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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF ACCOUNTING)	
FOR DISTRIBUTION OF WATER TO)	
THE FEDERAL ON-STREAM)	
RESERVOIRS IN WATER)	
DISTRICT 63)	
)	BOISE PROJECT BOARD OF
)	CONTROL'S SUPPLEMENTAL
)	MEMORANDUM
)	REGARDING DISCLOSURES BY
)	DIRECTOR

On January 9, 2015, the Director responded to the request of the Boise Project Board of Control for documents and disclosures. In that response, the Director stated that "The Director will provide non-privileged written documents and communications related to the Basin 63 contested case responsive to the Boise Project and Ditch Companies' requests. The Director will disclose the documents to parties to this contested case separately from this order." Response to Boise Project Board of Control's Document Request and Request for Disclosure, p. 11, January 9, 2015. Subsequently, a number of documents were posted to the website set up by the Department for Water District 63 Contested Case. In review of the website, the posting is incomplete. In particular, the presentation by the Director to the Natural Resources Interim Committee on September 17, 2014 is not attached. This Interim Committee presentation is directly relevant to the question of refill in Basin 63 and Basin 63 was actively discussed in that

session. However, the disclosure is not included on the website. A copy of that presentation by the Director is attached.

In addition, the minutes of that meeting with the remarks of the Director concerning the Basin 63 refill matter were not disclosed but are also relevant to the document disclosure request made by the Boise Project. A copy of those minutes (pp. 20-25) are attached. See also legislature.idaho.gov/sessioninfo/2014/interim/140917_natr_other_meet_time-Minutes.pdf. In addition, an audio-visual MP4 file kept by Idaho Public TV of this meeting is available on the legislature's website at <http://iso.legislature.idaho.gov/MediaArchive/MainMenu.do>, select meeting year 2014; category: Interim, Task Force and Special Committees; and Committee: Natural Resources Interim Committee. This September 17, 2014 audio-video file is available for download. The Boise Project requests that this information be added to the disclosures that the Director has made concerning his public statements on this topic and be posted.

The audio visual record of the presentation of the Natural Resources Interim Committee in September, 2014 and the Minutes are particularly important. In that oral presentation, the Director identifies some concerns over the accounting program and the fill of the reservoir following flood control releases and then knocks down each of the concerns as illegitimate. The Director stated clearly that one purpose of the accounting program is to protect future uses in the system. In response to questions from individual legislatures, the Director stated that the Boise River storage users are not entitled to any additional water since 1983. When asked by the Speaker what the problem was with refill, the Director replied that he was "mystified." The Director asserted that the water users had voluntarily and contractually assumed the risk. At the end of the session Representative Raybould suggested (perhaps in jest) solving the problem of refill by passing legislation forcing Reclamation to fill the reservoirs physically by March 31 of

each year or suffer fines and penalties. The Director, who is deciding the case about how reservoirs should be filled and credited with storage, responded “here, here.”

In May of 2015, the Director went on television and stated that the inability to accurately predict flood control release “That’s really the issue that’s here.” Ex. 3046. These previous positions taken by the Director on fill are relevant to the issue currently before the Director in his capacity as a hearing officer.

The Boise Project requested at the pre-hearing conference that additional disclosures be made. As of today, no additional disclosures have been posted to the website. Certainly the attached documents and referenced audio-visual files are relevant to the due process issues raised by having the Director as advocate for an outcome also sit as the independent and neutral hearing officer in this contested case.

Dated this 27th day of August, 2015

BARKER ROSHOLT & SIMPSON LLP



By: Albert P. Barker

Attorneys for Boise Project Board of Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2015, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S SUPPLEMENTAL MEMORANDUM REGARDING DISCLOSURES BY DIRECTOR** by the method indicated below, and addressed to each of the following:

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Albert P. Barker

MINUTES
Approved by the Committee
Natural Resources Interim Committee
Wednesday, September 17, 2014
8:30 am to 5:00 pm
State Capitol - Room EW42
Boise, Idaho

Co-chair Senator Monty Pearce called the meeting to order at 8:30 a.m. Members present were Co-chair Representative Dell Raybould, Senators Steve Bair, Jeff Siddoway, Lee Heider, Michelle Stennett, Speaker Scott Bedke and Representatives Mike Moyle and Donna Pence. Ad Hoc Members present included Senators Dean Cameron, Bert Brackett and Roy Lacey and Representatives Paul Shepherd and Grant Burgoyne. Representative Marc Gibbs and Ad Hoc members Senator Shawn Keough, Representatives JoAn Wood, Ken Andrus, and Frank Henderson were absent and excused. Staff members present were Katharine Gerrity, Elizabeth Bowen and Toni Hobbs.

Others present included Bert Stevenson, Idaho Water Resources Board; Ron Abramovich, NRCS Snow Survey; Sharon Kiefer, Virgil Moore, and Don Kemner, Department of Fish and Game; Brent Olmstead, Milk Producers of Idaho; Don Smith, Dredge Miner; Bryan Hurlbutt, Advocates for the West; Jeffrey Root, Midas Gold; Elli Brown, Veritas Advisors; Tyler Mallard, Risch Pisca; Russell Westerberg, Rocky Mountain Power; Aaron Golart and Cynthia Clark, Idaho Department of Water Resources; Marie Callaway Kellner and Justin Hayes, Idaho Conservation League; Tracy DeGering and James H. Werntz, Environmental Protection Agency-Idaho; Jonathan Parker, Holland and Hart; Pat Barclay, Idaho Council on Industry and Environment; Colby Cameron, Sullivan & Reberger; Dustin Miller and Sam Eaton, Governor's Office of Species Conservation; Sarah Higer and Rich Hahn, Idaho Power; Neil Colwell, Avista; Norm Semanko, Idaho Water Users Association; Chris Iverson and Andy Brunelle, Forest Service; Russ Hendricks, Farm Bureau; and Lisa Smith.

NOTE: All copies of presentations, reference materials, and handouts are on file at the Legislative Services Office and are also available online at the Legislative Services Office website, <http://www.legislature.idaho.gov>.

The first speaker to appear before the committee was Mr. Ron Abramovich, Water Supply Specialist, USDA, NRSC Snow Survey, Idaho. His presentation was in regard to water supplies in 2014 and an outlook to 2015.

Mr. Abramovich advised the committee that if they understood what had happened in 2014 it may provide insight into what could occur in 2015.

He began by reviewing a forecast from Andrew, at the Weather Centre, which showed a warm spot that had developed off the Pacific Ocean last January, and was still present. This created a high pressure ridge, which caused the blocking ridge that kept storms from coming into the Pacific Northwest, and set the stage for the previous winter. This forecast also indicated that there was a distinct cold and warm spot off of the cost of Greenland. He noted that if that continues it may cause a major buckling of the jet stream, which would indicate there would be cold air over the Eastern and Central United States similar to last year's conditions. He said that the early bird forecast calls for colder than normal temperatures in the Mid-West and East, and slightly warmer than normal conditions in the Northwest due to the ridging off the coast of Washington. He added that Andrew's precipitation forecast at this time is not definitive but shows that it may be normal to slightly above average in our area.

Mr. Abramovich explained that in studying weather, the key is to understand the teleconnections, or climatic indexes, and their correlations and influence on current weather, snowfall, stream flow and more. The two primary teleconnections are the Pacific Decadal Oscillation (PDO), which changes every 20 to 30 years, and El Nino, or the Southern Oscillation (SOI), which flip-flops every

Mr. Semanko explained that if a canal, such as the New York Canal, is considered in the waters of the United States, it would have to have beneficial uses associated with it, and if those beneficial uses were not being met that would mean it becomes a water quality limited segment. If it is a water quality limited segment, total maximum daily loads would have to be developed. Mr. Semanko stressed that this threshold question is worth fighting, and the issue that they are focusing on is that ditches and canals are not waters of the United States.

