

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

IN THE MATTER OF ACCOUNTING)	
FOR DISTRIBUTION OF WATER)	ORDER DENYING
TO THE FEDERAL ON-STREAM)	PETITIONS FOR
RESERVOIRS IN WATER)	RECONSIDERATION
<u>DISTRICT 63</u>)	

BACKGROUND

On October 15, 2015, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued the *Final Order* in the above captioned contested case. On October 20, 2015, the Director issued an *Amended Final Order*.

Two petitions for reconsideration of the *Amended Final Order* were filed with the Department. On November 3, 2015, the Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District and Boise-Kuna Irrigation District (collectively “Board of Control”) timely filed the *Motion for Reconsideration and Memorandum in Support* (“Board of Control’s Motion”). Also on November 3, 2015, the Ditch Companies¹ timely filed the *Ditch Companies’ Petition for Reconsideration* (“Ditch Companies’ Petition”). United Water Idaho, Inc., filed *United Water’s Combined Response To Petitions For Reconsideration* on November 17, 2015.

DISCUSSION

1. The Director’s Duty To Administer Water Rights In Water District 63 Requires A Process For Determination Of When The Storage Water Rights Are Satisfied.

The Board of Control asserts that in the *Amended Final Order* the Director “asserted unto himself the judicial power of the Courts.” Board of Control’s Motion at 3. The Director disagrees. The *Amended Final Order* addresses matters that fall under the Director’s statutory authority and discretion as explained by the Idaho Supreme Court in its decision on “*Basin-Wide Issue 17*.” *In Re SRBA, Case No. 39576, Subcase No. 00-91017*, 157 Idaho 385, 390, 336 P.3d 792, 797 (2014). There, the Court held that “[d]etermining when a water right is satisfied is within the Director’s discretionary functions.” *Id.* at 392, 336 P.3d at 799 (bold in original). In Water District 63, the need for that determination arises because the federal on-stream reservoirs regulate the flows of the Boise River, comingling natural flow with storage water. *E.g., Amended Final Order*, Findings of Fact ¶¶ 13, 97, 102, 104, 129, 130. Indeed, no party disputes that some method of accounting is necessary to administer and distribute natural

¹ 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

flow to licensed and decreed water rights in Water District 63. Further, no party disputes that the Director’s “clear legal duty” is to “direct and control distribution of water from all natural water sources within water districts” in accordance with the prior appropriation doctrine. *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800.

Decreed water rights are, to be sure, property rights. They “give the Director a quantity he must provide to each water user in priority.” *Id.* at 394, 336 P.3d at 801. But the decrees for the reservoir water rights in Water District 63 do not state when the quantity element of each right fills or satisfies. When faced with this “issue of fill,” both the Snake River Basin Adjudication (SRBA) District Court and the Idaho Supreme Court recognized it “is purely an issue of administration.” *Id.* at 392, 336 P.3d at 799. Both courts also recognized the issue is fact-intensive, involving a “complex and historically dense” record and requiring application of the Director’s technical expertise. *Id.* For those reasons, the Idaho Supreme Court held “determining when the decree is filled or satisfied” is “implicit” in the Director’s duty “to provide each user the water it is decreed.” *Id.* at 394, 336 P.3d at 801. The Court’s *Basin-Wide Issue 17* decision is binding on the Director, and the *Amended Final Order* documents the application of the Director’s technical expertise to the question of when the water rights for the federal on-stream reservoir in Water District 63 are satisfied.

2. The Special Master’s Recommendation In SRBA Subcase Nos. 63-33732 et al. Is Not Binding In This Proceeding.

The Board of Control and the Ditch Companies argue the Director must follow the October 9, 2015 *Memorandum Decision and Order Granting Ditch Companies’ and Boise Project’s Motions for Summary Judgment and Special Master’s Recommendation of Disallowance of Claims* (“*Recommendation*”) issued in SRBA Consolidated Subcase Nos. 63-33737, et al. by Special Master Theodore Booth. They characterize the *Recommendation* as a binding decision of the SRBA District Court. The Director disagrees.

The Special Master issued the *Recommendation* pursuant to Presiding Judge Wildman’s *Order of Reference* dated January 9, 2015. The *Order of Reference* directed the Special Master to “preside over the matter and to conduct all further proceedings necessary to issue a recommendation consistent with this Court’s [January 9, 2015] *Summary Judgment Order* and *SRBA Administrative Order 1, Rules of Procedure*.” (underline added). The plain terms of the *Order of Reference* are dispositive, because “the power of the master is determined by his order of reference, and he possesses no power to hear controversies or perform acts outside the scope of the order.” *Olson v. Idaho Dept. of Water Res.*, 105 Idaho 98, 100, 666 P.2d 188, 190 (1983) (citing *Idaho Placer Mining Co. v. Green*, 14 Idaho 294, 94 P. 161 (1908)). The *Order of Reference* did not empower the Special Master to issue a final judgment, nor did the Special Master purport to do so.

Under SRBA Administrative Order 1 and Idaho Rule of Civil Procedure 53(e)(2), the *Recommendation* is subject not only to alteration or amendment by the Special Master, but also further review by the Presiding Judge.² On review, the Presiding Judge is not bound by the

² In fact, when the Director issued the *Amended Final Order* on October 20, 2015, the *Recommendation* had not even appeared on the SRBA District Court’s Docket Sheet—an essential prerequisite for all further proceedings on the *Recommendation*. *Administrative Order 1* 13(a).

Recommendation's legal conclusions or its “clearly erroneous” findings of fact, if any. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991). This non-final procedural posture means the *Recommendation* does not—indeed, cannot—have preclusive effect. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007) (explaining the elements of issue preclusion, including “a final judgment on the merits in the prior litigation”); *see also Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) (explaining claim preclusion requires “a valid final judgment by a court of competent jurisdiction” in an action “between the same parties on the same claim”). Further, the *Recommendation* pertains to only the late claims in SRBA Subcase Nos. 63-33732 *et al.*, not the decreed reservoir water rights at issue in this proceeding—nos. 63-303, 63-3613, 63-3614, and 63-3618. The *Recommendation* does not purport to amend or set aside the existing partial decrees—which have been incorporated into the SRBA Court’s *Final Unified Decree*—nor does it recommend that the Presiding Judge do so. *See* Idaho Code § 42-1420(1); *A & B Irr. Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 515, 284 P.3d 225, 240 (2012) (“A decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.”). Therefore, the *Recommendation* is not binding for purposes of this proceeding.

3. The Question Of “Detriment” To Physical Fill Is Beyond The Scope Of Findings Of Fact 51, 138, and 139, And The Record Supports The Amended Final Order’s Findings Regarding Priority Administration Of The Reservoir Water Rights.

The Ditch Companies assert “[t]he record does not support the conclusion that junior priority right holders divert water to the detriment of reservoir ‘refill.’” Ditch Companies’ Petition at 3 (bold and capitalization omitted). The Ditch Companies argue that Findings of Fact in the *Amended Final Order* “are an incomplete rendition of the record with respect to the issue” of “diversions of water rights junior in priority to those of the Boise River Reservoirs . . . during the so-called reservoir ‘refill’ period.” *Id.* The Ditch Companies argue that the cited Findings of Fact “intentionally (and erroneously) leave the impression that junior water right diversions during the ‘refill’ period occurred to the *detriment of* the physical filling of the reservoirs as opposed to being merely coincidental to the physical filling of the reservoir under the operative flood control rule curves.” *Id.* (parenthetical and italics in original). The Ditch Companies also argue there is no “direct evidence” that the Boise River Watermaster “actively called for the release of stored water supplies to meet the downstream demand of junior appropriators during the refill period.” *Id.* The Ditch Companies rely on testimony of Department hydrologist Elizabeth Cresto and former Watermaster Lee Sisco to support these arguments. *Id.* at 3-4.

The cited Findings of Fact (51, 138, and 139) inform the *Amended Final Order's* determinations of whether the reservoir water rights were accounted for and/or administered in priority during the “refill period.” The cited Findings of Fact do not address whether junior water rights diverted to the “detriment” of physically filling or “refilling” the reservoirs in flood control years, or whether the Boise River Watermaster “actively called for the release of stored water supplies to meet the downstream demand of junior appropriators during the refill period.” *Id.* Further, and as discussed below, the Findings Of Fact cited by the Ditch Companies pertain to accounting and administration under two different systems: the system used before 1986 and the system used after 1986. The Water District 63 computerized accounting programs were implemented in 1986. *Amended Final Order* at 20 ¶ 44.

Finding Of Fact 51 And Pre-1986 Accounting and Administration.

Finding of Fact 51 is part of the *Amended Final Order*'s discussion of "Reservoir Water Right Accounting and Administration Before 1986." *Amended Final Order* at 20-28 (Findings of Fact 44-75). The *Amended Final Order* addresses this subject because the Ditch Companies, the Board of Control, and the City of Boise disagreed with the Staff Memorandum's determination that before 1986 "[w]ater was distributed according to priorities only during the regulation season, or the irrigation season." *Amended Final Order* at 20 ¶ 45. The Ditch Companies, the Board of Control, and the City of Boise argued, rather, "that before 1986, the reservoir water rights were interpreted and administered as being in priority during the 'fill' or 'refill' of flood control space." *Id.* The Director ultimately found that "prior to 1986, water rights in Water District 63 were not administered or regulated on the basis of priority or quantity until the 'canal regulation' period or season," which "was after the conclusion of reservoir system flood control operations and/or after the amount of water stored in the reservoir system had reached its maximum for the year"; and that "prior to 1986, the water rights for the federal on-stream reservoirs in Water District 63 were rarely administered in priority at any time during the year." *Id.* at 28 ¶ 75.

The Director's ultimate findings regarding accounting and administration before 1986 were based on specific documents and/or testimony, including findings regarding the annual watermaster reports for Water District 63, i.e., the "Black Books." *Amended Final Order* at 20-22 (Findings of Fact 47 - 51). In Finding of Fact 51, the Director found that "[t]here is no evidence in the Black Books that in high water years before 1986, diversions under water rights junior to the reservoirs were curtailed by the watermaster when the reservoirs were physically filling or 'refilling' after flood control releases." *Amended Final Order* at 21 ¶ 51. The Director also found in Finding of Fact 51 that an analysis of Black Book data prepared by Department hydrologist Elizabeth Cresto in response to a request by Pioneer Irrigation District "showed that water rights junior to the reservoir water rights had diverted during the flood control 'refill' period in three flood control years prior to 1986." *Id.*

Finding of Fact 51 limits its analysis to the pre-1986 Black Books, and the Cresto analysis of three years of pre-1986 Black Book data. There is nothing in the pre-1986 Black Books or the Cresto analysis documenting or referencing that diversions under junior water rights during the "refill" period were "to the detriment of the physical filling of the reservoirs . . . under the operative flood control rule curves," or that the watermaster "actively called for the release of stored water supplies to meet downstream demand of junior appropriators during the refill period." Ditch Companies' Petition at 3 (italics omitted). Therefore the record does not support the Ditch Companies' contentions that Finding of Fact 51 is "incomplete" and leaves an incorrect "impression."

