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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES, and DIRECTOR GARY SPACKMAN

Respondents.

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

CASE NO. CV-WA-2015-21376
(consolidated with Ada County CV-WA-2015-21391)

BOISE PROJECT BOARD OF CONTROL'S PETITIONERS' BRIEF

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

. . .

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.

Chief Justice John Marshall, *Marbury v. Madison* (1803)

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from an Amended Final Order issued by the Director of the Department of Water Resources on October 20, 2015, and an Order Denying Petitions for Reconsideration dated November 19, 2015. The appeal also encompasses the interlocutory decisions, of which there are many, preceding those decisions. The appeal is brought under Idaho Code §§ 67-5270 and 67-5279.

The nature of the underlying proceeding which gave rise to these final orders, is complex and unprecedented. On October 22, 2013, absent a petition from any person or entity, the Director issued a Notice of Contested Case and Formal Proceedings initiating what the Director described as a "contested case" to "address and resolve concerns with and/or objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in Water District 63." R.000007. No administrative record supported the existing Basin 63 accounting procedures and therefore the Director believed it was necessary to create one. R.0003. Tr. 0012/6/13 Status Conf. p. 26, l. 21-p. 27, l. 19; Tr. Vol I, p.46, ll.13-24. In reality, the case turned on one issue—the Director's insistence that "paper fill" constituted "satisfaction" of the storage water right.

This "contested case" proceeding did not involve traditional opposing parties. Instead, the Director staked out a position adverse to the interests of the holders of storage water rights and then challenged them to engage in this proceeding or suffer the consequences of failing to participate. Tr. 0010/7/14, Status Conf. p. 50, ll. 4-24. From the outset, the Director and the Department were the adverse parties. In this contest, the Director appointed himself as the presiding officer.

The Director and other department staff made numerous presentations to the legislature and others explaining why it was necessary to keep the "paper fill" rule in place. After the Supreme Court's Basin Wide 17 decision was released, this case proceeded forward. Because the Director was the leading advocate for "paper fill," a motion was filed to disqualify him from acting as the presiding officer in the contested case. The motion was denied. The parties sought to have the case stayed while the nature of the property right in the storage water rights was determined by the SRBA Court in the late claim proceedings. Consolidated subcases 63-33732. That motion was denied. The Boise Project Board of Control (Boise Project) filed a motion to have the "paper fill" accounting issue addressed through rulemaking. That motion was denied. The United States Bureau of Reclamation declined to participate in the proceedings, and even though it is the named owner of the storage rights at issue in the proceeding, the Director determined Reclamation's participation was unnecessary in the proceedings and that Reclamation was bound by the outcome.

The underlying case went to hearing over the objection of the Parties, pushed by the Director to develop a record to support the existing "paper fill" accounting program. The end result was a proceeding that became a vessel to hold the Director's pronouncement, a pronouncement he had made a thousand times before, that "paper fill" is "satisfaction" of a storage water right.

B. Course of Proceedings

On October 22, 2013, the Director initiated this proceeding as a contested case by issuing a Notice of Contested Case and Formal Proceedings, and Notice of Status Conference. R. 00002-9. He explained "[t]he existing accounting processes in Water District 1 and Water District 63 have become the subject of controversy as a result of concerns and objections expressed by the Bureau of Reclamation ("Reclamation") and some storage water users." *Id.* at 2. He therefore,

sua sponte, concluded that it was "necessary to initiate contested cases for the purpose of resolving the objections to the existing accounting processes for the distribution of water to the on-stream reservoirs in Water District 1 and Water District 63." *Id.* Two separate proceedings were initiated, one in each Basin, because "there are significant differences between the two districts, their reservoir systems, and their accounting processes." *Id.* Notice was provided in Basin 63 to every "holder of a water right describing a point of diversion within Water District 63 (Boise River)." R. 00001.

The Notice ordered interested parties to submit statements of concern or objections to the accounting processes on or before December 4, 2013. A number of water users submitted Statements of Concern, including the Boise Project. R. 000041-50. The Boise Project proposed that the subject matter should be addressed in a rulemaking under the Idaho Administrative Procedure Act (APA). The accounting program meets all of the requirements set out in *Asarco v. State*, 138 Idaho 719, 723 (2003), which mandates that the program be adopted pursuant to formal rulemaking. *Id.* at 000042-43. The program is used in at least three of the largest basins in the state, it is presumably applied generally and uniformly, the program applies prospectively, expresses a legal standard not in any enabling statute, it expresses agency policy and the program is an expression of the Department's interpretation of law or policy. *Id.* The Boise Project also objected that the Director's unilateral initiation of the contested case was merely an effort to create a *post hoc* record to rectify the Department's failure to have any record to support adoption of the Basin 63 accounting program in 1986. *Id.* at 000044.

The Boise Project also raised its concerns that the Director could not be an impartial adjudicative authority to hear the contested case.

> The Director has been personally involved in many discussions with water users over potential settlement of the fill and refill Basin Wide 17 case. The

> Director has also been involved in responding to settlement negotiations. In these circumstances, it is inappropriate for the Director or any other IDWR staff to serve as a neutral, impartial hearing officer. A truly independent hearing officer from outside the Department should be appointed.
>
> In briefing before the SRBA court, the State's attorneys argued that testimony of the Department and Water District staff would be necessary in this proceeding. The State's attorneys argued further that the Director and the Department 'must be given an opportunity to fully participate in the developing the record and to defend their water right administration and accounting methods.' Reply in Support of State of Idaho's Objection to Motion to Strike, p. 10 fn. 13. (Emphasis added). It appears that the State and Department's attorneys seem to think that this contested case proceeding is all about defending an existing accounting regime, for which there is no adequate record, rather than establishing a full and fair hearing for the space holders.

R. 000047. The Boise Project then requested production of documents from the Department's records and further requested that the proceedings be stayed pending a determination by the courts on the Basin Wide 17 case that was still pending. R. 00044-50.

On December 4, 2013, the Bureau of Reclamation informed the Director that it would not participate in any contested case related to the accounting programs in Basins 01 and 63 and that "the United States would not be bound by the results because the contested cases do not meet the requirements of the McCarran Amendment[.]" R. 00084.

On December 6, 2013, the Director convened a status conference. He began the conference by recognizing "[t]his is a status conference for a contested case that the Department of Water Resources and the Director initiated that nobody likes." Tr. 0012/6/13 Conference, p. 4, ll. 10-12. At the hearing, counsel for the Department and Director, admitted that the Department's purpose in initiating the contested case was to create the *post hoc* record that the Department had not created when the accounting program was adopted, explaining:

> From looking back in the record, it looks like some of these issues that we're struggling with in accounting were talked about at various points in time through history. And that's part of our struggle here is <u>there hasn't been a record created of why those things occurred</u>. And that was the anticipation of this. Not to have an informal setting where we don't build that where we don't have that for

> use in the future. It was to build a structure that we could have all that information come in and we can look at that and build that for the future going forward so we don't have to revisit these issues every so often, you've had that established documentation of what's going on behind it.
>
> And so I think there was – I hear what you're saying about questions about how the accounting is occurring. I think, at least from my understanding from where the Director was going with this, that was going to be part of this proceeding, is building that record to say, hey, this is what's going on, providing that information, but not only for documenting it right now, but for documenting it for in the future so folks could know what's taking place.

Tr. 0012/6/13 Status Conference, p. 26, l. 21-p. 27, l. 19 (emphasis added). After substantial discussion, the Director concluded that he would not dismiss the contested case, but would stay the proceedings pending the Supreme Court's Basin Wide 17 decision. On December 27, 2013, the Director issued an order staying the proceedings in Basin 63 pending the Idaho Supreme Court's decision in Basin Wide 17. R. 000088-89.

On August 4, 2014, the Idaho Supreme Court issued its decision in *A&B Irrigation Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014) . On September 10, 2014, the Director issued an Order Lifting Stay and Notice of Status Conference, setting a status conference for October 7, 2014. R. 000094-96. The Director also requested "the preparation of a memorandum from staff pursuant to Rule 602 of the Department's rules of procedure ... explaining: (1) how and why water is counted or credited to the water rights for reservoirs in Basin 63 pursuant to the existing accounting methods and procedures; and (2) the origin, adoption, and development of the existing methods and procedures in Water District 63." *Id.* The status conference was held on October 7, and much discussion was had concerning the same procedural irregularities that the parties had identified in the prior status conference. During this conference, the Director, Mr. Anderson on behalf of Trout Unlimited, and Mr. Barker for the Boise Project had the following important exchange:

> MR. ANDERSON: Well, you didn't have to file a contested. You didn't have to start this contested case. Nobody ordered it....His point is correct, you guys started this on your own. Now, sure, it's been an issue that's been litigated and been all the way up to the Supreme Court. But nobody said, 'Director, start a contested case.'
> THE HEARING OFFICER: No.
> MR. ANDERSON: You have.
> THE HEARING OFFICER: Yeah.
> MR. ANDERSON: And here's where we are.
> THE HEARING OFFICER: Yeah.
> MR. ANDERSON: So what are the issues you want us to try and address in your contested case?
> THE HEARING OFFICER: And we'll try and address that. And honestly, if everybody sitting here at the table wants to pull out, Peter, and you want to say goodbye and go fishing –
> MR. ANDERSON: I may.
> THE HEARING OFFICER: -- my invitation to you is go ahead. And you can join the feds and the others in taking whatever comes out of the contested case.
> MR. BARKER: See, you've already made a decision, Gary. That's just inappropriate comment.
> THE HEARING OFFICER: What's an inappropriate comment?
> MR. BARKER: For you to say if you're not here you got to take whatever comes out of the contested case. You don't know what the answer is. Garrick has said that's what the answer is, that the Bureau will be bound. You don't know that. I don't know that. Now you're reaching a conclusion about the – about the consequences of this case before it's even been defined what it is.

Tr. 0010/7/14 Status Conference, p. 43, l. 3-p. 44, l. 13. The Director responded to an inquiry from Mr. Farris who asked whether the contested case would proceed if none of the parties agreed to participate, by stating that it would. *Id.*, p. 50, ll. 4-24. The Director then ordered that the parties brief the procedural issues raised, including those he had just orally decided.

The Ditch Companies filed a motion to disqualify the Director and any other employee of the Department from serving as the hearing officer in the proceeding as a matter of right pursuant to Idaho Code § 67-5252, and for the appearance of bias, prejudice, interest and substantial prior involvement relating to the ultimate issue to be determined. R. 000100-108. The Director denied the motion, asserting that as the agency head he cannot be disqualified without cause. He refused to disqualify himself because he claimed the Ditch Companies had not demonstrated that he

could not judge the issue fairly as the hearing officer, even though he had taken public positions on the ultimate decision in the contested case. R. 000132-141.

The Boise Project filed a Motion to Dismiss the Contested Case and Initiate Rulemaking on October 28, 2014, on the grounds that the Director's Notice describing the issues the Director intended to resolve matched the requirements set out in *ASARCO*, such that rulemaking would be required. R. 000208-221. It also argued that any final order by the Director in the action would not bind Reclamation and therefore, would not answer the questions and solve the concerns that the Director intended to resolve. The Boise Project again protested that a contested case was an inappropriate forum to fashion a *post hoc* record for the 1986 accounting program. *Id.* The Boise Project also argued that the contested case did "not qualify as a contested case under the Department's own rules and violated the due process rights of the parties to an open forum where the outcome of the proceeding is not preordained." *Id.*

The Ditch Companies filed five motions: 1) a motion to reconsider the Director's determination not to disqualify himself from sitting as the hearing officer in the contested case; 2) a motion for disclosure of all ex parte communication between the Director and IDWR during the pendency of the action; 3) a motion to dismiss the contested case or at least stay the proceedings pending the outcome of the SRBA claims that were filed by the Boise Project and Reclamation for the water that fills the reservoirs subsequent to flood control releases; 4) a motion to further define the issues that the Director sought to have the parties address in the contested case; and 5) a motion to modify the scheduling order so that that parties would have sufficient time to prepare to address the Director's issues once they had been better defined. R. 000255-267. New York Irrigation District, Pioneer Irrigation District, and the City of Boise filed joinders. R. 000236-254.

On December 16, 2014, the Director issued an Order denying all of the Pre-hearing motions. He found that rulemaking was not required because the existing accounting program "is directly related to the Director's exercise of his technical expertise and his statutory authority and discretion to distribute water to, and regulate diversion by, the federal on-stream reservoirs in Water District 63," and that therefore, he was authorized by Idaho Code §§ 42-602 through 42-619, to undertake the contested case. R. 000335-352. He determined, as he had stated previously at the status conference, that Reclamation would be bound by the outcome of this contested case, determined that the McCarran Amendment was inapplicable to the proceedings, and found that Reclamation (the holder of legal title) was not a necessary party. *Id.* The Director held that he had the authority to call a contested case pursuant to the Department's procedural rule 104. *Id.* The Director refused to dismiss or stay the proceedings to allow the SRBA court to resolve the property interest in the water rights raised in the late claim subcases, asserting that the Supreme Court's Basin Wide Issue No. 17 decision required him to proceed. *Id.*

On November 4, 2014, Elizabeth Cresto produced the staff memorandum requested by the Director. R. 000270-282. The Memo contained some information concerning how the water right accounting program and storage allocations programs were currently operated by the Department, and admitted that there was little or no information concerning the origins of the program in Basin 63. *Id.*

In response to the staff memorandum, the Boise Project and other parties raised a number of concerns with the information presented, including the fact that the Memo failed to address the watermasters' historical treatment of the water accruing to the reservoir after flood control releases as water belonging to the storage right holders. R. 000517-525.

The case proceeded, including the taking of depositions of Elizabeth Cresto and Mathew Weaver.[1] On May 20, 2015, the Director set deadlines for expert disclosures, witness and exhibit lists, setting a pre-hearing conference, and setting the hearing dates to take place in August and September, 2015. R. 000618-623.

On June 19, 2015, the Ditch Companies, New York Irrigation District, Farmers Union Ditch Company, and the Boise Project filed a joint Expert Witness Disclosure listing Dave Shaw as their expert to testify in the matter and describing the substance of his anticipated testimony. R. 000628-640. The Ditch Companies and Boise Project's second joint disclosure on the same date listed Dr. Jennifer Stevens as an expert and included a summary of her testimony and an extensive historical report she had prepared. R. 000645-677. Confirming its adversarial role, the Department made an expert witness disclosure listing its employee, Elizabeth Cresto, as its expert witness and stating that the testimony set out in her November 4, 2014, Staff Memorandum would be the substance of her expert testimony. R. 000641-644. United Water Idaho (now Suez), the only party to align its interests with the Department, made no expert witness disclosure.[2]

On July 31, 2015, the Boise Project, New York Irrigation District, Farmers Union Ditch Company, and the Ditch Companies submitted joint exhibits and witness lists. R. 000702-733, and R. 000734-742. United Water submitted a witness list which mirrored the witness list submitted by the Department, but with the addition of former Director Dreher. R. 000752-756. The Department listed four witnesses: Ms. Cresto, former Directors Dunn and Tuthill, and

[1] These depositions were defended by the State of Idaho's counsel representing the State in the SRBA proceedings in the late claims who contended that he represented the Department in this proceeding. One of many instances where the lines between the State and Department have been blurred to the point of meaninglessness.
[2] The Water District 63 Advisory Committee unanimously opposed the Department's "paper fill" theory. Tr. Vol. IV, p. 1048, ll. 7-23. So, Suez was the only water user in Basin 63 to actually support the Director's "paper fill" concept.

Mr. Robert Sutter, the author of the accounting program. R. 000691-701. The Department's disclosure, in addition to identifying a few specific documents, included the following categories of documents that it claimed "may be made part of the record:"

> - All documents (including recordings, expert reports, and documents considered or relied upon by experts) identified or described on IDWR's website under "Water District 63 Contested Case" (url: http://idwr.idaho.gov/legal-actions/administrative-actions/contested-cases.html);
> - All documents identified or described in the "Document Overview" (Nov. 4, 2014) (url: http://idwr.idaho.gov/legal-actions/administrative-actions/contested-cases.html);
> - Documents listed in Attachment A that were taken from filed made available for review by the Bureau of Reclamation and referenced in the "Supplement to Document Overview" (June 18, 2015) (url: http://idwr.idaho.gov/legal-actions/administrative-actions/contested-cases.html). Attachment A is attached hereto.

R. 000692. No explanation as to how these documents were to be made part of the record.

United Water filed a Motion in Limine seeking to prevent the Boise Project and other parties from submitting evidence relating to certain conditions that were placed on United Water's rights that limit those rights to only diverting water when water is being released from Lucky Peak for flood control. R. 000801-820. The Boise Project, Ditch Companies, Farmers Union and New York Irrigation District answered in opposition to the Motion on August 13, 2015, explaining that the United Water rights that were identified as exhibits containing such a condition were relevant to show that the unappropriated water in the Boise was that released for flood control. R. 000827-852. These same parties filed a Motion in Limine and Memorandum in Support to limit the testimony of Ms. Cresto to that expert testimony identified in the Department's Expert Witness Disclosure, and to limit any additional testimony by the Department and United Water's other witnesses to lay testimony since none were identified as experts. R. 000853-868.

The Boise Project and Ditch Companies also filed their "Irrigation Entities Joint Notice of Issues for Pre-Hearing Conference." R. 000869-883. Therein, they requested that the Department clarify a number of procedural issues that had not yet been addressed, including the order and presentation of witnesses, exhibit management, and numbering and whether the Director requested the parties to submit any list of stipulated facts. *Id.* These parties also sought clarification concerning what issue the Director intended to decide at the conclusion of the proceedings. R. 000870-871. The parties were concerned that the proceeding was merely intended to determine how the Department counts water toward the fill of a water right using its accounting processes, but not "the potential legal effect of the administrative accounting process on existing storage rights[.]" *Id.* These same parties also sought clarification of what was to be considered the record in the matter pursuant to the Department's Procedural Rule 650.02. The Director had referenced vast swaths of records from the Department and Reclamation files that "may become part of the record," but no administrative record had been identified for purposes of the contested case. R. 000872-873.

