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IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 40975-2013

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).

BOISE PROJECT BOARD OF CONTROL,

Appellant,

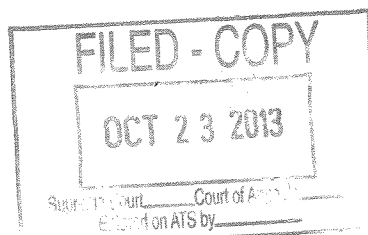
v.

STATE OF IDAHO, UNITED STATES OF AMERICA, AMERICAN FALLS RESERVOIR DISTRICT #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 IRR. DIST., NEW YORK IRR. DIST., BIG WOOD CANAL CO., BALLENTYNE DITCH CO., BOISE VALLEY IRR. DITCH CO., CANYON COUNTY WATER CO., EUREKA WATER CO., FARMERS' CO-OPERATIVE DITCH CO., MIDDLETON IRR. ASSN., INC., MIDDLETON MILL DITCH CO., NAMPA & MERIDIAN IRR. DIST., NEW DRY CREEK DITCH CO., PIONEER DITCH CO., SETTLERS IRR. DIST., SOUTH BOISE WATER CO., THURMAN MILL DITCH CO., IDAHO POWER COMPANY, FREMONT-MADISON IRR. DIST., IDAHO IRR. DIST., UNITED CANAL CO., CITY OF POCA TELLO, UNITED WATER IDAHO, INC., A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, PIONEER IRR. DIST.,

Respondents.

RESPONDENT STATE OF IDAHO'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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STATEMENT OF THE CASE¹

I. Nature Of The Case.

This appeal involves a “basin-wide issue” in the Snake River Basin Adjudication (“SRBA”). While most SRBA proceedings are “subcases” in which individual water right claims are resolved, Administrative Order 1 (“AO1”) § 10, a basin-wide issue “materially affects a large number of parties to the adjudication” and “is broadly significant.” AO1 § 16. The District Court designated “Basin-Wide Issue 17” as:

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

R., p. 257. All parties agreed a “remark” was not required, but relied on different interpretations of Idaho law to reach this conclusion. The District Court determined that once a storage water right has “filled,” a remark authorizing priority refill would be contrary to Idaho law, even if water diverted and stored pursuant to the right had been used by the reservoir operator for flood control purposes. *Memorandum Decision* at 9-10, 13-14.²

II. Course Of Proceedings And Statement Of Facts.

Much of the Boise Project Board of Control’s (“Boise Project”) appeal is based on assertions of the nature and scope of the District Court proceedings, and there is considerable overlap between the “Course of Proceedings” and the “Statement Of Facts” in this appeal. They

¹ While there is considerable overlap between this appeal and the appeal filed by the “Surface Water Coalition” (Idaho Supreme Court Case No. 40794) in terms of background facts, District Court proceedings, and ultimate legal issues, they are not consolidated appeals and further the Boise Project Board of Control has made certain arguments and factual assertions that partially distinguish this appeal from that of the “Surface Water Coalition.” These arguments and assertions are addressed in the latter portion of this brief, beginning with Part VI of the “Argument” section; the portions preceding that part are substantially the same as those in the State’s brief in the “Surface Water Coalition’s” appeal.

² For clarity, the *Memorandum Decision* will be cited directly. It is in the clerk’s record at pp. 883-96.

are therefore combined in this section, which also includes background information necessary to provide context.

A. Background.

In 2006, the United States Bureau of Reclamation (“Bureau”) filed amended SRBA claims for its licensed storage water rights at American Falls and Palisades reservoirs, asserting for the first time that the “Total Quantity Appropriated” included “the right to refill under the priority date of this water right to satisfy the United States’ storage contracts.” R., pp. 93, 97. The Director’s recommendations for these water rights did not authorize priority “refill,” and therefore the Bureau filed *Objections* asserting the quantity elements of the American Falls and Palisades water rights should include the following remark: “This water right includes the right to refill under the priority date of this water right to satisfy the United States’ storage contracts.” *Order* at 3-4; R., pp. 109, 116.³ The *Objections* further asserted “[a] remark for refill is necessary under this element to preserve the historical practice of maximizing the water resources above Milner Dam for use by Reclamation contractors.” R., pp. 111, 117.

The Bureau’s American Falls and Palisades claims were based on water right licenses issued in 1942 and 1973. R., pp. 101-02, 106. The licenses, however, did not include the Bureau’s proposed remark, any references to “refill,” the Bureau’s contracts, or historic practices above Milner Dam. *Id.* Rather, the American Falls license provided that the amount of water appropriated under the right “shall not exceed 1,800,000 acre feet per annum.” R., p. 101. The Palisades license similarly provided that the amount of water appropriated “shall not exceed

³ Minidoka Irrigation District, one of the Coalition entities, also filed *Objections* in the American Falls and Palisades subcases asserting that the storage water rights “include the right to refill the reservoir in priority.” R., p. 123.

1,200,000 acre feet per year.” R., p. 106. The Bureau’s priority “refill” claims for American Falls and Palisades were also unique: the Bureau had not claimed priority “refill” as an element of any of its other licensed-based or decree-based SRBA storage water right claims. R., p. 204.⁴

Because the American Falls and Palisades “refill” claims were unique and differed from the licensed quantities, Tr., 9/10/2013, p. 28, ll. 18-25, the State “disagreed with the United States’ proposed storage refill remark” and “proffered [an] alternative remark” via a summary judgment motion, “arguing that it more accurately reflects Idaho law on storage refill.” *Memorandum Decision* at 4. “As a result of the remarks proposed by the United States and the State, a dispute arose in subcase nos. 01-2064 [American Falls] and 01-2068 [Palisades] over the state of Idaho law regarding the ability of a storage water right holder to refill, under priority, water diverted and stored pursuant to a valid storage water right but which was used by the reservoir operator for flood control purposes.” *Id.* at 4-5.⁵

B. The Petition To Designate A Basin-Wide Issue.

During the American Falls and Palisades proceedings, a group of interested water users, including the Boise Project, “began to take note” of the various “refill” arguments and filed the *Petition To Designate Basin-Wide Issue*, which “argued that the state of Idaho law as it pertains to the ability to refill, under priority, stored reservoir water vacated for flood control is an issue

⁴ The Bureau filed separate “statutory” claims in the SRBA based on claims filed in 1983 with the Department for storage “refill” based on historic beneficial use. Idaho Code §§ 42-243, 42-245; R., pp. 131, 133, 136, 138, 139, 143. The “statutory” SRBA claims have been decreed disallowed by the SRBA District Court. R., p. 204 n.4.

⁵ The Special Master denied the State’s summary judgment motion in July 2012 and the Bureau subsequently withdrew its proposed “refill” remark. R., pp. 604 n. 2, 612. The Coalition, however, has objections pending in the Basin 01 proceedings that seek priority “refill” remarks. *Id.* The “fill” and “refill” issues in those proceedings have been stayed pending final resolution of Basin-Wide Issue 17.

of basin-wide significance.” *Memorandum Decision* at 5.⁶ The *Petition* framed the issue as a question of law: “**Does Idaho law require a remark authorizing storage rights to ‘refill’ space vacated for flood control?**” R., p. 14 (emphasis in original). It urged “an early and unified legal determination . . . which can then be applied to individual storage water rights.” *Id.* at 15. In filings seeking to expedite the basin-wide proceedings and consolidate them with the “refill” issue in the American Falls and Palisades subcases, the petitioners characterized the proposed basin-wide issue as “a question of law” and argued they sought to address the “legal question at the heart” of the State’s summary judgment motion. R., pp. 31, 68, 74. The “Surface Water Coalition” (“Coalition”⁷), which had been participating in the American Falls and Palisades subcases, supported the *Petition* and requested the District Court to “consider the following two issues as part of the basin-wide proceeding:”

The storage right holder determines when to divert water to storage in order to maximize the beneficial use of water under this right.

The beneficial use under this right is fully satisfied when the water stored and available for beneficial use equals the capacity of the reservoir.

R., p. 229 (bold in original). The Bureau filed a brief supporting designation of these “sub-issues,” R., p. 240, and implying the *Petition* was not limited to water released “because of flood control,” but also extended to water released for “other operational reasons.” *Id.* The State

⁶ The petition was filed by the Boise Project, Black Canyon Irrigation District, New York Irrigation District, and Pioneer Irrigation District. R., p.13.

⁷ The Coalition consists of A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

opposed the *Petition* on several grounds, *Order* at 2, 5-6, including that the Special Master had rejected the State's remark and the Bureau had withdrawn its remark. R., p. 202.

At the September 10, 2012 hearing on whether to designate a basin-wide issue, the District Court stated that the basin-wide issue as framed by the petitioners presented a "pure legal issue," Tr., 9/10/2012, p. 16, l. 2, and "a specifically framed legal issue." *Id.*, p. 18, l. 11. The petitioners, however, stated the basin-wide issue should also allow for development of a record of historic reservoir practices and operations in Basin 63 to "correct" and "augment" the record in the American Falls and Palisades proceedings. *Id.*, p. 14, l. 12. The petitioners further alleged there had been a "substantial change or rewrite" of the "reservoir accounting system, and the way it views fill and refill," and "so what we're dealing with here is largely a unified issue that deals largely with this new accounting method, so it's partly a legal question, partly a factual question." *Id.*, p. 19, l. 25 – p. 20, l. 7. The Coalition acknowledged it was requesting expansion of the proposed basin-wide issue to include "a couple other issues or subparts that we think are tied to the overarching question," *id.*, p. 23, l. 22, and the Bureau specifically requested that the proposed issue include "both operational releases and flood control releases." *Id.*, p. 43, l. 3.

The District Court expressed concerns that these proposals would lead to litigating factual issues and claims of historic practices, operations, and agreements at various individual projects and reservoirs, and that such matters do not lend themselves to basin-wide proceedings. *Id.*, pp. 14-16, p. 22, ll. 15-17, p. 24, ll. 5-8. The District Court observed based on prior SRBA experience that issues initially thought to be legal in nature and suited for basin-wide

proceedings sometimes were found to be “based on different factual circumstances” and more appropriately addressed in individual subcase proceedings. *Id.*, p. 15, ll. 1-11.

I mean if we’re dealing with Basin 63, the [Boise]; Basin 65, the [Payette]; and now Basin 01; and everybody’s going to argue, ‘Yeah, this may be the law, but we have a different set of circumstances because of historically it’s been done in this manner,’ are we going to get – are we going to get too bogged down for a basin-wide issue? . . . I’m just wondering if everybody else has a different perspective as to how water has been administered with respect to a different project. Are we just – is it going to be too cumbersome to handle as a basin-wide issue?

Id., p. 15, l. 18 – p. 16, l. 13.

Counsel for the petitioners, the Coalition, and the Bureau responded to these concerns by repeatedly reassuring the District Court that the issue was legal and would require little if any factual development:

- “I do believe this is primarily a legal issue. I don’t think you need to get into the specific operations or agreements that deal with the reservoirs.” *Id.*, p. 16, ll. 21-23.
- “And I don’t think you need to get into the specific – the operational specifics or agreements governing any particular reservoir to reach that particular issue. *Id.*, p. 17, ll. 6-9.
- So I don’t think there needs to be a whole heck of a lot of factual developing of reservoir-by-reservoir operations to answer what I agree boils down to a legal question” *Id.*, p.17, l. 23 – p. 18, l. 1.
- “I think it does raise some fundamental legal questions that we do need addressed.” *Id.*, p. 21, l. 1.

- “I think there are some unique facts, but generally a legal – a fundamental legal question of okay, how do we administer storage water rights.” *Id.*, p. 21, l. 17.
- “But overarching Idaho water law, you know, what constitutes satisfaction of a storage water right, I think it’s got to be the same across the board. I don’t think you can have different legal definitions of satisfying a water right or any type of right.” *Id.*, p. 22, l. 21 – p. 23, l. 2.
- “But I think it’s a pure legal issue, just some fundamental definitions, how do we define this right, what’s necessary to clarify it for administration.” *Id.*, p. 24, ll. 15-17.
- “And we feel that that is an issue that really is a purely legal issue and can be resolved with a minimum of factual development.” *Id.*, p. 25, ll. 13-15.

The State expressed concerns that the proposed proceedings would include challenges to the Department’s water accounting methodologies, factual development for individual reservoirs and water rights, “rehabilitative work” on the record in the American Falls and Palisades subcases, *Id.*, pp. 29-30, 32-33, and would open the door to “issue drift.” *R.*, p. 202. While the State agreed that “in broad terms, certainly,” the “definition of fill [has] got to be the same for all reservoirs,” the State pointed out that “as far as accounting, how it’s going to work with any individual water right, that may not be the same.” *Tr.* 9/10/2013, p. 33, ll. 14-23. The State acknowledged that a basin-wide issue could be appropriate for an “overarching legal issue,” but the petitioners’ broad characterization of the original issue and the new issues proposed by the Coalition and the Bureau would lead to factual questions and challenges to the Department’s methods of accounting for water distributions to individual reservoirs. *Id.*, p. 35 ll. 16-17.

The District Court questioned counsel for the petitioners about “expanding the issue,” to which counsel responded: “We support the expansion of the issue, if need be. As we mentioned during the hearing on the motions to expedite, we have full faith in your capabilities in re-crafting or re-drafting of the issue as necessary.” *Id.*, p. 39, ll. 17-21. Counsel’s allusion to what “we mentioned” in “the hearing on the motions to expedite” was a reference to the July 30, 2012 hearing on the motions to expedite, at which the District Court stated, “[b]ut I think what the concern is is that if the court modifies the issue, then we have to know exactly what we are and are not consolidating from Basin 01. In other words, I’m going to have to paint with a pretty fine brush. . . .” Tr., 7/30/2012, p. 38, ll. 9-13. Counsel for petitioners at that time responded: “Your honor, if I can address your concerns about the fine brush: All the parties on this side of the television have full faith in your ability to paint a very detailed picture.” *Id.*, p. 39, ll. 2-5.

C. The Order Designating The Basin-Wide Issue.

The District Court took these matters under advisement and subsequently issued the *Order Designating Basin-Wide Issue*. The *Order* determined “the issue raised by the Petitioners” was “fundamentally an issue of law” and designated the issue as it had been proposed, with the addition of the phrase “under priority”:

[T]he Court in its review of the file and the briefing submitted by the parties reads 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. Therefore, the Court in its discretion will frame the basin-wide issue as follows: **“Does Idaho law require a remark authorizing storage rights to ‘refill’, under priority, space vacated for flood control?”**

Order at 5 (emphases in original). The *Order* also limited the scope of the designated issue:

The State's concern regarding 'issue drift' is well noted. In response to the State's concern, the Court will not consider the specific factual circumstances, operational history, or historical agreements associated with any particular reservoir in conjunction with this basin-wide issue. Such specific factual inquiries do not lend themselves to review in a basin-wide proceeding involving many parties and many reservoirs. Rather, the basin-wide issue will be limited to the above-identified issue of law. Furthermore, as set forth below, the Court will not consider the various other issues proposed by the Surface Water Coalition or the United States.

Id.

The *Order* also rejected the State's argument that the legal question of priority "refill" could be addressed in the American Falls and Palisades subcases: "the Special Master's [report and recommendation] does not squarely address the legal issue of whether Idaho law authorizes the priority refill of a storage water right when water diverted under that right is released for flood control. The cat is out of the bag on that issue and numerous parties in the SRBA desire that it be addressed." *Id.* at 6. The District Court then turned to the two additional issues proposed by the Coalition:

In the Court's view the Surface Water Coalition's proposed issues, which both pertain to how a storage right is initially filled, are not well situated for resolution in a basin-wide proceeding. An on-stream reservoir alters the stream affecting the administration of all rights on the source. Accordingly, some methodology is required to implement priority administration of affected rights. Addressing the issue of reservoir fill may require factual inquiries, investigation and record development specific to a given reservoir, including how the State accounts for fill in each individual reservoir under its accounting program. As stated above, such factually specific inquiries do not lend themselves to review in a basin-wide setting involving multiple reservoirs. Furthermore, unlike the issue of priority refill which is directly related to the quantity element of a water right, the issue of fill is purely an issue of administration.

Id. at 6. The *Order* also declined the Bureau's request to expand the proposed issue to include all "operational" releases, determining it would lead to factual inquiries and was too broad and undefined for resolution in basin-wide proceeding. *Id.* at 6-7.

No objections were filed to the *Order*. No motions were filed for reconsideration or amendment of the *Order's* formulation of the basin-wide issue, its rejection of the two sub-issues proposed by the Coalition, or to its admonishments against using the proceedings as a vehicle for litigating "specific factual circumstances, operational history, or historical agreements associated with any particular reservoir," or "how the State accounts for fill in each individual reservoir under its accounting program." *Order* at 5-6. The *Order* authorized each interested party to file an opening brief, a response brief, and an optional reply brief. *Order* at 7-8.

A number of parties filed briefs, including the Boise Project, the Coalition and the State. R., pp. 356-500, 545-679, 702-726, 737-823. The Boise Project and the Coalition also filed affidavits, R., p. 262, 511, 825, and the State filed an objection and motion to strike regarding certain arguments raised in briefing¹ and requesting the Boise Project's affidavit be stricken. R., p. 501. Several parties, including the Boise Project and the Coalition, opposed the State's objection and motion to strike. R., pp. 727-736, 847-53, 857-871. The District Court sustained the State's objection from the bench, Tr., 2/12/2013, p. 47, ll. 7-16, and on March 30, 2013 issued the *Memorandum Decision* and an *Order Granting Motion To Strike Affidavit Of Shelley M. Davis*. R., pp., 883, 900. The Bureau, the Boise Project, and the Coalition filed separate appeals. R., pp. 906, 913, 920. The Coalition and the Boise Project filed their opening briefs on

September 25, 2013. The Bureau moved to dismiss its appeal the next day, and this Court granted the Bureau's motion on September 27, 2013.

ARGUMENT

I. Standard Of Review.

The question of designating a basin-wide issue in the SRBA is committed to the sound discretion of the District Court, AO1 § 16, and therefore is reviewed for abuse of discretion. This Court reviews questions of law *de novo*. *Idaho Dep't of Health & Welfare v. McCormick*, 153 Idaho 468, 470, 283 P.3d 785, 787 (2012).

II. Summary Of Argument.

The narrow legal issue in Basin-Wide Issue 17 is the question of whether under Idaho law the satisfaction of a storage water right is defined by the physical contents of a reservoir or by the annual volume of water authorized to be stored under the right: they are not the same, and therein lays the root of the issue. The position of the Petitioners, including the Boise Project, was that a storage water right can never be satisfied unless and until the reservoir is physically filled to capacity with water. The position of the State was that the satisfaction of a storage water right is defined by annual storage volume set forth in the quantity element of the right. The District Court concluded that the physical "fill" of a reservoir is distinct from the legal "fill" of a storage water right, and there can be situations where a storage water right is satisfied even though the reservoir is not filled to capacity with water.⁸ The District Court also concluded that

⁸ For instance, when unified operations of multiple reservoirs allow water legally decreed to one reservoir to be physically stored in another. *Memorandum Decision* at 9.

once a storage water right has been satisfied or “filled,” refilling reservoir space vacated for flood control purposes, *under the priority of the right*, would be contrary to Idaho law.

The District Court correctly distinguished these pivotal legal issues from the separate question of how a storage water right is initially determined to be satisfied or “filled” under the accounting methods and procedures the Director uses to distribute water to on-stream reservoirs in accordance with the prior appropriation doctrine. Particularly in the case of on-stream reservoirs operated for both irrigation storage and flood control purposes, accounting for the distribution of water among appropriators in accordance with the prior appropriation doctrine is an inherently complex and technical undertaking. The District Court correctly determined this question is statutorily committed to the Director, and is subject to judicial review to ensure the Director’s accounting complies with the prior appropriation doctrine as established by Idaho law.

The Boise Project, having had its legal theories rejected by the District Court, now attempts to re-define the basin-wide issue with assertions and arguments that are contrary to the record, including express representations to the District Court. These arguments and the Boise Project’s re-asserted legal “fill” arguments lack merit and should be rejected.

III. The District Court Defined The “Fill” Of A Storage Water Right In Terms Of The Decreed Volume Rather Than Reservoir Contents Or Capacity.

The Boise Project asserts the District Court simply “assumed” a definition of the term “fill” and “left the definition of that word for a future decision by the Director.” *BP Brief* at 5. The record shows, however, that the District Court defined the term and rejected the Boise Project’s arguments.

A. It Was Undisputed That Idaho Law Does Not Require A Priority “Refill” Remark.

While Basin-Wide Issue 17 was framed in terms of whether a “remark” is required to authorize priority “refill,” the “remark” aspect of this question was resolved in the first round of briefing because all parties asserted Idaho law does not require such a remark. R., pp. 364, 394-95, 401, 422, 437, 566, 681.⁹ The parties relied, however, on differing interpretations of the legal definition of the satisfaction or “fill” of a storage water right under Idaho law.

B. The Parties Disputed The Legal Definition Of The “Fill” Of A Storage Water Right.

The Petitioners argued a remark is not required because an Idaho storage water right, by its nature, includes a priority entitlement to physically fill a reservoir to full capacity with water. *See* R., p. 651 (“Here, the issue concerns the interpretation of the storage water right itself”); *id.*, p. 653 (“the water right is defined by what quantity of water is needed to physically fill the empty flood control space”); Tr., 2/12/2013, p. 146, l. 24 (“That’s what this case is about. Do we get to physically fill the water right for the purpose stated”); *id.*, p. 49, l. 15 (“the placeholders have the right to physically fill the reservoir”); *id.*, p. 59, l. 17 (“In the Boise, what we’re looking for is a recognition that the water users in the Boise have the right to fill the space”).

The key point, according to the Petitioners, was that physically refilling reservoir space vacated for flood control purposes is in reality simply “filling” the water right. *See* R., p. 483 (“although the reservoir may physically refill . . . the storage water right is not ‘refilled’ or satisfied twice”); *id.*, p. 719 (“What the State categorizes as ‘refill’ the Boise Project contends is ‘fill’ of its water rights.”) (capitalization and underlining omitted); *id.*, p. 849 (“The essence of

⁹ While the Bureau did not explicitly state whether Idaho law requires such a “remark,” like the other Petitioners the Bureau argued its storage water rights already included the right of priority refill. R., p. 386.

the Petitioners' position is that what the State has demarcated 'refill' legally should be defined as part of the initial 'fill.'"). In short, the Petitioners' position was that "the right to priority refill is inherent in the nature of a storage water right." *Memorandum Decision* at 8.

The State argued, in contrast, that the satisfaction or "fill" of a water right is defined by the annual volume of water stated in the quantity element, not whether the reservoir is physically filled with water. R., pp. 606-08, 762. The State argued a remark authorizing priority "refill" after the decreed annual volume had been reached would "(1) unlawfully result in an unquantified water right, (2) constitute an enlargement . . . and (3) conflict with the requirement of maximizing beneficial use and minimizing waste of water." *Memorandum Decision* at 8.

The significance of the dispute lay in the fact that the legal "fill" of a storage water right defines how much water the Director and the watermasters as supervised by the Director distribute to a reservoir under the priority of its storage water right. *See* Idaho Code § 42-602 (providing that water must be distributed "in accordance with the prior appropriation doctrine"). Given the parties' arguments on this question, the District Court was correct in concluding that "[r]esolution of the issue requires an analysis of the nature of storage water rights under the doctrine of prior appropriation as established in Idaho." *Memorandum Decision* at 5.

Resolving the issue also required the District Court to define the terms "fill" and "refill" with respect to storage water rights and reservoirs. The term "refill" had been the subject of confusion and disagreement in preliminary proceedings, which was one reason the State opposed the *Petition*. Tr. 7/30/2012, p. 32, l. 8 – p. 33, l. 3. The Boise Project dismissed this concern as "semantics," *id.*, p. 35, l. 19, acknowledged that "apparently we're going to continue to disagree

about the definition of refill,” and urged the Presiding Judge to expedite the basin-wide proceedings and “make the determination for himself.” *Id.*, p. 36, ll. 7-14.

C. The District Court Defined “Fill” In Terms Of The Decreed Annual Volume Of Water.

The District Court made its determination in the *Memorandum Decision*: “The term ‘refill’ is not a legal term of art under Idaho law, but its common meaning is ‘to fill again.’” *Memorandum Decision* at 9 (quoting *The American Heritage Dictionary of the English Language*). The District Court also determined the meaning of the root term, “fill”: “The term ‘fill’ means ‘to satisfy or meet.’” *Id.* (quoting *The American Heritage Dictionary of the English Language*). Moreover, the District Court recognized a crucial distinction: “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.)” *Id.* (emphases added).

In recognizing this distinction, the District Court necessarily rejected the Petitioners’ contention that the legal “fill” of a storage water right is the same as a reservoir physically filling to capacity with water. It also accepted the State’s positions that the legal “fill” of a storage water right is defined by the annual volume stated in the quantity element, and the right is satisfied when the total quantity stored under the right’s priority during the year reaches the licensed or decreed quantity. The conclusions are confirmed in the *Memorandum Decision*:

The distinction between the two uses of the term is significant, as there may be situations where the storage water rights associated with a particular reservoir are considered filled or satisfied even though the reservoir has not physically filled with water. . . . As a result, the storage water rights in a reservoir may be

considered filled or satisfied even though available space may exist in the reservoir to which the right was decreed.

Id. (emphasis added). This threshold determination resolved the legal question of whether the satisfaction or “fill” of a storage water right is defined by the physical contents of the reservoir or by the annual volume of water authorized for storage under the quantity element of the water right. The Boise Project’s assertions that the District Court “assumed” a definition of “fill” or left its definition to the Director discretion are incorrect. The District Court simply rejected the Boise Project’s arguments.

