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# A&B Irrigation District v. State Respondent's Brief 5 Dckt. 40974

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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

Supreme Court Docket No. 40975-2013

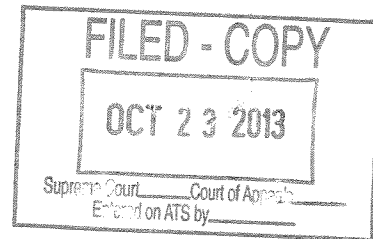
Boise Project Board of Control,

Appellant,

vs.

State of Idaho, et al.,

Respondents.



**RESPONDENT'S BRIEF**

Appeal from the District Court of the Fifth Judicial District for Twin Falls County,  
Snake River Basin Adjudication  
Honorable Eric J. Wildman, District Judge, Presiding

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## I. STATEMENT OF THE CASE

### A. Nature of the Case

This appeal involves a basin wide issue in the Snake River Basin Adjudication (SRBA), known as Basin Wide 17. The specific issue designated by the SRBA court is the following:

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

On May 20, 2013, the SRBA court issued a *Memorandum Decision* which stated that a storage water right may not be filled or satisfied multiple times under priority before rights held by affected junior appropriators are satisfied once and thus a remark authorizing such priority refill would be contrary to Idaho law. (R. 883-899). However, even though the SRBA court noted that “the more important issue pertains to” when the storage water right is considered filled or satisfied, the SRBA court declined to address the issue. (R. 894). Instead, the SRBA court held that the issue of when a storage water right is filled or satisfied is not suited for a basin wide issue because of the fact specific inquiries for a given reservoir and that the Idaho Department of Water Resources and its Director are better suited to determine and employ accounting methodologies for distributing storage water rights. (R. 894-895).

Appellants, the Surface Water Coalition and the Boise Project Board of Control, have appealed the decision of the SRBA court. These Respondents (hereinafter collectively referred to as “the Ditch Companies”),<sup>1</sup> unlike the Appellants, were not petitioners for purposes of this basin

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<sup>1</sup> These Respondents/the Ditch Companies collectively refers to the following irrigation entities: Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers’ Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

wide issue and have not appealed the decision of the SRBA court.<sup>2</sup> However, as recognized by the SRBA district court, the Ditch Companies have been generally aligned or “coalesced” with the Appellants on many of the issues presented in this basin wide issue. (R. 891). The Ditch Companies desire to weigh in on some, but not all, of the issues of the raised by the Appellants.<sup>3</sup>

**B. Course of Proceedings.**

The Ditch Companies do not dispute the “Course of Proceedings” in the Brief of Appellants Surface Water Coalition and Boise Project Board of Control in this case.

**C. Statement of Facts.**

The Ditch Companies do not dispute the “Statement of Facts” in the Briefs of Appellants Surface Water Coalition and Boise Project Board of Control in this case. However, the Ditch Companies desire to provide additional background information relating to these Ditch Companies.

The Ditch Companies consist of irrigation districts and canal companies located in the Treasure Valley. The irrigation districts deliver water to lands to which they have apportioned their water rights pursuant to Title 43 of the Idaho Code. The canal or ditch companies deliver water to land owners who hold shares issued by the companies. The Ditch Companies own natural flow water rights that they divert from the Boise River and deliver through their canal systems. To ensure

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<sup>2</sup> Nampa & Meridian Irrigation District was inaccurately listed on the initial Petition to Designate Basin-Wide Issue but did not independently sign the petition. (R. 13-18). In any event, the Ditch Companies, including Nampa & Meridian Irrigation, have participated throughout the proceedings as a party by submitting a Notice of Intent to Participate.

<sup>3</sup> The appeals by the Surface Water Coalition and Boise Project Board of Control have been consolidated for purposes of the transcript and record only pursuant to this Court’s *Order Conditionally Consolidating Appeal for Purposes of Clerk’s Record and Reporter’s Transcript Only* issued on May 22, 2013. Accordingly, the Ditch Companies have submitted this Respondent’s Brief in both appeals, but note for this Court’s ease of reference that this Respondent’s Brief is the same for both appeals with the exception of the docket no. and cover for each appeal.

that the lands served by Ditch Companies have adequate water supplies as the natural flows of the Boise River decline, they have rights to divert and deliver portions of the waters stored in one or more of the three Boise River reservoirs; Lucky Peak, Arrowrock and Anderson Ranch.

