IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 44745

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 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-Appellants,

v.

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/Respondent-Cross Appellant.

BOISE PROJECT BOARD OF CONTROL'S APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada;
Honorable Eric J. Wildman, District Judge, Presiding
(District Court Case No. CV-WA-2015-21376)

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I. STATEMENT OF THE CASE

The Idaho Department of Water Resources ("the Department" or "IDWR") uses a "paper fill/one-fill" accounting rule for "distributing" water to storage right holders in the Boise River Basin that punishes the right holders when the reservoirs must release water for flood control to protect the public, that charges them for water that cannot be used for irrigation, that distributes "paper water," and that ultimately strips those decreed storage rights of the property right to put water to beneficial use as required by the priority doctrine. This result cannot stand.

This proceeding is part of a larger strategy by the State and IDWR Director to deprive the storage right holders of any property interest in water filling the reservoirs after flood control releases. The Director's avowed strategy is to preserve that water, not for historic uses by the irrigators, but for newer uses that the Director deems more worthy.

The Director called a contested case, attempting to create a *post-hoc* record for the Basin 63 accounting program. The proceeding was intended to strip the Boise Project Board of Control ("Boise Project"), and the other storage water holders in the Boise River reservoir system, of any protectable property interest in the water that has historically been delivered to them during the irrigation season. The district court recognized that the Boise Project, and other storage holders, have a protectable property interest in water filling the reservoirs after flood control releases and remanded the proceeding to the Director. The Director strenuously disagrees. When the property interests in this water are recognized it becomes clear that the "paper fill" accounting methodology does not comply with the prior appropriation doctrine, is contrary to law, and must be reversed.

The contested case proceeding itself was infected with procedural irregularities that both violated Idaho law and deprived the participants of their due process rights to a fair hearing. The

participants were forced to respond to an agency that was determined to "defend" this "paper fill" rule. Yet, the same person defending this rule was also the ultimate decider of the issue. The Director had substantial prior involvement in the "refill" issue prior to initiating the contested case, made numerous public presentations supporting the outcome decided at the hearing, refused to disclose his other statements on the issue, but still refused to recuse himself from acting as the hearing officer. Because the "paper fill/one-fill" rule met the requirements of Idaho's APA and *ASARCO, Inc. v. State*, 138 Idaho 719, 723, 69 P.3d 139, 223 (2003), rulemaking should have been undertaken, but the Director plowed ahead. During the contested case hearing, the Department's counsel both advised the Hearing Officer and presented the Department's case. The Director consulted with Department witnesses outside the parties' presence on numerous occasions during the hearing and even directed one Department witness to create a new rebuttal exhibit. The Director went searching for evidence to use to impeach a witness during the hearing and consulted materials not presented by the Department at the hearing.

The Boise Project and the New York Irrigation District (collectively "Boise Project") appeal the judgment of the District Court affirming in part and reversing in part the Final Order issued by the Director in a *sua sponte* contested case called "[t]o 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." R, 1225-1247; *also see* R, 1262. The district court's holding that the paper fill rule of the accounting system conforms to the prior appropriation doctrine is contrary to Idaho law.

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II. ISSUES PRESENTED ON APPEAL

1. Whether the District Court erred when it upheld the Basin 63 paper fill accounting rule, which accrues all water entering the reservoirs to the storage water rights, even when the water is not stored, but is passed through or released for a public benefit of providing space for flood control operations, because the program is contrary to historic operations and contrary to the prior appropriation doctrine?

2. Whether the District Court improperly disregarded historic operations of the Boise River reservoir system, the understanding of the parties, the Boise River Water Control Manual, and other operating agreements that define how the Boise River reservoirs are jointly operated for flood control and other beneficial purposes, as irrelevant to the Director's duty to administer and account for water pursuant to the decreed Boise River reservoir water rights?

3. Whether the District Court improperly invoked the issue of "waste," which does not apply to mandatory flood control, to justify the paper fill accounting system, contrary to Idaho's prior appropriation doctrine?

4. Whether the District Court erred by concluding that the Director had the authority to interpret the partial decrees to authorize "paper fill?"

5. Whether the District Court erred by concluding, contrary to the substantial and undisputed evidence, that the Director could not account for water actually used by the storage right holders, contrary to the directive of this Court?

6. Whether the District Court erred in failing to invalidate the Director's paper fill rule as an improperly promulgated rule as required by Idaho Code § 67-5201(49) and *ASARCO, Inc. v. State*, 138 Idaho 719, 723, 69 P.3d 139, 223 (2003);

7. Whether the District Court improperly held that the Director had not violated the Idaho Administrative Procedure Act or violated the due process rights of the hearing participants as the result of the following acts:

a. When the Director called the contested case for the improper purpose of developing a post-hoc administrative record to "defend" its existing accounting program through a "fact finding hearing";

b. When the Director refused to recuse himself as the hearing officer in the proceeding, for his substantial prior involvement in the same matter, his numerous statements indicating that he had a firm conviction of the outcome, and for failing to disclose all of his *ex parte* and other conversations concerning the subject matter of the hearing;

c. When the Department's counsel acted in a dual role advising the Hearing Officer and presenting the Department's case during the contested case hearing in violation of IDAPA 04.11.01.423.02 and 03;

d. When the Director conferred with agency staff ex parte and outside the presence of the parties throughout the contested case hearing, including with the attorney general prosecuting the action and the Department's expert witness, when he directed the Department's expert to create a rebuttal exhibit and present rebuttal testimony, when he went searching for information to impeach a witness, and when he consulted a trove of information not presented at the hearing, all in violation of IDAPA 04.11.01.423.02 and 03, and IDAPA 04.11.01.424.

III. ATTORNEY'S FEES

Appellants Boise Project and New York Irrigation District request an award of attorney's fees and costs pursuant to Idaho Code § 12-117 and Id. R. Civ. P. 54(d)(1).

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IV. STANDARD OF REVIEW

The Supreme Court reviews an appeal from the District Court acting in an appellate capacity, reviewing a final order of an agency "to determine whether it correctly decided the issues presented to it." *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). "However, we review the agency record independently of the district court's decision" *Rangen, Inc. v. Idaho Dept. of Water Res*., 159 Idaho 798, 806, 367 P.3d 193, 199 (2016), *citing Spencer v. Kootenai County*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008). This Court will defer to the findings of fact of the agency unless clearly erroneous or unsupported by substantial and competent evidence in the record before the agency. *Id*. "This Court freely reviews questions of law." *Rangen v. Idaho Dept. of Water Res*., 159 Idaho at 806, 367 P.3d at 199. Due process issues are issues of law for this Court to exercise free review. *Idaho Historic Preservation Council, Inc. v. City Counsel of the City of Boise*, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000).

> [T]he court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3). "[A]gency action shall be affirmed unless substantial rights of the appellant have been prejudiced." Idaho Code § 67-5279(4). "[T]his Court has not yet attempted to articulate any universal rules to govern whether a petitioner's substantial rights are being violated under I.C. § 67-5279(4)" in part, because "each procedural irregularity, legal error, and discretionary decision is different and can affect the petitioner in varying ways." *Hawkins v. Bonneville County Bd. of Com'rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011).

V. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

A. Statement of Facts.

Appellants here are the Boise Project and New York Irrigation District. The Boise Project is the operating agency for five member irrigation districts: the Big Bend Irrigation District, the Boise-Kuna Irrigation District, the New York Irrigation District, the Nampa-Meridian Irrigation District and the Wilder Irrigation District (collectively "Districts"). AR, Tr. 8/31/2015, p. 948, ll. 6-19. The Boise Project Districts are the largest contract spaceholders in Arrowrock and Anderson Ranch reservoirs. The member Districts represent approximately 165,000 acres of irrigated land in the Boise Valley, and the Boise Project delivers water to those acres on behalf of the Districts. AR, Tr. 8/31/2015, p. 949, ll. 5-18. The Boise Project delivers a combination of natural flow water rights represented in the Bryan and Stewart decrees, in the amount of approximately 2,600 to 2,700 cfs, which only provides approximately a half foot to a foot per acre of water annually. AR, Tr. 8/31/2015, p. 952, l. 5-p. 953, l. 10. Consequently, the Boise Project Districts primarily rely upon their storage water rights in Arrowrock and Anderson Ranch reservoirs to deliver a full supply of irrigation water to landowners within the Districts. AR, Tr. 8/31/2015, p. 953, ll. 11-15, *also see* p. 956, ll. 6-20.

Arrowrock was the first reservoir constructed on the Boise River and was decreed a 1911 priority date for 8,000 cfs in the Bryan decree. AR, Ex. 2023. It was initially authorized for the purpose of irrigation storage. AR, Exs. 2056 and 2057. The Boise Project Districts entered into repayment contracts with the Bureau of Reclamation in 1926 for the construction costs of Arrowrock and took over the operation and maintenance of the irrigation delivery works. AR, Ex. 2058, *also see U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007). Arrowrock was also used for flood control dating back to at least 1916, but it was

ultimately not up to the task of protecting the growing Boise Valley from potential flood damage. AR, Ex. 2053, p. 12, *also see* Ex. 2060.

With the storage capacity of Arrowrock reservoir limited to 286,000 AF, the United States began to pursue construction of Anderson Ranch Dam and Reservoir on the South Fork of the Boise River, and in 1941 the Boise Project Districts entered into a contract with the United States for storage in Anderson Ranch Reservoir. AR, Ex. 2053, p. 12. Anderson Ranch was primarily authorized for irrigation storage and power purposes, with only a small portion of the reservoir space authorized for flood control. *Id*. at 14. Because of World War II, construction of the project wasn't complete until 1950, but at completion was able to store an additional 500,000 AF. *Id*. at 13, *also see* AR, Ex. 2071.

In 1943, between authorization and construction of Anderson Ranch, the Boise River Valley experienced substantial flooding, damaging approximately 30,000 acres. AR, Ex. 2053, p. 15. As a result of the 1943 flood, the Bureau of Reclamation, Corps of Engineers, State of Idaho and water users began a joint study of flood control solutions for Boise River flooding culminating in the decision to build Lucky Peak Dam and operate it primarily for flood control. AR, Ex. 2053, p. 16, *also see* Ex. 2089. A proposal was also made to convert all three Boise River reservoirs into multiple use reservoirs, providing more flexibility to operate the reservoirs to prevent damage to the Boise Valley. Importantly, the State of Idaho during these discussions acted as the representative of the contract spaceholders in the two existing reservoirs. AR, Ex. 2053, p. 21; Tr. 8/31/2015, p. 795, l. 24-p. 797, l. 5. The State, on behalf of the spaceholders, made multiple representations that the spaceholders' rights to the water in the reservoirs would not be harmed by converting the three reservoirs to multiple use. This promise was imperative to obtaining the spaceholders' agreement. AR, Ex. 2097, and Ex. 2053, p. 18. There was never any

suggestion in the historical records from this time that the water entering the reservoirs after flood control releases would not fill those reservoirs under the priority of the water rights for those reservoirs. AR, Tr. 8/31/2015, p. 797, ll. 6-24.

In 1953, the Department of Interior and Corps of Engineers entered into the "Memorandum of Agreement between the Department of Army and the Department of the Interior for Flood Control Operation of the Boise River Reservoirs, Idaho." AR, Ex. 2100, Ex. A. The Agreement provided specifically:

> No reregulation of storage or annual exchange of storage as provided in this plan shall, however, deprive any entity of water accruing to it under existing rights in Arrowrock, Anderson Ranch and Lake Lowell reservoirs.

Id., at p. 2177. The very next section of the Agreement explicitly provides the Boise River Watermaster and the State of Idaho with an integral role in the operation of the three reservoirs for flood control. *Id*. Section 5 of the Agreement states, in part:

> The Chief of Engineers, the Commissioner of Reclamation, and the watermaster, having agreed upon acceptable methods of forecasting seasonal volumes of runoff for the Boise River above Diversion Dam, will periodically during the period from January 1 to June 30 of each year, determine the volume of runoff that may be expected in the drainage area tributary to the Boise River above Diversion Dam. Any differences in forecasted amounts shall be reconciled to arrive at a common forecast within 48 hours after basic data for forecasts are available. To facilitate forecasting of runoff, mutually satisfactory arrangements will be made among the Chief of Engineers, the Commissioner of Reclamation, and the State of Idaho, after consultation with the interested water users' organizations, to expand the existing hydrologic network and to establish and operate continuously a system for the efficient assembly, analysis, and exchange of the basic data.

Id. The State of Idaho was at the table in drafting this agreement, and was assigned specific responsibilities to ensure that the joint operation of the three reservoirs for flood control, up to 983,000 AF, would be properly operated so as not to jeopardize the spaceholders' existing water rights in the reservoirs. AR, Ex. 2053, p. 23.

A thorough review of all of the historical documents and congressional transcripts related to the development of the Agreement revealed nothing that would have led any party to believe that the spaceholders' rights to the water in Anderson Ranch and Arrowrock reservoirs would not fill after flood control in the priority of the original right. AR, Tr. 8/31 2015, p. 799, l. 6-p. 800, l. 1. In light of these promises, the spaceholders entered into supplemental contracts with Reclamation in 1954. AR, Ex. 2100.

