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DEPARTMENT OF
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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'S POST-HEARING
BRIEF**

COMES NOW, the Boise Project Board of Control ("Boise Project"), by and through its attorneys of record, Barker Rosholt & Simpson, LLP, and submits this post-hearing brief in accordance with the order of the Hearing Officer. Further, the Boise Project is also acting on behalf of New York Irrigation District, one of its member districts, in this proceeding. Tr. 10.

INTRODUCTION

The issue of fill of the reservoirs following flood control releases in the Boise has proved to be intractable and contentious. It should not be. The Director has stated many times that his goal is to see the reservoirs filled. The Boise Project's concern is ensuring that fill occurs under the water rights of the Boise Project districts. While the bare legal title to the storage water rights is in the name of the Bureau of Reclamation ("Reclamation"), the true owners of the water rights are the districts and their water users. The water users need assurance that their water

rights – property rights under Idaho law – guarantee them the right to use the water in the reservoirs. Without that acknowledgment, the water users are left adrift.

The water users’ right to refill cannot be subject to the desires of either the State or the federal agencies, which change from one administration to the next. Eliminating a right to fill and replacing it with a “good idea” to refill, subjects the landowners to some future director’s notion of whether fill is even a “good idea” in the first place. Don’t abandon the water users by concluding that there is no right to refill and that refill is subject to anyone who wants to take the water ahead of filling the reservoirs.

COURSE OF PROCEEDINGS

I. Initiation of a Contested Case

On October 24, 2013, the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) issued a *Notice of Contested Case & Formal Proceedings*, and *Notice of Status Conference*. The Director ordered that the contested case would:

ADDRESS AND RESOLVE CONCERNS WITH AND/OR OBJECTIONS
TO HOW WATER IS COUNTED OR CREDITED TOWARD THE FILL OF
WATER RIGHTS FOR THE FEDERAL ON-STREAM RESERVOIRS
PURSUANT TO EXISTING PROCEDURES OF ACCOUNTING IN
WATER DISTRICT 63.

Id. at 6. The Director also acknowledged that there was no record of how and why the current accounting process was adopted. *Request for Staff Memorandum* (Sept. 10, 2014).

The Boise Project raised objections about whether a contested case, called *sua sponte* by the Director, was an appropriate vehicle to address these issues. The Director denied the objections and proceeded with the contested case. By participating in the hearing, the Boise Project does not waive any of its previous objections.

II. Issues Raised by Parties/Motions to Disqualify the Director as Hearing Officer.

The Boise Project and other parties also objected to the Director acting as the Hearing Officer in these proceedings. *See Motion to Disqualify* (Oct. 2, 2014). The Hearing Officer denied the motion to disqualify on October 3, 2014. *Order Denying Motion to Disqualify; Denying Request for Independent Hearing Officer* at 6. The Hearing Officer's subsequent disclosures posted to the website reinforced those concerns. *See Boise Project Board of Control's Supplemental Memorandum Regarding Disclosures by Director* (Aug. 25, 2015). By participating in this hearing, the Boise Project does not waive those objections.

STATEMENT OF FACTS

I. Early Development of Water Rights and Storage Reservoirs in the Boise Project.

The first natural flow rights in the Boise Project were developed in the 1860s. By the early 1900s, the natural flow available during the irrigation season in the Boise River had been fully appropriated. Additional irrigation would not be available, therefore, without the development of storage projects. *See, generally*, Ex. 2053 at 10-12.

In the early 1900s, the New York Canal Company began constructing the New York Canal. *New York Canal Co. v. United States*, 277 F. 444, 445 (D. Idaho 1913). In 1906, New York Canal Company entered into a contract to turn the canal over to the United States and to incorporate it into the Reclamation Project then known as the Payette-Boise Project. *Id.* In 1906, the United States entered into a contract with the Payette-Boise Water Users to develop a federal reclamation project to be known as the Boise Project. *In re Wilder Irrigation Dist.*, 64 Idaho 538, 540-41 (1943). The primary purpose of the Boise Project was to store water during the winter and spring months, when water supplies were higher, and to make that water available for irrigation during the summer months, when water supplies were lower. *Id.* 559-60.

The first dam constructed was Arrowrock. Ex. 2053 at 10-11. As originally authorized, Arrowrock was to be used only for irrigation storage. Exs. 2056 & 2057. The New York Canal Company undertook the duty of managing the Reclamation works and delivering the storage water to landowners from Arrowrock Reservoir. *New York Canal Co. v. Bond*, 265 F. 228, 229 (9th Cir. 1920); *New York Canal Co. v. Bond*, 273 F. 825 (D. Idaho 1921). Arrowrock was decreed a 1911 priority date for 8,000 cfs in the Bryan decree. Ex. 2023.

In 1926, Reclamation entered into contracts with the five Boise Project irrigation districts for repayment of the construction costs of Arrowrock and to operate and maintain the irrigation delivery works. Ex. 2058; *see also U.S. v. Pioneer Irr. Dist.*, 144 Idaho, 106, 110 (2007); *In re Wilder*, *supra*, 64 Idaho at 541. The districts and Board of Control then took on the obligation to deliver the storage water and natural flow to the landowners and to maintain the irrigation works.

Arrowrock also provided:

incidental flood control benefits. For example, faced with the rapid increase of flow in March 1916, Boise Project officials decided to delay Arrowrock storage in order to prevent later flooding that could potentially damage cities and property.

Id. at 12; *see also* Ex. 2060. However, Arrowrock was simply not adequate to stem the impacts of flooding in the Boise valley. *Id.* at 12 (“the new dam’s capacity of 286,000 acre-feet stored but a fraction of the water that flowed through the Boise River watershed”).

Over time, it was determined that additional storage was needed. A second contract was entered into in 1941 between the districts and the United States to obtain storage water rights from Anderson Ranch Reservoir to be constructed on the South Fork of the Boise. *Id.* at 12-14; *In re Wilder*, *supra*, 64 Idaho at 541, 560. Anderson Ranch was authorized for irrigation and power, with a very small flood control component. Ex. 2053 at 14; *See also* Exs. 2071 & 2076. Although construction on Anderson Ranch Dam began in the 1940s, completion was delayed

because of the war effort for World War II. Ex. 2053 at 15; Exs. 2079 & 2080. The first year of operation for Anderson Ranch was 1950. Ex. 2071.

II. Continued Flooding Concerns, the Construction of Lucky Peak Reservoir, and Flood Control Operations in the 1950s.

Massive floods occurred again in 1943. Tr. 794 (Stevens) (Largest flood event of record in the Boise River). The State was particularly concerned about dealing with this flood risk. Tr. 794 (Stevens). The Corps of Engineers, Bureau of Reclamation, State of Idaho and the water users then began a comprehensive study of flood control on the Boise. Ex. 2053 at 16; Ex. 2089. The joint study resulted in a decision to build Lucky Peak, primarily as a flood control dam. Ex. 2053 at 16. The federal agencies also proposed to convert Arrowrock and Anderson Ranch from exclusive irrigation reservoirs to multiple use reservoirs, and to operate all three reservoirs as a unified system. During this process, the State acted as representative of the water users. Tr. 796 (Stevens); Ex. 2053 at 21.

Conversion of Arrowrock and Anderson Ranch to multiple use happened only by demonstrating to the State and the water users that there would be no effect on their existing storage water rights and that any physical shortages in reservoir space caused by flood control releases and subsequent storage would be made up from Lucky Peak storage. Ex. 2097; *see also* Ex. 2053 at 18 (“despite this acceptance of the multi-use model and the desire for flood control, water users still wanted assurance that their irrigation supplies would remain senior and would not be trumped by efforts to control flooding”); *see also Id.* at 17-22. During this period, the State never suggested that the reservoirs would not fill in priority. Tr. 797 (Stevens). To the contrary, the State’s concern was to see that the water users would be covered for any shortfall and that the rights were filled in priority. *Id.*

In response, a system was implemented to protect the irrigation supplies:

[T]he system was intended to facilitate a sort of trade: extra water from Lucky Peak for the irrigators in exchange for allowing the storage space in Arrowrock and Anderson Ranch to be used for flood control. The idea was that if there was ever a shortage of irrigation water as a consequence of utilizing space in Arrowrock and Anderson Ranch for flood control, the extra water in Lucky Peak would make up for the loss.

Id. at 19. Again, there was no hint that the water right would not fill in priority. Tr. 797-98 (Stevens). A basic understanding of history of water development in this basin makes it clear that no one, not the State, not Reclamation and certainly not the water users contemplated that these existing water rights would fill in any way other than in priority.

In 1953, the United States Department of Interior and the Corps entered into a “Memorandum Agreement...for Flood Control Operation of Boise River Reservoirs, Idaho” (“MOA”). *Id.* at 7-17 & 23-25; Ex. 2100. The MOA provided that Lucky Peak would be operated under a coordinated plan of operation for all three reservoirs and set forth the terms of a system-wide plan for the reservoir system. *Id.* Under the MOA, 983,000 acre-feet of the available 1,084,000 acre-feet in the three reservoirs “will be primarily considered as available for irrigation except as such amount must be reduced by evacuation requirements for flood control.”

Id. The MOA provided that:

No reregulation of storage or annual exchange of storage as provided in this plan, ***shall*** however, ***deprive any entity of water accruing to it under existing rights*** in Arrowrock, Anderson Ranch, and Lake Lowell Reservoirs.

Id. (emphasis added). This language made it clear that the parties expected the water filling the reservoirs after flood control releases would fill the “existing rights.” The MOA further provided:

In the event Anderson Ranch or Arrowrock Reservoirs are not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights to the extent of the space thus remaining unfilled at the end of the storage season but not to exceed the amount evacuated for flood control.

Id.

Consistent with the MOA, in 1954 Reclamation entered into Supplemental Contracts with each of the irrigation entities having storage rights in Arrowrock and Anderson Ranch. *See* Exs. 2039 (NMID) & 3026 (Wilder). The Supplemental Contracts confirmed to contract holders the right to use storage waters in Lucky Peak for irrigation purposes in an amount equal to the unfilled storage capacity that resulted from evacuation of water from Anderson Ranch and Arrowrock Reservoirs for flood control purposes. Tr. 1043 & 1051-52 (Case). The Supplemental Contracts were identical and provided the following “Guarantee:”

7. Beginning with the first full flood control period after the agreement ... there shall be a determination for each storage season at the end of the season

(a) of the amount of water to which the District would have been entitled under its storage rights in the reservoir system and Lake Lowell under its Government-District contracts had Anderson Ranch, Arrowrock and Lake Lowell reservoirs been operated in accordance with those contracts except for the provisions thereof relating to the use of capacity for flood control benefits...and

(b) of the amount of water which is creditable to the storage rights of the District under its Government-District contracts taking account of actual operations under the flood control operating plan in accordance with this supplemental contract.

If the amount under (a) exceeds that under (b), there shall be credited and made available to the District, out of the water accrued to storage rights in Lucky Peak Reservoir, an amount of stored water equal to that difference.

Id.

