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In re SRBA Case No. 39576 Appellant's Brief Dckt. 44636

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re SRBA Case No. 39576 SUBCASE NOS. 65-23531 and 65-23532	**Supreme Court Docket No. 44636-2016**
BLACK CANYON IRRIGATION DISTRICT, Appellant, vs. STATE OF IDAHO and SUEZ WATER IDAHO, INC., Respondents.	SRBA CASE NO. 39576 Subcase Nos. 65-23531 & 65-23532

APPELLANT'S OPENING BRIEF

APPEAL FROM THE SNAKE RIVER BASIN ADJUDICATION DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT, TWIN FALLS COUNTY, IDAHO

Honorable Eric J. Wildman, District Judge, Presiding

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COMES NOW, Appellant Black Canyon Irrigation District ("BCID" or "District"), by and through its undersigned counsel of record, and hereby submits its *Appellant's Opening Brief.*

I.
STATEMENT OF THE CASE

A. Nature of the Case

This case marks the progression of Snake River Basin Adjudication Court ("SRBA") Basin-Wide Issue No. 17 ("BWI-17"), and this Court's decision on appeal in the same. *A&B Irr. Dist. v. State (In Re SRBA)*, 157 Idaho 385, 336 P.3d 792 (2014). It seeks answer to the question of what effect, if any, flood control releases from on-stream reservoirs operated for the dual purposes of flood control and beneficial use (*i.e.*, irrigation) storage have on the existing storage rights for Deadwood and Cascade Reservoirs (the "Reservoirs") in the Payette River Basin (Administrative Basin 65).

This Court previously characterized the "flood control" effect question as one of "first impression," and one that it would not address absent a more developed record. *A&B Irr. Dist.*, 1570 Idaho at 392, 336 P.3d at 799. That record was developed in the context of SRBA late claims proceedings, though the question remains unanswered to this point for the reasons discussed herein.

This matter does not involve an advisory opinion—there is no future-looking hypothetical. Instead, the answer will determine whether water users, such as the patrons of BCID, possess a protectable priority-based property right in storage water that the United States Bureau of Reclamation ("BOR" or "United States") has stored and released for end irrigation use for decades. Answering the question will also dictate how (or whether) BCID can obtain the

protectable property right it thought it had for decades, adjudicated twice over through the Payette River Adjudication and the subsequent Snake River Basin Adjudication.[1]

The State of Idaho (and IDWR's) "store it or lose it" paradigm is absurd and lacks common sense—that flood control releases benefitting the public at large is the irrigators' water flowing downstream during a time of year when they cannot use it, or when they have no need for it. The diversion and use of water prior to 1971 gives rise to and perfects a protectable, priority-based property interest. The water BCID and others depend on is not stored and used on a whim, nor is it stored and used under some amorphous policy directive of the State or IDWR.

Instead, the post-flood control release water that BOR has stored, and BCID has used for decades, is stored and used under authority of the existing storage rights for Deadwood and Cascade Reservoirs. Under federal "spill and fill" flood control operations, the water ultimately stored for end beneficial use is that stored and physically present in the Reservoirs at the point of maximum physical fill—that stored in reservoir space that becomes legally and physically available for beneficial use storage after regulation and bypass of peak flood flows as the flood risk wanes.

B. Course of Proceedings

The case comes to the Court via late claims proceedings in the SRBA culminating in the SRBA's *Memorandum Decision and Order on Challenges; Final Order Disallowing Water Right Claims* ("Challenge MDO") (October 7, 2016). R. 002509.[2] The United States initiated the late claims proceedings by filing *Standard Form 4 Motions to File Late Notices of Claim*

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[1] The same flood control effect question is also pending before this Court with respect to the Boise River Basin (Basin 63), in Docket Nos. 44677, 44745, and 44746.

[2] The Record on Appeal appears to contain duplicate Bates or page identification numbers. For example, this citation appears as: "002509002509." From here on BCID will cite only the substantive number, omitting duplicate digits and zeros (*i.e.*, R. 2509).

("SF4 Motions") with the SRBA on January 31, 2013, during the pendency of the BWI-17 proceedings. R. 32; 2585.[3]

The United States filed the late claims hedging against legal positions taken by the State of Idaho and others during the context of the BWI-17 proceedings, namely that flood control releases negatively impacted its (BOR's) storage water rights. R. 18-21. Assuming a worst case scenario (*i.e.*, that the State and others' legal theories ultimately proved correct on appeal during the BWI-17 proceedings), the United States filed the late claims to preserve the ability to complete one physical fill of its reservoirs in flood control years:

> The Notices of Claim are for supplemental beneficial use storage water rights—separate water rights with a junior priority—which, in conjunction with existing storage water rights, would allow Reclamation to complete one physical fill of its reservoirs in years when it must release stored water for flood control . . . The need for "refill" of a reservoir arises when water previously diverted into storage is vacated from the reservoir for flood control purposes rather than being delivered for beneficial use. In essence, "refill" water serves to replace that vacated.
>
> . . .
>
> In BWI 17, the United States joined with the Petitioners to assert a right to priority refill. The State, [Suez] and the Upper Valley Water Users have all argued that the Petitioners are seeking an improper enlargement of reservoir storage rights . . . Under their theory, all water entering a reservoir is considered diverted, including that released for flood control, with the result that releasing water for flood control can leave a reservoir full "on paper" but not physically full. Those parties argue that because the storage water right has been "filled," the storage of additional water under priority enlarges the quantity element of the water right . . . Consistent with those arguments, the proposed late claims seek a separate, supplemental water right with a junior priority which would allow Reclamation to complete one physical fill of its reservoirs in years when stored water is vacated for flood control.

R. 18-20 (citations omitted). The United States further made clear that if the Petitioners' shared priority refill contentions proved correct (*i.e.*, that the BOR's existing storage rights already

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[3] The United States sought leave of the SRBA to file late claims in multiple basins: Basin Nos. 01 (Upper Snake River), 37 (Big Wood River), 63 (Boise River), and 65 (Payette River).

authorized one physical fill of the reservoirs during flood control years), it would withdraw its proposed late claims as unnecessary and duplicative of the existing storage rights. R. 22, n. 7

The SRBA granted the United States' SF4 Motions noting that they complied with all applicable procedural requirements, and further noting that no one objected to the same. R. 41. The late notices of claim were forwarded to IDWR for further investigation and recommendation in the form of a *Director's Report*. R. 44; 2594. IDWR recommended the claims be disallowed for failure to claim them in a prior general stream adjudication (the Payette Adjudication). *Id.*

The United States timely objected to the *Director's Report* recommendations for the reasons explained in its SF4 Motions. R. 52; 2602. The State of Idaho filed a check-the-box Standard Form 2 Response to the pending objections. R. 56; 2606. The United States' objection triggered referral of the water right subcases to SRBA Special Master Theodore R. Booth, who was directed to "***conduct all proceedings necessary***" to issue a water right recommendation to SRBA Presiding Judge Eric Wildman. R. 129; 2611 (emphasis added).

After the BWI-17 proceedings failed to resolve the flood control effect question, and after the United States' late claims impugned the integrity of the existing storage water rights in Deadwood and Cascade Reservoirs (among others in other basins), BCID intervened in the Basin 65 late claims proceedings. R. 137; 147; 155; and 158. BCID shared the United States' position that the late claims should be disallowed because the existing storage rights for the Reservoirs already authorized one physical fill (or priority refill) of the Reservoirs during flood control years. R. 160-162. In the alternative, BCID also defended the late claims if they proved necessary to preserve one physical fill of the Reservoirs during flood control years. *Id.*

On August 25, 2015, the State of Idaho filed a motion for summary judgment seeking disallowance of the pending late claims on a variety of grounds. R. 1571. BCID and the United

States each opposed the State's motion. R. 1871 and 1903, respectively. BCID further advanced its own claim for summary judgment as the non-moving party in the context of the State's motion. *See, e.g.*, R. 1900; 430-431; 2358-2360; and 2209-2210. Like the State, BCID also sought disallowance of the pending late claims. Unlike the State, BCID sought disallowance of the late claims on the grounds that the water sought to be appropriated by them was already appropriated and used under the existing storage rights for the Reservoirs. *See, e.g.*, R. 2258-66.

On November 19, 2015, Special Master Booth issued a decision granting in part and dismissing in part the State's motion for summary judgment. R. 1984. The decision granted the State's motion for summary judgment insofar as the late claims should be disallowed because they were precluded by operation of the prior Payette Adjudication. The decision dismissed the remainder of the State's summary judgment claims as moot, and also dismissed BCID's opposing claim for summary judgment on the same *res judicata* grounds. R. 1992-99.

BCID, the United States, and the State each filed motions seeking to alter or amend Special Master Booth's November 2015 decision. *See* R. 2033; 2070; and 2057, respectively. BCID contended that the late claims, if necessary, were not barred by operation of the prior (1986) Payette Adjudication, and that through the provision of additional evidence the late claims should be disallowed because they sought the appropriation of water already appropriated by the existing storage rights for the (*i.e.*, the late claims were not necessary to refill the reservoirs post-flood control releases because one physical fill was already authorized by the existing storage rights). R. 2033; 2139.

On April 22, 2016, Special Master Booth granted in part and denied in part BCID's motion to alter or amend. R. 2206. Special Master Booth ultimately concluded that the pending late claims continued to be barred by operation of the prior Payette Adjudication and its resulting

prior decree. R. 2211-15. However, Special Master Booth further held, consistent with BCID's arguments, that the late claims should be disallowed on the additional basis that the water claimed by them was not subject to appropriation because it "had already been appropriated through the existing storage rights" for the Reservoirs (*i.e.*, the late claims were not necessary because the existing storage rights already authorized one physical fill of the reservoirs despite flood control releases in flood control years). R. 2215-2216; 2221.

Special Master Booth's dual bases for claim disallowance: (1) preclusive effect of the Payette Adjudication; and (2) the water claimed was already appropriated by the existing storage rights were subsequently "appealed" by the parties to SRBA Presiding Judge Wildman through the SRBA's Notice of Challenge procedures (Administrative Order 1, § 13). BCID and the United States continued to take issue with the Special Master's "preclusive effect" holding, and the State disagreed with the Special Master's additional/alternative "already appropriated" holding. R. 2234; 2231; and 2242, respectively.

After briefing and oral argument, the Presiding Judge issued his Challenge MDO (R. 2509) and companion *Final Order Disallowing Water Right Claims* (*id.*) on October 7, 2016. He adopted Special Master Booth's "preclusive effect" holding, but rejected his "already appropriated" holding on the grounds that the Special Master exceeded his authority (and, therefore, the jurisdiction of the SRBA) by "revisiting" and interpreting the existing storage rights against the backdrop of BCID's arguments. R. 2511-20.[4]

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[4] The Presiding Judge did not expressly refute the substance of Special Master Booth's "already appropriated" holding; rather, he did not address them out of jurisdictional concerns. R. 2518-20. However, his repeated cross-referencing and incorporation of his decision in the Basin 63 proceedings seemingly foreshadow any substantive rulings he would make in these Basin 65 proceedings. *Id.*

BCID and the United States timely appealed the SRBA decision through separate notices of appeal filed on November 17, 2016. R. 2564 and 2556, respectively.

C. Statement of Facts

Deadwood and Cascade Reservoirs are owned and operated by the BOR. R. 1807. Deadwood Reservoir is located on the Deadwood River in the South Fork of the Payette drainage and is the older and much smaller of the Reservoirs. R. 503. Cascade Reservoir is located on the Middle Fork of the Payette River and regulates flows in the much larger Middle and North Fork Payette drainages. R. 1808 (¶ 3); 1814.

Though owned and operated by BOR, the Reservoirs retain and store water predominantly for supplemental irrigation water supply for a variety of water user entities, including BCID. R. 1802; 1807; 1832; 1838. Because of the relatively junior priorities of BCID's natural flow water rights, BCID is particularly dependent on stored water supplies; so much so that BCID entered into a "special contractual arrangement" with BOR to secure for itself the first 125,000 acre-feet (or 125 kAF) of storage water stored in Cascade Reservoir. R. 559 (20:1-22; 46:12-18). For this important contractual preference, BCID pays the United States double the capital construction reimbursement rate and double the ongoing O&M charges of other reservoir space holders. *Id.*

Similar to the BOR reservoirs in the Boise River Basin, the Payette Basin Reservoirs serve the dual purposes of flood control and beneficial use storage. R. 1808-09 (¶¶ 4-6); 1985-88; 1989-92. While the Boise River Basin reservoirs serve flood control under the federal Flood Control Act of 1944, the Payette Basin Reservoirs do so under federal Reclamation Law provisions (Sections 9(a) and 9(b) of the Reclamation Project Act of 1939). R. 1808-11 (¶¶ 4-11). The difference between the federal flood control authorizations is one of cost reimbursement. R. 1808 (¶ 4). Operationally, both sets of reservoirs in both basins perform their

dual flood control and beneficial use storage purposes pursuant to forecast-based flood control rule curves. R. 1808-11 (¶¶ 4-11); 1985-88; 1989-92.

The flood control "rule curves" determine how much flood control space must be left open or made available in the reservoirs to accommodate, regulate, and mitigate snowpack runoff in order to meet downstream flow targets at various locations on the Boise and Payette Rivers. *Id.* The primary flood control flow target on the Payette River is 12,000 cubic feet per second ("cfs") at Horseshoe Bend, Idaho which, in turn, provides relief for communities farther downstream. *Id.*

Reservoir space required to be vacant under the rule curves is not physically or legally available to store water for end beneficial use. *Id.* Consequently, Reservoir inflows that must be bypassed through the Reservoirs and previously stored water that must be released from the Reservoirs (if such releases are necessary to maintain curve parameters) is not legally or physically available for end irrigation use. *Id.*

During flood control years some portion (or potentially all in particularly high runoff years like is currently being experienced in the Boise River Basin) of the water ultimately stored and retained for end beneficial use (*i.e.*, irrigation) is "second-in" water—that which is stored and retained after the flood risk wanes and flood control space is less/no longer necessary. *Id.*, *see also*, R. 1802; 1832; 1838. Thus, during flood control years, some portion of the storage water used for end irrigation use is the second-in water that is physically present in the Reservoirs at the point of maximum physical fill (the point at which downstream senior water right demand meets and exceeds Reservoir inflows, requiring the inflows to be bypassed through the Reservoirs for delivery downstream). *Id.*

In shorthand, many refer to the flood control operational regime as "spill and fill"—regulate and "spill" peak flood flows at a controlled rate to prevent downstream flooding to the extent possible, and then "fill" the vacant reservoir space with the remaining flood flows as they wane and it is safe to do so. The converse operational regime is "fill and spill"—fill the Reservoirs to their maximum capacity as soon as possible and allow flood flows to ride over the top and spill in a virtually uncontrolled and unregulated fashion come what may downstream.

The Reservoirs have been operated in this dual purpose, rule curve-based flood control fashion (*i.e.*, "spill and fill") since at least 1957. R. 1809 (¶ 7). The Payette Basin rule curves were updated in 1974; further refined under the National Environmental Policy Act (through a federal Environmental Assessment and public comment) in 1995; and further operationally (and Congressionally) engrafted into the pivotal anadromous fish flow augmentation provisions of the landmark Nez Perce Water Rights Settlement Act of 2004 (the Snake River Water Rights Act of 2004, Pub. L. No. 108-447, 118 Stat. 3431-41 (Dec. 8, 2004)). R. 1809-11 (¶ 6-11).

In addition to the Reservoirs' federal law-based flood control underpinnings, the State of Idaho benefits from, recognizes, and relies upon, spill and fill operations. For example, the State's legislatively ratified Comprehensive State Water Plan for the Payette River Basin ("Plan," adopted February 5, 1999) acknowledged and codified the Reservoirs' spill and fill operations. IDAHO CODE §§ 42-1734A, 42-1734B, and 42-1734C. The Plan identified recurrent flooding concerns given the relatively flat topography of the valley floor (where only 2 to 5 feet of overbank depth would cause damage). R. 1750-76. The Plan discussed the basin's ongoing need for, and benefits from, Reservoir flood control operations (including the 12,000 cfs flow target at Horseshoe Bend, Idaho). *Id.* The Plan acknowledged that the Reservoirs "provide the only major flood control for the Payette watershed," and fretted the fact that the Reservoirs can

only regulate flows from approximately 35% of the basin. *Id.* Finally, the Plan acknowledged and endorsed the balancing act of dual purpose Reservoir operations, noting the "refilling" of the Reservoirs as the flood risk wanes. *Id.*

Likewise, IDWR acknowledges the water users' dependence on the "historic practice" of back-filling flood control space to yield the supplemental irrigation water supplies that are crucial to Idaho's agriculturally-dominated economy. R. 2006-07; 2012. IDWR calls the Reservoirs' spill and fill operations the "status quo" in the basin, a process by which waning flood flows are used to refill "irrigation storage space that has been vacated for flood control or other purposes." R. 2012.

To the extent there was ever an administrative shift in the basin (one away from physical contents-based operations at the point of maximum physical fill to one "paper" fill-based, where water accrued to the reservoir rights regardless of whether the water was physically stored), that shift occurred no earlier than 1992/93. R. 559 (Gregg Depo. at 54:11-56:3; 59:4-23; 79:7-10; and 83:6-12: explaining that the Payette Basin was largely unregulated and operated on a physical contents/maximum physical fill basis until the early 1990s because no administrative water district above Black Canyon Dam near Emmett, Idaho existed, and because river gauges needed to support IDWR's "paper fill"-based accounting construct had yet to be installed); R. 590 (Gregg Depo. Exs. 5 and 6, p. 3: memos from IDWR personnel Sutter (1993) and Tuthill (1994), respectively, announcing the importation of "paper fill"-based accounting, and describing the same as one of "many changes" and a "new procedure"); R. 1537 and 1551 (State of Idaho concessions of the importation of computerized / "paper fill"-based water right accounting in 1992/93); R. 1802 (Lammey Aff., ¶¶ 2, 4-7: confirming pre-1971 "spill and fill" and physical contents-based reservoir operations, storage, delivery, and end irrigation use);

R. 1807 (Gregg Aff., ¶ 5: confirming the advent of "spill and fill" flood control operations in the Payette Basin beginning in 1957); R. 2046 (past BCID briefing and citations discussing these matters); and R. 2212-14 (Special Master Booth decision confirming these matters).

This matter comes before this Court not because the parties dispute the foregoing facts. The operational hydrograph is undeniable (*i.e.*, during flood control years some portion of storage water ultimately retained, stored, and delivered for end beneficial use is water captured and retained after peak flood flows are bypassed and regulated to prevent downstream property damage).[5] Rather, the dispute arises over the nature of the legal entitlement to capture and use those waning flood flows. The United States and BCID contend the existing storage rights for the Reservoirs provide the requisite (and priority-protectable) legal entitlement. The State and IDWR contend otherwise.

II.
ISSUES PRESENTED ON APPEAL

A. Whether the Presiding Judge Erred by Holding that the Special Master Exceeded His Authority (and, By Extension, That of the SRBA Court) by Interpreting and Applying the Existing Storage Water Right Decrees During the Late Claim Proceedings;

B. Whether the Special Master Properly Held That the Late Claims Should be Disallowed on the Grounds That the Water Sought to be Appropriated Was (and is) Already Appropriated by the Existing Storage Water Rights for Deadwood and Cascade Reservoirs;

C. Whether the Late Claims, if Necessary to Authorize One Physical Fill of the Reservoir System in Flood Control Years, Are Precluded by the Prior Payette Adjudication; and

D. Whether the Presiding Judge's Holdings Result in an Impermissible Taking of BCID Property Rights (*i.e.*, Water Rights).

