

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

In Re SRBA) Subcase Nos. 63-33732 (Consolidated
Case No. 39576) Subcase no. 63-33737), 63-33733
) (Consolidated subcase no. 63-33738),
) and 63-33734
)
) ORDER DENYING MOTIONS TO
) ALTER OR AMEND
)

I. ANALYSIS OF GENERAL ALLEGATIONS OF ERROR

A. There is a Justiciable Controversy.

In their respective Motions to Alter or Amend Special Master's Recommendation the State and Suez Water Idaho Inc. assert that the above-captioned claims should be disallowed solely on the grounds of mootness because all of the motions for summary judgment filed by the parties seek disallowance of the claims. While recognizing that the motions for summary judgment filed by the Ditch Companies and the Boise Project relied on entirely different reasoning as compared to the motions for summary judgment filed by the State and Suez, the State nevertheless asserts that those differences are meaningless under circumstances where all parties seek the same end result. The State

1 Suez Idaho Water Inc., FKA United Water Idaho Inc. ("Suez"), filed both a Motion to Alter or Amend Special Master's Recommendation (filed November 20, 2015) and a Notice of Participation in State of Idaho's Motion to Alter or Amend (filed December 14, 2015). In its Notice of Participation, Suez states that it supports the State's Motion. Therefore, references herein to assertions made by the State also include the same assertion made by Suez although not expressly stated.

argues that because the parties seek the same end result there is no adversity and hence no justiciable controversy.

While it is true that the parties have all argued for disallowance of the claims, the end result sought by the Boise Project and the Ditch Companies is that the water stored in the Boise River Reservoirs after flood control releases is stored pursuant to a property (water) right (whether it be under the existing storage rights or, alternatively, under the above-captioned claims); whereas the end result sought by the State is that the water stored in the Boise River Reservoirs after flood control releases is not stored pursuant to a property (water) right. Stated differently, the penultimate result sought by the parties (disallowance of the claims) is the same, but the ultimate result is very, very different. Accordingly, the *State's Motion* that the above-captioned claims be recommended disallowed on the grounds of mootness or lack of justiciable controversy is **denied**.

B. The Recommendation Does Not Exceed the Authority Set Forth in the Orders of Reference.

The State argues that the *Orders of Reference*² issued by the Presiding Judge do not provide for the authority to address the “threshold” issue presented by the Ditch Companies’ and the Boise Project’s motions for summary judgment. The *Orders of Reference* direct this Special Master to “conduct all further proceedings necessary to issue a recommendation consistent with the Court’s *Summary Judgment Order*.” The *Summary Judgment Order*³ resolved the issue of whether the claims filed by the “Irrigation Entities” must be disallowed as a matter of law “based upon the Idaho Supreme Court’s analysis in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).” *Id.* In the *Summary Judgment Order*, the Presiding Judge stated that “the claimants must establish the two essentials for obtaining a water right under the constitutional method – diversion and application of the water to beneficial use.” *Id.* at 5.

² The Presiding Judge issued the following *Orders of Reference* in these subcases: *Order of Consolidation; Order of Reference*, Subcase No. 63-33732 (Consolidated Subcase No. 63-33737) (Jan. 9, 2015) (Arrowrock); *Order of Consolidation; Order of Reference*, Subcase No. 63-33733 (Consolidated Subcase No. 63-33738) (Jan. 9, 2015) (Anderson Ranch); *Order of Consolidation; Order of Reference*, Subcase No. 63-33734 (Jan. 9, 2015) (Lucky Peak).

³ *Order Granting in Part and Denying in Part Motion for Summary Judgment*, Subcase Nos. 01-10614 et al. (Jan. 9, 2015).

The State argues that this language from the *Summary Judgment Order* imposes a limitation that precludes inquiry into any matter that falls outside the scope of the claimant's burden to show the aforementioned two essentials. This Special Master disagrees that the *Summary Judgment Order* intended such a limitation. However, assuming *arguendo* that such limitation was so imposed, the State's argument still fails. Under the constitutional method for the appropriation of a water right – wherein the claimant must demonstrate diversion of water and its application to beneficial use – the water so diverted and beneficially used must be water that is subject to appropriation, i.e. water not already appropriated under a prior water right. In *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072, 1074 (1919), the Idaho Supreme Court stated, “When one diverts water hitherto unappropriated and applies it to a beneficial use, his appropriation is complete, and he acquires a right to the use of such water” *Id.* (emphasis added).

