

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 44746-2016



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

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

Petitioners-Respondents,

and

BOISE PROJECT BOARD OF CONTROL and NEW YORK IRRIGATION DISTRICT,

Petitioners-Respondents,

vs.

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.

RESPONDENTS' BRIEF FOR THE DITCH COMPANIES

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, County of Ada

Honorable Eric J. Wildman, District Judge, Presiding

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

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

I. STATEMENT OF THE CASE

IDWR and the Director (collectively “IDWR”) are appealing Judge Wildman’s decision that Treasure Valley irrigation districts and canal companies are entitled to additional water rights (claimed by the Bureau of Reclamation (“BOR”)) to complete their historic storage and irrigation use of water in the Boise River Reservoirs during flood years like this one.

The arguments presented in this appeal, and the companion appeals in Supreme Court Docket No. 44677-2016 and Docket No. 44745-2016, present the Court with three possible outcomes: (1) storage of the full volume of water that fills the Boise River Reservoirs at the end of flood control operations under the decreed storage rights; (2) storage of the same volume first under the existing, decreed storage rights (until the point of “paper fill”), and then under additional beneficial use water rights (from the point of “paper fill” until maximum fill of the reservoirs); or (3) storage of water under the decreed rights up to the point of “paper fill,” followed by permissive storage at the Director’s discretion, subject to the water delivery demands of junior water rights and new appropriations of water.

Each outcome is based on differing views of what it means to store water in the Boise River Reservoirs pursuant to the reservoir storage rights. While the potential outcomes are

¹ The “Ditch Companies” include: Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers’ Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

convoluted by IDWR's arguments and the district court's conclusions, the "core" question is easily summarized as whether the decreed Boise River Reservoir storage rights are "filled" and "satisfied" by flood control releases. These outcomes are described in greater detail *infra* at pages 21-26.

The Ditch Companies submit that the correct answer to this question is a clear and resounding "NO!" As Special Master Booth correctly concluded in his summary judgment decision in the SRBA late claim subcase (AR. 001344-87), the water stored in the Boise River Reservoirs at the end of flood control operations is stored and beneficially used under the existing, decreed storage rights. No other result is consistent with the Boise River Reservoir storage water rights, Idaho law, Boise River Reservoir operations for flood control and beneficial use storage, storage right administration by the Boise River Watermasters, and the experience of Boise River water users.

However, if the Court decides otherwise, the Court must uphold Judge Wildman's decision that the Ditch Companies are entitled to additional water rights to complete their historic storage and irrigation use of water in the Boise River Reservoirs during flood years like this one. The storage and beneficial use of this water is too important to the Treasure Valley to be unauthorized and unsecured by water rights.

II. STATEMENT OF THE FACTS

IDWR's Statement of Facts in *IDWR's Appellants' Brief* ("*IDWR Brief*") relies primarily on findings and conclusions in the Director's *Amended Final Order* ("*Final Order*"), dated October 20, 2015 (AR. 001230),² with few references to evidence in the Record. IDWR's

² Citations to the Record will use the following formats: "R." and "AR." for the District Court and Agency Records, respectively, followed by the bates numbers; transcripts are cited as "Tr." followed by the date of the hearing and the page and line numbers; exhibits in the Agency

factual statement contains legal conclusions and arguments with which the Ditch Companies disagree, and address in the Argument section of this brief (*e.g.*, interpreting storage right Decrees (*IDWR Brief*, pp. 9-10); asserting flood control and water right administration conflict; creating an administrative “conundrum”; and the specter of federal control of Boise River water resources if the Court does not adopt IDWR’s position (*id.*, pp. 16-17, 26)).

IDWR briefly discusses Boise River Reservoir operations (*id.*, pp. 12-16), which the Ditch Companies described in detail in *Appellants’ Opening Brief* (pp. 9-35) in Supreme Court Docket No. 44677-2016, filed May 26, 2017 (“*DC App. Brief*”). The Ditch Companies provided the detailed description because understanding the operation of the Boise River Reservoirs for flood control and beneficial use storage under the congressionally-approved reservoir operating plan is essential to understanding the relationship between flood control and beneficial use storage in the Boise River Reservoirs and, therefore, resolving the “core question” in this case as described in *IDWR’s Brief*: determining when the storage rights are “satisfied.” *IDWR Brief*, p. 10.

Notwithstanding IDWR’s emphasis on water right administration, IDWR’s factual statement contains no discussion of the extensive evidence in the record describing the actual administration of Boise River storage rights by Boise River Watermasters, and the actual use of stored water by Water District 63 water users (summarized in *DC App. Brief* at pp. 35-42 and explained by the Watermasters and the water users themselves).

The majority of IDWR’s factual statement pertains to IDWR’s computerized water right accounting system. *IDWR Brief*, pp. 18-29.

Record are cited at “Ex.” followed by the exhibit number and bates number; and Officially Noticed Documents in the Agency Record are cited at “Offl. Not.” followed by the folder title and document name.

To minimize repetition, the Ditch Companies incorporate herein by this reference the statement of facts in *DC App. Brief* (pp. 9-42). The following statement summarizes aspects of reservoir operation and water right administration that are pertinent to IDWR's appeal, and addresses in greater detail IDWR's accounting system for the Boise River Reservoirs.

A. Full Appropriation of the Boise River

The summertime natural flow of the Boise River has long been fully appropriated by water rights decreed in the 1906 *Stewart Decree*, leaving springtime runoff or "floodwaters" the remaining unappropriated water supply of the Boise River, as evidenced by the 1929 *Bryan Decree*, also known as the "Flood Water Suit," IDWR's 1977 moratorium order, and IDWR's conditioning of water rights to utilize only water released from the reservoirs for flood control. *DC App. Brief*, p. 10, Ex. 2008, 000474-75, ¶¶ 11-12; *see also*, Exs. 3003, 3004, 3005, 3006, 3007, 3008, 3012 and 3013.

B. Boise River Reservoir Operations for Flood Control and Beneficial Use Storage

From the early 1950s to the present, the Boise River Reservoirs have been operated as a multiple-purpose system for beneficial use storage and flood control pursuant to the congressionally-approved reservoir operating plan developed, approved, modified and implemented cooperatively by the BOR and the Corps, IDWR and multiple levels of Idaho government, and Boise Valley water users, to provide high levels of assurance that flooding will be prevented, and that the Reservoirs will be filled to the maximum extent possible for irrigation and other beneficial uses at the conclusion of flood control operations. *DC App. Brief*, pp. 9-35.

The 1953 BOR report which was the basis for congressional approval of the reservoir operating plan explained that the plan resulted from:

[A] basic change in the concept of multiple-purposes operation. *There was a growing realization that the uses of reservoir space in that area for irrigation*

and flood control were complementary rather than competitive. This realization opened up the possibility of using space jointly for each purpose, rather than requiring exclusive reservations for each purpose.

DC App. Brief, p. 21 (emphasis in original, underlining added); Ex. 2071, 001932.

Under the plan, the combined space of the Boise River Reservoirs (approximately one million acre feet (1 MAF)) is authorized to be used for flood control and beneficial use storage.

The operating premise of the plan has always been:

Operation of Reservoirs for Flood Control.

12. It is possible, by means of snow surveys and data on winter precipitation, to make fairly reliable forecasts of the volume of flood runoff from the Boise River . . . ***[I]t will be necessary to reserve the adopted flood control space in advance of the flood season of every year and store no water therein during the flood period, except as needed to reduce the discharges below the Boise Project diversion dam. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.***

Use of flood control storage for irrigation.

17. ***In operating the reservoirs for flood control purposes, it is desired to avoid undue impairment of their value for irrigation purposes. In years of very high runoff, there is no question that the flood control storage will be filled in securing the desired reduction in flood peaks. Water thus stored in the flood control reserve will be subsequently released for irrigation.***

DC App. Brief, p. 12; Ex. 2070, 001922-23, and 001925-26 (emphasis added).

To accomplish the complimentary purposes of flood control and beneficial use storage during flood season (generally, November 1 through July), the operating plan requires the Corps and BOR to use sophisticated runoff forecasts and “rule curves” to determine the volume, distribution, and timing of reservoir space that must be vacant to capture and control the release of high runoff into the Boise River below Lucky Peak Dam, and the volume, distribution, and timing of filling reservoir space for beneficial use as runoff and the risk of flooding subside. DC App. Brief, pp. 22, 31-33.

In May 1974, Idaho Governor Andrus requested that IDWR review reservoir operations to determine whether changes could be made to decrease the risk of flooding downstream from

Lucky Peak Dam. Ex. 2181, 003631, ¶ 7. In response to the Governor's request, IDWR produced a report in November 1974, prepared by IDWR Water Resource Engineer Bob Sutter ("Sutter") in consultation with BOR and the Corps, evaluating the effectiveness of reservoir operations under the 1953 Agreement and the 1956 implementing Manual in preventing flooding and filling the reservoirs for irrigation storage. Ex. 2182. The 1974 Report used the terms "refill" and "fill" interchangeably to mean the annual filling of the Boise River Reservoirs during flood control operations for irrigation and other beneficial uses. Ex. 2181, 003631-32, ¶ 8. The Report found that operational changes were warranted because: urban encroachment along the Boise River increased the potential for economic damage from flooding; improved methods of runoff forecasting were available; and the 1953 Agreement's "rule curves" governing reservoir operations during the flood control season provided greater assurance of reservoir refill than flood prevention. *Id.* The Report evaluated changing reservoir operations to increase the vacant flood control space during the early phases of the flood control season to capture more peak runoff and thereby improve the ability to control reservoir releases to meet the 6,500 cfs flood control objective. Such a change could increase the risk that the reservoirs will not be filled by the end of flood control operations by shifting the timing of reservoir refill so that less is stored during the early "evacuation period" of flood control operations, and more is stored later during the "refill period." *Id.*, 003632-33, ¶ 9. The Report concluded that reservoir operations could be modified in such a manner without significantly reducing refill assurances, and recommended that BOR, the Corps and IDWR conduct additional studies and jointly prepare revisions to the 1953 Agreement and the 1956 Manual. *Id.*, 003633, ¶ 10.

IDWR's 1974 Report became the basis of a multi-year effort by BOR, the Corps and IDWR which resulted in adoption of a new implementing manual in 1985, entitled "Water

Control Manual for Boise River Reservoirs” (“Water Control Manual”). *Id.*, 003633-35,

¶¶ 11, 12. Early in the revision process a “plan of study” was developed, which stated:

This plan of study is to serve as a guide for a coordinated local, State, and Federal effort to develop a new and improved Boise River regulation plan, manual, and agreement . . . The primary participants of this study will be the Idaho Department of Water Resources, U.S. Bureau of Reclamation, and the U.S. Army Corps of Engineers.

Ex. 2183, 003712-13. IDWR employee Sutter, who participated in the preparation and review of the 1985 Manual, explained that his supervisor “Alan Robertson went to the meetings [with BOR and the Corps] and was informed of everything and provided advice and guidance, because it was really necessary to get the Department of Water Resources’ blessing on this.”

Tr. 8/28/15 459:3-17. IDWR Director Higginson later explained: “As a direct result of [IDWR’s 1974] report, a new Water Control Manual for Boise River reservoirs was finalized in April, 1985. *Although issued by the Corps of Engineers, this manual was a joint effort by the Corps, Bureau of Reclamation and [IDWR].*” Ex. 2171 (emphasis added).

The 1985 “Water Control Manual,” developed collaboratively by the Corps, BOR and IDWR, contains the reservoir operating plan’s runoff forecasting procedures, rule curves and Lucky Peak release schedules designed to prevent river flows from exceeding the flood control regulation objective of 6,500 cfs at the Glenwood gage (located at the Glenwood Bridge).

Ex. 2004; Ex. 2186. On November 30, 1987, IDWR Director Higginson explained:

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

Ex. 2171 (emphasis added).

The Manual requires the Corps and BOR to ensure that the reservoir space vacancy requirements prescribed by the rule curves “are not violated,” but allows for temporary

deviations when unpredictable runoff events occur. Ex. 2186, 003791, 003800-03. “When actual flood control space is less than rule curve requirements; the reservoir system is generally operated to ‘get back on the curve.’” Ex. 2004, 000352, ¶ 16; Tr. 8/31/15 725:10-737:6.

Reservoir space that is required to be kept vacant (“reserved”) for flood control purposes is not available to store water for irrigation use or any other purpose, until that space is no longer required to be kept vacant for flood control purposes. Water that is required to be released from the reservoir system to maintain required flood control spaces before it can be beneficially used is not available for beneficial use storage under reservoir storage water rights. Reservoir space becomes available for beneficial use storage only as flood space requirements decline in accordance with the runoff forecast and rule curve procedures of the reservoir operating plan. As runoff and the risk of flooding decline, flood control space allocation requirements are reduced, and water is increasingly stored for beneficial use, until the Reservoirs reach “maximum fill” for irrigation and other beneficial uses. Storage water rights are thus fulfilled as available reservoir storage spaces are filled. Ex. 2008, 000478-79, 000481, ¶¶ 17, 20; Ex. 2181, 003628-29, ¶¶ 4, 5; Ex. 2004, 000351-52, ¶ 14.

Operating the Reservoirs in accordance with runoff forecast-based rule curves provides a high degree of assurance to the spaceholders that their storage rights and storage accounts will be filled to the maximum possible extent by the end of flood control operations. Recognizing the uncertainties involved in runoff forecasting, the reservoir operating plan provides Arrowrock and Anderson Ranch spaceholders a secondary assurance or “guarantee” that any shortfall in filling the storage rights for Arrowrock and Anderson Ranch Reservoirs will be “made up” by crediting to the rights for those Reservoirs water stored in Lucky Peak Reservoir. Ex. 2038, 001368-69, Art. 6d. While Lucky Peak storage is subject to reduction in such circumstances, the BOR’s

agreement to credit water first from the BOR's 60,000 acre-feet of uncontracted Lucky Peak space provides Lucky Peak spaceholders additional assurance that their portions of Lucky Peak storage space will likely be filled at the conclusion of flood control operations as well.

The operating plan expressly provides that: "No reregulation of storage or annual exchange of storage as provided in this plan shall, however, deprive any entity of water accruing to it under existing rights in Arrowrock, Anderson Ranch and Lake Lowell Reservoirs."

Id., 001364, Art. 4. To change the operating plan's provisions for determining flood control space requirements and reservoir releases, BOR and the Corps must first consult with IDWR, the Boise River Watermaster and the Boise Project Board of Control. *Id.*, 001372, Art. 7. No change in reservoir operations that would diminish the spaceholders' storage rights may be made without their consent. *Id.*; Ex. 2100, 002169-70, Art. 6(a).

C. Boise River Storage Water Right Administration

The Boise River Watermasters have administered Boise River storage water rights with the following understandings:³

1. The natural flow from the upper Boise River watershed above Lucky Peak Reservoir is either: (1) stored in the Boise River Reservoirs for beneficial use pursuant to storage water rights; (2) released from the reservoirs for flood control; or (3) released for delivery to downstream diversions with natural flow rights. Ex. 2008, 000473-74, ¶ 10.

2. Water cannot be stored for beneficial use without a water right. *Id.*, 000488-89, ¶ 32; *see* IDAHO CODE §§ 42-201(2), 42-351(1).

