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

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

Petitioners,

vs.

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

Petitioners,

vs.

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

Respondents.

and

SUEZ WATER IDAHO, INC.,

Intervenor.

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

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

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

The case involves an appeal by the Boise Project Board of Control and New York Irrigation District (hereafter Boise Project) from a final order issued by the Director of the Department of Water Resources. The Director styled this proceeding as an opportunity to express "concerns" about the Department's accounting system as used in Basin 63. R. 000007. It was used instead as a vehicle for the Director to "defend" the paper fill rule and to dismiss concerns. *See* Brief of Respondent State of Idaho. Supreme Court docket 40975-2013, p. 26. It was not a search for the best way to keep track of water used by the water users. It was a pathway for the Director and State to evade the SRBA proceedings and to use the administrative process to declare that paper fill is satisfaction.

In declaring that paper fill is satisfaction, the Director has asserted the legal authority to define the water right by way of the accounting program. The accounting program is not employed to measure the water used by the water users as it should be. Instead, the Director uses the accounting program to tell water users when they must take their water. Whether the water users actually use the water is irrelevant in the accounting. By claiming the authority to define the right under the rubric of "discretion," the Director has usurped the role of the judiciary.

The Director's response to the appeal is muddled. He principally claims that accounting is "complex," that the court should not interfere with any of the complexities, and that the Court must defer to his interpretation of the water rights. However complex it may be to measure and track water use, the law and the water rights control what is to be measured. The measuring system does not override the law, as the Director would have it.

Ever since the dams were built, water that physically filled the reservoir after flood control filled the existing storage rights. That is the water that is put to beneficial use by the storage right holders. The Director now claims that water fills the reservoirs under no water right

in flood control years. He says he can authorize storage after flood control without a water right because it is good "policy." He says, don't worry, no one has been or can be hurt by storage without a water right. The problem is clear. Without a water right, there is no property right to store that water. The water users are at the mercy (or whim) of future applications, future decisions, and future directors, all in the name of sanctifying a computer accounting program. The Department and Suez on appeal agree. They assert that there is no legal protection for the water stored in the reservoir after flood control under the Director's Order. They assert that water that has historically filled the reservoir is and must be available for the needs of juniors and future water users. At the same time, they proclaim that the storage right holders are not and will not be harmed. Both contentions cannot be true.

The Department complains that the Boise Project has placed undue emphasis on the many procedural violations committed by the Director and Department during the course of the contested case proceedings. Bringing the multitude of procedural errors committed during the proceedings to the Court's attention is not undue. It is critical. First, those procedural violations help reveal that this was a proceeding where the Director's "paper fill as satisfaction" outcome was preordained. This process was designed to create a record to support paper fill. Second, the numerous procedural violations of Idaho law deprived the Boise Project of its fundamental right to due process and a fair hearing. That cannot be ignored. Where the Director demands that his decision be given deference, it is important to understand the abuse of law and process committed by the person demanding deference from the Court. The Director must be required to obey the law.

The Boise Project also demonstrated that the Director failed to comply with substantive Idaho law, including the prior appropriation doctrine. The Director relied only upon the evidence

he and the Department developed. He discounted all evidence that tended to call his paper fill rule into question. The Director's Amended Final Order was arbitrary and capricious, not supported by substantial evidence, and his determinations are in direct conflict with the prior appropriation doctrine. The Boise Project requests that this Court reverse the Director's Amended Final Order and remand it for whatever proceedings this Court deems necessary and appropriate including dismissal of the contested case proceedings.

II. ARGUMENT

A. The Director may not Engage in off-the-Record Fact-Finding and Discussions with Department and Witnesses during the Contested Case; and the Department and Suez make no Effort to Justify those Inexcusable Actions

In order to have a full and fair opportunity to rebut and respond to evidence that the hearing officer will rely upon in making its final determination in an action, the parties must have full notice of such evidence. I.C. § 67-5251. In this case the Director appointed himself as hearing officer. In that capacity, he consulted extra-record materials, sought out agency staff during the proceedings to discuss the substance of testimony of witnesses and look for impeachment materials, and regularly met with the Department's primary witness and prosecuting attorney to discuss the proceedings. He even directed the preparation of rebuttal evidence. These unlawful actions irretrievably tainted the proceedings, depriving the Boise Project of its substantial right to due process of law. No one even attempts to or can justify this behavior.

"An administrative hearing officer's findings of fact 'must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.'" *Masterson v. Idaho DOT*, 150 Idaho 126, 130, 244 P.3d 625, 630 (2010), citing I.C. § 67-5248(2). The Idaho Supreme Court has held that:

> [W]hen a governing body sits in a quasi-judicial capacity, it must confine its decision to the record produced at the public hearing, and that failing to do so violates procedural due process of law. See *Chambers*, 125 Idaho at 118, 867 P.2d at 992 (*citing Cooper*, 101 Idaho at 411, 614 P.2d at 951; *Gay v. Board of County Comm'rs of Bonneville County*, 103 Idaho 626, 629, 651 P.2d 560, 563 (Ct.App. 1982)). This Court has also observed that when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process. See *Chambers*, 125 Idaho at 118, 867 P.2d at 992.

Idaho Historic Preservation Council v. City Council of Boise, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000) (emphasis added). There is no dispute that the Director both prior to and during the hearing regularly consulted IDWR witnesses concerning the substance of testimony and evidence presented. It is impossible to know what was communicated to the Director in these private sessions and what additional evidence or advice the Director may have been provided that was not disclosed, but it is clear that inappropriate contact with Department staff and witnesses took place outside the presence of the parties to the contested case, the substance of which was never disclosed to these parties.

On day three of the contested case hearing, the Director, incensed with the testimony he was hearing, called for a break during the presentation of testimony of past Water District 63 Watermaster, Lee Sisco. He called with him behind closed doors several staff members including counsel for the Department, the Deputy Director, and the Department's lead witness, Ms. Cresto. After testimony concluded, the Director was asked what had taken place during that break outside of the hearing of counsel for the parties to the contested case. Tr. Vol. III, p. 908, ll. 15-21. He explained that he was looking for another IDWR employee to supply him with an IDWR record, and that he would continue to gather information on his own, regardless of whether it was "judicially" noticed. The Director also said that "it doesn't matter" that he was looking for undisclosed material to use in his decision. Tr. Vol. III, p. 942, l. 17-p. 944, l. 20.

What was discussed during this time-out was never revealed. This is but one example of the Director's "second fact-gathering session without proper notice" to the parties and without an opportunity to rebut the evidence and substance of conversations the Director obtained from Department staff. *Idaho Historic Preservation Council v. City Council of Boise*, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000). None of these off-the-record discussions were recorded or made part of the record as required by I.C. § 67-5242(3)(d).

This was not just an isolated instance. The Director, as the hearing officer in this proceeding, regularly consulted with staff and witnesses during the hearing outside the presence of the parties and off the record. Ms. Cresto admitted, after initially denying the fact, that she had had multiple conversations with the Director and counsel for the Department throughout the course of the contested case proceedings concerning the substance of witness testimony and the preparation of exhibits, including the rebuttal exhibit admitted into evidence. Tr. Vol. V, p. 1585, l. 10-1586, l. 15; and p. 1588, l. 25-1589, l. 10. On this record the inescapable conclusion is that the Director, acting as the Hearing Officer, sought extra-record information and materials during the course of the proceedings, and that the extent of his additional fact-finding sessions was not, is not, and cannot be known to the parties. This is a fundamental violation of the parties' right to due process of law, and the deprivation of such a fundament right undoubtedly affects a substantial right of the Boise Project and all parties to the proceeding. Neither the Director nor Suez offers any excuse for this obvious violation of law.

If a Hearing Officer intends to rely upon the expertise or specialized knowledge of Department staff, "[p]arties shall be notified of the specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data," so relied upon,

prior to or during the contested case proceedings. IDAPA 37.01.01.602.[1] If the agency relies upon such information and expertise "it must refer to matters in the record to substantiate its conclusion or place such matter in the record itself…. That much at least is required in order to enable the reviewing court to determine that the...decision is not capricious or arbitrary and thus not a denial of due process of law." *Boise Water Corp. v. IPUC*, 97 Idaho 832, 842, 555 P.2d 163, 173 (1976).

The Boise Project was denied due process of law when the Director regularly undertook extra-record fact-finding forays during the proceedings to which the parties' were not privy. It is impossible to know whether and to what extent these extra-record investigations influenced the Amended Final Order. Hence, the parties' substantial right to due process of law has been infringed. The Amended Final Order must be reversed and remanded with instructions that any subsequent hearing must be conducted in a manner that comports with fundamental due process requirements.

B. The Department Failed to Conform to I.C. § 67-5206(5)(b) When It Rejected Certain Portions of the Attorney General's Rules, and Rejecting Such Rules Does Not Excuse the Department from Providing the Due Process Protections Intended by the Rules

The Department next claims that it is free to have one lawyer act in multiple roles – prosecutor and advisor – and that is not bound to follow either the letter or the spirit of the attorney general's rules which preclude the same attorney from acting as both the investigative/prosecutorial to the agency head and as advisory attorney on behalf of a hearing officer in the same hearing. The Director argues that he is free to discuss the substance of both the investigation and development of a contested case with the attorney who presents the

[1] A staff memo was prepared, provided to the parties in advance, and entered into evidence. Ex. R.A.E. 00001-13 (Ex. 1). This is an example of the proper way to seek the Department's expertise. Not sidebars during the hearing.

evidence and at the same time receive advice from the same attorney about the evidence adduced at the contested case, with the excuse that "the Department has specifically 'declined' to adopt the Attorney General's rules." IDWR Brief p. 98. IDAPA 37.01.01.050 provides that the Department "decline[d] in whole to adopt the contested case portion of the 'Idaho Rules of Administrative Procedure of the Attorney General'."[2] However, for the Department to have effectively rejected the Attorney General's rules, it was required to "include in the rule adopting its own procedures a finding that states the reasons why the relevant portion of the attorney general's rules were inapplicable to the agency under the circumstances." I.C. § 67-5206(5)(b). A rule adopted in violation of the APA requirements is void. I.C. § 67-5231; *Asarco Inc. v. State*, 138 Idaho 719, 725, 69 P.3d 139, 145 (2003). Such an explanation is absent from the Department's rules and from the Department's brief in this case. Even if the Department had effectively rejected the attorney general's rules, doing so does not insulate the Department from providing the necessary protections to parties to contested cases to assure a full and fair opportunity to be heard before an impartial tribunal. At a minimum, due process requires that separate counsel be assigned to the agency head during the investigation, preparation of, and presentation of evidence in the contested case and another advisory attorney to advise the Hearing Officer.

The Department's interpretation of the Administrative Procedures Act is not entitled to deference. *A&B Irr. Dist. v. IDWR*, 154 Idaho 652, 654, 301 P.3d 1270, 1272 (2012), *citing Westway Constr., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107, 115, 73 P.3d 721, 729 (2003). The

[2] The Department adopted each rule promulgated by the Attorney General's model procedural rules, in the same order, except for the six rules governing the appropriate roles and actions of counsel assigned to the department, and the appropriate actions of the department head, department attorneys and staff and hearing officers after commencement of an action. It also omitted the rule relating to the consideration of requests for attorney's fees and costs. Compare IDAPA 37.01.01.000-791, and IDAPA 04.11.01.000-791.