There is nothing in the historical record suggesting that when water was released for flood control, it would not refill in priority. Tr. 799 (Stevens). There was no suggestion that there was no water right for “refill” of the reservoirs after a flood control event. *Id.* And, there was no suggestion that juniors would stand ahead of the storage right holders’ right to “refill.” *Id.*; see also Tr. 1039-40 & 1046-47 (Case); Tr. 1184-185 (Durrant). The lack of such evidence is significant because the issue of protecting storage rights was so significant to the State and water users. *Id.*

Lucky Peak Dam was completed in 1955. Ex. 2503 at 25; Ex. 2104. Even then, however, the three Boise reservoirs did not have sufficient capacity to capture all the flood waters in a high water year. Therefore, flood control releases would still have to be made in high water years. Ex. 2104.

In 1956, the Corps adopted an operating manual to implement the 1953 MOA and the 1954 Contracts. Ex. 2104. The operating manual provided for flood and/or evacuation based on a prediction of how much inflow would occur from the snow melt which would then fill the storage space for use by the storage right holders. *Id.* The reservoirs were operated under this manual and the Anderson Ranch and Arrowrock spaceholders were allowed to refill, in priority, after flood control releases. *Id.*

III. Flooding in the 1970s and the 1985 Water Control Manual.

From 1956 through 1974, the reservoirs were operated in accordance with the 1956 operating manual. Dr. Stevens summarizes the operations during these years:

During all seasons, river operators, regardless of agency, recognized the process of spilling the water first for flood control in the spring, and subsequently filling the reservoirs based on snowpack forecasts as flood control season wound down. The logs demonstrate that concern for refill was at the forefront of the operators’ minds.

Ex. 2053 at 29.

In 1974, flood water released from Lucky Peak caused significant flooding along the Boise River. Reports of “submerged pastures” and “man-made floods” reached the local paper as well as the Governor. Ex. 2053 at 34; *see also* Exs. 2129 & 2130; Tr. 800 (Stevens).

Landowners along the river requested greater flood control protections. *Id.* Governor Cecil Andrus criticized the reservoir operations and directed the Department to study and re-evaluate the flood control practices in the Boise Project to provide for earlier flood control releases. *See* Ex. 2131.

In April, IDWR Director Stephen Allred wrote to the Corps of Engineers and carried the governor’s message. The crux of Allred’s comments, written in response to a draft Environmental Impact Statement that had been prepared by the Corps as a requirement to construct a second outlet at Lucky Peak dam, suggested that the river had not been operated in strict accordance with the 1956 Manual for some time, and he urged the Manual’s modification to reflect actual conditions and thus provide a more reliable guide to operations. He closed by offering to meet with the Corps to discuss ways to accomplish the work. Shortly thereafter, a meeting was held between the Director of the Bureau of Reclamation, Colonel Conover of the Army Corps of Engineers, and Allred to determine how to gather the technical information requested by the Governor. ***Together, they hatched a plan to assemble a work committee with representatives from all three agencies.***

Ex. 2053 at 35 (emphasis added). Thus, at that time, the Department and State chose to work together with the federal agencies to review operations on the Boise. Tr. 800 (Stevens).

However, the Department quickly took control of the meetings, even causing the Bureau to complain that it did not want to “establish the precedent of being technical consultants for the State.” *Id.* at 36; *see also* Ex. 2135; Tr. 801 (Stevens) (Department declared that the report would be issued under the State’s name).

In 1974, the State prepared and issued the Department’s report entitled “Review of Boise River Flood Control Management.” Exs. 2133 and 2182. *See* Tr. 380 (Sutter) (“independent

report by the State”). The State and Department wanted more flood control and at the same time added protection for the storage water rights. Tr. 800 (Stevens). The State’s report identified flaws in the flood control curves under the 1956 manual as not conservative enough for protection from flooding. Ex. 2053 at 38-39; Exs. 2133 and 2182 (“The flood parameter curves are conservative for refill of the reservoirs, but not conservative for flood control, especially during the month of June. This means that a lower risk of refill is achieved at the expense of a higher risk for large flood damage”). Tr. 417 (Sutter) (“We felt greater flood protection could be afforded, and the reservoir system would still fill”).

The Department’s report echoed the Governor’s recommendation for earlier flood control releases, recognized the practice of and need to refill storage space after flood control releases, and called for a new study to provide greater flood protection while still protecting refill. Exs. 2133 and 2182; Tr. 801 (Stevens). Importantly, rather than conclude there was no right to refill the reservoir following flood control releases, the Department’s 1974 Report recognized the need to refill storage space for irrigation uses following these earlier flood control releases. *Id.* Further, the Department’s 1974 report did not state that refill would not occur in priority, did not raise the idea of “paper fill” as “satisfaction” of the water rights and did not claim that juniors could take ahead of reservoir refill. Tr. 802 (Stevens). The idea that juniors would take the refill water was not even considered, as it “was not an issue.” Tr. 455 (Sutter). The Department’s report is important because it was the foundation for the later Water Control Manual. Tr. 411-12 (Sutter).

Following release of the 1974 report, the Department, Corps and Reclamation collaborated to revise the 1956 manual.

Although the two federal agencies were responsible for reservoir operations, ***IDWR was directly involved in the reservoir operations review and revision process.*** The triple-agency effort – Corps, Bureau, and IDWR – to revise the manual got underway in December 1976.

Ex. 2053 at 40 (emphasis added). The Draft Plan of Study for the committee included consideration of flood control and the impact on refill. Ex. 2145 (Operational criteria and management include consideration of “fall and early winter evacuation based on a ***high refill assurance***”) (emphasis added). The Department, Corps and Reclamation agreed that “the flood regulation plan will provide for a high assurance of refill.” *Id.*

The State’s involvement was vital. The effort to modify the 1956 manual “identified five technical studies that would be required in order to make the desired changes to operations.” Ex. 2053 at 41. These studies included the Department’s development of “Fall and Winter Assured Refill Curves.” Ex. 2145.

The Department remained involved throughout the process of revising the manual.

IDWR continued to play a major role in the manual’s revision as it related to existing water rights. Director Stephen Allred notified the Corps in late 1979 that IDWR would accept that agency’s new runoff projection techniques, declaring them to be “consistent with the recommendations” in the 1974 Review of Boise River Operations report. The following year, Allred again wrote to the Corps, proposing that IDWR prepare a description of the “full annual operating cycle” of the reservoirs, “including the fill sequence, the irrigation use period, and the fall-winter operations for flow maintenance” for inclusion in the manual. He continued:

Accrual of storage water to the respective reservoirs is determined by the reservoir rights under the priority system. It is the responsibility of the watermaster to determine this fill in relation to the other rights that he administers. A description of this process should be included in the manual.

Allred offered to draft the section he was recommending, which his staff then proceeded to do. The manual as it was ultimately adopted included language similar to that of Allred’s letter.

Ex. 2053 at 46; *see also* Tr. 620 (Cresto) (confirming that the Department prepared Subsection 7.06(f), “Distribution of Irrigation Water” for the Water Control Manual).

Ultimately, the agencies jointly developed a protocol for river operations that was released in 1985, known as the Water Control Manual for Boise River Reservoirs (the “Water Control Manual”). Ex. 2186. This Water Control Manual was a “joint effort” by the Department, the Corps and Reclamation. Ex. 3001; Tr. 458-459 (Sutter). It was “really necessary to get the Department of Water Resource’s blessing.” Tr. 459 (Sutter). And the Department was “satisfied” with the Water Control Manual. Tr. 460 (Sutter). The Water Control Manual establishes “rule curves” for deciding how much space must be left available in the reservoirs to handle flood flows while, at the same time, ensuring physical fill of the reservoirs after flood control releases. Ex. 2186. These rule curves were reviewed by Alan Robertson, manager of the hydrology section and Bob Sutter’s supervisor, and by Bill Ondrechen, Department hydrologist. Tr. 424-25 (Sutter).

At no time during the development of the Water Control Manual did the State or Department ever assert to the water users or in any public forum that evacuation of water for flood control would result in empty reservoir space that could not be refilled unless all other existing and future water rights had been satisfied. To the contrary, the Department staff “concurred with the adopted curves, reflecting on the curves in 1987 that: ‘We feel that the new manual responds well to current conditions on the Boise River and provides a balance between flood protection and refill of storage.’” Ex. 2053 at 56. Further, the manual specifically provides that “Flood control regulation during the refill period (1 April through 31 July) requires the use of snowmelt runoff to refill flood control spaces within the Boise River reservoirs.” Ex. 2186.

Importantly, a part of the manual written by the Department recognizes that flood control releases were “surplus” to the reservoirs.

When Lucky Peak flood control releases are equal to or greater than the demand for irrigation water (all users are receiving an adequate supply), the entire release is considered surplus to the Boise River and the above computation of natural flow diversion by user is not necessary. During this period, no charges are made against stored water supplies.

Ex. 2186 at 7-26 (emphasis added). The manual did not say that these “surplus” flood control releases would count towards the “satisfaction” of the storage water rights. Never, at that time, were water right holders in the Boise advised that their water rights would not fill in priority. Tr. 462 (Sutter); Tr. 804 (Stevens); Tr. 1037 (Case); Tr. 1076 (Murgoitio); Tr. 1181 (Durrant); Henley Aff. (Ex. 3038).

Nothing in the development, public outreach or final manual indicated any change from the State’s prior assurances that flood control could not impact irrigation storage water rights. To the contrary, the purpose of the Water Control Manual was to protect both downstream property owners *and* reservoir spaceholders. Ex. 2053 at 46; *see also* Ex. 2049-64 (“These rules curves represent a balance between flood control risks and refill assurances”).

IV. Implementation of the Accounting Program.

Prior to implementation of the accounting program, accounting for water in the Boise was done by Hank Koelling, the water master. Mr. Koelling used hand calculations. Tr. 844 (Sisco). Mr. Sutter was not able to figure out exactly how Mr. Koelling did his accounting, Tr. 451 (Sutter); but he knew enough to know that Mr. Koelling did not use “paper fill” and instead filled the reservoirs in priority. Tr. 451-452 (Sutter). In fact, Mr. Koelling recorded the reservoir contends on a daily basis. Tr. 844-845 (Sisco); Ex. 2009, p. 57-58, Chart 7 (recording flood

control and other loss to the system). Tr. 849-850. Mr. Koelling did not use “paper fill” concept to “satisfy” the water rights. Tr. 912-913 (Sisco).

Just one year after the Water Control Manual was agreed to, the Department imported an accounting program into the Boise. *See, generally*, Ex. 2053 at 59-62. According to testimony at hearing, the implementation of the accounting program was part of a “state-wide” policy. Tr. 266-67 (Dreher) (testifying that, during his time in office, “we have used the policy *throughout the state* for these large reservoirs that they get one fill under their priority”) (emphasis added); Tr. 658 (Tuthill) (the one fill rule applies not only to the “federal on-stream reservoirs in the Boise River Basin,” but also to “other federal on-stream reservoirs *around the State of Idaho*”) (emphasis added); *see also* Ex. 1007 (Memo from David Tuthill) (same).