The Cresto analysis was prepared in response to a discovery request by Pioneer Irrigation District seeking an analysis of 104 years of data regarding whether water rights junior in priority to the reservoir water rights had diverted during the "Refill Period," which Pioneer Irrigation District defined as the period of time in flood control years during which the Boise River reservoir system was "physically filling." Ex. 3 at 1.³ Pioneer Irrigation District's

³ Time and data constraints limited the Cresto analysis to three representative years: 1943, 1952, and 1956. Ex. 3 at 1; *Amended Final Order* at 22 n. 21.

request did not seek a determination of whether junior diversions during the “Refill Period” were “to the *detriment of* the physical filling of the reservoirs . . . under the operative flood control rule curves,” or whether the watermaster “actively called for the release of stored water supplies to meet downstream demand of junior appropriators during the refill period.” Ditch Companies’ Petition at 3 (italics in original). Rather, Pioneer Irrigation District requested that the Department identify “those [junior] rights that were allowed to divert water during the Refill Period,” the “quantity of water diverted under each right during the Refill Period,” and “date(s) or period of time each water right diverted during the Refill Period.” *Pioneer Irrigation District’s First Set Of Discovery Requests To The Idaho Department Of Water Resources* (Nov. 26, 2014) at 8. The Cresto analysis, therefore, “identifie[d] and quantifie[d] water rights that diverted water during the ‘Refill Period’” that were junior to the reservoir water rights. Ex. 3 at 1. Any questions of whether the junior diversions were “to the *detriment of* the physical filling of the reservoirs . . . under the operative flood control rule curves,” or whether the watermaster “actively called for the release of stored water supplies to meet downstream demand of junior appropriators during the refill period,” Ditch Companies’ Petition at 3 (italics in original), were beyond the scope of Pioneer Irrigation District’s discovery requests and therefore were not addressed in the Cresto analysis.

While the Ditch Companies cited hearing testimony of Cresto, Sisco, and BOR hydrologist Mary Mellema in support of the assertion that various findings of fact in the *Amended Final Order* are “incomplete” or leave an incorrect “impression,” Ditch Companies’ Petition at 3-4, the cited testimony pertains to accounting, administration, and reservoir operations after 1986. The cited testimony, therefore, does not support the Ditch Companies’ assertion that Finding of Fact 51 is “incomplete” or leaves an incorrect “impression.”

Findings Of Fact 138-139 And Post-1986 Accounting and Administration.

The other Findings of Fact cited by the Ditch Companies (138 and 139) are part of the *Amended Final Order*’s discussion of “Reservoir Water Right Accounting and Administration After 1986.” *Amended Final Order* at 42-46 (Findings of Fact 131-145). These two individual findings pertain to former watermaster Lee Sisco’s hearing testimony that he would “‘disregard’ the water right accounting program’s determination of distribution priorities when the reservoir system was ‘backfilling’ following flood control releases,” and that “he did not allow junior water rights to divert during the flood control ‘backfill’ or ‘refill’ period.” *Amended Final Order* at 43 ¶134; *see* Tr. 863 (stating he did not allow the junior water rights “to turn on during that period of time.”). This testimony was contrary to the testimony of Cresto, Robert Sutter, and the former Directors (Kenneth Dunn, Karl Dreher, and David Tuthill). *Amended Final Order* ¶¶ 131-132.

Findings of Fact 138 and 139 call into question the reliability and/or credibility of Sisco’s testimony that he did not allow junior water rights “to turn on” during the flood control “refill” period:

138. The Black Books during Sisco’s tenure also do not document or imply that he routinely regulated or curtailed water rights junior in priority to the reservoir water rights during flood control “refill” or until the reservoir system reached its maximum contents. It is likely that this practice would have been documented had it been Sisco’s practice, however, because it would have been a significant

departure from prior administration. As previously discussed, the reservoir water rights were rarely if ever administered in priority prior to 1986, and in flood control years priority regulation of canal diversions did not begin until after the reservoir system had reached its maximum contents. Sisco's testimony that he did not allow junior water rights to divert during the flood control "refill" period is also contrary to the statement in his affidavit that when the reservoir system is "filling during flood control operations" there is "sufficient river flow for diversion by water rights with priorities that are junior to the Boise River Reservoir storage rights." Ex. 2008 ¶ 22.

139. Sisco's testimony that he did not allow water rights junior to the reservoir water rights to divert during the flood control "refill" period is also contrary to the fact that in 2006 United Water diverted under junior water rights in May and June, while the reservoir system was physically filling. Junior water rights also diverted during the flood control "refill" period in other years after implementation of the computerized water rights accounting system. Ex. 1019 at 13 (juniors diverted 690 acre-feet while reservoirs filled between April 15 and July 3, 1999); Ex. 9; Tr. 548:7-549:3 (Cresto).

The Sisco testimony called into question by Findings of Fact 138 and 139 did not address whether "junior water right diversions during the 'refill' period occurred to the *detriment* of the physical filling of the reservoirs" or whether the watermaster "actively called for the release of stored water supplies to meet downstream demand of junior appropriators during the refill period." Ditch Companies' Petition at 3 (*italics in original*). Findings of Fact 138 and 139, therefore, also do not address these questions. These two findings pertained, rather, to the reliability/credibility of Sisco's testimony that he did not allow the junior water rights "to turn on" during the flood control "refill" period. The findings contain facts that contradict and undermine the credibility of Sisco's testimony.

Addressing whether the junior diversions took place "to the *detriment* of the physical filling of the reservoirs" or whether the watermaster "actively called for the release of stored water supplies to meet downstream demand of junior appropriators during the refill period," Ditch Companies' Petition at 3 (*italics in original*), would have exceeded the scope of the Sisco testimony in question. The record does not support the Ditch Companies' contentions that Findings of Fact 138 and 139 are "incomplete" or leave an incorrect "impression."

"Other" Findings Of Fact.

The Ditch Companies also assert that the *Amended Final Order* includes findings of fact "other" than Findings of Fact 51, 138, and 139, Ditch Companies' Petition at 3, that are "an incomplete rendition of the record," or that "intentionally (and erroneously) leave the impression that junior water right diversions during the 'refill' period occurred to the *detriment* of the physical filling of the reservoirs rather than, as opposed to merely being coincidental to the physical filling of the reservoirs under the operative flood control rule curves." *Id.* The Ditch Companies, however, did not identify the "other" findings of fact they deem objectionable.

Rather, the Ditch Companies argue the record shows that flood control releases can “occur simultaneously with refill,” and that “refill under the flood control rule curves does not result in the closing of the reservoir spill gates.” Ditch Companies’ Petition at 4.⁴ The Ditch Companies assert that Sisco “consistently and adamantly testified that “junior water diversions only occurred when flood control releases were spilling past Lucky Peak Dam,” and that the Director should credit Sisco’s testimony on this question because he is “the individual with direct, first-hand knowledge of the matter.” Ditch Companies’ Petition at 4 (italics omitted).

This argument reduces to the assertion that despite conflicts between the testimony of Sisco and others, and between Sisco’s testimony and the documentary record, regarding whether the reservoir water rights were interpreted and/or administered as being in priority when the reservoirs were filling or “refilling” following flood control releases, that the Director should simply consider Sisco’s testimony to be authoritative. Weighing all of the testimony, however, the Director finds that it supports the Director’s findings for reasons discussed in the *Amended Final Order*, including but not limited to Findings of Fact 70-73, 133-139, and 154.

Further, the record does not support the Ditch Companies’ contention that the question of whether the reservoir water rights were accounted for and administered in priority during the flood control “refill” period hinges upon whether junior water rights diverted to the “detriment” of physically filling or “refilling” the reservoirs in flood control years, or whether the Boise River Watermaster “actively called for the release of stored water supplies to meet the downstream demand of junior appropriators during the refill period.” Ditch Companies’ Petition at 3-4. This argument assumes that the reservoir water rights were considered to be in priority unless junior water rights called for water to be released from Lucky Peak Dam and the delivery call prevented the reservoir from physically refilling. Water right priority is not contingent upon whether a delivery call is filed, however.

The lack of evidence of any delivery calls during the flood control “refill” period, either by the reservoir water rights or by junior water rights, is not probative of whether the reservoir water rights were considered to be in priority during the flood control “refill” period. When flood control operations are necessary, there is more than enough water to satisfy all water rights during the flood control “refill” period. Hence, in flood control years there is no need for any water right to make a delivery call during the “refill” period. Perhaps for this reason, prior to 1986 Water District 63 priorities were not recognized, enforced, or accounted for at all until the end of the flood runoff period, when natural flow supply dropped below irrigation demand and irrigators had to begin using storage. *Amended Final Order* at 28 ¶ 75. Year-round accounting of daily water distributions and priority water right administration in Water District

⁴ The Director agrees that, depending upon how the reservoir system is operated, flood control “releases” in the form of “evacuations” or “bypass” can and often do occur at the same time flood control space is filling or “refilling.” As discussed in the *Amended Final Order*, federal reservoir system flood control operations are complex and variable. See *Amended Final Order* at 14-18 ¶¶ 25-37 (discussing flood control operations). Further, reservoir system releases intended to achieve or maintain a system flood control space requirement under the flood control rule curves, i.e., “flood control releases,” often serve additional other purposes at the same time, including flow augmentation, streamflow maintenance, and/or “irrigation and other beneficial uses.” *Amended Final Order* at 16 ¶ 32. Even when reservoir system releases serve the purpose of achieving or maintaining a system flood control space requirement, the BOR can chose to account for such releases as “flow augmentation”—which unlike flood control releases the BOR does not “charge” against spaceholder storage allocations. The BOR may also make after-the-fact changes to its initial determinations of whether water was released for “flood control,” “flow augmentation,” or a “beneficial use.” Tr. 746 (Mellema).

63 began in 1986, and since then water right priorities have been accounted for and administered during the flood control “refill” period. *Amended Final Order* at 46 ¶ 145. But even though the reservoir water rights do not remain in priority after they have been satisfied, i.e., reached “paper fill,” in flood control years there is enough excess flow in the system to physically fill or “refill” the reservoir system before the end of the flood runoff period—provided the federal agencies’ runoff forecasts and reservoir system operations decisions have not resulted in vacating too much reservoir space during the evacuation period.

4. The *Amended Final Order*’s Findings That A Reservoir Water Right Is No Longer In Priority After Cumulative Accruals Have Reached The Water Right’s Annual Volume Limit Is Consistent With The “Green Bar” Sheets.

The Ditch Companies assert that reconsideration is warranted because “[t]he reservoir storage rights do not fall out of priority on the date of ‘paper fill’ according to the ‘green bar’ accounting sheets.” Ditch Companies’ Petition at 4 (bold and capitalization omitted). The Ditch Companies assert that Findings of Fact 106, 109, and 147 “conflict with the accounting program data output contained in the program’s ‘green bar’ sheets” by concluding that “accruals under the water right accounting program result in the Boise River Reservoirs storage rights falling out of priority once ‘paper fill’ is reached.” *Id.* at 4. The Ditch Companies further assert that the “green bar” sheets for 2011, 2012, and 2014 show that “physical filling of the reservoirs did not conclude” upon “paper fill” of the reservoir water rights, and that “despite reaching ‘paper fill,’” the “‘LAST RIGHT’ column of the green bar sheets continued to show” the reservoir water as “remaining in priority.” *Id.* at 5. The Ditch Companies contend the “[t]he Department’s conclusion that ‘paper fill’ under the computerized accounting program marks the date when the Boise River storage rights fall out of priority is not supported by the program’s own data output sheets (a/k/a the green bar sheets),” and is “erroneous, unsupported by the record, and presumably based on some other result-oriented, subjective interpretation of the computerized accounting program.” *Id.* at 6.

