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Attorneys for the Ditch Companies

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	**DITCH COMPANIES' POST-HEARING MEMORANDUM**

This Post-Hearing Memorandum is filed by Sawtooth Law Offices, PLLC, on behalf of Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-Operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company (hereinafter collectively referred to as the "Ditch Companies").

I. BACKGROUND

On October 22, 2013, the Director ("Director") of the Idaho Department of Water Resources ("IDWR" or the "Department") issued a *Notice of Contested Case* initiating this

proceeding "to 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." *Notice* at 6. The Director's *Notice of Contested Case* also stated an intention to develop a record to document "how and why existing accounting methods and procedures 'count' or 'credit' water towards the water rights for the federal on-stream reservoirs in . . . Water District 63" because there is no such formal record, and the informal IDWR records that do exist are "scattered and incomplete." *Id.* at 3, ¶ 6. The *Notice* ordered that "water users with rights to divert, store, or use water in Water District 63 that have concerns and/or objections regarding how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs in Water District 63 are to submit statements of the concerns and/or objections to the Department." *Id.* at 6. The Director's transmittal letter serving the *Notice* on the Ditch Companies and other Water District 63 water right holders stated: "Your participation is not mandatory but any decision made in the proceeding will be binding upon all water users that received notice of this proceeding."

The Ditch Companies and the Boise Project Board of Control filed various pre-hearing motions and made various objections to the Director's initiation and conduct of these proceedings which are of record and are reserved for the purpose of appeal. These issues cannot be remedied at this point because there is no remedy or relief which the Ditch Companies can now request from the Director. One issue of particular concern to the Ditch Companies that arose on the final day of hearing is the Director's multiple *ex parte* communications and conferences with IDWR's expert witness Liz Cresto during the course of the proceedings, including the preparation of an exhibit to impeach the Ditch Companies' witness, former Water District 63 Watermaster Lee Sisco. *See* Tr., Vol. V, pp. 1561-1563, 1585-1586, 1588-1589. For

the record, the Ditch Companies object to these *ex parte* communications; the Director's efforts to influence the evidence while presiding as hearing officer over the hearing; and the Director's and the Deputy Attorney General's participation, advocacy and cross-examination of witnesses when IDWR was supposedly a non-party to this Contested Case and when the Director was supposed to be an impartial hearing officer.

The Ditch Companies have understood from the Director's *Notice of Contested Case* that it is not their burden to present a record to explain IDWR's accounting procedures. The primary record the Director and IDWR presented for this purpose is the November 4, 2014 Memorandum the Director asked IDWR staff hydrologist Liz Cresto to prepare on or about September 10, 2014 "pursuant to Rule 602 of the Department's rules of procedure (IDAPA 37.01.01.602) explaining: (1) how and why water is counted or credited to the water rights for reservoirs in Basin 63 pursuant to the existing accounting methods and procedures; and (2) the origin, adoption, and development of the existing accounting methods and procedures in Water District 63." *Order Lifting Stay and Notice of Status Conference*.

The Ditch Companies' concerns about IDWR's explanation of its storage water right accounting methods and procedures for the Boise River Reservoirs (Arrowrock, Anderson Ranch, and Lucky Peak) are: (1) IDWR erroneously presumes that inflows to the Boise River Reservoirs that are required to be released for flood control purposes are "physically and legally available" for beneficial use storage; (2) IDWR therefore asserts that such inflows "fill" and "satisfy" the reservoir storage rights, so that (3) after flood control releases, the filling of the reservoirs occurs without a water right, under no priority, and is subject to the delivery demands of existing junior water rights and future appropriations of water. The Ditch Companies'

concerns and objections to IDWR's interpretation of its method of storage water right accounting are outlined below, and are supported by the record developed through this Contested Case.

The Ditch Companies' concerns and objections regarding IDWR's interpretation of its storage water right accounting method can be resolved through this proceeding by the Director issuing an order acknowledging that: (1) reservoir inflows that are required to be released from the Boise River Reservoirs for flood control purposes pursuant to the 1953 Agreement and the 1985 Water Control Manual are not "physically and legally available" for beneficial use storage and therefore do not accrue to, fill or "satisfy" the reservoir storage rights; and (2) reservoir inflows that are physically stored in the reservoirs during flood control operations, during and after flood control releases, accrue to the storage water rights in priority until the reservoirs reach maximum storage (*i.e.*, "maximum physical fill" or "maximum reservoir contents").

Based on these acknowledgments the Director should clarify that IDWR's method of storage water right accounting does not dictate that water released from the reservoirs for flood control purposes be "counted" or "credited" to the filling or "satisfaction" of the storage water rights, or that the storage rights go out of priority at the accounting point of "paper fill." Indeed, water actually, physically stored in the reservoirs at the point of maximum storage has always been "credited" to the storage water rights, and then allocated to the spaceholders' storage accounts in proportion to their contracted storage space for subsequent delivery to the spaceholders under the storage water rights for beneficial use. So it would seem that these acknowledgments would facilitate an interpretation of the accounting method that is consistent with the storage rights, the spaceholders' contracts, the operation of the Boise River Reservoirs, and the longstanding status quo administration of storage water rights in Water District 63 without having to modify the water right accounting program.

However, given the confusion and controversy regarding the status of the storage water rights that has resulted from IDWR's interpretation of the water right accounting program, it appears necessary for the terminology and methodology of the program to be more closely aligned with the actual beneficial use storage and end use of water in the Boise River Reservoirs. This should not be difficult to accomplish. After all, flood control releases have been and can continue to be identified under the pre-1986 and post-1986 methods of water right accounting. Watermaster Hank Koelling identified flood control releases in his Watermaster Reports, flood control releases are identifiable as storage passing Middleton, and flood control releases have been specifically identified in the reconciliation reports prepared by the IDWR hydrology section since 1986.

In these acknowledgments and proposed resolution there is no injury to water rights that are junior to the storage water rights, or hindrance to future appropriators. They will not be prevented from diverting or appropriating water that has historically been available to them. Juniors such as United Water have appropriated and may continue to appropriate water that is released for flood control purposes. The real complaint of the sole contrarian to this resolution is that the only, available, unappropriated water from the upper Boise River watershed is not available to them <u>when</u> they want to use it. But as former Watermaster Lee Sisco testified, if juniors and future appropriators want to take advantage of such water, they must do as the spaceholders did—by undertaking the expense and effort of creating storage or other facilities that are capable of diverting the water when it is available during the spring flood season. Taking storage away from the spaceholders through an accounting construct to fundamentally alter the carefully developed, congressionally- and State of Idaho-approved operation of the Boise River Reservoirs for beneficial use storage and for flood control is not an option.

A. IDWR's Interpretation Conflicts with the Operation of the Boise River Reservoirs for Beneficial Use Storage and Flood Control

The congressionally-authorized plan under which the Boise River Reservoirs are operated for beneficial use storage and flood control has been developed and implemented over a long period of time with the participation, approval and agreement of the Bureau of Reclamation ("Bureau"), the Corps of Engineers ("Corps"), the State of Idaho (particularly IDWR), the spaceholders and other Boise Valley interests. The reservoir operating plan was specifically developed for the Boise River Reservoirs. No other basin or reservoir system in Idaho was involved. The development of the reservoir operating plan for the Boise River Reservoirs is discussed in detail with citations to source documents in the report of Dr. Jennifer Stevens (Ex. 2053) and in Attachment A hereto. The operation of the Boise River Reservoirs for beneficial use storage and flood control pursuant to the reservoir operating plan is described by Mary Mellema (Ex. 2004; Tr., Vol. III, pp. 705-766), Bob Sutter (Ex. 2181, ¶¶ 4, 12-14; Tr., Vol. II, pp. 386-428) and Lee Sisco (Ex. 2008, ¶¶ 16-22).

The following is a summary of the development, provisions, and implementation of the Boise River Reservoir operating plan.

1. As early as the 1930s, Boise Valley water users, the State of Idaho, the Bureau, and the Corps began exploring and planning for additional Boise River reservoirs to be operated in conjunction with Arrowrock Reservoir to meet the Boise Valley's dual needs of flood control and additional supplemental irrigation supply.

2. The core concept of the plan for joint use of the Boise River Reservoir system for beneficial use storage and flood control, as explained to Congress in the 1940 Bureau report authorizing construction of Anderson Ranch Reservoir, is: "***To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of***

storage capacity indicated by the run-off forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses." Ex. 2027, H.R. Doc. 916, at 36 (emphasis added). While the particulars of the operating plan have evolved over time, this core concept remains the basis for Boise River Reservoir operations.

3. The dual purpose reservoir operation plan was formalized in a 1953 Agreement between the Bureau and the Corps. Ex. 2038. The plan was developed in consultation with Boise River Reservoir spaceholders and IDWR. Its key provisions include:

- Allocating up to 983,000 acre-feet of storage space in the reservoir system as needed for flood control during the flood control season (Art. 3);
- Using forecasts of snowmelt runoff into the reservoir system and operational "rule curves" attached to the Agreement during the flood control season (January 1 through July 31) to determine, allocate, and attain the volume of reservoir space (*i.e.*, "flood control space") necessary to capture runoff and control reservoir releases to prevent Boise River flows below Diversion Dam from exceeding 6,500 cfs (*id.*, Art. 6a-c);
- Factoring the diversion of water into the New York Canal into the determination of the quantity of water to be released from Lucky Peak (*id.*, Art. 6a);
- Prescribing the sequence of releases from the reservoirs for flood control, and the reverse of that sequence for filling the reservoirs for irrigation storage (*id.*, Art. 6d);
- Filling the reservoirs for irrigation use in accordance with the forecasts and the rule curves by the end of the flood control season (*id.*, Art. 6e); and
- Making up for shortfalls in filling Arrowrock and Anderson Ranch storage rights due to flood control releases with water stored in Lucky Peak at the conclusion of the flood control season pursuant to the Lucky Peak storage right (*id.*, Art. 6d).

4. In a contemporaneous joint press release (Ex. 2103), the Bureau and the Corps reiterated the core operating concept of the reservoir operating plan consistent with its early development during the 1930s and the 1940s:

The operating plan calls for the three reservoirs to be managed as one system, with water storage and release based on a forecast of runoff in the watersheds above the dams. Water will be released in advance of the spring snowmelt flood to provide flood control. Water will be captured on recession of the flood peak to supply irrigation requirements.

5. The 1953 Agreement provides the spaceholders the express assurance 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." Ex. 2038, Art. 4. Article 7 of the 1953 Agreement allows the Bureau and the Corps to modify the operating plan's provisions for determining flood control space requirements and reservoir releases after consultation with the State Reclamation Engineer (IDWR), the Boise River Watermaster, and the Boise Project Board of Control. Article 7 further provides: "[N]o modification which would affect in any substantial way any storage rights in the reservoir system and Lake Lowell, shall be made without the concurrence of all entities having rights in the reservoir system and Lake Lowell." *Id.*

6. The dual purpose reservoir operating plan in the 1953 Agreement was approved by supplemental storage spaceholder contracts executed in 1954 (Ex. 2100), authorized by Congressional enactment of Public Law 660 in 1954, and further effectuated by issuance of Reservoir Regulation Manual in 1956. Ex. 2104. The 1956 Manual remained in effect until it was replaced by the 1985 Water Control Manual for the Boise River Reservoirs. Ex. 2186. "Although issued by the Corps of Engineers, this manual was a joint effort by the Corps, Bureau of Reclamation and [IDWR]." Ex. 2171 at 1. Pursuant to IDWR's recommendations made in a 1974 Report prepared by Bob Sutter which instigated the revision of the 1956 Manual (Ex. 2182), the Water Control Manual updated runoff forecasting methods and flood space "rule

curves," and retained the core concept of the original reservoir operating plan as well as its essential terms. The 1953 Agreement remains in effect, except insofar as the operating plan is updated by the Water Control Manual. Like the original reservoir operating plan, the Water Control Manual was developed in consultation with IDWR. The Water Control Manual provided increased assurances of flood protection and refill for irrigation during the late runoff season, balancing the needs for flood protection and refill of storage for beneficial use.

7. Like the 1954 Supplemental Contracts with the Arrowrock and Anderson Ranch spaceholders, the 2005 repayment contracts with Lucky Peak spaceholders require the Bureau and the Corps to operate the Boise River Reservoirs for beneficial use storage in accordance with the reservoir operating plan. Ex. 2190 at 70.

8. Reservoir space that is required to be kept vacant for flood control purposes is not available to store water for beneficial use, until that space is no longer required to be kept vacant for flood control purposes. Water that is required to be released from the reservoir system to maintain required flood control spaces is, therefore, not available for beneficial use storage under reservoir storage water rights. Ex. 2008, ¶ 20; Ex. 2181, ¶ 5.