Department cannot ignore the law. Simply dismissing the parties' objections to the Department's attorney acting in both the role of the prosecuting/investigative attorney and the advisory attorney to the Hearing Officer on the basis that IDWR did not adopt those provisions from the Attorney General's model rules does not comply with I.C. § 67-5206(5)(b). The attempted exemption from the rules is void. I.C. § 67-5231; *Asarco, supra*.

The Department attempts to excuse its failure to provide different counsel to fill these separate functions by arguing that the contested case was not a "prosecution." IDWR Brief p. 98. Not true. The Attorney General's rules divide the responsibilities of agency attorneys assisting in a proceeding between those of a prosecutorial attorney/investigative attorney and advisory attorney. The distinction is not based on the type of action being overseen by the agency, but rather by the tasks performed by counsel who assists in the proceedings. IDAPA 04.11.01.420.

Prosecutorial and investigative functions include "presentation of allegations or evidence to the agency head for determination whether a complaint will be issued, the issuance of a complaint when complaints are issued without the involvement of an agency adjudicator, and presentation of evidence or argument and briefing on the record in a formal contested case proceeding." *Id*. (emphasis added) It is undisputed that the Department's counsel provided these functions. Tr. 08/14/15 Prehearing Conf., p. 48, l. 23-p. 50, l. 11.

Advisory attorneys serve the important function of advising the hearing officer during the pendency of the contested case and evaluating the evidence with the hearing officer to assist in the preparation of a decision. IDAPA 04.11.01.423.02.b. Furthermore "no agency attorney assigned to advise or assist the agency head or hearing officer shall discuss the substance of the complaint ex parte with any representative of any party or with agency attorneys or agency staff involved in the prosecution of investigation of the complaint." *Id*. Yet, that is exactly what

Department's counsel did. Tr. Vol. V., p. 1585, l. 10-1586 l. 15 and p. 1588, l. 25-1598 l. 10 (Cresto).

Mr. Baxter made it very clear that he would act in both roles. Tr. 08/14/15 prehearing conf., p. 49, l. 11-p. 50, l. 11. The Department argues that its attorney's dual role is just fine because its positions taken in the hearing were not "adverse" to the positions taken by the Petitioners. Not true. All of the testimony presented by the Department's counsel and all of his examination of witnesses was adverse, if not overtly hostile to the Boise Project. E.g., Tr. Vol. V, p. 1537, l. 6-p. 1540-l. 5. Whether "adverse" or not, the same lawyer was both presenting the Department's evidence designed to convince the Director to defend the paper fill rules and assisting the hearing officer in evaluating the evidence he just presented. Nothing could comport less with due process.

The Department argues that the Department 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." IDAPA 37.01.01.157. True, but this rule does not authorize the same counsel who investigated or presented evidence in the contested case proceedings to act as the advisory attorney to the Hearing Officer or to engage in ex parte contacts with the Hearing Officer. The testimony put on by the Department's counsel through the Department's witnesses, Dunn, Dreher, Sutter, Tuthill, and Cresto, and then evaluated by the same lawyer, along with the Director, was the very testimony that the Director claimed was the most reliable in his Order defending the accounting program. R. 001258-1263.

"The risk of bias becomes intolerably high when the prosecutor serves as the decision-maker's advisor in the same or a related proceeding. Thus, an administrative agency's staff counsel may permissibly prosecute a case before the agency when an independent hearing officer

presides over the contested case hearing and the prosecutor plays no role in the agency's deliberations." *Martin v. Sizemore*, 78 S.W.3d 249, 265 (Tenn. App. 2001), *citing Ogg v. Louisiana State Bd. of Chiropractic Exam'rs*, 602 So. 2d 749, 752-53 (La. App. 1992). As *Martin* stated, "[a] combination of prosecutorial and adjudicative functions is the most problematic for procedural due process violations." *Id*. These cases recognize the due process limits of the agency's attorney's roles, for which the Director has no answer.

The Boise Project's procedural due process guarantees were violated because the Department's counsel both presented the evidence upon which the Director relied and advised the Director about the value of that evidence. Purporting to reject the Attorney General's rules (without taking the necessary legal steps to do so) that were formulated to protect the parties' procedural due process guarantees does not insulate or justify the Department's violation of those due process guarantees. Procedural due process is a fundamental constitutional right and demands that the parties to a proceeding have that proceeding conducted before a fair and unbiased tribunal. *Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 505-506, 337 P.3d 655, 664-665 (2014). That guarantee was violated when the Boise Project's right to a fair and unbiased tribunal was taken from it.

C. The Statements and Actions of the Director Demonstrate that He Was Incapable of the Judging the Matter Fairly on its Merits

The Director mischaracterizes the Boise Project's position when he argues that the Director's bias arises solely because the Director "did not begin with the unquestioned premise that the Decreed Storage Rights are 'property rights' to the water 'actually, physically stored' in the reservoir system on the date of 'maximum physical fill.'" IDWR Brief p, 97. Actually the Director's bias is evidenced by his statements and actions prior to and throughout the contested case proceedings making clear his abiding belief that paper fill is satisfaction of the water right

and that the purpose of the contested case was to create a record to defend the continued use of the paper fill concept. The Director's conclusory statements that he "ha[d] not pre-judged the issues," and that he was "committed to obtaining a full understanding of the objections to the current water right accounting" simply do not square with his pre-hearing actions and statements, or with his conduct during the hearing. IDWR Brief p. 96.

The Boise Project does not advocate that "the Director approach every contentious water matter with an utterly empty mind" as the Department contends. *Id*. Rather, where any person has been the principal advocate for a specific outcome on the ultimate issue to be decided, that same person is incapable of judging the matter fairly on the merits. Whether the official subjectively believes otherwise is irrelevant. This appearance of impropriety is insurmountable because "the probability of actual bias on the part of the judge as decision maker is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009) (citing James Madison, The Federalist No. 10). The inquiry is not whether the judge is actually, subjectively biased, but whether there is an 'unconstitutional potential for bias.' *Id.* at 881, *quoting Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971) (emphasis added). Because the Director had taken on the paper fill cause as his own, that potential for bias cannot be ignored.

The Director was asked to disqualify himself from acting as the Hearing Officer very early in these proceedings because of his "bias, prejudice, interest, [and] substantial prior involvement other than as a presiding officer." R. 000102, citing I.C. § 67-5252(1) (emphasis in original). He was the principal advocate for paper fill. His prior involvement was not limited to participation in settlement discussions and a single presentation to the legislative interim committee as the Department suggests. IDWR Brief p. 93. That was just the tip of the iceberg. The Director personally participated in numerous settlement negotiations related to accounting

for the storage rights and made many pronouncements on the need to have paper fill as a control on the federal government. *See* Tr. Vol. IV, 1249, ll. 2-12 (Director, Mat, Liz, and AG's office all advocated for paper fill). The full extent of his prior involvement was not revealed and the Department's only excuse is that his involvement was "well known." IDWR Brief p. 93. His "well known" involvement is not an excuse to deny the request for an independent hearing officer. It is a reason to grant it.

The Director made a public presentation in September, 2014, to the Interim Natural Resources Committee of the Idaho Legislature to explain his position on the refill issues. R. 000114-131. His opinions on the ultimate issue were laid bare, even though he had already initiated the contested case. R. 000002-34. Not one of his comments suggested that the water users might have a valid legal interest in the water stored after a flood control release. Not surprisingly, these same opinions are carried through in the Amended Final Order.

For instance, the Director advised the legislature that storage "must be" accounted for using the paper fill rule:

> When water is being stored in the early winter, the Bureau and the spaceholders predict thirst—water is being physically stored to the satisfaction of the water right….When abundant snows dictate that water previously stored because of a perceived need be dumped down the river, some argue that need (or thirst) be determined in hindsight after the initial determination of need, even though the storage component of the water right has been exercised. Should the passage of water downstream for a purpose not defined by a state water right but by federal pre-emption be excused and the satisfaction of the state water right reset to a lesser number? The determination of need cannot wait until the end of the storage season or the end of the upcoming irrigation season – there is a right for storage and for use from storage – the storage portion of the right must be accounted for based on the state based water right.

R. 000125-126. The Director is not merely describing the accounting system as the Department contends, he was telling the legislature why it must work that way. In the Amended Final Order, the Director reaches the same conclusion. *See* R. 1295; R. 1299; R. 001284.

Again in the presentation to the Interim Legislative Committee the Director extolls the virtues of paper fill and rejects alternatives as not "appropriate":

> When any other water user demands water, it is counted against the water right until the water user has diverted the quantity of water authorized by the water right. Under this standard, any time water is being stored, it would be counted against the storage water right. If the right holder decides to dump water from storage, the amount of the right that has been exercised would not be reset. Once the right were satisfied, no more water could be stored. Being treated like any other water user is not the appropriate standard – it would result in reservoirs not physically filling and water flowing downstream and lost to downstream states and the ocean….Under the present method of accounting, one could argue the storage right holder receives more than any other water right holder because the storage space refills even after the right has been satisfied.

R. 0000127 (emphasis added).

The Amended Final Order, confirmed his perception of those virtues:

> When the decreed storage volume authorized by the water right has been satisfied, additional storage of water in the on-stream reservoirs is beyond the limits of the right. To allow the additional storage of water under the right is not water right administration, but is, instead, water right enlargement.

R. 001282; *see also* R. 001301.

The Director also advised the Interim Committee that "the historical practice" should be recognized to protect juniors and future users from the federal government:

> There is proposed draft settlement language to establish decreed water rights that would protect the historical practice of filling empty space in reservoirs vacated for flood control while protecting those who have relied on the present method of accounting. This draft language would also ensure that the federal government will be limited in its ability to use its flood control operations to control the river and take water from existing junior priority uses and from future users.

R. 000130 (emphasis added).

Ultimately, in the Amended Final Order the Director decided he had the authority to recognize a "policy" enshrining an "historical practice" to benefit the junior and future users:

> It is undisputed that the Department's longstanding policy has been to allow the on-stream reservoirs to refill space evacuated for flood control if it can be done without injury to other appropriators. …

R. 001296.

The Department does not deny that the Director told the legislators that he was "mystified" by the water users' position or deny that when Rep. Raybould suggested legislation requiring maximum fill of the reservoirs before the irrigation season (contrary to the water control manual that the Department "blessed") that the Director chimed in "hear, hear." R. 000903-04. He explained why the objections to paper fill lacked merit, but identified not a single problem on the opposite side of the ledger. *Id.* and exhibits. The Department does not explain how this is the conduct of an impartial trier of fact.

The Director had recommended that the late claims filed by Reclamation and the Boise Project to appropriate the water stored and used by the claimants after flood control releases be disallowed and that a general provision recognizing the historical practice of refilling the reservoirs after flood control operation be adopted.[3] At a hearing in sub-case nos. 63-33732, *et seq*., held in July, 2015, approximately six weeks before the contested case hearing began, the Deputy Attorney General advised the Special Master that the Court could not recognize the historical practice in the SRBA proceedings, even though that was the Director's preferred outcome. Sub-Case 63-33732, *et seq*., Tr. 07/14/15. P. 6, ll. 13-17. Having telegraphed the preferred outcome in July, the Director's Order then adopts that result as a matter of administrative dictate. R. 1296.

