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**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.

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

**MEMORANDUM IN SUPPORT
OF THE IRRIGATORS'
PETITION FOR REHEARING**

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

Petitioners,

vs.

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

Respondents,

and

SUEZ WATER IDAHO, INC.,

Intervenor.

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

Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company (the "Ditch Companies") and the Boise Project Board of Control (collectively the "Irrigators"), by and through undersigned counsel of record and pursuant to Idaho Rules of Civil Procedure 84(r) and 84(t)(2), and Idaho Appellate Rule 42, hereby submit this memorandum in support of their *Petition for Rehearing* (Sept. 22, 2016).

I. ARGUMENTS

A. The Reservoir Operating Plan Documents are Not “Extraneous,” and it is Error to Disregard Them

The Court stated in its Memorandum Decision and Order (Sept. 1, 2016) (“MDO”) that the reservoir operating plan is a “private agreement” that is “extraneous” to the Director’s method of accounting for the storage of water in the Boise River Reservoirs pursuant to the reservoir water rights, and therefore “will not be considered.” MDO, pp. 12-13. The reservoir operating plan is neither “private” nor “extraneous,” and the Court’s refusal to consider the plan is error.

First, the Court’s characterization of the reservoir operating plan as a mere “private agreement” among federal agencies and storage spaceholders is clearly contrary to the record before the Court. The reservoir operating plan has been jointly developed, approved, modified and implemented by BOR, the Corps and the State of Idaho (particularly IDWR), publicly vetted, and approved by Congress as the basis for its authorization to operate the Boise River Reservoirs as a system for beneficial use storage and flood control. The core concept of the reservoir operating plan has always been:

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

Ex. 2027 (H.R. Doc. 916).

While the Irrigators’ consent to the plan was a prerequisite to congressional authorization of the coordinated use of the Boise River Reservoirs for beneficial use storage and flood control, their consent did not render the plan a mere private arrangement that the State of Idaho may disregard in its administration and accounting of Boise River Reservoir storage rights. Indeed,

the “Water Control Manual” which has governed Boise River Reservoir operations since 1985, was prepared in response to the request and recommendations of the Governor of the State of Idaho and IDWR. R., Exs. 2137, 2171, 2181, 2182, and 2186. In 1987, IDWR Director Keith Higginson explained:

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

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

Ex. 2171 (emphasis added).

Under the plan, the State of Idaho and IDWR, acting through the Boise River Watermaster, have essential roles in the coordinated management of the reservoirs, as explained in the Water Control Manual:

Regulation criteria used to regulate this multipurpose system are jointly developed by the Bureau, Corps, and the Department of Water Resources (acting as representative for the State of Idaho). Day-to-day regulation of the system requires coordination between the Bureau, Corps, Department of Water Resources, and Boise River Watermaster (elected representative of the State of Idaho - Water District #63). Paragraphs 9-02, 9-03, 9-04, and 9-05 outline the overall responsibilities that each entity has in the management of the multipurpose system. Specific coordination procedures used between the entities to perform day-to-day regulation are outlined within Section VII -WATER CONTROL PLAN.

Ex. 2156 at 002091.

Second, the Department's accounting program does not disregard the fact that water is actually, physically stored in the Boise River Reservoirs after water has been released for flood control as required by the reservoir operating plan. The author of the program, Bob Sutter, explained that after flood control releases:

you're physically storing water in the reservoirs, and the program expects to see natural flow that overtops the reservoirs [because the program has filled the reservoir water rights] and go down the river, down at Middleton or someplace, and lo and behold it's not there, ***because, according to the flood-control plan, the assurance of refill requires or dictates that the physical space be refilled.***

So this refill is occurring, and there is no right to assign it to because the right has already filled. It's full. And so what to do with this block of water that's being refilled with no water right that says, you know, I'm going to have this, I need this. So we created . . . this category called "unaccounted-for storage." And ***this is where the coordinated agreement and the refill assurance comes back in . . . that's why we had this category.***

Tr. at 444:9-445:4 (emphasis added).

Mr. Sutter testified that "unaccounted-for storage" has been stored in the Boise River reservoirs since at least 1956 and allocated to the water users. Tr. at 495:6-23. He does not see a conflict between flood control and beneficial use storage of water under the reservoir operating plan so long as the "crediting back" continues:

The flood control doesn't speak to the -- to the water right -- I mean to the use of the water, and that water right accounting is an after-the-fact. So in order to make that work and to comply with the coordinated agreement, we have the unaccounted-for storage that is credited back. So I don't see any conflict.

