

IN THE SUPREME COURT OF THE STATE OF IDAHO
Supreme Court Docket No. 44677-2016

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

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

Petitioners-Appellants,

v.

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

Petitioners,

v.

THE 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.

IDWR RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding
Ada County District Court Case No. CV-WA-2015-21376
(Consolidated Ada County Case No. CV-WA-2015-21391)

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I. STATEMENT OF THE CASE¹

A. NATURE OF THE CASE

This is an appeal from a judicial review proceeding in which the District Court affirmed the Idaho Department of Water Resources' ("Department") methodology for determining when the four decreed water rights for the federal on-stream reservoirs in Water District 63 (the "Decreed Storage Rights")² are satisfied. [R. 001056-65](#).³ This methodology is known as the "Accrual Methodology." The Decreed Storage Rights are decreed with fixed annual quantities that, as this Court has held, must be distributed "in priority." *In re SRBA, Case No. 39576, Subcase No. 00-91017, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014)* ("Basin-Wide Issue 17" or "BWI-17"). The Accrual Methodology is the tool the Department uses to distribute water "in priority" pursuant to the elements of the Decreed Storage Rights.

¹ The Statement of the Case in this appeal (Supreme Court Docket No. 44677) is substantially similar to the Statement of the Case in the parallel appeal filed by the Boise Project Board of Control (Supreme Court Docket No. 44745). However, the Argument section is tailored to the Ditch Companies' specific arguments.

² The Decreed Storage Rights are water right nos. 63-303, 63-3613, 63-3614, and 63-3618. Partial decrees for these water rights were issued in the Snake River Basin Adjudication. [R. 001056](#).

³ Citations to the record herein will use the following formats: "R." and "A.R." for the District Court and Agency records, respectively, followed by bates numbers; transcripts are cited as "Tr." followed by the date of the hearing, and the page and line numbers; exhibits in the Agency Record are cited as "Ex." followed by the exhibit number and bates number; "Officially Noticed Documents" in the Agency Record are cited as "Off'l. Not." followed by the folder and document names, and the bates number.

In this appeal, the Ditch Companies⁴ assert that in flood control years, the determination of when the Decreed Storage Rights are satisfied should be based on federal flood control operations rather than by distributing water “in priority” pursuant to water right decrees.⁵ As the District Court recognized, accepting the Ditch Companies’ argument would cede control of the use, distribution, and development of Idaho’s water to the Federal Government. [R. 001061-62](#). This is because the Decreed Storage Rights are held by the United States, and each encumbers all river flows until it is satisfied.⁶ Under the Ditch Companies’ arguments, therefore, the Federal Government would hold open-ended, unquantified water rights to command all river flows until the flood runoff ends and federal flood control operations conclude. This Court has consistently rejected claims to command such open-ended quantities of water as contrary to law.

The Ditch Companies’ appeal arises from the fact that federal flood control operations “directly conflict” with the storage of water for irrigation and other purposes because flood control requires releasing water rather than storing it. [A.R. 001242](#) (quoting the *Water Control Manual for Boise River Reservoirs*). This conflict in turn creates a “conundrum” and “dilemma”

⁴ The “Ditch Companies” are: Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers’ Co-Operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

⁵ “The decrees give the Director a quantity he must provide to each water user in priority.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#).

⁶ Except flows required to satisfy senior water rights.

for priority water rights administration, as the District Court and the Director recognized. [R. 001164-65](#); [A.R. 001291](#). The Ditch Companies and other reservoir system “Spaceholders”⁷ recognized the conflict many years ago and addressed it in their federal storage contracts with the Bureau of Reclamation (“BOR”). Those contracts provide that Lucky Peak storage will be used to replace flood control releases from Arrowrock and Anderson Ranch, [Ex. 2100 at 002170-71](#), and that any flood control-caused shortfall in Lucky Peak storage will be “deducted” from Lucky Peak Spaceholders’ storage accounts. [Ex. 2112 at 002311](#).

The Ditch Companies now argue, however, that the conflict between flood control operations and irrigation storage should be addressed by interpreting the Decreed Storage Rights as open-ended entitlements to all flow in excess of senior diversions in each and every flood year. Diversions under junior water rights would not be authorized until the Corps declares that flood control operations have concluded. This would subordinate the prior appropriation doctrine as established by Idaho law to federal flood control operations and shift flood control risks the Ditch Companies expressly accepted to other water right holders.

The Water District 63 water distribution accounting system, including the Accrual Methodology, resolves the priority administration “conundrum” and “dilemma” by accommodating federal flood control operations and storage allocation practices without

⁷ “Spaceholders” are the water delivery entities, such as irrigation districts and canal companies, that have contracts with the federal government for “water storage space in the reservoir in return for the repayment of a proportional share of the construction costs.” *Kerner v. Johnson*, 99 Idaho 433, 438, 583 P.2d 360, 365 (1978); see [A.R. 001237](#) (“irrigation organizations that have contracted for storage in the reservoir system”).

allowing them to dictate or interfere with priority administration of water rights under Idaho's prior appropriation doctrine. The Water District 63 accounting system distributes water according to the elements of licensed and decreed water rights, and allows the BOR to replace "priority water"⁸ released by the U.S. Army Corps of Engineers ("Corps") for flood control purposes with excess water captured during flood control "refill" operations. The Accrual Methodology is integral to resolving the priority administration "conundrum" and "dilemma" created by federal flood control operations, and it is undisputed that the Spaceholders "have never suffered a water shortage" as a result of how water is distributed under the Water District 63 accounting system. [A.R. 001285](#).

The Ditch Companies' challenges to the Accrual Methodology reduce to collateral attacks on the Decreed Storage Rights that, if accepted, "severely undermine the purpose of the [Snake River Basin Adjudication ("SRBA")] and create uncertainty in water rights adjudicated in that process." [IGWA v. IDWR, 160 Idaho 119, 128, 369 P.3d 897, 906 \(2016\)](#). Further, the Ditch Companies' arguments are a direct attack on the prior appropriation doctrine as established by Idaho law. The Director must distribute water according to water right decrees and Idaho's prior appropriation doctrine rather than federal flood control operations.

The Director initiated the contested case proceeding underlying this appeal to give interested parties an administrative forum in which to address their concerns with and objections to the Water District 63 accounting system. The Ditch Companies argue that the contested case

⁸ "Priority water" is the water distributed to the reservoirs pursuant to the Decreed Storage Rights. [R. 001058-59](#).

was procedurally defective and deprived them of due process. These arguments mischaracterize the contested case proceeding and the record, and, in many instances, are contrary to the Department’s Rules of Procedure and Idaho law.

The Department respectfully requests that the Court affirm the District Court’s conclusion that the Accrual Methodology is consistent with the Decreed Storage Rights and the prior appropriation doctrine. The Department also requests that the Court affirm the District Court’s determination that the Ditch Companies’ procedural arguments lack merit.

B. STATEMENT OF FACTS

1. The Decreed Storage Rights

The United States and various irrigation entities filed a number of storage water right claims in the SRBA for the Boise River Reservoirs.⁹ [*United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 108, 157 P.3d 600, 602 \(2007\)](#). Partial decrees were issued for four claims—the Decreed Storage Rights—in 2007, 2008, and 2009.¹⁰ [A.R. 001234-36](#); [R. 001056](#). The Decreed Storage Rights were decreed in the name of the United States (acting through the BOR) and with the “*Pioneer* remark,” which provides that “title to the use of the water is held by consumers or

⁹ Water District 63 is coextensive with the Boise River Basin, also known as “Basin 63.”

¹⁰ The SRBA’s *Final Unified Decree* was signed August 25, 2014. The *Final Unified Decree* can be viewed on the “Idaho Water Adjudications” website, <http://www.srba.state.id.us/>. Attached hereto as [Addendum A](#) are copies of the text of the *Final Unified Decree* (i.e. pages 1-15). The Department requests that the Court take judicial notice of the *Final Unified Decree* pursuant to [I.R.E. 201\(d\)](#). “Judicial notice may be taken at any stage of the proceeding.” [I.R.E. 201\(f\)](#).

users of the water.” [R. 001056](#); [A.R. 001235](#); *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at

[609](#).¹¹ The elements of the Decreed Storage Rights were decreed as follows¹²:

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

In addition to the standard elements of a water right decreed in the SRBA, [Idaho Code §§ 42-1411\(2\), 42-1412\(6\)](#), the partial decrees for the Lucky Peak water right and one of the two

¹¹ The Ditch Companies’ assertion that they “are the beneficial owners of the storage rights,” [DC Brief at 1 n.2](#), is contrary to this Court’s decision in the *Pioneer* case. In that decision, this Court rejected a remark stating that “[b]eneficial or equitable title to this water right is held in trust by the irrigation organizations.” *Pioneer Irr. Dist.*, 144 Idaho at 109, 157 P.3d at 603. Rather, to “reflect this Court’s analysis,” this Court held the remark should provide that “title to the use of the water is held by consumers or users of the water,” and the irrigation organizations “act on behalf of the consumers or users to administer the use of the water.” *Id.* at 115, 157 P.3d at 609.

¹² [R. 001056](#); [Ex. 2015](#).

Arrowrock rights¹³ include remarks recognizing limited storage of water for flood control purposes.¹⁴ The partial decree for the Lucky Peak water right also includes a remark memorializing the BOR's 1954 flood control "Guarantee" to Arrowrock and Anderson Ranch Spaceholders that, if the reservoir system fails to refill as a result of flood control releases, Lucky Peak storage will be used to replace any resulting shortfall in Spaceholder storage account allocations from Arrowrock and Anderson Ranch reservoirs. See [A.R. 001240](#) (stating "there shall be made available" to Arrowrock and Anderson Ranch Spaceholders "water accrued to storage rights in Lucky Peak"). The Lucky Peak remark states that "[t]he storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the [BOR]." [A.R. 001235-36](#); [Ex. 2015 at 000723](#).

These remarks constitute the only references in the partial decrees for the Decreed Storage Rights to any of the various documents that the Ditch Companies collectively term the "reservoir operating plan." [R. 001170](#); [A.R. 001301](#). The partial decrees do not reference the 1953 *Memorandum of Agreement Between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs*, the Corps' 1956 *Reservoir*

¹³ Arrowrock has two water rights because the dam was raised five feet in the mid-1930s. [A.R. 001237](#).

¹⁴ The Lucky Peak water right includes a remark stating the reservoir "has 13,950 acre feet of capacity for flood control purposes in addition to the volume of water authorized for storage under this right." [Ex. 2015 at 000722](#). One of the two Arrowrock water rights includes a remark stating the BOR "may temporarily store water" in the reservoir's "surcharge" capacity "during flood events or emergency operations." [Ex. 2015 at 000718](#).

Regulation Manual for Boise River Reservoirs, the Corps' 1985 *Water Control Manual for Boise River Reservoirs*, or the 1985 *Memorandum of Understanding for Confirmation, Ratification, and Adoption of Water Control Manual for Boise River Reservoirs* between the Corps and the BOR. [R. 001063](#); [Ex. 2015](#). The partial decrees also do not include any references to flood control concepts such as “runoff forecasts,” “rule curves,” “refill assurances,” or “maximum fill.” *Id.*

No water rights authorizing “flood control” or “refill” have been licensed or decreed for the Boise River Reservoirs.¹⁵ After Basin-Wide Issue 17 arose, the United States and the Boise Project Board of Control (“Board of Control”) filed “motions to file late claims for separate beneficial use rights to address refill” for all three Boise River Reservoirs. [Off'1 Not.\BWI-17\91017\20130320_Memorandum Decision at 001419 n.7](#). These “refill” late claims remain pending in the SRBA. [R. 001056](#).

¹⁵ In 1983 the United States did file a statutory beneficial use-based claim for “refill or second fill” of Arrowrock Reservoir with the Department, pursuant to Idaho Code § 42-243. [A.R. 001255](#); see [Off'1 Not.\63-5262\19830630_63-5262 Claim to a Water Right at 000003](#) (“Remarks: Claim is for . . . refill or second fill of reservoir capacity”). The BOR’s SRBA claim for “refill” (no. 63-5262) was disallowed in 2003. [Off'1 Not.\63-5262\20030424_63-5262 Final Order Disallowing WR Claims at 000009](#). In 2006, the United States filed amended SRBA claims for American Falls and Palisades reservoirs that sought priority “refill” remarks. See [BWI-17, 157 Idaho at 388, 336 P.3d at 795](#) (“This water right includes the right to refill under the priority date of this water right to satisfy the United States’ storage contracts”). While the United States’ SRBA claims for the Boise River Reservoirs also were pending in 2006, the United States did not file amended claims for priority “refill” of the Boise River Reservoirs. Copies of the 2006 “refill” claims for American Falls and Palisades are attached hereto as [Addendum B](#). The Department moves the Court to take judicial notice of these amended claims filed in the SRBA pursuant to I.R.E. 201(d).

2. Reservoir Operations

Arrowrock, Anderson Ranch, and Lucky Peak are “on-stream” reservoirs created by dams that span the riverbed. [A.R. 000002 n.1](#); [R. 001058](#). ““An on-stream reservoir alters the stream affecting the administration of all rights on the source.”” [BWI-17, 157 Idaho at 388, 336 P.3d at, 795](#) (citation omitted). Each dam is operated so that “[t]he entire natural flow of the stream has been diverted and stored and becomes subject to controlled releases.” [A.R. 001238](#); [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001553](#); *see id.* at [001550](#) (“the entire flow of [the] river is diverted and then artificially released”); [R. 001058](#) (“Each dam consists of a river-wide diversion structure that captures and regulates the entire flow of the river”).

The Corps and the BOR operate the dams and reservoirs to divert, store, and release water for multiple purposes, including purposes not authorized in the Decreed Storage Rights, such as flood control. [R. 001057](#); *see* [A.R. 001242-48](#) (discussing reservoir operations). The BOR and the Corps store water according to their operational objectives rather than according to the elements of the Decreed Storage Rights. *See, e.g.,* [A.R. 001246](#) (“the BOR and the Corps physically store water in the reservoir system without regard to which reservoir is in priority”); [A.R.001295](#) (referring to “the federal practice of storing water without regard to the elements of the water rights”); [Ex. 2 at 000028](#) (“[The BOR and the Corps] store water in whatever space in the reservoir system best fits their overall operational objectives”). As a result, “the water stored under the priority date of one reservoir’s water right may be physically stored in a different reservoir.” [Ex. 2 at 000028](#); *see* [DC Brief at 15, 64](#) (acknowledging same).

3. The Water District 63 Accounting System

The District Court recognized that the Water District 63 accounting system is “fairly complex,” and “broadly summarize[d]” it in a few sentences. [R. 001057](#). The District Court acknowledged “[t]he Director’s findings are of course more nuanced,” [R. 001058](#), and the “nuances” are important in considering the Ditch Companies’ arguments.

The Water District 63 accounting system accounts for all diversions of the available natural flow supply within the district each day, according to the elements of licensed and decreed water rights. [A.R. 001264-67](#).¹⁶ The Accrual Methodology is a small, albeit significant, part of the Water District 63 accounting system, and is defined by the same principles and procedures that apply in distributing natural flow to all diversions in the district. *Id.* Water rights diverting from the same source are not administered in isolation from each other, and the Decreed Storage Rights are no exception. See [In re Snake River Basin Water Sys., 115 Idaho 1, 7, 764 P.2d 78, 84 \(1988\)](#) (“by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights.”) (quoting United States Senate Report on the “McCarran Amendment,” 43 U.S.C. § 666) (italics omitted). In order to

¹⁶ The Water District 63 accounting system does not govern, control, or dictate federal reservoir system operations, [A.R. 001271 & n.41](#), and has no effect at all on flood control operations. The BOR views flood control operations as “entirely independent of the water rights system.” [A.R. 001301](#); see [Off’l Not.\BWI-17\ 91017—201301111US Response Brief on BWI 17 at 001213](#) (same). The BOR has also asserted that the outcome of the “refill” question “will have no effect on [BOR’s] flood control operations.” [Off’l Not.\BWI-17\ 91017—201301111US Response Brief on BWI 17 at 001213](#).

understand the Accrual Methodology, it is necessary to understand the basic principles and procedures of the Water District 63 accounting system. [A.R. 001264-67](#).

a. Basic Principles and Procedures

The Water District 63 accounting system quantifies “‘natural flow availability and use’ and also ‘track[s] storage use.’” [A.R. 001264](#) (citation omitted). Diversions of “natural flow” and “stored water” must be accounted separately,¹⁷ and the distinction between the two is fundamental to the Water District 63 accounting system. *Id.* “Natural flow” is the water that would be present in the river absent reservoir operations and diversions. *Id.*¹⁸ “Stored water” is the water in excess of the computed natural flow. *Id.* Diversions of natural flow are accounted to licensed or decreed water rights. *Id.* Diversions in excess of the natural flow available under the priorities of the applicable water rights are charged against storage accounts, which are defined by BOR storage contracts. *Id.*; [A.R. 001267](#). These procedures are largely automated in two separate but related computer programs: the water rights accounting program, and the storage program. [A.R. 001264](#).

The water rights accounting program determines the natural flow supply available for distribution in the district each day, and accounts for all diversions within the district. *Id.* The

¹⁷ See, e.g., [Nelson v. Big Lost River Irrigation Dist.](#), 148 Idaho 157, 163, 219 P.3d 804, 810 (2009) (“the watermaster must determine the relative amounts of natural flow and storage water at the various diversion points on the river.”).

¹⁸ See [IDAPA 37.02.03.010.07 \(Natural Flow\)](#). Water or the right to use water that exists in a spring, stream, river, or aquifer at a certain time and which is not the result of the storage of water flowing at a previous time.”) (bold in original).

natural flow supply cannot be determined by simply measuring the flow in the river, because the Boise River Reservoirs fully regulate the river system and modify the natural runoff regime. *See* [BWI-17, 157 Idaho at 388, 336 P.3d at 795](#) (citation omitted) (“An on-stream reservoir alters the stream affecting the administration of all rights on the source.”). The daily natural flow supply is determined, therefore, by dividing the river into thirteen “reaches,” and computing the natural flow supply within each reach via the “reach gain equation.” *Id.* The reach gain equation determines the natural flow within each reach as a function of stream flow measurements establishing the reach’s inflow, outflow, diversions, and (if applicable) reservoir evaporation and change in reservoir content within the reach. *Id.* The reach gains (or losses) for all reaches are summed from upstream to downstream, and the amount of natural flow available for distribution to the diversions within a given reach is the sum of that reach’s gain (or loss) plus all upstream reach gains (or losses). *Id.*

After determining the natural flow supply available within each reach of the river on a given day, the water rights accounting program distributes to each licensed or decreed point of diversion the amount of natural flow available and diverted under the priority date and quantity elements of the diverter’s licensed or decreed water right(s). [A.R. 001264-65](#).¹⁹ Any diversion

¹⁹ Distributions are also made in accordance with any other applicable limitations in the water right, such as annual diversion volume limits, periods of use, etc. [A.R. 001265](#).

in excess of the natural flow available under the licensed or decreed water right(s) is charged as a use of storage water, and debited from the diverter's storage water account with the BOR. *Id.*²⁰

The storage program determines how much stored water is allocated to each storage account. [A.R. 001264](#). Storage account allocations are made once a year, on the “Day of Allocation”—that is, after the reservoir system has reached its maximum total physical content for the year and the natural flow supply is no longer sufficient to satisfy demand under all licensed and decreed water rights diverting from the river. [A.R. 001267-69](#), [001270](#).²¹ On the “Day of Allocation” the storage program allocates all of the water in the reservoir system to Spaceholders’ storage accounts, according to the terms of their storage contracts with the BOR. [A.R. 001267-68](#), [001270-71](#).

b. The Accrual Methodology for the Decreed Storage Rights

The Accrual Methodology uses the same principles to determine distributions of natural flow pursuant to the Decreed Storage Rights as are used for all other licensed and decreed water rights. The amount of natural flow available for diversion under each Decreed Storage Right is not determined by simply measuring reservoir “inflows,” but rather by the “reach gain equation” methodology. [A.R. 001266](#). The Accrual Methodology “accrues”—distributes—to each

²⁰ Early-season charges against storage accounts are “cancelled” on the “Day of Allocation” if the diversions occurred when water was being released from Lucky Peak for flood control purposes, or if the reservoir system has filled to full capacity. [A.R. 001265](#), [001271](#), [001283](#).

²¹ The “Day of Allocation” occurs when three requirements have been met: (1) no more water is accruing to the Decreed Storage Rights; (2) diversion demand is equal or greater to the available natural flow supply; and (3) the reservoir system has reached its maximum content. [A.R. 001267-68](#).

Decreed Storage Right, on a daily basis, all natural flow computed to be available under the priority of the Decreed Storage Right at its decreed point of diversion—the dam. *Id.* *All* natural flow available in priority is distributed because the Decreed Storage Rights are not limited by diversion rates, and each dam physically diverts the entire flow of the river into the reservoir, where it is thereafter subject to regulation and controlled releases by the BOR and/or the Corps. [R. 001058](#); [A.R. 001238](#). The dams “therefore divert the entire flow of the river that is available in priority at any given time.” [R. 001061](#).

In the early part of the year the natural flow available for diversion under the priority of a Decreed Storage Right may be the same as the amount of physical “inflow” to its reservoir. However, this is only because the Decreed Storage Rights are not limited by diversion rates and authorize diversions to storage year-round. [R. 001060-61](#); [Ex. 2015](#). As a result, the natural flow computed to be available for diversion under a Decreed Storage Right before senior irrigation water rights begin diverting may in some circumstances amount to all physical “inflow” to the reservoir. Under this methodology, accruals to a Decreed Storage Right continue until the cumulative accruals for the year have reached the annual volume of the quantity element. [A.R. 001266](#), [001293-94](#). When this occurs, the Decreed Storage Right is deemed satisfied and no longer in priority, and no natural flow is accrued to the Decreed Storage Right until the volume is “reset” and accruals begin for the next year. *Id.*²²

²² Accruals can also cease before a Decreed Storage Right is satisfied if the natural flow supply has diminished to the point that no more natural flow is available under the priority of the Decreed Storage Right. [A.R. 001266](#), [A.R. 001267 n.38](#); [001293-94](#).

Importantly, the Accrual Methodology is not based on measuring the “physical fill” or storage contents of the reservoirs, and cumulative accruals of priority water are not reduced when the BOR or the Corps release water from the reservoir (for any reason). [A.R. 001266](#). As a result, a Decreed Storage Right can be satisfied either before or after the BOR or the Corps allow the reservoir to physically fill with water. *Id.* This is what is meant by the term “paper fill.” *Id.* “Paper fill” simply means a Decreed Storage Right is no longer “in priority.” *Id.* The term does not mean the reservoir has physically filled or that physical storage of water in the reservoir must stop. *See generally* [A.R. 001266-68](#), [001270](#) (describing “unaccounted for storage” and storage account allocation procedures).

