IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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

Petitioners,

vs.

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

Petitioners,

vs.

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

Respondents,

and

SUEZ WATER IDAHO, INC.,

Intervenor.

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

BRIEF FOR RESPONDENTS' THE IDAHO DEPARTMENT OF WATER RESOURCES AND GARY SPACKMAN

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

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an administrative judicial review proceeding filed by the "Ditch Companies,"[1] the Boise Project Board of Control, and New York Irrigation District ("Petitioners") regarding final orders[2] of the Director ("Director") of the Idaho Department of Water Resources ("Department"). The final orders address "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."[3] The Petitioners request that this Court vacate the Director's orders, arguing the Director acted in excess of his authority and under unlawful procedure, and that the Director's orders are contrary to law, unsupported by the record, and arbitrary and capricious. This Court should reject these arguments and affirm the Director's orders.

The Director's orders resolved the Petitioners' objections to the accounting method used to determine when the decreed water rights for the three federal on-stream reservoirs on the Boise River ("Decreed Storage Rights"[4]) are satisfied or "filled" in years when water is released

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[1] The "Ditch Companies" are: 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. (R.001234.) Agency record citations in this brief refer to the folders in the electronic record and follow these conventions: the "Record" is cited as "R." followed by the bates number; transcripts are cited as "Tr. YYYYMMDD" followed by the page number; "Exhibits" are cited as "Ex." followed by the exhibit number and bates number; "Officially Noticed Docs" are cited as "Off'l. Not." followed by the folder name and bates number.

[2] *Amended Final Order* (Oct. 20, 2015) (R. 001230-1311); *Order Denying Petitions for Reconsideration* (Nov. 19, 2015) (R. 001401-35).

[3] (R. 000007.)

[4] The Decreed Storage Rights are water right nos. 63-303 and 63-3613 (Arrowrock Reservoir), 63-3614 (Anderson Ranch Reservoir), and 63-3618 (Lucky Peak Reservoir). (R. 001234-35.)

from the reservoir system for flood control purposes. The Petitioners (and others) sought to have their objections to the accounting method addressed in the Basin-Wide Issue 17 proceedings, but this Court and the Idaho Supreme Court held that the question of "fill" is statutorily committed to the Director. *See In Re SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17)*, 157 Idaho 385, 392-94, 336 P.3d 792, 799-801 (2014) ("Determining when a water right is satisfied is within the Director's discretionary functions") (bold omitted).

The significance of the "fill" determination for the Decreed Storage Rights in years of flood control releases is twofold: (1) the Decreed Storage Rights are "in priority" until they are satisfied; and (2) the "quantity" element in each Decreed Storage Right is decreed in terms of an annual volume (acre-feet per year, or AFY) that is not limited by a diversion rate (cubic feet per second, or CFS). The Decreed Storage Rights are thus defined to command all flows while "in priority,"[5] even during the highest flow conditions. No water is legally available for diversion under junior water rights as long as the Decreed Storage Rights are "in priority."[6] Thus, the determination of when the annual volumes of the Decreed Storage Rights have been satisfied each year is a significant issue in priority administration in Water District 63.

The Department uses a computerized accounting system to help determine when the Decreed Storage Rights have been satisfied. There is no objection to how the Department determines the satisfaction of the Decreed Storage Rights in water-short years. The Petitioners' objections are limited to how the Department determines satisfaction of the Decreed Storage

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[5] Except flows required to satisfy senior water rights.

[6] In this respect the Decreed Storage Rights differ significantly from water rights for direct diversion to immediate use, which are quantified in terms of a diversion rate expressed in CFS. Even when a senior direct diversion water right is diverting its full decreed quantity, there is often sufficient flow in the river for juniors to also divert under the priorities of their decreed water rights. This is never the case as long as the Decreed Storage Rights remain "in priority" because they are not limited by diversion rates.

Rights in years the United States Bureau of Reclamation and the United States Army Corps of Engineers ("Federal Agencies") release water from the reservoir system for flood control purposes.

The Water District 63 accounting system is complex and the particulars of its operation are questions of computer code developed to account for the distribution of water among many diversions in a large water district in all years: severe drought years, flood years, and everything in between. The Petitioners make many simplistic assertions about the accounting system, such as: that it "counts flood control releases"; that it is based on measuring "reservoir inflows"; that it treats flood control releases as a "use" of stored water; and others. Such characterizations are not only technically incorrect, but lead to erroneous conclusions about how the accounting system actually operates, why it is designed the way it is, and the implications of the Petitioners' challenges to the accounting system.

For purposes of determining the satisfaction or "fill" of the Decreed Storage Rights, the accounting system "counts" or "credits," *on a daily basis*, the amount of *natural flow* that is *available for storage* under the Decreed Storage Right. A Decreed Storage Right is considered satisfied or "filled" when the cumulative total of these daily amounts reaches the decreed annual quantity ("paper fill"). The Petitioners assert this methodology is contrary to law, and argue the Decreed Storage Rights and Idaho law require the accounting system to "count" or "credit" the amount of water *"actually, physically"* in the reservoir system on the date of "*maximum physical fill*," which is determined by federal flood control operations. This dispute—whether the "fill" of Decreed Storage Water Rights must be measured by the "maximum physical fill" of the reservoirs—is the core controversy in this case.[7] This controversy has significant implications

[7] As this Court stated in *Basin-Wide Issue 17*:

for the duration of the period of priority administration of the Decreed Storage Rights in flood control years, because federal flood control operations determine the date of "maximum physical fill" of the reservoir system. *Ditch Companies' Opening Brief* ("*DC Brief*") at 2, 5.

Computerized water accounting has been in place in Water District 63 since 1986. It is undisputed that the accounting system does not govern, control, or dictate federal reservoir operations in Water District 63. Further, the Petitioners have not alleged or shown that the accounting system has ever caused them to receive less storage water than the amount to which they are entitled under their federal contracts.[8] Rather, they argue that federal flood control operations govern priority administration, and that the Water District 63 accounting system diminishes the priorities of the Decreed Storage Rights and leaves the Petitioners without protection against junior water rights and future appropriations.

The Petitioners' arguments are misplaced because satisfaction of the Decreed Storage Rights is determined under the prior appropriation doctrine as established by Idaho law, not by federal flood control operations. The Petitioners' arguments also incorrectly attribute to the Water District 63 accounting system the consequences of flood control releases by the Federal Agencies under a plan of operations the Petitioners freely assented to in their storage contracts with the Bureau of Reclamation ("BOR"). These contracts allocated the risk of flood control

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> The Court notes that the term "fill" may be used to describe (1) a reservoir physically filling with water, or (2) the decreed volume of a storage water right being satisfied (i.e., when the total quantity that has been accounted to storage equals the decreed quantity). The distinction between the two uses of the term is significant, as there may be situations where the storage water rights associated with a particular reservoir are considered filled or satisfied even though the reservoir has not physically filled with water.

Off'l Not. 91017-001418.

[8] Despite having been aware of the accounting system's methodology for determining the satisfaction or "fill" of the reservoir water rights in flood control years since 2008 if not earlier (Ex. 5 000099; Off'l. Not. 63-3618—001322; Off'l. Not. 63-3618—001476), the Petitioners and the Bureau of Reclamation have never filed a delivery call or otherwise administratively challenged the accounting system. They did challenge the accounting system, however, in Basin-Wide Issue 17.

releases in accordance with the primary purposes of the reservoirs. Arrowrock and Anderson Ranch spaceholders' contracts expressly "guaranteed" that their storage accounts would be kept whole using Lucky Peak storage; while Lucky Peak spaceholders' contracts expressly made their storage accounts subject to the "Guarantee" and authorized the BOR to charge flood control releases against Lucky Peak spaceholder accounts.[9] In 1985, the Federal Agencies agreed that Lucky Peak spaceholders would be charged for flood control releases only if they caused a shortfall in total system storage of more than 60,000 acre-feet; the first 60,000 acre-feet of any flood control-caused shortfall is charged to BOR's "Streamflow Maintenance" storage account.[10]

The BOR's "Guarantee" to use Lucky Peak storage to protect Arrowrock and Anderson Ranch spaceholders from flood control operations was decreed in the *Partial Decree* for the Lucky Peak water right.[11] The "*Pioneer* remark" in the *Partial Decrees*[12] for all three reservoirs provides that the Petitioners "administer the use of the water in the quantities and/or percentages specified in the contracts between the BOR and the irrigation organizations." The Water District

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[9] A "spaceholder" is an irrigation entity that has contractual rights to "water storage space in the reservoir in return for the repayment of a proportional share of the construction costs." *Kerner v. Johnson*, 99 Idaho 433, 438, 583 P.2d 360, 365 (1978). For convenience, the Director referred to all water user entities holding federal contracts as "spaceholders," even if the contracts in question were "water service contracts" (such as the 1965 Lucky Peak contracts) rather than "repayment" or "spaceholder" contracts (such as the 2005 Lucky Peak contracts). (R. 001237 & n.9.)

[10] This Court addressed these matters in SRBA proceedings on the Lucky Peak water right. *See Memorandum Decision on Order for Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, Subcase No. 63-3618 (Lucky Peak Reservoir)* (Sep. 23, 2008) ("*Lucky Peak Decision*") at 4-13, 32-36. The *Lucky Peak Decision* was officially noticed. (Off'l. Not. 63-3618—001532.). The Water District 63 accounting system's methodology for determining the satisfaction of the reservoir water rights was also raised and argued in the Lucky Peak proceedings. (Ex. 5 000099; Off'l. Not. 63-3618—001322; Off'l. Not. 63-3618—001476.)

[11] *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right No. 63-3618* (Dec. 18, 2008) (Off'l. Not. 63-3618—001597.); *Lucky Peak Decision* at 33-36.

[12] *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007); *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right No. 63-303* (Jun. 28, 2007) (Off'l. Not. 63-303—000090); *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right No. 63-3613* (Jun. 28, 2007) (Off'l. Not. 63-361—000060); *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right No. 63-3614* (Feb. 25, 2009) (Off'l. Not. 63-3614—000305); *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right No. 63-3618* (Dec. 18, 2008) (Off'l. Not. 63-3618—001597.)

63 accounting system is consistent with these provisions, and also recognizes the Federal Agencies' 60,000 acre-foot flood control "buffer" for Lucky Peak spaceholders.

Accepting the Petitioners arguments would shift to junior water rights the risks and burdens of flood control operations that the Petitioners and the BOR allocated among themselves in the mid-1950s. It would also lead to enlargement of the volumes of water considered appropriated under the Decreed Storage Rights, and cede the state's sovereign control of the distribution, use, and development of state water resources to the federal government. (R. 001278-82, 001302-07.)

B. STATEMENT OF FACTS

1. Introduction

This case is an IDAPA[13] judicial review proceeding of final orders of the Director regarding distribution of water to the Decreed Storage Rights for Arrowrock, Anderson Ranch, and Lucky Peak reservoirs. (R. 001230.) While the Director made extensive factual findings (R. 001230-001286), the Petitioners' briefs ignore these findings and seek to construct an alternative factual record, particularly with respect to historic water accounting and water rights administration and the technical operation of the Water District 63 accounting system. The Respondents do not concede the Petitioners' statements of facts and herein incorporate by this reference the Director's factual findings. (R. 001234-86; R. 001401-31). The Respondents also provide the following factual summary.

[13] Idaho Administrative Procedure Act; Idaho Code §§ 67-5201—67-5292.

2. The Decreed Storage Rights.

This Court entered *Partial Decrees* for the Decreed Storage Rights in 2007, 2008, and 2009. (R. 001234-36.) Their priorities, quantities, and purposes and periods of use were decreed as follows:

Water Right	Priority	Quantity	Purpose of Use		Period of Use
63-303 (Arrowrock)	01/13/1911	271,600 AFY	Irrigation Storage Irrigation from Storage	(271,6000 AFY) (271,6000 AFY)	01/01 – 12/31 03/15 – 11/15
63-3613 (Arrowrock)	06/25/1938	15,000 AFY	Irrigation Storage Irrigation from Storage	(15,000 AFY) (15,000 AFY)	01/01 – 12/31 03/15 – 11/15
63-3614 (Anderson Ranch)	12/09/1940	493,161 AFY	Irrigation Storage Irrigation from Storage Industrial Storage Industrial from Storage Power Storage Power from Storage Municipal Storage Municipal from Storage	(487,961 AFY) (487,961 AFY) (5,200 AFY) (5,200 AFY) (493,161 AFY) (493,161 AFY) (5,200 AFY) (5,200 AFY)	01/01 – 12/31 03/15 – 11/15 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31
63-3618 (Lucky Peak)	04/12/1963	293,050 AFY	Irrigation Storage Irrigation from Storage Recreation Storage Streamflow Maintenance Storage Streamflow Maintenance from Storage	(111,950 AFY) (111,950 AFY) (28,800 AFY) (152,300 AFY) (152,300 AFY)	01/01 – 12/31 03/15 – 11/15 01/01 – 12/31 01/01 – 12/31 01/01 – 12/31

The *Partial Decrees* include the "*Pioneer* remark."[14] The *Partial Decree* for the Lucky Peak water right also includes a remark referencing the 1954 Supplemental Contracts between the BOR and spaceholders in Arrowrock and Anderson Ranch reservoirs. *Memorandum Decision on Order for Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, Subcase No. 63-3618 (Lucky Peak Reservoir)* (Sep. 23, 2008) (Off'l Not. 63-3618—001532) ("*Lucky Peak Decision*") at 32-36.

[14] *Partial Decrees*; *Pioneer*, 144 Idaho at 115, 157 P.3d at 609.

The *Partial Decrees* do not include any references to a "reservoir operating plan," [15] a "congressionally-approved plan," or any similar term. *DC Brief* at 2-3, 8-33, *Boise Project Board of Control's Petitioners' Brief* ("*BP Brief*") at 21-30. The *Partial Decrees* do not include any references to the Corps of Engineers' ("Corps") 1985 *Water Control Manual for Boise River Reservoirs*, *DC Brief* at 29; the 1953 "Memorandum of Agreement" between the BOR and the Corps regarding flood control operations of the Boise River reservoirs, *DC Brief* at 22; the Corps' 1956 "Reservoir Regulation Manual" for the Boise River reservoirs, *DC Brief* at 25; the 1965 Lucky Peak water service contracts, *DC Brief* at 27; or the 2005 Lucky Peak repayment (spaceholder) contracts. *DC Brief* at 29. The *Partial Decrees* do not reference "runoff forecasts," "rule curves," fill or refill "assurances," "'second-in' water," "maximum physical fill," or any similar terms. *DC Brief* at 3, 11, 22, 64.

3. <u>The Boise River Reservoirs.</u>

Arrowrock, Anderson Ranch, and Lucky Peak reservoirs are on-stream reservoirs created by federal dams. (R. 001236.) Lucky Peak dam is located on the Boise River approximately 10 miles upstream of Boise. (*Id.*) Arrowrock dam is approximately 12 miles upstream of Lucky Peak dam. (*Id.*) Anderson Ranch dam is located on the south fork of the Boise River approximately 49 miles upstream from Arrowrock. (*Id.*)

Arrowrock and Anderson Ranch reservoirs are BOR projects authorized exclusively or primarily for irrigation storage purposes. (R. 001237-001238.) They were completed in 1915 and 1950, respectively. (*Id.*) Lucky Peak reservoir is a Corps project authorized primarily for flood control purposes that was completed in 1955. (*Id.*)

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[15] "Reservoir operating plan" is a catch-all term the Petitioners use to describe their contracts, the *Water Control Manual,* the Federal Agencies' 1953 "Memorandum of Agreement," and various other documents relating to flood control operations of the Boise River reservoir system. *DC Brief* at 8-33; *BP Brief* at 21-30.

4. Contractual Allocation of Flood Control "Refill" Risk.

The Federal Agencies have coordinated the operations of the three Boise River reservoirs for both irrigation storage and flood control purposes since 1956. (R. 001238-49.) Irrigation storage operations and flood control operations often conflict because flood control objectives are optimized by keeping reservoirs empty and available to control flood waters, while irrigation objectives are optimized by keeping reservoirs as full as possible. (R. 001242.) At some times of the year, flood control operations may result in stored water being evacuated from the reservoir system or "bypassed"[16] so sufficient reservoir system space is empty and available to control the forecasted flood runoff. (R. 001242-001246.) The requirement of evacuating or "bypassing" stored water for flood control purposes creates a risk that the reservoir system will not completely refill before the end of the flood runoff. (R. 001245-001246.) The key conflict is that of flood control versus refilling the reservoirs for the next irrigation season. (R. 001242.)

The Federal Agencies and the Boise River water users recognized this conflict and addressed it through agreements executed in the 1950s: the Federal Agencies' 1953 "Memorandum of Agreement" for "Flood Control Operation of Boise River Reservoirs" ("1953 MOA"); and the 1954 "Supplemental Contracts" between the BOR and spaceholders in Arrowrock and Anderson Ranch reservoirs. While these agreements authorized flood control operations at all three reservoirs, they were carefully structured to ensure that spaceholders in the existing irrigation reservoirs, Arrowrock and Anderson Ranch, would be fully protected by using storage water captured in the new flood control reservoir, Lucky Peak, to replace Arrowrock and Anderson Ranch storage released for flood control operations. Thus, when Lucky Peak storage was subsequently contracted, Lucky Peak spaceholders' storage allocations were expressly made

[16] "Bypass" does not mean that water is not diverted into the reservoir system; rather it means that reservoir system releases are adjusted to maintain a constant storage volume or to control the rate at which storage increases. (R. 001243.)

subject to the Arrowrock and Anderson Ranch "Guarantee," and reductions to account for flood control releases.

The 1953 MOA stated that: (1) "No reregulation of storage or annual exchange of storage" would "deprive any entity of water accruing to it under existing rights in Arrowrock, Anderson Ranch, and Lake Lowell Reservoirs"; and (2) if "Anderson Ranch or Arrowrock Reservoirs are not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights to the extent of the space thus remaining unfilled." (R. 001238-39; Ex. 2100—002178, 002181; Ex. 3190—003972, 003977); *Lucky Peak Decision* at 6. The 1953 MOA was expressly conditioned upon being "formally accepted by the water users having storage rights in the reservoir system." (R. 001239; Ex. 2038—001373; Ex. 3190—003981.)[17]

Arrowrock and Anderson Ranch spaceholders "assented" to flood control operations at those reservoirs under the proposed plan in the "Supplemental Contracts" they executed with the BOR in 1954. (R. 001239-40; Ex. 2100—002169-70; Ex. 2190—003961.) The Supplemental Contracts included a "Guarantee" that "water accrued to storage rights in Lucky Peak" would be "credited" to Arrowrock and Anderson Ranch spaceholder accounts in "an amount equal to that difference" between the storage allocations the spaceholders would have gotten but for flood control operations, and the storage available under "actual operations under the flood control operation plan." (*Id.*) The Supplemental Contracts continue in effect while "water accruing to Lucky Peak storage rights required to meet deficiencies in fill by reason of the flood control

[17] The 1953 MOA was also contingent on a re-allocation of the water users' costs "reflecting the flood control benefits" of the proposal. (Ex. 2100—002183-84.) The re-allocation classified flood control costs as "nonreimburable" so water users would not be required to finance flood control operations. (R. 001273 n. 42.); 68 Stat. 794 (Public law 660; Act of August 24, 1954). The cost re-allocation was also an element of the water users' 1954 Supplemental Contracts. (Ex. 2100—002171; Ex. 2190—003963.)

operating plan is made available" pursuant to the "Guarantee." (Ex. 2190—003963.) The "Guarantee" was incorporated as a remark into the *Partial Decree* for the Lucky Peak water right (63-3618) in 2008. *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right No. 63-3618* (Dec. 18, 2008); (R. 001235-36); *Lucky Peak Decision* at 32-36.

Between 1955 and 1965, Lucky Peak storage in excess of that needed "to meet deficiencies in fill" in Arrowrock and Anderson Ranch reservoirs "by reason of flood control," (Ex. 2100—002171), was made available to water users "on an informal basis." (Off'l Not. IDWR Doc List-Attachment A 18_19690918.) Beginning in 1965, the BOR began requiring "Water Service Contracts" for Lucky Peak storage. *Lucky Peak Decision* at 8. The Lucky Peak Water Service Contracts provided that "[t]he primary purpose of the Reservoir is for flood control, for which it will be operated in accordance with" the 1953 MOA, that storage for irrigation purposes would be "[s]ubject to such operations for flood control" (Ex. 2112—002310; Ex. 2053—001654), and "other existing rights which must be supplied therefrom." (Ex. 2112—002312.) The Water Service Contracts also provided "[t]he United States may discharge such water as required for flood control . . . and such discharged water shall be deducted from any stored water held to the credit of the Contractor." (Ex. 2112—002311.) These provisions were retained in the Lucky Peak water users' contracts when in 2005, they were converted to "Repayment" (i.e., "spaceholder") Contracts. (Ex. 2190—003990-91); *Lucky Peak Decision* at 13.[18]

[18] The 2005 Lucky Peak spaceholder contracts explicitly recognized "the 1954 Supplemental Arrowrock and Anderson Ranch contracts approving the Boise River operating plan." (Ex. 2190—003990.)

5. Water Distribution and Water Rights Administration Before 1986.

Computerized water accounting was implemented in Water District 63 in 1986. (R. 001258.) Before 1986, Water District 63 did not account for water distributions or administer water rights on a year-round basis. (R. 001249-57.) For much of the year, diversions were not tracked or regulated at all, even after the start of the irrigation season. (R. 001249-51.) Water accounting and water rights administration began only with the "canal regulation" period, which started when the natural flow supply dropped below water users' demands and they began drawing down their storage supplies. (*Id.*) More often than not, the "canal regulation" period did not begin until sometime after the start of the irrigation season. (*Id.*) Consequently, the water rights for the Boise River reservoirs were not administered in priority at all in the years before 1986. (R. 001250-51, 001253, 001257, 001275-76.)

Then, as now, the Federal Agencies operated the Boise River reservoir system in flood years to reach maximum storage content, or "maximum physical fill," at the conclusion of flood control operations. *DC Brief* at 2, 5, 33; (R. 001251-53). "Maximum physical fill" occurred on or before the "canal regulation" period began, and the BOR determined spaceholders' contractual storage allocations based on the total volume of water in the reservoir system on the date of "maximum physical fill" of the reservoir system. (R. 001251-53.)

6. Implementation of Computerized Water Accounting.

In 1986, computerized water accounting was implemented in Water District 63 at the request of the new watermaster, Lee Sisco. (R. 001258.) Sisco felt the previous watermaster's methods of accounting for water in the reservoir system were not correct and requested guidance from the Department. (*Id.*) The accounting program was developed by Bob

Sutter of the Department. (*Id.*) Sisco wrote in his 1986 watermaster report ("Black Book")[19] that the new system "should provide an accurate, up-to-date accounting of not only storage use, but of reservoir accrual." (*Id.*)

The Water District 63 accounting system introduced daily, year-round accounting of water diversions to Water District 63. (R. 001265 & n.35; R. 00001276.) The accounting system was derived from a similar system implemented in Water District 1 (upper Snake River basin) in 1978. (R. 001258.) As in Water District 63, the federal reservoirs in Water District 1 were (and are) operated as a system in which water accrued under one reservoir's water right can be physically stored in a different reservoir; and two of the Water District 1 reservoirs (Jackson Lake and Palisades), were (and are) operated for both irrigation storage and flood control under Corps' regulations. (R. 00258 & n.29; Tr. 8/28/2015 at 452-53.)