These examples show that the Director had pre-determined the outcome – paper fill as satisfaction would stand. R. 1308. He did as the AG predicted he would in the Basin Wide 17

[3] *See* Memorandum Decision and Recommended Order, Subcase No. 63-33737 *et seq*., p. 9.

appeal, "defend" paper fill. His subjective claim that he would "provide a full and fair hearing and judge this issue on its merits," is not borne out. His decision does not waiver from the positions he staked out in settlement, in statements to the Interim Committee, or in his positions communicated to the SRBA Court. R. 000388. The Director had made the parties aware, through his advocacy to defend the paper fill rule, that his mind wasn't empty, but rather had been made up. He even committed to issue his decision regardless of whether anyone participated to voice concerns or objections. Tr. 10/7/14 Status Conference, p. 43, l. 3-p. 44, l. 13.

None of the cases relied upon by the Director to defend his refusal to disqualify himself bear any resemblance to the situation the parties were confronted with in this contested case. See *Idaho Dept. of Water Amended Final Order Creating WD No. 170 v. IDWR*, 148 Idaho 200, 220 P.3d 318 (2009). *WD No. 170* did not involve the level of advocacy we have here. There, Thompson Creek pointed to a single slide that simply described the provisions of the Wild & Scenic Rivers Agreement and the SRBA Court had made it clear IDWR was not bound. *Id.* at 208-209, 220 P.3d at 326-27. Here, the Director created his own vehicle to enshrine the paper fill rule. He didn't care whether any party participated, and he issued a final order that laid out in detail the identical arguments he had been making to the legislature and others beforehand. Under these circumstances there is no evidence that the Director was "fully capable of judging this particular controversy fairly on the basis of its own circumstances." IDWR Brief p. 96.

In *Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 337 P.3d 655 (2014), the Supreme Court addressed how the issue of bias in an agency decision maker should be handled. There, one member of a three person Board charged with investigating issues related to the licensing of appraisers had been the initial complainant and accuser of the party whose license was in question. The Court held "there is no question that Janoush was biased – his

personal stake in the Williams matter left him incapable of rendering a fair decision on the facts." *Id*. at 506, 337 P. 3d at 665. Yet, contrary to the proceeding here, that Board appointed an independent hearing officer. The hearing offer was not alleged to harbor any bias or preconceptions. His findings were later adopted by the Board without the participation of the biased member. The Court held that because the Board appointed an independent hearing officer who "performed the hearing in a professional and impartial manner," and because the accusing Board member recused himself from the vote on the hearing officer's decision, the party's due process rights were not violated. *Id*. at 666, 337 P.3d 507. The Court made it clear that the independent hearing officer's actions overcame the applicant's "justified" concerns. *Id.* The parties in this case simply did not have the benefit of a professional and impartial hearing officer to conduct the hearing.

The Department essentially agrees that the Director had a preconception of the correct legal view, but contends that is okay as long as he says he is willing to consider alternative views. IDWR Brief p. 94. Of course, saying and even believing it, does not make it so. The Court must view this claim through an objective lens, not based on the Director's subjective belief or that of his lawyers.[4] The Director's contention that he was "doing his job" (*Id.*) in talking to the legislature and advocating for a result does not insulate the Department from having to provide the parties an impartial hearing officer. The record illustrates the strong bias that the Director had towards paper fill. If on this record, the Director's advocacy is not disqualifying, then it is

[4] The non-partisan Office of Performance Evaluation (OPE) and the Legislature have recognized a major concern with the administration of justice by state agencies. OPE found an identified risk of bias in administrative hearings as inherent in the structure. OPE also commented that the cases that had a high risk of bias were typically where the agency head acted as the hearing officer. www.http.//legislative.idaho.gov/ope/publications/reports/r1602.pdf. In SCR 151, unanimously passed by the 2016 Legislature, the legislature concluded that the moderate and high risks of bias identified by OPE was "unacceptable," and called for measures to mitigate that risk. This Court should likewise recognize the risk of bias here and resolve that risk in favor of the citizens of the State, by reversing this Order.

unclear whether any hearing officer could be disqualified. Fundamental fairness demands that the Amended Final Order be reversed.[5]

The Department also contends that the Director was not required to disclose all of his public and private pronouncements about the refill or paper fill issue in response to requests from the Boise Project. IDWR Brief p. 93. *See* R. 387, Order Denying Request to Disclose. The Director contends these many communications with legislators, the governor's office, and other public groups were not with "parties," and therefore not *ex parte* contacts and need not be disclosed. *Id.* The Director admits he had "well known" and extensive communications with many people on the very subject matter of the hearing. While all such contacts may not have been with parties, the extent to which they were *ex parte* is unknown because the Director refused to disclose these contacts. These contacts with impartial decision makers and political figures would reveal the positions the Director had taken on the subject matter of the proceedings. What did he say to the rest of the world about how entrenched his position was? We do not know because the Director will not tell us or the Court. This failure to allow the parties to fully investigate the extent of his prior pronouncements deprived the Boise Project of its due process right to a fair tribunal.

[5] The Department's argument (IDWR Brief p. 91) that had the Director not disqualified himself then the matter could not have been decided is insupportable. The Department frequently assigns independent hearing officers to preside over contested case proceedings, and then the hearing officer submits his or her recommendations to the Director to adopt, modify, or reject. If the Department's argument is to be believed, then the Director would be required to serve as the hearing officer on every contested case proceeding before the Department. The Director and Department have never explained the Director's insistence that he and only he could act as the hearing officer in this matter and have never answered the question of why it would not appoint an independent hearing officer to protect the appearance of impartiality by the Department.

D. The Documents Officially Noticed by the Director Do Not Provide the Parties with the Information that they are Required to be Given to Refute or Rebut the Findings of the Director in this Proceeding

This contested case is not like other contested cases where two or more parties dispute the findings of a proposed final order of the Department concerning a dispute between those parties with a defined issue. A party files an initiating document with the Department, they engage in discovery to develop a record and then the Department holds a contested case to determine whether the aggrieved party is entitled to relief and what that relief should be. This case is very different. The Director framed a question that he wanted to resolve and served that question on the parties. Then he stated he would take judicial notice of thousands of documents that he might rely upon to answer the question.

These documents, that came to constitute the record in the contested case, were assembled by the Department and consisted of every black book dated from 1949 through 2014, and a few black books dating back to 1918, over 3,000 pages of various internal water right accounting binders, memoranda, correspondence, tables, reports and affidavits, correspondence with Reclamation and other IDWR personnel, and computer code. The purpose of noticing these materials was not explained.[6] The notice included the entire water rights backfiles for seven Basin 63 water rights, the Bryan and Stewart decrees, and the entire court record of the Basin Wide 17 SRBA litigation. In addition to these 'specifically' identified records, the Director also proclaimed that he would take official notice of:

- Water District 63 records of water distribution, water accounting, and/or reservoir operations in the possession of the Department, including reports, analyses, manuals, printouts, correspondence, memoranda, presentations, advisory committee minutes, **etc**. These documents can be reviewed at the Department's state office in Boise upon request.

[6] However, there is no pre-existing administrative record to support the adoption or use of the 1986 accounting program. Tr. Vol. I, p. 46, ll. 13-24.

R. 000887 (emphasis added). It is unclear what additional records the Director may have been referring to, or consulted and relied upon.

Counsel for the Director argued that this list of officially noticed documents was "not unduly burdensome." Tr. 08/14/15, p. 35, l. 14. The problem with this so-called official notice was that it was so all-encompassing as to be meaningless. There was no attempt to direct the parties to any particular documents or passages or subjects. In stark contrast, the Department only introduced nine exhibits at the contested case hearing, and only four of these were among the documents officially noticed. R. 000692.

When documents are officially noticed by an agency, "[p]arties must be afforded a ***timely and meaningful*** opportunity to contest and rebut the facts or material so noticed." I.C. § 67-5251(4), (emphasis added); *Masterson v. IDOT*, 150 Idaho 126, 129, 244 P.3d 625, 628 (Ct. App. 2010) (that opportunity must be provided prior to issuance of the Order). The Department's rules emphasize that "[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed." IDAPA 37.01.01.602. Rather than advise the participants to the hearing of specific facts or materials, the Director did not reveal any specific facts until the Final Amended Order was released. This deprived the Boise Project of a meaningful opportunity to refute or rebut the officially noticed material. I.C. § 67-5251(4).

For example, the Director's Order includes extensive discussion about what is and is not in the "black books," particularly prior to 1986. R. 1249-1255. He even cited a Basin 01 black book to support his decision. R. 001261. These topics are not disclosed in the Department's Staff Memorandum or in the Department's testimony at the hearing. R. 270-282 and 1250-1253.[7]

[7] Only two black books were introduced into evidence at the hearing for the years 1985 and 1986. Exs. 2009 and 2010. The Department's February 4, 2015, Response to Pioneer's discovery requests did reference the 1943 and 1955 black books (See R. 537-545). The Department did not present or rely on the information in that response at the hearing. That is the extent of the record concerning the black books.

The Department excuses this by arguing that the "presiding officer is not bound by the rules of evidence," and that "the rigorous approach the Petitioners advocate…would frustrate the purpose of authorizing the Department to take official notice of facts 'that could be judicially noticed' and 'technical or scientific facts within the agency's specialized knowledge.'" IDWR Brief, p. 89. Regardless of whether the Hearing Officer is bound by the rules of evidence, he is bound by the administrative rules concerning official notice and is not excused from complying with the Administrative Procedure Act or the rules.

Where the Department chooses to take official notice of any records, it must do so in a manner that provides the parties with a ***meaningful*** opportunity to rebut and refute the materials so noticed. The mass official notice of voluminous categories of document does not meet this required legal standard. It shows that the Director was willing to reach outside the record to justify a predetermined outcome. The Boise Project's substantial right to procedural due process was violated and the Director's Amended Final Order must be reversed.

E. The Director Abused his Discretion in Pushing Ahead with the Contested Case while the SRBA Late Claims were Pending

In the opening Brief, the Boise Project showed that the Director claimed he pushed this case forward because he claimed he was "compelled" to do so. Tr. 8/14/15. Prehearing Conf. p. 59, ll. 3-6. The Director cites no <u>evidence</u> to support this claim of compulsion, because there is none. He admits that his proceedings overlap the SRBA proceeding, but claims he is free to ignore the SRBA proceedings, because the State Attorney General has challenged the Special Master's Recommendation, IDWR Brief pp. 84-85. There was no attempt to exercise any discretion. No one asked him to proceed. He just did so, wrongfully claiming he had no choice. That is the epitome of an abuse of discretion.

