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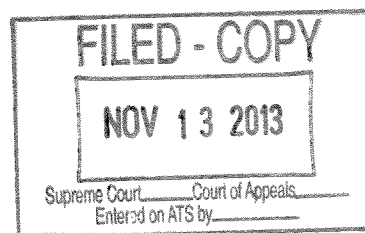
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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Supreme Court Docket No. 40975-
2013

Boise Project Board of Control,)
Appellant,)
v.)
State of Idaho, et al.,)
Respondents.)



**BOISE PROJECT BOARD OF CONTROL
REPLY 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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**RESPONSE TO RESPONDENTS' STATEMENTS OF THE CASE
AND FACTUAL ASSERTIONS:**

I. The Boise Project Depends on Water Stored in Arrowrock and Anderson Ranch to Provide Irrigation Deliveries to the Landowners:

The basic facts surrounding the history of irrigation and water storage in the Boise Basin are not in dispute. Much of that history appears in prior cases brought before this Court and others, including this Court's decision recognizing that, because of this history of development, the Boise Project districts, other districts and their respective landowners have a property interest in the water stored behind the reservoirs on the Boise River. *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

Natural flow rights on the Boise River were initially decreed in 1902 under the Stewart decree. *See Farmers Coop Ditch Co. v. Riverside Irrigation Ltd.*, 16 Idaho 525, 102 P. 481 (1909) and *Farmers Coop Ditch Co. v. Nampa & Meridian Irrigation Dist.*, 14 Idaho 450, 94 P. 761 (1908). This decree was supplemented by the 1929 Bryan decree which adjudicated more junior natural flow or "flood waters" up to the date of the decree. *Owen v. Nampa & Meridian Irr. Dist.*, 48 Idaho 680, 285 P. 464 (1930) (recognizing the orders of Judge Bryan as part of the adjudication); *See United States v. American Ditch Ass'n.*, 2 F Supp. 867 (D. Idaho 1933) (holding the United States is bound by the Bryan decree). The Bryan decree included the 1911 Arrowrock storage right. *See Bray v. Pioneer Irrigation Dist.*, 144 Idaho 116, 157 P.3d 610 (2007).

When the Boise Project Board of Control was formed in 1926 as the operating agent of the New York Canal for the five irrigation districts, the five districts received the interests of the United States Bureau of Reclamation ("Reclamation") in both Arrowrock and in the New York Canal natural flow rights. *U.S. v. Pioneer, supra; In re Wilder Irrigation Dist., v. Jorgensen*, 64

Idaho 538, 136 P.2d 461 (1943). The storage in Arrowrock reservoir is recognized in water rights nos. 63-303 and 63-3613. Water right no. 63-3613 accounts for a raise in the dam with a 1938 priority. Together these rights total, 286,600 acre of feet of irrigation storage. However, these water rights were simply not enough to provide for the desert lands south of the Boise River.

It was found, in the course of time, the water supply provided under the terms of the contract between the United States and the District, dated April 6, 1926, was not sufficient for the proper irrigation and reclamation of the lands within the district. That led the district to take steps to obtain additional water and to that end, the district entered into another contract with the United States, dated January 13, 1941, also subject to later authorization by the electors of the district, for 33 71/100 per cent of water to be stored in the Anderson Ranch Reservoir to be constructed by the United States. This second contract was likewise approved by the electors.

In re Wilder Irrigation Dist v. Jorgensen, 64 Idaho at 541 (emphasis added)¹.

Approving the contract with Reclamation for “additional water” in Anderson Ranch, this Court stated:

It must be kept in mind the contest in the case at bar is between appellant landowners within respondent district and the district itself; that the sole purpose of the contract in question is to provide much-needed additional water for the irrigation of the irrigated lands within the boundaries of the district, including appellants’ lands, in the manner and as expressly authorized by statute; that the additional supply of water contracted for from Anderson Ranch Reservoir does not depend upon a possible later substitution of water; that such additional supply is assured in any event; that the proposed contract will not have the effect of reducing the amount of water to which any landowner within the district is entitled.

Id. at 549. As a result, Anderson Ranch was built. Its water right is no. 63-3614 with a 1940 priority date, for 493,161 acre feet of irrigation storage.

The *Jorgensen* decision is important because the Court recognized that the storage water of Arrowrock alone was not sufficient to irrigate the lands of the Boise Project districts and that the Anderson Ranch “water” was critical (“much needed”) for irrigation by the districts. This

¹ The other four districts had identical contracts. *U.S. v. Pioneer, supra.*

Court repeatedly recognizes the districts' interest as an interest in "water" in the reservoirs. The

Court then provided guidance that is important in this case:

The dominant purpose of our irrigation district law is to facilitate the economical and permanent reclamation of our arid lands, and it must be the constant aim of judicial construction to effectuate that purpose so far as consistent with the whole body of our law. The continued existence of an irrigation district depends upon its ability to furnish water to land owners within the districts. * * * In the absence of * * * the right to furnish an adequate water supply * * *, the very purpose and object of the district would be thwarted and the growth and development of the state retarded to its serious detriment.

Id. at 550, quoting *Nampa & Meridian Irr. Dist. v. Petrie*, 28 Idaho 227, 238, 153 P. 425, 429 (1915).

II. Development of Flood Control in the Boise River Valley:

In 1943, devastating floods hit the Boise River valley. Historic reports of over 20,000 cfs flowing downstream past Arrowrock Dam were recorded. See S. Stacy, *When the River Rises* (1993) (a comprehensive history of flooding on the Boise and the construction of Lucky Peak Dam). The SRBA court's *Memorandum Decision* in SRBA sub-case no. 63-3618 (Lucky Peak Reservoir), also contains some of the history of construction of Lucky Peak Dam.² As a result of these floods, the U.S. Army Corps of Engineers ("Corps") was authorized to build Lucky Peak for navigation, flood control, and other purposes. Flood Control Act of 1946, 60 Stat. 641 (July 24, 1946). Reclamation obtained water rights to store water in Lucky Peak for irrigation storage, recreation storage and stream flow maintenance storage with a priority date of 1963.³

Between Congressional authorization of Lucky Peak Dam and its construction, Reclamation and the Corps entered into a Memorandum of Agreement for coordinated

² The State discusses this Memorandum Decision at various places in its brief. The Boise Project will respond to the State's arguments about this decision in a later section of this Reply.

³ See Water Right decree no. 63-3618. The Boise Project districts do not hold rights to any of the irrigation or other storage water rights in Lucky Peak. Nampa & Meridian had acquired some Lucky Peak irrigation storage, but transferred that right back to Reclamation.

operations of the Boise River reservoirs, including Lucky Peak. That MOA expressly provided that joint operations would not deprive any entity or person of water accruing to it under existing rights in Arrowrock, Anderson Ranch or Lake Lowell. *Memorandum Decision*, SRBA sub-case no. 63-3618, p.6. Supplemental Contracts were entered into with the Districts in 1954 securing these rights. *Id.*; R. 269-278.

Over the next several decades, the Valley began to grow, development moved closer to the river, and the channel's capacity to carry flood flows began to constrict. *See generally*, S. Stacy, *When the River Rises*. In 1974, the State, through Governor Andrus asked IDWR to prepare a report on Boise River Flood Management. R. 311-313. That report encouraged the Corps and Reclamation to increase the early season flood control releases to protect landowners downstream of Lucky Peak from later flooding. IDWR's report also expressly recognizes the practice of "refill" following flood control releases and requests that the Corps and Reclamation evaluate the risk to "refill" of the reservoirs and the impact to "irrigated agriculture" from increased flood control releases. *Id.*

In response to the State's request, the Corps and Reclamation, in cooperation with IDWR, developed and updated the 1985 Boise River Water Control Manual ("Water Manual"). R. 293, ("the Bureau, Corps, and State of Idaho jointly agreed to revision of operating criteria and procedures...")(emphasis added). The purpose of the Water Manual was to set flood control rule curves, provide "protection of space allocations in Arrowrock, Anderson Ranch, and Lake Lowell against water loss as a result of flood control operations," and for "provision of evacuation and refill sequence", among other provisions. R. 295-296. The Water Manual explains, "[f]lood control regulation during this period (1 November through the spring high water period) endeavors to maintain adequate flood control spaces within the reservoirs and yet

refill the reservoirs without exceeding 6,500 cfs as measured at the Glenwood gauging station.” R. 298-307. Water that refills the reservoir to its highest level expected in that irrigation season, is then allocated among the various space holders. R. 286.