In 1979, the Water District 1 accounting system's method of water distribution was explained to upper Snake River water users and BOR officials (including Neil Stessman, who was the Bureau's Project Superintendent for the Boise Project when the Water District 63 accounting system was implemented in 1986[20]) in a "Committee of Nine" meeting:

> Lester Saunders asked the Director of the Department of Water Resources, Stephen Allred, to explain the watermaster's process for crediting water to the reservoirs. Steve explained that any water available at a reservoir for storage is

[19] Watermasters are required to file annual reports with the Department. Idaho Code § 42-606. The reports are commonly referred to as the "Black Books."

[20] Stessman signed the attendance sheet for the 1979 meeting. (Ex. 1017—000157.) Eight years later, as Project Superintendent of the Boise Project, he received a copy of Director Ken Dunn's March 19, 1987 letter to Watermaster Lee Sisco forwarding a paper Dunn provided in response to Sisco's request for guidance on the procedure for determining accruals to the Boise River reservoirs. (R. 001259; Ex. 4—000088-98.) The accounting paper stated that the Water District 63 accounting system was similar to the Water District 1 system and that: "[a]ccrual occurs by assigning the natural flows at each reservoir in order of priority"; flood control releases "do not affect accrual"; "[a]ctual storage may continue to occur after the storage rights are all filled on paper'"; and the "second fill" after flood control releases was "unaccounted for storage." (R. 001259-001260; Ex. 4—000093.) Stessman forwarded Dunn's letter and the attached accounting paper to the BOR's Regional Director and the Field Solicitor, who "suggested that we go on record as being notified of the Director's decision." (R. 001259 & n.41; Ex. 4—000087.)

> credited to that reservoir storage right. *Once a right has filled on paper, even if water has been released and additional space is available, the priorities of the reservoirs are considered to be no longer in effect*. This is offset by the fact that any diversion which takes over its natural flow entitlement is charged with storage used. Steve explained that there are alternatives to this approach, but this is the best accounting method for showing "what is happening" in the system. Steve stressed that the computer only does the accounting and does not eliminate the need for human judgment.

R. 001425 n.16; Ex. 1017—000155 (emphasis added). The accounting system implemented in Water District 63 in 1986 also used this approach. (R. 001258-61, 001263, 001271-76; Tr. 20150828 at 349-51; Ex. 4—000093.) While in years before 1986 there had been no priority accounting or administration in Water District 63 until "canal regulation" began (R. 001249-51), from a water user's standpoint, the system implemented in 1986 would not have appeared to change their water accounting and deliveries. (R. 001276.)

7. Operation of the Water District 63 Accounting System.

The Water District 63 accounting system accounts for natural flow distributions and stored water use for all regulated diversions in the district. (R. 001264-65.) The distinction between "natural flow" and "stored water" is fundamental to the accounting system. (*Id.*) "Natural flow" is the water that would be present in the river absent reservoir operations and diversions. (*Id.*) "Stored water" is the water in excess of the computed natural flow. (*Id.*) The Water District 63 accounting system therefore uses two computer programs: the water rights accounting program and the storage program. (*Id.*)

The water rights accounting program determines the natural flow supply available for distribution in the district by dividing the river into thirteen "reaches," and determines the natural flow supply in each reach via the "reach gain equation." (*Id.*) The reach gain equation calculates the natural flow within each reach as a function of stream flow measurements establishing the reach's inflow, outflow, and diversions, and (if applicable) reservoir evaporation

and change in reservoir content within the reach. (*Id.*) The reach gains (or losses) are summed from upstream to downstream, and the amount of natural flow available for distribution within a given reach is the sum that reach's gain (or loss) plus all upstream reach gains (or losses). (*Id.*) The water rights accounting program distributes this natural flow to water rights throughout the district on a daily basis according to licensed or decreed priorities, points of diversion, diversion rates, volume limitations, periods of use, and/or other limitations on the water rights. (*Id.*)

Stored water uses are not measured by reservoir system releases or attributed to the Decreed Storage Rights. Rather stored water uses are tracked as charges to individual water user accounts when they divert in excess of the quantity available under the priorities of their natural flow water rights. (*Id.*) Water users' storage charges are "cancelled," however, if the stored use occurs before or during flood control releases from Lucky Peak, or if the reservoir system subsequently fills as a result of high runoff, such as during flood control "refill." (R. 001265, 001271, 001283.)

While this methodology readily lends itself to conventional single-purpose diversions such as canal headgates and pumps, for several reasons its application is more complicated with respect to accounting for distributions to the federal reservoirs. (R. 001265.) The federal projects are on-stream structures that physically divert and control all flows, create large artificial lakes, and are operated for multiple purposes, including purposes not authorized in the Decreed Storage Rights, such as flood control. (*Id.*) Storage use sometimes occurs before the Federal Agencies allow the reservoir system to reach "maximum physical fill." (*Id.*) In operating the reservoir system, the Federal Agencies do not physically fill the reservoirs in order of water right priorities and often physically store water decreed to one reservoir in a different reservoir. (*Id.*)

The Decreed Storage Rights are quantified in terms of annual volumes that are not limited by diversion rates and authorize diversions for storage purposes year-round. (*Id.*) Therefore, the Water District 63 accounting system distributes to each of the Boise River reservoirs on a daily basis all natural flow computed to be *available* for storage at the decreed points of diversion (the dams), under the priority of the reservoir's Decreed Storage Right; including any natural flow that would have been available if it had not been stored in an upstream reservoir. (R. 001266.) These daily distributions are not based on simply measuring reservoir system inflows, but rather are calculated quantities for each Decreed Storage Right derived from several different stream measurements, and are termed "accruals."[21] (*Id.*)

The water rights accounting program does not track where or when the water distributed to the reservoirs under the priorities of the Decreed Storage Rights is physically stored in the reservoir system. (R. 001271.) Daily accruals under a Decreed Storage Right are not based on the "physical fill" of the decreed reservoir on the day in question, or at any given point in time. (R. 001266.) Accruals are not reduced to account for releases from the reservoir system, regardless of whether the water is released for a use authorized in the Decreed Storage Right (such as irrigation) or for purposes not authorized in the Decreed Storage Right (such as flood control). (*Id.*) Releases from the individual reservoirs are not taken into account for any purpose other than determining the amount of natural flow available for distribution via the "reach gain equation" methodology. (R. 001264.)

The water rights accounting program keeps a running total of daily accruals for each Decreed Storage Right, and when the cumulative total of daily accruals reaches the annual volume, the Decreed Storage Right is considered satisfied and is no longer "in priority." (R.

[21] "Accruals" to the Decreed Storage Rights begin when the accounting is "reset" each year. (R. 001269); Ex. 5—000007.

001266-67.) This is known as "paper fill." (*Id.*) "Paper fill" does not mean the reservoir has filled physically, although it may have or may subsequently, depending on how the Federal Agencies operate the reservoir system. (*Id.*) "Paper fill" also does not mean that the reservoir must stop storing additional water. (*Id.*) The term only means the Decreed Storage Right is no longer in priority, may not be used to curtail junior water rights, and that natural flow can begin to be distributed to junior water rights. (*Id.*) "Paper fill" refers to the Decreed Storage Rights, not to spaceholders' storage accounts, and does not determine when or how much storage is allocated to spaceholders. (R. 001260, 001267-70.) The Water District 63 accounting system does not govern, control, or dictate federal reservoir system operations. (R. 001271 & n.41.)

The Federal Agencies generally operate the reservoir system to store as much water as possible throughout the year if space is available and reservoir system inflows exceed the demand under downstream water rights. (R. 001243, 001266-67.) Additional water physically stored in the reservoir system during flood control "refill" after the Decreed Storage Rights have "filled on paper" is not attributed to any water right, but rather is tracked as "unaccounted for storage." (*Id.*)[22] "Unaccounted for storage" is not a measure of reservoir system inflows, but rather a measure of increases in the physical contents of the reservoir system after the Decreed Storage Rights are satisfied. (*Id.*; R. 001408-10 & n.5, 001414 n.9, 001422 & n.14.) "Unaccounted for storage" is not stored under the priorities of the Decreed Storage Rights, but consists of water in excess of downstream demand physically captured in the reservoir system. (R. 001266.) "Unaccounted for storage" is assigned to the Decreed Storage Rights, in order of their priorities, on the "day of allocation." (R. 001268.)

[22] This is the reason "unaccounted for storage" is sometimes characterized as storage "without a water right."

Spaceholders' annual storage account allocations are defined by federal contracts rather than licensed or decreed state water rights, and are calculated by the storage program rather than the water rights accounting program. (R. 001267.) The storage program is run to determine spaceholders' annual storage allocations after the "day of allocation." (*Id.*) The "day of allocation" refers to the date when three requirements have been met: (1) no more natural flow is accruing to the Decreed Storage Rights; (2) diversion demand under licensed and decreed water rights is equal to or greater than the available natural flow supply; and (3) the reservoir system has reached its maximum total physical content. (*Id.*) The volume of stored water available for allocation to spaceholders on the "day of allocation" is determined by several factors, including: the satisfaction or "fill" of the Decreed Storage Rights, the total volume of water in the reservoir system (including "unaccounted for storage"), early season storage use, reservoir evaporation, salmon flow augmentation releases, and operational losses from the system. (*Id.*) Each year is different and storage allocations depend upon the circumstances. (*Id.*)

An "operational loss" occurs when storage water is released past Middleton[23] for any reason or purpose, including flood control. (R. 001245, 001268.) If "operational loss" results in a failure to physically fill the reservoir system, the BOR determines the reason for the loss, and spaceholders' storage allocations are reduced according to the BOR's instructions and the spaceholders' contracts. (R. 001268.) If flood control operations are the cause of a failure to physically fill the reservoir system, Arrowrock and Anderson Ranch spaceholders still receive full storage allocations. (*Id.*) The first 60,000 acre-feet of the shortfall is charged to the BOR's

[23] Middleton is considered to be the downstream end of the system (R. 001246), "because natural flow that arises below Middleton has historically met the demand" in the reaches downstream from Middleton. (Ex. 1—000009.)

"streamflow maintenance" account. (*Id.*) Any shortfall due to flood control operations in excess of 60,000 acre-feet is allocated proportionately among all Lucky Peak storage accounts. (*Id.*)[24]

The accounting system introduced in Water District 63 in 1986 has been continuously improved, but it retains the overall structure and water distribution algorithms of the system introduced in 1986, and the methods for determining the satisfaction of the Decreed Storage Rights and allocating storage to spaceholders has not changed since the system was introduced. (R. 001263, 001271-76.). In 2008, the operations of the Water District 63 accounting system in flood control years became a subject of discovery and briefing in the SRBA subcase proceedings on the Decreed Storage Right for Lucky Peak. (R. 001262; Ex. 5—000099; Off'l. Not. 63-3618 001321-25, 001476-88). The BOR filed a brief and an affidavit signed by Sutter, both of which explained the accounting system and terms such as "unaccounted for storage," "paper fill," and "physical fill." (*Id.*) Sutter was subsequently deposed on these matters, and after the deposition, Pioneer Irrigation District and Settlers Irrigation District filed a brief that also addressed the accounting issues. (*Id.*)

C. PROCEDURAL BACKGROUND

The administrative history of this case up until issuance of the *Amended Final Order* is set forth therein and incorporated herein by this reference. R. 001230-001234. The Petitioners filed petitions for reconsideration of the *Amended Final Order* on November 3, 2015. (R. 001313, 001331.) United Water Idaho (now Suez Idaho) filed a response to the petitions for reconsideration on November 17, 2015. (R.001390.) The Director filed the *Order Denying Petitions for Reconsideration* on November 19, 2015. (R. 001401.) The Petitioners filed

[24] Because the "top" 13,950 acre-feet of storage capacity in Lucky Peak is considered to be exclusive flood control space, *Partial Decree, Water Right No. 63-3618,* a physical failure to fill the reservoir system as a result of flood control must exceed (60,000 AF + 13,950 AF) or 73,950 AF before Lucky Peak storage allocations are reduced. (R. 001268 & n.39; Ex. 5—00093-94.)

petitions for judicial review of the Director's orders in Ada County District Court on December 12, 2015. (R. 001436, 001450.) The petitions were reassigned to this Court on December 21, 2015, and consolidated on December 30, 2015. *Order Consolidating Proceedings.*

II. ISSUES ON APPEAL

1. Whether the method for "counting" or "crediting" water to the federal on-stream reservoirs in Water District 63 is consistent with the prior appropriation doctrine as established by Idaho law;

2. Whether the alternative accounting procedures proposed by the Petitioners are consistent with the prior appropriation doctrine as established by Idaho law;

3. Whether water rights for irrigation storage purposes perfected under Idaho law should be administered on the basis of federal contracts and/or federal flood control statutes, regulations, and manuals;

4. Whether the Director's findings regarding historic water accounting and water rights administration are supported by substantial evidence; and

5. Whether the contested case was properly initiated and provided the Petitioners a meaningful opportunity to be heard in a meaningful manner.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under the Act, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

The Water District 63 accounting system is a "set of computational tools" used "to quantify natural flow availability and use, and to track storage use, on a daily, after-the-fact-basis" for all regulated diversions in a large and complex water district. (R. 0001264; Ex. 1—000002.) The Petitioners' objections are limited to a small albeit significant part of the accounting system: the method used to determine when the Decreed Storage Rights for the Boise River reservoirs have been satisfied, and therefore are no longer "in priority." As previously discussed, this method is based on keeping a running total of the daily natural flow "accruals" to each Decreed Storage Right. The Petitioners argue that this method is contrary to the Decreed Storage Rights, Idaho law, and the "reservoir operating plan." The Petitioners also argue this method diminishes the Decreed Storage Rights and leaves the Petitioners' storage supplies vulnerable. These arguments lack merit for the reasons discussed below.[25]

A. THE WATER DISTRICT 63 ACCOUNTING SYSTEM IS CONSISTENT WITH THE PRIOR APPROPRIATION DOCTRINE AS ESTABLISHED BY IDAHO LAW.

1. The Water District 63 Accounting System is Consistent With the Partial Decrees.

The Director must distribute water in accordance with decreed water rights and the prior appropriation doctrine as established by Idaho law. Idaho Code § 42-602; *Basin-Wide Issue 17*, 157 Idaho at 392-94; 336 P.3d at 799-801. Each *Partial Decree* "give[s] the Director a quantity he must provide to each water user in priority." *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801. The *Partial Decrees* define "quantity" in an annual volume that is not limited by diversion rates, and authorize diversions for storage purposes year-round. *Partial Decrees*; R.0001265. The *Partial Decrees* are "conclusive as to the nature and extent" of the Decreed

[25] The Petitioners' arguments in this proceeding are similar and in some instances identical to the arguments they made to the Director. The Director addressed many of these arguments in the *Amended Final Order*, (R. 001230-001308), and also in the *Order Denying Petitions for Reconsideration*. (R. 001401-001431.)

Storage Rights. *Final Unified Decree* at 7, 9; Idaho Code § 42-1420; *Rangen, Inc. v. IDWR et al.*, Idaho S.Ct. Docket Nos. 42775/42836 (Mar. 23, 2016) ("*Rangen*"), slip op. at 11. The *Partial Decrees* are binding on the Director for purposes of administration. *Final Unified Decree* at 13.

What is not in the *Partial Decrees* is also significant. The *Partial Decrees* do not authorize "flood control" as a Purpose of Use, and do not contain any "refill" remarks or "assurances." *Partial Decrees*; R. 001234-001236. The *Partial Decrees* also do not incorporate the "reservoir operating plan." *Id.*; *DC Brief* at 8-33. The *Partial Decrees* do not explicitly or implicitly reference the 1953 MOA, the Corps' 1956 Reservoir Regulation Manual, the Department's 1974 report on Boise river flood control management, or the Corps' 1985 *Water Control Manual*, runoff forecasts, "rule curves," "maximum physical fill," or "'second-in' water." *DC Brief* at 8-33, 63.

The *Partial Decrees* are not decreed in terms that implicitly or indirectly recognize the "reservoir operating plan." For instance, the *Partial Decrees* authorize diversions to "irrigation storage" year-round rather than limiting diversions to periods outside of the flood control season. The *Partial Decrees* do not limit diversions to "irrigation storage" by a diversion rate during the flood control season, but rather authorize diversion of all flows not required by senior water rights until their decreed annual volumes are reached. The *Partial Decrees* do not condition diversions or priority administration on the amount of reservoir system space or capacity available for "beneficial use storage" as opposed to "flood control storage" under the "reservoir operating plan." *DC Brief* at 2. Nothing in the *Partial Decrees* limits diversions under the Decreed Storage Rights to times when the BOR decides it is "exercising" the rights.

The *Partial Decrees* do not incorporate the Petitioners' contracts, but rather state that the Petitioners "administer the use of the water in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the [Petitioners]." *Partial Decrees*; *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. The only element or provision in the *Partial Decrees* that incorporates any of the extra-decree materials the Petitioners have relied upon is the Lucky Peak *Partial Decree*'s "remark" recognizing the "Guarantee" in the 1954 "supplemental contracts" that the BOR would use Lucky Peak water to replace any flood control losses from Arrowrock and Anderson Ranch storage. *Partial Decree, Water Right No. 63-3618*; *Lucky Peak Decision* at 33-36.

The Water District 63 accounting system therefore "counts" or "credits" to each Decreed Storage Right each day *all* of the natural flow available under its priority at the decreed point of diversion (the dam), until the running total of the cumulative daily accruals reaches the decreed annual volume. (R. 001264-67.) Each Decreed Storage Right is considered to be "satisfied" and no longer in priority when cumulative daily accruals reach the authorized annual volume. (*Id.*) This method is consistent with the elements of the *Partial Decrees*.[26]

2. Accounting for the Natural Flow *Available* for Storage Under the Decreed Storage Rights is Consistent With the Prior Appropriation Doctrine.

The Water District 63 water rights accounting program is consistent with the opportunistic nature of storage operations under the prior appropriation doctrine as established by Idaho law. "There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir . . . the very purpose of storage is to retain and hold for

[26] Storage is allocated to the Petitioners on the "day of allocation" according to the quantities or percentages in their federal contracts, the 1954 "Guarantee," the 60,000 acre-foot flood control "buffer" in Lucky Peak, and any instructions from the BOR; including but not limited to instructions to reduce storage allocations to account for operational losses (which include flood control). (R. 001260, 001267-68.) This method of allocating storage is consistent with the Petitioners' federal contracts and the *Water Control Manual*.

subsequent use." *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945); *see also Amer. Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 879-80, 154 P.3d 433, 450-51 (2007) (quoting *Rayl*). This exception to the requirement of applying water directly to beneficial use exists because there is often excess water available outside of the irrigation season, and allowing the excess to be captured for use later in the year (or in subsequent years) when the supply is limited promotes maximum use and development of the state's water resources. *See Rangen*, slip op. at 14 ("'[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'") (citation omitted) (brackets in original).

Runoff volume and timing varies greatly from year to year and even within a year, however. Thus, on-stream reservoir water rights in Idaho are typically decreed in terms of an annual volume that is not limited by a diversion rate. *See Partial Decrees* (quantity elements); Idaho Code § 42-1411(2)(c) ("storage in acre-feet per year"). In short, on-stream reservoir water rights are decreed, by design, to command the river when they are in priority.[27] (R. 001423.) This allows on-stream reservoirs to store their full volumes as quickly as possible when flows are high, which maximizes use of Idaho's water resources while minimizing conflict between storage operations and junior water rights (whether for storage or in-season use). (R. 001266.)

There is a flip side to this, however. Because on-stream reservoir water rights command <u>all</u> flows when "in priority" (except those required for senior water rights), leaving it to the reservoir operator to decide when and whether an on-stream reservoir water right is being "exercised" also puts the reservoir operator in control of deciding when and whether there is any natural flow available for junior water rights. It was largely for these reasons the accrual method

[27] This is often not the case for off-stream reservoirs that are filled via a canal rather than by damming the river and controlling all flows. Decreed water rights for off-stream reservoirs such as Lake Lowell usually have a diversion rate in the Quantity element. *See Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 63-00301A* (Dec. 16, 2014).

of the Water District 63 accounting system (which was originally developed and implemented in Water District 1) was adopted. (R. 001261.) As Sutter testified in the hearing:

> This approach was first implemented in the Upper Snake, and it was chosen so that any particular reservoir could not, in and of themselves choose any particular day whether they were exercising their storage right because—and this was a ruling by the Director of the Department of Water Resources.
>
> And that was done to prevent a reservoir with an older storage right from affecting the fill of reservoirs who had a junior right. In other words, they could—by choosing whether or not they were diverting, they could reduce the subsequent fill on a junior upstream or downstream reservoir.

(*Id.*)[28]

Leaving it to the operators of on-stream reservoirs to decide when and whether they are "exercising" the water rights for the on-stream reservoir or "diverting" water effectively vests the operators with authority to determine how water will be distributed to junior water rights. This result is contrary to Idaho law because distributing water among decreed water rights is the duty and responsibility of the Director. Idaho Code § 42-602; *Basin-Wide Issue 17*, 157 Idaho at 392-94, 336 P.3d at 799-801. This conflict is especially problematic when the reservoir operator's decisions about when the water right is being "exercised" or the reservoir is "diverting" are dictated by federal flood control operations that are not authorized Purposes of Use under the water right.[29]

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[28] The Water District 1 Black Book for 1978 provided a similar explanation of the basis for the flood control and accounting procedures of the computerized systems adopted in that district in 1978. (R. 001261 n.32.)

[29] Section 8 of the 1902 Reclamation Act provides that BOR "shall proceed in conformity with" state law regarding the "control, appropriation, distribution or use of water for irrigation." 43 U.S.C. § 383 (emphasis added). With respect to flood control, however, BOR has taken the position before this Court that its flood control operations are "required by federal law," are "entirely independent of the water rights system," and that any action by the State "to preclude, or even hinder federal flood control mandates . . . would be pre-empted." *The United States Response Brief on Basin-Wide Issue No. 17, Subcase No. 00-91017* (Jan. 11, 2013) (Off'l not. 91017—001209) at 4-5. These positions appear to be consistent with United States Supreme Court decisions. For instance, the United States Supreme Court stated in *United States v. Appalachian Elec. Power Co.* that the federal government's flood control authority is "'absolute'" while states' "control of the waters within their borders" is merely a "subordinate local control" that is "'subject to the acknowledged jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers.'" 311 U.S. 377, 426 (1941) (*superseded by statute on other grounds as stated in Rapanos v. United States*, 547 U.S. 715 (2006)).