These same Ditch Companies were also parties to the *U.S. v. Pioneer Irrigation District*, 144 Idaho 106,157 P.3d 600 (2007) in which this Court held that recognized the important role of the irrigation entities and their landowners/shareholders in diverting the stored water and putting the water to beneficial use.

## **II. ISSUES PRESENTED ON APPEAL**

The Ditch Companies do not dispute the “Issues Presented on Appeal” in the Briefs of Appellants Surface Water Coalition and Boise Project Board of Control in this case. However, the central issue in this appeal in which the Ditch Companies desire to weigh in can be summarized as follows:

1. Whether the SRBA court erred in failing to address whether a storage water right is filled or satisfied when water is released for flood control purposes?

## **III. ARGUMENT**

### **A. Summary of Argument**

The Ditch Companies’ position has been that Idaho law does not require a remark authorizing storage water rights to “refill”, under priority, when space is vacated for flood control. This is because the storage water right is not filled or satisfied when: (1) water is not physically diverted or stored but is allowed to pass though the reservoir for flood control purposes; and (2) water which is stored for a beneficial purposes, such as “Irrigation Storage” is later released/vacated because of flood control operations. In fact, the Ditch Companies specifically requested clarification from the

SRBA court that these situations of flood control operations would not amount to filling or satisfying a storage water right and thus there would be no “refill.” Instead of clarifying these situations, the SRBA court held that the basin-wide proceedings do not address the issue of when a storage water right is considered “filled” or “satisfied” even though it recognized this as being the more important issue.

The SRBA court erred in failing to address when a storage right is satisfied or filled in the first place. In order to answer the basin-wide issue at hand, and make a determination regarding so called “refill”, a threshold question must be answered as to whether and when a storage right is satisfied or filled when storage space is vacated for flood control purposes. The Ditch Companies contend that the storage right is not satisfied or filled, and thus is not being “refilled”, when water is allowed to pass through the reservoir or space is being vacated for flood control purposes. An operation flood control release is just that, a release for operational flood control purposes to protect life, property and/or the reservoir/dam itself. It is not a release that satisfies the elements of diversion or beneficial use for the intended purposes of the storage water right. This initial question must be answered to determine whether “refill” is occurring in the first place when water is released for flood control purposes.

Along these same lines, the SRBA court incorrectly suggests that flood control is a “use” by the storage right holder or operator when operational flood control does not satisfy the storage water right or the elements of the storage water right. The storage water rights have purposes of use for the storage of water and the subsequent release and use of water, i.e., “Irrigation Storage” and “Irrigation from Storage.” The SRBA court erred, whether it could be considered dicta or not given the fact it declined to specifically address the issue, in suggesting that flood control is a “use” by the



storage right holder or operator. Unless flood control is the intended purpose of use listed on the water right, flood control is not a beneficial use by the storage right holder or operator and thus it does not satisfy or fill the storage water right.

This Court should correct the errors of the SRBA court, and either answer the questions the SRBA court 's declined to address or remand this matter to the SRBA court for further proceedings consisting with Idaho law.

**B. Standard of Review**

The Ditch Companies do not dispute the “Standard of Review” in the Briefs of Appellants Surface Water Coalition and Boise Project Board of Control in this case.

**C. The District Court Erred in Failing to Address whether a Storage Right is Filled or Satisfied When Water is Released for Flood Control Purposes.**

**1. Nature of Storage Water Rights.**

The SRBA court correctly perceived that the resolution of the basin wide issue “requires an analysis of the nature of storage water rights under the doctrine of prior appropriation as established in Idaho.” (R. 888). Indeed, the SRBA court noted that Idaho law recognizes and provides for the appropriation of storage water rights and that:

Under Idaho law, “[o]ne may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right.” *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007); I.C. § 42-202. Therefore, storage water rights are integrated into Idaho’s prior appropriation doctrine on the basis of relative priority the same as other water rights. Once water **is diverted** and stored in a reservoir pursuant to a storage water right, it is no longer subject to the diversion and appropriation, but becomes the property of the appropriators and owners of the reservoir. *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935). It follows that no one can make an appropriation from a reservoir “for the obvious reason that the waters so stored or conveyed **are already diverted** and appropriated. . . .” *Id.* at 389, 43 P.2d at 946.

