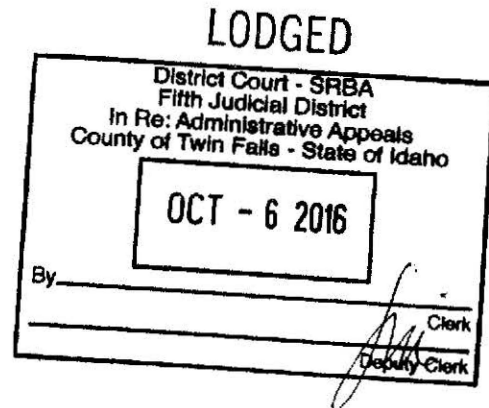


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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

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.

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,

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

**SUEZ'S MEMORANDUM IN  
SUPPORT OF PETITION FOR  
REHEARING**

and

SUEZ WATER IDAHO INC.,  
Intervenor.

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

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Intervenor, Suez Water Idaho Inc. (“Suez”), by and through its counsel of record and pursuant to Idaho Rule of Civil Procedure 84 and Idaho Appellate Rule 42(b), hereby submits this memorandum in support of its September 22, 2016 *Petition for Rehearing* (“*Petition*”).

### INTRODUCTION

Suez supports the September 9, 2016 *Petition for Rehearing* (“*IDWR Petition*”) filed by the Idaho Department of Water Resources (“IDWR” or “Department”). As of the September 22, 2016 petition for rehearing deadline, however, Suez had not reviewed the Department’s September 23, 2016 *Memorandum in Support of Respondents’ Petition for Rehearing* (“*IDWR Brief*”) and, therefore, Suez was unaware of the Department’s specific grounds for seeking rehearing. Accordingly, Suez filed its *Petition* to ensure that the Court will consider issues important to Suez.

Suez agrees with this Court’s findings and conclusions affirming the Director’s determination that the Department’s accounting system is consistent with Idaho’s Prior Appropriation Doctrine with respect to accruing to the Storage Rights<sup>1</sup> all natural flow entering

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<sup>1</sup> The term “Storage Rights” refers to the four water rights decreed by the SRBA Court for storage in three federal on-stream reservoirs in Basin 63. These are decreed right nos. 63-303, 63-3613, 63-3614, and 63-3618. In prior briefing, they also have been referred to as “Base Rights.” These terms are synonymous.

the reservoirs that is in available in priority, and by deeming those Storage Rights satisfied when the amount of natural flow that has entered the reservoirs in priority equals the Storage Rights' quantity elements. *Memorandum Decision and Order* ("*Decision*") at 7-14 (Sep. 1, 2016). Suez also agrees with this Court's conclusions on procedural issues in the "Procedural Analysis" section of the *Decision*. *Decision* at 17-22.

As described in its *Petition*, Suez seeks rehearing solely on this Court's findings and conclusions concerning the Department's accounting procedures pertaining to "unaccounted for storage" and, in particular, the right to store "excess water"<sup>2</sup> that Suez alleges is inherent in every on-stream storage right. These issues largely, if not completely, overlap the issues in the *IDWR Petition*. The arguments set forth in this brief should be considered in addition to, or in the alternative to, the grounds for rehearing set forth in the *IDWR Brief*.

### SUMMARY OF ARGUMENT

Suez contends that recognition of the right to refill with excess water is compelled by Idaho's Prior Appropriation Doctrine and, in particular, the constitutional mandate for maximum use. Neither Idaho law nor the Storage Rights themselves prohibit the storage of additional water beyond "paper fill" so long as the additional storage is for the same purpose(s) as stated on the face of the rights and no other water rights are injured. Refilling with excess water is a win-win-win practice. It benefits both the storage right holder (by allowing more water to be stored) and other water users (by increasing carryover and thus reducing the need to store water in priority the following year). Moreover, it promotes the State's interest in maximizing the

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<sup>2</sup> The *Decision* defines "excess water" as "water not required by any water right on the system." *Decision* at 14. Suez understands this to mean precisely the same thing as what it has called "free river" in prior briefing. In any case, both terms simply are other ways of saying unappropriated water.

resource.<sup>3</sup> Indeed, it is difficult to comprehend why anyone—the State of Idaho, other water users, or the owners of reservoir water rights—would object to the practice.

