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SEP 08 2017

SUPREME COURT
COURT OF APPEALS

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
BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

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

Petitioners/Appellants/Cross-Respondents,

and

BOISE PROJECT BOARD OF CONTROL and NEW YORK IRRIGATION DISTRICT,

Petitioners,

vs.

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

Respondents,

and

SUEZ WATER IDAHO, INC.,

Intervenor/Respondent/Cross-Appellant.

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, County of Ada
Honorable Eric J. Wildman, Judicial Judge, Presiding

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

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COME NOW Petitioners/Appellants/Cross-Respondents, the Ditch Companies,¹ by and through undersigned counsel of record and hereby submit this *Appellants' Reply Brief* in the above-captioned case.²

I. STATEMENT OF CASE

The central issue in this case is whether flood control releases “fill” and “satisfy” Boise River Reservoir storage rights. A flood control release is water that cannot be stored because it must be released from the Boise River Reservoirs in anticipation of peak runoff, before it can be beneficially used by the spaceholders, in order to maintain vacant reservoir space to manage runoff that would otherwise flood the Treasure Valley. In years like 2017, massive volumes of runoff are released from the Reservoirs for flood control, and these releases can occur for an extended period of time.

The issue is fundamentally a question of how and when storage under the Boise River storage water rights occurs in a reservoir system which must be operated for flood control and beneficial use storage. The resolution of this issue is confirmed by common sense and the extensive record presented by the Ditch Companies and the Boise Project Board of Control explaining how the Boise River Reservoirs are operated for flood control and beneficial use storage and how reservoir storage rights have actually been administered by Boise River

¹ The “Ditch Companies” include: 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.

² This *Appellants' Reply Brief* is also the Ditch Companies’ Cross-Respondents’ Brief in response to Suez Water Idaho, Inc.’s (“Suez”) Cross-Appellant’s Brief pursuant to I.A.R. 35(c).

Watermasters, the true Boise River water distribution “experts on the spot.” Boise River storage rights cannot be “filled” or “satisfied” by flood control releases that cannot be stored or beneficially used by storage right holders. Water is stored for beneficial use under the storage water rights when it is safe to do so, as and when vacant reservoir space is no longer needed as a buffer against high runoff and flooding.

This question was answered over 60 years ago as Anderson Ranch and Lucky Peak Reservoirs were authorized and constructed to be operated as a coordinated system with Arrowrock Reservoir through the congressionally-approved reservoir operating plan that IDWR and the Director’s predecessors helped develop and implement, and approved to govern and balance the use of the Reservoirs for flood control and beneficial use storage. Since that time, operation of the Reservoirs under the reservoir operating plan has protected the Treasure Valley from flooding and provided a sustainable supply of water for historic uses and future development.

The secondary question in this case is whether IDWR’s water right accounting system is consistent with the actual storage of water in the Boise River Reservoirs pursuant to the storage water rights and the reservoir operating plan. IDWR and Suez argue that the accounting system is premised on the idea that storage right holders are required under the “maximum use” doctrine to store water as early and as quickly as possible during the winter and spring to make more water available for juniors and new appropriations later on, regardless of the flooding consequences of having no reservoir space to manage peak runoff. Clearly, this position does not follow from the decreed storage rights themselves, which contain no such requirement, and is in direct conflict with the manner in which water is actually stored in the Reservoirs under the reservoir operating plan.

Given IDWR's lack of an administrative record and experience to explain how or why the accounting accrues water to the storage water rights, the Ditch Companies attempted to explain to the Director that the accounting program was not intended or used to treat the reservoir storage rights as "satisfied" with flood control release water that cannot be stored. To this end, the Ditch Companies presented the written testimony of IDWR Water Resource Engineer Bob Sutter and Watermaster Lee Sisco, the two individuals with the greatest knowledge and experience in the development and use of the Boise River accounting program. Ex. 2008; Ex. 2181; *See DC's Respondents' Brief* (filed in companion case, Idaho Supreme Court Docket No. 44746-2016) at pp. 11-20. They both explained that the accounting procedure "accrue[s] to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecast and rule curve procedures of the Water Control Manual." Ex. 2181, 003638-39, ¶ 21.

Despite the evidence presented, and without regard for common sense, the Director and Suez ask this Court to hold that (1) flood control releases "fill" and "satisfy" the Boise River Reservoir storage water rights; and (2) the actual filling of the Reservoirs that occurs as the need for vacant reservoir space to prevent flooding subsides is unsecured by a water right and is subject to the Director's discretionary permission and the water delivery demands of junior water rights and new appropriations. In support of these arguments, they assert that reservoir inflows that must be released for flood control are "available" for beneficial use storage, even though the water cannot be stored or beneficially used by the storage right holders. They argue that the policy of maximizing beneficial use obligates storage right holders to store water "as early and as quickly as possible" during the winter and spring in order to make more water available to junior users and new appropriators later on, even though the decreed storage rights say nothing of the

sort, and storing water this way during flood years such as 2017 would allow peak runoff to overrun the Reservoirs, flood the Treasure Valley and cause catastrophic damage.³ The “maximum use” doctrine does not dictate whether or when a water right holder must exercise a water right, much less compel storage right holders to store water in a manner that imperils property and public safety.

IDWR and Suez brush aside the congressionally-approved reservoir operating plan that they admit governs and balances flood control and beneficial use storage in the Boise River Reservoirs as “irrelevant” to storage water right administration. They attempt to characterize the water stored after “paper fill” as “unappropriated excess” flows that the Director and his predecessors have permissively “allowed” the Bureau of Reclamation to store, even though Idaho law clearly prohibits the storage and use of water without a water right. I.C. §§ 42-201(2), 42-351(1). They would eviscerate the “refill assurances” of the reservoir operating plan by making the storage of this water contingent upon the Director’s discretionary permission and the water delivery demands of junior water rights and new appropriations. They justify the restraints they seek to impose on Boise River Reservoir storage rights to redistribute water to junior rights and new appropriations by conjuring the false specter of the federal government taking over control of Idaho’s water resources.

IDWR and Suez say that the Director implemented this “store it or lose it” administrative scheme for senior storage rights 30 years ago through the obscure and incongruous “accrual,” “paper fill,” and “unaccounted for storage” counting methods and terminology of IDWR’s

³ Indeed, this year the Director himself argued publicly that the BOR and the Corps should *increase* their flood control releases to create more vacant reservoir space to manage the historic runoff. See Idaho Public Television, Idaho in Session, Governor Live, *Governor Press Conference* (April 19, 2017) available at: <http://idahoptv.org/insession/gov.cfm>.

computerized water right accounting program, despite the undisputed fact that its use resulted in no change in reservoir operations or water right administration. They disregard and reject the undisputed testimony of Boise River Watermaster Lee Sisco, the person who is most knowledgeable about the administration of water rights during his 22-year tenure as Watermaster. Mr. Sisco explained:

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

Ex. 2008, 000488-489, ¶ 32.

