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,

v.

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

Petitioners/Appellants-Cross Respondents,

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 REPLY 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

This appeal was brought by the Boise Project Board of Control and New York Irrigation District ("Boise Project") challenging the district court's approval of the Department of Water Resources' ("Department" or "IDWR") paper fill satisfaction rule. Paper fill satisfaction is contrary to the historical record for use of the reservoirs for flood control in the Boise, contrary to the prior appropriation doctrine, and as implemented in the Boise, contrary to the guidelines and directives of this Court's *Basin Wide 17* decision. The paper fill satisfaction rule, at its core, is intended to deprive the water users of any property right to divert water to the reservoirs following flood control releases, despite the unqualified historical record of beneficial use of that water by the spaceholders. R, 1067. Paper fill does not provide water to the water users in such a way that they can actually use the water, and actually wastes water. The Department's reliance on "unaccounted for storage" to provide water to the water users, if the Director chooses to allocate it to them, rests on the notion that the Director can "allow" storage of water without a water right, which is contrary to law.

This appeal also demonstrates that the Department adopted a statewide paper fill rule, without any procedure whatsoever, and applied it to the Boise River without advising the Boise water users that their rights would be deemed "satisfied" by paper fill. Much later, the Director called this contested case to bless and "defend" this paper fill satisfaction rule. The Director's decision to preside over the case as the hearing officer, independently search for evidence, and then discuss the case during the hearing with IDWR counsel and witnesses, and direct their testimony and presentation of evidence outside the presence of the parties and completely off the record, deprived the Boise Project of its rights under the Idaho Administrative Procedure Act,

Idaho Code § 67-5201 *et seq*. and the due process clauses of the United States and Idaho Constitutions. United States Constitution, Amendment 14, § 1; Idaho Constitution Article I, § 13.

The Department claims that its accounting program was affirmed, but the court held that identifying the water entering the reservoirs after flood control as "unaccounted for storage," stored under no water right, improperly strips the irrigators of a legally protectable water right in the water that they have delivered to their water users. R, 1067-68. The Department's brief makes it clear that its ultimate goal is to label the water that has been historically used and appropriated to fill the reservoirs as unappropriated water available for future users and not to the Boise Project's water users who have historically put this water to beneficial use on their lands. The property interest in this water rests with the water users. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). They are harmed by the Department's stance, not the federal government.

When a reservoir fills is "a mixed question of fact and law," and the factual record must be developed before this Court can determine whether the reservoir fill should be charged with flood releases. *A&B Irr. Dist. v. State*, 157 Idaho 385, 392, 336 P.3d 792, 799 (2014). The factual record does not support its position on paper fill satisfaction so the Department ignores that direction and argues that the decrees mandate paper fill satisfaction, and the historic record is irrelevant.

The Department then claims the Boise Project water users will be protected by federal flood control operations.[1] The Director opined that water filling the reservoirs as "excess" water was too unreliable to be appropriated. AR, 1304. The Department does not attempt to defend the

[1] The district court held that the Department had not properly raised the argument that federal law is the basis for storage in the reservoirs following flood control and could not be relied on to justify the unaccounted for storage accounts. R, 1162. The Department does not challenge that conclusion on appeal, and thus has waived that argument before this Court.

Director's rationale. Idaho's Constitution and laws make it clear that the unappropriated waters of the state are available for appropriation. Idaho Constitution Article XV, § 3; Idaho Code § 42-101. The problem is not purely theoretical. If the Court accepts the stance of the Department the water users will have no water rights and no property interests in the reservoir fill. That raises the very real possibility that the Boise Project and other irrigation interests would not have sufficient water to provide to the water users during the irrigation season in years when flood control has been required to protect life and property in the Boise Valley, because future demands could take the water that the users have come to rely on. Addendum A. Storage dams are critical to Idaho:

> Idaho's extensive agricultural economy would not exist but for the vast systems of irrigation canals and ditches which artificially deliver stored or naturally flowing water from Idaho's rivers and streams into abundant fields of growing crops. Many of these irrigation systems depend on dams which divert naturally flowing water, storing it in reservoirs and later releasing it for use on irrigated lands through canals and ditches. These artificial water storage systems serve an additional need for flood control, power generation, recreation and provide beneficial environments for fish and wildlife.

Kunz v. Utah Power & Light Co., 117 Idaho 901, 904, 792, P.2d 926, 929 (1990). The dams play a crucial role in Idaho, particularly in the Treasure Valley. AR, Tr. 9/9/2015, p. 1229, l. 20-p. 1230, l. 12 (over $522 million in annual economic benefits from agriculture in Canyon County). This Court should not countenance any policy that intentionally puts that use at risk.

II. STATEMENT OF FACTS

The complex factual history of development of the Boise River reservoirs should be fully developed. *A&B Irr. Dist. v. State*, 157 Idaho at 392, 336 P.3d at 797. The history was chronicled through the expert witness report of historian, Dr. Jennifer Stevens. AR, Ex. 2053. The pertinent facts are undisputed and set forth and summarized in Appellants Brief, pp. 6-14.

Without the water stored in Arrowrock and Anderson Ranch reservoirs, the Boise Project water users would not have enough water for their crops. AR, Tr. 8/31/2015, p. 949, ll. 5-18; p.

953, ll. 11-15; p. 956, ll. 6-20; AR, Ex. 2027, p. 18 (Anderson Ranch water "necessary in order to insure crop production within the area every year.") Storage and flood control by releases of flood water and fill of the reservoirs thereafter began in 1916, the first year after Arrowrock was completed. AR, Ex. 2060, p. 36; AR, Ex. 2053, p. 12. In 1943, floods devastated the Boise Valley. AR, Ex. 2053, p. 15; Tr. 8/31/2015, p. 794, ll. 3-10. These floods led to authorization of Lucky Peak for flood control. *Id.*, p. 16.

The State of Idaho represented the Arrowrock and Anderson Ranch water users during the planning for Lucky Peak, ensuring that their water rights would not be harmed by the effort to allow those reservoirs to be used with Lucky Peak to protect from the devastating floods that the Boise Valley had experienced. *Id.*, p. 18 and p. 21; Tr. 8/31/2015, p. 796, l. 8-p. 797, l. 5. When efforts to integrate flood control were underway, no one, not the Department – not anyone, ever said that the reservoirs would not be filled under the priority of the reservoir rights. AR, Tr. 8/31/2015, p. 789, ll. 1-10; p. 797, ll. 6-24; p. 799, ll. 6-14. No one mentioned paper fill satisfaction, as that concept had not been invented.

The Department's brief seriously misrepresents the 1954 agreement between Reclamation and the water users (AR, Ex. 3028) and the 1953 Memorandum of Agreement (MOA) between Reclamation and the Corps of Engineers describing the combined operations of the Boise River reservoirs. AR, Ex. 2038. The Department asserts that these agreements made irrigation storage "secondary" to flood control operations. IDWR, pp. 20-21.[2] This claim is preposterous on the historical record.

[2] This claim is preposterous on the historical record. The Department's citation to the Boise Project's Opening Brief to support this claim, ignores the fact that the quote states that flood control rule curves were developed to "capture runoff after flood control to maximize storage." Boise Project Brief, p. 32 (emphasis added).

Contrary to the Department's claims, the 1953 MOA does not say that storage is "secondary." AR, Ex. 2038. Nor do the 1954 contracts. AR, Ex. 3028; Ex. 2001. To the contrary, joint flood control use of the reservoirs can be undertaken only when mutually agreed by Reclamation, the Corps and local irrigation and flood control interests. AR, Ex. 2038, pp. 1-2. Lucky Peak cannot materially interfere with operations of Arrowrock. *Id.*, p. 2. Operations are intended to achieve the "greatest multiple purpose use of the combined total useable flood control and irrigation storage in all three reservoirs,…" *Id.*, p. 3. The MOA clearly states that the storage water rights are protected:

> 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., p. 5.

The MOA and 1954 contracts contemplate that water filling the reservoirs after flood control will be assigned to the existing storage water rights. AR, Tr. 8/31/2015, p. 799, l. 15-p. 800, l. 1. Indeed, that is how the system operated for decades. *Id.* p. 800, ll. 2-4; p. 803, ll. 2-6. The Lucky Peak guaranty was added so that if there was a shortage in physical fill after flood control releases and refill, Reclamation would protect the Arrowrock and Anderson Ranch spaceholders from any shortage in physical fill. AR, Ex. 3026; ON Docs – 63-3618; (Lucky Peak SRBA decision, p. 1565-1566). The Department's argument that this guaranty was included to protect water users from shortages caused by the paper fill satisfaction is absurd, because paper fill did not exist. Paper fill was invented decades later for the Upper Snake and not imported to the Boise River until 1987. AR, Tr. 8/27/2015, p. 245, ll. 16-18.

To determine the meaning of a contract, this Court has said "we must examine what the parties at the time of the contract contemplated…" *Northwest Pipeline Corp. v. State*, 129 Idaho

547, 550, 928 P.2d 898, 900 (1996); *accord Wolford v. Montee*, 161 Idaho 433, 438, 387 P.3d 100, 105 (2016) ("Court's primary objective is to ascertain the intent of the parties at the time the contract was made.") All parties to these agreements, and the State as representative of the water users, intended that the existing water rights would be fully protected from flood releases by the subsequent fill of the reservoirs. If there was a shortage in physical fill, it would have to be made up from Lucky Peak water. The Department cannot re-write history to claim that the contracts were intended to account for paper fill.

In 1956, a Reservoir Regulation Manual was adopted, assigning responsibilities between the Corps, Reclamation, the Boise River Watermaster, and the Boise Project, and defined how the three reservoirs would be operated jointly for flood control and irrigation storage purposes. AR, Ex. 2104, p. 22. Section 5-08 of the Manual states that after flood control "the reservoir system will be operated primarily to meet irrigation requirements in accordance with existing water rights." AR, Ex. 2104, p. 22. (emphasis added). Thus, the reservoirs were physically filled under their existing water rights following flood control. No one claimed that the rights were satisfied by flood control releases. AR, Tr. 8/31/2015, p. 799, l. 15-p. 800, l. 1. Such a concept would have been unthinkable. No one anticipated that some thirty years later the Department would adopt a paper fill rule intended to strip the storage right holders of a protectable property interest in the water delivered to them during the irrigation season. This Manual guided operation of the reservoirs for thirty years. *Id.*; Tr. 8/28/2015, p. 494, ll. 2-12; Tr. 8/31/2015, p. 803, ll. 2-6. It expressly allowed the water uers to rely on their existing water rights to capture refill.

In 1974, Governor Andrus, after a substantial flood in the Boise Valley, requested that the Boise River reservoir operations be reviewed to determine whether changes should be made to flood control operations. AR, Ex. 2131; Tr. 8/31/2015, p. 800, ll. 12-25. He did not

unilaterally change how the storage water rights were "satisfied." His request resulted in a report drafted by the Department, titled "Review of Boise River Flood Control Management." AR, Ex. 2182. The Report recognizes that:

> Boise River flows are controlled by the federal system of reservoirs which were constructed for irrigation, flood control, recreation, and power. Since completion of Lucky Peak Reservoir in 1954, flows have been almost completely regulated. A formalized flood control procedure was instituted at that time which specified how the reservoirs were to be managed during the flood control season. The system has operated successfully with that procedure for about twenty years generally controlling all floods to within the original objective of a regulated flow of 6500 cfs through the city of Boise.

Id.

Refill for irrigation purposes was an important component of the Report. IDWR analyzed hydrologic data from 1928 through 1971, "to determine the amount of water that could be available for refill of storage space each year under the present system of operation." AR, Ex. 2182, p. 3697; AR, Tr. 8/28/2015, p. 374, ll. 7-11. The Report recognized that the water in the reservoirs at the point of maximum fill is the water relied upon by the irrigators during the irrigation season, and the need to protect reservoir refill. AR, Ex. 2182, pp. 3710-3711.