Lucky Peak Dam was completed in 1955, but even the addition of that space primarily dedicated to flood control was, and continues to be, insufficient to store all the Boise River flows, even in an average water year. AR, Exs. 2053, pp. 22-25, and 2104.[1] In 1956, the Corps of Engineers adopted an operating manual that provided for flood space evacuation based on rule curves tied to the snow accumulation in the Boise Mountains. AR, Ex. 2104. The Corps, Reclamation, and the State of Idaho operated the three reservoirs under this manual until severe flooding in 1974, led the Governor to request an updated analysis of flood control operations. AR, Exs. 2053, p. 34, and 2131.

In 1974, Governor Andrus explained that he:

> ….directed the Idaho Department of Water Resources to review flood operation of the river. For a more complete understanding of how the river is operated, I refer you to their November, 1974 report 'Review of Boise River Flood Control Management.' The report does recommend revision of the present flood operation criteria, which may lead to greater early season release, but also concludes that the releases of 6500 cfs or greater are unavoidable with the present system facilities.

AR, Ex. 2131, p. 2; AR, Ex. 2182. Mr. Robert Sutter, an IDWR employee, was the primary drafter of the Department's 1974 report. AR, Tr. 8/28/2015, p. 374, ll. 7-11. Nothing in the 1974 report suggested that water that refills the reservoirs after flood control releases filled without the

[1] Total reservoir capacity is approximately 1 million acre feet. AR, Ex. 2053, pp. 23-25. Average run off is over 2 million acre feet per year. AR, Ex. 3001. Maximum Boise River run off to date is 3.66 million acre feet. *Id*.

benefit of the original water rights and their priority, or that junior users had any prior right to this refill water. AR, Ex. 2182. Instead, the report recognized the need to refill storage space for irrigation, and stated that further study was needed to protect the balance between flood control releases and refill for irrigation. *Id*. Mr. Sutter reviewed the 1956 operating manual and other hydrologic data and communications clarifying flood control procedures. AR, Tr. 8/28/2015, p. 380, ll. 7-13. IDWR's 1974 report recommended:

> (1) A new Reservoir Regulation Manual should be prepared with appropriate supporting Agreement.
>
> (2) Beginning in 1975, releases during the evacuation period should be determined by averaging the computed release over the remainder of the period as defined in paragraph 6c of the present Agreement.
>
> (3) A procedure should be developed to use a portion of the space in Lucky Peak Reservoir to provide greater flood protection for the occurrence of a major flood. Decisions must be made regarding the degree of flood protection desired in relation to reservoir refill risk.
>
> (4) The present maximum release from Lucky Peak Reservoir of 6500 cfs below Boise should not be decreased. Consideration should be given for an increase in the maximum release.
>
> (5) A single forecast procedure for reservoir operation should be developed and put into use as soon as possible. Feasibility of automating the existing snow course network for continuous monitoring should be examined.
>
> (6) The cities and counties within the Boise River flood plain should take the necessary steps to qualify for flood insurance. This should be accompanied by programs to develop public awareness of flood hazard areas.

AR, Ex. 2182, pp. 3710-3711. IDWR's recommendations were the impetus for the revision of the 1956 operative manual by IDWR, the Corps of Engineers, and Reclamation.

The revision of the 1956 operating manual and development of the 1985 Boise River Water Control Manual was divided into "five technical studies that would be required in order to make the desired changes to operations." AR, Ex. 2053, p. 41. A "final comprehensive study

plan" was developed to establish the protocols for the studies. AR, Ex. 2145, p.1. "The primary participants of this study will be the Idaho Department of Water Resources, U.S. Bureau of Reclamation, and the U.S. Army Corps of Engineers." *Id*., p. 2. In advance of the study, the participants met and agreed upon "[r]ecommended criteria which [could] reasonably be established without additional studies." *Id*. Among those agreed criteria was a decision that "[f]all and early winter **evacuation based on a high refill assurance** will be considered in the flood regulation plan." *Id*., p. 4 (**emphasis added**). This effort culminated in the 1985 Boise River Water Control Manual ("Water Control Manual"), which has formed the basis for flood control regulation on the Boise River through the present.

The Water Control Manual for the Boise River Reservoirs ("Water Control Manual") was completed in 1985. No records in the studies leading to the adoption of the Water Control Manual, or in the Water Control Manual itself even suggest that any party to the studies or manual contemplated that evacuation of water for flood control would result in empty reservoir space that could not be refilled until all junior and future water rights were satisfied. In fact, in a 1987 letter Director Higginson advised the spaceholders:

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

AR, Ex. 3001 (***emphasis added***). The Director went on to state:

> Please be assured that the Department of Water Resources has been in the past, and will continue to be, involved in the management plans for the Boise River reservoirs. The department has worked closely with the Corps of Engineers and Bureau of Reclamation in formulating an operating plan which strikes an acceptable balance among competing water uses on the Boise River within current physical and legal constraints.

Id.

The Department's collaboration in drafting the Water Control Manual included drafting that portion of the manual titled, "Irrigation Water Supply Plan." AR, Ex. 2186, p. 7-23. Sub-part "f" of that section, states:

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

Id. at pp. 7-26. When the Water Control Manual was drafted in 1985, the Department considered the water released for flood control purposes to be *surplus* to the system and stated that "[d]uring this period, no charges are made against stored water supplies." The key is that storage right spaceholders understood the flood control releases were "surplus" since signing the 1954 supplemental contracts, and no one ever advised them otherwise. AR, Tr. 8/28/201, p. ll. 3-8; Tr, 8/31/2015, p. 804, ll. 5-19; Tr. 9/9/2015, p. 1037, ll. 7-20, p. 1076, ll. 20-25, p. 1181, l. 19-p.1182, l. 6; Ex. 3038. Surplus water was released. Water reentering the reservoirs thereafter was needed for irrigation and stored under the existing water rights.

In 1986, IDWR imported Basin 01's computerized accounting program into the Boise River reservoir system for Basin 63. AR, Tr. 8/28/2015, p. 357, ll. 10-13. Mr. Sutter was IDWR's employee who coded the computerized accounting system for Basin 63 in 1986. AR, Tr. 8/28/2015, p. 429, l. 21-p. 430, l. 17. Mr. Sutter understood that implementing the computerized accounting did not have any impact on the way the reservoirs were managed pursuant to the Water Control Manual, or how the watermaster distributed water. *Id*., p. 431, ll. 3-18; p. 440, ll. 5-13. The computerized accounting program simply represented a more accurate way to track water. The water users would have no way of knowing how the water right program was accounting for the numbers. *Id.*, p. 438, l. 23-p. 439, l. 1. In fact, Mr. Sutter and the Boise

River Watermaster would not even look at the accounting in a flood control year and the accounting program wasn't even run "until much later, because there – there was no urgency to determine storage entitlements because we were pretty assured that they would pretty much – that they would fill." AR, Tr. 8/28/2015, p. 439, ll. 17-20. Importantly, the accounting program's author recognized that the 'storage entitlements' would fill following the flood control releases.

At the same time, between 1974 and 1986, the Department determined that the Boise River was fully appropriated above Lucky Peak Dam. In 1977, Director Allred issued guidance stating that "[e]ffective immediately, no additional water rights for the consumptive use of water during the period of time June 15 to November 1 will be issued on the Boise River and tributaries in the reach upstream from Lucky Peak Reservoir." AR, Ex. 3002. He went on to state, "[t]he water ***in this reach of the River has been determined to be fully appropriated by the existing waterusers, and*** therefore, ***no water is available for any additional users***." *Id*., (***emphasis added***.) The moratorium was extended in 1980, 1992, 1993, 1995, and most recently in 2008. AR, Exs. 3003, 3004, 3005, 3006, 3007, and 3008. After the moratorium was established, a few junior water rights were issued by the Department but they contained conditions limiting the exercise of the right:

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

AR, Ex. 3012.

Suez, formerly United Water, knew "that during large portions of most years the Boise River is fully appropriated," and for its junior priority water rights, explicitly "intended" that

water for these water rights would rely upon delivery "when flood releases are made from Lucky Peak Reservoir." AR, Ex. 3013. Suez's then hydrologist, Mr. Squires, produced the beneficial use field report for its water right no. 63-12055, stating that he would "recommend licensing at the permitted rate for use anytime surplus water is available on the Boise River (Lucky Peak spilling)." AR, Ex. 3041. Mr. Squires testified that he made the recommendation because water released for flood control is the water available for appropriation on the Boise River. AR, Tr. 9/9/2015, p. 1006, ll. 8-11.

Reclamation's storage water rights, nos. 63-303, 63-3613, 63-3614, and 63-3618, for Arrowrock, Anderson Ranch and Lucky Peak reservoirs were decreed between 2007 and 2009. AR, ON Docs, 63-303, 0090-91; 63-3613, 0060-61; 63-3614, 0305-306; 63-3618, 1599-1601. Each decree includes a condition stating that the reservoir capacity is not reached until it reaches a specified elevation "measured at the upstream face of the dam."[2] Each also contains a condition that states that while Reclamation is the named holder of the right, "as a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water." *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (requiring this condition). As far as the Boise Project knew, the existing storage water rights were being filled in priority in conformance with the historical operation of the reservoirs since 1954. It wasn't until mid-2012, that the Boise Project and Districts learned that a dispute had arisen in Basin 01 relating to the necessity of a remark on a storage decree to authorize "refill" of the reservoir. *A&B Irr. Dist. v. State of Idaho*, 157 Idaho 385, 388, 336 P.3d 792, 795 (2014).

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[2] The water right decrees are part of the documents officially noticed by the Director in the contested case hearing. For Arrowrock Reservoir the elevation is 3216 feet; Anderson Ranch is 4196 feet; Lucky Peak is 3055 feet.

B. Course of Proceedings.

After learning of the dispute in the Upper Snake, the Boise River water users became engaged because they correctly foresaw that the Director would take the same stance in the Boise. They helped initiate the *Basin Wide 17* proceedings. *Id*. Along with Reclamation, the Boise Project filed requests for late claims with the SRBA court for storage rights in the reservoirs based on beneficial use. *In re: SRBA*, Subcase No. 63-33732 (consolidated). *See Memorandum Decision and Order On Challenge* (Sept. 1, 2016). Despite the fact that the Director invited these claims as a way to solve the "refill" issue, the Director recommended that the late claims be disallowed. *Id*., p. 2. The State responded and throughout this proceeding the Director and State have jointly fought tooth and nail to prevent the recognition of any protected property interest or water right in the fill of the reservoir under either the existing storage rights or as a beneficial use right.[3] *Id*., *passim*. That proceeding is now stayed, at the State and Suez's request, pending this Court's decision. *See Suez's Motion to Continue Stay or Motion for Reconsideration of Decision to Lift Stay*, SRBA Subcases 63-33732 (63-33737), 63-33733 (63-33738), and 63-33734, Jan. 23, 2017, and Minutes of Hearing Held Feb. 14, 2017.

On October 22, 2013, the Director on his own accord issued a Notice of Contested Case and Formal Proceedings, and Notice of Status Conference. AR, 2-34. The Director stated that the purpose of the proceeding was "to initiate contested cases for the purpose of resolving the objections to the existing accounting processes for the distribution of water to the on-stream reservoirs in Water District 1 and Water District 63." AR, 2. The Director recognized that "there are significant differences between Water District 1 and Water District 63 in terms of water

[3] Ms. Cresto, IDWR's hydrologist, submitted an affidavit on behalf of the State of Idaho in the late claims proceedings that was subsequently admitted in the contested case proceeding. AR, Tr. 8/27/2015, p. 62, ll. 14-p. 64, ll. 13; AR, Ex. 2. Mr. Weaver, IDWR's deputy director, testified in the late claims proceedings as the State of Idaho's representative. Rule 30(b)(6). AR, Tr. 8/27/2015, p. 39, ll. 20-p. 40, ll. 25.

users, size, structure, hydrology, federal reservoir systems and operations, and water right accounting." *Id*. at 7. He therefore bifurcated the proceedings into separate proceedings for each water district. *Id*. This 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.

Id. The Order directed interested parties to submit statements of concern or in support of the existing procedures by December 4, 2013, in advance of the Director's scheduled December 6, 2013 status conference. *Id*.

The Boise Project submitted its statement of concern identifying a number of issues. AR, 41-50. It stated that the contested case could not be used as a vehicle to decide the property interests in the reservoirs, as that was dedicated to the SRBA Court; that the matter must be undertaken as a rulemaking; that the accounting program could not be subject to judicial review as there was no agency record to support the adoption of the accounting program; that Basin 63 could not be conflated with Basin 01; and that the proceedings were rife with conflict between the water users and the Department. *Id*., p. 49. The Boise Project also raised the issue that the *Basin Wide 17* proceedings were underway. *See A&B Irr. Dist. v. State of Idaho*, 157 Idaho 385, 388, 336 P.3d 792, 795 (2014). The parties took up this timing issue with the Director at the status conference held on December 6, 2013. AR, Tr. 12/6/2013, p. 12, ll. 1-19. The Director stayed the contested case proceedings until a decision was rendered by this Court in *Basin Wide 17*. AR, 88-92.

