

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 44746

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-Respondents,

and

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

Petitioners-Respondents,

v.

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

Respondents-Appellants,

and

SUEZ WATER IDAHO INC.,

Intervenor-Respondent.



**BOISE PROJECT BOARD OF CONTROL'S BRIEF IN RESPONSE TO IDWR &
DIRECTOR'S BRIEF**

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

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I. STATEMENT OF THE CASE

A. Nature of the Case.

The fundamental issue before this Court is whether the storage right holders agreed to spend millions of dollars to build reservoirs to store water for irrigation and then rely on “excess” flows rather than a water right to fill those reservoirs. The evidence demonstrates that they were relying on water rights. The district court concluded that the undisputed evidence showed that they are entitled to a water right. The Director would allow them no right at all.

In the administrative proceedings below, the Director concluded that the Department’s “statewide” paper fill rule would apply to the Boise River reservoirs. He also concluded that the Department’s “unaccounted for storage” account allowed the Department to accrue water stored in the reservoirs to no water right at all.

The district court agreed that the Department could utilize its “paper fill” rule, but reversed the Director’s “unaccounted for storage” construct because it violates Idaho law, specifically Idaho Code § 42-201(2), and violates the water users’ property interest in the water filling the reservoirs. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007) (defining water users’ property interest in the storage rights).

The Boise Project separately appealed the portion of the decision upholding the “paper fill” rule (Docket No. 44745). The Department and Director (hereafter “Director”) appealed the district court’s reversal of the “unaccounted for storage” portion of the accounting program. The Director’s appeal asks this Court to interpret away Idaho Code’s § 42-201(2) requirement that there must be a water right to divert water. The Director’s appeal wrongly accuses the district court of making unsupported factual findings and recites history of water use in Basin 63 that is mistaken or misleading, all the while omitting very important facts. He incorrectly asserts that the “paper fill” rule and the “unaccounted for storage” accounts only involve administration

when there is “excess” water rather than administration during times of shortage. His appeal contends that the “unaccounted for storage” account does not involve “distribution” of water. He asserts that he has broad, sweeping and virtually unlimited power to allocate water for “ancillary” uses when he deems it appropriate, so that he can dictate the maximum use of the waters of the State. The Director tries to justify overriding Idaho law and the water users’ private property interests by invoking fear of federal control. This case is about the Director’s efforts to diminish the water users’ private property interests, not federal control.

In this Response, the Boise Project focuses on the Director’s appeal, not its own, except to the extent overlap is necessary for context. We begin by correcting and supplementing the Director’s recitation of facts so that this Court has a more accurate and complete understanding of operations in the Boise River, for this Court has recognized that determining when a water right is filled in a particular reservoir system requires the “development of a factual record.” *A&B Irr. Dist. v. State*, 157 Idaho 385, 392, 336 P.3d 792, 799 (2014). We then explain why the district court correctly held that the Director cannot legally ignore the property interests of the water users, and cannot authorize diversion of water without a water right.

The Director’s attempt to instill fear about federal control is a smoke screen to hide his attempt to assert more authority than the legislature authorized. His Order harms the property interests and legitimate expectations of the water users, but leaves the federal government in no different position than it occupies today. The Director’s appeal makes it clear that he wants the water that has always filled the reservoirs after flood releases and put to use by the water users to be “excess” and unappropriated, so he can dole it out to new users he deems worthy. The Director’s theory that water used by the Boise Project water users is “excess” threatens the security of their ability to use that water. Declaring the water “excess” gives downstream, out-of-

state interests the ability to demand releases of “excess” water, unprotected by a water right, from downstream uses. *United States v. Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609.

II. RESPONSE TO NATURE OF THE CASE AND STATEMENT OF FACTS

A. Response to Nature of the Case.

The Director begins his brief alleging that the “District Court substituted its own factual findings for those of the Director and erred as a matter of law in holding that the capture and use of excess water is contrary to Idaho law.” IDWR Brief, p. 1. Actually, the district court examined the record, and agreed with the Director that there had been a “longstanding” and “historic” use of waters filling the reservoirs after flood control by the water users. R, 1066-67. The court relied on these undisputed facts and concluded, as a legal matter, that the Director erred when he contended that he can “condone” the “longstanding and historic practice” of diverting, storing and using water following flood control releases, without recognizing a water right to protect that water from future appropriation. R, 1066-67. That “longstanding and historic practice” is not in dispute. Nor is the court’s conclusion that the Director considers this same water to be unappropriated. *Id.*

The Director refuses to acknowledge any right to physically fill the reservoirs after flood control, stripping the reservoir spaceholders of a protected property interest in the water the landowners have beneficially used every flood control year. Prior to 1986, the flood control releases were treated as “surplus” and the water filling the reservoirs after flood control releases was assigned to the decreed water rights.¹ AR, Tr. 8/27/2015, p. 170, l. 4-p. 171, l. 15; AR, Tr. 8/27/2015, p. 278, l. 5-p. 280, l. 21; AR, Tr. 8/28/2015, p. 438, l. 6-p. 440, l. 13; p. 443, l. 16-p.

¹ AR, Ex. 2081, Water Control Manual (“When Lucky Peak flood control releases are equal to or greater than the demand for irrigation water (all users are receiving an adequate supply), the entire release is considered surplus to the Boise River and the above computation of natural flow diversion by user is not necessary. During this period, no charges are made against stored water supplies.”)

445, l. 4; AR, Tr. 8/31/2015, p. 901, l. 1-p. 903, l. 3; p. 907, l. 6-p. 908, l. 13; AR, 1249-1252.

The Department's witness agreed that the watermaster in the 1970s, Mr. Koehling, filled the reservoirs based on physical content and in priority. AR, Tr. 8/28/2015, p. 451, l. 18-p. 452, l. 6.

The Director must administer water rights "in accordance with the prior appropriation doctrine." Idaho Code § 42-602. Yet, the Department's witness admitted that the primary purpose of the water rights accounting of flood releases was to benefit junior uses in flood control years. AR, Tr. 8/27/2015, p. 170, l. 15-p. 171, l. 13. The Department's witness also admitted that water was not administered to protect juniors before the 1986 accounting program. *Id.* Mr. Sisco, the Basin 63 Watermaster from 1986 through 2008, testified that he did not permit juniors on the Boise River to interfere with reservoir fill during his 22 year tenure as Watermaster. AR, Tr. 8/31/2015, p. 901, l. 18-p. 903, l. 3; *see also* AR, Ex. 2008. Thus, the "unaccounted for storage" account does not comport with the prior appropriation doctrine, because it favors junior users and charges storage holders with the onus of protecting life and property from uncontrolled flooding. This appeal raises the question of whether the Director can ignore a "longstanding and historic practice" of filling the reservoirs for the storage right holders to benefit juniors and take the water historically used to fill the reservoirs and give it to future and junior users.

The Director also mischaracterizes the district court's order when he asserts that the court found that the Basin 63 "accounting system consists of two separate systems of 'distributing' water: one based on water rights, and one based on 'historic practices.'" IDWR Brief, p. 3. The district court actually determined that the accounting system recognizes that water accrues to the water rights even if not stored (paper fill) and purports to accrue water to no water right at all (unaccounted for storage). The district court concluded that this approach does not comply with

Idaho law, because the water filling the reservoirs after flood control releases, the “unaccounted for storage,” must be protected by water rights.

“The Director’s findings in this case acknowledge a ‘longstanding’ and ‘historic’ practice of the diversion of excess water into the dams for use by the irrigators following flood control releases in flood control years. R, pp. 1296, 1298, 1305. If this use has historically occurred, which it seems obvious it has, why hasn’t a water right for that use vested in the United States and irrigators?”

R, 1067. The district court explains:

Simply stated, if unaccounted for storage water has been historically and continuously diverted, stored and used by the irrigators for irrigation dating back before 1971, as the Director expressly recognizes, then the United States and irrigators have acquired a vested constitutional method water right in that water under Idaho law. Indeed, the United States and various water users have claimed beneficial use water rights in the SRBA for that water identified by the Director as unaccounted for storage. *See* SRBA Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738. The United States and water users have substantial rights in their water right claims. *Cf.* IDAPA 37.03.08.035.02.d. (providing ‘[a]n applicant’s interest in an application for permit to appropriate water is personal property’). These rights are prejudiced by the Director’s determination that they have not acquired water rights, via their diversion of use, in water he identifies as unaccounted for storage. Therefore, the Director’s determination that the United States and irrigators have not acquired a vested water right in water identified by him as unaccounted for storage is reversed and remanded for further proceedings.

R, 1068.

The district court rejected the Director’s legal conclusion that water can accrue to “unaccounted for storage” without a water right, because Idaho Code § 42-201(2) requires a water right to divert water and put it to use. “Unaccounted for storage, ...is just an alternative way of identifying the water as unappropriated water.” R, 1067.

The Director focuses on the district court’s phrase, “[t]he distribution of priority water to these reservoirs occurs pursuant to water rights.” R, 1056-1057. The term “priority water” was the district court’s shorthand explanation of the manner in which the accounting system credits water to the decreed storage water rights. It is not used in the accounting program. The court did not conclude that the water filling the reservoirs under the constitutional method has no priority,

or is not “priority water.” A constitutional water right has a priority date of the date it was first diverted and put to beneficial use. *City of Pocatello v. Idaho*, 152 Idaho 830, 841, 275 P.3d 845, 856 (2012); *Crane Falls Power Irr. Co. v. Snake River Irr. Co.*, 24 Idaho 63, 82, 133 P. 655, 661 (1913). The Director’s brief uses “priority water” as a synonym for “paper fill” satisfaction. The district court did not rule that “unaccounted for storage” is appropriated without any priority. The court just recognized that the accounting program attempts to authorize diversion and storage under no right at all. In fact, the district court concludes that the water stored in the reservoirs after “paper fill” has been stored and used since long before 1971.

