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

BALLENTYNE DITCH COMPANY; BOISE VALLEY IRRIGATION DITCH COMPANY; CANYON COUNTY WATER COMPANY; EUREKA WATER COMPANY; FARMERS' CO-OPERATIVE DITCH COMPANY; MIDDLETON MILL DITCH COMPANY; MIDDLETON IRRIGATION ASSOCIATION, INC.; NAMPA & MERIDIAN IRRIGATION DISTRICT; NEW DRY CREEK DITCH COMPANY; PIONEER DITCH COMPANY; PIONEER IRRIGATION DISTRICT; SETTLERS IRRIGATION DISTRICT; SOUTH BOISE WATER COMPANY; and THURMAN MILL DITCH COMPANY, Petitioners, vs. BOISE PROJECT BOARD OF CONTROL, and NEW YORK IRRIGATION DISTRICT, Petitioners, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his capacity as Director of the Idaho Department of Water Resources, Respondents, and SUEZ WATER IDAHO INC.,	Case No. CV-WA-2015-21376 (Consolidated Ada County Case No. CV-WA-2015-21391) **ORDER DENYING REHEARING**

Intervenor.

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

On September 1, 2016, this Court entered its *Memorandum Decision and Order* in the above-captioned matter. *Petitions* requesting rehearing of that decision were subsequently filed by the Idaho Department of Water Resources ("Department"), Suez Water Idaho, Inc., the Boise Project Board of Control, and the Ditch Companies.[1] The *Petitions* are made pursuant to Idaho Rule of Civil Procedure 84(r) and Idaho Appellate Rule 42. In an exercise of its discretion, the Court denies the *Petitions* for rehearing. The arguments made by the parties in support of rehearing are in large part a rehashing of arguments already made to, and considered by, the Court in this proceeding. The Court in its discretion will not entertain these arguments for a second time.

Other issues raised were not considered by the Director. For instance, the Department argues that "the physical diversion and storage of the 'unaccounted for storage' is authorized solely by federal law, and determination of whether, when, and how much 'unaccounted for storage' will occur are entirely dependent upon federal flood control operations." This argument implicates the doctrine of federal preemption. That said, the Department does not identify or cite to which specific federal law(s) it believes implicates the federal preemption doctrine, nor which specific state law(s) it believes have been preempted by federal law.[2] Furthermore, the Director did not engage in a federal preemption analysis in his *Amended Final Order*, and this Court will not address issues not addressed below.

[1] The term "Ditch Companies" refers collectively to 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 Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

[2] It should also be noted that the Idaho Supreme Court has directed that "federal law defers to state law in determining the rights to water in the reclamation projects," and that "the [Reclamation] Act clearly provided that state water law *would control in the appropriation and later distribution of the water*." *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007) (emphasis added).

Previously, the Department relied on state law in support of its accounting methodology. This Court affirmed in part concluding that the Department's accounting methodology was consistent with state law. However, the Court rejected the Department's treatment of "refill" water as "unaccounted for storage" water not subject to appropriation. The Court relied on state law in reaching that decision. The Department now appears for the first time to be asserting federal law in support of its determination that the "unaccounted for storage" water is not subject to appropriation. The Department cites no federal law authorizing the United States to refill the reservoirs once flood control release measures have concluded for the season and the Department has determined according to its accounting methodology that the reservoir water rights have been satisfied. Put differently, what authorization does the United States have to refill the reservoirs once the Department determines that the reservoir storage water rights have been satisfied? Historically, the United States has been refilling the reservoirs to satisfy its contractual obligations to the spaceholders to compensate for obligatory flood control releases. However, according to the Department's accounting methodology the reservoirs are not being refilled pursuant to a valid water right.

Until this point, no party, including the United States, has asserted the application of federal law as justification for the authorization to refill the reservoirs without a water right. If the justification relies on the contracts entered into between the United States and the spaceholders, any pertinent contract provisions were not memorialized into any decree or general provision. The contracts are therefore not binding on other water users on the system including any future appropriations. Suez points out that the historical practice of storing the water when available even though without a water right facilitates the most efficient use of the water. However, if the water is not being stored pursuant to a water right then by law it must be considered unappropriated water that is subject to appropriation. As a result, if someone wished to make application for the water otherwise captured for refill what authority would the United States have for continuing the practice as opposed to making the water available to satisfy the new appropriation? Absent the water already being appropriated, what authority would the Department have for denying an application to appropriate the water otherwise used to refill the reservoirs? Treating the refill water as "unaccounted for storage" does not result in protecting the historical practice of allowing the United States to continue to refill the reservoirs without a water right. Even the so-called "excess water" general provisions decreed in the SRBA as a

result of prior consent decrees recognized that such water was subject to future appropriation and subordinate to junior uses. The Court is unaware of any authority that would allow it to cloak "unaccounted for storage" with the protections of a water right so as to preclude future appropriation. Consequently, if the "unaccounted for storage" would otherwise be considered unappropriated water in the absence of pending late claims[3], the Court finds no lawful reason as to why the United States and spaceholders cannot assert, consistent with their claims, that they have been historically beneficially using that same water to supplement their reservoir water rights in the event of flood control releases. It would be legally inconsistent to hold otherwise.

