10-23-2013

A&B Irrigation District v. State Respondent's Brief 4 Dckt. 40974

In the Supreme Court of the State of Idaho

IN RE SRBA, CASE NO. 39576, SUBCASE 00-91017 (BASIN-WIDE ISSUE 17 – DOES IDAHO LAW REQUIRE A REMARK AUTHORIZING STORAGE RIGHTS TO 'REFILL', UNDER PRIORITY, SPACE VACATED FOR FLOOD CONTROL).

A & B IRRIGATION DIST., AMERICAN FALLS RESERVOIR DIST. #2, BURLEY IRRIGATION DIST., MILNER IRRIGATION DIST., MINIDOKA IRRIGATION DIST., NORTH SIDE CANAL CO., TWIN FALLS CANAL CO.,

Appellants

v.

STATE OF IDAHO, UNITED STATES OF AMERICA, BOISE PROJECT BOARD OF CONTROL, ABERDEEN-AMERICAN FALLS GROUND WATER DIST., ABERDEEN-SPRINGFIELD CANAL CO., BINGHAM GROUND WATER DIST., BONNEVILLE-JEFFERSON GROUND WATER DIST., JEFFERSON-CLARK GROUND WATER DIST., MADISON GROUND WATER DIST., MAGIC VALLEY GROUND WATER DIST., NORTH SNAKE GROUND WATER DIST., BLACK CANYON IRRIGATION DIST., NEW YORK IRRIGATION DIST., BIG WOOD CANAL CO., BALLENTYNE DITCH CO., BOISE VALLEY IRRIGATION DITCH CO., CANYON COUNTY WATER CO., EUREKA WATER CO., FARMERS' CO-OPERATIVE DITCH CO., MIDDLETON IRRIGATION ASSN., INC., MIDDLETON MILL DITCH CO., NAMPA & MERIDIAN IRRIGATION DIST., NEW DRY CREEK DITCH CO., PIONEER DITCH CO., SETTLERS IRRIGATION DIST., SOUTH BOISE WATER CO., THURMAN MILL DITCH CO., IDAHO POWER CO., FREMONT-MADISON GROUND WATER DIST., IDAHO IRRIGATION DIST., UNITED CANAL CO., CITY OF POCATELLO, UNITED WATER IDAHO INC., PIONEER IRRIGATION DIST.,

Respondents

BOISE PROJECT BOARD OF CONTROL,

Appellant

v.

STATE OF IDAHO, UNITED STATES OF AMERICA, AMERICAN FALLS RESERVOIR DIST. NO. 2, ABERDEEN-AMERICAN FALLS GROUND WATER DIST., ABERDEEN-SPRINGFIELD CANAL CO., BINGHAM GROUND WATER DIST., BONNEVILLE-JEFFERSON GROUND WATER DIST., JEFFERSON CLARK GROUND WATER DIST., MADISON GROUND WATER DIST., MAGIC VALLEY GROUND WATER DIST., NORTH SNAKE GROUND WATER DIST., BLACK CANYON IRRIGATION DIST., BIG WOOD CANAL CO., BALLENTYNE DITCH CO., BOISE VALLEY IRRIGATION DITCH CO., CANYON COUNTY WATER CO., EUREKA WATER CO., FARMERS' CO-OPERATIVE DITCH CO., MIDDLETON IRRIGATION ASSN., INC., MIDDLETON MILL DITCH CO., NAMPA & MERIDIAN IRRIGATION DIST., NEW DRY CREEK DITCH CO., PIONEER DITCH CO., SETTLERS IRRIGATION DIST., SOUTH BOISE

WATER CO., THURMAN MILL DITCH CO., IDAHO POWER CO., FREMONT-MADISON GROUND WATER DIST., IDAHO IRRIGATION DIST., UNITED CANAL CO., CITY OF POCATELLO, UNITED WATER IDAHO INC., A&B IRRIGATION DIST., BURLEY IRRIGATION DIST., MILNER IRRIGATION DIST., NORTH SIDE CANAL CO., TWIN FALLS CANAL CO., MINIDOKA IRRIGATION DIST., PIONEER IRRIGATION DIST.,

Respondents

BRIEF OF RESPONDENT UNITED WATER IDAHO INC.

Appeal from the District Court of the Fifth Judicial District of
The State of Idaho, in and for the County of Twin Falls,
Honorable Eric J. Wildman, District Judge, Presiding

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STATEMENT OF THE CASE

This brief is Respondent United Water Idaho Inc.'s ("United Water") consolidated response to *Appellant's Opening Brief* ("*BP Brief*") filed by Appellant Boise Project Board of Control ("Boise Project") in Docket No. 40974-2013 and the *Surface Water Coalition's Opening Brief* ("*SWC Brief*") filed by A & B Irrigation District, et al. ("Surface Water Coalition") in Docket No. 40975-2013. We refer to the Boise Project and the Surface Water Coalition collectively as "Irrigators." These appeals have not been consolidated, but this consolidated brief was authorized by the Clerk of the Court.

I. NATURE OF THE CASE

Irrigators appeal from District Judge Eric J. Wildman's *Memorandum Decision* issued on Basin-Wide Issue 17 (R. 883-99). A basin-wide issue is a broad, cross-cutting issue of law that has application to many of the over 150,000 rights involved in the general adjudication of water rights known as the Snake River Basin Adjudication ("SRBA")—one of the largest in the history of the West.

This basin-wide issue deals with the right to "refill under priority"—a somewhat obscure issue of water law. One may find oneself struggling at first to explain it to one's spouse or neighbor. But it is not really so hard. Those of us who have studied water law, which includes every member of the Idaho bar, know that water is distributed in priority and limited to the quantity authorized. This case poses the question: Should we depart from those principles and allow reservoir operators to take more water than their rights allow—to the detriment of other water right holders?

The basin-wide issue addressed by the District Court reads as follows:

> Does Idaho law require a remark authorizing storage rights to "refill," under priority, space vacated for flood control?

This is identical to the issue as proposed by Boise Project *et al.*, except for the addition, by the District Court, of the words "under priority." "Under priority" simply means that the refill may occur under a right based on the holder's priority with impunity as to the impact on junior right holders. That is, the holder may call out upstream juniors and is immune from call by downstream juniors.

The abstrusely-worded basin-wise issue (constrained by the 20-word limit in the SRBA's Administrative Order 1) might be restated more clearly as follows:

> In the absence of a remark expressly authorizing it to do so, is a storage right holder allowed to store more water, under priority, than the annual volume stated on the face of its water right?

The District Court ruled, quite sensibly, that a storage right holder may only take, under priority, the quantity stated in the right. In other words, the right may only be filled once:

> The Court holds that under the prior appropriation doctrine as established under Idaho law, a senior storage right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights once.

Memorandum Decision at 13 (R. 895). In other words, a storage right holder may take more than the stated annual volume (*i.e.*, refill) if and only if all other water rights have been satisfied—*i.e.*, when there is a "free river." Although the District Court did not employ the term, this concept is sometimes referred to as the "one-fill rule."[1] United Water finds the term to be a convenient shorthand, so long as its meaning is understood.[2]

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[1] As discussed in section V of this brief beginning on page 35, the term "paper fill" is also employed to capture this idea.

[2] The District Court also recognized the potential for confusion over terminology:

> The Court notes that the term "fill" may be used to describe (1) a reservoir physically filling with water, or (2) the decreed volume of a storage water right being satisfied (i.e. when the total quantity that has been accounted to storage equals the decreed quantity).

Memorandum Decision at 9 (R. 891). The District Court, however, was quite clear about which is which. The decision addresses fill and refill of storage rights, not reservoirs:

To be clear, this rule does not mean that one may fill a reservoir only once; it means that one may fill the licensed or decreed quantity of a water right only once under priority. Indeed, this is why the District Court added the words "under priority" to the basin-wide issue. In other words, a reservoir may be physically refilled after evacuation for flood control, even without a water right, but only when doing so does not injure others—that is, under "free river" conditions. In addition, a reservoir may be filled more than once, under priority, if expressly authorized by a water right. That is (1) when the original storage right states an annual volume that exceeds the reservoir capacity or otherwise expressly allows for multiple fill or (2) when the reservoir operator obtains another water right (typically, a junior right) authorizing additional fill.

The District Court carefully limited its ruling to the issue of the right to refill a storage water right that already has been filled once. It expressly avoided ruling on how the first (or any subsequent) fill of a water right is measured, holding that this is a question of administration not suited for a basin-wide issue. Specifically, the District Court avoided addressing the "more important issue pertain[ing] to when the quantity element of a storage right is considered filled." *Memorandum Decision* at 11 (R. 893).

The District Court was within its discretion in limiting the ruling in this way. The basin-wide issue asked whether refills of storage water rights under priority are allowed without some express authorization. The basin-wide issue does not ask how to determine when fill occurs.

> 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.

Memorandum Decision at 9 (R. 891) (emphasis supplied). This is reflected again in the Court's final conclusion:

> The Court holds that . . . a senior storage right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights once.

Memorandum Decision at 13 (R. 895) (emphasis supplied).

Any failure in framing the issue, of course, is a problem of the Irrigators' own making. After all, the Boise Project first proposed and drafted the basin-wide issue, and the Surface Water Coalition supported that proposal. *SWC Brief* at 203; *BP Brief* at 2-3. The two words added by the District Court ("under priority") clarified the issue but did not narrow the question's scope. Neither the Irrigators' question nor the District Court's edited version sought a ruling on "what is a fill?" or "how is it measured?"

Moreover, as the District Court noted, determining when a particular water right serving a reservoir or an integrated system of reservoirs is filled involves site-specific considerations and often highly technical tracking of water inputs and computer analysis thereof. Exploration of such things is not appropriate in a basin-wide issue.[3] *Order Designating Basin-Wide Issue* at 6 (R. 256); *Memorandum Decision at* 11 (R. 893).

That said, United Water understands the Irrigators' concern that it seems illogical to address refill without also talking about fill. As the Irrigators pointed out so often in their briefs, even the District Court recognized that the question of "what is a fill" is very important.

If this Court determines that it should answer the broader question of how fill is measured, it can do so very simply. There is no need for a remand. There is no need to explore

[3] Basin-wide issues, by their nature, involve broad questions of water law rather than the factual specifics of individual water rights. *SRBA Administrative Order 1* § 16(a)(1) at 22 (describing a basin-wide issue as "an issue [that] materially affects a large number of parties to the adjudication" and is "broadly significant"). The SRBA's and the Idaho Supreme Court's past experience with basin-wide issues shows a practice of addressing legal rather than factual issues through basin-wide proceedings. *See, e.g., United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998) (basin-wide issue no. 9, federal reserved water rights); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997) (basin-wide issue no. 10, partial forfeiture); *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (basin-wide issue no. 4, the facial constitutionality of "amnesty" statutes); *In re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614 (1995) (discussing basin-wide issue nos. 2 and 3, IDWR's role in the SRBA and the effect of legislative changes affecting a pending adjudication). *See also In re SRBA Case No. 39576*, Basin-Wide Issue No. 1 (facial constitutionality of presumption and accomplished transfer statutes) and No. 14 (whether aesthetic, recreational, and wildlife uses are beneficial uses). In questioning whether and how to frame the issue in this basin-wide proceeding, the District Court recalled how a proposed basin-wide issue (No. 13) was in fact not designated because the court would have had to review "different factual circumstances" at "every hydropower facility" if the record would be "getting into historical practices." Tr., 9/10/2012, p. 15, ll. 9-11.

the intricacies of specific reservoir accounting systems to answer this basic question of water law. A fill occurs when water legally available for storage (aka "storable inflow") has entered the impoundment in an amount equal to the annual volume of the water right. In other words, if the water is physically there and if the right holder is legally entitled to store the water, then it counts toward the right holder's storage right—regardless of what the right holder does with that water. [4]

The Idaho Department of Water Resources ("IDWR") has administered storage rights this way for as long as quantity accounting has been done, and the U.S. Bureau of Reclamation ("Reclamation" or "Bureau") has operated its reservoirs accordingly. Why, then, all the hubbub? There is no good reason for it.

This case represents an effort by the Irrigators to fix a clock that is not broken. Irrigators routinely store water for refill, out of priority, during free river conditions. This is entirely lawful. They have done this, when required, ever since their reservoirs were built. It works fine. During times when there is so much water that some must be released to create space to accommodate the incoming flows, there is likely to be enough water in the river to refill the vacated space and satisfy all other rights.

Could this change in the future? Will free river conditions occur less frequently as additional development comes to Idaho? Perhaps. But that does not justify a departure from the prior appropriation doctrine. If the Irrigators are concerned that future appropriations may eliminate the free river conditions that prevail today, all they need to do is get in line ahead of that development. That is, they should file applications for new, junior priority refill rights.

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[4] The administration of storage rights may be more complicated in the case of multiple reservoirs operated in ways that allow water to be physically stored in one reservoir but credited to rights in another reservoir. There is nothing wrong with this practice, and the storable inflow principle remains the same. Water legally available for storage entering the system of reservoirs must be credited to one storage right or another. Administration may be more complicated, but the idea—and the governing principle of law—remains very simple.

Doing so would protect them, while avoiding injury to existing rights.

Irrigators say they only recently came to the realization that they are entitled to only one fill of their rights under priority. It is unclear why they are tumbling to this only now. This is how storage water has been administered in Idaho since the first modern accounting system was put in place in the 1970s. *See* Minutes of Committee of Nine (Sept. 21, 1979) (R. 801) discussed further below in section V starting on page 35.

Yet now, for reasons that are unclear, the Irrigators want to change the status quo without bothering to apply for new, junior priority refill rights. They want to secure backdated rights to do something they have never had or needed before. They now seek the right to injure existing water rights by storing more water than the annual volume stated on the face of their rights.

The Irrigators also raise procedural arguments that the District Court violated standards for entering a declaratory judgment, granting summary judgment, determining the necessity of a remark or general provision, taking evidence, and making findings of fact. *SWC Brief* §§ I(A) to I(C), pp. 10-16, II, pp. 17-20; *BP Brief* § I, pp. 13-19. These arguments are frivolous.[5]

United Water is interested in this issue because it holds Boise River natural flow water rights with priority dates junior to the Bureau's storage rights associated with Lucky Peak,

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[5] Suffice it to say that the authorities cited are not applicable or instructive in the context of a basin-wide issue arising in a general adjudication—a unique proceeding that is limited to resolution of specific legal issues and is not intended to be dispositive of individual claims or factual issues involved in the adjudication.

The Boise Project also seems to argue that the District Court mistakenly failed to consider that the contractual relationship between Basin 63 spaceholders and the Bureau might be insufficient to protect their rights to storage water under federal law. *BP Brief* § IV, pp. 28-29. It is difficult to understand the relevance of this argument to the question of whether Idaho's prior appropriation doctrine—not reservoir-specific federal law or contract law—allows more than one fill of a storage water right in priority.

It is apparent that the Irrigators are straining hard to find a reason for the Court to remand to the District Court for development of a site-specific factual record—an action that is both unnecessary and inappropriate. The Supreme Court needs no additional facts to uphold the fundamental concept of prior appropriation determined by the District Court—that, as a matter of law, storage water rights are not entitled to refill, under priority, after water already has been stored once in priority. Nor does this Court need additional facts to determine that all water that is physically and legally available for diversion to storage counts toward the initial fill of a storage right regardless of whether the right holder stores the water until it is applied to beneficial use or releases it earlier for some other reason.

Anderson Ranch, and Arrowrock Reservoirs. These rights would be injured if the Irrigators prevailed in securing an entitlement to "priority refill." United Water also holds storage entitlements in Lucky Peak and Anderson Ranch reservoirs. United Water is seeking a result in this case that reflects the correct application of the prior appropriation doctrine—a rule that recognizes the rights of junior and senior appropriators, but that does not grant additional rights to one at the expense of the other.

