Gibson, Deborah

Subject: FW: Refill Issue
Attachments: Fill-Refill Issue FAQ's - IDWR.pdf; Refill Issue - Roger Batt's Response to IDWR FAQ's.docx

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From: Spackman, Gary
Sent: Monday, May 11, 2015 8:22 AM
To: Weaver, Mathew; Baxter, Garrick
Subject: FW: Refill Issue

Mat,

Here is some info about a further exchange about the fill/refill issue. I didn't read the response. Gary

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From: Rick Yzaguirre [mailto:ryzaguirre@adaweb.net]
Sent: Monday, May 11, 2015 8:19 AM
To: Spackman, Gary
Subject: FW: Refill Issue

Gary, FYI.....Rick

From: William Larsen [mailto:blarsen@treasurevalleypartners.org]
Sent: Friday, May 08, 2015 12:25 PM
To: Amber Pence; Angie Barkell; Becky Crofts; Bob Henry; Brad Holton; Brittany Sullenger; Cathy Ward; Chris Engels; Darin Taylor; Dave Bieter; Elizabeth Conner; Emily Oliver; Garret Nancolas; Gheen Christofferson; Greg Nelson; Jenen Ross; Jim Reynolds; John Bechtel; John Evans; Keith Green; Kelly Aberasturi; Monica Reeves; Nate Mitchell; Nathan Leigh; Peggy Gardner; Rick Yzaguirre; Robert Simison; Steve Rule; Susan Miller; Tammy deWeerd; Tammy Gordon; Terri Broome; Traci Osborn; Tracy Hall
Subject: Refill Issue

Good afternoon Treasure Valley Partnership members/staff,

Prior to our last TVP meeting, Mayor Evans, Mayor Reynolds and myself met with Gary Spackman of IDWR with regard to the refill issue. During our meeting, he gave us a 3-page fact sheet on the fill-refill issue. This fact sheet was subsequently sent out and I have attached it here for your review.

Roger Batt has provided us with an analysis of the fact sheet that IDWR provided us. His responses are also attached.

I look forward to seeing everyone in Parma on the 18th.

Bill Larsen
Treasure Valley Partnership
761-6395

Basin 63 (Boise River) Fill/Refill Issue - FAQs

What's the Problem?

1. In a nutshell, what's the fill/refill problem? **Historically, refill of storage space evacuated in federal on-stream reservoirs as a result of flood control operations has occurred. Refill has occurred during the spring freshet when surplus water has been commonly available in the system for storage after all water rights, including water rights junior to the storage water rights, were satisfied. There is a concern that changing future conditions—including new in-basin development, federal ESA flow release requirements, and climate change—may diminish the volume of surplus water historically available to refill reservoir space, resulting in a decline of the overall water supply to storage water users.**

Background

2. When were the federal reservoirs in the Boise Basin completed?

Basin 63 Reservoirs - Summary		
Reservoir	Earliest WR Priority Date	Construction Completion
Arrowrock Reservoir	1911	1915
Anderson Ranch Reservoir	1940	1950
Lucky Peak Reservoir	1955	1955

3. What is the purpose of the Boise River Basin reservoir system? **The Boise River storage system was constructed over the course of 40 years and has been operated for almost 100 years. The system has come to have multiple, sometimes conflicting purposes over its history, including storing water for beneficial use, providing flood protection, meeting recreational needs, and providing year round flows in the Boise River downstream of Lucky Peak.**

4. Who owns the storage water rights within the Boise Basin's federal reservoirs? **The United States Bureau of Reclamation (USBR) owns nominal legal title to the storage water rights.**

5. What are the beneficial uses associated with the Boise reservoir storage water rights? **There are multiple beneficial uses recognized by Idaho State water law associated with the combined reservoir system including irrigation (886,511), stream flow maintenance (152,300 AF), municipal (5,200 AF), and industrial (5,200 AF). Hydropower is also a recognized beneficial use, but water can only be released for hydropower when it accompanies the release of water for another beneficial use. This is termed "incidental" beneficial use.**

6. What about flood control? Isn't that a beneficial use? **Flood control operations are of course generally beneficial to the public's health and safety, and protection against property damage. Flood control operations are conducted jointly by the USBR and the Army Corps of Engineers under Federal flood protection authorities. However, the release and storage of water for flood control operations are**

not beneficial uses recognized in Idaho State water law and there are no water rights associated with flood control operations in the Boise River Basin.