The 1974 Report led to the adoption in 1985 of a new Boise River Water Control Manual with updated flood control rule curves. AR, Ex. 2186. Some of these rule curves were drafted by the Department. AR, Tr. 8/31/2015, p. 804, ll. 2-4. The Water Control Manual relied on detailed technical studies to create the comprehensive new operating procedures that remain in place to this day. AR, Ex. 2053, p. 1667. One of the fundamental tenets of the new manual was a decision that, "[f]all and early winter <u>evacuation based on a high refill assurance</u> will be considered in the flood regulation plan." AR, Ex. 2145, p. 1215. (emphasis added). This Manual was a "joint effort" by the Department, Reclamation and the Corps. AR, Ex. 3001; Tr. 8/27/2015, p. 249, ll. 5-20. The Department made it clear in portions of the Manual it drafted that the water filling the

reservoirs after flood control releases was not excess, but rather, the water released for flood control was "surplus" to the system. AR, Ex. 2186, p. 3808.

The accounting program was introduced in the Boise River only after the new Water Control Manual was adopted. AR, Tr. 8/28/2015, p. 451, l. 18-p. 452, l. 7. The water users were not informed that the program would have the water that fills the reservoirs after flood control releases unprotected by any water right. AR, Tr. 8/28/2015, p. 462, ll. 3-8; AR, Tr. 8/31/2015, p. 804, ll. 5-19; AR, Tr. 9/9/2015, p. 1037, ll. 7-20, p. 1076, ll. 20-25, and p. 1181, l. 19-p. 1182, l. 6; AR, Ex. 3038. In 1987, the Director advised the water users that the Water Control Manual "contains new rule curves and procedures aimed at providing greater flood protection through early season operation and increased assurances of refill for irrigation during the later runoff season." AR, Ex. 3001 (emphasis added). The Water District 63 Watermaster from 1986 through 2007, Lee Sisco, understood that he administered the storage rights on the day of allocation under the existing priorities. AR, Tr. 8/31/2015, p. 907, l. 6-p. 908, l. 13.

The Department did not advise the Water District 63 water users that it considered their water rights filled by flood releases even after the accounting program was initiated. AR, Tr. 8/27/2015, p. 200, ll. 13-25; Tr. 8/28/2015, p. 282, l. 23-p. 283, l. 5; p. 462, ll. 3-8; p. 500, ll. 7-25; Tr. 9/9/2015, p. 1037, ll. 10-20; p. 1042, l. 18-p. 1047, l. 10. The Department's current position on refill was first conveyed to the Boise River water users when the Director became embroiled with Reclamation over operations in the Upper Snake that eventually led to the *Basin Wide 17* proceedings. *Id.* p. 1047, ll. 11-24; *A&B Irr. Dist. v. State*, 157 Idaho at 388, 336 P. 3d at 795 (2014).

Meanwhile, Moratorium orders were issued declaring the Boise fully appropriated for the period of June 15 to November 1 (which includes the refill period). AR Ex. 3002-3008. Permits

were issued conditioning the water right to limit the use only to water released for flood control. AR Ex. 3012 and 3013. No provision to allow taking water that would "refill" the reservoirs was included because that water was considered appropriated. Beneficial use exams were conducted during this time recommending only flood releases available to be appropriated because the refill was already appropriated. AR Ex. 3040 and 3041.

Protection of reservoir fill was even recognized as an important element of the Nez Perce Settlement agreement in 2006. The Agreement prohibited use of powerhead for flow augmentation that would interfere "with the ability of spaceholders to refill and use active storage of the reservoir." https://www.idwr.idaho.gov/waterboard/WaterPlanning/NezPerce/pdf_files/complete-agreement.pdf at p. 20. Addendum B.

The Department does not dispute any of this historical background. It just asks this Court to ignore it.

III. ARGUMENT

A. Paper Fill Satisfaction and its Accrual of Flood Control Releases to the Storage Rights Violates the Prior Appropriation Doctrine.

There is no dispute that the paper fill satisfaction rule accrues all inflows in priority to the storage water rights until the rights are deemed "satisfied" regardless of whether that water can be stored because of the need for flood control. R, 1058. Water actually diverted by downstream seniors is not counted.[3] AR, Tr. 8/27/2015, p. 153, ll. 17-23. Water released for flood control is counted towards paper fill even though it cannot be put to use by the Boise Project water users. AR, Tr. 8/31/2015, p. 961, ll. 3-24; p. 1388, ll. 7-11.

[3] This counting of senior use occurs downstream after the water enters the upstream reservoirs, because the watermaster cannot know what is diverted downstream until it is diverted and measured, after it is released.

Because a water right is a property right to a certain amount of water, "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 at 394, 336 P.3d at 801. This is not a new concept, but is grounded in the prior appropriation doctrine. "An appropriator is entitled to have the full quantity of water called for by his appropriation flow in the natural stream, or in his ditch or canal, in such a way that he can enjoy its use…" *Bailey v. Idaho Irr. Co., Ltd.*, 39 Idaho 354, 358, 227 P. 1055, 1056 (1924) (emphasis added). Paper fill fails to count water to the Boise Project water users in a way they can use the water. They cannot use the flood releases and they have no right to the unaccounted for storage. They cannot irrigate with paper or promises.

The Director knows exactly how much water is "used" by the Boise Project by virtue of the natural flow and storage deliveries to the New York Canal. AR, Tr. 8/27/2015, p. 201, ll. 2-15; p. 961, ll. 3-24; p. 971, l. 21-p. 972, l. 17. Importantly, even if the diversions are to be measured at the face of the dam, measuring the water there does not require paper fill satisfaction. Water that must be released below the dam for senior use is not counted toward satisfaction of the storage rights. There is no reason that water released for flood control must be counted to satisfaction. The Department acknowledges that the Boise River accounting is all a matter of after-the-fact computations. IDWR, p. 29; AR, Ex. 1018, p. 4 (Accounting program is not real time. It is after the fact). The Director just wants it done his way to satisfy his policy preferences for paper fill satisfaction.

The district court rationalized paper fill satisfaction based on the theory that water rights must be measured at the face of the dam and the theory that juniors would not be entitled to divert if the reservoirs remained in priority during the flood release and fill season, if not for paper fill satisfaction. R, 1059-60. Neither rationale withstands scrutiny.

1. Paper Fill Satisfaction is not Required to Prevent Waste of Water.

The case law the district court relied on to require counting water and satisfying the water rights at the face of the dam were cases that required measurement at the point of diversion to prevent waste that would occur by measuring at the field headgates. *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 192 (1900) ("prevent the wasting of water"); *Glenn Dale Ranches v. Schaub*, 94 Idaho 585, 588, 494 P.2d 1029, 1032 (1972) (avoid "unreasonable loss"). In *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011), this Court cited *Stickney* as standing for the policy of preventing waste. In this case there is no issue of waste by the storage right users. The Department does not contend that measuring water at the face of the dam is necessary to prevent waste, but argues waste is irrelevant. IDWR, p. 40.

The Department relies on *Stickney* and *Glenn Dale* but also ignores the express policy behind those decisions of preventing waste in the conveyances. IDWR, p. 30. *Stickney* and *Glenn Dale* do not involve flood control releases or dams. The Department does not contend that these cases mandate paper fill satisfaction.[4] Nor do these cases require counting water released for flood control towards satisfaction.

The Boise Project is not advocating that the Department must follow the water from the reservoir to every headgate and every field and subdivision in the Treasure Valley, as the Department insinuates. Delivery of storage to the New York Canal is measured. So too is the amount physically stored in the reservoir on a daily basis. AR, Tr. 9/10/2015, p. 1381, ll. 7-20. Whether measuring actual water in the reservoir, diversions to the New York Canal, or both, the

[4] The Boise Project previously explained that the district court improperly interpreted *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935), as a case involving "water distributed to a dam." *See* R, 1059; BOC Opening Brief, pp. 25-26. In fact, *Talboy* does not involve "distribution" of water, but a dispute between spaceholders over water already stored. *Id.* The Department does not attempt to support the district court's reliance on *Talboy*.

Department can easily satisfy the directive of *A&B Irr. Dist.* to count the water "used" by the Boise Project without paper fill satisfaction, and without wasting water in conveyances.

2. Junior Appropriators are not Entitled to Dictate Senior Upstream Storage Operations.

The Department then argues that "appropriators" have the right to water in the stream as it flowed before the dams were built, citing *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 396, 283 P. 522, 526 (1929). IDWR, p. 30. This claim misrepresents the facts and holding of *Arkoosh*, which involved senior surface water users downstream of Magic Reservoir.[5] These senior users claimed that operation of the dam altered the stream hydrology so that it interfered with the delivery of their senior rights. *Id.* at 389-90. The Department's claim here, that all downstream users are entitled to have water delivered as it had been delivered prior to the construction of the dam, is contrary to *Arkoosh*. This Court determined that without an injunction, the dam operator "will continue to interfere with respondent's rights and deprive them of water to which they are entitled by reason of their prior appropriation, such action is wrongful and may be enjoined." *Id.* at 396 (emphasis added). The Department's effort to twist the holding of a case involving the rights of a senior located downstream of the junior storage facility, to the reverse situation cannot be countenanced. Certainly, downstream seniors are entitled to their water ahead of reservoir operations. That is not what is at issue in this case. In the Department's zeal to protect junior and future users from historic senior uses, it misstated *Arkoosh*'s holding.

In *Arkoosh*, this Court described the rights of the subsequent appropriator. "A subsequent appropriator has a vested right as against his senior to insist upon a continuance of the conditions that existed at the time he made his appropriation, provided a change would injure the

[5] "Respondents, owners and holders under what is known as the Frost decree…[citations omitted] of different priorities antedating the storage rights of appellant." 48 Idaho at 388, 283 P. at 527. (emphasis added).

subsequent appropriator." *Id.* at 397 (emphasis added), *quoting Bennett v. Nourse*, 22 Idaho 249, 253, 125 P. 1038, 1039 (1912). *Arkoosh* and *Bennett* make it clear that the junior appropriator takes the system as he finds it. He can only have water delivered "as it flowed when he made his appropriation." *Bennett*, 22 Idaho at 253. The Boise River reservoirs historically released water for flood control releases and subsequently filled the reservoirs for use by the Boise Project water users. AR, Tr. 8/28/2015, p. 494, ll. 2-17. The subsequent appropriators are entitled to that operation and no more. The Department's insistance that the seniors must accept paper fill to provide for juniors and future users violates Idaho law.

3. The Storage Right Holders Cannot Prevent Downstream Users from Taking Flood Control Releases.

The district court's decision also rested on the idea that if not for paper fill satisfaction, then juniors would not be able to divert because the reservoirs would always be "in priority." R, 1060, citing *Hutchins*, 5 Idaho Law Rev. 1, 50 (1968). The case law is clear, as *Hutchins* acknowledges, that the senior must allow the junior to take water when he does not need it for beneficial use. *Dunniway v. Lawson*, 6 Idaho 28, 29, 51 P. 1032, 1033 (1898); *Hall v. Blackman*, 8 Idaho 272, 282, 62 P. 19, 22 (1902); *Uhrig v. Coffin*, 72 Idaho 271, 275, 20 P.2d 480, 484 (1952); *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 15, 186 P.3d 502, 517 (2007). This means that neither the senior storage right holders nor the Department can prevent juniors from using water the senior user does not need, and must pass through the reservoir. The Department does not discuss these cases or defend the district court's rationale.

Instead of supporting the district court, the Department argues that its accounting program recognizes juniors' rights to divert water during flood control. IDWR, p. 59. Unfortunately, this is another half-truth. The accounting program limits natural flow water rights to the diversion rates. Flow above that is charged to storage. AR, Tr. 9/10/2015, p. 1475, ll. 23-

25. Flood releases are considered storage releases. *Id.*, p. 1476, ll. 1-2. Prior to paper fill, the accounting program treats these releases as storage water, not natural flow. *Id.*, ll. 18-19. The accounting program does not allow natural flow users to take the water the Department labels as storage releases. *Id.*, p. 1477, ll. 2-10. Storage cancellation allows the Department to wipe clean prior storage use if the reservoir physically refills. *Id.*, p. 1484, ll. 8-20. If the system does not physically fill, the storage right holder's account is reduced by this prior use. *Id.*, p. 1500, ll. 10-12.[6]

The Department's argument that junior users can divert flood releases cites only the Director's Order. IDWR Response Brief (hereafter "IDWR, p._"), pp. 58-59. But, the Director cites no testimony and no evidence to support his statement. *Id.* He says all storage used while flood control releases are occurring is **always** cancelled (emphasis in original). AR, 1283. The record is clear that storage cancellation occurs only if the reservoirs physically fill to 100%. AR, Ex. 1, p. 11. There is no evidence to support the Director's bold-faced statement that storage cancellation **always** occurs or that junior natural flow users can take flood releases. Prior to paper fill, only storage right holders can take flood releases. Only if the reservoirs physically fill, will that water not count against his storage rights. Ultimately, this part of the accounting program is designed to run water past Middleton and out of the system and wastes water. AR, Tr. 9/10/2015, p. 1492, ll. 1-20. On the other hand, if flood water is considered natural flow taken by natural flow users, as the Department contends, there is no basis to double-count this use to storage as paper fill.