As a preliminary matter, and contrary to the Ditch Companies’ argument, the *Amended Final Order* did not find or conclude that there is a single “date when the Boise River storage rights fall out of priority.” Ditch Companies’ Petition at 5. While the Corps and the BOR operate the reservoirs as a single coordinated system, the water rights were not decreed for the “reservoir system.” Each reservoir water right has a different priority date and quantity that must be accounted for individually. The *Amended Final Order* determined that the individual reservoir water rights are accounted for separately under the Water District 63 accounting program, and that a reservoir water right is no longer in priority after it has been satisfied—that is, “filled on paper.” Under priority administration, the individual reservoir water rights reach “paper fill” on different dates, which is confirmed in the “green bar” data sheets for 2011, 2012, and 2014 that are referenced by the Ditch Companies.⁵ Ditch Companies’ Petition at 4. The

⁵ In the “green bar” sheets, the cumulative accounting accruals for the individual reservoir water rights are set forth in the “middle right-hand” portion of the sheet where there “is a listing of the reservoirs . . . numbered 1 through 7.” Tr. 600 (Cresto). Cresto testified that the “STORED” column in this section “is what we commonly refer to as paper fill, and that is the water that is credited to the accrual of the water right.” *Id.* 600-01. The daily “green bar” sheets for the flood control years referenced by the Ditch Companies—2014, 2012, and 2011—show that each of the individual reservoir water rights reached its maximum “STORED” quantity (“paper fill”) on different dates, as follows:

Ditch Companies’ assertion that all of the reservoir water rights reach “paper fill” on the same date—that is, when the “TOTL STOR (AF)” for the reservoir system reached “986,624 acre-feet,” Ditch Companies Petition at 5, is contrary to the record.

Turning to the substance of the Ditch Companies’ argument, the record does not support the assertion that the *Amended Final Order*’s findings regarding priority administration “are erroneous, unsupported by the record, and presumably based on some other result-oriented, subjective interpretation of the computerized accounting program.” Ditch Companies’ Petition at 6. The *Amended Final Order*’s findings that in the Water District 63 water right accounting program a reservoir water right is no longer in priority after it has been satisfied, that is, after the reservoir water right has reached “paper fill,” are supported by the record. *See, e.g.*, Ex. 1 at 5-6; Ex. 2 ¶ 12-13; Ex. 6 ¶ 4-5; Tr. 226:22-227:15 (Cresto); Tr. 238:1-10 (Dunn); Tr. 265:11-266:5, 267:20-271:12 (Dreher); Tr. 345:2-12, 468:9-469:2 (Sutter); Tr. 548:11-17, 578:9-14 (Cresto); Tr. 1394:21-1395:6, 1402:14-19 (Barrie); Tr. 1542:17-21 (Shaw).

The record does not support the Ditch Companies’ contention that *Amended Final Order* “conflict[s] with the accounting program data output contained in the program’s ‘green bar’ sheets” by concluding that “accruals under the water right accounting program result in the Boise River Reservoirs storage rights falling out of priority once ‘paper fill’ is reached.” *Id.* at 4. The “green bar” sheets referenced by the Ditch Companies are printed summaries of daily accounting data generated by the Water District 63 water rights accounting program. *Amended Final Order* at 39 ¶ 114. The “green bar” sheets consist of rows and columns of numbers with brief descriptive headings, which are often abbreviated and/or consist of variable names used in the program code. *See, e.g.*, Ex. 2201.

Interpreting the “green bar” sheets requires training. *Amended Final Order* at 39 ¶ 114 & n. 40; *see* Tr. 193-97, 600-11 (Cresto) (explaining the “green bar” sheets); Tr. 1155 (Zirschky) (“I don’t think we’re all properly trained on what every—what every number represents, and how that number is reached.”). Cresto, the Department’s expert witness, runs and maintains the water rights accounting and storage allocation programs, supervises other Department staff in these areas, and wrote the Staff Memorandum. Tr. 54-56. Cresto trains the

	<u>2014</u>	<u>2012</u>	<u>2011</u>
Arrowrock [1911]	March 7	March 15	March 10
Arrowrock [1938]	March 10	March 16	March 15
Anderson Ranch	June 7	April 17	May 14
Lucky Peak	April 9	March 17	March 18
Anderson Ranch LTF	June 7	April 17	n/a
Lucky Peak LTF	May 18	March 22	March 31
Anderson Ranch LLTF	June 13	n/a	May 14

The “LTF” and “LLTF” designations for Lucky Peak and Anderson Ranch relate to the Nez Perce settlement and flow augmentation. The “green bar” sheets for 2014, 2012, and 2011 also suggest that Ditch Companies are incorrect in asserting that the reservoir system physically filled (or reached its overall maximum contents) in those years on June 1, June 13, and June 15, respectively. Ditch Companies’ Petition at 5. The “green bar” sheets for these years show that “unaccounted for storage” (“UNACCT STORED”) continued to accrue until June 13, June 19, and July 14, respectively. One of the requirements for “unaccounted for storage” to accrue is that the physical contents of the reservoir system must increase.

watermasters regarding accounting reports, such the “green bar” data sheets and the “storage report,” and explains the accounting and accounting reports in presentations to the water users. Tr. 80, 92-93. During the hearing, all parties relied upon Cresto to explain the programming code, the “green bar” sheets, and other accounting reports. *See, e.g.*, Tr. 85-88, 91-105, 130-34, 137-38.

While the “green bar” sheets summarize cumulative accruals to the individual reservoir water rights, the column containing this data is not titled “paper fill.” *Amended Final Order* at 39-40 ¶ 114. Rather, this data is printed under the “STORED” column in the “middle right-hand portion” of the “green bar” sheets, to the right of “a listing of the reservoirs . . . numbered 1 through 7.” Tr. 600-01 (Cresto); *see, e.g.*, Ex. 2201.⁶ The “green bar” sheets also report the physical contents of each reservoir for the current day (“CURR CONT (AF)”) and the previous day (“PREV CONT (AF)”). Tr. 195 (Cresto); *see, e.g.*, Ex. 2201. The “green bar” sheets report the priority date in effect for each “reach” of the river system in the upper right hand section of the “green bar” sheets under a column entitled “LAST RIGHT.” The “LAST RIGHT” priority dates are reported in YYYYMMDD format.

The “green bar” sheets do not support the Ditch Companies contention that the reservoir water rights remained in priority after they “filled on paper” in 2011, 2012, and 2014 because the physical contents of some or all of the reservoirs continued to increase after “paper fill,” and during these periods the “LAST RIGHT” priority dates in effect for the reaches in which the reservoirs are located were junior to the priority dates of the reservoir water rights.

The Water District 63 accounting program recognizes that additional physical storage may occur after one or more reservoir water rights have reached “paper fill,” particularly in years when the reservoir system is operated for flood control purposes. This additional physical storage does not occur under the priorities of the reservoir water rights, however. Rather it is reported as “unaccounted for storage,” which is allowed only if (1) there is empty space in the reservoir system and (2) there is water in excess to the demand under all water rights on the system. *Amended Final Order* ¶¶ 86, 93-94, 110-11, 124, 131, 140, 147, 157-58; Tr. 211: 3-8 (Cresto); Tr. 276:18-21 (Dreher); Tr. 346:4-347:1, 444:18-445:4, 468:7-469:2 (Sutter); Tr. 544:16-20, 612:1-7 (Cresto); Tr. 1420:14-19 (Barrie); Tr. 1488: 17-22 (Shaw). The “green bar” sheets for 2011, 2012, and 2014 are consistent with the *Amended Final Order* and the record in this regard. The “green bar” sheets for these years show that “unaccounted for storage” occurred in the reservoir system—“UNACCT STORED,” Ex. 1 at 9—during the time period when reservoir system contents increased following “paper fill.” *See* Ex. 2201 (line in the middle of the green bar sheet titled “YEAR-TO-DATE AF” under the column titled “UNACCT STORED.”).

The Ditch Companies’ alternative contention that the reservoir water rights remain in priority if they are senior to the “LAST RIGHT” priority dates in the “green bar” sheets is contrary to the record and misinterprets the data on the green bar sheets. Cresto testified that once a reservoir water right has been satisfied, that is, reached “paper fill,” it is no longer in

⁶ The term “paper fill” is not used in the program code or the reports; rather it is a shorthand reference to the accounting program’s accrual methodology for the reservoir water rights. *See* Ex. 1 at 8 (“The term *paper fill* has been used as a term of convenience to describe the cumulative amount of natural flow accrued to a reservoir water right.”); Tr. 533 (Cresto) (“It’s been a term of convenience to describe how water is accrued to a reservoir water right.”).

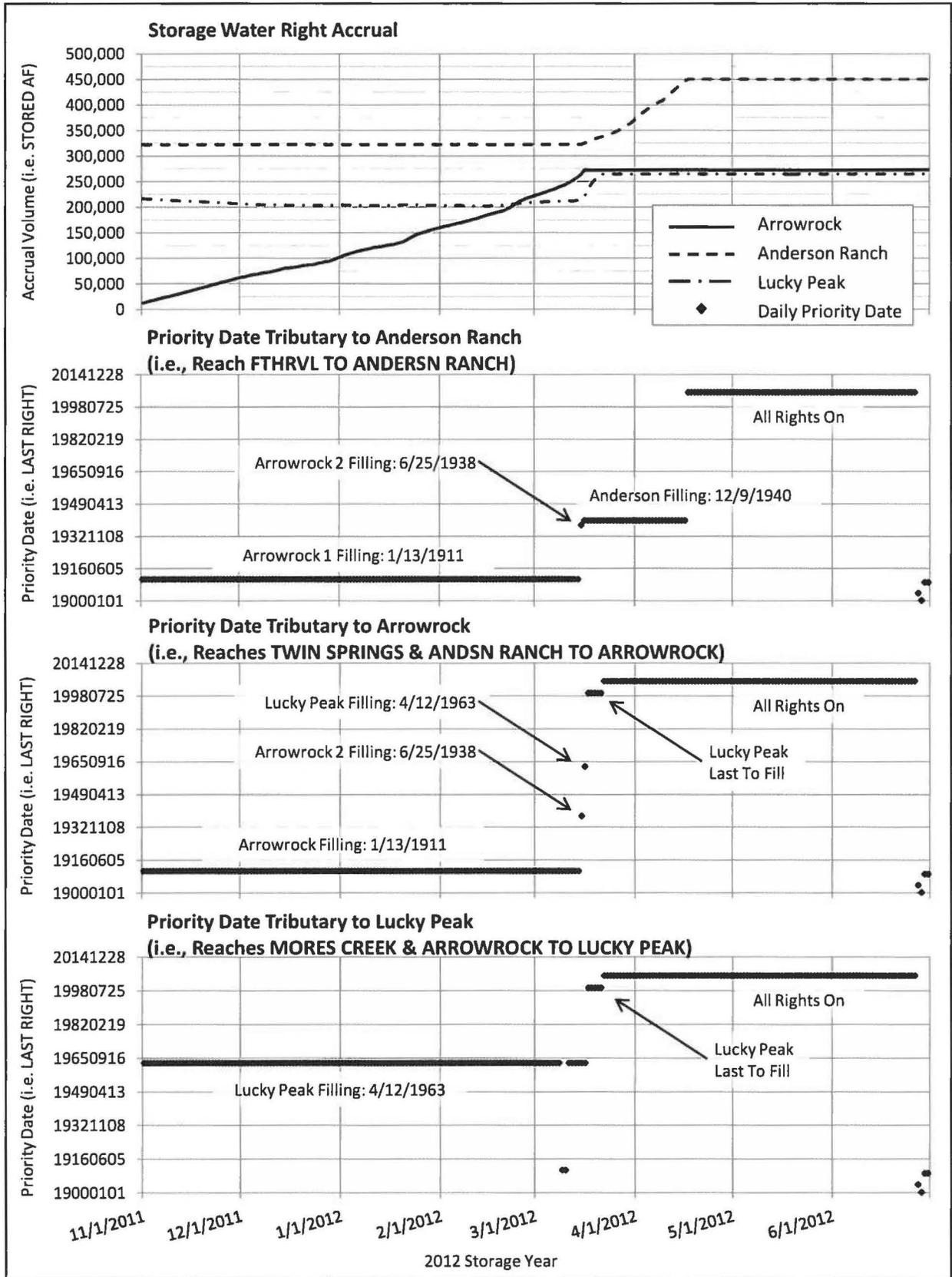
priority even if the reservoir water right's priority date is senior to the "the priority date on the river" in the accounting program. Tr. 225:25-227:15 (Cresto). Cresto's testimony is consistent with the "green bar" sheets.