Because of the unique nature of this contested case, having been called by the Director himself and without any underlying order being challenged, the burden of proof concerning the issues to be presented at the contested case was unclear. R. 000874. The Irrigation Entities sought clarification of that issue. Also, because of the manner in which the Department had conducted itself throughout the proceedings, calling the case, preparing its own evidence and witnesses, identifying expert and lay witnesses and exhibits, it was unclear whether the Department considered itself to be a party to the proceedings, or something else. R. 000875. The Irrigation Entities pointed out that "[i]f the Department is a party to this proceeding, Procedure Rule 157 limits the agency's participation to 'agency staff' only." *Id.* Furthermore, the parties

again requested identification and disclosure of "any and all *ex parte* communications between the Presiding Officer (or his counsel, Garrick Baxter) and IDWR (including IDWR counsel, whether embedded within the agency itself, or house in the larger Idaho Attorney General's Office) under Procedure Rule 417 given the Department's party status in this proceeding." *Id.*

No such disclosures were made. The Irrigation Entities again requested that the Director stay the proceedings pending a determination before the SRBA court on the late claims filed by Reclamation and the Boise Project regarding the legal right to water that enters the reservoirs after flood control releases. R. 000875-876. "[R]esolution of the flood control impact question is critical to any meaningful consideration and discussion of the Department's water right accounting program." *Id.* The parties reminded the Director that the SRBA proceeding was initiated before he called the contested case, and that there were currently pending before that court cross-motions for summary judgment. *Id.* Proceeding with the contested case constituted unnecessary and extraordinary cost to clients hailed into the proceeding by the Director *sua sponte*, and risked the very real possibility that inconsistent determinations could be made with respect to the same subject matter. *Id.*[3]

On August 14, 2015, a prehearing conference was convened. The Director stated that he wished to hear some presentation on the matters raised by the parties, but was not inclined to "get a lot of oral argument." Tr. 8/14/15, Prehearing Conf., p. 8, ll. 1-3. Addressing the scope of the issues that would be the subject of the contested case, he concluded that he would address the legal effect of the existing water rights, but not the pending late claims. *Id.*, p. 10, l. 9-p. 13, l. 7.

[3] The SRBA court entered its decision on the pending cross-motions for summary judgment in the late claim proceedings on October 9, 2015, eleven days before the Director/Presiding Officer issued his Amended Final Order in this proceeding. It did result in inconsistent determinations, but the Director asserts that he is not bound by the rulings of the Special Master of this Court, R.001403-04; R.001330, and that he is free to disregard the Special Master's conclusions about the scope of the legal right to fill under the existing water rights.

The Director directed the Department to put on its witnesses first, United Water would be next because of its identification of identical witnesses, cross examination would take place, and then the Irrigation Entities would present their witnesses and exhibits. *Id.* p. 15, l. 9-p. 21, l. 5.

A discussion was had with the Director concerning what he considered to be the record in the case. The parties protested that identifying entire classes of documents, such as all Water District 63 accounting black books dating back to the 1930's, as well as entire backfiles for numerous water rights, placed an impermissible burden on the Irrigation Entities to prepare for the contested case. R. 000872-873. The Irrigation Entities argued that rather than refer to entire categories of documents, the Director had to specifically identify the documents that he intended to take official notice of.

> MR. BAXTER: As to the rest of the documents, I think they're pretty self-explanatory, each one. I don't see that the list is overly burdensome, then documents that are posted on there.
> MR. BARKER: Well, then they should have been on your list. They should have been specifically identified on your list, instead of just saying 'Anything that we've ever identified as relevant to this case.'
> MR. BAXTER: They are specifically identified on the list.
> MR. BARKER: No, they're not.
> MR. BAXTER: Yes, they are.
> MR. BARKER: No, they are not. It simply says, everything on the website.
> MR. BAXTER: No. It says, 'IDWR's website under the Water District 63 contested case.'
> MR. BARKER: Yeah, right. They're not specifically identified.
> MR. BAXTER: It's not overly burdensome.
> THE HEARING OFFICER: All right.
> MR. BARKER: Well, it's not fair, and I'm going to make that objection, and I'm going to make that objection if he tries to offer an exhibit that is not specifically on his list.
> ...
> THE HEARING OFFICER: Well, at least initially I've said I will take judicial notice of these documents. It you think they are too expansive, then I'm willing to look at that expansive list to see whether it can be pared down in some way.
> MR. FARRIS: You do consider everything that has been put forward on the website part of the record going forward?
> THE HEARING OFFICER: That is what I –
> MR. FARRIS: If nobody presents another item, that is the record?

THE HEARING OFFICER: I don't understand your last statement, Bryce.
MR. FARRIS: It nobody presents any documents at the hearing, you consider the record to be what's on the website?
THE HEARING OFFICER: Yeah.

Tr. 08/14/15 prehearing conf., p. 33, l. 12-p. 39, l. 25.[4]

Mr. Barker then inquired about the burden of proof, submitting that it would be the Department's burden to determine what the accounting program is and how it came to be. Because it was not a standard contested case, the Director did not answer the question, stating: "I don't see that it carries the same burdens that an adversarial contested case carries. So unless there's something else in that statement that anyone needs clarification." Tr. 08/14/15 prehearing conf., p. 48, ll. 17-20.

Another concern raised by the Irrigation Entities was the procedural posture of the Department in the contested case proceedings, in particular, who was advising the hearing officer, and who was representing the Department. Mr. Baxter confirmed that he would represent both the Department and the Director in his capacity as presiding officer. Tr. 08/14/15 prehearing conf., p. 49, l. 11-p. 50, l. 11.

The parties renewed their objection to the Director acting as the hearing officer in the contested case, but he simply relied on his prior ruling. Tr. 08/14/15 prehearing conf., p. 55, l. 20-p. 56, l. 12. The Irrigation Entities again requested a stay of the proceedings, asking the Director as to what urgency he saw to the proceeding that justified forcing the participants into

[4] The Director committed to prepare an amended notice of documents officially noticed to the parties on August 17, 2015, which he did. R. 000959-964. Removed from that list were the documents made available for inspection by the Bureau of Reclamation which had previously been identified. R. 000692. The Boise Project objected to the inclusion of those documents in the Administrative Record before this Court as not having been part of the officially noticed documents, or referenced during the course of the contested case hearing or the Director's subsequent orders. *See* Boise Project Board of Control's Objection to Record and Motion to Augment, January 7, 2016. The Director denied the Boise Project's objection and those documents, even though not officially noticed by the Director as part of the record, remain a part of the administrative record before this court. Administrative Record at IDWR Doc List ATTM A 0001-0259.

costly dual track proceedings, responded simply: "It's been delayed for two years...and I think it's time for me to go through and make the decision, hold the hearing." Tr. 08/14/15 prehearing conf., p. 57, l. 21-p. 58, l. 3. The Director denied the Irrigation Entities' Motion in Limine, and stated that he would rule later on United Water's Motion. Tr. 08/14/15 prehearing conf., p. 61, ll. 16-25.

On August 24, 2015, the Director issued an order regarding United Water's Motion in Limine. R. 000891-896. He stated that the scope of the proceeding was narrow and "shall focus on how water is counted or credited toward the fill of the three federal on-stream reservoirs on the Boise River." *Id.* at 000892. He commented: "Much of the information sought to be introduced by the Irrigation Entities is likely irrelevant to this proceeding." *Id.* The Director denied United Water's Motion in Limine, holding that the proposed evidence "must be evaluated as it is presented in the administrative hearing so that its relevancy can be considered in the proper context." *Id.*

Despite repeated requests to disclose information and documents related to the *ex parte* conversations that the Director held with outside persons and organizations, with Department staff and with the parties, little was revealed.[5] On the day that the contested case hearing commenced some documents that the Boise Project discovered, but that had not been posted to the Department's website were submitted by the Boise Project in its Supplemental Memorandum Regarding Disclosures by the Director. R. 000902-949. Among these documents were the minutes of the Idaho Legislature's Natural Resources Interim Committee meeting held September 17, 2014, which recorded the Director as stating:

[5] The Director posted some documents on the website, but refused to identify all his communications on the topic of "paper fill." *See* Response to Boise Project Board of Control's Document Requests and Disclosure, R. 000377-391, wherein the Director stated that it "not only [was] not possible to provide such oral communication, it [was] not necessary." R. 000387.

> Director Spackman went on to say that there would be risks to resetting the satisfaction of the right downward to equal the physical storage. Those risks including increasing the water reliability for some spaceholders while diminishing the rights of other spaceholders and those holding junior priority water rights. It would also upset the historical deliveries of water, although this would vary from basin to basin. Another risk is that it would allow the Bureau of Reclamation and the larger federal government to have greater control for downstream interests to satisfy treaties.... He said that a further risk is that it may change the respective strengths and weaknesses of legal arguments of ground water and surface water users in the ongoing conjunctive management calls. He stated that this currently appears to be a major impediment to the settlement of the fill/refill issue.

R. 000911.

Upon questioning by legislators the Director stated that "the attempt to call the spaceholders contract rights a priority was perhaps confusing him, because the spaceholders themselves, although they have a beneficial use right, are not holders of the actual legal title to the water right." R. 000912. The Boise Project also included the Director's PowerPoint presentation that he made to the interim subcommittee which reiterated and reflected the comments cited above. R. 000925-949. The Boise Project requested that the Director disclose the audio files of that presentation, where he stood up and knocked down the criticisms of the accounting program, where he said he was "mystified" about the spaceholders' concerns, and where he said, "here, here" when Rep. Raybould suggested legislation requiring maximum fill of the reservoirs be completed prior to the irrigation season. R. 000903. The Director refused to make that audio part of his disclosures.[6] He also told the television news that "the issue" here was Reclamation's inability to predict flood control. R. 000904.

The hearing commenced on August 27, 2015, when the Director for the first time referred to the proceedings as a "fact finding" hearing. Tr. Vol. 1, p. 7, ll. 8-15. The Irrigation Entities

[6] The audio files are subject to judicial notice by this court and can be heard on the legislature's website at http://lso.legislature.idaho.gov/MediaArchive/MainMenu.do. Then select meeting year 2014; select category: Interim, Task Force and Special Committee; and select Committee: Natural Resources/Interim Committee. Then under September 17, 2014, there is an option to download the audio/video of that presentation.

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

The hearing continued with presentation of evidence and testimony from a number of witnesses. Mr. Baxter acted both as counsel to the Director and to the Department, examining and cross-examining witnesses, and consulting with the Director off the record. A number of noteworthy irregularities took place during the course of the proceedings. During cross-examination by Mr. Baxter of the Basin 63 watermaster, Mr. Lee Sisco, Mr. Steenson attempted to object to the type of cross-examination being undertaken by Mr. Baxter as it went far beyond the "purposes of clarification" that had been represented as the Department's role in the proceedings. In response to the objection the Hearing Officer stated,

> "Well, let me tell you, Mr. Steenson, because what I've heard Mr. Sisco say, is that he didn't adhere to the accounting system, and that he disregarded the accounting system. And this line of questioning is particularly germane and central to what we're talking about. And if it has to be brought out by cross-examination, either through Mr. Baxter, or by me, we will get to the bottom of it. Overruled."

Tr. Vol. III, p. 904, ll. 11-18.[7]

At the conclusion of Mr. Baxter's cross-examination of Mr. Sisco, the Director called for a break, calling Ms. Cresto, Mr. Baxter, and deputy director Mathew Weaver with him behind

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

closed doors for a discussion. At the conclusion of Mr. Sisco's testimony Mr. Barker inquired of the Director what had taken place with Department staff during this break outside of the hearing. Tr. Vol. III, p. 942, ll. 17-24.

> THE HEARING OFFICER: Okay. I will tell you that what I wanted to know – and I was actually going looking for Mr. Tim Luke, which I did. And what I went looking for was a blank copy of a watermaster report.
> MR. BARKER: Is there a reason that you are looking for evidence that the parties have not chosen to make part of the record?
> THE HEARING OFFICER: A watermaster report, Mr. Barker, is the report that – the form that the watermaster submits to the Director, representing that what's on the --- what he reports is true and correct, and an accurate representation of what was delivered.
> MR. BARKER: Okay. So don't you think the parties ought to have the opportunity to know what you are looking at in order to make your determination?
> THE HEARING OFFICER: I didn't find the form, Mr. Barker. And I didn't find Mr. Luke.
> MR. BARKER: And is that your—do you still intend to go gather information that's not being presented by the parties? Is that—I mean, that's my concern. What is it this hearing is becoming?
> THE HEARING OFFICER: Well, Mr. Barker, I promised that I would reveal things that I would take notice of. And certainly, the reporting document, that is a standard form that is used by the Department for all watermasters, certainly ought to be something that the Director could look at in terms of what the watermaster is reporting, what the watermaster is not reporting, and what representations the watermaster makes on that particular form.
> MR. BARKER: And don't you think the parties ought to have the opportunity to know that, so that the witnesses, who were involved in that, have the opportunity to discuss it?
> THE HEARING OFFICER: Sure.
> MR. BARKER: And we've now released Mr. Sisco. And you are going to go look for information that's relevant to what it is that he testified about.
> THE HEARING OFFICER: Well, I will tell you, Mr. Barker, that that particular form is a form that I will take notice of.
> MR. BARKER: That is not on your list of judicial noticed items; is it?
> THE HEARING OFFICER: It doesn't matter.
> MR. BARKER: It does to me.

Tr. Vol. III, p. 942, l. 25-p. 944, l. 20.[8]

[8] The watermaster reporting form referenced in this exchange is not among the documents provided to this Court in the administrative record and the extent to which the Director consulted or relied on it is not revealed in the record.

On the fourth day of the hearing, held September 9, 2015, the Director conducted his own cross-examination of Mr. Roger Batt, a witness called by the Ditch Companies in the proceedings. Mr. Batt had testified that a number of his agricultural organizations were aware of the "refill issue" and shared significant concerns about the position being taken by the Department regarding their water rights. Tr. Vol. IV, p. 1275, l. 19-p. 1280, l. 12. After the Department's counsel declined to cross-examine him, the Director chose to examine Mr. Batt, suggesting that there was something improper in Mr. Batt talking with his clients about their concerns over the Department's position on "paper fill." In other words, the Director chastised Mr. Batt for doing what the Director and his staff had been doing for years, meeting with stakeholders and explaining what they thought about the "paper fill" refill issue. Tr. Vol. IV, p. 1294, l. 11-p. 1295, l. 20.

The last day of the hearing, the Department recalled Ms. Cresto as a rebuttal witness to testify about a new exhibit she had created during the hearing, Exhibit 9. Ms. Cresto was asked whether she had conferred with the Director, or other Department staff concerning the substance of her testimony, to which she responded, "I don't believe so." Tr. Vol. V, p. 1562, l. 13-17. On re-direct examination by Mr. Baxter, a different response was elicited.

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

MS. CRESTO: Some, yeah.
MR. BAXTER: And to the extent of that, can you describe that.
MS. CRESTO: General conversations about – just in general about the proceedings or – or, you know, we talked about this [indicating] and whether or not we thought that that was –
MR. BAXTER: When you're saying 'this,' you're pointed to –
MS. CRESTO: -- this analysis. To Exhibit 9, the table.

Tr. Vol. V, p. 1585, l. 10-1586, l. 15. Mr. Steenson then asked Ms. Cresto whether during the course of the contested case proceedings she had had multiple conversations with the Director concerning the subject matter of the proceedings, and the evidence presented during the course of the proceedings. She answered, "Yes." Tr. Vol. V, p. 1588, l. 25-1589, l. 10. The contested case hearing ended after Ms. Cresto's testimony and some brief discussion on the record. Post-hearing briefing was submitted by the parties on September 28, 2015.

The Director issued his Final Order, R. 001147-1229, on October 15, 2015, which was followed shortly thereafter, on October 20, 2015, by an Amended Final Order, R. 001230-1311, correcting a few typographical errors in the earlier Final Order.

The Boise Project and Ditch Companies filed Motions for Reconsideration on November 3, 2015. The Boise Project argued that the Director's Amended Final Order was in error for failing to recognize the SRBA Special Master's determination that the water filling the reservoirs after flood control fills pursuant to the existing water rights. R. 001314-1317. The Boise Project specifically identified nineteen findings of fact that required revision or correction, and four conclusions of law that were in error and required correction. R. 001317-1330. On November 19, 2015, the Director issued his Order denying the Petitions for Reconsideration, finding that he was not bound by the Special Master's Order in the SRBA proceedings, and rejecting every single request that the Boise Project and Ditch Companies had made to correct the Order. R. 001401-1435. This proceeding for Judicial Review was timely commenced on December 17,

2015, with the filing of two separate actions in the Fourth Judicial District Court; one by the Boise Project and New York Irrigation District, and the other by the Ditch Companies. On December 30, 2015, this Court consolidated the proceedings. This Petitioner's Brief is presented on behalf of the Boise Project and New York Irrigation District.

II. STATEMENT OF FACTS

The Boise Project is the operating entity for the Wilder Irrigation District, New York Irrigation District, Nampa-Meridian Irrigation District, and Boise-Kuna Irrigation District, in Idaho, and the Big Bend Irrigation District in Oregon. The irrigation districts are the primary contractors with the Bureau of Reclamation for delivery of water from Arrowrock and Anderson Ranch reservoirs on the Boise River in Basin 63. Record, Admitted Exhibits ("R.AE."), 004231-4240 (Ex. 3026). The Boise Project and other reservoir contractors are entitled to use 271,600 acre feet of storage water for irrigation purposes from Arrowrock reservoir with a priority date of January 13, 1911, pursuant to water right no. 63-303, an additional 15,000 acre feet of storage water for irrigation purposes from Arrowrock with a priority date of June 25, 1938, pursuant to water right no. 63-3613, and from Anderson Ranch reservoir 487,961 acre feet of storage water for irrigation purposes with a priority date of December 9, 1941 pursuant to water right no. 63-3614. In addition, other right holders can use 111,950 acre feet of storage water for irrigation purposes with a priority date of April 12, 1963 from Lucky Peak reservoir. R.AE. 000716-724 (Ex. 2015). The United States Bureau of Reclamation holds legal title to the water rights. The Districts hold equitable title of these rights in trust for the benefit of the water users who make beneficial use of the water for irrigation purposes. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007).