(R. 889-890) (footnote omitted) (emphasis added).

However, while the SRBA court mentions the diversion of the water in the reservoir, the SRBA court failed to consider the fundamental principles of Idaho water law which requires physical diversion from a natural watercourse and application of the water to a beneficial use. *Joyce Livestock Company v. United States*, 144 Idaho 1, 19, 156 P.3d 502 (2007) (citing *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980)). With the exception of stock water rights and instream flow water rights, physical diversion is required to obtain a water right. *Id. See also Bedke v. City of Oakley*, 149 Idaho 532, 237 P.3d 1 (2010).

These requirements also apply to storage water rights and require the physical diversion or impoundment of water from a natural watercourse along with the storage and use of the water for beneficial purposes. Accordingly, storage water rights typically have two purposes of use: (1) the diversion of water from a natural water course for a beneficial purposes; and (2) the diversion or release of the stored water for a beneficial purpose. As the SRBA court recognized when analyzing the uses of storage water rights:

The first authorizes the storage of water for a particular purpose (i.e., “irrigation storage,” or “power storage”). The second authorizes the subsequent use of that stored water for an associated purpose, which is referred herein as the “end use” (i.e., “irrigation from storage,” or “power from storage”). Each purpose of use is assigned its own quantity and period of use, which may or may not differ from one another. With respect to storage water rights for irrigation, for example, it is typical for the “Irrigation Storage” purpose of use to be a year round use (01-01 to 12-31), and the “Irrigation from Storage” purpose of use to be limited to the irrigation season (e.g., 03-15 to 11-15).

(R.888-889) (footnote omitted).

Examples of these different elements of the storage water right were provided by the SRBA court for the American Falls and Palisades Reservoirs. (R. 887). The SRBA court also referenced

the storage water right for Lucky Peak Reservoir, water right no. 63-3618, because of its varying purposes of use (R. 888, footnote 2).<sup>4</sup> As the SRBA correctly points out, the “Recreation Storage” purpose of use for Lucky Peak Reservoir does not have a corresponding second purpose of use because the end use or beneficial use does not require a subsequent release of the stored water. However, all other purposes of use have a separate purpose of use for the diversion and storage of the water (i.e., “Irrigation Storage”) and then for the release and beneficial use of the stored water (i.e., “Irrigation from Storage”).

Another important aspect of a storage water right is that the storage right holder or reservoir operator’s has certain obligations to operate the storage facilities so as to prevent flooding or damages to persons or property. While Lucky Peak Reservoir has a portion of the capacity designated for flood control, most other reservoirs do not have flood control listed as a beneficial purpose.<sup>5</sup> Thus, releases for flood control are a result of the storage reservoir operator’s obligation/duty to operate the reservoir so as to prevent damages to others. These obligations stem from obligations to operate and maintain the reservoir and dam in a non-negligent manner. *See Stott v. Finney*, 130 Idaho 894, 950 P.2d 709 (1997) (holding that a dam operator can be held liable under the theory of negligence for damages caused by negligent construction, operation or maintenance of a dam). Just as ditch owner has obligations to prevent damages to others (I.C. § 42-1204) and to not divert more water than the banks of the ditch will contain or be used for beneficial purposes (I.C.

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<sup>4</sup> The Partial Decree Lucky Peak Reservoir, Water Right No. 63-03618, along with the Partial Decrees for Anderson Ranch and Arrowrock Reservoirs, were attached to the Ditch Companies’ Opening Brief before the SRBA court for the SRBA court’s and other parties ease of reference. (R. 414-420).

<sup>5</sup> Lucky Peak Reservoir, water right 63-3618, has 13,950 acre feet of space specifically allocated for flood control. With respect to the 13,950 which is allocated as flood control, when this water is released it is released for the purpose for which it is stored. This storage space is distinguishable from water stored for irrigation purposes which is released for flood control purposes.

§ 42-1203), an operator of a storage reservoir has the obligation to operate the reservoir to prevent damages to others and not store more water than the reservoir can hold. This means that a storage right holder has the obligation and duty to not divert and store water if the operator knows, or reasonably should know, the excess flows are too great, or will be too great later in the run-off season, than the capacity of the reservoir. This also means that an operator has the obligation and duty to release stored water for flood control purposes if the operator knows, or reasonable should know, the excess flows or run-off will be more than the capacity of the reservoir.