After a Decreed Storage Right has been satisfied for the year (“filled on paper”), its priority may not be exercised to curtail junior appropriators, but additional storage of water is allowed if there is empty space in the reservoir system and there is water in excess of diversion demand under downstream water rights. [A.R. 001266-67](#). The Accrual Methodology and “paper fill” apply only to priority administration of the Decreed Storage Rights with respect to other licensed and decreed water rights in Water District 63. They do not determine how much water is allocated to Spaceholder storage accounts on the “Day of Allocation.” [A.R. 001260](#), [001267-70](#).

c. The Unaccounted for Storage Methodology

The Water District 63 accounting system tracks and reports the physical storage of water after the Decreed Storage Rights have been satisfied as “unaccounted for storage.” [A.R. 001267](#), [001410](#); [Ex. 1 at 000009](#). The “Unaccounted for Storage Methodology” is entirely different

from the Accrual Methodology. In contrast to the Accrual Methodology, the Unaccounted for Storage Methodology is controlled by reservoir system operations and “physical fill.” [A.R. 001261, 001263, 001267, 001408-09 n.5, 001410, 001414 n.9, 001422 & n.14.](#)

“Unaccounted for storage” is a natural flow parameter in the water rights accounting program that serves as a proxy for tracking how much excess water—that is, water not needed to satisfy any water right diverting upstream from the Middleton gage²³—has been physically captured in the reservoir system. “Unaccounted for storage” is not determined by measuring reservoir system “inflows,” but rather by a computation based on measurements made at the Middleton gage near the City of Middleton, far downstream from the reservoirs. [Ex. 1 at 000004-05, 000009; Tr., Aug. 28, 2015, p.444, ll. 9-17.](#) If the measured flow at the Middleton gage is less than the excess natural flow that should be present after distributions have been made to all licensed and decreed water rights on the system, it is assumed that the excess was physically retained somewhere in the federal reservoir system—which is exactly what happens during flood control “refill” operations. [R. 001093-95, 001102; Ex. 1 at 000004-05, 000009.](#)²⁴ This deficit in the natural flow computed for the Middleton gage is reported in the daily

²³ The Middleton gage is the downstream end of the regulated portion of Water District 63 diversions. Diversions downstream from Middleton are measured and accounted for, but not regulated, because return flows below Middleton have historically been sufficient to satisfy all water rights. [Tr., Aug. 27, 2015, p.222, ll.217-18; Tr., Sep. 10, 2015, p.1375, ll.13-14.](#)

²⁴ This assumption is sound because the system accounts for all diversions downstream from Lucky Peak. The assumption is also verified through an annual reconciliation procedure that compares actual reservoir system contents with computed contents. [Tr., Aug. 27, 2015, p. 209, ll. 3-15.](#)

accounting system printouts as “UNACCT STOR,” which is an abbreviation for “unaccounted for storage.” [A.R.001408-09 n.5, 001410](#); [Ex. 1 at 000004-05, 000009](#); *see, e.g.*, [Ex. 2201 at 004026](#) (accounting printout).

The amount of excess water the Corps captures in the reservoir system during the flood control “refill” period—i.e., “unaccounted for storage”—is highly variable. It depends entirely on the Corps’ runoff forecasts, how much “priority water” the Corps releases during the “evacuation” period, *see* [A.R. 001244](#) (referring to “the forecasted volume of runoff” and “Spring Evacuation Requirements”), and the relative amounts of excess water the Corps chooses to store or “bypass” as the “refill” period progresses.²⁵ *See* [A.R. 001306](#) (“The uncontroverted evidence establishes that, from April 1 until the end of flood control operations ... the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent.”). As a result, the amount of “unaccounted for storage” the Corps captures in the reservoir system in flood control years is unpredictable. It can vary by hundreds of thousands of acre-feet even among years that have the same or similar volumes of runoff during the flood control “refill” period. *See* [R. 001097](#) (comparing flood runoff volumes with “unaccounted for storage” volumes).

On the “Day of Allocation”—which falls after flood control operations have concluded—the storage program allocates all of the water in the reservoirs to Placeholder storage accounts

²⁵ “Bypass” water is water that was physically diverted and stored. As the Director found: “Bypass does not mean that the inflow is not diverted into the reservoir; it means the amount of water released is adjusted to satisfy the goal of maintaining a constant storage volume or controlling the rate at which storage increases.” [A.R. 001243](#).

pursuant to federal storage contracts and BOR instructions, without regard to whether water was stored “in priority” under a Decreed Storage Right or is “unaccounted for storage.” [A.R. 001248-49](#), [001260](#), [001267-68](#), [001270-71](#), [001273](#), [001275-76](#), [001293](#), [001297](#).²⁶ In effect, the distinction between priority water and “unaccounted for storage” is erased on the “Day of Allocation,” and the BOR is allowed to substitute excess flood water captured by the Corps during flood control “refill” operations for priority water that the Corps released earlier. [A.R. 001267](#), [001273](#), [001276-77](#), [001293](#), [001296-97](#), [001421-22](#).

The Director found that the Unaccounted for Storage Methodology is consistent with the longstanding practice of replacing water the Corps releases for flood control purposes with excess flood waters captured during the “refill” phase of federal flood control operations. See [A.R.001276](#) (“The [*Water Control Manual for Boise River Reservoirs*] assumes that flood flows captured in the reservoir system during ‘refill’ operations will be available for allocation to storage spaceholders after the conclusion of flood control operations”); [A.R. 001296](#) (“The coordinated system of flood control operations, in short, is based on substituting flood water for previously stored irrigation water released during flood control operations.”); [A.R. 001421](#) (“The reservoir operations plan contemplated that excess flood water captured during the “refill” period

²⁶ If the Corps has not succeeded in “refilling” the reservoir system to within 73,950 acre-feet of full capacity, the available water is first assigned or credited to the individual reservoirs in order of their priorities, i.e., any shortfall is assigned to Lucky Peak. [A.R. 001261](#), [001267](#). This is not a priority distribution of natural flow but rather a contractual storage allocation procedure used to fulfill the BOR’s “Guarantee” to Arrowrock and Anderson Ranch spaceholders that Lucky Peak water will be used to replace any flood control-caused losses from their reservoirs. [A.R. 001240](#), [001247](#), [001261](#), [001275](#). This procedure is consistent with the BOR’s pre-1986 storage allocation practices. [A.R. 001251-52](#).

would replace—that is, would be substituted for—any stored or storable water released during flood control operations.”); [A.R. 001421](#) (“Substituting excess water that would otherwise have caused flooding for stored or storable water released to make reservoir space available for flood control purposes is an element of the reservoir operations plan to which the spaceholders and the BOR agreed.”).²⁷

4. The Conflict Between Flood Control and Storage

The Director determined the Unaccounted for Storage Methodology is integral to resolving the priority administration “conundrum,” [R.001164-65](#), and “dilemma” created by the conflict between flood control operations and storage, *see* [A.R. 001291](#) (“The Water District 63 water right accounting system resolves the dilemma by accounting for the distribution of natural flow according to decreed water rights and the allocation of stored water according to federal contracts in a manner consistent with coordinated reservoir system operations.”). The conflict arises from the fact that Arrowrock and Anderson Ranch projects were congressionally authorized primarily to store water for irrigation use and are owned and operated by the BOR. [R. 001055](#); [A.R. 001237-38](#); [Ex. 2053 at 001636-37, 001641-42](#). The Lucky Peak project, in contrast, was authorized primarily for flood control purposes and is owned and operated by the Corps. [R. 001055-56](#); [A.R. 001238](#); [Ex. 2053 at 001642](#); [Ex. 2096 at 002137, 002146](#).

²⁷ The Department has argued in its related appeal that the District Court’s findings regarding operation of the Unaccounted for Storage Methodology are contrary to the Director’s findings and that the District Court erred in concluding the Unaccounted for Storage Methodology is contrary to law. The Department incorporates herein by reference the arguments in the *IDWR Appellants’ Brief* in the Department’s appeal (Idaho Supreme Court Docket No. 44746-2017).

The Corps and the BOR have coordinated the operations of their respective reservoirs since 1956 so that all three reservoirs are used for *both* flood control and storage. [A.R. 001238-49](#); *see also* [Off'1 Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ \("Lucky Peak Decision"\) at 001535-37, 001543-44](#). Flood control operations directly conflict with storage because flood control operations require releasing water rather than storing it. As stated by the Corps in its 1985 *Water Control Manual for Boise River Reservoirs*:

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

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

The Corps and the BOR manage and minimize the conflict by operating all three reservoirs for flood control purposes until the flood runoff ends in spring or early summer. *See* [A.R. 001243-47](#) (describing flood control operations). The Corps is in charge of flood control operations and allows the reservoir system to “refill” during the last phase of flood control operations. *Id.*; *see* [DC Brief at 2](#) (“As runoff and the risk of flooding subsides . . . water is increasingly stored for beneficial use”); *id.* [at 23](#) (“water will be captured on recession of the

flood peak to supply irrigation requirements’”) (citation omitted); [A.R.001293](#) (“the reservoir system will physically ‘refill’ as high flows recede and the risk of flooding diminishes”).

Under this system of coordinated reservoir operations, the BOR and the Corps made storage secondary and subject to flood control operations. *See DC Brief at 45* (“Reservoir space kept vacant for flood control purposes is not available to store water for beneficial use until that space is no longer require for flood control”); *id. at 56* (“Water cannot be stored in reservoir space that is required to be vacant during flood control operations”).

The Corps decides whether water will be released from the reservoir system during flood control operations, which begin after the irrigation season ends and “continue until the Corps determines there is no longer a risk of exceeding the flood control objective downstream from Lucky Peak.” [A.R. 001243](#).²⁸ This does not happen until the end of the flood control “refill” period, which can be as early as May or as late as July. [A.R. 001243](#), [001245](#). “Refill” is itself a flood control operation,²⁹ and the reservoir system “refill” occurs only when and to the extent the

²⁸ The “flood control objective downstream from Lucky Peak,” [A.R. 001243](#), is to prevent flows at the Glenwood Bridge from exceeding 6,500 CFS, [A.R. 001239](#), [001244](#), [001245](#); [Ex. 2005 at 000418](#). Lucky Peak Dam is “the control point for managing overall reservoir system content,” [A.R. 001292](#), and the Corps has “final authority” over whether water will be released from Lucky Peak for flood control purposes, [A.R. 001243](#). Releases from the two BOR reservoirs upstream of Lucky Peak can change the distribution of stored water within the reservoir system, but cannot reduce the overall volume of stored water. [A.R. 001429-30](#).

²⁹ “Refill” is the last of three “somewhat overlapping” sequential periods that define the flood control season, [A.R. 001244-45](#), and “is ‘normally the most difficult and critical of the three flood control periods.’” [A.R. 001245](#) (quoting *Water Control Manual for Boise River Reservoirs*).

Corps deems permissible in light of the flood risk. The Director found that “the Corps controls the amount of water released from the reservoirs pursuant to the [*Water Control Manual for Boise River Reservoir*]’s Refill Requirements. During this period, the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent.” [A.R. 001306](#).³⁰

The risk inherent in these operations is that the Corps may not be able to fully “refill” the reservoir system if too much water is released early in the season, and/or the amount of runoff actually available for storage as “the risk of flooding subsides,” [DC Brief at 2](#), turns out to be less than was forecasted. When “this method of operation” was originally proposed, Boise River irrigators opposed it because they “fear[ed] it might jeopardize the storage of water for irrigation.” [Id.](#); [Ex. 2053 at 001644](#).

The BOR and the Corps consciously decided to make storage secondary to flood control. [Ex. 2038 at 001364](#) (“The above-designated 983,000 acre-feet or any part in storage at the end of each flood season will be primarily considered as available for irrigation except as such amount must be reduced by evacuation requirements for flood control.”). Arrowrock and Anderson Ranch Spaceholders (i.e., the irrigation districts represented by the Board of Control) consented to flood control operations after the Corps and the BOR agreed in 1953 that if Arrowrock or Anderson Ranch Reservoirs were “not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson

³⁰ “At the end of flood control operations, the Corps turns operational control over to the BOR,” [A.R. 001243](#), and the BOR allocates all of the water in the reservoir system to Spaceholder storage accounts according to Spaceholder contracts, [A.R. 001247-48](#), [001260-61](#), [001263](#), [001267-68](#), [001276](#).

Ranch storage rights to the extent of the space thus remaining unfilled at the end of the storage season.” [A.R. 001239](#); [Ex. 2038 at 001369](#); [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001537](#). Supplemental storage contracts for Arrowrock and Anderson Ranch executed in 1954 included an express “Guarantee” by the BOR that Lucky Peak storage would be used to replace flood control releases from Arrowrock and Anderson Ranch Reservoirs. [Ex. 2100 at 002169-71](#) (1954 supplemental contract between BOR and Nampa & Meridian Irrigation District); [A.R. 001239-40](#); [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001537](#).³¹

The SRBA Court ordered in 2008 that this “Guarantee” be reflected in a remark in the Lucky Peak water right to memorialize that “the BOR has historically administered the flood evacuation from Anderson Ranch and Arrowrock Reservoirs into Lucky Peak as being paramount” and Arrowrock and Anderson Ranch Spaceholders “have an interest in the storage space in Lucky Peak” that is “paramount to all other rights to storage space in Lucky Peak.” [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001565](#); [A.R. 001235-36](#); *see* [Ex. 2015 at 000723](#) (partial decree for Lucky Peak water right). Thus, if flood control operations result in a shortfall to Arrowrock and Anderson Ranch Spaceholders’ storage accounts, they are made whole with storage from Lucky Peak.

³¹ In addition, the Spaceholders’ repayment costs and O&M charges were re-allocated pursuant to a 1953 BOR cost allocation report for the Boise Project, so the Spaceholders would not bear the financial burden of “nonreimbursable” flood control operations. [Ex. 2071 at 001928, 001931](#); *see* [Ex. 2100 at 002171](#) (contract referring to cost allocation report).

Lucky Peak Spaceholders (such as most of the Ditch Companies) consented to flood control operations when the BOR began contracting Lucky Peak storage in 1965. These “water service contracts” expressly recognized that flood control was the “primary purpose” of the Lucky Peak project. [Ex. 2112 at 002310](#). The contracts provided that Lucky Peak storage was “[s]ubject to such operation for flood control,” that the Corps would release water “as required for flood control,” and that “such discharged water shall be deducted from any stored water held to the credit of the Contractor.” [Ex. 2112 at 002310-11](#). These provisions were retained when the Lucky Peak “water service contracts” were converted to “repayment” contracts in 2005. [Ex. 2190 at 003990-91](#); [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001544-45](#); see [A.R. 001238](#) (“the 71,017 acre-feet of Lucky Peak storage contracted for irrigation use is ‘[s]ubject to operations for flood control’”) (citation omitted). The SRBA Court held that when the irrigation entities entered into these contracts they acknowledged “that the reservoir could be used for purposes other than irrigation.” [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001564](#).

C. PROCEDURAL BACKGROUND

The Director initiated the contested case underlying this appeal to address “concerns with and/or objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in water district 63.” [A.R. 000007](#). These accounting procedures became an issue in Basin-Wide Issue 17, the SRBA proceeding commenced at the request of the Board of Control and others to address whether

“Idaho law require[s] a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control.” [BWI-17, 157 Idaho at 387, 336 P.3d at 795](#).

The Director initiated the contested case after the SRBA Court issued its Basin-Wide Issue 17 decision because the BOR, Board of Control, Ditch Companies, and others “continued to express concerns with and objections to existing accounting methods and procedures in Water District 63.” [A.R. 001232](#); *see* [A.R. 001263](#). At the request of parties, the Director stayed the contested case pending the outcome of the appeals of the District Court’s decision in Basin-Wide Issue 17 to this Court. [A.R. 001232](#). This Court subsequently held that the decision of “[w]hich accounting method to employ” in determining when a storage water right is satisfied is “within the Director’s discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#). Some of the parties to the “refill beneficial use claims still pending in the SRBA” asked the District Court “to stay processing those claims pending a decision by the Director in this contested case proceeding[.]” [A.R. 000095](#). Given this Court’s “decision on Basin-Wide Issue 17 and the parties’ request to stay the beneficial use claims pending before the SRBA District Court,” the Director lifted the stay of the contested case proceeding and scheduled a status conference. *Id.*

The contested case lasted more than two years, and included extensive discovery, pre-hearing motions, a five-day hearing, and post-hearing briefs. [A.R. 000001-1435](#). The Board of Control and Ditch Companies asserted throughout the contested case that the BOR’s decreed storage rights must be administered as being “in priority” until flood control “refill” operations have concluded. [A.R. 001306, 001413, 001416, 001423](#). The Director issued the *Amended*

Final Order on October 20, 2015, and the *Order Denying Petitions for Reconsideration* on November 19, 2015 (collectively, “Final Order”). [A.R. 001230](#); [A.R. 001401](#). The Director found that the Water District 63 accounting system distributes water in priority on the basis of the Decreed Storage Rights rather than flood control operations, and ordered that the Accrual Methodology remain in place. [A.R. 001308](#).

The Ditch Companies and Board of Control filed petitions for judicial review of the Final Order in Ada County District Court on December 17, 2015. [R. 001054](#). The petitions were reassigned to the District Court³² and consolidated on December 30, 2015. [R. 000056](#). On September 1, 2016, the District Court issued its *Memorandum Decision and Order*, affirming the Accrual Methodology, rejecting procedural error arguments concerning the contested case proceeding, and setting aside and remanding the Final Order in part. [R. 001052](#), [001074](#).³³ The Department, the Ditch Companies, the Board of Control, and Suez Water Idaho, Inc. (“Suez”) filed petitions for rehearing on various aspects of the District Court’s decision, [R. 001076](#), [001084](#), [001146](#), which the District Court denied in its *Order Denying Rehearing*. [R. 001161](#). The Ditch Companies and Board of Control filed appeals to this Court, Suez filed cross-appeals, and the Department filed a separate appeal. [R. 001168](#), [001214](#), [001344](#), [001390](#), [001517](#).

³² The District Court that decided the underlying appeal is the SRBA Court.

³³ The Department has argued in its related appeal (Sup. Ct. Docket No. 44746-2017) that the District Court erred by setting aside and remanding the Final Order in part.

II. ADDITIONAL ISSUES ON APPEAL

Pursuant to Idaho Appellate Rule 35(b)(4), the Department identifies the following additional issues presented on appeal:

- A. Whether the Ditch Companies' arguments are collateral attacks on partial decrees issued in the SRBA;
- B. Whether the prior appropriation doctrine as established by Idaho law should be subordinated to federal flood control operations;
- C. Whether legal control of the distribution, use, and development of Idaho's water should remain in the State of Idaho or be ceded to the Federal Government;
- D. Whether the Ditch Companies' arguments, if accepted, would extend the priorities of the Decreed Storage Rights to encumber all water in the Boise River Basin in excess of diversions under senior rights in years the Corps releases water from the Boise River Reservoirs for flood control purposes;
- E. Whether the Ditch Companies' procedural arguments lack merit; and
- F. Whether the Department is entitled to attorney fees.

III. STANDARD OF REVIEW

When reviewing the decision of a district court acting in its appellate capacity under the Idaho Administrative Procedure Act, this Court reviews the district court’s decision “to determine whether it correctly decided the issues presented to it,” but reviews the agency record “independently of the district court's decision.” [Rangen, Inc. v. IDWR, 160 Idaho 251, 255, 371 P.3d 305, 309 \(2016\)](#). The agency’s factual determinations “are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.” *Id.* This Court reviews questions of law de novo. [Vickers v. Lowe, 150 Idaho 439, 442, 247 P.3d 666, 669 \(2011\)](#).

This Court affirms the agency action unless this Court finds the agency’s findings, inferences, conclusions, or decisions are: in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; not supported by substantial evidence on the record as a whole; or arbitrary, capricious, or an abuse of discretion. [Idaho Code § 67-5279\(3\)](#). Even if one of these conditions is met, this Court will still affirm the agency action “unless substantial rights of the appellant have been prejudiced.” [Idaho Code § 67-5279\(4\)](#). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. [Idaho Code § 67-5279\(3\)](#).

IV. ARGUMENT

A. **THE ACCRUAL METHODOLOGY IS CONSISTENT WITH THE DECREED STORAGE RIGHTS AND IDAHO'S PRIOR APPROPRIATION DOCTRINE**

The Director must distribute water “in accordance with the prior appropriation doctrine.” [Idaho Code § 42-602](#); [BWI-17, 157 Idaho at 392-94](#); [336 P.3d at 799-801](#). Each partial decree for the Decreed Storage Rights defines “a quantity [the Director] must provide to each water user in priority.” [BWI-17, 157 Idaho at 394](#), [336 P.3d at 801](#). The partial decrees are “conclusive as to the nature and extent” of the Decreed Storage Rights, and are binding on the Director and all parties to the SRBA. [Final Unified Decree at Addendum A, pp.7, 9, 13](#); [Idaho Code § 42-1420](#). The Accrual Methodology is consistent with the Decreed Storage Rights and the prior appropriation doctrine as established by Idaho law.

At each of the dams, the entire flow of the river is physically diverted into a reservoir, and made subject to controlled releases by the BOR and/or the Corps. [R. 001058](#); [A.R. 001238](#), [001292](#). The dams “therefore divert the entire flow of the river that is available in priority at any given time.” [R. 001061](#). Accordingly, the Accrual Methodology distributes to each Decreed Storage Right, on a daily basis, all natural flow computed to be available under the priority of the right at its decreed point of diversion—the dam. [A.R. 001266-67](#); [R. 001058-59](#). This is consistent with the partial decrees for the Decreed Storage Rights because the quantity element of each right is defined as an annual volume that is not limited by a diversion rate, and each authorizes diversions to storage year-round. [Ex. 2015](#); [R. 001060-61](#); [A.R. 001289](#).

It is necessary to distribute water to the Decreed Storage Rights on the basis of the amount of natural flow computed to be available in priority rather than by simply measuring reservoir “inflow” because “[a]n on-stream reservoir alters the stream affecting the administration of all rights on the source.” [A.R. 001291](#) (citation omitted). Some of the “inflow” to a reservoir may include natural flow that is not available under the priority of the Decreed Storage Right. *See, e.g., DC Brief at 56-57* (“Water that is required to be released to downstream senior water rights is not stored pursuant to the storage water rights”). Further, because the Boise River Reservoirs are on the same river system, the “inflow” to one reservoir may include stored water released from an upstream reservoir. [A.R. 001287-88, 001291](#); *see Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 159, 219 P.3d 804, 806 (2009) (“When the Irrigation District's storage water is in the river, it may be comingled with natural flow water.”). In addition, “the BOR and the Corps physically store water in the reservoir system without regard to which reservoir is in priority,” [A.R. 001246](#); *see A.R.001295* (similar), and as result the water stored under the priority date of a downstream reservoir’s water right may be physically stored in an upstream reservoir, [Ex. 2 at 000028](#); [DC Brief at 15, 64](#).