³ This summary of Boise River water right administration is based on the Affidavit of former Boise River Watermaster Lee Sisco. Ex. 2008. Former Director Dave Tuthill testified that Sisco is the most knowledgeable person as to how Boise River water rights were administered during his 22-year tenure as Boise River Watermaster (1986-2008). Tr. 8/31/15 676:10-677:25. Rex Barrie, the current Boise River Watermaster, agreed with the explanation of Boise River water right administration in Sisco's Affidavit. Tr. 9/10/2015 1343:10-1344:11.

3. The majority of the natural flow of the Boise River watershed has long been fully appropriated by senior natural flow and storage water rights. For this reason, the only water available from the upper Boise River watershed for additional appropriation is high spring runoff that is released for flood control (*i.e.*, water that is neither stored pursuant to senior storage water rights, nor delivered to downstream natural flow water rights). *Id.*, 00474-75, ¶¶ 11-12.

4. Flood control use of the reservoirs does not require a water right, or constitute use of the established storage water rights. Ex. 2008, 000481, ¶ 20; (*accord* former IDWR Director Tuthill, Tr. 8/31/15 699:5-21). Consequently, water released for flood control cannot be treated as having been stored under the reservoir storage water rights, and the release of water from the reservoirs for flood control has no impact on the storage rights. Ex. 2008, 000480-81, ¶ 19.

5. Reservoir space that is required to remain vacant for flood control purposes is not available to store water for irrigation or any other beneficial use, until that space is no longer required for flood control purposes. *Id.*, 000481, ¶ 20.

6. Water that must be released to maintain required flood control spaces is not available for beneficial use storage under reservoir storage water rights, is not apportioned to the spaceholders' storage accounts, and is not delivered to spaceholders for beneficial use. *Id.*

7. During flood control operations, reservoir space becomes available for beneficial use storage only as the risk of flooding subsides and flood space requirements decline in accordance with the reservoir operating plan. *Id.*

8. Until reservoir space that is available for storage is filled, storage rights remain in effect and are filled in priority with all other Boise River water rights. *Id.*

9. All water physically stored in the reservoirs at the conclusion of flood control operations is stored, apportioned to the spaceholders accounts, and delivered to the spaceholders for beneficial use pursuant to the storage rights. *Id.*, 000473, 000488-89, ¶¶ 8, 32.

10. Reservoir inflows that are required to fill storage rights during flood control operations are never released to deliver water to junior water rights. *Id.*, 000482, ¶ 21. (There is no evidence that such releases have ever occurred.)

11. Notice from the Corps and BOR that flood control releases are required signals to the Watermaster and storage spaceholders that there should be sufficient runoff from the upper Boise River watershed to physically fill the Boise River Reservoirs and reservoir storage rights for full allocations to storage accounts for the upcoming irrigation season. Boise Valley spaceholders rely on this notice to plan their water deliveries, irrigation use, and planting. Ex. 2008, 000478-79, ¶ 18.

D. IDWR's Boise River Reservoir Water Right Accounting System

The relevant aspects of Boise River Reservoir storage water right accounting (before and after IDWR adopted the computerized accounting system in 1986) were explained by Sutter, former IDWR Water Resource Engineer and author of the computerized system, and Lee Sisco ("Sisco"), former Boise River Watermaster who had the most experience using it in the administration of Boise River water rights. Ex. 2008; Ex. 2181. They each learned the pre-1986 Boise River storage right accounting procedure from prior Watermasters who conducted the accounting.

Sutter's understanding of beneficial use storage during flood control operations is consistent with the Watermasters' understanding summarized above:

Under the reservoir operating plan, as forecasted inflows decline, less flood control space is required, and inflows are increasingly retained and added to reservoir contents until the danger of flooding has passed and the reservoirs are

filled or nearly filled. After the flood risk has passed, *the water stored in the reservoir system at the point of maximum fill is allocated among the reservoir storage water rights according to their priorities, and is available for delivery to those who are entitled to use the stored water for irrigation and other beneficial uses.*

5. Storage Water Right Accrual During Flood Control Operations. Water cannot be stored in Boise River Reservoir space that is required to be vacant during flood control operations. Reservoir inflows that must be released to maintain required flood control spaces are therefore not available to physically fill storage space. Reservoir space becomes available for physical storage only as flood space requirements decline in accordance with the established reservoir operating plan. *Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled.*

Ex. 2181, 003629, ¶¶ 4, 5 (emphasis added).

Presented with the same facts and testimony regarding Boise River Reservoir operations, water right administration, and the computerized water right accounting system, Special Master Booth concluded:

The undisputed facts in the record indicate that the water stored in the Boise River Reservoirs at the time of maximum physical fill has historically been considered by the Bureau, the Idaho Department of Water Resources, the watermasters, and the water users as having been stored pursuant to the existing storage rights. Given that the annual quantity element of the existing storage rights cannot be exceeded, the inescapable conclusion is that water that is released/bypassed for purposes of maintaining vacant flood control space in the Boise River Reservoirs is not water stored pursuant to the existing storage rights (although it temporarily may be designated as such under the 1986 accounting system during the course of the non-irrigation season).

AR. 001344.

Prior to 1986, Boise River Watermasters obtained stream measurement and reservoir water level data from the BOR to hand calculate the daily accrual of natural flow to the storage water rights, and make all the decisions regarding water right distribution. Tr. 8/28/15 367:21-369:7; Tr. 8/31/15 844:14-847:4. The Watermasters determined the extent to which the reservoir storage rights were filled during flood control operations based upon the quantity of water physically stored in the reservoirs when they reached maximum fill at the conclusion of flood

control operations. The Watermasters reported these volumes in their annual distribution reports as “total available” storage, which would equal total measured reservoir contents at that time of maximum reservoir fill, or be less if spaceholders had used storage prior to that time. Tr. 8/28/15 370:16-373:13, 418:4-15; Tr. 8/31/15 851:18-853:13; Ex. 2008, 000477-78, ¶ 15; Ex. 2009, 000558. The water accounted for as “total available” storage was stored under the under the priority of the storage water rights, and rights junior to the storage rights were not entitled to delivery of the water ahead of the storage rights. Tr. 8/31/15 854:14-855:4; Ex. 2008, 000481-82, ¶¶ 20, 21.

The Watermasters kept track of water released from the reservoirs for flood control purposes, did not accrue those flows to any reservoir storage right, and reported the total, annual flood control releases in their annual reports in a categories called “flood control and other loss to the [irrigation season or system].” Tr. 8/31/15 849:9-851-7; 860:4-12; Ex. 2009, 000550.

Sisco explained that he continued the storage right administration of his predecessors, with the exception that he administered storage rights based on source as well as and priority:

As Watermaster, I understood that the water physically stored in the Boise River Reservoirs as a result of this flood control procedure was stored pursuant to the reservoir storage water rights. The release of water from the reservoirs to attain required flood control spaces did not affect the accrual of physically stored water to reservoir storage rights. Mr. Koelling [Sisco’s predecessor] and I each administered storage water rights based on this understanding. We each accounted for the accrual of water physically stored in the reservoirs at the point of maximum reservoir fill to the reservoir storage water rights according to their priority dates. Mr. Koelling accrued stored water to all storage rights based on priority dates alone, while I accrued water to the storage rights based on source and priority date.

Ex. 2008, 000480, ¶ 19.

In 1986, in response to a request from incoming Watermaster Sisco, Engineer Sutter and Hydrology Section Manager Alan Robertson developed a computerized accounting system for the Boise River Reservoirs. Sisco felt that a computerized system may be more efficient than

longhand to collect water measurement data and calculate water flows and distributions.

Id., 000482-83, ¶ 23; Ex. 2181, 003630, 003637, ¶¶ 6, 18.

The adoption of the computerized accounting system for the Boise River Reservoirs *did not* alter reservoir operations, the filling of reservoir system storage spaces pursuant to the reservoir operating plan to fulfill reservoir storage rights, or make any other material change to Boise River Reservoir storage rights administration. Tr. 8/28/15 431:3-15, 432:23-433:1; Ex. 2008, 000483-484 ¶ 24; Ex. 2181, 003638, ¶ 20; Ex. 2004, 000356, ¶ 27.

The computerized accounting system does not define water rights or establish legal principles of water right interpretation. It does not determine how water rights are administered—it is a tool for the Watermaster’s use in administering water rights. Ex. 2008, 000484, ¶ 25; *IDWR App. Brief*, p. 20. Sutter explained that the accounting system is an “*after-the-fact accounting or tabulation of what happened*.” It doesn’t really influence operations, so that in a flood year we may not run the water right accounting for this period until maybe mid-July.” Tr. 8/28/15 439:14-25 (emphasis added). There was no urgency to determine storage entitlements in a flood year because of the assurance they would be filled.

The accounting system consists of two computer programs:

[A] ***water right accounting program*** that tracks all Boise River natural flows and all Boise River diversions of natural flow and stored water; and a ***storage allocation program*** that allocates water stored pursuant to storage water rights to spaceholder accounts.

Ex. 2008, 000484, ¶ 26 (emphasis added); Ex. 2181, 003630-31, ¶ 6.

The water right accounting program categorizes all reservoir inflows as natural flow that is either stored in the reservoirs and released as stored water, or is passed through the reservoirs as natural flow for delivery to downstream diversions or as excess natural flow. *Id.* This method of categorizing water was chosen so that the water right program is “generally applicable to all

Boise River diversions [by dams, canals and pumps], and to avoid the added complexity of distinguishing between reservoir inflows that must be released for flood control from inflows that are stored and released for beneficial use.” Ex. 2181, 003630-31, 003637-38, ¶¶ 6, 19.

The water right accounting program does not take into account the operation of the Boise River Reservoirs for flood control and beneficial use storage pursuant to the reservoir operating plan. “[It] does not consider the volume or distribution of flood control storage spaces during flood control operations,” or “recognize that reservoir inflows cannot be stored in flood control spaces that must be kept open until the high spring runoff subsides.” Ex. 2181, 003630, ¶ 6 and Ex. 2008, 000484-85, ¶ 26, respectively. It does not differentiate between inflows that must be released to maintain flood control spaces and inflows that may be stored for beneficial use. *Id.*

Sisco explained that in the absence of a category or method to account for the operation of the reservoirs for flood control and beneficial use storage:

The accounting program accrues inflows that are released to maintain required flood control spaces to storage rights, when in fact those inflows were not physically stored for beneficial use. In the accounting program, when reservoir contents at the beginning of the flood control season (November 1) plus inflows equals the volumes of the storage rights and reservoir storage spaces, the program shows reservoir storage spaces and rights as being “filled on paper,” when in fact neither the reservoirs nor the reservoir rights have been physically filled due to flood control releases. At the point of “paper fill,” the accounting program has run out of storage rights to “fill,” even though inflows continue to physically fill the reservoirs.

Ex. 2008, 000485, ¶ 26.

Sutter recognized the discrepancy between water right accrual method of the computer program and beneficial use storage in the Boise River Reservoirs, and the need for “additional procedures” to properly account for actual water storage in the reservoirs:

The water right accounting program was designed to account for all Boise River diversions whether the diversion is an instream dam, or a canal, or other riverbank-side diversion (to which we referred as “direct diversions” in the Water Control Manual). Ex. E at 7-26. However, ***additional accounting procedures***

were required to properly account for several distinguishing characteristics of the storage of water in the Boise River Reservoirs. It can be assumed that all water diverted by a direct diversion is diverted for beneficial use pursuant to the water right(s) for that diversion. This assumption does not apply to the Boise River Reservoirs because: (1) they have no diversion works to limit inflows to the volumes of water they store for beneficial use; (2) they have insufficient capacity to store the full volumes of inflows they receive during most years; (3) they are not allowed to store inflows that must be released to maintain required flood control spaces; and (4) natural flows pass through the reservoirs during the irrigation season for downstream diversions with earlier priority water rights. Consequently, *the accounting system cannot ultimately treat all reservoir inflows as physically stored for beneficial use. We recognized that, during flood control operations, the water right accounting program accrued to storage water rights inflows that could not be physically stored during flood control operations, and showed the reservoirs as full on paper when vacant flood control spaces continued to be maintained pursuant to the Water Control Manual's rule curves.*

Ex. 2181, 003637-38, ¶ 19 (emphasis added).

“To account for the actual, physical filling of the reservoirs, after the water right accounting program reaches the virtual point of ‘paper fill,’ the program continues to accrue reservoir inflows that are physically stored in the reservoirs as ‘unaccounted for storage.’”

Ex. 2008, 000485, ¶ 27. The incongruous terminology reflects the discrepancy between the water right program’s accrual method and how water is actually stored in the Boise River Reservoirs for beneficial use. In the program, “paper fill” occurs during flood control operations when the reservoirs are not full, and “unaccounted for storage” is accounted for.

The “paper filling” of the storage rights in the virtual world of the water right accounting program has no impact on the operation of the reservoirs for beneficial use or the actual administration of water rights in the real world. Sutter explained:

Reservoir inflows were not required to be released, and the water actually stored in the reservoirs was not allocated to storage water rights at the point of paper fill. Physical refill of storage spaces and storage water rights continued as required by to the Water Control Manual’s runoff forecast, rule curve and release procedures. For accounting purposes, *paper fill is more accurately understood to be a benchmark establishing that the reservoir water rights are entitled to be physically filled by subsequent reservoir inflows.*

Ex. 2181, 003638, ¶ 20 (emphasis added).

Sutter's explanation of the term "unaccounted for storage" further highlights the discrepancies between these accounting constructs and actual beneficial use storage:

[T]he program expects to see natural flow that overtops the reservoirs [because the program has filled the reservoir water rights] and go down the river, down at Middleton or someplace, and lo and behold it's not there, because, according to the flood-control plan, the assurance of refill requires or dictates that the physical space be refilled.

So this refill is occurring, and there is no right to assign it to because the right has already filled. It's full. And so what to do with this block of water that's being refilled with no water right that says, you know, I'm going to have this, I need this.

So we created . . . this category called "unaccounted-for storage." And this is where the coordinated agreement and the refill assurance comes back in . . . that's why we had this category.

Tr. 8/28/15 444:11-445:4.

To resolve these discrepancies between the water right accounting program's virtual accrual method and actual beneficial use storage, the accounting shows the reservoirs continuing to store water throughout flood control operations, and the storage water rights remaining full and in priority from the time of "paper fill" (*i.e.*, when the reservoirs would have filled if water was not released for flood control) through the time the reservoirs reach maximum fill. By this method, the water right accounting confirms that reservoir storage rights are filled when inflows physically fill reservoir storage spaces that become available for beneficial use storage as the risk of flooding and the need for vacant flood control space subside. After flood control operations are concluded and the reservoirs have reached maximum fill, the water stored in the reservoirs, including the water categorized by the accounting as "unaccounted for storage," is allocated to reservoir storage rights. Ex. 2008, 000485-86, ¶ 27; Ex. 2181, 003630-31, ¶ 6. "The net effect of this accounting procedure is to accrue to reservoir storage spaces and water rights inflows that

are physically stored pursuant to the runoff forecast and rule curve procedures of the Water Control Manual.” Ex. 2181, 003638-39, ¶ 21.

The volumes of water allocated to the storage water rights through the water right accounting program are input into the storage allocation program to be apportioned to the spaceholders’ storage accounts. The allocations are then input back into the water right accounting program to account for the subsequent delivery of stored water to the spaceholders. This point in the accounting procedure is commonly called the “day of allocation.” Ex. 2008, 000482, 000485-86, 000488-89, ¶¶ 21, 27, 31, 32; Ex. 2181, 003638-39, ¶ 21; Tr. 8/28/15 435:4-18. At that point, the Watermaster is informed of the allocations, and he informs the spaceholders of the amount of storage available to them for beneficial use. Ex. 2181, 003638-39, ¶ 21.