The District Court illustrated its conclusion by pointing out that “[m]any of the reservoirs implicated in this proceeding are administered as a unified system where storage space can be exchanged between reservoirs within the system.” *Id.* “For example, Palisades Reservoir can be holding and storing water that is decreed to American Falls Reservoir. As a result, the storage water rights in a reservoir may be considered filled or satisfied even though available space may exist in the reservoir to which the right was decreed.” *Id.*

The Boise Project has not disputed this example, nor can it in good faith do so: the type of “unified system” operation the District Court described has been in place in the Boise River basin decades. *See Memorandum Decision And Order On Cross-Motions For Summary Judgment Re: Bureau Of Reclamation Streamflow Maintenance Claim, In Re SRBA, Subcase No. 63-3618 (Lucky Peak Reservoir)* (Sep. 23, 2008) (“*Lucky Peak Decision*”) at 5-6 (referring to the “coordinated plan of operation for all three reservoirs” and “exchange of storage” under a 1953 “Memorandum Of Agreement . . . for Flood Control Operations of Boise River Reservoirs,

Idaho”).¹⁰ Under such operations the place of storage for each individual storage water right has essentially been expanded to include all reservoirs in the system, and therefore it is not possible to conclusively determine whether a given storage water right has been satisfied simply by looking to the physical contents of the reservoir for which the right was originally decreed.¹¹

D. Idaho Law Supports The District Court’s Definition Of “Fill” Of A Storage Water Right.

Idaho law supports the District Court’s conclusion that the satisfaction or “fill” of a storage water right is defined by the annual volume of the quantity element rather than the physical contents of the reservoir. Idaho law provides that the “quantity of water” decreed under a water right is to be expressed in terms of a fixed “annual volume” of water in “acre-feet per year,” Idaho Code § 42-1411(2)(c), or “AFY,” R., p. 490, not “what[ever] quantity of water is needed to physically fill” empty reservoir space. R., p. 652. Further, this Court has held it is “essential” that an Idaho water right be defined “in terms of quantity of water per year,” *A&B Irr. Dist. v. ICL*, 131 Idaho 411, 416, 958 P.2d 568, 573 (1997) (emphasis added), to establish “exactly how much water to which one is entitled.” *Savage Lateral Ditch Water Users Ass’n v. Pulley*, 125 Idaho 237, 243, 869 P.2d 554, 560 (1993) (emphasis added). Interpreting a storage water right as an entitlement to physically fill a reservoir to full capacity would fail to define a firm and fixed annual quantity of water. Weather and water supply conditions often create demands for stored water to be released before a reservoir has physically filled to capacity, and

¹⁰ The *Lucky Peak Decision* is appended hereto. (Appendix 1)

¹¹ In the District Court’s example it is also possible for a reservoir to physically fill with water even though its water right has not been satisfied. In the District Court’s example, Palisades is holding water decreed to American Falls and thus could physically fill even though its water right had not been satisfied or “filled.” In other words, there are situations when defining the “fill” of a storage water right by the physical contents of the reservoir would result in less storage for some spaceholders.

the operational objectives for the reservoir may require storage to be released before the reservoir physically fills to capacity. These are particularly significant considerations at multiple purpose reservoirs that are operated not just to store water for irrigation pursuant to state water rights, but also for flood control pursuant to federal law, such as Lucky Peak on the Boise River:

the 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 the Lucky Peak Dam and Reservoir. The BOR has flexibility in releasing the water . . . the BOR monitors and manages the stream flow releases from the reservoir on a day-to-day if not hour-to-hour basis.

Lucky Peak Decision at 22.

At such reservoirs, tying the quantity of the water right to the empty space in the reservoir would not define a firm and fixed annual volume of water, but rather would “award an uncertain amount of water to one appropriator whose needs are vague and fluctuating,” *Village of Peck v. Denison*, 92 Idaho 747, 750, 450 P.2d 310, 313 (1969), and result in “the elimination” of the “essential element” of quantity, which “vitiates the existence of a legal water right.” *State v. ICL*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998).

While the Boise Project argues that a storage water user is “entitled to fill the reservoir in priority” as “an element” of a storage water right. *BP Brief* at 1; *see id.* at 6 (asserting “the right to fill the reservoir”); *id.* at 28 (asserting “a property right to physically fill the reservoir”), and that “the quantity of the rights is simply the capacity of the reservoir,” *id.* at 23, the Boise Project has not cited any Idaho decision, statute, or rule providing that a storage water right is quantified by the physical content of the reservoir or the “empty” or “available” reservoir space rather than

a fixed annual volume of water. Indeed, a reservoir is simply a place of storage, a part of the diversion and conveyance works for a storage water right. Just as the “fill” of a water right for direct diversion to irrigation use is determined by the licensed or decreed diversion rate rather than the physical capacity of the canal, the “fill” of a storage water right is quantified by licensed or decreed annual volume rather than the physical capacity of the reservoir. As the District Court held, “storage water rights are integrated into Idaho’s prior appropriation doctrine on the basis of relative priority the same as other water rights.” *Memorandum Decision* at 6; *see Am. Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) (“AFRD2”) (“One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right.”).

The Boise Project’s argument that the District Court erred by focusing on the quantity element of a storage water right and failing to consider it “as a whole,” *BP Brief* at 25, avoids the legal question, i.e., which element of a water right defines the scope of the appropriation. A water right must define the “quantity of water” appropriated, Idaho Code § 42-1411(2)(c), and as the District Court pointed out, “[i]t is the quantity element that defines the duration of priority administration.” *Memorandum Decision* at 11. It is no coincidence that the “refill” issue was triggered by the Bureau’s claim for priority “refill” remarks in the quantity elements of the American Falls and Palisades water rights. *R.*, pp. 93, 97, 109, 116. A priority “refill” claim is simply a claim for an undefined amount of additional water under the priority of the right.

The ambiguity of the term “refill” has unnecessarily clouded a garden variety question of Idaho water law – how much water is appropriated under a water right – and made it appear to be

something new and different. *See Memorandum Decision* At 11 (“Approaching the issue from the perspective of priority refill . . . misses the mark”).¹² The quantity element of a storage water right defines priority diversions in terms of a firm and fixed annual volume of water, not in terms of whatever amount is necessary on any given day to physically fill or refill the reservoir to full capacity. The District Court recognized this basic legal principle, and the clear distinction Idaho law draws between the legal definition of the “fill” of a storage water right, vis-à-vis the administrative determination of when sufficient water has been distributed to a storage water right to satisfy or “fill” the annual volume authorized by the quantity element of the right.

IV. The District Court Correctly Declined To Address The Question Of How The Director Determines When A Storage Water Right Has “Filled.”

A. The District Court Distinguished Legal “Fill” From Accounting for Water Distributions.

The Boise Project’s arguments that the District Court avoided defining what constitutes the legal “fill” of a storage water right and left that determination to the unfettered discretion of the Director, *BP Brief* at 5, 19, mischaracterize the District Court’s decision and veer into hyperbole. As previously discussed, the District Court determined that the legal “fill” of a storage water right is defined by the “decreed volume” of water rather than by physically filling the reservoir to full capacity. The District Court distinguished this legal question from the administrative determination of “when the quantity element of a storage water right is rightfully considered to be satisfied,” *Memorandum Decision* at 11 (bold omitted), which the District Court concluded is “an accounting issue which this basin-wide proceeding does not address.” *Id.* The

¹² The State notes here that it intentionally avoided using the term “refill” in the remark the State proposed in the American Falls and Palisades subcases. *See Memorandum Decision* at 4.

District Court determined that resolving this question would require “factual inquiries, investigation and record development” specific to particular reservoirs or water rights, and would “require a record as to how the Department accounts for fill in each individual reservoir under its accounting methodology.” *Memorandum Decision* at 11. The District Court correctly relied on the Idaho Code, “[i]n particular, Idaho Code § 42-602,” and this Court’s decision in *AFRD2*, in reaching these conclusions. *Memorandum Decision* at 11-12.

B. The District Court Lacked Jurisdiction To Review The Director’s Accounting Methods Because The Petitioners Had Not Exhausted Administrative Remedies.

The Idaho Code expressly provides the Director has “direction and control over the distribution of water from all natural sources” in a water district and “shall distribute water in accordance with the prior appropriation doctrine.” Idaho Code § 42-602.¹³ Watermasters as supervised by the Director distribute water and regulate diversions in accordance with the prior appropriation doctrine. *Id.* §§ 42-602, 42-607. Under the Idaho Code and this Court’s decisions, challenges to the Director’s discharge of these duties are subject to the requirement of exhausting administrative remedies before seeking judicial review. Idaho Code §§ 42-1701A(3), 67-5271. This is a jurisdictional requirement, *AFRD2*, 143 Idaho at 871, 154 P.3d at 442-43; *Owsley v.*

¹³ The full text of Idaho Code § 42-602 provides as follows (emphases added):

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Indus. Comm'n, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005), and it is undisputed that the Petitioners have not exhausted the administrative remedies available to address their challenges to the Director's accounting systems, such as petitioning for a contested case or filing a delivery call.

As this Court stated in *AFRD2*, “[i]mportant policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.” 143 Idaho at 872, 154 P.3d at 443 (citation omitted). Such considerations are particular weighty in distributing water and regulating diversions in accordance with Idaho law and appropriators' water rights, which is a complex task requiring specialized expertise and experience:

the state engineer is ‘the expert on the spot’ . . . and we are constrained to realize the converse, that ‘judges are not super engineers’ The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state.

Keller v. Magic Water Co., 92 Idaho 276, 283, 441 P.2d 725, 732 (1968) (citations omitted); see Idaho Code § 42-1701(2) (“[the] director . . . shall be a licensed civil or hydraulic engineer, and shall have had not less than five (5) years’ experience in the active practice of such profession, and shall be familiar with irrigation in Idaho”).

The technical problems of distributing water in accordance with the prior appropriation doctrine as established by Idaho law are formidable when it comes to the Bureau's on-stream

reservoirs, which are intentionally operated to divert and control the entire flow of the river. *See Lucky Peak Decision* at 19 (“the entire flow of the river is diverted and then artificially released”); *United States v. State*, 135 Idaho 655, 662, 23 P.3d 117, 124 (2001) (referring to “major reclamation projects that regulated the flow of the Snake River” and “changed the Snake River from a free flowing river to a controlled river”). While these facilities store water for irrigation purposes under state water rights, they are also operated for federal purposes, including flood control, that are not authorized by their water rights. *Lucky Peak Decision* at 4-13.

The complexity is compounded in basins with multiple on-stream reservoirs, because the inflow to a downstream reservoir may consist in part of stored water released from an upstream reservoir for use by irrigators located below the reservoir system. *See Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 159, 219 P.3d 804, 806 (2009) (“When the Irrigation District's storage water is in the river, it may be comingled with natural flow water”). Further, if the reservoirs are operated as a “unified system,” the water decreed to one reservoir may be physically stored in another. *Memorandum Decision* at 9. Moreover, “many storage right holders also hold natural flow rights that are used in conjunction with their storage rights.” *Id.*

The District Court was correct in concluding that specialized accounting methods, generally implemented through complex computer programs,¹⁴ are necessary to distribute water in such systems. Developing and administering the water accounting procedures and computer programs are examples of tasks that have been statutorily delegated to the Director “[b]ecause of

¹⁴ *See* Robert J. Sutter, Ronald D. Carlson, and Dan Lute, *Data Automation For Water Supply Management*, 9 JOURNAL OF WATER RESOURCES PLANNING AND MANAGEMENT 237 (Vol. 9, No. 3) (July, 1983). A copy is appended hereto (Appendix 2).

the need for highly technical expertise.” *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).¹⁵ The statutory requirement of exhausting administrative remedies and this Court’s decisions require that for matters within the core area of the Director’s technical competence and statutory authority, the Director should be provided the initial opportunity to develop the record and review – and correct, if necessary – any alleged errors.

There is no merit in the Boise Project’s arguments that the District Court ignored their water rights and put them at the mercy of the Director’s unfettered discretion. Idaho law requires the Director to distribute water “in accordance with the prior appropriation doctrine,” Idaho Code § 42-602, and “[t]he “Director’s discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts.” *Memorandum Decision* at 12. The District Court correctly recognized, however, that such judicial review must occur “in an appropriate proceeding, and upon a properly developed record.” *Id.* The Boise Project’s attempt to prematurely reach such matters is contrary to the purpose of Chapter 6 of Title 42, which this Court has recognized is “to insure that a water right consists of more than the mere right to a lawsuit” by “providing for controlled delivery of water.” *Almo Water Co. v. Darrington*, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972).¹⁶ The Boise Project’s arguments, if accepted, would

¹⁵ The Ninth Circuit Court of Appeals has also recognized this principal in a somewhat similar context. *See San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 699 (9th Cir. 2012) (referring to “water accounting” as “inherently within [the Bureau’s] discretion and expertise”).

¹⁶ This Court has also recognized that Chapter 6 is intended to “to further the state policy of securing the maximum use and benefit of its water resources.” *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977).

return Idaho to the administration-by-lawsuit approach of the earliest days of the prior appropriation doctrine.¹⁷

C. The Idaho Code Precludes Judicial Review Of The Director's Distribution of Water In SRBA Proceedings.

Chapter 14 of Title 42 of the Idaho Code includes a “Jurisdictional Limitation” specifically providing that water rights adjudications such as the SRBA are not appropriate proceedings for seeking judicial review. “Review of an agency action of the department of water resources, which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code, shall not be heard in any water rights adjudication proceeding commenced under this chapter.” Idaho Code § 42-1401D. Basin-Wide Issue 17 is part of a water rights adjudication proceeding, and, as previously discussed, the Director’s accounting methods are subject to judicial review under chapter 52 of title 67. The District Court therefore

¹⁷ As described by the same scholar the District Court quoted (*Memorandum Decision* at 10):

It became increasingly evident [in the last decades of the 19th century and the early part of the 20th century] that if the potential of the West’s water resources was to be realized in the developing economy, something had to be done about public control of these resources and their utilization. Necessarily, efficient public control went beyond legislative declarations as construed by the courts in individual controversies and as enforced in their decrees. It invoked continuing action by the executive arm of the State government, through the agency of administrative organizations equipped to find facts and to act upon them. It called for such action by applying clearly worded directives in exercising the police power of the State for the protection and utilization of public property.

Wells A. Hutchins, I WATER RIGHTS IN THE WESTERN UNITED STATES 298 (1971). In Idaho these concerns were addressed through the enactment of statutes such as Idaho Code § 42-101 (1900), which provides in part that the State “shall equally guard all the various interests involved” in providing for the use of the State’s public waters. Among those interests is “the policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (citation omitted). Private litigants are generally concerned with their individual interests rather than the public interest.

lacked jurisdiction to hear the Petitioners' challenges to the Director's accounting methods as part of the Basin-Wide Issue 17 proceedings.

SRBA proceedings are ill-suited to such judicial review in any event. The Director is not a party to the SRBA and his limited statutory role, Idaho Code § 42-1401B, would prevent his participation to the extent necessary to develop the record and explain or defend the accounting methods he employs in the performance of his statutory water distribution duties. Thus, as the District Court noted, the Petitioners must pursue their challenges to the "accounting methodologies" via non-SRBA proceedings "where the Department is a party," *Memorandum Decision* at 9 n. 6, and a full administrative record can be developed.¹⁸

V. Under Idaho Law, Releases Of Stored Water For Flood Control Purposes Are Not A Consideration In Distributing Natural Flow To Storage Water Rights.

The Boise Project argues the District Court should have decided the accounting question because the District Court described it as "the more important issue." *SWC Brief* at 9; *Memorandum Decision* at 11. This argument ignores the fact that even if "accounting" was the "more important" issue, it was not the basin-wide issue proposed by the Petitioners or designated by the District Court. Further, an administrative record is necessary to answer the accounting issue framed by the District Court. *See Memorandum Decision* at 11 ("is water that is diverted

¹⁸ While the SRBA has authority to decree remarks or general provisions "necessary" to administer water rights, *SWC Brief* at 3, 12, 17 (citing Idaho Code § 42-1411(2)(j)), this provision was not intended to transform water right administration from an executive function to a judicial one. *See State v. ICL*, 131 Idaho at 335, 955 P.2d at 1114 ("Although it is not permissible for a court to be required to actively administer the rights in its decree, the general provisions are binding once they become part of the decree, and the executive branch will be required to administer the water rights in conformity with the decree in this case.").

and stored under a storage water right counted towards the quantity of that right if it is used by the reservoir operation for flood control purposes?”).

The Boise Project also argues, however, that as a matter of law “[w]ater that is released [from the reservoir] but that cannot be put to beneficial use for irrigation purposes cannot be charged to the beneficial use accounts of the irrigation entities.” *BP Brief* at 24. The District Court rejected this argument in holding “[i]t is the quantity element of a water right,” not the purpose of use element, “that defines the duration of priority administration.” *Memorandum Decision* at 11. This legal conclusion was correct, and the Boise Project’s argument that water must continue to be distributed to a reservoir in priority until the reservoir operator has delivered to each water user their full allocation of stored water is contrary to Idaho law, for two reasons: (1) the watermaster must look to diversions in measuring distributions among appropriators; and (2) flood control releases are not a question of natural flow distributions but rather are matters of stored water management between the Bureau and its water users.

A. Maximizing Beneficial Use Of Stored Water Is The Appropriator’s Obligation.

The Boise Project’s argument that the satisfaction or “fill” of a storage water right is governed by the quantity applied to the end beneficial use incorrectly assumes that absent a complaint, objection, or delivery call, the watermaster must routinely determine the extent of actual beneficial use, and/or measure out each distribution at the place of actual use. As previously discussed, Chapter 6 of Title 42 is intended to “provid[e] for controlled delivery of water,” *Almo Water Co.*, 95 Idaho at 21, 501 P.2d at 705, and a watermaster making “controlled deliveries” pursuant to Chapter 6 must distribute the decreed quantity “to the correct point of

diversion.” *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977); see *Almo Water Co.*, 95 Idaho at 21, 501 P.2d at 705 (“the watermaster is a ministerial officer . . . authorized to distribute water only in compliance with applicable decrees).”¹⁹ The watermaster does not also routinely evaluate how much water each individual irrigator is actually putting to beneficial use as a condition of distributing water, and doing so would be impracticable: many water users are located far down a canal system, miles from the river diversion, and their individual distributions are controlled by a canal company or irrigation district.

Further, the Idaho Code provides that the “quantity” to which an appropriator is “entitled” is “measured at the point of diversion.” Idaho Code § 42-110. Thus, absent a complaint, objection, or delivery call by another water user, the amount of water the watermaster distributes to an appropriator is determined on the basis of the amount diverted by the appropriator, not the amount the appropriator ultimately applies to beneficial use. This Court has confirmed this statutory principle. See, e.g., *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029, 1032 (1972) (“waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use.”).²⁰ This Court has explained the requirement is a corollary of the “spirit and policy of our constitution and laws, as well as . . . public policy” against permitting “the wasting of our waters.” *Stickney v. Hanrahan*, 7 Idaho 424, 435, 63 P. 189, 192 (1900).

¹⁹ Watermasters are also “supervised by the [D]irector” in distributing water. Idaho Code § 42-602.

²⁰ See *Basinger v. Taylor*, 30 Idaho 289, 300, 164 P. 522, 525 (1917) (“water appropriated for irrigation purposes must be measured to the claimant at the point of diversion”); *Bennett v. Nourse*, 22 Idaho 249, 254, 125 P. 1038, 1040 (1912) (same).

While “[b]eneficial use is enmeshed in the nature of a water right,” *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 113, 157 P.3d 600, 608 (2007) (“*Pioneer*”), it is up to the appropriator, not the watermaster, to ensure the water is beneficially used. *See id.* (“the appropriator must apply the water to a beneficial use”). This continuing obligation may not be shifted to other water users:

Application to beneficial use is an individual matter not collective. Each user must apply his water to a beneficial use and is solely responsible therefor and subject to deprivation if he does not. One user cannot by his neglect forfeit another’s right, nor can he be held responsible for another’s neglect.

Rayl v. Salmon River Canal Co., 66 Idaho 199, 208, 157 P.2d 76, 80-81 (1945).

The Boise Project’s argument is contrary to these principles: under Idaho law, a failure to beneficially use water distributed for the purposes identified in the water right is potential grounds for curtailment or forfeiture, *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997); Idaho Code § 42-222,²¹ not a basis for diverting more water under the priority of the water right after it has been satisfied. Allowing an appropriator to divert additional water under the original priority after the right has been satisfied could require curtailment of other water users, *Memorandum Decision* at 8, 10, impermissibly holding them “responsible” for the appropriator’s failure to make beneficial use of his or her water. *Rayl*, 66 Idaho at 208, 157 P.2d at 80-81.

The Boise Project’s arguments also would have the Director and the watermaster turn a blind eye to actual diversion and storage of water. As previously discussed, the Bureau’s

²¹ The State is not suggesting that the Bureau’s flood control releases are a basis for forfeiture.

reservoirs are intentionally operated so that “the entire flow of the river is diverted and then artificially released.” *Lucky Peak Decision* at 19. At such facilities, an “attempt to distinguish between stored and bypassed water is a distinction without a difference.” *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 914, 792 P.2d 926, 939 (1990) (Bistline, J., dissenting); cf. *Bennett v. Spear*, 5 F. Supp. 2d 882, 884 (D. Or. 1998) (“The Bureau of Reclamation (Reclamation) manages both watersheds, manipulating the flow of water for purposes of irrigation and flood control through a series of channels, reservoirs, diversions, canals, and dams.”). Under Idaho law a storage water right is entitled to the natural flow physically available for storage under its priority until “the total quantity that has been accounted to storage equals the decreed quantity,” *Memorandum Decision* at 9, and it would be contrary to Idaho law for the Director to ignore actual diversion and storage of water simply because a reservoir operator releases stored water for purposes not authorized by the storage water right.

B. Idaho Law Distinguishes Between Distributions Of Natural Flow And Stored Water.

There is no dispute in this case that a storage water right is entitled to sufficient natural flow to satisfy or “fill” the licensed or decreed annual volume in accordance with its priority. After natural flow is diverted and stored in a reservoir pursuant to a valid water right, however, “it [i]s no longer ‘public water’ subject to diversion and appropriation,” but rather “the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to beneficial use.” *Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935); *AFRD2*, 143 Idaho at 879, 154 P.3d at 450 (same); *Memorandum Decision* at 6-7. As this Court has stated, “the very purpose of storage is to retain and hold for subsequent use,”

Rayl, 66 Idaho at 208, 157 P.2d at 80, it is the obligation of the storage right holder to maximize beneficial use of the storage. *Pioneer*, 144 Idaho at 113, 157 P.3d at 608.

The Idaho Code distinguishes between the distribution of natural flow among appropriators and the distribution of stored water among those holding “title to the use” of the stored water. *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. Natural flow distributions are governed by Chapter 6 of Title 42, while stored water distributions are governed by Chapters 8 and 9 of Title 42. *Compare* Idaho Code §§ 42-602 – 42-619 (“Distribution of Water Among Appropriators”) *with* Idaho Code §§ 42-801 – 42-802 (“Distribution of Stored Water”) *and* Idaho Code §§ 42-901 – 42-916 (“Distribution of Water To Consumers”). Indeed, in *Pioneer* this Court based its holding that the spaceholders hold “title to the use” of the stored water in large part on Idaho Code § 42-915. *See Pioneer*, 144 Idaho at 114, 157 P.3d at 608 (quoting Idaho Code § 42-915 and emphasizing its provision for “title to the use of said water”).

Further, while Idaho Code § 42-602 provides for the Director and the watermaster to distribute water from “natural sources . . . in accordance with the prior appropriation doctrine,” Idaho Code § 42-801 addresses the distribution of “stored water” via “the bed of a stream, or a natural water course,” and requires the watermaster to regulate stored water diversions according to “the volume to which [the users] are entitled.” Idaho Code § 42-801. The entitlement is not defined by the storage water right for the reservoir but by other authorities, such as Bureau contracts, canal company shares or bylaws, irrigation district rules or regulations, etc. This was confirmed in *Pioneer*, which recognized that the water users’ storage allocations are not determined by the storage water right but rather by “the quantities and/or percentages specified

in the contracts between the Bureau of Reclamation and the irrigation organizations.” 144 Idaho at 115, 157 P.3d at 609.²² Further, as this Court held in *Nelson*, water users with rights to stored water distributed from an on-stream reservoir “are not appropriators of the storage water.” 148 Idaho at 158 n. 1, 163, 219 P.3d at 805 n. 1, 811.

The Boise Project’s arguments ignore these principles and would shift the burden of the making beneficial use of the stored water from the storage right holder to junior appropriators, who could be curtailed to replace storage released for purposes not authorized under the storage water rights. *See Memorandum Decision* at 8 (“such priority refill may necessitate . . . the curtailment of juniors”) R., pp. 658, 816 n. 10, 817 (arguing juniors may be curtailed to refill flood control space under priority). As the District Court concluded, it would be contrary to Idaho law to extend the priority of a storage water right that had already been satisfied because some of the storage had been released for flood control purposes:

As soon as a senior storage right is filled it is no longer in priority. Allowing a storage right holder to refill his right under priority after his right is filled, but before junior holders are satisfied once, is impermissible as it would wrongfully disturb the junior appropriators’ rights to the use of water, *Van Camp v. Emery*, 13 Idaho at 208, 89 P. at 754, and would diminish the junior right holders’ priorities. . . .

Simply stated, under Idaho’s doctrine of prior appropriation a senior storage holder may not fill or satisfy his water right multiple times, under priority, before rights held by affected junior appropriators are satisfied once. A remark authorizing such priority refill would be contrary to Idaho law. The fact that water diverted and stored pursuant to a valid storage water right is used by the reservoir operator for flood control purposes does not alter this analysis,

²² In most cases the spaceholders have contractually consented to federal flood control operations. R., p. 209 & n.12; *see Lucky Peak Decision* at 33 (“The irrigation entities entered into these contracts acknowledging that the reservoir could be used for purposes other than irrigation.”).

assuming, as the term 'refill' necessarily implies, the storage right has already been filled once during the period of use under priority."

Id. at 10 (underlining added; italics in original).

In short, releases of stored water for unauthorized purposes, and any “charge[s] to the beneficial use accounts of the irrigation entities,” *BP Brief* at 24, are matters between the reservoir operator and the beneficial user. They are not grounds for extending the priority of the storage water right and seeking curtailment of junior appropriators to store additional water under the priority of the water right after it has already “filled.” The Boise Project’s brief and the District Court’s *Lucky Peak Decision* confirm that stored water shortages resulting from flood control operations are contractual matters between the Bureau and its spaceholders. *See, e.g., Lucky Peak Decision* at 13 (quoting contract providing that spaceholders’ storage rights in Lucky Peak are “[s]ubject to operations for flood control”); *id.* at 33 (“The irrigation entities entered into these contracts acknowledging that the reservoir could be used for purposes other than irrigation.”).

The Boise Project’s reliance on *Pioneer*, *BP Brief* at 25-28, is misplaced because there is no dispute the water users hold “title to the use” of the storage under Idaho constitutional and statutory law. *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. Moreover, *Pioneer* provided the water users with a remedy against the Bureau: the Boise Project’s arguments would transform a shield intended to hold the Bureau accountable to the water users into a sword to be wielded against other water right holders – effectively letting the Bureau off the hook and imposing the burden of the Bureau’s operations on junior appropriators.

VI. Contrary To The Boise Project's Arguments, The District Court Did Not Describe Flood Control As A "Beneficial Use" Or As A Use "By The Spaceholders."

The Boise Project argues the *Memorandum Decision* must be "corrected" for stating flood control releases are a "beneficial use" or used "by the spaceholders." *BP Brief* at 26. The District Court never made such statements, however; it simply referred to flood control releases as water "used by the reservoir operator for flood control purposes." *Memorandum Decision* at 5, 7, 8, 10, 11, 12, 13. The distinction is significant because "beneficial use" is a term of water law art with important ramifications, while the generic verb "use" simply means "[t]o bring or put into service or action," or "[t]o put to some purpose." *Websters II New College Dictionary* (3d ed.) (2005), at 1244. The District Court used the term in its generic sense, recognizing that in vacating flood control space a reservoir operator affirmatively asserts dominion and control over the stored water in order to achieve a flood control objective.