Senator Siddoway asked Mr. Semanko's about a comment from the EPA Administer that if something had not been a water of the United States before the proposal, it wasn't going to be a water of the United States after the proposal. Mr. Semanko said that he believed the source of that comment was the 2001 *Swank* decision by the U.S. Supreme Court that said isolated wetlands or ponds were not waters of the United States, however before that decision the EPA and others thought that they were waters of the United States because the rule said that if birds fly from one end to the other then it is a water of the United States. He then pointed out that there are those that have tried to take the word "navigatable" out of the statute to reverse the *Swank* decision and return things back to the way they were. He pointed out that the *Rapanos* decision came along in 2006 to refine it even further when Justice Scalia said that waters of the United States were the permanent geographic features, and in a concurring opinion Justice Kennedy said it was more than that, and if there was a significant connection then it could be a waters of the United States. He said, however, that they all agreed that the decision was wrong and needed to be thrown out as that was not a water of the United States whether it was based on the permanent geographic feature or on the significant nexus. He indicated that if you listen carefully to the most exacting description of what they are doing they are not creating waters of the United States in areas that were not historically or previously administered as waters of the United States. So it really is about reversing or undoing those two decisions and what has flowed from those decisions to have a broader universe of the Waters of the United States as the EPA and the court thought they had before those decisions. In discussing how to do something like that, he noted one example was the idea that you could categorically decide a significant connection, so instead of going in to see if there is a significant nexus you do a connectivity study, which the EPA has done, and you say that in all these broad categories of cases there is a connection so in all of these scenarios there will always be a connection jurisdictionally by rule. He said that was not what Justice Kennedy said in his concurring opinion, so really it is about returning things back to the way they were before 2001 so they could make a straight-faced statement that they were not expanding the definition of Waters of the United States beyond what it historically has been.

~~The final speaker was Director Gary Spackman~~, Idaho Department of Water Resources. Director Spackman indicated that he would be using a power-point presentation and would leave the committee with copies of his presentation.

He indicated that it was his understanding that he was asked to speak about the Idaho Supreme Court Decision of *A&B Irrigation v. the State of Idaho*, and what the decision meant to the Department of Water Resources and the State of Idaho. He advised that this case revolved around what they call a basin-wide issue in the Snake River Basin Adjudication. This is an issue that affects all of the users in the basin, and these particular issues have been designated by the adjudication judges over the years as the Snake River Basin Adjudication Procedure, and that this one was number 17. He quoted the basin wide issue as: "Does Idaho Law require a remark authorizing storage rights to refill, under priority, space vacated for flood control?"

Director Spackman stated that Federal on-stream reservoirs are required under federal law to be operated for flood control purposes. He indicated that he wanted to emphasize that these reservoirs are operated for flood control by federal, not state, law. He explained that Dworshak Reservoir was constructed for flood control, however in the Snake River Adjudication the federal government refused to obtain a water right for storage and releases from storage of that reservoir while asserting that storage and release of storage for flood control was not subject to state regulation. He said that

the state of Idaho does not determine the timing of federal flood control releases or the timing of physical fill in the reservoir after a flood control release except as it may affect other state water rights. He stated that in addition to flood control, this reservoir has been operated for other federal purposes including flow augmentation down the river and for temperature control for migrating fish.

Director Spackman then discussed space vacated for flood control. He explained that there is space vacated for flood control in on-stream reservoirs when there is lots of snow in the mountains, and the reservoirs need empty space to hold the spring runoff. Storage water is not vacated for flood control in off-stream reservoirs or in years of low or average snow pack. He pointed out that most sizable on-stream reservoirs storing water for irrigation are owned or managed by the federal government; however there are a few that are owned by private entities. Additionally, the U.S. Bureau of Reclamation holds water rights to store and deliver water for irrigation, because in his opinion, they are required to follow state law with respect to storage for these purposes, but there is no requirement that they have a water right for flood control, and in fact there are no water rights, state or federal, for flood control on dual purpose reservoirs. He also pointed out that irrigation companies and irrigation districts contracted with the bureau, after the construction of these reservoirs, for storage water in the reservoirs to be beneficially used for irrigation. Additionally some reservoirs were built for flood control, and there is no state water right for storage or release of storage for flood control as this is a federally dictated operation.

Director Spackman explained that in an on-stream reservoir that is operated for irrigation and flood control which has a state based water right and a contractual obligation that is borne by the bureau to deliver water for irrigation space holders, that the federal government has a conflict as they must attempt to store enough water to deliver to the contract spaceholders their storage allocations, but they must also empty the reservoirs to make room for the predicted runoff resulting from a high snowpack or significant precipitation. He said that contracts of spaceholders who are entitled to stored water in reservoirs operated for flood control can have their storage allotments reduced during years of releases from reservoirs to empty space for flood control. This is a requirement of the spaceholder's contracts and is an inherent risk that the spaceholders assume in relying on storage water from an on-stream reservoir that must be operated for flood control as flood control comes first. Director Spackman stated that regardless of whether there is a right to "refill" the reservoir space that is emptied to capture future flood water, the empty space may not refill. This is because the reservoir space is often emptied months ahead of the runoff. As a result, flood control operation is somewhere between a predictive and a best-guess science. Although the Bureau tries to predict what the water flows will be in the reservoir using various data models, the predictions are inaccurate.

The director said that some of the factors that contribute to the predictive uncertainty are: 1) how much snow there is; 2) how full the reservoirs are; 3) the long-term precipitation forecast; 4) the long-term temperature forecast; 5) soil moisture; 6) whether there are comparable years; 7) the water demand; and 8) risks of flooding vs. risks of not supplying sufficient irrigation water.

He explained that at that point the question becomes when there is a federal obligation in the reservoirs, where there is not a water right, and the federal government has unfettered ability to operate that reservoir for flood control, how does the director account for a water right that authorizes storage for irrigation, but does not authorize use for flood control. He emphasized that this only happens when there is abundant water in the system, and does not happen in low water years. The director then walked the committee through a series of graphs that illustrated this process over a year's time.

He then reminded the committee that any empty space in the reservoir at the time of maximum physical fill is the result of the inaccurate prediction of how much storage water must be dumped out of the reservoir to create empty reservoirs for flood control.

Director Spackman then went back to the question of, whether Idaho law requires a remark authorizing storage rights to refill in the original priority of the reservoir. He advised that the Idaho Supreme Court said that Idaho Code section 42-602 gives the director broad powers to direct and control distribution of water from all natural water sources within water districts. The statute gives the director a clear legal duty to distribute water. However, he said, the details of the performance of the duty were left to the director's discretion. He noted that the decision provides that the director's clear duty to act means that the director uses his information and discretion to provide each user the water it is decreed and implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

Director Spackman advised that because of the decision he reactivated administrative contested cases to determine when a water right to store and use water for irrigation is satisfied. He said that he anticipates gathering evidence and deciding this issue basin by basin. He noted that there are status conferences scheduled in these cases and they will try to define a path forward, however he anticipates that these hearings will gather evidence which will become record, and that any decision that comes out of this will be appealable to the courts. He stated that it is his opinion that these are unique issues that have to be determined basin by basin.

The director then discussed some of the complaints regarding the present accounting. One of the complaints is that it forces the storage space holders to take a drink when they are not thirsty. He indicated that this is only partially true, and explained that when water is being stored in the early winter, the bureau and the spaceholders predict thirst, and the water is being physically stored to the satisfaction of the water right and to satisfy the thirst of the user. He explained that when water is stored in a reservoir there is a perceived need to store the water. When abundant snows dictate that water previously stored because of a perceived need be dumped down the river, some argue that need be determined in hindsight after the initial determination of need, even though the storage component of the water right has been exercised. The director then asked whether the passage of water downstream for a purpose not defined by a state water right, but by federal pre-emption, be excused and the satisfaction of the state water right reset to a lesser number. He also stated that some say that the issue of thirst can't be determined until after the storage season is over, or even after the irrigation season is over. He indicated that they had to determine whether those storage rights were satisfied or not satisfied during the storage season, and not in hindsight.

Director Spackman said that one of the other issues regarding the present accounting is that they want to be treated like any other water user. He advised that if they were to treat storage like any other water user it would result in reservoirs not physically filling and water flowing downstream, lost to downstream states and to the ocean.

Director Spackman went on to say that there would be risks to resetting the satisfaction of the right downward to equal the physical storage. Those risks include increasing the water reliability for some spaceholders while diminishing the rights of other spaceholders and those holding junior priority water rights. It would also upset the historical deliveries of water, although this would vary from basin to basin. Another risk is that it would allow the Bureau of Reclamation and the larger federal government to have greater control over flood control releases without consequences, including flood control for downstream interests or to satisfy treaties. It may also change the way that private and tribal reservoirs are operated to the detriment of natural flow right holders. Some examples of this would be the Chesterfield or Blackfoot Reservoir. He said that a further risk is that it may change the respective strengths and weaknesses of legal arguments of ground water and surface water users in the ongoing conjunctive management calls. He stated that this currently appears to be a major impediment to the settlement of the fill/refill issue.