The Director's duty is to determine the natural flow supply available each day and distribute it among appropriators in accordance with the prior appropriation doctrine as established by Idaho law. Idaho Code § 42-602; *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800. At the federal dams, however, "[t]he entire natural flow of the stream has been diverted and stored and become subject to controlled releases," and the BOR manages releases "on a day-to-day if not hour-to-hour basis." *Lucky Peak Decision* at 22; (R. 001238, 001242-47) (discussing reservoir system operations).[30] Thus, the quantity of water "actually, physically stored" in the reservoir system on any given day, *DC Brief* at 1-5, is not a measure of the natural flow available for storage under the *Partial Decrees* on that day. It is also not a measure of the total natural flow supply available for storage under the *Partial Decrees* during that year. Rather, the quantity of water "actually, physically stored" in the reservoir system on any given day, *DC Brief* at 1-5, is a measure of operational decisions made by the Federal Agencies. (R. 001242-47.) Therefore, measuring the satisfaction of the Decreed Storage Rights by the quantity of water "actually, physically stored" in the reservoir system on a particular day, *DC Brief* at 1-5, would result in distributing water and administering water rights on the basis of federal reservoir operations rather than the natural flow supply, SRBA decrees, and the prior appropriation doctrine as established by Idaho law.[31] (R. 001279, 001284, 001307.)

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[30] "Natural flow" is the water that would be present in the river "absent" reservoir operations (and diversions). (R. 001264). The federal on-stream reservoirs complicate the task of determining the natural flow supply available for distribution. *See Basin-Wide Issue 17*, 157 Idaho at 388, 336 P.3d at 795 ("An on-stream reservoir alters the stream affecting the administration of all rights on the source"); *Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 159, 219 P.3d 804, 806 (2009) ("When the Irrigation District's storage water is in the river, it may be comingled with natural flow water.").

[31] The same impermissible result follows if, as the Petitioners urge, the amount of natural flow available for storage is determined on the basis of the availability of reservoir *space* rather than the availability of *water*. *DC Brief* at 1-2. The Director's duty is to determine the amount of *water* available for distribution to decreed water rights. Idaho Code § 42-602; *Basin-Wide Issue* 17, 157 Idaho at 392-94, 336 P.3d at 799-801. Further, federal reservoir system operations often result in water diverted under the priority of a Decreed Storage Right being physically stored in

Thus, in light of federal reservoir operations in the Boise River basin, it is necessary to determine the satisfaction of the Decreed Storage Rights on the basis of the amount of natural flow *available* under the elements of the Decreed Storage Rights, rather than on the basis of the amount of water "actually physically stored" in the reservoir system on the date of "maximum physical fill," *DC Brief* at 1-5, or on any given day. The Water District 63 accounting system determines the satisfaction of the Decreed Storage Rights based on the amount of natural flow *available* each day. This approach is consistent with the *Partial Decrees* and the Director's duty to distribute water in accordance with the prior appropriation doctrine as established by Idaho law. Idaho Code § 42-602; *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800.

B. THE PETITIONERS' OBJECTIONS TO THE WATER DISTRICT 63 ACCOUNTING SYSTEM LACK MERIT.

The Petitioners raise objections to the Water District 63 accounting system that lack merit for various reasons. They are discussed in turn below.

1. The Director's Findings are Controlling With Respect to "the Mechanics" of the Water District 63 Accounting System.

The Petitioners incorrectly assert "[t]here is no dispute regarding the mechanics of IDWR's accounting program." *DC Brief* at 3. This assertion implies that the Petitioners' simplified narrative of the operation of the Water District 63 accounting system is just as accurate as the concise technical analysis of the system in the Director's findings of fact. (R. 001264-71.) This contention lacks merit.

This Court and the Idaho Supreme Court determined in the Basin-Wide Issue 17 proceedings that questions such as water distribution accounting are statutorily committed to the

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reservoirs other than the one decreed as the authorized place of storage in the Decreed Storage Right. (R. 001265.) Under such a system of reservoir operations, it is necessary to have accounting methods that allow the Director to administer the priorities and quantities of the Decreed Storage Rights independently of the physical fill of the individual reservoirs. (R.001265, 001292.) The Water District 63 accounting system provides such a method. (*Id.*)

Director in large part because of "the need for highly technical expertise." 157 Idaho at 394, 336 P.3d at 801; *see id.* ("[T]he state engineer is the expert on the spot") (citation omitted; brackets in original). The Water District 63 accounting system involves two computer programs developed to account for diversions of both natural flow and stored water by many water right holders in a complex water district consistent with decreed water rights and federal contracts, and under various water supply and demand conditions.

This Court should reject the Petitioners' attempts to downplay the technical nature of certain accounting questions raised in this proceeding and to substitute their interpretations of the accounting system for the Director's findings. Factual questions of how the accounting system actually operates, and why it is designed to operate as it does, should begin and end with the Director's detailed analysis of the system, which is supported by substantial evidence in the record. (R. 001264-71.) Precise terminology and attention to technical details matter in describing the operation of the accounting system. The Petitioners' narrative falls short on both counts and is contrary to the Director's findings.[32] Some examples of the problems that arise from adopting the Petitioners' imprecise description of the operation of the accounting system are discussed below.

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[32] The primary source of the Petitioners' narrative of the operation of the Water District 63 accounting system is the Sisco affidavit they filed in SRBA Subcase Nos. 63-33732, et al. *DC Brief* at 43-47; (Ex. 2008—000469.) Sisco's affidavit was reviewed by the Department hydrologist who oversees the accounting system, Cresto, and she signed an affidavit that identified errors in Sisco's description of the accounting system and provided a more precise explanation. (Ex. 2—000014.) Cresto also wrote the staff memorandum the Director requested for the contested case. (Ex. 1—000001.) Cresto's affidavit, in turn, was reviewed by Sutter, developer of the accounting system, and he signed an affidavit concurring in Cresto's explanation of how the accounting system operates. (Ex. 6—000105.) Cresto and Sutter testified at the hearing and provided detailed explanations of accounting system terminology and operations. (Tr. 20150827 at 54-231; Tr. 20150828 at 502-638; Tr. 20150910 at 1549-91; Tr. 20150828 at 318-502.) Sisco's hearing testimony showed a limited understanding of accounting terminology and the nuances of accounting system operations. (*See* Tr. 20150831 at 905 ("well, I may not have understood exactly all of the terminology when it came to the computer program. I had a basic understanding of what that computer program was going to do for me. . . . I guess if I didn't understand all of the nuances of the program, then so be it.").) Sisco's testimony is also discussed in subsequent sections of this brief.

a. The Accounting System Does not "Count" Flood Control Releases.

The Petitioners have argued in these and previous proceedings that the Water District 63 accounting system is unlawful because it "counts" flood control releases or otherwise takes flood control releases into account in determining satisfaction of the Decreed Storage Rights. *See DC Brief* at 5; *Basin-Wide Issue 17*, 157 Idaho at 390, 336 P.3d at 797 ("the parties ask this court, in various ways, to answer the question of whether flood control releases count towards the fill of a water right"). These objections mischaracterize the accounting system.

The Director found the Water District 63 accounting system "counts" only the natural flow computed to be available for storage each day under the priority of a Decreed Storage Right at its decreed point of diversion. (R. 001264-67.) The Director also found that releases from the reservoirs are not taken into account for any purpose other than determining the amount of natural flow available for distribution via the "reach gain equation" methodology. (*Id.*) These findings are supported by substantial evidence in the record.

There is no record support, however, for the Petitioners' assertions that the accounting system "counts" or even considers flood control releases in determining satisfaction of the Decreed Storage Rights. To the contrary, the accounting system would have to be changed to account for flood control releases (R. 001281-82), because the *Partial Decrees* do not authorize "flood control" uses. The Petitioners' arguments that flood control releases should not be "counted" would require a form of "content-based" accounting that entails distributing additional water to replace flood control releases, or "priority refill." (R. 001278.) This "would be, from an accounting standpoint, the same as recognizing an unquantified water right for the unauthorized uses with the same priority date as the original water right." (Ex. 2—000019.)

"Counting" flood control releases as proposed by the Petitioners[33] is unworkable because the accounting system is based on year-round accounting of water distributions on a daily basis (R. 001265, 001276), but the BOR does not make daily determinations of the volume of flood control releases from the reservoir system. (R. 001246.) Rather, at the end of the flood control season, the BOR makes retrospective determinations of the overall volume of water released and categorizes the releases as flood control, salmon augmentation flow, and various operational loss designations. (*Id.*) The BOR has discretion to categorize releases during the flood control period as releases for "flood control" or salmon flow augmentation (or other operational purposes), or to "feather" the two into each other; and may make after-the-fact changes to its initial categorizations of these releases. (*Id.*)

These end-of-season federal determinations are not part of the Water District 63 accounting system, do not distinguish releases for flood control purposes from releases necessary to satisfy downstream water rights, and may or may not be communicated to the Department. (*Id.*) Thus, and as the Director found, taking flood control releases into account for purposes of determining satisfaction of the Decreed Storage Rights "is incompatible with year-round accounting and would essentially preclude day-to-day accounting and administration of water rights in Water District 63 until after flood control operations had ended and the reservoir system had reached its maximum contents." (R. 001284.)

[33] One of the Petitioners' accounting proposals was to compute accruals towards each Decreed Storage Right as the difference between the volume of natural flow available under the rights each day less the volume of flood control releases from the reservoir system each day. (R. 001280-83.) This could not be implemented unless the BOR replaced its end-of-season procedures with a method that provided the Department with daily accountings of the volumes and purposes of various releases from the reservoir system. (R. 001284.)

b. The Accounting System Does not Treat Flood Control Releases as "use."

The Petitioners' assertion that the Water District 63 accounting system treats flood control releases as a "use" of storage, *see BP Brief* at 71 (arguing "water released for flood control is not 'used' by the water right holders"), is contrary to the Director's findings. As discussed above, the Director found that reservoir "releases" are measured only to determine the natural flow supply, not to administer the Decreed Storage Rights. Further, the only storage "uses" the Water District 63 accounting system tracks are diversions downstream from the reservoir system that exceed the diverters' natural flow rights. (R. 001264-65.)[34] Diversions in excess of natural flow rights are tracked because the watermaster is required by statute to regulate stored water use by diverters when natural flow and stored water released from the reservoir system are comingled in the river. Idaho Code § 42-801; *Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 159, 219 P.3d 804, 806 (2009) (R. 001262, 001265, 001428.[35])

c. The Accounting System is not Based on Measuring "Reservoir Inflows."

Most of the Petitioners' criticisms of the Water District 63 accounting system are based on their incorrect characterization of it as simply measuring "reservoir inflows." *See DC Brief* at 5 (referring to "IDWR's use of the water right accounting program to 'count' reservoir inflows"); *see also id.*at 3, 8, 57, 63, 105, 108; *BP Brief* at 58, 64 ("water entering the reservoirs"). This characterization is contrary to the Director's findings and ignores the elements of the *Partial*

[34] While the "Reconciliation Report" has sometimes categorized flood control as a "use," the Reconciliation Report is generated to detect accounting errors. It has no role in determining natural flow distributions to the Decreed Storage Rights. Tr. 20150827 at 209-14; Tr. 20150828 at 440-42; Ex. 2—000025; Ex. 6—000106.)

[35] The accounting system charges spaceholders' stored water uses to their individual storage accounts, which are lump-sum accounts that combine each spaceholders' storage for all of the reservoirs into a single storage account. (R. 001300, 001419.)

Decrees. As previously discussed, the Director found that the accounting system "counts" the amount of natural flow available each day under the elements of the Decreed Storage Rights, not "reservoir inflows." (R. 001264-67, 001417.)

While at some times of the year all "inflow" to the reservoir system is also natural flow that is available for storage under the priorities of the Decreed Storage Rights, this is simply a consequence of the fact that the *Partial Decrees* are not limited by diversion rates and have a year-round period of storage use.[36] *See Partial Decrees* ("Quantity" and "Purpose & Period of Use" elements). The Petitioners' characterization of the accounting system as indiscriminately "counting" all "reservoir inflows" is contrary to the Director's findings. It also ignores the elements of the *Partial Decrees*, which entitle the Decreed Storage Rights to all reservoir system inflow any time senior water rights are not diverting and the Decreed Storage Rights have not been satisfied.

The Petitioners are also incorrect in asserting that "unaccounted for storage" is determined by indiscriminately measuring all "reservoir inflows" after the Decreed Storage Rights have been satisfied. *DC Brief* at 3. "Unaccounted for storage" is a measure of the amount of water physically stored in the reservoir system after the Decreed Storage Rights have been satisfied. (R. 001261, 001263, 001267, 001270, 001273-74, 001276, 001278, 001408-10, 001414, 001422.) As the Director stated in the *Order Denying Petitions for Reconsideration*, "most of the reservoir system 'inflow' after 'paper fill' is not 'counted' at all. 'Unaccounted for storage' can only accrue after [the] Corps and/or BOR cease 'evacuations' and 'bypass' and begin physically storing more water." (R. 001422.) The volume of "unaccounted for storage" in

[36] As previously discussed, "inflow" to the reservoir system from the middle fork of the Boise River never "counts" towards the Decreed Storage Right for Anderson Ranch because that reservoir is upstream, on the south fork of the Boise. "Unaccounted for storage" in Arrowrock or Lucky Peak often is assigned to the Decreed Storage Right for Anderson Ranch on the "day of allocation," however, if the Anderson Ranch water right has not been satisfied. (R. 001267.)

the reservoirs on the "day of allocation" is a product of flood control decisions made by the Federal Agencies, (R. 001408-001410 & n.5.), not "reservoir inflows."

The Petitioners' characterization of the accounting system as indiscriminately measuring all "reservoir inflows" is not only technically incorrect but misleading. "Reservoir inflows" is an operational term that has significance for reservoir regulation and flood control rather than water rights administration. *See DC Brief* at 57 (referring to "reservoir inflows that are required by the reservoir operating plan to be released for flood control purposes"). Characterizing the Water District 63 accounting system as being based on "reservoir inflows" incorrectly implies that the purpose of the accounting system is to monitor or manage reservoirs, when its actual purpose is to determine and distribute the natural flow supply.

The "reservoir operating plan" is based on physically storing the "second-in" or "last-in" water at the end of the flood control season, *DC Brief* at 64, while the Director's duty is to distribute the water supply according to prior appropriation principles. Idaho Code § 42-602; *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800. Under Idaho law, the timing and volume of water distributions to the Decreed Storage Rights must be determined by the actual supply of natural flow in the river each day and decreed priorities, quantities, and periods of use, *id.*, not by the Federal Agencies' runoff forecasts, or by the flood control "rule curves" and refill "assurances" of the "reservoir operating plan." *DC Brief* at 3.

d. The Accounting System Does not Allocate "Paper Water."

The Petitioners have often criticized the Water District 63 accounting system as allocating the Petitioners "paper water" when what they need is "wet water." *See, e.g.,* Tr.

20150909 at 1021-22 ("Yeah, not paper water. Yeah, you can't irrigate with paper water."); *id.* at 1056 ("I can't irrigate with paper. I need the wet water to deliver to users."). These criticisms lack merit because they incorrectly equate natural flow distributions with storage allocations.

Natural flow distributions to the Decreed Storage Rights are defined by the *Partial Decrees*, while the Petitioners' storage allocations are defined by their federal contracts. (R. 001264, 001267.) Further, in flood control years, storage allocations are not made on the day the Decreed Storage Rights have all been satisfied ("paper fill"), but rather on the "day of allocation," after reservoir system contents have reached their "maximum physical fill." (R. 001260, 001267-68, 001270.) On the "day of allocation," the storage program allocates storage to spaceholders according to their BOR contracts on the basis of the physical contents of the reservoir system, as adjusted for evaporation, operational losses (which can in some cases including flood control releases), early season storage use, and any instructions received from the BOR. (R. 001267-70.)

The Water District 63 accounting system measures, distributes, and allocates "wet water." The question of how much of the "wet water" is retained in the reservoir system until the "day of allocation" is determined by federal reservoir operations, not the accounting system.

e. The Decreed Storage Rights do not Remain "in Priority" Until the Date of "Maximum Physical Fill."

The Petitioners also assert the Director's findings are incorrect and that the Decreed Storage Rights *actually* remain "in priority" under the Water District 63 accounting system until the date of "maximum physical fill." *DC Brief* at 5, 50, 108. The Petitioners assert this must be true because "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." *DC Brief* at 5. This contention is contrary to the Director's

findings. While the Director did determine that "unaccounted for storage" is assigned to the Decreed Storage Rights" in order of priority on the "day of allocation," he also found that the "unaccounted for storage" is not stored under priority at the time it is captured in the reservoir system; rather it is surplus water that is not required to satisfy any downstream water rights. (R. 001267, 001270.) The fact that the "unaccounted for storage" is assigned to the Decreed Storage Rights on the "day of allocation" is not "priority administration" but rather an allocation of surplus water to the Petitioners and other spaceholders.[37] This longstanding historic practice does not interfere with any water rights and maximizes use of the resource.[38] (R. 001272.)

The Petitioners' alternative argument that the accounting system "green bar" printouts necessarily imply that the Decreed Storage Rights remain "in priority" until the date of "maximum physical fill," *DC Brief* at 50, is also contrary to the record. The Director addressed this argument and determined that the "green bar" sheets do not support the Petitioners' interpretations. (R. 001408-001414.) The Director's determinations are supported by substantial evidence in the record.

[37] Because the "unaccounted for storage" is excess to the demand under all water rights when captured in the reservoir system, allocating it to spaceholders on the "day of allocation" does not interfere with the exercise of any other water rights, and promotes maximum use of the state's water resources. There is no reason not to allocate it to spaceholders; and if it was not allocated to spaceholders it would simply remain in the reservoir system as "carryover" (unless released by the Federal Agencies for operational purposes such as flood control) and be credited to the satisfaction of the Decreed Storage Rights after "reset." (R. 001266.)

[38] Even disregarding flood control operations, it is not possible to use "physical fill" as the basis for determining satisfaction of the Decreed Storage Rights because the Federal agencies do not operate the reservoirs in accordance with the elements of the Decreed Storage Rights. The reservoirs are not physically filled in order of priority, water diverted under the priority of one of the Decreed Storage Rights may be physically stored in a reservoir other than the one authorized as the place of storage, and the reservoirs may be simultaneously storing water and releasing water for spaceholder use. (R. 001265-67, 001269, 001271, 001292, 001292.)

2. "Content-Based" Accounting and "Physical Fill" Administration of the Decreed Storage Rights is Contrary to Idaho Law.

The Petitioners argue in various ways, as they did before the Director, that the satisfaction of the Decreed Storage Rights should be based on some form of "content-based" accounting or "physical fill" administration. *See DC Brief* at 1-5 ("the water actually, physically stored in the reservoirs"); *BP Brief* at 76 ("the reservoir accrued to existing water rights based on physical fill, not 'paper fill'"). Under these methods, accounting would be based on the water "actually, physically stored" on the date of "maximum physical fill." *DC Brief* at 1-5. Accounting accruals to the Decreed Storage Rights would occur only when "physical fill" increases and previous accruals would be excused or cancelled when water is released from the reservoir system for purposes other than irrigation. (R. 001280, 001292, 001306-07.) The end result is always that the Decreed Storage Rights remain "in priority" until the reservoir system reaches "maximum physical fill" for the year. "Content-based" accounting and "physical fill" administration of the Decreed Storage Rights is contrary to Idaho law for several reasons, discussed in turn below.

a. "Content-Based" Accounting Enlarges the Decreed Storage Rights.

As this Court stated in the Basin-Wide Issue 17 proceedings, "[i]t is the quantity element of a water right that defines the duration of the period of priority administration during its authorized period of use." *Memorandum Decision, Basin-Wide Issue 17, Subcase No. 00-91017* (Mar. 20, 2013) at 11. Under a "content-based" or "physical fill" approach, however, the Decreed Storage Rights' quantity elements would no longer define "the duration of the period of priority administration during [their] authorized period of use." *Id.* Rather, the Decreed Storage Rights would remain "in priority" until the date the reservoir system reaches "maximum physical

fill." (R. 001280-83.) In flood years, the date of "maximum physical fill" does not arrive until the end of reservoir system flood control operations. *DC Brief* at 2, 5, 33; (R. 001250-52, 001257, 001261, 001278-79, 001284.)

Because the Decreed Storage Rights are not limited by diversion rates, leaving them in priority would, by operation of their elements, appropriate *all* flow in the river except that required by downstream seniors until the end of flood control operations. In flood years such as 1999, this would result in the Decreed Storage Rights controlling a volume of water far in excess of that authorized in the *Partial Decrees*. (R. 001280-83.) Also, because the *Partial Decrees* do not include a limiting diversion rate, the appropriation would enlarge with any increase in the volume of flood runoff—from day to day or week to week within a year, and also from year to year. The duration of priority administration would increase, and the amount of water controlled by the Decreed Storage Rights would enlarge in years of relatively higher flood flows as compared to years of lower flood runoff. (R. 001278,001282.) This would be tantamount to administrative recognition of a priority interest in all "excess" flood flows. *See A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 416, 958 P.2d 568, 573 (1997) ("there cannot be a prior relation to excess water").

The Petitioners' "physical fill" approach thus would impermissibly enlarge the volume of water administered under the priorities of the Decreed Storage Rights. *Barron v. IDWR*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001) ("Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use"); *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) ("'An increase in the volume of water diverted is an enlargement and is not allowed under I.C. § 42–1425.' *Id.* Likewise, 'there is *per se* injury to junior water rights holders anytime an enlargement receives priority.'"). (R. 001280-83.)

b. "Content-Based" Accounting of the Decreed Storage Rights is Contrary to Beneficial Use Principles.

There is no merit in the Petitioners' arguments that ensuring beneficial use of the full quantities of the Decreed Storage Rights requires that they remain "in priority" until the date of "maximum physical fill." Idaho law forbids extending the priorities of the Decreed Storage Rights to encumber a volume of water in excess of the amount authorized for beneficial use. *Rangen,* slip op. at 20 ("'The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate.'") (quoting *Schodde v. Twin Falls Land & Water Co.*, 224 U..S. 107, 120 (1912) (brackets in original).

As the Idaho Supreme Court recently stated, "'[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water.'" *Id.* (citation omitted).[39] While the Decreed Storage Rights are "property right[s] to a certain amount of water" that "the Director must fill in priority," *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801, they do not include an entitlement to remain in priority until beneficial use of the full decreed volume has been completed. They do not allow for an open ended appropriation. *See Vill. of Peck v. Denison*, 92 Idaho 747, 750, 450 P.2d 310, 313 (1969) ("if the decree awards an uncertain amount of water to one appropriator whose needs are vague and fluctuating, it is likely that he will waste water and yet have the power to prevent others from putting the surplus to any beneficial use"). Arguments that an appropriator must be allowed to encumber a greater volume of water than that authorized for beneficial use have been made and rejected for many years. As the Idaho Supreme Court stated in 1912 in *Van Camp v. Emery*:

[39] While in this passage the Idaho Supreme Court quoted Conjunctive Management Rule 20.03, the Court held that this rule "merely restate[s] a broader understanding of Idaho law: The prior appropriation doctrine sanctifies priority of right, but subject to limitations imposed by beneficial use." *Rangen,* slip op. at 19.