Tr. at 496:9-15.

The question is whether accruing flood control releases to "satisfy" reservoir storage rights truly reflects the actual operation of the reservoirs to store water for beneficial use in accordance with the mandatory "spill and fill" procedures of the reservoir operating plan. Mr. Sutter explained:

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

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

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

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

Ex. 2181, ¶¶ 4, 5, 6, 21 (emphasis added). *See also*, Ex. 2008, ¶¶ 23-32; and Tr. at 1343

(testimony of Boise River Watermaster Lee Sisco, who requested that the accounting program be adapted for his use in administering Boise River Water Rights; and testimony of the current Boise River Watermaster Rex Barrie).

Third, the Department's *Memorandum in Support of Respondent's Petition for Rehearing* (Sept. 23, 2016) ("Rehearing Memo") confirms that the reservoir operating plan documents govern, and will continue to govern, the timing of beneficial use storage in the Boise River Reservoirs regardless of what the existing water right partial decrees do (or do not) provide, and regardless of what the Department's computerized water right accounting program tracks and distributes. Simply because the existing storage right partial decrees are silent with respect to the effect of flood control operations in the Boise Valley does not mean that the rights are (or should be) administered absent consideration of them. *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 522-23, 284 P.3d 225, 248 (2012) (water right decrees are subject to interpretation like contracts, and not all decrees necessarily contain all aspects of their administration or enforcement within their four corners); *Anderson v. Dewey*, 82 Idaho 173, 181, 350 P.2d 173 (1960) (decrees are construed "in light of the facts in the case, and the law as it existed when the decree was entered").

As discussed further in Section D below, the existing storage right partial decrees merely set upper limits of diversion quantity, when in priority, during a particular season of use. They do not contain remarks intruding upon the discretion afforded to appropriators under Idaho law (*i.e.*, they are devoid of any requirement to divert and store first-in water).

Basin-specific facts and history matter. *See Anderson, supra*; *see also, A&B Irr. Dist. v. State*, 157 Idaho 385, 390, 336 P.3d 792, 797 (2014) (the "legal effect of flood control releases" is a matter of "first impression" in Idaho; one that ought be considered after development of a proper record). The "legal effect" question was one this Court suggested it would answer when properly framed outside a basin-wide issue. *Memorandum Decision, Basin-Wide Issue 17*, Subcase No. 00-91017 (Mar. 20, 2013), p. 10, n. 7; p. 11; and p. 12 ("The Court notes that since this issue has arisen some reservoir storage right holders have filed motions to file late claims for

separate beneficial use claims to address refill”; “Addressing the issue of fill may require factual inquiries, investigation and record development specific to a given reservoir and water right or rights associated with the reservoir. Addressing the issue of fill will require a record as to how the Department accounts for fill in each reservoir under its accounting methodology”; “[T]he parties to [BWI-17] did not address pursuant to what state authority water that is diverted and stored pursuant to a valid storage water right is used for flood control purposes by the reservoir operator (in either a federal or non-federal reservoir) where no water right exists under state law authorizing such use. Therefore, the Court does not reach that issue.”).

The pending late claims and the contested case proceeding before the Director each squarely raised the “legal effect” question. The Irrigators went to great lengths and expense to develop a robust and undisputed record, and the Department’s accounting methodology has been considered. The Irrigators submit that disregarding critical portions of the record and labeling them as “extraneous” is error—particularly when the Department’s most recent rehearing briefing confirms that the “spill and fill” reservoir operating plan defines the timing of beneficial use storage in the Boise Basin. On this point, the Irrigators agree. This agreement ends, however, where the Department suggests that the ultimate storage and beneficial use of water in the Boise Basin occurs without a state-based water right. If that is the case, why did the State of Idaho spend 30-plus years enduring a McCarran Amendment general stream adjudication?

B. IDWR Is Fully Informed of the Timing and Quantity of Flood Control Releases in Real Time

The Court stated that the Irrigators’ arguments were “problematic because the Director has no way of knowing whether water he distributes to the dams will ultimately be released to irrigators, or whether it will be released for some other purpose (*i.e.*, flood control, dam maintenance, endangered [*sic*] species etc.).” MDO, p. 10. The Court continued: “It may be

months before [the Director] knows whether that water is released to the irrigators or released for some other purpose”; under this assumed lack of knowledge “the system of priority water right distribution breaks down.” *Id.*, p. 11. The Court’s contentions are erroneous.