Thirty years after Mr. Sisco requested that Bob Sutter provide him with a computerized program to replace the handwritten calculations of his predecessors, the Director initiated a contested case as a post hoc procedure to validate his preconceived agenda to reallocate and redistribute water from senior storage right holders to juniors and new appropriators under the guise of water right accounting. During that proceeding, the Director participated as both hearing officer and advocate for the position he and the State of Idaho announced and defended in the Basin-Wide 17 litigation and publicly prior to hearing. He disregarded testimony and evidence that contradicted that position, conferred ex parte with IDWR's counsel and primary

witness throughout the hearing, to, among other things, present rebuttal testimony in an attempt to discredit the credibility of the highly respected, long-time Boise River Watermaster, because his testimony did not support the Director's position.

It is clear from the arguments presented by the Director and Suez that the issue in this case arises from the Director's attempt to redistribute water from senior storage right holders to junior users and new appropriations through IDWR's accounting program. Their convoluted justification for it belies common sense, undermines senior storage rights and the historic operation of Boise River Reservoirs for flood control and beneficial use pursuant to the congressionally-approved reservoir operating plan IDWR helped author to prevent flooding and provide a sustainable water supply for the Treasure Valley.

The Director's position injects conflict where there has been compromise and balance since the 1950s in the operation of the Boise River Reservoirs for flood control and beneficial use storage. The Director's assertion that storage rights require storage early and quickly conflicts directly with a water users' right to decide whether and when to exercise a water right and the need to keep reservoir space open as a buffer against high spring runoff and flooding.⁴ The Director's corollary assertion that the actual filling of the Reservoirs as the risk of flooding subsides occurs without a water right and is subject to the delivery demands of juniors and new appropriations eviscerates the essential "refill assurances" that make possible joint use of the reservoirs for flood control and beneficial use storage under the reservoir operating plan. The

⁴ See *McGinnis v. Stanfield*, 6 Idaho 372, 374-75, 55 P. 1020, 1021 (1898), *United States v. American Ditch Ass'n*, 2 F. Supp. 867, 869 (D. Idaho 1933), and *Knutson v. Huggins*, 62 Idaho 662, 668-69, 115 P.2d 421, 424 (1941) (each noting diversion discretion under Idaho law; the right to divert up to a water right's limits, but not the requirement or obligation to do so); See also *Burgess v. Salmon River Canal Co.*, 119 Idaho 299, 305-06, 805 P.2d 1223, 1229-30 (1991) (imposing the duty of due care on dam operators to control watercourse flows to prevent damage to others).

Director thus undermines both flood control and beneficial use storage under the plan that has protected the Treasure Valley from catastrophic flooding and provided a sustainable water supply for the Treasure Valley for over 60 years.

Moreover, the Court should be wary of the far-reaching implications of the Director's position that he has the discretion to administer the distribution and use senior storage rights to increase the availability of water for junior rights and new appropriations. During times of water shortage, the exercise of any senior right necessarily affects the timing and volume of water available for junior rights and new appropriations.⁵ Distributing water in accordance with the priority of water rights is the essence of the constitutional "first in time is first in right" principle, whether the rights are for storage or natural flow, held by the federal government, the State of Idaho, an irrigation organization, or an individual. Confirming the elements of Idaho water rights to facilitate the distribution of water in accordance with the prior appropriation doctrine was the fundamental purpose of the Snake River Basin Adjudication. If this Court determines that the Director has the discretion to read into partial decrees terms and conditions that do not exist; to impose post-adjudication conditions and restraints on the exercise of senior storage rights in order to redistribute water to junior rights and new appropriations, there is no reason to suppose that this Director and his successors, Suez and other junior right holders, will not assert such authority to condition the exercise of other storage and natural flow water rights for the benefit of juniors, whether the senior rights are held by a governmental entity, a private organization or an individual.

⁵ *Knutson, supra*, quoting *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909); *See also, Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 9-10, 154 P 2d 507, 510 (1944) (junior appropriators take a stream as they find it and that which seniors allow go undiverted may be used by juniors for such time period as the senior does not need it or cannot use it).

II. ADDITIONAL ISSUES/ATTORNEY FEES ON APPEAL

The Ditch Companies request an award of attorney fees and costs pursuant to Idaho Code Sections 12-117 and 12-121 and Idaho Rule of Civil Procedure 54(d)(1).⁶

III. ARGUMENT

As explained in detail in the *DC's Respondents' Brief* (filed in companion case, Idaho Supreme Court Docket No. 44746-2016), pp. 21-27, the issue presented boils down to three possible options/outcomes:

Option #1: Water that cannot be stored, and must be released for flood control does not fill or satisfy the Boise River Reservoir storage rights. Water is stored for beneficial use as and when it is safe to do so in accordance with the reservoir operating plan. Water stored in the Reservoirs at the end of flood control operations is stored and beneficially used under the existing, decreed storage rights.

Option #2: Flood control releases “fill” and “satisfy” the existing storage rights, but there is an additional constitutional method water right to store and beneficially use the water stored following flood control. When the Reservoirs reach maximum fill at the end of flood control operations, a portion of the water is stored under the existing, decreed water rights, and the remainder is stored under additional water rights that have been established by beneficial use.

Option #3: Flood control releases “fill” and “satisfy” the existing storage rights, and there is no water right to store and beneficially use the water after “paper fill.” Instead, the storage and use may be “allowed” at the Director’s discretion, subject to the water delivery demands of junior water rights and new appropriations.

The Ditch Companies submit that the only option which makes factual, legal and practical sense is **Option #1**. This is also the only option that does not require the Court to decide the twisted and contorted arguments of IDWR and Suez, including, whether additional

⁶ This *Reply Brief* is also the Ditch Companies’ Cross-Respondents’ Brief to Suez’s Cross-Appeal, and thus the Ditch Companies have included the additional issue on appeal requesting the Ditch Companies’ attorney fees and costs on cross-appeal.

water rights are quantifiable and whether the State can allow the storage and beneficial use of water without a water right. The Ditch Companies further submit that under no circumstances can this Court leave water users of the Treasure Valley without protectable storage water rights; subject, instead, to the discretionary whim of the Director and subject to appropriation by future juniors, including out-of-state interests. Thus, if the Court decides that the flood control releases do “fill” or satisfy the existing storage rights then the Court must affirm Judge Wildman’s decision under **Option #2** and hold that the Ditch Companies are entitled to additional storage rights to complete their historic storage and beneficial use.