This Court issued its decision in the *Basin Wide 17* proceeding on August 4, 2014. *A&B Irr. Dist. v. State of Idaho*, 157 Idaho 385, 336 P.3d 792 (2014). On September 10, 2014, the

Director issued an Order lifting the stay of the proceedings and setting a status conference for October 7, 2014. AR, 94-99. Prior to the status conference, on October 2, 2014, the Ditch Companies, also appellants, filed a Motion to Disqualify and Request for Independent Hearing Officer. AR, 100-108. One day later, October 3, 2014, the Director denied the motion, stating that he would continue to preside over the contested case. AR, 132-141.

At the October 7, 2014 status conference, a number of parties raised concerns with irregularities in the proceedings. Among those irregularities were: (1) IDWR counsel's declared that the contested case would be used to create a record to support the existing accounting program; (2) the lack of a record created substantial issues in preparing for a contested case; and (3) a better definition was needed of exactly what was at issue in the contested case. AR, Tr. 10/7/2014. It was clear from the tone of the conference that the parties were being placed in a position of adversity to the agency that was ultimately the finder of fact. *Id*. The Boise Project, the Ditch Companies, United Water Idaho (now Suez), the City of Boise, New York Irrigation District, Farmers Union Ditch Company, Trout Unlimited, Idaho Power Company, Boise City Canal Company, and the Surface Water Coalition all filed notices of intent to participate in the contested case. AR, 156-205. The Bureau of Reclamation had earlier informed the Director that it did not intend to participate in the proceeding as the hearing failed to meet the requirements of the McCarran Amendment. AR, 84.

On October 28, 2014, the Boise Project filed three pre-hearing motions: (1) The Boise Project's Request for Disclosure of Ex Parte Contacts and Prior Statements by the Director and Staff Concerning the Issue of Storage Accounting; (2) Boise Project's Document Request; and (3) Motion to Dismiss Contested Case Proceedings and Initiate Negotiated Rulemaking and Memorandum in Support. AR, 208-235.

On November 4, 2014, the Department produced a Memorandum titled "Accounting for the distribution of water to the federal on-stream reservoirs in Water District 63." R, 270-282. This memo was drafted in response to a request from the Director for such a memo "addressing: '(1) how and why water is counted or credited to the water rights for reservoirs in Basin 63 pursuant to the existing accounting methods and procedures; and (2) the origin, adoption, and development of the existing accounting methods and procedures in Water District 63.'" AR, 270. The memo explained how the accounting program counts water for the on-stream reservoir, and defined terms like "paper fill" and "unaccounted for storage," and explained additionally how the storage allocation program is used in conjunction with the accounting program. AR, 270-280. The memo concluded that "when there is natural flow in excess of demand and there is space in the reservoirs, water may be physically stored in a reservoir, but not accrued to a reservoir right because the right has been satisfied." AR, 282.

On December 16, 2014, the Director denied the pre-hearing motions, including the motions filed by the Boise Project. AR, 335-352. The Director held that a contested case was properly called and that rulemaking was not required. AR, 336-341. He held that the United States would be bound by the determinations made in the contested case. AR, 341. He denied the Ditch Companies' Motion for Reconsideration of his earlier order refusing disqualification and appointment of an independent hearing officer, denied a Motion to Stay the Proceedings pending the outcome of the late claim proceedings before the SRBA court, and denied a request for clearer definition of the issues to be addressed at the hearing. AR, 341-349.

On January 9, 2015, the Director responded to the Boise Project's request for disclosure of ex parte contacts and prior statements. AR, 385-87. He admitted that he and the Department had met with legislators, the governor's office and water users' groups to "keep them apprised of

the issues." AR, 387. He defended this action as appropriate and admitted that he had taken a position on the issues, but said that doing so did not require disqualification. *Id*. He stated that he would not disclose any oral communications, but would provide "non-privileged" written communications. *Id*. No privilege log was provided. The later posting was meager, http://www.idwr.idaho.gov/legal-actions/administrative-actions/WD63-contested-case.html, and incomplete. AR, 902-949.

At the pre-hearing conference held on August 14, 2015, the parties again moved the Director to stay the contested case, until the property interests were resolved in the SRBA late claims proceedings. AR, Tr. 8/14/2015, p. 57, l. 7-p. 59, l. 24. A five day hearing was held in August and September, 2015. AR, 618-623. After the hearing, the parties submitted post-hearing briefing to the Director on September 28, 2015. AR, 969-1146. On October 15, 2015, the Director issued a Final Order, AR, 1147-1229, followed shortly thereafter by an Amended Final Order. AR, 1230-1311.

The Boise Project and Ditch Companies filed Petitions for Reconsideration, AR, 1313-1389, which were denied by the Director in an Order issued November, 19, 2015. AR, 1401-1435. On December 17, 2015, the Boise Project and New York Irrigation District petitioned for judicial review of the agency action. AR, 1436-1449. The Ditch Companies petitioned for judicial review. These two petitions were consolidated for briefing[4] and hearing by the District Court. R, 55-59. Oral Argument was held on July 11, 2016. On September 1, 2016, the District Court entered its Memorandum Decision and Order, and Judgment, affirming in part and reversing and remanding in part, the Amended Final Order. AR, 1049-1075.

[4] Briefs are found at AR. 113-368, AR. 454-664, and AR 915-1048.

All parties' timely petitioned for rehearing. IDWR's Petition raised for the first time, the theory that "physical diversion and storage of the 'unaccounted for storage' is authorized solely by federal law[,]" attempting to justify the Director's refusal to recognize the property rights of the spaceholders. R, 1091. The district court declined to address IDWR's new federal preemption argument, stating:

> Other issues raised were not considered by the Director. For instance, the Department argues "the physical diversion and storage of the 'unaccounted for storage' is authorized solely by federal law, and determination of whether, when, and how much 'unaccounted for storage" will occur are entirely dependent upon federal flood control operations.' This argument implicates the doctrine of federal preemption. That said, the Department does not identify or cite to which specific federal law(s) it believes implicates the federal preemption doctrine, nor which specific state law(s) it believes have been preempted by federal law. Furthermore, the Director did not engage in a federal preemption analysis in his *Amended Final Order*, and this Court will not address issues not addressed below.

R, 1162 (internal footnote omitted). The district court denied the Petitions for Rehearing. R, 1161-1167. This appeal follows.

VI. ARGUMENT

The district court concluded that the paper fill accounting program can be reconciled with the prior appropriation doctrine. A review of the history of water storage and flood control operations in this basin, the water right decrees, and Idaho law reveals that the accounting program fundamentally diverges from the prior appropriation doctrine. Once appropriated, water becomes a property right of the appropriator. The Director's paper fill accounting for that water strips that property interest from the appropriator and violates Idaho's prior appropriation doctrine.

A. The Accounting Program in Plain English.

The district court's opinion provides a brief explanation of how the Department operates its paper fill accounting program. R, 1057-1058. The accounting program is not law, not a

regulation, and not published guidance. The program was not adopted under any APA procedures and it is not cloaked with any imprimatur of law. Rather, "the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user." *A&B Irrigation Dist. v. State of Idaho*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014).

Three on-river reservoirs are included in the accounting program. R, 1057. The paper fill accounting program accrues all water that flows into the reservoirs to the storage rights, except the natural flow water actually diverted by downstream seniors. R, 1058. The exception to the accrual to these storage rights is based on measuring the senior's actual diversion, not the amount the senior has the right to receive. AR, 270-282. Water which must be released for flood control under federal law is counted towards "paper fill," and is not excepted. *Id*., 274-278. Once the inflow total reaches the volume limit on the water right, "paper fill" is reached and the Director "deems" the storage right "satisfied," regardless of the physical content of the reservoir. *Id*.

After "paper fill," the program parks new reservoir inflows into a separate account called "unaccounted for storage." [5] AR, 281. This separate account was created, according to IDWR's program's author, because one cannot divert water without a water right. AR, Tr. 8/28/2015, p. 444, ll. 18-25. This part of the program accrues calculated stream flow amounts not required for other water rights to this "unaccounted for storage" account. The accounting program also records and tracks the physical content of the reservoirs on a daily basis based on data from the reservoir gauges. *Id*.

The "day of allocation" occurs when inflows to the reservoirs are insufficient to supply senior natural flow demand. AR, 281. At that point, the "unaccounted for storage" account is

[5] The district court uses the term "unaccounted for storage." R, 1065. The term "unallocated storage" is also used in the testimony and pleadings. The terms mean the same thing.

closed. AR, Tr. 8/27/2015, p. 104, l. 24-p. 105, l. 5. The Department allocates all water physically stored in the reservoirs on the day of allocation to Reclamation's storage water rights. *Id*. Whether the water accrues under the accounting program to the initial "paper fill" or the "unaccounted for storage" accounts, all water physically available in the reservoirs goes to the existing storage rights. AR, Tr. 8/27/2015, p. 215, l. 13-p. 216, l. 24. The Department then runs its storage program to allocate the total physical storage among the various spaceholders (including the Boise Project Districts) according to their contractual rights. *Id*.

The Boise River Watermaster delivers both stored and natural flow water rights to the head of the New York Canal for the Boise Project where the natural flow and stored water is diverted from the river. Each drop of natural flow and stored water is counted and tracked by the Department. AR, 274-275. Deliveries of stored water are deducted from the storage accounts of each user so the Department knows exactly how much storage is actually used and how much is carried over.[6] The Department does not track deliveries to individual headgates below the New York Canal diversion within the Boise Project conveyance system. That measuring is done by the Boise Project. AR, Tr. 8/31/2015, p. 948, l. 15-p. 949, l. 4.

B. The Paper Fill Accounting Program's Accrual of Flood Control to the Storage Rights in the Boise Violates the Prior Appropriation Doctrine.

The paper fill accounting program accrues all inflow in priority to the storage rights regardless of whether the water entering the reservoir is actually available to be stored. R, 1057. The district court concluded that this practice can be reconciled with the prior appropriation doctrine. R, 1058-1060. Under the undisputed facts and historical practices relevant to the Boise River, the conclusion is erroneous.

[6] This deduction of actual use from the storage accounts takes place after the day of allocation. Storage use prior to the day of allocation may or may not be deducted depending on whether the reservoirs actually physically fill.

The district court first states that water rights must be measured at the point of diversion. R, 1057-1059. Second, the district court concludes that the dams are structures where water is diverted and stored. *Id*. Third, the court says that junior rights can be exercised only when the junior right is in priority. R, 1059-1060. This three-legged stool is the legal foundation of the district court's decision. *Id*. If even one leg fails to support the burden of the court's logic, the entire weight of the decision falls.

Turning to the first leg, the district court states that a water right is measured at the point of diversion, *citing* Idaho Code § 42-110 and *Stickney v. Hanrahan*, 7 Idaho 424, 435, 63 P. 189, 192 (1900). R, 1058. The district court also cites *Glenn Dale Ranches Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029, 1032 (1972), for the proposition that waters should be measured at the point of diversion, not the place of use. R, 1059. The district court states that after the point of diversion, the Director loses the ability to "control," (i.e. measure and deliver) water. R, 1060.

Idaho Code § 42-110 refers to "proprietors of any ditch, canal or conduit or other works for diversion and carriage of water." It does not explicitly refer to dams. Before 2004, the title of this section was "Right of Ditch Owners to Divert Water." The 2004 amendments removed the term "ditch owners" in the title, but did not reference dams. This change was part of HB 745 which was enacted to ensure that once water was diverted <u>from</u> a natural stream, that water in the ditch or canals was the property of the appropriators and not "navigable" waters for federal jurisdiction purposes. See Statement of Purpose HB 745, 2004 Legislature. This statute does not address how to measure water diverted and stored by dams on a natural stream.

Stickney v. Hanrahan, supra, involved a dispute between diverters from Antelope Springs to determine their respective rights and priorities. No storage dam was involved. This Court held in *Stickney* that the water for these appropriators should be measured where the water is diverted

from the stream. The Court explicitly stated that the reason for measuring at the point of diversion, rather than the ultimate place of use, was to "prevent the wasting of water." 7 Idaho at 433, 63 P. at 192. Otherwise, water would have been run into dry channels where it could not be used for irrigation. *Id*. Requiring measurement at the point of diversion (now Idaho Code § 42-110) was based upon the policy of preventing waste. *Id*.

Glenn Dale Ranches, Inc. v. Schaub, *supra*, is to the same effect. This was a water rights dispute between users of a stream known as the Medini Tunnel, or J-3 Coulee. No storage dam was involved. This Court stated that waters are to be measured at the point of diversion, not the place of use. 94 Idaho at 588, 494 P.2d at 1032. This holding was based upon the need to avoid "unreasonable loss" once the water is diverted from the river, and places a duty on the appropriator to build flumes, pipes and other conveyance systems to avoid unreasonable loss or waste after the water is diverted out of the stream into the private conveyance system. *Id*.