4. Flood Control Releases and Subsequent Reservoir Fill Represents Historic Use and is not an Enlargement.

[6] None of this testimony was disputed by the Department during the hearing.

The Department then resorts to an argument not adopted by the district court. It contends that the storage right holder may only divert (once) the volume of water in the decree, and diverting more is an enlargement. IDWR, pp. 31-32. The Department alleges that the dams divert the entire flow of the river, and that diverting more than the decreed volume is an "enlargement." But, the dams have always intercepted the entire flow of the river. If doing so diverts the entire flow of the river, continuing to do so cannot be an enlargement. The Boise River dams have always released water for flood control and filled thereafter. Continuing to do so is not an enlargement. "At the end of the day, there's only a million acre-feet in storage available for beneficial use." AR, Tr. 9/10/2015, p. 1531, ll. 19-21.

Flood control release and subsequent fill is how the dams have always operated. It is the condition the juniors accepted. *Arkoosh, supra; Bennett, supra*. It is undisputed that "[t]he record establishes that flood control years and flood control releases occurred many times before 1971, and that in all of those years, water identified by the Director as unaccounted for storage was diverted, stored and ultimately used by the irrigators for irrigation." R, 1067.

The Department contends that the Boise Project is laying claim to all the water in the Boise River by asking this Court to recognize a right to fill the reservoir after flood control releases. Nonsense. The Boise Project would not prevent juniors from taking flood control releases, only the Department does. Rather, the Boise Project asks this Court to recognize that it has the right to store water that historically filled the reservoir for beneficial use by the water users. This is not enlargement.

5. Paper Fill Satisfaction is the Department's Own Concept.

The Department strenuously objects to the Boise Project's reference to the "paper fill" and "one-fill" satisfaction rule. IDWR, p. 33. They claim that the Director did not use those

terms and did not say his accounting satisfaction methodology adopted that concept. *Id.* With respect, the Department could not have been paying attention to the testimony it elicited at the hearing, or the Director's Orders, which are riddled with references to "paper fill" and "filled on paper." For example, the Director explains:

> 108. Under these procedures, accrual to a reservoir water right is not based on the physical fill or contents of the reservoir, and the cumulative accrual to a reservoir water right is not reduced when storage is released from the reservoir or "bypassed." Ex. 1 at 6-7; Ex. 2 ¶¶ 10, 11, 13, 19; Ex. 6 ¶ 4. This means that a reservoir's water right can be satisfied or "filled" from an accounting standpoint before (or after) the Corps or the BOR allows the reservoir to physically fill with water. Ex. 2 ¶ 12; Ex. 6 ¶. The accounting term used to describe this concept is "paper fill." Ex. 1 at 8; Ex. 2 ¶ 12; Ex. 6 ¶ 4, 5.

R, 1183-84 (emphasis added). "Paper fill" means the right is satisfied by the initial inflow, regardless of reservoir bypass or release. R, 1267 and 1408. The Department knows exactly when paper fill occurs. AR, Tr. 8/27/2015, p. 140, ll. 9-10; p. 143, ll. 16-17.

Several former directors of the Department testified that there is a statewide paper fill rule. In 1977, "Steve Allred, who was director, or in management at some point there, stated this rule of one fill." AR, Tr. 8/31/2015, p. 659, ll. 2-3 (emphasis added). Former Director Dunn testified that "once a water right is filled, it was Department policy that you only get a second fill if all other rights are met." Ar, Tr. 8/27/2015, p. 238, ll. 2-16 and p. 240, l. 7 ("one fill in priority"). There was no "paper fill in the Boise until 1987." *Id.*, p. 245, ll. 16-18. Former Director Dreher described a "one fill rule." *Id.*, p. 268, ll. 11-18. It was a "longstanding practice" of the Department to allow accrual of the first fill to a storage water right and storage thereafter without a water right. *Id.*, p. 277, ll. 4-12; p. 278, ll. 1-15, p. 278, ll. 19-p. 279, l. 9. Then Director Tuthill wrote, "we had used the policy throughout the State for these larger reservoirs that they get one fill." AR, Ex. 8 (emphasis added); AR, Tr. 8/31/2015, p. 652, ll. 1-3. In response to questioning by Suez, Mr. Tuthill repeatedly referred to one-fill as a "rule." *Id.*, p.

658, ll. 3-p. 659, l. 18. While the Department may not like hearing its witnesses' description of the paper fill satisfaction rule repeated, that language came from the highest level Department employees. It was not invented by the Boise Project.

B. Paper Fill Satisfaction is Not Consistent with the Partial Decrees' Requirement to Fill and Measure Volume Based on Reservoir Elevations.

The quantity element on the face of the water right decrees provide that the quantity is filled when measured at a specific elevation on the upstream face of the dam.[7] The district court did not consider these conditions. This language describes how the reservoir capacity is filled and measured. The paper fill rule does not measure the water at an elevation on the upstream face of the dam and does not determine that the water right is "filled" when it reaches that elevation. The Department contends that measuring the fill at the upstream face of the dam conflicts with the decree, but does not explain how. IDWR, p. 50. Instead, the Department simply argues that measuring fill at the elevation is not required. Yet, nothing on the face of the decrees references the paper fill rule. AR, Tr. 8/31/2015, p. 669, l. 25-p. 670, l. 4.

The Department claims that this language in the decrees only refers to the capacity of the reservoir and is meaningless when it comes to defining or administering the quantity element of water rights. Idaho Code § 42-1412(6) requires a decree to "incorporate a statement of each element of a water right." Idaho Code § 42-1411(2)(c) states that the quantity element of the water right includes the "annual volume of diversion of water for use or storage in acre-feet per year as necessary for proper administration of the water right." *See also State v. Idaho Conservation League*, 131 Idaho 329, 333, 955 P.2d 1008, 1012 (1998) (authorizing general conditions necessary for efficient administration of water rights under Idaho Code § 42-1412(6)).

[7] AR, ON Docs, 63-303, 0090-91; 63-3613, 0060-61; 63-3614, 0305-06; 63-3618, 1599-1601.

The Department's claim that this part of the quantity element provision is unnecessary to define or administer the right cannot be true. Those provisions could not have been included in the decree if they were meaningless.[8] According to the Department, the number is all that matters, and measuring at the elevation is irrelevant. The same rules of construction that apply to contracts apply to interpretation of a decree. *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 517, 284 P.3d 225, 248 (2012). "A court should construe judgments to give effect to every word and part." *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986). By accepting the Department's argument that the "measurement" and "filled" language in the element of the right is meaningless, this Court would not give effect to every word of the decree.

The Director "is in no way authorized to decide or determine what rights, if any, the permit holder has acquired under the permit…" *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 595, 76 P.2d 923, 926 (1938). The watermaster is a ministerial officer obliged to deliver as required by the decrees. *Almo Water Co. v. Darrington*, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972). Thus, interpreting this language from the decree rests with the courts, not the Director. Interpreting every word of the decree, as this Court must, requires that effect be given to the language describing the reservoir is filled and where that fill is measured. The district court failed to do so, and its decision should be reversed.

The Department then argues that the surcharge provisions on the Arrowrock and Lucky Peak rights negate the language in the decrees regarding elevation measurement to fill the quantity element. The Department has it backwards. These remarks specifically allow storage in the reservoirs above the elevation fill line in the event of emergencies. *See* fn 8. The remarks provide meaning to the elevation provision. This is additional fill on top of the decreed

[8] A typical decree does not explain how the natural flow rate of diversion is calculated. The Department offers no reason that a storage right decree quantity element must show how it was calculated.

elevations, not additional flow-through or additional paper fill.[9] The Director opined that these two surcharge remarks have "little or no" effect on water accounting or administration. R, 1415-16. Yet, the Department now trots them out before this Court as meaningful on the issue of paper fill accounting without explaining how. IDWR, p. 51.

The Department also contends that a remark in the Lucky Peak decree dictates that the decree's language measuring the quantity at an elevation on the upstream face reservoirs should be ignored. That remark arose from summary judgment motions filed to determine whether storage for streamflow maintenance was a legitimate purpose of use for the Lucky Peak water rights. ON Docs 63-3618, pp. 1532-1568.[10] The SRBA Court set out a list of issues raised in those motions, and none of them mention paper fill or accounting. *Id.*, p. 1546. The SRBA court held that stored water could be used for streamflow maintenance and was not an instream flow right. *Id.*, p. 1556. The court also held that challenging the instream flow purpose of use was a collateral attack on the license. *Id.*, p. 1563. Finally, the court determined that, to the extent uncontracted storage in Lucky Peak from the instream flow storage account is made available to Arrowrock and Anderson Ranch storage holders for irrigation use, these storage right holders were entitled to a remark authorizing the use for irrigation without having to apply for and obtain a temporary change in purpose of use every time the streamflow maintenance water is made available for irrigation as required by contracts with the Districts. *Id.*, p. 1567.

The Director admits, "the SRBA District Court's Lucky Peak decision did not specifically address the Water District 63 accounting system." R, 1263. Nor did the SRBA

[9] These remarks are not used in the accounting program to provide the storage right holders with any additional "paper fill" satisfaction.
[10] *Memorandum Decision and Order on Cross Motions for Summary Judgment re: Bureau of Reclamation Streamflow Maintenance Claim*, Subcase 63-03618 (September 23, 2008).

court's Lucky Peak decision approve the paper fill rule. The court did not bless the accounting program and the decision cannot be construed as supporting the theory of paper fill satisfaction.

C. The Director Could Deliver Wet Water Rather than Paper Fill.

The water users are the beneficial owners of the storage water rights. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). As such, they have the right to have their water delivered to them in priority so it can be used on the land. Idaho Constitution Article XV, § § 3, 4, and 5; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 806-07, 252 P.3d 71, 87-88 (2011). The Director is required to deliver water to the senior water users in such a way that the water user can enjoy its use. *Bailey v. Idaho Irr. Co., Ltd.*, 39 Idaho at 358, 227 P. at 1056. When counting water for the storage project, the Director must count the water used and make sure the senior gets that amount of water ahead of the junior. *A&B Irr. Dist. v. State*, 157 Idaho at 394, 336 P.3d at 801.

There is no dispute that paper fill satisfaction does not do that. R, 1183 (reservoir water right can be satisfied or filled before it physically fills); IDWR, p. 35 (paper fill does not mean that the reservoir has physically filled). Paper fill ignores the availability of wet water for irrigation storage. IDWR, p. 34. Paper fill satisfaction does not provide water when the water user can use it in flood control years because the water simply cannot be stored at that time. The Director does not contend that it can be. Paper fill satisfaction is based on the simplistic notion that the water might have been available for storage if not for flood control releases necessary to protect life and property in the Boise Valley. Recognizing the need for flood control releases in this basin, the Department wrote some of the flood control rule curves, Tr., 8/31/2015, p. 804, ll. 2-4, and gave its "blessing" to the technical work on flood releases. *Id.* Tr., 8/27/2015, p. 459, l. 12 – p. 460, l. 7.

In 1999, there was a shortage of 600,000 acre-feet in the reservoir when paper fill was reached. AR, Tr. 9/10/2015, p. 1435, l. 23-p. 1436, l. 16; AR, Ex. 2049-88, p. 1098; AR, Ex. 1019, p. 5. In that flood year, the paper fill rule would "satisfy" the water users with only 40% of their decreed rights. The remaining 60% is paper. AR, Tr. 9/10/2015, p. 1435, l. 23-p. 1436, l. 16; AR, Ex. 2049-88; AR, Ex. 1019, p. 5. Paper fill deprives them of the right to 60% of their water. The Director's claim that he is "distributing" water to the water users by watching it flow downstream when they cannot use it, is a perversion of the term "distributing" water. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994), equated the duty to distribute, under Idaho Code § 42-602, with a duty to deliver water. By allowing the water users the right to only 40% of their decreed rights, the Director is not delivering wet water to the storage rights.