The first natural flow rights in the Boise Project were developed in the 1860s. By the early 1900s, the natural flow available during the irrigation season in the Boise River had been fully appropriated and additional irrigation would not be available without the development of storage projects. R.AE. 001627-1693. (Ex. 2053 at 10-12). In 1906, after construction of the New York Canal, the United States entered into a contract with the Payette-Boise Water Users to develop a federal reclamation project to be known as the Boise Project. *In re Wilder Irrigation Dist.,* 64 Idaho 538, 540-41, 136 P.2d 461 (1943). The primary purpose of the Boise Project was to store water during the winter and spring months, when water supplies were higher, and to make that water available for irrigation during the summer months, when water supplies were lower. *Id.* at 559-60.

The first dam constructed was Arrowrock. R.AE. 001627-1693. (Ex. 2053 at 10-12). Arrowrock was originally authorized only for irrigation storage. R.AE. 001695-1795 (Exs. 2056 & 2057). Arrowrock was decreed a 1911 priority date for 8,000 cfs in the Bryan decree. R.AE. 000829-842 (Ex. 2023). In 1926, Reclamation entered into contracts with the five Boise Project irrigation districts for repayment of the construction costs of Arrowrock and to operate and maintain the irrigation delivery works. R.AE. 001756-1773 (Ex. 2058); *see also Pioneer, supra,* 144 Idaho, at 110 (2007); *In re Wilder, supra,* 64 Idaho at 541. The Districts and Board of Control then took on the obligation to deliver the storage water and natural flow to the landowners and to maintain the irrigation works.

Arrowrock also provided:

> incidental flood control benefits. For example, faced with the rapid increase of flow in March 1916, Boise Project officials decided to delay Arrowrock storage in order to prevent later flooding that could potentially damage cities and property.

R.AE 001627-1693 (Ex. 2053 at 12); R.AE. 001809 (Ex. 2060). However, Arrowrock was simply not adequate to stem the impacts of flooding in the Boise valley. *Id.* at 12 ("the new dam's capacity of 286,000 acre-feet stored but a fraction of the water that flowed through the Boise River watershed"). After recognizing the need for more storage, a second contract was entered into in 1941 between the districts and the United States to obtain storage water rights from Anderson Ranch Reservoir to be constructed on the South Fork of the Boise with authorization for both irrigation and power, and a small flood control component. *Id.* (Ex. 2053 at 12-14); *In re Wilder*, *supra*, 64 Idaho at 541, 560. R.AE. 001627-1693 (Ex. 2053 at 14) and R.AE. 001928-1948 (Ex. 2071) & R.AE. 001990-2018 (Ex. 2076). The first year of operation for Anderson Ranch was 1950. R.AE. 001928-1948 (Ex. 2071).

The Boise River experienced a massive flood in 1943. A comprehensive flood study by the Corps of Engineers and Reclamation led to the decision to construct Lucky Peak reservoir, primarily for flood control purposes. Tr. Vol. III, p. 794, l. 3-p. 798, l. 11, *see also* R.AE. 001627-1693 (Ex. 2053 at p.16); R.AE. 002089-2108 (Ex. 2089). The federal agencies also proposed to convert Arrowrock and Anderson Ranch from exclusive irrigation reservoirs to multiple use reservoirs, and to operate all three reservoirs as a unified system. During this process, the State acted as the representative of the water users. Tr. Vol. III, p. Tr. 796; R.AE. 001627-1693 (Ex. 2053 at p. 21).

Conversion of Arrowrock and Anderson Ranch to multiple use happened only by demonstrating to the State and the water users that there would be no effect on their existing storage water rights and that any physical shortages in reservoir space caused by flood control releases and subsequent storage would be made up from Lucky Peak storage. R.AE. 002150-2154 (Ex. 2097); *see also* R.AE. 001627-1693 (Ex. 2053 at 18, "despite this acceptance of the

multi-use model and the desire for flood control, water users still wanted assurance that their irrigation supplies would remain senior and would not be trumped by efforts to control flooding"); *see also Id.* (Ex. 2053, at 17-22). During this period, the State never suggested that the reservoirs would not fill in priority. Tr. Vol. III, p. 797. To the contrary, the State's concern was to see that the water users would be covered for any shortfall and that the existing rights were filled. *Id.*

In response, a system was implemented to protect the irrigation supplies:

> [T]he system was intended to facilitate a sort of trade: extra water from Lucky Peak for the irrigators in exchange for allowing the storage space in Arrowrock and Anderson Ranch to be used for flood control. The idea was that if there was ever a shortage of irrigation water as a consequence of utilizing space in Arrowrock and Anderson Ranch for flood control, the extra water in Lucky Peak would make up for the loss.

R.AE. 001627-1693 (Ex. 2053 at 19). Again, there was no hint that the storage space would not fill under the existing water rights. Tr. Vol. III, pp. 797-98. The history of water development in this basin makes it clear that no one, not the State, not Reclamation and certainly not the water users contemplated that these existing water rights would fill in any way other than in priority.

In 1953, the United States Department of Interior and the Corps entered into a "Memorandum Agreement … for Flood Control Operation of Boise River Reservoirs, Idaho" ("MOA"). R.AE. 001627-1693 (Ex. 2053 at 7-17 & 23-25); R.AE. 002167-2184 (Ex. 2100). The MOA provided that Lucky Peak would be operated under a coordinated plan of operation for all three reservoirs and set forth the terms of a system-wide plan for the reservoir system. *Id.* Under the MOA, 983,000 acre-feet of the available 1,084,000 acre-feet in the three reservoirs "will be primarily considered as available for irrigation except as such amount must be reduced by evacuation requirements for flood control." *Id.* The MOA provided 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. (emphasis added). This language made it clear that the parties expected the water filling the reservoirs after flood control releases would fill the "existing rights." The MOA further provided:

> In the event Anderson Ranch or Arrowrock Reservoirs are not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights to the extent of the space thus remaining unfilled at the end of the storage season but not to exceed the amount evacuated for flood control.

Id. At this time, the discussions centered around physical fill. The notion of "paper fill," as the Court will see, had not been dreamed of.

Consistent with the MOA, in 1954 Reclamation entered into Supplemental Contracts with each of the irrigation entities having storage rights in Arrowrock and Anderson Ranch. R.AE. 001277-1391 (Ex. 2039) and R.AE. 004231-4240 (Ex. 3026). The Supplemental Contracts confirmed the right to use storage waters in Lucky Peak for irrigation purposes in an amount equal to the unfilled storage capacity that resulted from evacuation of water from Anderson Ranch and Arrowrock Reservoirs for flood control purposes. Tr. Vol. IV, p. 1043 and pp. 1051-52. The Supplemental Contracts provided the following "Guarantee:"

> 7. Beginning with the first full flood control period after the agreement … there shall be a determination for each storage season at the end of the season
>
> > (a) of the amount of water to which the District would have been entitled under its storage rights in the reservoir system and Lake Lowell under its Government-District contracts had Anderson Ranch, Arrowrock and Lake Lowell reservoirs been operated in accordance with those contracts except for the provisions thereof relating to the use of capacity for flood control benefits…and

> (b) of the amount of water which is creditable to the storage rights of the District under its Government-District contracts taking account of actual operations under the flood control operating plan in accordance with this supplemental contract.
>
> If the amount under (a) exceeds that under (b), there shall be credited and made available to the District, out of the water accrued to storage rights in Lucky Peak Reservoir, an amount of stored water equal to that difference.

Id.

Nothing in the historical record suggests that when water was released for flood control, the reservoirs would not fill in priority under the existing rights. Tr. Vol III, p. 799. There was no suggestion that there was no water right for "refill" of the reservoirs after a flood control event. *Id.* And, there was no suggestion that juniors would stand ahead of the storage right holders' right to store water following flood control. *Id.*; *see also* Tr. Vol. IV, pp. 1039-40, 1046-47 and 1184-1185. The lack of such evidence is significant because the issue of protecting the existing storage rights was so important to the State and water users. *Id.*

Lucky Peak Dam was completed in 1955. R.AE. 1627-1693 (Ex. 2503 at 25) and R.AE. 000511-562 (Ex. 2104). Even then, however, the three Boise reservoirs did not have sufficient capacity to capture all the flood waters in a high water year. Therefore, flood control releases would still have to be made in high water years. *Id.* In 1956, the Corps adopted an operating manual to implement the 1953 MOA and the 1954 Contracts. *Id.* The operating manual provided for flood releases based on a prediction of how much inflow would occur from the snow melt which would then fill the storage space for use by the storage right holders. *Id.* The reservoirs were operated under this manual and the Anderson Ranch and Arrowrock spaceholders were allowed to fill, in priority, after flood control releases. *Id.*

From 1956 through 1974, the reservoirs were operated in accordance with the 1956 operating manual:

> During all seasons, river operators, regardless of agency, recognized the process of spilling the water first for flood control in the spring, and subsequently filling the reservoirs based on snowpack forecasts as flood control season wound down. The logs demonstrate that concern for refill was at the forefront of the operators' minds.

R.AE. 1627-1693 (Ex. 2053 at 29).

In 1974, flood water released from Lucky Peak caused significant flooding along the Boise River. Reports of "submerged pastures" and "man-made floods" reached the local paper and the Governor. R.AE. 1627-1693 (Ex. 2053 at 34); *see also* R.AE. 002533-2534 (Ex. 2129) and R.AE. 2535 (Ex. 2130); Tr. Vol. III, p. 800. Landowners along the river requested greater flood control protections. *Id.* Governor Cecil Andrus criticized the reservoir operations and directed the Department to study and re-evaluate the flood control practices in the Boise Project to provide for earlier flood control releases. R.AE. 002536-2538 (Ex. 2131).

> In April, IDWR Director Stephen Allred wrote to the Corps of Engineers and carried the governor's message. The crux of Allred's comments, written in response to a draft Environmental Impact Statement that had been prepared by the Corps as a requirement to construct a second outlet at Lucky Peak dam, suggested that the river had not been operated in strict accordance with the 1956 Manual for some time, and he urged the Manual's modification to reflect actual conditions and thus provide a more reliable guide to operations. He closed by offering to meet with the Corps to discuss ways to accomplish the work. Shortly thereafter, a meeting was held between the Director of the Bureau of Reclamation, Colonel Conover of the Army Corps of Engineers, and Allred to determine how to gather the technical information requested by the Governor. ***Together, they hatched a plan to assemble a work committee with representatives from all three agencies.***

R.AE. 1627-1693 (Ex. 2053 at 35) (emphasis added). Thus, at that time, the Department and State chose to work together with the federal agencies to review operations on the Boise. Tr. Vol. III, p. 800. However, the Department quickly took control of the meetings, even causing Reclamation to complain that it did not want to "establish the precedent of being technical

consultants for the State." *Id.* at 36; *see also* R.AE. 002718-2722 (Ex. 2135); Tr. Vol. III, p. 801 (Department declared that the report would be issued under the State's name).

In 1974, the State prepared and issued the Department's report entitled "Review of Boise River Flood Control Management." R.AE. 002644-2713 (Ex. 2133) and R.AE. 003642-3711 (Ex. 2182). Tr. Vol. II, pp. 379-380, ("independent report by the State"). The State and Department wanted more early season flood control releases and at the same time added protection for the storage water rights. Tr. Vol. III, pp. 800-801. The State's report complained that the flood control curves under the 1956 manual were not conservative enough to provide protection from flooding. R.AE. 1627-1693 (Ex. 2053 at 38-39); R.AE. 002644-2713 (Ex. 2133) and R.AE. 003642-3711 (Ex. 2182) ("The flood parameter curves are conservative for refill of the reservoirs, but not conservative for flood control, especially during the month of June. This means that a lower risk of refill is achieved at the expense of a higher risk for large flood damage"). Tr. Vol. II, pp. 415- 417. ("We felt greater flood protection could be afforded, and the reservoir system would still fill").

The Department's report echoed the Governor's recommendation for earlier flood control releases, recognized the practice of and need to refill storage space after flood control releases, and called for a new study to provide greater flood protection while still protecting refill. R.AE. 002644-2713 (Ex. 2133) and R.AE. 003642-3711 (Ex. 2182); Tr. Vol. III, p. 801. Importantly, rather than conclude there was no right to refill the reservoir following flood control releases, the Department's 1974 Report recognized the need to refill storage space for irrigation uses following these earlier flood control releases. *Id.* Further, the Department's 1974 report did not state that refill would not occur in priority, did not raise the idea of "paper fill" as "satisfaction" of the water rights and did not claim that juniors could take ahead of reservoir refill. Tr. Vol. II,

p. 802. The idea that juniors would take the refill water was not even considered, as it "was not an issue." Tr. Vol. II, p. 455. The Department's report is important because it was the foundation for the later Water Control Manual. Tr. Vol. II, pp. 411-12.[9]

Based on the 1974 report, the Department, Corps and Reclamation collaborated to revise the 1956 manual.

> Although the two federal agencies were responsible for reservoir operations, ***IDWR was directly involved in the reservoir operations review and revision process***. The triple-agency effort – Corps, Bureau, and IDWR – to revise the manual got underway in December 1976.

R.AE. 001627-1693 (Ex. 2053 at 40) (emphasis added). The Draft Plan of Study for the committee included consideration of flood control and the impact on refill. R.AE. 002915-2924 (Ex. 2145) (Operational criteria and management include consideration of "fall and early winter evacuation based on a ***high refill assurance***") (emphasis added). The Department, Corps and Reclamation agreed that "the flood regulation plan will provide for a high assurance of refill." *Id.*

The State's involvement was vital. The effort to modify the 1956 manual "identified five technical studies that would be required in order to make the desired changes to operations." R.AE. 001627-1693 (Ex. 2053 at 41). These studies included the Department's development of "Fall and Winter Assured Refill Curves." R.AE. 002915-2924 (Ex. 2145).

The Department remained involved throughout the process of revising the manual.

> IDWR continued to play a major role in the manual's revision as it related to existing water rights. Director Stephen Allred notified the Corps in late 1979 that IDWR would accept that agency's new runoff projection techniques,

[9] While Mr. Steenson was examining Mr. Sutter concerning the contents of this important document that was the catalyst to the revision of the control manual that had governed flood control operation since 1956, the Director interrupted Mr. Steenson to inform him that he was about "to cut off questioning really soon." Tr. Vol. II., p. 420, l. 22-p. 422, l. 17. The Director elaborated by stating "This –this was a general report done by Mr. Sutter. And he spoke and said it was a catalyst for something that came later, but was not really the basis for anything. And yet we're spending an hour and a half or two hours in the report. And I would suggest that you move to the actual reports that establish whatever those operations are. This report didn't establish any of that. And Mr. Sutter has said that it did not relate to accounting of water rights for fill of the reservoir. So I don't see the relevance of this document. I don't see the relevance of it, Mr. Steenson." *Id.*

> declaring them to be "consistent with the recommendations" in the 1974 Review of Boise River Operations report. The following year, Allred again wrote to the Corps, proposing that IDWR prepare a description of the "full annual operating cycle" of the reservoirs, "including the fill sequence, the irrigation use period, and the fall-winter operations for flow maintenance" for inclusion in the manual. He continued:
>
> > Accrual of storage water to the respective reservoirs is determined by the reservoir rights under the priority system. It is the responsibility of the watermaster to determine this fill in relation to the other rights that he administers. A description of this process should be included in the manual.
>
> Allred offered to draft the section he was recommending, which his staff then proceeded to do. The manual as it was ultimately adopted included language similar to that of Allred's letter.

R.AE. 001627-1693 (Ex. 2053 at 46); Tr. Vol. II, p. 620 (confirming that the Department prepared Subsection 7.06(f), "Distribution of Irrigation Water" for the Water Control Manual).

Ultimately, the agencies jointly developed a protocol for river operations that was released in 1985, known as the Water Control Manual for Boise River Reservoirs (the "Water Control Manual"). R.AE. 003739-3841 (Ex. 2186).

In 1987, Director Higginson wrote to an attorney for the water users, Mr. Blanton, and advised him that the new manual was a "joint effort" by the Corps, Reclamation, and Department. Ex. 3001. Director Dunn agreed that was the case. Tr. Vol I, p. 249, ll. 5-20. Mr. Sutter agreed that the manual was a "joint effort" that included Mr. Alan Robertson of the Department. Tr. Vol II, p. 457, l 19 – p. 459, l. 10. As Mr. Sutter explained, it was "necessary" to get the Department's "blessing" for this manual.

> A: But I think, as far as the technical work that was done, putting it all together, the Department –Alan Robertson went to the meetings and was informed of everything and provided advice and guidance, because it <u>was really necessary to get the Department of Water Resources' blessing on this</u>. And I just would say that the crux of the plan was developed by the Corps.
> Q. And you said it was necessary to get the Department's blessing?

A. Necessary? It was very prudent for the Corps and the Bureau, to maintain good working relations, to include the Department.

Q. And they did get the Department's blessing on this Water Control Manual?

A. I think we were satisfied with it, yes.

Q. And if there was anything that you weren't satisfied with in the manual, it's not – there's no record of that being expressed to the Corps or to the Bureau, right?

A. I think, yeah.

Id. p. 459. L. 12 – p. 456, l. 7 (emphasis added).

Mr. Sisco, appointed watermaster in 1986 just after the Manual was completed, agreed that it was a joint effort and that it was to be used by the Department in administration. Tr. Vol. III, p. 922, ll. 3-25. Mr. Page of the Boise Project recounted a recent instance when Ms. Cresto sent him a section of the Manual to explain water right administration. *Id.* p. 976, ll. 1-6.

The Water Control Manual establishes "rule curves" for deciding how much space must be left available in the reservoirs to handle flood flows while, at the same time, ensuring physical fill of the reservoirs after flood control releases. R.AE. 003739-3841 (Ex. 2186). These rule curves were reviewed by Alan Robertson, manager of the hydrology section and Bob Sutter's supervisor, and by Bill Ondrechen, Department hydrologist. Tr. Vol. II, pp. 424-25.

At no time during the development of the Water Control Manual did the State or Department ever assert to the water users or in any public forum that evacuation of water for flood control would result in empty reservoir space that could not be refilled unless all other existing and future water rights had been satisfied. To the contrary, the Department staff "concurred with the adopted curves, reflecting on the curves in 1987 that: '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.'" R.AE. 001627-1693 (Ex. 2053 at 56). Further, the manual specifically provides that "Flood control regulation during the refill period (1 April through 31

July) requires the use of snowmelt runoff to refill flood control spaces within the Boise River reservoirs." R.AE. 003739-3841 (Ex. 2186).