Importantly, no notice was ever provided that this state-wide policy would change or impact the accounting of storage water rights. Ex. 2053 at 59. The only mention of the new accounting program provided to the water users was included in the 1986 Boise River Watermaster’s Report, which provided:

Several *small additions* were made by [new watermaster] Mr. Sisco, one of these was the computerized storage accounting program that was developed by Mr. Bob Sutter of the Department of Water Resources. This program, once implemented, should provide an accurate up-to-date accounting of not only storage use, but of reservoir accrual.

This annual report is reflective of the new computer use, with several of the charts and/or appendixes being generated by this new process. 152 [Emphasis added.]

Ex. 2177 (emphasis added). Ms. Cresto confirmed that there was no “evidence of outreach to the water users in Water District 63 about this accounting program.” Tr. 202 (Cresto). This was true, even though the Department recognized that the accounting procedures constituted a change from the method of accounting for storage water in the past. Ex. 2178 (March 19, 1987 letter

from Dunn to Sisco stating that “While the allocation procedure cannot accurately be described as new because it simply applies the appropriations doctrine, *it is a modification from procedures applied from time-to-time in the past*”) (emphasis added).

The “most significant” change was accounting to the reservoirs, by priority and source rather than treating the reservoirs as a whole. Tr. 872 (Sisco); Ex. 2187.

No water user on the Boise was ever informed that the accounting program effected any “modification” to their water rights or that the Department would now consider their rights to be satisfied by release of flood waters. Ex. 2053 at 61 (“The historical record does not reveal that either the Department of Water Resources or the Boise River Watermaster had any additional discussions with Boise River water users, or collaborated with the Corps of Engineers or the Bureau of Reclamation, in the development and adoption of the new accounting system for the Boise River, other than informing them after the fact of its implementation in 1986”); *see also* Tr. 805 (Stevens); Tr. 1037-41 (Case) (No notice of changes proposed by the new accounting program or that flood control would count against storage right accrual). Tr. 202 (Cresto). To the contrary, water users had been repeatedly assured that flood control released would not impact their irrigation storage. *Supra*. In fact, in 1987, Director Higginson assured the Boise River water users that the Water Control Manual was a “joint effort,” including the Department, and that the manual provided for “increased assurance of refill for irrigation during the late runoff season.” Ex. 3001. Director Higginson’s letter, however, did not even mention the concept of “paper fill” as “satisfaction.”

V. The Boise Basin is Fully Appropriated.

The ability to refill storage space vacated due to flood control operations is vital to the Boise Project. Tr. 953-56 (Page). In the early 1900s, the water users recognized that the natural flow of the Boise River was fully appropriated, necessitating the development of reservoirs to capture high flows. *Supra*. Since 1977, the Director has repeatedly declared the Boise River fully appropriated. Exs. 3002, 3004, 3005, 3006, 3007 & 3008.

In administering water rights on the Boise, everyone understood that the only time water was available for new appropriation was when water was being released past Lucky Peak for flood control. Tr. 1002-03 (Squires); Ex. 3041; Tr. 855 (Sisco); Ex. 3038 (Henley Aff.); *see also* Exs. 2017, 2018 & 3013. New appropriations on the Boise River, including water right 63-31409, bear a condition similar to the following:

The right holder shall exercise this right only when authorized by the District 63 watermaster when the Boise River is on flood release below Lucky Peak dam/outlet. Flood releases shall be determined based upon the Memorandum of Agreement Between the Department of Army and the Department of Interior for Flood Control Operations of Boise River Reservoirs, dated November 20, 1953, contracts with Reclamation contract holders in the Boise River reservoirs, the Water Control Manual for Boise River Reservoirs, dated April 1985, and any modifications adopted pursuant to the procedures required in these documents and federal laws. The right holder shall not seek, directly or indirectly, any change to the flood control operations in the 1985 Water Control Manual for Boise River Reservoirs. This water right may not be used to divert water released from storage to augment lower Snake River flows during the migration of Snake River salmon as authorized under Idaho law, or for any purpose of use authorized under the water rights for Lucky Peak Reservoir.

Ex. 3012; Tr. 863-64 (Sisco). As watermaster, Mr. Sisco recommended similar conditions on all new water rights. *Id.*; e.g., Ex. 2017. The Department never told the watermaster that these flood control conditions were not appropriate. Tr. 864 (Sisco). Boise is, in fact, “over-appropriated” as it is. Tr. 864 & 885 (Sisco).

LEGAL AUTHORITY

I. The Supreme Court's Decision in Basin Wide 17 Requires that the Director Account for Water "Used" By the Storage Right Holders.

The issue of refill of a storage right following flood control releases arose in the Snake River Basin Adjudication ("SRBA") in relation to proceedings involving reservoirs in the Upper Snake River. *A&B Irr. Dist. v. State*, 157 Idaho 385, 387-88 (2014). There, water users in the Boise and Upper Snake asked the Court to address whether Idaho law required a remark authorizing storage rights to refill, under priority. *Id.* In addition, several parties asked the SRBA Court to address "when the quantity element of a storage water right is considered filled." *Id.* The SRBA Court denied the request. *Id.*

In affirming the SRBA Court's refusal to consider when a storage water right is filled, the Supreme Court held that such a determination is to be made by the Director in the first instance. But, the Court directed that the Director's decision must be guided by the following:

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.
...

The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that ***the Director must fill in priority to that user.*** However, it is within the Director's discretion to determine when that number has been met for each individual decree. ***In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user.*** Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.

Id. at 393-94 (emphasis added). In other words, although the Director has “discretion” to employ an accounting method, any such accounting method must count the water “a person has used,” and the Director must “provide each user the water it is decreed.”¹

The term “use of water” is a term of art in Idaho water law. Beneficial use is a vital component of a water right. I.C. § 42-104 (“The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases”); *see also* IDAHO CONST. art. XV, § 3 (“The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied”).

The issue of “use,” as it relates to storage water rights, was explored by the Supreme Court in *U.S. v. Pioneer Irrigation District*, 144 Idaho 106 (2007). There, the Court held that “as a matter of Idaho constitutional and statutory law ***title to the use of the water is held by the consumers or users of the water.***” 144 Idaho at 115. The Court recognized that the water users, through their representative irrigation entities, held equitable title to the storage water rights. *Id.* This “equitable” title distinction is based on the fact that it is the storage space holders (i.e. the water users) who actually put the stored water to beneficial use. *Id.* at 110.

In Idaho it is “a well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law.”

Id. (quoting *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 60 (1924)). A water right is not title to the water itself, it is title to the right to use the water. *Joyce Livestock v. U.S.*, 144 Idaho 1, 7 (2007). In *Pioneer* and in *Joyce*, the United States was not the entity that used the water

¹ In the Department’s public presentations about the Court’s Basin Wide 17 decisions, this portion of the Supreme Court’s opinion is never quoted. Instead, the Department repeatedly quotes language about “discretion” of the Director. However, the Director and Department are not free to ignore this directive of the Court. The Director never has the “discretion” not to follow the Court’s legal guidance.

under the water rights. Rather, it was the people who applied the water to the land and for the cattle.

When the Supreme Court, in *A&B, supra*, held that the Director has authority to “simply count how much water a person has used,” that mandate must be read in terms of Idaho water law. Here, there is no dispute that the districts’ water users are the ones who use the water in the reservoirs by applying it to their fields. *Pioneer, supra*. This use formed the basis – i.e. constituted the beneficial use – for which the storage right were decreed. See I.C. § 42-104. In other words, but for the irrigation use, the storage rights in Arrowrock and Anderson Ranch would not exist.

Flood control releases, on the other hand, benefit the general public and downstream landowners. *Kunz v. Utah Power & Light Co.*, 117 Idaho 901 (1990). Flood control releases in the Boise are not beneficially used by the spaceholders or landowners. Tr. 201-02 (Cresto) (“storage water that’s released past Middleton” is not put to beneficial use); *accord* Tr. 1076 (Murgoitio) (flood control releases not used by Boise Project districts); Tr. 1236 (Platt) (Boise Project and Wilder do not use water released for flood control); Tr. 1185 (Durrant) (water released for flood control not used by Boise-Kuna irrigators); Tr. 963 & 970 (Page) (only diversion from River is at Diversion Dam and no way to get water passing that point, no use of flood control releases). After a flood control release, there is often empty reservoir space – and water users cannot irrigate with empty space. Unless that space is filled with water from run off, there will be no water to beneficially use. Indeed, the record is unequivocal that as far back as 1916, extending through the 1954 contracts and through the 1985 Water Control Manual, water that physically filled the reservoirs after flood control releases has been put to beneficial use by the water users. *Supra*.

The Supreme Court required the Director to account for water actually “used” by the senior water right holder. Since water that is released for flood control purposes on the Boise River is not used by any water user – it is “surplus,” in the works of the Department – it cannot legally count against the satisfaction of the storage water right. Therefore, such storage rights must be permitted to fill, in priority, following a flood control release.

II. State Law, Combined with the Repeated Assurance that Flood Control would not Impact Irrigation Storage, Confirms That The Right to Store Water Includes the Right to Refill, In Priority, Following a Flood Control Release.

Reviewing Idaho law, together with the joint efforts of all the parties on the Boise River to incorporate flood control measures into the existing water rights, the only logical conclusion is that storage water rights must be permitted to refill in priority. Any other conclusion would be inconsistent with Idaho law.

The water of this arid state is an important resource. Not only farmers, but industry and residential users depend upon it. ... Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” Idaho's extensive agricultural economy would not exist but for the vast systems of irrigation canals and ditches which artificially deliver stored or naturally flowing water from Idaho's rivers and streams into abundant fields of growing crops. Many of these irrigation systems depend on dams which divert naturally flowing water, storing it in reservoirs and later releasing it for use on irrigated lands through canals and ditches. These artificial water storage systems serve an additional need for flood control, power generation, recreation, and provide beneficial environments for fish and wildlife.

Kunz v. Utah Power & Light Co., 117 Idaho 901, 904 (1990) (internal citations omitted).

In Idaho, a storage water right is a property right appurtenant to the lands within the districts using the water. I.C. § 55-101; *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797 (2011); *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 878 (2007); *U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 115 (2007). As such, it cannot be taken without due process and payment of just compensation. *Clear Springs*,

150 Idaho at 797 (*quoting Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651 (1915)). Any diversion and/or use of water without a water right is prohibited.

I.C. § 42-201(2) (“No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists”). When viewed in light of these foundational legal principles, it is clear that a reservoir must be allowed to fill, in priority, under its existing water rights following a flood control release.