To properly interpret the "green bar" sheet data for storage, one must first look at the seven-line reservoir summary in the middle right-hand side of each "green bar" sheet. The summary lists each reservoir (with separate lines for storage that is last-to-fill) or portions of the reservoir in descending order from earliest water right priority space to the last water right priority space.⁷ The numerical values listed under the column heading "RIGHT" is the storage volume authorized by the water right associated with the identified reservoir space. Each numerical value listed below the heading "STORED" is the total volume of water that has been registered toward satisfaction of the storage water right. When the numerical value in the "STORED" column equals the numerical value in the "RIGHT" column, the water right for the reservoir or portion of the reservoir on the same line is fully satisfied.

Because the reservoir water rights are not limited by diversion rates, they are entitled to all flow when they are in priority. Until the reservoir water rights are satisfied, the reservoir water rights establish the latest priority date possible for their reaches of the river, which are tabulated under the heading "LAST RIGHT" and located in the upper right hand corner of the "green bar" sheet. When an on-stream reservoir water right is satisfied, natural flow is no longer being accrued to the reservoir water right, and so natural flow becomes available for diversion by junior water rights in the river reach in which the reservoir is located and other affected reaches. In other words, the satisfaction of the reservoir water right moves the priority date listed under "LAST RIGHT" to a later date.

Each "green bar" sheet reports data for a single day, and causes and effects of water right satisfaction are difficult to illustrate solely by narrating through each "green bar" sheet for the entire storage season. The following graphs of the daily "green bar" sheet data for the year 2012 are derived directly from the "green bar" sheets to illustrate Cresto's explanations of the satisfaction of reservoir water rights and the effect of satisfaction of the storage water rights on the deliverability of water to holders of junior water rights. The graphs show the correlation between the satisfaction of the on-stream reservoir water rights ("STORED") and the simultaneous change to later priority dates listed under the heading "LAST RIGHT."

⁷ Except for the two Arrowrock water rights, the individual reservoir water rights do not assign different priorities to different space assignments within a given reservoir. The BOR's assignments of fill or "refill" priorities for reservoir space allocations, such as "last-to-fill" space, are matters of contracts and federal reservoir operations rather than decreed or licensed water right priorities. *Amended Final Order* at 25 ¶ 64 & n. 26. The "green bar" sheets report "last-to-fill" space because the accounting program and the "green bar" sheets are administrative tools rather than a definition of the water rights.



Similar graphs could be derived from the “green bar” sheets for other years to illustrate the same pattern of correlation between reservoir water right satisfaction and simultaneous advancement of the priority date under the heading "LAST RIGHT." The priority dates listed in the “LAST RIGHT” column for some of these year bounce up and down, such as in 2014, when accruals to the reservoir water rights were cut off for short periods because all available natural flow was accruing to the satisfaction of the water rights senior to a reservoir water right well into the irrigation season, and the senior water rights were preventing accrual of natural flow to the reservoir water right that had not yet been satisfied.

The Ditch Companies’ argument incorrectly assumes that the “LAST RIGHT” column is the only information on the “green bar” sheets relevant to whether the reservoir water rights are in priority. The data from the “green bar” sheets establishes, however, that the accounting program determines an on-stream reservoir water right is no longer in priority after it is satisfied, and natural flow is no longer accrued toward the on-stream reservoir water right. The satisfaction of the reservoir water right results in natural flow becoming available for diversion by junior water rights, which would not be the case if the reservoir water rights were still in priority. The listing of later water right priorities in the “LAST RIGHT” column does not mean that the on-stream reservoir water rights were still in priority. The listing of later water right priorities in the “LAST RIGHT” column is a result of the satisfaction of the earlier-in time-priority in-stream reservoir water rights.

The Ditch Companies also ignore the annual volumes decreed in the quantity elements of the reservoir water rights, which are administered through the accounting program code. *Amended Final Order* ¶¶ 1, 83, 101, 104, 106-07, 117, 120-21, 172, 174. The Water District 63 water right accounting program, in short, recognizes that a reservoir water right can fall out of priority in two different situations: (1) when there is insufficient natural flow to satisfy water rights senior to the reservoir water right; or (2) when natural flow remains available under the priority of the reservoir water right, but accruals to the reservoir water right have reached its annual volume limit. The “green bar” sheets recognize this duality. The “green bar” sheets report the “LAST RIGHT” priority date, which defines the end of the period of priority administration of a reservoir water right during low flow periods; and the “green bar” sheets also report the cumulative accounting volume “STORED” for each reservoir water right (“paper fill”), which defines the end of the period of priority administration of a reservoir water right in high flow periods. The record and the “green bar” sheets, therefore, do not support the Ditch Companies’ argument that the “LAST RIGHT” column is the only section of the “green bar” sheets that applies in determining whether a reservoir water right remains in priority.

The Ditch Companies’ interpretation of the “green bar” sheets would keep the storage water rights in priority long after there has been sufficient runoff to satisfy the storage water rights, that is, until federal flood control operations are concluded. This would prevent any junior water rights from diverting under their priorities until federal flood control operations have ended, even though there is generally more than enough water to satisfy all water rights on the system during such periods. Federal flood control operations, in short, would become the principle basis for water distribution and priority water rights administration in Water District 63 during flood control years. This would be contrary to the decreed elements of the reservoir water rights, would violate the priorities of junior water rights, would be contrary to the purposes of storage operations and storage water rights under Idaho law, and would cede control of Idaho’s water resources to the federal government. *Amended Final Order* at 78 ¶¶ 69, 70.

The Ditch Company's mistaken argument that the priority dates for the various river reaches listed under the "LAST RIGHT" column alone define whether the water rights for the on-stream reservoirs are still "in-priority" reflects a misinterpretation of the "green sheets" and ignores complicated accounting issues such as: (1) operating three reservoirs as one for irrigation storage purposes; (2) operating three reservoirs as one for flood control; (3) satisfying the BOR's "last to fill" space requirement in the reservoirs because of out-of-basin releases by BOR; (4) determining when an on-stream reservoir water right is on or off and in which reservoir the water is held; and other related considerations. *Amended Final Order* at 36 ¶ 104.

5. The Ditch Companies' Arguments Regarding The Water "Legally And Physically" Available To The Reservoir Water Rights Are Contrary To The Decreed Elements Of The Water Rights And Idaho Law.

The Ditch Companies also assert that reconsideration is warranted because the *Amended Final Order's* determination of "[w]hat storage space and water is 'legally and physically available' is contrary to the Governing Reservoir Operating Plan." Ditch Companies' Petition at 6 (bold and capitalization omitted).⁸ The Ditch Companies assert that "as a matter of law the water and the space that are 'legally and physically available' to satisfy the storage water rights in question are governed by the 1985 Water Control Manual," and therefore the *Amended Final Order's* Findings of Fact 13, 17, 21, 22, 28 and 153, and Conclusions of Law 19-32, are erroneous and/or contrary to law. Ditch Companies' Petition at 6-7. The Ditch Companies also argue that various findings and conclusions in the *Amended Final Order* "misconstrue and mischaracterize the water and the reservoir storage space that is 'legally and physically' available for beneficial use storage," and the Department "erroneously concludes that on-stream reservoirs divert, store and, therefore, accrue to storage all water flowing into them." Ditch Companies' Petition at 6-7.

The *Amended Final Order* did not, however, conclude that the Water District 63 water rights accounting program "accrue[s] to storage all water flowing into [the reservoirs]." Ditch Companies' Petition at 7. The *Amended Final Order* found, rather, that the Water District 63 water rights accounting program determines the natural flow available for accruals to the reservoir water rights on the basis of various measurements and the "reach gain equation." *Amended Final Order* at 35-38 ¶¶ 99-111.⁹ All natural flow computed to be available under the

⁸ The Ditch Companies also assert the *Amended Final Order* is "Contrary to . . . the Special Master's Legal Rulings in This regard." *Id.* (bold omitted). As previously discussed, however, the Special Master's *Recommendation* is not a final decision of the SRBA Court, and is not binding in this proceeding.

⁹ The Ditch Companies incorrectly interpret the *Amended Final Order* as having determined the accounting program "accrues to storage all water flowing into" a reservoir simply because at each federal dam and reservoir "[t]he entire flow of the natural stream has been diverted and stored and become subject to controlled releases," *Amended Final Order* at ¶ 13 (quoting *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, In Re SRBA, Subcase No. 63-3618*). While it cannot be disputed that each federal dam and reservoir intercepts and fully regulates "the entire flow of the natural stream"—and also re-regulates any storage released from upstream reservoirs—that does not mean that "the entire flow" is "accrued" to the reservoir water rights in the accounting program; and the *Amended Final Order* did not so find or conclude. The *Amended Final Order* also did not find or conclude that "unaccounted for storage" consists of "all water flowing into" the reservoir system after the reservoir water rights have filled from an accounting standpoint—i.e., "filled on paper." "Unaccounted for storage" accrues only if physical storage in the reservoir system increases after "paper fill." *Amended Final Order* at 32 ¶ 6; *id.* at 34 ¶ 93; *id.* at 38 ¶ 110; 41 ¶ 124; *id.* at 45 ¶ 140; *id.* at 49 ¶ 158.

priority of a reservoir water right at its decreed points of diversion (the dam) is accrued to the water right until it is satisfied because each reservoir water right is entitled to all of the remaining natural flow when it is in priority, and at each dam the entire flow of the river has been physically diverted and made subject to controlled releases at the discretion of the Corps and the BOR.

The Ditch Companies' assertion that the Water District 63 water rights accounting program is contrary to law because the *Amended Final Order* "concludes that the Boise River Reservoirs' operating plan has little or no bearing upon the satisfaction of a storage water right," Ditch Companies' Petition at 7, conflicts with the Idaho Supreme Court's *Basin-Wide Issue 17* decision and the reservoir water right decrees.

The question of whether water is "legally and physically available" to a water right is a question of water distribution, including the determination of whether a water right has been satisfied.¹⁰ The Idaho Supreme Court held in *Basin-Wide Issue 17* that "[d]etermining when a water right is satisfied is within the Director's discretionary functions." 157 Idaho at 392, 336 P.3d at 799 (bold omitted). The Court held the Director has "a statutory duty" to "distribute water in water districts in accordance with the prior appropriation doctrine." *Id.* at 393, 336 P.3d at 800 (quoting Idaho Code § 42-602). If "the Director distributes water in accordance with prior appropriation, he meets his clear legal duty." *Id.* While the "[d]etails are left to the Director," *Id.*, he is bound by the elements of the SRBA decrees for the reservoir water rights. *See Final Unified Decree, In Re SRBA Case No. 39576* (Aug. 26, 2014) at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987"). These principles establish the framework for determining the "natural flow physically and legally available for storage under the reservoir water right[s]." Ex. 2 ¶ 12.

The *Partial Decrees* for the reservoir water rights do not authorize "flood control" as a "purpose of use." The *Partial Decrees* also do not reference or incorporate the "Water Control Manual" or "the Boise River Reservoirs' operating plan." Ditch Companies' Petition at 7. The *Partial Decrees* for the reservoir water rights also do not reference or incorporate flood runoff forecasts, flood control "rule curves," or any other components of the methodology the Corps and the BOR use to determine when and how much "reservoir storage space," *id.* at 6, will be allocated to flood control in coordination with "all of the other system uses." Ex. 2005 at 60-61 (*Water Control Manual For Boise River Reservoirs*, pp. 7-2 – 7-3) ("Use Conflicts").