II. COURSE OF PROCEEDINGS

Three appeals were filed from District Judge Eric J. Wildman's decision on Basin-Wide Issue 17 in the Snake River Basin Adjudication: one by the Boise Project, another by the Surface Water Coalition, and a third by the United States.

The United States subsequently moved to dismiss its appeal with prejudice. This Court granted that motion.

United Water is unable to discern any material difference between the appeals of the Boise Project and the Surface Water Coalition. Both contend that—because the public policy of flood control is so important—they may lawfully fill their water rights once and then fill them again, thereby exceeding the annual volume quantity of their rights, even if doing so injures other right holders.

Boise Project and others asked the District Court to designate the basin-wide issue after they became aware of a debate on remarks related to refill that was playing out in another part of the State. *Petition to Designate Basin-Wide* Issue (R. 13-15). The Surface Water Coalition later endorsed that request. *Surface Water Coalition's Response in Support of Petition to Designate Basin-Wide Issue* (R. 228-35). In certain subcases arising in Basin 01, the Bureau submitted SRBA water right claims including a remark that expressly authorized refill of its storage rights. Claims (R. 93, 97, 109, and 116); *Order Designating Basin-Wide Issue,* at 3-4 (R. 253-54). The

Bureau asserted this alleged right to refill despite the fact that the Bureau's water right licenses did not include any such remark or reference to refill, and despite the licenses clearly stating that the amount of water appropriated under each right "shall not exceed" the amount stated in the quantity elements. R. 101, 106.

IDWR's recommendation for the Bureau's Basin 01 claims did not include the remark authorizing refill sought by the Bureau. The Bureau objected. The State of Idaho responded to the Bureau's objection by offering an alternative remark that would have provided the Bureau with a right to refill the Palisades and American Falls reservoirs out of priority, or "subordinated" to other water rights. *Order Designating Basin-Wide Issue* at 3-4 (R. 253-54).[6]

Certain water users in Basins 63 and 65, including the Boise Project, became concerned about the Bureau's and the State's dispute over "refill" remarks in Basin 01 because the Bureau's decreed storage rights for Black Canyon, Lucky Peak, Anderson Ranch, and Arrowrock reservoirs did not include any mention of priority or subordinated "refill." This is described in the *Memorandum Decision* at 4 (R. 887). *See also Memorandum in Support of Motion to Consolidate Issue Regarding "Refill" of Bureau of Reclamation Storage Rights* at 4 (R. 22). Accordingly, the Boise Project filed a *Petition to Designate Basin-Wide Issue* in an attempt to have a right to "priority refill" decreed as a new, generally applicable rule of law that would apply to all storage water rights—even those that were already decreed without any remark authorizing refill. They framed the basin-wide issue as: "Does Idaho law require a remark authorizing storage rights to 'refill' space vacated for flood control?" *Petition to Designate Basin-Wide Issue* at 2 (R. 14).

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[6] The State's proposed remark read: "This right is filled for a given irrigation season when the total quantity of water that has been 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." *Order* at 4 (R. 254).

In designating Basin-Wide Issue 17, the District Court added the words "under priority" after "refill" to clarify the proposed question, recognizing "the crux of the issue as whether Idaho law authorizes the refill of a storage right, *under priority*, where water diverted under that right is released for flood control." *Order Designating Basin-Wide Issue* at 5 (R. 255) (emphasis original). This was after considerable debate as to whether the issue was fit for basin-wide designation at all, or whether it would involve too many facts related to specific reservoirs and their operations—specifically facts related to whether and how IDWR properly accounts for the initial "fill" of the storage water rights related to those reservoirs. *Id. See also generally* Tr. 9/10/12, pp. 14-27. The parties promoting the basin-wide issue's designation, including the Irrigators, assured the District Court that the question of "refill" is a question of law and that "little, if any, factual record development would be necessary." *Order Designating Basin-Wide Issue* at 5 (R. 255). Accordingly, the District Court designated the basin-wide issue narrowly and specifically to address "storage rights," and admonished the parties not to delve into "the specific factual circumstances, operational history, or historical agreements associated with any particular reservoir" because "[s]uch factual inquiries do not lend themselves to review in a basin-wide proceeding involving many parties and many reservoirs." *Order Designating Basin-Wide Issue* at 5 (R. 255).

Having failed in the District Court, the Irrigators have now changed course, urging the Court to allow development of a complex site-specific factual record. This request is both unnecessary and inconsistent with the very idea of a basin-wide issue. (See footnote 12 at page 25 describing other proceedings in which site-specific factual records may be developed.)

III. STATEMENT OF THE FACTS

This is a basin-wide appeal. It poses a broad question of law that does not turn on the particular facts of any water right or reservoir. The various affidavits and other materials before

the Court may be helpful for providing context to the legal analysis, but are not essential to answer the legal question presented. There is no need to create a more elaborate record than is already before the Court.

One broad fact is clear. Idaho has long administered storage rights under the one-fill rule based on storable inflow (what in Idaho is called "paper fill"). Specifically, Idaho administers storage rights allowing them to fill only once under priority, while allowing additional water to be stored as necessary to the extent that other rights are not injured thereby. However, even this "fact" does not really matter. Idaho has been doing this right. But that does not make it right. What makes it right is the prior appropriation doctrine.

ADDITIONAL ISSUES PRESENTED ON APPEAL

In addition to the issues identified in the Irrigators' briefs, United Water identifies the following issues. United Water displays how it would answer each question in brackets.

1. In the absence of an express authorization in a prior license, permit, or decree for more than one fill, is the holder of a storage right entitled to more than one fill of its water right under priority? [No.]
2. In other words, may such a senior storage right holder injure or call out junior water rights to enable the senior to divert and store more water than the annual volume stated on the face of the right? [No.]
3. What water counts toward the initial fill of a storage right? Specifically, does all storable inflow (that is, water physically and legally available for diversion to storage) count toward the fill regardless of whether the right holder stores the water until it is applied to beneficial use or releases it earlier for some other reason? [Yes.]
4. If a storage right holder is allowed only one fill of its water right, may it nevertheless divert and store additional water when its reservoir is not full due to release of water

for flood control purposes when doing so will not impair other water rights? [Yes.]

5. Is development of a site-specific factual record necessary or appropriate in a basin-wide issue case such as this? [No.]

ATTORNEY FEES ON APPEAL

Although United Water believes that basic principles of the prior appropriation doctrine clearly dictate the outcome of this case, it also recognizes that this is a question of first impression in Idaho. Accordingly, United Water does not seek attorney fees on this appeal.

ARGUMENT

I. PRIORITY REFILL AUTHORIZATION WOULD ENLARGE SENIOR STORAGE WATER RIGHTS AND INJURE JUNIOR WATER RIGHTS.

The crux of this case is whether storage space vacated in a reservoir to accommodate oncoming flood waters is entitled under Idaho law to "refill" that space under priority. The District Court correctly held the answer to be "no," stating that "under the prior appropriation doctrine as established under Idaho law, a senior storage water right holder may not refill his storage water right under priority before junior appropriators satisfy their water right once." *Memorandum Decision* at 13 (R. 895).

The rationale for this holding is simple—"as soon as a storage right is filled it is no longer in priority." *Memorandum Decision* at 10 (R. 892). The court's well-reasoned opinion explained that this conclusion flows from basic principles of water law:

> 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. Idaho's prior appropriation doctrine provides protections to both senior and junior appropriators through a system of priority administration. A senior appropriator's water right is protected under the doctrine against interference from those whose rights are subsequent in priority. [Citations omitted.] At the same time, a junior appropriator's water right is protected against wrongful acts on the

> part of senior appropriators that would disturb the junior's right to the use of water.

Memorandum Decision at 9-10 (R. 891-92).

The District Court also cited *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907), in which the Idaho Supreme Court held that a senior may divert the quantity of water to which he is entitled to in priority "but, when he has once done so, he may not dam the stream below or hinder or impede the flow of the remaining stream to the [junior's] headgate." The Irrigators' contention that they may obtain the full quantity of their water rights, and then fill those rights again under priority, cannot be reconciled with these foundational principles of water law. In times of shortage (when there is not a "free river"), the water used to satisfy Irrigators' refill must come from somewhere. The prior appropriation does not allow it to come at the expense of some other water user.

Water rights have a quantity element. That quantity element means something. The District Court's determination that priority refill is not allowed is based on its straightforward interpretation of the elements of a water right. "It is the quantity element of a water right that defines the duration of priority administration during its authorized period of use." *Memorandum Decision* at 11 (R. 893). "As soon as a senior storage right is filled it is no longer in priority." *Memorandum Decision* at 10 (R. 892).

As with any right, a storage right is limited to the authorized quantity. The "quantity of water per year . . . is essential to the establishment and granting of a water right." *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 416, 958 P.2d 568, 573 (1997). This is because if a right were to authorize "an uncertain amount of water to one appropriator whose needs are vague and fluctuating, it is likely that he will waste water and yet have the power to prevent others from putting the surplus to any beneficial use." *Village of Peck v.*

Denison, 92 Idaho 747, 750, 450 P.2d 310, 313 (1969) (emphasis supplied); *see also State v. Idaho Conservation League*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) ("the elimination of all of the elements of a water right, particularly the essential elements of priority date and quantity, vitiates the existence of a legal water right").

The Irrigators seek the very thing condemned by this Court in *Village of Peck*. They seek a water right that is "vague and fluctuating" and in an "uncertain amount." Specifically, they contend they have broad discretion to release previously stored water (including bypass) and then store more water—in excess of the quantity authorized under their storage rights. And that they may do so "under priority"—that is, under their senior right with impunity as to the impact on other right holders.

If this were the law, there would be little point in putting any quantity limit on the storage right. But this is not the law. In Idaho, storage rights are quantified according to the volume authorized to be diverted in a year—typically, acre-feet annually ("AFA") or acre-feet per year ("AFY"). *See e.g.*, Idaho Code § 42-1411(2)(c) (requiring IDWR to recommend a water right's claimed quantity for "storage in acre-feet per year"); IDAPA 37.03.01.060.02.f.iv (in a notice of claim filed in a general stream adjudication "the amount of water stored shall be listed in af per annum"). The storage rights of concern to the Irrigators are consistent with this standard. R. 414-20 (containing the partial decrees for Lucky Peak Reservoir (No. 63-03618), Anderson Ranch Reservoir (No. 63-03614), and Arrowrock Reservoir (No. 63-00303)); R. 490-91 (Stipulated Director's Report for storage right no. 1-2068, Palisades Reservoir).

The annual volume of water listed in a storage water right's quantity element must be the limit of the amount of water that may be diverted into storage under the right in priority. Otherwise, the number is meaningless and water rights could be enlarged to the disadvantage of junior appropriators. *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012)

("An increase in the volume of water diverted is an enlargement . . . ."); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001) ("Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use.") But enlargements are not allowed because, by their very nature, they injure junior water rights. "[T]here is *per se* injury to junior water rights holders anytime an enlargement receives priority." *Pocatello,* 152 Idaho at 835 (quoting *A & B Irrigation Dist. v. Aberdeen–American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005)) (emphasis in original). "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." *Id.* (quoting *Jenkins v. Idaho Dept. of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982)).

II. THERE IS NO "FLOOD CONTROL" EXCEPTION THAT ALLOWS DIVERSIONS UNDER PRIORITY IN EXCESS OF A STORAGE RIGHT'S TOTAL ANNUAL VOLUME.

A cornerstone of the Irrigators' argument is that "protective" flood control releases should not be held against them. *See e.g., SWC Brief* at 2, 4, 5, 6, 12, 20, 22, 23-27, 31-36; *BP Brief* at 1, 8, 27 (asserting that storage right holders should not be "punished" for flood control releases).

This has some superficial appeal, but the Court should not take the bait. This is a zero sum game. When the Irrigators complain that they are being "punished," what they are really asking is that someone else be punished instead. The prior appropriation doctrine is not premised on punishing people or feeling sorry for people. It is premised on maximizing the use of the public resource by applying the rules of priority and non-injury with discipline and letting the chips fall where they may.

To be sure, no one in this litigation, including United Water, has a problem with flood control releases. These releases serve a vital public purpose, and they are authorized by state

law, *e.g., Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 914, 792 P.2d 926, 939 (1990), and federal law, *e.g.*, 33 C.F.R. § 208.11(e) (table listing Palisades, Anderson Ranch, and Arrowrock reservoirs as federal projects with flood control purposes, and noting their authorizing legislation); *see also* An Act to Authorize Palisades Dam and Reservoir, 64 Stat. 1083 (Sept. 30, 1950) and other materials set out at R. 494-500. But what happens to the water after it is diverted to storage does not change the fact that it was diverted and stored.

The Irrigators contend that because storage releases do not constitute "beneficial use" under their irrigation rights, water that they stored and later released for flood control does not count toward the fill of their rights. *SWC Brief* at 22. But the responsibility to vacate stored water does not create the right to injure others to make up the shortfall.

The Irrigators' focus on what happens to the water after it is diverted to storage is misplaced. Whatever ultimately happens to that water—whether it is put to the authorized beneficial use, released for flood control, given to needy orphans, or lost to a leaky reservoir—does not change the fact that it counts toward the fill of the right as soon as the diversion occurs. If senior storage rights that have been filled once are allowed to fill again under priority—no matter how great the need or noble the cause—juniors will be injured.

Irrigators cite no authority for their proposition that water diverted and stored under priority and then released for flood control operations can be replaced under priority irrespective of impact on junior water rights. None exists. On the contrary:

> A double filling in effect would give two priorities of the same date and of the same capacity to the same reservoir, on the same single appropriation, which is impossible in fact and in law, and, if allowed, would violate the fundamental doctrine of the law of appropriation—he who is first in time is first in right—by making a junior superior to a senior reservoir appropriator.

Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 98 P. 729, 733 (1908).[7]

In short, a double fill of a water right is an enlargement of a water right. This Court has been very clear that enlargement constitutes *per se* injury. "[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." *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (emphasis original) (citations and internal quotation marks omitted).

Ultimately, it makes no difference whether stored water is released for flood control or any other purpose, because the result is the same—junior water rights are shorted if a storage right holder is allowed to store the authorized quantity of water more than once under the same priority. In short, there are no exceptions to the basic rule that a water right cannot be diverted in excess of its authorized quantity.

III. THE ONE-FILL RULE IS RECOGNIZED BY OTHER PRIOR APPROPRIATION STATES.

Most of the reported cases involving refill have arisen in Colorado, perhaps the purest of prior appropriation states.[8] However, each and every western state that has addressed the subject has embraced the one-fill rule and found that it is part and parcel of the prior appropriation doctrine.[9]

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[7] As discussed in section III starting on page 21, *Windsor* is the origin of the so-called "one-fill rule" that has been the law of Colorado and other prior appropriation states for more than a century.

[8] Colorado is a pure prior appropriation state and is looked to as the source of the doctrine. Indeed, the rejection of the riparian doctrine and the embrace of the prior appropriation doctrine was originally referred to as the "Colorado Doctrine." Samuel C. Wiel, *Water Rights in the Western States* (3rd ed.) § 167, p. 185, *et seq.* (1911).

[9] In addition to states embracing the one-fill rule in judicial decisions, Washington, has adopted the rule by regulation. "'Reservoir permit' means a water right permit which authorizes construction of an impoundment structure, storage of water and generally the use of water in the amount of one filling annually." Wash. Admin. Code 173-559-020(11). "Secondary permit' means a water right permit which allows diversion of water for beneficial use from a storage reservoir. A secondary permit is necessary only for use in excess of one filling annually, or for diversion and use by a party other than the reservoir owner." Wash. Admin. Code 173-559-020(12).