First, the Department’s Rehearing Memo acknowledges the daily ability to track and quantify flood control releases. Though the accounting program does not track “flood control” releases as an express variable within it, the releases are nonetheless calculable from the data points/variables that are expressly tracked and reported. Rehearing Memo, pp. 8-10; 13. The Director’s quarrel with the Court’s MDO is not over a lack of meaningful knowledge, rather it is one of distinction between the accounting program’s “tracking” and “reporting” functions as compared to the ultimate “distribution” of the water tracked and reported. *Id.*, p. 12.

Second, the Department’s Rehearing Memo again makes clear that the reservoir operating plan governs the timing of beneficial use storage in the reservoirs, and that it will continue to do so absent interference from the agency or junior appropriators. That plan makes clear the advance and real time communications regarding the timing and quantity of flood control releases. R., Ex. 2186, pp. 003801-3803; and 3818-3825. “Daily regulation” of flood control releases are “closely coordinated” between the Army Corps, the Bureau of Reclamation, and the Boise River Watermaster. *Id.* The very first step in coordination is consultation of the Boise River Watermaster. *Id.* Then, after the Corps and the Bureau coordinate a release schedule, the proposed schedule is communicated to the Boise River Watermaster at least 24-hours in advance of any release. And, violation of the criteria contained in the Water Control Manual, including its “close coordination” provisions, can only occur under unique conditions where strict adherence is not “possible or practical.” *Id.*

Third, the Director's *Amended Final Order* (Oct. 20, 2015) likewise acknowledges the real time communication and consultation that occurs with the Boise River Watermaster regarding the timing and quantity of flood control releases. *Id.*, Finding of Fact No. 38.

C. Junior Appropriators Do Not “Forego” Diversions or “Let Water Pass” Under the Reservoir Operating Plan

In its MDO, the Court stated that the Irrigators' arguments would require juniors to “forgo” their diversion of water in favor of priority refill of the reservoirs during and near the completion of flood control operations. MDO, pp. 8-9. This is neither factually nor legally correct.

First, flood control releases are a consequence of too much water, not too little—there is no priority “distribution” of water during flood control releases because there is no “scarcity” to administer against. Thus, junior diversions are not curtailed during flood control releases. *See* IDAHO CODE § 42-603 (“distribution” of water occurs through the watermaster’s adjustment of headgates “when in times of scarcity” it is necessary to do so to supply senior rights); R., Ex. 2 (Cresto Affidavit; Jul. 21, 2015), ¶ 27 (“The problem during the flood control period, both before and after 1986, is managing excess flows. Water right priority determines distribution during times of shortage . . . While priorities are recognized during flood control operations under the current system, there is typically no need for regulation or enforcement because all water rights are satisfied during high flow periods.”).

Second, there is no appreciable universe of junior appropriators upstream of the reservoirs, and those that do exist have not been administered subject to downstream senior water rights anyway. *Amended Final Order* (Oct. 20, 2015), Finding of Fact Nos. 5 and 60; Conclusion of Law No. 58; *see also*, *Preliminary Order* (now since final) (Oct. 21, 2013) *In the Matter of Expansion of the Boise River Water District No. 63 Upstream of Lucky Peak Dam*;

Order Granting Petition for Clarification; Denying Petition for Reconsideration (Sept. 8, 2014) *In the Matter of Requiring Measuring Devices and Controlling Works For Diversions in Water District No. 63, Boise River and Tributaries; and Water Distribution of Boise River District 63* 2014 (2014 “Black Book”), p. 59 and A-3 (Diversions: Upstream to Downstream).

Third, flood control releases are available for diversion by junior appropriators as a general matter; they are appropriated by existing juniors when flood control releases occur; and the water is/can be available both up and downstream of the reservoirs given the prescribed communications of the reservoir operating plan and the Department’s existing capability of real time tracking of the timing and quantity of flood control releases. R., Exs. 3012 (water right report for permit no. 63-31409), 3040 (Squires Aff.), and 2008 (Sisco Aff.), ¶ 12; *see also, e.g., Knutson v. Huggins*, 62 Idaho 662, 668-89, 115 P.2d 421, 424 (1941), quoting *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909) (when a senior appropriator is not using their full entitlement, or any at all, the unused water is considered unappropriated and may be used by juniors “for such period of time” as the senior is letting it flow past unused). In sum, flood control releases are not lost to the system, and they are appropriable “for such period of time” as the releases occur.