F. This "Contested Case" did not meet the Regulatory Requirements for a Contested Case under IDWR Rules

Here, the Director admits that he instigated a case "that nobody likes." IDWR Brief p. 100. He claims he has a duty to deliver water and so therefore (in a *non-sequitur*) must call a contested case. Of course, the Director does not initiate a contested case every time he delivers water. The Boise Project's Opening Brief (p. 66) showed that none of the participants in the proceedings met the regulatory definition of a "party" because none were Applicants, Claimants, or Appellants. IDAPA 37.01.01.150 and 151. The Department does not claim that the regulatory definition was satisfied. Instead, the Department asserts in a circular fashion that the Boise Project was a "party" because it participated. IDWR Brief p. 73. The Boise Project "participated" because the Director said he would issue an Order whether anyone participated or not. Tr. 107/14 status conf., p. 42, l. 17-p. 45, l. 13. None of the regulatory triggers for a contested case were present. There was no application, petition, or complaint. What is left is a proceeding called by the Director because he wanted to issue a pronouncement about paper fill. But simply calling a proceeding a "contested case" as the Director did and now does before this Court does not allow him to modify the rules to achieve the procedural result he wants to reach. See *Sun Valley Co. v. Spackman*, Case No. CV-WA-2015-14500, Memorandum Decision and Order (April 22, 2016). Having exceeded his authority by initiating, *sua sponte*, a contested case that nobody wanted, the Final Amended Order must be reversed.

G. The Department Erred by Attempting to Establish its Paper Fill Rule Using the Contested Case Process Rather than Formal Rulemaking

In this proceeding the Director issued a ruling that water entering an on-stream reservoir must be counted toward the satisfaction of that water right, regardless of whether the water must be released for flood control to protect the property and lives of the citizens of the State of Idaho. R. 1308. This decision is based upon a "state-wide" policy that the Department has relied upon

since the late 1970s. Tr. Vol I, p. 245, l 17-p. 246, l. 20; Tr. Vol I, p. 277, l.9-p. 279, l. 25; Tr. Vol III, p. 658, l. 3-p. 659, l. 6. On appeal the Director says that paper fill rule was based on "a ruling by the Director" in the Upper Snake. IDWR Brief. p. 27, quoting Sutter; R. 1261.

Under this paper fill rule, the storage right holder in an on-stream federal reservoir must store water against the right regardless of whether the storage right holder has any practical ability or desire to do so. The rule is based on the Department's "statewide" paper fill policy. The Director's Order enshrined a policy that water must be attributed to storage rights even when water has been released for legitimate and necessary flood control purposes.[8] Paper fill as satisfaction of the water right is a firm, unbending rule. The Court must examine the effect of this paper fill rule in light of its consequences on the parties and on the public as a whole, not based on the process the Department choses to follow.

The Department and Suez argue on appeal that the Supreme Court's decision in *Asarco v. State*, 138 Idaho 719, 69 P.3d 139 (2003), is "not controlling." Suez even argues that the Department has the choice of acting under either rulemaking or a contested case proceeding. The Department made that argument in its initial decision denying the petition to dismiss the case. R. 000337-339. However, the Department wisely has abandoned the contention that it can simply choose whether or not to engage in rulemaking. In *Asarco*, the Supreme Court rejected the DEQ's argument that it had discretion not to engage in rulemaking. The Supreme Court made it clear that the Court has an obligation to review the effects of the agency action to determine

[8] The Department and Suez argue that this accounting program and the attribution of reservoir infill to "paper fill" of the storage rights simply applies to four rights in the Boise River. The Department and Suez fail to advise the Court, even though both know full well this is true, that the Director has made it clear that this same accounting program will continued to be applied in the Upper Snake and in particular the concept of paper fill will continue to be applied *See* Sub-case no. 01-2064, et seq., SRBA proceedings Upper Snake Settlement proposal filed with the court on Jan. 30, 2015. This action by the Director is of course consistent with the testimony of all IDWR personnel and directors in this contested case proceeding that there is and always has been a "state-wide" one fill/paper fill rule in effect ever since former Director Allred concluded that this paper fill rule should apply in the Upper Snake.

whether that agency action meets the statutory definition of a rule. *Id.* at 723 and 725. If it does, the agency must go through the formal rulemaking procedures of the Administrative Procedure Act. *Id.* It is wrong to say, as Suez does, that the agency decision can be upheld simply because the agency chose not to use the rulemaking procedures. "An agency action characterized as a rule must be promulgated according to the statutory directives for rulemaking in order to have a force and effect of law." *Id.* at 723. *Accord, State v. Riendeau*, 159 Idaho 52, 355 P.3d 1282 (2015); *State v. Haynes*, 159 Idaho 36, 355 P.3d 1266 (2015).

In *Asarco*, the IDEQ attempted to convince the Supreme Court that the TMDL was not a rule arguing it was merely "an unenforceable planning tool." *Asarco*, 138 Idaho at 722. The State's attorney general argued there that because the TMDL was unenforceable it could not have the force and effect of law and therefore did not have to be created by a rulemaking. The State and Suez argue to the contrary here. They do not contend that the Director's paper fill rule is just an unenforceable planning tool or that it has no legal effect. Rather, they contend the paper fill rule has the force and effect of law and that there is no authority to deviate from that by the watermaster or anyone else.[9] If so, then rulemaking is required under *Asarco*.

The Department and Suez fundamentally misunderstand or misstate the facts giving rise to the *Asarco* decision. The Department argues that the TMDL at issue in *Asarco* did not allocate pollutant loads among users, but simply created a total allocation for the basin. IDWR Brief p. 75. The TMDL does create a cumulative load for the maximum amount of a pollutant a water body can handle. *Asarco*, 138 Idaho at 722. However, the Department misses the Court's description of the load and waste load allocations that attribute portions of the receiving water's loading capacity to existing and future non-point and point sources. *Id.* at 725. The Supreme

[9] Tr. Vol. V, p. 1540, ll. 1-5; IDWR Brief p. 103 (watermaster had not adhered to his statutory duty to administer water by failing to slavishly follow the accounting program).

Court determined that once the waste load allocations are established then those waste load allocations are used as enforceable limits in modifying the companies' NPDES permits. *Id.* at 724. The argument that a TMDL has no effect on an individual discharger is wrong as a matter of fact and law.

Suez argues that the TMDL in *Asarco* was established without any procedures whatsoever, so that the only choice the Court had was to require rulemaking. Not correct. The Court held that the procedure that must be followed is dictated by the legal consequence of the decision. Second, the argument that there was no process in place to develop a TMDL displays unfamiliarity with the TMDL process. Idaho Code §§ 39-3611-3616 provide for an extensive administrative process in developing TMDLs including involvement of watershed and basin advisory groups. See also *Pronsolino v. Nastri*, 291 F3d 1123 (9th Cir. 2002)(describing in detail the TMDL process). The TMDL at issue in *Asarco* allocated pollutant loads among the various users through the waste load and load allocation process. *Asarco*, 138 Idaho at 724.[10] As with the TMDL, here the Director is prescribing to the water users when their "share" of the scarce resource has been "satisfied." In a TMDL, once the total load is discharged the discharger can discharge no more. Under the paper fill rule, once the reservoir has achieved paper fill, the water right is satisfied and can fill no more.

The Director argues that rulemaking would be a collateral attack on the SRBA decrees. IDWR Brief p. 77. The same rationale would be true of his decision to engage in a contested case to decide when a storage water right is satisfied. If the decrees dictate the result, there is no room

[10] Suez suggests that the legislature over-rode the Supreme Court's decision in *Asarco* by passing HR 458. Suez Brief, p. 69 n. 51. In fact, the legislature concluded that rulemaking should apply to some and not other TMDLs. I.C. § 39-3611(2) (applying rulemaking to Coeur d'Alene Basin metals TMDL). Rather than overruling *Asarco*, the legislature created a limited exception for one type of administrative action. That exception does not exempt any IDWR actions and does not apply here.

for any administrative action. Whether the paper fill as satisfaction rule is established by rule or by contested case, it has the same impact on the storage rights. Paper fill does not appear on any of the water rights, so is not an element of the rights. Under the Director's theory, the contested case would also be a collateral attack on the SRBA decreed rights of the storage right holders and therefore should be dismissed for that reason.

In the end, the Department and Suez concede that *Asarco's* six part test is controlling on whether an agency action must go through a formal rulemaking in order to be effective. Under *Asarco*, the first inquiry is whether or not the action has "wide coverage." The Department and Suez argue that this proceeding involved only four water rights in the entire Basin 63 and therefore does not have "wide coverage." This is nonsense, and Suez admits it: "This case is bigger than these four water rights." Suez Brief p. 8. There is no dispute that the Director sent notice to <u>every</u> water user in Basin 63. R. 000010-34. He did not limit notice of this proceeding to the storage right holders. In fact, the Director's decision makes it clear that he is implementing this provision for the purpose of protecting junior and future water users. The Department agrees. IDWR Brief pp. 57-58. Since the Director's paper fill rule applies to all current and future water users in the Boise and indeed "statewide" it has "wide coverage."

The Director and Suez argue that requiring rulemaking to establish the Director's paper fill rule would bring all water right administration to a halt. This too is nonsense. The Director had plenty of time when this case was initiated to go through the rulemaking procedures and it certainly could have been completed by now had he chosen to do so. He simply refused. He was not forced to act in the face of a delivery call. Unlike *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), the Director is not using the lack of rule as an excuse for failing to deliver water. Also unlike *Musser*, "nobody" wanted this proceeding – except the Director.

The second *Asarco* factor is whether the standard is to be applied generally and uniformly. In responding to this factor, the Director confuses the general and uniformity provision with the wide coverage provision. What the Supreme Court said in *Asarco* about general and uniform procedures is that even though the TMDL focuses on individual sources of pollution, it has an overall scheme which is more appropriately described as generally and uniformly applicable because it affects all of the dischargers on the river. The same is true here. The Director's Order affects all the water users on the river.

The third factor is that the decision applies only in future cases. The Director and Suez argue that since the Director made the decision years ago to impose the paper fill rule on the Boise, therefore his decision operates retroactively. This is wrong because the Director's Order expresses what he "will" do in the future. R. 1308. Furthermore, Respondents' misconstrue *Asarco*. What the Court said was that the TMDL "does not adjudicate past actions." This proceeding did not adjudicate past actions. It was not a delivery call. It was a determination of how the Director "will" use the paper fill rule in the Boise henceforth.[11]

The fourth *Asarco* factor is that the decision prescribes a legal standard not provided by the enabling statute. The Director argues that the legal standard is simply the quantity on the decree. However, this Court recognized in Basin Wide 17 that the quantity on the decree does not answer the question of how that quantity should be accounted for. See *Memorandum Decision*, 00-91017, p. 11. There is no doubt that this a legal standard that is not set forth in the decrees or in any statute. The Director cites no statutory directive to impose his paper fill rule.

[11] When the Director denied the Motion to Dismiss, he stated that his decision would not operate prospectively unless he decided to change the accounting. R. 000340. In other words, the Director can initiate an administrative proceeding with the goal of not changing things and thereby providing an excuse not to go through rulemaking.

That is because there is none. There is no doubt that the Director intends this paper fill to be enforceable. R. 1308.

The fifth *Asarco* criterion is whether or not the pronouncement expresses new agency policy. The Boise Project agrees that this contested case proceeding was a *post hoc* effort to rationalize an existing "statewide" agency policy that sprang from the unilateral action or "ruling" of Director Allred in Basin 01 and that has been carried out by the Department ever since. The fact remains, though, that there was no outreach to the water users when this policy was adopted in Basin 63 to let them know that "paper fill" meant satisfaction of their rights. Tr. Vol. I, p. 202, ll. 6-25. So this pronouncement, if not new to the Department, is new to the water users.