As explained above, the State was very much a party to the early decisions leading to the use of Arrowrock and Anderson Ranch for flood control on the condition that doing so would not harm the storage water right or accrual of water under the existing rights. The State was the water users’ representative in the negotiations that culminated with the 1954 Contracts acknowledging the protection of existing water rights (i.e. irrigation storage) in the face of flood control releases. Ex. 2053 at 20-25. Then, following flooding in the early 1970s, the Governor directed the Department to review operations on the Boise River. Ex. 2053 at 35; *see also* Ex. 2131. The Department controlled those meetings. Ex. 2053 at 36; *see also* Ex. 2135. Through its resulting 1974 report, the Department complained that the then-existing flood control curves did not release enough water to provide flood control protection and called for greater flood protection, while at the same time, providing a “greater assurance” of the right to refill. Exs. 2133 and 2182; Ex. 2053 at 38-39; Exs. 2131, 2133 and 2182.

Over the next decade, the Department participated extensively in the revisions to the Water Control Manual – even drafting sections of the manual. Tr. 620 (Department drafted section on the “Distribution of Irrigation Water”). The Department took an active role in

designing the flood control “rule curves” that would be used to ensure both greater protection for downstream property and greater assurance of refill. Ex. 2053 at 41.

In 1985, when the Water Control Manual was approved by the Department, it carried out the same goals of making earlier flood releases while still protecting reservoir refill. Ex. 2186. At no time during the development of the Water Control Manual did the Department assert to the water users or in any public forum that evacuation of water for flood control would result in empty reservoir space that could not be refilled unless all other existing and future water rights had been satisfied. Rather, the Department staff “concurred with the adopted curves, reflecting on the curves in 1987 that: ‘We feel that the new manual responds well to current conditions on the Boise River and provides a balance between flood protection and refill of storage.’” Ex. 2053 at 56. Furthermore, the Department recognized in the manual that flood control releases were “surplus” to the reservoirs. Ex. 2186 (p. 7-26).

Throughout this history, the Department never told anyone that flood control water released would count towards the “satisfaction” of the storage water rights. Rather, the Department complained that the flood curves were too “conservative” for irrigation and not conservative enough for flood control. Ex. 2053 at 38-39. To shift this dynamic, the State pushed for earlier flood control releases, all the while assuring water users that their irrigation storage rights would be protected. Exs. 2131 & 2135. The Water Control Manual implemented the State’s assurances – identifying flood control releases as “surplus” and, again, assuring that irrigation storage would be protected. Ex. 2186.

This history is important because it represents the State’s, including the Department’s, intimate involvement in the development and operation of a reservoir system that allowed the space vacated by flood control operations to fill under the existing water rights – thereby

protecting irrigation storage rights. This fill was always understood to occur under the existing water rights and their respective priorities. Such actions and policies are consistent with Idaho law providing that a storage right is a property right developed pursuant to the beneficial use thereof. *Supra*. The storage rights here provide a volume of water for irrigation purposes based on a specific elevation on the upstream face of the dam. *See* Water Right Nos. 63-303, 63-3613, 63-3614 & 63-3618. In flood control years, this elevation is not reached until the day of allocation or day of maximum fill.

Those rights must be protected by allowing them to fill, in priority, following a flood control release. This is particularly true in the Boise River, because the rule curves call for releases earlier in the season pursuant to a process advocated, aided and abetted by the Department. *Supra*. To argue otherwise is to admit that the Department intentionally developed a system, in concert with the Corps and Reclamation, sanctioning widespread illegal diversions (i.e. the “refill” of space vacated by flood control even though the base storage rights had been satisfied). I.C. § 42-201(2) (illegal to divert water without a water right).

III. Using this Proceeding to Justify the Unilateral Implementation of the 1986 Accounting Program Constitutes an Improper Post Hoc Rationalization and Does Not Rectify the Department’s Failure to Conduct Rulemaking as Required by Idaho Law.

A. The Department Provided No Justification for the 1986 Accounting Program at the time it was Unilaterally Imposed on the Boise Water Users.

When the accounting program was implemented in 1986, the Department did not provide any notice to the Boise water users the impacts it would have on storage accumulation- a fact that was unchallenged at hearing. Tr. 202 (Cresto); Tr. 1037 (Case); Tr. 1076 (Murgoitio); Tr. 1181 (Durrant); Henley Aff. (Ex. 3038). The water users were not notified that the

accounting program would effectively rescind the repeated assurance that flood control would not impact irrigation storage. *Supra*.

At that time, the Department never expressed any concern over the federal government taking advantage of a system that allows refill in priority. Tr. 1501-02 (Shaw) (no record that the Department raised this concern of federal control in 1986). In fact, the Department had just blessed the Water Control Manual. Tr. 459-60 (Sutter). This “blessing” was obtained only after the Department, Corps and Reclamation “jointly” agreed to greater flood control efforts with “greater assurance of refill.” *Id.*; Ex. 3001. Likewise, the Department did not assert at that time that allowing a storage right to fill, in priority, following a flood control release would harm junior or future uses. Tr. 578 & 591-92 (Cresto).

The only explanation provided to the water users at that time was that the watermaster wanted a computerized system.

Several small additions were made by [new Watermaster] Mr. Sisco, one of these was the computerized storage accounting program that was developed by Mr. Bob Sutter of the Department of Water Resources. This program, once implemented, should provide an accurate up-to-date accounting of not only storage use, but of reservoir accrual.

This annual report is reflective of the new computer use, with several of the charts and/or appendixes being generated by this new process.

Ex. 2177.

Had the water users been made aware of how the accounting “modifications” would have affected their right to refill after flood control events, they would have vigorously challenged such a program. Tr. 1037 (Case) (Wilder “very definitely” would have brought this to the attention of the watermaster); Tr. 1076 (Murgoitio) (“Old timers on the Board, they were very adamant about our water rights. And they would have fought tooth and toenail to secure the water rights”); Tr. 1181 (Durrant) (Previous directors had no inkling there was no right to refill

the reservoirs); Henley Aff. (Ex. 3038) (never notified that storage rights would not fill in priority following flood control event).

Given the implementation and roll-out of the water control manual just one year earlier – a process that took nearly a decade – there was no reason to expect that the Department would change the way it accounted for the storage of water following a flood control release. Tr. 1040 (Case) (Reclamation and Corps explained the Water Control Manual to the Wilder Board and did not indicate that managing the early season flood control would have any effect on the water rights or fill of the reservoirs).

Furthermore, even after the implementation of the accounting program, space vacated for flood control was allowed to continue to fill in priority. Tr. 862-63 & 865 (Sisco). This process continued without any assertion by the Department that the water filling the reservoirs after a flood control event was filling without a water right or that the water was available for new appropriations. Tr. 864 (Sisco).

Now, the Department claims that priority refill of space vacated by flood control released will result in injury to junior water rights and would lead to federal control of the State water rights. Such arguments have no basis in the record. Tr. 223-25 (Cresto) (no analysis conducted to determine impacts on junior water rights as a result of priority refill). Post hoc rationalizations like these are improper and cannot be used to justify an action taken nearly 30 years ago. *See Bingham v. Montane Res. Assoc.*, 133 Idaho 420, 424 (1999) (post hoc justifications for an award of attorney fees are not considered regardless of their merit); *Fournier v. Fournier*, 125 Idaho 789, 792 (1994) (same); *c.f. Stevens v. State*, 156 Idaho 396, 412 (2013) (“We must also make every effort to avoid a post hoc rationalization of the attorney’s conduct”); *Castellanos v. Small*, 766 F.3d 1137, 1148 (9th Cir. 2014) (“we cannot consider the post hoc justifications offered by

Deputy District Attorney”). The fact that this accounting program was implemented 30 years ago with no notice to the water users cannot justify retaining a policy based on a state-wide “rule” that was not properly adopted in the first place.

B. In Order to Effectuate the State-Wide Changes Contemplated by the 1986 Accounting Program, the Department Must Undergo Formal Rulemaking.

An administrative agency cannot simply impose rules and regulations on the public. Further, an agency’s authority is limited to that “given to it by the legislature.” *Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879 (1979); *see also Maguire, Ward, Maguire & Elbredge v. Idaho Ins. Guarantee Assoc.*, 112 Idaho 166, 167 (Ct. App. 986) (Insurance association is a “creature of statute. It has only the powers and obligations given to it by the legislature”).

Under Idaho law, the Director is given “direction and control of the distribution of water from all natural water sources.” I.C. § 42-602. This authority includes the ability to “adopt rules and regulations” for the distribution of water. I.C. § 42-603.² The adoptions of such rules is governed by the administration procedures act, originally adopted in Idaho in 1965. *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, Gilmore, Michael S. and Dale D. Goble, 30 Idaho L. Rev. 273 (1994). Under the APA, a “rule” is defined as follows:

[A]ny agency statement of ***general applicability*** that implements or prescribes law or interprets a statute as the statement ***applies to the general public***. The term includes the amendment or repeal of a prior rule ...

I.C. § 67-5201 (emphasis added).³

² The current language of section 42-603 was enacted through an amendment to the statute in 1992. *See* 1992 ID SB 1450 (Apr. 14, 1992). Prior to 1992, the section provided the Director with authority to “devise all needful rules for the distribution of water from the streams.” *Id.*

³ *See* 192 Idaho Sess. Laws 263 (Apr. 8, 1992) (text of APA prior to 1992 amendments).

In 1986, the APA required specific actions in order to adopt a new rule. *See* I.C. § 67-5203 (1965).⁴ First, “Prior to the adoption, amendment, or repeal of any rule, the agency shall give at least twenty (20) days’ notice of its intended action.” *Id.* at 67-5203(a). The notice was required to include an explanation of the “statutory authority under which the action is proposed,” and “a statement in nontechnical language of the substance of the intended action and the principal issues involved.” *Id.* at 67-5203(a)(1). The notice was required to be published in the “newspapers published in the State sufficient to provide public notice.” *Id.* The agency is required to “afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing.” *Id.* at § 67-5203(a)(3). Further, the agency was required to provide a hearing and opportunity for comment if requested. *Id.* Finally, “***No rule hereafter adopted is valid unless adopted in substantial compliance with this section.***” *Id.* at § 67-5203(g) (emphasis added).

The Department failed to follow these statutory procedures. Prior to 1986, there was no computerized accounting program utilized in the Boise River. Tr. 170-71 (Cresto); Tr. 844 (Sisco). Hank Koelling did the accounting by hand and filled the reservoirs in priority. Tr. 845-47 (Sisco); Tr. 451-52 (Sutter). Now, the Department asserts that all that changed when the Department unilaterally imposed the accounting program in 1986. Tr. 171 (Cresto) (The Department’s policy that “after their [storage] water right has been satisfied, that juniors should be allowed to divert” was not in place “before 1986”).

The “one-fill rule” element of the accounting program constituted a rule due to its “general applicability” and application “to the general public.” Not only would the accounting program’s “one fill rule” affect all water users on the Boise River, but the unchallenged

⁴ Section 67-5203 was substantially revised and moved to section 67-5221 in the 1992 amendments to the APA. 1992 Idaho Sess. Laws 263 (Apr. 8, 1992).

testimony of the Department's former directors confirmed that the accounting program's concepts of "paper fill" and "one fill" were based on a "state-wide" policy for the management of on-stream reservoirs. Tr. 266-67 (Dreher); Tr. 658 (Tuthill); *see also* Ex.; Tr. 238 (Dunn) ("general policy" of no second fill).

