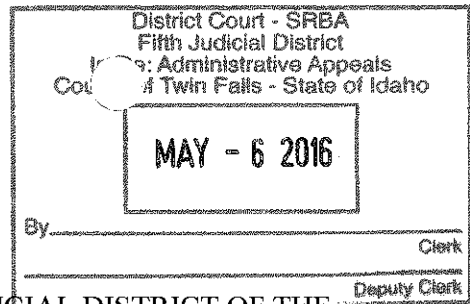


IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BALLENTYNE DITCH COMPANY, et al.;

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES; et al.;

Respondents.

**Case No. CV-WA-2015-21376**
(Consolidated Ada County Case No. CV-WA-2015-21391)

IN THE MATTER OF ACCOUNTING FOR DISTRIBUTION OF WATER TO THE FEDERAL ON-STREAM RESERVOIRS IN WATER DISTRICT 63

# DITCH COMPANIES' REPLY BRIEF

Appeal from the Idaho Department of Water Resources to the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

Director Gary Spackman presiding

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. UNDISPUTED FACTS ..... 10

III. ARGUMENT ..... 14

A. Boise River Reservoir Storage Rights are Not "Filled" by Water Released for Flood Control ..... 14

1. IDWR's Water Right Accounting does not Treat "All" Reservoir Inflows that are Not Delivered to Downstream Senior Rights as Available for Storage ..... 15

2. Water Released for Flood Control is Not "Available" for Beneficial Use Storage ..... 16

3. Actual Storage of Water is Essential to the Exercise of a Storage Water Right ..... 17

4. Boise River Reservoir Flood Control is Not a Unilateral "Choice" of the of Reservoir Operators or Storage Spaceholders ..... 18

5. The Boise River Reservoir Operating Plan is Relevant to Water Right Administration ..... 20

a. Congress Authorized and Approved the Reservoir Operating Plan ..... 21

b. The Director is Estopped From Asserting that the Reservoir Operating Plan is Irrelevant to Administration of Boise Rive Reservoir Storage Rights ..... 23

c. The Lack of a Reference to the Reservoir Operating Plan in the Storage Right Decrees Does Not Render it Irrelevant to the Administration of the Rights ..... 28

B. Respondents' Arguments that Presume Second Fill are Misplaced ..... 28

1. Storing Water in the Boise River Reservoirs After Flood Control Releases is Consistent with "Beneficial Use Principles" ..... 28

2. Storing Water in the Boise River Reservoirs After Flood Control Releases is Not an Enlargement of the Storage Rights ..... 30

3. The Ditch Companies Position is Not a "Collateral Attack" on the Storage Rights ..... 31

4. Water Stored in the Boise River Reservoirs During Flood Control Operations is not Unappropriated "Surplus," "High Flow," or "Free River" Water ..... 33

5. The "Lucky Peak Guarantee" Pertains to Incremental Shortfalls in Filling, Not to Flood Control Releases in Total ..... 34

6. Respondents "Federal Takeover" Arguments are Baseless Propaganda ..... 36

C. The Director's Contested Case Proceeding Was Fatally Flawed ..........38

1. The Director Exceeded His Authority by Initiating this Contested Case and/or Should have Stayed the Contested Case ..........38

2. The Contested Case Violates the Rulemaking Requirements of IDAPA ..42

a. The Contested Case has Wide Coverage and is Applied Generally and Uniformly ..........44

b. The Contested Case Operates Only in Future Cases ..........45

c. The Contested Case Attempts to Prescribe Legal Standards, Attempts to Express New Policy of IDWR and Attempts to Interpret Law and Policy ..........46

3. Procedural Due Process Violations ..........48

a. The Director and Suez Misapply the Governing Legal Standards ..........48

b. Sisco-Related Exchanges—the All-Encompassing Example of Department and Hearing Officer Abuse of Process ..........52

c. The Other Examples ..........60

D. Attorney Fees on Judicial Review ..........63

1. The Ditch Companies' Request is Viable ..........63

2. Suez's Request for Costs and Fees Should be Denied ..........64

IV. CONCLUSION ..........66

## TABLE OF AUTHORITIES

**Cases**


*A & B Irrigation District v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012) .................................. 31

*Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999) ......................... 49

*Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003) ..................... 43, 44, 45, 46, 48

*Beacom v. Equal Employment Opportunity Com.*, 500 F. Supp. 428 (9th Cir. 1980) .................. 25

*Bedke v. City of Oakley*, 149 Idaho 532, 237 P.3d 1 (2010) ...................................................... 29

*Boise City v. Wilkinson*, 16 Idaho 150, 102 P. 148 (1909) ......................................................... 25

*Castaneda v. Brighton Corp.*, 130 Idaho 923, ___ P.3d ___ (1998) .......................................... 59

*City of Osburn v. Randall*, 152 Idaho 906, 277 P.3d 353 (2012) ................................................ 63

*County of San Diego v. California Water & Telephone Company*, 30 Cal. 2d 817 (1947) .......... 25

*Delancey v. Delancey*, 110 Idaho 63, 714 P.2d 32 (1986) ........................................................ 31

*Eacret v. Bonner County*, 139 Idaho 780 (2004) ............................................................... 49, 62

*Eddins v. City of Lewiston*, 150 Idaho 30 (2010) ...................................................................... 49

*Freight Ways, Inc. v. Arizona Corporation Commission*, 129 Ariz. 245 (1981) ......................... 26

*Golden Gate Water Ski Club v. County of Contra Costa*, 165 Cal. App. 4th 249 (2008) ........... 25

*Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*,
101 Idaho 677, 619 P.2d 1130 (1980) .................................................................... 29

*In re SRBA, Case No. 39576, Subcase No. 00-91017*,
157 Idaho 385, 336 P.3d 792 (2014) ................................................................... 1, 38

*Joyce Livestock Company v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) .......................... 29

*Knori v. State ex rel. Department of Health, Office of Medicaid*, 2005 Wy. 48 (2005) .............. 26

*KTVB, Inc. v. Boise City*, 94 Idaho 279, 486 P.2d 992 (1971) .............................................. 23, 24

*Lloyd Crystal Post, American Legion v. Jefferson County*,
72 Idaho 158, 237 P. 2d 348 (1951) ...................................................................... 26

*Long Beach v. Mansell*, 3 Cal. 3d 462 (1970) ........................................................................... 25

*Marcia C. Turner, LLC v. Twin Falls*, 144 Idaho 203 (2007) .................................................... 49

*Naranjo v. Idaho Department of Corrections*,
151 Idaho 916, 265 P.3d 529 (Ct. App. 2011) ................................................... 23, 24

*Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945) ................................... 18, 29

*Robinson v. Lemp*, 29 Idaho 661, 161 P. 1024 (1916) ............................................................... 26

*Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991) .............................. 9

*State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997) ..................... 9

*State v. Twin Falls-Salmon River Land & Water Co.*, 30 Idaho 41, 66 P. 220 (1916) .......... 25, 26

*U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2006) .......... 32

*Williams v. Idaho State Board of Real Estate Appraisers*, 157 Idaho 496, 337 P.3d 655 (2014) .......... 62

**Statutes**

IDAHO CODE § 12-117 .......... 64, 65

IDAHO CODE § 42-201 .......... 36

IDAHO CODE § 42-602 .......... 38

IDAHO CODE § 67-5201 .......... 59

IDAHO CODE § 67-5223 .......... 43

IDAHO CODE § 67-5224 .......... 43

IDAHO CODE § 67-5231 .......... 43

IDAHO CODE § 67-5242 .......... 61

IDAHO CODE § 67-5253 .......... 60

IDAHO CODE § 67-5279 .......... 49

**Rules**

Idaho Appellate Rule 35 .......... 63

Idaho Appellate Rule 41 .......... 63, 64

Idaho Civil Rule of Procedure 84 .......... 63, 64

Idaho Rule of Evidence 201 .......... 61

IDAPA 37.01.01.005.07 .......... 51

IDAPA 37.01.01.005.15 .......... 51

IDAPA 37.01.01.007 .......... 59

IDAPA 37.01.01.015 .......... 59

IDAPA 37.01.01.153 .......... 52, 53

IDAPA 37.01.01.157 .......... 52, 53, 59

IDAPA 37.01.01.417 .......... 53, 60

IDAPA 37.01.01.600 .......... 52, 53

IDAPA 37.01.01.602 .......... 52, 53, 61

The Petitioner Ditch Companies[1] hereby submit this *Reply Brief* in Support of their *Petition for Judicial Review* of the October 20, 2015 *Amended Final Order* ("Director's Order") of the Director of the Idaho Department of Water Resources ("IDWR" or the "Department") in the above-captioned matter (the "Contested Case").

## I.
## INTRODUCTION

In the Basin-Wide Issue 17 proceeding, this Court held that a reservoir storage right, like any other water right, cannot be "filled" or "satisfied" a second time to the detriment of junior appropriators. *In re SRBA Case No. 39576, Subcase No. 00-91017, Basin-Wide Issue 17*, Memorandum Decision ("BW 17 Decision") at 9-10 (Idaho Dist. Ct., 5th Judicial Dist., March 20, 2013). The Court did not address the "more important," underlying "issue of whether water released for flood control purposes counts towards the initial fill of a water right." *In re SRBA, Case No. 39576, Subcase No. 00-91017*, 157 Idaho 385, 391, 336 P.3d 792, 798 (2014). The Court declined to consider "'specific factual circumstances, operational history, or historical agreements associated with any particular reservoir'" that may be pertinent to understanding how and when reservoir storage rights are "filled" in the context of a basin-wide issue proceeding. *Id.*, 157 Idaho at 390, 336 P.2d at 797.

In the Late Claims Subcases and the Contested Case before the Director that followed, the Ditch Companies and the Boise Project Board of Control ("Boise Project") presented a clear, comprehensive and undisputed record of the facts, operational history, and historical agreements which explain and govern how the Boise River Reservoirs are operated to protect the Boise

[1] The "Ditch Companies" include: Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

Valley from flooding and to fill the reservoirs for beneficial use during flood control operations.

On the basis of this record, Special Master Booth held that water that cannot be stored and must be released from the reservoirs for flood control does not "fill" or "satisfy" Boise River Reservoir storage rights, and that the water that physically fills the reservoirs after flood control releases is stored for beneficial use pursuant to the existing reservoir storage rights. This is because there is only one fill of the reservoirs during flood control operations, as and when it is safe to do so in accordance with the Boise Reservoir operating plan that IDWR and the State of Idaho helped develop, approve and implement over the course of the last 60-plus years.

As explained in the Ditch Companies Opening Brief, the basic principle for the operation of the Boise River Reservoirs for flood control and beneficial use storage has always been:

> 12. It is possible, by means of snow surveys and data on winter precipitation, to make fairly reliable forecasts of the volume of flood runoff from the Boise River . . . ***[I]t will be necessary to reserve the adopted flood control space in advance of the flood season of every year and store no water therein during the flood period, except as needed to reduce the discharges below the Boise Project diversion dam. The reserved capacity can be reduced as the snow cover disappears and then filled for irrigation uses.***
>
> Use of flood control storage for irrigation.
>
> 17. ***In operating the reservoirs for flood control purposes, it is desired to avoid undue impairment of their value for irrigation purposes. In years of very high runoff, there is no question that the flood control storage will be filled in securing the desired reduction in flood peaks. Water thus stored in the flood control reserve will be subsequently released for irrigation.***

Ex. 2070 (emphasis added).

The reservoir operating plan that has been in effect since the early 1950s provides for the use of forecasts of snowmelt runoff into the reservoir system and operational "rule curves" during the flood control season (January 1 through July 31) to (1) determine, allocate, and attain the volume of reservoir space (*i.e.*, "flood control space") necessary to capture runoff and control reservoir releases to prevent Boise River flows below Diversion Dam from exceeding 6,500 cfs,

and (2) fill the reservoirs for irrigation use in accordance with the forecasts and the rule curves by the end of the flood control season. Ex. 2038, Art. 6a-e. As explained succinctly in a contemporaneous press release describing the reservoir operating plan:

> The operating plan calls for the three reservoirs to be managed as one system, with water storage and release based on a forecast of runoff in the watersheds above the dams. Water will be released in advance of the spring snowmelt flood to provide flood control. Water will be captured on recession of the flood peak to supply irrigation requirements.

Ex. 2103.

Twenty years later, at Governor Andrus' request, IDWR prepared a report written by IDWR Engineer Bob Sutter evaluating the potential modification of Boise River Reservoir operations to further decrease the risk of flooding (by increasing required flood control spaces during the early phases of flood control operations), while maintaining a high level of assurance that the reservoirs and reservoir storage rights will be filled for irrigation use at the conclusion of flood control operations,. Ex. 2182; Tr., 418: 4-15.[2] The report clearly and repeatedly identifies the period of reservoir "fill" following the period of "evacuation," when flood control releases are made to maintain required flood control spaces, in which no water can be stored.

> Use of the parameter curves can be discussed in two stages, ***the period of evacuation and the period of fill***. The evacuation period begins in January as soon as the first forecast is made and continues until the natural inflow exceeds the release at Lucky Peak. The release at Lucky Peak is that which is necessary to obtain the required flood space at the end of the evacuation period. Beginning in January, the release is calculated using ***April 15 as the tentative date for the end of the evacuation period*** . . .
>
> ***Filling operations immediately follow the period of evacuation***. The parameter curves in Figure 6 are used to determine the releases, but releases are planned on the basis of short term forecasts of reservoir system inflow. This is a continuing process and forecasts and releases may be revised daily . . .

---

[2] Sutter explained: "In the Report, we used the term 'refill' to mean annual filling of the Boise River Reservoirs during flood control operations for irrigation storage and other beneficial uses." Ex. 2181 at 003632, ¶ 8; Tr., 410:18-411:2.

> Throughout the evacuation period, releases from individual reservoirs are scheduled such that space is provided in the following order: first, from Lucky Peak; second, from Arrowrock; and last, from Anderson Ranch. The reverse order is followed ***during the filling period*** so that flood space is maintained low in the system.

*Id.* at 003677-3678 (emphasis added).

> During the ***actual flood runoff (filling period) in April, May, June, and July***, any deficiency in diversions from those assumed for parameter curve construction would limit flood regulation ability.

*Id.* at 003680 (emphasis added).

> ***Filling Period***
>
> While flood operations during the evacuation period are governed by an April 15 target date, space requirements ***throughout filling*** can be determined directly from the flood parameter curves (Figure 6) using the current runoff forecast.

*Id.* at 003687 (emphasis added).

> Once forecasts of runoff have been made, operation of the Boise River reservoirs for flood control becomes dependent on the flood space parameter curves shown on Figure 6. These curves are used by the operating agencies, the Bureau of Reclamation and the Corps of Engineers, ***during the evacuation and fill periods*** to judge the releases that should be made to provide the required flood space.