The sixth element to be considered under *Asarco* is whether or not the agency action implements and interprets existing law, i.e. the priority doctrine. The Department and Suez twist and turn on this point, but ultimately they agree that the Director is filling in the blanks by making a determination that a storage water right is "satisfied" upon paper fill. The Director explicitly says he is employing this rule "in accordance with Idaho law." R. 1308. Under I.C. § 42-603, the Director is authorized to promulgate rules for distribution of water in accordance with the priorities of the rights. He has failed to carry out that duty.

Here, the Director has made a formal policy decision. According to the Director, paper fill is satisfaction of the storage right holders' rights. He intends this decision to be binding on the waster master, the water users, the storage right holders, and that it affects all water users on the Boise River. His paper fill rule meets all the requirements for promulgation as a rule under the Idaho Administrative Procedures Act and the Supreme Court's decision in *Asarco*. The Amended Final Order must be reversed.

H. The Basin Wide 17 Decision Neither Compels nor Authorizes the Paper Fill as Satisfaction Rule for the Boise River

The Director's response to this appeal primarily rests on his theory that the Supreme Court gave him unlimited discretion to decide how to account for water in federal on-stream reservoirs. *A&B Irrigation Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014)[12] (hereafter *Basin Wide 17*). *Basin Wide 17* does recognize that the Director, as an engineer, has technical expertise that can be brought to bear. 157 Idaho at 394. He also has discretion in determining how to measure when a water right has been satisfied. *Id.* However, *Basin Wide 17* does not vest the Director with any legal authority to declare the law, nor does he, as an engineer, have any legal expertise. The legal expertise rests with the Court and the Court does not defer to the engineer's legal judgment. Thus, the Supreme Court has held that the Director is not authorized to determine what rights the permit holder has acquired by virtue of the permit. *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 595, 76 P.2d 923, 926 (1938). The Court in *Basin Wide 17* agreed. The Director has a duty to deliver water in accordance with the prior appropriation doctrine. I.C. § 42-602. "This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law." 157 Idaho at 393.

The Supreme Court directed: "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 appropriator." *Id.* at 394 (emphasis added). "What accounting method is employed to determine how much a water right holder has used is up to the Director. Each decree gives a quantity that the Director "must provide to each water user in priority." *Id.* This is straight-forward. Provide the water user water he can use in priority. The Director thinks otherwise.

[12] The Director relies so heavily on this decision; it is cited "passim" in his brief.

First he assumes the right to interpret the decrees. IDWR Brief pp. 23-25. He does not respond to the Supreme Court's contrary directive in *Huff* that he is not endowed with that power. Then he contends that the rights do not allow flood control releases to be made from the reservoirs, even though he admits that flood control was an authorized use of the reservoirs.[13] IDWR Brief p. 27, n 29. In other words, the reservoirs must release water to protect the City of Boise. After recognizing that the reservoirs must pass or release water for flood control, he then leaps to the illogical conclusion that the water released by virtue of federal flood control law is "available" to the storage rights. *Id.* p. 29. Exactly how water that must be released prior to the irrigation season is "available" to the water users remains a mystery. Yet, he contends that counting "available" water is what the storage rights require and that it is consistent with his duty to count water "used" by the senior.

To "use" something requires that it be put to use or even "consumed." *American Heritage Dictionary* (1969). Available means "accessible" or capable of being put to use. *Id.* The words are not, as the Director suggests, synonymous. In the end, the Director concedes that he has not even attempted to count the water storage right holders have actually "used." Instead, he contends that the Court did not mean what it said. Counting water that is "used" does not mean water "used," it means that the Director has discretion to create an accounting system that counts water that would be "available" if not for flood control releases. IDWR Brief p. 45. If the prior appropriation doctrine requires measurement of water "used" by the senior, as the *Basin Wide 17* decision says, then the Director has failed to follow the law and his decision cannot be upheld.

The Director then argues at length why he disagrees with the Court's directive to count water that is used. He says he cannot track water released for flood control. IDWR Brief p. 32.

[13] In exchange for protection of the Anderson and Arrowrock storage rights. R.AE. 002167-2184 (Ex. 2100.)

This is nonsense. The reservoir accounts track the quantity of water in the reservoir on a daily basis. Tr. Vol. I, p. 141, ll. 16-21. The releases from Lucky Peak are also counted on a daily basis.[14] Tr. Vol. V, p. 1493, ll. 13-19.

The Director's defense of the accounting system (IDWR Brief pp. 29-37) is primarily an exercise in semantics. He contends that the program does not "count" flood releases in determining satisfaction of the water right or treat those releases as "use." The problem with the accounting program is that it accrues all water entering the system, except that required to meet senior rights to the storage rights, including water bypassed or released for flood control. Once paper fill is achieved, no more water accrues to that right, even if the reservoir is half-full. So the effect of the program is that the right is "satisfied" on paper without the water in the reservoir to put to beneficial use on the ground. The water available for beneficial use is what is important to the water users. Tr. Vol. IV, p. 1044, ll. 17-23; p. 1062, ll. 12-16; p. 1259, ll. 2-6. Not paper fill. He even claims that paper fill provides "wet" water, but the irrigators cannot irrigate with paper. Tr. Vol. IV, p. 1022, ll. 1-2; p. 1052, ll. 11-19; p. 1067, ll. 23-24.

The Director also complains that if the reservoirs remain in priority, these storage rights deprive the juniors of the ability to divert any water until the reservoir is physically full. IDWR Brief p. 39. In the Boise, the reservoirs are located in the mountains above the City and agricultural areas. There is little diversion above the reservoirs, unlike in the Upper Snake. This distinction is critical, and explains a major reason why the Upper Snake program is not suitable for the Boise.[15] The stated rationale for the Upper Snake ruling of preventing an older reservoir from affecting fill of a junior reservoir is not relevant in the Boise, because the 1953 MOA

[14] Otherwise, how would the Director administer rights that can be exercised only when flood control releases are occurring, as his technical witness testified should be done and as he ordered be done. R. 1308.
[15] The Boise program was incorporated whole cloth from the Upper Snake program. IDWR Brief p. 27, quoting Sutter.

already prescribed how all three Boise reservoirs would be jointly operated. R.AE. 002174-2184 (Ex. 2100) *supra*; *Id.* (Sutter). So it is arbitrary and capricious to simply move the accounting system from one basin to the Boise, when the rationale does not exist.

Moreover, the Director's complaint that the reservoirs would take "all" the water while in priority misstates or ignores the law. *Joyce Livestock Co. v. US,* 144 Idaho 1, 156 P.3d 502 (2007), makes it clear that the director's excuse for not counting the water actually used is unfounded. In *Joyce*, the Court explained:

> A water right does not make the appropriator the owner of the source of water, nor does it give the appropriator control over that source. *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P.1059 (1909) (the right to divert all of the water out of a watercourse during the irrigation season does not make the appropriator the sole and exclusive owner of the watercourse.) It does not even make the appropriator the owner of the water. We have long recognized that an appropriator may not waste water, but must permit others to use the water when the appropriator is not applying it to a beneficial use. *Hall v. Blackman,* 8 Idaho 272, 68 P. 19 (1902) (although the owner of real estate need not make or allow any use of the land, an appropriator cannot waste the water but must permit others to use it when the appropriator is not applying it to a beneficial use). A water right simply gives the appropriator the right to the use of the water from that source, which right is superior to that of later appropriators when there is a shortage of water.

144 Idaho at 15 (emphasis added).

So, the storage right holders would not be able to appropriate "all" the flow and prevent the junior from taking water while the reservoirs are storing water. Any water not necessary to meet the storage right holders' beneficial use needs would by law be available for junior users. Unfortunately, the Director's Order ignores this tenant of Idaho law, and encourages "waste" of water past Middleton.

Under the accounting program, before the reservoirs are full on paper, if there are releases in excess of the irrigation demand, the releases are considered release of storage water. Tr. Vol. V, p. 1491, l. 6-p. 1492 l. 20. When that happens, rights junior to the reservoir rights

cannot divert that water. *Id.* So, the accounting program, as interpreted by the Director, causes "waste" of that release from storage.[16]

The Department attempts to justify the accounting program as necessary to prevent "waste" (ignoring the waste inherent in the accounting program) and for "optimum development" of the State's water resources, citing Article XV, § 7 of the Constitution. The Director ignores the Supreme Court decision in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). There, the Court held that Article XV, § 7's optimum development concept did not override Article XV, § 3 which provides that "priority of appropriation provides the better right." *Clear Springs*, 150 Idaho at 807, 252 P.3d at 88.

Yet the end result of the Director's accounting program is that the juniors and future users have the "better right." They get to take water when they want it. They are not forced to take water when they do not. The senior rights are saddled with this burden, and become a lesser right, by the Director's action. Doing so violates Article XV, § 3 and *Clear Springs*, is contrary to law and must be reversed.

The Director then claims that recognizing a right to a fill of the reservoir following flood control releases and accounting for the water based on what he calls "contents based" accounting would harm junior users.[17] Of course, the Director's obligation is to deliver water to the senior users first. *Basin Wide 17*, 157 Idaho at 394. Nevertheless, the Director's claim of injury to the

[16] The Department excuses this under the "storage cancellation" theory. IDWR Brief p. 15. But storage cancellation applies only to storage rights, not junior natural flow rights. It also applies only to water actually diverted and put to use, not water wasted past Middleton. Tr. Vol. I, p. 181, ll. 10-13.

[17] The Director also inaccurately claims that "contents-based accounting was considered and rejected for reasons previously discussed when the existing water rights accounting and storage allocation programs were implemented in Water District 1 in 1978 and Water District 63 in 1986." R. 1284. He cites no support for the conclusion that anything about the accounting was considered or rejected in Basin 63 in 1986. That is because there is no record of any rejection of "contents-based" accounting in Basin 63 until this case came along. Whatever was discussed in Basin 01 is not in the record of this proceeding in any event.

juniors is simply not supported by the facts. The evidence from the water delivery records is to the contrary.

> Q. And have you made any determination of whether or not, in your view, that storage under the circumstances that you described, if it were to happen in priority, would have any effect on junior diversions?
>
> A. The data shows that it would not have any impact on junior diversions. The reason being when the reservoirs are storing, there's more water in the system than what's needed to meet the diversions and the amount that's being stored. So there's excess water going past Middleton.
>
> Q. And that's your – that's what you found in review of the accounting records for the period of record for the Boise?
>
> A. Yes.

Tr. Vol. V, p. 1470, l. 15-p. 1471, l. 4; p. 1537 ll. 19-25 (the reservoirs do not take all the water that is available during refill). This evidence is unrebutted. It was simply ignored by the Director.

The Department called Liz Cresto as a rebuttal witness. She prepared and introduced Ex. 9.[18] It was her effort to show potential injury to juniors. Ms. Cresto was able to identify only nine rights that diverted water during refill periods over 26 previous years. Of these nine rights, six were earlier in priority than Lucky Peak and would be entitled to divert ahead of Lucky Peak's 1965 priority date. One of the rights is a ground water right. So there were only two juniors diverting during some portion of some refill years. Ms. Cresto further admitted that there was enough water flowing past Middleton in 1999 to satisfy these rights without affecting reservoir fill. Tr. Vol. V, p. 1575 l. 14-p. 1576, l. 10. She also admitted that she did not know if in any of these other years in Ex. 9 whether there was sufficient water in the river passing Middleton to satisfy the juniors during refill. *Id.* p.1576 ll. 11-14. There is simply no substantial,

[18] Ex. 9 was discussed with and prepared at the direction of the Director. Tr. Vol. V, p. 1585, l. 23-p. 1586 l. 9 and p. 1588, l. 23-p. 1589 p. 10.

competent evidence of any injury to juniors if the reservoirs were allowed to fill under their water right, as the Director imagined. His conclusions to the contrary must be reversed.