After considering the testimony of Sisco, Sutter and IDWR’s expert Elizabeth Cresto (“Cresto”), Special Master Booth explained:

[U]nder the Boise River accounting system, the “unaccounted for storage” becomes “existing storage right storage” once it has been assigned or “credited” to be beneficially used pursuant to the “irrigation from storage” element of the existing storage rights. As previously stated, the 1986 accounting system appears to be the basis of the State’s argument that the existing storage rights are satisfied by cumulative total of all “physically and legally” available inflows. However, even if the accounting system utilized by Idaho Department of Water Resources can be determinative of the nature of the existing storage rights, the accounting system does not support the State’s position. Although the accounting system initially counts such “physically and legally” available water as accruing to the existing storage rights, at the time of maximum physical fill the water that is physically in the reservoirs is placed on the accounts as the water that is stored and beneficially used pursuant to the existing storage rights.

AR. 001377-78.

IDWR’s weekly water right accounting reports (the “green bar sheets”), reconciliation

sheets, and storage allocation reports confirm the foregoing.⁴ Water physically stored in the reservoirs at the point of maximum storage has always been credited to the storage rights and fully, 100% allocated to the spaceholders' storage accounts for beneficial use. The water right accounting reports do not show that the storage water rights go out of priority or are "satisfied" at the point of "paper fill." Instead, the water right accounting reports show that the reservoir storage rights remain full and in priority until the day of allocation, after the reservoirs reach maximum fill. Sisco explained:

As was the case during Mr. Koelling's tenure, all the water actually, physically stored in the reservoirs at the conclusion of flood control operations has been stored pursuant to the reservoir storage rights, and allocated to the storage accounts of the spaceholders.

Ex. 2008, 000489, ¶ 32. Sutter confirmed that the adoption of the computerized accounting system did not alter the water users' experience in the administration and of their water rights: "It would not have changed. They had 100 percent fill." Tr. 8/28/15 440:5-13.

Prior to the 2012 Basin-Wide Issue 17 (BW17) proceedings in the SRBA, no IDWR employee had ever advised the Boise River Watermaster or the Boise River water users that

⁴ For example, 2012 was a flood control year as flood control releases were made from Lucky Peak. Ex. 2004, 000354, ¶ 23; Ex. 2007. Based upon the 2012 green bar sheets, the Boise River Reservoirs reached "paper fill" (or "TOTL STOR (AF)") of 986,624 acre-feet on April 17, 2012. Off'l. Not.\WD63 Records of Water Distribution\WD63 Boise River Historic WR Accounting\BoiseRiver\2012\BOIWRA3-23-12TO6-26-2012, pp. 25, 26, 96. However, physical filling of the Reservoirs did not conclude until approximately June 1, 2012. Tr. 8/31/15 719:22-25, 720:13-18. Between April 17, 2012 and June 27, 2012, the "LAST RIGHT" column of the green bar sheets continued to show water rights senior to 2005 remaining in priority for river reaches 1 through 10 (the Boise River reaches upstream of Middleton). Off'l. Not.\WD63 Records of Water Distribution\WD63 Boise River Historic WR Accounting\BoiseRiver\2012\BOIWRA3-23-12TO6-26-2012, pp. 26, 96; Off'l. Not.\WD63 Records of Water Distribution\WD63 Boise River Historic WR Accounting\BoiseRiver\2012\BOIWRA6-27-12TO10-31-12, p. 1. Consequently, and despite reaching "paper fill" on April 17, 2012, the Reservoir storage rights did not fall out of priority according to the accounting program output data until June 27, 2012, and the Reservoirs continued to accrue physical contents to reach maximum physical fill matching that of "paper fill" between April 17 and June 1, 2012.

IDWR considered water released from the Boise River Reservoirs for flood control purposes as a release of water that had been stored for beneficial use pursuant to a storage water right. No IDWR employee had suggested to the Boise River Watermaster that storage rights were “satisfied” at the point of “paper fill” in the water right accounting, that storage rights were no longer in effect or in priority after the point of paper fill, or that junior rights were entitled to call for the release of water from the reservoirs prior to maximum physical fill. Ex. 2008, 000488-89, ¶ 32.

Responding to IDWR’s theory in this case, Sisco stated:

I would not have agreed to the use of the water right accounting program if it had the effect of treating the reservoir water rights as “satisfied” at the point of paper fill in the water right accounting program, treating water as being stored for beneficial use without a water right, or indicating that water rights with priorities junior to the storage rights were entitled to call for the release of water that was required to be stored pursuant to the Water Control Manual in order to fill the reservoir storage spaces and reservoir water rights. This was never the intent or effect of adopting the computerized water right accounting procedure.

Ex. 2008, 000488, ¶ 32.

E. The Spaceholders’ Undisputed Beneficial Use of Water Stored During Flood Control Operations

In its *Memorandum Decision and Order*, the District Court found: “The Director has explicitly found that irrigators have historically diverted, stored and used water identified as unaccounted for storage for irrigation following flood releases in flood control years.”

R. 001067 (citations omitted). During the Contested Case, IDWR’s primary witness acknowledged that the water that has been stored in the reservoirs after flood control releases (aka unaccounted for storage) pursuant to the reservoir operating plan has been delivered to the spaceholders for beneficial since the plan was implemented in the mid-1950s. Tr. 8/28/15 594:19-596:7.

III. ADDITIONAL ISSUES/ATTORNEY FEES ON APPEAL

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

IV. ARGUMENT

The arguments presented in this appeal, and the companion appeals in Supreme Court Docket No. 44677-2016 and Docket No. 44745-2016, present the Court with three possible outcomes: (1) storage of the full volume of water that fills the Boise River Reservoirs at the end of flood control operations under the decreed storage rights; (2) storage of the same volume first under the decreed storage rights (until the point of “paper fill”), and then under additional beneficial use water rights (from the point of “paper fill” until maximum fill of the reservoirs); or (3) storage of water under the decreed rights up to the point of “paper fill,” followed by permissive storage at the director’s discretion, subject to the water delivery demands of junior water rights and new appropriations of water.

Each outcome is based on differing views of what it means to store water in the Boise River Reservoirs pursuant to the reservoir storage rights. While the potential outcomes are convoluted by IDWR’s arguments and the district court’s conclusions, the “core” question is easily summarized as whether the decreed Boise River Reservoir storage rights are “filled” and “satisfied” by flood control releases. The Ditch Companies maintain that the correct answer to this question is a clear and resounding “NO!” The water stored in the Boise River Reservoirs at the end of flood control operations is stored and beneficially used under the decreed storage rights. AR. 001364. No other result is truly consistent with Boise River Reservoir storage water rights, Idaho law, Boise River Reservoir operations for flood control and beneficial use storage, storage right administration by Boise River Watermasters, and the experience of Boise River

water users.

Outcome Number One (The Existing Storage Rights Are Sufficient). The first outcome is to conclude, as Special Master Booth did, that all the water stored in the Boise River Reservoirs when they reach “maximum fill” at the end of flood control operations is stored pursuant to the decreed storage rights. This conclusion, advocated by the Ditch Companies and the Boise Project Board of Control, is consistent with Idaho law, the operation of the Boise River Reservoirs for flood control and beneficial use storage, the administration of reservoir storage rights by Boise River Watermasters, and the understandings of the Treasure Valley irrigation districts and canal companies who are entitled to use the stored water. This conclusion is supported by the understanding that water is stored in the reservoirs for beneficial use as and when vacant reservoir space is no longer required to prevent flooding and becomes available for beneficial use storage as the risk of flooding subsides. Water that must be released before it can be beneficially used to maintain the required flood control space in the reservoirs is not “physically or legally available” for beneficial use storage, and therefore does not “fill” or “satisfy” the existing storage rights. This conclusion is based on the understanding that the right to retain water in storage until it is needed for beneficial use is essential to the exercise of a storage water right. IDWR opposes this conclusion for various reasons that are difficult to comprehend. Basically, it seems IDWR believes this outcome will diminish its authority *vis-a-vis* the federal government, and deprive junior rights of water. As a junior water user, Suez joins IDWR in opposing this view for obvious reasons.

Outcome Number Two (The Existing Storage Rights Are Deficient – Supplemented by the Beneficial Use Late Claims). The second outcome reached by Judge Wildman is that, when the reservoirs reach maximum fill at the end of flood control operations, a portion of the

water is stored under the decreed water rights, and the remainder is stored under additional water rights that have been established by beneficial use. This outcome contains two conclusions.

The first conclusion, advocated by IDWR and adopted by the Judge Wildman (but rejected by Special Master Booth), is based on the view that all water entering the reservoirs that is not passed through for delivery to downstream senior water rights is “physically and legally available” for storage and therefore necessarily diverted by and stored under the reservoir water rights, regardless of whether the water must be passed through or released for flood control. Consequently, the reservoir rights are “filled” and “satisfied” by flood control releases that cannot be physically stored or beneficially used. When the storage rights “fill on paper” in the water right accounting (an expression used because the reservoirs are not in physically filled), in part with water that is physically stored and in part with water that is released for flood control, they are “satisfied” and longer entitle the right holders to store water.

This conclusion is based on the IDWR’s legal theory that storage rights and Idaho law/policy compel storage right holders to store water “as quickly as possible,” without regard to flood control considerations. IDWR argues that it implements this interpretation through the water right accrual method and terminology of the computerized water right accounting program IDWR developed in 1986. IDWR advocates for this conclusion apparently believing that it maximizes the availability of water for junior water rights and sustains or enlarges its authority over water management *vis-à-vis* the federal government. The Ditch Companies oppose this conclusion because it is inconsistent with the storage rights, Idaho law, the operation of the Boise River Reservoirs for flood control and beneficial use storage, and the actual administration of storage rights by Boise River Watermasters, and most importantly, because it diminishes their storage water rights.

Judge Wildman's second conclusion in outcome number two is that the irrigation districts and ditch companies are entitled to beneficial use rights (held by BOR) that have been established under the constitutional method of appropriation to complete the storage of water after the so-called point of "paper fill." This conclusion is based on the undisputed fact that, since the 1950s, if not earlier, water has been physically stored and in the reservoirs after "paper fill" until the reservoirs reach maximum fill at the end of flood control operations, and subsequently beneficially used by irrigation district and ditch company water users. This conclusion is based, in part, on the understanding that under Idaho law water cannot be stored and beneficially used without a water right. IDAHO CODE §§ 42-201(2), 42-351(1).

The Ditch Companies support this conclusion and outcome *only if* this Court rejects outcome number one, and concludes that flood control releases "fill" and "satisfy" storage water rights, because the water stored in Boise River Reservoirs is too important to the water users of the Treasure Valley to be unsecured by a water right. IDWR and Suez oppose this second conclusion and outcome for the same confusing reasons they oppose outcome number one. In their view, recognition of any water right that secures storage of the full volume of water in the reservoirs at the point of maximum fill at the end of flood control operations deprives junior rights of water and cedes control of Boise River water resources to the federal government.

Outcome Number Three (The Existing Storage Rights Are Deficient and No Supplemental Storage Rights Can Vest). The third outcome, advocated by IDWR and Suez, also contains two conclusions. The first is the same as the first conclusion in outcome number two, that flood control release "fill" and "satisfy" storage water rights so that there is no water right to complete the storage of water in the reservoirs after "paper fill."

IDWR's second conclusion is that IDWR has the discretion to "allow" BOR to continue

to store water after “paper fill” without a water right. In its water right accounting program, IDWR calls this permissively stored water “unaccounted for storage.” IDWR contends that it has the discretion to administratively “substitute” permissively stored water for the portion of the water lost when IDWR counts flood control releases that cannot be stored or beneficially used toward the “satisfaction” of the storage rights. According to IDWR, the permissively stored water is unappropriated “excess” that is subject to the delivery demands of junior water rights and future appropriations. Again, IDWR asserts that its permissive storage substitution theory maximizes the availability of water for junior water rights and sustains or enlarges its authority over water management vis-à-vis the federal government. The Ditch Companies oppose this conclusion for the same reasons that it opposes IDWR’s theory that flood control releases “fill” and “satisfy” their storage water rights.

IDWR and the Director acknowledge that, for as long as the reservoirs have been operated for flood control and beneficial use storage, Treasure Valley water users have beneficially used the water that has been physically stored and allocated to their storage rights when the reservoirs reach maximum fill at the end of flood season. They acknowledge that this water has been and will continue to be stored for beneficial use in accordance with the congressionally-approved reservoir operating plan that IDWR helped develop. They recognize that the Director has no authority to interfere with the storage of this water or redistribute this water for use by junior water rights or new appropriations. R. 001104, 001108, 001109, 001111. The Director has also acknowledged that water cannot be stored in reservoir spaces that must be vacant during flood control operations, and that water released to maintain vacant space is not available for beneficial use under the established reservoir storage water rights. AR. 001243-44, ¶¶ 27-29.

The real “conundrum” in this case is that, notwithstanding these acknowledgements, IDWR and the Director contend that the storage and beneficial use of this water should not be secured by water rights. IDWR’s explanation of the Director’s position confirms that the Director is attempting to implement a “store it or lose it,” “free river” water management policy that will expand the Director’s control and discretion over storage rights and his influence over reservoir operations, redistribute water from senior storage right holders to junior rights, penalize storage right holders for flood control use of the reservoirs, and undermine the carefully constructed balance between flood control and beneficial use storage under the reservoir operating plan. If the Director is allowed to implement his agenda, in flood years like this one, there would be no water rights to secure the storage of large volumes of water that supply the Treasure Valley’s water needs when daily mid-summer temperatures exceed 90 degrees.

The Ditch Companies objective in this case is to ensure that the storage of water in the Boise River Reservoirs for beneficial use in the Treasure Valley during flood years is secured by storage water rights. The resolution to the Director’s assault on Treasure Valley storage rights that is most consistent with Idaho law, the operation of the reservoirs, the administration of storage rights by Boise River Watermasters, and the use of stored water by Treasure Valley water users, is to acknowledge (as Special Master Booth did) that the Boise River Reservoirs are filled during flood control operations pursuant to the existing reservoir storage water rights.

However, if the Court decides otherwise, the Court must uphold Judge Wildman’s decision that the Ditch Companies are entitled to additional water rights to complete their historic storage of water in the Boise River Reservoirs during flood years like this one. The storage and beneficial use of this water is too important to the Treasure Valley to be unauthorized and unsecured by water rights, and subject to the Director’s discretionary choices

about whether and when to “allow” Treasure Valley water users to store and use water.

A. The Director’s Storage Right Satisfaction and Distribution Theories Are Freely Reviewable and Open to Judicial Scrutiny

IDWR’s explanation of the Director’s position that flood control releases “fill” and “satisfy” storage water rights begins with the assertion that there is a “conflict” between flood control and beneficial use storage in the operation of the Boise River Reservoirs. *IDWR Brief*, pp. 2, 12, 37. IDWR asserts that this conflict “create[s] a ‘conundrum’ and ‘dilemma’ for priority administration of water rights” because the existing storage rights do not authorize using the reservoirs for flood control. *Id.*, p. 2. “The administrative problem is rooted in the Corps’ flood control operations, which are based on releasing rather than storing water.” *Id.*, p. 37. IDWR asserts that the Director has solved the “conundrum” and “dilemma” by accruing flood control releases to reservoir storage rights until the rights are “filled” and “satisfied” “on paper,” and thereafter “allowing” BOR to store water without a water right, so long as the water is not demanded by junior water right holders or appropriated by new water right applications.