The Director attempts to cloak his actions in the mantle of administration, claiming administration is statutorily committed to the Director and insulated from scrutiny. The Director struggles to find any authority for his actions. He relies on an “excess” flow doctrine. Yet, he ignores the history of surplus flows in the Boise and cites no statutory authority for this supposed doctrine. He asserts that the policy of “maximum use” allows him unbridled authority. He asserts that the spectre of flood control by the federal government gives him authority he does not have. And he finally resorts to “common sense.” All of these theories do not allow him to disregard Idaho Code § 42-201(2) or the “longstanding and historic practices” of water operation in the Boise.

B. Response to Statement of Facts.

1. The Storage Rights are Misconstrued

The Director begins his Statement of Facts section by misstating the facts underlying the Lucky Peak and Arrowrock decrees. He contends that “the accounting system was also at issue in the Lucky Peak subcase.” IDWR Brief at p. 10, fn. 11. However, he previously admitted that “the SRBA District Court’s Lucky Peak decision did not specifically address the Water District 63 accounting systems[.]” AR, 1063. He asserts that the Lucky Peak remark was

intended to memorialize the practice of replacing flood waters with water from Lucky Peak, but the remark had nothing to do with the accounting program. The purpose of the remark was to avoid changes in purpose of use as the SRBA district court held:

Also granting partial summary judgment, in part, in favor of the Boise Project Board of Control; holding that a remark in Partial Decree is necessary to acknowledge interest and allow Bureau of Reclamation to meet obligations concerning flood evacuation to contract right holders in Anderson Ranch and Arrowrock Reservoirs **without requiring temporary change in purpose of use.**

AR, ON Docs, 63-3618, 001532, Memorandum Decision (Sept. 23, 2008) (emphasis added). The remainder of that decision is dedicated to the court's legal determination concerning the impact of the streamflow maintenance water right on the contract spaceholders' water rights. The decision says nothing about when or how the water rights are filled or administered pursuant to the accounting program, or the legality of "unaccounted for storage" accounting.

The Director then misstates the purpose of the remark included in the decree for water right no. 63-3613 for Arrowrock. This remark states:

TOTAL RESERVOIR CAPACITY IS 286,600 ACRE FEET WHEN FILLED TO ELEVATION 3216 AND MEASURED AT THE UPSTREAM FACE OF THE DAM. THE BUREAU OF RECLAMATION MAY TEMPORARILY STORE WATER IN THE SURCHARGE CAPACITY, WHICH IS ABOVE ELEVATION 3216 DURING FLOOD EVENTS OR EMERGENCY OPERATIONS.

AR, Ex. 2015, p. 718 (emphasis added). This remark does not mention and has nothing to do with filling the reservoir after flood control or replacing any water. It allows Reclamation to store more water above elevation 3216 when necessary to deal with floods or emergencies.

In describing the elements of the decreed storage water rights, the Director overlooks an important element of the storage rights. Each of the rights for the Boise River reservoirs contains a condition stating that the quantity is measured by reservoir capacity when "filled" to a specific elevation "measured at the upstream face of the dam." AR, Ex. 2015. The capacity and elevation

are different for each reservoir, but each decree contains this description of the quantity element. Prior to the date of maximum fill, when water is being released for flood control, capacity is not reached and the reservoir is not “filled.” Only when the reservoirs are “filled” are the existing water rights satisfied. The Director and district court both failed to acknowledge those quantity descriptions in the decrees when evaluating whether the “paper fill” theory is consistent with the plain meaning of the decrees and the prior appropriation doctrine. It clearly is not.

2. The State is Instrumental in Flood Control and Fill Operations

The Director then conspicuously neglects the roles that the Department and the Basin 63 Watermaster play in flood control operations, and have played since the reservoirs began to operate as a multiple use system in 1953. The State of Idaho’s Reclamation Engineer, the Boise Project Board of Control and the Basin 63 Watermaster all worked together in order to negotiate and lobby for the authorization of the Lucky Peak Reservoir before Congress. AR, Tr. 8/31/2015, p. 795, l. 24-p. 796, l. 3; *see also* AR, Ex. 2053. A fundamental condition of the State and water users’ support for Lucky Peak was that existing water rights would not be injured by flood control operations. AR, Ex. 2097; Ex. 2053, pp. 17-22. The State did not advise the water users that the fill after flood control would not be in priority of a water right. AR, Tr. 8/31/2015, p. 799, l. 6-p. 800, l. 1. In 1974, following substantial flooding in the Boise, the State commissioned a study of improved flood control measures for the Boise River reservoirs, authored by Robert Sutter, an IDWR employee. AR, Tr. 8/31/2015, p. 800, l. 10-p. 801, l. 18; *see also* AR, Ex. 2182. This report was the “catalyst” for a collaborative effort between the State, the Corps and Reclamation, culminating in the Boise River Water Control Manual. AR, Tr. 8/28/2015, p. 418, l. 21-p. 491, l. 1.

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3. The Water Control Manual Defines Flood Control Operations

The Director's brief also mischaracterizes the record concerning flood control operations and even contradicts the findings in his Amended Final Order. Flood control is strictly dictated by date and volume of reservoir space that must remain unfilled, and operations are mandated by the Boise River Water Control Manual. AR, Ex. 2004, p. 6. It is not, as the Director argues, a wildly fluctuating process that is operated however the Corps and Reclamation "deem[] prudent." AR 1306, *see also* IDWR Brief, p. 15.

The flood control season has three phases. During each phase a minimum flood control space must be kept empty. The first phase is the winter evacuation period, from November 1 to December 31, when the Water Control Manual dictates that a minimum of 300,000 AF of reservoir space must remain empty. AR, Ex. 2004, p. 000352-353. January 1 to March 1, is the spring evacuation period when 150,000 AF of reservoir space must be available. *Id.* From March 1 to March 31 a minimum of 50,000 AF of reservoir space must be available in Lucky Peak. *Id.*, p. 000353. "During the spring evacuation period, the flood control season flood space and storage volume requirements are determined by the rule curves of Plate 7-1 or Plate 7-2 of the [Water Control Manual]." *Id.* The refill period occurs April 1 through July 31. *Id.*, p. 000352. "During the flood control season, the majority of runoff from snowmelt flows into the reservoir system after April 1. During this refill phase, the operational forecasts are still used to determine the minimum flood control space and space distributions requirements while the reservoir projects are being refilled." AR, Ex. 2004 p. 000354. While the Water Control Manual allows some flexibility, both the Corps and Reclamation are bound to follow the rule curves. AR, Tr. 8/31/2015, p. 734, l. 11-p. 737, l. 6, p. 762, ll. 13-17. Water is not released for dam operational purposes such as the valve replacement projects or the hydroelectric plants. *Id.*, p. 764, l. 17-p. 766, l. 24.

The Director's claim that the "uncontroverted evidence establishes that...the reservoirs refill at whatever rate the Corps, in consultation with BOR, deems prudent[.]" (R, 1306) is directly contradicted by his own finding of fact that "[u]nder the Refill Requirements, the system flood control requirements depends on forecasts of the total runoff from the remaining snowmelt, flood control rule curves, space distribution curves, as well as short-term projections of reservoir inflow." AR, 1245. The flood control and subsequent fill process for the Boise River reservoirs is heavily regulated and tied to the flood control rule curves in the Water Control Manual. The Corps and Reclamation do not refill the reservoirs however they "deem prudent."

An important mistake in the Director's brief is his suggestion that the end of flood control occurs on the "day of allocation." IDWR Brief, p. 15. It is possible for those events to coincide, but they rarely do. The Department's Exhibit 9, prepared by its in-house witness, shows that the end of flood control and the day of allocation has been separated by as much as 41 days, and that in every year covered by the exhibit, but one, when there were flood control releases, there was a gap between the end of flood control and the day of allocation. AR, Ex. 9; Tr. 9/10/2015, p. 1552, l. 15-p. 1553, l. 15.

4. Any Conflict Between Flood Control Operations and Priority Administration is Caused by the Current Interpretation of the Accounting Program

The Director asserts that there is a conflict between flood control operations and administration of the decreed water rights for the Boise River reservoirs. However, he misquotes the district court's decision, when he claims that "the Corps stores and releases water on an unpredictable 'pick and choose' or 'wait and see' basis." IDWR Brief, p. 16. The district court did not describe flood control operations that way. Instead, the court was referring to whether a storage right holder could "pick and choose" when to exercise his rights, under the irrigators' theory of initial fill. R, 1063, fn 9. The Corps and Reclamation have the authority to operate the

Boise River reservoirs for flood control purposes. *See*, 1946 Flood Control Act, Pub. L. No. 79-529, 60 Stat. 641 (July 24, 1946). The leap from that fact to the contention that flood control operations are conducted on a whim is contradicted by the undisputed evidence.

The operations of the Boise River reservoirs are confined to the negotiated policies and rule curves of the Water Control Manual. AR, Ex. 2186. This Manual was a “joint effort” by the State, the Corps and Reclamation. The State even drafted portions of the Manual. AR, Tr. 8/28/2015, p. 424, l. 9-p. 427, l. 9; Tr. p. 620, ll. 13-20; p. 458, l. 6-p. 460, l. 7. The Manual’s Memorandum of Understanding provides “the Bureau, Corps, and the State of Idaho jointly agreed to revision of the operating criteria and procedures in the Agreement through the Memorandum of Understanding shown in Exhibit C of this Manual.” AR, Ex. 2186, Appendix C-1. It “was really necessary to get the Department of Water Resources’ blessing.” AR, Tr. 8/28/2015, p. 459, ll. 16-17. The Manual was approved by the Department. *Id.*, p. 459-, l. 25-p. 460, l. 7.

In 1986, the Department adopted the accounting program for the Boise River. In 1987, Director Higginson wrote to the storage right holders to inform them that a new Boise River Water Control Manual had been adopted in 1985. AR, Ex. 3001. He explained:

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

Id. The Department “worked closely with” the reservoir operators to develop a plan to allow early season releases for flood protection and fill of the space to benefit the storage right holders and ultimately “blessed” that plan.

