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Attorneys for Respondents

**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,

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

**MEMORANDUM IN SUPPORT OF
RESPONDENTS' PETITION FOR
REHEARING**

and NEW YORK IRRIGATION DISTRICT,

Petitioners,

vs.

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

Respondents,

and

SUEZ WATER IDAHO, INC.,

Intervenor.

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

Respondents, the Idaho Department of Water Resources (“Department”) and Gary Spackman in his capacity as Director (“Director”) of the Department, petitioned this Court for rehearing regarding its *Memorandum Decision and Order* issued the above-captioned matter on September 1, 2016 (“Memorandum Decision”). *Petition for Rehearing* (Sep. 9, 2016). Respondents hereby submit this memorandum in support of the *Petition for Rehearing*. I.A.R. 42(c).

SUMMARY

The Memorandum Decision, in “broadly summariz[ing]” the Director’s findings in the October 20, 2015, *Amended Final Order* (“Final Order”), states that “unaccounted for storage” is natural flow that enters the reservoirs after all water rights on the Boise River system (including

the previously decreed water rights for the reservoirs) have been satisfied. *Memorandum Decision* at 6-7, 14. The *Memorandum Decision* also states that “unaccounted for storage” is a “continued distribution of water to the reservoirs.” *Id.* at 14. These statements are contrary to the Director’s findings and the substantial evidence upon which he relied. The Director found that “unaccounted for storage” is additional water the U.S. Army Corps of Engineers (“Corps”) physically captures in the reservoir system during flood control “refill” operations. Rather than finding that the Water District 63 accounting system “distributes” excess natural flow to the reservoirs as “unaccounted for storage,” the Director found that the accounting system simply tracks and reports the volume of “unaccounted for storage” in the reservoir system. This is not a “distribution” of natural flow “in accordance with the prior appropriation doctrine,” Idaho Code § 42-602, but rather a routine (and necessary) computation made in determining the amount of natural flow available for distribution to licensed and decreed water rights in a system of comingled natural flow and stored water.

The *Memorandum Decision* further states that the rights of the Petitioners and the United States are prejudiced by the Director’s determination that they have not acquired water rights in the “unaccounted for storage.” *Memorandum Decision* at 17. It is undisputed, however, that there are no water right licenses or decrees that authorize storage of the “unaccounted for storage” water, or its subsequent allocation to spaceholders for beneficial use on the “day of allocation.” Rather, physical diversion and storage of the “unaccounted for storage” is authorized solely by federal law, and determinations of whether, when, and how much “unaccounted for storage” will occur are entirely dependent on federal flood control operations. Under Idaho law the Director may not treat the diversion and storage of water pursuant to flood control operations for which no water right exists or has been claimed as a “distribution” of

natural flow “in accordance with the prior appropriation doctrine.” Idaho Code § 42-602.¹

While the “unaccounted for storage” physically stored in the reservoir system on the “day of allocation” has been allocated by the Bureau of Reclamation (“BOR”) to its spaceholders, this is an allocation of stored water pursuant to federal contracts rather than a distribution of natural flow pursuant to the prior appropriation doctrine.

The Respondents seek rehearing on these matters because they implicate the legal conflict in Water District 63 between Idaho’s prior appropriation doctrine and federally-authorized flood control operations. The complexity in this case is that in flood control years there is water in the reservoir system on the “day of allocation” that was stored under federal flood control authority rather than state water rights, and historically the BOR has been allowed to allocated this “unaccounted for storage” to its spaceholders for beneficial use. The timing and rate of storing the “unaccounted for storage” water, and the ultimate volume of “unaccounted for storage” in the reservoir system on the “day of allocation,” are entirely dependent on federal flood control operations. Past and present federal flood control operations do not provide the Director with administrable priority dates, quantities, or periods of use for purposes of distributing water to the reservoirs, however. If these federal flood control operations constitute state water rights, then the elements of the water rights must be established by the claimants in the pending SRBA late claim proceedings, as stated in this Court’s order of January 9, 2015.²

These matters are more fully explained below.

¹ The unadjudicated late claims for supplemental storage water rights currently pending in the SRBA do not seek flood control as a purpose of use. To the extent the late claims seek partial decrees for “a single physical fill” of the reservoirs consistent with federal flood control operations, the late claims do not provide the Director with administrable priority dates, quantities, or periods of use. *Nettleton v. Higginson*, 98 Idaho 87, 90-91, 558 P.2d 1051-52 (1977). This is discussed more fully in the section of this brief addressing the connection with the remand ordered by this Court. *Memorandum Decision* at 17, 23.

² *Order Granting In Part And Denying In Part Motion For Summary Judgment, SRBA Subcase Nos. 01-10619, et al.* (Jan. 9, 2015) at 5.

ARGUMENT

I. The Memorandum Decision’s Definition of “Unaccounted for Storage” is Inconsistent With the Director’s Findings and Contrary to the Substantial Evidence Upon Which the Director Relied.

The Memorandum Decision states the Director found that “unaccounted for storage” is “identified” as “natural flow” that “enters the reservoir” after all water rights on the Boise River system (including the previously decreed water right for the reservoir) have been satisfied. *Memorandum Decision* at 6-7; *see also id.* at 14 (“excess natural flow entering a reservoir after the reservoir water right is satisfied”). This statement is contrary to the Director’s findings and the substantial evidence upon which the Director relied.

a. The Director Found That “Unaccounted for Storage” is Additional Physical Storage in the Reservoir System After the Reservoir Water Rights are Satisfied, not the “Excess” Natural Flow That “Enters” the Reservoirs.

In the Final Order, the Director explicitly found that “unaccounted for storage” is additional water physically captured in the reservoir system during flood control “refill” operations after the decreed water rights for the reservoirs have been satisfied:

- “The reservoirs often *store additional water* after the reservoir water rights have ‘filled on paper’ when there is empty space in the reservoir system and the inflow to the system exceeds the demand under downstream rights. . . . the *additional storage* . . . is tracked as ‘unaccounted for storage.’” R. 001267 (emphasis added).
- “[A]ny additional runoff from the Middle Fork *captured* in Arrowrock or Lucky Peak would be ‘unaccounted for storage’ even though the Anderson Ranch water right had not yet been satisfied, because Middle Fork flows are not tributary to Anderson Ranch R. 001267 n.37 (emphasis added).
- “Any water in excess of all water rights that is *physically held* in the on-stream reservoirs after flood control releases is characterized as ‘unaccounted for storage’ or ‘unallocated storage.’” R. 001270 (emphasis added).
- “[T]he ‘unaccounted for storage’ *captured* in the reservoir system during flood control ‘refill’ operations is included in the calculation of the volume of storage

available for allocation to the spaceholders on the ‘day of allocation.’” R. 001276 (emphasis added).