In particular, there is no legitimate reason for existing storage water right holders to oppose an interpretation of their rights or Idaho law that operates to potentially increase the amount of water they can store. As a general principle, water right holders seek interpretations of their rights to allow them the greatest possible use of water, not the least. Here, the opponents of excess water storage are playing a Machiavellian game: They seek to eliminate a practice that benefits them in order to create an argument that they must be awarded rights in priority that would benefit them even more.

The Court dismissed the State’s “unaccounted for storage” arguments and Suez’s arguments in favor of free river refill on grounds that (1) Idaho Code § 42-201(2) states that “[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid right to do so,” and (2) cases recognizing the historical practice of using excess water are “factually distinguishable.” *Decision* at 14-15. The Court concluded that pre-1971 capture and beneficial use of “second in” water, if proven, would give rise to valid water rights under the constitutional method of appropriation. *See Decision* at 17 (“if unaccounted for storage water has been historically and continuously diverted, stored and used by the irrigators for irrigation dating back before 1971, as the Director expressly recognizes, then the United States and irrigators have acquired a vested constitutional method water right in that water under Idaho law.”)

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<sup>3</sup> “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990). Allowing storable water to run downstream does not further this constitutional policy and bedrock prior appropriation principle.



As explained below, however, while Idaho's statutes prohibit the diversion and use of excess water by persons who hold no water rights, they do not prohibit recognition of the longstanding practice allowing excess water refill ancillary to an existing on-river storage water right. Also, while it may be possible to prove up pre-1971 water rights or obtain new appropriations for "refill,"<sup>4</sup> no such rights have been decreed or appropriated. The Late Claims<sup>5</sup> currently pending in the SRBA have not been proven up.

Thus, the Director did not err by determining that the United States has no vested, priority-based water right in water identified by him as "unaccounted for storage." Nor did he err by not distributing "second in" water pursuant to the Late Claims. The Director's duty and discretion to distribute water in accordance with the prior appropriation doctrine and decreed water rights does not allow him to determine the nature, extent, or existence of water rights—that occurs through the adjudication process.

In the absence of decreed rights for priority refill, the Director nevertheless allowed the capture and use of excess water after the Storage Rights filled "on paper." In doing so, he properly exercised his duty and discretion in accordance with Idaho's maximum use doctrine without injuring other water rights. Indeed, if the Late Claims ultimately are not decreed, Suez contends the Director should continue to fulfill his duty and exercise his discretion the same way. Unfortunately, however, the Court's *Decision* forecloses this possibility.

But even if the Late Claims are decreed, the Court's rejection of excess water refill in Basin 63 will have implications across the State since it appears that, aside from the federal

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<sup>4</sup> As Suez has explained before, if a reservoir operator feels insecure in its ability to capture excess water ancillary to its existing water rights, it could always seek a new appropriation through the application for permit process. This would allow the public and the Department to evaluate the proposed elements and develop appropriate conditions for the exercise of such rights.

<sup>5</sup> The "Late Claims" are the United States' and Boise Project Board of Control's beneficial use claims currently pending in SRBA Subcase Nos. 63-33732 *et al.*

government and irrigators in a few specific basins, the vast majority of on-stream reservoirs have no water rights expressly authorizing the capture or use of “second in” water. Under the Court’s *Decision*, it would appear that these on-stream storage reservoirs must bypass or release any excess water after paper fill rather than store it and put it to beneficial use. That does not maximize the use of Idaho’s water resources. It does the opposite.

To be clear, Suez does not contend that excess water cannot be appropriated—it is, after all, simply unappropriated water. Rather, Suez contends that Idaho law allows both for the appropriation of excess water and the capture and use of excess water ancillary to existing on-stream storage water rights when it is done consistent with the purposes and conditions stated on the face of the rights and without injury to any other water rights. In this way, Idaho’s water resources are maximized without conflicting with flood control obligations or Idaho statutes.

