

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BALLENTYNE DITCH COMPANY, et al.;

Petitioners,

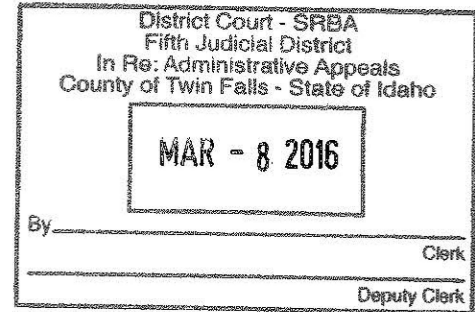
vs.

IDAHO DEPARTMENT OF WATER RESOURCES;  
et al.;

Respondents.

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

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



**DITCH COMPANIES' OPENING BRIEF**

Appeal from the Idaho Department of Water Resources to the District Court of the Fourth  
Judicial District of the State of Idaho in and for the County of Ada

Director Gary Spackman presiding

Daniel V. Steenson, ISB No. 4332  
S. Bryce Farris, ISB No. 5636  
Andrew J. Waldera, ISB No. 6608  
SAWTOOTH LAW OFFICES, PLLC  
1101 W. River Street, Suite 110  
P.O. Box 7985, Boise, Idaho 83707  
Tel: (208) 629-7447  
Fax: (208) 629-7559  
dan@sawtoothlaw.com  
bryce@sawtoothlaw.com  
andy@sawtoothlaw.com

*Attorneys for Ditch Companies - Petitioners*

Garrick L. Baxter  
Deputy Attorney General  
STATE OF IDAHO  
IDAHO DEPARTMENT OF WATER RESOURCES  
P.O. Box 83720  
Boise, Idaho 83720  
Tel: (208) 287-4811  
Fax: (208) 287-6700  
garrick.baxter@idwr.idaho.gov

*Attorneys for Respondents*



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The Petitioner Ditch Companies<sup>1</sup> hereby submit this *Opening Brief* in Support of their *Petition for Judicial Review* of the October 20, 2015 *Amended Final Order* of the Director of the Idaho Department of Water Resources in the above-captioned matter.

## **I. STATEMENT OF THE CASE**

The fundamental issue presented to the Court by the Ditch Companies' *Petition for Judicial Review* is the validity of the Director's legal determination that water released from the Arrowrock, Anderson Ranch and Lucky Peak Reservoirs (the "Boise River Reservoirs") for flood control purposes "fills" or "satisfies" the reservoir water rights, so that the actual, physical storage of water in the reservoirs after flood control releases occurs without a water right, subject to the delivery demands of existing junior water rights and future appropriations of water. This issue concerns the legal entitlement to store water in the Boise River Reservoirs pursuant to the reservoir storage rights, and the relationship between flood control and beneficial use storage in these reservoirs.

Interpreting the Ditch Companies' property right to store water pursuant to the Boise River Reservoir storage rights is a question of law. The Director's legal theory is that water entering the Boise River Reservoirs that is not delivered to downstream senior water rights is "physically and legally available" for beneficial use storage, is necessarily diverted by and stored in the reservoirs for beneficial use, and must therefore be treated as "filling," and "satisfying" the reservoir's storage rights. The Director contends that whether water is actually available for storage and end beneficial use is irrelevant to the "satisfaction" of a storage water right.

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

The Ditch Companies contend that the right to retain water in the Boise River Reservoirs until it is needed for beneficial use is fundamental to the legal entitlement to store water under the storage rights. Actual, physical storage of water is the true measure of a storage water right. Water that cannot be actually, physically stored and retained until it is needed for beneficial use is not “physically and legally available” for beneficial use storage, and does not “satisfy” a storage water right. The release of water for flood control purposes before it can be beneficially used is not a “choice” of the storage right holders—it is a mandate of the need to use the Boise River Reservoirs to protect downstream lands from flooding.

The relationship between flood control and beneficial use storage in the Boise River Reservoirs is also an issue of law. The record and the Director’s *Amended Final Order* (“*Order*”) reveal no dispute that, since the 1950s, the Boise River Reservoirs have been operated for flood control and beneficial use storage pursuant to a congressionally-approved plan that was collaboratively developed and implemented by the United States Bureau of Reclamation (“Bureau” or “BOR”), the Army Corps of Engineers (“Corps”), the State of Idaho, particularly Idaho Department of Water Resources (“IDWR”), and Boise Valley water users. The plan contains criteria and procedures that determine when water must be released to maintain sufficient vacant reservoir space to capture high spring flows and regulate reservoir releases to prevent flooding, and when water may be stored for irrigation and other beneficial uses. Reservoir space that is required to be kept vacant for flood control purposes is not available to store water for beneficial use, until that space is no longer required to be kept vacant for flood control purposes. Reservoir space becomes available for beneficial use storage only as flood space requirements decline. As flood control space requirements decline, water is increasingly stored for beneficial use, until the reservoirs reach “maximum fill.” Storage water rights are

“filled” for beneficial use storage as available reservoir storage spaces are physically filled. This is how the reservoir operating plan defines the relationship between flood control and beneficial use storage in the Boise River Reservoirs.

The Director asserts that reservoir operations under the plan have no bearing on the exercise or administration of Boise River Reservoir rights. The Ditch Companies contend the opposite; that operation of the Boise River Reservoirs to store water for beneficial use under the operating plan, and the plan’s assurances that water entering the reservoirs after flood control releases will be stored for their beneficial use under their storage water rights, define how the storage water rights are actually exercised, “filled” and “satisfied.” The Director has no authority to unilaterally abrogate the congressionally-approved plan and its assurances to the water users.

Whether IDWR’s accounting methods are consistent with the Boise River Reservoir storage water rights and their exercise and administration under applicable legal principles, or are inconsistent and should be modified to conform therewith, are also questions of law. There is no dispute regarding the mechanics of IDWR’s accounting methods. The water right accounting program accrues all water entering the reservoirs that is not delivered to downstream senior water rights to storage water rights until the volume limit of the storage rights is reached (the so-called point of “paper fill” in the water right accounting program), and thereafter accrues reservoir inflows to an accounting category called “unaccounted for storage,” regardless of whether the water is actually, physically stored and available for beneficial use. When the reservoirs reach their maximum filling for the ensuing irrigation season, the water actually, physically stored in the reservoirs is credited back to the reservoir storage water rights, and allocated among the storage accounts of the spaceholders who own reservoir space and the right



to use the water stored therein. This actual, physically stored water is delivered from the reservoirs to the water users, is beneficially used by them, and the water right accounting program accounts for such delivery based on measurements reported by the watermaster.

It is undisputed that IDWR's accounting methods do not define the property right inherent in the storage water rights. Those property rights are defined by decrees issued by this Court, and Idaho law pertaining to the legal entitlement represented by those decrees. IDWR's accounting methods do not divert, store or distribute water to water users, or administer water rights in Water District 63. These things are done by water users and watermasters operating in the real world (versus the theoretical world of IDWR's computer program). The proper role of any accounting methodology is to account for the actual distribution of water to natural flow and storage water rights in Water District 63 in conformance with the applicable water rights and well-settled legal principles.

Water District 63 watermasters have never administered Boise River Reservoir storage water rights as if they were "filled" or "satisfied" and no longer entitled to store water after the theoretical point of "paper fill" in the water right accounting program. Conversely, they have always administered Water District 63 water rights with the understanding that water cannot be stored in the Boise River Reservoirs without a water right, that water stored in the Boise River Reservoirs after flood control releases is stored pursuant to the storage water rights, and that water is delivered to, and beneficially used by, the water users pursuant to the storage water rights. Water District 63 water users have always had the same understanding.

The Director's position is that the satisfaction of the Boise River Reservoir storage rights is correctly defined by the water right accounting program's "paper fill" construct, so that the water users have no discernable right to store water after flood control releases, and such storage

is subject to the water delivery demands of existing junior water rights and future appropriations. This position is contrary to the legal entitlement of the storage water rights, the purposes and provisions of the reservoir operating plan, the actual operation of the reservoirs for flood control and beneficial use storage, and the actual use and administration of storage water rights in Water District 63. The Ditch Companies contend that IDWR's use of the water right accounting program to "count" reservoir inflows does not support the Director's legal conclusion that Boise River Reservoir storage rights are "filled" and "satisfied" by water released for flood control because, ultimately, the accounting method credits back to the reservoir storage rights all water that is actually, physically stored in the reservoirs at the conclusion of flood control operations at the point of maximum storage.

The Ditch Companies advised the Director that they believed their concerns in the Contested Case proceeding could be addressed with or without modifying IDWR's accounting method, provided the Director issue an order acknowledging that: (1) water released for flood control pursuant to the reservoir operating plan is not "physically and legally available" for beneficial use storage and therefore does not accrue to "fill" or "satisfy" the reservoir storage rights, and (2) reservoir inflows that are actually, physically stored in the reservoirs during flood control operations, during and after flood control releases, accrue to the storage water rights in priority until the reservoirs reach maximum storage. *Ditch Companies Post-Hearing Memorandum*, R., 000972-73.

Notwithstanding the Director's *Order*, the Ditch Companies continue to believe their concerns about the Director's position can be resolved through issuance of such an order by this Court.

## **II. PROCEDURAL BACKGROUND**

On October 22, 2013, the Director ("Director") of the IDWR *sua sponte* issued a *Notice*

*of Contested Case* initiating a contested case proceeding “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., 000002. The Director’s *Notice of Contested Case* also stated an intention to develop a record to document “how and why existing accounting methods and procedures ‘count’ or ‘credit’ water towards the water rights for the federal on-stream reservoirs in . . . Water District 63” because there is no such formal record, and the informal IDWR records that do exist are “scattered and incomplete.” *Id.*, 000004.

The *Notice of Contested Case* ordered that “water users with rights to divert, store, or use water in Water District 63 that have concerns and/or objections regarding how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs in Water District 63 are to submit statements of the concerns and/or objections to the Department.” *Id.*, 000007. The Director’s transmittal letter serving the *Notice* on the Ditch Companies and other Water District 63 water right holders stated: “Your participation is not mandatory but any decision made in the proceeding will be binding upon all water users that received notice of this proceeding.” R., 000001.

The Ditch Companies and the Boise Project Board of Control (“Boise Project”) filed various pre-hearing motions and made various objections to the Director’s initiation and conduct of the Contested Case proceeding. For example, the Ditch Companies sought disqualification of the Director as Hearing Officer (R., 000100); stay of the proceeding to allow for the SRBA Late Claims process to reach conclusion (R., 000255); clarification of the Director’s use of “official notice” (R., 000869); dismissal for failure (and inability) to join the Bureau (R., 000255); improper use of staff memoranda (R., 000526); IDWR participation as an adversarial party (R.,

000869); and limitation on IDWR “expert” witness testimony (R., 000859). The Director rejected each of these requests/objections.<sup>2</sup>

After staying the proceeding during the appeal of what is commonly known as Basin-Wide Issue 17 (“BW 17”), and the Idaho Supreme Court’s decision of the same,<sup>3</sup> the Director issued his *Order Lifting Stay and Notice of Status Conference, in the Matter of Accounting for the Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* (Sept. 10, 2014). R., 000094. The order triggered a number of events and obligations, including authorizing discovery and requesting agency staff memoranda. *Id.*

The Ditch Companies understood from the Director’s *Notice of Contested Case* that it was not their burden to present a record to explain IDWR’s accounting procedures. The primary record the Director and IDWR presented for this purpose was a November 4, 2014 Memorandum the Director asked IDWR staff hydrologist Liz Cresto (“Cresto”) to prepare on or about September 10, 2014 “pursuant to Rule 602 of the Department’s rules of procedure (IDAPA 37.01.01.602) explaining: (1) how and why water is counted or credited to the water rights for reservoirs in Basin 63 pursuant to the existing accounting methods and procedures; and (2) the origin, adoption, and development of the existing accounting methods and procedures in Water District 63.” *Order Lifting Stay and Notice of Status Conference*. R., 000094.

The Ditch Companies’ concerns about IDWR’s explanation of its storage water right accounting methods and procedures for the Boise River Reservoirs (Arrowrock, Anderson Ranch, and Lucky Peak) are: (1) IDWR erroneously presumes that inflows to the Boise River Reservoirs that are required to be released for flood control purposes are “physically and legally

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<sup>2</sup> The foregoing is not an exhaustive list of the Ditch Companies’ motions, concerns, and objections as are discussed further later herein.

<sup>3</sup> *In re SRBA, Case No. 39576, Subcase No. 00-91017*, 157 Idaho 385, 336 P.3d 792 (2014).

available” for beneficial use storage; (2) IDWR therefore asserts that such inflows “fill” and “satisfy” the reservoir storage rights, so that (3) after flood control releases, the filling of the reservoirs occurs without a water right, under no priority, and is subject to the delivery demands of existing junior water rights and future appropriations of water. The Ditch Companies’ concerns and objections to IDWR’s interpretation of its method of storage water right accounting are outlined below, and are supported by the record developed through this Contested Case.

Eventually, the Contested Case proceeding that is the subject of this appeal was held over the course of five days: August 27-28, 31 and September 9-10, 2015. Post-hearing briefs were filed on September 18, 2015, and the Director issued his *Final Order* on October 15, 2015, which he amended by his *Amended Final Order* (“*Order*”) on October 20, 2015. R., 001230.

Further administrative proceedings included the filing of petitions for reconsideration by the Ditch Companies and the Boise Project on November 3, 2015. Those petitions were ultimately denied on November 19, 2015 (R., 001401), and the Ditch Companies petitioned for judicial review of the Department’s *Order* on December 17, 2015. R., 001450.

### **III. STATEMENT OF FACTS**

#### **A. The Relationship Between Flood Control and Beneficial Use Storage Under the Boise River Reservoir Operating Plan**

Since the mid-1950s, the Boise River Reservoirs have been operated as a system for storage and flood control purposes pursuant to a plan developed and implemented through congressional authorization, and collaboration, approval and agreement among BOR, the Corps, the State, Boise Valley water users and other local interests. Boise River Reservoir storage water rights were established in conjunction with the development of the reservoir system and the plan under which it is operated. The appropriation of storage water rights provided the basis for contracts with BOR under which water users financed reservoir construction, acquired storage

space, and established the right to receive water stored in that space for irrigation use. These water rights, storage contracts, the reservoir system and the plan under which it is operated have provided a secure water supply for over 300,000 acres of land in the Boise Valley over the course of the last 100 years.<sup>4</sup>

1. **Appropriation of Boise River Flows, Stewart and Bryan Decrees, Arrowrock Reservoir and Storage Contracts (1864-1929)**

Water rights substantially exceeding Boise River summertime flows were appropriated between 1864 and 1904, and in 1906 were decreed in the “*Stewart Decree*.” Ex. 2021; Ex. 2008, 000472-73; and Ex. 2011. Litigation over the delivery of water to *Stewart Decree* rights as Boise River flows declined during the irrigation season was resolved by an order entered in 1919, requiring distribution of natural flows on the basis of 75% and 60% cuts in priority order. Ex. 2022. River flows were adequate to meet additional irrigation demand only during the spring runoff. Water rights to these flood waters were appropriated between 1894 and 1914, and later decreed in the 1929 “*Bryan Decree*” (aka “Flood Water Suit”). Ex. 2023.

To meet the need for additional water supplies, water users in the Boise River Valley sought the assistance of the U.S. Reclamation Service (now the Bureau of Reclamation), shortly after it was created by the 1902 Reclamation Act. Construction of the first dam on the Boise River, Arrowrock Reservoir, was authorized on January 6, 1911, under the 1902 Reclamation Act to store spring runoff to provide supplemental water during the irrigation season as natural flows declined. Ex. 2033. Water right license no. 7180 established a January 13, 1911 priority for the right to store water in Arrowrock Reservoir. Ex. 2023. Construction of Arrowrock Dam on the Middle Fork of the Boise River (*see Ex. 2012*) began in 1911, storage began in

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<sup>4</sup> Additional historical context and detail are provided in Dr. Jennifer Stevens’ report entitled *History of Boise River Reservoir Operations, 1912-1995*. Ex. 2053.

October 1914, and construction was completed in 1915. Ex. 2056.

The Bureau entered into contracts with irrigation districts pursuant to the Reclamation Act of 1902, under which the districts acquired storage capacity in Arrowrock Reservoir. *See, e.g., Ex. 2058*, 001762, ¶ 6. Each district was required to apportion to lands within their boundaries the right to receive water stored in the Arrowrock space acquired by the district, as well as a proportionate part of the cost of constructing the reservoir. *Id.* at 001765-770, ¶¶ 10-12. The 1911 storage water right for Arrowrock Reservoir was decreed in the 1929 *Bryan Decree* with other “flood water rights.” Ex. 2023.<sup>5</sup>

**2. Formulation of the Reservoir Operating Plan, Anderson Ranch Reservoir Authorization and Storage Water Right (1937-1956)**<sup>6</sup>

Arrowrock Reservoir was authorized and constructed for irrigation use only, though it had been operated incidentally to reduce flooding by releasing water in anticipation of high spring runoff in order to capture peak runoff and control releases to the extent possible without impairing irrigation storage beginning in its first year of operation (1916). *Exs. 2060 and 2061*. By the 1930s, Boise River water users, the Bureau, and the Corps acknowledged the need for another reservoir to store and manage spring runoff in order to provide additional water for irrigation and to prevent flooding. While construction of a new reservoir at Twin Springs was under consideration, a plan for coordinated use of Arrowrock Reservoir and the proposed reservoir for flood control and irrigation storage was formulated. At a joint public hearing in Boise on September 8, 1937, the Corps and BOR received public testimony regarding Boise River Valley flooding. Ex. 2065. In November 1938, the Corps produced a report in consultation with the Boise River Watermaster and the Manager of the Boise Project evaluating

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<sup>5</sup> The *Stewart* and *Bryan Decree* orders and rights are discussed in Exhibits 2033 and 2010.

<sup>6</sup> Historical context and detail are provided in *Stevens Report*. Ex. 2053, 001638-1642.



the potential to reduce flooding through joint operation of Arrowrock Reservoir and the proposed Twin Springs Reservoir. *Id.* The report concluded that flooding could be reduced by reserving 30,000 acre-feet of space in Twin Springs for flood control use. *Id.*

In a June 28, 1939 report, BOR described the core elements of the plan: (1) using runoff forecasts to reserve reservoir space for flood control; and (2) filling the reserved space with spring runoff for irrigation as the need to manage spring runoff to prevent flooding declines:

Storage Capacity Required to Control Floods.

6. If the Twin Springs and Arrowrock reservoirs are to be operated for flood control purposes *some part of the storage capacity would need be reserved in nearly every year for flood control purposes and permitted to fill only as needed to reduce the flood discharge or as the remaining snow may justify reduction in reserved capacity.*

Operation of Reservoirs for Flood Control.

11. Arrowrock reservoir has been operated primarily for irrigation purposes. Within limitations of outlet capacity and the requirement that the reservoir fill for irrigation, it has also been operated for flood control . . . To secure more extensive flood control, *it will be necessary to revise somewhat the plan of operation heretofore adopted by reserving some capacity primarily for flood control.*

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

Use of flood control storage for irrigation.

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

Ex. 2070 (emphasis added).

While this coordinated reservoir operating plan was being formulated, Congress considered and passed the Reclamation Project Act of 1939 ("1939 Act"). Act of Aug. 4, 1939,



ch 418, 53 Stat. 1187 *et seq.*, codified at 43 U.S.C. § 485. Section 9(a) of the 1939 Act authorizes the Secretary of Interior to investigate the feasibility and cost of reclamation projects, and to report his findings to the President and to Congress. 43 U.S.C. § 485h(a). If the Secretary of Interior's cost determination does not exceed estimated "repayable and returnable allocations" (*i.e.*, project benefits) for purposes such as irrigation, power and flood control, then the project "shall be deemed authorized and may be undertaken by the Secretary" without further congressional authorization. *Id.* Section 9(b) of the 1939 Act authorizes the Secretary to allocate part of the cost of a reclamation project to flood control in consultation with the Corps' Chief of Engineers and the Secretary of War, and to operate the project for flood control purposes to the extent of the allocation. 43 U.S.C. § 485h(b).

By 1940, the Corps and BOR determined that a reservoir on the South Fork of the Boise River at the Anderson Ranch site would be more beneficial than a reservoir at the Twin Springs location on the Middle Fork. On June 25, 1940, Interior Secretary Ickes submitted to President Roosevelt a BOR report proposing to substitute Anderson Ranch Reservoir for Twin Springs as a "multi-purpose project" to "provide a supplemental water supply for 340,000 acres of irrigated lands in the Boise Valley," power generation, and "a large measure of flood control throughout the Boise Valley." Ex. 2027. Secretary Ickes informed the President that the project was feasible, economically beneficial and that cost repayment "can be anticipated with assurance." *Id.* Anderson Ranch Reservoir was therefore authorized for construction under Section 9 of the 1939 Act, with funds available under the 1941 Interior Department Appropriations Act. Secretary Ickes asked the President whether he objected to submitting the report to Congress. The President responded that he did not object, but recommended that construction be "deferred indefinitely" due to "demands upon the Federal Treasury for purposes of national defense." In

his July 22, 1940 reply, Secretary Ickes reiterated that: “[t]he supplemental water supply to be provided by the proposed development is greatly needed [in the Boise Valley] to prevent crop losses in practically every year,” and requested funding to conduct preliminary work. The President relented, and authorized Secretary Ickes to proceed due to the “urgent need for a supplemental water supply for the Boise Valley.” *Id.*

The report the Interior Secretary submitted to the President and to Congress (H.R. Doc. No. 916, 76<sup>th</sup> Cong., 3d Sess. (1940)) described the proposed plan for reservoir operations:

*Operation of reservoirs for flood control.*—The Arrowrock Reservoir was constructed with no particular provision for flood control and without allocation of any part of the costs to flood control. It has been operated primarily for irrigation purposes, but an incidental result has been some reduction to the peak discharges of past floods. Early in the history of Arrowrock Reservoir operations, earnest efforts were made to provide a larger measure of flood control, storage being vacated in some degree for that purpose. ***In one or two instances, the changes in run-off conditions developed rapidly and resulted in an unfilled reservoir and subsequent irrigation shortage. The need of the reservoir’s entire capacity every year for irrigation makes it imperative to avoid this.***

The run-off at the Anderson Ranch Dam site averages about 40 percent of the inflow to the Arrowrock Reservoir. ***To obtain the maximum possible flood-control benefits from storage, the Anderson Ranch Reservoir should be operated with the Arrowrock Reservoir. In these studies such a joint operation is presumed . . .***

It is possible, by means of snow surveys and data on winter precipitation, to make fairly reliable forecasts of the volume of flood run-off from the Boise River. However, flood damage on Boise River is largely a function of the peak rate of discharge and the momentary rates of discharge are influenced by climatic conditions while the snow is melting and cannot be accurately predicted. ***To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of storage capacity indicated by the run-off forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.***

*Id.* (emphasis added).

The Corps also prepared and submitted a report to Congress in 1940 (H.R. Doc. No. 957, 3d Sess. (1940)) pursuant to the Flood Control Act of 1938 (52 Stat. 1215), which also described the reservoir operating plan: “*The tentative plan of storage operation would provide that the*

*jointly used storage will be held available for flood control during the spring months when run-off of flood proportions is predicted on the basis of snow surveys. Run-off from melting snows would then be stored for later use for irrigation.” Ex. 2028 (emphasis added).*

On December 9, 1940, BOR filed with the Idaho Department of Reclamation (now IDWR) permit application no. 26522 to construct Anderson Ranch Reservoir and to appropriate a water right to store 500,000 acre-feet per annum for irrigation and power uses. Ex. 2029, 000910-911. The Secretary of Interior’s report to President Roosevelt and to Congress (H.R. Doc. No. 916), explaining the dual reservoir operating plan for irrigation storage and flood control, was filed with the permit application. Id., 000923. IDWR approved the permit application on February 25, 1941. Id., 000911.