- “The ‘unaccounted for storage’ consists of excess flows captured in the reservoir system on the receding end of the flood period in high water years” R.001278 (emphasis added).

The Director confirmed these findings in the *Order Denying Petitions for Reconsideration*:

- “The Water District 63 accounting program recognizes that additional physical storage may occur after one or more reservoir water rights have reached ‘paper fill,’ particularly in years when the reservoir system is operated for flood control purposes. This additional physical storage . . . is reported as ‘unaccounted for storage,’ which is allowed only if (1) there is empty space in the reservoir system and (2) there is water in excess to the demand under all water rights on the system.” R.001410 (emphasis added).
- “Unaccounted for storage accrues only if physical storage in the reservoir system increases after ‘paper fill.’” R. 001414 n.9 (emphasis added).
- “‘Unaccounted for storage’ can only accrue after Corps and/or the BOR cease ‘evacuations’ and ‘bypass’ and begin physically storing more water in the reservoir system.” R. 001422 (emphasis added).

These findings are based on substantial evidence in the record. The Staff Memorandum stated that “[w]ater that is physically stored in the reservoir system but not accrued to a reservoir water right is referred to as unallocated storage (UNACCT STOR),” and “[u]nallocated storage is the natural flow physically captured in a reservoir that could not be distributed to a water right.” Ex. 1 at 4-5, 8 (emphases added; parenthetical in original).³ Sutter, Cresto, and Barrie testified that “unaccounted for storage” is defined as a post-“paper fill” increase in the amount of water physically stored in the reservoir system. Tr. 211, 346, 1420. The affidavits of Cresto and Sutter characterized “unaccounted for storage” as “water that was physically stored in the reservoir system after the reservoir water rights ‘filled on paper,’” Ex. 2 at 11 ¶ 22 (emphasis

³ The Staff Memorandum noted that the terms “unallocated” and “unaccounted” storage “have been used historically to mean the same thing.” Ex. 1 at 5 n.3

added), and “the amount of natural flow *stored* during the refill phase of a flood operation.” Ex. 5 at 4 ¶ 11 (emphasis added). Sutter’s 1987 “Accounting Paper” referred to “unaccounted for storage” as “[*a*]ctual storage” and the “*second fill*” that occurred “after the storage rights are all ‘filled on paper.’” Ex. 4 at 7 (page 5 of “Accounting Paper”) (emphasis added).

In the *Order Denying Petitions for Reconsideration*, the Director specifically distinguished the accounting system’s definition of “unaccounted for storage” from the Petitioners’ contention that “unaccounted for storage” is measured by the amount of water that enters the reservoirs after the reservoir water rights are satisfied:

The *Amended Final Order* also did not find or conclude that “unaccounted for storage” consists of “all water flowing into” the reservoir system after the reservoir water rights have filled from an accounting standpoint—i.e., “filled on paper.” “*Unaccounted for storage*” *accrues only if physical storage in the reservoir system increases after “paper fill.”* *Amended Final Order* at 32 ¶ 6; *id.* at 34 ¶ 93; *id.* at 38 ¶ 110; 41 ¶ 124; *id.* at 45 ¶ 140; *id.* at 49 ¶ 158.

R. 001414 n.9 (emphasis added).

The Ditch Companies and the Board of Control incorrectly assume that all “inflow” to the reservoir system after the reservoir water rights have been satisfied from an accounting standpoint—i.e., “filled on paper”—is “counted” as “unaccounted for storage.” In fact, most of the reservoir system “inflow” after “paper fill” is not “counted” at all. “*Unaccounted for storage*” *can only accrue after Corps and/or the BOR cease “evacuations” and “bypass” and begin physically storing more water in the reservoir system.*

R. 001422 (emphasis added).

Thus, the Memorandum Decision’s statement that “unaccounted for storage” is “identified” as “excess natural flow entering a reservoir after the reservoir water right is satisfied,” *Memorandum Decision* at 6-7, 14, is contrary to the Director’s findings and the substantial evidence on which the Director relied. The volume of the “unaccounted for storage” as determined by the Water District 63 accounting system is always less, and

usually significantly less, than the volume of “excess” natural flow entering the reservoirs after the reservoir water rights have been satisfied. This is discussed below.

b. The Volume of “Unaccounted for Storage” as Determined by the Water District 63 Accounting System is Significantly Less Than the Volume of “Excess” Water That “Enters the Reservoirs” After “Paper Fill.”

The volume of “excess natural flow entering a reservoir after the reservoir water right is satisfied,” *Memorandum Decision* at 14, is not the same as the amount of additional water physically stored in the reservoirs after the reservoir water rights are satisfied. This is confirmed by daily accounting reports, or “green bar sheets.” R. 001268, 001408-14.

While the accounting system does not specifically report the “excess natural flow entering a reservoir after the reservoir water right is satisfied,” *Memorandum Decision* at 14, this parameter is reported daily in the “remaining natural flow” at Middleton. Ex. 1 at 4-5, 9.⁴ If the *Memorandum Decision*’s definition of “unaccounted for storage” is consistent with the Water District 63 accounting system, then the sum of the daily volumes of “remaining natural flow” after the reservoir water rights are satisfied until the “day of allocation would be the same as the

⁴ For all practical purposes, the “remaining natural flow” reported for Middleton is the measure of the “excess” natural flow “that continues to enter the reservoirs” after the reservoir water rights have been satisfied and before the “day of allocation.” *Memorandum Decision* at 6-7, 14. Natural flow reach gains from Lucky Peak to Middleton are minimal in comparison to the reach gains upstream from Lucky Peak. *See, e.g.*, “REACH GAIN” for Reach 10 in the “REACH FLOWS IN CFS” section of the “green bar sheets” for 2011 (file entitled “BOIWR11-01to10-31.PDF” in Officially Noticed Documents, WD63 Records of Water Distribution\WD63_Boise River Historic WR Accounting\BoiseRiver\2011) (“2011 Green Bar Sheets”). The “remaining natural flow” computed for Middleton is a daily determination of the amount of natural flow that is “surplus” to the demand under all upstream water rights. Ex. 1 at 9. The Water District accounting system divides the Boise River into thirteen reaches. R. 001264; Ex.1 at 3. “Remaining natural flow” is a computation of “the amount of natural flow at the end of each reach after all of the water rights within the reach and upstream reaches have been satisfied.” Ex. 1 at 4 (emphasis added). The Middleton reach (Reach 10) is considered to be the end of the regulated system. Ex. 1 at 3; R. 001246, 001268, 001296. The “remaining natural flow” at Middleton is reported in the column entitled “REMAINING NAT FLOW,” at the entry for Reach 10 (“GLENWOOD BR TO MIDLTLN”) in the “REACH FLOWS IN CFS” section of the “green bar sheets.” *See, e.g.*, 2011 Green Bar Sheets.