7. What is a space holder contract? **A space holder contract is a contract between the owner of the reservoir (USBR) and the party putting the stored water to beneficial use (i.e. irrigators, municipal providers, etc.). These contracts are not water rights but they define the space allocations of water stored under USBR water rights. Individual space holders such as irrigation districts, canal companies, and municipal providers do not own storage water rights.**

8. When was the current water right accounting first implemented? **Current or modern era computerized water right accounting practices were first initiated in the Upper Snake River in 1977. Modern practices were adopted from the Snake and implemented in the Boise River Basin in 1986.**

9. How does the current water right accounting accrue water to storage water rights? **Under current water right accounting practices, any natural flowing water (i.e. water not released from an upstream reservoir) entering a reservoir, in priority, is accrued towards the satisfaction of the reservoir storage water right. Natural flow water entering a reservoir that is either immediately or subsequently released, even when not released for beneficial use, still counts towards the satisfaction of the water right. This practice is consistent with water right accounting practices for on-stream reservoirs in many western states and is termed the "store it or lose" principle.**

10. Has refill historically occurred under a water right? **Under water right accounting practices, the refill of space in a reservoir previously evacuated for flood control has occurred, but it has not occurred under a water right. A storage water right is only entitled to one fill.**

11. How has refill historically been accomplished? **During the spring freshet surplus natural flow water exists in the system (i.e. more water is in the river than is necessary to satisfy all water right needs), and the surplus water is captured and stored in empty reservoir space. The stored surplus water is subsequently allocated to storage water rights at the conclusion of the runoff season.**

12. Are there any existing mechanisms in place that protect space holders from reservoirs that don't fill as a result of flood control operations? **Yes, space holder contracts and current Endangered Species Act (ESA) flow augmentation release practices provide a first line of defense for space holders.**

13. What happens in the Boise River basin if the reservoir system fails to fill due to flood control releases? **If the reservoir system fails to fill due to flood control by 60,000 AF or less, all storage entitlements in Lucky Peak Reservoir receive 100% of their allocation except for the USBR's streamflow maintenance entitlement. Only when the volume of water that failed to fill is greater than 60,000 AF are space holders in Lucky Peak[1] impacted.**

[1] This "shortfall" is subtracted from the Lucky Peak Reservoir entitlements because Lucky Peak Reservoir has the latest water right priority of the three Boise system reservoirs, and is the primary flood control facility.

14. How often has the Bureau of Reclamation missed filling the reservoir system by more than 60,000 acre-feet in a year when flood control releases were made? **Other than 1989, there has never been a year that space holder's storage space was adversely affected by flood control releases, where the inability to "top off" the reservoir resulted in less than a full allocation of storage water to space holders other than the USBR.**

15. What is the target volume of water associated with ESA flow augmentation releases (i.e. storage water releases for salmon recovery) in the Boise Basin? **When available, 40,932 acre-feet of storage water is released from the Boise basin reservoir system for flow augmentation.**

16. How is flow augmentation water released in the Boise Basin? **In the Boise, the USBR releases flow augmentation water by the time the spring freshet concludes. It does so by targeting full reservoir volume as the actual physical volume less flow augmentation storage releases. When water is released for flood control operations after April 10, and the space vacated by the release does not subsequently refill, the water released can be counted towards flow augmentation requirements.**

Is there a Solution?

17. Is anyone working on a solution to this fill/refill issue? **Yes, the Department, the USBR, and the water users have been engaged in settlement discussion with the purpose of finding a solution to the fill/refill issue that is acceptable to all parties. Currently, a settlement solution has been proposed by the Department, whereby a pair of refill water rights would be decreed in the Snake River Basin Adjudication for each of the three on-stream federal reservoirs. This solution would create real property rights, for the first time, associated with the historical practice of refill, thereby preserving the existing status quo and guarding against future diminishment of the refill practice. The pair of water rights would include a fully subordinated Refill 1 water right, which would include as an element a very large storage volume that will allow for water to be stored in all but the wettest of water years. The Refill 2 water right having an effective priority date of 2014 will allow for prioritized refill of the last 154,000-264,000 acre-feet (i.e. reservoir "top off"), depending on the reservoir, in normal to very wet years. In dry years, when there are no flood control operations, the reservoirs will fill under their base water rights.**

18. What are the priority dates and storage volumes for the proposed refill water rights?

Basin 63 - Refill WRs Summary				
Reservoir	Refill 1 Vol. (AF)	Refill 1 Priority Date[2]	Refill 2 Vol. (AF)	Refill 2 Priority Date
Arrowrock	3.286 MAF	1965/Subordinated	264,000	1984/2014
Anderson Ranch	1.316 MAF	1965/Subordinated	247,000	1984/2014
Lucky Peak	3.693 MAF	1965/Subordinated	154,150	1983/2014

[2] Priority dates for Refill 1 and refill 2 water rights will have a priority date listed on the water right that is based on hydrologic analysis of years of maximum event and an effective priority date that is the result of the conditions of the settlement.