The Boise River reservoirs have, between them, storage capacity of less than 1,000,000 acre feet. R. 282, and 295. Average runoff in the Boise is about 1,400,000 acre feet. R. 281. Much of that is dedicated to the senior Stewart and Bryan decree rights. However, the Boise River is capable of producing as much as 3,500,000 acre feet or less than 900,000 acre feet from year to year. *See generally, S. Stacy, When the River Rises.* The Water Manual recognizes that even in average water years, because of the timing of the runoff, runoff years “near normal require delicate balances between flood control and refill regulation.” R. 298. In very low water years, there is no flood control and in high years, the releases are significant. Thus, in the Boise River reservoir system there are many years when some measure of flood releases are required to protect the downstream interests and the public at large.

III. Boise River is Fully Appropriated and New Rights Limited:

At the same time the State was agreeing with the Corps and Reclamation on how flood control releases would be made and how refill would occur to protect space allocations in Arrowrock, Anderson Ranch, and Lake Lowell, the Department of Water Resources (“Department” or “IDWR”) and the Idaho Water Resource Board (“Board”) had declared the Boise River and its tributaries above Lucky Peak “fully appropriated.” R. 316. The Board stated:

Since January 1980, the Idaho Department of Water Resources has issued no water right permits for consumptive use of water during the period June 15 to November 1 on the Boise River and its tributaries above Lucky Peak Reservoir. Water in the affected area has been judged to be fully appropriated, and therefore no additional consumptive uses can be permitted.

Id. The only logical conclusion one can draw from declaring the Boise River “fully appropriated” in light of the practice of refilling the reservoirs, is that the water “refilling” the reservoirs was already appropriated. If the water that refills the reservoir was considered unappropriated, as the State now alleges is the policy of the State, the Department and the Idaho Water Resource Board would not have concluded that the Boise River was fully appropriated.

Thereafter, the Department issued a few junior natural flow rights in the Boise, but those rights authorize the diverters to take water only when water is released at Lucky Peak pursuant to the flood control rule curves in the Water Manual that the Department had agreed to. R. 324, and 327-348. Similar provisions were inserted into water rights seeking to expand the season of use of senior diverters in the SRBA. *Id.* No new rights were granted expressly recognizing the right to divert water that would otherwise “refill” the reservoir after a flood control release.

The Boise Project, its irrigation districts and landowners have relied on the ability to deliver water to the landowners that “fills” or “refills” the reservoir after flood control releases. As this Court recognized in *Jorgensen, supra*, without Anderson Ranch, the water supply was “insufficient” to supply to over 165,000 acres. Without the right to water stored in the reservoirs, the Boise Project would not be able to furnish an adequate supply of water to its landowners.

IV. The Fill/Refill Issue:

One may ask, in light of the clear history of the need for irrigation supplies in the Boise and the agreed upon practice of flood control releases and physical “refill” or “fill” of the reservoir in flood control years, what is the dispute?

The problem is simple, but stark. The State of Idaho and others now assert there is no “right” to the water that fills or refills the reservoir after a flood control release. According to these parties, the irrigation storage water right holders are required to allow water to be released

for flood control, and then take a place in line behind anyone who might now have, or in the future obtain a junior water right, before the storage right holders are entitled to a single drop of water entering the reservoir after a flood control release.

The Boise Project irrigators bought and paid for the reservoirs. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 114-115, 157 P.3d 600, 608-609 (2007). They have diverted and put the water that fills the reservoir to beneficial use after flood control releases. Under *Pioneer*, they are the beneficial owners of a water right to use that water as the appropriators.

V. What is Flood Control?

The SRBA court incorrectly concluded that the irrigators are indistinguishable from Reclamation and that the irrigators “use” the water released for flood control, without a water right. R. 889-890. The SRBA court even questioned whether a release for flood control can take place under any of the storage rights. R. 894-895.

The best description of flood control from this Court comes in *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 792 P.2d 926 (1990), where the Court upheld the right of Utah Power & Light Co. to release flood waters held in Bear Lake into Bear River. This Court recognized that the reservoirs serve the “additional need for flood control...” *Id.* at 904. Flood control serves a compelling public benefit for the good of the entire state.

The Department has long recognized the public benefits of flood control. In its Amicus Brief in *Kunz*, the Department’s brief in support of the reservoir operator recognized:

The land owners, as well as other residents in the area have all benefited from the operation of the system. Were it not for the benefits of the system, downstream landowners would be subject to uncontrolled flooding each spring without having the degree of certainty provided by the system. Under the circumstances, the operation of the water system makes available benefits to all residents in the area, including the plaintiffs.

Department's Amicus Brief, pp. 14-15, Supreme Court Case No. 18076 (Sept. 12, 1989).⁴

In 1974, the Department, at the request of the Governor, recommended that the space in Lucky Peak be used to provide greater flood protection for the occurrence of a major flood. R. 311-313. The Department and the State clearly understand that there is an enormous public benefit to downstream landowners of using flood control releases from the Boise and other reservoirs. Yet, now the State argues that the space holders and water users must bestow this "benefit to all residents of the area," at the cost of their right to "refill" the reservoir and put that water to beneficial use.

In the Boise River, flood control releases are circumscribed by flood control rule curves agreed upon by the State, the Corps, and Reclamation. R. 297-309. The rule curves provide both a public benefit and the opportunity for the irrigators to refill the space vacated for that public benefit. Yet, the SRBA court refused to consider how the Boise River rule curves manage flood releases and specifically authorize "refill." Instead, the SRBA court held there is no right to "refill" because that would result in a violation of the prior appropriation doctrine and potentially deprive junior users. R. 889-892. To the contrary, without the right to "fill" or "refill" the reservoir after flood control, the irrigators perform a public service to downstream property to the detriment of their senior irrigation water rights, to benefit some unknown future users. There is no double counting of the right in this situation, because the irrigators are only asking to have the ability to put to beneficial use the amount of water decreed for irrigation from storage on the storage rights.

RESPONSE TO RESPONDENTS' ARGUMENTS

⁴ Copy of Brief on file with the Idaho Supreme Court records and as such can be judicially noticed by this Court.

I. Some Factual Record as to Flood Control and Fill Practices is Imperative Because Determination of Whether a Remark is Necessary for Administration of a Water Right is Inherently a Mixed Question of Law and Fact:

A Basin Wide issue in the context of the SRBA court is one that “is broadly significant and affects many [water] rights holders throughout the state.” R. 254. There is nothing in Administrative Order Rule 16, the rule governing the procedure of the SRBA court in Basin Wide issues, defining what constitutes an appropriate Basin Wide issue that limits the issue to strictly a legal question, excluding the development of a factual record. In this case, the Basin Wide Issue formulated by the SRBA court specifically asked, “[d]oes Idaho law require a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control?” R. 257. For the court to purport to answer that question absent any relevant factual record to determine how a system is administered or managed, constitutes legal error requiring remand.

This Court has already decided that a determination of whether a remark is necessary to define or administer a water right is a mixed question of law and fact. *State v. Idaho Conservation League*, 131 Idaho 329, 332, 955 P.2d 1108, 1111 (1998), *citing State v. Nelson*, 131 Idaho 12, 14, 951 P.2d 943, 945 (1998). In the Boise Project’s Opening Brief, the importance of an inquiry into the historical operation or administration in order to determine whether a remark is necessary for definition and future administration of a right was discussed at length. *See* Opening Brief of Appellant Boise Project Board of Control, pp. 13-19. Of particular note is this Court’s holding in *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 414, 958 P.2d 568, 571 (1997), stating “[w]hether a general provision is ‘necessary’ depends upon the specific general provision at issue and involves a question of fact, (defining the proposed general provision and the circumstance of its application), and a question of law, (determining whether

the general provision facilitates the definition or efficient administration of water rights in a decree).” In this instance, the Court determined neither.

In this action, counsel for the Boise Project specifically answered in response to the SRBA court’s question whether development of a factual record would be necessary, that some record is necessary because the issue is “partly a legal question -- partly a factual question.” 9/10/12 Tr. p. 20, ll. 4-10. The State cited a number of statements made by counsel for Petitioners in the Basin Wide proceedings wherein those parties stated that the ultimate question answered in the proceeding would be a question of law, but no party conceded that no factual record would need to be examined by the court in order to reach that answer. *See* Brief of Respondent State of Idaho, pp. 6-7.