final volume of “unaccounted for storage.”⁵ But these two quantities are not the same—indeed in most flood control years they are not even close to the same, as accounting data in the record confirm:

YEAR ⁶	“PAPER FILL” TO “DAY OF ALLOCATION” ⁷	“EXCESS” NATURAL FLOW AFTER “PAPER FILL” (AF) ⁸	“UNACCOUNTED FOR STORAGE” ON “DAY OF ALLOCATION” (AF) ⁹
1999	3/26 – 7/4	854,100	611,300
2011	3/31 – 7/17	877,300	310,200
2012	3/22 – 6/27	897,200	269,700

The annual volume of “unaccounted for storage” as determined by the Water District 63 accounting system is always less, and in most cases far less, than the annual volume of “excess” natural flow that “continues to enter the reservoirs” after the reservoir water rights are satisfied.

Memorandum Decision at 6-7, 14. The difference is due to the fact that flood control operations

⁵ “Unaccounted for storage” is reported under “UNACCT STORED” in the “YEAR-TO-DATE AF” section of the “green bar sheets.” R. 001408-10 & n.5; Ex. 1 at 9; *see, e.g.*, 2011 Green Bar Sheets.

⁶ These years were cited by the Petitioners in the contested case proceeding, and were discussed in the Final Order and/or the *Order Denying Petitions for Reconsideration*. R. 001274, 001280-83, 001406, 001408-14, 001429.

⁷ For current purposes, “Paper Fill” is defined as the date the “green bar sheets” show the Lucky Peak water right as being satisfied, that is, when the “STORED (AF)” volumes for “LUCKY PEAK” and “LUCKY PEAK LTF” equal their “RIGHT (AF)” volumes. R. 001266 & n.36, 001408 n.5; *see, e.g.*, 2011 Green Bar Sheets, at Mar. 30-31, 2011. “Unaccounted for storage” can begin to occur after the Lucky Peak water right is satisfied, even if the Anderson Ranch water right has not been satisfied. R. 001267. The “day of allocation” is the date when the number reported under “UNACCT STORED” in the “YEAR-TO-DATE AF” entries in the “green bar sheets” drops to zero. *See, e.g.*, 2011 Green Bar Sheets, at Jul. 16-17, 2011. The record also includes the “green bar sheets” for 1999 and 2012.

⁸ The numbers in this column are the sums of the daily volumes of “REMAINING NAT FLOW” for Reach 10 (“GLENWOOD BR TO MIDLTLN”) in the “green bar sheets” during the “Refill Period.” *See, e.g.*, 2011 Green Bar Sheets. The “remaining natural flow” is reported in the “green bar sheets” as a daily flow rate (CFS). Daily volumes of “remaining natural flow” were obtained by using the flow rate-to-volume conversion factor (1 CFS for 24 hours = 1.98 AF).

⁹ The numbers in this column are the volumes of “UNACCT STORED” reported in the “green bar sheet” for the last day before the “day of allocation.” *See, e.g.*, 2011 Green Bar Sheets, at July 16-17, 2011.

“bypass” much of the “excess” natural flow that enters the reservoirs after the reservoir water rights are satisfied. *See* R. 001243 (“bypass”). The excess is not accounted or attributed to the reservoirs or their water rights in any way. *See* R. 001422 (“most of the reservoir system ‘inflow’ after ‘paper fill’ is not ‘counted’ at all”). The volume of “excess” natural flow entering the reservoirs during the “refill” period often far exceeds the volume of additional water the Corps retains to physically “refill” the reservoir system.¹⁰ *See* R.001296 (“the accounting results show that, during the period when irrigation demand overlaps with reservoir refill operations, water passed Middleton unused, indicating that water supply exceeded not only irrigation demand but also demand for refill purposes”).

A remand under the Memorandum Decision’s definition of “unaccounted for storage,” therefore, would not simply require the Director to re-characterize “unaccounted for storage” as water appropriated under the constitutional method late claims currently pending in the SRBA. *Id.* at 17. It would require the Director to fundamentally change the Water District 63 accounting system’s method of quantifying “unaccounted for storage” to conform to the Memorandum Decision’s quite different definition and measurement methodology.¹¹

II. The Memorandum Decision’s Description of “Unaccounted for Storage” as a “Continued Distribution” of Natural Flow is not Consistent With the Director’s Findings, the Record, or Idaho Law.

- a. The Director may “Distribute” Natural Flow Only Pursuant to a License or Decree.

¹⁰ Lucky Peak dam is the control point for determining whether, when, and how much water will be stored in or released from the reservoir system. As discussed below, the Corps has authority over these decisions during the “refill” period.

¹¹ Remand implications of the Memorandum Decision’s definition of “unaccounted for storage” are discussed further in a subsequent section of this brief.

A “distribution” of natural flow in accordance with the prior appropriation doctrine must be authorized by a valid water right. *See* Idaho Code § 42-201 (“all the waters of this state shall be controlled and administered in the manner herein provided”); *Memorandum Decision* at 5-6 (“The distribution of priority water to these reservoirs occurs pursuant to water rights.”). In the absence of concrete elements, including a firm priority date and a definite quantity, the Director lacks the legal authority and information necessary to “distribute” natural flow “in accordance with the prior appropriation doctrine.” Idaho Code § 42-602. As the Idaho Supreme Court stated in *Nettleton v. Higginson* in discussing the “problem that the watermaster faces” in attempting to determine “which claimed ‘constitutional use’ rights are valid and which are unwarranted and unjustified claims for water under the guise of a ‘constitutional use right’”:

it is evident that a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion. . . . Only by having a specific list reciting the names of the water users, with their dates of priority, amounts, and points of diversion can such a system be administered.

98 Idaho 87, 90-91, 558 P.2d 1048, 1051-52 (1977) (internal quotation marks and citation omitted).

- b. The Director Found That “Unaccounted for Storage” is “Tracked” or “Reported,” not “Distributed.”