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[5] This spill and fill operational regime is further confirmed and discussed in Section IV.C below, where this regime formed the backdrop against which the Reservoirs' water rights were previously claimed, adjudicated, and administered on a physical contents basis through the early 1990s.

III.
ATTORNEY FEES ON APPEAL

Because of the importance of this matter and its "first impression" nature, BCID does not seek costs or attorney fees on appeal.

IV.
ARGUMENT

A. Standard of Review

Though this matter comes to this Court from SRBA AO1, Section 13 *Challenge* proceedings, it is rooted in the State and BCID's competing requests for summary judgment (the State as the moving party, and BCID as the non-moving party). When reviewing an order for summary judgment, this Court applies the same standard of review used by the trial court in ruling on the motion. *See, e.g., Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 746, 215 P.3d 457, 466 (2009) (citation omitted).

Summary judgment is proper 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 a judgment as a matter of law. *Id.* If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review. *Id.* The burden is on the moving party to prove there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. *Id.*

In a bench trial context such as this one, the court as the ultimate trier of fact is free to arrive at the most probable inferences based on the undisputed evidence before it and to grant summary judgment despite the possibility that conflicting inferences could be drawn from the same evidence. *Intermountain Eye and Laser Centers v. Mark Miller, M.D.*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005) (*citing and applying Shawver. v. Huckleberry Estates, LLC*, 140 Idaho

354, 93 P.3d 685 (2004); *see also*, *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011).

A court may grant summary judgment to a non-moving party even if the party has not filed its own motion with the court. A motion for summary judgment allows the court to rule on the issues placed before it as a matter of law; the moving party runs the risk that the court will find against it. *Harwood v. Talbert,* 136 Idaho 672, 677, 39 P.3d 612, 617 (2001); *see also*, *Farmers Nat'l Bank v. Green River Dairy, LLC*, 155 Idaho 853, 855, 318 P.3d 622 (2014) (citation omitted).

B. Summary of Argument

What effect, if any, do flood control releases have on BOR's existing storage water rights for the Reservoirs in the Payette River Basin? This is a question of property rights determination—a judicial function of interpretation of the partial decrees for the existing storage water rights; it is not an administrative water right accounting question.

BCID raised the flood control effect question in the late claims proceeding not only because the SRBA is the proper forum for addressing the same, but because BCID was compelled to do so. The late claims impugned the integrity of the existing storage water rights upon which BCID depends for supplemental irrigation water supply, and set in motion a statutory and judicial process requiring response, or risk preclusion in future judicial and administrative proceedings under a host of theories, including waiver, judicial admission, estoppel, and *res judicata.*

BCID submits that there is no deficiency in the existing storage water rights for the late claims to address; that the existing storage water rights authorize and secure one physical fill of the Reservoirs in flood control years. This is because reservoir space that is legally and physically available for beneficial use storage is that filled after regulation and bypass of peak

flood flows as the flood risk wanes. This is also because end beneficial use is determinative of a water right's legal existence and perfection. Neither diversion "to storage" nor "flood control" are beneficial uses of water, though flood control releases are an inherent and necessary component of prudent reservoir management. Unless water is stored and released (or available for release) for the decreed beneficial end use up to the corresponding quantity limit the very purpose of a storage water right under Idaho law is frustrated—the right to retain and hold water until it can be used for its authorized purpose(s).

If flood control releases made pursuant to federal "spill and fill" flood control operations have no effect on (*i.e.*, do not detract from) the existing storage water rights as a matter of law, then this matter is decided and the Court need not delve into questions regarding the propriety of the underlying late claims and the potential application of *res judicata*. Conversely, if flood control releases constitute the waste or use of the existing storage rights under Idaho law, thereby illuminating some deficiency in the rights, the late claims are necessary to preserve the historic storage and use of post flood release water—the "historic practice" and "status quo" acknowledged by IDWR.

The diversion and use of post-flood release water pre-1971 perfected a property right in the same (a constitutional method water right). And, that right cannot be taken or otherwise impaired by *post hoc* administrative whim or erroneous application of the *res judicata* doctrine. General stream adjudication finality and judicial economy are laudable goals, but they do not override the ends of justice.

C. The Payette Adjudication and Post-Adjudication Operations

The Payette Basin underwent its own basin-wide general stream adjudication prior to the 1987 commencement of the larger SRBA. This is forgotten by some because the Payette

Adjudication was later subsumed by the larger SRBA, and claims filed in the prior Payette Adjudication were later re-filed in the SRBA.

The Payette Adjudication began in November 1969 as Gem County Case No. 3667. As in the later (and much larger) SRBA, the United States (via BOR) was joined and filed several water right claims in the Payette Adjudication. Regarding Cascade and Deadwood Reservoirs, BOR claimed an aggregate 863.0 kAF of "irrigation storage" and "irrigation from storage" water to provide a "full or supplemental irrigation supply" for roughly 215,000 acres of land in the lower Payette Valley. R. 504-14. Seven hundred thousand acre-feet (700 kAF) of water was claimed for the irrigation of 150,000 acres under Cascade Reservoir, and an additional 163 kAF of water was claimed for the irrigation of 65,540 acres under Deadwood Reservoir. *Id.* Not coincidentally, the aggregate 863.0 kAf of water claimed by BOR matches the combined active capacity of the Reservoirs—BOR did not intend to have physical storage capacity go unused.

IDWR recommended BOR's irrigation-based claims as claimed (65-2927 for Cascade Reservoir, priority date of 1937; and 65-9483 for Deadwood Reservoir, priority date of 1926). R. 516; 528-29; 532; 533-34. IDWR did so after its own independent "examination of the ditches, diversions, lands irrigated and other uses of water within the Payette River Drainage Basin." R. 518. IDWR expressly recommended BOR's water rights as claimed consistent with Payette Decree Conclusion of Law Nos. 3 and 14. R. 525-26 (COL No. 3 providing that the "adjudication of water rights should recognize the past history of water use in the area" and COL No. 14 providing that IDWR's water right recommendations memorialize "water [that] has been diverted and applied to a beneficial use as described."). Thus, the 1986 Payette Decree decreed to BOR the aggregate 863.0 kAF it claimed for the irrigation of the approximately 215,000 acres

it claimed. This same aggregate quantity of water and acres irrigated was later claimed and decreed in the SRBA.[6]

As noted in Section I.C above, the Reservoirs were operated on a flood control "spill and fill" basis since at least 1957. Consequently, BOR's 1977 Payette Adjudication claims were filed against the backdrop of that operational regime. Likewise, IDWR's independent investigation and recommendation of BOR's claims, and the court's subsequent 1986 decree of the claims as claimed, occurred against that same "spill and fill" backdrop. *See, e.g.*, R. 524 (In the Payette Decree, IDWR specifically acknowledged in FOF No. 19 that the water rights recommended had been diverted and applied to beneficial use as recommended, ***and*** that "in addition, the water users in the Payette River Drainage Basin have historically diverted the so called 'high water' or 'flood water' generally during the months of May and June."). Administratively, actual water storage and use in the Payette Basin occurred on a physical contents basis, with post-flood control water being stored and used under the existing storage rights for the system.

So far as the water users (including BCID), BOR, and IDWR were concerned, the "history of water use" in the Payette Basin before, during, and several years after the pendency of the Payette Adjudication was physical contents-based irrespective of flood control releases during flood control years. There was no inkling that flood control release water was that belonging to the water users, flowing past their headgates during a time of the year that they

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[6] The aggregate quantity of water decreed by the SRBA remained the same for Cascade and Deadwood Reservoirs (863.0 kAF), but the quantity was slightly modified to reflect municipal water uses supplied by BOR after the Payette Adjudication. Thus, BOR exited the SRBA with 860.5 kAF of "irrigation storage" and "irrigation from storage" water, and 2.5 kAF of "municipal storage" and "municipal from storage" water. R. 543-57.

could not use it or had no need therefor (typically February thru June). R. 1802; 1807; 1832; 1838; 559 (54:11-56:3; 59:4-23; 79:7-10; and 83:7-13); 1537; 1551; 2212-14.

D. Jurisdiction of the SRBA Was Proper and the Special Master Acted Within His Authority

The Presiding Judge rejected Special Master Booth's "already appropriated" theory on the grounds that it was improper for him to "revisit" and interpret the existing storage water right partial decrees in the context of the late claims proceeding; that doing so "exceeded his jurisdiction" (and that of the SRBA). R. 2518-20. He opined that the Director of IDWR is exclusively reserved the first opportunity to address BCID's question of partial decree interpretation as an administrative matter. *Id.* Finally, the Presiding Judge held BCID's interpretation of the existing storage right partial decrees to be a collateral attack upon the same. *Id.* BCID disagrees with the SRBA's reasoning.

1. Procedural Posture of BCID's Presentation of its "Already Appropriated" Contention

Though filed out of an abundance of caution given the late hour of the SRBA and as a hedge against the State's arguments in BWI-17, the pending late claims impugned the integrity of the existing storage rights. The late claims presumed a legal deficiency in the existing storage rights that BCID adamantly disagrees exists.

Once the United States' SF4 Motions were granted, IDWR (the Director) was statutorily obligated to investigate and recommend the claims via a *Director's Report*. IDAHO CODE § 42-1411. He did so, recommending disallowance of the late claims finding that none of the claimed water right elements existed due to operation of the prior Payette Adjudication. R. 44; 2594. The statute then obligated BOR and BCID to come forward with evidence rebutting the evidentiary presumptions of the *Director's Report*. IDAHO CODE § 42-1411(4)-(5).

BCID agrees with disallowance of the late claims, but for very different reasons than IDWR and the State. Idaho Code Section 42-1411 does not preclude advancement of legal argument as a means of rebutting the findings of the *Director's Report*. Every element of the claimed water rights was at issue and ripe for contention. BCID argued (as was its right and statutory obligation) that the elements of the claimed water rights could not have come into existence because as a legal proposition, the water claimed (that physically present in the Reservoirs at the point of maximum physical fill post-flood control releases) had already been appropriated by the existing storage rights.[7]

The Presiding Judge criticized the Special Master for addressing BCID's arguments because as a matter of timing BCID was required to first address them to the Director. R. 2518. Neither BOR, nor BICD had that luxury. Either BCID advanced its arguments and evidence rebutting the *Director's Report*, or it risked being barred from making those arguments in future proceedings through theories of waiver, estoppel, claim preclusion, or issue preclusion. There was no forum choice available given the mandatory obligations of Idaho Code Section 42-1411 and its related statutes.

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[7] The Director's role in the SRBA is limited to that of technical expert and factual development. IDAHO CODE § 42-1401B. He is a professional engineer by training, familiar with irrigation practices in Idaho. IDAHO CODE § 42-1701(2). In the context of a general stream adjudication, the Director is the primary investigator/fact gatherer whose factual findings enjoy presumptive weight, but whose findings are rebuttable and ultimately accepted or rejected by the SRBA. IDAHO CODE §§ 42-1410 (investigatory "examination" function); 42-1411(4) and (5) (affording *Director's Reports prima facie* weight, but noting the rebuttable presumption status); and 42-1412 (ultimate fact finding and legal determinations are left to the SRBA). The Director plays no role in determining the scope of the late claims proceedings, rather he performs his investigatory and reporting functions as required and governed by statute, and the judiciary performs all necessary remaining functions to determine and decree the property rights (water rights) at issue. In this case in particular, the *Director's Reports* for the pending late claims are entitled to no presumptive weight or deference—they are *prima facie* factual findings of nothing because they rest on a pure legal conclusion: whether the prior Payette Adjudication serves as a preclusive bar.

The parties' "now or never" expectations and obligations were also informed by the Presiding Judge's *Order Granting Motions to File Late Notice of Claims* (R. 41) and his *Orders of Reference* (R. 129, 2611), referring the late claims for further proceedings to Special Master Booth. Neither order contained restrictions limiting the course of the proceedings. To the contrary, the Presiding Judge expressly instructed the Special Master to "***conduct all proceedings necessary to issue a recommendation consistent with SRBA Administrative Order 1, Rules of Procedure***." *Id.* (emphasis added).

2. BCID's Argument is Not a Purely Administrative Matter

The SRBA's "Director first" holding conflicts not only with the procedural posture of the late claims proceedings (where Director first was not an available option at the time), but also with this Court's holdings in BWI-17. This Court characterized the issue of "fill" as a mixed question of law and fact. *A&B Irr. Dist. v. State*, 157 Idaho 385, 392, 336 P.3d 792, 799 (2014). This Court further contrasted the administrative water right accounting/distribution function with the judicial function of property rights determination. *Id.*, 157 Idaho at 393, 336 P. 3d at 800 ("Thus, the main issue here is whether the Director is determining water rights, and therefore property rights, when he determines that a water right is 'filled,' or if the Director is just distributing water."). Regardless of the Director's role, he is bound by the prior appropriation doctrine—"he must follow the law." *Id.* And, at bottom, whatever specialized knowledge or technical expertise the Director may bring to water right distribution and accounting "is governed by" the water right partial decrees. *Id.*, 157 Idaho at 394, 336 P.3d at 801.

Special Master Booth perceived the issues similarly and accordingly. Special Master Booth acknowledged the discretionary aspect of the administrative accounting function, but likewise appreciated the judicial responsibility of answering the property right question of law before him:

> The first of these matters (i.e. determining "what is the property?") is the question of law portion of the question . . . The nature of the property at issue does not change in relation to the accounting methodology used by the Idaho Department of Water Resources to administer the Boise River water rights according to their relative priorities . . . the legal descriptions of the existing storage rights do not describe what portion of the total [reservoir] inflows is authorized to be stored under those rights.
>
> . . .
>
> The issues as to "what is the property?" and "how to account for the property?" are not the same. The accounting is left to the Idaho Department of Water Resources, but a determination of 'what is the property?' is answerable by the SRBA Court and making such a determination is compatible with the holding in Basin-Wide Issue 17.

Memorandum Decision and Order Granting Ditch Companies' and Boise Project's Motions for Summary Judgment; Special Master's Recommendation of Disallowance of Claims (Subcase Nos. 63-33732, et al. (Oct. 9, 2015)).[8]

Both Special Master Booth and the Presiding Judge found the existing storage water right partial decrees were "silent" on the flood control effect question. App. 1, pp. 20; 32, n. 17; *see also*, R. 2518. Their approaches to addressing the silence were markedly different: (a) Special Master Booth exercised his authority and jurisdiction to "apply historical fact together with Idaho law" to reach a decision; and (b) the Presiding Judge deferred entirely to the Director of IDWR, avoiding making a decision even on the pending question of law before him. BCID

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[8] A copy of this decision is attached as Appendix 1 ("App.") hereto pursuant to Idaho Appellate Rule 35(f). Though a decision made in the context of the Basin 63 proceedings, Special Master Booth and Judge Wildman consistently cross-referenced the Boise Basin proceedings in these (Payette Basin) proceedings. *See, e.g.*, R. 1989-92 (wherein Special Master Booth characterized the Basin 63 proceedings as "related subcases" and detailed their similarities); and 2519-20 (wherein Judge Wildman incorporated the "same rationale" he used in the Basin 63 proceedings into his decision in these Basin 65 proceedings); *see also*, R. 1985-87 (Special Master Booth cross-referencing and using the Basin 63 and 65 records before him) and 2217-20 (wherein Special Master Booth rejects the State's objections to his use of certain Basin 63 record materials in part because the State selectively and voluntarily injected many Basin 63 materials into the Basin 65 proceeding). Moreover, the Special Master's decisions, like those of the Presiding Judge, are citable authority like any other legal decision or treatise.

respectfully submits Special Master Booth's approach was both correct and necessary under the circumstances and the procedural posture of the late claims proceedings.

The SRBA maintains jurisdiction over the adjudication of water rights and over the water rights it decrees. *See, e.g.*, IDAHO CODE §§ 1-1603 and 1-1901(2); *see also, Vierstra v. Vierstra*, 153 Idaho 873, 880, 292 P.3d 264, 271 (2012) (trial courts have the authority to receive evidence regarding the enforcement of their prior orders). The SRBA further specifically retained jurisdiction over these late claims subcases (as well as those in the Boise, Big Wood, and Upper Snake River Basins) in its *Final Unified Decree*. R. 843 and 859-60. The SRBA granted the late claims, and the matter proceeded according to Idaho Code Section 42-1411. After being instructed to "***conduct all further proceedings necessary to issue a recommendation***," Special Master Booth interpreted the existing storage right partial decrees against the record of federal flood control operations and the actual diversion, storage, and end beneficial use of storage water in flood control years. This exercise was legitimate and appropriate—were the Reservoirs filling to the point of maximum physical fill during flood control years under the existing storage rights, or under some other legal construct (*e.g.*, the constitutional/beneficial use method of appropriation embodied by the late claims)?

Special Master Booth's application of historic fact to law in addressing the partial decree "silence" both he and the Presiding Judge agree exists is consistent with prior SRBA precedent, as well as prior precedent of this Court. This is because the interpretation of the partial decrees against the legal backdrop of federal flood control operations ***is not*** a collateral attack on the existing partial decrees. *See, e.g., Gile v. Laidlaw*, 52 Idaho 665, 670-71, 20 P.2d 215, 216-17 (1933) (mere interpretation of a water right decree does not set aside, overrule, or interfere with the same); *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 522-23, 284 P.3d 225, 248 (2012) (water

right decrees, like contracts, do not necessarily contain all germane aspects of their administration or enforcement within their four corners); and *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Streamflow Maintenance Claim*; Subcase No. 63-3618 (Sept. 23, 2008), p. 18 (citation omitted) (requests "to clarify existing law against which the water right holders [are] entitled to rely . . . [is not] a collateral attack on a prior decree or license.").[9]

Even accepting the Presiding Judge's post-dated "narrow focus" contentions as true (*i.e.*, that Special Master Booth was constrained to examine only evidence concerning whether the late claims were supported by additional diversion and use evidence as claimed), and ignoring BCID's "now or never" procedural obligations, Special Master Booth still needed to determine the nature and scope of the existing property rights (the quantity of water already encumbered by the existing storage rights) in order to then determine whether the late claims embodied diversion and use of additional water. R. 432 ("The use of water that would suffice to constitute a new appropriation of water could have only begun at a point where the use of water under the 'base' right was complete."). Attempting to recommend the late claims absent consideration of the existing storage rights is both unreasonable and illogical:

> If the existing storage rights authorize the storage of water that cannot be used, then the above-captioned claims seek judicial recognition of the right to store water that can be used. But proceeding further down the path toward such judicial recognition makes no sense if the existing storage rights already authorize the storage of water that can be, has been, and is beneficially used. The possible result of failing to ascertain the answer to this question is the issuance of duplicative water right decrees. The answer to this question cannot be found through an examination of the IDWR's accounting methodologies.

App. 1, p. 20.

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[9] A copy of this SRBA Presiding Judge decision (J. Melanson) is attached as Appendix 2 hereto for the Court's convenience.