The Department also argues that it has not been distributing the refill water to the spaceholders pursuant any prior decree or license and that it has no control over when refill occurs. As such, the Department asserts that it has only been tracking or accounting for the refill water. This reasoning does not create a legal impediment to establishing a water right. The claims at issue are based on beneficial use. A beneficial use claim can be established provided the water was diverted and put to beneficial use prior to 1971. A beneficial use right, provided it can be proven up, is no more or less enforceable than a water right based on a license or prior decree. The appropriator need not have intended to either establish a water right or even have understood that the manner in which he was securing and using water would be recognized as a valid water right. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 11, 156 P.3d 502, 512. The fact that the Department was not "distributing" water to the irrigators does not preclude the establishment of a water right, provided that the irrigators can establish diversion and beneficial use. The record supports that United States has been historically capturing the "refill" water and distributing it to the spaceholders for irrigation. If proven, it is difficult to rationalize how the United States would be prevented from establishing a state-law based water right for the benefit of the end user irrigators.

Finally, the spaceholders' position regarding the scope of their reservoir storage water rights also presents a foreseeable conundrum for administration of the reservoir rights. At oral argument in related SRBA subcase nos. 65-23531 and 65-23532, the Court inquired of counsel as to the nature of the interest pertaining to the "first in" water that is captured in the reservoirs which may or may not be later released for flood control. And which the spaceholders assert should not be counted against their reservoir storage water rights if in fact later released for flood

[3] SRBA subcase nos. 65-23531 and 65-23532 are claims to the "refill" water filed in the SRBA.

control. The Court inquired that if the water should not be counted against the reservoir storage rights then would it be subject to appropriation by another or use by existing juniors?[4] Counsel was unable to define the particular nature of the interest but made it clear that the water would not be subject to appropriation or use by another. Its herein that lies the conundrum. Indeed if the water is counted as part of the reservoir water rights then it would be not subject to appropriation or use by another. If it is not counted against the reservoir rights the converse is true. Another issue arises with respect to future administration in low water years. Is the first fill of the reservoirs protected from interference by junior users or only the refill of the reservoirs after flood control measures, if any, have ended for the season? In order to respond to a request for administration the Director has to determine if the senior right is in fact being injured. In order to secure the protections of a water right the "first in" water would need to be counted as part of the reservoir water right. The Court points this out to illustrate the number of foreseeable issues that would be difficult if not impossible to resolve in the event of a future appropriation attempt or a request for administration. The water cannot be treated as being subject to a water right for certain purposes but not for others. Alternatively, if the "first in" water and any subsequent "refill" are both considered part of the water right then the decreed quantity element is exceeded.

The Court reemphasizes that its ruling in this case in no way relies on precedent established in other states regarding the so-called "one-fill rule." Although the opinion clearly sets forth the Court's reasoning it needs to be emphasized that the result reached relies solely on the application of Idaho statutes and established Idaho legal precedent. The issue of reconciling the effect of flood control releases on in-stream reservoirs and the impact on water rights is one of first impression. The issue is further complicated by the fact that the United States is responsible for operating the reservoirs and administering the reservoirs for flood control is part of this responsibility. It is an aspect affecting water administration over which the Director has no control. Nonetheless, the Director has the statutory duty to distribute water rights according to state law and as such must do so in conjunction with reservoir operations. The issues in this case can be resolved, as set forth in this Court's decision, without resorting to the creation of

[4] Such "first in" water would be subject to appropriation or use by another after it has been released, but the question here is whether it would be subject to appropriation or use in anticipation of its release.

novel specialized exceptions to established Idaho water law principles and that would result in a host of unintended consequences in the future.

Therefore, IT IS ORDERED that the *Petitions* requesting rehearing in the above-captioned matter **are hereby denied**.

Dated November 14, 2016

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING REHEARING was mailed on November 14, 2016, with sufficient first-cla postage to the following:

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