IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BALLENTYNE DITCH COMPANY, ET AL.;

Petitioners,

and

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

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES; AND GARY SPACKMAN, IN HIS CAPACITY AS THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents,

and

SUEZ WATER IDAHO INC.,

Intervenor.

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

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

INTERVENOR SUEZ'S RESPONSE BRIEF

Appeal of final agency action by the Idaho Department of Water Resources, Director Gary Spackman, Presiding

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STATEMENT OF THE CASE

This is the response brief of Intervenor Suez Water Idaho Inc. ("Suez").[1] It responds to the opening briefs of Petitioners Boise Project Board of Control and New York Irrigation District (collectively "Boise Project") and Ballentyne Ditch Company, *et al.* (collectively "Ditch Companies"). Boise Project and the Ditch Companies are referred to collectively as "Irrigators.") This brief responds to the *Boise Project Board of Control's Petitioners' Brief* ("*BP Brief*") and the *Ditch Companies' Opening Brief* ("*DC Brief*"), both dated March 8, 2016.

I. NATURE OF THE CASE

This is a judicial review of a decision in a contested case initiated by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") on October 24, 2013 ("Contested Case"). The Irrigators challenge the Director's *Amended Final Order* (R. at 001230 to 001311).[2] The Contested Case is limited to the Department's administration of four water rights decreed by this Court under Idaho law for storage in three federal on-stream reservoirs in Basin 63 ("Storage Rights").

But this case is bigger than these four water rights. It could determine who controls the Boise River. Will the State of Idaho through the Director of IDWR continue to administer the distribution of water rights according to Idaho's Prior Appropriation Doctrine? Or will the State, for all practical purposes, relinquish control of the federal reservoirs to the federal government,

[1] Suez began its participation in this proceeding under its former name, United Water Idaho Inc., which was formally changed on November 9, 2015, by filing the appropriate articles of amendment with the Idaho Secretary of State. The name change reflects no change in corporate ownership or management.

[2] References to documents in the agency record will be cited in this brief as "R. at" followed by the agency-stamped page number (which, in some instances, includes preceding letters or numbers that identify the matter). Exhibits admitted at hearing (identified as in the record as "Admitted Exhibits") will be cited as "Ex. at" followed by the agency-stamped page number.

allowing it to send Idaho's water downstream and out of state when it judges appropriate and then refill with water belonging to other Idaho water users?

In the Contested Case, the Director correctly determined that Idaho law gives the Director authority to administer the distribution of the Boise River's waters, and discretion in how he does it. He also correctly determined that the Department's decades-old methodology for administering water to Boise River decreed storage water rights is consistent with Idaho's Prior Appropriation Doctrine. Accordingly, he properly exercised his discretion to continue using that methodology to administer the four Storage Rights.

As explained in the *Amended Final Order*, the Department's accounting methodology allocates all legally and physically storable water to decreed Storage Rights until their quantity limits are reached. The Storage Rights are no longer in priority after they are filled in this manner, at which point junior water rights are entitled to divert their water under their priorities. In other words, the reservoir operators are expected to capture and hold all storable inflow until their rights are filled. If instead they elect to bypass storable inflow or to release stored water (whether for flood control or any other non-beneficial use) that water nonetheless accrues to their Storage Rights. Once each right's decreed annual quantity is filled, it may not take more water under its priority, *i.e.*, to the determent of other right holders. However, the Department's accounting system does allow the reservoir operators to store additional water to "refill" vacated space so long as all other water rights are satisfied. As explained in Section II below, Suez calls these the "one-fill," "storable inflow," "paper fill," and "free river" principles. Using these principles, the Department's accounting system enforces the quantity and priority elements of decreed water rights and maximizes the beneficial use of the Boise River's waters consistent

with Idaho's Prior Appropriation Doctrine. See *Rangen, Inc. v. IDWR* ("*Rangen II*"), 2016 WL 1130276 (Mar. 23, 2016) (J. Jones, C.J.).

The Irrigators challenge the Director's decision. They contend that the Storage Rights implicitly include the right to "priority refill"—that is, the right to take more water than stated on the face of the right—and to do so under priority—when storable inflow is bypassed or reservoir space is vacated for flood control. They are wrong. The Storage Rights contain no explicit right to priority refill, and there is no factual basis or legal authority for implying such a right. They are also wrong that storable water released for non-beneficial uses does not "count" toward fill of their rights. Beneficial use is the basis of a water right when it is created, and a water right holder must continue beneficial use to avoid forfeiture, but the Director distributes water based on the decreed quantity. Reading a right to priority refill into the decree would ignore the decreed elements of the Storage Rights, enlarge the right, and impair maximum beneficial use of the State's water resources. The Director was within his discretion in adopting an accounting methodology that recognizes the "one-fill," "storable inflow," "paper fill," and "free river" principles. Indeed, adopting an accounting system that failed to honor these principles would violate Idaho's Prior Appropriation Doctrine and thus constitute an abuse of his discretion.

The Irrigators baldly assert that the Director's methodology deprives spaceholders of storage water they need or are entitled to. But there is no evidence of any shortfall in the 30 years since the Department's computerized accounting system was implemented. As a practical matter, they have spent enormous legal resources challenging a practice that has never hurt them. This is not to say that their rights are filled every year. There are dry years, but this case is not about those. In wet years, when flood releases occur, the reservoirs have been able to

refill under free river conditions sufficiently to avoid any actual shortage.[3], which is hardly surprising since the concern in wet years is too much water.

Might the Department's accounting system work to the Irrigators' disadvantage someday? Yes it might. If the federal government, which controls the reservoirs, decided to change the rule curves or other policies, they might not be able to refill completely under free river conditions. Under these circumstances, the Department's accounting system would insist the junior holders be allowed to fill their rights once before the Storage Rights are filled twice. That is what this case is about.

'The Prior Appropriation Doctrine is not a merciful doctrine. But it is a fair one. Contrary to Irrigators' arguments, the Department's accounting system is not to blame for any shortfall that might occur, and junior water right holders should not be responsible for any hardship that might result. It is the federal government who controls whether to release or bypass water for flood control purposes, and it is the spaceholders who agreed to allow these operations and to accept the potential that such operations might result in the failure to completely fill the federal reservoirs. Allowing the federal government to bypass and spill with impunity, and then to take a second fill at the expense of other water users, would undermine the Director's authority and responsibility to distribute water to Idaho water users based on decreed quantities. Worse yet, it would create perverse incentives for the federal government to not store water when available. Put simply, the Irrigators ask this Court to create new and bad solutions to problems that do not exist.

[3] In only one year (1989) did flood releases result in shortages to some spaceholders, but only in Lucky Peak reservoir. Even in that year, there was carryover storage at the end of the season. See discussion in footnote 33 at page 47, and accompanying text.

The Irrigators have offered no legally permissible alternative to the Department's current accounting system. What the Director has done is consistent with Idaho's Prior Appropriation Doctrine. What the Irrigators propose is not, and would result in more water wastefully flowing out of state. In short, the Director's findings and conclusions are consistent with Idaho law, are within the bounds of his discretion, and are supported by substantial and competent evidence in the record.

The weakness of the Irrigators' case on the merits of the accounting system may explain why they devote so much of their briefing to alleged procedural defects in the Contested Case proceeding. Even if the procedural arguments were correct (which they are not), they do not prejudice any substantial rights warranting relief.

Finally, they contend that the Director had no authority to engage in this Contested Case at all, but instead should have initiated a rulemaking. They are wrong, again. If the Director were required to engage in rulemaking every time he sought to take an action in the administration of water rights, the administration of water rights would grind to a halt.

The Irrigators simply fail to demonstrate any reason why this Court should overturn the Director. The Court should affirm the *Amended Final Order*.

II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

This case begins and ends with the Department's administration of the Storage Rights—four water rights decreed by this Court under Idaho law for storage in three federal on-stream reservoirs in Basin 63.[4]

[4] The Storage Rights' partial decrees are in the record at R. at 63-303-000090 to 000091, 63-3613-000060 to 000061, 63-3614-000305 to 000306, and 63-3618-001599 to 001601. For the Court's convenience, copies are set out in Addendum A to this brief, together with a table summarizing their elements.

Importantly, none of the Storage Rights include flood control storage or flood control releases as authorized purposes of use. The only references to flood control in the Storage Rights are in the partial decree associated with Lucky Peak reservoir, but no one argues that these provide a "priority refill" entitlement.[5]

In 1986, consistent with his statutory authority over the "direction and control of the distribution of water from all natural water sources within a water district," Idaho Code § 42-602, the Director implemented a computerized accounting system to assist the watermaster of Water District 63 (the Boise River basin) in determining the demand for natural flow, the amount of natural flow in the river, which natural flow rights (including rights for storage) are in priority, and the amount of water to which each diversion is entitled. *Amended Final Order* at 19 ¶ 40 (R. at 001248). The same computerized accounting system, with only minor modifications, has been used ever since. *Amended Final Order* at 42 ¶ 131 (R. at 001271).

The Department's accounting system accrues water to the Storage Rights using (according to Suez's terminology) the "one-fill rule" based on "storable inflow" and "paper fill" principles and, after complete paper fill has been achieved, allows the federal reservoirs to physically refill under "free river" conditions without injuring junior rights.[6] The *Amended Final*

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[5] The Lucky Peak partial decree includes these remarks: (1) "Lucky Peak Reservoir has 13,950 acre feet of capacity for flood control purposes in addition to the volume of water authorized for storage under this right"; and (2) "The storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation." R. at 63-3618-001600.

[6] Suez has consistently argued the propriety of these principles since the Basin-Wide Issue 17 litigation. In its brief to the Idaho Supreme Court on appeal of the SRBA District Court's decision in the Basin-Wide Issue 17 litigation, Suez (then United Water) addressed these fundamental Prior Appropriation principles and set out extensive authority addressing them from Idaho and other prior appropriation states. *Brief of Respondent United Water Idaho Inc.* ("*Appellate Brief*") at 21-41, Idaho S. Ct. Docket Nos. 40974-2013 and 40975-2013 (Oct. 23, 2013). A copy of Suez's *Appellate Brief* is in the agency record of this proceeding, R. at 000426-000516 (Exhibit 1 to the January 26, 2015 *Affidavit of Christopher H. Meyer*). *See also* R. at 40974-40975-40976–000120 to 40974-40975-40976–000210. Suez also discussed these concepts in its *Response to Department's Staff Memo*, R. at 000400 to 000410, and in *United Water's Post-Hearing Brief*, R. at 001103 to 001113. Suez has argued for these

Order explains how these principles work and how they are implemented through the Department's accounting system consistent with Idaho's Prior Appropriation Doctrine:

> Reduced to its most basic operation, the Department's accounting program determines that an on-stream reservoir's storage water right is 'satisfied' when the quantity of natural flow diverted by the reservoir in priority equals the total quantity authorized by that reservoir's decreed storage water right. Once a storage water right is satisfied, the program determines that right is no longer in priority [*i.e.*, the "one-fill" rule]. Natural flow accrues toward satisfaction of the storage water rights in this manner until all of the storage rights are satisfied or a senior natural flow right comes into priority. This methodology implements three principles of Idaho water law. First, a reservoir diverts and stores water when natural flow enters the reservoir [*i.e.*, "storable inflow"]. Second, a storage water right is satisfied when the reservoir has diverted, in priority, the total quantity of natural flow stated on the face of its partial decree [*i.e.*, "paper fill"]. Third, diversion and storage of natural flow in excess of the decreed quantity is permissible if the additional storage does not injure downstream appropriators [*i.e.*, "free river" refill].

Amended Final Order at 64-65 ¶ 28 (R. at 001293 to 001294) (bracketed material supplied; footnote omitted). Suez elaborates on these principles in Section II of its Argument below.

On September 21, 2012, this Court designated Basin-Wide Issue 17 in response to a petition filed by some of the parties to this proceeding. *Order Designating Basin-Wide Issue* ("*Order Designating*") (R. at 91017-000720).[7] The parties sought designation of a basin-wide issue because a dispute had arisen in Water District 1 regarding "the state of Idaho law pertaining to storage refill," and they "became concerned that the outcome of the storage refill issue might affect their right to the use of storage water" in Water District 63. *Order Designating* at 4 (R. at

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same principles in the so-called "Late Claims" proceedings. *See, e.g., In Re SRBA Subcase Nos. 63-33732 et al, United Water's Brief in Opposition to Irrigators' Motions for Summary Judgment* (Jul. 21, 2015).

[7] The parties who petitioned for designation of Basin-Wide Issue 17 and who are involved in this case include Black Canyon Irrigation District, New York Irrigation District, Pioneer Irrigation District, Nampa & Meridian Irrigation District, and the Boise Project Board of Control. *Order Designating Basin-Wide Issue* at 1 (R. at 91017-000720).

91017-000723).[8] The Court framed the question simply: "Does Idaho law require a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control?" *Order Designating* at 5 (R. at 91017-000724) (emphasis original).

In its Basin-Wide Issue 17 decision, this Court held:

> Simply stated, under Idaho's doctrine of prior appropriation a senior storage holder may not fill or satisfy his water right multiple times, under priority, before rights held by affected junior appropriators are satisfied once.

Memorandum Decision at 10 (R. at 91017-1419).

But this Court declined to address when the quantity element of a storage water right is considered filled, noting:

> Accordingly, the Department utilizes an accounting methodology for the purpose of determining when a storage water right has been "filled." The methodologies employed by the Department for determining when a right has been filled are beyond the scope of these proceedings.

Memorandum Decision at 9 n.6 (R. at 91017-1418).

About seven months later, on October 24, 2013, the Director initiated the Contested Case, stating that its purpose is:

> 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.

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[8] The dispute in the Water District 1 subcases involved the Bureau's assertion that the following remark should be included in partial decrees for storage rights associated with American Falls and Palisades reservoirs: "This water right includes the right to refill under the priority date of this water right to satisfy United States' storage contracts." *Order Designating* at 3-4 (R. at 91017-000722 to 91017-000723). IDWR did not recommend this remark in its Director's Reports for those claims. *Order Designating* at 3 (R. at 91017-000722). The State of Idaho disagreed with the Bureau's proposed remark, and suggested the following language more accurately reflects the state of Idaho law on storage refill: "This right is filled for a given irrigation season when the total quantity of water that has been accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights." *Order Designating* at 4 (R. at 91017-000723). The State of Idaho's proposed remark is consistent with Idaho law, the Department's accounting system for Water District 63, and Suez's argument set forth in this brief.

Notice of Contested Case and Formal Proceedings, and Notice of Status Conference ("*Notice of Proceedings*") at 6 (capitalized in original, emphasis added) (R. at 000007).[9]

As the Director explained, the Contested Case was initiated because "[t]he existing accounting processes in Water District 1 and Water District 63 have become the subject of controversy as a result of concerns and objections expressed by the Bureau of Reclamation ("Bureau") and some storage water users." *Notice of Proceedings* at 1 (R. at 000002). *See also Amended Final Order* at 3 (R. at 001232) (citing, as an example, an April 15, 2013 letter from the Boise Project Board of Control chairman containing questions about accounting procedures).[10]

In undertaking this Contested Case, the Director acted purposefully and consistently with this Court's ruling in the Basin-Wide Issue 17 proceeding. This Court said:

> [T]he authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, the Idaho Department of Water Resources and its Director.
>
> . . .
>
> The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs. The Director's discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts. When review of the Director's discretion in this respect is brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.

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[9] On the same date, the Director initiated a contested case proceeding for the same purpose in Water District 01 (the upper Snake River Basin). *Amended Final Order* at 3 (R. at 001232). The Department uses a computerized accounting system in Water District 01 that employs precisely the same "one-fill," "storable inflow," "paper fill," and "free river" principles as are employed by the Department in Water District 63. *Amended Final Order* at 29 ¶ 77 (R. at 001258). Interestingly, the Water District 01 contested case was resolved without a hearing through a proposed settlement that is pending approval by the SRBA Court. *Amended Final Order* at 5 n.4 (R. at 001234).

[10] The Boise Project Chairman's letter is in the record at WD63 Archived Docs – 000058 to 60.

Memorandum Decision at 11-12 (R. at 91017-1420 to 91017-1421) (citation omitted).

However, shortly after commencing the Contested Case, the Director stayed the proceeding at the participants' request pending the outcome of the Basin-Wide Issue 17 appeal to the Idaho Supreme Court. *Order Staying Proceeding* (R. at 000088 to 000099).

The Supreme Court issued its Basin-Wide Issue 17 decision in August 2014 and, like this Court, it declined to decide how water should be counted toward the fill of a water right. "Nor will this Court answer that question on appeal." *A & B Irrigation Dist. v. State* ("*A&B IV*"), 157 Idaho 385, 392, 336 P.3d 792, 799 (2014) (Burdick, C.J.). Like this Court, the Supreme Court held that the question must be answered by the Director: "That statute gives the Director a clear legal duty to distribute water. However, the details of the performance of the duty are left to the director's discretion." *A&B IV*, 157 Idaho at 393, 336 P.3d at 800 (quotation marks and citation omitted).