> If the defendant, who lives above plaintiff, is entitled to a priority for 45 inches of water, he may unquestionably divert that quantity, but, when he has once done so, he may not dam the stream below or hinder or impede the flow of the remaining stream . . . Whatever amount of water defendant shows himself entitled to for the irrigation of his meadows or other lands as a prior right . . . beyond that he cannot go under any other pretext . . . .

Van Camp v. Emery, 13 Idaho 202, 89 P. 752, 754 (1907). The Idaho Supreme Court recognized in its recent *Rangen* decision that extending priority to a volume in excess of that authorized for beneficial use has potentially "disastrous consequences":

> There might be a great surplus of water in the stream at and above plaintiff's premises, and an urgent demand for a portion of this surplus for beneficial uses, but . . . the plaintiff would have a cause of action to prevent such an appropriation. It is clear that in such case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated.

Rangen, slip op. at 20 (quoting *Schodde*, 224 U.S. at 120).

These principles foreclose the Petitioners' arguments for "content-based" accounting and "physical fill" administration, which would extend priority over all "surplus" flows during flood years, and provide the BOR (or perhaps the Petitioners) with a legal right to block any application to appropriate the surplus by arguing there is not water available to appropriate. *See* Idaho Code § 42-203A (5).

c. "Content-Based" Accounting Would Cede State Control Over the Distribution and Development of Idaho's Water to Federal Authorities.

The date of "maximum physical fill" of the Boise River reservoir system is determined by federal reservoir system operations, which in turn are determined by the Federal Agencies interpreting and applying federal flood control standards and guidelines. (R. 001250-52, 001257, 001261, 001278-79, 001284.) The Petitioners' argument would therefore make satisfaction of the Decreed Storage Rights subject to federal flood control operations, effectively cloaking federal flood control operations with the priorities of the Decreed Storage Rights. (R. 001278-

83.) Federal flood control operations would have state law-based priority over junior water rights, which would have no legal right to divert until the close of flood control operations.[40] The Petitioners' arguments risk subordinating state water rights and state water law to federal flood control operations. The Federal Agencies in their filings in this Court have taken the position that, while irrigation storage operations may be subject to state law, their flood control operations are entirely exempt from administration or regulation by the State because federal flood control law pre-empts state law. *The United States Response Brief on Basin-Wide Issue No. 17, Subcase No. 00-91017* (Jan. 11, 2013) (Off'l Not. 91017—001209) at 4-5.[41]

Any future development of the flood waters (including future storage projects, which the Petitioners' witnesses supported (R. 001278)), could be blocked by the BOR. The BOR would usurp the sovereign authority of the State of Idaho to distribute water in accordance with state law and to provide for "optimum development of water resources in the public interest" of Idaho's citizens. Idaho Const. Art. XV § 7; *see also Rangen*, slip op. at 7, 19 (citing Idaho Code § 42-101 and Idaho Const. Art. XV § 7). Legal control over such matters would pass from the State to the BOR.

3. Making "end use" the Measure of Priority Distributions is Contrary to the *Partial Decrees* and Idaho Law.

The Petitioners argue that satisfaction of the Decreed Storage Rights must be measured by "end use," that is, the "irrigation from storage" component of the Purpose of Use element of

[40] According to the *Water Control Manual*, flood control operations (which are supervised by the Corps) do not conclude until the reservoir system has been "refilled" to its maximum physical content. (*See* WD63 Archived Docs 002462 ("Flood control regulation during the refill period (1 April through 31 July) requires the use of snowmelt runoff to refill flood control spaces"); *see also* Ex. 5—000102 ("The Accounting Program tracks the amount of natural flow stored during the refill phase of a flood operation as 'unaccounted for' storage. When the accumulation of 'unaccounted for' storage ends, the flood operation is complete.").)

[41] As previously noted, while federal reclamation law requires the BOR to conform to Idaho law with respect to irrigation, 43 U.S.C. §83, federal flood control law does not yield to state water law. *Appalachian Elec. Power Co.*, 311 U.S. at 426.

the *Partial Decrees. DC Brief* at 64, 105-06. This contention lacks merit because the Quantity element of a decreed water right is the measure of priority administration. *See Basin-Wide Issue 17,* 157 Idaho at 387-90, 392, 394, 336 P.3d at 794-97, 799, 801 (referring to "quantity element")[42]; *Memorandum Decision, Basin-Wide Issue 17, Subcase No. 00-91017* (Mar. 20, 2013) (Off'l Not. 91017—001410) at 11 ("It is the quantity element of a water right that defines the duration of the period of priority administration during its authorized period of use."); *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.,* 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) ("One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right."); *State v. ICL*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) (referring to "the essential elements of priority date and quantity").

In any event, the Petitioners are not in fact asserting that beneficial "end use" should be the measure of satisfaction of the Decreed Storage Rights. The Petitioners contend, rather, that satisfaction should be measured by the volume of water "actually, physically stored" water in the reservoir system on the date of "maximum physical fill." *DC Brief* at 1-5.[43] "End use" does not take place in the reservoir system. Measuring the volume of water in the reservoir system on the date of "maximum physical fill" is simply measuring "storage," not "end use." *See Pioneer*, 144 Idaho at 110, 157 P.3d at 604 ("the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities"); *Rayl*, 66 Idaho at 209, 157 P.2d at 81 ("Respondent operating company merely diverts, conveys, stores and distributes, it does not as such apply any water to a beneficial use"); *Washington Cty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943, 945

[42] In *Basin-Wide Issue 17*, the Petitioners made the same "irrigation from storage" argument to this Court and to the Idaho Supreme Court that they are making in this proceeding.

[43] The "Surface Water Coalition" took essentially the same position early in the Basin-Wide Issue 17 proceedings, when it sought designation of a "sub-issue" on "whether the beneficial use under this right is fully satisfied when the water stored and available for beneficial use equals the capacity of the reservoir." *Basin-Wide Issue 17*, 157 Idaho at 388, 336 P.3d at 795.

(1935) ("The waters so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use"). Moreover, *Pioneer* and the *Partial Decrees* specifically provide that the Petitioners administer "end use." *See Pioneer*, 144 Idaho at 115, 157 P.3d at 609 ("The irrigation organizations administer the use of the water for the landowners."); *see also Rayl*, 66 Idaho at 209, 157 P.2d at 80 ("Each user must apply his water to a beneficial use and is solely responsible therefor").

Further, measuring distributions to the Decreed Storage Rights based on "end use" would be contrary to the statutory requirement that the Director measure distributions to decreed water rights at "the point of diversion." Idaho Code § 42-110. The Idaho Supreme Court also has held that distributions to decreed water rights are to be measured at the point of diversion rather than the place of use. *Glenn Dale Ranches, Inc.*, 94 Idaho 585, 494 P.2d 1029 (1972); *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900)). The policy of this rule is to discourage waste of a limited public resource:

> The waters of all streams belong to the public. . . . It is against the spirit and policy of our constitution and laws, as well as contrary to public policy, to permit the wasting of our waters, which are so badly needed for the development and prosperity of the state, and every act on the part of any individual claimant that tends to waste water is to be discouraged rather than encouraged. The necessity of measuring to each claimant, at the point of diversion from the natural stream, the waters appropriated and used by him, is apparent.

Stickney, 7 Idaho 424, 63 P. at 192. The points of diversion for the Decreed Storage Rights are the federal dams that create the reservoirs. *Partial Decrees*; *Lucky Peak Decision* at 19, 22. Distributing water to the Decreed Storage Rights based on the amount of "end use" that takes in the fields supplied by the Petitioners' canals and ditches, therefore, would be contrary to Idaho Code § 42-110, *Glen Dale Ranches*, and *Stickney*.

There is no merit in the Petitioners' argument that the Idaho Supreme Court in *Basin-Wide Issue 17* ignored or overturned these well-established principles by issuing a "directive that the Director's accounting systems must account for the water that has been used." *BP Brief* at 68 (bold omitted). The Petitioners' argument mischaracterizes a single sentence taken out of context from that decision. When read in context, there is no "directive," but rather confirmation of the Court's main point, i.e., that accounting falls under the Director's statutory authority and discretion, and judicial review of the accounting must be sought through a judicial review proceeding pursuant to the Idaho Administrative Procedure Act rather than in the SRBA:

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

Basin-Wide Issue 17, 157 Idaho at 394, 336 P.3d at 801.

The Petitioners' reliance on the familiar principle that beneficial use is the "basis, measure, and limit" of a water right, *DC Brief* at 55, 64, is also misplaced. Interpreting this principle as authorizing unlimited priority diversions unless and until an individual appropriator has completed beneficial use of the full decreed volume conflicts with larger beneficial use principles. As the Idaho Supreme Court explained in *Stickney*, it would be contrary to the "public policy" that "every act on the part of any individual claimant that tends to waste water is to be discouraged." *Stickney*, 7 Idaho 424, 63 P. at 192. The Petitioners' argument would invert overarching beneficial use principles of Idaho law by authorizing an individual appropriator to enlarge priority diversions on the basis of a failure to put decreed water to the authorized use.

See Rangen, slip op. at 20 ("'The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate.'") (quoting, 224 U..S. at 120 (brackets in original)).

4. The "Reservoir Operating Plan" Does not Determine Priority Administration of the Decreed Storage Rights.

The Petitioners argue the Water District 63 accounting system impermissibly "conflicts with the congressionally-authorized operating plan for the Boise River Reservoirs." *DC Brief* at 105. These arguments are contrary to the record, the *Partial Decrees*, and Idaho law.

a. The Petitioners' Reliance on the "Reservoir Operating Plan" is a Collateral Attack on the *Partial Decrees*.

The *Partial Decrees* are "conclusive as to the nature and extent" of the Decreed Storage Rights and are binding on the Director and the Petitioners for purposes of administration and water distribution. *Final Unified Decree* at 7, 9, 13; Idaho Code § 42-1420; *Rangen*, slip op. at 11. The "reservoir operating plan" is legally irrelevant because there the *Partial Decrees* do not explicitly incorporate or reference the "reservoir operating plan." The *Partial Decrees* also do not implicitly recognize the "reservoir operating plan" through means such as limiting the "period of use" for "irrigation storage" to times outside of the flood control period, or by limiting the "quantity" element with a diversion rate that applies during flood control periods. The *Partial Decrees* also do not condition diversions or priority administration on the amount of reservoir system space or capacity available for "beneficial use storage" as opposed to "flood control storage" under the "reservoir operating plan." *DC Brief* at 2. Nothing in the *Partial Decrees* limits diversions under the Decreed Storage Rights to times when the BOR decides it is "exercising" the rights.

Had the Decreed Storage Rights "always" been understood as incorporating the "reservoir operating plan" or being administered according to it, as the Petitioners assert, *DC*

Brief at 106, 108, the *Partial Decrees* would reflect this understanding in express language or by the way the elements were claimed and decreed; but they do not. The Petitioners, in other words, are arguing the federal "reservoir operating plan" was exhaustively documented virtually everywhere *except* in the water rights. This contention undermines the Petitioners' contention that the "reservoir operating plan" was "always" considered to be an inherent part of the water rights. If the BOR and the Petitioners, and the Department had viewed the "reservoir operating plan" or any of its components as integral to the definition or administration of Decreed Storage Rights, this understanding could have, should have, and would have been reflected in the licenses, the SRBA claims, the Department's recommendations, objections to the Department's recommendations, or the *Partial Decrees*.

The *Lucky Peak Decision* confirms this conclusion. The *Lucky Peak Decision* discusses the history of the federal reservoir system and its flood control operations, and specifically addresses the 1953 MOA, the 1954 Supplemental Contracts, the 1965 and 2005 Lucky Peak contracts, and the *Water Control Manual*. The *Lucky Peak Decision* resulted in an order incorporating the "Guarantee" of the 1954 Supplemental Contracts into the *Partial Decree* for Lucky Peak. The *Lucky Peak Decision* shows that, had the "reservoir operating plan" or any of its components other than the "Guarantee" been viewed as integral to the definition or administration of the Decreed Storage Rights, that claim could have and would have been made.

The Petitioners' argument that the "reservoir operating plan" is integral to the Decreed Storage Rights is simply an effort to administratively re-define the Decreed Storage Rights. This is a judicial review proceeding of final orders of the Director, not an SRBA proceeding on a Rule 60 motion. The Petitioners' arguments amount to an administrative "collateral attack" on the

Partial Decrees, and if accepted, would "severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process." *Rangen*, slip op. at 13.

b. The "Reservoir Operating Plan" Consists of Federal Agreements and Flood Control Documentation.

The Petitioners' "reservoir operating plan" consists almost entirely of federal materials pertaining to federal flood control operations and the Petitioners' contractual storage allocations rather than to the Decreed Storage Rights.[44] The Director, however, must distribute water in accordance with the prior appropriation doctrine as established by Idaho law, *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800. As previously discussed, the BOR has made it quite clear that it sees flood control operations as "entirely independent" of the prior appropriation doctrine. While the Petitioners assert that the Department is by agreement legally bound to administer the Decreed Storage Rights according to the "reservoir operating plan," the Department did not sign the 1953 Memorandum of Agreement, the 1954 Supplemental Contracts (or any of the water users storage contracts), the 1985 Memorandum of Understanding adopting the *Water Control Manual*, or the *Water Control Manual* itself. (R. 001240-41.)

The Petitioners argument that the "reservoir operating plan" is "congressionally-approved" or "congressionally-authorized," *DC Brief* at 5, 105, is contrary to the record. *DC Brief* at 105. The "reservoir operating plan" described by the Petitioners is not a single document, but rather a collection of various federal agreements, contracts, reports, and manuals spanning decades. *See DC Brief* at 8-33. Presumably the Federal Agencies in executing contracts and developing flood control reports and manuals acted pursuant to authority granted

[44] The "reservoir operating plan" as defined by the Petitioners includes the Department's 1974 report on Boise river flood control management. *DC Brief* at 29-30. The Director reviewed the 1974 report and the hearing testimony of its author, Bob Sutter, and determined that the report did not support the Petitioners' arguments. (R. 001240, 001253, 001255-56.)

by Congress; but there is nothing in the record showing that Congress specifically authorized or approved the contracts and manuals, much less authorized or approved them as collectively amounting to a global "reservoir operating plan." At most, Congress in 1954 authorized the Federal Agencies to coordinate their reservoir operations "subject to then existing contractual obligations of the United States in relation to the Boise Project." 68 Stat. 794 (Public law 660; Act of August 24, 1954).

The Petitioners in characterizing the "reservoir operating plan" as being congressionally "approved" or "authorized" are essentially making a federal preemption argument. If Congress had "approved" a federal "reservoir operating plan" for the Boise River reservoirs and intended that it would preempt Idaho law and Idaho water rights, that intention would have been clearly stated at some point in the record, especially since Arrowrock and Anderson Ranch pre-dated Lucky Peak. But in authorizing Lucky Peak, what Congress actually said was that it "shall be operated in such manner as not materially to interfere with the operation of said Arrow Rock Reservoir," 60 Stat. 650,[45] which is hardly preemption language. If preemption was intended, the BOR likely would have claimed the Decreed Storage Rights as federal reserved water rights, but they were claimed and decreed in the SRBA as water rights established under state law, and the BOR has not sought any judicial or administrative change in this status.

c. The Petitioners' Expert Report Does not Support Their Arguments.

The Petitioners' theory of the "reservoir operating plan" relies on the report of the Petitioners' historian, Dr. Jennifer Stevens. *See, e.g., DC Brief* at 9, 10, 17, 19, 20, 26, 29, (citing Ex. 2053, "History of Boise River Reservoir Operations"). The Director found that Dr. Stevens' report and testimony did not support a conclusion that prior to 1986 the Decreed

[45] Flood Control Act of 1946 (Jul. 24, 1946). Anderson Ranch had not yet been constructed.

Storage Rights had been interpreted or administered as being "in priority" during fill or "refill" after flood control releases. (R. 001253-001255.) The Director's findings are supported by substantial evidence in the record. (R. 001249-57.)

The Director also found that the component of the "reservoir operating plan" upon which the Petitioners place the greatest weight, the Corps' *Water Control Manual*, "expressly recognizes that the distribution of water under licensed and decreed water rights is governed by state law as administered by state officials"; and that hearing testimony supported the conclusion that "the Water Control Manual has not been interpreted as defining or governing water rights, water distributions, or priority administration." (R. 001277.) These findings are supported by substantial evidence in the record. (R. 001241; Ex. 2005—000438, 000441-44; Tr. 20150827 at 82-83, 166-67; Tr. 20150828 at 455, 484, 495-96, 624-25; Tr. 20150910 at 1413-14; Ex. 2—000028; Ex. 6—000106.)

d. The Petitioners' Freely Assented to Flood Control Operations in Exchange for a "Guarantee" That Lucky Peak Storage Would be Used to Replace Flood Control Releases From Arrowrock and Anderson Ranch.

In the end, the so-called "reservoir operating plan" is simply the plan of forecast and "rule curve"-based operation of all three Boise River reservoirs as a coordinated system for both irrigation storage and flood control that was proposed in 1953 and has been in place since 1956. The Petitioners' arguments that flood control operations are a "mandate" forced upon them rather than a "choice" that they freely made, *see. e.g., DC Brief* at 2, are contrary to the record. The Petitioners expressly "assented" to flood control operations at Arrowrock and Anderson Ranch in their 1954 Supplemental Contracts. (R. 001239-40; Ex. 2100—002169-71.) They did not have to do this; they could have declined, and presumably flood control operations would have been limited to Lucky Peak, the reservoir specifically authorized for that purpose.

The Petitioners conditioned their "assent" to instituting flood control operations at Arrowrock and Anderson Ranch on the BOR's "Guarantee." (*Id.*); *Lucky Peak Decision* at 6-7. The "Guarantee" provides that flood control releases from Arrowrock and Anderson Ranch will be replaced with Lucky Peak storage. (*Id.*); *Lucky Peak Decision* at 6-7. This made sense, of course: Arrowrock and Anderson Ranch are irrigation reservoirs, and Lucky Peak is a flood control reservoir. Assigning the risk of flood control releases to Lucky Peak was consistent with the authorized purposes of the individual reservoirs.

Further, at the time Lucky Peak storage was uncontracted and entirely supplemental. (Off'l Not. IDWR Doc List-Attachment A 18_19690918); *Lucky Peak Decision* at 8. But when the BOR began to contract Lucky Peak storage in 1965, the Lucky Peak contracts of necessity made contractors' storage allocations subject to the "Guarantee," and also to Lucky Peak's "primary" purpose of flood control. (Ex. 2112—002310-12; Ex. 2053—001654; Ex. 2190—003990-91.) As a result, the Lucky Peak storage contracts explicitly authorize the BOR to reduce storage allocations to account for flood control releases. (Ex. 2112—002311 ("'The United States may discharge such water as required for flood control purposes, or under subarticle (h) of this article, and such discharged water shall be deducted from any stored water held to the credit of the Contractor.'"); Ex. 2190—003991 ("The United States may discharge such water as required for flood control purposes in accordance with subarticle (a) of this article, or under subarticle (h) of this article, and such discharged water shall be deducted from any holdover water held to the credit of the Contractor.'"). Lucky Peak spaceholders freely agreed to these conditions. *See Lucky Peak Decision* at 33 ("The irrigation entities entered into these contracts acknowledging that the reservoir could be used for purposes other than irrigation."); (R. 001247, R. 001268, R. 001285, R. 001303.)

Thus, the question that the Petitioners contend remains unanswered, "the relationship between flood control and beneficial use storage in the Boise River Reservoirs," *DC Brief* at 1-3, was in fact raised and resolved contractually in the mid-1950s, some sixty years ago. The Petitioners' argument that the question was never raised or addressed prior to the Basin-Wide Issue 17 proceedings is contrary to the record. The BOR and the water users allocated the risk of flood control operations in accordance with the authorized purposes of the reservoirs: the existing Arrowrock and Anderson Ranch storage allocations are fully protected using Lucky Peak storage; Lucky Peak storage allocations are subject to flood control operations, including the "Guarantee." This agreed-upon allocation of flood control risk has worked for sixty years, was incorporated into the Water District 63 accounting system implemented in 1986, and was decreed in the 2008 *Partial Decree* for the Lucky Peak water right. *Partial Decree, Water Right No. 63-3618; Lucky Peak Decision* at 4-13, 32-36.

The Petitioners' arguments are contrary to the "reservoir operating plan." The Petitioners arguments would unwind the carefully constructed risk-allocation framework of the "reservoir operating plan" and shift to third parties (junior water rights and future appropriators) the risks of flood control operations that were instituted with the Petitioners' express agreement.

5. There is no Merit in the Petitioners' Claims of Injury.

The Petitioners have asserted various claims of injury arising from the Water District 63 accounting system. These claims are contrary to the record and Idaho law, and incorrectly attribute to the Water District 63 accounting system and the Director the results of a system of flood control operations to which they freely agreed in their contracts with the BOR.

a. The Water District 63 Accounting System Does not Diminish or "Take" the Decreed Storage Rights or the Petitioners' Contract Rights.

The Petitioners argue that, in years of flood control operations, the Water District 63 accounting system "takes" or diminishes their property rights by "depriv[ing] the spaceholders of the right to store water" and "subordinat[ing] the spaceholders' storage water rights and storage contracts to all junior water rights and future appropriations." *DC Brief* at 62; *see BP Brief* at 72-76. These arguments are contrary to the record and Idaho law.

i. The Accounting System Protects the Priorities of the Decreed Storage Rights.

The portion of the natural flow supply that is to be distributed to the Decreed Storage Rights each year is defined by the elements of the *Partial Decrees*: priority, period of use, and quantity. The Director determined that the Water District 63 accounting system distributes water to the Decreed Storage Rights in accordance with the elements of their *Partial Decrees*, including the priority dates, as previously discussed. The same approach is used to distribute water to the Decreed Storage Rights each year, regardless of whether it is a drought year or a flood year, because the *Partial Decrees* do not condition priority administration or water distribution on whether the reservoir system is operated for flood control purposes.[46] This approach protects and enforces the priorities and quantities of the Decreed Storage Rights, and will continue to do so. (R. 001422.)

The incorrect premise of the Petitioners' argument is that the Decreed Storage Rights inherently include a right of "priority refill," or that the Petitioners have "property rights" to the water "actually, physically stored in the reservoirs" on the date of "maximum physical fill." *DC*

[46] The Director found there were no objections to the operations of the Water District 63 accounting system in "low water years, or years without flood control operations." (R. 001277.)

Brief at 1-5, 105-09. This contention is contrary to the *Partial Decrees*, *Basin-Wide Issue 17*, and, as previously discussed, incorrectly assumes the Decreed Storage Rights encumber volumes in excess of their decreed quantities. Nothing in the *Partial Decrees* or Idaho law recognizes an open-ended appropriation for all flood flows, year in and year out, simply to compensate for federal flood control releases; and especially not when the Petitioners freely "assented" to the flood control operations, negotiated a "guarantee" of full protection for Arrowrock and Anderson Ranch spaceholders, and agreed that Lucky Peak storage would be subject to the "Guarantee" and to reductions to account for flood control releases.