Furthermore, this statewide policy, or "one fill rule" as it was consistently described by the former Department Directors, was imported into the Boise from the Upper Snake accounting practices without any effort to discuss whether the Upper Snake program should be used in the Boise. Tr. 428 (Sutter) (Contacted the new watermaster about the "potential use of the Water District 1 water right accounting procedure for the Boise"); Tr. 1502 (Shaw) (No explanation for why the Department chose to apply a "one fill" accounting program other than that is what they did in the Upper Snake).

Given the general state-wide applicability of this "one fill" rule to all large reservoirs around the State, the Department was required to provide notice and an opportunity to comment. Yet, no notice of the implementation of the "one fill rule" was ever provided to the water users. Tr. 202 (Cresto) (There is no "evidence of outreach to the water users in Water District 63 about this accounting program").

Furthermore, contrary to the statutory requirements, the Department did not provide "a statement in nontechnical language of the substance of the intended action and the principal issues involved." *Id.* at 67-5203(a)(1), *supra*. Indeed, at hearing, several water user representatives testified that had their boards been provided with an explanation of the Department's intentions, the Districts would have challenged the Department's actions. Tr. 1037 (Case); Tr. 1076 (Murgoitio); Tr. 1181 (Durrant); Henley Aff. (Ex. 3038).

By failing to follow the statutory mandates for implementing the state-wide policy of the accounting program, the Department violated the law and cannot now rely on that “one fill rule” to justify its accounting for the storage rights in the Boise River. *Supra*.

IV. Filling Storage Space, in Priority, Following a Flood Control Event is Necessary to Protect Streamflow Maintenance.

Dr. Rick Williams provided testimony about the importance of maintaining adequate wintertime flows in the Boise River for fish habitat and recreational and economic opportunities in the Boise River. Tr. 811-830 (Williams). Steve Burgos provided testimony concerning the importance of wintertime flows for the City of Boise’s NPDES permits, TMDL and other general operations. Tr. 1298-303 (Burgos).

During the hearing, the Hearing Officer commented that he viewed this information as having questionable relevance. Tr. 1305. This statement was particularly discouraging since, in prior meetings with the Boise Project and other water users, the importance of the stream flow maintenance account was discussed at length and its importance appeared to have been acknowledged by the Director. Because of the Director’s statements at the hearing impugning the relevance of the streamflow maintenance account to the storage fill computations, further explanation is provided.

As Dr. Williams explained, historical releases to the Boise River from the streamflow accounts were approximately 85 cfs. Tr. 819-24 (Williams). These releases were later increased to 240 cfs. *Id.* In part, this was at the insistence of the Idaho Department of Fish and Game, which continues to advocate for even greater releases of water into the Boise River above the 240 cfs. *Id.* These higher flows are important for the health of the aquatic species in the river. *Id.*

The streamflow maintenance shortage accounts are held by Reclamation and by the Idaho Fish and Game to provide water for this winter flow. In the past, the State has been a strong supporter of maintaining those streamflow maintenance accounts. *See Memorandum Decision & Order on Cross-Motions for Summary Judgment RE: Bureau of Reclamation Streamflow Maintenance Claim*, Water Right No. 63-3618 (SRBA Dist. Ct.) (Sept. 23, 2008). The Department has also recognized the importance of the streamflow accounts by conditioning new water rights so that the rights do not impact streamflow maintenance releases. *E.g.*, Ex. 3012 (Water Right No. 63-31409, Condition 8).

Lucky Peak is the last reservoir to fill in the system. Based upon agreements between Reclamation and the spaceholders, the last accounts in Lucky Peak reservoir to fill are the streamflow maintenance accounts held by Reclamation and Fish and Game. If the reservoirs fail to fill because of flood control releases, the first 60,000 acre feet of that failure to fill comes out of Lucky Peak storage – and, in particular, the streamflow maintenance accounts.⁵ Tr. 535 (Cresto).

In other words, every acre foot of water that is released and allowed to flow down the river – as is the case for flood control releases under the Department’s current accounting program – robs the watermaster of the ability to fill the streamflow maintenance account. Likewise, every acre foot of water taken by junior users during the reservoir fill period directly robs the ability of the streamflow maintenance accounts to fill.

The purpose of the streamflow maintenance account is not to provide water in the current year’s irrigation season cycle. Rather, it is to ensure that there is sufficient water available for the following winter and to provide carryover for additional years in the event of a drought. *See*

⁵ This makeup agreement was intended to deal with physical shortfalls in fill, not junior users taking water that would otherwise have filled the reservoirs after a flood release. Tr. 1183-84 (Durrant).

Tr. 181 (Cresto). In a drought cycle following a flood control release – as has occurred quite often in the Boise River, *see, e.g.*, Ex. 9 – the streamflow maintenance account is the last to fill and may not fill without adequate new inflow. As the presence of the City of Boise at these hearings demonstrates, this insurance for wintertime flows in the Boise River is very important to the public. It is part of the overall delicate balance of providing water for all the needs of the Basin, while still protecting the agricultural and other storage water rights. Concluding there is no “right” to refill upsets that balance.

The current accounting program shorts the streamflow maintenance accounts and places water users on the Boise River at an increasing risk. The current accounting program and the Department’s interpretation of the current accounting program treats water that fills the reservoirs following a flood control release including the water that fills the streamflow maintenance account, as “excess water.” According to the Department, no one has a right to this water, and no one is entitled to store it. That means that the water that would otherwise be available to fill the stream flow maintenance accounts of the Lucky Peak water rights is available for future users and current users who could expand their use. This causes undue stress on the system which can be readily avoided by adopting a proposal for modifying the accounting program as described in Mr. Shaw’s testimony. *See infra* Part VI.

V. The Boise Project Has Compelling Interests in Ensuring that the Storage Rights Are Able to Fill, in Priority, Following A Flood Control Event.

The Boise Project appreciates the opportunity to express the concerns of its landowners, directors and managers over the Department’s waters rights accounting program and is hopeful that the Director will heed those concerns. The directors are, however, skeptical that the Boise Project’s concerns will be heard. In the past, the Director has been the leading proponent of the idea that “paper fill” is “satisfaction” of the water rights. The Director has been in contentious

discussions with Reclamation over its flood control operations in the Upper Snake. These flood control perceptions appear to have spilled into the Boise River, even though the Department helped develop the Water Control Manual – which directs flood control in the Boise River – and even though the Department has had no objection to the flood control and refill operations in the Boise River. Contrary to its position in the Upper Snake, in the Boise the Department has been the leading advocate for greater flood releases. It has been very disappointing to hear the Department’s employees continually try to distance themselves from the flood control operations that the Department advocated for and ultimately blessed. Tr. 459 (Sutter) (“it was really necessary to get the Department of Water Resources blessing on this”).

The Boise Project is also very concerned that the needs and desires of the water users in the Upper Snake is driving the Department’s decisions with respect to operations in the Boise River. This is particularly true since the undisputed testimony is that the Department’s “one-fill rule” emerged out of the Upper Snake to deal with issues in the Upper Snake and was inserted into the accounting program in the Boise River without any communication to the Boise water users. *See* Tr. 428 (Sutter) (Contacted the new watermaster about the “potential use of the Water District 1 water right accounting procedure for the Boise”). Tr. 658 (Tuthill) (one-fill from Upper Snake).

Additionally, the Boise Project was very discouraged by the approach taken by the Department during the hearing. The Department’s cross-examination of the Boise Project and Ditch Company witnesses was aggressive, argumentative at times and contentious at others. There was no inclination that the Department would even consider, let alone recognize, that any of the concerns expressed by the Boise Project and the Ditch Companies had any legitimacy. At the same time, the Department showed no willingness to argue with any of the positions or take

issue with any arguments made by United Water. It was as if United Water and the Department were echo chambers of each other.

The perspectives of the Boise Project water managers were provided by testimony of Mr. Henley and Mr. Page. Mr. Henley was employed by the Boise Project for 35 years. He was assistant project manager to Carl Padour in 1985 and became project manager in 1990. Ex. 3038, ¶ 2. He retired in 2005 before any of this refill issue surfaced. The current manager, Tim Page has been with the Project for 30 years in various capacities including watermaster and assistant project manager.

Mr. Henley's testimony is found in his affidavit, Ex. 3038, and in his hearing testimony. There, Mr. Henley describes his relationship with Hank Koelling. Mr. Koelling had been the assistant manager of the Boise Project, the watermaster for Water District 63 and, upon retiring as watermaster was a director of the New York Irrigation District and the Boise Project. Ex. 3038, ¶ 3. Much of what Mr. Henley learned about the water rights' administration came from Mr. Koelling. Mr. Henley was also working at the Project when the Water Control Manual and the accounting program were implemented in the Boise River. *Id.* at ¶ 4. His understanding, including from his work with the former watermaster, was that water that was released for flood control would not be considered as the water belonging to the districts. Rather, the water belonging to the districts would be the water that filled the reservoir after the flood control releases. *Id.* at ¶ 5. No one, not Mr. Koelling nor any of the other watermasters, nor any one from the Department, ever told him anything different. *Id.* at ¶¶ 5, 9-11.

Mr. Henley also was the manager of the Boise Project at the time the Project protested the 2001 United Water permit when the Department, the parties, and United Water all agreed that the water available for appropriation in the Boise River was not water that was refilling the

reservoir after a flood control release. Rather, it was water that had been released for flood control. Ex. 3038, ¶ 9. This recognition in the water right was understood to be a recognition of the long-standing practice in the Boise River. *See also* Tr. 1002-003 (Squires).

United Water offered a 1993 letter in examining Mr. Henley. That exhibit related to the practice of storing Mores Creek water in Lucky Peak for later delivery to Lake Lowell under the Boise Project's natural flow rights. Tr. 1167-68 (Henley). The Department, through Mr. Tuthill, informed Mr. Henley that this practice would no longer be allowed. There was a reference in that letter to "one fill," but as Mr. Henley explained, "there was no inclination, whatsoever, at that time that that had anything to do, other than the Lucky Peak storage of the Mores Creek water to Lake Lowell." Tr. 1170-71 (Henley). "That was our whole understanding or the whole thing that was even ever mentioned at that time that I recall." *Id.* Otherwise the "one fill rule" was never discussed with the Department in connection with flood control operations. *Id.*

Mr. Page had similar education in water rights administration on the Boise River. Again no one from the Department of Water Resources, none of the watermasters and none of the Director's predecessors ever advised Mr. Page that the Districts had no right to fill the reservoirs following flood control releases and he had never been told that the reservoirs did not fill in priority. Ex. 3039, Tr. 968-69 (Page).

Mr. Henley and Mr. Page explained the need for the water users in the District to have some way of knowing how much water would be available for them in flood control years. Water users simply cannot wait until the day of allocation to know whether or not the Department has allowed the reservoirs to refill. If the Boise Project districts do not have the right to fill that reservoir, how can the manager impart to the water users how much water would be available for them? The water users need to know early in the year in order to plan what

crops to put in the ground. It is hard enough to make those predictions with the variations in weather, snow fall and temperature. Adding a complication that other users can take water that otherwise would have filled the reservoir under the parameters of the Water Control Manual imposes an unacceptable burden on the water users.