Additionally, the Idaho Department of Water Resources is responsible to supervise the construction, operation, repair and maintenance of dams and reservoirs for the protection of life and property. I.C. § 42-1710. As part of these responsibilities the Director has the obligation to employ remedial measures necessary to protect life and property if the condition of the dam or floods threaten the safety of the dam, life or property. I.C. § 42-1718. The remedial measures may include lowering the water level by releasing water from the reservoir or completely emptying the reservoir. *Id.* Thus, the Idaho Department of Water Resources may require the stored water to be released for flood control purposes to prevent damage to life and property. In such a case, the release of water for flood control may be required by the Idaho Department of Water Resources, beyond the control of the storage right holder, and not for the intended purpose for which the water was stored.

The SRBA court noted that I.C. § 42-223(6), which provides in part that “no portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control”, is not applicable because this basin wide issue does deal with the forfeiture of water rights. (R. 896). However, the SRBA court misinterpreted the point which is that this Court and Idaho statutory law provide that a water right, including the water right’s

priority date, cannot be lost for circumstances beyond the water right holder's control. *See Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999) (holding "there can be no forfeiture if the appropriator is prevented from exercising his right to the water by circumstances over which he or she has no control"); I.C. § 42-223(6).

The Ditch Companies agree that this basin wide issue does not directly deal with forfeiture of storage water rights but the same principle applies in that the use or nonuse of water for circumstances beyond the control of the water right owner should not result in a loss of the water right or the water right's priority. As the SRBA court correctly observed "[u]nder Idaho law, '[o]ne may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right.' *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007); I.C. § 42-202." (R. 889). Just as the water right cannot be lost for circumstances beyond the control of the water right owner, the priority date or the right to fill and satisfy the water right in the first place under priority cannot be lost. Whether operation flood control occurs as a result of a determination by the water right owner, a reservoir operator or by the Department of Water Resources in order to meet obligations to prevent damages or flooding to persons and property, the flood control should not result in a loss of the storage water right or its priority.

**2. "Refill" Cannot be Determined Without Determining When the Water Right is Filled or Satisfied.**

The central issue in this basin wide issue whether a storage right can be "refilled" or filled for a second time when water is released for flood control purposes. In order to address this issue and answer whether the storage right is being "refilled" it is necessary to determine if the right is

filled or satisfied in the first place. The SRBA court incorrectly declined to address this issue.

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In designating the basin wide issue the SRBA court determined that:

The Court agrees with Petitioners that the legal issue pertaining to the ability to refill storage water rights under priority when water is diverted under a storage right is released for flood control is broadly significant and affects many storage water rights throughout the State.

(R. 254). The SRBA court also held in its *Memorandum Decision* that “the more important issue pertains to” when the storage right is considered filled or satisfied. Yet, the SRBA court declined to address the issue of when a storage water right is filled or satisfied. (R. 894). Thus, the issue which is broadly significant to, and is the more important issue affecting storage water rights throughout the State, the SRBA court declined to address. Instead, the SRBA court pointed out that a storage right may not be filled or satisfied multiple times under priority before rights held by affected junior appropriators are satisfied once and thus a remark authorizing such priority refill would be contrary to Idaho law. (R. 891).

The Ditch Companies do not disagree with the proposition that a storage right cannot be filled and satisfied multiple times for the intended beneficial uses. This, however, begs the question as to whether the water right is filled or satisfied when water is released for flood control purposes. It is this question that was determined by the SRBA court to be appropriate for a basin wide issue and was the more important issue affecting storage right holders throughout the State.