The following are the undisputed, essential truths regarding flood control, beneficial use storage, the storage rights and the computerized water right accounting system:

- During flood control operations, water is stored in the Boise River Reservoirs in accordance with the congressionally-approved reservoir operating plan that IDWR approved and helped develop and implement;
- The core concept of the “spill and fill” reservoir operating plan has always been: *“To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of storage capacity indicated by the run-off forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.”* Ex. 2027, 000884 (emphasis added);
- Water cannot be stored in reservoir space that must remain vacant during flood control operations to prevent flooding by managing peak spring runoff;
- Consequently, water released for flood control to maintain vacant space is not available for beneficial use storage;
- Water is stored in the Boise River Reservoirs for beneficial use when it is safe to do so, as the need for vacant reservoir space to prevent flooding subsides;
- Operation of the Reservoirs under the reservoir operating plan benefits the entire Treasure Valley by preventing flooding and providing a sustainable supply of stored water to supplement river flows;
- No one wants the Reservoirs to cease being operated for flood control, or under “fill and spill” regime, because the Reservoirs would be physically filled before peak runoff;
- Water has been and will continue to be stored for beneficial use in accordance with the congressionally-approved operating plan which IDWR helped develop;

- Flood control is not a beneficial use of water;
- Flood control use of the Boise River Reservoirs does not require a water right or constitute use of the existing, decreed storage rights;
- The purpose of a storage water right is to retain and hold water until it is needed for beneficial use (*Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945));
- The storage right decrees are silent on whether water released for flood control “satisfies” or “fills” the storage rights (*i.e.*, the decrees are silent as to the legal effect of flood control releases);
- The storage right decrees “allow” the right holders to store available water up to the limits of the rights, but there is nothing in the decrees requiring that all river flows be stored as early and as quickly as possible or otherwise prescribes whether, when or at what rate the decreed volumes of water must be stored during the decreed periods of use;
- Each storage contract represents a proportionate beneficial ownership of the storage water rights held by the Bureau of Reclamation;
- As long as the Reservoirs have been operated for flood control and beneficial use storage (*i.e.*, pre-1971), the Treasure Valley water users have beneficially used the water physically stored and allocated to their storage rights when the Reservoirs reach maximum physical fill at the end of flood control operations;
- Boise River Watermasters have administered the storage water rights with the understanding beneficial use storage cannot occur without a water right, and all water physically stored in the reservoirs for beneficial use is stored pursuant to the storage water rights;
- Water released for flood control is available for junior appropriations and juniors have appropriated water rights in the water released for flood control;
- Reservoir inflows that are required to fill storage rights during flood control operations have never been released to deliver water to fulfill water rights that are junior to the Reservoir storage rights;
- Boise River flows have long been fully appropriated, with the exception of peak runoff that is released from the reservoirs during flood control operations;
- The accounting program is a “tool” that does not define water rights or administer water rights but rather assists the Boise River Watermaster with the administration of water rights;
- Both Sutter and Sisco explained that the computerized accounting program did not alter the accrual of water to storage pursuant to the reservoir operating plan and Water Control Manual;
- Prior to the Basin Wide 17 proceedings in 2012, no IDWR employee had suggested to the Boise River Watermaster or Boise River water users that the storage rights were satisfied as the point of “paper fill”, that the storage rights were no longer in priority after the point

of paper fill, or that juniors were entitled to call for the release of water from the Reservoirs prior to maximum physical fill.

While the above points are not disputed by IDWR and Suez, they continue to argue this Court should dismiss these points and instead hold that the water which fills the Reservoirs following flood control is not protected by a water right and is instead subject to the discretion of the Director.

A. The Irrigators of the Treasure Valley Must Have a Protectable Water Right to Store Water in the Boise River Reservoirs and the Storage Rights are not “Filled” or “Satisfied” at the point of “Paper Fill”

The position of the Ditch Companies, that flood control releases do not “fill” or “satisfy” the existing storage rights, is supported by the historical record, actual administration and Idaho law. *See DC’s App. Brief*, pp. 9-35; 44-69; *DC’s Respondents’ Brief*, pp. 49-53. IDWR and Suez on the other hand, acknowledge that the existing storage rights “allow” or “entitle” the diversion of all available flows, but then make the unsupported leap that there is an “obligation” and “requirement” to divert all flows in order to make water available to juniors. There is no dispute that an obligation to store water is not in the decrees and thus IDWR and Suez are attempting to add conditions to the decrees under the guise of maximum use to make water available to juniors. That the storage rights *authorize* diversion and storage up to their limits while in priority is consistent with Idaho law. That the storage rights *require* diversion and storage up to their limits at all times while in priority is not. *Compare McGinnis v. Stanfield*, 6 Idaho 372, 374-75, 55 P. 1020, 1021 (1898); *United States vs. American Ditch Ass’n*, 2 F. Supp. 867, 869 (D. Idaho 1933); and *Knutson v. Huggins*, 62 Idaho 662, 668-69, 115 P.2d 421, 424 (1941).

In *U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007), this Court affirmed the Ditch Companies' beneficial ownership of the storage rights at issue in this case. The Director's *Final Order* undermines these rights by concluding (1) that they are "filled" and "satisfied" (on paper) by water that must be released and cannot be stored for flood control, (2) the actual, physical storage of water after "paper fill" does not occur under the priorities of the water rights, and (3) substituting water right storage with his administrative permission to store water that can be revoked at the Director's discretion and is subordinate to water delivery demands of junior water rights and new appropriations. Idaho law clearly provides that water cannot be diverted, stored or used without a water right. I.C. §§ 42-201(2), 42-351(1). Without a water right, there is no protectable basis for storage to occur at all, and the Director has made it clear that permissive storage of so-called "excess" flow is subordinate to the claims of junior water rights and to new appropriations.

The Director speculates that future appropriations "would likely be of such small quantities as to have few or no effects on the" storage rights the Ditch Companies rely upon to irrigate crops, lawns, gardens, parks and golf courses in the Treasure Valley. *See IDWR Response*, p. 62. If IDWR really believes that future appropriations will be minimal and inconsequential, then one questions why the State, IDWR and the Director have continued to aggressively litigate to redistribute water from senior storage rights to juniors and new appropriations. The Court need look no further than the recent application filed by former Director, David Tuthill, for 100,000 acre feet of storage water below Anderson Ranch Reservoir to see that the risk of future appropriations and the likely litigation they will spawn are substantial. *See Boise Project's Respondent's Brief*, Addendum A.

1. Sutter, Sisco and the Actual Administration of the Storage Rights are Consistent with Each Other

IDWR contends that the testimony of Sisco and Sutter are inconsistent with each other and then suggests that they “had very different understandings of the accounting system.” *IDWR Response*, p. 36, fn. 39. This characterization is simply not true. The Ditch Companies have gone to great lengths to explain the testimony of Sisco and Sutter, the two individuals who were directly involved in the creation and implementation of the accounting program and both are clear as to their understandings. *See DC’s App. Brief*, pp. 33-42; *DC’s Respondents’ Brief*, pp. 13-20. Both Sisco and Sutter confirmed that:

Water physically stored in the reservoirs at the point of maximum storage has always been credited to the storage rights and fully, 100% allocated to the spaceholders’ storage accounts for beneficial use. The water right accounting reports do not show that the storage water rights go out of priority or are “satisfied” at the point of “paper fill.” Instead, the water right accounting reports show that the reservoir storage rights remain full and in priority until the day of allocation, after the reservoirs reach maximum fill.

