity storable under the existing storage rights). Yes, there is a diversion structure (the dam) and yes water is diverted for purposes of Idaho water law. But because the diversion structure is not designed to take some water out of the channel and leave some water in the channel, all of the water that comes down the channel must pass through the diversion. All of the water that leaves the reservoir does so via the natural river channel (with the exception of seepage and evaporation). Hence, while the dams divert the water, the water does not leave the confines of the natural channel. There are no disputed facts in this regard, and again the State has failed to demonstrate how the error it alleges has a bearing on the threshold question of whether the water right claims represented by the above-captioned water right numbers are for unappropriated water or whether such water was already appropriated under the existing storage rights.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

G. There is not a Disputed Factual Question Regarding Whether Water has Historically Been Stored in the Boise River Reservoirs Following Flood-Control Releases.

The State alleges that this Special Master improperly resolved a disputed factual question by stating that the *Director's Report* for the above-captioned subcases is premised upon "historic practice" being the legal basis for the storage of the water after flood control releases, which implicitly means that the Director has determined that such water has not historically been stored under the authority of the existing storage rights. *State's Motion* at 14. There is not a factual dispute that water has historically been captured and stored in the Boise River Reservoirs following flood control releases. The dispute between the parties is in regard to the legal basis for the storage of such water. This Special Master did not resolve a disputed question of fact regarding the historic practice of capturing water in the Boise River Reservoirs following flood control releases.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

H. IDWR has Not Always Viewed the Storage of Water Following Flood-Control Releases as Occurring under the Legal Authority of "Historic Practice."

The State asserts that this Special Master improperly resolved a disputed question of material fact by stating in a footnote that "[t]he current view of the IDWR and the State appears to be a more recent development." *State's Motion* at 14, citing ***Recommendation*** at 21 n. 12. In its *Motion*, the State asserts that "since 1986, the 'maximum physical fill' of the reservoirs has never been the measure of the satisfaction [of] the existing reservoir water rights . . . ." *State's Motion* at 12. This Special Master has made the factual finding that during the time period relevant to the above-captioned water right claims (i.e. prior to the change in law in 1971), IDWR had the view that the water physically contained in the Boise River Reservoirs at the time of maximum physical fill was the water that satisfied the existing storage rights. The current view of IDWR, which is set forth in the *Director's Report*, is that some or all of the water in the

Boise River Reservoirs at the time of maximum physical fill (in an amount equal to the "unaccounted for storage" account) is not stored pursuant to the existing storage rights, but rather it is stored under the legal authority of "historic practice." The State asserts that this change took place in 1986. There are evidentiary facts in the record to support this view. *See Cresto Aff.* ¶¶ 12, 13, 19, & 22. However, there are also evidentiary facts in the record that demonstrate this change did not take place in 1986. *See Sutter Aff.* ¶¶ 4, 5, 6, 13, 14, 20, and 21. Suffice it to say that the change took place sometime between 1986 and the present. The footnote complained of by the State was simply meant to acknowledge this discrepancy in the evidentiary facts, not resolve it. What is important to understand is that it does not matter whether the change took place in 1986 or 1996 or 2006; rather what is important is that prior to 1971 IDWR considered the existing storage rights to be satisfied by the water in the Boise River Reservoirs at the time of maximum physical fill. Any factual dispute regarding what took place after 1986 does not need to be resolved because it is immaterial to what took place before 1971.

I. It is Not Material Whether the Post-1986 Accounting Procedures Were or Were Not Operated in Accordance with the Premise that Water Physically Stored in the Reservoirs on the Date of Maximum Physical Fill is Water that was Stored Under the Existing Storage Rights

The State asserts that this Special Master improperly resolved disputed issues of fact by finding that the post-1986 accounting procedures are/were operated in accordance with the premise that the physical storage of water in the Boise River Reservoirs at the time of maximum physical fill is authorized by the existing storage rights. Nearly 30 years have come and gone since IDWR implemented the 1986 accounting system. The evidence in the record relative to the time period immediately following the transition in 1986 indicates that at that time the newly implemented accounting system was not intended to change the historical concept that the water stored in the Boise River Reservoirs at the time of maximum physical fill was stored pursuant to the existing storage rights. See *Affidavit of Robert J. Sutter* (filed July 2, 2015) ¶¶ 4, 5, 6, 13, 14, 20, & 21. However, this is not the present-day view of IDWR. See *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) ¶¶ 12, 13, 19, & 22. The record in these subcases does

not pinpoint the exact time at which IDWR's historical view morphed into its current view. As explained by Engineer Sutter in his deposition testimony in subcase 63-3618, several changes have been made to the accounting system over the years. *Deposition of Robert J. Sutter, Volume II*, pp 188-191, attached as Ex. 19A to the *Fifth Affidavit of Michael C. Orr* (filed July 31, 2015).