According to IDWR, resolving the “conundrum” is purely a question of administration that is statutorily committed to the Director requiring his specialized technical expertise. *Id.*, pp. 2, 10, 32, 36. IDWR argues that the Director’s position has been integrated into the water right accrual method and terminology of IDWR’s computerized accounting program. Dressed in computerized accounting jargon, the Director’s position sounds all the more “technical” and obscured from scrutiny.

In fact, the Director’s position is not derived from specialized knowledge, expertise, or experience in Boise River Reservoir operations and Basin 63 storage right administration. The Director’s findings and conclusions do not pertain to any water measurement, hydrology or engineering principles this Court has recognized to be within the Director’s technical expertise.

A&B Irr. Dist. v. State, 157 Idaho 385, 393-394, 336 P.3d 792, 800-801 (2014). IDWR, the Director and the State of Idaho adopted the position that flood control releases “fill” and “satisfy” Boise River Reservoir storage rights before the Director initiated the contested case proceeding, at a time when IDWR’s “scattered and incomplete” records regarding the computerized accounting system were inadequate to explain how and why the accounting program credits or counts water toward the satisfaction of storage water rights. The Director’s position is uninformed by the actual operation of the Boise River Reservoirs for beneficial use storage and flood control, or the actual administration and use of storage water rights in Water District 63. To the contrary, the Director treats the actual operation the Boise River Reservoirs for flood control and beneficial use storage as antagonistic to his administration of water rights. The Director ignored or rejected the testimony of the Boise River Watermasters, who are the true “experts on the spot” regarding the administration and distribution of Boise River Reservoir storage water rights.

Instead, the Director’s position is a product of his interpretation of the nature and extent of storage water rights (a legal, property rights determination) and his abstract legal theories that reservoir inflows are legally diverted and stored under storage water rights regardless of whether the water can be physically stored until it is needed for beneficial use, and that he has the authority to “allow” water storage and use without a water rights, so long as no other water right holder wants the water. IDWR explains that the Director has adopted this position to prevent the federal government from controlling Idaho water use and development, to maximize beneficial use by making water stored during flood control operations available for junior water rights and new appropriations, and to “assign” to storage right holders the risk that the reservoir rights won’t be filled after water is released for flood control.

None of these legal theories and policy choices is a technical issue of engineering or hydrologic expertise that is “committed” to the Director’s discretion. These are not factual determinations that are binding on the Court. *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, 804, 367 P.3d 193, 199 (2016). They are all freely reviewable by this Court.

1. The Director Decided the “Core Question” as a Legal Issue

IDWR identifies the determination of when a storage right is satisfied as the “core” question in this case and the “key to priority administration in Water District 63.” *IDWR Brief*, p. 10. The Ditch Companies addressed this issue in *DC App. Brief*, pp. 9-35.

The Director interprets the quantity element of storage water rights that authorize storage of a volume of water without a diversion rate to “command” the entire river flow while in priority and “*allow*[] the on-stream reservoirs to store their full volumes *as quickly as possible*.” *IDWR Brief*, p. 10 (emphasis added). According to the Director, this “means that no water is legally available for diversion under junior water rights until the Decreed Storage Rights are satisfied.” *Id.* The Director’s theory is that all flows entering the Reservoirs that are not passed through to deliver water to senior water rights are “physically and legally” available to be stored and he calls all such water “priority water.” He regards all such water as necessarily diverted into and stored in the Reservoirs. The Director adopts a “store it or lose it” approach which treats all such “priority water” as “filling” and “satisfying” the storage rights until the volume limits are met, even if the water is not “physically stored” or available for beneficial use. The Director’s theory thus compels reservoir operators to store and retain early flood season runoff or lose the right to fill the Reservoirs under a storage water right.

The Director’s legal interpretations and theories are not factual determinations or conclusions based on hydrologic or other technical expertise. Consequently, they are subject to de novo review by this Court. *City of Blackfoot v. Spackman*, Docket No. 44207, Idaho LEXIS

179 at 6 (2017). There are multiple flaws in the Director’s legal interpretations and theories, addressed *infra*, and in *DC App. Brief*, pp. 44-68.

2. IDWR’s Lack of Institutional Knowledge and Records

When the Director initiated the Contested Case, there was a surprising lack of institutional knowledge and documentation at IDWR concerning the use of the Boise River Reservoirs for flood control and beneficial use storage, storage water right administration by Boise River Watermasters, the development of the Basin 63 computerized accounting program, and the Watermasters’ use of accounting information IDWR produced from its accounting system. In his Notice initiating the Contested Case, the Director announced that IDWR had no “formal record” that documented how and why IDWR’s existing accounting methods and procedures “count” or “credit” water towards the water rights for federal on-stream reservoirs and that the informal IDWR records that existed were “scattered and incomplete.” AR. 000004, ¶ 6. Cresto, IDWR’s current Hydrology Section Manager and designated expert for the contested case, confirmed that IDWR’s records concerning the accounting program were lacking and incomplete. Tr. 8/27/15 76:4-78:15. The Director initiated the Contested Case to develop formal administrative records fully documenting: (1) how and why water is “counted” or “credited” to the water rights for reservoirs pursuant to the existing accounting methods and procedures; (2) the origin, adoption, and development of the existing accounting methods and procedures in; and (3) appropriate changes, if any to the existing procedures as they may relate to federal flood control operations. AR. 000004, ¶ 6.

Alan Shepard and Sutter had retired years earlier. They were IDWR Hydrology Section staff who evaluated reservoir operations 1974, participated in revising the reservoir operating plan’s procedures in the 1985 Water Control Manual, and developed the water right accounting system at Boise River Watermaster Sisco’s request in 1986. IDWR did not contact Sutter until

long after the Director initiated the Contested Case, the month prior to the hearing, after the Ditch Companies filed Sutter's Affidavit with the SRBA Court in support of their motion for summary judgement the late claims subcase. Sutter's Affidavit explains IDWR's role in revising the reservoir operating plan, the relationship between flood control and beneficial use storage, and the accounting system he developed for Sisco. Tr. 8/28/15 359:18-362:25; Ex. 2181. IDWR did not contact Watermaster Sisco at all, despite the fact that he was acknowledged during the hearing to be the most knowledgeable person as to how Boise River water rights were administered during his 22-year tenure as Watermaster. Tr. 8/31/15 676:9-677:25; Tr. 8/27/15 126:17-127:1. IDWR also did not contact the current Watermaster, Rex Barrie. Tr. 8/27/15 126:17-127:1

It was not until 2013 that the State Attorney General's office contacted the Corps to discover and notify IDWR that flood control operations in the Boise Basin are conducted pursuant to the 1985 Water Control Manual. This revelation came to the State and IDWR after they litigated their position that flood control releases count toward the "fill" and "satisfaction" of storage water rights before the SRBA Court in Basin-Wide Issue 17 ("BW17").⁵

As a result of this lack of institutional understanding, experience and expertise, the State, IDWR and the Director were ill-equipped to assess the relationship between flood control and beneficial use storage in the Boise River Reservoirs by the time they committed themselves to

⁵ On July 11, 2013, Deputy Attorney General Clive Strong sent an e-mail to Elizabeth Cresto and others at IDWR that he had confirmed that the Corps and BOR "still conduct flood control pursuant to the 'Water Control Manual for Boise River Reservoirs' dated April 1985." Said document is part of the record in Late Claim Proceedings. *In re: SRBA*, Subcase Nos. 63-33733, 63-33733 and 63-33734, as Exhibit DD to Amended Affidavit of Daniel V. Steenson, dated July 7, 2015, which can be found on the SRBA website under IWATRS Report and Summary Sheet for Subcase No. 63-33732, *et al.* and is attached hereto as **Appendix 1**. The Ditch Companies move the Court to take judicial notice of said document pursuant to Idaho Rule of Evidence 201(d) as a record or exhibit in a separate case. "Judicial notice may be taken at any state of the proceeding." I.R.E. 201(f).

the position that flood control releases “fill” and “satisfy” reservoir storage rights. There was no going back; their theories were too public, having been shopped to the judiciary during BW17 and the Legislature thereafter.

3. IDWR Did Not Present Sufficient Evidence to Answer the “Core Question”

To answer to the “core” question of whether storage water rights are “filled” and “satisfied” by flood control releases, it is not enough for IDWR to merely describe the methods and terminology of its accounting program. IDWR must also address how water is actually stored for beneficial use and how water rights are actually administered to determine the fit between reality and its accounting theories, methods and definitions.

IDWR participated as a party to the Contested Case, but, due to its lack of institutional knowledge, it failed to present evidence or demonstrate experience or expertise pertaining to the operation of Boise River Reservoir operations, and the administration of water rights by Watermasters, who are the true “experts on the spot” in the administration of water rights in water districts.

IDWR’s primary witness was Cresto, who “ran” the Boise River water right accounting and storage allocation programs at the time of hearing. Her testimony related solely to her understanding of the water rights accounting program. She had some familiarity with reservoir operations, but did not consider herself to be an expert, and had no working understanding of the rule curves which define the flood control space requirements and storage volumes during flood control operations. Tr. 8/27/15 81:24-82:11. She prepared a “report” of her understanding (IDWR’s Ex. 1), which IDWR and the Director have relied upon, but did not contact former Watermaster Sisco, current Watermaster Barrie, or Sutter. Tr. 8/27/15 126:17-127:1. Two of the three people who provided Cresto information to prepare the report, and who reviewed it prior to

release, are Michael Orr, and Garrick Baxter, Deputy Attorney Generals for the State and IDWR who have been litigating the State's preconceived position that flood control releases "fill" and "satisfy" reservoir storage rights since BW17. Tr. 8/27/15 127:2-10; *see generally*, Tr. 8/27/15 123:12-127:14.

Cresto's report and testimony did not provide the information required to assess the fit between IDWR's accounting system and reality. Indeed, her testimony raised additional questions regarding the adequacy of IDWR's institutional knowledge of the of the water right and storage allocation programs themselves. She began overseeing and running the Boise River water right accounting and storage allocation programs when she started working for IDWR's Hydrology section, with no prior education, training or experience in water right accounting. *Id.*, 72:20-23, 73:19-74:5, 74:6-10. There was no manual for her to follow, and the lack of adequate recordkeeping compounded her naïveté. *Id.*, 76:4-78:15.

4. The Director Ignored or Rejected Substantial Competent Evidence Directly Relevant to the "Core Question"

Further compounding the inadequacy of IDWR's presentation, the Director ignored or rejected testimony and evidence presented by Sisco and Sutter which directly addressed Boise Reservoir Operations under the reservoir operating plan, water right administration during flood control operations, and the development and use of the water right accounting and storage allocation programs in which they were both directly involved. Their explanations of these matters were thoroughly documented in Affidavits they prepared which were admitted into evidence. Ex. 2008 (Sisco); Ex. 2181 (Sutter). No other witnesses possessed as much experience and expertise on these matters. The Director's *Final Order* contains no reference to Sutter's Affidavit. AR. 001230. During the Hearing, the Director was openly antagonistic to Sisco's live testimony that, during flood control operations, he administered the storage of all

water that physically filled the reservoirs at the point of maximum fill as stored under the existing storage rights, and that the accounting concept of “unaccounted for storage” meant little to him. Tr. 8/31/15 880:21-881:3, 893:19-908:13. Sisco testified that he regarded the use of the reservoirs for flood control as a “public service,” and that the storage right holders should not be penalized for the use of the reservoirs for this purpose by counting flood control releases against storage rights. Tr. 8/31/15 919:10-920:14. The Director was so upset by Sisco’s testimony that he met *ex parte* with IDWR witness Cresto to prepare rebuttal to undermine Sisco’s credibility and testimony, and he expressly rejected Sisco’s testimony in his *Final Order*. Tr. 8/28/15 942:17-945:25; Tr. 9/10/15 1562:13-23, 1585:8-1586:15, and 1588:21-1589:10; *see also*, AR. 001230; *DC App. Brief*, pp. 77-78.

5. The Director Predetermined the “Core Question” and Conducted the Hearing as an Advocate for his Preconceived Position

Early in the contested case process it was evident to the Ditch Companies and the Boise Project Board of Control (“Boise Project”) that they would not get a fair, and unbiased hearing from the Director. He clearly conducted the hearing as an advocate for the his predetermined position that flood control releases “fill” and “satisfy” the Boise River Reservoir storage rights, rather than as a technical expert objectively evaluating the facts to ascertain the truth. The procedural errors and inappropriate conduct of the Director throughout the Contested Case are explained in the *DC App. Brief* and in the *Boise Project’s Opening Brief* in Supreme Court Docket No. 44745-2016. In their *DC App. Brief*, the Ditch Companies raise the Director’s conduct during the Contested Case as inappropriate, procedurally flawed, and biased because, *inter alia*, the Director repeatedly took public positions in the Legislature and elsewhere to support the accounting program before he conducted the hearing, and the Director inappropriately participated in and advocated in support of IDWR’s predetermined position. *DC*

App. Brief, pp. 75-82; *see also*, *Boise Project's Opening Brief*, pp. 46-47.

For the foregoing reasons, the Court should reject IDWR's attempts to insulate the Director's resolution of the "core question" under the cloak of discretion and specialized expertise. Doing so would only further embolden the Director to infringe upon the rights of the Ditch Companies and others in future proceedings.

B. Any Potential "Conflict" Between Flood Control and Beneficial Use Storage Was Resolved by the Reservoir Operating Plan

IDWR's assertion of conflict in Boise River Reservoir operations is based on the oversimplification that flood control requires emptying the reservoirs, while storage requires filling them. In support of this oversimplification, IDWR cites an excerpt from the 1985 Water Control Manual which describes a hypothetical conflict between "*optimum* flood control, [which] would require that the reservoirs be maintained empty and available for floodwaters," and "*optimum* irrigation [storage which] would require that the system be maintained as full as possible." This excerpt explains that:

Because the Boise River reservoirs are managed as a multiple-purpose system, it is not possible to *optimize* regulation [of the Boise River Reservoirs] for each of the[ir] *separate* uses. Thus, *this Water Control Plan represents compromises between the various uses*.

Ex. 2005, 000418-19 (emphasis added).

In other words, *if* the reservoirs were operated *exclusively* for irrigation storage with no consideration for flood control, they would be filled as quickly as possible during the non-irrigation season, and subsequent peak flows would flow through the dam outlets and over the dam spillways uncontrolled to cause potentially catastrophic damage. On the other hand, *if* the reservoirs were operated *exclusively* for flood control, vacant reservoir spaces would be maintained to capture runoff and control releases from Lucky Peak Dam with no consideration for filling the reservoirs at the end of flood control season. As the Water Control Manual excerpt

cited clearly states, the multiple-purpose Boise River Reservoirs are not operated exclusively for either flood control or irrigation storage, but are instead operated on the basis of compromises between flood control, beneficial use storage and other reservoir uses to coordinate and maximize the benefits from all uses.