Id.; Ex. 2008, 000489, ¶ 32; Tr. 8/28/15 440:5-13. There is nothing inconsistent about the testimony and description of the storage and administration of the Boise River Reservoir water rights by Sisco and Sutter.

2. Special Master Booth’s Decisions are Not Meaningless and Provide an Unbiased Analysis of the Issues Raised in these Appeals

IDWR suggests that the Ditch Companies’ reliance on Special Master Booth’s decisions is misplaced because his decisions were not adopted by the district court and the record before Special Master Booth was limited. *IDWR Response*, pp. 58-59. First, the district court did not reject the specific conclusions or analysis of Special Master Booth concerning the “effect of flood control” question but rather remanded the Late Claims back to Special Master Booth based upon a conclusion that Special Master Booth exceeded the authority granted to him. *See App. 3, DC’s App. Brief*. Second, the record and affidavits before Special Master Booth contain the

same operational history, reservoir operating plan and history of administration, including, but not limited, to the Affidavits of Sisco and Sutter, which are not in dispute in these appeals. In any event, the decisions and analysis of Special Master Booth considered the very arguments which are now being asserted by IDWR and Suez in these appeals, and unlike the Director, the analysis is from a disinterested tribunal, which was not based upon bias, a pre-determined position or a procedurally flawed process. The Ditch Companies contend that Special Master Booth's analysis of these issues is sound and implore this Court to carefully review those decisions. *See App. 1 and 2, DC's App. Brief.* This Court is then free to determine persuasiveness of the analysis contained in the decisions just as it is able to do so with any legal determinations rendered by the Director or the district court.

3. Numerous Inconsistencies and Contradictions Demonstrate the Fallacy of IDWR and Suez's Positions

Because the legal interpretations and theories of IDWR and Suez are not consistent with the existing storage rights, Idaho law, the operations of the Reservoirs for flood control and beneficial use storage and the actual administration of the storage water rights by Boise River Watermasters, both continue to make circular and inconsistent arguments in support of their respective positions. These inconsistent positions include:

1. The most glaring inconsistency is IDWR and Suez's recognition and acknowledgment that water has been stored and beneficially used after flood control for decades prior to 1971, but they both continue to contend that there is no water right for such storage and beneficial use under either the existing rights or under a beneficial use/constitutional method water right. All of the requirements for a protectable water right in the water stored and beneficially used are met. There is no legal impediment to the perfection of such a right, Idaho law requires a water right, and yet both IDWR and Suez contend that the storage and beneficial

use should continue at the discretion of the Director absent a legally protectable property right. Despite the facts that Idaho law requires a water right to divert water in this State, and all of the necessary requisites exist for the water to be stored and beneficially used under the existing water rights, or at a minimum under additional beneficial use water rights, IDWR and Suez vehemently assert that the water stored and used are “excess flows” without a protectable priority.

2. IDWR contends that the accounting program is not based upon a “store it or lose it” principle. *IDWR Response*, p. 46. Suez, on the other hand, contradicts IDWR and contends that the accounting program and the Director’s use of “paper fill” is precisely “store it or lose it” because “if water is there and available to store, the storage right holder is expected to store it.” *Suez’s Response/Opening Brief (“Suez Brief”)*, pp. 28-29. Whether under the nomenclature of “one fill rule,” “store it or lose it,” “paper fill,” or “storable inflow” Suez correctly points out that the Director’s use of the accounting program does in fact employ the store it or lose it principle by treating all “priority water” as “filling” or “satisfying” the storage rights until the volume limits are met, even if the water is not “physically stored” or available for beneficial use. *See DC’s Respondents’ Brief*, pp. 29-30. Additionally, while IDWR tries to distance itself from the “store it or lose it” principle before this Court, it has been abundantly clear that IDWR believes its accounting practices do in fact employ the “store it or lose it principle.”⁷ For IDWR to now contend that the accounting practices do not involve the “store it or lose it principle” is a

⁷ IDWR Deputy Director Matthew Weaver provided a FAQ document prior to these proceedings which made it clear that IDWR’s accounting program follows the “store it or lose it” principle. *See* Comm. Docs. 000067-70, 000088-90, and 000109-111. Said FAQ document is attached hereto as **Appendix 1**. *See* Comm. Docs. 000069, paragraph 9. It should also be noted that the FAQ documents explained IDWR’s position before the hearing was held before the Director, and before evidence was presented, specifically Sutter and Sico, to explain IDWR’s “scattered and incomplete” records.

mischaracterization of its prior positions and, more importantly, a misstatement of how the Director is in fact answering the “core question” presented in these appeals.

3. Suez contends that the water stored and beneficially used at the conclusion of flood control operations is not with a protectable water right, including a protectable priority; that it is instead “excess flows” available only under the “maximum use” doctrine and the corresponding discretion of the Director. But now, Suez suggests a simple (albeit contradictory) solution: that the Ditch Companies file an application for permit or the Ditch Companies should agree to a settlement similar to that agreed to by IDWR, the State and the water users in Basin 01. *IDWR Response*, p. 65. Similarly, IDWR continues to assert that water stored and beneficially used after flood control should be recognized as an ancillary right because a water right to store the water is unquantifiable or would turn over the river to federal control.

First, Suez’s latest contention that the Ditch Companies can simply file a new application for permit suggests that the water which is stored and beneficially used following flood control is in fact appropriable water and there is no legal impediment to establishing a water right for said water. In other words, if a water right can be established by filing a new application for permit then there is also no impediment to establishing a water right to the water stored and beneficially used following flood control if such use exists prior to 1971, which Judge Wildman and all the parties agree has indeed occurred. Second, while Suez contends that the Ditch Companies should agree to a settlement similar to that in Basin 01 because the settlement included subordination conditions which suit Suez, Suez’s suggestion of a water right similar to that agreed to in Basin 01, and IDWR and the State’s agreement to the water rights in Basin 01, directly contradict their collective arguments that: (a) priority-based rights cannot be established in “excess flows”; (b) that post-flood control release water rights are hopelessly (and fatally)

unquantifiable; or (c) that such water rights will result in the federal government taking over control of the river. IDWR and Suez cannot have it both ways.

4. Suez and IDWR continue to contend that the right to store and beneficially use the water stored in the Reservoirs following flood control is simply excess flows or an ancillary use allowed at the discretion of the Director. As previously pointed out these contentions are contradicted by the actual administration of the storage rights by Watermaster Sisco, including his testimony that no juniors were entitled to call for the water, and that he conditioned junior applications for permit to only divert water while water is being released for flood control. *See DC's App. Brief*, pp. 59-61. This is even further evidenced by the fact that Suez's junior water right, water right no. 63-31409, contains such a condition. Suez tries to explain this away by asserting it was part of a settlement condition it agreed to but it does not explain that Suez's acceptance of the condition, and IDWR's recognition of the condition in a water right that it ultimately licensed and approved, is inconsistent with their latest positions in these appeals.