Director Spackman also indicated that the determination of how rights are satisfied in each river basin is unique and dependent upon where reservoirs are located, where water is diverted, priorities of the various water rights, whether the river reaches gain or lose water, and local customs and

practices. He explained that is why the expertise of technical staff and an analysis of each river basin's needs are important to determine water delivery issues on a case-by-case basis. He advised that there is proposed draft settlement agreement language to establish decreed rights that would protect the historical practice of filling empty space in reservoirs vacated for flood control while protecting those who have relied on the present method of accounting. This draft language would also ensure that the federal government will be limited in its ability to use its flood control operations to control the river and take water from existing junior priority uses and from future uses.

Representative Burgoyne asked Director Spackman to address the current controversy in the Boise River Basin over the possibility that the historic practice in that area may be changing. Director Spackman said that he was aware that there were water users in the Boise Basin and the Upper Snake that were concerned about this. He indicated that the nature of their concerns was different to some degree, and that some of the differences related to the individual factors that he previously talked about as the reservoirs are unique in their locations and in the way water is delivered, and even in the threats for future water use. He used the Upper Snake as an example of this where there is a concern about additional water for recharge, and indicated that was not an immediate concern in the Boise Basin. He believes the concern in the Boise Basin is that the users feel the present method of accounting for water is an erosion and a devaluation of the basin water rights that are held by the Bureau of Reclamation for storage of irrigation water for which they hold contracts. They believe it is an erosion because they cannot divert the water under the priority of the rights once the space has been vacated.

Representative Burgoyne asked if there was anything in the Supreme Court or District Court's decision that Director Spackman believes mandates the change in the accounting of water as it relates to the Boise Basin. Mr. Spackman indicated that he did not.

Representative Burgoyne went through a hypothetical scenario in which a reservoir is full, and then due to a surprise storm they have to let some water out, and that water is not recouped later on. He asked whether the rights depleted proportionately, or did the senior holders keep their water, and deplete the juniors. Director Spackman explained that if there was 60,000 acre feet that did not fill, it would be backfilled by the bureau and taken out of the storage account. If more than 60,000 acre feet did not fill, the allocation of the users would be reduced according to their contracts. He also stated that Lucky Peak Reservoir is the latest priority reservoir as it was constructed for flood control. His understanding is that it comes out of the space of the Lucky Peak spaceholders and the allocation for the minimum stream flow in the Boise River.

Representative Burgoyne indicated that his question did not go to the contract, but rather to their accounting of the water right, and when storage rights were deemed filled even though the water is not physically present. He said he wanted to know if everyone would lose a little bit or if it would fall on the junior rights holders. Director Spackman explained that when they deem that the storage right is satisfied, and that the right is not entitled to any additional water, it moves to the end and all other junior water rights are satisfied, and that space is filled with the water that is predicted to come down as a result of the snow pack that is in the mountains. He said that is how they account for that right.

In response to a question by Representative Burgoyne and Speaker Bedke, Director Spackman indicated that the mixture of priority that was being referred to, and the attempt to call the spaceholders contract rights a priority was perhaps confusing him because the spaceholders themselves, although they have a beneficial use right, are not holders of the actual legal title to the water right. He said that they have a contract right to that space, so if there were 100,000 acre feet empty, then that 100,000 deficiency would be subtracted from the contractual allotment of the spaceholders according to what the bureau tells them is the contract provisions under which they operate. He further explained that they would show the water right as being satisfied, and that

deficiency is a result of flood control operations, so the bureau would then tell them, under the contracts, which would bear that deduction in their physical storage allotment.

Speaker Bedke asked if the situation they were talking about had only happened once since 1960, and the language in the recent Supreme Court case did not change anything, what the problem was. Director Spackman said that he was frankly mystified. Speaker Bedke asked Director Spackman to explain his 19th slide which illustrated "unaccounted fill." Director Spackman explained that the dotted line which indicated unaccounted fill was an exact mirror of the red line (reservoir contents) as it filled from April 17th until July 3rd. He stated that they had simply shifted that line up and said that on top of satisfaction of the water right they had received that much extra as that was how much came in and was physically placed in the reservoir after the flood control operation. Speaker Bedke stated that if the physical fill had stopped at the hypothetical 900,000 acre feet, then the water above that would not be available to satiate anyone's thirst, and the director agreed.

Speaker Bedke indicated that it had been the directive of the Senate Chairman at the end of the last session that the parties negotiate a settlement as opposed to having to legislate the matter. He said that it was his impression through the summer that this was close to being accomplished. He asked if the Supreme Court decision regarding Basin 17 was the triggering event for the parties to move away from each other, or was it something else that drove these parties further apart just as they were on the cusp of a negotiated settlement. Director Spackman said he didn't know how the Basin 17 decision affected the parties, and pointed out that there is a difference in the Boise River compared to the Upper Snake River because the storage rights in the Boise River have been decreed for years, and in the Upper Boise the storage rights are still being considered in the SRBA. So from his perspective there is not an opportunity for the people on the Boise to come in and reopen those decrees to address that issue, so that was why Basin wide 17 was brought because the Boise River people could not go back and litigate the way in which the rights were decreed. He stated that there is still an open forum for determination of the storage rights.

Speaker Bedke asked Director Spackman to put himself in the place of the side that was stalling in negotiations and explain their position. Director Spackman indicated that the surface water people fear that by establishing later priority dates that if there is a change in the way that the director administers conjunctively, by looking at the rights rather than full water supply, that the ground water users would be able to argue that all ground water rights prior to 1994 would somehow be exempt from a delivery call. He stated that the fear on the other side is that if they are protected back to the original priority date maybe the surface water coalition may be seeking to ask that the ground water users to make up the deficiencies when the bureau does not accurately predict how much storage needs to be vacated so that responsibility is borne by the ground water users. He explained that what has happened is that there are two conflicting paranoias and they have separated.

Speaker Bedke indicated that he was very optimistic as he had heard that the parties were very close to agreement, and now he was hearing that they were not. He said that he believed future members of the Committee should direct the parties to negotiate, and that they would not legislate clear winners and losers.

Senator Brackett asked if it was correct that the senior holders bore a greater risk in a shortfall under the present system. He also indicted that he believed that it was legitimate to want to get this issue settled so we would not be place in jeopardy from future developed, and he asked Director Spackman to comment.

Director Spackman said that he wanted to make sure that he did not misrepresent because what happens in the Boise River is not what happens in the Upper Snake, and because he was aware that Representative Burgoyne had an interest in the Boise River that he had spoken to that with him. He indicated that the way in which that allocation occurs, and the frequency of a shortfall being borne by the spaceholders is greater in the Upper Snake. The reason for that is that there is more storage, the uncertainty of prediction is greater, and there is no provision from the bureau that

guarantees a 60,000 acre feet backfill, or something comparable. As a result of this difference the water users in the Upper Snake incur a reduction in their allocation when the bureau misses its mark more often. This happened in 2012 and was fairly significant at 300,000 to 400,000 acre feet that was divided amongst the spaceholders.

Senator Brackett asked how many times this had happened in the Upper Snake, and also asked the director if the senior water right holders bore a disproportionate or greater risk from a shortfall. Director Spackman made it clear that he was talking about senior storage water rights in a reservoir that was operated for irrigation storage and flood control, and the users of that water, for irrigation, have contractual relationships with the holder of that right, and in that relationship they bear the risk of that space not filling. He explained that as they are senior spaceholders in a reservoir that is operated for a dual purpose, and because their contracts say what they say, they bear an inherent risk that is not borne by the others through the federal flood control operations that the space may not physically fill. He indicated that although they do bear that risk he did not want to call that a risk of a senior right holder that was somehow being subordinated to a junior right holder as that was not the way the contracts were set up, or the way that the reservoir space was allocated.