Further, as a practical geographical matter, downstream juniors never “let water pass” during flood control operations provided they have a valid right to divert the releases. *See, e.g., Knutson, supra; see also, R., Ex. 3012.*

Fourth, at most, the opportunity for juniors to divert water during flood control releases might be delayed in the case of evacuations of previously stored water. The diversion and use of bypass water (that which was not retained and stored, but is passed through the system nearly contemporaneously) is not delayed, and any delay is insignificant given the dearth of upstream

juniors. Further, any delay is consistent with Idaho law where juniors take a stream as they find it at the time of their appropriation. *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 12, 154 P.2d 507, 510 (1944).

Flood control water evacuated post storage is a boon to juniors because it is water made available for them to divert that would not otherwise be available in a non-flood control year, when it would remain in storage until used by the Irrigators.

Finally, flood control water (the first-in water) is water being taken from senior users for the greater good of flood control in the Boise Valley. There is no conflict between flood control and beneficial use storage under the reservoir operating plan. Rather, the plan “balances” the dual objectives through the reasonable assurances given the Irrigators that, in exchange for letting the early flood waters pass by, they would be kept whole through the diversion, storage, and use of the later (second-in) flows. R., Ex. 2171 (Director Higgenson wrote about the “new rule curves and procedures aimed at providing greater flood protection through early season operations *and* increased assurances of refill for irrigation during the late runoff season . . . the new manual . . . provides a balance between flood protection and refill of storage.”) (Emphasis added). The Department and the Court are putting multipurpose reservoir operations back in conflict by ignoring the core “spill and fill” premise of the plan, sacrificing senior water rights along the way and calling into question the continued wisdom of those operations going forward if we are forced to store the first-in water.

D. Not All “Priority” Flows are Physically or Legally Diverted, Stored, or Distributed

The Court concludes that because the Boise River Dams each consist of a “river-wide diversion structure,” they necessarily “capture[] and regulate[] the entire flow of the river.” MDO, p. 7. Because “[t]he dams are themselves the structures into which water is diverted and

stored under the reservoir water rights,” and because the reservoir water rights speak in terms of diversion volume only (*i.e.*, there is no diversion rate limitation), the reservoirs “therefore divert the entire flow of the river that is available in priority at any given time.” *Id.* pp. 7; 10. This is neither factually nor legally correct because the terms “divert,” “store,” and “distribute” are not synonymous.

First, while span-of-river dams have the ability to regulate (*i.e.*, slow) all incoming flows, the dams cannot divert all flows to storage unless the reservoirs possess the physical capacity to do so. There is no dispute that the aggregate capacity of the Boise River Reservoirs (approximately 1.0 mAF) is less than the average 1.7 mAF runoff (or more) of the basin. *See, e.g.*, R., Ex. 2171.

Second, the Court and the Department erroneously equate reservoir *inflows* with diversion and distribution; it’s the *outflows* that matter. MDO, pp. 6-8. Distribution is accomplished through the adjustment of headgates. The control point of the reservoirs (the “headgate”) is located at the dam—the downstream-most point of the reservoir, not the head (inflow) end. R., Ex. 2181 (Sutter Aff., Jul 2, 2015), ¶ 19 (The Boise River Reservoirs lack works capable of controlling the quantity of inflows and they lack capacity to store all inflows in most years). Headgates on streams are *opened* to divert water out of the stream and, thus, out of the supply system until some portion of the diverted flow eventually returns as return flows downstream of the diversion. Diversion of water by dams requires the opposite—dam gates are *closed* to *retain and hold* flows back into storage (thereby raising water elevations in the reservoirs). *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) (“[T]he very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.”).

So long as the dam gates are open (regardless of degree), the dams are not diverting (let alone storing) all flows entering the reservoirs even if reservoir inflows are in priority. The Department's Rehearing Memo confirms this "not all flows entering are diverted and stored" point. *See, e.g.*, Rehearing Memo, pp. 5-8 ("Unaccounted for Storage" is that what is physically retained and present in the reservoirs *after flood control releases occur*).

As discussed above, there is no meaningful "distribution" of water during flood control operations because times of flood control are times of plenty, not times of scarcity. *See also*, Rehearing Memo, pp. 9-10 ("bypass" flows occurring during flood control operations are "not accounted or attributed to the reservoirs or their water rights in any way.").