Neither *Stickney* nor *Glenn Dale* require any particular way to measure waters stored in an on-river reservoir. These cases require measuring water to avoid waste. Here the record is clear that the storage water delivered to the Boise Project is measured at the head of the New York Canal, not at the ultimate place of use on a field. AR, Tr. 8/31/2015, p. 961, ll. 3-20. The Boise Project is responsible for the pipes, flumes and conveyances from the head of the canal to the fields. *Id*., p. 961, l. 25-p. 962, l. 13. The Director and district court have created a false dichotomy here. The Boise Project does not contend its storage use should be measured at the field headgate. The Director does not contend that accounting for all inflow to the reservoir regardless of whether it can be stored for future use is necessary to ensure that water is not wasted in a conveyance system. Rather, flood control releases provide a public benefit and do *not* involve waste. AR, 1302.

The facts of how Boise River water is actually delivered fail to support the Director's and district court's conclusions that the only measurement that matters is water entering the reservoir. In fact, quite the opposite is true. Water is measured when it enters the reservoirs. R, 1057. Every drop of water that is released from the outlet at Lucky Peak is also measured. AR, 274-275. The reservoir elevations are measured daily. *Id*. All of the water delivered to the Boise Project Districts, both natural flow and storage, is measured daily at the head of the New York Canal. AR, Tr. 8/31/2015, p. 948, l. 17-p. 949, l. 4. The New York Canal is diverted from the Boise River at Diversion Dam, located just below Lucky Peak. AR, Tr. 8/31/2015, p. 961, ll. 3-24. There are no diversions between Lucky Peak and Diversion Dam. AR, Ex. 2186, p. 4-16. The Boise Project Districts have no way to divert water that goes past the headworks of the New York Canal. AR, Tr. 8/31/205, p. 961, ll. 3-24.

The district court concluded that once the water is "diverted" into the reservoirs the Director then loses the ability to administer storage water. As water is, and historically has been, delivered in this basin to the Boise Project, this conclusion is not supported by substantial evidence. The watermaster controls all storage diversions into the New York Canal. The Director knows exactly how much storage water is used by the Boise Project by virtue of the measurements of diversions from the river to the canal.

The district court turns to this Court's decision in *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935), for the proposition that "***water distributed*** to a dam becomes 'the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use.'" R, 1059 (***emphasis added***). *Talboy* does not discuss "water distributed" by the Director. Instead, the Court stated:

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> After the water was **diverted** from the natural stream **and stored** in the reservoir it was no longer "public water" subject to diversion and appropriation under the provisions of the Constitution (art. 15, sec. 3). It then became water "*appropriated for sale, rental or distribution*" in accordance with the provisions of sections 1, 2 and 3, art. 15 of the Constitution. **The waters so impounded then became the property of the appropriators** and owners of the reservoir, impressed with the public trust to apply it to a beneficial use. A **subsequent appropriator** claiming a part or all of such waters **would be the only person who could question the lack, extent, or nature of its application to a beneficial use**.

55 Idaho at 389, 43 P.2d at 945. (**Emphasis added**).

Talboy arose from a dispute over water between two entities who were co-tenants in the same reservoir where their water was impounded. There was no question of distribution of that stored water by the Director, or how to account for inflows or flood releases. Rather, all water diverted *and* stored became the property of the owner of the reservoir. The court purposefully referenced both diversion and storage as the basis for ownership of the water. Water passed through the reservoir or released for flood control does not meet the *Talboy* test of being diverted *and* stored.

The district court also erred when it attempted to describe the relationship between the senior and junior water users on the Boise River. R, 1060. The court quoted an excerpt from Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 50 (1968), for the proposition that once a senior has diverted his water right he may not impede a junior. This quoted section does not define when a senior storage right holder has diverted or stored his right. See *Talboy*, *supra*. In the case law supporting this quote, Hutchins cites, at footnote 283, *Dunniway v. Lawson*, 6 Idaho 28, 29, 51 P. 1032, 1032 (1898), which states that the court would allow the junior to use water not needed by the seniors, "but that all rights of defendants to such water were and must remain inferior and subservient to the rights of plaintiffs [seniors]."

Hutchins also cites *Hall v. Blackman*, 8 Idaho 272, 282, 62 P. 19, 22 (1902). *Hall* holds that a senior must permit a junior to take water when he is not using it.

Hutchins goes on to say: "This is the law; but all rights of junior appropriators to such water must remain inferior to the rights of the prior appropriators for the proper and necessary irrigation of their lands," citing *Uhrig v. Coffin*, 72 Idaho 271, 275, 20 P.2d 480 (1952). Hutchins and this Court recognize that the senior is entitled to water necessary to irrigate with before the junior is entitled to its water. The case law holding that a senior cannot impede the flow to a junior unequivocally recognizes the right to the senior to have enough water to irrigate with. As this proceeding makes clear, paper fill does not provide the seniors with water "for the proper and necessary irrigation of their lands." *Uhrig v. Coffin*, *supra*.

The district court assumes that senior rights come into priority, stay in priority until "satisfied," and thereafter cannot interfere with juniors. This is not how the prior appropriation doctrine works. A senior cannot "take" water when he cannot put it to beneficial use. To do so is a "waste" of water. Rather, the senior "must permit others to use the water when the appropriator is not applying it to a beneficial use." *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 15, 186 P.3d 502, 517 (2007); *Hall v. Blackman*, 8 Idaho 272, 282, 62 P. 19, 22 (1902).

This case law means, in the context of the Boise River storage rights, that the water released from the reservoirs for flood control is water that the spaceholders cannot put to beneficial use. The Boise Project Districts do not, and cannot, put any of the flood releases to beneficial use. AR, Tr. 8/31/2015, p. 970. ll. 14-25. The water so released should be available for juniors to use under *Joyce* and *Hall*. Indeed, the Department recognized this release as "surplus" when it wrote its portion of the Water Control Manual. AR, Ex. 2186, p. 7-26. However, the paper fill accounting program does not allow a junior natural flow user to divert flood control

release water not needed by the storage right. Prior to "paper fill" and deemed "satisfaction," water released for flood control is considered to be storage water and is *not available* for junior natural flow users to take and put it to use. AR, Tr. 9/10/2015, p. 1476, ll. 16-23. The prior appropriation doctrine requires exactly the opposite of what the accounting program demands. When the senior bypasses water he cannot put to use, that water must be made available to the junior and cannot be attributed to "satisfaction" of the senior's right. Under the prior appropriation doctrine, juniors are always required to forgo use of water when needed by the senior to satisfy the senior's rights. *Dunniway v. Lawson*, *supra*; *Uhrig v. Coffin*, *supra*.

C. Counting Inflow as Satisfaction is Not Consistent with the Decrees Because the Partial Decrees Require Filling Storage Volume Based on Reservoir Elevations, Not Inflow.

The district court next concludes that the Director's decision to "satisfy" the senior storage rights based on "paper fill" of water that inflows and passes through the reservoir for flood control purposes is consistent with the partial decrees for the storage rights. R, 1060-1061. The court observes that the partial decrees establish a volume, and do not have a flow rate. *Id*. This leads the court to conclude that the reservoirs divert the entire flow, even the flow passed through for flood control, but excluding the flow needed for senior downstream rights. However, the decrees do not require or even mention counting inflow. *Id*. To the contrary, the decrees for these storage rights explicitly recognize that the volume is established by an elevation on the upstream face of the dams. AR, ON Docs, 63-303, 0090-91; 63-3613, 0060-61; 63-3614, 0305-306; 63-3618, 1599-1601.[7]

Arrowrock's water rights, nos. 63-303 and 63-3613, were decreed in 2007 with quantity elements of 271,600.00 AFY and 15,000.00 AFY. Arrowrock has two rights, one with a 1911

[7] The district court's description of the reservoir rights omits these details about the quantity element. R, 1054.

and one with a 1938 priority date (because the dam was raised to provide additional storage capacity). The quantity element of the decrees provide that "Total reservoir capacity is 286,600 acre feet when *filled* to elevation 3216 and measured at the upstream face of the dam." AR, ON Docs 63-303, 0090-91; AR, ON Docs 63-3613, 0060-61. The second right also recognizes that Reclamation can exceed the 3216 elevation (i.e. store more water) on a temporary basis during flood events or emergency operations. AR, ON Docs 63-3613, 0060-61.

Anderson Ranch's water right, 63-3614, was decreed in 2009 with a quantity element of 493,161.00 AFY. The quantity element there recognizes that the quantity is based on "The total reservoir capacity is 493,161 acre feet when *filled* to elevation 4196.0 and measured at the upstream face of the dam." AR, ON Docs 63-3614, 0305-06.

Lucky Peak's water right, 63-3618, was decreed in 2008 with a quantity element of 293,050.00 AFY. Like the other rights, the quantity element recognizes that the quantity is measured "when *filled* to elevation 3055.0 and measured at the upstream face of the dam." AR, ON Docs 63-3618, 1599-1601. Like Arrowrock, Lucky Peak is authorized to store an additional quantity above elevation 3055, up to an additional 13,950 AF for flood control purposes. *Id*.

The description of the elevation is found in the quantity element of the rights. It is not in a remark for "other provisions," but is an important element of the right itself. The decreed elevations cannot be satisfied or "filled" by counting inflows that pass through or are released for flood control. The only way the volumes on the face of the decrees can be "filled," as described in the decree, is if water is physically filled and stored to the designated elevation on the upstream face of the dam. The accounting program ignores the elevation on the face of the dam, and thus violates the decree. The district court did not address the specifics of the quantity element of the four decrees when it concluded that the Petitioners were challenging the decrees.

The Boise Project is not challenging the decrees, but asking that every element of the decrees be interpreted and enforced by the courts. The Director is either ignoring this part of the decree or interpreting it away. The Director is simply not authorized to determine what rights the right holder has obtained by virtue of the license or permit. That is the province of the Court. *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 595, 76 P.2d 923, 926 (1938).

If the Director or the State believed that measuring quantity of water "filled" under the decree based on specified elevation of actual stored water in the reservoir was wrong, the Director should not have recommended the rights and the State should have objected in the appropriate forum – the SRBA. Having failed to do so, the Director is precluded from revising the decreed rights in an administrative forum to measure the storage rights by inflow to create "paper water." *Rangen Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016).

D. <u>The Director Has Sufficient Information to Distribute "Wet" Water to the Water Users Using the Existing Data</u>.

The district court next concludes that the irrigators' objections to the paper fill accounting system should be rejected because the Director has no way of knowing what happens to waters after they are distributed to the reservoir. R, 1061. This conclusion is directly at odds with the facts and the law. The Director is not charged with delivering "paper water." Paper water cannot be put to beneficial use. It cannot be used to grow crops. It is purely an accounting fiction. The Director "simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user." *A&B Irr. Dist. v. State*, 157 Idaho 385, 395, 336 P.3d 792, 801 (2014). By "distributing" "paper water" the Director is violating that obligation.

The Director does not even pretend that he is delivering actual "wet" water under his accounting system. He merely contends he does not know how. Nonsense. The Director knows what the demands of the seniors are. He knows how much water is released from the reservoir.

The flood control releases are readily calculable. He knows the reservoir elevation. He knows exactly how much water is diverted into the New York Canal for use by the Boise Project Districts' landowners. It might be hard to balance water right accounting with flood control, but it is not impossible. The Director is required by law to have technical expertise, Idaho Code § 42-1701(2), and is required to make careful measurement of all stream flows. Idaho Code § 42-1706. If it were easy anyone could administer water rights. "Too hard" is not an excuse to deny irrigators their water.

The district court's conclusion that the Director "cannot" distribute water unless he uses a "paper fill" approach is not supported by substantial competent evidence. In fact, the record clearly demonstrates that the watermasters had no trouble filling the reservoirs after flood control releases and distributing storage water to the irrigators in the Boise for decades before anyone ever dreamt of paper fill. AR, Tr. 8/31/2015, p. 845, ll. 21-856, l. 24; AR, Ex. 2008.

E. <u>The Federal Government is Not Granted Greater Control Over Flood Control by Protecting the Spaceholders Right to Fill the Reservoir</u>.

The district court expresses concerns that failing to accrue flood control against the storage rights would cede control of water right administration to the federal government. R, 1062. It does not. Water released for flood control is released to benefit the public and prevent the City of Boise from suffering for the kind of disastrous floods the Valley has previously experienced. S. Stacy, *When the River Rises*; see also *Utah Power & Light v. Kunz*, 117 Idaho 901, 792 P.2d 926 (1990). Any water passed through is not diverted *and* stored by the reservoirs, but legally is available to be diverted by any junior user (although is not actually available under the paper fill program). AR, Ex. 3012; *also see* AR, Tr. 9/10/2015, p. 1476, ll. 5-23.

The current system of flood control in the Boise is governed by the 1985 Water Control Manual. AR, Ex. 2186. This Manual is a modification of the 1956 Flood Control Manual. The

Department requested revisions to the 1956 Manual to provide for greater flood control releases early in the season and "greater assurance of refill." 1974 Report. AR, Ex. 3001. The Department worked hand-in-glove with the Corps and Reclamation to refine the methodology to anticipate runoff and to evaluate or leave open reservoir space so that the reservoirs can capture runoff after flood control releases to maximize storage. The Department "blessed" this approach.[8] AR, Tr. 8/28/2015, p. 459, ll. 11-24. The Manual would not have been approved without the Department's input and concurrence. AR, Tr. 8/28/2015, p. 459, l. 25-p. 460, l. 7.