Vern Case is an important witness to all of these events. He has been a director of Wilder Irrigation District continuously since the early 1980s, before the Water Control Manual and before the accounting program. Tr. 1023 (Case). Mr. Case and the managers describe the water allocation and explained that for the Boise Project districts, the Arrowrock and Anderson Ranch storage rights are the most important rights that they have. The farms in the district depend on the ability to fill the Anderson and Arrowrock storage. Mr. Case described the reasons for participation in the lawsuit to confirm the property interests of the districts in the storage water rights. Tr. 1029 & 1031 (Case). That property interest is important to the livelihood of the irrigators in the Boise Project. Tr. 1031 (Case).

Mr. Case also described the Wilder Board as experienced in water and farming and willing to stand up for the interests of the irrigation district. Tr. 1035-36 (Case). When he came on the Board in the 1980s, it was understood and communicated to him that there was a right to fill the reservoirs after flood control releases and that no one ever told the Wilder Board otherwise. Tr. 1036-37 (Case). When the Water Control Manual was presented to the Wilder Board, there was never any indication that increasing the early season flood control releases (as requested by the Department) would have impacted the ability to fill the water rights. Tr. 1039-40 (Case).

Mr. Case has been on the Board of Water District 63 and is the current chairman. Prior to this refill issue arising in the Upper Snake, no one from the Department ever told the water users

in Water District 63 that their rights did not fill in priority or that the rights were satisfied by paper fill.⁶ Tr. 1046-47 (Case). The Advisory Committee of Water District 63 is unanimous that they do not believe that paper fill should be considered satisfaction of the water right. Tr. 1048 (Case). That is true, even in the face of the Department's many subsequent efforts to convince the Advisory Committee that "paper fill" is "satisfaction" should be the rule in the Boise.

Mr. Murgoitio testified as a director for the New York Irrigation District and the Boise Project. He is a third generation farmer and his father had been on the Board of the New York Irrigation District since the mid-1970s. Richard took his father's place on the Board when his father passed away in 1993. The Murgoitios have been closely involved in water rights in the Boise Project and the New York Irrigation District for decades. Mr. Murgoitio explained that it was the understanding of the New York Irrigation District and its landowners that all water that was filling the reservoir after flood control releases was water that belonged to the districts. Tr. 1074-75 (Murgoitio). Mr. Murgoitio further testified that there was never an instance where fill of the reservoir was curtailed to provide water to junior users. Tr. 1076 (Murgoitio). The water used by the New York irrigations is the water turned into the headgates of the fields, not the water released for flood control. Tr. 1082 (Murgoitio).

In addition, Mr. Murgoitio described meeting with the Director when he was chairman of the Boise Project Board following the issuance of the 2013 Basin Wide 17 District Court opinion. There, the Director indicated to the Board that the refill issue giving rise to Basin Wide 17 could be solved by either adjusting the accounting program or granting a beneficial use claim. Tr. 1078 (Murgoitio). Of course, to date, the Department's lawyers have been working on behalf of the State to do whatever it takes to prevent the districts from obtaining a beneficial use right

⁶ Ms. Cresto who made presentations to Water District 63 did not contradict Mr. Case's testimony on this point, even though she was called as a rebuttal witness.

and there has been no change in the accounting program. In short, none of the concerns raised by the districts have been satisfied.

Mr. Durrant testified on behalf of the Boise Project and the Boise-Kuna Irrigation District. Mr. Durrant's grandparents settled on the land in the mid-1940s and currently there are three generations of Durrants working the farm. Tr. 1175-76 (Durrant). Mr. Durrant describes how reliant Boise Kuna and Boise Project are on their storage rights. Tr. 1178 (Durrant). He shared the concern that the State's effort to diminish the water right by saying that there is no right to fill the reservoir after a flood control event would constitute a takings of the adjudicated rights that go with the property and that these water rights are important to provide a source of income for the farmers. Tr. 1179 (Durrant). He also described the need to know as early in the season as possible when water would be available and how much would be available out of these storage accounts. Tr. 1179-180 (Durrant). Mr. Durrant described his education from previous directors and, based upon his understanding, no one with Boise Kuna ever had any inkling that there was no right to refill the reservoirs. Tr. 1181 (Durrant).

Once the water users in Boise-Kuna heard of the concept raised by the Department about paper fill being satisfaction of their water rights, they were very dissatisfied. This information resulted in very heated discussions because no one understood how the State could argue that water that was being released to protect the safety and livelihood of the residents of the Boise River was water belonging to the irrigators. Tr. 1184-85 (Durrant). Indeed, the water released for flood control cannot be used by the irrigators. Rather, the water that is put to beneficial use by the irrigators is the water that fills the reservoir following flood control releases. Tr. 1185 (Durrant).

Mr. Platt testified on behalf of the Boise Project and the Wilder Irrigation District. His family moved to the area prior to the construction of Lake Lowell, and his son is a fifth generation farmer on the same farm land. Tr. 1227-228 (Platt). Mr. Platt described the economic vitality of the farming community in the Treasure Valley. In Canyon County alone the economic impact of agriculture is \$522 million as of 2012. Tr. 1229-30 (Platt). The agricultural community in the Treasure Valley relies upon the storage water in the reservoirs. Tr. 1230-31 (Platt). He also described the importance of having knowledge as early in the season as possible to plant the appropriate crops. Tr. 1232-34 (Platt). Mr. Platt also confirmed that the water users in the Boise Project and Wilder cannot put water to beneficial use that has been released for flood control because once the water goes past the headgate of the New York Canal, it cannot be obtained anywhere else from the River for use by the Boise Project districts. Tr. 1236 (Platt).

Mr. Platt described the negative reaction that the farmers in Wilder had to the Department's concept that their water rights would be satisfied by water that had been released to go down stream. Tr. 1238-39. Indeed, everyone that the Wilder directors talked to about the Department's position was surprised to hear that the Department would take such a position. Tr. 1239-40.

Mr. Platt also described the negative impact to generation for the districts' power plants at Arrowrock, Lucky Peak, and on the canal systems if less water was allowed to be stored in the reservoirs as a result of the inability to fill the reservoirs following flood control releases. Tr. 1241-45. He confirmed, as a member of the Arrowrock Steering Committee during the construction of the Arrowrock Hydroelectric Project, that the work was sequenced so that no water was released out of Lucky Peak or Arrowrock to build the power plant. Tr. 1245. Likewise, the Arrowrock Valve Project involved no release of storage water. Tr. 765 (Mellema).

As with the other directors, Mr. Platt confirmed that water released for flood control was not put to beneficial use and that the water that was put to beneficial use was water that refilled the reservoirs. Tr. 1246. He expressed the concern that this idea of “paper fill” as “satisfaction” of the water right would be adverse to the districts because juniors could take water that has previously been stored in the reservoirs ahead of the districts who had always relied upon that water and put it to beneficial use. Tr. 1247.

The testimony of the Water District 63 watermasters is also important to understand the concerns of the Boise Project to the consequences of the State’s decision to treat water that is released for flood control as water that is satisfied the irrigation district’s water rights. The watermasters understood that the accounting program was a tool to help them fill the water rights. They understood the water rights were filled in priority following a flood control release, including the rights of the storage right holders. They understood that irrigators cannot irrigate with paper fill and that it was not appropriate for the irrigators to bear the burden of releases that were made for the benefit of property owners in the City of Boise and along the Boise River.

The watermasters also recognized that the water that is surplus or excess to the flows of the Boise River is water that has been released for flood control under the directions of the Water Control Manual and flood control rule curves. That is why the watermaster recommended that conditions be placed on any new rights limiting diversions to times when water was being released for flood control. Everyone understood that that was the case, including United Water – no matter how hard United Water tries to deny that fact today. No one at the Department ever advised the watermaster that his interpretation of water that was available for appropriation was wrong. Tr. 860-61 (Sisco).

VI. Proposed Modifications to the Accounting System

David Shaw is an engineer and hydrologist with over 40 years of experience in water rights administration in the State of Idaho. He was recognized, without objection, as an expert in water rights accounting and hydrology. Tr. 1462 (Shaw). Mr. Shaw worked for the Department, and its predecessors, for over 20 years and managed the kick-off of the Snake River Basin Adjudication for the Department.

Mr. Shaw's challenge was to review the Department's technical memorandum to the Director, provide comments, and provide proposed modifications to the accounting system to protect the interests of the storage right holders. Mr. Shaw concluded that the 1985 Water Control Manual was the result of a joint effort by the Department, the Corps, and Reclamation, to develop an operational plan, which included inputs from the Department, for the Boise River. Tr. 1465 (Shaw).

Mr. Shaw reviewed a portion of the Water Control Manual prepared by the Department, Ex. 2186 (§ 7.06), which provides that, when flood control regulation is occurring, there is "surplus" water in the system in excess of irrigation demand and not charged to storage. Tr. 1471-75 (Shaw). However, the accounting program fails to match the description of the operations in the Boise River as described by the Department in the Water Control Manual. Instead, the accounting program charges all flood control releases up until the time of paper fill to storage, even though this so-called "storage" water simply runs down the River to the sea. Contrary to the Water Control Manual, the Department does not allow junior water users to take that water as natural flow. Tr. 1475-77 (Shaw). This testimony was un rebutted.

In his examination of the historical and accounting records, Mr. Shaw found no explanation from the Department as to why the Department said one thing in the Water Control

Manual and took a completely different action in the water rights accounting program. There is no contemporaneous explanation for the accounting program. Tr. 1478 (Shaw). Ms. Cresto also could not find any contemporaneous explanation for these divergent actions. Tr. 202 (Cresto) (no “evidence of outreach to the water users in Water District 63 about this accounting program”). Mr. Sutter did not explain the reason for the change either. Nothing in the accounting program or the documentation for the program states that the accounting program’s calculation of paper fill requires a finding of “satisfaction” of storage rights. Tr. 1484 (Shaw). Paper fill does not have to equate with “satisfaction.”

Mr. Shaw’s proposal to modify the program is to recognize that excess or surplus water over and above what is necessary to meet the senior irrigation demands below Lucky Peak should be considered natural flow and would be available for anyone with a water right. Tr. 1489 (Shaw). This change to the accounting system would have no effect on junior rights because, in virtually every flood control year during the refill period, extra water is going past Middleton that would be available to use as natural flow and not as storage.

Under the accounting program, storage water users must take water that is available to them whether they want to use it or not. However, there is no rule or statute that authorizes the Director to force a user to take water that he does not want or need. The unintended consequence of the accounting program is that water will leave the system at Middleton – unable to be used by water users in the Boise River. Tr. 1492 (Shaw) (accounting program “seems to be a designed method to run water down the River”). The accounting program prohibits juniors from taking natural flow water that would otherwise be available to them. Mr. Shaw proposes to change the accounting to allow the juniors to take the flood control releases as natural flow. Tr. 1492 (Shaw). Since the accounting program accounts for the physical contents of the

reservoirs on a daily basis, it is possible to use the existing accounting program to account for water in the fashion described by Mr. Shaw. Tr. 1493 (Shaw).