Senator Brackett expressed his opinion that future development was a valid concern in both the Boise Basin and the Snake River Basin, and asked if the director agreed. Director Spackman indicated that he agreed. He noted that they have said that in the Snake River Basin they will grant two water rights, one that will describe the current practice, which is that any time there is excess water, after they say that the right has been satisfied, that the water can be diverted to storage. The second water right, which is up to the maximum amount that they can identify, has been vacated for flood control and fill.

Senator Brackett asked if that was by application, or if it was an actual water right that was in place. Director Spackman indicated that there were beneficial use claims pending before the court at this time, and they have said in the negotiations, that they will agree to those two water rights and their ability to refill that empty space will be recognized by decreed water rights through the Snake River Basin Adjudication court. He indicated that they were making similar offers in the Boise Basin that would essentially protect them from future development downstream.

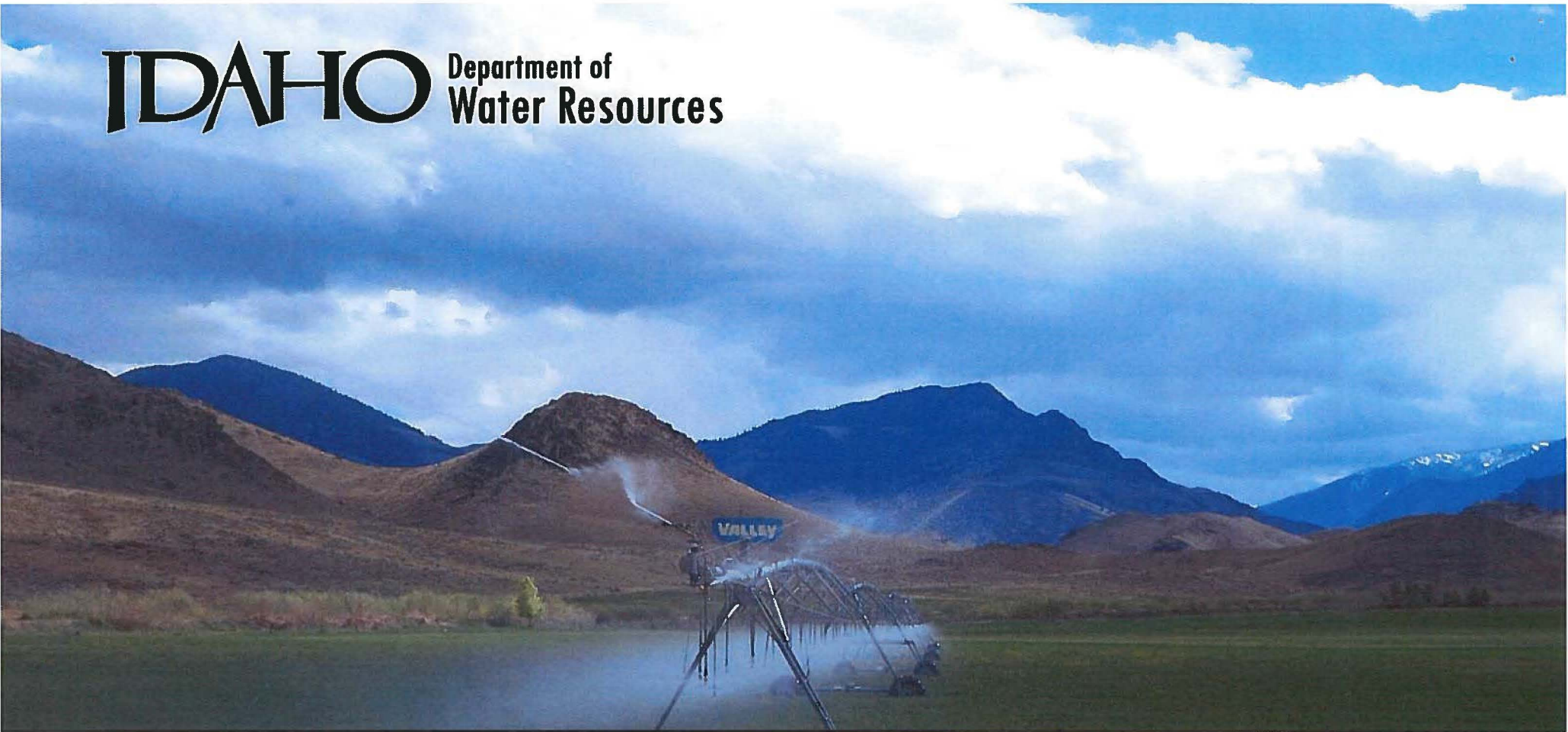
Director Spackman also advised the committee that they were actively pursuing extension of the adjudication of the water rights process into the Bear River Basin, and indicated that he would be speaking to legislators and some of the water users from that area the following week. He said they felt that it was important that since they had the adjudication court in place that these rights also be adjudication and be part of the success story of the adjudication in the State of Idaho.

Senator Stennett asked how many people had water rights, and how much water there was in the Bear River Basin area. Director Spackman told the committee that they believe there will be between 15,000 to 20,000 claims filed in that area. That compares to approximately 160,000 in the Snake River Adjudication. They believe that the level of effort in the Bear River Basin will be somewhere near the level of effort that is going on in the Northern Idaho Adjudication, and that the ultimate appropriation will be at about the same level also. He also indicated that if this goes forward there will be need for authorizing legislation.

Co-chairman Pearce adjourned the committee at 4:40 p.m.

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Water Resources



Snake River Adjudication

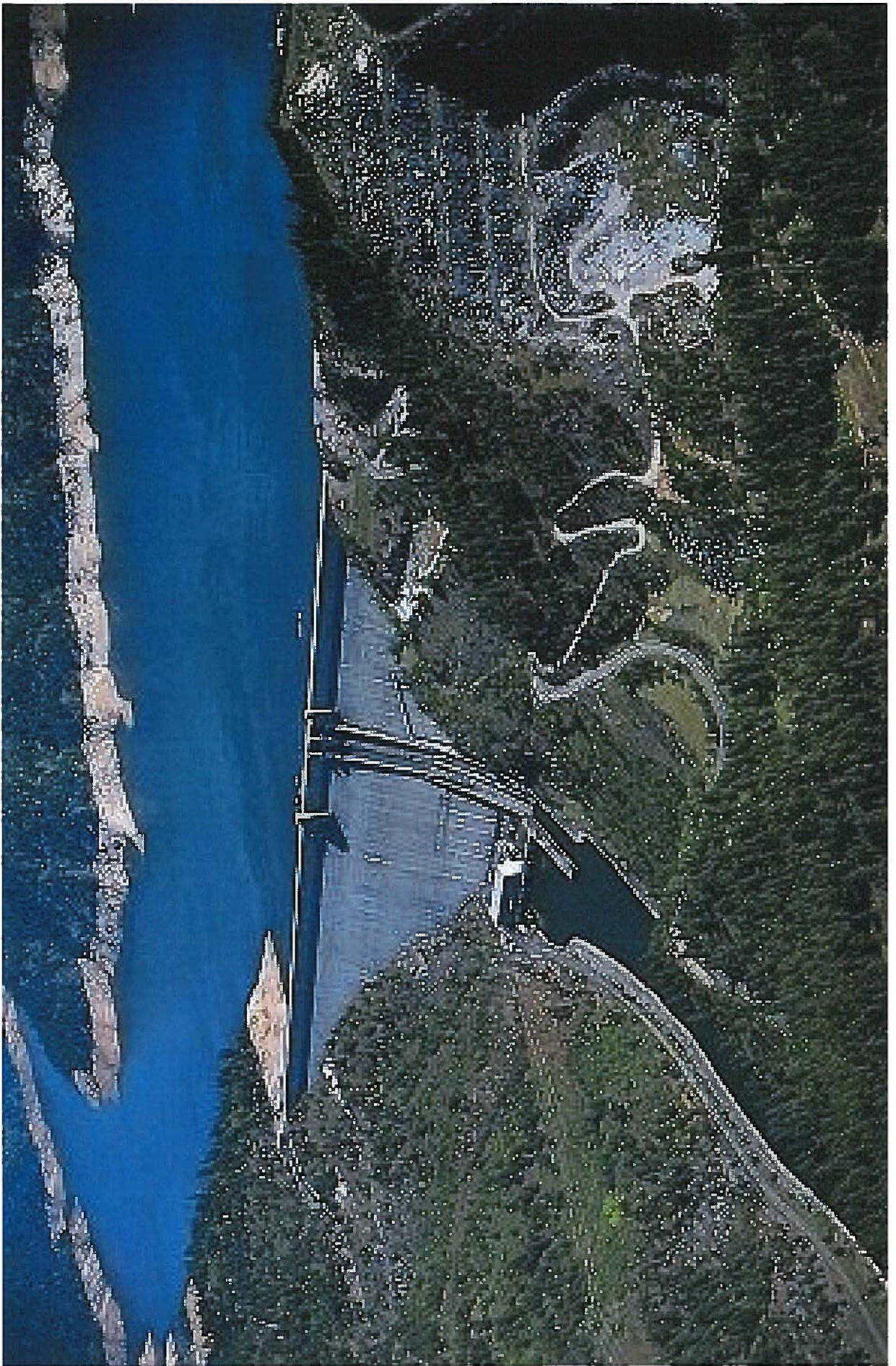
Basin Wide Issue no. 17

*“Does Idaho Law Require a
Remark Authorizing Storage
Rights to ‘Refill’, Under Priority,
Space Vacated for Flood
Control”?*