This Special Master makes no factual findings regarding the exact nature of the transformation of the view of IDWR from its historical view that the water in the Boise River Reservoirs at the time of maximum physical fill was stored pursuant to the existing storage rights, to the present view that the water in the Reservoirs at the time of maximum physical fill in a year in which flood control releases were made is stored pursuant to historic practice. The statements complained of in the ***Recommendation*** were not intended to be findings of fact but rather an explanation that such a change has occurred. No specific factual findings need be made regarding any post-1986 transformation because it is not material to the resolution of the threshold issue on summary judgment. What is relevant and the factual finding that has been made is that prior to 1971, the view of IDWR was that the existing storage rights authorized the storage of the water in the Boise River Reservoirs at the time of maximum physical fill.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

J. The *Recommendation* Does Not Misinterpret or Misdescribe the Terms "Physically and Legally Available."

The State complains that the ***Recommendation*** improperly resolved disputed issues of material fact by misinterpreting and incorrectly describing the terms "physically and legally available." In the ***Recommendation*** this Special Master described the term "physically available" to mean "water that actually enters a particular reservoir, or water that would enter such reservoir but for being retained in an upstream reservoir." ***Recommendation*** at 4. This statement cites to the *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) at ¶ 14. Therein Hydrologist Cresto states: "[T]he flows that the water right accounting program counts or 'accrues' towards the satisfaction or 'paper fill' of a reservoir water right is the quantity of natural flow determined to be physically

available for storage at the decreed point of diversion (the dam) under the priority of the reservoir's water right, or that would have been available but for being retained in an upstream reservoir." As to the term "legally available" this Special Master stated: "Legally available . . . means physically available water minus water that must be passed through the reservoir to satisfy a downstream senior water right and minus storage released from an upstream reservoir." ***Recommendation*** at 4. This statement again cites to the *Affidavit of Elizabeth Anne Cresto*, wherein Hydrologist Cresto states: "The amount of natural flow determined to be physically and legally available for storage under this approach cannot be determined by simply measuring a reservoir's inflows, because inflows can also include natural flow subject to senior downstream water rights, and/or storage released from an upstream reservoir(s)." *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) at ¶ 15.

While this Special Master's descriptions of the terms "physically and legally available" do not use the exact same sequence of words as is used by Hydrologist Cresto, the State does not explain the exact nature of the misinterpretation or inaccurate description. Assuming *arguendo* that the ***Recommendation*** does misinterpret and inaccurately describe the concepts of "physically and legally available," the descriptions of these terms in the ***Recommendation*** was simply meant to familiarize the reader with the concepts and in no way can such descriptions be construed as resolving genuine issues of disputed material fact. Whatever these terms mean they became applicable in conjunction with the 1986 accounting system and hence are not relevant to the question of whether the water that is the subject of the above-captioned claims was unappropriated water prior to 1971.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

K. The Descriptions in the *Recommendation* of the 1986 Water Right Accounting Program are Not Factual Findings Regarding Disputed Issues of Material Fact.

The State argues that this Special Master improperly resolved disputed issues of material fact by describing the 1986 accounting system. The State does not explain what it perceives to be the error in the descriptions contained in the recommendation, nor does it explain the nature of the asserted dispute regarding the operation of the 1986 accounting system. Whatever the perceived error it is immaterial. The purpose of describing the 1986 accounting system in the ***Recommendation*** was to explain the basis of the State's argument that the existing storage rights authorize the storage of all water that is deemed to be legally and physically available until the accumulation of such water equals the quantity of the existing storage rights irrespective of whether such water must be released to maintain vacant reservoir space, and thereafter any water that is subsequently stored and accounted under the "unaccounted for storage" account is excess water to which no water right may attach. This Special Master is not aware of any material factual disputes about the way IDWR has operated its accounting system since 1986. If there were such a factual dispute it would not be relevant to the question of whether the water stored in the Boise River Reservoirs at the time of maximum physical fill prior to 1971 was or was not stored pursuant to the existing storage rights and hence whether it was subject to appropriation under the above-captioned constitutional water right claims.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

L. The Description in the *Recommendation* Regarding the 1986 Accounting System's Allocation of Water First to the "Existing Storage Right" Account and thereafter to the "Unaccounted for Storage" Account, and the Reason Therefor, is Not a Factual Finding Regarding a Disputed Issue of Material Fact.

The State argues that this Special Master improperly resolved a disputed issue of material fact by stating the following:

> Because reservoir inflows are measured/calculated and attributed to one of these accounts [existing storage right account or unaccounted for storage] on a daily basis, such inflows necessarily have to be first attributed to the accounts for the existing storage rights. This is because the respective existing storage right accounts are limited by the annual volume of the water rights, whereas the "unaccounted for storage" account is unlimited. If water were attributed to the "unaccounted for storage" account first, there is nothing that would trip the accounting system to begin filling the existing storage right account.

Recommendation at 14. The above-statement is not a resolution of a disputed issue of material fact; rather it is an *a priori* observation that is self-evident based on a thing [in this case water] being attributed to two different accounts, one of which is limited and the other is unlimited. The filling of the limited account is what triggers the accounting system to begin filling the unlimited account. If the thing were first attributed to the unlimited account then nothing would ever be attributed to the limited account.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

M. Natural Flow that is Physically Stored in the Reservoirs after Paper Fill is Attributed to the "Unaccounted For Storage" Account.