Mr. Shaw further stated that, in his experience, there has not been a situation outside of statutory exemptions where water was entitled to be diverted without a water right. Tr. 1494 (Shaw). The failure to recognize a right to fill the reservoir after a flood control release under a water right puts this stored water at risk for downstream demands. If the water is being stored without a water right, what is to prevent a downstream entity from calling for or asking the courts to require releases of water from Reclamation facilities which are storing water, according to the Department, without a water right? Tr. 1494-98 (Shaw); *accord* Tr. 1248 (Platt) (risk that Reclamation could do “other things” with that water).

Additionally, Mr. Shaw found that the Department’s currently stated concern that Reclamation would “control the river” and “run water out of the system” was not articulated by the Department in 1986. Tr. 1501-02 (Shaw). Rather, the sole justification stated at the time was that the Department had an accounting program in the Upper Snake that it wanted to incorporate into the Boise River and that the new watermaster wanted to use a computerized accounting system. *Id.* Furthermore, the constraints on the Corps and Reclamation because of the junior nature of Reclamation’s water rights on the Boise River and the limits of how flood control can take place with a 6500 cfs flow limit to protect the City of Boise mean that the ability of these agencies to run wild is not a realistic concern. Tr. 1499. In the end, the Department produced no actual evidence of the stated basis for the concern over “federal control” of the Boise in light of the Water Control Manual, even though a rebuttal witness was called.

In the one instance of such a suggestion, Ms. Cresto expressed concern about the flows released from Anderson Ranch for fisheries purposes in the South Fork by Reclamation. Tr. 627

(Cresto). The evidence is clear, though, that these releases are at the behest of the State (Idaho Department of Fish & Game) and under an agreement with the State. *Id.* 627-28 (Cresto); Tr. 741-42 (Mellema). Moreover, the Department has never actually expressed any concern over operations of Anderson Ranch. Tr. 629 (Cresto).

The Department's counsel cross-examined Mr. Shaw by arguing with him over whether the data supported his conclusions. Tr. 1524-39. Yet, no data was produced by the Department's counsel to show that Mr. Shaw's conclusions were wrong. The rebuttal testimony of Ms. Cresto did not rebut Mr. Shaw's conclusion that the Department's accounting resulted in wasting water down the Boise River that otherwise could have been available as natural flow for junior users during the period of time that flood control releases were occurring.

The Department offered no cogent explanation for why allowing water to leave the system at Middleton is good policy. Nor did the Department make any effort to attempt to compare the amount of time or the volume of water that would have been saved for junior users under Mr. Shaw's proposal when compared to the number of days the Department believed that there would have been a window of opportunity that juniors would have been required to take storage. *See* Ex. 9. The Department's unwillingness to see the benefits of this proposal remains a mystery.⁷ In truth, Mr. Shaw's proposal would provide for the maximum use of the State's waters. *See, e.g., Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808 (2011) ("The

⁷ It is clear from the record that there is only one entity on the Boise that supports the Department's position in this case and that is United Water. None of the other juniors that the Department claims to be looking out for have protested. Not the City of Boise, as the City of Boise supports the position taken by the Boise Project and the Ditch Companies. Micron and Surprise Valley have not objected. None of the other junior users have objected even though all were notified by the Director of the contested case. They haven't done so much as write a letter in support of the Department. There is nothing but silence. The Water District 63 Advisory Committee unanimously disapproved of the Department's approach. Tr. 1048 (Case). It is only United Water that stands to gain by this effort. Why the Department insists upon protecting the corporate profits of a foreign entity at the expense of farmers, ranchers, homeowners and cities in the Treasure Valley has never been explained.

policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources”).

VII. The Department’s Rebuttal Exhibit, Exhibit 9 Does Not Demonstrate Injury to Water Rights.

At the conclusion of the presentation of witnesses by the Boise Project and Ditch Companies, the Department elected to recall Ms. Cresto to explain a new exhibit that she had prepared and completed the last day of the hearing. Ex. 9. This document was created in consultation with the Director/Hearing Officer and counsel for the Department. Tr. 1585-86.⁸

The rebuttal exhibit is improper expert testimony because it is technical in nature and the witness did not provide the background data or information considered by the witness in forming the opinion. *See* I.R.C.P. 26(b)(4)(A)(1). It is simply not enough for a witness to say that she has considered the accounting records – a foundation must be laid. In this case, adequate foundation was not provided.

The document was apparently intended to respond to both the testimony of Mr. Sisco, concerning when water rights were made available to junior users, as well as that of Mr. Shaw, concerning Ms. Cresto’s view that junior users would be injured by modifying the accounting program. However, in preparing Exhibit 9, Ms. Cresto chose to provide only one side of the evidence on this point.⁹

The exhibit attempts to show days when Boise River juniors actually diverted after flood control ended and prior to the day of allocation. This was done by calculating diversion days in

⁸ The Boise Project believes that this consultation between the Hearing Officer and the witness as the Department’s technical expert about creating the rebuttal exhibit violates the APA, the Department’s rules and the due process rights of the Boise Project as a party to the hearing. The Exhibit and rebuttal testimony should be disregarded for that reason alone.

⁹ The Department is supposed to be an independent evaluator of the evidence, yet Exhibit 9 provides only half of the story. Such one-sided approach from a neutral agency and Hearing Officer is questionable, at best. All the facts should have been presented, but they were not.

excess of senior natural flow rights. Yet, as Mr. Shaw demonstrated, in his unrebutted testimony, right now the accounting program curtails junior users' rights during flood control releases – contrary to the Water Control Manual as drafted by the Department. Ex. 2186 (§ 7.06, p. 7-26) (flood releases are “surplus” and should not be counted against storage). Neither Ms. Cresto nor any other Department witness made any attempt to quantify that amount of water or the number of days that water was not available to juniors because of the accounting program's failure to follow the Department's prescription for operations in the Boise River.

Exhibit 9 purports to show the number of days “junior” Boise River water rights diverted natural flow between the date flood control ended and the day of allocation.¹⁰ The date of allocation is the day reservoir storage is allocated to the contract spaceholders and should be at or near the date of maximum physical fill of the Boise River reservoirs.

Exhibit 9 identifies nine entities who are described as “juniors” and who allegedly took water between the date flood control ended and the day of allocation. Of the nine, only three have water rights that are junior to Lucky Peak's 1963 water right: United Water with its 1993 and 2001 permits, Eagle Island Park's 1982 water right and Seven Suckers' 1971 water right. The other six are all senior to Lucky Peak – and four of those are also senior to Anderson Ranch's 1940 water right: Discovery Park's 1935 right, Ridenbaugh's 1924 right, Boise Valley's 1921 right and Seven Suckers' 1915 right. In other words, six can call for water ahead of the 1963 Lucky Peak right and four can also call water ahead of Anderson Ranch. Thus, Exhibit 9 does not show injury to junior rights or that the watermaster delivered water to rights

¹⁰ The date on which flood control ends is somewhat subjective with testimony indicating these dates are obtained from the Bureau of Reclamation and separately confirmed. Confirmation was purportedly based on flows at Middleton, but the flows at Middleton were not consulted for the rebuttal exhibit leaving no way to check the accuracy of these conclusions. Tr. 1565 & 1579.

junior to Lucky Peak between the end of flood control and the Day of Allocation for those six rights.¹¹

Furthermore, United Water's 2001 water right (Water Right No. 63-31409) includes Condition 14, limiting diversions to times when "the Boise River is on flood release below Lucky Peak dam/outlet." Yet, Exhibit 9 purports to show diversions during the period after flood control ends until the day of allocation. This right should not be included in the table since Condition 14 prohibits diversions under this right after flood control ends.

The first three rights identified in Exhibit 9 for Spring Shores, Sandy Point and Discovery Park are for amounts of 0.075 cfs, 0.27 cfs and 0.1 cfs, respectively and all are senior to Lucky Peak. The daily accounting posted online shows zero diversions for all three of these rights for the period 5/24/2012 – 6/27/2012 and 5/5/2014 – 6/15/2014. The online water district data shows Spring Shores did divert between 0.1 to 0.2 cfs during the period 5/24/2012 – 6/27/2012. The online water district data does not show any diversions under the rights for either period except that noted for Spring Shores in 2012.

As for the Eagle Island Park right, there is no water right in the Department's database that matches any surface water right described for Eagle Island Park. The water right is not listed in the Water District 63 Black Book. Ms. Cresto's presentation, Ex. 1020, lists this Eagle Island State Park right as 63-9929. However, 63-9929 is a ground water right. A ground water right should not be included as a right that could be adversely affected by storage fill following a flood control release. Eagle Island State Park also receives surface water from the Hart-Davis Canal, but the park's surface water rights have an 1864 priority date, according to the Water

¹¹ Any of the rights senior to Lucky Peak would be able to call for water from Mores Creek past Lucky Peak, irrespective of the status of the other two reservoirs on the system. Since Arrowrock fills the earliest of the 3 reservoirs, rights senior to Lucky Peak could call for water from the entire basin, except the South Fork upstream of Anderson Ranch for a large part of the fill period.

District 63 Black Book. If the park was taking in excess of its Boise River water through the Hunt-Davis Canal, it would properly have been charged for storage water out of its storage account, but this has nothing to do with diversions from ground water under 63-9929.

The Seven Suckers' 1971 rights total 0.5 cfs, an amount less than the ability of the Watermaster to control at Lucky Peak. These rights could not have been calling for water to be released from storage during the window of time identified in Exhibit 9. The rights were only exercised twice in the entire history shown on Exhibit 9. Moreover the two water years cited for diversions (2008 and 2011) were both very large water years during which there was ample water leaving the system during the post-flood control period to supply the rights without any releases from Lucky Peak.

Ms. Cresto agreed at the hearing on cross examination that the flows at Middleton in 1999 were more than 1000 cfs above the operational flow between the end of flood control and the day of allocation. *See* Ex. 1019. Any juniors taking water during the five days period described in 1999 would not have been affecting storage fill and vice-versa. Tr. 1575-576 (Cresto). Because of this, Ms. Cresto agreed that 1999 year should be crossed off the list. Tr. 1576 (Cresto).

Since Exhibit 9 was only prepared and presented on the last day of hearing, the Boise Project had no real opportunity to review the basis of this testimony or its foundation during the hearing. Since that time, the daily accounting records for four "flood control" years have been examined to compare the availability of water for junior water rights under the current system to the availability under a modified accounting procedure that accounts for physical storage in the reservoirs.¹² The years reviewed were 2006, a year with over 1 million acre feet of flood control

¹² These daily accounting records are documents which the Director said would be "judicially" noticed.

release; 2008, a year with about 120 thousand acre feet of flood control release; 2012, a year with about 810 thousand acre feet of flood control release; and 2014, a year with about 65 thousand acre feet of flood control release.