Rather than incorporating the Water Control Manual into the Boise accounting program, the Department rolled out the Basin 01 program. Yet, from the adoption of the accounting system in 1986 through Mr. Sisco's departure as the watermaster in 2007 and beyond, the Water District 63 watermaster and water users believed the "unaccounted for storage" account was filling the reservoirs under the priority of the original water right decrees. AR, Tr. 8/31/2015, p. 901, l. 4-p. 903, l. 3 (Sisco); AR, Ex. 2008, pp. 476-478; *also see* AR, Ex. 2018; AR, Tr. 9/10/2015, p. 1433, l. 21-p. 1434, l. 25 (Barrie). That "refill" was not considered unappropriated.

The Director now claims that the Department used its "common sense" and "allowed" storage of water filling the reservoir after flood control to no water right at all because doing so does not interfere with other uses. This is not what the Department thought at the time, as the accounting program's author testified that the Department cannot let water be stored without a right. AR, Tr. 8/28/2015, p. 454, ll. 10-11. The Director's contention that the "unaccounted for storage," fulfills a "longstanding...storage allocation practice" clearly shows that he is allocating water to historic uses which the court found requires the protection of a water right. R, 1066.

5. The Director Misuses the Term "Excess" as it Applies to the Boise

The Director then attempts to rewrite history by misusing the term "excess water" as applied to operations in the Boise. He insists that "excess water" is the water that fills the reservoirs after flood control releases, even though that water has been beneficially used by the irrigators in every flood control year since the reservoirs were built. The Water Control Manual, in a section authored by the Department, defines "surplus" water as water that is available while flood control releases are being made from Lucky Peak Dam and when all water rights are receiving an adequate supply. AR, Ex. 2186, p. 2081. The Department's witness contended that this provision the Department drafted did not apply to the administration of water rights after

1986, because it pre-dated adoption of the accounting program, but had no explanation of when the Department changed its mind. AR, Tr. 8/28/2015, p. 624, l. 9-p. 625, l. 18.

The Director's legal conclusion that the water filling the reservoirs after flood control is "excess" is also incorrect because the Boise River has been declared fully appropriated since 1977. The only water that has been available for appropriation in the Boise is the water released for flood control, not the reservoir fill. AR, Exs. 3002, 3003, 3004, 3005, 3006, 3007 and 3008. This fact is confirmed in water rights issued junior to Lucky Peak. Those rights contain conditions limiting the use of the water to times when flood control is released from Lucky Peak Dam and in conformance with the Boise River Water Control Manual, and the "contracts with Reclamation contract holders in the Boise River Reservoirs." AR, Ex. 3012. The watermaster provided water to junior water rights when flood control operations were in progress. AR, Tr. 8/31/2015, p. 884, ll. 2-17. Mr. Squires, a beneficial use field examiner for clients seeking surface water rights below Lucky Peak, testified that the only surplus or excess water that he would recommend for licensing was flood control waters released from Lucky Peak. AR, Tr. 9/9/2015, p. 1005, l. 23-p. 1006, l. 11 (Lucky Peak "spilling"). Hence, the only "excess" water in the Boise River are those waters released for flood control.

The substantial evidence before the Director demonstrated that the "dilemma" or "conundrum" that the Department now perceives in administering the Boise River reservoir storage rights did not exist until the Department attempted to overlay its Basin 01 administrative tool on a carefully balanced and agreed upon Boise River reservoir operation system that the Department approved and blessed. The accounting program, as the Director now construes it, undermines the carefully balanced state and federal agreement for operation of the river and strips any property interest from the water actually beneficially used for irrigation.

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C. Response to Description of the Water District 63 Accounting Program.

The Director begins his discussion of the accounting program by repeating the canard that no priority administration occurred before 1986, when the Basin 01 paper fill accounting program was imported into the Boise. What the Director is trying to say without admitting it, is that there was no “paper fill” “satisfaction” and no “unaccounted for storage” account before 1986. AR, Tr. 8/27/15, p. 202, ll. 21-25. Reservoirs accrued water based on physical contents until the existing water rights were filled. *Id.*, p. 178, ll. 8-16. The water district records say that “canal regulation” did not begin until “flood runoff” had passed. ON Docs, 1985 Black Book, pp. 10-11. The records do not say that junior users filled ahead of reservoir refill, as the Director would have this Court infer. In fact, junior users were not supplied water that was needed to fill the reservoirs after flood control. AR, Tr. 9/10/2015, p. 1374, ll. 2-25; AR, 1404-05.

For the first time on appeal, the Director argues that his accounting program is made up of two separate “methodologies”: an “accrual methodology” and an “unaccounted for storage” methodology. At earlier stages of this proceeding, the accounting system has always been described as a unified “set of computational tools the watermaster uses to quantify natural flow availability and use, and to track storage use on a daily, after-the-fact basis.” AR, 1264; Tr. p. 178, ll. 8-16. This Court will not consider arguments raised for the first time on appeal. *Morgan v. New Sweden Irr. Dist.*, 156 Idaho 247, 253, 332 P.3d 980, 986 (2014).

The Director admits that the Boise River accounting program was imported from Water District 1 to Water District 63 to solve a “dilemma” in the Upper Snake. IDWR Brief, p. 19. However, the Upper Snake reservoirs are operated very differently the Boise reservoirs. There is no Water Control Manual for Water District 1, unlike in the Boise. AR, Tr. 9/10/2015, p. 1464, l. 12-p. 1465, l. 15. “The same basic approach” that the Director concluded was best for Water District 1 was forced on Water District 63 without explanation. In Water District 1, the Director

claims that his predecessor explained “paper fill” to the Committee of Nine. IDWR Brief, p. 19, fn 18. This was not done in the Boise. AR, Tr. 9/9/15, p. 1036, l. 18-p. 1042, l. 25.

The Director asserts that the “accounting system was implemented with the consent and cooperation of the BOR and water users in basin 63.” IDWR Brief, p. 20. The Department’s witness tasked with finding evidence of outreach to the water users in Basin 63 found none. AR, Tr. 8/28/2015, p. 202, ll. 11-25. The Director says that watermaster Sisco “met several times with the water users regarding the adoption and operation of the Department’s computerized accounting systems.” AR, 1259. However, Sisco’s testimony does not support the contention that “paper fill” satisfaction or “unaccounted for storage” to no water right at all was explained to, or implemented with, the consent and cooperation of the water users in Basin 63. Sisco testified that Director Dunn’s 1987 letter was not provided to the water users. AR, Tr. 8/31/2015, p. 870, ll. 18-24; *see also* AR, Ex. 4. Even that letter does not say that water is stored under the accounting program to no water right.

Sisco explained to the water users that “I was going to change how we accrued water to the system based on source, rather than just gross water into the earliest priority date.” AR, Tr. 8/31/2015, p. 871, ll. 4-18 (water that arose below the other dams would only be accrued to Lucky Peak); AR, Ex. 4 (biggest change). Sisco believed that the water entering the reservoirs after the flood releases accrued under the original water rights. AR, Tr. 8/31/2015, p. 901, l. 4-p. 903, l. 3; AR, Ex. 2008. At no time prior to 2012, did the water users know that the accounting system treated their decreed water rights as “satisfied” at paper fill, and that the water they have beneficially used every flood year since the reservoirs were built was unprotected by a water right. Nor did the Department representatives tell them so before *Basin Wide 17* arose. AR, Tr. 8/28/2015, p. 500, ll. 7-25; Tr. 8/31/2015, p. 804, ll. 5-19; Tr. 9/9/2015, p. 1037, ll. 7-20, p. 1076, ll. 20-25, p. 1181, l. 19-p.1182, l. 6; Ex. 3038.

1. Injury from the Director's Actions

The Director argues that the district court must be wrong because he contends that the water users have not alleged injury. IDWR Brief, p. 21. In 2012, as soon as the Basin 63 storage spaceholders learned that the water that they beneficially used every flood year was supposedly unprotected by any water right, injury was asserted. *A&B Irr. Dist. v. State*, 157 Idaho 385, 388, 336 P.3d 792, 795 (2014) (“refill issue might affect their right to the use of storage water”). The district court agrees there has been injury. R, 1068 (rights are prejudiced); *see also Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982) (“Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder”). The Director says, “don’t worry” the water users will always get their water from the “unaccounted for storage” account. IDWR Brief, p. 28. But he also says the waters are unappropriated and subject to appropriation, despite the “longstanding” and “historic” use. *Id.*, p. 58. The injury is real, because according to the Director, this “longstanding and historic practice” is not protected by any water right. The water users have lost the right to ensure that this use continues into the future. The Director’s assurances that “there is limited potential for future appropriation of the ‘refill’ water’ because of the unreliable nature of flood flows,” is little consolation, as Idaho’s Constitution provides that appropriation of unappropriated waters shall never be denied. Article XV, § 3. If the Director’s “unaccounted for storage” concept is affirmed, these waters are “unappropriated.” R, 1163.

In addition to being legally wrong about the lack of injury, the Director is wrong on the facts in the record. Former Director Tuthill admitted in his testimony that the water entering the reservoirs after flood control was subject to appropriation and that he has clients interested in appropriating that water. AR, Tr. 8/31/2015, p. 698, ll. 14-23. In fact, one of his clients, Cat Creek Energy, has filed an application to appropriate 100,000 acre feet from Anderson Ranch

Reservoir in the Boise. *See* Water Right Application No. 63-34403, Addendum A. Mr. Sutter, the Department's witness, confirmed that water filling the reservoirs could be subject to appropriation by others and that such appropriation "would affect their refill." AR, Tr. 8/28/2015, p. 457, ll. 9-18. The contention that it is practically impossible for someone else to appropriate that water is not supported by the record. Indeed, one has to question why Suez is involved if it were not interested in securing those waters for its use. *See also* Addendum A.