I. The Director's Amended Final Order Defining Water Filling the Reservoirs after Flood Control Releases as Excess and Unappropriated Flows is Contrary to the Evidence

In 1985, the Department directed in that portion of the Boise River Water Control Manual it drafted, "[w]hen Lucky Peak flood control releases are equal to or greater than the demand for irrigation water (all users are receiving an adequate supply), the entire release is considered surplus to the Boise River and the above computation of natural flow diversions by user is not necessary. During the period, no charges are made against stored water supplies." R.AE. 003809 (Ex. 2186, p. 7-26), also see R.AE. 003636 (Ex. 2181, p. 10).

The Director does his utmost to distance himself from this definition of excess flows, from the Water Control Manual and the process leading up to it. He contends these are "federal" documents of no relevance to water right administration. If so, why was the Department so intimately involved in the 1974 flood study and the 1985 Water Control Manual? He claims the Department's role was *de minimus*. R. 001241 and 001255**.** This is not true and not supported by the record. The Department initiated the flood 1974 study. Tr. Vol. II, p. 376, l. 16-p.377, l. 21. It advocated for greater early season flood releases. R.AE. 000903-905 (Ex. 2133). It drafted parts of the Manual and "blessed" it before it became effective. Tr. Vol. II, p. 459, l. 2-p. 460, l. 7. As Director Higginson said at the time, the Manual was a "joint effort" between the Department, Reclamation, and the Corps. R.AE. 004199-4201 (Ex. 3001). The Director's conclusion that none of this really happened or is irrelevant is arbitrary, capricious, and not supported by any substantial competent evidence.

Today, the Director flips the historical definition of "surplus" or "excess" flows on its head. Instead of recognizing that the water released for flood control is the surplus or excess

flow, the Director claims that the accounting program changed that directive so that water filling the reservoirs after flood control releases is excess to the system. He then asserts that this water is unappropriated by the existing storage rights or indeed any water right. R. 001270. According to the Director, this result is accomplished by the 'unaccounted for storage' account which captures the excess flows in the reservoir system. R. 001278. He downplays this decision as insignificant, contending that there is little likelihood of this "unappropriated" water being appropriated by future users because it's not dependably available. *Id.* This is little consolation to the Boise Project whose patrons depend on that water to irrigate their farms and homes. Indeed both the Director and Suez made clear on appeal that this is unappropriated water, available for future appropriation. IDWR Brief p. 41, Suez's Brief p. 33.

The Director's conclusion that the water refilling the reservoirs is not dependably available is not supported by substantial, competent evidence. His Order makes no findings about the amount of water that is produced in the Boise or how often there would be water in the system he now describes as "excess." The Water Control Manual[19] reports an average run off of 2,040,000 acre-feet. The maximum production was in excess of 3.6 million acre-feet in 1964-65.[20] The total capacity of the three on-stream reservoirs is about 1 million acre-feet. R. 1236.[21] The Department's rebuttal Exhibit 9 shows flood releases in 15 of 26 years.[22] Thus, even in average years, the run off "greatly exceeds" reservoir capacity. *Id.* In each year, prior to January 1, the Water Control Manual requires that 300,000 a/f of empty space be available in the reservoirs to protect against flood events. R.AE. 004199-4201 (Ex. 3001). Even in an average

[19] Ex. 2005, Table 4-8, Admitted Exhibits 000395.
[20] See late claims filed by Reclamation in sub-case nos. 63-33732, 63-33733 and 63-33734.
[21] See R. 12378; Ex. 2004 at p. 000349, Tr. Vol. III, p. 740, ll. 3-11 for capacity of individual reservoirs (Arrowrock 272,000; Anderson 413,000; Lucky Peak 264,000).
[22] Ex. 9.

water year some water would be passed through the system for flood control purposes, and more in high flow years. Water released for flood control is not used by the Boise Project. Tr. Vol. III, p. 970, ll. 15-20. The Director's contention that the Boise Project should not be concerned about allowing future appropriations from the water that fills the reservoirs after flood control releases because the fill is not dependably available is not supported by substantial evidence. The basic hydrology of the basin contradicts such a finding.

Moreover, the Director's Order cites only a reference to testimony of Robert Sutter to support this claim. R. 1278. But, Sutter only referred to "existing" later priority uses as having an insignificant effect. He admitted that the assurance of refill did not contemplate future appropriations of water refilling the reservoirs. Tr. Vol II, p. 455, ll. 15-19. He also admitted that if someone appropriated the water that would be filling the reservoir that "would affect the refill." *Id.* p. 457, ll. 9-18. The Director ignored this admission from the only source he relied on to claim there would be no injury. On appeal, the Director cites no other evidence. IDWR Brief. p. 58.

Further, testimony from witnesses for the Department and Suez show that they believe this water which would otherwise fill the reservoirs should be made available to new appropriators. Former Director Tuthill, who is now a consultant, admitted that he has clients who would be interested in appropriating unappropriated water in the Boise basin and that he considered that water, that was subsequently filling the reservoir, available for future appropriation. Tr. 08/31/15, p. 691, l. 25-p. 692, l. 4. The Department's primary witness, Ms. Cresto, testified similarly that after paper fill has occurred in the system "juniors should be allowed to divert." Tr. 08/27/15, p. 171, ll. 1-3. Former Director Dreher testified that future appropriations could be made from the water that has been relied upon to supply irrigation water

by the Boise Project. Tr. 08/27/15, p. 303, ll. 4-6. The Director's determination that "future appropriations of 'unaccounted for storage' downstream of the reservoir system would likely be of such small quantities as to have few or no effects on the quantity of water available to 'refill' flood control space," is not supported by any substantial evidence in the record and should be reversed. R. 001278.

The 1953 Memorandum of Agreement (MOA) was the basis for using all three reservoirs for flood control. It dealt with the physical location of space and how that space would be filled after flood control. The designated storage in the three reservoirs at the end of each flood season "will be primarily considered as available for irrigation except as such amount must be reduced by evacuation requirements for flood control." R.AE. 001364 (Ex. 2038, p. 5). The MOA established a schedule for flood releases from the reservoirs, and that "[f]illing of the three reservoirs will follow the reverse of the evacuation schedule to the extent that water is available at the respective sites." *Id*., (Ex. 2038, p. 10). In other words, water would be released, the reservoirs would subsequently fill, and the water users would have the water that filled the reservoirs. Reclamation, the Corps, the water users, and the State all understood that. Further, "[r]elease of water for irrigation will be made from Lucky Peak Reservoir at such times and at such rate, pursuant to the rights established under law, ***as requested by the owners thereof***, or by officials and agencies authorize to make such requests." *Id*., (Ex. 2038, p. 11) (emphasis added). It was never contemplated that the flood control releases made by the Corps would be counted as releases made in satisfaction of the water rights. The MOA also recognizes that "no modification which would affect in any substantial way any storage rights in the reservoir system and Lake Lowell, shall be made without the concurrence of all entities having rights in the reservoir system and Lake Lowell." *Id*., (Ex. 2038, p. 13). Most importantly:

> No reregulation of storage of annual exchange of storage as provided in this plan shall, however, deprive any entity of water accruing to it under its existing rights in Arrowrock, Anderson Ranch, and Lake Lowell Reservoirs.

Id., (Ex. 2038, p. 5).

The Director's finding that "[b]efore 1986, the flood waters captured in the reservoir system during flood control 'refill' operations often included unappropriated flows that were allocated to storage spaceholders for subsequent use," is clearly erroneous. R. 001276. Nothing in the MOA or the Operating plan can be read to mean that the water accruing to the reservoirs after flood control releases was deemed to be 'unappropriated' as a result of the flood control operations. The 1953 MOA expressly stated that the flood control operations would not affect water accruing to the existing rights in the three reservoirs. R.AE. 001364 (Ex. 2038, p. 5). The Director's much later interpretation that water filling the reservoirs after flood control operations is made up of 'excess' or 'surplus' water cannot be reconciled with plain and unambiguous language of the MOA.

The Director attempts to rectify his irreconcilable re-defining of 'excess' or 'surplus' flows by arguing that the Arrowrock and Anderson Ranch water users bargained for the post-1986 accounting regime when they agreed to accept 60,000 acre-feet of Lucky Peak storage in years where there is a shortfall. R. 001303. This cannot be true, as the contracts were negotiated 33 years earlier, at a time when no one had ever contemplated that the Department would institute an accounting program that had the effect of satisfying their water rights from water released for flood control. R. AE. 001388, Ex. 2039, pp. 12-13, also see R.AE. 004231-4240 (Ex. 3026). Paper fill as "satisfaction" did not exist. Tr. Vol I, p. 202, ll. 11-25; p. 244, ll. 16-18; p. 805, ll. 1-15. The MOA was intended to "guarantee the holders of storage rights against a loss of water by reason of the operation of the Army-Interior flood control plan." *Id*. The 60,000 acre-

foot guarantee was intended to make the Arrowrock and Anderson Ranch storage right holders whole by allowing them access to water stored in Lucky Peak if the system does not physically fill after flood control operations. Tr. Vol. IV, p. 1183, l. 19-p. 1184, l. 8.[23] There was no suggestion in 1953 that the Department intended to count against the storage rights the water released for flood control, so the guarantee could not have been intended as a protection against the paper fill concept. The Director's contention that the storage right contractors bargained away their priority water rights by agreeing to operate the reservoirs jointly for flood control in exchange for a guarantee of 60,000 acre-feet of Lucky Peak physical water is not supported by substantial, competent evidence.

J. The Director Disregarded the Substantial Evidence in the Record that the Boise River is Fully Appropriated, Except for Water Released for Flood Control

The undisputed evidence is that the Boise River has been determined to be fully appropriated, by Order of the Director as far back as 1977. The Bryan decree natural flow rights post-dating the 1906 Stewart decree are considered flood rights. Ex. 2009, p. 7; admitted Exhibit 000499. The only time water has been available for a new appropriation is when it is released for flood control from Lucky Peak. The Director's findings that 'unaccounted for storage' filling the reservoir after the flood releases consists of unappropriated water cannot be reconciled with these undisputed facts. See R. 001278. The Director's only reference to the Boise River as fully appropriated since 1977 is limited to a mention that "[t]he Boise River system is fully appropriated during most of the irrigation season." *Id*. On appeal the Director ignores the

[23] Furthermore, as demonstrated at the hearing, by the presence of the City of Boise, the testimony of its engineer, and the testimony of Dr. Rick Williams, *see Tr. Vol. III, p. 825*, the Department's reliance on the Lucky Peak "guarantee" puts the stream flow maintenance storage rights in Lucky Peak at even greater risk, as these rights do not benefit from the guarantee, but are the source of the guarantee. No one argues that this stream flow maintenance water won't take the hit.

moratorium orders and all the evidence that only flood releases were available to be appropriated.

