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DEPARTMENT OF
WATER RESOURCES

**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

**UNITED WATER'S POST-HEARING
BRIEF**

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INTRODUCTION

United Water Idaho Inc. (“United Water” or “UWID”) submits this *Post-Hearing Brief* pursuant to the Director’s order made on the record at the September 10, 2015 hearing in the above-captioned contested case, as amended by his September 24, 2015 *Order Granting Extension of Time for Filing Post-Hearing Briefs*.

This contested case was initiated, and a hearing was held, for the following purpose:

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 of Contested Case and Formal Proceedings, and Notice of Status Conference (“*Contested Case Notice*”), p. 6 (Oct. 22, 2013) (capitalization in original; underlining added). At the opening of the hearing on August 27, 2015, the Director read this statement into the record to reinforce that it defines the scope of the proceeding.

In other words, the scope of this contested case is very limited. It is about water rights issued under Idaho law for storage in federal on-stream reservoirs in Basin 63 (the “Storage Rights”), and how those rights must be accounted for and administered under Idaho’s Prior Appropriation Doctrine. The Idaho legislature has given the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) the authority to figure out how to accomplish this. *See* Idaho Code § 42-602.

The Storage Rights authorize the storage of water for beneficial uses such as irrigation. Ex. 2015 (the Storage Rights’ SRBA-issued partial decrees).¹ “Flood control” is not an

¹ References to exhibits admitted into the record at the hearing are cited as “Ex.” References to officially noticed documents are cited with a description of the document preceded by the bracketed letters “[O.N.]”

authorized purpose of use for any of the Storage Rights. Thus, this matter concerns the Director's methods of accounting for and administering the storage of water for beneficial uses—not for flood control—according to the Storage Rights' partial decrees, and whether those methods are consistent with Idaho law. As explained later in this brief, with one exception,² the Department's current accounting system's methodology for accruing water to the Storage Rights is required by Idaho's Prior Appropriation Doctrine and should not be altered to accommodate the Irrigators'³ concerns.

Indeed, even if the Prior Appropriation Doctrine did not mandate this result, the Director should exercise his discretion to adopt this approach. This approach is the one best suited to ensure fairness, efficiency, predictability, maximum utilization of resources, and, most importantly, State control over the State's water resources.

The Department's current accounting methodologies are described in a November 4, 2014 memorandum ("*Staff Memo*") authored by Liz Cresto, Technical Hydrologist for the

Officially noticed documents are listed in the Director's September 15, 2015 *Amended Documents Officially Noticed*.

² As discussed later in this brief, United Water disagrees that the accounting system should "reset" the accrual of water to storage water rights on August 15 (or any other date prior to the beginning of the storage year), unless such a reset subordinates the storage water rights to all other water rights. A non-subordinated "reset" prior to the beginning of the storage year puts the storage water rights in priority ahead of junior water rights even though the storage water rights already might have been satisfied once during the storage year. This practice is not consistent with Idaho's Prior Appropriation Doctrine and it injures junior water rights by allowing a "double fill" of the storage rights.

³ In this brief, the term "Irrigators" refers to: Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company, Thurman Mill Ditch Company; Pioneer Irrigation District; New York Irrigation District; Farmers Union Ditch Company; the Boise Project Board of Control; Big Bend Irrigation District; Wilder Irrigation District; and Boise-Kuna Irrigation District. Other parties, such as the City of Boise and the Surface Water Coalition, also are involved in this matter.

Department. Ex. 1 (the *Staff Memo*).⁴ The *Staff Memo* confirms that, at least since 1986, the Department has followed the “one-fill” rule based on “storable inflow” and “paper fill” in accounting for storage water rights in Basin 63 (if not all by name, as described below). The *Staff Memo* also documents that federal reservoirs in Basin 63 have operated efficiently and successfully under the *status quo*, which has allowed reservoirs to physically refill after flood control releases on a regular basis under “free river” conditions without injuring junior rights.⁵ As discussed in United Water’s January 26, 2015 *Response to Department’s Staff Memo* (“*Response to Staff Memo*”), the *Staff Memo* is consistent with these principles which are mandated by Idaho’s Prior Appropriation Doctrine and, in any event, are the best approach.

The Irrigators contend this case is not about Idaho law, but instead is about federal laws, regulations, policies, and/or contracts governing reservoir operations (specifically, flood control operations). They argue that water released or bypassed⁶ by the federal government for flood

⁴ For the convenience of the reader, and because it is referenced repeatedly herein, the *Staff Memo* is cited by name rather than by reference to its exhibit number.

⁵ The “one-fill” rule, and “storable inflow,” “paper fill,” and “free river” principles are described in Section III.A below.

⁶ We use the term “bypass” as shorthand to describe the situation in which there are simultaneous inflows into and outflows out of a reservoir. To the lay person, it may seem that, when inflow equals outflow (and the reservoir height remains unchanged), no water is being stored. This is not the way the law views it, however. When inflow equals outflow that simply means that the same amount of water is being diverted and stored as is being released. This is because all water that is available to store under a storage right is diverted and stored, as a matter of law, as soon as it enters the impoundment. The reservoir operator, who maintains control over the impoundment and its release structures may elect to set the valves so that some or all of that stored water is simultaneously released. Thus, “bypass” simply means simultaneous storage and release. Such was the holding in [O.N.] *In re SRBA*, Case No. 39576, *Memorandum Decision and Order on Cross-Motions for Summary Judgment re: Bureau of Reclamation Streamflow Maintenance Claim (Subcase No. 63-03618)* (“*Lucky Peak Order*”) at 19 (SRBA Ct. Sept. 28, 2008). In the *Lucky Peak Order*, the SRBA Presiding Judge held that water entering an impoundment is “diverted” even if it is promptly released (or passed through) for flow maintenance purposes:

[T]he entire flow of the natural stream has been diverted and stored and become subject to controlled releases. The storage and releases are made possible by the massive and costly structure known as Lucky Peak dam and reservoir.

[Reclamation] has flexibility in releasing the water when needed to accomplish such purposes. Rather than taking no action, as is the case with an [instream flow] water right, [Reclamation] monitors and manages the stream flow releases from the reservoir on a day-to-day if not hour-to-hour basis.

control purposes should not be counted toward the satisfaction of the Storage Rights.

Notwithstanding the eighteen witnesses and thousands of pages of exhibits the Irrigators produced at the hearing, their arguments cannot be squared with Idaho law. Nothing in Idaho law, including the Prior Appropriation Doctrine, calls for the subordination of the rights of Idaho water users to federal management objectives.

It is undisputed that the Storage Rights authorize the storage of water for beneficial uses such as irrigation, but do not authorize the storage or release of water for flood control purposes. There is no evidence in the record that flood control is a beneficial use of water under Idaho law, let alone under the Storage Rights at issue in this proceeding.

It also is undisputed that the administration of the Storage Rights must be handled by the Director in accordance with Idaho law. Idaho Code § 42-602 (“The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine.”). On the other hand, flood control operations (including the timing and quantities of water released to vacate space to catch potential flood waters) at Arrowrock, Anderson Ranch, and Lucky Peak reservoirs are determined by the U.S. Bureau of Reclamation (“Bureau” or “BOR”) and the U.S. Army Corps of Engineers (“Corps”) according to federal law and policy, and not by the State of Idaho, the Department, or any other water user according to Idaho law.

Based on the evidence they presented and their prior statements in this proceeding (and elsewhere), United Water understands that the Irrigators do not like the Department’s current

Id. at 22. Thus all water flowing through the impoundment, even water that is immediately released (or bypassed), is legally diverted.

accounting methodologies for the Storage Rights. However, they have not proposed any alternative approach that would be consistent with Idaho law. Instead, at the hearing, their witnesses proposed allowing the federal reservoir operators to determine when and how much water should be counted toward the fill of the Storage Rights. This would allow storable water to be released or bypassed when other users do not need it, and the capture and storage of water later to the injury of other water users. Allowing the Boise River reservoirs operators to dictate when water accrues to the Storage Rights would take away the Director's authority to administer the public waters of the State and give that authority to the federal government.

The Irrigators' witnesses also proposed reducing the amount of water accruing to the Storage Right by the amount of water released or bypassed during flood control operations, and then allowing a second accrual of water in priority. This "double filling" would allow storage of more water than authorized under the Storage Rights, in violation of the basic rule that a water right is entitled to fill only once in priority.

The upshot of these proposals is to extend the amount of time that the Storage Rights remain unfilled and in priority. These proposals violate Idaho's Prior Appropriation Doctrine, including the policy of this State to secure the maximum use of its water resources, and would harm junior water rights by delaying the date that they are entitled to divert water in priority.

United Water also anticipates that the Irrigators will call on the Department to impose limitations on every water right junior to the Storage Rights that would restrict diversions of such rights to water released from Lucky Peak during flood control operations. That is not only a bad idea, but one beyond the scope of these proceedings. This contested case is about the Storage Rights, not about other water rights, particularly existing or future junior natural flow rights. It would be improper and prejudicial to existing junior water right holders, and a violation of their

due process rights, if this proceeding resulted in the imposition of new conditions on the use of their water rights. Moreover, Idaho's Prior Appropriation Doctrine provides no basis for restricting junior water rights to only water released from Lucky Peak—the Boise River's surplus waters are the property of the State, not the federal government, and it would be unconstitutional for the Department to restrict the appropriation of the unappropriated waters of this state. Idaho Const. art. XV § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . .").