Further, all parties agreed flood control operations can "conflict" with irrigation storage by releasing stored water "before it is put to its authorized end use by the right holder." The District Court recognized "[t]his is particularly problematic in reservoirs where there is an absence of any water right identifying 'flood control' as a beneficial use." *Memorandum Decision* at 7 (emphasis added). The District noted "it is most often the case, if not unanimously the case, that no water right exists for [the reservoirs represented in the proceedings] that identify 'flood control' as a beneficial use." *Id.* n. 5.²³ The District Court also observed that where "the entire storage capacity of the reservoir" is "irrigation storage and irrigation from storage" under

²³ There are two licensed Idaho water rights for small volumes of "flood control storage." *R.*, p. 781, n. 25.

state water rights, flood control operations release “water that was stored by a storage right holder under state law for some other authorized purpose.” *Id.* at 7-8.²⁴ There is nothing to be “corrected” because the District Court never stated that flood control releases are used “by the spaceholder” or are a “beneficial use” under Idaho law. *BP Brief* at 26.

There is no merit in the Boise Project’s argument that under the District Court’s decision “flood releases must be authorized in a water right to be permissible” and the Bureau is “precluded” from physically refilling the reservoirs following flood control releases. *BP Brief* at 27. Federal flood control authority arises under the Commerce Clause, *Rapanos v. United States*, 547 U.S. 715, 782-83 (2006), and is implemented through flood control acts, not the Reclamation Act. *See, e.g.*, 58 Stat. 887 (Flood Control Act of 1944). The Corps of Engineers has regulatory authority over “the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations.” 33 U.S.C. § 709. “Flood control” at the Bureau facilities is not simply releasing water to vacate flood control space – it also includes catching the flood flows. In other words, “refill” is “flood control” at the federal facilities: the “refill” is not “irrigation storage” but rather “flood control storage.” In flood years, the reservoirs essentially are re-tasked from “irrigation” facilities to

²⁴ If done without the water users’ consent, such flood control releases likely would be in derogation of the water users’ “title to the use” of the storage. *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. The District Court did not address the question of what remedies (contractual, statutory, constitutional, or otherwise) the water users might have against the reservoir operator in such a situation. *Memorandum Decision* at 11 n. 8. It should be noted, however, that flood control releases from an upstream reservoir can be re-captured in a downstream reservoir and distributed to the spaceholders for irrigation use, R., 465-66 & n. 10; and so it cannot be said as a matter of law that flood control releases are never “available” for spaceholder use and never actually used for irrigation.

“flood control” facilities, and a portion of what had been “irrigation storage” is re-allocated to “flood control storage” pursuant to the Corps’ flood control rule curves. *Id.*; 33 C.F.R. § 208.11(c)(4).

The Corps has consistently taken the position in the SRBA that it needs no water rights to authorize flood control operations, and that its “usage” of water for such purposes is “not amenable to administration by the State of Idaho.”²⁵ Flood control operations at federal facilities in Idaho – including physical refill – will continue regardless of whether they are authorized in an Idaho water right. The Boise Project’s argument that the District Court’s decision created a “perverse incentive” to put lives and property at risk, *BP Brief* at 27, is a scare tactic. As the Bureau specifically reassured the District Court: “flood control operations are independent of the water right system [and] required by federal law,” R., p. 674 (bold and capitalization omitted), and “the outcome of this proceeding will have no effect on Reclamation’s flood control operations.” R., p. 675.

Idaho law controls the separate question of “title” to the flood waters, however, and under Idaho law, storing water to prevent flooding does not confer “title,” which must be perfected through further steps “in the manner provided by law”:

The commissioners of any flood control district may in the manner provided by law obtain title to any unappropriated waters which said district has developed, conserved, or stored and said commissioners may sell, dispose, or use said waters within or without the said district in any manner which the commissioners shall decide is of the greatest advantage to the district

²⁵ See Appendix 3 (excerpted pages of Corps of Engineers’ SRBA motion to file “Notice of Water Usage” in connection with Dworshak Dam).

Idaho Code § 42-3119 (“Title To And Sale Of Waters – Disposition Of Aggregate”). There is no reason to think the Legislature would take a different view when the flood control entity is a federal agency rather than a state flood control district: in both cases, allowing the flood control entity to acquire “title” to the water simply by restraining it would be contrary to the requirement of making beneficial use of the water. *See Pioneer*, 144 Idaho at 110, 157 P.3d at 604 (“There is no dispute that the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities.”). Flood control is not an exception to beneficial use principles. *See Idaho Code § 42-3102* (declaring it is state policy “to provide for the prevention of flood damages in a manner consistent with the conservation and wise development of our water resources.”).

This underscores an important public policy consideration: future development of “refill” water is simply development of excess and potentially dangerous flood water. *See Memorandum Decision* at 12 n. 9 (“in the context of water law the term [‘flood water’] has been used interchangeably with ‘excess water’ and used to describe the circumstance where water in the system at a given time exceeds the quantity necessary to satisfy existing non-flood rights”). The Boise Project’s arguments could prevent beneficial development of excess flood water. This would not only be contrary to “[t]he policy of the law of this State . . . to secure the maximum use and benefit, and least wasteful use, of its water resources,” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011), it is not necessary to protect the Boise Project spaceholders. Development of the flood water will reduce flood risk, and therefore

should also reduce the need for the Bureau to release the irrigators' storage from the federal reservoirs to make flood control space available.

VII. The Boise Projects Claims Of Historic Practices And Uses Must Be Resolved In Individual Subcase Proceedings.

The Boise Project's arguments that it has historically used "refill" water for irrigation purposes, *BP Brief* at 10-14, 22, 29, are claims for individual water rights at individual reservoirs based on assertions of historic beneficial use. Such individual, fact-specific claims are appropriately resolved in individual SRBA subcases based on the "constitutional method" of appropriation, *Pioneer*, 144 Idaho at 110, 157 P.3d at 604; Idaho Code §§ 42-243, 42-245, not in a "basin-wide issue." AO1 § 16. Further, the District Court made it clear in the hearing on the *Petition* and in the *Order* that a basin-wide proceeding was not an appropriate avenue for pursuing such individualized, fact-specific claims, and that it did not want to have a situation where "everybody's going to argue, 'Yeah, this may be the law, but we have a different set of circumstances because of historically it's been done in this manner.'" Tr., 9/10/2012, p. 15, ll. 20-22; *Order* at 5 ("the Court will not consider the specific factual circumstances, operation history, or historical agreements associated with any particular reservoir in conjunction with this basin-wide issue").

The Boise Project's assertion it had "no choice" but a basin-wide proceeding to present its claims of historic use at particular reservoirs, *BP Brief* at 14, lacks credibility. Indeed, the Boise Project has filed separate SRBA "refill" claims based on the constitutional method of

appropriation, making the same historic use contentions it makes in this appeal.²⁶ The Boise Project's argument that had to initiate a basin-wide proceeding to "respond" to "incorrect" affidavits the State filed in the American Falls and Palisades subcases, *BP Brief* at 2,²⁷ is unavailing for the same reason: to the extent the Boise Project believes it needs to "correct" the record on historic practice in the Boise River basin, it must do so in individual subcases rather than a basin-wide proceeding.²⁸

²⁶ Appended hereto are excerpted pages of the Boise Project's SRBA claims for priority "refill" rights based on assertions of historic practices and actual beneficial use (Appendix 4). The State does not concede the validity of these claims as filed and reserves the right to argue all questions of fact and law.

²⁷ Moreover, the Boise Project mischaracterizes the American Falls and Palisades proceedings in asserting it needed an opportunity to "respond" to affidavits filed therein by the State. *BP Brief* at 2. The State's affidavits were themselves a response to affidavits the Boise Project had previously filed in support of its *amicus* motion, and were intended to demonstrate that the Boise Project and the other *amicus* petitioners had no interest in the American Falls and Palisades proceedings (because the Boise and Payette river watermasters agreed the State's remark for American Falls and Palisades was consistent with historic operations and administration in the Boise and Payette basins (Appendix 5)). That issue was resolved when the Special Master granted the Boise Project's *amicus* motion. Further, the storage water rights for the federal reservoirs in the Boise and Payette had already been partially decreed, and the State had not sought to have those partial decrees amended to include the remark the State proposed in the American Falls and Palisades subcases. Indeed, there was no need to, because unlike at American Falls and Palisades, the Bureau had never asserted its licensed and decreed storage water rights in the Boise and Payette basin included the right of priority "refill." This difference was significant: the Bureau's claims for Lucky Peak, Arrowrock, and Anderson Ranch were still pending in 2006 the Bureau filed its priority "refill" claims for American Falls and Palisades in 2006, and yet the Bureau filed no comparable priority "refill" claims for the Boise River reservoirs, nor did it file objections seeking priority "refill" remarks. In short, there was never a reason for the State to propose a "refill" remark for the Boise River reservoirs; and the State never did. In any event, the Special Master rejected the State's proposed remark, the Bureau withdrew its proposed remark, and the Boise Project had a full and fair opportunity in the District Court proceedings on Basin-Wide 17 to advocate its views that as a matter of law "'refill . . . is 'fill' of its water rights," R., p. 849, and that a storage water user is "entitled to fill the reservoir in priority" as "an element" of a storage water right. *BP Brief* at 1.

²⁸ The State notes for the record that the factual and historic record the Boise Project sought to create in the District Court proceedings is incomplete and one-sided. A fully developed record would show that there is more to the story, including that the storage water rights for the Bureau's reservoirs have historically been limited by their decreed annual volumes rather than by the physical fill or refill of the reservoirs, *see* Appendix 5; that the "shoulder" remarks the Boise Project claims were intended to recognize a priority right of "refill" were actually intended for quite different purposes, *see* Appendix 6; and other relevant matters. These matters should be fully developed in the appropriate proceedings that address the specifics of the Boise Project's individual claims, not in a remand on a basin-wide issue.

VIII. *Pioneer* Established That The Boise Project Is Not Limited To Contractual Remedies For The Bureau's Flood Control Releases.

The Boise Project mischaracterizes the State's position in the District Court proceedings as being that the spaceholders "should be left to their contractual remedies" against the Bureau. *BP Brief* at 28. To the contrary, the State consistently recognized in the District Court proceedings that the spaceholders were not limited to contractual remedies because they hold "title to the use" of the storage as a matter of constitutional and statutory law. *See. e.g., R.*, p. 768, 777, 778 n. 22. Further, the Boise Project's argument that "contractual rights offer inadequate protection to the spaceholders," *BP Brief* at 28 (bold and capitals omitted), was addressed and resolved in *Pioneer*. In that case, the Boise Project and others (including the State) argued to this Court that "without an equitable interest" in the storage water rights, the irrigators were "vulnerable" to storage releases to comply with federal law. *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. This Court addressed that concern by holding the Boise Project and the other spaceholders hold "title to the use of the water" as "a matter of Idaho constitutional and statutory law." *Id.* *Pioneer* established that the Boise Project is not limited to contractual remedies with respect to the Bureau's flood control operations.²⁹

The Boise Project now essentially argues *Pioneer* is not enough, that this Court should recognize an additional remedy in the form of "a property right to physically fill the reservoir."

²⁹ The Boise Project's suggestion that 33 U.S.C. § 702c and *Central Green Co. v. United State*, 531 U.S. 425 (2001), would immunize the Bureau from liability for releasing storage owned by the irrigators, *BP Brief* at 28-29, should not be credited as those authorities apply to tort claims for damages caused "by floods or flood waters." 33 U.S.C. § 702c; *see Central Green Co.*, 531 U.S. at 437 ("courts should consider the character of the waters that cause the relevant damage"). Even if it were otherwise, this argument would not justify curtailing other water rights to replace the lost storage.

BP Brief at 28. As previously discussed, however, such a right is not a “remedy” against the Bureau’s actions; to the contrary, it would insulate the Bureau from accountability and would be asserted to curtail junior appropriators and force them to replace water that was released in flood control operations they had nothing to do with. *Memorandum Decision* at 8, 10. *Pioneer* was grounded in the premise that storage releases for federal purposes are matters between the Boise Project and the Bureau; the Boise Project’s current argument is contrary to *Pioneer* because it would give the Bureau a pass and impose the burden of its operations on third parties.

The Boise Project’s argument that “[t]he spaceholders do not make any decisions about flood control releases,” *BP Brief* at 27, ignores an important fact: the spaceholders “entered into these [federal] contracts acknowledging that the reservoir could be used for purposes other than irrigation.” *Lucky Peak Decision* at 33. The third party water right holders who could be curtailed to make up for irrigation storage the Bureau releases to vacate flood control space, *Memorandum Decision* at 8, 10, have even less control over the situation than the spaceholders, and never consented to having their rights curtailed to replace storage released by the Bureau. The Boise Project’s argument that the spaceholders “bought and paid for the reservoirs” and are being “punished” for flood control operations, *BP Brief* at 28, is hyperbole and ignores the fact that the Boise Project agreed to federal flood control operations.

The Boise Project’s assertions also ignore the fact that as a condition of agreeing to flood control operations, the Arrowrock and Anderson Ranch spaceholders received a “guarantee” from the Bureau that it would replace shortfalls resulting from flood control with Lucky Peak water, up to 60,000 acre-feet; and shortages beyond that would be borne by Lucky Peak


placeholders.³⁰ *Lucky Peak Decision* at 6-7, 34.³¹ Indeed, the fact that flood control “refill” was raised in the *Lucky Peak* proceedings and seen exclusively as a matter between the Bureau and the placeholders confirms the State’s position in this appeal.

CONCLUSION

The State respectfully requests that this Court affirm the District Court.

Respectfully submitted this 23rd day of October, 2013.

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³⁰ Unlike Arrowrock and Anderson Ranch, Lucky Peak was intended primarily as a flood control facility.


³¹ Flood control operations at federal facilities in Idaho can also have other benefits for placeholders, such as reducing repayment costs and/or operations and maintenance charges. For instance, the original construction cost estimates for Palisades Reservoir in the Upper Snake River allocated as much of the costs to “flood control” as to “irrigation,” but “flood control” was a “non-reimbursable” allocation – meaning these costs would be borne by the general public rather than the irrigators. *See* Appendix 9.

CERTIFICATE OF SERVICE

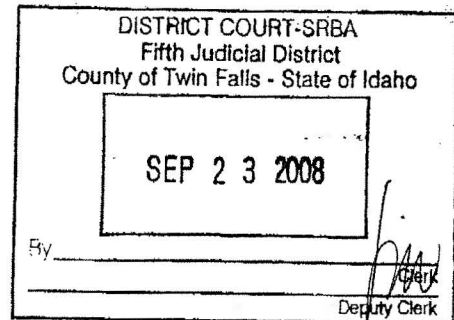
I hereby certify that on this 23rd day of October, 2013, I served a true and correct copy of the foregoing *Respondent State of Idaho's Brief* on the person(s) listed below by U.S. Mail and/or electronic mail:

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Appendix 1



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) Subcase: 63-03618
Case No. 39576) (Lucky Peak Reservoir)
) MEMORANDUM DECISION AND
) ORDER ON CROSS-MOTIONS FOR
) SUMMARY JUDGMENT RE: BUREAU
) OF RECLAMATION STREAMFLOW
) MAINTENANCE CLAIM

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Holding: Granting Summary Judgment in favor of the United States, City of Boise, Ada County and State of Idaho Department of Fish and Game; holding that provisions of Idaho Minimum Stream Flow Act, I.C. § 42-1501 et. seq., do not apply to the streamflow maintenance right at issue. License issued by Idaho Department of Water Resources is therefore valid and objections to purpose of use constitute impermissible collateral attacks on valid license. Streamflow maintenance right does not interfere with contractual obligations or guarantees made by Bureau of Reclamation to contract right holders in Lucky Peak Reservoir.

Also granting partial summary judgment, in part, in favor of Boise Project Board of Control; holding that a remark in Partial Decree is necessary to acknowledge interest and allow Bureau of Reclamation to meet obligations concerning flood evacuation to contract right holders in Anderson Ranch and Arrowrock Reservoirs without requiring temporary change in purpose of use.

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MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT RE: STREAMFLOW MAINTENANCE CLAIM

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II. PROCEDURAL BACKGROUND

The water right claim in this case pertains to Lucky Peak Reservoir and Dam which are part of the Boise Project on the Boise River. At issue are two of the recommended purposes of use pertaining to streamflow maintenance. The issues involving the ownership of the irrigation and irrigation from storage purposes of use for this same claim, as well as other claims associated with the Boise Project, were decided in Consolidated Subcase 91-63. *See Memorandum Decision and Order on Cross-Motions for Summary Judgment and Notice of Status Conference (91-63 Ownership of Water Rights Between Irrigation Entities and Bureau of Reclamation)* (Sept. 2, 2004) aff'd in part and remanded in part *U.S. v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

The United States Bureau of Reclamation ("BOR" or "United States") claimed, and the Idaho Department of Water Resources ("IDWR") recommended, year 'round streamflow maintenance storage and streamflow maintenance from storage in the amount

of 152,300.00 AFY. The streamflow maintenance is for the channel of the Boise River downstream from Lucky Peak Dam to the confluence with the Snake River. The recommendation is based on and consistent with the license issued by IDWR in 2002 for this claim.

Numerous objections were filed to the recommended streamflow maintenance purpose of use by various irrigation districts, canal companies and other irrigation delivery entities as well as by the Boise Project Board of Control (collectively as "Objectors"). In general, the Objectors argue that the streamflow maintenance purpose of use cannot be decreed because under Idaho law only the Idaho Water Resource Board can hold a minimum instream flow claim. Further, the Objectors argue that allowing winter time releases for fish and game habitat is contrary to the irrigation and flood control purposes for which Lucky Peak Dam and Reservoir were constructed.

The State of Idaho, on behalf of the Idaho Department of Fish and Game (State of Idaho) filed a response to each of the objections. The City of Boise, Ada County and the Board of Ada County Commissioners were granted leave to participate in the proceedings as respondents. (collectively as "Respondents").

Motions for summary judgment were filed by the Objectors, Canyon County Water Co., Farmers Union Ditch Co., Ltd., Middleton Irrigation Ass'n. Inc. and Middleton Ditch Co.; Nampa & Meridian Irrigation District; and Pioneer and Settlers Irrigation Districts. Objector Boise Project Board of Control filed a motion for partial summary judgment. The United States, the City of Boise and Ada County filed cross-motions for summary judgment. The State of Idaho filed a response in opposition to the Objectors' motions.

A hearing was held on the cross-motions on June 19, 2008.

III.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in these matters on June 16, 2008. Thereafter, the matter was taken under advisement. On July 21, 2008, Pioneer and Settlers Irrigation Districts filed a *Notice of Additional Authority*. Parties were given until July 31, 2008, to respond to the *Notice*. Therefore, this matter is deemed fully submitted for decision the next business day, or August 1, 2008.

IV.
FACTUAL HISTORY

The facts in this subcase are not in dispute. The record is nonetheless voluminous as circumstances surrounding the construction and operation of Lucky Peak Dam and Reservoir have a lengthy history. Lucky Peak Reservoir is the third and farthest downstream of the three on-river reservoirs of the Boise Project. Arrowrock Dam is located about 4 miles below the confluence of the main stem and the South Fork of the Boise River. Construction of Arrowrock Reservoir was completed in 1916. Anderson Ranch Dam is located 42 miles upstream from Arrowrock on the South Fork of the Boise River. Construction of Anderson Ranch Dam began in 1940. Prior to its completion, in 1943 a devastating flood occurred in the Boise Valley. As a result, the United States Army's Board of Engineers for Rivers and Harbors conducted a flood control study in 1946. The study ultimately concluded that a two reservoir system would not adequately control the problem of flooding and recommended the addition of a third reservoir at the Lucky Peak site located 12 miles below Arrowrock. *Jarvis Aff.*, Ex. B, pp. 107-08 (*Review of Survey Report Boise River Idaho with a View to Control Floods*, pp. 79-80).

The study concluded that:

Although the storage in Lucky Peak Reservoir would be primarily for flood control, other uses would be made of it. Enough supplemental water would be made available to eliminate irrigation shortages. By maintaining a permanent pool at Lucky Peak Reservoir, the pumping lift to the

proposed Mountain Home project would be reduced by 80 feet, thereby enabling the power which would be required to overcome this lift to be made available for other uses in the general area. Construction of Lucky Peak Reservoir would permit the installation of a 13,000-kw. power plant at Arrowrock to supply mainly during the irrigation season. Other benefits which would be realized by the construction of a dam and reservoir at the Lucky peak site include added recreational facilities and its advantages to the people of the valley, betterments for fish and wildlife by the increased regulation of the streamflow, prevention of probable loss of life during floods, allaying the fear of floods, expansion of local business and residential areas, enlargement of local tax base, and increased social security.

Id. at 105-106.

Congress authorized the construction of Lucky Peak Reservoir "for the benefit of navigation and the control of destructive flood waters and other purposes." Flood Control Act of 1946, 60 Stat. 641, 643, 650 (July 24, 1946).

Although the study concluded that the primary purpose of Lucky Peak would be flood control, one of the other recommended uses was for irrigation in conjunction with the proposed Mountain Home Project. In 1944, the BOR proposed a complex and expensive irrigation project intended to develop 230,000 acres of land in the Mountain Home desert. *Jarvis Aff.*, Ex. C, p. 132. The project called for a trans-basin diversion of surplus water from the Payette River drainage to the Boise River drainage and then from the Boise River drainage to the Snake River drainage through a complex and expensive system of reservoirs, hydroelectric plants, pump stations, tunnels and canals. *Jarvis Aff.*, Ex. C, pp. 140-41. In essence water would be diverted from the Boise River for the Mountain Home Project and replaced with water from the Payette River. *Jarvis Aff.*, Ex. D, p. 142.

In 1953, the United States Department of Interior and the United States Army Corp of Engineers entered into a "Memorandum of Agreement . . . for Flood Control Operation of Boise River Reservoirs, Idaho" ("MOA"). *Arrington Aff.*, Ex. A. The MOA provided that Lucky Peak would be operated under a coordinated plan of operation for all

three reservoirs and set forth the terms of a system-wide plan for the reservoir system. *Id.* at 3. The MOA acknowledged that the 983,000 acre-feet of the available 1,084,000 acre-feet “will be primarily considered as available for irrigation except as such amount must be reduced by evacuation requirements for flood control. *Id.* at 5. The MOA provided that:

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

Id. at 5. The MOA also provided:

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

Id. at 10. The MOA was made contingent upon being formally accepted by the water users having storage rights in the reservoir system and Lake Lowell. *Id.* at 14.

Consistent with the MOA, in 1954 the BOR entered into Supplemental Contracts with each of the irrigation entities having storage rights in the upstream reservoirs. Among other things, the Supplemental Contracts confirmed to contract holders the use of storage waters in Lucky Peak for irrigation purposes in an amount equal to the unfilled storage capacity that results from the water having been evacuated from Anderson Ranch and Arrowrock Reservoirs for flood control purposes. The Supplemental Contracts were identical in substance and provided:

Guarantee:

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

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

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

Arrington Aff., Ex. B, pp.4-5 (Wilder Irr. Dist.); *Stevens Aff.*, Ex B and C (Pioneer and Settlers Irr. Dists.)

Lucky Peak dam was completed in 1955.

On December 18, 1957, the BOR filed permit application R-35086 with the Idaho Department of Reclamation¹ "To Construct a Reservoir and Appropriate and Store the Public Waters of the State of Idaho." The application was for 307,000 acre feet total capacity with 278,000 acre feet useable storage. The purpose of use stated was for "irrigation and power for irrigation pumping." *Kiser Aff.*, Ex A. Pursuant to publication notice, the last day to file timely protests to the approval of the application was January 27, 1958. *State of Idaho*, Ex B. A protest was filed by the State of Idaho on behalf of the Idaho Department of Fish and Game. *Jarvis Aff.*, Ex. I, pp. 176-79. Closures of the outlet of the dam during periods of annual maintenance resulted in low flows on the Boise River which caused problems for fish and wildlife. *Jarvis Aff.*, Ex. H. As a result, the Idaho Department of Fish and Game made application for a 100 cfs water right from

¹ Predecessor to the Idaho Department of Water Resources.

Lucky Peak and wanted a determination of its permit application prior to approval of the BOR's permit application. *Jarvis Aff.*, Ex. I, p. 176.

Protests were also filed by New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, Big Bend Irrigation District and Nampa & Meridian Irrigation District all of whom are Objectors in this proceeding. *Jarvis Aff.*, Ex. J, pp. 184-87. The irrigation entities were concerned that diverting waters for use in the Mountain Home Project and the Hillcrest Project would adversely impact their rights and the coordinated plan of administration then in effect. Notably, the irrigation entities also alleged that Lucky Peak was constructed primarily for flood control purposes and that changing the use to irrigation purposes would impair their existing use of the Boise River. *Jarvis Aff.*, Ex. J, p. 186.

Ultimately, the BOR resolved the protests through the filing of an amendment to the permit application. The application was amended to provide that "Lucky Peak stored waters will be utilized in the Boise Valley on presently irrigated lands for supplemental irrigation water" and also to include the following remark:

This permit is issued on condition – That the yield of water from 50,000 acre feet of space be available for maintaining winter time flow in the Boise River below Boise Diversion dam under a release pattern established from time to time by the Director of the Idaho Fish and Game Department.

The application for permit was approved on March 20, 1964. *Jarvis Aff.*, Ex. II.

In 1966, irrigation entities holding irrigation rights in Arrowrock and Anderson Ranch reservoirs entered into water service contracts with the BOR for supplemental water supplies. *Stevens Aff.*, Ex. D & E (Contracts for Pioneer and Settlers are identical except as to parties). The contracts acknowledged that "the United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses" *Id.* at 1.

In the mid 1970's the Mountain Home Project was abandoned. The result was that Lucky Peak had 116,250 acre-feet of storage space not under contract. In 1979, the BOR initiated a "Boise Power and Modification Study," which among other things addressed the issue of how to make best use of the uncontracted storage space. *Jarvis Aff.*, Ex. O, p.213, *Jarvis Aff.*, Ex. P, p. 223. Participants in the study included representatives from Nampa-Meridian Irrigation District and the Boise Project Board of Control. *Jarvis Aff.*, Ex. V, p.253. Ultimately, the study recommended using the uncontracted space in conjunction with the 50,000 acre feet dedicated to the Department of Fish and Game in order to provide a minimum streamflow release from Lucky Peak of 150 cfs. *Jarvis Aff.*, Ex. V.

On March 9, 1984, the BOR submitted an application for amendment of the permit requesting that the purpose of use be amended as follows:

<u>Amount (acre feet)</u>	<u>Use</u>	<u>Period: From</u>	<u>To</u>
111,950	Storage for Irrigation	Jan. 1	Dec. 31
152,300	Storage for Streamflow Maintenance	Jan. 1	Dec. 31
152,300	Streamflow Maintenance From Storage	Jan. 1	Dec. 31
28,800	Storage for Recreation	Jan. 1	Dec. 31
111,950	Irrigation from Storage	Mar. 15	Nov. 15

Jarvis Aff., Ex. X, p.256. The deadline for filing protests to the approval of the amendment was April 23, 1984. *Jarvis Aff.*, Ex. FF. No protests were filed to the application for amendment.