The Director found that the Water District 63 accounting system “distributes” natural flow “according to the priority, point of diversion, flow rate, volume, period of use, and/or other limitations on the water right.” R. 001265. The Director also determined, and this Court confirmed, that the existing SRBA water right decrees for the reservoirs do not authorize the “distribution” of natural flow to the reservoirs on the basis of federal flood control operations. *Memorandum Decision* at 9-13. Since there are no other water right licenses or decrees

authorizing the diversion, storage, or use of either the “unaccounted for storage,” or the “excess natural flow entering a reservoir after the reservoir water right is satisfied,” *Memorandum Decision* at 14, the Director does not have the essential information necessary to “distribute” the “unaccounted for storage” in accordance with Idaho Code § 42-602. *See* R. 001288 (“The distribution of water to the federal reservoirs in Water District 63 must be consistent with the decreed elements of the water rights for the reservoirs.”).¹²

The Final Order did *not* find or imply that “unaccounted for storage” is a “continued distribution” of natural flow to the reservoirs after the decreed reservoir water rights have been satisfied. *Memorandum Decision* at 6-7, 14. Rather, the Director found that physical storage of additional water in the reservoir system during flood control “refill” operations is simply “tracked” or “reported” as “unaccounted for storage.” R. 001263, 001267, 001293, 001410. “Tracking” or “reporting” the volume of water physically stored in the reservoir system pursuant to federal authority rather than a state water right is not the same thing as “distributing” natural flow “in accordance with the prior appropriation doctrine.” Idaho Code § 42-602. Accordingly, the *Memorandum Decision*’s statement that the Director found “unaccounted for storage” to be a “continued distribution” of water to the reservoirs, *Memorandum Decision* at 6-7, 14, is contrary to the plain language of the Final Order, and inconsistent with the definition of a “distribution” of natural flow “in accordance with the prior appropriation doctrine.” Idaho Code § 42-602.

c. The Director’s Findings are Supported by Substantial Evidence.

The substantial evidence upon which the Director relied confirms that the daily accounting determination of “unaccounted for storage” is not a “distribution” of natural flow “in

¹² While the *Memorandum Decision* states that the constitutional method late claims pending in the SRBA (subcase nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738) seek water rights for the “unaccounted for storage,” *Memorandum Decision* at 17, the late claims have not been decreed.

accordance with the prior appropriation doctrine.” Idaho Code § 42-602. The water right accounting program makes daily determinations of the residual natural flow at Middleton (which is considered the end of the system), and while a negative residual is reported as “unaccounted for storage,” this is not a “distribution” of natural flow to the reservoirs under the prior appropriation doctrine. Rather, it is a determination that surplus natural flow was physically stored somewhere in the reservoir system. This is consistent with the accounting system’s “reach gain” methodology.

As stated in the Final Order and the Staff Memorandum, the Water District 63 accounting system divides the Boise River into thirteen (13) reaches for purposes of determining the natural flow supply and distributing water. R. 001264-65; Ex. 1 at 3-4. Integral to this methodology is a daily determination of the “remaining natural flow” at the downstream end of each reach—that is, “the amount of natural flow at the end of each reach after all of the water rights within the reach and upstream reaches have been satisfied.” Ex. 1 at 4. The “remaining natural flow” at the end of a given reach is the amount of natural flow entering the next downstream reach that is available for distribution to downstream water rights.

Middleton is the end of the regulated system,¹³ Ex. 1 at 3, and therefore, the “remaining natural flow” calculated for Middleton is the “surplus” natural flow that was *not* “distributed” to any of the water rights on the system. *Id.* at 9. On any day “the observed (actual) discharge passing Middleton **is less than** the *remaining natural flow* at Middleton,” the difference “accrues to the unallocated storage (UNACCT STOR) in the water rights accounting.” *Id.* (bold, italics &

¹³ While the accounting system tracks flows and diversions in the reaches downstream from Middleton (Reaches 11-13), diversions downstream from Middleton are not regulated because “[n]atural flow that arises below Middleton has historically met demand in the lower reaches.” Ex. 1 at 3. Should regulation below Middleton become necessary in the future, downstream water rights that are in priority would be entitled to call for any remaining natural flow computed to be available at Middleton.

parenthetical in original). The difference is the “amount of surplus natural flow that could not be distributed to a water right (but now resides physically in the reservoir system).” *Id.* (italics and underlining added; parenthetical in original). This distinction between “unaccounted for storage” and “distributions” pursuant to licensed and decreed water rights is reflected in the “green bar sheets.” “Unaccounted for storage” is reported as a single number for the entire reservoir system: “UNACCT STORED.” *Id.*¹⁴ “Distributions” to the individual reservoirs, in contrast, are reported separately for each reservoir according to priorities, under the column entitled “STORED (AF).” R. 001266 & n.36, 001408-09 & n.5.¹⁵

In other words, the accounting program determines whether any natural flow should be present at Middleton after priority distribution to all licensed and decreed water rights upstream from Middleton is complete. If the actual measured flow at Middleton is less than the calculated natural flow that should be present, it is assumed that the surplus natural flow was physically retained in the reservoir system. *See id.* at 5 (“unallocated storage has been captured in the system when the *remaining natural flow* (calculated) at the end of the system (the Boise River near Middleton gage) is greater than the actual measured discharge.”) (emphasis and parentheticals in original).¹⁶

¹⁴ *See, e.g.*, 2011 Green Bar Sheets.

¹⁵ *See, e.g.*, 2011 Green Bar Sheets. The “priority” ordering of the reservoirs in the “green bar sheets” recognizes “Last To Fill” space designations (“LTF” and “LLTF”) relating to the Nez Perce settlement and fish flow augmentation releases. *Id.*; R. 001408-09 n.5.

¹⁶ Some of the difference between the actual discharge and the “remaining natural flow” may result from a reach gain “averaging” error, Ex. 2 at 12; R. 001265; Ex. 1 at 4, and/or excess or out-of-priority diversions by water users downstream from the reservoir system. These generally do not have significant effects, however, and are addressed through other accounting procedures, such as the “reconciliation report,” Ex. 2 at 12, and by accounting for diversions in excess of licensed and decreed rights as a use of stored water. R. 001265. Storage use charges are “cancelled,” however, if the Corps or the BOR make flood control releases. R. 001265, 001267, 001270-71, 001280, 001283-84.

Thus, the accounting algorithm that determines the amount of “unaccounted for storage” is not a “distribution” of natural flow “in accordance with the prior appropriation doctrine,” Idaho Code § 42-602, but rather a measure of the effect of federal reservoir operations on the water supply. Federal reservoir operations are also responsible when the actual discharge measured at Middleton *exceeds* the computed “remaining natural flow”: the excess is storage water leaving the system. Ex. 1 at 3.¹⁷ The BOR determines the reasons for such storage losses, and also determines whether and how storage losses will be charged against spaceholder storage allocations. R. 001267-68; Ex. 1 at 2, 7-9.