Director Allred in July 1977, determined that "effective immediately, no additional water right permits for consumptive use of water during the period of June 15 to November 1 will be issued on the Boise River and its tributaries in the reach upstream from Lucky Peak." R. AE. 004202 (Ex. 3002). From June 15 to November 1 "[t]he water in this reach has been determined to be fully appropriated by the existing waterusers, and therefore, no water is available for any additional users." *Id*. (emphasis added). The day of allocation occurs "typically in June." Tr. 8/27/15, p. 86, l. 19. This is after flood releases are over. Since the Boise River above Lucky Peak is fully appropriated as of June 15, the water that is delivered to the storage right holders "typically in June" after flood releases must be already appropriated by the storage right holders.

Subsequent moratorium orders were issued in 1980. R.AE. 004203 (Ex. 3003); and 1992, and 1993. R.AE. 004204-4206 (Ex. 3004); R.AE. 004207-4208 (Ex. 3005). The moratorium was revised in May, 1995, but "applications which propose use of surface water upstream from the Star Bridge will be denied unless the applicant files an acceptable plan to mitigate or avoid any material injury to existing water rights." R. AE. 004217-4220 (Ex. 3007). In February, 2008, the Director confirmed "[s]urface water in the Boise River or tributary to the Boise River upstream from Star Bridge is fully appropriated during the irrigation season and during much of the rest of the year." R.AE. 004221-4224 (Ex. 3008).

Yet, now the Director contends that the flood waters captured in the reservoir system during flood control "refill" operations are unappropriated flows. R. 001276. These so-called unappropriated flows had never before been identified by the Department.

Suez complains that the Boise Project has "attacked" its water rights by referring to evidence that junior water rights in the Boise are limited to being exercised during flood control releases.[24] Not true. The Boise Project introduced evidence concerning conditions on junior water rights not as an attack upon those rights, but because these conditions demonstrate that the Department, water right experts, and junior water rights holders all understood that the only surface water available for appropriation from the Boise River above Star Bridge is water released from Lucky Peak for flood control operations. This universal agreement is important because it contradicts the Director's final Order.[25]

As an example, permit number 63-31409 contains the following conditions:

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

R.AE. 004225-4228 (Ex. 3012). A Department file memo for permit no. 63-12055, states that the application for right No. 63-20155 "is intended to pertain to water made available in the river when flood releases are made from Lucky Peak Reservoir." R.AE. 004229-4230 (Ex. 3013). Mr. Squires, a certified water rights examiner recommended that water right No. 63-12055 be permitted for "for use anytime surplus water is available on the Boise River (Lucky Peak spilling)," because "the IDWR has considered the Boise River to have been fully appropriated prior to the filing of Permit no. 63-12055 and that only those waters that are passed through the

[24] Importantly, Suez offered no evidence that its rights were not intended to be exercised only during flood control releases or that administration was different than described herein.
[25] Yet, the Director's Order and his appeal just ignores any evidence that does not fit his conclusion that paper fill is satisfaction of the storage rights.

Boise River reservoir system for flood control are available for appropriation." R.AE. 004256-4260 (Ex. 3040) and R.AE. 004262 (Ex. 3041).

Any finding that water physically filling the Boise River reservoirs after paper fill is unappropriated water available for future appropriation is completely at odds with this record. The Final Amended Order, to the extent it makes that claim is arbitrary and capricious, not supported by the record and must be reversed.

The Director argues on appeal that he cannot recognize federal flood control operations as an element of the water rights or water right administration in the Boise, because to do so would give too much control to the reservoir operators. IDWR Brief p. 27. This argument is also not supported by the record. As quoted above, water rights on the Boise already have incorporated flood control releases into the terms of the permits. See Ex. 3012, Permit No. 63-31409. The decree for the Lucky Peak water right also refers to the federal contracts. *See* partial decree for water right no. 63-3618.The Director did not complain about those conditions or assert that they interfered with administration. Water can be appropriated and diverted when it is released for flood control. The Director acknowledged these flood release conditions and protections can be accommodated in water right accounting because he ordered staff to include those permit and licensed conditions in the accounting program. R. 1308.

K. There is No Legal Authority in Idaho to Store Water Without a Water Right

On appeal, the Director concedes that he characterizes the water stored in the unaccounted for storage account as water stored without a water right. IDWR Brief p. 55. He contends that once the water gets into that account it cannot be demanded by others, because it is storage water. *Id.* p. 56,[26] but then he contends that junior and future users are free to take that

[26] The Director is correct that he has no authority over stored water. Only already appropriated water can be stored. I.C. § 42-801.

water before it is stored. *Id.* p. 57. The end result is that the Director believes he can prevent storage once paper fill occurs, if he wants to make that water available to junior users – or indeed for any other purposes. *Id.* He never demonstrates how this "unaccounted for" storage account purporting to track water stored without a water right is consistent with I.C. § 42-207(2), because it is not.

Idaho law is unequivocal that "[n]o person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists." I.C. § 42-201(2). Lacking statutory authority, the Director, invokes a "policy" justification for this practice. He says that "the Department's longstanding policy has been to allow the on-stream reservoirs to refill the space evacuated for flood control…." R. 001296 and R. 001304. It is true that the reservoirs have been filling after flood control releases since at least 1956. Tr. Vol. II, p. 495, ll. 6-9. But it is also undisputed that there was no unallocated storage account then. *Id.* ll. 11-15. So the accounting program took the practice of filling the existing rights after flood releases and converted that fill into a mythical storage account without any water right.

On appeal, the Director argues that the "unallocated" storage was just an accounting solution developed by engineers that has no bearing on the legal authority to store water. IDWR Brief p. 56. Thus, this accounting system is (ironically) legally meaningless. *Id.* But, the author of the accounting system testified that, with the paper fill concept, the reservoir fills (or refills) without a water right. Tr. Vol. II, p. 44, ll. 18-25 (Sutter). That is why the unallocated storage

account was created. *Id.* Mr. Sutter further testified "you can't let water be stored without a right." *Id.* p. 464, ll. 10-11.[27]

In response to repeated requests that the Department's representatives explain under what legal authority the water is stored after the water rights have been 'satisfied on paper' former Director Dreher testified that "—these on-stream reservoirs, they've received the benefit of an exception[,]" to Idaho Code § 42-201(2). Tr. 08/27/15, p. 278, l. 25-p. 279, l.1. When asked what the basis for the exception, Mr. Dreher replied that it was longstanding policy that predated his tenure as Director. He was asked, "is it your position that there is no right to store that water?" Tr. 8/27/15, p. 279, ll. 10-11. Mr. Dreher answered:

> No, I wouldn't stay that. There is not a decreed right, but I would say – I would say there is a – I'm not sure how to correctly characterize it. But the right is implied, because the facility is there. It has the physical capacity. Water can be stored. And it's to the benefit of the spaceholders.

Tr. 8/27/15, p. 279, ll. 12-17. Mr. Dreher admitted that there is no such thing as an implied in law water right. *Id*., ll. 18-21. This "implied" right theory is not advanced on appeal.

Former Director Tuthill was unable to provide any legal basis upon which the water is stored either. Mr. Tuthill explained:

> A. In my experience, the Department allowed additional use of water, after the right had been filled, to the extent available, even though there wasn't a specific water right identifying that.
>
> Q. So is it that your position when you were at the Department, that the reservoir was refilling without a water right?
>
> A. Yes.
>
> Q. How did you reconcile what seems to be a contradiction there?

[27] Lee Sisco, Boise River watermaster from 1986 to 2008, testified that no one at the Department ever informed him that water could be stored in the reservoirs without a water right. Tr. 9/31/15, p. 917, ll. 20-24. Also see R.AE. 000469-492 (Ex. 2008). He confirmed that it was his understanding, as the Basin 63 watermaster, that "to me, it all had to have a water right to store it[.]" *Id.*, p. 920, ll. 19-24.

> A. The initial water right provided the basis for the refill, in my experience. Had there been no water right, whatsoever, then the water couldn't have been diverted. But the underlying water right provided the basis for a second use if water was available.

Tr. 8/31/15, p. 691, ll. 2-24. Mr. Tuthill's "second use" theory is not advanced by the Director on appeal.

The Department's position that it has a policy to violate Idaho law and store water after paper fill with no water right cannot stand. The original decreed rights must provide the legal authority, and priority, to fill the space evacuated for flood control operations. Accordingly, the Director's ultimate conclusion in the contested case, that "the current water right accounting program is consistent with the prior appropriation doctrine and is the best method for efficiently accounting and distributing water and maximizing water use without waste[,]" is arbitrary and capricious, not in accordance with Idaho law, and must be reversed. R. 001308.

L. The Director's Substitution Theory Does Not Provide a Legal Basis to Justify the Accounting Program's Treatment of Water Storage in the Boise River Reservoirs After Paper Fill

In the Final Amended Order the Director injected a theory of "substitution" into the proceeding by asserting that "[t]he coordinated system of flood control operations, in short, is based on substituting flood water for previously stored water released during flood control operations." R. 001296. This issue was not raised by anyone in the proceeding. He relies upon *Bd. of Directors Wilder Irr. Dist. v. Jorgenson*, 64 Idaho 538, 136 P.2d 461 (1943), to support this theory. Tellingly, the Director never refers to Idaho law which defines how exchanges of water are allowed to occur in Idaho. Idaho Code § 42-105(2) states:

> (2) The water that a person is entitled to divert by reason of a valid water right, or water that a person is seeking to appropriate, may be exchanged for water under another water right, or for other water from the same or another source, as hereinafter provided:

> (a) If the applicant intends to exchange water the applicant is entitled to divert under an existing valid water right for any other water, approval of the exchange shall be obtained by filing an application under the provisions of section 42-240, Idaho Code;
>
> (b) If the applicant proposed to exchange water that the applicant is seeking to appropriate, approval of the exchange shall be obtained by filing an application to appropriate water under 42-202, Idaho Code. The proposed exchange shall be described in the application and the application shall be processed in accordance with the provisions of section 42-203A, Idaho Code. If the application seeks to exchange the water to be appropriated with water available under another water right, the application shall be accompanied by an agreement to exchange signed by the owner of the existing water right. An exchange with water under an existing water right cannot result in an enlargement in use of the existing right.

I.C. § 42-105(2).

The Director contends that "these substitutions have occurred for decades without detriment to the spaceholders or other appropriators, because the accrued water is released and the substituted water is stored at a time of excess supply." R. 001297. Yet, there is no evidence in the record that the process spelled out in Idaho Code § 42-105(2) was followed to authorize any substitution or exchange.

The Director's reference to *Jorgenson*, and his claim that it shouldn't matter to the spaceholders where their water comes from, disregards the law and facts of *Jorgenson*. *Jorgenson* was a proceeding to confirm the contract between Wilder and Reclamation for Anderson Ranch Dam and Reservoir. In the contract, Reclamation reserved the right to provide water from the Salmon and Payette to fill the reservoir and to move Boise River water to the Mountain Home desert. The Court held that the reservation of that right was not *ultra vires*. 64 Idaho at 547.