The Petitioners' contracts essentially authorized BOR to substitute Lucky Peak storage for Arrowrock and Anderson Ranch storage in flood control years, as necessary to ensure full allocations. (R. 001296-97, 001421-22; Ex. 2053—001644-45) ("a sort of trade: extra water from Lucky Peak for the irrigators in exchange for allowing the storage space in Arrowrock and Anderson Ranch to be used for flood control")). Thus, there is no injury to the Petitioners' interests in the Decreed Storage Rights or to their federal contracts simply because the water allocated to Arrowrock and Anderson Ranch spaceholders on the "day of allocation" is not the "same water" that is accounted towards the satisfaction of the Decreed Water Rights. (R. 001296-001297, 001421-001422.) For similar reasons, allocating "unaccounted for storage" to spaceholders also does not injure their interests in the Decreed Storage Rights or their federal contracts. The Petitioners freely agreed to make their storage allocations dependent on the Federal Agencies forecasts of excess flood runoff. Historically such excess water has been considered available for allocation to the Petitioners. (R. 001272). Historic practices do not constitute enforceable water rights, however. *See Order Deconsolidating Subcase 00-92026 and Order of Recommitment to Special Masters, In Re SRBA Case No. 39576, Subcase No. 00-92026*

(Jul. 1, 2008) at 3 ("if historical practices of administration, without a supporting legal doctrine, were to be controlling a significant purpose of the adjudication would be undermined.").

ii. Juniors and Future Appropriators Have no Right to Call "Unaccounted for Storage."

The Petitioners are simply incorrect in arguing that the accounting system makes "unaccounted for storage" subject "to the delivery demands of existing juniors water rights and future appropriators," and that they can "call for the release" of the "unaccounted for storage" from the reservoir system. *DC Brief* at 46, 50. This argument ignores the fundamental legal distinction between "natural flow" and "stored water," and how the accounting system actually tracks "unaccounted for storage." (R. 001264.)

While decreed and licensed water rights authorize appropriators to divert and call upon natural flow, they are not entitlements to divert or call for stored water of any kind. *Compare* Idaho Code § 42-602 *with* Idaho Code § 42-801. Junior water rights, therefore, have a right to call only for natural flow available under the priorities of their water rights. Junior water right holders have no legal right to call "unaccounted for storage" out of the reservoirs because "unaccounted for storage" is not natural flow but rather stored water. The fact that the "unaccounted for storage" is sometimes characterized as having been "stored without a water right" does not mean that junior water right holders or future appropriators can "call for the release" of "unaccounted for storage" from the reservoir system. *DC Brief* at 46, 50.

The natural flow supply available each day for junior water rights is determined by the "reach gain equation" method. (R. 001264-001265.) Under this method, the natural flow supply available for distribution each day is "the flow that would be present in the river 'absent reservoir operations and diversions.'" (R. 001264; Ex. 2—000002.) "Unaccounted for storage" is surplus water captured in the reservoir system because of reservoir operations; it is water that "absent

reservoir operations" would have continued downstream and left the system unused. "Unaccounted for storage" is therefore tracked separately in the water rights accounting program as "UNACCT STOR," a data register that tracks the running total of the water physically captured in the reservoir system each day (after the Decreed Storage Rights are satisfied) because it was not required to meet downstream demand. (Ex. 1—000009; R. 001260, 001263, 001267, 001270, 001408-001410 & n.5.)[47] "Unaccounted for storage" in the reservoir system, in short, is not part of the daily natural flow the accounting system determines to be available for distribution.

None of this is altered by the Petitioners' arguments that "unaccounted for storage" is "stored without a water right." *See, e.g., DC Brief* at 1, 4, 8; *BP Brief* at 39, 64, 73. This characterization refers to an accounting convention developed by engineers, not the legal authority for storing water. When the accounting programs were originally being developed, Sutter and his colleagues "created this category called unaccounted-for storage," because "refill is occurring, and there's no right to assign it to because the right has already filled. It's full." (Tr. 20150828 at 444-45.) The terminology simply reflected the need to create an additional account in the program code to track surplus storage. It was an engineering solution that was never understood to mean there was no legal authority to retain the surplus in the reservoirs, or that the surplus could not subsequently be allocated to spaceholders, or that junior water rights were entitled to call the surplus storage out of the reservoir system.

Moreover, the Director addressed the Petitioners' concern that "unaccounted for storage" is stored "without a water right" by ordering that, "if given the opportunity," he would

[47] The accounting system makes computations on a daily time-step basis. (R. 001265.) This means it distributes natural flow and tracks stored water use for each day based on that day's supply and demand data (although the program generally is not run each day because it is not necessary to do so). (*Id.*) After surplus natural flow has been captured in the reservoir system it is no longer "natural flow," but rather is "unaccounted for storage," even though it was unappropriated natural flow before being captured.

recommend that a "general provision" for Basin 63 be adopted in the SRBA to authorize "the historical practice of refilling the on-stream reservoirs when sufficient water is available to do so without injury to other appropriators." (R. 001308); *See Memorandum Decision and Order on Challenge, Subcase Nos. 74-15051, et al. (294 "High Flow")* (Jan. 3, 2012) at 21 ("if the expectation of the general provision was to authorize use of high flow water ancillary to an existing right but not amounting to a water right then a general provision may be appropriate.").

iii. The Petitioners' Arguments Would Condition the Right to Appropriate on Federal Flood Control Operations.

The Petitioners' real concern is that "unaccounted for storage" is considered to be unappropriated water before it is stored. (R. 001260, 001263, 001267, 001270, 001408-001410 & n.5.) The Petitioners seek to "secure" the unappropriated surplus with a water right so it remains available in perpetuity to "refill" reservoir space vacated as a result of federal flood control releases. *See DC Brief* at 58 ("no protectable water right to store after those [flood control] releases are made"); *id.* at 61-62 ("unsecured by a water right"); *id.* ("security . . . has been wiped out"); *BP Brief* at 36 ("without the protection of any valid water right"); *id.* at 72 ("The Director's approach does not provide . . .any legal protection for the ability to fill those reservoirs") (emphasis in original)).

There is no real dispute that in many years there is unappropriated water in the Boise River during the flood period. (R. 001277-78.) Under the Idaho Constitution, unappropriated water is available for future appropriations. Idaho Const. XV § 3. The Petitioners do not deny this principle, but rather argue that the *Water Control Manual* and federal flood control operations govern whether, where, and when water is available for new appropriations, and that all future water rights must include "flood control conditions." *DC Brief* at 67-68; *BP Brief* at 10, 33, 78-80.

Idaho Code provides that future applications to appropriate the unappropriated flood waters of the Boise River must be addressed on a case-by-case basis. *See generally* Chapter 2, Title 42, Idaho Code. The Director is vested with authority to determine whether the proposed use "will reduce the quantity of water under existing water rights" and whether "the water supply itself is insufficient for the purpose for which it is sought to be appropriated." Idaho Code § 42-203A(5). The Petitioners' arguments that the only water in the Boise River system available for future appropriations is water released pursuant to federal flood control operations under the *Water Control Manual*, *BP Brief* at 79, would allow the Federal Agencies to usurp authority that resides with the Director. (R. 001277, 001279.)[48]

Further, the Director found there was no factual basis for the Petitioners' concerns that flood control "refill" water would not be available for allocation to spaceholders in the future. The Director determined the flood waters had remained unappropriated for many years due to their unreliable nature, that flood waters only last for a short time early in the season, and that the river is fully appropriated during most of the summer. (R. 001277-78, 001430; Tr. 20150828 at 446-48, 456-57.) The Director thus found that the opportunity for future appropriation of these flows is limited. (*Id.*) The Director also found that most future appropriations would be of such limited quantities that they would have little or no measurable effect on flood control "refill," and in many cases would be beneficial to reservoir operations by providing the Federal Agencies with additional operational flexibility. (*Id.*)

[48] The Director has authority to condition future applications with respect to flood control operations, if necessary. (R. 001308.) The issues the Petitioners seek to raise through the "moratorium orders," *BP Brief* at 33, 77-80, are also questions of whether, when, and where unappropriated water may be available for future applications. These questions are committed to the Director to resolve based on the facts of each individual application. *See generally* Chapter 2, Title 42, Idaho Code (Permits, Certificate, and Licenses). The "moratorium orders" address permitting and have no application in accounting for the amount of natural flow available for distribution each day. (R. 001427.)

The Director further found that while new storage projects could conceivably appropriate a significant quantity of the "refill" water, they would also add flood control capacity to the system, which would reduce the need for flood control releases from the existing reservoirs in the first place. (*Id.*) The Federal Agencies have revised their flood control operation plans and guidelines in the past to adjust to new conditions, and they can do so again in the future in the unlikely event of a large appropriation of "refill" water. (Tr. 20150828 at 446-47, 456.) Any such future appropriation would of course be junior to the Decreed Storage Rights, and their full decreed quantities would be protected and administered in priority.

iv. The Accounting System is Consistent With the Petitioners' Federal Contracts.

The Petitioners' contention that the Water District 63 accounting system results in a "taking" of the Petitioners' "storage contracts" also lacks merit. *DC Brief* at 62. The Director found that the accounting system's storage allocation procedures are defined by and consistent with the Petitioners' federal contracts. (R. 001267-70.)

The Petitioners' related argument that the distribution of natural flow to the Decreed Storage rights must be based on their federal contracts is incorrect as a matter of law. The distribution of natural flow among appropriators and the distribution of stored water to spaceholders are legally distinct. (R. 001264.) This distinction is explicitly recognized in the *Pioneer* decision, the *Partial Decrees,* and Idaho Code provisions. *See Pioneer*, 144 Idaho at 115-16, 157 P.3d at 609-10 (ordering that the remark state "[t]he irrigation organizations administer the use of the water in the quantities and/or percentages specified in the contracts between the BOR and the irrigation organizations" but not "the identity of each irrigation entity . . . and the quantity of the water right owned"); *compare* chapter 6, title 42, Idaho Code

("Distribution of Water Among Appropriators") *with* chapter 8, title 42, Idaho Code ("Distribution of Stored Water").

b. The Petitioners' Arguments That the Accounting System Will Reduce Storage Water Supplies is Contrary to the Record.

The Petitioners assert, without support, that the Director's orders may result in "diminished" storage supplies. *See DC* Brief at 49 ("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 Petitioners have not cited any evidence in the record that the Director's orders or the Water District 63 accounting system can (much less will) result in "diminished storage water supplies." *Id.* Further, the Director found that storage water shortages result from drought, but there has been no shortage of storage water in years of flood control releases:

> any risk of insufficient water supply and resulting reduction of crop production or crop failure is the result of insufficient water supply during drought year and is not the result of a deficiency in total storage physically held in the Boise River on-stream reservoirs after flood control releases. In years of flood control releases, the reservoir spaceholders have had enough storage water to irrigate their crops.

R. 001285.

In their federal contracts, the Petitioners freely "assented" to flood control operations at all of the Boise River reservoirs. (R. 001239-40; Ex. 2100—002169-70.) Any concerns the Petitioners have that federal flood control operations may result in a "diminished storage water supply" are questions of reservoir operations and private contractual arrangements they have made with the BOR. The Petitioners put their trust in the Federal Agencies to release no more than necessary to capture the forecasted flood runoff. So long as the forecast is reasonably accurate and operational decisions do not result in too much evacuated space, this system works:

there is enough surplus water in the system to "refill" and that can be allocated to spaceholders without interfering with other water rights, existing or future.

No guarantees were made at any time by any party or entity, however, that the excess flood waters the Federal Agencies capture in the reservoir system pursuant to forecast and "rule curve"-based flood control operations would be "protected" by a water right priority, or would remain unappropriated indefinitely. (R. 001422.) Indeed, providing such a guarantee outside the elements of a valid state water right would have been contrary to Idaho law. Idaho Const. Art. XV § 3. The Petitioners' objections to the Water District 63 accounting system are in fact contrary to the "reservoir operating plan" to which they freely agreed. If adopted, the Petitioners' proposal would shift the risk of flood control operations to junior water rights. (R. 001305.)

c. The Water District 63 Accounting System has Never Caused the Petitioners to Receive Less Than Their Contractually Defined Quantities of Stored Water.

The Director found that, while the Water District 63 accounting system has been updated and improved since it was implemented in 1986, the system still uses the same algorithms and procedures to determine satisfaction of the Decreed Storage Rights and to allocate storage, including "unaccounted for storage," to the Petitioners and other spaceholders. R. 001271. The Director found that, for all practical purposes, the same procedures implemented in 1986 have remained in place and are still in use. (R. 001274-75.) These findings are supported by substantial evidence in the record. (*Id.*)

The Director further found that, with the exception of one year since implementation in 1986 (1989), the Petitioners have received full storage allocations in every year the Federal Agencies operated the reservoir system for flood control purposes. (R. 001247, 001268, 001285.) In 1989, the failure to physically fill the reservoir system after flood control releases exceeded

60,000 acre-feet, and therefore, the BOR reduced Lucky Peak spaceholders' storage allocations. (*Id.*); *Lucky Peak Decision* at 12-13, 33-35. The BOR has never reduced Arrowrock and Anderson Ranch spaceholder storage allocations as a result of flood control operations in any year since the Water District 63 accounting system was implemented in 1986. *Id.* These findings are supported by substantial evidence in the record. (R. 001247, 001249-75, 001285, 001303.)

C. THE DIRECTOR'S FACTUAL FINDINGS REGARDING WATER ACCOUNTING AND WATER RIGHTS ADMINISTRATION BEFORE AND AFTER 1986 ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Petitioners challenge the Director's factual findings regarding water accounting and water rights administration in Water District 63 both before and after the accounting system was implemented in 1986. These challenges are based on the Petitioners' arguments that the Director should have relied on Sisco's testimony to resolve conflicts in the evidence regarding these matters. *DC Brief* at 108-10; *BP Brief* at 31, 81. This Court should reject the Petitioners' arguments because the Director's resolution of disputed factual questions of water accounting and administration before and after 1986 are based on substantial evidence in the record. *See Rangen*, slip op. 24 ("Although IGWA presented conflicting evidence, the findings of IDWR staff relied on the by the Director provided substantial evidence on the record to support the Director's finding"; *State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998) ("Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion.").

1. The Director's Findings Regarding pre-1986 Water Accounting and Water Rights Administration are Supported by Substantial Evidence.

The Staff Memorandum requested by the Director stated that prior to 1986, water was distributed by priorities only during the irrigation season or the regulation season. (R. 001249.) Suez Idaho agreed with the Staff Memorandum in this regard, but the Petitioners argued that, prior to 1986, the Decreed Storage Rights "were interpreted and administered as being in priority during the 'fill' or 'refill' of flood control space." (*Id.*)

In resolving this factual dispute, the Director considered a range of evidence: the Staff Memorandum; the Water District 63 "Black Books"; the testimony and report of the Petitioners' expert (Dr. Stevens); the permits and licenses underlying the Decreed Storage Rights; a 1983 filing by the BOR for a beneficial use-based water right for "refill or second fill" of Arrowrock; the Department's 1974 report on flood control management of the Boise River; and the testimony of Sisco and Sutter. (R. 001249-57.)

The Director found that, "prior to implementation of the Water District 63 computerized accounting system in 1986, there was no year-round accounting of water distributions in Water District 63," and that "water rights in Water District 63 were not administered or regulated on the basis of priority or quantity until the 'canal regulation' period or season." (R. 001257.) The Director further found that, in years prior to 1986, "the water rights for the federal on-stream reservoirs in Water District 63 were rarely if ever administered in priority at any time during the year." (*Id.*) These findings are supported by substantial evidence in the record, (R. 001249-57), and therefore must be sustained. *Rangen*, slip op. 24; *see Barron*, 135 Idaho at 417, 18 P.3d at 222 ("the agency's factual determinations are binding on the Court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record").

The Petitioners concede that the Director was entitled to weigh the evidence and determine the credibility of the witnesses, but argue he erred by entirely failing to consider Sisco's testimony and "dismissing it out of hand altogether." *DC Brief* at 103. These arguments mischaracterize the Director's analysis. The Director explicitly considered Sisco's testimony regarding pre-1986 administration of the water rights for the reservoirs, (R. 001256-57), and found it to be "contrary to the documentary record, the testimony of Sutter, and . . . inconsistent with elements of the water rights." (R. 001257.)

In the *Order Denying Petitions For Reconsideration*, the Director again referred to the "conflicts between the testimony of Sisco" and that of other witnesses, as well as the documentary record, regarding whether the Decreed Storage Rights had been "interpreted and/or administered as being in priority when the reservoir were filling or 'refilling' following flood control releases." (R. 001407.) The Director stated that, after "[w]eighing all of the testimony . . . the Director finds that it supports the Director's findings" for the reasons stated in the *Amended Final Order*. (*Id.*)[49] The record shows the Director did not simply dismiss Sisco's testimony "out of hand," *DC Brief* at 103, but rather resolved conflicts between Sisco's testimony and the other evidence.

The Petitioners' assertion that Sisco is "the only direct human link" between pre- and post-1986 accounting, *DC Brief* at 103, is incorrect. Sutter, who developed the accounting system, was also familiar with pre-1986 accounting and administration. (R. 001252; Tr. 20150828 at 363-76; Ex. 6—000107.) Sutter joined the Idaho Water Resources Board's ("IWRB") technical staff in 1969 partly "in response to this threat from California that they were going to come up here and divert water from the Snake River." (Tr. 20150828 at 363-64.)

[49] This statement referred to conflicts with regard to both pre-1986 administration and post-1986 administration because the Director cited "findings of fact" in the *Amended Final Order* pertaining to both time periods. (R. 001407.)

Sutter testified the IWRB "had been charged with showing that Idaho needed all of their [sic] water," and wanted to demonstrate that the State was "using the water efficiently and wisely." (*Id.* at 364.) Sutter testified "as part of that, I visited the watermasters and began to understand the processes that they were using to account for their water." (*Id.*) After being hired in 1969, Sutter met "almost immediately" with the Boise River watermaster (Musselman) and "I got in the truck with him and we went down the river, and he showed me all the canals. And I just basically wanted to understand how he operated." (*Id.* at 364-66.) Further, while Sisco's testimony was limited to the pre-1986 accounting procedures of one watermaster (Koelling), Sutter's testimony addressed the accounting methods of both Koelling and his predecessor (Musselman). (R. 001252; Tr. 20150828 at 363-76.)[50]

The Petitioners' alternative contention that the Director should not have referred to or relied upon the Water District 63 "Black Books" also lacks merit. The "Black Books" are annual reports watermasters are required by law to prepare and file with the Department to document "the total amount of water delivered," the "amount delivered to each water user," and "records of stream flow the water master used or made in the process of distributing water supplies." Idaho Code § 42-606.[51] The Petitioners' argument that "the Black Books do not expressly controvert Sisco's testimony," *DC Brief* at 104, is contrary to the Director's findings. The Director found: (1) that the pre-1986 Black Books documented a system of administration under which "the

[50] The Petitioners' contentions about historic water rights administration and operation of the Water District 63 accounting system also rely to some degree on affidavits and hearing testimony of their managers and/or officers. To the extent their affidavits and testimony create an evidentiary conflict, the Director's findings must be sustained because they are supported by substantial evidence in the record. *Rangen*, slip op. 24; *Barron*, 135 Idaho at 417, 18 P.3d at 222; *Tupper*, 131 Idaho at 727, 963 P.2d at 1164. Further, the affidavits and testimony show that most of these witnesses had little or no experience with the accounting system, and they frequently (and incorrectly) equated their district's contractual "storage rights" with the Decreed Storage Rights for the federal reservoirs. (Exs. 2002, 2189, 3038, 3039; Tr. 20150909 at 1018-1265.)

[51] The Black Books were identified as potentially relevant documents in the "Document Overview" of November 4, 2014 (R. 000269), and the Director took official notice of the Black Books. (R. 000887, 000961.)

water rights for the federal reservoirs were rarely if ever administered on a priority basis at any time of the year," (R. 001250); and (2) that had the watermaster been accounting for priority distributions to the reservoir water rights, he would have been begun documenting it in the Black Books in 1963, because in that year "the Black Books began documenting spaceholders' annual storage allocations and use." (R. 001251.) These findings are supported by substantial evidence in the record, i.e., the Black Books.

2. The Director's Findings Regarding Post-1986 Water Accounting and Water Rights Administration are Supported by Substantial Evidence.

The Petitioners also rely on Sisco's testimony to challenge the Director's finding that "the distribution of water to the reservoir water rights and the allocation of storage to spaceholders has been consistent" with the Water District 63 accounting system since its implementation in 1986. (R. 001275.) The Petitioners acknowledge the conflict in the evidence on this question, but assert the Director erred in crediting other witnesses' testimony and documentary evidence over Sisco's testimony. *See, e.g., DC Brief* at 104 n. 21 ("yet the Director placed greater stock in inanimate documents").

Sisco's testimony was mixed on the question of water rights administration after 1986. Sisco testified that in most cases he relied on the accounting system for purposes of water rights administration during his tenure as watermaster (1986 – 2008). (R. 001272.) In this regard, Sisco's testimony was consistent with the testimony of Sutter, Cresto, the former Directors, and the Black Books. (*Id.*)

The Petitioners argue the Director's findings are erroneous because Sisco also testified he made "one exception" to this administration; he saw flood control as "a public service" and believed the spaceholders should not be "punished or take a reduced amount because of flood control." (R. 001272.) Sisco testified he therefore would "disregard" the water rights

accounting program's determination of distribution priorities when the reservoir system was "backfilling" after flood control releases, and did not allow junior water rights to divert during the "backfill" or "refill" period. (*Id.*)[52]

Despite testifying that he "disregarded" the accounting and curtailed junior water rights during the "refill" period, however, Sisco also testified that he never objected to the accounting system and never notified the Department that he was not following the accounting system's determinations of priority distributions. (R. 001272.) Rather, each Black Book Sisco prepared during his tenure as watermaster simply stated, without qualification or exception, that "[t]he storage. . . was figured using a computerized water right and storage accounting program." (R. 001258.) Moreover, Sisco could not identify any "specific circumstance where [he] didn't administer consistent with the water right accounting program." (*Id.*) Sisco also testified that he did not actually "change something" in the daily accounting during flood control," but rather "[a]ll I knew is at the end of the season, when we went in and looked at the date of allocation, I wanted as much physical water up there as possible." (*Id.*) Sisco testified that "[w]e backfilled those spaces up there using the basic water right premise of the water rights that belonged to the three reservoirs, their respective priority." (R. 001273.)

When asked whether his testimony was consistent with the accounting system's procedure for allocating "unaccounted for storage" on the "day of allocation," Sisco admitted "I can't say if that was contrary to the way the accounting program ran." (Tr. 20150831 at 894.) Indeed, Sisco's testimony taken as a whole suggested a limited understanding of accounting terminology and operations of water District 63 accounting system.[53] Siscos testimony also

[52] As will be discussed, this testimony raised questions about Sisco's methods of administering state water rights.

[53] For instance, when asked if he understood the term "unallocated for storage," Sisco responded "I'm not sure I do," (Tr. 20150831 at 900), and subsequently equated "unaccounted for storage," which consists of water physically

suggested, as the Director found, a misconception that flood control operations "punish" spaceholders, and a lack of awareness that Arrowrock and Anderson Ranch spaceholders have a full "Guarantee" that has always protected them from flood control-caused losses, that there is a 60,000 acre-foot flood control "buffer" that protected Lucky Peak spaceholders, and that Lucky Peak spaceholders' contracts make this storage allocations subject to reductions for any flood control loss in excess of 60,000 acre-feet. (R. 001273.)