The State failed to dispute the Boise Project’s position that the SRBA court improperly struck the affidavit of Shelley M. Davis supplied in support of the Opening Brief of the Boise Project Board of Control and the New York Irrigation District. The basis upon which the State moved to have the Affidavit struck before the SRBA court was that the submission of the judicially noticeable documents violated the SRBA court’s admonishment against development of a factual record. R. 501-510. As has already been demonstrated, the determination of whether a remark is necessary for administration of a water right is inherently a mixed question of fact and law, so it was necessary and appropriate for the Boise Project to provide a bare minimum of documents to constitute a factual record, all of which were capable of being judicially noticed, in order to provide the SRBA court an opportunity to make an informed decision.

The documents that the Boise Project specifically requested to be admitted by the court were judicially noticeable. Idaho Rule of Evidence 201(d) requires “that a court take judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case” where

the party has identified and provided the documents to the court and to other parties. Under those circumstances, “[a] court shall take judicial notice if requested by a party and supplied with the necessary information.” *Id.* R. Ev. 201(d) (emphasis added). In this case, the SRBA court improperly excluded documents that it was mandatorily required to admit. Other documents that were not subject to reasonable dispute, are generally known within the territorial jurisdiction, and are capable of accurate and ready determination, were also excluded. The SRBA court improperly granted the *State of Idaho’s Motion to Strike the Affidavit of Shelley M. Davis in Support of Opening Brief of the Boise Project Board of Control and New York Irrigation District*. Further, the failure of the SRBA court to recognize that the Basin Wide Issue that it formulated is inherently a mixed question of fact and law, and to decide the issue with no factual record, requires that this matter be remanded for the development of the necessary factual record.

A. The SRBA Court, Not the Director of the Idaho Department of Water Resources, Has Proper Jurisdiction to Decide The Question Posed in the Basin Wide Issue and Exhaustion of Administrative Remedies Is Not at Issue:

The question posed in the Basin Wide proceeding was whether a “remark” was necessary for definition and administration of the Boise River reservoir decreed water rights. A partial decree is a final judgment of a court, which cannot be modified except through an action to set aside or amend such judgment. ID.R.CIV.P. 60(b). In this instance, all of the water rights for the reservoirs in the Boise River reservoir system were partially decreed by the SRBA court. The earliest partial decree was entered for water right no. 63-3613 in 2007, and the last partial decree of the four was entered for water right no. 63-3614 in 2009, four years before the issue of whether a remark was necessary for administration of a storage water right in order to provide for priority refill after a flood control release was even raised. Only the SRBA court has the

authority to place a remark on an already decreed water right if such a remark is deemed required. *LU Ranching v. U.S.*, 131 Idaho 606, 608-610, 67 P.3d 85, 87-89 (2003).

The State argues that the SRBA court lacked the jurisdiction to decide the question posed because, it asserts, the question of whether a water right is filled is purely an accounting or administrative function of the Idaho Department of Water Resources. *See* Brief of Respondent State of Idaho, p. 21-25. That is not the case. The question posed is whether a remark is necessary for proper administration of the water rights in question. Whether a remark is necessary is inherently a mixed question of fact and law, which the SRBA court failed to properly take into account. *State v. Idaho Conservation League*, 131 Idaho 329, 332, 955 P.2d 1708, 1111 (1998). The Basin Wide question did not ask whether the Director properly discharged any of his duties pursuant to Idaho Code § 42-602. It did not ask whether the Director or the Department properly accounted for the ‘fill’ of the reservoir. It asked whether, under the historical operations of the reservoir, and the settled treatment of ‘refill’ of the Boise River reservoirs, a remark was necessary to allow the Boise Project to continue to refill, in priority, the space vacated for flood control. Answering that question, relying upon the facts and circumstance attendant to the question, as well as the law governing water rights, was purely within the jurisdiction of the SRBA court. *State v. Idaho Conservation League*, 131 Idaho 329, 332, 955 P.2d 1108, 1111 (1998), *citing State v. Nelson*, 131 Idaho 12, 14, 951 P.2d 943, 945 (1998).

The State also argues here that Idaho Code § 42-602 mandates that it is the director’s duty to determine when and how a water right is filled; or rather, when the quantity element is met. This is an exaggeration of the duty outlined in Idaho Code § 42-602. It simply provides:

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 shall be accomplished by watermasters as provided in the 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.

I.C. § 42-602. Nothing in the balance of Ch. 6, title 42 defines or describes how the director would determine when a water right has been ‘filled’ or ‘satisfied.’ Under I.C. § 42-603 the director may adopt rules and regulations “for the distribution of water from the streams, rivers, lakes....as shall be necessary to carry out the laws in accordance with the priorities of the rights,” however, the State has not demonstrated that any such rules or regulations exist.

Under these circumstances there is no administrative remedy for the Boise Project to exhaust. The proposed remedy in the Basin 01 sub-cases, requiring a remark to authorize refill after flood control releases, necessitated action by the Boise Project in order to protect the refill after flood control that it was relied upon to supply irrigation water. The only available action was a Basin Wide Issue before the SRBA court, the court that entered the final judgment in the form of a partial decree for the Boise River reservoirs. It is up to the SRBA court to apply the proper standard to determine whether a remark is necessary for definition of the rights, not the director.

B. The Late Claims For Water Rights Filed by the Boise Project Do Not Resolve the Question Posed by the SRBA Court:

The State further suggests that the better place to resolve the question posed in the Basin Wide Issue is before the Department in the individual proceedings on the late claims for water rights filed by the Boise Project for the Boise River reservoirs. The Boise Project in the Basin Wide 17 matter asked the SRBA court to determine the scope of its current water rights, in conjunction with the necessary factual record, to determine whether a remark is necessary to

continue administration of the rights relying upon priority refill. The new rights will not address that issue.

Further, the State appears to disregard the fact that the Boise River reservoir water rights have already been partially decreed, and the administration of those rights has always included applying water that ‘refills’ the reservoir after flood control releases to the quantity of its irrigation storage water rights. R. 285-286. All four of the Boise River reservoir rights went to partial decree without any allegation from the State that a remark was required in order to continue to be administered in that fashion. Only when the Basin 01 sub-cases raised the issue did the State take the position that a remark is required to continue to store ANY refill after a flood control release. R. 186-187. It is clear that the remark proposed by the State does not satisfy Idaho law and is inconsistent with historic reservoir operations on the Boise River. The late claim water rights do not address the question posed in Basin Wide 17.

II. The SRBA Court Improperly Failed to Define Fill and, Therefore, It is Impossible to Determine Whether A Remark Authorizing Priority ‘Refill’ is Necessary for Administration of the Irrigation Storage Rights:

The SRBA court did not define ‘fill’ in this proceeding. The Section C heading in its *Memorandum Decision* is titled “This basin-wide proceeding does not address the issue of when the quantity element of a storage right is rightfully considered to be ‘filled’ or ‘satisfied.’” R.

893. The SRBA court specifically stated:

Approaching the issue from the perspective of priority refill of a storage water right, which assumes a priority fill of that right has already occurred, misses the mark. It is the quantity element of a water right that defines the duration of priority administration during its authorized period of use. Thus, the more important issue pertains to when the quantity element of a storage right is considered filled. Namely, is water that is diverted and stored under a storage right counted towards the quantity of that right if it is used by the reservoir operator for flood control purposes? That is an accounting issue which this basin-wide proceeding does not address.

R. 893. Therefore, the State’s argument that the SRBA court defined ‘fill’ is incorrect. The SRBA court plainly did not determine when a storage water right is filled or satisfied.

No party has been able to provide any legal authority to the SRBA court demonstrating that the director of the Department of Water Resources has the right to determine when a water right is filled. This is because no such authority exists. Simplistically, the State points to Idaho Code § 42-1411(2)(c) stating that one element of a recommendation for a water right that the director is required to make to the court to include in a water right decree is “the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the right.” That element is a matter for the court to decree, and once decreed, the quantity of water that the holder is entitled to is not to the director’s discretion. Moreover, this duty to provide a recommendation to the SRBA court does not explain how the director determines when the volume of a storage right is filled for a river system that passes twice its storage capacity through the reservoirs each year. How the director determines when that volume is full is nowhere explained in Idaho law, or administrative guidance.

The quantity element of a water right is a fundamental and important element of the water right, and once that quantity is provided to the holder of a water right, then the right may go out of priority. Even though the SRBA court expressly refused to define ‘fill,’ the State now asserts that the court’s decision means that all water that passes through the reservoir, whether it is stored in order to provide wet water to fulfill the beneficial uses from the reservoir or not, counts against the volume of water that is ultimately considered as ‘fill’ of the reservoir. Setting a volume limit on a water right, and determining when that limit has been met for an on-river

reservoir, are two different things. While the director may, pursuant to Idaho Code § 42-602, “distribute water in accordance with the prior appropriation doctrine,” the director may not determine that a water right is filled and out of priority before the water necessary to fulfill the quantity of the right is available to be delivered.