The only references in the reservoir water rights' *Partial Decrees* that relate to the "Water Control Manual" or "the Boise River Reservoirs' operating plan," Ditch Companies' Petition at 6-7, are three "flood control" remarks, one in an Arrowrock water right decree (63-3613), and two in the Lucky Peak water right decree (63-3618). *Amended Final Order* at 6-7 ¶ 3.¹¹ Two of these remarks require little or no water accounting or water rights administration by the watermaster or the Director. The remark in Arrowrock water right 63-3613 authorizes

¹⁰ The *Amended Final Order* does not expressly determine what water is "legally and physically available." This terminology, rather, was used by Cresto and Sutter to describe the rationale of the Water District 63 accounting program's methodology for determining accruals to the reservoir water rights. *See, e.g.*, Ex. 2 ¶¶ 12, 15, 16, 19, 33; Tr. 152-53 (Cresto); Tr. 343 (Sutter).

¹¹ The Special Master *Recommendation* did not recommend to the Presiding Judge that remarks be added to the existing *Partial Decrees* for the reservoir water rights, or that they otherwise be amended.

temporary storage in “surcharge capacity” during “flood events or emergency operations.” The remark in Lucky Peak water right 63-3618 recognizes that the reservoir “has 13,950 acre feet of capacity for flood control purposes in addition to the volume of water authorized for storage under this right.” *Id.*

The remaining remark, which is also in the Lucky Peak water right decree, implicates water accounting and water rights administration by the watermaster and the Director. This remark states that “[t]he storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation.” *Id.* This remark was decreed to ensure that the Lucky Peak Reservoir water right memorialized the BOR’s contractual “Guarantee” to Arrowrock and Anderson Ranch spaceholders that Lucky Peak water would be used to protect their storage allocations from any adverse effects of reservoir system flood control operations. *Memorandum Decision And Order On Cross-Motions For Summary Judgment Re: Streamflow Maintenance Claim, SRBA Subcase no. 63-3618* (Sep. 23, 2008) at 6-7, 33-35. Water distribution, water rights accounting, and storage allocation in Water District 63 conforms to and effectuates this decreed remark. *Amended Final Order* ¶¶ 12, 15.e, 16, 37, 86, 94, 95, 113, 127, 137, 148, 185.

The water right decrees are but one part of water distribution. The Director must distribute water “in accordance with the prior appropriation doctrine.” *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800 (quoting Idaho Code § 42-602). A *Partial Decree* does not recite all background principles of the prior appropriation doctrine as established by Idaho law that must be considered in the distribution of water.

The Corps of Engineers’ “Water Control Manual” and the federal government’s “Boise River Reservoirs’ operating plan,” however, are not part of the background principles of the prior appropriation doctrine as established by Idaho law; rather they are federal agency interpretations and implementations of federal law and federal policies. Indeed, the “Water Control Manual” expressly recognizes that the distribution of water under licensed and decreed water rights is governed by state law as administered by state officials, and does not state or imply that reservoir system flood control operations govern the distribution of water under state water rights and state law. *Amended Final Order* at 48 ¶ 153. Moreover, the BOR has taken the position that flood control operations are “entirely independent of the water rights system.” *Amended Final Order* at 72 ¶ 50 (citing Ex. 1028 at 5).

The Ditch Companies’ argument that the *Amended Final Order* should make the “Water Control Manual” and “the Boise River Reservoirs’ operating plan” determinative of the water that is “legally and physically available” for purposes of distributing water essentially urges the Director to read federal administrative provisions into the water rights that were not decreed and that are not a part of the prior appropriation doctrine as established by Idaho law. *Amended Final Order* at 74 ¶ 53. This argument would result in enlargement of the reservoir water rights, would significantly alter the historic *status quo*, and would subordinate Idaho water law to federal flood control law as administered and interpreted by federal officials, thereby ceding state sovereignty to the federal government. *Amended Final Order* at 72-73 ¶¶ 50-51, 53, *id.* at 78 ¶¶ 69-70. The Director “must follow the law” and must distribute water “in accordance with the prior appropriation doctrine,” *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800 (quoting Idaho Code § 42-602), not pursuant to a federal reservoir system flood control

operations plan. The Ditch Companies' argument would require the Director to go beyond the decreed elements of the water rights and his statutory authority when distributing water and administering water rights pursuant to the prior appropriation doctrine as established by Idaho law.

Aside from being unlawful, the Ditch Companies' approach would largely preclude ongoing, day-to-day priority administration in accordance with decreed water rights junior in priority to the reservoir water rights during high water years. *Amended Final Order* at 70 ¶ 43; *id.* at 72 ¶ 49. Distributions to junior water rights in flood control years either could not begin until reservoir system flood control operations had concluded; or could only be determined and accounted for retrospectively, long after the fact, when the information is of little or no use. Decisions regarding how much water users can or should divert under their natural flow water rights must be available on a timely basis to be useful in day to day operations, especially for purposes of deciding whether to draw on storage accounts or incur rental pool charges for diverting storage.

6. The Amended Final Order Is Consistent With Beneficial Use Principles And The Reservoir Water Rights.

The Ditch Companies assert that “[d]istilled to its core” the *Amended Final Order* “holds” that:

- “the ‘storage for’ (or diversion to storage) component of a storage water right receives all water captured in the impoundment . . . regardless of whether the water is physically held in the reservoir,”;
- a storage water right can be satisfied “regardless of whether there is water physically in the reservoir for end beneficial use”; and
- if water has been released for flood control purposes, “the empty space can be refilled with runoff after all junior water rights are satisfied.”

Ditch Companies Petition at 7. The Ditch Companies argue the *Amended Final Order* therefore “ignores the fundamental legal principles of end beneficial use (the express ‘use from storage’ element and quantity of the storage water rights),” and “impermissibly results in the diminution of the Ditch Companies’ property rights in the existing storage water rights.” Ditch Companies’ Petition at 7-8 (parenthetical in original).¹²

As a preliminary matter, the Ditch Companies are incorrect in asserting the *Amended Final Order* determined that the Water District 63 water right accounting program accrues “all water captured in the impoundment” towards the satisfaction of a reservoir water right. As previously discussed, the *Amended Final Order* concluded that the accounting program determines the amount of natural flow that accrues each day to each reservoir water right on the basis of the “reach-gain equation” methodology, *Amended Final Order* at 35-38 ¶¶ 99-111, not by measuring reservoir inflow or “all water captured in the impoundment.” Ditch Companies’ Petition at 7.

¹² The Ditch Companies also assert the *Amended Final Order* is contrary to “the Special Master’s rulings in this regard.” *Id.* As previously discussed, the Special Master’s *Recommendation* to the SRBA Presiding Judge is not a final decision of the SRBA Court, and is not binding for purposes of this proceeding.

In addition, the Water District 63 water rights accounting program does not administer the 'storage for' and "use from storage" components of the reservoir water rights, which are sub-parts of the "Purpose of Use" element. *Basin-Wide Issue 17*. 157 Idaho at 389, 336 P.3d at 796; *Amended Final Order* at 60 ¶ 13 & n. 45. As both the SRBA District Court and the Idaho Supreme Court recognized in *Basin-Wide Issue 17*, the "quantity element" applies in determining when a water right has been satisfied or "filled." *Id.* at 387, 388, 389, 390, 392, 394, 336 P.3d at 794, 795, 796, 797, 799, 801. Other Idaho Supreme Court decisions support the conclusion that the "quantity" element rather than the "purpose of use" element is controlling in determining when a water right has been satisfied or "filled.. See *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) ("One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right."); *State v. ICL*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) (referring to "the essential elements of priority date and quantity").

The "Quantity" element of the reservoir water rights has consistently been viewed as the numerical quantity establishing the upper limit for diversions under the water rights – not the flow rates or volumes associated with each "end use" listed in the "from storage" component of the "Purpose of Use" element. Many water rights, including the Basin 63 on-stream storage water rights, authorize multiple beneficial uses and establish a numerical value in flow rate and/or volume for each individual beneficial "end use." Multiple beneficial uses may be accomplished with the same drops of water. Sometimes the duplicate numerical values for each beneficial use may create flexibility in the division of how the water is beneficially used in any given year. If the numerical values for each beneficial use under "Purpose of Use" are summed together, the total numerical value will often exceed the "Quantity" authorized. Distributing water to the reservoir water rights by referring to the "end use" would result in enlargement of use of water rights by allowing each individual beneficial use quantity to be fully exercised.

The Ditch Companies' argument that water distributions should be measured by the "Purpose of Use" element is contrary to the statutory requirement and Idaho Supreme Court holdings that the Director distribute water on the basis of diversion measurements rather than measurements of use. *Amended Final Order* at 63 ¶ 23; *id.* at 65 ¶ 30; *id.* at 70 ¶ 44 (citing Idaho Code § 42-110; *Glenn Dale Ranches, Inc.*, 94 Idaho 585, 494 P.2d 1029 (1972); *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900)). This requirement is consistent with principle that the responsibility for making beneficial use of the water rests with the appropriator rather than the watermaster, the Director, or third parties. *Amended Final Order* at 53 ¶ 173; *id.* at 71 ¶ 46 (citing *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945); *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007)). The Ditch Companies' argument that "end use" should be the measure of water distributions is contrary to the "spirit and policy of our constitution and laws, as well as . . . public policy' against the wasting of water." *Amended Final Order* at 70 ¶ 4 (quoting *Stickney*, 7 Idaho at 435, 63 P at 192). The Ditch Companies' argument is also contrary to the principle that the appropriator is "solely responsible" for ensuring beneficial use under a water right. *Amended Final Order* at 71 ¶ 46 (quoting *Rayl*, 66 Idaho at 209, 157 P.2d at 80). The Ditch Companies' argument makes the Director, the watermaster, and ultimately junior appropriators responsible for ensuring that federal flood control operations and other federal water management practices to which the spaceholders explicitly agreed do not adversely affect the spaceholders' storage allocations.

The Ditch Companies' argument is also contrary to the *Partial Decrees* for the reservoir water rights, which provide that administering "use" of the stored water is the responsibility of the spaceholder irrigation entities, and is a contractual matter between the BOR and the spaceholders rather than a question of distributing water in accordance with decreed water rights:

The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations.

United States v. Pioneer Irr. Dist., 144 Idaho 106, 115, 157 P.3d 600, 609 (2007); *Amended Final Order* at 59-60 ¶ 9. The fact that the partial decrees for the reservoir water rights do not identify the individual spaceholders, their storage quantities, or their points of diversion—that is, the information necessary to administer the "end use" (i.e., "irrigation from storage")—confirms that administering "end use" is not part of distributing water in accordance with the *Partial Decrees*.

Even if Idaho law and the reservoir water rights authorized the Director to distribute water on the basis of the "use from storage" components of the "Purpose of Use" elements of the reservoir water rights, Ditch Companies' Petition at 7, coordinated operation of the three reservoirs as an integrated system under the "reservoir operating plan" disregards the elements of the reservoir water rights. Storage under all reservoir water rights is combined into lump sum spaceholders accounts, which precludes the administration of individual reservoir water rights on the basis of the "irrigation from storage" components of the "Purpose of Use" element. *Amended Final Order* at 63 ¶ 21; *id.* at 71 ¶ 47. The Water District 63 accounting programs, therefore, do not account for "irrigation from storage" use under the individual reservoir water rights during the season. Storage use during the season is tracked, rather, by the spaceholders' contractual storage accounts.

The principle that beneficial use is the "basis, measure, and limit" of a water right, Ditch Companies' Petition at 8, does not mean the Director must account for the distribution of water to decreed water rights on the basis of the "Purpose of Use" element. Interpreting this principle as establishing the measure of the watermaster's distribution of water to decreed water rights would create a conflict with the Idaho Code and controlling Idaho Supreme Court precedent, and effectively nullify the "Quantity" elements of the reservoir water rights.