Reservoir operations, in short, mask the natural flow supply and do not conform to the priorities of the Decreed Storage Rights. “Accordingly, some methodology is required to implement priority administration of affected rights.” [A.R. 001291](#) (citation omitted). This is why it is necessary to distribute the natural flow computed to be available at the Decreed Storage Rights’ points of diversion based on a number of streamflow parameters, rather than by simply measuring reservoir “inflows.” [A.R. 001264-67](#); *see A.R. 001264* (“Natural flow is the water

that would be present in the river ‘absent reservoir operations and diversions’”) (citation omitted). The Accrual Methodology allows the Director to factor out reservoir operations for purposes of distributing the available natural flow supply in accordance with the elements of the Deeded Storage Rights, as well as the elements of all other licensed and deeded water rights diverting from the river. [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#) (recognizing “the need for the Director’s expertise”). This Court has long recognized that appropriators diverting downstream from an on-stream reservoir have rights “at their headgates to the amount of water to which they are entitled under their appropriations as if the same would have naturally flowed in the stream prior to the construction” of the reservoir. [Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 396, 283 P. 522, 526 \(1929\)](#).

The Accrual Methodology is also consistent with the statutory requirement of measuring a distribution of water at the point of diversion, which this Court has repeatedly confirmed.³⁴ [R. 001058 & n.6](#); see [Idaho Code § 42-110](#) (stating that water right holders “shall be entitled to such quantity measured at the point of diversion”); [Glenn Dale Ranches, Inc. v. Shaub, 94 Idaho 585, 588, 494 P.2d 1029, 1032 \(1972\)](#) (“waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use”); [Stickney v. Hanrahan, 7 Idaho 424, 435, 63 P. 189, 192 \(1900\)](#) (“The necessity of measuring to each claimant, at the point of diversion from the natural stream, the waters appropriated and used by him, is apparent”). The dams are the

³⁴ The *Stewart* and *Bryan Decrees*, [DC Brief at 10](#), also require distributions to be measured at the point of diversion. [Ex. 2021 at 000791](#) (*Stewart Decree*); [Ex. 2023 at 000791](#) (*Bryan Decree*).

decreed points of diversion and physically divert all streamflow into the reservoirs, [R. 001056](#), [001058](#); [A.R. 001238](#), [001292](#), including “the entire flow of the river that is available in priority at any given time,” [R. 001061](#).

The fact that the Corps or the BOR sometimes release priority water for purposes not authorized in the Decreed Storage Rights (such as flood control) does not change the fact that the water was diverted into the reservoirs and made subject to the exclusive physical control of the Corps and/or the BOR. *See* [R. 001060](#) (“it is the federal government that decides how to store and release water. . . . What the federal government chooses to do does not change the fact that the Director distributed the water in priority and to the point of diversion authorized under the reservoir water right”). It is the responsibility of the appropriator to make beneficial use of water actually diverted and distributed to the appropriator under the priority of a water right. *See* [R. 001059](#) (“it is the appropriator who is tasked with applying [water] to beneficial use”); [Rayl v. Salmon River Canal Co.](#), 66 Idaho 199, 209, 157 P.2d 76, 80 (1945) (“Each user must apply his water to a beneficial use and is solely responsible therefor”).³⁵

³⁵ None of this is changed by the Ditch Companies’ argument that flood control space is not “legally available’ for beneficial use storage.” [DC Brief at 51, 56](#). Distributions are measured by diversions, and all priority water is physically diverted into the reservoirs and made subject to the exclusive control of the Corps and the BOR. Further, the “availability” of reservoir space for “beneficial use storage” as opposed to flood control is not defined by decree, statute, rule, or any quantifiable legal standard. The “availability” of reservoir space for storage as opposed to flood control, rather, is an operational determination made by the Corps based on the Corps’ judgment. [A.R. 001244 n.14](#). This method of operations makes the availability of “beneficial use storage” secondary and subject to flood control, and is specifically authorized by the Spaceholders’ contracts, as previously discussed. Arrowrock and Anderson Ranch Spaceholders secured protection for their “beneficial use storage” by obtaining a “guarantee” that they would be made

Deeming each Decreed Storage Right to be “satisfied” and no longer “in priority” when cumulative accruals reach the decreed annual volume, [A.R. 001266-67](#), is also consistent with the quantity elements of the Decreed Storage Rights and Idaho’s prior appropriation doctrine. See [R. 001064-65](#) (“the Director’s determination to deem the right satisfied is consistent with the partial decree”). An appropriator holding a “prior right” to a decreed quantity of water “may unquestionably divert that quantity, but when he has done so” the priority of the water right may not be asserted over a larger volume of water “under any other pretext[.]” [Van Camp v. Emery, 13 Idaho at 208, 89 P. at 754 \(1907\)](#). Extending priority to diversions in excess of the decreed volume would constitute an enlargement and *per se* injury to junior appropriators. See [City of Pocatello v. Idaho, 152 Idaho 830, 835, 275 P.3d 845, 850 \(2012\)](#) (“An increase in the volume of water diverted is an enlargement” and “there is *per se* injury to junior water rights holders anytime an enlargement receives priority.”) (italics in original) (citation omitted); see also [Barron v. IDWR, 135 Idaho 414, 420, 18 P.3d 219, 225 \(2001\)](#) (“Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use.”).³⁶

whole from Lucky Peak storage. Lucky Peak Spaceholders agreed that flood control releases would be “deducted” from their “beneficial use storage.”

³⁶ While the Ditch Companies assert “[j]uniors forego nothing” if the priorities of the Decreed Storage Rights remain in effect until the conclusion of flood control operations, [DC Brief at 63](#), the Director found that doing so “would create the real possibility of curtailment of junior water rights in the future.” [A.R. 001284](#). In any event, the Ditch Companies’ argument misses the point. Lack of injury to juniors is not a legal basis for extending priority over volumes of water greater than those defined in the Decreed Storage Rights.

The Accrual Methodology distributes the decreed quantities of the Decreed Storage Rights according to their decreed priorities and consistent with the fact that each dam physically diverts the entire flow of the river into a reservoir, including “the entire flow of the river that is available in priority at any given time.” [R. 001061](#). The Accrual Methodology is consistent with the statutory requirement that the Director (rather than reservoir operators) has “direction and control of the distribution of water from all natural water sources within a water district.” [Idaho Code § 42-602](#). The Accrual Methodology is consistent with the statutory requirement that “control” of the state’s water “shall be in the state” rather than the federal government, and that “in providing for its use, [the state] shall equally guard all the various interests involved.” [Idaho Code § 42-101](#).³⁷ The Accrual Methodology thus distributes water “in accordance with the prior appropriation doctrine” as established by Idaho law. [Idaho Code § 42-602](#). The District Court was correct in affirming the Accrual Methodology. *See* [R.001065](#) (“The Director’s finding is therefore consistent with both the prior appropriation doctrine and the subject decrees. It must be affirmed.”).

³⁷ The Ditch Companies do not object to how the Accrual Methodology works in “non-flood years.” [A.R. 001277](#). The Ditch Companies essentially seek two different methods of priority administration, depending upon the water supply.

B. THE DITCH COMPANIES' OBJECTIONS TO THE ACCRUAL METHODOLOGY LACK MERIT

1. The Ditch Companies' Description of the Accrual Methodology Is Contrary to the Director's Factual Findings

The Ditch Companies incorrectly assert “[t]here is no dispute regarding the mechanics of IDWR’s accounting program.” [DC Brief at 65](#). The Ditch Companies’ description of the Accrual Methodology is contrary to the Director’s factual findings and the record. The Ditch Companies would have this Court ignore the Director’s factual findings and most of the record, and instead focus on just a few documents offered by the Ditch Companies. *See, e.g., id. at 9* (asserting that while “the record is voluminous, this Court should pay particular attention to” certain Ditch Company exhibits). The Ditch Companies argue this limited evidence trumps the Director’s factual findings and allegedly proves that the Water District 63 accounting system interprets the Decreed Storage Rights as remaining in priority until the reservoirs have physically filled with water at the conclusion of flood control operations—or at least that is how it allegedly worked when the Director began using it in 1986, and that something has changed since then. *See, e.g., id. at 41* (“This was never the intent or effect of adopting the computerized water right accounting procedure.”) (quoting Sisco affidavit).

The Director specifically found, however, that the Water District 63 accounting system determines satisfaction of the Decreed Storage Rights on the basis of computed accruals of the natural flow available for diversion at the dams under the priorities of the Decreed Storage Rights rather than by “physical fill” and/or federal flood control operations. [A.R. 001265-67](#). The Director also found that the Decreed Storage Rights are “no longer in priority” once they

have been deemed satisfied under the Accrual Methodology, [A.R. 001266](#), and that the Accrual Methodology has worked this way since its first use in 1986. [A.R. 001275](#).

The Director based these findings on detailed consideration of substantial evidence in the record, his weighing of the evidence,³⁸ and his determinations of the credibility and/or reliability of witness testimony.³⁹ [A.R. 001258-75](#); [001403-14](#). Because the Director’s findings, inferences, and conclusions are supported by substantial evidence in the record, his determinations must be affirmed. [Idaho Code § 67-5279\(1\)](#) (“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.”); [Idaho Code § 67-5279\(3\)](#) (“the court shall affirm the agency action unless the court finds that the agency’s findings, inferences, conclusions or decisions are . . . not supported by substantial

³⁸ Much of the evidence was quite technical in nature. *See, e.g.,* [A.R. 001408-14](#) (analysis of accounting program printouts).

³⁹ In constructing their narrative of how the Water District 63 accounting system operates, the Ditch Companies’ rely largely on two affidavits: one executed by Bob Sutter (the former IDWR Engineer who was the primary developer of the computerized accounting programs), and one executed by former Watermaster Lee Sisco. The Ditch Companies imply these two affidavits are consistent, and that Sutter and Sisco agreed that the Decreed Storage Rights are not satisfied, and remain in priority, until “maximum physical fill” at the conclusion of flood control operations. *See generally* [DC Brief at 33-41](#) (citing [Ex. 2008](#) (Sisco Aff.) & [Ex. 2181](#) (Sutter Aff.)). But the record shows that the affidavits are *not* consistent and that Sutter and Sisco had very different understandings of the accounting system. The record includes two additional Sutter affidavits, which the Ditch Companies ignore, that contradict the Ditch Companies’ description of the Accrual Methodology. [Ex. 5](#); [Ex. 6](#). Further, Sutter testified at the hearing that he clarified the affidavit upon which the Ditch Companies rely ([Ex. 2181](#)) in one of his other affidavits ([Ex. 6](#)). [Tr., Aug. 28, 2015, p.330, 1.21-25](#). Sutter also testified that the Decreed Storage Rights are no longer considered to be in priority after they have been deemed satisfied pursuant to the Accrual Methodology, [Tr., Aug. 28, 2015, p.345, 1.9-12](#), and that the Sisco affidavit’s description of the Accrual Methodology was misleading or incorrect. [Tr., Aug. 28, 2015, p.336-39](#).

evidence on the record as a whole”); [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#) (“[T]he state engineer is the expert on the spot, and we are constrained to realize the converse, that judges are not super engineers. The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state”) (citation omitted).

2. The Accrual Methodology Does Not “Count” Flood Control Releases

The Ditch Companies repeatedly assert that the Accrual Methodology “counts” flood control release towards the satisfaction of the Decreed Storage Rights. [DC Brief at 3, 6, 44, 46](#). This argument is a strawman that is contrary to the Director’s findings.

a. The Accrual Methodology Is Based On Diversions, Not Releases

The federal dams “divert the entire flow of the river that is available in priority at any given time.” [R. 0010161](#); [A.R. 001238](#). The Accrual Methodology therefore “counts” towards the satisfaction of each Decreed Storage Right the natural flow computed to be available under the priority of the right at the decreed point of diversion. [A.R. 001266-71](#). The Accrual Methodology ignores releases, whether for flood control or any other purpose, in accounting for distributions of natural flow pursuant to the elements of the Decreed Storage Rights. *Id.* These findings are supported by substantial evidence in the record. *Id.*

b. Released-Based Accounting Is Incompatible with the Decreed Storage Rights

The District Court determined that “[o]nly the [federal government] knows” the purposes for which it releases water from the reservoirs, and as a result of flood control operations “it may be months before [the Director] knows whether that water is released to the irrigators or released

for some other purposes.” [R. 001062](#). The District Court recognized that as a result, release-based water right administration is incompatible with the decreed storage rights: “How is the Director to distribute and administer to other water rights on the system in the interim if he does not know whether the reservoir water rights are, or are not, satisfied? Effectively, he cannot, and the system of priority water right distribution breaks down.” *Id.*

While the Accrual Methodology is based on year-round accounting of water distributions on a daily basis, [A.R. 001265](#), [001276](#), the Director found that the Corps and the BOR do not make daily accountings of the volume of flood control releases from the reservoir system. [A.R. 001246](#). Rather, the BOR makes retrospective determinations of the overall volume of water released at the end of the flood control season, and categorizes the releases as flood control, salmon augmentation flow, and various operational loss designations. *Id.* The BOR has discretion to categorize releases during the flood control period as releases for “flood control” or salmon flow augmentation (or other operational purposes), or to “feather” the two into each other; and may make after-the-fact changes to its initial accounting of these releases. *Id.*

These end-of-season federal determinations are not part of the Water District 63 accounting system, do not distinguish releases for flood control purposes from releases necessary to satisfy downstream water rights, and may or may not be communicated to the Department. *Id.* Thus, as the Director found, taking flood control releases into account for purposes of determining satisfaction of the Decreed Storage Rights “is incompatible with year-round accounting and would essentially preclude day-to-day accounting and administration of water

rights in Water District 63 until after flood control operations had ended and the reservoir system had reached its maximum contents.” [A.R. 001284](#).⁴⁰

3. “Physical Fill” Administration of the Decreed Storage Rights Would Be Contrary to the Prior Appropriation Doctrine as Established by Idaho Law

The Ditch Companies argue the Accrual Methodology is flawed because it should be based on measuring the “physical fill” of the Boise River Reservoirs. *See, e.g., DC Brief at 45* (“Storage water rights are thus fulfilled as available reservoir spaces are physically filled with water”); *id. at 51* (“Actual, physical storage of water for beneficial use is the true measure of a storage water right”); *id. at 65* (“The proper role of any accounting methodology is to account for the actual storage of water”). The Ditch Companies argue the Decreed Storage Rights should only be considered satisfied when the reservoirs “are physically filled at the end of flood control operations.” *Id. at 2*. This argument is contrary to the partial decrees for the Decreed Storage Rights and the prior appropriation doctrine.

a. “Physical Fill” Administration Is Contrary to the Partial Decrees

Each partial decree for the Decreed Storage Rights gives the Director “a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user.” [BWI-17, 157](#)

⁴⁰ The Ditch Companies argue that making daily determinations of the amount of water released for flood control purposes is no different from determining the amount released each day to satisfy senior water rights. [DC Brief at 52-53](#). This argument is contrary to the Director’s factual findings and substantial evidence in the record. Senior diversions under licensed and decreed water rights are measured and reported on a real-time basis. The BOR’s flood control release accounting is not.

[Idaho at 394, 336 P.3d at 801](#); *see* [Ex. 2015](#) (partial decrees). The partial decrees for the Decreed Storage Rights do not state or imply that they are to be considered satisfied only when the reservoirs have “physically filled” at the end of flood control operations.

The Decreed Storage Rights also do not authorize “flood control” as a purpose of use, do not include flood control “refill” remarks, *see* [BWI-17, 157 Idaho at 388, 336 P.3d at 795](#) (referring to “[s]everal irrigation districts in the Treasure Valley, whose storage water rights were already decreed without a remark on refill rights”), and do not include any of “several styles of ‘flood control use’ remarks” decreed in some other water rights, [DC Brief at 59](#).⁴¹ The Decreed Storage Rights do not reference any of the various documents the Ditch Companies have collectively labelled as the “reservoir operating plan,” [R. 001170](#); [A.R. 001301](#), nor the flood control terminology the Ditch Companies assert to be controlling, such as “runoff forecasts,”

⁴¹ The only remark in any of the Decreed Storage Rights that addresses the effect of flood control operations on Spaceholder storage supplies is the remark in the Lucky Peak partial decree memorializing the BOR’s 1954 “Guarantee” that Lucky Peak storage would be used to replace any flood control losses from Arrowrock and Anderson Ranch storage. [Ex. 2015 at 002345](#); [A.R. 001235-36, 001240](#); [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001564-67](#). The Water District 63 accounting system incorporates the “Guarantee” by crediting “unaccounted for storage” to the Decreed Storage rights in order of their priorities on the “Day of Allocation.” [A.R. 001267](#). This ensures that the Arrowrock and Anderson Ranch reservoirs (which are senior to Lucky Peak) get full allocations when the storage in the reservoirs at the conclusion of flood control operations is not sufficient to provide full allocations to all Spaceholders. This has happened only once since the Department began using the Water District 63 accounting system in 1986, however. That was in 1989, when Lucky Peak Spaceholders received less-than-full storage account allocations. In all other flood control years, the 60,000 acre-foot “buffer” of uncontracted streamflow maintenance storage provided by the *Water Control Manual for Boise River Reservoirs* has been sufficient to fully protect Lucky Peak Spaceholders against flood control releases. [A. R. 001245](#); [001247](#); [001263](#); [001268](#); [001270](#); [001273](#); [001276](#); [001303](#).

“rule curves,” “refill assurances,” or “maximum fill,” [DC Brief at 2, 5, 11, 18, 22, 29, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 45, 46, 48, 50, 53, 56, 63, 66, 67, 68.](#)

The elements of the Decreed Storage Rights are not decreed in terms that implicitly or indirectly recognize flood control operations or the so-called “reservoir operating plan.” [DC Brief at 2.](#) For instance, the partial decrees for the Decreed Storage Rights authorize diversions to “irrigation storage” year-round rather than limiting diversions to periods outside of the flood control season as defined by the *Water Control Manual for Boise River Reservoirs*. [R. 001060-61; A.R.001243-47; Ex. 2015.](#) The partial decrees also do not define diversions or storage volumes to conform to flood control season, runoff forecasts, or the “rule curves,” but rather authorize diversion of all flows not required by senior water rights each and every day until the decreed annual volume is satisfied. *Id.*

The partial decrees for the Decreed Storage Rights do not condition diversions or priority administration on the amount of reservoir system space available for “beneficial use storage” as opposed to “flood control storage” under the “reservoir operating plan.” [DC Brief at 2, 4, 12.](#) Nothing in the partial decrees limits diversions under the Decreed Storage Rights to times when the BOR decides it is “exercising” the rights. [Id. at 52-53.](#) The partial decrees do not make priority administration subject to the Ditch Companies’ storage contracts, but rather provide that “administer[ing] the use of the water in the quantities and/or percentages specified in the contracts between the [BOR] and the irrigation organizations” is the responsibility of the “irrigation organizations.” [Pioneer, 144 Idaho at 115, 157 P.3d at 609; Ex. 2015.](#)

Moreover, the diversion of water and the storage of water are two different things.⁴² The dams that create the Boise River Reservoirs divert all river flows each day, including “the entire flow of the river that is available in priority at any given time.” [R. 001061](#). Once priority water has been diverted into the reservoir, however, “it is physically controlled by the appropriator.” [Idaho Code § 42-110](#); *see* [R. 001059](#) (“It is, at that point, under the control of the appropriator”). The Federal Government “decides how to store and release that water,” and “[w]hat the federal government chooses to do does not change the fact that the Director distributed the water in priority and to the point of diversion authorized under the reservoir water right.” [R. 001060](#).

The responsibility for physically storing priority water until it is needed by the irrigators lies with the BOR. [Pioneer Irr. Dist., 144 Idaho at 110, 157 P.3d at 604](#) (“the BOR . . . manages and operates the storage facilities”). The irrigators hold “title to the use” of the water and this Court’s *Pioneer* decision confirmed that, “as a matter of Idaho constitutional and statutory law,” it is the BOR—not the Director and not junior appropriators—that is accountable to the Spaceholders when it releases the Spaceholders’ water for purposes authorized by federal law rather than the Decreed Storage Rights. [Id. at 115, 157 P.3d at 609](#). It is not the responsibility of the Director (or junior water right holders) to ensure the reservoirs are full when flood control operations conclude.

⁴² “Storage” is a component of the “purpose of use” element of the Decreed Storage Rights, not the “point of diversion” element. *See* [Ex. 2015](#) (partial decrees).

b. “Physical Fill” Administration Is Flood Control-Based Administration

The Boise River Reservoirs “are physically filled at the end of flood control operations.” DC Brief at 2. The full quantity of “priority water” encumbered by the Decreed Storage Rights, R. 001056-57, does not simply show up in the reservoirs all at once on the day of “maximum fill,” however. DC Brief at 2. The natural flow available for diversion under the priorities of the Decreed Storage Rights flows to the dams over a period of months at varying rates determined by the snowpack and the weather. In contrast, the day of “maximum fill” is an artificial event determined by the Corps’ flood control decisions. See A.R. 001306 (“the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent.”).

Thus, measuring the satisfaction of the Decreed Storage Rights by “[a]ctual, physical storage of water” or “physical fill” at the end of flood control operations, or by whether reservoir space is “‘legally available’ for beneficial use storage,” DC Brief at 51, 55, would replace priority administration under Idaho’s prior appropriation doctrine with flood control-based administration based on the decisions of federal dam operators. A.R. 001279, 001284, 001307. As the District Court held, this “would effectively transfer water right distribution in the basin from the Director to the federal government” because “[t]he Director would be unable to deem the reservoir water rights satisfied and/or distribute water to junior users until the federal government says he can.” R. 001062.

Nothing in Idaho law authorizes replacing priority administration with flood control-based administration, or allowing the federal government to usurp the Director’s exclusive “direction and control” over the distribution of water to Idaho water rights. Idaho Code § 42-

602. Even the BOR admits (in the SRBA proceedings on Basin-Wide Issue 17) that federal flood control operations are “entirely independent of the water rights system.” [A.R. 001301](#). The BOR further asserts that the outcome of the “refill” question “will have no effect on [BOR’s] flood control operations.” [Off’l Not.\BWI-17\ 91017—201301111US Response Brief on BWI 17 at 001213](#).⁴³ The Ditch Companies’ theory of “physical fill” administration is contrary to the partial decrees and to the prior appropriation doctrine because it would replace priority administration with flood control-based administration.

c. “Physical Fill” Administration Would Transform the Decreed Storage Rights Into Open-Ended Appropriations of All Excess Flood Water

Making satisfaction of the Decreed Storage Rights dependent on when the reservoirs “are physically filled at the end of flood control operations,” [DC Brief at 2](#), would mean that the Decreed Storage Rights would remain “in priority” until the end of the flood runoff period. Because the Decreed Storage Rights are not limited by diversions rates, the priorities of the Decreed Storage Rights would therefore encumber any and all flood water in the Boise River Basin, year in and year out. This result would be contrary to Idaho’s prior appropriation doctrine because “[t]here cannot be a prior relation to excess water.” [A & B Irr. Dist. v. ICL, 131 Idaho 411, 416, 958 P.2d 568, 573 \(1997\)](#); *see id.* (“Excess flow is not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right.”); *see also* [Village of Peck v. Dennison, 92 Idaho 747, 750, 450 P.2d 310, 313 \(1970\)](#) (“if

⁴³ Section 8 of the 1902 Reclamation Act provides that BOR “shall proceed in conformity with” state law regarding the “control, appropriation, distribution or use of water for irrigation.” [43 U.S.C. § 383](#).

the decree awards an uncertain amount of water to one appropriator whose needs are vague and fluctuating, it is likely that he will waste water and yet have the power to prevent others from putting the surplus to any beneficial use”).