While the State has tried to distance itself from the position it took in the Basin 01 sub-cases that led to the Basin Wide 17 sub-case, that all water that enters the reservoir is considered ‘stored’ and counts toward the volume limit of the reservoir, that is its position. On hearing before the SRBA court, counsel for the State conceded, “[t]he state is not now and we haven’t ever argued that the quote, ‘first,’ unquote, inflow into the reservoir counts towards the right, or that’s how it’s supposed to be counted. The state’s only argued that these bank to bank on-stream reservoirs, as a matter of fact, divert all the water.” 2/12/13 Tr. p. 91, ll. 16-21. While paper fill has been historically counted in this manner, the Boise River operators have always considered water “refilling” the reservoir after flood control releases as storage water accruing to the Boise Project irrigators’ storage rights. R. 353-354. (“At the end of a flood operation, ideally the amount of ‘unaccounted ‘or’ storage will be equal to the amount of storage released for flood control so that the amount of water stored physically in the reservoir will be equal to the paper fill, which is 100 percent of the storage right (or allocated storage).”)

A. Space Vacated in the Boise River Reservoirs for Flood Control Operations Has Not Historically Been Prevented From Refilling in Priority:

The State takes the position that “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,” and therefore the State in its administration of the water rights has only an obligation to declare the right full and take the right out of priority. *See* Brief of Respondent State of Idaho, p.

27. The State’s historic role in defining ‘refill’ in the Boise River reservoir system, and administration of rights pursuant to that definition belies the State’s assertion.

The State of Idaho has always played a role in the historic operation of the Boise River reservoir system pursuant to the contracts with Reclamation and in conformance with the 1985 Water Manual, which rely upon water that re-enters the reservoirs after flood control releases in order to satisfy the Boise basin irrigators’ irrigation water from storage, in priority. Prior to the proceedings in Basin 01 that precipitated the Basin Wide 17 matter, the State has never taken the position that reliance upon ‘refill’ to fulfill irrigation storage rights results in open-ended, unquantified water rights. In fact, ‘refill’ of reservoir storage has been recognized by every administrator in recent times of the Boise River, as a necessary component of ‘filling’ the water rights of the spaceholders in the reservoirs. *See R.* pp. 285-287, 290-309, 311-313, 315-318, 320-322, and 350-355.

The 1974 Boise River Flood Control Management report created at the request of Governor Andrus undeniably demonstrates that the State understood that water to serve irrigation from storage water rights depends on the ability to refill the system after flood control releases occur. R. 313. The report concludes:

The effect of taking a greater refill risk on irrigated agriculture and reservoir recreation has not been evaluated. ...In the detailed studies for manual revision, the trade-offs between flood control and other reservoir uses should be evaluated before a new operating plan is selected.

Id.

The 1985 Water Manual prepared in response to the State’s 1974 Flood Control Management report reinforces that water to fulfill irrigation storage rights largely depends on ‘refill’ of the reservoir system after flood control releases. The Water Manual states that water continues to accrue to storage accounts “until the annual flood control season is over (normally

ranging between 15 April to 1 July).” R. 297, (emphasis added). This statement, included in the report created jointly by the State of Idaho, Corps and Reclamation, R. 293, explicitly states that water accruing to the reservoirs through the end of the flood control period, is “add[ed] to storage.”

Robert J. Sutter, the hydrology section manager for the Department from 1995 to 2002, and Mary Mellema of Reclamation, both submitted affidavits in SRBA sub-case no. 63-3618. Both confirmed that water entering the reservoirs after flood control operations have occurred is counted toward, and not against, the irrigation storage. Ms. Mellema stated “[a]fter flood control operations have occurred and the reservoirs fill to the maximum reservoir level expected to occur during that irrigation season, IDWR uses the Boise River Storage Program to allocate storage to the various contractors and purposes. At this time, any shortages that need to be made up to the various Reclamation contractors in Anderson and Arrowrock, due to flood control operations in the Boise Project, pursuant to the 1985 Water Control Manual and contracts, occurs.” R. 286.

The facts surrounding the operation of the Boise River reservoir system demonstrate that because the system cannot, in even a year of average flows, store the entire river, water is not allocated to the storage accounts until after flood control operations have ceased and the reservoirs have refilled to the maximum level expected in that year. R. 281-282. Junior rights in the Boise River reservoir system are still protected and able to be served as the result of the remarks allowing them to take water during flood control releases. R. 327-348. This operation of the system protects both the junior natural flow water right holders, and the senior storage right holders under the prior appropriation doctrine. It also affirms the determination that the Boise River is fully appropriated.

B. Junior Natural Flow Water Rights Have Been Subordinated to Storage Refill in the Boise since the 1980's and the State's New Position Turns That Subordination Relationship Upside Down:

The Department, during the course of the Basin Wide 17 proceedings, identified the water rights junior to the Boise River reservoir storage rights. R. 324-325. Those rights were issued with remarks that limit the ability of those junior natural flow water rights to exercise the rights only during the time when flood control water is being released in the system. R. 327-348. These remarks demonstrate that the State has not always administered the Boise River reservoir system in a manner that takes the reservoir storage rights out of priority once the quantity limit is met on paper. Were that the case, then the junior natural flow rights in the Boise River system would not contain remarks exactly reversing that scenario. These remarks were expressly approved and recommended to be included on these junior rights by the Department, and it can be safely presumed the Department knew at that time how the Boise River reservoirs 'fill' and 'refill' after flood control releases.

The SRBA court's conclusion that priority refill is improper seems to be based on its perception that the storage right holder is depriving the junior of the use of its water twice, once when the senior right holder initially stores, and again when the senior right holder 'refills' after flood control. R. 892. What the SRBA court's reasoning leaves out is the middle period, while flood control is being released. At this time water is being made available for juniors' use, at least in the Boise River, where the Water Manual and subordinated water rights allow juniors to take water released for flood control. R. 323-324, and 327-348. This is consistent with both the SRBA shoulder remarks allowing seniors to take flood control releases during their expanded season of use and with the flood control remarks on junior water rights. *Id.* In the Boise, the flood control season begins as early as January 1 and may extend as late as July. R. 297. Thus,

the juniors are authorized to divert and use the water during the time when flood waters are being released; water that they would not otherwise be entitled to take if the river flow was being stored in this period.

Ultimately, however, the Court's conclusion that the Boise River storage right holders are not entitled to refill in priority is incorrect because the practice of flood control and 'refill' on the Boise River does not deprive juniors (or future users) of their right to take water. No more than the full volume of the reservoirs is actually diverted and stored for irrigation storage and irrigation from storage. This leaves that amount of water that exceeds the reservoirs' capacities available for junior natural flow use in any given season.

C. The SRBA Court's Failure to Consider the Operational Facts of the Boise River Reservoir System Resulted in an Opinion that Jeopardizes the Boise Project's Water Rights:

The facts concerning the administration and operation of the Boise River reservoir system demonstrate that the Boise Projects' storage water rights are not fully satisfied when an equivalent number of acre feet have been passed down the river for flood control. The fact that allocation to their storage is not computed until the reservoirs have refilled to their maximum level in a given irrigation season after flood control has ceased, R. 286, makes it clear that the proposed change in the accounting policy and methodology proposed by the State is not even possible. This matter must be remanded to the SRBA court in order to create the necessary record so that the court may properly define 'refill' and its limitations, in the context of the actual facts concerning the physical system of 'fill' on the Boise River, rather than assumed definition of 'fill.'

III. The SRBA Court Did Not Take Into Account the Other Important Elements of Water Rights, Including Priority and Purpose of Use, When He Assumed the a Water Right is Full When the Quantity Limit Has Been Met:

The SRBA court’s Memorandum Decision rests on a simple holding that a reservoir water right, like any other water right in Idaho, is only entitled to be ‘filled’ once in priority during its season of use in any given year. R. 892. The Boise Project has never asserted that their respective rights entitle them to delivery of more water in an irrigation season than their water rights entitle them to. The question these parties posed to the SRBA court is whether the State’s position that the irrigators’ storage rights have been ‘filled’ when water has been passed through the system, and is not actually stored or available to the beneficial users, is consistent with their water rights. Ergo, they asked the SRBA court to determine whether the water rights must contain a remark that authorizes them to continue to “refill” the Boise River reservoir storage rights in priority. The SRBA court’s decision, without the benefit of a proper factual record, fails to answer the question and fails to properly account for the other important elements of the storage rights, including purpose of use, place of use, and priority, and ultimately did not address the question that the court itself posed.