2. A Right to Fill the Reservoirs After Flood Control Releases can be Accounted for and Administered

The Director's discussion of the accrual methodology asserts that he is entitled to account for water in-flow into the reservoirs without regard to physical fill. He also contends that "unaccounted for storage" to no water right is necessary to prevent the federal government from exercising complete control over the river. The Director fails to advise the Court that he has already stipulated with the water users in the Upper Snake that Reclamation can effectively control the river and determine when junior rights can be exercised. *See* SRBA decreed Water Right No. 1-10621B (authorizing Reclamation to notify the watermaster to stop and start accrual of storage water right).² The Director claims here that no water right can be allowed that allows a senior storage right to determine when to store water, yet he has approved exactly such a water right for the Upper Snake storage reservoirs.

The Director then argues that "unaccounted for storage" is different from accrual. The Director has never before contended that accrual to the right and accrual to "unaccounted for storage" is anything but a set of computational tools operated by the Department. Unaccounted for storage does not occur when the reservoirs release water to make space for flood control as

² This Court can take judicial notice of proceedings of lower courts. IRE 201(c) (records from court files in separate cases). Copy attached as Addendum B.

the Director asserts. IDWR Brief, p. 23. “Water that is physically stored in the reservoir system but not accrued to a reservoir right is referred to as unallocated storage.” AR, Ex. 1, pp. 4-5. The Director argues that water is accrued to the water user’s individual storage accounts when the storage accounting program is run, but the Department runs the storage program. AR, Tr. 8/27/2015, p. 188, ll. 1-6. This procedure, he contends, gives the water users “full storage allocations.” IDWR Brief, p. 24. The problem is that this procedure does not recognize a right to the “unaccounted for storage” water. So there is no legal assurance that this water can either be stored or distributed to the water users.

The Director then argues that the “unaccounted for storage” account simply measures “excess natural flow” rather than distributing water. IDWR Brief, p. 26. “Unaccounted for storage” does not measure all flow above that measured by “paper fill,” it measures water that has been captured in the reservoirs after “paper fill.” AR, Ex. 1, pp. 4-5. The Department’s “green bar chart” tracks natural flow and storage and records “paper fill” of the reservoirs. AR, Ex. 2201. This exhibit also records actual reservoir content on a daily basis, which changes daily. It has an entry for “Middleton Stored” and a separate entry for “Unacct. Stored.” “Middleton Stored” is the “stored flow” passing Middleton, not retained in the reservoirs. AR, Tr. p. 185, ll. 5-15; p. 176, l. 19-p. 177, l. 2; p. 200, l. 5-24. Flow past Middleton is water not put to beneficial use by the storage right holders. *Id.*, p. 201, ll. 6-15. After paper fill, “the reservoirs can continue to physically accrue water and that is tallied as ‘unaccounted for storage.’” *Id.*, p. 211, ll. 3-8.

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III. ADDITIONAL ISSUES ON APPEAL

A. The Director Lacks Authority to Create an “Unaccounted for Storage” Account for Water Storage that is Not “Distribution of Water.”

The Director asserts that he has authority to authorize diversion and storage of water through an “unaccounted for storage” account outside his authority to distribute water under Idaho Code § 42-602. Does this claim of an inherent power to mete water out to users, without a water right, outside any express statutory authority, violate Idaho law?

B. Attorneys Fees on Appeal.

The Boise Project requests an award of attorneys fees on appeal under Idaho Code § 12-117. The Director’s position that he can authorize diversion of water without regard to Idaho Code § 42-201(2), and that he has the authority to create an “unaccounted for storage” account outside of his statutory authority to distribute water lacks any reasonable basis in fact or law.

IV. ARGUMENT

A. Introduction.

The Director claims that this case involves complex technical issues, hoping that this Court will turn a blind eye to the straightforward legal issues decided by the district court. The accounting program may be complex. However, the district court did not delve into the minutiae of the program. Rather, the district court held that the Director had no authority to create an “unaccounted for storage” account that accrues water to a fictional account that has no relation to any water right. The district court held that the undisputed facts show that water that fills the reservoirs after flood control has been put to beneficial use by the storage right holders prior to 1971. R, 1067-68. Therefore, the accounting program must recognize a water right to store and use water. R, 1068. The district court did not disagree with any factual findings of the Director.

Rather, the district court held that the manner that the Director has chosen to account for water as “unaccounted for storage” is not consistent with Idaho law. R, 1065-66.

The Director’s characterization of the water filling the reservoir after flood release as “excess” or unappropriated water was not accepted by the district court. The court’s rejection of the Director’s position does not involve a dispute of fact. It is a question of what legal consequences flow from the undisputed “longstanding and historic practice” of operations in the Boise; not, as the Department argues, operations in the Upper Snake.³

The legal issue is resolved by Idaho Code § 42-201(2). It is clear and unambiguous. No diversion and use of water can take place without a water right. The accounting program’s author recognized that diversion cannot take place without a water right. AR, Tr. 8/28/2015, p. 464, ll. 10-11. The Director does not contend that the statute does not apply. He simply wants this Court to enact a special exception that is not found in Idaho Code § 42-201(3) or § 42-202A.

The Director’s attempt to justify his action by alluding to unbridled federal control of the river is of no avail. The district court simply held that the undisputed facts here require recognition of a water right to fill the reservoir after flood control is completed. R, 1066-67. The Department has already agreed that there should be a water right for that second fill in the Upper Snake. *See e.g.* Addendum B, Water Right No. 1-10621B. That Palisades storage right recognizes a property right to fill the reservoirs and specifically allows Reclamation to determine when to exercise that right. For the Department to bless that arrangement on the Snake, and claim here that the arrangement is illegal in the Boise and will lead to disastrous and unimaginable consequences, reeks of duplicity.

³ It is telling that the Director feels the need to refer to Upper Snake meetings and even attempts to pad the record with the reference to an extra-record book describing the Upper Snake with no reference to the Boise at all. IDWR Brief, p. 42, fn. 33 and Addendum B. Basin 01 operations are not in the record and do not support the Director’s decision here.

B. Standard of Review.

The Court conducts an independent review of the administrative record. *City of Blackfoot v. Spackman*, Docket No. 44207 (June 20, 2017). This Court must determine if, based on the record, the Director's orders violate Idaho's Constitution or laws, exceeds the agency's statutory authority, are not supported by substantial evidence, or are arbitrary, capricious or an abuse of discretion. *Id.* An agency's actions are arbitrary and capricious when made without a rational basis, or in disregard of the facts and circumstances, or without adequate determining principles. *Lane Ranch v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007). An abuse of discretion occurs when the agency action is "arbitrary, capricious or unreasonable." *Id.* Agency action that does not comport with statutory requirements is invalid. *Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 133 Idaho 320, 322, 986 P.2d 343, 345 (1999).

C. The Director Claims "Unaccounted for Storage" is Not Distribution of Water.

The Director argues in section III.C, that this appeal involves priority administration that is "statutorily committed" to him. Section III.C cites no statute. Instead, he cites *A&B Irr. Dist. v. State*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014), for the proposition that the State Engineer (now Director) has the duty to distribute State waters. This Court's *A&B* decision recognizes two important factors. One, the Director "must follow the law." *Id.* at 393, 336 P.3d at 800. Two, the source of the Director's power to "direct and control distribution of water" is Idaho Code § 42-602. *Id.*

Yet here, the Director does not rely on Idaho Code § 42-602 as authority for his "unaccounted for storage" account. He expressly disclaims that his "unaccounted for storage" account has anything to do with "distribution" of water. He says it is "incorrect to assume...that "unaccounted for storage" amounts to a *de facto* 'distribution.'" IDWR Brief, p. 42. Rather, the Director claims an inherent authority to resolve a "conundrum" of how to deal with flood waters,

and that bestows on him the power to manage the water filling the reservoirs after flood control releases. IDWR Brief, § III.D. He makes this claim to avoid recognizing that the water users have any right to use this water.

D. The Department has Limited Authority and Can Only Exercise the Authority that the Legislature has Expressly Vested in it.

The Director has no roving commission to manage water as he sees fit. He must “follow the law.” *A&B Irr. Dist.*, 157 Idaho at 393, 336 P.3d at 800. An important foundation of Idaho law is that state agencies must find a source for their authority in an Idaho statute. Neither this Court nor the agency can presume any power not legislated to the agency. Thus:

Administrative agencies are “creature[s] of statute” and, therefore, are “limited to the power and authority granted [them] by the Legislature.” *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996). Because the Department is an administrative agency, it “exercises limited jurisdiction, and nothing is presumed in favor of its jurisdiction.” *Id.*; see also *Dep’t of Employment v. St. Alphonsus Hosp.*, 96 Idaho 470, 472, 531 P.2d 232, 234 (1975).

Henderson v. Eclipse Traffic Control, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009).

Not only can the agency not presume authority, the agency cannot expand its authority beyond the legislative grant.

....as ‘[a]n administrative agency is a creature of statute, limited to the power and authority granted to it by the Legislature and may not exercise its sub-legislative powers to modify, alter, or enlarge the legislative act which it administers.’ *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996). Accordingly, the [agency] exercises only that discretion granted by the Legislature.

Simpson v. Louisiana Pacific Corp., 134 Idaho 209, 213, 998 P.2d 1122, 1126 (2000). Thus:

Where the Legislature establishes a statutory scheme that includes assignment of duties to various governmental entities, those entities may not disregard their assigned duties. In *Roberts v. Transp. Dep’t*, 121 Idaho 727, 731-32, 827 P.2d 1178, 1182-83 (Ct. App. 1991), the Court of Appeals correctly observed that where

the legislature enacts a statute requiring that an administrative agency carry out specific function ... that agency cannot validly

subvert the legislation by promulgating contradictory rules. An administrative agency is limited to the power and authority granted it by the legislature. Such delegated authority is primary and exclusive in the absence of a clearly manifested expression to the contrary. An agency must exercise any authority granted by statute within the framework of that statutory grant. It may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered.

City of Sandpoint v. Independent Highway Dist., 161 Idaho 121, 125, 384 P.3d 368, 372 (2016).