*Id.* at 003696 (emphasis added).

The 1985 revision to the Boise River Reservoir operating plan that was instigated by IDWR's 1974 Report continues to be based on the principle of delaying the storage of water in the Boise River Reservoirs until it is safe to do so. The "Water Control Plan" (Section VII) of the Water Control Manual explains:

> ***The amount of water stored in the system and precisely when it is stored is dependent on water rights, the amount of water available as runoff, the timing of the runoff, and the required flood control regulation.*** Flood control regulation during this period (1 November through the spring high water period) endeavors to maintain adequate flood control spaces within the reservoirs and yet refill the reservoirs without exceeding 6,500 cfs as measured at the Glenwood Bridge gaging station. In the low runoff years, flood control regulation during the spring snowmelt period is normally limited or not necessary, and water conservation and reservoir refill are the primary objectives. Runoff years near

normal require delicate balances between flood control and refill regulation, with runoff timing and volume forecasts as the key factors for the balances. In large runoff years, maintaining adequate flood control space within the reservoirs and ***passing excess water through the system without unduly jeopardizing system refill, are the primary objectives.***

Ex. 2186 at 003782 (emphasis added).

c. Refill Requirements. Flood control regulation ***during the refill period (1 April through 31 July)*** requires the use of snowmelt runoff ***to refill flood control spaces within the Boise River reservoirs.*** Refill rates for these flood control spaces must be controlled such that the regulation objective of 6,500 cfs at the Glen wood gage is not exceeded and the required reservoir project spaces are refilled at the end of the snowmelt runoff period. ***Premature filling of these spaces (before natural floodflows had decreased to regulation objective levels) would result in extensive flood damages below Lucky Peak Dam.*** Reservoir regulation during the refill period is normally the most difficult and most critical of the three flood control periods. Therefore, it is absolutely essential that required minimum flood control spaces and space distributions be maintained while the reservoir projects are being refilled. Reservoir releases must be scheduled such that flood control requirements are not violated; and yet, release fluctuations at Lucky Peak must be limited as much as practical to avoid unnecessary interference with irrigation diversions during this period.

*Id.* at 003791 (emphasis added).

Former IDWR Director Higginson explained the revised reservoir operating plan in 1987:

In 1974 Governor Andrus requested [IDWR] to evaluate flood control management of the Boise River system. A report was issued in November of that year recommending several changes for improving Boise river flood control operations. ***As a direct result of this report, a new Water Control Manual for Boise River reservoirs was finalized in April, 1985. Although issued by the Corps of Engineers, this manual was a joint effort by the Corps, Bureau of Reclamation and [IDWR]***. . .

[The new manual] ***contains new rule curves and procedures aimed at providing greater flood protection through early season operations and increased assurance of refill for irrigation during the late runoff season. We feel that the new manual responds well to current conditions on the Boise River and provides a balance between flood protection and refill of storage***. . .

To illustrate the need for this space, the December 1964 flood produced almost 200,000 acre-feet of runoff in one week, and had there been no reservoir space available, would have resulted in a peak flow of 44,000 cfs through Boise. Such a flood today would cause more than 400 million dollars in damages. To protect

> against such an event, current criteria call for a minimum of 300,000 acre-feet of empty reservoir space during November and December.

Ex. 2171 (emphasis added).

In their Response Brief, the Director and the Idaho Department of Water Resources (collectively the "Director") acknowledge that "[t]he 'reservoir operating plan' is based on physically storing the 'second-in' or 'last-in' water at the end of the flood control season." IDWR Response, p. 35. As indicated by the above quotations, delaying reservoir fill until water can be safely stored in the Boise River Reservoirs is imperative to protecting the Boise Valley from flooding. Sutter explained: "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." Ex. 2181 at 003628, ¶ 4.

The Director and Suez concede that the Boise River Reservoirs are operated during flood control season to store water for beneficial uses as and when reservoir space becomes available for storage under the reservoir operating plan. Notwithstanding this concession, they contend that the Boise River Reservoir storage water rights must be treated as "filled" and "satisfied" by flood control release water that BOR cannot store, and that spaceholders cannot beneficially use. In other words, water released for flood control is the water users' stored water flowing past their headgates at a time of the year when they cannot possibly use it. The Director and Suez further contend that filling the reservoirs after flood control releases occurs without a water right, by the good graces of the Director, and is subject to the water delivery demands of junior water right holders and future appropriators. These are precisely the outcomes that the reservoir operating plan was carefully crafted, adopted and approved to avoid. Boise River water users would never have agreed to the coordinated use of the reservoirs for flood control and storage under such terms, amounting to an effective abandonment and forfeiture of the right to store significant

quantities of water in years when flood control is necessary to protect the Boise Valley from the devastating impacts of flooding. The Director and Suez needlessly pit flood control against beneficial use storage, and undermine the storage rights and agreements that have sustained the Boise Valley for over 60 years.

Their rationales for their legal position (addressed below) are: (1) the "filling" or "satisfaction" of Boise River Reservoir storage rights is to be judged solely on the basis of reservoir inflows they variously call "available for reservoir storage," (IDWR Response, pp. 3, 13-14, 16, 25, 28, 29, 31), physically and legally available for storage," (Ex. 2 (Cresto Aff.) at ¶¶ 12, 15, 16, 19, 33); "physically and legally storable" (Suez Response, pp. 9, 26) and "storable inflow" (Suez Response, p. 26); (2) the opportunity to accumulate and retain water in the reservoirs until it is needed for beneficial use is immaterial the exercise of a storage water right; (3) that Idaho law compels storage right holders to store the "first in" water, and gives them no discretion as to when and under what circumstances water is stored under a storage water right; and (4) the Boise River Reservoir operating plan is irrelevant to storage water right administration, because the decrees do not reference it, and the State of Idaho did not sign it.

Their briefs skip through several arguments the State of Idaho daylighted during the Basin-Wide Issue 17 proceedings and tried again before Special Master Booth, to no avail. Assuming that water released for flood control fills storage rights, and that storage after flood control releases constitutes a "second fill," they argue that storing water after flood control release constitutes and impermissible enlargement of storage water rights, is inconsistent with beneficial use principles, and is a "collateral attack" on the storage water right decrees. They misrepresent the "Lucky Peak guarantee" of the reservoir operating plan as the sole assurance provided by the Boise River Reservoir Operating Plan to protect the storage rights, and an

agreement that Lucky Peak storage would be used to replace ***all*** water released from Arrowrock and Anderson Ranch for flood control purposes (not just shortfalls in filling the reservoirs resulting from uncertainties and errors in forecasting runoff and reservoir inflows). They assert that the water stored in the Boise River Reservoirs after flood control releases is unappropriated "excess flow" that is unprotected by a water right, and is subject to the water delivery demands of junior water right holders and future appropriations.

Finally, they propagandize the issue before this Court, warning that the federal government will take over control of the Boise River and water right administration if the Court agrees with the water users and the Watermasters, as Special Master Booth did. This public sound bite is baseless fearmongering.

The Director attempts to insulate the Director's Order from contradiction and meaningful review by asserting: (1) that the question of reservoir fill has been "statutorily committed to the Director"; (2) that questions concerning IDWR's accounting system "should begin and end" with the Director's analysis, and (3) that the accounting system is too complex for the water users and the Boise River Watermasters to understand. However, the response briefs make clear that the Director's position that water released for flood control "fills" and "satisfies" storage water rights is a legal proposition, which is freely reviewable by this Court. Special Master Booth correctly rejected the State's attempts to suggest that the question was beyond his consideration, and the Presiding Judge should too.

While the algorithms of the water right accounting program may be complex, they were not at issue in the Contested Case. The operation of the water right accounting program insofar as it is relevant to the "filling" and "satisfaction" of Boise River Reservoir storage rights is relatively straightforward, has been explained by several witnesses, and was understood and

addressed by Special Master Booth.

The record demonstrates that the Director initiated and conducted the Contested Case to justify his predetermined outcome that the water that has historically, actually filled the Boise River Reservoirs is available for distribution to junior water right holders (principally Suez) and future appropriators. In this process, the Director participated as both an adversarial party and the Hearing Officer. He met with IDWR witnesses throughout the hearing process to discuss information presented during the hearing and he helped IDWR witnesses prepare testimony and exhibits. He further assisted IDWR's examination and cross-examination witnesses. The Director disregarded Special Master Booth's Late Claims decision,[3] and he disregarded the affidavits and testimony of Sutter and Sisco submitted by the Ditch Companies explaining Boise River Reservoir operations, storage during flood control operations, and water right administration. He rejected the undisputed testimony of the Boise River Watermasters, Assistant Watermasters, and water users explaining how storage water rights have been administered, both before and after the adoption of the water right accounting program. He specifically rejected Watermaster Sisco's testimony (whom former Director Tuthill testified knows more about Boise River water right administration during his tenure as watermaster than anyone else), and counseled IDWR's so-called expert in the preparation of testimony designed to rebut and discredit Sisco.

In short, the Director initiated an adversarial contested case proceeding, participated in it as a party and as the Hearing Officer, and issued a decision which attempts to validate the pre-

[3] A Special Master's conclusions of law are expected to be persuasive with the SRBA Court. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997) (citing *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991)). The Special Master's conclusions should likewise be persuasive with the Director. At a minimum the Special Master's decision merits the Director's consideration.

determined position he advocated throughout the proceeding. This thoroughly flawed process deprived the Ditch Companies and the Boise Project of their due process rights, results in an unconstitutional taking of their water rights, and resulted in a decision that is entitled to no deference from this Court.

## II.
## UNDISPUTED FACTS

The following facts are undisputed and have not, nor can they be, disputed by the Director or Suez:

1. The summertime natural flow of the Boise River has long been fully appropriated by water rights decreed in the 1906 Stewart Decree, leaving springtime runoff or "floodwaters" the remaining unappropriated water supply of the Boise River, as evidenced by the 1929 Bryan Decree, also known as the "Flood Water Suit," IDWR's 1977 moratorium order, and IDWR's conditioning of water rights to utilize only water released form the reservoir system for flood control.
2. From the early 1950s to the present, the Boise River Reservoirs have been operated as a system for beneficial use storage and flood control pursuant to the congressionally-approved reservoir operating plan developed, approved, modified and implemented cooperatively by the Bureau of Reclamation ("Bureau"), the Corps of Engineers ("Corps"), the State, and Boise Valley water users to provide high levels of assurance that flooding will be prevented, and that the reservoirs will be filled to the maximum extent possible for irrigation and other beneficial uses at the conclusion of flood control operations.
3. To accomplish the dual flood control and beneficial use storage objectives, the operating plan requires the Bureau and the Corps to use of runoff forecasts and "rule curves" to determine how much reservoir space is reserved for flood control and must remain vacant, and how much space may be filled for beneficial use storage during the flood control season (generally November 1 through June/July).
4. Reservoir space that is required to be kept vacant for flood control purposes is not available to store water for beneficial use, until that space is no longer required to be kept vacant for flood control purposes. Water that is required to be released from the reservoir system to maintain required flood control spaces is, therefore, not available for beneficial use storage under reservoir storage water rights.
5. Reservoir space becomes available for beneficial use storage only as flood space requirements decline in accordance with the runoff forecast and rule curve procedures of the reservoir operating plan. As runoff and the risk of flooding decline, flood control space allocation requirements are reduced, and water is increasingly stored for beneficial use, until the reservoirs reach "maximum fill." Storage water rights are thus fulfilled as available reservoir storage spaces are physically filled.

6. The water that is actually physically stored in the reservoirs at the point of maximum reservoir fill is allocated to the reservoir water rights and to the spacholders' storage accounts (on what is commonly called the "day of allocation") for supplemental beneficial use as river flows decline during the irrigation season.
7. The 1954 supplemental contracts with Arrowrock and Anderson Ranch spaceholders, and the repayment contracts with Lucky Peak spaceholders, require the Bureau and the Corps to operate the Boise River Reservoirs for beneficial use storage in accordance with the reservoir operating plan. No change in reservoir operations that would diminish the spaceholders' storage rights may be made without their consent.
8. Operating the reservoirs in accordance with runoff forecast-based rule curves provides a high degree of assurance to the spaceholders that their storage rights and storage accounts will be filled to the maximum possible extent by the end of flood control operations.
9. Recognizing the uncertainties involved in runoff forecasting, the reservoir operating plan provides the Arrowrock and Anderson Ranch spaceholders a secondary assurance or "guarantee" that any shortfall in filling the storage rights for Arrowrock and Anderson Ranch reservoirs will be "made up" by crediting to the rights for those reservoirs water stored in Lucky Peak Reservoir.
10. While Lucky Peak storage is subject to reduction in such circumstances, the Bureau's agreement that water will be credited first from the Bureau's 60,000 acre-feet of uncontracted Lucky Peak space provides Lucky Peak spaceholders additional assurance that their portions of Lucky Peak storage spaces will likely be filled at the conclusion of flood control operations as well.
11. Flood control use of the reservoirs does not require a water right, or constitute use of the established storage water rights. Consequently, water released for flood control cannot be treated as having been stored under the reservoir storage rights, and the release of water from the reservoirs for flood control purposes has no impact on the reservoir storage rights.
12. The Boise River Watermasters have administered Boise River storage water rights with the understanding that beneficial use storage cannot occur without a water right, and that all water physically stored in the reservoirs at the conclusion of flood control operations has been stored pursuant to the storage rights and allocated to the spaceholders' storage accounts.
13. The Boise River Watermasters have administered Boise River storage water rights with the understanding that the water physically stored in the Boise River Reservoirs during flood control operations pursuant to the reservoir operating plan is stored pursuant to the reservoir storage water rights, and that flood control releases do not affect the accrual of physically stored water to reservoir storage rights.
14. The Boise River Watermasters have administered Boise River storage water rights with the understanding that, until reservoir space that is available for storage is physically filled, storage water rights remain in effect and are filled in priority with all other Boise River water rights. "When the reservoirs reach maximum physical fill at the conclusion of flood control operations, the storage rights have likewise reached

maximum fill, and the water that has been physically stored pursuant to the storage water rights is allocated to the spaceholders' storage accounts."

15. The Boise River Watermasters have administered Boise River storage water rights with the understanding that, if the Boise River Reservoirs have not physically filled by April 1, physical storage of reservoir inflows continues under the priorities of the storage rights, in order of priority with natural flow rights, until the reservoirs are physically filled, or until natural flow becomes insufficient to fill the reservoirs because of downstream senior irrigation demand. If the reservoirs and storage rights are completely filled when the reservoirs reach maximum physical fill at conclusion of flood control operations, additional storage may occur during the ensuing irrigation season if all subsequent rights have been met.