A. The Boise Project Does Not Assert that it’s Entitled to Unlimited Unquantified Storage of Water that Arises in the Boise River Basin, But Rather that Paper Fill of a Reservoir Does Not Provide the Wet Water Necessary to Supply its Landowners in Order to Maximize Beneficial Use:

The Boise Project has always asserted that its rights are physically filled when a quantity of water sufficient to supply the irrigation from storage component of each reservoir right is physically stored in the reservoir. In the context of the Boise River reservoir system, the Boise Project’s rights will only be capable of being filled when each reservoir is filled to capacity with wet water. Filling the reservoirs does not equal storing the entire capacity of the Boise River. R. 280-282. Nor does filling the reservoirs result in an open-ended unquantified water right as the State argues. It is important to note that each of Reclamation’s storage water rights contains a ‘capacity remark’ which sets the volume and capacity for the reservoir “measured at the

upstream face of the dam,” rather than at the gauge which measures water entering the reservoir. For this reason, the State’s argument that annual volume limits and reservoir capacity are not the same thing is wrong in the Boise River reservoir system.

The capacity of each reservoir is distributed to each of the beneficial uses of the reservoir as set forth in the rights. The quantity element of each right is entitled to be filled in order to supply the water necessary to fulfill the beneficial use of the right. *See* Partial Decrees for water right nos. 63-303, 63-3613, 63-3614, and 63-3618. The State’s position that only some rights contain such reservoir capacity remarks is wrong for the Boise. The Arrowrock, Anderson Ranch and Lucky Peak rights all contain this remark. The ‘paper fill’ of the reservoirs and physical fill of its water rights are distinguishable and a vitally important distinction in order to actually fulfill the function of irrigation. R. 374-379. In the context of the operations of the Boise River reservoir system, a holding that the ‘paper fill’ of the reservoirs takes the irrigators storage rights out of priority ignores a century of operational and contractual operations.

The State has asserted that allowing the Boise River reservoir rights to refill in priority will resort in open-ended and unquantifiable water rights. R. 447-449. The manner in which the Boise River reservoir system has been operated in conformance with the Water Manual demonstrates that the Boise Project storage rights have always refilled in priority after flood control releases, until the maximum reservoir level is reached in any given year, in order to provide the actual wet water that is necessary to fulfill the quantity element of the specific beneficial use of their water rights. R. 286, and 297-309. The SRBA court’s opinion ignores this important fact.

The Boise River reservoir system, because it only has the capacity to physically store approximately half of the average annual flow of the Boise River, means that a volume twice the

physical capacity of the reservoir is in some years passed through the system for flood control and other operational purposes. R. 281-282. The past 30 year average of the Boise River reservoir system demonstrates that on average, at least 500,000 acre feet is passed through the reservoirs serving no beneficial use but rather emptying the reservoir in an orderly manner to protect the downstream property within the flood plain. R. 282. So if the State is correct and the water rights are ‘filled’ when 1,000,000 acre feet of water passes the reservoirs gauges, the State’s theory would allow any existing or future junior water user to take every drop of water that would otherwise fill the reservoir before the irrigators are entitled to fulfill their senior rights to provide water for the beneficial use of irrigation.

The longstanding legal position of this Court has been to interpret the law to allow irrigation entities in the state to maximize the water resources that they have worked hard to develop and protect.

The dominant purpose of our irrigation district law is to facilitate the economical and permanent reclamation of our arid lands, and it must be the constant aim of judicial construction to effectuate that purpose so far as consistent with the whole body of our law. The continued existence of an irrigation district depends on its ability to furnish water to land owners within the district....In the absence of.... the right to furnish an adequate water supply..., the very purpose and object of the district would be thwarted and the growth and development of the state retarded to its serious detriment.

In Re Wilder Irr. Dist. v. Jorgensen, 64 Idaho 538, 550, 136 P.2d 461, 466 (1943), quoting *Nampa & Meridian Irr. Dist. v. Petrie*, 28 Idaho 227, 238, 153 P. 425, 153 P. 425, 429 (1915).

The mere filling of the volume of any given reservoir on paper because water has passed a gauge at the head of the reservoir, and been passed downstream through the reservoir for public safety rather than a beneficial use, and a subsequent determination that those rights are therefore ‘filled,’ despite that water no longer being stored to provide its intended beneficial use, does not does not support “[t]he dominant purpose of our irrigation district law...to facilitate the

economical and permanent reclamation of our arid lands[.]” *Id.* In fact, it would promote scarcity and conflict since the State of Idaho has already determined that the Boise River system is already fully appropriated.

The State cannot truly be arguing that in order for Reclamation and the Boise Project to “maximize” the beneficial use of the water that necessarily passes through the reservoirs, that the flood control operations as they are outlined in the 1985 Water Manual be abandoned, and replaced with a “fill and spill” policy.⁵ This historical practice led to the Governor’s 1974 request for more aggressive flood control. Such a practice could jeopardize the property and safety of the Boise River valley, and would not serve the important secondary function that the reservoirs were intended to serve, flood control.

In 1980 the State of Idaho determined that the Boise River system is fully appropriated, and a moratorium on new surface water rights has been in place since that time. R. 369-370. In the Idaho Water Resource Board’s 1990 Comprehensive State Water Plan: South Fork of the Boise River Sub-Basin, the Board stated “[s]ince January 1980, the Idaho Department of Water Resources has issued no water right permits for consumptive use of water during the period June 15 to November 1 on the Boise River and its tributaries above Lucky Peak Reservoir. Water in the affected area has been judged to be fully appropriated, and therefore no additional consumptive use can be permitted.” R. 316. This fact was reiterated in the Water Resource Board’s 1992 State Water Plan for the Upper Boise River Basin. R. 322. The system is already fully appropriated and the State’s attempt to ‘make water’ for future users by redefining the manner in which the system has been historically operated cannot be sustained.

⁵ The State, in a footnote at p. 29 of its Respondent’s Brief states that it “is not suggesting that the Bureau’s flood control releases are a basis for forfeiture,” but this is little comfort in the overall context of its position in these proceedings.

B. The Quantity Element of a Water Right is But One Element Defining the Scope of the Water Right, And Does Not Vitiating the Other Elements of the Right:

A water right is defined in terms of its elements. The elements of a right must include 1) the name of the owner, 2) the source of water, 3) the quantity of water used in either terms of rate of diversion or annual volume of diversion, 4) the priority date, 5) the point(s) of diversion, 6) the purpose of use, 7) the period of use, 8) the place of use, 9) conditions on the exercise of the right, and 9) any remarks necessary for definition and administration of the right. I.C. § 42-1411(2). For the Boise River reservoir rights the owner is listed as the United States acting through the Bureau of Reclamation, however, the irrigators have been held to be the beneficial owners. The source is the Boise River tributary to the Snake River. The quantities vary based on the capacity of the reservoirs in question. The beneficial uses listed on the partial decrees for the water rights include irrigation storage, irrigation from storage, recreation storage, streamflow maintenance storage, streamflow maintenance from storage, industrial storage, industrial from storage, power storage, and power from storage. Not all beneficial uses apply to all reservoirs. Some are unique to the individual reservoir, but each contains a sub-quantity of water from the total quantity of the right which is dedicated to that purpose. The place of use for all of the rights is “within the Boise Federal Reclamation project within Ada, Canyon, Boise, Elmore Counties, Idaho, and Malheur County, Oregon (Big Bend Irrigation District.)”⁶ Each has a separate priority date based on the date proof of beneficial use was made for each individual project. The period of use is year round, 1/1 to 12/31 for the storage component of each element, and 3/15 to 11/15 for the irrigation from storage component of each right. Even though the State has argued that quantity and priority are the “essential elements of a water right,” putting water to beneficial use

⁶ See Partial Decrees for water right nos. 63-303, 63-3613, 63-3614 and 63-3618 in the public records of the Snake River Basin Adjudication.

has always been the controlling and determinative element of whether a valid water right exists. R. 443, also see *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007), citing 43 U.S.C. § 372.