The Director found Sisco's mixed testimony on the whole to be "consistent with, rather than contrary to" the Water District 63 accounting system's procedure for assigning "unaccounted for storage" to the Decreed Storage Rights reservoir water rights on the "day of allocation" in order of their priorities. (R. 001273.) The Director found Sisco's testimony that he "disregarded" the accounting system and curtailed junior water rights during the flood control "refill" period to be lacking in "reliability/credibility," as he explained in the *Order Denying Petitions for Reconsideration*. (R. 001405-06.) The Director's findings are supported by substantial evidence in the record.

D. THE PETITIONERS' PROCEDURAL ARGUMENTS LACK MERIT.

The Petitioners argue that for various reasons the Director lacked authority to initiate the contested case. They also argue he should have stayed the contested case pending the outcome of the SRBA proceedings in subcase nos. 63-33732, *et al.*, but failing that should have "followed" the Special Master's recommendation in those proceedings. The Petitioners also argue the Director should have disqualified himself, that the contested case proceedings were

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stored in the reservoirs that is allocated to spaceholders and actually used for irrigation, to "paper water." (Tr. 20150831 at 902.) Sisco also testified that "well, I may not have understood exactly all of the terminology when it came to the computer program. I had a basic understanding of what that computer program was going to do for me. . . . I guess if I didn't understand all of the nuances of the program, then so be it." (Tr. 20150831at 905.)

procedurally defective in various ways, and that the Petitioners were deprived of due process. These arguments are addressed in turn below.

1. The Director Acted Within his Authority by Commencing the Contested Case.

The Petitioners assert the Director lacked authority to initiate the contested case for a variety of reasons, arguing: that a contested case can be initiated only by a party petition or a "Complaint" or "Charge"; that the Petitioners' concerns and objections regarding the accounting system should have been addressed through formal rulemaking; that the BOR was a "necessary party"; and that the contested case "circumvented the authority of the SRBA." *DC Brief* at 69-82; *BP Brief* at 65-67. These arguments are addressed in turn below.[54]

a. The Genesis of the "Fill" Controversy in Water District 63.

The Petitioners' arguments ignore the stated purpose of the contested case and the need for such a proceeding. The Director initiated the contested case for a specific purpose: "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 [in Water District 63] pursuant to existing procedures of accounting." (R. 000007.) To understand why the Director had authority to initiate a contested case for this purpose and why he did so, it is necessary to review the how the "issue of fill" arose in the first place. *Basin-Wide Issue 17*, 157 Idaho at 389, 336 P.3d at 792.

The "fill" controversy arose from competing "refill" remarks that the BOR and the State of Idaho proposed in the SRBA subcases for American Falls and Palisades reservoirs, which led the Petitioners to seek a basin-wide issue on the question of "priority refill." *Id.* at 387-88, 336 P.3d at 794-95;(R.001230-34.) Despite the fact that this Court explicitly excluded "the issue of

[54] The Director addressed some of these arguments in the *Order Denying Pre-Hearing Motions* (R. 000335) and the *Order Denying Petitions for Reconsideration* (R. 001401).

fill" as "purely an issue of administration," the Petitioners directly attacked the accounting system by asserting that "the concept of 'paper fill' is a fatally flawed construct" that "impermissibly diminishes real property rights." *Pioneer Irrigation District's Opening Brief, In re SRBA, Subcase No. 00-91017* (Dec. 21, 2012) (Off'l Not. 91017—000910) at 9–10. This Court held that questions of accounting for the distribution of water are statutorily committed in the first instance to the Director. *Memorandum Decision, Basin-Wide Issue 17, Subcase No. 00-91017* (Mar. 20, 2013) (Off'l Not. 91017—001410) at 11.

The Petitioners and others appealed this Court's decision to the Idaho Supreme Court. *Basin-Wide Issue 17,* 157 Idaho at 387, 336 P.3d at 794. While the appeal was pending, the Director and Department staff continued to receive communications expressing concerns with and objections to the Water District 63 accounting system's method for determining the satisfaction or "fill" of the Decreed Storage Rights. For instance, the Chairman of the Boise Project Board of Control in April 2013 requested the Director "provide answers" to questions about the accounting methodology, including: "[h]ow do you intend to define 'fill' of the storage rights in the Boise? ... Does 'fill' include pass-through flood water when inflow equals outflow [or] water that is stored and then released for flood water?" and "[w]hat is the rationale for defining 'fill' as you have, and is there any rule, regulation, or written decision explaining this rationale?" (R. 000004.)

Clearly, a controversy had emerged in the Basin-Wide Issue 17 proceedings over the Water District 63 accounting system's method for determining the satisfaction or "fill" of the Decreed Storage Rights, which is a key component of priority administration in Water District 63. As this Court recognized, "[a]n on-stream reservoir alters the stream affecting the administration of all rights on the source. Accordingly, some methodology is required to

implement priority administration of affected rights." *Basin-Wide Issue 17*, 157 Idaho at 388, 336 P.3d at 795 (quoting *Order Designating Basin-Wide Issue, Basin-Wide Issue 17, Subcase No. 00-91017*, (Sept. 12, 2012) (Off'l Not. 91017—000720) at 6. The Water District 63 accounting system had been in place since 1986 with "no injury alleged," *Basin-Wide Issue 17*, 157 Idaho at 392, 336 P.3d at 799, yet water users who had accepted the system for decades were suddenly calling it into question.

In September 2013, the Director initiated the contested case to provide interested parties with an administrative proceeding in which to address their concerns with and objections to how the Water District 63 accounting system "counts" water towards the "fill" of the Decreed Storage Rights. (R. 000001-7.) At the request of the Petitioners and other parties, the Director stayed the proceeding in December 2013 pending the outcome of the appeal. (R. 001232.) In August 2014 the Idaho Supreme Court resolved Basin-Wide Issue 17 by effectively affirming this Court's analysis, and held that "it is within the Director's discretion to determine when [the decreed quantity] has been met for each individual decree." *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801. (R. 001233.) In September 2014 the Director lifted the stay, authorized discovery, and requested a staff memorandum. (R. 001233.)

b. The Director has Authority to Initiate the Contested Case.

The Petitioners contend the Director lacked authority to initiate the contested case because no party requested it, no court ordered it, and no statute authorizes the Director to address the questions presented in the contested case. *DC Brief* at 70; *BP Brief* at 66-67. These arguments are contrary to the Idaho Code, the *Basin-Wide Issue 17* decision, and the Department's Rules of Procedure.

Idaho Code section 42-602 gives the Director "broad powers to direct and control distribution of water from all natural water sources within water districts," including the authority to supervise watermaster for this purpose. *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800. While this statute imposes a "clear legal duty" on the Director to distribute water "in accordance with prior appropriation," the "'details of the performance of the duty are left to the director's discretion.'" *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800 (quoting *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994)).

The Director determined that, to fulfill his statutory duty, it was necessary to initiate a proceeding to address and resolve water users' concerns with and/or objections to the Water District 63 accounting system's method of determining when the Decreed Storage Rights are satisfied. (*E.g.*, R. 000006, 000338, 001286–88.) This determination is supported by substantial evidence in the record, and is well within the statutory authority and discretion conferred on the Director to ensure that water is distributed in accordance with the prior appropriation doctrine as established by Idaho law. *Basin-Wide Issue 17*, 157 Idaho at 392-94, 336 P.3d at 799-801.

In addition, and contrary to the Petitioners' assertions that the Director lacked authority to initiate a contested case through any means other than a "charge" or "complaint," *BP Brief* at 66, Rule 104 of the Department's Rules of Procedure explicitly recognizes that the "agency" may "initiate" contested case proceedings with a "notice," and "order," or a "document":

> Formal proceedings, which are governed by rules of procedure other than Rules 100 through 103, must be initiated by a document (generally a notice, order or complaint if initiated by the agency) or another pleading listed in Rules 210 through 280 if initiated by another person. Formal proceedings may be initiated by a document from the agency informing the party(ies) that the agency has reached an informal determination that will become final in the absence of further action by the person to whom the correspondence is addressed, provided that the document complies with the requirements of Rules 210 through 280. Formal proceedings can be initiated by the same document that initiates informal proceedings.

IDAPA 37.01.01.104 (emphases added) (parentheses in original). The Director properly initiated the contested case via the Director's *Notice of Contested Case and Formal Proceedings*, which cited Rule 104. (R. 000007).

Further, it is not unusual for the Director to initiate contested cases to address water distribution questions pertinent to his statutory duties. In such cases, interested parties, like the Petitioners here, receive notice and participate to express their views on how the Director should address the question. Sometimes proceedings are informal, and sometimes the parties formally join a contested case.[55] The Director's *Order Denying Pre-Hearing Motions* lists a variety of administrative proceedings where the Director has issued orders addressing water users concerns on emergent issues.[56] (R. 000339.) The Director was well within his authority in initiating this contested case because it addressed an ongoing controversy directly related to his "clear legal duty" to distribute water in Water District 63 "in accordance with prior appropriation." *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800.

c. The Director was not Required to Engage in Formal Rulemaking.

The Petitioners argue that *Asarco, Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003), requires the Director to use formal rulemaking procedures to address their objections to the

[55] The Petitioners' assertion that there were "no parties" to the contested case, *BP Brief* at 67, is belied by the Petitioners' active participation in the proceedings. The Petitioners objected to, and sought changes in, the accounting system's method of determining satisfaction of the Decreed Storage Rights. *See* IDAPA 37.01.01.152 (defining "Petitioners" as "[p]ersons not applicants who seek to . . . otherwise take action that will result in the issuance of an order or rule").

[56] *See, e.g, Final Order Regarding Instructions to Watermaster,* In the Matter of Water Right No. 1-6 (Feb. 11, 2013); *Final Order Regarding Measuring and Reporting the "Average Daily Flow" as Measured at the Murphy Gaging Station,* In the Matter of Distributing Water to Water Right Nos. 02-100, 02-201, 02-223, 02-224, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, and 37-20710 (Oct. 27, 2014); *Final Order Regarding Instruction to the Watermasters for Water District Nos. 1 and 27 (Blackfoot River Water Management Plan),* In the Matter of Administration of Water in Water District Nos. 1 and 27 (July 22, 2013); *Final Order Regarding Administration,* In the Matter of Water Right Nos. 03-2018, 03-10246, and 03-10247 (June 28, 2013).

Water District 63 accounting system's method of "counting" water toward the "fill" of the Decreed Storage Rights. *DC Brief* at 78-83; *BP Brief* at 57-65. These arguments are incorrect because *Asarco* is distinguishable, and even under the *Asarco* analysis the contested case did not involve "*de facto* rulemaking." *BP Brief* at 57.

i. Asarco has no Application to This Case.

Asarco involved a challenge to a "TMDL"[57] created by the Idaho Department of Environmental Quality ("DEQ") and the United States Environmental Protection Agency. *Asarco*, 138 Idaho at 721, 69 P.3d at 141. The TMDL established "the maximum amount of pollution" for "the Coeur d'Alene River Basin," *id.*, "a numerical limit or budget for a given water body, based on the sum of allowable pollution." *Id.* at 723, 69 P.3d at 143. The Idaho Supreme Court rejected DEQ's argument that the TMDL could be established outside of formal rulemaking. *Id.* at 725, 69 P.3d at 145. The Court held that "[t]he central problem with DEQ's argument is the state water quality standards do not provide all of the information or direction necessary for promulgating a TMDL. While the water quality standards serve as a basis for the TMDL calculations, the TMDL requires much more." *Id.* In other words, the underlying statutory framework was inadequate to define a TMDL, so DEQ had to create a legally enforceable numerical limit on its own.

Such is not the case here. The adjudication statutes of Idaho Code specifically define the elements that must be included in decreed water rights, Idaho Code §§ 42-1411, 42-1412. This Court decreed those elements with specificity in the SRBA. The elements of the *Partial Decrees* define when and how much natural flow the Director must distribute to the Decreed Storage Rights. As with other water rights, the Priority, Quantity, and Period of Use elements define

[57] Total Maximum Daily Load.

which portion of each year's natural flow supply is to be distributed to the Decreed Storage Rights. The *Partial Decrees* define "quantity" in an annual volume that is not limited by diversion rates, and authorize diversions for storage purposes year-round. *Partial Decrees* (R.0001265.) By operation of these elements, the Decreed Storage Rights when in priority are entitled to all natural flow other than that required by downstream senior water rights. Unlike in *Asarco*, where DEQ had to "establish the maximum amount of pollution" on its own, 138 Idaho at 721, 69 P.3d at 141, the Director does not have to create a legally enforceable numerical limit on his own when distributing water to the Decreed Storage Rights. This Court through the *Partial Decrees* has provided the information the Director needs to distribute water to the Decreed Storage Rights, and as previously discussed, the accounting system is consistent with the *Partial Decrees*.

For similar reasons, there is no merit in the Petitioners' alternative argument that the TMDL in *Asarco* "set a policy on how to allocate the scarce resource, i.e., pollution loads, among the various users in the basin" and "[t]he Director is doing exactly the same thing here." *BP Brief* at 60. While in *Asarco* the agency created a "numerical limit" on its own, 138 Idaho at 723, 69 P.3d at 143, in this case, the *Partial Decrees* "give the Director a quantity he must provide to each water users in priority." *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801.

Further, and contrary to the Petitioners' argument, the TMDL in *Asarco* did not "allocate . . . pollution loads among the various users," *BP Brief* at 60, but rather applied to the entire basin. The Court recognized this in distinguishing TMDLs from NPDES permits: "In contrast to the NPDES permitting system, which focuses on individual point source dischargers, the TMDL calculation considers the water quality of the receiving waterbody and the cumulative impacts of multiple sources of pollution." *Asarco*, 138 Idaho at 722, 69 P.3d at 142. The TMDL in *Asarco*

established a numerical standard that applied across the entire Coeur d'Alene River basin, while the accounting system's method of determining satisfaction of the Decreed Storage Rights applies only to the three federal on-stream reservoirs in the Boise River basin. *Asarco* simply has no application to this case.

Contrary to the Petitioners' assertion, the Director did not state or imply that *State v. Alford*, 139 Idaho 595, 83 P.3d 139 (Ct. App. 2004) gave him "carte blanche authority to establish his 'paper fill' rule with regard to the APA." *BP Brief* at 60. The *Order Denying Pre-Hearing Motions* simply stated that *Alford* "confirmed" the Director's interpretation of *Asarco* as not requiring formal rulemaking "to address water users' concern and/or objections to existing accounting methods and procedures employed by the Director to determine when sufficient water has been distributed to federal on-stream reservoirs in Water District 63 to satisfy the numerical limits," in this case "the decreed quantities." (R. 000337.) Further, and as the Director stated, in *Alford* "[t]he DUI statute already prescribed the legal standard limiting an individual's alcohol concentration." (*Id.*)[58]

The Petitioners' *Asarco* arguments challenge the entire accounting system to reach the procedure for determining satisfaction of the four Decreed Storage Rights,[59] which the

[58] There is no legal merit in the Petitioners' related argument that, under the DUI cases of *State v. Riendeau*, 159 Idaho 52, 355 P.3d 1282 (2015), and *State v. Haynes*, 159 Idaho 36, 355 P.3d 1266 (2015), the Director is required to use formal rulemaking to address their concerns and objections regarding the existing accounting system. *BP Brief* at 60 n. 18. These two decisions held that, under *Asarco*, the Idaho State Police were required to use formal rulemaking to define "Standard Operating Procedures" ("SOPs") for breath alcohol testing. *Haynes*, 159 Idaho at 72, 159 Idaho at 1272; *Riendeau*, 159 Idaho at 55, 355 P.3d at 1286. DUI standards apply to all persons in the state, however, while the *Partial Decrees* apply only to the Decreed Storage Rights. Further, the SOPs in *Haynes* and *Riendeau* prescribed in detail the various protocols that individual operators of the testing equipment were required to following in order to ensure reliable test results. *Id.* This case, in contrast, does not involve any challenge to the operation or calibration of the various streamflow measurement devices or the computer equipment.

[59] The Petitioners *Asarco* arguments rely in large part on re-characterizing the contested case as a proceeding on "IDWR's Internal Adoption and Use of the Water Right Accounting Program," *DC Brief* at 78, that was initiated "to create a *post hoc* record" on the 1986 implementation of the accounting system. *BP Brief* at 3, 4, 7. These arguments are contrary to the *Notice*, which specifically identified the narrow issue to be resolved. (R. 000007.) Further, the Director found the accounting system was adopted at the request of the watermaster and with the

Petitioners contend must as a matter of law remain 'in priority' and unsatisfied until the day of "maximum physical fill." *See, e.g., DC Brief* at 75-76; *BP Brief* at 69. Such water right-specific arguments should have and could have been made in the SRBA proceedings on the Decreed Storage Rights. The Petitioners' *Asarco* arguments are an attempt to get a second bite at the apple through rulemaking. Formal rulemaking is not a substitute for SRBA adjudication procedures, however, and accepting the Petitioners' rulemaking arguments would open an avenue that undermines the finality of decreed water rights. *See State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) ("Finality in water rights is essential.").

ii. The Contested Case did not Involve Rulemaking Under the *Asarco* Analysis.

Application of the six-factor *Asarco* analysis confirms that the narrow issue of addressing the Petitioners' concerns with and objections to one aspect of a large and complex accounting system is not a matter for formal rulemaking.

Wide Coverage: The Idaho Supreme Court held in *Asarco* that the TMDL had "wide coverage" because it applied "to all current and future dischargers" in the Coeur d'Alene River Basin." 138 Idaho at 723, 69 P.3d at 143. The contested case, however, dealt only with four water rights and the three federal reservoirs. (R. 001230-36.). The fact that existing and future users of stored water receive it from the federal reservoir system, *BP Brief* at 62; *DC Brief* at 80, does not transform the accounting system's method of "counting" water for the four Decreed Storage Rights into a standard that applies "to all current and future" water users. *Asarco*, 138 Idaho at 723, 69 P.3d at 143. The Petitioners' argument assumes that the "counting" method has "wide coverage" simply because current and future water users obtain stored water from the federal reservoir system. But the "counting" method does not determine water users' storage

consent and cooperation of the water users and the BOR. (R. 001258-61.) The Petitioners' *Asarco* arguments attempt to re-visit the adoption of the accounting system, and retrospectively apply *Asarco*, simply to address their current objections to one part of the system: the method for determining satisfaction of the Decreed Storage Rights.

allocations. Storage allocations are defined by the spaceholders' federal contracts, not by the *Partial Decrees*. *See Pioneer*, 144 Idaho at 115, 157 P.3d at 609 ("The [Petitioners] administer the use of the water in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the [Petitioners]."). [60] In contrast, the TMDL in *Asarco* applied directly to "all current and future dischargers." 138 Idaho at 723, 69 P.3d at 143.

Further, the Petitioners' "wide coverage" argument has no stopping point. All water rights on a common source are interconnected in some way, and under the Petitioners' logic, all acts of water distribution eventually become matters for formal rulemaking. This would be contrary to the policy of providing for efficient administration of water rights, *see A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 414, 958 P.2d 568, 571 (1997) ("Administering a water right is not a static business."), and contrary to the Director's obligation to timely administer water, *see Musser*, 125 Idaho at 395, 871 P.2d at 812.

Generally and Uniformly: The contested case also did not meet the second *Asarco* factor of establishing a legal standard to be "applied generally and uniformly." 138 Idaho at 723, 69 P.3d at 143. Unlike DEQ's TMDL in *Asarco*, the accounting system does not establish a new numerical limit, but rather relies on the elements of the *Partial Decrees*. Further, while in *Asarco* the TMDL required DEQ "to focus on the water body as a whole, as opposed to the individual sources of pollution," *id.* at 724, 69 P.3d at 144, the accounting system's method of determining satisfaction of the Decreed Storage Rights focuses on the federal reservoirs, not the entire river system.

[60] In accounting for stored water use pursuant to Idaho Code § 42-801, the Director and the watermaster as supervised by the Director are not administering the *Partial Decrees* but rather regulating stored water use according to spaceholders' individual storage accounts with the BOR. (R. 001262, 001265, 001300, 001419, 001428.); *Nelson*, 148 Idaho at 159, 219 P.3d at 806.

Only in Future Cases: The contested case was not "only" concerned with "future cases," *Asarco,* 138 Idaho at 725, 69 P.3d at 145, because the Petitioners' objections to the accounting system relied mainly on their narrative of historical reservoir system operations and water rights administration in Water District 63. *See, e.g., DC Brief* at 8-33. The Petitioners make the same history-based arguments in this proceeding. The Petitioners' request for relief asks this Court to reject the Director's factual findings and the substantial record evidence supporting them in favor of adopting the Petitioners' historical narrative.

Legal Standard not Provided by Statute: The fourth *Asarco* factor has no application because, as previously discussed, the "legal standards" for determining satisfaction of the Decreed Storage Rights, 138 Idaho at 724, 69 P.3d at 144, are the Quantity elements of the *Partial Decrees* issued by this Court in the SRBA. *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801 ("The decrees give the Director a quantity he must provide to each water user in priority."). Further, the elements that must be included in partial decrees are prescribed by statute. Idaho Code §§ 42-1411 and 42-1412.

New Agency Policy: The fifth *Asarco* factor does not apply because it is undisputed that the Water District 63 accounting system was implemented thirty years ago, in 1986. While the Petitioners argue that the Department's interpretation of the term "paper fill" is "new agency policy," *BP Brief* at 64; *see DC Brief* at 51 ("the manipulation and exploitation of the term 'paper fill' term is a recent occurrence"), the Director found otherwise, and his findings are supported by substantial evidence in the record. Further, the Petitioners' fixation on the term "paper fill,"[61] and their insistence that the Department has changed its meaning or re-interpreted

[61] As the Director stated in the *Order Denying Petitions for Reconsideration*, the Petitioners' "paper fill" arguments "attach[] undue weight to a shorthand label that, as this proceeding demonstrates, can be confusing or ambiguous." (R. 001426.)

it, simply confirms that the real issue the Petitioners sought to address in the contested case (and continue to press before this Court) is one of history, not of "future cases." *Asarco,* 138 Idaho at 724-25, 69 P.3d at 144-45.

Implements and Interprets Existing Law: The final *Asarco* factor does not apply because the Director's resolution of the Petitioners' objections to the accounting system's method of determining satisfaction of the Decreed Storage Rights did not "implement[] or interpret[] existing law" within the meaning of *Asarco.* 138 Idaho at 725, 69 P.3d at 145. As previously discussed, "implementing or interpreting existing law" under *Asarco* refers to when an agency must 'fill in the blanks' with substantive legal standards that are missing from the underlying legal authority. *Id.* That is not the case here because the Legislature provided clear statutory standards that this Court decreed in the elements of the *Partial Decrees.*

d. The United States is Not a Necessary or Indispensable Party.