## **ARGUMENT**

### **I. IDAHO CODE § 42-201(2) DOES NOT PRECLUDE THE CAPTURE AND USE OF EXCESS WATER THAT IS ANCILLARY TO AN EXISTING STORAGE WATER RIGHT.**

This Court stated, “The prior appropriation doctrine requires that water be diverted and used pursuant to a water right. Idaho Code § 42-201(2) specifically directs that ‘[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so . . . .’ This language is plain and unambiguous.” *Decision* at 14.

Suez does not disagree with these statements, as far as they go. Contrary to the Court’s ultimate conclusion, however, Suez contends that this statute does not prohibit an existing storage right holder from capturing and using excess water as an ancillary component to its existing water right.<sup>6</sup> In other words, where a valid water right authorizes the storage and use of

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<sup>6</sup> One might term the right to refill with excess water as “ancillary to,” or “incidental to,” or “inherent in” the storage right. Whatever one calls it, it is part and parcel of the on-stream storage right. The holder has the same

water, the statutes (and Idaho's maximum use doctrine) allow the capture and use of excess water in addition to the "priority water."<sup>7</sup>

Idaho Code § 42-201(2) does not say all that much. It says that one cannot divert without a water right. What does that tell us? Only this: Persons who hold no valid water right may not divert. Thus, for example, a person with no valid water right may not construct a reservoir and legally store water simply by proclaiming that he or she will only store excess water. The statute plainly prohibits this. And that is all it prohibits.

The statute does not address the question of how much water, and under what circumstances, water may be diverted under a storage right. That question must be answered by the Department and by this Court based on the water right itself, the rest of the Water Code, Idaho's Prior Appropriation Doctrine, the Idaho Constitution, the case law, and common sense.

In sum, Section 42-201(2) constrains the Director's discretion to recognize non-priority refill of excess water, limiting it to those persons who hold a valid storage right. That is all.<sup>8</sup>

Notably, Idaho Code § 42-201(2) did not exist until 1986. 1986 Idaho Sess. Laws ch. 313 § 2. Prior to its 1986 amendment, Idaho Code § 42-201 contained only the text in subsection (1). *Id.* So even if, today, Section 42-201(2) prohibits the capture and use of excess water ancillary to a valid storage water right (which it does not, for the reasons described above), that

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usufructuary right to control and beneficially use water stored pursuant to that ancillary right as it does water stored under priority.

<sup>7</sup> The Court uses the term "priority water" a number of times in the *Decision*. See, e.g., *Decision* at 5, 6, 7, 8, 9, and 11. Suez understands this term to mean water distributed to a valid water right under priority, i.e., water that accrues to the right under the so-called "first fill."

<sup>8</sup> Section 42-201(3) is different and not relevant here. The diversion and use of excess water ancillary to an existing valid water right is not like the exceptions listed in Section 42-201(3). Subsection (3) allows water to be diverted from a natural watercourse and used at any time for the listed purposes "with or without a water right." In other words, a person need not have any valid water right to divert and use water for the purposes listed in subsection (3). To store and use excess water, on the other hand, there must be a valid storage water right.

prohibition did not exist prior to 1986—including prior to 1971, when the Late Claims are asserted to have been appropriated.

As the *Decision* notes, Section 42-201(2) is not addressed in *State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998) or in this Court's January 3, 2012 *Memorandum Decision and Order on Challenge* in subcase nos. 74-15051, *et al. Decision* at 14-15.

Accordingly, nothing in these cases mandates the *Decision*'s conclusion that Section 42-201(2) precludes the storage and use of excess water ancillary to valid storage water rights.<sup>9</sup>

## **II. DESTRUCTION OF THE RIGHT TO EXCESS WATER REFILL WOULD UPSET THE DELICATE BALANCE THAT MAXIMIZES IDAHO WATER RESOURCES.**

It is universally recognized that the federal government's goals with respect to its onstream Boise River reservoirs are inherently conflicted. By their nature, the goals of flood protection and storage for beneficial use are at odds.

The accounting system that has been in place for decades (paper fill coupled with excess water refill) has successfully harnessed that tension and helped to ensure that those competing goals are properly and effectively balanced. The fact that refill does not occur under priority (absent a water right expressly providing therefore), keeps the pressure on the federal government not to release too much water for flood control. It may be tempting—if not to this federal Congress or administration, to some future ones—to tip the balance in the other direction. It may be tempting to release more water for flood control or, for that matter, any other federal purpose, such as endangered species, if the federal dam operator had the right to make up the difference by refilling to the detriment of other water right holders.