Roughly a month after the Supreme Court's decision was issued, and consistent with this Court's and the Idaho Supreme Court's directives, the Director lifted the Contested Case's stay so he could answer the question of how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting. *Order Lifting Stay and Notice of Status Conference* (R. at 000094 to 000099). Following extensive discovery, various pre-hearing matters, and failed settlement efforts, a hearing was held over five days in August and September 2015.

The parties who participated in the hearing (including Suez, the Ditch Companies, Boise Project, and the City of Boise) submitted post-hearing briefs on September 28, 2015.

On October 15, 2015 the Director issued his *Final Order* in the Contested Case. R. at 001147 to 001229. He issued his *Amended Final Order* on October 20, 2015 to correct

typographical errors and formatting issues. R. at 001230 to 001311. The *Amended Final Order* determined, among other things, that "the current water right accounting method is consistent with the prior appropriation doctrine and is the best method for efficiently accounting and distributing water and maximizing water use without waste." *Amended Final Order* at 79 ¶ 73 (R. at 001308). Accordingly, he ordered that "the Director will continue the current method of accounting for the 'fill' or 'satisfaction' of the Water District 63 federal onstream reservoirs water rights." *Amended Final Order* at 79 (R. at 001308).

The Irrigators filed their petitions seeking judicial review of the *Amended Final Order* on December 17, 2015. R. at 001436 to 001449 (Boise Project's petition); R. at 001450 to 001460 (Ditch Companies' petition).

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Is the method for "counting" or "crediting" water to the federal on-stream reservoirs in Water District 63 consistent with and/or compelled by Idaho's Prior Appropriation Doctrine? [Yes]
2. May water rights for irrigation storage purposes perfected under Idaho law be administered on the basis of federal contracts and/or federal statutes, regulations, manuals, and policies, as opposed to the law of Idaho? [No]
3. Are the Director's findings and conclusions supported by substantial evidence? [Yes]
4. Was the Contested Case properly initiated and conducted? [Yes]
5. Were the Irrigators afforded a meaningful opportunity to be heard?
6. Were the Irrigators' substantial rights prejudiced? [No]

ATTORNEY FEES ON APPEAL

Suez seeks attorney fees, in full or in part, on this judicial review pursuant to Idaho Code §§ 12-117(1) and 12-117(2). The basis of Suez's claims of attorney fees and opposition to the

Irrigators' request for fees is set out in section VI at page 73 below.

STANDARD OF REVIEW

A district court acting in its appellate capacity in a judicial review proceeding under the Idaho Administrative Procedure Act ("IAPA") must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67–5279(3); *Rangen II,* at *5 (citing *Clear Springs Foods, v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011) (Eismann, C.J.)).

A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Rangen II* at *5 (citing *A & B Irrigation Dist. v. IDWR* ("*A&B II*"), 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012) (Burdick, C.J.)). But the reviewing Court "freely reviews questions of law." *Rangen II* at *5 (citing *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011) (W. Jones, J.)).

Even if one of the standards in Idaho Code § 67–5279(3) is violated, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." Idaho Code § 67–5279(4); *Rangen II* at *6.

Discretionary decisions of an agency shall be affirmed if the agency (1) perceived the issue in question as discretionary, (2) acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and (3) reached its own decision through an exercise of reason. *Rangen II* at *6 (citing *Haw v. Idaho State Bd. of Med.*,

143 Idaho 51, 54, 137 P.3d 438, 441 (2006) (Trout, J.)). "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 Code § 67-5279(3).

Here, the Director's findings, inferences, conclusions, and decisions in the *Amended Final Order* do not violate any of the standards in Idaho Code § 67–5279(3). The Director properly acted within his discretionary authority and applicable legal standards and reached his decision through an exercise of reason. The Irrigators have not demonstrated any substantial right that has been prejudiced by any alleged error. Accordingly, the Director's decision should be affirmed.

ARGUMENT

I. THE DIRECTOR HAS BROAD POWERS TO CONTROL THE DISTRIBUTION OF WATER, BUT HE MUST EXERCISE THAT DISCRETION WITHIN THE BOUNDS OF IDAHO'S PRIOR APPROPRIATION DOCTRINE SO AS TO HONOR THE DECREED ELEMENTS OF THE WATER RIGHTS.

Idaho law gives the Director authority to administer the distribution of the Boise River's waters to decreed water rights, and discretion to determine how he does it in accordance with those decrees and Idaho's Prior Appropriation Doctrine. Idaho Code § 42-602. As this Court said in the Basin-Wide Issue 17 proceedings, "The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs." *Memorandum Decision* at 12 (R. at 91017-1421).

The Supreme Court agreed, providing this explanation of the Director's role:

> 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. That statute gives the Director a clear legal duty to distribute water. However, the details of the performance of the duty are left to the director's discretion. Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.

> ... Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.
>
> ...
>
> 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.

A&B IV, 157 Idaho at 393-94, 336 P.3d at 800-01 (quotation marks and citation omitted).

In short, the Supreme Court has "recognized the Director's discretion to direct and control the administration of water in accordance with the prior appropriation doctrine," *A&B IV*, 157 Idaho at 393, 336 P.3d at 800, and "the need for the Director's specialized expertise in certain areas of water law." *A&B IV*, 157 Idaho at 394, 336 P.3d at 801.

Thus, there is no doubt that the Director has discretion in performing his duty to determine how water accrues to the Storage Rights. In some ways, that discretion is broad. For example, the Director has exercised his discretion to begin the annual accounting period for the Storage Rights on November 1 as opposed to the beginning of the calendar year. *Amended Final*

Order at 40 ¶ 118. This exercise of discretion is wise[11] but not compelled by the Prior Appropriation Doctrine. The Director could have taken a different approach on the start date.

Then again, the Director's discretion is not unbridled. As the Supreme Court said, "the Director cannot distribute water however he pleases at any time in any way; he must follow the law." *A&B IV*, 157 Idaho at 393, 336 P.3d at 800. Here, "as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty," *Id.*, when he exercises his discretion in determining how water accrues to the Storage Rights under the Department's accounting system. The Department's accounting system confirmed by the *Amended Final Order* meets that standard.

In the sections that follow, Suez explains why it believes that the Director's use of an accounting system based on principles of one-fill, storable inflow, paper fill, and free river is not only within his discretion, but is compelled by Idaho's Prior Appropriation Doctrine.

II. THE DEPARTMENT'S ACCOUNTING SYSTEM CORRECTLY INCORPORATES THE ONE-FILL, STORABLE INFLOW, PAPER FILL, AND FREE RIVER PRINCIPLES THAT ARE COMPELLED BY IDAHO'S PRIOR APPROPRIATION DOCTRINE.

At the hearing, former IDWR Directors Kenneth Dunn, Karl Dreher, and David Tuthill testified that the current accounting system's methodologies were used during each of their tenures as Director.[12] Directors Dunn and Dreher also confirmed their prior statements in Exhibits 4 and 1003, respectively, that these methodologies are consistent with Idaho's Prior Appropriation Doctrine.[13]

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[11] It enhances the ability to begin storing water under the Storage Rights as soon as it is available after the irrigation season ends, rather than waiting for January 1 as suggested by the partial decrees. This exercise of discretion is consistent with the Storage Rights' elements, and it maximizes the state's water resources. No one has questioned this exercise of discretion.

[12] Tr. Vol. I, pp. 238-41 (Dunn); Tr. Vol. I, pp. 263-64 (Dreher); Tr. Vol. III, pp. 649-52 (Tuthill).

[13] In a 1987 letter to Watermaster Lee Sisco, former Director Dunn described the Department's accounting procedures as "simply appl[ying] the appropriations doctrine." Ex. 4 p. 2 (R. at Admitted Exhibits - 000088). In a

The Department's accounting system accrues water to the Storage Rights using the "one-fill" rule based on "storable inflow" and "paper fill" principles and, after complete paper fill has been achieved, allows the federal reservoirs to physically refill under "free river" conditions without injuring junior rights. The *Amended Final Order* correctly concludes that this approach accords with the Prior Appropriation doctrine:

> In sum, the Department's method of accruing natural flow toward the satisfaction of the storage water rights accords with the prior appropriation doctrine because it implements established diversion and priority principles without impairing the beneficial use of water stored in the reservoirs. It does so in a way that incentivizes storage, accommodates coordinated reservoir operations, avoids enlarging the storage water rights, and permits the longstanding practice of storing excess natural flow to continue.

Amended Final Order at 69 ¶ 41 (R. at 001298) (emphasis supplied).[14]

Suez explains each of these principles in the following subsections and how, by confirming their continued use in the Department's accounting system, the Director is "follow[ing] the law." *A&B IV*, 157 Idaho at 393, 336 P.3d at 800.

A. The one-fill rule

The one-fill rule is shorthand for Idaho's law that a storage water right may be satisfied only once in priority. Without using that terminology, this Court's Basin-Wide Issue 17 decision

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2015 affidavit, former Director Dreher described the principles and methodologies described in the *Staff Memo* as "consistent with my knowledge and understanding of IDWR's administration of on-stream storage water rights in Water District 63 during my tenure as Director of IDWR and Idaho's prior appropriation laws." Ex. 1003 p. 2 ¶ 4 (R. at Admitted Exhibits - 000125 ¶ 4).

[14] The *Amended Final Order*'s findings and conclusions are supported by substantial evidence in the record. On the subject of how the Department's accounting system operates, the Director relied primarily on evidence introduced through Robert Sutter, IDWR's former Hydrology Section Manager and author of the Department's accounting system, and Elizabeth Cresto, IDWR's current Hydrology Section Supervisor and operator of the Department's accounting system. As reflected in citations throughout the *Amended Final Order*, the Director's finding and conclusions are supported by testimony Mr. Sutter and Ms. Cresto provided orally at the hearing and through affidavits. In addition, the Director often cites Ms. Cresto's staff memorandum (Ex. 1, R. at Admitted Exhibits - 000001 to 000013 ("*Staff Memo*")) prepared at the Director's request specifically for this proceeding.

confirmed that the rule applies in Idaho. "The assertion that a senior storage right holder can 'fill,' or 'satisfy,' his water right multiple times under priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law." *Memorandum Decision* at 9 (R. at 91017-1418).

On appeal, the Idaho Supreme Court characterized the question of "whether a storage water right holder whose right has been satisfied once may refill that right in priority following flood control releases" as a "relatively straightforward question," and paraphrased this Court's answer this way:

> The SRBA court ultimately held that a remark was not necessary under Idaho law because under the prior appropriation doctrine, a storage water right holder could not refill its right under priority once that right had already been satisfied once.

A&B IV, 157 Idaho at 390, 336 P.3d at 797 (emphasis supplied).

This straightforward conclusion is compelled by the elemental rule of law that a water right is limited to its decreed amount. Allowing the storage of quantities greater than authorized by the Storage Rights would amount to a "double filling."

As far back as 1912, the one-fill principle was deemed black letter law and incorporated in Kinney's treatise on water law:

> As in the case with other rights acquired under the Arid Region Doctrine of appropriation, the rule of priority governs, and it is held that the reservoir having the prior right is entitled to fill the same first from the flow of the stream to the full extent of the capacity of the appropriation made therefor. But having once during any one season filled such reservoir, a later appropriation or a subsequent reservoir may take the surplus of the water flowing in the stream, after the prior reservoir has been once filled.

1 *Kinney on Irrigation*, 2nd ed. § 845, p. 1,484 (1912) (emphasis supplied).

The *Amended Final Order* confirms that the Department's accounting system incorporates the one-fill rule:

> Reduced to its most basic operation, the Department's accounting program determines that an on-stream reservoir's storage water right is "satisfied" when the quantity of natural flow diverted by the reservoir in priority equals the total quantity authorized by that reservoir's decreed storage water right. Once a storage water right is satisfied, the program determines that right is no longer in priority.

Amended Final Order at 64 ¶ 28 (R. at 001293).

> Once cumulative accruals have reached the reservoir water right's annual volume limit the water right has been satisfied or "filled" from an accounting standpoint and therefore is no longer in priority, and natural flow can begin to be distributed to junior water rights.

Amended Final Order at 37 ¶ 106 (R. at 001266)

The Director's conclusions as to the one-fill rule are supported by the record. For example, IDWR's *Staff Memo* states: "Once the reservoir's cumulative accrual has reached the [storage right's] annual volume limit, the reservoir water right can no longer accrue additional natural flow to its water right in the water rights accounting and natural flow can begin to be distributed to junior water rights." *Staff Memo* at 6 (R. at 000275; R. at Admitted Exhibits – 000006).[15] *See also* Ex. 2 ¶ 12 (R. at Admitted Exhibits - 000020 ¶ 12); Ex. 6 ¶¶ 4-5 (R. at Admitted Exhibits - 000106 ¶¶ 4-5).

In short, under Idaho law a storage right holder gets only one-fill in priority.[16] This Court already has decided this. The Idaho Supreme Court appears to agree. Suez certainly does. And so does the Department. The Irrigators never actually deny the applicability of the one-fill rule.

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[15] For simplicity of citation, subsequent pinpoint references to the *Staff Memo* will be to the original page number of the memorandum.

[16] As explained in Suez's *Appellate Brief*, the one-fill rule has been part and parcel of the Prior Appropriation Doctrine followed in the western states for more than 100 years. It is followed not only in Idaho but has been embraced by the Supreme Courts of Colorado, Wyoming, Montana, and Washington. Each of these courts has recognized that it is compelled by the Prior Appropriation Doctrine itself. Not a single appellate decision in a prior appropriation state, including Idaho, has rejected the one-fill rule.

Nor do they expressly concede its applicability.

To the extent the Irrigators implicitly concede the one-fill rule, they turn it on its head. Their contention that not all water available in priority under their rights "counts" toward the single fill of those rights would eviscerate the purpose of the one-fill rule. This takes us to the issues of storable inflow and paper fill.

B. Storable inflow and paper fill

(1) Storable inflow and paper fill call for storing water when available, not when convenient.

"Storable inflow" is shorthand for water that is physically and legally available for storage in a reservoir under a particular water right. The storable inflow principle requires that if water is coming into a reservoir and is "in priority" to the associated storage water right, it counts towards the fill of the storage right. The term "in priority" simply means that it is legally available to store, *i.e.*, is not required to be bypassed for delivery to downstream senior priority water rights.[17]

In short, if water is physically and legally available to store, the storage right holder is expected to store it. If a storage right holder decides not to store storable inflow, or stores it and later releases some of it—for whatever reason—that does not reduce or otherwise affect the right's accrued fill. The right holder may not say, "Well, I think I'll just let this water pass and then take my fill later."

Without calling it "storable inflow," the *Amended Final Order* confirms the principle is embedded in the Department's water rights accounting system:

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[17] The storable inflow principle described here is identical to the storable inflow concept used in Colorado: "Storable inflow is the amount of water that is physically and legally available for storage in a reservoir under a particular water right." Colorado Division of Water Resources, *General Administration Guidelines for Reservoirs* at 9 (Oct. 2011) (reproduced in Exhibit A to Suez's *Appellate Brief*, R. at 000482).

> Under the accrual procedures of the Water District 63 water rights accounting program, any natural flow available under the priority of an on-stream reservoir water right at its point of diversion (the dam), or that would have been available at the dam if the water had not been stored in an upstream reservoir, is accrued (distributed) toward the satisfaction of the reservoir's water right until the cumulative total reaches the water right's annual volume limit.

Amended Final Order at 37 ¶ 106 (R. at 001266). *See also Amended Final Order* at 65 ¶ 28 (R. at 001294) ("a reservoir diverts and stores water when natural flow enters the reservoir"). These conclusions are supported by the record.[18]

Counting all "storable inflow" toward fill of a storage water right is frequently described as "paper fill"—a term employed by the Department. Thus, the terms "storable inflow" and "paper fill" go together hand in glove. The term "paper fill" has been described as a "term of convenience to describe the cumulative amount of natural flow accrued to a reservoir water right in the water rights accounting." *Staff Memo* at 8 (emphasis in original). "Paper fill" captures two points: (1) all storable inflow counts toward filling the right, whether it is captured or not, and (2) releasing previously captured water does not reduce the accrued fill.

The Irrigators prefer to think of storage rights being filled when the reservoir is physically full. The Department's accounting system rejects that approach. It determines the satisfaction of the Storage Rights using a paper fill, rather than a physical fill,[19] methodology:

> Under these procedures [the Department's accounting program], accrual to a reservoir water right is not based on the

[18] "Any natural flow, that is available or would be available if not for upstream storage, and in priority at the point-of-diversion (dam), is accrued toward the satisfaction of the on-stream reservoir water rights." *Staff Memo* at 5-6.[18] "Any natural flow that is available and in priority at the point of diversion is accrued towards the reservoir right until the annual volume limit has been met." *Staff Memo* at 6. "The water rights accounting accrues natural flow that is both available (or that would be available if not for upstream storage) and in priority at the point-of-diversion toward the satisfaction of the reservoir right." *Staff Memo* at 6. All of these describe the same storable inflow concept despite not calling it by that name.

[19] "The term *physical fill* has been used to describe the water volume physically held in a reservoir or in the reservoir system." *Staff Memo* at 8 (emphasis in original).