The computation of “remaining natural flow” at the end of each reach is integral to the accounting system’s “reach gain” methodology of distributing natural flow only pursuant to licensed and decreed water rights. Ex. 1 at 4. The accounting system’s assumption that a deficiency in “remaining natural flow” at Middleton is due to physical storage of “surplus” natural flow in the reservoirs, *id.* at 9, is not a “distribution” of natural flow “in accordance with the prior appropriation doctrine.” Idaho Code § 42-602. Tracking the amount of “unaccounted for storage” is simply a calculation required by the fact that federal reservoir operations result in a comingling of natural flow and stored water. The Director must distinguish between natural flow diversions and stored water use. Idaho Code §§ 42-602, 42-801; *Nelson v. Big Lost Irr. Dist.*, 148 Idaho 157, 159, 162-63, 219 P.3d 804, 806, 809-10 (2009); R. 001264-65, 001287-88, 001420. He must also distinguish storage taking place pursuant to state water rights from storage occurring pursuant to federal flood control operations *not* authorized by state water rights. Idaho Code § 42-201.

¹⁷ The volume of storage water leaving the system at Middleton is reported in the “green bar sheets” in the “MIDDLETON STORED” field of the “YEAR-TO-DATE AF” entries. Ex. 1 at 5; R. 001245-46, 001268; *see, e.g.*, 2011 Green Bar Sheets.

d. Federal Flood Control Operations Govern the Diversion and Storage of “Unaccounted for Storage.”

It is undisputed that the Corps and the BOR have authority under federal law to operate the reservoir system to divert, regulate, and store water during flood control operations. The Corps and the BOR do not hold (and have not claimed) state water rights authorizing the diversion or storage of water for flood control purposes, *Memorandum Decision* at 6 & n.4, and “[o]nly the federal government has the authority to operate the dams.” *Id.* at 11. Any decision about whether, when, and at what rate water will be physically stored in or released from the reservoir system for flood control purposes “is made by the federal government and is out of the Director’s control.” *Id.* at 10.

“Refill” of the Boise River reservoir system is a flood control operation conducted under authority of federal law. *See* R. 001245 (stating the “refill” period is “normally the most difficult and critical of the three flood control periods”) (quoting the *Water Control Manual*). “The uncontroverted evidence establishes that, from April 1 until the end of flood control operations, the Corps controls the amount of water released from the reservoirs pursuant to the *Water Control Manual*’s Refill Requirements. During this period, the reservoirs refill at whatever rate the Corps, in consultation with the BOR, deems prudent.” R. 001306. The physical filling or “refilling” of the reservoir system pursuant to flood control operations “is determined by runoff forecasts, flood control rule curves, the best judgment of the reservoir system operators, and other operational considerations.” R. 001279. “Coordinated reservoir system operations seek to physically fill or ‘refill’ the system at the end of the flood control season.” R. 001293.

“Unaccounted for storage” is “the amount of natural flow stored during the refill phase of a flood operation.” R. 001260-61 (quoting Ex. 5 at 4). The accumulation of “unaccounted for storage” ends when “the flood operation is completed,” and “at the end of a flood operation, ideally the amount of ‘unaccounted for storage’ will be equal to the amount of storage released for flood control.” R. 001260-61 (quoting Ex. 5 at 4-5). “Maximum fill” of the reservoir system, therefore, does not occur until “the flood season is over.” R. 001261 (quoting Tr. 446.). The Corps, which does not hold state water rights for the reservoirs, has final authority to determine when flood control “refill” operations have ended.¹⁸ R. 001245, 001247.

The Director’s finding that “unaccounted for storage” is “tracked” and “reported” rather than “distributed,” R. 001263, 001267, 001293, 001410, is consistent with the fact that there are no state water right licenses or decrees that authorize the Director to “distribute” to the reservoirs any natural flow in excess of the annual volumes already decreed. In the absence of a valid state water right authorizing the additional storage, it would be contrary to Idaho law for the Director to deem “unaccounted for storage” a “distribution” of natural flow “in accordance with the prior appropriation doctrine.” Idaho Code § 42-602; *see id.* § 42-607 (stating that anyone claiming a water right “but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license . . . shall . . . be held to have a right subsequent to any adjudicated, decreed, permit[ted], or licensed right in such stream or water supply”); *id.* § 42-201 (“all the waters of this state shall be controlled and administered in the manner herein provided”); *In Re SRBA, Subcase No. 00-91017 (Basin-Wide Issue 17)*, 157 Idaho 385, 394, 336

¹⁸ The end of flood control “releases” is not the same thing as the end of flood control “operations.” Releases simply provide the reservoir space necessary to regulate and store the predicted flood runoff so that flows at Glenwood do not exceed the flood control regulation objective of 6,500 c.f.s. *See* R. 001239 (referring to “flood storage allocation parameter curves (or ‘rule curves’) to be used . . . of each year in conjunction with the runoff forecasts to determine the total reservoir capacity required to control a flood to the 6,500 cubic foot per second objective or less”) (parenthetical in original).

P.3d 792, 801 (2014) (“the Director’s duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority”); *Almo Water Co. v. Darrington*, 95 Idaho 16, 20, 501 P.2d 700, 704 (1972) (stating that a watermaster “is authorized to distribute water only in accordance with applicable decrees”); *Nettleton*, 98 Idaho at 91, 558 P.2d at 1052 (“a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion”) (citation omitted).

For the same reasons, deeming the capture of “unaccounted for storage” in the reservoir system a “continued distribution” of natural flow to the reservoirs under Idaho’s prior appropriation doctrine, *Memorandum Decision* at 6-7, 14, would be the same as recognizing a water right for federal flood control operations. The “unaccounted for storage” is captured in the reservoir system under the authority of federal flood control law and at the sole discretion of the Corps and the BOR. As discussed above, the Corps determines when “refill” starts—and therefore when “unaccounted for storage” occurs—on the basis of federal runoff forecasts and flood control rule curves, not on the basis of water right priorities or Idaho law. The Corps seeks to fully “refill” the reservoir system at the very end of the flood risk period, *see, e.g.*, R. 001278 (“receding end of the flood period”), 001293 (“as high flows recede and the risk of flooding diminishes”), and in many years there is a lengthy period during which the Corps “bypasses” a considerable volume of “excess” natural flow before deciding that “refill” can begin. R. 001243-44, 001246-47, 001293, 001422.¹⁹

¹⁹ There is no accounting to the reservoirs or their water rights of the excess natural flow that is “bypassed” rather than physically stored in the reservoir system after “paper fill.” *See* R. 001422 (“most of the reservoir system ‘inflow’ after ‘paper fill’ is not ‘counted’ at all”). Any excess flow “bypassed” through the reservoir system after “paper fill” is simply natural flow available for downstream water rights.