C. Only When the Water Diverted Is Available to Fulfill its Intended Beneficial Use Can The Water be Applied Against the Right:

As a result of the decision in *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), each water right partial decree also includes a remark necessary for the administration and definition of the right that indicates that while Reclamation is the named holder of the right, “title to the use of the water is held by consumers or users of the water.” That is because beneficial use is the paramount requirement for a valid water right in the state of Idaho; a tenet that is vitiated by the SRBA court’s narrow reliance on the volume element of the right as the determining factor of when the right is filled, used, or in priority. All water appropriated “must be for some useful or beneficial purpose[.]” I.C. § 42-104. In the case of the storage elements of the reservoir rights, the benefit of the storage is not the mere holding it the reservoir, but rather for delivery to its place of use for its purpose of use, irrigation.

Idaho water law, under both the constitutional and statutory methods of appropriation, relies upon the fundamental element of beneficial use in order to determine whether the appropriation is complete. “[T]he appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho.” *U.S. v. Pioneer*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007). Reclamation was the initial appropriator of the water in the Boise River reservoirs. *Id.* “Thereafter, the United States and the irrigation districts entered into contracts that provide for the repayment to the United States for the costs of constructing the facilities and the continuing operation and maintenance costs. There is no dispute that the irrigation districts have fully repaid

the construction costs, except for Lucky Peak, and they have paid for development of the stored water.” *Id.*

The storage of the water in the reservoir system is for the ultimate purpose of putting it to use for irrigation later in the season, when natural flow and snow melt run-off have ended. It is not stored for the sake of storage. That is why the allocation of storage to the account holders in the reservoir does not occur until “[a]fter flood control operations have occurred and the reservoirs fill to the maximum reservoir level expected to occur during that irrigation season[.]” R. 286. At that time “IDWR uses the Boise River Storage Program to allocate storage to the various contractors and purposes...any shortages that need to be made up to the various Reclamation contractors in Anderson and Arrowrock, **due to flood control operations** in the Boise Project, pursuant to the 1985 Water Control Manual and contracts, occurs.” *Id.* Priority does not become a factor in the delivery of the irrigation water until the reservoirs have filled to their expected maximum level and delivery of stored irrigation water occurs, because water simply entering the reservoir, but not stored, does not affect the fill of the right.

“By actually diverting and applying water to a beneficial use, a legal appropriation is made.” *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 9, 156 P.3d 502, 510 (2007), *citing Furey v. Taylor*, 22 Idaho 605, 127 P. 676, 678 (1912). In *Sarret v. Hunter*, 32 Idaho 536, 541-542, 185 P. 1072, 1074 (1919), this Court importantly held that the ultimate *intended* beneficial use of the water is what makes the appropriation complete.

The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use. When one diverts water hitherto unappropriated and applies it to a beneficial use, his appropriation is complete, and he acquires a right to the use of such water, which is at least coextensive with his possession, and so when one makes application for a permit to divert and appropriate water, the query is not upon whose lands does he intend to apply it, but upon what lands he intends to apply it, and to what use does he expect to put it when so applied. His right to possession, or the character of his occupancy as

between claimants to the right to the use of the public waters of the state, is not in issue.

The diversion of the water alone is not determinative of whether a right has been filled. It is whether the water so diverted and stored is ultimately available to fulfill its beneficial use.

This Court confirmed as much when it held in *Pioneer*:

There is no dispute that the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities. Irrigation of the lands serviced by the irrigation districts was the basis upon which original water right licenses were issued. Without the diversion by the irrigation districts and beneficial use of water for irrigation purposes by the irrigators, valid water rights for the reservoirs would not exist under Idaho law. The beneficial use theme is consistent with federal law. The Reclamation Act provides that ‘the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right.’

U.S. v. Pioneer Irr. Dist., 144 Idaho 106, 110, 157 P.3d 600, 604 (2007), citing 43 U.S.C. § 372.

The water merely entering the reservoir is not the measure of the quantity of the water of the right. Only the water that is diverted and measured at the head of the dam⁷, and ultimately delivered to serve the irrigation beneficial use may be charged against the quantity of the right assigned to that beneficial use. The Boise Project takes the position that no remark is necessary to confirm this relationship on its already decreed water rights, but the State’s new definition of ‘refill’ and the Court’s assumed definition of ‘fill’ put this well-settled policy in jeopardy of being undone.

D. The Irrigators Are the Appropriators of the Water:

The State completely misstates the law of Idaho, and the actual holding of the case cited, when it argued that “water users with rights to stored water diverted from an on-stream reservoir ‘are not the appropriators of the storage water.’” See Brief of Respondent State of Idaho, p. 32, citing *Nelson v. Big Lost River Irr. Dist.*, 148 Idaho 157, 158 fn. 1, 219 P.3d 804, 805 (2009).

⁷ See the “as measured at the face of the dam” remark referenced in fn 6.

There, this Court in fact held “[t]he Irrigation District, not the Plaintiffs, is the appropriator of the storage water.” *Id.*

Subsequently, this Court, in *Pioneer* made it very clear, that by fulfilling all conditions of their repayment contracts both the irrigation districts and their constituent irrigators are the appropriators of the right. This Court quoted the United States Supreme Court in *Ickes v. Fox*, 300 U.S. 82, 95, 57 S.Ct. 412, 416-17, where it held:

Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.

U.S. v. Pioneer Irr. Dist., 144 Idaho at 111, 157 P.3d at 605 (2007). The Boise Project irrigation districts, who hold the water rights in the reservoirs, are the owners, appropriators and beneficial users of the water rights. For the State to pretend otherwise, ignoring *Pioneer* in which it participated and defended the Irrigators’ interests, and now argue that Reclamation is the appropriator just to support its theories here, is at the very least disingenuous.

E. The State Has Misconstrued and Overstated the SRBA Court’s Memorandum Decision in Sub-Case No. 63-3618 – the Lucky Peak Case:

The State acts as if the SRBA court’s Lucky Peak *Memorandum Decision* in sub-case no. 63-3618, is determinative of the issues in this appeal, and has sprinkled references to the decision throughout its brief. In doing so, the State has completely missed the mark.⁸ The decision does not conclude that every drop of water that enters a reservoir must be counted as diverted to the

⁸ Both Respondent State of Idaho and Respondent United Water submitted to this Court appendixes to their respective briefs consisting of documents that do not appear in the Record on Appeal in violation of I.A.R. 30. The Court has consistently held that it will not consider documents or evidence not part of the record on appeal. *See Idaho Power Co. v. Idaho Dept. Water Resources*, 151 Idaho 266, 279, 255 P.3d 1152, 1165 (2011), *Chisholm v. Idaho Dept. Water Resources*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005), *citing State ex rel Ohman v. Ivan H. Talbot Fam. Trust*, 120 Idaho 825, 827, 820 P.2d 695, 697 (1991). The Boise Project objects to the inclusion of these extra-record appendixes and respectfully requests, in conformance with precedent, that the Court not consider them in its deliberations on this matter.

space holder's irrigation storage account. Nor does the decision address the right to 'refill' or 'fill' after flood control releases.

Rather, the decision deals with two discrete issues. First, does Reclamation have the right to store and release water for "streamflow maintenance?" The SRBA court held that Reclamation did, and legally could, appropriate storage water to be later released for streamflow maintenance. Streamflow maintenance is used to assure fall and wintertime flows in the Boise River, when the reservoirs would otherwise be storing water. R. 296. The SRBA court drew a distinction between minimum stream flows, which are natural flow rights in the river that can only be held by the Idaho Water Resource Board, and releases for streamflow maintenance from storage, which could be held by Reclamation. *See Memorandum Decision* in sub-case 63-3618, pp. 21-22.⁹

The second part of the Lucky Peak decision dealt with a request by the Boise Project to have Reclamation's Lucky Peak right recognize, pursuant to the MOA and supplemental storage contracts, that the Arrowrock and Anderson Ranch water rights have the ability to call on water from Lucky Peak storage, when necessary, with a transfer proceeding. *Id.*, pp. 33-35. The SRBA court agreed that a remark recognizing the ability of Reclamation to make up some water from Lucky Peak for releases from Arrowrock and Anderson Ranch reservoirs was appropriate. The Court's remark specifically acknowledges that the storage rights in Lucky Peak are subject to the supplemental contracts for Arrowrock and Anderson Ranch. *Id.*, p. 35. As we have seen earlier, and as the SRBA court recognized, those supplemental contracts specifically provide that no re-regulation or exchange of storage shall deprive any entity of water that accrues to it under the rights for Arrowrock, Anderson Ranch, and Lucky Peak. *Id.*, p. 6.

⁹ The quote repeated out of context about Lucky Peak as a diversion structure comes from this discussion, about the distinction between natural flow and releases from storage.