In effect since 1965 (amended in 1967), the provisions of Idaho Code § 42-1737 require that "[a]ll project proposals involving the impoundment of water in a reservoir with an active storage capacity in excess of ten thousand (10,000) acre feet" to be approved by the Idaho Water Resource Board. The requirement was interpreted to also apply to applications to amend existing permits. *Kiser Aff.*, Ex. F, p. 2. In preparation of

the review of the amendment, David R. Tuthill, Jr., then Supervisor for the Water Allocation Section of IDWR (now Director), prepared an Issue Paper which concluded that the amendment being sought was not subject to the requirements of the minimum streamflow act as set forth in Idaho Code § 42-1501 *et. seq.*:

Chapter 15, Title 42, Idaho Code established that the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality can be considered to be beneficial uses, when the uses are recorded pursuant to the minimum stream flow act. The act can apply to "any lake, spring, creek, stream, river or other natural body of standing or moving water which is subject to appropriation under the laws of Idaho." A minimum stream flow water right can be approved only in the name of the Idaho Water Resource Board, pursuant to the provisions of Chapter 15.

Lucky Peak Reservoir is not a natural body of water, and the stored quantities are not subject to the provisions of Chapter 15. Because Chapter 15 does recognize that certain instream uses can be beneficial, however, the precedent for recognizing such uses is established in Idaho water law. Most water rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

Kiser Aff., Ex. F, p. 3.

On December 13, 1984, in accordance with the provisions of Idaho Code § 42-1737, the Idaho Water Resource Board conducted the review of the application for amendment. The minutes from the proceeding provide the following:

The amendment proposes to maintain the 50,000 af streamflow, change the 28,800 af dead storage to storage for recreation, and change the 228,200 af for irrigation to 102,300 af streamflow maintenance and 111,950 af for irrigation (allowing 13,950 af flood control). Two issues the Board may wish to consider are: "Is streamflow maintenance from storage in conformance with the State Water Plan?" and "Should the duration of the water right be conditioned?". In regard to the first issue, Lucky Peak Reservoir is not a natural body of water and the stored quantities are not subject to the provisions of Chapter 15, Idaho Code. Most water rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted. Historically, the BOR has not allowed the

102,300 acre feet of storage to be contracted except on a limited basis. On the issue of conditioning a water right, the Board may wish to consider the increased competition between the various uses of the limited water supplies in Idaho and the notion that "higher and better use" now may be viewed differently in the future.

Jarvis Aff., Ex. W, p. 254-255. Idaho Water Resource Board member F. David Rydalch, made the motion that "streamflow maintenance from storage" is a water use in conformance with the State Water Plan and recommended that the director approve the application for amendment. The motion passed with 8 Ayes and 0 Nays. A subsequent motion was made that the Board adopt a recommendation that the term of the Lucky Peak storage permit be thirty (30) years prior to review. This motion also passed with 8 Ayes and 0 Nays. *Jarvis Aff.*, Ex. W, p. 255. The amendment to the permit was approved by IDWR on February 14, 1985. *Jarvis Aff.*, Ex. X, p. 257. The amended permit did not incorporate the Board's recommendation of a 30-year review.

On March 11, 1987, the BOR sought a temporary change of use of 44,700 acre feet from streamflow maintenance to irrigation to offset shortages due to the construction of the power plant at Lucky Peak Dam. Pioneer and Settlers Irrigation Districts filed protests to the amendment. *Jarvis Aff.*, Ex. AA, p. 276. Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District; Middleton Mill Ditch Company and Middleton Irrigation Assn, Inc. and others filed a petition for leave to intervene in the proceedings. *Jarvis Aff.*, Ex. AA, p. 273, *Jarvis Aff.*, Ex. BB, p. 283. None of the protests contested the validity of the streamflow maintenance purpose of use. The protests were eventually withdrawn pursuant to a stipulation making additional water available to the protestants during the 1987 irrigation season. *Jarvis Aff.*, Ex. BB, p. 283, 291-296. Another application for amendment was filed by BOR on July 11, 1990, in order to provide temporary supplemental water from the streamflow maintenance account for irrigation entities. No protests were filed. The application for the amendment was approved November 11, 1990.

A beneficial use examination memorandum recommending the issuance of the license for permit No. 63-03618 was prepared February 19, 2002. *Jarvis Aff.*, Ex. DD, pp. 300-304. On September 27, 2002, IDWR issued the license for water right no. 63-03618 which described the following purposes of use and quantities:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>ANNUAL DIVERSION VOLUME</u>
IRRIGATION FROM STORAGE	03/01 to 11/15	111,950.0 AF
IRRIGATION STORAGE	01/01 to 12/31	111,950.0 AF
RECREATION STORAGE (INACTIVE)	01/01 to 12/31	28,800.0 AF
STREAMFLOW MAINTENANCE STORAGE	01/01 to 12/31	152,300.0 AF
STREAMFLOW MAINTENANCE FROM STORAGE	01/01 to 12/31	152,300.0 AF

Jarvis Aff., Ex. EE. The *Director's Report* recommendation for water right no. 63-03618 was filed with the Court on September 30, 2004, and is based on the license. It describes the same purposes of use and quantities as in the license.

In 1985, the Army Corps of Engineers adopted a *Water Control Manual for Boise River Reservoirs* which set forth a "Water Control Plan to define reservoir regulation procedures and practices for joint use of the storage spaces in Anderson Ranch, Arrowrock, and Lucky Peak Reservoirs." 2nd *Jarvis Aff.*, Ex. KK, p. 11. The *Water Control Manual* provides that in the event flood control operations result in irrigation entities having less storage than they would otherwise, then the first 60,000 acre-feet of any shortfalls caused by flood control operations comes from the streamflow maintenance allocation. The system has been administered in this manner since 1985. Since 1985 there have been three years that Arrowrock and Anderson Ranch reservoirs did not fill due to flood releases. In only one of those years did the shortfall exceed the 60,000 acre-feet. The shortage beyond the 60,000 acre-feet was allocated proportionality among all the uses in Lucky Peak. Contract holders in Anderson Ranch and Arrowrock received their full allocation of storage water under their respective contracts for those reservoirs. *Mellema Aff.* pp. 3-4. Since the coordinated reservoir operations began in

1955, there have been seven (7) years in which the flood control operations resulted in a shortfall. *Id.*

In 2005, the 1966 water service contracts entered into by Pioneer and Settlers Irrigation Districts were converted to repayment contracts in accordance with Federal Reclamation laws. *Campbell Aff. Ex. H & I* (contracts identical except as to parties). The 2005 repayment contracts superseded the 1966 service contracts. *Id.* at 3. The repayment contracts specifically acknowledged that the “United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses, for which the United States holds License No. 63-03618 *Id.* at 2. The repayment contracts also provided:

WATER SUPPLY AND OPERATION OF THE RESERVOIR

16. (a) As of the date of this Contract, the United States holds License No. 63-03618, issued on September 27, 2002, by the State of Idaho to the United States for the storage of 307,000 acre-feet per annum of the waters of Boise River in Lucky Peak Reservoir. The primary purpose of the Reservoir is for flood control, for which it will be operated, in accordance with the Memorandum of Agreement between the Department of the Army and the Department of the Interior, dated November 20, 1953, and as it may be amended, the Act of August 24, 1954 (ch. 909, 68 Stat. 794), the 1954 Supplemental Arrowrock and Anderson Ranch Reservoir contracts approving the Boise River operating plan, and the Water Control Manual for Boise River Reservoirs, dated April 1985, copies of which are available for inspection at the office of the Contracting Officer. Subject to operations for flood control, the United States will operate the Project so as to store under existing storage rights all available water, and during each irrigation season, the Contracting Officer will make available to the Contractor for irrigation the Contractor’s proportionate share of the stored water that accrues in each year to the active capacity of the Reservoir, together with any stored water that may have been carried over in the Contractor’s share of such active capacity from prior water years.

(c) All space in Lucky Peak Reservoir shall be operated with like priority as to storage rights and all space will be treated proportionately

V.

ISSUES RAISED ON SUMMARY JUDGMENT

Summarily stated, the issues raised on motion for summary judgment are as follows:

Whether the arguments raised on summary judgment constitute collateral attacks upon a previously licensed water right?

Whether the license issued by IDWR for streamflow maintenance is valid?

Whether an entity other than the Idaho Water Resources Board can hold title to a water right for streamflow maintenance?

Whether streamflow maintenance can be decreed as a beneficial use?

Whether the streamflow maintenance claim interferes with the interests and guarantees held in Lucky Peak Reservoir by irrigation entities?

Whether the interests held in Lucky Peak Reservoir for flood evacuation pursuant to Supplemental Contracts should be reflected in the *Partial Decree*?

VI.

STANDARD OF REVIEW

Summary judgment shall be rendered when “the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). Generally, disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007). However,

[I]f an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct.App.1985) (citing *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)).

Here, opposing parties have moved for summary judgment on the same issues of law. The Idaho Supreme Court has explained the legal standards to be applied when deciding cross motions for summary judgment as follows:

In *Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996), this Court held that when both parties file a motion for summary judgment relying on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment. *Brown*, 129 Idaho at 191, 923 P.2d at 436. In *Wells v. Williamson*, 118 Idaho 37, 794 P.2d 626 (1990), this Court recognized that when opposing parties file cross motions for summary judgment, based upon different theories, the parties should not be considered to have effectively stipulated that there is no genuine issue of material fact. *Wells*, 118 Idaho at 40, 794 P.2d at 629.

Eastern Idaho Agricultural Credit Association v. Niebaur, 130 Idaho 623, 626-627, 944 P.2d 1386, 1389-1390 (1997).

VII.

DISCUSSION

A. The Arguments Raised on Summary Judgment Constitute Collateral Attacks on a Previously Licensed Water Right Unless the License is Determined to be Void.

The director's recommendation for water right 63-03618 is based on a license. Subject to certain noted exceptions, the SRBA Court has consistently prohibited licenses from being collaterally attacked in the SRBA. In a recent opinion this Court discussed the rationale:

Licenses are and have been consistently treated in the SRBA the same as prior decrees for purposes of binding the parties and their privies. In *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcases 36-02708 *et al.* (Dec. 29, 1999), the SRBA Court affirmed a special master's ruling that the SRBA was not the appropriate forum for collaterally attacking licenses previously issued through administrative proceedings.

The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alred.* Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844 693 P.2d 1046 (1984).

Id. (quoting *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)* (July 31, 1998); *see also Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge*, subcase 36-08099 (Jan 11, 2000)(upholding subordination remark contained in a license for hydropower water right claim).

...

The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.

Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law (City of Pocatello - Federal Law Claims), Subcase No. 29-11609 (Oct. 6, 2006) at 12-13. This Court then discussed an exception to issuing a decree for a water right other than consistent with the elements stated in the license. Technically, however, this exception is not a collateral attack on the

elements of the license because it results from circumstances occurring after the license was issued.

Like a prior decree, a licensed right is not conclusive as to the extent of the water right, since a license does not insulate a claimant from practices occurring after the license was issued such as abandonment or forfeiture. However, unlike a prior decree, the binding effect of a license extends beyond the parties to the administrative proceeding and their privies. [FN Publication notice is given and any affected person can initiate a contested case.]. With respect to prior decrees, not all water users hydraulically connected to the source were always joined as parties. The Idaho legislature also acknowledged the binding effect of prior licenses and decrees in enacting Idaho Code § 42-1427 which provides a mechanism for defining elements of water rights not described in prior decrees or licenses. Accordingly, the City is also bound by its prior license for water right claim 29-07431. [Footnote omitted].

Id. at 13.

Another exception was applied by this Court in the portion of this case dealing with the ownership of storage rights for which irrigation entities hold repayment contracts. This Court held that the inclusion of a remark to clarify an otherwise ambiguous license and avoid future controversy did not constitute a collateral attack on a license. This Court reasoned:

This Court acknowledges the prohibition against collaterally attacking a license as well as the *res judicata* effect on parties to a prior decree. However, the Court does not view all of the relief sought nor the relief ultimately granted as being inconsistent with these principles. The inclusion of a remark regarding equitable interest is not inconsistent with the prior license or the decree. I.C. § 42-1412 and 42-1411(2) and (3) specify what elements to include in a partial decree. One of the elements includes “such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for the administration of the right by the director.” In the interest of uniformity and brevity, referring to existing law in individual partial decrees is the exception and not the rule. The Court generally views it as unnecessary because parties have the right to rely on the backdrop of existing law for the definition and administration of their water right. The exception is when the application of the existing law is at issue. Without clarification of applicable law, the issues raised here potentially make the decree

ambiguous without a clarifying remark. In such cases the Court allows a clarifying remark so as to avoid future controversy.

In the instant matter, the issue of the relationship between the BOR and project water users was never raised or litigated in either the licensing proceedings or in conjunction with the *Bryan Decree*. Project water users were entitled to rely on the backdrop of existing law in defining the relationship between the BOR and project water users, irrespective of whether or not it was incorporated into the decree. For example, when water rights are decreed in the name of an irrigation district, the license or partial decree does not contain language to the effect that the rights are held in trust for the water users within the district as the relationship is defined by law. *See* I.C. § 43-316. The fact that the rights are decreed in solely in the name of the irrigation district does not alter that relationship.

To the extent the Court is now being asked to clarify existing law against which the water right holders were entitled to rely, the Court does not view that as a collateral attack on a prior license or decree. The Court views the matter as a clarification of a prior decree or license. The Court also finds it necessary to include a remark regarding the same so as to avoid having to readdress the issue at some point in the future.

Conversely, to the extent the Irrigation Entities seek to obtain full title (on behalf of their members) to the subject water rights -- that is inconsistent with existing law and would be a collateral attack on the prior decree or license. That issue should have been raised in the former proceedings.

Memorandum Decision and Order on Cross-Motions for Summary Judgment and Notice of Status Conference (91-63 Ownership of Water Rights between Irrigation Entities and Bureau of Reclamation) at 29-30. The inclusion of the remark for a previously licensed right was upheld by the Idaho Supreme Court. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2006).

In the instant case, the Objectors assert that the issues raised in the objections do not constitute a collateral attack on the elements stated in the license because the license is not valid.² The Objectors argue that IDWR acted outside the scope of its authority in issuing the license for streamflow maintenance by failing to follow the exclusive

² The Boise Project Board of Control also argues that the objections do not constitute a collateral attack because the license was issued after the director's report and recommendation was filed.

procedure for licensing a minimum streamflow right as set forth in the Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.* This Court disagrees. The Court acknowledges that the failure of IDWR to follow statutory procedures in issuing a license may very well invalidate a license. The Court also acknowledges that an invalid license may also constitute an exception to the collateral attack prohibition. However, for the reasons discussed below the Court does not find that IDWR failed to follow proper procedures in issuing the license for the streamflow maintenance purpose of use. Therefore the Court finds that the license is not void.

B. The Idaho Minimum Stream Flow Act does not apply to the Streamflow Maintenance Claim.

The arguments raised by the Objectors rest on the assumption that the streamflow maintenance claim at issue is in all respects a minimum streamflow claim as defined by the Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.* (“IMSFA” or “Act”). The Respondents argue that because the claim involves a diversion, namely the dam, the IMSFA does not apply. The facts of this case present somewhat of an anomaly and a case of first impression regarding the application of the IMSFA. There are colorable arguments on both sides of the issue. While on one hand there is a diversion, the place of use is still located within the natural channel of the river. On the other hand, the entire flow of river is diverted and then artificially released. In other words, the claim does not involve the appropriation of a natural flow within the channel. In arriving at the decision that the IMSFA does not apply to the licensed streamflow maintenance claim, this Court relies on the following: 1) A plain reading and application of the IMSFA; 2) the interpretation of the Act as applied by the Idaho Department of Water Resources, 3) the interpretation of the Act as applied by the Idaho Water Resource Board, 4) the minutes from the House Resources and Conservation Committee on the IMSFA, and 5) the Idaho Supreme Court’s analysis in *In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge, State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000) (“*Smith Springs*”). Each is discussed below.

1. **Based on the plain meaning of the statutory language, the IMSFA does not apply to the streamflow maintenance claim.**

It is well established that the interpretation of a statute begins with an examination of the statute's literal words. *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 68 (Ct. App. 2000). The language of the statute must be given its plain, obvious and rational meaning. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). If the language is clear and unambiguous, it must be applied according to its plain terms, and there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Id.* However, if it is necessary for the Court to interpret a statute, then it will attempt to ascertain legislative intent by examining the language used, the reasonableness of the proposed interpretations, as well as the policy behind the statute. *Id.*

Idaho Code § 42-1501 of the IMSFA provides:

42-1501. Legislative purpose – Minimum stream flow declared beneficial use. – The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality. The preservation of the water of the stream of this state for such purposes when made pursuant to this act is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water. The legislature further declares that minimum stream flow is a beneficial use of water of the streams of this state of the purpose of protecting such waters from interstate diversion to other states or by the federal government for use outside the boundaries of the state of Idaho. Minimum stream flows as established hereunder shall be prior in right to any claims asserted by any other state, government agency, or person for out of state diversion. It is, therefore, necessary that authority be granted to receive, consider, approve or reject applications for permits to **appropriate water of the streams of this state to such beneficial uses to preserve such water from subsequent appropriation to other beneficial uses under the provisions of chapter 2, title 42, Idaho Code.** [emphasis added].

The “definitions” section of the Act defines “appropriate” as “the identification of a beneficial use and **place of in-stream use of waters of a stream.** It shall not be

construed to require any kind of physical structure or physical diversion from the stream. . . .” I.C. § 42-1502(a) (emphasis added). “Stream” is defined as any lake, spring, creek, stream, river or other natural body of standing or moving water which is subject to appropriation under the laws of the state of Idaho.” I.C. § 42-1502(e) (emphasis added). “Minimum stream flow” is defined as the minimum flow of water in cubic feet per second of time . . . required to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of a stream in the public interest” I.C. § 42-1502(f) (emphasis added). The Act defines “Unappropriated water” as “water which is not subject to diversion and use under any prior existing water right established by diversion and application to a beneficial use or by application, permit or license on file or issued by the director under the provisions of chapter 2, title 42, Idaho Code, with a priority of water right date earlier than an application for appropriation of minimum stream flow filed under the provisions of this act.” I.C. § 42-1502(g).

While there are apparent similarities between the subject streamflow maintenance water right and a water right perfected under the IMSFA, a plain reading of the statutory language of the IMSFA indicates that they are not the same. A water right perfected under the IMSFA is an *in situ* right, meaning the water is appropriated in its natural or original state. The purpose of the appropriation is to leave a portion of the unappropriated natural flow of a stream in its natural channel to accomplish such stated purposes as “protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.” The IMSFA works by appropriating an in-stream flow through the identification of a defined quantity of a natural stream flow measured in cubic feet per second of time. Once the right is perfected, the appropriator, the Idaho Water Resource Board, need not take any action to implement the use of the water authorized under the right. No diversion works need to be constructed and no pipes, ditches or other means of conveyance need be utilized. In other words, the Idaho Water Resource Board need not do anything to implement the use of water under the right. The effect of the right is that the natural body of water is protected from subsequent appropriations to the extent of the minimum flows. Put differently,

otherwise appropriable water is removed from the potential for future appropriation. Pursuant to the Idaho Constitution, such a protection from future appropriations could only be accomplished through the creation of a water right as opposed to the Legislature simply passing legislation prohibiting unappropriated water from being appropriated.³ Prior to the enactment of the IMSFA – and a few similar water rights created by the Idaho legislature on a case-by-case basis – such a water right did not exist because of the diversion requirement. *See e.g.* I.C. § 67-4307 (Malad Canyon) and discussion *infra*; I.C. § 67-4308 (Niagra Springs); I.C. § 67-4309 (Big Springs); I.C. § 67-4310 (Box Canyon); 67-4311 (Thousand Springs).

While the subject streamflow maintenance water right accomplishes a number of the same purposes for which the IMSFA was created, it does so in a different manner. The water right is not an *insitu* right in that the water is not being appropriated in its natural state. Instead, the 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 the Lucky Peak dam and reservoir. The BOR has flexibility in releasing the water when needed to accomplish such purposes. Rather than taking no action, as is the case with an IMSFA water right, the BOR monitors and manages the stream flow releases from the reservoir on a day-to-day if not hour-to-hour basis. This is not the same “no action” water right as is contemplated by the IMSFA. A water right perfected under the IMSFA is defined and measured in cubic feet per second within the natural channel. *See* I.C. § 42-1502(f) (defining minimum flow of water in cubic feet per second of time); I.C. § 42-1502(e) (defining stream as natural body of water subject to appropriation). Unlike a claim under the IMSFA, the subject streamflow maintenance claim is not defined or measured in terms of cubic feet per second within its natural stream channel. Rather, the claim is measured in terms of total acre feet per year within the body of the reservoir. Releases from the reservoir are also measured in terms of total acre feet per year.

³ Article XV § 3 of the Idaho Constitution provides in relevant part: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.”

One argument raised over the application of the IMSFA concerns the purpose and meaning of the language of I.C. § 42-1502(a) which provides: "It shall not be construed to require any kind of physical structure or physical diversion from the stream. . . ." ⁴ This language has been argued to support the proposition that the IMFSA applies whether or not a diversion exists. This Court disagrees with that interpretation. Such an interpretation would result in an internal inconsistency in the application of the statute. Simply put, if the Act also applies to a diversion "from a stream" as the term "stream" is defined by I.C. § 42-1502(e) then by the statutes' own terms it would not be an appropriation of an in-stream flow in its natural channel, which is the purpose of the Act. To the extent the provision can be argued to make the application of the IMSFA ambiguous, the Court notes the following canon of statutory interpretation.

A statute is passed as a whole and not in parts or sections and is animated by one general purpose or intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

Vol. 2A Sutherland, *Statutes and Statutory Construction* § 46:05 (2001).

The more rational explanation for the inclusion and purpose of the provision is to resolve any ambiguity and make clear that the Idaho Legislature waived the statutory diversion requirement that would otherwise be required to establish a water right after the issue presented itself in *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974) ("*Malad Canyon*"). The *Malad Canyon* case involved one of the above-referenced case-by-case in-stream flows created by the Idaho legislature prior to the enactment of the IMSFA. In 1971, the Idaho legislature enacted I.C. § 67-4307 directing the Department of Parks of the State of Idaho to appropriate in trust for the citizens of the State of Idaho certain unappropriated natural flows of the Malad Canyon. One of the challenges to the appropriation was whether the Idaho Constitution required an actual physical diversion in order to perfect a water right. The Idaho Supreme Court

⁴ Some previous legislative case-by-case appropriations included the language "and no proof of completion of any diversion works shall be required." See 67-4301 (Big Payette Lake); 67-4304 (Priest, Pend d'Orielle, and Coeur d'Alene Lakes).

held that the Idaho Constitution did not require a physical diversion and that the requirement was a statutory requirement. The provisions of Idaho Code § 67-4307 did not expressly state that the statutory diversion requirement had been waived. In resolving the conflict between the general statutory diversion requirement and the application of I.C. § 67-4307, the Idaho Supreme Court resorted to established rules of statutory interpretation and held by implication that the Legislature did away with the diversion requirement:

It is axiomatic that where a general statute and a specific statute deal with the same subject matter and are in conflict, the provisions of the specific statute must control. . . . It is also clear that where two statutes conflict the latest expression of the legislative will must prevail.

We deem it to be the intent of the Idaho legislature to dispense with any physical diversion requirement in the case of the appropriation directed in I.C. § 67-4307. Any other construction would nullify the obvious purpose of I.C. § 67-4307. Courts should if possible in construing a statute give it an interpretation which does not in effect nullify the statute.

Id. at 444-45, 530 P.2d at 928-29 (citations omitted).

The IMSFA was enacted in 1978 as an alternative to the Idaho Legislature having to enact specific legislation on a case-by-case basis to appropriate in-stream flows. 1978 Idaho Sess. Laws ch. 345. Accordingly, in an effort to avoid the same conflict as arose in the *Malad Canyon* case, the Idaho Legislature included the provision “[i]t shall not be construed to require any kind of physical structure or physical diversion from the stream. . . .”

Therefore, based on a literal reading of the statutory language of the IMSFA this Court holds that the IMSFA does not apply to the streamflow maintenance claim at issue.

2. **The interpretations of the agencies responsible for applying the provisions of the IMSFA also conclude that the IMSFA does not apply to the streamflow maintenance claim.**

Although this Court does not find the IMSFA to be ambiguous, this Court's analysis regarding its application is consistent with IDWR's interpretation and historic application of the Act. As recited previously in the factual history section of this decision, Director Tuthill, then Supervisor for the Water Allocation Section of IDWR, prior to granting an amendment to the permit concluded that "Lucky Peak Reservoir is not a natural body of water and stored quantities are not subject to the provisions of Chapter 15." *Kiser Aff.*, Ex. F, p. 3. The Court's analysis is also consistent with the conclusions of the Idaho Water Resource Board (IWRB), which determined:

Lucky Peak Reservoir is not a natural body of water and the stored quantities are not subject to the provisions of Chapter 15, Idaho Code. Most water rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

Jarvis Aff., Ex. W, p. 254-255.

In *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400, (1997), the Idaho Supreme Court set forth the criteria regarding when a Court should accord deference to an agency's construction of a statute.

In *Jr. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991), the Court established a four-part test for when agency construction of a statute should be accorded deference. This Court summarized this test as follows:

This four prong test states that an agency's construction of a statute will be given great weight if (1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statute is reasonable; (3) the statutory language at issue does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present.

Garner v. Horkley Oil, 123 Idaho 831, 833, 853 P.2d 576, 578, (1993) (citing *Simplot*, 120 Idaho at 862, 820 P.2d at 1219).

Hagerman Water Right Owners at 734, 947 P.2d at 407. The rationales underlying the rule of deference were set forth in *Garner v. Horkley Oil*.

These rationales include situations when an agencies interpretation has been relied upon for a number of years; when the agency's interpretation represents a practical interpretation; when the statutory test has not been altered by the legislature in light of the interpretation, or when the interpretation is formulated contemporaneously with the enactment of the statute; and when the interpretation involves an area of expertise developed by the agency.

Id. at 834, 853 P.2d 579 fn.3.

In applying the above-stated criteria, the IWRB and IDWR are the agencies charged with implementing and administering the provisions of the IMSFA. Idaho Code § 42-1504 authorizes any person, agency etc. to make a request in writing with the IWRB to consider the appropriation of a minimum stream flow of unappropriated waters. The IWRB is authorized to accept or reject the proposal and may hold hearings in reaching a decision. There is no right of review of the rejection of a proposal. I.C. § 42-1504. If the IWRB accepts the proposal, it then submits an application to the Director of IDWR. The Director, pursuant to notice, is authorized to conduct an investigation and hold hearings for the purpose of making findings either "approving the application in whole, or in part, or upon conditions or rejecting said application." I.C. § 42-1503. The IWRB or any party, who testified at a hearing, aggrieved by the decision of the Director may seek judicial review. *Id.* The conclusions of both IDWR and the IWRB that the IMSFA does not apply to the subject streamflow maintenance claim are reasonable. This Court arrived at the same conclusion by way of an independent analysis.