> physical fill or contents of the reservoir, and the cumulative accrual to a reservoir water right is not reduced when storage is released from the reservoir or "bypassed." This means that a reservoir's water right can be satisfied or "filled" from an accounting standpoint before (or after) the Corps or the BOR allows the reservoir to physically fill with water. The accounting term used to describe this concept is "paper fill."

Amended Final Order at 37 ¶ 108 (R. at 001266) (citations to the record omitted).

> First, a reservoir diverts and stores water when natural flow enters the reservoir. Second, a storage water right is satisfied when the reservoir has diverted, in priority, the total quantity of natural flow stated on the face of its partial decree.

Amended Final Order at 65 ¶ 28 (R. at 001294).

This Court recognized the distinction between the filling of water rights and the filling of reservoirs in its Basin-Wide Issue 17 decision:

> 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.

Memorandum Decision at 9 (R. at 91017-1418).

The *Staff Memo* describes several reasons why "[t]he *paper fill* in each reservoir water right is frequently different than the physical fill in each reservoir . . . ." *Staff Memo* at 8 (emphasis original). To summarize: "Any difference between the accounting accruals (*paper fill*) and the physical content of the reservoir system (*physical fill*) is a result of storage deliveries, and/or releases by the Bureau, and/or reservoir evaporation." *Staff Memo* at 8 (emphasis original).

Physical fill is simply a function of reservoir operations—operations that are controlled by the federal government. It is not a water right concept, and it has nothing to do with accounting for the fill of the Storage Rights. Likewise, paper fill based on storable inflow has nothing to do with whether a reservoir is physically filled. It is an accounting principle necessary for the administration of water rights—the proper focus of this case.

At the same time, achieving complete paper fill of the Storage Rights in the current accounting system based on the storable inflow principle means that sufficient storable water has reached the reservoirs to completely physically fill them. Tr. Vol. II, p. 345 (Sutter); Tr. Vol. II, p. 541 (Cresto); Tr. Vol. V, p. 1505 (Shaw). If complete paper fill is achieved, any failure to physically fill the reservoirs results from the federal reservoir operators' operational decisions, such as deciding to bypass or release water for flood control. The State of Idaho, the Department, and other water users do not control the timing or quantity of flood control releases, or any other operational decisions by the federal government. Consequently, the federal government and its contractors (not other water users) should bear any adverse consequences resulting from those operational decisions.

(2) There is no basis to look beyond the face of the decrees.

The Director's obligation to "distribute water in water districts in accordance with the prior appropriation doctrine," Idaho Code § 42-602, "require[s] the Director to interpret . . . partial decrees." *Rangen, Inc. v. IDWR* ("*Rangen I*"), 2016 WL 768152 at *11 (Idaho Feb. 29, 2016) (J. Jones, C.J.). Here, there is no ambiguity, so there is reason to look beyond the face of the decrees.[20] Each of the decrees clearly states the maximum annual volume of water allowed

[20] "Idaho courts interpret water decrees using the same interpretation rules that apply to contracts." *Rangen I* at *8 (citing *A&B II*). The Idaho Supreme Court said in the context of an unambiguous divorce decree, "the proper analysis is to look first only to the four corners of the divorce decree. . . . The court's inquiry will move

to be diverted into storage under the right's priority date. And that is all they say. There is no provision for refill and no special rule saying that flood control releases are not part of the authorized quantity. Accordingly, neither the Director nor this Court has authority to read these provisions into the rights.

Nowhere in their briefs do the Irrigators allege the Storage Rights' decrees are ambiguous. They are not. Therefore, it is not appropriate to consider extrinsic evidence to interpret the decrees. *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 266, 297 P.3d 222, 229 (2012) (Horton, J.) ("Parol evidence may be considered to aid a trial court in determining the intent of the drafter of a document if an ambiguity exists."). *See also Rangen I* at *8-10 (finding no ambiguity in partial decrees).[21]

(3) The storable inflow and paper fill principles are necessary to prevent enlargement.

The *Amended Final Order* correctly observes that the storable inflow and paper fill principles are necessary to properly administer the Storage Rights. "By accruing to the reservoir water rights all natural flow available and in priority at the point of diversion, the accounting program recognizes and enforces 'the essential elements of priority date and quantity.'" *Amended Final Order* at 66 ¶ 32 (R. at 001295) (citing *State v. Idaho Conservation League*

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beyond the four corners of the decree . . . only when the decree is ambiguous and reasonably susceptible to conflicting interpretations." *Borley v. Smith*, 149 Idaho 171, 177, 233 P.3d 102, 108 (2010) (J. Jones, J.)

[21] In *Rangen I*, the Idaho Supreme Court agreed with the Director's and this Court's conclusions that the source and point of diversion elements in Rangen's partial decrees are not latently ambiguous. Among other things, the Supreme Court agreed with the Director that, "if Rangen truly believed that Martin-Curren Tunnel was the common name for the entire spring complex, Rangen should have sought and had its water right decreed with additional points of diversion because the entire spring complex stretches over at least two ten-acre tracts." *Rangen I* at *9. In addition, the Court agreed with this Court that "adopting Rangen's perspective would render its partial decrees less, rather than more, clear." *Rangen I* at *10. Similarly, in this case, had the Bureau (or the Irrigators) truly believed there was a right to priority refill inherent in the Storage Rights, they should have asserted such a right in their SRBA claims and sought a corresponding remark in their decrees (as the Bureau did in Basin 01). Also, as discussed in the next section of this brief, adopting the Irrigators' perspective would render the Storage Rights' decrees less clear by authorizing diversions to storage in excess of the rights' quantity element.

("*ICL*"), 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) (Silak, J.)). These principles prevent impermissible enlargement of the Storage Rights' elements by limiting priority diversions to the decreed quantities of the water rights. *Amended Final Order* at 66 ¶ 33 (R. at 001295).

Multiple fill of a water right, in priority, is an enlargement of a water right, and the Idaho Supreme Court has held that enlargement constitutes *per se* injury. "An increase in the volume of water diverted is an enlargement . . . ." *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (Eismann, J.) (quoting *Fremont–Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (Schroeder, J.)). "[T]here is *per se* injury to junior water rights holders anytime an enlargement receives priority. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Id.* (citation omitted). *See also Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001) (Walters, J.) ("Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use.")

The Irrigators' proposal is contrary to law because it would violate the one-fill rule by allowing the storage of more water than authorized under the Storage Rights' partial decrees. For example, if 750,000 acre-feet was stored under the Storage Rights, and 350,000 acre-feet was subsequently released to vacate space for flood control, the Irrigators propose "resetting" the Storage Rights' accrual to 400,000 acre-feet (750,000-350,000) thus allowing an additional 600,000 acre-feet to stored under the Storage Rights (for a final total reservoir contents of 1 million acre-feet).[22] That, however, amounts to 1,350,000 acre-feet of storage, which exceeds the Storage Rights' total authorized volume of approximately 1 million acre-feet.

[22] This example was discussed by the Ditch Companies' expert witness Dave Shaw at the Contested Case hearing. Tr. Vol. V, pp. 1519-20.

The Idaho Supreme Court has not had occasion to deal with the quantity issue in the context of storage refill. But it has been clear enough on the fundamental principle that quantity matters and that "vague and fluctuating" quantities do not fit under the Prior Appropriation Doctrine.

> This Court has imposed the measurement requirement as a corollary to the basic policy of the conservation of water resources for beneficial use. [Citing the Idaho Constitution and Water Code.] The Court has required such a measurement when the decree is intended to settle the rights of various appropriators who claim and use fluctuating amounts of water from the same source. Thus, 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. [Reference to cases rejecting decrees for unspecified amounts.] The practice condemned by these cases was not simply the issuance of unmeasured decrees but that of awarding to one competing appropriator more water than he could beneficially use. These cases express a policy against waste irrespective of the technical legal error found to have permitted it.

Village of Peck v. Denison, 92 Idaho 747, 750-51, 450 P.2d 310, 313-14 (1969) (McQuade, J.) (emphasis added).

That hits the nail on the head. If the federal government is allowed to store, release, and store again more water than it takes to fill its water rights, it will have stored more water than it can beneficially use, and it is "likely that that [it] will waste water and yet have the power to prevent others from putting the surplus to any beneficial use." *Id.*

The Irrigators' proposed methodology would take away the Director's authority under Idaho Code 42-602 to administer the State's public waters in the Boise River according to their stated quantities, and effectively abdicate that authority to the federal reservoir operators, empowering them to injure juniors at will. As the Idaho Supreme Court said in the context of the right to take water during free river conditions: "[T]he elimination of all of the elements of a

water right, particularly the essential elements of priority date and quantity, vitiates the existence of a legal water right in the 'excess' water." *ICL*, 131 Idaho at 333, 955 P.2d at 1112. The Irrigators' proposal would allow the federal government to take any quantity it chooses, thereby vitiating the quantity element of their decreed rights. As the *ICL* Court said, that may be allowed during free river conditions (see discussion of free river condition refill in section II.C at page 42). But a water right under right of priority with no meaningful quantity limit does not fit within the Prior Appropriation system.[23]

The Irrigators' approach would effectively, and impermissibly, give the federal government a priority entitlement to all of the Boise River's unappropriated waters. *In re SRBA Case No. 39576, Subcase Nos. 74-15051 et al.* ("*Lemhi High Flow Decision*"), Memorandum Decision and Order on Challenge, at 25 (Idaho Dist. Ct. for the 5th Judicial Dist., Jan. 3, 2012) (Wildman, J.) ("high flows are therefore unappropriated water"). But the federal government has no right to prevent future appropriations. Idaho Const. art. 15, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied"); *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982) ("The right to appropriate unappropriated water is guaranteed by article XV, section 3 of the Idaho Constitution").

The decreed rights include no flood control exception to the quantity element in the Storage Rights' decrees.[24] Accordingly, if the storage right holders release storable water, they

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[23] This is not to say that a water right could not expressly provide for second fill, or that another right for additional fill could not be perfected. *See infra* footnote 28 at page 42. An express provision to that effect would not be "vague and fluctuating" (in the words of *Village of Peck*). But such a right would need to pass muster under the all other aspect of Idaho law, including lawful diversion and beneficial use, to be created in the first place.

[24] In his decision in the Late Claims proceedings, the Special Master agreed with this logic. "United Water's argument is likely correct when applied to a hypothetical situation involving a reservoir operated for the sole purpose of water storage." *In Re SRBA, Subcase Nos. 63033732 et al.* ("*SM Recommendation*"), Memorandum Decision and Order Granting Ditch Companies' and Boise Project's Motions for Summary Judgment, et al. 17,

must allow other water users to fill their rights before taking a second fill of the storage rights. This might sound harsh, but that is how the prior appropriation doctrine works when water is scarce.[25] Far from rendering the Storage Rights' elements "meaningless," *DC Brief at 65*, the storable inflow and paper fill principles represent strict enforcement of the quantity and priority date elements.

(4) The storable inflow and paper fill principles are necessary to ensure the maximum beneficial use of the State's water resources.

The storable inflow and paper fill principles are compelled as well by principles of maximum beneficial use, as observed in the *Amended Final Order*:

> This methodology also creates an incentive to store water when it is most readily available and least in demand by other appropriators—i.e., prior to irrigation season. This incentive is in keeping with the longstanding policy of the law to encourage the most efficient and least wasteful use of the waters of the state. It is also consistent with the opportunistic role storage water rights have in Idaho water law. The purpose of storage is to capture high

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(Idaho Dist. Ct. for the 5th Judicial Dist., Oct. 9, 2015) (Booth, Special Master). He then went off track and determined incorrectly that such a situation is not present with the Storage Rights because of the federal government's flood control policies in the *WCM*:

> In a hypothetical situation involving a "storage only" reservoir operation, it seems unlikely that Idaho law would allow the reservoir operator to voluntarily release or bypass otherwise storable inflow (for whatever reason) during a time of year when there is no demand for it by juniors and subsequently store water at a time when juniors could use such water. In such a situation, the voluntary action of the reservoir operator (even if such voluntary action was for the purpose of flood control) would injure the hypothetical juniors and would likely not be permitted under Idaho law. However, this hypothetical scenario is inapplicable to the Boise River Reservoirs. The Bureau and the Corps of Engineers are legally obligated to operate the Boise River Reservoirs for flood control purposes. The effect of this is that available storage capacity of the Boise River Reservoirs is not fixed but rather it fluctuates in accordance with the rule curves of the Water Control Manual.

SM Recommendation at 17 (emphasis supplied).

The Special Master's recognition that the Irrigators' approach to accounting would result in a right that "fluctuates in accordance with the rule curves of the Water Control Manual" is exactly the problem. It is exactly the sort of "vague and fluctuating" quantity element that was condemned in *Village of Peck v. Denison*, 92 Idaho 747, 750, 450 P.2d 310, 313 (1969) (McQuade, J.).

[25] "These principles [of the prior appropriation doctrine] become even more difficult, and harsh, in their application in times of drought." *Am. Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007) (Trout, J.).

> flows in times of plenty for later use, when the natural flow supply dwindles.

Amended Final Order at 66 ¶ 32 (R. at 001295) (internal quotation marks omitted; citing *Simonson v. Moon*, 72 Idaho 39, 47, 237 P.2d 93, 98 (1951) (Taylor, J.); *Reynolds Irr. Dist. v. Sproat*, 69 Idaho 315, 334, 206 P.2d 774, 786 (1948) (Miller, J.); *A&B IV*, 157 Idaho at 389, 336 P.3d at 796; *American Falls Reservoir Dist. No. 2*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2006) (Trout, J.); *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) (Givens, J.); *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943, 945 (1935) (Alshie, J.)).

Idaho's commitment to maximum beneficial use is firmly established and on par with other bedrock principles of the Prior Appropriation Doctrine. "The purpose of the one-fill rule is to promote the beneficial use of water." A. Dan Tarlock, *Law of Water Rights and Resources* § 5:39 (2007).

In a seminal 1902 decision, our Supreme Court noted that a senior may not take his water inefficiently so as to deprive others:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much by proper application.

Van Camp v. Emery, 13 Idaho 202, 202, 89 P. 752, 752 (1907) (Ailshie, C.J.).

The same approach was taken by the U.S. Supreme Court in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912), where a senior appropriator used a waterwheel driven by the current of the Snake River to raise irrigation water to his lands. The Supreme Court affirmed the lower court ruling that there is "no right under the constitution and laws of the State of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses." *Schodde*, 224 U.S. at 117 (1912). The

Court cited one of its earlier cases in concluding that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *Schodde*, 224 U.S. at 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)).

In the same year, the Idaho Supreme Court held that extending priority to "all the waters that flow" during the high runoff period is contrary to the constitutional principle that right to appropriate unappropriated flows may never be denied:

> To say that the respondents are entitled to all the waters that flow in the stream, when there is more water flowing at some seasons of the year than respondents are able to divert and apply to a beneficial use, would deny the right of appropriation by any other person, notwithstanding the fact that the respondents were not diverting or applying the excess to a beneficial use.

Lee v. Hanford, 21 Idaho 327, 331, 121 P. 558, 560 (1912) (Stewart, C.J.).

Citing a line of cases back to 1900, the Idaho Supreme Court observed in 1990: "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) (Bakes, J.).

In 2011, the Supreme Court reiterated the State's longstanding commitment to this principle:

> In *Niday v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909), we stated, "The theory of the law is that the public waters of this state shall be subjected to the highest and greatest duty." In *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909), we phrased it, "Economy must be required and demanded in the use and application of water." In *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960), we expressed the same concept by stating, "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (Eismann, C.J.).

Just last month, the Idaho Supreme Court reinforced over a century of precedent on this subject. "As we recently stated in *Clear Springs*, the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy in Idaho." *Rangen, Inc. v. IDWR* ("*Rangen II*"), 2016 WL 1130276 at *13 (Mar. 23, 2016) (J. Jones, C.J.).

> As discussed, Idaho law contemplates a balance between the "bedrock principles" of priority of right and beneficial use. The Director is authorized to undertake this balancing act, subject, as he acknowledged here, to the limitations of Idaho law.

Rangen II, at *13 (citing *In Matter of Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.* ("*A&B III*"), 155 Idaho 640, 650, 315 P.3d 828, 838 (2013) (Horton, J.)).

Finally, the Court explained that *Schodde* is not just about a reasonable means of diversion. It established a general principle of maximum beneficial use:

> [T]he principles stated in *Schodde* apply equally in this water management case where the senior appropriator seeks to assert control over practically the entire aquifer, regardless of the minimal benefit to the senior and the great detriment to the juniors.

Rangen II, at *15.

This maximum use principle is of great import here. By their very nature, on-stream reservoirs control the entire river. That control is reflected on the face of the associated storage right in that, unlike other rights, they are decreed with no instantaneous flow limit. The only quantity limit is their annual volume. Thus, they may take every drop. This unique quantity limitation gives storage rights both the ability and the obligation to capture all legally available water when they can, as early in the accounting year as possible.

There is a fundamental difference with regard to the

> diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

Rayl v. Salmon River Canal Co., 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) (Givens, J.).

In other words, contrary to the immediate use required of rights diverted from natural flow, "[w]ater diverted and stored pursuant to a storage water right need not be put to the end use immediately, but may be stored for a period of time prior to the end use . . . ." *A&B IV*, 157 Idaho at 389, 336 P.3d at 796.