This remark and the *Memorandum Decision* then protect the existing water rights from adverse impact due to flood control releases. Exactly the opposite of the State’s current argument. Notably, the State did not object to the remark protecting the existing water rights when this issue was brought to the SRBA court in sub-case 63-3618. It is too late to argue otherwise now. Indeed, this remark suggests strongly that everyone, the State included, acknowledges that water refilling the reservoir would be used to ‘fill’ or ‘refill’ the irrigation districts accounts.

The State further argues that the parties agreed that the reservoir could be used for purposes other than irrigation. *See* Brief of Respondent State of Idaho, p. 32 n. 22. This reference is to the element of the storage water right held for streamflow maintenance, which is not an irrigation purpose, not to flood control.

IV. The State Makes Various Untenable and Unsupportable Assertions Buried in Its Arguments that Must be Corrected:

There are a number of assertions made by the State, buried within its arguments, that misrepresent terms of art, facts concerning the realistic operation of the Boise River reservoir system, and the remedies available to the Boise Project as against Reclamation in the context of this Basin Wide Issue, that must be corrected.

A. The Term “Use” When Used in the Context of a Water Rights Action, Is a Term of Art, and the Misuse of the Term May Have Unforeseen Consequences:

In its *Memorandum Opinion* in Basin Wide 17, the SRBA court raises a question as to “what state law authority water that is diverted and stored pursuant to a valid water right is used for flood control by the reservoir operator where no water right exists authorizing the use.” R. 894-895 (emphasis added). In doing so, the SRBA court expressly declines to address the question whether such a “use” of water is authorized, but in doing so, much like assuming a

definition for ‘fill,’ the SRBA court assumes that such water is ‘used.’ The State attempts to minimize the SRBA court’s use of the term by simply claiming that the court was relying upon the Webster’s Dictionary definition of the word. *See* Respondent State of Idaho’s brief p. 34. The SRBA court appears to show concern that water is being ‘used’ without the beneficial use being authorized by a water right. Therefore, the SRBA court’s concern about this ‘use,’ absent an authorized water right from the state for such a use, belies the State’s attempt at minimization of the SRBA court’s use of term.

Water released for flood control serves an authorized and important public function, and is imperative in the Boise River where its reservoirs can only store a fraction of the water that arises in the Boise River in any given year. R. 281-282. Reclamation or the water right holders do not, however, beneficially use it. As the Idaho Department of Water Resources argued in

Kunz:

The land owners, as well as other residents in the area have all benefited from the operation of the system. Were it not for the benefits of the system, downstream landowners would be subject to uncontrolled flooding each spring without having the degree of certainty provided by the system. Under the circumstances, the operation of the water system makes available benefits to all residents in the area, including the plaintiffs.

Department’s Amicus Brief, pp. 14-15, Supreme Court Case No. 18076 (Sept. 12, 1989).¹⁰ The District’s, through their Supplemental Contracts, recognized the importance of this function to protect life and property downstream of the reservoirs. R. 269-278. However, after implementation of the changes set forth in the Supplemental Contracts, the reservoir system was operated so that inflow after flood control releases was credited to the accounts of the irrigation spaceholders. R. 295-296, (1953 Memorandum of Agreement provided for “evacuation and refill sequence among the three reservoirs.) It has continued to be operated for flood control purposes,

¹⁰ *See* fn 4 at p. 8 herein.

but no one, prior to Basin Wide Issue 17, took the position that the water was ‘used’ by the reservoir operator or any other water right holder.

The Boise Project has relied upon the protections afforded through the adoption of the flood control rule curves and the operation under the Water Manual to ensure that water refilling the reservoirs after flood control releases is available to fill its irrigation storage rights. A definition of flood control water that ascribes to it some beneficial use, could undermine these protections.

B. The State’s Characterization of ‘Excess Flows’ is Exactly the Opposite of How that Term Is Used in the Water Manual:

In its brief the State takes the position that the “Boise Project’s arguments could prevent beneficial development of excess flood water.” *See* Respondent State of Idaho’s Brief, p. 37. This follows on its premise that “future development of ‘refill’ water is simply development of excess and potentially dangerous flood water.” *Id.* “Excess water” is not water that normally reenters the storage reservoirs to ‘refill’ the space vacated by flood control passage. It is water that cannot be stored in the system because of continuing run-off that would result in flooding if that water is not released.

“Excess flows” describe releases for flood control, not water that enters the reservoir to refill space vacated for flood control. The “excess flow” is the water that is currently available for appropriation subject to the subordination remarks currently attached to the junior water rights in the Boise River system. R. 327-348. Development of this water, as is suggested by the State, is already provided under the current system. How the State believes additional development could “reduce flood risk” is a mystery. *See* Respondent State of Idaho’s Brief, p. 37. The same amount of flood control storage will exist on the Boise River, presumably subject to the same flood control rule curves, and presumably, still subject to the priority doctrine.

The State turns the terms “excess flows” and “flood control” on their head when it argues that “‘refill’ is ‘flood control’ at the federal facilities: the ‘refill’ is not ‘irrigation storage’ but rather ‘flood control storage.’” *See* Brief of Respondent State of Idaho, p. 35, (emphasis in original). ‘Refill’ is the water that enters the reservoir after space has been vacated, i.e. after the “excess flows” or “flood control” has been released. ‘Refill’ is then stored to replace the water lost to the system due to “excess flows” that had to be released in order to accommodate additional run-off in the system. As the Water Manual makes clear “[i]n large runoff years, maintaining adequate flood control space within the reservoirs and passing excess water through the system without unduly jeopardizing system refill, are the primary objectives.” R. 298, (emphasis added). The State is wholly incorrect when it argues, “[i]n flood years, the reservoirs essentially are re-tasked from ‘irrigation’ facilities to ‘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.” *See* Brief of Respondent State of Idaho, p. 36. Water that is passed through the system to make room for additional run-off is “excess water.” The water that cannot be stored for use later in the irrigation season is passed through the system and is available to downstream appropriators, subordinated to refill of the system. The “excess water” is not irrigation storage that is somehow transformed into flood control storage.

C. The Remedy that Boise Project Seeks in this Matter is Consistent With Administration of its Water Right, Which Can Only Be Provided by the State, Not Reclamation:

The Boise Project’s historic administration of its water rights in conformance with the Water Manual and flood control rule curves is not jeopardized by actions of Reclamation. It is the State’s newly proposed definition of reservoir ‘fill’ that gave rise to Basin Wide Issue 17. The State concedes that the Boise Project’s contractual remedies against Reclamation are

insufficient protection, but, nevertheless, asserts that the Boise Project's remedy for administration of its rights lies with Reclamation, and that Reclamation is responsible for any shortages to the Boise Project water rights due to the director's determination of when its water rights are 'filled.' *See* Brief of Respondent State of Idaho, pp. 40-42. The State, however, is responsible for administration of state based water rights, including the quantity elements of those rights, and the Boise Project's remedy lies with the State.

The State has argued that it has no responsibility for the manner in which Reclamation and the Corps release flood control, that the duty to store the water for maximum beneficial use lies entirely with Reclamation, and therefore, if the Boise Project is injured by shortages in its water rights, the remedy lies against Reclamation. In 1974 Governor Andrus specifically requested that more stringent flood control releases be adopted. R. 311-313. "[T]he Bureau, Corps and State of Idaho jointly agreed to revision of the [1953 Memorandum of Agreement] operating criteria and procedures in the Agreement," because of a joint belief that "the operating criteria and procedures in the [1953] Agreement did not reflect current conditions, needs, and technology[.]" R. 293. The provisions agreed upon jointly by the State include "[p]rotection of space allocated in Arrowrock, Anderson Ranch, and Lake Lowell against water loss as a result of flood control procedures." R. 296. The State agreed that "Anderson Ranch, Arrowrock, and Lucky Peak reservoirs normally add water to storage from the end of the irrigation season (in October) each year until the annual flood control season is over (normally ranging between 15 April to 1 July)." R. 297. The State also agreed that "maintaining adequate flood control space within the reservoirs and passing excess water through the system without unduly jeopardizing system refill, are the primary objectives." R. 298. (Emphasis added). The State also agreed to the

inclusion of the remarks added to junior natural flow water rights in the Boise River reservoir system that subordinate such rights to ‘refill’ after flood control. R. 327-348.

Despite all of these past representations by the State, it is the now the State’s position that water refilling the system after a flood control release is out of priority after the gauge at the head of the reservoir reaches the quantity limit for the right in any given year. It isn’t Reclamation’s operation of the reservoirs in conformance with the Water Manual and rule curves that jeopardizes the Boise Project’s rights, but the State’s abrupt change in position. Therefore, the remedy that the Boise Project seeks in Basin Wide 17 is the appropriate.