Indeed, as far back as 1912, the one-fill principle was deemed black letter law and incorporated in Kinney's treatise on water law:

> As in the case with other rights acquired under the Arid Region Doctrine of appropriation, the rule of priority governs, and it is held that the reservoir having the prior right is entitled to fill the same first from the flow of the stream to the full extent of the capacity of the appropriation made therefor. But having once during any one season filled such reservoir, a later appropriation or a subsequent reservoir may take the surplus of the water flowing in the stream, after the prior reservoir has been once filled.

1 *Kinney on Irrigation*, 2nd ed. § 845, p. 1,484 (1912) (emphasis supplied).

The seminal "one-fill rule" case arose in Colorado over a century ago. In *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 98 P. 729 (Colo. 1908), the court held that only one fill of a reservoir is allowed under priority.[10] The *Windsor* decision involved the interpretation of a statute then in effect concerning reservoir operations. As the quotation above shows, however, the one-fill principle is premised on the prior appropriation doctrine itself. This is confirmed by the fact that the Colorado Supreme Court has continued to apply the one-fill rule after the reservoir statute was repealed in 1943.

The Montana Supreme Court adopted the rule in *Windsor*, saying "[w]e like the language used in *Windsor*" and then quoting extensively from that case. *Federal Land Bank v. Morris*, 116 P.2d 1007, 1011 (Mont. 1941). The Montana court summed up:

> Generally, and briefly, in this state what are the reservoir rights of any person? We would say that, in any year, to store for use in that or succeeding years what he has a right to use, and also

[10] The *Windsor* case might be read to suggest that an appropriator can never obtain a right for more than one fill of a reservoir—even if such a right is expressly sought. If that was intended, it is clearly no longer the law. In *City of Grand Junction v. City and County of Denver*, 960 P.2d 675, 683 (Colo. 1998), discussed more fully below, the whole premise of the case was Denver's right to obtain a second, junior right to cover additional fill (refill). Likewise, the Colorado Supreme Court has recognized a right to refill a reservoir under the original appropriation if such authority was part and parcel of the original appropriation. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 27-28 (Colo. 1996). *Windsor* may have been a little vague on this point, but there is no doubt now that the one-fill rule limits refills of water right, not reservoirs. As discussed in section VII beginning on page 41, and as set out in Exhibit B, Idaho also allows rights that refill a reservoir.

> any additional amounts that others would not have the right to use, and that would otherwise go to waste, seems to cover the situation in this case.

Federal Land, 116 P.2d at 1012 (emphasis supplied). In this Montana case, the water rights for the subject reservoirs authorized a smaller volume than the size of the reservoir. The Montana court explained that while the right holder is only entitled to store "what he has a right to use" (*i.e.*, the amount on the right), he may capture and store "additional amounts" that are not allocated to other water rights. In other words, he may top off his reservoir if and only if there is a free river.

The *Federal Land* case was relied on in *Bagnell v. Lemery*, 657 P.2d 608 (Mont. 1983). In this case the Montana court affirmed a storage water decree in an amount that exceeded the size of the reservoir. This is consistent with the point made elsewhere in this brief that, so long as the quantity element is clear, it may be large enough to accommodate more than the initial fill of a reservoir.

More recently, Wyoming has embraced the one-fill rule. In *Wheatland Irrigation Dist. v. Pioneer Canal Co.*, 464 P.2d 533 (Wyo. 1970), the Wyoming Supreme Court framed the question: "The critical question posed in this connection is whether or not Pioneer, under its appropriation, was entitled to more than one filling of the reservoir each year up to its existing capacity." *Id.* at 539. Citing *Windsor* and *Federal Land* as authority, the court answered the question in the negative.

The one-fill rule continues to prevail in Wyoming. In a 2006 law review article, Professor MacKinnon reported: "In summer 2004, the State Engineer in response wrote Shoshone River users a strict reminder that despite their customary ability to make use of several fills of the Buffalo Bill Reservoir each year, Wyoming law entitles irrigators to only a single reservoir fill." Anne MacKinnon, *Historic and Future Challenges in Western Water Law: The*

Case of Wyoming, 6 Wyo. L. Rev. 291 (2006).

Colorado cases have continued to adhere to the rule. In *Orchard City Irrigation Dist. v. Whitten*, 361 P.2d 130, 135 (Colo. 1961), the court said that "the right to fill the reservoir more than once a year" if it exists "must be found in the decrees or result from a proper and legal construction thereof."

In *City of Westminster v. Church*, 445 P.2d 52, 58 (Colo. 1968), the court reiterated: "A reservoir right permits one filling of the reservoir per year." This was quoted with approval in *Southeastern Colorado Water Conservancy Dist. v. Fort Lyon*, 720 P.2d 133, 146 (Colo. 1986).

In *North Sterling Irrigation Dist. v. Simpson*, 202 P.3d 1207, 1211 (Colo. 2009), the court said once again: "One such applicable law is the 'one-fill' limitation on water storage rights. Colorado law dictates that a reservoir is limited to one annual filling, according to its decreed capacity." In this case, the court held that where the water right did not expressly provide how diversions are to be accounted for, the state engineer was justified in administering the one-fill rule based on a fixed water year (rather than the low point of the reservoir each year). "However, where, as here, storage decrees are silent on the issue, the state engineer and division engineers are bound by their statutory mandate to account for, and if necessary, curtail diversions that violate the one-fill rule." *North Sterling*, 202 P.2d at 1211.

In 1992 the court said, yet again: "A reservoir is permitted one filling each year." *Bd. of County Comm'rs of County of Arapahoe v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840, 851 (Colo. 1992) ("Arapahoe I").

In *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 40 n.13 (Colo. 1996), the Colorado Supreme Court noted the "common law principle that storage rights in reservoirs are limited to one fill annually." The court explained that the one-fill rule is a presumption that may

be overcome where the claim for the conditional water right clearly contemplates multiple fills.[11] *Id.*

In sum, the one-fill rule is followed not only in Idaho but has been embraced by Colorado, Wyoming, Montana, and Washington. Each recognizes that it is compelled by the prior appropriation doctrine itself. Not a single prior appropriation state has rejected the one-fill rule.

IV. ALL STORABLE INFLOW COUNTS TOWARD FILL.

The District Court ruled that the one-fill rule applies in Idaho, and stopped there. The judge declined to address how the fill is measured. That, he said, is a matter of administration, inappropriate to a basin-wide issue, and best left to future case-specific proceedings, such as when a water user places a call for curtailment of junior rights.[12]

As we noted above in the Statement of the Case, the District Court may have been right to limit its ruling in this way. After all, the basin-wide issue proposed by the Irrigators does not inquire into how a fill is measured. On the other hand, we can understand why the Irrigators would like to have this question answered. It is important. And it may be seen as part and parcel of the ruling that only one fill is allowed.

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[11] The terminology employed in Colorado reflects the fact that, in that state, water rights (decrees) are issued by the court, not an administrative agency (permits and licenses). A conditional water right decree corresponds functionally to a permit in Idaho, while an absolute decree corresponds to a license.

[12] Yesterday IDWR initiated contested case proceedings in Basins 01 and 63 to develop a formal administrative record documenting its accounting methods for federal on-stream reservoir storage rights, and to address interested parties' concerns with the same. *IDWR Notice of Contested Case and Formal Proceedings, and Notice of Status Conference, In the Matter of Accounting For Distribution of Water To the Federal On-Stream Reservoirs in Basin 63* (Oct. 22, 2013) (see also the identical *Notice* filed the same day with respect to Basin 01). Unlike this basin-wide issue, these proceedings will involve site-specific factual issues. These proceedings, in any event, will benefit from a clear statement by this Court as to the basic principles of law governing storable inflow and refill. The proceedings may then be limited to a determination of whether particular reservoir accounting operations comport with those principles.

If this Court determines it is appropriate to address the issue, there is a simple answer to the question. All storable inflow counts toward fill. It is that simple. "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 this brief).

In other words, if the water is there (coming into the reservoir), and it is legally available to store, the right holder is expected to store it. If she does not store it, it still counts toward her fill. If she later releases some of that water—for whatever reason—that does not reduce or otherwise affect the fill. This concept is known as "paper fill." It is a simple accounting principle that bears no relation to whether the reservoir is physically filled. *Id.* at 11-13; *Sutter Affidavit* ¶ 4, p. 2-3 (R. 351-52).

Perhaps this principle sounds harsh. But that harshness reflects the reality that we live in a land of shortage. That reality is at the very core of the prior appropriation doctrine. As this Court noted: "These principles [of the prior appropriation doctrine] become even more difficult, and harsh, in their application in times of drought." *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007).

But, applied properly, the doctrine furthers "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).

If we are to secure maximum use and benefit of our State's water, we must recognize that storage rights are different from rights for diversion 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).

Thus, a reservoir operator may not fill its reservoir at the operator's convenience.[13] When water is released (including bypassed water[14]) during high spring flows, it rarely provides

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[13] In *Wheatland Irrigation Dist. v. Pioneer Canal Co.*, 464 P.2d 533 (Wyo. 1970), a reservoir operator testified that, due to silting and seepage problems, they did not fill the reservoir as quickly as they could but instead filled "at whatever rate we might think we could use it at best possible advantage." *Id.* at 539. The state engineer found this unacceptable and instructed the reservoir operators to "take our water from the river as fast as we could." *Id.* The state engineer later changed his mind. But the Wyoming Supreme Court found that filling the reservoir at the operator's leisure violated the one-fill rule. *Id.* at 540.

[14] 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 *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 Presiding Judge held that Reclamation's claimed and recommended "streamflow maintenance" water right could be decreed because it was not a "minimum stream flow" water right that could only be held by the Idaho Water Resource Board pursuant to the Idaho Minimum Stream Flow Act, Idaho Code § 42-1501 *et. seq.* The court reasoned 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.

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

The Irrigators would have this Court believe that reservoir operators—particularly Reclamation—are at Mother Nature's mercy with respect to storing and releasing water before, during, and after flood control operations. *SWC Brief* at 22 ("Such high water conditions result from weather events beyond the control of any water user or reservoir operator."). This is not the case. Consistent with the holding in the *Lucky Peak Order* and as described in the affidavits and documents in the record, Reclamation actively operates its reservoirs throughout the year under detailed and comprehensive formal procedures. There is nothing passive about any release. *See* R. 290-309 (excerpts from the Water Control Manual for Boise River Reservoirs); R. 516-30 (deposition transcripts of Anthony Olenichak and Lyle Swank, IDWR Basin 01 Assistant Watermaster and Watermaster, respectively).

benefit to downstream holders of consumptive use rights. Reservoirs are expected to fill, to the extent possible, during the non-irrigation season and during the early irrigation season when plenty of water is available. If the reservoir operator misses this opportunity, or releases water previously stored, then water must be stored later in the season. 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. Accordingly, refills may occur, but not under priority.

In *Bd. of County Comm'rs of County of Arapahoe v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840 (Colo. 1992) ("Arapahoe I"), the Colorado Supreme Court affirmed the water court's ruling that all storable inflow counts toward the fill of a storage right. This case dealt with a system of federal reservoirs serving a variety of purposes. The Taylor Park Reservoir was located higher in the system. Pursuant to a 1975 contract, water was bypassed and releases were made to enhance downstream fisheries and flood control in a program that allowed the released water to be recaptured downstream. Pursuant to the 1975 contract, the Upper Gunnison Water Conservancy District filed an application for a new water right to authorize multiple fills of the reservoir. The issue in the case was an accounting question involving whether particular inflows should count toward filling the original 1941 water right or the new refill right.

The accounting system was challenged by Arapahoe County because the county wanted to build a new trans-mountain diversion project. There was a lot of water flowing in the river, and the county wanted to show that it was available for appropriation in their project. If that unconsumed water was instead counted toward multiple fills of the Taylor Park Reservoir, no water would be available to divert to the Front Range. Indeed, the county's fears were soon realized in *Bd. of County Comm'rs of County of Arapahoe v. United States*, 891 P.2d 952 (Colo. 1995) ("*Arapahoe II*"), *appeal after remand sub nom., Bd. of County Comm'rs of County of*

Arapahoe v. Crystal Creek Homeowners' Assn., 14 P.3d 325 (Colo. 2000) ("Arapahoe III") (holding that insufficient water was available for the proposed new project due to the decision in the *Grand Junction* case).

There is no need to get bollixed up in the accounting complexities and computer modeling at issue. The take home message is that water flowing into the reservoir counted toward fill, even if it simply passed through the reservoir and even if it was stored and later released for fishery and flood control purposes.

Specifically, the county complained that the accounting system "improperly credits water passing directly through Taylor Park Reservoir as water being stored." *Arapahoe I*, 838 P.2d at 851. The Colorado Supreme Court said, "We reject these arguments." *Id.* It explained:

> The accounting system includes provisions that all inflow into the Taylor Park Reservoir available under the 1941 decree shall initially be charged against the first fill of the reservoir and that only subsequent fills shall be charged against the District's refill water right.
>
> . . .
>
> We find no abuse of discretion in the water court's determination to credit by-pass flows to the 1941 right.

Arapahoe I, 838 P.2d at 852-53.

Arapahoe I was the first Colorado case to rule that fill is based on the quantity of legally available water flowing into the reservoir, without consideration of what the reservoir operator does with that water. But it was not the last.

The case of *City of Grand Junction v. City and County of Denver*, 960 P.2d 675 (Colo. 1998) involved Denver's application for a second fill of Dillon Reservoir. The litigation grew out of a situation virtually identical to the flood control release scenario presented in this basin-wide issue. For many years, Denver had operated Dillon Reservoir by releasing water for flood control purposes and then topping off the reservoir "whenever reservoir capacity and water

supply were available." *Grand Junction*, 960 P.2d at 677.

> Pursuant to its historic use of Dillon Reservoir for flood control, Denver bypasses through the reservoir a certain amount of water that is capable of being stored under the reservoir's 1946 priority.

Grand Junction, 960 P.2d at 677 (emphasis supplied).

In the late 1980s, the State's Division Engineer clamped down on this practice, noting that "[f]or practical purposes, this amounted to a refill of the reservoir." *Grand Junction*, 960 P.2d at 677:

> Under the Division Engineer's determination, this bypassed water would count against the 1946 priority. Thus, Dillon Reservoir could achieve a "paper fill" without being physically full.

Grand Junction, 960 P.2d at 677 (emphasis supplied). In other words, water "bypassed" through the reservoir counted toward fill.

As a lawyer for the Denver Water Board explained in a recent article:

> Denver Water had evacuated space and bypassed inflow for flood control purposes. The [State Engineer] decided this was storable inflow and should be counted toward the reservoir's fill, thus leaving Denver Water in the predicament that its reservoir may not physically fill if a call came on the river.

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 539 n.136 (2006).

Thus, Denver had gotten away with storing more water than it was entitled to for many years. Interestingly, the Denver Water Board—which is known as the most tenacious and litigious water right holder in the West—did not challenge this ruling. To the contrary, Denver did what the Irrigators ought to do here. The board applied for a new, junior refill right. "In order to protect its historic use of the reservoir, Denver filed an application in the Water Court in 1987 to confirm a priority to refill Dillon Reservoir . . . . Although Denver initially claimed a 1965 appropriation date for this refill, Denver ultimately stipulated to an appropriation date of January 1, 1985." *Grand Junction*, 960 P.2d at 677.

It was this junior refill right which was challenged in the *Grand Junction* case. The challenge had nothing to do with the basic concept of fill and refill. Everybody got that. Rather, the litigation involved technical issues, not relevant here, about jurisdiction and interpretation of the Blue River Decree.

We can debate whether this was a holding or not, but the key fact is that none of the very sophisticated players in this litigation, nor the Colorado Supreme Court, questioned the basic premise that water that is available for storage counts toward fill, irrespective of whether it is stored or immediately released (*i.e.*, bypassed). All water that is physically and legally available to the reservoir operator is under the operator's dominion and control. Hence, it is legally diverted and counts toward fill.

The *Grand Junction* case also illustrates what the reservoir operator must do to protect its position. It is simple: apply for a new water right for a second fill with a junior priority.