B. Suez's Cross-Appeal

Suez's argument in support of its cross-appeal can generally found in Section V of *Suez Brief*, wherein it joins in IDWR's argument that the District Court erred in concluding that there must be a beneficial use (*i.e.*, constitutional method) water right for the water physically stored and beneficially used following flood control operations. *Suez Brief*, pp. 54-69. Suez's argument on cross-appeal, however, is nothing more than a re-statement of IDWR's appeal under the Suez moniker of "free river." Accordingly, the Ditch Companies incorporate herein by reference the *DC's Respondents' Brief* which addressed the same arguments by IDWR that there can be no water right for the water stored and beneficially used in the Reservoirs following flood control, and that instead the Director should have the discretion whether to allow the Treasure Valley water users to beneficially use water stored after flood control under a theory of excess

flows. *See DC's Respondents' Brief*, pp. 53-67. The Ditch Companies reiterate that there is no legal impediment to the perfection of beneficial use water rights for the storage and beneficial use of water stored in the Reservoirs following flood control releases. No one disagrees that such beneficial use has occurred since the existence of the Reservoirs pre-1971. Even now Suez makes the contradictory suggestion that all the storage right holders "need to do is file a permit application for a second fill." *Suez Brief*, p. 65. This statement alone, which acknowledges the right to perfect a water right in the water stored and beneficially used following flood control, estops Suez from contending that there is any legal or other impediment to perfecting a beneficial use right for water stored and beneficially used prior to 1971.

C. The Contested Case was Procedurally Flawed

IDWR contends that the Ditch Companies simply disagree with the outcome of the Contested Case and have not identified any prejudice resulting from the procedural flaws. *IDWR Respondent's Brief*, p. 77. Similarly, Suez contends that the procedural arguments of the Ditch Companies and the Boise Project "boils down to complaining that they were given too much process." Then Suez has the audacity to suggest to this Court that the Contested Case and the Director's decision "is a model of unemotional, and even-handed decision-making in which each of the parties' arguments received careful attention and explanation." *Suez Brief*, pp. 72 and 81-82. In other words, both would have this Court condone the procedural process and irregularities employed by the Director in this Contested Case and in future administrative proceedings before the Director and/or IDWR. The Ditch Companies submit that the procedural process employed by the Director was anything but fair and impartial and if this is now the "model" of administrative proceedings in this State going forward then water users and other parties involved in administrative proceedings should be prepared for little, if any, due process or procedural consistency.

The procedural flaws with the Contested Case proceeding, from its *sua sponte* initiation by the Director to the result-oriented bias and the due process violations, are addressed at length in the *DC's App. Brief* at pages 69-86, as well as the *BPBC Brief* at pages 38-58. IDWR and Suez attempt to minimize these flaws but the procedural flaws employed by the Director remain:

1. The Director Initiated the Contested Case, forcing the parties into litigation. The Director *sua sponte* initiated this Contested Case while the Late Claims were pending the SRBA and despite the fact that no water users, parties to the Contested Case, or the judiciary requested that a Contested Case be initiated. The Director's order initiating the Contested Case states that the Contested Case was initiated in response to concerns from water users holding storage rights in the Boise River Reservoirs and the Bureau of Reclamation (AR. 000002), but every water user holding storage rights opposed the initiation of the Contested Case, sought dismissal or stay of the Contested Case for various reasons, and the Bureau is not even a party to the Contested Case. The Director made no showing of any urgency to proceed with the Contested Case other than serving as a means to justifying his (and IDWR's) pre-determined positions, staked early on in the Basin-Wide Issue 17 proceedings.

2. The Director Determined the Outcome before the Contested Case. Administrative due process "entitles a person to an impartial and disinterested tribunal." *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004). Furthermore, the mere appearance of (as opposed to actual) impropriety is "constitutionally unacceptable" and the procedural due process rights are, in and of themselves, sufficiently "substantial rights" afforded protections. *Id. See also, Eddins v. City of Lewiston*, 150 Idaho 30, 244 P.3d 174 (2010). Actual (as opposed to mere appearance of) impropriety by the Director is clearly demonstrated by the record. IDWR has not

disputed the Director's involvement in settlement discussions or that he made statements regarding his position with regard to the "Refill" issue prior to the hearing but rather dismisses them because they "were already well known to the Ditch Companies and the other parties." *IDWR Response*, pp. 84-85. This is precisely why the Ditch Companies and Boise Project requested to have the Director disqualify himself. The Boise River storage rights which are now being eroded (if not taken) by the Director are "substantial rights" which are clearly being prejudiced by his abuses. The Director had ample opportunities to disqualify himself, appoint an independent hearing officer, stay the Contested Case proceedings, and prevent himself from being put in the untenable position of adversary supporting/defending the accounting program and he intentionally chose not to do so.

3. The Director avoided the Rulemaking Requirements. In *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003), this Court established six criteria for determining whether an agency action constitutes a "rule" and if it meet the criteria then it "constitutes a rule requiring rulemaking to be valid." *Id.* at 723, 69 P.3d at 143. Despite Suez's attempts to provide the Director with the discretionary choice whether to follow formal rulemaking, there is nothing in IDAPA permitting an agency to self-initiate a contested case in which the Director appoints himself as the hearing officer in lieu of formal rulemaking. Either the agency action constitutes a "rule" requiring rulemaking to be valid or it does not. With regard to the Contested Case, the "one-fill rule" and corresponding "store it or lose it" principle espoused and defended has wide-spread application across the Boise Basin (and beyond). The rule is applied generally and uniformly to all water users on the Boise River, it is applicable to future administration of the Boise River storage rights, it attempts to prescribe new policy to document the "scattered and incomplete" records concerning the internal adoption of the accounting system, and it attempts to

prescribe legal standards and law regarding whether water that is released for flood control is “legally available.” The six criteria set forth in *Asarco* have been met.

4. The Director Conferred with Witnesses During the Hearing. Notably absent from the responses of IDWR and Suez is any mention of the fact the Director conferred with Ms. Cresto (IDWR’s own expert witness) during the hearing, and directly assisted Ms. Cresto in her preparation of rebuttal testimony and a rebuttal exhibit. *Compare* Tr. 9/10/15 1561:22-1562:17 (wherein Cresto directly denied “conferring” with the Director during the course of the hearing); 1585:8-1586:15 (wherein Cresto reversed course and admitted to the Director’s direct participation not only in her testimony, but in the analysis leading to the creation of her rebuttal exhibit and her testimony regarding the same); and 1588:21-1589:10 (wherein Cresto again confirmed the Director’s “multiple” ex parte communications concerning her testimony in conjunction with IDWR counsel Garrick Baxter throughout the proceedings, not just during “rebuttal.”). IDWR and Suez fail to address this issue because it is impossible to defend. It was troublesome enough that IDWR was playing an adversarial role in this proceeding. But, the hearing officer doing the same is unconscionable.