Snake River Adjudication

Basin Wide Issue no. 17

Federal On-Stream Reservoirs Are Required Under Federal Law To Be Operated For Flood Control Purposes.



Snake River Adjudication

Basin Wide Issue no. 17

- Dworshak Reservoir was constructed for flood control.
- The federal government refuses to obtain a water right for storage and releases from storage from Dworshak Reservoir asserting that storage and release of storage for flood control is not subject to state regulation.
- The state of Idaho does not determine the timing of federal flood control releases or the timing of physical fill in the reservoir after a flood control release except as it may affect other water rights.

Snake River Adjudication

Basin Wide Issue no. 17

- When is “*space vacated for flood control*”?
 - On stream reservoir
 - Lots of snow in the mountains – empty reservoir space will not hold the spring runoff
 - Reservoir content is usually high at the beginning of the storage season.
 - **Remember – lots of water!**

Snake River Adjudication

Basin Wide Issue no. 17

- When is storage water **not** “*vacated for flood control*”?
 - Off-stream reservoir
 - Low or average snow pack years
 - Low storage in reservoir at beginning of storage season

Snake River Adjudication

Basin Wide Issue no. 17

- Most sizable on-stream reservoirs storing water for irrigation are owned or managed by the federal government – a few are owned by private entities.
- US Bureau of Reclamation holds water rights to store and deliver water for irrigation –required by federal law.
- Irrigation companies and irrigation districts contracted with Bureau for storage water in the reservoirs to be beneficially used for irrigation.

Snake River Adjudication

Basin Wide Issue no. 17

- Some reservoirs were built for flood control.
- There is no state water right for storage or release of storage for flood control – this is a federally dictated operation.
- Bureau must attempt to (1) store enough water to deliver to the contract spaceholders their storage allocations, but also (2) empty the reservoirs to make room for the predicted runoff resulting from a high snowpack or significant precipitation.

Snake River Adjudication

Basin Wide Issue no. 17

Contracts of spaceholders who are entitled to stored water in reservoirs operated for flood control can have their storage allotments reduced during years of releases from reservoirs to empty space for flood control. This is requirement of the spaceholder's contracts and an inherent risk the spaceholders assume in relying on storage water from an on-stream reservoir that must be operated for flood control. Flood control comes first!

Snake River Adjudication

Basin Wide Issue no. 17

- Regardless of whether there is a right to “refill” the reservoir space emptied to capture future flood water, the empty space may not refill.
- Why?
- Because the reservoir space is often emptied months ahead of the runoff. As a result, flood control operation is somewhere between a predictive and a best-guess science. Using various data models, the Bureau tries to predict what the water flows to the reservoir will be in the future. The predictions are inaccurate.

Snake River Adjudication

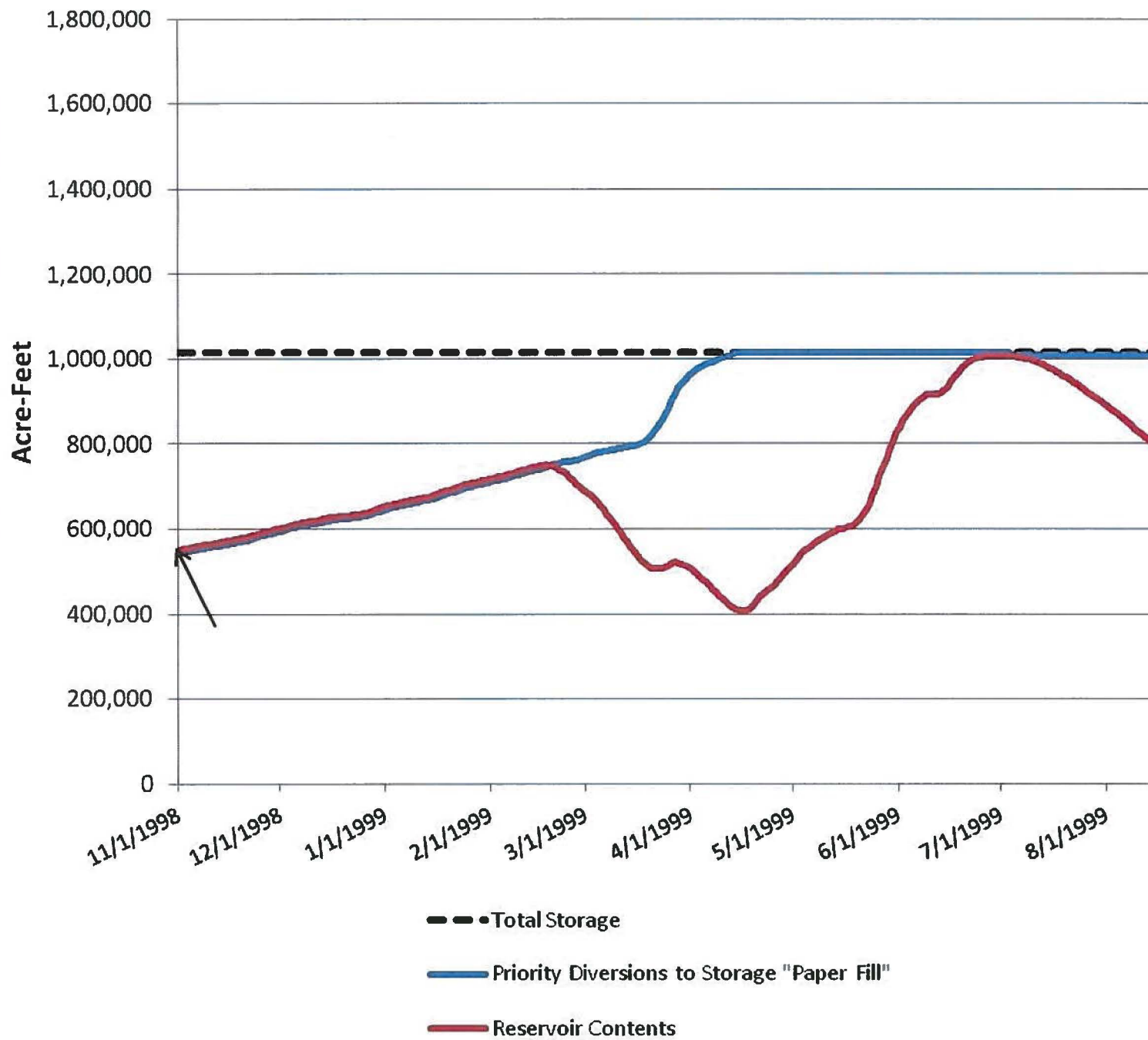
Basin Wide Issue no. 17

- Factors that contribute to the predictive uncertainty:
 - How much snow is there?
 - How full are the reservoirs?
 - What is the long term precipitation forecast?
 - What is the long term temperature forecast?
 - What is the soil moisture?
 - Are there comparable years?
 - What will the water demand be?
 - What are the risks of flooding vs. risks of not supplying sufficient irrigation water?

