

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

In Re SRBA

Case No. 39576

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

I. APPEARANCES

Albert P. Barker, Barker Rosholt & Simpson, LLP, Boise, Idaho, for Boise Project Board of Control.

Daniel V. Steenson, Sawtooth Law Offices, PLLC, Boise, Idaho, for 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 (hereinafter collectively referred to as "Ditch Companies").

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

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

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

II. ORAL ARGUMENTS

Oral arguments were heard in these matters as follows:

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

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

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

III. INTRODUCTION

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

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

reservoirs and exceeds the volume of water that may be stored under the existing storage water rights¹ for the Boise River Reservoirs. Because the dams that impound the water in the Boise River Reservoirs are physically located in the stream channel, all of the water produced upstream therefrom necessarily must pass through the reservoir(s) and dam(s). Of the total quantity that is produced in the basin each year, some of the water is stored to fruition (i.e. such time as it may be released downstream to be used for irrigation and other beneficial uses), and some of the water must be passed downstream, unused, at a time of year when there is no demand for it.

The above-captioned claims filed by the United States Bureau of Reclamation (“Bureau”) and the Boise Project Board of Control (“Boise Project”) seek judicial recognition of beneficial use² water rights for the storage of such water that exceeds the annual quantity of the existing storage rights. However, the summary judgment motions filed by the Ditch Companies and the Boise Project,³ seek to answer the threshold question of whether the water that forms the basis of the claims was already being stored pursuant to the existing storage rights and hence the claims fail for the reason that such stored water cannot simultaneously be authorized under the existing storage rights and be the basis for beneficial use water rights. The answer to this threshold question, the movants argue, requires a determination of what water is stored under the existing storage rights and what water is not. The State’s position is that the existing storage rights are for all water that is “physically and legally available for storage,” beginning on November 1 of each year, until the cumulative total of the daily inflows of such water equals the

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

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

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

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

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

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

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

Control Manual⁵, and then using such vacant space to regulate reservoir releases below a level that is deemed to cause flooding.⁶ The Ditch Companies and the Boise Project assert that water that is released from the reservoirs as required by the rule curves to maintain adequate vacant space - such water then flowing past the downstream diversion works and headgates of the various irrigation entities at a time of year when the water cannot be beneficially used - is not water that was stored pursuant to the “irrigation storage” components of the existing storage rights.

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

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

⁵ Water Control Manual for Boise River Reservoirs, U.S. Army Corps of Engineers, Walla Walla District (April 1985), attached as Exhibit E to the *Affidavit of Robert J Sutter* (filed July 2, 2015).

⁶ The flood control objective is defined as no more than 6,500 cfs at the Glenwood Gauge near Eagle Island.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE DIRECTOR’S REPORT

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

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

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

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

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

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

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

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

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

V. STANDARD OF REVIEW ON SUMMARY JUDGMENT

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

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

However, these standards differ where cases, such as this one, are tried to courts in the absence of a jury. See, e.g., *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008) (citations omitted). In those instances, the court as the trier of fact need not draw inferences in favor of the non-moving party; and the court is free to draw its own “most probable” conclusions in the face of conflicting facts. *Id.* (“[W]here the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. When an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.”).

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

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

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

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

rights. The problem with their argument, however, is that they are building a “straw-man” contention and attributing it to the Ditch Companies and the Boise Project. The Ditch Companies and the Boise Project do not contend that the quantity element of the existing storage rights can be exceeded for water stored thereunder. Rather they simply contend that the water that is stored pursuant to the existing storage rights is the water that is physically in the Boise River Reservoirs⁹ at the time of maximum physical fill. Stated differently, the Ditch Companies and the Boise Project do not claim that the existing storage rights allow the capture and storage (and release) of all “storable inflow” for purposes of filling the existing storage rights and thereafter the capture and storage of all remaining flows for purposes of filling the reservoir.