On January 28, 1941, in support of the permit application, BOR filed with IDWR a summary of terms of contracts for Anderson Ranch Storage that were under consideration by New York Irrigation District, Nampa & Meridian Irrigation District, Boise-Kuna Irrigation District and Wilder Irrigation District. Id., 000917. The 1941 contracts allotted each district space in Anderson Ranch Reservoir to store water for supplemental irrigation use, in exchange for the districts’ agreement to repay the costs of constructing the reservoir in proportion to their allotted space. Id., 000999-1003, Arts. 10-13. The contracts required BOR to release to the districts their contractual proportions “of *the stored water actually available* from said reservoir [each] year for irrigation purposes.” Id., 001003, Art. 13 (emphasis added). The contracts further provided that the districts may hold over unused storage from one year to the next (aka “carryover storage”). Id., 001005-1009, Art. 18.

Regarding flood control, the contracts provided that “45,000 acre-feet of empty storage space shall be kept available in the Anderson Ranch and Arrowrock Reservoirs for control of

flash floods,” with preference for maintaining such empty space in Arrowrock Reservoir, because Arrowrock collected runoff from the largest portion of the upper Boise River watershed. Id., 001008-1009, Art. 18(d), (e). The contracts provided that water stored in Arrowrock or Deer Flat Reservoirs under the priorities of the water rights for those reservoirs may be temporarily held in Anderson Ranch, or vice versa, without affecting the districts’ rights to the water in the respective reservoirs. Accounting for this practice is an example of what later became known as “paper fill,” whereby a reservoir water right may be accounted for as “filled” by storage physically held in another reservoir. Ex. 2008, 000476-477, Art. 14. The contracts reflect the plan for operating the reservoirs jointly for irrigation storage and flood control by vacating storage capacity on the basis of run-off forecasts to control flood flow, and then filling the reserved capacity with reservoir inflows from spring runoff after the flood risk has passed:

(g) In the filling of the available Anderson Ranch Reservoir capacity, except that reserved for power which will be filled first and except that amount of 45,000 acre-feet capacity reserved for control of flash floods, the reservoir management will endeavor so to handle the filling thereof that the same will serve both for the benefit of irrigation and for the benefit of flood control, and may for flood control purposes evacuate so much of its capacity as is deemed advisable with such releases to be first from holdover storage water on hand, in the same manner and with the same effect as provided in Article 18(b).

Ex. 2029, 001009, Art. 18(g).

As required by Idaho Code Section 42-401 (Ex. 2026, now IDAHO CODE § 43-401), the irrigation districts submitted to IDWR surveys, examinations, maps, plans, and cost estimates, with district board minutes and copies of the proposed Anderson Ranch spaceholder contracts for the review and approval of the Department. Ex. 2029, 000922-959. As required by the statute, the Commissioner of the Department examined the information submitted by BOR and the districts, and filed with the districts’ reports favorable to their proposed acquisitions of storage, stating, *inter alia*: “The fact that the dam can be used for flood control and power purposes . . . it is the opinion of this Department that the proposed new construction will be a great asset to the

water users who are to be benefitted, as well as to the people at large in this part of the State” (undated report to Boise-Kuna, id., 000952); “the benefits accruing to the lands with the District in acquiring the right to the storage water, as provided in said contract, will greatly exceed the cost thereof, and I therefore approve the same” (2/28/41 report to Wilder, id., 000949-950); “the project represented [by the maps and document submitted] is meritorious and should have the support of all the water users concerned” (3/19/41 report to Nampa & Meridian, id., 000959-960). The Commissioner filed similar approval reports with other districts as they entered into contracts with BOR. Id., 000975, 986.

Shortly after receiving the Commissioner’s favorable reports, the irrigation districts held elections as required by Idaho Code Section 42-401 (now 43-401) authorizing the districts to execute the contracts. The districts apportioned their respective Anderson Ranch storage water entitlements and repayment obligations to the lands within their boundaries, and filed proof of the apportionment with IDWR. Id., 00925-935.

Construction of Anderson Ranch Reservoir began in August 1941. Ex. 2186, 003750. BOR submitted proof of completion of works in February 1951, showing that 315,079 acre-feet of water had been stored in 1950, and identifying the place of use as the 257,766 acres of land that were entitled under BOR contracts to receive Anderson Ranch stored water as a supplemental water supply for irrigation. Ex. 2029, 000987-994. In connection with proof of completion, the Department requested, and BOR provided, a list of the thirteen irrigation districts and canal companies that, by 1956, had entered into contracts for Anderson Ranch storage, along with representative contracts with the different irrigation entities. Id., 000995. BOR submitted proof of beneficial use in February 1956, demonstrating storage of the full reservoir capacity of 493,161 acre-feet for use on “all lands having storage rights in Anderson Ranch Reservoir

pursuant to repayment contracts.” *Id.*, 001044-1051. On the basis of that proof, the State Reclamation Engineer issued a license on December 17, 1956, for storage of 493,161 acre-feet of water in Anderson Ranch for use on the lands under contract that BOR identified in its proof of completion. *Id.*, 001052-1055.

### 3. **Lucky Peak Reservoir Authorization**<sup>7</sup>

While BOR was building Anderson Ranch Dam, negotiating additional storage contracts, and developing the water right under its approved permit, extraordinarily high flows in 1943 flooded about 29,000 acres of agricultural, urban and suburban property in the Boise Valley. *Ex. 2085*, 002084. In October of 1943, congressional committees requested that the Board of Engineers for Rivers and Harbors review the Corps’ 1940 report in House Document 957 to identify additional flood control improvement opportunities. *Id.*, 002081.

In 1944, Congress passed a Flood Control Act declaring congressional policy “to recognize the interests and rights of the States in determining the development of the watersheds within their borders.” 33 USCA § 701-1. The Act further declared that flood control projects shall “not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.” 33 USCA § 701-1(b). To effectuate this policy, the Act required the Department of the Army to consult and cooperate with the states in which flood control projects were proposed regarding the development of project plans to provide affected states and the Department of the Interior an opportunity to submit written comments and recommendations on the Corps’ reports to Congress, and to submit the states’ comments and recommendations with the report. 33 USCA § 701-1(a). The Act also required the Department

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<sup>7</sup> Historical context and detail are provided in *Stevens Report*. *Ex. 2053*, 001643-47.

of the Interior to consult with states and the Department of the Army concerning proposed reclamation projects for irrigation purposes, and provided that, if either the Secretary of the Army or an affected state objected, the project would not be deemed authorized unless approved by a congressional act. 33 USCA § 701-1(c).

The Board of Engineers prepared the report the congressional committees requested in 1943. In March 1946, the Corps notified interested parties of the opportunity to submit comments on the report. Ex. 2086, 002089-108. The notice stated that “the proposed report of [the] Chief of Engineers will be submitted officially to the Governors of the affected states and to the Secretary of the Interior pursuant to Section 1 of the Flood Control Act of 22 December 1944, and such comments as they may make will be transmitted by the War Department to Congress with the report of the Chief of Engineers.” Id., 002090. A copy of the draft report was lodged with IDWR for its review. Id. The long list of parties to whom notice was sent included the Idaho Congressional delegation, Idaho Governor Williams, IDWR, county and city officials, and Boise River water users. Id., 002092-108.

On May 13, 1946, the Corps submitted the report to the House Committee on Flood Control, with the Corps’ recommendation for construction of Lucky Peak Reservoir. Ex. 2085, 002081-002088. The report contained the following analysis, findings and recommendations:

4. To supply additional water for irrigation, provide storage for flood control and develop hydroelectric power, the Bureau of Reclamation has under construction Anderson Ranch Reservoir . . . The storage has been allocated 212,500 acre-feet for flood control, an equal amount for irrigation, . . . *In operation of the flood control storage on the basis of flood forecasts from snow surveys largely financed by local interests, increased storage for irrigation will be realized. The project contemplates coordinated operation of the Arrowrock and Anderson Ranch Reservoirs. The district engineer finds that use of the storage to maximum advantage, including flood control, would require drawdown of the reservoirs early in the year and refilling on the basis of runoff forecasts. Irrigationists oppose this method of operation as they fear that it might jeopardize the storage of water for irrigation. Hence, no definite agreement has been made for the use of Arrowrock storage for flood control. . .*



9. The district engineer . . . presents a plan in the interest of flood control, irrigation and hydroelectric power development which provides for construction of Lucky Peak Reservoir on Boise River with dam site about 10 miles above Boise. . . *The plan also provides for . . . operation as a system, in accordance with runoff forecasts, of the storage space in Anderson Ranch, Arrowrock and Lucky Peak Reservoirs in the combined interest of flood control, irrigation and power.*

10. The district engineer finds that *with this added reservoir and use of an adequate factor of safety in forecasting runoff, additional storage space in Anderson Ranch and Arrowrock Reservoirs can be used for flood control when needed without endangering the irrigation water supply and that additional water for irrigation would be made available thereby. He proposes to furnish this supplemental water to the irrigationists who use Arrowrock Reservoir water as a recompense for the proposed flood control use of that reservoir. . .*

12. The district engineer recommends that . . . initiation of the proposed construction be conditioned upon obtaining satisfactory assurances from interested water users that, in consideration of the irrigation benefits to be derived from the additional storage in Lucky peak Reservoir, they will agree to use of Anderson Ranch and Arrowrock Reservoirs for flood control as proposed in the present report of the district engineer. . .

14. Local interests were advised of the nature of the report of division engineer and afforded an opportunity to present additional information to the Board. No communications have been received.

*Id.*, 002083, 2085-87 (emphasis added).

On July 24, 1946, Congress authorized construction of Lucky Peak Reservoir as part of the Flood Control Act of 1946 “substantially in accordance with the recommendations of the Chief of Engineers in his report dated May 13, 1946.” Ex. 2090.

#### **4. “Interim” and “Ultimate” Reservoir Operating Plans (1946-1953)**<sup>8</sup>

With Lucky Peak authorized and Anderson Ranch construction ongoing, BOR, the Corps, IDWR, and Boise River water users met several times from September 1946 to September 1952, to collaboratively develop an “interim plan” for joint operation of Arrowrock and Anderson Ranch prior to completion of Lucky Peak, and the “ultimate plan” for operation of all three reservoirs after completion of Lucky Peak as a system for irrigation storage and flood control as

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<sup>8</sup> Historical context and detail are provided in *Stevens Report*. Ex. 2053, 001647-48.



contemplated by the previously-discussed reports to the President and to Congress (House Doc. Nos. 916 and 957). Ex. 2078; Ex. 2035, 001036-38, 001343-45. BOR's initial outline of the interim and ultimate plans included operating the reservoirs on a "forecast basis" during the "flood season of each year" to reduce flows below Diversion Dam (the headworks of the New York Canal) to 6,500 cfs. Reservoir space would be evacuated only to the extent deemed necessary to meet the 6,500 cfs flood control objective. BOR would operate Arrowrock and Anderson Ranch, and the Corps would operate Lucky Peak once it was completed. BOR advised the group that implementing the ultimate reservoir operating plan required: (1) prior submission to Congress of a supplemental report explaining the plan and reallocating Arrowrock and Anderson Ranch reservoir costs to irrigation storage, flood control and power generation; and (2) "agreements with all water users having space in Arrowrock and Anderson Ranch accepting the ultimate operating plan." Ex. 2078, 002029-36. The collaboration resulted in two draft interim operating plan, issued by the Corps in 1948 and 1951 (Ex. 2099; Ex. 2034), and the "ultimate" reservoir operating plan that has governed reservoir operations from the early 1950s to the present.

**5. Final Approval and Implementation of the Plan: 1953 Agreement, 1954 Supplemental Contracts, Congressional Authorization, 1956 Manual**<sup>9</sup>

By 1953, the "ultimate" reservoir operating plan that had been in development since the late 1930s, was ready for final approval; first by agreement between BOR and the Corps setting forth the terms and requirements of the plan, second by agreements between BOR and the Arrowrock and Anderson Ranch storage spaceholders, and finally by congressional authorization to use the total capacities of Arrowrock and Anderson Ranch reservoirs for flood control. The Commissioner of Reclamation (IDWR) recommended that the Secretary of Interior sign the

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<sup>9</sup> Historical context and detail are provided in *Stevens Report*. Ex. 2053, 001648-1651.

agreement with the Corps, explaining that:

The several actions dependent on the execution of this agreement are:

1. The presentation of the operating plan to the several water users' organizations having irrigation storage rights in Arrowrock and Anderson Ranch Reservoirs for formal acceptance by means of contracts supplemental to the existing contracts defining those storage rights. . .

3. The completion of a revised allocation report for the Boise Project, this revised report to be presented to the Congress along with the flood control operating plan as supporting documents . . .

The flood control operating agreement provides for the joint use of the space in the three Federal reservoirs on the Boise River for irrigation and flood control, such joint use not being permissible under existing governing arrangements for Anderson Ranch and Arrowrock. The operating plan is the key to various succeeding actions, and without such a joint use the desired measure of flood control cannot be achieved. . .

The proposed operating plan has been discussed with the State Reclamation Engineer and the Boise Project Board of Control, a group representing the major water users' organization of the Boise Valley, and tentative agreement has been reached with them. The operating plan, by its terms will become effective only when the affected water users' organization have given formal approval to it and after its transmission to the Congress.

Ex. 2037, 001357-59.

On September 21, 1953, BOR issued a Revised Allocation and Repayment Report for the Boise Project pursuant to Sections 7 and 9 of the Reclamation Project Act of 1939 and the 1946 Flood Control Act. Ex. 2071. The report supplemented the Secretary of Interior's June 25, 1940 finding of feasibility in House Document No. 916 to "provide an authoritative basis for the operation of [Anderson Ranch and Arrowrock Reservoirs] in conjunction with Lucky Peak for flood control purposes on a system basis." Id., 001930-31. The Report summarized the authorization and construction of the Boise River Reservoirs, and the development of the reservoir operating plan in the 1953 Agreement:

#### PLAN OF OPERATION

The Boise Project was initially considered only in relation to irrigation. With the passage of time, however, the functions of power and flood control came to be recognized as significant partners. . . .

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

Studies of operating plans made jointly by the Corps of Engineers and the Bureau of Reclamation were focused in this direction with the result that it is now proposed to use 418,000 acre-feet of active space in Anderson Ranch Reservoir, the 285,000 acre-feet in Arrowrock and the 280,000 acre-feet in Lucky Peak Reservoir jointly for irrigation and flood control. *A copy of the agreement providing for such operation is attached. . . .*

...  
Thus, facilities originally undertaken solely for irrigation have been converted to multiple-purpose uses by making necessary additions and by improving plans for using them.

Id., 001931-32 (emphasis added).

The November 20, 1953 Agreement between BOR and the Corps (Ex. 2038) contains the following essential terms of the reservoir operating plan for joint use of the Boise River

Reservoirs for irrigation storage and flood control:

Allocating up to 983,000 acre-feet of storage space in the reservoir system as needed for flood control during the flood control season (id., 001363, Art. 3);

Using forecasts of snowmelt runoff into the reservoir system and operational "rule curves" attached to the Agreement during the flood control season (January 1 through July 31) to determine, allocate, and attain the volume of reservoir space (*i.e.*, "flood control space") necessary to capture runoff and control reservoir releases to prevent Boise River flows below Diversion Dam from exceeding 6,500 cfs (id., 001365-68, Art. 6a-c);

Factoring the diversion of water into the New York Canal into the determination of the quantity of water to be released from Lucky Peak (id., 001365, Art. 6a);

Prescribing the sequence of releases from the reservoirs for flood control, and the reverse of that sequence for filling the reservoirs for irrigation storage (id., 001368-69, Art. 6d);

Filling the reservoirs for irrigation use in accordance with the forecasts and the rule curves by the end of the flood control season (*id.*, 001369-70, Art. 6e); and

Making up for shortfalls in filling Arrowrock and Anderson Ranch storage rights due to flood control releases with water stored in Lucky Peak at the conclusion of the flood control season pursuant to the Lucky Peak storage right (*id.*, 001368-69, Art. 6d).

The 1953 Agreement provides the spaceholders the express assurance that: “No reregulation of storage or annual exchange of storage as provided in this plan shall, however, deprive any entity of water accruing to it under existing rights in Arrowrock, Anderson Ranch and Lake Lowell Reservoirs.” *Id.*, 001364, Art. 4. Article 7 of the 1953 Agreement allows BOR and the Corps to modify the operating plan’s provisions for determining flood control space requirements and reservoir releases after consultation with the State Reclamation Engineer (IDWR), the Boise River Watermaster and the Boise Project Board of Control. Article 7 further provides: “[N]o modification which would affect in any substantial way any storage rights in the reservoir system and Lake Lowell, shall be made without the concurrence of all entities having rights in the reservoir system and Lake Lowell.” *Id.*, 001372.

Article 9 of the 1953 Agreement provides that it will not become effective until it is accepted by all Arrowrock and Anderson Ranch spaceholders, and a revised allocation report “supplemental to the report and finding of June 25, 1940 (H.R. Doc. No. 916, 76<sup>th</sup> Cong. 3d Sess.) reflecting the flood control benefits based on the operating plan herein set forth, has been transmitted to Congress.” *Id.*, 001373.

In a December 9, 1953 joint press release, the BOR and the Corps summarized the core concept of the reservoir operating plan in the 1953 Agreement, as it had been developed since the late 1930s, with the added assurance of storage in Lucky Peak if Arrowrock and Anderson Ranch did not completely fill:

The operating plan calls for the three reservoirs to be managed as one system, with water storage and release based on a forecast of runoff in the watersheds above the dams.  
*Water will be released in advance of the spring snowmelt flood to provide flood control.*

*Water will be captured on recession of the flood peak to supply irrigation requirements. In the event that Arrowrock and Anderson Ranch reservoirs cannot supply irrigation needs by reason of having evacuated water for flood control in excess of refill, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights, to the extent of the space in those reservoirs remaining unfilled, but not to exceed the amount evacuated for flood control. . .*

The authorization of Lucky Peak contemplated that it would permit the existing two reservoirs, Anderson Ranch and Arrowrock, when operated in conjunction with Lucky Peak, to provide not only a desired degree of flood control in the Boise Valley, but also to insure a firm supply of water for irrigators, and in numerous years supplemental water would be available. However, the joint use at times of the entire capacities in Arrowrock and Anderson Ranch Reservoirs for flood control and irrigation was not envisioned prior to the authorization of Lucky Peak Reservoir. Therefore, the matter must be submitted to the Congress.

Ex. 2103 (emphasis added).

During 1953, BOR negotiated terms for supplemental contracts to approve the reservoir operating plan with the Arrowrock and Anderson Ranch spaceholders. In December 1953, BOR delivered to the spaceholders draft supplemental contracts, the November 20, 1953 Agreement, and resolutions authorizing the spaceholders to enter into the supplemental agreements after approval by the Secretary of the Interior. Ex. 2039, 001388-89. The BOR's transmittal letter highlighted Article 7 of the draft, under which shortages in filling Arrowrock and Anderson Ranch would be "made up out of water accruing to the storage rights in Lucky Peak Reservoir." Id., 001388. After the spaceholders passed the necessary resolutions in early 1954, and the Secretary of the Interior approved the draft supplemental contract, BOR transmitted the supplemental contracts to the spaceholders, with the 1953 Agreement attached as Exhibit A. During the summer of 1954, BOR entered into supplemental contracts with 15 Arrowrock and/or Anderson Ranch spaceholders (8 irrigation districts and 7 canal companies), in which they assented to the dual purpose reservoir operating plan contained in the 1953 Agreement.

Ex. 2100.

The 1954 supplemental contracts supplement define the "storage season" for the

reservoirs as October 1 through the following year “when no more water is available for storage therein” and the “flood control period” as January 1 through July 31. *Id.*, 002169, Art. 5. The supplemental contracts:

Require BOR to operate the reservoir system “jointly for irrigation and flood control storage in accordance with the operating plan” in the 1953 Agreement (*id.*, 002169-70, Art. 6(a));

Substitute the reservoir operating plan of the 1953 Agreement for the flood control plan in the Anderson Ranch storage contracts (*id.*, 002169-70, Art. 6(a) & (b));

Guarantee that any shortfall in filling the spaceholders’ storage rights in Arrowrock and Anderson Ranch Reservoirs due to flood control operations will be made up from “water accrued to storage rights in Lucky Peak Reservoir” (*id.*, 002170-71, Art. 7);

Make the supplemental contracts effective “only when an allocation report for the Boise Project, supplemental to the report and finding of June 25, 1940 covering Anderson Ranch Dam (H.R. Doc. No. 916, 76<sup>th</sup> Cong.) reflecting the flood control benefits based on the operating plan set forth in Exhibit A has been presented to Congress and become operative” (*id.*, 002171, Art. 8 (a)); and

Make the supplemental contracts effective so long as the water accruing to Lucky Peak storage rights is provided to cover shortfalls in filling the spaceholders’ storage rights in Arrowrock and Anderson Ranch Reservoirs pursuant to article 7 (*id.*, 002170-71).

On August 24, 1954, after all the supplemental contracts were signed, Congress passed Public Law 660 (introduced in the Senate by Idaho Senator Dworshak as S.B. 3420) authorizing the Secretary of the Interior to operate the Boise River Reservoirs in accordance with the reservoir operating plan in the 1953 Agreement, and to allocate Arrowrock and Anderson Ranch Reservoir costs to irrigation, power and flood control accordingly. Ex. 2101.

In 1956, the Corps issued the Reservoir Regulation Manual for Boise River Reservoirs to provide information, criteria and procedures for operation of the Boise River Reservoir system as required by the 1953 Agreement. Ex. 2104. The 1953 Agreement remains in effect today. The Boise River Reservoirs were operated pursuant to the reservoir operating plan in the 1953 Agreement and the 1956 Manual for 30 years, until the plan was modified, and the Manual was updated and replaced in 1985.



6. **Lucky Peak Storage Rights, Contracts and the Reservoir Operating Plan**<sup>10</sup>

The Corps began construction of Lucky Peak Reservoir in October 1949, and completed it in December 1957. Ex. 2186, 003751. Storage began during construction in 1954. The Corps was not required to obtain a water right to construct or operate Lucky Peak Reservoir for flood control. Lucky Peak was operated pursuant to the 1953 Agreement without a water right permit for irrigation storage until 1964.

BOR filed a permit application with IDWR in 1957, to store and deliver water from Lucky Peak for irrigation use. Ex. 2030, 001057-59. The reservoir operating plan of the 1953 Agreement was an important factor in IDWR's processing of the permit application. The application proposed an exchange, whereby water would be diverted from the South Fork of the Boise River and delivered through a tunnel to the Hillcrest Division of the Mountain Home Project in the Mountain Home area. The permit application was protested by several Boise Valley irrigation districts and canal companies, alleging potential injury to their Bryan Decree "flood water rights," and interference with the storage of water under the reservoir operating plan of the 1953 Agreement. Id., 001061-68. IDWR took no action on the permit until after the protests were resolved by agreement between BOR and the protestants and the filing of a new permit application in 1963 which confined the supplemental use of Lucky Peak stored water to lands in the Boise Valley with existing water rights. Id., 001075-76. In a letter filed with IDWR, BOR confirmed its understanding that the application would not interfere with prior water rights, or the water users' rights under the 1954 Supplemental Contracts in which they approved the reservoir operating plan of the 1953 Agreement. BOR offered the inclusion of a condition to this effect in IDWR's approval of the Lucky Peak permit. Id., 001076. The

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<sup>10</sup> Historical context and detail are provided in *Stevens Report*. Ex. 2053, 001652-54.

spaceholders withdrew their protests, and IDWR approved the permit application on March 20, 1964. *Id.*, 001077-78.