Dear Mayors and Commissioners:

I have been made aware of the 3-page document (attached) that IDWR provided to the Treasure Valley Partnership regarding the Water Rights "Refill" Issue. This is the same identical three-page document that was circulated by IDWR to members of the Legislature and others during the 2015 Session. The bottom line – there is a lot of false and misleading information in this Document. Understanding that IDWR's Director and Deputy Directory have been asked to meet with the Partnership during your May meeting I thought you may be interested in some responses to the Document (the "what's wrong" version) coupled with some questions to ask the Director and Deputy Director during your meeting if you feel so inclined to do. Please see this information below that was also reviewed and approved by some of our water attorneys for legal clarification.

Responses to Item #1:

IDWR states that "refill" under the existing storage rights has historically occurred with "surplus" water being available during high runoff years after all existing water rights (juniors included) have been satisfied.

First, IDWR's suggestion that there is "surplus" water available in the Boise Basin contradicts several Department memoranda and administrative orders issued by IDWR between 1977 and 1995 that state that the Boise Basin is fully appropriated above Lucky Peak Dam (the downstream-most reservoir) . . . in other words there is no additional water available for appropriation since at least 1977.

Second, IDWR has produced no evidence (despite being asked for it) substantiating its claim that "refill" has only occurred (or been allowed to occur) after all other existing water rights (including juniors) have been satisfied. There is no evidence that water rights junior to senior storage rights have been allowed to divert water during the refill period that would otherwise be stored in the reservoirs under the senior storage rights.

Third, to the extent there is "surplus" water in the basin during the spring runoff, that flood water is the water available to juniors and future development, not water earmarked for fillng the reservoirs following flood control releases. For example, the Department's FAQs conveniently omit references to various junior water rights containing express conditions allowing them to divert only when flood control releases are being made from the reservoirs. This means that water rights conditioned accordingly (including those of United Water Idaho) may only divert water from the river channel when flood water is being flushed out of the system to make space in the reservoirs needed to catch the melting snow pack and spring rains. These water right conditions are consistent with IDWR's prior (1977 forward) findings that the basin is fully appropriated above Lucky Peak Dam, otherwise the conditions would not be necessary.

Question for IDWR regarding Item #1:

Why are the existing (and senior) storage water rights for the reservoirs not sufficient enough to authorize a so-called "refill" of the reservoirs? IDWR is asking everyone to believe that "refill"

occurs without a valid water right, and that the agency has looked the other way and ignored the practice for over 60 years. Why?

Responses to Item #2:

There is really nothing more to add to the reservoir water right priority dates or reservoir completion dates, other than to say that the facts speak for themselves regarding the senior nature of the storage rights for the reservoirs (particularly Arrowrock and Anderson Ranch).

Responses to Item #3:

IDWR's description of the reservoir system is incomplete. Each reservoir was Congressionally authorized for specific purposes. Arrowrock was constructed for irrigation storage only. Anderson Ranch contained a very small (< 10%) flood control component (the rest was for irrigation storage purposes), and Lucky Peak was constructed for a mixed use: predominantly flood control with ancillary irrigation, streamflow maintenance, and recreation benefits. Based on these authorizations, Arrowrock and Anderson Ranch were considered fill and spill facilities (they would be filled, and flood water would flow over the top and out the spillway unabated). During the planning stages for Lucky Peak, however, the federal government sought better and more coordinated flood control with the permission of the water users. This lead to a 1953 Agreement with the water users that effectively allowed the re-purposing of Arrowrock and Anderson Ranch to serve flood control purposes in conjunction with Lucky Peak. The benefit of the bargain for the water users was that while their water would get dumped/evacuated to make space to flood water on a forecast basis, the dumped water would be replaced by the later in time flood inflows. Thus, the reservoir system and its contents and forecast-based flood control rule curves developed since, converted the entire system to a spill and fill operational regime to maximize safety and flood control benefits. In fact, the State of Idaho advocated for greater flood control use of the reservoirs in 1977, which led to the 1986 Water Control Manual-based flood control rule curves we've pretty much been living under/with since. So, putting a finer point on IDWR's incomplete description of the system . . . the vast majority of it (approximately 750,000 Acre Feet of the available 1 Million Acre Feet of storage space) was dedicated almost exclusively to irrigation storage until the entire system was re-purposed/authorized in connection with the construction of Lucky Peak.