Proceeding with the late claims prior to examining and interpreting the existing storage rights would be a fool's errand, likely spawning inconsistent judgments and unintended consequences. As explained in greater detail in Section IV.D.3 below, Special Master Booth did not intrude on or otherwise usurp the Director's administrative accounting function; rather he defined the extent of the existing property rights against the backdrop of federal flood control operations while conducting the proceedings he deemed necessary as was his charge. The late claims proceedings were underway and BCID had no choice but to argue as it did in defending the existing storage rights.

It was not, nor is it ever, the Director's exclusive province (or primary jurisdiction) to determine the property rights embodied by the SRBA's partial decrees. The determination of the scope of property rights (a question of law) is a judicial function that has nothing to do with the Director lending any engineering or other technical expertise in performance of his investigatory and reporting adjudication functions under Idaho Code Sections 42-1401B, 42-1410, and 42-1411. Just as the Idaho judiciary is not populated by "super engineers" (hence the initial deference afforded the Director's factual findings), the Department is not populated with "super judges." *A&B Irr. Dist.*, 157 Idaho at 394, 336 P. 3d at 801 (citation omitted) (this Court noting the Director's technical expertise, and typical deference thereto). Determining property rights, and interpreting and applying the law (including the interpretation and application of a court's decrees) rests with the judiciary. *Id.*, 157 Idaho at 393, 336 P. 3d at 800 (this Court contrasting the administrative accounting/water right distribution function from the judicial property rights determination function); *see also, In Re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614 (1995) (noting application of Idaho Code Section 42-1412(6), and the constitutional judicial

function of including decree provisions directing how any particular water right is to be ultimately administered).

3. BCID's Interpretation of the Existing Storage Right Partial Decrees is the More Reasonable One

In light of the existing storage water right "silence" on the potential effect of flood control operations, BCID was equally entitled to offer its interpretation of the water right decrees as was the State. Between the two differing interpretations, BCID believes its interpretation to be the more reasonable under the facts and the law.

As discussed in Sections I.C and IV.C above, the hydrograph of the pre-1971 storage and use of water in flood control years is undeniable. For nearly 60 years, the Reservoirs have diverted and stored water on the recession of peak flood flows, and that water has been delivered and beneficially used by downstream irrigators, including BCID patrons. BCID contends this pattern of storage and use occurs pursuant to the existing storage rights consistent with the mandates of Idaho Code Sections 42-103 and 42-201(2). IDWR calls the storage and use an extra-water right "historic practice" that should be memorialized as a Basin 65 General Provision. R. 2006-12. While the parties argue over the underlying legal authorization, they do not dispute the hydrograph. Thus, BCID renews its question in light of the Presiding Judge's unwinding of Special Master Booth's answer: "What effect, if any, do flood control releases have on the BOR's existing storage rights?" R. 2215. Does BOR need to encumber more than 863.0 kAF of diversion "to storage" water to yield 863.0 kAF of use "from storage" water during flood control years?

BCID's interpretation of the "irrigation storage" and "irrigation from storage" quantities of the existing Reservoir water rights leaves those express water right elements and quantities intact, while the State (and IDWR's) theories decouple them. Decoupling those quantities of

water (now 860.5 kAF because of the 2.5 kAF carved out for "municipal" uses during the SRBA) effectively reads the "from storage" quantity out of the existing partial decrees; re-writing them in a manner inconsistent with decades of actual storage and use, and inconsistent with applicable law.

It is well-settled that the act of diversion alone (or storage alone, if one considers all inflows into an on-stream reservoir to be stored) does not a water right make.[10] *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110; 113, 157 P.3d 600 (2007) (beneficial use is "enmeshed in the nature of a water right"; beneficial use is the "basis, measure, and limit of the right"; and without beneficial use there is no perfection of a water right). It is equally well-settled that a storage water right is a priority-protected right to divert and retain water in a reservoir until the same can meaningfully be used. *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945); *see also, A&B Irr. Dist. v. State*, 157 Idaho 385, 389-90, 336 P.3d 792, 796-98 (2014) (quoting *Rayl*). The State and IDWR's theories frustrate end beneficial use and the opportunity to meaningfully store water in a dual purpose reservoir system.

The State and IDWR's "store it or lose it"-based partial decree interpretation also conflicts with Idaho flood control mandates, recognitions, and policies in addition to federal law.

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[10] The State and IDWR's "store it or lose it" theory is premised on the idea that on-stream reservoirs necessarily divert and store all inflows reaching the dam. Despite this, the State acknowledges the lack of perfecting beneficial use. *Compare* R. 1547 ("natural flow [is] allocated to reservoir rights regardless of whether physical storage actually occurs") and R. 1560 ("The theory of the Late Claims is contrary to [Idaho law] because the Late Claims presume a new water right may be established, or the Base Rights enlarged, to 'replace' storage released for purposes not authorized in the water rights. Allowing a new water right to be established, or an existing water right to be enlarged, on the basis of a failure to put the water to the authorized beneficial use violates the 'well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law." (citation omitted) (emphasis in original). Suez Water Idaho shares this sentiment, but states it more bluntly. R. 2419 ("Storage right holders are not obligated to capture all water that is legally and physically available, but their failure to do so is at their own peril.").

Baranick v. North Fork Reservoir Co., 127 Idaho 482, 483-84, 903 P.2d 71, 72-73 (1995) (dam and reservoir operators must operate their facilities in a non-negligent manner); *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) (recognizing the ancillary flood control benefits of reservoirs); *Burgess v. Salmon River Canal Co.*, 119 Idaho 299, 305-06, 805 P.2d 1223, 1229-30 (1991) (imposing common law duties on dam operators: (a) to not accumulate water and cast it down upon lower landowners in unnatural concentrations; and (b) to reasonably manage and control impounded water and reservoir inflows so as not to damage the property of others); IDAHO CODE §§ 42-1718(b) and 42-3102 (mandating flow passage to protect life and property and announcing the policy of Idaho to prevent flood damage "consistent with the conservation and wise development of our water resources"); R. 1750-76; IDAHO CODE §§ 42-1734A, 42-1734B, and 42-1734C (State Water Plan for the Payette Basin recognizing and codifying the value and need for dual purpose/spill and fill reservoir operations in the Payette Valley—operations that are binding on state agencies under Section 42-1734B(4)); Reclamation Project Act of 1939, §§ 9(a) and 9(b) (53 Stat. 1194, 43 U.S.C. § 485h(a) and (b)); and *United States v. California*, 694 F.2d 1171, 1177 (9th Cir. 1982) (The State may not impose on any BOR project any condition that "clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme").

Finally, and perhaps most importantly, the "store it or lose it" theory is contrary to the Payette Decree, wherein IDWR and the district court investigated and confirmed actual need and use of storage water, stored in and used from the Reservoirs on a physical contents/post-flood control release basis—what IDWR is willing to recognize as an SRBA General Provision based on the "historic practice," but storage and use the agency says is not protectable under a bona

fide water right. Idaho Code Section 42-201(2) precludes the State and IDWR's position, and it is well-settled that one can perfect a priority-based water right in flood flows. *Memorandum Decision and Order on Challenge*, Subcase Nos. 74-15051, et al. (Jan. 3, 2012) ("Lemhi High Flow Claims"), pp. 18, 25; *see also*, *State v. ICL*, 131 Idaho 329, 955 P.2d 1108 (1998) (both recognizing the ability to perfect a fully vested water right in flood/high flows, rather than water users having to rely on a more generic, less protective general provision).

E. The Late Claims Were Properly Denied Because the Water Sought Was Already Appropriated

BOR and the water users' right to store and use 863.0 kAF of water in the Payette Basin stems from Idaho water right licenses expressly acknowledging that the "right to the use of said waters has been perfected in accordance with the laws of the State of Idaho and is hereby confirmed by the State Reclamation Engineer of Idaho." R. 590 (Gregg Depo. Exs. (specifically internal exhibit nos. 14 and 15 (R. 719 and 720, respectively)—the prior licenses for water right nos. 65-2927 (License No. R-646, dated November 7, 1962) and 65-2917 (License No. R-403, dated January 16, 1942)).[11] According to the State Reclamation Engineer, BOR proved the need and use of an aggregate 863.0 kAf of storage water in the Payette Basin. BOR could not have done so by 1942 and 1962, respectively, absent the storage ***and*** use of physical water for the licensed purposes. *Morgan v. Udy*, 58 Idaho 670, 680, 79 P.2d 295 (1938) ("diversion and application to beneficial use" are the "two essentials" of a "valid appropriation" under Idaho law).

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[11] The original Deadwood Reservoir water right license (License No. R-403) was for 163.0 kAF of power generation purpose only. That same quantity of water was later claimed and adjudicated in both the Payette and Snake River Basin Adjudications for irrigation use as water right no. 65-9483. R. 506; 529; 534; and 555.

This express acknowledgement of the State Reclamation Engineer is consistent with the IDWR's own independent investigation and "examination of the ditches, diversions, lands irrigated and other uses of water within the Payette River Drainage Basin" during the Payette Adjudication. R. 516. This is because IDWR recommended BOR's aggregate 863.0 kAF storage water right claims as claimed pursuant to Payette Decree Conclusion of Law No. 3, confirming that the adjudication "recognize[d] the past history of water use in the area." *Id.*, 525; *see also, id.*, 526 (COL No. 14 confirming that the water rights recommended in the Proposed Finding of Water Rights have "been diverted and applied to a beneficial use as described [therein]."). This past diversion and use included the capture and use of spring "high water" and "flood water." *Id.* 524 (FOF No. 19).

The only way the State Reclamation Engineer (in 1942 and 1962), IDWR (during the Payette Adjudication), and the SRBA could issue the existing storage water right partial decrees as licensed and later claimed was through administrative and judicial satisfaction that the water was diverted ***and beneficially used*** up to the extent of the amount licensed and decreed (863.0 kAF). Anything less required the licensing and decree of some different, lesser quantity of "[use] from storage" water. Thus, according to the State's own records and IDWR's past administrative actions, the "old system" the State refers to (R. 2292) could not be anything other than one based on maximum physical fill because one cannot claim and perfect metaphysical water rights under Idaho law. *See Morgan, supra.*

Physical contents-based administration was likewise confirmed by BOR witness Jerrold Gregg and BCID farmers. *See, e.g.*, R. 1807 (Gregg Aff., ¶¶ 5-9: water storage and use from at least 1957 forward (in Cascade Reservoir), including during the pendency of the Payette Adjudication, was done on a "spill and fill" basis, later memorialized by forecast-based flood

control rule curves like in the Boise Basin where reservoir space becomes legally and physically available for beneficial use storage only after the flood risk wanes in flood control years); *see also*, R. 1802 (Lammey Aff., ¶ 7: the water ultimately stored and released for end beneficial use in the Payette Basin is the "second-in" water, that present after flood control releases when the Reservoirs reach maximum physical fill as determined in consultation with the local watermaster).

Finally, pre-1992/93 physical contents-based administration ***tied to the existing/underlying storage water rights*** was confirmed by IDWR hydrologist and computerized accounting program author Robert Sutter. In his 1993 memo to then Water District 65 Watermaster Helen Bivens, Sutter explained that the advent of computerized accounting in the basin would, like in other water districts using the same, bring "year around" accounting resulting in the accrual of water to the reservoir water rights "regardless of whether physical storage actually occurs." R. 688. Then, each year after "maximum accounted for reservoir fill is achieved" the storage water is allocated to each user "according to space ownerships."[12] *Id.* This administrative accounting-based change was not lost on Special Master Booth. R. 2213.

The dual purpose flood control/spill and fill hydrograph is, again, undisputed. BOR and water users (including BCID patrons) stored and beneficially used "second-in" water (that captured and held as the flood risk waned) prior to 1971 (and continue to do so today). That diversion and use of 863.0 kAF of water was all that was needed to perfect protectable property rights (water rights) under the constitutional method of appropriation as Special Master Booth correctly concluded. R. 2215-16; 2221; *see also*, *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 26-27,

[12] Taken together, Sutter explained that natural flow was allocated to the existing reservoir storage rights, and after the point of "maximum fill" that water was then divided amongst the spaceholders according to their contractual spaceholdings.

752 P.2d 625, 628-29 (1988) (holding in part that valid, although unadjudicated, constitutional method appropriations pre-1971 retain a protectable senior priority in relation to those later in time); and *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 11, 156 P.3d 502, 512 (2007) (a beneficial use claim is established prior to 1971 through the diversion and use of water, and such a right is no less enforceable than one based on a license or prior decree; the appropriator need not have intended to establish the water right or have even understood that he secured a valid water right).

F. The Late Claims, if Necessary, Are Not Barred by Operation of the Prior Payette Adjudication

Both Special Master Booth and the Presiding Judge agreed that BOR's late claims should ultimately be disallowed by operation of the prior Payette Adjudication. *Compare* R. 1992-95; 2211-15; and 2511-18. Both agreed that the claims were precluded by a combination of the prior Payette Decree, statute (former Idaho Code Section 42-1411, *circa* 1969), and the doctrine of *res judicata*. Curiously, however, Special Master Booth conceded that based on:

> [The] undisputed evidentiary facts and the inferences drawn therefrom [ ] at all times relevant to the filing of water right claims in the Payette Adjudication there [was] no basis upon which the Bureau could have claimed the water rights that are represented by the above-captioned claim numbers.

R. 2212-14.

BCID agrees with Special Master Booth's concession, and submits that both he and the Presiding Judge erred in holding that the late claims are barred by operation of the prior Payette Adjudication if the late claims are, in fact, necessary to yield one physical fill of the Reservoirs during flood control years.

1. The Payette Decree and Operation of Idaho Code Section 42-1411 (1969)

The Presiding Judge, agreeing with Special Master Booth, found the plain language of the 1986 Payette Decree and its incorporation of former Idaho Code Section 42-1411 (1969) as

barring the United States' late claims in this matter. R. 2512-13; 2517-18. He (and Special Master Booth) found the judgment: (a) unambiguously and conclusively decided all water rights in the basin established before October 19, 1977; and (b) conclusively extinguished (by forfeiture) any preexisting rights that were not claimed in the Payette Adjudication by operation of Idaho Code Section 42-1411 (cited and incorporated by reference within the decree). *Id.* Former Idaho Code Section 42-1411 (1969) provided that "any water user who [was] joined and who failed to submit proof of his claim . . . shall be barred and estopped from subsequently asserting any right theretofore . . . and shall be held to have forfeited all rights to any water theretofore claimed." Idaho Session Laws, 1969, Ch. 279, p. 832.

The SRBA's holdings are contrary to the plain language of former Section 42-1411. The former statute applied to, and barred, water users who: (1) had been joined in the Payette Adjudication; and (2) "who failed to appear and submit proof of his claim." BOR was not amongst the class of water users subject to the statute's forfeiture provisions because: (1) it was joined; and (2) it did appear and submit proof of its claims—claims that were ultimately decreed in the amount claimed (863.0 kAf of water). *State v. Hagerman Water Right Owners*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997) (statutory interpretation and application begins with the statute's plain language; when clear and unambiguous, courts merely apply the statute as written absent additional statutory construction).

As discussed in Sections IV.C and E above, so far as BOR, BCID, IDWR, the Payette Adjudication Court, and later the SRBA were concerned, BOR entered and exited the Payette Adjudication (and the SRBA) with 860.5 kAF of physical "irrigation from storage" water for purposes of irrigating the 215,540 acres in the lower Payette River Valley as claimed. Had BOR not appeared and submitted proof of its claims in the Payette Adjudication, this end result could

not have occurred. To the contrary, IDWR expressly found and the Payette Decree confirmed, that BOR's physical storage and the water users' ultimate beneficial use of 863.0 kAF (860.5 kAF for irrigation) of water was "the past history of water use in the area" based upon IDWR's own, independent "examination of the ditches, diversions [and] lands irrigated" in the Payette Basin. R. 516; 525-26; and 543-57.

The purpose of former Section 42-1411 was to bring finality and predictability to/against those joined in the Payette Adjudication, but who utterly failed to appear and submit evidence of their claimed water use. BCID agrees with the SRBA that the Payette Decree, in conjunction with former Section 42-1411, conclusively decided the issue of "unclaimed water rights." But, BOR's water rights were not unclaimed; rather, they were claimed, proven, and adjudicated exactly as claimed. Instead, and as discussed in Sections IV.F.2 and IV.G below, the question is whether later-in-time administrative constructs and legal theories can take water previously licensed, claimed, and adjudicated.

Finally, the Presiding Judge suggested that BCID and BOR might have fared better in his court under a Rule 60(b) motion to set aside. R. 2513, n. 3. Maybe so, if one takes his suggestion/invitation at face value. Perhaps Rule 60(b) was (and remains) a procedural option in hindsight, but it is not the ***exclusive*** procedural vehicle. Instead, BOR and BCID found themselves under the procedure and obligations of the SRBA late claims process—the "now or never" conundrum addressed in Section IV.D.1 above by virtue of Idaho Code Section 42-1411 and the SRBA's granting orders. Neither BOR nor BCID proceeded down the late claims path expecting the SRBA to ultimately shun its jurisdiction on a mixed question of law and fact interpreting and applying the water right decrees it previously issued.

2. *Res Judicata*

Additionally, the SRBA held the late claims are barred under general principles of *res judicata*. R. 2514-17. The Presiding Judge reasoned that BOR had a full and fair opportunity ("indeed an obligation") to assert the present late claims in the Payette Adjudication. R. 2514. He held that the late claims were barred by the doctrines of both claim and issue preclusion, and that pursuing and possibly decreeing the claims now would defeat the "core purpose" of finality upon which general stream adjudications are premised. R. 2515-17. The Presiding Judge's fears of the potentially widespread upsetting of finality are unfounded, and his application of *res judicata* was overly rigid; running contrary to Idaho judicial policy and ignoring well-settled exceptions to the doctrine that squarely apply in this case.

a. Judicial Policy

When a court obtains jurisdiction, "it is the policy of the law that if possible all differences should be decided in the one proceeding." *Sweeney v. American National Bank*, 62 Idaho 544, 551, 115 P.2d 109, 112 (1941); *see also*, IDAHO R. CIV. P. 1(a). Consequently, courts "retain jurisdiction for the settlement of all controversy between the parties." *Anderson v. Whipple*, 71 Idaho 112, 122, 227 P.2d 351, 357 (1951). The ability to resolve all portions of a dispute and to render equity without regard to the "technical niceties of pleading and procedure" provides "flexibility in adjudicating cases, which is necessary because not all cases are presented in precisely the same fashion." *Kessler v. Tortise*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000); *see also, Troupis v. Summer*, 148 Idaho 77, 81, 218 P.3d 1138, 1142 (2009); *see also, Anderson, supra* ("the court will grant all proper relief consistent with the case made and embraced within the issues, whether the particular relief be prayed for or not."). These policies are also consistent

with the overarching purposes of the SRBA. *See, e.g.*, IDAHO CODE §§ 42-1425, 42-1426, and 42-1427.[13]

The SRBA obtained jurisdiction over these matters upon its commencement on November 19, 1987. *Commencement Order*, Twin Falls County Case No. 39576 (Nov. 19, 1987); *see also, In re Snake River Basin Water System*, 115 Idaho 1, 8, 764 P.2d 78, 85 (1988) (holding that the rights of all claimants on the Snake River and its tributaries, including the Payette River, among others, must be included in the SRBA); and *Order Consolidating Payette Adjudication with the SRBA*, Twin Falls County Case No. 39576 (Feb. 8, 2001). Though the Payette Adjudication adjudicated approximately 9,700 water right claims, those claims were renewed/refiled in the SRBA upon its commencement. In most cases, the SRBA claims simply mirrored what the Payette Decree decreed, and the SRBA likewise adjudicated the claims accordingly. The SRBA further obtained (and maintained) jurisdiction over these matters as explained in Section IV.D.2 above, and through its grant of the United States' SF4 Motions, thereby triggering the adjudication procedures of Idaho Code Title 42, Chapter 14 and those of SRBA Administrative Order 1.