The State asserts that this Special Master improperly resolved a disputed issue of material fact by stating that after paper fill, the "legally and physically available" inflows that are stored in the Boise River Reservoirs are attributed to the "unaccounted for storage" account in the 1986 accounting system. This Special Master recognizes that calculation of "physically" available water may be different for water attributed to the accounts for the existing storage rights as compared to the calculation of water "physically" stored after paper fill. This Special Master also recognizes that the legal authority, as contemplated by IDWR, for the storage of paper fill water is different than the legal authority asserted for post-paper fill water (i.e. legally authorized storage under the existing storage rights as opposed to legally authorized storage under IDWR's "historic practice" theory). Nevertheless, for purposes of resolving the issue presented by the Ditch Companies and the Boise Project on summary judgment, this distinction is not material. Therefore, while the description of exactly what water gets attributed to the

"unaccounted for storage" account may not have been as carefully crafted as might have been; the distinctions are without a difference.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

N. The *Recommendation* Did Not State that the Water District 63 Water Rights Accounting Program Allocates "Stored Water" to the Accounts for the Existing Reservoir Water Rights.

The State argues that this Special Master improperly resolved a disputed issue of material fact by "determin[ing] that the Water District 63 water rights accounting program distributes or allocates 'stored water' to the accounts for the existing reservoir water rights." *State's Motion* at 15. The State derives this allegation of error from a footnote on page 16 of the ***Recommendation*** that alerts the reader that the word "allocate" as used by Engineer Sutter describes two separate accounting procedures – one for the allocation of water under the water rights accounting program, and the other for the allocation stored water to the spaceholders. ***Recommendation*** at 16, n. 10. Not only is there no factual dispute about this and certainly no resolution of a factual dispute, but the footnote does not even say what the State asserts. With regard to the two different connotations for the word "allocate" the footnote states in part: "One is the 'allocation' of inflows and/or stored water to the respective water accounts (i.e. 'existing storage right' or 'unaccounted for storage' . . . ." *Id.* Calculated inflows are allocated to the existing storage right accounts, whereas stored water is allocated to the "unaccounted for storage" account. It is a stretch to construe the footnote complained of by the State as making a factual finding that stored water is allocated to the existing storage right accounts.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

O. The 1986 Water Rights Accounting System is Used to Account for the "Irrigation From Storage" Component of the Existing Storage Rights.

The State argues that this Special Master improperly resolved a disputed issue of material fact by finding that "the Water District 63 water rights accounting program administers or accounts for the 'irrigation from storage' component of the decreed reservoir water rights." *State's Motion* at 15. There are a couple of problems with the State's contention regarding this matter. First, on the pages of the ***Recommendation*** complained of by the State, this Special Master was pointing out that the evidence in the record reveals that under the 1986 water rights accounting system, irrespective of whether the water physically stored in the Boise River Reservoirs is considered to be authorized pursuant to the existing storage rights or whether it is considered to be stored under the authority of historic practice, the beneficial use of the water is considered to be authorized under the "irrigation from storage" component of the existing storage rights. There is no dispute among the parties that the 1986 accounting system considers that the stored water that is subsequently beneficially used for irrigation (and other uses) is used under the "irrigation from storage" component of the existing storage rights. Hence, this Special Master's statements in this regard can in no way be construed as resolving a disputed issue of material fact – improperly or otherwise.

Another problem with the State's argument is that the record in these subcases absolutely and clearly demonstrates that the 1986 water rights accounting program is in fact used to account for the "irrigation from storage" component of the existing storage rights. In his *Affidavit*, Engineer Sutter states: "The water right accounting program is used to account for all Boise River natural flows and all Boise River diversions of natural flow and stored water, whether the diversion is a dam, a canal, or a pump." *Affidavit of Robert J. Sutter*, ¶ 6 (emphasis added). The State cites to the *Affidavit of Elizabeth Anne Cresto* ¶¶ 11, 33 and the *Second Affidavit of Robert J. Sutter* ¶¶ 2-6 to show that the water rights accounting program is not used to account for the use of stored water from the Boise River Reservoirs under the "irrigation from storage" components of the existing storage rights. This Special Master has reviewed the citations offered by the State and can find nothing that refutes the above-quoted statement from Engineer Sutter. The *Memorandum* (Ex. C to her *Affidavit*) authored by Hydrologist Cresto also shows that the

water rights accounting program is used to account for the use of stored water under the "irrigation from storage" components of the existing storage rights. In the *Memorandum*, Hydrologist Cresto states: "The storage program is run to determine the total storage available to the individual spaceholder and the results are entered into the water rights accounting program." *Affidavit of Elizabeth Anne Cresto*, Ex. C, p. 11 (emphasis added).

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

P. The *Recommendation* Does Not Resolve a Disputed Issue of Material Fact by Quoting a Definition of the Phrase "Day of Allocation."

The State asserts that this Special Master improperly resolved a disputed issue of material fact by defining the phrase "day of allocation." *State's Motion* at 15. The ***Recommendation*** does explain what the day of allocation is by quoting from the *Affidavit of Tim Page*, which states: "[The day of allocation] is the day the reservoirs reached maximum physical fill and senior irrigation demand equals or exceeds inflow into the reservoirs and there is no more water available to put into storage." The State would prefer to use the explanations of the "day of allocation" offered by Hydrologist Cresto, who supplies the record with two versions. The first states: "The 'day of allocation' is defined by three factors: (1) the physical storage in the reservoir system has stopped increasing; (2) the reservoir water rights have 'filled on paper'; and (3) the 'remaining natural flow' at Middleton as calculated in the water rights accounting program has dropped to zero." *Affidavit of Elizabeth Anne Cresto* ¶ *20*. The other explanation offered by Hydrologist Cresto states that the day of allocation occurs "after: (1) the last day of reservoir accrual to reservoir rights has occurred in the water rights accounting; (2) diversion demand is equal to or greater than the available natural flow; and (3) the maximum physical total reservoir contents has occurred." *Id.*, Ex. C at 11.