Importantly, a part of the manual written by the Department recognizes that flood control releases were "surplus" to the reservoirs.

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

Id. at 7-26 (emphasis added). The manual did not say that these "surplus" flood control releases would count towards the "satisfaction" of the storage water rights. Never, at that time, were water right holders in the Boise advised that their water rights would not fill in priority. Tr. Vol. II, p. 462; Tr. Vol. III, p. 804; Tr. Vol. IV, p. 1037; Tr. Vol. IV, p. 1076; Tr. Vol. IV, p. 1181; R.AE. 004241-4247 (Ex. 3038). Nothing in the development, public outreach, or final manual indicated any change from the State's prior assurances that flood control could not impact irrigation storage water rights. To the contrary, the purpose of the Water Control Manual was to protect both downstream property owners ***and*** reservoir spaceholders. R.AE. 001627-1693 (Ex. 2053 at 46); R.AE. 003739-3841 (Ex. 2186)("These rules curves represent a balance between flood control risks and refill assurances").

In 1986, the Department brought its Basin 01 water rights accounting program into Basin 63. R. 001258; R. 001261; R. 001425. Tr. Vol. II, p. 428, l. 17-p. 429, l. 20. In March 1987, after a request from Lee Sisco, the new watermaster for the Boise River for guidance concerning the accounting program procedures, Director Dunn sent a memo to Mr. Sisco explaining the process. R.AE. 003393-3403 (Ex. 2178). This is the only document among the many exhibits introduced during the hearing that even references a right filling on paper. *Id.* at

003398. Notably, it does not state that "paper fill" is "satisfaction" of the right as the Director now contends. *Id.*[10] The record reflects that the water users were not informed that the Department was adopting the concept of 'paper fill' as "satisfaction," and were not informed that "paper fill" had any impact, as the Director now contends. Tr. Vol. II, p. 461, l. 12-p. 462, l. 8; *see also* R.AE. 000110-111 and Tr. Vol. IV, p. 1167, l. 21-p. 1172, l. 16; Tr. Vol. IV, p. 1040, l. 18-p. 1044, l. 23.

While the evaluation of the new water control procedures were underway, the Director determined that the Boise River was fully appropriated, except when flood control water was being released from Lucky Peak. In 1977, a moratorium was entered for all new appropriations from the Boise River for consumptive use from June 15 to November 1 in each year. R.AE. 004202 (Ex. 3002). The moratorium was confirmed and extended on multiple occasions, most recently in February, 2008. R.AE. 004203-4224 (Exs. 3003-3008). Junior water right holders who have submitted applications and received permits during this time have frequently had conditions placed on their permits and/or licenses limiting diversion of water from the Boise River to only those times when water is being released from Lucky Peak reservoir for flood control purposes pursuant to the Water Control Manual. R.AE. 004225-4228 (Ex. 3012), 004229-4230 (Ex. 3013), and 004261-4262 (Ex. 3041). Tr. Vol. IV, p. 1002, l. 19-p. 1003, l. 23 and p. 1014, ll. 19-22.

Water users in the Boise Basin did not become aware until 2012 that the Department believed that their storage rights had been "satisfied" when "paper fill" was reached under the computer program or that the accounting program purportedly treated the water in the reservoirs

[10] Adoption of the accounting program in Basin 63 in 1986 was not undertaken in a rulemaking with a full and fair opportunity for comment, if it were to have, as the Director contends it does, a binding substantive effect.

on the day of allocation, the date when the reservoirs have reached their peak accrual for the season, as not appropriated by any water right.

III. STANDARD OF REVIEW

Judicial review of a final decision or order of the Department is governed by the Idaho Administrative Procedure Act (APA), chapter 52, title 67, Idaho Code§ 42-1701A(4). The administrative record constitutes the exclusive basis for agency action in contested cases or judicial review thereof. Idaho Code § 67-5249(3). Appeals are confined to the agency record and any supplemental evidence allowed under Idaho Code § 67-5276, Idaho Code § 67-5277. The court defers to the agency's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998).

As to review of discretionary issues, "an appellate court reviewing agency actions under the [IDAPA] must determine whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason." *Haw v. Idaho State Bd. Of Med.*, 143 Idaho 51, 54, 137 P.3d 438, 441 (2006).

The court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3). A party challenging the agency decision must show the agency erred in a manner specified by Idaho Code § 67-5279(3) and its substantial rights have been prejudiced. Idaho Code § 67-5279(4); *Lamar Corp. v. City of Twin Falls*, 133

Idaho 36, 981 P.2d 1146 (1999); *Barron v. Id. Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Court exercises free review over questions of law. *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 127, 176 P.3d 126, 132 (2007). When the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3).

Due process issues are generally questions of law, and the Court exercises free review over questions of law. *Idaho Historic Preservation Council, Inc. v. City Council of City of Boise*, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000). Due process requires "fundamental fairness" in every matter. Applying due process requires the Court to examine the situation by comparing precedent with the interests at stake in the proceeding. *Williams v. Idaho State Board of Real Estate Appraisers*, 157 Idaho 496, 505, 337 P.3d 655, 664 (2014), *quoting Lassiter v. Dept. of Social Services of Durham County,* 452 US 18, 24-25 (1981).

IV. ISSUES PRESENTED FOR REVIEW

1. The following actions of the Department and the Director, acting in his capacity as the Presiding Officer, were made on unlawful procedure, were made arbitrarily and capriciously, and deprived the Boise Project of due process and prejudiced its substantial rights:

a. The Director refused to appoint an impartial, independent hearing officer, but insisted on presiding over a case where he had been the biggest proponent, before the case began, of the ultimate outcome he ordered;

b. The Director improperly called this case as a proceeding to "defend" the existing accounting program's use of "paper fill;"

c. The Director as presiding officer improperly consulted and conferred with Department staff and counsel during the course of the hearing concerning the substance of testimony, improperly took it upon himself to search for evidence to use against the parties' witnesses, and improperly directed the preparation of rebuttal evidence;

d. The Director's counsel improperly acted as both the prosecutor in support of the Department's position and as advisor to the Presiding Officer on the ultimate Order during the course of the proceedings, including consulting with Department staff and the Director both prior to and during the course of the contested case hearing on the substance of testimony and exhibits;

e. The Director refused to stay or dismiss the contested case in the face of the risk of inconsistent findings in two parallel forums, and where no party desired to continue the contested case;

f. The Director's expansive use of "official notice" of documents and materials not entered into evidence violated the APA and the due process rights of the parties;

g. The Director improperly called the proceeding *sua sponte* as a contested case when a rulemaking should have been undertaken pursuant to the APA.

2. The following determinations and actions of the Director were arbitrary and capricious and constitute clear legal error, resulting in prejudice to a substantial right of the Boise Project:

a. The Director improperly interpreted the existing storage rights, in excess of his authority and contrary to the holding of the Special Master in the SRBA proceedings to prohibit the existing rights from storing water after "paper fill;"

b. The Director misinterpreted and misapplied the holding of the Supreme Court in *A & B Irr. Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2015), by failing to require the accounting program to count the water used by the beneficial users of the water;

c. The Director improperly determined that in 1986 the Department lawfully adopted a "paper fill" rule resulting in senior water rights being "satisfied" by water that is no longer available for beneficial use;

d. The Director improperly rejected undisputed evidence of historic operations and administration of water rights on the Boise River when he claimed that the Boise River reservoirs were not filled under their existing water rights prior to adoption of the Department's accounting program;

e. The Director has no legal basis to support his conclusion that water held in the reservoirs and allocated to spaceholders on the day of allocation following flood control release is held without the protection of any valid water right;

f. The Director improperly determined without any legal support that administration of water rights in Basin 63 cannot rely on the Water Control Manual.

3. The Boise Project is entitled to attorneys' fees under Idaho Code § 12-l17(1) because the agency actions here were taken without a reasonable basis in law.

V. ARGUMENT

A. Introduction

This case was purportedly about documenting the 1986 adoption of the accounting procedures and "concerns" that water users had about the accounting. R. 00002. Ultimately, it became a case about one thing: the Director's insistence that "paper fill" under the accounting program was "satisfaction" of the storage rights.[11] According to the Director, the policy of "satisfaction" upon "paper fill" provides that the storage rights do not allow any further storage after "paper fill," but that storage is permitted under a written "policy" to allow that storage, but only so long as that storage takes place after all junior users and all future users are completely satisfied. R. 001296.

This decision is wrong both substantively and procedurally. Substantively, the Director has it wrong about what the water rights allow. The storage rights in the Boise were developed and implemented with the premise that the storage rights would be filled by water entering the reservoirs after flood control releases, not by the flood control releases that are unavailable to the storage right holders, as the Director insists.

[11] As a result of this singular focus, the Director refused to even address the "reset" or "late-season fill" of the storage rights, R 001294 fn. 46. Storage reset is part of the accounting program. Ms. Cresto described it as having been adopted when the accounting program came into the Boise in 1986. Ex. 1, p. 7; Tr. Vol I, p. 159, l. 12-p. 160, l. 21, and p. 182, l. 21-p. 183, l. 22. Tr. Vol. V, p. 1442, l. 20-p. 1443, l. 7. Mr. Sutter testified that he "hardwired" the reset into the accounting program because "you can't just let water be stored without a water right." Tr. Vol. II, ll. 3-25; and p. 463, l.7-p.464, l.11. The Director also refused to make any determinations about the concerns raised by the water users that the accounting program failed to provide any mechanisms for dealing with water right conditions, such as the condition limiting diversion to the time that Lucky Peak was filling. R. 001308. Tr. Vol. II, p. 504, l. 8-p. 508, l. 20.

Procedurally, the contested case process has been so flawed that it cannot support the Director's determination. The Director was the loudest and most prominent advocate for the "satisfaction" by "paper fill" policy, yet he appointed himself the judge of his own favored policy, depriving the water users of an independent, neutral hearing officer. He overstepped his authority as hearing officer by engaging in repeated *ex parte* contacts with the Department's prosecutor and key witness and even rifled through the Department's files looking for evidence to impeach the watermaster's testimony. Moreover, under APA, any decision to impose a "satisfaction" by "paper fill" policy on the Boise River water users is not the proper subject of a contested case, but such a major policy pronouncement could only be adopted by rulemaking, even if the Director, rather than the court, had the authority to make such a determination.

Long before the case began, the Director had been actively making public statements concerning the necessity to continue the "paper fill" accounting program without revision or amendment. He insisted that "paper fill" was "satisfaction" of the water right. After initiating the contested case, he continued to advocate before the legislature, and elsewhere, to preserve the Department's "paper fill" policy. Despite recognizing that no party wanted this contested case, the case forged ahead, with the Director denying every procedural motion that came before him, and staunchly standing firm that he and only he would be the hearing officer in the proceedings. During the hearing, the Director was openly dismissive of the Irrigation Entities' evidence as "irrelevant" and hostile to some of their witnesses, particularly the watermaster. R. 001257 (rejecting the watermaster's testimony). The Director admitted conferring with Department staff and witnesses outside of the hearing, and the Department's key witness regularly consulted with the hearing officer's counsel. Mr. Baxter acted as both the investigative attorney for the Department, prosecuting the case for the Department, and as the attorney advising the Director as

Hearing Officer on the merits of the Department's case. Under these circumstances, the Boise Project and other parties were hailed into this contested case proceeding to protect their interests, without due process. The entire contested case was had upon unlawful procedure, the actions of the Director were arbitrary and capricious, and prejudiced the substantial rights of the Boise Project and other parties, requiring that this Court reverse the Director's Amended Final Order, and if it deems appropriate, remand for an appropriate proceeding that will ensure that due process protections are in place for the parties.

In addition to the myriad procedural improprieties, the Director acting as Hearing Officer made substantive determinations that constitute clear legal error, or were made arbitrarily and capriciously, prejudicing the substantial rights of the parties. The Director ignored a key element of the Supreme Court's holding in the Basin Wide 17 matter. He improperly ignored, or held as irrelevant, the undisputed evidence demonstrating that the current interpretation of the accounting program does not comport with pre-1986 administration, and ignored the multiple use requirements placed upon the Boise River reservoirs. The Director's arbitrary and capricious determination that water can be stored under an accounting function titled "unaccounted for storage" without a water right, and still be protected from future appropriation is without basis in law. During the course of the proceedings, and in the Director's Final Amended Order he held that state water right administration cannot rely upon the federal water control manual, even though it was created as a "joint effort" with and "blessed by" the Department. His conclusion is contravened by the history of water right administration in the State of Idaho, and Idaho law. These errors, in addition to the procedural due process violations, must result in the Director's Amended Final Order being vacated, and remanded for such proceedings as this Court may deem appropriate and necessary.

B. The Director's Public Statements Prior to and During the Course of the Contested Case Demonstrate Insurmountable Bias and He Should Not Have Acted as the Hearing Officer

A presiding officer may hear and judge a case even where that officer has taken public positions on a policy issue related to a dispute. *Idaho Dept. of Water Amended Final Order Creating WD No. 170 v. IDWR*, 148 Idaho 200, 208, 220 P.3d 318, 326 (2009). However, here the Director had not just made mild public positions on the underlying policy issues. Instead he had publicly advocated for the continued existence of the "paper fill" policy. These actions crossed the line, depriving the parties of the impartial and disinterested tribunal that they are entitled to. *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (*citing Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610 (1980)). It was clear from early in the proceedings that the Director was "not capable of judging [this] particular controversy fairly on the basis of its own circumstances." *Eacret v. Bonner County*, 139 Idaho 780, 785, 86 P.3d 494, 499 (2004). He called this case of his own volition, continued the case in the face of opposition of the parties compelled to participate, continued to advocate for the ultimate outcome during the pendency of the case, failed to disclose all his public and private pronouncements on the case, and actively dismissed the arguments, objections, and witnesses of the parties, demonstrating that the Director lacked the necessary disinterest that a litigant is entitled to in order to ensure due process.

The Ditch Companies' October 2, 2014, Motion to Disqualify the Director and IDWR from acting as the hearing officer in the contested case cited Idaho Code § 67-5252(1) that provides for the right of disqualification without cause, and also, alternatively, for cause "for bias, prejudice, interest, substantial prior involvement other than as a presiding officer, lack of professional knowledge in the subject matter of the contested case, or any other cause provided in this chapter or any cause for which a judge is or may be disqualified." R. 000102 (emphasis in original). The Ditch Companies cited evidence of the Director's public presentation where he

had "explained the issue presented in this contested case, described many of the arguments which may arise, described the Director's opinions relating to the issues, identified consequences concerning these issues and identified ongoing settlement discussions which the Director and/or IDWR are aware of and/or have been involved in." R. 000103. They protested that the Director was "not only aware of the settlement options being considered at this point but had been involved in such discussions, as the Director has provided settlement proposals with proposed priority dates and analysis of those dates." *Id.*

The Director denied this Motion to Disqualify. R. 000132-141. He did not dispute any of the facts offered by the Ditch Companies. The Director held that, as agency head, he could not be disqualified without cause under Idaho Code § 67-5252(1). He determined that since he would not receive a pecuniary benefit from sitting on the case, he could not be disqualified pursuant to Idaho Code § 67-5252(4). *Id.* He asserted that his "participating in discussions and presentations related to this matter have been entirely appropriate." R. 000137. Yet, he never revealed what his participation had been or what his later public involvements were at any time thereafter in response to repeated requests, up to and including the time of the hearing. The court just has the Director's word that his actions were "appropriate." The Director also failed to address how appointing an independent person as the hearing officer "would result in an inability to decide [the] contested case." The parties simply asked for an independent hearing officer, not that there be no hearing officer.[12] That request was denied.

The Director did not and could not refute the fact that he had "substantial prior involvement other than as a presiding officer" in the matter at issue in the contested case, aside

[12] There are well documented incidences when an independent hearing officer other than the Director had presided. *See A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 315 P.3d 828 (2013)(Justice Schroder acted as the hearing officer); *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012)(Justice Schroder acted as hearing officer).

from asserting that his actions were "entirely appropriate." Idaho Code § 67-5252(1). R. 000137. The Director had actively participated in settlement negotiations and made repeated presentations to the legislature and other stake holders during the pendency of the case. This is entirely inappropriate for a person acting in a capacity as a judicial officer. The Director had also been responsible for making recommendations that the late claims filed by Reclamation and the Boise Project to appropriate the "unaccounted for storage" water be recommended as disallowed. *Memorandum Decision and Order Granting Ditch Companies' and Boise Project's Motions for Summary Judgment*, p. 9 (Oct. 9, 2015), SRBA subcase no. 63-33733.

The Ditch Companies moved for reconsideration of the Director's Order Denying the Motion for Disqualification. R. 000255-267. They pointed out that the Director's public statements concerning the ultimate issue in the proceeding went beyond the September presentation to include "private, *ex parte* discussions which involve settlement and other matters," with "other non-parties and Legislators, and which include settlement negotiations and proposals." R. 000257. His participation in these negotiations and discussions is prohibited by Idaho Code § 67-5253 which requires that "a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication." The Director denied the Motion for Reconsideration. R. 000335-352. He provided no additional analysis, relied on his prior denial, and failed to address the concerns about his substantial participation in the substantive issue outside of his role as the hearing officer. R. 000348. He also refused to disclose all his extra-judicial contacts. R. 000387.

The objection to the Director serving as the hearing officer was raised again at the Pre-Hearing Conference held on August 14, 2015. Mr. Barker stated, "You have been an advocate

for the outcome in this case that paper fill is satisfaction. You have made that clear in proceedings, in presentations to the legislature, to the governor, to our clients, to other people. It seems unfair that the person who is the advocate for the Department's position is the person who is the one who's going make the decision. And we think it's a due process violation." Tr. 08/14/15 Pre-Hearing Conf., p. 55, l. 20-p. 56, l. 3. The Director did not disagree that he had advocated for the result, but rejected the argument stating "And I've heard that argument previously and ruled on that issue. So I don't want to have to address that issue today." *Id.*, p. 56, ll. 4-6.