The SRBA failed to resolve this matter on its merits, and it further failed to promote the flexibility of adjudication otherwise available to it. The Presiding Judge's underlying orders (R. 41; 129) offered no indication that these proceedings were somehow limited to the "narrow focus" he later ascribed to them (R. 2518), nor is such narrowing even permissible under Idaho Code Sections 42-1409 through -1413. By operation of Section 42-1411, each and every element of the late claimed water rights was in dispute and open to scrutiny—dispute and scrutiny that necessarily involved review and interpretation of the existing storage rights given

[13] Idaho's general stream adjudication statutes connote a clear legislative intent that water right adjudications preserve and protect "historic water use patterns."

the "supplemental" nature of the late claims. One cannot properly investigate the "supplemental" late claims unless and until a deficiency is found and defined in the existing rights requiring supplementation to cure.

b. Applicable Exceptions to the Doctrine in This Case

BCID does not quarrel with the finality goal of the *res judicata* doctrine, nor with the "three fundamental purposes" discussed by this Court (and cited by the SRBA) in *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). R. 2515. However, application of the doctrine is not as rigid as the SRBA's Challenge MDO suggests; rather, modern evolution of the doctrine has led to various well-settled exceptions BCID believes are applicable here: (1) the might and should have litigated exception; and (2) the new facts/ripeness exception.

The "might and should have litigated" exception derives from this Court's landmark decision in *Joyce v. Murphy Land Co.*, 35 Idaho 549, 208 P. 241 (1922). The oft-quoted portion of *Joyce* provides:

> We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim ***but also as to every matter which might and should have been litigated in the first suit.***

Id., 35 Idaho at 553, 208 P. at 242-43 (emphasis added); *see also*, *Heaney v. Board of Trustees*, 98 Idaho 900, 902-903, 575 P.2d 498, 500-501 (1978). Post-*Joyce*, the seminal question has become whether any particular claim or defense might ***and*** should have been litigated in the prior suit. Whether something "might and should have been litigated" in the prior suit involves consideration of whether the claim or defense arises out of the same transaction or series of transactions (or nucleus of facts) as the prior litigation (*i.e.*, the analysis is case-by-case and fact-specific). *U.S. Nat'l Bank Ass'n v. Kuenzli*, 134 Idaho 222, 226, 999 P.2d 877, 881 (2000); *see also*, *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 148-150, 804 P.2d 319, 321-323

(1990). Further, whether a factual grouping constitutes a transaction is "to be determined pragmatically, giving weight to such considerations as whether facts are related in time, space, origin, or motivation." *Ticor Title Co. v. Stanion*, 144 Idaho 119, 126, 157 P.3d 613, 620 (2007).

The "new facts" / "ripeness" exception derives from this Court's opinion in *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 663 P.2d 287 (1983).

> Even though two actions may arise out of the same operative facts between the same parties this Court has also stated that '[however], sometimes a single trial covering all aspects of the case will be neither desirable nor feasible. Evidence bearing upon one aspect of a case may be unduly prejudicial with respect to another. ***Or, certain matters may be ripe for trial while consideration of others would be premature.***

Duthie, 104 Idaho at754, 663 P.2d at 290 (emphasis added) (citing *Heaney*, *supra*, and holding that new facts arising after the first action—the actual revocation of a license then sued upon—were not ripe for adjudication in the first action because they had yet to manifest).

Modern application of *res judicata* is a question of policy, rather than blindly applied as blackletter rule. *Heaney*, 98 Idaho at 902-903, 575 P.2d at 500-01. The rule adapts to Idaho's changing jurisprudence, and the root of the policy question is "society's interest in providing a forum for the just and responsive adjudication of every aggrieved party's claim." *See Diamond*, 119 Idaho at 149, 804 P.2d at 322 (1990), and *Heaney*, 98 Idaho at 903, 575 P.2d at 501, respectively. For example, though judicial economy and efficiency are laudable goals to preserve under *res judicata*, even fragmented litigation should be "tolerated" where "fragmentation is necessary in order to serve the ends of justice." *Heaney*, 98 Idaho at 903, 575 P.2d at 501. The softening of the *Joyce* rule and the modern exceptions carved from it, have been acknowledged and upheld repeatedly by both this Court and the Idaho Court of Appeals over time. *See, e.g., Diamond, supra* (noting the evolution of the *Joyce* rule and acknowledging the *Heaney* and *Duthie* exceptions); *Bell Rapids Mutual Irr. Co. v. Hausner*, 126 Idaho 752, 890

P.2d 338 (1995) (applying the *Duthie* exception); *United States Bank Nat'l Ass'n, supra* (acknowledging and applying both exceptions); *Sagewillow, Inc. v. Idaho Dept. of Water Res.*, 138 Idaho 831, 70 P.3d 669 (2003) (acknowledging modern evolution of the *Joyce* rule and both exceptions); and *Aldape v. Akins*, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983) (discussing the evolution of the *Joyce* rule and both exceptions).

Both exceptions apply in this case. As discussed previously herein:

- The State of Idaho issued water right licenses to the BOR for an aggregate 863.0 kAF of water in 1942 and 1962, respectively; which licenses provide that the "right to the use of said waters has been perfected in accordance with the laws of the State of Idaho."

- The Payette Adjudication later decreed those licenses as claimed based in part on Payette Decree Conclusion of Law Nos. 3 and 14 holding that the water rights claimed (right nos. 65-2927, 65-2917, and 65-9483) had been "diverted and applied to beneficial use as described."

- Those water rights were claimed, decreed, and used against the backdrop of "spill and fill" flood control operations beginning in 1957, creating a hydrograph whereby some portion of the water stored and beneficially used in flood control years was necessarily "second-in" water stored and retained after peak flood flows were bypassed through the system and the flood risk waned.

- The Reservoirs were operated, and that water was actually stored and beneficially used, on a physical contents/maximum physical fill basis until the advent of year around computerized water right accounting in 1992/93—which accounting first introduced the concept of "paper fill, whereby water would accrue to the reservoir storage rights on paper regardless of whether the water was actually stored and retained (*i.e.*, water bypassed through and evacuated from the Reservoirs during flood control years was attributed to the existing storage rights).

Consequently, what BOR and BCID knew or should have known from 1957 through at least 1992 (including the 1986 close of the Payette Adjudication) was that they were entitled to 863.0 kAF of physical water duly licensed, claimed and decreed pursuant to proven need and use, and that that aggregate quantity of water included some portion of "second-in" water during flood control years by virtue of the prevailing "spill and fill" flood control operations.

Nobody could have appreciated that a non-formal, non-rulemaking internal administrative water right accounting change could undo decades-old water rights perfected by diversion and end beneficial use. Holding that the 1992/3 "paper fill"-based/administrative construct "might and should have been litigated" during the pendency of the Payette Adjudication (1969-1986) is not only a chronological impossibility, but frustrates the policy of providing a forum for the "just and responsive adjudication" of this flood control question of first impression. Likewise, the administrative regime shift to "paper fill" concepts in 1992/93 constituted new facts that were not, and could not be, ripe for adjudication during the pendency of the Payette Adjudication.

Because the "refill" issue (really the issue of whether BOR exited the Payette Adjudication with something less than the 863.0 kAF of physical "from storage" water decreed during flood control years) was not ripe for consideration during the Payette Adjudication, BCID submits that the late claims are not barred by *res judicata* to the extent the claims are necessary to preserve one physical fill of the Reservoirs during flood control years.

G. Takings

The SRBA's Challenge MDO reversing Special Master Booth's "already appropriated" holding ***and*** barring the late claims works an untenable and unconstitutional result. The record is clear that BCID and other water users in the Payette Basin have been beneficially storing and using water captured after the regulation and bypass of peak flood flows as the flood risk wanes and reservoir space becomes available for beneficial use storage for decades (*i.e.*, the storage water beneficially used in the Payette Basin since at least 1957 during flood control years is the second-in water).

That undisputed diversion to storage and subsequent beneficial use perfected a vested property right in the second-in water. *See, e.g.*, Idaho Constitution Article XV, Section 3; IDAHO

CODE § 55-101; and *U.S. v. Pioneer*, 144 Idaho at 113 (generally surveying the common theme under state law that application to beneficial use is required to perfect a water right, and that Idaho law is no different in this regard; beneficial use perfects, and gives rise to, "a valid water right under both the constitutional method of appropriation and [the] statutory method of appropriation"). These property rights were further confirmed by the subsequent water right licenses (nos. R-403 and R-646 issued in 1942 and 1962, respectively[14]) and the Payette Decree (finding the diversion and application to beneficial use as claimed, and as the past history of water use in the area).

Divesting BCID and other water users of the priority right and use of second-in water results in an unconstitutional taking of those vested property rights. *See, e.g., Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048 (1977); *see also, American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433 (2007) (treating storage water rights the same as any other water right).

V.
CONCLUSION

During the course of BWI-17, the SRBA Court evaded the flood control effect question by reformulating the question before it to one it was willing to answer, but one none of the parties wanted or needed answered. *A&B Irr. Dist.*, 157 Idaho at 391-92, 336 P.3d at 798-99. The United States and BCID (and many others in the Basin 63 proceedings) went back, developed a record, and brought the flood control effect question forward again as was their right and their obligation during the late claim proceedings only to have the SRBA evade the question again. The primary object of the law is to obtain a determination on the merits of a claim. *See, e.g., Wackerli v. Martindale*, 82 Idaho 400, 404, 353 P.2d 782, 784 (1960). It is equally well-

[14] The licenses are also binding on the State under Idaho Code Section 42-220.

settled that the end-goal of the judicial process is the "just, speedy, and inexpensive determination" of claims. *See, e.g.*, IDAHO R. CIV. P. 1(a). By failing to address the threshold question presented by BCID, the SRBA is effectively failing to quiet title to the existing storage rights, thereby perpetuating legal uncertainty and leaving the issue to be decided in some other forum in the future.

The interpretation and application of the existing storage water right partial decrees against the backdrop of spill and fill flood control operations are questions of law. Likewise, the question of whether the pending late claims, if deemed necessary to supplement the existing storage water rights, are barred by operation of the prior Payette Adjudication is a question of law. The Director completed his administrative investigatory and reporting functions by issuing his *Director's Reports* for the late claims. The remainder of the late claims proceedings necessary to decide the claims and defenses of the parties is the judiciary's responsibility.

BCID submits that Special Master Booth was correct, not only in exercising the SRBA Court's clear jurisdiction to address the question, but also his answer to the question: the late claims must be denied because the water they claim is already appropriated by the existing storage water rights for Deadwood and Cascade Reservoirs. Therefore, BCID respectfully requests that this Court review and adopt the Special Master's reasoning and conclusions of law addressing the flood control effect question as its own. In the alternative, and to the extent the late claims are necessary to cure some yet-to-be-determined deficiency in the existing storage water rights, BCID requests that this Court reverse the SRBA's preclusive effect/*res judicata* holdings, and remand the late claims back for further proceedings to preserve the hydrograph of historical water use and diversion in flood control years consistent with the undisputed record of spill and fill flood control operations—the diversion and use of post-flood release inflows that

IDWR expressly acknowledges as the "historical practice" and "status quo" in the Payette River Basin.

RESPECTFULLY SUBMITTED and DATED this 12th day of May, 2017.

CHAS. F. MCDEVITT, LAW OFFICE

By _____
Chas. F. McDevitt

SAWTOOTH LAW OFFICES, PLLC

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2017, I caused a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** to be served by the method indicated below, and addressed to the following:

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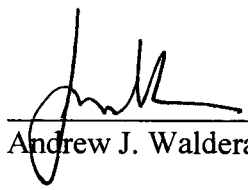

Andrew J. Waldera

Docket No. 44636-2016

Black Canyon Irrigation District
Appellant's Opening Brief

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 Nos. 63-33732 (Consolidated Subcase no. 63-33737), 63-33733 (Consolidated subcase no. 63-33738), and 63-33734
Case No. 39576	**MEMORANDUM DECISION AND ORDER GRANTING DITCH COMPANIES' AND BOISE PROJECT'S MOTIONS FOR SUMMARY JUDGMENT**
	ORDER DISMISSING STATE OF IDAHO'S AND UNITED WATER IDAHO'S CROSS-MOTIONS FOR SUMMARY JUDGMENT
	ORDER DISMISSING BOISE PROJECT'S MOTION IN LIMINE
	ORDER DISMISSING BOISE PROJECT'S MOTION TO STRIKE
	RECOMMENDATION ON BOISE PROJECT'S MOTION FOR SANCTIONS
	RECOMMENDATION ON STATE OF IDAHO'S MOTION FOR AWARD OF REASONABLE ATTORNEY FEES PURSUANT TO RULE 11(A)(1)
	SPECIAL MASTER'S RECOMMENDATION OF DISALLOWANCE OF CLAIMS

I. APPEARANCES

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Michael C. Orr, Deputy Attorney General, Natural Resources Division, Boise, Idaho, for the State of Idaho.

Michael P. Lawrence, Givens Pursley, LLP, Boise, Idaho, for United Water Idaho Inc.

David W. Gehlert, United States Department of Justice, Denver, Colorado, for United States of America, Department of Interior, Bureau of Reclamation.

II. ORAL ARGUMENTS

Oral arguments were heard in these matters as follows:

August 4, 2015, hearing on Ditch Companies' and Boise Project's *Motions for Summary Judgment*.

September 8, 2015, hearing on State of Idaho's and United Water's *Cross-Motions for Summary Judgment*; hearing on Boise Project's *Motion to Strike*, *Motion for Sanctions*, and *Motion in Limine*.

September 29, 2015, hearing on the State of Idaho's *Motion for Award of Reasonable Attorney Fees Pursuant to Rule 11(A)(1)*.

III. INTRODUCTION

A. Ditch Companies' and Boise Project's Motions for Summary Judgment.

In most years, the amount of water produced in the Boise River drainage upstream from Arrowrock Reservoir, Anderson Ranch Reservoir, and Lucky Peak Reservoir (collectively the "Boise River Reservoirs") exceeds the physical capacity of the

reservoirs and exceeds the volume of water that may be stored under the existing storage water rights[1] for the Boise River Reservoirs. Because the dams that impound the water in the Boise River Reservoirs are physically located in the stream channel, all of the water produced upstream therefrom necessarily must pass through the reservoir(s) and dam(s). Of the total quantity that is produced in the basin each year, some of the water is stored to fruition (i.e. such time as it may be released downstream to be used for irrigation and other beneficial uses), and some of the water must be passed downstream, unused, at a time of year when there is no demand for it.

The above-captioned claims filed by the United States Bureau of Reclamation ("Bureau") and the Boise Project Board of Control ("Boise Project") seek judicial recognition of beneficial use[2] water rights for the storage of such water that exceeds the annual quantity of the existing storage rights. However, the summary judgment motions filed by the Ditch Companies and the Boise Project,[3] seek to answer the threshold question of whether the water that forms the basis of the claims was already being stored pursuant to the existing storage rights and hence the claims fail for the reason that such stored water cannot simultaneously be authorized under the existing storage rights and be the basis for beneficial use water rights. The answer to this threshold question, the movants argue, requires a determination of what water is stored under the existing storage rights and what water is not. The State's position is that the existing storage rights are for all water that is "physically and legally available for storage," beginning on November 1 of each year, until the cumulative total of the daily inflows of such water equals the

[1]The existing storage water rights are: Arrowrock 63-303, 271,600 AFY (January 13, 1911 priority) and 63-3613, 15,000 AFY (June 25, 1938 priority) (total capacity of Arrowrock Reservoir is 286,600 AF when filled to elevation 3216 on the upstream face of the dam); Anderson Ranch 63-3614, 493,161 AFY (December 9, 1940 priority) (total capacity of Anderson Ranch Reservoir is 493,161 AF when filled to elevation 4196 on the upstream face of the dam); Lucky Peak 63-3618, 293,050 AFY (April 12, 1963 priority) (total capacity of Lucky Peak Reservoir is 293,050 AF when filled to elevation 3055 on the upstream face of the dam).

[2] Under the beneficial use method of appropriation, sometimes called the Constitutional method, a water right could be perfected by diverting unappropriated water and applying it to beneficial use. In 1971 the Idaho legislature changed the law so as to eliminate this method of water right appropriation.

[3] The United States, Department of Interior, Bureau of Reclamation, has not filed any briefing regarding the Ditch Companies' and the Boise Project's motions for summary judgment nor did they participate in oral argument. However the United States informed the court that they are in agreement with the position put forth by the Ditch Companies and the Boise Project.

quantity of the existing storage right.[4] "Physically available" means water that actually enters a particular reservoir, or water that would enter such reservoir but for being retained in an upstream reservoir. *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) ("*Cresto Aff.*") ¶ 14. "Legally available," according to the State, means physically available water minus water that must be passed through the reservoir to satisfy a downstream senior water right and minus storage released from an upstream reservoir. *Cresto Aff.* ¶ 15.

The State's use of the term "legally available" pertains only to whether the water is legally available to be stored. The term does not pertain to whether there is any space in the Boise River Reservoirs that may be legally available. Obviously in order to store water in a reservoir there must be both legally available water and legally available space. Stated differently, the use of the term "legally available" as used by the State only looks to the body of law of competing property interests and the relative priority thereof and does not include the body of law governing the congressionally approved reservoir operating plan that has been developed and implemented by the Bureau of Reclamation, the Corps of Engineers, the State of Idaho, and the Boise River water users for over 60 years. Under the reservoir operating plan, water may not legally be stored in reservoir space during the time that such space is dedicated to flood control.

The Ditch Companies and the Boise Project, on the other hand, argue that the existing storage rights are not, and have not ever, been a right to capture and store water in reservoir space that cannot be utilized. Such space is required to be left vacant to capture runoff that would otherwise cause downstream flooding. The Boise River Reservoirs are operated for two purposes: (1) to store water - to be subsequently used for beneficial purposes - that is produced by the basin at a time when the supply exceeds the demand (i.e. the non-irrigation season which is generally November 1 through March 31); and (2) to prevent downstream flooding by means of forecasting runoff, maintaining adequate vacant space in the reservoirs as dictated by the rule curves of the Water

[4] This is the State's position on the merits of the question. The State's primary position is that the matters sought to be resolved in the summary judgment motion cannot be decided by the SRBA Court in the context of the above-captioned subcases, but rather the issues involved herein can only be resolved through an administrative proceeding before the Idaho Department of Water Resources.

Control Manual[5], and then using such vacant space to regulate reservoir releases below a level that is deemed to cause flooding.[6] The Ditch Companies and the Boise Project assert that water that is released from the reservoirs as required by the rule curves to maintain adequate vacant space - such water then flowing past the downstream diversion works and headgates of the various irrigation entities at a time of year when the water cannot be beneficially used - is not water that was stored pursuant to the "irrigation storage" components of the existing storage rights.