The exact nature or definition of the phrase "day of allocation" was not an issue in the motions for summary judgment filed by the Ditch Companies and the Boise Project, and hence this Special Master made no such findings of fact in this regard. However, for purposes of understanding the context of the dispute between the parties to the above-captioned subcases, it is important to have a basic understanding of the "day of

allocation." If the precise nature and operation of the "day of allocation" were an issue in these subcases, then such a determination could not be made upon the factual record on summary judgement; rather testimony at trial would have to be heard from Hydrologist Cresto and Boise Project Manager Tim Page and whomever else might offer relevant evidence regarding the day of allocation. But there is no such factual issue that needs to be resolved in these subcases. Of the three different definitions quoted above, any one of them would suffice for a general understanding of what must occur before the water physically in the reservoirs is allocated among the spaceholders. The fact that this Special Master quoted one of the definitions and not the others cannot be construed as improperly resolving a disputed issue of material fact.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

Q. The Storage Allocation System is used to Allocate the Water Stored in the Boise River Reservoirs to Individual Spaceholder Accounts.

The State asserts that this Special Master improperly resolved a disputed issue of material fact by determining that "spaceholder storage allocations determined via the storage allocations program on the 'day of allocation' are determined solely on the basis of the amount of water physically in the reservoirs on the 'day of allocation.'" *State's Motion* at 15. The State derives this allegation of error from a footnote on page 16 of the ***Recommendation*** that alerts the reader that the word "allocate" as used by Engineer Sutter describes two separate accounting procedures – one for the allocation of water under the water rights accounting program and the other for the allocation stored water to the spaceholders. ***Recommendation*** at 16, n. 10. The footnote states in relevant part: "[T]he term [allocate] is used to describe the process of allocating the water stored in the reservoirs (whatever amount that may be) to the respective spaceholders." The footnote does not contain the word "solely." The State cites to the *Affidavit of Elizabeth Anne Cresto* to show that the statement in the footnote in incorrect. In her *Affidavit*, Hydrologist Cresto states: "On the day of allocation, the storage allocations program is used to allocate the water stored in the reservoir system to individual spaceholder accounts." *Id.* at ¶ 21. This Special Master is unable to see the distinction between the

statement in the footnote and the statement in the *Affidavit* of Hydrologist Cresto, and the State does not explain the distinction. Assuming *arguendo* that this Special Master somehow imprecisely stated exactly what water is being allocated by the allocations program on the day of allocation, such imprecision is not material to the resolution of the issue presented in the motions for summary judgment filed by the Ditch Companies and the Boise Project. The above-captioned subcases do not present a disputed material question regarding the operation of the allocations program, and this Special Master made no factual findings in that regard.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

R. The Holding in the *Recommendation* does not Rely on a Factual Finding of whether the 1986 Accounting System does or does not Include an Adjustment that Occurs Contemporaneously with the day of Allocation.

The State asserts that this Special Master improperly resolved a disputed issue of material fact by stating that the water right accounting procedures in place since 1986 include an adjustment or "retrospective accounting [occurring contemporaneously with the day of allocation] necessary for the accounting system to recognize that the water that is put to beneficial use is the water that is physically stored in the reservoir on the day of maximum physical fill . . . ." ***Recommendation*** at 16. During the course of these proceedings the State has attempted to demonstrate its view of the nature of the existing storage rights (i.e. that they are for all physically and legally available water irrespective of whether such water may actually be stored given the flood control mission of the Boise River Reservoirs) by showing how such water rights have been accounted for by IDWR since 1986.[6] The statement complained of by the State attempts to show that the State is not looking at the entire "accounting" picture. The evidence in the record has numerous references that demonstrate under the 1986 accounting system the water actually stored in the reservoirs at the time of maximum physical fill is allocated to the existing storage

[6] As explained above in Section II. A., another problem with the State's argument in this regard is that the implications of the post-1986 accounting system would have to be retrospectively applied to the period prior to 1971.

rights. *See, e.g. Affidavit of Robert J. Sutter* ¶¶ 20-21. Indeed the State's own argument demonstrates this point. Specifically, the State has repeatedly argued that the above-captioned claims must fail because the claimants cannot carry their burden of demonstrating beneficial use of water above and beyond the amount used pursuant to the existing storage rights. *See, e.g. State's Motion* at 16. In other words, the State argues that the beneficial use of the water in the Boise River Reservoirs can only occur under the existing storage rights irrespective of whether the storage of such water was authorized under a legal theory of "historic practice." The logical extension of this argument is that the water stored under the authority of "historic practice" must at some point be converted to water beneficially used under authority of the existing storage rights.