However, even if the Boise Project were forced to look to Reclamation if it is injured, the Boise Project would be left without a remedy. What is at issue in Basin Wide 17 is the question whether the Boise Project is entitled to delivery of the quantity of its water rights, in priority, for delivery to its irrigators after flood control releases occur. The State is responsible for administering the quantity of water decreed in a water right in conformance with the prior appropriation doctrine. I.C. § 42-602. The Reclamation Act does not “require[] Federal Defendants to provide any particular volume of irrigation water, or that they operate the [projects] to ‘full capacity.’” *San Luis Unit Food Producers v. U.S.*, 772 F.Supp.2d 1210, 1231 (2011). While the Boise Project irrigators’ contracts may be distinguishable from the *San Luis Unit* case “since the contracts between the United State and the irrigation entities define which organizations receive water and the quantity they may receive,” it is not the contracts with Reclamation that ensure that the irrigators will, in priority, be provided the water decreed to them in their water rights. *U.S. v. Pioneer*, 144 Idaho at 116, 157 P.3d at 610 (2007). It is the State’s obligation to administer the rights in conformance with Idaho law.

V. United Water Idaho, Inc.’s Suggestion That Idaho Either Has or Should Adopt the Colorado Model of the One-Fill Rule Ignores Some Substantial and Fundamental Differences Between the Two State’s Reservoir systems:

First and foremost, United Water’s suggestion that the SRBA court “ruled that the one-fill rule applies in Idaho, and stopped there,” is incorrect. *See* Brief of Respondent United Water Idaho, Inc., p. 25. The SRBA court held that “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.” R. 892. The SRBA court expressly refused to define when a water right is ‘filled,’ stating that defining fill “is an accounting issue which this basin-wide proceeding does not address.” R. 893.

The court nowhere held that the one-fill rule, as applied in Colorado, applies in Idaho. United Water advocates adoption of the Colorado Division of Water Resources *General Administration Guidelines for Reservoirs* position that “storable inflow is the amount of water that is physically and legally available for storage in a reservoir under a particular water right.” *See* Brief of Respondent United Water Idaho, Inc., p. 26. Idaho and Colorado are dramatically distinguishable, given “the Colorado River system’s ability to store approximately 60 maf, or nearly 4 years average natural flow of the river.” R. 731. Contrast that to the Boise River that is only capable of storing little more than half of one year’s natural flow in an average year. R. 280-282. In an average year, the flow of the Boise River through the reservoirs, depending on run-off timing, could exceed the entire capacity of the reservoir during or prior to the irrigation season even beginning. This distinguishing characteristic from the Colorado’s one-fill rule system, is what puts the Boise Project irrigation storage rights in jeopardy.

The authority provided by United Water points out another important distinguishing characteristic of the Colorado River system; the vast majority of its reservoirs are off-stream.

United Water supplies a substantial amount of case law from Colorado for the propositions that other jurisdictions recognize a one-fill rule for reservoir storage, and that in those jurisdictions all water that enters the reservoir is considered storable inflow. *See* Brief of Respondent United Water Idaho, Inc., pp. 21-35. None of the cases provided present a similar factual scenario to the Boise River reservoir system, and none support such an interpretation for the Boise River.

United Water refers to *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 44 Colo. 214, 222-223, 98 P. 729, 733 (1908) as “the seminal ‘one-fill’ case[.]” *See* Brief of Respondent United Water Idaho, Inc., pp. 22. Like the SRBA court, the Colorado court declined to define for purposes of that case what constitutes ‘fill.’ It simply held that when a reservoir has been filled once in a season, it could not be filled again. *Wheatland Irr. Dist. v. Pioneer Canal Co.*, 464 P.2d 533 (Wyo.1970), also relied upon by United Water in support of its argument concerning the one-fill rule, deals again with a reservoir that it is not on-stream, but rather is directed from the river to the reservoir via a canal. *Id.* at 535. The question of whether water that must be passed through the reservoir for flood control purposes should count against the right was never raised. For reservoirs that take water from the reservoir and divert it via a canal or ditch to the reservoir, the right is not in jeopardy of being filled and out of priority due to flood control operations.

All but two of the cases cited by United Water as supportive of the one-fill rule involve diversions of water to off-stream reservoirs, not on-stream reservoirs. *See Orchard City Irr. Dist. v. Whitten*, 362 P.2d 139, 128-129(Colo. 1961)(reservoir supplied by water diverted through Alfalfa Ditch); *City of Westminster v. Church*, 445 P.2d 52, 54(Colo.1968)(water diverted and supplied through Last Chance, McKenzie, Eggleston and Autry ditches); *Southeastern Colo. Water Conservancy Dist. v. Simpson*, 720 P.2d 133, 136 (Colo.1986)(water diverted and supplied

through Lyon Canal); *North Sterling Irr. Dist. v. Simpson*, 202 P.3d 1207, 1209 (Colo. 2009)(water is diverted from the river to the reservoir).

United Water provides only two cases with fact patterns that involve on-stream reservoirs. Both cases support the position held by the Boise Project; that all water entering the reservoir cannot be counted toward against the storage of the right. In *Bd. of County Comm. of County of Arapahoe v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840, 847 (Colo.1992), the water right decree included rights for initial fill, and refill, as well as incorporating actual accounting procedures in order to determine whether those amounts were being properly calculated. All water entering the reservoir in that case was not counted toward the initial fill of the right.

United Water argues that *City of Thornton v. Bijou*, 961 P.2d 1, 28 n. 13 (Colo.1996), explains “that the one-fill rule is a presumption that may be overcome where the claim for the conditional water right [comparable to a water right claim in Idaho] clearly contemplates refill.” See Brief of Respondent United Water Idaho Inc., p. 25. The court in *City of Thornton* affirmed the district court’s holding that the right to refill of the on-stream reservoirs was granted in the action because such refill was inherently contemplated under the water rights application process. The objector’s had argued that they should not have had to object to the possibility that refill would be included in the claims when not explicitly referenced in the claim, because of reliance on “the traditional Colorado common law principle that storage rights in reservoirs are limited to one fill annually.” *Id.* There the Court stated:

This is not a situation where a specific storage reservoir was identified and a specific capacity described with no indication of intent to refill. Rather, any interested party here was made aware of the necessity of inquiring into the extent of the claimed storage and whether the storage capacity was to be provided by single annual fills of a large number of reservoirs or multiple fills of a lesser number.

City of Thornton v. Bijou Irr. Co., 926 P.2d 1, 28 n. 13 (Colo. 1996). The Colorado court did not state that the presumption of one-fill could be overcome by the clear contemplation of refill in the permit, it asserts that for any on-stream reservoir there is a possibility that the volume of the reservoir may rely upon multiple fills.

The model established in Colorado applying the one-fill rule contemplates off-stream reservoir storage, in a system that has the capacity to store eight times the amount of water that the Boise River can store in any given season. United Water's attempt to overlay the same model on the Boise River reservoir system does not fit.


CONCLUSION

The SRBA court failed to apply the proper standard when it determined that no remark was necessary for the proper administration of the Boise Project's senior storage water rights in the Boise River reservoir system. Without considering the last sixty years of administration of the Boise River reservoir system, the SRBA court's determination jeopardizes the Boise Project's ability to continue to deliver its senior priority storage rights to the irrigators in the Boise River basin who are the beneficial users and appropriators of those rights. The Boise Project irrigators, and not Reclamation have for decades relied upon "refill" water entering the reservoirs after flood control releases to "fill" its rights in priority. The Water Manual and testimony of the Boise River operators confirm this practice. In its opinion the SRBA court did not conclude that Idaho has adopted a 'one-fill' rule similar to that adopted in Colorado, but rather failed to define what constitutes "fill" in the first place, in derogation of the fact that the determination of whether a remark is necessary for administration of a water right is inherently a mixed question of law and fact. For these reasons, the Boise Project respectfully requests that the

Court remand this matter to the SRBA court for the development of the record necessary to make such a determination.

Dated this 13th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2013, I served two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** on the person(s) listed below, by U.S. Mail:

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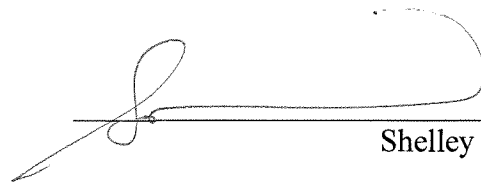
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