The IMSFA does not expressly address the question at issue. Although in this Court's opinion, a plain reading of the statute answers the question at issue. The arguments raised in the context of these proceedings would suggest that the statute does adequately address the issue.

The Court also finds that one or more criteria of the rationales underlying the rule of deference are satisfied. The interpretation and application of the IMSFA by both IDWR and the IWRB have been in existence at least since 1984 when the application to amend the permit was filed and reviewed. The Boise River has been administered in accordance with the amended permit since it was approved. There has been considerable reliance on the administration of the River since that time. *See e.g. Finch Aff.; O'Neal*

Aff.; *Harmon Aff.*; *Engel Aff.*; *Bieter Aff.* Moreover there were multiple opportunities for affected parties to contest the permit since 1964 when the permit for the 50,000 acre-feet was approved. Almost forty-years elapsed since the objections to the permit and license were filed. Finally, the agencies' interpretations represent a practical interpretation of the application of the Act.

Accordingly, the Court's finds it appropriate that weight and deference also be given to the interpretations of the scope of the IMSFA as applied by both IDWR and the IWRB.

3. The minutes from the Resources and Conservation Committee conclude that the IMSFA does not apply to a diversionary right.

The minutes from the Idaho State House Resources and Conservation Committee wherein the IMSFA was discussed also reflect an interpretation consistent with this Court's analysis of the IMSFA and the interpretations of IDWR and the IWRB.

Policy No. 6: INSTREAM FLOWS

Water rights should be granted for instream flow purposes. The legislation authorizing this policy should recognize and protect existing water rights and priorities of all established rights and delegate responsibilities for determining flows and administrative authority to the Department of water resources. The legislation should also direct that the Idaho Water Resource Board shall be the only applicant for instream flow.

Rep Tibbitts: Would you define instream flows?

Mr. Allred: Those flows by which there is no diversion. They are instream flows for some purpose whether fisheries, recreation, or water quality. There is no physical diversion.

2nd Jarvis Aff., Ex. LL, p. 21.

While not conclusive of legislative intent concerning the application of the IMSFA, the explanation is consistent with the Court's interpretation and those of IDWR and the IWRB.

4. **The Idaho Supreme Court's analysis in the *Smith Springs* case distinguished between the significance of diversionary and non-diversionary rights used for wildlife purposes.**

The Idaho Supreme Court also weighed in on the application of the IMFSA in its analysis in *In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge, State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000) ("*Smith Springs*"). In *Smith Springs*, the United States filed a state-law based beneficial use in-stream flow claim for wildlife habitat. The issue was framed as whether the United States could claim a non-diversionary water right for purposes other than stock-watering. The Idaho Supreme Court rejected the United States' claim for wildlife habitat solely on the basis that there was no diversion. The Supreme Court's entire analysis focused on a comprehensive history of the diversion requirement and its two exceptions, which include in-stream stock-watering and state agencies acting pursuant to statute (i.e. the IMSFA). The Supreme Court determined "neither of these exceptions covers the United States' claim." *Id.* at 110, 996 P.2d at 810. The entire basis for the decision turned on the absence of a physical diversion. Presumably, if the only way to perfect a water right for wildlife habitat was through the IMSFA, whether or not a diversion existed, the issue would have more appropriately focused on the purpose of use as opposed to the exceptions to the diversion requirement. The logical inference is that the United States could have perfected an in-stream non-consumptive use claim for wildlife habitat so long as a physical diversion of some type was present.

In sum, based on the cumulative weight of all of the above-discussed factors, this Court holds that the IMSFA does not apply to the licensed streamflow maintenance claim at issue. Having concluded that the IMSFA does not apply to the license, the Court cannot conclude that IDWR acted outside of its authority by failing to following the procedures set forth in the IMSFA.

C. Objections to the Streamflow Maintenance Purpose Of Use Constitute Collateral Attacks on a Valid License.

The Objectors also argue that even if the IMSFA only applies to non-diversionary rights, the only way to perfect a water right for the underlying purposes of the streamflow maintenance claim such as those enumerated in the IMSFA including "protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality" is through the IMSFA. This Court disagrees. First, the claim, including the purpose of use, is based on a license. This Court already determined that IDWR did not act outside the scope of its authority in issuing the license without complying with the IMSFA. The Court therefore views challenges to the purpose of use as impermissible collateral attacks on the license. IDWR is the administrative agency charged with administering water rights in the State including the administration of the application, permit and licensing process for perfecting a water right. The fact that IDWR issues a license for a purpose of use that has not previously been affirmed by the Idaho Constitution, the Idaho Legislature or the Idaho Supreme Court does not mean the agency is acting outside of its authority by issuing a license for such a purpose.⁵ If this were to be the case, then every time an application for a novel use for water is made IDWR would have to either go to the legislature or seek a declaratory judgment prior to proceeding with processing such a permit application. Furthermore, in the course of the licensing process the fact that IDWR may make a decision argued to be legally incorrect does not mean IDWR is acting outside the scope

⁵ In Justice Bakes special concurrence in the *Malad Canyon* case he stated: "I therefore conclude that the uses other than those enumerated in Article 15, § 3, can be beneficial uses." *Malad Canyon* at 447, 530 P.2d at 931 (Bakes special concurrence). He also stated:

With the exception of the uses implicitly declared to be beneficial by Article 15, § 3, there is always a possibility that other uses beneficial in one era will not be in another and *vice versa*. As stated in *Tulare Irrig. Dist. v. Lindsay-Stratmore Irrig. Dist.*, 3 Cal.2d 489, 45 P.2d 972, 1007 (1935):

What is a beneficial use, of course depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

Id. at 448-49, 530 P.2d at 932-33.

of its delegated authority. Instead the permit and licensing process affords any aggrieved party the opportunity to contest the purpose of use and seek judicial review of the matter.

In this case the streamflow maintenance purpose of use was not contested at the permitting stage. In fact, just the opposite occurred. The initial 50,000 acre-foot for streamflow maintenance purpose of use came about as a result of a settlement of protests to out of basin diversions filed by many of the same parties who are objectors in this subcase. Parties also had the opportunity to protest the purpose of use in 1984 when the BOR made application to amend the quantity. Therefore, based on the previously discussed law-of-the case, the Court finds that objections to the streamflow maintenance purpose of use constitute impermissible collateral attacks on the license.

The Objectors cite no authority supporting the proposition that the exclusive means for perfecting a water right – involving a diversion - for the “protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality” is through the IMSFA. In *Smith Springs*, the Idaho Supreme Court rejected the United States’ claim for wildlife habitat solely on the basis that there was no diversion. The Idaho Supreme Court’s entire analysis focused on the diversion requirement and its two exceptions. Simply stated, if the only means for perfecting such a wildlife habitat water right were through the IMSFA or some other statute, the issue as framed - whether the United States could claim a non-diversionary water right for purposes other than stock-watering – as well as the comprehensive discussion over the diversion requirement would have been irrelevant. Again, the issue would have focused on the purpose of use as opposed to whether or not a physical diversion was present.

- 1. Although the *Director’s Report* was issued prior to the license, the objections still constitute impermissible collateral attacks.**

The Boise Project Board of Control argues that no impermissible collateral attack on the license occurred because the *Director’s Report* including the recommendation for the water right was filed prior to the issuance of the license. This Court disagrees.

The beneficial use exam occurred on February 19, 2002. The *Director’s Report* which included the recommendation for the water right claim was filed on September 24,

2002. The recommendation specifically states that it is based on the license as opposed to a permit. If the recommendation was based on a permit, it would have stated as such. See I.C. § 42-1421. The license was issued three days later on September 27, 2002. The first objections to the *Director's Report* were filed January 14, 2003.

The Court fails to see the legal relevance of the timing of the issuance of the license. The prohibition on collateral attacks to licenses results from the permit and licensing process being a separate administrative proceeding. Remedies are sought through the Idaho Administrative Procedures Act and judicial review. The Idaho Legislature made it clear that the SRBA is not the proper forum for reviewing administrative decisions. I.C. § 42-1401D. The Court recognizes that there can be jurisdictional overlap between actions originating administratively and those arising in the SRBA. In such circumstances, the SRBA Court holds a hearing to determine whether the matter should continue to proceed administratively or whether the administrative proceeding should be stayed and the matter continued in the SRBA. However, once a final administrative order is issued and no right of review is preserved, the proceedings on the license become final.

At the time the license was issued, on September 27, 2002, the Boise Project Board of Control should not have assumed that judicial review of the license would be conducted solely through the SRBA and not through the Idaho Administrative Procedures Act. Particularly after the enactment of I.C. § 42-1401D in 2001. To the extent there was any uncertainty about the proper forum for judicial review, any protestors could have pursued grievances in both forums, i.e. they could have sought judicial review through the APA and filed an objection in the SRBA.

D. The Operation of Idaho Code § 39-104(4) is Consistent with this Court's Decision on the Application of the IMSFA.

On July 21, 2008, Pioneer and Settlers Irrigation Districts filed a *Notice of Additional Authority* citing I.C. § 39-104(4). Idaho Code § 39-104(4) is part of the Idaho

Environmental Protection and Health Act, I.C. §§ 39-101 *et. seq.* Idaho Code § 39-104 establishes the Department of Environmental Quality. Paragraph (4) provides:

No provision of this title shall be interpreted as to supersede, abrogate, injure or create rights to divert or store water and apply water to beneficial uses established under section 3, article XV of the constitution of the state of Idaho and title 42, Idaho Code. Nothing in this title shall be construed to allow the department to establish a water right for minimum water levels in any lakes, stream flows, or impoundments. *Minimum stream flows and minimum water levels may only be established pursuant to chapter 15, title 42, Idaho Code.*

(emphasis added).⁶ The provisions of I.C. §39-104(4) do not alter this Court's prior analysis.

First, no provision of Title 39 is being relied upon to establish the streamflow maintenance right at issue. Second, although I.C. §39-104(4) provides that "minimum stream flows" can only be established pursuant to the IMSFA, for the reasons discussed previously, the streamflow maintenance right at issue is not the same type of water right as the "minimum stream flow" right contemplated under the IMSFA. As such, the Court holds that I.C. §39-104(4) is of no effect in this matter.

E. The Streamflow Maintenance Claim does not Interfere with the Interests Held in Lucky Peak Reservoir by Irrigation Entities.

The Objectors also argue that the streamflow maintenance claim should be denied because the claim is contrary to the representations and guarantees made to irrigation entities by the BOR. This Court disagrees. In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the Idaho Supreme Court held that storage right holders have a property interest in the water rights for which they hold contracted storage space. In this case, the irrigation entities do not hold contracts for the entire capacity of Lucky Peak Reservoir. In 1966, the same irrigation entities holding irrigation rights in Arrowrock and Anderson Ranch Reservoirs entered into water service contracts with the BOR for supplemental water supplies. In 2005, the water service contracts were

converted to repayment contracts. According to the terms of the 2005 repayment contracts “[a]ll space in Lucky Peak Reservoir shall be operated with like priority as to storage rights and all space will be treated proportionately” These rights are acknowledged in the *Director's Report* in the amount of 111,950 acre-feet for irrigation storage and irrigation from storage. The 152,300 acre-feet of storage space used to satisfy the streamflow maintenance water claim at issue represents storage space for which these entities do not hold contracts. As such, these irrigation entities do not have a property interest in this space as a result of these repayment contracts, nor do they have a senior priority. The Court cannot find that the streamflow maintenance rights interfere with these rights. Accordingly, the holding and reasoning in *United States v. Pioneer Irr. Dist.* does not apply to this storage space for which no contracts are held.

The Court also finds no merit in the argument, that second to flood control, the primary purpose of Lucky Peak was for irrigation and therefore the space may only be used for the storage and release of irrigation water rights. The 1966 water service contracts for the supplemental water supplies specifically acknowledged that “the United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses” *Stevens Aff.*, Ex. D & E at 1. The repayment contracts also specifically acknowledged that the “United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses, for which the United States holds License No. 63-03618” The irrigation entities entered into these contracts acknowledging that the reservoir could be used for purposes other than irrigation.

- 1. Irrigation entities holding repayment contracts in Anderson Ranch and Arrowrock Reservoirs have an interest in Lucky Peak which should be reflected in the *Partial Decree* in the form of a remark.**

⁶ The term “department” as used in the statute means the Department of Environmental Quality. I.C. §39-103(4)

Prior to the establishment of the 50,000 acre-feet for maintaining winter time flows and prior to the existence of the contracts for supplemental water supplies, the BOR entered into contracts which amended or supplemented the repayment contracts held by each of the irrigation entities having storage rights in Arrowrock and Anderson Ranch Reservoirs. The "Supplemental Contracts" guaranteed to those contract holders the use of storage waters in Lucky Peak for irrigation purposes in an amount equal to the unfilled storage capacity resulting from the water having been evacuated from Anderson Ranch and Arrowrock Reservoirs for flood control purposes. *Arrington Aff.*, Ex. B, pp.4-5; *Stevens Aff.*, Ex B and C. Since 1985, pursuant to the *Water Control Manual for Boise River Reservoirs*, the first 60,000 acre-feet of any shortfalls caused by flood control operations comes from the streamflow maintenance allocation. Any shortages beyond the 60,000 acre-feet are allocated proportionality among all the uses in Lucky Peak.

The Boise Project Board of Control argues that this contract interest should be reflected in the *Partial Decree* to allow water otherwise used for streamflow maintenance to be released for irrigation purposes in order to satisfy these contractual obligations. This Court agrees for two reasons. First, pursuant to the Idaho Supreme Court's holding in *United States v. Pioneer Irr. Dist.*, the repayment contract holders in Arrowrock and Anderson Ranch Reservoirs also have an interest in the storage space in Lucky Peak Reservoir *viz- a-viz* the terms of these Supplemental Contracts. This interest for flood evacuation is paramount to all other rights to storage space in Lucky Peak, including space for which these same entities hold separate repayment contracts (formerly water service contracts). The Court acknowledges that the repayment contract right holders in Anderson Ranch and Arrowrock are the same entities also holding separate repayment contracts (formerly water service contracts) for water out of Lucky Peak. Nonetheless, the repayment contracts in Anderson Ranch and Arrowrock are distinct from the repayment contracts in Lucky Peak. The Supplemental Contracts regarding flood evacuation are tied to the repayment contracts held in Anderson Ranch and Arrowrock and are senior to all other interests in Lucky Peak.

Second, although the BOR has historically administered the flood evacuation from Anderson Ranch and Arrowrock Reservoirs into Lucky Peak as being paramount,

there is no authorization for it on the face of the *Partial Decree*. This is particularly true with respect to releasing water designated for streamflow maintenance for irrigation purposes in order to satisfy the obligation without having to apply for a statutorily required temporary change in purpose of use.

This Court holds that, consistent with the holding in *United States v. Pioneer Irr. Dist.*, that the interest in Lucky Peak held by contract right holders in Anderson Ranch and Arrowrock should be reflected in the *Partial Decree* in the form of a remark included in the “*Other Provisions Necessary for the Definition or Administration of this Water Right*,” which provides:

The storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations.

Accordingly, the Boise Project Board of Control’s *Motion for Partial Summary Judgment* is **granted in part**.

VI.

CONCLUSION AND ORDER

For the above-stated reasons, this Court holds that the streamflow maintenance claim at issue is outside the scope of the IMSFA. IDWR did not act outside its authority in the license for a streamflow maintenance purpose of use and, therefore, the license is valid. Objections to the purpose of use therefore constitute impermissible collateral attacks to the license. The Court holds further that a remark in the partial decree is

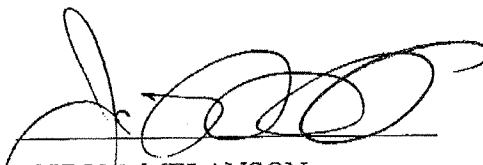
necessary to acknowledge and administer the interests held in Lucky Peak that are related to contract rights held in Anderson Ranch and Arrowrock Reservoirs.

VII.

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.

Dated Sept. 23, 2008



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT RE: BUREAU OF RECLAMATION STREAMFLOW MAINTENANCE CLAIM** were mailed on September 23, 2008, by first-class mail to the following:

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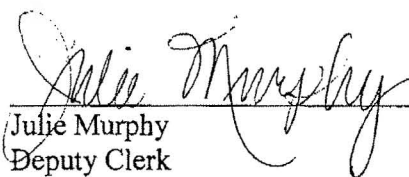
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Appendix 2

DATA AUTOMATION FOR WATER SUPPLY MANAGEMENT^a

By Robert J. Sutter,¹ Ronald D. Carlson,² and Dan Lute³

ABSTRACT: The available daily water supply of a multi-reservoir river system, the Upper Snake River in Idaho, is managed more efficiently using an automated system of data collection, transmission, and processing. Streamflow, reservoir, and canal data are transmitted daily from remote gage sites and regional terminals to a central computer where a FORTRAN program computes natural (unregulated) flow and accounts for storage water supplies. Natural flow is distributed among various uses (primarily irrigation) and users based on established water rights. Storage allocations are monitored daily to better manage remaining supplies. Daily uses and resulting supplies are projected ahead by as much as one week to reduce river operation response times. The improved management correctly accounts for water distribution by rights and for storage allocations while promoting conservation of water supplies.

INTRODUCTION

The extremely dry year of 1977 produced record low runoff for the Snake River and its tributaries. It became obvious during that water short year that managing Idaho's Water District 1, the Upper Snake River, had become too complex for traditional methods of water allocation to fairly and accurately distribute water to the proper users (primarily for irrigation) in a timely manner. Natural flow and storage water were being delivered based on hand computations developed in the 1920s when far fewer diversions, reservoirs, and rights existed. These computations were very time-consuming and necessarily general in nature resulting in many inaccuracies in water distribution.

As a direct result of the problems encountered in 1977, the Idaho Department of Water Resources (IDWR), Water District 1, and the U.S. Bureau of Reclamation (USBR), at the request of the water users, began a joint effort late in that year to develop an automated system of data transmittal, storage, and use to better manage the Upper Snake water resources.

This paper describes the methods selected to collect and process the data, the FORTRAN IV program developed to account for natural flow and stored water, and the ability of the system to achieve the desired goals.

^aPresented at the May 19-21, 1982, ASCE Water Resources Planning and Management Division Specialty Conference, held at Lincoln, Neb.

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Note.—Discussion open until December 1, 1983. To extend the closing date one month, a written request must be filed with the ASCE Manager of Technical and Professional Publications. The manuscript for this paper was submitted for review and possible publication on May, 1982. This paper is part of the Journal of Water Resources Planning and Management, Vol. 109, No. 3, July, 1983. ©ASCE, ISSN 0733-9496/83/0003-0237/\$01.00. Paper No. 18126.

WATER DISTRICT

Idaho's Water District 1, the Upper Snake River, extends from the Wyoming border westerly to Milner Dam in south central Idaho. The district includes all of the Upper Snake River in Idaho above Milner Dam and most of its tributaries, forming an area approximately 200 mile (320 km) long and 60 mile (95 km) wide. Figure 1 shows the extent of Water District 1 which includes 800 mile (1,300 km) of river and major tributaries. More than 300 canals and pumps representing over 650 water rights divert streamflow to irrigate approximately 1,300,000 acre (525,000 ha). Runoff mainly from snowmelt is stored for summertime use in seven major reservoirs having a capacity of about 4,000,000 acre-ft (4.9×10^9 m³). Most of the canals and pumps have storage entitlements in the reservoir system.

The distribution of water is legally accomplished under the western prior appropriation doctrine, i.e.: "first in time is first in right." The difficulty in ensuring the proper distribution of available water supplies increases as demand for water increases. As early as 1905 the Upper Snake River was beginning to experience such distribution problems. Resulting lawsuits forced the adjudication of water entitlements. In 1919, the office of Snake River Watermaster was established to assure the proper distribution of water in accordance with the adjudicated rights.

The watermaster's responsibility is to assure that natural streamflow is diverted in the same order of priority as it was originally developed.

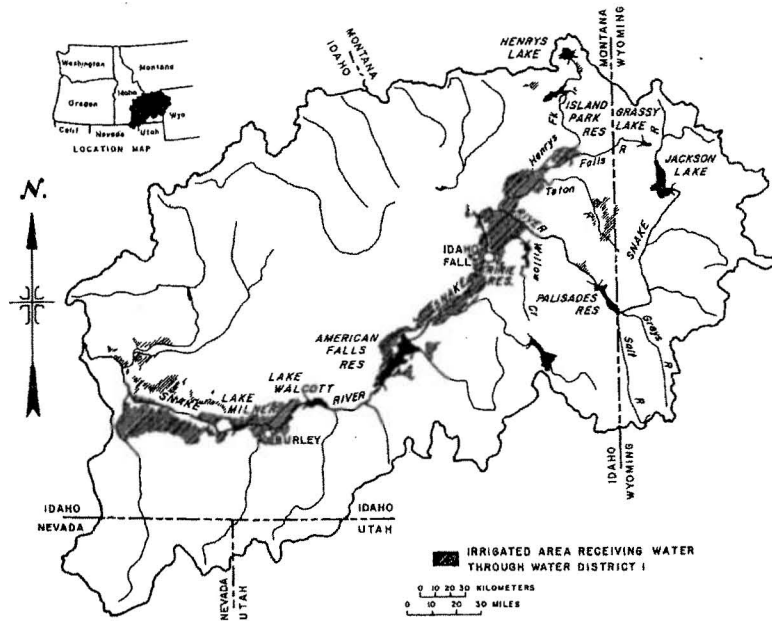


FIG. 1.—Upper Snake River Basin

The area of jurisdiction of the Upper Snake River watermaster is designated as Water District 1 by the state of Idaho. In addition to distributing the natural flow pursuant to the water rights, the watermaster must see that water released from storage and commingled with the natural flow is delivered to its rightful recipients. Storage deliveries normally represent about one-third of the 8,000,000 acre-ft (9.9×10^9 m³) distributed for irrigation each season.

WATER RIGHTS

Natural Flow Rights.—All water rights in Idaho have limitations and restrictions such as quantity, priority, nature of use, period of use, point of diversion, and place of use. Although water is used for a variety of purposes in District 1, the water rights are primarily for direct diversion of irrigation water or for storage of water in reservoirs for irrigation. Direct irrigation rights are normally valid only during the irrigation season (usually April 1 to November 1), while reservoir storage can take place any time sufficient water is available. Water rights for both of these purposes are considered equally in allocating natural flow, subject to the rules of prior appropriation. Although direct irrigation rights have, in general, earlier priorities, there are many direct rights with priorities later than the storage rights.

Stored Water Entitlements.—Use of stored water from reservoirs is governed by contracts with the USBR, which owns the storage rights in six of the seven major reservoirs in District 1. Space holders are allocated storage each year subsequent to maximum reservoir fill. In general, all space holders share proportionally in the shortage when a reservoir does not completely fill.

THE PROBLEM

Prior to the development of the computer technology described here, the watermaster determined distribution priorities and segregated stored water using simplified hand methods. These methods divided the river system into three distribution areas: Henrys Fork, Snake River above American Falls Reservoir, and Snake River below American Falls Reservoir to Milner Dam. The computed natural river flow at selected river gaging stations was allocated to the various water rights within each broad area. Daily changes in reservoir storage were converted to an average daily flow and used to adjust the flow leaving each area to arrive at the allocable natural stream flow. This was not accurate because the basin's water supply is much more geographically variable than can be represented by the three areas. The lengthy trial and error computations which were required to distribute the natural flow caused delays in informing users of their rates of stored water diverted. Many of the smaller water users were not included in the system accounting because the volume of data could not be handled by the limited staff.

The complexities of early season reservoir operation (concurrent storing and withdrawal by various space holders in the same reservoir) made it impossible to integrate direct irrigation rights with reservoir rights until the reservoirs reached their maximum fill, even though the reservoir

rights were, in many cases, earlier in priority. Reservoir carry-over storage could not be easily reconciled with the sum of individual space holder's storage supplies remaining at the end of the irrigation season. As the demand for available water supplies increased, these generalized accounting methods became less acceptable. After the drought of 1977, water users concluded that changes had to be made.

NECESSARY IMPROVEMENTS

In reviewing the distribution problems on the Upper Snake, it became apparent that a number of changes would have to be made to assure distribution of, and accounting for, natural flow and storage entitlements. A system for collecting, processing, and storing a large amount of data had to be developed to reach the following goals:

1. Improvement in basic data accuracy. Accurate diversion, stream-flow, and reservoir data were required on a daily basis. In addition, water rights for each diversion point needed to be identified or confirmed.
2. Development of a method to accelerate data collection to accurately approximate real time conditions.
3. More accurate determination of available water supplies each day. Natural flow must be allocated pursuant to its availability at each diversion point, and the use of stored water by space holders must relate to the actual water remaining in the reservoir.
4. Storage of the information generated each day such that it would be readily available for daily river management as well as permanently retained for planning and general use.

Through a cooperative agreement with the water users in 1978, the IDWR assumed the watermaster services and began to make the necessary improvements for District 1.

IMPROVE QUALITY OF BASIC DATA

Field investigations were made to locate and describe all surface water diversions. Owners of diversion works which were not adequate for proper control were required to upgrade their diversion structures. In addition, measuring devices were improved or installed on all diversions, and continuous stage recorders were provided for all canals which were capable of diverting 100 cfs (2.8 m³/s) or more. Funding for these improvements was provided through a 1977 USBR drought relief program. Diversions were matched against IDWR water right records to verify all water rights.

DATA COLLECTION, TRANSMISSION, AND STORAGE

The allocation and distribution of water from the Upper Snake River system requires daily data for over 300 diversions, nine reservoirs, and 25 river gaging stations. The task of collecting, checking, and storing these data early each day during the irrigation season was considered

most important for this project. The size of the District itself adds to the difficulty in assembling the data.

Because of necessary adjustments in the data for travel time between gaging stations, difficulty in determining rates of storage change in reservoirs, and time lags in collecting river discharge and diversion rates, current day conditions must be approximated from the most recent data. Each day, therefore, water rights and flow accounting must be estimated using the previous average daily river flow and reservoir values and early morning rates of diversion. The following procedure was developed to collect and process the necessary data.

Remote terminals were installed at the District 1 office in Idaho Falls, Idaho, and at the USBR project office in Burley, Idaho, in order to transmit diversion data to the state of Idaho's central computer facility in Boise, which is used to process and store the data. Reservoir and river flow data are received daily by the state computer from the USBR Pacific Northwest Region computer facility in Boise.

There are three paths by which the data travel to the state computer facility as shown by Fig. 2. First, the diversion data collected from gage readers are sent by the watermaster directly via remote terminal. Second, diversion data collected from gage readers by the USBR project office are transmitted by remote terminal to the USBR central computer facility in Boise. Third, remote data collection platforms automatically send the reservoir and river flow data via satellite to the USBR facility in Boise. The satellite transmitted data are processed after midnight each day and, at a specified time the next morning, are transmitted along with the USBR project data to the state computer.