In short, the Irrigators' evidence supports no legally permissible alternatives to the Department's current accounting system, or the one-fill, storable inflow, paper fill, and free-river refill principles upon which it is based. United Water believes no lawful alternatives exist, and that there is no legal or factual justification to stray from the sound principles reflected in the current accounting system.

ARGUMENT

I. THE DIRECTOR IS RESPONSIBLE FOR DISTRIBUTING WATER TO THE FEDERAL ON-STREAM STORAGE WATER RIGHTS IN ACCORDANCE WITH IDAHO'S PRIOR APPROPRIATION DOCTRINE.

This contested case arose because of questions raised in the Basin-Wide Issue 17 proceedings. *Contested Case Notice*, pp. 2-3 ¶ 4. In those proceedings, SRBA Presiding Judge Wildman and the Idaho Supreme Court agreed that the question presented here—how water should be "counted" or "credited" toward the fill of water rights associated with the Boise River's federal on-stream reservoirs—is within the Director's discretion to determine in accordance with Idaho law. Judge Wildman stated, "[t]he Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs." *Memorandum Decision* at 12.

The Supreme Court agreed, recognizing first that “IDWR has a statutory duty to allocate water.” *A&B Irrigation Dist. v. State*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). The Supreme Court further explained:

The Idaho legislature gave the IDWR’s Director the power to make appropriation decisions in Idaho Code section 42-602: “[t]he director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the . . . facilities diverting therefrom.” The Director also “shall distribute water in water districts in accordance with the prior appropriation doctrine.”

. . .
Idaho Code section 42-602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. That statute gives the Director a “clear legal duty” to distribute water.

A&B, 157 Idaho at 393, 336 P.3d at 800 (internal citations and footnote omitted). The Director’s “clear duty to act,” said the Court, “means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.” *A&B*, 157 Idaho at 393-94, 336 P.3d at 800-01.

The Supreme Court also “recognized the Director’s discretion to direct and control the administration of water in accordance with the prior appropriation doctrine,” *A&B*, 157 Idaho at 393, 336 P.3d at 800, and “the need for the Director’s specialized expertise in certain areas of water law.” *A&B*, 157 Idaho at 394, 336 P.3d at 801. Explaining how this expertise is to be used, the Court explained:

[T]he Director’s duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user. However, it is within the Director’s discretion to determine when that number has been met for each individual decree.

A&B, 157 Idaho at 394, 336 P.3d at 801.

In short, there is no question that the Director has discretion in performing his duty of determining how water accrues to the Storage Rights. Then again, that discretion is not unbridled. As the Supreme Court said, “the Director cannot distribute water however he pleases at any time in any way; he must follow the law.” *A&B*, 157 Idaho at 393, 336 P.3d at 800. Here, “as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty,” *Id.*, when he exercises his discretion in determining how water accrues water to the Storage Rights under the Department’s accounting system.

II. THE WATER RIGHTS AT ISSUE IN THIS PROCEEDING ARE DEFINED BY THE SRBA PARTIAL DECREES FOR THE WATER RIGHTS ASSOCIATED WITH THE FEDERAL ON-STREAM RESERVOIRS.

As noted above:

[T]he Director’s duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user.

A&B, 157 Idaho at 394, 336 P.3d at 801.

Accordingly, this contested case is about the Director’s determination of how water accrues toward the satisfaction of the Storage Rights, whose elements were decreed by the SRBA Court. Copies of the Storage Rights’ partial decrees are in the record as Exhibit 2015, and are summarized in the following table:

Right No.	Associated Reservoir	Priority Date	Total Quantity in Acre-Feet Annually (“AFA”)	Purposes of Use	Purpose of Use Quantity (in AFA)	Period of Use
63-303	Arrowrock	1/13/1911	271,600	Irrigation Storage	271,600	1/1-12/31
				Irrigation From Storage	271,600	3/15-11/15
63-3613	Arrowrock	6/25/1938	15,000	Irrigation Storage	15,000	1/1-12/31
				Irrigation From Storage	15,000	3/15-11/15
63-3614	Anderson Ranch	12/9/1940	493,161	Irrigation Storage	487,961	1/1-12/31
				Irrigation From Storage	487,961	1/1-12/31
				Industrial Storage	5,200	1/1-12/31
				Industrial From Storage	5,200	1/1-12/31
				Power Storage	493,161	1/1-12/31
				Power From Storage	493,161	1/1-12/31
				Municipal Storage	5,200	1/1-12/31
				Municipal From Storage	5,200	1/1-12/31
63-3618	Lucky Peak	4/12/1963	293,050	Irrigation Storage	111,950	1/1-12/31
				Irrigation From Storage	111,950	3/15-11/15
				Recreation Storage	28,800	1/1-12/31
				SM Storage*	152,300	1/1-12/31
				SM From Storage*	152,300	1/1-12/31

*“SM” in the table above means “Streamflow Maintenance”

None of the Storage Rights include flood control storage or flood control releases as authorized purposes of use. The only references to flood control in the Storage Rights are in the partial decree associated with Lucky Peak reservoir, which contains remarks stating: (1) “Lucky Peak Reservoir has 13,950 acre feet of capacity for flood control purposes in addition to the volume of water authorized for storage under this right”; and (2) “The storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation.” Ex. 2015. But these provisions do not authorize the release or bypass of water for flood control that was stored or could have been stored (*i.e.*, storable inflow) for beneficial use, or additional storage of the same quantity again in priority.

In fact, none of the Storage Rights include authorization to physically store water in reservoirs in priority after flood control operations if there already was sufficient storable inflow to completely satisfy the Storage Rights. This is consistent with documentation concerning the Department's SRBA recommendation for the storage rights associated with Arrowrock reservoir. In a 2002 email to Deputy Attorney General Nick Spencer, IDWR's bureau chief for the Snake River Basin Adjudication, David Tuthill, stated: "Regarding the fills per season, we have used the policy throughout the state for these large reservoirs that they get one fill under their priority—more can be stored if water is available to fill all priorities. This prevents a senior from continuing to fill and release all season long." Ex. 8, p. 1.⁷ At the hearing, Mr. Tuthill testified that he understood that the storage rights associated with Arrowrock reservoir were recommended by IDWR and decreed by the SRBA Court consistent with these statements. Mr. Tuthill also testified that these statements accurately reflected how water accrued to all on-stream storage water rights in Idaho during his time with the Department.

The Director's administration of the Storage Rights is not defined by the federal government's laws or policies governing flood control contained in the federal *Water Control Manual for Boise River Reservoirs – April 1985* ("WCM")⁸ or elsewhere, nor is it defined by

⁷ Mr. Tuthill later served as IDWR's Director from 2007 to 2009. Former Director Tuthill's statement about the "policy throughout the state" is confirmed by the September 21, 1979 Minutes of Committee of Nine Meeting, which states:

Lester Saunders asked the Director of the Department of Water Resources, Stephen Allred, to explain the watermaster's process for crediting water to the reservoirs. Steve explained that any water available at a reservoir for storage is credited to that reservoir storage right. Once a right has been filled on paper, even if the water has been released and additional space is available, the priorities of the reservoirs are considered to no longer be in effect.

Ex. 1017, p. 1.

⁸ The Director has taken official notice of the *WCM. Amended Documents Officially Noticed* at 2 (Sep. 15, 2015).

contracts between storage spaceholders and the federal government. This is addressed further in Section IV.B below. And, as explained below in Section IV.C, rather than supporting the Irrigators' apparent argument that the federal government is entitled to physically refill the reservoirs in priority in order to make spaceholders whole after flood control operations, these documents show that the federal government and the spaceholders have long recognized and agreed that operation of the reservoirs for flood control could (and often would) result in less-than-complete physical refill of the reservoirs.

III. WITH ONE EXCEPTION, THE DEPARTMENT'S CURRENT ACCOUNTING METHODOLOGIES FOR THE STORAGE RIGHTS ARE CONSISTENT WITH IDAHO'S PRIOR APPROPRIATION DOCTRINE

A. The Department's current accounting system incorporates the Prior Appropriation Doctrine's one-fill rule, as well as the paper fill, storable inflow, and free river refill principles.

The record demonstrates that the Department's accounting system accrues water to the Storage Rights using the "one-fill rule" based on "storable inflow" and "paper fill" principles and, after complete paper fill has been achieved, allows the federal reservoirs to physically refill under "free river" conditions without injuring junior rights. Except for the mid-August "reset" of accrual to the Storage Rights (discussed in Section III.B below), the Department's accounting methodology for the Storage Rights "follow[s] the law." *A&B*, 157 Idaho at 393, 336 P.3d at 800.

The *Staff Memo* explains how the Department's current accounting system incorporates the one-fill rule and storable inflow, paper fill, and free-river refill principles (using somewhat different terminology). At the hearing, the *Staff Memo*'s author Elizabeth Cresto (IDWR

Technical Hydrologist and accounting program manager for Basin 63) confirmed that these principles are incorporated into the Department's water rights accounting program for Basin 63, and that the *Staff Memo* accurately describes the accounting program that has been in place since 1986.⁹ Robert Sutter (Ms. Cresto's predecessor and the creator of Basin 63's accounting program) agreed. Their testimony is supported by Ms. Cresto's affidavits (Exs. 2 and 1002) and powerpoint presentations (Exs. 1018, 1019, and 1020), and Mr. Sutter's affidavits (Exs. 5 and 6). No witness at the hearing testified that the Department's accounting system functions any differently than described by Ms. Cresto and Mr. Sutter.