After IDWR approved the permit application in 1964, BOR entered water service contracts pursuant to Section 8 of the Flood Control Act of 1946 with several Boise Valley irrigation districts and canal companies for storage in Lucky Peak Reservoir. *Ex. 2112*. Eighteen contracts were entered by 1968. *Ex. 2115*, 002331. Like the Anderson Ranch contracts, the Lucky Peak contracts entitled the contractors to defined proportions of the water that was actually stored in Lucky Peak Reservoir, and allowed the contractors to “hold over” unused storage from one year to the next (aka “carryover storage”). *Ex. 2112*, 0002305, 310-311. The contracts identified BOR’s approved permit to store water in Lucky Peak, acknowledged that Lucky Peak is operated primarily for flood control pursuant to the 1953 Agreement, and provided that:

Subject to such operation for flood control, the United States will operate Lucky Peak Dam and Reservoir so as *to store under existing storage rights all available water*, and during each irrigation season, the United States will make available to the Contractor for irrigation the Contractor’s proportionate share of the storage water that accrues in each year to the active capacity of the Reservoir, together with any stored water that may have been carried over in the Contractor’s share of such active capacity from prior water years.

*Id.*, 002310 (emphasis added).

Under the contracts, in a year of below normal runoff, when storage releases are not required to create the flood control space required to capture runoff to prevent flooding, Lucky Peak storage available to the contractors consists of carryover from the prior water year (November 1 to October 31), plus runoff stored during the current water year. In a flood control year, when it is necessary to release carryover storage to create the required flood control space, carryover from the prior year is reduced by the amount released, and Lucky Peak storage available to the contractors would consist of remaining carryover, if any, plus runoff captured



during flood control operations. All water in Lucky Peak after flood control releases is accounted for as new storage or “new fill.” *Id.*, 0002310-311. The Lucky Peak contractors were thus entitled to water stored in the reservoir “under existing storage rights” after flood control releases on “recession of the flood peak to supply irrigation requirements,” subject to the possibility that their entitlements would not be completely filled at the conclusion of flood control operations due to: (1) forecasting errors or unforeseen runoff conditions; and (2) the assignment of Lucky Peak storage to make up for shortages in Arrowrock and Anderson Ranch storage. *Ex. 2103*.

The Lucky Peak water right remained in permit stage for several decades, until it was finally licensed in 2002. The reservoir operating plan continued to be a factor in the development of the Lucky Peak water right. Extensions of time were granted while the Bureau, the Corps, and IDWR conducted various studies related to the use of uncontracted Lucky Peak storage space and modification of the reservoir operating plan. *Ex. 2030*, 001079-136. These studies included the *Boise Project Power and Modification Study*, which was used in the selection of new criteria for the revised reservoir operating plan that was adopted in 1985. *Id.*, 001090-136.<sup>11</sup> After that study was completed and the reservoir operating plan was revised, BOR filed an application to amend the permit to add streamflow maintenance as the purpose of use for the uncontracted storage, and submitted proof of beneficial use. *Id.*, 001163-164. IDWR performed a beneficial use examination in 2002, after the Lucky Peak permit was claimed in the SRBA. *Id.*, 001165-1170. IDWR’s analysis confirmed its longstanding position that flood control “cannot be recognized as a beneficial use.” *Id.*, 001172, 001124-125. The analysis recommended the license include a condition that use of the Lucky Peak storage right is “subject

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<sup>11</sup> See also, *Stevens Report*. *Ex. 2053*.

to contracts administered by the right holder.” *Id.*, 001173.

After further consultation on the proposed license with BOR, an IDWR staff memorandum recommended inclusion of a condition stating that the Boise River Reservoirs are operated as one system in accordance with the 1954 Act (Public Law 660). *Ex. 2031*, 001201-204. The staff memorandum includes an excerpt of a 1955 Corps report entitled “Lucky Peak Dam and Reservoir” from IDWR’s Lucky Peak dam safety file, which explains “the operation plan” as follows: “To permit more effective use of all storage space, the operation of the three dams in the Boise River Basin is coordinated to provide as much as 983,000 acre-feet of flood control space on a forecast basis with all three reservoirs refilled at the end of the flood season for irrigation.” *Id.*, 001206. While the license was issued without the recommended condition, the reservoir operating plan was clearly considered by IDWR.

To secure the Lucky Peak contractors’ long-term rights to storage in Lucky Peak Reservoir, the Lucky Peak water service contracts were converted to repayment contracts in 2005, after BOR analyzed and vetted the contract conversion through a public NEPA process. *Ex. 2190*, 003982-4002. The repayment contracts require that Lucky Peak be operated pursuant to the 1953 Agreement, the 1954 supplemental contracts, and the 1985 Water Control Manual for Boise River Reservoirs, and retained the understanding of the water service contracts regarding the relationship between flood control operations on the storage of water pursuant to “existing storage rights” for use by the Lucky Peak spaceholders. *Ex. 2190*, 003990-91.

**7. IDWR’s 1974 Report and Revision of the Reservoir Operating Plan**<sup>12</sup>

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

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<sup>12</sup> Historical context and detail are provided in the *Stevens Report*. *Ex. 2053*, 001660-82.

Lucky Peak Dam.<sup>13</sup> Ex. 2181, 003631, ¶ 7. In response to the Governor's request, IDWR produced a report in November 1974, prepared by IDWR Water Resource Engineer Bob Sutter ("Sutter") in consultation with BOR and the Corps, evaluating the effectiveness of reservoir operations under the 1953 Agreement and the 1956 Manual in preventing flooding and filling the reservoirs for irrigation storage. Ex. 2182. The 1974 Report used the terms "refill" and "fill" interchangeably to mean the annual filling of the Boise River Reservoirs during flood control operations for irrigation and other beneficial uses. Ex. 2181, 003631-32, ¶ 8. The Report found that operational changes were warranted because urban encroachment along the Boise River increased the potential for economic damage from flooding; improved methods of runoff forecasting were available; and the 1953 Agreement's "rule curves" governing reservoir operations during the flood control season provided greater assurance of reservoir refill than flood prevention. Id. The Report evaluated changing reservoir operations to increase the vacant flood control space during the early phases of the flood control season to capture more peak runoff and thereby improve the ability to control reservoir releases to meet the 6,500 cfs flood control objective. Such a change could increase the risk that the reservoirs will not be filled by the end of flood control operations by shifting the timing of reservoir refill so that less is stored during the early "evacuation period," of flood control operations, and more is stored later during the "refill period." Id., 003632-33, ¶ 9. The Report concluded that reservoir operations could be modified in such a manner without significantly reducing refill assurances, and recommended that BOR, the Corps and IDWR conduct additional studies and jointly prepare revisions to the 1953 Agreement and the 1956 Manual. Id., 003633, ¶10.

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<sup>13</sup> Reservoir operations from 1956 to 1974 are discussed in the *Stevens Report*. Ex. 2053, 001654-60.

## 8. The 1985 Water Control Manual

IDWR's 1974 Report became the basis of a multi-year effort by BOR, the Corps and IDWR which resulted in revision of the reservoir operating plan in the 1953 Agreement, and adoption of a new manual in 1985, entitled "Water Control Manual for Boise River Reservoirs" ("Water Control Manual" or "1985 Manual"). *Id.*, 003633-35, ¶¶ 11, 12. Early in the revision process a "plan of study" was developed, which stated: "This plan of study is to serve as a guide for a coordinated local, State, and Federal effort to develop a new and improved Boise River regulation plan, manual, and agreement . . . The primary participants of this study will be the Idaho Department of Water Resources, U.S. Bureau of Reclamation, and the U.S. Army Corps of Engineers." *Ex. 2183*, 003712-13. IDWR employee Bob Sutter, who participated in the preparation and review of the 1985 Manual, explained that his supervisor "Alan Robertson went to the meetings [with BOR and the Corps] and was informed of everything and provided advice and guidance, because it was really necessary to get the Department of Water Resources' blessing on this." *Tr.*, 459:4-17. As explained by IDWR Director Higginson:

In 1974 Governor Andrus requested [IDWR] to evaluate flood control management of the Boise River system. A report was issued in November of that year recommending several changes for improving Boise river flood control operations. *As a direct result of this report, a new Water Control Manual for Boise River reservoirs was finalized in April, 1985. Although issued by the Corps of Engineers, this manual was a joint effort by the Corps, Bureau of Reclamation and [IDWR].*

The new manual represents several years of effort to adopt current technology and data to today's condition and needs, all of which have changed since the first operating manual was issued in 1956.

*Ex. 2171* (emphasis added).

After the Water Control Manual was completed in April 1985, BOR and the Corps entered into a "Memorandum of Understanding" ("1985 MOU") adopting the Manual as an "integral part" of the 1953 Agreement to "constitute the current operating plan and procedures until further changed or modified by the parties in accordance with Article 7" of the 1953

Agreement. Ex. 2045, 001460. The 1985 MOU explains that the BOR and the Corps agreed to revise the reservoir operating plan “after consultation with the State of Idaho, Boise River Watermaster, and Project Manager of the Boise Project Board of Control.” Id., 001459. The Water Control Manual explains: “The Memorandum of Understanding is a supplement to the Agreement, which does not change its terms, but rather incorporates a new operating agreement under Article 7 of the 20 November 1953 agreement.” Ex. 2186, 003747.

The 1985 Manual retains the longstanding reservoir operating principle as explained to and approved by Congress, Boise River Reservoir spaceholders, and the State of Idaho beginning in the 1930s:

*To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of storage capacity indicated by the run-off forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.*

H.R. Doc. No. 916, 76<sup>th</sup> Cong., 3d Sess. (1940) (authorizing construction of Anderson Ranch Reservoir) Ex. 2027, 000884 (emphasis added). On November 30, 1987, IDWR Director Higginson explained:

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

Ex. 2171 (emphasis added).

Though updated, the linchpins of the revised reservoir operating plan continued to be:

- (1) the flood control objective of 6,500 cfs at the Glenwood gage (Ex. 2186, 003797);
- (2) allowable releases between 6,500 cfs and 10,300 cfs during normal flood control operations (without exceptional runoff and reservoir inflows) between January 1 and July 31, depending on the volume of irrigation diversions pursuant to established senior natural flow water rights between Lucky Peak Dam and the Glenwood Gage (id., 003768, 003797);

- (3) updated methods and procedures for forecasting the timing and volume of inflows from runoff into the reservoir system (*id.*, 003779);
- (4) new rule curves to define flood control space requirements based on reservoir inflow forecasts (*id.*, 003799, 003832, Plate 7-1); and
- (5) updated methods for scheduling releases to maintain required flood control spaces (*id.*, 003788, 003793).

See also, Ex. 2181, 003634-35, ¶ 12.

The Water Control Manual divides the “flood control season” (end of irrigation season to maximum reservoir fill) into three phases of operation. During the first “winter space requirements” phase (November 1 to March 31) the Manual requires that minimum flood control spaces be maintained, regardless of forecasted runoff, to control unexpected runoff from snowmelt and precipitation on frozen ground. Ex. 2004, 000352-53, ¶ 17. Generally, reservoir releases are not required during the winter months to meet the prescribed minimum space requirements (*id.*), unless there are exceptional runoff conditions, as explained in 1987 by IDWR Director Higginson:

To illustrate the need for this space, the December 1964 flood produced almost 200,000 acre-feet of runoff in one week, and had there been no reservoir space available, would have resulted in a peak flow of 44,000 cfs through Boise. Such a flood today would cause more than 400 million dollars in damages. To protect against such an event, current criteria call for a minimum of 300,000 acre-feet of empty reservoir space during November and December.

Ex. 2171, 003352.

Generally, beginning January 1, runoff forecasts are used in conjunction with the rule curves to determine the volume of reservoir space that must remain vacant to capture forecasted runoff, and the volume of reservoir space in which inflows may be stored. Ex. 2181, 003632-33, ¶ 9. This procedure represents the balance described by IDWR Higginson between flood control and reservoir refill, providing “high levels of assurance that (1) Boise River flows will not exceed the flood control objective of 6,500 cfs, and (2) the reservoirs will be refilled to the maximum extent possible at the conclusion of flood control operations pursuant to reservoir

storage water rights.” Ex. 2181, 003635, ¶ 13; *see also*, Ex. 2004, 000349-50, ¶¶ 6, 7; *Order*, R., 001242, ¶ 24.<sup>14</sup>

In his *Order*, the Director found that the amount of water BOR and the Corps store and release from the Boise River Reservoirs is governed by the Water Control Manual, in an effort to balance flood control and irrigation storage in accordance with the overriding objective of the Manual. R., 001242-43, ¶¶ 23, 24; 001279, ¶ 163.

**B. Storage in the Boise River Reservoirs During Flood Control Season**

The operation of the Boise River Reservoirs for beneficial use storage and flood control pursuant to the reservoir operating plan is described by Mary Mellema (Ex. 2004; Tr., 705-766), Sutter (Ex. 2181, ¶¶ 4, 12-14; Tr., 386-428) and Lee Sisco (Ex. 2008, ¶¶ 16-22).

Sutter, author of the 1974 Report, participant in the development of the 1985 Water Control Manual, and author of the IDWR’s computerized water right accounting program, explained how water is stored for beneficial use during flood control operations:

4. Reservoir Operations Overview. . . . Because the reservoir system stores water for irrigation and other uses during the spring runoff season, the reservoir operating plan is designed to ensure that the reservoirs will be filled during flood control operations to store water pursuant to established rights. Joint operation of the reservoir system for flood control and beneficial use storage is accomplished through the use of the runoff forecasts, rule curves, and scheduled reservoir releases. Under the reservoir operating plan, as forecasted inflows decline, less flood control space is required, and inflows are increasingly retained and added to reservoir contents until the danger of flooding has passed and the reservoirs are filled or nearly filled. After the flood risk has passed, the water stored in the reservoir system at the point of maximum fill is allocated among the reservoir storage water rights according to their priorities, and is available for delivery to those who are entitled to use the stored water for irrigation and other beneficial uses.

5. Storage Water Right Accrual During Flood Control Operations. Water cannot be stored in Boise River Reservoir space that is required to be vacant during flood control operations. Reservoir inflows that must be released to maintain required flood control spaces are therefore not available to physically fill storage space. Reservoir space

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<sup>14</sup> For additional explanation of flood control operations under the Water Control Manual, *see* Ex. 2181, 003632-34, ¶¶ 9-11; Ex. 2008, 000478-82, ¶¶ 16-22; and Ex. 2004, 000349-56, ¶¶ 4-26.



becomes available for physical storage only as flood space requirements decline in accordance with the established reservoir operating plan. Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled.

Ex. 2181, 003628-29, ¶¶ 4, 5. *See also*, Ex. 2004, 000351-52, ¶ 14, (Mellema: flood control space is not available for storage).

Consistent with Sutter's testimony, the Director found:

25. The Water Control Manual's Water Control Plan specifies *the amount of space that must be left vacant at various times during flood control operations*, as well as the distribution of this vacant space among the three on-stream reservoirs. For present purposes, the total amount of reservoir system *storage space that must be left vacant* at any given time of year, and its distribution among the individual reservoirs, is termed the 'system flood control space requirement.'

26. Throughout the year, the reservoir system is generally operated *to store as much water as possible without violating the system flood control space requirement*. *Ensuring that the required amount of reservoir space is empty at the times prescribed by the Water Control Manual often requires the release of water that could otherwise be stored in the reservoir system for later use*. These flood control releases can take the form of either 'bypasses' or 'evacuations.'

R., 001243 (emphasis added).

The Director described reservoir releases as either "evacuations," which reduce reservoir contents, or "bypasses," which do not, and explained that the effect of either type of release is *"less water being physically stored than would have been stored absent the need to meet the system flood control space requirement."* R., 001243-44, ¶¶ 27-29 (emphasis added). He then explained that when "Refill Requirements" govern reservoir operations from April 1 through July 31, *"the operation shifts from evacuating to filling or 'refilling' vacant space in the reservoir system*. This normally is the most difficult and most critical of the three flood control periods . . . because *prematurely filling the reservoir system increase flood risk, but also failing to fill the reservoir system reduces the supply of stored water available for later use."*

R., 001245, ¶ 13d (emphasis added).

Lee Sisco ("Sisco"), whose 40-year experience in the administration of water rights in Water District 63 and southwest Idaho, including working for IDWR from 1967 to 1986 in the



Western Region office as a field examiner and as Manager of the Watermaster Program, and, more importantly, holding the office of the Boise River Water Master from 1986 until 2008, explains that all water physically stored and released from the Boise River Reservoirs for beneficial use is stored and delivered pursuant to the decreed existing storage rights for the reservoirs. Ex. 2008, 000473, ¶ 8. Sisco explains beneficial use storage and water right administration during flood control operations:

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

20. During my experience in Boise River water right administration, no spaceholder, Watermaster, or IDWR employee advised me that they considered water that was released from the Boise River Reservoirs for flood control purposes as a release of water that had been stored for beneficial use pursuant to a storage water right. Flood control use of the reservoir system does not require a water right, or constitute storage or storage use under any of the storage water rights for the Boise River Reservoirs. Reservoir space that is required to be kept open for flood control purposes is not available to physically store water for irrigation or any other beneficial use, until that space is no longer required for flood control purposes. Water that is required by the Water Control Manual to be released from the reservoir system to maintain required flood control spaces is not available for beneficial use storage under reservoir storage water rights, and is not treated as delivered to spaceholders for beneficial use under storage water rights. During flood control operations, reservoir inflows are physically stored for beneficial use as flood space requirements decline, and reservoir space that becomes available for beneficial use storage is physically filled with water. During flood control operations, I worked with the BOR and the Corps to make every effort to fill reservoir space with water following flood control releases to fulfill existing storage rights and spaceholder contracts. Until reservoir space that is available for storage is physically filled, storage rights remain in effect and are physically filled in priority with all other Boise River water rights. When the reservoirs reach maximum physical fill at the conclusion of flood control operations, the storage rights have likewise reached maximum fill, and the water that has been physically stored pursuant to the storage water rights is allocated to the spaceholders' storage accounts.

Id., 000480-81, ¶¶ 19, 20.

Boise River Reservoir spaceholders have also understood that water filling the Boise River Reservoirs following flood control releases is stored pursuant to the reservoir water rights. Ex. 2002, 000296-97, ¶ 10; Ex. 2189, 003917, ¶ 14. Spaceholders depend heavily upon storage secured by the storage water rights they established, in the reservoir space they paid for. They have relied upon reports of physical reservoir contents to gauge their storage supplies for the upcoming irrigation season. Ex. 2002, 000294-95, ¶ 6. Notice of flood control releases signals to the spaceholders that there will be sufficient natural flow to physically fill the Boise River Reservoirs and storage rights for a full allocation to their storage accounts (which are based on storage water rights). Id., 000295, ¶ 7; Ex. 2189, 003915-16, ¶¶ 10, 11. Prior to BW-17, they had never been informed that IDWR or the State of Idaho considered flood control releases to be releases of their stored water, or that any of the water allocated to their storage accounts had been stored without a water right. Ex. 2002, 000296-97, ¶ 10; Ex. 2189, 003917, ¶ 14.

**C. Administration of Boise River Reservoir Storage Water Rights**

Boise River Watermasters are responsible for the administration of Water District 63 water rights, which includes distributing and accounting for the distribution of water to the Boise River Reservoir storage water rights. Ex. 2008, 000470-71, ¶ 3. Sisco was the Boise River Watermaster for 22 years, from 1986 to 2008. Prior to becoming Watermaster in 1986, he worked for IDWR from 1967 to 1986. His final position with IDWR was Manager of the Watermaster Program for IDWR's Western Region, providing technical and administrative assistance to all Watermasters in southwestern Idaho, including Henry Koelling, the Water District 63 Watermaster who preceded Sisco. The Watermaster prior to Mr. Koelling was Roy Musselman. Tr., 364:19-22. When Sisco became the Boise River Watermaster, Mr. Koelling provided Sisco training in the accounting and distribution of water rights. Id., 000469-70, ¶ 2. Former IDWR Director David Tuthill, who worked with Sisco in IDWR's Western Region

Office, had very high regard for Sisco. Tuthill support Sisco becoming Watermaster, considered him to be a competent Watermaster, and regards him as the most knowledgeable person as to how Boise River water rights were administered during his tenure. Tr., 676:9-677:25.

Historically, BOR, the Boise Project and the Watermaster worked closely together (working in the same building) on Boise River water management. Tr., 367:11-368:1. The Bureau served as a source of water measurement data and other technical information, and the Watermasters made their water distribution and administration calculations by hand. Sutter explained that "it was an amazing process . . . but very, very time consuming." Tr., 368:6-369:7. The Boise River Watermasters evaluated the physical contents of the Boise River Reservoirs to determine the point at which the reservoir water rights were filled. Sutter testified:

Q. With regard to reservoir storage rights, do you know how Mr. Musselman determined at what point in the year they had filled?

A. He used the physical fill of the reservoirs. And I think this was also done in conjunction with the Bureau of Reclamation. I'm not quite sure of the interaction because, as I said, they were so close together, they probably just got together and talked about it and came up with the fill of the reservoirs based on physical contents.

Q. And when you say "based on physical contents," what do you mean?

A. When the reservoirs physically reached the maximum content, that was the water that was then considered having been stored in that reservoir to be allocated to the various water users in the reservoir.

Q. And do you mean that it was -- the water was considered to have been stored in the reservoir pursuant to the reservoir storage water rights?

A. Yes.

Q. And do you know how they made that determination at that time -- I'm just going to stick with Mr. Musselman's time -- as to when maximum reservoir fill or content had been reached?

A. I can only speculate that they watched the reservoirs and looked at the various conditions on the river and together they said, "Okay. Today is going to be the day that we allocate the water." I don't know the specific procedure of how they did that.

Q. And that volume would have been the volume represented by reservoir gauge measurements; correct?

A. Yes.

Q. That maximum fill volume; correct?

A. Yes.

Q. And then after that was determined, I think you indicated they allocated the water to - to what? What did they then allocate the stored water to?

A. Well, each reservoir -- the Bureau of Reclamation has storage water contracts and other storage designated uses in each reservoir that has a certain space in the reservoir. And depending upon the fill, each water user or entity will accumulate water in that space. And the fill then is allocated to the various entities or contract holders in each reservoir respectively.

Q. So to summarize, then, the water that fills the reservoirs pursuant to the storage rights, at the point of maximum fill, was allocated to the spaceholders in proportion to their contract entitlements; correct?

A. Correct.

Tr., 370:16-372:16.

Prior to 1986, Watermaster Koelling reviewed streamflow measurements and reservoir levels on the Bureau's Hydromet system every day to account for the accrual of natural flow to the storage water rights. Tr., 844:14-845:6. He hand calculated the daily accruals by determining change in reservoir content from the previous day, subtracting outflow from Lucky Peak and then converted that figure to cfs to determine natural flow into the reservoirs. He would then accrue and credit the natural flow he calculated to the reservoir that was in priority at the time. Tr., 845:21-847:4.

Mr. Koelling also kept track of flood control releases as water that flowed through the reservoir system, and did not accrue those flows to any reservoir storage right. Mr. Koelling reported flood control releases in his annual Watermaster Reports in a category called "flood control and other loss to the [irrigation season or system (total year)]." Tr., 849:9-851:7; 860:4-12; Ex. 2009, 000550.

Mr. Koelling also determined and reported the "total available" storage in the reservoir system based on the physical reservoir contents at the time of maximum storage (*i.e.*, maximum reservoir fill). That figure would equal total measured contents at that time, or be less if

spaceholders had used storage prior to that time. Tr., 851:18-853:13; Ex. 2009, 000559. During Mr. Koelling's tenure, the water he accounted for as "total available" storage was stored under the priority of the storage water rights, and rights junior to the storage rights were not entitled to delivery of water ahead of the storage rights. Tr., 854-855; 370:16-373:13, 418:4-15. This was also the case during Sisco's tenure as Watermaster, as explained during Sisco's live hearing testimony and in his Affidavit. Tr., 855:5-9; Ex. 2008.

After Sisco retired in 2008, he provided his successor, Watermaster Rex Barrie ("Barrie"), training. Tr., 1335-1339. Barrie described Sisco's reputation as the Boise River Watermaster as "exemplary." Tr., 1337:15-17. Sisco trained Barrie in the Boise River water rights, reservoir operations and the Watermaster's use of IDWR's accounting methodology, and Barrie administers Boise River water rights consistent with that training. Tr., 1337:24-1338:10. Barrie reviewed and agrees with the statements in Sisco's Affidavit and administers water rights consistent with those statements. Tr., 1343:10-1344:11.