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<sup>9</sup> Suez recognizes that the Court found these cases to be “factually distinguishable” from the circumstances presented in this Judicial Review because the cases involved prior adjudications and general provisions, based on consent decrees, memorializing the use of excess water based on historical practices. *Decision* at 15. Nevertheless, Suez contends that nothing in these cases precludes the conclusion that Idaho law, and in particular Section 42-201(2), allows the capture of excess water in on-stream reservoirs.

For decades, without any right to refill in priority, the federal government has successfully balanced its competing storage and flood control obligations. And for that they deserve praise. But federal policies can change. Putting Idaho water at the mercy of anyone but the State of Idaho—particularly federal policy-makers—is inconsistent with the State’s control of its public water resource and its constitutional mandate of maximum use. The risk is plain to see—more water running unused downstream and out of state, while the needs of junior diverters go unmet.

There may be occasions when a right to priority refill is appropriate. Indeed, there are some on the books. *See, e.g.*, SRBA Partial Decree no. 37-19740. But applications for priority refill should be carefully weighed and conditioned and beneficial use claims must be carefully proven up.<sup>10</sup> It would be a mistake for Idaho to abandon the practice of excess water refill, thereby compelling virtually every reservoir operator in the State to run to court or the Department with claims or applications for priority refill. Perhaps those claims and applications would be granted under subordination conditions that render them harmless to other water users while maintaining the necessary tension to ensure maximization of the resource.<sup>11</sup> But there is no constitutional or statutory need undertake that monumental exercise. Why fix a clock that is not broken? The same result can be obtained simply by maintaining recognition of excess water refill. Worse yet, if all those claims and applications were granted for priority refill without subordination, the delicate balance that has ensured the careful operation of Idaho’s reservoirs will be undermined.

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<sup>10</sup> As Suez has argued, there are reasons to believe that the Late Claims cannot be proven up, that any such rights that may have existed may no longer be valid, and that if they still are valid they must be conditioned to avoid injury and maximize beneficial use.

<sup>11</sup> The partial decrees issued for “refill” water rights in other basins contain such subordination conditions. *See, e.g.*, SRBA Partial Decree no. 01-10620 (“This water right is subordinate to all existing and future water rights established pursuant to Idaho law for use within the Snake River Basin above Milner.”).

### **III. RECOGNITION OF THE RIGHT TO REFILL UNDER EXCESS WATER CONDITIONS AVOIDS FEDERAL PREEMPTION OF IDAHO LAW.**

Aside from securing the maximum use of Idaho's water resources, there is another significant reason to confirm Suez's contention that Section 42-201(2) and Idaho's Prior Appropriation Doctrine allow the capture and use of excess water without injury to other rights: Doing so would avoid the potential conflict between storage for beneficial uses and flood control obligations (whether pursuant to federal authority or Idaho common law). As this Court knows, the U.S. Supreme Court has held that "[t]he legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California v. United States*, 438 U.S. 645, 675 (1978). However, interpreting other Supreme Court decisions, the Ninth Circuit subsequently held that "a state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." *United States v. California*, 694 F.2d 1171, 1177 (9th Cir. 1982).

Here, the Department's recognition that Idaho law allows the storage of excess water after the Storage Rights have been satisfied in priority allows the federal on-stream reservoirs to operate for flood control without hindering storage for beneficial uses. Indeed, it has successfully accomplished this for decades.

A different interpretation of Idaho law risks the opposite conclusion: that federal flood control law trumps Idaho's Prior Appropriation Doctrine. Indeed, rejecting excess water refill invites an entirely unnecessary confrontation with the federal government on a playing field (federal supremacy) that disfavors Idaho. Surely the Idaho Legislature never intended such an outcome when it enacted Section 42-201(2) (or any other statute, for that matter). In short,

because the Department's accounting system allows for complete satisfaction of the Storage Rights, and additional storage of excess water, by recognizing the Storage Rights' inherent right to capture excess water flows, it does not conflict with any congressional directives related to the Boise River reservoirs' flood control operations.