The Director's prior involvement and repeated statements concerning the need to preserve "paper fill" both before and during the proceedings is unlike the cases relied on by the Director in his order denying the Motion for Disqualification. *In Re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 220 P.3d 318 (2009), stands for the proposition that "a decision maker is not disqualified solely because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.* at 208, 220 P.3d at 326, *citing Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d, 840, 846 (2007). In *WD 170,* Thompson Creek pointed to a single slide showing a summary of the provisions of the Wild & Scenic Rivers Agreement. Missing in that record was what we have here, a long history of the Director acting as the principle advocate for "paper fill" as "satisfaction." In *Turner*, the Petitioner argued that the City Council's determination that it could hear an appeal from a Planning and Zoning Commission decision meant that the City Council was not impartial. The Court disagreed because the City's finding required only a determination "there may be significant adverse impact as a result of the

Commission's action." Exercising that power does not violate the Due Process Clause. *Turner*, 144 Idaho at 209, 159 P.3d at 846. Here the Director did not just decide to hear an appeal from a subordinate body. Instead he made numerous statements that "paper fill" as "satisfaction" was essential to protecting the State's sovereignty and called the contested case to provide a record to support that decision. Under these circumstances, "the decision maker [was] not capable of judging this particular controversy fairly on the basis of its own circumstances," violating the parties' due process rights. *WD 170,* 148 Idaho at 208.

The Director also relied upon *Ass'n. of National Advertisers v. F.T.C.*, 627 F.2d 1151, 1154 (D.C. CiR. 001979). In that action the Petitioners urged that the FTC chairman be disqualified from presiding over a rulemaking based on statements made in a single speech given two years earlier concerning broadly the subject of children's advertising, the issue in the rulemaking. *Id.* Those facts are clearly distinguishable. This Director did not simply make general public statements concerning reservoir storage or accounting procedure. He has instead actively lobbied for the preservation of the very "paper fill" accounting program at issue in the proceedings, made specific statements about the damage that would occur if the current system was not preserved, and went so far as to call his own contested case to provide a forum for him to create a record to "defend" it.

The totality of the Director's statements and actions rendered him incapable of acting as an impartial decision maker in the contested case proceedings. In *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), the United States Supreme Court addressed the meaning of "impartiality" as it is used in the context of applying the Due Process Clause to judges. It means "the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will

apply the law to him in the same way he applies it to any other party." *Id.* at 775-76. *Accord, Williams v. Idaho State Board of Real Estate Appraisers*, 157 Idaho 496, 505, 337 P.3d 655, 664 (2014); and *Turner, supra*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007), *quoting White*. Here the Director put the parties in the untenable position of having to defend themselves against the positions taken by the Director himself, and then having the Director, as the primary proponent and guardian of those actions be the decision maker in his own contested case. The Director lacked "impartiality" as required by the law.

Due process "entitles a person to an impartial and disinterested tribunal." *Cowan v. Bd. Of Comm'rs,* 143 Idaho 501, 148 P.3d 1247 (2006) . *quoting Davisco Foods Int'l, Inc.*, 141 Idaho at 791, 118 P.3d at 123,; *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004), *citing Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980)). "This requirement applies not only to courts, but also to state administrative agencies" *Eacret*, 139 Idaho at 784 *citing Stivers v. Pierce*, 71 F.3d 732 (9th CiR. 001995). "An impartial decision maker is essential," *Williams, supra*, 157, *quoting Goldberg v. Kelly,* 397 US 254, 271 (1970).

The Director's September 2014 presentation to the Natural Resources Interim Committee reads like a self-fulfilling prophesy of his October 2015 Amended Final Order. At page 5 of the presentation the Director informs the committee that:

> Contracts of spaceholders who are entitled to stored water in reservoirs operated for flood control can have their storage allotments reduced during years of releases from reservoirs to empty space for flood control. This is [a] (sic) requirement of the spaceholder's contracts and an inherent risk that spaceholders assume in relying on storage water from an on-stream reservoir that must be operated for flood control. Flood control comes first!

R. 000118. Thus, the Director had predetermined the legal effect of irrigation entities' contractual entitlements, outside of the context of the hearing and without any evidence having been presented.

In the same 2014 presentation, the Director described concerns raised by the irrigation entities when the contested case was initiated in 2013, and then rejects those concerns prior to any evidence being taken or witnesses called. In response to the parties' concerns that their rights were being "filled on paper" and out of priority before the irrigation season even began, the Director asserted "When water is being stored in early winter the Bureau and spaceholders predict thirst – water is being physically stored to the satisfaction of the water right and to satisfy the thirst of the user." R. 000125. He then claimed that "The determination of need cannot wait until the end of the storage season or the end of the upcoming irrigation season -- there is a right for storage and for use from storage -- the storage portion of the right must be accounted for based on the state based water right." R. 000126 (emphasis added). He stated "Under the present method of accounting, one could argue the storage right holder receives more than any other water right holder because the storage base refills even after the right has been satisfied." R. 000127. These statements reveal more than mere policy concepts. They cross the line to a pre-determination of the ultimate issue that the Director himself had crafted in the Notice of Contested Case. R. 000007.

The Director then lectured the Committee that amending or revising the accounting program was too risky:

> Director Spackman went on to say that there would be risks to resetting the satisfaction of the right downward to equal the physical storage. Those risks including increasing the water reliability for some spaceholders while diminishing the rights of other spaceholders and those holding junior priority water rights. It would also upset the historical deliveries of water, although this would vary from basin to basin. Another risk is that it would allow the Bureau of Reclamation and the larger federal government to have greater control for downstream interests to satisfy treaties. ... He said that a further risk is that it may change the respective strengths and weaknesses of legal arguments of ground water and surface water users in the ongoing conjunctive management calls. He stated that this currently appears to be a major impediment to the settlement of the fill/refill issue.

R. 000911. His statements create the appearance that the Director had no intention of revising the Department's accounting program and prejudiced the parties' rights.

C. The Director's Actions During the Hearing of Independently Seeking Evidence and Consulting with the Department's Witnesses and Attorney Outside the Hearing and Directing Preparation of Rebuttal Exhibits Violated the IDAPA and Due Process

During the hearing, the Director admitted that he was gathering evidence outside of the record and consulting with IDWR staff concerning the substance of the testimony and evidence and regarding potential evidence to impeach the watermaster. Tr. Vol. III, p. 942, l. 17-p. 944, l. 20. He also consulted with counsel for the Department and the Department's primary witness outside the hearing, even directing the creation of a new Exhibit 9 to be offered by the Department's rebuttal witness as supplemental expert testimony. Tr. Vol. V, p. 1585, l. 10-1586, l. 15. And that wasn't an isolated event. The Director had multiple conversations with the Department's prosecuting counsel and lead witness throughout the contested case hearing. Tr. Vol. V, p. 1588, l. 25-1589, l. 10.

The Director participated in the investigation and prosecution of this contested case by participating in settlement discussions, formulating, and initiating the contested case, directing the gathering of evidence and information, discussing testimony with staff witnesses and counsel, and directing the rebuttal testimony. Tr. Vol. IV, p. 1585, l. 10-1586, l. 15, and Tr. Vol. IV, p. 1588, l. 25-1589, l. 10. Due process exists to prevent the type of proceeding that the Director forced the parties to participate in. These acts also violate Idaho's Administrative Rules requiring that the Director's Amended Final Order be vacated.

The APA prevents the hearing officer from consulting with parties, directly or indirectly, during the pendency of the case, without notice and an opportunity to participate. Idaho Code §§ 67-5252 and 67-5253. "These sections are intended to ensure that the decision maker bases the order solely on the facts and arguments contained in the record created at the evidentiary

hearing." M. Gilmore and D. Goble, The Idaho Administrative Procedure Act: a Primer for the Practitioner, 30 Idaho Law Rev. 273, 321 (1994).[13] No hearing officer may discuss the case with the agency attorney or staff. IDAPA 04.11.424; *see also* IDAPA 04.11.01.417 (applying rule to presiding officer).[14] Thus, an agency head cannot have *ex parte* contacts with agency personnel involved in the investigation or prosecution of the pending matter. *State v. Kalani-Keegan*, 155 Idaho 297, 307, 311 P.3d 309, 319 (Ct. App. 2013). "[A]ny discussions with other agency personnel who are involved in the case are clearly impermissible." *Gilmore, supra*, p. 325. Having exceeded the permissible bounds by consulting with the Department's personnel involved in this very proceeding, the Director's actions require that his Order be vacated.

D. Counsel's Dual Role Advising the Hearing Officer and Prosecuting Counsel for the Department During the Proceedings Violated the Procedural Rules and Prejudiced the Parties' Right to Due Process

Similar restrictions to those imposed on an agency head in formal contested cases also apply to agency attorneys. The IDAPA contains the following rules that apply to the agency attorneys.

> Prosecutorial/Investigative Attorneys: Except as authorized by 423.01.a of this rule, no agency attorney involved in the investigation or prosecution of a complaint shall discuss the substance of the complaint ex parte with the agency head, a hearing officer assigned to hear the complaint, or with any agency attorney assigned to advise or assist the agency head or to advise or assist a hearing officer assigned to hear the complaint; provided, that when a hearing officer has made a bench ruling and has on the record directed the agency attorney to prepare findings of fact and other reasoning supporting the decision in conformance with the bench ruling, or when a hearing officer has by written document served on all parties, ordered the agency attorney to prepare findings of fact and other reasoning supporting the decision in conformance with the written document, the agency attorney may contact the hearing officer in connection with the preparation of the written document to be submitted to the hearing officer.

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[13] Hereafter, *Gilmore*. This article has been cited by the Supreme Court in *Westway v. Idaho Transportation Dept.*, 139 Idaho 107, 113-14, 73 P.3d 721, 727-28 (2003).

[14] The totality of these *ex parte* contacts were not placed in the record as required by Rule 417, despite the request by the parties for these disclosures prior to the hearing.

IDAPA 04.11.01.423.02.a. No attorney assigned to assist the hearing officer or agency head "shall discuss the substance of the complaint ex parte with any representative of any party or with agency attorneys or agency staff involved in the prosecution or investigation of the complaint." IDAPA 04.11.01.423.02.b.

Mr. Baxter served as both the investigative attorney for the Department, examined and prepared its witnesses, and also served as the advisory attorney to the Director acting in his capacity as the hearing officer. He admitted at the prehearing conference on August 14, 2015, that he would both present the Department's evidence and advise the Director. Tr. 08/14/15 prehearing conf., p. 49, l. 11-p. 50, l. 11.

Ms. Cresto testified that Mr. Baxter continued to act in both roles throughout the contested case hearing. Ms. Cresto admitted that during the course of the contested case proceedings she had had multiple conversations with the Director concerning the subject matter of the proceedings and the evidence that had been presented during the hearing. Tr. Vol. V, p. 1588, l. 25-1589, l. 10. She had not disclosed that information in earlier questioning because the Department's counsel, Mr. Baxter, was also present during those three-party conversations and she thought these conversations were privileged. *Id.*, p. 1585, l. 10-1586, l. 15.

Idaho Code § 42-1701A provides that all IDWR hearings shall be conducted in accordance with IDAPA. Therefore, analysis of whether the necessary process was provided requires an inquiry into whether the provisions of IDAPA were substantially complied with. *In Re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 220 P.3d 318 (2009). As we have seen, the Idaho Administrative Rules were not complied with, and therefore procedural due process was denied as a matter of law, prejudicing the substantial right of the parties to an unbiased and impartial adjudicative process.

"Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (internal quotations omitted); *see Cowan*, 143 Idaho at 510, 148 P.3d at 1256. Due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Castaneda v Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998) *quoting Sweitzer v. Dean*, 118 Idaho 568, 573, 798 P.2d 27, 32 (1990). The parties to the contested case were deprived of the right to be heard in a meaningful manner when the presiding officer's attorney was working both to investigate and prosecute the contested case.

The Attorney General's office was required to provide separate counsel to the agency head from the deputy prosecuting the action to avoid improper off-the-record *ex parte* contacts between the attorney and the agency head. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Board*, 145 P.3d 462, 473 (Cal. 2006). In *Martin v. Sizemore*, 78 S.W.3d 249, 265 (Tenn.App. 2001), the court held that a licensee before a board had been deprived his due process rights because the Board's attorneys had acted in both advisory and adjudicative roles to the Board:

> A combination of prosecutorial and adjudicative functions is the most problematic combination for procedural due process purposes. A prosecutor, by definition, is a partisan advocate for a particular position or point of view. The role is inconsistent with the objectivity expected of administrative decision-makers. Accordingly, to permit an advocate for one party to act as the legal advisor for the decision-maker creates a substantial risk that the advice given to the decision-maker will be skewed. *Howitt v. Superior Court*, 5 Cal. Rptr. 2d at 202. However, the risk of bias becomes intolerably high only when the prosecutor serves as the decision-maker's advisor in the same or a related proceeding. Thus, an administrative agency's staff counsel may permissibly prosecute a case before the agency when an independent hearing officer presides over the contested case hearing and the prosecutor plays no role in the agency's deliberations. *Ogg v. Louisiana State Bd. of Chiropractic Exam'rs*, 602 So. 2d 749, 752-53 (La. Ct. App. 1992).

Here Mr. Baxter was both the investigative attorney for the Department, prosecuting the contested case, and the Presiding Officer's advisor throughout the action. This created the substantial risk that "the advice given to the decision-maker [was] skewed." *Id.* Therefore, the risk that the parties' procedural due process rights were violated is "intolerably high," and the Director's Amended Order must be vacated. *Id.*

E. The Director Improperly Took "Official Notice" of Inadequately Identified Records and Documents

Part and parcel of the improper reach outside the hearing record to discuss the case with agency personnel and the prosecuting attorney, the Director also reached well beyond the matters introduced into evidence at the hearing to a wide-range of material not properly disclosed to the Parties.

The Boise Project objected to the Agency Record because the Director had improperly taken "official notice" of documents that were not identified in a manner that gave the parties a meaningful opportunity to review, object or rebut the information that was "officially noticed" and relied upon by the Director in his Final Amended Order. *See* Boise Project's Objection to Agency Record and Motion to Augment, Case No. CV-WA-2015-21376, January 7, 2016 ("Objection"). Idaho Code § 67-5248(a)(2) provides that the findings of fact of the presiding officer in a contested order "must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding."

> Parties shall be notified of the **specific facts or material noticed** and source thereof, including any staff memoranda and data. Notice should be provided **either before or during the hearing,** and **must be provided before the issuance of any order** that is based in whole or in part on facts or material noticed. Parties must be afforded a timely and meaningful opportunity to contest and rebut the facts or material so noticed.

Idaho Code § 67-5251 (emphasis added).

The Department's procedural rule 603 closely resembles Idaho Code § 67-5251 but further provides that "[o]fficial notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts with the agency's specialized knowledge." IDAPA 37.01.01.602. However, taking notice of technical or scientific facts within the Department's specialized knowledge does not relieve it of the burden of providing official notice in such a manner as to provide the parties with "an opportunity to contest and rebut the facts or material officially noticed." *Id.*

The Boise Project objected to the Director's notice of the entire water rights backfiles for water right nos. 63-303, 63-2158, 63-3614, 63-3618, 63-5261, and 63-5262, as well as the Director's taking official notice of all "those documents in Basin Wide 17 to the extent that they're relevant." Tr. Vol. V, p. 1601, ll.1-3; Objection, pp. 3-4. The Director argued that he was "only required to provide notice of the materials he intends to take notice of, the source of those materials, and to provide the notice before or during the hearing," and that he was not required to provide any specificity as to which portions of the vast swaths of documents identified he would or would not rely upon. Order Settling the Agency Record and Transcript, January 19, 2016, p. 4 ("Order Settling Record").

In *Application of Citizens Util Co.*, 82 Idaho 208, 214-215, 351 P.2d 487, 490 (1960), the Supreme Court made it clear that the facts relied upon must be identified in the record.

> It is generally held that where the commission intends to consider and rely upon facts coming to its knowledge in other cases, such facts must be brought on the record in the pending proceedings in such manner that the parties affected thereby will be afforded an opportunity to test the accuracy, applicability, or relevancy of such facts, and to refute same, and that findings, based on evidence not in the record cannot be sustained. A hearing at which the applicant is fully advised of the claims of the opposition and of the facts which may be weighed against him, and at which he is given full opportunity to test and refute such claims and such facts, and to present his side of the issues in relation thereto, is essential to due process.

Id. (citations omitted).

The back files and adjudication files for the seven water right numbers that the Director stated he was taking official notice of total 2,790 pages, not including pleadings and other documents filed in the proceedings leading to the water rights' recommendation or disallowance, and also not including the entire Basin Wide 17 proceedings, and whatever subset of those pleadings, orders, transcripts and exhibits the Director may have deemed "relevant." Tr. Vol. V, p. 1601, ll.1-3. Objection, pp. 3-4. See R. 001425 (plucking a statement from Director Allred made in 1974 in reference to Basin 01 from the State's briefing in Basin Wide 17). Under these circumstances, the Director's blanket assertion of official notice, without further advance notice of what facts found in those documents that he intended to rely upon, deprived the parties of their procedural due process rights. *Application of Citizens Util Co., supra.*

The Boise Project also objected to the blanket official notice under the titles "WD63 Black Books" and "WD63 Records of Water Administration," because the Director had the obligation to notify the parties of the specific Black Books and Records of Water Administration, and the facts contained therein, that he intended to rely upon, but he didn't. Objection, p. 5. While it is true that a hearing officer may rely upon "its own expertise [if] it has the background to do so, it must refer to matters in the record to substantiate its conclusions or place such matters in the record itself." *Boise Water Corp. v. Idaho Pub. Util. Comm'n*, 97 Idaho 832, 842, 552 P.2d 163, 173 (1976). The Director's reference to taking official notice of "WD 63 Records of Administration" is so vague as to be unidentifiable.

The parties still don't know specifically what the Director looked to among all of the officially noticed records to support his decision. *See* R. 001249-51 (generic references to what the "black books" do or do not say). We do know that he reached beyond the Basin 63 black

books to rely upon at least some of the Basin 01 black books, which were not introduced in the record. R. 001161. As a result, the Director's Amended Final Order is arbitrary and capricious, not supported by substantial evidence in the record, and deprived the parties of their substantial right to procedural due process. Accordingly, the Director's Amended Final Order should be vacated.