During his testimony, Barrie described his annual and daily activities as Watermaster. Tr., 1358-1360, 1369-1374. He explained that he refers water users to BOR's Hydromet site and teacup diagrams showing the physical contents of the reservoirs "to know exactly how much water you've got in the reservoir. Irregardless of anything else, that water that is physically in that reservoir is what they have to operate with at that particular time." Tr., 1338:24-1359:12.

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

- (1) Flood control use of the reservoirs does not require a water right, or constitute use of the established storage water rights. Ex. 2008, 000481, ¶ 20; *see also*, Tr., 699:5-21. Consequently, water released for flood control cannot be treated as having been stored under the reservoir storage rights, and the release of water from the reservoirs for flood control purposes has no impact on the reservoir storage rights.

- (2) All water physically stored in the Boise River Reservoirs for beneficial use, and all stored water that is delivered from the reservoirs for those beneficial uses, is stored and delivered pursuant to the reservoir storage water rights. Ex. 2008, 000473, ¶ 8.
- (3) Beneficial use storage cannot occur without a water right, and all water physically stored in the reservoirs at the conclusion of flood control operations has been stored pursuant to the storage rights and allocated to the spaceholders' storage accounts. Ex. 2008, 000489, ¶ 32.
- (4) The water physically stored in the Boise River Reservoirs during flood control operations pursuant to the reservoir operating plan is stored pursuant to the reservoir storage water rights, and flood control releases do not diminish the accrual of physically stored water to reservoir storage rights. Ex. 2008, 000480, ¶ 19.
- (5) Until reservoir space that is available for storage is physically filled, storage water rights remain in effect and are filled in priority with all other Boise River water rights. "When the reservoirs reach maximum physical fill at the conclusion of flood control operations, the storage rights have likewise reached maximum fill, and the water that has been physically stored pursuant to the storage water rights is allocated to the spaceholders' storage accounts." Ex. 2008, 000481, ¶ 20.
- (6) If the Boise River Reservoirs have not physically filled by April 1, physical storage of reservoir inflows continues under the priorities of the storage rights, in order of priority with natural flow rights, until the reservoirs are physically filled, or until natural flow becomes insufficient to fill the reservoirs because of downstream senior irrigation demand. Ex. 2008, 000473, ¶ 8. If the reservoirs and storage rights are completely filled when the reservoirs reach maximum physical fill at conclusion of flood control operations, additional storage may occur during the ensuing irrigation season if all subsequent rights have been met. Ex. 2181, 003637, ¶ 16; Ex. 2186, 003807.
- (7) Notice from the Corps and BOR that flood control releases are required signals to the Watermaster and the water users that there should be sufficient natural flow from the upper Boise River watershed to physically fill the Boise River Reservoirs and reservoir storage rights for a full allocation to storage accounts for the upcoming irrigation season. Boise Valley spaceholders rely on this notice to plan their water deliveries, irrigation use, and planting. Ex. 2008, 000479-80, ¶ 18.
- (8) The Boise River flows from the upper Boise River watershed are available for additional/junior appropriation only during flood control operations when water is released for flood control purposes. Ex. 2008, 000475, ¶ 12. Watermaster Sisco recommended, and IDWR has included, conditions in permits issued for new appropriations of water from the upper Boise River watershed to notify junior right holders that water is available for their diversions only during flood control operations—when spring runoff from the Upper Boise River watershed exceeds: (a) irrigation demand by diversions with *Stewart* and *Bryan Decree* water rights, and (b) the physical filling demand of the Boise River Reservoirs pursuant to storage water rights in accordance with the reservoir operating plan. Ex. 2008.
- (9) "Reservoir inflows that are required to fill storage rights during flood control operations are never released to deliver water to water rights that are junior to the Boise



River Reservoir storage.” Ex. 2008, 000482, ¶ 21; Tr., 1374:2-1375:5. IDWR has no evidence that water that would otherwise be stored to fill the Boise River Reservoirs has ever been released from the reservoirs to fulfill water rights that are junior to the reservoir storage rights. Tr., 158:4-159:11.

(10) Prior to the 2012 BW 17 proceedings in the SRBA, no IDWR employee had ever advised the Boise River Watermaster or the Boise River water users that IDWR considered water released from the Boise River Reservoirs for flood control purposes as a release of water that had been stored for beneficial use pursuant to a storage water right. Ex. 2008, 000481, ¶ 20. No IDWR employee had suggested to the Boise River Watermaster that storage rights were “satisfied” at the point of “paper fill” in the water right accounting, that storage rights were no longer in effect or in priority after the point of paper fill, or that junior rights were entitled to call for the release of water from the reservoirs prior to maximum physical fill. Ex. 2008, 000488-489, ¶ 32.

**D. Storage Water Right Accounting During Flood Control Operations**

On September 30, 1980, while BOR, the Corps, and IDWR were working on the new Water Control Manual, IDWR Director Steve Allred wrote to Col. Thayer (copying Boise River Watermaster Koelling), proposing that the new manual should describe the “full annual operating cycle” of the Boise River Reservoirs. In the letter, he explained:

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. We would be happy to work with your office and the Water and Power Resources Service in drafting it.

Ex. 2184.

IDWR Hydrologist Sutter prepared the operating cycle description Director Allred suggested, it was forwarded to the Corps on April 2, 1981, and later included in the Water Control Manual. Consistent with Mr. Allred’s 1980 letter, Sutter’s memo explains the Watermaster’s role in determining “Boise River Reservoir Fill” as follows:

Boise River reservoir storage accrues on a daily basis to each reservoir according to the priority or the water right(s) for the reservoir(s) and the natural flow supply available at the point of diversion. Natural flow is determined at the location of the dams for the main river reservoirs (Anderson Ranch, Arrowrock, and Lucky Peak), and at the Boise Project Main (New York) Canal Diversion Dam for the offstream reservoir, Lake Lowell. . .



It is the duty of the Boise River Watermaster to determine on a daily basis the accumulation of stored water under the rights of each of the four reservoirs and to inform the United States Water and Power Resources Service and the Boise Project Board of Control each season when the maximum fill of each reservoir is known. . . .

Ex. 2185.

The computerized accounting system that is used to account for the accrual of water to Boise River Reservoir storage water rights was adapted for the Boise River by Sutter and Alan Robertson, and implemented at Sisco's request when he became the Boise River Watermaster in 1986. Ex. 2181, 003630-31, 003637, ¶¶ 6, 18; Ex. 2008, 000482-23, ¶ 23. Watermaster Koelling felt that his longhand method of accounting was adequate, but Sisco, as the new Watermaster, felt it might be more efficient for a computerized system to make the calculations Mr. Koelling made by hand. Ex. 2008, ¶ 23.

Sutter and Sisco explain the methodology of the accounting system in their affidavits. Ex. 2181, 003630-31, 003637-39, ¶¶ 6, 18-21; Ex. 2008, 000482-89, ¶¶ 23-32. The only significant change implemented through the adoption of the computerized accounting system was to account for the accrual of water to the reservoirs based on source and priority, rather than priority alone. Ex. 2008, 000483-84, ¶ 24. This was an administrative decision to properly account for the storage of water *as between the reservoir storage rights* that could have been implemented without the accounting system. *Id.* Adoption of the accounting system did not make any other change to the administration of Boise River storage water rights, or the accrual of physically stored water to those rights. *Id.*

As an accounting tool, the accounting system does not itself determine how water rights are administered. *Id.*, 000484, ¶ 25. The accounting system does not affect required flood control spaces, storage volumes (*i.e.*, reservoir contents), reservoir system releases or any other aspect of reservoir operations during the flood control season pursuant to the Water Control

Manual. *Id.*, see also, Ex. 2004, 000356, ¶ 27. Specifically, the “paper fill” methodology of the water right accounting program did not change reservoir operations, reservoir refill, or water right administration. Ex. 2181, 003638, ¶ 20. Physical filling of reservoir system storage spaces and water rights continued as required by the Water Control Manual’s runoff forecasts, rule curve and release procedures. *Id.* The accounting system was not intended or used to treat reservoir storage rights as “satisfied” at the point of “paper fill” when in fact vacant flood control spaces remained due to flood control releases over which the spaceholders had no control. Nor was it the intent or effect of the accounting system to treat water as being stored for beneficial use without a water right, or allowing junior water rights to call for the release of water that was required by the Water Control Manual to be stored to fill reservoir storage spaces and water rights. Ex. 2008, 000488-89, ¶ 32.

To the contrary, Sutter explains that “the net effect of this accounting procedure is to accrue to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecasts and rule curve procedures of the Water Control Manual.”

Ex. 2181, 003638-39, ¶ 21.

[T]he water right accounting program confirms that reservoir storage rights are fulfilled as inflows physically refill reservoir storage spaces during flood control operations. After flood control operations are concluded and the reservoirs have reached maximum fill, stored water is allocated to the existing storage water rights, confirming that filling the reservoirs for beneficial use storage pursuant to reservoir storage rights is not completed until maximum reservoir fill is achieved.

*Id.*, 003631, ¶ 6.

In Sisco’s words: “As was the case during [Watermaster] Koelling’s tenure, all the water actually, physically stored in the reservoirs at the conclusion of flood control operations has been stored pursuant to the reservoir storage rights, and allocated to the storage accounts of the spaceholders.” Ex. 2008, 000488-89, ¶ 32. “The accounting system protects the established

storage rights, and does not penalize spaceholders for the use of the reservoir system for flood control purposes to protect downstream lands from flooding.” *Id.*, 000488, ¶ 31.

Sisco explains that the only significant change in the administration of water rights instituted through the use of the computerized accounting system was to accrue water to the reservoirs by source and priority, rather than by priority alone as Mr. Koelling had done. Sisco felt that accruing water by priority alone, without regard to whether the water was tributary to a reservoir (*i.e.*, could physically enter a reservoir) was inconsistent with Idaho water law and deprived Lucky Peak storage rights and space holders of water they were entitled to receive from Mores Creek and the South Fork of the Boise River below Anderson Ranch Dam. *Id.*, ¶¶ 15, 24; Sisco, Tr., Vol. III at 872:5-14. IDWR Director Dunn’s March 19, 1987 letter to Sisco confirmed that accruing water to reservoir storage rights by source and priority was the only significant change implemented through the computerized accounting system. *Ex. 2008*, ¶ 24. It states:

Probably *the most significant effect of the accounting change* results from computation and allocation of natural flow at each reservoir. The former method allocated the total physical fill based upon the overall right sequence: Arrowrock, Anderson Ranch and Lucky Peak. This had the effect of crediting natural flow upstream. Mores Creek water was moved to Arrowrock and Anderson until they filled. After Arrowrock filled, gain below Anderson Ranch was moved into Anderson until it filled. The new method will always result in some accrual to Lucky Peak because of its location.

*Ex. 4*, p. 6 (emphasis added); Tr., 911:20-912:5.

An internal Bureau memorandum prepared by Neil Stessman reflects the same understanding and agreement with the principle of accruing water to the reservoir on the basis of source and priority:

As you are aware the Watermaster has adopted a new method of accruing storage to the respective reservoirs [that] as a affects rather significantly the relative rights of Lucky Peak and Anderson Ranch Reservoirs, Lucky Peak storage becoming a better right in relation to what it had been thought to be and Anderson Ranch storage becoming correspondingly less good.

Field Solicitor Bill Dunlop has suggested that we go on record as being notified of the Director's decision.

Id., p. 1.

Director Dunn's letter did not identify any other significant change resulting from the adoption of the computerized water right accounting program. As Sisco testified, an accounting change that would treat the reservoir water rights as filled at the point of "paper fill," long before maximum storage was reached, would be a much more "significant effect" of adopting the new water right accounting program than accruing water by source and priority. Tr., 912:6-14.

Sisco testified that the computerized water right accounting program for the Boise River did not alter the storage or administration of Boise River Reservoir Storage Rights as asserted by IDWR:

I would not have agreed to the use of the water right accounting program if it had the effect of treating the reservoir water rights as "satisfied" at the point of paper fill in the water right accounting program, treating water as being stored for beneficial use without a water right, or indicating that water rights with priorities junior to the storage rights were entitled to call for the release of water that was required to be stored pursuant to the Water Control Manual in order to fill the reservoir storage spaces and reservoir water rights. This was never the intent or effect of adopting the computerized water right accounting procedure. No IDWR employee ever suggested to me that storage rights were "satisfied," at the point of paper fill, that storage after paper fill occurred without a water right, that the storage rights were no longer in effect or in priority after the point of paper fill, or that junior rights were entitled to call for release of water from the reservoirs prior to maximum physical fill. It has always been my understanding that beneficial use storage cannot occur without a water right, and that all water physically stored in the reservoirs for beneficial use is stored pursuant to the storage water rights. As was the case during Mr. Koelling's tenure, all the water actually, physically stored in the reservoirs at the conclusion of flood control operations has been stored pursuant to the reservoir storage rights, and allocated to the storage accounts of the spaceholders.

Ex. 2008, ¶ 32.

Sutter likewise explained in the sixth paragraph of his Affidavit (Ex. 2181) that the adoption of the water right accounting program did not alter "the accrual of water to storage pursuant to the reservoir operating plan of the Water Control Manual." Sutter further described reservoir questions and water right accrual:

4. Reservoir Operations Overview. . . . Under the reservoir operating plan, as forecasted inflows decline, less flood control space is required, and inflows are increasingly retained and added to reservoir contents until the danger of flooding has passed and the reservoirs are filled or nearly filled. After the flood risk has passed, the water stored in the reservoir system at the point of maximum fill is allocated among the reservoir storage water rights according to their priorities, and is available for delivery to those who are entitled to use the stored water for irrigation and other beneficial uses.

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

Id., 003628-29.

Sutter continued:

20. No change in reservoir operations, in reservoir refill, or in water right administration resulted from the paper fill methodology of the accounting program. Reservoir inflows were not required to be released, and the water actually stored in the reservoirs was not allocated to storage water rights at the point of paper fill. Physical refill of storage spaces and storage water rights continued as required by to the Water Control Manual's runoff forecast, rule curve and release procedures. For accounting purposes, paper fill is more accurately understood to be a benchmark establishing that the reservoir water rights are entitled to be physically filled by subsequent reservoir inflows.

21. The net effect of this accounting procedure is to accrue to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecast and rule curve procedures of the Water Control Manual. After maximum reservoir fill, the water physically stored in the reservoirs, including the "unaccounted for storage," is allocated to reservoir storage rights, and then to spaceholders with contract-based storage entitlements by the storage allocation program. The storage allocations are input into the water right accounting program. This point in the accounting procedure at which stored water is allocated to storage water rights is referred to as the "day of allocation." These allocations become the basis for the accounting of storage water right use during the irrigation season. The Watermaster is informed of the allocations, and he in in turn informs the storage right holders of the amount of storage that is available to them for ensuring irrigation season.

Id., 003638-39.

During his live hearing testimony, Sutter confirmed that the adoption of the water right accounting program did not modify reservoir operations pursuant to the Water Control Manual or how water is stored in the reservoirs, and that the rules for water right distribution stayed the

same. Tr., 431:3-15, 432:23-433:1. Sutter acknowledged that “according to the flood-control plan, the assurance of refill requires or dictates that that physical space be refilled.

Tr., 444:15-17. Notwithstanding the adoption of a different accounting construct, the actual physical storage and delivery of water continued as it had prior to 1986:

Q. When you were operating the water right accounting program, did you call Mr. Sisco at the point in time in which the water right accounting program reached paper fill and advise him of that?

A. You mean early in the season when it reached paper fill did I advise him of that?

Q. Yes.

A. No. On that date no.

Q. Would you at some point in time?

A. Pardon?

Q. Would you advise him of that at some point in time?

A. We worked closely together. And in a flood control situation we probably didn’t even run – meaning the Department, didn’t even run the water right accounting until much later, because there – there was no urgency to determine storage entitlements because we were pretty assured that they would pretty much – that they would fill.

So we may – the accounting is an after-the-fact accounting or tabulation of what happened. It doesn’t really influence operations, so that in a flood year we may not run the water right accounting for this period until maybe mid-July.

...

Q. Back to my prior question. In terms of physically storing water, apportioning it the storage accounts, and having it be available for water users thereafter, the adoption of the accounting program in 1986 would not have changed the experience of those water users pre-1986 to after 1986 would it?

A. It would not have changed. They had 100 percent fill.

Tr., 439:6-440:13.

**E. Ditch Company Witnesses Testimony**

Among the many water user witnesses who testified during the hearing were Ditch Company witnesses John Anderson (“Anderson”), Mark Zirschky (“Zirschky”), and Daren Coon (“Coon”). Anderson and Coon have worked many years (and Coon still works) for Nampa & Meridian Irrigation District (“NMID”) as Superintendent and Secretary, respectively. Anderson

was employed by NMID for approximately 34 years (1977-2011), and Coon has worked continuously at NMID from 1976 to date.

Zirschky has worked many years for Pioneer Irrigation District (“Pioneer”), serving as its Superintendent since 2010, and Assistant Superintendent for several years prior. In all, Zirschky has worked for Pioneer for 23 years (since 1992). Zirschky also currently serves as Assistant Watermaster for Water District 63 following in the footsteps of Anderson who did the same from 1993 to 2011.

Between them, NMID and Pioneer supply water to over 100,000 acres in the Treasure Valley, both natural flow, and approximately 136,000 acre-feet of aggregate storage (exclusive of NMID’s share of Boise Project storage) in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs. The lands served by the Districts are a mosaic of rural agricultural and urbanizing lands, including the cities of Boise, Meridian, Nampa, and Caldwell. Consequently, the interpretation and application of IDWR’s computerized water right accounting program is a true water user issue, not simply one of rural versus urban/agriculture versus municipal/residential. Farmer and urbanite alike stand to be affected by diminished storage water supplies depending on the Hearing Officer’s/IDWR’s decision in this matter.

The testimony of Anderson, Coon, and Zirschky is detailed in Hearing Exhibit numbers 2002 and 2003 (Anderson Affidavit and attachments); 2189 and 2190 (Zirschky Affidavit and attachments); 2188 (excerpts of 2004 Lucky Peak repayment contract conversion FONSI and EA prepared by the Bureau of Reclamation—discussed by Zirschky at hearing); and the Hearing Transcript at pages: 1087-1121 (Anderson), 1122-1156 (Zirschky), and 1191-1226 (Coon), the full extent of which need not be discussed here. However, highlights include:

- The crucial importance of stored water supplies for purposes of supplementing natural flow diversions as natural flow declines; without storage water, Pioneer and NMID



would typically be out of water between mid-June and mid-July each year;

- The importance of stored water supplies to farmers and urbanites alike (for example, the cities of Boise, Meridian, Nampa and Caldwell are delivered water by Pioneer and NMID, with the cities of Nampa and Caldwell being two of Pioneer and NMID's largest delivery accounts, and the growth of those communities, and others, occurs where the Districts supply water rather than to dry lands which lack the benefit of the Districts' senior and secure water supplies. The number of subdivisions served by the Districts number in the several thousands. Coon stated that the potential loss of NMID storage rights would be "devastating," and that loss or diminishment of the same across the Treasure Valley could lead to "economic collapse";
- News of flood control releases is eagerly anticipated and welcomed because it signals full (or near full) storage supplies for the upcoming irrigation season; flood control releases mean snowpack data and reservoir inflow forecasts predict ample runoff—so much so that additional storage space must be evacuated to regulate and capture the incoming flood flows;
- Even in flood control years, natural flows can decline to the point where storage use is needed by, and sometimes prior to, mid-June;
- Though Pioneer and NMID strive to conserve and carry some stored water over as a hedge against a dry winter, it is not unusual for storage water accounts to be exhausted, leaving no carryover heading into the next irrigation season;
- Anderson, Zirschky, and Coon have never known or understood the Department's computerized water right accounting program to: (a) count flood control releases against the storage water rights (*i.e.*, that the flood control release water is the water users' stored water flushing downstream out of the system); (b) treat the water physically stored in the reservoirs after flood control releases as water having been stored without a water right (to the contrary, Anderson and Zirschky have always understood that the water stored in the reservoirs after flood control releases is stored under the existing storage water rights and under the original priorities of those rights with respect to junior users); and (c) allow junior users to call for water that is otherwise physically filling the reservoirs post-flood control release (instead, junior water use during the so-called "refill" period is coincidental to priority refill, and occurs because there remains floodwater-based reservoir inflows that need be passed through the reservoirs in order to comply with the governing reservoir operations "rule curves");
- The weekly water right accounting reports (the "green bar sheets") confirm the foregoing by continuing to accrue water to the reservoirs after "paper fill" and by showing that the reservoir storage rights continue to remain in priority (the "Last Right" column) until or near the day of maximum physical fill—at which point river priority ("Last Right") shifts markedly downward in seniority (*i.e.*, "Last Right" priority shifts from mid-1900s or later down to the mid-to-late 1800s);
- The understandings of Anderson, Zirschky, and Coon were informed by the Water District 63 watermasters at the time (Henry Koelling, Sisco, and Barrie, respectively), and those understandings were (and are) critical to the functioning of the Districts and the farming season planning of their respective landowners;

- Coon and Anderson's careers with NMID spanned the collective tenures to date of Boise River Watermasters Henry Koelling, Sisco, and Barrie, and neither of them (Coon or Anderson) experienced any practical, on-the-ground water right administrative change as a result of the implementation of the Department's computerized water right accounting program in 1986. Prior to 1986, flood control releases were tracked but not debited from the existing storage water right accounts. The same carried over post-1986, though accounting terms may have changed or been introduced via the program; terms such as "storage past Middleton" and the accounting variable "unallocated storage." In fact, Coon testified that NMID could not locate any indication in over 100 years of records, including the Water District 63 Watermaster-prepared annual reports (the "black books") that implementation of the computerized water rights accounting program in 1986 brought with it any palpable change to water rights administration in the basin under the so called "paper fill" construct, or that there was no water right to fill the reservoirs following flood control releases. To the contrary, the manipulation and exploitation of the "paper fill" term is a recent occurrence attributed to latent legal positions taken by IDWR and the State of Idaho in the context of the Snake River Basin Adjudication, particularly in Basin 01;
- Any computerized water right accounting program interpretation and application resulting in "paper fill" (*i.e.*, a situation where the Bureau's existing storage water rights are "satisfied" on paper based on inflows only with no regard for physical reservoir contents) greatly diminishes the value of the property rights at issue, and converts the reservoirs to disproportionately expensive holes in the ground. For example, Pioneer spends approximately \$126,000 per year for its storage space—this on top of the millions of dollars of repayment obligations and O&M charges it historically paid (and already satisfied) in relation to Arrowrock and Anderson Ranch Reservoirs; and
- Concurring with Sisco's testimony, IDWR's computerized water rights accounting program is merely a tool to aid the watermaster in administering Boise River water rights (including the Bureau's existing storage rights) because data entry and reporting errors occur (*i.e.*, the computerized water rights accounting does not dictate water rights administration, rather it informs it in part; actual administration is performed by the watermaster with the aid of other data/resources, coupled with human judgment and discretion).

#### IV. STANDARD OF REVIEW

A party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in district court." *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003); IDAHO CODE § 67-5270(2). An agency's findings, inferences, conclusions, or decisions must be overturned if they 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). The reviewing court must also find that, as a result of the error, “substantial rights of the appellant have been prejudiced.” IDAHO CODE § 67-5279(4).

A court’s review of an agency’s findings of fact is confined to the agency record. *See, e.g., Chisholm v. Idaho Dep’t of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005). The interpretation and application of statute and administrative rules or regulations present purely legal issues over which the court exercises free review. *Schroeder v. Idaho Dep’t of Transp.*, 147 Idaho 476, 479, 210 P.3d 584, 587 (Ct.App. 2009). “If the agency’s 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).