5. The Director Rejected Testimony which Did Not Support his Position. Despite Sisco’s exemplary reputation and the testimony that he was the most knowledgeable person regarding the actual administration of the Boise River storage rights during his 22 year tenure, Sisco’s testimony directly contradicted the pre-determined position of the Director, IDWR and the State, and thus the Director went to great lengths to impeach, and since impeachment was not feasible, to simply reject the testimony of Sisco. There is no dispute that a hearing officer may weigh the evidence presented, but it was improper for the Director to take it upon himself to seek out evidence and testimony mid-hearing to impeach testimony which he disagrees with (*see, e.g.,*

Tr. 8/31/15 904:4-18; 942:17-945:25). And, then not being able to find any impeachment evidence, to directly assist IDWR's own expert witness in attempt to rebut Sisco's testimony (*see, e.g.*, Tr. 9/10/15 1585:8-1586:15). And finally, when Sisco's testimony could not be impeached or rebutted, to simply reject it altogether (*see, e.g.*, AR. 001257 (*Final Order*, FOF No. 73)). These actions were the result of the Director's bias and pre-determined outcome and violated the due process rights of the Ditch Companies and his obligations as an objective hearing officer.

6. The Director and IDWR Advocated for a Position as a Party. IDWR's role in the Contested Case was dictated by how "party" status best suited the agency at the moment. On the one hand, IDWR took the initial position with regard to discovery that it was not a party in the proceeding. AR. 000875. On the other hand, the Director himself submitted an expert witness, lay witness and exhibit list disclosures. AR. 000641 and 000691. Furthermore, despite representations that IDWR was participating to facilitate the presentation of records, counsel for IDWR presented witnesses through direct and re-direct examination, vigorously cross-examined witnesses, and lodged and actively defended evidentiary objections. *See, e.g.*, Tr. 8/31/15 889:16-908:14; Tr. 9/10/15 1549:1-1561:16; Tr. 9/10/15 1585:8-1588:17; and Tr. 8/31/15 839:9-840:25. Finally, with regard to the introduction and admission of evidence, IDWR offered as exhibits for admission only nine (9) exhibits which were subject to the evidentiary standards and objections of the other parties. The agency then created its own additional record within the universe of "scattered" documents under the guise of "officially noticed" documents which were not specifically identified and in which there was not an adequate opportunity to be heard despite the Ditch Companies repeated objections.

7. The Director Failed to Abide by the Disclosure Requirements. Along these same lines of IDWR's picking and choosing its party status and whether evidentiary standards are applicable to IDWR, the Director impermissibly allowed Cresto's rebuttal testimony and rebuttal exhibit (not surprising given the Director himself and IDWR's legal counsel assisted in its preparation). The Director himself identified Cresto as an expert of IDWR and maintained that her testimony would relate to IDWR Exhibit 1; Cresto too later confirmed that her testimony and opinions were only those expressed in Exhibit 1 and nothing else. *See* AR. 000641 and Tr. 8/27/15 60:18-62:12. Yet, Cresto's rebuttal testimony and exhibit offered opinions which went beyond the scope of her disclosures and according to Cresto herself related to "a very different analysis" examining Water District 63 water delivery records than she had previously disclosed or performed. Tr. 9/10/15 1551:5-19; 1553:13-25; and 1564:7-12. Despite IDWR and Suez's contentions, the subject of Cresto's rebuttal testimony and exhibit (which was intended to challenge the testimony of Sisco) was well known to Cresto and IDWR before the hearing. *See, e.g.,* Ex. 2008 000473, 74-75, 80-81, 82, and 88-89, ¶¶ 8, 11, 12, 19, 20, 22, 31 and 32 (disclosed before the hearing and which clearly described Sisco's administration and that junior water rights would not be entitled to call for the release of water that was required to be stored pursuant to the Water Control Manual to fill the reservoir spaces and reservoir storage rights and that Sisco sought inclusion of remarks/conditions in junior water rights, including Suez's water right no. 63-12055, making it clear that the junior right could only be diverted when water was spilling past Lucky Peak Dam for flood control).⁸ The Ditch Companies made it clear before the hearing

⁸ Suez attempts to explain this condition in its own water right, wherein it agreed that it could not divert water unless it was spilling past Lucky Peak for flood control, as simply a condition of settlement. *Suez Brief*, p. 67. Regardless, it does not change the fact that the imposition of the condition was consistent with Sisco's testimony and administration of all junior appropriators. In any event, it cannot be argued that IDWR and Suez were not aware of Sisco's

that they objected to Cresto straying from those opinions previously disclosed by filing a *Motion in Limine* (AR. 000853 and 000859) and they objected during the hearing (Tr. 9/10/15 1559:13-1560:25). But the Director overruled the objections and allowed the testimony. The no harm no foul justification now being asserted by IDWR and Suez has been rejected by this Court because simply allowing for cross-examination during the hearing is not sufficient if there is not an adequate disclosure. *See, e.g., Easterling v. Kendall*, 159 Idaho 902, 367 P.3d 1214 (2016) (*quoting Clark v. Klein*, 137 Idaho 154, 158, 45 P.3d 810, 814 (2002) (“Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he [or she] must have some idea of the bases of that opinion and the data relied upon.”)).

If the above summary of events is now the standard or “model” for which administrative hearings are now conducted in this State, then the Ditch Companies submit there is no standard or procedure to constrain the Director. If the Director is willing to blatantly disregard the procedural and due process rights of the Ditch Companies in this case, and this Court is willing to confirm such behavior, then it is easy to envision just how far the Director will be willing to abuse the rights of other water users in order to substantiate his pre-determined agendas. The Contested Case was a biased means to an end; an opportunity for the Director to justify this position and seek administrative deference refuge as the matter proceeded to the judiciary. This Court cannot condone the process employed by the Director in this Contested Case or in future administrative proceedings.

administration of the Boise River storage rights, and his treatment of juniors, until he testified to such during the hearing.

D. Attorney Fees on Appeal

1. The Ditch Companies' Request for Fees Should be Granted and the Requests of IDWR and Suez Should be Denied

In response to the Ditch Companies' request for attorney fees and costs, IDWR contends that the Director's *Final Order* is consistent with the prior appropriation doctrine and the existing decrees, that the Ditch Companies were provided "ample opportunity to present evidence and be heard" and that the Ditch Companies "have not demonstrated any prejudice to a substantial right." *IDWR Response*, pp. 99-100. IDWR then makes the same general, unsupported and conclusory arguments in support of their own request for attorney fees. *Id.* Similarly, Suez contends that following the Director's "careful and comprehensive exposition of the law and facts" the Ditch Companies should have recognized the Director's discretion in affirming the accounting system and thus the Ditch Companies' request for fees should be denied and Suez should instead be awarded its fees. *Suez Brief*, pp. 83-84.