The Director recognizes the inherent fallacy in his argument and reverts arguing that he can use the "unaccounted for storage" account to deliver wet water on the Day of Allocation. IDWR, p. 35. He also contends that this unaccounted for storage account has been good enough in the past to allocate wet water to the water users without a water right. In essence, the Director claims that the water users have not yet suffered injury, that they might be injured in the future by this scheme, but not to worry, such injury is unlikely. AR, 001278. The Director's argument that future injury is not a concern to water right holders was expressly rejected by this Court. *City of Pocatello v. State*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012). When the City contested a condition on its water right, this Court said the City was "wrong" to contend that future injury was irrelevant. *Id.* The Director is equally wrong to claim that future injury is irrelevant here. These water users could not use their storage water when the Director awards it to future or junior users. Injury to their priority and future ability to use that water is injury. *Id.*

Of course, the Director could count the water actually stored in the reservoirs. That is how water was stored and the priorities satisfied before Director Allred invented paper fill satisfaction, made it a statewide policy or "rule" and before 1987 when paper fill was imported to the Boise. AR, Tr. 8/28/2015, p. 494, ll. 2-12; AR, Tr. 8/31/2015, p. 845, l. 21-p. 856, l. 24. Determining how much water is released for flood control from the Boise reservoirs is, as the Department admits, a "general subtraction" exercise, even under the current accounting program. AR, Tr. 8/27/2015, p. 200, l. 19-p. 201, l. 5. The accounting program tracks, on a daily basis, releases of water for flow augmentation from Reclamation storage accounts (*Id.*, p. 197, ll. 11-25), Idaho Power rentals (*Id.*, p. 198, ll. 1-14), streamflow maintenance releases (*Id.*, p. 198, ll. 16-20) and flow past Middleton.

It is not for want of ability, it is lack of will. The accounting program tracks physical content of the reservoirs daily. *Id.*, AR, Tr. 9/10/2015, p. 1493, ll. 13-14. It could accrue water to the storage accounts based on existing data. *Id.*, ll. 15-19. Even if the Director finds it difficult to determine, using the current accounting program, how to fill the water rights without accounting for flood control releases, his unwillingness to do so does not excuse his duty to deliver water to the seniors at a time they can actually use the water. *Bailey v. Idaho Irr. Co., Ltd.*, 39 Idaho at 358, 227 P. at 1056.

D. Protecting the Spaceholders' Right to Fill the Reservoirs After Flood Control Provides the Greatest Protection to Idaho Water.

The Department asserts that paper fill satisfaction is necessary to preserve state control over Idaho's water and prevent the federal government from running amok. IDWR, p. 2. Yet, the paper fill satisfaction rule has exactly the opposite result. It prevents the water users from exercising their water rights to require the federal government to store water in the reservoir after

flood control. Without a water right, there is no legal requirement to keep that water in the reservoirs or in the state.

Everyone agrees that the federal government has an obligation to release water for flood control to protect life and property in the Boise Valley. These Operations were agreed to and blessed by the Department. AR, Tr. 8/28/2015, P. 459 l. 12- p. 490 l. 7. The Director claims (without citation to the record) that releases are based on what the United States deems "prudent." AR, Ex. 1306. In fact, releases and fill are dictated by the rule curves. AR, Tr. 8/31/2015, p. 738 ll. 4-10. Flood control operations were the result of a "joint effort by the Corps, Bureau of Reclamation, and Idaho Department of Water Resources." AR, Ex. 3001; AR, Tr. 8/27/2015, p. 244, ll. 5-20.

This Court's *Pioneer* decision illustrates why recognizing the right to fill the reservoir after flood control under a water right is critical. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). There, the United States argued that there was no need to recognize that the water users held a property interest in the storage rights because the water users were protected by their contracts with the United States. *Id.* at 115, 157 P.3d at 609. The irrigation interests argued that unless the Court recognized they had equitable title to the water right itself, they were "vulnerable." *Id.* The State agreed. This Court held that mere contractual remedies are not enough to ensure that water is stored in the reservoir for the water users. *Id.*

Now the Department argues that the water users are protected by their contracts without a water right of any kind. This two-faced approach deeply concerns the water users. A mere contractual remedy against the United States is not enough. It was not enough in *Pioneer* and is not enough today.[11] This Court explained:

[11] *See Ak-Chin Indian Community v. Central Arizona Water Conservation Dist.*, Case 2:17-cv-00918-DGC, United States Motion to Dismiss Third Party Complaint (July 2, 2017) (arguing that the United States is protected by

> They argue that recent cases illustrate that the irrigation districts have few, if any, remedies when the United States breaches water distribution contracts. *See Orff*, 545 U.S. 596, 125 S.Ct. 2606, 162 L.Ed.2d 544; *Klamath Irrigation Dist. v. U.S.*, 67 Fed.Cl. 504 (2005). In *Klamath* the court held the water users had no constitutional takings claim and must rely on contractual remedies within their distribution contract. However, in *Orff* a group of individual irrigators sued the United Stated [sic] for breach and the Ninth Circuit Court of Appeals held since they were not third party beneficiaries, the United States was immune from the suit.

Id.

Without a water right there is no legal impediment to a downstream federal court ordering the federal agencies to release water stored without a water right for downstream, out-of-state federal purposes. AR, Tr. 9/10/2015, p. 1496, l. 11-p. 1498, l. 16. The Department never addresses that threat and does not even try to explain how labeling the water as "excess" and stored without any water right protects Idaho from downstream demands.

Litigation over the Federal Columbia River Power System has been underway in federal courts downstream of Idaho for many years. *National Wildlife v. National Marine Fisheries Service*, 184 F. Supp. 3d 861 (D. Ore. 2016). One of the claims in this litigation is that additional flow augmentation water must be released from Idaho by the federal government. In 2011, the federal court directed NOAA Fisheries to consider requiring "additional flow augmentation and reservoir modifications." *National Wildlife v. National Marine Fisheries Service*, 839 F. Supp. 2d 1117, 1131 (D. Ore. 2011).

There is a clear and present danger to Idaho water from downstream interests. The Department's "excess flow" theory precludes storage under a water right and puts that water at risk. *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. Accepting the Department's claim that the water is "excess" and not protected by a water right, what prevents a federal court from ordering a federal agency to release water that no water user has any right to receive? The Department has

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sovereign immunity from claims that it failed to deliver water, and citing the *Orff* decision that concerned this Court in *Pioneer*). Addendum C.

no answer. It is so focused on protecting its paper fill rule that it ignores the consequences. This Court must not expose the water users to this downstream risk.

E. It was Error to Refuse to Consider the Historic Uses of the Reservoir System.

This Court concluded that to fully determine the rights of the water users to have water fill the reservoir is a "mixed question of fact and law" that requires development of the factual and historic record. *A&B Irr. Dist. v. State*, 157 Idaho at 392, 336 P.3d at 797. The Department disagrees. It claims that considering the historic record amounts to a collateral attack on the SRBA partial decrees. IDWR, p. 60. The district court stated that the historic record and agreements would "not be considered" because they were not referenced in the decrees. R, 1064. Neither the Department nor the district court have reconciled this Court's directive to develop an historical record to resolve this "mixed question of fact and law" with the claim that the partial decrees provide all the answers.

The Boise Project is not asking the Court to amend the decrees. The decrees either require the quantity element to be measured by elevations on the face of the dam (Section II.B., *supra*) or they are silent. The decrees do not mention paper fill satisfaction or any of the Department's "longstanding" rules or policies. If the decrees were meant to incorporate these policies, it was incumbent on the Department to raise them during the SRBA. The Department sat silent. Only after the decrees were final for the Boise reservoirs, did the Department claim that the decrees mandate paper fill satisfaction.

While the Director has discretion to determine how to account for water, he must do so in accordance with law. To determine whether the accounting program was properly adopted and whether it comports with the decreed rights, this Court must consider the historic operations to

resolve these mixed questions of law and fact. This complex history of water operations, reservoir fill, and beneficial use of the water must be considered, rather than ignored.

When this Court considers: (1) the historic operations of the reservoirs to release water for flood control, avoiding overtopping the dams, and filling the reservoirs with late season run-off; (2) the negotiations between the water users and State with the United States to provide more storage and flood control while protecting the existing water rights; (3) the Water Control Manual unique to the Boise developed as a "joint effort" among the Department, the Corps and Reclamation to increase the reliability of refill and provide controlled releases to protect life and property; (4) the historic operations of filling the reservoirs under the existing storage rights; (5) the moratorium recognizing that the Boise is fully appropriated except during flood releases; (6) the conditioning of junior rights limiting them to flood control releases; and, (7) the understanding of the water users and the water master, the historic record requires recognition of "satisfaction" of water rights in a way the water users can use the water and not by paper fill.

The Department's cite to *Rangen Inc. v. IDWR*, 159 Idaho 798, 367, P.3d 193 (2016), is completely inapplicable. This decision involved a fish farm whose SRBA water right decrees described the source of water as a particular tunnel and the point of diversion as within a specific ten-acre tract. *Id.* at 805, 367 P.3d at 200. This Court held that the decrees limited the fish farm to diverting from that specific source and location, and that the decrees could not be interpreted to allow it to divert from a separate location. *Id.* at 806, 367 P.3d at 201.

The Boise Project is not asking the Court to change any element of the decreed water rights. It is asking the Court to hold that the paper fill satisfaction rule, which does <u>not</u> appear on the decrees, violates the water users' right to fill the reservoir after flood control releases, as they have done for generations. R, 1067. *Rangen* does not address the situation before this Court. The

Department's insistence that the Court read the paper fill satisfaction doctrine into the decrees, when the decrees do not mention paper fill, violates *Rangen*.

F. The Director's Decision Violates the *Basin Wide 17* Decision.

This Court held in *Basin Wide 17* that, "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. *A&B Irr. Dist. v. State*, 157 Idaho at 394, 336 P.3d at 801. The Department argues that the language requiring the Director to count how much water the senior has "used" does not mean what it says, but means that the Director must count the water that enters the reservoir, regardless of whether the water is or can be used. IDWR, p. 42. The Department further argues that this Court gave the Director free rein in how to account for water. Neither argument is correct.

This Court recognized that the Director has discretion on which accounting program to employ to determine what the water user "has used." The Director was not granted the discretion to ignore the water the "person has used." Yet, that is exactly what the Director has done. He does not care how much water the Boise Project "has used" or can use. Suez can't escape this language, so accuses this Court of using "sloppy" language. Tr. p. 91, ll. 12-13 (July 11, 2016).

The Supreme Court interprets the law. The judiciary has the ultimate responsibility to determine the law. *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001); *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 853, 20 P.2d 1206, 1210 (1991); *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60, 73 (1803). The Director does not. *Twin Falls Canal Co. v. Huff, supra*. When this Court tells an agency to count how much water a "person has used," it should expect the agency to carry out the law as announced by this Court. The Director admittedly has not done so and his decision must be reversed.

G. Unaccounted for Storage Violates Idaho Law and Cannot Salvage the Department's Accounting Rules.

The Department attempts to salvage paper fill satisfaction by asserting that paper fill is saved by allowing storage without a water right. IDWR, p. 36. This approach doesn't comport with Idaho law. Calling the water that fills the reservoir "excess" to the needs of the system is an argument constructed by the Department and counsel long after the fact to justify its current litigation position. Nothing in the documentation surrounding adoption of the accounting program describes the reservoir fill after flood control as "excess" or surplus. Historically, the Department recognized that the purpose of storing the water after flood control was to "maximize" storage for use by the water users. AR, Ex. 2145, p. 1215. Now the Department puts that storage at risk.

In 1985, the Department stated that when "flood control releases" exceed irrigation demand "the entire release is considered surplus to the Boise River." AR, Ex. 2186, pp. 7-26. The Department doesn't dispute that it historically considered the flood control releases as "surplus." Nor can it point to any statement that the late season inflows were considered excess.