## V. ARGUMENT

### A. Storage Water Rights Entitle the Right Holders to Retain Water in Storage Until it is Needed For Beneficial Use

The Director’s legal opinion that water released from the Boise River Reservoirs for flood control purposes “fills” and “satisfies” the reservoir storage water rights is predicated upon his supposition that: “In legal terms, all natural flow that enters the reservoir system has been ‘diverted.’” *Order*, R., 001294, ¶¶ 29, 30. To support this premise the Director quotes dictionary definitions of “diverted” (meaning to “turn aside from a direction or course”), and references cases in which it has been observed that on-stream dams “alter the flow of the natural stream by diverting the entire flow into a reservoir.” *Id.* The definitions and cases cited by the Director do not, however, define the circumstances in which a storage water right is “exercised,” “filled,” or “satisfied,” and they provide no guidance concerning the relationship between flood control and beneficial use storage.

The Director’s supposition does not “hold water” (literally or figuratively) for several

reasons. Clearly, Idaho law does not treat all water entering the Boise River Reservoirs as legally diverted and stored under a reservoir's water right. A prime example is reservoir inflow that passes through the Boise River Reservoirs for delivery to downstream senior Stewart and Bryan Decree water rights. Diversion of water is not itself sufficient to constitute the exercise of a water right. The diversion must be for a beneficial use authorized by a water right. *See, e.g., State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806 (2000) ("Idaho water law generally requires an actual diversion and beneficial use for the existence of a valid water right."); *see also, Morgan v. Udy*, 58 Idaho 670, 680, 79 P.2d 295 (1938) ("diversion and application to beneficial use" are the "two essentials" in the State of Idaho for a "valid appropriation."). Water destined for delivery to other water rights is not diverted or stored for beneficial use under a storage water right.

The same is true of water that enters the Boise River Reservoirs, but must be released for flood control purposes while the use of the reservoirs is committed to flood prevention. Former IDWR Director David Tuthill acknowledged that flood control use of the Boise River Reservoirs does not require a water right, or constitute use of the established reservoir storage water rights. Tr., 699:5-21; *see also, Ex. 2008*, ¶ 20. This is because flood control use of the reservoirs does not divert and store water for beneficial use.

Even if water released for flood control purposes is in some sense "diverted," the Director's own findings recognize that water released for flood control purposes is not stored. He explained that releasing water to maintain required vacant flood control space in the reservoir system results in "*less water being physically stored than would have been stored absent the need to meet the system flood control space requirement.*" R., 001244, ¶ 29 (emphasis added). "*Ensuring that the required amount of reservoir space is empty at the times prescribed by the Water Control Manual often requires the release of water that could otherwise be stored in the*

*reservoir system for later use.* R., 001243, ¶ 26 (emphasis added).

Unlike direct, natural flow diversions from a river to the place of use through a canal or other conveyance, the “exercise” or “satisfaction” of storage water rights cannot be evaluated in terms of diversion alone. As Sutter explained:

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

Ex. 2181, ¶ 19.

“Store,” as a verb, means “to keep or accumulate (something) for future use,” and “storage” means “the action or method of storing something for future use.” The Concise Oxford American Dictionary 896 (2006), *accord* Black’s Law Dictionary 1556 (9th ed. 2009) (defining “store” as “to keep (goods, etc.) in safekeeping for future delivery in an unchanged condition”). As explained in Kinney on Irrigation and Water Rights, 2d Ed., Vol. II, Sec. 844, p. 1178:

‘Storage’ may be defined as the temporary accumulation, conservation, or the storage of water for future use, as distinguished from either ‘direct irrigation’ or ‘immediate use.’ . . . The impounding or the storage of water in reservoirs is not in and of itself a beneficial use of the water. ‘Storage’ is not a use. The storage is merely an incident of the means of making the use occurring between the diversion and the application. Storage, therefore, like diversion and the conducting of the water to the place of use, is but a “means to an end.” The appropriation is not made for the mere purpose of storage; it is made for the irrigation of lands or for some other useful or beneficial purpose.

“A storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse by means of a diversion structure such as a dam.” *In Re SRBA, Case*

No. 39567, Subcase No. 00-91017, 157 Idaho 385, 389, 336 P.3d 792, 796 (2014) (“BW 17”) (citing *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935)). The Ditch Companies acquired storage in the Boise River Reservoirs to supplement their natural flow supplies as they decline during the summer months. See, *id.* at 157, Idaho at 389 (“Storage water is water held in a reservoir and intended to assist the holders of the water right in meeting their decreed needs.”) “[T]he very purpose of storage is to retain and hold for subsequent use.” *Id.* At 390-391 (quoting *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945)).

In *U.S. v. Pioneer*, 144 Idaho 106; 157 P.3d 600 (2007), the Idaho Supreme Court affirmed water users’ ownership interests in the reservoir storage rights, and explained the central role of beneficial use under both federal reclamation law and Idaho water law:

Without the diversion by the irrigation districts and beneficial use of water for irrigation purposes by the irrigators, valid water rights for the reservoirs would not exist under Idaho law. The beneficial use theme is consistent with federal law. The Reclamation Act provides that “the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right.”

*Id.* at 144 Idaho at 110.

A common theme throughout these cases is the recognition of the connection between beneficial use of water and ownership rights. The underlying principle of the state law, which requires application of the water to beneficial use before a water right is perfected, is the same. In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation. *Basinger*, 36 Idaho at 598, 211 P. at 1086-87; I.C. §§ 42-217 & 42-219. The requirement of beneficial use is repeatedly referred to throughout the Idaho Code. Beneficial use is enmeshed in the nature of a water right, which is explained in I.C. § 42-101 . . .

*Id.* at 113.

There are several phrases used in the Idaho Constitution and the Idaho Code that signify that the beneficial users have an interest that is stronger than mere contractual expectancy. The Idaho Constitution provides that when water is appropriated or used for agriculture purposes, “such person . . . shall not thereafter, without his consent, be deprived of the annual use of the same.” IDAHO CONSTITUTION art. XV § 4. This



notion of a perpetual right is reiterated in the Idaho Code, which states, the “right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure . . . to pay the ordinary charges or assessments.” I.C. § 42-220.

*Id.* at 114.

The mere passage of water through a reservoir without the opportunity to retain the water until it can be put to beneficial use, does not and cannot “satisfy” a storage water right. Special Master Booth recognized this in his October 9, 2015 summary judgment decision in SRBA Subcase Nos. 63-33732, et al., rejecting the legal conclusion the Director advocates in his *Order*:

Because the dams that impound the water in the Boise River Reservoirs are physically located in the stream channel, all of the water produced upstream therefrom necessarily must pass through the reservoir(s) and dam(s). Of the total quantity that is produced in the basin each year, some of the water is stored to fruition (i.e. such time as it may be released downstream to be used for irrigation and other beneficial uses), and some of the water must be passed downstream, unused, at a time of year when there is no demand for it.

*Memorandum Decision and Order Granting Ditch Companies and Boise Project Board of Control’s Motions for Summary Judgment* (“MDO” or “*Memorandum Decision*”) at 3.<sup>15</sup>

The State’s use of the term “legally available” pertains only to whether the water is legally available to be stored. The term does not pertain to whether there is any space in the Boise River Reservoirs that may be legally available. Obviously in order to store water in a reservoir there must be both legally available water and legally available space. . . under the reservoir operating plan, water may not legally be stored in reservoir space during the time that such space is dedicated to flood control.

*Id.* at 4.

The holding in this *Memorandum Decision* is based upon one simple premise:

The water that is beneficially used pursuant to the previously decreed water rights for the Boise River Reservoirs is the same water that is stored pursuant thereto. Stated differently, the right to beneficially use the water, and the ancillary right to accumulate and store the water until such time as it can be used, is the same right to the same water. To hold otherwise would result in two untenable propositions: (1) the water right holder,

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<sup>15</sup> The Ditch Companies request that the Court take judicial notice under Rule 201 of the Idaho Rules of Evidence of the records, pleadings and files in said proceeding before it in *SRBA Consolidated Subcase Nos. 63-33732, et al.*, including, but not limited to, the *Memorandum Decision* and the *Order Denying Motions to Alter or Amend* issued on February 26, 2016.



in a flood control year, necessarily has to breach its obligation to apply the “stored” water to its beneficial purpose; and (2) the water right holder has no protectable property right in the water that is accumulated in the Boise River Reservoirs (as the rule curves allow) that has historically been used for such beneficial purpose.

The priority date for the previously decreed water rights has significance only with respect to the right to capture and store water in the Boise River Reservoirs to be subsequently used for the intended beneficial uses. Once such water has been captured and stored pursuant to a valid water right, there is no competing demand by junior water rights with respect to the “irrigation (and other uses) from storage” component of the right. Water stored in a reservoir pursuant to a valid water right is not available for use by other water rights, senior or junior, and hence it is not the priority date that protects the right to use such water; rather the priority date protects the right to capture and store such water. The priority date of a storage right protects the right to accumulate and store the water in the first place. The State’s legal theory essentially makes the priority date meaningless in a flood control year. It is apparently not much comfort to the Bureau and the water users for the State to point out that the “excess flows” (according to the State’s theory) have historically been made available to fulfill the “irrigation (and other uses) from storage” component of the existing storage rights. The point is, without the ability to capture water in the Boise River Reservoirs, under a protectable priority-based property right, and store such captured water until such time as the same may be used, the Bureau and the water users are left with little to no means to ensure that the water historically used for beneficial purposes can continue to be used into the future.

*Id.* at 7-8.

Consequently, water released for flood control cannot be treated as having been stored under the reservoir storage rights, and the release of water from the reservoirs for flood control purposes has no impact on the reservoir storage rights.

The Director’s legal conclusion that that reservoir inflows that are required by the reservoir operating plan to be released for flood control purposes are “physically and legally available” for beneficial use storage pursuant to the reservoir storage rights is clearly erroneous. Water cannot be stored in reservoir space that is required to be vacant during flood control operations. Consequently, reservoir inflows that must be released to maintain required flood control spaces are not “physically and legally available” for beneficial use storage. Water is not stored for beneficial use simply because it enters a reservoir. Water that is required to be released for flood control purposes is not stored for beneficial use, just as water that is required

to be released to downstream senior water rights is not stored pursuant to storage water rights. The water users must have the opportunity to retain water in the Boise River Reservoirs until it is needed for beneficial use. Releasing water for flood control purposes is not a discretionary “choice,” or use of water by the operators or the spaceholders of the Boise River Reservoirs: it is a non-discretionary mandate of the State-approved reservoir operating plan to protect the Boise Valley from potentially severe economic losses due to flooding.

**B. The Director’s Order Conflicts with the Operation of the Boise River Reservoirs for Beneficial Use Storage and Flood Control under the Reservoir Operating Plan**

The consequence of the Director’s erroneous legal conclusion that water released for flood control purposes “satisfies” Boise River Reservoir storage rights is that the Ditch Companies have no protectable water right to store water after those releases are made, and, according to the Director, the water that is supposed to fill the Boise River Reservoirs under the reservoir operating plan, “can begin to be distributed to junior water rights. *Order*, R., 001266. The Director’s legal conclusion thus deprives the Ditch Companies of the refill assurances provided by the congressionally-approved reservoir operating plan which the State of Idaho helped develop and approve, and upends the plan’s carefully-crafted balance between flood control and beneficial use storage in the Boise River Reservoir system.

Even if there were some toehold in Idaho water law for the Director’s position, it is not sustainable. Section 8 of the 1902 Reclamation Act provides that the Act shall not be construed to “affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder.” 43 U.S.C. § 383. However, “state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary.” *California v. United States*, 438 U.S. 645, 668, n. 21, 98 S. Ct. 2985 (1978).

The core concept of the reservoir operating plan has always been: *“To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of storage capacity indicated by the run-off forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.”* Ex. 2027, H.R. Doc. 916, at 36 (emphasis added). While the particulars of the operating plan have evolved over time, this core concept remains the basis for Boise River Reservoir operations.

The 1953 Agreement provides the spaceholders the express assurance 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.” Ex. 2038, Art. 4. Article 7 provides: “[N]o modification which would affect in any substantial way any storage rights in the reservoir system and Lake Lowell, shall be made without the concurrence of all entities having rights in the reservoir system and Lake Lowell.” Id.

The dual purpose reservoir operating plan in the 1953 Agreement was approved by supplemental storage spaceholder contracts executed in 1954 (Ex. 2100), authorized by Congressional enactment of Public Law 660 in 1954, and further effectuated by issuance of Reservoir Regulation Manual in 1956. Ex. 2104. The 1956 Manual remained in effect until it was replaced by the 1985 Water Control Manual for the Boise River Reservoirs. Ex. 2186. “Although issued by the Corps of Engineers, this manual was a joint effort by the Corps, Bureau of Reclamation and [IDWR].” Ex. 2171 at 1. Pursuant to IDWR’s recommendations made in a 1974 Report prepared by Bob Sutter which instigated the revision of the 1956 Manual (Ex. 2182), the Water Control Manual updated runoff forecasting methods and flood space “rule

curves,” and retained the core concept of the original reservoir operating plan as well as its essential terms. The 1953 Agreement remains in effect, except insofar as the operating plan is updated by the Water Control Manual. Like the original reservoir operating plan, the Water Control Manual was developed in consultation with IDWR. The Water Control Manual provided increased assurances of flood protection and refill for irrigation during the late runoff season, balancing the needs for flood protection and refill of storage for beneficial use.

Like the 1954 Supplemental Contracts with the Arrowrock and Anderson Ranch spaceholders, the 2005 repayment contracts with Lucky Peak spaceholders require the Bureau and the Corps to operate the Boise River Reservoirs for beneficial use storage in accordance with the reservoir operating plan.

Reservoir space that is required to be kept vacant for flood control purposes is not available to store water for beneficial use, until that space is no longer required to be kept vacant for flood control purposes. Water that is required to be released from the reservoir system to maintain required flood control spaces is, therefore, not available for beneficial use storage under reservoir storage water rights. Reservoir space becomes available for beneficial use storage only as flood space requirements decline in accordance with the runoff forecast and rule curve procedures of the reservoir operating plan. As runoff and the risk of flooding decline, flood control space allocation requirements are reduced, and water is increasingly stored for beneficial use, until the reservoirs reach “maximum fill.” Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled. Consistent with the operating plan, after the flood risk has passed, the water that is actually physically stored in the reservoirs at the point of maximum reservoir fill is allocated to the reservoir water rights according to their priorities and to the spaceholders’ storage accounts (on what is commonly called the “day of allocation”) for

supplemental beneficial use as river flows decline during the irrigation season.

The express purpose and effect of the reservoir operating plan is to allow and authorize the Boise River Reservoirs to be used for flood control by reserving and maintaining vacant flood control spaces as necessary in anticipation of peak runoff in order to prevent flooding and resulting economic loss to the populated areas along the river downstream from Lucky Peak, while at the same time providing high levels of assurance that the reservoirs would be filled to the maximum extent possible for beneficial use storage as the flood risk and the need for vacant flood control spaces declines. The 1953 Agreement, the 1954 Supplemental contracts, Public Law 660, and the 1956 and 1985 Water Control Manuals all provide this assurance narratively, and through the mandatory use of runoff forecasts and the corresponding flood control rule curves. The plan clearly provides for the beneficial use storage of water entering the reservoirs during flood control operations (*i.e.*, after flood control releases), as space becomes available, to fulfill the storage water rights and the storage contracts on which those water rights are based.

As explained by IDWR Director Higginson on November 30, 1987:

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

Ex. 2171 (emphasis added).

This balance could not have been achieved, and cannot be maintained, if IDWR treats the storage water rights as filled and “satisfied,” by water that is released for flood control purposes, and no longer in effect or in priority long before the promised filling of the reservoirs can occur. If IDWR’s theory were actually implemented, in 1999 the spaceholders’ authorized physical storage would have ceased at 400,000 acre-feet, with the remaining 600,000 acre-feet of storage unsecured by a water right. In 1997, a year when the reservoirs were nearly emptied to prevent

flooding, virtually all of the physical storage that occurred that year would have been unsecured by a water right. Tr., 713-714.

C. **The Director's Order Deprives the Spaceholders of the Beneficial Use of Their Storage Water Rights and their Storage Contracts**

Water rights are real property rights that must be afforded the protection of due process before they may be taken by the state. *See, e.g.*, IDAHO CODE § 55-101; *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048 (1977). This is particularly true of adjudicated (*i.e.*, judicially proven) water rights, which are owed administrative preference. *See* IDAHO CODE § 42-607; *see also, Nettleton*, 98 Idaho 90. Storage water rights are entitled to the same protection and preference. *See, e.g.*, IDAHO CODE § 42-202 and *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878-80, 154 P.3d 433 (2007).

As previously explained, water that is required by the reservoir operating plan to be released for flood control purposes cannot be stored for beneficial use. “Counting” or “crediting” water that cannot be stored to the “satisfaction” of the Boise River Storage water right deprives the spaceholders of the right to store water pursuant to their water rights and storage contracts. Similarly, water that is released from the reservoirs for flood control purposes cannot be put to beneficial use by the spaceholders either because the water is released prior to the authorized period of use or because there is adequate natural flow to deliver their natural flow water rights. IDWR’s position that beneficial use storage for delivery of stored water to the spaceholders occurs without a water right and under no priority, subordinates the spaceholders’ storage water rights and storage contracts to all junior water rights and future appropriations. IDWR’s interpretation of its storage water right accounting method thus deprives the spaceholders of their storage water rights and contract rights without due process of law, and constitutes an unconstitutional taking of those rights.

**D. IDWR's Accounting Method Does Not Dictate the Result Advocated by the Director's Order**

IDWR's accounting method does not define the Boise River Reservoir storage rights. *Order Denying Motions to Alter or Amend*, Subcase Nos. 63-33732 (Consolidated Subcase No. 63-33737), 63-33733 (Consolidated subcase no. 63-33738), and 63-33734 (Feb. 26, 2016) at 11. It does not divert, store, or distribute water or administer water rights. The accounting system is not the law, and it is not the Watermaster. It is a tool for the Boise River Watermaster's use in administering water rights in accordance with applicable law.

Boise River Watermasters have used IDWR's accounting system without depriving Boise Valley water users of their storage rights and without upsetting the reservoir operating plan's assurances and carefully-crafted balance between flood control and beneficial use storage, because they have understood and abided the storage water rights and the reservoir operating plan and have not administered storage water rights as if they are "satisfied" at the theoretical point of "paper fill" in the water right accounting program. IDWR's accounting method need not be antithetical to the Boise River Reservoir Storage rights and reservoir operations because, in the end, the accounting method credits to the storage water rights all water that actually, physically fills the reservoirs at the point of maximum storage at the conclusion of flood control operations.

The problem in this case is not the accounting method, it is the Director's misinformed and ill-advised legal opinion. As the Ditch Companies advised the Director, this problem can be resolved, without modifying IDWR's accounting method, provided the Director issue an order acknowledging that: (1) water released for flood control pursuant to the reservoir operating plan is not "physically and legally available" for beneficial use storage and therefore do not accrue to "fill" or "satisfy" the reservoir storage rights, and (2) reservoir inflows that are actually,



physically stored in the reservoirs during flood control operations, during and after flood control releases, accrue to the storage water rights in priority until the reservoirs reach maximum storage. *Ditch Companies Post-Hearing Memorandum*, R., 000972-73.

**E. There is No “Substitution” of Water During Flood Control Operations**

Idaho water law is governed by the concept of end beneficial use; “storage for” some particular use without actually accomplishing the end use: (1) does not a valid water right make; and (2) does not count against existing storage water rights perfected to facilitate and serve decreed end uses. *See, e.g., Morgan v. Udy*, 58 Idaho 670, 680 (1938) (“diversion and application to beneficial use” are the “two essentials” in Idaho for a “valid appropriation”); *see also, U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 113 (2007) (“In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and the statutory method of appropriation . . . Beneficial use is enmeshed in the nature of a water right.”). In fact, the Idaho Supreme Court recently put an even finer point on the beneficial use principle, calling it the “basis, measure, and limit of the right.” *Pioneer*, 144 Idaho at 110.

Perhaps recognizing the beneficial use nexus issue (*i.e.*, that the water actually used under the “irrigation from storage” elements of the existing storage rights is the “second-in” water stored after flood control releases end), the Director offered his “substitution” theory, whereby he acknowledged: (1) that the later-captured “flood water” is that which is ultimately physically stored and used for end beneficial use; and (2) that the substitution practice could and should continue for it should “make no difference” to the water users which water they use. R., 001230, Conclusion of Law (“COL”) Nos. 35-40. The Ditch Companies disagree with the Director’s “substitution” theory because:

- The theory is not supported by Idaho law; and

- The “substitution” the Department proposes is not a true “substitution” with a protectable priority date.

The lone authority cited in support of the Department’s “substitution” theory is *Bd. of Dirs. of Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461 (1943). The case does support the Director’s novel substitution theory, neither in the concurring opinion cited by the Director, nor in the controlling majority opinion.

As Special Master Booth noted in his October 2015 MDO, the State’s (and the Department’s) “no harm, no foul” approach to the storage of water during the refill period effectively and impermissibly renders the existing storage right priority dates meaningless in a flood control year. MDO, pp. 7-8. This impairs or degrades a necessary (and core) element of the existing storage rights.

To the contrary, a true substitution would provide the Ditch Companies an exchange of water of equal value to that which is being released for flood control. An “equal value” exchange or substitution would by definition include the original priority dates of the water exchanged. This is not what the Department proposes. Rather, the Department proposes an unequal substitution whereby the refill/replacement/substituted “flood water” is fully subordinated and without priority. This is an unacceptable and illegal diminution (and taking) of the Ditch Companies’ vested property rights; and is expressly prohibited by the Idaho Supreme Court’s analysis in *Jorgensen*.

The *Jorgensen* Court’s analysis and approval of *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918) and *Daniels v. Adair*, 38 Idaho 130, 220 P. 107 (1923) signaled its willingness to entertain an equal value exchange at some point in the future should one prove necessary under the federal contract at issue. *Jorgensen*, 64 Idaho at 546-49, 136 P.2d at 464-466. Both cases (*Reno* and *Daniels*), in turn, supported source-based water substitution/exchanges provided they

occur “in the absence of detriment to [the] other water users” already established on the respective sources.

For example in the *Reno* case, the Idaho Supreme Court supported a source-based water exchange (injection of increased/improved flows from Pass Creek into Birch Creek) allowing a Birch Creek appropriator to divert an additional quantity of Birch Creek water up to the quantity of water that that appropriator injected into Birch Creek below them to keep the downstream Birch Creek appropriators whole. The fundamental (and entire) premise of the allowed substitution/exchange was that the same was accomplished “in the absence of detriment to other users of waters from Birch Creek.” *Jorgensen*, 64 Idaho at 546-47, 136 P.2d at 464-465.

The *Jorgensen* Court then compared the *Reno* case to the *Daniels* case where the Idaho Supreme Court rejected an unequal source substitution that would have required an established Agency Creek appropriator to have to change their existing point of diversion to accommodate use of Lemhi River water injected into the creek as the exchange. The exchange proposed in *Daniels* was rejected because the point of diversion change “work[ed] an injury to the Pattees as well as to intervening water users.” *Jorgensen*, 64 Idaho at 549, 136 P.2d at 465. Thus, the *Daniels* Court, consistent with the *Reno* Court, admonished that “under no circumstances can it be done [referring to the proposed exchange of water] where the exchange would result to the detriment of prior users.” *Id.*

If a forced change of a point of diversion is sufficient “detriment” striking an exchange/substitution down, loss of priority date and complete subordination forevermore certainly suffices to do the same to the Department’s accounting program (or at least the Director’s operational interpretation of it). Moreover, the Director’s “don’t worry” approach with respect to the risk exposure created by existing and future junior appropriators (*see, e.g.,*

MDO Finding of Fact Nos. 157-160 and COL No. 58) is speculative, of little comfort, and impermissibly dismissive of the vested property rights embodied by the existing storage water rights.