Though river inflows into the reservoir system may be in priority for the reservoir to divert, retain, and store does not mean that a reservoir operator must (or does) divert, retain, and store those flows. If dam gates are open (however incrementally), it is a physical and legal impossibility that distribution and storage of all inflows are occurring. Rather, it is a well-settled tenet of Idaho's prior appropriation doctrine that the appropriator possesses discretion to divert up to the limits of the governing water rights, but not necessarily to the limits of those rights at all times as a matter of law:

Priority of appropriation having been established, as well as the amount of the water appropriated, and the beneficial use thereof, it seems to us that the functions of the court under the statute have reached their limit. For the court to dictate the manner in which the appropriator shall use the water so appropriated, so long as it is adapted to a useful or beneficial purpose, is going beyond its province.

We are of the opinion that, so long as the appropriator of water applies the same to a beneficial or useful purpose, *he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used.*

McGinnes v. Stanfield, 6 Idaho 372, 374-75, 55 P. 1020, 1021 (1898) (emphasis added).

This is because needs and ability to use (among other factors) are variable; thus, it is unrealistic and inappropriate to assume the diversion, use and distribution of all flows in priority. *United States v. American Ditch Assoc.*, 2 F.Supp. 867, 869 (D. Idaho 1933) (emphasis added) (“A water right is the right, in due order of priority and within the maximum appropriated, to use the amount of water which reasonably suffices *for the owner’s needs at any particular time. The factors variable, the amount is variable, not only season to season, but any day by day, even hour by hour.* Consequently, it is obvious the court cannot justly prescribe any fixed schedule. It must be left to the honest judgment of the [water right] owner in application, subject to control by the court’s watermaster, who interferes in any the owner’s abuse, and prescribes limits for immediate use.”).

It can hardly be said that flood control releases, required of non-negligent dam operations in Idaho, equal the waste of water any more than they are a beneficial use of water. *See, e.g., Baranick v. North Fork Reservoir Co.*, 127 Idaho 482, 483-84, 903 P.2d 71, 72-73 (1995); IDAHO CODE §§ 42-3102 and 42-1718(b). Just like a canal or ditch owner/operator is duty bound to use no more water than good husbandry requires at any given time during the season of use, and to further use discretion to turn no more water into the ditch system than the system can handle, dam and reservoir operators are likewise required to exercise sound judgment to divert and store only that which can be safely retained for future use. *Compare id.* and IDAHO CODE §§ 42-1203 and 42-1204. The meter is not, and cannot, as a matter of physical reality and law, always be running. R., Ex. 2181 (Sutter Aff., Jul 2, 2015), ¶ 19 (The Boise River Reservoirs lack works capable of controlling the quantity of inflows and they lack capacity to store all inflows in most years); and Tr. at 439:6-440:13 (Sutter hearing testimony) (the accounting program in and of itself does not “distribute” water because the accounting is an

“after-the-fact . . . tabulation of what [already] happened” concerning the actual diversion and storage of water).

There is no detrimental “picking and choosing” of water as the Court contends. *See, e.g.*, MDO, p. 12, n. 9. Despite the ordinary discretion afforded appropriators under Idaho law, that discretion is constrained by the “spill and fill” reservoir operating plan, jointly negotiated, authored, and implemented by the State of Idaho, the Department, the Bureau of Reclamation, the Army Corps of Engineers, and the Irrigators. The flood control rule curves impose objective, engineered storage and release criteria that are planned and communicated in real time. The Department, the Boise River Watermaster, and water users (seniors and juniors alike) know what is happening as it is happening, and the rule curves prescribe what water must be released to accommodate reservoir inflows while maintaining acceptable reservoir water elevations and the 6,500 cfs flow target at Glenwood gage. Again, juniors on the system do not “forgo” anything—flood control releases are available for their use and are not lost to the system.

While true that the Irrigators might prefer a “fill and spill” system as is available under Idaho’s prior appropriation doctrine (because that operational regime guarantees full reservoir fill during flood control years), the betterment of the valley through coordinated flood control demands otherwise. The Irrigators were only willing to shift operational regimes in exchange for the reasonable assurances of “refill” provided by the operating plan.