IDWR's claim of conflict between flood control and beneficial use storage ignores the history and provisions of the reservoir operating plan. As explained to Congress in 1953 when the operating plan was submitted to Congress for approval, the plan solved the hypothetical conflict between flood control and beneficial use storage:

PLAN OF OPERATION

The Boise Project was initially considered only in relation to irrigation. With the passage of time, however, *the functions of power and flood control came to be recognized as significant partners*... By the time it became evident that these reservoirs would not provide adequate irrigation water, *the concept of multiple-purposes development had begun to take root. It was therefore only natural, when attention was turned to addition storage in the 1930 decade, that consideration should also be given to the possibility of using that storage for other complementary purposes, namely: flood control and power.* . . [D]uring the eleven intervening years between authorization and completion [of Anderson Ranch Reservoir], other significant changes occurred. The first of these was the authorization of Lucky Peak Reservoir for construction by the Corps of Engineers. . . *The second event of significance involved a basic change in the concept of multiple-purposes operation. There was a growing realization that the uses of reservoir space in that area for irrigation and flood control were complementary rather than competitive. This realization opened up the possibility of using space jointly for each purpose, rather than requiring exclusive reservations for each purpose.*

DC App. Brief, p. 21; Ex. 2071, 001931-33 (emphasis added).

Reports to Congress explained how flood control and beneficial use storage in the Boise River Reservoirs complement one another under the operating plan:

Operation of Reservoirs for Flood Control.

12. It is possible, by means of snow surveys and data on winter precipitation, to make fairly reliable forecasts of the volume of flood runoff from the Boise River . . . *[I]t will be necessary to reserve the adopted flood control space in advance of the flood season of every year and store no water therein during the*

flood period, except as needed to reduce the discharges below the Boise Project diversion dam. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.

Use of flood control storage for irrigation.

17. In operating the reservoirs for flood control purposes, it is desired to avoid undue impairment of their value for irrigation purposes. In years of very high runoff, there is no question that the flood control storage will be filled in securing the desired reduction in flood peaks. Water thus stored in the flood control reserve will be subsequently released for irrigation.

DC App. Brief, p. 12; Ex. 2070, 001922-23, and 001925-26 (emphasis added).

The Corps, the BOR and IDWR worked collaboratively to preserve the complementary relationship between flood control and beneficial use storage when they modified the reservoir operating plan in 1985 Water Control Manual. The plan's "rule curves" define required flood control spaces based on runoff forecasts. The Manual states that the curves developed by the Corps, the BOR and IDWR "represent a balance between flood control risks and refill assurances and were specifically designed to minimize the impact of volume forecast errors and abnormal runoff timing sequences." Ex. 2186, 003799. IDWR Director Higginson explained:

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

Ex. 2171 (emphasis added).

Actual Boise River Reservoir operations do not involve the hypothetical conflict between emptying reservoirs for flood control to the exclusion of filling them for beneficial use storage. Instead, flood control requires *managing* river flows by maintaining sufficient vacant reservoir space *before* peak runoff to *capture* high flows and control the release of water from Lucky Peak Dam to prevent flooding the Boise Valley. Creating the protective buffer of open space in the reservoirs to *capture high flows* may require releasing early reservoir inflows that could

otherwise be stored. When peak flows come, flood control requires *filling* the reservoirs to protect the Boise Valley from potentially catastrophic flooding. Obviously, if 20,000 cfs enters the reservoir system, and no more than 10,000 cfs may be released from Lucky Peak to prevent flooding, then a significant portion of the runoff into the Boise River Reservoirs must be *retained* in the reservoirs for flood control. The same water that is captured to protect the Boise Valley from flooding is retained in storage for beneficial use later in the irrigation season. This is how actual flood control and beneficial use storage in the Boise River Reservoirs *complement* one another under the reservoir operating plan.

C. Boise River Reservoir Operations are Not “Incompatible” with Water Right Administration

The centerpiece of IDWR’s appeal is the repeated assertion that Boise River Reservoir operations create a “conundrum” or “dilemma” for the water right administration. According to IDWR, the dilemma “arises from the fact that, during flood control operations, the Corps stores and releases water on an unpredictable ‘pick and choose’ or ‘wait and see’ basis [and] [t]hese operational decisions are out of the Director’s control.” *IDWR Brief*, p. 16. Like its false assertion that flood control conflicts with beneficial use storage discussed above, IDWR claims that the operation of the Boise River Reservoirs pursuant to the reservoir operating plan is “fundamentally incompatible with priority administration under Idaho water law.” *Id.*, p. 32.

IDWR’s remarkably false claims of incompatibility and unpredictability cannot be reconciled with IDWR’s direct participation in the development and approval of the reservoir operating plan since its inception. Over 60 years ago, the need for flood flow management was recognized as imperative to the welfare of the Treasure Valley. The Boise River Reservoirs were constructed and authorized to be operated by the Corps and the BOR at the request of the communities of the Treasure Valley and the State of Idaho with IDWR’s assistance. Since the

reservoir operating plan was implemented, the reservoirs have been operated as a system pursuant to the operating plan's procedures and criteria, including runoff forecast procedures and rule curves that IDWR helped develop. At no point in the development, implementation and revision of the plan did IDWR assert that reservoir operations and water right administration were incompatible.

IDWR gave no indication that it believed Boise River Reservoir operations were incompatible in its 1974 report (Ex. 2182) evaluating the potential for modification to the reservoir operating plan to decrease flood risk, or in the "Irrigation Water Supply Plan" section of the 1985 Water Control Manual that IDWR staff drafted. Ex. 2186, 003805.

The 1985 Manual describes important role for the Boise River Watermaster and IDWR in reservoir operation, including the development and revision of "regulation plans used for regulation of Anderson Ranch, Arrowrock, and/or Lucky Peak projects. Through joint development and revision of the regulation plans, *[IDWR] is able to protect the water control management interests of the State of Idaho.*" Ex. 2005, 000459 (emphasis added).

Director Higginson mentioned no such incompatibility when he acknowledged that preparation of the Water Control Manual was a "joint effort by the Corps, Bureau of Reclamation and [IDWR]. . . We feel that the new manual responds well to current conditions on the Boise River and provides a balance between flood protection and refill of storage." Ex. 2171.

Just as there is no "conflict" between flood control and beneficial use storage in the Boise River Reservoirs, there is no conflict between reservoir operations and water right administration. It is undisputed that flood control use of the Boise River Reservoirs does not require a water right or constitute use of the established reservoir storage water rights.

Tr. 8/31/15 699:5-21; Ex. 2008, 000481, ¶ 20. Managing river flows to prevent flooding is not a beneficial use of water. Flood flow management modifies the timing and volume natural flow that enters the Boise River below Lucky Peak Dam. It does not consume or otherwise use water for any purpose.

The uncertainties and risks associated with uncontrolled and sometimes unpredictable runoff from the upper Boise Watershed have been replaced with flow management under the reservoir operating plan to protect the Treasure Valley from flooding. Managed flood flows are the agreed-upon condition of the water supply of the Boise River within which all water rights are exercised during flood control operations. Flood flow management necessarily determines the timing and volume of space that is available for beneficial use storage, and natural flow that is available for downstream diversion during flood season.

Storage water rights are the most directly affected by flood control. “Reserved” flood control spaces deprive storage rights of storage space until the risk of flooding subsides and space becomes available for beneficial use storage. Reservoir inflows that could otherwise be stored must be passed through to maintain the required vacant space. At times, when unexpected runoff occurs, the flood control imperative requires that reservoir contents be reduced to “get back on curve.” Water that must be released for flood control is not physically or legally available for beneficial use storage. The delayed filling of the reservoirs would be intolerable for storage right holders were it not for the refill assurances of the reservoir operating plans’ forecast and rule curve operating criteria, which enabled the previously discussed “compromise” and “balance” between flood control and beneficial use storage.

Junior rights are not deprived of water by reservoir operations to manage flood flows. By definition, flood control releases exceed downstream irrigation demand. Watermaster Sisco

explained:

During flood control operations, after the start of the irrigation season, releases from Lucky Peak Dam exceed the demand for natural flow from the upper Boise River watershed by diversions with senior, Stewart and Bryan Decree water rights. Consequently, the Watermaster has no authority, and no need, to request or order the release of water from the reservoir system to deliver water to natural flow water rights downstream from Lucky Peak Dam.

...

Because Lucky Peak releases during flood control operations exceed senior irrigation demand, filling reservoir storage spaces during flood control operations does not interfere with the priority delivery of water to senior Boise River water rights, and there is sufficient river flow for diversion by water rights with priorities that are junior to the Boise River Reservoir storage rights.

Ex. 2008, 000482, ¶¶ 21, 22.

The widely reported high winter and spring runoff and flood control releases of 2017 illustrates the point. Releases from Lucky Peak Dam ranged from 7,000 cfs in early March to over 12,000 cfs in early June. Flows at the Glenwood gage (near the Glenwood Bridge) ranged from 7,000 cfs to over 9,000 cfs during the same period, even after diversions by canals below Lucky Peak. The cumulative release from Luck Peak from the beginning of February to the end of June was nearly 2.5 million acre feet. A very large percentage of this water was released for flood control. Throughout the widely reported flood control operations and flood season of 2017, while water was stored for beneficial use, the water supply below Lucky Peak far exceeded demand by all water users.⁶

The majority of the water supply from the upper Boise River watershed was fully appropriated long ago by water rights adjudicated in the 1906 *Stewart Decree* and the 1929

⁶ Data from BOR's Hydromet website <https://www.usbr.gov/pn/hydromet/arcread.html>. Lucky Peak release data retrieved from <https://www.usbr.gov/pn-bin/webarccsv.pl?station=LUC&format=3&year=2017&month=1&day=1&year=2017&month=7&day=28&pcode=QD>. Glenwood gage data retrieved from <https://www.usbr.gov/pn-bin/webarccsv.pl?station=BIGI&format=3&year=2017&month=1&day=1&year=2017&month=7&day=28&pcode=QD>. The Lucky Peak release volume is calculated using the conversion factor 1 cfs = 1.9835 acre feet per day.

Bryan Decree, commonly known as the “Flood Water Suit.” The only unappropriated water in the Boise River available for water rights junior to these early priority rights and the storage rights is the “excess flow” that is released during flood control operations. While flood control operations alter the timing and rate of unappropriated flows available for diversion below Lucky Peak Dam, the total volume of unappropriated water available during flood season remains the same. The same volume of water in excess of flows diverted by senior natural flow rights or stored under senior storage rights is available to juniors—the question is whether juniors want the water when it is available. In order to divert excess flood flows and have the water available when they want it, industrious juniors and new appropriators could finance the construction of reservoirs, just as the irrigation districts and ditch companies did to construct Arrowrock, Anderson Ranch and Lucky Peak Reservoirs. It appears, however, that the Director and Suez prefer instead to avoid that expense by redistributing and subordinating water that is stored in the Boise River Reservoirs under the existing storage rights.

D. The Director’s Claims Regarding the Use and Effect of the Accounting Program Are Clearly Erroneous

IDWR claims that the water right accounting program: “distributes” to storage rights flood control releases that cannot be stored or beneficially used; determines that storage rights are “filled” and “satisfied” by the un-storable and unusable water; compensates for the resulting loss of the right to store water by “allowing” water to be stored without a water right so long as no other water user wants the water; and prevents the federal government from controlling “the use, distribution, and development of Idaho’s water resources.” The Director has no authority to implement these water right, water management and water policy determinations through water right “accounting,” or “reporting.” Each of these determinations is clearly erroneous as a matter of law and fact.

1. Water Right Accounting Does Not Distribute Water

IDWR's claim that the accounting program "distributes" water to water users conflates water distribution with water right "accounting" or "reporting."

The Director's authority over water right distribution is defined by statute. Idaho Code Section 42-602 gives the Director "direction and control of the distribution of water from all natural water sources . . . in accordance with the prior appropriation doctrine." The statute assigns the direct responsibility for water distribution to watermasters, "under the supervision of the Director." Idaho Code Section 42-607 defines a watermaster's duty to distribute water according to water right priorities by controlling diversion works within a water district:

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply.

IDAHO CODE § 42-607.

Idaho Code Section 42-606 directs watermasters to prepare and submit to IDWR annual reports of the amount of water they deliver to each water user during the preceding year that include stream flow records the watermaster used to distribute water. This is the only statute that addresses "accounting" (*i.e.*, reporting) for the distribution of water in water districts.

IDWR's conflation of water distribution and accounting leaves the incorrect impression that accounting distributes water or determines water distribution. This is backwards. The accounting is supposed to reflect how the Watermaster distributes water. The computerized accounting system is a tool for the Watermaster's use in administering water rights. Ex. 2008, 000484, ¶ 25; *IDWR Brief*, p. 20. Watermasters distribute water by controlling diversions.

Sutter explained that the accounting system is an “after-the-fact accounting or tabulation of what happened.” The accounting does not influence the operation of the reservoirs to store water for beneficial use. In a flood year, IDWR may not even run the accounting program until mid-July. Tr. 8/28/15 439:14-25. The accounting does not tell the Watermaster how to distribute water. Sisco explained that water distribution decisions are governed by the water rights, Idaho law, and the Watermaster’s understanding of the water system, which, for the Boise River, includes Boise River Reservoir operations under the reservoir operating plan. Ex. 2008, 000484, ¶ 25.

At hearing, IDWR presented no testimony or evidence to show that the actual distribution of water to storage rights has been affected by the theory that flood control releases “fill” and “satisfy” storage rights, that storage rights are not entitled after “paper fill” in the water right accounting program, or that water has been stored permissively, without a water right as “unaccounted for storage.” To the contrary, the uncontroverted testimony demonstrated that the adoption of the computerized accounting system for the Boise River Reservoirs did not alter reservoir operations, the filling of reservoir system storage spaces pursuant to the reservoir operating plan to fulfill reservoir storage rights, or make any other material change to Boise River Reservoir storage rights administration. Tr. 8/28/15 431:3-15, 432:23-433:1; Ex. 2008, 000483-84, ¶ 24; Ex. 2181, 003638, ¶ 20; Ex. 2004, 000356, ¶ 27.

The “paper filling” of the storage rights in the virtual world of the water right accounting program has no impact on the operation of the reservoirs for beneficial use or the actual administration of water rights in the real world. Sutter explained:

Reservoir inflows were not required to be released, and the water actually stored in the reservoirs was not allocated to storage water rights at the point of paper fill. Physical refill of storage spaces and storage water rights continued as required by the Water Control Manual’s runoff forecast, rule curve and release procedures. For accounting purposes, *paper fill is more accurately understood to be a*

benchmark establishing that the reservoir water rights are entitled to be physically filled by subsequent reservoir inflows.

Ex. 2181, 003638, ¶ 20 (emphasis added).

It is undisputed that Boise River Watermasters administer storage rights with the understandings that: water released for flood control cannot be treated as having been stored under the reservoir storage water rights; the release of water from the reservoirs for flood control has no impact on the storage rights; until reservoir space that is available for storage under the reservoir operating plan is filled, storage rights remain in effect and are filled in priority with all other Boise River water rights; all water physically stored in the reservoirs at the conclusion of flood control operations is stored, apportioned to the spaceholders accounts, and delivered to the spaceholders for beneficial use pursuant to the storage rights; and reservoir inflows that are required to fill storage rights during flood control operations are never released to deliver water to junior water rights. *See, supra* at 11-20.

2. Water Right Distribution and Accounting Do Not Determine Water Right Entitlements or the Legal Principles of Administration

The Director's supervisory authority to distribute water "in accordance with the prior appropriation doctrine . . . means that [he] cannot distribute water however he pleases at any time in any way; he must follow the law." *A&B Irrigation Dist. v. State*, 157 Idaho at 393, 336 P.3d at 800.

The Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: ***a number that the Director must fill in priority to that user.*** However, it is within the Director's discretion to determine when that number has been met for each individual decree. In short, ***the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user.***

Id., 157 Idaho at 394, 336 P.3d at 801 (emphasis added).

The computerized accounting system does not define water rights or establish legal principles of water right interpretation. It does not determine how water rights are administered. Ex. 2008, 000484, ¶ 25; *IDWR Brief*, p. 20.

Idaho Code Section 42-603 authorizes the Director to adopt rules for water distribution. The Director has not adopted rules which generally address the distribution of water in water districts or specifically address water distribution in Water District 63. The Director has not adopted rules that address water right accounting.

As this court observed in the BW17 appeal: “The main issue is whether the Director is determining water rights, and therefore property rights, when he determines that a water right is ‘filled,’ or if the Director is just distributing water.” *A&B v. State*, 157 Idaho at 394, 336 P.3d at 801. The Director’s discretion to decide which accounting method to employ does not include the discretion to determine the nature and extent of water rights. Special Master Booth explained the discretionary red line this way:

[The] question is: In any year where reservoir inflows exceed the quantity elements of the respective existing storage rights, what portion of such water is attributable to the existing storage rights? This is not a question of accounting procedure; rather it is a question as to the nature of the existing storage rights. In other words, while measurement and accounting methodologies are left to the sound discretion of the director, the question sought to be answered by the Ditch Companies and the Boise Project relates to “what to count?” rather than “how to count it?”

The question of “how” to make an accounting of something cannot yield the answer of “what” to count. This is backwards. Before determining how to account for something one must know what is being counted. Accordingly, it cannot be said that the Director’s discretionary decision of “how” to account for the existing storage rights is determinative of what portion of the annual reservoir inflows are stored under the authority of the existing storage rights.

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Here, the Director is clearly crossing the red line. The Director generically interprets storage rights to include ‘because you can you do’ or ‘because you can you must’ conditions that

present the right holder with a “store it or lose it” Hobson’s choice. The Director first observes that the quantity element of a storage right that is defined by a volume without a diversion rate, allows the right holder to “command” (*i.e.*, divert) the entire flow of the river. *IDWR Brief*, pp. 9-10. The Director uses word “command” to imply control. He does not yet infer that the storage right holder is required to divert the entire flow. He may or may not. The Director next infers that a storage right “allows” the right holder to store water “as quickly as possible when flows are high.” *Id.* By “possible” he means storing all water that is not required to be passed through the reservoirs to downstream senior rights. Again, the Director does not interpret this as a requirement. The storage right holder may or may not store the entire flow of a stream as quickly as possible. So far so good. No harm no foul.

The Director next asserts that the purpose of storing water as quickly as possible is to “minimiz[e] conflict between storage operations and junior rights.” *Id.* Presumably he means by this that rapid, early filling of a storage right puts juniors in a position of priority earlier and over more water. He asserts that diverting water as quickly as possible when flows are high “means that no water is legally available for diversion under junior rights until the Decreed Storage Rights are satisfied.” *Id.* (*i.e.*, “satisfy” the senior storage rights as quickly as possible to put juniors in a position of priority earlier). Hence, the Director concludes, the need for him to determine when a storage right is satisfied to resolve the conflict. *Id.* His justification for doing so is the State policy of maximizing beneficial use of water.

The Director asserts that he has done this through the accrual method of the water right accounting program by accruing to a storage water right all water that enters a reservoir that is not required to be passed through to a downstream senior right until the total volume of the storage right is reached. *Id.*, p. 22. The Director calls all water that is not passed through a

reservoir to a downstream senior right “priority water.” *Voila!* The Director has solved the conflict he inferred earlier by administratively treating the storage right as storing water as quickly as possible. This is the Director’s determination of the “core question” of when a storage water right is satisfied. Gone is the storage right holder’s discretion to choose to whether to store all “available flow” or “priority water” as quickly as possible (back when the Director interpreted a storage right to “allow” the right holder store all available flow as quickly as possible). The Director has done it for him, whether or not water is in fact stored. The accrual method thus “ignores” physical filling of a reservoir because the Director has determined that the storage right must (no longer may) store all available water as quickly as possible. Thus, a right can be “filled on paper” without a reservoir being filled with water. It is here that the Director draws a distinction between “paper filling” of a water right and “physical filling” of a reservoir. One does not necessarily mean the other. Once filled “on paper” a storage right is no longer in effect, falls out of priority, and can store no more.

The problem with the Director’s decision for the Boise River Reservoir operations and storage right holders is that his determination that a storage right must be filled as quickly as possible “ignores federal flood control operations.” *Id.* The Director’s decision to force senior storage rights to store water “as quickly as possible” is in direct conflict with the need to delay storing water in order to maintain vacant reservoir space to capture and control later peak runoff. The Director says fill early to make water available for junior water rights, while flood control says store later to protect everyone from flooding. In fact, in reservoirs that are operated for flood control, it is not possible to fill the reservoirs quickly without creating the risk of potentially catastrophic flooding. The Hobson’s choice “store it or lose it” is reduced to no choice at all—just lose it. No matter, the Director goes ahead anyway and accrues to storage

water rights water that cannot be stored.

Clearly the Director has crossed the red line between determining what to count and how to count. He has taken away the storage right holder's discretion to determine how much water to store, and when to store the water. By accruing flood control releases to storage water rights, and ignoring "physical fill," he is taking from storage right holders the right and ability to store water as the flood risk subsides, when it is safe to store water without flooding the Treasure Valley.

Worse yet, by ignoring "flood control operations," the Director is undermining the balance between flood control and beneficial use storage his predecessors helped craft in the reservoir operating plan. The Director simply does not have such authority or discretion.

3. Flood Control Releases Do Not "Fill" or "Satisfy" Storage Rights

IDWR identifies the determination of when a storage right is satisfied as the "core" question in this case and the "key to priority administration in Water District 63." *IDWR Brief*, p. 10. The Director interprets the volume-based quantity elements of the storage water rights as "command[ing]" the entire river flow while in priority and "*allow*[ing]" the on-stream reservoirs to store their full volumes *as quickly as possible*." *Id.* (emphasis added). According to the Director, this "means that no water is legally available for diversion under junior water rights until the Decreed Storage Rights are satisfied." *Id.* Thus, the Director adopts a "store it or lose it" approach, treating all such "priority water" as "filling" and "satisfying" the storage rights until the volume limits are met, even if the water is not "physically stored" or available for beneficial use. The Director's theory compels reservoir operators to store and retain early flood season runoff or lose the right to fill the reservoirs under a storage water right, regardless of the flooding consequences.

The Director's legal interpretations and theories are not factual determinations or conclusions based on hydrologic or other technical expertise. Rather, the Director's "core" findings are property rights determinations. The Ditch Companies addressed this issue at length in *DC App. Brief*, pp. 9-35; 44-69. In summary, the Director's legal reasoning is flawed because:

1. A storage right under Idaho law is the right to capture and retain water until it is needed for beneficial use. *A&B Irr. Dist. v. State*, 157 Idaho 385, 389-391, 336 P.3d 792, 796 (2014); citing *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935) and quoting *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) (A storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse by means of a diversion structure such as a dam; "Storage water is water held in a reservoir and intended to assist the holders of the water right in meeting their decreed needs"; accordingly: "the very purpose of storage is to retain and hold for subsequent use"). The Director's "store it or lose it" legal conclusion ignores this meaningful right to store and retain water for end beneficial use.

2. The period of use to divert water into storage stated in decrees for the Boise River Reservoir storage rights is year round. There is no language in the decrees that dictates, defines or otherwise mentions the time during the year when water is required or expected to be stored. Nothing in the decrees suggests any limitation on right holder's discretion to determine whether and when water will be stored.

3. The Director's volume-based quantity interpretation (*i.e.*, "command[ing]" all river flows) ignores flood control. It is not possible to store water that must be released to maintain vacant space in the reservoirs for flood control. Under the reservoir operating plan, storage under the existing storage rights is subordinate to flood control until the flood risk

subsidies and reservoir space becomes available for beneficial use storage. This is compatible with (and implemented by) the diversion discretion afforded water users under Idaho law—the discretion to divert up to the limits of their water rights at any given time, or the discretion to divert nothing at all depending on the prevailing circumstances. *McGinnes v. Stanfield*, 6 Idaho 372, 374-75, 55 P. 1020, 1021 (1898) (emphasis added) (“[S]o long as the appropriator of water applies the same to a beneficial or useful purpose, ***he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used.***”); *see also*, *United States v. American Ditch Ass’n.*, 2 F.Supp. 867, 869 (D. Idaho 1933) (emphasis added) (“A water right is the right, in due order of priority and within the maximum appropriated, to use the amount of water ***which reasonably suffices for the owner’s needs at any particular time. The factors variable, the amount is variable, not only season to season, but any day by day, even hour by hour . . . It must be left to the honest judgment of the [water right] owner in application,*** subject to control by the court’s watermaster, who interferes in any the owner’s abuse . . .”).

4. Flood control releases occur before the water can be beneficially used by the storage right holders. Consequently, flood control releases are not “physically or legally available” to be stored for beneficial use, and cannot be put to beneficial use. Therefore, the Director’s accrual method disregards the beneficial use foundation of the reservoir storage rights. *See, e.g., State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806 (2000) (“Idaho water law generally requires an actual diversion and beneficial use for the existence of a valid water right.”); *Morgan v. Udy*, 58 Idaho 670, 680, 79 P.2d 295 (1938) (“diversion and application to beneficial use” are the “two essentials” in the State of Idaho for a “valid appropriation.”); and *U.S. v. Pioneer Irr.*

Dist., 144 Idaho 106, 110, 113, 157 P.3d 600, 604 (2007) (beneficial use is “enmeshed in the nature of a water right”; it is the “basis measure and limit of the right”).

5. The Director’s theory undermines the refill assurances that are fundamental to the reservoir operating plan “compromise” and “balance” between flood control and beneficial use storage. The Director’s theory thereby undermines both flood control and the water supply for the Treasure Valley.

6. Flood control use of the Boise River Reservoirs does not require a water right, or constitute use of the existing storage water rights. Tr. 8/31/15 699:5-21 (testimony of former IDWR Director David Tuthill); *see also*, Ex. 2008, 000481, ¶ 20 (testimony of former Boise River Watermaster Sisco). Use of the reservoirs for flood control is authorized independently of storage water rights. Boise River Reservoir operations do not assert priority entitlement to flood control releases under the reservoir storage rights. Consequently, water released for flood control cannot be treated as having been stored under the reservoir storage rights, and the release of water from the reservoirs for flood control purposes has no impact on the reservoir storage rights. Ex. 2181, 003637-38, ¶¶ 17-20 (testimony of accounting program author Sutter).

7. It is not true that “no water is legally available for diversion under junior water rights until the Decreed Storage Rights are satisfied.” Managed flood flows are “physically and legally available” for junior diversions. Flood control releases provide ample water for junior diversions because flood control releases are treated as unappropriated water, available for use by others with valid water rights to do so. *Knutson v. Huggins*, 62 Idaho 662, 668-69, 115 P.2d 421, 424 (1941), *quoting Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909) (when a senior appropriator is not diverting their full entitlement, or any at all, the un-diverted water is treated as unappropriated, available for use by junior right holders “for such

period of time” as the senior lets the flow past un-diverted); *see also*, Ex. 3012 (water right report for right no. 63-31409); Ex. 3040 (Squires Aff.), and Ex. 2008 (Sisco Aff.) 000475, ¶ 12.

4. The Director Has No Authority to Substitute Permissive Storage for Storage Under a Water Right

According to IDWR, the Director “allows” the BOR to store the water ultimately released for end beneficial use as “substitute” or “replacement” for the flood control releases the Director treats as “filling” and “satisfying” the reservoir storage rights “on paper.” *IDWR Brief*, pp. 17, 25, 44-45. The placeholders do not seek to “substitute” water stored under the storage rights with permissive storage because flood control releases do not “fill” or “satisfy” the existing storage rights. There is no loss of stored water to replace. Nevertheless, the Director attempts to unilaterally force substitution—to reallocate, subordinate, and redistribute senior storage rights under the guise of water right administration. “Substituting” or “replacing” storage under a water right with permissive storage without a water right is contrary to the statutory prohibition against diverting or using water without a water right, and deprives the irrigation districts and ditch companies of their water rights.

Idaho Code Section 42-201(2) plainly provides that outside of some very limited exceptions that do not apply in this case, “[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so”⁷ Similarly, Idaho Code Section 42-351(1) states: “It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert or use water not in conformance with a valid water right.”

⁷ This statutory prohibition applies equally to storage water rights as it does natural flow water rights. *American Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449 (citing IDAHO CODE § 42-202, and treating storage water rights the same as any other water right).

IDWR attempts to justify the Director’s unilaterally-imposed substitution under Idaho’s policy to maximize use of the State’s water resources, the practice of using “excess flow” under a water right, and case law recognizing that a water user may substitute or exchange water from one source with water from another source under certain circumstances. However, none of IDWR’s theories abrogates or qualifies the plain language and meaning of the statutory prohibitions contained in Sections 42-201(2) and 42-351(1). Moreover IDWR’s arguments impermissibly render the plain language of these statutes a nullity. *Twin Lakes Canal Co. v. Choules*, 151 Idaho 214, 218-19, 254 P.3d 1210, 1214-15 (2011) (citations omitted) (statutory interpretation begins with the plain language of the enactment; the Legislature is presumed to know of pertinent legal precedent when a statute is enacted; and statutes must be applied in a manner that does not render them a nullity).

The “maximum use” doctrine asserted by IDWR works within Idaho’s prior appropriation doctrine, not independently of it. And, the doctrine applies in times of scarcity, not plenty (*i.e.*, flood control releases are a product of too much water, not too little).⁸

In water distribution cases (*i.e.*, times of scarcity), this Court has recognized that the policy of “securing the maximum use and benefit of its water resources,” and the concomitant policy against waste of those resources, supports certain limitations a senior’s right to curtailment of juniors in a water delivery call. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808-809, 252 P.3d 71, 89-90 (2011) (policy supporting the Director requiring seniors to employ reasonable means of diversion); *IGWA v. IDWR*, 160 Idaho 119, 129-131, 369 P.3d

⁸ In part, these appeals stem from IDWR’s attempt to administer the storage water rights year-round—to superimpose “distribution” authority during times of plenty (flood control years) contrary to the scarcity-based administrative premise of Idaho Code Title 42, Chapter 6. *See, e.g.*, IDAHO CODE § 42-607 (the administrative “distribution” duty arises “when in times of scarcity of water it is necessary” to “shut and fasten” headgates or otherwise police the diversion and use of water “in order to supply the prior rights of others in the stream or water supply”).

897, 907-909 (2016) (policy supporting the Director’s consideration of disparity between acres to be curtailed and the water delivery to a senior). But, these cases are inapplicable here. This is not a water delivery call case. The holdings do not suggest that the “maximum use” doctrine is a basis for: (1) determining when a water right is “filled” or “satisfied” or (2) diminishing existing water rights by imposing the substitution of permissive storage (ancillary use of excess flows) in contravention of the statutory prohibition against using water without a water right. The so-called “maximum use” doctrine does not enlarge or amend the Director’s authority to distribute water, or provide an independent basis to administer water in a manner inconsistent with Idaho’s prior appropriation doctrine.