These fundamental attributes of storage rights require the conclusion that an on-stream reservoir operator may not fill its reservoir at the operator's convenience. Simply put, on-stream reservoirs are expected to fill when they can. To the extent possible, this should happen before or early in the irrigation season when plenty of water is available. *Amended Final Order* at 66 ¶ 32 (R. at 001295). When storable inflow is released or bypassed during these periods, it rarely provides benefit to downstream holders of water rights (most of whom desire diversions during the irrigation season).

If the federal reservoir operators were allowed to determine when and how much water should be counted toward the fill of the Storage Rights, the federal government could decide to forego capturing storable inflow during the non-irrigation season and instead store water later. This would not further the policy of maximizing beneficial use of the State's water resources. Indeed, if water is not captured in the winter and spring, it will very likely leave the State undiverted by any user. Meanwhile, capturing water later is more likely to come at the expense of junior users who need the water at a time when it is less plentiful.

The Director's accounting system, which requires the Storage Rights to take the water

when it is legally available or run the risk that it may not be available later, conforms to the "bedrock principle" of maximum beneficial use. As the Director noted in the quotation at the beginning of this subsection, this approach creates the proper incentive to manage reservoir storage efficiently, putting as much water to work for Idaho as possible. Indeed, it has worked magnificently well (see footnote 33 at page 47). This system is not broken. The Director exercised his discretion appropriately in deciding not to break it.

(5) Water rights are quantified on the basis of beneficial use at the time of their creation, not at the time of their distribution.

The Irrigators urge that the Department's accounting system be reprogrammed so that the amount of water accrued to the Storage Rights is reduced by the amount of water released or bypassed during flood control operations. *DC Brief* at 67. They observe that such water is not applied by them to beneficial use. From that correct premise, they leap to the incorrect conclusion that water not beneficially used does not count toward fill.

Beneficial use is important. But an assessment of beneficial use has nothing to do with the Director's responsibility to distribute water to a water user once her water right has been established. The Director's responsibility under Idaho Code § 42-602 is to "distribute water in water districts in accordance with the prior appropriation doctrine." Distribution is not the time for making judgments or predictions as to beneficial use. Beneficial use is evaluated at the time of permitting, licensing, transfer, exchange, lease, rental, adjudication, or forfeiture proceeding. *See*, *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912) (Stewart, C.J.). At the time of distribution, the Director simply allocates the water according to the quantities and priorities on the face of the water rights. "[D]ecree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." *Rangen I* at *5 (citing Idaho Code § 42–1420(1)).

> [T]he 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.

A&B IV, 157 Idaho at 394, 336 P.3d at 801 (emphasis added).

It is not the Director's job to ensure that water diverted under a water right is put to beneficial use. That is the water right holders' (or their contractors') job. If the right holder fails to beneficially use the water to which he or she is entitled—for any reason, good or bad—the right holder will suffer whatever consequences occur and is not entitled to demand make-up water at the expense of others.

To be clear, evaluation of the extent of beneficial use is a bedrock principle, but it occurs at another time. Indeed, at the time of distribution (based on water rights whose beneficial use already has been established), the Director has no way of knowing what the user will do with the water. If a farmer takes water under a water right and wastes it needlessly, that has no effect on whether that right has been filled. Her right has been filled whether she uses it beneficially or irrigates rocks.

Indeed, when water is diverted to storage, it may be held in storage for years. At the time of diversion to storage, the Director cannot know whether it will be released for flood control years hence. And in any year that a flood control release is made, on what basis can the Director say that it was this year's water that was released as opposed to last year's carry over? The Irrigators' idea that accounting for water right accrual is linked to beneficial use is unworkable.

It is also unfair. It is unfair because other water users cannot be expected to make up the shortfall caused by the acts of the right holder. For example, if Suez needed to dispose of water held in one of its storage tanks because it was contaminated by an evil doer, that disposal would be for the public good. But that would not entitle Suez to take more water than it is entitled to

under its water rights in order to refill its storage tank. Likewise, releasing water for flood control may be praiseworthy. But a praiseworthy act does not entitle a good Samaritan to take someone else's water to make him whole.

In support of their argument, the Irrigators cite *Morgan v. Udy*, 58 Idaho 670, 680, 79 P.2d 295, 299 (1938) (Givens, J.), and *U.S. v. Pioneer*, 144 Idaho 106, 113, 157 P.3d 600, 607 (2007) (Schroeder, C.J.). But these cases discuss the subject of beneficial use only in the context of perfecting, not administering, an appropriation.[26]

Of course, continued beneficial use is necessary to avoid forfeiture of a water right. Idaho Code § 42–222(2). But this case is not about whether the Storage Rights have been forfeited, and no one contends that they have. This case is about how the Director counts water toward the fill of the Storage Rights. He does this properly by counting how much water is physically and legally available under the Storage Rights.[27] Whether the water is later put to beneficial use does not change the distribution.

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[26] *See, e.g. Pioneer*, 144 Idaho at 113, 157 P.3d at 607 ("The underlying principle of the state law, which requires application of the water to beneficial use before a water right is perfected, is the same [recognized by the U.S. Supreme Court]. In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation."); *Morgan*, 58 Idaho at 680, 79 P.2d at 299 (holding that a valid appropriation may be established by diversion and beneficial use even though the appropriator has "only a temporary and revocable way of conveyance for his water"). No one disputes here whether the Storage Rights are valid appropriations perfected under state law.

[27] In arguing to the contrary, Boise Project seizes on a single word in the Basin-Wide Issue 17 decision: "In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user." *A&B IV*, 157 Idaho at 394, 336 P.3d at 801 (emphasis supplied). It would be error to place any weight on that word. The Court just said "used"; it did not say beneficially used. In any event, the Court made exceptionally clear that it was not deciding whether water released for flood control does or does not count toward fill. "To clarify, we are not holding that the SRBA court abused its discretion in declining to designate the question of whether flood control releases count toward the "fill" of a water right as a basin-wide issue. Nor will this Court answer that question on appeal." *A&B IV*, 157 Idaho at 392, 336 P.3d at 799. "The SRBA court did not abuse its discretion by declining to address when the quantity element of a storage water right is considered filled or in stating that such a determination was within the Director's discretion." *A&B IV*, 157 Idaho at 394, 336 P.3d at 801. Boise Project's suggestion that this issue was decided based on the word "used" is not credible. (See *BP Brief* at 36, referring to this as a "holding.")

C. Refill under free river conditions

While Idaho's Prior Appropriation Doctrine insists on strict application of the rule of priority, it is founded as well on the principle of maximum beneficial use of water. Accordingly, rather than letting water run unused down the river and out of state, a reservoir operator may lawfully top off a reservoir, even after its first paper fill, when doing so impairs no other water right. This is why, as a practical matter, the Irrigators have suffered nothing under the Department's administration of the principles of one-fill, storable inflow, and paper fill over the last 30 years. *See infra* footnote33 at page 47,.

Under this so-called free river principle, the federal on-stream reservoirs are allowed to physically refill after water is bypassed or released earlier in the storage season so long as all other water rights are satisfied—even after the Storage Rights have been filled, and without an express authorization to refill under a water right.[28]

This right to refill without injury to others is inherent in every storage right. Former IDWR Directors Tuthill and Dreher testified at the Contested Case hearing that it does not require express authorization.[29] This rule is fully consistent with Idaho law, it has been followed in the current and historical administration of the Storage Rights, it has never dealt any harm to the spaceholders or the Bureau, it furthers the state's policy of maximizing the use of the state's

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[28] It also is possible for a storage right holder to obtain a second fill under priority if such an entitlement was part and parcel of the original appropriation or if a separate water right for refill is perfected, subject to whatever priority and conditions are stated on such right. However, because no such rights exist today, the Department's accounting system does not account for any. The so-called "Late Claim" proceedings ostensibly involve claims for such rights, but the Ditch Companies and Boise Project (and the United States of America) have argued that those claims actually are "not necessary." *See, e.g., In re SRBA Subcase Nos. 63-33732 et al., [Boise Project's] Brief in Support of Motion for Summary Judgment* at 3 ("The Boise Project submits that a refill right is not necessary, for the reasons explained herein." (footnote omitted)).

[29] At the hearing, former Director Tuthill testified that the initial water right (here, the Storage Rights) provides the basis for refilling under free river conditions (i.e. when there is sufficient water to fill all water rights). Tr. Vol. III, p. 691 ll. 19-24. Former IDWR Director Dreher described the long-standing practice of allowing refill without injury to others as "implied" in the original right. Tr. Vol. I, p. 279 ll. 2-17.

water resources, and it protects junior water rights' expectation that the water system will be maintained as the juniors found it.

The term "free river conditions" has been used to describe the situation "when natural supply rendered official administration unnecessary." *N. Sterling Irrigation Dist. v. Simpson*, 202 P.3d 1207, 1209 (Colo. 2009).

> "'Free river conditions' occur when there is sufficient natural supply to satisfy all water uses, whether decreed or undecreed, and State Engineer administration is unnecessary for the protection of decreed water rights." *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1149 n.14 (Colo. 2001). Water users may divert beyond the measure of their decrees during free river conditions because the diversion and storage does not infringe upon the rights of other water users. *City of Westminster v. Church*, 445 P.2d 52, 59 (Colo. 1968).

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 539 n.137 (2006).

Using the term "excess flows" instead of "free river," the *Amended Final Order* confirms that the Department's accounting system allows the historical practice of refilling reservoir space with "excess flows" after the Storage Rights are satisfied once:

> It is undisputed that the Department's longstanding policy has been to allow the on-stream reservoirs to refill the space evacuated for flood control if it can be done without injury to other appropriators. Both the Idaho Supreme Court and the SRBA District Court have approved the recognition of historical practices related to the diversion and use of "excess flows" through general provisions in the SRBA insofar as the there is no resulting injury to other appropriators and the use is consistent with historical practice. These cases support the conclusion that the historical practice of the use of excess flows to fill the on-stream reservoirs in Water District 63 is appropriate where there is no resulting injury to other appropriators.

Amended Final Order at 67 ¶ 34 (R. at 001296) (citations omitted).

This Court's and Idaho Supreme Court's decisions cited by the Director in the quotation above confirmed that Idaho law allows the diversion of unappropriated "excess water" or "high

flows" in addition to the amount authorized by a water right. In 2012, after discussing the Idaho Supreme Court's decisions in *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1997) ("*A&B I*") and *ICL*, this Court held that Idaho law may recognize "based on historical practices . . . the 'use' of high flow water not amounting to a water right." *Lemhi High Flow Decision*, at 18.[30] The Ditch Companies' and Boise Project's opening briefs do not address this decision, nor do they dispute that Idaho law allows the historical practice of diverting high flow water not amounting to a water right so long as other rights are not injured.[31]

The United States (who is not a party to this judicial review despite owning and operating the federal on-stream reservoirs in Basin 63) recognized the right to free river refill in its briefing to this Court in the Basin-Wide Issue 17 litigation:

> [N]o party has disputed Reclamation's ability to refill its reservoirs; the issue has been whether refill may be done under the priority of Reclamation's storage water rights. By emphasizing that the issue before the [SRBA] Court is whether "refill" can occur in priority, the Court effectively affirmed that no remark is necessary for "refill" done using water that can be stored without injury to other water rights.

United States' Opening Brief on Basin-Wide Issue No. 17, at 1 n.1 (R. at 91017 – 000990).

The State of Idaho said much the same thing in that case: "A remark authorizing storage refill using excess or surplus flows and that would not impair other water rights would be

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[30] This Court's holding was made in the context of determining whether the SRBA Court could decree a general provision allowing the use of high flow water. But this does not limit the fundamental principle it approved, which is that Idaho law allows the diversion and use of high flow water even though such a practice "does not create a water right." *Lemhi High Flow Decision* at 19 (explaining the *A&B I* holding). This Court did not hold that an SRBA-decreed general provision is necessary to authorize the use of high flow water. Rather, it stated "if the expectation of the general provision was to authorize use of high flow water ancillary to an existing water right but not amounting to a water right then a general provision may be appropriate." *Lemhi High Flow Decision* at 21 (explaining the holding in *ICL*) (emphasis supplied).

[31] In fact, in the *Lemhi High Flow Decision* case, the same law firm now representing the Boise Project in this proceeding argued in favor of the historical practice of diverting high flow water not amounting to a water right so long as other rights are not injured. *See, e.g., In re SRBA Case No. 39576, Subcase Nos. 74-15051 et al.*, Lemhi Irrigation District's Opening Brief on Challenge, at 7 (Idaho Dist. Ct. for the 5th Judicial Dist., Sep. 23, 2011) ("diverting and using available high flows is a critical water use practice in the Lemhi Basin that continues today.").

consistent with Idaho law, but not required to validate and continue historic administration and practice, which routinely allows such refill." *State of Idaho's Opening Brief*, at 2 n.1 (R. at 91017–000927).

Consistent with this, after the Storage Rights reach paper fill, the Department's water rights accounting system classifies storage of this excess or surplus water as "unallocated" or "unaccounted for" storage (although calling it "free river storage" might be easier to understand) because it is water stored without accrual to a specific water right.

> The reservoirs often store additional water after the reservoir water rights have "filled on paper" when there is empty space in the reservoir system and the inflow to the system exceeds the demand under downstream rights. The water rights accounting program does not attribute this additional storage to the reservoir water rights after they have "filled" from an accounting standpoint; the additional storage, rather, is tracked as "unaccounted for storage" or "unallocated storage" that is not associated with or credited to any water right.

Amended Final Order at 38 ¶ 110 (R. at 001267) (internal citations omitted).

> In flood control years, the reservoir water rights often reach "paper fill" relatively early in the year due to the high runoff, and as a result a significant portion of the water stored during the flood control "refill" period may consist of "unaccounted for storage."

Amended Final Order at 38 ¶ 111 (R. at 001267).

> Any water in excess of all other water rights that is physically held in the on-stream reservoirs after flood control releases is characterized as "unaccounted for storage" or "unallocated storage."

Amended Final Order at 41 ¶ 124 (R. at 001270).

> The "unaccounted for storage" consists of excess flows captured in the reservoir system on the receding end of the flood period in high water years when the forecasted runoff volume is greater, often significantly greater, than the capacity of the reservoir system.

Amended Final Order at 49 ¶ 158 (R. at 001278).

In short, when physical fill of the federal on-stream reservoirs in Basin 63 is less than the paper fill of the Storage Rights due to flood control or other operational releases, the reservoirs can and do refill with excess flows under free river conditions. Importantly, it does so without violating the Storage Rights' priority or quantity elements *and* without detriment to other water rights. *Amended Final Order* at 64 ¶ 27 (R. at 001293) ("By tracking the additional storage as "unaccounted for storage" rather than attributing it to the storage water rights, the Water District 63 accounting system avoids violating the rights' decreed priorities and quantities.").

Despite its water rights accounting classification as "unallocated" or "unaccounted for" storage, the free river refill water is in fact allocated to the storage spaceholders for their beneficial use. *Amended Final Order* at 38 ¶111 (R. at 001267) ("The 'unaccounted for storage' is credited back to the reservoirs in order of priority on the 'day of allocation,' and otherwise made available to storage water users."). This is done using the Department's storage program, which is a separate program from the water rights accounting program. *Amended Final Order* at 38 ¶ 112 (R. at 001267) ("The amount of stored water allocated to water users' storage accounts each year is calculated by the storage program."); *Amended Final Order* at 35 ¶ 98 (R. at 001264) ("Two separate but related computer programs are used in the accounting process: the water rights accounting program and the storage program.").

None of this is news. In February 2008, during the SRBA litigation involving the streamflow maintenance portion of Lucky Peak's Storage Right (No. 63-3618), the United States explained to this Court:

> After the reservoir rights have filled on paper, that refill water is designated as "unaccounted for" storage. As the

> reservoirs begin to refill, the "unaccounted for" storage account continues to be credited on paper as long as excess natural flow is available to the system. The reservoirs remain filled on paper for the duration of the season.
>
> Ideally, the reservoirs capture enough "unaccounted for" storage to match the paper fill in the accounting system. In some years, however, more water is released for flood control than is subsequently captured from the run off. When that happens, the shortfall is termed "failure to refill due to flood control[.]"

Reply Brief in Support of the United States' Motion for Summary Judgment ("*US Reply*"), at 11-12 (R. at 63-3618–001323 to 63-3618–1324). The attorneys for the Ditch Companies and the Boise Project participated in the Lucky Peak proceedings on behalf of some of the same clients they represent in this judicial review. *US Reply*, Certificate of Service (R. at 63-3618–001327).[32] The ins and outs of the Department's accountings system were on full display in the Lucky Peak proceeding (which was pending prior to the issuance of the Storage Rights' decrees), undercutting any claims of ignorance by the Irrigators now. (Not that ignorance of the law changes the law.)