Finally, the Court misconstrues the Irrigator’s contentions regarding end beneficial use of water. MDO, p. 10. The Irrigators do not contend that water rights (including reservoir water rights) should be measured at the field headgate (the ultimate place of use). Instead, the Irrigators merely seek the accounting and distribution of that water which is purposefully stored (actually retained in the reservoirs and available for end beneficial use) when it is safe and

prudent to do so (*i.e.*, the second-in water stored near the conclusion of flood control operations as flood risk wanes). Thus, the Court’s reliance on point of diversion/measurement-based cases such as *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900), *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912), and *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972) are inapposite.¹

The arguments advanced by the Irrigators are not “where” to count, but rather “what” and “how” to count against the backdrop of the reservoir operating plan that all, including the Department, agree governs the timing of beneficial use storage in the Boise Basin. *See, e.g.*, Rehearing Memo, pp. 4; 16-17.

E. Rulemaking Failure—The Department’s Statewide One-Fill Rule Was the Basis for the Accounting Program for the Three Boise River Reservoirs

When evaluating the Director’s denial of the Boise Project’s Motion to Dismiss and institute rulemaking, the Court characterized the contested case proceeding as relating only to “the distribution of water to three federal on-stream reservoirs on the Boise River System pursuant to four specific water rights.” MDO, p. 20. In doing so the Court failed to take into account how and why the contested case was initiated, failed to recognize that notice was provided to every water right holder in Basin 63, and failed to acknowledge that the undisputed

¹ The Court’s reliance on the foregoing authorities regarding measurement at the point of diversion is also not directly applicable because the overriding policy behind measurement at the point of diversion rather than the place of use is grounded in the prevention of waste. Unless the court is prepared to equate flood control releases with “waste” under Idaho law as a general matter, there is little to no “waste” to guard against in an on-stream reservoir system (save maybe evaporation losses) because flood control releases are not lost to the system or otherwise consumed unless diverted by junior appropriators. The on-stream reservoirs do not turn water out of the natural channel, and there are no conveyance losses as a result of a dam’s so-called “diversion.” The foregoing authorities considered ditch-based systems, not on-stream reservoirs, and feared waste based on unreasonable/excessive conveyance losses between the point of diversion and the ultimate place of use. That is simply not the case with on-stream reservoirs.

testimony at the hearing was that the Department had adopted, without rulemaking or guidance, a statewide one-fill rule applicable to *all* federal on-stream reservoirs.

The contested case was initiated on October 22, 2013. The Director stated that “[t]he existing accounting processes in Water District 1 and Water District 63 have become the subject of controversy as a result of concerns and objections expressed by the Bureau of Reclamation (“Reclamation”) and some storage water users.” R., 00002-9. He concluded that it was “necessary to initiate contested cases for the purpose of resolving the objections to the *existing accounting processes* for the distribution of water to the on-stream reservoirs in Water District 1 and Water District 63.” *Id.* (emphasis added). The intent of the contested case was not to simply resolve accounting as it related to four storage water rights, but rather was to create the record to support the Department’s de facto adoption of its statewide one-fill rule over 30 years earlier.

Counsel for the Department admitted that was the intent of the contested case from the outset:

From looking back in the record, it looks like some of these issues that we’re struggling with in accounting were talked about at various points in time through history. And that’s part of our struggle here is *there hasn’t been a record created of why those things occurred*. And that was the anticipation of this. Not to have an informal setting where we don’t build that where we don’t have that for use in the future. It was to build a structure that we could have all that information come in and we can look at that and build that for the future going forward so we don’t have to revisit these issues every so often, you’ve had that established documentation of what’s going on behind it.

And so I think there was – I hear what you’re saying about questions about how the accounting is occurring. I think, at least from my understanding from *where the Director was going with this*, that was going to be part of this proceeding, *is building that record to say, hey, this is what’s going on*, providing that information, but not only for documenting it right now, but for documenting it for in the future so folks could know what’s taking place.

Tr., 0012/6/13 Status Conference at 26:1-27:19 (emphasis added). It was clear that the contested case proceeding was intended to create a post hoc record to support the application of this existing one-fill rule to the Boise River reservoirs.

It is undisputed that the Department treats the accounting program as “the whole or part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter that implements, interprets or prescribes (a) law or policy; or (b) the procedures or practice requirements of an agency.” IDAHO CODE § 67-5201(19). Each of the past-Directors who testified on behalf of the Department in its own contested case testified that the accounting program was developed to implement a statewide rule initially developed for the upper Snake River, but later imported into the Boise and Payette River basins as well. Tr. at 245:17-246:20; 277:9-279:25; 658:3-659:6 (“rule” established in 1977). Furthermore, the Director justified his decision to employ “paper fill” as “satisfaction” to protect junior water users from the storage right holders and/or the federal government. R., 001278. *See also*, Tr. at 170:15-171:9. The Director went so far as to explain that the purpose of the contested case was to “document” the existing methods and procedures of accounting, and to “inform the water users of how the existing system works.” R., 000338.