By exercising their authority to store water under federal law without a state water right, the Corps and the BOR are not effecting a “distribution” of natural flow under Idaho law, and the Water District 63 accounting system does not recognize “unaccounted for storage” as a “distribution” under state law. Deeming the “refill” or “unaccounted for storage” a “continued distribution” of “excess natural flow entering a reservoir after the reservoir water right is satisfied,” *Memorandum Decision* at 14, would make federal flood control operations the basis for “distributing” water and “effectively transfer water right distribution in the basin from the Director to the federal government.” *Memorandum Decision* at 11.

- e. The Allocation of “Unaccounted for Storage” to Spaceholders for Beneficial use is not a “Distribution” of Natural Flow Under Idaho Code § 42-602.

The “unaccounted for storage” in the reservoir system is assigned to the individual reservoirs and allocated to spaceholders only on the “day of allocation,” in accordance with federal contracts and any instructions received from the BOR. R. 001267-70. This is an allocation of “stored water” resulting from federal flood control operations, however, not a “distribution” of natural flow “in accordance with the prior appropriation doctrine.” Idaho Code § 42-602.

“Natural flow” is water that would be flowing in the river system absent reservoir operations and diversions; “stored water” is water in excess of the computed natural flow. R. 001236 n.7, 001264; Ex. 1 at 2. These different types of water are comingled in the Boise River system, and distinguishing between “natural flow” and “stored water” is “fundamental in accounting for the distribution of water in Water District 63.” R. 001264; *see id.* 001287 (“The Boise River Water master, as supervised by the Director, must account for the distribution of

natural flow and stored water separately.”); *Nelson*, 148 Idaho at 159, 219 P.3d at 806 (recognizing that the watermaster must account for comingled natural flow and stored water).

The “unaccounted for storage” is “stored water” because absent reservoir operations it would have left the regulated system in the form of “remaining natural flow” at Middleton, R. 001236 n.7, 001264; Ex. 1 at 2, as previously discussed. The “unaccounted for storage” water is present in the reservoir system on the day of allocation only *because* of reservoir operations. It is water that has been physically “stored” rather than allowed to flow through the river system. The fact that it was stored pursuant to federal flood control authority rather than a state water right does not change the character of the water. It simply means that the Corps and the BOR stored the water under *federal* flood control authority rather than *Idaho’s* prior appropriation doctrine. As this Court recognized, the Director cannot prevent the Corps and the BOR from operating the reservoirs to capture “unaccounted for storage” during flood control “refill” operations, *see Memorandum Decision* at 11 (“Only the federal government has the authority to operate the dams”), nor would it make sense for the Director to attempt to do so. Diverting, regulating, and storing excess flood flows during the “refill” period is integral to reservoir system flood control operations.

As this Court recognized, the Director must make “distributions” of natural flow “in real time,” and does so “on a day-to-day and week-to-week basis.” *Memorandum Decision* at 10-11; *see* R. 001265, 001271 (“on a daily basis”). “Unaccounted for storage” is not assigned to the individual reservoirs or allocated to the spaceholders on a daily or weekly basis; this procedure occurs just once a year, on the “day of allocation.” All of the water in the reservoir system, both the “unaccounted for storage” and the “accounted for” storage, is allocated on the “day of

allocation.” R. 001248, 001260, 001267-68, 001273-75; Ex. 1 at 10-11; Ex. 2 at 10-11.²⁰ The Director found, and the record confirms, that the procedures for providing the “unaccounted for storage” to the BOR’s spaceholders once a year are an allocation of “stored water,” not a “distribution” of natural flow “in accordance with the prior appropriation doctrine.” Idaho Code § 42-602.

f. Allocating “Unaccounted for Storage” to Spaceholders Prevents Waste of Stored Water.

The “refill” water physically stored pursuant to federal flood control operations has been, and will be, present in the reservoir system on the “day of allocation” even though no state water right authorizes diversion and storage of “unaccounted for storage.” Indeed, the BOR has argued to this Court that “flood control operations are entirely independent of the water rights system,” that “to the extent State law were construed to preclude, or even hinder, federal flood control mandates it would be pre-empted,” and the outcome of SRBA “refill” proceedings “will have no effect on Reclamation’s flood control operations.” Off’l Not. BWI-17, 91017-001212-13 & n.3²¹; R. 001275, 001301.

The Corps and the BOR physically divert and regulate all flows even though the partial decrees (and the underlying licenses) authorize diversion of only a fraction of the total runoff. The Corps and the BOR also regularly store water out-of-priority, in reservoirs that are not authorized places of storage in the partial decree that is in priority when the water is captured. R.

²⁰ A considerable volume of “accounted for” storage or “priority water,” *Memorandum Decision* at 5-11, remains in the reservoir system on the “day of allocation,” even in the highest runoff years. R. 001422 & n.14. This is because the relative proportions of “accounted for” and “unaccounted for” storage in the reservoir system on the “day of allocation” is not determined by how much water enters the reservoirs, but rather by how much flood control space the Corps evacuates or keeps empty, and then subsequently “refills.”

²¹ *The United States’ Response Brief On Basin-Wide Issue No. 17, In re SRBA, Subcase No. 00-91017* (Jan. 11, 2013) at 4-5 & n. 3.

001246, 001252, 001265, 001291; Ex. 2 at 15. The Corps and the BOR regularly release water stored under the priorities of the partial decrees for flood control and other purposes that are not authorized in the partial decrees. R. 001235, 001265; *see Memorandum Decision* at 6 (“They are operated for purposes other than, and in addition to, the distribution of priority water to irrigators under the reservoir water rights”). Federal flood control operations in the Boise River system, in short, conflict with the prior appropriation doctrine as established by Idaho law.

The question, therefore, is whether Idaho law allows the BOR to allocate “unaccounted for storage” physically held in the reservoir system on the “day of allocation” without a state water right to spaceholders for irrigation use.²² If strictly applied, the “plain and unambiguous” language of Idaho Code § 42-201, *Memorandum Decision* at 14, would preclude the BOR from both storing the “unaccounted for storage,” and also from subsequently allocating it to spaceholders. *See* Idaho Code § 42-201(2) (“No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.”).