9. Reservoir space becomes available for beneficial use storage only as flood space requirements decline in accordance with the runoff forecast and rule curve procedures of the reservoir operating plan. As runoff and the risk of flooding decline, flood control space allocation requirements are reduced, and water is increasingly stored for beneficial use, until the reservoirs reach "maximum fill." Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled. Ex. 2008, ¶ 20; Ex. 2181, ¶ 5.

10. After the flood risk has passed, the water that is actually physically stored in the reservoirs at the point of maximum reservoir fill is allocated to the reservoir water rights

according to their priorities and to the spacholders' storage accounts (on what is commonly called the "day of allocation") for supplemental beneficial use as river flows decline during the irrigation season. Ex. 2008, ¶ 19; Ex. 2181, ¶ 4.

11. Flood control use of the reservoirs does not require a water right, or constitute use of the established storage water rights. Tr., Vol. III, p. 699 at 5-21; Ex. 2008, ¶ 20. Consequently, water released for flood control cannot be treated as having been stored under the reservoir storage rights, and the release of water from the reservoirs for flood control purposes has no impact on the reservoir storage rights.

These facts demonstrate the error in IDWR's presumption that reservoir inflows that are required by the reservoir operating plan to be released for flood control purposes are "physically and legally available" for beneficial use storage pursuant to the reservoir storage rights. Water cannot be stored in reservoir space that is required to be vacant during flood control operations. Consequently, reservoir inflows that must be released to maintain required flood control spaces are not "physically and legally available" for beneficial use storage. Water is not stored for beneficial use simply because it enters a reservoir. Water that is required to be released for flood control purposes is not stored for beneficial use, just as water that is required to be released to downstream senior water rights is not stored pursuant to storage water rights. Releasing water for flood control purposes is not a discretionary "choice" or use of water by the operators or the spaceholders of the Boise River Reservoirs: it is a non-discretionary mandate of the State-approved reservoir operating plan to protect the Boise Valley from potentially severe economic losses due to flooding.

As Bob Sutter explained:

> It can be assumed that all water diverted by a direct diversion is diverted for beneficial use pursuant to the water right(s) for that

> diversion. This assumption does not apply to the Boise River Reservoirs because: (1) they have no diversion works to limit inflows to the volumes of water they store for beneficial use; (2) they have insufficient capacity to store the full volumes of inflows they receive during most years; (3) they are not allowed to store inflows that must be released to maintain required flood control spaces; and (4) natural flows pass through the reservoirs during the irrigation season for downstream diversions with earlier priority water rights. Consequently, the accounting system cannot ultimately treat all reservoir inflows as physically stored for beneficial use. We recognized that, during flood control operations, the water right accounting program accrued to storage water rights inflows that could not be physically stored during flood control operations, and showed the reservoirs as full on paper when vacant flood control spaces continued to be maintained pursuant to the Water Control Manual's rule curves.

Ex. 2181, ¶ 19.

The express purpose and effect of the reservoir operating plan is to allow and authorize the Boise River Reservoirs to be used for flood control by reserving and maintaining vacant flood control spaces as necessary in anticipation of peak runoff in order to prevent flooding and resulting economic loss to the populated areas along the river downstream from Lucky Peak, while at the same time providing high levels of assurance that the reservoirs would be filled to the maximum extent possible for beneficial use storage as the flood risk and the need for vacant flood control spaces declines. The 1953 Agreement, the 1954 Supplemental contracts, Public Law 660, and the 1956 and 1985 Water Control Manuals all provide this assurance narratively, and through the mandatory use of runoff forecasts and the corresponding flood control rule curves. The plan clearly provides for the beneficial use storage of water entering the reservoirs during flood control operations (*i.e.*, after flood control releases), as space becomes available, to fulfill the storage water rights and the storage contracts on which those water rights are based. As explained by IDWR Director Higginson on November 30, 1987:

> [The new manual] c***ontains new rule curves and procedures aimed at providing greater flood protection through early season***

> ***operations and increased assurance of refill for irrigation during the late runoff season. 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. 2171 (emphasis added).

This balance could not have been achieved, and cannot be maintained, if IDWR treats the storage water rights as filled and "satisfied," by water that is released for flood control purposes, and no longer in effect or in priority long before the promised filling of the reservoirs can occur. If IDWR's theory were actually implemented, in 1999, (the year Mrs. Cresto uses to exemplify her interpretation of storage water right accounting) the spaceholders authorized physical storage would have ceased at 400,000 acre-feet, with the remaining 600,000 acre-feet of storage unsecured by a water right. Ex. 2049-20 at 26. In 1997, a year when the reservoirs were nearly emptied to prevent flooding, virtually all of the physical storage that occurred that year would have been unsecured by a water right. Tr., Vol. III, pp. 713-714.

Fortunately, the Boise River Watermasters, employing their extensive training, experience *and common sense*, have never administered the Boise River Reservoir storage rights in the manner recently suggested by IDWR, and as the agency and United Water advocated during hearing.

B. IDWR's Interpretation Deprives the Spaceholders of the Beneficial Use of Their Storage Water Rights and their Storage Contracts

As previously explained, water that is required by the reservoir operating plan to be released for flood control purposes cannot be stored for beneficial use. "Counting" or "crediting" water that cannot be stored to the "satisfaction" of the Boise River Storage water right deprives the spaceholders of the right to store water pursuant to their water rights and storage contracts. Similarly, water that is released from the reservoirs for flood control purposes cannot be put to beneficial use by the spaceholders either because the water is released prior to

the authorized period of use or because there is adequate natural flow to deliver their natural flow water rights. IDWR's position that beneficial use storage for delivery of stored water to the spaceholders occurs without a water right and under no priority, subordinates the spaceholders' storage water rights and storage contracts to all junior water rights and future appropriations. IDWR's interpretation of its storage water right accounting method thus deprives the spaceholders of their storage water rights and contract rights without due process of law, and constitutes an unconstitutional taking of those rights.

C. The Computerized Accounting Method Does Not Alter the Principles Under Which Watermasters Administer Boise River Reservoir Storage Water Rights

The adoption of the computerized accounting method in 1986 for the Boise River Storage Water Rights did not alter the following principles and understandings under which the Boise River Watermasters administer Boise River storage water rights:

1. All water physically stored in the Boise River Reservoirs for beneficial use, and all stored water that is delivered from the reservoirs for those beneficial uses, is stored and delivered pursuant to reservoir storage water rights. Ex. 2008, Sisco Aff., ¶ 8.

2. Beneficial use storage is not permissible without a water right. *Id.*, ¶ 32; IDAHO CODE § 42-201(2).

3. Flood control use of the reservoirs does not require a water right, or constitute use of the established storage water rights. *Id.*, ¶ 20; Tuthill at Tr., Vol. III, p. 699 at 14-21.

4. Reservoir space that is required by the Water Control Manual to be kept vacant for flood control purposes is not available to physically store water for beneficial use, until that space is no longer required for flood control purposes. Water that is required by the Water Control Manual to be released from the reservoir system to maintain required flood control spaces is not available for beneficial use storage under reservoir storage water rights, and is not

treated as delivered to spaceholders for beneficial use under storage water rights. During flood control operations, reservoir inflows are physically stored for beneficial use as flood space requirements decline, and reservoir space that becomes available for beneficial use storage is physically filled with water. Ex. 2008, ¶ 20.

5. Until reservoir space that is available for storage is physically filled, storage water rights remain in effect and are filled in priority with all other Boise River water rights. "If the Boise River Reservoirs have not physically filled by April 1, physical storage of reservoir inflows continues under the priorities of the storage rights, in order of priority with natural flow rights, until the reservoirs are physically filled, or until natural flow becomes insufficient to fill the reservoirs because of downstream diversions." *Id.*, ¶ 8. "When the reservoirs reach maximum physical fill at the conclusion of flood control operations, the storage rights have likewise reached maximum fill, and the water that has been physically stored pursuant to the storage water rights is allocated to the spaceholders' storage accounts." *Id.*, ¶ 20.

6. "Reservoir inflows that are required to fill storage rights during flood control operations are never released to deliver water to water rights that are junior to the Boise River Reservoir storage." *Id.*, ¶ 21.

7. Boise River flows from the upper Boise River watershed are available for delivery to water rights that are junior to the Boise River Reservoir storage rights new appropriation only during flood control operations when water is released for flood control purposes. *Id.*, ¶ 12.

D. The Adoption of the Computerized Accounting Did Not Alter the Storage or Administration of Boise River Reservoir Storage Water Rights.

Boise River Watermasters are responsible for the administration of Water District 63 water rights, which includes distributing and accounting for the distribution of water to the Boise River Reservoir storage water rights. Ex. 2008, ¶ 3. Lee Sisco was the Boise River Watermaster

for 22 years, from 1986 to 2008. Prior to becoming Watermaster in 1986, he worked for IDWR from 1967 to 1986. His final position with IDWR was Manager of the Watermaster Program for IDWR's Western Region, providing technical and administrative assistance to all Watermasters in southwestern Idaho, including Henry Koelling, the Water District 63 Watermaster. When Mr. Sisco became the Boise River Watermaster, Mr. Koelling provided Mr. Sisco training in the accounting and distribution of water rights. *Id.*, ¶ 2. Former Director David Tuthill, who worked with Mr. Sisco in IDWR's Western Region Office, had very high regard for Mr. Sisco, supported his becoming Watermaster, considered him to be a competent Watermaster, and regards him as the most knowledgeable person as to how Boise River water rights were administered during his tenure. Tuthill, Tr., Vol. III at 676:9-677:25.

After Mr. Sisco retired in 2008, he provided his successor, Watermaster Rex Barrie, training. Barrie, Tr., Vol. III, pp. 1335-1339. Mr. Barrie described Mr. Sisco's reputation as the Boise River Watermaster as "exemplary." *Id.* at 1337:15-17. Mr. Sisco trained Mr. Barrie in the Boise River water rights, reservoir operations and the Watermaster's use of IDWR's accounting methodology, and Mr. Barrie administers Boise River water rights consistent with that training. *Id.* at 1337:24-1338:10. Mr. Barrie reviewed and agrees with the statements in Mr. Sisco's Affidavit and administers water rights consistent with those statements. *Id.* at 1343:10-1344:11.

Prior to 1986, Watermaster Koelling reviewed streamflow measurements and reservoir levels on the Bureau's Hydromet system every day to account for the accrual of natural to the storage water rights.[1] Sisco, Tr., Vol. III at 844:14-845:6. He hand calculated the daily accruals by determining change in reservoir content from the previous day, subtracting outflow from

[1] Liz Cresto's Memorandum (Ex. 1) incorrectly states that, prior to adoption of the water right accounting program in 1986, during the non-irrigation season, accruals to reservoir water rights were not determined by the Watermasters or on a daily basis, but were instead determined by the Bureau only of the date of maximum reservoir fill. Ex. 1 at 12.

Lucky Peak and then convert that figure to cfs to determine natural flow into the reservoirs, and then accrue and credit the natural flow he calculated to the reservoir that was in priority at the time. *Id.* at 845:21-847:4.

Mr. Koelling also kept track of water released from the reservoirs for flood control purposes as water that flowed through the reservoir system, and did not accrue those flows to any reservoir storage right. Mr. Koelling reported flood control releases in his annual Watermaster Reports in a category called "flood control and other loss to the [irrigation season or system (total year)]." *Id.* at 849:9-851-7; 860:4-12; Ex. 2009 at p. 58.

Mr. Koelling also determined and reported the "total available" storage in the reservoir system based on the reservoir contents at the time of maximum storage (*i.e.*, maximum reservoir fill). That figure would equal total measured contents at that time, or be less if spaceholders had used storage prior to that time. *Id.* at 851:18-853:13; Ex. 2009 at p. 67. During Mr. Koelling's tenure, the water he accounted for as "total available" storage was stored under the priority of the storage water rights, and rights junior to the storage rights were not entitled to delivery of that water ahead of the storage rights. *Id.* at 854-855; Sutter, Tr., Vol. I at 370:16-373-13, 418:4-15. This was also the case during Mr. Sisco's tenure as Watermaster as well, as explained during Mr. Sisco's live hearing testimony and in his Affidavit. Sisco, Tr., Vol III at 855:5-9; Ex. 2008.

When he became Watermaster, Mr. Sisco consulted with Bob Sutter and worked with him to use the system for the Boise River for the first time in 1986. Ex. 2008, ¶ 23; Ex. 2181, ¶ 18. Watermaster Koelling felt that his method of accounting was adequate, but Mr. Sisco, as the new Watermaster, felt it might be more efficient for a computerized system to make the calculations Mr. Koelling had made by his hand calculation method. Ex. 2008, ¶ 23.