16. Notice from the Corps and the Bureau that flood control releases are required signals to the Watermaster and storage spaceholders that there should be sufficient natural flow from the upper Boise River watershed to physically fill the Boise River Reservoirs and reservoir storage rights for a full allocation to storage accounts for the upcoming irrigation season. Boise Valley spaceholders rely on this notice to plan their water deliveries, irrigation use, and planting.

17. The Boise River Watermasters have administered Boise River water rights with the understanding that Boise River flows from the upper Boise River watershed are available for additional/junior appropriation only during flood control operations when water is released for flood control purposes. IDWR includes conditions in permits issued for new appropriations of water from the upper Boise River watershed to notify junior right holders that water is available for their diversions only during flood control operations, when spring runoff from the Upper Boise River watershed exceeds irrigation demand by diversions with Stewart and Bryan Decree water rights, and the physical filling of the Boise River Reservoirs pursuant to storage water rights in accordance with the reservoir operating plan.

18. Reservoir inflows that are required to fill storage rights during flood control operations are never released to deliver water to water rights that are junior to the Boise River Reservoir storage." IDWR has no evidence that water that would otherwise be stored to fill the Boise River Reservoirs has ever been released from the reservoirs to fulfill water rights that are junior to the reservoir storage rights.

19. Prior to the 2012 Basin-Wide 17 proceedings in the SRBA, no IDWR employee had ever advised the Boise River Watermaster or the Boise River water users that IDWR considered water released from the Boise River Reservoirs for flood control purposes as a release of water that had been stored for beneficial use pursuant to a storage water right. No IDWR employee had suggested to the Boise River Watermaster that storage rights were "satisfied" at the point of "paper fill" in the water right accounting, that 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 the release of water from the reservoirs prior to maximum physical fill.

20. The 1986 adoption of computerized water rights accounting system for the Boise River did not alter Boise River Reservoir operations, the physical filling of reservoir system storage spaces and water rights pursuant to the reservoir operating plan, or

> make any material change to the administration of Boise River Reservoir storage rights. The accounting system confirms that all the water actually, physically stored in the reservoirs at the conclusion of flood control operations, at the point of maximum reservoir fill, has been stored pursuant to the existing reservoir storage rights under the priorities of those rights.

The relevant aspects of IDWR's computerized water right accounting program are not in dispute. The water right accounting program "accrues" or "distributes" to Boise River Reservoir storage water rights reservoir inflows (*i.e.*, natural flow entering the reservoirs) that enter the reservoirs "in priority" (*i.e.,* water that is not required to be passed through the reservoirs for delivery to downstream senior water rights), until the accrual equals the volume limits of the reservoir rights. The program accrues reservoir inflows to the storage rights regardless of whether the water is actually retained in the reservoirs. IDWR engineers use "paper fill" as "a term of convenience" to describe this point in the water right accounting program's accrual process. Actual, physical storage (retention of reservoir inflows until maximum fill is reached) is thereafter tracked by the water right accounting program as "unaccounted for storage." When "maximum fill" of the reservoirs is reached, the physically stored water (which includes the "unaccounted for storage") is allocated to the reservoir water rights, and apportioned to the spaceholders through the "storage program" in accordance with the spaceholders' proportionate interests in the stored water, as defined by their contracts with the Bureau of Reclamation.

How the water right accounting program works is not the Ditch Companies' primary concern on appeal. As previously discussed, the Ditch Companies believe the problem in this case is the Director's ***legal conclusion*** that flood control releases "fill" and "satisfy" reservoir storage rights. The water right accounting program's accounting methods have never been employed to administer Boise River Reservoir storage rights as if they were "filled" and no longer in effect at the point of "paper fill," or to distribute water that is necessary to fill the reservoirs after flood control releases to junior water rights (or future appropriations). But now

that the Director has formalized his legal position in his Order, it is likely that the Director will seek to change the administration of Boise River Reservoir storage rights to conform to his position. Consequently the Ditch Companies seek an order from this court reversing the Director's legal conclusion, and holding that: (1) flood control releases do not "fill" or "satisfy" Boise River Reservoir storage rights; and (2) the storage rights remain in effect until the reservoirs are filled to the maximum extent possible in accordance with the Boise River Reservoir operating plan. If the Court determines that remand is necessary to conform IDWR's water right accounting methods to these holdings, the Ditch Companies request that the Court instruct the Director to appoint an independent hearing officer, who is not an employee of IDWR.

## III.
## ARGUMENT

### A. Boise River Reservoir Storage Rights are Not "Filled" by Water Released for Flood Control

The Director and Suez assert that the Boise River Reservoir storage water rights are "filled" and "satisfied" at the point of "paper fill" in the water right accounting program, even if the reservoirs are not actually filled with water, because all reservoir inflows that are not delivered to downstream senior water rights are "physically and legally available" to be stored.

Their rationale for this legal position (devoid of citation to supporting legal authority) is that, because the storage right decrees do not contain diversion rates or language limiting diversions, they "authorize diversion of all flows not required by senior water rights until their decreed annual volumes are reached." IDWR Response, p. 24 (emphasis in original). According to the Director, "the elements of the *Partial Decrees,* . . . entitle the Decreed Storage Rights to ***all*** reservoir system inflow any time senior water rights are not diverting and the Decreed Storage Rights have not been satisfied." *Id.*, p. 34 (emphasis added). Borrowing a term from

IDWR's Conjunctive Management Rules, the Director asserts that:

> Because on-stream reservoir water rights ***command*** ***all*** flows when 'in priority' (except those required for senior water rights)" leaving it to the reservoir operator to decide when and whether an on-stream reservoir water right is being 'exercised' also puts the reservoir operator in control of deciding when and whether there is any natural flow available for junior rights.

*Id.*, p. 26 (emphasis added).

According to Suez, if water is physically available (*i.e.*, entering a reservoir) and legally available (*i.e.*, not passed through to a downstream senior), "the storage right holder is expected to store it" and failure to store such water counts toward the "fill" and "satisfaction" of a storage right. Suez Response, p. 26. In direct conflict with Boise River Reservoir flood control operations under the reservoir operating plan, Suez wants to force storage right holders to store the "first in" water and let the later peak flows rush through the Boise Valley so that Suez and other juniors can have the water when it is convenient and "desirable" for them (assuming that flooding will not adversely impact their operations). Suez Response, p. 38. On this basis, IDWR's Response Brief explains: "The Water District 63 accounting system therefore 'counts' or 'credits' to each Decreed Storage Right each day *all* of the natural flow available under its priority at the decreed point of diversion (the dam), until the running total of the cumulative daily accruals reaches the decreed annual volume." IDWR Response, p. 25 (emphasis in original).

### 1. IDWR's Water Right Accounting does not Treat "All" Reservoir Inflows that are Not Delivered to Downstream Senior Rights as Available for Storage

The Director and Suez incorrectly claim that all reservoir inflows besides those that are delivered to downstream seniors are accrued to the reservoir water rights. The Director's expert witness, Elizabeth Cresto, testified that approximately 250 cfs is passed through the Boise River Reservoirs and delivered downstream as "operational flow" to provide sufficient head to deliver water to downstream Boise River headgates, without being treated as available natural flow for

beneficial use storage. Tr., 607:13-609:2. This underscores the point that water is not treated as "filling" and "satisfying" reservoir storage rights simply because it enters the Boise River Reservoirs. As Sutter explained:

> 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.

Ex. 2181 at 003628, ¶ 19.

Presumably, IDWR does not accrue the 250 cfs operational flow to the reservoir storage rights because IDWR recognizes that it is passed through the reservoirs to facilitate the delivery of water to downstream water users, rather than being stored for a beneficial use under the storage water rights. The same recognition should apply to water that cannot be stored for beneficial use, and must be released from the Boise River Reservoirs to prevent flooding.

### 2. <u>Water Released for Flood Control is Not "Available" for Beneficial Use Storage</u>

As previously discussed, the record and Special Master's Booth's Late Claims decision conclusively demonstrate that water required to be released from the reservoir system to maintain required flood control spaces is not available for beneficial use storage under the reservoir storage water rights. Obviously, water cannot be stored in space that is not available for storage. Reservoir space becomes available for beneficial use storage only as flood space requirements decline in accordance with the runoff forecast and rule curve procedures of the reservoir operating plan. As runoff and the risk of flooding decline, flood control space allocation requirements are reduced, and water is increasingly stored for beneficial use, until the

reservoirs reach "maximum fill." The Director and Suez concede these facts.

The Director and Suez also acknowledge that flood control use of the Boise River Reservoirs does not require a water right, is not authorized by a water right, and does not constitute the use of a storage water right. This is exemplified by the fact that Lucky Peak Reservoir was operated for flood control without any water right from the time it was constructed until the 1960s when a water right permit was issued and storage contracts were entered to authorize such use.

Consequently, there is no rational basis for the Director's legal position that water that cannot be stored and must be released for flood control purposes, is "physically and legally available for storage," and therefore "fills" and "satisfies" the reservoir storage water rights. Special Master Booth reached this same conclusion:

> 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.

*Memorandum Decision and Order Granting Ditch Companies and Boise Project Board of Control's Motions for Summary Judgment* (Oct. 9, 2015) ("Memorandum Decision"), p. 4.

### 3. <u>Actual Storage of Water is Essential to the Exercise of a Storage Water Right</u>

As explained in the Ditch Companies' Opening Brief, the opportunity to accumulate and retain water until it is needed for beneficial is essential to the exercise of a storage water right. That opportunity does not exist with water that cannot be stored, and must be released for flood control purposes. Opening Brief, pp. 52-58. The Director and Suez argue that the actual storage of water and the opportunity to beneficially use it are irrelevant to the Director's determination

of whether a storage water right is filled" and "satisfied." According to them, as soon as water that is not destined for a downstream senior water right enters a reservoir, it "satisfies" the storage right, regardless of whether the water can be actually, physically stored in the reservoir.

This Court has explained that the Boise River Reservoir water rights have two purposes of use components:

> ***The first authorizes the storage of water for a particular purpose (i.e., "irrigation storage," or "power storage"). The second authorizes the subsequent use of that stored water for an associated purpose, which is referred herein as the "end use" (i.e., "irrigation from storage," or "power from storage").*** Each purpose of use is assigned its own quantity and period of use, which may or may not differ from one another. With respect to storage water rights for irrigation, for example, it is typical for the "Irrigation Storage" purpose of use to be a year round use (01-01 to 12-31), and the "Irrigation from Storage" purpose of use to be limited to the irrigation season (*e.g.*, 03-15 to 11-15)... ***'[T]he very purpose of storage is to retain and hold for subsequent use***, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.' *Rayl v. Salmon River Canal Co.*, 66 Idaho 199,208, 157 P.2d 76, 80 (1945).

BW 17 Decision, pp. 5-6 (emphasis added).

The theory of storage water right administration advocated by the Director and Suez effectively eliminates the storage and beneficial use components of storage right, which this Court has recognized are elements of the Boise River Reservoir storage rights.

**4. Boise River Reservoir Flood Control is Not a Unilateral "Choice" of the of Reservoir Operators or Storage Spaceholders**

The Director and Suez attempt to portray flood control operations as an ongoing, unilateral "choice" by the Bureau of Reclamation and the Corps of Engineers, and by the spaceholders who agreed that beneficial use storage in the reservoirs will occur in accordance with the reservoir operating plan. Their portrayal infers that: (1) that only the federal agencies and the spaceholders were involved in establishing the operating plan under which the Boise River Reservoirs are operated; and (2) the federal agencies and the spaceholders have the

discretion to dispense with flood control operations, and may instead "choose" to fill the reservoirs to the maximum "as quickly as possible," regardless of the risk that that winter and spring runoff will flow over and through the reservoirs to inundate the Boise Valley downstream from Lucky Peak, and cause widespread damage.

In this portrayal, the Director and Suez ignore the substantial evidence in the record that the State of Idaho, through its congressional delegation, its Governors, IDWR, and the Boise River Watermasters, was deeply involved at virtually every step of the way in requesting, formulating, advocating for, negotiating, developing, approving and modifying the reservoir operating plan as a benefit to the entire Treasure Valley and the State as a whole. While construction and operation of the Boise River Reservoirs for flood control and beneficial use storage are directly authorized, accomplished and funded under the federal law, the State, and IDWR in particular, have been directly involved in the decision-making to provide coordinated, multiple use of the Boise River Reservoirs for flood control and beneficial use storage. The record is too clear, voluminous and detailed on this point for the Director and Suez to claim otherwise. In addition to the discussion of the State's involvement in the Ditch Companies' Opening Brief, the report of Dr. Jennifer Stevens provides extensive information regarding the State' historical involvement in the development and implementation of the reservoir operating plan.

Similarly, the Director and Suez know full well that the Bureau and the Corps cannot unilaterally choose to cease, suspend or modify flood control operations as required by the reservoir operating plan without significant State and water user involvement. The record on this point is also clear, voluminous and detailed. The 10-year effort instigated by Governor Andrus and IDWR's 1974 report resulting in the 1985 revision to the reservoir operating plan

demonstrates that changing reservoir operations is a very involved task requiring the involvement of multiple interested parties, including the State of Idaho and the local water users.

In this regard, Special Master Booth explained:

> United Water also asserts that all "storable inflow" 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) . . . 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.

Memorandum Decision, p. 17.

Neither the BOR, nor the Corps, nor the Boise River Reservoir spaceholders have the discretion to disregard the requirements of the reservoir operating plan. Nor would anyone in their right mind residing, owning property or conducting business in Basin 63 suggest they do so.

### 5. <u>The Boise River Reservoir Operating Plan is Relevant to Water Right Administration</u>

On the one hand the Director and Suez acknowledge that the relationship between flood control and beneficial use storage is defined by the Boise River Reservoir operating plan, and that a the plan governs how water is stored in the Boise River Reservoirs for beneficial use. On the other hand, they argue that the reservoir operating plan is irrelevant to the administration of Boise River Reservoir storage water rights. So, the Director need not consider when and under what circumstances water is actually stored for beneficial use during flood control operations when he decides that the storage rights are "filled," "satisfied," "off," and "no longer in priority."

Water rights cannot be administered in a theoretical vacuum devoid of a meaningful

understanding or regard for how water is actually diverted, stored, delivered and used in the real world. It seems too obvious to argue that storage water right administration must be based on how water is stored. Indeed, the Water Control Manual clearly states: "***The amount of water stored in the system and precisely when it is stored is dependent on water rights, the amount of water available as runoff, the timing of the runoff, and the required flood control regulation.***" Ex. 2186 at 003782 (emphasis added). This statement appears in the introduction to the "Water Control Plan" section of the Water Control Manual, which IDWR helped draft.