This case was discussed in a law review note by a Denver water lawyer Austin Hamre in which he noted that "*Grand Junction* continues the court's more liberal approach toward the one-fill rule." Austin Hamre, *When You've Had Your Fill: A Review of the One-Fill Rule*, 27 Colo. Lawyer 95, 96 (1998). Mr. Hamre explains that the early cases, although ambiguous, could be read to say that one can never obtain a right for a second fill. The more recent cases, however, make quite clear that the one-fill rule is the default. Thus, when the right states a quantity, that quantity may be filled only once. But that right or other rights may authorize quantities that are sufficient for more than one physical fill of a reservoir.

Mr. Hamre then goes on to note that Colorado's State Engineer has adopted guidance specifically addressing how a fill is calculated, and that all storable inflow counts toward fill:

> Determining when a reservoir has filled can be further complicated by the treatment of water that could have been stored by a reservoir, but was not. In some cases, the State Engineer's

> Office has charged intentionally foregone diversions when storage capacity is available against a reservoir's annual fill. Conceivably, because a storage right is limited by volume, the failure of a senior storage right to divert in one month might result in it placing a call in a later month that would have been unnecessary if the senior right had taken water and filled earlier when more water was in the stream.
>
> The State Engineer's policy may be justified if a legally cognizable injury results; however, the situations in which that occurs should be quite limited. Administration in this manner has been tacitly approved twice, but the practice does not appear to have been specifically litigated at the appellate level. It is questionable whether such "paper fills" could provide a basis for making a right absolute.

Austin Hamre, *When You've Had Your Fill: A Review of the One-Fill Rule*, 27 Colo. Lawyer 95, 97 (1998) (footnotes omitted).

It bears emphasis that while the author (a water lawyer with Duncan, Ostrander & Dingess, P.C.) quite reasonably questions whether bypass flows may be used to prove up a conditional water right, he does not question the State Engineer's conclusion that once an absolute water right is obtained (what we would call a license in Idaho), all storable inflow counts toward fill whether it is stored or bypassed.

The *Grand Junction* case is also discussed and explained in a law review article authored by Casey S. Funk, a water lawyer who represented Denver in *Grand Junction*.

> "Storable inflow" means water that is physically and legally available to store under the storage priority. When water that a water user could impound or control under the storage priority is bypassed through a reservoir, the [State Engineer] will still count that water towards the fill under the decree, even though the water user did not physically store the water. . . .

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 538 (2006) (footnotes omitted).

Mr. Funk then went on to address the precise question presented in this case—what happens when a storage right holder bypasses water because of the need to reserve reservoir capacity for flood control purposes:

> The accounting principle of storable inflow assures junior water right users the ability to use water in the amount and time that they could have stored, had the senior storage right filled with water available to it under its storage water right's priority. The reservoir owner must assess the runoff conditions prior to bypassing storable inflow because storage rights cannot bypass storable inflow to the detriment of junior water rights.
>
> For example, if a reservoir operator with a decree to store 20,000 acre-feet of water bypassed 5,000 acre-feet of water that they would otherwise have been able to store in-priority, the [State Engineer] considers the bypassed water storable and would credit the bypassed water toward the fill of the reservoir. Thus, the reservoir would achieve a paper fill even though the reservoir only physically contains 15,000 acre-feet of water. If a reservoir operator provides temporary flood control protection by bypassing storable inflow, the reservoir owner risks not being able to physically fill when either a senior or junior water user places a call on the river. Indeed, this is what happened in *City of Grand Junction v. City and County of Denver*, where Denver Water filed for a refill right that would allow it to bypass storable water, yet capture water under a new refill priority so that the reservoir could physically fill.

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 538 (2006) (footnotes omitted).

The guidance from the Colorado State Engineer referenced in the law review article is attached hereto as Exhibit A. This guidance is consistent with the case law described above, confirming that refill rights are possible, but only where expressly made a part of the application:

> Some reservoirs operate under decrees that provide for refill rights. A refill right typically has a later priority than the original storage right. However, if the reservoir owner applied for a refill right in the original application, the owner may have been given a right to store under the same priority of the original appropriation after the reservoir achieves its first fill and capacity becomes available. Available capacity for a refill right in a reservoir is created by evaporative and seepage losses in addition to actual storage releases. Storage that is held as the subject reservoir's water right at another location is not included in the available refill capacity of the subject reservoir. While this space cannot be filled under a refill right until the storage held at the other location has been released and put to use, the subject reservoir could be filled under a separate junior storage right for the subject reservoir, under free river conditions or with foreign water.

Colorado Division of Water Resources, *General Administration Guidelines for Reservoirs* at 11 (Oct. 2011).

The guidance also contains this helpful and succinct explanation of storable inflow:

> Storable inflow is the amount of water that is physically and legally available for storage in a reservoir under a particular water right. After the beginning of the seasonal year, all storable inflow must be accounted against the storage right in order to protect other water users, whether or not the reservoir owner actually stores the water. This assures junior water right users that they will be able to divert water in the amount and time that they could have if the senior storage right had filled with all water available to it under its storage priority. For example, if a reservoir operator with a decree to store 20,000 acre-feet of water chooses to bypass 5,000 acre-feet of water that they would otherwise have been able to store in-priority, the Division Engineer considers the bypassed water "storable inflow." Accordingly, the Division Engineer would credit the bypassed water toward the fill of the reservoir and would consider the storage right to be filled when the reservoir physically contains 15,000 acre-feet of water stored under the storage right.

Colorado Division of Water Resources, *General Administration Guidelines for Reservoirs* at 9 (Oct. 2011).

These guidelines were explained by Dick Wolfe (the Colorado State Engineer and Director of the Colorado Division of Water Resources) in a recent conference, as reported in Koley Borchard, *Conference Reports*, 16 U. Denver L. Rev. 457 (2013):

> In his concluding remarks, Mr. Wolfe explained that storable inflow, paper fill, out-of-priority storage, temporary detention, and surcharge all pertain to the physical holding of water in a reservoir. Storable inflow is the amount of water that is both physically and legally available for storage under a reservoir owner's existing water right. Water that bypasses through a reservoir counts against the storage water right.
>
> To calculate how much bypass counts against a water right, the Division uses an accounting mechanism called paper fill. This method charges the bypassed water against the actual storage water right, thereby decreasing the remaining water right.

Id. at 458.

United Water recognizes, of course, that these are foreign authorities.[15] But their logic is simple and compelling. The one-fill rule derives necessarily from the fact that storage rights are decreed with an annual volume. Allowing multiple fills that are not expressly provided on the face of the right would violate that annual volume. "Under the 'one-fill rule,' injury to other appropriators is prevented by prohibiting a reservoir from making more than one fill annually based on its adjudicated priority." 94 C.J.S. *Waters* § 438 (2013).

Note that not all water entering a reservoir is storable inflow. It is only "storable" if it is legally available to the storage right holder. Thus, water bypassed to serve a downstream senior does not count against the storage right holder's fill. Likewise, water that is bypassed to meet instream flow or other permit conditions does not count toward fill. "The [State Engineer], however, does not consider water bypassed through a reservoir due to a permit condition storable because the water is not legally available to be stored." Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 538 n.135 (2006).

In sum, the rule is that storable inflow counts toward fill. Once that water is stored, it does not matter what happens to that water. The fact that it is later released for flood control, dam repair, or what have you, does not "un-fill" the first fill.

V. IDAHO HAS FOLLOWED THE "PAPER FILL" RULE FOR DECADES.

The "one-fill rule" and "paper fill" concepts discussed in the context of Colorado above are identical to those employed in Idaho for decades. Indeed, since the State first developed methodologies and accounting practices to track reservoir fill in the 1970s, this "paper fill" principle has governed water allocation.

[15] As a result of its water court system, Colorado has the most highly developed body of law on water rights system in the West. Accordingly, Colorado is often looked to as a key source of law in other prior appropriation states. What may be a case of first impression elsewhere is frequently well developed law in Colorado.

An August 20, 1979 memorandum from an IDWR staff member Alan Robertson to IDWR Director Stephen Allred describes the accounting system for determining what water accrues to fill: "Accrual, on paper, has been computed within this limit, whenever natural flow was available at the reservoir under its priority, whether water was actually stored or not." *Memorandum* at 1 (R. 799). This prompted a discussion at the next Committee of Nine meeting on September 21, 1979. The minutes report:

> 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 filled on paper, even if water has been released and additional space is available, the priorities of the reservoirs are considered to no longer be in effect.

Minutes of the Committee of Nine Meeting at 1 (R. 801). This discussion of "paper fill" could not be a more clear articulation of the "storable inflow" principle.

This policy remains in place to this day, as is documented by affidavits of officials of IDWR and Reclamation. These affidavits were submitted to the District Court by the Boise Project. *Affidavit of Shelley M. Davis in Support of Opening Brief of Boise Project Board of Control, and New York Irrigation District* (R. 262-355).

The most helpful is the *Affidavit of Robert J. Sutter* ("*Sutter Affidavit*") (R. 350-55) describing the operation and accounting of water rights for the federal reservoirs in the Boise River system. Mr. Sutter and Mr. Robertson (mentioned above) were the IDWR employees who actually wrote the Fortran computer code back in the 1970s that has been used ever since to account for storage in the Upper Snake. Mr. Sutter was also responsible for development of the accounting system for reservoirs in the Boise River system.

Mr. Sutter leaves no doubt that Idaho follows the same "paper fill" approach employed in Colorado. This is something that has been done for decades in full cooperation with

Reclamation. Mr. Sutter, now retired from IDWR, was hired by Reclamation in another SRBA Subcase in which this affidavit was prepared. Thus, Reclamation's own witness acknowledges that the State administers its water rights in this fashion. Mr. Sutter states in his affidavit:

> 4. . . . The accumulated amount of storage credited to each reservoir storage right is often termed "paper fill," as opposed to the measured contents of the reservoir, which is termed "physical fill."
>
> 5. . . . The Allocation Program computes storage water allocations for these entitlements in Arrowrock, Anderson Ranch and Lucky Peak reservoirs simultaneously based on the paper fill of each reservoir.

Sutter Affidavit at 2-3 (emphasis supplied) (R. 351-52).

Mr. Sutter continues, explaining that water released for flood control purposes does not reduce or affect the paper fill in any way:

> 7. When storage is released for flood control, the paper fill of each reservoir in the Accounting Program is not affected, and continues to increase until each reservoir fills to 100 percent of its storage right.

Sutter Affidavit at 4 (R. 353).

In other words, even when water is being released at the bottom of the reservoir, water entering the top of the reservoir continued to be charged to the fill. Thus, initial fill may occur before the reservoirs are physically full. Indeed, this is common and to be expected in high water years:

> 7. . . . I have found that for years when system flood control operations have occurred on the Boise River, the paper fill of all storage rights in Arrowrock, Anderson Ranch and Lucky Peak reservoirs has never failed to initially fill to 100 percent.

Sutter Affidavit at 4 (emphasis supplied) (R. 353).

Irrigators bemoan this as a disaster. That is hardly the case. As Mr. Sutter explains, the fact that paper fill has been achieved does not prevent the reservoirs from continuing to fill physically:

> 8. As the flood control operation typically progresses, the reservoirs cease storage and begin to physically refill as the high runoff is then stored to prevent downstream flooding. The Accounting system tracks the amount of natural flow stored during the refill phase of a flood operation as "unaccounted for" storage. When the accumulation of "unaccounted for" storage ends, the flood operation is completed. At the end of the flood operation, ideally the amount of "unaccounted for" storage [that is, the amount of refill] will be equal to the amount of storage released for flood control so that the amount of water stored physically in the reservoirs will be equal to the paper fill, which is 100 percent of the storage right (or allocated storage). If the "unaccounted for" storage is less than the storage released for flood control, this shortfall is termed the "failure to refill due to flood control."

Sutter Affidavit at 4-5 (emphasis supplied) (R. 353-54).[16]

Thus, in most years, out-of-priority refill under free river conditions makes up for any water not captured due to bypass or flood release. But, as Mr. Sutter acknowledges, there can be years when there is a "failure to refill due to flood control."

As a practical matter, this happens very rarely, as Mr. Sutter explains:

> 9. . . . From 1986 through 2007, there have been ten years for which system flood control releases were made. I have examined these years and in all cases, Arrowrock and Anderson Ranch entitlements received 100 percent allocation. The same conclusion was reached by Mary Mellema in her Affidavit dated November 13, 2007.

Sutter Affidavit at 5 (R. 354). (The Mellema affidavit is also in the record, R. 284-88.)

[16] The term "unaccounted for" storage simply refers to storage of water that is taking place without a valid water right because the reservoir's storage water right has already filled from an accounting standpoint (*i.e.*, on paper), but there is space available in the reservoir as a result of storage use by spaceholders or operational releases by Reclamation, including flood control releases. Although such refill occurs without a water right it is nonetheless lawful so long as no other right is injured. In other words, during "free river" conditions.

In the next paragraph of Mr. Sutter's affidavit, he explains that the reason Arrowrock and Anderson Ranch (which hold the irrigation rights) nearly always manage to physically fill is that any shortfall, up to 60,000 acre-feet, is allocated to Lucky Peak's fill.

Frankly, none of these facts of reservoir operation and accounting for fill are necessary to the Court's ruling on this basin-wide issue. The nature of fill and refill are pure questions of law. We offer this discussion, however, to serve two purposes. First, it documents that the paper fill rule so well developed in Colorado has long been the practice here in Idaho. This is not unique to Colorado, Montana, Wyoming, and Washington. This is pure, standard prior-appropriation practice long employed by both the federal government and the state of Idaho. Second, it works. The sky is not falling.

Even if Idaho were not following the "paper fill" practice and even these reservoirs were refilling during non-free-river times to the detriment of other water right holders, the law is the same. This Court should rule that, in the absence of an expressly stated refill right (which the Irrigators do not have) refill may occur only during free river conditions and reservoir operators are subject to call to the extent they impair other users during their refill.

VI. IRRIGATORS CAN AND DO REFILL THEIR RESERVOIRS DURING FREE RIVER CONDITIONS WITHOUT INJURY TO OTHERS.

The Irrigators present a "sky is falling" argument that, if the District Court's ruling is upheld, they will not be able to refill their reservoirs to top them off after flood releases. This is legally and factually incorrect.

The fact is, Irrigators can and do refill their reservoirs after water is bypassed or released earlier in the storage season. Indeed, no party to this litigation questions the right of storage right holders to refill their reservoir out-of-priority during what is often called "free river" conditions.

The United States put it succinctly:

> 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 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.

United States' Opening Brief on Basin-Wide Issue No. 17, at 1 n.1 (R. 382).[17] This is well said, and quite correct.

As the United States further explained, the right to bypass flows and/or vacate space for flood control is soundly based in Idaho common law as well as federal law. These actions are important for public safety and one of the primary reasons that Congress agreed to spend taxpayer money building these projects. *Id.* at 2-3 (R. 383-84). Most importantly, nothing in this litigation will change any of this. "As a result, resolution of this matter will have no impact whatsoever on how Reclamation operates it[s] reservoirs for flood control purposes." *Id.* at 2 (R. 383).

In short, storage right holders are free to continue to fill their reservoirs even after reaching a paper fill so long as they can do so without injury to other water right holders.

> "'Free river conditions' occur when there is sufficient natural supply to satisfy all water uses, whether decreed or undecreed, 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, 539n.137 (2006).

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[17] The State of Idaho said much the same thing. "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." *State of Idaho's Opening Brief* at 2 n.1 (R. 438).

> End of fill marks the date the storage priority achieves its paper fill or when the reservoir goes out-of-priority. It signifies that the reservoir can no longer store water under its original priority. The reservoir, however, may continue to physically store water during free river conditions, under a refill right or under other supplemental priorities including exchanges.

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 547 (2006).