The purpose of the SRBA court is to provide the foundation for the administration of water rights in accordance with title 42, Idaho Code. *See* I.C. § 42-1412 (providing for the SRBA court to determine the nature and elements of the water rights and to also provide “such general provisions necessary for the definition of the rights or for the efficient administration of the rights”). As such,

the SRBA court must provide the necessary guidance through remarks or otherwise that are not only necessary for the definition of the right, but also to provide for the efficient administration of the rights so that the watermaster can administer water rights pursuant to chapter 6, title 42, Idaho Code. Answering the question of whether a storage right is filled or satisfied when water is released for flood control is necessary to define the “nature” of the storage water right and to efficiently administer storage water rights and other rights. While each individual reservoir may have different facts, historic operations and accounting, defining the nature of the storage water right and whether flood control satisfies the end use, i.e. Irrigation from Storage, is necessary for the efficient administration.<sup>6</sup> This issue is not a matter of accounting but rather is a matter of determining whether the elements of a storage water right, including quantity, diversion, beneficial use and place of use, have been satisfied when water is released for flood control purposes.

### **3. If Water is Not Diverted and Stored then It is Not Refill.**

A threshold question to address “refill” must be answered as to when the storage right is filled in the first place. If the water is not diverted, stored or filled in the first place then it is not “refill.” As addressed, *supra*, with the exception of stock water and instream flow rights, appropriation of a water right requires the physical diversion of the water from natural watercourse for a beneficial purpose. To the extent water passes through a reservoir then it is not diverted or

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<sup>6</sup> The Ditch Companies have contended that if the SRBA court was inclined to answer the basin wide issue by concluding that a remark is necessary to “refill” in priority water released for flood control then the Court would have to consider the specific circumstances, operational history or historical agreements that would be necessary for each reservoir. The water rights for many reservoirs, such as those in Basin 63, have already been partially decreed without such a remark and storage right holders would have legal arguments such as *res judicata*, *estoppel* and *collateral estoppel* which would preclude such remarks. However, this does not mean that the SRBA court cannot define the nature of the storage water right under Idaho law and whether it is filled or satisfied when water is released for operational flood control purposes.

stored. When the water is not physically diverted and stored then the water which passes through the reservoir for flood control or other reasons should not be considered filled or satisfaction of the storage water right.

If the water right has not be satisfied then there is no “refill.” Accordingly, this Court should clarify that water allowed to pass through the reservoir for flood control purposes does not jeopardize the storage right holder’s ability to divert and store subsequent run-off or flows under priority. In this situation there is no need for a remark authorizing “refill” because the water has not been stored or filled in the first place. A storage right holder and/or reservoir operator’s decision to store or not store water passing through the reservoir may be dictated by the obligation to prevent damages to others and there should be no adverse impacts to the water right.

**4. Water Released for Flood Control Does Not Satisfy the Storage Water Right.**

The other situation which the SRBA court did not address involves when water which is physically and intentionally stored and then stored water is released for flood control purposes. This would first require the physical storage of the water for irrigation or other authorized purposes. At some point, the storage right holder, reservoir operator or Idaho Department of Water Resources determines that the rate of run-off will be too great to safely release the water for flood control, will likely cause flood damages to those downstream, and storage space needs vacated to prevent such flooding. In this situation the storage right holder and/or reservoir operator releases or vacates the stored for flood control purposes. The water is not being released for irrigation or other uses in which water was originally stored, and it is instead being released based upon a determination that the continued storage of the water will cause damage to the dam or reservoir and/or will result in flood damage to downstream property or persons. The release is a direct result of the obligation to



operate and maintain the reservoir in a non-negligent manner and to prevent foreseeable damage to others.

In this situation the release for flood control is not for the purpose in which the water was stored, i.e. Irrigation from Storage. This is an operational determination, obligation or duty to release water for flood control and there is no intent to divert or release the stored water for irrigation purposes. The release of the water which is stored for purposes other than flood control, i.e. Irrigation Storage, and which is later released for flood control, cannot be considered “refill” because the storage right holder never diverted/released the water for the intended purpose. “Refill” would apply when the water is released for the intended purpose. However, the release of stored water for flood control is not a release for “Irrigation from Storage” and the “Irrigation from Storage” right is not being “refilled” but rather has not been satisfied/filled because of a flood control release. Vacating storage space for operational purposes such as flood control cannot, should not, and historically has not, counted against the storage right holder’s right to divert, store and release the authorized quantity of water under priority.

Storage water rights specifically include a specified quantity for the portion released and beneficially used, i.e. Irrigation from Storage, and such elements should not be disregarded for purposes of determining whether the right is satisfied. Such an argument that the beneficial or end use purpose of the storage right is not a critical element is similar to the argument advanced by the United States Bureau of Reclamation in *U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007).