The Director attempts to justify his disregard for actual beneficial use storage under the reservoir operating plan by arguing: (1) Congress did not authorize or approve the reservoir operating plan; (2) that it is inapplicable to water right administration because the State of Idaho did not sign it; and (3) that it irrelevant to water right administration because it is not mentioned in the prior decrees. Each of the arguments is without merit.

**a. Congress Authorized and Approved the Reservoir Operating Plan**

The Director incorrectly asserts that Congress did not approve the reservoir operating plan. As explained in the Ditch Companies' Opening Brief, in 1940, the Interior Secretary and the Corps of Engineers each submitted reports to Congress which explained the plan for the construction and operation of Anderson Ranch Reservoir, including the core concept of operating the reservoirs on the basis of run-off forecasts to vacate reservoir space in advance of the flood season, and fill that space as the runoff and the risk of flooding subsided. Opening Brief, pp. 13-14.

After extensive flooding in 1943, congressional committees requested the Board of Engineers for Rivers and Harbors review the Corps 1940 report to identify additional flood control opportunities. On May 13 1946, after extensive consultation with the Idaho congressional delegation, the Idaho Governor, IDWR local officials and Boise River water users,

the Corps of Engineers submitted the requested report to Congress proposing the construction of Lucky Peak Reservoir to be operated jointly with Arrowrock and Anderson Ranch in accordance with core concept of the reservoir operating plan. On July 24, 1946, Congress authorized construction of Lucky Peak in accordance with the May 13, 1946 report. *Id.*, pp. 17-19.

From 1946 to 1953 the Bureau, the Corps, and IDWR developed the reservoir operating plan that took the form of the 1953 Agreement signed by the Bureau and the Corps. *Id.* at 19-21. The 1953 Agreement was discussed in, and attached to, a September 21, 1953 Revised Allocation and Repayment Report, as the basis for joint Boise River Reservoir Operations. The Revised Allocation and Repayment Report supplemented the Secretary of Interior's 1940 report regarding Anderson Ranch to "provide an authoritative basis for the operation of [the Boise River Reservoirs] for flood control purposes on a system basis." Ex. 2071 at 001930-31. After the 1953 Agreement was signed, and joint reservoir operations was approved by the Arrowrock and Anderson Ranch spaceholders through the 1954 supplemental contracts, Congress passed Public Law 660 (introduced by Idaho Senator Dworshak), which provided:

> Sec. 2. The Secretary is further authorized, ***on the basis of the principles set forth in the revised allocation and repayment report for the Boise Federal reclamation project, Idaho, dated September 21, 1953*** (which report is in part the basis upon which the above-described amendatory repayment contract was negotiated, and subject to then existing contractual obligations of the United States in relation to the Boise project (1) to coordinate his operation of the facilities of the project with that of other Federal installations of the Boise and Payette Rivers . . . .

Ex. 2101 (emphasis added).

Thus, contrary to the Director's argument, Congress clearly and specifically approved the reservoir operating plan of the 1953 Agreement. The 1953 Agreement remains in effect today, modified by the 1985 Water Control Manual to update the flood control rule curves and other operating procedures. Opening Brief, p. 31.

**b. The Director is Estopped From Asserting that the Reservoir Operating Plan is Irrelevant to Administration of Boise Rive Reservoir Storage Rights**

The State of Idaho and IDWR's extensive participation in the development and approval of the reservoir operating plan is thoroughly documented in the record. The Director now asserts that the reservoir operating plan has no bearing on water right administration, so that he may take the inconsistent positions that water released for flood control is the Ditch Companies' stored water flowing downstream past their headgates, they have no protectable water right to store water after flood control releases occur, and the water that has historically been stored for their use can instead by distributed to junior water rights and future appropriators. The Director's position undermines the essential promises and assurances provided to the water users through the reservoir operating plan that the State, and specifically IDWR, led the Ditch Companies to believe would protect their storage water rights. The Court should find that the Director is estopped from asserting this position.

**i. Estoppel**

Quasi-estoppel precludes a party from asserting a position inconstant with that previously asserted to the detriment of another. *KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971). Estoppel applies in cases where it would be unconscionable to allow the party to maintain a position inconsistent with the one in which he acquiesced. *Id.* Therefore, quasi-estoppel is properly applied when a party unconscionably asserts an inconsistent position, with knowledge of the facts and his rights, to the detriment of another. *Id.*, 282, 486 P.2d at 995; *see Naranjo v. Idaho Department of Corrections*, 151 Idaho 916, 920, 265 P.3d 529, 533 (Ct. App. 2011). It is thus essential for quasi-estoppel's proper application that the court "focus [its] attention upon the specific facts and circumstances of the case at bar." *KTVB*, 94 Idaho at 282, 486 P.2d at 995.

The record is clear that the State and IDWR affirmatively participated in the formulation, preparation, approval and modification of the reservoir operating plan. Additionally, the State and IDWR have had multiple opportunities to raise the objections the Director and the State have presented through the Contested Case proceeding and the Late Claims case to the method of storing water under the reservoir operating plan for beneficial use to fill the Ditch Companies' storage water rights (*e.g.*, injury to junior water rights, usurpation of State control of water right administration):

> Where nonaction or passivity is relied on to create an estoppel, it must appear that the party to be estopped was under a duty to act under the circumstances, or . . . was bound in equity and good conscience actively to evidence his intention not to be bound by the transaction. There may be an equitable duty to speak, if subsequent maintenance of a position inconsistent with that acquiesced in would lead to unconscionable results.

*KTVB*, 94 Idaho at 284, 486 P.2d at 997.

The State's and IDWR's continual support of both the reservoir operation plan when by law they had a duty to voice their objections and/or provide alternative recommendation, created reliance in the Ditch Companies that the State would honor and abide by the reservoir operating plan. It is unconscionable to allow the Director to maintain this inconsistent position in this proceeding, which results in the evisceration of the water users' existing storage rights—storage rights the water users have depended on and paid for since the inception of the Boise River Reservoir system.

#### ii. The Petitioners' Case Represents an "Exceptional Case"

Idaho courts have held that the doctrine of estoppel is applicable to the government or a public agency only in "exceptional cases" when either functions in a sovereign or governmental capacity. *Naranjo v. Idaho Department of Corrections*, 151 Idaho 916, 920, 265 P.3d 529, 533 (Ct. App. 2011). Exceptional circumstances are required to ensure that estoppel does not nullify

or adversely affect a strong public policy, or is not used to replace lengthy established substantive and procedural requirements." *Golden Gate Water Ski Club v. County of Contra Costa*, 165 Cal. App. 4th 249, 259 (2008). The Idaho Supreme Court has not articulated what circumstances constitute an "exceptional case." Nevertheless, *Boise City v. Wilkinson*, 16 Idaho 150, 177, 102 P. 148, 155 (1909), states, "there are exceptional cases in which the doctrine of estoppel and laches should be applied . . . ." These circumstances exist where estoppel's "application is essential to prevent great wrong and injustice being committed against the adverse party." *Id.*

Although Idaho courts have not articulated "exceptional circumstances," California courts and the 9th Circuit Court of Appeals provide guidance. The Supreme Court of California holds estoppel is properly applied to a state action in "extraordinary cases where the injustice is great and the precedent set by the estoppel is narrow." *Long Beach v. Mansell*, 3 Cal. 3d 462, 496-97 (1970), *see County of San Diego v. California Water & Telephone Company*, 30 Cal. 2d 817, 835 (1947) (In "exceptional cases . . . where justice and right require it, a governmental body may be bound by estoppel."). The 9th Circuit Court of Appeals holds estoppel is applicable to state conduct where the state's "affirmative misconduct is sufficiently severe to outweigh the countervailing interest of the public not to be unduly damaged by the imposition of estoppel." *Beacom v. Equal Employment Opportunity Com.*, 500 F. Supp. 428, 435-36 (9th Cir. 1980). In such cases "affirmative misconduct" is determined by examining the justification for the state's misconduct, the magnitude of the injury possible from the state's breach of duty, and the harm to public by permitting estoppel. *Id.* at 438.

In *Twin Falls-Salmon River Land & Water Co.*, a case the Supreme Court of Idaho applied estoppel to a state agency but on a pecuniary theory, the Court opined:

> The state may properly be estopped from taking conflicting positions at different times without just reason. No good reason can be offered why the state in its dealings with this matter should be unaffected by consideration of morality and right, which ordinarily bind the conscience, and the observance of honest and fair dealing on the part to the state may become of higher importance than [that of the people]. We naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and higher morality that belong to the ordinary transactions of individuals.

*State v. Twin Falls-Salmon River Land & Water Co.*, 30 Idaho 41, 69, 166 P. 220, 230 (1916) (internal citation omitted).

California and the 9th Circuit's application of estoppel to the government or government agency share common themes with *Twin Falls-Salmon River Land & Water Co., supra*, in that where the government or its agencies offer no justifiable reason for its inconsistent position, the injury is sufficiently severe, the State's ability to effectuate its police power is not implicated by the application of estoppel, and justice and right require it, an "exceptional case" is before the court and estoppel may be applied to the government and its agencies. *See Lloyd Crystal Post, American Legion v. Jefferson County*, 72 Idaho 158, 237 P. 2d 348 (1951) (City was estopped from claiming a right to Lloyd's property where the "exceptional and unusual facts" justified estoppel's applications. Lloyd relied on the city conveyance of the property, the city acquiesced to Lloyd's title and Lloyd made substantial improvements to the property.); *Robinson v. Lemp*, 29 Idaho 661, 161 P. 1024 (1916), (City for many years treated City property as Lemp's, who controlled, occupied, and possessed the property; thus, the city was estopped from asserting its claim of title.), *see Knori v. State ex rel. Department of Health, Office of Medicaid*, 2005 Wy. 48 (2005); *Freight Ways, Inc. v. Arizona Corporation Commission*, 129 Ariz. 245 (1981).

The Director's repudiation of the method of storing water to fulfill the Ditch Companies' storage rights under the reservoir operating plan represents an "exceptional case." The State offers no valid justification why it should not be required to abide by the reservoir operating plan

when it substantially participated in, supported, approved and acquiesced to the plan for over 60 years. The only justification the State offers for the position it now asserts is that it was not a signatory party to the reservoir operation plan or the storage contracts between the water users and BOR. The State in good conscience and morality should not be able to assert such a claim when a similar claim would be estopped if the offending party was not the State.

A substantial and severe injury to the Ditch Companies water rights will result if the Director is allowed to disregard the beneficial use storage and protection provisions of the reservoir operating plan. The Ditch Companies depend heavily upon the storage water rights secured in the reservoir space they paid for. Many of the water users use the stored water to irrigate crops. They have relied upon reports of physical reservoir contents to gauge their storage supplies for the upcoming irrigation season. Prior to Basin-Wide Issue 17, they had never been informed that the State or IDWR considered flood control releases to be releases of their stored water, or that any of the water allocated to their storage accounts had been stored without a water right.

Governmental police powers are not implicated either. The Ditch Companies only request that the Court compel the State and IDWR to honor the commitments they assented to in the formation of the reservoir operation plan and the storage contracts they supported.

Justice and right require the State and IDWR to be held to a higher standard than that of the individuals they govern. The State and IDWR's conduct from the inception of the reservoir operation plan and their subsequent support of the storage contracts led the water users to believe that the State and IDWR would honor their indirect commitments to the water users. The water users relied on the representations of the State and IDWR to their detriment. It would be unconscionable to allow the State and IDWR to ignore the reservoir operating plan now,

whatever their motivation.

#### c. The Lack of a Reference to the Reservoir Operating Plan in the Storage Right Decrees Does Not Render it Irrelevant to the Administration of the Rights

The Director argues that the reservoir operating plan is irrelevant to water right administration because it is not mentioned in the decrees for the Boise River Reservoir water rights. The same is true of IDWR's water right accounting program, the so called "one-fill rule," and the Director's theories that the decrees authorize a storage right holder to "command" the entire flow of a river, that a storage right holder is obligated store water as soon as it enters a reservoir, and that physical storage and beneficial use of water are irrelevant to "satisfaction" of a storage water right.

It is obviously not the case that the words within the four corners of a decree are the only basis for understanding, interpreting, and administering water rights. Statutory and common law, administrative rules, agreements between water users, principles of hydrology, facts specific to the basin or stream within which the water right is diverted, and, hopefully, experience and common sense, are among the many factors that play a role in water right interpretation and administration. Consequently, the assertion of the Director and Suez that the reservoir operating plan is not mentioned in the Boise River Reservoir storage rights is unavailing.

## B. Respondents' Arguments that Presume Second Fill are Misplaced

### 1. Storing Water in the Boise River Reservoirs After Flood Control Releases is Consistent with "Beneficial Use Principles"

As discussed, *supra*, the essence of the argument by the Director and Suez is that "all" flows of the Boise River are diverted by the storage water rights regardless of whether the water is physically stored in the reservoirs and regardless of whether the water cannot be stored because it is being passed through as part of flood control releases. If the Court is having a

flashback or a sense of *deja vu* it is because these same arguments were raised by the State of Idaho in the Basin-Wide Issue 17 proceedings. The Director contends now, as the State did then, that IDWR's water right accounting only considers the diversion, *i.e.*, "Irrigation Storage" component of the quantity amount even though the storage water rights also include a beneficial use component which is also expressly quantified, *i.e.*, "Irrigation from Storage." Despite the Director's current arguments to the contrary, end beneficial use remains a critical element to storage water rights and cannot simply be decoupled from the diversionary element. The water must be physically available when needed to satisfy the end beneficial use.

The fundamental principles of Idaho water law requires physical diversion from a natural watercourse ***and*** application of the water to a beneficial use. *Joyce Livestock Company v. United States*, 144 Idaho 1, 19, 156 P.3d 502 (2007) (citing *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980)). With the exception of stock water rights and instream flow water rights, physical diversion is required to obtain a water right. *Id. See also*, *Bedke v. City of Oakley*, 149 Idaho 532, 237 P.3d 1 (2010). Storage water rights require the physical diversion or impoundment of water from a natural watercourse along with the storage and use of the water for beneficial purposes. Accordingly, storage water rights typically have two purposes of use: (1) the diversion of water from a natural water course for a beneficial purposes; and (2) the diversion or release of the stored water for a beneficial purpose.

The very purpose of a storage water right is to "retain and hold for a subsequent use." *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945). If the water cannot be diverted or physically retained for end use because of an operating plan which has been approved by the water users, water right holder, Congress and the State of Idaho, then it cannot be stored and subsequently put to beneficial use. Water that cannot be actually, physically stored

and retained until it is needed for beneficial use is not "physically and legally" available for beneficial use and does not "satisfy" the storage water rights.

### 2. Storing Water in the Boise River Reservoirs After Flood Control Releases is Not an Enlargement of the Storage Rights

For these same reasons, the Director's arguments that accounting for the storage water rights based upon the maximum physical fill, even though that is exactly how the Director and its Watermasters have administered the rights for decades, would result in an enlargement also fail. As indicated by the Director, an enlargement results in increasing the amount of water diverted or consumed to accomplish a beneficial use. IDWR Response, p. 39. However, this issue simply reverts back to the central issue and argument of the Department that "all" water is diverted by the reservoirs even if it is not physically stored or retained for subsequent use because it must be released for flood control purposes. The amount of water stored in the reservoirs and the end beneficial use available to the spaceholders has not increased. Rather, the same amount historically allocated to the spaceholders by the Department's accounting programs and its Watermasters at the point of maximum physical fill is quantified by the existing storage water rights (*i.e.*, "Irrigation from Storage") and this amount has not changed. The Ditch Companies are not suggesting the existing storage water rights are entitled any additional diversion, or more importantly, an additional amount of water for beneficial use following flood control releases. Again, the amount of end beneficial use, which is quantified by the end beneficial use component of the existing storage water right, continues to be the same following flood control releases.

The Ditch Companies are also not seeking to fill existing storage water rights multiple times because there is no multiple fill or "double" fill of the existing storage water rights when the reservoirs are empty because of required flood control releases. Indeed, the Ditch Companies

agree that the existing storage water rights cannot be filled or satisfied multiple times for the intended beneficial use. However, this simply begs the question as to whether the existing storage water rights are satisfied when the reservoir is vacant because it is required to be vacant due to flood control operations. All agree that flood control releases are not a use of the existing storage water rights, and that the end beneficial use of the stored water by the spaceholders remains unchanged. However, the Department would like to count the flood control releases as if that water has been used.

### 3. <u>The Ditch Companies Position is Not a "Collateral Attack" on the Storage Rights</u>

The Director argues that the existing water rights are conclusive as to the nature and extent of the rights and thus reliance on the reservoir operating plan is a collateral attack on the decrees. This argument, however, ignores the fact that the relationship between flood control and beneficial use storage under the reservoir operating plan. When this Court addressed Basin-Wide Issue 17, it specifically stated that addressing the "more important" question of "fill" "may require factual inquiries, investigation and record development specific to a given reservoir and the water right or water rights associated with the reservoir." BW 17 Decision, p. 11.

A water right decree, like a contract, may not include every aspect within its four corners. Therefore, courts apply the same rules of interpretation to decrees as they apply to contracts. *A & B Irrigation District v. IDWR*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012) (citing *Delancey v. Delancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986)). Whether a contract or decree is ambiguous depends upon whether it is subject to conflicting interpretations. *See Delancey* at 65, 714 P.2d at 34. Decrees issued by this Court certainly provide the elements of the water rights, but gaps in those elements may occur, and those gaps are appropriately subject to resolution by the Court.

As explained by this Court when addressing these same storage water rights:

> 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.

*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 Court went on to address the relationship between the Bureau of Reclamation and the water users and found that clarifying the existing law regarding said relationship, irrespective of whether or not it was incorporated into the decree, was not viewed as a collateral attack on a prior license or decree. *Id.* The inclusion of a remark clarifying the ownership relationship even though there was a previously issued license was subsequently upheld by the Idaho Supreme Court in *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2006).

In this matter, the decrees are silent regarding the relationship between flood control and beneficial use storage. Therefore, Court may clarify the existing law concerning said relationship. In other words, and as correctly determined by Special Master Booth in the Late Claims Subcases:

> ***[T]he 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, 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?"

*Summary Judgment Decision*, pp. 33-34 (emphasis added).

Clarifying and cementing the relationship of federal flood control operations to the existing storage rights is not an impermissible collateral attack. *See, e.g., Memorandum Decision on Order on Cross-Motions for Summary Judgment Regarding Streamflow Maintenance Claim*, Subcase No. 63-3618 (Sept. 23, 2008), p. 18. The Ditch Companies seek no changes to the elements of the existing storage rights. Instead, they merely seek clarification of the legal impact of flood control releases as implicated by the Director's Order.

#### 4. Water Stored in the Boise River Reservoirs During Flood Control Operations is not Unappropriated "Surplus," "High Flow," or "Free River" Water

The Director and Suez contend that "unaccounted for storage" under IDWR's water rights accounting program is "surplus" (or Suez's term: "Free River") water to which no protectable property (let alone priority property) interest attaches. IDWR Response, pp. 55-57; Suez Response, pp. 42-52. These contentions ignore the plain language of the 1985 Water Control Manual, and the direct testimony of accounting program author (and former long-time IDWR hydrologist) Robert Sutter.

Sutter made clear that the "net effect" of the accounting procedure ***he authored on behalf of IDWR*** was to "accrue water 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***." Ex. 2181 at 003638-39 (emphasis added). Sutter continued to explain that "unaccounted for storage" is that which is "physically stored in the reservoirs," at the "point of maximum reservoir fill" under the Water Control Manual rule curve procedures. *Id.* The Water Control Manual to which Sutter refers, in turn explains that the "excess water" present in the Boise River system during flood control years is that "pass[ed] . . . through the system without unduly jeopardizing system refill." Ex. 2186 at 003782. As Sutter confirmed at hearing, the

assurance of "refill" under the 1953 Agreement, the 1954 Supplemental Contracts, the Lucky Peak Repayment Contracts, and the 1985 Water Control Manual requires that storage space maintained or evacuated for flood control purposes be physically refilled so that the water needed for end beneficial use exists in reality, rather than only in the world of "paper fill." Compare Ex. 2181 at 003628-29; 003638-39; and Tr., 431:3-15; 432:23-433:1; and 444:15-17.

In other words, Sutter and the Water Control Manual make clear that "unaccounted for storage" is water physically retained for purposes of supplying a first fill—it is the "second-in" water ultimately retained for end beneficial use after the flood risk wanes and reservoir space can then, as a consequence, be used for beneficial use storage. Any "excess" or surplus water in the system is that physically ***passed through the system*** (*i.e.*, spilled past Lucky Peak Dam, as opposed to that physically retained) during flood control operations. The Department and Suez reverse this concept to advance their erroneous "legally and physically available," "storable inflow," and "free river" theories. Special Master Booth squarely rejected these arguments once before, and the Presiding Judge should as well. *See* Memorandum Decision, pp. 13-16; 27-31.

**5. The "Lucky Peak Guarantee" Pertains to Incremental Shortfalls in Filling, Not to Flood Control Releases in Total**

The Director asserts that the Ditch Companies' freely negotiated and assented to the Lucky Peak "Guarantee." IDWR Response, pp. 50-52. And, that the "Guarantee" provides that "flood control releases from Arrowrock and Anderson Ranch will be replaced with Lucky Peak storage." *Id.*, p. 51. The Director's premise misrepresents the terms of the 1953 Agreement, the 1954 Supplemental Contracts, and the Lucky Peak Repayment contracts.

The genesis of Lucky Peak Reservoir, and the joint operations of all three of the Boise River Reservoirs is detailed at pages 17 to 29 of the Ditch Companies' Opening Brief, and the Ditch Companies direct the Court's attention there should it feel the need for more detail. But, in

short, joint reservoir operations in the Boise River Basin to serve both flood control and beneficial use (irrigation) storage was rooted in two assurances needed to receive the water users' consent to use Arrowrock and Anderson Ranch for flood control purposes: (1) the use of runoff forecast-based "rule curves" providing a sufficiently high degree of probability of physically filling the reservoir system with snowmelt after the flood risk sufficiently waned; and (2) the use of Lucky Peak storage to further hedge against any ***incremental refill shortfalls*** that might occur should the runoff forecasts prove inaccurate.

The benefit of the bargain for Lucky Peak spaceholders was that Lucky Peak storage space would receive the same high degree of "refill" assurance as enjoyed by Arrowrock and Anderson Ranch because ***all three reservoirs*** would be jointly operated under the same reservoir operating plan. The whole purpose of the joint operating plan, in turn, was to use the same runoff forecast-based rule curves ***system-wide*** to maximize likelihood of full physical refill (statistically upwards of 95+%) by the end of flood control operations ***in all three reservoirs***. Then, to the extent there was any shortfall in Arrowrock or Anderson Ranch attributable to inaccurate forecasting, Lucky Peak spaceholders were further buffered by the Bureau's separate 60 kAF obligation (where the first 60 kAF of any incremental filling shortfall would be borne by the Bureau's uncontracted Lucky Peak space, thereby keeping the Lucky Peak spaceholders whole nearly every year on record).

The logical extension of the Director's total "Guarantee" theory would require one to believe: (1) that the Arrowrock and Anderson Ranch spaceholders (aggregate irrigation storage space of 703 kAF under the 1953 Agreement) were willing to live with only 280 kAF of Lucky Peak "Guarantee" replacement water once the first 703 kAF of flood water flowed through the system; and (2) as noted above, that the Lucky Peak spaceholders were willing sacrifice

themselves, and their millions of dollars of repayment investment, to "Guarantee" (fully subsidize) the Arrowrock and Anderson Ranch spaceholders. You cannot fit 703 kAF of water in a 280 kAF bucket, and forty percent (40%) replacement is not much of a "Guarantee." Moreover, the Lucky Peak spaceholders did not purchase and maintain space in which they stored water for others. The Director's premise is as absurd as it is insulting.

**6. Respondents "Federal Takeover" Arguments are Baseless Propaganda**

In a variety of ways, the Director attempts to inflame this Court's emotions against "usurping the sovereign authority of the State of Idaho to distribute water in accordance with state law" and to optimize the use of the state's water resources. *IDWR Response*, p. 42. Deciding in favor of the Ditch Companies would "subordinat[e] state water rights and state water law to federal flood control operations." *Id.* And, deciding in the Ditch Companies' favor could lead to the Bureau's blocking of future appropriations of Boise River flood waters. *Id.* The Ditch Companies hesitate to waste ink in response to these "Chicken Little" claims.

First, the Boise River system is already federalized, and the Boise Valley has been reaping the benefits ever since. The Boise River Reservoirs would not exist but for the industrious and progressive relationship between the water users and the Bureau of Reclamation. While the water users and the State have not always agreed with various federal agency positions taken during the course of the adjudication, all must agree that the benefits produced by the Boise River Reservoirs for outweigh any negatives. Fearmongering the joint benefits of flood control and beneficial use storage that built this valley is baseless and disingenuous.

Second, the sovereignty of state law regarding state based water rights is well settled under Section 8 of the Reclamation Act of 1902 (Pub. L. 57-161). The Bureau is the same as any other water user in the State of Idaho; consequently, it cannot store water in the Boise River Reservoirs absent a valid state law-based water right. *Id.*; *see also*, IDAHO CODE § 42-201(2).

Third, IDWR cannot be heard to fear federal flood control operations and a reservoir operating plan that it played a significant role in creating and implementing. After all, the State of Idaho sought ***more flood control releases*** in 1974, not less. Ex. 2182. The State advocated for the conversion of what was once a "fill and spill" system to one of "spill and fill" in order to better protect life and property downstream of the reservoirs.

Fourth, the legal underpinning of the reservoir operating plan (the 1953 Agreement, which is still in effect today) expressly provides (at Article 7) that neither the Bureau nor the Army Corps can modify the plan's provisions for determining flood control space requirements (and, therefore, reservoir flood control releases) without prior consultation of the State Reclamation Engineer (IDWR), the Boise River Watermaster, and the Boise Project. Ex. 2038 at 001372. The 1953 Agreement also requires the express "concurrence of all entities having rights in the reservoir system" before any modification substantially affecting the reservoir storage rights can be made. *Id.* These principles are further confirmed in the 1985 Water Control Manual. Ex. 2186 at 003747-48. Translation: the federal agencies are not free to do as they please regarding Boise River Reservoir operations. IDWR has an express seat at the table under the 1953 Agreement. *See also*, Ex. 2045 at 001459.

Fifth, the Bureau has not blocked the subsequent appropriation of flood control release water. Instead there are a number of junior water rights on the Boise River licensed since the completion of Lucky Peak Reservoir. *See, e.g.*, Ex. 2008 at 000475 (referring to water right no. 63-12055); *see also*, Exs. 2017, 3012, and 3040.

The State and IDWR have invited and embraced federalization of the Boise River for decades. Their arguments fearing that relationship now are ludicrous; but necessary to support their incongruous legal conclusions regarding "fill" of the reservoir storage rights.

## C. The Director's Contested Case Proceeding Was Fatally Flawed

This Contested Case, initiated *sua sponte* by the Director, suffered numerous procedural errors/irregularities which render the Director's Order void.[4] The Director has suggested that these procedural errors or irregularities can be simply ignored based upon some general authority of the Director to administer water rights pursuant to Idaho Code Section 42-602. In fact, the Director repeatedly cites to the portions of the Idaho Supreme Court's decision in Basin-Wide Issue 17 as creating the platform upon which to initiate this Contested Case to address the "Fill Controversy." However, the Idaho Supreme Court was clear that the Director's authority is simply to count the water, and that the Director's administrative discretion is bound by the prior appropriation doctrine. *See In Re SRBA, Case No. 39576, Subcase No. 00-91017 (Basin Wide Issue 17)*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). The Idaho Supreme Court did not direct the Director to *sua sponte* initiate a Contested Case, did not authorize the Director to circumvent the authority of the SRBA, did not authorize the Director to circumvent the rulemaking requirements of IDAPA, and did not authorize the Director to repeatedly violate the due process rights of the Petitioners by using the Contested Case to justify the pre-determined positions of the Director, IDWR and the State with regard to "Refill" following flood control releases.

### 1. The Director Exceeded His Authority by Initiating this Contested Case and/or Should have Stayed the Contested Case

The Director myopically argues that the decision in Basin-Wide Issue 17 provided him the authority to initiate this Contested Case and to make legal determinations concerning the refill of the reservoirs following flood control releases. The Ditch Companies fail to find this

[4] The Ditch Companies have raised several procedural errors with the Director's Contested Case, including the initiation of the Contested Case, the failure to appoint an independent hearing officer, the failure to join the titled owner of the storage water rights, and those arguments were addressed in the Ditch Companies' Opening Brief and are incorporated herein.

unilateral authority. This is especially true when the same issue is squarely before the SRBA as part of the Late Claim proceedings. Those Late Claim proceedings were before the SRBA prior to the Director initiating this Contested Case and this Court's Special Master squarely addressed the very issues the Director contends he has the sole authority to do so.

As explained in the Ditch Companies' *Motion to Stay* and accompanying memoranda in support, Special Master Booth made the following determinations in the Late Claim Subcases which contradict Director's Order:

> [T]he summary judgment motions filed by the Ditch Companies and the Boise Project 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.

Memorandum Decision, p. 3.

> 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.

*Id.*, p. 6.

In these Subcases, the issue raised by the Ditch Companies and the Boise Project goes directly to the question of whether the water stored in the Boise River Reservoirs was subject to being appropriated. If the water stored in the Boise River Reservoirs after flood control releases is stored pursuant to the existing storage rights, it is not subject to being appropriated.

*Order Denying Motions to Alter or Amend*, p. 3.

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.

Memorandum Decision, pp. 10-11.

[T]he 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, 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 question of whether they are claims to water already stored under the existing storage rights.

*Id.*, pp. 33-34.

Special Master Booth concluded that the late claims are not legally cognizable or necessary because "the irrigation storage component of the ***existing water rights*** is the right to store the water contained in the Boise Reservoirs at the time of maximum physical fill," and the water put to beneficial use under the ***existing water rights*** is the water that is stored in the reservoirs following flood control releases. Memorandum Decision, pp. 7, 8, and 35 (emphasis added).

> 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.

*Id.*, p. 11.

These determinations cannot be reconciled with the Director's Order and are in fact in direct contradiction to the Director's Order. Yet, noticeably absent in the response briefs of IDWR and Suez are any acknowledgment or recognition of Special Master Booth's decisions in the Late Claim Subcases even though said decisions are in direct conflict the arguments the Director is now making to justify the initiation of this Contested Case. The Director and Suez do not take the opportunity to explain, rationalize or distinguish the decisions of Special Master

Booth other than the Director making the unsupported and incorrect assertion that the issues before Special Master Booth involve beneficial use based claims and not the existing storage water rights even though Special Master Booth's decisions are clear that they relate to the "existing" storage water rights. In other words, the Director completely ignores the legal determinations made by this Court's Special Master. It is one thing to disagree with the Special Master's determinations, but another to ignore it altogether.

While this Court has stated that it intends for the Contested Case and Late Claims Subcases to be treated as companion cases, the Ditch Companies continue to maintain that Special Master Booth correctly determined that the SRBA Court was not restrained from deciding the issue presented by the Ditch Companies' motion for summary judgment and that the SRBA Court has ample authority to determine "what" the property interest is before the Director determines "how" to count the property interest. Thus, the Ditch Companies maintain that even if the Court hears the two cases as "companion" cases, the Court should decide the issues determined by Special Master Booth before it addresses the Director's Order in this Contested Case. The Director exceeded his authority by trying to circumvent the authority of this Court by re-defining the property rights at issue under the guise of administrative accounting.

**2. <u>The Contested Case Violates the Rulemaking Requirements of IDAPA</u>**

The Director concedes that IDWR did not follow the rulemaking requirements of IDAPA when it internally adopted the water right accounting program, and further concedes that he did not follow the rulemaking requirements when the he initiated this Contested Case for the purpose of addressing the "fill controversy." The Director continues to incorrectly suggest that rulemaking requirements of IDAPA are not applicable to the Contested Case.

Suez, on the other hand, takes a different approach and suggests that the Director had a choice between initiating this Contested Case and formal rulemaking and that the Director

correctly chose the Contested Case because the Contested Case provided a formal process similar to the rulemaking procedures. In fact, Suez acknowledges that "[p]erhaps the Director could have engaged in rulemaking on the subject of how fill of storage water rights is counted. But . . . The Director exercised his discretion by choosing one of two formal procedures to address an important question." Suez Response, p. 73. Contrary to Suez's suggestion, there is nothing in IDAPA which makes the decision as to whether to follow formal rulemaking as discretionary choice of the administrative agency. IDAPA also does not provide that if engaging in rulemaking, the administrative agency can proceed under some other process such as a self-initiated contested case in which the Director appoints himself as the hearing officer. If an agency action constitutes a "rule" under the IDAPA, and the rule is not adopted in compliance with IDAPA, then it is "voidable unless adopted in substantial compliance with the requirements of this chapter." IDAHO CODE § 67-5231(1).[5] Either the administrative agency is formulating, adopting, amending or repealing a rule, and thus must follow the rulemaking procedures provided by IDAPA or it is not. Despite Suez's latest arguments, the Director incorrectly contends that the Contested Case is not rulemakeing, that the actions of the Director do not constitute rulemakeing, and that the IDAPA requirements concerning rulemaking have not been followed because they are inapplicable.

There has been no dispute as to the factors indicative of a "rule" set forth in *Asarco, Inc. v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003), which the Court stated includes the following: (1) wide coverage, (2) [is] applied generally and uniformly, (3) operates only in

[5] Substantial compliance does not mean, as may be suggested by Suez, that IDWR can simply initiate a contested case and appoint its own Director as the hearing officer to post-hoc create an order justifying IDWR's pre-determined positions. Substantial compliance rather refers to substantial compliance with the rulemaking procedures which require, inter alia, submission, review and approval of the Legislature. *See generally*, IDAHO CODE §§ 67-5223 and 67-5224. The Director has used this self- initiated Contested Case to avoid many of the procedures, including any submission, review or approval by the Legislature, which would be required under formal rulemaking.

future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy." *Id.* The only dispute is whether these factors apply to this Contested Case. The Ditch Companies addressed these factors in their Opening Brief, but because the Director and, to some degree, Suez contend the factors are not applicable to this Contested Case, it is necessary to reiterate the applicability of the factors to the actions of the Director.

**a. <u>The Contested Case has Wide Coverage and is Applied Generally and Uniformly</u>**

The Director contends that the Contested Case was limited to "four water rights and the three federal reservoirs," and therefore does not meet the wide coverage or general/uniform application factors indicative of rulemaking. IDWR Response, p. 77. Suez also suggests that the Contested Case is limited to four storage water rights for three reservoirs but also acknowledges "***this case is bigger than four water rights***. It could determine who controls the Boise River." Suez Response, p. 8 (emphasis added). Suez goes on to explain that the Contested Case "might establish an administrative precedent" and "that precedent may affect others, ***even lots of others***." Suez Response, p. 70 (emphasis added). As acknowledged by Suez, this Contested Case has widespread coverage, implicates all water users on the Boise River, both present and future. No one can dispute that, similar to the TMDL at issue in *Asarco, Inc. v. State of Idaho* which involved the Coeur d'Alene River Basin and was determined to have wide coverage, this Contested Case has implications for the entire Boise River Basin. Indeed, the Director's *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference* was not simply sent to those with interests in the four storage water rights but was sent to all water users in the Boise River Basin. R., 000002. As correctly noted by Suez, the validity of the existing storage water rights, including the ability to fill the space following flood control releases will impact all

other water rights on the Boise River because senior rights affect junior rights. Suez Response, p. 71. Just like the TMDL at issue in *Asarco, Inc. v. State of Idaho*, which involved a load limitation for the entire Coeur d'Alene River Basin, the priority protection of the storage water rights and the ability to physically fill following flood control releases affects the availability of water for the storage water rights but also all other water rights in the Boise River Basin, including future appropriations. This is exactly the wide, general and uniform applicability the Idaho Supreme Court found to require rulemaking pursuant to IDAPA in *Asarco, Inc. v. State of Idaho*.

Both the Director and Suez suggest that administration would grind to a halt if the Director had to follow formal rulemaking procedures in every administrative action. The Ditch Companies do not contend that every administrative action involving water rights requires formal rulemaking. Instead, the Ditch Companies contend that this particular Contested Case involves formal rulemaking because the Director is not simply counting water rights and is not simply performing an administrative function. As explained, *supra*, the Director is attempting to use the Contested Case as a means to justify the pre-determined positions of the Director, IDWR, and State concerning the "Refill" of reservoir water rights following flood control releases. The Director is using the guise of a Contested Case to make legal determinations concerning the water rights which are squarely before the SRBA. The Director is using the accounting program as a rule.

**b. <u>The Contested Case Operates Only in Future Cases</u>**

With respect to this factor, Suez acknowledges that the Director's Order is "forward-looking in a sense," but both Suez and IDWR contend that because the record includes a historical narrative and context it is somehow not forward looking. The Ditch Companies do not dispute that the historical context, agreements and operations are relevant to the issue concerning

"fill" of the reservoirs following flood control releases. But, that historical context does not change that the Director's Order is forward looking or that the Order, if allowed to stand, would only impact future accounting for the existing water rights and future appropriations in Basin 63.

The Director has not attempted to employ this latest position that the reservoirs have been allowed to fill following flood control releases without a water right until now. In fact, the Director spends considerable briefing explaining the genesis of the "Fill" controversy first arising in the SRBA subcases for American Falls and Palisades Reservoirs which then led to Basin-Wide Issue 17. IDWR Response, pp. 69-70. In other words the "Fill" controversy did not exist until the competing positions taken by the State and BOR which led to Basin-Wide Issue 17. The Director contends that he then initiated the Contested Case to address concerns which "emerged in the Basin-Wide Issue 17 proceedings." *Id.*, p. 70. The Contested Case does not attempt to adjudicate past years of accounting or to reduce, alter or diminish water available to water users in past years. It, as the Director suggests, is in response to Basin-Wide Issue 17, and thus would only impact ***future*** accounting for existing water rights and ***future*** appropriations within Basin 63. Again, this is exactly the type of situation which requires rulemaking under IDAPA.

### c. The Contested Case Attempts to Prescribe Legal Standards, Attempts to Express New Policy of IDWR and Attempts to Interpret Law and Policy

With regard to the last three factors set forth in *Asarco, Inc. v. State of Idaho*, the Director and Suez contend that the Director's Order simply interprets the accounting which has been employed since 1986. However, neither the Director or Suez address the fact that the Director's Order provides new law, policy and rules regarding the fill of the reservoirs following flood

control releases which were not previously expressed.[6] Again, the Director's own argument is that the genesis of the "Refill" issue did not emerge until Basin-Wide Issue 17, and there is no record, document or evidence that the Director ever treated the storage water rights as filling following flood control without a water right. To the contrary, the irrigators and the Boise River Watermasters have treated the existing water rights as filling at the point of maximum physical fill and that they not only had water rights to do so but those rights were entitled to priority protection against future junior appropriations. Now, after a gathering of "scattered" information and documents concerning the internal adoption and use of the accounting system in Basin 63, the Director has attempted to prescribe legal standards concerning the satisfaction of storage water rights, and has expressed new policies of IDWR concerning the satisfaction of storage water rights (namely that the storage water rights are satisfied at the point of "paper fill" and that no water right exists in order to refill the reservoirs following flood control releases). The Director has clearly attempted to interpret law by using accounting to define the existing storage water rights.

Again, this Contested Case is not simply a matter of the Director exercising his administrative function to simply count or administer the water available in the Boise River Basin. The Director is making legal determinations as to when water is "legally available," that agreed upon flood control operations and contracts have no legal bearing on the water "legally available," that water which cannot be stored in the reservoirs because it is required to be released for flood control operations is "legally available," and that the reservoirs can be filled with excess water without a water right. The fact that the Director has suggested that he would

[6] If IDWR and the Director contend that the law concerning the "Refill Issue" was established by the accounting program implemented in 1986 then this argument is flawed because that is not consistent with the evidence and testimony of Sutter, the Watermasters or the water users but also would mean that there has been no formal rulemaking to establish this new law or policy back in 1986.

recommend a general provision for the existing storage water rights to provide the right to refill the reservoirs following flood control releases is a further indication of his attempt to prescribe new law and express new policy.

For the above-stated reasons, and for those previously set for the by the Ditch Companies and Boise Project Board of Control, the Contested Case initiated by the Director constitutes rulemaking under IDAPA and *Asarco, Inc. v. State of Idaho*. Accordingly, the Director's Order should be voided because it did not follow formal rulemaking as required by IDAPA.

**3. <u>Procedural Due Process Violations</u>**

The manner in which the Contested Case was conducted violated the Ditch Companies' due process rights for the reasons and examples previously discussed in the Ditch Companies' Opening Brief. *See* Opening Brief, pp. 83-102. Not surprisingly, the Director disagrees, as does Suez. IDWR Response, pp. 85-104, and Suez Response, pp. 62-66, respectively. The record speaks for itself, and there is no question that the Hearing Officer played an active role orchestrating and facilitating the Director's adversarial defense of its existing water rights accounting program.

**a. <u>The Director and Suez Misapply the Governing Legal Standards</u>**

The Director and Suez contend that the Ditch Companies' procedural due process rights were not violated during the conduct of the Contested Case primarily because if there were any procedural violations (and both contend there were not), the Ditch Companies fail to substantiate how any such violations prejudiced any substantial rights. IDWR Response, p. 85; Suez Response, p. 65. This "no harm, no foul" approach misapplies the applicable legal standards, and ignores the practical import of the interpretation and use of the Department's water right accounting program.

Understandably, the Director and Suez focus on the case authorities that seemingly import elements of flexibility and subjectivity to the due process analysis. *See, e.g., Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999) and *Marcia C. Turner, LLC v. Twin Falls*, 144 Idaho 203 (2007); *IDWR Response*, pp. 86-87, 94; *Suez Response*, pp. 63, 66. The Ditch Companies also cite these authorities (or the root cases) out of candor and fairness. *See* Opening Brief, p. 84 (citing and quoting both the *Peiper* and *Twin Falls* cases). However, the Director and Suez do not do likewise given their wholesale disregard and lack of acknowledgement of *Eacret v. Bonner County*, 139 Idaho 780 (2004), and the Department's disregard of *Eddins v. City of Lewiston*, 150 Idaho 30 (2010), wherein the Idaho Supreme Court made clear that: (1) the mere appearance of (as opposed to actual) impropriety is "constitutionally unacceptable"; and (2) procedural due process rights are, in and of themselves, sufficiently "substantial rights" afforded protection under Idaho Code Section 67-5279.[7]

Contrary to Suez's contention that the Ditch Companies failed to allege concrete examples of procedural due process violations, the Ditch Companies re-direct Suez to pages 85 to 102 of their Opening Brief. Thus, to the extent any of the examples offered by the Ditch Companies rise to the level of a "mere appearance" of bias, predetermination or lack of impartiality, those examples alone constitute the violation (or prejudice) of substantial rights consistent with Idaho Code Section 67-5279, *Eacret*, and *Eddins*. The deprivation of fair procedure is, itself, the actionable harm; no additional harm to additional rights or property need be shown. However, and further negating Suez's naked misapplication of the applicable legal standards, there are other "substantial rights" at issue in this proceeding as well, not the least of

[7] Unlike the Director, Suez does at least acknowledge the *Eddins* case, not to quarrel with the core proposition that due process rights are actionable "substantial rights" afforded protection under Idaho Code Section 67-5279, but to contend that the Ditch Companies only "summarily argue" actual "impairment" of their "substantial rights." Suez Response, pp. 65-66.

which include the storage water rights for the Boise River Reservoirs.

The Ditch Companies agree that it is outside the bounds of the Director's legal authority to define the property rights at issue in this matter—the storage water right partial decrees for the Boise River Reservoirs. However, the Director's contention that "the Petitioners' 'legal rights' were never at issue" rings hollow. IDWR Response, pp. 86-87. This contention ignores the practical impact of the interpretation and application of IDWR's accounting construct, and its determination of water right "satisfaction."

As succinctly noted by Special Master Booth in the context of the Basin 65 "refill" proceedings:

> At oral argument on motions to alter or amend, counsel for the State said: "[W]ater rights accounting . . . is a method for administering water rights. It's not a method for decreeing water rights. It doesn't create, define, or alter water rights."

*Order Denying State of Idaho's Motion to Strike the Affidavit of Andrew J. Waldera, et al.* (Apr. 22, 2016); SRBA Subcase Nos. 65-23531 and 65-23532, p. 14, n. 3.

The foregoing sounds strikingly familiar in this case:

> The Petitioners' "legal rights" were never at issue; the Decreed Storage Rights were adjudicated in the SRBA, the *Partial Decrees* were (and remain) "conclusive" and binding in this proceeding . . . the Director did not determine of define the "legal rights" of the Petitioners, but rather addressed the Petitioners' objections to the Director's chosen method of discharging his "clear legal duty" to distribute water in Water District 63[.]

IDWR Response, pp. 86-87 (italics in original).

Special Master Booth's response to the State's logic in the Basin 65 proceedings (and which applies equally to IDWR's logic in this matter) was appropriately terse and practical:

> As a *de jure* proposition, counsel for the State is absolutely correct. However, what is left out of this statement is that as a *de facto* proposition, water rights accounting by the administrative agency of the State with the authority to administer water rights can, as a practical matter, define water rights.

*Order Denying State of Idaho's Motion to Strike the Affidavit of Andrew J. Waldera, et al.* (Apr. 22, 2016); SRBA Subcase Nos. 65-23531 and 65-23532, p. 14, n. 3.

The manner in which the storage water rights are accounted, which in turn determines (according to the Department) when the same are "satisfied" and fall out of priority is ***the*** fundamental outcome of this proceeding; determinative of when junior water users may then adversely affect the physical filling of the reservoirs, and determinative of whether and to what extent future appropriators may do the same. The Department's water right accounting program (or at least the agency's interpretation and application of it) may not issue any new or amended water right partial decrees, but it does affect how and when existing rights receive water. It also determines what water is stored under the existing rights versus that stored as a matter of administrative policy. Thus, in addition to the Ditch Companies' procedural due process rights, which are actionable "substantial rights" themselves, the storage water rights at issue in this basin are also very real and very substantial property rights directly affected by the Department's actions in this matter.

For the Department and Suez to argue that this matter was neither an adversarial proceeding nor one affecting legal rights ignores the very definitions of the terms "Contested Case" and "Order," provided in the administrative rules governing this proceeding. The Department's Rules of Procedure define a "Contested Case" as: "[a] proceeding which results in the issuance of an order." IDAPA 37.01.01.005.07. Those same rules then define the term "Order" to be: "[a]n agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." IDAPA 37.01.01.005.15. Moreover, and as noted in their Opening Brief, the Director made clear that even those who chose not to participate in his contested case proceeding would,

nonetheless, be expressly bound by the outcome of the same. R., 000001.

The Director and Suez's "no harm no foul" approach is incorrect, and the record clearly demonstrates that there was more than a "mere appearance" of impropriety in this matter.

### b. Sisco-Related Exchanges—the All-Encompassing Example of Department and Hearing Officer Abuse of Process

The Ditch Companies, the Director, and Suez take very different views of Procedure Rule 157 (IDAPA 37.01.01.157). The Director and Suez contend that Procedure Rule 157 affords IDWR wide latitude and the ability to essentially play an adversarial party-like role without necessarily taking on full party status. IDWR Response, pp. 97-100; Suez Response, p. 65. The Ditch Companies disagree, contending that the Director's participation under Procedure Rule 157 is, as the rule says, "subject to" Procedure Rule 600 (IDAPA 37.01.01.600). Opening Brief, pp. 90-93. As it was wont to do in this proceeding, this is one example of many where the Director latches onto only a few words, clauses, or snippets of evidence, twisting them out of context.

The Director's participation under Procedure Rule 157 is not unfettered. Rather, it is tempered by Procedure Rules 600 and 602 (IDAPA 37.01.01.600 and 37.01.01.602) which proper context of the agency's participation: namely, in an expert capacity where the agency's specialized knowledge and expertise can be brought to bear in order to foster the creation of a sound record. While Suez at least acknowledges the "subject to" language of Procedure Rule 157, the Director ignores it altogether.

The Director is correct that it was not a complainant in this proceeding—one of the few, if not only, instances where the Director is authorized to pursue an adversarial role under Procedure Rule 153 (IDAPA 37.01.01.153). IDWR Response, p. 97. All the more reason why the "experience, technical competence, and specialized knowledge," and the "agency's

specialized knowledge" language of Procedure Rules 600 and 602 provides appropriate sideboards for the Director's participation under Procedure Rule 157.

To the extent the Director and Suez's view of Procedure Rule 157 is correct, this is further reason why the Director's behavior was so inappropriate under the *ex parte* contact provisions of Procedure Rule 417 (to be discussed further below). Even a cursory review of the plain language of Procedure Rule 157 discloses the inescapably adversarial activities the Director performed when it: introduced evidence, examined witnesses, argued motions (at least in the form of evidentiary objections), stated positions, and fully participated in the proceeding. Absent tempering by Procedure Rules 600 and 602, these activities are by their very nature adversarial, with the Director taking a position and the agency head effectively deciding the matter on behalf of the agency. Said a bit differently, the Director was both a party and the decider in this matter, and it is improper for the Director to do both (again, save the limited circumstance of prosecuting cases as a complainant under Procedure Rule 153).

Regardless, the Director contends that its participation in this matter was not adversarial; rather that its participation was "for the limited purpose of clarifying the record on complex issues within the sphere of the Department's statutory authority and specialized expertise." IDWR Response, pp. 98-99. The record belies this assertion, and the Sisco-related witness exchanges provide an instructive microcosm of just how contorted this Contested Case proceeding was.

The Ditch Companies already discussed much of the Sisco-related hearing experiences in their Opening Brief at pages 85 thru 97, and much of that material need not be repeated in such detail here. However, the Director's incomplete and sanitized version of the events bears discussion.

Demonstrating the Director's penchant for selective and incomplete quotation are its: (1) "we will get to the bottom of it"; and (2) so-called Sisco flood control accounting "exception" testimony. Regarding the "we will get to the bottom of it" statement, the Director correctly couches the exchange in terms of "cross-examination" and "rebuttal testimony by Cresto." IDWR Response, pp. 102-103. But, as much as reading a cold transcript minimizes the emotion of the moment, the Director's seemingly innocuous "we will get to the bottom of it" citation does so even more, leaving the misimpression that IDWR and the Director simply asked "clarifying" questions to further hone Mr. Sisco's direct testimony. *Id.*, p. 103.

The ***full*** exchange between counsel for the Ditch Companies and the Director was far less innocuous and far more emotional (on the part of the Director):

> MR. STEENSON:—I'm going to object. The role of Mr. Baxter here is supposed to ask clarifying questions, not to cross-examine witnesses. This sounds to me like cross-examination of a witness, rather than merely asking to clarify his answers. He's challenging the witness' understanding of these documents. So I object.
>
> THE HEARING OFFICER: Well, let me tell you, Mr. Steenson, because what I've heard Mr. Sisco say is, that he didn't adhere to the accounting system, and that he disregarded the accounting system. And this line of questioning is particularly germane and central to what we're talking about. And if it has to be brought out by cross-examination, either through Mr. Baxter, or by me, ***we will get to the bottom of it.*** Overruled.

Tr., 904:4-18 (emphasis added to highlight the only portion of the exchange quoted by the Director). This was not an innocuous or emotionless exchange. And, the Director's apparent agitation over Sisco's alleged "disregard" for, and "failure to adhere to," IDWR's computerized accounting system was palpable. The heading of this portion of the Department's briefing: "*Sisco's Testimony Implied he had Only a Limited Understanding of the Accounting System and had Administered the Decreed Storage Rights Contrary to Idaho Law*," tells one all they need to know about the Department's adversarial bent and the Director's deep-rooted bias; ***failure to***

***abide by the Department's accounting program was tantamount to administering water rights contrary to Idaho law!*** IDWR Response, pp. 101-103. The Ditch Companies were not aware that an accounting "convention" of engineers (IDWR Response, p. 56) had risen to the level of Idaho law.

Further, the Department's contention that Sisco "had not adhered to his statutory duty as watermaster to distribute water in accordance with the prior appropriation doctrine 'as supervised by the Director'" is incorrect. The Department (and its directors over the course of Sisco's tenure as Water District 63 Watermaster) knew exactly what Sisco was doing: Sisco was not carving out an "exception" for flood control releases, rather he was administering junior water rights according to the very flood control release conditions he requested with the Department's approval and implementation.

For example, the Department (and its watermasters) have long acknowledged the "fully appropriated" nature of the Boise River during the majority of the irrigation season. Ex. 2008 at ¶¶ 11-12. As a consequence, Sisco sought the inclusion of various remarks or conditions upon the administration of junior water rights in the basin. *Id.* A remark variant was imposed on Suez water right no. 63-12055, making clear that the right could only be diverted unless water was spilling past Lucky Peak Dam for flood control. As Sisco made consistently clear through the years, such remarks were intended to:

> [E]nsure that appropriators of new Boise River water rights [were] notified that water is available for their diversions only during flood control operations, ***when spring runoff*** from the Upper Boise River watershed ***exceeds irrigation demand by diversions with Stewart and Bryan Decree water rights, and the physical filling of the Boise River Reservoirs pursuant to storage water rights in accordance with the Water Control Manual*** . . . I wanted to make sure new water users had notice of the limited water supply for their water rights.

*Id.* at ¶ 12 (emphasis added).

In other words, Sisco consistently kept the Boise River Reservoir storage rights in

priority until the point of maximum physical fill, and in a manner where junior water rights were not entitled to call for the release of water that was needed to physically fill the reservoirs. *Id.* at ¶¶ 20 and 32. This was consistent with the vast majority of Sisco's hearing testimony, save those fragments the Department selectively cites in its briefing.

The Department later concedes that Sisco did not, in fact, create any flood control exception, though it continued to use the "exception" as an excuse for justifying the Cresto rebuttal testimony and hearing Exhibit No. 9. IDWR Response, pp. 103-104. The Department further meekly alleges a disclosure timing gap as justification for Cresto's rebuttal testimony and Exhibit 9. IDWR Response, p. 104 (wherein the Department asserts the need for Cresto's rebuttal testimony and additional Exhibit 9 analysis because the agency did not know of any alleged flood control "exception" prior to Sisco's in-hearing testimony). However, this assertion/justification is unfounded and quickly exposed by the record.

Assuming the Department can credibly argue that it did not know of the so-called exception in at least 1993 in connection with Sisco's conditioning of Suez water right no. 63-12055—which it cannot—the Department cannot escape the variety of consistent statements contained in Sisco's July 2, 2015 Affidavit serving as Exhibit 2008 in this matter; an affidavit supplied to the Department in the context of the parallel SRBA Late Claims case nearly two months prior to the hearing in this Contested Case. Moreover, Department witness Cresto was personally aware of the affidavit and its contents having drafted her own rebuttal affidavit and filing the same with the SRBA on July 21, 2015—over one month prior to the Contested Case hearing in this matter. *See* Ex. 2.

Comparison of the Sisco and Cresto affidavits demonstrates the disingenuousness of the Department's *post hoc* justification of the Cresto rebuttal testimony and her rebuttal Exhibit 9.

Worse yet, the Department acknowledges that the additional Cresto testimony and rebuttal analysis (a "very different" expert analysis in her own words; Tr., 1551:5-19, 1553:12-25, and 1564:7-12) were not disclosed ahead of hearing. IDWR Response, p. 104.

Paragraph nos. 8, 11, 12, 19, 20, 22, 31, and 32 of the July 2, 2015 Sisco Affidavit (Ex. 2008) all make clear that the physical filling of the Boise River Reservoirs was paramount, and accomplished in priority with respect to water rights junior to the reservoirs. This is, of course, consistent with the junior water right permit/license conditions Sisco requested and received from the Department on several later in time rights, through which Sisco (and the Department) made it known to junior appropriators that junior diversions only occur when "spring runoff from the Upper Boise River watershed exceeds irrigation demand by diversions with Stewart and Bryan Decree water rights, ***and the physical filling of the Boise River Reservoirs pursuant to the storage water rights in accordance with the Water Control Manual***." *See, e.g.*, Ex. 2008 at ¶ 12. Until the point of maximum physical fill, Sisco explained that the "storage rights remain in effect," and that "sufficient [river] flow for diversion by water rights with priorities that are junior to the Boise River Reservoir storage rights" only exists when "Lucky Peak releases" are made "during flood control operations." *Id.* at ¶¶ 20 and 22. In sum, Sisco would not have agreed to use of the accounting program at all if, among other things, "water rights with priorities junior to the storage water rights were entitled to call for the release of water that was required to be stored pursuant to the Water Control Manual in order to fill the reservoir storage spaces and reservoir water rights." *Id.* at ¶ 32.

On July 19, 2015, Department expert witness Cresto executed her own rebuttal affidavit (Ex. 2), filed with the SRBA on July 21, 2015—over one month ***prior*** to the commencement of the Contested Case hearing. In her affidavit, Cresto expressly testified that she "had reviewed

the affidavits of Lee Sisco and Robert J. Sutter," and that many of the statements contained within those affidavits "directly or indirectly refer to the operations and procedures of the Water District 63 water right accounting program and/or the Water District 63 storage allocations program." Ex. 2 at ¶ 7. Cresto further acknowledged that the subject matter of the Sisco and Sutter affidavits are the "***same subjects***" discussed in meetings she had attended, "***discussed in the staff memorandum I prepared***," and were the same subjects covered in her prior deposition in the Contested Case. *Id.* (emphasis added). Almost the entire remainder of Cresto's affidavit (some 10 pages) were devoted to her (Cresto's) disagreements with Sisco's affidavit testimony, specifically including the concepts that: (1) the computerized accounting program does not operate on the basis of "physical fill"; and (2) "paper fill" under the accounting program means that the "reservoir water right[s] [are] no longer in priority and may not be used to curtail junior water rights." Cresto would have had no reason to include such statements in her July 21, 2015 affidavit if, as the Department now contends, it (or its expert witness) did not understand or appreciate the nature of Sisco's testimony ahead of hearing. IDWR Response, p. 104.