The position taken by the State appears to have its origins in the accounting system implemented for Boise River water rights by the Idaho Department of Water Resources in 1986. Under the 1986 accounting system, water entering the Boise River Reservoirs is calculated on a daily basis and then attributed to one of two different accounts, starting with the accounts for the respective existing storage rights, until the cumulative total of "legally and physically" available water equals the storage quantity specified in existing storage right licenses/decrees. *Cresto Aff.* ¶ 12. Thereafter, such daily "legally and physically" available inflows are attributed to an account denominated as "unaccounted for storage." *Id.*, ¶ 22. Unlike the accounts for the respective existing storage rights, the "unaccounted for storage" account has no limit regarding how much water may be attributed thereto. *Id.*

Prior to the implementation of the daily accounting system in 1986, the storage component of the existing storage rights was accounted for with an annual accounting that occurred when the reservoirs reach maximum physical fill. *Cresto Aff.* ¶ 18. The point in time at which the Boise River Reservoirs reach maximum physical fill varies from year to year and coincides with the point in time at which discharges are reduced to the amount of actual irrigation requirements (i.e. the rule curves require zero vacant space) and the inflows are providing no more water than is being demanded by the senior natural flow irrigation water rights of the Stewart and Bryan Decrees. For example, in 1970 maximum physical fill was determined to have occurred on June 30, and in 1971

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[5] Water Control Manual for Boise River Reservoirs, U.S. Army Corps of Engineers, Walla Walla District (April 1985), attached as Exhibit E to the *Affidavit of Robert J Sutter* (filed July 2, 2015).
[6] The flood control objective is defined as no more than 6,500 cfs at the Glenwood Gauge near Eagle Island.

maximum physical fill occurred on July 13. *Fifth Affidavit of Michael C. Orr*, Exs. 69, 72.

The State repeatedly argues that the only issue to be resolved regarding the above-captioned late claims is "whether the claimant actually applied the quantity of water claimed, to the claimed use, at the time and place claimed." *State of Idaho's Scheduling Proposal* (Oct. 10, 2014) at 6. The State argues that any other issue, and especially the issue raised by the Ditch Companies and the Boise Project regarding whether the claims are "necessary," cannot be answered in these proceedings. This Special Master disagrees.

The purpose of the claims filed by the Bureau and the Boise Project is simply to make sure that the water contained in the Boise River Reservoirs at the time of maximum physical fill (i.e. the water that is actually used during the irrigation season) is properly stored pursuant to a valid water right. Under the legal theory of the State, and under the legal theory set forth in the *Director's Report*, in a year in which water is passed through or released for purposes of keeping the vacant space in the Boise River Reservoirs in compliance with the rule curves of the Water Control Manual, some or all of the water therein contained at the time of maximum physical fill is not stored pursuant to any water right. The legal theory of the Ditch Companies and the Boise Project, on the other hand, is that the water contained in the Boise River Reservoirs at the time of maximum physical fill is the water stored pursuant to the existing storage rights and water that entered and was passed through or released prior to the time of maximum physical fill is not water stored pursuant to the existing storage rights. If the water contained in the Boise River Reservoirs at the time of maximum physical fill is stored pursuant to the existing storage rights, then the same water cannot form the basis of a claim under the Constitutional method of appropriation.

The question sought to be answered by the Ditch Companies and the Boise Project involves a question of law. The recommendation of disallowance in the *Director's Report* is based upon the conclusion of law that the water used for beneficial purposes in a flood control year is stored pursuant to historic practice rather than stored pursuant to the existing storage rights. The State argues that the question of what portion

of the total reservoir inflows in a flood control year is covered by the existing storage rights is purely a question of accounting which only the Director can answer. But the Director has already given his answer to this question in the *Director's Report*, and any party to the SRBA may challenge this legal conclusion by filing an objection to the *Director's Report*.[7]

For the reasons set forth herein, this Special Master finds and concludes that the view of the Ditch Companies, the Boise Project, and the Bureau is the correct view – i.e. the "irrigation storage" component of the existing storage rights is the right to store the water contained in the Boise River Reservoirs at the time of maximum physical fill. Because the above-captioned claims are for water that is stored subsequent to the satisfaction of the existing storage rights, and because there are no appreciable amounts stored after the date of maximum physical fill, this Special Master recommends that the water right claims be decreed disallowed.

The holding in this *Decision* is based upon one simple premise: The water that is beneficially used pursuant to the previously decreed water rights for the Boise River Reservoirs is the same water that is stored pursuant thereto. Stated differently, the right to beneficially use the water, and the ancillary right to accumulate and store the water until such time as it can be used, is the same right to the same water. To hold otherwise would result in two untenable propositions: (1) the water right holder, in a flood control year, necessarily has to breach its obligation to apply the "stored" water to its beneficial purpose; and (2) the water right holder has no protectable property right in the water that is accumulated in the Boise River Reservoirs (as the rule curves allow) that has historically been used for such beneficial purpose.

The priority date for the previously decreed water rights has significance only with respect to the right to capture and store water in the Boise River Reservoirs to be subsequently used for the intended beneficial uses. Once such water has been captured and stored pursuant to a valid water right, there is no competing demand by junior water rights with respect to the "irrigation (and other uses) from storage" component of the

[7]Actually, this Special Master knows of no reason why some person or entity who is not currently a party to these subcases would be foreclosed from challenging this legal issue in a motion to alter or amend pursuant to SRBA Administrative Order 1 (13).

right. Water stored in a reservoir pursuant to a valid water right is not available for use by other water rights, senior or junior, and hence it is not the priority date that protects the right to use such water; rather the priority date protects the right to capture and store such water. The priority date of a storage right protects the right to accumulate and store the water in the first place. The State's legal theory essentially makes the priority date meaningless in a flood control year. It is apparently not much comfort to the Bureau and the water users for the State to point out that the "excess flows" (according to the State's theory) have historically been made available to fulfill the "irrigation (and other uses) from storage" component of the existing storage rights. The point is, without the ability to capture water in the Boise River Reservoirs, under a protectable priority-based property right, and store such captured water until such time as the same may be used, the Bureau and the water users are left with little to no means to ensure that the water historically used for beneficial purposes can continue to be used into the future.

B. State of Idaho's Cross-Motion for Summary Judgment.

In the Ditch Companies' *Response in Opposition to the State of Idaho's Cross-Motion for Summary Judgment*, the Ditch Companies succinctly state the difference between the competing motions for summary judgment:

> There are two basic questions now pending before the Court on summary judgment in this matter – (1) that posed by the Ditch Companies and the Boise Project []: Are the pending late claims necessary or do the existing storage rights authorize filling of the reservoirs after flood control releases?; and (2) that posed by the State of Idaho: Are the pending late claims supportable/provable if they are deemed necessary? The State's Cross Motion goes to the merits of the late claims themselves, while the Ditch Companies' and Boise Project's prior Motion for Summary Judgment [] addresses the threshold legal question concerning the impact, if any, flood control releases has upon the existing storage rights; a question posed in an effort to determine if the late claims are needed.

Id., at 1. Stated differently, the Ditch Companies and the Boise Project are seeking a judicial determination that the water that is beneficially used under the "irrigation from storage" component of the existing storage rights is the same water that is stored pursuant to the "irrigation storage" component (i.e. the water that is physically in the reservoirs at

the time of maximum physical fill), and hence such water, having been stored pursuant to the existing storage rights, cannot form the basis of the above-captioned claims (i.e. the claims are not necessary). The State and United Water, on the other hand, argue that in a flood control year, where inflows are assigned to the "unaccounted for storage" account, the water that was stored pursuant to the existing storage rights, in an amount equal to the "unaccounted for storage," is released from Lucky Peak and sent down the Boise River at a time of year when it cannot be used under the "irrigation from storage" components of the existing storage rights; and subsequently, the water that is in the reservoirs at the time of maximum physical fill, which is the water that is beneficially used pursuant to the "irrigation from storage" component of the existing storage rights, is unappropriated water to which the Bureau and the water users have no property interest. The State's *Cross-Motion for Summary Judgment* seeks a judicial determination that the Bureau and the water users have not appropriated this "unaccounted for storage" water under the Constitutional method of appropriation prior to the date this method expired in 1971.

For the reason that the Ditch Companies' and Boise Project's motions for summary judgement are herein granted, the issues raised by the State and United Water regarding whether the "post paper-fill" water has been appropriated under the Constitutional method of appropriation become moot and therefore will not be addressed (See Section VII. below).

IV. THE DIRECTOR'S REPORT

The *Director's Report* for the above-captioned claims recommends that the claims be disallowed and states the reason for disallowance as follows:

> The use of floodwaters captured in evacuated flood control space in on-stream reservoirs in Basin 63 for irrigation and other beneficial purposes is a historical practice. The Department recommends that the historical practice be recognized by the SRBA through a general provision.

Director's Report for Late Claims, filed December 31, 2013. By statute, a director's report constitutes *prima facie* evidence of the nature and extent of a water right acquired under state law and therefore constitutes a rebuttable evidentiary presumption. I.C. § 42-1411 (4)-(5); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-746, 947

P.2d 409, 418 (1997). The objecting party has the burden of going forward with evidence to rebut the director's report as to all issues raised by the objection. I.C. § 42-1411 (5).

The *Director's Report* for the above-captioned claims directly provides two things: (1) an ultimate conclusion (that the claims should be disallowed); and (2) the reason for disallowance being that the water claimed is not appropriable because it has been stored pursuant to "historic practice." Indirectly, the following can be inferred from the *Director's Report*: (1) that water has been and is captured in the Boise River Reservoirs following flood control releases; (2) that such water has been and is put to beneficial use; and (3) that in a flood control year, all or part of the water in the Boise River Reservoirs at the time of maximum physical fill is water that is lawfully stored and beneficially used pursuant to "historical practice."

The phrase "historic practice" under Idaho law is a term of art. *In State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998), the Idaho Supreme Court held that under circumstances of long-standing historical practice, so-called "excess" water may be lawfully used, but there is no property right for the use of such water. The Court further held that the lawful "extra-water right" use of such water may be recognized in a general provision if necessary for the efficient administration of water rights. *Id.*, at 334-335.

With regard to the legal authorization to store the water that ends up in the Boise River Reservoirs at the time of maximum physical fill, there are three possibilities presented in these subcases. Such water is either: (1) "historical practice" water (as recommended by the Director); (2) water appropriated under the Constitutional method (which is what is claimed in the above-captioned claims); or (3) "existing storage right" water (as asserted by the Ditch Companies and the Boise Project in their *Motions for Summary Judgment*). The rebuttable presumption set forth in the *Director's Report* is that, in a flood control year, the water in the Boise River Reservoirs at the time of maximum physical fill is "historical practice" water (or some combination of "historic practice" water and "existing storage right" water if less than all of the water initially stored under the existing storage rights is released to maintain vacant flood control space). The inference of that presumption is that the water in the Boise River Reservoirs

at the time of maximum physical fill is neither "existing storage right" water nor "Constitutional method" water. The objecting parties (the Bureau, the Ditch Companies and the Boise Project) have the burden of going forward with evidence to rebut the presumption in the *Director's Report*.[8]

Based upon the file and record herein, and as explained in this *Decision*, this Special Master finds and concludes that the water that is contained in the Boise River Reservoirs at the time of maximum physical fill is water that is authorized to be stored under the existing storage rights. Accordingly, because none of the water contained in the Boise River Reservoirs at the time of maximum physical fill could have been appropriated under the Constitutional method of appropriation, the above-captioned late claims should be decreed disallowed.

V. STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment must be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, a summary judgment motion is typically denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho at 272, 869 P.2d at 1367.

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[8] The *prima facie* presumption of correctness of the Director's Report is applied to the facts contained therein. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 746, 947 P.2d 400 (1997). The conclusion in the Director's Report that "historic practice" provides the authorization to store water in the Boise River Reservoirs following flood control releases is not a determination of fact but rather it is a legal conclusion. This Special Master is not aware of any legal authority under which a legal conclusion by the Idaho Department of Water Resources is presumed to be correct.

However, these standards differ where cases, such as this one, are tried to courts in the absence of a jury. See, e.g., *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008) (citations omitted). In those instances, the court as the trier of fact need not draw inferences in favor of the non-moving party; and the court is free to draw its own "most probable" conclusions in the face of conflicting facts. *Id.* ("[W]here the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. When an action is to 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 but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.").

VI. ANALYSIS OF DITCH COMPANIES' AND BOISE PROJECT'S MOTIONS FOR SUMMARY JUDGMENT

A. The Quantity Element of the Existing Storage Rights Cannot be Exceeded.

United Water and the State argue that the Ditch Companies and the Boise Project claim the right to store all water that enters the reservoir and is legally available to store (what United Water calls "storable inflow") thereby obtaining the full quantity of the existing storage rights and then, after such water is released for the purpose of complying with the rule curves of the Water Control Manual, to refill the reservoir under the existing storage rights. *United Water's Brief in Opposition* at 28-29. Simply stated, United Water and the State are arguing that the amount of water that can be stored under the existing storage rights is limited by the quantity element of the existing storage rights and that the Ditch Companies and the Boise Project are seeking to exceed the quantity elements of the existing storage rights.

United Water and the State are correct in their assertion that the quantity element of the existing storage right cannot be exceeded for water that is stored pursuant to such

rights. The problem with their argument, however, is that they are building a "straw-man" contention and attributing it to the Ditch Companies and the Boise Project. The Ditch Companies and the Boise Project do not contend that the quantity element of the existing storage rights can be exceeded for water stored thereunder. Rather they simply contend that the water that is stored pursuant to the existing storage rights is the water that is physically in the Boise River Reservoirs[9] at the time of maximum physical fill. Stated differently, the Ditch Companies and the Boise Project do not claim that the existing storage rights allow the capture and storage (and release) of all "storable inflow" for purposes of filling the existing storage rights and thereafter the capture and storage of all remaining flows for purposes of filling the reservoir.

1. The Basis of the State's Argument that the Existing Storage Rights are for all "Physically and Legally" Available Water.

The basis of the State's contention that all "physically and legally" available inflow counts toward the existing storage rights (whether it can be stored or not) apparently stems from the accounting procedures used by the Idaho Department of Water Resources since 1986. A detailed description of those accounting procedures is set forth in a *Memorandum* authored by Elizabeth Cresto, Technical Hydrologist for the Idaho Department of Water Resources, dated November 4, 2014, and attached as Exhibit "C" to the *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) ("*Cresto Memo*"). The Boise River system of diversions, storage, measurement, and water rights is highly complex, and the accounting system utilized by the Boise River Watermaster and the Idaho Department of Water Resources to keep track of it all is commensurately complicated. With respect to the three on-stream Boise River Reservoirs, accounting of the water that is attributable to the existing storage rights is even more complicated by the fact that the volume of water that passes through the reservoir points of diversion (i.e. the dams) is typically greater than both the annual volume limitation for the existing storage rights and the physical capacity of the reservoirs. These differences are succinctly stated by Robert

[9] Recognizing that reservoir operations allow the cross-storage of water within the reservoir system.

J. Sutter, former Water Resource Engineer, Hydrology Section, Idaho Department of Water Resources:

> The water right accounting program was designed to account for all Boise River diversions whether the diversion is an instream dam, or a canal, or other riverbank-side diversion (to which we referred as "direct diversions" in the Water Control Manual). However, additional accounting procedures were required to properly account for several distinguishing characteristics of the storage water in the Boise River Reservoirs. It can be assumed that all water diverted by a direct diversion is diverted for beneficial use pursuant to the water rights(s) for that diversion. This assumption does not apply to the Boise River Reservoirs because: (1) they have no diversion works to limit inflows to the volumes of water they store for beneficial use; (2) they have insufficient capacity to store the full volumes of inflows they receive during most years; (3) they are not allowed to store inflows that must be released to maintain flood control spaces; and (4) natural flows pass through the reservoirs during the irrigation season for downstream diversions with earlier priority water rights. Consequently, the accounting system cannot ultimately treat all reservoir inflows as physically stored for beneficial use. We recognized that, during flood control operations, the water right accounting program accrued to storage water rights inflows that could not be physically stored during flood control operations, and showed the reservoirs as full on paper when vacant flood control spaces continued to be maintained pursuant to the Water Control Manual's rule curves.

Affidavit of Robert J. Sutter (filed July 2, 2015) ¶ 19. For the reason that more water passes through the Boise River Reservoirs than can be stored, the accounting system implemented in 1986 set up two separate accounts for each reservoir to which inflows could be allocated: (1) an account for each of the respective existing storage rights; and (2) accounts denominated as "unaccounted for storage." Because reservoir inflows are measured/calculated and attributed to one of these accounts on a daily basis, such inflows necessarily have to be first attributed to the accounts for the existing storage rights. This is because the respective existing storage right accounts are limited by the annual volume of the water rights, whereas the "unaccounted for storage" account is unlimited. If water were attributed to the "unaccounted for storage" account first, there is nothing that would trip the accounting system to begin filling the existing storage right account. In order for the accounting system to recognize the water in the reservoir at the time of maximum physical fill as "existing storage right" water, and any water that

previously entered and exited the reservoir as "unaccounted for storage," the daily measurements would have to be attributed to the appropriate accounts retrospectively on or after the time of maximum physical fill.

The record in these subcases demonstrates that although the water right accounting system allocates inflows first to the existing storage rights and thereafter to the "unaccounted for storage" account, there is also an accounting adjustment made after maximum physical fill to reallocate the accounts to reflect that the water that is ultimately retained in the reservoirs is the "existing storage right" water that will be used for its intended beneficial purpose. Engineer Sutter explains it this way:

> No change in reservoir operations, in reservoir refill, or in water right administration resulted from the paper fill methodology of the accounting program. Reservoir inflows were not required to be released, and the water actually stored in the reservoirs was not allocated to storage water rights at the point of paper fill. Physical refill of storage spaces and storage water rights continued as required by to [sic] the Water Control Manual's runoff forecast, rule curve and release procedures. For accounting purposes, paper fill is more accurately understood to be a benchmark establishing that the reservoir water rights are entitled to be physically filled by subsequent reservoir inflows.
>
> The net effect of this accounting procedure is to accrue to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecast and rule curve procedures of the Water Control Manual. After maximum reservoir fill, the water physically stored in the reservoirs, including the "unaccounted for storage," is allocated to reservoir storage rights, and then to spaceholders with contract-based storage entitlements by the storage allocation program. The storage allocations are input into the water right accounting program. This point in the accounting procedure at which stored water is allocated to storage water rights is referred to as the "day of allocation." These allocations become the basis for the accounting of storage water right use during the irrigation season. The Watermaster is informed of the allocations, and he in turn informs the storage right holders of the amount of storage that is available to them for ensuring [sic] irrigation season.

Id., ¶¶ 20-21 (emphasis added). As explained above by Engineer Sutter, in years when more water enters the reservoirs than can be retained therein, there is a period of time during the year where the accounting system considers the existing storage rights to be filled and subsequent inflows are attributed to the "unaccounted for storage" account.