While the Ditch Companies argue the Director must "count against the existing storage water rights" the "water physically in the reservoir" when physical storage in the reservoir system peaks, Ditch Companies' Petition at 7-8, this would be counting "storage," not "beneficial use." Beneficial "end use" does not take place at the reservoir but rather occurs downstream after storage has been released into the river channel, re-diverted into to the spaceholder entities' canal systems, and delivered to irrigators. *Amended Final Order* at 71 ¶ 46. Further, to extend priority administration of the reservoir water rights until the date when physical storage in the reservoir system peaks would mean that the quantity diverted, stored, and released under the priorities of the water rights would far exceed the final quantity actually applied to beneficial "end use." Idaho law limits priority administration to the quantity actually

applied to beneficial use, however. “In Idaho it is ‘a well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law.’” *Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604; *See also Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907); *Lee v. Hanford*, 21 Idaho 327, 121 P.558, 560 (1912). The Ditch Companies’ argument would enlarge diversion and storage under the priorities of the reservoir water rights to replace water released from the reservoir system for purposes that are not authorized “end uses” in the water rights. There is no precedent in Idaho law for enlarging priority administration of a water right on the basis that water distributed to the water right was not applied to the decreed beneficial use.

The Ditch Companies’ argument that the Water District 63 water rights accounting program results in a “diminution” or “taking” of the reservoir water rights, Ditch Companies’ Petition at 8-9, ignores the legal distinction between distributing natural flow according to decreed priorities and allocating storage according to federal spaceholder contracts. This distinction is decreed in the reservoir water rights. *See United State v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007) (ordering a “remark” referencing “the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations”).

The Idaho Constitution and Idaho Code distinguish between distribution of natural flow pursuant to water right priorities and allocation of storage pursuant to spaceholder contracts. Priority applies only to the distribution of natural flow in accordance with water right decrees, not to the distribution of stored water to the “consumers or users of the water” in accordance with their contracts. *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609; *compare* Chapter 6, Title 42, Idaho Code (“Distribution Of Water Among Appropriators”) *with* Chapter 8, Title 42, Idaho Code (“Distribution of Stored Water”) *and* Chapter 9, Title 42, Idaho Code (“Distribution Of Water To Consumers”). The BOR does not use the storage for irrigation; the reservoir water rights are, therefore, water rights for “sale, rental, or distribution” within the meaning of section 1, 4, 5, and 6 of Article XV of the Idaho Constitution. *See Clear Springs Foods, Inc. v Spackman*, 150 Idaho 790, 805-07, 252 P.2d 71, 86-87 (2011) (“The framers of our Constitution evidently meant to distinguish settlers who procure a water right under a sale, rental, or distribution, from that class of water users who procure their water right by appropriation and diversion directly from the natural stream.”) (citation omitted). The fact that storage is allocated to spaceholders pursuant to their contracts each year only after the reservoir system has reached its peak physical contents does not mean that the satisfaction or “fill” of the individual reservoir water rights is also measured or determined by the peak physical contents of the reservoir system.

While the BOR is statutorily authorized to use the river channel to deliver storage to the spaceholders, Idaho Code § 42-801, that fact does not make the allocation and distribution of storage to spaceholders a matter of priority water right administration any more than the distribution of water to irrigators within an irrigation district canal system is a matter of priority water right administration.¹³ In both instances, the water right decree governs the distribution of

¹³ Irrigation districts’ water rights are also water rights for “rental, sale, or distribution.” *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 544-45, 381 P.2d 440, 449-50 (1963).

natural flow to the “distributor,” *Application of Johnston*, 69 Idaho 139, 146, 204 P.2d 434, 438 (1949), while contracts, bylaws, shares, or other separate arrangements govern allocation and delivery of the water to the “distributees.” *Bradshaw*, 85 Idaho at 545, 381 P.2d at 449. The Ditch Companies’ argument blurs this fundamental distinction and would make contractual storage allocations the measure of priority water right administration and water distribution. The result would be to extend the duration of the period of priority administration of the reservoir water rights in flood control years, giving the BOR priority control over a quantity of water far greater than the amount actually applied to beneficial use. Moreover, the period of priority administration—and the quantity of water under the priority control of the BOR—would enlarge with the water supply, because larger runoff volumes mean flood control operations last longer.

The Ditch Companies and the Board of Control are incorrect in asserting the Water District 63 water rights accounting system renders the priorities of the reservoir water rights “meaningless” or results in a “diminution” or “taking” of the water rights. The Water District 63 water rights accounting system protects the decreed priorities and quantities of the reservoir water rights by distributing to them all of the natural flow to which they are entitled when they are in priority, until accruals reach the annual volumes decreed in the “Quantity” elements. The fact that the Corps and/or the BOR may release some of this water for flood control purposes does not diminish the priorities of the reservoir water rights: the authorized quantity of natural flow is distributed in priority according to decreed elements of the water rights regardless of how the federal agencies operate the reservoir system. Any “diminution” that may result from flood control operations is a diminution of contractual storage allocations incident to coordinated plan of reservoir operations for both flood control and irrigation storage purposes that the spaceholders explicitly accepted and agreed to in their contracts with the BOR.

The reservoir operations plan contemplated that excess flood water captured during the “refill” period would replace—that is, would be substituted for—any stored or storable water released during flood control operations. The spaceholders and the BOR agreed to this substitution; and also to the “Guarantee” of the 1954 Supplemental Contracts that water stored under the priority of the Lucky Peak water right would be substituted for any flood control-caused shortfall to Arrowrock and Anderson Ranch storage allocations. Under the “Guarantee” which is decreed in the Lucky Peak water right, the BOR guaranteed that Lucky Peak storage would be used to keep Arrowrock and Andersons Ranch spaceholders whole, and Lucky Peak spaceholders agreed that the storage allocations would be “subject to” the flood control operations and the “Guarantee.” *Amended Final Order* at 6-7 ¶ 3; *id.* at 61 ¶ 15; *id.* at 68 ¶ 38. *Memorandum Decision And Order On Cross-Motions For Summary Judgment Re: Streamflow Maintenance Claim, SRBA Subcase no. 63-3618* (Sep. 23, 2008) at 6-7, 33-35. Thus, there is no merit in the Ditch Companies argument that “the Department’s ‘substitution’ theory . . . is not supported by Idaho law” and “is not a true ‘substitution’ with a protectable priority date.” Ditch Companies’ Petition at 9. Substituting excess water that would otherwise have caused flooding for stored or storable water released to make reservoir space available for flood control purposes is an element of the reservoir operations plan to which the spaceholders and the BOR agreed. This “substitution” does not violate Idaho law and does not injure the reservoir water rights because it “can make no difference” to the spaceholders whether the water the BOR allocates to

them is the same water that was accrued to the satisfaction of the reservoir water rights. *Wilder Irrigation Dist. Bd. of Dirs. v. Jorgensen*, 64 Idaho 538, 548, 136 P.2d 461, 465 (1943).

The spaceholders may not seek to use the priorities of the reservoir water rights to avoid the consequences of a plan of reservoir operations to which they specifically agreed. Other than the “Guarantee” of the 1954 Supplemental Contracts, no other guarantees were made at any time to or by any party, including the State of Idaho, that the excess flood waters the BOR captured in the reservoir system during flood control “refill” operations would be protected by a water right priority, and the BOR and the spaceholders never sought such protection. No guarantees were made that the excess flood waters the BOR captured in the reservoir system during flood control “refill” operations would remain physically available or legally unappropriated indefinitely; and to have provided such a “guarantee” outside the elements of a valid water right would have been contrary to Idaho law. Further, no other guarantees were (or are) necessary. The priorities of the existing water rights protect the decreed quantities for each water right, and will continue to do so.

The Ditch Companies’ assertion that there is a “taking” or that priority is also contrary to the record because it assumes the “water physically in the reservoir for end beneficial use” on the “day of allocation” is not stored under the priorities of the reservoir water rights. In most flood control years the majority of the water physically in the reservoir system on the day of allocation is water that was stored under the priorities of the reservoir water rights.¹⁴ The Ditch Companies and the Board of Control incorrectly assume that all “inflow” to the reservoir system after the reservoir water rights have been satisfied from an accounting standpoint—i.e., “filled on paper”—is “counted” as “unaccounted for storage.” In fact, most of the reservoir system “inflow” after “paper fill” is not “counted” at all. “Unaccounted for storage” can only accrue after Corps and/or the BOR cease “evacuations” and “bypass” and begin physically storing more water in the reservoir system. As a result, in most years the large majority of the water physically in the reservoir system on the day of allocation is “accounted for” storage—water that was stored under the priorities of the reservoir water rights.

The Water District 63 water right accounting program is consistent the fact that on-stream reservoir storage water rights are decreed to conform to the opportunistic nature of storage operations under Idaho law. “There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. . . . the very purpose of storage is to retain and hold for subsequent use.” *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945); *see also Amer. Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 879-80, 154 P.3d 433, 450-51 (2007) (quoting *Rayl*). A reservoir water right captures water during the winter and spring when the supply exceeds the demand, and holds it for use in the summer when the supply is limited. The reservoir water rights are therefore decreed and administered differently from water rights for diversion directly to immediate use.

¹⁴ The amount of storage allocated to spaceholders when the reservoir system physically fills to capacity is approximately 986,624 AF. The “green sheets” for the three flood control years the Ditch Companies cited in their petitions—2014, 2012, and 2011—most of the water that was “physically” in the reservoir system and allocated to spaceholders was water that had been stored under the priorities of the water rights. In 2014, only 45,985 AF of this was “unaccounted for storage.” In 2012, the “unaccounted for storage” was only 26,9707 AF, and in 2011, the “unaccounted for storage” was only 310,191 AF.

Unlike direct diversion water rights, the reservoir water rights are decreed to allow diversions year-round and are not limited by diversion rates. The reservoir water rights are, by design, decreed to command the river when they are in priority, which allows all excess flow to be stored. This is consistent with the purpose of “retain[ing] and hold[ing] for subsequent use,” *id.*, and minimizes conflict between storage operations and in-season use under direct diversion rights. It also prevents any junior water rights from diverting until the annual volumes of the storage water rights are satisfied, however. Thus, administration of the annual volume limit in the quantity element of the each reservoir water right determines when junior water rights can begin to divert.

The existing accounting system distributes water to the Boise River reservoir storage water rights in accordance with their decreed elements, which entitle the storage water rights to all of the natural flow available under their priorities regardless of federal flood control operations. This protects the decreed priorities and quantities of the storage water rights, and also allows junior water rights to begin diverting under their priorities after there has been sufficient runoff to satisfy the storage water rights. The Ditch Companies’ argument would, as previously discussed, keep the reservoir water rights in priority until the conclusion of federal flood control operations. This would preclude any and junior water rights from diverting until the conclusion of federal flood control operations. The Ditch Companies’ argument, in short, would make federal flood control operations the principle basis for water distribution and priority water rights administration in Water District 63 during flood control years. This would be contrary to the partial decrees for the reservoir water rights and the prior appropriation doctrine as established by Idaho law.

7. The Board Of Control’s Requested Amendments And Additions To The Findings Of Fact Are Not Warranted.

The Board of Control requests a number of amended or additional findings of fact on the ground that the proposed amendments are “undisputed facts.” Board of Control Motion at 5. The Director evaluates these requests below.

First, the Board of Control requests that Finding of Fact 3 be amended to reference remarks on the quantity element of the decreed storage water rights. Finding of Fact 3 concerns elements and/or remarks in the partial decrees that expressly pertain to flood control or flood events. The remarks the Board of Control seeks to add to Finding of Fact 3 do not expressly pertain to flood control or flood events. The remarks reference the “total reservoir capacity” when each reservoir is filled to a given elevation “and measured at the upstream face of the dam.”¹⁵ Ex. 2015 (underline added). Including remarks in Finding of Fact 3 concerning reservoir capacity that do not address flood control is unnecessary and potentially confusing. Reservoir capacities often include “dead storage” which cannot be delivered downstream for beneficial use. The annual volumes decreed in the quantity elements, not the reservoir capacities, specify the “number that the Director must fill in priority to that user.” *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801.