As previously discussed, an appropriator’s “prior right” is limited to the decreed quantity of water, and while the appropriator “may unquestionably divert that quantity,” priority may not be asserted over a larger quantity of water “under any other pretext[.]” Van Camp, 13 Idaho at 208, 89 P. at 754. An appropriator may not command any and all flows in a river, year in and year out, to support a much smaller appropriation. See A & B Irr. Dist. v. ICL, 131 Idaho at 416, 958 P.2d at 573 (“[t]here cannot be a prior relation to excess water”); IGWA, 160 Idaho at 133, 369 P.3d at 911 (“The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate.”) (brackets in original) (citation omitted).

This limitation on the exercise of priority is crucial to “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” IGWA, 160 Idaho at 129, 369 P.3d at 907 (citation omitted). If it is not enforced, “[t]here might be a great surplus of water in the stream” and yet a senior appropriator “would have a cause of action to prevent such an appropriation [of the surplus].” Id. at 134, 369 P.3d at 911; see Lee v. Hanford, 21 Idaho 327, 332, 121 P. 558, 560 (1912) (“such surplus and overflow of water would be wasted . . . and the right to appropriate public unused waters of the state would be denied”); Idaho Const. Art. XV § 3 (“The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . .”).

In light of federal flood control operations in the Boise River Basin, Idaho's prior appropriation doctrine *requires* that satisfaction of the Decreed Storage Rights be determined on the basis of the amount of natural flow available for storage under the elements of the Decreed Storage Rights, rather than on the basis of the amount of reservoir storage space available under the so-called "reservoir operating plan," [DC Brief at 11](#), or when the reservoirs "are physically filled at the end of flood control operations." [Id. at 2](#).

4. The Accrual Methodology Is Not Based on a "One-Fill Rule" or a "Store It or Lose It Principle"

The Ditch Companies also object to the Accrual Methodology as implementing new policies or concepts they describe as the "'one-fill' rule" and/or the "'store it or lose it' principle." [DC Brief at 3, 57, 71, 72](#). The Ditch Companies have not supported these characterizations of the Accrual Methodology with record citations; and a review of the Director's order confirms that he did not find or conclude the Accrual Methodology implements or uses a "'one-fill' rule" or a "'store it or lose it' principle." See [A.R. 001230-001311 \(Amended Final Order\)](#); [A.R. 001401-001435 \(Order Denying Petitions for Reconsideration\)](#). The District Court in affirming the Accrual Methodology implicitly rejected arguments that the Water District 63 accounting system is based on a "'one-fill' rule" or a "'store it or lose it' principle." See [R. 001165](#) ("The Court reemphasizes that its ruling in this case in no way relies on precedent established in other states regarding the so-called 'one-fill rule.'"). The Accrual Methodology is a straightforward application of basic prior appropriation principles of Idaho law

and the elements of the partial decrees, not a “one-fill” rule” or a “store it or lose it” principle.”⁴⁴

5. The Accrual Methodology Does Not “Take” or “Subordinate” the Decreed Storage Rights or the Ditch Companies’ Storage Contracts

The Ditch Companies assert the Accrual Methodology “deprives the spaceholders of their right to store water pursuant to their water rights and storage contracts” by “subordinat[ing] them to “all junior water rights and future appropriations,” and therefore constitutes an “unconstitutional taking.” [DC Brief at 69](#). These assertions have no legal or factual merit.

The Decreed Storage Rights are “property right[s] to a certain amount of water” that the Director must distribute “in priority.” [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#). As previously discussed, the Accrual Methodology distributes the decreed quantities in priority, consistent with the partial decrees and the prior appropriation doctrine. The Accrual Methodology does not “subordinate” or “take” the Decreed Storage Rights; to the contrary, it protects them.⁴⁵

⁴⁴ The Accrual Methodology also is not based on a “paper fill” rule or standard. [DC Brief at 39](#). The standard for determining the satisfaction of a Decreed Storage Right is the quantity element in its partial decree, [A.R. 001266](#), not “paper fill.” “Paper fill” is a term of convenience used in recognition of the fact that a Decreed Storage Right can be satisfied even if its reservoir has not physically filled to full capacity. [A.R. 001426](#); [Ex. 1 at 000008](#). The term “paper fill” does not appear in the program code or the accounting printouts. [A.R. 001266 n.36, 001268, 001411](#).

⁴⁵ The Department’s use of “year-round accounting” beginning in 1986, [A.R. 001256-57, 001265, 001276, 001283-84](#), did not constitute a “taking.” While it is true there was no year-round accounting of the Decreed Storage Rights prior to 1986, [A.R. 001257](#), a water right holder “has no property interest in being free from the State’s regulation of water in accordance with the prior appropriation doctrine[.]” [In re IDWR Amended Final Order Creating Water District No. 170, 148 Idaho 200, 213-14, 220 P.3d 318, 3231-32 \(2009\)](#). The Director is statutorily authorized to require accounting for the distribution of water “at any time” of the year he deems it necessary “for the use and control of the waters of the district.” [Idaho Code § 42-608\(2\)](#);

The Accrual Methodology does not determine how much water will be allocated to Spaceholder storage accounts. Spaceholders' storage accounts are computed, rather, by the storage program. [A.R. 001267-68, 001270](#). The storage program computes storage account allocations according to the terms of the Spaceholders' storage contracts and the BOR's instructions, based on the volume of water in the reservoirs on the "Day of Allocation"—that is, the day of "maximum fill"—not based on the volume of water in the reservoirs on the date(s) of "paper fill."⁴⁶ [A.R. 001260, 001267-68, 001270](#).

The Accrual Methodology also does not cause or require flood control releases of priority water—that is, water to which irrigators rather than the Corps or the BOR hold "title to the use." [Pioneer Irr. Dist., 144 Idaho at 115, 157 P.3d at 609; Ex. 2015](#). Flood control releases are controlled by the Corps pursuant to the so-called "reservoir operating plan" to which the Spaceholders expressly agreed in their contracts with the BOR. [A.R. 001239-40; Ex. 2100 at 002169-71; Ex. 2112 at 002310-11; Ex. 2190 at 003990-91; Off'l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001537, 001544-45](#).

The Accrual Methodology also does not prevent or forbid the physical storage of excess flood water during the flood control "refill" period or allocation of the "unaccounted for storage" to Spaceholder storage accounts on the "Day of Allocation." [A.R. 001266-68, 001270-71](#),

⁴⁶ Each Decreed Storage Right has a different priority date and quantity, and is administered separately from the other Decreed Storage Rights. Consequently, each individual Decreed Storage Right is satisfied on different date (i.e., each Decreed Storage Right has a different "paper fill" date). [A.R. 001409](#).

[001273-75](#), [001293](#), [001296-96](#). The Accrual Methodology simply prevents the BOR and/or the Spaceholders from asserting priority over more water than the annual volumes to which they are entitled to under the Decreed Storage Rights. This is not a legally cognizable injury; to the contrary, it is a fundamental principle of the prior appropriation doctrine. [Van Camp](#), 13 Idaho at 208, 89 P. at 754; [Lee](#), 21 Idaho at 332, 121 P. at 560; [A & B Irr. Dist. v. ICL](#), 131 Idaho at 416, 958 P.2d at 573; [Barron](#), 135 Idaho at 420, 18 P.3d at 225; [City of Pocatello](#), 152 Idaho at 835, 275 P.3d at 850; [IGWA](#), 160 Idaho at 129, 133, 369 P.3d at 907, 911.

6. Arguments That the Decreed Storage Rights Must Be Administered According to “Reservoir Operating Plan” Are Collateral Attacks on the Decreed Storage Rights

The Ditch Companies place considerable emphasis on the so-called “reservoir operating plan.” The Ditch Companies’ brief includes a twenty-four page characterization of the “reservoir operating plan,” [DC Brief at 9-33](#), and many of the Ditch Companies’ arguments are based, directly or indirectly, on the “reservoir operating plan.” *See, e.g., id. at 44* (arguing that the Director’s *Final Order* “undermines . . . the reservoir operating plan”); [id. at 47](#) (arguing the District Court “erred by disregarding the reservoir operating plan”).

The so-called “reservoir operating plan” is just a collection of various federal reports, operations manuals, interagency agreements, and storage contracts held together by little more than a label coined for purposes of this litigation. *See* [R. 001063](#) (“Many of the Petitioners’ additional arguments rely upon documents other than the partial decrees issued for the reservoir water rights.”). More importantly, the “reservoir operating plan” is irrelevant to priority administration of the Decreed Storage Rights. As previously discussed, the “reservoir operating

plan” is not referenced or incorporated into the partial decrees for the Decreed Storage Rights, and the elements of the partial decrees are not defined so as to authorize or require administration according to the “reservoir operating plan.”

The Ditch Companies, other Spaceholders, and/or the United States could have and should have sought administrative provisions addressing the so-called “reservoir operating plan” in the SRBA if they believed the “reservoir operating plan” was integral to the definition or administration of the Decreed Storage Rights. This is confirmed by the partial decree for the Lucky Peak water right (water right no. 63-3618), which includes a remark memorializing one part of the “reservoir operating plan”—the “Guarantee” in the 1954 supplemental contracts between the BOR and Spaceholders in Arrowrock and Anderson Ranch Reservoirs that Lucky Peak storage would be used to replace flood control releases from Arrowrock and Anderson Ranch. [*DC Brief* at 24](#); [A.R. 001235-36, 00129-40, 001290](#); [Ex. 2015 at 000723](#); [Off’l Not.\63-3618\20080923 Memorandum Decision and Order on Cross-Mtn for SJ at 001565-66](#).⁴⁷ As the Ditch Companies admit, administrative provisions regarding the “reservoir operating plan” were included in a number of other water rights decreed in the SRBA. [*DC Brief* at 59-60](#).

The Ditch Companies’ argument that the Decreed Storage Rights must be administered according to the “reservoir operating plan” is a collateral attack on the Decreed Storage Rights. *See IGWA, 160 Idaho at 128, 369 P.3d at 906* (holding it to be a collateral attack when IGWA was “essentially arguing” that the source identified in a partial decree was “miscategorized”);

⁴⁷ In effect, the “Guarantee” remark means the Lucky Peak water right is a flood control “refill” right for Arrowrock and Anderson Ranch Reservoirs.

[Rangen, Inc. v. IDWR, 159 Idaho 798, 806, 367 P.3d 193, 201 \(2016\)](#) (“this argument was an impermissible collateral attack on the decrees”). If accepted, the Ditch Companies’ argument will “severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process.” [IGWA, 160 Idaho at 128, 369 P.3d at 906.](#)

7. The Water District 63 Accounting System Is Consistent With the “Reservoir Operating Plan”

The Director examined and took testimony on the various documents that collectively constitute the “reservoir operating plan,” *see, e.g.*, [A.R. 001238-48](#), [001255-56](#), as well as the expert report of Dr. Stevens—“History of Boise River Reservoir Operations, 1912-1995”—which is in many respects the factual centerpiece of the Ditch Companies’ arguments. [A.R.001253-55](#); *see, e.g.*, [DC Brief at 10, 11, 16, 19, 20, 25, 28](#) (stating in footnotes that “historical context and detail are provided” in Dr. Stevens’ expert report). The Director found that these documents did not support a conclusion that the Decreed Storage Rights had historically been interpreted or administered as authorizing priority “refill” of reservoir space vacated for flood control purposes. [A.R. 001257.](#)

To the contrary, the “reservoir operating plan” makes storage secondary and subject to flood control operations. Flood control operations conflict with storage. *See* [A.R.001242](#) (“Flood control use directly conflicts with all of the other system uses to some degree. . . . the key conflict is that of flood control versus refill”) (quoting *Water Control Manual for Boise River Reservoirs*). As the Ditch Companies admit, the Corps and the BOR seek to “balance” these two conflicting uses of the reservoir system by operating all three reservoirs for flood

control purposes during the early part of the season, and refilling the reservoirs as the risk of flooding recedes later in the season. See [DC Brief at 2](#) (“As runoff and the risk of flooding subsides . . . water is increasingly stored for beneficial use”); [id. at 23](#) (“water will be captured on recession of the flood peak to supply irrigation requirements”) (citation omitted); [A.R.001293](#) (“the reservoir system will physically ‘refill’ as high flows recede and the risk of flooding diminishes”).

Under this system, retention of stored water is secondary and subject to flood control objectives. The Ditch Companies’ assertions confirm this conclusion. See [DC Brief at 45](#) (“Reservoir space kept vacant for flood control purposes is not available to store water for beneficial use until that space is no longer required for flood control”); [id. at 12](#) (stating that flood control storage would be “permitted to fill only as needed to reduce the flood discharge or as the remaining flow may justify reduction in reserved capacity”) (citation omitted); [id. at 34](#) (“Reservoir space becomes available for physical storage only as flood space requirements decline”) (citation omitted).

The Director’s findings are consistent with these assertions. The Director determined that reservoir system operations “seek to physically fill or ‘refill’ the system at the end of the flood control season, and assume that the storage physically in the system at the end of the flood season is available for allocation to storage spaceholders following the conclusion of flood control operations.” [A.R. 001293](#). The Director further determined that “[t]he coordinated system of flood control operations, in short, is based on substituting flood water for previously stored irrigation water released during flood control operations.” [A.R. 001296](#).

The Director determined that “[t]he Water District 63 accounting system accommodates these assumptions and operates in a manner consistent with the priority administration of the reservoir water rights” by allowing “physical storage in the reservoir system of excess natural flow”—i.e., “unaccounted for storage”—that is subsequently allocated to Spaceholder storage accounts to “replace” priority water previously released for flood control purposes. [A.R. 001293, 001296](#); *see* [A.R. 001276-77](#) (“The Water District 63 Water Rights Accounting and Storage Allocations Programs are Consistent With the [*Water Control Manual for Boise River Reservoirs*]”) (bold and italics omitted).

This Court has long recognized that Idaho law authorizes ancillary use of excess water, when it happens to be available, by those already holding water rights. *See* [State v. ICL, 131 Idaho at 333, 334, 955 P.2d at 1112, 1113 \(1998\)](#) (approving a historical practice of using excess water “even though there is no water right in the ‘excess’ water itself.”). This is consistent with “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” [IGWA, 160 Idaho at 129, 369 P.3d at 907](#). The amount of excess water the Corps captures in the reservoir system during the flood control “refill” period—i.e., “unaccounted for storage”—is variable and unpredictable. It depends entirely on the Corps’ runoff forecasts, how much “priority water” the Corps releases during the “evacuation” period, and the relative amounts of excess water the Corps chooses to store or “bypass” as the “refill” period progresses. *See* [A.R. 001306](#) (“the Corps controls the amount of water released from the reservoirs pursuant to the [*Water Control Manual for Boise River Reservoirs*] Refill Requirements. . . . [T]he reservoirs refill at whatever rate the Corps, in consultation with the

BOR, deems prudent.”). The excess water identified as “unaccounted for storage” thus “is not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right.” [A & B Irr. Dist. v. ICL, 131 Idaho at 416, 958 P.2d at 573](#); see *id.* (“Consequently there cannot be a prior relation to excess water.”).⁴⁸

There is no merit in the Ditch Companies’ arguments that the Water District 63 accounting system is contrary to, or undermines, the “reservoir operating plan.” To the contrary, the Director found that the water District 63 accounting system *accommodates* coordinated reservoir operations without allowing them to dictate or interfere with the distribution, use, and development of water pursuant to the prior appropriation doctrine. [A.R. 001293, 001295, 001296, 001297, 001305](#). The Director’s findings are supported by substantial evidence in the record.⁴⁹

⁴⁸ *IDWR Appellants’ Brief* in the Department’s appeal (Sup. Ct. Docket No. 44746-2017) further addresses “unaccounted for storage.”

⁴⁹ Even assuming for purposes of argument that the Water District 63 accounting system is *not* consistent with the “reservoir operating plan,” the Water District 63 accounting system would not—and could not—“undermine” or “upend” reservoir operations. [DC Brief at 44, 46](#). Reservoir operations and priority administration of water rights are two different things, as the District Court recognized. See [R. 001060](#) (“While the Director distributes priority water to the dams pursuant to water rights, it is the federal government that decides how to store and release that water.”). The Corps does not hold any water rights, the BOR views flood control operations as “entirely independent of the water rights system,” [A.R. 001301](#) (citation omitted), and the BOR has asserted in the SRBA that the outcome of the “refill” question “will have no effect on [BOR’s] flood control operations,” [Off’1 Not.\BWI-17\ 91017—201301111US Response Brief on BWI 17 at 001213](#). The Ditch Companies admit “[t]he accounting system does not affect required flood control spaces, storage volumes (*i.e.*, reservoir contents), reservoir system releases, or any other aspect of reservoir operations during the flood control season....” [DC Brief at 39](#).

8. The Water District 63 Accounting System Is Consistent With Historic Administration in Water District 63

The Ditch Companies argue that the Accrual Methodology is not consistent with historic administration of the Decreed Storage Rights as described by former Watermaster Lee Sisco, and that the Director “ignored” Sisco’s testimony. [DC Brief at 67-68](#). These assertions are contrary to the record and the Director’s findings.

The Director found that the Accrual Methodology has been used since 1986, and since then “the distribution of water to the reservoirs water rights and the allocation of storage to spaceholders has been consistent with the procedures and operations of the accounting and allocations programs as described earlier in this order under ‘Review of the Water District 63 Accounting Programs.’” [A.R. 001275](#); see [A.R. 001264-71](#) (“*Review of the Water District 63 Accounting Programs*”). This finding is based on substantial evidence in the record, including: the testimony of Sisco; the testimony of current Watermaster Rex Barrie; the testimony of Sutter, the former Department engineer who developed the accounting programs and for many years oversaw their operation; the testimony of Elizabeth Cresto (“Cresto”), the Department hydrologist who has overseen the accounting programs since 2005 and authored the “Staff Memorandum” requested by the Director;⁵⁰ the testimony of three former Directors of the

⁵⁰ See [A.R. 000095](#) (“the Director will separately request a memorandum from staff pursuant to Rule 602”); [A.R. 001271](#) (referring to Cresto’s staff memorandum); [Ex. 1](#) (“Memorandum”).

Department (Kenneth Dunn, Karl Dreher, and David Tuthill); and the annual watermaster reports (“Black Books”) prepared during Sisco’s tenure as Watermaster.⁵¹ [A.R. 001271-75, 001403-06.](#)

The Director found that, prior to 1986, “there was no year-round accounting of water distributions in Water District 63,” and “the water rights for the federal on-stream reservoirs in Water District 63 were rarely if ever administered in priority[.]” [A.R. 001257.](#) This finding is also based on detailed consideration of documentary evidence and testimony, including Dr. Steven’s expert report and testimony, and the documents that collectively make up the so-called “reservoir operating plan.” [A.R. 001249-57.](#)

Further, introducing year-round accounting of the Decreed Storage Rights did not constitute any “change” in interpretation of the Decreed Storage Rights. It simply made the BOR’s water rights subject, for the first time, to the priority administration principles that apply to all other water rights. See [In re IDWR Amended Final Order Creating Water District No. 170, 148 Idaho at 213-14, 220 P.3d at 321-32](#) (“A water user has no property interest in being free from the State's regulation of water distribution in accordance with the prior appropriation doctrine”); [Bd. of Directors of Wilder Irr. Dist. v. Jorgensen, 64 Idaho 538, 136 P.2d 461, 469 \(1943\)](#) (stating that the federal government “in appropriating water and constructing dams and distributing systems, it has no greater power or superior rights under the law than has an

⁵¹ Idaho Code requires watermasters to “make an annual report to the [Department].” [Idaho Code § 42-606.](#) Watermasters are “ministerial” officers “authorized to distribute water only in compliance with applicable decrees,” [Almo Water Co. v. Darrington, 95 Idaho 16, 21, 501 P.2d 700, 705 \(1972\),](#) and are “supervised by the director.” [Idaho Code § 42-602.](#)

individual”) (Koelsch, District Judge, concurring); [43 U.S.C. § 383](#) (providing that the Secretary of the interior “shall proceed in conformity with [state] laws” relating “to the control, appropriation, use, or distribution of water used in irrigation”).

The Ditch Companies are incorrect in contending that “there is no priority ‘distribution’ of water during flood control releases simply because there is no ‘scarcity’ to administer against.” [DC Brief at 61](#). This argument confuses “distribution” with “curtailment.” While it is true that [Idaho Code § 42-607](#) authorizes the Director to order junior appropriators’ diversions “to be shut or fastened” when necessary to supply water to “prior rights” in “times of scarcity,” the Director’s “‘clear legal duty’ to distribute water” in accordance with prior appropriation principles is *not* limited to “times of scarcity.” [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#); see [Idaho Code § 42-602](#) (“The director of the [Department] shall distribute water in water districts in accordance with the prior appropriation doctrine.”). This Court implicitly recognized this distinction in holding that “[n]othing in the Idaho Code suggests that a water district may only be created when necessitated by conflict or scarcity.” [In re IDWR Amended Final Order Creating Water District No. 170, 148 Idaho at 211, 220 P.3d at 329](#). “In fact,” as this Court held, “efficient distribution of water, in accordance with the legislative mandate, requires that [the Department] implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversight which allows for consistent planning by water users.” [Id.](#)

The Director’s factual findings confirm that the Ditch Companies are challenging a proven system of water distribution that resolves the priority administration “conundrum” and

“dilemma” created by the conflict between flood control operations and irrigation storage, [R. 001164-65](#); [A.R. 001291](#), that has been in place for more than thirty years. Accepting the Ditch Companies argument would fundamentally alter the system by making Idaho water and water rights subject to federal flood control operations, creating “the real possibility of curtailment” of junior appropriators. [A.R. 001284](#).

9. The Ditch Companies’ Reliance on a Rejected SRBA Special Master Recommendation Is Misplaced

The Ditch Companies rely on an SRBA Special Master’s recommendation regarding beneficial use-based water right claims that remain pending in the SRBA to argue that “the water that fills the Boise River Reservoirs during flood control operations is stored pursuant to the [Decreed Storage Rights.]” [DC Brief at 3](#); *see id. at 5-6, 55-56, 58-59, 73* (similar). This reliance is misplaced for several reasons.

The Special Master’s recommendation is not legal authority because it was rejected by the District Court rather than adopted. In addition, the questions arising in this appeal were outside the scope of the late claims that were before the Special Master (and that are now back before him). The nature and extent of the Decreed Storage Rights had already been conclusively adjudicated in the SRBA. *See* [Ex. 2015](#) (partial decrees); [Final Unified Decree at Addendum A, pp.7, 9, 13](#) (incorporating the partial decrees). Any question of whether the Department’s method of accounting for the distribution of water was inconsistent with the Decreed Storage Rights, therefore, had to be presented to the Director first, with judicial review through Idaho Administrative Procedure Act proceedings, not in the SRBA. *See* [BWI-17, 157 Idaho at 394, 336](#)

[P.3d at 801](#) (“Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.”); [Idaho Code § 42-1401D](#) (“Review of an agency action of the [Department], which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code, shall not be heard in any water rights adjudication proceeding commenced under this chapter.”).