The data transmitted by the USBR project office and the satellite to the USBR central computer are sent to the state of Idaho's IBM 3033 computer where they are stored on a temporary disk file. A similar file is created when data from the watermaster are transmitted to the state. These files are then merged, sorted, and added to a permanent file. This

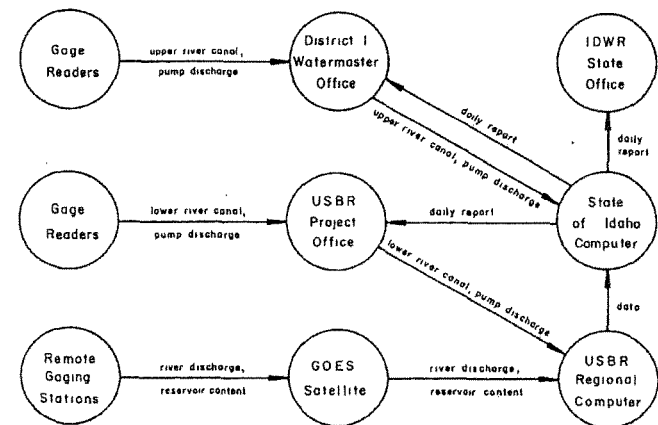


FIG. 2.—Upper Snake River Automation

file then contains all of the hydrologic data necessary for the water right accounting (reservoir contents and evaporation rates, river flow, and diversion rates). In addition to these basic data values, also stored are related data, such as gage heights, measurement shift from rating curve, temperature, precipitation, etc.

BOISE-MINIDOKA HYDROMET SYSTEM

The initial phase of the satellite data collection system previously referred to was installed by the USBR during 1980–81. The system included 67 hydrometeorological (hydromet) data stations throughout the Middle and Upper Snake River basins, a Direct Readout Ground Station (DRGS) in Boise for the Geostationary Operational Environmental Satellite (GOES), and a central computer facility which acts as a network controller. Nineteen stream gaging stations and six reservoir gaging stations in the Upper Snake River basin were included in the first phase and are used directly by Water District 1. Five additional stream gaging stations, three reservoir stations, and 13 canal gaging stations were added to the system in 1982 under the second phase. The hydromet system development was coincidental to District 1 data automation, but has proven to be invaluable for data collection and reporting.

At each gage site, a Data Collection Platform (DCP) interrogates gage sensor outputs at 15-min intervals and stores the values in its memory. At the end of the preassigned time interval of every 3 hr, the DCP transmits all stored values (12 values from each sensor) to the USBR computer facility through the DRGS in Boise.

All data received by the computer facility are processed in real time and stored on disk in a short-term data file where they are available to users through time-share terminals. At 0300 hr each morning, the central computer compiles data from the previous day's short-term file readings to be added to a long-term file. The long-term file includes midnight reservoir elevations and contents, maximum and minimum temperatures, mean daily flows, etc. These long-term file data are then also available to users through time-share terminals.

In addition to the scheduled transmission of reservoir and river flow from the USBR long-term file to the state computer, the Water District and other users can interrogate either the long or short-term USBR files any time current flow or reservoir data are needed.

WATER SUPPLY AND WATER RIGHT ACCOUNTING

Natural Flow Computation.—In order to better define the available water supplies, it was concluded that with improved data, the Upper Snake system could be divided into several reaches and the water supply determined at the downstream end of each reach. The water gained in each reach is calculated by the following equation: Reach gain = reach outflow - reach inflow + sum of reach diversions + reservoir change in storage + reservoir evaporation.

The sums of these gains accumulated from the headwaters to the end of each reach represent the natural flow available for distribution according to water right priorities. At the present time, the Snake system

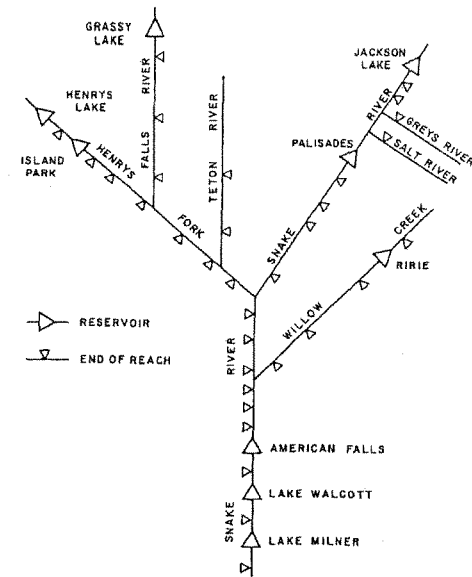


FIG. 3.—Diagram of Upper Snake Reaches and Reservoirs

has been divided into 37 separate reaches. Reaches are located between gaging stations and at other locations where significant inflow occurs between points of diversion. Because gaging stations are not available at the ends of every reach, some flow data are estimated through special calculations. A schematic diagram of the Upper Snake system is shown in Fig. 3.

Accounting Program.—Because of the numerous reaches, diversions, and water rights, a FORTRAN IV computer program was developed to accomplish the water supply and water right accounting necessary to properly distribute natural flow and stored water. The program was initially written in a general form so that it could be adapted to any size system with any number of diversions, reservoirs, water rights, and tributary inflows. The general program is designed to accomplish the following:

1. Adjust hydrologic data to account for travel times between gaging stations.
2. Compute natural flow supplies at specified reach end points.
3. Correct for evaporation losses, which result from impounding water, by adding the equivalent evaporation loss to the distributable natural flow.
4. Allocate natural flow by water right priority equitably over the entire system, subject to the water supply available locally.
5. Proportion natural flow to the rights of equal priority when the water supply is limited.

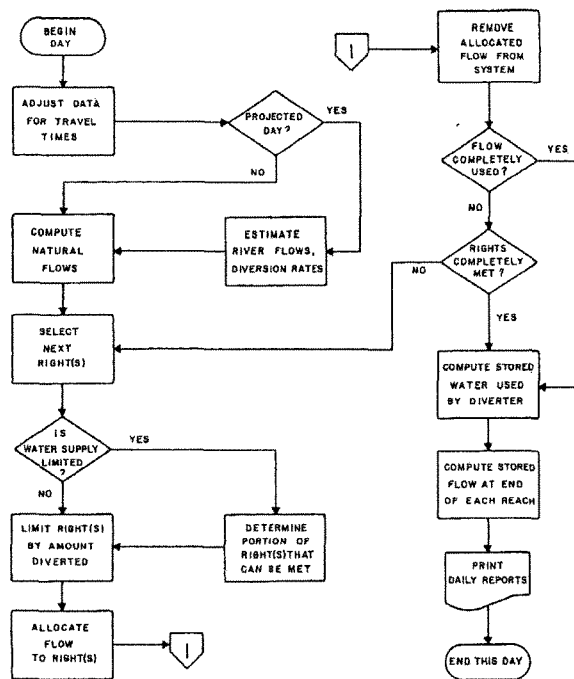


FIG. 4.—Flow Chart of Daily Water Supply and Water Right Accounting

6. Identify the amounts of stored and natural flow at each flow station.
7. Identify use of stored water.
8. Keep running totals of seasonal stored water used and remaining storage supply for all users.
9. Project accounting several days in advance by predicting or using predicted flows.

Figure 4 is a flow chart of the daily water right and water supply accounting procedure. All data including diversion rates, reservoir contents and evaporation, and river flows are converted to a common data to adjust for travel times. A check is made to determine if the day for which the accounting is to be done is a past or future day. For a future day, the accounting is to be "projected" so that river flow and diversion data must be replaced by estimates (see following section).

The natural flow supply is determined by accumulating the computed reach gains in downstream order. Rights of equal priority are identified beginning with the earliest priorities, and each right or group of rights is then allocated natural flow. As each right is met, that amount of flow is deducted from the natural flow in that reach and all downstream reaches, making it unavailable to other rights. Each right is limited that day by the amount actually diverted by the user. When the flow supply becomes limited, the last right may be allocated only a partial supply.

If there are rights of equal priority, they are reduced proportionally, thus sharing the deficiency. Once either the natural flow supply has been exhausted or all rights have been completely satisfied, the amount of water that must be supplied from storage is computed. The preceding process is repeated for each day of the accounting period.

Upon completion of the general accounting program, the program was adapted to the Upper Snake. Several "special cases" in water distribution and water rights unique to the Upper Snake system required modifications and additions to the general program.

SIMPLIFIED ACCOUNTING EXAMPLE

The accounting procedure can be illustrated through the use of an example river system such as the one shown in Fig. 5, which is similar in configuration to the Upper Snake River but simplified for illustrative purposes. The following analysis describes the daily accounting procedure using assumed hydrologic and water right values for the hypothetical system.

Natural Flow Allocation.—Table 1 shows the natural flow computation for each reach of the river. By accumulating the reach gains in downstream order, the total potential natural flow to be allocated throughout the system is found to be 565 cfs (15.8 m³/s), which is the

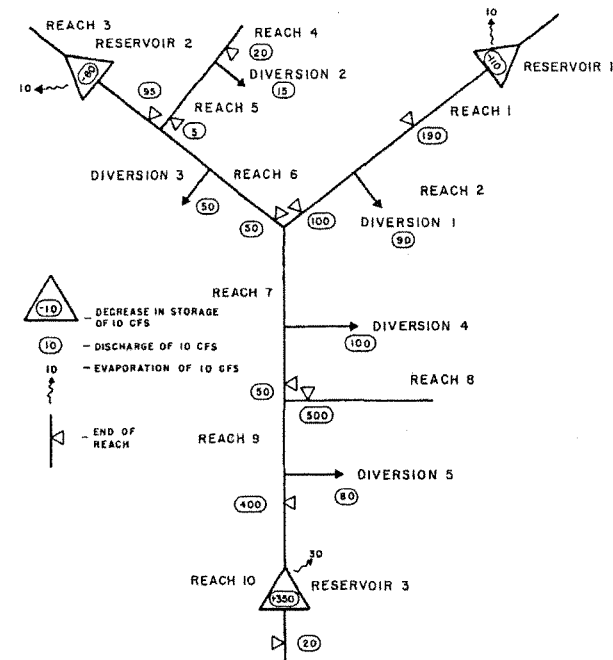


FIG. 5.—Diagram of Example River System (1 cfs = 0.028 m³/s)

TABLE 1.—Natural Flow Computation for Example River, in Cubic Feet per Second

Reach number (1)	Outflow (2)	Inflow (3)	Diver-sion (4)	Reservoir change in storage (5)	Reservoir evaporation (6)	Reach gain (7)	Natural flow (8)
1	190	0	0	-110	10	90	90
2	100	190	90	0	0	0	90
3	95	0	0	-80	10	25	25
4	20	0	0	0	0	20	20
5	5	20	15	0	0	0	20
6	50	100	50	0	0	0	45
7	50	150	100	0	0	0	135
8	500	0	0	0	0	500	500
9	400	550	80	0	0	-70	565
10	20	400	0	+350	30	0	565

Note: 1 cfs = 0.028 m³/s.

value at Reach 10, the final reach. Columns 1 through 6 are taken from Fig. 5.

The hypothetical list of rights for the system is given in Table 2 in order of priority. Using the natural flow of each reach, the rights are allocated portions of the flow as shown in Table 3, beginning with the right having the earliest priority. Each right is compared to the actual rate of diversion, and if the rate is less than the right, the right is limited to the rate of diversion for the day. For example, Right 2 for 20 cfs (0.6 m³/s) is limited by the rate of diversion, 15 cfs (0.4 m³/s). The right (or reduced right) is then subtracted from the natural flow of the reach in which the diversion occurred and every reach downstream. The reach remainder is called the "remaining natural flow" or RNF.

The flow allocated to each right can also be limited by any downstream natural flow value that is smaller than the right. A smaller value means that there is insufficient water to satisfy the entire right. In the example, the flow allocated to rights 7-9 is, in each case, limited by the RNF in a downstream reach. Right distribution was discontinued with Right 11 because the RNF in the final reach became zero.

Multiple Rights of Equal Priority.—Often there are several rights which have the same priority. When the water supply is inadequate to meet all of these, the flow is divided proportionally among the rights. The computations for this are somewhat more complex because each right may experience a different water supply because of physical location on the river system or may be limited by the magnitude of the actual diversion, or both.

Consider the situation in Fig. 6 which shows the calculated natural flow of a river (reservoirs exist in the system but stored water is not shown). Assume the three diversions, X, Y, and Z, have rights of equal priority for 300, 100, and 400 cfs (8.4, 2.8, and 11.2 m³/s), respectively. With natural flow supplies of 100, 200, and 300 cfs (2.8, 5.6, and 8.4 m³/s) available to X, Y, and Z, respectively, it is not immediately obvious how the total natural flow should be distributed.

TABLE 2.—Water Rights for Example River

Priority (1)	Location (2)	Amount, in cubic feet per second (3)
1	Diversion 5	40
2	Diversion 2	20
3	Diversion 4	60
4	Diversion 3	20
5	Diversion 1	10
6	Diversion 4	20
7	Diversion 1	100
8	Diversion 3	40
9	Diversion 4	50
10	Diversion 5	40
11	Reservoir 3	— ^a
12	Reservoir 1	— ^a
13	Reservoir 2	— ^a

^aReservoir allowed to store all available flow up to reservoir capacity.

Note: 1 cfs = 0.028 m³/s.

An iterative procedure is used to allocate the flow equitably. A cumulative total of all rights is made for each reach in downstream order. The natural flow at each reach is divided by the cumulative total to determine the portion of the rights that can be met above each reach. Values greater than 1.0 are limited to 1.0 and then revised such that no reach has a value larger than the one below it. In the Fig. 6 example, values of 0.333, 0.375, and 0.375 can be computed for points A, B, and C, respectively. These values are then applied to the rights in each reach, and the natural flow is allocated as described previously. The amount distributed is deducted from the appropriate diversions and rights, and the second iteration is begun by recomputing the cumulative rights for each reach, this time eliminating any rights above the reach with no remaining natural flow.

This procedure is repeated until the remaining natural flow of the last reach has been entirely used. For the example (Fig. 6), it is found that the natural flow of 300 cfs (8.4 m³/s) should be distributed as follows: Diversion X = 100 cfs (2.8 m³/s); Diversion Y = 40 cfs (1.1 m³/s); and Diversion Z = 160 cfs (4.5 m³/s).

Stored Water Accounting.—The amount of stored water passing a reach is found by comparing the remaining natural flow of a reach to the actual flow. If the actual flow is greater than the remaining natural flow, stored water is being passed through the reach. Table 4 shows the stored flow computation by reach for the example river in Fig. 5; the final remaining natural flows from Table 3 were subtracted from the reach outflows in Table 1.

Similarly, the stored water used by a diversion is found by subtracting the natural flow allocated to its right from its total rate of diversion. For the example in Fig. 5, the computation of stored water use is presented in Table 5. The natural flow allocated (Col. 3) to Diversion 4, for example, is found by adding the flow allocated to rights 3, 6, and 9 in Table 3, for a total of 80 cfs (2.2 m³/s). This diversion must then be

TABLE 3.—Natural Flow Distribution of Example

Reach number (1)	Natural flow (2)	FLOW ALLOCATED TO EACH RIGHT				
		Right 1	Right 2	Right 3	Right 4	Right 5
		FA RNF (3)	FA RNF (4)	FA RNF (5)	FA RNF (6)	FA RNF (7)
1	90	---	---	---	---	---
2	90	---	---	---	---	10 80
3	25	---	---	---	---	---
4	20	---	---	---	---	---
5	20	---	15 5	---	---	---
6	45	---	15 30	---	20 10	---
7	135	---	15 120	60 60	20 40	10 30
8	500	---	---	---	---	---
9	565	40 525	15 510	60 450	20 430	10 420
10	565	40 525	15 510	60 450	20 430	10 420

Note: 1 cfs = 0.028 m³/s.

charged for use of 20 cfs (0.6 m³/s) from storage. The total natural flow allocated to diversions in the example is 215 cfs (6.0 m³/s) and this amount, when added to the 350 cfs (9.8 m³/s) stored by Reservoir 3, accounts for the total system natural flow of 565 cfs (15.8 m³/s).

PROJECTED ACCOUNTING

Projecting ahead the water supply and natural flow allocations throughout the river system provides for: (1) Earlier use of upper basin data; and (2) better knowledge of future storage releases from reservoirs and stored water used by individuals.

Earlier Use of Upper Basin Data.—The large size of District 1 results in travel times as great as seven days from the headwater gaging stations to the lowest gaging station in the basin. Therefore, the most current daily accounting run, which uses "today's" flow data at the lowest gaging station, also uses data taken seven days earlier at the uppermost stations. By projecting the accounting seven days into the future and thus requiring the flow to be estimated for this period at the lowest station, "today's" data at the upper stations are used and "today's" conditions in the upper basin are estimated.

Future Reservoir and Storage Use Operations.—By keeping reservoir contents constant for projected days, the computed reservoir releases and, consequently, the flow downstream may be greater or smaller than desired for the best river operation. The watermaster can quickly estimate the proper change in storage (or reservoir outflow) necessary to provide the proper flows at various points. In this way, the accounting program is an aid in daily river management.

Projected days also show effective water right priorities. Often canals wish to divert the maximum possible flow without exceeding their natural flow rights (thus preventing use of limited storage supplies). By knowing in advance what priority dates will be in effect, diversions can be adjusted to minimize stored water use.

River for One Day, in Cubic Feet per Second

(FA) AND REMAINING NATURAL FLOW (RNF)					
Right 6	Right 7	Right 8	Right 9	Right 10	Right 11
FA RNF (8)	FA RNF (9)	FA RNF (10)	FA RNF (11)	FA RNF (12)	FA RNF (13)
---	---	---	---	---	90
---	10 70	---	---	---	70
---	---	---	---	---	25
---	---	---	---	---	20
---	---	---	---	---	5
---	---	0 10	---	---	10
20 10	10 0	0 0	0 0	---	0
---	---	---	---	---	500
20 400	10 390	0 300	0 390	40 350	350 0
20 400	10 390	0 390	0 390	40 350	350 0

Method of Projection.—Projections of river flow are made using the individual reach gains for previous days. The change in the reach gain is averaged for the previous three days and that average change is added to the gain of the last day. In this manner, the first day is projected for each reach. For subsequent days, the projected first day gain is held constant. If forecasts of river flow are available, these can be used instead of the computed values.

Diversion rate and reservoir data for projected days are usually assumed equal to the last day's measurements. Estimated diversion rates can be entered by the watermaster if he has an indication of how they may change.

FLOW AND WATER RIGHT ACCOUNTING RESULTS

Daily Report.—The daily report produced by the FORTRAN accounting program consists of: (1) River flow conditions; and (2) diversion conditions.

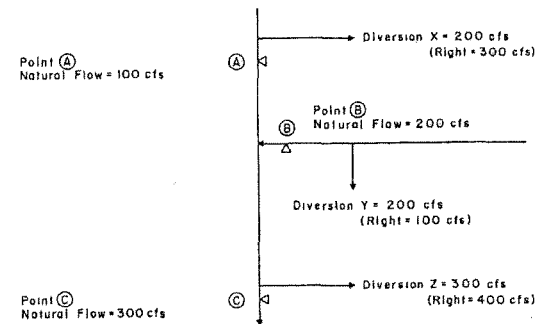


FIG. 6.—Equal Priority Example (1 cfs = 0.028 m³/s)

TABLE 4.—Stored Flow Determination for Example River

Reach number (1)	Outflow, in cubic feet per second (2)	Remaining natural flow, in cubic feet per second (3)	Stored flow, in cubic feet per second (4)
1	190	90	100
2	100	70	30
3	95	25	70
4	20	20	0
5	5	5	0
6	50	10	40
7	50	0	50
8	500	500	0
9	400	0	400
10	20	0	20

Note: 1 cfs = 0.028 m³/s.

TABLE 5.—Stored Water Diverted for Example River

Diversion number (1)	Rate, in cubic feet per second (2)	Natural flow allocated, in cubic feet per second (3)	Stored water used, in cubic feet per second (4)
1	90	20	70
2	15	15	0
3	50	20	30
4	100	80	20
5	80	80	0
Total	335	215	120

Note: 1 cfs = 0.028 m³/s.

An excerpt from the daily report for selected Upper Snake reaches and diversions is presented in Table 6, which lists the river flow conditions. The remaining natural flow in Col. 4 is the amount of natural flow in Col. 2 less the total natural flow diverted upstream from the station. The stored flow presented in Col. 5 is found by subtracting the remaining natural flow from the observed flow. The priority date of the last water right receiving natural flow in the reach above the station is listed in Col. 7.

Table 7, also an excerpt from the daily report, presents diversion conditions for selected canals. The total diversion for each user is divided into components of natural and stored water. The running total of storage water diverted for the season is listed in Col. 5, and the amount available for the remainder of the season is shown in Col. 6. Available storage is adjusted for estimated evaporation losses at the beginning of the season, and later corrected using observed pan evaporation.

Each day the preceding report is available to the watermaster, the IDWR, and the USBR. The report is the primary source of information upon which the watermaster bases decisions for regulating diversions and determining which water rights receive natural flow.

TABLE 6.—Accounting Report: Flow Conditions, August 16, 1981 (Selected Stations)

Flow station at end of reach (1)	Natural flow, in cubic feet per second (2)	Observed flow, in cubic feet per second (3)	Re-maining natural flow, in cubic feet per second (4)	Stored flow, in cubic feet per second (5)	Total diversion, in cubic feet per second (6)	Date of last right filled (7)
Snake River near Heise	3,750	9,130	3,750	5,380	30	June 10, 1890
Snake River near Lorenzo	3,300	3,980	0	3,980	4,000	June 10, 1890
Henry's Fork near Rexburg	3,010	1,500	1,320	180	3,170	November 24, 1890
Snake River near Blackfoot	7,740	1,220	0	1,220	6,370	November 24, 1890
Snake River at Neeley	11,010	12,200	3,260	8,940	180	October 11, 1900
Snake River near Mindoka	11,170	9,570	3,420	6,150	2,402	October 11, 1900
Snake River at Milner	10,900	290	0	290	9,080	October 11, 1900

Note: 1 cfs = 0.028 m³/s; 1 acre-ft = 1,233 m³.

TABLE 7.—Accounting Report: Diversion Conditions, August 16, 1981 (Selected Users)

User name (1)	Total diverted, in cubic feet per second (2)	Natural flow diverted, in cubic feet per second (3)	Stored flow diverted, in cubic feet per second (4)	Total storage diverted, in acre-feet (5)	Reservoir storage remaining, in acre-feet (6)
Harrison Canal	388	71	317	28,934	17,709
Sunnydell Canal	93	65	28	7,232	5,172
Farmers Canal	81	4	77	6,846	1,319
Egin Canal	306	300	6	809	7,641
Idaho Canal	1,069	1,000	69	29,838	62,616
Twin Falls Canal	3,536	2,788	748	132,351	98,477

Note: 1 cfs = 0.028 m³/s; 1 acre-ft = 1,233 m³.

Annual Report.—Daily results previously described are stored on disk files to provide a record of past operations. At the end of each year, District 1 prepares an annual report which summarizes the daily results, again using specially prepared computer programs.

EVALUATION AND CONCLUSIONS

The automated data handling and processing system presently being used on the Upper Snake River has been successful in enabling a limited number of personnel to handle a large volume of data and, thereby, to

improve the accuracy of water distribution. The availability of streamflow and reservoir data from the USBR hydromet system has reduced the time consumed by data acquisition while greatly improving the real time reliability of these data. The immediate storage of these data on computer disk files allows timely access to up-to-date data at any time. By monitoring key points on the river, water supplies are managed with less risk of waste.

Problems encountered with the system during the initial four years have been chiefly associated with data reliability and system complexity. Even though computer programs have been developed to assist in verifying data, removal of data errors is tedious and time-consuming. However, the resulting quality of the data used for water right accounting makes the additional effort justifiable. To alleviate present data handling problems, a third remote terminal has been installed in the Henrys Fork area for data entry, and consideration is being given to including additional canal gaging stations in the USBR hydromet system.

Water District 1 is a large and complex area with a number of "special cases" in river operation and water right accounting. The computer programs developed have proven sufficiently adaptable to allow such special cases to be effectively handled.

Because of the improved data and data handling methods, water rights are protected to an extent never before possible. Full integration of reservoir storage and direct irrigation rights has allowed accurate determination of reservoir fill and, by including the numerous small diversions, natural flow is being allocated accurately. Similarly, because of the more accurate accounting for water use, water users are managing water better than in the past. Consequently, additional water supplies have become available for users with inadequate supplies and for new development. The favorable results in the Upper Snake River have prompted the IDWR to begin adapting the system to other river basins in Idaho.

Appendix 3

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

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576

Ident. Number 83-11874

Date Received:

Receipt No:

Received By:

NOTICE OF CLAIM TO A WATER RIGHT USAGE ACQUIRED UNDER STATE LAW

Please type or print clearly

1. Name of Claimant (s) U.S. Army Corps of Engineers/Real Estate Division Phone (509) 527-7320

Mailing Address 201 N. Third Avenue, Walla Walla, WA ZIP 99362

2. Date of Priority (Only one (1) per claim) N/A Month Day Year (YYYY)

3. Source of water supply (Check one) Ground Water () or Other (x) Dworshak Reservoir which is tributary to (b) Clearwater River

4. a. Location of Point of Diversion is: Township 37N, Range 1EBM, Section 26 SW, 1/4 of SE, 1/4 Govt. Lot 6, BM., County of Clearwater

Parcel (PIN) no.

Additional points of diversion if any:

If available, GPS Coordinates

b. If instream flow, beginning point of claimed instream flow is:

Township, Range, Section, 1/4 of, 1/4

Govt. Lot, BM., County of

ending point is: Township, Range, Section, 1/4 of, 1/4

Govt. Lot, BM., County of

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc), including the dates of any changes or enlargements in use, the dimensions of the diversion works as constructed and as enlarged and the depth of each well. 717 foot dam with penstocks

Blank lines for additional information or signature.

6. Water is claimed for the following purposes:

(both dates are inclusive MM-DD) (cfs) (acre feet)

For Power generation purposes from 01/01 to 12/31 amount 12,000 or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) 12,000 (cfs) and/or (b) _____ (acre feet)

8. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock, Etc.) _____

9. Description of place of use: Dworshak Dam

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

Twn	Rng	Sec	NE				NW				SW				SE				Totals	
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE		
37N	1E	26																		
37N	1E	35					P													
37N	1E	35		P																

Parcel (PIN) no(s) _____ Total number of acres irrigated _____

10. In which county (ies) are lands listed above as place of use located? Clearwater County

11. Do you own the property listed above as place of use? Yes (✓) No ()
If your answer is No, describe in Remarks below the authority you have to claim this water right.