Mr. Sisco explains that the only significant change in the administration of water rights that was instituted through the use of the accounting system was to accrue water to the reservoirs by source and priority, rather than by priority alone as Mr. Koelling had done. Mr. Sisco felt that accruing water by priority alone, without regard to whether the water was tributary to a reservoir (*i.e.*, could physically enter a reservoir) was inconsistent with Idaho water law and deprive Lucky Peak storage rights and space holders of water they were entitled to receive from Mores Creek and the South Fork of the Boise River below Anderson Ranch Dam. *Id.*, ¶¶15, 24; Sisco, Tr., Vol. III at 872:5-14. IDWR Director Dunn's March 19, 1987 letter to Mr. Sisco confirmed to Mr. Sisco that accruing water to reservoir storage rights by source and priority was the only significant change implemented through the computerized accounting system. *Id.*, ¶ 24. It states:

> Probably ***the most significant effect of the accounting change*** results from computation and allocation of natural flow at each reservoir. The former method allocated the total physical fill based upon the overall right sequence: Arrowrock, Anderson Ranch and Lucky Peak. This had the effect of crediting natural flow upstream. Mores Creek water was moved to Arrowrock and Anderson until they filled. After Arrowrock filled, gain below Anderson Ranch was moved into Anderson until it filled. The new method will always result in some accrual to Lucky Peak because of its location.

Ex. 4, p. 6 (emphasis added); Sisco, Tr., Vol. III at 911:20-912:5.

An internal Bureau memorandum prepared by Neil Stessman reflects the same understanding, and agreement with the principle of accruing water to the reservoir on the basis of source and priority:

> As you are aware the Watermaster has adopted a new method of accruing storage to the respective reservoirs [that]as a affects rather significantly the relative rights of Lucky Peak and Anderson Ranch Reservoirs, Lucky Peak storage becoming a better right in relation to what it had been thought to be and Anderson Ranch storage becoming correspondingly less good.

> Field Solicitor Bill Dunlop has suggested that we go on record as being notified of the Director's decision.

Id., p. 1.

Director Dunn's letter did not identify any other significant change resulting from the adoption of the water right accounting program. As Mr. Sisco testified, an accounting change that would treat the reservoir water rights as filled at the point of "paper fill," long before maximum storage was reached, would be a much more "significant effect" of adopting the new water right accounting program than accruing water by source and priority so that water would be accrued to the Lucky Peak storage right from Mores Creek and the South Fork of the Boise River below Anderson Ranch Dam. Sisco, Tr., Vol. III at 912:6-14.

Mr. Sisco testified that of the water right accounting program for the Boise River did not alter the storage or administration of Boise River Reservoir Storage Rights as asserted by IDWR:

> I would not have agreed to the use of the water right accounting program if it had the effect of treating the reservoir water rights as "satisfied" at the point of paper fill in the water right accounting program, treating water as being stored for beneficial use without a water right, or indicating that water rights with priorities junior to the storage rights were entitled to call for the release of water that was required to be stored pursuant to the Water Control Manual in order to fill the reservoir storage spaces and reservoir water rights. This was never the intent or effect of adopting the computerized water right accounting procedure. No IDWR employee ever suggested to me that storage rights were "satisfied," at the point of paper fill, that storage after paper fill occurred without a water right, that the storage rights were no longer in effect or in priority after the point of paper fill, or that junior rights were entitled to call for release of water from the reservoirs prior to maximum physical fill. It has always been my understanding that beneficial use storage cannot occur without a water right, and that all water physically stored in the reservoirs for beneficial use is stored pursuant to the storage water rights. As was the case during Mr. Koelling's tenure, all the water actually, physically stored in the reservoirs at the conclusion of flood control operations has been

> stored pursuant to the reservoir storage rights, and allocated to the storage accounts of the spaceholders.

Ex. 2008, ¶ 32.

Bob Sutter explained in the sixth paragraph of his Affidavit (Ex. 2181) that the adoption of the water right accounting did not alter "the accrual of water to storage pursuant to the reservoir operating plan of the Water Control Manual," described in the fourth paragraph of his or the principles stated in the fifth paragraph of his affidavit:

> 4. Reservoir Operations Overview. . . . Under the reservoir operating plan, as forecasted inflows decline, less flood control space is required, and inflows are increasingly retained and added to reservoir contents until the danger of flooding has passed and the reservoirs are filled or nearly filled. After the flood risk has passed, the water stored in the reservoir system at the point of maximum fill is allocated among the reservoir storage water rights according to their priorities, and is available for delivery to those who are entitled to use the stored water for irrigation and other beneficial uses.
>
> 5. Storage Water Right Accrual During Flood Control Operations. Water cannot be stored in Boise River Reservoir space that is required to be vacant during flood control operations. Reservoir inflows that must be released to maintain required flood control spaces are therefore not available to physically fill storage space. Reservoir space becomes available for physical storage only as flood space requirements decline in accordance with the established reservoir operating plan. Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled.

Id., ¶ 4, 5.

In his affidavit, Mr. Sutter further explained:

> 20. No change in reservoir operations, in reservoir refill, or in water right administration resulted from the paper fill methodology of the accounting program. Reservoir inflows were not required to be released, and the water actually stored in the reservoirs was not allocated to storage water rights at the point of paper fill. Physical refill of storage spaces and storage water rights continued as required by to the Water Control Manual's runoff forecast, rule curve and release procedures. For accounting purposes, paper fill is more accurately understood to be a benchmark establishing that

> the reservoir water rights are entitled to be physically filled by subsequent reservoir inflows.
>
> 21. The net effect of this accounting procedure is to accrue to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecast and rule curve procedures of the Water Control Manual. After maximum reservoir fill, the water physically stored in the reservoirs, including the "unaccounted for storage," is allocated to reservoir storage rights, and then to spaceholders with contract-based storage entitlements by the storage allocation program. The storage allocations are input into the water right accounting program. This point in the accounting procedure at which stored water is allocated to storage water rights is referred to as the "day of allocation." These allocations become the basis for the accounting of storage water right use during the irrigation season. The Watermaster is informed of the allocations, and he in in turn informs the storage right holders of the amount of storage that is available to them for ensuring irrigation season.

Id., ¶ 20, 21.

During his live hearing testimony, Mr. Sutter confirmed that the adoption of the water right accounting program did not modify reservoir operations pursuant to the Water Control Manual or how water is stored in the reservoirs, and that the rules for water right distribution stayed the same. Sutter, Tr., Vol. II at 431:3-15, 432:23-433:1. Mr. Sutter acknowledged that "according to the flood-control plan, the assurance of refill requires or dictates that that physical space be refilled. *Id.* at 444:15-17. Notwithstanding the adoption of a different accounting construct, the actual physical storage and delivery of water continued, as it had occurred prior to 1986:

> Q. When you were operating the water right accounting program, did you call Mr. Sisco at the point in time in which the water right accounting program reached paper fill and advise him of that?
>
> A. You mean early in the season when it reached paper fill did I advise him of that?
>
> Q. Yes.

A. No. On that date no.

Q. Would you at some point in time?

A. Pardon?

Q. Would you advise him of that at some point in time:

A. We worked closely together. And in a flood control situation we probably didn't even run – meaning the Department, didn't even run the water right accounting until much later, because there – there was no urgency to determine storage entitlements because we were pretty assured that they would pretty much – that they would fill.

So we may – the accounting is an after-the-fact accounting or tabulation of what happened. It doesn't really influence operations, so that in a flood year we may not run the water right accounting for this period until maybe mid-July.

. . .

Q. Back to my prior question. In terms of physically storing water, apportioning it the storage accounts, and having it be available for water users thereafter, the adoption of the accounting program in 1986 would not have changed the experience of those water users pre-1986 to after 1986 would it?

A. It would not have changed. They had 100 percent fill.

Id. at 439:6-440:13.

E. Ditch Company Witnesses Testimony.

Among the many water user witnesses who testified during the hearing were Ditch Company witnesses John Anderson, Mark Zirschky, and Daren Coon. Mr. Anderson and Mr. Coon have worked many years (and Mr. Coon still works) for Nampa & Meridian Irrigation District ("NMID") as Superintendent and Secretary, respectively. Mr. Anderson was employed by NMID for approximately 34 years (1977-2011), and Mr. Coon has worked continuously at NMID from 1976 to date.

Mr. Zirschky has worked many years for Pioneer Irrigation District ("Pioneer"), serving as its Superintendent since 2010, and Assistant Superintendent for several years prior. In all, Mr. Zirschky has worked for Pioneer for 23 years (since 1992). Mr. Zirschky also currently serves as Assistant Watermaster for Water District 63 following in the footsteps of Mr. Anderson who did the same from 1993 to 2011.

Between them, NMID and Pioneer supply water to over 100,000 acres in the Treasure Valley, both natural flow, and approximately 136,000 acre-feet of aggregate storage (exclusive of NMID's share of Boise Project Board of Control storage) in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs. The lands served by the Districts are a mosaic of rural agricultural and urbanizing lands, including the cities of Boise, Meridian, Nampa, and Caldwell. Consequently, the interpretation and application of IDWR's computerized water right accounting program is a true water user issue, not simply one of rural versus urban/agriculture versus municipal/residential. Farmer and urbanite alike stand to be affected by diminished storage water supplies depending on the Hearing Officer's/IDWR's decision in this matter.

The testimony of Anderson, Coon, and Zirschky is detailed in Hearing Exhibit numbers 2002 and 2003 (Anderson Affidavit and attachments); 2189 and 2190 (Zirschky Affidavit and attachments); 2188 (excerpts of 2004 Lucky Peak repayment contract conversion FONSI and EA prepared by the Bureau of Reclamation—discussed by Mr. Zirschky at hearing); and the Hearing Transcript at pages: 1087-1121 (Anderson), 1122-1156 (Zirschky), and 1191-1226 (Coon), the full extent of which need not be discussed here. However, highlights include:

- The crucial importance of stored water supplies for purposes of supplementing natural flow diversions as natural flow declines; without storage water, Pioneer and NMID would typically be out of water between mid-June and mid-July each year;

- The importance of stored water supplies to farmers and urbanites alike (for example, the cities of Boise, Meridian, Nampa and Caldwell are delivered water by Pioneer and NMID, with the cities of Nampa and Caldwell being two of Pioneer and NMID's largest delivery accounts, and the growth of those communities, and others, occurs where the Districts supply water rather than to dry lands which lack the benefit of the Districts' senior and secure water supplies. The number of subdivisions served by the Districts number in the several thousands. Mr. Coon stated that the potential loss of NMID storage rights would be "devastating," and that loss or diminishment of the same across the Treasure Valley could lead to "economic collapse" (Tr., Vol. IV, p. 1208 at 8-17);

- News of flood control releases is eagerly anticipated and welcomed because it signals full (or near full) storage supplies for the upcoming irrigation season; flood control releases mean snowpack data and reservoir inflow forecasts predict ample runoff—so much so that additional storage space must be evacuated to regulate and capture the incoming flood flows;

- Even in flood control years, natural flows can decline to the point where storage use is needed by, and sometimes prior to, mid-June;

- Though Pioneer and NMID strive to conserve and carry some stored water over as a hedge against a dry winter, it is not unusual for storage water accounts to be exhausted, leaving no carryover heading into the next irrigation season;

- Mr. Anderson, Mr. Zirschky, and Mr. Coon have never known or understood the Department's computerized water right accounting program to: (a) count flood control releases against the storage water rights (*i.e.*, that the flood control release water is the water users' stored water flushing downstream out of the system); (b) treat the water physically stored in the reservoirs after flood control releases as water having been stored without a water right (to the contrary, Mr. Anderson and Mr. Zirschky have always understood that the water stored in the reservoirs after flood control releases is stored under the existing storage water rights and under the original priorities of those rights with respect to junior users); and (c) allow junior users to call for water that is otherwise physically filling the reservoirs post-flood control release (instead, junior water use during the so-called "refill" period is coincidental to priority refill, and occurs because there remains floodwater-based reservoir inflows that need be passed through the reservoirs in order to comply with the governing reservoir operations "rule curves");

- The weekly water right accounting reports (the "green bar sheets") confirm the foregoing by continuing to accrue water to the reservoirs after "paper fill" and by showing that the reservoir storage rights continue to remain in priority (the "Last Right" column) until or near the day of maximum physical fill—at which point river priority ("Last Right") shifts markedly downward in seniority (*i.e.*, "Last Right" priority shifts from mid-1900s or later down to the mid-to –late 1800s);

- The understandings of Mr. Anderson, Mr. Zirschky, and Mr. Coon were informed by the Water District 63 watermasters at the time (Henry Koelling, Lee Sisco, and Rex Barrie, respectively), and those understandings were (and are) critical to the functioning of the Districts and the farming season planning of their respective landowners;