The Director’s forced substitution (*i.e.*, exchange) theory also contravenes Idaho Code Section 42-240. Substitution, if permissible, is the product of a water user request—not the unilateral imposition of the Director. IDAHO CODE § 42-240(1). And the Director must first (“shall”) solicit and receive the “recommendations of the watermaster,” including any “recommended conditions necessary for the exchange of water to be properly administered and regulated.” IDAHO CODE § 42-240(4). While the Director may be the initial decision-maker regarding the propriety of water exchanges, his is not the only input and his decision is ultimately subject to judicial review. IDAHO CODE § 42-240(3), (4), (5), and (7).

In addition to being procedurally deficient under Section 42-240, the Director’s substitution theory is impermissibly injurious to the Ditch Companies as a matter of law. While the proposed substitution under the particular circumstances of the *Jorgensen* case was acceptable (*IDWR Brief*, p. 46), this Court made clear that substitutions breeding injury are not. *Bd. of Dirs. of Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 546-49, 136 P.2d 461, 464-65 (1943) (Holden, C.J., majority) (Substitutions or “exchanges” of water are permissible provided that

water users are not “compelled to surrender any right whatsoever”; where substitution would not “operate to the detriment” of the water users); 64 Idaho at 550-51, 136 P.2d at 466-67 (Alshie, J., concurring) (Substitution permissible because the contract at issue does not change, or attempt to change, the priorities of any water rights implicated therein; substitution permissible provided that the substitute water is delivered to the headgate “at the times and under the priorities to which [the prior] location and appropriation entitle him”); 64 Idaho at 554, 136 P.2d at 468 (Budge, J., specially concurring) (Substitution permissible “so long as the landowners and water users receive the quantity of water as of the date of their priorities for beneficial use. No additional burdens are to be placed upon the landowners and water users by reason of the exchange or substitution of water”); 64 Idaho at 565, 136 P.2d at 474 (Koelsch, D.J., concurring) (substitution proposed under the contract at issue permissible because the affected water users “are not asked to surrender or even modify their rights; the power to change the quantity of water to which they are entitled, and the relative dates of their rights to such quantity” is not altered by the contract). This “no injury,” like-for-like (or true substitution) requirement is codified at Section 42-240(5).

In this case, the Director requires the Ditch Companies (and others) to surrender their vested senior priority property rights (the existing storage water rights for the Boise River Reservoirs) in exchange for water (“unaccounted for storage”) he openly acknowledges is diverted, stored, and ultimately used without a water right; ***water that no protectable water right can ever be perfected in.*** *IDWR Brief*, pp. 40-55. This is not a substitution, it is a taking that cannot be reconciled with long-standing precedent of this Court. *See, e.g., Daniels v. Adair*, 38 Idaho 130, 134-35, 220 P. 107, 108 (1923) (rejecting a “substitution” forcing a water right holder to accept the undecreed waters of one source (Lemhi River) for the previously decreed waters of

another (Agency Creek), in addition to having to relocate their point of diversion to accommodate the use of the Lemhi River water), *see also*, *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977) (water rights cannot be taken by the state or its agencies absent just compensation).⁹

5. Boise River Reservoir Operations Do Not Cede Control Over Boise River Water Resources to the Federal Government

The Director's siren-ringing assertion that the federal government will take over control of the Boise River if the Court acknowledges that the water stored in the reservoirs at the conclusion of flood control operations is stored under the decreed storage rights is an absolute ruse.

The Corps and BOR have been managing flood flows and storing water for beneficial use for the benefit of the people of the Treasure Valley for decades. The congressionally-approved reservoir operating plan under which this is done was sought by the people of this valley and the State of Idaho, and developed, implemented and modified with IDWR's assistance and blessing. The plan provides an agreed-upon balance between flood control and beneficial use storage. Under the plan, the Boise River Watermaster and IDWR have defined roles to play and access to any information they desire regarding reservoir management, if only someone within IDWR would take the time and interest. Ex. 2186, 003818-3825.

⁹ In *Daniels* this Court found the water right security and subordination question particularly troublesome. *Id.*, 38 Idaho at 134-35, 220 P. at 108 (emphasis added) ("***To require [the Pattees] to surrender such property right and take in lieu thereof undecreed waters of Lemhi River would be in violation of their constitutional right to the possession and enjoyment of their property . . . It may be that under certain circumstances, where a clear case is made, an exchange of water may be brought about, but under no circumstances can it be done where the exchange would result to the detriment of prior users or result in depriving such prior users of a property right.***"). The Director's forced "substitution" is no different (and no less injurious) here—the substitution or exchange of "priority water" stored under the existing storage rights for water permissively stored under administrative whim, unsecured by a protectable priority-based water right.

The Director's bogeyman that the federal government is coming to take over control of the Boise River has no basis. Flood control and beneficial use storage are imperative, regardless of whether the reservoirs are managed by federal or state governmental agencies. The issue is not who manages the reservoirs. The issue is how they are managed, and no one has suggested they be managed differently.

Flood flow management necessarily affects the timing and volume of runoff during flood season. This is how flooding is prevented. During flood control operations the Corps and BOR forecast runoff and use the rule curves to determine the amount of reservoir space that is needed, and the amount of water that may be stored, as and when the risk of flooding subsides and reservoir space becomes available. Knowing that IDWR lacked meaningful institutional knowledge of the reservoir operating plan, the Ditch Companies conducted extensive research, submitted voluminous documents and reports dating back to the 1930s, and provided an explanatory affidavit and live testimony of BOR's Supervisory Hydrologist who works directly with the Corps to conduct reservoir operations. The Director has the information he needs to know better than to characterize flood control operations as nothing more than a "pick and choose," "wait and see" process.

Managed flood flows are as available for junior diversion as uncontrolled runoff would be. Unmanaged flood runoff would not provide more favorable conditions for junior diversions and new appropriations. The managed flood flows are safer and more predictable than uncontrolled runoff from the upper Boise River watershed. The Boise River Watermaster, IDWR and Boise River water users have real time access to runoff forecasts and Lucky Peak release schedules for the asking. Indeed, this year of historic runoff, changes in Lucky Peak releases were regularly reported through the media.

Until the reservoir operating plan is changed through the type of extensive consultation with IDWR (and spaceholder consent) as occurred over thirty years ago, flood control releases will continue to be made pursuant to the well-crafted runoff forecast procedures and rule curve criteria which “balance” the needs of flood control and refill assurance. Flood control operation of the of the reservoirs for the public benefit of the people of the Treasure Valley will continue in accordance with the reservoir operating plan, regardless of how storage is authorized under State law. The only question is whether there will be water rights to authorize and secure beneficial use storage in the future.

E. Water Stored During Flood Control Operations is Too Important to the Treasure Valley to be Unsecured by Water Rights

Nearly a century of development and prosperity in the Treasure Valley owes its existence to the dual benefits provided by the Boise River Reservoirs (flood control and supplemental irrigation water). In excess of 350,000 acres of farms, parks, subdivisions, school yards, golf courses and other irrigated landscapes owe their existence to storage water supplied under the senior priority of the Boise River Reservoir storage rights. The use of water stored in the Boise River Reservoirs at the conclusion of flood control operations is far too important to the Treasure Valley to be unauthorized and unsecured by a water. The Ditch Companies understand that storing water for beneficial use requires a water right. The statutory prohibition against storing water without a water right is clear and unambiguous. IDAHO CODE §§ 42-202(2) and 42-351(1). Having no water right leaves the Ditch Companies utterly exposed; they have no priority based real property right to defend. It is that simple.

The Ditch Companies maintain that flood control releases *do not* “fill” and “satisfy” the decreed storage water rights, and that all the water stored in the reservoirs at maximum fill at the end of flood control operations is stored pursuant to those rights. This conclusion is supported

by the undisputed facts, the law, the operation of the Boise River reservoirs pursuant to the reservoir operating plan, and the historic administration and use of the reservoir storage rights. Flood control releases will continue to be available for junior rights and new appropriations as they have been for the last sixty years. Not only is this conclusion consistent with the history and reality of Boise River water management, it is the most rational and common sense answer to question of when water is stored under the storage rights.

If, however, the Court rejects this outcome by adopting IDWR's theory that flood control releases "fill" and "satisfy" the Boise River Reservoir storage rights as IDWR contends, it is absolutely essential that a water right be decreed to authorize and protect the historic and ongoing storage of water after the so-called "paper filling" of the decreed storage rights.

The Ditch Companies cannot rely on the Director's discretionary permission to store water without a water right, or his transitory assurance that he will extend that permission into the future. Such an approach undermines the refill assurances of the reservoir operating plan, and thereby calls into question continued flood control protection for the Treasure Valley if the BOR and the spaceholders are forced in the future to store water "as quickly as possible" in order to secure their storage rights and water supply.

1. Beneficial Use of Water Stored After "Paper Fill" is Undisputed

Prior to 1971, Idaho law recognized two equally valid methods of securing a water right: (1) the constitutional (or beneficial use) method; and (2) the statutory method. *Fremont-Madison Irr. Dist. v. IGWA*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996). Under the constitutional method, a valid water right vests and perfects upon the simple diversion of water from a natural source and beneficial use of the water diverted. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 8, 156 P.3d 502, 509 (2007). A water right established under the constitutional is no less enforceable than one based on the statutory method. *Id.* at 11, 156 P.3d at 512.

There is no dispute that the Boise River is a natural source and that “irrigation storage” and “irrigation from storage” are valid beneficial uses of water under Idaho law. There is, likewise, no dispute that the Ditch Companies, among others, have historically diverted and used the water the Director calls “unaccounted for storage” for decades prior to 1971. AR. 001263, 001267-68, 001296, and 001298; *see also*, R. 001067-68. In its *Memorandum Decision and Order*, the district court observed: “The Director has explicitly found that irrigators have historically diverted, stored and used water identified as unaccounted for storage for irrigation following flood releases in flood control years.” R. 001067 (citations omitted). During the Contested Case, IDWR’s primary witness acknowledged that the water that has been stored in the reservoirs after flood control releases (“unaccounted for storage” in IDWR’s accounting vernacular) pursuant to the reservoir operating plan has been delivered to the spaceholders for beneficial since the plan was implemented in the mid-1950s. Tr. 8/28/15 594:19-596:7.

2. There is No Legal Impediment to Recognition of Water Rights for the Beneficial Use of Water Stored after “Paper Fill”

As previously discussed, IDWR raises the unfounded specter of junior water right deprivation and the bogeyman of federal sequestration of the Boise River’s water resources as roadblocks to water rights to complete the historic and ongoing storage of water in the Boise River Reservoirs after the decreed rights are filled “on paper.” Neither of these apparitions is forceful in opposition to supplemental storage rights for storage during flood control operations. As has been the case for the past 60 years, flood control releases are available for junior rights and new appropriations. These managed flood flows are certainly no more “unpredictable” than uncontrolled runoff from the upper Boise River watershed. Indeed, the Boise River Watermaster, IDWR and Boise River water users have real time access to runoff forecasts and Lucky Peak release schedules for the asking.

As previously discussed, the bogeyman that the federal government is coming to take over control of the Boise River is a ruse. Until the reservoir operating plan is changed through the type of extensive consultation with IDWR (and spaceholder consent) as occurred over thirty years ago, flood control releases will continue to be made pursuant to the well-crafted runoff forecast procedures and rule curve criteria which “balance” the needs of flood control and refill assurance. Flood control operation of the of the reservoirs for the public benefit of the people of the Treasure Valley will continue, regardless of how storage is authorized under State law.

IDWR’s machinations regarding the “ancillary use” of excess water are unavailing. Judicial recognition of such use does not preclude the opportunity and right to appropriate such water, just as juniors like Suez have not been prevented from securing permits and license to use the unappropriated managed flood flows in the past.

By legal definition, water stored pursuant to a water right is not unappropriated excess. In fact, flood control releases are the only unappropriated excess in the Boise River. Tr. 8/31/15 859:10-13; 864:10-12; Ex. 2186, 003782 (emphasis added) (Water Control Manual, “In large runoff years, maintaining adequate flood control space within the reservoirs and *passing excess water through the system* without unduly jeopardizing system refill, are the primary objectives.”).

These same arguments were specifically rejected by the District Court when it found that it “finds no lawful reason as to why the United States and spaceholders cannot assert, consistent with their claims, that they have been historically beneficially using that same water to supplement their reservoir water rights in the event of flood control releases” or that IDWR’s arguments fail to “create a legal impediment to establishing a water right.” R. 001164. This is because other than speculation and fear-mongering, IDWR did not present any legal arguments

to the District Court, or now on appeal, which would prohibit or prevent the establishment and recognition of protectable storage water rights for the water that is stored and beneficially used after “Paper Fill.” If the Reservoir storage rights are “filled” by water that is released for flood control, as IDWR contends, then additional storage water rights are indeed necessary and appropriate to authorize the physical filling of the Reservoirs with water for beneficial use storage after flood control releases occur. If, on the other hand, the Reservoir rights are not filled by water that is released for flood control, as the Ditch Companies and the Boise Project Board of Control contend, then the existing Reservoir rights are not filled and remain in priority until the point of “maximum fill” at the conclusion of flood control operations, and not additional storage rights are necessary. Either way, there needs to be a water right for the continued storage and beneficial use of water in the Reservoirs following flood control and IDWR has failed to present any arguments which preclude such rights.

With regard to IDWR’s arguments that the water stored following flood control is ancillary use or excess flows, the District Court correctly rejected these theories because they do not preclude or prevent the establishment of water rights in the water stored and beneficially used following flood control. R. 001065-67. This case does not involve the interpretation or application of a general provision as was the case in *State v. ICL*, 131 Idaho 329, 955 P.2d 1108 (1998), and the companion case *A&B Irr. Dist. v. ICL*, 131 Idaho 411, 958 P.2d 568 (1997). And, as the District Court notes, the cases did not address Idaho Code Section 42-201(2)’s requirements, nor whether the historic use of so-called “excess water” or “high flows” ripened into vested and perfected water rights under the constitutional method of appropriation. R. 001066. Consequently, IDWR’s cited authorities have no bearing on the analysis of the circumstances pending in this appeal—where there are existing claims to the water categorized

as “unaccounted for storage,” and where Idaho Code Section 42-201(2) has been raised and argued.

In addition to being misplaced, IDWR misapprehends this Court’s holding that “excess water” (or “high flow”) could not be decreed as a water right. *IDWR Brief*, pp. 46-47. This Court did not generally hold that one cannot establish bona fide water rights in “excess flows” as IDWR contends. Rather, this Court held that general provisions in and of themselves do not establish water rights, and that the particular general provisions at issue in *A&B* and *ICL*, using the vague terms “excess” and “high” flows, should not be decreed because the terms were incapable of (or not “necessary”) for defining or administering the water rights otherwise decreed in conformance with Idaho Code Sections 42-1411(2) and 42-1412(6). *A&B Irr. Dist.*, 131 Idaho at 414; 416, 958 P.2d at 7-8; 13; *accord*, *State v. ICL*, 131 Idaho at 332-333, 955 P.2d at 1111-12.

As further explained by the SRBA Court in its *Memorandum Decision and Order on Challenge*, Subcase Nos. 74-15051, *et al.* (“Lemhi High Flows Claims”) (Feb. 12, 2012), this Court’s decisions in *ICL* and *A&B Irr. Dist.* stand only for the proposition that general provisions do not create a water right. *Id.* at 25. “Excess flows,” “high flows,” and “excess water” are nothing more than “unappropriated water.” *Id.*; *see also*, R. 001066. And, “unappropriated” water is subject to claim and appropriation. IDWR expressly concedes this point. *IDWR Brief*, p. 58 (“‘Unaccounted for storage’ is, by definition, excess to all water rights and therefore available for future appropriation until it is captured in the reservoir system.”); *see also*, IDAHO CONST. art. XV, § 3.