The Court held that even though the Director’s *Amended Final Order* may have precedential value, because it only applies to four specific water rights it is applied particularly, not generally. MDO, p. 21. The Court, however, looked only at the end product, and did not take into account the purposes and intent of the calling of the contested case. By doing so, the Court did not properly apply the *ASARCO* test. In *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003), the Idaho Supreme Court recognized that the Idaho Code Section 67-5201(19) definition of an agency “rule” was too broad and issued additional guidance to define when an agency action constitutes a rule. A “rule” has “(1) wide coverage, (2) [is] applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not

previously expressed, and (6) is an interpretation of law or general policy.” *Asarco*, 138 Idaho at 723, 69 P.3d at 143 (2003). If an action of an agency meets the criteria set out above, it “constitutes a rule requiring rulemaking to be valid.” *Id.*

This Court’s determination that the Director’s *Amended Final Order*, creating a previously non-existent record for the one-fill rule, only applied to four water rights on the Boise River, and did not therefore have “wide coverage” was in error based on the facts of record in this case. The one-fill rule which formed the foundation for the accounting program is a statewide rule, as testified to by several past-directors. The rule is applied uniformly throughout the state, expressed agency policy not previously expressed, and was the Director’s interpretation of law or general policy concerning his obligation to distribute water. The contested case should have been dismissed and rulemaking instituted pursuant to the criteria set out in *Asarco, Inc.*, *supra*.

F. The Contested Case Proceedings Denied the Parties Their Due Process and Statutory Rights

The Court concluded that the parties primarily relied upon a presentation given by the Director to an interim legislative committee related to the Basin-Wide Issue 17 proceedings as the basis for requiring the Director to have removed himself and appointed an independent hearing officer. MDO, p. 18. While the Director’s statements and presentation during the interim committee meeting provide some evidence of his bias in these proceedings, it was not the sole evidence relied upon by the parties. The parties asked for disclosures of the Director’s statements about the one-fill rule. The Department stone-walled and refused to provide those statements, asserting that his position was “well known” or that there was no obligation to advise the parties of his many statements to persons who were not parties to the contested case. In doing so, the Director was free to express his opinion in advance without judicial review of those

statements. The Director also participated in settlement negotiations with the parties prior to calling the contested case, and participated in the deliberations leading to the recommendation that the late claims filed in the SRBA be disallowed as “unaccounted for storage.” *Memorandum Decision and Order Granting Ditch Companies’ and Boise Project’s Motions for Summary Judgment*, p. 9 (Oct. 9, 2015), SRBA Subcase No. 63-33733. This constitutes “***substantial prior involvement other than as a presiding officer***” that is grounds for disqualification pursuant to Idaho Code Section 67-5252(1) (emphasis added). This was not a simple case of the Director acting as a hearing officer in a contested case where two or more parties came to the tribunal seeking resolution. Here, the Director put the parties in the untenable situation of defending themselves against the policies and determinations of the Department made 30 some years ago, and where the Director had made numerous public and private statements concerning his belief that the accounting program as it currently was implemented was the best option. R., 000902-949.

Furthermore, while the contested case was being heard before the Director, he had numerous conversations with Department staff, including those who testified on behalf of the Department, and even directed the Department’s expert witness to prepare rebuttal evidence to be submitted in support of the position advocated by the Director in these proceedings. Tr. at 1585:10-1586:15; 1588:25-1589:10. This is a clear violation of the Idaho Administrative Procedure Act, and further evidence that the parties did not have their case heard by an impartial tribunal. The APA prohibits any hearing officer from consulting with parties, directly or indirectly, during the pendency of the case, without notice and an opportunity to participate. IDAHO CODE §§ 67-5252 and 67-5253. “These sections are intended to ensure that the decision maker bases the order solely on the facts and arguments contained in the record created at the

evidentiary hearing.” M. Gilmore and D. Goble, The Idaho Administrative Procedure Act: a Primer for the Practitioner, 30 Idaho Law Rev. 273, 321 (1994). The APA prohibits the hearing officer from discussing the case before it with the agency attorney or staff. IDAPA 04.11.424; *see also*, IDAPA 04.11.01.417 (applying rule to presiding officer). It is unequivocally the case that where the agency head is acting as the hearing officer, he or she may not have ex parte contacts with agency personnel involved in the investigation or prosecution of the pending matter. *State v. Kalani-Keegan*, 155 Idaho 297, 307, 311 P.3d 309, 319 (Ct. App. 2013) (“[A]ny discussions with other agency personnel who are involved in the case are clearly impermissible.”). *Gilmore, supra*, p. 325.