However, this period of time ends on the day of allocation[10] when "the water physically stored in the reservoirs, including the 'unaccounted for storage,' is allocated to reservoir storage rights." *Id.* The differentiation between "existing storage right" water and "unaccounted for storage" water does not continue past the day of allocation. This process provides the retrospective accounting necessary for the accounting system to recognize that the water that is put to beneficial use is the water that is physically stored in the reservoir on the day of maximum physical fill; such retrospective accounting being necessary under a system that accounts daily for inflows and necessarily attributes them first to the existing storage rights and next to the "unaccounted for storage" account.

The State relies on the accounting system to demonstrate that the existing storage rights are for the "legally and physically" available water that first enters the reservoirs. Another way of stating this argument is that the accounting system defines the existing storage water rights. It does not. But even if the accounting system defines the existing storage water rights, the State's analysis ignores a very important part of the accounting system – i.e. on the day of allocation the "unaccounted for storage" water is considered to be "existing storage right" water and then first allocated to the existing storage water rights and then to the individual spaceholders accordingly. At the end of this annual accounting system, on the day of allocation, water that is accounted for as "existing storage right" water does not exceed the annual volume of the respective existing storage rights.

[10] It should be noted that the term "allocate" as used by Engineer Sutter describes two separate accounting processes. One is the "allocation" of inflows and/or stored water to the respective water accounts (i.e. "existing storage right" or "unaccounted for storage"); and secondly the term is used to describe the process of allocating the water stored in the reservoirs (whatever amount that may be) to the respective spaceholders. It should also be noted that the spaceholder allocation process does not provide a partial allocation to the spaceholders of "existing storage right" water (if any) and another allocation of "unaccounted for storage" water. Rather the water physically stored in the reservoirs is all treated as "existing storage right" water and allocated to spaceholders accordingly.

2. The Basis of United Water's Argument that the Existing Storage Rights are for all "Physically and Legally" Available Water.

United Water also asserts that all "storable inflow"[11] counts towards the existing storage rights irrespective of whether such inflow can be stored or must be released/bypassed for flood control or other purposes. United Water bases this argument on one of the fundamental premises of the prior appropriation doctrine, i.e that junior appropriators are protected from wrongful or wasteful acts by seniors. *United Water's Brief in Opposition* at 28, citing *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907).

United Water's argument is likely correct when applied to a hypothetical situation involving a reservoir operated for the sole purpose of water storage. But with respect to the Boise River Reservoirs, which are operated under a legal obligation to use reservoir space to regulate downstream flows to prevent flooding, United Water's argument is misplaced. In a hypothetical situation involving a "storage only" reservoir operation, it seems unlikely that Idaho law would allow the reservoir operator to voluntarily release or bypass otherwise storable inflow (for whatever reason) during a time of year when there is no demand for it by juniors and subsequently store water at a time when juniors could use such water. In such a situation, the voluntary action of the reservoir operator (even if such voluntary action was for the purpose of flood control) would injure the hypothetical juniors and would likely not be permitted under Idaho law. However, this hypothetical scenario is inapplicable to the Boise River Reservoirs. The Bureau and the Corps of Engineers are legally obligated to operate the Boise River Reservoirs for flood control purposes. The effect of this is that available storage capacity of the Boise River Reservoirs is not fixed but rather it fluctuates in accordance with the rule curves of the Water Control Manual. Reservoir space that must be left vacant for flood control operations cannot be used during such times, and the failure to store water in this unavailable space cannot be considered as a wrongful or wasteful act.

B. The Issue Sought to be Resolved in the Ditch Companies' Motion for Summary Judgment is not Precluded by the Holding in Basin-Wide Issue 17.

The State argues the issue raised by the Ditch Companies and the Boise Project in their *Motions for Summary Judgment* cannot be resolved in the SRBA for the reason that the answer to the question is solely a matter of accounting which is an administrative function of the Idaho Department of Water Resources. In other words, the State asserts that the ongoing process of accounting by the Idaho Department of Water Resources is determinative of what portions of the annual inflows to the Boise River Reservoirs are stored under the existing water rights and what portions are not; and therefore, the holding in Basin-Wide Issue 17 precludes the SRBA from addressing the issue posed by the Ditch Companies and the Boise Project. For the reasons set forth below, this Special Master determines that the SRBA Court is not so precluded.

There are two separate matters involved in determining when a water right has been satisfied, and the State's argument conflates these two separate matters into one. One of these matters involves a one-time determination of the legal description of the property at issue (in this case the existing storage rights). The other of these matters involves the on-going accounting of flowing water within the constructs of the legal descriptions of the water rights being accounted.

In its decision in Basin-Wide Issue 17, the Idaho Supreme Court stated that the question of when a storage right is filled is a mixed question of law and fact. *In re SRBA*, 157 Idaho 385, 392, 336 P.3d. 792, 799 (2014). The first of these matters (i.e. determining "what is the property?") is the question of law portion of the question. The second of these matters (i.e. the application of accounting to the described property) is the question of fact portion of the question. The *Motions for Summary Judgment* brought by the Ditch Companies and the Boise Project seek only an answer to the first part of the mixed question – what is the property? The nature of the property at issue does not change in relation to the accounting methodology used by the Idaho Department of Water Resources to administer the Boise River water rights according to their relative priorities.

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[11] United Water uses the term "storable inflow" to describe the same concept as what the State calls "legally and physically" available inflows. *United Water's Brief in Opposition* at 26, citing the *Cresto Memo*, p. 6.

The accounting of the Boise River water rights, including the existing storage rights, happens on a daily basis, year in and year out, and involves complicated measurements and calculations. There is no dispute among the parties that this accounting is solely a function of the Idaho Department of Water Resources, reviewable by a court only after having exhausted administrative remedies. The Ditch Companies and the Boise Project are not challenging the accounting side of the mixed question of law and fact. Rather they are simply stating, correctly, that the legal descriptions of the existing storage rights do not describe what portion of the total inflows is authorized to be stored under those rights.

This question does not occur regarding the vast majority of water rights licensed by the Idaho Department of Water Resources or decreed in the SRBA which divert water out of the natural channel. The reason for this is succinctly stated by Engineer Sutter:

> It can be assumed that all water diverted by a direct diversion [meaning a canal or other riverbank-side diversion] is diverted for beneficial use pursuant to the water rights(s) for that diversion. This assumption does not apply to the Boise River Reservoirs because (1) they have no diversion works to limit inflows to the volumes of water they store for beneficial use; (2) they have insufficient capacity to store the full volumes of inflows they receive during most years; (3) they are not allowed to store inflows that must be released to maintain flood control spaces; and (4) natural flows pass through the reservoirs during the irrigation season for downstream diversions with earlier priority water rights.

Affidavit of Robert J. Sutter (filed July 2, 2015) ¶ 19 (emphasis added). Unlike most diversion works, the diversion works for the Boise River Reservoirs do not divert water out of the natural channel; and therefore, the water that passes through the Boise River Reservoirs and dams consists of water that is authorized to be stored pursuant to the existing storage rights and water that is not authorized to be stored pursuant to the existing storage rights. There are two categories of water that flow into the Boise River Reservoirs that cannot be stored under the existing storage rights. One category is water that must be passed through the Boise River Reservoirs for senior downstream diversions. There is no dispute in these subcases regarding this category of water. The legal descriptions of the existing storage rights and the legal descriptions of the senior downstream diversion (i.e. the relative priority dates) provide the framework for the

Idaho Department of Water Resources to account for and administer this category of water that cannot be stored pursuant to the existing storage rights. It is the second category of water that is in dispute – inflows that exceed the annual volume limitation of the existing storage rights. The ***Partial Decrees*** for the existing storage rights do not provide a description of what portion of such water is to be considered stored under the existing storage rights and what portion is not to be so considered.

The above-captioned claims are to this second category of water that cannot be stored pursuant to the existing storage rights. However, the Ditch Companies and the Boise Project are not interested in having a water right to store water that cannot be beneficially used – i.e. the water that must be released pursuant to the rule curves during a time of year when there is no irrigation demand for such water. Rather the Ditch Companies and the Boise Project desire to make sure that the Bureau has water rights to store the water that can actually be used – i.e. the water in the Boise River Reservoirs at the time of maximum physical fill. If the existing storage rights authorize the storage of water that cannot be used, then the above-captioned claims seek judicial recognition of the right to store the water that can be used. But proceeding further down the path toward such judicial recognition makes no sense if the existing storage rights already authorize the storage of water that can be, has been, and is beneficially used. The possible result of failing to ascertain the answer to this question is the issuance of duplicative water right decrees.

The answer to this question cannot be found through an examination of the IDWR's accounting methodologies. That being said, the factual history regarding the accounting of the existing storage rights is relevant in determining what portion of the inflows the parties have historically viewed as being storable under the existing storage rights. All of the parties to the usufructory and ancillary components of the existing storage rights are parties to these subcases – the water users who use the water, the Bureau who stores the water, and the State who owns the water. In addition, the Idaho Department of Water Resources has filed its *Director's Report* which sets forth its current understanding of what inflows are storable under the existing storage rights. The record in these subcases demonstrates that historically all of these entities viewed the

existing storage rights as authorizing the storage of the water that is actually used – i.e. the water in the Boise River Reservoirs at the time of maximum physical fill[12] (See Section VI. C. below). Again, the issues as to "what is the property?" and "how to account for the property?" are not the same. The accounting is left to the Idaho Department of Water Resources, but a determination of "what is the property?" is answerable by the SRBA Court and making such a determination is compatible with the holding in Basin-Wide Issue 17. The historical accounting, both before and after 1986, is relevant only to the extent that it sheds light on the answer to the question of "what is the property?"

C. The Water that is Stored Pursuant to the Existing Storage Rights is the Water that is Physically Stored in the Reservoirs at the Time the Reservoirs Reach Maximum Physical Fill.

The record in these subcases clearly demonstrates the undisputed fact that the existing storage rights were historically considered satisfied at the point in time that the reservoirs reached maximum physical fill, which typically occurred sometime in June or July. The point in time that the reservoirs reached maximum physical fill is closely associated with what is referred to as the day of allocation. In his *Affidavit*, Boise Project Board of Control Project Manager Tim Page describes the day of allocation:

> The final allocation of water to the storage rights, including the rights held by the Boise Project districts in Anderson Ranch and Arrowrock storage, occurs on the day of allocation. That is the day the reservoirs reached maximum physical fill and senior irrigation demand equals or exceeds inflow into the reservoirs and there is no more water available to put into storage. All water that is coming into the river, including the reservoirs, after the day of allocation is water necessary to meet the demands of the natural flow users. On the day of allocation, the physical contents of the reservoirs is fixed.

Affidavit of Tim Page (filed July 2, 2015) ¶ 7. The historical methodology of accounting for accruals to the Boise River Reservoir existing storage rights at the time of maximum physical fill is succinctly stated in the *Memorandum* authored by Elizabeth Cresto, IDWR

[12] The current view of the IDWR and the State appears to be a more recent development.

Technical Hydrologist, dated November 4, 2014, and attached as Exhibit "C" to the *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015). Therein Hydrologist Cresto states:

> Prior to implementation of water rights accounting [in 1986], the watermaster in Water District 63 used hand calculations to distribute water to water right holders in priority. In general, there was a reservoir accrual season (November 1 to April 1, non-regulation season) and an irrigation season (April 1 to October 31, regulation season). Water was distributed according to priorities on a daily basis only during the irrigation season. Accruals to reservoir water rights were not determined on daily but rather on the date of maximum total reservoir fill[6]. The bureau determined the fill of the reservoir rights. On the date of maximum fill, storage was assigned to the most senior right first. Arrowrock received the first allocation up to 100% of its right, the remainder was assigned to Anderson Ranch up to 100% of its right, and any remaining storage was assigned to the Lucky Peak right. Under this scenario, an upstream reservoir could have been credited for natural flow that arose below the reservoir.
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> [fn 6] Memorandum May 3, 1977 To: RO 100, 700, 760 Project Superintendent, SCPO, Boise, Idaho From: 761 Subject: New Method Adopted for Allocation of Boise System Storage.

Id., Ex. C, p. 12. (emphasis added) (cited Memorandum is in the record as Ex. 89 to the *Fifth Affidavit of Michael C. Orr* (filed July 31, 2015)). The *Affidavit of Robert J. Sutter* provides further evidence regarding the determination that the water stored in the reservoir system at the point of maximum physical fill is water stored pursuant to the existing storage rights:

> Reservoir Operations Overview. The average annual volume of inflows into the reservoir system from snowmelt runoff and precipitation exceeds the collective capacity of the Boise River Reservoirs. During high runoff years, inflows from runoff can be two to three times the reservoir capacity. If all reservoir inflows were to be retained in storage to fill the reservoir system in high runoff years, spring runoff could not be controlled, and downstream flooding would occur. A reservoir operating plan has been in effect since 1953 to regulate mainstem Boise River flows to prevent flooding along the Boise River. The plan was revised in 1985 through the development and adoption of the Water Control Manual by the United States Corps of Engineers ("USCE"), the United States Bureau of Reclamation ("USBR") and IDWR. The Boise River flood control plan involves: (1) forecasting the timing and volume of inflows from runoff

into the Boise River Reservoirs ("runoff forecasts"); (2) estimating the volume of reservoir system space that must remain vacant prior to and during the spring runoff period in order to capture inflows and control releases ("flood control space") as established by "rule curves"; and (3) scheduling releases from Lucky Peak Dam to maintain required flood control spaces and not exceed the established flood control objective of 6,500 cfs in the vicinity of the City of Boise ("flood control objective"). Because the reservoir system stores water for irrigation and other uses during the spring runoff season, the reservoir operating plan is also designed to ensure that the reservoirs will be filled during flood control operations to store water pursuant to established rights. Joint operation of the reservoir system for flood control and beneficial use storage is accomplished through the use of the runoff forecasts, rule curves, and scheduled reservoir releases. Under the reservoir operating plan, as forecasted inflows decline, less flood control space is required, and inflows are increasingly retained and added to reservoir contents until the danger of flooding had passed and the reservoirs are filled or nearly filled. After the flood risk has passed, the water stored in the reservoir system at the point of maximum fill is allocated among the reservoir storage water rights according to their priorities, and is available for delivery to those who are entitled to use the stored water for irrigation and other beneficial uses.

Storage Water Right accrual During Flood Control Operations. Water cannot be stored in Boise River Reservoir space that is required to be vacant during flood control operations. Reservoir inflows that must be released to maintain required flood control spaces are therefore not available to physically fill storage space. Reservoir space becomes available for physical storage only as flood control space requirements decline in accordance with the established reservoir operating plan. Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled.

Storage Water Right Accounting During Flood Control Operations. A computerized system was developed and adapted in 1986 by myself and the IDWR Hydrology Section Manager Alan Robertson, with the assistance of other IDWR staff, to account for the distribution of water to Boise River water rights and to reservoir storage spaceholders. The accounting system did not alter the above-described principles or the accrual of water to storage pursuant to the reservoir operating plan of the Water Control Manual.

Affidavit of Robert J. Sutter (filed July 2, 2015) ¶¶ 4-6 (emphasis added). The statements in the record of former Boise River Watermaster Lee Sisco (Watermaster from 1986 to

2008) further confirm that the water physically in the Boise River Reservoirs at the time of maximum physical fill is "existing storage right" water. In his *Affidavit*, Mr. Sisco states:

> No IDWR employee ever suggested to me that storage water rights were 'satisfied,' at the point of paper fill, that storage after paper fill occurred without a water right, that the storage rights were no longer in effect or in priority after the point of paper fill, or that junior rights were entitled to call for release of water from the reservoir prior to maximum physical fill.

Affidavit of Lee Sisco (filed July 2, 2015) ¶ 32. Mr. Sisco also explains how he was trained by his predecessor Henry Koelling.

> [Mr. Koelling] calculated the change in reservoir system contents by subtracting the measured Lucky Peak outflow from the total natural inflow to the reservoir system. If the total natural inflow exceeded outflow, increasing reservoir contents, Mr. Koelling allocated the increase in natural flow to the most senior reservoir right that had not been filled. If outflows exceeded inflows, decreasing reservoir contents, Mr. Koelling reduced the daily allocation of natural flow to the reservoir storage rights accordingly. This analysis enabled the Watermaster, and Bureau and the Boise Project staff to monitor the status of the filling of the storage rights. As explained in paragraph 15 of my first [July 2, 2015] affidavit, <u>at the point of maximum reservoir fill, Mr. Koelling allocated the total combined volume of water that was physically stored in the Boise River Reservoirs to the reservoir storage rights on the basis of their priorities</u>.

Second Affidavit of Lee Sisco (filed August 25, 2015) ¶ 5.[13] In addition to the Bureau, the Idaho Department of Water Resources, and the Watermasters, the water users similarly considered the water in the Boise River Reservoirs at the time of maximum physical fill to be water stored under the existing storage rights. For example, Paul Lloyd Akins, who sits on the Board of Directors of the Farmers Union Ditch Company and farms land served by the Farmers Union canal, states:

> Because in years of flood control releases the Boise River basin had more water available than the reservoir system could hold, Farmers Union

[13] In describing the pre-1986 accounting methodology, the *Cresto Memo* at page 12 states: "Accruals to reservoir water rights were not determined daily [during the non-irrigation season] but rather on the date of maximum total reservoir fill." While Mr. Sisco's description of the pre-1986 accounting methodology differs from Ms. Cresto's description regarding daily accounting during the non-irrigation season, they both agree that the pre-1986 accounting methodology determined existing storage right accruals / allocations at the time of maximum physical fill. The factual discrepancy regarding daily accounting is not material to resolution of the issues presented on summary judgment.

> would expect our full complement of storage water to be available . . . . It was only in years of low snow pack that Farmers Union was concerned over not filling our storage rights. Generally if snow pack produced enough runoff to require flood control releases, Farmers Union would expect its storage rights would be filled after the releases. Farmers Union never believed that in years which the Boise River basin had an overabundance of snow pack and water supply that we could possibly not have fully filled our storage water rights.

Affidavit of Paul Lloyd Akins (filed July 2, 2015) ¶ 4. Another example comes from Boise Project Board of Control Project Manager Tim Page. Mr. Page states:

> No one from the Department of Water Resources, nor the District 63 Watermaster, nor any predecessors of mine ever told me that the [irrigation] districts [Boise Kuna, Big Bend, Nampa & Meridian, New York, and Wilder] have no water right for filling the reservoirs following flood control releases . . . .

Affidavit of Tim Page (filed July 2, 2015) ¶ 12. Former Boise Project Board of Control Project Manager Ken Henley similarly states:

> At no time during my tenure with the Boise Project, including during the roll out of the [1985] water control manual was I or the Boise Project ever told that the storage accounts would be satisfied by counting water that had been released for flood control. To the contrary, I and the Boise Project always understood that the water control manual procedures were designed to ensure that storage water would be physically available to the districts' storage water rights following flood control releases as had always been done.

Affidavit of Ken Henley (filed July 2, 2015) ¶ 5. Yet another example is from retired Nampa & Meridian Irrigation District Water Superintendent John P. Anderson who states:

> During my 30-plus years of experience in delivering water to NMID's landowners, as well as my experience as Assistant Boise River Watermaster, I was never informed by another spaceholder, the Boise River Watermaster, my predecessors at NMID or any IDWR employee that: (a) water that was released from the Boise River Reservoirs for flood control purposes was a release of water that had been stored for beneficial use pursuant to a storage water right; (b) water was stored in the Boise River Reservoirs following flood control releases without a water right; or (c) that junior water users were entitled to call for the delivery of water

> that was necessary to fill the Boise River Reservoirs following flood control releases.