The Department's role in drafting the Water Control Manual is an example of cooperative federalism where both the state and federal government work together to jointly maximize their respective responsibilities over flood control and water storage. That was then. The Department defined the flood control releases as "surplus" to the system. AR, Ex. 2186, p. 7-26. Today, the Director has a new idea. He wants to charge the storage holders with flood releases, make the refill water unappropriated, forbid the storage right holders from having a property interest in that reservoir fill and from preventing others from taking water that has throughout history been used for filling the storage water rights, and then making the refill water available to other potential appropriators.

The Director contends that his paper fill accounting rule is necessary to prevent Reclamation from dumping too much water down the river under the guise of flood control. Yet, the only actual complaints that have ever arisen is that the federal government errs on the side of not releasing enough storage and risking flooding. AR, Ex. 2131. In any event, the Director admits that the federal government's flood control obligation is independent of irrigation storage.

[8] The Director complains that the Department's blessing of the program does not make it a party to the Manual. AR, 1241. Party or not, the Director should not be allowed to wave his hand and dismiss the years of hard work and cooperation, and the Department's own draftmanship.

The accounting program does not alter the government's flood control obligations. *See* Director's Motion to Alter or Amend. R, 1089-1119. Rather "paper fill" is an effort to strip the water users of any property interest in that water, contrary to "long-standing" practice. R, 1068.

F. The District Court Must Consider the Historical Context of Water Use on the Boise River in Evaluating the Paper Fill Accounting Program.

The district court wrongly dismissed the irrigators' reliance on historical "documents other than the partial decrees." R, 1063. The court concluded that none of the historic records, including the MOA for flood control operations, the spaceholder contracts, the water control manuals and other "various private agreements" were relevant. *Id*. This is not correct. The State and Department were intimately involved in and directed the outcome of these agreements. AR, Ex. 2053, pp. 1647-1673. Indeed, the Department "blessed" the 1985 Water Control Manual. AR, Tr. 8/28/2015, p. 459, l. 20-p. 460, l. 7.

Importantly, the district court's conclusion is directly contrary to this Court's holding that "when a storage right is filled presents a mixed question of fact and law." *A&B Irr. Dist. v. State*, 157 Idaho 385, 392, 336 P.3d 792, 799 (2014). *Basin Wide 17* came before this Court on the legal issue of how a storage right was filled and whether a remark authorizing storage rights to refill was necessary. *Id* at 387, 336 P.3d at 794. The district court held that it would not address when the quantity element of a water right was "filled," because the factual inquiries relating to individual reservoirs do not lend themselves to a basin-wide review. *Id* at 388-89, 336 P.3d at 795-96. This Court agreed with the Boise Project that a factual record was necessary. *Id* at 392, 336 P.3d at 799. This Court recognized that the history was complex and needed to be fully developed.

The record was developed in this proceeding and before the SRBA Court on the late claims. These documents provide an important foundation for the historical record that was

required to be developed. They were not offered to contradict the partial decrees. They were offered to show why the paper fill accounting program was not consistent with the historic operations and understandings in the Boise. Yet, the district court said this historic record was irrelevant. How water was released and filled the reservoirs is developed in detail in these agreements and manuals. There is no dispute of fact that they form an important part of the understanding of reservoir operations. They are directly on point. The district court's holding simply cannot be reconciled with this Court's *A&B* directive. The decision should be reversed. *Mac Tools, Inc. v. Griffin*, 126 Idaho 193, 199-200, 879 P.2d 1126, 1132-1133 (1994).

G. The Director's Decision Violates this Court's Directive in *Basin Wide 17*.

This Court recognized in *Basin Wide 17* that the Director has discretion in determining how to measure when a water right has been satisfied. *A&B Irrigation Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014). However, *Basin Wide 17* does not vest the Director with any legal authority to declare the law, nor does he, as an engineer, have that legal authority. *Twin Falls Canal Co. v. Huff*, 58 Idaho at 595, 76 P.2d at 926. The Director must deliver water in accordance with the prior appropriation doctrine. Idaho Code § 42-602. "This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law." 157 Idaho at 393, 336 P.3d at 800.

This Court balanced the duties of the Director and the rights of the water users, and stated: "In short, the Director simply counts how much water a person has **used** and makes sure a prior appropriator gets that water before a junior user." *Id*. at 394, 336 P.3d at 801 (**emphasis added**). Which accounting method to employ is up to the Director. But "[t]he decrees give the Director a quantity he must provide to each water user in priority." *Id*. This is straight-forward. Provide the water user water the water he can use in priority.

To "use" something requires that it be put to use or even "consumed." *American Heritage Dictionary* (1969). Available means "accessible" or capable of being put to use. *Id*. Indeed, the district court recognized that storage water filling the reservoirs after flood control was "ultimately used by the irrigators for irrigation." R, 1067. In this context, "use" means to actually use for irrigation. The paper fill program does not attempt to count the water that storage right holders have actually "used" or even have available to be used. However, the Director does count water diverted into the New York Canal where it is delivered to the Districts' water users to put to beneficial use. Counting water that is "used" does not allow the Director to account for water that is not "available" to be "used" because of mandatory flood control releases. Since the prior appropriation doctrine requires measurement of water "used" by the senior, as *Basin Wide 17* holds, then the Director has failed to follow the law and his decision cannot be upheld.

The district court did not determine that the "paper fill" accounting program actually measures water used by the storage right holders, as required by *Basin Wide 17*. As applied to water released to protect the property along the Boise River from flood damage, it clearly does not measure water "used" by the senior. Hence, the Director's paper fill accounting, and the district court's decision upholding that part of the paper fill accounting, as applied to flood releases, violates the law and must be overturned.

H. The District Court Correctly Concluded that the Unaccounted for Storage Provisions of the Accounting Program are Not Consistent with Idaho Law or the Prior Appropriation Doctrine.

Both the district court and the Director acknowledge a "long-standing" and "historic" practice of diversion and storage of water behind the dams following flood control releases. R, 1067, *citing* AR, pp. 1296, 1298 and 1305. This practice was memorialized in the 1954 contracts, the 1956 Flood Control Manual, the Department's 1974 Report, the 1985 Water Control Manual,

and “blessed” by the Department. AR, Exs. 3026, 2104, 2182, and 2186. It is undisputed that water filling the reservoirs following flood control was stored and delivered to the spaceholders. R, 1068. “The record establishes that flood control years and resulting flood control releases occurred many times before 1971, and that in all those years, water identified by the Director as unaccounted for storage was diverted, stored and ultimately used by the irrigators for irrigation.” R, 1067. This conclusion is supported by substantial competent evidence.

These undisputed facts establish that the paper fill accounting program deprives the storage right holders of any protectable right to water filling the reservoirs they have received and are entitled to receive. In so doing, the paper fill program violates the prior appropriation doctrine and Idaho law.

The Director attempts to excuse “paper fill” accounting by creating an “unaccounted for storage” account, but in so doing, he refuses to recognize the storage right holders’ property interest in the water stored in the reservoirs. The “unaccounted for storage” account is a fictitious account for a non-existent water right. The Director remains adamant that the storage right holders have no water right at all to fill the reservoirs following “paper fill” and flood control releases. AR, 282. The Director wants the ability to parcel out water to juniors and future users, which is the same water that has admittedly filled the storage water rights under “longstanding” and “historic practices.” R, 1067.

The district court properly held that this fictional “unaccounted for storage” account does not comport with Idaho law. R, 1065-1067. The account was created because the author of the program knew that water could not be stored without a water right. AR, Tr. 8/28/205, p. 444, ll. 18-25. Idaho law is clear that he was correct. Idaho Code § 42-201(2); R, 1066.

Water in this "unaccounted for storage" account is ultimately allocated to the reservoir storage rights on the "day of allocation." If a second account were to be used to track water stored under the storage water right, then that account would have to accrue the water to the account under the priorities of the water rights. But the Director refuses to do so, citing his "paper fill is satisfaction" rule. Instead, the Director purports to track water to an account which he contends is not linked to any a water right. This approach violates Idaho Code § 42-201(2). R, 1067.

The district court's solution was to recognize a beneficial use right through the late claims in the SRBA. The Director and State disagree. They continue to oppose any recognition of any property interest in the water filling the reservoirs after paper fill. R, 1161-1167. The Director recommended that the late claims be disallowed. The State, utilizing the Department as its witnesses, has fought recognition of any water right tooth and nail. See *Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master*, Subcase No. 63-33732, et al. (Sept. 1, 2016). The Director's *Notice of Appeal* in this case makes it clear that the Director's goal is to prevent "interference with existing or future diversions" of water that would otherwise fill, and that historically has filled, the reservoirs after flood control. R, 1347. Paper fill accounting is just one part of the Director's orchestrated effort to deprive the water users of their "long-standing" property interests.

The district court correctly recognized that the accounting program violates the storage right holder's property rights. However, the historic record and long-standing practice reveals this water has been, and should continue to be, accrued to the existing storage rights.

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I. The One-Fill Rule Accounting Program for Basin 63 is a Rule that was Not Properly Promulgated Under the APA's Rulemaking Procedures and is Therefore Invalid.

The first procedural question this Court must face is whether the Director's "paper fill" rule is a rule that has to be promulgated under the rulemaking provisions of the APA, or whether it can be adopted without notice and comment and years later imposed on the parties in a contested case. Given the far reaching effect of the Director's "paper fill" rule, that rule clearly must be promulgated by notice and comment rulemaking, where it can be subject to legislative review. Idaho Code § 67-5291.

The Director does not want to engage in rulemaking for delivery of water in priority, contending it is unduly restrictive and ties his hands. This position is contrary to Idaho law which explicitly recognizes that rulemaking is particularly appropriate for the Director's supervision of water distribution. Idaho Code § 42-603 expressly authorizes the Director to promulgate rules and regulations necessary to carry out the laws and deliver water in priority. The Director's contention that rulemaking is unduly restrictive to guide his duties in delivering water is not consistent with Idaho Code § 42-603.

In any event, an agency pronouncement is a rule if it displays the characteristics of a rule, regardless of whether rulemaking was undertaken. *ASARCO Inc. v. State*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003). Such an agency pronouncement, if not properly promulgated, is invalid. *Id*. at 725, 69 P.3d at 145.

The district court concluded that "[t]his matter lacks wide coverage," and therefore it was not a rule. R, 1072. This conclusion is not supported by substantial evidence and is contrary to law. The district court stated that the accounting program and the paper fill/one-fill rule affects only four water rights. R, 1071-72. The Director did not initially think so. The Notice of Contested Case was not served just on the holders of four water rights (nos. 63-303, 63-3613, 63-

3614 and 63-3618), it was served on 710 water right holders in Basin 63. AR, 2-33. The Director told Trout Unlimited that it, along with the feds and everyone else, would be bound by his decision. Tr. 10/7/14, p. 43, l. 7-p. 44, l. 1. Suez admits "this case is bigger than these four water rights." R, 582. The Department's *Notice of Appeal* makes it clear that the case affects *all* junior and future rights in the Boise. R, 1347 (citing the need to protect "existing or future diversions"). No one really believes this rule applies only to four water rights. It directly affects all water use in the basin. Therefore, the district court's labeling of the proceeding as "particular" rather than "general" is not supported by substantial, competent evidence from the facts and record in the case. R, 1013.

Idaho Code § 67-5201(19) defines a rule as "the whole or part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter that implements, interprets or prescribes (a) Law or policy; or (b) the procedures or practice requirements of an agency." This Court in *ASARCO, Inc. v. State of Idaho,* 138 Idaho 719, 69 P.3d 139 (2003), defined Idaho Code § 67-5201(19) by holding that a rule had "(1) wide coverage, (2) [is] applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy." *Id*. at 723, 69 P.3d at 143. The accounting program meets all of these requirements.

The accounting program implements what the Department calls a "one-fill" or "paper fill" rule for all of the water that enters the on-stream reservoirs in Basin 01 and Basin 63, and indeed, statewide. A program that accounts for the vast majority of the water supplied to irrigated farmland in the southern and eastern part of the State of Idaho cannot be arguably described as having only a particular applicability. R, 1072. The Notice of the Contested Case

was directed to every water right holder in Basin 63. AR, 1. At the hearing, the Department and Suez called upon former directors to defend the "paper fill" rule. They all testified that the one-fill satisfaction rule was a statewide rule originating in the Upper Snake and then applied in the Boise. AR, Tr. 8/27/2015, p. 245, l. 17-p. 246, l. 20; AR, Tr. 8/28/2015, p. 277, l. 9-p. 279, l. 25; AR, Tr. 8/31/2015, p. 658, l. 3-p. 659, l. 6 ("rule" established in 1977). This one-fill/paper fill rule has even wider coverage than the TMDL found to be subject to rulemaking in *ASARCO*, where the "wide coverage" prong was satisfied because the TMDL applied to all current and future dischargers in a specific water body in the Basin, just as the Director's accounting program applies to the entire Boise River and all water users in Basin 63. *ASARCO*, 138 Idaho at 723, 69 P.3d at 143. It is clear that the one-fill satisfaction rule of the accounting program is applied generally and uniformly wherever storage accounting is undertaken.