F. The Director Initiated and Prosecuted the Contested Case After Late Claims Were Filed by Reclamation and the Boise Project, Refused to Stay the Case, Putting the Parties to Unnecessary Duplicate Efforts and Expense, Resulting in Inconsistent Decisions

The Director initiated the Contested Case on his own without the support of any party, and refused to dismiss or stay the matter knowing that overlapping issues were being addressed in the SRBA proceedings, ultimately resulting in inconsistent findings and orders and substantial unnecessary and duplicative costs to the litigants. Tr. 0012/6/13 Status Conf., p. 4, ll. 10-12. In October 2014, the Boise Project moved the Director to dismiss the proceeding and initiate rulemaking. R. 000208-221. The Ditch Companies also moved to dismiss or stay the proceedings because the same issues that the Director called in his contested case were pending before the SRBA court, which ultimately has the authority to decide the legal issue regarding the property interests of the parties. R. 000259-262. The Director refused to stay or dismiss the matter claiming that the issue of whether water released for flood control purposes counts toward the initial fill of a water right was solely the Director's prerogative.

The determination of whether to proceed with an action where a similar case is pending in a separate proceeding is discretionary. *Diet Center, Inc. v. Basford,* 124 Idaho 20, 22, 855 P.2d 481, 483 (Ct. App. 1993). When a discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion

and consistently with any legal standards applicable to the specific choices before it; and (3) whether the decision was reached by an exercise of reason. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

When addressing a motion to stay or dismiss a proceeding based on the potential for inconsistent determinations, the "court must evaluate the identity of the real parties in interest and the degree to which the claims or issues are similar... [and] whether the court in which the matter already is pending is in a position to determine the whole controversy and to settle all the rights of the parties." *Diet Ctr. v. Basford*, 124 Idaho 20, 855 P.2d 481 (Ct. App. 1993) (*additional cites omitted*). The court may take into account "objectives of judicial economy, minimizing costs and delay to litigants, obtaining prompt and orderly disposition of each claim or issue, and avoiding potentially inconsistent judgment." *Id. citing Wing*, 106 Idaho at 908, 684 P.2d at 310.

The parties at the outset advised the Director that he was taking up issues that were pending before the SRBA court. R. 000049. On December 31, 2013, the Director had recommended that the late claims be disallowed and that "the use of floodwaters captured in evacuated flood control space in on-stream reservoirs is an historical practice. The Department recommends that the historical practice be recognized by the SRBA through a general provision." *Memorandum Decision and Order Granting Ditch Companies' and Boise Project's Motions for Summary Judgment*, p. 9 (Oct. 9, 2015). SRBA sub-case no. 63-33733. The Director put the issue of the legal right to capture flood waters in evacuated space at issue in his recommendation to the SRBA Court in the late claim proceeding. He knew that the risk of inconsistent determinations existed. Nevertheless, he forged ahead, denying all motions to stay or dismiss the proceedings. R. 000348. *See also* R. 001330.

When the request to stay the proceedings was raised again in the August 14, 2015 status conference, the Director admitted that, "whether or how the accounting process comports with prior-appropriation doctrine requirements," is a central and germane issue, and "whether and to what extent federal flood-control operations affect the accrual of water to existing beneficial use storage rights," is also a "central issue." Tr. 08/14/15 Prehearing Conf., pp. 11 ll. 20-25, p. 12 ll. 2-6. He went on to say, "that that issue of whether that operation and that physical fill has any bearing on the accounting at all, or in what way it does, was a central part of the factual issues that we'll look at." Tr. 08/14/15 Prehearing Conf., p 12, ll. 9-16. Later in the conference counsel for the Ditch Companies raised the issue again:

> MR. WALDERA: Nobody's requested this contested case. You initiated it on your own. What is the rush? Why—I think you owe us a response where you identify what is the rush to have this done prior to those late claims that are pending and before the SRBA court?
> HEARING OFFICER: Because I've been assigned a responsibility, and I intend to follow through with it.
> MR. WALDERA: And that doesn't answer the question. What's the rush to have it done before?
> THE HEARING OFFICER: I don't think I have to answer that question.
> MR. WALDERA: But you recognize there's late claims, and that has issues that are very similar before them in front of the SRBA court?
> THE HEARING OFFICER: Well, I think there are issues that are in front of the SRBA Court that are somewhat related, but they are different issues.
> MR. WALDERA: You feel compelled to have this resolved before then?
> THE HEARING OFFICER: I feel compelled to hold the hearing and issue a decision.
> MR. WALDERA: Well, I guess, again, we've renewed that motion to stay, because I think it's unnecessary and it's a waste at this point, based on the fact that there's dual tracks. The late claim was pending before this contested case. I'm just making that record.

Tr. 08/14/15 Prehearing Conf., p. 58, l. 9-p. 59, l. 12 (emphasis added).

The Director's order denying the motion to stay the proceedings does not address whether the matter is one of discretion or how he reached his conclusion or the reasons for proceeding. He admits that the two proceedings overlapped. Indeed, his Amended Final Order

directly contradicted the Special Master's recommendation on summary judgment motions in the late claims subcases. [15] The Director's statement that he felt "compelled" to carry on the case was arbitrary and capricious in the face of the evidence that the parties were subject to inconsistent rulings before two tribunals. He was not "compelled" to move ahead. No one "assigned" him the duty of calling a contested case. He just wanted to decide the issues himself.

G. The Director's Determination that Paper Fill Satisfies Reservoir Storage Rights is a *De Facto* Rulemaking in Violation of the APA and ASARCO

The Director determined that "paper fill" of a reservoir "satisfies" the storage water right, regardless of the amount of water actually stored in the reservoir, and that there is no legal right to store water in the reservoir thereafter. According to the Director, any subsequent storage is not authorized by the water rights, but is a matter of storing "excess water" which can be accomplished solely as authorized by the Director.[16] R. 001296.

The Director concedes that in reaching these conclusions, he did not follow the procedure set out in the Idaho Administrative Procedure Act for rulemaking. A rule is "the whole or part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter that implements, interprets or prescribes (a) law or policy; or (b) the procedures or practice requirements of an agency." Idaho Code § 67-5201(19). The Idaho Supreme Court has explained the statute means that an agency action is a rule, "if it (1) is a statement of general applicability and (2) implements, interprets or prescribes existing law." *ASARCO v. State*, 138 Idaho 719, 723, 69 P.3d 139, 223 (2003). *Gilmore, supra*, at 286 ("if the

[15] The SRBA Special Master entered his Summary Judgment order in the cross motions for summary judgment on October 9, 2015, approximately two weeks before the Director issued his Amended Final Order. The decisions are inconsistent and the same parties are now appealing the two separate decisions simultaneously before this Court. *See also* R.001320 and R. 001402-1403.

[16] This conclusion is contrary to the decision of the Special Master of this Court which the Director contends is not binding and that he is free to ignore. R.001402-1403; R. 001330.

agency desires to adopt a 'statement ... that ... prescribes ... law, it must comply with the APA's rulemaking procedures) (ellipses and emphasis in original).

The Director's determination that water entering the reservoir up to the point of "paper fill" under the accounting program constitutes legal "satisfaction" of the water right clearly meets these standards prescribed by the statute and the Court for a rulemaking. In fact, he says that his methodology "implements three principles of Idaho water law." R. 001294. What could be more clear?

The Supreme Court has provided "further guidance" in a six-part test examining the characteristics of the agency action to determine when an agency action requires rulemaking. Does it:

1. Have wide coverage
2. Apply generally and uniformly
3. Operate only in future cases
4. Prescribe the legal standard or directive not otherwise provided by the enabling statute
5. Express agency policy not previously expressed, and
6. Interprets law or general policy.
7.

Id.

An action taken by an agency not adopted in substantial compliance with the requirements of the APA is voidable. *Id.*, p. 725.

In *ASARCO*, the Court held that a TMDL promulgated by the Idaho Department of Environmental Quality (DEQ) was in fact a rule that could only be established through formal rulemaking, because, applying the six-part test, the TMDL functioned as a rule. A brief recap of the TMDL process explains why. DEQ is required to write a TMDL (total maximum daily load) to allocate pollutant loads among various users on a water body, so that the water body as a whole will meet water quality standards previously set by the DEQ. In other words, the TMDL

assigns loads of how much pollutant a particular user is entitled to discharge into a particular stream. The Supreme Court held that the TMDL, which applied to all current and future discharges in a specific water body (i.e., the Coeur d'Alene River), had "wide coverage." *Id.* at 723. The Court determined that the TMDL applies generally and uniformly because it creates a numerical limit or budget for a given water body, and then from that numerical limit establishes load allocations and waste load allocations. *Id.* at 723-24. The TMDL operated only in future cases because the agency did not use the TMDL to adjudicate past actions by the parties. *Id.* at 724. The TMDL prescribes new legal standards because the limits established in the TMDL for load and waste load allocations provides legal standards that are not explicit in either the Clean Water Act or the Idaho Water Quality Act. *Id.* Further, the TMDL expresses new policy as it applies to the numerical limits, but also to the determination of what steps are necessary to achieve water quality standards. *Id.* The Court then determined that the TMDL implements existing law because the state water quality standards do not provide all the information necessary to promulgate a TMDL. *Id.* at 725.

In *ASARCO*, the state argued that the TMDL was not a rule because the agency chose not to engage in rulemaking. The Court rejected that argument, concluding that an agency action is not judged by what label the agency places on the action, but by what effect that action has on the parties. *Id.* at 723. The State makes the same error here that it did in *ASARCO*, arguing that it intentionally chose not to engage in rulemaking.

The Director's Order denying Boise Project's motion to dismiss explains the Director's rationale.[17] R. 000335. The Director argued first that *ASARCO* did not apply to it, i.e., was "not

[17] Any other explanation the Department's attorneys may offer to support the Director's decision not to engage in rulemaking would simply be litigation-driven *post hoc* argument, entitled to no deference by this court. *See Martin v. Occupational Safety and Health Review Commission,* 499 U.S. 144 (1991)(Our decisions indicate that agency

controlling." R. 000337. The Director asserted that since he was not creating a new water right quantity (i.e., a numeric standard), then *ASARCO* does not apply. Of course, the Director has no authority to establish any quantity for the water rights. The Director just has the authority to distribute the limited amount of water available to the water users in a basin. Idaho Code § 42-602. The TMDL set a policy on how to allocate the scarce resource, i.e., pollution loads, among the various users in a basin. The Director is doing exactly the same thing here, setting a policy on how to allocate a scarce resource, a quantity of water, among the various users. The Director's policy deems the storage water right completely "satisfied" when "paper fill" is determined to have occurred so he can make water available to other users, past, present and future, on this river system. R. 0001293-1294. *See* Tr. Vol. IV, p. 1248, ll. 8-20 (Department goal of making water available to juniors).

The Director then contended that *State v. Alford*, 139 Idaho 595, 83 P.3d 139 (Ct. App. 2004), grants him carte blanche to establish his "paper fill" rule without regard to the APA. R. 0003337-38. He is wrong. In *Alford*, the Court of Appeals held that rulemaking was not necessary for the policy to "authorize the use of certain breath testing equipment by law enforcement agencies." *Id.* at 598. *Alford* would stand for the proposition that the Department would not be required to engage in rulemaking to decide what types of measuring devices would be appropriate for the Director to use in carrying out his obligations to measure water.[18] It does not mean he can select procedures for implementing water delivery without rulemaking. Thus, the Director could select a Cipoletti weir, or a certain type of totalizing flow meter, or other

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"litigating positions" are not entitled to deference when they are merely appellate counsel's "post hoc rationalizations" for agency action, advanced for the first time in the reviewing court.)

[18] This conclusion is confirmed in the recent decisions of *State v. Riendeau*, 159 Idaho 52, 355 P.3d 1282 (2015) and *State v. Haynes*, 159 Idaho 36, 355 P.3d 1266 (2015). These cases held that the selection of a type of device for measuring breath alcohol was not subject to rulemaking, per *Alford*, but that under *ASARCO* the selection of procedures for conducting testing for breath alcohol concentration did require rulemaking. Since the agency did not follow the rulemaking procedures in adopting the testing procedures, the procedures were struck down as void.

measuring device, and, under the reasoning of *Alford*, that decision would not require a rulemaking. This is not what the Director is suggesting here. The Director is not saying that he will use a certain device to measure water to determine whether or not the water users have received the water they are entitled to. Instead, he is telling the storage right users what water they are entitled to take and what water they are not. He is making a sweeping legal pronouncement that, no matter what type of device is used to measure the storage, once "paper fill" occurs under the Department's accounting system, the water right is deemed "satisfied." Clearly this is a substantive legal matter, not a question of deciding what type of devices to use to measure water or breath alcohol.

Then, the Director argues that since he has a duty to supervise the watermasters and to distribute water in accordance with the prior appropriation doctrine, he can choose how to do so without rulemaking. He cites to *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994), to claim that his duty to deliver water is "clear and executive" and beyond the rulemaking requirements of the APA. The Director has an undoubted duty to deliver water in accordance with the prior appropriation doctrine. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 800, 252 P 3d 71, 81 (2011), *quoting Beecher v. Cassia Creek Irrigation Company*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944); Idaho Constitution Article XV, § 3. But, in *Musser*, the Supreme Court rejected the Director's argument that his discretion to decide how to deliver water shielded him from court review for his failure to protect the Mussers' water right. The courts have the authority to issue a mandamus requiring the Director to distribute water to Musser in accordance with his right. *Id.*, at 395. Similarly, the fact that the Director has a legal duty to distribute water does not free him from his obligation to comply with the APA.

Then the Director explains that the whole purpose of this contested case is simply to "document" the existing methods and procedures to "inform the water users of how the existing system works." R. 000338. In other words, this contested case is intended to document an unclear existing policy, that exists without any developed record, and that is so poorly explained to the water users that a new process is necessary to document the Department's procedures and policies regarding filling reservoirs in this basin. By saying he is establishing and documenting policy, he proves this issue requires rulemaking.

The Director then asserts that this case does not involve "wide coverage" because it does not apply to a "large segment" of the general public. According to the Director, this case merely involves storage deliveries to a small group of water users. Clearly, the Department does not believe its own rhetoric. When the Department sent out notice of the contested case proceeding, it notified every water user in Basin 63, not just the storage right holders. R. 00001. The Director justifies his decision to employ "paper fill" as "satisfaction" to protect junior water users from the storage right holders and/or the federal government. R. 001278. *See also* Tr. Vol. I, p. 170, l. 15-p. 171, l. 9. If his decision does not affect the other users on the system, but only the storage right holders, he could not justify his decision as protecting these other users. He allowed United Water to participate to protect its junior water rights R. 000142-147. Clearly, the Director's decision imposing a "paper fill" rule on the Boise River watershed affects all water users in the Boise watershed. This is exactly the type of "wide coverage" that was found to apply to the TMDL in *ASARCO*, which was applied just to the Coeur d'Alene River, but not to other water bodies. A basin-specific TMDL has "wide coverage" as that term was interpreted in *ASARCO*. The Boise River basin-specific accounting likewise has "wide coverage."

The Director then asserts that the "paper fill" rule applies only in Water District 63. R. 000339. The irony behind this claim is that during the hearing, the Department called a number of former directors to defend the "paper fill" rule who testified that it was a statewide rule originating in the Upper Snake and then applied in the Boise. Tr. Vol. I, p. 245, l. 17-p. 246, l. 20; Tr. Vol. II, p. 277, l. 9-p. 279, l. 25, Tr. Vol. III, p. 658, l. 3-p. 659, l. 6 ("rule" established in 1977). This unwritten "statewide" "rule" is the basis for the Director's decision, yet in his order denying pre-hearing motions, he claimed there is no such wide-spread application of "paper fill" rule. R. 000340. The Director's claim that his "paper fill" rule does not have wide coverage is not supported by substantial competent evidence.

The Director then claims that the third *ASARCO* factor is not satisfied because the contested case proceeding does not operate prospectively only since the rule has been in place since 1986. If nothing will change, why was a contested case convened? That the Director did not intend to change anything is not the proper inquiry. The TMDL operated only prospectively because it "does not adjudicate past actions by the Mining Companies or any other party." *ASARCO*, 138 Idaho at 724. In this proceeding, the Director did not adjudicate any past actions; rather he decided to confirm a statewide "paper fill" "rule" in deeming that storage water rights are "satisfied" in Basin 63. R. 001308.

Next, the Director contends that the fourth factor is not satisfied because he is not prescribing a legal standard. R. 000340. In fact, *ASARCO* says that the fourth factor is prescribing a legal standard not provided by the enabling statute. The Director is statutorily required to fill the water rights in accordance with the prior appropriation doctrine. Idaho Code § 42-602. He concluded that there is no legal right to store water in the reservoir under the existing water right and the prior appropriation doctrine once "paper fill" has been reached. Then

the Director says that water entering the reservoirs following "paper fill" is legally available not to the storage right holders, but to junior users. He next articulates a policy allowing storage of water without a water right. R. 001294. Clearly, this decision prescribes legal standards that affect the legal rights of not only the storage right holders, but all Boise basin water users. He is prescribing a legal standard that he is insisting that the watermaster follow. In fact, during the hearing, the Director became incensed at the watermaster's testimony that the accounting program was mere guidance as opposed to mandatory procedures that he must follow. Tr. Vol. III, p. 929, l. 17-p. 944, l. 20.

The Director asserted that the fifth *ASARCO* factor did not apply because he would not express agency policy not previously expressed, but simply rely on "existing records." R. 000340. His prediction in his Order that he would not "modify" the water accounting procedures came true in his final decision. R. 001308. Even so, the Director's Order denying the pre-hearing motions is internally inconsistent on this very point. He recognizes that he is "without a record explaining how water is counted/credited to the reservoirs at issue under existing measures and procedures. . ." R. 000338. Then he claims later that the "existing records documented and explain the water accounting process." R. 000340. The Department's Staff Memo admits there is no documentation that the 1986 procedures were ever explained to the water users. R.AE. 00001-13 *Accord.* Tr. Vol. I., p. 202, ll. 3-20; Tr. Vol. III, p. 691, l. 10-p. 692, l. 23; Tr. Vol. III, p. 870, l. 12-p. 872, l. 9; Tr. Vol. IV, p. 1077, l. 7-p. 1078, l. 8. Former Director Tuthill admitted there has never been any documentation of the Department's "paper fill" rule. Tr. Vol. III, p. 663, ll. 7-15. The fact that the Department has an unwritten policy that it wishes to formally adopt as agency policy certainly meets the standard of "expression of agency policy not previously expressed." *ASARCO*, 138 Idaho at 724.