Allowing storage of water under free river conditions, and allocating it to the spaceholders, has worked well since computerized accounting began in 1986, with only one year (1989) resulting in a shortfall of water to the irrigation spaceholders in Lucky Peak as a result of flood control operations.[33] In that year, irrigation spaceholders with senior rights in Arrowrock

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[32] The parties represented by the same counsel in the Lucky Peak case and in this judicial review include: South Boise Water Company, Nampa & Meridian Irrigation District, Boise Project, and New York Irrigation District. Settlers Irrigation District, Pioneer Irrigation District, Canyon County Water Company, Middleton Irrigation Association, and Middleton Mill Ditch Company also participated in the Lucky Peak litigation, but through different counsel than in this judicial review. *See* R. at 63-3617 – 001532-1533 (*Memorandum Decision and Order on Cross-Motions for Summary Judgment re: Bureau of Reclamation Streamflow Maintenance Claim*).

[33] At the hearing, Ms. Cresto testified that in 1989 the three reservoirs failed to physically fill due to flood control by more than the 60,000 acre-feet of "cushion" provided by the Bureau, and therefore the Lucky Peak spaceholders received less than full allocations. Tr. Vol. II, pp. 534-36 (explaining Ex. 1019, R. at Admitted Exhibits – 000220). *See also* Ex. 1020 p. 12, R. at Admitted Exhibits - 000242 (Ms. Cresto's presentation displaying the amount of total system shortfall experienced since 1985 due to flood control). However, even though not all of the Lucky Peak storage was completely filled in 1989, the record shows that no spaceholders suffered any shortage that year. This conclusion is apparent because there was substantial Lucky Peak carryover—that is, storage

and Anderson Ranch received their full allocations. This was recognized during the Lucky Peak proceedings mentioned above, where then-SRBA Presiding Judge Melanson and counsel for the United States discussed how filling reservoirs during flood control operations occurs only when water is plentiful:

> MR. GEHLERT: . . . Both Ms. Mellema for the Bureau of Reclamation and Mr. Sutter, who, as I said, was the manager at IDWR, went through water master records and concluded that, in fact, the irrigators had been kept whole in every year for which there was flood control operations, as is required by the contracts.
>
> Now, Mr. Campell —
>
> THE COURT: Excuse me, Mr. Gehlert. Wouldn't you expect that? I mean, in flood control years there'd be a lot of water.
>
> MR. GEHLERT: See, what happens—there is a lot of water, but every year the Bureau has to make an estimation whether so much water is going to come that it's going to overtop the dam and cause a flood. And obviously they don't want to cause a flood, so what they do is they vacate water before the spring runoff comes. Now, as I said in my opening remarks, it's a very complicated calculation. . . .
>
> So some years they dig a hole that's too big, because they want to error [sic] on the side of preventing floods. So some years they may evacuate more water than they catch that comes off in the spring runoff. Those are the years where there's this shortfall due to flood control operations. And under the contracts we are required to make sure that the Anderson Ranch and the Arrowrock contractors are kept whole in those years.
>
> THE COURT: And you've done that.
>
> MR. GEHLERT: And we've done that. And that's what Mr. Sutter testified to.

Ex. 1022 (Lucky Peak MSJ Transcript, at 66-68) (R. at Admitted Exhibits – 000272). *See also Affidavit of Robert J. Sutter*, at 4 ¶ 7 (R. at Admitted Exhibits – 000102) ("It is logical that the system will fill completely in any year in which there is a system flood control operation because

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water still unused—at the end of the 1989 irrigation season. *See* R. at WD63 Black Books – 007738 (showing 106,596 acre-feet of Lucky Peak carryover at end of 1989 irrigation season). This was confirmed by water users who testified at the Contested Case hearing, none of whom could recall receiving less than their full allocations in flood control years.

the criteria for flood releases are based on the presence of insufficient space in the system to capture the forecasted runoff.").

The only spaceholders potentially affected in 1989 were those tied to junior water rights in Lucky Peak, because that water has always been intended to be "make up" water in case flood control operations reduced the amount of water available for irrigation in Anderson Ranch and Arrowrock reservoirs. In other words, the protection against failing to fill Anderson Ranch and Arrowrock reservoirs due to flood control operations is provided by the water captured in Lucky Peak. In the Lucky Peak streamflow maintenance case, this Court described how this arrangement was agreed to by the federal government and its contracted spaceholders:

> The [1953] MOA also provided:
>
> > In the event Anderson Ranch or Arrowrock Reservoirs are not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights to the extent of the space thus remaining unfilled at the end of the storage season but not to exceed the amount evacuated for flood control.
>
> [1953 MOA] at 10.

Lucky Peak Streamflow Maintenance Order, at 6 (R. at 63-3618–001537) (emphasis supplied).[34]

The Lucky Peak spaceholders agreed to this. Their contracts with the federal government specifically provide that their entitlements may be affected by the flood control purpose of the reservoir:

> Subject to operations for flood control, the United States will

[34] The "1953 MOA" is the Memorandum of Agreement for Flood Control Operation of the Boise River Reservoirs, dated November 20, 1953, between the U.S. Department of the Army and the U.S. Department of the Interior. A copy is in the record at Ex. 2100, R. at Admitted Exhibits - 002174 to 002184. The 1953 MOA is incorporated into many if not all subsequent spaceholder contracts. *See, e.g.,* Ex. 2100, R. at Admitted Exhibits - 002170 (page 3 of the Supplemental Contract, dated June 17, 1954, between U.S. Department of the Interior and Nampa & Meridian Irrigation District ("1954 NMID Contract")); Ex. 2190, R. at Admitted Exhibits – 003961 (page 3 of Supplemental Contract, dated August 3, 1954, between U.S. Department of the Interior and Pioneer Irrigation District ("1954 Pioneer Contract").

> operate the Project so as to store under existing storage rights all available water, and during each irrigation season, the Contracting Officer will make available to the Contractor for irrigation the Contractor's proportionate share of the stored water that accrues in each year to the active capacity of the Reservoir, together with any stored water that may have been carried over in the Contractor's share of such active capacity from prior water years.

Ex. 2190 (Repayment Contract for Lucky Peak, at 8-0) (R. at Admitted Exhibits – 003990 to 003991) (emphasis supplied).

The bottom line is that there is no evidence that spaceholders have ever been without water due to accounting using the one-fill, storable inflow, paper fill, free river refill principles. Not that this matters. The law is the same whether the Irrigators suffer a shortage or not. But they have not.

In any event, the Department's accounting system cannot be blamed for any real or hypothetical failure to completely physically fill the reservoirs after complete paper fill is achieved. The reason why is obvious: if sufficient storable inflow reaches the reservoirs to achieve paper fill of the associated Storage Rights, there must have been enough water to satisfy the Storage Rights. In fact, spaceholders take heart when paper fill is achieved because it signals, correctly, that it is a wet year and sufficient water has reached the reservoirs to fill the Storage Rights.

> When paper fill was accruing, we knew that was going—there was enough water going through the system, that when it reached maximum fill, we knew that we were going to have a full storage season.

Contested Case Hearing Transcript, Tr. Vol. IV, p. 1043 ll. 2-5 (testimony of Vernon E. Case).

Consequently, if complete paper fill is achieved, any failure to physically fill the reservoirs results from the reservoir operators' operational decisions, such as deciding to bypass or release water for flood control. Consequently, reservoir operators and their spaceholders—

which in this case is the federal government and its contractors—should bear any adverse consequences resulting from those operational decisions. Other water users should not.

The Ditch Companies object to free river refill water because such refill does not occur under the Storage Rights' "original priority dates." *DC Brief* at 65. But so long as refill occurs, it hardly matters whether it occurs in priority or under free river conditions. The water is just as wet either way. Indeed, until the Basin-Wide Issue 17 dispute arose, the spaceholders, apparently, were blissfully ignorant of the fact that for decades they had been irrigating with free river water during flood control years (despite having been told that the Department's computerized accounting program incorporated this methodology).[35] The alleged objections to storing and using free river water are illusory. Storage and beneficial use of free river water is unobjectionable under Idaho law whether or not you call it a "substitution" (as the Director did). *Amended Final Order* at 67-68 ¶¶ 36-38.[36]

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[35] The Department never hid how its accounting methodology worked. In 1987, IDWR Director Kenneth Dunn sent a paper explaining the accounting system to the Watermaster, which was then circulated to the Bureau. Ex. 4, R. at Admitted Exhibits – 000087 to 000098. It explains, among other things, how "[a]ccrual occurs by assigning natural flows at each reservoir in order of the respective [Storage Right] priorities," how "[f]lood control releases . . . do not affect accrual," how "[a]ctual storage may continue to occur after the storage rights are filled 'on paper'," and how "[t]he second fill, called 'unaccounted for storage,' may, but usually does not, result in a total system fill." R. at Admitted Exhibits – 000093. It also explains that "[t]he volume stored per annum, beginning on 1 November or each year, cannot exceed the volume specified by the water right or the physical capacity of the reservoir unless all subsequent rights have been met." R. at Admitted Exhibits – 000091. The Department also communicated the free river refill concept directly to the Boise Project. Ex. 7, R. at Admitted Exhibits – 000110 (letter from IDWR Western Regional Manager David Tuthill to Boise Project Board of Control Manager Kenneth Henley describing how "each water right is allowed to be filled under its priority one time only. Subsequent filling can occur only if all other storage rights on the system have been filled and all natural flow water rights are being satisfied.").

[36] In his decision, the Director spoke in terms of "substituting flood water [*i.e.*, free river water] for previously stored irrigation water released during flood control operations." *Amended Final Order* at 67 ¶ 36 (R. at 001296). Suez does not find this analysis, including the Director's discussion of *Bd. of Dirs. of Wilder Irr'n Dist. v. Jorgensen*, 64 Idaho 538, 136 P.26 461 (1943), necessary or instructive. If this Court finds it to be useful and on point, that is fine. If not, this analogy to the law of substitute supply may be set aside. It is most certainly not necessary to support the Director's conclusion. As already discussed, free river water may be lawfully stored under Idaho law. In any case, *Jorgensen* and the other cases cited by the Ditch Companies do not support their argument that free river water is not of "equal value" because it was stored with a lesser priority than the Storage Rights (*i.e.*, under no priority). The Ditch Companies recognize the *Jorgensen* Court approved a potential substitution that might occur at some point in the future, but there is no evidence in *Jorgensen* that the substitution water would carry an equal or better priority date than the substituted-for water. Indeed, it is entirely possible (if not likely) that some

In short, the Department's accounting system recognizes, consistent with Idaho law, the historical practice of the federal on-stream reservoirs capturing excess flows under free river conditions without detriment to other water rights. The *Amended Final Order* aptly summarizes this historical practice as follows:

> There is no dispute that federal reservoir operations presently, and as a matter of historical practice, aim to refill the space evacuated for flood control to the extent possible. It is also undisputed that some or all of this refilling occurs after the storage water rights have been satisfied according to the accounting program. Further, the present and former watermasters' Black Books establish that the reservoirs refilled while downstream natural flow rights, both junior and senior to the storage water rights, diverted. . . . Thus, the longstanding federal practice of using excess spring runoff to refill reservoir space evacuated for flood control has occurred without injury to other appropriators. Since its implementation in 1986 at the request of Watermaster Lee Sisco, the computerized accounting program has accommodated this historical practice while enforcing the decreed quantities and priorities of the reservoir water rights.

Amended Final Order at 67 ¶ 35 (R. at 001296).

III. THE STORAGE RIGHTS ARE NOT DEFINED BY, AND ADMINISTRATION UNDER IDAHO LAW DOES NOT DEPEND ON AND IS NOT DICTATED BY, FEDERAL LAWS, RULES, POLICIES, OR CONTRACTS.

It was observed above that the decrees are unambiguous and, consequently, there is no basis to look beyond them. But even if there was ambiguity, no evidence supports adding a right of priority refill to the decrees.

Nothing in the Department's and SRBA Court's files related to the Storage Rights suggests they include a right to refill under priority. For example, none of the Storage Rights' predecessor decrees or licenses mention any right to refill in priority. R. at 63-303–000223; 63-3613–000093; 63-3614–000348; 63-3618–001802 to 63-3618–001803. None of Storage Rights'

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future substitution would require a future appropriation, thereby ensuring that the new water would have lesser priority than the original water.

SRBA claims mention it. R. at 63-303–000227 to 63-303–000228; 63-3613–000122 to 63-3613–000124; 63-3614–000412 to 63-3614–000414; 63-3618–001850 to 63-3618–001852. IDWR's recommendations did not include any mention of a right to priority refill. R. at 63-303–000197 to 63-303–000198; 63-3613–000081 to 63-3613–000082; 63-3614–000417 to 63-3614–000418; 63-3618–001799 to 63-3618–001800.[37] And no party to the adjudication (including the Bureau, the Ditch Companies, or the Boise Project) objected on grounds that the Storage Rights should include such a right. R. at 63-303–000159 to 63-303–000196; 63-3613–000068 to 63-3613–000080; 63-3614–000331 to 63-3614–000385; 63-3618–001695 to 63-3618–001793. And no one has moved this Court to set aside the Storage Rights' decrees on grounds they should include such an entitlement.

Comparing the SRBA proceedings on the Bureau's claims in Basin 63 and Basin 01 further suggests that no right to refill was ever intended to be claimed or decreed. The Bureau sought a remark allowing priority refill in Basin 01, but did not in Basin 63. (See footnote 8 at page 15.) And no one, including the Bureau, objected when IDWR did not recommend a refill remark for the Storage Rights. R. at 63-303–000159 to 63-303–000196; 63-3613–000068 to 63-3613–000080; 63-3614–000331 to 63-3614–000385; 63-3618–001695 to 63-3618–001793. This is despite the fact that the dispute over the Bureau's claimed refill remark in Basin 01 arose before any of the Storage Rights' partial decrees were issued in June 2007. R. at 91017–000722

[37] In a 2002 email to Deputy Attorney General Nick Spencer about the Department's SRBA recommendation for the storage rights associated with Arrowrock reservoir, IDWR's bureau chief for the Snake River Basin Adjudication, David Tuthill, stated: "Regarding the fills per season, we have used the policy throughout the state for these large reservoirs that they get one fill under their priority—more can be stored if water is available to fill all priorities. This prevents a senior from continuing to fill and release all season long." Ex. 8, p. 1; R. at Admitted Exhibits - 000112. At the Contested Case hearing, Mr. Tuthill testified that he understood that the storage rights associated with Arrowrock reservoir were recommended by IDWR and decreed by the SRBA Court consistent with these statements. Mr. Tuthill also testified that these statements accurately reflected how water accrued to on-stream storage water rights in Idaho during his time with the Department. Tr. Vol. III, p. 652 ll. 1-11.

to 000723 (stating that the Director's recommendations and the Bureau's objections in Basin 01 occurred in December 2006 and April 2007, respectively).

The irrigators devote much of their briefs (and vast quantities of the record) to an exploration of federal policies and agreements governing the operation of the federal reservoirs—as if this has something to do with this case. Of course, it does not.

The federal government's laws and contracts and, in particular, its policies governing flood control contained in the federal *Water Control Manual for Boise River Reservoirs* ("*WCM*"), R. at WD63 Archived Docs – 002366 to 002707,[38] neither define the Storage Rights nor control the Director's administration of those rights. Indeed, the suggestion that the federal government—through existing manuals or, worse yet, policies yet to be adopted—can dictate the administration of water rights in Idaho in an alarming proposition, to say the least. It is hardly a contention that one would expect the Irrigators to make.

Curiously, even if the *WCM* were a controlling document, it does nothing to advance the Irrigators' cause. To the contrary. Rather than supporting the Irrigators' argument that the federal government is entitled to physically refill the reservoirs in priority in order to make spaceholders whole after flood control operations, these documents show the opposite. They show that the federal government and the spaceholders have long recognized and agreed that operation of the reservoirs for flood control could (and often would) result in less-than-complete physical refill of the reservoirs.

The *WCM* sets forth the federal government's Basin 63 reservoir operation policies and procedures. It defers to Idaho law (and does not dictate Idaho law) concerning the administration of water rights. *See WCM* at 7-24 ("Surface water rights on the Boise River are administered by

[38] For simplicity of citation, subsequent pinpoint references to the *WCM* will be to the original page number of the manual.

the Boise River Watermaster. The Watermaster is responsible for the measurement, accounting, and distribution of water according to all decreed, licensed, and permitted rights."). *See also WCM* at 9-6 to 9-7 (describing the Department's responsibility for administering water rights in accordance with Idaho law). While the State of Idaho may have been involved in its formulation, the State of Idaho is not a signatory to the *WCM*. *See Memorandum of Understanding for Confirmation, Ratification, and Adoption of Water Control Manual* (R. at WD63 Archived Docs – 002705 to 002707).

The *WCM* recognizes that refilling the reservoirs after the Storage Rights have been filled once may occur only under free river conditions: "The volume stored per annum, beginning on 1 November of each year, cannot exceed the volume specified by the water right or the physical capacity of the reservoir unless all subsequent rights have been met." *WCM* at 7-25 (emphasis supplied). In other words, the *WCM* affirmatively states that the Storage Rights contain no priority refill entitlement.