The district court also concluded that the six *ASARCO* "characteristics are listed in the conjunctive, so the lack of one seals the deal." R, 1072. This is an incorrect reading of the law. In *ASARCO*, this Court expressly stated that the six factors represented "characteristics of agency action indicative of a rule." 138 Idaho at 143, 69 P.3d at 723. The six part test looks at "factors" that the district courts are to consider. *Id*. They are not *sine quo non*. Nothing in *ASARCO* supports the conclusion that "the lack of one seals the deal." R, 1072. This Court has expressly held that the absence of one characteristic "is not determinative" in whether an agency action is a rule. *State v. Haynes*, 159 Idaho 36, 45, 355 P.3d 1266, 1275 (2015). Thus, an agency action that lacked one characteristic was still held to be void under the *ASARCO* test. *Id*.

The district court's conclusion must be reversed on this ground alone. The court says it is "arguable" whether the other factors are met, but does not dispute that they are. R, 1072. That is because those other factors are satisfied. Factor two is whether the standard is applied uniformly.

Here the Director brooks no deviation, as shown from the cross-examination of the Basin 63 Watermaster. AR, Tr. 8/31/2015, p. 903, l. 8-p. 904, l. 18. The third factor is future application. *ASARCO* says this factor means that the action "does not adjudicate past actions." 138 Idaho at 724, 69 P.3d at 124. Clearly this was not such a proceeding. The fourth factor is that it prescribes a legal standard not in the statutes. *Id*. There can be no doubt that the Director is prescribing a "one-fill" "paper fill" standard and that such a standard is not found in any statute, law or regulation. *A&B Irr. Dist. v. State*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). Fifth, is the rule an expression of new agency policy? *ASARCO*, 138 Idaho 724, 69 P.3d at 124. It certainly came as a surprise to the water users who first heard of it when the one-fill issue arose in Basin 01. *A&B Irr. Dist.*, *supra*, 157 Idaho at 388, 336 P.3d at 795. Prior to implementation of the accounting program there was no such thing as "unaccounted for storage" or "paper fill," and so it was applied prospectively in the Boise River Basin since its adoption. Sixth, does the standard implement law? *ASARCO*, 138 Idaho at 725, 69 P.3d at 125. There is no doubt that this one-fill/paper fill rule is intended to carry out the Director's statutory duties to administer water. *A&B Irr. Dist.*, 157 Idaho at 393, 336 P.3d at 800. The Director claims that the accounting program is "directly related to the Director's exercise of his technical expertise and his statutory authority and discretion to distribute water to, and regulate diversions by, the federal on-stream reservoirs in Water District 63," based on Idaho Code §§ 42-602-42-619. AR, 338. Clearly, then it does.

The one-fill/paper fill rule was not adopted as required by law. A rule not adopted in conformance with the APA is void. Idaho Code § 67-5231. *Sons and Daughters v. Lottery Comm'n*, 142 Idaho 659, 663, 132 P.3d 416, 420 (2006); *ASARCO*, 138 Idaho at 725, 69 P.3d at 145. The accounting program meets all of the qualifications of the *ASARCO* test, and was improperly adopted without the necessary rulemaking. The decision must be reversed.

J. The Contested Case Proceeding Violated the Idaho Administrative Procedure Act, and the Parties' Due Process Rights.

The contested case proceeding gave rise to so many procedural violations of the APA in support of the Department's unrelenting effort to shore up or defend its paper fill accounting rule, that the Director's decision must be reversed; and to the extent that the district court authorized these procedures, that decision must also be reversed.

The district court brushed aside the many procedural deficiencies to reach the merits of the paper fill accounting program. R, 1069-74. This Court has the opportunity on remand to pass on all issues of law presented in this appeal as necessary for final determination of the legal issues. Idaho Code § 1-205; *Cassia Creek Reservoir Co. v. Harper*, 91 Idaho 488, 491, 426 P.2d 209, 212 (1967). The fundamental procedural errors involve issues that will continue to arise in the future if this Court does not provide direction to an unrepentant agency that will not change unless directed to do so by this Court.

1. The Procedural Morass

At the first status conference the Director acknowledged that "[t]his is a status conference for a contested case that the Department of Water Resources and the Director initiated that nobody likes." AR, Tr. 12/6/2013, p. 4, ll. 10-12. In this same conference, counsel for the Director admitted that the purpose of the contested case was to create a *post hoc* record because no record had been created when the paper fill accounting program was adopted, no explanation of the basis for the one-fill rule had ever been articulated, and it was necessary for the Director to document the Director's decision. AR, Tr. 12/6/2013, p. 26, l. 21-p. 27, l. 19. In Basin 63 the Director engaged in no outreach to the water users, had no discussions with them about how their water rights would be filled, or how an accounting program would mesh with the Water Control

Manual. The Basin 63 water users were not told about the effect of this paper fill program. AR, Tr. 9/9/2015, p. 1038, ll. 6-25, p. 1074, ll. 2-14, p. 1184, l. 15-p. 1185, l. 3.

To document the rule the Director requested a staff memorandum, "explaining: (1) how and why water is counted or credited to the water rights for reservoirs in Basin 63 pursuant to the existing accounting methods and procedures; and (2) the origin, adoption, and development of the existing accounting methods and procedures in Water District 63." AR, 94-96.

Trout Unlimited objected to a contested case that no one petitioned for. AR. Tr. 10/7/14, p. 43, ll. 3-11. The Director responded, stating he would conduct his own contested case whether anyone participated or not and that they would all be bound by his decision, stating "you can join the feds and the others in taking whatever comes out of the contested case." AR, Tr. 10/7/14, p. 43, l. 19-p. 44, l. 1. The Director also advised the parties that the contested case would proceed even if none of the parties agreed to participate. *Id*., p. 50, ll. 4-24.

The Ditch Companies had filed a Motion to Disqualify the Director from acting as the hearing officer. AR, 100-108. They alleged that the parties were entitled to seek disqualification as a matter of right, under Idaho Code § 67-5252, as a result of the Director's appearance of bias, prejudice, interest in the outcome, and substantial prior involvement relating to the ultimate issue to be determined in the case. *Id*. The Director denied the motion, asserting that as the agency head he cannot be disqualified without cause. He refused to disqualify himself for cause, or otherwise. AR, 132-141.

The Boise Project filed a Motion to Dismiss the Contested Case and Initiate Rulemaking, on the grounds that the Director's Notice describing the issues the Director intended to resolve matched the requirements set out in *ASARCO*, such that rulemaking would be required. AR, 208-221. The Boise Project objected that any final order by the Director would not bind Reclamation

as an indispensable party, this contested case was an inappropriate forum to fashion a *post hoc* record for the 1986 accounting program, and that the contested case was not a properly contested case under the Department's rules, and it violated the due process rights of the parties to an open forum, and that the outcome of the proceeding appeared to be preordained. AR, 208-221.

The Ditch Companies thereafter filed: 1) a motion to reconsider the Director's determination not to disqualify himself; 2) a motion for disclosure of all ex parte communications between the Director and IDWR; 3) a motion to dismiss or stay the proceedings pending the outcome of the SRBA claims; 4) a motion to further define the issues in the contested case; and 5) a motion to modify the scheduling order. AR, 255-267. New York Irrigation District, Pioneer Irrigation District, and the City of Boise joined. AR, 236-254.

On December 16, 2014, the Director denied all of the pre-hearing motions. The Director held that rulemaking was not required, asserting that anything to do with distributing water was beyond the scope of rulemaking. The Director asserted that the McCarran Amendment was inapplicable, and that Reclamation (the holder of legal title) was not a necessary party but would be bound by the outcome. AR, 335-352. He claimed the authority to call a contested case *sua sponte*, and refused to dismiss or stay the proceedings to allow the SRBA court to resolve the property interest in the water rights raised in the late claim subcases, contending that this Court's *Basin Wide No. 17* decision required him to proceed. *Id*.

Procedural irregularities continued to litter the contested case proceedings. On June 19, 2015, the irrigators identified their expert witnesses. AR, 628-640, 645-677. IDWR, identified its own employee as an expert witness relying on the November 4, 2014, Staff Memorandum for her expert testimony. AR, 641-644. In doing so, IDWR made it clear that IDWR was an adverse

party in the contested case.[9] IDWR listed four witnesses: Ms. Cresto, former Directors Dunn and Tuthill, and Mr. Robert Sutter, the author of the accounting program and the 1974 Report. AR, 691-701. The Department's disclosure identified a handful of specific documents, but included expansive categories of documents that it claimed "may be made part of the record." AR, 692. The Department did not explain how it intended to use this wide-ranging variety of evidence.

The irrigators filed *Irrigation Entities Joint Notice of Issues for Pre-Hearing Conference*. AR, 869-883. These issues included who carried the burden of proof, what was in the agency's record, and whether the Director considered IDWR a party to the case given that it intended to call witnesses and introduce exhibits. *Id*. The Irrigation Entities pointed out that "[i]f the Department is a party to this proceeding, Procedure Rule 157 limits the agency's participation to 'agency staff' only." AR, 875. The irrigation entities again requested identification and disclosure of "any and all *ex parte* communications between the Presiding Officer (or his identified counsel, Garrick Baxter) and IDWR (including IDWR counsel, whether embedded within the agency itself, or housed in the larger Idaho Attorney General's Office) under Procedure Rule 417 given the Department's party status in this proceeding." *Id*. No such disclosures were provided.

The Irrigation Entities protested that identifying entire classes of documents, such as all Water District 63 accounting black books dating back to the 1930s, as well as entire backfiles for numerous water rights, placed an impossible burden on them to prepare for the contested case. AR, 872-873. IDWR made no attempt to identify what part of the files would be used or for what purposes. The Irrigation Entities requested that, rather than refer to entire categories of documents, the Director had to identify the specific documents that he intended to officially

[9] Not coincidentally, Suez adopted the Department's expert as its own, AR, 752-756, further demonstrating that the Director and Department had already taken sides.

notice. The Director refused, instead relying on the Department's website. AR, Tr. 8/14/2015, p. 33, l. 12-p. 39, l. 25.

When asked about the burden of proof, the Director stated: "I don't see that it carries the same burdens that an adversarial contested case carries." AR, Tr. 8/14/2015, p. 48, ll. 17-20. What burdens the parties had was never explained. The Irrigation Entities challenged the role of the Department in the contested case proceedings, in particular, who was advising the Hearing Officer and who was representing the Department. Mr. Baxter confirmed that he would represent both the Department and the Director in his capacity as presiding officer. AR, Tr. 8/14/2015, p. 49, l. 11-p. 50, l. 11. The parties renewed their objection to the Director acting as the hearing officer in the contested case, but he simply relied on his prior ruling. AR, Tr. 8/14/2015, p. 55, l. 20-p. 56, l. 12. They again requested a stay of the proceedings, asking the Director what urgency there was to the hearing that justified forcing the participants into costly dual track proceedings. The request was denied. AR, Tr. 8/14/2015, p. 57, l. 21-p. 58, l. 3.

The Director stated that the scope of the proceeding was narrow and "shall focus on how water is counted or credited toward the fill of the three federal on-stream reservoirs on the Boise River." AR, 892. He further stated that evidence of historic practices or water right administration was not something he wanted to hear, stating that "[m]uch of the information sought to be introduced by the Irrigation Entities is likely irrelevant to this proceeding." *Id*.

The Boise Project had repeatedly requested that the Director and Department disclose all *ex parte* communications, but as of the date the hearing began, very little had been provided. The Director posted some documents on the website but refused to identify all his communications on the topic of "paper fill." In fact, the Director stated that it "not only [was] not possible to provide such oral communication, it [was] not necessary." AR, 387. The Boise Project submitted

statements the Director made to the Idaho Legislature's Natural Resources Interim Committee at a meeting held September 17, 2014. AR, 902-949. There he was recorded as stating:

> Director Spackman went on to say that there would be risks to resetting the satisfaction of the right downward to equal the physical storage. Those risks include increasing the water reliability for some spaceholders while diminishing the rights of other spaceholders and those holding junior priority water rights. It would also upset the historical deliveries of water, although this would vary from basin to basin. Another risk is that it would allow the Bureau of Reclamation and the larger federal government to have greater control over flood control releases without consequences, including flood control for downstream interests or to satisfy treaties…. He said that a further risk is that it may change the respective strengths and weaknesses of legal arguments of ground water and surface water users in the ongoing conjunctive management calls. He stated that this currently appears to be a major impediment to the settlement of the fill/refill issue.

R, 911.

This presentation confirmed that the Director had been publicly stating that he did not want to change the status quo for political reasons. It was clear "that the State and Department's attorneys seem to think that this contested case proceeding is all about <u>defending</u> an existing accounting regime, for which there is no adequate record, rather than establishing a full and fair hearing for the space holders." AR, 47. Indeed, the Attorney General told the SRBA court that the Department and Director "must be given an opportunity to fully participate ***in developing the record and to defend their water right administration and accounting methods***." (***Emphasis added***). AR, 41-50. The Director had also told the television news that "the issue" in the contested case was Reclamation's inability to predict flood control needs. AR, 904. Why an impartial hearing officer would appear on television immediately before the hearing to challenge Reclamation in advance of a hearing on Reclamation's water rights was never explained.