¹⁵ As noted in FOF ¶ 3, the remarks for the smaller Arrowrock right (63-3613) and the Lucky Peak right (63-3618) contain remarks authorizing additional storage for flood control purposes. *See* Ex. 2015.

Next, the Board of Control challenges Finding of Fact 17, which states: “The State of Idaho supported the plan for coordinated operations but was not a signatory to the 1953 MOA or the 1954 Supplemental Contracts.” The Board of Control asserts the expert report of Dr. Jennifer Stevens supports an additional statement in Finding of Fact 17 that the “State acted as the representative of the water users in these negotiations.” Board of Control Motion at 6 (citing Ex. 2053 at 21). The cited passage of the Stevens report relates to the 1946 negotiation of the “interim operation” implemented before the Corps and BOR entered into the 1953 MOA. Ex. 2053 at 21. The cited passage says nothing about the 1953 MOA or the 1954 Supplemental Contracts. And, although the Stevens report asserts the State of Idaho represented the water users in the interim operation negotiations, the primary sources cited do not. Exs. 2092, 2094, 2095, 2096, 2097. In short, the Board of Control has not identified evidence in the record to support its requested finding.

With respect to Finding of Fact 19, the Board of Control requests additional findings pertaining to the 1974 *Review of Boise River Flood Control Management* authored by Robert Sutter. These requested amendments would inaccurately find that the 1974 Report was “the impetus and basis” for revisions to the Water Control Manual. Board of Control Motion at 7. As Sutter testified, the 1974 Report “wasn’t meant to actually be a flood control or water supply manual to be used.” Tr. 411. While Sutter agreed the 1974 Report was “a catalyst” for revisions to the Water Control Manual, he did not agree it was “the basis” for them, and stated “I don’t think you should read too much into” the 1974 Report. Tr. 418-19. Instead, as the text of the report states, it was an assessment of the “potential for improved operation” of the Boise River reservoir system. Ex. 2182 at 53; Tr. 411–412. In addition to the 1974 Report, several other factors—including new technology, the BOR’s and the Corps’ efforts to update the rule curves, the results of the BOR’s 1982 *Boise Project’s Power and Modification Study*, and decision on how to utilize uncontracted space in Lucky Peak—contributed to a general agreement on the need to revise the 1956 *Reservoir Regulation Manual for Boise River Reservoirs*. See generally Ex. 2053 at 39–56. In light of this record, the Board of Control’s proposed amendments to Finding of Fact 19 are not “undisputed” facts and would place undue weight on the 1974 Report.

Similarly, with respect to Finding of Fact 20, the Board of Control asserts the record does not establish the Department drafted only a “small portion” of the Water Control Manual, and seeks additional findings elevating the role of the Department’s participation in development of the Water Control Manual. Board of Control’s motion at 7-8. While the Department participated in development of the Water Control Manual, Robert Sutter, the only witness with direct knowledge to testify on the division of labor among the three agencies, stated that the “Corps, I would say, was 85 percent involved,” the BOR had the next highest level of involvement, and the Department was least involved. Tr. 458. Beyond Sutter’s testimony, however, the evidence is unclear as to exactly which portions of the Water Control Manual were drafted by the Department. Board of Control expert David Shaw testified, with little foundation, that it was his “understanding” that the Department prepared all of Water Control Manual Section 7-06, Tr. 1471, but his testimony focused on Section 7-06(f), which appears on page 7-26 only. 1473–1476. Department hydrologist Liz Cresto testified that the Department prepared Water Control Manual Section 7-06(f) entitled “Distribution of Irrigation Water.” Tr. 620. The Stevens Report and its supporting documents indicate that Sutter prepared drafts of what became Section 7-06(e) entitled “Boise River Storage Accrual.” Compare Ex. 2186 at 68–70 (Water Control Manual pp. 7-24 to 7-26) with Ex. 2185 (Sutter draft); see also

Ex. 2053 at 46–47 (discussing Sutter’s drafts). On the whole, this evidence indicates the Department drafted between three and five pages of a very large document of several hundred pages—a small portion by any measure and consistent with Sutter’s testimony. Therefore, the Board of Control’s proposed amendments do not constitute “undisputed” facts and are not supported by the record.

Finding of Fact 42 describes in general terms the process for distributing irrigation water to storage spaceholders after the day of allocation. The Board of Control requests that Finding of Fact 42 be amended with an additional finding describing when the Department’s computerized storage allocation program is run or can be run. Board of Control Motion at 8. Finding of Fact 42 addresses the “day of allocation,” and it is undisputed that storage allocations are determined on the “day of allocation.” The Board of Control’s proposed amendment is irrelevant to not only the subject of the Finding of Fact 42, but also the ultimate issue in this contested case. Contractual storage allocations do not determine priority distributions to the reservoir water rights.

Like the Ditch Companies’ objection discussed above, the Board of Control asserts Finding of Fact 51 is incomplete. The Board argues Finding of Fact 51 must be amended to add that “Cresto’s analysis in Exhibit 3 does not show that water was released from the reservoirs to satisfy the junior users identified in Ex. 3, nor that water diverted by juniors was water that would otherwise have been stored in the reservoirs.” Board of Control Motion at 8. As explained, however, these were not the purposes of Exhibit 3 because Pioneer Irrigation District did not request such analyses. The Board of Control’s proposed amendment is not supported by the record for the same reasons previously discussed in connection with the Ditch Companies’ similar objection to Finding of Fact 51.

The Board of Control also requests an amendment to Finding of Fact 76, which is the first of twenty findings regarding the implementation of the Water District 63 computerized accounting programs. Finding of Fact 76 is introductory in nature. While the Board of Control does not object to Finding of Fact 76 itself, the Board claims the finding must be amended to state that the “concept of paper fill did not exist” before the accounting program was implemented, that the concept was based on an “unwritten statewide ‘policy,’” and that water users were not “informed” of the concept prior to the *Basin-Wise Issue 17* proceedings. *Id.*

The term “paper fill” is not a “concept,” Board of Control Motion at 8, but rather a term of convenience that references the accrual methodology required to implement year-round priority administration and daily accounting of water distributions in accordance with licensed and decreed water rights, which was new to Water District 63. While the term “paper fill” and the system of daily, year-round water distribution accounting it references were not implemented in Water District 63 until 1986, the term and the accrual methodology were not entirely new; they were first implemented by the Department in 1978 in Water District 1.¹⁶ *Amended Final Order* at 29 ¶¶ 77-78 *id.* at 30 ¶ 83; *id.* at 32 ¶ 87 & n. 32; *id.* at 55 ¶4. The

¹⁶ The term “paper fill” was in use in Water District 1 (Upper Snake River basin) before 1986. At a Committee of Nine meeting in Idaho Falls on September 21, 1979, Director Stephen Allred explained the accounting program accrual methodology to water users and BOR officials and stated: “Once a right has filled on paper, even if the water has been released and additional space is available, the priorities of the reservoirs are considered to be no longer in effect.” *State Of Idaho’s Reply Brief, SRBA Subcase No. 00-91017, Basin-Wide Issue 17* (Jan. 25, 2013), Attachment 2.

record therefore does not support the Board of Control's proposed amendment to the effect that the term "paper fill" and the water distribution accounting methodology it references "did not exist" or was "unwritten" before implementation of the Water District 63 accounting programs in 1986.

While it is true that the term "paper fill" and the accounting methodology it references were introduced in Water District 63 with implementation of the accounting programs in 1986, these facts are set forth in the *Amended Final Order*. The Board of Control's proposed amendment is cumulative and unnecessary, and attaches undue weight to a shorthand label that, as this proceeding demonstrates, can be confusing or ambiguous. Further, the implied assertion that implementation of the accounting program went unnoticed or unexplained is contrary to the record. It is undisputed that former Watermaster Lee Sisco requested that the Department assist in implementing the accounting program. *Amended Final Order* at 29 ¶ 79. Further, Findings of Fact 80 through 85 detail the 1987 Accounting Paper Sisco requested from the Department. The paper explained the accounting procedures, including the concept, sometimes called "paper fill," that an on-stream reservoir's storage water right accrues natural flow in priority until the cumulative accrual reaches the annual volume limit or natural flows are all credited to prior rights. Then Director Dunn explained in his letter to Sisco covering the 1987 Accounting Paper that the accounting procedure "cannot accurately be described as new because it simply applies the prior appropriation doctrine, it is a modification from procedures applied from time-to-time in the past." *Id.*, FOF ¶ 81. Sisco served as the "liaison" between the Department and water users, met with water users about the adoption of the computerized accounting system, and noted the system was adopted in the 1986 Black Book. *Id.*, FOF ¶¶ 76, 79, 81. The BOR was likewise "informed," and there is evidence in the record that Sisco notified the BOR and the Board of Control soon after implementation of the accounting systems that if a reservoir water right had "filled on paper" it was no longer in priority.¹⁷ *Id.*, FOF ¶ 81. Yet Sisco "did not recall the BOR or the water users voicing any concerns with or objections to the new system." *Id.*

Finding of Fact 90 pertains to a 1993 letter from the Department's David Tuthill to Board of Control manager Kenneth Henley that responded to a request by Henley for information regarding storage of Mores Creek water in Lucky Peak and Lake Lowell. The Board of Control requests an additional finding concerning Henley's understanding of the letter. The Board of Control does not dispute Finding of Fact 90's summary of the letter or its determination that Tuthill received no response from the Board of Control. As the Finding of Fact 90 notes, the letter responding to Henley's request stated "each water right is allowed to be filled under its priority one time only. Subsequent filling can occur only if all other storage rights on the system have been filled and all natural flow water rights are being satisfied." Henley's testimony that there was "no" indication that Tuthill's statement had anything to do with the subject of his information request regarding the storage of water in Lucky Peak is belied by the terms of the letter. It refers

¹⁷ In March of 1987, Board of Control Project Manager Carl Padour wrote BOR Superintendent Neil Stessman requesting that "any streamflow gathered below Arrowrock Reservoir that could be diverted to Lake Lowell, be stored in Lucky Peak Reservoir . . ." Letter from Padour to Stessman (Mar. 30, 1987) (officially noticed). Stessman responded that he had "discussed this matter with Lee Sisco, Watermaster, [and] understand from him that the storage rights in Lucky Peak Reservoir are filled (on paper). Accordingly, any designation of storage presently accruing in the system as being for the storage account of Lake Lowell would be in derogation of the rights and interests of those holding rights to space in Anderson Ranch Reservoir, including districts included in the Boise Project Board of Control and other contractors." Letter from Stessman to Padour (undated) (officially noticed).

to “this type of storage” being subject to “three limitations,” and it is clear from the context that “this type of storage” refers to a preceding sentence: “In Idaho, for systems on which the Bureau of Reclamation operates multiple reservoirs, it is common for water to be stored upstream from the reservoir which is to receive a certain priority water right.” Ex. 7. The letter is the best evidence of what it says, and Henley’s testimony does not support the additional finding proposed by the Board of Control.