Jorgenson, quoting *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918), makes it clear that "under no circumstances can it [the proposed exchange of water] be done where the exchange

would result to the detriment of prior users." *Id*. at 548-549, 136 P.2d at 465. Even if the Director could, without conforming to Idaho Code § 42-105(2), declare a substitution for water refilling the reservoirs after flood control, he could not do so, as he proposes here because it would work a severe detriment to the spaceholders by depriving them of water protected by a valid water right. *Almo Water Co. v. Darrington*, 95 Idaho 16, 20, 501 P.2d 700, 704 (1972) (Such exchanges are invalid only if they clearly infringe upon the rights of other water users.") The Director quoted from *Jorgenson* that passage which includes the holding "It can make no difference to the appropriator of water, whether he gets the water from one stream or another, or from the pooled waters of a lake or reservoir, so long as it is delivered to him at his headgate at the times **and under the priorities** to which his location and appropriation entitle him." *Jorgenson*, 64 Idaho at 548, 136 P.2d at 465 (emphasis added). Here the Director proposes no such even exchange.

Substituting validly appropriated water for water unprotected by any valid water right as the Director contends is occurring matters very much to the spaceholders. I.C. § 42-105(2) authorizes exchanges of one valid water right for another. But, according to the Director's theory of the accounting program, he would be exchanging unappropriated water not held pursuant to any valid water right which is not authorized by the statute. Idaho Code § 42-105 would also allow a substitution for water that is sought to be appropriated. Reclamation and the Boise Project filed late claims to appropriate the unappropriated 'unaccounted for storage' and the Director recommended those claims be disallowed.[28] In the words of the Director, the spaceholders cannot have a water right, but they can enter into an exchange, which requires a water right. The circularity of the Director's substitution theory is irreconcilable with Idaho law.

[28] *See* Memorandum Order and Recommendation, Sub-case nos. 63-33732, *et seq*, Oct. 2015.

His conclusion is unsupported by any evidence in the record, and therefore should be reversed. Indeed, on appeal the Director makes no effort to support this substitution theory and must be deemed to have abandoned it.[29]

M. The Lemhi High Flow Cases, A&B and ICL do not Authorize the Unallocated Storage/Paper Fill Accounting System

The Director's Order claims to find support for his theory that water can be stored without a water right by reference to the historical practices to excess flows that were decreed by the SRBA court in the Lemhi high flow subcase. R. 1296. On appeal, the Director makes only a passing reference to general provisions authorizing use of high flows. IDWR Brief. p. 57. The Director does not claim that the Court has decreed such a general provision for the Boise River. How he can use the accounting system to "decree" a "high flow" general provision is left unaddressed, and must be deemed abandoned on appeal.

Suez argues that the Court can recognize high flow use without a water right, citing the *Lemhi* decision. Suez Brief p. 44. Suez then leaps to the conclusion that the Director can create high flow rights by way of an accounting system under an historical practice theory. Suez's sole authority for this notion rests on its demand that this Court import Colorado's supposed "free river" concept, a foreign proposition that no Idaho Court has adopted (or should).[30]

The use of "excess" or "high flow" water in Reynolds Creek and Lemhi involved a practice by irrigators to divert and put to use more water than their rights allowed and as much water as possible early in the irrigation season when the streams are running high. *State v. ICL*, 131 Idaho 329, 331, 955 P.2d 1108, 1110 (1998). These high flows were actually diverted and "used" on the ground by the irrigators. The general provision allowed this practice to continue.

[29] Suez does not support this concept on appeal, either. Suez Brief p. 51, n. 36.
[30] Not even the Director supports this "free river" theory.

As a result, the water users were permitted to actually put to use both the full amount of their water rights and the excess flows. Here the argument is made that the Boise River water users are not entitled to use all their storage rights, because the paper fill doctrine charges them with water they cannot use.[31] Then the flows the Department claims are "excess" might or might not be available depending on whether a junior or future user takes that water before it goes into storage, or even if the Director chooses to put that water to some other use – fish flush for example.

Suez argues that the water that fills the reservoirs after flood control releases is analogous to the "excess flow" or "high flows" general provision in the *Lemhi* cases, but the Boise has a very different history and hydrology. The water released for flood control is the water that is "excess" to the system and available for new appropriation, not the water that fills the system after flood control operations. In the high flows cases, it was the early season high flows that were excess to the system and available for appropriation; and eventually many of the claimants actually did appropriate those flows. Here, taking the Director at his word that the excess flows available for appropriation in the Boise River are the flows that fill the reservoir after the spring flood water releases, the Boise Project and Reclamation filed late claims to recognize the appropriation of this refill water. The Director recommended the claims be denied. The result of this squeeze by the Director and the State is that the Boise storage right holders have no "right" to continue to use the water that they have relied upon for over a century to irrigate the Boise valley. The Director's attempt to redefine 'excess flows' in the Boise River is contrary to law,

[31] By analogy, under the Suez's theory, the irrigators in the Reynolds Creek and Lemhi River Basins would lose their right to divert water later in the irrigation season if they diverted too much "excess" or "high flow" early in the spring.

not supported by substantial competent evidence, and his Amended Final Order must be reversed.

N. The Boise Project has Demonstrated Actual Prejudice to its Substantial Rights through both the Director's Procedural Due Process Violations, and Because the Amended Final Order is Contrary to Idaho Law and not Supported by the Record

Idaho Code § 67-5279(4) provides that agency action shall be affirmed "unless substantial rights of the appellant have been prejudiced." The Department relies on the argument that no matter how bad things were, the Boise Project has failed to demonstrate that its substantial rights have been "prejudiced." The Director's actions prior to and during the course of the contested case proceedings denied them due process of law. And the Director's Amended Final Order is unsupported by the record and contrary to Idaho law. The Director's Order purports to strip the Boise Project districts of any protectable interest in the water filling the Basin 63 reservoirs after flood control operations. These are all substantial rights.

The Supreme Court "has not yet attempted to articulate any universal rules to govern whether a petitioner's substantial rights are being violated under I.C. § 67-5279(4). This, in part, is due to the fact that each procedural irregularity, legal error, and discretionary decision is different and can affect the petition in varying ways." *Hawkins v. Bonneville County Bd. of Comm'rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011). In *Hawkins*, the Court held that both an applicant in a land use proceeding, and an interested opponent, "should expect proceedings that are free from procedural defects that might reasonably have affected the final outcome." *Id., citing Noble v. Kootenai County,* 148 Idaho 937, 942-43, 231 P.3d 1034, 1039-40 (2010). Where an agency or board fails to provide written notice of its processes and procedures, instead invoking its "expertise and experience," or "collective knowledge" to ad hoc determine the rights and remedies of affected parties, due process is denied and substantial rights are deprived. "This

Kafkaesque chain of secrecy is not what the Due Process Clause contemplates." *H & V Engineering, Inc. v. Idaho State Bd. Of Prof. Engrs. & Land Surveyors*, 113 Idaho 646, 650-651, 757 P.2d 55, 59-60 (1987), see also *Rincover v. State*, 124 Idaho 920, 923, 866 P.2d 177, 180 (1993).

The Director's numerous deprivations of the Boise Project's due process rights are set out in Sections A-G above. The contested case proceedings were rife with "procedural" defects that might reasonably have affected the final outcome." *Id. citing Noble v. Kootenai County*, 148 Idaho 937, 942-43, 231 P.3d 1034, 1039-40 (2010). The totality of the procedural due process violations in this proceeding demonstrates that the Boise Project's substantial rights have been prejudiced. *Hawkins v. Bonneville County Bd. of Comm'rs*, 151 Idaho 228, 254 P.3d 1224, 1228 (2011). In addition to the procedural due process violations, the Boise Project has also demonstrated that the Director's findings and conclusions in this proceeding are not supported by the record and violate Idaho law. See Sections H-M above.

If the Department is to be believed, its adoption in 1986 of the accounting program attempted to transform a previously well settled use and appropriation of the water in the reservoir, to a non-conforming use or at least one without any right. In *Eddins v. City of Lewiston*, 150 Idaho 30, 33-34, 244 P.3d 174, 177-178 (2010) the Supreme Court held that it was a violation of due process to adopt a zoning ordinance that would make a previously conforming use non-conforming and is prohibited where there was no expansion of the original use of the property. "Due process protects the fundamental or primary use of the property prior to the enactment of a new zoning ordinance; therefore, a nonconforming use is not impermissibly enlarged or expanded until there has been some change in the fundamental or primary use of the property." *Id.* at 34, 244 P.3d 178. The Department's transformation of the storage water into

'unaccounted for storage' and claiming it is unappropriated and available for future appropriation is a due process violation depriving the spaceholders of their substantial rights in that property.

The holder of a valuable property right is entitled to due process, and when an administrative order is issued that is unsupported by substantial evidence and that contravenes Idaho law, resulting in the deprivation of that property interest, then that party is deprived of its substantial rights. *Mena v. Idaho State Bd. of Medicine,* ISC docket no. 43125-2015, March 23, 2016, p. 19 and 33.

O. The Boise Project is Entitled to Costs and Fees; Suez is not

An award of fees under I.C. § 12-117 is appropriate when the Department has acted without a reasonable basis in fact or law. If the agency lacks the authority to act in the manner it has, fees should be awarded. *Syringa Networks LLC v. Idaho Dept. of Admin.*, ISC docket no. 43027 (March 1, 2016). Likewise, a long-time Deputy Attorney General warned long ago that when an agency has failed to promulgate a rule under the rulemaking procedures then costs should be awarded. *Gilmore*, 30 Id. Law rev 273, 287 (1994). The Department's response is merely that is complied with the rules and the law. IDWR Brief p. 105. If the Court finds it did not, costs and fees are appropriate.

Suez demands fees under I.C. § 12-117, based on the fact that it inserted itself into the case as an intervenor. Yet, Suez is not entitled to fees since it is not a person who is adverse to the state agency. Suez sang the Department's tune throughout the proceeding. Suez cannot complain of "unnecessary" litigation since it chose to tag along for the ride on the Department's coat-tails. Moreover, Suez cannot show that the Boise Project acted without a reasonable basis in fact or law. Its request, to the extent it applies to the Boise Project, than the Department, must be denied.

III. CONCLUSION

The Director's Order cannot stand for all the procedural and substantive violations demonstrated herein. This Court should reverse the Final Amended Order, and direct that the contested case proceeding be dismissed. If the Court remands, given the prejudice that would attend a hearing in front of the same hearing officer, the Court should order that the remand be assigned to a different hearing officer. *See U.S. v. Estate of E. Wayne Hage*, Ninth Circuit Docket No. 2:07-CV-01154-RCJ-VCF, Jan. 15, 2016 (9th Cir. 2016)("reassignment advisable to maintain the appearance of justice").

Dated this 6th day of May, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 2016, I caused to be served a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** the method indicated below, and addressed to each of the following:

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

Ballentyne Ditch Company
Boise Valley Irrigation
Canyon County Water Company
Eureka Water Company
Farmers' Co-Operative Ditch
Middleton Irrigation Assn. Inc.
Middleton Mill Ditch Company
Nampa & Meridian Irrigation
New Dry Creek Ditch Company
Pioneer Ditch Company
Pioneer Irrigation District
Settlers Irrigation District
South Boise Water Company
Thurman Mill Ditch Company
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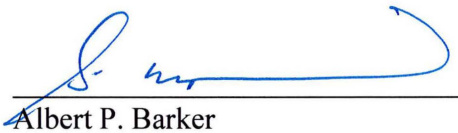

Albert P. Barker