In addition, the *WCM* expressly acknowledges the reservoir system's competing flood control and storage purposes, and that the compromises the agencies must make to try to fulfill these purposes will result in less-than-optimal storage:

> Because the Boise River reservoirs are managed as a multiple-purpose system, it is not possible to optimize regulation for each of the separate uses. Thus, this Water Control Plan represents compromises between the various uses . . . . Flood control use directly conflicts with all of the other system uses to some degree. Optimum flood control protection possible with the system would require that the reservoirs be maintained empty and available to control floodwaters. . . . Optimum irrigation use would require that the system be maintained as full as possible . . . . [T]he key conflict is that of flood control versus refill . . . .

WCM at 7-2 to 7-3.

The *WCM* contains complicated procedures to address this conflict and to try to balance these objectives, but it does not guarantee perfect flood abatement or that reservoirs will always completely fill following flood control operations. It states:

> These rule curves represent a balance between flood control risks and refill assurances and were specifically designed to minimize the impact of volume forecast errors and abnormal runoff timing sequences. Use of the operational flood control rule curves does not provide complete assurance that flows in excess of 6,500 cfs at the Glenwood gage can be prevented during the entire flood control season, nor that the reservoir system will completely refill.

WCM at 7-19 ¶ 7-05.d(4) (emphasis supplied). The Ditch Companies' witness from the Bureau in the Contested Case quoted the last sentence above in connection with her statement that the "flood control rule curves" assert merely a "high degree of assurance that . . . the reservoirs will be refilled to the maximum extent possible after flood control operations." R. at Admitted Exhibits – 000350 ¶ 7 (*Affidavit of Mary Mellema*, p. 3 ¶ 7).

Specifically the *WCM* provides at best a 95% "refill assurance." *WCM* Plate 7-1 ("the flood control space required for a 1-percent forecast error risk and the space which could be refilled with a 95% chance assurance were determined."); *WCM* Plate 7-2 ("Curves provide 100-year winter flood protection and a 95 percent refill assurance for 871,728 acre-feet of system space.").[39] The fact that the rule curves target a 1% flood control risk and 95% refill assurance

[39] The *WCM's* procedures have different flood control space requirements for different times of the year, and none of them guarantee complete reservoir fill after flood control operations. For example, from November 1 through December 31, the *WCM* requires minimum flood control space requirements of 300,000 acre-feet among the three Boise River reservoirs "without consideration to either existing climatic conditions or refill potential." *WCM* at 7-4 ¶ 7-05.a. This requirement means that "refill assurances for the total active system capacity will be approximately 89 percent on 1 January for normal runoff volumes." *WCM* at 7-5 ¶ 7-05.a.

At other times of the year, the *WCM* dictates flood control space requirements based on runoff volume forecasts. *WCM* at 7-5 ¶ 7-05.a. For example, from January 1 through the end of February, the rule curves for "below normal forecasts" are contained in *WCM* Plate 7-2, which "provide 100-year winter flood protection and a 95 percent refill assurance for 871,728 acre-feet of system space." *WCM* Plate 7-2, note 2.

And, at other times, *WCM* Plate 7-1's "operational flood control rule curves" are used to define required system flood control spaces as functions of date and operational runoff volume forecasts." *See WCM* at 7-19 ¶ 7-

demonstrates that the *WCM* prioritizes meeting the 6,500 cfs flood control goal over complete refill. This prioritization was confirmed at the Contested Case hearing by the Ditch Companies' witness from the Bureau who answered "Yes" when asked if "the rule curves place greater emphasis on reducing risks for flood control than on refill?" *See* Tr. Vol. III, p. 747 ll. 15-18.

The documentation leading up to the adoption of the *WCM* confirms the widespread understanding that complete fill could not be guaranteed while balancing flood control operations and storage for beneficial uses. In an April 22, 1983 letter to the Bureau's acting Regional Director, the Corps' District Engineer stated: "It is not possible to completely fill the Boise River system each year and still provide the required flood regulation assurances." R. at IDWR Doc List-ATTM A – 000201 (letter from Robert B. Williams to John W. Keys, III). In the same letter, the Corps' District Engineer advocated for increased flood protection and "an operation atmosphere that will tolerate leaving a reasonable amount of space in the system unfilled in some years." R. at IDWR Doc List-ATTM A – 000202.

The same realization is evident in documentation following the *WCM's* adoption. For example, a November 30, 1987 letter from the Director of IDWR to an attorney for the water users described how the *WCM* "provides a balance between flood protection and refill of storage" but cautioned that "[t]his does not mean . . . that all future flooding will be prevented, nor that the reservoirs will completely fill." Ex. 2171; R. at Admitted Exhibits - 003351 (letter from IDWR Director Higginson to J. Charles Blanton).

This understanding also is evident it the spaceholders' contracts with the federal government. These contracts expressly allow the Boise River's federal reservoirs to be operated

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05.d(4). According to *WCM* Plate 7-1, "[f]or a given volume forecast, the flood control space required for a 1-percent forecast error risk and the space which could be refilled with a 95-percent assurance were determined." *WCM* Plate 7-1.

jointly for flood control and storage even though the reservoirs would not be guaranteed to completely refill after flood control operations. That realization underlies the "guarantee" that Arrowrock and Anderson Ranch users would get "make-up" water from Lucky Peak in the event that flood control operations resulted in less than total system fill. *See e.g.*, Ex. 2100, R. at Admitted Exhibits – 002169 to 002171 (1954 NMID Contract). That realization is front and center in the Lucky Peak contracts. the Ex. 2190; R. at Admitted Exhibits – 003990 to 3991 ("Subject to operations for flood control, the United States will operate the [Lucky Peak] Project so as to store under existing storage rights all available water . . . .")

Simply put, the risk of failing to fill due to flood operations was accepted by the spaceholders who contracted with the federal reservoir operators. The State of Idaho is not a party to the *WCM,* other agreements between federal agencies related to reservoir operations, or to contracts between the spaceholders and the federal government for storage water entitlements. Neither the State nor any other water user plays any role in how the federal reservoir operators determine flood control operations. This fact was recognized by the United States in its briefing to this Court in the Basin-Wide Issue 17 proceedings, where it stated that "flood control operations are entirely independent of the water rights system." R. at 91017 - 001213.

In any case, none of these agreements or other federal documents can be considered as defining the Storage Rights or Idaho's Prior Appropriation Doctrine. They defer to Idaho water law, as they must. For example, the 1953 MOA between the Corps and the Bureau states that "there are storage rights in Arrowrock, Anderson Ranch, and Lake Lowell Reservoirs by virtue of appropriations under the laws of Idaho" and "certain of the rights above described are adjudicated rights, which are exercised under the supervision of the State of Idaho." R. at Admitted Exhibits – 002176.

This, of course is consistent with the requirements in Section 8 of the Federal Reclamation Act of 1902, pursuant to which Arrowrock and Anderson Ranch Dams were constructed:

> That 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 (Sec. 8 of Act of June 17, 1902, 32 Stat. 388). *See also* Ex. 2100, R. at Admitted Exhibits - 002175 to 002176 (1953 MOA referencing Federal Reclamation Act of 1902). The U.S. Supreme Court has held that "[t]he legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California v. United States*, 438 U.S. 645, 675 (1978) (Rehnquist, C.J.).[40]

In the end, none of the evidence concerning federal policies or contracts related to reservoir operations matter to this case because the issue presented in this proceeding involves a question of state-law based water rights under Idaho's Prior Appropriation Doctrine. Idaho law does not depend upon and cannot be altered by the federal government's reservoir operations or its contracts between federal agencies or with spaceholders. The Director must administer the Storage Rights under Idaho law, not federal law, policy, or contracts. Whatever agreement, understanding, expectation, or acquiescence may exist between the federal government and the

[40] *California* is quoted by the Ditch Companies for the proposition that "state water law does not control the distribution of reclamation water if inconsistent with other congressional directives to the Secretary [of the Interior]." *DC Brief at 58*, quoting *California*, 438 U.S. at 668 n.21, 98 S. Ct. at 2997 n.21. However, as described

spaceholders, those parties do not have the right or the power to impair the water rights of third parties, to alter the Prior Appropriation Doctrine, or to control the Director's duty to administering water rights consistent with Idaho law.

IV. THE IRRIGATORS' ATTACK ON SUEZ'S WATER RIGHTS IS A SIDESHOW.

Unable to advance their argument on the merits, the Irrigators offer a distraction. They attack Suez's junior water rights. Their attack is baseless. But we will not waste the Court's time countering the substance of the attack here, because it has nothing to do with this judicial review.[41]

One would think it is obvious that this Contested Case is not about the nature, extent, or interpretation of natural flow water rights junior in priority to the Storage Rights. Such rights do not fall within the scope of the Contested Case proceeding or, consequently, this judicial review.[42]

Moreover, by definition, junior water rights did not exist when senior water rights were appropriated, and therefore cannot be looked at to help understand what the senior rights mean. In addition, junior natural flow water rights simply cannot affect the fill of a senior storage water right because basic prior appropriation principles require that senior rights are filled ahead of junior rights, and junior rights can be satisfied only so long as senior rights are satisfied.

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earlier in this brief, the Department's accounting system allows for complete satisfaction of the Storage Rights (and then some) and therefore does not conflict with any congressional directives related to the Boise River reservoirs.

[41] The Irrigators argue that juniors take a water source as they find it at the time of their appropriation. *DC Brief* at 67 (citing *Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 12, 154 P.2d 507, 510 (1944). This is true, and irrelevant. Since the Irrigators raised the issue, however, it is worth noting that all junior water rights established since the Department's current accounting system was implemented in 1986 have done so while the Storage Rights were administered using the one-fill, storable inflow, paper fill, and free river principles. Thus, these post-1986 rights are entitled to have this administrative regime maintained.

[42] *Contested Case Notice* at 6 (defining the scope of the Contested Case as addressing "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").

Nevertheless, over Suez's repeated objections in the Contested Case proceeding, the Irrigators introduced evidence related to Suez's junior priority natural flow water rights. *See, e.g., United Water's Motion in Limine* (R. at 000801 to 000820) (arguing that it would be unfairly prejudicial to Suez, and a violation of its due process rights, for the Contested Case to determine the nature, extent, or interpretation of Suez's water rights, how they should administered, or how Suez's permits should be licensed). See also *United Water's Post-Hearing Brief* at 34 n. 24 (R. at 001122 n. 24) (repeating Suez's objection and urging the Director to make no findings, conclusions, or orders that would affect Suez's water rights).[43] Consistent with the Director's statements during the Contested Case hearing that such evidence would not be used to make determinations about Suez's water rights in this proceeding, the *Amended Final Order* made no findings or conclusions about Suez's water rights.

Now, however, the Irrigators cite evidence concerning Suez's water rights in support of arguments in their judicial review briefing. *See BP Brief* at 79-80 *and DC Brief* at 68-69 (referencing Suez's 63-31409 and 63-12055). This Court should disregard such arguments because Suez's rights have no connection to how water is counted or credited toward any senior water rights, including the Storage Rights. Suez vigorously disputes the Irrigators' contentions about the meaning of evidence in the record concerning Suez's water rights. Whatever it means will be determined in the proper forum, which is not this proceeding.

[43] *See, e.g., United Water's Motion in Limine* (R. at 000801 to 000820) (arguing that it would be unfairly prejudicial to Suez, and a violation of its due process rights, for the Contested Case to determine the nature, extent, or interpretation of Suez's water rights, how they should administered, or how Suez's permits should be licensed). See also *United Water's Post-Hearing Brief* at 34 n. 24 (R. at 001122 n. 24) (repeating Suez's objection and urging the Director to make no findings, conclusions, or orders that would affect Suez's water rights).

V. THE IRRIGATORS' OBJECTIONS TO THE CURRENT ACCOUNTING SYSTEM AND THE ALLEGED PROCEDURAL ERRORS ARE WITHOUT MERIT AND IMPLICATE NO SUBSTANTIAL RIGHTS.

A. The Director properly initiated and conducted the Contested Case.

Much of the Irrigators' briefing focuses on complaints about how the Contested Case proceeding was conducted. They complain that the Director should not have initiated the Contested Case, should have stayed the Contested Case, should have participated less in the Contested Case, and otherwise should have conducted the Contested Case differently. None of these complaints have merit, and no substantial rights were prejudiced in any case.[44]

By initiating and pursuing the Contested Case, the Director acted within his discretion, and pursuant to his "clear legal duty" to distribute water in accordance with the Prior Appropriation Doctrine. *Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 812 (1994) (Johnson, J.). As the *Musser* Court said, "Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water." *Id.* By initiating and conducting the Contested Case, the Director sought to "address and resolve concerns with and/or objections to" those details concerning how water is counted or credited toward the fill of the Storage Rights. *Notice of Proceedings*, at 6 (R. at 000007). IDWR's Rules of Procedure authorize him to initiate contested cases. IDAPA 37.01.01.104 ("Formal proceedings may be initiated by a document from the agency . . . ."). The Director understandably felt compelled to follow through with the Contested Case rather than risk being accused of abdicating his duty to distribute water.

[44] Early in the Contested Case, the Director rejected arguments that he should dismiss the proceeding, redefine the issues involved, and disqualify himself as the hearing officer. *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer*, R. at 000132 to 000141; *Order Denying Pre-Hearing Motions*, R. at 000335 to 000352. Suez agrees with and adopts the Director's analyses in those orders.

Contrary to the Irrigators' arguments, the Director's decision is not the result of bias and the Contested Case proceeding satisfied due process. "The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Thompson Creek Mining Co. v. IDWR*, 148 Idaho 200, 208, 220 P.3d 318, 326 (2009) (Burdick, J.).

The Idaho Supreme Court has examined what constitutes decision-maker bias:

> In the context of due process, it does not mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. It also does not mean having no preconceptions on legal issues, but being willing to consider views that oppose his preconceptions, and remaining open to persuasion, when the issues arise in a pending case. Impartiality under the Due Process Clause does not guarantee each litigant a chance of changing the judge's preconceived view of the law.
>
> 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.

Thompson Creek, 148 Idaho at 208, 220 P.3d at 326 (brackets, internal citations, and quotation marks omitted) (citing and quoting *Marcia T. Turner, L.L.C. v. City of Twin Falls.*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007) (Eismann, J.)).

Under these standards, the Director acted with appropriate impartiality. Although he might have explained the Department's accounting system to other parties, including "the legislature and other stake holders during the pendency of the case," *BP Brief* at 42, this was entirely appropriate and does not prove that he was incapable of judging the controversy fairly on the basis of its own circumstances. The Irrigators assert no evidence that a party did not have notice and an opportunity to participate in any settlement negotiation or other substantive discussion with the Director and another party. The *Amended Final Order* demonstrates that the

Director considered the Irrigators' objections and concerns with the Department's accounting methodology for the Storage Rights, and considered a broad range of other factors in coming to the decision that the existing accounting methodology should remain in place. The Director allowed the Irrigators to present the vast majority of the witnesses and introduce the vast majority of the exhibits at the hearing. The voluminous record in this case shows that the Director treated the Irrigators fairly throughout the Contested Case process, but in the end simply disagreed with them. All of this appears at least as impartial as the Director's unbiased actions in *Thompson Creek.*

The Legislature has given the Director many duties in addition to his duty to decide contested cases, which means he cannot be held to a standard of complete silence or inaction outside a contested case proceeding. The Director is responsible for the day-to-day distribution of public waters. Idaho Code § 42-602.[45] In addition, among other things, the Director is responsible for supplying information to the public about water measurement and instructing watermasters as to "measurement of water so as to secure a just distribution of the same" (Idaho Code § 42-1702), for making annual reports to the Governor about the Department's work including "any recommendations he may have to make in reference to legislation affecting the department" (Idaho Code § 42-1704), and for "such other professional duties as may be required of him by the [G]overnor," including giving advice to the Governor "on any matters of a professional nature, when called upon by the governor to do so" (Idaho Code § 42-1706). The Director simply cannot perform all of his duties and remain the blank slate the Irrigators argue he is required to be.

[45] See also, Idaho Code § 42-101 (the State is responsible for regulating the "just apportionment to, and economical use by, those making a beneficial application" of the "waters of the state," and "in providing for its use, [the state] shall equally guard all the various interests involved.").

In denying the Irrigators' motion to disqualify the Director as hearing officer and appoint and "independent" hearing officer on grounds of alleged agency bias, the Director cited numerous authorities explaining why agencies' (including the Director's) activities outside the contested case process are appropriate and do not result in bias or unfairness. *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer* at 6, R. at 000137. Suez agrees with those authorities.

The Irrigators allege that the Director improperly conducted the hearing by consulting with and involving IDWR employees and attorneys. But none of this was inappropriate. IDWR's Rules of Procedure allow the Director to consult with agency personnel during the hearing. "The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence." IDAPA 37.01.01.600. IDWR's Rules of Procedure also give Department personnel (including the Director and IDWR's attorney) broad authority to actively participate in a contested case. IDAPA 37.01.01.157 ("Subject to Rules 558, 560, and 600, all parties and agency staff may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments.").[46]

In any case, none of these alleged procedural errors prejudiced the Irrigators' substantial rights. The Boise Project's allegation that its substantial rights were prejudiced must be rejected because it provides no argument describing how. *Akers v. D.L. White Const., Inc.*, 156 Idaho 37, 45, 320 P.3d 428, 436 (2014) ("if the appellant does not present argument that the court's error

[46] The Boise Project cites the Office of Attorney General's procedural rules, IDAPA 04.11.01.424 and 04.11.01.417, for the proposition that "[n]o hearing officer may discuss the case with the agency attorney or staff." *BP Brief* at 48, and for rules applying to agency attorneys. *BP Brief* at 48-49. But IDWR's Rules of Procedure expressly reject adoption of these rules. IDAPA 37.01.01.050 ("The Department and the Board through the promulgation of these rules decline in whole to adopt the contested case portion of the 'Idaho Rules of Administrative Procedure of the Attorney General,' cited as IDAPA 04.11.01.100 through 04.11.01.799.").

affected a substantial right, the issue is waived"). The Ditch Companies summarily argue that "due process rights are actionable 'substantial rights.'" *DC Brief* at 83 (citing *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010)).