Also at the hearing, former Directors David Tuthill, Kenneth Dunn, and Karl Dreher confirmed that Idaho followed these principles during their respective tenures, and that these principles are consistent with Idaho's Prior Appropriation Doctrine.

In its *Response to Staff Memo*, United Water described how the one-fill rule and storable inflow, paper fill, and free-river refill principles are incorporated into the Department's accounting system described in the *Staff Memo*, and how these principles are required by Idaho's Prior Appropriation Doctrine.¹⁰ For the sake of brevity, United Water incorporates by reference the more complete discussions of the principles contained in its *Response to Staff Memo* and *Appellate Brief*, and provides here only a summary discussion of these principles in the following subsections.

⁹ Prior to 1986, the record suggests that little if any state administration of water rights occurred until after the reservoirs reached maximum physical fill.

¹⁰ In its brief to the Idaho Supreme Court on appeal of the SRBA District Court's decision in the Basin-Wide Issue 17 litigation, United Water addressed these fundamental Prior Appropriation principles and set out extensive authority addressing them from Idaho and other prior appropriation states. *Brief of Respondent United Water Idaho Inc. ("Appellate Brief")* at 21-41, Idaho S. Ct. Docket Nos. 40974-2013 and 40975-2013 (Oct. 23, 2013). United Water's *Appellate Brief* was incorporated by reference into its *Response to Staff Memo*, and a copy of it was submitted into the record of this contested case as Exhibit 1 to the January 26, 2015 *Affidavit of Christopher H. Meyer*, which is incorporated herein by reference.

(1) The one-fill rule.

The one-fill rule is shorthand for Idaho's law that a storage water right may be satisfied only once in priority. The *Staff Memo* describes how the Department's accounting system incorporates this rule: "Once the reservoir's cumulative accrual has reached the [associated storage right's] annual volume limit, the reservoir water right can no longer accrue additional natural flow to its water right in the water rights accounting and natural flows can begin to be distributed to junior water rights." *Staff Memo* at 6.

The one-fill rule was confirmed by Presiding SRBA Judge Wildman in his Basin-Wide Issue 17 decision, wherein he stated: "The assertion that a senior storage right holder can 'fill,' or 'satisfy,' his water right multiple times under priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law." *In Re SRBA, Case No. 39576, Subcase 00-91017, Memorandum Decision* at 9. (SRBA Ct. Mar. 20, 2013).

On appeal, the Idaho Supreme Court left intact Judge Wildman's holding on the one-fill rule, stating that Basin-Wide Issue 17 presented a "relatively straightforward question." *A&B*, 157 Idaho at 392, 336 P.3d at 799 ("The question the SRBA court designated and answered was the relatively straightforward question of whether a storage water right holder whose right has been satisfied once may refill that right in priority following flood control releases.") As United Water's *Appellate Brief* at 21-25 describes in detail, the one-fill rule has been part and parcel of the Prior Appropriation Doctrine followed in the western states for more than 100 years.

(2) Storable inflow and paper fill.

Without calling it "storable inflow," the *Staff Memo* describes the storable inflow concept as follows: "Any natural flow that is available and in priority at the point of diversion is accrued

towards the reservoir right until the annual volume limit has been met.” *Staff Memo* at 6.¹¹

Counting all storable inflow toward fill of a storage water right is required by “the policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) (quoting multiple cases; quotation marks and citations omitted). A contrary rule would allow storable water to be released or bypassed (usually in the non-irrigation season) when few if any other water users need it, and diversion to storage to occur later by taking water that junior water rights otherwise would be entitled to.

The *Staff Memo* uses the term paper fill to describe the accrual of storable inflow toward the fill of a storage water right. “The term *paper fill* has been used as a term of convenience to describe the cumulative amount of natural flow accrued to a reservoir water right in the water rights accounting.” *Staff Memo* at 8 (emphasis in original). The paper fill of a water right is not affected by the release of stored water for flood control or other purposes. *Staff Memo* at 6 (“The cumulative amount accrued to the reservoir water right in the water right accounting is not adjusted downwards as [storage] water users divert [*i.e.*, release] storage for irrigation purposes, nor is the cumulative amount reduced for storage that is released past Middleton.”)¹² Thus, the paper fill methodology reflects both of these principles: (1) all storable inflow counts toward filling the right whether it is captured or not, and (2) releasing previously captured water does not reduce the accrued fill.

¹¹ The storable inflow principle described in the *Staff Memo* is identical to the storable inflow concept used in Colorado. “Storable inflow is the amount of water that is physically and legally available for storage in a reservoir under a particular water right.” Colorado Division of Water Resources, General Administration Guidelines for Reservoirs at 9 (Oct. 2011) (reproduced in Exhibit A to United Water’s *Appellate Brief*).

¹² Water that is “released past Middleton” includes “[s]torage released as a result of reservoir operations, such as flood control.” *Staff Memo* at 9.

(3) Refill under free-river conditions.

Idaho's Prior Appropriation Doctrine allows for on-stream reservoirs to physically refill after water is bypassed or released earlier in the storage season—during what often is called “free river” conditions. This right to refill without injury to others is inherent in every storage right. Former IDWR Directors Tuthill and Dreher testified that it does not require express authorization.¹³

The term “free river conditions” has been used to describe the situation “when natural supply rendered official administration unnecessary.” *N. Sterling Irrigation Dist. v. Simpson*, 202 P.3d 1207, 1209 (Colo. 2009).

“‘Free river conditions’ occur when there is sufficient natural supply to satisfy all water uses, whether decreed or undeclared, and State Engineer administration is unnecessary for the protection of decreed water rights.” *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139, 1149 n.14 (Colo. 2001). Water users may divert beyond the measure of their decrees during free river conditions because the diversion and storage does not infringe upon the rights of other water users. *City of Westminster v. Church*, 445 P.2d 52, 59 (Colo. 1968).

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 539 n.137 (2006).

In 2012, SRBA Presiding Judge Wildman confirmed that Idaho law allows the diversion of unappropriated “excess water” or “high flows” in addition to the amount authorized by a water right. *Memorandum Decision and Order on Challenge, In Re SRBA Case No. 39576, Subcase Nos. 74-15051, et al.* (Jan. 3, 2012) (“*Lemhi High Flows Decision*”).¹⁴ After discussing

¹³ At the hearing, Former Director Tuthill testified that the initial water right (here, the Storage Rights) provides the basis for refilling under free river conditions (i.e. when there is sufficient water to fill all water rights). Former IDWR Director Dreher described the long-standing practice of allowing refill without injury to others as “implied” in the original right.

¹⁴ The terms “excess” water, “high” water, “flood” water, and “free river” describe substantially the same concept. *Compare State v. Idaho Conservation League (“ICL”)*, 131 Idaho 331, 955 P.2d 1110 (1998) (“The term ‘excess’ water refers to the fact that during spring runoff, the flow in Reynolds Creek is high, and the creek contains

the Idaho Supreme Court's decisions in *ICL* and *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1997), Judge Wildman held that Idaho law may recognize "based on historical practices . . . the 'use' of high flow water not amounting to a water right." *Lemhi High Flows Decision* at 18.¹⁵

The *Staff Memo* describes how the Department's accounting system incorporates the historical practice of allowing physical storage in the Boise River's federal on-stream reservoirs after the Storage Rights have reached complete paper fill:

9. Water that is physically stored in the reservoir system but not accrued to a reservoir water right . . . can occur when there is natural flow in excess of demand, the reservoir right(s) has been satisfied, and there is space in the reservoir system.

Staff Memo at 4-5 (emphasis added). Put another way, "[d]uring times when there is natural flow in excess of demand and there is space in the reservoirs, water may physically be stored in a reservoir, but not accrued to a reservoir right because the right has been satisfied." *Staff Memo* at 13 (emphasis added). The Department's water rights accounting system classifies this water stored under free river conditions as "unallocated storage" because it is water stored without accrual to a specific water right. *Staff Memo* at 9. ("Unallocated storage is the natural flow

more water than can be used.") with *Lemhi High Flows Decision* at 7 ("High water' or 'flood water' . . . describes a natural flow of 'water over and above the amounts required to fulfill (1) existing quantified rights as shown in the decree of water rights and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho.'") with *N. Sterling Irrigation Dist.*, 202 P.3d at 1209 ("free river conditions, when natural supply rendered official administration unnecessary.") Excess waters are unappropriated waters. *Lemhi High Flows Decision* at 25 ("Since the use of high flow water does not create a water right high flows are therefore unappropriated water.").

¹⁵ Judge Wildman's holding was made in the context of determining whether the SRBA Court could decree a general provision allowing the use of high flow water. But this does not limit the fundamental principle he approved, which is that Idaho law allows the diversion and use of high flow water even though such a practice "does not create a water right." *Lemhi High Flows Decision* at 19 (explaining the *A&B* holding). Judge Wildman did not hold that an SRBA-decreed general provision is necessary to authorize the use of high flow water. Rather, he stated "if the expectation of the general provision was to authorize use of high flow water ancillary to an existing water right but not amounting to a water right then a general provision may be appropriate." *Lemhi High Flows Decision* at 21 (explaining the *ICL* holding; emphasis added).

physically captured in a reservoir that could not be distributed to a water right. Unallocated storage occurs when there is water in excess of demand and there is space available in the reservoirs. . . .” (emphasis added)). The *Staff Memo*’s terminology “in excess of demand” is simply another way of saying there is a free river or surplus, unappropriated water.

Although this “unallocated storage” does not accrue to the Storage Rights (which it could not, because they already have been filled), it is tracked nonetheless and allocated to the storage spaceholders using the Department’s storage program. This is a “separate program from the water rights accounting [program],” *Staff Memo* at 10, the purpose of which is “to allocate storage water to the individual spaceholders” *Id.* The storage program determines individual spaceholders’ storage allocations after “the maximum physical total reservoir system contents has occurred.” *Staff Memo* at 11. In this way, water stored under free river conditions works to the direct benefit of irrigators. They get the full benefit of the entire physical reservoir contents, including the water classified as unallocated storage (*i.e.*, the natural flow physically captured in a reservoir that could not be distributed to a storage water right because the right already has reached paper fill).

The United States has recognized the propriety of this approach. On appeal of Judge Wildman’s decision in Basin Wide Issue 17, the United States acknowledged that refill under free river conditions requires no special “remark”:

As is noted below, in prior briefing no party has disputed Reclamation’s ability to refill its reservoirs; the issue has been whether refill may be done under the priority of Reclamation’s storage water rights. By emphasizing that the issue before the [SRBA] Court is whether “refill” can occur in priority, the Court effectively affirmed that no remark is necessary for “refill” done using water that can be stored without injury to other water rights.

[O.N.] *Idaho S. Ct. Docket Nos. 40974-2013 and 40975-2013, United States' Opening Brief on Basin-Wide Issue No. 17*, at 1 n.1 (Oct. 23, 2013) (emphasis added).¹⁶ The federal *WCM* also recognizes that “[t]he total stored per annum, beginning on 1 November of each year, cannot exceed the volume specified by the water right or the physical capacity of the reservoir unless all subsequent rights have been met. . . .” *WCM* at 7-25 (emphasis added).

In sum, consistent with the Prior Appropriation Doctrine, the water rights accounting and storage accounting programs described in the *Staff Memo* allow the federal dam operators in Basin 63 to physically refill reservoirs under free river conditions after releasing water for flood control or other operational reasons. The accounting system’s approach is perfectly legal under Judge Wildman’s *Lemhi High Flows Decision*.

(4) The one-fill rule, storable inflow, paper fill, and free river principles are required by Idaho’s Prior Appropriation Doctrine.

Applied properly, the one-fill rule, and storable inflow, paper fill, and free river principles further “the policy of the law of this State . . . to secure the maximum use and benefit,

¹⁶ The State of Idaho said much the same thing in its briefing to the SRBA Court on Basin-Wide Issue 17: “A remark authorizing storage refill using excess or surplus flows and that would not impair other water rights would be consistent with Idaho law, but not required to validate and continue historic administration and practice, which routinely allows such refill.” [O.N.] *In Re SRBA, Case No. 39576, Subcase 00-91017, State of Idaho's Opening Brief* at 2 n.1 (Dec. 21, 2012). In earlier SRBA proceedings in Basin 01, the State of Idaho offered the following language if any remark was decreed for federal on-stream storage rights:

This right is filled for a given irrigation season when the total quantity of water that has accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.

Ex. 1027 p. 2. Ms. Cresto submitted an affidavit in those proceedings confirming that this remark “is consistent with how the water rights for the federal reservoirs in the Boise River system and the Payette River system have been accounted for under the accounting programs for both of those systems during the entire period I have been responsible for running those programs.” Exs. 1002 (2012 Cresto affidavit). Similarly, current Water District 63 Watermaster Rex Barrie submitted an affidavit in those proceedings confirming that this remark “is consistent with how the water rights for the federal reservoirs in Water District 63 have been administered during my tenure as Watermaster.” Ex. 1004 (2012 Barrie Affidavit).

and least wasteful use, of its water resources.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960); *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) (quoting multiple cases; quotation marks and citations omitted).

There can be no doubt that the one-fill rule applies in Idaho. Allowing the storage or bypass of storable inflow in quantities greater than authorized by the Storage Rights would amount to a “double filling.” In short, a double fill of a water right is an enlargement of a water right, and the Idaho Supreme Court has held that enlargement constitutes *per se* injury. *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (“[T]here is *per se* injury to junior water rights holders anytime an enlargement receives priority. Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder.”)

Securing maximum use and benefit of our State’s water requires that storage rights be administered differently than rights for diversion of natural flow for immediate application to beneficial use. “There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.” *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945). In other words, contrary to the immediate use required of rights diverted from natural flow, “[w]ater diverted and stored pursuant to a storage water right need not be put to the end use immediately, but may be stored for a period of time prior to the end use” *A&B*, 157 Idaho at 389, 336 P.3d at 796.

These fundamental attributes of storage rights require the conclusion that a reservoir operator may not fill its reservoir at the operator's convenience. Simply put, reservoirs are expected to fill when they can. To the extent possible, this should happen during the non-irrigation season and during the early irrigation season when plenty of water is available. When storable inflow is released or bypassed during these periods, it rarely provides benefit to downstream holders of water rights (most of whom desire diversions during the irrigation season). If the reservoir operator misses releases or bypassed storable inflow, then water must be stored later. If there is still a free river, then there is no problem. If not, later season storage must come directly at the expense of other rights.

The one-fill, paper fill, and storable inflow principles are compelled by the Prior Appropriation Doctrine which prohibits injury to junior rights by a senior who has received their entitlement to water. "A prior appropriator of the water of a stream may divert and use the amount of water to which he is legally entitled, but, when he has once done so, he may not dam the stream below him, or hinder or impede the flow of the remaining waters of the stream to the headgate of the next appropriator." *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907). The Idaho Supreme Court has held that extending priority to "all the waters that flow" during the high runoff period is contrary to the constitutional principle that right to appropriate unappropriated flows may never be denied:

To say that the respondents are entitled to all the waters that flow in the stream, when there is more water flowing at some seasons of the year than respondents are able to divert and apply to a beneficial use, would deny the right of appropriation by any other person, notwithstanding the fact that the respondents were not diverting or applying the excess to a beneficial use.

Lee v. Hanford, 21 Idaho 327, 331, 121 P. 558, 560 (1912). The Supreme Court has interpreted its holding in *Lee* to mean that a decree is "defective because it awarded all of the water of a

stream to one of two appropriators who could not use all of the water.” *Village of Peck v. Denison*, 92 Idaho 747, 751, 450 P.2d 310, 314 (1969). According to the *Village of Peck* Court, “[t]he practice condemned . . . [is] that of awarding to one competing appropriator more water than he could beneficially use.” *Id.* Thus, the Storage Rights cannot be interpreted as including a priority entitlement to all of the Boise River’s unappropriated surplus waters by bypassing, filling, releasing, and refilling without regard to the quantity stated on the face of the right.

The Department’s water rights and storage accounting systems described in the *Staff Memo* are consistent with these fundamental prior appropriation principles. “Water right holders junior to the reservoir rights are not curtailed to make up for storage lost by operational decisions.” *Staff Memo* at 8.

At the hearing, former IDWR Directors Kenneth Dunn, Karl Dreher, and David Tuthill testified that the current accounting system’s methodologies were used during each of their tenures as Director. Directors Dunn and Dreher also confirmed their prior statements in Exhibits 4 and 1003, respectively, that these methodologies are consistent with Idaho’s Prior Appropriation Doctrine.¹⁷

B. The current accounting system’s “reset” of the Storage Rights must be changed to be consistent with the Prior Appropriation Doctrine.

The current accounting program’s mid-August “reset” of the Storage Rights violates the prior appropriation principles discussed above. The *Staff Memo* states that “[t]he reservoir accrual annual volumes are reset in the water rights accounting after the day of allocation. After the reset, the reservoirs may accrue water under their rights [*sic*] priority towards the annual

¹⁷ In a 1987 letter to Watermaster Lee Sisco, former Director Dunn described the Department’s accounting procedures as “simply appl[ying] the appropriations doctrine.” Ex. 4 p. 2. In a 2015 affidavit, former Director Dreher described the principles and methodologies described in the *Staff Memo* as “consistent with my knowledge and understanding of IDWR’s administration of on-stream storage water rights in Water District 63 during my tenure as Director of IDWR and Idaho’s prior appropriation laws.” Ex. 1003 p. 2 ¶ 4.

volume for the following year's allocation." *Staff Memo* at 7.¹⁸ At the hearing, Ms. Cresto testified that the accounting system is programmed to automatically reset the Storage Rights on August 15 each year so that the Storage Rights can begin to accrue water in priority if there is surplus water available.

The Storage Rights' periods of use for storage purposes begin on January 1. Ex. 2015. But historically the "reservoir accrual season" was considered to begin on November 1—the day after the irrigation season ends. *Staff Memo* at 12.¹⁹ This practice presumably arose as a means to maximize the amount of water stored for irrigation beneficial uses such as irrigation, which a number of witnesses at the hearing agreed requires storing all available water (*i.e.*, all storable inflow) when it is available.²⁰ Accordingly, in the case of storage for irrigation, allowing water to be accrued in priority under the Storage Rights as soon as the irrigation season ends—when the reservoirs presumably are at their emptiest after releasing water during the irrigation season—further the goal of maximizing storage.

However, "resetting" accrual to the Storage Rights on August 15 puts the Storage Rights back into priority two and half months prior to the end of the irrigation season. If the Storage Rights already were satisfied once after the prior November 1, allowing additional storage to

¹⁸ The "day of allocation" is the date after which the Department's storage program (which is separate from its water rights accounting program) is run so that "storage water is allocated to individual spaceholders according to the federal contracts and Bureau instructions." The day of allocation occurs after: (1) the last day water accrues to reservoir rights in the water rights accounting program; (2) diversion demand is equal to or greater than the available natural flow; and (3) the maximum physical total reservoir contents has occurred. *Staff Memo* at 10-11.

¹⁹ November 1 also is the date upon which reservoir carryover is determined in the current water rights accounting system. *Staff Memo* at 11 ("The distribution of carryover among the reservoirs becomes the November 1 volume of water credited towards the satisfaction or 'fill' of the reservoir rights in the water rights accounting."). "Carryover is the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water." *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007).

accrue in priority under the Storage Rights beginning on August 15 (or any date earlier than November 1) would result in accruals exceeding the quantity elements of the Storage Rights. In addition, it would preclude diversions by junior priority water rights that would be entitled to available water but for the Storage Rights being “reset” prior to November 1. Both results violate the Prior Appropriation Doctrine.

United Water requests that the Department’s accounting system be programmed so the Storage Rights are reset on November 1, and to allow the physical storage of available water (*i.e.*, water not needed by other water rights in priority) to accrue under the same “unallocated storage” methodology set forth in the *Staff Memo*. See *Staff Memo* at 9 (“Unallocated storage occurs when there is water in excess of demand and there is space available in the reservoirs.”) In this way, surplus waters may be physically stored in the reservoirs without harming junior water rights.

IV. THE IRRIGATORS’ ANTICIPATED OBJECTIONS TO THE CURRENT ACCOUNTING SYSTEM ARE WITHOUT MERIT, AND THEIR PROPOSED CHANGES ARE NOT CONSISTENT WITH IDAHO’S PRIOR APPROPRIATION DOCTRINE.

It is obvious from the evidence presented at the hearing and this and other proceedings that the Irrigators object to the Department’s current accounting system, and particularly to the one-fill rule, and storable inflow, paper fill, and free-river refill principles it employs. Through witness testimony at the hearing, the Irrigators propose changes to the accounting system that would violate these principles by allowing physical storage of more water in priority than authorized by the quantity elements of the Storage Rights, to the detriment of junior water users, and in derogation of Idaho’s policy of securing the maximum use of its water resources. These

²⁰ At the hearing, at least two of the Irrigators’ witnesses (Mr. Dave Shaw and Mr. Rex Barrie) described operating reservoirs to maximize storage for beneficial uses using the term “fill and spill,” which means that all available water (*i.e.*, storable inflow) is captured until the reservoir is full.

proposals also would eviscerate the Director's duty to administer water rights, and to do so according to Idaho's Prior Appropriation Doctrine. The Director should reject the Irrigators' objections and proposed changes to the accounting system.

A. As a practical matter, the current accounting system's methodologies have virtually no impact on the Storage Rights, the federal government's ability to physically refill reservoirs following flood control releases, or the contract spaceholders' use of stored water.

It is undisputed that achieving complete paper fill of the Storage Rights in the current accounting system, based on the storable inflow principle described above, means that sufficient storable water has reached the reservoirs to completely fill them. If complete paper fill is achieved, any failure to physically fill the reservoirs results from the federal reservoir operators' operational decisions, such as deciding to bypass or release water for flood control. The State of Idaho, the Department, and other water users do not control the timing or quantity of flood control releases, or any other operational decisions by the federal government. Consequently, the federal government and its contractors (not other water users) should bear any adverse consequences resulting from those operational decisions.

Fortunately for all, the record also demonstrates that these adverse consequences rarely occur. This is because, in addition to achieving paper fill of the Storage Rights, the Department allows the reservoirs to physically refill under free river conditions (*i.e.*, so long as all other water rights are being satisfied). As explained in Section III.A(3) above, the Department's accounting system recognizes the physical storage of water under free-river conditions after the Storage Rights have accrued sufficient water to reach complete paper fill. This additional physical storage under free river conditions accrues to the "unallocated storage" account in the water rights accounting program. The water physically in the reservoirs upon the day of allocation (including the "unallocated storage") is allocated to the spaceholders using the

Department's storage program. *Staff Memo* at 9-11. The record demonstrates that this system has worked since 1986, with only one year (1989) resulting in a shortfall of water to the spaceholders as a result of flood control operations.²¹ In any event, the Department's accounting system cannot be blamed for this or any other year's failure to physically fill the reservoirs if complete paper fill is achieved. In such cases, any failure to physically fill is a result of operational decisions that are made by the federal reservoir operators.

The record also demonstrates that, if there is a failure to physically fill the reservoirs due to flood control, the Bureau completely absorbs the first 60,000 acre-feet of any shortfall. *Staff Memo* at 11. In other words, contracted spaceholders are made whole if a failure to physically fill the entire reservoir system due to flood control is 60,000 acre-feet or less. Above that, Lucky Peak spaceholders' accounts are reduced proportionally, and Arrowrock and Anderson Ranch spaceholders' accounts are made whole. *Id.* See also Ex. 5 pp. 5-6 ¶¶ 9-10 (2008 Affidavit of Robert J. Sutter describing same) and Ex. 1022 pp. 21-22, 28-29 (describing same as "make-up" water). Again, spaceholder accounts were reduced due to flood control only once since 1986—the 1989 shortfall described above. Including that aberrant year, the average shortfall due to flood control between 1985 and 2014 was inconsequential—19,569 acre-feet, or less than 2% of total reservoir system capacity. Ex. 1020 p. 12.²²

²¹ At the hearing, Ms. Cresto testified that in 1989 the reservoirs failed to physically fill by 138,807 acre-feet due, and that because this amount exceeded the 60,000 acre-feet of "cushion" provided by the Bureau, the spaceholders received less than full allocations. See also Ex. 1020 p. 12 (Ms. Cresto's presentation displaying the amount of total system shortfall experienced since 1985 due to flood control). In any case, water users who testified at the hearing could not recall receiving less than their full allocations in flood control years.

²² The record shows that the reservoirs come much closer to physically filling during flood control years than non-flood control years. During the same period (1985-2014), the average shortfall in years where flood control did not occur (the years shown in grey in Ex. 1020, p. 12) was 271,487 acre-feet—approximately 27% of total reservoir system capacity.

B. Administration of the Storage Rights under Idaho law does not depend on and is not dictated by federal laws, rules, policies, or contracts with spaceholders.

The *WCM* governs flood control operations for the Boise River's federal on-stream reservoir system. It is undisputed that the *WCM* sets forth federal policies about reservoir operations. It defers to Idaho law (and does not dictate Idaho law) concerning the administration of water rights. *See WCM* pp. 7-24 ("Surface water rights on the Boise River are administered by the Boise River Watermaster. The Watermaster is responsible for the measurement, accounting, and distribution of water according to all decreed, licensed, and permitted rights."). *See also* 9-6 to 9-7 (describing the Department's responsibility for administering water rights in accordance with Idaho law). While the State of Idaho may have been involved in its formulation, the State of Idaho is not a signatory to the *WCM*. The State of Idaho also is not a party to contracts between the spaceholders and the federal government for storage water entitlements.

Neither the State nor any other water user plays any role in how the federal reservoir operators determine flood control operations. This fact was recognized by the United States in its briefing to the SRBA Court in the Basin Wide Issue 17 proceedings: it stated that "flood control operations are entirely independent of the water rights system." [O.N.] *In Re SRBA, Case No. 39576, Subcase No. 00-91017, The United States' Response Brief on Basin-Wide Issue No. 17*, p. 5 (Jan. 10, 2013).

In sum, whatever agreement, understanding, expectation, or acquiescence may exist between the federal government and the spaceholders, those parties do not have the right or the power to impair the water rights of third parties, to alter the Prior Appropriation Doctrine, or to control whatever discretion the Director has in administering water rights.

C. The Water Control Manual and spaceholder contracts acknowledge that flood control operations may hinder storage for beneficial uses.

The *WCM* and spaceholder contracts demonstrate the broad recognition and agreement among their parties that the three Boise River on-stream federal reservoirs (a) would be operated as a combined system, jointly for flood control and storage for beneficial uses, and (b) that there was no guarantee that the reservoirs would completely refill after flood control operations.

The *WCM* expressly recognizes the tension between flood control operations and storage for beneficial uses. “Optimal flood control protection possible with the system would require that the reservoirs be maintained empty and available to control floodwaters. . . . [while] [o]ptimum irrigation use would require that the system be maintained as full as possible” *WCM* at 7-3.