From the earliest days of this State, it has been a foundational principle that state agencies have limited authority that must be derived from powers granted by the legislature. *Orr v. State Board of Equalization*, 2 Idaho 923, 926, 28 P. 416, 419 (1891). This Court applied that principle to the commissioner of reclamation (now the Director) in *Evans v. Swendsen*, 34 Idaho 290, 292, 200 P. 136, 137 (1921), holding that where the statute gave no express authority to cancel a notice under the Carey Act, the commissioner could not refuse to accept a Carey Act filing. In *First Security Bank v. State*, 49 Idaho 740, 744, 291 P. 1064, 1065 (1930), this Court recognized that the commissioner's right to approve change in place of use does not detract from the existing property right and that the statutory procedures must be followed.

No agency, not even IDWR, has the power or authority to do more than the legislature authorized to it. The Director is not free to disregard legislative enactments or to circumvent the limitations placed on him by the legislature. While the Director has some discretion in how to "deliver" water, he does not have free reign to act outside the authority granted by the legislature.

E. Idaho Code § 42-201(2) Unambiguously Prohibits Diversion of Water Without a Water Right.

Idaho Code § 42-201(2) is clear and unambiguous. It provides in no uncertain terms:

No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. **No person shall divert any water** from a natural watercourse or apply water to land **without** having obtained **a valid water right to do so**, or apply it to purposes for which no valid water right exists.

(Emphasis added). The Director does not contend this statute is ambiguous. It is not.

This Court's duty when confronted with an unambiguous statute is clear.

The interpretation of a statute is a question of law over which we exercise free review. *Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002). It must begin with the literal words of the statute, *Thomson v. City of Lewiston*, 137 Idaho 473, 478, 50 P.3d 488, 493 (2002); those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 667, 735 P.2d 974, 978 (1987). We construe statutes under the assumption that the legislature was aware of all other statutes and precedents at the time the statute was passed. *Druffel v. State Dept. of Transp.*, 136 Idaho 853, 856, 41 P.3d 739, 742 (2002).

City of Pocatello v. State, 152 Idaho 830, 838-39, 275 P.3d 845, 853-54 (2012); *Accord Tracfone Wireless, Inc. v. State*, 158 Idaho 671, 677, 351 P.3d 599, 605 (2015) (Court does not interpret an unambiguous statute, but follows the law). If a statute is clear on its face, it is unnecessary to engage in the tools of statutory construction. *Hillcrest Haven v. Idaho Department of Health and Welfare*, 142 Idaho 123, 125, 124 P.3d 999, 1001 (2005). In *Pocatello*, this Court held that had the legislature intended to include the source element in the transfer statute, "it would have done so." 152 Idaho at 839, 275 P.3d at 854.

Likewise, had the legislature intended to provide the Director with authority to divert and store water filling a reservoir after flood control without a water right, it would have done so. It did not. Therefore, the Director cannot "interpret" Idaho Code § 42-201(2) to conflict with the plain language of the statute.

The Department contends that all waters entering a reservoir are diverted. Idaho Code § 42-201(2) clearly provides that there must be a water right associated with that diversion. Idaho Code § 42-201(3), provides certain limited exceptions which allow diversion and use of water without a water right to extinguish a fire or for forest practices in specified limited circumstances. Idaho Code § 42-202A allows the Director to issue temporary approvals for

certain water rights as long as those temporary approvals do not injure other water rights, and the temporary approvals do not exceed five (5) acre feet in quantity and one (1) year in duration. Idaho Code § 42-202A(5). In 2017, the legislature amended the temporary approval statute to authorize additional temporary uses to prevent flood damage, for ground water recharge and surface water remediation, but only on an annual basis. House Bill 319. That statutory amendment specifically states that reservoir flood control operations are not subject to the Director's temporary approval. Thus, the Idaho statutes provide no authority for the "unaccounted for storage" account with no water right at all.

What is the source of the legislative delegation for the Director to create an "unaccounted for storage" account and to disregard a water right as a condition to fill the reservoir? The Director says it is not Idaho Code § 42-602. IDWR Brief, p. 42. Apparently, he claims the power to independently distribute water because flood control creates a "conundrum." *Id.* at 37. A conundrum poses a question. It provides no authority for the Director to resolve the question.

Lacking statutory authority to create an account for no water right and faced with the prohibition on diversion without a water right, the Director advances several so-called doctrines. None of them suffice and none allow him to "interpret" or ignore Idaho Code § 42-201(2).

F. The Accounting Program Must Comply with the Prior Appropriation Doctrine and Idaho Law.

In section III.D, the Director pauses briefly to acknowledge the prior appropriation doctrine but then takes aim at the doctrine by asserting that the "conundrum" created by flood control and the maximum use and benefit of the water resources concept allows him to create the "unaccounted for storage" account to resolve this conundrum. The Director relies on *A&B Irr. Dist. v. State*, 157 Idaho 393, 336 P.3d 800 (2014), for the proposition that he must distribute water to decrees in priority and can maximize use. He also cites *Nettleton v. Higginson*, 98 Idaho

87, 558 P.2d 1048 (1977), to support his maximum use theory. However, neither case holds that the concept of maximum use allows the Director the freedom to deliver water to no water right at all. *A&B* refers to filling decreed rights in a way that maximizes their use. *Nettleton* discusses delivery of water to decreed, licensed and claimed uses. *Nettleton* discloses that Idaho Code § 42-607 authorizes distribution of water to claimed uses. The district court held that the undisputed facts showed that the spaceholders hold a valid beneficial use constitutional right to divert water. Distributing water to those constitutional water rights under Idaho Code § 42-607 comports with Idaho law.

No doubt there is some tension between flood control and filling the reservoirs for irrigation use. That tension arose in the early 1970s when Governor Andrus asked the Department to engage with Reclamation and the Corps of Engineers to ensure protection of downstream landowners from floods and still ensure “greater assurance” of refill of the reservoirs following that flood control. This report catalyzed the Department, Reclamation and the Corps to design rule curves for the reservoirs identifying when water should be released to provide flood control and when the reservoirs would fill. AR, Ex. 2186.

The Boise Project believes the water filling the reservoirs should be distributed to the decreed water rights (Docket No. 44745). The district court held the water should be distributed to constitutional water rights. R, 1066-67. The Director wants to distribute water to no rights at all, in violation of Idaho law. In the 1970s and 1980s, the Department was keen on providing “greater assurance” of refill to the water users. AR, Ex. 3001. Now the Director demands to be able to allocate that water for some other purpose, to the injury of the water users.

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G. The District Court Correctly Summarized the “Unaccounted for Storage” Accounting.

The Director’s challenge to the district court’s decision in section III.E. misstates the district court’s conclusions. He claims that the court found that the Director had adopted two separate systems of accounting: one that distributes water based on priority and the other that distributes water based on historic practices. IDWR Brief, p. 40. The district court merely summarized, in broad strokes, the fundamental tenets of the accounting program, recognizing that the details were “more nuanced.” R, 1057-58. Those four points were, first, that natural flow entering the reservoir available in priority accrues to the reservoir water right. AR, 1057. Second, the district court stated that when natural flow entering the reservoir reaches the quantity element, the Director deems the right “satisfied” whether water is physically present or not. *Id.* (i.e. “paper fill”). The district court states that natural flow that enters into the reservoir thereafter is treated as “unaccounted for storage” if the water is not needed to satisfy other rights. *Id.*, AR, 1058. Then the district court states that the program provides that natural flow in the “unaccounted for storage” account can be stored and distributed, which is consistent with historic practice, but not under a water right. *Id.* The Director does not challenge those summary characterizations and agrees that “historic practice in Water District 63” allows storage in the “unaccounted for storage” space to be used by the water users. IDWR Brief, p. 40. The district court did not hold that these accounts were two completely separate accounting systems.

H. “Unaccounted for Storage” is Part of the Accounting for Distribution of Water to the Reservoirs.

The Director claims that the accounting program’s “unaccounted for storage” refers to “excess” flood waters. The truth is that the waters that the Department considered to be surplus to the system were the waters that were released for flood control. AR, Ex. 2186, p. 70. His characterization of the late season fill as “excess flows” does not comport with this history or the

greater guarantee of reservoir fill. Nor does his statement that the flows are “excess” make it so. These are flows historically dedicated to reservoir fill as the district court held. R, 1066-67.

The Director now asserts that he is not “distributing” water to the “unaccounted for storage” account but that this is done by the Corps. This is a new argument raised for the first time on this appeal. Throughout the proceedings below, the Department’s description of the accounting program references the “unaccounted for storage” account as an integral part of the Department’s accounting program. In fact, the Director stated at the outset that the purpose of this administrative hearing process was for “accounting for distribution of water to the federal on-stream reservoirs in Water District 63.” AR, Ex. 01 (emphasis added). The Department’s Exhibit 1 describes the “unaccounted for storage” account as a key element of the Department’s water rights accounting definitions and concepts. Ex. 1, p. 4-5. The new assertion that “unaccounted for storage” has nothing to do with accounting for “distribution” of water to the federal on-stream reservoirs is belied by the history of this proceeding. The Amended Final Order describes the accounting program as a set of computational tools for both natural flow and storage use. AR, 1264, ¶ 98, *citing* Ex. 1, p. 2 (“the term *water rights accounting*, in this document, is used to describe this set of computational tools the watermaster uses to quantify natural flow availability and use, and to track storage use, on a daily, after-the-fact basis”).

Tracking storage and use is part of the accounting program and has been, since 1986, part of the distribution of water to the spaceholders and their storage accounts. On the day of allocation, the Department allocates the water in the “unaccounted for storage” account to the storage rights. The Department then runs its storage accounting program to determine how much water the individual waters users are entitled to have. This practice is consistent with and even necessary because the *Pioneer* decision held that the partial decrees for the Boise River storage water rights did not have to specifically describe the portions of the storage right held by each of

the individual irrigation entities because those water rights have been “administered successfully.” *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 116, 152 P.3d 600, 610 (2007).

Administration of this storage water is the Department’s job under *Pioneer*.

The Director then argues that “unaccounted for storage” cannot be distributed, but the Department already distributes “unaccounted for storage.” On the day of allocation, the water that has been “tracked” in the “unaccounted for storage” account is transferred to the storage rights. From there it is allocated among the individual spaceholders. The watermaster carefully follows the distribution of water in each one of those individual spaceholder accounts to ensure that no more water than is in that entities’ account is distributed to its canals.