More is required to show the impairment of substantial rights than to recite the words "due process." The Idaho Supreme Court has explained:

> Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when the defendant is provided with notice and an opportunity to be heard. The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement. 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.

Aberdeen-Springfield Canal Co. v. Peiper, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999). Here, even if a procedural error occurred during the Contested Case process, there is no question that the Director provided the Irrigators adequate notice and a meaningful opportunity to be heard.

B. The Director is not required to engage in formal rulemaking to determine that the current accounting system will remain applicable to the four subject water rights.

The Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 to 67-5292, provides a variety of mechanisms for agencies to make decisions as they carry out their statutory duties. One is by formal rulemaking. Idaho Code §§ 67-5201(9), 67-5201(19), 67-5201(20), 67-5220 to 67-5231. Another is by contested case. Idaho Code §§ 67-5240 to 67-5254.[47] In this

[47] There are others, too, such as written interpretations of rules, Idaho Code § 67-5201(19)(iv), and declaratory rulings, Idaho Code §§ 67-5201(19)(ii), 67-5232, 67-5255.

instance, the Director elected to proceed by way of contested case. The Irrigators contend that that the only permissible mechanism was rulemaking. *DC Brief* at 78-83; *BP Brief* at 57-65.[48]

In support of this contention, they cite *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003) (Trout, C.J.), the seminal Idaho case explaining when agency action is a "rule" that requires rulemaking. In *Asarco*, the Idaho Department of Environmental Quality ("IDEQ") established numerical limitations for the total maximum daily load ("TMDLs") for specified pollutants in the Coeur d'Alene River without going through formal rulemaking or any IAPA procedure. *Asarco*, 138 Idaho at 721-22, 69 P.3d at 141-22.

However, *Asarco* does not support the Irrigators' position that rulemaking is required here. That case did not involve the choice between rulemaking and a contested case. In other words, *Asarco* did not involve an agency selecting one set of formal procedures versus another set of formal procedures. It involved rulemaking procedures versus following no statutory procedures at all. The *Asarco* Court ruled that where an agency action of general applicability satisfies six tests or "characteristics" of a rule, the agency may not execute that action by administrative fiat (with little or no formal process) but must follow rulemaking procedures.

The situation here is far different. The Director chose to proceed by contested case (which, like rulemaking, provides a meaningful opportunity to be heard) because it was an agency action of "particular applicability."[49] Rulemaking, on the other hand, "means the process for formulation, adoption, amendment or repeal of a rule," Idaho Code § 67-5201(20), and a

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[48] The Irrigators raised the same rulemaking argument below, and the Director rejected it in his December 16, 2014 *Order Denying Pre-Hearing Motions*, R. at 335-52. Suez agrees with and adopts the Director's analysis in that order.

[49] The IAPA provides: "'Contested case' means a proceeding which results in the issuance of an order." Idaho Code § 67-5201(6). "'Order' means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." Idaho Code § 67-5201(12) (emphasis added)).

"rule" is "the whole or a part of an agency statement of general applicability . . . ." Idaho Code § 67-5201(19) (emphasis added). The question of how water is counted or credited toward four federal on-stream water rights in Water District 63 is particularly applicable, not generally.[50]

Contested cases are administrative lawsuits. By their nature, the agency, sitting as the decision-maker, interprets and applies the law. There is no requirement in the IAPA that, when engaging in a contested case, every interpretation of law must be preceded by a rulemaking. That would be an absurdly unworkable requirement. Implementing, interpreting, or prescribing law is inevitable when deciding tough issues in the context of a well developed record relating to specific parties and specific facts.

Rulemaking is required only when the agency seeks to establish a new, uniform, forward-looking rule immediately legally binding on everyone. That is not to say that decisions in contested cases have no effect on non-parties. Case-specific decisions create administrative precedent. If appealed and affirmed, they become judicial precedent. But that does not turn a legal principle articulated in a contested case into a rule requiring rulemaking. That is how contested cases work.

As noted, *Asarco* arose in a different context. In *Asarco*, it was rulemaking or nothing. There was no contested case option. IDEQ could not name every conceivable present and future discharger and make them a party. The only way to establish a legally binding "budget" or "load" for all dischargers was by rule. Instead, IDEQ promulgated what amounted to a rule by

[50] It might be fairly debatable whether a particular agency action is specifically or generally applicable. Here, in the context of four water rights, there is no question that the Director's action was specific. An agency must proceed under a contested case or rulemaking where a statutory or regulatory structure dictates one or the other. For example, if a rule exists on a subject, the agency may not amend the rule through a contested case, but rather must amend it through rulemaking. Idaho Code § 67-5201(20) ("'Rulemaking' means the process for formulation, adoption, amendment or repeal of a rule."). As another example, a statute or rule may require the agency to proceed by contested case or by rulemaking. *See, e.g.,* IDAPA 37.03.11.030.02 (requiring IDWR to treat a delivery call outside of an organized water district "as a petition for contested case").

administrative fiat, bypassing rulemaking and any other statutory hearing procedures.[51] It was intentionally, purposefully, immediately, and automatically applicable to anyone and everyone who, then or in the future, made a point source discharge of a pollutant into the Coeur d'Alene River. IDEQ's action was an end run around formal rulemaking.

Accordingly, *Asarco* is not on point. Even if it were, however, it gets the Irrigators nowhere. The Director's decision to apply longstanding accounting procedures to four specific water rights does not meet the *Asarco* test of what is a rule.

IDEQ contended that the TMDL was not a rule under the IAPA's definition, but was merely an "unenforceable planning tool." *Asarco*, 138 Idaho at 722, 69 P.3d 142. The Court said it was no such thing. The numerical limits set by IDEQ apply to everyone and have binding legal effect. Specifically, the TMDLs issued by IDEQ establish a total pollution "budget" which, in turn, controls the outcome of permitting decisions by the U.S. Environmental Protection Agency (which allocates the total load to individual dischargers based on that budget). *Asarco*, 138 Idaho at 724, 69 P.3d 144.

The Court looked to the statutory definition of a rule, Idaho Code § 67-5201(19), which it paraphrased as follows: "an agency action is a rule if it (1) is a statement of general applicability and (2) implements, interprets, or prescribes existing law." *Asarco*, 138 Idaho at 723, 69 P.3d at 143. However, the Court observed that "this definition of a rule is too broad to be workable. Under such a definition, virtually every agency action would constitute a rule requiring rulemaking procedures." *Asarco*, 138 Idaho at 723, 69 P.3d at 143. Bingo.

Accordingly, the Court described the following six "characteristics" of a rule:

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[51] Curiously, the Idaho Legislature did not think this was such a bad thing. It promptly overrode the decision as to TMDLs. "The legislative response was swift. H.R. 458 was quickly introduced, specifying that the rulemaking provisions of IDAPA 'shall not apply to TMDLs.'" Dale D. Goble, *News from the States*, 29 Admin. & Reg. L. News 25, 26 (2003).

> Therefore, in order to provide further guidance in determining when agency action requires rulemaking, this Court adopts the reasoning of the district court and considers the following characteristics of agency action indicative of a rule: (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy.

Asarco, 138 Idaho at 723, 69 P.3d 143 (citations omitted).

Here, the Director's decision to apply the existing accounting methodology to four specific water rights falls short of meeting all of those six characteristics. Some are debatable, perhaps. Others are not. These tests are listed in the conjunctive. Meeting fewer than all is insufficient.[52]

First, and very significantly, the Director applied the accounting methodology to the four specific Storage Rights, in other words, to a "narrow select group" as opposed to "a large segment of the general public." *Asarco*, 138 Idaho at 723, 69 P.3d at 143. Underscoring the limited scope of this contested case, the Director initiated different contested cases for other water rights. For instance, the contested case for federal storage rights in Basin 01 involved the separate accounting system applicable to federal reservoirs in that basin.

The fact that a contested case might establish an administrative precedent (and, if appealed, a judicial precedent) does not change things. The fact that precedents may affect others, even lots of others, does not convert every precedent into a rule requiring rulemaking. If that were the case, there could be no contested cases. Our Legislature expressly provided a

[52] In *Sons and Daughters of Idaho, Inc. v. Idaho Lottery Comm'n*, 142 Idaho 659, 132 P.3d 416 (2006) (J. Jones, J.), the Court found that satisfying four of the six was insufficient. In *State v. Alford*, 139 Idaho 595, 83 P.3d 139 (Ct. App. 2004) (Perry, J.), the Court of Appeals found that satisfying three of the six was insufficient.

mechanism for contested cases and for judicial review thereof. If those decisions become important precedents, so be it.[53]

Second, and in the same vein, the Director's decision is not applied "generally and uniformly." Rather, as noted, the Contested Case is applicable only to the four Storage Rights for the three federal reservoirs. In *Asarco*, the Court noted that the TMDLs have aspects that are "discharger specific" and other aspects that apply to "all existing and future point and nonpoint source dischargers." *Asarco*, 138 Idaho at 724, 69 P.3d at 144. If only the former were involved, that would not meet the test for a rule, said the Court. Here, only the former are involved—a determination of how the quantity limits in four Storage Rights will be administered.

The Irrigators might contend that how the four Storage Rights are administered will affect other rights. That, of course, would be true. Senior rights always affect junior rights. That is the nature of the priority system. But that does not, and cannot, mean that every administrative action affecting specific water rights must be undertaken by rulemaking. If that were the law, the administration of water rights in Idaho would grind to a halt.

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[53] Indeed, this is what the Idaho Supreme Court suggested should happen in the Basin-Wide Issue 17 appeal:

> Indeed, the complex and historically dense contents of the Shelley Davis affidavit, along with the parties' attempts to prove when a storage water right is filled by using reservoir-specific historical practices, support the conclusion that determining when a water right is filled requires the development of a factual record. There is an administrative procedure for fleshing out these factual interpretations if the SRBA court chooses to address the issue of fill on remand.

A&B IV, 157 Idaho at 392, 336 P.3d at 799.

The Court's reference to the SRBA Court is a bit confusing. Obviously, the SRBA Court cannot initiate administrative proceedings. Perhaps the Court meant to refer to the Director. Or perhaps the Court had in mind what we have here—a judicial review of a contested case. In any event, the thrust of the Court's observation is perfectly clear. The Idaho Supreme Court contemplates that the Director's expertise should be applied in the development of a factual record based on reservoir-specific historical practices. That sounds like a contested case. That, of course, is exactly what the Director has done here.

Third, the Department's accounting methodology has been in place for nearly four decades (without objection, by the way, until now). While the Director's decision to continue to employ the accounting methodology is forward-looking in a sense, the continuation of a longstanding practice does not seem to fit the characteristic of something that "operates only in future cases." *Asarco*, 138 Idaho at 724, 69 P.3d at 144.

Fourth, the confirmation of an accounting methodology for Storage Rights does not "prescribe a legal standard or directive not otherwise provided by the enabling statute." *Asarco*, 138 Idaho at 724, 69 P.3d at 144. In *Asarco*, the legal standard was the numeric limit set in the TMDL. Here the legal standards are the quantity and priority elements of the four Storage Rights. The Director is not setting or modifying those decreed quantities or priorities. But the Director is obligated by statute to administer those rights and to curtail uses that injure others and are in excess of the decreed rights. Thus, the accounting methodology is not analogous to the setting of numeric TMDLs in *Asarco*, but is analogous to the specification of a gauging tool for measuring blood alcohol content in *State v. Alford*, 139 Idaho 595, 83 P.3d 139 (Ct. App. 2004) (Perry, J.).

Fifth, the Director's *Amended Final Order* does not "express[] agency policy not previously expressed." *Asarco*, 138 Idaho at 724-25, 69 P.3d at 144-45. Again, this accounting methodology has been used for nearly four decades.

As for the sixth *Asarco* test, it is fair to say that the Department's accounting methodology "implements and interprets existing law." *Asarco*, 138 Idaho at 725, 69 P.3d at 145. But that test alone does not render the decision to follow that methodology a "rule." If every action that implemented and interpreted existing law required rulemaking, the Department (and all agencies) would be hamstrung. The Department could not issue permit or licenses. It

could not act on a delivery call. It could not fulfill its "clear legal duty" duty to distribute water under in accordance with the Prior Appropriation Doctrine. *Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 812 (1994) (Johnson, J.).

As the *Musser* Court said, "Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water." *Id.* Here, the Director is seeking to resolve those details—important details indeed—by means of a contested case. It is worth noting that the *Musser* Court did not instruct the Director to engage in rulemaking before distributing water. To the contrary, the Director wanted to engage in rulemaking, but the Court told him not to wait. Plainly, then, rulemaking is not a prerequisite to every Department action on water rights involving an interpretation of law.

Perhaps the Director could have engaged in rulemaking on the subject of how fill of storage rights is counted. But the Director is not required to do everything by rulemaking. "[T]his definition of a rule is too broad to be workable." *Asarco*, 138 Idaho at 723, 69 P.3d at 143. Where, unlike the situation in *Asarco*, a contested case proceeding is an available method of resolving an issue affection specific parties, that, too, is permissible. The Director exercised his discretion by choosing one of two formal procedures to address an important question. The Irrigators do not contend the Director abused his discretion. They contend he had none. And that is simply wrong.

VI. SUEZ IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND THE IRRIGATORS ARE NOT

Idaho Code § 12-117(1) authorizes awards of attorney fees to the "prevailing party" in a proceeding involving as adverse parties a state agency and a person, when "the nonprevailing party acted without a reasonable basis in fact or law." Both determinations are committed to the discretion of the trial court and are reviewed under an abuse of discretion standard. *City of*

Osburn v. Randel, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (J. Jones, J.). However, if those tests are met, the award is mandatory. *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012) (Burdick, C.J.). Idaho Code § 12-117(2) authorizes awards of attorney fees to the prevailing party "on a portion of the case" if the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case.

If this Court confirms the one-fill, storable inflow, paper fill, and free river principles employed by the Department's accounting system, Suez is entitled to an award of attorney fees. At all stages of these proceedings (not to mention the Basin Wide Issue 17 and Late Claims proceedings), Suez has fully participated and has argued in support of these principles. The Irrigators ignored the supporting authority and reasoning provided by Suez. Indeed, as described above, the Irrigators have offered no authority or reasoning of their own that would legally support changing the Department's accounting system so the Storage Rights could store more water than authorized by their quantity elements or so they could remain in priority longer and to the detriment of junior water rights. Years of unnecessary litigation has resulted from the Irrigators' unwillingness to accept that the Storage Rights do not authorize flood control releases, that Idaho's Prior Appropriation Doctrine does not allow storage of more water than stated on the face of a decree, that the Director of IDWR has the duty and discretion to interpret and distribute water to the Storage Rights, and that the Department's current accounting system has never resulted in a shortage of water to spaceholders. This stands in stark contrast to other part of the state where the same issues were resolved relatively swiftly—following the ruling in *A&B IV*—with win-win solutions for all parties. Suez has been compelled to participate in these proceedings to protect its rights from the frivolous overreach advocated by the Irrigators,

including a pointless retaliatory attack on Suez's water rights (which have nothing to do with this proceeding). Accordingly, Suez is entitled to an award of attorney fees.

In the alternative, Suez seeks a partial award of attorney fees under Idaho Code § 12-117(2), which provides that even a partially prevailing party may obtain an award of attorney fees as to those issues on which it prevailed and the other party acted without a reasonable basis. *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996) (Johnson, J.); *Nelson v. Big Lost River Irrigation Dist.*, 133 Idaho 139, 143, 983 P.2d 212, 216 (1999) (Kidwell, J.); *Hobson Fabricating Corp. v. SE/Z Const.*, LLC, 154 Idaho 45, 49-51, 294 P.3d 171, 175-77 (2012) (Burdick, C.J.).

On the other hand, even if the Irrigators were to prevail on any issue in this case, the Irrigators are not entitled to an award of attorney fees. First, the Ditch Companies failed to include any attorney fee request in their opening brief as required by Idaho Appellate Rule 35(a)(5), which is an "other procedural rule" incorporated into the judicial review procedures by I.R.C.P. 84(r). In the context of an appeal to the Supreme Court, "[i]n order to be entitled to attorney fees on appeal, authority and argument establishing a right to fees must be presented in the first brief filed by a party with this Court." *Mulford v. Union Pac. R.R.*, 156 Idaho 134, 142, 321 P.3d 684, 692 (2014) (emphasis added). Since judicial review is akin to an appeal (even incorporating many appellate procedural rules), the Ditch Companies failure to request attorney fees in its first brief precludes any award.