VII. IRRIGATORS MAY PROTECT THEMSELVES AGAINST NEW APPROPRIATIONS BY OTHERS BY OBTAINING THEIR OWN NEW APPROPRIATIONS FOR SECOND FILLS OF THEIR RESERVOIRS.

One can understand the Irrigators' concern that, while reliance on free river conditions to top off their reservoirs has worked fine for the last century, conditions may change. But there is a simple solution to that. They are free to apply for new, junior water rights for refill, just as Denver did in *Grand Junction*.

As Mr. Funk noted in his article:

> A reservoir operator has achieved a "paper fill" when carry-over storage plus storable inflow equals the decreed amount of the storage water right or the physical capacity of the reservoir, whichever is less. Even if there is capacity to store, the [State Engineer] will not allow the reservoir operator to continue to store water beyond the paper fill, unless there is a free river condition or the reservoir has supplemental storage rights such as a refill right. Thus, a storage water right could be fully satisfied, but the reservoir may not be physically full.

Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 539 (2006) (footnote omitted) (emphasis supplied).

Examples of Idaho storage water rights expressly authorizing multiple fills of reservoirs are attached as Exhibit B this brief.

- In the case of Water Right No. 37-19825, the SRBA court decreed a separate refill right which states, on the face of the right: "The capacity of Pioneer Reservoir is 1460 AF. This right is for storing additional water in Pioneer Reservoir after it

has filled once, and [the reservoir's 1910 priority rights] are satisfied."

- Water Right No. 37-19740 is a single water right with a stated annual volume of 367.5 acre-feet per year. On its face, it authorizes multiple fills of the reservoir: "The capacity of the storage reservoir is 22.5 AF. The reservoir may be refilled multiple times up to the total diversion volume in a single year."
- Water Right No. 22-11987 is similar. It authorizes an annual volume of 80 acre-feet with the remark: "The capacity of the storage reservoir is 8.0 AF. The reservoir may be refilled multiple times up to the total diversion volume in a single year."

It is too late for Irrigators to modify their existing rights to authorize additional fills with the original priority date.[18] But there is no need for that. They have managed just fine for decades without interfering with other people's water rights. If they wish to protect themselves from future threats, all they need to do is obtain a new water right appropriation with today's priority so that their place in line is secured ahead of others yet to come.[19]

CONCLUSION

For the reasons discussed above, United Water urges the Court to affirm the District Court's conclusion that allowing more than one fill of a water right, under priority, is unlawful.

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[18] "A subsequent appropriator has a vested right against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation. A second appropriator has a right to have the water continue to flow as it flowed when he made his appropriation." *Bennett v. Nourse*, 22 Idaho 249, 253, 125 P. 1038, 1039 (1912) (quoting Samuel C. Wiel, *Water Rights in the Western States* (3rd ed.) § 302, p. 314 (1911)) (internal quotation marks omitted). Likewise, United Water, which invested substantially in the Columbia Treatment Plant on the Boise River, is entitled to rely on conditions in effect when it filed for water rights for that facility. Those conditions are that Bureau reservoirs refill only during free river conditions, *i.e.*, in a manner respectful of other rights.

[19] As the District Court noted, *Memorandum Decision* at 10 n.7, some storage right holders recently filed late SRBA claims for refill of storage rights. But these claims have backdated priority dates and are therefore just as injurious to existing water right holders. What the Irrigators need to do is either seek new appropriations or agree to subordinate earlier claims. The later (subordination) is exactly what IDWR proposed, and the storage right holders found unacceptable, in the Basin 01 remark dispute that provoked this basin-wide issue.

This conclusion is compelled by the prior appropriation doctrine. Allowing a water right to be filled under priority more than once would violate the quantity element of the right, resulting in enlargement of the right and injury to others. It is that simple. The Court could stop there, as did the District Court.

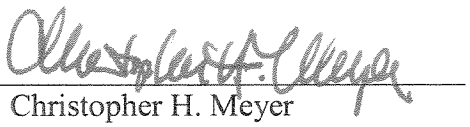
However, United Water urges the Court also to make clear that the stated quantity of storage rights may be filled more than once, when needed, under circumstances when no injury is done to other rights. This is how reservoirs have always operated in Idaho and throughout the West. There is no need to change the status quo—or the prior appropriation doctrine. If Irrigators are uncomfortable relying on a free river to refill their reservoirs, all they need to do is apply for a new, junior storage refill right.

The Court could go further and answer the question now posed by the Irrigators—the question the District Court said was most important: How is fill measured? This is a simple question. The answer is simple, too, and consistent with how storage rights have been administered in Idaho for decades. Storage rights are granted with the expectation that the water right holder will fill when he or she can—not when he or she chooses. This avoids injury to others and maximizes use of the resource. Accordingly, all storable inflow (water that is physically and legally available to the right holder) counts toward fill.

All of these are straightforward questions of law. The prior appropriation doctrine does not vary depending on the intricacies of particular reservoir accounting computer models. In short, there is no need for a remand. We do not need to send more sons and daughters of water lawyers to college.

Respectfully submitted this 23rd day of October, 2013.

GIVENS PURSLEY LLP

By 
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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of October, 2013, the foregoing was served as follows:

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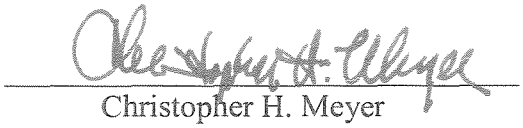


Christopher H. Meyer

EXHIBIT A: COLORADO DIVISION OF WATER RESOURCES – GENERAL ADMINISTRATION GUIDELINES FOR RESERVOIRS

GENERAL ADMINISTRATION GUIDELINES FOR RESERVOIRS[1]

Colorado Division of Water Resources

October 2011

[1] This document was originally prepared under the direction of Hal Simpson, former State Engineer, and further revised under the direction of Dick Wolfe, State Engineer. Several staff members of the Colorado Division of Water Resources were instrumental in its development including Claudia Engelmann, Jim Hall, Alan Martellaro, David Nettles, John Sikora and Dick Wolfe with review by many other staff of the Division of Water Resources. We are grateful that Devin Odell from the Attorney General's Office provided critical legal review.

Purpose

These Reservoir Operating Guidelines are a basic practical guide for the staff of the Division of Water Resources ("DWR"), including division engineers, water commissioners and others charged with administering the state's many reservoirs. They reflect the "institutional knowledge" of DWR personnel and the general practice across the state, summarizing DWR's understanding of the statutes, court cases, and administrative rules, policies, and practices related to the storage of water. These Guidelines are intended to provide present and future staff with an understanding of the basic concepts, giving them a common starting point for the many difficult decisions that they must make on a daily basis. We also hope that these Guidelines will be useful to reservoir operators, engineers, attorneys, policy makers and anyone else who seeks a better understanding of general reservoir operations in the State of Colorado.

These Guidelines should not be relied upon for administrative or legal authority, and they are not intended to be or to function as rules or regulations governing the storage of water. Although these guidelines present fundamental examples of reservoir operations, they do not, and could not, cover all of the historic exceptions that exist for specific reservoirs. Given the significant variation in the decrees granting storage rights, in the physical setting and hydrology of the various reservoirs, and in historical administrative practices, nothing in this document should be construed as definitive with regard to any particular reservoir or storage right. Moreover, DWR does not intend for these Guidelines to change the vested rights of any water user. As changes in the law, altered circumstances, and unforeseen situations arise, DWR will periodically update these Guidelines so that they remain as accurate as possible.

Introduction

Storage of water continues to be a critical component of water supply in Colorado. While State Records show needs of agriculture — the largest use of water in the state — remain fairly constant, water needs for municipal, industrial, environmental and recreational purposes continue to increase. Moreover the administration of interstate compacts, agreements, and treaties, along with the federal government's claims for reserved water rights, are all becoming increasingly important in allocating the remaining waters of Colorado.

The most senior water rights on Colorado streams are direct flow rights, first developed by the earliest settlers in the mid-19th century. Water for direct flow usage was usually plentiful during spring and early summer runoff, but began to diminish in late summer and early fall until it could no longer be diverted. In the most developed areas, such as the South Platte River basin, competition for water led to curtailment of junior rights during the summer and even during the spring in drier years after only several decades of settlement. The seasonal as well as annual fluctuations in water availability, combined with the increasing demand by junior appropriators, led irrigators to capture and store for later use some of the vast quantity of the annual spring runoff from the Rocky Mountain snowmelt. The right to store water was affirmed by the Colorado legislature in 1879 and has become an integral part of the state's water supply.[2]

The task of administering the state's water has been given to the State Engineer, who is appointed by the governor as the Director of DWR, also known as the State

[2] Corbridge, James N. Jr. and Teresa A. Rice. 1999. *Vranesh's Colorado Water Law. Revised Edition.* University Press of Colorado, Niwot, CO. p 53.

Engineer's Office (SEO). The State Engineer appoints division engineers who, in turn, manage local water commissioners, all of whom are charged with administering and distributing the waters of the state, including the determination of the way a water user exercises a storage priority.

General Administration Principles

One Fill Rule

Water may either be stored under a water right under the priority system or in some situations contractually – for instance a user may be able to store reusable water in a reservoir. The one fill rule concerns the storage of water under the priority system. Under Colorado law, a water user may store water whenever the water is physically available, its water right is in-priority, and the decree for the water right has not been filled. Under Colorado Supreme Court decisions, a user is entitled to only one filling of a reservoir water right in any one year unless a user has a water right that provides for a refill and/or additional storage or free river conditions exist (i.e. no downstream shortage of water to meet the demands of all users for their decreed water rights).

In creating this rule, courts did not define a storage year. Given that irrigation reservoirs typically begin filling in the fall, after irrigation has been completed, the SEO, starting with State Engineer M.C. Hinderlider[3] in 1936, adopted a "seasonal year" of November 1 to October 31. The Colorado Supreme Court has recognized this seasonal year for irrigation reservoirs. This is the presumed seasonal year for a majority of reservoirs unless the decree specifies a different date. Subsequently, different

[3] Letter from M.C. Hinderlider, State Engineer, to all Division Engineers and Water Commissioners dated May 11, 1936. Please see Appendix for document.

seasonal years have been adopted by some municipal water suppliers at a set date in the spring, usually April 1 prior to spring runoff when their reservoirs are generally near their lowest point. While this date can vary between municipal suppliers, it cannot be changed once established.

Under the one-fill rule, a reservoir user may only use a storage right to "call" for water during the seasonal year if the decree for the storage right has not yet been filled during that year. (When a user with a decree is short water to meet their decreed demand, the water commissioner will place a "call" or "curtail" users such that no user junior to the "call" in a reach of river may divert in that reach of river.) If the storage right has been filled, the reservoir owner must wait until the beginning of the next seasonal year to place a call for additional water. For example, if a reservoir with a seasonal year beginning November 1 has received the full amount of water it is entitled to under its storage right by June 1, then the user must wait until the next November 1 to begin filling again under that right. In addition, any diversions prior to November 1 will be curtailed if there is a call on the river, whether junior or senior to the storage right.

The reservoir owner could, however, divert water under free river conditions. Alternatively, the reservoir owner could store under a junior priority (either a refill right or separate storage right) or store foreign water. For purposes of this document, the term "foreign water" refers to all water located in a given reservoir except priority storage water associated with the particular reservoir and water stored under free river. Examples of foreign water include: historical consumptive use credits from changed water rights, transbasin water, nontributary water, priority (or free river) water stored by

another structure and relocated to the subject reservoir, recaptured return flows from fully consumable water such as lawn irrigation return flows, etc.

Carryover

Generally, any water remaining in a reservoir at the end of the seasonal year is called "carryover water," and is credited to the next year's fill. This will limit the amount of new water to be put into storage during next year's seasonal year. For example, if a reservoir's decreed and physical capacity is 100,000 acre-feet and at the end of seasonal year 1 it contains 60,000 acre-feet, then the carryover would be 60,000 acre-feet for the next year, seasonal year 2. In this situation, the Division Engineer or Water Commissioner would limit the amount the owner could divert and store in seasonal year 2 to 40,000 acre-feet because the 100,000 acre-foot water right is filled once the 40,000 acre-feet is stored. The 40,000 acre-foot limit would exist even if the owner released water from storage during seasonal year 2 and created additional capacity. In this situation, this additional capacity can only be refilled under free river conditions since no other storage rights exist.

Moving from a reservoir with a single storage right to the next simplest case where a single owner has a senior storage right and a junior enlargement for the same uses, the Division Engineer may account for reservoir storage using the principle of "first in, first out" so long as the decrees do not have contrary provisions. [4] For instance, suppose an irrigation reservoir owner has a senior right for 5,000 acre-feet and a more junior right for 9,000 acre-feet to fill a 14,000 acre-foot reservoir. In year 1, the reservoir

[4] State Engineer's "Written Instruction and Order 2007-02: Instruction and Order Concerning the Administration of Storage Rights by Seniors First" signed May 31, 2007 by Hal D. Simpson (http://water.state.co.us/DWRIPub/Documents/wio2007-02.pdf).

starts empty, is completely filled under the two rights, and releases 7,500 acre-feet during the irrigation season leaving 6,500 acre-feet in the reservoir. Under the "first in, first out" methodology, the reservoir owner may fill 5,000 acre-feet under the senior fill right and the remaining 2,500 acre-feet under the junior right in year 2.

In more complex situations, where multiple owners, types of uses or places of use are involved, the user(s) must keep separate accounts of the various water rights. A basis for keeping separate accounts must first be established by the owner(s) and approved by the Division Engineer. If separate accounts for each water right are tracked then water stored under a junior right would only be carried over into the junior right's account. In complex situations, all carryover is credited to the most senior storage right in the reservoir at the start of the subsequent year if separate accounts for each priority are not tracked.

Similarly, any foreign water that is stored in a reservoir that is remaining in the reservoir at the end of the season is assumed to be priority water and credited to the most senior storage right unless this water is tracked separately by the reservoir owner. Therefore, detailed accounting of all the different types of priority and foreign water stored in a reservoir is important to avoid limiting the amount of water that can be stored under the most senior storage right.

If the water right for a reservoir allows water stored in priority to be relocated in another structure, the amount of priority water that was relocated to another structure still remaining in that structure at the end of the season counts against the storage right it was originally stored under. This is done to assure that a user does not use a senior right to fill more than one reservoir. For example, assume that municipal reservoir A

has a right for 1,000 acre-feet which is stored in priority during year 1. Also assume during year 1 that 400 acre-feet of the water stored in reservoir A is released and relocated in reservoir B and the remaining 600 acre-feet is released to municipal use. In this case, reservoir A would be entitled to store 600 acre-feet in year 2 not 1,000 acre-feet. The user would only be able to fill the remaining 400 acre-feet in reservoir A in the seasonal fill year subsequent to its release from reservoir B for use. Further, there may also be limits placed on how much the user may store in reservoir B depending on the situation.

Decreed versus Physical Capacity

Given the large investment required for reservoir construction, a potential reservoir owner generally receives a decree for a conditional water right to store an amount of water prior to construction. Upon completion of the reservoir, the actual physical capacity of the reservoir may be different from the decreed capacity. This raises the question of whether the physical capacity or the decreed capacity controls the administration of the amount of water that can be stored. If the physical capacity is less than the decreed capacity, then the allowed amount of fill will be based upon the physical capacity rather than the decreed capacity. For example, when a reservoir is physically full at 50,000 acre-feet and has a decreed capacity of 60,000 acre-feet then the reservoir has reached its one fill and cannot come back in later in the season when space becomes available to fill the additional 10,000 acre-feet. The difference between the decreed capacity and the lower physical capacity is subject to abandonment (or if conditional, to cancellation for failure to prove diligence) unless the reservoir owner

shows intent to make subsequent modifications to enlarge the reservoir to the originally decreed capacity.