The Director's final contention is that the agency policy does not implement or interpret existing law. R. 000340. This claim is flatly contradicted by the Amended Final Order. R. 001294, (implements Idaho water law); R. 001308 (consistent with priority administration under Idaho law).

The decision should be vacated. If the Director wishes to adopt his "paper fill" rule, he must follow APA rulemaking procedures.

H. The *Sua Sponte* Proceeding Initiated by the Director was not Properly a Contested Case

As the Supreme Court made clear in *ASARCO*, 138 Idaho at 723, an agency determination to label a proceeding as a rule or contested case does not make it so. Rather, the Court must look at the effect of the decision to determine the correct process that must be followed. The distinction between a rule and a contested case has been likened to the agency acting in its "legislative" capacity for a rule and its "judicial" capacity for contested cases. *Gilmore, supra*; p. 284. This distinction was recognized by the U.S. Supreme Court in *Londoner v. Denver*, 210 U.S. 373 (1908), and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915); *see also United States v. Florida East Coast Ry*, 410 U.S. 224, 244 (1973) (same). Thus, contested case *procedures* are required where a "small number of persons . . . are exceptionally affected . . . upon individual grounds"; rulemaking *procedures*, are employed "where a rule of conduct applies to more than a few people." *Bi-Metallic*, *supra*, at 445 and 446.[19]

[19] Thus, in *Southern Nevada Operating Engineers Contract Compliance Trust v. Johnson*, 119 P.3d 720 (Nev 2005), the court held that a decision which affected a class of workers eligibility to receive prevailing wage was not a proper subject for a contested case, but should have been made through rulemaking. Deciding whether an individual fell in a class of worker is a proper subject for a contested case, but not whether the class as a whole qualified for coverage. The court refused to validate an agency's action in a contested case because it amounted to ad hoc rulemaking.

Here, the Director used the proceedings to make sweeping generalities about the legally enforceable nature of the Department's accounting procedures. R. 001230-1311. He chastised the Basin 63 watermaster for not employing those accounting procedures, Tr. Vol. III, p. 942, l. 17-p. 944, l. 20, and "rejected" the watermaster's testimony, R. 001257, including the watermaster's statement that he considered the accounting procedures merely advisory and not mandatory. Tr. Vol. III, p. 923, l. 23-p. 924, l. 9. Quite clearly, the Director views the Department's accounting as setting legal standards that affect all water users in the Boise.

The contested case in Basin 63 was not started with an application, a petition, or complaint from any person. Rather, the Director decided on his own to initiate this case. R. 00002-34. He claimed he did so because the Boise Project chairman had written him a letter asking how he would administer water rights following this court's Basin Wide 17 decision. R. 00001. The Director answered the letter informing the Boise Project that no change in the accounting program was necessary or contemplated as a result of the Basin Wide 17 decision, a decision which he affirmed in his amended final order. R. 000959, and R. 001230-1311. The Boise Project did not ask the Director to initiate a contested case, but asked him to dismiss it. R. 000041-50; R. 000208-221. The Director plowed ahead on his own accord.

None of the participants in the case meet the regulatory definitions of a "party."[20] The Boise Project and Ditch Companies are not Applicants/Claimants/Appellants under Rule 151. They have not filed any petition or "asked the agency to initiate a contested case" and are hence not Petitioners under Rule 152. They have not charged or been charged with a complaint and are not Complainants or Respondents under Rules 153 or 154. They have not opposed an application or claim and are not Protestants under Rule 155. They merely responded to the Director's

[20] United Water might technically qualify as an intervenor, but, of course, if there is not otherwise a contested case initiated by a party there would be nothing for United Water to intervene in.

demand that they take part, under protest R. 000041-50, because the Director threatened to make his decision regardless of whether any person participated. R. 000344; R. 00001.

As there are no "parties" under Rule 150, there is no basis for the Director to employ the contested case process, especially over the objection of the persons who would be affected by his decision. The Director has cited no instance where a contested case was initiated by an agency head without an application, petition, complaint, or similar request.[21] A contested case is analogous to a judicial proceeding, so allowing the agency to initiate a contested case and inviting all of Basin 63 water to participate would be like this Court determining it wanted to decide an issue and inviting people to provide testimony regarding an issue the Court described, clearly, an unprecedented act requiring the decision to be vacated.

I. The Director's Decision Exceeded his Statutory Authority to Act under a Contested Case Proceeding

The Director has also exceeded his authority by attempting to adjudicate the legal rights that the storage right holders acquired under their water rights. To hold a contested case the legislature must have granted the agency the authority to determine the particular issue. *Lochsa Falls LLC v. State*, 147 Idaho 232, 237, 207 P.3d 963, 968 (2009); *Westway Construction Inc. v. Idaho Transportation Dept.*, 139 Idaho 107, 112, 73 P.3d 721, 726 (2003).

Here, the legislature told the Director to deliver water under the prior appropriation doctrine. Idaho Code § 42-602. However, the Supreme Court has long held that it is beyond the power of the state engineer (now the Director) to determine the legal rights and responsibilities associated with the water rights. That is the duty of the judiciary, not the state engineer or director. Thus:

[21] An example of a contested case in water right proceedings is *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001), where an applicant appealed an order denying his transfer.

> The Power and duties of the engineer with reference to hearing the contest and cancelling the permit are pure matters of administration. He is in no way authorized to decide or determine what rights, if any, the permit holder has acquired under the permit, or by virtue of any acts taken in connection with the construction of the works authorized by the permit, or the diversion or appropriation of water in connection therewith.

Twin Falls Canal Co. v. Huff, 58 Idaho 587, 595, 76 P.2d 923 (1938).

In the Basin Wide 17 case, the Court recognized that the Director had a certain amount of discretion, but explained, "In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user." *A&B Irrigation Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014). No statute gives the Director authority to determine that a water right is satisfied by water that the holder cannot use and is prohibited from using. Since the Director exceeded his authority granted to him by the legislature by undertaking to define the legal rights of the water users, the proceeding was not a proper subject of a contested case and the decision must be reversed.

J. The Director's Decision fails to Comply with the Supreme Court's Directive that the Director's Accounting System must Account for the Water that has been Used

"The Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user." *A&B Irrigation District v. State*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014). Whenever the Director quotes from the Supreme Court's Basin Wide 17 decision, he always leaves out that directive. He prefers to point to statements about agency expertise and discretion of the Director. He never tries to explain what this language means or now it limits his authority. Yet, there is no doubt that the Supreme Court meant exactly what it said.

The Director first recognizes that the Boise reservoir system can both pass water through or fill to a certain point and then release water. He uses the term "bypass" to describe the former and "evacuations" to describe the latter. *Id.* at 001243. The testimony in the hearing is

unequivocal. Water that is released for flood control by either of these methods is water that cannot be used by the storage right holders. The water that is put to beneficial use by the irrigators (or "used" by the irrigators) is the water that fills the reservoir following flood control releases. Tr. Vol. IV, p. 1185, ll. 4-22; Tr. Vol. IV, p. 1081, l. 13-p. 1082, l. 24, Tr. Vol. IV, p. 1236, ll. 6-25. The Director's SRBA recommendation recognizes this truth. Flood control releases are made from Lucky Peak Dam just upstream from the City of Boise. Immediately downstream of Lucky Peak is Diversion Dam and the head of the New York Canal. That is the only location on the Boise River that Boise Project water users have to take water out of the river. Tr. Vol. III, p. 970, l.15-p. 971, l. 8. Once water passes Diversion Dam, that water cannot be diverted or "used" by the Boise Project. *Id.*

The Director never concludes that the storage right holders have "used" any of the water that has been released for flood control and accounted for by the accounting program toward "satisfaction" of the storage water rights. Rather, he suggests that the Court must have meant something different than water "used" by the water users. He claims that he can only count water that has entered the reservoir behind the dam because the dam is the point of diversion. R. 001289. This claim that is not possible to count physical storage or releases from Lucky Peak for flood control is not supported by the record, because those figures are measured daily. Tr. Vol. V, p. 1369-1370 (watermaster tracks water beneficially used by the water users). The Department has access to how much water is released from Lucky Peak on a daily basis and how much is taken by storage right and natural flow users on a daily basis. Tr. Vol. V, p. 1483 l. 20-p. 1484 l. 5.

The Director contends that accounting for water actually "used" by the irrigators would preclude any distribution of water to junior users, R. 001299, until after the irrigators had put all

the water stored in the reservoir to beneficial use. This is nonsense. As with any other right, if the senior right holder is not actually using the water then water is available for diversion by the juniors. That is a fundamental principle of the prior appropriation system. So counting the water actually "used" by the storage users does not preclude all junior diversions. In fact, the current accounting system will not allow a user to take flood control releases that are occurring prior to "paper fill" without a storage right, resulting in water being flushed down the River past Middleton unavailable for use by anyone. Tr. Vol. V, p. 1490 l. 4-p. 1492, l. 20. The Boise River Water Control Manual specifically contemplates that when excess water is being released for flood control purposes, it is available for diversion and use by juniors. R.AE. 003739-3841, at 3808-3809; *see also* R.AE. 004225-4228, 004256-4260, and 004261-4262. Tr. Vol. V, p. 1478, l. 4-p. 1480, l. 8.

United States v. Pioneer Irr. Dist., 144 Idaho 106, 157 P.3d 600 (2007), provides an important indication as to what the Court means by water "used" by the water users. In *Pioneer*, the Court held that the water users and the irrigation entities were equitable title holders to the storage water rights which gave them the right to the use of the water. *Id.* at 115, 157 P.3d at 109. The Court made it clear that the right to the use of the water is tied to the concept of beneficial use.

> In Idaho, is it a 'well-settled rule' of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law.

Id. at 110, 157 P.3d at 604, *quoting Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 60 (1924);. *See also Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 509 (2007) (owners of the cattle drank water were the ones who used the water, not the United States).

The Director acknowledges that flood control releases provide significant public benefit. R. 001302. He agrees that flood control releases are not purposes of use under the reservoir water rights. *Id.* These admissions further demonstrates that water released for flood control is not "used" by the water right holders. Rather, these releases provide a significant public benefit, including protecting the City of Boise, the State Capital, and downstream water users from significant damage. *See also Kuntz v. Utah Power & Light Co.*, 117 Idaho 901, 792 P.2d 926 (1990) (flood control releases benefit the general public and downstream landowners).

Flood control releases in the Boise are not beneficially used by the spaceholders or landowners. Tr. Vol I, p. 201, l. 6-p. 202, l. 7 ("storage water that's released past Middleton" is not put to beneficial use); Tr. Vol. IV, p. 1076, ll. 3-14, p. 1082 ll. 2-16 (flood control releases not used by Boise Project districts); *Id.*, p. 1236, ll. 10-25 (Boise Project and Wilder do not use water released for flood control); *Id.*, p.1185, l 10-p. 1186, l. 7 (water released for flood control not used by Boise-Kuna irrigators); Tr. Vol. III, p. 970, l. 15-p. 971, l. 7 (only diversion from the river for the Boise Project is at Diversion Dam and there is no way to divert water passing that point, and no use of flood control releases). After a flood control release, there is often empty reservoir space – and water users cannot irrigate with empty space. Unless that space is filled with water from run off, there will be no water to beneficially use. The record is unequivocal that as far back as 1916, extending through the 1954 contracts and through the 1985 Water Control Manual, water that physically filled the reservoirs after flood control releases has been put to beneficial use by the water users.

The Director states that because flood control releases take place in water rich years, then there is no "scarcity" in those years for priority administration. R. 001302. The scarcity comes not when water is being released for flood control. The Water Control Manual specifically

recognizes that these releases of flood waters are "excess flows" and are available for water users to divert. Tr. Vol. V, p. 1489, l. 20-p. 1491, l. 2; R.AE. 003702 (Ex. 2186). However, scarcity can come into play later in a year when there has been flood control. Because of the variable nature of water run-off in this climate, there are times when the rivers provide both more or less water than can be put to use, even in the same irrigation season. E.g., *Lee. v. Hanford*, 21 Idaho 327, 331, 121 P. 558 (1912). There are times of scarcity during a flood year when the flood waters recede and run off is necessary to fill the reservoirs. That is exactly how the Boise River system was designed to operate. R.AE. 003702 (Ex. 2186). In those times of scarcity, storage right holders need the right to fill the reservoir under their existing water rights, a right denied to them by the Director's improper interpretation of their water rights. This interpretation must be reversed.

K. The Director's Decision Put the Water Users' Water Rights and the Ability to Fill the Reservoir at Significant Risk

The Director's Order upholds his method of accounting primarily on the theory that everything works fine because he allows the reservoirs to fill after the flood releases. He essentially promises this Court and the water users that there will always be plenty of water to fill the reservoirs in a flood control season so there is no reason to worry. The Director will take care of them. R. 001293-1305. The Director's approach does not provide the water users with any legal protection for the ability to fill those reservoirs. That is so because the Director's Order concludes that the storage water rights are completely "satisfied" when "paper fill" occurs. R. 001308.

A storage water right is a property right appurtenant to the lands within the districts using the water. Idaho Code § 55-101; *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797 (2011); *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862,

878 (2007); *U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 115 (2007). This right cannot be taken without due process and payment of just compensation. *Clear Springs,* 150 Idaho at 797, *quoting Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651 (1915). Any diversion and/or use of water without a water right is prohibited. Idaho Code § 42-201(2) ("No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists").

The Director asserts that he does not have to worry about Idaho Code § 42-201(2) because there is a "long-standing practice" that has allowed the storage right holders to store water without a water right. R. 00304. The Order does not say how this long standing practice was adopted or what the legal authorization for it is. The Director asserts that this historic practice "could be" recognized as necessary for administration of the water rights. R. 001298. The Director supports his approach by citing to Idaho Code § 42-1412(6), and *Idaho Conservation League v. State*, 131 Idaho 329, 334-35, 955 P.2d 1108, 1113-14 (1998) (general provision). R. 001296. Yet, Idaho Code § 42-1412(6) refers to the power of the Court to declare general conditions. Nothing in that code section gives the Director the right to declare general provisions dealing with "excess flows" or to create a "longstanding policy" to manage refill in an accounting program. There is no such general provision in Basin 63. So, the Director has taken it upon himself to declare that the law gives him the authority to use an accounting system to create a general provision where none exists. Then he claims that this un-codified, un-decreed accounting system protects the water users so they can have access to water to fill the reservoir following a flood control release.

This claim described in the accounting program as "unallocated storage" creates a huge risk for the water users. The Court has recognized,

> Many of the smaller streams extending into the mountains from the valleys of this state become dry during a portion of the irrigation season and supply no water whatever, and at other seasons of the year the flow in such stream is increased to a large volume, and when this is true the excess flow of water is subject to appropriation and use by anyone who can divert such waters and who will apply the same to beneficial use.

Lee v. Hanford, 21 Idaho 327, 331, 121 P. 558, 560 (1912). The Director's assertion is that there is no legal right to store the water filling the reservoir after the flood control release because it was "excess," means that this water would be available by appropriation for anybody who could take it. *Id.; Idaho Constitution, Article XV, § 53.* This court has rejected other efforts by the Director to prevent parties from appropriating unappropriated waters of the State as beyond his authority. *North Snake Groundwater District v. IDWR,* p. 5, CV-2015-083 (Aug. 7, 2015).

The Director asserts that because no one has done so, the so-called "excess" water cannot be appropriated. R. 001278. To support this position, the Director cites only to the testimony of Mr. Sutter for the proposition that there is only a small quantity of water available which could be appropriated following flood releases. R. 001278. This misstates Mr. Sutter's testimony. Mr. Sutter was discussing the small impact of "existing later priority rights" on the rule curves. Tr. Vol. II, p. 447, ll. 7-8. At another point in the Order, the Director recognizes the true magnitude of the potential impact, by admitting that in 1999 the reservoirs refilled with 600,000 acre feet after flood control. R. 001280. Under the Director's theory, this entire 600,000 acre feet would be subject to the ability of current and future juniors to take that water before the storage right holders. R. 001308. Contrary to the Director's decision, Mr. Sutter would not "speak to" whether that 600,000 acre feet of "refill" was available for appropriation. Tr. Vol II, p. 447, l. 21-

p. 448, l. 2. He also admitted that appropriation of the unallocated-for storage could affect "refill." *Id.* p. 457, ll. 13-18.

One of the main reasons that no one has been able to appropriate this water before now is that it was universally understood that the Boise was fully appropriated and that no water was available to be appropriated, except for water that was being released for flood control from Lucky Peak.[22] The Water Control Manual section written by the Department recognizes that water released for flood control is considered "excess" to the system, not the water that fills the reservoir following the flood control release. R.AE. 003782 (Ex. 2186). That is the main reason why there has been no appropriation. The Director then asserts that there is something wrong if the water rights refer to the Water Control Manual because it is a "federal" document. R. 001300-1302. Setting aside for a moment the fact that the Water Control Manual is a "joint" product of the Department and the federal agencies, R.AE. 004199-4201 (Ex. 3001), that was blessed by the Department, Tr. Vol. II, p. 459, l. 20-p. 460, l. 2, the fact is that the Manual is already used by this Court and the Department to describe Boise River water rights. R. 001290; water right no. 63-3618. R.AE. 000716-724 (Ex. 2015); R.AE.004227 (Ex. 3012); Tr. Vol. I, p. 290, l. 7-p. 292, l. 9; Tr. Vol. IV, p. 1006, LL. 8-11; R.AE. 004256-4260 at 4257-58 (Ex. 3040); R.AE. 004261-426 (Ex. 3041).

The water users are very concerned that downstream interests could demand that water be released from reservoirs for out of state purposes if, as the Director would have it, there is no protectable water right to store the water and no legal basis for the United States to retain the so-called access water in the reservoirs without a water right. Tr. Vol. IV, p. 1247, ll. 6-22; Tr. Vol.