The Department's accounting program and the Director's use of the same, are governed by the prior appropriation doctrine, the application of which begins with the definition and scope of the underlying water rights being counted. Neither the Department, nor its policies or computerized accounting programs define the nature and extent of Idaho water rights. Instead, the agency merely accounts for the water in accordance with the law. *See, e.g., In Re SRBA, Case No. 39576, Subcase No. 00-91017*, 157 Idaho 385, 336 P.3d 792 (2014), *supra*; *see also*, MDO, pp. 16, 18, and 21. The applicable law in this matter is that the existing storage water rights include the right (property interest) to store for end beneficial use the refill (or second-in) water in priority. The Department's *Order* must be revised to comport with this basic legal premise as decided and applied by Special Master Booth.

**F. Junior Water Rights are Not Entitled to Delivery of Water that is Stored After Flood Control Releases**

Idaho law and the historic Basin 63-specific record in this matter agree that junior appropriators take a water source as they find it at the time of their appropriation. *See, e.g., Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 12, 154 P.2d 507, 510 (1944) ("Each junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under conditions as they existed at the time the appropriation was made."). The Boise River Reservoirs and their operations formed the backdrop against which junior appropriators secured their later in time rights in the valley, just as the Bureau took the river system as it found it in 1911, 1940, and 1955, when perfecting its storage rights in the face of the *Stewart* and *Bryan Decrees*.

Recognizing this legal framework, and the fact that surface water in the Boise River Basin upstream of Lucky Peak Dam has been considered fully appropriated since 1977, the Department has long conditioned junior surface water rights accordingly by limiting their use to times of flood control releases. *See, e.g., Ex. 2008, ¶¶ 11-12; see also, Exs. 3003, 3004, 3005, 3006, 3007, 3008, 3012, and 3013.*

While there are several styles of “flood control” use remarks used by the Department in Basin 63, Condition No. 908 is a good example:

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.

Ex. 3012.

As noted by former long-time Boise River Watermaster Sisco, flood control release-related remarks were included on junior water rights “to ensure that appropriators of new Boise River water rights [were] notified that water available for their diversions” was of “limited” duration and supply. Ex. 2008, ¶ 12. Sisco repeatedly made clear that junior water rights would be served “only during flood control operations” given the “fully appropriated” status of the river. Id., ¶¶ 11-12. Sisco’s junior applicant admonition comports with the same understanding of Edward Squires (“Squires”), a registered professional geologist, hydrologist, and long-time certified water rights field examiner in Basin 63. Ex. 3040, ¶¶ 2-3. For example, Squires conducted the beneficial use/licensing field examination for permit no. 63-12055. Id., ¶ 4. When recommending the licensure of permit no. 63-12055, Squires recommended that the same

be licensed “for use anytime surplus water is available on the Boise River (Lucky Peak spilling).” *Id.* Squires explained that the reason for his comment was due to his professional understanding that the Boise River was fully appropriated, and that the only water available for junior water rights was that passed through the Boise River Reservoir system for flood control purposes. *Id.*, ¶ 5.

The above-described flood control use water right remarks employed by the Department constitute express acknowledgement and concession that BOR’s existing storage rights authorize “refill.” If they did not, the need for such later-in-time water right remarks would not exist. Instead, the water right remarks exist to protect priority “refill” of BOR’s storage rights because the reservoir operating plan formed the backdrop against which all other junior water rights came onto the system—able to divert water only when flood control releases are being made (*i.e.*, when BOR has no choice but to release water, or pass it through, to comply with required flood space reservations).

**G. The Director Exceeded His Authority by *Sua Sponte* Initiating This Contested Case**

On October 22, 2013, the Director *sua sponte* initiated this Contested Case by filing a *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference*. R., 000002. Neither the SRBA nor the Idaho Supreme Court ordered or directed the Director to *sua sponte* initiate a contested case. Further, no party or water users petitioned the Director to initiate a contested case. The Director instead initiated this Contested Case on his own accord “because the United States Bureau of Reclamation (“BOR”) and other water users holding the right to storage space in the federal Boise River on stream reservoirs questioned the Department’s methods and procedures of accounting.” *Order*, R., 001230, p. 1. Interestingly, BOR, which had previously filed Late Claims with the SRBA to address its concerns regarding the State’s position in BW 17, and which continue to be pending in a parallel proceeding before the SRBA,

notified the Director that it would not participate in the Contested Case initiated by the Director and was not bound by the Contested Case. As to the "other water users holding the right to storage space" referenced by the Director's initial *Notice of Contested Case*, those water users have opposed the Contested Case from Day One and have repeatedly sought dismissal or stay of the Contested Case for various reasons, including, the fact that the proper forum to decide the issues or concerns is currently pending before the SRBA as part of the "Late Claims," the Contested Case is an attempt at impermissible rulemaking and BOR is an indispensable party. Nevertheless, in a rush to decide the issue before the SRBA could decide the pending Late Claims, the Director proceeded forward with Contested Case in order to validate the pre-determined position of the Director, IDWR and the State regarding "Refill" of the existing storage water rights following flood control releases.

It should be noted that not only has no court, party or water user requested that the Director initiate a Contested Case, thereby forcing parties into a second litigation while the legal rights associated with the storage water rights are already pending in the SRBA, but the Director has made no showing that there is any urgency to initiate or proceed with this Contested Case. The Ditch Companies and other parties have repeatedly requested that the Contested Case be dismissed, or at least stayed, because there is no urgency other than the Director's own agenda. For the reasons discussed below, the Director has inappropriately initiated this Contested Case and this Court should dismiss/set aside the Contested Case altogether or at a minimum stay the matter until the pending Late Claims are resolved and then remand the matter to the Department to proceed consistent with this Court's decision in the Late Claim proceedings. Furthermore, in the event the Court remands this matter to any extent to the Department the Court must order the Department to appoint an independent hearing officer.



1. **The Contested Case Improperly Attempts to Circumvent the Authority of the SRBA**

There is no dispute that the Idaho Supreme Court in BW 17 acknowledged that the Director has an administrative role to play in counting the fulfillment of storage water rights. *In Re SRBA, Case No. 39576, Subcase No. 00-91017*, 157 Idaho 385, 336 P.3d 792 (2014). However, the Court also was very clear that said administrative discretion is bound by the prior appropriation doctrine and the Director's duty to administer water is governed by the decrees. *Id.* More specifically, the Court went on to state that "this means that the Director cannot distribute water however he pleases at any time in any way; *he must follow the law.*" *Id.* at 393, 336 P.3d at 800 (emphasis added). The law which must be followed includes the orders and decrees of the SRBA concerning water rights because it is the SRBA that is charged with determining the elements of water rights and issuing decreed water rights.

As stated by SRBA Special Master Theodore Booth in the Late Claim subcases:

The issues as to "what is the property?" and "how to account for the property?" are not the same. The accounting is left to the Idaho Department of Water Resources, but a determination of "what is the property?" is answerable by the SRBA Court and making such a determination is compatible with the holding in Basin-Wide Issue 17.

*See Memorandum Decision and Order Granting Ditch Companies' and Boise Project's Motion for Summary Judgment and Special Master's Recommendation of Disallowance of Claims in SRBA Consolidated Subcase No. 63-33732, et al., p. 21 (Oct. 9, 2015).*

More recently, in the *Order Denying Motions to Alter or Amend* issued by Special Master Booth, he reiterated that "the accounting system does not define the existing storage water rights." *Order Denying Motions to Alter or Amend*, SRBA Consolidated Subcase No. 63-33732, et al., pp. 29-30 (Feb. 26, 2016). The storage water rights, which are property rights, cannot be modified, limited or diminished by the Director's post hoc determinations of accounting procedures. Those accounting procedures and the administrative role of the Director cannot

dictate what those property rights are, but rather must follow what the judiciary, in this case the SRBA, defines as the property right. In other words, “[b]efore determining how to account for something, one must know what is being counted. Accordingly, it cannot be said as a Director’s discretionary decision of ‘how’ to account for the existing storage rights is determinative of what portion of the annual reservoir inflows are stored under the authority of the existing water rights.” *See Recommendation*, Consolidated Subcase No. 63-33732, et al., p. 33.

At the time he *sua sponte* initiated this Contested Case, the Director was well aware that BOR and the Boise Project had filed Late Claims in the SRBA based upon the position taken by the State in BW 17. Indeed, the SRBA granted leave to file the Late Claims on May 22, 2013, exactly five months prior to the Director initiating his own Contested Case. Yet, even though the Director was aware of the pending Late Claim proceedings, and even though the Director was repeatedly asked to dismiss or stay the Contested Case pending the outcome of the Late Claims, the Director defiantly proceeded with the Contested Case in an inexplicable rush to issue an order before the SRBA.

Furthermore, it is not as if the Director merely proceeded with the Contested Case in order to explain IDWR’s internal adoption and use of the accounting system since 1986. Rather, the Director has attempted to use the accounting system to affect the legal rights and property interests of the Ditch Companies and other parties. The Director has made legal conclusions based upon the internal use and adoption of the accounting system to define the water rights themselves which is in direct contradiction to the legal determinations made by Special Master Booth in the Late Claims. *Compare Order*, Conclusions of Law, ¶¶ 28-33 and *Recommendation*, p. 7. Those legal determinations as to “what” the storage property right consists of exceed the Director’s authority and should instead be resolved the judiciary/SRBA which is charged with

interpreting and decreeing water rights.

a. **The Director Erred in Failing to Stay the Contested Case Pending Resolution of the Late Claims by the SRBA**

The impact, if any, flood control operations/releases have upon the existing federal storage water rights in Basin 63 is currently before the SRBA in the Late Claims and the resolution of the flood control impact question is critical to any meaningful consideration of the Department's water right accounting program. If the SRBA affirms the *Recommendation* of Special Master Booth that the Late Claims are unnecessary because the existing decrees for the Basin 63 reservoirs entitle storage right holders to fill reservoirs following flood control releases, the Director is bound to administer water according to those decrees. If, on the other hand, the SRBA determines that the Late Claims are necessary then the resolution of those Late Claims may result in additional decrees which allow the Basin 63 reservoirs to fill reservoirs following flood control releases. Again, the Director would be bound to administer water according to those decrees and this Contested Case would become unnecessary. Either way the Director erred in initiating this Contested Case while the Late Claims were pending before the SRBA, or at a minimum should have stayed the Contested Case until the SRBA rendered a decision on the Late Claims. Proceeding forward with the Contested Case, while the Late Claims remain pending, poses the danger of inconsistent decisions in separate proceedings, which is what has happened with the Director making legal conclusions based upon the internal use and adoption of the accounting system to define the water rights themselves which are in direct contradiction to the legal determinations made by Special Master Booth in the Late Claims.

For these reasons, the Ditch Companies are filing a *Motion to Stay* the judicial review of the Contested Case until the Late Claims have been resolved. The Director has overstepped his authority by proceeding with this Contested Case while the Late Claims are pending before the

SRBA and neither the Contested Case nor the judicial review of the Contested Case should proceed any further until the Late Claims are fully resolved. Even though SRBA Presiding Judge Wildman will be hearing both the judicial review of the Contested Case, and the likely notice of challenge of Special Master Booth's *Recommendation*, they should not be allowed to continue on parallel tracks. Rather, the SRBA must determine the issues raised in the Late Claims, which includes the "threshold issue" answer by the Special Master before the accounting of those rights can be addressed.

b. **The Director Erred in Failing to Follow Special Master Booth's Decision in SRBA Subcase No. 63-33732, et al.**

Not only should the Director have dismissed or stayed the Contested Case pending the outcome of the Late Claims, but once a decision was issued by the SRBA the Director was bound to follow it. On October 9, 2015, Special Master Booth issued a *Memorandum Decision and Order Granting Ditch Companies' and Boise Project's Motion for Summary Judgment and Special Master's Recommendation of Disallowance of Claims in SRBA Consolidated Subcase No. 63-33732, et al.* (hereinafter "*Recommendation*").<sup>16</sup> This *Recommendation* was issued six days before the Director issued his *Final Order* in the Contested Case, and eleven days before the Director issued his *Order*. In perhaps the most blatant showing of the Director's predetermined position and bias to decide the issue himself, the Director not only disregarded the *Recommendation*, but he failed to even mention it in either order. When the Boise Project and the Ditch Companies filed motions for reconsideration arguing that the *Recommendation* must be followed the Director discounted the *Recommendation* as nothing more than a recommendation

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<sup>16</sup> Since the Director issued the *Order*, SRBA Special Master Booth has issued an *Order Denying Motions to Alter or Amend*, SRBA Consolidated Subcase No. 63-33732, et al., pp. 29-30 (Feb. 26, 2016). In said *Order*, Special Master Booth rejects the arguments of the State of Idaho and Suez, including those that the SRBA Special Master exceeded his authority by answering the "threshold issue" posed by the Ditch Companies.

which is not a final judgment and then makes the absurd suggestion that the *Recommendation* is not applicable because it “pertains to only the late claims in SRBA Subcase No. 63-33732, et al., not the decreed reservoir rights at issue in this proceeding—nos. 63-303, 63-3613, 63-3614, and 63-3618.” *Order Denying Petitions for Reconsideration*, pp. 2-3 (Nov. 19, 2015). R., 001401.<sup>17</sup>

The Director is correct that the *Recommendation* is not a final judgment at this point but it certainly is a decision of the SRBA, deciding the very issue the Director has inappropriately attempted to decide. As explained, *supra*, the judiciary, in this case the SRBA, has the power to interpret law and define the property rights involved. The Director must distribute the water in accordance with the law and decreed water rights. *See Basin-Wide Issue 17*, 157 Idaho 385, 336 P.3d 792. Simply because the SRBA Presiding Judge has referred the Late Claims to a Special Master does not allow the Director to ignore decisions of the SRBA. The *Recommendation* clearly and unequivocally interprets the law with regard to the storage water rights and whether those existing storage rights are “satisfied” at the point of “paper fill.” The Director’s utter disregard for the legal conclusions of the SRBA further illustrates his misguided attempts to interpret legal rights and define property rights through his Contested Case.

Further, it is disingenuous to say the least for the Director to suggest that the *Recommendation* is not relevant because it pertains only to Late Claims. The *Recommendation*, as the Director is well aware, concludes that the Late Claims are not necessary because “the irrigation storage component of the *existing water rights* is the right to store the water contained

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<sup>17</sup> The Director is nothing if not persistent in his defiance that Late Claims pending before the SRBA Court will not resolve issues raised in the Director’s Contested Case. When the Ditch Companies sought to have the Contested Case dismissed or stayed pending the resolution of the late claims by the SRBA Court, the Director responded that “[t]he Ditch Companies are incorrect that the issue of whether water released for flood control purposes counts toward the initial fill of a water right is before the SRBA Court as part of the late claims.” *See Order Denying Pre-Hearing Motions*, p. 14 (Dec. 16, 2014). R., 000335.

in the Boise River Reservoirs at the time of maximum physical fill.” *Recommendation*, p. 7 (emphasis added). The *Recommendation* further held that the water put to beneficial use under the *existing water rights* was the water that is stored in the reservoirs following flood control releases, *the existing water rights* are not “satisfied” by “paper fill” and thus there is no need for second water rights/late claims to “refill” the Boise River Reservoirs following flood control releases because the right to do so is provided by the *existing water rights*. See, generally, *Recommendation*, pp. 7, 8 and 35. In other words, the decreed water rights which the Director suggests are at issue in the Contested Case (water right nos. 63-303, 63-3613, 63-3614, and 63-3618) are the same “existing water rights” the Special Master determined are not “satisfied” by “paper fill.”

The Director must follow the decision of the Special Master interpreting the law and decrees. The Director erred in not following the *Recommendation* of Special Master Booth. This is precisely why the Director should have stayed the Contested Case until the SRBA proceedings were completed. The Ditch Companies do not agree that a Contested Case is warranted even with the guidance of the SRBA’s decision on the Late Claims, but at least the Director and the parties would have the benefit of the decision. Again, for this reason, the Ditch Companies are filing a *Motion to Stay* this Contested Case until the Late Claims are fully resolved.

**c. BOR is a Necessary and Indispensable Party**

Shortly after the Director initiated the Contested Case, BOR sent a letter to the Director informing him that BOR would not be participating in the Contested Case, that in BOR’s view it is under no obligation to do so, and that BOR is not bound by the results of the Contested Case because it does not meet the requirements of the McCarran Amendment. Indeed, BOR correctly pointed out that it is not bound by administrative proceedings such as this Contested Case

because this administrative proceeding is not a “suit” under the McCarran Amendment. *See United States v. Puerto Rico*, 287 F.3d 212 (1<sup>st</sup> Cir. 2002) (holding that a purely administrative proceeding is not a “suit” contemplated by the McCarran Amendment). In *United States v. Puerto Rico*, the court stated “[t]o accept that the right to a limited APA-type of judicial review suffices to convert a purely administrative proceeding into a suit would compel the absurd conclusion that *all* administrative proceedings are suits and that no purely administrative proceedings exist. We cannot endorse so radical a proposition.” *Id.* at 219 (emphasis in original). The court also diffused any suggestion that the McCarran Amendment waives sovereign immunity to administrative proceedings concerning the administration of water rights and stated “[t]o be sure, the McCarran Amendment does contain a reference to the ‘administration of [water use] rights,’ but read in context, these words grammatically refer to suits for the administration of such rights, and so fail to broaden the scope of waiver.” *Id.* at 218, note 5.

Under such interpretation and case law, the Contested Case initiated by the Director, which is subject to judicial review under the IDAPA, would not constitute a “suit” under the McCarran Amendment and thus the titled owner of the storage water rights would not be subject to the administrative proceeding. BOR is the titled owner of the storage water rights. *See United States v. Pioneer Irr. District*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). BOR is also the entity referenced by the Director as raising concerns with the accounting which the Director suggested necessitated the need to *sua sponte* initiate the Contested Case. Yet, BOR is not a party to the Contested Case and the Director erred in proceeding with the Contested Case without a necessary and indispensable party.

What is clear is that BOR is bound by the proceedings before the SRBA concerning the



BOR's own Late Claims. The Ditch Companies have contended that it does not make sense to proceed with a Contested Case which may not affect the titled owner of the storage water right when instead the issue which the SRBA and the Idaho Supreme Court indicated is the "more important" issue is before the SRBA and which is going to be binding upon BOR. In other words, the Director should dismiss or stay the Contested Case until the Late Claims pending before the SRBA are resolved. This is yet another example of the Director's attempt to circumvent the authority of the SRBA by rushing to decide the issue himself.

Obviously the Contested Case proceeded without the participation of BOR as a party, BOR cannot be joined as a party at this point in the Contested Case proceedings, and the only relief at this point would be to set aside the *Order* or remand the Contested Case back to the Director. However, this issue further illustrates the Director's error in proceeding with this Contested Case while the Late Claims are pending before the SRBA. For this reason, and those reasons expressed herein, the SRBA should stay this Contested Case until all issues in the Late Claim proceedings have been fully resolved. Once those issues have been resolved then the SRBA can proceed with judicial review of the Director's *Order*, set aside the *Order* or remand the Contested Case to proceed in accordance with the SRBA's direction. In the event this Court remands any portion of the Contested Case back to the Department it should direct the Department to appoint an independent, unbiased hearing officer to preside over any further proceedings.

2. **IDWR's Internal Adoption and Use of the Water Right Accounting Program Violates Formal Rulemaking Requirements of IDAPA**

Another example of the Director's attempt to circumvent the rules and laws of the State in order to maintain control of this "Refill Issue" is the Director's defiance of the rulemaking requirements of IDAPA. Early in these proceedings, parties moved the Director to dismiss the

Contested Case based upon the fact that the Contested Case is rulemaking under the criteria set forth in *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003). The Director denied the motion and incorrectly held that the issues to be resolved in the Contested Case are not subject to formal rulemaking. *See Order Denying Pre-Hearing Motions* (Dec. 16, 2014). R., 000335.

An agency “rule” under the Administrative Procedures Act is “the whole or part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes: (a) Law or policy; or (b) The procedure or practice requirements of an agency.” IDAHO CODE § 67-5201(19). If an agency action constitutes a “rule” under the IDAPA, and they are not adopted in compliance with IDAPA, then they are “voidable unless adopted in substantial compliance with the requirements of this chapter.” IDAHO CODE § 67-5231(1).

In *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003), the Idaho Supreme Court explained that the statutory definition of “rule” under Idaho Code Section 67-5201(19) is too broad to be workable because under the definition “virtually every agency action would constitute a rule requiring rulemaking procedures.” *Id.* at 723, 69 P.3d at 143. Therefore, in order to provide further guidance in determining when an agency action constitutes a “rule” requiring rulemaking to be valid, the Court set forth “the following characteristics of agency action indicative of a rule: (1) wide coverage, (2) [is] applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy.” *Id.*

Applying the factors indicative of a “rule” as set forth in *Asarco, Inc. v. State of Idaho*,

this Contested Case and the issues sought to be decided by the Director constitute a “rule” requiring formal rulemaking under IDAPA in order to be valid.

**a. The Contested Case has Wide Coverage**

In *Asarco, Inc. v. State of Idaho*, the Idaho Supreme Court held that the TMDL which applied to a specific water body, the Coeur d’Alene River Basin, had wide coverage under the factors indicative of a rule. Similarly, this Contested Case has wide coverage to a specific watershed, the Boise River Basin, and applies to a large segment of the general public which divert and use water within the basin. Like the TMDL in the Coeur d’Alene River Basin, which would apply to all current and future dischargers in the basin, the Contested Case and the issues sought to be determined by the Director would apply to all current and future water users in the basin. Despite the Director’s suggestion that the impact of this Contested Case is limited to only three reservoirs, the accounting and satisfaction of the water rights for those three reservoirs applies to and impacts all current and future water users within the Boise River Basin. Indeed, the *Notice of Contested Case* was provided to all water users in Basin 63 and provided that “any decision made in the proceeding will be binding upon all water users that received notice of this proceeding.” R., 000001. Accordingly, the Contested Case has wide coverage to all water users in Basin 63 and wide coverage under the rulemaking factors.

**b. The Contested Case is Applied Generally and Uniformly**

In applying this factor to the TMDL at issue in *Asarco, Inc. v. State of Idaho*, the Idaho Supreme Court stated that “[w]hile the TMDL has characteristics that are generally applicable and discharger specific, the TMDL, on the whole, is more appropriately described as generally applicable.” *Id.* The Court then went on to hold that:

Clearly these procedures are generally and uniformly applicable and require DEQ to focus on the waterbody as a whole, as opposed to the individual sources of pollution. Therefore, for the above reasons, even though the TMDL involves determinations of

specific applicability, the over-all scheme demonstrates the TMDL is more appropriately described as generally and uniformly applicable.

*Id.* at 724, 69 P.3d at 144.

In this Contested Case, the Director would like to suggest that the *Order* only applies to the accounting and satisfaction of the storage water rights for three reservoirs, but again the over/all applicability is to all water users in the Boise River Basin and is more akin to a TMDL which has been found to be generally and uniformly applicable. Put another way, the Director's *Order* concerning accounting for the storage water rights has general and uniform application for the accounting by the Boise River Watermaster for the entire Boise River Basin. According to the Director's own *Notice of Contested Case* all water users in Basin 63 were put on notice of the Contested Case and while participation was not mandatory any decision issued will be binding on "all water users" in Basin 63. R., 000001. The legal determinations made by the Director not only impact the administration of existing senior and junior water right holders within the entire Basin, but also future appropriations within the entire Basin.