It was not until the issue of the right to store reservoir fill after flood control arose in the Upper Snake that the Department's counsel began to label the water filling the reservoirs as "excess." *See A&B Irr. Dist. v. State*, 157 Idaho at 390-91, 336 P.3d at 797-98. This post-hoc litigation rationale is entitled to no weight. *Bower v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be an agency's convenient litigating position would be entirely inappropriate.") That is particularly true when, as here, the newly discovered rationale clashes so directly with the Department's contemporaneous explanation that flood releases were "surplus." AR, Ex. 2186, p. 3808.

The Department's reliance on the "excess" water case law, *State v. Idaho Conservation League*, 131 Idaho 333, 955 P.2d 1112 (1998); *A&B Irr. Dist. v. Idaho Conservation League*,

131 Idaho 411, 958 P.2d 568 (1998), ignores the facts and holdings of those cases. The Department ignores the district court's explanation that excess flow remarks were only recognized in the SRBA was because the remarks were based on prior decrees that preceded the SRBA that had to be included in the SRBA decrees. R, 1066. The Department ignores the district court's explanation that these decrees were not reconciled with Idaho Code § 42-201(2), which requires a water right for diversion of water. The Department ignores the distinction between excess flow remarks memorialized in a decree and the Department's current position that it can allow storage of excess flows without a water right in the absence of a remark or a decree.

Factually, the Department also stumbles when it attempts to analogize this case to the excess flow decrees. In the SRBA proceedings, the "excess" flows were the same early season flood waters as those "surplus" waters released for flood control in the Boise. *State v. Idaho Conservation League*, 131 Idaho at 336, 955 P.2d at 1115. Flows that came after the flood waters were not considered "excess." These excess flow cases do not support the Department's position.

The Department claims that unaccounted for storage allows water to refill the reservoir, but has no explanation for the requirement for a water right in Idaho Code § 42-201(2). The Department's brief does not even mention that law. It just argues that unaccounted for storage cannot be quantified. IDWR, p. 38. But that is nonsense. The unaccounted for storage account is quantified every year. AR, Tr. p. 211 ll. 3-8 (203,302.5 AF in unaccounted for storage account); p. 276 ll. 18-21(second fill is "accounted for" as unaccounted-unallocated storage). The water in the unaccounted for storage account is tracked, but without a water right – according to the Department. AR, Tr. 8/28/2015, p. 444 ll. 18-25. The accounting program already tracks the physical content of the reservoirs, so quantification is done. AR, Tr. 9/10/2015, p. 1493 ll. 13-19.

H. Suez's Colorado Law Arguments Conflict with Idaho Law and Boise River Historical Operations.

In *Basin Wide 17*, Suez tried to convince this Court to govern Idaho by Colorado law, but this Court did not take the bait. *A&B Irr. Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014). Suez again argues for Colorado law. Suez's Brief, pp. 69-70. There are substantial differences between Colorado's reservoir systems and the historic development of the reservoirs on the Boise River. Suez would cast aside Idaho's rich legal tradition of water law in favor of Colorado. The district court rejected Suez's effort. R, 1165. This Court should do the same.

Suez advocates for the adoption of the Colorado Division of Water Resources General Administration Guidelines for Reservoirs. Suez's Brief, pp. 19-20. Suez ignores "the Colorado River system's ability to store approximately 60 MAF, or nearly 4 years average natural flow of the river."[12] The Boise River, in contrast, can store less than half of one year's natural flow in an average year. AR, Ex. 3001. Suez's vision of Colorado's one-fill rule jeopardizes the Boise Project's storage rights.

The authority Suez relies on demonstrates an important distinguishing characteristic of the Colorado storage system; the vast majority of its reservoirs are off-stream. Suez cites Colorado case law for the proposition that other jurisdictions recognize a one-fill rule for reservoir storage, and that those jurisdictions consider all water that enters the reservoir as storable inflow. None of the cases present a similar factual scenario to the Boise River reservoir system.

Suez argues that *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 44 Colo. 214, 222-223, 98 P. 729, 733 (1908), stands for the proposition that Colorado's "one-fill" rule should apply in Idaho. Like the SRBA court in *Basin Wide 17*, the Colorado court declined to define

[12] *See* December 2012, Colorado River Basin Water Supply and Demand Study, U.S. Dept. of the Interior, found at http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/Executive%20Summary/Executive_Summary_FINAL_Dec2012.pdf, Executive Summary, p. ES-1. The Boise Project Board of Control expressly requests that this Court take judicial notice of this publically available record of the United States Bureau of Reclamation.

what constitutes "fill." It simply held that when a reservoir has been filled once in a season, it could not be filled again. *Wheatland Irr. Dist. v. Pioneer Canal Co.*, 464 P.2d 533 (Wyo. 1970), involves diversion from the river to an off-stream reservoir via a canal. *Id.* at 535. The question of whether water that must be passed through the reservoir for flood control purposes should count against the right was not an issue. Diversion from the river via a canal or ditch to an off-stream reservoir, does not implicate flood control operations.

Most cases cited by Suez to support the one-fill rule involve diversions of water to off-stream reservoirs.[13] Suez's only cases involving on-stream reservoirs actually support the proposition that all water entering the reservoir cannot be counted as "stored" pursuant to the water right. In *Bd. of County Comm. of County of Arapahoe v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840, 847 (Colo. 1992), the water right decree included rights for initial fill, and refill, and incorporated accounting procedures to determine storage amounts. All water entering the reservoir in that case was not counted toward the initial fill of the right. In *City of Thornton v. Bijou*, 926 P.2d 1, 28 n. 13 (Colo. 1996), the court affirmed the right to refill the on-stream reservoirs because refill was inherently contemplated under the water right's application process. The Colorado court recognized that for any on-stream reservoir there is a possibility that the volume of the reservoir may rely upon multiple fills. As in the Boise, the facts matter. Applying Colorado's one-fill rule for off-stream reservoirs involves a storage system with the capacity to store eight times the relative amount of flow that the Boise reservoirs can store. Suez's attempt to impose its Colorado model on the Boise River reservoir system must be rejected. R, 1165.

[13] *See Orchard City Irr. Dist. v. Whitten*, 362 P.2d 139, 128-129 (Colo. 1961) (reservoir supplied by water diverted through Alfalfa Ditch); *City of Westminster v. Church*, 445 P.2d 52, 54 (Colo. 1968) (water diverted and supplied through Last Chance, McKenzie, Eggleston and Autry ditches); *Southeastern Colo. Water Conservancy Dist. v.*

Suez's other arguments are simply the Department's arguments with different terminology. *See* IDWR Response to Suez Cross-Appeal. Suez and the Department contend that the maximum use doctrine authorizes storage without a water right. All of the evidence in the record points to the fact that the Boise River reservoirs are operated under a carefully planned and thorough system of operations guided by the Water Control Manual and its rule curves. AR, Ex. 2186; see also AR, Tr. 8/31/2017, p. 754, ll. 6-24. There is not a shred of evidence to demonstrate that operations of the Boise River reservoirs have wasted any water. Storage dams are an invaluable resource that allow Idaho's agricultural economy to exist and provide "flood control, power generation, recreation, and provide beneficial environments for fish and wildlife." *Kunz v. Utah Power and & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990). These uses should be protected.

No case holds that the "maximum use" concept authorizes diversion and storage without a water right or justifies ignoring Idaho Code § 42-201(2). Similarly, Suez's argument for a "free-river" when anyone and everyone can take water without a water right is flatly prohibited by Idaho Code § 42-201(2). If accepted by this Court, Suez's free-river would quickly degenerate into a free-for-all with innumerable parties claiming the right to divert without a water right. Why bother with a water right if Suez could just take water when it wants it?

I. The Boise Project's Due Process Rights Were Violated:

1. The Proceedings as a Whole Violated the Boise Project's Due Process Rights.

The district court limited its review of the Boise Project's due process arguments primarily to the question of whether the Director properly denied the motion to appoint an independent hearing officer. R, 1069-1071. The district court did not address the argument the

Simpson, 720 P.2d 133, 136 (Colo. 1986) (water diverted and supplied through Lyon Canal); *North Sterling Irr. Dist. v. Simpson*, 202 P.3d 1207, 1209 (Colo. 2009) (water is diverted from the river to the reservoir).

proceedings as a whole deprived the Boise Project of the due process guaranteed to them under the U.S. and Idaho Constitutions. The Boise Project was not solely concerned with the Director's demonstrated bias to "defend" the accounting program, but that his actions and statements throughout the course of the proceedings made it clear that the parties were hailed before the Department for the purpose of creating an *ad hoc* record to support existing rules. The Director was unwilling to consider the Boise River reservoir operations as part of how flood control should be factored into accruing water rights in the Boise River. In the Director's view, the case was about confirming the Department's program. Historical use was always irrelevant.

Due process issues are generally questions of law, and this Court exercises free review over questions of law. *Idaho Historic Preservation Council, Inc. v. City Council of City of Boise*, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000). Additionally, "due process is not a concept to be applied rigidly in every matter. Rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation." *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91, 982 P.2d at 926 (internal quotations and citations omitted).

Idaho law allows a presiding officer in an administrative case to hear and judge that case even where the officer has taken a public position on the policy issue to be decided. *Idaho Dept. of Water Amended Final Order Creating WD No. 170 v. IDWR*, 148 Idaho 200, 208, 220 P.3d 318, 326 (2009). That does not mean that in every instance where a presiding officer has taken such a position, that it is always appropriate for the presiding officer to hear and judge the case. This Court must decide, under the facts and circumstances of this case, whether the Director was "not capable of judging [this] particular controversy fairly on the basis of its own circumstances." *Eacret v. Bonner County*, 139 Idaho 780, 785, 86 P.3d 494, 499 (2004)(overruled on attorney's fees grounds in *City of Osburn v. Randel*, 152 Idaho 906, 277

P.3d 353 (2012)). In *Eacret*, the Court was asked to determine whether a planning and zoning board member's statement advancing the interests of the applicant before the board rendered the vote unconstitutionally biased. In *Eacret*, the board member whose vote was in question had made an earlier statement that he believed the applicant was being required to spend too much money on the project, that he had driven by the property in question a couple of times and had spoken with the applicants about the project on a couple of occasion. *Id.*

Examining how a decision maker's prehearing statements must be evaluated, this Court held:

> By way of explanation then, prehearing statements by a decision maker are fatal to the validity of the zoning determination if the statements show that the decision maker: (a) has made up his or her mind regarding the facts and will not listen to the evidence with an open mind, or (b) will not apply the existing law, or (c) has already made up his or her mind regarding the outcome of the hearing.

Eacret v. Bonner County, 139 Idaho at 785-786, 86 P.3d at 499-500, internal citations omitted. Applying this test to the facts and record in the contested case proceeding, the Director's statements and actions during the contested case proceedings deprived the Boise Project of due process, and rendered the Director incapable of judging the Basin 63 paper fill case fairly.

Substantial evidence in the record shows that the Director had made up his mind regarding the facts and did not intend to heed contrary evidence. At the outset, counsel for the Director made clear that the purpose of the contested proceeding was not "to address and resolve concerns with and/or objections to how water is counted or credited toward the fill of water right for the federal on-stream reservoirs pursuant to existing procedures for accounting in Water District 63." AR, 7. At the December 6, 2013, initial conference for the contested case, that the Director admitted "nobody likes," his counsel explained that if the accounting program were to change then, "[i]f you take water—if you change the accounting and it takes water from – or gives water to somebody or [improves] somebody else's position, there somebody else that's

going to be on the other side of that water shift." AR, Tr. 12/6/2013, p. 4, l. 12; p. 9, ll. 11-15. This pre-conceived position, that any concerns about the accounting program would injure juniors, was echoed by the Department's primary witness in her testimony at the contested case. She admitted that she had heard that sentiment stated at the Department, and that she held that opinion herself. AR, 8/27/2015 Tr., p. 223, l. 24-p. 224, l. 17.

At the December 6, 2013, initial status conference, the Director's counsel admitted that the purpose of the proceedings was to create the missing record to support the existing accounting program. He stated, "[a]nd that's part of our struggle here is that there hasn't been a record created of why those things occurred. And that was the anticipation of this. Not to have an informal setting where we don't build that where we don't that for the future. It was to build a structure that we could have all the information come in and we can look at that and build that for the future going forward so we don't have to revisit these issues every so often, or at least if you do revisit it, you've had that established documentation of what's going on behind it." AR, 12/6/2013 Tr., p. 26, l. 24-p. 27, l. 10.