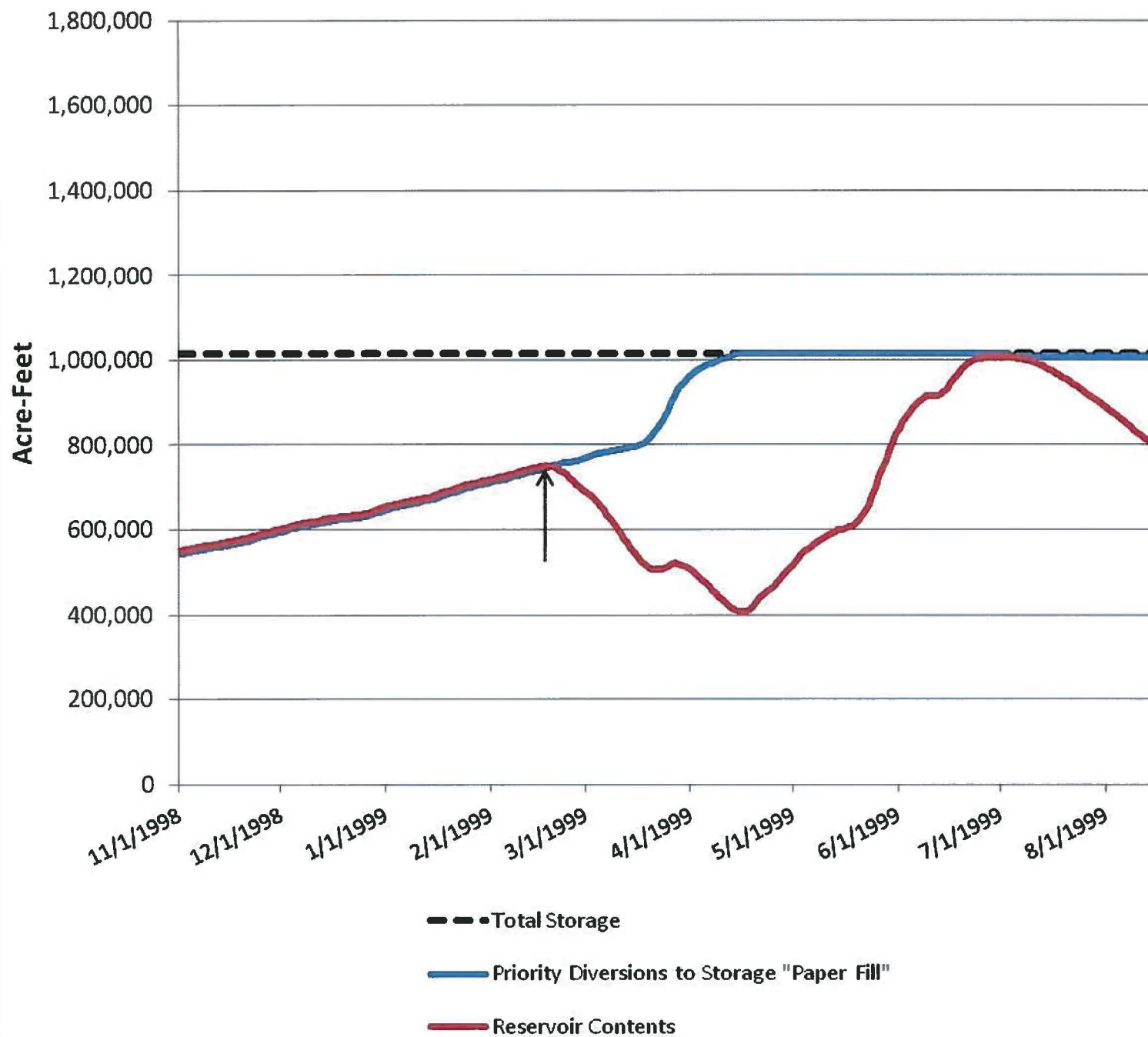
Snake River Adjudication

Basin Wide Issue no. 17

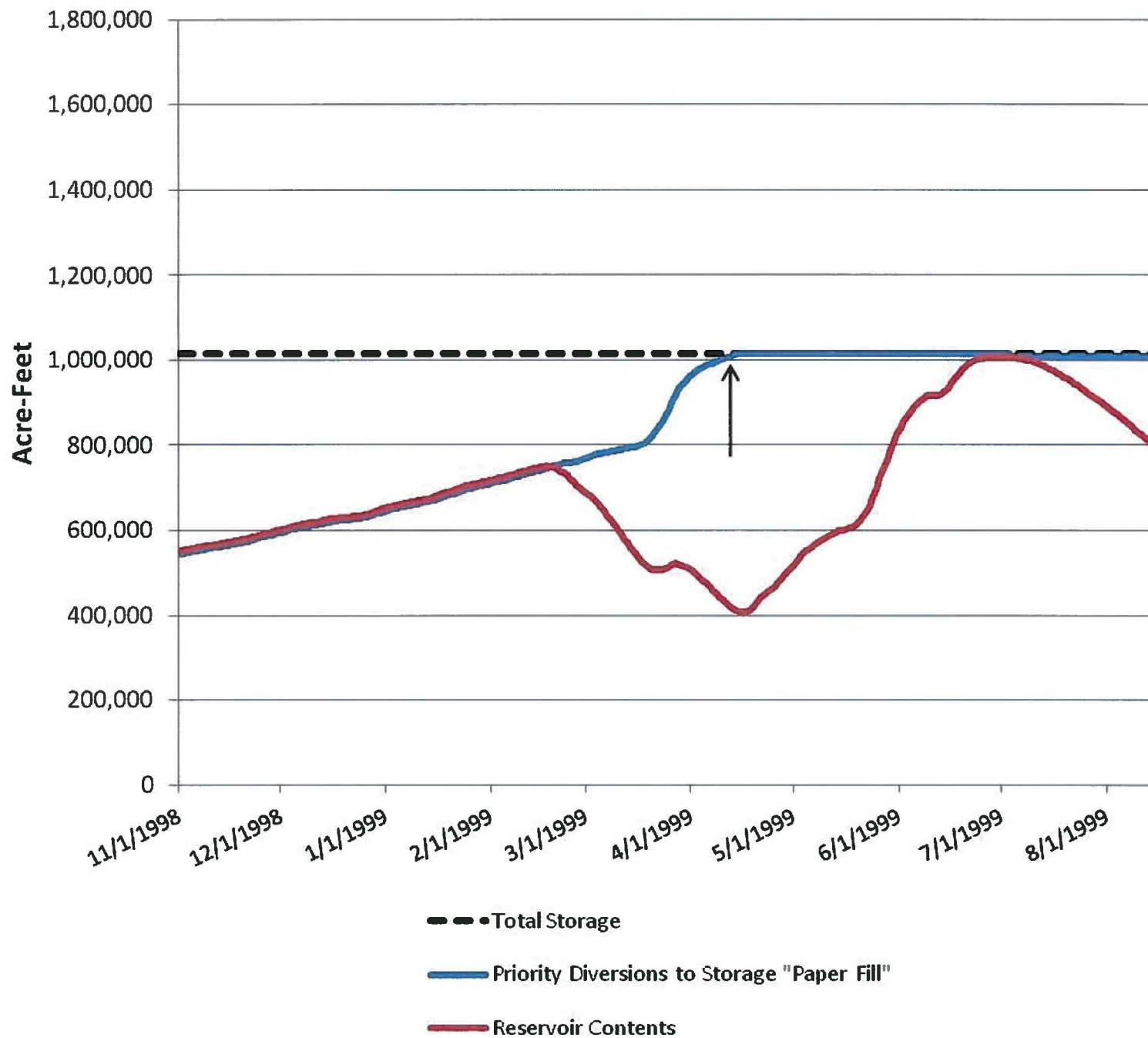
- How does the Director account for a water right that authorizes storage for irrigation, but does not authorize use for flood control?
- **There is abundant water in the system!**