When physical capacity is greater than decreed capacity, a fill is based upon the decreed capacity. To use the additional capacity, the reservoir owner must adjudicate a new water right for the difference, use other foreign water legally available for storage in the reservoir, or hope to fill the difference under free river conditions.

Storable Inflow

Storable inflow is the amount of water that is physically and legally available for storage in a reservoir under a particular water right. After the beginning of the seasonal year, all storable inflow must be accounted against the storage right in order to protect other water users, whether or not the reservoir owner actually stores the water. This assures junior water right users that they will be able to divert water in the amount and time that they could have if the senior storage right had filled with all water available to it under its storage priority. For example, if a reservoir operator with a decree to store 20,000 acre-feet of water chooses to bypass 5,000 acre-feet of water that they would otherwise have been able to store in-priority, the Division Engineer considers the bypassed water "storable inflow." Accordingly, the Division Engineer would credit the bypassed water toward the fill of the reservoir and would consider the storage right to be filled when the reservoir physically contains 15,000 acre-feet of water stored under the storage right.

Storable inflow also includes any out of priority storage by upstream junior storage rights (further discussed in the Out of priority Storage Statute section below). To track the amount of storable water that has not actually been stored, for whatever

reason, the Division Engineer uses what is known as a "paper fill." A paper fill is an accounting mechanism whereby storable inflow is charged against a storage water right either because the reservoir owner elected not to physically divert or store water under that right or a junior upstream reservoir diverted the storable inflow out of priority. A detailed discussion of paper fill, along with some of the exceptions to the general principle of storable inflow, can be found in the Paper Fill Including Bookover section below.

Generally, a storage right is filled when carryover storage under that water right plus storable inflow, whether actually diverted or only a paper fill, equals the decreed amount of the storage water right or the total physical capacity of the reservoir (which may be restricted due to dam safety or flood control concerns), whichever is less. A reservoir user may continue to physically store water under a fill right even if it has gone out of priority and is called out if it comes back into priority and has not already been filled. In this case, storage is limited to the volume unfilled by the storage right when the reservoir went out of priority. Even if there is capacity to store, the Division Engineer will not allow the reservoir operator to continue to store water beyond that point, unless free river conditions occur, the reservoir has supplemental storage rights that come into priority (such as a refill right or junior storage rights), or the reservoir owner is storing foreign water. Water users may divert beyond the measure of their decrees during free river conditions because this does not infringe upon the rights of other water users.

The water level in a reservoir does not have to be rising or increasing in order for storage to occur and new water can be placed into storage in a reservoir at the same time as previously stored water is being released.

Refill Rights

Some reservoirs operate under decrees that provide for refill rights. A refill right typically has a later priority than the original storage right. However, if the reservoir owner applied for a refill right in the original application, the owner may have been given a right to store under the same priority of the original appropriation after the reservoir achieves its first fill and capacity becomes available. Available capacity for a refill right in a reservoir is created by evaporative and seepage losses in addition to actual storage releases. Storage that is held as the subject reservoir's water right at another location is not included in the available refill capacity of the subject reservoir. While this space cannot be filled under a refill right until the storage held at the other location has been released and put to use, the subject reservoir could be filled under a separate junior storage right for the subject reservoir, under free river conditions or with foreign water.

Paper Fill, Including Bookover

As discussed above, a paper fill is an accounting mechanism whereby storable inflow is charged against a storage water right either because the reservoir owner elected not to physically divert or store water under that right or a junior upstream reservoir diverted the storable inflow out of priority. Some examples of paper fill are described below, followed by a discussion of some of the exceptions to the general rule. These are not meant to be exhaustive on this issue, but should provide an understanding of the most typical situations.

1. A reservoir may have multiple rights. For example, it may have a senior storage right and a junior storage right for additional decreed uses. If water is stored under the junior right before the senior right is filled, then a paper fill for the

amount stored and credited under the junior right will also be charged against the senior storage water right, to the extent that it remains unfilled. Once the senior right is filled (either physically or on paper), the junior right may continue to store under its own priority unless it is (or until it becomes) filled.

2. A paper fill is charged against a water storage right when a reservoir cannot be filled to its decreed capacity because of a flood control limitation on storage (unless flood control is a decreed beneficial use) or because of a State Engineer storage restriction on the dam.
3. A paper fill is charged if sedimentation has occurred limiting the reservoir's physical capacity.
4. A paper fill is charged when actual storage in the reservoir includes foreign water that limits the capacity of the reservoir to fill under a senior priority unless the owner of the senior priority books over the foreign water in the reservoir to the senior right at the rate that the senior right would have filled the space taken up by the foreign water.
5. A paper fill is charged for any exchange on natural flow into the reservoir for foreign water. For example, assume an on-stream reservoir user exchanges 20 cfs of foreign water into the reservoir by making release of a substitute supply downstream at the same time the user is entitled to fill the reservoir in priority. In this example, the reservoir would be paper filled for the 20 cfs or approximately 40 acre-feet each day the exchange occurred.

For on-stream reservoirs, if there is no diversion and storage, a paper fill is charged at the rate of storable inflow to the reservoir. For off-stream reservoirs, the paper fill of the senior right is charged at the rate at which the user could have legally and physically filled under the senior right. For example assume the following:

a. there is 400 cfs stream flow at the headgate of the feeder ditch for off-stream reservoir A
b. reservoir A is empty
c. reservoir A has a fill right for 300 cfs that is in priority
d. the capacity of the ditch to fill reservoir A is 250 cfs
e. the reservoir operator is diverting 200 cfs

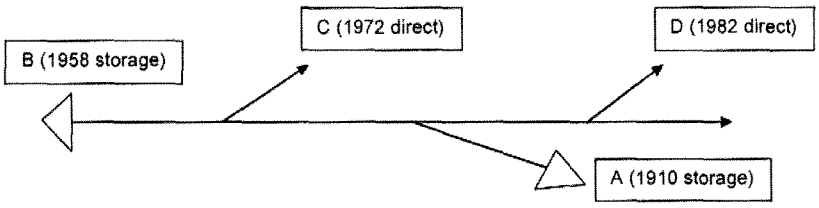
Under these conditions, the reservoir would be paper filled at the rate of 50 cfs per day or approximately 100 acre-feet per day. If an off-stream reservoir is physically full due to storage of foreign water, for example, the rate of paper fill does not occur instantaneously but at a rate that is available at the reservoir from the decreed source of supply. However, if the user does not track the necessary information, then the reservoir is paper filled immediately.

There are times when water will not be counted as storable inflow and used to paper fill a reservoir. When a water user is not able to store water due to safety issues such as repairing and maintaining feeder ditches, winter icing (preventing the reservoir operator from impounding and controlling the inflow) or avoiding poor water quality, then the owner may exclude this water from storable inflow on approval from the Division Engineer. (In addition to the examples above, "paper fill" is also used in applying the out of priority storage statute, as discussed in the following section.)

Out of priority Upstream Storage Statute

As early as 1924, State Engineer Hinderlider allowed upstream reservoirs to fill "as early as possible and depend, to some extent, on the return flow to complete the filling of the reservoirs farther down the river." [5] In 1969, the General Assembly codified this longstanding practice in what is now C.R.S. § 37-80-120. Presently, out of priority upstream storage may only occur against a storage water right on the South Platte in accordance with a plan approved by the Division Engineer. [6] To date, no one has been given approval of such a plan. While other Divisions have not adopted a formal process, some of the considerations that would be taken into account prior to allowing out of priority storage are spelled out in the example below.

Assume structures A and B are reservoirs (owned and operated by different entities) with storage rights and structures C and D are ditches with direct flow rights. All structures are situated on the river as shown below:



In our example, Reservoir A has a decreed and physical capacity of 1,000 acre-feet and has the senior right (1910) on the river, and Reservoir B has a decreed and physical capacity of 200 acre-feet and a 1958 right. Assume that as of March 1, Reservoir A has

[5] Letter from M.C. Hinderlider, State Engineer, to W.B. Gaumer, President, Farmers Reservoir & Irrigation Co. dated November 17, 1924. Please see Appendix for document.

[6] Letters from James R. Hall, Division Engineer, to Division 1 Water Users dated October 6, 2005 and July 27, 2006 regarding South Platte Non-Irrigation Season Administration. Please see Appendix for documents.

diverted 820 acre-feet into storage, and that Reservoir B has been allowed (by approval of the Division Engineer) to divert 200 acre-feet into storage even though its right is junior to Reservoir A's right and Reservoir A has not yet filled (i.e. Reservoir B has stored 200 acre-feet out of priority). If the transit losses to Reservoir A from Reservoir B are 20 acre-feet, then Reservoir A is paper filled to 1,000 acre-feet and no longer able to place a call. At this point, Ditch C would be in priority and thus could divert water and make a call if necessary. Likewise, Ditch D would be entitled to make a call curtailing the diversion of Reservoir A.

Reservoir A would only be allowed to divert additional water to storage under free river conditions. As for Reservoir B, it could continue to divert water under its 1958 water right while at the same time releasing the out of priority water stored and delivering it past Ditch C to Reservoir A even if ditches C or D placed a call. This water then replaces Reservoir A's paper fill with actual water and decreases the risk to Reservoir B that it will be required to release its water to Reservoir A later in the season when it is no longer able to store water under its 1958 priority. In a situation where more than one reservoir is storing out of priority upstream of Reservoir A, all upstream out of priority storage must be aggregated to determine when Reservoir A is paper full.

Administration of the upstream storage statute is further complicated by the requirement to account for any seasonal transit loss changes within the reach from the junior to the senior reservoir and within the feeder ditches of the senior reservoir between the time of out of priority storage and the time the water is released to the senior reservoir. The junior reservoir storing out of priority is responsible for payment of

any increase in transit losses should the senior reservoir not fill assuring the senior reservoir receives the full amount to which they were paper filled.

Due to these complexities required to assure non-injury when storing out of priority, upstream out of priority storage is typically not allowed. In some cases, however, out of priority upstream storage is unavoidable. For example, winter conditions may prevent access to some small high mountain reservoirs for real time operation and may prevent real time measurement of winter inflows due to inaccurate measurements caused by ice cover.

Evaporation

Reservoirs are categorized based on their location from a natural stream as either on-channel or off-channel. When a reservoir is constructed on a natural stream bed (on-channel) it causes an increase in losses to the stream system due to the increase in free water surface area of the stream. When an on-channel reservoir is in-priority and filling, the operator does not have to pay back the stream for this increased loss. However when the reservoir is not filling in priority, the operator is required to release stored water to offset the amount of this increased loss to assure that the total natural flow is passed through the reservoir as if the reservoir did not exist. Usually, the release for this loss is accomplished by lowering the reservoir stage to correspond to the calculated net depletion amount. If daily administration is not practical because of the limited size of a reservoir surface, releases for this loss are often aggregated and made on a monthly rather than daily basis. If more than one water right is in a reservoir or the reservoir contains foreign water, the reservoir owner may specify which type(s) of water to release to account for evaporation.

When predicting the amount of future evaporation to be covered by an on-channel reservoir, the average gross evaporation (free water surface) must be calculated based upon average evaporation atlases in NOAA Technical Report NWS 33[7] and the maximum surface area of the reservoir (unless otherwise decreed). The total gross evaporation estimate from NOAA shall be distributed to all months. The monthly distribution for elevations below 6500 feet msl is: Jan-3.0%, Feb-3.5%, Mar-5.5%, Apr-9.0%, May-12.0%, Jun-14.5%, Jul-15.0%, Aug-13.5%, Sep-10.0%, Oct-7.0%, Nov-4.0%, and Dec-3.0%. The monthly distribution for elevations above 6500 feet msl is: Jan-1.0%, Feb-3.0%, Mar-6.0%, Apr-9.0%, May-12.5%, Jun-15.5%, Jul-16.0%, Aug-13.0%, Sep-11.0%, Oct-7.5%, Nov-4.0%, and Dec-1.5%.[8]

When determining the actual evaporation based on the actual surface area of the reservoir, more site-specific information, if available, may be used or may be required depending upon decree conditions, size of reservoir, impact of reservoir evaporation on other users, and/or availability of data. Any site-specific estimate is subject to evaluation and must be approved by the Division Engineer before use. During times when site-specific instrumentation goes down, NOAA values must be used until the instrumentation is operating again. NOAA values must also be used if site-specific instrumentation is inaccurate, has not been approved by the Division Engineer, or does not exist.

For months during which the surface is completely covered with ice during the entire month, the gross evaporation may be calculated as zero for that month, without

[7] Farnsworth, Richard K., Edwin S. Thompson, and Eugene L. Peck. 1982. *Evaporation Atlas for the Contiguous 48 United States.* NOAA Technical Release NWS 33. U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service.

[8] State Engineer's "Policy 2003-2: Implementation of Section 37-92-308, C.R.S. (2003) Regarding Substitute Water Supply Plans" signed August 12, 2003 by Hal D. Simpson http://water.state.co.us/DWRIPub/Documents/policy2003-2.pdf

redistributing that month's percentage into the remaining months of the year. The applicant may prorate the estimated evaporation for months during which the surface is covered with ice over a portion of the surface and/or during a portion of the month. The user must provide evidence of ice cover for that month. For projection purposes only, the ice cover period may be estimated as that period during which the mean air temperature is below 32 degrees Fahrenheit. The Division Engineer, however, will assess actual losses based on actual conditions.

The gross amount of evaporation can be offset for on-stream reservoirs by any evaporation from previously existing free water surfaces, effective precipitation that would have been consumed by any native vegetation, and/or groundwater consumption due to any native phreatophytes. Essentially, statute allows on-stream reservoir owners the right to reduce their required evaporation releases for any natural depletion to the stream that would have occurred if the reservoir were not in existence (37-84-117 (5) C.R.S.). An analysis of the pre-existing conditions must be performed to determine what reduction to the gross amount of evaporation will be allowed. In addition, a user may be required to keep track of actual site-specific precipitation in determining the reduction to the gross amount of evaporation for large reservoirs. Typically, the SEO has assumed for a native site (without phreatophytes) with a deep ground water table that 70% of the total precipitation is either consumed or goes to soil moisture storage.[9]

Seepage

As soon as water stored in a reservoir or in the process of being delivered by a ditch seeps through the bottom or sides of the structure, it is considered waters of the

[9] Wolfe, Dick and Richard L. Stenzel. 1995. "Evaporation." *Evapotranspiration and Irrigation Efficiency.* Proceedings of the 1995 Seminar held in Arvada, CO on October 10-11, 1995. Please see Appendix for document.

state subject to the prior appropriation doctrine. This applies to water that cannot be "re-used" as well as fully-consumable water that is no longer under the dominion and control of the user. A reservoir owner may not recapture seepage water from a reservoir as part of the original storage right unless specifically allowed by decree and may not recapture fully consumable water without dominion and control accounting approved by the division engineer. An appropriator of seepage water cannot require or demand that the seepage continue as the reservoir or ditch owner is generally allowed to make improvements that may eliminate or reduce the seepage.

Absent a specific decreed appropriation to the contrary, water flowing from the toe drain of a dam associated with a reservoir is considered "seepage". Toe drain outlets must drain freely without restriction to protect the dam and must be discharged without use and separate from the measured release from the reservoir. Structures oriented such that the toe drain flow cannot be separated from the measured reservoir release must quantify the toe drain flow in a manner approved by the division engineer and must subtract the toe drain flow from the measured, comingled release. Toe drain flow from on-stream reservoir dams may be counted as an "accretion to the stream flow resulting from the existence of a reservoir" that is used to offset evaporative losses in accordance with §37-84-117 (5), C.R.S. provided the user relinquishes all dominion and control over the released toe drain flow.