The contested case commenced on August 27, 2015, when the Director, for the first time, referred to the proceedings as a "fact finding" hearing. AR, Tr. 8/27/2015, p. 7, ll. 8-15. The

Irrigation Entities raised their continuing objections to the Director, presiding as the hearing officer, the fact that no party, aside from the Director, wanted the contested case to go forward, the fact that the issue to be decided as a result of the contested case was still not clearly defined, the overbreadth of the documents that were potentially a part of the record, and the participation of the Department's counsel as counsel for both the Hearing Officer and for the Department. *Id*., p. 19, l. 1-p. 49, l. 25.

During the hearing, the Director stated that the Department's prior evaluation of flood control operations, with a goal of refilling the reservoirs for irrigation supplies, was not relevant to how water filling the reservoirs after flood control should be attributed. AR, Tr. 8/28/2015, p. 420, l. 19-p. 421, l. 11. Consistent with his August 24, 2015 Order, the Director considered the Irrigation Entities' evidence and testimony "irrelevant" to his attempt to "defend" the paper fill accounting program. Apparently angered by how the "paper fill" accounting program had been used by the Watermaster, the Director had taken a personal interest in the testimony in a way that an independent hearing officer, who was not 'defending' his own administrative accounting program, should not. AR, Tr. 8/31/15, p. 904, ll. 11-18.[10]

Following the Watermaster's testimony, the Director called for a break and took IDWR employees, Cresto and Weaver, and the Attorney General's representative behind closed doors, which again illustrates a lack of impartiality. Upon questioning, the Director revealed that he went to IDWR's offices to look for evidence that the Department and the parties had not identified or offered, asserting that he would take judicial notice of what he was looking for,

[10] This exchange illustrates the Director's inappropriate insistence on treating the accounting program, and the "paper fill" concept, as binding on the watermaster and the water users rather than a guideline. Nothing had ever been promulgated establishing these concepts. It was at best an unwritten "policy." Policies not adopted pursuant to the APA "do not have the force and effect of law." *Krinitt v. Idaho Department of Fish & Game*, 159 Idaho 125, 357 P.3d 850 (2015).

asserting that the watermaster should have been making certain reports. Tr. Vol. III, p. 942, l. 25-p. 944, l. 20.[11] He later rejected the Watermaster's testimony. AR, 1273-74 and AR, 1405-06 (explicitly questioning the Watermaster's credibility).

On the last day of the hearing, Ms. Cresto, the Department's employee and witness, admitted that she, counsel, and the Director had met throughout the hearing multiple times to discuss the evidence and testimony off the record. When Ms. Cresto was called as a rebuttal witness, she was asked on cross-examination whether she had conferred with the Director or other Department staff concerning the substance of her testimony, to which she responded, "I don't believe so." AR, Tr. 9/10/2015, p. 1562, l. 13-17. On re-direct, a different response was came out:

> MR. BAXTER: First, Ms. Cresto, you were asked a question about conversations between you and the Director. My recollection is you answered no, that conversations weren't with the Director. Is that right, you answered that no?
>
> MS. CRESTO: Correct.
>
> MR. BAXTER: And at the time was it your understanding that you answered that no not because there were not conversations between you and the Director, but because those conversations included your attorney, and you thought those conversations might be attorney-client privileged communication?
>
> MS. CRESTO: That's correct.
>
> MR. BAXTER: Okay. So let's just clarify the record. Has the Director sat in or has he had conversations with you, listened to conversations with you about your testimony?
>
> MS. CRESTO: Yes.
>
> MR. BAXTER: Do you recall the extent of those – that participation?
>
> MS. CRESTO: Some, yeah.
>
> MR. BAXTER: And to the extent of that, can you describe that.
>
> MS. CRESTO: General conversations about – just in general about the

[11] The watermaster reporting form referenced in this exchange is not one of the documents provided in the administrative record, and whether the Director consulted or relied on it is not revealed in the record as he does not discuss the form in any of his Orders. Moreover, what was discussed in this off the record meeting with Department employees was never disclosed as required by law. Idaho Code § 67-5253.

> proceedings or – or, you know, we talked about this [indicating] and whether or not we thought that that was –
>
> MR. BAXTER: When you're saying 'this,' you're pointing to –
>
> MS. CRESTO: -- this analysis. To Exhibit 9, the table.

AR, Tr. 9/10/2015, p. 1585, l. 10-1586, l. 15. Counsel then asked Ms. Cresto whether, during the course of the contested case proceedings, she had had multiple conversations with the Director concerning the subject matter of the proceedings, and the evidence presented during the course of the proceedings. She answered, "Yes." *Id*., p. 1588, l. 25-1589, l. 10.

The totality of these irregularities were overlooked by the district court, and where he did address the question the district court summarily affirmed the actions of the Director.

2. The Director Has No Authority to Call A Contested Case Under Idaho Code § 42-602, Where there are No Adverse Parties, and No Proposed Order

Idaho Code § 42-602 authorizes the Director to determine how to account for water pursuant to the prior appropriation doctrine, but it does not excuse compliance with the Idaho Administrative Procedure Act. R, 1068-1069. Here the Director initiated proceedings by issuing a Notice of Contested Case. IDAPA 37.01.01.104, states that formal proceedings:

> ….must be initiated by a document (generally a notice, order or complaint if initiated by the agency)[.] 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[.]

IDAPA, 37.01.01.104. Yet, no proposed order that would become final in the absence of further action was issued. AR, Tr. 8/27/2015, p. 21, ll. 1-22. No parties had requested that the Department initiate a contested case through a protest or request for declaratory relief. Instead, the Department called a contested case to create a *post hoc* record for the accounting program that was imported into the Boise from Basin 01, without notice to the water users, in 1986. AR, 2-33.

None of the participants in the case meet the administrative definition of a "party." The Boise Project was not an Applicant/Claimant/Appellant under Rule 151 because it did not "seek any right, license, award or authority from the agency." IDAPA, 37.01.01.151. The Boise Project did not file any petition or "ask the agency to initiate a contested case," and hence, is not a Petitioner under Rule 152. IDAPA 37.01.01.152. The parties hailed before the Director in this contested case repeatedly sought to have it dismissed. AR, 208-221. Indeed, the Director recognized that "nobody" wanted him to call the contested case. AR, Tr. 12/6/2013, p. 4, ll. 10-13.

Appellants were not charged with a complaint and are not Complainants or Respondents under Rules 153 or 154, nor did they oppose an application or claim, and are not Protestants under Rule 155. IDAPA 37.01.01.153-155. Appellants responded to the Director's demand that they take part, because the Director announced that everyone would be bound by his decision, even if no one participated in the proceedings. AR, 1, 41-50, and 344. A contested case is analogous to a judicial proceeding. Allowing the agency to initiate a contested case and inviting all Basin 63 water users to participate would be like a court determining it wanted to decide an issue and inviting people to provide testimony regarding an issue the court described.

The district court held that the Director could call a contested case of his own accord because he had a duty to distribute water, *citing* Idaho Code § 42-602 and IDAPA 37.01.01.104. Idaho Code § 42-602 says nothing about APA procedures or contested case proceedings. Rule 104 allows the agency to initiate a formal proceeding by issuing an "informal determination that will become final in the absence of action by the person to whom the correspondence is addressed." IDAPA 37.01.01.104. No such writing was provided. The Director simply said that he wanted to hear concerns about the accounting program. AR, 2-33. In fact, the basis for the

Basin 63 accounting program was largely unknown, even to the Department. *Id*. Since Rule 104 was not complied with, it cannot justify a contested case. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 154 Idaho 652, 301 P.3d 1270 (2012).

3. It Was Prejudicial Error for the Director to Refuse to Disqualify Himself from Acting as the Hearing Officer. Sitting in that Capacity Violated IDAPA and the Parties Due Process Rights

a. The Idaho APA Violation

The Director was asked on multiple occasions to disqualify himself and to appoint an independent hearing officer. On each occasion he refused, insisting on hearing the case himself. Instructive is the first such motion filed by the Ditch Companies. AR, 100-106. The motion asserted that the Director could not sit as a hearing officer under Idaho Code § 67-5252, because of bias, prejudice and "substantial prior involvement in the matter." AR, 102 (emphasis in original). The motion stated that the Director and Department had been "advocating and/or participating in settlement discussions and have taken various positions regarding the resolution of this matter." *Id*.

The day after the motion was filed the Director issued a written Order denying the Motion to Disqualify. AR, 132-138. The Director asserted that the agency head could only be disqualified for cause under Idaho Code § 59-704, and that since he had no private pecuniary interest in the outcome, he was not subject to disqualification. AR, 136.

The Director's premise that the agency head can never be disqualified except for a pecuniary interest in the outcome is contrary to the plain language of Idaho's APA and IDAPA rules. Idaho's APA expands the grounds for disqualification. Under Idaho's APA, these rights of disqualification, "**are unusually broad** and have no parallel in the federal or model state APAs."

Gilmore & Gobel, *The Idaho Administrative Procedure Act*, 30 Idaho L. Rev. 273, 323 (1994) (**emphasis added**). *Compare* Idaho Code § 42-5252 with 5 USC § 556(b).

The Director relies on Idaho Code § 67-5252(4) to claim that the disqualification must meet the standards of Idaho Code § 59-704 whenever the agency head is involved as the hearing officer. This is another misreading of the plain language of the statute. Subsection (4) defaults to Idaho Code § 59-704 **only** when disqualification "would result in an inability to decide a contested case." The Director does not contend that an independent hearing officer could not be appointed to hear the case. Rather, he points to the procedures of recommended or preliminary orders in Idaho Code §§ 67-5243, 5244 and 5245, following a hearing presided over by an independent hearing officer which **might** require action by the agency head. (Agency head "may" review preliminary order – Idaho Code § 67-5245.) However, the Director totally ignores his own rules which explicitly provide that preliminary order and recommended orders may be reviewed by "the agency head's **designee**." IDAPA 37.01.01.720.01 and 37.01.01.730.01.

The Director need not preside at a hearing as the hearing officer. IDAPA 37.01.01.410. The hearing officer need not be an employee and can be an independent contractor. *Id*. The review of a preliminary or recommended order can be delegated to an agency head's "designee," if a review is even necessary. Therefore, the absolute bar to disqualifying the agency head asserted by the Director simply does not exist under Idaho law.

Moreover, the Director does not challenge the fact that he had "substantial prior involvement in the matter" as contemplated by Idaho Code § 67-5252(1). He does not challenge the fact that he met with legislators, parties, non-parties, and others on substantive matters. AR, 136. He simply declares his substantial prior involvement as "entirely appropriate." AR, 137. Appropriate or not, the Director's "substantial prior involvement" in the subject matter of the

contested case prevents him from then assuming the role of an independent and fair minded hearing officer, and doing so is neither appropriate nor authorized by Idaho law. The district court erred by failing to recognize the Director's "substantial prior involvement" as a disqualifying factor.

b. The Due Process Violations

The Director's attorney announced that the purpose of the hearing was to assemble a record to defend the accounting program. AR, Tr. 9/6/2013, p. 26, l. 21-p. 27, l. 19. The Director also determined prior to the hearing that evidence the parties intended to rely on "is irrelevant" to his contested case. AR, 892.

The district court held that the Director could preside over the hearing despite his prior statements, relying primarily on the court's review of one presentation given by the Director to the Legislature's Natural Resources Interim Committee. R, 1070. More critically, the district court did not address the Director's refusal to identify his prior statements, allowing the Director to choose what was disclosed to the parties (and this Court). AR, 387. Even if the Director could not recount all that was said, he should have disclosed the gist of the discussions and the positions he took, but he refused to do so.

Clearly the Director held certain preconceived notions about the accounting program, then called a contested case "that nobody like[d]," AR, Tr. 12/6/2013, p. 4, ll. 10-12, and used the proceeding "to develop administrative records fully documenting how and why existing accounting methods and procedures 'count' or 'credit' water towards the water rights[.]" AR, 4.