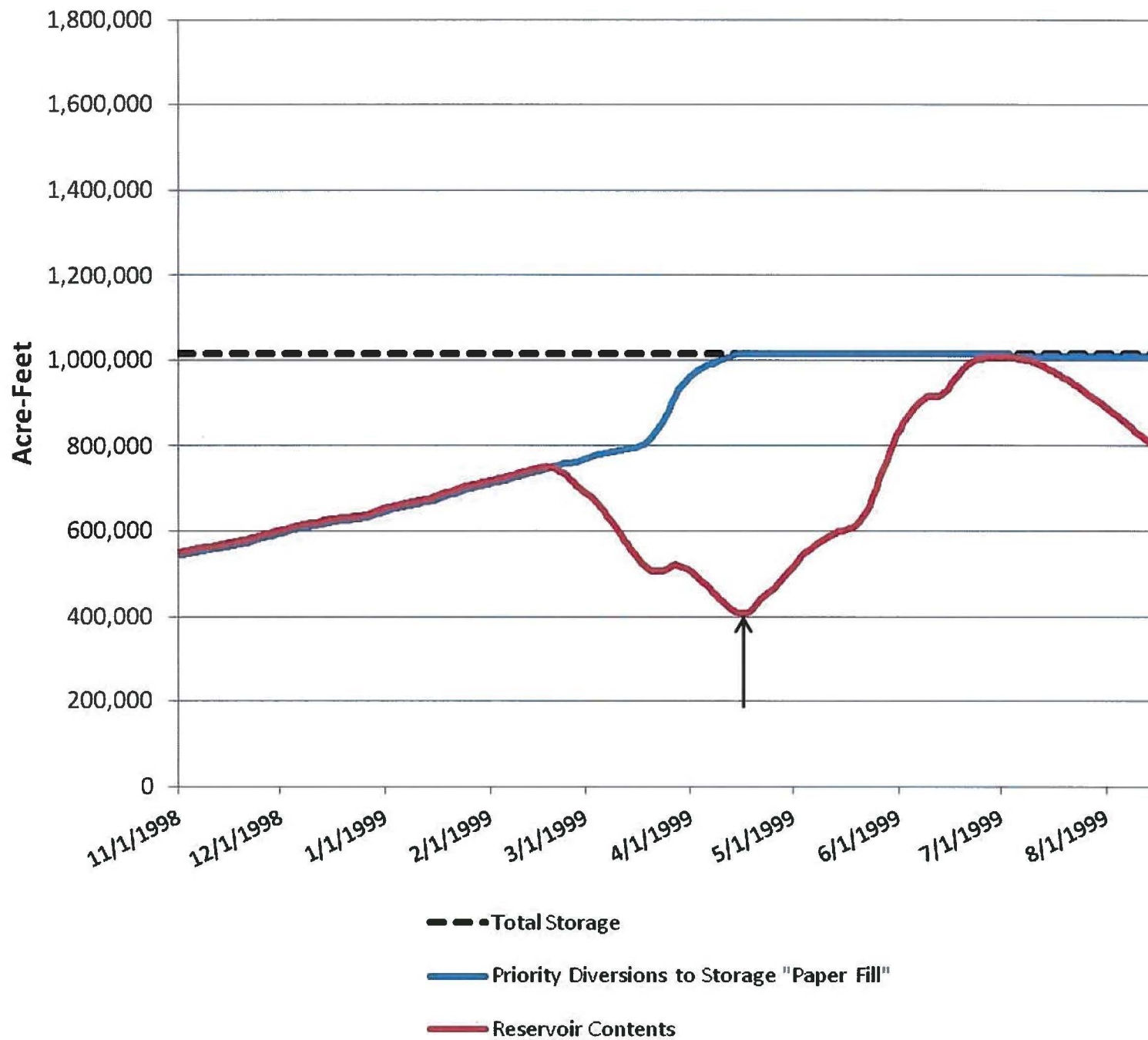
- **Nov. 1**
Accounting
fill equals
physical
contents.



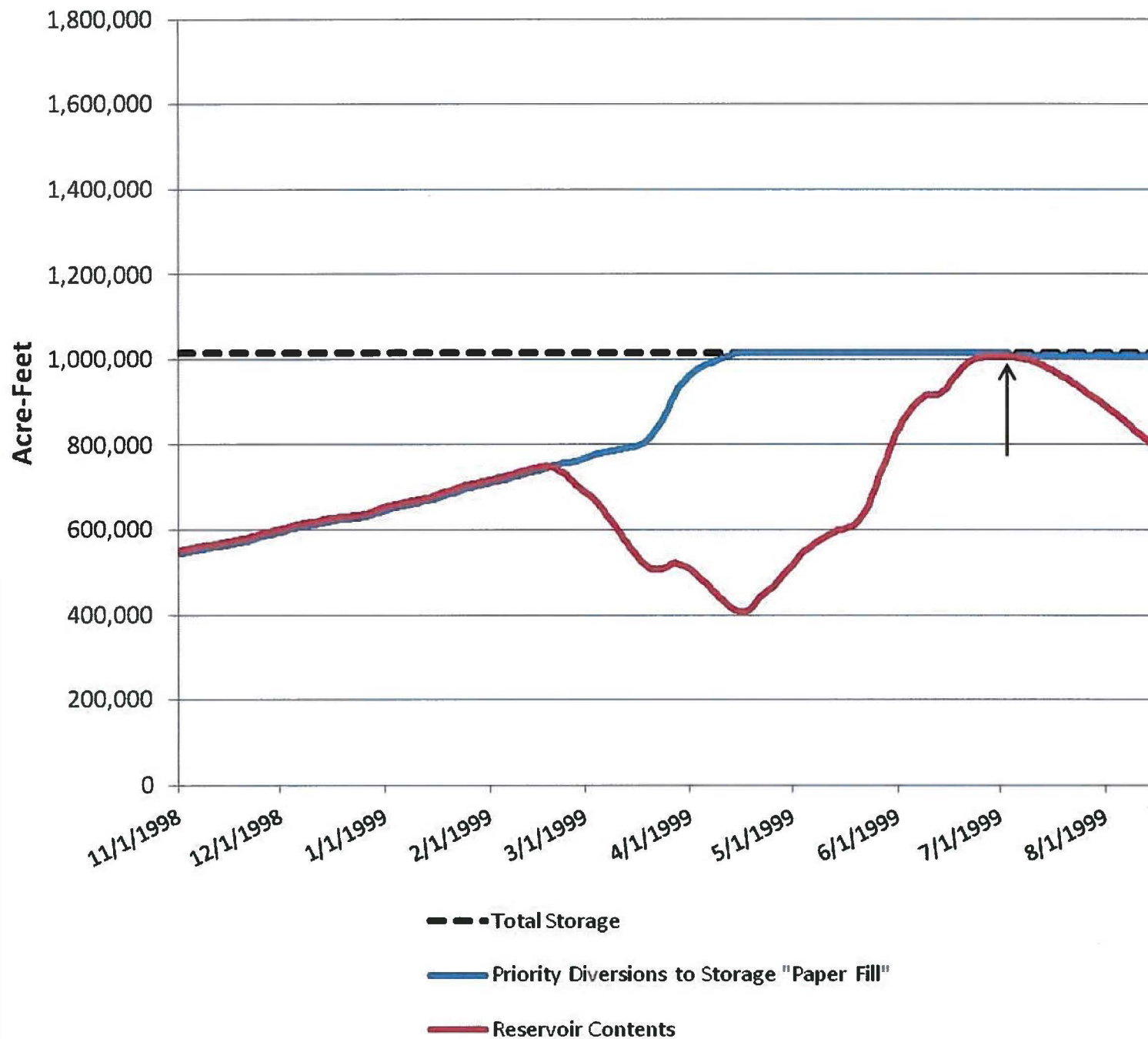
- **Nov. 1**
Accounting fill equals physical contents.
- **Feb 17**
Flood control begins.