In light of this, the *WCM* provides a less-than-100% assurance of physical reservoir fill after water is released for flood control. In the winter (November 1 through March 1 according to the *WCM*, p. 7-3 ¶ 7-05.a), the *WCM* requires minimum flood control space requirements. From November 1 through December 31, the *WCM* contains a minimum flood control space requirement of 300,000 acre-feet among the three Boise River reservoirs “without consideration to either existing climatic conditions or refill potential.” *WCM* p. 7-4 ¶ 7-05.a. This requirement results in “refill assurances for the total active system capacity will be approximately 89 percent on 1 January for normal runoff volumes.” *WCM* p. 7-5 ¶ 7-05.a (emphasis added).

From January 1 through the end of February, the *WCM* dictates flood control space requirements based on runoff volume forecasts. *WCM* p. 7-5 ¶ 7-05.a. The rule curves dictating these requirements are contained in *WCM* Plate 7-2. These curves “provide 100-year winter

flood protection and a 95 percent refill assurance for 871,728 acre-feet of system space.” *WCM* Plate 7-2, note 2 (emphasis added).

From March 1 until the end of the flood control season (which the *WCM* defines as July 31), flood control and refill operations are defined by the *WCM*’s “operational flood control rule curves (Plate 7-1).” *WCM* p. 7-19 ¶ 7-05.d(4).²³ These curves “define required system flood control spaces as functions of date and operational runoff volume forecasts.” *WCM* p. 7-19 ¶ 7-05.d(4). Regarding these, the *WCM* states:

These rule curves represent a balance between flood control risks and refill assurances and were specifically designed to minimize the impact of volume forecast errors and abnormal runoff timing sequences. Use of the operational flood control rule curves does not provide complete assurance that flows in excess of 6,500 cfs at the Glenwood gage can be prevented during the entire flood control season, nor that the reservoir system will completely refill.

WCM p. 7-19 ¶ 7-05.d(4) (emphasis added).

The operational rule curves’ notes state: “For a given volume forecast, the flood control space required for a 1-percent forecast error risk and the space which could be refilled with a 95-percent assurance were determined.” *WCM* Plate 7-1. The rule curves’ 1% flood control risk and 95% refill assurance demonstrates that the rule curves prioritize meeting the 6,500 cfs flood control target over complete refill. *See WCM* Plate 7-4 (depicting storable volume rule curves with a 95% refill assurance) *and* Plate 7-5 (depicting flood control space rule curves with a 1% volume forecast error risk, and noting that the operational rule curves (Plate 7-1) “compromise required flood control space with space required to assure refill.”)

²³ In addition to forecast based flood control space requirements, the *WCM* prescribes “minimum allowable system space is 150,000 acre-feet, January through February time period,” and “[a] minimum of 50,000 acre-feet of space must be maintained in Lucky Peak reservoir from 1 January through 31 March.” *WCM* Plate 7-2.

In their contracts with the federal government, the spaceholders expressly agreed to allow all the reservoirs to be operated jointly for flood control and storage, and that the reservoirs would not be guaranteed to completely refill after flood control operations. *See e.g.*, Ex. 2190, p. 40 (1954 contract stating “WHEREAS, the District, recognizing the benefits to accrue from a system-wide operation of Anderson Ranch, Arrowrock, and Lucky Peak dams in the interest, jointly, of flood control and irrigation . . . desires to cooperate . . . to permit such system-wide and integrated operations.”); p. 41 (1954 contract stating “The United States shall operate the net total active capacity of the reservoir system . . . during the flood control period each year jointly for irrigation and flood control storage”); pp. 70-71 (2005 contract stating “Subject to operations for flood control, the United States will operate the Project so as to store under existing storage rights all available water”).

In sum, the Director must administer the Storage Rights under Idaho law, not federal law, policy, or contracts.

D. Junior priority rights are entitled to water after the Storage Rights achieve complete paper fill, they do not impair the federal government’s ability to physically refill space vacated for flood control, and they benefit rather than hinder flood control objectives.

First, contrary to the Irrigators’ contentions during these proceedings, it is not necessary (or appropriate) to consider the nature, extent, or interpretation of natural flow water rights junior in priority to the Storage Rights. Such rights do not fall within the scope of the contested case proceeding defined by the Director. Moreover, junior natural flow water rights cannot affect the fill of a senior storage water right, because basic prior appropriation principles require that senior

rights are filled ahead of junior rights, and junior rights can be satisfied only so long as senior rights are satisfied.²⁴

Nevertheless, United Water includes the discussion in the following subsections because junior water rights are affected by the way water is accrued to the satisfaction of senior rights, and because the Irrigators argue (incorrectly) that the federal government's ability to physically refill its reservoirs during flood control operations has been substantially affected and is threatened by junior water rights.

(1) Junior water rights are entitled to water after the Storage Rights reach paper fill.

Junior rights cannot affect the accrual of water to senior rights when those rights are in priority. In contrast, because the right of juniors to divert depends on senior rights being satisfied first, juniors have a direct interest in ensuring that water available to seniors accrues to those senior rights. *A&B*, 157 Idaho at 394, 336 P.3d at 801 (“In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user.”)

As described in Section III.A above, and in United Water's *Response to Staff Memo* and *Appellate Brief*, junior water rights are entitled to water after the Storage Rights achieve one

²⁴ As discussed in United Water's August 7, 2015 *Motion in Limine*, it would be unfairly prejudicial to United Water, and a violation of its due process rights, for this proceeding to determine the nature, extent, or interpretation of United Water's water rights, how they should be administered, or how United Water's permits should be licensed. The Director clearly limited the scope of this contested case 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.” *Contested Case Notice* at 6. See also *Pre-Hearing Motion Order* at 5-6 (“This proceeding will consider how water accrues to satisfy water rights for only three reservoirs, which are owned and operated by a single entity, the United States government. . . . This contested case applies only to the three federal on-stream reservoirs in Water District 63.”). Nevertheless, over United Water's repeated objections, the Director allowed the introduction of evidence at the hearing that is related to United Water's water rights. At least once, the Director also stated that such evidence would not be considered with respect to how United Water's permits should be licensed. United Water continues to object to evidence related to United Water's water rights, including all testimony by Mr. Ed Squires and exhibits related to his testimony, and respectfully insists that the Director make no findings, conclusions, or orders that would affect United Water's water rights.

paper fill of storable inflow. Idaho's Prior Appropriation Doctrine requires it. See *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907) ("A prior appropriator of the water of a stream may divert and use the amount of water to which he is legally entitled, but, when he has once done so, he may not dam the stream below him, or hinder or impede the flow of the remaining waters of the stream to the headgate of the next appropriator.").

(2) As a practical matter, junior water rights have little to no impact on physical refill of reservoirs following flood control releases.

The Irrigators appear to contend that diversions by junior water rights are responsible for any failures to physically fill the reservoirs. But there is no basis for this. Once again, if complete paper fill has been achieved, that means there has been sufficient water available to completely fill the reservoirs, and any failure to physically fill the reservoirs must be attributed to federal operational decisions.

The record demonstrates that, at least since adoption of the Department's computerized accounting system in 1986, junior priority water rights have been entitled to divert water in priority after the Storage Rights have reached complete paper fill, even while reservoirs were physically refilling following flood control releases. Ms. Cresto confirmed this in her testimony during the hearing. See also *Staff Memo* at 8 ("Water right holders junior to the reservoir rights are not curtailed to make up for storage lost by operational decisions.") Prior to 1986, there is no evidence that the reservoirs were physically refilled in priority (*i.e.*, to the detriment of other users) after flood control releases. In fact, Ms. Cresto produced an analysis of historical Watermaster records showing that junior water rights have diverted while reservoirs physically refilled. Ex. 3. In other words, in the real world, reservoirs routinely refill after complete paper fill is achieved in flood control years, but they do so under free river conditions. As a practical

matter, storage water is bypassed or released when there is plenty of water, and that ample supply results in free river conditions allowing those reservoirs to be refilled without injury to others.

Ms. Cresto also confirmed, in two separate but similar analyses, that junior water rights are, and have been, entitled to divert water in priority after flood control releases have ended during the period of 1989 through 2014 (Ex. 9), and that between 1991 and 2014 the maximum potential “impacts” of existing junior water rights were miniscule (Ex. 1020). Ms. Cresto testified at the hearing that both analyses looked at periods during flood control years when junior priority rights diverted water while the reservoirs were physically refilling space vacated for flood control. These periods were determined to begin on the dates when flood control releases ended (information that was provided by Ms. Mellema at the Bureau) and to end on the day of allocation. Ms. Cresto’s analysis in Exhibit 9 shows that, except for one year (1998, when flood control releases and the day of allocation occurred on the same day), junior priority water rights diverted water as few as two and as many as 41 days.

Ms. Cresto’s analysis in Exhibit 1020 used a conservative factor (*i.e.*, a factor that would tend to overestimate the amount diverted by juniors) to calculate that the maximum amount all existing junior water rights could have diverted. She concluded that junior diversions would amount to a maximum of 8,384 acre-feet in the single biggest year (2014) when reservoirs were physically refilling space vacated for flood control. This represents only 0.02% of the total reservoir system capacity. This is hardly an amount that could be seen as “impacting” the amount of water physically stored in the reservoirs after flood control releases ended.²⁵

²⁵ The 8,384 acre-feet also amounts to only 1 day of releasing 4,200 cfs for flood control, or 4 days of releasing 1,050 cfs. These quantities and time frames for flood releases do not appear to be unusual. *See e.g.* Ex.