The BOR declined to participate in the contested case, asserting that as a result of the McCarran Amendment the BOR would not be bound by the outcome of the contested case. (R. 000084).[62] The Petitioners thus argue "the Director erred in proceeding with the Contested Case

[62] The McCarran Amendment is codified at 43 U.S.C. § 666 and is a waiver of the United States' sovereign immunity in certain types of lawsuits. *In re SRBA Case No. 39576,* 128 Idaho 246, 251, 912 P.2d 614, 619 (1995). It states, in relevant part:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

without a necessary and indispensable party," and "the only relief at this point would be to set aside the [*Amended Final*] *Order* or remand the Contested Case back to the Director." *DC Brief* at 77-78. The Petitioners cite no statute, rule, or judicial decision in support of this contention, and in fact it is contrary to law.[63]

The Petitioners concede the contested case was an administrative proceeding rather than a "lawsuit." *DC Brief* at 76-78. The concept of "necessary and indispensable parties" is a judicial requirement that applies in lawsuits conducted pursuant to the Idaho Rules of Civil Procedure. *See* I.R.C.P. 12(b) ("failure to join an indispensable party"); I.R.C.P. 19(a)(2) ("the court shall determine whether . . . the action should proceed . . . or should be dismissed, the absent person being thus regarded as indispensable"). There is no Idaho statute or judicial decision that applies these provisions of the Idaho Rules of Civil Procedure to IDAPA administrative proceedings, and the Department's Rules of Procedure also do not incorporate these provisions or any similar requirement.

Further, under Idaho law, the BOR's participation was not "necessary" for the contested case to proceed. The *Notice* did not seek relief against or action by any party, but rather initiated the contested case to address challenges the BOR, the Petitioners, and others raised regarding the Director's discharge of his "clear legal duty" under Idaho Code § 42-602 to distribute water in accordance with the prior appropriation doctrine. *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800; *See A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 650, 315 P.3d 828, 383 (2013) ("this is not a water rights case. . . . This is a water management case wherein the management authority and discretion of the Director are at issue."). The Director is required by law to perform this duty regardless of whether the BOR (or any party) chose to participate in the

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43 U.S.C. § 666(a).

[63] The Director addressed similar arguments in the *Order Denying Pre-Hearing Motions* (R.000335.)

contested case. *Id.* The only effect of the BOR's decision not to participate in the contested case was to forfeit its opportunity to have its concerns and objections heard in an administrative proceeding initiated specifically for that purpose. *Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 874, 243 P.3d 1055, 1062 (2010).

The Petitioners' argument that the BOR was correct in asserting it will not be bound by the Director's orders, *DC Brief* at 76-78 (R. 000084), is irrelevant. Regardless of whether the Petitioners or the BOR believe the Director's orders are binding on the BOR, the Director must perform his "clear legal duty" under Idaho Code § 42-602 to distribute water in accordance with the prior appropriation doctrine as established by Idaho law. *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800. That duty is not contingent upon the McCarran Amendment or the BOR's participation in the contested case.

Further, under Idaho law, water administration is not done through McCarran lawsuits, but rather administrative proceedings, and nothing in the McCarran Amendment requires otherwise. The McCarran Amendment is simply a waiver of the United States' sovereign immunity, *In re SRBA Case No. 39576*, 128 Idaho 246, 251, 912 P.2d 614, 619 (1995), and by no means the only authority governing the extent to which the United States is subject to state water law. *See South Delta Water Agency v. U.S. Dep't of Interior*, 767 F.2d 531, 541–42 (9th Cir. 1985) (rejecting the argument that the "McCarran Amendment is the exclusive avenue of review for water rights disputes involving the United States" in part because the Amendment "is an attempt to address a particular type of water rights dispute, not the entire field of water law litigation involving the federal government").

Section 8 of the 1902 Reclamation Act expressly requires the BOR to "proceed in conformity with" state law "relating to the control, appropriation, use, or distribution or water used in irrigation":

> Nothing in this Act shall be construed as affecting or intended 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, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. Under this provision the BOR is bound by the outcome of the contested case because it is an administrative proceeding addressing the "distribution of water used in irrigation" under Idaho law. *Id.* The Director's orders simply mean that the distribution of water to the Decrees Storage Rights will continue as it has for the last thirty years. The Director's orders do not award relief against the BOR, do not require any action by the BOR, and do not prevent the BOR from taking any action. They are binding on the BOR in the sense that, if they are affirmed, the BOR will be precluded from raising future challenges to the accounting system's existing method of determining the satisfaction of the Decreed Storage Rights. *Laughy*, 149 Idaho at 874, 243 P.3d at 1062.[64]

e. The Director did not err in Declining to Stay the Contested Case and Declining to "Follow" the Special Master Recommendation

The Petitioners assert the Director erred by declining to stay the contested case pending the outcome of the SRBA proceedings in subcase nos. 63-33732, et al., and by declining to "follow" the special master recommendation in those proceedings. *DC Brief* at 73-75; *BP Brief*

[64] The BOR's decision not to participate in the contested case may also preclude it from mounting a "collateral attack" on the Director's orders in federal court. *United States v. Hennen*, 300 F. Supp. 256, 264 (D. Nev. 1968).

at 54-56. These arguments are contrary to the Departments Rules of Procedure, the *Partial Decrees*, and the *Final Unified Decree*.

The Department's Rule of Procedure 780 provides the Director broad discretion in considering a request for a stay: "Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final." IDAPA 37.01.01.780. Construing identical language in IDAPA 04.11.01.780, the Idaho Court of Appeals confirmed "it is within the hearing officer's discretion to either grant or deny a stay." *Platz v. State*, 154 Idaho 960, 969, 303 P.3d 647, 656 (Ct. App. 2013).

This proceeding addresses questions of the distribution of water to the Decreed Storage Rights, not the beneficial use-based water rights claims pending in the SRBA. The *Partial Decrees* for the Decreed Storage Rights are "conclusive," *Final Unified Decree* at 5, 7, and were binding on the Director in the contested case. *See id.* at 13 ("The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state, and tribal law"). Further, in the Basin-Wide Issue 17 proceedings, the Idaho Supreme Court agreed with this Court's determination that "[d]etermining when a water right is satisfied is within the Director's discretionary functions." *Basin-Wide Issue 17*, 157 Idaho at 392-94, 336 P.3d at 799-801.

While the Special Master has issued a recommendation in the SRBA proceedings on the beneficial use-based water right claims, a special master recommendation "does not constitute a final ruling" of this Court. *Order Designating Basin-Wide Issue*, Basin-Wide Issue 17, Subcase No. 00-91017 (Sept. 12, 2012) at 6. Further, the recommendation has been challenged, and the challenge remains pending. The Director did not err in concluding the Special Master

recommendation in the pending SRBA claims is "not binding for purposes of this proceeding." (R.001401.)

Further, the Director did stay the contested case while Basin-Wide Issue 17 was pending before the Idaho Supreme Court, recognizing that the appeal "could impact the issues in the contested case for water accounting in WD63." (R. 000088.) But, once Basin-Wide Issue 17 ran its course, the Director recognized the question of how water is counted or credited toward the fill of a water right was "squarely before" him. (R. 000348 (citing *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800).) The Director did not abuse his discretion in declining to stay the contested case pending the outcome of the SRBA proceedings.

The Petitioners' argument that the contested case decided "the very issue" presented in the SRBA proceedings, *DC Brief* at 75, is incorrect. The contested case was initiated to "address and resolve concerns with and/or objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in Water District 63." (R. 000007.) The recommendation did not purport to address or resolve any concerns or objections regarding the accounting system. The Director did not err in declining to "follow" the recommendation for purposes of resolving the contested case. *DC Brief* at 74-76.

2. The Petitioners Were Afforded Due Process.

The Petitioners' arguments that they were deprived of due process throughout the course of the contested case, *DC Brief* at 83-101; *BP Brief* at 47-54, mischaracterize the nature and course of the proceedings and fail to identify any prejudice resulting from the alleged deprivation of due process. The record shows the Petitioners were afforded due process and they simply disagree with the outcome of the contested case.

Procedural due process requires "'there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.'" *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (citation omitted). This requirement is met when there is "'notice and an opportunity to be heard.'" *Id.* (citation omitted). The opportunity to be heard must occur "'at a meaningful time and in a meaningful manner.'" *Id.* Due process "is not a concept to be applied rigidly in every matter. Rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation." *Id.* (quotation marks and citation omitted).

The Petitioners' arguments rely primarily on mischaracterizing the contested case as a "prosecution" in which the Director determined or defined their "legal rights." *BP Brief* at 48-51; *DC Brief* at 70, 72, 75, 90, 95. The Petitioners' "legal rights" were never at issue; the Decreed Storage Rights were adjudicated in the SRBA, the *Partial Decrees* were (and remain) "conclusive" and binding in this proceeding, and the Director relied upon the *Partial Decrees*. R. 001234-36, 001288-91. The question addressed in the contested case was one of the Director's discharge of his "clear legal duty" to distribute water "in accordance with prior appropriation." *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800; *see A & B Irr. Dist. v. IDWR*, 153 Idaho 500, 518, 284 P.3d 225, 243 (2012) (referring to "[t]he distinction between the adjudication of a water right and an administration of that water right").

The contested case was initiated to provide the Petitioners (and others) with an administrative proceeding in which to present their "concerns with" and "objections to" the Water District 63 accounting system. (R. 000007.) The Director, in resolving the Petitioners' concerns and objections, considered himself bound by the *Partial Decrees*. (R. 001234-36, 001288-91.) The record establishes that the Director did not determine or define the "legal

rights" of the Petitioners, but rather addressed the Petitioners' objections to the Director's chosen method of discharging his "clear legal duty" to distribute water in Water District 63 "in accordance with the prior appropriation." *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800.

Moreover, the proceedings lasted more than two years; solicited the Petitioners' "concerns with and/or objections to" the accounting system; included a stay (at the Petitioners' request) pending *Basin-Wide Issue 17*; took the Petitioners' scheduling requests into consideration; notified the parties of the nature and location of potentially relevant documents (and made many available on the Department's website); provided for pre-hearing motions; allowed for extensive discovery including interrogatories, document production, and depositions; culminated in a five-day hearing with post-hearing briefs; and addressed the Petitioners' motions for reconsideration. (R. 000001-1435.) The record confirms that the Petitioners' concerns and objections to the Water District 63 accounting system were heard "'at a meaningful time and in a meaningful manner'" and the Petitioners were "not arbitrarily deprived of [their] rights in violation of the state or federal constitutions.'" *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91, 982 P.2d at 926 (citation omitted).

The Petitioners' many generalized assertions that the contested case deprived them of due process are contrary to the record. The Petitioners' relatively few contentions of specific instances of denial of due process are similarly without merit, as discussed below.

a. The Director's Official Notice Specifically Identified the Noticed Materials and did not Prejudice the Petitioners.

The Petitioners argue the Director deprived them of due process by taking official notice of documents that were not sufficiently identified and without providing the Petitioners adequate notice and opportunity to review the documents. *BP Brief* at 51-52; *DC Brief* at 98-100. These

contentions are contrary to the record and apply the wrong legal standards. The Petitioners had ample notice and opportunity to review and rebut the specifically identified materials, the Director's reliance on the officially noticed documents was minimal, and almost entirely to resolve factual questions the Petitioners put at issue.

Rule 602 of the Department's Rules of Procedures requires that, when taking official notice, the Director shall notify parties of "the specific facts *or* materials noticed and the source of the material noticed," that official notice should be taken "either before or during the hearing," and parties "must be given an opportunity to contest and rebut the facts or materials officially noticed." IDAPA 37.01.01.602 (emphases added). The Director provided the parties with notice of specifically-identified "materials" of which he was taking notice and the "sources" of the materials, and the Director provided notice "either before or during the hearing." *Id.* (R. 000885-87, 000959-61, 000697-701, 000678.) The parties were "given an opportunity to contest and rebut" the materials officially noticed. IDAPA 37.01.01.602.

The Petitioners' assertions that the noticed materials were insufficiently identified are contrary to the record; the notices specifically identified the "materials" and their "sources." (R. 000885-87, 000959-61, 000697-701, 000678.) The Petitioners' argument incorrectly reads Rule 602 as limiting the Director to taking official notice of "specific facts," and therefore argue the Director was required to identify all "specific facts" within the noticed materials. *See, e.g., BP Brief* at 52 (citing *Citizens Utilities Co. v. Shoshone Natural Gas Co.*, 82 Idaho 208, 351 P.2d 487 (1960)). This argument is contrary to the plain language of the rule, and in *Citizens* the Court was addressing an entirely different situation: the agency had relied on a bare reference to

"its experience in other cases" without identifying the "experiences," the "other cases," or any facts at all regarding them. *Id.* at 214-15, 351 P.2d at 490. That is not the case here.[65]

The Petitioners' argument that the Director improperly circumvented the rules of evidence, *DC Brief* at 97, also applies the wrong legal standard. *See* IDAPA 37.01.01.600 ("The presiding officer is not bound by the rules of evidence"). Moreover, the "rigorous" approach the Petitioners advocate, *DC Brief* at 97, 100, would frustrate the purpose of authorizing the Department to take official notice of facts "that could be judicially noticed" and "technical or scientific facts within the agency's specialized knowledge." IDAPA 37.01.01.602.

The Department identified the vast majority of the officially noticed materials as potentially relevant well in advance of the hearing, notified the parties of the locations of the materials, and posted as many as possible on the contested case website. (R. 000268-69, 000377, 000678.) Virtually all of the materials were public documents available at the Department, the Water District 63 office, and/or online, and were already known to the Petitioners. *Id.*[66] The Petitioners had ample notice and opportunity to review these materials, and the disclosure of their historical expert (Dr. Stevens) stated that she had "reviewed documents identified by the Idaho Department of Water Resources as relevant to the contested case concerning water rights

[65] The decision in *Grindstone Butte Mut. Canal Co. v. IPUC*, 102 Idaho 175, 67 P.2d 804 (1981) also undermines the Petitioners' characterization of *Citizens* as establishing a strict "specific facts" rule. In *Grindstone Butte*, the Court upheld an agency taking official notice of "current political, economic and environmental realities" that were within the agency's "own 'experience, technical competence, and specialized knowledge.'" *Id.* at 184, 627 P.2d at 813.

[66] The officially noticed materials (R. 000268-69, 000377, 000678) include: the Departments files for seven SRBA water right claims for the Boise River reservoirs (63-303, 63-3613, 63-3614, 63-3618, 63-2158, 63-5261, and 63-5262 - the last three claims were not decreed); the *Basin-Wide Issue 17* record; the Water District 63 "Black Books," Water District 63 water distribution records (including documents that were posted on the contested case website and accounting data for the years from 1986 through 2014); and the documents identified in "Attachment A" to IDWR's Witness, Exhibit And Document List (R. 000697-701.). *See* "Officially Noticed Docs" folder in the electronic version of the agency record. The "Attachment A" documents consisted of some of the historic documents the BOR had made available for review by the parties at its Snake River office in Boise. (R. 000692, 000678.). The dates of the "Attachment A" documents fall within the date ranges of the historic documents the Petitioners' historian expert (Dr. Stevens) reviewed at the BOR's Snake River office while researching her report for the contested case. (*Compare* R. 000697-701 *with* R. 000671-73, entry nos. 153-55, 182-87.).

accounting in Water District 63." (R. 000647.) In fact, Dr. Stevens' expert disclosure shows that her extensive review of historic documentation covered a volume of materials far greater than the materials officially noticed by the Department. (R. 000647, 000664-75.)

The Petitioners' technical expert (David Shaw), also reviewed officially noticed materials. Shaw testified that he "looked particularly at the daily accounting records that are available" in "some detail. I looked at the . . . FORTRAN code for a couple of the years, reviewed some of the input files . . . some of the support information, some of the background from the Water Control Manual" and "records of the Bureau of Reclamation and the Geological Survey." (Tr. 20150910 at 1463-64.)

The Director's reliance on officially noticed materials was almost entirely limited to the "Black Books"—the reports of water distribution and streamflow records the watermaster is statutorily required to file with the Department each year. Idaho Code § 42-606. The Director referred to the Black Books for purposes of resolving disputed questions of fact regarding historic water accounting and water rights administration both before and after the 1986 implementation of the accounting system. (R. 001249-53, 001255-56, 001272-73.) This conflict arose in part from the testimony of the Petitioners' witnesses Sisco, Stevens, and Barrie, which conflicted with the testimony of other witnesses and admitted exhibits. *Id.* The Petitioners cannot reasonably assert they had no reason to think the Black Books would be relevant to questions of historic accounting and water rights administration that they raised. The Petitioners were not prejudiced by the Director's reliance on the Black Books.[67]

[67] Other than the Black Books, the Director's reliance on officially noticed documents was largely for context and did not prejudice the Petitioners. For instance, while the Petitioners take issue with a footnote in the *Order Denying Petitions For Reconsideration* quoting the minutes of a 1979 "Committee of Nine" meeting that had been appended to a brief filed in the *Basin-Wide Issue 17* proceedings, *BP Brief* at 53 (citing R. 001425), the same "minutes" are in the record as an Admitted Exhibit. (Ex. 1017; Tr. 9/10/2015 at 1595-96.)

b. There is no Merit in the Petitioners' Arguments That the Director Predetermined the Contested Case and Should Have Disqualified Himself.

The Petitioners assert the Director was biased and predetermined the outcome of the contested case, and by not disqualifying himself, deprived the Petitioners of due process. *BP Brief* at 40-46; *DC Brief* at 83-89. In support of these contentions, the Petitioners point to the Director's public statements and resolution of the Petitioners' pre-hearing motions. *Id.* These arguments fail as a matter of law, are contrary to the record, and reduce to contentions that the Director must have been biased because he did not agree with the Petitioners' arguments.

i. The Petitioners' Disqualification Arguments are Contrary to the Department's Rules, Idaho Code, and the Record.

The Department's Rules of Procedure provide that, "[d]isqualification of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4), Idaho Code." IDAPA 37.01.01.412. The Director has sole statutory authority over "direction and control of the distribution of water from all natural sources within a water district," Idaho Code § 42-602, and the sole authority to issue final orders in administrative proceedings. Idaho Code § 42-1701A. The Director was the "agency head" in this contested case because he is the individual "in whom the ultimate legal authority of the agency is vested by any provision of law." IDAPA 37.01.01.005.04. Under Rule 412, therefore, the Petitioners' motion to disqualify the Director was governed by "Sections 59-704 and 67-5252(4), Idaho Code." IDAPA 37.01.01.412.

Idaho Code section 67-5252(4) provides that when disqualification of the agency head "would result in an inability to decide a contested case, the actions of the agency head shall be treated as a conflict of interest under the provisions of section 59-704, Idaho Code." Disqualification of the Director would have resulted in an "inability to decide" the contested case because the authority to "direct and control" the distribution of water is statutorily vested in the

Director. Idaho Code § 42-602; *Basin-Wide Issue 17*, 157 Idaho at 392-94, 336 P.3d at 799-801. No one but the Director had "ultimate legal authority" to decide the contested case. IDAPA 37.01.01.005.04.

Rule 412 anticipates such situations by citing to Idaho Code section 59-704. This statute prohibits public officials from deciding matters only if the public officials fail to disclose potential conflicts of interest. *See* Idaho Code § 74-404[68] ("A public official shall not take any official action or make a formal decision . . . where he has a conflict of interest and has failed to disclose such conflict.").

Under this framework, the Director was authorized to decide the contested case provided he disclosed the alleged "conflict of interest." At the time, a "conflict of interest" for purposes of Idaho Code section 59-704 was statutorily defined as a "private pecuniary benefit."[69] The Petitioners did not allege that the contested case would result in a "private pecuniary benefit" to the Director, any member of his household, or a business with which the Director or a member of his household was "associated."[70] The Petitioners alleged, rather, that the Director was biased and prejudiced because of his "substantial prior involvement" in issues related to the contested case. (R. 000102-105.) The "substantial prior involvement" alleged was the Director's participation in "settlement discussions" involving the SRBA proceedings and his "presentation to the Interim Natural Resources Committee." (R. 000102-03.)

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[68] In 2015, the Idaho Legislature "move[d]" the Ethics in Government Act (59-701, et seq.) to Title 74 in recognition of "a need to provide one place for citizens to find laws relating to government transparency." *Statement of Purpose*, H.R. 90, 63rd Leg., 1st Reg. Sess. (Idaho 2015). Idaho Code section 59-704 was still in effect in October 2014 when the Petitioners moved for disqualification of the Director, and when the Director issued the *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer* (R. 000100-141.) Idaho Code section 74-404 superseded Idaho Code section 59-704, and has the same or very similar language.

[69] Former Idaho Code section 59-703(4), which was also repealed July 2015.

[70] Former Idaho Code § 59-703(4).

The Petitioners' allegations of "substantial prior involvement" are not grounds for disqualification of the Director under Rule 412 and Idaho Code sections 67-5252(4) and 59-704, even if "substantial prior involvement" constituted a "conflict of interest." Idaho Code § 67-5252(4). Under Idaho Code § 59-704, the remedy for a "conflict of interest" is disclosure, not disqualification. *See also* Idaho Code § 74-404 (same). Moreover, the Director's involvement in settlement efforts and his public presentation to the Committee were already well known to the Petitioners and the other parties.

The Petitioners' arguments that the Director "failed to disclose all public and private pronouncements on the case," *BP Brief* at 40, are based on categorizing much of the Director's communications as "ex parte." *Id.* (R. 000386.). Rule 417 of the Department's Rules of Procedure only requires disclosure of contacts the Director may have had with parties to the contested case proceeding once the Director became presiding officer. IDAPA 37.01.01.417. As the Director explained in the *Response to Boise Project Board of Control's Document Requests and Requests for Disclosure,* "contacts the Director has had with legislators, legislative groups, representatives of the government of the State of Idaho, or other non-parties are not ex parte communications and do not violate the Idaho Administrative Procedure Act nor the Idaho Constitution." (R. 000387.) The Director did not err by determining he was not required to disclose all such communications.

Further, "[i]n an exercise of full transparency" the Director committed to disclose all "non-privileged written documents and communications related to the" contested case proceeding responsive to the Petitioners' requests for disclosure. (R. 000387.) Thereafter, the Director posted several responsive documents to the Department's website for the contested case proceeding under the heading "Communication Documents." These documents are included in

the record on appeal and contained in the electronic folder labeled "Communication Documents." The Petitioners' arguments that the Director erred by not disqualifying himself for a failure to disclose "substantial prior involvement" are contrary to the record, and to the provisions of the Department's rules and Idaho Code governing disqualification.

ii. The Director's Public Statements Were Made in the Discharge of his Statutory Duties and did not Evidence Bias or Predetermination.

The principal basis of the Petitioners' argument that the Director was "biased" and "predetermined" the contested case is the Director's presentation to the Idaho Legislature's Natural Resources Interim Committee in response to its request for information about *Basin Wide Issue 17* and associated questions of flood control, "refill," and accounting. (R. 000909.) The Petitioners argue the Director's presentation demonstrated "insurmountable bias" and that he was "not capable of judging [this] particular controversy fairly on the basis of its own circumstances." *BP Brief* at 40; *see DC Brief* at 85 (similar).