Further, the Special Master made his determination based on a limited summary judgment record. The documentary record developed in the administrative proceeding in this case is much larger and more complete than the limited record upon which the Special Master relied. Moreover, the contested case involved a five-day hearing that generated a transcript of more than fifteen hundred pages. The Special Master took no testimony, but rather heard only the arguments of counsel.⁵² Finally, the Special Master did not apply deferential Idaho Administrative Procedure Act judicial review standards, [Idaho Code § 67-5279](#), and took up *de novo* a question of water distribution that is statutorily committed to the “direction and control” of the Director, [Idaho Code § 42-602](#); see [Appendices to DC Brief, Appendix 3 at 4](#) (“The Special Master exceeded the jurisdiction of the [SRBA] by ruling on the Director’s accounting

⁵² Significantly, the Department was not a party to the SRBA subcases, [Idaho Code § 42-1401B\(3\)](#), and the Special Master reached his conclusions without seeking any input from the Department regarding how the Water District 63 accounting system works.

methodology.” (bold omitted)).⁵³ The Special Master’s recommendation should carry no weight in this appeal.

10. The Ditch Companies Have Not Been Injured

The Director found that “Spaceholders in the storage reservoirs have never suffered a water shortage as a result [of] the existing water rights accounting and storage allocations program.” [A.R. 001285](#). This finding is supported by substantial evidence in the record. The only injury the Ditch Companies have alleged is the “taking” or “deprivation” of “their right to store water pursuant to their water rights and storage contracts” by “subordinat[ing] them to “all junior water rights and future appropriations.” [DC Brief at 69](#). This allegation lacks legal and factual merit for reasons previously discussed. More importantly, and contrary to the arguments the Ditch Companies make, the Accrual Methodology actually protects the priorities of the Decreed Storage Rights, and those of other appropriators, by enforcing the priorities of Decreed Storage Rights in accordance with the prior appropriation doctrine. *See* [Idaho Code § 42-101](#) (“control [of water] shall be in the state, which, in providing for its use, shall equally guard all the various interests”).

⁵³ The Ditch Companies assert this Court should consider the substance of the Special Master’s recommendation because the District Court stated that the SRBA subcases and this judicial review proceeding “should not go up piecemeal.” [DC Brief at 7](#). However, the District Court made this statement *before* considering challenges to the Special Master’s recommendation. *After* hearing and upholding the challenges, the District Court *denied* the Ditch Companies’ motion for [I.R.C.P. 54\(b\)](#) certification of the SRBA subcases. A copy of the order denying the Ditch Companies’ request for I.R.C.P. 54(b) certification is attached hereto as [Addendum C](#) (*Order Denying Motion for I.R.C.P. 54(b) Certificate*, SRBA Subcase Nos. 63-33732, et al.) (Jan. 6, 2017)). The Department requests that the Court take judicial notice of this order pursuant to I.R.E. 201(d).

There is also no merit in the Ditch Companies' assertion that junior appropriators can call "unaccounted for storage" out of the reservoirs because it is "unsecured by a water right." [DC Brief at 47](#). Under Idaho law, licensed and decreed water rights encumber "natural flow" and have no legal right to call "stored water" out of a reservoir. See [Arkoosh, 48 Idaho at 396, 283 P. at 526](#) (holding that appropriators downstream of a reservoir are entitled only to the water that "would have naturally flowed in the stream prior to [its] construction"); [Nelson, 148 Idaho at 163, 219 P.3d at 810](#) ("the watermaster must determine the relative amounts of natural flow and storage water at the various diversion points on the river. If that determination is not made, an appropriator of the natural flow may receive some of the Irrigation District's storage water"). The Accrual Methodology, therefore, does not allow licensed and decreed water rights to call "stored water" out of the reservoirs—and "unaccounted for storage" is defined as "stored water."

In computing the natural flow supply available for diversion under licensed and decreed water rights, the Accrual Methodology factors out any water that is present in the system as a result of reservoir operations. See [A.R. 001264](#) ("Distinguishing between 'natural flow' and 'stored water' is fundamental in accounting for the distribution of water"). "Natural flow" is the flow that would be present in the river 'absent reservoir operations and diversions, while "stored water" or "stored flow" is water in excess of the computed natural flow. [Id.](#) By definition, "unaccounted for storage" is "stored water" because it is present only as a result of reservoir operations. "Unaccounted for storage" is water in excess of all diversions that should have flowed past the Middleton gage but did not, because it was captured somewhere in the reservoir system. [Ex. 1 at 000004-05, 000009; Tr., Aug. 28, 2015, p.444, ll. 9-17](#). "Unaccounted for

storage,” therefore, is not part of the “natural flow” supply determined to be available for distribution to licensed and decreed water rights under the Accrual Methodology. [A.R. 001264](#). The Water District 63 accounting system does not allow junior water right holders to call “unaccounted for storage” from the reservoirs.

The Director also found little or no risk of injury to the Ditch Companies as a result of future appropriations of the unappropriated flows that the Corps has historically captured in the reservoir system during the flood control “refill” period. The Director found that these excess flood waters “have remained unappropriated since coordinated reservoir operations began with Lucky Peak in the mid-to-late 1950s—approximately 60 years” because “they are not dependable: some years are flood years, some are not, and even in flood years, the flood period ends relatively early in the year. The Boise River system is fully appropriated during most of the irrigation season.” [A.R. 001278](#). The Director also found that future appropriations of the “refill” water “would likely be of such small quantities as to have few or no effects on the quantity of water available to ‘refill’ flood control space,” and “would be more likely to have a beneficial impact on reservoir system flood control operations by providing the Corps with additional margin or flexibility in determining flood control releases from the reservoir system.” [Id.](#) These findings are supported by substantial evidence in the record.

Moreover, challenges to future applications to appropriate water may not be resolved in the context of distributing water to existing water rights pursuant to the provisions of chapter 6 of Title 42, Idaho Code. Any question of injuries that may or may not result from future appropriations must be decided on a case-by-case basis during permitting and licensing pursuant

to the provisions of chapter 2 of Title 42, Idaho Code, and based on facts rather than speculation. Protections for existing water rights are built into the permitting and licensing process, which addresses questions of whether future appropriations “will reduce the quantity of water under existing water rights” and whether “the water supply itself is insufficient for the purpose for which it is sought to be appropriated.” [Idaho Code § 42-203A\(5\)](#).

C. THE DITCH COMPANIES’ PROCEDURAL ARGUMENTS LACK MERIT

The Ditch Companies raise a number of procedural objections to the initiation and conduct of the contested case proceeding. [DC Brief at 69-89](#). These arguments lack merit as discussed below.

1. The Director Acted Within His Authority by Commencing the Contested Case

The Ditch Companies assert that the Director lacked authority to initiate the contested case, should have stayed the contested case pending the outcome of the beneficial use-based water right claims in SRBA subcase nos. 63-33732, *et al.*, and should have initiated rulemaking. [DC Brief at 69-74](#). These arguments are contrary to the record and mischaracterize the issues raised and addressed in the contested case.

a. The Origin of the Accounting Controversy in Water District 63

The Ditch Companies’ arguments ignore the stated purpose of the contested case and the circumstances giving rise to the need for such a proceeding. The Director initiated the contested case for a specific purpose: “to address and resolve concerns with and/or objections to how water is counted or credited toward the fill of water rights for the Federal on-stream reservoirs [in

Water District 63] pursuant to existing procedures of accounting.” [A.R. 000007](#). The need for such a proceeding arose out of Basin-Wide Issue 17.

Basin-Wide Issue 17 began with competing “refill” remarks the BOR and the State of Idaho proposed in the SRBA subcases for American Falls and Palisades reservoirs, which led the Board of Control and others to seek a basin-wide issue on the question of “priority refill.” [Id. at 387-88, 336 P.3d at 794-95](#); [A.R. 001230-34](#). Despite the fact that the SRBA Court explicitly excluded “the issue of fill” as “purely an issue of administration,” [id. at 389, 336 P.3d at 796](#) (quoting the SRBA Court), the accounting system was attacked as “a fatally flawed construct” that “impermissibly diminishes real property rights,” [Off’l. Not.\BWI-17\91017 Pioneer Irrigation District’s Opening Brief, In re SRBA, Subcase No. 00-91017 at 000918-19](#). The SRBA Court declined to address these arguments and held that questions of accounting for the distribution of water are statutorily committed in the first instance to the Director. [Off’l Not. BWI-17\91017 Memorandum Decision, BWI-17, Subcase No. 00-91017 at 001420-21](#). The Board of Control and the Surface Water Coalition appealed the SRBA Court’s decision to this Court. [BWI-17, 157 Idaho at 387, 336 P.3d at 794](#).

While the appeal was pending, the Director and Department staff continued to receive communications expressing concerns with and objections to the Water District 63 accounting system’s method for determining the satisfaction or “fill” of the Decreed Storage Rights. In April 2013, the Chairman of the Board of Control requested the Director “provide answers” to questions about the accounting methodology, including: “[h]ow do you intend to define ‘fill’ of the storage rights in the Boise? ... Does ‘fill’ include pass-through flood water when inflow

equals outflow [or] water that is stored and then released for flood water?” and “[w]hat is the rationale for defining ‘fill’ as you have, and is there any rule, regulation, or written decision explaining this rationale?” [A.R. 000004](#).

As this background demonstrates, and as the District Court recognized, a “controversy concerning how water is distributed to the federal on-stream reservoirs” in the Boise River Basin “became manifest in SRBA Basin-Wide Issue 17[.]” [R. 001068-69](#); *see* [R. 001069](#) (“The controversy continues as evidenced by various communications and objections received by the Director”). The Director initiated the contested case to resolve this controversy by providing interested parties an administrative forum in which to raise “concerns with and/or objections to how water is counted or credited toward the fill of [the Decreed Storage Rights].” [A.R. 000007](#).

b. The Director Properly Initiated the Contested Case

The Ditch Companies suggest that the Director could not “*sua sponte*” initiate the contested case. [DC Brief at 88](#). The District Court rejected this argument, citing the “broad discretion granted [to the Director] under Idaho Code § 42-602” and the fact that “the Department’s Rules of Procedure expressly grant the Director authority initiate formal proceedings such as a contested case by notice.” [R. 001069](#).

The District Court was correct. [Idaho Code § 42-602](#) gives the Director “broad powers to direct and control distribution of water from all natural water sources within water districts,” including the authority to supervise watermasters for this purpose. [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#). While this statute imposes a “clear legal duty” on the Director to distribute water “in accordance with prior appropriation,” the “details of the performance of the duty are

left to the director’s discretion.’’ Id. (quoting Musser v. Higginson, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994)). The Director determined that, to fulfill his statutory duty, it was necessary to initiate a proceeding to address and resolve water users’ concerns with and/or objections to the Water District 63 accounting system’s method of determining when the Decreed Storage Rights are satisfied. *E.g.*, A.R. 000006, 000338, 001286–88. This determination is well within the statutory authority conferred on the Director to ensure that water is distributed in accordance with the prior appropriation doctrine as established by Idaho law. BWI-17, 157 Idaho at 392-94, 336 P.3d at 799-801. The District Court agreed, explaining that the Director did not exceed “the broad discretion granted him under Idaho Code 42-602” by “initiating the contested case via notice in furtherance of his duty to distribute and administer water.” R. 001068-69.

Further, the Department’s Rule of Procedure 104 expressly authorizes the Director to initiate a contested case, stating:

Formal proceedings, which are governed by rules of procedure other than Rules 100 through 103, must be initiated by a document (generally a notice, order or complaint if initiated by the agency) or another pleading listed in Rules 210 through 280 if initiated by another person. Formal proceedings may be initiated by a document from the agency informing the party(ies) that the agency has reached an informal determination that will become final in the absence of further action by the person to whom the correspondence is addressed, provided that the document complies with the requirements of Rules 210 through 280. Formal proceedings can be initiated by the same document that initiates informal proceedings.

IDAPA 37.01.01.104 (emphases added). The Director initiated the contested case by issuing his *Notice of Contested Case and Formal Proceedings* (“Notice”) citing to and consistent with the plain language of Rule 104. A.R. 000007. As the District Court stated, it “cannot be said that [the Director] acted contrary to law” in initiating the contested case “as the Department’s Rules

of Procedure expressly grant the Director authority to initiate formal proceedings such as a contested case via notice.” [R. 001069](#).

It is not unusual for the Director to initiate contested cases to address water distribution questions pertinent to his statutory duties. In such cases, interested parties, like the Ditch Companies here, receive notice and participate to express their views on how the Director should address the question. Sometimes proceedings are informal and sometimes the parties formally join a contested case. The Director’s *Order Denying Pre-Hearing Motions* lists a variety of administrative proceedings where the Director has issued orders addressing water users concerns on emergent issues.⁵⁴ [A.R. 000339](#). The District Court correctly concluded the Director was well within his authority in initiating the contested case because it addressed an ongoing controversy directly related to his “clear legal duty” to distribute water in Water District 63 “in accordance with prior appropriation.” [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#); see [R. 001069](#) (“The Director’s decision to initiate the contested case must be affirmed”).

c. The Director Did Not Err by Declining to Stay the Contested Case.

⁵⁴ See, e.g., *Final Order Regarding Instructions to Watermaster*, In the Matter of Water Right No. 1-6 (Feb. 11, 2013); *Final Order Regarding Measuring and Reporting the “Average Daily Flow” as Measured at the Murphy Gaging Station*, In the Matter of Distributing Water to Water Right Nos. 02-100, 02-201, 02-223, 02-224, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, and 37-20710 (Oct. 27, 2014); *Final Order Regarding Instruction to the Watermasters for Water District Nos. 1 and 27 (Blackfoot River Water Management Plan)*, In the Matter of Administration of Water in Water District Nos. 1 and 27 (July 22, 2013); *Final Order Regarding Administration*, In the Matter of Water Right Nos. 03-2018, 03-10246, and 03-10247 (June 28, 2013).

The Ditch Companies assert “it was premature for the Director to initiate and proceed with” the contested case before the SRBA Court resolves the beneficial use-based water right claims pending in SRBA subcase nos. 63-33732, *et al.* [DC Brief at 73](#).⁵⁵ This assertion overlooks the Department’s Rules of Procedure, the partial decrees for the Decreed Storage Rights, the *Final Unified Decree*, this Court’s decision in Basin-Wide Issue 17, and the distinction between the matters at issue in the contested case and the matters at issue in the SRBA proceedings.

The Department’s Rule of Procedure 780 provides the Director broad discretion in considering a request for a stay: “Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final.” [IDAPA 37.01.01.780](#). Construing identical language in [IDAPA 04.11.01.780](#), the Idaho Court of Appeals confirmed “it is within

⁵⁵ The Ditch Companies suggest the Director erred by proceeding with the contested case without the BOR’s participation. [DC Brief at 73 n.21](#). The BOR declined to participate in the contested case on grounds that it did not meet the requirements of the McCarran Amendment, 43 U.S.C. § 666. [A.R. 000084](#). The BOR’s participation was not necessary for the contested case to proceed, however. The Director has a “clear legal duty” under [Idaho Code § 42-602](#) to distribute water in accordance with the prior appropriation doctrine, [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#), and that duty is not contingent upon whether the BOR (or any party) chooses to participate in administrative proceedings initiated to address their objections to the Water District 63 accounting system. Further, the McCarran Amendment is a waiver of sovereign immunity that only applies in court proceedings that seek relief against the United States. The Notice initiated an administrative proceeding that did not seek relief against or action by any party, but rather addressed challenges to the Director’s discharge of his statutory duty to distribute water to the Decreed Storage Rights in accordance with the prior appropriation doctrine as established by Idaho law. [A.R. 000343-47](#). The only effect of the BOR’s decision not to participate was to forfeit its opportunity to have its concerns and objections heard in an administrative proceeding initiated specifically for that purpose. [Laughy v. Idaho Dep’t of Transp., 149 Idaho 867, 874, 243 P.3d 1055, 1062 \(2010\)](#).

the hearing officer's discretion to either grant or deny a stay." [Platz v. State, 154 Idaho 960, 969, 303 P.3d 647, 656 \(Ct. App. 2013\)](#).

The contested case addressed questions of the distribution of water to the Decreed Storage Rights pursuant to their partial decrees. The partial decrees for the Decreed Storage Rights are "conclusive," [Final Unified Decree at Addendum A, pp.5, 7](#), and were binding on the Director in the contested case, [see id. at 13](#) ("The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state, and tribal law"). Further, in the Basin-Wide Issue 17 proceedings, this Court agreed with the SRBA Court's determination that "[d]etermining when a water right is satisfied is within the Director's discretionary functions." [BWI-17, 157 Idaho at 392-94, 336 P.3d at 799-801](#). The Director did stay the contested case while Basin-Wide Issue 17 was pending before this Court, recognizing the appeal "could impact the issues in the contested case for water accounting in WD63." [A.R. 000088](#). Once Basin-Wide Issue 17 ran its course, however, the Director recognized the question of how water is counted or credited toward the fill of a water right was "squarely before" him. [A.R. 000348](#) (citing [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#)).⁵⁶

The Ditch Companies' assertion that the contested case proceeding and the SRBA subcases on the beneficial use-based late claims are "parallel" proceedings is incorrect. [DC Brief at 70, 74](#). As this Court recognized in Basin-Wide Issue 17, adjudicating water right claims and administering decreed water rights are two different things. [See BWI-17, 157 Idaho at 393, 336](#)

⁵⁶ Several parties to the SRBA subcases even argued that the subcases should be stayed pending the outcome of the contested case. [A.R. 000095](#).

[P.3d at 800](#) (distinguishing “determining water rights, and therefore property rights” from “just distributing water”). The contested case was initiated to “address and resolve concerns with and/or objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in Water District 63.” [A.R. 000007](#). The Director was bound by the partial decrees, and the Ditch Companies’ argument that the Director “determine[d] water rights,” [DC Brief at 74](#), ignores the distinction between determining water rights and determining when sufficient water has been distributed in priority to satisfy a water right, which “is within the Director’s discretionary functions.” [BWI-17, 157 Idaho at 392-94, 336 P.3d at 799-801](#).

The SRBA proceedings, in contrast, address claims for additional water rights based on assertions of beneficial use before 1971. Should the SRBA Court issue partial decrees for those beneficial use-based water rights claims, the Director will distribute water to those rights in accordance with the partial decrees. See [Final Unified Decree at Addendum A, p.13](#). However, the question of whether the beneficial use-based water rights claims should be decreed in the SRBA has no relation to the Director’s method for determining satisfaction of the water rights already decreed in the SRBA. See [Appendices to DC Brief, Appendix 3 at 7](#) (“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 water rights. . . . The claimants also apparently appreciated this distinction as well when they filed the late claims.”). The Director did not abuse his discretion by declining to stay the contested case pending the outcome of SRBA proceedings in subcase nos. 63-33732, *et al.*

d. The Director Is Not Required to Engage in Formal Rulemaking

The Ditch Companies argue that the “Contested Case” did not comply with formal rulemaking requirements of the Idaho Administrative Procedure Act, citing this Court’s decision in *Asarco, Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003). *DC Brief at 70*. The Ditch Companies’ argument ignores that a contested case and rulemaking are two different things. Idaho Code § 67-5201(6) (defining “contested case”); Idaho Code § 67-5201(20) (defining “rulemaking”). A “contested case” is a proceeding that results in the issuance of an “order,” Idaho Code § 67-5201(6), and an “order” is “an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” Idaho Code § 67-5201(12). The contested case underlying this appeal was initiated to address any concerns with or objections to “how water is counted or credited” toward the Decreed Storage Rights. A.R. 000007. The ultimate action taken by the Director was not implementation of a “rule,” but rather issuance of a “final order” addressing “the Director’s discharge of his statutory duty” to distribute water in accordance with the prior appropriation doctrine. A.R. 000342-44. The purpose and substance of the contested case proceeding fell squarely within the statutory provisions governing contested cases and orders, which are statutorily distinct from rulemaking.

To the extent the Ditch Companies argue the Accrual Methodology (as opposed to the “Contested Case”) was subject to formal rulemaking pursuant to *Asarco*, this argument also lacks merit. The Accrual Methodology distributes water pursuant to the elements of Decreed Storage

Rights, not a “one-fill” rule. Furthermore, *Asarco* is factually distinguishable and, even if *Asarco*’s six-part test is applied, the characteristics are not met and rulemaking is not required.

i. The Accrual Methodology Is Based on the Partial Decrees and Is Necessary to Distribute Water to the Decreed Storage Rights in Accordance With the Prior Appropriation Doctrine

The Ditch Companies assert the Director was required to initiate rulemaking because the Accrual Methodology allegedly uses a “one-fill rule” to determine when a Decreed Storage Right is satisfied. [DC Brief at 71](#). This contention lacks merit for reasons previously discussed. The Director did not find or conclude that the Accrual Methodology uses a “one-fill’ rule, but rather that the Accrual Methodology distributes water according to the elements of the Decreed Storage Rights in accordance with well-established principles of the prior appropriation doctrine. The District Court affirmed the Accrual Methodology on the same grounds, and specifically *not* on the basis of a “one-fill’ rule.” [R. 001165](#).

Distributing water in accordance with the elements of decreed water rights and prior appropriation principles that have been repeatedly confirmed by this Court and the Legislature is not tantamount to creating a new “rule.” Further, distributing water pursuant to federal flood control operations as urged by the Ditch Companies would “cripple” the Director’s ability to administer water rights in priority and transfer control of water distribution “from the Director to the federal government,” [R. 001062](#), effectively rendering the elements of the Decreed Storage Rights meaningless. See [Rangen, Inc., 159 Idaho at 807, 367 P.3d at 202](#) (rejecting decree interpretation that would “render the point of diversion element of a water right meaningless.”).

Furthermore, rulemaking was not necessary for the Department to begin using the Accrual Methodology in 1986 because introducing year-round accounting simply made the BOR's water rights subject to the same priority administration principles that apply to all water rights. [A.R. 001257](#), [001265-66](#). Previously, the BOR's water rights had rarely, if ever, been administered on a priority basis because there was no year-round accounting before 1986. [A.R. 001257](#). The use of a year-round accounting system did not require rulemaking because a water right holder "has no property interest in being free from the State's regulation of water distribution in accordance with the prior appropriation doctrine," *In re IDWR Amended Final Order Creating Water District No. 170*, 148 Idaho at 213-14, 220 P.3d at 321-32, and the Director has a clear legal duty under [Idaho Code § 42-602](#) to distribute water in accordance with the prior appropriation doctrine. *BWI-17*, 157 Idaho at 393, 336 P.3d at 800.⁵⁷ In performing this duty the Director is specifically authorized to determine the times of year during which "there is a necessity for the use and control of the waters of the district." [Idaho Code § 42-608\(2\)](#); *see* [Idaho Code § 42-608\(3\)](#) (providing that the watermaster "shall not continue performing services after the necessity therefore shall cease, unless determined necessary by the director").