In 2006, flood control release began on 1/25/2006 while both Spring Valley/Micron (Spring Valley)¹³ and United Water¹⁴ were diverting.¹⁵ Under the current accounting system, both Spring Valley and United Water were charged for storage for those diversions. Spring Valley continued to be charged for storage for a period of 66 days. United Water was charged storage for 44 days until their 1993 water right showed as in priority in the accounting records. These charges are contrary to the Water Control Manual, which identifies those releases as “surplus.” Ex. 2186 (p. 7-26). “Refill” under the current system began on 3/29/2006 followed by periods of storage gain and release until the maximum physical fill was reached (on 6/27/2006). Under a physical fill accounting procedure, these rights would not have been charged storage until the day of maximum fill. Indeed, during the period between when flood control releases began (1/25/2006) and the date of maximum physical fill (6/27/2006), there was always extra water in the system, which, according to the Water Control Manual, should have been treated as “surplus” water available for diversion by junior water rights. As a result, the Department’s accounting system shorted the juniors by several months, when compared to the accounting proposed by the Boise Project.

¹³ The list of water rights from the WD63 Black Book lists six water rights in the name of Spring Valley. The Department’s database shows only one of the rights, 63-161BN in the name of Spring Valley, the others are either in the name of NMID or Boise Valley Ditch Co. Spring Valley does not have any winter water rights in the current accounting.

¹⁴ The list of water rights from the WD63 Black Book list four senior water rights in the name of United Water. The Department’s database shows one of those rights, 63-147D to be in the name of Boise Valley Ditch Co.

¹⁵ This fact shows that the two largest junior diverters on the Boise River take water in the non-irrigation season that would be available to them as natural flow under the proposed modifications to the accounting program, if not for the Department’s practice of charging flood releases to storage. In other words, allowing these rights to take flood releases as natural flow involves a time period when these users have historically taken this flow, just as storage, instead of natural flow.

In 2008, a small flood control release began on 4/18/2008 and, according to Exhibit 9, continued until 5/28/2008. However, actual releases only continued through 5/7/2008, during which time United Water was charged storage. Again, those charges were contrary to the Water Control Manual and would be counted as natural flow under the proposed physical fill accounting procedure. On 5/8/2008, Lucky Peak's Last to Fill account began accruing storage. Since that right is junior to United Water's 1993 right, storage use ended for United Water on that day. Flood releases began again on 5/13/2008 and continued for five days, which, according to the Water Control Manual, should have replaced storage uses occurring on those days. Refill began on 5/19/2008 and continued through 6/16/2008 with intermittent days of storage accrual and storage release under the current accounting procedure but with a consistent increase in physical contents of the reservoirs each day. Although the reservoirs were physically filling, there was extra water available for diversion by juniors on each of the 29 days during this period.

On 6/17/2008 the current water right accounting was "reset" to allow the second Arrowrock water right to come back on and accrue additional storage. This reset was accomplished by reducing the amount of accrued "paper fill" storage to less than 11,600 acre feet – allowing the 1938 priority to come back on. The paper fill of Anderson Ranch was also reduced was the Last to Fill right for Lucky Peak. This reset caused United Water to go back on storage on a day when flood control releases were being made. Contrary to Exhibit 9, United Water used storage on 6/17, 6/20 and 6/21. However, under a physical fill procedure, natural flow would have been available for junior rights at that time and United Water would not have been charged storage.

In 2012, flood releases began on 2/13/2012 while Spring Valley was diverting storage water.¹⁶ United Water began diverting storage water again on 2/20/2012 and both Spring Valley and United Water diverted storage through 2/28/2012¹⁷ when their senior natural flow rights were allowed to turn on. Spring Valley would have been allowed to divert natural flow for an additional 23 days under a physical fill accounting procedure. Yet, these users were charged for storage. Refill began on 3/26/2012 and continued until the reservoirs reached their maximum physical fill on 6/9/2012. During this 76 day period all rights, including junior rights, were on and would have been on under a physical fill accounting procedure. Extra water was available for diversion by additional rights during all but one day during that time (6/1/2012). Storage releases beginning on 6/10/2012 appear to be for flow augmentation and junior rights continued to divert through 6/26/2012. However, Exhibits 9 and 1020 do not distinguish the Flow Augmentation releases from the flood control releases. Hence, Exhibit 9 is of questionable utility for 2012.

In 2014, the flood control release was the smallest of any year described on Exhibit 9. Flood control releases began on 3/29/2014 and ended on 5/5/2014. The discharge at the Glenwood gage in Boise never reached 2,000 cfs during the releases.¹⁸ Under normal flood operations, this would have been a 5 day event instead of a 38 day event as occurred in 2014. The Woods' 1986 water right (63-10348) was charged storage from 4/3/2014 – 4/8/2014 while there was 1,800 cfs or more going past the Middleton gage – something that would not have happened with a physical fill accounting procedure and should not have happened according to the Water Control Manual. Similarly, United Water was charged storage from 4/28/2014 –

¹⁶ United Water had diverted earlier in the year but turned off on 2/6/2012

¹⁷ Under the current accounting procedure Spring Valley and United Water should have been charged storage on 2/29/2012 since their natural flow rights don't begin until March 1.

¹⁸ Normal flood control objective is no more than 6,500 cfs at the Glenwood gage.

5/2/2014 while more than 500 cfs was going past the Middleton gage. In all, multiple entities were charged storage for a total of 147 days during the 38 day period from 3/29/2014 – 5/5/2014 that could have been diverted as natural flow with a physical storage accounting procedure. United Water was charged storage for 4 days during the period from 5/5/2014 – 6/15/2014, contrary to Exhibit 9 showing United Water was not charged for storage during that period.

This exercise demonstrates several very important points. First, Ex. 9 does not impeach Mr. Sisco's testimony about how he delivered water. Charging water to an account as storage or natural flow after the fact is a far cry from showing that water was released from Lucky Peak by the watermaster for any of the diversions. Tr. 1565 (Cresto) (no evidence that the watermaster actually released water from Lucky Peak for these diversions). *See also* Tr. 446 (Sutter) (watermaster talks to canal companies to determine how much water to order). Second, the exhibit improperly included purported impacts to rights that would otherwise have the right to call on releases of water ahead of the fill of the Lucky Peak and Anderson Ranch rights. Third, the exhibit improperly includes a groundwater right that is irrelevant to the analysis. Fourth, the exhibit does not show the water in the river available for juniors to take as natural flow, so there is no way to know if the purported impact is real or imaginary from the exhibit. Fifth, the exhibit is admittedly over-inclusive of years when there is no impact. Finally, the exhibit fails to account for the fact that the current accounting program forces juniors to take storage at a time when they could be taking natural flow (as described in the Water Control Manual) and so the net effect of the current accounting program causes greater harm to the juniors and releases more water downstream than the proposal made by the Boise Project.

CONCLUSION

The contested case hearing demonstrated some undeniable truths. The history of development of irrigation storage and flood control operations in the Boise River is very different from the Upper Snake. The battle over when and how flood control should take place was settled long ago on the Boise River in a collaborative effort between the Department, the Corps and Reclamation. Flood control provides the State, the capitol and downstream landowners with significant benefits. Flood control provides no benefit to the Boise Project districts and water users.

When flood control was engrafted into the pre-existing irrigation storage system on the Boise, it was only permitted on the condition that it would not harm the existing storage rights. The State was a full partner at the table with the water users when these promises were made. Not once during these negotiations did the State or Department tell the water users that their water rights would be deemed “satisfied” by water released for flood control operations. Thus, for over 30 years, the joint operations of the reservoirs was conducted under existing water rights and with no contemplation that juniors would take ahead of water filling the reservoirs after flood control.

The Department says it changed all this when it imported a computer accounting program from the Upper Snake into the Boise River. Did the Department tell the water users about this change? It did not. Thus, none of the water users knew that the computerized accounting program was viewed by the Department as having diminished their water rights. There was no open process to provide a forum to discuss opposing points of view. There was no effort even to ask the water users on the Boise River what they thought. Instead, an inflexible State-wide “one-fill rule” developed in the Upper Snake for all on-stream reservoirs was imposed on the Boise

River without any consideration for how and why flood control came to be employed on the Boise River.

The Department and United Water persist in disparaging the Boise Project District's rights as merely contractual. They are not. The districts have equitable title to the water rights in the storage reservoirs. They own the water rights. The Supreme Court acknowledges their property interest in the water rights. *Pioneer, supra*. This property interest must be protected by the accounting program.

Whatever dispute there may be about how the accounting program works or is intended to work or whether or not it was implemented by the watermaster in a way that the Director would like them to have implemented them, there is no dispute that the accounting program is at odds with how the Department described water right accounting in Section 7.06 of the Water Control Manual. There, the Department stated that flood control releases over the senior irrigation demands were "surplus" to the system that can be taken without charging storage. There is no dispute that this "surplus" release was historically considered the water available for appropriation on the Boise River. A simple fix would be to recognize today what the Department recognized in 1985 and treat these surplus flood releases as natural flow.

There is grave danger to the water users on being told they have no water right to fill the reservoir. This pronouncement leaves them at significant risk that other users or other forces will take that water and prevent the fill of the reservoir for use by the district's landowners. The "one-fill rule" fosters uncertainty and makes it difficult to plan what crops to plant. It makes the water manager's job doubly difficult in flood years, when the flows should provide great certainty. It certainly takes the legs out from under the Department's repeated promises of "greater assurance" of refill.

In 2014, the Director provided a draft letter for the Governor explaining to the water users (and legislators) his objectives. In that letter, the Director assured the Governor he shared these goals.¹⁹ Specifically, the letter concludes that these judicial and administrative proceedings must ‘ensure the continuing right to store water is not undermined and that the users of water are protected from ‘claims of the federal government, downstream states and other parties.’”

The current accounting program accomplishes none of these goals and objectives. The Department witnesses admit that the program, as it is currently interpreted, puts the water users at risk of future users who might seek to appropriate the inflows to the reservoirs after flood control. The observation of the Boise Project witnesses that the State has represented publicly that it needed to protect future juniors was not rebutted. Telling the water users they have no right to fill the reservoirs following a flood control release is not only a slap in the face, but it has significant consequences to the reliability of the water rights.

Modifications to the accounting program as suggested by the Boise Project and Mr. Shaw in the hearing will, however, accomplish the goals and objectives outlined in the Director’s draft letter to the Governor. We urge the Director to carry through on his promise to the Governor and the Boise Project and modify the program to provide them the protection they so dearly require.

DATED this 28th day of September, 2015.

¹⁹ Email from Gary Spackman to Stephen Goodson and David Hensley, *RE: Draft Letter-Inquiry from Legislators about Reservoir Fill with Attachments* (Oct. 21, 2014) (http://www.idwr.idaho.gov/files/legal/WD63/WD63_20141021_Email_from_GSpackman_to_SGoodson_DHensley_w-attachments.pdf).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September, 2015, I caused to be served a true and correct copy of the foregoing EXPERT WITNESS DISCLOSURE OF BOISE PROJECT BOARD OF CONTROL by the method indicated below, and addressed to each of the following:

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