But the holding in the ***Recommendation*** does not rely on a factual finding of whether the 1986 accounting system does or does not include an adjustment that occurs contemporaneously with the day of allocation whereby "historic practice" water is recognized to be "existing storage right" water. The ***Recommendation*** specifically states that the accounting system does not define the existing storage rights. *Id.* at 16. At oral argument on the *State's Motion* counsel for the State agreed that the accounting system does not define the water rights.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

S. The Accounting System Utilized by IDWR does not Define the Existing Storage Rights.

The State argues that this Special Master improperly resolved a disputed issue of material fact by "determin[ing] that the accounting an allocation procedures on the 'day of allocation' are intended to ensure that the annual volume limits of the decreed reservoir water rights are not exceeded, and the water physically in the reservoirs is designated as having been stored under the priorities of the decreed reservoir water rights." *State's Motion* at 16, citing ***Recommendation*** at 15-16. It should be noted that the ***Recommendation*** says nothing about what IDWR "intends" for the accounting system to do or not do. Rather the ***Recommendation*** simply points out that the description provided by Engineer Sutter as to how the accounting system works includes

several statements to the effect that after maximum reservoir fill the water physically stored in the reservoirs, including "unaccounted for storage" is allocated to the reservoir storage rights. *See Affidavit of Robert J. Sutter* ¶¶ 20-21.

But as stated above, the holding in the ***Recommendation*** does not rely on a factual finding of whether the 1986 accounting system does or does not include an adjustment that occurs contemporaneously with the day of allocation whereby "historic practice" water is recognized to be "existing storage right" water. The ***Recommendation*** specifically states that the accounting system does not define the existing storage rights. *Id.* at 16. At oral argument on the *State's Motion* counsel for the State agreed that the accounting system does not define the water rights.

In accordance with the foregoing, this Special Master declines to alter or amend the ***Recommendation*** in this regard.

III. ORDER

In accordance with the foregoing, the State's and Suez's *Motions to Alter or Amend* are **denied.**

Dated Feb 26, 2016

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTIONS TO ALTER OR AMEND was mailed on February 26, 2016, with sufficient first-class postage to the following:

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Docket No. 44677-2016

Appellants' Opening Brief

APPENDIX 3

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

In Re SRBA	) Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734
Case No. 39576	)
	) **MEMORANDUM DECISION AND ORDER ON CHALLENGE AND ORDER OF RECOMMITMENT TO SPECIAL MASTER**

I.
BACKGROUND

1. On January 31, 2013, the United States Bureau of Reclamation ("United States") filed *Motions to File Late Notice of Claim* in subcase numbers 63-33732, 63-33733, and 63-33734. The late claims seek storage water rights associated with Arrowrock Dam, Anderson Ranch Dam, and Lucky Peak Dam (collectively "federal reservoirs") based on beneficial use.

2. On that same date, the Boise Project Board of Control[1] filed *Motions to File Late Notice of Claim* in subcase numbers 63-33737 and 63-33738. The late claims seek storage water rights associated with Arrowrock Dam and Anderson Ranch Dam based on beneficial use.

3. The five late claims were asserted in addition to water right numbers 63-303, 63-3613, 63-3614, and 63-3618 (hereinafter "reservoir water rights"). The reservoir water rights were previously decreed in the SRBA and authorize storage water rights associated with the federal reservoirs based on prior licenses.

[1] The term "Boise Project Board of Control" refers collectively to the Boise Project Board of Control, Boise-Kuna Irrigation District, Nampa-Meridian Irrigation District, Wilder Irrigation District, New York Irrigation District, and Big Bend Irrigation District.

4. On May 22, 2013, the Court entered *Orders* granting the *Motions to File Late Notice of Claim*. The late claims were then forwarded to the Idaho Department of Water Resources ("Department") for investigation.

5. On December 31, 2013, the Director filed his *Director's Report for Late Claims*, wherein he recommended that the late claims be decreed disallowed. *Objections* and *Responses* to the Director's recommendations were filed by various parties. The subcases were subsequently referred to the Special Master for further proceedings.

6. On July 2, 2015, the Ditch Companies[2] filed a *Motion for Summary Judgment*, asserting that the water use claimed under the late claims is already memorialized under, and occurs pursuant to, the reservoir water rights. The Boise Project Board of Control joined in the Ditch Companies' *Motion*.

7. On July 31, 2015, the State of Idaho filed a *Cross-Motion for Summary Judgment*, asserting that the late claims should be decreed disallowed as a matter of law. Suez Water Idaho, Inc. joined in the State's *Cross-Motion*.

8. On October 9, 2015, the Special Master entered his *Special Master's Recommendation*, recommending that the late claims be decreed disallowed. In so recommending, the Special Master determined that the Ditch Companies' *Motion for Summary Judgment* be granted, and that the State's *Cross-Motion for Summary Judgment* be dismissed.

9. *Motions to Alter or Amend* the *Special Master's Recommendation* were filed by the State and Suez Water Idaho, Inc. The Special Master entered an *Order* denying those *Motions* on February 26, 2016.

10. Timely *Notices of Challenge* were filed by the State and Suez Water Idaho, Inc., challenging the *Special Master Recommendation* and his *Order Denying Motions to Alter or Amend*. A hearing on the *Notices of Challenge* was held before this Court on July 11, 2016. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day, or July 12, 2016.

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[2] The term "Ditch Companies" refers collectively to 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, Nampa & Meridian Irrigation Company, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

II.

STANDARD OF REVIEW

A. Challenge.

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(j); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18. The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

B. Summary judgment.

This matter comes before the Court on challenge by way of summary judgment, and the Court is asked to review certain findings and conclusions of the Special Master made pursuant to an order on summary judgment. Summary judgment is properly granted when the pleadings, depositions, and admissions on file, together with the affidavits, if any, "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). Where the case will be tried without a jury, the district court, as the trier of fact, is entitled to draw the most probable inferences from the undisputed evidence properly before it and grant the summary judgment motion in spite of the potential of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrev. Trust,* 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). The burden of demonstrating the absence of a genuine issue of material fact, and that summary judgment is proper as a matter of law, is on the moving party. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005).

III.

ANALYSIS

A. The Special Master exceeded the jurisdiction of the Snake River Basin Adjudication by ruling on the Director's accounting methodology.

i. Brief factual overview.

These subcases originated as a result of late claims filed for water that has historically been stored in the federal reservoirs and released for use by spaceholders in years requiring flood control measures after those measures have been completed for the season. By way of brief explanation, the United States and spaceholders hold reservoir water rights associated with the federal reservoirs. As with all storage rights, the quantity element for these rights was decreed with a volumetric quantity. Partial decrees were issued for the reservoir water rights in the Snake River Basin Adjudication ("SRBA"). Among other administrative duties, the federal reservoirs are operated by the United States to prevent flooding. In years when the estimated water content of the Boise River Basin exceeds the capacity of the reservoir system water otherwise available for storage under the decreed reservoir water rights is passed through the reservoir system and/or water that has previously been stored in the reservoirs is released in order to maintain sufficient space in the reservoirs to accommodate runoff estimated to occur later in the season. After all flood control releases have ceased for the season the reservoirs are then filled to the extent possible with the remaining available runoff. If the estimates were correct the reservoirs fill to capacity. Historically, this water has been distributed to the spaceholders for use.

In conjunction with his duty to distribute water, the Director adopted an accounting methodology for carrying out his administrative duty with respect to the federal reservoirs. In accounting for the water that is distributed to the reservoirs, the accounting methodology takes into account that quantity of water passed through the reservoirs by the United States when the reservoir water rights are in priority and that water that has been previously stored but released by the United States to meet its flood control obligations. The result is that respective quantities for the reservoir water rights can be considered satisfied or partially satisfied irrespective of how much water is physically in the reservoirs after flood control measures have ceased for the season. This result has been referred to in these proceedings as "paper fill." The water that has been historically stored and later distributed to the spaceholders after flood control releases have

ceased has been referred to as "refill." In his methodology, the Director referred to this water as "unaccounted for storage." It is this "refill" or "unaccounted for storage" water that is the subject of the beneficial use late claims. However, as discussed below the spaceholders argue that the water identified by the Director as unaccounted for storage is water that is included in their previously decreed reservoir water rights. This brief explanation is provided for sufficient context necessary to address the issue in this case. The historic administration of the reservoir water rights is detailed and quite complex. A comprehensive overview is provided in the *Memorandum Decision and Order* entered in Ada County Case No. CV-WA-2015-21376 contemporaneously herewith.

ii. The issue decided by the Special Master impermissibly dealt with the propriety of the Director's accounting methodology for the previously decreed reservoir water rights.

Although coming to this Court in a different proceeding, the issue now before the Court on challenge is in most respects the same issue this Court previously declined to hear in conjunction with the Basin-Wide Issue 17 proceedings. *Memorandum Decision*, SRBA Subcase No. 00-91017, pp.11-12 (March 20, 2013) (hereinafter, "Basin-Wide Issue 17"). In Basin-Wide Issue 17 this Court declined to hear the issue of when the reservoir water rights were satisfied or "filled" under the Director's particular accounting methodology. *Id.* This Court reasoned that the partial decrees issued for the reservoir water rights were silent as to how the rights were to be administered. The Court held that the issue was therefore purely one of administration and should be determined by the Director on a fully developed record in an administrative proceeding. In reaching this ruling, the Court was not treating the spaceholders differently from any other decreed water right holder in the SRBA. The Idaho Supreme Court has instructed that once a water right has been decreed, the Director has a clear legal duty to administer the water right according to the decree. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). However, the details of the performance of that duty are left to the Director's discretion. *Id.* In simplistic terms what this means is that once a right has been decreed and the decree holder takes issue with the way in which the Director is administering the right (i.e. exercising his discretion), then the decree holder must take up the issue first with the Director, not the Court who issued the decree. The Idaho Supreme Court was clear on this point when it affirmed this

Court's ruling in Basin-Wide Issue 17. *In Re SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 394, 336 P.2d 792, 801 (2014) (holding which accounting method to employ is within the Director's discretion and IDAPA provides the procedures for challenging the chosen accounting method).