Second, the Department and Suez have acted with a reasonable basis in fact and law. This has been demonstrated throughout the Contested Case and this judicial review, including the Director's findings and conclusions in his *Amended Final Order* and Suez's arguments

contained in this brief and others. Accordingly, the Irrigators would not be entitled to any award of attorney fees in any event.

CONCLUSION

With the single exception of the "reset date" issue discussed above, the water rights and storage accounting programs described in the *Staff Memo* are consistent with the one-fill, storable inflow, paper fill, and free river principles of the Prior Appropriation Doctrine. These principles allow the federal dam operators in Basin 63 to physically refill reservoirs after releasing water for flood control or other operational purposes, while at the same time protecting junior water rights and the State's interest in administering—and maximizing—the use of the water resource.

These principles are part and parcel of the Prior Appropriation Doctrine. They require the federal dam operators to fill their reservoirs under their storage water rights when, and to the fullest extent that, water is physically and legally available for storage under those rights. If storable inflow must be released or bypassed for flood control, environmental goals, or other operational reasons, the federal dam operators can and do refill their reservoirs under free river conditions after the Storage Rights achieve paper fill.

These mechanisms further the State's maximum use policy by ensuring that federal dam operators manage flood control and other operational releases in ways that do not injure other water users. The alternative, in which dam operators could refill in priority at the expense of other users, would allow reservoir operators to forego storage of water when it is plentiful and available early in the storage season. In Basin 63, this would effectively turn control of the Boise River over to the federal government. As the *Staff Memo* said: "If reservoir operations and physical contents determined the satisfaction of state water rights it could result in federal control of the distribution of natural flow to state water rights." *Staff Memo* at 7-8. Idaho's Prior

Appropriation Doctrine, as implemented in the water rights and storage accounting procedures described in the *Staff Memo*, does not and must not allow this.

The *status quo* accounting regime is lawful and has served Idaho well. The practical reality is that storage right holders in Basin 63 have done quite well under the *status quo*, refilling after flood control operations successfully for decades without complaint. Importantly, they have accomplished this while respecting the priorities of the handful of junior rights with which they share the river.

Departure from the *status quo* would serve no useful purpose, would unconstitutionally impair the property rights of junior diverters, would cede control of Idaho's surface water resources to the federal government, would impair the maximum utilization of water resources, and would violate the Prior Appropriation Doctrine.

Suez urges that adherence to the one-fill, storable inflow, paper fill, and free river principles are compelled by the Prior Appropriation Doctrine. But even if they were not, they are sensible principles that have served the State well. To the extent the Director has discretion in the matter, he was right to exercise that discretion to retain the principles that have proven fair and effective in Idaho and throughout the West.

For the reasons discussed above, the Director's *Amended Final Order* should be affirmed.

DATED this 8th day of April, 2016.

Respectfully submitted,

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
Michael P. Lawrence

Attorneys for Suez Water Idaho Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of April, 2016, the foregoing was served as follows:

DOCUMENT FILED:

Clerk of the District Court SNAKE RIVER BASIN ADJUDICATION 253 Third Avenue North Twin Falls, ID 83301-6131 Mailing address: PO Box 2707 Twin Falls, ID 83303-2707 ddelaney@idcourts.net	☐ ☒ ☐ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile: 208-736-2121 E-mail

DOCUMENT SERVED:

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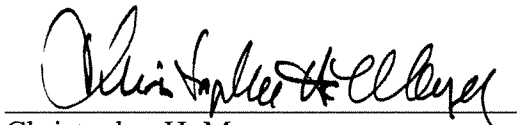

Christopher H. Meyer

Summary of the SRBA partial decrees associated with the federal on-stream reservoirs in Basin 63 (the "Storage Rights"):

Right No.	Partial Decree Issue Date	Associated Reservoir	Priority Date	Total Quantity in Acre-Feet Annually ("AFA")	Purposes of Use	Purpose of Use Quantity (in AFA)	Period of Use
63-303	6/28/2007	Arrowrock	1/13/1911	271,600	Irrigation Storage	271,600	1/1-12/31
					Irrigation From Storage	271,600	3/15-11/15
63-3613	6/28/2007	Arrowrock	6/25/1938	15,000	Irrigation Storage	15,000	1/1-12/31
					Irrigation From Storage	15,000	3/15-11/15
63-3614	2/25/2009	Anderson Ranch	12/9/1940	493,161	Irrigation Storage	487,961	1/1-12/31
					Irrigation From Storage	487,961	1/1-12/31
					Industrial Storage	5,200	1/1-12/31
					Industrial From Storage	5,200	1/1-12/31
					Power Storage	493,161	1/1-12/31
					Power From Storage	493,161	1/1-12/31
					Municipal Storage	5,200	1/1-12/31
					Municipal From Storage	5,200	1/1-12/31
63-3618	12/18/2008	Lucky Peak	4/12/1963	293,050	Irrigation Storage	111,950	1/1-12/31
					Irrigation From Storage	111,950	3/15-11/15
					Recreation Storage	28,800	1/1-12/31
					SM Storage*	152,300	1/1-12/31
					SM From Storage*	152,300	1/1-12/31

*"SM" in the table above means "Streamflow Maintenance"

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

TWIN FALLS CO., IDAHO
FILED
2007 JUN 28 PM 4 18

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 63-00303

NAME AND ADDRESS: UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

SOURCE: BOISE RIVER TRIBUTARY: SNAKE RIVER

QUANTITY: 271600.00 AFY

TOTAL RESERVOIR CAPACITY IS 286,600 ACRE FEET WHEN FILLED TO ELEVATION 3216 AND MEASURED AT THE UPSTREAM FACE OF THE DAM

PRIORITY DATE: 01/13/1911

POINT OF DIVERSION: T03N R04E S13 LOT 5 (SWNE) Within Boise County
LOT 7 (NWSE)

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	271600.00 AFY
Irrigation from Storage	03-15 TO 11-15	271600.00 AFY

PLACE OF USE:

THE PLACE OF USE IS WITHIN THE BOISE FEDERAL RECLAMATION PROJECT WITHIN ADA, CANYON, BOISE, ELMORE COUNTIES, IDAHO, AND MALHEUR COUNTY, OREGON (BIG BEND IRRIGATION DISTRICT).

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

THE NAME OF THE UNITED STATES OF AMERCIA ACTING THROUGH THE BUREAU OF RECLAMATION APPEARS IN THE NAME AND ADDRESS SECTIONS OF THIS PARTIAL DECREE. HOWEVER, AS A MATTER OF IDAHO CONSTITUTIONAL AND STATUTORY LAW, TITLE TO THE USE OF THE WATER IS HELD BY THE CONSUMERS OR USERS OF THE WATER. THE IRRIGATION ORGANIZATIONS ACT ON BEHALF OF THE CONSUMERS OR USERS TO ADMINISTER THE USE OF THE WATER FOR THE LANDOWNERS IN THE QUANTITIES AND/OR PERCENTAGES SPECIFIED IN THE CONTRACTS BETWEEN THE BUREAU OF RECLAMATION AND THE IRRIGATION ORGANIZATIONS FOR THE BENEFIT OF THE LANDOWNERS ENTITLED TO RECEIVE DISTRIBUTION OF THIS WATER FROM THE RESPECTIVE IRRIGATION ORGANIZATIONS. THE INTEREST OF THE CONSUMERS OR USERS OF THE WATER IS APPURTENANT TO THE LANDS WITHIN THE BOUNDARIES OF OR SERVED BY SUCH IRRIGATION ORGANIZATIONS, AND THAT INTEREST IS DERIVED FROM LAW AND IS NOT BASED EXCLUSIVELY ON THE CONTRACTS BETWEEN THE BUREAU OF RECLAMATION AND THE IRRIGATION ORGANIZATIONS.

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

RULE 54(b) CERTIFICATE

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

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

TWIN FALLS CO. IDAHO
FILED
2007 JUN 29 PM 1 18

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 63-03613

NAME AND ADDRESS: UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

SOURCE: BOISE RIVER TRIBUTARY: SNAKE RIVER

QUANTITY: 15000.00 AFY

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

PRIORITY DATE: 06/25/1938

POINT OF DIVERSION: T03N R04E S13 LOT 5 (SWNE) Within Boise County
LOT 7 (NWSE)

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	15000.00 AFY
Irrigation from Storage	03-15 TO 11-15	15000.00 AFY

PLACE OF USE:

THE PLACE OF USE IS WITHIN THE BOISE FEDERAL RECLAMATION PROJECT WITHIN ADA, CANYON, BOISE AND ELMORE COUNTIES, IDAHO AND MALHEUR COUNTY, OREGON (BIG BEND IRRIGATION DISTRICT).

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

THE NAME OF THE UNITED STATES OF AMERCIA ACTING THROUGH THE BUREAU OF RECLAMATION APPEARS IN THE NAME AND ADDRESS SECTIONS OF THIS PARTIAL DECREE. HOWEVER, AS A MATTER OF IDAHO CONSTITUTIONAL AND STATUTORY LAW, TITLE TO THE USE OF THE WATER IS HELD BY THE CONSUMERS OR USERS OF THE WATER. THE IRRIGATION ORGANIZATIONS ACT ON BEHALF OF THE CONSUMERS OR USERS TO ADMINISTER THE USE OF THE WATER FOR THE LANDOWNERS IN THE QUANTITIES AND/OR PERCENTAGES SPECIFIED IN THE CONTRACTS BETWEEN THE BUREAU OF RECLAMATION AND THE IRRIGATION ORGANIZATIONS FOR THE BENEFIT OF THE LANDOWNERS ENTITLED TO RECEIVE DISTRIBUTION OF THIS WATER FROM THE RESPECTIVE IRRIGATION ORGANIZATIONS. THE INTEREST OF THE CONSUMERS OR USERS OF THE WATER IS APPURTENANT TO THE LANDS WITHIN THE BOUNDARIES OF OR SERVED BY SUCH IRRIGATION ORGANIZATIONS, AND THAT INTEREST IS DERIVED FROM LAW AND IS NOT BASED EXCLUSIVELY ON THE CONTRACTS BETWEEN THE BUREAU OF RECLAMATION AND THE IRRIGATION ORGANIZATIONS.

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

RULE 54(b) CERTIFICATE

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

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 63-03614

NAME AND ADDRESS: UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
1150 N CURTIS RD SUITE 100
BOISE, ID 83706-1234

SOURCE: SOUTH FORK BOISE RIVER TRIBUTARY: BOISE RIVER

QUANTITY: 493161.00 AFY

TOTAL RESERVOIR CAPACITY IS 493,161 ACRE FEET WHEN FILLED TO ELEVATION 4196.0 FEET AND MEASURED AT THE UPSTREAM FACE OF THE DAM.

PRIORITY DATE: 12/09/1940

POINT OF DIVERSION: T01S R08E S01 LOT 4 (NWSE) Within Elmore County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	487961.00 AFY
Irrigation from Storage	03-15 TO 11-15	487961.00 AFY
Industrial Storage	01-01 TO 12-31	5200.00 AFY
Industrial from Storage	01-01 TO 12-31	5200.00 AFY
Power Storage	01-01 TO 12-31	493161.00 AFY
Power from Storage	01-01 TO 12-31	493161.00 AFY
Municipal Storage	01-01 TO 12-31	5200.00 AFY
Municipal from Storage	01-01 TO 12-31	5200.00 AFY

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS EARLY AS MARCH 1 AND MAY CONTINUE TO AS LATE AS NOVEMBER 15, PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE OF WATER BEFORE MARCH 15 UNDER THIS REMARK IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE A PARTIAL DECREE IS ENTERED FOR THIS RIGHT.
493,161 ACRE-FEET FOR POWER THAT CAN BE GENERATED BY THE RELEASE OF 487,961 ACRE-FEET OF WATER FOR IRRIGATION AND 5,200 ACRE-FEET FOR INDUSTRIAL AND MUNICIPAL PURPOSES.

PLACE OF USE:

THE PLACE OF USE IS WITHIN THE BOISE FEDERAL RECLAMATION PROJECT WITHIN ADA, CANYON, ELMORE COUNTIES, IDAHO AND MALHEUR COUNTY OREGON (BIG BEND IRRIGATION DISTRICT).

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

THE NAME OF THE UNITED STATES OF AMERICA ACTING THROUGH THE BUREAU OF RECLAMATION APPEARS IN THE NAME AND ADDRESS SECTIONS OF THIS PARTIAL DECREE. HOWEVER, AS A MATTER OF IDAHO CONSTITUTIONAL AND STATUTORY LAW, TITLE TO THE USE OF THE WATER IS HELD BY THE CONSUMERS OR USERS OF THE WATER. THE IRRIGATION ORGANIZATIONS ACT ON BEHALF OF THE CONSUMERS OR USERS TOADMINISTER THE USE OF THE WATER FOR THE LANDOWNERS IN THE QUANTITIES AND/OR PERCENTAGES SPECIFIED IN THE CONTRACTS BETWEEN THE BUREAU OF RECLAMATION AND THE IRRIGATION ORGANIZATIONS FOR THE BENEFIT OF THE LANDOWNERS ENTITLED TO RECEIVE DISTRIBUTION OF THIS WATER FROM THE RESPECTIVE IRRIGATION ORGANIZATIONS. THE INTEREST OF THE CONSUMERS OR USERS OF THE WATER IS APPURTENANT TO THE LANDS

OTHER PROVISIONS (continued)

WITHIN THE BOUNDARIES OF OR SERVED BY SUCH IRRIGATION ORGANIZATIONS, AND THAT INTEREST IS DERIVED FROM LAW AND IS NOT BASED EXCLUSIVELY ON THE CONTRACTS BETWEEN THE BUREAU OF RECLAMATION AND THE IRRIGAITON ORGANIZATIONS.

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

RULE 54(b) CERTIFICATE

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

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
Case No. 39576) I.R.C.P. 54(b) FOR
) Water Right 63-03618

NAME AND ADDRESS: UNITED STATES OF AMERICA
REGIONAL DIRECTOR PN REGION
BUREAU OF RECLAMATION
1150 N CURTIS RD SUITE 100
BOISE, ID 83706-1234

SOURCE: BOISE RIVER TRIBUTARY: SNAKE RIVER

QUANTITY: 293050.00 AFY

Maximum Volume Annually Diverted to Storage and Release from Storage: 293,050.0 AF.
The reservoir storage capacity is 293,050 acre feet when filled to elevation 3055.0 and measured at the upstream face of the dam.
Lucky Peak Reservoir has 13,950 acre feet of capacity for flood control purposes in addition to the volume of water authorized for storage under this right.

PRIORITY DATE: 04/12/1963

POINT OF DIVERSION: T02N R03E S11 LOT 7 (SENE) Within Ada County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	111950.00 AFY
Irrigation from Storage	03-01 TO 11-15	111950.00 AFY
Recreation Storage	01-01 TO 12-31	28800.00 AFY
Streamflow Maintenance Storage	01-01 TO 12-31	152300.00 AFY
Steamflow Maintenance from Sto	01-01 TO 12-31	152300.00 AFY

PLACE OF USE:

Irrigation from Storage — Within Ada County

T02N R03E S11	LOT 4	(NENE)		NESE
	S12	NWNW		SWSW
R04E S04		SWSW		
	S05 LOT 8	(SWNE)	LOT 6	(SWNW)
		NESE		NWSE
		SWSE		SESE
	S06	SWNE		NESW
	LOT 8	(SWSW)	LOT 9	(SESW)
	LOT 6	(NESE)		NWSE
	LOT 11	(SESE)		
	S07	NWNE		SWNE
	LOT 1	(NENW)		SENW
		NESW	LOT 4	(NWSW)
		NWSE		

Within Boise County

T03N R04E S05		SENE		
	S11	SENE	LOT 1	(NESE)
	S12	SWNW	LOT 1	(NWSW)

Within Elmore County

	S22 LOT 3	(NENW)	SWNW
		SENW	

Within Ada County

	S32 LOT 1	(NWNE)		SWNE
	LOT 5	(NWSE)	LOT 10	(SWSE)

Recreation Storage — Within Ada County

63-3618 - 001599

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

PLACE OF USE (continued)

Same as Irrigation Storage

Streamflow Maintenance Storage — Within Ada County
Same as Irrigation Storage

Irrigation Storage — Within Ada County
Lucky Peak Reservoir
Streamflow Maintenance from Storate — Within Ada County
Wtinin the Channel of the Boise River from Lucky Peak Dam
downstream to the confluence with the Snake River.
The place of use is within the Boise Federal Reclamation Project within Ada, Canyon, Payette, and Gem Counties, Idahp; Malheur County, Oregon; and the above-listed tracks in Ada, Boise, and Elmore Counties, Idaho.

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

Recreation Storage (inactive storage) shall not be released from storage for a beneficial use.
The name of the United States of America Acting Through the Bureau of Reclamation appears in the Name and Address Section of this Partial Decree. However, as a matter of Idaho constitutional and statutory law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.
The storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations.
The Bureau of Reclamation and Idaho Department of Fish and Game shall provide joint written instructions to the Department, for conveyance to the watermaster, regarding release of the Lucky Peak streamflow maintenance storage water.
THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

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

John M. Melanson
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