⁵⁷ The introduction of year-round accounting had no effect on storage water supplies from a water user standpoint. [A.R. 001275-76](#).

ii. Asarco Has No Application to This Case because the Legally Enforceable Standard Has Already Been Established by Court Decree

Asarco involved a challenge to a Total Maximum Daily Load (“TMDL”) created by the Idaho Department of Environmental Quality (“DEQ”). [Asarco, 138 Idaho at 721, 69 P.3d at 141](#). The TMDL established “the maximum amount of pollution” for “the Coeur d’Alene River Basin,” *id.*, “a numerical limit or budget for a given water body, based on the sum of allowable pollution.” [Id. at 723, 69 P.3d at 143](#). This Court rejected DEQ’s argument that the TMDL could be established outside of formal rulemaking. [Id. at 725, 69 P.3d at 145](#). This Court held that “[t]he central problem with DEQ’s argument is the state water quality standards do not provide all of the information or direction necessary for promulgating a TMDL. While the water quality standards serve as a basis for the TMDL calculations, the TMDL requires much more.” [Id.](#) In other words, the underlying statutory framework was inadequate to define a TMDL, so DEQ had to create a legally enforceable numerical limit on its own.

Such is not the case here. The adjudication statutes of Idaho Code specifically define the elements that must be included in decreed water rights. *See* [Idaho Code §§ 42-1411, 42-1412](#). The SRBA Court decreed those elements with specificity in the SRBA. The elements of the partial decrees define when and how much natural flow the Director must distribute to the Decreed Storage Rights. As with other water rights, the Priority, Quantity, and Period of Use elements define which portion of each year’s natural flow supply is to be distributed to the Decreed Storage Rights. The partial decrees define “quantity” in an annual volume that is not limited by diversion rates, and authorize diversions for storage purposes year-round. [A.R.](#)

[0001265](#). By operation of these elements, the Decreed Storage Rights when in priority are entitled to all natural flow other than that required by downstream senior water rights. Unlike in *Asarco*, where DEQ had to “establish the maximum amount of pollution” on its own, [138 Idaho at 721, 69 P.3d at 141](#), the Director does not have to create a legally enforceable numerical limit on his own when distributing water to the Decreed Storage Rights. The SRBA Court has provided the information the Director needs to distribute water to the Decreed Storage Rights through the partial decrees and, as previously discussed, the Accrual Methodology is consistent with the partial decrees.

iii. The Accrual Methodology Does Not Qualify as a Rule Under *Asarco*

Even assuming *Asarco* applies to this case, application of the six-factor *Asarco* analysis confirms the Accrual Methodology is not a matter for formal rulemaking. In *Asarco*, this Court adopted a six part test to determine when an agency action is indicative of a rule: (1) does the action have wide coverage, (2) is the action applied generally and uniformly, (3) does the action operate only in future cases, (4) does the action prescribe a legal standard or directive not otherwise provided by the enabling statute, (5) does the action express agency policy not previously expressed, and (6) is the action an interpretation of law or general policy. [138 Idaho at 723, 69 P.3d at 143](#).

As discussed above, the Accrual Methodology does not “prescribe a legal standard or directive not otherwise provided by the enabling statute.” *Id.* Rather, the “legal standard” for determining satisfaction of the Decreed Storage Rights is prescribed by the quantity elements of the partial decrees issued by the SRBA Court. [BWI-17, 157 Idaho at 394, 336 P.3d at 801](#) (“The

decrees give the Director a quantity he must provide to each water user in priority.”). As the District Court concluded, “[t]he quantitative information [the Director] needs to distribute water to the federal on-stream reservoirs in the Boise River Basin is not prescribed by him. It is judicially provided to him in the form of the” partial decrees for the Decreed Storage Rights. [R. 001382](#).⁵⁸

For the same reasons, the Accrual Methodology does not “express agency policy not previously expressed.” [Asarco, 138 Idaho at 723, 69 P.3d at 143](#). Distributing water pursuant to the Director’s clear legal duty under Idaho Code § 42-602 and according to the elements of decreed water rights is not a new policy. In addition, the Accrual Methodology does not interpret “law or general policy.” *Id.* The concept of “implementing or interpreting existing law” under *Asarco* refers to when an agency must ‘fill in the blanks’ with substantive legal standards that are missing from the underlying legal authority. *Id.* That is not the case here because the Legislature provided clear statutory standards that the SRBA Court decreed in the elements of the partial decrees.⁵⁹

Since a number, if not all, of the characteristics of a rule are absent, the Director did not err by declining to undertake formal rulemaking rather than proceeding with the contested case.

⁵⁸ Further, the elements that must be included in partial decrees are prescribed by statute. *See Idaho Code §§ 42-1411 and 42-1412.*

⁵⁹ As the District Court determined, the Accrual Methodology also “lacks wide coverage” and is not “applied generally and uniformly.” [R. 001072](#). In addition, the Accrual Methodology does not “operate only in future cases.” [Asarco, 138 Idaho at 723, 69 P.3d at 143](#).

See State v. Alford, 139 Idaho 595, 598, 83 P.3d 139, 142 (2004) (holding that agency action is not a rule when only three of the six *Asarco* characteristics are met); Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 142 Idaho 659, 663-64, 132 P.3d 416, 420-21 (2006) (holding that an agency action is not a rule even though four of the *Asarco* characteristics are met).⁶⁰

2. The Ditch Companies Were Afforded Due Process

The Ditch Companies' allegation that they were deprived of due process relies primarily upon mischaracterizing the nature of the contested case proceeding. Further, the Ditch Companies fail to identify any prejudice resulting from the alleged deprivation of due process. The record shows the Ditch Companies were afforded due process and simply disagree with the outcome of the contested case.

Procedural due process requires “there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.” Aberdeen-Springfield Canal Co. v. Peiper, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (citation omitted). This requirement is met when there is “notice and an opportunity to be heard.” Id. (citation omitted). The opportunity to be heard must occur “at a meaningful time and in a meaningful manner.” Id. Due process “is not a concept to be applied rigidly in

⁶⁰ The Ditch Companies incorrectly assert that “the district court only addressed the first two factors set forth in *Asarco*” in determining the Director did not err by deciding to decline rulemaking. DC Brief at 70-71. The District Court addressed three characteristics, determining the contested case involves a matter that “lacks wide coverage,” is not “applied generally and uniformly,” and “does not prescribe a legal standard or directive not otherwise provided [by] the enabling statute.” R. 001072.

every matter. Rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation.” *Id.* (quotation marks and citation omitted).

The Ditch Companies were provided a meaningful opportunity to be heard, but mischaracterize the Department as an “adversarial party” to support their contention they were deprived of due process. *DC Brief at 76, 81-84.* This contention is contrary to the record and overlooks the purpose of the contested case. The contested case was initiated to provide the Ditch Companies (and others) with an administrative proceeding in which to present “concerns with” and “objections to” the Water District 63 accounting system. *A.R. 000007.* The Director, in resolving the Ditch Companies’ concerns and objections, considered himself bound by the partial decrees for the Decreed Storage Rights. *A.R. 001234-36, 001288-91.* The record establishes that the Director addressed the Ditch Companies’ objections to the Director’s chosen method of discharging his “clear legal duty” to distribute water in Water District 63 “in accordance with the prior appropriation.” *BWI-17, 157 Idaho at 393, 336 P.3d at 800.*

Moreover, the proceeding lasted more than two years; solicited the Ditch Companies’ “concerns with and/or objections to” the accounting system; included a stay pending Basin-Wide Issue 17; took scheduling requests into consideration; notified the parties of the nature and location of potentially relevant documents (and made many available on the Department’s website); provided for pre-hearing motions; allowed for extensive discovery including interrogatories, document production, and depositions; culminated in a five-day hearing with post-hearing briefs; and addressed motions for reconsideration. *A.R. 000001-1435.* The record confirms that the Ditch Companies’ concerns and objections to the Water District 63 accounting

system were heard ““at a meaningful time and in a meaningful manner”” and they were “not arbitrarily deprived of [their] rights in violation of the state or federal constitutions.”” [Aberdeen-Springfield Canal Co., 133 Idaho at 91, 982 P.2d at 926](#) (citation omitted). The Ditch Companies were thus afforded due process and suffered no prejudice. The Ditch Companies simply disagree with the outcome of the contested case. Against this backdrop, the Ditch Companies’ specific contentions of due process violations will be discussed in turn.

a. The Director’s Official Notice Specifically Identified the Noticed Materials and Did Not Prejudice the Ditch Companies

The Ditch Companies assert the Director deprived them of due process because he took official notice of documents “without adequately identifying the ‘specific facts or material’ relied upon within the documents.” [DC Brief at 84](#). This assertion ignores the plain language of Rule 602 and is contrary to the record.

Rule 602 of the Department’s Rules of Procedures requires that, when taking official notice, the Director shall notify parties of “the specific facts or materials noticed and the source of the material noticed.” [IDAPA 37.01.01.602](#).⁶¹ Consistent with Rule 602, the Director’s notices of documents officially noticed specifically identified the “materials” and their “sources.” [A.R. 000885-87, 000959-61](#)⁶². The Department identified the vast majority of the officially

⁶¹ Rule 602 does not require that the Director notify the parties of “specific facts” within “materials noticed.” Rather, Rule 602 allows the Director to notify the parties of either “specific facts *or* material noticed”. [IDAPA 37.01.01.602](#) (emphasis added).

⁶² The Director issued an *Amended Documents Officially Noticed* following the hearing to document his decision at hearing that he would take official notice of documents in the Basin-Wide issue 17 proceedings and also would “refine the broadness or the breadth of” documents

noticed materials as potentially relevant well in advance of the hearing, notified the parties of the locations of the materials, and posted most of the documents on the contested case website. [A.R. 000268-69](#), [000377](#), [000678](#), [000697-701](#).⁶³ The materials officially noticed were public documents available at the Department, the Water District 63 office, the SRBA Court and/or online, and were already known to the Ditch Companies. *Id.*⁶⁴

The Ditch Companies also assert they were deprived of the ability “to frame meaningful objections or offer evidence in rebuttal” to the officially noticed materials. [DC Brief at 86](#). This assertion is contrary to the record. The record shows that their historical expert, Dr. Stevens, and

described in “the last two bulleted items” set forth in his *Documents Officially Noticed* issued prior to hearing. [Tr., Sept. 10, 2015, p.1600-03](#).

⁶³ The Ditch Companies assert the “documents identified” in the Director’s official notice “were not provided to the parties” and complain that the official notice “stated that the documents could be found on the [Department] or SRBA websites, or otherwise reviewed in hardcopy at the [Department] state office upon request.” [DC Brief at 85](#). The Ditch Companies’ assertion reads a requirement to provide the parties with the documents officially noticed into Rule 602 that does not exist. See [IDAPA 37.01.01.602](#). Further, the Ditch Companies’ assertion erroneously suggests that the Director’s posting of documents to the Department’s website is not an action that “provided” the parties with officially noticed documents.

⁶⁴ The officially noticed materials ([A.R. 000268-69](#), [000377](#), [000678](#)) include: the Departments files for seven SRBA water right claims for the Boise River Reservoirs (63-303, 63-3613, 63-3614, 63-3618, 63-2158, 63-5261, and 63-5262 - the last three claims were not decreed); the Basin-Wide Issue 17 record; the Water District 63 “Black Books,” Water District 63 water distribution records (including documents that were posted on the contested case website and accounting data for the years from 1986 through 2014); and the documents identified in “Attachment A” to IDWR’s Witness, Exhibit And Document List ([A.R. 000697-701](#)). The “Attachment A” documents consisted of some of the historic documents the BOR made available for review by the parties at its Snake River office in Boise. [A.R. 000692](#), [000678](#). The dates of the “Attachment A” documents fall within the date ranges of the historic documents the historian expert (Dr. Stevens) reviewed at the BOR’s Snake River office while researching her report for the contested case. Compare [A.R. 000697-701](#) with [A.R. 000671-73](#), entry nos. 153-55, 182-87.

the Board of Control’s technical expert, David Shaw, reviewed the officially noticed materials in advance of the hearing. Dr. Stevens stated that she had “reviewed documents identified by the [Department] as relevant to the contested case concerning water rights accounting in Water District 63.” [A.R. 000647](#). In fact, Dr. Stevens’ expert disclosure shows that her extensive review of historic documentation covered a volume of materials far greater than the materials officially noticed by the Department. [A.R. 000647](#), [000664-75](#). David Shaw testified that he “looked particularly at the daily accounting records that are available” in “some detail. I looked at the . . . FORTRAN code for a couple of the years, reviewed some of the input files . . . some of the support information, some of the background from the [*Water Control Manual for Boise River Reservoirs*]” and “records of the [BOR] and the Geological Survey.” [Tr., Sep. 10, 2015, p. 1463, ll.11-15, 25, p. 1464, l.1.](#)

The Ditch Companies suggest that the Director cannot utilize the official notice process and must instead follow the “exhibit presentation and admission process.” [DC Brief at 84](#). This suggestion ignores the Director’s authority to take official notice of material that is expressly set forth in the Department’s Rule of Procedure 602. [IDAPA 37.01.01.602](#). The Director complied with the requirements of Rule 602 in taking official notice of material in the contested case.

Moreover, the Ditch Companies have failed to demonstrate they were prejudiced by the Director’s taking official notice of materials in the contested case. The Director’s reliance on officially noticed materials was almost entirely limited to the Black Books—the reports of water distribution and streamflow records the watermaster is statutorily required to file with the Department each year. [Idaho Code § 42-606](#). The Director referred to the Black Books for

purposes of resolving disputed questions of fact regarding historic water accounting and water rights administration both before and after the 1986 introduction of the accounting system. [A.R. 001249-53](#), [001255-56](#), [001272-73](#). This conflict arose in part from the testimony of the witnesses Sisco, Stevens, and Barrie, which conflicted with the testimony of other witnesses and admitted exhibits. *Id.* The Ditch Companies cannot reasonably assert they had no reason to think the Black Books would be relevant to questions of historic accounting and water rights administration that they raised.⁶⁵ The Ditch Companies have failed to explain how the Director’s official notice process deprived them of due process.

b. There is No Merit in the Ditch Companies’ Argument That the Director Predetermined the Contested Case and Should Have Disqualified Himself

The Ditch Companies argue that the Director deprived them of due process by not disqualifying himself because he was “biased” and had “predetermined” the outcome of the contested case. [DC Brief at 75](#), [80 n.24](#). In support of this argument, the Ditch Companies rely upon the Director’s public statements prior to hearing. [Id. at 76](#). The Ditch Companies’ argument is contrary to the Department’s Rules of Procedure, Idaho Code, and the record, and reduces to a contention that the Director must have been biased because he did not agree with the Ditch Companies’ position.

⁶⁵ The Ditch Companies’ exhibits included two Black Books, and excerpts of a third. [Ex. 2009](#), [2010](#), [2011](#).

i. The Ditch Companies' Disqualification Argument Is Contrary to the Department's Rules and Idaho Code

The Department's Rule of Procedure 412 ("Rule 412") provides that, "[d]isqualification of agency heads, if allowed, will be pursuant to Sections [59-704](#) and [67-5252\(4\), Idaho Code.](#)" [IDAPA 37.01.01.412](#). The Director has sole statutory authority over "direction and control of the distribution of water from all natural sources within a water district," [Idaho Code § 42-602](#), and the sole authority to issue final orders in administrative proceedings, [Idaho Code § 42-1701A](#). The Director was the "agency head" in the contested case because he is the individual "in whom the ultimate legal authority of the agency is vested by any provision of law." [Idaho Code § 67-5201\(3\)](#); [IDAPA 37.01.01.005.04](#). Under Rule 412, therefore, the Ditch Companies' *Motion to Disqualify* the Director was governed by "[Sections 59-704](#) and [67-5252\(4\), Idaho Code.](#)" [IDAPA 37.01.01.412](#).

[Idaho Code § 67-5252\(4\)](#) provides that, when disqualification of the agency head "would result in an inability to decide a contested case, the actions of the agency head shall be treated as a conflict of interest under the provisions of [section 59-704, Idaho Code.](#)" As the District Court determined, disqualification of the Director would have resulted in an "inability to decide the contested case in violation of [Idaho Code § 67-5252\(4\)](#)" because the Director is "[t]he individual statutorily charged with distributing water" [R. 001071](#). Indeed, the authority to "direct and control" the distribution of water is statutorily vested in the Director. [Idaho Code § 42-602](#); [BWI-17, 157 Idaho at 392-94, 336 P.3d at 799-801](#). No one but the Director had "ultimate legal authority" to decide the contested case. [IDAPA 37.01.01.005.04](#). Delegating the responsibility

to decide the contested case to “an independent” hearing officer as the Ditch Companies request, [DC Brief at 74](#), would be “an improper abdication of” the Director’s duty, [R. at 001071](#).

Rule 412 anticipates such situations by citing to [Idaho Code § 59-704](#). This statute allows a public official to decide matters if the public official discloses potential conflicts of interest. See [Idaho Code § 74-404](#) (“A public official shall not take any official action or make a formal decision . . . where he has a conflict of interest and has failed to disclose such conflict.”).

Under this framework, the Director was authorized to decide the contested case provided he disclosed the alleged “conflict of interest.” At the time the Director ruled on the Ditch Companies’ *Motion to Disqualify*, a “conflict of interest” for purposes of [Idaho Code § 59-704](#) was statutorily defined as a “private pecuniary benefit.”⁶⁶ The Ditch Companies did not allege that the contested case would result in a “private pecuniary benefit” to the Director, any member of his household, or a business with which the Director or a member of his household was “associated.” The Ditch Companies alleged, rather, that the Director was biased and prejudiced because of his “substantial prior involvement” in issues related to the contested case. [A.R. 000102-105](#). The “substantial prior involvement” alleged was the Director’s participation in

⁶⁶ In 2015, the Idaho Legislature “move[d]” the Ethics in Government Act (Idaho Code § 59-701, et seq.) to Title 74 in recognition of “a need to provide one place for citizens to find laws relating to government transparency.” *Statement of Purpose*, H.R. 90, 63rd Leg., 1st Reg. Sess. (Idaho 2015) (attached hereto as [Addendum D](#)). Idaho Code § 59-704 was still in effect in October 2014 when the Ditch Companies moved for disqualification of the Director, and when the Director issued the *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer*. [A.R. 000100-141](#). Idaho Code § 74-404 superseded Idaho Code § 59-704, and has the same or very similar language.

“settlement discussions” involving the SRBA proceedings and his “presentation to the Interim Natural Resources Committee.” [A.R. 000102-03](#); see [DC Brief at 76](#).

The Ditch Companies’ allegations of “substantial prior involvement” are not grounds for disqualification of the Director under Rule 412 and [Idaho Code §§ 67-5252\(4\)](#) and [59-704](#), even if “substantial prior involvement” constituted a “conflict of interest.” [Idaho Code § 67-5252\(4\)](#). Under [Idaho Code § 59-704](#), the remedy for a “conflict of interest” is disclosure, not disqualification. See [Idaho Code § 74-404](#) (same). Moreover, the Director’s involvement in settlement efforts and his public presentation to the Committee were already well known to the Ditch Companies and the other parties. The Ditch Companies’ argument that the Director erred by not disqualifying himself is contrary to the provisions of the Department’s Rules of Procedure and Idaho Code governing disqualification.

- ii. The Director’s Public Statements Did Not Evidence Bias or Predetermination, Were Made in the Discharge of his Statutory Duties, and Were Properly Disclosed to the Parties

The Ditch Companies assert the Director had “predetermined” the outcome of the contested case and could not act as an “impartial and disinterested tribunal.” [DC Brief at 75](#). In an attempt to support this assertion, the Ditch Companies point to the Director’s presentation to the Idaho Legislature’s Natural Resources Interim Committee in response to its request for information about Basin-Wide Issue 17 and associated questions of flood control, “refill,” and accounting. [Id. at 76](#); [A.R. 000109-131](#).

This Court has explained that impartiality “does not mean ‘lack of preconception in favor of or against a particular legal view. . . . It also does not mean having ‘no preconceptions on

legal issues, but [being] willing to consider views that oppose his preconceptions, and remain[ing] open to persuasion, when the issues arise in a pending case.” [Marcia T. Turner, LLC v. Twin Falls, 144 Idaho 203, 209, 159 P.3d 840, 846 \(2007\)](#) (citations omitted). Further, and directly contrary to the Ditch Companies’ contentions:

A decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is ‘not capable of judging a particular controversy fairly on the basis of its own circumstances.’

Id. (citation omitted) (emphasis added).

The Director’s presentation to the Committee fell well within these sideboards. The Director reviewed Basin-Wide Issue 17, the federal on-stream reservoir system, flood control operations, the accounting system, concerns that had been expressed about the accounting, and the possible effects of changing the accounting. [A.R. 000114-119, 000120-130](#). Nothing in this presentation suggested the Director had made up his mind on the issues in the contested case. As the District Court explained, “[t]here are no pledges, promises, or definitive statements of law contained therein. Nothing is said in specific relation to the Boise River System. It is merely a broad overview of the issues raised in Basin-Wide Issue 17 and some of the concerns that surround the distribution of water to federal on-stream reservoirs.” [R. 001070-71](#). At most, the presentation reflected the fact that the Water District 63 accounting system had been operating for thirty years or more without any complaint until the Board of Control and others initiated Basin-Wide Issue 17. See [BWI-17, 157 Idaho at 392, 336 P.3d at 799](#) (“no injury alleged”).

Further, in responding to the Committee’s request, the Director was simply doing his job. As this Court stated in Basin-Wide Issue 17, the Director as state engineer “is the expert on the spot,” that the “[t]he legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state,” and that the Legislature “has recognized the need for the Director’s expertise.” *Id.* at 394, 336 P.3d at 801 (citations omitted). The Director’s duties run the gamut from engineering and enforcement to distributing water to the quasi-legislative and the quasi-judicial. Idaho Code §§ 42-1701(2), 42-1701B(5)(a), 42-602, 42-1702(4), 42-1805(8)-(9). The Director is expected to have and share opinions on policy matters with elected officials to assist them in their duties. *See, e.g., Idaho Code § 42-1704* (“any recommendations he may have to make in reference to legislation affecting the department”). He is expected to investigate and develop an opinion on the nature and extent of claimed water rights. Idaho Code § 42-1411. Providing to the Committee the type of information and insight that he is uniquely qualified to provide is part and parcel of the Director’s job. As the District Court recognized: “Of course the Director will have some preconceived notions of how water is and should be distributed to federal on-stream reservoirs in the Boise River System. This is only natural given he is statutorily charged with distributing water to those reservoirs, a task he undertakes yearly.” R. 001070.

The Ditch Companies’ arguments ignore all this and would have the Director approach every contentious water matter with an utterly empty mind: no information and no preconceptions whatsoever. This is not realistic and contravenes the statutorily defined duties

and qualifications required of the Director.⁶⁷ The District Court agreed: “The restraints the Petitioners seek to impose on the Director exceed those required by law.” [R. 001070](#). Moreover, and contrary to the Ditch Companies’ repeated mischaracterization of the contested case as an effort by the Department to “defend[]” and “affirm[]” the accounting system, [DC Brief at 70, 81](#), the contested case proceeding was initiated to provide the Ditch Companies an opportunity to raise objections to how the Director is discharging his statutory duty of distributing water in accordance with the prior appropriation doctrine.