In *U.S. v. Pioneer*, the SRBA court and this Court rejected the arguments of the United States and held that the irrigation entities held an ownership interest in the water rights because beneficial

use is a critical element in establishing the storage water rights. The Ditch Companies and other irrigation entities in Basin 63 claimed an ownership interest in the storage water rights. These claims were based upon the fact that the irrigation entities owned an interest in the storage water rights because they and their respective landowners/shareholders diverted and put the water to beneficial use. The United States took the position that the United States, and the United States alone, held title to the water rights and the irrigation entities only held contractual interests. However, this Court rejected the arguments of the United States, recognized the important role of the irrigation entities and their landowners/shareholders in diverting the stored water and putting it to beneficial use and held that:

[w]ithout the diversion by the irrigation districts and beneficial use of water for irrigation purposes by irrigators, valid water rights for the reservoirs would not exist under Idaho law. The beneficial use theme is consistent with federal law. The Reclamation Act provides that “the right to use of water acquired under provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right.”

*Id.* at 110, 157 P.3d at 604.

Just as a storage right cannot be established without beneficial use, a storage right cannot be satisfied or filled without beneficial use. This Court should follow the same holding and reasoning it made in the ownership case and hold that beneficial use is a critical element to determine the basis, measure and limit of a storage water right. If there has been no beneficial use of the water, and the water is instead released as part of operational flood control, then the storage right has not been satisfied. There is no “refill” if the right has never been satisfied in the first place.

**5. The SRBA court Erred in Assuming Flood Control is a “Use” by the Storage Right Holder or Reservoir Operator.**

While the SRBA court declined to address whether a storage water right is satisfied or filled

when water is released for flood control purposes, the SRBA court made numerous references to the storage right holder or operator's "use" of flood control. (R. 890, 893). These references inappropriately imply that the release for flood control is a use of the storage water right. As discussed, *supra*, the quantity of the storage water right is limited by the volume of water physically diverted and stored for the intended beneficial use and the quantity physically diverted/released for the intended beneficial use. This is precisely why the storage water right has the two components such as "Irrigation Storage" and "Irrigation from Storage" with a specified quantity for each. The purposes or authorized beneficial uses identified in the water right and the specific quantities for each provide the quantity limitations. However, those quantity limitations are not met or "used" when water is not diverted and beneficially used for the authorized beneficial uses but rather is allowed to pass through or is released as an operational flood control. The quantity of water authorized for "Irrigation Storage" is not "used" or satisfied water when the water is not physically diverted or stored but is allowed to pass through the reservoir for flood control purposes. Further, the quantity of water for "Irrigation from Storage" is not "used" or satisfied when water is released/vacated because of operation or flood control purposes. This Court should correct the erroneous suggestions by the SRBA court that flood control is a "use" by the storage right holder or reservoir operator.

#### **IV. CONCLUSION**

For the foregoing reasons, the Ditch Companies respectfully request that this Court address the central or "more important" issue raised by this basin wide issue and clarify that water which is not stored, and which passes through a reservoir for flood control or other purposes, does not require a "refill" remark, and does not jeopardize a storage right holder's ability to subsequently store the

water in priority. Additionally, the Ditch Companies request that the Court clarify that “refill” does not include water which is stored for a beneficial purpose, i.e. irrigation, but later released/vacated of a different purpose such as flood control. Such releases for purposes other than the intended beneficial purpose should not jeopardize a storage right holder’s ability to subsequently store the water in priority. This Court should answer this basin-wide issue by holding that Idaho law does not require a remark authorizing storage water rights to “refill,” under priority, when space is vacated for flood control.

In the alternative, the Ditch Companies respectfully request that this Court remand this matter for the SRBA court to address the issue of whether a storage water right is filled or satisfied when water is released for flood control purposes. The Ditch Companies also request that the Court correct and clarify that flood control is not a “use” of the storage right if the water is not diverted and beneficially used for the intended purpose.

DATED this 23<sup>rd</sup> day of October, 2013.

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By 

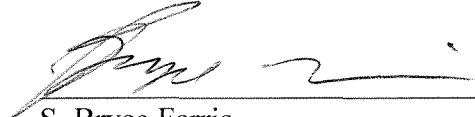
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## CERTIFICATE OF MAILING

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