(3) Senior and junior diversions assist rather than hinder flood control objectives.

Rather than hindering flood control operations, the record demonstrates that all diversions (senior and junior) to the Storage Rights can assist in managing floods. *See e.g. WCM* p. 7-17 (“During the irrigation season, irrigation water is diverted from the Boise River between Lucky Peak Dam and the Glenwood Bridge gaging station. These diversions are normally quite dependable from year to year and significantly aid in reducing flows and thus allow Lucky Peak releases to be increased by an equal amount if necessary for flood control.”) For example, Ms. Mellema testified that the *WCM* rule curves account for diversions to the New York Canal—a relatively senior diversion downstream of Lucky Peak. Likewise, junior diversions downstream from Lucky Peak can help the federal government’s flood control operations by providing additional outlets for flood control water.²⁶ The existence of additional outlets actually would promote releasing less water for flood control, and retaining more in storage, because the additional outlets reduce the risk of exceeding the 6,500 cfs limit if an unexpected large runoff event occurred.

Nothing in the record suggests the Bureau and the Corps are incapable of taking new diversions into account in determining the timing and quantity of flood control releases. The record demonstrates that the flood control rule curves have been amended before based on better data, and Ms. Mellema confirmed that the federal agencies have discussed amending them again based on the latest available data. Even without formal amendment of the rule curves, Ms.

1019, p. 12 (showing about one month (mid-March through mid-April) of releases nearing roughly 6,500 cfs, and another week or so (around July 1) of releases above 2,000 cfs.)

²⁶ The benefit of additional diversions downstream from Lucky Peak was illustrated through a hypothetical posed by the Irrigators’ counsel, who asked Mr. Sutter about the effect of a new 1,000 cfs water right diverted downstream from Lucky Peak. The witness confirmed that all diversions below Lucky Peak (senior or junior) help maintain flows below the 6,500 cfs limit.

Mellema testified that, as it stands today, the Bureau consults with the Water District 63 watermaster to determine how much water might be diverted from all diversions downstream from Lucky Peak when the Bureau is calculating how much flood control water to release.

E. Idaho's Prior Appropriation Doctrine provides no basis for limiting existing or future junior appropriations to only water released from Lucky Peak reservoir for flood control.

It appears that the Irrigators would like the Department to limit all junior water right diversions to water released from Lucky Peak dam for flood control. This would not be appropriate for several reasons.

First, this contested case is not the proper forum to determine conditions placed on existing or future appropriations. As already explained, it is not necessary (or appropriate) to consider the nature, extent, or interpretation of natural flow water rights junior in priority to the Storage Rights. Such junior rights cannot affect accrual to the Senior Rights, and therefore are outside the scope of this proceeding. Each appropriation must be determined on its merits based on the record developed in their respective proceedings.

Second, the availability of unappropriated water in the Boise River (above Middleton) is not determined by the federal government's decision to release water from Lucky Peak for flood control. Neither the Department, the State of Idaho, nor any water user dictates those releases. Ms. Cresto and other witnesses at the hearing testified that most unappropriated Boise River waters originate above Lucky Peak. If the Department recognized that the only water available for appropriation in the Boise River (above Middleton) is the water released from Lucky Peak for flood control, that would mean that the federal government would determine the timing and quantity of unappropriated waters in the Boise River.

Letting the federal reservoir operators dictate when and how much unappropriated water is available in the Boise River would violate Idaho's Prior Appropriation Doctrine and the Director's authority to administer the appropriation and distribution of water rights. Idaho Const. art. XV § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . ."); Idaho Code § 42-201(7) ("This title delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state."); Idaho Code § 42-602 ("The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine."). Accordingly, the Director should reject any request to restrict junior appropriations to water released from Lucky Peak.

F. The current accounting system does not jeopardize the Streamflow Maintenance account.

As discussed above, the Bureau absorbs the first 60,000 acre-feet of any shortfall in physical reservoir contents due to flood control operations, and above that Lucky Peak spaceholders' accounts are reduced proportionally after Arrowrock and Anderson Ranch spaceholders' are made whole. The Bureau's initial 60,000 acre-foot absorption reduces the amount of water allocated to the Streamflow Maintenance account. This means that the 152,000 acre-foot Streamflow Maintenance account could be reduced by 60,000 acre-feet before any other spaceholders are affected.

But the 60,000 acre-foot reduction would not impair streamflow maintenance releases in the Boise River, which Ms. Cresto testified typically amount to 240 cfs between November 1 and April 1 (although they may end sooner). If the entire 60,000 acre-foot reduction occurred, there

would still be sufficient water to release 240 cfs for 192 days—well above the 152 day period between November 1 and April 1.²⁷ Using the average shortfall due to flood control of 19,569 acre-feet, Ex. 1020, p. 12, there is sufficient water in the Streamflow Maintenance account to release 240 cfs for 277 days.

The bottom line is that the Streamflow Maintenance account is more than adequate to meet wintertime Boise River flows and has not been jeopardized by the Department's current accounting system.

G. The Irrigators should not be “surprised” by the Department’s current accounting system.

Ms. Cresto and Mr. Sutter testified that the Department's computerized accounting system for Basin 63 was adopted in 1986, and that it employs the same basic methodologies today as it did then (*i.e.*, accruing water to the Storage Rights based on the one-fill rule, storable inflow, and paper fill principles). The record further demonstrates that the Water District 63 Watermaster (the State's primary liaison with water users) and the Bureau were aware of the new computerized accounting system and its methodologies at least as early as 1987. *See e.g.* Ex. 4 (1987 Department of Interior memorandum enclosing letter from IDWR Director Dunn to Lee Sisco, Water District 63 Watermaster, to which was enclosed a paper authored by Robert Sutter entitled “Water Delivery Accounting, Boise River, WD-63”).

With respect to how water is counted toward the fill of storage water rights, Mr. Sutter's paper explained, among other things:

The volume stored per annum, beginning on 1 November of each year, cannot exceed the volume specified by the water right

²⁷ Here's the math: 152,300 acre-feet reduced by 60,000 acre-feet equals 92,300 acre-feet. Because 1 cfs released for 24 hours would amount to approximately 2 acre-feet, releasing 240 cfs for 24 hours would reduce the Streamflow Maintenance account by 480 acre-feet each day. At this rate, it would take 192 days to release 92,300 acre-feet at a constant daily rate of 240 cfs.

or the physical capacity of the reservoir unless all subsequent rights have been met. . . .

. . .

Accrual occurs by assigning the natural flows at each reservoir in order of the respective priorities. . . . Accrual ceases when the reservoir rights are all filled or when the natural flows are all credited to earlier irrigation rights. . . .

Flood control releases occur in more than seventy percent of all years. These do not affect accrual. Accrual continues in accordance with the rights in effect, but the released water is water that was stored earlier. Actual storage may continue to occur after the storage rights are all filled “on paper” as a result of the flood control releases. The second fill, called “unaccounted for storage,” may, but usually does not, result in a total system fill.

Ex. 4 (paper pp. 3-5). In short, Mr. Sutter’s paper explained how the Department’s accounting system employed the one-fill rule, the paper fill based on storable inflow principles, and physical refill of space vacated for flood control under free river conditions after paper fill is achieved.

Former Director Dunn’s cover letter enclosing Mr. Sutter’s paper states that the paper “is based upon the storage accrual procedure described at paragraph 7-06(e) (page 7-24) of the ‘Water Control Manual for Boise River Reservoirs’ published in April 1985 by the Corps of Engineers. The paper provides an expanded discussion of the published procedure” Ex. 4 (Dunn letter p. 1).²⁸ Former Director Dunn stated that, although different from prior practice, the Department’s accounting methodology described in the paper (and in the *WCM*) “simply applies the appropriations doctrine.” *Id.*

Later, in 1993, David R. Tuthill, then Manager of IDWR’s Western Regional Office (and later IDWR’s Director) sent a letter to Ken Henley, Manager of the Boise Project, stating that storage of water in the Boise River federal on-stream reservoir system is “subject to three

²⁸ Mr. Sutter’s paper and the *WCM* contain some identical provisions, including the statement that “[t]he volume stored per annum, beginning on 1 November of each year, cannot exceed the volume specified by the water right or the physical capacity of the reservoir unless all subsequent rights have been met.” *Compare WCM* at 7-24 with Ex. 4 (paper p. 3).

limitations, which are consistent with both Idaho water law and my understanding of Bureau of Reclamation contract provisions.” Ex. 7, p. 1. The first limitation Mr. Tuthill explained to Mr. Henley was:

Each water right is allowed to be filled under its priority one time only. Subsequent filling can occur only if all other storage rights on the system have been filled and all natural flow water rights are being satisfied.

Ex. 7, p. 1. These statements, of course, encapsulate the one-fill rule and the practice of physically refilling space vacated for flood control under free river conditions which were employed at the time by the Department’s accounting system.