In his Order Initiating the Contested Case, the Director stated "[n]o formal administrative record has been developed" concerning the accounting and that "[t]he existing 'records' on these matters are scattered and incomplete." AR, 4. This certainly telegraphed that the Director intended to create a record to support the existing accounting. This fear was confirmed in an Order issued by the Director on the eve of the contested case that stated "[m]uch of the evidence sought to be introduced by the Irrigation Entities is likely irrelevant to this proceeding." AR, 892.

The district court based its decision on the presentation the Director gave to the Legislative Interim Committee in 2014, and concluded on the basis of this document alone that the due process rights of the parties had not been violated. R, 1069-1071. While that document

alone might not be enough, it is further evidence that the Director had made up his mind, and did not intend to listen to the evidence and testimony he thought was "irrelevant." *Eacret v. Bonner County*, 139 Idaho at 785-786, 86 P.3d at 499-500. The Director summarized the "Complaints About Present Accounting,"[14] he had gleaned from *Basin Wide 17* and settlement talks. He then explained why he believed the complaints lacked merit. AR, pp. 125-127. For instance, to the "complaint" that the present accounting season "forces the spaceholders to take a drink when they are not thirsty"[15] he responded by stating "[t]he determination of need cannot wait until the end of the storage season or the end of the upcoming irrigation season" *Id.*, p. 126. He repeats this conclusion in his Amended Final Order. AR, p. 1299.

Another "complaint" noted by the Director is the waterusers' request to be treated like any other water user. AR, p. 127. In response the Director stated that "[b]eing treated like any other water user is not the appropriate standard – it would result in reservoirs not physically filling and water flowing downstream and lost to downstream states and the ocean." *Id.* He went to claim that "[u]nder the present method of accounting, one could argue that the storage right holder receives more than any other water right holder because the storage space refills even after the right has been satisfied."[16] *Id.* The Director made clear that he believed that the waterusers' concerns lacked merit. The Director then explained that he believed "Resetting the satisfaction of the right downward to equal physical storage" would have negative and unacceptable consequences. AR, pp. 128-130. While the Director need not have preconceptions,

[14] It is worth noting that no water user actually filed a "complaint" with the Department under APA or the Department's rules IDAPA 37.01.01.153.
[15] This is the Director's language, and not any party's. The concerns as expressed by the Boise Project are that the Department accrues water to the storage account, and fills that account and takes it out of priority, prior to the irrigation season in flood control years, leaving the Boise Project's irrigation water rights unprotected by any water right. This, as the district court held, means the water they supply to the water users is subject to future appropriation. See Addendum B.
[16] Of course, his explanation omits the fact that he contends this refill occurs without any right and without any assurance that it will actually be there.

all his preconceptions are parroted in the Amended Final Order, AR, 1230-1311, and none of the concerns are heeded, it shows a decision maker with an immovable position.

Eacret also asks whether the presiding officer will follow the law. *Eacret v. Bonner County*, 139 Idaho at 785-786, 86 P.3d at 499-500. Here, the Director refuses to apply Idaho Code § 42-201(2) regarding diversion without a water right. He asserts the right to account for water rights pursuant to I.C. § 42-602, to adopt an accounting tool that strips the decreed water rights of their priority, and leaves unprotected by any water right the water that is delivered for irrigation use in a flood year. *A&B Irr. Dist. v. State*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014), held that "the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user." The Director claims that the water the person "has used" has no meaning and that it is impossible for him to count the water used. This is not true. The Water District 63 Watermaster and Department count all water used by the Boise Project; and all water stored for that use. AR, Tr. 8/31/2015, p. 855, l. 10-p. 856, l. 24.

From the beginning of the proceedings the Director knew the outcome he wanted. He found the water users' evidence "irrelevant" and "rejected" the testimony of the watermaster. *Eacret v. Bonner County*, 139 Idaho at 785-786, 86 P.3d at 499-500. Idaho Code § 67-5252(1) entitles the parties to an unbiased decision maker, who was not prejudiced to the interests of the parties, and who did not have substantial prior involvement in the matter other than as a presiding officer. The Director had a admittedly "well known" substantial prior involvement in the action. He had strong opinions concerning the outcome and even actively lobbied and advocated for the result that he ultimately reached. The totality of the circumstances show that the Director was "not capable of judging [this] particular controversy fairly on the basis of its own circumstances." *Eacret v. Bonner County*, 139 Idaho 780, 785, 86 P.3d 494, 499 (2004).

2. The Director Did Not Have to and Should Not Have Acted as Hearing Officer:

The district court also affirmed the Director's decision not to disqualify himself, on the theory that disqualification "would have resulted in an inability to decide the contested case in violation of Idaho Code § 67-5252(4)." R, 1071. This conclusion does not comport with the historic practice of the Department. Prior Directors routinely appointed independent hearing officers to preside over cases where issues of substantive Department policy. *See A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 315 P.3d 828 (2016)(Schroeder); *Clear Spring Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011)(Schroeder); *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225(2012)(Schroeder); *North Snake Groundwater Dist. v. Idaho Dept. of Water Resources*, 160 Idaho 518, 376 P.3d 722 (2016)(Cefalo); *see also* IDWR Backfile water right no. 01-7011 (Schroeder). Given the close attention and control exercised by the Director to creating a record in the contested case, it appears that the Director was unwilling to cede control of the proceedings or the record upon which the case would be decided. Whatever the reason he declined to disqualify himself, it was not because it would have prevented the Department from deciding the case.

In any event, Idaho Code § 67-5252(4) does not state that where disqualification of the agency would result in an inability to decide a contested case, that the agency head should just continue to act as the hearing officer. Instead it provides that the provisions of Idaho Code § 74-404 shall govern. That section requires a written statement to the appointing authority (the Governor) who can then ask the Attorney General for a legal opinion. There is no record that any of this occurred. Since the required procedures were not followed to deal with the situation that the Director claims occurred, the Director cannot now rely on the argument that his recusal would preclude a decision.

3. The Director's Ex Parte Conversations with the Department's Primary Witness Deprived the Parties' of Due Process:

The most egregious action that deprived the Boise Project of its due process right to a fair and impartial tribunal surfaced on the last day of testimony in the contested case. The parties learned then that the Director had been engaged in ongoing conversations with the Department and witnesses during the hearing but outside the hearing record, and that he directed the presentation of testimony and preparation of an exhibit while acting as the presiding officer. The district court believed that this problem was cured because "the topic of this conversation was revealed…." R, 1072. The district court did not appreciate that this consultation continued throughout the hearing, entirely off-the record. Crucially, the Department has not even attempted to explain how a presiding officer can sit with the Department's witness off the record, discuss the proceedings and direct presentation of evidence.

Idaho Code § 67-5253 states that "[u]nless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication." (emphasis added). But, the Department's primary witness met with the presiding officer and counsel throughout the proceedings. The presiding officer gave the Boise Project no opportunity to observe or participate in these communications. The substance of those consultations, aside from the witness' description of talking "in general" about the proceedings and the Director directing her to prepare AR Exhibit 9, is not known. AR, Tr. 9/11/2015, p. 1588, l. 25-1589, l. 10. This Court should be horrified by this practice.

We also know that the Director at least attempted to consult with other Department staff off the record during the course of the hearing. AR, Tr. 8/31/2015, p. 942, l. 17-p. 944, l. 20. We

don't know what other efforts there were. "A quasi-judicial officer must confine his or her decision to the record produced at the public hearing." *Eacret v. Bonner County*, 139 Idaho at 786, 86 P.3d at 500 (2003); citing *Idaho Historic Preservation Council v. City Council of City of Boise*, 134 Idaho 651, 8 P.3d 646 (2000). Having failed to confine himself to the public record, the Director's Orders must be reversed.

4. The Accounting Program Should have Been Adopted Through Rulemaking:

The district court stated that accounting for water rights in Basin 63 "involved matters of particular applicability," when he concluded that rulemaking was not required to adopt the accounting in Basin 63. R, pp. 1071-1072. The court and Department overlook Idaho Code § 42-603, authorizing rulemaking for water distribution. If, as the Department argues, distribution can't be done by rulemaking, why did the legislature authorize rulemaking for distribution?

The Director's statements in calling the contested case, and the testimony of three prior Directors, further undermine the district court's conclusion. The Order Initiating Contested Case was served on every water right holder in Basin 63, and it "ORDERED that water users with rights to divert, store, or use water in Water District 63 that have concerns and/or objections regarding how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs in Water District 63 are to submit statements of concern and/or objections to the Department." AR, 7-34.

Three past directors, Dunn, Dreher and Tuthill, testified that the accounting program was based on a longstanding practice or a "rule" adopting the concepts of "paper fill," "unaccounted for storage," and "one fill." AR, Tr. 8/31/2015, p. 659, ll. 2-3; Tr. 8/27/2015, p. 238, ll. 2-16 and p. 240, l. 7. Former director Tuthill testified, "we had used the policy through the State for these larger reservoirs that they get one fill." AR, Ex. 8; AR, Tr. 8/31/2015, p. 652, ll. 1-3; and that the one-fill was a "rule" throughout his examination by counsel for Suez. AR, Tr. 8/31/2015, p. 658,

l. 3- p. 659, l. 18. It is undoubtedly a rule with (1) wide coverage, and (2) applied generally and uniformly across the state. *ASARCO v. State*, 138 Idaho 719, 723, 69 P.3d 139, 223 (2003). There is also no contention that the accounting program was intended to (3) operate only in future cases. *Id.*

The Department argues that Idaho Code § 42-602 gives the Director so much discretion that no matter what he does he is free from rulemaking because the legislature has authorized him to distribute water. This circular reasoning does not justify paper fill satisfaction. Nothing in Idaho Code §42-602 or the decrees require paper fill. Paper fill sprang from the mind of a prior director, whole cloth. AR, Tr. 8/31/2015, p. 855, l. 9-p. 856, l. 24. Adoption of the paper fill rule had the effect of (4) prescribing a legal standard or directive not otherwise provided by the enabling statute. *ASARCO v. State*, 138 Idaho 719, 723, 69 P.3d 139, 223 (2003). Prior to adoption of the paper fill rule, the Department did not accrue water to no water right, and call it "unaccounted for storage." Therefore the paper fill was also an (5) interpretation of law or general policy of the Department that did not exist prior to implementation of the accounting program.

Paper fill satisfaction meets all of the requirements necessary to require rulemaking. A rule established by an agency not adopted in substantial compliance with the requirements of the APA is voidable. *Id.*, at 725, 69 P.3d at 225.

IV. RESPONSE TO REQUEST FOR ATTORNEY FEES

The Department alleges it is entitled to attorney's fees because the Boise Project's arguments are a collateral attack on the decreed storage rights and challenge the prior appropriation doctrine[.]" The Director called the contested case that nobody wanted, and threatened anyone who did not participate that they would be forced to take whatever came out

of his proceedings. AR, Tr. 10/7/2014, p. 43, l. 7-p. 44, l. 1. The decrees don't mention paper fill and the Department hasn't cited a single case holding that the prior appropriation doctrine requires paper fill.

Suez argues that it should be entitled to attorney's fees, because the case involves an issue of the Department's specialized expertise, in other words, it is futile to even challenge the Director. Creating a contested case to create the post hoc record that he needed to support the Basin 63 accounting program, does not mean that the Boise Project's challenge to the Director's actions lack a basis in law or fact.

V. REQUEST FOR ATTORNEY FEES

The Boise Project Board of Control is entitled to attorney's fees and costs pursuant to Idaho Code § 12-117. The Director pre-determined the outcome, refused to stay or dismiss the proceedings, and forced the parties into a hearing to create a record to justify the Basin 63 accounting program. The Director ignored the mixed questions of fact and law, ignored the history of operations, the Watermaster, and the water users, has rewrote history, has ignored I.C. § 42-201(2), and insisted that he could authorized storage of "unaccounted for storage" without a water right to protect junior users in violation of Idaho's Constitution and law. The proceedings violated the Boise Project due process rights. The Director acted "without a reasonable basis in fact or law," and attorney's fees should be awarded to the Boise Project pursuant to I.C. § 12-117.