While issues pertaining to the administration of specific water rights can be entertained in the SRBA, such issues need to be raised at the time the affected rights are being adjudicated. *See e.g., Rangen Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016). Any resulting special administrative provisions need to be either reflected in the partial decree itself or through a general provision.[3] There are numerous examples in the SRBA where water rights have historically been administered in a manner that promotes the most efficient use of water given the peculiarities of a particular system. This is true even though the administrative scheme may not pass muster if the rights were to be administered strictly in accordance with the prior appropriation doctrine. Such administrative schemes have typically been adopted through the consent of all affected water users and such users wish to have the administrative scheme memorialized in conjunction with their respective water rights. The SRBA is replete with such examples. Separate streams administration in various administrative basins and the administrative general provisions in the Big Lost in Basin 34 provide a couple of examples. However, what sets these types of examples apart from the instant case is that issues regarding a special administrative scheme were raised at the time the rights were being adjudicated and prior to the rights being decreed. To the extent an administrative provision successfully makes its way into a decree (or a general provision) then the Director must give effect to that provision in carrying out his administrative duties.

In the instant case, issues regarding any particular method of administration were never raised at the time the reservoir water rights were adjudicated. As a consequence the partial decrees issued for those rights are silent as to any particular type of administrative scheme or methodology. Indeed, allowing a water right holder to come back into the SRBA after the right has been decreed and then argue that it should be administered according to some particular methodology not otherwise provided for in the partial decree would constitute an impermissible

[3] The spaceholders entered into contracts with the United States, which among other things, specify how the reservoirs are to be administered for flood control. The contracts also address the obligations of the United States in the event of shortfalls resulting from flood control measures. However, the State of Idaho and other water right holders on the system are not signatories to these contracts. The terms of these contracts pertaining to administration were not incorporated into the partial decrees issued for the reservoir rights.

collateral attack on the partial decree. *Rangen*, 159 Idaho at 806, 367 P.3d at 201. Moreover, it would ignore the finality of the partial decree as well as the final unified decree in which the partial decree was incorporated. *Id.* Accordingly, absent such an administrative provision, as is the case with any other decreed right in the SRBA, the Director must administer the rights according to the partial decrees in accordance with Idaho law. Absent an administrative provision in a partial decree or a general provision, the SRBA Court does not instruct the Director how to carry out his administrative duties in distributing water. If a decree holder asserts that the Director is not administering his or her right either according to the decree or consistent with Idaho law, he or she must first take it up with the Director.

In Basin-Wide Issue 17 this Court opined that despite the spaceholders' failure to timely raise issues pertaining to administration, a potential solution within the jurisdiction of the SRBA would be for the spaceholders to seek leave to file late claims to that water which physically "refilled" the reservoirs after flood control measures had ceased and the original rights were determined to be satisfied by the Director according to his accounting methodology.[4] Thereafter the United States and various other water users filed beneficial use late claims for the "refill." The filing of the late claims was unopposed and the Court found "good cause" for granting leave to allow the claims to proceed. However, it needs to be emphasized that leave was granted for the filing of beneficial use late claims that were separate and distinct from the previously decreed reservoir water rights. Namely, the claims were limited to water diverted and stored after the original rights were determined to be satisfied by the Director however that determination was made. Again, given that the partial decrees were silent on administration, the SRBA Court lacked any jurisdiction to decide the soundness of the Director's accounting methodology used to determine when the original rights were deemed satisfied. I.C. § 42-1401D. The claimants also apparently appreciated this distinction as well when they filed the late claims. This is evidenced by reviewing the basis for the respective late claims. The reservoir water rights were claimed and decreed based on prior licenses. The late claims, on the other hand, were claimed based on beneficial use. Clearly, the beneficial use claims were intended as being distinct from the

[4] The other alternative addressed by the Court was to move to set aside and reopen the reservoir water right claims. This option was not pursued by the United States or the spaceholders. The process for reopening a partial decree provides notice to parties to the adjudication that a water right claim relied on be finalized through a partial decree is again at issue and subject to change. The process affords interested parties a mechanism for participating in the proceedings.

previously decreed reservoir water rights as a result of how those rights were administered taking into account flood control measures.

The Director then issued a Director's Report recommending that the late claims be disallowed. He recommended that the water he identifies in his methodology as "unaccounted for storage" be memorialized in a general provision, and that it be made available for use by the spaceholders consistent with historic practice, albeit not pursuant to a water right. In effect, the "unaccounted for storage" was recommended by the Director as similar in concept to so-called "excess water." The origin and nature of excess water is discussed at length in the *Memorandum Decision and Order* entered in Ada County Case No. CV-WA-2015-21376 contemporaneously herewith. *See also Memorandum Decision and Order on Challenge*, Subcase Nos. 74-15051, *et. al.*, (Jan 3, 2012) (addressing "high flow" claims in Lemhi Basin).

Objections were filed to the Director's recommendation and the subcases were referred to the Special Master. In the proceedings before the Special Master, the spaceholders asserted that the beneficial use late claims need not be pursued because the historical use of water identified as "unaccounted for storage" was already covered by the reservoir water rights. The State and Suez asserted that the late claims should be disallowed because the "refill" water is "unaccounted for storage" and not attributable to any water right and therefore would not support beneficial use claims. In an attempt to fully address the objections, the Special Master entertained what he considered to be the threshold issue of whether the water argued to be unaccounted for storage was indeed covered by the reservoir water rights. In reaching his decision, the Special Master considered evidence on the propriety of the Director's accounting methodology used for distributing water to the federal reservoirs. The Special Master ultimately concluded the Director erred in his accounting methodology, ruling on summary judgment that the previously decreed reservoir rights included the water identified as unaccounted for storage, and that is the subject of the late claims.