12. Describe any other water rights used at the same place and for the same purposes as described above. See information provided for cooling system, heat exchange system, and deck wash at Dworshak Project. or None ()

13. Remarks: The Dworshak Dam and Reservoir Project ("Project") was authorized by the Flood Control Act of 1962 (Pub. L. No. 87-874 Stat. 1193) pursuant to an assertion by Congress of the Commerce Clause power, Art.1 Section 8, Clause 3, of the U.S. Constitution. The United States has not asserted water rights in connection with the operation of the Project, nor is the use, storage, or control of water in this project for its authorized purposes, amenable to administration by the State of ID. Federal use and control of water utilized for the project involves the exercise of said Commerce Clause Power. This information is being sent to assist the State of ID in administering water resources, but does not waive the assertion by Congress of the Commerce Clause power in providing for the operation of the Project. The State should acknowledge the quantities of water referenced in the notice and supporting documentation without purporting to alter, deny, or restrict such use and control of water, and should acknowledge that the information has been provided by the United States as a matter of comity for informational use only.

Last Name U.S. Army Corps of Engineers Identification No. _____

14. Basis of Claim (Check One) Beneficial Use () Posted Notice () License () Permit () Decree () (X) OTHER

Court _____ Decree Date _____ Plaintiff v. Defendant _____

If applicable provide IDWR Water Right Number _____

15. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notices in the Snake River Basin Adjudication." (b.) I/We do () do not (✓) wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 2 (map and previous informational filing)

For Individuals: I/We do solemnly swear or affirm under penalty of perjury that the statements contained in the foregoing document are true and correct.

Signature of Claimant (s) _____ Date: _____

_____ Date: _____

For Organizations: I do solemnly swear or affirm under penalty of perjury that I am

Acting Real Estate District Chief of U.S. Army Corps of Engineers,
Title Organization

that I have signed the foregoing document in the space below as

Acting Real Estate District Chief of U.S. Army Corps of Engineers,
Title Organization

and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent Rodney Huff Date 11/10/2011

Title and Organization Rodney Huffman, Acting District Chief of Real Estate, U.S. Army Corps of Engineers

16. Notice of Appearance:

Notice is hereby given that I, Chloe Eloise Pullman, will be acting as attorney at law of behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature _____ Date 17 November 2011

Address 201 N. Third Avenue

Walla Walla, WA 99362

COPY

Last Name U.S. Army Corps of Engineers Identification No. _____

10. Place of use:

Township	Range	Section	1/4 of 1/4		Lot	Use	Acres
37N	01E	26	SE	SW		POWER	
37N	01E	35	NE	NW		POWER	
			NW	NE		POWER	

11. Place of use in counties: CLEARWATER

12. Do you own the property listed above as place of use? Yes

13. Other Water Rights Used:

14. Remarks:

The Dworshak Dam and Reservoir Project ("Project") was authorized by the Flood Control Act of 1962 (Pub. L. No. 87-874 Stat. 1193) pursuant to an assertion by Congress of the Commerce Clause power, Art 1 Section 8, Clause 3, of the U.S. Constitution. The United States has not asserted water rights in connection with the operation of the Project, nor is the use, storage, or control of water in this project for its authorized purposes, amenable to administration by the State of ID. Federal use and control of water utilized for the project involves the exercise of said Commerce Clause Power. This information is being sent to assist the State of ID in administering water resources, but does not waive the assertion by Congress of the Commerce Clause power in providing for the operation of the Project. The State should acknowledge the quantities of water referenced in the notice and supporting documentation without purporting to alter, deny, or restrict such use and control of water, and should acknowledge that the information has been provided by the United States as a matter of comity for informational use only.

15. Basis of Claim:

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Enclosure No. 1

I did not file a Notice of claim to the use of the water in the SRBA because:

The Dworshak Dam and Reservoir Project ("Project") was authorized by the Flood Control Act of 1962 (Pub. L. No. 87-874, 76 Stat. 1193) pursuant to an assertion by Congress of the Commerce Clause power, Article 1, Section 8, Clause 3, of the U.S. Constitution. The United States has not asserted water rights in connection with the operation of the Project; nor is the use, storage, or control of water in this project for its authorized purposes, amenable to administration by the State of Idaho. Federal use and control of water utilized for the project involves the exercise of said Commerce Clause power.

This information is being sent to assist the State of Idaho in administering the water resources, but does not waive the assertion by Congress of the Commerce Clause power in providing for the operation of the Project. The State should acknowledge the quantities of water referenced in the notice and supporting documentation without purporting to alter, deny, or restrict such use and control of water, and should acknowledge that the information has been provided by the United States as a matter of comity for information use only.

Appendix 4

DISTRICT COURT - SRBA
 Fifth Judicial District
 County of Twin Falls - State of Idaho

JAN 31 2013

By _____
 Clerk

**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

Case 39576

) Subcase 13-33737
)
)
) **STANDARD FORM 4**
)
) **MOTION TO FILE:**
) **LATE NOTICE OF CLAIM**
)
)

INSTRUCTIONS

This form is used to file a late Notice of Claim or an amendment to a Notice of Claim in a reporting area where the Director's Report has been filed. Forms may be obtained from the SRBA Court, the Idaho Department of Water Resources (IDWR), or you may copy or reproduce this blank form. If you copy or reproduce this form, please copy on both sides with the even-number pages upside down.

The water right number for your late or amended claim must be indicated above in the blank space following "Subcase." You must use a **separate form for each** late or amended Notice of Claim.

This form has been adopted by the court in **SRBA Administrative Order 1, Rules of Procedure** (amended Sept. 30, 1996), Section 4, which may be consulted for further information.

By filing a *Motion to File a Late Notice of Claim* or a *Motion to File an Amended Notice of Claim*, you certify that it is well-grounded in fact; is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; and is not filed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

X I have read *SRBA Administrative Order 1, Rules of Procedure* (amended Sept. 30, 1996).

My name is _____

My address is _____

My phone number is: Work _____ Home _____

I am an attorney representing BOISE PROJECT BOARD OF CONTROL; NAMPA-MERIDIAN IRRIGATION DISTRICT; BOISE-KUNA IRRIGATION DISTRICT; NEW YORK IRRIGATION DISTRICT; WILDER IRRIGATION DISTRICT; AND BIG BEND IRRIGATION DISTRICT _____

My name is ALBERT P. BARKER

My address is P.O. BOX 2139

BOISE, IDAHO 83701-2139

My phone number is 208-336-0700

MOTION TO FILE A LATE NOTICE OF CLAIM

A *Motion to File a Late Notice of Claim* will require a hearing before the Presiding Judge.

X I did not file a Notice of claim to the use of water in the SRBA because:

This claim is based upon historical beneficial use at Arrowrock Reservoir on the Boise River.

Claimants thought this water use was included in the original SRBA claim filed for right number 63-303, for which a partial decree has been issued. Recently, the issue of refill has been called into question in the SRBA, so Claimants want to protect the historical beneficial use of this water right.

I filed a Notice of Claim and elected to defer judicial proceedings on my domestic or stock watering use. I desire to reinstate my Notice of Claim for domestic or stock watering use.

X I am providing legal and factual documentation for my claimed use of water. You must describe these documents and attach a readable copy. (You do not need to fill this out if you are reinstating a Notice of Claim for domestic or stock watering use, but you **must** attach a copy of your Notice of Claim.)

SEE ATTACHED EXHIBIT "A"-AFFIDAVIT OF TIM PAGE

I have attached:

- X A fully completed Notice of Claim (available from IDWR).
- A claim filing fee for a domestic and stock watering use. IDWR may charge this fee pursuant to I.C. § 42-1414. To determine this amount, contact IDWR at

(800) 451-4129. I have also enclosed a check payable to: State of Idaho Department of Water Resources in the amount of \$_____.

- X A claim filing fee and a late claim fee for those claims other than a domestic or stock watering use for which a notice of claim was not filed. To determine this amount, contact IDWR at (800) 451-4129. I have enclosed a check payable to: State of Idaho Department of Water Resources in the amount of \$50.00 for late fee; claim filing fee on acres previously paid with other rights. ¹⁰⁰

Follow these instructions regarding the hearing on this motion.

1. Contact the Clerk of the SRBA Court (208-736-3011) to request a hearing date and time.
2. Fill in the following information:

This motion will be heard on May 21, 2013 at 1:30 pm
(Insert Date and Time)

at the SRBA courthouse, 253 Third Avenue North, Twin Falls, Idaho.

Albert P. Barker, ISB #2867
 Shelley M. Davis, ISB #6788
BARKER ROSHOLT & SIMPSON LLP
 1010 W. Jefferson St., Ste. 102
 P.O. Box 2139
 Boise, ID 83701-2139
 Telephone: (208) 336-0700
 Facsimile: (208) 344-6034

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> JAN 31 2013 </div>	
By _____	_____ Clerk Deputy Clerk

Attorneys for Boise Project Board of Control

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
 Case No. 39576

Subcase No. 03-33737
AFFIDAVIT OF TIM PAGE

STATE OF IDAHO)
) ss.
 County of Ada)

Tim Page, having been duly sworn upon oath, deposes and states as follows:

1. I, Tim Page, am the Manager of the Boise Project Board of Control, whose business address is 2465 Overland Road, Boise, Idaho 83705. Boise Project Board of Control is a governmental entity which is the operating agent for five irrigation districts, Boise-Kuna Irrigation District, New York Irrigation District, Nampa & Meridian Irrigation District, Wilder Irrigation District, and Big Bend Irrigation District. Only four of the five irrigation districts have participated in this claim. Nampa-Meridian Irrigation District and New York Irrigation Districts declined to participate and so none of the storage allocated to those Districts has been claimed.

2. I was elected to be the manager in January 2013. Prior to that, I served for eight years as the assistant manager and prior to that, I worked for the Boise Project Board of Control in the Wilder office. I have worked for the Project for 28 years.

3. The Boise Project Board of Control delivers water to approximately 167,000 acres of land in Ada County and Canyon County, Idaho, and Malheur County, Oregon. Boise Project Board of Control operates and maintains the canal systems and delivers the natural flow rights and storage rights to patrons of the five irrigation districts.

4. In my capacities with the Boise Project Board of Control, I am familiar with water accounting and the historical use of water by the Boise Project irrigation districts.

5. Of the 286,600 acre feet of storage in Arrowrock Reservoir, the five Boise Project districts hold contractual rights to 232,871 acre feet. Since Nampa-Meridian declined to participate in the claim, the Project's other four Districts have claimed refill rights in the amount of 177,816 acre feet. No storage is specifically allocated to New York Irrigation District from Arrowrock Reservoir so no reduction in the amount allocated to the Boise Project has been made on New York Irrigation District's behalf.

6. As a result of an agreement between the Districts and the Bureau of Reclamation and the Corps of Engineers, entered into at about the time the Lucky Peak Dam was built by the Corps of Engineers, the Bureau of Reclamation and Corps of Engineers operate all three dams on the Boise River in a unified fashion to satisfy the flood control obligations of Lucky Peak and to store water under the storage rights. Those storage rights are held in the name of the Bureau of Reclamation. However, the courts have decided that the irrigation districts and their patrons hold equitable title to the stored water rights behind the reservoirs and the Bureau of Reclamation's

partially decreed water rights for Arrowrock and Anderson recognize the equitable interest of the irrigation districts.

7. Every year at the end of the irrigation season, the Department of Water Resources' Water Master, Bureau of Reclamation, and the Boise Project meet to discuss the allocation of storage rights after the operations have concluded. The parties do this because the Bureau of Reclamation and the Corps of Engineers have agreed to protect the Boise Project districts and the other space holders in Arrowrock from injury up to a certain amount from the inability of the reservoirs to physically fill if more water is released for flood control than later comes in to fill the storage accounts.

8. Based upon this history, I know that every year in which any flood control releases are made which includes most years of operation, that water physically refills the space behind the reservoir and is accrues to the accounts of the space holders in Arrowrock Reservoir including the five Boise Project districts.

9. That water that is stored during the refill period is then delivered to the patrons of the five irrigation districts where the individual farmers and landowners put the water to beneficial use on their lands. The Boise Project Districts do not use all of the water that flows through the reservoir, but do put to beneficial use, every year, 232,871 acre feet of water stored in Arrowrock Reservoir, even after flood control releases have occurred.

10. The Boise Project Board of Control measures all of its deliveries and in every year delivers the full amount of its storage space in Arrowrock Reservoir to the Boise Project landowners. There is no carryover of storage in Arrowrock. Any water that physically remains in Arrowrock over the winter is maintained there by the Bureau of Reclamation for its minimum pools.

11. Attached hereto is a true and correct copy of a chart, excerpted from a March 28, 1988 Boise Reservoir Contract, showing the total amount of storage space held by the five irrigation districts of the Boise Project in Arrowrock Reservoir.

12. All of the Boise Project storage rights are delivered to the head of the New York Canal below diversion dam with the exception that the Nampa & Meridian Irrigation District does have the ability to and does take some of its storage rights for Boise Project lands on occasion to the head of the Ridenbaugh canal located behind Barber Dam.

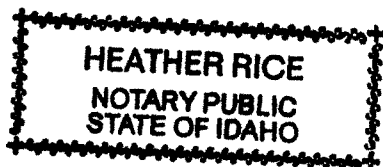
13. The season of use for the water that refills the reservoir is the same as the season of use for the existing irrigation rights. The place of use of the water stored behind Arrowrock during refill after flood control releases is within the boundaries of the five irrigation districts now set forth in their digital boundaries decreed in the SRBA to those five districts.

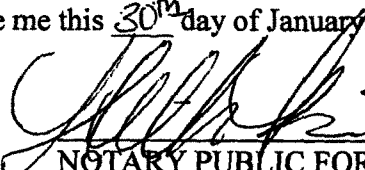
Further your affiant sayeth naught.



Tim Page

SUBSCRIBED AND SWORN to before me this 30th day of January, 2013.





NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 12/16/2015

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN 31 2013
By _____
Deputy Clerk

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39878
Ident. Number: 03-33737
Date Received: _____
Receipt No: _____
Received By: _____

NOTICE OF CLAIM
TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

Please type or print clearly

1. Name of Claimant (s) Boise Project Board of Control & Irrigation Districts* Phone (208) 336-0700

Mailing Address Attn: Al Barker, P.O. Box 2139 Boise ID ZIP 83701-2139
Street or Box City State

2. Date of Priority (Only one (1) per claim) 1-13-1911
Month Day Year (YYYY)

3. Source of water supply (Check one) Ground Water () or Other (✓) (a) Boise River
which is tributary to (b) Snake River

4. a. Location of Point of Diversion is: Township 3N, Range 4E, Section 13,
SW, 1/4 of NE, 1/4 Govt. Lot 5, BM., County of Boise

Parcel (PIN) no. _____
Additional points of diversion if any: 3N, 4E, SEC.13, NWSE, LOT 7
If available, GPS Coordinates _____

b. If instream flow, beginning point of claimed instream flow is:
Township _____, Range _____, Section _____, _____, 1/4 of _____, 1/4
Govt. Lot _____, BM., County of _____
ending point is: Township _____, Range _____, Section _____, _____, 1/4 of _____, 1/4
Govt. Lot _____, BM., County of _____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc),
including the dates of any changes or enlargements in use, the dimensions of the diversion works as constructed
and as enlarged and the depth of each well. Arrowrock Dam & Reservoir

*Irrigation Districts include: Boise-Kuna Irrigation District; Nampa-Meridian Irrigation District; Wilder Irrigation
District; New York Irrigation District; and Big Bend Irrigation District. This claim excludes the storage allocated to
Nampa-Meridian Irrigation.

6. Water is claimed for the following purposes:

(both dates are inclusive MM-DD) (cfs) (acre feet)

For Irrigation Storage purposes from 1/1 to 12/31 amount _____ or 177,816 AFY

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) _____ (cfs) and/or (b) 177,816 (acre feet)

8. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock, Etc.) _____

9. Description of place of use:

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

Twn	Rng	Sec	NE				NW				SW				SE				Totals		
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE			
3N	4E	13			IS																

Parcel (PIN) no(s). _____

Total number of acres irrigated _____

10. In which county (ies) are lands listed above as place of use located? _____

11. Do you own the property listed above as place of use? Yes (✓) No ()

If your answer is No, describe in Remarks below the authority you have to claim this water right.

12. Describe any other water rights used at the same place and for the same purposes as described above.

63-303; 63-3613 or None ()

13. Remarks: This claim is for irrigation from storage at Arrowrock Reservoir, including the right to refill.

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JAN 31 2013

By _____ Clerk
 _____ Deputy Clerk

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

<p>In Re SRBA</p> <p>Case 39576</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Subcase <u>03-33738</u></p> <p style="text-align: center;">STANDARD FORM 4</p> <p>MOTION TO FILE: LATE NOTICE OF CLAIM</p>
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INSTRUCTIONS

This form is used to file a late Notice of Claim or an amendment to a Notice of Claim in a reporting area where the Director's Report has been filed. Forms may be obtained from the SRBA Court, the Idaho Department of Water Resources (IDWR), or you may copy or reproduce this blank form. If you copy or reproduce this form, please copy on both sides with the even-number pages upside down.

The water right number for your late or amended claim must be indicated above in the blank space following "Subcase." You must use a **separate form for each** late or amended Notice of Claim.

This form has been adopted by the court in *SRBA Administrative Order 1, Rules of Procedure* (amended Sept. 30, 1996), Section 4, which may be consulted for further information.

By filing a *Motion to File a Late Notice of Claim* or a *Motion to File an Amended Notice of Claim*, you certify that it is well-grounded in fact; is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; and is not filed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

X I have read *SRBA Administrative Order 1, Rules of Procedure* (amended Sept. 30, 1996).

My name is _____

My address is _____

My phone number is: Work _____ Home _____

I am an attorney representing BOISE PROJECT BOARD OF CONTROL; NAMPA-MERIDIAN IRRIGATION DISTRICT; BOISE-KUNA IRRIGATION DISTRICT; NEW YORK IRRIGATION DISTRICT; WILDER IRRIGATION DISTRICT; AND BIG BEND IRRIGATION DISTRICT _____

My name is ALBERT P. BARKER

My address is P.O. BOX 2139

BOISE, IDAHO 83701-2139

My phone number is 208-336-0700

MOTION TO FILE A LATE NOTICE OF CLAIM

A *Motion to File a Late Notice of Claim* will require a hearing before the Presiding Judge.

X I did not file a Notice of claim to the use of water in the SRBA because:

This claim is based upon historical beneficial use at Anderson Ranch Reservoir on the Boise River.

Claimants thought this water use was included in the original SRBA claim filed for right number 63-3614, for which a partial decree has been issued. Recently, the issue of refill has been called into question in the SRBA, so Claimants want to protect the historical beneficial use of this water right.

I filed a Notice of Claim and elected to defer judicial proceedings on my domestic or stock watering use. I desire to reinstate my Notice of Claim for domestic or stock watering use.

X I am providing legal and factual documentation for my claimed use of water. You must describe these documents and attach a readable copy. (You do not need to fill this out if you are reinstating a Notice of Claim for domestic or stock watering use, but you **must** attach a copy of your Notice of Claim.)

SEE ATTACHED EXHIBIT "A"-AFFIDAVIT OF TIM PAGE

I have attached:

- X A fully completed Notice of Claim (available from IDWR).
- A claim filing fee for a domestic and stock watering use. IDWR may charge this fee pursuant to I.C. § 42-1414. To determine this amount, contact IDWR at

(800) 451-4129. I have also enclosed a check payable to: State of Idaho Department of Water Resources in the amount of \$_____.

- X A claim filing fee and a late claim fee for those claims other than a domestic or stock watering use for which a notice of claim was not filed. To determine this amount, contact IDWR at (800) 451-4129. I have enclosed a check payable to: State of Idaho Department of Water Resources in the amount of \$50.00 for late fee; claim filing fee on acres previously paid with other rights. ^{100.}

Follow these instructions regarding the hearing on this motion.

1. Contact the Clerk of the SRBA Court (208-736-3011) to request a hearing date and time.
2. Fill in the following information:

This motion will be heard on May 21, 2013 at 1:30 pm
(Insert Date and Time)

at the SRBA courthouse, 253 Third Avenue North, Twin Falls, Idaho.

Albert P. Barker, ISB #2867
Shelley M. Davis, ISB #6788
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Boise Project Board of Control

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho
JAN 31 2013
By _____
Clerk Deputy Clerk

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
Case No. 39576

Subcase No. 03-33738

AFFIDAVIT OF TIM PAGE

STATE OF IDAHO)
) ss.
County of Ada)

Tim Page, having been duly sworn upon oath, deposes and states as follows:

1. I, Tim Page, am the Manager of the Boise Project Board of Control, whose business address is 2465 Overland Road, Boise, Idaho 83705. Boise Project Board of Control is a governmental entity which is the operating agent for five irrigation districts, Boise-Kuna Irrigation District, New York Irrigation District, Nampa & Meridian Irrigation District, Wilder Irrigation District, and Big Bend Irrigation District. Only four of the five irrigation districts have participated in this claim. Nampa-Meridian and New York Irrigation Districts declined to participate and so none of the storage allocated to those Districts has been claimed.

2. I was elected to be the manager in January 2013. Prior to that, I served for eight years as the assistant manager and prior to that, I worked for the Boise Project Board of Control in the Wilder office. I have worked for the Project for 28 years.

3. The Boise Project Board of Control delivers water to approximately 167,000 acres of land in Ada County and Canyon County, Idaho, and Malheur County, Oregon. Boise Project Board of Control operates and maintains the canal systems and delivers the natural flow rights and storage rights to patrons of the five irrigation districts.

4. In my capacities with the Boise Project Board of Control, I am familiar with water accounting and the historical use of water by the Boise Project irrigation districts.

5. Of the 423,200 acre feet of irrigation storage in Anderson Ranch Reservoir, the five Boise Project districts hold contractual rights to 359,934 acre feet. Nampa-Meridian and New York Irrigation Districts declined to participate in the claim, so the Project's other three Districts have claimed refill rights in the amount of 241,144 acre feet.

6. As a result of an agreement between the Districts and the Bureau of Reclamation and the Corps of Engineers, entered into at about the time the Lucky Peak Dam was built by the Corps of Engineers, the Bureau of Reclamation and Corps of Engineers operate all three dams on the Boise River in a unified fashion to satisfy the flood control obligations of Lucky Peak and to store water under the storage rights. Those storage rights are held in the name of the Bureau of Reclamation. However, the courts have decided that the irrigation districts and their patrons hold equitable title to the stored water rights behind the reservoirs and the Bureau of Reclamation's partially decreed water rights for Arrowrock and Anderson recognize the equitable interest of the irrigation districts.

7. Every year at the end of the irrigation season, the Department of Water Resources' Water Master, Bureau of Reclamation, and the Boise Project meet to discuss the allocation of storage rights after the operations have concluded. The parties do this because the Bureau of Reclamation and the Corps of Engineers have agreed to protect the Boise Project districts and the other space holders in Anderson Ranch Reservoir from injury up to a certain amount from the inability of the reservoirs to physically fill if more water is released for flood control than later comes in to fill the storage accounts.

8. Based upon this history, I know that every year in which any flood control releases are made which includes most years of operation, that water physically refills the space behind the reservoir and accrues to the accounts of the space holders in Anderson Ranch Reservoir including the five Boise Project districts.

9. That water that is stored during the refill period is then delivered to the patrons of the five irrigation districts where the individual farmers and landowners put the water to beneficial use on their lands. The Boise Project Districts do not use all of the water that flows through the reservoir, but do put to beneficial use, every year, 359,934 acre feet of water stored in Anderson Ranch Reservoir, even after flood control releases have occurred.

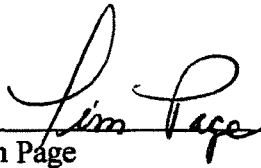
10. The Boise Project Board of Control measures all of its deliveries and in every year delivers the full amount of its storage space in Anderson Ranch Reservoir to the Boise Project landowners.

11. Attached hereto is a true and correct copy of a chart, excerpted from a March 28, 1988 Boise Reservoir Contract, showing the total amount of storage space held by the five irrigation districts of the Boise Project in Anderson Ranch Reservoir.

12. All of the Boise Project storage rights are delivered to the head of the New York Canal below diversion dam with the exception that the Nampa & Meridian Irrigation District does have the ability to and does take some of its storage rights for Boise Project lands on occasion to the head of the Ridenbaugh canal located behind Barber Dam.

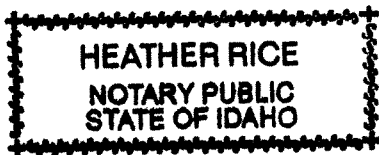
13. The season of use for the water that refills the reservoir is the same as the season of use for the existing irrigation rights. The place of use of the water stored behind Anderson Ranch Reservoir during refill after flood control releases is within the boundaries of the five irrigation districts now set forth in their digital boundaries decreed in the SRBA to those five districts.

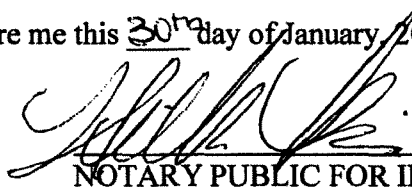
Further your affiant sayeth naught.



Tim Page

SUBSCRIBED AND SWORN to before me this 30th day of January, 2013.





NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 12/16/2015

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JAN 31 2013

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

Clerk
Deputy Clerk

**IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM**

CIVIL CASE NUMBER: 39576
Ident. Number 03-33738
Date Received: _____
Receipt No: _____
Received By: _____

**NOTICE OF CLAIM
TO A WATER RIGHT
ACQUIRED UNDER STATE LAW**

Please type or print clearly

1. Name of Claimant (s) Boise Project Board of Control & Irrigation Districts* Phone (208) 336-0700

Mailing Address Attn: Al Barker, P.O. Box 2139 Boise ID ZIP 83701-2139
Street or Box City State

2. Date of Priority (Only one (1) per claim) 12-9-1940
Month Day Year (YYYY)

3. Source of water supply (Check one) Ground Water () or Other (✓) (a) Boise River
which is tributary to (b) Snake River

4. a. Location of Point of Diversion is: Township 1S, Range 8E, Section 1,
NW, 1/4 of SE, 1/4 Govt. Lot 4, BM., County of Elmore

Parcel (PIN) no. _____

Additional points of diversion if any: _____

If available, GPS Coordinates _____

b. If instream flow, beginning point of claimed instream flow is:

Township _____, Range _____, Section _____, _____, 1/4 of _____, 1/4

Govt. Lot _____, BM., County of _____

ending point is: Township _____, Range _____, Section _____, _____, 1/4 of _____, 1/4

Govt. Lot _____, BM., County of _____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc), including the dates of any changes or enlargements in use, the dimensions of the diversion works as constructed and as enlarged and the depth of each well. Anderson Ranch Dam & Reservoir

*Irrigation Districts include: Boise-Kuna Irrigation District; Nampa-Meridian Irrigation District; Wilder Irrigation District; New York Irrigation District; and Big Bend Irrigation District. Nampa-Meridian and New York Irrigation Districts have elected not to participate in the claim, and the storage allocated to those Districts is not claimed.