The Director argues that “unaccounted for storage” is impossible to distribute in a particular year because of the variability of flood control operations. IDWR Brief, p. 43. This is not true because “unaccounted for storage” is quantified in the accounting program every year. AR, Ex. 2201; Tr. 8/27/2015, p. 211, ll. 3-8.

I. The Director’s Substitution Theory is Not Supported by the Jorgensen Decision.

The Director next contends that his practice of creating an “unaccounted for storage” account tied to no water right is supported by the theory of substitution. He argues that the “unaccounted for storage” account is a Reclamation operation that allows Reclamation to substitute one type of water for another. IDWR Brief, p. 44. To be clear, “unaccounted for storage” is not a Reclamation concept. It is a function of the Department’s accounting program, necessary in order to justify its paper fill satisfaction rule. AR, Ex. 1.

The district court recognized that historically the reservoirs were filled following flood control so that Reclamation could satisfy its obligations to the spaceholders to deliver water to them following flood control operations. R, 1163. The district court did not hold that this practice was a substitution of one water right for another. Rather, the district court was responding to the

Director's argument on rehearing in which the Director contended that the Reclamation and Corps of Engineers' flood control operations preempted state law and justified filling the reservoirs without a water right. *Id.* The district court held that tracking water as "unaccounted for storage" does not prevent recognition of a beneficial use water right. *Id.* The district court also concluded that "[t]reating the refill water as 'unaccounted for storage' does not result in protecting the historical practice of allowing the United States to continue to refill the reservoirs without a water right." *Id.* Everyone agrees. There was, and has been since the reservoirs were constructed, an historical practice of filling the reservoirs following flood control and making that water available to the spaceholders for beneficial use. The Director wants to strip that practice of any legal protection. Instead, the Director wants the authority to decide who gets to use the water that has historically filled the reservoirs following flood control and has historically been put to beneficial use by the water users. In doing so, the Director violates Idaho water law and the Idaho Constitution Article XV, §§ 3 and 5.

The Director cites to *In Re: Wilder Irrigation District v. Jorgensen*, 64 Idaho 538, 136 P.2d 461 (1943), for the proposition that this Court has already held that substituting water does not violate the water rights of the Boise River spaceholders. The Director has badly misstated the holding of this Court in *Jorgensen*. At issue in *Jorgensen* was the validity of a contract between the Wilder Irrigation District and the Bureau of Reclamation for new storage in Anderson Ranch. The appeal arose from a confirmation petition, and this Court upheld the contract. A provision in the contract stated that "the United States may, at some future time, substitute an equal amount of Payette and Salmon River water for district Boise River water[.]" 64 Idaho at 549.

Reclamation had proposed the possibility of diverting water from Anderson Ranch to the Mountain Home desert and bringing in Payette or Salmon River water to Anderson Ranch. This Court recognized that a possible exchange could be permitted only in the absence of injury to or

detriment to prior users. *Id.* at 548-49. This Court concluded that the landowners were not compelled to give up any rights by this contract provision because they would have to receive an equal amount of water in the event of an exchange that might be made in the future.

Justice Alshie's concurring opinion (cited by the Director) further emphasized the limited nature of the Court's holding. He stated that it does not make a difference to the appropriator whether it gets water from one stream or another, "so long as it is delivered to him at his headgate at the times and **under the priorities** to which his location and appropriation entitle him." *Id.* at 551 (emphasis added). The Director omits this point and claims that *Jorgensen* authorizes him to require the holders of water rights to substitute their water for water that accrues to no water right at all. According to the Director, the water users must rely on the potential that the Director might continue to allow them to have that water in the future after flood control releases. *Jorgensen* does not support the Director's position that he can substitute a water right, whether from a constitutional appropriation or under the original water right, for no water right at all, as his "unaccounted for storage" accounting program tries to do.

The Department claims that accruing water to no water right at all in this "unaccounted for storage" account allows the spaceholders to get their same storage allotments they would have received, if not for flood control. Without a water right their ability to store water and receive their water right allocations is subject to appropriation of that very water by other users. R, 1163-1164; IDWR Brief, p. 58. That is not a substitution of a right for a legally equivalent right as *Jorgensen* requires.

J. The Maximum Use Theory Does Not Override Idaho Code § 42-201(2).

The Director ultimately pins his legal argument on the theory that the policy of "maximum use" authorizes him to circumvent the unambiguous requirements of Idaho Code § 42-201(2). In other words, even though there is no statutory authority for the Director's

“unaccounted for storage” account, he can recognize this use because he claims the maximum use theory allows him to authorize “ancillary” use of water. IDWR Brief, p. 47. There is no statutory authority for such “ancillary” use of water. The only time this Court has ever discussed an “ancillary” use of water is with respect to firefighting use. *State v. Idaho Conservation League*, 131 Idaho 329, 334, 955 P.2d 1108, 1113 (1996) (“firefighting use ancillary to existing water rights...”). *See also A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1996) (approving a general provision allowing an existing water right to be used for firefighting purposes without a separate purpose of use on the right). This Court held that firefighting was a use specifically authorized as a condition of the decree necessary for administration of water rights. 131 Idaho at 334, 955 P.2d 1113. Such use is also explicitly authorized by statute. Idaho Code § 42-201(3). Here, the Department did not request during the adjudication of these storage rights or any similar general provision authorizing an “unaccounted for storage” ancillary use. Without a water right, a general provision or a statute there is no authority for “ancillary” use claimed by the Director.

1. The Theory of “Excess” Flows Does Not Override Idaho Code § 42-201(2) or Provide a Basis for the Maximum Use Claim

The Director relies on *State v. Idaho Conservation League* and *A&B Irr. Dist. v. Idaho Conservation League*, *supra*, to claim that he can authorize use of “excess” water without a water right. The district court explained that these cases did not address Idaho Code § 42-201(2) and were factually not on point. The district court explained that the Director’s reliance on those cases was misplaced because in the SRBA there was only one instance where diversion and use of “excess” water without a water right was approved. R, 1066. That use was decreed as a general provision. The district court explained that the merits of whether a general provision authorizing use of excess water without a water right could be upheld was not addressed in the

SRBA or on appeal. Rather, because that “excess” flow provision had been included in a prior decree, the SRBA court was bound to include it in the Lemhi decree. *Id.* Moreover, “excess” flows in the Lemhi involve early season “high flow,” like the “surplus” water released for flood control in the Boise, not water that fills a reservoir after flood control. Rather than address the district court’s explanation, the Director simply repeats himself. He provided no new authority or analysis, and failed to address the basis for the district court’s decision. As the district court held, the *Idaho Conservation League* cases provide no authority for “unaccounted for storage” accounts or ignoring Idaho’s statutes.

2. The Claim There is No Scarcity in Flood Water Years is Arbitrary and Capricious and Not Supported by Law and Does Not Support the Maximum Use Claim

Next, the Director contends that flood control years involve not times of scarcity but times of “excess.” The Director’s insistence that he can favor junior users over reservoir fill because there is no scarcity of water in a flood control year is puzzling. Under Idaho Code § 42-607, he can only administer between decreed rights, junior uses and claimed rights “in times of scarcity.” *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 27, 752 P.2d 625, 629 (Ct. App. 1988); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977); *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973). In the absence of scarcity, the Director lacks authority to administer the claimed rights. Yet, the “unaccounted for storage” account purports to put reservoir fill at the end of the line. The evidence demonstrates that any junior use in the Boise has occurred without “detriment” to reservoir fill. AR, 1404-05. If there is no scarcity as contended by the Director, he has no authority to prefer junior rights to the rights claimed by the storage right holders. Idaho Code § 42-607.

Because of the variable nature of water run-off in this climate, there are times when the rivers provide both more and less water than can be put to use, even in the same irrigation

season. E.g., *Lee v. Hanford*, 21 Idaho 327, 331, 121 P. 558 (1912). There are times of scarcity during a flood year when the flood waters recede and run off is necessary to fill the reservoirs. That is exactly how the Boise River system was designed to operate. AR, Ex. 2186. Later in the season when there is potential scarcity, storage right holders need the right to fill the reservoir, a right denied to them by the Director's insistence that he can fill without a water right.

3. The Director's Interpretation of Maximum Use Violates Idaho's Constitution

The Director contends that the "doctrine" of excess flows allows him to decide who gets to use excess flows and when. He finds this "doctrine" rooted in the policy of "maximum use." But, the "maximum use" policy does not overturn the Idaho Constitution or Idaho law. Maximum use does not prevent someone from appropriating unappropriated waters. The district court found that the storage users in the Boise have appropriated the reservoir fill by putting the late season fill to beneficial use and have filed late claims for those flows. R, 1066-67. The district court correctly recognized that the rights of the water users under these beneficial use claims, SRBA subcase nos. 63-33732, 63-33733, 63-33734, 63-33737 and 63-33738, are substantial property rights. R, 1066, fn. 12, *citing* IDAPA 37.03.08.035.02.d.

Article XV § 3 of the Constitution provides that any party has the right to appropriate unappropriated waters and that priority of appropriation is the better right. "[T]he law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld. The legislative will is clearly expressed in the following language: 'As between appropriators, the one first in time is the first in right.'" *Malad Valley Irr. Co. v. Campbell*, 2 Idaho 378, 379, 18 P. 52, 53 (1888). Article XV, § 4 provides that when the waters have been put to beneficial use for agricultural purposes, which these waters no doubt have, their distribution "shall be deemed an exclusive dedication to such use and that the water users cannot be deprived

of that water without their consent.” As the district court found, it is undisputed that the late season storage has been put to beneficial use. R, 1066-67. These rights are constitutionally protected under Article XV, § 4. Article XV, § 5 reiterates that priority in time gives the appropriator a superior right.