Volumetric versus Gage Height Decrees

The amount of storage water could be defined in a decree as a specific volume or up to a specific gage height in the reservoir. A "volumetric" decree is filled once the total volume of water as measured into the reservoir (plus any carryover and paper fill

volume) reaches the decreed amount or physical amount, whichever is less. A "gage height" decree is filled once the level in the reservoir (plus any paper fill amount) reaches the decreed gage height. The difference between gage height and volumetric decrees is that while filling under these two types of rights, evaporation and seepage does not count against the gage height decree but does count against the volumetric decree. (Seepage may or may not count against an on-stream volumetric decree depending on how the inflow is determined.) Once a gage height decree is filled, however, it is then treated just like storage under a volumetric decree for an off-channel reservoir where the storage in the reservoir suffers evaporative and seepage losses. Absent a refill right, foreign water or free river conditions the additional space created by these losses cannot be replaced.

It is important to have a good stage-capacity curve even for reservoirs with gage height decrees. If the reservoir is curtailed due to a call prior to being filled, the stage-capacity curve can be used to determine how much water the reservoir still has under its water right should it come back into priority. If the gage-height decree comes back into priority, it can continue to fill up to the volume associated with the difference between the gage height when it was curtailed and the completely full gage height.

The following is an example of a gage-height decree for Julesburg Reservoir decreed in civil action no. 944:

> It is therefore Adjudged and Decreed, that the said Julesburg reservoir be allowed to have stored in it from the South Platte river by means of the Harmony ditch No. 1, as enlarged and extended as a feeder to said reservoir, and for the benefit of the party or parties aforesaid under and by virtue of said appropriation by construction No. 1, so much water as is necessary to fill said reservoir to a depth of forty-seven (47) feet above the bottom of the lower discharge conduit from said reservoir, being an estimated capacity of one billion two hundred and twenty-seven million

> four hundred and forty-five thousand cubic feet, which appropriation of water for said storage purposes and other beneficial uses took effect on and dates from the 12th day of February, 1904.

The gage height of 47 feet above the bottom of the lower discharge conduit dictates when this reservoir has reached its one fill under this right despite the decree giving an estimated volume associated with this gage height.

Transit (Conveyance) Losses

Transit losses are losses to the stream due to seepage, stream evaporation, or plant consumption. The General Assembly requires the State Engineer to determine and charge transit losses (also referred to as "conveyance losses") for the delivery of water released from storage or taken into storage. Transit losses vary depending upon channel size, elevation, stream gradient, vegetation, bank storage, time of year, location, distance, and other factors.

Exchanges

In an exchange, water is generally provided at one point on a stream so that it may be diverted out of priority at another point upstream. Reservoirs may be part of exchanges. Some examples of possible exchanges that involve reservoirs include:

- release from a downstream reservoir in exchange for diversion into an upstream reservoir
- release of reusable effluent from a downstream treatment plant in exchange for diversion into an upstream reservoir.
- release from a downstream reservoir in exchange for diversions into an upstream ditch

- consumptive use credits from a downstream changed direct right are left in the stream to replace water diverted in an upstream reservoir

As with all exchanges, the exchange must be approved by the Water Commissioner or Division Engineer and the release downstream timed so that the flow will be the same as if the upstream diversion had not taken place. Further, when a water right holder releases water allowing an upstream diversion by exchange, the diverted water takes on the "character" of the released water. For example, the water stored in a reservoir in exchange for the release of reusable water from a treatment plant would "take on the character" of the reusable effluent and the water released from the treatment plant becomes the same character as the water that was physically stored in the reservoir (either natural stream or delivery water).

Temporary Detention (72-Hour Rule)

Direct water rights may be temporarily detained for up to 72 hours in order to allow more efficient or effective beneficial use of the water. Examples of such detention would be ponds used to receive delivery of a direct flow irrigation water right that is then applied by a sprinkler or temporarily detained and slugged out through a ditch (operational, head stabilization, equalization or flow regulating ponds), or the use of forebays or regulating structures associated with municipal operations. A specific storage right generally will not be required as long as the water is held for less than 72 hours and the detention is for purposes of allowing for more efficient or effective beneficial use of the direct water right. Absent a storage right or free river conditions, all water, including storm water, must be released within 72 hours. Ponds that intercept ground water are subject to additional limitations and all dams associated with the

construction of ponds must comply with all requirements of the State of Colorado's Dam Safety Rules and Regulations.

If storm water is not diverted or captured in priority, by exchange or under a substitute water supply plan or decreed plan for augmentation, Colorado Water Law requires it to be released. The State Engineer's current policy requires that all detained water be released to the stream system within a maximum of 72 hours after detainment.

Surcharge Storage

Surcharge storage means the volume of water that may be impounded but not retained within a reservoir between the normal spillway and the crest of the dam. This surcharge is not considered part of the reservoir fill under the water right. The reason for this is that the reservoir operator does not control water in surcharge and by definition in CRS 37-92-103(10.8) storage is the impoundment, possession, and control of water by means of a dam. Unless free river conditions exist or an exchange is made to "recolor" (or change the character of) this water, surcharge storage must be released within 72 hours. Operation of the reservoir outlet works may be required in order to release the surcharge within 72 hours.

Adequate Measurements

In cases where the reservoir right is limited to gage height, it is important that a staff gage that is easily readable be installed in the reservoir. A stage-capacity table (a table that reflects the capacity or volume of storage in the reservoir based on the stage or elevation of the water in the reservoir) has also usually been developed in conjunction with obtaining an absolute right for the reservoir. As long as the decree for the reservoir covers complete filling of the reservoir and no other water is stored in the

reservoir when the reservoir reaches the full level as measured on the elevation/staff gage, then the reservoir is considered full under that right. While the reservoir is filling, any losses due to evaporation or seepage can be made up. However, once the reservoir has reached its decreed gage height, it cannot be refilled to make up for losses due to evaporation or seepage under this right unless the decree specifically allows this.

Measuring inflow with a decree specifying a staff gage height is more difficult when releases are being made at the same time that water is being stored. In this situation, a reservoir operator may be required to measure via gages all inflow to and outflow from the reservoir to determine the storage under the right. Alternatively, the Division Engineer or Water Commissioner may allow the use of a "computed inflow." In computing inflow, reservoir operators measure the outflow and the change in storage (as measured by the staff gage) over the same period of time and account for net surface water evaporative losses. This method accounts for all inflow, including underflow, unmeasured tributaries, and precipitation on the reservoir's surface.

In cases where the amount of storage allowed is limited to a volume and not a specific gage height (volumetric decrees), an accurate measure of all inflow is generally necessary. This is done by use of a flume or a weir with a continuous recorder. For volumetric decrees, losses due to evaporation or seepage from the reservoir cannot be made up under the storage right.

Recording is often midnight to midnight, but historical and pragmatic practice may allow recording to be 8am to 8am or another 24-hour period. Reservoir operators

must report this recorded information as required by the Division Engineer. Reporting requirements may vary depending on the time of year.

Accounting Principles

Accounting requirements differ depending on the administrative requirements of a reservoir. In simple situations, no independent accounting from the user would be required when the reservoir can be administered without such accounting. The reservoir is simply considered full when it reaches its decreed limit after accounting for carryover (as described separately in this document). In these cases, the only record is often the Water Commissioner's record of diversions and storage contents.

Accounting does become necessary when a reservoir goes into and out of priority prior to being filled or the user is releasing water prior to being filled. As described earlier, accounting is also required if there is more than one storage decree associated with a reservoir (especially if the decrees are for different purposes) or foreign water is stored in a reservoir. In the case of more than one storage decree for different uses or places of use, the user may keep track of each type of water in the reservoir independently. If the user does not provide accounting, all carryover is charged to the senior most right as discussed earlier (except when the first-in first-out principal is applied) and takes on the character of the senior right.

In some cases, a reservoir has been designated as an alternate place of storage for another storage right. In this case, the user must keep track of the different types of water in the reservoir. If a particular right is stored in more than one reservoir (either as an alternate place of storage or relocated to other reservoirs), then the user must

account for storage under this right in all reservoirs so as to document compliance with the decree(s).

Administrative Accounts (Owe-The-River Account)

It is sometimes necessary to use water balance type accounting when it is difficult to directly measure all of the inflow into an on-stream reservoir. With water balance accounting, the inflow is determined by measuring outflow (including releases and evaporation) and change in storage during the day. The determination of inflow is a day in arrears because of the dependence on change in storage information. An administrative account is used to keep track of "errors" in release amounts because of not knowing the inflow until a day late. For example, assume the following:

a. Reservoir A is on stream and cannot store because it is out of priority.
b. The users are releasing 10 cfs (approximately 20 acre-feet/day) from storage in the reservoir for use.
c. The Division Engineer or Water Commissioner is releasing an additional 5 cfs (approximately10 acre-feet/day) as that is the assumed natural inflow to the reservoir.
d. The net evaporation from reservoir A is 1 cfs (approximately 2 acre-feet/day).
e. The reservoir declines approximately 20 acre-feet between day 1 and day

On day 2, the Division Engineer/Water Commissioner and/or user will use water balance accounting to determine that the actual inflow between day 1 and day 2 was approximately 12 acre-feet (Inflow = Releases (30) + Evaporation (2) + Change In Storage (-20)) or 6 cfs rather than the estimated 5 cfs. In this case, an administrative

account or "owe the river account" would be approximately 2 acre-feet. The Division Engineer/Water Commissioner would adjust the release on day 2 to attempt to continue to release natural inflow plus release the 2 acre-feet in the "owe-the-river" account. The same steps would be taken each day to adjust for either too high or too low an estimate of the actual inflow each day and to keep the administrative account as near to zero over time as possible.

Enforcement Principles

Installation of Measurement Device or Reporting Orders

Generally, the Division Engineer or Water Commissioner verbally directs reservoir users concerning the measurement devices and reporting necessary to administer reservoir rights. In accordance with 37-92-502 (5) (a), C.R.S., the State Engineer and the Division Engineers also have formal authority to order any owner or user of a water right to install and maintain at such owner's or user's expense necessary meters, gauges, or other measuring devices and to report at reasonable times to the appropriate Division Engineer the readings of such meters, gauges, or other measuring devices. Users are subject to liability for impacts to other users from improper storage and subject to paying legal fees and costs of the State in enforcement efforts associated with measuring devices and reporting.

Storage Release Orders

In most situations, the Water Commissioner or Division Engineer informally directs a user to release water stored improperly or directs the user to provide information on why they should be able to retain water when it appears they have stored

out of priority. However, if necessary, the Division Engineer can formally order the release of any water that the Division Engineer finds to have been illegally or improperly stored in accordance with 37-92-502 (3), C.R.S. The Division Engineer is directed to deliver this water to users who are entitled to the same and to insure that the release will not cause damage. Users are subject to liability for impacts to other users from improper storage and subject to paying legal fees and costs of the State in such circumstances. In addition to other orders discussed in these guidelines, the Division Engineer may order removal of any obstruction in a river if it impacts water rights.

ADDITIONAL INFORMATION

Dam Safety Restriction and Breach Orders

The State Engineer's staff inspects reservoirs within the state to determine their safe storage level. When necessary, the State Engineer will issue a restriction order to limit the user from storing above this safe storage level (see Rule 4.2.29 of the Dam Safety Rules). The Division Engineer will order the release of water in the reservoir if it exceeds the restricted level.

A breach order is an order issued by the State Engineer, or his designee, to remove all or part of a dam to the level of the natural ground, so it is incapable of impounding water and creating a hazard (see Rule 4.2.3 of the Dam Safety Rules).

Dead/Active Storage

Active storage is that volume of water capable of being released from the reservoir by means of gravity through an outlet of the reservoir. Dead storage is that amount of water that cannot be released without pumping because of the location and elevation of the lowest outlet from the reservoir. A user may be required to pump dead storage water out of a reservoir into the stream to replace evaporation losses or out of priority inflows into the reservoir. The SEO may oppose the use of small ponds with dead storage as an augmentation source in an augmentation plan due to the unreliability and inadequacy of these structures.

Underground Storage

Placing water into underground storage has a number of advantages that achieve the legislature's objective to maximize the beneficial use of all of the State's waters. For example, water stored underground is not lost to evaporation; the water can be used as an emergency supply in the event of disruption to surface water systems; storing water in an aquifer raises the water table and can reduce energy demand and energy costs otherwise needed for well pumping; and storing water underground helps to reduce committing additional surface land to additional large reservoirs, conveyance systems, and stream modifications.

Underground reservoirs are not reservoirs within the meaning of C.R.S. 37-87-101(2) except to the extent such reservoirs are filled by other than natural means with water to which the person filling such aquifer has a conditional or decreed right. Recharge water rights are not considered storage. Underground reservoirs also include porosity storage reservoirs which are defined as underground storage vessels in an alluvial deposit over an aquiclude that is formed by separating a volume of that alluvial deposit by surrounding it by a man-made substantially impermeable barrier so that the volume is hydrologically separate from the original surrounding deposit.

Subgrade Storage

Subgrade storage includes any water stored below the natural land surface elevation such that it must be accessed by means other than gravity drainage. This includes rock quarries in low permeability material, but generally is associated with placing a very low permeability lining around a mined-out gravel pit or other excavation

into high permeability material. The purpose of the very low permeability liner is to isolate the water placed into the excavation from the surrounding ground water, thus impounding, possessing, and controlling the water, rather than letting it flow away with the surrounding ground water and become unavailable for future use.

The very low permeability liner must be approved in accordance with the August 1999 State Engineer Guidelines for Lining Criteria for Gravel Pits (please see Appendix for document). The Liner Guidelines contain a procedure for testing the constructed liner, two allowable liner leakage standards, a mass balance accounting procedure for lined excavations, and provisions to address a liner failure that may occur during operation of the reservoir.

The testing procedure set forth in the Liner Guidelines requires that the liner be demonstrated to meet leakage standards. Typically this is done by holding the lined excavation essentially dry; measuring the volume of water removed from the lined excavation; and calculating the volume of any precipitation entering the lined excavation based on the surface area and a simple on-site rain gage correlated to official weather stations in the area. If the lined excavation is not held essentially dry during the test, the volume of evaporation from the free water surface must also be calculated based on the surface area over the course of the test and data from official weather stations in the area. The differences between the known inflows and the known outflows plus any changes in storage are assumed to be ground water leakage by the liner. If this volume does not meet the leakage standards in the Liner Guidelines then the excavation is determined to be a well and water storage is not allowed.

It should be noted that the Liner Guidelines contain a similar testing procedure as discussed above for locations of high permeability material where a slurry wall has been installed to isolate an area from the local ground water but where no excavation has yet occurred. The procedure here requires piezometers located inside and outside of the slurry wall to monitor water levels on both sides of the wall. Water is then pumped from inside the wall to establish a steady-state head gradient across the wall for the 90 day test. The minimum acceptable head gradient prior to starting the test is ten (10) vertical feet or to bedrock if bedrock is located less than ten feet below the local water table. The same leakage standards used for an excavated area are also used in this instance.

The mass balance accounting procedure set forth in the Liner Guidelines is straightforward and requires any out of priority inflow from any source, including ground water, to be returned to the stream or fully augmented. The Liner Guidelines provision to address a liner failure that may occur during operation of the reservoir requires that if, in two consecutive months, the accounting shows the unregulated ground water inflows exceed the Guideline Standards, the reservoir operator and the State Engineer's Office will consult on the probable cause(s) and possible solution(s) to the excessive inflows. Specific operational requirements and time lines for agreement and repair are also set forth in the Liner Guidelines. The ultimate result of a previously approved liner failing to meet the Guideline Standards during actual operation is a prohibition of storage in the reservoir with a requirement that all out of priority inflows be pumped to the stream or fully augmented pursuant to an augmentation plan or a substitute water supply plan.

Rock quarries in low permeability material that seek to store water are tested in accordance with the Liner Guidelines discussed above as applied to lined excavations

into high permeability material where the excavation intercepts ground water. They are also subject to the same two tiered accounting approach discussed above.