- Mr. Coon and Mr. Anderson's career with NMID spanned the collective tenures to date of Boise River Watermasters Henry Koelling, Lee Sisco, and Rex Barrie, and neither of them (Mr. Coon or Mr. Anderson) experienced any practical, on-the-ground water right administrative change as a result of the implementation of the Department's computerized water right accounting program in 1986. Prior to 1986, flood control releases were tracked but not debited from the existing storage water right accounts. The same carried over post-1986, though accounting terms may have changed or been introduced via the program; terms such as "storage past Middleton" and the accounting variable "unallocated storage." In fact, Mr. Coon testified that NMID could not locate any indication in over 100 years of records, including the Water District 63 Watermaster-prepared annual reports (the "black books") that implementation of the computerized water rights accounting program in 1986 brought with it any palpable change to water rights administration in the basin under the so called "paper fill" construct, or that there was no water right to fill the reservoirs following flood control releases. Tr., Vol. IV, pp. 1199-1201; 1215-1266. To the contrary, the manipulation and exploitation of the "paper fill" term is a recent occurrence attributed to latent legal positions taken by IDWR and the State of Idaho in the context of the Snake River Basin Adjudication, particularly in Basin 01;

- Any computerized water right accounting program interpretation and application resulting in "paper fill" (*i.e.*, a situation where the Bureau's existing storage water rights are "satisfied" on paper based on inflows only with no regard for physical reservoir contents) greatly diminishes the value of the property rights at issue, and converts the reservoirs to disproportionately expensive holes in the ground. For example, Pioneer spends approximately $126,000 per year for its storage space—this on top of the millions of dollars of repayment obligations and O&M charges it historically paid (and already satisfied) in relation to Arrowrock and Anderson Ranch Reservoirs; and

- Concurring with Mr. Sisco's testimony, IDWR's computerized water rights accounting program is merely a tool to aid the watermaster in administering Boise River water rights (including the Bureau's existing storage rights) because data entry and reporting errors occur (*i.e.*, the computerized water rights accounting does not dictate water rights administration, rather it informs it in part; actual administration is performed by the watermaster with the aid of other data/resources, coupled with human judgment and discretion).

II. POSITION SUMMARY AND CONCLUSION

1. IDWR's position conflicts with the congressionally-authorized operating plan for the Boise River Reservoirs that was developed and approved by the Bureau of Reclamation, the Corps of Engineers, the State of Idaho, and the spaceholders under which the Boise River Reservoirs have been operated for beneficial use storage and flood control. That plan provides for the actual, physical storage of water in the reservoirs after flood control releases for beneficial use by the spaceholders pursuant to the reservoir storage rights and the spaceholders' storage contracts.

2. IDWR's position incorrectly treats reservoir inflows that are required by the reservoir operating plan to be released for flood control purposes as "physically and legally available" for beneficial use storage pursuant to the reservoir storage rights. Reservoir space that is required to be vacant for flood control is not "physically and legally available" for beneficial use storage, and reservoir inflows that must be released to maintain required flood control spaces are not "physically and legally available" for beneficial use storage. In other words, water that is required to be released for flood control purposes is not stored for beneficial use, just as water that is required to be released to downstream senior water rights is not stored pursuant to storage water rights. Releasing water for flood control purposes is not a discretionary "choice" or use of water by the operators or the spaceholders of the Boise River Reservoirs: it is a non-discretionary mandate of the State-approved reservoir operating plan to protect the Boise Valley from potentially sever economic losses due to flooding.

3. IDWR's position conflicts with the storage water rights and the spaceholders' storage contracts which are based on the actual storage of water in the reservoirs pursuant to the storage water rights in accordance with the reservoir operating plan.

4. IDWR's position is contrary to Idaho Code Section 42-201(2), which prohibits the diversion and use of water without a water right. IDWR's position impermissibly decouples the "irrigation storage" and "irrigation from storage" components of the storage water rights, so that water delivered for irrigation use pursuant storage water rights has not been stored pursuant to a water right.

5. IDWR's position conflicts with the principle that use of the reservoirs for flood control purposes does not require a water right, or constitute use of the existing storage water rights.

6. IDWR's position is contrary to the administration of the Boise River Reservoir storage water rights by Boise River Watermasters and the actual storage, delivery and beneficial use of water pursuant to the storage water rights for the Boise River Reservoirs and the spaceholders' storage contracts. Boise River Watermasters have never treated water released from the Boise River Reservoirs for flood control purposes as a release of water that has been stored for beneficial use pursuant to a storage water right. Boise River Watermasters have always administered water rights with the understanding that water actually, physically stored in the reservoirs at the conclusion of flood control operations, at the point of maximum storage (*i.e.*, maximum reservoir fill), as stored pursuant to the reservoir storage rights, and allocated to the storage accounts of the spaceholders. Use of storage has never been charged to any spaceholder account until and unless storage is actually released from Lucky Peak for delivery to the spaceholder's canal diversion. Water has never been released from Lucky Peak Reservoir to deliver water to Reservoir inflows that are required to fill storage rights during flood control operations are never released to deliver water to water rights that are junior to the Boise River

Reservoir storage rights. IDWR produced no evidence demonstrating that such releases ever occurred.

7. IDWR's position is contrary to the longstanding recognition by IDWR, Boise River Watermasters, judicial decrees and Boise River water users that the natural flow from the upper Boise River watershed above Lucky Peak Reservoir is fully appropriated by existing Stewart and Bryan Decree water rights, and that the water from the upper Boise River watershed is available for new consumptive uses only while water is released from the reservoirs for flood control purposes.

8. The water right accounting program, and IDWR's interpretation of it, have never been adopted or implemented pursuant to requirements of the Idaho Administrative Procedure Act, or in any other manner that could legally alter or storage water rights or the spaceholders' contract rights. Prior to the Basin-Wide Issue 17 proceedings in the SRBA, no IDWR representative ever told the Boise River Watermasters or the spaceholders that the storage water rights were fully "satisfied" and no longer in effect as a result of the water right accounting program showing that the storage rights are "full on paper," that water was thereafter stored without a water right, or that filling the reservoirs after flood control releases was subject to junior water rights and new appropriations.

9. IDWR acknowledges that, prior to adoption of the water right accounting program in 1986, water was stored in the Boise River Reservoirs during flood control operations and after flood control releases under the priorities of the storage water rights, and that filling those rights was based on reservoir contents at the point of maximum storage. IDWR's position that the water right accounting program changed water right accounting so that water previously stored pursuant to the priorities of the storage water rights was instead stored without a water

right, under no priority, subject to all junior water rights and future appropriations, effectively divests or subordinates the storage rights without due process of law and constitutes an unconstitutional taking of the Ditch Companies' water rights and contract rights.

10. IDWR's "scattered and incomplete" records pertaining the Boise River water right accounting program do not provide a basis to construe the 1986 adoption and use of the program as fundamentally altering the storage water rights, the storage contracts or the administration of those rights. The only substantive change in the administration of reservoir storage rights that was instituted through the adoption of the water right accounting program was to accrue reservoir inflows to the storage water rights on the basis of source and priority, instead of on the basis of priority alone.

11. The adoption of the water right accounting program in 1986 did not alter the storage water rights, the storage contracts, the operation of the Boise River Reservoirs for beneficial use storage or the administration of those rights. "Paper filling" of the reservoir storage rights in the water right accounting program does not result in any change in the operation of the reservoirs for beneficial use storage or any change in water right administration. Water is not allocated to the spaceholders' storage accounts when the water at the point of paper fill in the water right accounting program. Water is not credited to the storage water rights and to the spaceholder accounts until the day of allocation. To the contrary, water physically stored in the reservoirs at the point of maximum storage has always been credited to the storage rights and fully, 100% allocated to the spaceholders' storage accounts for beneficial use. The water right accounting reports do not show that the storage water rights go out of priority or are "satisfied" at the point of "paper fill." The water right accounting reports show that the reservoir storage rights remain in priority until the day of allocation.

12. Contrary to IDWR's current position that water right accounting has nothing to do with reservoir operations, Bob Sutter, the author of the program, designed the program to credit water physically stored in the reservoirs after the conclusion of flood control operations (less storage previously delivered for beneficial use and evaporation) at the point of maximum storage to the storage water rights, to reflect the provisions of the 1953 Agreement and the criteria and procedures of the Water Control Manual under which water is physically stored during flood control operations and after flood control releases for beneficial use.

13. Boise River water right administration, including water right accounting, is the duty of the Boise River Watermaster, not the hydrology section of IDWR. The accounting program is run by the hydrology section as a tool for the Watermaster to use in the administration and accounting of water rights. The accounting methodology should *reflect* the administration of water rights by the watermaster. It *does not determine* the elements of the water rights, the operation of the Boise River Reservoirs for beneficial use storage, or how the Watermaster administers water rights in accordance with priorities of the water rights under Idaho law.

14. For these reasons, IDWR's apparent position in this matter is: (a) in violation of constitutional or statutory provisions, (b) in excess of IDWR's statutory authority, (c) made upon unlawful procedure, (d) arbitrary, capricious, and an abuse of discretion.

DATED this 28th day of September, 2015.

SAWTOOTH LAW OFFICES, PLLC

By _____
Daniel V. Steenson
Attorneys for the Ditch Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 2015, I caused a true and correct copy of the foregoing **DITCH COMPANIES' POST-HEARING MEMORANDUM** to be served by the method indicated below, and addressed to the following:

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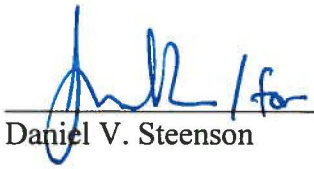

Daniel V. Steenson

ATTACHMENT A
to Ditch Companies' Post-Hearing Brief

RESERVOIR OPERATIONS DETAILED STATEMENT OF FACTS

This attachment provides a detailed discussion of the concise statement facts to the Ditch Companies' Post-Hearing Brief. Additional historical context and detail are provided in Dr. Jennifer Stevens' report entitled *History of Boise River Reservoir Operations, 1912-1995.* Ex. 2053.

1. Appropriation of Boise River Flows, *Stewart* and *Bryan Decrees*, Arrowrock Reservoir and Storage Contracts (1864-1929)

Water rights substantially exceeding Boise River summertime flows were appropriated between 1864 and 1904, and in 1906 were decreed in the "*Stewart Decree*." Ex. 2021; Ex. 2008, ¶ 7; and Ex. 2033. Litigation over the delivery of water to *Stewart Decree* rights as Boise River flows declined during the irrigation season was resolved by an order entered in 1919, to distribute natural flows on the basis of 75% and 60% cuts in priority order. Ex. 2022. River flows were adequate to meet additional irrigation demand only during the spring runoff. Water rights to these flood waters were appropriated between 1894 and 1914, and later decreed in the 1929 "*Bryan Decree*" (aka "Flood Water Suit"). Ex. 2023.

To meet the need for additional water supplies, water users in the Boise River Valley sought the assistance of the U.S. Reclamation Service (now the Bureau of Reclamation), shortly after it was created by the 1902 Reclamation Act. Deer Flat Reservoir (aka "Lake Lowell") was authorized and constructed to provide off-stream storage of water diverted from the Boise River through the New York Canal. Ex. 2056. The location of Deer Flat Reservoir is shown in Exhibit 2012. Construction of the first dam on the Boise River, Arrowrock Reservoir, was

authorized on January 6, 1911, under the 1902 Reclamation Act to store spring runoff to provide supplemental water during the irrigation season as natural flows declined. Ex. 2033. Water right license no. 7180 established a January 13, 1911 priority for the right to store water in Arrowrock Reservoir. Ex. 2023. Construction of Arrowrock Dam on the Middle Fork of the Boise River (*see* Ex. 2012) began in 1911, storage began in October 1914, and construction was completed in 1915. Ex. 2049-64.

The Bureau entered into contracts with irrigation districts pursuant to the Reclamation Act of 1902, under which the districts acquired storage capacity in Arrowrock Reservoir. *See, e.g.*, Ex. 2058, ¶ 6. Each district was required to apportion to lands within their boundaries the right to receive water stored in the Arrowrock space acquired by the district, as well as a proportionate part of the cost of constructing the reservoir ($75.00 per acre per the contracts). *Id.*, ¶¶ 10-12. The 1903 storage water right for Deer Flat Reservoir and the 1911 storage water right for Arrowrock Reservoir were decreed in the 1929 *Bryan Decree*, commonly referred to as the "Flood Water Suit," with other "flood water rights." Ex. 2023.[1]

2. Formulation of the Reservoir Operating Plan, Anderson Ranch Reservoir Authorization and Storage Water Right (1937-1956)[2]

Arrowrock Reservoir was authorized and constructed for irrigation use only, though it had been operated incidentally to reduce flooding by releasing water in anticipation of high spring runoff in order to capture peak runoff and control releases to the extent possible without impairing irrigation storage beginning in 1916, its first year of operation. Exs. 2063 and 2059. By the 1930s, Boise River water users, the Bureau, and the Corps acknowledged the need for

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[1] The *Stewart* and *Bryan Decree* orders and rights are discussed in Exhibits 2033 and 2010.

[2] Historical context and detail are provided in *Stevens Report*. Ex. 2053.

another reservoir to store and manage spring runoff in order to provide additional water for irrigation and to prevent flooding. While construction of a new reservoir at Twin Springs was under consideration, a plan for coordinated use of Arrowrock Reservoir and the proposed reservoir for flood control and irrigation storage was formulated. At a joint public hearing in Boise on September 8, 1937, the Corps and the BOR received public testimony regarding Boise River Valley flooding. Ex. 2063. In November 1938, the Corps produced a report in consultation with the Boise River Watermaster and the Manager of the Boise Project Board of Control evaluating the potential to reduce flooding through operation of Arrowrock Reservoir and the proposed Twin Springs Reservoir. *Id.* The report concluded that flooding could be reduced by reserving 30,000 acre-feet of space in Twin Springs for flood control use. *Id.*

In a June 28, 1939 report, the BOR described the core elements of the plan—(1) using runoff forecasts to reserve reservoir space for flood control; and (2) filling the reserved space with spring runoff for irrigation as the need to manage spring runoff to prevent flooding declines:

> Storage Capacity Required to Control Floods.
>
> 6. If the Twin Springs and Arrowrock reservoirs are to be operated for flood control purposes ***some part of the storage capacity would need be reserved in nearly every year for flood control purposes and permitted to fill only as needed to reduce the flood discharge or as the remaining snow may justify reduction in reserved capacity.***
>
> Operation of Reservoirs for Flood Control.
>
> 11. Arrowrock reservoir has been operated primarily for irrigation purposes. Within limitations of outlet capacity and the requirement that the reservoir fill for irrigation, it has also been operated for flood control . . . To secure more extensive flood control, ***it will be necessary to revise somewhat the plan of operation heretofore adopted by reserving some capacity primarily for flood control***.
>
> 12. It is possible, by means of snow surveys and data on winter precipitation, to make fairly reliable forecasts of the volume of flood runoff from the Boise River . . . ***[I]t will be necessary to reserve the adopted flood control space in advance of the flood season of every year and store no water therein during the flood period, except as needed to***

> ***reduce the discharges below the Boise Project diversion dam. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.***
>
> Use of flood control storage for irrigation.
>
> 17. ***In operating the reservoirs for flood control*** purposes, ***it is desired to avoid undue impairment of their value for irrigation purposes. In years of very high runoff, there is no question that the flood control storage will be filled in securing the desired reduction in flood peaks. Water thus stored in the flood control reserve will be subsequently released for irrigation.***

Ex. 2065 (emphasis added).

While this coordinated reservoir operating plan was being formulated, Congress considered and passed the Reclamation Project Act of 1939 ("1939 Act"). Act of Aug. 4, 1939, ch 418, 53 Stat. 1187 *et seq.*, codified at 43 U.S.C. § 485. Section 9(a) of the 1939 Act authorizes the Secretary of Interior to investigate the feasibility and cost of reclamation projects, and to report his findings to the President and to Congress. 43 U.S.C. § 485h(a). If the Secretary of Interior's cost determination does not exceed estimated "repayable and returnable allocations" (*i.e.*, its benefits) for purposes such as irrigation, power and flood control, then the project "shall be deemed authorized and may be undertaken by the Secretary" without further congressional authorization. *Id.* Section 9(b) of the 1939 Act authorizes the Secretary to allocate part of the cost of a reclamation project to flood control in consultation with the Corps' Chief of Engineers and the Secretary of War, and to operate the project for flood control purposes to the extent of the allocation. 43 U.S.C. § 485h(b).

By 1940, the Corps and BOR had determined that a reservoir on the South Fork of the Boise River at the Anderson Ranch site would be more beneficial than a reservoir at the Twin Springs location on the Middle Fork. On June 25, 1940, Interior Secretary Ickes submitted to President Roosevelt a BOR report proposing to substitute Anderson Ranch Reservoir for Twin Springs as a "multi-purpose project" to "provide a supplemental water supply for 340,000 acres

of irrigated lands in the Boise Valley," power generation, and "a large measure of flood control throughout the Boise Valley." Ex. 2027. Secretary Ickes informed the President that the project was feasible, economically beneficial and that cost repayment "can be anticipated with assurance," and was therefore authorized for construction under Section 9 of the 1939 Act, with funds available under the 1941 Interior Department Appropriations Act, and asked whether the President objected to submitting the report to Congress. The President responded that he did not object, but recommended that construction be "deferred indefinitely" due to "demands upon the Federal Treasury for purposes of national defense." In his July 22, 1940 reply, Secretary Ickes reiterated that: "[t]he supplemental water supply to be provided by the proposed development is greatly needed [in the Boise Valley] to prevent crop losses in practically every year," and requested funding to conduct preliminary work. The President relented, and authorized Secretary Ickes to proceed due to the "urgent need for a supplemental water supply for the Boise Valley." *Id.*

The report the Interior Secretary submitted to the President and to Congress (H.R. Doc. No. 916, 76th Cong., 3d Sess. (1940)) described the proposed plan for reservoir operations:

> *Operation of reservoirs for flood control.*—The Arrowrock Reservoir was constructed with no particular provision for flood control and without allocation of any part of the costs to flood control. It has been operated primarily for irrigation purposes, but an incidental result has been some reduction to the peak discharges of past floods. Early in the history of Arrowrock Reservoir operations, earnest efforts were made to provide a larger measure of flood control, storage being vacated in some degree for that purpose. ***In one or two instances, the changes in run-off conditions developed rapidly and resulted in an unfilled reservoir and subsequent irrigation shortage. The need of the reservoir's entire capacity every year for irrigation makes it imperative to avoid this.***
>
> The run-off at the Anderson Ranch Dam site averages about 40 percent of the inflow to the Arrowrock Reservoir. ***To obtain the maximum possible flood-control benefits from storage, the Anderson Ranch Reservoir should be operated with the Arrowrock Reservoir. In these studies such a joint operation is presumed*** . . . .

> It is possible, by means of snow surveys and data on winter precipitation, to make fairly reliable forecasts of the volume of flood run-off from the Boise River. However, flood damage on Boise River is largely a function of the peak rate of discharge and the momentary rates of discharge are influenced by climatic conditions while the snow is melting and cannot be accurately predicted. ***To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of storage capacity indicated by the run-off forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses***.

Id. (emphasis added).

The Corps also prepared and submitted a report to Congress in 1940 (H.R. Doc. No. 957, 3d Sess. (1940)) pursuant to the Flood Control Act of 1938 (52 Stat. 1215), which also described the reservoir operating plan: "***The tentative plan of storage operation would provide that the jointly used storage will be held available for flood control during the spring months when run-off of flood proportions is predicted on the basis of snow surveys. Run-off from melting snows would then be stored for later use for irrigation***." Ex. 2028 (emphasis added).

On December 9, 1940, the BOR filed with the Idaho Department of Reclamation (now IDWR) permit application no. 26522 to construct Anderson Ranch Reservoir and to appropriate a water right to store 500,000 acre-feet per annum for irrigation and power uses. Ex. 2029. The Secretary of Interior's report to President Roosevelt and to Congress (H.R. Doc. No. 916), explaining the dual reservoir operating plan for irrigation storage and flood control, was filed with the permit application. *Id.* IDWR approved the permit application on February 25, 1941.

On January 28, 1941, in support of the permit application, the BOR filed with IDWR a summary of terms of contracts for Anderson Ranch Storage that were under consideration by New York Irrigation District, Nampa & Meridian Irrigation District, Boise-Kuna Irrigation District and Wilder Irrigation District. *Id.* The 1941 contracts allotted each district space in Anderson Ranch Reservoir to store water for supplemental irrigation use, in exchange for the

districts' agreement to repay the costs of constructing the reservoir in proportion to their allotted space. *Id.*, Arts. 10-13. The contracts required the BOR to release to the districts their contractual proportions "of ***the stored water actually available*** from said reservoir [each] year for irrigation purposes." *Id.*, Art. 13 (emphasis added). The contracts further provided that the districts may hold over unused storage from one year to the next (aka "carryover storage"). *Id.*, Art. 18.

Regarding flood control, the contracts provided that "45,000 acre-feet of empty storage space shall be kept available in the Anderson Ranch and Arrowrock Reservoirs for control of flash floods," with preference for maintaining such empty space in Arrowrock Reservoir, since Arrowrock collected runoff from the largest portion of the upper Boise River watershed. *Id.*, Art. 18(d), (e). The contracts provided that water that would be stored in Arrowrock or Deer Flat Reservoirs under the priorities of the water rights for those reservoirs may be temporarily held in Anderson Ranch, or vice versa, without affecting the districts' rights to the water in the respective reservoirs. Accounting for this practice is an example of what later became known as "paper fill," whereby a reservoir water right may be accounted for as "filled" by storage physically held in another reservoir. Ex. 2008, pp. 8-9, ¶ 14. The contracts reflect the plan for operating the reservoirs jointly for irrigation storage and flood control by vacating storage capacity on the basis of run-off forecasts to control flood flow, and then filling the reserved capacity with reservoir inflows from spring runoff after the flood risk has passed:

> (g) In the filling of the available Anderson Ranch Reservoir capacity, except that reserved for power which will be filled first and except that amount of 45,000 acre-feet capacity reserved for control of flash floods, the reservoir management will endeavor so to handle the filling thereof that the same will serve both for the benefit of irrigation and for the benefit of flood control, and may for flood control purposes evacuate so much of its capacity as is deemed advisable with such releases to be first from holdover storage water on hand, in the same manner and with the same effect as provided in Article 18(b).

Ex. 2029, Art. 18(g).

As required by Idaho Code Section 42-401 (Ex. 2026, now IDAHO CODE § 43-401), the irrigation districts submitted to IDWR surveys, examinations, maps, plans, and cost estimates, with district board minutes and copies of the proposed Anderson Ranch spaceholder contracts for the review and approval of the Department. Ex. 2029. As required by the statute, the Commissioner of the Department examined the information submitted by the BOR and the districts, and filed with the districts' reports favorable to the districts' proposed acquisitions of storage, stating, *inter alia*: "that the proposed new construction will be a great asset to the water users who are to be benefitted, as well as to the people at large in this part of the State" (undated report to Boise-Kuna, *id.*); "the benefits accruing to the lands with the District in acquiring the right to the storage water, as provided in said contract, will greatly exceed the cost thereof, and I therefore approve the same" (2/28/41 report to Wilder, *id.*); "the project represented [by the maps and document submitted] is meritorious and should have the support of all the water users concerned" (3/19/41 report to Nampa & Meridian, *id.*). The Commissioner filed similar approval reports with other districts as they entered into contracts with the BOR. *Id.*

Shortly after receiving the Commissioner's favorable reports, the irrigation districts held elections as required by Idaho Code Section 42-401 (now 43-401) authorizing the districts to execute the contracts. The districts apportioned their respective Anderson Ranch storage water entitlements and repayment obligations to the lands within their boundaries, and filed proof of the apportionment with IDWR. *See, e.g., id.*

Construction of Anderson Ranch Reservoir began in August 1941. Ex. 2186. The BOR submitted proof of completion of works in February 1951, showing that 315,079 acre-feet of water had been stored in 1950, and identifying the place of use as the 257,766 acres of land that

were entitled under BOR contracts to receive Anderson Ranch stored water as a supplemental water supply for irrigation. Ex. 2029. In connection with proof of completion, the Department requested, and BOR provided, a list of the thirteen irrigation districts and canal companies that, by 1956, had entered contracts for Anderson Ranch storage, along with representative contracts with the different irrigation entities. *Id.* The BOR submitted proof of beneficial use in February 1956, demonstrating storage of the full reservoir capacity of 493,161 acre-feet, for use on "all lands having storage rights in Anderson Ranch Reservoir pursuant to repayment contracts." *Id.* On the basis of that proof, the State Reclamation Engineer issued a license on December 17, 1956, for storage of 493,161 acre-feet of water in Anderson Ranch for use on the lands under contract that BOR identified in its proof of completion. *Id.*

3. Lucky Peak Reservoir Authorization[3]

While the BOR was building Anderson Ranch, negotiating additional storage contracts, and developing the water right under its approved permit, extraordinarily high flows in 1943 flooded about 29,000 acres of agricultural, urban and suburban property in the Boise Valley. Ex. 2085. In October of 1943, congressional committees requested that the Board of Engineers for Rivers and Harbors review the Corps' 1940 report in House Document 957 to identify additional flood control improvements. *Id.*

In 1944, Congress passed a Flood Control Act declaring congressional policy "to recognize the interests and rights of the States in determining the development of the watersheds within their borders." 33 USCA § 701-1. The Act further declared that flood control projects shall "not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water,

[3] Historical context and detail are provided in *Stevens Report*. Ex. 2053.

irrigation, mining, or industrial purposes." 33 USCA § 701-1(b). To effectuate this policy, the Act required the Department of the Army to consult and cooperate with the states in which flood control projects were proposed regarding the development of project plans to provide affected states and the Department of the Interior an opportunity to submit written comments and recommendations on the Department's reports to Congress, and to submit the states' comments and recommendations with the report. 33 USCA § 701-1(a). The Act also required the Department of the Interior to consult with states and the Department of the Army concerning proposed reclamation projects for irrigation purposes, and provided that, if either the Secretary of the Army or an affected state objected, the project would not be deemed authorized unless approved by a congressional act. 33 USCA § 701-1(c).

The Board of Engineers prepared the report the congressional committees requested in 1943. In March 1946, the Corps notified interested parties of the opportunity to submit comments on the report. Ex. 2086. The notice stated that "the proposed report of Chief Engineers will be submitted officially to the Governors of the affected states and to the Secretary of the Interior pursuant to Section 1 of the Flood Control Act of 22 December 1944, and such comments as they may make will be transmitted by the War Department to Congress with the report of the Chief of Engineers." *Id.* A copy of the draft report was lodged with IDWR for inspection. *Id.* The long list of parties to whom notice was sent included the Idaho Congressional delegation, Idaho Governor Williams, IDWR, county and city officials, and Boise River water users. *Id.*

On May 13, 1946, the Corps submitted the report to the House Committee on Flood Control, with the Corps' recommendation for construction of Lucky Peak Reservoir. Ex. 2085. The report contained the following analysis, findings and recommendations:

> 4. To supply additional water for irrigation, provide storage for flood control and develop hydroelectric power, the Bureau of Reclamation has under construction Anderson Ranch Reservoir . . . The storage has been allocated 212,500 acre-feet for flood control, an equal amount for irrigation, . . . ***In operation of the flood control storage on the basis of flood forecasts from snow surveys largely financed by local interests, increased storage for irrigation will be realized. The project contemplates coordinated operation of the Arrowrock and Anderson Ranch Reservoirs. The district engineer finds that use of the storage to maximum advantage, including flood control, would require drawdown of the reservoirs early in the year and refilling on the basis of runoff forecasts. Irrigationists oppose this method of operation as they fear that it might jeopardize the storage of water for irrigation. Hence, no definite agreement has been made for the use of Arrowrock storage for flood control.***

Id. (emphasis added).

> 9. The district engineer . . . presents a plan in the interest of flood control, irrigation and hydroelectric power development which provides for construction of Lucky Peak Reservoir on Boise River with dam site about 10 miles above Boise. . . . ***The plan also provides for . . . operation as a system, in accordance with runoff forecasts, of the storage space in Anderson Ranch, Arrowrock and Lucky Peak Reservoirs in the combined interest of flood control, irrigation and power.***
>
> 10. The district engineer finds that ***with this added reservoir and use of an adequate factor of safety in forecasting runoff, additional storage space in Anderson Ranch and Arrowrock Reservoirs can be used for flood control when needed without endangering the irrigation water supply and that additional water for irrigation would be made available thereby. He proposes to furnish this supplemental water to the irrigationists who use Arrowrock Reservoir water as a recompense for the proposed flood control use of that reservoir.*** . . .
>
> 12. The district engineer recommends that . . . initiation of the proposed construction be conditioned upon obtaining satisfactory assurances from interested water users that, in consideration of the irrigation benefits to be derived from the additional storage in Lucky peak Reservoir, they will agree to use of Anderson Ranch and Arrowrock Reservoirs for flood control as proposed in the present report of the district engineer.
>
> 14. Local interests were advised of the nature of the report of division engineer and afforded an opportunity to present additional information to the Board. No communications have been received.

Id. (emphasis added).

On July 24, 1946, Congress authorized construction of Lucky Peak Reservoir as part of the Flood Control Act of 1946 "substantially in accordance with the recommendations of the Chief of Engineers in his report dated May 13, 1946." Ex. 2090.

4. Working Out the Details of "Interim" and "Ultimate" Reservoir Operating Plans (1946-1953)[4]

With Lucky Peak authorized and Anderson Ranch construction ongoing, the BOR, the Corps, IDWR, and Boise River water users met several times from September of 1946 to September of 1952, to collaboratively develop an "interim plan" for joint operation of Arrowrock and Anderson Ranch prior to completion of Lucky Peak, and the "ultimate plan" for operation of all three reservoirs after completion of Lucky Peak as a system for irrigation storage and flood control, as contemplated by the previously-discussed reports to the President and to Congress (House Doc. Nos. 916 and 957). Ex. 2076; Ex. 2035. The BOR's initial outline of the interim and ultimate plans included operating the reservoirs on a "forecast basis" during the "flood season of each year" to reduce flows below Diversion Dam (the headworks of the New York Canal) to 6,500 cfs. Reservoir space would be evacuated only to the extent deemed necessary to meet the 6,500 cfs flood control objective. The BOR would operate Arrowrock and Anderson Ranch, and the Corps would operate Lucky Peak once it was completed. The BOR advised the group that implementing the ultimate reservoir operating plan required: (1) prior submission to Congress of a supplemental report explaining the plan and reallocating Arrowrock and Anderson Ranch reservoir costs to irrigation storage, flood control and power generation; and (2) "agreements with all water users having space in Arrowrock and Anderson Ranch accepting the ultimate operating plan." Ex. 2035. Their collaboration resulted in two draft interim operating plans, issued by the Corps in 1948 and 1951 (*id.*, doc no. 36, doc no. 106), and the "ultimate" reservoir operating plan that has governed reservoir operations from the early 1950s to the present.

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[4] Historical context and detail are provided in *Stevens Report*. Ex. 2053.

5. Final Approval of the Plan: 1953 Agreement, 1954 Supplemental Contracts, Congressional Authorization, 1956 Reservoir Regulation Manual[5]

By 1953, the "ultimate" reservoir operating plan, that had been in development since the late 1930s, was ready for final approval; first by agreement between the BOR and the Corps setting forth the terms and requirements of the plan, second by agreements between the BOR and the Arrowrock and Anderson Ranch storage spaceholders, and finally by congressional authorization to use the total capacities of Arrowrock and Anderson Ranch reservoirs for flood control. The Commissioner of Reclamation recommended that the Secretary of Interior sign the agreement with the Corps, explaining that:

> The several actions dependent on the execution of this agreement are:
>
> 1. The presentation of the operating plan to the several water users' organizations having irrigation storage rights in Arrowrock and Anderson Ranch Reservoirs for formal acceptance by means of contracts supplemental to the existing contracts defining those storage rights.
>
> . . .
>
> 3. The completion of a revised allocation report for the Boise Project, this revised report to be presented to the Congress along with the flood control operating plan as supporting documents . . . .
>
> The flood control operating agreement provides for the joint use of the space in the three Federal reservoirs on the Boise River for irrigation and flood control, such joint use not being permissible under existing governing arrangements for Anderson Ranch and Arrowrock. The operating plan is the key to various succeeding actions, and without such a joint use the desired measure of flood control cannot be achieved.
>
> . . .
>
> The proposed operating plan has been discussed with the State Reclamation Engineer and the Boise Project Board of Control, a group representing the major water users' organization of the Boise Valley, and tentative agreement has been reached with them. The operating plan, by its terms will become effective only when the affected water

[5] Historical context and detail are provided in *Stevens Report*. Ex. 2053

users' organization have given formal approval to it and after its transmission to the Congress.

Ex. 2037.

On September 21, 1953, the BOR issued a Revised Allocation and Repayment Report for the Boise Project pursuant to Sections 7 and 9 of the Reclamation Project Act of 1939 and the 1946 Flood Control Act. Ex. 2069. The report supplemented the Secretary of Interior's June 25, 1940 finding of feasibility in House Document No. 916 to "provide an authoritative basis for the operation of [Anderson Ranch and Arrowrock Reservoirs] in conjunction with Lucky Peak for flood control purposes on a system basis." *Id.* The Report summarized the authorization and construction of the Boise River Reservoirs, and the development of the reservoir operating plan in the 1953 Agreement:

PLAN OF OPERATION

> The Boise Project was initially considered only in relation to irrigation. With the passage of time, however, the functions of power and flood control came to be recognized as significant partners. . . .
>
> . . .
>
> By the time it became evident that these reservoirs would not provide adequate irrigation water, the concept of multiple-purpose development had begun to take root. It was therefore only natural, when attention was turned to additional storage in the 1930 decade, that consideration should also be given to the possibility of using that storage for other ***complementary purposes***, namely: flood control and power. . . [D]uring the eleven intervening years between authorization and completion [of Anderson Ranch Reservoir], other significant changes occurred. The first of these was the authorization of Lucky Peak Reservoir for construction by the Corps of Engineers. . . The second event of significance involved a basic change in the concept of multiple-purposes operation. ***There was a growing realization that the uses of reservoir space in that area for irrigation and flood control were complementary rather than competitive. This realization opened up the possibility of using space jointly for each purpose, rather than requiring exclusive reservations for each purpose.***
>
> Studies of operating plans made jointly by the Corps of Engineers and the Bureau of Reclamation were focused in this direction with the result that it is now proposed to use 418,000 acre-feet of active space in Anderson Ranch Reservoir, the 285,000 acre-feet in

> Arrowrock and the 280,000 acre-feet in Lucky Peak Reservoir jointly for irrigation and flood control. ***A copy of the agreement providing for such operation is attached.*** . . .
>
> . . .
>
> Thus, facilities originally undertaken solely for irrigation have been converted to multiple-purpose uses by making necessary additions and by improving plans for using them.

Id. (emphasis added).

The November 20, 1953 Agreement between the BOR and the Corps (Ex. 2038) contains the following essential terms of the reservoir operating plan for joint use of the Boise River Reservoirs for irrigation storage and flood control:

- Allocating up to 983,000 acre-feet of storage space in the reservoir system as needed for flood control during the flood control season (*id.*, Art. 3);
- Using forecasts of snowmelt runoff into the reservoir system and operational "rule curves" attached to the Agreement during the flood control season (January 1 through July 31) to determine, allocate, and attain the volume of reservoir space (*i.e.*, "flood control space") necessary to capture runoff and control reservoir releases to prevent Boise River flows below Diversion Dam from exceeding 6,500 cfs (*id.*, Art. 6a-c);
- Factoring the diversion of water into the New York Canal into the determination of the quantity of water to be released from Lucky Peak (*id.*, Art. 6a);
- Prescribing the sequence of releases from the reservoirs for flood control, and the reverse of that sequence for filling the reservoirs for irrigation storage (*id.*, Art. 6d);
- Filling the reservoirs for irrigation use in accordance with the forecasts and the rule curves by the end of the flood control season (*id.*, Art. 6e); and
- Making up for shortfalls in filling Arrowrock and Anderson Ranch storage rights due to flood control releases with water stored in Lucky Peak at the conclusion of the flood control season pursuant to the Lucky Peak storage right (*id.*, Art. 6d).

The 1953 Agreement provides the spaceholders the express assurance that: "No reregulation of storage of 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.*, Art. 4. Article 7 of the 1953 Agreement allows the BOR and the Corps to modify the operating plan's provisions for determining flood control space requirements and reservoir releases after consultation with the State Reclamation Engineer (IDWR), the Boise River Watermaster and the Boise Project Board of Control. Article 7 further provides: "[N]o modification which would affect in any substantial way any storage rights in the reservoir system and Lake Lowell, shall be made without the concurrence of all entities having rights in the reservoir system and Lake Lowell." *Id.*

Article 9 of the 1953 Agreement provides that it will not become effective until it is accepted by all Arrowrock and Anderson Ranch spaceholders, and a revised allocation report supplemental to the report and finding of June 25, 1940 (H.R. Doc. No. 916, 76th Cong. 3d Sess.) reflecting the flood control benefits based on the operating plan herein set forth, has been transmitted to Congress." *Id.*

In a December 9, 1953 joint press release, the BOR and the Corps summarized the core concept of the reservoir operating plan in the 1953 Agreement, as it had been developed since the late 1930s, with the added assurance of storage in Lucky Peak if Arrowrock and Anderson Ranch did not completely fill:

> The operating plan calls for the three reservoirs to be managed as one system, with water storage and release based on a forecast of runoff in the watersheds above the dams. ***Water will be released in advance of the spring snowmelt flood to provide flood control. Water will be captured on recession of the flood peak to supply irrigation requirements. In the event that Arrowrock and Anderson Ranch reservoirs cannot supply irrigation needs by reason of having evacuated water for flood control in excess of refill, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights, to the extent of the space in those reservoirs remaining unfilled***, but not to exceed the amount evacuated for flood control. . . .
>
> The authorization of Lucky Peak contemplated that it would permit the existing two reservoirs, Anderson Ranch and Arrowrock, when operated in conjunction with Lucky

> Peak, to provide not only a desired degree of flood control in the Boise Valley, but also to insure a firm supply of water for irrigators, and in numerous years supplemental water would be available. However, the joint use at times of the entire capacities in Arrowrock and Anderson Ranch Reservoirs for flood control and irrigation was not envisioned prior to the authorization of Lucky Peak Reservoir. Therefore, the matter must be submitted to the Congress.

Ex. 2088 (emphasis added).

During 1953, the BOR negotiated terms for supplemental contracts to approve the reservoir operating plan with Arrowrock and Anderson Ranch spaceholders. In December 1953, the BOR delivered to the spaceholders draft supplemental contracts, the November 20, 1953 Agreement, and resolutions authorizing the spaceholders to enter into the supplemental agreements after approval by the Secretary of the Interior. Ex. 2039. The BOR's transmittal letter highlighted Article 7 of the draft, under which shortages in filling Arrowrock and Anderson Ranch would be "made up out of water accruing to the storage rights in Lucky Peak Reservoir." *Id.* After the spaceholders passed the necessary resolutions in early 1954, and the Secretary of the Interior approved the draft supplemental contract, the BOR transmitted the supplemental contracts to the spaceholders, with the 1953 Agreement attached as Exhibit A. During the summer of 1954, the BOR entered supplemental contracts with 15 Arrowrock and/or Anderson Ranch spaceholders (8 irrigation districts and 7 canal companies), in which they assented to the dual purpose reservoir operating plan contained in the 1953 Agreement. Ex. 2088.

The 1954 supplemental contracts supplement the spaceholders' existing contracts for storage in Arrowrock and Anderson Ranch Reservoirs. They define the "storage season" for the reservoirs as October 1 through the following year "when no more water is available for storage therein" and the "flood control period" as January 1 through July 31. *Id.*, Art. 5. The supplemental contracts:

- Require the BOR to operate the reservoir system "jointly for irrigation and flood control storage in accordance with the operating plan" in the 1953 Agreement (*id.*, Art. 6(a));

- Substitute the reservoir operating plan of the 1953 Agreement for the flood control plan in the Anderson Ranch storage contracts (*id.*, Art. 6(a) & (b));

- Guarantee that any shortfall in filling the spaceholders' storage rights in Arrowrock and Anderson Ranch Reservoirs due to flood control operations will be made up from "water accrued to storage rights in Lucky Peak Reservoir" (*id.*, Art. 7);

- Make the supplemental contracts effective "only when an allocation report for the Boise Project, supplemental to the report and finding of June 25, 1940 covering Anderson Ranch Dam (H.R. Doc. No. 916, 76th Cong.) reflecting the flood control benefits based on the operating plan set forth in Exhibit A has been presented to Congress and become operative" (*id.*, Art. 8 (a)); and

- Make the supplemental contracts effective so long as the water accruing to Lucky Peak storage rights is provided to cover shortfalls in filling the spaceholders' storage rights in Arrowrock and Anderson Ranch Reservoirs pursuant to article 7 (*id.*).

On August 24, 1954, after all the supplemental contracts were signed, Congress passed Public Law 660 (introduced in the Senate by Idaho Senator Dworshak as S.B. 3420) authorizing the Secretary of the Interior to operate the Boise River Reservoirs in accordance with the reservoir operating plan in the 1953 Agreement, and to allocate Arrowrock and Anderson Ranch Reservoir costs to irrigation, power and flood control accordingly. *Id.*; Ex. 2039.

In 1956, the Corps issued the Reservoir Regulation Manual for Boise River Reservoirs to provide information, criteria and procedures for operation of the Boise River Reservoir system as required by the 1953 Agreement. Ex. 2092. The 1953 Agreement remains in effect today. The Boise River Reservoirs were operated pursuant to the reservoir operating plan in the 1953 Agreement and the 1956 Manual for 30 years, until the plan was modified, and the Manual was replaced in 1985.

6. Lucky Peak Storage Rights, Contracts and the Reservoir Operating Plan[6]

The Corps began construction of Lucky Peak Reservoir in October 1949, and completed it in December 1957. Ex. 2186. Storage began during construction in 1955. The Corps was not required to obtain a water right to construct or operate Lucky Peak Reservoir for flood control. Lucky Peak was operated pursuant to the 1953 Agreement without a water right permit for irrigation storage until 1964.

The BOR filed a permit application with IDWR in 1957, to store and deliver water from Lucky Peak for irrigation use. Ex. 2030. The reservoir operating plan of the 1953 Agreement was an important factor in IDWR's processing of the permit application. The application proposed an exchange, whereby water would be diverted from the South Fork of the Boise River and delivered through a tunnel to the Hillcrest Division of the Mountain Home Project in the Mountain Home area. The permit application was protested by several irrigation districts and canal companies, alleging potential injury to their Bryan Decree "flood water rights," in Arrowrock and Anderson Ranch Reservoirs, and interference with the storage of water under the reservoir operating plan of the 1953 Agreement. *Id.* IDWR took no action on the permit until after the protests were resolved by agreement between the BOR and the protestants and the filing of a new permit application in 1963 which confined the supplemental use of Lucky Peak stored water to lands in the Boise Valley with existing water rights. *Id.* In a letter filed with IDWR, the BOR confirmed its understanding that the application would not interfere with prior water rights, or the water users' rights under the 1954 Supplemental Contracts in which they approved the reservoir operating plan of the 1953 Agreement. The BOR offered the inclusion of a condition

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[6] Historical context and detail are provided in *Stevens Report*. Ex. 2053.

to this effect in IDWR's approval of the Lucky Peak permit. *Id.* The spaceholders withdrew their protests, and IDWR approved the permit application on March 20, 1964. *Id.*

After IDWR approved the permit application in 1964, the BOR entered water service contracts pursuant to Section 8 of the Flood Control Act of 1944 with several Boise Valley irrigation districts and canal companies for storage in Lucky Peak Reservoir. Ex. 2099. Eighteen contracts were entered by 1968. Ex. 2100. Like the Anderson Ranch contracts, the Lucky Peak contracts entitled the contractors to defined proportions of the water that was actually stored in Lucky Peak Reservoir, and allowed the contractors to "hold over" unused storage from one year to the next (aka "carryover storage"). Ex. 2099. The contracts identified the BOR's approved permit to store water in Lucky Peak, acknowledged that Lucky Peak is operated primarily for flood control pursuant to the 1953 Agreement, and provided that:

> Subject to such operation for flood control , the United States will operate Lucky Peak Dam and Reservoir so as ***to store under existing storage rights all available water***, and during each irrigation season, the United States will make available to the Contractor for irrigation the Contractor's proportionate share of the storage water that accrues in each year to the active capacity of the Reservoir, together with any stored water that may have been carried over in the Contractor's share of such active capacity from prior water years.

Id. (emphasis added).

Under the contracts, in a year of below normal runoff, when storage releases are not required to create the flood control space required to capture runoff to prevent flooding, Lucky Peak storage available to the contractors consists of carryover from the prior water year (November 1 to October 31), plus runoff stored during the current water year. In a flood control year, when it is necessary to release carryover storage to create the required flood control space, carryover from the prior year is reduced by the amount released, and Lucky Peak storage available to the contractors would consist of remaining carryover, if any, plus runoff captured during flood control operations. All water in Lucky Peak after flood control releases is

accounted for as new storage or "new fill." *Id.* The Lucky Peak contractors were thus entitled to water stored in the reservoir "under existing storage rights" after flood control releases on "recession of the flood peak to supply irrigation requirements," subject to the possibility that their entitlements would not be completely filled at the conclusion of flood control operations due to: (1) forecasting errors or unforeseen runoff conditions; and (2) the assignment of Lucky Peak storage to make up for shortages in Arrowrock and Anderson Ranch storage. Ex. 2088.

The Lucky Peak water right remained in permit stage for several decades, until it was finally licensed in 2002. The reservoir operating plan continued to be a factor in the development of the Lucky Peak water right. Extensions of time were granted while the Bureau, the Corps, and IDWR conducted various studies related to the use of uncontracted Lucky Peak storage space and modification of the reservoir operating plan. Ex. 2030. These studies included the *Boise Project Power and Modification Study*, which was used in the selection of new criteria for the revised reservoir operating plan that was adopted in 1985. *Id.*[7] After that study was completed and the reservoir operating plan was revised, the BOR filed an application to amend the permit to add streamflow maintenance as the purpose of use for the uncontracted storage, and submitted proof of beneficial use. *Id.* IDWR performed a beneficial use examination in 2002, after the permit was claimed in the SRBA. *Id.* IDWR's analysis confirmed its longstanding position that flood control "cannot be recognized as a beneficial use." *Id.* The analysis recommended the license include a condition that use of the Lucky Peak storage right is "subject to contracts administered by the right holder." *Id.*

After further consultation on the proposed license with BOR, an IDWR staff memorandum recommended inclusion of a condition stating that the Boise River Reservoirs are

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[7] *See also, Stevens Report.* Ex. 2053.

operated as one system in accordance with the 1954 Act (Public Law 660). Ex. 2031. The staff memorandum includes an excerpt of a 1955 Corps report entitled "Lucky Peak Dam and Reservoir" from IDWR's Lucky Peak dam safety file, which explains "the operation plan" as follows: "To permit more effective use of all storage space, the operation of the three dams in the Boise River Basin is coordinated to provide as much as 983,000 acre-feet of flood control space on a forecast basis with all three reservoirs refilled at the end of the flood season for irrigation." *Id.* While the license was issued without the recommended condition, the reservoir operating plan was clearly considered by IDWR.

To secure the Lucky Peak contractors' long-term rights to storage in Lucky Peak Reservoir, the Lucky Peak water service contracts were converted to repayment contracts in 2005, after the BOR analyzed and vetted the conversion through a public NEPA process. Ex. 2088; Ex. 2190. The repayment contracts require that Lucky Peak be operated pursuant to the 1953 Agreement, the 1954 supplemental contracts, and the 1985 Water Control Manual for Boise River Reservoirs, and retained the understanding of the water service contracts regarding the relationship between flood control operations on the storage of water pursuant to "existing storage rights" for use by the Lucky Peak spaceholders. Ex. 2190.

7. IDWR's November 1974 Report and Revision of the Reservoir Operating Plan[8]

In May 1974, Idaho Governor Andrus requested that IDWR review reservoir operations to determine whether changes could be made to decrease the risk of flooding downstream from Lucky Peak Dam.[9] Ex. 2181, ¶ 7. In response to the Governor's request, IDWR produced a

[8] Historical context and detail are provided in *Stevens Report*. Ex. 2053.

[9] Reservoir operations from 1956 to 1974 are discussed in the *Stevens Report*. Ex. 2053.

report in November 1974, prepared by IDWR Water Resource Engineer Bob Sutter in consultation with the BOR and the Corps, which evaluated the effectiveness of reservoir operations under the 1953 Agreement and the 1956 Manual in preventing flooding and filling the reservoirs for irrigation storage. Ex. 2186. The 1974 Report used the terms "refill" and "fill" interchangeably to mean the annual filling of the Boise River Reservoirs during flood control operations for irrigation and other beneficial uses. *Id.*, ¶ 8. The Report found that changes were warranted because: urban encroachment along the Boise River increased the potential for economic damage from flooding; improved methods of runoff forecasting were available, and the 1953 Agreement's "rule curves" governing reservoir operations during the flood control season provided greater assurance of reservoir refill than flood prevention. *Id.*, ¶ 8. The Report evaluated changing reservoir operations to increase the vacant flood control space during the early phases of the flood control season to capture more peak runoff and thereby improve the ability to control reservoir releases to meet the 6,500 cfs flood control objective. Such a change could increase the risk that the reservoirs will not be filled by the end of flood control operations by shifting the timing of reservoir refill so that less is stored during the early "evacuation period," of flood control operations, and more is stored later during the "refill period." *Id.*, ¶ 9. The Report concluded that reservoir operations could be modified in such a manner without significantly reducing refill assurances, and recommended that the BOR, the Corps and IDWR conduct additional studies and jointly prepare revisions to the 1953 Agreement and the 1956 Manual. *Id.*, ¶ 10.

IDWR's 1974 Report became the basis of a multi-year effort by the BOR, the Corps and IDWR to which resulted in revision of the reservoir operating plan in the 1953 Agreement and adoption of a new manual in 1985, entitled "Water Control Manual for Boise River Reservoirs"

("Water Control Manual" or "1985 Manual"). *Id.*, ¶¶ 11, 12. As explained by IDWR Director Higginson:

> In 1974 Governor Andrus requested [IDWR] to evaluate flood control management of the Boise River system. A report was issued in November of that year recommending several changes for improving Boise river flood control operations. ***As a direct result of this report, a new Water Control Manual for Boise River reservoirs was finalized in April, 1985. Although issued by the Corps of Engineers, this manual was a joint effort by the Corps, Bureau of Reclamation and [IDWR]***.
>
> The new manual represents several years of effort to adopt current technology and data to today's condition and needs, all of which have changed since the first operating manual was issued in 1956.

Ex. 2171 (emphasis added).

8. The 1985 Water Control Manual

After the Water Control Manual was completed in April, 1985, the BOR and the Corps entered a "Memorandum of Understanding" ("1985 MOU") to adopt the Manual as an "integral part" of the 1953 Agreement to "constitute the current operating plan and procedures until further changed or modified by the parties in accordance with Article 7" of the 1953 Agreement. Ex. 2045. The 1985 MOU explains that the BOR and the Corps agreed to revise the reservoir operating plan "after consultation with the State of Idaho, Boise River Watermaster, and Project Manager of the Boise Project Board of Control." *Id.* The Water Control Manual explains: "The Memorandum of Understanding is a supplement to the Agreement, which does not change its terms, but rather incorporates a new operating agreement under Article 7 of the 20 November 1953 agreement." Ex. 2186.

The 1985 Manual retains the longstanding reservoir operating principle as explained to and approved by Congress, Boise River Reservoir spaceholders, and the State of Idaho beginning in the 1930s: "***To secure the desired flood-control results, it will be necessary to vacate, each year in advance of the flood season, an amount of storage capacity indicated by the run-off***

forecasts to be needed to control the flood flow to the safe carrying capacity of the channel. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses." (H.R. Doc. No. 916, 76th Cong., 3d Sess. (1940)), authorizing construction of Anderson Ranch Reservoir) Ex. 2027 (emphasis added). On November 30, 1987, IDWR Director Higginson explained:

> [The new manual] ***contains new rule curves and procedures aimed at providing greater flood protection through early season operations and increased assurance of refill for irrigation during the late runoff season. 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. 2171 (emphasis added).

Though updated, the linchpins of the revised reservoir operating plan continued to be:

(1) the flood control regulation objective of 6,500 cfs at the Glenwood gage (Ex. 2186 at 7-17);

(2) allowable releases between 6,500 cfs and 10,300 cfs during normal flood control operations (without exceptional runoff and reservoir inflows) between January 1 and July 31, depending on the volume of irrigation diversions pursuant to established senior natural flow water rights between Lucky Peak Dam and the Glenwood Gage (*id.* at 4-15, 7-17);

(3) updated methods and procedures for forecasting the timing and volume of inflows from runoff into the reservoir system (*id.* at 6-1);

(4) new rule curves to define flood control space requirements based on reservoir inflow forecasts (*id.* at 7-19 and Plate 7-1); and

(5) updated methods for scheduling releases to maintain required flood control spaces (*id.* at 7-8, 7-13).

Ex. 2181, ¶ 12.

The Water Control Manual divides the "flood control season" (end of irrigation season to maximum reservoir fill) into three phases of operation. During the first "winter space requirements" phase, November 1 to March 31, the Manual requires that minimum flood control spaces be maintained, regardless of forecasted runoff, to control unexpected runoff from

snowmelt and precipitation on frozen ground. *See* Ex. 2004, ¶ 17. Generally, reservoir releases are not required during the winter months to meet the prescribed minimum space requirements (*id.*), unless there are exceptional runoff conditions, as explained in 1987 by IDWR Director Higginson:

> To illustrate the need for this space, the December 1964 flood produced almost 200,000 acre-feet of runoff in one week, and had there been no reservoir space available, would have resulted in a peak flow of 44,000 cfs through Boise. Such a flood today would cause more than 400 million dollars in damages. To protect against such an event, current criteria call for a minimum of 300,000 acre-feet of empty reservoir space during November and December.

Ex. 2171.

Generally, beginning January 1, runoff forecasts are used in conjunction with the rule curves to determine the volume of reservoir space that must remain vacant to capture forecasted runoff, and the volume of reservoir space in which inflows may be stored. Ex. 2181, ¶ 9. This procedure represents the balance described by IDWR Higginson between flood control and reservoir refill, providing "high levels of assurance that (1) Boise River flows will not exceed the flood control objective of 6,500 cfs, and (2) the reservoirs will be refilled to the maximum extent possible at the conclusion of flood control operations pursuant to reservoir storage water rights." Ex. 2181, ¶ 13; *see also*, Ex. 2004, ¶¶ 6, 7.[10]

[10] For additional explanation of flood control operations under the Water Control Manual *see* Ex. 2181, ¶¶ 9-11; Ex. 2008, ¶¶ 16-22; and Ex. 2004, ¶¶ 4-26.

9. Storage of Water in the Boise River Reservoirs During Flood Control Season

Bob Sutter, author of the 1974 report, participant in the development of the 1985 Water Control Manual, and author of the IDWR's computerized water right accounting program, explains how water is stored for beneficial use during flood control operations this way:

> 4. Reservoir Operations Overview. . . . Because the reservoir system stores water for irrigation and other uses during the spring runoff season, the reservoir operating plan is designed to ensure that the reservoirs will be filled during flood control operations to store water pursuant to established rights. Joint operation of the reservoir system for flood control and beneficial use storage is accomplished through the use of the runoff forecasts, rule curves, and scheduled reservoir releases. Under the reservoir operating plan, as forecasted inflows decline, less flood control space is required, and inflows are increasingly retained and added to reservoir contents until the danger of flooding has passed and the reservoirs are filled or nearly filled. After the flood risk has passed, the water stored in the reservoir system at the point of maximum fill is allocated among the reservoir storage water rights according to their priorities, and is available for delivery to those who are entitled to use the stored water for irrigation and other beneficial uses.
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> 5. Storage Water Right Accrual During Flood Control Operations. Water cannot be stored in Boise River Reservoir space that is required to be vacant during flood control operations. Reservoir inflows that must be released to maintain required flood control spaces are therefore not available to physically fill storage space. Reservoir space becomes available for physical storage only as flood space requirements decline in accordance with the established reservoir operating plan. Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled.

Ex. 2181, ¶¶ 4, 5. *See also*, Ex. 2004, ¶ 14, flood control space is not available for storage.

Lee Sisco, whose 40-year experience in the administration of water rights in Water District 63 and southwester Idaho includes working for IDWR from the 1970s to 1986 in the Western Region office as a field examiner and as Manager of the Watermaster Program, and, more importantly, holding the office of the Boise River Water Master from 1986 until 2008, explains that all water that is physically stored in and released from the Boise River Reservoirs for beneficial use is stored and delivered pursuant to the decreed storage rights for the reservoirs.

Ex. 2008, ¶ 8. Mr. Sisco explains beneficial use storage and water right administration during flood control operations as follows:

> 19. As Watermaster, I understood that the water physically stored in the Boise River Reservoirs as a result of this flood control procedure was stored pursuant to the reservoir storage water rights. The release of water from the reservoirs to attain required flood control spaces did not affect the accrual of physically stored water to reservoir storage rights. Mr. Koelling [the previous Watermaster] and I each administered storage water rights based on this understanding. We each accounted for the accrual of water physically stored in the reservoirs at the point of maximum reservoir fill to the reservoir storage water rights according to their priority dates. . . .
>
> 20. During my experience in Boise River water right administration, no spaceholder, Watermaster, or IDWR employee advised me that they considered water that was released from the Boise River Reservoirs for flood control purposes as a release of water that had been stored for beneficial use pursuant to a storage water right. Flood control use of the reservoir system does not require a water right, or constitute storage or storage use under any of the storage water rights for the Boise River Reservoirs. Reservoir space that is required to be kept open for flood control purposes is not available to physically store water for irrigation or any other beneficial use, until that space is no longer required for flood control purposes. Water that is required by the Water Control Manual to be released from the reservoir system to maintain required flood control spaces is not available for beneficial use storage under reservoir storage water rights, and is not treated as delivered to spaceholders for beneficial use under storage water rights. During flood control operations, reservoir inflows are physically stored for beneficial use as flood space requirements decline, and reservoir space that becomes available for beneficial use storage is physically filled with water. During flood control operations, I worked with the BOR and the Corps to make every effort to fill reservoir space with water following flood control releases to fulfill existing storage rights and spaceholder contracts. Until reservoir space that is available for storage is physically filled, storage rights remain in effect and are physically filled in priority with all other Boise River water rights. When the reservoirs reach maximum physical fill at the conclusion of flood control operations, the storage rights have likewise reached maximum fill, and the water that has been physically stored pursuant to the storage water rights is allocated to the spaceholders' storage accounts.

Ex. 2008, ¶¶ 19, 20.

Boise River Reservoir spaceholders have also understood that water filling the Boise River Reservoirs following flood control releases is stored pursuant to the reservoir water rights. Ex. 2002, ¶ 10; Ex. 2189, ¶ 14. Spaceholders depend vitally upon storage secured by the storage water rights they established, in reservoir space they paid for. They have relied upon reports of

physical reservoir contents to gage their storage supplies for the upcoming irrigation season. Ex. 2002, ¶ 6. Notice of flood control releases signals to the spaceholders that there will be sufficient natural flow to physically fill the Boise River Reservoirs and storage rights for a full allocation to their storage accounts (which are based on storage water rights). *Id.*, ¶ 7; Ex. 2189, ¶¶ 10, 11. Prior to BW-17, they had never been informed that IDWR or the State of Idaho considered flood control releases to be releases of their stored water, or that any of the water allocated to their storage accounts had been stored without a water right. Ex. 2002, ¶ 10; Ex. 2189, ¶ 14.

10. Storage Water Right Accounting During Flood Control Operations

The computerized accounting system that is used to account for the accrual of water to Boise River Reservoir storage water rights was adapted for the Boise River by Bob Sutter and Alan Robertson, and implemented at Lee Sisco's request when he became the Boise River Watermaster in 1986. Ex. 2181, ¶¶ 6, 18; Ex. 2008, ¶ 23. Mr. Sutter and Mr. Sisco explain the methodology of the accounting system in their affidavits. Ex. 2181, ¶¶ 6, 18-21; Ex. 2008, ¶¶ 23-32. What is important to understand for purposes of this case is that the only significant change implemented through the adoption of the accounting system was to account for the accrual of water to the reservoirs based on source and priority, rather than priority alone. Ex. 2008, ¶ 24. This was an administrative decision to properly account for the storage of water *as between the reservoir storage rights* that could have been implemented without the accounting system. *Id.* As an accounting tool, the accounting system does not itself determine how water rights are administered. Ex. 2008, ¶ 25. Adoption of the accounting system did not make any other change to the administration of Boise River storage water rights, or the accrual of physically stored water to those rights. *Id.* The accounting system does not affect required

flood control spaces, storage volumes (*i.e.*, reservoir contents), reservoir system releases or any other aspect of reservoir operations during the flood control season pursuant to the Water Control Manual. *Id.*, *see also*, Ex. 2004, ¶ 27. Specifically, the "paper fill" methodology of the water right accounting program did not change reservoir operations, reservoir refill, or water right administration. Ex. 2181, ¶ 20. Physical filling of reservoir system storage spaces and water rights continued as required by the Water Control Manual's runoff forecasts, rule curve and release procedures. *Id.* The accounting system was not intended or utilized to treat reservoir storage rights as "satisfied" at the point of "paper fill" when in fact vacant flood control spaces remained due to flood control releases over which the spaceholders had no control. Nor was it the intent or effect of the accounting system to treat water as being stored for beneficial use without a water right, or allowing junior water rights to call for the release of water that was required by the Water Control Manual to be stored to fill reservoir storage spaces and water rights. Ex. 2008, ¶ 32.

To the contrary, Mr. Sutter explains that "the net effect of this accounting procedure is to accrue to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecasts and rule curve procedures of the Water Control Manual." Ex. 2181, ¶ 32.

> [T]he water right accounting program confirms that reservoir storage rights are fulfilled as inflows physically refill reservoir storage spaces during flood control operations. After flood control operations are concluded and the reservoirs have reached maximum fill, stored water is allocated to the existing storage water rights, confirming that filling the reservoirs for beneficial use storage pursuant to reservoir storage rights is not completed until maximum reservoir fill is achieved.

Ex. 2181, ¶ 6.

In Mr. Sisco's words: "As was the case during [Watermaster] Koelling's tenure, all the water actually, physically stored in the reservoirs at the conclusion of flood control operations has been stored pursuant to the reservoir storage rights, and allocated to the storage accounts of

the spaceholders." Ex. 2008, ¶ 32. "The accounting system protects the established storage rights, and does not penalize spaceholders for the use of the reservoir system for flood control purposes to protect downstream lands from flooding." Ex. 2008, ¶ 31.