The Department’s accounting program subsequently was front-and-center during the SRBA proceedings on the Lucky Peak storage water right (No. 63-3618)—proceedings involving many of the Irrigators and their counsel. Mr. Sutter provided an affidavit in that case and was deposed twice on the subject of the Department’s accounting system. In that case, Mr. Sutter’s description of the accounting program was consistent with his Second Affidavit and his testimony at the hearing in this case. The United States clearly understood the import of the accounting system during that proceeding. Citing Mr. Sutter in briefing to the SRBA Court, the United States explained, among other things:

While water is being physically released from the reservoir system, water flowing into the reservoirs is credited to the reservoirs on paper. After the reservoir rights have filled on paper, that refill water is designated as “unaccounted for” storage. As the reservoirs begin to refill, the “unaccounted for” storage account continues to be credited on paper as long as excess natural flow is available to the system. The reservoirs remain filled on paper for the duration of the season.

Ideally, the reservoirs capture enough “unaccounted for” storage to match the paper fill in the accounting system. In some years, however, more water is released for flood control than is subsequently captured from the runoff. When that happens, the shortfall is termed “failure to refill due to flood control.”

[O.N.] *In Re SRBA, Case No. 39576, Subcase No. 63-3618, Reply Brief in Support of the United States' Motion for Summary Judgment*, pp. 11-12 (Feb. 14, 2008) (emphasis added).

Despite decades of Department communications about its accounting methodologies for on-stream reservoirs, and the clear evidence that the Bureau fully understood them as recently as 2008, there is no evidence that anyone has ever been concerned enough to object (until now). Perhaps this is not surprising since these accounting methodologies have worked well, and to the benefit of senior and junior water users. In any case, the Irrigators' current hand-wringing over the Department's accounting system is no reason to change its methodologies or provide additional "protection" to the Storage Rights.

At the end of the day, it does not matter whether the Irrigators were surprised to learn that the Prior Appropriation Doctrine and longstanding Departmental policy does not entitle them to multiple fills at the expense of other water right holders. Their surprise does not change the law. That said, it is hard to understand how they could have been surprised.

H. Dr. Stevens' report and testimony are not relevant and do not support changing the current accounting system.

The Irrigators produced Dr. Jennifer Stevens as an expert historian. However, Dr. Stevens' testimony and report, Ex. 2053, do not help answer the question of how water is counted or credited toward the fill of the Storage Rights. Her report is almost entirely devoted to the historical evolution of federal reservoir operations—a subject not germane to how water rights are administered under Idaho law. Again, this contested case is about how water is counted or credited toward the fill of the Storage Rights. Yet her report does not even mention the Storage Rights (save for one instance describing how the permit for Lucky Peak reservoir was amended to include additional streamflow maintenance storage and the 13,950 acre-feet of

exclusive flood control space). Ex. 2053, pp. 54-55. Dr. Stevens testified at the hearing that she did not review the Storage Rights, and did not become familiar with how the Department's water right accounting system works or has been implemented since it was adopted in 1986. In sum, Dr. Stevens testimony and report (including the documents cited therein²⁹) do not support changing the Department's current water rights accounting system.

I. Mr. Shaw's proposed changes to the accounting system are not consistent with the Prior Appropriation Doctrine.

The Irrigators proposed changes to the Department's accounting system primarily through the testimony of Mr. Dave Shaw. Mr. Shaw urges allowing the federal reservoir operators to determine when and how much water should be counted toward the fill of the Storage Rights. Under Mr. Shaw's proposal, the federal government could decide to forego capturing storable inflow during the non-irrigation season and instead store water later. This would not further the policy of maximizing the use of the State's water resources because, as explained, there is less demand by others for the bypassed water during the non-irrigation season, and storing water later will come at the expense of other users who need the water. This proposed methodology also would take away the Director's authority to administer the State's public waters in the Boise River, Idaho Code 42-602, and effectively abdicate that authority to the federal reservoir operators.

Mr. Shaw also proposes that the Department's accounting system be reprogrammed so that the amount of water accrued to the Storage Rights would be reduced by the amount of water released or bypassed during flood control operations. This, too, would violate the one-fill rule by

²⁹ More than 100 of the Irrigators' Exhibits (nos. 2055 – 2180) are documents cited in Dr. Stevens' report. These documents were not admitted based on any relevancy determination, but were admitted merely as support for Dr. Stevens' report, which is itself has minimal, if any, relevance.

allowing the storage of more water than authorized under the Storage Rights' partial decrees. For example, using an example Mr. Shaw employed at the hearing, if 750,000 acre-feet was stored under the Storage Rights, and 350,000 acre-feet was subsequently released to vacate space for flood control, the Irrigators propose "resetting" the Storage Rights' accrual to 400,000 acre-feet (750,000-350,000) so an additional 600,000 acre-feet could be stored under the Storage Rights (for a final total reservoir contents of 1 million acre-feet). Clearly, however, this amounts to 1,350,000 acre-feet of storage, which exceeds the Storage Rights' total authorized volume of approximately 1 million acre-feet.

In short, the Irrigators' goal is to extend the amount of time that the Storage Rights remain unfilled and therefore in priority. But this goal (and the specific proposals designed to achieve it) would violate Idaho's Prior Appropriation Doctrine, including the State's policy of securing the maximum use of its water resources. The Irrigators' proposals would give the federal reservoir operators command of the Boise River, and would harm junior water rights by delaying the date that they are entitled to divert water in priority. The Irrigators have offered no legally sufficient alternatives to the Department's current accounting system, or the one-fill, storable inflow, paper fill, and free-river refill principles upon which it is based. United Water believes no legal alternatives exist, and that there is no legal or factual justification to stray from these principles.

J. The Irrigators' other witness testimony does not support changing the current accounting system

The Irrigators produced a parade of witnesses at the hearing who had little, if any, knowledge about the Department's current accounting system. One witness' testimony could be

summed up as “fish need water,”³⁰ and another’s as the “dilution of pollution needs water.”³¹ Many other witnesses’ testimony can be summarized as “crops need water.”³² These matters are self-evident and not relevant to answering the question of how water should accrue to the Storage Rights under Idaho’s Prior Appropriation Doctrine. None of these witnesses provided any testimony relevant to that question.

The Irrigators also presented former Water District 63 Watermaster Lee Sisco, current Watermaster Rex Barrie, and Bureau employee Mary Mellema. Mr. Sisco and Mr. Barrie testified inconsistently about their agreement or disagreement with the paper fill, storable inflow, and free river refill principles, although neither disagreed that these principles in fact have been incorporated into the Department’s accounting system since at least 1986. Their testimony should be given little, if any, weight on the subject of whether or how the current accounting system should be changed.

Ms. Mellema testified about the Bureau’s and the Corps’ reservoir operations. In addition to her testimony described above, among other things she explained that flood control decisions have some inherent subjectivity, and that such decisions are made without regard to Idaho water law. None of Ms. Mellema’s testimony supports changing the Department’s current accounting system.

V. CONCLUSION

With the single exception of the “reset date” issue discussed above, the water rights and storage accounting programs described in the *Staff Memo* are consistent with the one-fill,

³⁰ Testimony of Rick Williams, Ph.D., biological consultant and fly fishing outfitter.

³¹ Testimony of Steve Burgos, City of Boise environmental manager.

³² *E.g.*, testimony of Ron Platt, Director, Wilder Irrigation District.

storable inflow, paper fill, and free river principles of the Prior Appropriation Doctrine. These principles allow the federal dam operators in Basin 63 to physically refill reservoirs after releasing water for flood control or other operational purposes, while at the same time protecting junior water rights and the State's interest in administering—and maximizing—the use of the water resource.

These principles are part and parcel of the Prior Appropriation Doctrine. They require the federal dam operators fill their reservoirs under their storage water rights when, and to the fullest extent that, water is physically and legally available for storage under those rights. If storable inflow must be released or bypassed for flood control, environmental goals, or other operational reasons, the dam operators can and do refill their reservoirs under free river conditions after the storage rights achieve paper fill.

These mechanisms further the State's maximum use policy by ensuring that federal dam operators manage flood control and other operational releases in ways that do not injure other water users. The alternative, in which dam operators could refill in priority at the expense of other users, would allow reservoir operators to forego storage of water when it is plentiful and available early in the storage season. In Basin 63, this would effectively turn control of the Boise River over to the federal government. As the *Staff Memo* said: "If reservoir operations and physical contents determined the satisfaction of state water rights it could result in federal control of the distribution of natural flow to state water rights." *Staff Memo* at 7-8. Idaho's Prior Appropriation Doctrine, as implemented in the water rights and storage accounting procedures described in the *Staff Memo*, does not and must not allow this.

The *status quo* accounting regime is lawful and has served Idaho well. The practical reality is that storage right holders in Basin 63 have done quite well under the *status quo*,

refilling after flood control operations successfully for many decades without complaint. Importantly, they have accomplished this while respecting the priorities of the handful of junior rights with which they share the river.

Departure from the *status quo* would serve no useful purpose, would unconstitutionally impair the property rights of junior diverters, would cede control of Idaho's surface water resources to the federal government, would impair the maximum utilization of water resources, and would violate the Prior Appropriation Doctrine.

United Water urges that adherence to the one-fill, storable inflow, paper fill, and free river principles are compelled by the Prior Appropriation Doctrine. But even if they were not, they are sensible principles that have served the State well. To the extent the Director has discretion in the matter, he should exercise that discretion to retain the principles that have proven fair and effective in Idaho and throughout the West.

Respectfully submitted this 28th day of September, 2015.

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Michael P. Lawrence