First, the Ditch Companies disagree that the Director's *Final Order* was consistent with the decrees, the actual administration of the Boise River storage rights or that it was a careful examination of the law and facts. The Contested Case was a self-initiated proceeding, forcing the parties into a contested case to avoid the "Refill" issue from first being decided in the preexisting SRBA Late Claims proceeding, and in which the Director continuously manipulated the playing field in order to substantiate and justify his pre-determined positions. In order to substantiate his position, the Director ignored or disregarded the actual administration of the Boise River storage rights pursuant to the congressionally approved agreements which IDWR and the State actively participated in. The Director's *Final Order* was not a careful examination of the law and facts, nor is it consistent with the actual administration of the storage rights.

Second, while the Director used the guise of a contested case “hearing” to allow parties to present evidence, it was anything but a fair, reasonable or meaningful opportunity to be heard. The record is replete with procedural abuses and failures of the Director. Using this procedurally flawed process as a means to a pre-determined end, the Director’s *Final Order* attempts to undermine the existing storage rights by leaving the Ditch Companies with no protectable water right to fill the Reservoirs following flood control. It is axiomatic that such unfair process absolutely prejudices and impairs the substantial rights of the Ditch Companies, specifically including the storage rights they rely upon to irrigate the crops, lawns, parks and golf courses in the Treasure Valley.

Accordingly, the Ditch Companies submit that there is no merit to the requests for fees by IDWR and Suez. The Ditch Companies were forced into this Contested Case, and the positions that they have taken below and now on appeal have been reasonable and supported by the law and facts. Indeed, the Ditch Companies submit that their position is supported by the actual administration of the Boise River Reservoirs during and following flood control, the congressionally-approved agreements and Water Control Manual which continues to control the actual operations of the Boise River Reservoirs, and the testimony of Sisco and Sutter, the two individuals with direct knowledge and experience concerning the development, creation and intended effect of the accounting program. Given these undisputed facts, the Director and IDWR’s disregard of said facts, as well as the numerous procedural abuses of the Director, this Court should award attorney fees to the Ditch Companies.

2. The Ditch Companies Should be Awarded Fees on Cross-Appeal

The Ditch Companies request attorney fees and costs against Suez in responding to Suez’s cross-appeal because the cross-appeal is nothing more than the same issues already raised by IDWR’s appeal. *Compare* IDWR’s Issues on Appeal, *IDWR Brief*, pp. 30-31 and Suez’s

Issues presented on Cross-Appeal, *Suez Brief*, p. 15. *See also, IDWR's Response to Suez's Opening Brief on Cross-Appeal.* Both IDWR and Suez continue to assert that the Boise River Reservoir storage rights should be allowed to fill following flood control under a theory of excess flows but that there is no protectable water right, with a priority, to do so because the filling of the Reservoirs following flood control is subject to existing and future appropriations. Suez is simply restating the same issues presented by IDWR in IDWR's appeal under the guise of a cross-appeal.

As stated in the *Ditch Companies' Respondents' Brief*, IDWR, and now Suez, take the unreasonable position that water can be stored and beneficially used without a water right even though Idaho law is clear that a water right is in fact necessary. *DC Respondents' Brief*, pp. 69-70. IDWR, and now Suez, take this unreasonable position based upon an accounting program that was not adopted until 1986 and despite the fact that the testimony of Sisco and Sutter, the two individuals involved in the development of the accounting system, established that the accounting program is merely a tool that did not change the long-standing administration of the existing storage rights—that the water stored and used following flood control is stored under the priorities of the existing storage rights.

IDWR, and now Suez, take this unreasonable position even though it conflicts with the congressionally-authorized operating plan under which the Boise River Reservoirs have been operated for beneficial use storage. In fact, Suez acknowledges that one of its junior water rights has been conditioned to allow the diversion of water only when water is spilling from Lucky Peak Dam for flood control. Suez suggests that this condition was simply a result of a settlement but it is unreasonable and disingenuous for Suez to have agreed to such a condition and then now contend that no protectable water right exists to physically fill the Boise River Reservoirs

following flood control. Not only has Suez agreed to conditions in its water rights which now conflict with its latest position, but Suez's position was squarely rejected by the district court. It is unreasonable and frivolous for Suez to continue to assert that there is no vested water right to store and beneficially use the water stored in the Boise River Reservoirs following flood control when it is undisputed that such storage and beneficial use has occurred well before 1971. Accordingly, the Court should award attorney fees and costs to the Ditch Companies in responding to Suez's cross-appeal under Idaho Code §§ 12-117 and 12-121.

IV. CONCLUSION

For the forgoing reasons, and for the reasons set forth in the *Ditch Companies' Appellants' Brief* and *Ditch Companies' Respondents' Brief*, the Ditch Companies respectfully request that this Court reverse the Director and district court's erroneous legal conclusion that flood control releases, which cannot be stored or beneficially used, count toward the satisfaction and fill of the storage rights. This Court must recognize a protectable water right for the water that has been historically stored and put to beneficial use following flood control. Water for the Treasure Valley is too important to leave it to the discretionary whim of the Director and subject to the future appropriations of this State and other States. This Court must protect and secure the State's water and reject the Director's attempts to undo a congressionally-approved operating plan which has effectively balanced flood control and beneficial storage for more than 60 years. The Ditch Companies further contend that the procedural abuses of the Director must be rejected and this Court cannot condone the numerous procedural violations employed by the Director in this Contested Case. Finally, IDWR and Suez continue to doggedly defend the procedural abuses of the Director and continue to take contradictory, inconsistent and unreasonable positions and thus the Court should award the Ditch Companies' their attorney fees and costs.

DATED this 8th day of September, 2017.

SAWTOOTH LAW OFFICES, PLLC

By  for:
Daniel V. Steenson
Attorneys for Petitioners/Appellants/
Cross-Respondents the Ditch Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September, 2017, I caused a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF to be served by the method indicated below, and addressed to the following:

Original to:

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Boise, ID 83720
Telephone: (208) 334-2210
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Daniel V. Steenson

Docket No. 44677-2016

Reply Brief for the Ditch Companies

APPENDIX 1

Gibson, Deborah

From: Spackman, Gary
Sent: Friday, March 27, 2015 10:27 AM
To: Gibson, Deborah
Subject: FW: Basin 63 Refill FAQ
Attachments: Basin63_RefillFAQ_v5.pdf

From: Weaver, Mathew
Sent: Tuesday, February 17, 2015 8:21 PM
To: Spackman, Gary; Stephen.Goodson@gov.idaho.gov
Subject: Basin 63 Refill FAQ

Gentleman,

I think I promised this document to both of you in the last week. Here you go. A prlmer on the refill issue in Basin 63.

Cheers,

Mathew Weaver, PE
Deputy Director
Idaho Department of Water Resources
www.idwr.idaho.gov
(208) 287-4800

Basin 63 (Boise River) Fill/Refill Issue - FAQs

What's the Problem?