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

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

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

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

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

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

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

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

No change in reservoir operations, in reservoir refill, or in water right administration resulted from the paper fill methodology of the accounting program. Reservoir inflows were not required to be released, and the water actually stored in the reservoirs was not allocated to storage water rights at the point of paper fill. Physical refill of storage spaces and storage water rights continued as required by to [sic] the Water Control Manual’s runoff forecast, rule curve and release procedures. For accounting purposes, paper fill is more accurately understood to be a benchmark establishing that the reservoir water rights are entitled to be physically filled by subsequent reservoir inflows.

The net effect of this accounting procedure is to accrue to reservoir storage spaces and water rights inflows that are physically stored pursuant to the runoff forecast and rule curve procedures of the Water Control Manual. After maximum reservoir fill, the water physically stored in the reservoirs, including the “unaccounted for storage,” is allocated to reservoir storage rights, and then to spaceholders with contract-based storage entitlements by the storage allocation program. The storage allocations are input into the water right accounting program. This point in the accounting procedure at which stored water is allocated to storage water rights is referred to as the “day of allocation.” These allocations become the basis for the accounting of storage water right use during the irrigation season. The Watermaster is informed of the allocations, and he in turn informs the storage right holders of the amount of storage that is available to them for ensuring [sic] irrigation season.

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

However, this period of time ends on the day of allocation¹⁰ when “the water physically stored in the reservoirs, including the ‘unaccounted for storage,’ is allocated to reservoir storage rights.” *Id.* The differentiation between “existing storage right” water and “unaccounted for storage” water does not continue past the day of allocation. This process provides the retrospective accounting necessary for the accounting system to recognize that the water that is put to beneficial use is the water that is physically stored in the reservoir on the day of maximum physical fill; such retrospective accounting being necessary under a system that accounts daily for inflows and necessarily attributes them first to the existing storage rights and next to the “unaccounted for storage” account.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

existing storage rights as authorizing the storage of the water that is actually used – i.e. the water in the Boise River Reservoirs at the time of maximum physical fill¹² (See Section VI. C. below). Again, the issues as to “what is the property?” and “how to account for the property?” are not the same. The accounting is left to the Idaho Department of Water Resources, but a determination of “what is the property?” is answerable by the SRBA Court and making such a determination is compatible with the holding in Basin-Wide Issue 17. The historical accounting, both before and after 1986, is relevant only to the extent that it sheds light on the answer to the question of “what is the property?”

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

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

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

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

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

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

Prior to implementation of water rights accounting [in 1986], the watermaster in Water District 63 used hand calculations to distribute water to water right holders in priority. In general, there was a reservoir accrual season (November 1 to April 1, non-regulation season) and an irrigation season (April 1 to October 31, regulation season). Water was distributed according to priorities on a daily basis only during the irrigation season. Accruals to reservoir water rights were not determined on daily but rather on the date of maximum total reservoir fill⁶. The bureau determined the fill of the reservoir rights. On the date of maximum fill, storage was assigned to the most senior right first. Arrowrock received the first allocation up to 100% of its right, the remainder was assigned to Anderson Ranch up to 100% of its right, and any remaining storage was assigned to the Lucky Peak right. Under this scenario, an upstream reservoir could have been credited for natural flow that arose below the reservoir.

[fn 6] Memorandum May 3, 1977 To: RO 100, 700, 760
Project Superintendent, SCPO, Boise, Idaho From: 761
Subject: New Method Adopted for Allocation of Boise
System Storage.

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

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

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

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

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

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

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

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

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

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

Second Affidavit of Lee Sisco (filed August 25, 2015) ¶ 5.¹³ In addition to the Bureau, the Idaho Department of Water Resources, and the Watermasters, the water users similarly considered the water in the Boise River Reservoirs at the time of maximum physical fill to be water stored under the existing storage rights. For example, Paul Lloyd Akins, who sits on the Board of Directors of the Farmers Union Ditch Company and farms land served by the Farmers Union canal, states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Companies and the Boise Projects are seeking an interpretation of the *Partial Decrees* – i.e. they are seeking a collateral¹⁶ interpretation,¹⁷ not a collateral attack.

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

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

¹⁶ The term “collateral” is used here simply to signify that the interpretation is being sought in the proceedings in the above-captioned subcases rather than the subcases for the existing storage rights.