VI. CONCLUSION

For generations, the Boise River reservoir system was operated to release flood waters to protect life and property and then fill the reservoirs with late season runoff. The water users historically put this water that filled the reservoir to beneficial use. Everyone knew that these

reservoirs filled under the existing water rights. The Department even helped to write the operating guidelines to maximize storage. Now the Department has constructed a theory that it can authorize storage without a water right, in violation of Idaho Code § 42-201(2). This theory deprives the water users of any protectable interest in the water they have used for generations. It puts irrigated agriculture at risk in this basin, to the threats of future uses and downstream demands.

The Boise Project requests that this Court reverse the decision of the district court which upheld the paper fill rule, remand with appropriate instructions, and hold that the contested case violated the due process rights of the Boise Project and engaged in improper rulemaking.

DATED this 8th day of September, 2017.

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By: Albert P. Barker
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By: Charles McDevitt
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September 2017, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S REPLY BRIEF** the method indicated below, and addressed to each of the following:

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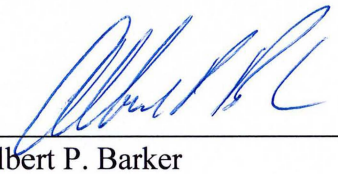

Albert P. Barker

ADDENDUM A

to

BOISE PROJECT BOARD OF CONTROL'S

REPLY BRIEF

Filed on September 8, 2017

Boise Project Board of Control, et al. v. IDWR
Supreme Court Docket No. 44745-2017

Rights and releases

Idaho water case highlights difficulty of dam management under climate change

BY EMILY BENSON

Water being released from Lucky Peak Dam creates a rooster tail flowing into the Boise River.
DAVID R. FRAZIER PHOTOLIBRARY, INC. / ALAMY STOCK

On a sunny day in late April, the U.S. Army Corps of Engineers released hundreds of millions of gallons of water from Idaho's Lucky Peak Dam, a dozen miles upstream of Boise. The dam operators call it a "rooster tail" display; thousands of observers took in the spectacle. The water, roaring out of a dam gate, arced high above the Boise River, rainbows shimmering in its spray.

Rooster tails are one way the Corps releases excess water to reduce the risk of flooding — a partially empty reservoir can capture spring runoff before it can race downstream and inundate Boise. Releases are necessary about seven years out of every 10, including this year, when basin flows were among the highest recorded. Lucky Peak and two associated reservoirs also store water for irrigation. In snow-heavy years, that means dam operators must strike a balance between letting enough water go early in the spring and retaining sufficient water for the hot, dry days to come.

Getting releases right is crucial for the farmers who depend on the Boise River to irrigate crops like sugar beets and seed corn. The river also waters lawns and parks, and supplies about 30 percent of Boise's drinking water. As in other Western states, water users with older rights get first dibs. But since 2013, several irrigation companies and the Idaho Department of Water Resources have been fighting over administrative details that determine which water Lucky Peak irrigators are entitled to use during a wet year: flood-control releases, or the "refill" water that collects after releases are done. The case is now before the Idaho Supreme Court. Its outcome will determine how the water in the Boise River system is doled out — no small consequence for the people and fish that depend on it. The fight itself, however, highlights a larger challenge water managers across the West are confronting: How do you operate dams effectively as climate change alters the historical patterns used to predict runoff timing and volume?

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The Department of Water Resources contends that water counts toward storage rights upon entering the reservoir. That means flood-control releases could include already-allotted water. But irrigators say those releases arrive too early in the season to be useful, sometimes while snow still covers their fields. They claim they are entitled to the water that subsequently refills the reservoir, which is distributed later in the summer when they need it most.

While the department does dole out refill water, it considers it to be excess and unappropriated water that doesn't fulfill any reservoir storage rights. In September 2016, District Court Judge Eric Wildman ruled partially in favor of the department, writing that water entering the reservoir satisfies users' rights. However, he also pronounced the department's practice of allocating refill unlawful, leaving the refill water distribution in limbo. The Supreme Court is expected to make a decision by year's end. "For anybody to say that (releases) should be counted against our storage rights, as water that we're actually using — it's ridiculous," says Roger Batt, executive director of the Treasure Valley Water Users Association, the irrigation companies' lobbying group.

Regardless of its legality, the department's method has largely kept water flowing to the irrigators. Since its implementation in 1986, there's only been a single year in which there were flood-control releases but users didn't get their full amount.

But the problem isn't purely theoretical, says Mathew Weaver, Idaho Department of Water Resources deputy director. With no rights attached to the refill, future demands could take water that current users have come to rely upon. Extremely wet years could, paradoxically, leave fields and lawns parched if big flood-control releases happen and the refill water has been claimed for other uses. A similar case occurred in Idaho's Upper Snake River Basin, where large diversions for groundwater recharge spurred a 2015 settlement in which irrigators gained legal rights to refill water. Those rights, however, date to 2014, meaning they have lower priority than older water rights.

Adding to the complexity of the situation, refilling reservoirs may be getting more difficult, thanks in part to shifting precipitation patterns caused by climate change. Greater extremes — wetter wet years and drier dry years — and earlier spring thaws could make it harder to manage dams, says Doug Kenney, the director of the Western Water Policy Program at the University of Colorado. "All these operating guidelines that you built up based on data from the last century just don't work very well anymore," he says.

Whether next year is wet enough to warrant a rooster tail display at Lucky Peak depends on nature; exactly how flood-control releases will be accounted for, however, is up to the Idaho Supreme Court. Whatever the decision, climate change will continue to impact water in the West. "We really need to use our reservoirs more skillfully than we have in the past," Kenney says. "And it's a challenge." □

ADDENDUM B

to

BOISE PROJECT BOARD OF CONTROL'S

REPLY BRIEF

Filed on September 8, 2017

Boise Project Board of Control, et al. v. IDWR
Supreme Court Docket No. 44745-2017

federal government.

2. The flow augmentation program above the Hells Canyon Complex is designed to assist fish survival downstream of Hells Canyon Dam. The parties understand that the flow augmentation program provides maximum amounts of flow augmentation delivered from the upper Snake and that no guarantee can be provided, beyond the terms of this agreement, that any particular amount of water will be provided in any particular water year.
3. Sources shall include, but are not limited to contracted and uncontracted storage, powerhead, Oregon natural flow water, Sho-Ban water bank water, rentals pursuant to the IWRB Water Bank, and natural flow acquisitions herein provided.
4. Idaho Code § 42-1763B will be reenacted to authorize the rental of up to 427,000 acre-feet (AF) of water annually for flow augmentation for the term of the agreement. Reauthorization shall also provide for the rental of water from storage or natural flow sources from the Snake River and its tributaries at or above Lewiston.
5. If necessary to implement the flow augmentation program of this section III, the BOR will negotiate a lease with Idaho Power pursuant to Idaho Code § 42-108A to rent uncontracted and powerhead space in the Boise Project, Arrowrock Division, for power production. In the event powerhead water is released pursuant to this section, it shall be the last of the last space to refill.
6. The United States may also acquire on a permanent basis or rent up to 60,000 acre-feet of consumptive natural flow water rights diverted and consumed below Milner and above Swan Falls from the mainstem of the Snake River. The United States may rent said rights for flow augmentation through the IWRB Water Bank pursuant to the Board's water bank rules and I.C. Sec. 42-1763B as amended (to include up to 60,000 acre-feet of consumptive natural flow acquisition and to allow its use pursuant to this section). The 60,000 acre-feet may be rented through the water bank as long as the total rentals in III.C.4, III.C.5 and this III.C.6 do not exceed 487,000 acre-feet.
7. Powerhead water in BOR storage facilities may be used only to increase the reliability of 427,000 acre-feet for flow augmentation and is subject to the following limitations:
    a. After utilization by the United States of all water described in sections III.C.4 through 6, above, if the total amount of water released for flow augmentation is less than the 427,000 acre-feet, the Palisades Reservoir powerhead water may be utilized by the United States to attain 427,000 acre-feet for flow augmentation;
    b. Use of powerhead shall not at any time interfere with the currently established minimum conservation pools or hereinafter established minimum conservation pools;
    c. Powerhead space used for flow augmentation shall be the last space to refill after all other space in reservoirs in that water district, including other space used to provide flow augmentation, in the basin has filled;
    d. Use of water from powerhead space shall be in compliance with state law;
    e. Use of powerhead space shall not interfere at any time with the operating levels required for diversions of water by spaceholders in the reservoir pool, with the ability of spaceholders to refill and use active storage of the reservoir, or with the diversion of natural flow.
8. Rental charges for stored water.

ADDENDUM C

to

BOISE PROJECT BOARD OF CONTROL'S

REPLY BRIEF

Filed on September 8, 2017

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Supreme Court Docket No. 44745-2017

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ak-Chin Indian Community,

Plaintiff/Counterclaim Defendant,

v.

Central Arizona Water Conservation District,

Defendant/Counterclaim/Third-Party Plaintiff

v.

United States of America, *et al.*,

Third-Party Defendants.

CV-17-00918-PHX-DGC

UNITED STATES' MOTION TO DISMISS THE THIRD-PARTY COMPLAINT

Third-party Defendants, the United States of America; United States Department of the Interior; Ryan Zinke, Secretary of the Interior; United States Bureau of Reclamation; Alan Mikkelsen, Acting Commissioner of the Bureau of Reclamation;[1] Terry Fulp, Regional Director, Lower Colorado Region, Bureau of Reclamation; and Leslie Meyers, Phoenix Area Office Manager, Lower Colorado Region, Bureau of Reclamation (together, the "United States"), appear for the limited purpose to respectfully request that this Court, pursuant to Fed. R. Civ. P. 12(b)(1), dismiss the Third-Party Complaint of Central Arizona Water Conservation District ("CAWCD"), Dkt. 16, for lack of subject matter jurisdiction because Congress has not waived the United States' sovereign immunity.[2]

I. Procedural History

The Ak-Chin Indian Community ("Community") filed suit against CAWCD on March 22, 2017. Dkt. 1. On April 20, 2017, CAWCD filed a Third-Party Complaint against the United States. Dkt. 16 (corrected at Dkt. 28-1). CAWCD purports to have served the United States on April 21, 2017. Dkt. 36-42. Assuming service on April 21, 2017, the United States' original deadline to respond to CAWCD's Third-Party Complaint was June 20, 2017. *See* Fed. R. Civ. P. 12(a)(2). On June 14, 2017, the United States filed a consent motion for an extension of time to respond to the Third-Party Complaint until July 20, 2017. Dkt. 49. The Court granted the motion. Dkt. 51.

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[1] Under Federal Rule of Civil Procedure 25(d), Alan Mikkelsen, the current Acting Commissioner of the Bureau of Reclamation, is automatically substituted as the named defendant for David Murillo, the former Acting Commissioner.

[2] While not explicitly plead in the third-party complaint, CAWCD counsel has confirmed that CAWCD brings suit against the four named United States government employees solely in their official capacity.

II. Legal Standard

A. Sovereign Immunity

"It is well-established that the United States 'is immune from suit save as it consents to be sued.'" *Hill v. Premier Healthcare Servs., LLC*, No. CV09-1956-PHX-DGC, 2010 WL 2292972, at *2 (D. Ariz. June 8, 2010) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). "The Court does not have jurisdiction over a suit without such a waiver of sovereign immunity." *Id.* (quoting *Sherwood*, 312 U.S. at 586 and *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Courts must "strictly construe in favor of the government the scope of any waiver of sovereign immunity." *Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir. 2004), *aff'd*, 545 U.S. 596 (2005) (quoting *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)). A congressional waiver of sovereign immunity must "be 'unequivocally expressed' in the statutory text." *Blue Fox*, 525 U.S. at 261 (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)). "[N]o officer of the United States can confer jurisdiction by his or her actions." *Hill*, 2010 WL 2292972, at *2 (citing *United States v. Shaw*, 309 U.S. 495, 501 (1940)).

"This doctrine extends to agents or officers of the United States to the extent they are sued in their official capacities and the relief would affect the federal fisc." *Id.* (citing *Gilbert v. DaGrossa,* 756 F.2d 1455, 1458 (9th Cir. 1985) ("Naming the three appellees as defendants does not keep this action from being a suit against the United States. It has long been the rule that the bar of sovereign immunity cannot be avoided by naming officers and employees of the United States as defendants. Thus, a suit against IRS employees in their official capacity is essentially a suit against the United States.")).