Affidavit of John P. Anderson (filed July 2, 2015) ¶ 10. Another example is from Pioneer Irrigation District Superintendent and Assistant Water District 63 Watermaster Mark Zirschky who states:

> It is my understanding, as district Superintendent and as Assistant Boise River Watermaster, that water physically stored after flood control releases by the BOR and the Corps is stored under the BOR's existing storage water rights. During my 23 years of experience with Pioneer, and my 2 years to date as Assistant Boise River Watermaster, I have never been informed by the BOR, IDWR, the Watermaster, or any other Reservoir spaceholder that: (a) water released from, or passed through, the Reservoirs for flood control purposes is debited from spaceholder storage accounts; (b) water stored in the Reservoirs after flood control releases is stored without a valid water right; or (c) that junior water users are entitled to the delivery of post-flood control release Reservoir inflows that are otherwise needed to physically fill the storage spaces evacuated or left open to perform flood control operations. To the contrary, it is my understanding as District Superintendent and Assistant Boise River Watermaster that while junior water users sometimes divert water in the same time period during which the Reservoirs are filling post flood-control releases, those junior diversions are coincidental because Reservoir filling occurs based on "rule curves" in a stepped/gradual fashion. I have not experienced a situation where water has been passed through or released to supply water to junior users when that water was needed to fill the Reservoirs after flood control releases.

Affidavit of Mark Zirschky (filed July 2, 2015) ¶ 14. The undisputed facts in the record indicate that the water stored in the Boise River Reservoirs at the time of maximum physical fill has historically been considered by the Bureau, the Idaho Department of Water Resources, the watermasters, and the water users as having been stored pursuant to the existing storage rights. Given that the annual quantity element of the existing storage rights cannot be exceeded, the inescapable conclusion is that water that is released / bypassed for purposes of maintaining vacant flood control space in the Boise River Reservoirs is <u>not</u> water stored pursuant to the existing storage rights (although it temporarily may be designated as such under the 1986 accounting system during the course of the non-irrigation season).

D. The Water contained in the Reservoirs at the Time of Maximum Physical Fill is not Excess Water to which no Property Interest may Attach; Rather it is the Property of the Bureau of Reclamation.[14]

In years that the amount of water produced in the Boise River drainage upstream from the Boise River Reservoirs exceeds the volume of water that may be stored under the existing storage rights, such excess water must necessarily be released downstream during the non-irrigation season with no beneficial use being made thereof. If the Boise River Reservoirs did not have a flood control function and were operated for the sole objective of irrigation storage, the reservoirs could be filled as early in the non-irrigation season as possible; and once filled any additional water could be released at the same rate it comes in (without regard to downstream flooding that could otherwise be prevented). If such were the case, the water that would ultimately end up in the reservoirs – i.e. the water that is put to the beneficial use of irrigating crops – would be the water that first entered the reservoirs during the non-irrigation season. However, such is not the case.

The Boise River Reservoirs are operated for both flood control and irrigation (and other) storage. As such, the amount of water that the drainage will produce must be forecasted in advance, and sufficient vacant space must left in the reservoirs so as to regulate the downstream flows to meet the flood control objective. Because of this, the reservoirs typically cannot be filled early in the non-irrigation season; rather the timing of the fill is intended to coincide with the point in time when the rule curves of the Water Control Manual require zero vacant space and with the time when the senior natural flow rights (i.e. Stewart and Bryan Decree rights) preclude any further reservoir fill. The result of this dual-purpose operating regime is that the water that ultimately ends up in the Boise River Reservoirs, to be released downstream to meet the demand for beneficial use, is not the first water that first entered the reservoirs; rather it is the water that last entered.

The State's and United Water's theory of the existing storage rights is that the property interest represented by the decrees for the existing storage rights is for the water that first enters the reservoirs irrespective of whether such water can be stored or must be

[14] Subject to the water users' beneficial interest as stated on the ***Partial Decrees*** for the existing storage

released to maintain the vacant space as dictated by the rule curves of the Water Control Manual. The State and United Water go on to assert that any water that is captured in the reservoirs that replaces the water so released is not held pursuant to a property right, but rather it is excess water to which no property interest may attach. (This is essentially the same as the legal conclusion set forth in the *Director's Report* that "historic practice" authorizes the storage of water following flood control releases.) The result of the State's and United Water's theory is that some or all of water that is purportedly stored under the Bureau's property right is passed downstream at a time of year when no beneficial use can be made thereof and the water that is subsequently captured and then released downstream to satisfy irrigation demand is water that was not stored pursuant to a property right.

Water rights are usufructory property rights. The term "usufruct" means the right of the use of a thing (e.g. water) and the right to that which may be produced by the thing, while the physical ownership of the thing is vested in another (in Idaho water is property of the state, I.C. § 42-101), so long as such use does not destroy or injure the thing. The origin of the word "usufruct" is from the Latin words for "use" (usus) and "fruit" (fructus). The storage of water is not a usufructory right in and of itself, i.e. storage is not an independent beneficial use, nor does it produce anything. Rather storage is ancillary to a beneficial use. As such, stored water is the property of the appropriator who is under a legal obligation to apply such stored water to a beneficial use. *Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935).

Under the State's legal theory, the water that first enters the reservoir is stored pursuant to the existing storage right and as such, it becomes the property of the Bureau, impressed with the obligation to apply such water to a beneficial use. But the Bureau cannot satisfy this obligation with respect to any water that cannot be stored or must be released (for purposes of maintaining vacant reservoir space) before it can be beneficially used. The next part of the State's legal theory is that the water that is subsequently captured and stored pursuant to the Bureau's (and/or the Corps of Engineers') obligation to regulate downstream flows (and the Bureau's contract obligations to the spaceholders),

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rights.

to which the State asserts is not property, is the water that is ultimately used for beneficial purposes. Assuming *arguendo* that the State's theory is correct, what is the legal theory that would allow the Bureau of to disregard its obligation to beneficially use the water in which it does have a property interest and substitute it for water in which it does not have a property interest?

The State and United Water argue that the water that is captured in the reservoirs for the purpose of regulating downstream flows to prevent flooding is "excess water"[15] as that phrase was contemplated in *State v. Idaho Conservation League* ("*ICL*"), 131 Idaho 329, 955 P.2d 1108 (1998) and the companion case *A & B Irrigation Dist. v. Idaho Conservation League* ("*A & B*"), 131 Idaho 411, 958 P.2d 568 (1997). In the *Memorandum Decision and Order on Challenge, Subcase Nos. 74-15051, et al.* ("*Lemhi High Flows Claims*") (February 12, 2012) the SRBA Presiding Judge conducted a detailed analysis of the holdings in *ICL* and *A & B* and concluded:

> In A & B, the Idaho Supreme Court held as a matter of law that . . . a general provision [authorizing the use of high flows or excess water] does not create a water right. In ICL, the Idaho Supreme Court upheld the use of such a general provision, for among other reasons, that the general provision did not create a water right.

Memorandum Decision and Order on Challenge, Subcase Nos. 74-15051, et al. at 25. The SRBA Presiding Judge went on to explain that "[s]ince the use of high flow water [pursuant to a general provision] does not create a water right high flows are therefore unappropriated water." *Id.*

United Water asserts that all water captured in the reservoirs after "paper fill" is "excess water" to which no property right may attach because such excess water cannot be decreed as a water right under Idaho law. *United Water's Brief in Opposition* at 35.

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[15] With respect to the State's and United Water's "excess water" theory, the following should be noted: First, it should be noted that the Bureau's obligation to operate the reservoirs to control flooding – which necessarily entails impounding water so as to regulate downstream flows – is not dependent on a state-based water right. Such flood control obligation is created pursuant to the federal legislation and agreements that relate to the Boise River Reservoirs. Second, it should be noted that the impoundment of water by the Bureau solely for the purpose of regulating downstream flows does not in and of itself create a property interest in the water so impounded. Third, it should be noted that there is nothing to prevent the water that is impounded for purposes of regulating downstream flows from coincidentally being impounded pursuant to a state-based proprietary water right.

United Water's view of the law in Idaho regarding excess water is too broad. The holding in *A & B* does not stand for the proposition that "excess water" (whatever that may be) can never be subject to a property right, but rather that a general provision authorizing the use of such "excess water" does not create a water right. In the instant subcases there is no previously decreed or recommended (in a Director's Report) general provision regarding the use of any water that passes through the Boise River Reservoirs that may or may not be "excess water." A general provision, to which *prima facie* weight is statutorily attached, would presumably provide some guidance or criteria on what is, and what is not, "excess water."

United Water's *Brief in Opposition* is not entirely clear on describing what characteristics must be attributed to water for it to be considered "excess water." Is "excess water" any water above and beyond "paper fill"? Is there a necessary component of "excess water" that it vary from year to year due to snowpack amounts, spring temperatures, precipitation, etc.? Fortunately there is no reason presented in these subcases that would require a factual determination of what may be "excess water." This is because so-called "excess water," whatever it may be, is unappropriated water that is subject to appropriation. The Idaho law relied upon by United Water stands for the proposition that a general provision authorizing the use of excess water does not create a water right – not for the proposition that there is some generally recognizable category of water in Idaho called "excess water" that can never be subject to a water right.

The post-appeal procedural history of the recommended general provision at issue in *ICL* illustrates the concept that "excess water" is subject to appropriation as a water right. In the ***Special Master's Report and Recommendation for General Provisions in Basin 57 Designated as Basin-Wide Issue 5-57***, Subcase No. 91-0005-57 (September 11, 2002), Special Master Cushman describes what happened:

> [F]ollowing remand in *State of Idaho v. Idaho Conservation League*, the parties claiming the use of "excess water" under General Provision 2 filed individual late claims for the "excess water" in an attempt to comply with the holding of the Supreme Court. IDWR recommended these late claims in a March 5, 2001, late claims report. . . . The individual late claims for the "excess water" were either uncontested or any objections have now been resolved via SF-5's. . . . Because the "excess water" issue was no longer being pursued as a general provision, this Special Master ordered

> that IDWR prepare a *Supplemental Director's Report* recommending the remaining portions of General Provision 2, if any, that were necessary in light of the individual claims for the "excess water." IDWR filed its *Supplemental Director's Report* on June 19, 2002. According to the *Supplemental Report*, the only remaining portion of General Provision 2 recommended following the filing of the individual late claims is portions of paragraph 5(b), which address the historical practice of rotation irrigation.

Id., at pp. 3-4. The State and United Water argue that the water that is contained in the reservoirs at the time of maximum physical fill is all or part "excess water" (i.e. any amounts attributed to the "unaccounted for storage" account) that is not subject to appropriation. The Ditch Companies and the Boise Project do not primarily counter by asserting that such water is appropriable (which it would be if it were "excess water"); but rather they counter by asserting that the water contained in the Boise River Reservoirs at the time of maximum physical fill is not appropriable because it is water that is stored under the existing storage rights. This Special Master agrees with the Ditch Companies and the Boise Project in this regard. Therefore, the claims of the Bureau and the Boise Project must fail for the reason that the water claimed is not subject to appropriation because it has already been appropriated.

E. The Ditch Companies and the Boise Project are not Collaterally Attacking the *Partial Decrees* for the Existing Storage Rights; However they are Seeking a Collateral Interpretation thereof.

The State and United Water assert that what the Ditch Companies and Boise Project are asking for in their *Motions for Summary Judgment* amounts to an impermissible collateral attack on the existing storage rights and therefore the *Motions* must be denied. For the reasons set forth below, this Special Master concludes that the *Motions* do not collaterally attack the ***Partial Decrees*** for the existing storage rights.

The Ditch Companies and the Boise Project are not asserting that anything on the face of the ***Partial Decrees*** for the existing storage rights means anything other that the plain meaning of the words and numbers set forth thereon. That being said, the Ditch

Companies and the Boise Projects are seeking an interpretation of the ***Partial Decrees*** – i.e. they are seeking a collateral[16] interpretation,[17] not a collateral attack.

The State and United Water cite to the SRBA Court's ***Order Denying Motion to File Late Claims***, Subcase No. 36-16977 (October 2, 2013) (*Rangen*), to support the proposition that the instant *Motions for Summary Judgment* constitute an impermissible collateral attack on the existing storage rights. The Ditch Companies and the Boise Project point out, correctly, that the issue in *Rangen* involved whether a late claim should be granted; whereas in the instant subcases the motions to file late claims have already been granted.

There is another factor that differentiates the interpretation being sought in the instant subcase from the attack sought in the *Rangen* subcase. The ***Partial Decrees*** issued in the SRBA for Rangen's water rights differed materially from the previously issued licenses upon which they were based and from Rangen's historical usage. Specifically, in the SRBA the source was decreed as "Martin-Curren Tunnel" whereas the licenses stated "springs tributary to Billingsly Creek," and the point of diversion was decreed as a 10-acre tract rather than the licensed 40-acre tract. In an administrative proceeding before the Idaho Department of Water Resources, Rangen argued that the SRBA ***Partial Decrees*** included water sources in addition to the Martin-Curren Tunnel and sources outside of the decreed 10-acre tract. In other words, Rangen was asserting before the Idaho Department of Water Resources that the ***Partial Decrees*** meant something other than what was set forth within the four corners of the document. The late claim filed in the SRBA by Rangen was admittedly an attempt to protect its historic water use should the Idaho Department of Water Resources rule unfavorably. What is important to note is that the allegations made by Rangen before the Idaho Department of Water Resources and the late claim it was seeking from the SRBA Court were both

[16] The term "collateral" is used here simply to signify that the interpretation is being sought in the proceedings in the above-captioned subcases rather than the subcases for the existing storage rights.
[17] The use of the term "interpretation" is not meant to connote that there is any ambiguity or unclarity in the ***Partial Decrees*** for the existing storage rights with respect to the issues raised in these subcases; rather the interpretation involves the application of historical fact together with Idaho law to ascertain the answer to a question upon which the ***Partial Decrees*** are silent. The clarification of existing law against which the water right holders are entitled to rely is not a collateral attack on a prior license or decree. ***Memorandum***

designed for the same end – recognition that Rangen's water rights were something other than what was set forth on the face of the ***Partial Decrees*** – i.e. an "attack."

1. The Ditch Companies' and the Boise Project's Interpretation of the Existing Storage Rights.

Unlike Rangen, the Ditch Companies and the Boise Project are not asserting that the ***Partial Decrees*** for the existing storage rights mean something different than what is stated thereon. That being said, the ***Partial Decrees*** for the existing storage rights are silent regarding a question that must be answered in order to determine whether there is any unappropriated water that might form the basis of the above-captioned claims. That question is: In any year where reservoir inflows exceed the quantity elements of the respective existing storage rights, what portion of such water is attributable to the existing storage rights? This is not a question of accounting procedure; rather it is a question as to the nature of the existing storage rights. In other words, while measurement and accounting methodologies are left to the sound discretion of the director,[18] the question sought to be answered by the Ditch Companies and the Boise Project relates to "what to count?" rather than "how to count it?"

The question of "how" to make an accounting of something cannot yield the answer of "what" to count. This is backwards. Before determining how to account for something one must know what is being counted. Accordingly, it cannot be said that the Director's discretionary decision of "how" to account for the existing storage rights is determinative of what portion of the annual reservoir inflows are stored under the authority of the existing storage rights. The State asserts that it is not necessary for the Court to determine one way or the other regarding what water is stored under the existing storage rights. This Special Master disagrees. The above-captioned claims either are, or are not, for the same water authorized to be stored under the existing storage rights. If the claims are for the same water, they fail. It would be a futile endeavor to engage in additional fact finding and legal analysis if the claims fail upon the answer to the basic

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Decision and Order on Cross-Motions for Summary Judgment Re: Streamflow Maintenance Claim, Subcase 63-3618 (Sept 23, 2008) p. 18 (citation omitted).

[18] In re SRBA, 157 Idaho 385, 394, 336 P.3d. 792, 801 (2014)

question of whether they are claims to water already stored under the existing storage rights.

When the Idaho Department of Water Resources designed the accounting system that it implemented in 1986, the designers necessarily had to grapple with the question regarding what portion of the reservoir inflows are attributable to the existing storage rights. As stated by Engineer Sutter:

> [T]he accounting system cannot ultimately treat all reservoir inflows as physically stored for beneficial use. We recognize that, during flood control operations, the water right accounting program accrued to storage water rights inflows that could not be physically stored during flood control operations, and showed the reservoirs as full on paper when vacant flood control spaces continued to be maintained pursuant to the Water Control Manual's rule curves.

Affidavit of Robert J. Sutter ¶ 19. Engineer Sutter goes on to explain that the daily accruals that constitute "paper fill" of the existing storage water rights is not the end of the accounting process. The next step in the accounting process is that "[a]fter maximum reservoir fill, the water physically stored in the reservoirs, including the 'unaccounted for storage,' is allocated to reservoir storage rights." *Id.*, ¶ 21. Hydrology Section Supervisor Cresto explains it this way:

> The "unaccounted for storage" is often used to provide full reservoir allocations so that charges for early-season storage use or the Bureau's flood control releases can be "cancelled."

Affidavit of Elizabeth Anne Cresto (filed July 21, 2105) ¶ 23. Engineer Sutter states that he concurs with the statements in the *Affidavit of Elizabeth Anne Cresto* and elaborates:

> Natural Flow in excess of that needed to satisfy all existing natural flow rights and is physically stored in a reservoir is coded as unaccounted for storage. This unaccounted for storage is credited back to the reservoirs, and if it is insufficient to provide for full reservoir allocations, the unaccounted for storage is assigned to fulfill the reservoir allocations consistent with the original priority dates of the reservoir rights.

Second Affidavit of Robert J. Sutter (filed July 21, 1015) ¶¶ 4 and 6. In other words, under the Boise River accounting system, the "unaccounted for storage" becomes

"existing storage right storage" once it has been assigned or "credited" to be beneficially used pursuant to the "irrigation from storage" element of the existing storage rights.[19] As previously stated, the 1986 accounting system appears to be the basis of the State's argument that the existing storage rights are satisfied by cumulative total of all "physically and legally" available inflows. However, even if the accounting system utilized by Idaho Department of Water Resources can be determinative of the nature of the existing storage rights, the accounting system does not support the State's position. Although the accounting system initially counts such "physically and legally" available water as accruing to the existing storage rights, at the time of maximum physical fill the water that is physically in the reservoirs is placed on the accounts as the water that is stored and beneficially used pursuant to the existing storage rights.

2. The State's and United Water's Interpretation of the Existing Storage Rights.

The State[20] and United Water also argue for a collateral interpretation of the existing storage rights. They argue that the existing storage rights are filled once the sum of daily accruals equals the annual volume limit of the existing storage rights. Thereafter, they argue, actual storage can continue under the existing storage rights, but under the

[19] This practice is also consistent with the accounting for carryover storage. The accounting procedure for carryover storage is described in the paper entitled Water Delivery Accounting, Boise River, WD-63: "Unused prior year storage is assigned as carryover in the following sequence: Lucky Peak. Anderson Ranch, Arrowrock, because use is charged in the reverse order." *Third Affidavit of Michael C. Orr*, Ex. 67. At the beginning of the storage season, the existing storage right accounts do not start at zero – they begin with the carryover amounts. When the existing storage rights are filled on paper, the "unaccounted for storage" does begin at zero. In other words, there is not any "unaccounted for storage" that is carried over to the following year's "unaccounted for storage" account because such "unaccounted for storage" is credited to the existing storage rights at the time of maximum physical fill.