1. In a nutshell, what's the fill/refill problem? Historically, refill of storage space evacuated in federal on-stream reservoirs as a result of flood control operations has occurred. Refill has occurred during the spring freshet when surplus water has been commonly available in the system for storage after all water rights, including water rights junior to the storage water rights, were satisfied. There is a concern that changing future conditions—including new in-basin development, federal ESA flow release requirements, and climate change—may diminish the volume of surplus water historically available to refill reservoir space, resulting in a decline of the overall water supply to storage water users.

Background

2. When were the federal reservoirs in the Boise Basin completed?

Basin 63 Reservoirs - Summary		
Reservoir	Earliest WR Priority Date	Construction Completion
Arrowrock Reservoir	1911	1915
Anderson Ranch Reservoir	1940	1950
Lucky Peak Reservoir	1955	1955

3. What is the purpose of the Boise River Basin reservoir system? The Boise River storage system was constructed over the course of 40 years and has been operated for almost 100 years. The system has come to have multiple, sometimes conflicting purposes over its history, including storing water for beneficial use, providing flood protection, meeting recreational needs, and providing year round flows in the Boise River downstream of Lucky Peak.
4. Who owns the storage water rights within the Boise Basin's federal reservoirs? The United States Bureau of Reclamation (USBR) owns nominal legal title to the storage water rights.
5. What are the beneficial uses associated with the Boise reservoir storage water rights? There are multiple beneficial uses recognized by Idaho State water law associated with the combined reservoir system including irrigation (886,511), stream flow maintenance (152,300 AF), municipal (5,200 AF), and industrial (5,200 AF). Hydropower is also a recognized beneficial use, but water can only be released for hydropower when it accompanies the release of water for another beneficial use. This is termed "incidental" beneficial use.
6. What about flood control? Isn't that a beneficial use? Flood control operations are of course generally beneficial to the public's health and safety, and protection against property damage. Flood control operations are conducted jointly by the USBR and the Army Corps of Engineers under Federal flood protection authorities. However, the release and storage of water for flood control operations are

not beneficial uses recognized in Idaho State water law and there are no water rights associated with flood control operations in the Boise River Basin.

7. What is a space holder contract? **A space holder contract is a contract between the owner of the reservoir (USBR) and the party putting the stored water to beneficial use (i.e. irrigators, municipal providers, etc.). These contracts are not water rights but they define the space allocations of water stored under USBR water rights. Individual space holders such as irrigation districts, canal companies, and municipal providers do not own storage water rights.**
8. When was the current water right accounting first implemented? **Current or modern era computerized water right accounting practices were first initiated in the Upper Snake River in 1977. Modern practices were adopted from the Snake and implemented in the Boise River Basin in 1986.**
9. How does the current water right accounting accrue water to storage water rights? **Under current water right accounting practices, any natural flowing water (i.e. water not released from an upstream reservoir) entering a reservoir, in priority, is accrued towards the satisfaction of the reservoir storage water right. Natural flow water entering a reservoir that is either immediately or subsequently released, even when not released for beneficial use, still counts towards the satisfaction of the water right. This practice is consistent with water right accounting practices for on-stream reservoirs in many western states and is termed the "store it or lose" principle.**
10. Has refill historically occurred under a water right? **Under water right accounting practices, the refill of space in a reservoir previously evacuated for flood control has occurred, but it has not occurred under a water right. A storage water right is only entitled to one fill.**
11. How has refill historically been accomplished? **During the spring freshet surplus natural flow water exists in the system (i.e. more water is in the river than is necessary to satisfy all water right needs), and the surplus water is captured and stored in empty reservoir space. The stored surplus water is subsequently allocated to storage water rights at the conclusion of the runoff season.**
12. Are there any existing mechanisms in place that protect space holders from reservoirs that don't fill as a result of flood control operations? **Yes, space holder contracts and current Endangered Species Act (ESA) flow augmentation release practices provide a first line of defense for space holders.**
13. What happens in the Boise River basin if the reservoir system fails to fill due to flood control releases? **If the reservoir system fails to fill due to flood control by 60,000 AF or less, all storage entitlements in Lucky Peak Reservoir receive 100% of their allocation except for the USBR's streamflow maintenance entitlement. Only when the volume of water that failed to fill is greater than 60,000 AF are space holders in Lucky Peak¹ impacted.**

¹ This "shortfall" is subtracted from the Lucky Peak Reservoir entitlements because Lucky Peak Reservoir has the latest water right priority of the three Boise system reservoirs, and is the primary flood control facility.

14. How often has the Bureau of Reclamation missed filling the reservoir system by more than 60,000 acre-feet in a year when flood control releases were made? **Other than 1989, there has never been a year that space holder's storage space was adversely affected by flood control releases, where the inability to "top off" the reservoir resulted in less than a full allocation of storage water to space holders other than the USBR.**
15. What is the target volume of water associated with ESA flow augmentation releases (i.e. storage water releases for salmon recovery) in the Boise Basin? **When available, 40,932 acre-feet of storage water is released from the Boise basin reservoir system for flow augmentation.**
16. How is flow augmentation water released in the Boise Basin? **In the Boise, the USBR releases flow augmentation water by the time the spring freshet concludes. It does so by targeting full reservoir volume as the actual physical volume less flow augmentation storage releases. When water is released for flood control operations after April 10, and the space vacated by the release does not subsequently refill, the water released can be counted towards flow augmentation requirements.**

Is there a Solution?

17. Is anyone working on a solution to this fill/refill issue? **Yes, the Department, the USBR, and the water users have been engaged in settlement discussion with the purpose of finding a solution to the fill/refill issue that is acceptable to all parties. Currently, a settlement solution has been proposed by the Department, whereby a pair of refill water rights would be decreed in the Snake River Basin Adjudication for each of the three on-stream federal reservoirs. This solution would create real property rights, for the first time, associated with the historical practice of refill, thereby preserving the existing status quo and guarding against future diminishment of the refill practice. The pair of water rights would include a fully subordinated Refill 1 water right, which would include as an element a very large storage volume that will allow for water to be stored in all but the wettest of water years. The Refill 2 water right having an effective priority date of 2014 will allow for prioritized refill of the last 154,000-264,000 acre-feet (i.e. reservoir "top off"), depending on the reservoir, in normal to very wet years. In dry years, when there are no flood control operations, the reservoirs will fill under their base water rights.**
18. What are the priority dates and storage volumes for the proposed refill water rights?

Basin 63 - Refill WRs Summary				
Reservoir	Refill 1 Vol. (AF)	Refill 1 Priority Date ²	Refill 2 Vol. (AF)	Refill 2 Priority Date
Arrowrock	3.286 MAF	1965/Subordinated	264,000	1984/2014
Anderson Ranch	1.316 MAF	1965/Subordinated	247,000	1984/2014
Lucky Peak	3.693 MAF	1965/Subordinated	154,150	1983/2014

² Priority dates for Refill 1 and refill 2 water rights will have a priority date listed on the water right that is based on hydrologic analysis of years of maximum event and an effective priority date that is the result of the conditions of the settlement.