The Idaho Supreme Court has explained, however, that impartiality "does not mean 'lack of preconception in favor of or against a particular legal view. . . . It also does not mean having 'no preconceptions on legal issues, but [being] willing to consider views that oppose his preconceptions, and remain[ing] open to persuasion, when the issues arise in a pending case.'" *Marcia T. Turner, LLC v. Twin* Falls, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007) (citations omitted). Further, and directly contrary to the Petitioners' contentions:

> A decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is 'not capable of judging a particular controversy fairly on the basis of its own circumstances.'

Id. (citation omitted) (emphasis added).

The Director's presentation to the Committee fell well within these sideboards. The Director reviewed *Basin Wide Issue 17*, the federal on-stream reservoir system, flood control operations, the accounting system, concerns that had been expressed about the accounting, and the possible effects of changing the accounting. R. 000114-119, 000120-130. Nothing in this presentation suggested the Director had made up mind on the issues in the contested case. At most, the presentation reflected the fact that the accounting system had been operating for 30 years or more without any complaint until the Petitioners initiated *Basin-Wide Issue 17. See Basin-Wide Issue 17*, 157 Idaho at 392, 336 P.3d at 799 ("no injury alleged").

Further, in responding to the Committee's request, the Director was simply doing his job. As the Idaho Supreme Court stated in *Basin-Wide Issue 17*, the Director as state engineer[71] "is the expert on the spot," that the "[t]he legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state," and that the Legislature "has recognized the need for the Director's expertise." 157 Idaho at 394, 336 P.3d at 801 (citations omitted). The Director's duties run the gamut from engineering and enforcement to distributing water to the quasi-legislative and the quasi-judicial. Idaho Code §§ 42-1701(2), 42-1701B(5)(a), 42-602, 42-1702(4), 42-1805(8)-(9). The Director is expected to have and share opinions on policy matters with elected officials to assist them in their duties. *See , e.g.,* Idaho Code § 42-1704 ("any recommendations he may have to make in reference to legislation affecting the department"). He is expected to investigate and develop an opinion on the nature and extent of claimed water rights. Idaho Code § 42-1411. Providing to the Committee the type of information and insight that he is uniquely qualified to provide is part and parcel of the Director's job.

[71] Idaho Code § 42–1701(2).

The Petitioners' arguments ignore all this and would have the Director approach every contentious water matter with an utterly empty mind: no information and no preconceptions whatsoever. This is not realistic even for members of the judiciary. Moreover, and contrary to the Petitioners' arguments, the contested case did not adjudicate their legal rights or interests. The Petitioners' legal rights were already adjudicated in the SRBA. The contested case was an administrative proceeding initiated to provide the Petitioners an opportunity to raise their objections to how the Director is discharging his statutory duty of distributing water in accordance with the prior appropriation doctrine as established by Idaho law.

The Director's resolution of the Petitioners' pre-hearing motions and disclosure requests in the contested case also did not show bias. To the contrary, in his response to the Ditch Companies' *Motion to Disqualify*, the Director stated "that he has not pre-judged issues that he may be asked to decide." (R. 000137.) In the *Response to Boise Project Board of Control's Document Request and Requests for Disclosure*, the Director stated that he remained "committed to obtaining a full understanding of the objections to the current water right accounting," would "provide a full and fair hearing," and was "fully capable of judging this particular controversy fairly on the basis of its own circumstances." (R. 000388.)

The Director's orders are the true test of the Petitioners' bias and predetermination arguments. The Director issued detailed, reasoned orders that carefully considered the Petitioners' arguments and evidence, and the applicable law, in regard to their pre-hearing motions and the ultimate issues in the contested case. (R. 000132-41, 000335-52, 000377-91, 001230-1311, 001401-35.) The Petitioners' arguments reduce to a contention that the Director must have predetermined the issues because he did not agree with their arguments that the accounting system is unlawful and must be changed. The fact that the Director did not agree

with the Petitioners' arguments does not mean he had predetermined the issues to be decided in the contested case or that he deprived the Petitioners of due process.

c. The Contested Case was not a "Prosecution" and the Department did not Take an "Adversarial" Position.

The Petitioners' arguments that they were deprived of due process rely mainly on their still-firm belief that the Decreed Storage Rights are, by definition, "property rights" to remain "in priority" until the date of "maximum physical fill." This is the basis of the Petitioners' characterization the proceedings as "adversarial," "prosecutorial," and "hostile." *DC Brief* at 6, 85, 90, 92, 96, 100; *BP Brief* at 9, 14, 36, 38, 47, 49-54. In the Petitioners' view, the Director violated their due process rights simply by conducting an administrative proceeding that did not begin with the unquestioned premise that the Decreed Storage Rights are "property rights" to the water "actually, physically stored" in the reservoir system on the date of "maximum physical fill." *DC Brief* at 1-5.

The Petitioners' assertions that the contested case was a "prosecution" are contrary to the record. The Director initiated the contested case under the authority of Idaho Code § 67-5240 and IDAPA 37.01.01.104 with the *Notice*. The purpose was to provide an administrative proceeding in which the Petitioners (and others) could raise their "concerns with and/or objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in Water District 63." (R. 000007.) The *Notice* did not "charge" any person or entity with an "act or omission" under IDAPA 37.01.01.153, and did not seek any relief or the imposition of a penalty against any person or entity. Rather, the *Notice* determined the contested case was "necessary, for purposes of identifying and resolving concerns with and objections to the existing accounting methods,"

(R. 000006.), and the Director notified all potentially interested persons and parties that "[y]our participation is not mandatory." (R. 000001.)

The Petitioners' characterizations of the contested case as a "prosecution" and the Department's counsel as the "prosecuting attorney" incorrectly rely on the Attorney General's IDAPA rule regarding "Prosecutorial/Investigative Attorneys." *BP Brief* at 48-49 (discussing IDAPA 04.11.01.423.02.a). The Attorney General's rules have no application in Department proceedings because the Department has specifically "declined" to adopt the Attorney General's rules. IDAPA 37.01.01.050; *see* IDAPA 04.01.01.001.02 (providing that the Attorney General's apply "unless the state agency by rule affirmatively declines to adopt this chapter, in whole or in part").

The Petitioners' arguments that the contested case was a "prosecution" and the Department was an "adversarial" and "hostile" party reduce to two assertions: (1) that Department's counsel should not have been allowed to examine witnesses and present evidence; and (2) that the Petitioners' evidentiary objections were repeatedly overruled while Suez Idaho's objections were invariably upheld. *See generally DC Brief* at 6-7, 85, 90, 92, 93, 95-96, 100; *BP Brief* at 9, 14, 36, 38, 47, 49-54. These arguments are contrary to the Department Rules of Procedure and the record.

The Department's Rules of Procedure specifically provide that agency staff "may appear at the hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments." IDAPA 37.01.01.157 (emphasis added). Further, and contrary to the Petitioners' characterizations of the record, Department's counsel participated in the proceedings for the limited purpose of clarifying the

record on complex issues within the sphere of the Department's statutory authority and specialized expertise.

The Petitioners' assertions that the Director's evidentiary rulings consistently went against them are disproved by the record. The Director sustained many of the Petitioners' objections and overruled many of Suez Idaho's objections. (*See* Tr. 20150827 at 237, 268, 271; Tr. 20150828 at 470, 568, 588, 591; Tr. 20150831 at 933; Tr. 20150910 at 1539 (sustaining Petitioners' objections); Tr. 20150827 at 228-30, 284-85, 288; Tr. 20150828 at 506; Tr. 20150831 at 689, 835-36; Tr. 20150909 at 999-1000, 1004, 1012-14, 1052, 1072, 1075-76, 1090, 1127, 1154-55, 1277-78, 1285 (overruling Suez Idaho's objections).

The Petitioners' due process arguments are rooted in their rejection of the decisions of this Court and the Idaho Supreme Court in *Basin-Wide Issue 17*. In that proceeding, the Petitioners argued "the Director's discretionary functions do not include the ability to determine when a water right is satisfied" because "water rights are property rights" and the *Partial Decrees* represent property rights to remain in priority until the end of the flood control "refill" period. *Basin-Wide Issue 17*, 157 Idaho at 392-93, 336 P.3d at 799-800. This Court and the Idaho Supreme Court rejected this argument, holding the *Partial Decrees* are "a property right to a certain amount of water: a number that the Director must fill in priority to each user. However, it is within the Director's discretion to determine when that number has been met for each individual decree." *Id.* at 394, 336 P.3d at 801.

The Petitioners never accepted this decision, but rather continue to assert in this proceeding and elsewhere that the Decreed Storage Rights are "property rights" to the water "actually, physically stored" in the reservoir system at the end of flood control "refill"—that is, the date of "maximum physical fill." *DC Brief* at 1-5, 33. From the outset of the contested case

the Petitioners challenged the Director's authority to address "the issue of fill." *Basin-Wide Issue 17*, 157 Idaho at 392, 336 P.3d at 797. From the outset, the Petitioners resisted the Director's attempt to provide an administrative proceeding in which to address the objections to accounting system they have repeatedly asserted in virtually every forum except an administrative proceeding. *See BP Brief* at 6 ("Mr. Farris . . . asked whether the contested case would proceed if none of the parties agreed to participate"); *id.* at 4 (quoting the Director as referring to the contested case as a proceeding "nobody likes.").

Regardless of the Petitioners' resistance, the contested case was not a "prosecution" and the Department was not an "adversarial" and "hostile" party. Again, Idaho Code section 42-602 imposes a "clear legal duty" on the Director to distribute water "in accordance with prior appropriation," and the "'details of the performance of the duty are left to the director's discretion.'" *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800 (quoting *Musser*, 125 Idaho at 395, 871 P.2d at 812). The Director properly determined that, to fulfill his statutory duty, it was necessary to initiate a proceeding to address and resolve water users' concerns with and/or objections to the Water District 63 accounting system's method of determining when the Decreed Storage Rights are satisfied. (*E.g.*, R. 000006, 000338, 001286–88.)

d. The Petitioners' Objections to the Cross-Examinations of Batt and Sisco Lack Merit and do not Show Prejudice.

In support of their due process argument, the Petitioners also focus on two limited matters that arose during the five-day hearing: the Director's brief examination of Roger Batt, a lobbyist for the Treasure Valley Water Users Association; and Sisco's testimony that he "disregarded" the Water District 63 accounting system during flood control "refill" operations, and created an "exception" under which he curtailed junior water rights during "refill" even if

the Decreed Storage Rights had been satisfied. In neither of these cases were the Petitioners deprived of due process.

i. Batt's Testimony was Advocacy and Opinion.

The Petitioners' witness Batt is a lobbyist and his clients include a number of agricultural and natural resources organizations (Tr. 20150909 at 1266-67), including the Treasure Valley Water Users Association, of which some of the Ditch Companies are members. (Tr. 20150909 at 1269, 1291.) Batt does not have any training, education, or experience in water rights administration or the Water District 63 accounting system, had never reviewed the *Partial Decrees* for the Decreed Storage Rights, and was not familiar with the Idaho Supreme Court's *Basin-Wide Issue 17.* (Tr. 20150909 at 1283-84, 1290.) Batt testified, however, as to his clients' legal concerns about the Water District 63 accounting system and the contested case. (Tr. 20150909 at 1270-71, 1275-82.) Batt also testified he had drafted letters and documents on the accounting system for his clients that they provided to the Idaho Legislature (Tr. 20150909 at 1286-88), and that on at least one occasion, the Ditch Companies' counsel provided "legal review" of such a letter. (Tr. 20150909 at 1288.)

All of this testimony was offered before the Director examined Batt. The Director's follow-up examination of Batt was brief; less than three pages of the transcript in total. Tr. 20150909 at 1292, l. 25 - 1295, l. 18.) The Director examined Batt on the subjects as to which he had previously testified, and Batt confirmed that his role in the issues surrounding the accounting system was that of a lobbyist advocating on behalf of his clients. The Director's brief examination of Batt did not violate due process and did not prejudice the Petitioners.

ii. Sisco's Testimony Implied he had Only a Limited Understanding of the Accounting System and had Administered the Decreed Storage Rights Contrary to Idaho Law.

The Petitioners' other assertions of due process violations pertain to Sisco's previously-discussed testimony that he administered water rights consistent with the Water District 63 accounting system but for "one exception": he believed flood control was "a public service" and the spaceholders should not be "punished or take a reduced amount because of flood control," and therefore would "disregard" the water rights accounting program's determination of distribution priorities when the reservoir system was "backfilling" after flood control releases, and curtail junior water rights to divert during the "backfill" or "refill" period. (R. 001272.) Sisco also testified that he believed the Department was a signatory to the *Water Control Manual* (Tr. 20150831 at 858, 876), and that he believed the *Water Control Manual* determined the availability of water for junior water rights and future appropriations downstream from Lucky Peak. (Tr. 20150831 at 856, 885-86.)

Sisco's testimony on these subjects, as previously discussed, evidenced a limited understanding of accounting terminology and the actual operation of the Water District 63 accounting system. *See* (Tr. 20150831 at 905 ("well, I may not have understood exactly all of the terminology when it came to the computer program. I had a basic understanding of what that computer program was going to do for me. . . . I guess if I didn't understand all of the nuances of the program, then so be it.").) Sisco's concern that the spaceholders were being "punished" showed he had even less understanding of the long-standing contractual arrangements "guaranteeing" that Lucky Peak storage would be used to protect Arrowrock and Anderson Ranch spaceholders from flood control releases, and authorizing the BOR to reduce Lucky Peak storage allocations to account for the "Guarantee" and flood control releases. (R. 001272.)

Further, Sisco's testimony that he had "disregarded" the accounting system and created an "exception" under which he would curtail junior water rights on the basis of the *Water*

Control Manual evidenced a lack of understanding (or disregard) of the water right licenses[72] and Idaho law. Sisco's testimony raised the possibility that he had not adhered to his statutory duty as watermaster to distribute water in accordance with the prior appropriation doctrine "as supervised by the director." Idaho Code § 42-602; *see Almo Water Co. v. Darrington*, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972) ("Because the watermaster is a ministerial officer, he is authorized to distribute water only in compliance with applicable decrees").

This testimony was the subject of cross-examination by the Department's counsel (*see* Tr. 20150831 at 904 ("we will get to the bottom of it")), and the rebuttal testimony by Cresto and the exhibit she prepared at the Director's request. (Tr. 20150831 at 1549-80.) The cross-examination and the rebuttal was justified to clarify Sisco's assertions that he had created an accounting "exception" and had relied on the *Water Control Manual* as a basis for curtailing junior water rights.

The cross examination helped clarify that Sisco never informed the Department of the "exception," never documented it in the Black Books, and had not actually "changed anything" in the accounting, but rather that "[a]ll I knew is at the end of the season, when we went in and looked at the date of allocation, I wanted as much physical water up there as possible." (R. 001273.) As the Director found, this examination clarified that, while Sisco may have believed he created a flood control "exception" to the accounting, his specific description of the "exception" was actually the normal operation of the accounting system. (R. 001273.) As Sutter testified, the accounting system "would not have changed the experience of those water users pre-1986 as opposed to after 1986." (R. 001275; *see* R. 001276 (finding the accounting system "resulted in very little change in water distributions or storage allocations").)

[72] The Decreed Storage Rights were still licenses during Sisco's tenure as watermaster.

The Petitioners' objection that Cresto's rebuttal testimony on these matters was beyond the scope of her deposition and "IDWR was aware of [Sisco's testimony] well before the hearing" is contrary to the record. *DC Brief* at 94. Sisco's affidavits did not disclose that he had created an "exception" under which he "disregarded" the accounting system during flood control operations and curtailed junior water rights during the flood control "refill" period. It is not required (or even possible) to disclose rebuttal for testimony that was not disclosed. *See, e.g., State v. Lopez*, 107 Idaho 726, 739, 692 P.2d 370, 383 (Ct. App. 1984). Further, the Petitioners had an opportunity to cross-examine Cresto regarding her rebuttal testimony and the exhibit (Ex. 9—000114), including the data and methods she used in preparing it. (Tr. 20150910 at 1559-79, 1585-88.) In addition, Cresto's rebuttal testimony and the exhibit she prepared for it had essentially no bearing on the Director's analysis of Sisco's testimony. The Director found Sisco's testimony lacking in reliability and/or credibility on numerous grounds that had nothing to do with the exhibit. (R. 001272-74; R. 01405-06). These findings are supported by substantial evidence in the record. The Petitioners were not prejudiced by Cresto's rebuttal testimony or the exhibit.

e. The Petitioners are Not Entitled to Attorneys Fees.

The Petitioners request attorney fees and costs on appeal pursuant to Idaho Code section 12-117(1). *BP Brief* at 83-84; *Request for Reasonable Attorney Fees and Costs on Judicial Review*. The Ditch Companies are not entitled to attorney fees because they failed to request attorney fees in their opening brief as required by Idaho Appellate Rule 35(a)(5). *Morrison v. Nw. Nazarene Univ.,* 152 Idaho 660, 666–67, 273 P.3d 1253, 1259–60 (2012)) ("[W]here a party requests attorney fees on appeal but does not address the issue in the argument section of the party's brief, [the Court] will not address the issue because the party has failed to comply with

Idaho Appellate Rule 35."). Instead, the Ditch Companies filed a separate and untimely *Request for Reasonable Attorney Fees and Costs on Judicial Review* with the Court contrary to the clear requirements of Idaho Appellate Rule 35. The Ditch Companies' failure to timely request attorney fees in its opening brief precludes any award.

Regardless, the Petitioners cannot recover costs or attorney fees pursuant to Idaho Code section 12-117(1). That section provides that "the court shall award the prevailing party reasonably attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law." Idaho Code § 12-117(1). Here, the Director acted within his statutory authority and consistent with the Department's administrative rules and Idaho law in proceeding with the contested case and issuing the final orders challenged by the Petitioners. The Petitioners have suffered no prejudice to a substantial right. Because the Director has acted with a reasonable basis in fact and law, the Court should deny the Petitioners' requests for attorney fees and costs.

V. CONCLUSION

This is a water distribution case. The Director's "clear legal duty" is to distribute water in accordance with the prior appropriation doctrine. Idaho Code § 42-602; *Basin Wide-Issue 17*, 157 Idaho at 393, 336 P.3d at 800. "[A]s long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty." *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800.

The Water District 63 accounting system distributes water to the Decreed Storage Rights in accordance with the prior appropriation doctrine. The accounting system distributes to each Decreed Storage Right, on a daily basis, all of the natural flow available under the priority of the Decreed Storage Right at the decreed point of diversion (or that would have been available but

for being captured in an upstream reservoir) until the running total of the daily distributions reaches the decreed annual volume. At that point, the Decreed Storage Right is no longer "in priority" and natural flow can begin to be distributed to junior water rights. This method is consistent with the *Partial Decrees* because they are decreed solely in terms of annual volumes that are not limited by diversion rates and authorize diversions to store year-round.

The Petitioners' arguments are contrary to the *Partial Decrees*. The *Partial Decrees* do not authorize "flood control" as a Purpose of Use, and do not contain any "refill" remarks or "assurances." The *Partial Decrees* do not explicitly or implicitly reference the 1953 MOA, the Corps' 1956 Reservoir Regulation Manual, the Department's 1974 report on Boise river flood control management, or the Corps' 1985 *Water Control Manual*, runoff forecasts, "rule curves," "maximum physical fill," or "'second-in' water." The *Partial Decrees* are not decreed in terms that implicitly or indirectly recognize any "reservoir operating plan." Nothing in the *Partial Decrees* authorizes the Director to condition or limit the timing or volume of distributions on the basis of federal flood control operations. Further, extending the duration of the period of priority administration to take federal flood control operations into account would enlarge priority administration of the Decreed Storage Rights, to the detriment of existing and future junior water rights.

While the Director's clear legal duty is to distribute the natural flow supply available each day in accordance with prior appropriation, at the federal reservoirs, "[t]he entire natural flow of the stream has been diverted and stored and become subject to controlled releases," and the BOR manages releases "on a day-to-day if not hour-to-hour basis." *Lucky Peak Decision* at 22. Thus, the amount of water "actually, physically stored in the Boise River reservoirs" on the date of "maximum physical fill," *DC Brief* at 1-5, 106-08, is a measure of federal reservoir

operations, not a measure of the natural flow available for distribution. The Petitioners' various proposals for "content-based" accounting and "maximum physical fill" administration would, therefore, subordinate the prior appropriation doctrine as established by Idaho law to federal agreements, contracts and reservoir manuals. In effect the Petitioners' proposals would cede the State's sovereign authority over the distribution and development of Idaho water under state law to federal flood control operations.

The Petitioners in their contracts freely "assented" to federal flood control operations with the express understanding that Arrowrock and Anderson Ranch spaceholders would be fully protected from flood control releases, while Lucky Peak spaceholders would be subject to them. The accounting system incorporates these agreed-upon arrangements and has never caused the Petitioners to receive anything less than the amount of stored water to which they are entitled under their contracts. "Content-based" accounting and "maximum physical fill" administration, however, would shift this negotiated allocation of flood control risks to junior and future appropriators.

The Petitioners' arguments in the contested case were based on the premise that until 2012 the Decreed Storage Rights had always been interpreted and administered as being "in priority" until the date of "maximum physical fill." The Director found that the Decreed Storage Rights had *never* been accounted or administered in priority before 1986. The Director also found that since implementation of the Water District 63 accounting system in 1986, the Decreed Storage Rights had been accounted and administered as being "in priority" only until the date when cumulative daily distributions reached the decreed annual volume—"paper fill." While the Petitioners presented some conflicting evidence, the Director's findings are supported by substantial evidence in the record.

Consistent with the decisions of this Court and the Idaho Supreme Court in *Basin-Wide Issue 17*, the contested case proceeding provided the Petitioners with an administrative forum in which to have their concerns and objections regarding the accounting system addressed. Given the cloud that Petitioners' many public pronouncements of perceived problems with the accounting system had cast upon water distribution in Water District 63, the Director correctly determined that it was necessary to initiate a contested case so that he could discharge his clear legal duty of distributing water in accordance with the prior appropriation doctrine. The Director had authority to initiate the contested case and did not abuse his discretion in doing so.

The Petitioners' assertions of due process violations are rooted largely in their denial of the clear holdings of this Court and the Idaho Supreme Court in the Basin-Wide Issue 17 proceeding, that the authority and discretion to address their objections to the accounting system is statutorily committed to the Director rather than the SRBA Court. The Petitioners' due process arguments therefore mischaracterize the course of the proceedings as a systematic deprivation of their rights. The record is clear, however, that the Director provided the Petitioners with due process and that they had a meaningful opportunity to be heard in a meaningful manner. The Petitioners simply disagree with the Director's resolution of the issues.

For the reasons set forth herein, Respondents request that this Court affirm the Director's orders in full.

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RESPECTFULLY SUBMITTED this 8TH day of April 2016.

LAWRENCE G. WASDEN
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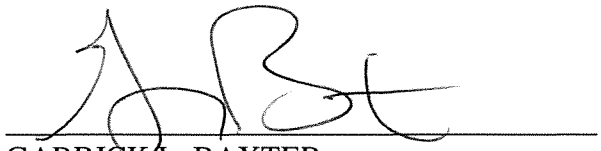

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April 2016, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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