In light of the previous discussion, it is apparent that the Special Master strayed from the narrow focus of conducting proceedings on the beneficial use late claims by delving into the propriety of the Director's accounting methodology. The narrow issue before the SRBA Court dealt with the beneficial use late claims not the scope or administration of the previously decreed reservoir water right claims. The SRBA Court lacks jurisdiction to rule on the propriety of the Department's accounting methodology as it pertains to those decreed reservoir rights. I.C. § 42-

1401D. The partial decrees issued for the reservoir water rights unambiguously define the elements of those rights and are silent as to any particular method of administration. As such, the methodology implemented by the Director for administering the reservoir water rights is an issue that needs to be raised administratively before the Director in accordance with the IDAPA. The Idaho Supreme Court is clear on this issue. *In Re SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 394, 336 P.2d 792, 801 (2014) (holding which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedures Act provides the procedures for challenging the chosen accounting method). This is the same protocol that applies to every other decreed right in the SRBA. To hold otherwise would be to ignore the finality of a partial decree. If a water right holder complains that the Department is not administering his or her right according to the partial decree, the matter needs to originate with the Department not the SRBA Court. In that same vein, the late claims cannot be used as a mechanism for either collaterally attacking the previously issued partial decrees or as an end run around IDAPA. IDAPA imposes a different standard of review and constrains the actions available to a district court on review. I.C. § 67-5279. In this case, the Special Master effectively overruled the Director's methodology without applying the standard of review that applies to a judicial review proceeding. *Id.*

iii. Despite the issues raised by the parties, the Special Master should have required the parties to elect to either proceed with the late claims based on the methodology in place or request to stay the proceedings to allow contests to the accounting methodology to proceed administratively.

This Court acknowledges that the Special Master needed to hear evidence on the Director's accounting methodology for general context for the purpose of determining whether the "unaccounted for storage" was indeed unappropriated "excess water" or whether the circumstances could support beneficial use water rights. However, the limited issue before the Special Master is pretty straightforward. Based on the Director's accounting methodology, the quantity of water that is available for storage but is nonetheless passed through for flood control while the senior storage right is in priority, or water that is initially stored but later released for flood control, is counted against the reservoir water rights despite not ultimately being used for irrigation. The propriety of this accounting and distribution method is beyond the jurisdiction of

the SRBA Court now that the reservoir rights have been decreed. I.C. § 42-1401D. No party disputes that after flood control releases have ceased for the season, the reservoirs have historically been physically filled to the extent of available water. No party further disputes that this water has been historically allocated among the spaceholders and has been distributed to the spaceholders for irrigation. That said, the issue before the Special Master is limited to whether this historical use of water identified as unaccounted for storage supports the establishment of beneficial use claims. This Court granted the spaceholders' leave to file late claims to assert claims to this water, not for purposes of reopening previously decreed reservoir water rights or to challenge the Director's administration of those decreed reservoir water rights. Accordingly, the Special Master could have thoroughly conducted proceedings on the late claims without ruling on the scope of the previously decreed reservoir water rights or the propriety of the Director's accounting methodology.

Based on the nature of the issues raised by the parties, the Special Master had two options. He could have proceeded with the late claims based on the accounting methodology in place and moved forward on the late claims. Alternatively, if the spaceholders wished to pursue their position that the Director's accounting methodology was in error, the Special Master could have entertained staying the proceedings to allow the spaceholder to raise the issue in the appropriate forum.[5] Depending on the outcome of that proceeding, the spaceholders could then make the determination whether it was necessary to proceed with their late claims. In any event, the SRBA Court, including the Special Master, lacked jurisdiction to rule on the propriety of the Director's methodology for administering the previously decreed reservoir water rights.

B. Remaining issues raised on challenge.

The Court acknowledges that other issues were raised by the parties. However, having determined that the Special Master exceeded the jurisdiction of the SRBA by ruling on the Director's accounting methodology, the Court need not reach these remaining issues.

[5] The Director apparently acknowledged the jurisdictional distinction. Following the Idaho Supreme Court's decision in Basin-Wide Issue 17 the Director on his accord initiated a contested case regarding his accounting methodology for the reservoir water rights. However, the proceedings before the Special Master were not stayed.

IV.

CONCLUSION AND ORDER OF RECOMMITMENT

In conclusion, in Basin-Wide 17 this Court declined to hear the issue of when the decreed reservoir water rights were considered to be satisfied under the Director's accounting methodology. The Idaho Supreme Court affirmed that ruling. The late claims neither open a door for the SRBA Court to address the administration of the decreed reservoir water rights, nor do they provide a procedural mechanism for an end run around this Court's prior ruling. Therefore, the Court rejects in whole the findings of fact and conclusions of law set forth in the *Special Master's Recommendation*. I.R.C.P. 53(j).

It is ORDERED that the matter is recommitted to the Special Master for further proceedings consistent with this decision.

IT IS SO ORDERED.

DATED: September 1, 2016

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE AND ORDER OF RECOMMITMENT TO SPECIAL MASTER was mailed on September 01, 2016, with sufficient first-class postage to the following:

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