[22] *Id.*, and Tr. Vol. IV, p. 1051, ll. 6-10 and p. 1277, ll. 1-12; Tr. Vol. IV, p. 1002, l. 19-p. 1003, l. 23 and p. 1006, ll. 8-11; Tr. Vol. V, p. 1374 l. 19-p. 1375, l. 5 and p. 1409, ll. 3-10; R.AE. 004225-4220 (Ex. 3012); R.AE. 004339-4230 (Ex. 3013); R.AE. 004256-60 (Ex. 3040); R.AE 004261-62 (Ex. 3041.)

V, p. 1496, ll. 2-25. In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the Court recognized the need to protect the water right users' legal interest in the storage rights because of the possibility the United States would demand water be released for non-Project purposes or even breach the contracts. *Id.* at 115, 157 P.3d at 609. The security the Supreme Court provided the water users with the *Pioneer* decision has been wiped out by the Directors' unilateral assertion that there is no right to store water in the reservoirs following a flood control release. For this reason, the Director's determination must be reversed.

L. The Director Mischaracterized the Pre-1986 Administration and Operations of the Boise River Reservoir System

The Director concluded the Department's 1986 accounting program is all that matters. R. 001308. The evidence offered by the irrigation entities was "largely irrelevant." R. 000892. However, the undisputed evidence of the historical operation and administration of the Boise River prior to the 1986 accounting program demonstrates that the storage rights were filled based on physical content and that "paper fill satisfaction" was not used.[23] The Director's Order asserting that the concept of "paper fill" as "satisfaction" (as embodied in his interpretation of the accounting program) merely continues practices in place long before 1986 is contrary to the evidence, arbitrary and capricious, without a basis in Idaho law, and deprives the Boise Project of its substantial right to have the water that it beneficially uses protected by a water right.

The Director's Order fundamentally misconstrues or disregards the facts. The claim that the 1986 accounting program is "consistent with pre-1986 accounting" is also contrary to the Department's assertion in this case that 1986 marked a new era in water rights administration. Tr. Vol. I, p. 171, ll. 6-15. The Director contends that "before 1986, the reservoir water rights

[23] Tr. Vol. II, p. 451, l. 6-p. 452, l. 7, and p. 497, ll. 13-21. Tr. Vol. II, p. 444 l. 14-p. 415, l. 6 (paper fill not considered in 1974 flood control report); Tr. Vol. III, p. 802, ll. 2-14 and p. 804, ll. 5-19; and p. 910, l. 20 and p. 968, ll. 1-14.

were rarely if ever administered in priority." *Id.* at 001275. This claim is not supported by the record. R.AE. 000493-598 (Ex. 2009). Prior to 1986, the reservoirs accrued to existing water rights based on physical fill, not "paper fill." Tr. Vol. 1, p. 178, ll. 7-11. There was no "unallocated storage account." Tr. Vol. II, p. 497, ll. 15-21. Prior to 1986 water released for flood control was "surplus flows" available for appropriation, and water stored after was stored under the existing water right. Tr. Vol. III, p. 850, l. 11-p. 851, l. 7. R.AE. 000469-429 (Ex. 2007 at pp. 9-13). Yet, the Director contends this water used to satisfy the storage accounts is unappropriated "excess" flow. R. 001278.

A portion of the Water Control Manual written by the Department states explicitly that:

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

R.AE. 003739-3841 at 3808 (Ex. 2186)(emphasis added). Tr. Vol. II, p. 620, ll. 7-20. Water released for flood control is "surplus" to the system, not the water stored in the reservoirs thereafter and allocated to the beneficial users on the day of allocation. The legal premise that water stored in the reservoirs after water has been released for flood control constitutes "excess flows" not appropriated by a water right is erroneous, arbitrary, and capricious.

M. The Boise River Moratorium Orders Refute the Director's Erroneous Excess Flow Theory

The Director's Order is at odds with the Boise River Moratorium Orders. "In 1977, a year of extremely low runoff from the upper Boise River watershed, IDWR formally acknowledged what had been understood by IDWR and Water District 63 water users for many years: the natural flow from the upper Boise River watershed above Lucky Peak is fully appropriated by existing water users." R.AE. 000474 (Ex. 2008, p. 6). Director Allred issued a staff

memorandum titled "Boise River Appropriations" declaring that "no additional water right permits for consumptive use of water during the period of June 15 to November 1[24] will be issued on the Boise River and tributaries in the reach upstream from Lucky Peak Reservoir." R.AE. 004202 (Ex. 3002). This is the time period when "refill" is occurring in the reservoirs. "The water in this reach of the River has been determined to be fully appropriated by the existing water users, and therefore, no water is available to any additional users." *Id.* He cautioned that people filing new applications should be made aware of the "limited season of use and possible denial of the permit." *Id.* Ever since then, the moratorium on new water rights has been continued, with some slight adjustment. R.AE. 004217-4220 (Ex. 3007, p. 3). The most recent extension of the moratorium order was issued in 2008, ordering:

> Surface waters in the Boise River or tributary to the Boise River upstream from Star Bridge is fully appropriated during the irrigation season and during much of the rest of the year. As stated in the May 3, 1995, Amended Moratorium Order for the Boise River Drainage:
>
> > Applications which propose use of surface water upstream from Star Bridge will be denied unless the applicant files an acceptable plan to mitigate or avoid any material injury to existing water right.

R.AE. 004221-4224 (Ex. 3008, p. 1) (emphasis added). Those times of the year when the water was not found to be fully appropriated generally coincide with the time of the year when flood control releases are being made. Tr. Vol. III, p. 670, l. 22-p. 671, l. 17.

Because the Boise River is fully appropriated, the watermaster recommended that new water right applications for diversions from the Boise River must be subject to the condition that "no diversion will take place under this right unless the river is in flood control." R.AE. 00475 (Ex. 2008, p. 7). This is because "[n]atural flow from the upper Boise River watershed is adequate to deliver water to new appropriations only during flood control operations with or

[24] Notably this is also the "refill" period. Tr. Vo. I, p. 160, ll. 17-21.

without the condition, but [he] wanted to make sure new water users had notice of the limited water supply for their rights." *Id.* This practice is unique to the Boise basin and consistent with the moratorium orders and with the premise that the "surplus flows" of the Boise River consist of water passed through the reservoirs for flood control. R.AE. 003739-3841 at 3808 (Ex. 2186). The Director's position that the water that enters the reservoirs after flood control releases is the water that surplus to the system, R. 001278, is not supported by the facts and is arbitrary and capricious.

Further evidence that flood control releases constitute the unappropriated water available in the Boise River is found in the conditions placed on juniors seeking to appropriate Boise River surface flows. The water right permit for water right no. 63-31409 includes the following condition:

> The right holder shall exercise this right only when authorized by the District 63 watermaster when the Boise River is on flood release below Lucky Peak dam/outlet. Flood releases shall be determined based upon the Memorandum of Agreement between the Department of Army and the Department of Interior for Flood Control Operations of Boise River Reservoirs, dated November 20, 1953, contracts with Reclamation contract holders in the Boise River reservoirs, the Water Control Manual for Boise River Reservoirs, dated April 1985, and any modifications adopted pursuant to the procedures required in these documents and federal laws. The right holder shall not seek directly or indirectly, any change to the flood control operations in the 1985 Water Control Manual for Boise River Reservoirs.

R.AE. 004225-4228, at 4227 (Ex. 3012). Tr. Vol. I, p. 290, l. 7-p. 292, l. 9. Ms. Cresto confirmed that this right and others in the Boise contain similar conditions limiting use only to times when the Boise River is in flood control, but that these conditions are not incorporated into the accounting program for administration; something that would be appropriate. Tr, Vol. II, p. 504, l. 8-p. 508, l. 20.

Beneficial use field examination reports for junior surface water rights on the Boise River recommended water right no. 63-12055 be "limited to times when Lucky Peak is spilling [because] it is [his] understanding that IDWR has considered the Boise River to have been fully appropriated prior to the filing of Permit No. 63-12055 and that only those waters that are passed through the Boise River reservoir system for flood control are available for appropriation." Tr. Vol. IV, p. 1006, ll. 8-11. R.AE. 004256-4260 at 4257-4258 (Ex. 3040); *see also* R.AE. 004261-4262 (Ex. 3041).

The Director makes no mention of the Boise River moratoria, or the conditions placed on junior water rights to limit them to take water only during flood control operations on the Boise River. These undisputed facts are entirely at odds with his current position that the water filling the reservoirs after flood control operations is "surplus" to the system and unappropriated. Even after the adoption of the accounting program in 1986, the Department has recognized that the only unappropriated water in the Boise River are flood flows, and that the water that is beneficially used by the water users after the day of allocation is appropriated under Reclamation's existing water rights. Because the decision is not supported by substantial competent evidence, it must be reversed.

N. The Director has Misstated the Evidence Concerning the Implementation of the 1986 Accounting Program

The Director's Order suggests that the watermaster asked for the "paper fill" procedure, that an extensive explanation on "paper fill" was supplied and that as of 1986, everyone was aware of and on board with the concept of "paper fill." R. 001258-1263. This perspective through the lens of the leading advocate of the "paper fill" concept is not supported by substantial competent evidence and leads to an arbitrary and capricious result.

The 1970s watermaster, Hank Koehling, and his predecessor, Roy Musselman, both used daily hand calculations and both filled the reservoir accounts based on physical contents on the day of maximum fill. Tr. Vol. II, p. 8368, l. 11-p. 369, l. 7 and p. 372, l. 3-p. 373, l. 13 and p. 881, l. 7-p. 882, l. 10. Water that was released for flood control was considered lost to the system and was not charged to the storage accounts. Tr. Vol. III, p. 860, ll. 4-12. The Department never advised Mr. Koehling that his method of treating the flood releases was improper. *Id.*, p. 861, ll. 2-5.

The Director contends when Mr. Sisco was elected as watermaster in the mid-1980s, he felt that Mr. Koehling's methods were not accurate and asked for guidance from the Department. R. 001258. The inference the Director would like to draw is that Mr. Sisco did not believe that the reservoir accounting by physical fill was proper. Not true. Mr. Sisco's main concern was that Mr. Koehling filled all three reservoirs just in priority and Mr. Sisco wanted to include the source or tributary of the water accruing to each reservoir. Tr. Vol. III, p. 871, l. 4-p. 872, l. 14. Mr. Sisco did not challenge the physical fill concept. The accounting program, other than the change to account by source was described as a "minor" change.

The Director relies heavily on a 1987 accounting paper which he says implemented this "paper fill" as "satisfaction" concept. R. 001258-62. The Director fails to even mention the 1987 letter from Director Higginson to counsel for some of the Boise water users. That letter describes the Water Control Manual as a "joint effort" by the state and federal agencies. R.AE. 004199-4201 (Ex. 3001). It also explains that this joint effort will lead to "increased assurance of refill for irrigation during the late season runoff." *Id.* Tr. Vol. III, p. 666 l. 3-p. 667, l. 6. So at the time the accounting procedures were brought to the Boise, the water users were being told that they would have "increased assurance" of refill, not less as the Director now insists.

The Director now tells a different story. He contends that the 1987 accounting paper reworked the entire water rights accounting system in the Boise. The watermaster did not understand that to be the case. He did not discuss this paper with the water users. Tr. Vol. III, p. 870, ll. 22-24. He did not ask for "paper fill." Nor did he ever communicate to the water users that their rights would henceforth be "satisfied" by "paper fill" or that they would have to fill without a water right. In fact, he administered the river to maximize storage in flood control years, without regard to the accounting precepts. *Id.* p. 894, ll. 3-17 and p. 919, l. 10-p. 92, l. 24.

The Director then suggests that everyone knew that this program was in place in 1986, and they have no reason to complain now. Again, the record does not support his belief. First, the Department's expert witness admitted that she could find no record that the "paper fill concept" was used before 1986 or that the water users were ever told that the accounting program ushered in the "paper fill" era. Tr. Vol. I, p. 200, ll. 11-25. The Department attended annual Water District 63 meetings, but never mentioned "paper fill" as "satisfaction." Tr. Vol. IV, p. 1046, ll. 18-23. Prior to the Basin Wide 17 issue, no one from the Department ever told the Basin 63 water users their rights were "satisfied" by "paper fill."[25]

Then the Director points to a letter from Mr. Tuthill when he was with the Department, to Mr. Henley, who was the manager of the Boise Project, regarding the practice of allowing Mores Creek water destined for Lake Lowell to be stored in Lucky Peak, as evidence that the water users were advised of the "satisfaction" by "paper fill" concept. Mr. Tuthill's letter refers to a "statewide" "one-fill" philosophy, but the letter did not say what "one-fill" meant. It did not refer to "paper fill" as "satisfaction." Tr. Vol. III, p. 665, ll. 3-8. There was no indication that this

[25] Tr. Vol. III, p. 805, ll. 1-15; Tr. Vol. IV, p. 1044, ll. 17; p. 1045, l. 2; and p. 1046, l. 18- p. 1048, l. 6; p. 1163, ll. 4-8; p. 1181, l. 15-p. 1182, l. 6; p. 1184, l 5-p. 1185, l. 3; p. 238, ll. 5-13; p. 1239, l 4; p. 1240, l. 4; p. 1274 ll. 4-9; Vol. V, p. 1357, l. 6-p. 1358 l. 5.

letter had anything to do with anything other than Lucky Peak storage of Mores Creek water going to Lake Lowell. Tr. Vol. IV, p. 1170, l. 23-p. 1172, l. 16. The Director begs to differ, but does so without any evidence to back him up. Even so, the fact that a single letter written in the 1990s explaining the concept of "satisfaction" of the rights by "paper fill" is not substantial competent evidence to support a finding that the water users were aware of, much less on board with, the Department's current interpretation of the accounting program to end the ability of the existing rights to store water when "paper fill" occurred. Irrigators cannot irrigate with "paper fill." The Director's contrary decision must be reversed.

O. The Boise Project is Entitled to its Costs and Reasonable Attorney's Fees

Idaho Code § 12-117(1) provides that in a proceeding where the parties are a state agency and another person or entity, that the court "shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the non-prevailing party acted without a reasonable basis in fact or law." Idaho Code § 12-117(1). "Where an agency has no authority to take a particular action, it acts without a reasonable basis in fact or law." *Syringa Networks, LLC v. Idaho Dept. of Admin.*, Idaho Supreme Court docket no. 43027, March 1, 2016, p. 24-25, *citing Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005). In *Syringa* the Court held that the Director of the Department of Administration did not have the authority to violate the laws and rules that govern that agency and that "doggedly defend[ing]" the violation of the law and rules was unreasonable. *Id.* at p. 26. Here, the Director repeatedly violated the rules and laws governing the Department and refused to make any corrections.

The Director was requested on multiple occasions to comply with the IDAPA's rulemaking requirements. E.g., R. 000209. He repeatedly denied these requests. He denied that he was interpreting or implementing existing law. R. 000340. Yet, he justified his final order as

necessary to implement three important elements of Idaho water law. R. 001294. Throughout his Order, the Director explains his view of what he believes the law requires as it affects the storage rights. R. 001230-1308, *passim*, which shows that this was not a proper contested case. He also repeatedly violated the procedural rules for consulting with witnesses and the Department in his capacity as hearing officer.

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

Gilmore, supra, p. 287. Therefore, the Boise Project requests that it be awarded its reasonable attorney's fees and costs incurred during the contested case proceedings, and on appeal.

VI. CONCLUSION

The Boise Project requests that this Court vacate the Director's Amended Final Order. The contested case proceedings should never have been held as any "paper fill" as "satisfaction" "rule" would have to be adopted by formal rulemaking. The Director should have disqualified himself, and any Department staff from hearing this contested case and appointed an independent hearing officer. The Department's counsel improperly acted as both advisory and adjudicatory counsel in the proceedings. The Director conferred with adjudicatory counsel and Department staff and witnesses throughout the proceedings. He had improper *ex parte* communications with legislators and others commenting on and prejudging the ultimate issue to be decided in the proceeding. In his Amended Final Order the Director made numerous clearly erroneous findings of fact that are unsupported by the record, and made conclusions of law based on those erroneous finding and not supported by Idaho law. His Order deprives the water users of a valuable property right and puts their use of the reservoirs at significant risk by contending that there is no

water right to fill the reservoirs. For all of these reasons, the substantial rights of the Boise Project to due process of law and to the protection of their interest the storage reservoir rights have been denied, and the Boise Project requests that this Court vacate the Director's Amended Final Order.

Dated this 8th day of March, 2016.

BARKER ROSHOLT & SIMPSON LLP

By: Albert P. Barker
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March, 2016, I caused to be served a true and correct copy of the foregoing **PETITIONER'S BRIEF** the method indicated below, and addressed to each of the following:

Original Filed with the Clerk of the SRBA Court, via Hand Delivery.

Ballentyne Ditch Company Boise Valley Irrigation Canyon County Water Company Eureka Water Company Farmers' Co-Operative Ditch Middleton Irrigation Assn. Inc. Middleton Mill Ditch Company Nampa & Meridian Irrigation New Dry Creek Ditch Company Pioneer Ditch Company Pioneer Irrigation District Settlers Irrigation District South Boise Water Company Thurman Mill Ditch Company *Represented by:* ANDREW J. WALDERA DANIEL V. STEENSON S. BRYCE FARRIS SAWTOOTH LAW OFFICES, PLLC 1101 W. RIVER STREET, SUITE 110 PO BOX 7985 BOISE, ID 83707	__X__ Hand Delivery _____ U.S. Mail, postage prepaid _____ Facsimile _____ Overnight Mail __X__ Email
SUEZ WATER IDAHO, INC. *Represented by:* MICHAEL P. LAWRENCE 601 W. BANNOCK STREET BOISE, ID 83701-2720	__X__ Hand Delivery _____ U.S. Mail, postage prepaid _____ Facsimile _____ Overnight Mail __X__ Email

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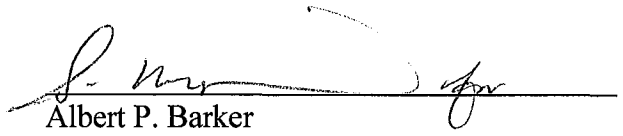

Albert P. Barker