6. Water is claimed for the following purposes:

(both dates are inclusive MM-DD) (cfs) (acre feet)

For Irrigation Storage purposes from 1/1 to 12/31 amount _____ or 241,144 AFY

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) _____ (cfs) and/or (b) 241,144 (acre feet)

8. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock, Etc.) _____

9. Description of place of use:

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

Twn	Rng	Sec	NE				NW				SW				SE				Totals		
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE			
1S	8E	1															IS				

Parcel (PIN) no(s). _____ Total number of acres irrigated _____

10. In which county (ies) are lands listed above as place of use located? _____

11. Do you own the property listed above as place of use? Yes (✓) No ()
If your answer is No, describe in Remarks below the authority you have to claim this water right.

12. Describe any other water rights used at the same place and for the same purposes as described above.
63-3614 _____ or None ()

13. Remarks: This claim is for irrigation from storage at Anderson Ranch Reservoir, including the right to refill.

Appendix 5

ORIL

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

MICHAEL C. ORR (ISB # 6720)
Deputy Attorney General
Natural Resources Division

700 West State Street - 2nd Floor
P.O. Box 44449
Boise, ID 83711-4449
(208) 334-2400

Attorneys for the State of Idaho

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUN 19 2012	
By _____	Clerk
_____	Deputy Clerk

**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)	Subcase Nos. See Attachment A
)	
)	AFFIDAVIT OF REX R. BARRIE,
)	WATERMASTER, WATER
)	DISTRICT NO. 63

STATE OF IDAHO)	
)	ss.
COUNTY OF BLAINE)	

REX R. BARRIE, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of eighteen and the facts stated below are based on my personal knowledge.

2. I am employed by Water District No. 63. I have been appointed by the Director, Idaho Department of Water Resources as Watermaster for Water District No. 63, which includes Basin 63 and the Boise River. I have been the Watermaster for Water District No. 63 since 2008.

3. As Watermaster for Water District No. 63, I am responsible for administering the water rights on the Boise River system, including the water rights for the federal reservoirs at Anderson Ranch, Arrowrock, and Lucky Peak.

4. As I understand and administer the water rights for the federal reservoirs in Water District No. 63, those water rights are limited to the annual volume decreed by the SRBA District Court, and they are no longer in priority after the quantities of water diverted into the reservoirs under their water rights reaches the annual volumes decreed by the Court. Additional water may be and often is stored in the reservoirs after the annual volume has been reached, but only if all other water rights have also been filled.

5. I have reviewed the *State Of Idaho's Motion For Partial Summary Judgment* which was filed on January 25, 2012, in the SRBA proceedings for the water rights for American Falls Reservoir (subcase no. 01-2068) and Palisades Reservoir (subcase no. 01-2068). The "refill" remark that the State of Idaho proposed in that motion is consistent with how the water rights for the federal reservoirs in Water District No. 63 have been administered during my tenure as Watermaster.

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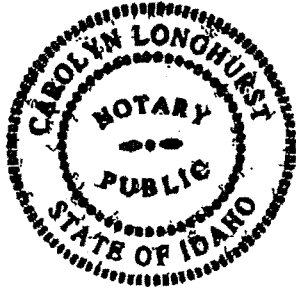
///


Further your affiant sayeth naught.

DATED this 18 day of June 2012.


REX R. BARRIE

SUBSCRIBED AND SWORN to before me this 18th day of June 2012.




Notary Public for Idaho
Residing at: Blaine County
My commission expires: 9/1/17

00101331

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

MICHAEL C. ORR (ISB # 6720)
Deputy Attorney General
Natural Resources Division

700 West State Street - 2nd Floor
P.O. Box 44449
Boise, ID 83711-4449
(208) 334-2400

Attorneys for the State of Idaho

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JUN 19 2012

By _____ Clerk
_____ Deputy Clerk

**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

)
) Subcase Nos. See Attachment A
)
)

) **AFFIDAVIT OF RON SHURTLEFF,**
) **WATERMASTER, WATER**
) **DISTRICT NO. 65**
)

STATE OF IDAHO)
) ss.
COUNTY OF BLAINE)

RON SHURTLEFF, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of eighteen and the facts stated below are based on my personal knowledge.

2. I am employed by Water District No. 65. I have been appointed by the Director, Idaho Department of Water Resources as Watermaster for Water District No. 65, which includes Basin 65 and the Payette River. I have been the Watermaster for Water District No. 65 since 2002.

3. As Watermaster for Water District No. 65, I am responsible for administering the water rights on the Payette River system, including the water rights for the federal reservoirs at Cascade and Deadwood.

4. As I understand and administer the water rights for the federal reservoirs in Water District No. 65, those water rights are limited to the annual volume decreed by the SRBA District Court, and they are no longer in priority after the quantities of water diverted into the reservoirs under their water rights reaches the annual volumes decreed by the Court. Additional water may be and often is stored in the reservoirs after the annual volume has been reached, but only if all other water rights have also been filled.

5. I have reviewed the *State Of Idaho's Motion For Partial Summary Judgment* which was filed on January 25, 2012, in the SRBA proceedings for the water rights for American Falls Reservoir (subcase no. 01-2068) and Palisades Reservoir (subcase no. 01-2068). The "refill" remark that the State of Idaho proposed in that motion is consistent with how the water rights for the federal reservoirs in Water District No. 65 have been administered during my tenure as Watermaster.

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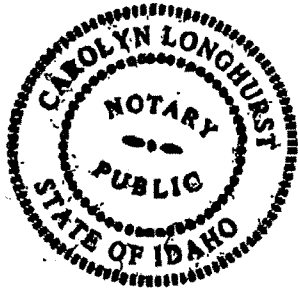
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Further your affiant sayeth naught.

DATED this 18th day of June 2012.

Ron Shurtleff
RON SHURTLEFF

SUBSCRIBED AND SWORN to before me this 18th day of June 2012.



Carolyn Longhurst
Notary Public for Idaho
Residing at: Blaine County
My commission expires: 9/1/17

DECLINED

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

MICHAEL C. ORR (ISB # 6720)
Deputy Attorney General
Natural Resources Division

700 West State Street – 2nd Floor
P.O. Box 44449
Boise, ID 83711-4449
(208) 334-2400

Attorneys for the State of Idaho

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUN 19 2012	
By _____	Clerk
_____	Deputy Clerk

**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)	Subcase Nos. See Attachment A
)	
)	AFFIDAVIT OF ELIZABETH
)	ANNE CRESTO
_____)	

STATE OF IDAHO)	
)	ss.
COUNTY OF ADA)	

ELIZABTH ANNE CRESTO, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of eighteen and the facts stated below are based on my personal knowledge.

2. I have been employed by the Idaho Department of Water Resources (“Department”) as a surface water hydrologist since 2004. My current position is Technical Hydrologist. My job responsibilities include running the water rights accounting program and the storage allocations program for the Boise River system and also the water rights accounting program and the storage allocations program for the Payette River system. I have been responsible for running these programs since 2005.

3. I have reviewed the *State Of Idaho’s Motion For Partial Summary Judgment* which was filed on January 25, 2012, in the SRBA proceedings for the water rights for American Falls Reservoir (subcase no. 01-2068) and Palisades Reservoir (subcase no. 01-2068). The “refill” remark that the State of Idaho proposed in that motion is consistent with how the water rights for the federal reservoirs in the Boise River system and the Payette River system have been accounted for under the accounting programs for both of those systems during the entire period I have been responsible for running those programs.

4. I have reviewed the “Affidavit of Robert J. Sutter” which was filed in SRBA Subcase No. 63-3618 on February 12, 2008, and the description of the water rights and storage accounting programs therein is consistent with the current accounting for the Boise River system and the Payette River system.

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Further your affiant sayeth naught.

DATED this 18th day of June 2012.

Elizabeth A Cresto
ELIZABETH ANNE CRESTO

SUBSCRIBED AND SWORN to before me this 18th day of June 2012.

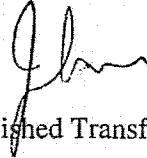


D. M. Smith
Notary Public for Idaho
Residing at: BOISE ID
My commission expires: Dec 12, 2012

Appendix 6

ADJUDICATION MEMORANDUM #16C

TO: Adjudication Staff

FROM: Jeff Peppersack, Water Allocation Bureau Chief 

SUBJECT: Reviewing Claims for Changes Based on Accomplished Transfers, Enlargements or Expansions

DATE: January 17, 2012

This memo supersedes Adjudication Memorandums #16A and #16B.

Section 42-222, Idaho Code, requires the department evaluate, among other issues, whether there would be injury to other water rights and whether there would be an enlargement in use of the original right. The department must also evaluate the validity of the right and ensure the applicant owns the right as part of its review. This guidance applies to changes filed as accomplished transfers under Section 42-1425, Idaho Code, enlargements under Section 42-1426, Idaho Code, or expansions under Section 42-1416B, Idaho Code.

The purpose of this memo is to provide guidance to Adjudication staff on how to review changes to water rights based on Sections 42-1416B, 42-1425 and 42-1426, Idaho Code. These statutes allow the department to recognize some limited changes made to pre-existing water rights, provided certain conditions are met, as discussed below.

Accomplished Transfers (Changes Based on Section 42-1425, Idaho Code)

Section 42-1425(a), Idaho Code, provides:

The legislature finds and declares that prior to the commencement of the Snake River basin adjudication, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of Sections 42-108 and 42-222, Idaho Code.

Section 42-1425(b), Idaho Code, continues:

The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with Sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim.

- Any use of water outside the established period of use for the water right is an enlargement.
- Enlargements in period of use can include domestic rights (i.e. decreed for 5/1 to 10/31 for a summer cabin but cabin is now occupied year-round).
- If the claimant is claiming irrigation use earlier or later than the established irrigation season for an area, that use of water may be an enlargement.
- Sometimes the standard season of use for an irrigation water right has changed and the Department now recognizes a longer season than previously recorded. In that case, the recommended season of use should reflect the original right's season of use, but include a so-called "shoulder remark" to reflect the currently recognized season of use. This is not treated the same as an enlargement, but the priority date for the extended part of the season is subordinated.
- There may be specialized shoulder language for each basin. Consult the Adjudication Section Manager for more information.
- Quantity
 - The original diversion rate of a water right cannot be increased, but an enlargement can recognize an increase in volume. There are cases where a water user diverted volume in excess of their water right without increasing diversion rate.
- Priority date
 - The priority date for the enlargement in use is the date of the enlargement and must be on or before November 19, 1987. Recommendations for enlargements should include a Condition C11 or its equivalent: "This water right is subordinate to all water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to Section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right."

Recommending claims based on enlargements pursuant to Section 42-1426, Idaho Code

- Enlargement recommendations require some specific conditions.
 - POU
 - If the enlargement is for irrigation:
 - The base right recommendation requires an acre limit
 - The enlargement recommendation must identify the number of acres enlarged from the base right
 - Both recommendations have a total combined acre limit
 - If the enlargement is for other than irrigation, conditions for the base and enlargement recommendations must be customized to best describe the situation.
 - For further guidance on conditioning a Permissible Place of Use (PPU), see the PPU section below.
 - Priority Date
 - The recommended priority date for an enlargement claim is the date supported by the evidence for the enlarged use, but must be on or before November 19, 1987.

Appendix 7

PALISADES DAM AND RESERVOIR PROJECT
IN IDAHO

LETTER
FROM THE
SECRETARY OF THE INTERIOR

TRANSMITTING

A SUPPLEMENTAL REPORT ON THE ALLOCATION
AND REPAYMENT OF COSTS OF THE PALISADES
DAM AND RESERVOIR PROJECT IN IDAHO, PUR-
SUANT TO PUBLIC LAW 864, 81ST CONGRESS



NOVEMBER 27, 1950 — Referred to the Committee on Public Lands
and ordered to be printed, with illustrations

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON 1951

Function	Direct costs	Cost allocated to function
Considered as nonreimbursable		
Flood control.....		\$22,733,300
Recreation.....	\$148,000	6,296,000
Fish and wildlife.....	350,000	2,805,000
Subtotal.....	498,000	31,834,300
Reimbursable		
Irrigation		
From water users.....		10,305,000
From power.....		11,419,400
Power		
Irrigation pumping power.....		8,986,500
Commercial power.....	21,565,600	14,055,800
Subtotal.....	21,565,600	44,766,700
Total.....	22,063,600	76,601,000

The importance of power to the project is evidenced by the fact that it carries the largest allocation of the three principal functions and would be responsible for 77 percent of the reimbursable costs.

Upon the basis of the regional director's estimates of benefits and costs, summarized as follows in table 9, page 28, of his report, the Palisades project is well justified.

Function	Annual costs	Annual benefits	Ratio of benefits to costs
Irrigation.....	\$844,425	\$1,981,000	2.35-1.00
Power.....	1,434,650	1,621,000	1.13-1.00
Flood control.....	399,330	899,300	2.25-1.00
Fish and wildlife.....	125,015	125,015	1.00-1.00
Recreation.....	244,915	241,915	0.99-1.00
Total.....	3,548,335	4,871,215	1.37-1.00

The annual costs in this table are computed upon the basis of amortization of the construction cost in 50 years at 3 percent interest, and include operation, maintenance, and replacements. The Commission staff advises that, for purposes of benefit-cost analysis of the power function, it has utilized as a basis the power value, for the Pacific Northwest, arrived at cooperatively in the field by representatives of the Bonneville Power Administration, the Corps of Engineers, and the Commission. On this basis the staff computes the value of the power benefits at Palisades, with 112,500 kilowatts installed as proposed, to be \$1,564,500 or \$129,850 in excess of the annual costs shown. The actual revenues, however, which are shown as \$1,175,400 in the reports, are substantially less than these estimates of benefits.

The report shows that the estimated power revenues are sufficient to meet the costs to be paid out of power revenues, on the basis of payout proposed. The Commission staff understands that this basis includes as costs, operation, maintenance, and replacements of power facilities, the payment of \$8,986,500 allocated to irrigation pumping power in equal installments over a 56-year period, without interest, and interest on and amortization of the \$14,055,800 allocated to commercial power over a 56-year period, with the interest element being utilized in the repayment of the \$11,419,400 irrigation costs allocated to be paid from power revenues.

is of runoff forecasts, and storage for power would provide flood purposes for a power plant installed under heads varying

Palisades Dam would reservoir for irrigation firm power would be should have to be passed satisfy the prior storage

The regional director, in conjunction with the Palisades power plant, the Palisades power plant, 521,400,000 kilowatts, would be salable, including The annual revenue estimated in the report report as a basis for this firm energy; 3 mills for nonfirm energy. The be 2.85 mills per kilo-

due from its sale, have acre-foot of dead storage d. The reports make water for miscellaneous connection consider a age space. The reports to that possible future that encroachment on is water supply would report

in to comment on the several purposes of the dered costs in relation lucing project function ue project given in your is \$76,601,000. The ish and wildlife are the your report to irrigation onal director, and corre- it is relatively inconse- detail, the figures of the hich follows.

n's report may be segre-

UNITED STATES DEPARTMENT OF THE INTERIOR
JULIUS A. KRUG, *Secretary*

SUPPLEMENTAL REPORT
PALISADES DAM AND RESERVOIR PROJECT
IDAHO

BUREAU OF RECLAMATION
MICHAEL W. STRAUS, *Commissioner*

REGION I
R. J. NEWELL, *Regional Director*

Boise, Idaho, June 1949

XXXI

The National Park Service considers that the total allocation of costs to recreational purposes would be equivalent to twice the cost of the facilities constructed exclusively for recreation, or \$296,000

As stated above, operation of Palisades will create much more substantial recreational benefits at Jackson Lake Reservoir, adjacent to Grand Teton National Park. During the past 33 years, Jackson Lake Reservoir has supplied the entire irrigation storage water requirements of the irrigated land in the Upper Snake River Valley served from the South Fork of Snake River above American Falls. This has necessitated heavy drafts on Jackson Lake and wide fluctuation in its level during the height of the tourist travel season from June 15 to September 1. Lowering of the lake level exposes wide stretches of unsightly reservoir bottom and, of course, detracts greatly from the scenic beauty and use of the area.

The unsightly shore line resulting from the wide fluctuation in lake level, which has caused many complaints by thousands of tourists visiting this famous area every summer, will be largely eliminated by construction of Palisades Reservoir. The storage requirements of the lands above American Falls would be met first from Palisades Reservoir. Jackson Lake would be operated as a hold-over reservoir. The latter, therefore, could be held full, with little if any fluctuation during the summer, except during extremely dry years such as 1931, 1934, and 1935. In such years, Palisades storage would have been exhausted, and it would have been necessary then to draw irrigation storage from Jackson Lake. Such a condition would have occurred in only 3 years during the past 60 years of stream-flow records. This plan of operation would greatly increase the recreational value of Jackson Lake. The National Park Service believe that an allocation to recreation purposes in the amount of \$6,000,000 would be justified because of increased tourist use and because of enhancement to the beauty of the foreground of the Grand Tetons. This figure has been adopted as the maximum amount of capital cost allocable on a non-reimbursable basis by reason of these benefits. The \$296,000 recreation benefit for Palisades Reservoir combined with the \$6,000,000 recreation benefit from Jackson Lake Reservoir results in a total benefit of \$6,296,000. When reduced to a yearly equivalent, this amount results in an annual benefit of \$244,915.

SUMMARY OF BENEFITS

The total annual benefits for the various functions served by the project are summarized as follows:

Functions	Annual benefits
Irrigation.....	\$1,981,000
Power.....	1,621,000
Flood control.....	899,330
Fish and wildlife.....	125,000
Recreation.....	241,915
Total.....	4,871,215

III ALLOCATION OF COSTS

Several approaches to the allocation of costs were attempted before selection of the procedure adopted herein, which combines several methods. The allocations of joint costs to recreation, to flood con-

rol, and to fish and wildlife a butable allocations, are deduc hsh the reimbursable oblig. reimbursable amount to irri average of the priority of use an methods

NONREIMBU

The total annual benefits for project, as described in part II benefits were reduced to a net annual costs including operati forecasting, and the annual costs. The annual operation and runoff forecasting associat at \$38,700. Of this amount, and maintenance, \$20,700 to forecasting. The assignment-replacements were based upon Falls Reservoir. The annual upon the expected program a work. Subsequent assignment cost of operation and maint power, and flood control was for the various purposes. Su forecasting among irrigation the estimated relative use of functions involved.

In addition to the operati facilities, there are also direct replacement costs associated mated at \$528,000 for the po wildlife area, plus \$1,000 fo \$7,600 for the recreational l estimated that the income in fees will be adequate to meet which are not otherwise prov annual operation and mainter in table 4.

TABLE 4 — Estimated total annual Palisades Dam

Function
Irrigation.....
Power.....
Flood control.....
Fish and wildlife.....
Recreation.....

1 Will be paid by irrigators in addition to
 2 Includes \$1,000 replacements
 3 Income from rentals will provide for 90

control, and to fish and wildlife are based on benefits, and, as nonreimbursable allocations, are deducted from the total joint costs, to establish the reimbursable obligation. Allocation of that residual, reimbursable amount to irrigation and power is based upon an average of the priority of use and the alternative justifiable expenditure methods.

NONREIMBURSABLE ALLOCATION

The total annual benefits for the various functions served by the project, as described in part II, above, amount to \$4,871,245. These benefits were reduced to a net basis by subtracting the associated annual costs including operation, maintenance, replacements, runoff forecasting, and the annual equivalent of the direct construction costs. The annual operation, maintenance, and replacement cost, and runoff forecasting associated with the storage system is estimated at \$38,700. Of this amount, \$14,000 has been assigned to operation and maintenance, \$20,700 to replacements, and \$4,000 to runoff forecasting. The assignments to operation and maintenance and to replacements were based upon the operating history of the American Falls Reservoir. The annual cost of runoff forecasting was based upon the expected program and historical costs for carrying on such work. Subsequent assignment of appropriate parts of the annual cost of operation and maintenance and replacement to irrigation, power, and flood control was based upon the relative use of facilities for the various purposes. Subdivision of the annual cost of runoff forecasting among irrigation, power, and flood control was based upon the estimated relative use of the data collected for each of the three functions involved.

In addition to the operation and maintenance costs for the joint facilities, there are also direct annual operation and maintenance and replacement costs associated with specific functions. These are estimated at \$528,000 for the power facilities, \$15,000 for the Grays Lake wildlife area, plus \$1,000 for replacements of improvements, and \$7,600 for the recreational facilities on Palisades Reservoir. It is estimated that the income in the form of rentals and concessionaires' fees will be adequate to meet the annual costs on recreational facilities, which are not otherwise provided for in the project costs. The total annual operation and maintenance and replacement costs are presented in table 4.

TABLE 4—Estimated total annual operation and maintenance and replacement costs, Palisades Dam and Reservoir project, Idaho

Function	Joint facilities			Direct operation and maintenance and replacements	Total
	Operation and maintenance	Replacements	Runoff forecasting		
Irrigation.....	\$4,000	58,490	\$1,300	0	\$63,790
Power.....	7,000	3,000	1,000	\$528,000	\$539,000
Flood control.....	3,000	11,300	1,500	0	15,800
Fish and wildlife.....	0	0	0	* 16,000	16,000
Recreation.....	0	0	0	† 7,600	7,600

* Will be paid by irrigators in addition to cost of storage space.
 † Includes \$1,000 replacements.
 ‡ Income from rentals will provide for operation and maintenance and replacements.

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The direct construction costs associated with each function were reduced to their annual equivalents by the application of a capital-recovery factor based upon a 50-year period and 3 percent interest. The total direct annual costs, including operation and maintenance, replacements, and direct construction, were then subtracted from the total benefits to secure the net benefits associated with joint costs, as presented in table 5.

TABLE 5—Estimated net annual benefits, Palisades Dam and Reservoir project, Idaho

Function	Gross benefits	Operation and maintenance and replacements	Direct annual construction costs	Net annual benefits
Irrigation.....	\$1,981,000	0	0	\$1,981,000
Power.....	1,621,000	\$539,000	\$338,150	243,850
Flood control.....	899,330	15,800	0	883,530
Fish and wildlife.....	125,000	10,000	13,604	95,396
Recreation.....	244,915	0	5,757	239,158

The annual net benefits for the various functions normally considered as nonreimbursable were then converted to their present worth by the application of the annuity factor for 50 years at 3 percent interest to determine the allocation of joint costs to each function that would be justified on the basis of such benefits. The amounts thus secured (adjusted) amounted to \$22,733,300 for flood control; \$6,148,000 for recreation; and \$2,455,000 for fish and wildlife. The full capitalized values of the net benefits to flood control, fish and wildlife, and recreation were allocated to those functions as their share of the joint costs. Combined, the allocation of joint costs to flood control, recreation, and fish and wildlife amounted to \$31,336,300.

REIMBURSABLE ALLOCATION

The balance of the joint costs of \$23,201,100 for other functions—irrigation and power—was allocated on the basis of the average of the priority of use and alternative justifiable expenditure methods of allocation. Under the priority-of-use approach, all of the remaining joint costs are assigned to irrigation, since it has prior use of the active space over power. Under the alternative justifiable-expenditure approach, single-purpose developments were considered which would result in the same benefits to irrigation and to power derived from the proposed project. It was found that the cost of the alternative, hydro-power project would be greater than the capitalized value of the net power benefit. Therefore, the capitalized value of the net benefit has been taken as the alternative justifiable expenditure. In the case of irrigation, however, the cost of a single-purpose irrigation reservoir was used because it was less than the capitalized value of the irrigation benefits. These figures are as follows.

Irrigation.....	\$43,000,000
Power.....	6,274,000
Total.....	49,274,000

Irrigation accounted for 87 percent remainder, or 12.73 percent joint cost of \$23,201,100 resulting in irrigation and \$2,953,500 to power. In two approaches, the allocation and \$1,476,700 to power (table 6).

TABLE 6—Allocation of estimated Palisades Dam

Function
Irrigation.....
Power.....
Total.....

The allocation of joint cost to the direct construction cost function (table 7). These allocations are as follows:

TABLE 7—Allocation of total cost

Function
Irrigation.....
Power.....
Flood control.....
Fish and wildlife.....
Recreation.....
Totals.....

With respect to the allocation of irrigation pumping power, the policy and is requisite to the findings of this report. Only the portion of commercial power is treated as described in part II, (1) are designed to supply a load through operation in Falls power plant and other power plant and other power plant and other power plant.

As described in part II, (1) are designed to supply a load through operation in Falls power plant and other power plant and other power plant and other power plant. This operation indicate that full load development, the full kilowatts of power for pump 33,000 kilowatts for commercial supply conditions, the Palisades down to the dead-storage level with the power-plant capacity at minimum head, there will be a surplus power. Hence, the allocation of the dependable capacity

Irrigation accounted for 87.27 percent of the total and power for the remainder, or 12.73 percent. These percents applied to the remaining joint cost of \$23,201,100 resulted in the assignment of \$20,247,600 to irrigation and \$2,953,500 to power. By averaging the results of the two approaches, the allocation of \$21,724,400 was made to irrigation and \$1,476,700 to power (table 6).

TABLE 6—Allocation of estimated remaining joint costs to irrigation and power, Palisades Dam and Reservoir project, Idaho

Function	Priority of use	Alternative justifiable expenditure	Average	
			Amount	Percent
Irrigation.....	\$23,201,100	\$20,247,600	\$21,724,400	93.64
Power.....	0	2,953,500	1,476,700	6.36
Total.....			23,201,100	100.0

The allocation of joint costs to the various functions was then added to the direct construction costs to secure the total allocation to each function (table 7). These allocations are in terms of estimated costs.

TABLE 7—Allocation of total costs, Palisades Dam and Reservoir project, Idaho

Function	Joint costs	Direct costs	Total allocation
Irrigation.....	\$21,724,400	0	\$21,724,400
Power.....	1,476,700	\$21,565,600	23,042,300
Flood control.....	22,733,300	0	22,733,300
Fish and wildlife.....	2,455,000	350,000	2,805,000
Recreation.....	6,148,000	148,000	6,296,000
Totals.....	54,537,400	22,063,600	76,601,000

With respect to the allocation to power, a further suballocation to irrigation pumping power is justified in keeping with Reclamation policy and is requisite to the pay-out analysis presented in part IV of this report. Only the portion of the power investment allocated to commercial power is treated as interest bearing in the pay-out analysis.

As described in part II, the power facilities of the Palisades project are designed to supply a large block of seasonal irrigation pumping power through operation in coordination with the proposed American Falls power plant and other Federal plants in the area. Studies of this operation indicate that, under critical water conditions, and at full load development, the Palisades power plant will supply 21,000 kilowatts of power for pumping projects, and at the same time produce 33,000 kilowatts for commercial loads. Under these critical water supply conditions, the Palisades Reservoir would have been drawn down to the dead-storage level by drafts for irrigation purposes, and with the power-plant capability thus limited by reason of operation at minimum head, there would be no generating capacity for production of surplus power. Hence, the above loads are taken as a measure of the dependable capacity of the power plant, and provide a basis