**c. The Contested Case Operates Only in Future Cases**

The Contested Case only operates prospectively to the extent it attempts to limit the satisfaction of the storage water rights in the future. While the Contested Case impacts existing water right holders in the entire Basin, it only impacts them in the future because the Contested Case does not attempt to adjudicate past years of accounting or to reduce, alter or diminish water available to water users in past years. The *Order* does not retroactively determine, reduce or adjudicate what has been accrued to the storage water rights in the past. Rather, the Contested Case and the Director's *Order*, if allowed to stand, would only impact *future* accounting for existing water rights and *future* appropriations within Basin 63.

d. **The Contested Case Attempts to Prescribe Legal Standards, Attempts to Express New Policy of IDWR and Attempts to Interpret Law and Policy**

With regard to the last three factors set forth in *Asarco, Inc. v. State of Idaho*, the Director would like the SRBA to believe that the Contested Case is nothing more than gathering of “scattered” information and documents concerning the internal adoption and use of the accounting system in Basin 63. However, it is axiomatic that the Director initiated this Contested Case to do much more than simply describe the accounting procedures employed by the Boise River watermasters. Indeed, the Director’s orders throughout this proceeding make it clear that: (a) the Director has attempted to prescribe legal standards concerning the satisfaction of storage water rights; (b) the Director has expressed new policies of IDWR concerning the satisfaction of storage water rights, namely that the storage water rights are satisfied at the point of “paper fill” and that no water right exists in order to refill the reservoirs following flood control releases; and (c) the Director has clearly attempted to interpret law by using accounting to define the existing storage water rights. Again, there is no dispute that the Director has authority to administer water rights. But, it is abundantly clear that the accounting does not define the existing storage water rights. *See Order Denying Motions to Alter or Amend*, SRBA Subcase No. 63-33732, et al., pp. 29-30. The Director has attempted to use his duty to administer water rights as a guise to prescribe legal standards, express policies and interpret law concerning the definition of the existing storage water rights. The definition of the existing storage water rights is squarely before the SRBA as part of the Late Claims and the attempts by the Director to do so satisfies the last three factors of rulemaking and thus are void.

For the above-stated reasons, the Contested Case initiated by the Director constitutes rulemaking, and the Director erred by failing to dismiss the Contested Case and instead proceeding under formal rulemaking as required by IDAPA. Accordingly, this Court should set

aside the *Order* and remand the matter back to the Department to proceed under formal rulemaking in conformance with any guidance provided by the Court and in conformance with the Court's decision in the Late Claim proceedings.

**H. The Manner in Which the Contested Case Hearing was Conducted Violated The Ditch Companies' Due Process Rights**

For the reasons set forth below, the manner in which the Contested Case hearing was conducted violated the Ditch Companies' due process rights, and the Ditch Companies repeatedly objected to the conduct of the hearing, including the fact that the Director continued to preside over the Contested Case when he had demonstrated his bias and predetermined position early on in the proceedings. For this reason, the Ditch Companies requested that the Director disqualify himself as the presiding officer and appoint an independent hearing officer. R., 000100, 000247, and 000255. In both cases the Director denied the motions. R., 000132 and 000335. As feared by the Ditch Companies, the Director continued to demonstrate his bias throughout the course of the proceedings and it became even more evident that the Director should have disqualified himself and should have appointed an independent hearing officer. For these reasons, and those set forth below, the Court should set aside the *Order*. Should the SRBA have reason to remand the matter to the Department, the Court must direct the Department to appoint an independent, impartial hearing officer to conduct any further proceedings. Given the Director's bias and conduct during the course of this matter the Ditch Companies cannot get a fair and impartial hearing before the Director.

**1. The Director's Conduct and Active Participation at Hearing was Biased and Evidenced a Predetermined Result**

Procedural due process requires that there must be some process to ensure that individuals are not deprived of their rights in violation of the state or federal constitutions. Due process requirements are typically met when one is provided with adequate notice and an

opportunity to be heard. *See, e.g., Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (citations omitted). While due process may be a somewhat fluid and “flexible concept,” it is only satisfied where one has the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Id.*

The Ditch Companies do not contend that they were not provided the opportunity to be heard; rather they question whether that opportunity was provided in a “meaningful manner.” This is because, among other things, due process entitles one to an impartial and disinterested tribunal. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *see also, Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012). As noted in *Eacret*, this requirement applies to state administrative agencies as well as the courts. *Eacret*, 139 Idaho at 784, 86 P.3d at 498. Bias of decision-makers is “constitutionally unacceptable,” and reviewing courts are charged with both: (1) assuring impartial decision-making *and* (2) avoiding the mere appearance of (as opposed to actual) impropriety. *Id.*

However, a decision-maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute he is deciding absent a showing that he is “not capable of judging a controversy fairly on the basis of its own circumstances. *Eacret*, 139 Idaho at 785, 86 P.3d at 499. Said a bit differently, impartiality does not necessarily mean a “lack of preconception in favor of or against a particular legal view.” *Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007). But, showings that a decision-maker: (1) has made up their mind regarding facts and will not entertain others with an open mind, or (2) will not apply existing law, or (3) has pre-determined the outcome of the hearing prior to its conclusion violates due process-based impartiality requirements. *Eacret*, 139



Idaho at 785-86, 86 P.3d at 499-500.

With respect to the Idaho Code Section 67-5279's requirement that agency action be affirmed notwithstanding minor procedural violations unless substantial rights of the appellant have been prejudiced, the Idaho Supreme Court has plainly held that due process rights are actionable "substantial rights." *See, e.g., Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010).

In this matter, several actions of the Director (serving as the Presiding Officer) demonstrate unacceptable bias and predetermination in violation of the Ditch Companies' due process rights. The Ditch Companies were not heard by an impartial and disinterested tribunal.

For example, the Director repeatedly took public positions in support of the Department's water right accounting program, and against the positions of the Ditch Companies and the Boise Project in the Idaho Legislature and elsewhere pre-hearing. *See, e.g., R.*, 000109.<sup>18</sup> Also, pre-hearing, the Director issued an order in which he seemingly pre-judged the worth of anticipated irrigation entity evidence as being "likely irrelevant"; which was again reiterated by the Director at hearing. *Tr.*, 23:7-25:13. Later, during hearing, the Director actively supported IDWR's adversarial role when the agency's deputy attorney general was cross-examining Ditch Company and Boise Project witness (and former Boise River Watermaster) Sisco. *Tr.*, 889:15-904:18.

As the Department's adversarial role became more and more contentious over whether Sisco administered the Boise River Reservoir storage rights in lock-step with the Department's computerized water rights accounting program (which Sisco testified plainly that he did not due

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<sup>18</sup> The Director later confirmed these Legislative contacts. *R.*, 000386-87 ("The Boise Project is correct that the Director has met with legislators, the Governor's office, and water users' groups to keep them apprised of the issues raised in the Water District 63 contested case."). The Director then opined that his communications were not impermissibly "*ex parte*" or otherwise inappropriate given his capacity as hearing officer. However, the Director felt compelled for some reason to assert attorney-client privilege as a means by which to avoid full disclosure of his public contacts and statements. *Id.*

to his own practical and legal disagreements over blind use of the program), counsel for the Ditch Companies objected to the Department's line and tone of questioning.

MR. STEENSON:--I'm going to object. The role of Mr. Baxter here is supposed to ask clarifying questions, not to cross-examine witnesses. This sounds to me like cross-examination of a witness, rather than merely asking to clarify his answers. He's challenging the witness' understanding of these documents. So I object.

THE HEARING OFFICER: *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., 904:4-18 (emphasis added).

As Sisco continued holding his ground regarding his prior testimony, the Director's bias and emotion continued during redirect examination. For example, after eliciting testimony regarding Sisco's practice of restricting junior diversions to only those times when flood control releases were being made from Lucky Peak Reservoir, counsel for United Water Idaho uttered a naked, undefined and unsupported objection which the Director immediately sustained.

Tr., 909:6-11. Only after counsel for the Ditch Companies requested explanation of the nature of the objection and grounds supporting the same did United Water counsel and the Director cite and rely upon "relevance" to sustain the objection. Tr., 909:12-15.

The Director's own attempts to impeach Sisco continued. For example, during the Sisco testimony, the Director called a ten-minute recess after IDWR's first round of cross-examination. Tr., 908:14-20. It was later revealed that after the Director exited the hearing room with Department counsel and staff (including Cresto and Deputy Director Mat Weaver), he went looking for staff member Tim Luke and a copy of a "watermaster report." Tr., 942:17-945:25. Apparently the Director sought a copy of the form to review its "true and correct" certification block *presumably to confront Sisco with the same during his testimony.* *Id.* Ultimately, the

Director found nothing wrong with his actions during recess because he was unable to find Mr. Luke, unable to locate the form, and, therefore, unable to ask Sisco any questions based on the form. Tr., 945:5-25.

The Director's bias again surfaced on the record, not because *he* candidly admitted his *ex parte* contacts with Department witnesses throughout the hearing (namely contacts with IDWR expert witness Cresto), but because redirect examination of Cresto exposed the same after she testified under oath that she did not confer with the Director during the course of the hearing regarding her testimony when, in fact, she had. *Compare* Tr., 1562:13-23; 1585:8-1586:15; and 1588:21-1589:10.

MR. STEENSON: Q. Okay. Has the Director conferred with you about your testimony –

MS. CRESTO: A. No, I don't believe –

MR. STEENSON: Q. –during these days of the hearing.

MS. CRESTO: A. I don't believe so.

...

MR. BAXTER: Q. 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 no?

MS. CRESTO: A. Correct.

MR. BAXTER: Q. And at the time was it your understanding that you answered 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 communications?

MS. CRESTO: A. That's correct.

MR. BAXTER: Q. 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: A. Yes . . . [g]eneral conversations about the proceedings or – or, you know, we talked about this [indicating] and whether or not we thought that that was –

MR. BAXTER: Q. When you're saying "this," you're pointing to –

MS. CRESTO: A. –this analysis.

To Exhibit 9, the table.

...

MR. STEENSON: Q. I want to make sure the record's clear.

If I understood you correctly, you've had multiple conversations during the course of these proceedings with the Director, Mr. Spackman, and Mr. Baxter?

MS. CRESTO: A. Yes.

MR. STEENSON: Q. Concerning the subject matter of these proceedings?

MS. CRESTO: A. Yes.

MR. STEENSON: Q. And information that has been presented during the course of these proceedings?

MS. CRESTO: A. Yes.

*Id.*

The foregoing witness exchanges not only demonstrate the Director's lack of impartiality and foretold the predetermined outcome of this matter, but they also violated well-settled prohibitions against *ex parte* communications. To the extent the Department attempts to argue that it was not a party to this proceeding, that contention lacks merit as will be discussed later below.

At a minimum, the Director's pre-hearing and in-hearing communications with Deputy Attorney General Baxter (IDWR counsel presenting the Department's case) and Department expert witness Cresto (including input regarding her rebuttal testimony and the creation of Department Exhibit No. 9) violated Procedure Rule 417 (IDAPA 37.01.01.417) and Idaho Code Section 67-5253. Procedure Rule 417 and Section 62-5253 both provide that a presiding officer: "shall not communicate, directly or indirectly, regarding any substantive issue in the [proceeding/contested case] with any party, except upon notice and opportunity for all parties to participate in the communication." *Id.* Procedure Rule 417 further provides that a party to the contested case proceeding "shall not communicate directly or indirectly with the presiding officer or the agency head regarding any substantive issue in the contested case."

IDAPA 37.01.01.417. Repeated violations of the prohibition against *ex parte* communications “shall be cause for the presiding officer to dismiss an action or to dismiss a party from an action.” *Id.*

Further, and in many ways, the Director, sitting in his quasi-judicial capacity, was analogous to a member of the Idaho judiciary. This is because, by definition, his Contested Case proceeding necessarily resulted in an order, which, in turn, has the effect of “determining legal rights, duties, privileges, immunities, or other legal interests” of those who were party to the proceeding. *See* IDAPA 37.01.01.007 and .015; *see also*, IDAHO CODE §§ 67-5201(6) and 67-5201(12); *see also*, *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927 (1998) (when statutes require notice and hearing, the matter is a quasi-judicial proceeding). In fact, the Director made clear that even those who chose not to participate in the proceeding would be bound by its outcome. R., 000001. When viewed in the light of his judicial function, the Director’s actions violated a number of the canons of the Idaho Code of Judicial Conduct.<sup>19</sup>

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<sup>19</sup> The Ditch Companies’ acknowledge that the Director is not a “judge” who is bound by the Idaho Code of Judicial Conduct. However, the canons of the judicial code provide an instructive backdrop against which to compare the Director’s behavior in this matter.

Specifically, the Director violated 4 of the 5 canons. The Director violated Canon No. 1 by eroding public (and the Ditch Companies’) confidence in the impartiality of the tribunal. The Director violated Canon No. 2 by creating at least the appearance of impropriety—the reasonable perception that his capacity for impartiality was impaired. The Director violated Canon No. 3 by failing to perform his quasi-judicial function without bias or prejudice (again, mere appearance of such bias or prejudice is a violation—this includes the Canon’s admonition against making any public statements regarding a pending proceeding). The Director also violated Canon No. 3 by initiating, permitting, and considering *ex parte* communications both pre- and in-hearing, and by failing to voluntarily disclose the same. The Director further violated Canon No. 3 by independently investigating facts outside the evidence at the time (this was done in the context of searching for Mr. Luke and seeking the watermaster certification form; it also occurred in the context of the Director’s direct participation in the creation and presentation of Cresto’s rebuttal testimony and supporting IDWR Exhibit No. 9). Lastly, the Director violated Canon No. 3 by failing to disqualify himself when repeatedly requested to do so by the Ditch Companies and the Boise Project (this is because mere appearance of bias, or any “reasonable” question concerning impartiality is grounds for disqualification under the Canon). Finally, the Director violated Canon No. 4 by failing to conduct his extra-judicial activities in a manner that would not breed “reasonable doubt” over his ability to act impartially (*i.e.*, the contents and tenor of the Director’s communications with

As the foregoing authorities and discussion makes clear, impermissible bias arises when there is a mere “appearance” of the same; actual bias need not be proven. *See, e.g., Eacret*, 139 Idaho at 784, 86 P.3d at 498 (citations omitted) (the reviewing court must, among other things, assure impartial decision-making “and [ ] avoid the appearance of impropriety”). At the least, the above-discussed examples create at least the mere appearance of impropriety, regardless of whether there was any actual impropriety. Moreover, the Ditch Companies respectfully submit that the Director’s actions, particularly when considered in their totality, crossed the line from mere appearance and amounted to actual impropriety in violation of the parties’ due process rights.

**2. IDWR’s Advocacy-Based Hearing Participation Was Improper**

Much to the Ditch Companies’ surprise, confusion, and objection, IDWR essentially (and improperly) participated in the Contested Case hearing as an adversarial party. The hearing involvement of Department staff and its legal counsel was clearly geared towards advocating for, and supporting the affirmance of, the agency’s computerized water rights accounting program. This adversarial and advocacy-based hearing participation exceeded the Department’s authority under Procedure Rules 150, 157, 600, and 602 (IDAPA 37.01.01.150, .157, .600, and .602).

The Department, as an administrative agency, has no authority other than that conferred on it by the Legislature. *See, e.g., Arrow Transportation Co. v. Idaho Pub. Utilities Comm’n*, 85 Idaho 307, 313-14, 379 P.2d 422, 425-26 (1963) (citations omitted); *see also, Henderson v. Eclipse Traffic Control and Flagging, Inc.*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009). As a tribunal of limited jurisdiction, an agency’s jurisdiction is “dependent entirely on the statutes reposing power in them.” *Arrow Transportation Co.*, 85 Idaho at 313-14, 379 P.2d at 425-26.

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legislators, the Governor’s Office, and various water user groups at least “cast reasonable doubt” over his impartiality).

In this matter, the Director's (and the agency's) authority is limited to that granted by Title 42, Idaho Code, the IDAPA (Section 67-5201, *et seq.*), and the agency's administrative rules promulgated in accordance with these authorities. *See* IDAHO CODE §§ 42-1701A, 42-1805(8), and IDAPA 37.01.01. And, IDWR's participation in the hearing of this matter unlawfully exceeded the participation authority otherwise granted it by these authorities.

For example, IDWR Procedural Rule 1 (IDAPA 37.01.01.001.02) provides that IDAPA 37.01.01 (the *Rules of Procedure of the Idaho Department of Water Resources*) "shall govern contested case proceedings before" the Department. Procedure Rule 50 (IDAPA 37.01.01.050) provides the same.

Procedure Rule 150 (IDAPA 37.01.01.150) defines "parties to contested cases" as: "applicants or claimants or appellants, petitioners, complainants, respondents, protestants, or intervenors." *Id.* Procedure Rules 151 thru 156 (IDAPA 37.01.01.151 thru .156) further define those various "parties" as those who: seek something "from the agency"; "ask the agency to initiate a contested case"; "charge other person(s) with any act or omission"; respond to complaints or against whom investigations are initiated; and those who are none of the above, but who properly and timely intervene in a contested case proceeding. *Id.* None of the applicable definitions of a "party" includes reference to IDWR.<sup>20</sup>

Instead, Procedure Rule 157 (IDAPA 37.01.01.157) authorizes IDWR staff to participate in contested case hearings for a variety of what appear to be "party"-like purposes. However, that agency staff participation is strictly "subject to" other Procedure Rules, including Procedure Rule 600 (IDAPA 37.01.01.600).

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<sup>20</sup> The Ditch Companies' use the term "applicable" because IDWR can be a "complainant" under Procedure Rule 153 in those instances where it is charging a person with an act or omission within its authority to do so. This Contested Case was not a "complainant" situation.



Procedure Rule 600, in turn, advises that IDWR should take evidence in a manner that assists the parties' development of the administrative record, and that the agency's "experience, technical competence, and specialized knowledge may be used in evaluation of the evidence" adduced at hearing. IDAPA 37.01.01.600. Relatedly, and although not specifically referenced in Procedure Rule 157, Procedure Rule 602 (IDAPA 37.01.01.602) authorizes the preparation and evidentiary admission of "staff memoranda," "staff reports," and "data" provided that the subject matter is of "generally recognized technical facts within the agency's specialized knowledge." *Id.***Error! Bookmark not defined.**

Taken together, the Ditch Companies submit that the purpose of IDWR staff participation in Contested Case proceedings before the agency is one of technical expert/assistant similar to what Idaho Code Section 42-1401B provides in the context of general stream adjudications. IDWR staff participation under Procedure Rule 600 is to assist in the formation of the administrative record where that type of support is warranted; namely within the sphere of the agency's "experience, technical competence, and specialized knowledge." IDWR staff participation is not, however, to take on true adversarial party status resulting in zealous advocacy for a certain outcome (except, of course, in the expressly limited circumstances where IDWR is exercising its authority as a "complainant").

When asked about its status in the Contested Case, IDWR took the position (at least initially) that it was not a "party" in the proceeding. R., 000875. However, as the matter progressed towards and thru hearing, IDWR staff and counsel acted very much otherwise.

For example, the Department, *under the Director's own signature*, filed an expert witness disclosure and a subsequent lay witness and exhibit list disclosure. *See* R., 000641 and 000691, respectively. Counsel for the Department presented witnesses through direct and

re-direct examination; vigorously cross-examined others; and lodged and actively defended evidentiary objections. *See, e.g.*, Tr., 889:16-908:14; 1549:1-1561:16; 1585:8-1588:17; and 839:9-840:25. The clear purpose of all of this was to advocate support for, and uphold, the Department's computerized water right accounting program and the Department's (and the State's) view of the program's alleged administrative import. The Department's presentations and participation at hearing did not lend mere record clarification, or provide mere technical expertise, to explaining the nuts and bolts of the program, how it came to be, etc. Rather, the Department made a concerted effort to shape a record benefitting the program and its prior adoption.

In sum, the record makes clear that the Department's participation in this matter far exceeded the governing parameters of Procedure Rules 600 and 602 (IDAPA 37.01.01.600 and .602). Consequently, the Department's party status in this matter exceeded the scope of its authority under Procedure Rule 157 (IDAPA 37.01.01.157), which is, in turn, governed by the limitations imposed under Procedure Rules 600 and 602.

**3. Cresto Testimony Exceeding the Scope of Her Staff Memorandum Was Improper and Further Demonstrated IDWR and Director Bias**

Though it stated otherwise, the record makes clear that IDWR participated in this matter as a party who advocated for a particular result—namely the *post hoc* creation of an administrative record favorable to the existence and ongoing use of its computerized water rights accounting program. As a party in the proceeding, IDWR should be held to the same standards as any other party when it comes to the nature and scope of the “expert” testimony it disclosed and presented through Cresto.

In his *Fifth Amended Scheduling Order; Notice of Hearing* (May 20, 2015) (R., 000618), the Director set an expert witness disclosure of June 19, 2015. The order also provided that the

disclosure deadline applied to “any experts who may testify for IDWR at hearing.” *Id.*

Consequently, IDWR disclosed Cresto as an “expert who may testify for IDWR at the hearing in this matter.” R., 000641. IDWR further stated in the disclosure that: “[t]estimony from this witness will relate to discussion of the November 4, 2014, Memorandum she prepared for the Director on the subject of ‘Accounting for the distribution of water to the federal on-stream reservoirs in Water District 63.’” *Id.* Based on this disclosure, the Boise Project and the Ditch Companies deposed Cresto specifically in her designated “expert” capacity on July 21, 2015.

During that deposition, Cresto was directly asked what, exactly, her opinions were, and what, exactly, she would be testifying to in her expert capacity. *See, e.g.,* Tr., 60:18-62:12. In response, Cresto testified that the *only* opinions she would offer and testify regarding were those expressed in her November 4, 2014 Technical Memorandum and nothing else. *Id.* Despite this testimony, Cresto offered opinions far beyond the scope of her technical memorandum, some of which were memorialized in an exhibit (IDWR Ex. 9) created during the course of hearing based on data plainly in IDWR’s possession prehearing. Tr., 1559:13-1560:20. Moreover, the purported responsive or “rebuttal” nature of the new exhibit and related testimony was to rebut testimony IDWR was aware of well before hearing. *Id.* The exhibit and its corresponding testimony stemmed from, according to Cresto, “a very different analysis” examining Water District 63 water delivery records than she previously performed. Tr., 1551:5-19; 1553:13-25; and 1564:7-12.

The Ditch Companies acknowledge under Procedure Rule 52 (IDAPA 37.01.01.052) that the Idaho Rules of Civil Procedure do not strictly apply to IDWR contested case proceedings. However, there is no question that the contested case proceedings are quasi-judicial in nature,

and result in the issuance of orders affecting the legal rights and interests of the parties. See Procedure Rules 7 and 15 (IDAPA 37.01.01.007 and .015; *see also*, IDAHO CODE § 67-5201(6) and (12). In that vein, the procedural and tactical safeguard provisions provided by the civil rules have a bearing in this matter—particularly in the expert witness context.

Among the policy protections afforded by Rule 26(b)(4)(A) is the full and complete disclosure of expert opinion so that adequate opportunity exists for full and fair cross-examination. *See, e.g., Easterling v. Kendall*, \_\_\_ Idaho \_\_\_, \_\_\_ P.3d \_\_\_, 2016 Ida. Lexis 11, 25 (2016), *quoting Clark v. Klein*, 137 Idaho 154, 158, 45 P.3d 810, 814 (2002) (“Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he [or she] must have some idea of the bases of that opinion and the data relied upon.”).

In this matter, the Boise Project and the Ditch Companies objected to any and all Cresto testimony straying from the subject matter and contents of her November 2014 Technical Memorandum. This concern was first raised prehearing in the context of the parties’ joint *Motion in Limine of the Ditch Companies* (Aug. 13, 2015) (R., 000853 and 000859), and it carried over throughout Cresto’s so-called “rebuttal” testimony. Tr., 1559:13-1561:5. The Director quickly overruled the objections.