Responses to Item #4.

The Bureau of Reclamation owns nominal legal title to the storage water rights used to fill the reservoirs. The equitable/beneficial owners of the storage water rights are the water users themselves who apply the water to the ground and who have literally paid for the construction of the reservoirs. The Idaho Supreme Court was clear on this through a 2007 Supreme Court Case which states: the true "owners" of the water rights, are the water user entities, and that remark/condition is written into the water rights themselves.

Responses to Item #5:

There is nothing more to add to No. 5, other than that which was mentioned above in No. 3. The system was constructed for irrigation first and foremost in its beginnings and was later re-purposed with the agreement of the water users who paid for the system.

Question for IDWR Regarding Item #5:

Why would anyone think that the water users would have allowed the re-purposing of the system in 1953 if it meant jeopardizing their existing senior irrigation storage rights? That is a rhetorical question by IDWR.

Responses to Item #6:

There is nothing much more to add to No. 6. The State of Idaho has consistently held that flood control releases are not a beneficial use of water under Idaho law.

Question for IDWR Regarding Item #6:

If flood control is not considered a recognized "use" of water under Idaho Law, how can IDWR turn around and count those releases against reservoir storage rights as though those rights (i.e., "irrigation storage" and "irrigation from storage"-based rights) "used" the water? If the water was not "used" there is no water right to debit.

Responses to Item #7:

IDWR's statements are poorly worded at best, and false at worst.

First, Idaho law is clear that the water users have legal and defensible ownership interests in the water rights used to fill the reservoirs.

Second, most space holder contracts were converted to repayment contracts (meaning the water users own the space . . . they don't just "rent" it from BOR).

Third, while the contracts, in and of themselves, are not water rights, they are based on the underlying water rights. Said, differently, the contracts would not exist but for the existence of the water rights. Regardless, the "contract" issue raised by IDWR is a red herring: the law is already clear that the water user entities do, in fact, own (at least in part) the storage water rights at issue.

Responses to Item #8:

Nothing more to add to No. 8.

Responses to Item # 9:

There is nothing much more to add to No. 9 except that this pretty much sums up IDWR's scary "store it or lose it" proposition. Prior to the construction of Lucky Peak, the system was "store it or lose it" (i.e., fill and spill). But, that operational regime was not deemed to be particularly wise or safe from a flood control perspective; hence the re-purposing of the system under the 1953 Agreement. The Department's description of its accounting system is accurate from its perspective, but it inexplicably ignores the "storage program" IDWR developed at the same time, and that it uses in conjunction with the accounting program. The accounting program is nothing more than a bean counting program tracking every drop of water flowing into the reservoir system. The accounting program in and of itself is ignorant of, and does not concern itself with, reservoir operations mandated under the flood control rule curves. This is why the "storage program" is so important. The storage program is used on or shortly after the "Day of Allocation" (the day when maximum fill of the reservoirs occurs after flood control operations cease). The storage program allocates (or credits) the physical water stored during the refill period back to the senior storage rights that were drafted for the earlier flood control releases. Again, this was the water user benefit of the bargain back in 1953 when the reservoir system was re-purposed to be a flood control first system: flood control releases dump stored water to make space to catch flood water, and that flood water caught later is given back to the water users to keep them whole.

Question for IDWR Regarding Item #9:

What is the storage program/when is the program run/ what is its purpose/and who developed the program?

Responses to Item #10:

IDWR has, throughout this refill dispute, taken the position that refill of the reservoirs has historically occurred without a valid water right. The water user community, obviously, disagrees by contending that our existing senior water rights authorize water to fill the reservoirs following flood control releases based on the historic operations of the system (namely the flood control first operations based on flood control rule curves developed in part by the State of Idaho through IDWR).

Questions to IDWR Regarding Item #10:

Assuming IDWR's position is correct (i.e., that refill occurs without a valid water right), the question then becomes: under what legal authority does refill occur? IDWR will point to other "policy" decisions and administrative rules that promote refill as a form of maximizing the beneficial use of the state's water resources.