[20] It is a bit challenging to ascertain exactly what the State's position is regarding the answer to the question about what portion of the annual reservoir inflows are authorized to be stored under the existing storage rights. The State is clear regarding its position that the question should not be answered in these proceedings, but as to the substance of the question the State claims on page 38 of the *State's Response* that it "has taken no position" regarding questions of interpretation of the existing storage rights. However, the State spends numerous pages of its briefing describing the development of "paper fill" accounting and how the Ditch Companies and the Boise Project have "mischaracterized" the operation of the Water District 63 accounting procedures. See, e.g., *State's Response* pp. 54-63. It is the understanding of this Special Master that the State would prefer to have an amorphous rather than particularized definition of this aspect of the existing storage rights.

condition that the existing storage rights are "no longer in priority."[21] *State's Response* at 28 and 67, *United Water's Brief in Opposition* at 31-33. Stated differently, the State and United Water argue that the existing storage right annual quantity limit can be exceeded so long as the priority element is ignored. This legal theory is without merit. Furthermore, and in contrast to the legal theory of the Ditch Companies and the Boise Project (i.e. that the existing storage rights authorize the storage of the water in the Reservoirs at the time of maximum physical fill as opposed to authorizing the storage of water that must be released to comply with the rule curves), the legal theory of the State and United Water does constitute an impermissible collateral attack on the existing storage rights. There is nothing in the ***Partial Decrees*** for the existing storage rights that even hints that the quantity element can be exceeded so long as the priority element is ignored. Hence the theory advocated by the State and United Water is more akin to the unsuccessful position taken by Rangen that the partial decrees for its water rights mean something more than what is stated on the face of the decree.

VII. ORDER DISMISSING STATE OF IDAHO'S AND UNITED WATER IDAHO'S CROSS-MOTION FOR SUMMARY JUDGMENT

For the reason that the Ditch Companies' and Boise Project's motions for summary judgement are herein granted, the issues raised by the State regarding whether the "post paper-fill" water has been appropriated under the Constitutional method of appropriation become moot and therefore will not be addressed. Accordingly the *State of Idaho's Cross-Motion for Summary Judgment* is **dismissed.**

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[21] The State's use of the phrase "no longer in priority" in this context is puzzling. Typically when a water right is said to be "no longer in priority" or "out of priority" it means that the demand for water on a source is greater than supply and the junior rights that are "no longer in priority" are no longer receiving any water (absent an approved plan to mitigates damages by out of priority diversions). Under the typical use of the phrase, the existing storage rights would be "no longer in priority" when the natural flow of the river is equal to or less than the demand of senior natural flow rights of the Stewart and Bryan Decrees. When that happens, the existing storage rights are not only "out of priority" but the reservoirs themselves are out of any additional water that may be stored. But the State is not using the phrase to connote the point in time when reservoir storage physically ceases; rather the phrase is being used to describe the time of the year when the existing storage rights are "off" because they have purportedly filled on paper, but natural flow supply is still greater than senior natural flow demand and hence storage continues to occur. In other

VIII. ORDER DISMISSING BOISE PROJECT'S MOTION IN LIMINE

On August 18, 2015, the Boise Project filed a *Motion in Limine* seeking an order precluding the State and United Water from introducing expert witness testimony for the reason that no expert witness was disclosed by either of these parties. Because the trial has been vacated, the *Motion* is moot and is therefore **dismissed.**

IX. ORDER DISMISSING BOISE PROJECT'S MOTION TO STRIKE

On August 18, 2015, the Boise Project filed the *Boise Project's Motion to Strike and Motion for Sanctions* ("*Boise Project's Motion to Strike*"). The *Motion* seeks an order striking the *State of Idaho's Cross-Motion for Summary Judgment*, the *Memorandum in Support* thereof, and the *Fifth Affidavit of Michael C. Orr* on the grounds that the State's *Cross-Motion for Summary Judgment* is directly contrary to the testimony of the State's 30(b)(6) deponent. For the reason that the *State of Idaho's Cross-Motion for Summary Judgment* is herein dismissed, the *Boise Project's Motion to Strike* need not be addressed and is accordingly **dismissed.**

X. RECOMMENDATION ON BOISE PROJECT'S MOTION FOR SANCTIONS

The *Boise Project's Motion to Strike* seeks an order requiring the State to pay the costs associated with responding to the *State of Idaho's Cross-Motion for Summary Judgment*. The basis for the *Motion* is that the State's I.R.C.P. 30(b)(6) witness stated in his deposition testimony that the State had "no position" on whether the late claims should be disallowed and "no position" on whether or not water that is captured in the Boise River Reservoirs following flood control releases is put to beneficial use, but that in all likelihood such water was either put to beneficial use or carried over to the next season. *Boise Project's Motion to Strike* at 1. The Boise Project asserts that these non-positional statements are directly contrary to the *State of Idaho's Cross-Motion for*

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words, the existing storage rights are not considered to be "off" because they are "no longer in priority",

Summary Judgment wherein the State seeks disallowance of the claims. The Boise Project also asserts that the State's non-positional statement regarding whether the water captured in the Boise River Reservoirs following flood control releases is put to beneficial use is contrary to the State's assertion in its *Cross-Motion* that the claimants (Bureau and Boise Project) have admitted that they cannot prove that such post flood-control release water was put to beneficial use.[22]

In analyzing the State's "position" (or lack thereof), the starting point is Idaho Code § 42-1412 (2) which states in relevant part:

> If a party other than the claimant or the objector desires to participate in the proceeding concerning a particular objection, the party shall file a response to the objection that states the position of the party.

I.C. § 42-1412 (2) (emphasis added). The *Responses* filed by the State in these subcases simply have "checked boxes" as to the elements to which the State is responding. The State's *Responses* to not provide any additional information or explanation.[23] In the absence of any additional explanation, the State's *Responses* set forth a position that the State simply agrees with the *Director's Report*. See ***Memorandum Decision and Order on Challenge***, Subcase Nos. 36-00061 et al., (September 27, 1999) p. 16 ("In contested subcases where NSGWD agrees with the Director's Report . . . they can file a Response (Standard Form 2) which, in essence, would state: 'We agree with the Director's Report.'"). As discussed in Section IV above, the *Director's Report* provides two things: (1) an ultimate conclusion (that the claims should be disallowed); and (2) the reason for

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rather they are "off" because the annual volumetric limitation has been met.

[22] The State's legal theory regarding the Claimant's burden of proving beneficial use to support their claims is that the stored water that has historically been beneficially used has been used under the authority of the existing storage rights irrespective of whether the water in the Boise River Reservoirs was stored under the existing storage rights or stored pursuant to "Constitutional method" water rights. In other words, under the State's theory, even though the "existing storage right" water may have been released downstream at a time of year when it cannot be used, the water that replaces the "existing storage right" water is beneficially used under the existing storage rights, just not stored under the existing storage rights. The result of this legal theory is that the claimants would be required to prove additional use (irrigated acreage) beyond that which is authorized under the existing storage rights. See *State's Memo in Support of Cross-Motion* at 52-56.

[23] The document entitled "*Instructions for Filing Responses to Objections to Water Rights in the Snake River Basin Adjudication*" which is an attachment to *SRBA Administrative Order 1, Rules of Procedure*, states: "You may attach any explanation or documentation that you feel is necessary to support your Response."

disallowance being that the water claimed in the late claims is not appropriable because it has been stored pursuant to "historic practice."

The Boise Project asserts that I.R.C.P. 11(a)(1) authorizes imposing sanctions including the payment of costs incurred in responding to the *State's Cross-Motion for Summary Judgment* which is inconsistent with the testimony of the State's 30(b)(6) deponent. The imposition of such sanctions is committed to the discretion of the trial court. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1990). Abuse of discretion is evaluated based upon three factors: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether it acted within the boundaries of its discretion and consistently with applicable legal principles; and (3) whether it reached its decision through an exercise of reason. *Id.*

A. Analysis of Sanctions Regarding the Statement of the 30(b)(6) Deponent that the State has no Position as to Whether the Claims Should be Disallowed or Not.

The purpose of the discovery rules in the Idaho Rules of Civil Procedure is to facilitate fair and expedient fact gathering. *Edmunds v. Kraner, M.D.*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006). The State's 30(b)(6) deponent stated that "the State [does not have] an agreement, or a disagreement with the recommendations [in the Director's Report]" and that "[the State does not] have a position currently on whether that recommendation should move forward or not." *30(b)(6) Deposition Transcript*, p. 16 (reproduced in *Boise Project's Motion to Strike* at 4). The assertion of the 30(b)(6) deponent to the effect that the State has no position on whether the claims should be disallowed or not is not a matter of fact subject to being discovered under the discovery rules; rather it is a position regarding the ultimate disposition of the above-captioned claims. The Boise Project is correct in its assessment that this statement of position made by the 30(b)(6) deponent is inconsistent with the relief sought in the *State's Cross-Motion for Summary Judgment*. The deponent's statement of position is also inconsistent with the *Response* filed by the State which takes a position of agreeing with the *Director's Report* (that the claims should be disallowed for reason of water storage under "historic

practice"). However, the State's position in its *Response* is consistent with its *Cross-Motion for Summary Judgment* at least as to the ultimate disposition of disallowance of the claims.[24] Despite the inconsistencies, the Boise Project cannot be heard to have been "sandbagged" by the State's filing of its *Cross-Motion for Summary Judgment*. The Boise Project has known since the time it received notice of the State's *Responses* that the State sought disallowance of the claims. In accordance with the foregoing, and in an exercise of reason and within the boundaries of discretion, this Special Master concludes that the inconsistencies between the State's *Response*, the testimony of the State's 30(b)(6) deponent, and the *State's Cross-Motion for Summary Judgment*, should not be sanctioned as to the costs incurred by the Boise Project in responding to the *Cross-Motion*.

B. Analysis of Sanctions Regarding the Statement of the 30(b)(6) Deponent that the State has no Position as to Whether or Not Water Captured in the Reservoirs After Flood-Control Releases was put to Beneficial Use.

Another "no-position" statement by the 30(b)(6) deponent that the Boise Project asserts is inconsistent with the *State's Cross-Motion for Summary Judgment* is in effect that the State has no position on whether the water captured in the Boise River Reservoirs following flood control releases has been put to beneficial use. *30(b)(6) Deposition Transcript*, p. 18 (reproduced in *Boise Project's Motion to Strike* at 5). The disagreement between the State and the Boise Project regarding the question of whether or not the water contained in the Boise River Reservoirs at the time of maximum physical fill in a flood-control year has been put to beneficial use is not a disagreement as to facts. There is not a factual dispute that such water has historically been put to beneficial use; rather the disagreement is in regard to whether such use occurred under the "irrigation from storage" component of the existing storage rights or whether the same use could be the beneficial use that forms the basis of the above-captioned claims. The State's legal theory is that the beneficial use of the water in the Boise River Reservoirs at the time of

[24] In its *Motion for Summary Judgment*, the State lists four reasons that the late claims should be disallowed, none of which are that the post flood-control release water was stored pursuant to "historic practice" as is asserted in the *Director's Report*.

maximum physical fill, in a year in which water was previously released to be in compliance with the rule curves of the Water Control Manual, always occurs under the existing storage rights even though the "existing storage right" water was released from the Boise River Reservoirs before it could be used.[25] The Boise Project, on the other hand, asserts that the ancillary property right under which water is stored goes hand in glove with the usufructory property right under which such water is beneficially used. In other words, water beneficially used under the existing storage rights can only be water that is stored under the existing storage rights; and if water is stored under some authorization other than the existing storage rights, then the beneficial use of such water may properly be the basis of the above-captioned claims.

The State's 30(b)(6) deponent did not opine as to whether the beneficially used water was used pursuant to the existing storage rights or otherwise. Again, there is not a factual dispute that the water in the Boise River Reservoirs at the time of maximum physical fill has been put to beneficial use; rather there is a legal dispute as to whether such use can lead to the creation of a water right under the Constitutional method of appropriation. Therefore, irrespective of the answer to this legal issue, the deponent's cautiously circumspect answer is consistent with the legal position taken by the State in its *Cross-Motion.*

In accordance with the foregoing, and in an exercise of reason and within the boundaries of discretion, this Special Master concludes that the alleged inconsistencies between the testimony of the State's 30(b)(6) deponent and the *State's Cross-Motion for Summary Judgment* should not be sanctioned as to the costs incurred by the Boise Project in responding to the *Cross-Motion.* Therefore, this Special Master **recommends** that the SRBA District Court enter a final order denying the Boise Project's and Ditch Companies'[26] motion for sanctions.

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[25] At oral argument on the *State of Idaho's Motion for Protective Order* (held July 14, 2015), Deputy Attorney General Garrick Baxter stated: "Originally when the Department tried to go through and investigate the beneficial use claims, we came to the conclusion that we were unable to see additional beneficial use beyond what is taking place under what we've referred to as the existing storage water rights and so they were disallowed." *Reporter's Transcript, Motion for Protective Order on Behalf of the State of Idaho*, p. 6, ll. 1-6.

[26] On August 18, 2015, the Ditch Companies filed a joinder in the Boise Project's *Motion to Strike.*.

XI. RECOMMENDATION ON STATE OF IDAHO'S MOTION FOR AWARD OF REASONABLE ATTORNEY FEES PURSUANT TO RULE 11(A)(1)

On August 25, 2015, the State filed a *Motion for Award of Reasonable Attorney Fees Pursuant to Rule 11(A)(1)* ("*Rule 11 Motion*") seeking an award of the costs of reasonable attorney fees incurred in responding to the Boise Project's August 18, 2015, *Motion to Strike and Motion for Sanctions*. The basis of the State's *Rule 11 Motion* is the assertion that the relief sought in the *Boise Project's Motion to Strike* is not authorized by the Rules under which it was brought – i.e. that the Boise Project failed to make a reasonable investigation into the applicable law regarding its *Motion to Strike*.

Specifically, the State asserts that the Boise Project, prior to filing its *Motion to Strike*, failed to ascertain: (1) that Rule 11 only authorizes the striking of a filing for failure to be signed (and the *State's Cross-Motion* was signed); (2) that under Rule 37, only "pleadings" may be stricken (and a motion for summary judgment is not a pleading); and (3) that under Idaho law a motion to strike a motion for summary judgment is not cognizable under *McPheters v. Maile*, 138 Idaho 391, 396, 64 P.3d 317 322 (2003).

The Boise Project responds that the State is bound by the testimony of its 30(b)(6) deponent (citing *CUMIS Insurance Society v. Massey*, 155 Idaho 942, 947, 318 P.3d 932, 937 (2014)); that the July 14, 2015 bench order denying the *State of Idaho's Motion for Protective Order* is the type of order contemplated under I.R.C.P. 37(b)(2); that the State's 30(b)(6) deponent provided evasive answers in violation of that bench order; that such violation is sanctionable under I.R.C.P. 37(b)(2)(B) and 37(e); and that such sanctions include striking or excluding anything that is at odds with that testimony of the 30(b)(6) deponent.

As is ordered in Section VII above, the *State of Idaho's Cross-Motion for Summary Judgment* is dismissed for the reason that the issues raised therein do not need to be addressed given the disposition of the Ditch Companies' and Boise Project's *Motions for Summary Judgment*. It would be improper for this Special Master to engage in a detailed hypothetical analysis of whether the *State of Idaho's Cross-Motion for*

Summary Judgment and accompanying *Fifth Affidavit of Michael C. Orr* would or would not be subject to being stricken under the different legal analysis provided by the parties. That being said, the Boise Project, in its *Motion to Strike*, is making an allegation that the testimony of the State's 30(b)(6) deponent is at odds with the position taken by the State in its *Cross-Motion for Summary Judgment*; that the State is purposefully being obfuscatory in its role as Respondent in these subcases, and that such conduct is sanctionable under the Idaho Rules of Civil Procedure. In the absence of conducting a detailed legal analysis of a moot question (i.e. can the *State of Idaho's Cross-Motion* be stricken?), the only question is whether the Boise Project met the minimum requirement of reasonable inquiry and has a good faith argument of what the law is or should be with respect to this question.

In accordance with the foregoing, and in an exercise of reason and within the boundaries of discretion, this Special Master finds, based on the file and record herein, and upon the comments made at oral argument on this matter, that the legal theories under which the Boise Project filed its *Motion to Strike* demonstrate the requisite "reasonableness" as is required under I.R.C.P. 11(a)(1), and that such *Motion* was made in good faith. Therefore, this Special Master **recommends** that the SRBA District Court enter a final order denying the State of Idaho's and United Water's[27] *Motion for Sanctions*.

XII. ORDERS AND RECOMMENDATIONS

In accordance with the foregoing, the *Motion for Summary Judgment* filed by the Ditch Companies and the Boise Project are **granted**. The *Cross-Motion for Summary Judgment* filed by the State is **dismissed**. The *Motion in Limine* filed by the Boise Project is **dismissed**. The *Motion to Strike* filed by the Boise Project is **dismissed**.

IT IS RECOMMENDED that the SRBA District Court enter a final order, pursuant to I.R.C.P. 54(b), disallowing the above-captioned water right claims.

[27] On September 2, 2015, United Water filed a joinder in the State's *Motion for Sanctions*.

IT IS FURTHER RECOMMENDED that the SRBA District Court enter final order denying the Boise Project's motion for sanctions and the State of Idaho's motion for sanctions.

Dated _____

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION, ORDERS AND RECOMMENDATIONS was mailed on October 09, 2015, with sufficient first-class postage to the following:

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Deputy Clerk

Docket No. 44636-2016

Black Canyon Irrigation District
Appellant's Opening Brief

APPENDIX 2

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

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.

I.
APPEARANCES

David W. Gehlert, Environment and Natural Resources Division, United States Department of Justice, attorney for United States of America;

Scott L. Campbell, Tara Martens, Moffatt, Thomas, Barrett, Rock & Fields, Chartered , Boise, Idaho, attorneys for Settlers Irrigation District and Pioneer Irrigation District;

David J. Barber, Deputy Attorney General , Boise, Idaho, for State of Idaho Dept. of Fish and Game;

Daniel V. Steenson, S. Bryce Farris, Ringert Clark Chartered, Boise, Idaho, attorneys for South Boise Water Company and Nampa & Meridian Irrigation District;

Albert P. Barker, Shelly M. Davis, Paul L. Arrington of Barker Rosholt & Simpson LLP, Boise, Idaho, attorneys for Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District;

Jerry A. Kiser , Stoppello & Kiser, Boise, Idaho, attorney for Canyon County Water Company, Farmers Union Ditch Company, Middleton Irrigation Ass'n., Middleton Mill Ditch Company;

Robert A. Maynard, Erika E. Malmen, Perkins Coie LLP, Boise, Idaho, attorneys for Ada County & Board of Ada County Commissioners and City of Boise;

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 Reclamation[1] "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:

Amount (acre feet)	Use	Period: From	To
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:

BENEFICIAL USE	PERIOD OF USE	ANNUAL DIVERSION VOLUME
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 *insitu* 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 cannon 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 Legislation 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

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[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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