The Ditch Companies’ argument that the Director erred by failing to disclose all “his public contacts and statements” is based on erroneously characterizing the Director’s communications as “*ex parte*.” [DC Brief at 76 n.22](#). Rule 417 of the Department’s Rules of Procedure only requires disclosure of contacts the Director may have had with *parties* to the contested case proceeding *once the Director became presiding officer*. [IDAPA 37.01.01.417](#). As the Director explained in the *Response to Boise Project Board of Control’s Document Requests and Requests for Disclosure*, “contacts the Director has had with legislators, legislative groups, representatives of the government of the State of Idaho, or other non-parties are not *ex parte* communications and do not violate the Idaho Administrative Procedure Act nor the Idaho Constitution.” [A.R. 000387](#). The Director did not err by determining he was not required to disclose all such communications.

⁶⁷ While the Ditch Companies point to the Idaho Code of Judicial Conduct to support their argument that the Director was biased and violated their due process rights, [DC Brief at 80](#), the Director is not a “judge” who is bound by the Idaho Code of Judicial Conduct.” *Id.* Further, the Director did not violate any canons of the judicial code by presiding over the contested case.

Further, “[i]n an exercise of full transparency” the Director committed to disclose all “non-privileged written documents and communications related to the” contested case proceeding responsive to the Board of Control’s requests for disclosure. *Id.* Thereafter, the Director posted several responsive documents to the Department’s website for the contested case proceeding under the heading “Communication Documents.” These documents are included in the record on appeal and are contained in the electronic folder labeled “Communication Documents.”

The Director’s resolution of pre-hearing motions and disclosure requests demonstrates the Director was not biased and had not predetermined the outcome of the contested case. In his response to the Ditch Companies’ *Motion to Disqualify*, the Director stated “that he has not pre-judged issues that he may be asked to decide.” [A.R. 000137](#). In the *Response to Boise Project Board of Control’s Document Request and Requests for Disclosure*, the Director stated that he remained “committed to obtaining a full understanding of the objections to the current water right accounting,” would “provide a full and fair hearing,” and was “fully capable of judging this particular controversy fairly on the basis of its own circumstances.” [A.R. 000388](#).

The Director’s orders are the true test of the Ditch Companies’ bias and predetermination arguments.⁶⁸ The Director issued detailed, reasoned orders that carefully considered the

⁶⁸ The Ditch Companies assert the Director was biased and deprived them of due process because he “pre-judged the worth of anticipated irrigation entity evidence as being ‘likely irrelevant.’” [DC Brief at 76](#). In an attempt to support this assertion, the Ditch Companies take one statement out of context from a prehearing order and misrepresent the Director’s statements regarding the issue at hearing. Specifically, the Ditch Companies point to the Director’s statement in his *Order Denying United Water’s Motion in Limine* that “[m]uch of the

arguments and evidence, and the applicable law, in regard to their pre-hearing motions and the ultimate issues in the contested case. [A.R. 000132-41](#), [000335-52](#), [000377-91](#), [001230-1311](#), [001401-35](#). The Ditch Companies’ arguments reduce to a contention that the Director must have predetermined the issues because he did not agree with assertions that the Water District 63 accounting system is unlawful and must be changed. The fact that the Director did not agree with the Ditch Companies’ arguments does not demonstrate he had predetermined the issues to be decided in the contested case or that he deprived the Ditch Companies of due process. As the District Court stated: “The Director’s *Final Order* demonstrates that he properly, and more than adequately, considered those arguments [of the Board of Control and the Ditch Companies].” R. 0010170.

c. The Department Did Not Take an Adversarial Position

The Ditch Companies mischaracterize the Department as “an adversarial party” in the contested case. [DC Brief at 81](#). In the Ditch Companies’ view, the Director violated their rights simply by conducting an administrative proceeding that did not begin with the unquestioned

information sought to be introduced by the Irrigation Entities is likely irrelevant to this proceeding.” *See id.* The Ditch Companies fails to acknowledge that the Director made this statement right before he denied a request to exclude exhibits the Ditch Companies sought to introduce at hearing. [A.R. at 000892](#). The Director determined that “[t]he information must be evaluated as it is presented in the administrative hearing so that its relevancy can be considered in the proper context.” *Id.* At the hearing, the Director did not state that any evidence was “likely irrelevant” as the Ditch Companies contend. Rather, the Director stated that documents the Ditch Companies sought to introduce at hearing “may be, or may not be relevant to determining how water rights are accounted for” and informed counsel for the Ditch Companies “you’ll have every opportunity to establish the relevancy of those documents.” [Tr., Aug. 27, 2015, p.24, ll.23-25, p.25, ll.9-10](#). These statements demonstrate the Director did not prejudge the relevancy of the Ditch Companies’ evidence.

premise that the Decreed Storage Rights constitute a “vested water right in the water stored in the Boise River Reservoirs following flood control.” *Id. at 87*. The Ditch Companies’ allegation that the Department was an “adversarial party” overlooks the stated purpose of the contested case, the Department’s Rules of Procedure, and mischaracterizes the record.

The Director initiated the contested case to provide an administrative forum in which the Ditch Companies (and others) could raise “concerns with and/or objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in Water District 63.” *A.R. 000007*. As the Notice explained, the contested case was “necessary, for purposes of identifying and resolving concerns with and objections to the existing accounting methods.” *A.R. 000006*. The Director did not initiate the contested case to advocate “for a certain outcome.” *DC Brief at 81*.

The Ditch Companies argue that the participation of Department staff and the Department’s counsel in the contested case “exceeded [the Department’s] authority” under the Department’s procedural rules and shows the Department took on “adversarial party status.” *DC Brief at 81*. The Ditch Companies support this argument by pointing to the fact the Department submitted witness and exhibit lists to the parties “*under the Director’s own signature.*” *Id.* (emphasis in original). The submission of witness lists to the parties by the Director under his own signature is not evidence of an adversarial position, but shows that the Director wanted to ensure the parties had ample notice of who was going to testify at the hearing. To lay the foundation for how the Water District 63 water right accounting system works and its history, testimony from current and former Department employees was necessary. To ensure that parties

had notice of who would testify to lay this foundation, the Director provided witness lists to the parties. [A.R. 000641](#); [A.R. 000691](#). The Director also provided the parties notice of documents that would be used at hearing to help explain how the water right accounting system works. [A.R. 000692](#). The Director's decision to provide notice to the parties was not "adversarial" as the Ditch Companies suggest, but ensured that all parties were aware of those individuals the Department would rely upon to explain how the water right accounting system works and the history of its development and what documents the Department was going to rely upon.

The Ditch Companies also suggest that participation of the Department's counsel at hearing was contrary to rule and improper. [DC Brief at 81](#). The Ditch Companies' argument ignores the plain language of the Department's Rule of Procedure 157, which specifically provides that agency staff "may appear at the hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments." [IDAPA 37.01.01.157](#). The Department was not transformed into an "adversarial party" because counsel for the Department participated in the proceeding by presenting witnesses, examining witnesses, and making evidentiary objections. *See* [DC Brief at 81](#). The Department's counsel participated in the proceeding for the purpose of facilitating the introduction of testimony and clarifying the record on complex issues within the sphere of the Department's statutory authority and specialized expertise. The participation of the Department's counsel was consistent with Rule of Procedure 157.

The Ditch Companies incorrectly assert that the Department was an "adversarial party" because the Director communicated with Department staff and the Department's counsel during

the hearing, citing to the Department’s Rule of Procedure 417 and Idaho Code § 67-5253 and referring to such communications as “*ex parte*.” [DC Brief at 77-79, 84](#). Again, the Department’s Rule of Procedure 417 only requires the Director must disclose communications “regarding any substantive issue in the contested case with any *party*” [IDAPA 37.01.01.417](#) (emphasis added). Similarly, [Idaho Code § 67-5253](#) prohibits communications “regarding any substantive issue in the proceeding, with any *party*, except upon notice and opportunity for all parties to participate in the communication.” (emphasis added). Department staff and the Department’s counsel were not parties to the contested case. *See* [IDAPA 37.01.01.150](#). Nonetheless, the fact that the Director communicated with Department staff Cresto during the course of the hearing was disclosed to the parties. *See* [DC Brief at 78](#). As the District Court explained, “the topic of this discussion was revealed and put on the record, and the [Ditch Companies] had the opportunity to cross examine Mrs. Cresto regarding that discussion.” [R. 001072](#). “Therefore there is no prejudice or harm to the [Ditch Companies], and their due process argument is unavailing.” *Id.*

The Ditch Companies also point to one evidentiary ruling whereby the Director sustained an objection by Suez to support their contention that the Department took on an “adversarial role.” [DC Brief at 77](#). The Ditch Companies imply that the Director’s evidentiary rulings consistently went against the Ditch Companies and the Board of Control. *Id.* This implication is disproved by the record. The Director sustained many of the Ditch Companies’ and Board of Control’s objections and overruled many of Suez’s objections. *See* [Tr., Aug. 27, 2015, p.237, 268, 271](#); *see* [Tr. Aug. 28, 2015, p. 470, 568, 588, 591](#); *see* [Tr., Aug. 31, 2015, p.933](#); *see* [Tr.](#)

[Sept. 10, 2015, p.1539](#) (sustaining Ditch Companies’ and Board of Control’s objections); [see Tr., Aug. 27,2015, p. 228-30, 284-85, 288](#); [see Tr., Aug. 28, 2015, p.506](#); [see Tr., Aug. 31, 2015, p.689, 835-36](#); [see Tr., Sept. 9, 2015, p.999-1000, 1004, 1012-14, 1052, 1072, 1075-76, 1090, 1127, 1154-55, 1277-78, 1285](#) (overruling Suez’s objections).

The Ditch Companies’ due process arguments are rooted in their rejection of the decisions of the SRBA Court and this Court in Basin-Wide Issue 17. In that proceeding, the Board of Control argued “the Director’s discretionary functions do not include the ability to determine when a water right is satisfied” because “water rights are property rights” and the Decreed Storage Rights represent property rights to remain in priority until the end of the flood control “refill” period. [BWI-17, 157 Idaho at 392-93, 336 P.3d at 799-800](#). The SRBA Court and this Court rejected this argument, holding the Decreed Storage Rights are “a property right to a certain amount of water: a number that the Director must fill in priority to each user. However, it is within the Director’s discretion to determine when that number has been met for each individual decree.” [Id. at 394, 336 P.3d at 801](#).

The Ditch Companies have not accepted this decision. From the outset, the Ditch Companies resisted the Director’s attempt to provide an administrative proceeding in which to address their objections to the accounting system. Regardless of the Ditch Companies’ assertions, the Department was not an “adversarial party” in the contested case. [Idaho Code § 42-602](#) imposes a “clear legal duty” on the Director to distribute water “in accordance with prior appropriation,” and the ““details of the performance of the duty are left to the director’s discretion.”” [BWI-17, 157 Idaho at 393, 336 P.3d at 800](#) (quoting [Musser, 125 Idaho at 395, 871](#)

[P.2d at 812](#)). The Director properly determined that, to fulfill his statutory duty, it was necessary to initiate a proceeding to address and resolve water users' concerns with and/or objections to the Water District 63 accounting system's method of determining when the Decreed Storage Rights are satisfied. *E.g.*, [A.R. 000006](#), [000338](#), [001286–88](#).

d. The Department's Response to Sisco's Testimony Was Not Improper and Did Not Deprive the Ditch Companies of Due Process

In support of their due process argument, the Ditch Companies point to the Department's response to a matter that arose during the hearing involving the testimony of former watermaster Sisco. [DC Brief at 76-77](#). At hearing, Sisco testified that the computerized water right accounting programs were used to administer water rights during his tenure. [Tr., Aug. 31, 2015, p.893, ll.15-18, p.927, ll.10-25](#). He testified that Department hydrologist Cresto regularly provided him with water right accounting reports, and that he relied on the reports for purposes of water accounting and water right administration. [Tr., Aug. 31, 2015, p.940, ll.6-17](#). Sisco testified that the "basic" water right accounting program is "sound," [Tr., Aug. 31, 2015, p.941, l.8](#), and that with one exception he administered water rights in accordance with the water right accounting system, [Tr., Aug. 31, 2015, p.894, ll.9-11](#).

The "exception" Sisco referred to related to water right administration while the reservoir system was "backfilling" after flood control releases. *Id.* Sisco testified that he would "disregard" the water right accounting system's determination of distribution priorities when the reservoir system was "backfilling" after flood control releases, and curtail junior water rights during the "backfill" or "refill" period. [Tr., Aug. 31, 2015, p.880, ll.22-25, p.881 ll.1-3, p.894,](#)

[ll.9-11, p.941, ll.3-18](#). Sisco’s testimony regarding this “exception” raised the possibility that he had either not adhered to his statutory duty as watermaster to distribute water in accordance with the prior appropriation doctrine “as supervised by the director,” [Idaho Code § 42-602](#); *see Almo Water Co. v. Darrington*, [95 Idaho 16, 21, 501 P.2d 700, 705 \(1972\)](#), or did not understand the water right accounting system well enough to know that he had not really created an exception.⁶⁹

The Director was appropriately concerned with Sisco’s testimony because the water right accounting system is the tool the Director uses to comply with his statutory duty to administer water rights consistent with the water right decrees and a former watermaster had just testified he had ignored the system. During a break, the Director looked for a Department employee who could locate a copy of a “form that the watermaster submits to the Director representing” that the deliveries of water he reports to the Director are “true and correct.” [Tr., Aug. 31, 2015, p.943, ll.8-12](#).⁷⁰ However, the Director was unable to find the Department employee or the form. [Tr., Aug. 31, 2015, p.943, ll.16-17](#).

⁶⁹ Indeed, although Sisco testified that he followed the water right accounting system but for this “exception,” Sisco was unable to point to a specific example when this exception occurred ([Tr., Aug. 31, 2015, p.893, l.25, p.894, ll.1-17](#)), testified he was unsure if he remembered correctly how the water right accounting system accounts for flood control ([Tr., Aug. 31, 2015, p.894, ll.4-5](#)), admitted he did not understand some of the terminology and nuances associated with the computerized accounting ([Tr., Aug. 31, 2015, p.905, ll.3-16](#)), and testified he did not understand “what this unaccounted for storage was.” ([Tr., Aug. 31, 2015, p.906, ll.10-11](#)). The Director found that the records of the water district do not support Sisco’s testimony. [A.R. 001272](#). The Director found that, while Sisco may have believed he created a flood control “exception” to the accounting system, his specific description of the “exception” was actually the normal operation of the system. [A.R. 001273](#).

⁷⁰ This form is distinct from the Black Books.

The Ditch Companies suggest that the Director’s response to Sisco’s testimony evidences bias against the Ditch Companies. [DC Brief at 76-77](#). The fact that the Director looked for a Department employee to see if he could locate a copy of the form does not demonstrate the Director was biased against the Ditch Companies. Rather, the Director’s response demonstrates he was concerned with the credibility of Sisco’s testimony and concerned that a former watermaster had possibly disregarded the tool the Director uses to comply with his statutory duty to administer water rights consistent with water right decrees. Further, as the District Court determined, the Director’s response to Sisco’s testimony did not “prejudice or harm” the Ditch Companies because the Director was unable to find the Department employee or the form. [R. 001072](#). The Director also did not rely upon the form in the Final Order.

The Ditch Companies also complain that Cresto’s rebuttal testimony and exhibit regarding Sisco’s testimony ([Ex. 9 at 000114](#)) were “to rebut testimony [the Department] was aware of well before hearing” and “stray[ed] from the subject matter and contents of her November 2014 Technical Memorandum.” [DC Brief at 83](#).

The Department was not aware of Sisco’s “exception” prior to hearing. The *Affidavit of Lee Sisco* did not discuss that he administered water rights consistent with the Water District 63 accounting system but for the “exception” he described at hearing. See [Ex. 2008](#). Cresto’s rebuttal testimony and exhibit were appropriate to rebut Sisco’s testimony regarding his alleged “exception.” As this Court explained in [Van Brunt v. Stoddard, 136 Idaho 681, 685–86, 39 P.3d 621, 625–26 \(2001\)](#), “[r]ebuttal evidence is evidence that explains, repels, counteracts, or disproves evidence” Cresto’s testimony and exhibit disproved Sisco’s testimony that he

“did not allow water rights junior to the reservoir water rights to divert during the flood control ‘refill’ period” in years after the water right accounting system was in place. [A.R. 001273-74](#).

The Ditch Companies’ suggestion that the Department had to disclose Cresto’s rebuttal testimony and exhibit prior to hearing is misplaced. See [DC Brief at 83](#). In support of this assertion, the Ditch Companies cite this Court’s statement in [Easterling v. Kendall, 159 Idaho 902, 912, 367 P.3d 1214, 1224 \(2016\)](#) that, “[b]efore an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon.” [DC Brief at 83](#). But this Court did not make that statement in reference to rebuttal testimony. See [Easterling, 159 Idaho at 912, 367 P.3d at 1224](#). Cresto’s rebuttal evidence was not required to be disclosed prior to hearing. See [State v. Vierra, 125 Idaho 465, 470, 872 P.2d 728, 733 \(Ct. App. 1994\)](#).

Moreover, the Ditch Companies had an opportunity to cross-examine Cresto regarding her rebuttal testimony and the exhibit, including the data and methods she used in preparing it. [Tr., Sept. 31, 2015, p.1559-79, 1585-88](#). In addition, Cresto’s rebuttal testimony and the exhibit had very little bearing on the Director’s analysis of Sisco’s testimony. The Director found Sisco’s testimony lacking in reliability and/or credibility on numerous grounds that had nothing to do with the exhibit. [A.R. 001272-74](#); [A.R. 01405-06](#). These findings are supported by substantial evidence in the record. The Ditch Companies were not prejudiced by Cresto’s rebuttal testimony or the exhibit.

D. THE DITCH COMPANIES ARE NOT ENTITLED TO ATTORNEY FEES

The Ditch Companies argue they are entitled to attorney fees pursuant to Idaho Code § 12-117(1). [*DC Brief at 89.*](#) [Idaho Code § 12-117\(1\)](#) authorizes the Court to award “reasonable attorney’s fees . . . if it finds that the nonprevailing party acted without a reasonable basis in fact or law.”

The Ditch Companies assert they are entitled to an award of attorney fees because the Director: 1) improperly rejected their challenges to the Accrual Methodology, 2) improperly initiated the contested case to “validate” the “use of the water right accounting program to determine the ‘satisfaction’ of Boise River Reservoirs storage water rights,” and 3) was “an adversarial party.” [*DC Brief at 87-88.*](#)

The Ditch Companies’ assertions lack merit. The Director instituted the contested case to address the repeated complaints he received about the Water District 63 accounting system from the Ditch Companies and other water users. [A.R. 000007](#). The Director did not initiate the contested case to “defend” or “validate” the Accrual Methodology. Rather, as the District Court found, the Ditch Companies “were provided with an impartial and disinterested tribunal. They were given notice of the contested case and had ample opportunity to present evidence and be heard on their arguments. The Director’s [Final Order] demonstrates that he properly, and more than adequately, considered those arguments.” [R. 001070](#). The Director properly determined that the Accrual Methodology is consistent with the prior appropriation doctrine and the partial decrees for the Decreed Storage Rights. Further, the Ditch Companies’ argument that the Director acted as an “adversarial party” during the contested case overlooks the stated purpose of

the contested case, the Department's Rules of Procedure, Idaho law, and mischaracterizes the record. The Ditch Companies have not demonstrated any prejudice to a substantial right or that the Director acted without a reasonable basis in fact or law. The District Court properly affirmed the Director's conclusion that the Accrual Methodology is consistent with the partial decrees for the Decreed Storage Rights and the prior appropriation doctrine and properly rejected the Ditch Companies' procedural arguments. The Ditch Companies are not entitled to attorney fees.

E. THE DEPARTMENT IS ENTITLED TO REASONABLE ATTORNEY FEES

The Ditch Companies' arguments regarding the Accrual Methodology reduce to collateral attacks on the Decreed Storage Rights and a direct attack on the prior appropriation doctrine. The Ditch Companies' arguments that the contested case proceeding was procedurally defective and deprived them of due process mischaracterize the proceeding and the record and overlook the Department's Rules of Procedure and Idaho law. The Ditch Companies have failed to demonstrate any prejudice to a substantial right. Accordingly, the Ditch Companies' arguments are without a reasonable basis in fact or law. Because the Department has been forced to expend time and expense to defend against this appeal that lacks any basis in fact or law, the Court should award the Department reasonable attorney fees pursuant to Idaho Code § 12-117(1).

V. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court affirm the District Court's conclusion that the Accrual Methodology is consistent with the partial decrees for the Decreed Storage Rights and the prior appropriation doctrine. The Department also requests that the Court affirm the District Court's determination that the Ditch Companies' procedural arguments are unavailing. Finally, the Department requests that the Court deny the Ditch Companies' request for attorney fees, but award the Department reasonable attorney fees pursuant to Idaho Code § 12-117(1).

RESPECTFULLY SUBMITTED this 1st day of August 2017.

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Attorney General

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Chief, Natural Resources Division



GARRICK L. BAXTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August 2017, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:

Clerk of the Court
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Boise, ID 83702

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ADDENDUM A
to
IDWR RESPONDENTS' BRIEF
Filed on August 1, 2017

BDC, et al. v. IDWR;
Supreme Court Docket No. 44677-2016

ORIGINAL

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DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
AUG 26 2014	
By _____	Clerk
_____	Deputy Clerk

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)
)
)
 Case No. 39576)
)
)
 _____)

FINAL UNIFIED DECREE

I. PROCEDURE

On June 17, 1987, the State of Idaho, ex rel. A. Kenneth Dunn in his official capacity as Director of the Idaho Department of Water Resources, filed a petition in the above-entitled Court seeking commencement of a "general adjudication inter se of all rights arising under state or federal law to the use of surface and ground waters from the Snake River basin water system and for the administration of such rights." *Petition* at 2. On November 19, 1987, this Court issued its *Commencement Order* thereby initiating the above-entitled general stream adjudication of all rights to the use of the waters of the Snake River Basin within the State of

Idaho pursuant to Idaho Code § 42-1406A (Supp. 1987).¹ The *Commencement Order* adopted by reference this Court's October 14, 1987, *Memorandum Opinion on Commencement of Adjudication* as "further findings of fact and further conclusions of law as permitted by I.R.C.P. 52(a)." *Commencement Order* at 4.