Due process “entitles a person to an impartial and disinterested tribunal.” *Cowan v. Bd. of Comm’rs*, 143 Idaho 501, 148 P.3d 1247 (2006), quoting *Davisco Foods Int’l, Inc.*, 141 Idaho at 791, 118 P.3d at 123; *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004), citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). “This requirement applies not only to courts, but also to state administrative agencies.” *Eacret*, 139 Idaho at 784. “An impartial decision maker is essential,” *Williams, supra*, 157, quoting *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Here, the Court failed to look at the totality of the record before it when it made its determination that the Director properly acted as the hearing officer in these proceedings.

Agency counsel acting as both counsel to the Director as hearing officer, and to the Department head prior to and during the contested case as Department counsel, was further evidence of the intrinsic bias of the hearing officer, and further eroded the due process protections that the parties were entitled to in this contested case. Ms. Cresto testified that Mr. Baxter continued to act in both roles throughout the contested case hearing. Ms. Cresto admitted that during the course of the contested case proceedings she had had multiple conversations with

the Director concerning the subject matter of the proceedings and the evidence that had been presented during the hearing. Tr. at 1588:25-1589:10. This was not just a single isolated incident, as this Court believed, but pervaded the entire case. She had not disclosed that information in earlier questioning because the Department's counsel, Mr. Baxter, was also present during those three-party conversations and she thought these conversations were privileged. *Id.* at 1585:10-1586:15.

“Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.” *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (internal quotations omitted); *see also*, *Cowan*, 143 Idaho at 510, 148 P.3d at 1256. Due process requires an opportunity to be heard “at a meaningful time and in a meaningful manner.” *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998), quoting *Sweitzer v. Dean*, 118 Idaho 568, 573, 798 P.2d 27, 32 (1990). This Court's determination that because the parties had an opportunity to cross examine Ms. Cresto concerning one of her ex parte contacts with the hearing officer during the course of the proceedings, then their due process rights were not infringed constitutes error. Furthermore, the determination of this Court that Mr. Baxter could advise both the hearing officer and the Department simultaneously prior to and during the contested case, because there was no complaint that the Director acted upon, is also in error. The Director initiated the contested case because it was “necessary to initiate contested cases for the purpose of resolving the objections to the existing accounting processes for the distribution of water to the on-stream reservoirs in Water District 1 and Water District 63.” R., 00002-9. The Director himself asserted that the reason he was holding the contested case was because people had complaint which seems to fit the definition of “the investigation or

prosecution of complaint.” MDO, p. 22. This Court’s holding is not supported by the record and facts in this action.

Additionally, no attorney assigned to assist the hearing officer or agency head “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 or investigation of the complaint.*” IDAPA 04.11.01.423.02.b. This rule was clearly violated throughout the entire contested case.


II. CONCLUSION

One has to account for, and distribute, water consistent with the manner in which water storage and use in the Boise Valley actually occurs. The jointly negotiated and implemented reservoir operating plan prescribes the circumstances under which water is diverted and stored for end beneficial use in Basin 63. Water released for flood control is not “physically or legally available” for beneficial use storage. The Department’s Rehearing Memo reconfirms as much. It is arbitrary and capricious for the Director to account for water in a manner inconsistent with the plan, and it is error for the Court to disregard the plan.

Further, the Irrigators were entitled to a fair and impartial tribunal. They did not receive such a tribunal during what should have proceeded as a formal negotiated rulemaking process in the first place.

DATED this 6th day of October, 2016.

SAWTOOTH LAW OFFICES, PLLC

By 
Daniel V. Steenson
Attorneys for the Ditch Companies

DATED this 6th day of October, 2016.

BARKER ROSHOLT & SIMPSON LLP

By  _____

Albert P. Barker

Shelley M. Davis

Attorneys for the Boise Project Board of
Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 2016, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF THE IRRIGATORS' PETITION FOR REHEARING** to be served by the method indicated below, and addressed to the following:

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