The Director must nonetheless distribute water in accordance with Idaho’s prior appropriation doctrine. Idaho Code § 42-602; *see Memorandum Decision* at 12 (“The Director does not distribute water pursuant to these private [flood control] agreements. . . . the Director distributes water pursuant to the partial decrees issued for the reservoir water rights”). Despite the conflict with Idaho Code § 42-201, the BOR has allocated the “unaccounted for storage” stored in the reservoir system on the “day of allocation” to spaceholders for irrigation and other uses, even though the water was physically stored pursuant to federal flood control authority. No

²² The 1953 Memorandum of Agreement between the BOR and the Corps, the 1985 Memorandum of Agreement regarding the *Water Control Manual*, and the BOR’s contracts with its spaceholders, specifically authorize the BOR to operate the reservoirs for flood control purposes, and to allocate to the spaceholders water that is stored during flood control “refill” operations. *See, e.g., Memorandum Decision* at 12; R. 001238-43.

one has challenged this practice because it is consistent with “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” *IGWA v. IDWR*, 160 Idaho 119, 131, 369 P.3d 897, 909 (citation omitted).

The “unaccounted for storage” has been, and will continue to be, physically diverted and stored in the reservoir system pursuant to federal flood control law, without regard to state water rights. The “unaccounted for storage” physically captured in the reservoir system on the “day of allocation” is not available for distribution to junior water right holders or future appropriators because priority distribution under licensed and decreed water rights applies only to natural flow, not stored water. *Compare* Idaho Code § 42-602 *with* Idaho Code § 42-801; *see Nelson*, 148 Idaho at 162, 219 P.3d at 810 (distinguishing the allocation of storage water from the appropriation decreed in the reservoir’s water right). Thus, if not considered to be available for allocation to spaceholders for irrigation and other uses, the “unaccounted for storage” would either be spilled downstream unused or simply remain in the reservoir system until the accounting “resets,” at which point it would become “accounted for” storage. Whether the BOR’s practice of allocating the “unaccounted for storage” in the reservoir system on the “day of allocation” is permissible under Idaho law is the fundamental question that must be resolved. Resolution of this question does not require a remand to the Director; rather this question must be resolved by this Court in the pending SRBA subcases for supplemental storage water right claims.

III. The Remand is not Necessary and Would Require the Director to Exceed his Legal Authority.

The Memorandum Decision concludes that the substantial rights of “the United States and water users . . . are prejudiced by the Director’s determination that they have not acquired

water rights . . . in water he identifies as unaccounted for storage.”²³ *Memorandum Decision* at 17. This Court therefore reversed “the Director’s determination that the United States and irrigators have not acquired a vested water right in water identified by him as unaccounted for storage,” and “remanded for further proceedings.” *Id.* This reversal and remand contemplates that, in distributing water pursuant to Idaho Code § 42-602, the Director has authority to “determine” water rights or to distribute natural flow to the BOR’s unadjudicated (and contested) late claims for supplemental storage water rights. The Director does not have such authority under Idaho law in the absence of a water right setting forth specific elements.

a. The Director Cannot “Determine” Water Rights in Distributing Natural Flow and Therefore did not “Determine” Water Rights in the Contested Case.

The Idaho Supreme Court distinguished “determining water rights” from “just distributing water” in its *Basin Wide-Issue 17* decision. 157 Idaho at 393, 336 P.3d at 800. The Court held water rights are determined by partial decrees, not the Director’s distribution of water or the accounting system. *See id.* at 394, 336 P.3d at 801 (“the Director’s duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority”). Under chapter 14 of Title 42 of the Idaho Code, this Court has sole authority to determine the nature and extent of the unadjudicated (and contested) late claims pending in the SRBA. The Director in distributing water does not have authority to make a “determination,” *Memorandum Decision* at 17, of the

²³ The United States did not assert any objections to the accounting system in the contested case, and is not a party to this judicial review proceeding. Further, the United States represented to the Special Master in the SRBA proceedings on the late claims for supplemental storage water rights in Basin 63 that the United States “accepts” the Department’s “accounting system,” and the Department’s “construction” or “interpretation” of the partial decrees for the reservoir water rights. *Reporter’s Transcript, Tuesday, Sept. 8, 2015, SRBA Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738*, at 117, 118, 122. This Court may take judicial notice of this transcript. I.R.E. 201.

nature or extent of the supplemental storage water rights rights that have been claimed in the SRBA.

The Director also did not purport to make a “determination” of the nature or extent of the claimed storage water rights. Rather, the Director determined, and this Court affirmed, that the partial decrees for the reservoir water rights do not authorize storage of the “unaccounted for storage.” *Memorandum Decision* at 5-14. It is undisputed that there are no other licenses or decrees authorizing the “unaccounted for storage,” and the Director did not evaluate or “determine” the late claims pending in the SRBA for purposes of the contested case.

b. The Director Cannot Make “Distributions” of Natural Flow to the Unadjudicated Late Claims or Pursuant to Flood Control Operations.

The Director cannot make priority-based distributions of natural flow pursuant to the unadjudicated late claims pending in the SRBA. As the Idaho Supreme Court stated in *Nettleton* when addressing a similar question:

[The] claimed property interest is that of a ‘constitutional use’ water right, such right being created simply by diverting unappropriated waters and putting those waters to beneficial use. I.C. s 42-103 et seq. Such a right, unless adjudicated, is an unproven right, i. e. no formal proceeding, neither judicial nor administrative, has established said right.

98 Idaho at 90, 558 P.2d at 1051.

Idaho’s prior appropriation doctrine requires that “distributions” of natural flow be made pursuant to water right licenses or decrees, as previously discussed. There are no licenses or decrees for the late claims pending in the SRBA; they are “unproven” rights that have not yet been adjudicated. *Id.* It would be contrary to Idaho law for the Director to “distribute” water to these unadjudicated late claims. *See* Idaho Code § 42-602 (“The director of the department of

water resources shall distribute water in water districts in accordance with the prior appropriation doctrine.”).

While it is undisputed that the Corps has diverted and stored flood water during the flood control “refill” period, that this “unaccounted for storage” has been allocated to spaceholders, and that some as-yet undetermined quantity of the “unaccounted for storage” may have been beneficially used by irrigators, *Memorandum Decision* at 17,²⁴ the flood control operation does not provide a legal basis for priority administration. See *Order Deconsolidating Subcase 00-92026 and Order of Recommitment to Special Masters, In Re SRBA Case No. 39576, Subcase No. 00-92026* (Jul. 1, 2008) at 3 (“if historical practices of administration, without a supporting legal doctrine, were to be controlling a significant purpose of the adjudication would be undermined.”).