**IV. ONLY A SLIGHT CHANGE, IF ANY, MUST BE MADE TO THE DEPARTMENT'S ACCOUNTING SYSTEM TO ACCOMMODATE EXCESS WATER REFILL ANCILLARY TO THE STORAGE RIGHTS.**

The Department's accounting system accrues the storage of excess water to an account called "unaccounted for storage." Suez understands this to be simply a computerized "bucket" into which the amount of excess water captured in the reservoirs is represented. To Suez's knowledge, the computer code does not expressly link this captured excess water to the Storage Rights or otherwise recognize that the right to capture it is ancillary to the Storage Rights. This less-than-formal system seems adequate to Suez.

However, if the Court believes this "bucket" insufficient to account for the Storage Rights' ancillary right to capture excess water, that problem presumably can be fixed easily enough by renaming "unaccounted for storage" (*e.g.*, "federal storage of excess water"), or by otherwise linking "unaccounted for storage" to the Storage Rights in the computer code. To the extent this matter must be remanded, that is all the Director should be tasked with.

**V. THE DIRECTOR DID NOT PREJUDICE SUBSTANTIAL RIGHTS BY NOT RECOGNIZING DECREED WATER RIGHTS FOR REFILL.**

The Director found that that the accounting system does not and cannot recognize rights for priority refill. He found that the Storage Rights do not include a right to priority refill, and this Court agreed. Likewise, he could not recognize a right to priority refill under the Late Claims, because the Late Claims have not yet been ruled on. Stated differently, he understood



that he may distribute water under priority only pursuant to a decreed, permitted, or licensed right.<sup>12</sup>

This Court concluded that the Director's findings concerning "unaccounted for storage" must be "set aside and remanded as contrary to Idaho Code § 42-201(2) and, as prejudicial to the Petitioners' substantial rights." *Decision* at 15. The Court explained that "the substantial rights that are prejudiced are the water right claims associated with the dams that have been claimed by the United States and other water users in the SRBA [known as the Late Claims]." *Decision* at 15 n.12.

In fact, there is no prejudice. Recognition of the right to refill with excess water does nothing to diminish the Storage Rights. If anything, it improves them.

Nor is there prejudice by the Director's decision to not recognize a vested right to priority refill. As much (or, frankly, as little<sup>13</sup>) as the United States and the Irrigators would like the Director to have recognized an entitlement to refill under the Late Claims' priority, his failure to account for the un-decreed Late Claims cannot be prejudicial to the United States or Irrigators—who, by the way, never asserted such rights before filing the Late Claims and have since undertaken virtually no effort to actually prove them up. Therefore, there is no reason to remand the matter to the Director "for further proceedings" on "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." *Decision* at 17. As explained the previous section, if any remand is

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<sup>12</sup> *A & B Irrigation Dist. v. State*, 157 Idaho 385, 393-94, 336 P.3d 792, 800-01 ("the Director's duty to administer water according to technical expertise is governed by water right decrees."). Indeed, had the Director recognized such not-yet-adjudicated beneficial use claims as existing water rights, he would have prejudiced the substantial rights of existing water right holders.

<sup>13</sup> As the Court is well aware, the United States and the Irrigators have steadfastly argued that the Late Claims are "not necessary."



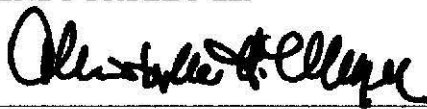
necessary, it should be limited to clarifying the nature of “unaccounted for storage” in the computer code.

### CONCLUSION

Suez respectfully asks this Court to grant its *Petition* for the purpose of rehearing the *Decision*’s findings and conclusions concerning the Department’s “unaccounted for storage” and, in particular, the right to store excess water that Suez alleges is inherent in the Storage Rights and compelled by Idaho’s Prior Appropriation Doctrine’s mandate for maximum use.

Respectfully submitted this 5th day of October, 2016.

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I hereby certify that on this 5th day of October, 2016, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

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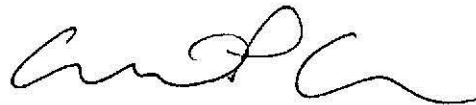
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