As set forth in the *Memorandum Opinion on Commencement of Adjudication*, Idaho Code § 42-1406A (Supp. 1987) required that the adjudication be commenced within the terms of the McCarran Amendment, 43 U.S.C. § 666. This Court determined that for the adjudication to come within the terms of the McCarran Amendment the entire Snake River Basin water system within the State of Idaho had to be adjudicated. This Court defined the entire Snake River Basin water system within Idaho as follows:

Beginning at the point where the southern boundary line of the state of Idaho meets the western boundary line of the state of Idaho, then following the western boundary of the state north to the northern boundary of the Clearwater Basin, in Idaho, in section 36, T. 36 N., R. 6 W., B.M., then following the northern watershed divide of the Clearwater River Basin north and east to the eastern boundary of the state of Idaho in section 4, T. 42 N., R. 11 E., B.M., then following the eastern boundary of the state southeast to the northern boundary of the Bear River Basin in section 35, T. 10 S., R. 46 E., B.M., then following the northern watershed divide of the Bear River Basin, in Idaho, southwest to the southern boundary of the state of Idaho in section 26, T. 16 S., R. 28 E., B.M., then following the southern boundary line of the state of Idaho west to the point of beginning.

Commencement Order at 5. A map showing the boundaries of the Snake River Basin water system is attached for illustrative purposes as Attachment 1, as required by Idaho Code § 42-1413 (2003). The following counties are wholly located within the boundaries of the Snake River Basin water system:

Ada	Canyon	Idaho	Owyhee
Adams	Clark	Jefferson	Payette

¹ Idaho Code § 42-1406A was added by section 1 of chapter 18, 1985 Idaho Sess. L. at 28. Section 42-1406A was subsequently amended by section 11 of chapter 454, 1994 Idaho Sess. L. at 1452-53, and now appears as an uncodified law in the 1994 Idaho Session Laws.

Bingham	Clearwater	Jerome	Teton
Blaine	Custer	Lemhi	Twin Falls
Boise	Elmore	Lewis	Valley
Bonneville	Fremont	Lincoln	Washington
Butte	Gem	Madison	
Camas	Gooding	Minidoka	

Commencement Order at 5. The following counties are partly located within the boundaries of the Snake River Basin water system:

Bannock	Nez Perce
Caribou	Oneida
Cassia	Power
Latah	Shoshone

Id. at 6.

The *Commencement Order* also determined that “all classes of water uses . . . within the water system [must] be adjudicated as part of the Snake River Basin adjudication.” *Id.* At 6. On January 17, 1989, however, this Court entered its *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses* that allowed claimants of *de minimis* domestic and stock water rights, as defined in Idaho Code § 42-1401A(5) and (12) (Supp. 1988), to elect to defer adjudication of their claims; provided, all such claimants “shall be joined as parties in this proceeding and will be bound by all decrees entered in this case, including the final decree.” *Findings of Fact* at 3.

The *Commencement Order* directed the Director of the Idaho Department of Water Resources (“Director”): 1) to investigate the water system as provided in Idaho Code § 42-1410 (Supp. 1987); 2) to prepare the notice of order commencing a general adjudication containing that information required by Idaho Code § 42-1408A(1) (Supp. 1987); 3) to serve notice of the order commencing a general adjudication in accordance with chapter 14, title 42, Idaho Code; and 4) to file with this Court affidavits and other documents stating the

persons served with a notice of order commencing the adjudication. *Commencement Order* at 7-8.

Based upon the claims submitted; the files and records of the Idaho Department of Water Resources and the Court; the examination of the ditches, diversions, lands irrigated, and other uses of water within the water system; the Director's Reports and evidence herein, this Court enters the following findings of fact and conclusions of law:

II. FINDINGS OF FACT

1. All requirements for joinder of the United States as a party under state and federal law, including but not limited to 43 U.S.C. § 666, have been satisfied.
2. The Nez Perce Tribe participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Notice of Claim to a Water Right Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance* (March 18, 1993).
3. The Northwestern Band of the Shoshoni Nation participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Partial Protective Filing by the Northwestern Band of the Shoshoni Nation of Notices of Claim for Water Rights Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance on Behalf of the Northwestern Band of the Shoshoni Nation* (March 22, 1993).
4. The Shoshone-Bannock Tribes sought and were granted intervention in this proceeding. *Order Granting Permissive Intervention by the Shoshone-Bannock Tribes* (April 12, 1993).

5. The Shoshone-Paiute Tribes of the Duck Valley Indian Reservation sought and were granted intervention in this proceeding. *Motion to Intervene and Request for Expedited Hearing* (SRBA Consolidated Subcase No. 51-12756, Jan. 12, 1999); *Order Granting Tribes' Motion to Intervene, Order Requiring Written Status Reports and Order for Scheduling Conference Reports* (SRBA Subcases Nos. 51-12756 et al., Dec. 6, 1999).

6. The Director served notice of the commencement of the Snake River Basin Adjudication ("SRBA") in accordance with chapter 14, title 42, Idaho Code and the orders of this Court. This included service of the notice of commencement on the State of Idaho and the United States; service of the notice of commencement on all other persons by publication; service of the notice of commencement by posting in each county courthouse, county recorder's office and county assessor's office in which any part of the water system is located; service of the notice of commencement by mail on each person listed as owning real property on the real property assessment roll within the boundaries of the Snake River Basin water system; and filing of a copy of the notice of commencement in the office of the county recorder in each county in which any part of the water system is located.

7. In addition to the steps taken in paragraph 6, the Idaho Department of Water Resources also served notices of commencement on persons who may have used water within the water system, but were not listed as owners of real property. The sources of information the Idaho Department of Water Resources reviewed for this purpose were: 1) water right records of the Idaho Department of Water Resources for each basin wholly or partly within the water system; 2) cooperating farm/ranch operator records of the United States Department of Agriculture, Agricultural Stabilization and Conservation Service for each basin wholly or partly within the water system; and 3) mining claim records on federal

land of the United States Department of Interior, Bureau of Land Management for each basin wholly or partly within the water system.

8. The Director has completed an examination of the Snake River Basin water system and submitted Director's Reports to this Court in conformance with the requirements of chapter 14, title 42, Idaho Code and the orders of this Court.

9. As required by title 42, chapter 14, Idaho Code and this Court's orders, claims to water rights arising under state or federal law to the use of the surface and ground waters from the Snake River Basin water system have been adjudicated resulting in the issuance of partial decrees that have been certified as final pursuant to I.R.C.P. 54(b).²

10. Idaho Code § 42-1412(8) (2003) provides that: "Upon resolution of all objections to water rights acquired under state law, to water rights established under federal law, and to general provisions, and after entry of partial decree(s), the district court shall combine all partial decrees and the general provisions into a final decree." The Court finds that the conditions of Idaho Code § 42-1412(8) (2003) have been met with respect to the water rights identified in Attachments 2, 4, 5 and 6 and the general provisions in Attachment 3, enabling the Court to issue this Final Unified Decree.

III. CONCLUSIONS OF LAW

1. The SRBA is a general stream adjudication *inter se* of all water rights arising under state or federal law to the use of surface and ground waters from the Snake River Basin water system and for the administration of such rights.

2. The State of Idaho is a party to this proceeding.

² At the time of entry of this Final Unified Decree there are a total of 103 subcases pending final resolution. A separate *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* is being entered contemporaneously herewith, which provides for the continued processing of the subcases listed therein.

3. The Director was withdrawn as a party to this proceeding in 1994. Idaho Code § 42-1401B (2003); *State of Idaho, ex rel. Higginson v. United States*, 128 Idaho 246, 256-57, 912 P.2d 614, 624-25 (1995).

4. The United States is a party to this proceeding under 43 U.S.C. § 666.

5. This Final Unified Decree is conclusive as to the nature and extent of all rights of the United States to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, including, but not limited to, water rights held by the United States in trust for any Indian tribe, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

6. The Nez Perce Tribe, the Northwestern Band of the Shoshoni Nation, the Shoshone-Bannock Tribes, and the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation are parties to this proceeding.

7. The *Consent Decree Approving Entry of Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe and the Nez Perce Tribe to the Use of Water in the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resources Board* with its six attachments dated January 30, 2007 (“*Nez Perce Consent Decree*”), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Nez Perce Consent Decree* is conclusive as to the nature and extent of all rights of the Nez Perce Tribe to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

8. The *Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, dated August 13, 2014 (“*Shoshone-Bannock Consent Decree*”), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Bannock Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Bannock Tribes to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

9. The *Revised Consent Decree Approving Entry of Partial Decrees Determining the Rights of the United States as Trustee for the benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho* with its three attachments, dated December 12, 2006 (“*Shoshone-Paiute Consent Decree*”), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Paiute Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

10. This Final Unified Decree is conclusive as to the nature and extent of all rights of the Northwestern Band of the Shoshoni Nation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

11. Claimants in each of the SRBA basins received notice of the commencement of the SRBA in accordance with chapter 14, title 42, Idaho Code and orders of this Court. These notice procedures satisfy constitutional due process requirements. *LU Ranching Co. v. U.S.*, 138 Idaho 606 (2003).

IV. ORDER

NOW THEREFORE this Court ORDERS, ADJUDGES AND DECREES as follows:

1. This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987, except the following described water rights shall not be lost by failure to file a notice of claim, as provided in Idaho Code § 42-1420 (2003):

- a. Any domestic and stock water right, as defined in Idaho Code § 42-111 (1990), Idaho Code § 42-1401A(5) (1990), and Idaho Code § 42-1401A(12) (1990), the adjudication of which was deferred in accordance with this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*;
- b. A water right application for permit filed under chapters 2 or 15, title 42, Idaho Code;
- c. A water right permit issued under chapters 2 or 15, title 42, Idaho Code, unless the Director required the permit holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code;
- d. A water right license issued under chapters 2 or 15, title 42, Idaho Code, if proof of beneficial use was not filed with the Department of Water Resources

before November 19, 1987, unless the Director required the license holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code; and

- e. A claim to a water right under federal law, if the priority of the right claimed is later than November 18, 1987.

All other water rights with a priority before November 19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed.³ Any water rights with a priority date subsequent to November 18, 1987, were not required to be claimed in the SRBA, but to the extent any such water rights were claimed in the SRBA and a partial decree issued, the partial decree is conclusive as to the nature and extent of the right.

2. All partial decrees issued by this Court are set forth in Attachments 2 and 4 to this Final Unified Decree and are incorporated herein by reference.

3. Attachment 2 consists of a name index and a copy of all partial decrees issued by this Court.

4. General provisions decreed by this Court are set forth in Attachment 3 to this Final Unified Decree and are incorporated herein by reference.

5. Attachment 4 consists of the federal and tribal reserved water rights partially decreed and/or otherwise memorialized in a consent decree issued in conjunction with the approval of a federal reserved water right settlement, including all consent decrees and all attachments thereto; all partial decrees issued by this Court as part of the respective settlements; and all Federal, State and/or Tribal legislation necessary to enact and approve the water right settlements. In the case of any conflict between this Final Unified Decree and the partial

³ Excepting those claim numbers listed in the *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* entered contemporaneously herewith.

consent decrees approving reserved water right settlements, the partial consent decrees approving the reserved water right settlements as set forth in Attachment 4 shall control.

6. All claims to water rights filed in this proceeding that were decreed disallowed by this Court are set forth in Attachment 5 to this Final Unified Decree and are incorporated herein by reference.

7. The water right numbers for those water rights of record with the Idaho Department of Water Resources that were required to be claimed but were not claimed in this proceeding and therefore were decreed disallowed by this Court are set forth in Attachment 6 and are incorporated herein by reference. The portion of any disallowed water right that was deferrable pursuant to this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* is not affected by this paragraph.

8. This Final Unified Decree is binding against all persons including any persons that deferred filing of domestic and/or stock water claims pursuant to this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*, which is set forth in Attachment 7 to this Final Unified Decree and is incorporated herein by reference.

9. The adjudication of deferred domestic and stock water claims and the administration of such rights prior to their adjudication shall be governed by this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* and applicable state law.

10. All water rights based on beneficial uses, licenses, permits, posted notices, and statutory claims required to be claimed in this proceeding are superseded by this Final

Unified Decree. Provided, however, this Final Unified Decree does not supercede the third-party beneficiary contractual rights conferred on certain classes of water rights pursuant to the "Contract to Implement Chapter 259, Sess. Law 1983" as authorized by 1983 Idaho Sess. Laws 689 and codified as Idaho Code § 61-540 (2002). The scope of third-party beneficiaries and contract rights are defined in this Court's *Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2*. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011) included as Attachment 9.

11. All prior water right decrees and general provisions within the Snake River Basin water system are superseded by this Final Unified Decree except as expressly provided otherwise by partial decree or general provisions of this Court.

12. This Final Unified Decree shall not be construed to define, limit or otherwise affect the apportionment of benefits to lands within an irrigation district pursuant to chapter 7, title 43, Idaho Code.

13. This Final Unified Decree shall not be construed to supersede or affect otherwise the following: 1) any administrative changes to the elements of a water right completed after the entry of a partial decree but prior to the entry of this Final Unified Decree; or 2) elements of a water right defined by a license where, in accordance with Idaho Code § 42-1421(3) (2003), a partial decree was issued based on a permit prior to the issuance of the license.

14. The time period for determining forfeiture of a partial decree based upon state law shall be measured from the date of issuance of the partial decree by this Court and not from the date of this Final Unified Decree. State law regarding forfeiture does not apply to partial decrees based upon federal law.

15. The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state and tribal law, including the administrative provisions set forth in the federal reserved water right settlement agreements in Attachment 4.

16. Nothing in this Final Unified Decree shall be interpreted or construed as exempting the holder of a decreed water right based on state law from exercising or changing such right in compliance with applicable Idaho law.

17. This Court retains jurisdiction of this proceeding to: a) resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources; b) adjudicate any domestic or stock water rights deferred under this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*; and c) enter partial decrees, orders of disallowance, or other final determination for the pending subcases listed in the *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* entered contemporaneously herewith. Any order amending or modifying this Final Unified Decree, including the attachments hereto, will be entered on the register of action for Civil Case No. 39576 in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, and will be filed with the Idaho Department of Water Resources in lieu of issuing an Amended Final Unified Decree. Attachment 8 contains instructions on how to access any orders amending this Final Unified Decree.

18. The incorporation by reference of partial decrees and orders of this Court contained in the Attachments to this Final Unified Decree does not constitute a reissuance of such partial decrees and orders.

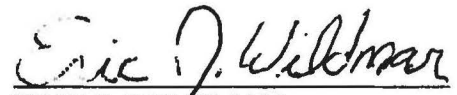
19. This Final Unified Decree, including the entirety of Attachments 1 through 10 listed below, shall be entered in the records of the clerk of the District Court for the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

- | | |
|---------------|--|
| Attachment 1 | Snake River Basin Water System Map. |
| Attachment 2 | Partially Decreed Water Rights, including a name index, consisting of 770 pages. |
| Attachment 3 | General Provisions, consisting of 113 pages. |
| Attachment 4 | Federal and Tribal Reserved Water Right Settlements, including all Consent Decrees and all Attachments thereto, all Partial Decrees issued by this Court as part of the Respective Settlements, and all Federal, State and/or Tribal Legislation Necessary to Enact and Approve the Water Right Settlements consisting of 2,857 pages. |
| Attachment 5 | List of Water Right Numbers for Filed Water Right Claims Decreed as Disallowed consisting of 66 pages. |
| Attachment 6 | List of Water Right Numbers for Unclaimed Water Rights Decreed as Disallowed consisting of 24 pages. |
| Attachment 7 | June 28, 2012, <i>Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims</i> consisting of 6 pages. |
| Attachment 8 | Instructions on Searching the Final Unified Decree consisting of 5 pages. |
| Attachment 9 | <i>Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2.</i> Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011). |
| Attachment 10 | <i>Register of Actions</i> , Twin Falls County Case No. 39576 (i.e., SRBA Main Case). |

20. A certified paper and electronic copy of the entire Final Unified Decree shall be provided to the Director. The Director shall record the Final Unified Decree excluding all

Attachments other than Attachments 7 and 8 in the office of the county recorder of each county in which the place of use or point of diversion of any individual decreed water right in the Final Unified Decree is located. The Director shall maintain a copy of the Final Unified Decree for public inspection.

DATED this 25th day of August, 2014.


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

ADDENDUM B

to

IDWR RESPONDENTS' BRIEF

Filed on August 1, 2017

BDC, et al. v. IDWR;

Supreme Court Docket No. 44677-2016

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

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

CIVIL CASE NUMBER: 39576

Ident. Number: A01-02064

Date Received:

Receipt No:

Received By: _____

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

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

2. Date of Priority: MAR 30, 1921

156,830 AFY of this right shall be administered under a priority date of
03/29/1921.

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

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
07S	31E	30	SW	SE			POWER

5. Description of diverting works:

AMERICAN FALLS DAM

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION STORAGE	01/01	12/31			1,700,000.00
IRRIGATION FROM STORAGE	03/15	11/15			1,700,000.00
POWER STORAGE	01/01	12/31			1,700,000.00
POWER FROM STORAGE	01/01	12/31			1,700,000.00

7. Total Quantity Appropriated is:

C.F.S. (and/or) 1,700,000.00 A.F.A.

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

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

9. Non-irrigation uses:

DOMESTIC AND POWER

10. Place of Use:

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

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

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

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

13. Other Water Rights Used:

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

14. Remarks:

15. Basis of Claim: LICENSE

16. Signature (s)

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

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

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

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

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

Signature of Authorized Agent [Handwritten Signature]

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

Date 12/1/2006

State of Idaho)

County of Ada)

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

Notary Public [Handwritten Signature]

Residing at Boise, Idaho

My Commission Expires 10/12/2009

Katy Loomis Please Print Name



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

Signature _____

Address _____

Date _____

Last Name _____ Ident. Number _____

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

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

CIVIL CASE NUMBER: 39576

Ident. Number: A01-02068

Date Received:

Receipt No:

Received By: _____

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

1. Name: UNITED STATES AMERICA, ACTING THROUGH 208-378-5306
Address: REGIONAL DIRECTOR, P.N. REGION ATTN: PN-3100
BUREAU OF RECLAMATION
1150 NORTH CURTIS
BOISE, ID 83706-1234
2. Date of Priority: JULY 28, 1939

259,600 AFY of this right shall be administered under a priority date of
03/29/1921.
3. Source: SNAKE RIVER Trib. to: COLUMBIA RIVER
4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
01S	45E	17	NE	NE			BONNEVILLE
01S	45E	17	NW	NE			BONNEVILLE
01S	45E	17	SE	NE			BONNEVILLE
01S	45E	17	SW	NE			BONNEVILLE
5. Description of diverting works: PALISADES DAM
6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION STORAGE	01/01	12/31			1,200,000.00
IRRIGATION FROM STORAGE	03/15	11/15			1,200,000.00
POWER STORAGE	01/01	12/31			1,200,000.00
POWER FROM STORAGE	01/01	12/31			1,200,000.00
7. Total Quantity Appropriated is:
C.F.S. (and/or) 1,200,000.00 A.F.A.

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

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

9. Non-irrigation uses:

DOMESTIC AND POWER

10. Place of Use:

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

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

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

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

13. Other Water Rights Used: 01-10043

14. Remarks:

15. Basis of Claim: LICENSE

16. Signature (s)

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

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

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

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

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

Signature of Authorized Agent [Handwritten Signature]

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

Date 12/1/2006

State of Idaho)

County of Ada)

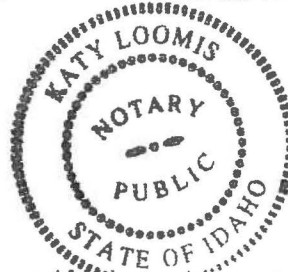
Subscribed and sworn (or affirmed) before me this 1st day of December 2006.

Notary Public [Handwritten Signature]

Residing at Boise, Idaho

My Commission Expires 10/17/2009

Katy Loomis Please Print Name



17. Notice of Appearance:

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

Signature _____

Address _____

Date _____

Last Name _____ Ident. Number _____

ADDENDUM C
to
IDWR RESPONDENTS' BRIEF
Filed on August 1, 2017

BDC, et al. v. IDWR;
Supreme Court Docket No. 44677-2016

II. ANALYSIS

The Ditch Companies ask the Court to certify the *Memorandum Decision* as a final and appealable judgment under Rule 54(b). The Court in an exercise of its discretion declines to do so. In denying the *Motion*, the Court first finds that the Court did not direct entry of a final judgment as to any of the claims involved in the above-captioned subcases. That is, the Court did not enter a *Partial Decree* either allowing or disallowing any of the water right claims involved. Therefore, the *Memorandum Decision* is an interlocutory order. The Court next finds that the movants did not timely seek appeal of the *Memorandum Decision* by permission under Idaho Appellate Rule 12. Moving for a Rule 54(b) certification is not a substitute for timely seeking appeal by permission of an interlocutory order under Idaho Appellate Rule 12.

Finally, the Court is unable to make a determination under Rule 54(b) that there is no just reason for delay. The State of Idaho raised numerous issues in the summary judgment proceedings before the Special Master. The Special Master failed to reach any of these issues due to the limited scope of his ruling. As a result, the only issue the Court would be certifying as final for purposes of appeal pertains to the proper jurisdiction for resolving disputes implicating the scope of decreed water rights. The substantive issue regarding the scope of the decreed reservoir rights is at issue in the administrative cases currently on appeal. Depending on the outcome of the appeal the reservoir right holders can determine whether or not to further pursue the late claims. Therefore, while it may promote judicial economy to motion the Special Master to stay the late claim proceedings pending the outcome of the administrative appeal, it would not promote judicial economy to create a situation potentially requiring further appeals once the issues raised by the State have been ruled on.

Therefore, the Court will deny the *Motion* and recommit the subcases to the Special Master for further proceedings.

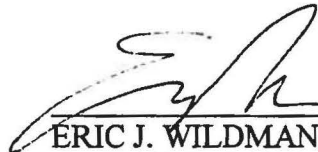
III.
ORDER

THEREFORE, BASED ON THE FOREGOING THE FOLLOWING ARE HEREBY ORDERED:

1. The *Motion for Rule 54(b) Certification* is **denied**.
2. The subcases are recommitted to the Special Master for further proceedings consistent with the Court's *Memorandum Decision*.

IT IS SO ORDERED.

DATED: January 6, 2017



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION FOR I.R.C.P. 54(B) CERTIFICATE was mailed on January 06, 2017, with sufficient first-class postage to the following:

ALBERT P BARKER
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

ANDREW J WALDERA
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

CHIEF NATURAL RESOURCES DIV
OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720-0010
Phone: 208-334-2400

CHRISTOPHER H MEYER
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

DANIEL V STEENSON
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
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Phone: 208-629-7447

SHELLEY M DAVIS
1010 W JEFFERSON ST STE 102
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BOISE, ID 83701-2139
Phone: 208-336-0700

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098



ADDENDUM D

to

IDWR RESPONDENTS' BRIEF

Filed on August 1, 2017

BDC, et al. v. IDWR;

Supreme Court Docket No. 44677-2016

STATEMENT OF PURPOSE

RS23319

Recognizing a need to provide one place for citizens to find laws relating to government transparency, this bill moves existing public record, open meeting, ethics in government, and prohibition against contracts with officers statutes into a new title called Transparent and Ethical Government.

FISCAL NOTE

There is no fiscal impact.

Contact:

Cally Younger
Office of the Governor
(208) 334-2100

Statement of Purpose / Fiscal Note

H0090