"The burden is on Plaintiff to show that the government's sovereign immunity has been expressly waived and that the Court has jurisdiction over the suit." *Id.* (citing *Cato v. United States,* 70 F.3d 1103, 1107 (9th Cir. 1995)). "If Plaintiff fails to show how his claim against the United States falls within a waiver of sovereign immunity, the Court must dismiss the action for lack of jurisdiction [under Rule 12(b)(1)]." *Id.* (citing *United States v. Dalm,* 494 U.S. 596, 608 (1990)).

B. Rule 12(b)(1)

Rule 12(b)(1) allows a defendant to move for dismissal on the basis that the court lacks subject matter jurisdiction. "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *McCoy v. Colvin*, No. CV-15-00344-PHX-DGC, 2016 WL 6522806, at *1 (D. Ariz. Nov. 3, 2016) (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction." *Id.* (quoting *Meyer*, 373 F.3d at 1039). "Plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Id.* (citing *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009)).

III. Argument

The Court should dismiss CAWCD's Third-Party Complaint against the United States because the Court lacks subject matter jurisdiction. CAWCD has not plead a valid waiver of sovereign immunity, and no waiver has been made. Even if the Court finds that Congress has waived sovereign immunity for suit against the United States alone, the Court should dismiss the two department and four defendants named in their official capacities because Congress has not waived their sovereign immunity and no legitimate purpose is served by their inclusion in this case.

A. The United States Has Not Waived Sovereign Immunity

As noted above, it is black-letter law that a plaintiff suing the United States must plead and identify a waiver of sovereign immunity. CAWCD alleges in its Third-Party Complaint ("Compl.") that the United States has waived sovereign immunity, relying upon 43 U.S.C. § 390uu. Compl. ¶¶ 36-42. However, Section 390uu does not allow CAWCD's Third-Party Complaint. The statute says:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees

> of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

43 U.S.C. § 390uu. The analysis here begins and ends with the first line of the provision: "Consent is given to *join* the United States as a *necessary party defendant* . . . ." *Id.* (emphasis added). Where the other conditions of the statute have been met, Congress has expressly authorized courts to join the United States as a necessary party defendant under Fed. R. Civ. P. 19. Yet, Congress provided no authorization for a party to directly sue the United States as a named defendant, as CAWCD attempts to do through its Third Party Complaint.

The Supreme Court has confirmed this plain-language reading of the statute. In *Orff v. United States*, 545 U.S. 596 (2005), the Court clarified that the waiver in Section 390uu only grants consent to *join* the US as a *necessary* party:

> Section 390uu grants consent 'to join the United States as a necessary party defendant in any suit to adjudicate' certain rights under a federal reclamation contract. This language is best interpreted to grant consent to join the United States in an action between other parties--for example, two water districts, or a water district and its members--when the action requires construction of a reclamation contract and joinder of the United States is necessary. It does not permit a plaintiff to sue the United States alone.
>
> . . . *The statute does not waive immunity from suits directly against the United States*, as opposed to joinder of the United States as a necessary party defendant to permit a complete adjudication of rights under a reclamation contract.

Orff, 545 U.S. at 602, 604 (emphasis added). The most recent reported federal court opinions addressing the issue adhere to the Supreme Court's ruling in *Orff*. *See Friant Water Auth. v. Jewell*, 23 F. Supp. 3d 1130, 1143 (E.D. Cal. 2014) (no waiver under 390uu where plaintiff attempted to "sue the United States directly"); *see also Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1036, n. 6 (9th Cir. 2005) (Section 390uu only permits joinder of the United States, and does not allow direct suits against

the United States); *Frenchman Cambridge Irr. Dist. v. Heineman*, 974 F. Supp. 2d 1264, 1281 (D. Neb. 2013) ("jurisdiction under 43 U.S.C. § 390uu is foreclosed by the Supreme Court's holding that the statute waives immunity only in actions in which the United States is joined as a party, and not in direct actions against the United States") (citing *Orff*, 545 U.S. at [604]); *Goosebay Homeowners Ass'n, LLC v. Bureau of Reclamation*, No. CV 13-21-H-CCL, 2013 WL 1729261, at *4 (D. Mont. Apr. 22, 2013) (Section 390uu does not permit a party to sue the United States directly).

A ruling by another member of this Court correctly identified the controlling legal authority, but failed to apply the statute as written. In *Roosevelt Irrigation District v. United States*, No. CV-15-00448-PHX-JJT, the Court addressed numerous pending motions related to jurisdiction in a November 16, 2015 order ("Order"). Attached as Exhibit 1. The case began in state court, where the Roosevelt Irrigation District ("RID") sued the Salt River Project Agricultural Improvement and Power District ("Salt River"). The state court dismissed the case, holding that the "United States was a required party to be joined under Arizona Rule of Civil Procedure 19 but could not be sued in [Arizona] Superior Court." Order at 5. RID then sued Salt River in this Court, naming the United States as an additional defendant. No. CV-15-00448-PHX-JJT, Dkt. 1. The United States moved to dismiss based on the absence of a waiver of sovereign immunity, Dkt. 32, and Salt River brought an alternate motion to join the United States as a required party under Rule 19, Dkt. 44.

The Court first affirmed that "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Order at 5 (quoting *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994)). "A waiver of the government's sovereign immunity 'must be unequivocally expressed in statutory text.'" *Id.* (quoting *Lane*, 518 U.S. at 192). Relying on *Orff*, the Court then explained that "[s]overeign immunity is waived under § 390uu when the United States is joined as a necessary party defendant." *Id.* at 6. Finally, the Court acknowledged that Section "390uu's reference to necessary party parallels the requirements of Rule 19(a)." *Id.* at 7. Nonetheless, even though a motion to join the United States was pending, the Court denied that motion, finding that "the Federal

Defendants have been properly joined in accordance with § 390uu" because, "[a]fter the State Court Action dismissal based on the United States' status as a required party, RID initiated the present action joining the Federal Defendants." *Id.* In making that finding, the Court noted that United States itself had argued that it was a necessary party and that the requirements of Rule 19 had otherwise been met. *Id.* The Court concluded that "dismissing the Federal Defendants only to have [Salt River] or RID join them again under Rule 19(a) would amount to procedural gymnastics because RID has already joined the Federal Defendants in this declaratory judgment action after the state court dismissal." *Id.* at 7-8.

While the *Roosevelt Irrigation District* Court correctly identified the controlling legal principles, the United States respectfully disagrees with the Court's practical application of Section 390uu. Because, as the Supreme Court recognized, Section 390uu allows only joinder and not a direct suit against the United States, the *Roosevelt Irrigation District* Court should have granted the motion to dismiss and, if it so chose, granted Salt River's motion to join. It appears, however, that the Court was influenced by the fact that RID had already had its state court suit dismissed and was reluctant to dismiss its suit again.

Here, though, the procedural history of this case is nothing like that in *Roosevelt Irrigation District*. There was no prior state court action here, and CAWCD filed a motion to join at the same time it filed its Third-Party Complaint. There is thus no reason here to depart from the plain language limitations of Section 390uu and the Supreme Court's holding in *Orff*, which do not allow CAWCD's direct suit against the United States.[3]

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[3] Although CAWCD's third-party complaint is not authorized under Section 390uu, it also fails the requirements of Rule 14. The Third-Party Complaint fails to properly allege that the United States is liable to CAWCD should CAWCD be found liable for the Community's claims against it. *See* Fed. R. Civ. P. 14(a)(1) (defending party may serve a complaint on a nonparty "who is or may be liable to it for *all or part of the claim against it*" (emphasis added)); *Barnard-Curtiss Co. v. Maehl*, 117 F.2d 7, 9 (9th Cir.

B. CAWCD's Arguments for Waiver of Sovereign Immunity Fail

In its Third-Party Complaint, CAWCD incorrectly pleads that "The United States Has Statutorily Waived Sovereign Immunity." Compl. ¶¶ 36-42. CAWCD relies upon Section 390uu, but wrongly asserts that the statute "provides consent for the United States to be sued in certain circumstances." Compl. ¶ 37. Section 390uu speaks only of "join[der]" of the United States – there is no language stating or suggesting the United States may be "sued." Compare, for example, 25 U.S.C. § 1496, which explicitly states that the Secretary of the Interior may "*sue and be sued* in his official capacity in any court of competent jurisdiction" "[w]ith respect to matters arising out of the guaranty or insurance program authorized by this subchapter." (Emphasis added).

CAWCD then cites Fed. R. Civ. P. 14, Compl. ¶ 41, which indisputably allows a defendant to bring a third-party complaint, but does not alter the black-letter requirement that a plaintiff must demonstrate a waiver of sovereign immunity that allows its claims to proceed against the United States. Moreover, CAWCD's reliance upon *E.E.O.C. v. Peabody Western Coal Co.* is misplaced and its citation is misleading. In that case, in considering whether to permit a third-party complaint, the Ninth Circuit specifically addressed whether the Secretary of the Interior had waived sovereign immunity. The court concluded that, based upon the "unqualified waiver of sovereign immunity" found in "§ 702 of the APA, . . . either Peabody or the Nation may assert a claim against the Secretary requesting injunctive or declaratory relief [and, thus,] neither Peabody nor the

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1941) (appellant not entitled to invoke Rule 14 without showing nonparty might be liable for all or part of claim against it); *Se. Mortg. Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975) ("the third party must necessarily be liable over to the defendant for all or part of the plaintiff's recovery, or [] the defendant must attempt to pass on to the third party all or part of the liability asserted against the defendant"). CAWCD has alleged only that the United States is "liable for [the Community's] claims against CAWCD because it was responsible for providing" the water that the Community and United States requested CAWCD deliver, Compl. ¶ 42, and which CAWCD has refused to deliver. It is not logical that the United States could be liable to CAWCD if the Court determines CAWCD improperly failed to comply with delivery ordered by the United States. *Cf. Nat'l Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 196 F.2d 597, 598 (D.C. Cir. 1952) (defendant may not implead third party for potential direct liability to plaintiff).

Nation is barred by sovereign immunity from bringing a third-party complaint seeking prospective relief against the Secretary under Rule 14(a)." 610 F.3d 1070, 1085-86 (9th Cir. 2010). The issue before the Court here is not whether the Federal Rules of Civil Procedure allow CAWCD to bring a third-party complaint, but whether CAWCD can demonstrate that Congress has waived sovereign immunity to allow the direct, third-party action against the United States. Such a waiver was clearly identified in *Peabody*, but CAWCD cannot identify a waiver here.

C. CAWCD Has Not Pled a Waiver of Sovereign Immunity for the Six Departmental and Official-Capacity Defendants

Even if this Court concludes that the United States has waived its sovereign immunity for CAWCD's Third-Party Complaint based upon Section 390uu, the Court should nonetheless dismiss the six named department and official-capacity defendants: (1) United States Department of the Interior; (2) Ryan Zinke, Secretary of the Interior; (3) United States Bureau of Reclamation; (4) Alan Mikkelsen, Acting Commissioner of the Bureau of Reclamation;[4] (5) Terry Fulp, Regional Director, Lower Colorado Region, Bureau of Reclamation; and (6) Leslie Meyers, Phoenix Area Office Manager, Lower Colorado Region, Bureau of Reclamation. By its plain language, Section 390uu only provides "[c]onsent . . . to join the United States."[5] CAWCD identifies no other waiver of sovereign immunity for the other six named defendants, and none exists.

Moreover, as to the four employees named in their official capacities, a United States government employee "is immune unless his actions violated clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800.818-19 (1982), and *Davis v. Scherer*, 468 U.S. 183, 197 (1984)). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of

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[4] *See supra* at 2 n.1.

[5] Compare 25 U.S.C. § 1496, discussed above, where Congress explicitly waived sovereign immunity for certain suits against the Secretary of the Interior.

discovery." *Id.* at 526 (citing *Harlow*, 457 U.S. at 818). CAWCD, which concedes it sues these employees in their official capacities, has made no such allegations.

IV. Conclusion

For the foregoing reasons, the United States requests that the Court dismiss CAWCD's Third-Party Complaint. However, should the Court conclude that Congress has waived sovereign immunity to allow the action against the United States, the United States requests that the Court dismiss the other six departmental and official-capacity defendants.

Dated: July 20, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 20, 2017, I electronically filed the foregoing UNITED STATES' MOTION TO DISMISS THE THIRD-PARTY COMPLAINT with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Kevin VanLandingham
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