The Board of Control next requests that Finding of Fact 158 be amended to reference various orders and instructions from the Director imposing, modifying, and lifting moratoriums on the approval of new water right applications in Water District 63. *See* Ex. 3002–3008. The Board of Control contends these orders establish that the “Boise River is fully appropriated.” Board of Control Motion at 9. This is an oversimplification. As former Director Dreher testified, “in a fully appropriated system there are still periods when all rights are satisfied and when all rights are not satisfied. It’s not a static condition.” Tr. 302. Stated differently, “[t]he existence of unappropriated high flows in flood control years is a product of the snowpack.” *Amended Final Order*, Finding of Fact 154. Accordingly, the orders in Exhibits 3002 to 3008 are simply further evidence that variations in snowpack determine the volume and timing of the water supply for both existing and new appropriators. It is undisputed that the Boise River water supply varies on a seasonally and annually, and those facts are addressed in Finding of Fact 158 and other findings.

The orders do not establish that the Boise River is fully appropriated in all circumstances. For example, the orders in Exhibits 3004 through 3007 chronicle the Director’s efforts to manage water supplies in the Snake River Basin during a multi-year drought. The amount of water available for distribution to licensed and decreed water rights during a crippling drought is far less than the supply in a flood control year, when excess flows threaten to cause flooding and there is no dispute that there is unappropriated water in the system. Further, Exhibit 3008—a water right application processing memorandum issued in 2008—supports the Director’s finding in Finding of Fact 158 that the “Boise River system is fully appropriated during most of the irrigation season.” The record does not support the Board of Control’s claim that the Boise River is, without qualification, fully appropriated. *See Order On Nez Perce Tribe’s Motion To Set Aside, SRBA Subcase No. 03-10022* (Mar. 23, 2000) at 16 (“The quantity of water available to all Idaho water users is not constant. . . . It is not uncommon at different points in time for the resources to be overallocated to one degree or another The converse is also true. At a given time the resources may be under allocated, i.e., a surplus may exist”).

Finding of Fact 159 concludes that future appropriations of “unaccounted for storage” downstream of the reservoir system will likely be beneficial for future flood control operations and not affect “refill” of the flood control space. The Board of Control proposes additional sub-findings, pertaining to conditions on new applications to appropriate water from the Boise River. In general, these conditions prohibit the appropriator from diverting except when authorized by the Watermaster during flood control releases from Lucky Peak Dam. *E.g.*, Exs. 2017, 3012. The existing accounting program does not document such conditions and would need to be reprogrammed to do so. Tr. 505–506 (Cresto). The Director recognized this and ordered “Department staff to work with Water District 63 water users to address other concerns raised in this contested case, such as how water rights with conditions limiting their exercise

during flood control releases are documented in the water right accounting program.” *Amended Final Order* at p. 79.

The Board of Control next requests an addition to Finding of Fact 165 stating “[t]here is no dispute that ...” section 7-06 of the Water Control Manual “was written by Department employees.” The record does not support this proposed amendment for the same reasons discussed above in connection to the Board of Control’s proposed amendment to Finding of Fact 20. While the record confirms that the Department employees had a limited role in proposing or drafting a portion of the language ultimately incorporated into the Water Control Manual, the record does not support a finding that “there is no dispute” that section 7.06 “was written by Department employees.”

The Board of Control requests that several sentences be added to Finding of Fact 165. The Board of Control proposes statements that that “[u]nder the water rights accounting program water released for flood control is charged to storage right holders,” and that “[w]ater released for flood control prior to paper fill . . . is accrued against the storage accounts.” Board of Control Petition at 12. These statements are contrary to the record. The water rights accounting program ignores flood control releases and does not “accrue” or allocate water to spaceholder storage accounts. Any “charges” against spaceholder storage accounts for flood control releases are made in the storage allocations program rather than the water rights accounting program, as required by and in accordance with spaceholder contracts and BOR instructions. *See Amended Final Order* at 35-42 (describing the programs).

The Board of Control also requests an addition to Finding of Fact 165 stating that “[w]ater released for flood control prior to paper fill is only available to storage right holders” and that “[s]torage water released prior to “paper fill” is not available for natural flow users unless they have a storage account.” These statements imply that only space holders have “storage accounts” and therefore non-spaceholders cannot divert the water released for flood control. This interpretation is incorrect. Finding 89 states:

The 1987 Accounting Paper stated that “[s]tored water use will be charged whenever a diversion exceeds the right it is entitled to exercise at that time,” but also that “if flood control releases occur after these stored water charges, the stored water account use will be returned to zero.”

In other words, when a diversion “exceeds the right it is entitled to exercise” the water diverted is charged as storage water use, regardless of whether the diverter is a spaceholder. This charge creates a “storage account.” Applying this broad interpretation of a storage account, “if flood control releases occur after these stored water charges, the stored water account use will be returned to zero. “

Liz Cresto referred to the 1987 Accounting Paper in her affidavit, stating that she “reviewed the “paper” and the procedures it describes are the same procedures used in the existing water right accounting program and storage allocation program in Water District 63.” Ex. 2 at 13-14 ¶ 29. Cresto also testified that “[i]n certain years, natural flow is not sufficient to satisfy all the demand on the river, and people start using storage water,” but subsequently water is released for flood control purposes, and in such years “that early season storage use would have just come out as part of—as additional flood control. That storage use is canceled.” Tr.

177:3-12. The record does not support the additional statements regarding storage use and storage canceling that the Board of Control proposes for Finding of Fact 166.

Turning to Finding of Fact 170, the Board of Control argues the Amended Final Order mischaracterizes the contents-based accounting method proposed by its hydrologist, Dave Shaw.¹⁸ Shaw proposed accounting for “what’s being stored in the reservoirs” by “allow[ing] the storage right holder to call for water” such that “the reservoir would be treated like any other diverter.” Tr. 1500–1501. When asked how this methodology would work in a flood control year, Shaw explained that water physically stored in the reservoir “would be counted and then erased [if evacuated for flood control], and then you’d start over again” once the contents of the reservoir begin increasing. Tr. 1525–1526. In light of this testimony, Finding of Fact 170 accurately describes Shaw’s testimony as proposing “an adjustment of the accruals to the on-stream reservoir water rights to match the physical contents of the reservoir” and allowing the BOR “to determine whether it wants to exercise its water right to store water and turn the water on and off like any water user.” The finding goes on to illustrate how these concepts would have worked during the 1999 irrigation year. *See* Ex. 1019 at 5 (depicting 1999 irrigation year reservoir contents and priority diversions to storage). This illustration points out a problem in Shaw’s proposal, but the finding does not mischaracterize his testimony.

Finding of Fact 171 contains further discussion of Shaw’s proposal, specifically regarding his contention that flood control releases should be handled by erasing, or resetting, the volume of water accrued to the storage rights. Shaw’s rationale for the reset is that water physically stored in the reservoirs but later released for flood control is not stored for beneficial use. Tr. 1520. The Board of Control objects to Finding of Fact 171 because it “failed to make specific findings” that “water released for flood control is not and cannot be beneficially used.” This objection is contrary to the record, which does not support such a finding. The record establishes that there is often overlap between flood control releases and the irrigation season, and in some cases the water released for flood control purposes can be and has been applied to beneficial use. *Amended Final Order* at 16 ¶ 32; *id.* at 18 ¶ 38; *id.* at 67 ¶ 35.

Findings of Fact 25 through 38—all of which are undisputed—flood control releases may occur any time during flood control operations, which extend from November 1 until the Corps determines the flood risk has passed (usually sometime between mid-May and mid-June). Consequently, flood control operations and irrigation season can, and do, overlap. Indeed, it is not uncommon for spaceholders to divert water from their storage accounts during the “refill” phase of flood control operations.¹⁹

Third, water released from Arrowrock or Anderson Ranch may be stored in a downstream reservoir. *E.g.*, Tr. 148–149 (Cresto), 765 (Mellema). During flood control operations, this may be necessary to distribute water among the three reservoirs in accordance

¹⁸ The Board of Control also complains Finding of Fact 170 mischaracterizes unspecified “rule curve decisions” purportedly “described by Mary Mellema and set forth in the Water Control Manual.” Board of Control Motion at 12. Read in context, however, it is clear that Finding of Fact 170’s references to the BOR’s “decisions” are for purposes of illustrating Shaw’s proposal to “allow the storage right holder to call for water.” Tr. 1500–01. Further, the Board has failed to specify a basis in the record for its objection (beyond vaguely gesturing toward Mellema’s testimony and the 100-plus page Manual), and the Director finds none.

¹⁹ There would be no need for a “storage cancelling” procedure if this was not the case. *See* Ex. 1 at 11.

with the Water Control Manual's "flood control space distribution curves." See Ex. 2186 at 96 (Plate 7-3). Releases to redistribute flood control space among the reservoirs are "flood control releases," but they do not necessarily result in water being released from Lucky Peak and passing Middleton unused. In other words, whether a given "flood control release" can or cannot be beneficially used depends on a variety of complex factors. The record also establishes that determining whether and how much of a given "release" is a "flood control release" as opposed to a release for "flow augmentation" or beneficial use is generally determined by the BOR as a discretionary matter, that the BOR generally does not make such determinations in real time, and that the BOR may subsequently revise its initial determinations of when, and how much, water was released for "flood control" as opposed to other purposes. *Amended Final Order* at 17 ¶ 33; Tr. 746 (Mellema). The record does not support the Board of Control's request for an amendment to Finding of Fact 171.

8. The Board of Control's Proposed Amendments To The Conclusions of Law Are Unwarranted.

The Board of Control requests that the Director cite in Conclusion of Law 56 the legal authority for storing water "without a water right." This request is based on the Board of Control's assumption that the water that is physically stored in an on-stream reservoir after the reservoir water right has been satisfied is stored without a water right. Conclusion of Law 40 suggests that the SRBA could decree a general provision recognizing the historical practice of physically storing flood waters after a flood control release, and cites precedent for a similar general provision. In addition, the Bureau and the spaceholders filed beneficial use claims with the SRBA Court seeking beneficial use rights for the water physically filling empty reservoir space vacated for flood control. These claims are presently pending before the SRBA Court. The above are recognized processes for documenting the legal diversion of water after the on-stream storage water rights are satisfied. The spaceholders and the Bureau are responsible for determining the means of recognition, however, not the Director. Conclusion of law 56 will not be amended.

The Board of Control argues the record does not support Conclusion of Law 58 that the "potential for future appropriations is very limited because 'refill' water consists of unreliable flood waters that are difficult to appropriate" and "that no such appropriation has occurred since coordinated operations of the Boise River reservoir system began in 1957." This contention is incorrect. Findings of Fact 157-160 support Conclusion of Law 58. Furthermore, the Board of Control's quoted testimony of Sutter poses a hypothetical circumstance where the State of Idaho gives its water to California as a large scale appropriation that might affect the refill of reservoir space vacated for flood control. The quoted testimony of Dave Shaw does not address the issue of whether the "potential for future appropriations is limited . . ." Conclusion of Law 58 will not be amended.

The Board of Control asserts that Conclusion of Law 69 should be amended to state that the Department has not "disagreed with decisions of the Corps and Reclamation in flood control releases from the Boise Reservoir systems under the Water Control Manual." The proposed language is not relevant to Conclusion of Law 69, which discusses the implications of a proposal for contents-based accounting by Dave Shaw.

The Board of Control suggests additional language for Conclusion of Law 70 related to “release of water from Anderson Ranch and Arrowrock for fisheries purposes.” Conclusion of Law 70 does discuss releases of water for fisheries purposes, and the suggested language is irrelevant or so marginally relevant that its addition has no value. The suggested additional language will not be added into Conclusion of Law 70.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Ditch Companies' Petition for Reconsideration and the Boise Project Board of Control's Motion for Reconsideration are DENIED.

DATED this 19th day of November 2015.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November 2015, I served the foregoing *Order Denying Petitions for Reconsideration* to the following and by the method indicated below:

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for *Givens Pursley*
Deborah J. Gibson
Administrative Assistant for the Director
Idaho Department of Water Resources

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

(To be used in connection with actions when a hearing was held)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, Idaho Code.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.