¹⁷ The use of the term “interpretation” is not meant to connote that there is any ambiguity or unclarity in the *Partial Decrees* for the existing storage rights with respect to the issues raised in these subcases; rather the interpretation involves the application of historical fact together with Idaho law to ascertain the answer to a question upon which the *Partial Decrees* are silent. The clarification of existing law against which the water right holders are entitled to rely is not a collateral attack on a prior license or decree. *Memorandum*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The State²⁰ and United Water also argue for a collateral interpretation of the existing storage rights. They argue that the existing storage rights are filled once the sum of daily accruals equals the annual volume limit of the existing storage rights. Thereafter, they argue, actual storage can continue under the existing storage rights, but under the

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

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

condition that the existing storage rights are “no longer in priority.”²¹ *State’s Response* at 28 and 67, *United Water’s Brief in Opposition* at 31-33. Stated differently, the State and United Water argue that the existing storage right annual quantity limit can be exceeded so long as the priority element is ignored. This legal theory is without merit.

Furthermore, and in contrast to the legal theory of the Ditch Companies and the Boise Project (i.e. that the existing storage rights authorize the storage of the water in the Reservoirs at the time of maximum physical fill as opposed to authorizing the storage of water that must be released to comply with the rule curves), the legal theory of the State and United Water does constitute an impermissible collateral attack on the existing storage rights. There is nothing in the *Partial Decrees* for the existing storage rights that even hints that the quantity element can be exceeded so long as the priority element is ignored. Hence the theory advocated by the State and United Water is more akin to the unsuccessful position taken by Rangen that the partial decrees for its water rights mean something more than what is stated on the face of the decree.

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

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

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

VIII. ORDER DISMISSING BOISE PROJECT'S MOTION IN LIMINE

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

IX. ORDER DISMISSING BOISE PROJECT'S MOTION TO STRIKE

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

X. RECOMMENDATION ON BOISE PROJECT'S MOTION FOR SANCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In accordance with the foregoing, and in an exercise of reason and within the boundaries of discretion, this Special Master finds, based on the file and record herein, and upon the comments made at oral argument on this matter, that the legal theories under which the Boise Project filed its *Motion to Strike* demonstrate the requisite "reasonableness" as is required under I.R.C.P. 11(a)(1), and that such *Motion* was made in good faith. Therefore, this Special Master **recommends** that the SRBA District Court enter a final order denying the State of Idaho's and United Water's²⁷ *Motion for Sanctions*.

XII. ORDERS AND RECOMMENDATIONS

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

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

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

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

Dated _____

A handwritten signature in black ink, appearing to read 'Theodore R. Booth', written over a horizontal line.

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

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

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BALLENTYNE DITCH COMPANY
BOISE VALLEY IRRIGATION
CANYON COUNTY WATER COMPANY
EUREKA WATER COMPANY
FARMERS' CO-OPERATIVE DITCH CO
MIDDLETON IRRIGATION ASSN INC
MIDDLETON MILL DITCH COMPANY
NAMPA & MERIDIAN IRRIGATION
NEW DRY CREEK DITCH COMPANY
PIONEER DITCH COMPANY
SETTLERS IRRIGATION DISTRICT
SOUTH BOISE WATER COMPANY
THURMAN MILL DITCH COMPANY

BOISE PROJECT BOARD OF CONTROL
Represented by:
SHELLEY M DAVIS
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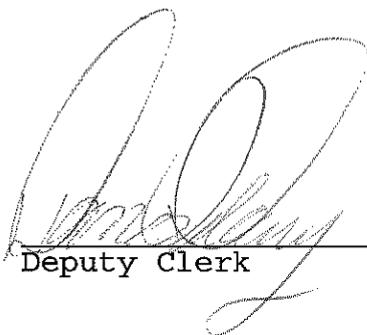
Represented by:
DANIEL V STEENSON
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MEMORANDUM DECISION AND RECOMMENDATION

USDI BUREAU OF RECLAMATION
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
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(Certificate of mailing continued)

BOISE, ID 83720-0098



Deputy Clerk