Perfection of a valid water right under Idaho law requires: (a) physical diversion from a natural source; and (2) end beneficial use of the water diverted. IDWR already concedes that flood control releases are not the beneficial use of water. Consequently, such non-use of water should not be debited against valid existing water rights dedicated and perfected for end beneficial uses

under the law such as irrigation. The water users agree that the storage water rights are entitled to only one fill. But, one cannot "refill" water rights that have not been "filled" in the first place. The accounting construct of "paper fill" has no connection to the physical availability of wet water for actual end beneficial use, and that is where the "paper fill" construct runs afoul of the "beneficial use" requirements of Idaho law; and that is why the storage program is a crucial and integral step in the process--the actual allocation of physical water back to storage water rights so that the water is present and available for its intended end beneficial use.

Responses to Item #11:

Please see Nos. 1, 9, and 10 above for purposes of addressing IDWR's statements. Also, notice how the following IDWR statement: "The stored surplus water is subsequently allocated to storage water rights at the conclusion of the runoff season" (a) directly contradicts the Department's prior statement that refill occurs without a valid water right ("allocated to storage water rights"); and (b) indirectly acknowledges the existence and purpose of the "storage program" without actually mentioning the program's existence (to allocate the runoff water back to the "storage water rights").

Responses to Item #12 and 13:

In response to this point, it depends on one's definition of "protect." It is true that space holders in Arrowrock and Anderson Ranch are kept whole up to a 60,000 AF shortfall should rule curve operations miss badly. But, there is exposure to Lucky Peak space holders. Further, the 60,000 AF "cushion" protection assumes current conditions and continuing "refill" as the same has occurred over the last 60-plus years. IDWR and the State of Idaho's current refill position starts calling the validity and continuation of past practice into question, and exposes the system to delivery calls downstream of Star Bridge and in the Snake River (and possibly farther) assuming for the moment valid water rights are not in place. IDWR's cushion/protection argument is short-sighted and incomplete, and assumes continuation of the very status quo that its legal theories and positions are challenging.

Regardless, all of this "protection" talk distracts from the larger problem: IDWR's water rights challenge is jeopardizing the senior water rights that promote the future growth in this valley through the security of their seniority. The water user entities of this Valley not only supply Idaho's chief industry (agriculture), but supply water to irrigate parks, lawns, gardens, golf courses, schoolyards, cemeteries, landscaping, etc. This is an urban and agricultural issue. The Department's positon jeopardizes development, rather than promote it.

Question to IDWR Regarding Items #12 and #13:

As a general matter, which water right is more secure on the Boise River: a court adjudicated right with a 1911 priority date, or an administrative permit or license with a 2015 priority date?

Responses to Item #14:

IDWR's statistical statement may be correct. But, as explained in Nos. 12 and 13, above, the Department's "this is no big deal" mantra assumes that the status quo as we know it will continue--something that IDWR's positions expressly threaten. Moreover, the stated purpose for IDWR's position in its FAQs (see No. 1) is that future conditions will change (new development, ESA requirements, climate change). Thus, IDWR already concedes that the status quo will not continue, and its legal theories/positions only make the problems worse.

Responses to Item #15 and #16.

There is nothing to add to IDWR's points other than to say that they are irrelevant, and distract from the core issue: the undermining of the senior storage water right and reservoir operational regime that built this Valley, and that continues to build it today based on the security of the existing senior water rights.

Responses to Item #17 and #18:

The absurdity of the Department's priority date positions is self-evident. So are the Department's proposed settlement quantities (e.g., the water users have never used, nor could they use, between 1.3 and 3.7 MAF—nor does the reservoir system have the physical capacity to store as much). The existing storage rights (what IDWR calls the "base rights") already promote refill--the water user benefit of the bargain in 1953 when they allowed the existing reservoir system to be converted to a flood control first system for the greater good of the Valley. Now, IDWR and others in the state seek to penalize the water users for the bargain reached in 1953, to take advantage of the conversion of the system from one of fill and spill to one of spill and fill--a conversion the state of Idaho actively wanted, and participated in.

Again: one cannot refill what has not been filled once in the first place. If water stored for irrigation use is dumped from the system beyond the control of the water users, during times of year when it cannot be used for irrigation, how is that water "used" from the irrigation accounts under IDWR's accounting program? The truth is, the flood control water is not "used." It is not used because: (a) per IDWR's own admission, flood control water is not a recognized beneficial use under Idaho law; and (b) it is not used for the express "irrigation from storage" purpose for which the water rights were perfected and adjudicated under Idaho law.

Rest assured, the water users have also submitted their own settlement proposal to IDWR. One that protects the integrity and seniority of the existing storage water rights, and one that offers a measure of subordination to protect existing junior rights. Unfortunately, however, IDWR is, to this point, is unwilling to recognize the existing and senior priority dates of the base rights at issue.