Types of Dams

Colorado laws governing dams and reservoirs were enacted for the protection of lives and property due to potential hazards associated with the storage of water in the reservoir behind a dam. The owner of the dam is responsible for the safe storage of water impounded in the reservoir. There are specific construction and administration requirements depending on the category of a dam. The categories are as follows: jurisdictional size dams, non-jurisdictional size dams, livestock water tanks (LSWT), erosion control dams (ECD) and exempt structures such as mill tailing impoundments (see complete list of these structures in Section 37-87-114(5) C.R.S.). Laws that are contained in the Colorado Revised Statutes establish specific requirements for each type of dam. Jurisdictional and non-jurisdictional size dams, exempt structures, and ECDs are governed by Sections 37-87-101 thru 125, C.R.S. and the Rules and Regulations for Dam Safety and Dam Construction. LSWTs are regulated by Sections 35-49-101 thru 116, C.R.S. The owner of a dam and/or irrigation ditch has responsibilities, and the Division Engineer in charge of each Water Division has additional related authorities, under the following statutes: C.R.S 37-84 inclusive and 37-92 inclusive.

Constructing a dam to create a reservoir does not assure the owner the right to store water. Likewise, having a water right does not constitute an approval to construct the dam. A water right must be obtained through the Water Court. Approval for construction of a dam must be obtained from the State Engineer.

Jurisdictional versus Non-jurisdictional

A jurisdictional dam is one that has a statutory height of greater than 10 feet in height to the spillway crest from the lowest point in the natural stream channel or natural ground surface, or creates a reservoir with more than 100 acre-feet of water, or covers a surface area of more than 20 acres at the high waterline. Plans and specifications for jurisdictional dams must be approved by the State Engineer before construction. The "Rules and Regulations for Dam Safety and Dam Construction" can be accessed from the following website link: http://water.state.co.us/DWRIPub/Documents/ds_rules07.pdf. Additionally, you can obtain a publication from this office free of charge titled, "Guide to Construction and Administration of Dams in Colorado" (or you can download it at the following link: http://water.state.co.us/DWRIPub/Documents/damguide.pdf), which is helpful in providing general information regarding dams, livestock water tanks, and erosion control dams.

A flood control dam is a special purpose dam which is normally dry and has an un-gated outlet structure which will drain the water impounded during the flood. The jurisdictional size and classification of the dam are determined assuming the reservoir is full to the emergency spillway (see Rule 4.2.5.7 of the Dam Safety Rules).

Non-Jurisdictional size dams are smaller in size than jurisdictional size dams. Plans and specifications are not required for construction, however, filing of a Notice of Intent to Construct a Non-Jurisdictional Water Impoundment Structure is required. The form may be obtained from the Office of the State Engineer in Denver, from any Water Division office, or from the DWR website http://www.water.state.co.us/DWRDocs/Forms/Pages/DamForms.aspx, and must be

filed 45 days prior to construction. No fee is required to file the Notice of Intent form. The Division Engineer may require an outlet pipe with a regulating gate to be installed in the bottom of the dam to allow releases to prevent injury to existing water rights. Because any dam, regardless of size, has the potential to cause damage downstream if it should fail, the owner is advised to consult a person familiar with dam construction to ensure the dam is constructed properly. The Notice of Intent form shall be submitted to the Division Engineer of the Water Division in which the dam is to be located. Addresses of the seven division offices are available online at http://www.water.state.co.us/org/contacts.asp.

Livestock Water Tanks

Livestock water tanks are covered under the "Livestock Water Tank Act of Colorado" Sections 35-49-101 to 35-49-116, C.R.S. (Also see Rule 17.4 of the Dam Safety Rules.) A LSWT requires a permit from the State Engineer. A LSWT is a dam constructed to capture run-off water on rangeland to provide water for livestock. They may only be constructed on normally dry water courses, and may also be used for recreation, but not for irrigation. A normally dry water course or stream is considered dry 80% of the time during a calendar year. The structure must not have a ditch or other structure delivering water to or from it.

Height of the dam cannot be greater than 15 feet from the bottom of the stream channel to the spillway crest. Impoundment volume of the reservoir cannot exceed 10 acre-feet. If the LSWT is five feet or less in height to the spillway, and two acre-feet capacity or less, no application is necessary, but an application may be filed to obtain a priority between LSWT's. It is important to note that this is not a water right, but only

provides a priority between LSWT's. The LSWT does not require a water right for its use but may be subject to curtailment from downstream senior users depending on the specific circumstances.

An outlet pipe with a regulation gate is required unless specifically waived by the Division Engineer during review of the application. Standard specifications and application forms are available from any Water Division office or the DWR website http://www.water.state.co.us/DWRDocs/Forms/Pages/DamForms.aspx. The application and fee should be submitted to the division office that the LSWT is to be located in. Construction of the LSWT may begin upon approval of the application by the Division Engineer. The State Engineer may then inspect the LSWT and within 10 days after receiving notice of completion or within 10 days after inspection he must then approve or disapprove of the structure. The U.S. Natural Resources Conservation Service may assist owners in preparing an application, or owners may wish to hire a licensed professional engineer experienced in dam design for assistance.

Erosion Control Dams

In Colorado, many farms and ranches need ways to control erosion. In recognition of this need, the Colorado legislature instituted statutes governing the development and use of these types of structures. Erosion control dams are governed under Section 37-87-122, C.R.S. (Also see Rule 17.5 of the Dam Safety Rules.)

An ECD requires a permit from the Office of the State Engineer. These dams may only be constructed on normally dry watercourses and are only for the purpose of controlling soil erosion caused by floods. The vertical height of the dam cannot exceed 15 feet from the bottom of the channel to the bottom of the spillway. The height is

measured at the toe of the upstream slope where the dam contacts the ground surface. The spillway must have a minimum freeboard of four feet to the dam crest. Impoundment volume of the reservoir cannot exceed 10 acre-feet at the emergency spillway level. An ECD with more than two acre-feet capacity must have an un-gated outlet conduit large enough to pass stored water in excess of two acre-feet within a 36-hour period, but no less than a 12-inch diameter. The vertical location of the outlet must be at or below the two acre-feet storage volume level. In certain circumstances, an outlet structure may be required for an ECD with less than two acre-feet capacity to address water administration issues.

A water right is not required for an ECD but a number is assigned, similar to a LSWT. An ECD is also subject to curtailment from downstream water rights depending upon the circumstances. Since an ECD is not intended to store water, a priority is not assigned. Standard specifications and application forms are available from any Water Division office or the DWR website http://www.water.state.co.us/DWRDocs/Forms/Pages/DamForms.aspx. The application, along with a fee, must be submitted to the Water Division office. Construction may begin upon approval of the application by the Division Engineer. The U.S. Natural Resources Conservation Service may assist owners in preparing an application, or owners may wish to hire a licensed professional engineer for assistance.

Other Regulatory Requirements

Other state and federal agencies regulate runoff from storm water in construction activities, industrial activities and concentrated animal feeding operations. These facilities may involve temporary or permanent detention, retention, or sediment ponds or

basins. These structures are designed to capture, settle, store and/or release water. These structures can be constructed by excavation and/or by placing an earthen embankment across a low area or drainage swale. They can be designed to maintain a permanent pool or to drain completely dry.

The two agencies that regulate these activities are the Colorado Department of Public Health and Environment, Water Quality Control Division http://www.cdphe.state.co.us/wq/PermitsUnit/ and the Environmental Protection Agency http://www.epa.gov/region8/water/stormwater/. Even though these structures are permitted and regulated by these other agencies they must still comply with all State water rights laws regarding diversion and depletion of surface water.

Compensatory Storage Doctrine (Transbasin Storage Agreements)

The cost of constructing and operating large projects precluded all but the largest municipalities. To provide a means to finance, acquire water rights and land surface rights, and for operations, the Colorado legislature created special statutory entities called water conservancy districts. The first of these districts was the Northern Colorado Water Conservancy District, created in 1937 to develop the Colorado-Big Thompson Project. Recognition of compensatory storage as an integral part of transmountain diversions by way of water conservancy districts came in 1943 when the Colorado legislature amended the original Water Conservancy Districts Act to require facilities to be constructed so as not to impair nor increase costs to existing or prospective water users within the natural basin of the Colorado River. Three reservoirs

have been built in the Colorado River drainage as a result of this act. The Colorado-Big Thompson Project built Green Mountain Reservoir with a capacity of 152,000 acre feet in return for the right to divert an expected 320,000 acre feet to the South Platte drainage. Of the 152,000 acre feet, 100,000 acre feet is in the compensatory pool for the benefit of in-basin users. These beneficiaries receive replacement releases either by the language of the authorizing legislation of the project or by contract. This authorizing legislation for the CBT, Senate Document 80, became the model for compensatory storage. The Fry-Ark Project built Ruedi Reservoir with a capacity of 102,000 acre feet in return for the right to divert an expected 69,200 acre feet to the Arkansas River drainage. An individual beneficiary of this compensatory pool obtains release of stored water by contract. The Windy Gap project provided $10M for the construction of compensatory storage, which ultimately helped build Wolford Mountain Reservoir, and the first 3,000 acre feet of Windy Gap water pumped to Granby Reservoir. Municipalities, irrigation companies, and other corporations that construct transmountain diversion projects are not required to provide compensatory storage because they are not incorporated or created under the statute requiring such storage.

Dick Wolfe

Dick Wolfe, P.E.
State Engineer, Director
Colorado Division of Water Resources
October 31, 2011

EXHIBIT B: EXAMPLES OF IDAHO WATER RIGHTS EXPRESSLY AUTHORIZING MULTIPLE RESERVOIR FILLS: NOS. 22-11987, 37-19740, AND 37-19825

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
) PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR
Case No. 39576)
) Water Right 37-19740

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAR 29 2012
By _____ Clerk
Deputy Clerk

NAME AND ADDRESS: INDIAN CREEK RANCH OWNERS ASSN INC
PO BOX 3411
HAILEY, ID 83333-3411

SOURCE: INDIAN CREEK TRIBUTARY: BIG WOOD RIVER

QUANTITY: 367.50 AFY

The capacity of the storage reservoir is 22.5 AF. The reservoir may be refilled multiple times up to the total diversion volume in a single year.
The reservoir is filled by Water Right Nos. 37-296B, 37-296C and other water accruing to Indian Creek and the reservoir below the point of diversion for Water Right No. 37-296A.

PRIORITY DATE: 06/01/1931

POINT OF DIVERSION:

T03N R18E S22	SWSE	(Injection)	Within Blaine County
	SWSE		
S27	NENW	(Rediversion)	
	SENW	(Rediversion)	
S28	NESE	(Rediversion)	
	NESE	(Rediversion)	
	SWSE	(Rediversion)	
S33	NWNE	(Rediversion)	
	NWNE	(Rediversion)	
	SENW	(Rediversion)	

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	22.50 AFY
Irrigation from Storage	04-15 TO 10-31	367.50 AFY
Stockwater Storage	01-01 TO 12-31	18.00 AFY
Stockwater from Storage	01-01 TO 12-31	18.00 AFY
Recreation Storage	01-01 TO 12-31	22.50 AFY

PLACE OF USE:

Recreation Storage		Within Blaine County
T03N R18E S22	SESW	SWSE

Place of use is within the service area of the Indian Creek Ranch Owners Association as provided for under Idaho law. The irrigation use is currently limited to the irrigation of 105 acres within the service area.
The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.
The service area includes Lot 67 of Indian Creek Ranch Subdivision.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

SRBA PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 37-19740 File Number: 01342

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DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED _____

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 22-11987

NAME AND ADDRESS: SURTON PHILLIPS
KATHY PHILLIPS
810 N 300 W
TETONIA, ID 83452

SOURCE: SPRINGS TRIBUTARY: SINKS

QUANTITY: 80.00 AFY

The capacity of the storage reservoir is 8.0 AF. The reservoir may be refilled multiple times up to the total diversion volume in a single year.

PRIORITY DATE: 06/01/1965

POINT OF DIVERSION: T06N R45E S09 SESESW Within Teton County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	8.00 AFY
Irrigation from Storage	04-15 TO 10-31	80.00 AFY

PLACE OF USE: Irrigation from Storage

			Within Teton County
T06N R45E S09	SWSE	0.3	SESE 20.0
S16	NENE	31.0	NWNE 30.0
	SWNE	6.7	NENW 8.0
	SENW	2.0	

100.0 Acres Total

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

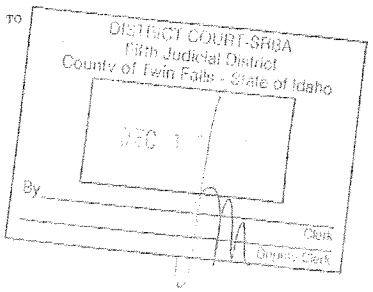
RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
Case No. 39576) I.R.C.P. 54(b) FOR
) Water Right 37-19825



NAME AND ADDRESS: CASA DEL NORTE LP
JOHN B MC CALLUM
11804 N BAR 21 DR
GLENNS FERRY, ID 83623

SOURCE: CLOVER CREEK TRIBUTARY: SNAKE RIVER

Point of rediversion from Clover Creek.

QUANTITY: 800.00 AFY

The capacity of Pioneer Reservoir is 1450 AF. This right is for storing additional water in Pioneer Reservoir after it has filled once, and right nos. 37-8228, 37-828 and 37-21291 are satisfied.
The quantity of water under this right for stockwater use shall not exceed 13,000 gallons per day.

PRIORITY DATE: 04/08/1920

POINT OF DIVERSION: T05S R12E S17 NWNW Within Gooding County
NWNW (Rediversion)

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	800.00 AFY
Irrigation from Storage	03-15 TO 11-15	800.00 AFY
Stockwater Storage	01-01 TO 12-31	6.70 AFY
Stockwater from Storage	01-01 TO 12-31	6.70 AFY

PLACE OF USE:

Irrigation Storage — Within Gooding County
Same as Irrigation from Storage

Irrigation from Storage — Within Gooding County

T04S R12E S32		SESW 10.0		SWSE 0.4	
T05S R12E S05 LOT 2		(NWNE) 12.0		SWNE 36.0	
		SENE 2.8	LOT 3	(NENW) 8.8	
	LOT 4	(NWNW) 7.3		SWNW 9.6	
		SENW 22.0		NESW 10.0	
		NWSW 2.5			
	S08	NWNE 28.0		SWNE 9.6	
		NENW 33.0		SENW 16.0	
		NESW 24.0		NWSW 1.5	
		SESW 22.0		NWSE 8.6	
		SWSE 0.3			
	S17	NWNE 0.9		NENW 24.0	

269.3 Acres Total

Stockwater Storage — Within Gooding County
Same as Stockwater from Storage

Stockwater from Storage — Within Gooding County

T04S R12E S32	SESW	SWSE	
T05S R12E S05 LOT 2	(NWNE)	SWNE	
	SENE		
S08	NWNE	NENW	
	SENW	NESW	
	SESW		

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

PLACE OF USE (continued)

S17 NENW NWSE
SESE

Right nos. 37-819A, 37-820A, 37-821B, 37-823, 37-824, and 37-21291 are limited to the irrigation of a combined total of 253.3 acres in a single irrigation season.
Right nos. 37-819A, 37-820A, 37-823, 37-824, 37-826, 37-827, 37-828, 37-7081, 37-19825 and 37-21291 are limited to the irrigation of a combined total of 269.3 acres in a single irrigation season.
Right nos. 37-819A, 37-820A, 37-823, 37-824, and 37-21291 are limited to the irrigation of a combined total of 121.4 acres in a single irrigation season.
Right nos. 37-819A, 37-820A, 37-821B, 37-823, 37-824, 37-826, 37-827, 37-828, 37-7081, 37-19825 and 37-21291 are limited to the irrigation of a combined total of 401.2 acres in a single irrigation season.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The quantity of water decreed for this water right for stockwater use is not a determination of historical beneficial use.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication