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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMIT NOS. 63-34079 AND 63-34080 IN THE NAME OF CHRIS EMMERT	**MUNICIPAL PROVIDERS' BRIEF ON EXCEPTIONS TO THE DIRECTOR**

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INTRODUCTION

COMES NOW the City of Nampa and Suez Water Idaho Inc., by and through their attorneys Givens Pursley LLP, the City of Meridian and the City of Caldwell, by and through their attorney Honsinger Law, PLLC, the City of Eagle, by and through its attorneys Moore Smith Buxton & Turcke, Chartered, the City of Boise, by and through its attorney Abigail R. Germaine, and the City of Kuna, by and through its attorney Richard T. Roats (collectively "Municipal Providers") and hereby submit this brief in support of the exceptions (aka appeal) filed by Applicant Chris Emmert ("Applicant" or "Emmert") on August 3, 2017.

This brief is based largely on the brief filed with the Hearing Officer on July 14, 2017. However, it has been updated and expanded.

This matter involves two applications for permit (Nos. 63-34079 and 63-34080) filed by Applicant Chris Emmert ("Applicant" or "Emmert") on May 8, 2015 and September 25, 2015, respectively.[1] The applications were protested by Boise Project Board of Control ("Protestant" or "Boise Project"), the Applicant's own surface water supplier. (Depending on the context, the Boise Project also may refer to the project facilities owned and operated by the Protestant and its affiliates.)

Emmert operates a seed farm southwest of Lake Lowell. For generations, the Emmert family has relied on surface water provided by Boise Kuna Irrigation District via Boise Project facilities. The new ground water diversions sought by Emmert are intended to supplement that

[1] Application No. 63-34079 sought 1.9 cfs with no volume limit from a well approximately 225 deep. Application No. 63-34080 sought 1.46 cfs with no volume limit from a separate well also approximately 225 deep. The Hearing Officer found that the "total likely diversion for the two Applications" would be up to 235 acre-feet annually. *First Preliminary Order*, ¶¶ 8 & 19, p. 3 & 4; *Amended Preliminary Order*, ¶¶ 8 & 19, p. 6 & 7.

surface water supply because, unlike other crops, seed crops must be irrigated until the seeds are to a certain level of development and cannot be harvested early or late.

Boise Project diverts surface water from the Boise River over 20 miles to the east of Applicant's seed operation. Once diverted, the Boise Project employs leaky canals to deliver water for storage in an off-river reservoir, Lake Lowell, which the Hearing Officer determined also leaks. From there, the water is delivered in ditches and laterals (which in many cases are unlined) to water users served by four irrigation districts.

Boise Project protested the application, initially contending that pumping from the Applicant's wells would induce yet further seepage from its allegedly leaky storage facility, Lake Lowell. As the proceeding progressed, Boise Project expanded its grounds for protest to also include its leaky delivery system.

The Hearing Officer issued his *Preliminary Order Approving Applications for Permit* ("*First Preliminary Order*") on June 19, 2017. On June 30, 2017, the Protestant timely filed *Boise Project Board of Control's Petition for Reconsideration of Preliminary Order Approving Applications for Permit* ("*Petition for Reconsideration*"). Emmert filed *Applicant's Opposition to Reconsideration* on July 14, 2017. On the same day, July 14, 2017, the Municipal Providers filed *Municipal Providers' Petition to Intervene* and *Municipal Providers' Brief in Opposition to Petition for Reconsideration.* On July 21, 2017, following further motion practice and briefing, the Hearing Officer issued his *Order Denying Petition to Intervene* and his *Order Granting Petition for Reconsideration; Amended Preliminary Order Rejecting Applications for Permit* ("*Amended Preliminary Order*"). The *First Preliminary Order* and *Amended Preliminary Order* are referred to collectively as the "*Preliminary Orders.*" On July 24, 2017, the Hearing Officer

issued an *Amended Order Denying Petition to Intervene*, which corrected the certificate of service without amending the substance of the order.

On August 3, 2017, the Applicant filed *Applicant's Exceptions to Amended Preliminary Order* ("*Applicant's Exceptions*"). In a separate petition filed simultaneously with this brief, Municipal Providers seek intervention on appeal (following the denial of their earlier petition to intervene before the Hearing Officer).

Given that Emmert has filed exceptions to the Hearing Officer's decision, which is an appeal as of right, Municipal Providers have not sought reconsideration or review of the Hearing Officer's denial of the Municipal Providers' prior petition to intervene. If, for whatever reason, the Department were to determine that it is more appropriate to reverse the Hearing Officer's denial of the *First Petition to Intervene*, Municipal Providers have asked that he treat the pending petition to intervene as a petition for reconsideration or review of the denial of the *First Petition to Intervene*.

Based on the evidence presented by the parties, the Hearing Officer found in the *First Preliminary Order* that the proposed ground water pumping would result in induced seepage (*i.e.*, increased seepage) from Lake Lowell corresponding to 1.3% of the volume pumped by the Applicant. *First Preliminary Order*, ¶ 19, p. 4; *Amended Preliminary Order*, ¶ 19, p. 7. The Hearing Officer concluded that the Applicant's "proposed ground water diversions will reduce the amount of water to Boise Project under its existing water rights below the amount historically beneficially used by Boise Project." *First Preliminary Order* at 7. Accordingly, the Hearing Officer initially conditioned the permit to require the Applicant to mitigate for the increased seepage from Lake Lowell (in an amount of 1.3% of the maximum volume authorized) induced

by ground water pumping under the permit plus an indeterminate additional amount of water to cover conveyance losses in delivering the mitigation water to Lake Lowell.[2]

The amount of mitigation required under the *First Preliminary Order* is potentially much greater than 1.3% because the Hearing Officer ruled that the Applicant must provide the mitigation in the form of newly acquired wet water delivered to Lake Lowell (rather than by reducing the quantity of surface water delivered to the Applicant by the Boise Kuna Irrigation District). The Hearing Officer concluded that if the mitigation water is delivered to Lake Lowell via the Protestants' canals (which is most likely to be the case), the Applicant will be responsible for acquiring additional mitigation water to compensate for the substantial conveyance losses resulting from use of the Boise Project's leaky system.

In its *Petition for Reconsideration*, Boise Project did not challenge the Hearing Officer's decision not to quantify the conveyance losses portion of the mitigation obligation. Instead, Boise Project sought to expand that mitigation requirement to require mitigation for induced seepage from all of its canals and delivery system allegedly caused by the Applicant's ground water pumping.

In granting the *Petition for Reconsideration*, the Hearing Officer abruptly changed course. He declined the more extensive mitigation sought by Boise Project and instead rejected the permit applications altogether, without prejudice. Acting *sua sponte*, he determined that

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[2] The *First Preliminary Order* set out two sets of conditions, one for each permit. Permit No. 63-34079 requires mitigation of "at least" 1.8 acre-feet (*First Preliminary Order* at 12 ¶ 12). Permit No. 63-34080 requires mitigation of "at least" 1.3 acre-feet. (*First Preliminary Order* at 14 ¶ 12). These sum to 3.1 acre-feet, corresponding to the 1.3% of induced seepage estimated by the Applicant's expert (1.3 % of 235 acre-feet = 3.06 acre-feet, rounded to 3.1 acre-feet). The *First Preliminary Order*'s "at least" language reflects the Hearing Officer's initial decision not to quantify the amount of conveyance losses for mitigation water. The Hearing Officer determined, correctly, that the Applicant is not responsible for mitigating the estimated reduction in groundwater inflow into Lake Lowell (which also was said to be

because Emmert had failed to foresee the form of mitigation ordered by the Hearing Officer and therefore failed to present evidence on conveyance losses, "the Hearing Officer cannot determine how much mitigation water Emmert would have to provide to overcome the reduction to the amount of water beneficially used by the Boise Project pursuant to its existing rights." *Amended Preliminary Order* at 12.[3]

The Hearing Officer's *First Preliminary Order* focused on the technical, hydrogeologic issues raised by the parties, and in particular the hydraulic connection (or lack thereof) between the lake and canal system and Emmert's proposed wells. Neither the Hearing Officer's initial decision nor his *Amended Preliminary Order* addressed the following threshold legal questions: (The correct answer is provided in brackets.)

- Is a junior appropriator obligated to provide any mitigation when its ground water diversion will not reduce the quantity of water available to the senior at the senior's point of diversion? [No]
- Is a water user entitled to employ, if it so chooses, leaky canals and a leaky off-stream reservoir to store and deliver water it has diverted out of a natural stream? [Yes]
- If a water user elects to store and deliver water it has diverted out of a natural stream via leaky canals and a leaky off-stream reservoir, may it require other water users to shoulder the burden of the resulting water loss? [No]
- If a water user elects to store and deliver water it has diverted out of a natural stream via leaky canals and a leaky off-stream reservoir, is it entitled to demand compensation for induced leakage caused by other lawful ground water diversions? [No]

1.3%). The Applicant is not responsible for mitigating this impact of his pumping because the Boise Project does not hold a water right for ground water seeping into the reservoir.

[3] It is unfortunate that the Hearing Officer did not raise the question of conveyance losses for mitigation water until after the hearing and briefing had been concluded. He could have continued the proceedings to afford the parties an opportunity to present evidence and argument. IDAPA 37.01.01.561. Of course, the position of the Municipal Providers is that no further hearings are necessary because no mitigation should be required, as a matter of law.

By skipping over these threshold questions in both of his orders, the Hearing Officer implicitly assumed that the answer to each of them is "yes." For reasons discussed below, that was error. That error has grave implications for ground water users throughout the Treasure Valley and across the State. Indeed, it has grave implications for the future development of Idaho's ground water resources.

ARGUMENT

I. JUNIOR APPROPRIATORS ARE RESPONSIBLE FOR INJURY THEY CAUSE AT THE POINT OF THE SENIOR'S DIVERSION, NOT THROUGHOUT THE SENIOR'S OFF-RIVER STORAGE AND DELIVERY SYSTEM, OVER WHICH THEY HAVE NO CONTROL.

The *Preliminary Orders* correctly identify the controlling statute regarding the evaluation of injury in an appropriation application.

> (5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. Provided however, that minimum stream flow water rights may not be established under the local public interest criterion, and may

> only be established pursuant to chapter 15, title 42, Idaho Code. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

Idaho Code § 42-203A(5) (emphasis supplied).

The plain meaning of this section is the junior must not reduce the quantity of water available to be diverted by the senior. Specifically, it must not reduce the quantity of water available to the senior at the senior's point of diversion.

That should be obvious enough. Idaho Code § 42-110 makes it more obvious.

> The proprietors of any ditch, canal or conduit, or other works for the diversion and carriage of water, whose right relative to the quantity of water they shall be entitled to divert by means of such works shall have been established by any valid claim, permit, license or decree of court, shall be entitled to such quantity measured at the point of diversion, subject, however, to all prior rights. Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator.

Idaho Code § 42-110 (emphasis supplied).

This conclusion is underscored by Judge Wildman's recent decision in the contested case on IDWR's accounting system for refill of storage rights. (Copy attached as Exhibit A.) Judge Wildman explained:

> A long-standing tenant of that doctrine [the prior appropriation doctrine] is the quantity element of a water right is measured at the point of diversion.[4] See e.g., I.C. § 42-110 . . . .
>
> Measuring water rights at the point of diversion is only natural given the relationship between water uses under the

[4] This tenant of Idaho's prior appropriation doctrine is truly long-standing. It has been codified in statute since 1899 (1899 Idaho Sess. Law p. 380, § 32) and recognized by case law since 1900. *Stickney v. Hanrahan*, 7 Idaho 424, 435, 63 P. 189, 192 (1900).

> doctrine of prior appropriation. . . .
>
> Under the doctrine of prior appropriation, the distribution of water under a water right is not measured at the place of use or by how much water is actually used to satisfy a purpose of use. *See e.g., Glenn Dale Ranches, Inc. v. Shaub*, 924 Idaho 585, 588, 494 P.2d 1029, 1032 (1972) ("waters appropriated will be measured for their sufficiency from the point of diversion, not the place of use"). It is measured at the point of diversion. *Id.* Measuring water rights at the point of diversion is necessary from a distribution standpoint because once a water is distributed by the Director to an authorized point of diversion he generally lacks control over what happens to it thereafter.

Ballentyne Ditch Co. v. IDWR, Memorandum Decision and Order at 7-8 (Idaho Dist. Ct., 4th Jud. Dist. Sept. 1, 2016) (emphasis supplied) (footnote original). The Director is now defending this conclusion in litigation before the Idaho Supreme Court.

The underlined portion makes a key point here. Once diverted, it is the surface water user's duty to husband the water to the place of use. It is not the duty of the Director. And that burden cannot be shifted to the ground water users of the Treasure Valley.

Boise Project's point of diversion is on the Boise River. No one has suggested that Emmert's wells have any measurable impact on the Boise River upstream of the diversion structures. That should be the end of the discussion, and the end of the protest.

What the senior does with its water once it is diverted from the natural source is up to the senior. If it elects to store and/or deliver that water in pipes or confined facilities, the diverted water will arrive at the place of use largely undiminished. If, instead, it elects to employ unlined earthen facilities to store and deliver its water, much of that water may be lost before it is beneficially used (depending on the geologic materials underlying the facility). There is nothing wrong with that, so long as the system is not deemed unreasonably wasteful. No such allegation has been made in this proceeding.

But it is another thing altogether to suggest that a senior user that elects to avoid the expense of a water-tight system can expect to be kept whole if seepage from that leaky system is induced by other ordinary and lawful diversions of the public ground water resource. Yet that is exactly the conclusion that the Hearing Officer implicitly reached.

In his decision, the Hearing Officer relied on the Department's rule implementing this statutory requirement.

> 01. Criteria For Evaluating All Applications To Appropriate Water. The Director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions.
>
> a. Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:
>
> i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

IDAPA 37.03.08.045.01(a)(i) (emphasis supplied).

The rule is not intended to increase the burden on a water appropriation applicant beyond the standard set out in Idaho Code § 42-203A(5). The rule has two parts. The first is the requirement that the new appropriation not reduce "the amount recorded by permit, license, decree or valid claim." This means, very simply, that the new diversion should not reduce the quantity available for diversion by the senior below the quantity stated on the face of the senior's water right. (That is what "the amount recorded" means.) Because it speaks in terms of the "amount recorded" by the water right, it is clear that the rule is referring to the amount that may be diverted at the point of diversion.

But the rule does not stop there. Even if the new diversion were expected to prevent the senior from diverting the full quantity stated on the face of the senior's water right, the application may still be approved if its diversion will not reduce "the amount historically used" by the senior.

Thus, in order to succeed in a protest, the senior must show that the quantity available for diversion will be reduced below the quantity on the face of the right or below the quantity actually historically beneficially used, whichever is less. For example, suppose a senior has a right to divert up to 10 cfs, but actually only diverts and beneficially uses 8 cfs. If the new appropriation will diminish the water available at the senior's point of diversion to 9 cfs, the application may nonetheless be approved.

Yet it appears that the Hearing Officer has focused on the words "historical amount beneficially used" to justify an examination of the hydraulic connection (if any) between the senior's post-diversion delivery and storage system and the new appropriation. *First Preliminary Order* at 7 ¶ 3. That is a misapplication of the rule.

Obviously, if the senior has historically used more than it was entitled to divert, that unlawful use is not protected. That is why the rule says "whichever is less." The purpose of talking about historical use was to lower the hurdle faced by the applicant (where the senior has not historically diverted and beneficially used the entire authorized quantity), not to increase the burden on a water right applicant by allowing an examination into alleged hydraulic connections to the senior's leaky and inefficient delivery and storage system.

II. THE MITIGATION SOUGHT BY BOISE PROJECT VIOLATES THE MAXIMUM USE DOCTRINE.

If the Boise Project succeeds in requiring other water users to mitigate the impacts of their ground water pumping on its delivery and/or storage system, it will have succeeded in a

masterful end-run of Idaho's maximum use doctrine. That doctrine, which is part and parcel of the prior appropriation doctrine, establishes that there is more to Idaho water law than priority. Priority counts, but it cannot be used to destroy the very thing that the prior appropriation doctrine was intended to achieve—the full use of Idaho's waters.

To be clear, the maximum use doctrine does not allow the Department to override the priority system. Municipal Providers do not ask that their junior rights be preferred over senior ones because their uses are more valued. Nor do they seek to take away the senior's rights. Rather, the contention is that no senior is entitled to shift the burden of water leaking from an inefficient, wasteful, or simply leaky means of diversion, storage, or distribution to other water users.

If a senior water user elects to put water it diverts into an unlined earthen distribution and storage system touching over a hundred square miles, so be it. But that senior cannot then expect ground water users—present or future—to pay it tribute (in the form of mitigation) when the juniors exercise their constitutional right to divert water. Again, and very simply, it is the senior's job to husband that water once diverted. Some do a better job than others. But none may expect to shift to every subsequent user for all time the burden of avoiding or mitigating a hydraulic connection with a leaky system.[5]

Idaho's commitment to maximum beneficial use is firmly established, rooted in our Constitution, and on par with other bedrock principles of the prior appropriation doctrine.

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[5] The decision to use unlined canals and storage facilities is a mixed bag. Some water may be lost, but other water may be gained. As the Hearing Officer noted (based on the modeling evidence presented), the Boise Project benefits from significant ground water inflow into the lake (notwithstanding the fact that the Boise Project has not acquired a water right therefore, and notwithstanding the fact that other users are not required to mitigate for their impacts on such inflows). It is patently unfair, and contrary to maximum use of the resource, for water users to benefit from inflow into unlined facilities

Though the phrase "maximum use doctrine" is of recent vintage, the core principles are nearly as ancient as the prior appropriation doctrine itself.

In a 1904 case dealing with the duty of water, the Idaho Supreme Court noted that the prior appropriation doctrine cares not just about diversion and beneficial use, but also about efficiency. *Abbot v. Reedy*, 9 Idaho 577, 581, 75 P. 764, 765 (1904) (Ailshie, J.) ("The inquiry was, therefore, not what he had used, but how much was actually necessary.").

In a seminal 1907 decision, the Court noted that a senior may not take his water inefficiently so as to deprive others:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much by proper application.

Van Camp v. Emery, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (Ailshie, C.J.) (senior upstream user not entitled to dam stream to subirrigate a meadow resulting in reduced stream flows to junior downstream headgates).

In 1909, the Court allowed a prior decree to be re-opened to examine whether senior appropriators really needed as much water as they had been awarded. *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.,* 16 Idaho 525, 102 P. 481 (1909) (Ailshie, J.). "One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water." *Farmers' Co-operative*, 16 Idaho at 536, 102 P. at 484.

(which reduces the supply to ground water users) while demanding to be compensated for additional seepage out of their unlined facilities induced by lawful ground water pumping.

In 1912, the U.S. Supreme Court, applying Idaho law, handed down the most celebrated maximum use case of all. In *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912), a German immigrant installed a waterwheel driven by the current of the Snake River to raise irrigation water to his farm. Sometime thereafter, Milner Dam was built. When the placid water behind the dam stilled Schodde's waterwheels, he sued the junior appropriator. The U.S. Supreme Court affirmed the Ninth Circuit's ruling that, while the senior's priority is entitled to protection, he may not use an inefficient diversion to impair all other development of the Snake River. No doubt Schodde's waterwheel was a brilliant engineering feat. And it was efficient, so far as Schodde was concerned. But it was deeply inefficient, so far as the resource as a whole was concerned.

As the *Schodde* Court said, "If the plaintiff were permitted to own the current of the stream appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he could control and own. . . . It is clear that in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated." *Schodde*, 224 U.S. at 120. The U.S. Supreme Court cited one of its earlier cases in concluding that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *Schodde*, 224 U.S. at 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)).

The Idaho Supreme Court held in a 1915 water right transfer case that the quantity transferred is limited to the amount previously put to beneficial use. This principle—which seems obvious enough today—was grounded in the Court's recognition that the policy of maximum beneficial use is embedded in the prior appropriation doctrine. "A prior appropriator

is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes." *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) (Budge, J.).

In 1931, a federal district court ruled that the Twin Falls Canal Company may not compel upstream users to pay for construction of Milner dam, even if they benefit from the increase in water elevation. Doing so would "result in such a monopoly as to work disastrous consequences to the public." *Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 49 F.2d 632, 635 (D. Idaho 1931). The court said this result was compelled by *Schodde*. *Id.* at 636.

In 1954, the Ninth Circuit, applying Idaho law, rejected a nuisance claim by a farmer who complained that an upstream reservoir increased the flow below the dam thus interfering with his ability to ford the stream. "In our opinion, the *Schodde* case supplies a complete answer to appellant's contentions." *Johnson v. Utah Power & Light Co.*, 215 F.2d 814, 816 (9th Cir. 1954).

In 1957, the Idaho Supreme Court addressed the maximum use doctrine in the context of adverse possession of a water right. In *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957) (Taylor, J.), the Court rejected the defendant's claim of adverse possession of a water right. The Court premised its ruling on the policy of maximum use. "It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources." *Mountain Home*, 79 Idaho at 442, 319 P.2d at 968 (citing *Van Camp, Farmers' Cooperative, Duffy, et al.*). It described this as a "constitutional policy" that is also grounded in statute. *Id.*

In a 1960 case, the Court held: "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) (Smith, J.) (holding that one party may discharge its irrigation waste into the drainage ditch of another party where that artificial channel substituted for the original channel by which the wastewater would have been returned to natural flows).

In 1964, the Court reiterated that "it is the policy of the law to prevent waste and to secure the maximum beneficial use of the waters of the state." *Ward v. Kidd*, 87 Idaho 216, 226-27, 392 P.2d 183, 190 (1964) (Taylor, J.).

In 1973, the Court upheld a constitutional challenge to the reasonable pumping level restrictions in Idaho's Ground Water Act. "We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, § 7." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (Shepard, J.). Accordingly, "senior appropriators are not necessarily entitled to maintenance of historic pumping levels." *Id.*

In 1977, the Court invoked the principle of maximum use in holding that the statute authorizing state water masters to allocate water during times of shortage with preferences for decreed, permitted, and licensed water rights did not work a deprivation of property as to holders of non-adjudicated constitutional use water rights. "The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources." *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) (Donaldson, J.).

In 1982, the Court upheld—on the basis of "optimum development" and "maximum use"—a statutory distinction (eliminated in 1978) between treatment of domestic and other

wells. "The decision as to how the optimum development of water resources in the State of Idaho can best be achieved is a policy decision exclusively within the province of the legislature. The legislature was therefore free to give special consideration to the position of domestic water users in enacting legislation to implement the policy of 'optimum development.'" *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) (Bistline, J.). The Court continued:

> Furthermore, it is clearly state policy that water be put to its maximum use and benefit. That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution.

Parker, 103 Idaho at 513, 650 P.2d at 655 (citing *Poole* and Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 2 (1968)).

In 1985, the Court invoked the policy of maximum use in holding that a prescriptive easement for drainage does not entitle the owner to engage in unnecessarily wasteful irrigation practices. "Regardless of how long such practices had continued, or whether easements had been acquired to discharge certain volumes of water across a lower property, those wasteful practices would contravene the public policy of this state. That policy 'is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Merrill v. Penrod*, 109 Idaho 46, 55, 704 P.2d 950, 959 (Ct. App. 1985) (Swantrom, J.) (quoting *Poole*).

In 1990, the Court reiterated that our arid conditions compel maximum use of our water resources. "Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. 'The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) (Bakes, C.J.) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.) (the policy of seeking maximum

use of the State's water resources justifies not holding reservoir and canal operators strictly liable for flood damage).

In a 1997 basin-wide decision, the Court recognized partial forfeiture of water rights, which it found was compelled by the longstanding goal of maximum use. "The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing maximum use and benefit of our natural water resources." *State v. Hagerman Water Right Owners* ("*Basin-Wide Issue 10*") ("*Hagerman I*"), 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) (Schroeder, J.) (quoting *Nettleton* and citing *Kunz*).

In the same year, the Court extended the ruling in *Kunz* (which limited the liability of irrigation dam owners) to dams constructed for wildlife and other purposes. As in *Kunz*, the Court based its ruling on the policy of maximum use. "It has been the policy of this State to secure the maximum use and benefit of its water resources." *Stott v. Finney*, 130 Idaho 894, 896, 950 P.2d 709, 711 (1997) (Walters, J.).

In another 1998 case, the Court recognized a federal reserved water right for stock watering to benefit permittees on federal lands. *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.). The Court noted that the purpose of the federal reservation was to ensure that the water would be available for use "by whichever member of the public happens at any time to have the grazing permit for the lands" thereby preventing private appropriations whereby "individuals could monopolize the water." *United States v. State*, 131 Idaho at 471, 959 P2d at 452. "To hold otherwise would be in contravention of the policy of this state 'to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *United States v. State*, 131 Idaho at 472, 959 P2d at 453 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.)).

In 1999, the Court carved out an exception to the forfeiture principle for Carey Act irrigators. In noting that forfeiture is not favored, the Court relied on the "state policy of securing the maximum use and benefit of its water resources." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (Silak, J.) (quoting *Hagerman I*, which, in turn, quoted *Nettleton*).

In 2007, the Court upheld the constitutionality of the Department's Conjunctive Management Rules which were expressly premised on an integration of the prior appropriation doctrine and "the principle of optimum use of Idaho's water." *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD2*"), 143 Idaho 862, 867, 154 P.3d 433, 438 (2007) (Trout, J.).

In 2011, the Court employed the maximum use doctrine in upholding the Director's conjunctive management curtailment order.

> There is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest. . . . The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (Eismann, C.J.) (citing *Niday v. Barker,* 16 Idaho 73, 101 P. 254 (1909), *Farmers' Cooperative*, *Poole*, and *Parker*).

In 2013, the Court invoked the policy of maximum use in upholding the right of an irrigator to condemn a pipeline easement in order to reduce conveyance losses. The Court reiterated that it is "this State's policy to secure the maximum use and benefit, and least wasteful use, of its water resources." *Telford Lands LLC v. Cain*, 154 Idaho 981, 987, 303 P.3d 1237, 1243 (2013) (Eismann, J.) (quoting *Poole*).

Last year, the Court upheld the Director's conjunctive management curtailment order in which the Director relied on the maximum use doctrine in avoiding curtailments beyond a "trim line." "Additionally, the Director relied on the policy of promoting the optimum development of the State's water resources enunciated in Article XV, section 7 of the Idaho Constitution and this Court's decision in *Clear Springs,* where we stated that '[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Rangen, Inc. v. IDWR* ("*Rangen II*"), 160 Idaho 119, 129, 369 P.3d 897, 907 (2016) (J. Jones, C.J.) (brackets original)[6]. "As we recently stated in *Clear Springs,* the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy in Idaho." *Rangen II*, 160 Idaho 131, 369 P.3d 909 (citing *Clear Springs*, *Niday*, *Farmers' Co-operative*, and *Poole*). "[A]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." *Rangen II*, 160 Idaho at 140, 369 P.3d at 918 (quoting IDAPA 37.03.11.020.03).[7] The Court also expounded on the importance of *Schodde* and *Van Camp*. *Rangen II*, 160 Idaho at 132-34, 369 P.3d at 910-12.

This discussion of the maximum use doctrine documents its deep roots in Idaho water law and its application in a broad range of contexts. The Director is now defending this doctrine

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[6] *Rangen II* is sometimes referred to as *IGWA v. IDWR*. IGWA is included in the "In the Matter of" portion the caption, but Rangen is the plaintiff-appellant. Another Rangen case, *Rangen, Inc. v. IDWR* ("*Rangen I*"), 159 Idaho 798, 367 P.3d 193 (2016) (J. Jones, J.), deals with the finality of decrees and does not implicate the maximum use doctrine. A third case deals with a mitigation plan addressing the same delivery call. *Rangen, Inc. v. IDWR* ("*Rangen III*"), 160 Idaho 251, 371 P.3d 305 (2016) (J. Jones, J.).

[7] In this passage, the Court quoted from IDWR's conjunctive management rule. The Court made clear, however, that the principle of maximum use has its roots not just in the rule but in the Idaho Constitution. "The Director did not treat either [the rule or the Idaho Constitution] as directly granting him discretion to apply a trim line. Instead, the Director recognized, correctly, that each source merely restated a broader understanding of Idaho law . . . ." *Rangen II*, 160 Idaho at 132, 369 P.3d at 910.

before the Idaho Supreme Court in the refill litigation. The decision in this contested case should not undercut this vital and foundational principle of Idaho law.

In sum, if the Boise Project elects not to line its canals or render its storage facilities more impervious, that is its choice. Other water users are not responsible for the resulting leakage and, indeed, may appropriate the leaked water. This is reflected in the *First Preliminary Order*, which was limited to additional leakage said to be induced by the junior's pumping. But holding juniors responsible for induced leakage is also contrary to the maximum use doctrine. Requiring every junior to devise a mitigation strategy around a leaky system over which they have no control is no different from what Henry Schodde (and his widow) sought. This is even more troubling, given that it is only because of the artificially elevated ground water levels created by the Boise Project that there is even an argument for a hydraulic connection. Schodde sought to use his senior status to constrain development of the entire Snake River. The Boise Project must not be allowed to use its senior status to similarly hamper development of an entire aquifer whose existing and future use is vital to every city in the Valley.

III. WHAT IS REALLY GOING ON HERE.

Why would the Protestant spend so much time and money litigating the inconsequential impacts of a seed farmer's two small wells? Two reasons come to mind.

First, it presents an opportunity to establish a powerful precedent in the context of a contested case against a small-scale water user—one who has no reason to be concerned with the broad policy implications of the decision and can hardly afford to litigate the matter. Second, and more significantly, it allows the Protestant an opportunity to establish that precedent outside the context of the Department's conjunctive management rules. IDAPA 37.03.11.

Those rules, adopted in 1994, provide a forum for the careful and thorough analysis of the interaction of ground and surface water diversions in the context of Idaho's maximum use doctrine. IDAPA 37.03.11.020.03. See generally, Fereday & Creamer, *The Maximum Use Doctrine and its Relevance to Water Rights Administration in Idaho's Lower Boise River Basin*, 47 Idaho L. Rev. 67 (2010).

If it wished, the Boise Project could initiate a delivery call under the conjunctive management rules. It has not chosen that path. If it did, it would subject the project's own water uses to examination. IDAPA 37.03.11.042 (which calls for examination of such things as "the acreage of the land served" (as opposed to paved over) and "the amount of water diverted and used compared to the water rights"). Instead, it selected this forum where it hopes to avoid such hard questions.

At the end of the day, this protest is an attempted end run around the conjunctive management rules. Perhaps that is permissible. But even when protestants allege injury outside the context of the conjunctive management rules, the Department should be mindful that the constitutional principles of maximum use apply in all water proceedings—and they were not applied in either of the *Preliminary Orders* in this case. The Boise Project must not be allowed to establish a cookie-cutter precedent in this case based on technical engineering considerations and mathematical models that are oblivious to the maximum use doctrine and to the common sense principle that once a water user diverts water, it is the user's job—not the junior's—to husband that water to its beneficial use.

CONCLUSION

The Hearing Officer's fundamental flaw was looking to the wrong location to evaluate injury. Injury should be evaluated at the point of diversion. Instead, the Hearing Officer

evaluated injury throughout the Boise Project's delivery and off-river storage system. That system leaks. Hundreds of thousands of acre-feet enter the aquifer after diversion from the river. This artificial condition, created by the Boise Project and other surface irrigators, is so extensive that drains have been installed to remove water from swampy soil. That drained water mostly runs out of state. It is because of the artificially elevated ground water levels that Boise Project is in a position to argue that ground water pumping induces seepage.

Here, the Hearing Officer found that evidence of such an hydraulic connection was provided only for Lake Lowell (and not for the canals). Who knows what the evidence might be in the next hearing. If the Hearing Officer's ruling stands, we can expect to see surface irrigators throughout the State deluge the Department with protests, delivery calls, and other actions in which they seek to establish a hydraulic connection affecting their leaky systems—and demand compensation from ground water users.

That is wrong. It violates statute, the prior appropriation doctrine, and the maximum use doctrine. Even if in this or some future proceeding surface water users are able to establish such a hydraulic connection, surface users should not be allowed to demand tribute of ground water users to compensate for induced seepage that would not exist but for the surface users' own delivery and application of irrigation water through leaky systems over which other water users have no control.

Respectfully submitted this 4th day of August, 2017.

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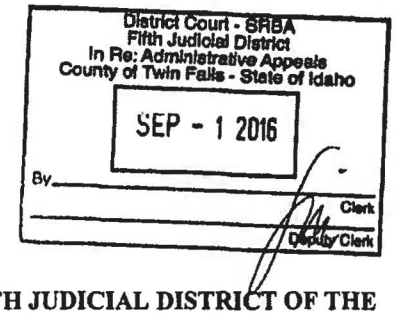
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Christopher H. Meyer



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

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,	)	Case No. CV-WA-2015-21376 (Consolidated Ada County Case No. CV-WA-2015-21391)
Petitioners,	)	**MEMORANDUM DECISION AND ORDER**
vs.	)	
BOISE PROJECT BOARD OF CONTROL, and NEW YORK IRRIGATION DISTRICT,	)	
Petitioners,	)	
vs.	)	
THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his capacity as Director of the Idaho Department of Water Resources,	)	
Respondents,	)	
and	)	
SUEZ WATER IDAHO INC.,	)	

Intervenor.

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

I.

STATEMENT OF THE CASE

A. Nature of the case.

This case originated when the Ditch Companies,[1] the Boise Project Board of Control, and the New York Irrigation District filed *Petitions* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). Under review is the Director's *Amended Final Order* issued on October 20, 2015 ("*Final Order*"). The *Final Order* addresses the Director's distribution of water to federal on-stream reservoirs in water district 63. The Petitioners assert that the *Final Order* is contrary to law and request that the Court set it aside and remand for further proceedings.

B. Course of proceedings and statement of facts.

This matter concerns the Director's method of distributing water to federal on-stream reservoirs located in the Boise River System. The Director commenced the underlying contested case proceeding on October 24, 2014. R., pp.1-34. He found it necessary "[t]o address and resolve concerns with and/or objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in water district 63." *Id.* at 7. Notice of commencement was served by the Director on affected water users who were invited to participate. *Id.* at 1-34. The notice ordered interested parties to

[1] The term "Ditch Companies" refers collectively to 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, Nampa & Meridian Irrigation Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

submit statements of concern regarding how water is distributed to federal on-stream reservoirs in water district 63. *Id.* at 7. A number of water users submitted such statements while others filed notices of intent to participate. *Id.* at 35, 39, 41, 51, 58, and 65. The United States informed the Director it would not participate on the basis the contested case proceeding did not meet the requirements of the McCarran Amendment. *Id.* at 84.

An administrative hearing was held before the Department over a period of five days in August and September 2015.[2] Tr., pp.1-1608. The Director acted as presiding officer. *Id.* at 7. Following the submission of post-hearing briefs, the Director entered his *Final Order*. R., pp.1230-1311. The Director made a series of findings concerning how water is distributed to the federal on-stream reservoirs. *Id.* at 1293-1298. He found the Department's method of distribution to be consistent with Idaho's prior appropriation doctrine. *Id.* He concluded that method will continue to govern the distribution of water to federal on-stream reservoirs located in the Boise River System. *Id.* at 1308. The Ditch Companies and the Boise Project Board of Control filed *Motions* asking the Director to reconsider his *Final Order*. *Id.* at 1313; 1331. The Director denied the *Motions* on November 19, 2015. *Id.* at 1402.

On December 17, 2015, the Ditch Companies filed a *Petition for Judicial Review* in Ada County Case No. CV-WA-2015-21376. On that same date, the Boise Project Board of Control and the New York Irrigation District filed a *Petition for Judicial Review* in Ada County Case No. CV-WA-2015-21391. Both *Petitions* assert the Director's *Final Order* is contrary to law. The cases were reassigned by the clerk of the court to this Court, after which Ada County Case No. CV-WA-2015-21391 was consolidated into the above-captioned proceeding. On February 4, 2016, the Court entered an *Order* permitting Suez Water Idaho, Inc. to appear as an intervenor. A hearing on the *Petitions for Judicial Review* was held before this Court on July 11, 2016. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day, or July 12, 2016.

[2] The proceeding was held over the following five days in 2015: August 27th, 28th, 31st, and September 9th and 10th.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or, (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

HISTORICAL BACKGROUND

The federal government operates three on-stream dams and associated reservoirs in the Boise watershed. The first, Arrowrock Dam, was completed by the United States Bureau of Reclamation ("USBOR") in 1915. Ex. 2071, p.2. It is located on the main stem of the Boise River and was authorized for the sole purpose of storing runoff during high flow periods for irrigation purposes. Ex. 2053, p.12. The second, Anderson Ranch Dam, was completed by the USBOR in 1950. Ex. 2401, p.19. It is located on the South Fork of the Boise River and was authorized "as a multi-purpose structure for the benefit of irrigation, flood control and power."[3] Ex. 2071, p.5; Ex. 2053, p.14. The third, Lucky Peak Dam, was completed by the United States

[3] The Bureau of Reclamation recognized that "irrigation is the primary use of the reservoir." Ex. 2053, p.14.

Corps of Engineers in 1955. Ex. 2401, p.20. It is located on the main stem of the Boise River and was authorized primarily for flood control. Ex. 2053, p.16; Ex. 2071, p.3.

Storage water rights associated with the reservoirs were claimed in the Snake River Basin Adjudication ("SRBA"). The SRBA District Court decreed four of those rights as follows:

Right	Point of Diversion	Source	Quantity	Priority	Purpose	Period
63-303	Arrowrock Dam	Boise River	271,600 afy	01/13/1911	Irrigation Storage Irrigation from Storage	01/01-12/31 03/15-11/15
63-3613	Arrowrock Dam	Boise River	15,000 afy	06/25/1938	Irrigation Storage Irrigation from Storage	01/01-12/31 03/15-11/15
63-3614	Anderson Ranch Dam	South Fork Boise River	493,161 afy	12/09/1940	Irrigation Storage Irrigation from Storage Industrial Storage Industrial from Storage Power Storage Power from Storage Municipal Storage Municipal from Storage	01/01-12/31 03/15-11/15 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31
63-3618	Lucky Peak Dam	Boise River	293,050 afy	04/12/1963	Irrigation Storage Irrigation from Storage Recreation Storage Streamflow Maintenance Storage Streamflow Maintenance from Storage	01/01-12/31 03/15-11/15 01/01-12/31 01/01-12/31 01/01-12/31

Ex. 2015. These four water rights were claimed by the United States based on prior licenses. *Id.* They are decreed in the name of the USBOR. *Id.* However, title to the use of the water is held by the consumers or users of the water. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). The four decreed rights provide for a cumulative storage capacity of 1,072,811 acre feet annually. Ex. 2015.

Additional water rights associated with the dams have been claimed by the United States and other water users based on beneficial use. *See* SRBA Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738. These were filed as late claims in the SRBA. *Id.* The SRBA District Court approved the filing of the late claims and they are currently pending before that Court. For reasons set forth in the SRBA District Court's *Memorandum Decision on Challenge* entered contemporaneously herewith in those subcases, the Director has recommended that the late claims be decreed disallowed in the SRBA. As a result, his *Final Order* does not take the late claims into account when considering how water is distributed to the subject reservoirs.

IV.
DISTRIBUTION ANALYSIS

The Director's *Final Order* addresses how water is, and will be, distributed to the federal on-stream reservoirs in the Boise River System. The distribution of priority water to these

reservoirs occurs pursuant to water rights. These water rights were partially decreed in the SRBA as water right numbers 63-303, 63-3613, 63-3614, and 63-3618. They will be referred to herein as the "reservoir water rights." It is without doubt the Director is the appropriate individual to determine how water is to be distributed under the reservoir water rights. After all it is he who is statutorily vested with a clear legal duty to distribute water. I.C. § 42-602. Given this endowment of authority, the details of how the Director chooses to distribute water are largely left to his discretion. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). Such details will not be disturbed so long as they are reconcilable with prior appropriation and true to the elements of the subject water right(s). *Id.*; I.C. § 42-602.

The Court turns then to whether the Director's method of distributing water to the subject reservoirs is reconcilable with prior appropriation and the partial decrees issued for the reservoir water rights. As can be gleaned from the *Final Order*, the Director's distribution of water to the reservoirs is fairly complex. There are a number of reasons for this. The reservoir water rights are storage rights. Storage rights by their very nature involve complexities not associated with other categories of water rights, including the right to store water for future use. The nature of the dams also adds complexity. They are operated for purposes other than, and in addition to, the distribution of priority water to irrigators under the reservoir water rights. Most prominent is the federal government's operation of the dams for the purpose of flood control, a purpose which has not historically been reflected in our state's system of water rights.[4] As such, operation of the dams for purposes such as flood control may conflict with the reservoir water rights.

Given the circumstances, it is no surprise it is difficult to summarize the Director's findings in a brief sentence or two. Nevertheless, for purposes of judicial review the Court broadly summarizes his findings as they relate to the distribution of water to the subject reservoirs as follows:

1.) All natural flow entering the reservoir that is available in priority is accrued to the reservoir water right. R., pp.1266; 1294-1298.

2.) When the amount of natural flow that has entered the reservoir in priority equals the quantity element of the reservoir water right, the right is deemed satisfied. *Id.*

[4] What is meant by this is that historically the federal government has not claimed or acquired water rights under Idaho Code §§ 42-201, *et seq.*, and/or 42-1401, *et seq.*, to divert, store, or release water for flood control purposes.

3.) Natural flow that continues to enter the reservoir thereafter is identified as "unaccounted for storage" if it is excess water not needed to satisfy other water rights on the system. *Id.* at 1267; 1294-1298.

4.) Natural flow identified as "unaccounted for storage" may be stored in the reservoir and distributed to irrigators consistent with historic practices, but not pursuant to a water right. *Id.*

The Director's findings are of course more nuanced. However, it is these broader points which the Petitioners primarily challenge. In discussing those points, the Court will address the more nuanced findings of the Director where necessary. After reviewing the file, and for the reasons set forth below, the Court ultimately holds that the Director's *Final Order* is affirmed in part and set aside and remanded in part.

A. The Director's accrual to the reservoir water right of all natural flow entering the reservoir that is available in priority is affirmed.

i. The finding is reconcilable with the doctrine of prior appropriation.

The Director accrues to a reservoir water right all natural flow entering the reservoir that is available in priority. R., pp.1294-1298. The Director's finding is reconcilable with the prior appropriation doctrine. A long-standing tenant of that doctrine is the quantity element of a water right is measured at the point of diversion.[5] *See e.g.*, I.C. § 42-110; *Stickney v. Hanrahan*, 7 Idaho 424, 435, 63 P. 189, 192 (1900) ("[t]he necessity of measuring to each claimant, at the point of diversion from the natural stream, the waters appropriated and used by him, is apparent"). The Director's finding is consistent with this tenant. All three federal dams are on-stream dams. Each consists of a river-wide diversion structure that captures and regulates the entire flow of the river. The dams are themselves the structures into which water is diverted and stored under the reservoir water rights.[6] Therefore, once the Director distributes priority water to

[5] This tenant of Idaho's prior appropriation doctrine is truly long-standing. It has been codified in statute since 1899 (1899 Idaho Sess. Law p.380, § 32) and recognized by case law since 1900. *Stickney v. Hanrahan*, 7 Idaho 424, 435, 63 P. 189, 192 (1900).

[6] This is reflected in the partial decrees issued for the reservoir water rights which identify the dams as the authorized points of diversion under the rights. Ex. 2015; R., p.1289. The partial decrees do not identify the downstream points of diversion at which the irrigation organizations re-divert stored water released from the reservoir system. *Id.*

a dam it is consistent with the prior appropriation doctrine to accrue that water to the applicable reservoir water right.

Measuring water rights at the point of diversion is only natural given the relationship between water users under the doctrine of prior appropriation. Water users on a source are divided into senior and junior users in relation to one another. A junior user is entitled to water only when his water right is in priority. Idaho Const., Art XV, § 3; I.C. § 42-106. A junior's right is in priority when the water rights of all senior users have been, or are being, satisfied. *Id.* Until that time, a junior user must let water pass his point of diversion so that it may be distributed to satisfy senior rights. *Id.* Once the junior has let enough water pass to so satisfy senior rights, and the Director has distributed that water to the points of diversion authorized under those rights, the junior's water right comes into priority and he is entitled to exercise it. But what if a senior complains that he did not use the priority water distributed to him to accomplish the purpose of use authorized under his water right? The junior has already let enough water pass to satisfy the senior right. Must his right go out of priority again? Must he let more water pass to satisfy the senior? No. The doctrine of prior appropriation does not contemplate this result.

Under the doctrine of prior appropriation, the distribution of water under a water right is not measured at the place of use or by how much water is actually used to satisfy a purpose of use. *See e.g., Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029, 1032 (1972)("waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use"). It is measured at the point of diversion. *Id.* Measuring water rights at the point of diversion is necessary from a distribution standpoint because once water is distributed by the Director to an authorized point of diversion he generally lacks control over what happens to it thereafter. It is, at that point, under the control of the appropriator. And, it is the appropriator who is tasked with applying it to beneficial use. That such is the case with respect to dams has been recognized. *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935) (water distributed to a dam becomes "the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use"). If a water user does not carry out this task, it does not change the fact that the Director distributed priority water to his authorized point of diversion. Nor does it change the

fact that junior users were required to forgo that water so that it may be distributed to him in priority.

Additionally, when a junior's water right comes into priority he is protected against further interference from senior rights under the doctrine of prior appropriation:

> The junior appropriator . . . is entitled to protection not only against those whose rights are subsequent to his, but also against wrongful acts on the part of earlier appropriators. That is to say, while an appropriator *may divert* the quantity of water to which he is entitled, when he has once done so he may not so impede the flow of the remaining stream as to prevent it from reaching the junior appropriator's headgate.

Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 50 (1968) (emphasis added). Therefore, in the scenario proposed above, the doctrine of prior appropriation does not require the junior to let more water pass to the complaining senior.

In this case, it is the federal government that operates the subject dams. While the Director distributes priority water to the dams pursuant to the reservoir water rights, it is the federal government that decides how to store and release that water. It may release the water to irrigators consistent with the reservoir water rights. Or, as is shown in the record, it may release the water for a myriad of other purposes such as flood control. What the federal government chooses to do does not change the fact that the Director distributed the water in priority and to the point of diversion authorized under the reservoir water right. Nor does it change the fact that juniors were required to forgo that water so that is may be so distributed. As a result, the Director's decision to accrue that water to the reservoir water rights is reconcilable with the prior appropriation doctrine and must be affirmed.

ii. The finding is consistent with the partial decrees.

Accruing water to the reservoir water rights in this fashion is also consistent with the plain language of the partial decrees issued for those rights. The amount of water that may be diverted under each reservoir water right is plainly stated in the partial decrees in terms of annual volume. Ex. 2015. For example, the quantity element of the partial decree for water right number 63-3614 permits the diversion of 493,161 acre-feet annually at Anderson Ranch Dam. *Id.* Unlike many other surface water rights, the reservoir water rights do not contain any corresponding flow limitations. Flow limitations are typically expressed in terms of cubic feet

per second, and limit a user in the amount of total available river flow he may divert at a given time.[7] The reservoir water rights lack flow limitations. They therefore divert the entire flow of the river that is available in priority at any given time.

In addition to lacking flow limitations, the reservoir water rights lack period of use limitations on storage. The partial decrees unambiguously provide for year-round use. Ex. 2015. That is, the reservoir water rights divert water to storage any day of the year that they are in priority up until the time they are satisfied. Since the partial decrees provide for year-round use, and contain no flow limitations, the Director's accrual of all natural flow entering the reservoirs in priority to the reservoir water rights is consistent with the partial decrees and must be affirmed.

iii. The Petitioners' challenges to the finding are inconsistent with the prior appropriation doctrine and the plain language of the partial decrees.

The Petitioners challenge the Director's accrual method. The thrust of their challenge is that the Director should not accrue against the reservoir water rights water that is distributed to the dams in priority but is released by the federal government for some purpose other than irrigation. This argument, at its core, is no different than arguing the reservoir water rights should be measured at the authorized place of use, or by how much water is actually used to satisfy the purpose of use, instead of at the point of diversion. Similar arguments have been rejected many times as contrary to Idaho's doctrine of prior appropriation. *See e.g., Glenn Dale Ranches, Inc.*, 94 Idaho at 588, 494 P.2d at 1032 (1972); *Stickney v. Hanrahan*, 7 Idaho 424, 435, 63 P. 189, 192 (1900); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912); *Special Master Report and Recommendation*, SRBA Subcase Nos., 72-16778, *et al*, (Jan. 13 2010).

The Petitioners' argument is problematic because the Director has no way of knowing whether water he distributes to the dams will ultimately be released to irrigators, or whether it will be released for some other purpose (i.e. flood control, dam maintenance, endanger species etc.). This determination is made by the federal government and is out of the Director's control. Sure the Director may learn where the water went well after the fact. But that is not meaningful to the Director in light of his statutory duty to distribute water in real time – a duty which he

[7] For example, a water right that contains a 7 cubic feet per second flow limitation limits the user to the diversion of 7 cubic feet per second from the source at any given time even if more flow, say 10 cubic feet per second, is available.

undertakes on a day-to-day and week-to-week basis. It also does not change the fact that juniors were required to forgo that water so that it may be distributed to the dams in priority.

It can be tempting to reason that if stored water is not released to irrigators because it is released for some other purpose it should not be accrued against the reservoir water rights. However, aside from being contrary to the prior appropriation doctrine and decrees, this would cripple the Director's ability to effectively distribute water under our system of water rights administration. For example, let's say the Director has distributed the full amount of priority water called for under the reservoir water rights to the dams. If he cannot accrue that water to the reservoir water rights when he distributes it, then when can he? It may be months before he knows whether that water is released to the irrigators or released for some other purposes.[8] How is the Director to distribute and administer to other water rights on the system in the interim if he does not know whether the reservoir water rights are, or are not, satisfied? Effectively, he cannot, and the system of priority water right distribution breaks down.

The argument that only water released to the irrigators should be accrued to the reservoir water rights is problematic for another reason. It would effectively transfer water right distribution in the basin from the Director to the federal government. If the Director cannot accrue water to the reservoir water rights at the time of priority distribution, then it is wholly up to the federal government to determine when those rights will be satisfied. Only the federal government has the authority to operate the dams. Only it knows when it will release water to the irrigators and when enough has been released to satisfy the reservoir water rights. The Director would be unable to deem the reservoir water rights satisfied and/or distribute water to junior users until the federal government says he can. Such a result is contrary to law. The Legislature has given the Director, not the federal government, the authority to distribute water in this state. I.C. § 42-602. The Idaho Supreme Court has likewise made clear that "federal law defers to state law in determining the rights to water in the reclamation projects," and that "the [Reclamation] Act clearly provided that state water law would control in the appropriation *and*

[8] It must be noted that in some years all of the priority water distributed to the reservoirs will be released to the irrigators. This is because flood releases are not necessary every year. In other years, some, but not all, of the priority water distributed to the reservoirs will be released for flood control.

later distribution of the water." *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007) (emphasis added).[9]

Many of the Petitioners' additional arguments rely upon documents other than the partial decrees issued for the reservoir water rights. These include:

1) Memorandum of Agreement Between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs, Idaho, dated November 20, 1953. Ex. 2038.

2) Contract Between Nampa & Meridian Irrigation District and The United States of America, dated June 17, 1954. Ex. 2100.

3) Corps of Engineers U.S. Army Reservoir Regulation Manual for Boise River Reservoirs, dated August 1956. Ex. 2104

4) Water Control Manual for Boise River Reservoirs, Boise River, Idaho, dated April 1985. Ex. 2156.

5) Memorandum of Understanding for Confirmation, Ratification, and Adoption of Water Control Manual Boise River Reservoirs, Boise River, Idaho, dated 1985. Ex. 2157.

The Petitioners' assertion that the Court should rely upon these documents to upset the Director's *Final Order* is untenable.

The cited documents consist of various private agreements between federal agencies and/or water users concerning, among other things, how the Boise reservoirs will be operated and regulated for flood control. The Director does not distribute water pursuant to these private agreements. Neither the Department nor the State is a party to the agreements. To the contrary, the Director distributes water pursuant to the partial decrees issued for the reservoir water rights. Under the law, it is those decrees that are "conclusive as to the nature and extent" of the use. I.C. § 42-1420(1). As set forth above, the partial decrees are plain and unambiguous. There is no reason to resort to extraneous documents to interpret how water is distributed under the decrees.

[9] Although this issue arose in the context of federally operated reservoirs the same principle applies to on-stream reservoirs not operated by the federal government. Allowing a senior storage right holder to determine when to store water when the storage right is otherwise in priority effectively turns over distribution control from the Director to the senior storage right holder. A senior storage right holder with a year round storage right would have the flexibility to "pick and choose" when to physically store the water despite being in priority. Such flexibility would occur to the detriment of juniors on the system who would be precluded from exercising their rights while the senior is in priority, whether or not the senior is actually storing the water. The Court is not implying that an on-stream reservoir should be operated void of flood control measures. Rather, issues regarding the apparent conflict between the administration of a storage right in light of flood control measures need to be raised and addressed when the storage right is being adjudicated.

See e.g., Sky Cannon Properties, LLC v. The Golf Club at Black Rock, LLC, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) (stating that if a decree's terms are unambiguous, the decree's meaning and legal effect are to be determined from the plain meaning of its own words). Therefore, the documents will not be considered.

Moreover, the Idaho Supreme Court has directed that if a party to the SRBA disagrees with how its water rights were ultimately decreed, "it had an opportunity and responsibility to voice its concerns in the appropriate form – the SRBA." *Rangen Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016). A review of the partial decrees issued for the reservoir rights reveals no mention, reference to, or incorporation of the documents cited to by the Petitioners. If the Petitioners believed that these documents, or portions thereof, were required to define the nature or extent of the reservoir water rights or were necessary for administration of those rights, they were required to raise that issue in the SRBA.[10] *Id.* They did not, and are precluded from raising the issue for the first time in a proceeding outside the SRBA. *Id.*

B. The Director's determination that the reservoir water rights are satisfied when the amount of natural flow that has entered the reservoir in priority equals the quantity element of the right is affirmed.

The Director's method of distribution deems the reservoir water rights satisfied when the amount of natural flow that has entered the reservoir in priority equals the quantity element of the right. R., pp.1266; 1294-1298. The legal analysis applicable to this finding is largely the same as that set forth in the preceding section. The Court will not duplicate it here. It states only that the finding is reconcilable with the requirement that water rights be measured at the point of diversion. It is also reconcilable with the correlative relationship of senior and junior users under a prior appropriation system. It is further consistent with the elements of the partial decrees issued for reservoir water rights. Those decrees contain no flow limitations or period of use limitations in regard to storage. Therefore, when the rights are in priority they divert the entire flow of the river that is available in priority. Once that flow equals the quantity element of the

[10] Had such issues been raised in the SRBA when the rights were being adjudicated and had any administrative provisions been memorialized in the partial decrees as a result, the Director would be obligated to give effect to such administrative provisions. *See Memorandum Decision and Order on Challenge*, Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33737 and 63-33738, pp. 6-7, issued contemporaneously with this decision (examples of where claimants have sought administrative provisions in partial decrees to memorialize historical methods of administration).

reservoir water right, the Director's determination to deem the right satisfied is consistent with the partial decree. The Director's finding is therefore consistent with both the prior appropriation doctrine and the subject decrees. It must be affirmed.

C. The Director's determination that excess natural flow entering a reservoir after the reservoir water right is satisfied is to be identified as "unaccounted for storage" is set aside and remanded for further proceedings as necessary.

Under certain circumstances, the Director's method of distribution provides for the continued distribution of water to the reservoirs for storage even after the reservoir water rights have been satisfied. R., pp.1294-1298. The *Final Order* identifies water so distributed as "unaccounted for storage." *Id.* Water identified as unaccounted for storage is distributed to spaceholders for irrigation in years where flood control releases occur.[11] In those years, the Director may distribute excess water (i.e., water not required by any water right on the system) to the dams following flood releases to be stored and ultimately used by the irrigators. *Id.* However, under the Director's methodology neither the diversion nor use of water identified as unaccounted for storage occurs pursuant to a water right. *Id.*

The Court finds the Director's finding in this respect to be contrary to law. The prior appropriation doctrine requires that water be diverted and used pursuant to a water right. Idaho Code § 42-201(2) specifically directs that "[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so . . . ." This language is plain and unambiguous. The Legislature has identified some limited exceptions to the water right requirement, however unaccounted for storage is not one of them. I.C. § 42-201(3). Rather than address the statute, the Director relies upon case law to justify his position. R., p.1296. He cites the Idaho Supreme Court's decision in *State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998) and the SRBA District Court's *Memorandum Decision and Order on Challenge* issued in SRBA subcase numbers 74-15051, *et al.*, on January 3, 2012. The Director's reliance on these cases is misplaced. *Id.*

[11] Flood control releases do not occur every year. The three federal on-stream reservoirs have an active storage capacity of 949,700 acre-feet. R., p.1238. It is undisputed that the average annual flow of the Boise River exceeds 949,700 acre-feet. Ex.2182, p.2. In an average or above-average water supply year, flood control releases will occur. However, in below average water supply years it is possible to store the entire flow of the Boise River. In those years no flood releases occur.

The cases cited by the Director do not address Idaho Code § 42-201(2) and are otherwise factually distinguishable. They concerned the Reynolds Creek Basin and Lemhi River Basin respectively. Both basins were the subject of general adjudications prior to the SRBA. The final decrees entered in those adjudications contained general provisions memorializing the use of excess water by certain users without a water right based on historic practices. Importantly, the general provisions were not the result of rulings on the merits. The decrees were consent decrees, entered pursuant to and consistent with the stipulation of the parties to those adjudications. As a result, the respective adjudication courts did not address Idaho Code § 42-201(2). Nor did they address whether the historic use of excess flows could have resulted in vested water rights under the constitutional method of appropriation had such rights been claimed by users in the respective adjudications.

In the SRBA, the SRBA District Court memorialized the diversion and use of excess water without a water right on only one occasion. It entered a general provision authorizing such use in the Lemhi River Basin. *Partial Decree for General Provisions in Basin 74*, Twin Falls County Case No. 39576 (April 3, 2012), p.2. Critically, the SRBA District Court did not address the merits of whether such diversion and use could be reconciled with Idaho Code § 42-201(2). *Memorandum Decision and Order on Challenge*, SRBA subcase nos. 74-15051, *et al.* (Jan. 3, 2012). It did not need to reach that issue, as the doctrine of *res judicata* required it to adopt the general provision previously entered by the prior adjudication court in the Lemhi Adjudication. *Id.* at 21-22. Nor did the SRBA District Court address whether individuals in the Lemhi Adjudication could have claimed water rights in that adjudication for the excess flow based on the constitutional method of appropriation. Therefore, the cases cited to by the Director do not support the position that use of water identified as unaccounted for storage without a water right can be reconciled with Idaho Code § 42-201(2). It follows that the Director's finding must be set aside and remanded as contrary to Idaho Code § 42-201(2), and as prejudicial to the Petitioners' substantial rights.[12]

In light of the foregoing analysis, there is a deeper legal question that needs to be explored. The Director's findings in this case acknowledge a "longstanding" and "historic"

[12] As will be explained further below, the substantial rights that are prejudiced are the water right claims associated with the dams that have been claimed by the United States and other water users in the SRBA based on beneficial use in SRBA Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738. *Cf.*, IDAPA 37.03.08.035.02.d. (providing "[a]n applicant's interest in an application for permit to appropriate water is personal property").

practice of the diversion of excess water into the dams for use by the irrigators following flood releases in flood control years. R., pp.1296, 1298, 1305. If this use has historically occurred, which it seems obvious it has, why hasn't a water right for that use vested in the United States and irrigators? This question is addressed in the next section.

D. The Director's determination that water identified as "unaccounted for storage" may be used by irrigators consistent with historic practices, but not pursuant to a water right is set aside and remanded for further proceedings as necessary.

Until 1971, an individual could appropriate surface water in Idaho under the constitutional method of appropriation. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007). Under that method, an appropriation of water is completed, and a water right vests in the appropriator, upon the diversion and application of water to beneficial use. *Id.* at 8, 156 P.3d at 509. The Director has explicitly found that irrigators have historically diverted, stored and used water identified as unaccounted for storage for irrigation following flood releases in flood control years. R., pp.1263; 1267-68; 1296; 1298. He acknowledges this use has occurred pursuant to "long-standing" practice, and even condones the continued practice of diverting, storing, and using such water consistent with how it has been done historically. *Id.* According to the *Final Order*, in flood control years Arrowrock and Anderson Ranch Reservoir spaceholders have always received their full storage allocations for irrigation and in only one year (i.e,. 1989) have spaceholders in Lucky Peak not received their full storage allocations. *Id.* at 1263; 1268. Yet, he does not recognize the appropriation of that water. He identifies the water as unaccounted for storage, which is just an alternative way of identifying the water as unappropriated water. As such, he does not recognize that the United States and/or the irrigators have a valid legal right to, or vested property interest in, water identified as unaccounted for storage.

The Director's finding in this respect cannot be reconciled with the prior appropriation doctrine. All three of the subject dams were completed well before 1971. The record establishes that flood control years and resulting flood control releases occurred many times before 1971, and that in all of those years, water identified by the Director as unaccounted for storage was diverted, stored and ultimately used by the irrigators for irrigation. *See e.g.*, Water District 63 Black Book for 1985; R.,pp.1263; 1268. Under the constitutional method, the diversion and use

of such water is all that is necessary to complete the appropriation and obtain a vested water right. *Joyce Livestock Co.*, 144 Idaho at 7, 156 P.3d at 508. In fact, a water user need not have even intended or understood that the diversion and use of the water would ultimately be recognized under law as creating a valid water right. *Id.* at 11, 156 P.3d at 512.

The Court agrees with the Director that the use of unaccounted for storage does not occur under the reservoir water rights for the reasons set forth above. But it disagrees that the use has not accrued to the United States and/or the irrigators a vested water right in that water. Simply stated, if unaccounted for storage water has been historically and continuously diverted, stored and used by the irrigators for irrigation dating back before 1971, as the Director expressly recognizes, then the United States and irrigators have acquired a vested constitutional method water right in that water under Idaho law. Indeed, the United States and various water users have claimed beneficial use water rights in the SRBA for that water identified by the Director as unaccounted for storage. *See* SRBA Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33737 and 63-33738. The United States and water users have substantial rights in their water right claims. *Cf.*, IDAPA 37.03.08.035.02.d. (providing "[a]n applicant's interest in an application for permit to appropriate water is personal property"). These rights are prejudiced by the Director's determination that they have not acquired water rights, via their diversion of use, in water he identifies as unaccounted for storage. Therefore, the Director's determination that the United States and irrigators have not acquired a vested water right in water identified by him as unaccounted for storage is reversed and remanded for further proceedings.

V.
PROCEDURAL ANALYSIS

A. The Director's initiation of the contested case is affirmed.

The underlying contested case was initiated by the Director. R., p.2. The Petitioners assert he lacked the authority to initiate the contested case upon his own volition. This Court disagrees. The Director has a clear legal duty to distribute water in accordance with the prior appropriation doctrine. I.C. § 42-602. The details of his performance of this duty are left to his discretion. *Musser*, 125 Idaho at 395, 871 P.2d at 812. In this case, the Director recognized the existence of a controversy concerning how water is distributed to federal on-stream reservoirs in the Boise River System. R., p.2. The controversy became manifest in SRBA Basin-Wide Issue

17 but was left unresolved.[13] The controversy continues as evidenced by various communications and objections received by the Director. R., p.4. In light of this, the Director initiated the contested case via notice in furtherance of his duty to distribute and administer water. *Id.* at 2. It cannot be said that he exceeded the broad discretion granted him under Idaho Code 42-602 by proceeding in this fashion. It also cannot be said that he acted contrary to law, as the Department's Rules of Procedure expressly grant the Director authority to initiate formal proceedings such as a contested case via notice. IDAPA 37.01.01.104. Therefore, the Director's decision to initiate the contested case must be affirmed.

B. The Director's decision to preside over the contested case is affirmed.

The Petitioners challenge the Director's decision to preside over the contested case as violative of their due process rights. They assert that the Director exhibited preconceived notions on disputed issues and took public positions that prevented him from presiding in a fair and impartial manner. They rely primarily on a presentation given by Director to the Idaho Legislature's Natural Resources Interim Committee in 2014. That presentation, which was given in response to a request from the Committee, provided an overview of Basin-Wide Issue 17. R., p.909. The Director made certain statements during the presentation on flood control operations in federal reservoirs and the effects of those operations on spaceholders' entitlements to storage water. *Id.* at p.118; 909-911. These statements included the following:

> Contracts of spaceholders who are entitled to stored water in reservoirs operated for flood control can have their storage allotments reduced during years of releases from reservoirs to empty space for flood control. This is [a] requirement of the spaceholder's contracts and an inherent risk the spaceholders assume in relying on storage water from an on-stream reservoir that must be operated for flood control. Flood control comes first!

Id. at 118. The Petitioners assert that due process required the Director to disqualify himself from the contest given his public comments and preconceptions on how water is distributed to federal on-stream reservoirs.

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[13] The SRBA District Court declined to hear the issue on the basis that water distribution is within the province of the Director. *Memorandum Decision*, Twin Falls County Case No. 39576, Subcase No. 00-91017, pp.11-12 (March 20, 2013). This decision was affirmed by the Idaho Supreme Court. *In Re SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 394, 336 P.2d 792, 801 (2014) (holding which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedures Act provides the procedures for challenging the chosen accounting method).

The restraints the Petitioners seek to impose on the Director exceed those required by law. Of course the Director will have some preconceived notions on how water is and should be distributed to federal on-stream reservoirs in the Boise River System. This is only natural given he is statutorily charged with distributing water to those reservoirs, a task he undertakes yearly. However, due process does not require a presiding officer have no preconceptions on a given issue. *Republican Party of Minn. v. White*, 536 U.S. 765, 777 (2002) (a presiding officer's "lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice"). It likewise does not preclude a presiding officer from taking a public position on policy issues related to a dispute. *Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007) ("a decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute. . . .").

What is required is that the Director provide the Petitioners with "an impartial and disinterested tribunal." *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. Co. 170*, 148 Idaho 200, 208, 220 P.3d 318, 326 (2009). An impartial and disinterested tribunal is one which "assures equal application of the law." *Republican Party of Minn.*, 536 U.S. at 775-776 (2002). That is, "it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies to any other party." *Id.* at 776. An example from the Supreme Court is illustrative of this concept of impartiality:

> To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

Id. (emphasis in original).

The Court finds the Petitioners were provided with an impartial and disinterested tribunal. They were given notice of the contested case and had ample opportunity to present evidence and be heard on their arguments. The Director's *Final Order* demonstrates that he properly, and more than adequately, considered those arguments. R., pp.1298-1308. The presentation on which the Petitioners focus to establish the Director's partiality is, quite frankly, rather innocuous. There are no pledges, promises, or definitive statements of law contained therein. *Id.* at 114-131. Nothing is said in specific relation to the Boise River System. *Id.* It is

merely a broad overview of the issues raised in Basin-Wide Issue 17 and of some of the concerns that surround the distribution of water to federal on-stream reservoirs. More importantly, there is no evidence that the Director is or was biased against the Petitioners or their counsel personally. There is certainly no evidence that the Director had a personal stake in the contest that could bias the outcome or result in a conflict of interest. The Court therefore finds that the Director was capable of judging the contest fairly, and that he provided the Petitioners with an impartial and disinterested tribunal.

The Petitioners additionally challenge the Director's decision to preside as violative of Idaho Code § 67-5252. That statute gives parties the right to disqualify a presiding officer under certain circumstances. The Ditch Companies moved to disqualify the Director and any other Department employee from presiding over the contested case. R., p.100. The Director acted in accordance with law in denying the *Motion*. *Id.* at 132. The disqualification request would have resulted in an inability to decide the contested case in violation of Idaho Code § 67-5252(4). The individual statutorily charged with distributing water is the Director. I.C. § 42-602. Delegating this responsibility to an individual outside of the Department, while disqualifying himself from participating in the matter, would be an improper abdication of his duty. It would also result in the inability to decide the contest, as the delegate would not be vested with the statutory authority to distribute water. The Director was the appropriate individual to preside over the contested case. His decision to preside is affirmed.

C. The Director's denial of the Petitioners' motion to dismiss and to initiate rulemaking is affirmed.

Certain of the Petitioners moved the Director to dismiss the contested case and initiate rulemaking in its stead. R., p.208. The Director correctly denied the request. *Id.* at 334. The issues before the Director involved matters of particular applicability. Namely, the distribution of water to three federal on-stream reservoirs on the Boise River System pursuant to four specific water rights. Matters of such particularity do not conform to the statutorily definition of "rule," which applies to agency statements of "general applicability." I.C. § 5201(19). That such is the case is evidenced by application of the six characteristics of a "rule" delineated in *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003). Those characteristics looks to whether an agency action has (1) wide coverage, (2) applies generally and uniformly, (3) operates only in future

case, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously express, and (6) is an interpretation of law or general policy. *Id.* at 723, 69 P.3d at 143.

This matter lacks wide coverage. At its heart it addresses how water is to be distributed pursuant to *Partial Decrees* issued for water right numbers 63-303, 63-3613, 63-3614 and 63-3618. As such it is a matter of particular applicability, not general. Nor is the Director's *Final Order* applied generally and uniformly. While it arguably may have potential precedential value, the *Final Order* itself addresses, and is applied to, four specific water rights. It is therefore applied particularly, not generally. The *Final Order* also does not prescribe a legal standard or directive not otherwise provided the enabling statute. The Director is statutorily authorized to distribute water. The quantitative information he needs to distribute water to the federal on-stream reservoirs in the Boise River Basin is not prescribed by him. It is judicially provided to him in the form of the *Partial Decrees* issued by the SRBA District Court for water right numbers 63-303, 63-3613, 63-3614 and 63-3618. It is arguable, but irrelevant, whether the other *Asarco Inc.* characteristics are met. The six characteristics are listed in the conjunctive, so the lack of one seals the deal. Since issues before the Director involved matters of particular applicability, his decision to decline rulemaking accords with law and must be affirmed.

D. The remainder or the Petitioners' procedural arguments are unavailing.

The Petitioners assert the Director improperly consulted Department staff outside of the hearing concerning testimony provided by Lee Sisco, former water master for water district 63. They assert this conduct violated their due process rights, and that the *Final Order* must be set aside. The record reflects that during a break in the testimony of Mr. Sisco, the Director sought Tim Luke, a Department employee who oversees the watermasters for the Department. Tr., pp.942-944. However, the Director did not find or talk to Mr. Luke. *Id.* at 943. Therefore there is no prejudice or harm to the Petitioners. The Director did have a discussion outside of the hearing with Elizabeth Cresto, a Department employee who oversees the water district 63 records for the Department. *Id.* at 1585-1588. However, the topic of this discussion was revealed and put on the record, and the Petitioners had the opportunity to cross examine Mrs. Cresto regarding that discussion. *Id.* at 1588-1591. Therefore there is no prejudice or harm to the Petitioners, and their due process argument is unavailing.

The Petitioners assert that Garrick Baxter, counsel for the Department in this matter, acted in violation of IDAPA 04.11.01.423.02.a. This Court disagrees. That rule provides in part that "no agency attorney involved in the investigation or prosecution of a complaint shall discuss the substance of the complaint ex parte with the agency head . . . ." IDAPA 04.11.01.423.02.a. A complaint is defined as "[a]ll pleadings charging other person(s) with acts or omissions under law administered by the agency." IDAPA 04.11.01.240.01. The proceeding before the Director did not involve the "investigation or prosecution of a complaint."[14] Therefore, the rule is inapplicable and the Petitioners' argument in unavailing.

The Petitioners assert the Director improperly took notice of certain materials. Idaho Code § 67-5251(4) provides that the presiding officer may take official notice of certain materials. When such notice is taken, "[p]arties shall be notified of the specific facts *or* materials noticed and the source thereof. . .," and that notice should be "provided either before or during the hearing." I.C. § 67-5251(4) (emphasis added). The record in this case establishes that the Director provided the parties with notice of the materials he took official notice of, as well as the sources of the materials prior to the hearing. R., pp.885-890, 959-964, 697-701. The Court finds that the Director complied with the statute and that the Petitioners' argument is unavailing.

VI.
ATTORNEY FEES

The Ditch Companies, Boise Project Board of Control and Suez Water Idaho, Inc. seek an award of attorney fees under Idaho Code § 12-117. The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). In this case, none of the parties requesting fees have prevailed in full. As such, they are not prevailing parties entitled to an award of fees under the statute. *Syringa Networks LLC v. Idaho Dept. of Administration*, 155 Idaho 55, 67-68, 305 P.3d 499, 511-512 (2013). Further, attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the Court holds that the Petitioners and the Respondents have presented legitimate

[14] There is no pleading filed in this case charging an individual with acts or omissions under law. The case was initiated by the Director via *Notice*, which the Director has the express authority to do for reasons set forth above under IDAPA 37.01.01.104 and Idaho Code § 42-602.

questions for this Court to address. The issues presented in this case are largely issues of first impression. In light of that, the Court does not find the either the Petitioners' argument or the Respondents' arguments to be frivolous or unreasonable. Therefore, the Court in an exercise of its discretion denies the requests for attorney fees.

VII.
ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Director's *Amended Final Order* issued on October 20, 2015 **is hereby affirmed in part and set aside and remanded in part.**

Dated September 1, 2016

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on September 01, 2016, with sufficient first-class postage to the following:

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