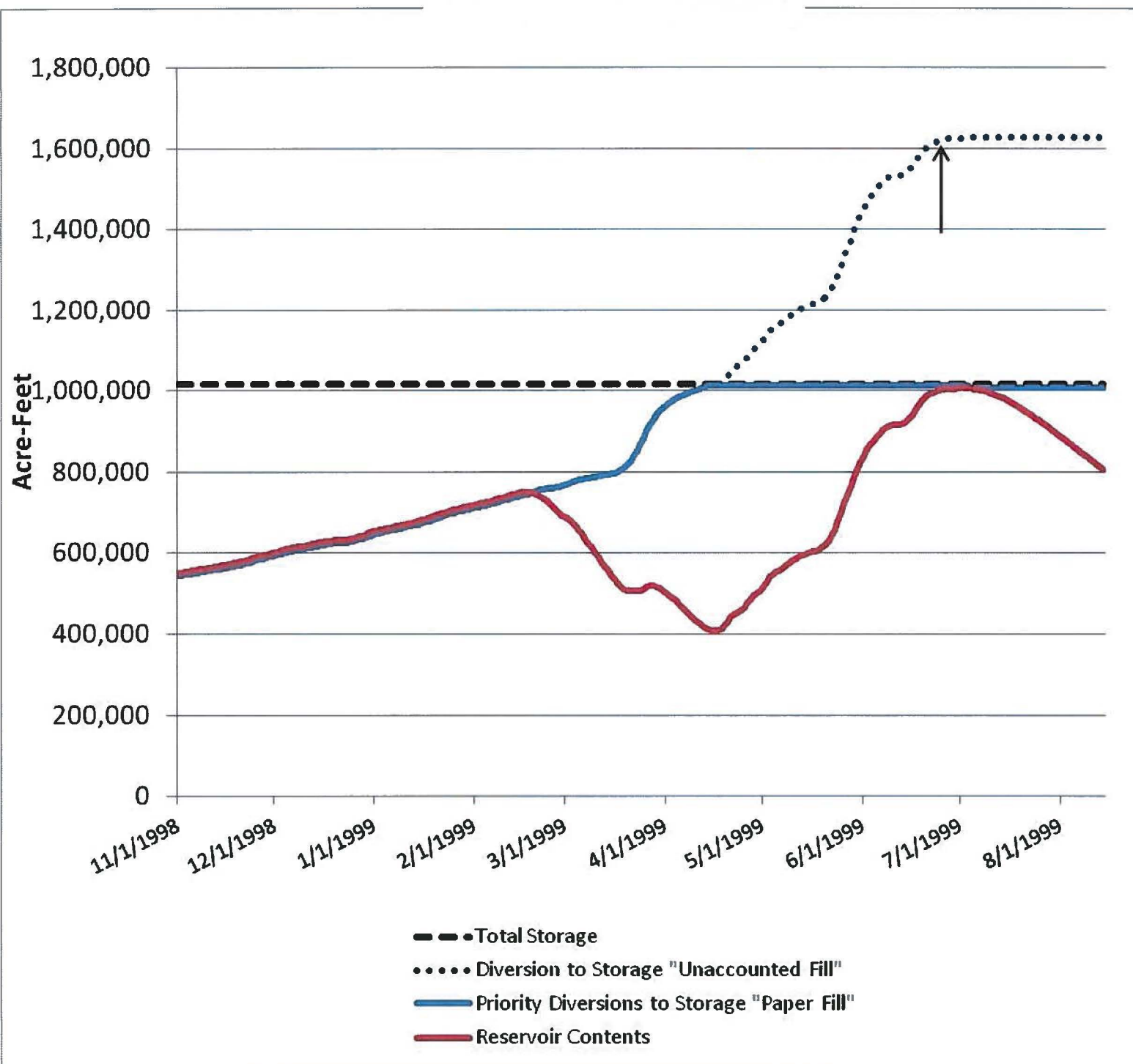
- **Nov. 1**
Accounting fill equals physical contents.
- **Feb 17** Flood control begins.
- **April 14**
Reservoirs filled based on accounting.



- **Nov. 1** Fill equals Physical contents.
- **Feb 17** Flood control begins.
- **April 14** Reservoirs filled based on accounting
- **April 16** Minimum reservoir physical contents.
- **April 17** Begin physical fill.



- **Nov. 1**
Accounting fill equals physical contents.
- **Feb 17** Flood control begins.
- **April 14**
Reservoirs filled by accounting.
- **April 16**
Minimum reservoir physical contents.
- **April 17** Begin physical fill.
- **July 3** Day of maximum physical fill.
- **July 4** Day of allocation.



- **Nov. 1**
Accounting fill equals physical contents.
- **Feb 17** Flood control begins.
- **April 14**
Reservoirs filled by accounting.
- **April 16**
Minimum reservoir physical contents.
- **April 17** Begin physical fill.
- **July 3** Day of maximum physical fill.
- **July 4** Day of allocation.

Snake River Adjudication

Basin Wide Issue no. 17

Any empty space in the reservoir at the time of maximum physical fill is the result of the inaccurate prediction of how much storage water must be dumped out of the reservoir to create empty reservoirs for flood control.

Snake River Adjudication

Basin Wide Issue no. 17

Supreme Court Decision

“Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. That statute gives the Director a clear legal duty to distribute water. However, the details of the performance of the duty are left to the director's discretion. Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.”

Snake River Adjudication

Basin Wide Issue no. 17

Supreme Court Decision

“Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.”

Snake River Adjudication

Basin Wide Issue no. 17

Director's Actions

Because of the above decision of the Supreme Court, the Director reactivated administrative contested cases to determine when a water right to store and use water for irrigation is satisfied. The Director anticipates gathering evidence and deciding this issue basin by basin.

Complaints About Present Accounting

- It forces the storage space holders to take a drink when they are not thirsty
 - When water is being stored in the early winter, the Bureau and the spaceholders predict thirst – water is being physically stored to the satisfaction of the water right and to satisfy the thirst of the user.

Complaints About Present Accounting

- Thirst?
 - When water is stored in a reservoir there is a perceived need to store the water.
 - When abundant snows dictate that water previously stored because of a perceived need be dumped down the river, some argue that need (or thirst) be determined in hindsight after the initial determination of need, even though the storage component of the water right has been exercised.
 - Should the passage of water downstream for a purpose not defined by a state water right but by federal pre-emption be excused and the satisfaction of the state water right reset to a lesser number?

Complaints About Present Accounting

- Thirst?
 - The determination of need cannot wait until the end of the storage season or the end of the upcoming irrigation season – there is a right for storage and for use from storage – the storage portion of the right must be accounted for based on the state based water right.

Complaints about Present Accounting

- We want to be treated like any other water user
 - When any other water user demands water, it is counted against the water right until the water user has diverted the quantity of water authorized by the water right. Under this standard, any time water is being stored, it would be counted against the storage water right. If the right holder decides to dump water from storage, the amount of the right that has been exercised would not be reset. Once the right were satisfied, no more water could be stored. Being treated like any other water user is not the appropriate standard – it would result in reservoirs not physically filling and water flowing downstream and lost to downstream states and the ocean.

Complaints About Present Accounting

- We want to be treated like any other water user
 - Under the present method of accounting, one could argue the storage right holder receives more than any other water right holder because the storage space refills even after the right has been satisfied.

Other Fill/Refill Considerations

- Resetting the satisfaction of the right downward to equal physical storage will have the following possible consequences:
 - Will increase the water reliability for some space holders while diminishing the rights of other spaceholders and those holding junior priority water rights. It would upset the historical deliveries of water – Varies from river basin to river basin.

Other Fill/Refill Considerations

- Resetting the satisfaction of the right downward to equal physical storage will have the following possible consequences:
 - Will allow the Bureau and the larger federal government to have greater control over flood control releases without consequences – including flood control for downstream interests or to satisfy treaties.

Other Fill/Refill Considerations

- Resetting the satisfaction of the right to equal physical storage will have the following possible consequences:
 - May change the way private and tribal reservoirs are operated to the detriment of natural flow right holders. Some examples are the Chesterfield Reservoir or the Blackfoot Reservoir.

Other Fill/Refill Considerations

- Resetting the satisfaction of the right to equal physical storage will have the following possible consequences:
 - May change the respective strengths and weaknesses of legal arguments of ground water and surface water users in the ongoing conjunctive management calls. This currently appears to be a major impediment to settlement of the fill/refill issue.

Other Fill/Refill Considerations

- Resetting the satisfaction of the right to equal physical storage will have the following possible consequences:
 - The determination of how rights are satisfied in each river basin is unique and dependent upon where reservoirs are located, where water is diverted, priorities of the various water rights, whether river reaches gain or lose water, and local customs and practices. This is why the expertise of technical staff and an analysis of each river basin's needs is important to determine water delivery issues on a case-by-case basis.

Snake River Adjudication

Basin Wide Issue no. 17

- There is proposed draft settlement agreement language to establish decreed water rights that would protect the historical practice of filling empty space in reservoirs vacated for flood control while protecting those who have relied on the present method of accounting. This draft language would also ensure that the federal government will be limited in its ability to use its flood control operations to control the river and take water from existing junior priority uses and from future uses.

Questions?