Contrary the suggestion of IDWR, there is no categorical prohibition against establishing priority-based protectable water rights in “excess” or “high” flows (*i.e.*, otherwise

unappropriated water), no matter how variable those flows may be. For example, the Reynolds Creek water users perfected water rights in the “excess water” in that drainage; water flows “occurring during the spring runoff when the flow of Reynolds Creek is high and contains more water than can be used under the established rights during periods of high flows.” *Special Master’s Report and Recommendation for General Provisions in Basin 57 Designated as Basin-Wide Issue 5-57*, Subcase No. 91-0005-57 (Sept. 11, 2002), p. 2. Likewise, Suez has done the same in this (the Boise River) basin. *See, e.g.*, Ex. 3012 (water right report for permit no. 63-31409, a flood water right Suez is authorized to divert when flood control releases are being made/spilled from Lucky Peak Reservoir).

This is not a new concept; people can and do appropriate bona fide water rights in “excess flows” under Idaho law—look no further than the *Stewart* and *Bryan* Decrees in Basin 63. Exs. 2021 and 2023. After the *Stewart Decree* (1906) decreed water rights exceeding the reliable summertime flows of the Boise River, water rights to the river’s spring runoff “flood waters” were later decreed in the *Bryan Decree* (1929), also known as the “Flood Water Suit.”

The Director is no more able to ignore the strictures of Idaho Code Section 42-201(2) (or Section 42-351), than he is able to preclude the appropriation of unappropriated water. IDWR’s arguments concerning ancillary or excess flows, which were rejected by the District Court, do not prevent or preclude the establishment or recognition of water rights in the water stored in the Reservoirs following flood control releases.

Indeed, because the Director and the Department cannot reconcile the “unaccounted for storage” methodology with Idaho Code Section 42-201 and other core principles of Idaho’s prior appropriation doctrine, they argue the absurdities that the Ditch Companies have argued throughout these proceedings:

- The apparent need for late claim-based water rights encumbering all reservoir inflows to comply with the underlying premise that all inflows count against the existing storage rights; and
- The issuance of water rights to an aggregate volume of water far exceeding that capable of storage and beneficial use in the Boise Basin.

IDWR Brief, pp. 50-55.¹⁰ Thus, IDWR’s objections to the District Court’s decision are a product of agency’s own creation. IDWR cannot laud the District Court’s affirmation of the accounting program’s “all reservoir inflows count” premise and then lament the consequences of that affirmation by operation of Idaho Code Section 42-201(2) and the constitutional method of appropriation (*i.e.*, the undisputed, pre-1971 diversion and beneficial use of the water IDWR’s earmarks as “unaccounted for storage”).

Moreover, the arguments now being asserted by IDWR in this appeal are directly contrary to the water rights IDWR and the State agreed to in the Basin 01 (Upper Snake Basin) proceedings. As pointed out in the *Boise Project’s Brief in Response to IDWR & Director’s Brief* (Supreme Court Docket No. 44746 filed on July 14, 2017), IDWR and the State stipulated with the Upper Snake Water Users and BOR to decreed storage water rights for space evacuated for flood control; water rights that expressly codify and confer the senior diversion timing and quantity discretion (federal control) the Director apparently cannot abide in the Boise Basin). *Id.*, p. 17 and App. B. Thus, for IDWR and the Director to argue that there are legal

¹⁰ As the Court is aware, the late claims proceedings were (and remain) inexorably intertwined with the Director’s Contested Case proceedings. The Ditch Companies have consistently taken the positions that: (1) they seek no more water than the 1.0 MAF aggregate storage capacity of the Boise River Reservoirs, perfected under the existing storage rights for the Boise River Reservoirs; and (2) that water rights encumbering an aggregate quantity exceeding 1.0 MAF make no sense because the reservoirs cannot meaningfully divert and store more than that aggregate quantity and the irrigators have not broken out any more ground than historically permitted, licensed, and decreed (*i.e.*, the irrigators cannot beneficially use the entire runoff of the basin in flood control years).

impediments to issuing water rights for the beneficial use of water stored in the Reservoirs after “paper fill” and after flood control is patently disingenuous when they agreed to such rights in Basin 01.

Finally, IDWR’s concerns primarily involve the adjudication of the late claims and how those rights may be ultimately decreed by the SRBA Court; not whether there is any legal impediment to the recognition of water rights for the water that no one disputes has been stored and beneficially used following flood control since well before 1971. Put another way, the fearmongering and complaints of IDWR as to how the late claims may ultimately be decreed have no bearing on whether this Court affirms the District Court’s determination that the Director’s Order prejudiced the late claims or the District Court’s holding that the Director erred in determining “that the United States and irrigators have not acquired a vested water right in the water identified by him as unaccounted for storage.” *See* R. 001068.

To be clear, the Ditch Companies continue to disagree with the District Court’s holding that the existing storage water rights for the Boise River Reservoirs do not authorize the storage and beneficial use of the water actually stored and beneficially used as flood risk wanes. Water that is physically stored in the Reservoirs, and beneficially used, at the point of maximum fill (following flood control operations) is stored not pursuant to the late claims but under the existing storage water rights. Once this Court answers this legal question then there is no need to try to make sense of IDWR’s nonsensical explanations of how to reconcile the “unaccounted for storage” with the undisputed facts that the water stored at the point of maximum fill is stored and beneficially used. However, if this Court determines that the Reservoir storage rights are “filled” by water that is released for flood control, then additional storage water rights are indeed necessary to authorize physically filling the Reservoirs with water for beneficial use storage after

flood control releases occur and there is no legal or other impediment to the recognition of such water rights.

F. The Ditch Companies Agree There is Nothing to Remand to the Director/IDWR

IDWR contends that the district court erred remanding the Contested Case to the Director because “the Director has no authority to make determinations of the nature or extent of unproven and disputed late claims pending in the SRBA.” *IDWR Brief*, pp. 59-60. The Ditch Companies agree that the Director has no authority to determine the nature and extent of water rights, that the Director cannot use the accounting program to diminish existing storage water rights and, as the Ditch Companies have argued throughout this Contested Case, that the nature and extent of the Boise River Reservoir storage rights is a legal question that should be addressed by the SRBA Court (and now this Court) rather than through a Contested Case initiated by the Director. *See DC App. Brief*, pp. 6-7; 73-74. The Director’s legal determinations concerning the nature and scope of the existing storage water rights should be resolved by the judiciary and any water rights ultimately decreed by in the Late Claims before the SRBA Court should be incorporated into the accounting system. Other than requiring the Director to conform to this Court’s decision and/or to incorporate any additional Late Claims decreed by the SRBA into the accounting system, the Ditch Companies agree there is no need to remand this matter to the Director.

G. Attorney Fees and Costs

The Ditch Companies request an award of attorney fees and costs pursuant to Idaho Code Section 12-117 and Idaho Rule of Civil Procedure 54(d)(1). Idaho Code Section 12-117(1) provides that in a proceeding where the parties include a state agency and other person or entity the court “shall award the prevailing party reasonable attorney fees, witness fees, and other

reasonable expenses, if it finds that the non-prevailing party acted without a reasonable basis in fact or law.” As a creature of statute, the Director and IDWR are strictly confined to acting consistent with statutes and the administrative rules applicable to the agency. *See Arrow Transportation Co. v. Idaho Pub. Utilities Comm’n*, 85 Idaho 307, 379 P.2d 422 (1963). In *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 159 Idaho 813, 832, 367 P.3d 208, 227 (2016), this Court held that the Director of the Department of Administration did not have the authority to violate the laws and rules governing the agency, and that “doggedly defend[ing]” the violations was unreasonable.

In this case, while the appeal filed by the Ditch Companies concerning whether flood control releases fill or satisfy the Boise River Reservoir storage rights may be an issue of first impression in this State, the issue now being advanced by IDWR in IDWR’s appeal involves the absurd assertion that water filling the reservoirs after flood control does so without a water right.¹¹ IDWR takes the unreasonable position that it, the agency responsible for the administration of water rights in this State, can simply allow water to be stored in reservoirs and to be beneficially used by irrigators without a water right even though Idaho law is clear that one must have a water right to store and beneficially use water in this State. IDAHO CODE §§ 42-201(2) and 42-351(1). IDWR’s position conflicts with the congressionally-authorized operating plan for the Boise River Reservoirs developed and approved by the Bureau, the Corps, the State (including IDWR), and the placeholders under which the Boise River Reservoirs have been operated for beneficial use storage and flood control. Instead, IDWR

¹¹ While the issue presented in the Ditch Companies’ appeal may involve an issue of first impression, the Ditch Companies maintain that they are also entitled to attorney fees and costs in the Ditch Companies’ appeal given the Director’s unlawful conduct and procedures throughout the Contested Case, including the initiation of the Contested Case itself. *See DC App. Brief*, pp. 86-89.

unreasonably contends that the water rights accounting program, which was not adopted until 1986, changed the long-standing administration and water right accounting so that water previously stored pursuant to the priorities of the storage water rights is instead stored without a water right, under no priority, subject to all junior water rights and future appropriations.

IDWR takes this position despite the testimony and affidavits of Sutter and Sisco that the accounting program *did not* result in such a change, and it was unreasonable for IDWR to reject and ignore the testimony of those most knowledgeable and involved with the creation of the accounting program and actual administration of the Boise River storage rights. IDWR also takes this position despite Idaho Code Sections 42-201(2) and 42-351(1)'s express prohibitions against the diversion and use of water without a water right. Even the district court found that it was reversible error for the Director to suggest that the water users had no vested right in the water stored and beneficially used following flood control releases. Thus, even if one accepts IDWR's position with regard to the accounting mechanics for argument's sake, it has been a completely unreasonable position for IDWR and the Director to continuously contend that there is no vested water right in the water stored in the Boise River Reservoirs following flood control.

The unreasonableness of IDWR and the Director's positions is further demonstrated by his biased and prejudicial conduct of the underlying Contested Case proceeding. *DC App. Brief*, pp. 69-86. The Department and the Director's behavior was inexcusable, violated the Ditch Companies' due process rights, and impugned the integrity of the contested case process. Accordingly, the Ditch Companies submit that the Director and IDWR acted without reasonable basis in fact or law with regard to their positions, decisions and unlawful procedures employed in this Contested Case. The Ditch Companies respectfully request their reasonable attorney fees and costs incurred in this matter during the Contested Case and on appeal to the district court

under Idaho Code Section 12-117. The Ditch Companies contend that the district court erred in denying the Ditch Companies' request for attorney fees and costs.

Furthermore, and for the same reasons explained *supra*, this Court should also award the Ditch Companies' attorney fees and costs incurred on appeal to this Court. The Director and IDWR continue to "doggedly defend" the unreasonable positions and procedures employed during this Contested Case, and on appeal, and the Court should also award attorney fees and costs to the Ditch Companies on appeal under Idaho Code Section 12-117.

V. CONCLUSION

How the water right accounting program works is not the issue on appeal. The Ditch Companies contend the problem in this case is the Director's ***legal conclusion*** that flood control releases "fill" and "satisfy" reservoir storage rights. The water right accounting program's accounting methods have never been employed to administer Boise River Reservoir storage rights as if they were "filled" and no longer in effect at the point of "paper fill," or to distribute water that is necessary to fill the reservoirs after flood control releases to junior water rights (or future appropriations).

The issue presented by IDWR in its appeal is mooted and there is no "conundrum" or "dilemma" if this Court reverses the Director's legal conclusion and holds that: (1) flood control releases do not "fill" or "satisfy" Boise River Reservoir storage rights; and (2) the storage rights remain in effect until the reservoirs are filled to the maximum extent possible in accordance with the Boise River Reservoir operating plan. In other words, the Court does not need to address the twisted and contorted arguments of IDWR in this appeal if the Court holds that coordinated use of the Boise River Reservoirs for beneficial use storage and flood control, as is provided in the reservoir operating plan and as administered by the Boise River Watermasters, is preserved and

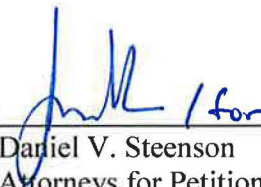
that water that fills the Boise River Reservoirs during flood control operations is stored pursuant to the established/existing reservoir storage water rights.

If on the other hand the Court holds that every drop of water passing through the Boise River Reservoirs counts toward or “satisfies” the Reservoir storage rights regardless of whether water cannot be stored in reservoir space that must be kept open for flood control under the reservoir operating plan, water released for flood control is not available for storage or beneficial use and water is and always has been for beneficial use to fulfill the existing reservoir storage water rights as the risk of flood control subsides then then the Court can address the issues presented in IDWR’s appeal. If the Reservoir storage water rights are “filled” or “satisfied” by water released for flood control, as IDWR contends, then additional storage rights are necessary to physically fill the Boise River Reservoirs for beneficial use after flood control releases occur. The Court must reject the absurd and illogical position of IDWR that the storage and beneficial use can simply occur under the Director’s discretion, with no protectable water right and protections from future appropriations.

Finally, if the Court determines that remand is necessary to conform IDWR’s water right accounting methods to this Court’s holdings, the Ditch Companies request that the Court instruct the Director to appoint an independent hearing officer, who is not an employee of IDWR.

RESPECTFULLY SUBMITTED AND DATED this 15th day of August, 2017.

SAWTOOTH LAW OFFICES, PLLC

By  for _____
Daniel V. Steenson
Attorneys for Petitioners-Respondents
Ditch Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 2017, I caused a true and correct copy of the foregoing **RESPONDENTS' BRIEF FOR THE DITCH COMPANIES** to be served by the method indicated below, and addressed to the following:

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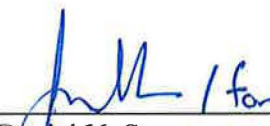
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Daniel V. Steenson

Docket No. 44746-2016

Respondents' Brief for the Ditch Companies

APPENDIX 1

Subject:

FW: Water Control Manual

--- Original Message---

To: 'Cresto, Liz'; 'Weaver, Mathew'; Baxter, Garrick; Orr, Michael; Bromley, Chris; Rigby, Richard

From: Strong, Clive

Sent: 7/11/2013 12:02PM

Subject: Water Control Manual

>> I spoke with Steve Hall at the Corps of Engineers and confirmed that
>> indeed they still conduct flood control pursuant to the "Water
>> Control Manual for Boise River Reservoirs" dated April 1985. They
>> are in the process of doing revisions to the Manual but the substantive provisions will
not change.

>>

>>

>>

>> I also learned that the Corps has a similar Water Control Manual for
>> Palisades, Jackson and Ririe. There is no manual for the Payette
>> because it does not have any flood control responsibility. Thus, the
>> Payette is in an entirely different situation than the Boise and
>> Upper Snake. Likewise the Boise and the Upper Snake are different because the Boise is
primarily controlled by the Corps and the Upper Snake by BOR.

>>

>>

>>

>> Liz does IDWR have the Water Control Manual for Palisades and Jackson?

>>

>>

>>

>> Clive J. Strong

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>> Chief Natural Resources Division

>>

>> Office of the Idaho Attorney General

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>> clive.strong@ag.idaho.gov

>>

>> (208) 334-4124

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