Not only was IDWR actively advocating in support of its accounting program (as opposed to merely playing a neutral record “clarification” and development role), but as discussed earlier, the Director himself played an active role in organizing the rebuttal testimony and exhibit *ex parte*. Compare Tr., 1561:22-1562:17 (wherein Cresto directly denied “conferring” with the Director during the course of the hearing); 1585:8-1586:15 (wherein Cresto reversed course and admitted to the Director’s direct participation not only in hear hearing testimony, but the analysis leading to the creation of IDWR Exhibit No. 9 and her testimony

regarding the same); and 1588:21-1589:10 (Cresto again confirming the Director's "multiple" *ex parte* communications concerning her testimony in conjunction with IDWR counsel Garrick Baxter *throughout* the proceedings, not just during "rebuttal."). Thus, it should come as no surprise that the Boise Project and Ditch Companies' shared objection would be overruled by the same individual leading the witch hunt seeking to "impeach" the testimony of an eminently qualified witness (*the Boise River Watermaster who administered Basin 63 water rights immediately before and for a long period of time after implementation of IDWR's accounting program in 1986*). This "rebuttal" testimony exchange viewed in isolation, let alone in conjunction with other hearing behavior, demonstrated: (1) IDWR's adversarial party status; and (2) the Director's predetermined and desired hearing outcome—namely aiding and abetting "rebuttal" testimony designed to discredit direct witness testimony undermining IDWR's case.

Moreover, Cresto's November 2014 Technical Memorandum established early on the adversarial "party" status of IDWR. As discussed earlier, Procedure Rule 602 (IDAPA 37.01.01.602) authorizes the preparation of agency staff memoranda capturing scientific facts and data within the agency's specialized knowledge. Instead of narrowly tracking this line, Cresto's November 2014 memorandum included a number of gratuitous statements and opinions further substantiating IDWR's biased advocacy position.

For example, Cresto's memorandum stated legal opinions and conclusions, including:

- Outlining a watermaster's legal duties under Idaho Code Sections 42-602, -801, and the "prior appropriation doctrine";
- Opining that storage water is delivered according to spaceholder contracts between the various water users and the federal government;
- Opining that the water users' "entitlements" to storage water are "defined by their contracts with the Bureau or other water users";
- Opining that on-stream reservoirs "divert and store" the "entire flow of the natural stream" they span;

- Opining that “physical contents”-based accounting would effectively “result in federal control of the distribution of natural flow to state water rights”; and
- Opining and concluding that post-flood control release storage of additional water is not stored (or accrued) under the existing reservoir storage rights because the same have been “satisfied” on paper.

R., 000270.

Thus, rather than explain the simple mechanics of how IDWR counts and credits water through its own internal accounting program (*i.e.*, simple explanations of program variables, how numbers are derived, and how they are tracked), the Cresto memorandum bleeds over into concepts defining the nature and scope of the underlying water rights/property rights and stating legal opinions regarding the effect of flood control releases on the existing storage rights. In short, various portions of the memorandum stray far beyond simple data presentation within the technical expertise of the agency as contemplated in Procedure Rule 602. And, instead, the memorandum takes on a biased advocacy-based bent of law and policy demonstrating the true party nature of IDWR’s participation in the proceeding.

#### **4. The Director’s Use of Rule 602 Official Notice Was Improper and Prejudicial**

As explained at length in the Ditch Companies’ *Objection to Agency Record Lodged by IDWR* (Jan. 7, 2016), the Director abused his authority under Procedure Rule 602 (IDAPA 37.01.01.602), and by extension Idaho Code Section 67-5242(3), by taking official notice of thousands of pages of documents without adequately identifying the “specific facts or material” relied upon within the documents. The Director’s amorphous “official notice” also allowed IDWR to circumvent the more formal and rigorous hearing exhibit presentation and admission process required of the remaining parties. Abuse of “official notice” procedure was an ongoing concern of the Ditch Companies and the Boise Project. *See* R., 000873-74 and *Objection to Agency Record Lodged by IDWR* (Jan. 7, 2016); *see also*, Tr., 27:9-33:20.

Procedure Rule 602 provides, in its entirety:

***Official 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 within the agency's specialized knowledge. ***Parties shall be notified of the specific facts or material noticed and the source of the material noticed***, including any agency staff memoranda and data. Notice that official notice will be taken 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 officially noticed. ***Parties must be given an opportunity to contest and rebut the facts or material officially noticed***. When the presiding officer proposes to notice staff memoranda or agency staff reports, responsible staff employees or agents shall be made available for cross-examination if any party timely requests their availability.

IDAPA 37.01.01.602 (emphasis added).

Idaho Code Section 67-5242(3) provides, in pertinent part:

(3) At the hearing, the presiding officer:

(a) ***Shall regulate the course of the proceedings to assure that there is a full disclosure of all relevant facts*** and issues . . .

(b) ***Shall afford all parties the opportunity to respond and present evidence and argument on all issues*** involved . . .

*Id.* (emphasis added).

Finally, Idaho Rule of Evidence 201, governing use of judicial notice, requires, in pertinent part that facts noticed be either “generally known” within the jurisdiction, or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” I.R.E. 201(b). Further, when judicial notice is exercised, Rule 201 requires specific identification of the “documents or items” noticed, and the opportunity to be heard “as to the propriety of taking notice and the tenor of the matter noticed.” I.R.E. 201(c), (d), and (e).

On August 19, 2015, one week prior to the administrative hearing in this matter, the Director issued a document titled: *Documents Officially Noticed* (“Notice”). R., 000885. The documents identified in the *Notice* were not provided to the parties or formally entered into the record. Instead, the *Notice* stated that the documents could be found on the Department or SRBA websites, or otherwise reviewed in hardcopy at the Department state office upon request.

In response to a renewed objection to the Director’s *Notice* made at hearing



(Tr., 27:8-28:20), the Director issued an *Amended Documents Officially Noticed* disclosure post-hearing on September 15, 2015 (“*Amended Notice*”). R., 000959. The *Amended Notice* issued after the Director’s “additional review” and conclusion that “certain documents [could] be identified with more specificity.” *Id.*

The various categories of documents referenced in the *Amended Notice* included:

- (a) A list of various documents provided prior to the Hearing on July 31, 2015, referred to in the Record as “IDWR Doc-List Attachment A”;
- (b) A list of documents posted on IDWR’s website referred to in the Record as “WD63 Records of Water Distribution”;
- (c) Water right back files for various storage water rights and claims which can be accessed through IDWR’s website and SRBA claims which can be accessed through the SRBA website (hereinafter “Water Right Back Files”);
- (d) Unspecified and vague references to documents in the Department’s files which can be available from search the Department’s website or can be reviewed at the Department’s offices (hereinafter “all IDWR files”);
- (e) The annual watermaster reports or “Black Books”;
- (f) Unspecified and vague references to the Water District 63 records in possession of the Department (hereinafter “all WD63 records”); and
- (g) The Basin Wide Issue 17 record before the SRBA Court and Idaho Supreme Court (hereinafter “all BW17 files”).

*Id.*

None of the documents listed above were marked, identified or offered as exhibits at the hearing, and many were not copied/scanned until after the Department was charged with creating a Record for this appeal. Whether the copies include all documents which may have been in the Department’s files or records no one knows for certain except the Department, and even it has admitted through the course of this matter that the agency’s records are “scattered and incomplete.”

Regardless, the manner of official notice employed by the Director was problematic and prejudicial for at least two reasons: (1) it failed to cite the specific facts or material relied upon

in derogation of Procedure Rule 602; and (2) it allowed the Department to avoid more rigorous evidentiary record creation standards applied to the other parties in the proceeding, leading to the creation of an administrative record post-hearing and absent an adequate opportunity to be heard on the issue.

Regarding the strictures of Procedure Rule 602, it plainly provides that official notice requires identification of not only the “source” of the material noticed, but also the “specific facts or material” noticed within the “sources” consulted. While the *Amended Notice* identified a variety of “sources,” it did not specifically identify the facts or material culled from the identified sources. Even at this appellate stage of the proceedings, the Ditch Companies have no firm or express idea regarding what specific facts or materials were used/relied upon by the Director in his decision-making process. Rather, the Ditch Companies only know that some facts or materials were presumably culled from sources comprising several thousands of pages. Absent specific identification, the Ditch Companies cannot possibly begin to frame meaningful objections or offer evidence in rebuttal.

Equally troubling, was the Department’s waffling between adversarial party status when it suited, and non-party facilitator when that posture was more advantageous to its ultimate advocacy position in this matter. Under the so-called guise of record “clarification” or “facilitation” (*see, e.g., Tr., 54:5-12*), the Department and its counsel presented witnesses, cross-examined others in an adversarial manner, and offered exhibits which it believed to be relevant to this matter. The Department also lodged evidentiary objections on the record, and went so far as to offer rebuttal witness testimony and exhibits.

Then, notwithstanding the fact that the Department had the opportunity to present testimony and witnesses, and the facts that the Department had the opportunity to identify

specific documents, lay proper foundation and then offer, introduce and admit exhibits into the record which it contended were relevant to the Contested Case, neither the Department, nor the Director offered any of the documents “officially noticed” as exhibits or for admission other than the nine IDWR exhibits lodged. Instead, the Department improperly chose to create (or augment) its own record under the guise of *Documents Officially Noticed*.

The fact that the Department was able to identify, copy/scan and make a record of the *Amended Noticed* in response to this appeal demonstrates that the Department could have done so prior to the underlying hearing in order to provide the parties with an opportunity to respond or object to such documents. If the Department contends that these documents have relevance to the issues presented in this matter then it could have and should have specifically identified those documents and offered them for admittance at the hearing.

The Director and the Department apparently thought that only nine documents were relevant to this case and thus identified, offered and introduced those nine exhibits for admission in the ordinary course, subject to the evidentiary strictures imposed on the other parties. The remaining documents contained in the *Amended Noticed* are either not relevant in the Director and Department’s view, or the Director and the Department are intentionally circumventing evidentiary and other standards in order to selectively include documents in the record. In either case, the parties to this matter should have been afforded the opportunity to consider and object to each specific “fact or material” noticed, rather than the Director leaving those “facts or material” unidentified and buried within thousands of pages of “source” materials.

The Ditch Companies respectfully submit that the Director failed to satisfy the “official notice” requirements of Procedure Rule 602 (IDAPA 37.01.01.602), and the related disclosure and discourse requirements of Idaho Code Section 67-5242(3) and Idaho Rule of Evidence 201.

These failings led to the creation of an unwieldy and unspecified record, and selectively allowed the Department to circumvent the record creation/evidentiary admission obligations imposed on the other parties to the proceeding. These rule and statute-based failings not only stand on their own merits as errors justifying correction, but also further demonstrate the due process failings of the entire proceeding.

**I. The Director Erred by “Rejecting” the Testimony of Former Boise River Watermaster Sisco**

One of the key witnesses presented by the Ditch Companies and the Boise Project was former Boise River Watermaster Sisco. Sisco’s testimony was provided via affidavit and live testimony. Tr., 830:1-836:12. Sisco also authenticated a number of hearing exhibits referenced throughout his testimony. *Id.*, 836:14-837:21.

Sisco was the Boise River Watermaster for 22 years. Tr., 830:25-831:1. Sisco was the human bridge between pre- and post-computerized accounting implementation having studied under his predecessor Henry Koelling and his longhand accounting methods, and later requesting the implementation of computerized accounting when he (Sisco) became Watermaster in 1986. Tr., 841:1-861:5; 893:8-18; *see also*, Ex. 2008, 000482-83, ¶ 23. Before ascending to the position of Boise River Watermaster, Sisco was a 19-year veteran employee of the Department, including serving as Manager of the Watermaster Program for IDWR’s Western Region, providing technical and water right administration support to all watermasters in southwest Idaho, Mr. Koelling included. Ex. 2008, 000469-70, ¶ 2. By all accounts, Sisco was both competent and highly regarded during his tenure with the Department and as Boise River Watermaster. *See, e.g.*, Tr., 676:9-677:25 (wherein former IDWR Western Region Manager, and later Department Director Tuthill described Sisco as not only competent, but the most knowledgeable person regarding how, in fact, Boise River water rights were administered during

his (Sisco's) tenure); *see also*, Tr., 1337:15-17 (wherein current Boise River Watermaster Barrie, Sisco's successor, described Sisco's reputation as "exemplary.").

Despite Sisco's considerable knowledge, sterling reputation, and the fact that he is the only direct human link between pre- and post-computerized accounting in the Boise Basin (having worked directly with Mr. Koelling and later directly with Sutter in the design and implementation of the accounting program), the Director found Sisco's testimony less than "authoritative." *See, e.g.*, R., 001401. The Director went so far as to "reject" certain portions of Sisco's testimony, seemingly dismissing it out of hand altogether. R., 001257 (*Order*, Finding of Fact No. 73). To the extent the Director "rejected" Sisco testimony as he states, he violated his obligations as the hearing officer in this matter.

As the trier of fact in this matter, the Director is required to consider the admissible evidence put before him. The Ditch Companies acknowledge that the Director was entitled to weigh the credibility of witnesses and to place greater or lesser weight on any particular piece of evidence. *See, e.g., Morgan v. Idaho Dept. of Health & Welfare*, 120 Idaho 6, 8, 813 P.2d 345, 347 (1991). However, as the trier of fact in this matter, the Director was required to consider the admissible evidence put before him; he was not free to dismiss (or "reject") evidence out of hand. *See, e.g., Pierstoff v. Gray's Auto Shop*, 58 Idaho 438, 447, 74 P.2d 171, 175 (1937) (noting the "rule applicable to all witnesses" is that "a board, court, or jury must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial"; and that the fact finder may not "arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law").

Specifically, the Director "rejected" Sisco's testimony explaining the pre-1986

administration of Boise River water rights as he (Sisco) observed and learned firsthand from his predecessor Henry Koelling. R., 001257 (Finding of Fact No. 73). The Director also largely disregarded Sisco's testimony regarding the fact that he (Sisco) did not count flood control releases against the Boise River Reservoir storage rights (rather storage water right administration was performed on a physical contents basis), and as a corollary he (Sisco) would not allow junior water rights to divert water to the detriment of priority reservoir refill post-flood control releases. *Id.*, 001272-1274 (Finding of Fact Nos. 133-39). Instead the Director chose to rely predominantly on the Water District 63 "Black Books" which did not, according to the Director, corroborate Sisco's testimony. With all due respect, the converse is also true: the Black Books do not expressly controvert Sisco's testimony either.<sup>21</sup>

The Director's outright "rejection" of certain Sisco testimony and discounting of other Sisco testimony speaks to the preordained outcome the Director sought in this proceeding. As discussed earlier, the Director took great offense to the fact that Sisco treated the accounting program as a mere tool in the toolbox aiding in water right administration; rather than treating the accounting program *as the means of administering* the water rights at issue. Tr., 904:4-18; 914:10-21; 918:25-920:25.

At most, the Director, as hearing officer, was free to weigh the evidence properly admitted into the record. But, he was not free to "reject" any of it altogether.

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<sup>21</sup> Regarding junior diversion curtailment for example, the Director noted that the Black Books were silent on the issue. R., 001273 (Finding of Fact No. 138). Instead, the Director surmised that it would have been "likely" that Sisco's administrative practices "would have been documented" had Sisco, in fact, acted accordingly. Sisco authored the Black Books in question, and directly testified in plain terms what his practices were *for over 20 years*. Yet the Director placed greater stock in inanimate documents which were silent on the issue.

## **VI. CONCLUSION**

1. IDWR's position conflicts with the congressionally-authorized operating plan for the Boise River Reservoirs that was developed and approved by the Bureau of Reclamation, the Corps of Engineers, the State of Idaho, and the spaceholders under which the Boise River Reservoirs have been operated for beneficial use storage and flood control. That plan provides for the actual, physical storage of water in the reservoirs after flood control releases for beneficial use by the spaceholders pursuant to the reservoir storage rights and the spaceholders' storage contracts.

2. IDWR's position incorrectly treats reservoir inflows that are required by the reservoir operating plan to be released for flood control purposes as "physically and legally available" for beneficial use storage pursuant to the reservoir storage rights. Reservoir space that is required to be vacant for flood control is not "physically and legally available" for beneficial use storage, and reservoir inflows that must be released to maintain required flood control spaces are not "physically and legally available" for beneficial use storage. In other words, water that is required to be released for flood control purposes is not stored for beneficial use, just as water that is required to be released to downstream senior water rights is not stored pursuant to storage water rights. Releasing water for flood control purposes is not a discretionary "choice" or use of water by the operators or the spaceholders of the Boise River Reservoirs: it is a non-discretionary mandate of the State-approved reservoir operating plan to protect the Boise Valley from potentially severe economic losses due to flooding.

3. IDWR's position conflicts with the storage water rights and the spaceholders' storage contracts which are based on the actual storage of water in the reservoirs pursuant to the storage water rights in accordance with the reservoir operating plan.

4. IDWR's position is contrary to Idaho Code Section 42-201(2), which prohibits the



diversion and use of water without a water right. IDWR's position impermissibly decouples the "irrigation storage" and "irrigation from storage" components of the storage water rights, so that water delivered for irrigation use pursuant storage water rights has not been stored pursuant to a water right.

5. IDWR's position conflicts with the principle that use of the reservoirs for flood control purposes does not require a water right, or constitute use of the existing storage water rights.

6. IDWR's position is contrary to the administration of the Boise River Reservoir storage water rights by Boise River Watermasters and the actual storage, delivery and beneficial use of water pursuant to the storage water rights for the Boise River Reservoirs and the spaceholders' storage contracts. Boise River Watermasters have never treated water released from the Boise River Reservoirs for flood control purposes as a release of water that has been stored for beneficial use pursuant to a storage water right. Boise River Watermasters have always administered water rights with the understanding that water actually, physically stored in the reservoirs at the conclusion of flood control operations, at the point of maximum storage (*i.e.*, maximum reservoir fill), as stored pursuant to the reservoir storage rights, and allocated to the storage accounts of the spaceholders. Use of storage has never been charged to any spaceholder account until and unless storage is actually released from Lucky Peak for delivery to the spaceholder's canal diversion. Water required to fill storage rights during flood control operations has never been released to deliver water to water rights that are junior to the Boise River Reservoir storage rights. IDWR produced no evidence demonstrating that such releases ever occurred.

7. IDWR's position is contrary to the longstanding recognition by IDWR, Boise

River Watermasters, judicial decrees and Boise River water users that the natural flow from the upper Boise River watershed above Lucky Peak Reservoir is fully appropriated by existing *Stewart and Bryan Decree* water rights, and that the water from the upper Boise River watershed is available for new consumptive uses only while water is released from the reservoirs for flood control purposes.

8. The water right accounting program, and IDWR's interpretation of it, have never been adopted or implemented pursuant to requirements of the Idaho Administrative Procedure Act, or in any other manner that could legally alter or storage water rights or the spaceholders' contract rights. Prior to the BW 17 proceedings in the SRBA, no IDWR representative ever told the Boise River Watermasters or the spaceholders that the storage water rights were fully "satisfied" and no longer in effect as a result of the water right accounting program showing that the storage rights are "full on paper," that water was thereafter stored without a water right, or that filling the reservoirs after flood control releases was subject to junior water rights and new appropriations.

9. IDWR acknowledges that, prior to adoption of the water right accounting program in 1986, water was stored in the Boise River Reservoirs during flood control operations and after flood control releases under the priorities of the storage water rights, and that filling those rights was based on reservoir contents at the point of maximum storage. IDWR's position that the water right accounting program changed water right accounting so that water previously stored pursuant to the priorities of the storage water rights was instead stored without a water right, under no priority, subject to all junior water rights and future appropriations, effectively divests or subordinates the storage rights without due process of law and constitutes an unconstitutional taking of the Ditch Companies' water rights and contract rights.

10. IDWR's "scattered and incomplete" records pertaining the Boise River water right accounting program do not provide a basis to construe the 1986 adoption and use of the program as fundamentally altering the storage water rights, the storage contracts or the administration of those rights. The only substantive change in the administration of reservoir storage rights that was instituted through the adoption of the water right accounting program was to accrue reservoir inflows to the storage water rights on the basis of source and priority, instead of on the basis of priority alone.

11. The adoption of the water right accounting program in 1986 did not alter the storage water rights, the storage contracts, the operation of the Boise River Reservoirs for beneficial use storage or the administration of those rights. "Paper filling" of the reservoir storage rights in the water right accounting program does not result in any change in the operation of the reservoirs for beneficial use storage or any change in water right administration. Water is not allocated to the spaceholders' storage accounts when the water at the point of paper fill in the water right accounting program. Water is not credited to the storage water rights and to the spaceholder accounts until the day of allocation. To the contrary, water physically stored in the reservoirs at the point of maximum storage has always been credited to the storage rights and fully, 100% allocated to the spaceholders' storage accounts for beneficial use. The water right accounting reports do not show that the storage water rights go out of priority or are "satisfied" at the point of "paper fill." The water right accounting reports show that the reservoir storage rights remain in priority until the day of allocation.

12. Contrary to IDWR's current position that water right accounting has nothing to do with reservoir operations, Sutter, the author of the program, designed the program to credit water physically stored in the reservoirs after the conclusion of flood control operations (less

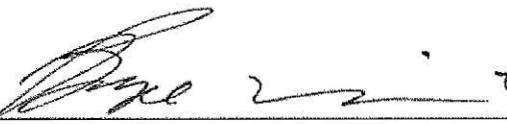
storage previously delivered for beneficial use and evaporation) at the point of maximum storage to the storage water rights, to reflect the provisions of the 1953 Agreement and the criteria and procedures of the Water Control Manual under which water is physically stored during flood control operations and after flood control releases for beneficial use.

13. Boise River water right administration, including water right accounting, is the duty of the Boise River Watermaster, not the hydrology section of IDWR. The accounting program is run by the hydrology section as a tool for the Watermaster to use in the administration and accounting of water rights. The accounting methodology should *reflect* the administration of water rights by the watermaster. It *does not determine* the elements of the water rights, the operation of the Boise River Reservoirs for beneficial use storage, or how the Watermaster administers water rights in accordance with priorities of the water rights under Idaho law.

14. For these reasons, IDWR's apparent position in this matter is: (a) in violation of constitutional or statutory provisions, (b) in excess of IDWR's statutory authority, (c) made upon unlawful procedure, and (d) arbitrary, capricious, and an abuse of discretion.

DATED this 8<sup>th</sup> day of March, 2016.

SAWTOOTH LAW OFFICES, PLLC

By  for:  
Daniel V. Steenson  
Attorneys for Petitioners

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8<sup>th</sup> day of March, 2016, I caused a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** to be served by the method indicated below, and addressed to the following:

Original to:

Snake River Basin Adjudication  
253 3<sup>rd</sup> Avenue North  
P.O. Box 2707  
Twin Falls, ID 83303-2707  
Facsimile: (208) 736-2121

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☒ (X) Hand Delivered  
☐ ( ) Overnight Mail  
☐ ( ) Facsimile  
☐ ( ) Electronic / CM-ECF

Copies to the following:

Garrick L. Baxter  
Deputy Attorney General  
STATE OF IDAHO - IDWR  
P.O. Box 83720  
Boise, ID 83720  
Facsimile: (208) 287-6700  
E-Mail: garrick.baxter@idwr.idaho.gov

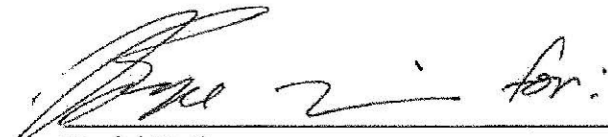
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☐ ( ) Facsimile  
☐ ( ) Electronic / CM-ECF

Albert P. Barker  
Shelley M. Davis  
BARKER ROSHOLT & SIMPSON LLP  
1010 W. Jefferson, Suite 102  
P.O. Box 2139  
Boise, ID 83701-2139  
Facsimile: (208) 344-6034  
E-Mail: apb@idahowaters.com  
smd@idahowaters.com

☒ (X) U.S. Mail, Postage Prepaid  
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☐ ( ) Overnight Mail  
☐ ( ) Facsimile  
☐ ( ) Electronic / CM-ECF

Michael P. Lawrence  
GIVENS PURSLEY, LLP  
601 W. Bannock St.  
P.O. Box 2720  
Boise, ID 83701-2720  
Facsimile: (208) 388-1300  
E-Mail: mpl@givenspursley.com

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☐ ( ) Facsimile  
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Daniel V. Steenson