Administering to federal flood control practices would be the antithesis of priority administration. The Corps and the BOR have historically allowed large volumes of flood water to flow down the river, and the water ultimately captured in the reservoirs during flood control “refill” operations is the “last-in” water as identified by federal runoff forecasts and flood control rule curves. *Ditch Companies’ Reply Brief* at 6. But, under Idaho’s prior appropriation doctrine, the water available for storage under a reservoir water right is the “priority water,” *Memorandum Decision* at 5, 7-9, 11, the “first-in” water as identified by water right priorities. Distributing water on the basis of the flood control operations of the Corps and the BOR, *Memorandum*

²⁴ The fact that “unaccounted for storage” is allocated to spaceholders does not necessarily mean that it is also applied to beneficial use. Storage water allocated to spaceholders that is not needed for irrigation purposes can be carried over, *Memorandum Decision* at 6, but carryover storage may be released for flood control purposes in the following winter or spring. R. 001248-49, 001251-52. The Lucky Peak storage contracts specifically authorize the BOR to release spaceholders’ carryover water for flood control purposes. Ex. 2190—003991 (“The United States may discharge such water as required for flood control purposes . . . and such discharged water shall be deducted from any holdover water held to the credit of the Contractor.”).

Decision at 16-17, would replace priority administration with flood control administration and “effectively transfer water right distribution in the basin from the Director to the federal government.” *Id.* at 11.

Federal flood control practices in the Boise River basin also do not provide the specificity required to distribute water “in accordance with the prior appropriation doctrine.” Idaho Code § 42-602. As the Idaho Supreme Court stated in *Nettleton*:

When one considers the magnitude of the watermaster’s problem of water delivery in his water district, it is evident that a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion. * * *

Only by having a specific list reciting the names of the water users, with their dates of priority, amounts, and points of diversion can such a system be administered. Since the so-called ‘constitutional use right’ is unrecorded in respect to priority, amount and point of diversion, the whole system of delivery in a water district would be endangered if such a right were recognized. * * *

98 Idaho at 91, 558 P.2d at 1052 (emphasis added) (internal quotation marks and citation omitted). While distributions of natural flow in accordance with the prior appropriation must be made on the basis of firm priorities and definite quantities, federal runoff forecasts and the flood control rule curves provide neither. They are inherently variable and identify a spectrum of operational requirements and options that are “entirely independent of the water rights system.” R. 001301.²⁵ Federal flood control operations recognize and allow for a wide range of storage release and “refill” volumes, and time periods during which such operations may occur. R. 001238-47. Operational decisions made by the Corps and the BOR pursuant to their runoff forecasts and the flood control rule curves can result in very different “unaccounted for storage” volumes even for years with similar water supplies, *see, e.g.*, R. 001268 (“Each year is different

²⁵ *The United States’ Response Brief On Basin-Wide Issue No. 17, In re SRBA, Subcase No. 00-91017* (Jan. 11, 2013) at 4-5; Off’l Not. BWI-17, 91017-001212-13.

and storage allocations depend on the facts in that year”), as the table in Part I.b. above illustrates.²⁶

These federal procedures and practices do not identify firm priority dates, definite annual volumes, or fixed periods of use. They are un-administrable for purposes of distributing natural flow in accordance with Idaho’s prior appropriation doctrine. The Director cannot make priority-based “distributions” to such practices or to any claimed water right for “unaccounted for storage” unless and until the practice or claim is reduced to administrable elements in a partial decree consistent with the requirements of Idaho Code §§ 42-1411 & 42-1412. This is a corollary of “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” *IGWA v. IDWR*, 160 Idaho at 131, 369 P.3d at 909 (citation omitted). As the Idaho Supreme Court stated in *Nettleton*, “[t]he governmental function in enacting not only I.C. s 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.” 98 Idaho at 91, 558 P.2d at 1052.

c. Any Partial Decrees Issued for the Late Claims will be Incorporated Into the Accounting System as a Matter of Course.

No remand is necessary to implement the distribution of water to any partial decrees that may be issued pursuant to the pending late claims for “unaccounted for storage.” As previously discussed, the Water District 63 accounting system distributes natural flow according to decreed elements such as priority date, quantity, point of diversion, etc., and any decreed administrative remarks or conditions. The elements of the individual water rights are not coded into the

²⁶ The table shows that while the years 1999, 2011, and 2012 had quite similar amounts of “excess” flood runoff, the volume of “unaccounted for storage” in these years varied widely. The volume of “unaccounted for storage” is determined by federal flood control operations, not water supply and demand.

accounting algorithms, however, but rather are identified in separate water right files.²⁷ Decreed conditions or remarks requiring special administrative procedures are implemented through coded algorithms added to the accounting program.

The elements of any partial decrees issued for the pending late claims will be added to the water right files as a matter of course, and any decreed administrative conditions or remarks will be coded into the accounting program. These steps are already required under the *Final Unified Decree*, which explicitly requires the Director to administer water rights in accordance with partial decrees issued in the SRBA. *Final Unified Decree* at 13.

Thus, should any of the late claims be decreed as water rights for the water currently identified as “unaccounted for storage,” that water will necessarily be distributed in accordance with the partial decrees under existing accounting procedures. No change to the accounting definition or procedures for determining “unaccounted for storage” would be necessary.²⁸ After the water right files are updated to include the elements of the partial decrees and any decreed administrative conditions are added to the accounting algorithms, the water encumbered by the partial decrees would be distributed to the reservoirs in accordance with the decrees under existing accounting procedures. The normal and routine operation of the accounting program would not allow flows encumbered by and distributed pursuant to the partial decrees to be identified as “unaccounted for storage.” *See supra* Part II.c.

²⁷ The water rights files are in the record, as Officially Noticed Documents in the folder WD63 Records of Water Distribution\WD63_Boise River Historic WR Accounting\Boise River. There is a subfolder for each year that contains a number of files, including the water rights file, which ends in “.RTS.”

²⁸ As previously discussed, requiring that the accounting system adopt the Memorandum Decision’s definition of “unaccounted for storage” *would* require a fundamental change in accounting procedures.


CONCLUSION

For the reasons discussed herein, Respondents respectfully request that this Court grant the *Petition for Rehearing* and set a briefing schedule. Respondents do not request oral argument.

RESPECTFULLY SUBMITTED this 23rd day of September 2016.

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I HEREBY CERTIFY that on this 23rd day of September 2016, I caused to be served a true and correct copy of the foregoing document by the methods indicated:

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