The Department knew exactly how Sisco was going to testify well in advance of the Contested Case hearing, and it (and the Director) set Cresto's "very different" analysis and rebuttal testimony in motion mid-hearing once Sisco testified as expected. Consequently, there is no question that Cresto impermissibly testified to matters outside the scope of her expert disclosure, and that the Director not only condoned as much, but, as discussed in greater detail below, he facilitated it.

If the Department played no adversarial role, and pursued no predetermined agenda designed to defend and uphold its accounting program, it would have had no reason to expressly rebut Sisco's testimony in the form of active cross-examination, or through subsequent expert

witness rebuttal testimony and exhibit admission based on a "very different" analysis than Cresto had previously performed. This Sisco testimony-related example alone amply belies the so-called "clarifying" role the Department played in this matter.

Assuming for the moment that Procedure Rule 157 provides the Department the "broad authority to actively participate in a contested case" as the agency and Suez assert (Suez Response, p. 65), that cannot also include the "Director and IDWR's attorney" as Suez states. The Director, as the hearing officer, and the Department, as adversarial party, cannot have it both ways, and doing so resulted in the contrived proceeding the Court now finds itself wading through.

The Department, through the Director, put itself in this untenable position when it initiated the Contested Case; a formal quasi-judicial proceeding, which by its own terms would result in the issuance of a binding order affecting the legal rights and interests of the participants (and even those who received notice but did not participate). *See, e.g.*, IDAPA 37.01.01.007 and .015; IDAHO CODE §§ 67-5201(6) and 67-5201(12); and *Castaneda v. Brighton Corp.*, 130 Idaho 923, __, ___ P.3d ___, ___ (1998). A position in which IDWR Attorney Baxter both presented the Department's case in support/defense of the agency's computerized water right accounting program ***and*** advised the Director ***in his hearing officer capacity*** regarding the disposition of pre-, mid-, and post-hearing motions. A position in which the Director plainly wore two hats: (1) Director of the agency actively defending/supporting the accounting program; and (2) supposedly impartial hearing officer. And, the record makes clear that the Director played far more of the former role than the latter, when one would expect him to err on the side of extreme caution in the other (impartial hearing officer) direction.

Instead, the hearing officer, as Director of the accounting agency, sought out extra-record evidence and testimony in an attempt to impeach Sisco's direct testimony mid-hearing (*see* Opening Brief, pp. 86-87); emotionally sustained naked and unsupported objections directed at Sisco testimony (*id.*), and, perhaps, most egregiously, conferred with Department expert witness Cresto throughout the hearing—so much so that he played a direct role in the formulation of her rebuttal testimony and the "very different" analysis leading to the creation of Department Exhibit No. 9 (*id.*, pp. 87-88). The Ditch Companies submit that the Director's actions (all mid-hearing and all while he was supposed to be serving as an impartial and unbiased hearing officer) create at least the unacceptable "mere appearance" of bias and predetermination, and repeatedly violated the *ex parte* communications prohibitions of Procedure Rule 417 (IDAPA 37.01.01.417) and Idaho Code Section 67-5253.

The Director did ***nothing*** to wall himself off, or separate himself from his Director/IDWR personnel status in this matter. Instead, he actively participated in the formulation and presentation of the agency's adversarial case—one orchestrated to support and defend the very accounting program he was to independently evaluate. There is no due process in that, and this Court should have no confidence in the resulting Order.

To be sure, the Ditch Companies do not enjoy bringing these issues to the Court's attention. But, having to endure these due process violations was both unsettling and exasperating. Counsel for the Ditch Companies have never seen, or heard of, such abuse of process before, let alone have to live it firsthand.

**c. The Other Examples**

As noted at the outset, the foregoing Sisco testimony-related matters serve as a microcosm of the Department's problematic adversarial participation in the Contested Case, and evidence the Director's bias and predetermination to uphold the accounting program and its

implications for the satisfaction of the Basin 63 storage water rights. And, while the Sisco testimony-related example is a good one, it was not the Director's only questionable action in this proceeding.

Without further belaboring the points raised in their Opening Brief, the Ditch Companies remind the Court of the following:

- The Director had ample opportunity to err on the side of caution and appoint an independent hearing officer;
- The Director and the Department abused the "official notice" process of Procedure Rule 602 (IDAPA 37.01.01.602), and were forewarned of the same (*id.*, pp. 97-102);[8]
- The Director further cemented his elevation of interested agency "director" above his impartial hearing officer status by executing and issuing expert witness disclosures and agency witness and exhibit lists (Opening Brief, pp. 92-93);
- The Director took repeated public positions ***against*** those of the Ditch Companies and the Boise Project (Opening Brief, p. 85);
- The Director pre-judged the worth of the Ditch Companies' and the Boise Project's anticipated evidence and witness testimony pre- and mid-hearing as being "likely irrelevant" (*id.*); and

[8] The Department's response on the issue (IDWR Response, pp. 87-90) misreads the plain language of Procedure Rule 602. The Ditch Companies submit that the most reasonable and logical reading of the rule requires the identification of: (1) "specific facts or material noticed"; ***and*** (2) "the source of the material noticed." The first clause requires the more precise identification and dissection of the facts and material noticed that is otherwise buried in thousands of pages of "source" materials. Said differently, these clauses of the Rule build upon each other to ensure that a level of sufficient specificity is achieved. This reading of the Rule is most consistent with the analogous provisions of Idaho Rule of Evidence 201 and Idaho Code Section 67-5242(3) (both requiring more precise identification of all facts noticed so as to provide parties ample opportunity to review and debate (if necessary) the use of the notice).

The Ditch Companies continue to maintain that the Director only identified "sources," and not the "specific facts or materials noticed" within those source materials. Exactly what ***specific*** facts or materials the Director culled from the source materials identified continues to elude the Ditch Companies.

While there can be streamlining value in the use of official or judicial notice, that value must be balanced against the need to provide ample notice and opportunity for argument. Just because witnesses Stevens and Shaw reviewed hundreds, if not thousands, of pages of documents identified to the source level does not necessarily mean they touched upon the actual facts or materials the Department or the Director, themselves, found relevant. Stevens and Shaw were left to nothing more than their educated guesses, and the point of Rule 602 is to not leave anyone guessing.

- The Director, in his own words, "rejected" the testimony of Lee Sisco—which, if true, fell short of his duty to weigh the evidence properly submitted and admitted into the record before him (Opening Brief, pp. 102-104).[9]

The Ditch Companies readily acknowledge that procedural due process is a relatively flexible and nebulous concept. They noted as much in their Opening Brief. However, due process is worthy of more scrutiny and protection than the Respondents' collective "no harm, no foul" approach.

At its core, due process is rooted in "fundamental fairness"—"a requirement whose meaning can be as opaque as its importance is lofty." *Williams v. Idaho State Board of Real Estate Appraisers*, 157 Idaho 496, 505, 337 P.3d 655, 664 (2014) (citation omitted). The Ditch Companies respectfully submit that an objective review of the record of these proceedings does not leave one with the impression that "fundamental fairness" was afforded or achieved. Not when the Department clearly advocated for a particular, adversarial result, and not when the Director actively participated in formulating and supporting the Department's case. The Director acted too much the "director" of the agency with a vested interest in the defense of its water right accounting program and too little of an impartial, unbiased, and independent hearing officer whose conflict of interest was beyond reasonable question.

Again, the "mere appearance" of impropriety, and the mere "likelihood" of bias are sufficient violations of procedural due process. *Eacret v. Bonner County*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004). The record in this matter at the least justifiably raises the question.

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[9] There is no question that the Director, as the supposedly impartial and unbiased hearing officer, took great offense to Sisco's testimony—particularly that in which Sisco treated the accounting program as merely an administrative tool for use in combination with others to practically and realistically administer water rights. The Director (and the Department) made (and make) clear that the accounting program ***is the sole means of administering the Basin 63 storage rights***; anything less is "contrary to Idaho law." *See* Tr., 904:4-18; 914:10-21; 918:25-920:25; *see also*, IDWR Response, pp. 101-104.

### D. Attorney Fees on Judicial Review

#### 1. The Ditch Companies' Request is Viable

As the Department and Suez correctly note, to the extent Civil Rule 84 required the Ditch Companies to submit a request for their costs and fees consistent with Idaho Appellate Rule 35 and 41, they (the Ditch Companies) did not so include the request within the four corners of their Opening Brief. *See, e.g., Request for Reasonable Attorney Fees and Costs on Judicial Review* (March 9, 2016). However, the Ditch Companies did advance such a request (coupled with supporting argument) less than twenty-four hours later. *Id.* Consequently, the Department and Suez's primary arguments against the Ditch Companies' arguably tardy request are the very definition of elevating form over substance.

Whether to grant fees and costs in this matter is ultimately a discretionary call of the Court, and that decision is reviewed under an abuse of discretion standard. *See, e.g., City of Osburn v. Randall*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The Department and Suez leave the impression that the Ditch Companies' *Request for Reasonable Attorney Fees and Costs on Judicial Review* (March 9, 2016) is procedurally defective and irretrievably fatal as a result. IDWR Response, pp. 104-105; Suez Response, p. 75. That argument ignores the Court's discretion on the matter, and further ignores the plain language of Idaho Appellate Rule 41(a) which expressly reinforces the discretionary nature of the matter regardless of the underlying procedure: "provided, however, the Supreme Court may permit a later claim for attorney fees under such conditions as it deems appropriate." *Id.*

Tellingly, neither the Department nor Suez allege any prejudice as a result of the Ditch Companies' alleged tardy request—nor could they given the facts that: (1) the Ditch Companies' request was filed and fax-served less than twenty-four hours after the March 8 briefing deadline; and (2) any timing-related prejudice that might exist (approximately 19 hours) was fully

mitigated (and then some) by the parties' cooperative extension of the Respondents' briefing deadline on April 1 (ordered by the Court on April 4). *See Motion for Extension of Time for Filing Respondents' Brief* (Apr. 1, 2016); *see also, Order Granting Motion for Extension of Time* (Apr. 4, 2016). Further, Civil Rule 84 (the root civil rule governing this judicial review proceeding) does not contain an express attorney fee request provision within it—rather the procedures for such request must be imported from the Idaho Appellate Rules by operation of Civil Rule 84(r).

Thus, the Ditch Companies submit that the matter is not as bright-line as the Respondents suggest it to be. And, regardless of how bright-line the matter might be from a procedural standpoint, it would hardly be an abuse of the Court's discretion to allow the Ditch Companies' request to go forward under the circumstances in accordance with the plain language of Appellate Rule 41(a), and in the wholesale absence of any prejudice to the Respondents who had more than adequate notice of the claim, and more than adequate opportunity to fully and fairly respond to the same.

### 2. **Suez's Request for Costs and Fees Should be Denied**

Suez correctly notes the applicable standard under Idaho Code Section 12-117(1), namely that the prevailing party is only entitled to an award of its fees and costs under the statute when the Court, in the proper exercise of its discretion, determines that the non-prevailing party acted "without a reasonable basis in fact or law." The Ditch Companies' briefing in this matter demonstrates that their challenge to the Director's Order is reasonably grounded in fact and in law, both substantively and procedurally.

For this Court to find otherwise, it would have to ignore the following (at the least) undisputed facts and legal principles (at the least):

- Water rights are usufructory rights under Idaho law (*i.e.*, beneficial use is the end measure and basis of a water right);
- "Flood control" is not a recognized beneficial use of water under Idaho law;
- The stored water ultimately beneficially used in the Boise Valley is the "second-in" water—that stored as the flood risk wanes and reservoir storage space is no longer needed (or lesser needed over time) to regulate flood flows;
- The water historically needed, proven, and adjudicated for irrigation purposes in the Boise Valley is the nearly 1.0 MAF expressly quantified as (and dedicated to) "irrigation from storage" on the storage water right partial decrees for the Boise River Reservoirs; and
- The "paper fill" construct of the Department's water right accounting program erodes the integrity of the existing storage rights by making physical fill in flood control years dependent on the availability "unaccounted for" or "unallocated" storage—a class of water the Department and Suez contend is stored without a water right, and that which has no protectable priority interest.

Thus, the Ditch Companies' concerns are valid and imminently understandable. The priority-based property interest they have in the existing storage rights is disputed by the Department and Suez. How can it be that the water ultimately used for beneficial use in the Boise Valley for decades is so unsettled from a protectable property right perspective?

Further underscoring the reasonableness of the Ditch Companies' actions in this matter are the well-reasoned decisions of Special Master Booth in the companion Basin 63 Late Claims Subcases (Subcase Nos. 63-33732, et al.). *See* Memorandum Decision; *see also*, *Order Denying [State of Idaho and Suez's] Motions to Alter or Amend* (Feb. 26, 2016). If the Ditch Companies' actions were as frivolous as Suez suggests, it (Suez) and the State of Idaho would not be the ones appealing Special Master Booth's decisions to the Presiding Judge, but that is where they find themselves.

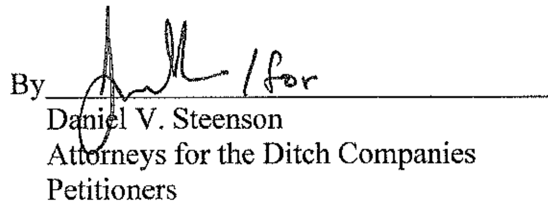
Consequently, and for the foregoing, the Ditch Companies respectfully submit that Suez's request for fees and costs under Idaho Code Section 12-117 be denied.

## IV.
## CONCLUSION

For the foregoing, the Ditch Companies maintain their request that this Court reverse the Director's erroneous legal conclusion that flood control releases count against the satisfaction or fill of the Boise River Reservoir storage rights. The Ditch Companies further request that if the Court remands this matter back to IDWR for further proceedings that it do so under the requirement that an independent hearing officer (not an IDWR employee) be appointed to preside over the same.

DATED this 6th day of May, 2016.

SAWTOOTH LAW OFFICES, PLLC



By ______ /for
Daniel V. Steenson
Attorneys for the Ditch Companies
Petitioners

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 2016, I caused a true and correct copy of the foregoing **DITCH COMPANIES' REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

Original to:

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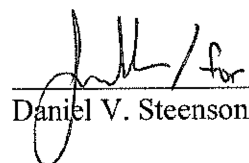

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