Here, the Director claims that the maximum use policy allows him to override these foundational principles of the Idaho Constitution, but the Director lacks authority to act unless he has been delegated that authority by specific legislative action. The Director relies exclusively on *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016), to bolster his maximum use and full economic development argument. The Director completely ignores this Court’s prior decision in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). *Clear Springs* was a unanimous decision of this Court. *IGWA* was a 3-2 split decision involving a narrow issue of conjunctive management and it did not overrule *Clear Springs*.

Clear Springs describes the relationship between Article XV, § 7 and Article XV, § 3. Article XV, § 7 provides that the State Water Resource Board has the power to formulate and implement a plan for “optimum development” of the water resources. Article XV, § 7 was adopted in 1984 after the *Swan Falls* decision and long after the “longstanding” and “historic” use of water filling the reservoirs had vested rights in the Boise storage right holders. 150 Idaho at 807, 252 P.3d at 88. *Clear Springs* explains:

There is nothing in the wording of Article XV § 7 that indicates that it grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Article XV § 3 which states ‘Priority of appropriation shall give the better right as between those using the water [of any natural stream]....’ The current state water plan does not purport to do so. It provides the goal of conjunctive management is to protect the holders of prior water rights while allowing for the optimum development and use of the state water resources. Idaho Water Resource Board, the State Water Plan (1996).

Id. So maximum use does not allow the Director to override the constitutional beneficial use of the water users.

Since *Clear Springs*, a newer State Water Plan was adopted in November 2012. The Optimum Use's Conjunctive Management section (1E) of the new Plan recognizes that there are differences between Conjunctive Management and water right administration. Conjunctive Management encompasses actions other than water rights administration. In contrast, "water rights administration is the enforcement of the relative rights of water right holders under the prior appropriation doctrine." *Id.* Here, the Director relies on conjunctive management case law to support his administration of surface water, contrary to the State Water Plan.

In *IGWA*, this Court held that the Director could rely on Conjunctive Management Rule 20.03 and Article XV, § 7 as a basis for implementing a trim line in a conjunctive management delivery call. The concept of full economic development in Conjunctive Management Rule 20.03 is founded upon Idaho Code § 42-226, and applies only to ground water, not to surface water. *Clear Springs, supra*. This case does not involve ground water or conjunctive management. Moreover, unlike in *IGWA*, there are no rules regarding "unaccounted for storage" accounts or "paper fill" to support the Director's actions. The legislative direction in Idaho Code § 42-201(2) that diversion requires a water right and Article XV, § 3's requirement that priority of appropriation gives the better right are not modified by Article XV, § 7. *Clear Springs, supra*. In fact, as this Court has recognized, it is Title 42 which secures the maximum use and benefit. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999). So the Director cannot rely on maximum use to override the provisions of Title 42, or interpret Idaho Code § 42-201(2) as allowing storage to no water right.

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K. The District Court Did Not Determine that Idaho Code § 42-201(2) Authorizes Unquantified Water Rights.

The Director then alleges that the court's decision requiring recognition of a water right for water stored and put to use by the water users would require an unquantified water right to all flows in the river after “paper fill.” IDWR Brief, p. 50. The court made no such ruling. Nothing in the court’s decision says that the storage right holders are entitled to store all flows in the river. Instead, the court recognized that the water in the “unaccounted for storage” account should be protected.

The Director suggests that all water over paper fill and natural flow demand is “excess” and measured as “unaccounted for storage.” In some years, like 2017, water is released past Middleton that cannot be retained. “Unaccounted for storage” does not track all those releases, but only tracks what is physically accrued in the reservoir after paper fill, and which is then allocated to the water right holders. AR, Tr. 8/27/2015, p. 211, ll. 3-8; AR, Ex. 2201. That captured water is what is put to beneficial use, not the flows going past Middleton. *Id.*, p. 201, ll. 6-15. That is the water the district court recognized as constitutionally appropriated. R, 1066-67. It is not a water right for an uncertain amount. Every flood year the water in the “unaccounted for storage” account is quantified by the Department. The storage right holders are not wasting that water, they are storing it to put to use. The beneficial use storage right can easily be quantified and conditioned with a combined use remark. *See Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001) (referencing a combined use remark for two separate water rights); *see also* Water Right 01-10621B (Addendum B).

The Director argues that recognizing beneficial use is not possible because storing water is subject to flood control operations. That factor did not stop the Director from recognizing a priority water right to store water in the reservoirs in the Upper Snake. *See*, e.g. SRBA Water

Right No. 01-10621B, Addendum B. Recognizing a beneficial use in water actually stored does not, as the Director claims, require him to administer water released for flood control. Nothing would prevent the Director from allowing juniors to divert “surplus” water released for flood control, as the Department contemplated when it wrote that section of the Water Control Manual. AR, Ex. 2186, § 7.06. The “surplus” of water in the stream the Director fears would be there as a result of the flood control operations. He should permit diversion of that surplus flow. AR, Tr. 9/10/2015, p. 1473, l. 5-p. 1477, l. 10.

L. “Unaccounted for Storage” to No Water Right at All is Prejudicial.

The Director claims that no water right should be recognized for late season reservoir fill because he has created a mechanism to protect the users in his “unaccounted for storage” accounting. Idaho Code § 42-201(2) cannot be “interpreted” to allow a diversion when an administration mechanism has been created or it would render the requirement for a water right superfluous. If this Court agrees that he can deliver water without a water right, the Director and the State will argue in the SRBA that there is no need for the late claims. That is an adverse consequence to the storage right holders.

The Director even contends that since “unaccounted for storage” did not exist prior to 1971, then the water user could acquire no rights to water now tracked in that account. IDWR Brief, p. 55, fn. 37. The district court recognized that the water stored in the reservoirs that the Director now labels as “unaccounted for storage” was “diverted, stored and ultimately used by the irrigators for irrigation” prior to 1971. R, 1067. The court did not find that use had begun only since the accounting program was instituted. As everyone acknowledges, the “unaccounted for storage” account tracked the historic use of storage water before 1971.

The Director then claims that there is no “imminent threat of injury” because it is difficult (but not impossible) to appropriate the unappropriated water filling the reservoirs. Declaring the

water the storage right holders have used to be “unappropriated” is injury. That is why we have water rights – to protect the use. He asserts that once the water is stored, it is not subject to appropriation and juniors cannot call it from the reservoir. IDWR Brief, p. 58. While true in the abstract, there still must be a right to store water. In addition, the Director also contends that he can prevent water from entering storage in the first place by delivering it to new or junior water users. *See also* AR, Tr. 8/28/2015, p. 451, l. 9-18. In fact, he admits that this “refill” water is subject to appropriation. Addendum A, seeking to appropriate 100,000 acre feet also shows that injury is indeed “imminent.”

M. The “Excess” Flow Theory Puts Idaho Water at Greater Risk than Recognizing a Water Right.

The Director then makes an overwrought claim that, unless he is free to allocate water to no water right at all in his “unaccounted for storage” account, then the federal government will control the river and he will be helpless to administer water. This Court should not succumb to this obvious contrivance. First, Idaho Code § 42-201(2) contains no exceptions that allow the Director to avoid following the law just so he can exert pressure on federal flood control operations. He has had opportunities to approach the legislature since this issue arose, but has chosen not to.

Second, his claims that unless he can deny the storage right holders a property interest, as is their right under *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the Corps and Reclamation will run rough-shod over the water users in the Boise, does not comport with the history of flood operations in the Boise. Flood control was introduced in the Boise only with the understanding of the State and water users that doing so would not harm their ability to use stored water for their crops. AR, Tr. 8/31/2015, p. 796, l. 8-p. 800, l. 1. As a result, the federal government has a flood control obligation to protect life and property in the Boise. 33

U.S.C.A. § 701-1. Operations were established under a 1953 Memorandum of Understanding. AR, Ex. 2038. When the State was dissatisfied with those operations it commissioned a study to encourage more early season flood releases and “greater assurance” of refill. AR, Ex. 2171. The Department worked hand-in-glove with Reclamation and the Corps to develop a Water Control Manual that tied releases to tightly defined rule curves. AR, Ex. 2186. Those operations were approved by the Department, which gave the Manual its “blessing.” AR, Tr. 8/28/2015, p. 459, l. 20-p. 460, l. 7. So flood releases will take place with the goal of refilling the reservoirs at the end of the spring runoff anyway. The question is whether the water users have the right to store and use that water that has historically been put to beneficial use? Or some new appropriation?

While the Director says that the federal government flood control runs rough-shod over the Boise, the Department has not objected to how the rule curves operate in the Boise. AR, Tr. 8/31/2015, p. 763, l. 10-p. 764, l. 2. The only concern over operations in the Boise that has been mentioned relates to releases from Anderson Ranch to Arrowrock in the winter. AR, Tr. 8/31/2015, p. 741, l. 20-p. 743, l. 1. However, those releases are managed under an agreement between Reclamation and the State of Idaho, Department of Fish and Game, for flows in the South Fork of the Boise to protect the fishery. *Id.* The Department admits it has no objection to those operations. *Id.* While the Director has had issues with Reclamation operations in the Upper Snake, there is no actual problem to solve in the Boise that is not well-managed by the Water Control Manual and its rule curves, which have received the Department’s “blessing.” AR, Tr. 8/28/2015, p. 459, l. 20-p. 460, l. 7.

Fourth, if the Director is successful in labeling the water that has filled the reservoirs as “excess” and “unappropriated,” as he asks this Court to approve, the consequences will be dire. If the water is “excess” there is nothing to prevent downstream, out-of-state interests from asking a federal judge to require the federal reservoir operators to release or pass through water that

would otherwise be required to be stored under a water right. AR, Tr. 9/10/2015, p. 1496, ll. 2-25. That is exactly why these spaceholders raised the ownership interest in stored water in *United States v. Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609. This Court recognized that it was vital for the water users to have a property interest in the stored water. *Id.* Yet, now the Director wants to take away the property interest and its attendant protections. This Court should not allow the Director to undo all the good done in *Pioneer*.

N. Remand is Appropriate.

The district court did not err in remanding. The court did not require the Director to adjudicate the late claims. The same judge presided over the late claims. He is the SRBA judge and knows the SRBA court's jurisdiction. He remanded because the "unaccounted for storage" account violates Idaho law. The Director's Order approving that account cannot be allowed to stand. On remand, the Director will undoubtedly have to await the quantification of the late claims in the SRBA. Thereafter, he can fix the accounting program.

V. ATTORNEYS FEES

The Boise Project requests an award of attorneys fees under Idaho Code § 12-117. That section authorizes fees in a proceeding where a state agency is an adverse party, and when the non-prevailing party acted "without a reasonable basis in fact or law." *Id.*

Here, the Boise Project is entitled to fees because the Department has no reasonable legal argument to ignore Idaho Code § 42-201(2). It cannot interpret that statute in a way that allows storage of water without a water right. Its reading of the statute is untenable. It is unreasonable to rely on conjunctive management authority to support its theory of surface water administration. With respect to its excess flow argument, the Department asserts the same arguments on appeal as it did before the district court. It failed to add any new analysis and failed to respond to the district court's reasoned explanation. Attorneys fees are appropriate under these circumstances.

City of Blackfoot v. Spackman, Docket No. 44207 (June 20, 2017); *Chandlers-Boise LLC v. Idaho State Tax Comm'n*, Docket No. 44211 (July 11, 2017).


VI. CONCLUSION

On appeal, the Director asks this Court to either “interpret” or ignore the plain, unambiguous language of Idaho Code § 42-201(2) to create a new exception. Neither the Director, nor this Court, may do so. When the legislature has spoken it is the duty of the Court and the Director to follow that directive. Using an “unaccounted for storage” account to accrue water to no water right at all violates Idaho law.

The district court’s remedy was to recognize the longstanding and historic practice of storing water after flood control for the benefit of the water users and putting that water to beneficial use as a constitutional beneficial use right. The Boise Project’s separate appeal argues that the water should be distributed to the decreed rights. If this Court agrees, the Director’s appeal is moot. If the Court upholds the “paper fill” satisfaction ruling, the Boise Project requests that this Court affirm the district court’s ruling that it is impermissible to allocate water to no right at all.

DATED this 14th day of July, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July, 2017, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S BRIEF IN RESPONSE TO IDWR & DIRECTOR'S BRIEF** the method indicated below, and addressed to each of the following:

Original to:

IDAHO SUPREME COURT
451 W. State Street
P.O. Box 83720
Boise, ID 83720

☒ Hand Delivery
☐ U.S. Mail, postage prepaid
☐ Facsimile
☐ Overnight Mail
☐ Email

Copies to:

Garrick Baxter
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Albert P. Barker

ADDENDUM A

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IDAHO DEPARTMENT OF WATER RESOURCES
Water Application Report

7/13/2017

WATER RIGHT NO. 63-34403

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	CAT CREEK ENERGY LLC 398 S 9TH ST STE 240 BOISE, ID 83701 4064593013
Representative	IDAHO WATER ENGINEERING ATTN DAVID R TUTHILL JR 2918 N EL RANCHO PL BOISE, ID 83704 2083781513

Priority Date: 05/16/2017

Status: Active

<u>Source</u>	<u>Tributary</u>
SOUTH FORK BOISE RIVER	BOISE RIVER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
POWER STORAGE	01/01	12/31		101352 AFA
POWER FROM STORAGE	01/01	12/31		100000 AFA
DIVERSION TO STORAGE	01/01	12/31	9996 CFS	
Total Diversion			9996 CFS	

Location of Point(s) of Diversion:

SOUTH FORK BOISE RIVER	SWNE	Sec. 26	Township 01N	Range 09E	ELMORE County
SOUTH FORK BOISE RIVER	SWNW	Sec. 26	Township 01N	Range 09E	ELMORE County
SOUTH FORK BOISE RIVER	SENE	Sec. 26	Township 01N	Range 09E	ELMORE County

Place(s) of use:

Place of Use Legal Description: POWER STORAGE ELMORE County

<u>Township</u>	<u>Range</u>	<u>Section</u>	<u>Lot</u>	<u>Tract</u>	<u>Acres</u>	<u>Lot</u>	<u>Tract</u>	<u>Acres</u>	<u>Lot</u>	<u>Tract</u>	<u>Acres</u>	<u>Lot</u>	<u>Tract</u>	<u>Acres</u>
01N	09E	26		SWNE										

Place of Use Legal Description: POWER FROM STORAGE same as POWER STORAGE

Dates:

Date Application Received: 05/16/2017

Date Application Denied:

Last Date of Beneficial Use:

Extension End Date:

Protest Deadline Date:

Number of Protests: 0

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Other Information:

State or Federal:

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Application Type: New Appropriation

Applicant Remarks:

Other Water Rights:

Time to Complete Works: 5

Transfer Affected Description:

Transfer Affected Contracts:

Old Transfer Number:

Transfer Reason:

Transfer Return Flows:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

Close

ADDENDUM B

RECEIVED

MAR 30 2017

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLSDEPARTMENT OF
WATER RESOURCES**AMENDED**

PARTIAL DECREE PURSUANT TO

I.R.C.P. 54(b) FOR

Water Right 01-10621B

In Re SRBA)

Case No. 39576)

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

MAR 29 2017

By

Clerk

Deputy Clerk

NAME AND ADDRESS:

UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PN CODE-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

SOURCE:

SNAKE RIVER TRIBUTARY: COLUMBIA RIVER

QUANTITY:

1043298.00 AFY

Water right nos. 01-2068, 01-4055, 01-10043, 01-10044, 01-10045, 01-10621A, 01-10621B and 01-10623 are limited to the total combined annual diversion volume necessary to allocate a total of 2,047,000 acre-feet of irrigation storage water per year to the consumers or users of the irrigation storage water. Water will not accrue towards the satisfaction of this water right until the United States of America, acting through the Bureau of Reclamation, has notified the Water District 01 Watermaster of the calendar date on which it intends to store water pursuant to this water right. Following initial notification, the United States can provide notification directing the Water District 01 Watermaster to stop and start the accrual of water pursuant to this water right, until the water right has been satisfied. All notification must be made in writing. Each notification must identify a specific calendar date on which administrative action should occur. The identified calendar date cannot predate the date of written notification. This water right is limited to the total space evacuated upstream from Palisades Dam for local flood control operations as determined by the Water District 01 Watermaster, prior to the date of final storage allocation not to exceed 1,043,298 acre-feet. 'Local flood control operations' are reservoir flood control operations in accordance with the Act of September 30, 1950, Public Law 81-864, 64 Stat. 1083-85, as amended or supplemented, and the operating plan for Palisades Reservoir as it may be revised pursuant to the foregoing laws. The watermaster's determination of the space evacuated for flood control is made for the purpose of determining the distribution of natural flow to this water right in accordance with state law. The watermaster's determination shall not bind the United States, nor have any effect on the United States' determinations, authority, or discretion under federal law in operating this reservoir for local flood control purposes.

PRIORITY DATE:

10/31/1976

POINT OF DIVERSION:

T01S R45E S17

SENE

Within Bonneville County

PURPOSE AND

PERIOD OF USE:

PURPOSE OF USE

PERIOD OF USE

QUANTITY

Irrigation Storage

03-15 TO 07-31

1043298.00 AFY

Water accruing to this water right supplements water accrued under water right nos. 01-2068, 01-4055, 01-10043, 01-10044, and 01-10045 and water available under this water right will be allocated for end use as provided in contracts entered into between the United States and federal contractors referenced in paragraph 2 as if it had accrued under water right nos. 01-2068, 01-4055, 01-10043, 01-10044, and 01-10045.

PLACE OF USE:

Place of use is on those lands identified under water right nos. 01-2068, 01-4055, 01-10043, 01-10044, and 01-10045. Water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range 21E, sections 28 and 29, when determined by the Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources), the Water District 01 advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

1. The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.
2. The allocation of storage to federal contractors and the location of that storage, including carryover storage, in the reservoir system shall be determined by the United States Bureau of Reclamation pursuant to federal reclamation law and contracts entered into between the United States and federal contractors. The Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources) shall distribute stored water in accordance with the allocation instructions from the United States Bureau of Reclamation. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott, which store and distribute water pursuant to water right nos. 1-219, 1-2064, 1-2068, 1-4055, 1-10042, 1-10043, 1-10044, 1-10045, 1-10620, 1-10621A, 1-10621B, 1-10622, 1-10623, 21-2156, 21-4155, 21-10560, 21-13161, 21-13194, 25-7004, 25-14413A and 25-14413B.
3. This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may ultimately be determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.
4. The operation, use and administration of this water right is subject to the terms and conditions of the Settlement Agreement signed on February 14, 2006 with Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District #2.
5. This decree does not alter, amend, or modify the contracts entered into between the various federal contractors and the United States Bureau of Reclamation, as amended, including but not limited to the contractual storage exchanges, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties.
6. Combined use limit amongst 01-10621B and 25-14413B not to

OTHER PROVISIONS (continued)

exceed 1,043,298 acre-feet.

7. For surface water right administration this water right is subordinate to all water rights permitted, licensed, or decreed prior to May 1, 2014 that are not decreed as enlargements pursuant to Section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right. The administration of this water right and ground water rights is addressed in Provision 8 below.

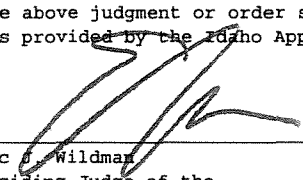
8. For conjunctive administration this water right shall not be used as the basis for a water right delivery call, nor shall it be the basis for a defense to a water right delivery call; provided, the Director of IDWR may consider the effect of Provision 7 above on the total supply of water available to the calling party. Further, this water right shall not be construed as an admission or waiver of any available claims or defenses related to the conjunctive administration of water right nos. 01-2068, 01-4055, 01-10043, 01-10044, and 01-10045.

9. The exercise and administration of this water right is subject to the terms and conditions of the Stipulation effective November 16, 2015, which is incorporated herein by reference.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


Eric C. Wildman
Presiding Judge of the
Snake River Basin Adjudication