Even the written record of one of the Director's public presentations makes it clear that the Director decided that the storage right owners are subject to reduction in storage due to flood control. Tellingly, many of the Director's prehearing statements are repeated in his Amended

Final Order. For instance, the Director represented that the accounting program could not be re-set at the completion of the flood control operations because it "[w]ill increase the water reliability for some space holders while diminishing the rights of other spaceholders and those holding junior priority water rights." AR, 943. In the Amended Final Order the Director concluded that the accounting system cannot be modified because "[j]unior water rights that have historically been considered in priority and allowed to divert during high flow periods would no longer be in priority." AR, 1278. The Director's presentation states that the accounting system could not be modified because it would "allow the Bureau and the larger federal government to have greater control over flood control releases without consequences – including flood control for downstream interests or to satisfy treaties." AR, 944. In the Amended Final Order the Director states that it would "give federal dam operators control over when the reservoir rights are in priority simply by declaring that the reservoirs are not storing water for beneficial use." AR, 1307.[12]

Here the Director called the contested case, defined it, and forced the parties to participate in a process designed to document and "defend" the existing paper fill accounting program. AR, 2-33; *also see State of Idaho's Reply in Support of Objection and Motion to Strike*, Sub-Case No. 00-91017 (Basin Wide 17), p. 10, fn. 13. The district court upheld the Director's decision to preside, believing that the parties had "an impartial and disinterested tribunal," that the Director did not have a personal stake in the contest and that he found no evidence that the Director is or was biased against the Petitioners or their counsel personally. R, 1070-1071. The Boise Project is not aware the Director had a financial stake in the outcome of the case or

[12] The Basin 01 settlement agreement recognizes Reclamation's right to do exactly this – declare when they are storing water. Yet, the Basin 63 program that prohibits Reclamation from deciding when to store water, must be upheld because it is necessary to prevent Reclamation from determining when it will store water. How is this evidence that there is an even-handed application of the law in this Basin?

personal bias towards the parties, but from the totality of the evidence, the Director was heavily invested in ensuring that paper fill was upheld, and as such, the impartial tribunal was missing.

A hearing officer may hear a case when that officer has taken public positions on a policy issue related to a dispute. *In re: Idaho Dept. of Water Resources Amended Final Order Creating WD No. 170*, 148 Idaho 200, 208, 220 P.3d 318, 326 (2009). But where the fact-finder was "not capable of judging [this] particular controversy fairly on the basis of its own circumstances," the line has been crossed. *Eacret v. Bonner County*, 139 Idaho 780, 785, 86 P.3d 494, 499 (2004). *In re: WD No. 170* involved a complaint over a slide that listed bullet points reciting the terms of the Wild & Scenic River Agreement, indicating that the Director believed that a water district should be created. *Id*., 148 Idaho at 208-09, 220 P.3d at 326-7. Here the evidence of the Director's predilection was not confined to a slide. He had "substantial prior involvement" in settlement discussions and with the legislature, Governor's office, and others over legislative solutions.

This case is far more like *Eacret*. There a county commissioner had made prehearing statements about whether property owners should have been allowed to build boathouses. This Court observed that these statements created an appearance of unfairness. 139 Idaho at 786, 86 P.3d at 500. These pre-hearing statements had to be "viewed in conjunction with the ex parte communication." The ex parte communications in *Eacret* involved discussions with one of the parties and an ex parte site view.

The Director has the same problem as the commissioner in *Eacret*. He expressed an unfair preconception of what he believed to be the proper outcome and engaged in ex parte communications both before and during the hearing. Like the Commissioner in *Eacret*, the Director went out looking for information on his own. AR, Tr. 8/31/2015, p. 942, l. 25-p. 944, l.

20. The district court excused this because the Director said he did not find what he was looking for. R, 1073. The point is, an impartial hearing officer should not be hunting for evidence to impeach a witness, and doing so illustrates a lack of impartiality and fairness. There were pervasive ex parte communications with the Department's main witness "throughout" the hearing. AR, Tr. 8/31/2015, p. 942, l. 17-p. 944, l. 24. In addition, the Director refused to disclose all of his prior statements. AR, 377-391. Taken as a whole, the Director's statements and actions rendered him incapable of even appearing to act as an impartial decision maker in the contested case.

Recently, the Supreme Court in *Rippo v. Baker*, 137 S.Ct. 905 (2017), held that "the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.'" 137 S.Ct. at 907, *quoting Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 106 S.Ct. 1580 (1986). "Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.'" *Id.*, *citing Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (additional citations omitted). Here that bar has been met. The Director, in his words and actions, demonstrated the probability of actual bias and it deprived the parties of their due process rights.

Due process "entitles a person to an impartial and disinterested tribunal." *Cowan v. Bd. Of Comm'rs*, 143 Idaho 501, 148 P.3d 1247 (2006), *quoting Davisco Foods Int'l, Inc*., 141 Idaho at 791, 118 P.3d at 123; *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004), *citing Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). "This requirement applies not only to courts, but also to state administrative agencies" *Eacret*, 139 Idaho at 784, *citing Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995). "An impartial decision-maker is essential," *Williams, supra*, 157, Idaho at 505, 337 P.3d at 664, *quoting Goldberg v. Kelly*, 397 US 254, 271 (1970). The

district court incorrectly concluded that the parties received an impartial and disinterested tribunal. R, 1070.

4. The Conduct of the Hearing Violated the Idaho Administrative Procedure Act and the Appellants' Due Process Rights

The conduct of the hearing itself further crossed the lines drawn by Idaho's APA and the Due Process clause of the United States and Idaho Constitutions. One major issue involved the presence of the same lawyer who appeared to present the Department's evidence, cross-examine witnesses offered by the irrigation entities, coordinated with Suez on the presentation of its evidence, and who then turned around and consulted with the Hearing Officer during the hearing outside the presence of the parties, even helping draft the final decision. How can it be considered fair when one's legal adversary is also advising the Hearing Officer which side of evidence should be relied upon?

The district court got it wrong when it held that the Idaho APA allows counsel to act both as the Director's advisor and to present evidence during the hearing. R, 1073. The district court reasoned that the contested case did not arise from the prosecution of a complaint and therefore counsel was permitted to act in both roles. *Id*. The court overlooked IDAPA 04.11.01.420.01, that explains that the prosecutorial function "includes…presentation of evidence or argument and briefing on the record in a formal contested case proceeding."

The Director said he initiated a formal contested case proceeding. AR, 1. There is no doubt that the same attorney both advised the Director in his role as the Hearing Officer and also presented "evidence or argument and briefing on the record in a formal contested case." IDAPA 04.11.01.420.01. Dual roles of deputies attorney general, as the investigative/prosecutorial and adjudicatory, are prohibited. No attorney assigned to assist the hearing officer or agency head "shall discuss the substance of the complaint ex parte with any representative of any party or

with agency attorneys or agency staff involved in the prosecution or investigation of the complaint." IDAPA 04.11.01.423.02.b. Yet, we know the advisor attorney also met with agency witnesses during the hearing. AR, Tr. 9/10/2015, p. 1585, l. 10-1586, l. 15.

Idaho Code § 42-1701A provides that all IDWR hearings shall be conducted in accordance with IDAPA. "Procedural due process requires that '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) (internal quotations omitted); *see Cowan*, 143 Idaho at 510, 148 P.3d at 1256. Due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998). The parties to the contested case were deprived of the right to be heard in a meaningful manner when the presiding officer's attorney was working to present the Department's views in the contested case, and then "throughout" the hearing conferred on multiple occasions with the hearing officer about the substance of the testimony of witnesses, including the very witnesses and exhibits he presented. *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 199 P.3d 1142, 1145-1146 (Cal. 2009); *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 145 P.3d 462, 466-467 (Cal. 2006); *Board of Pensions and Retirement v. Schwartz*, 510 A.2d 835, 839-840 (Pa.Cmwth. 1986).

The second major issue was the Director's actions during the hearing to search on his own for evidence to impeach the watermaster, to consult with the Department's principle witness "throughout" the hearing, and to direct presentation of evidence. The district court did not approve of these contacts but concluded that the parties had not demonstrated prejudice. R, 1072.

IDAPA makes very clear that the hearing officer may not consult with parties, directly or indirectly, during the pendency of the case, without notice and an opportunity to participate. Idaho Code § 67-5253. Sections 67-5252 and 5253 "are intended to ensure that the decisionmaker bases the order solely on the facts and arguments contained in the record created at the evidentiary hearing." M. Gilmore and D. Goble, The Idaho Administrative Procedure Act, 30 Idaho Law Rev. 273, 321 (1994). No hearing officer may discuss the case with the agency attorney or staff. IDAPA 04.11.01.424; *see also* IDAPA 04.11.01.417 (applying rule to presiding officer). Thus, an agency head cannot have ex parte contacts with agency personnel involved in the investigation or prosecution of the pending matter. *State v. Kalani-Keegan*, 155 Idaho, 311 P.3d (Ct. App. 2013). "[A]ny discussions with other agency personnel who are involved in the case are clearly impermissible." *Gilmore, supra*, p. 325.

"Procedural due process requires that '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) (internal quotations omitted). The Director's behind-the-curtain actions are not known, in full, to the Boise Project and can never be known to this Court as they were off-the-record and unrecorded. However, there is no doubt that the Director relied heavily on the same witness he consulted with "throughout" the hearing, Liz Cresto. She is cited by name over 25 times in the *Amended Final Order*, AR, 1230, and over 30 times in the *Order Denying Rehearing*. AR, 1401. The rebuttal exhibit (Ex. 9) she prepared at his direction is also relied upon in the decision. AR, 1274 and AR, 1406. There is no doubt that this communication with the Department improperly infected the proceeding and this primary witness clearly influenced the outcome. Moreover, the Hearing Officer did not disclose these communications as required by law. IDAPA 37.01.01.417.

Failing to confine the decision to the record violates due process and is basis for reversal. *Idaho Historic Preservation Counsel, Inc. v. City Council of the City of Boise,* 134 Idaho 651, 655-56, 8 P.3d 646, 651-52 (2000); *Chambers v. Kootenai County Board of Commissioners*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994).

K. <u>The Boise Project is Entitled to its Attorneys Fees</u>.

Idaho Code § 12-117(1) provides that in a proceeding where the parties are a state agency and another person or entity, that the court "shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law." Idaho Code § 12-117(1), "Where an agency has no authority to take a particular action, it acts without a reasonable basis in fact or law." *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 159 Idaho 813, 367 P.3d 208 (2016).

The Director was requested on multiple occasions to comply with IDAPA's rulemaking requirements. AR, 209. He repeatedly denied these requests. He denied that he was interpreting or implementing existing law. AR, 340. Yet, he justified his final order as necessary to implement important elements of Idaho water law. AR, 1294. He also repeatedly violated the procedural rules for consulting with witnesses and the Department in his capacity as hearing officer.

> It is crucial that courts require agencies to comply with the APA's procedural requirements when they seek to affect individuals. An agency that attempts to enforce compliance with statements that is has not promulgated as a rule under the APA's rulemaking provisions should be assessed costs in any resulting judicial action since the agency 'acted without a reasonable basis in…law.'

Gilmore, *supra*, p. 287.

The Boise Project requests that it be awarded its reasonable attorney's fees and costs incurred during the contested case proceeding and on appeal.

VII. CONCLUSION

This contested case is a proceeding that nobody wanted, and for good reason. It served only to allow the Director to confirm his "paper fill" is "satisfaction" rule that was adopted in the Upper Snake and imported into the Boise. This rule deprives the storage right holders of any right to fill the reservoirs after mandatory flood control releases. It utilizes a fictional account that violates Idaho law and Idaho Code § 42-201(2). It purports to distribute "paper water" and fails to provide wet water to the seniors to use to irrigate their crops. This "paper fill" rule is contrary to the historic understandings and history of water use in the Boise. For all these reasons the "paper fill" rule violates Idaho law. The "paper fill" rule was implemented in violation of the IDAPA's rulemaking requirements, and the procedures used in the contested case violated both IDAPA and the due process rights of the Boise Project.

To the extent the district court upheld "paper fill" in the Boise, that decision should be reversed. The district court's decision recognizing a property interest in the water filling the reservoirs should be affirmed. The process used to "defend" the "paper fill" rule should also be reversed.

DATED this 26th day of May, 2017.

BARKER ROSHOLT & SIMPSON LLP

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CHAS F. MCDEVITT, LAW OFFICE

By: Charles McDevitt
Attorney for New York Irrigation District

CERTIFICATE OF SERVICE

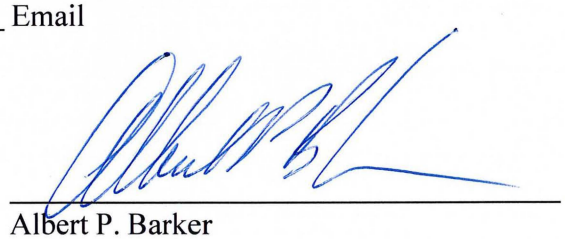
I HEREBY CERTIFY that on this 26th of May 2017, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S APPELLANT'S BRIEF** the method indicated below, and addressed to each of the following:

Original to:

IDAHO SUPREME COURT 451 W. State Street P.O. Box 83720 Boise, ID 83720	_x_ Hand Delivery ____ U.S. Mail, postage prepaid ____ Facsimile ____ Overnight Mail ____ Email

Copies to:

Garrick Baxter Emmi Blades Andrea L. Courtney Deputy Attorney General IDAHO DEPARTMENT OF WATER RESOURCES 322 E. Front Street, 6th Floor P.O. Box 83720 Boise, Idaho 83720-0098	_x_ Hand Delivery ____ U.S. Mail, postage prepaid ____ Facsimile ____ Overnight Mail ____ Email
Michael P. Lawrence Christopher H. Meyer GIVENS PURSLEY 601 W. Bannock St. P.O. Box 2720 Boise, ID 83701-2720	_x_ Hand Delivery ____ U.S. Mail, postage prepaid ____ Facsimile ____ Overnight Mail ____ Email



Albert P. Barker