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

C. The Recommendation Utilized the Correct Summary Judgment Standard.

The State asserts that this Special Master stated an incorrect legal standard regarding the role of a court in ascertaining facts and drawing inferences therefrom in an action where the court rather than a jury is the fact finder. The State also asserts that this Special Master misapplied the correct legal standard. As a starting point, let us first consider what is the appropriate legal standard regarding fact-finding in an action where there is a motion for summary judgment and no jury. The Ditch Companies cite to the following passage from *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982), as a succinct statement of the correct standard:

This Court has held in the past that even though there are no genuine issues of material facts between the parties “a motion for summary judgment must be denied if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable men might reach different conclusions.” *Such a rule is proper where the matter is to be tried to a jury*, because even though evidentiary facts may be undisputed, those

evidentiary facts may yield conflicting inferences as to what the ultimate facts of the case are. If such conflicting inferences are possible, then summary judgment would deprive the parties of the right to have the jury make the decision in the matter. *Nevertheless, where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.*

Ditch Companies' Response to Motion to Alter or Amend Special Master's Recommendation at 13 (citations omitted; emphasis added by Ditch Companies). The passage quoted above discusses three concepts: (1) evidentiary facts; (2) inferences that can be drawn from evidentiary facts; and (3) ultimate facts. The trier of fact is tasked with finding the ultimate facts of the case. The ultimate facts are derived from the evidentiary facts presented to the fact-finder and the inferences that the fact finder draws from those evidentiary facts. With respect to disputed evidentiary facts, it matters not whether the fact finder is the court or a jury – in either case such disputed evidentiary facts must be presented at trial where the fact finder can judge, among other things, the credibility of the witnesses. Conversely, if the evidentiary facts are not in dispute, it does matter whether the fact finder is a court or a jury. If the fact finder is a jury, then summary judgment is improper if the nature of the evidence is such that reasonable people might reach different conclusions based upon the inferences they might draw therefrom. The reason for this is that it is the province of the jury to draw the inferences and reach the conclusions. However, where the court is the fact finder and hence is responsible for drawing inferences from undisputed evidentiary facts, there is no useful purpose for that process to occur in a trial setting and therefore summary judgment is proper.

Based upon the standard set forth in the above-quoted passage from the Idaho Supreme Court, the State is correct in its assertion that this Special Master may not make findings as to the ultimate facts where the evidentiary facts are in dispute. However the State is incorrect in its assertion that this Special Master may not draw inferences from undisputed evidentiary facts.

D. The Legal and Factual Support for the Simple Premise that the Storage Water Put to Beneficial Use is the Same Water Stored Pursuant to the Existing Storage Rights.

The State argues that the *Recommendation* does not cite any legal or factual support for the holding in the *Recommendation* that the water put to beneficial use is the same water that is stored pursuant to existing storage rights. *State's Motion* at 9, n.13. With respect to the factual support, see section II. A. below.

With respect to the legal support for the conclusion reached in the *Recommendation*, such support lies in the fundamental nature of the prior appropriation doctrine, which is the legal method for the creation of property rights in water in Idaho. The prior appropriation doctrine is not some abstraction that has been randomly adopted by the Idaho Legislature. To the contrary, the prior appropriation doctrine is deeply rooted in the philosophical concept of private property articulated by John Locke, who explained that when an individual combines his or her labor with unused land or other naturally occurring resources, the result is private ownership. Under the prior appropriation doctrine in Idaho, unused water is available to individuals who can apply their ideas and labor with the goal of producing something of value from the unused and thereby increase their material well-being. John Locke stated: "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common." John Locke, Two Treatises of Government p. 148, § 32 (New Ed., 1824). With respect to the appropriation of water under the prior appropriation doctrine, the "enclosure" is the priority date. The creation of a property right that results from combining a person's ideas, capital, and labor with a previously unused natural resource (e.g. water) is the means by which such combination can survive into the future.

With this concept in mind, it cannot be said that an appropriator of water somehow acquired a property right in water that he or she did not and cannot use (i.e. the water that must be released down the river before it can be beneficially used); but yet cannot acquire a property right in the water that is actually used (i.e. the water in the Boise River Reservoirs at the time of maximum physical fill). The property rights embodied in the *Partial Decrees* for the existing storage rights could not have come into

existence without the application of the individual human labor invested by the irrigators and other end users into making productive use of the water. And no property rights could have been created in water that flows down the river, unused. *Ergo* the water that is beneficially used (i.e. the water in the Boise River Reservoirs at the time of maximum physical fill) is the water in which the prior-appropriative property rights pertain. To argue otherwise contravenes the fundamental nature of how property rights in water are created and reduces the prior appropriation doctrine to an ungrounded abstraction.

E. The Factual and Legal Questions Concerning Whether the Claimants are Capable of Carrying Their Burden of Proof Need not be Answered.

The State argues that the claimants of the above-captioned water rights (the Bureau and the Boise Project) are incapable of proving actual beneficial use of water to support the claims because it is undisputed that the amount of stored water subsequently applied to beneficial uses did not exceed the annual quantity of the existing storage rights. *State's Motion* at 16-17. Therefore, the State argues, the above-captioned water rights should be recommended disallowed on this basis and the "threshold" issue posited by the Ditch Companies and the Boise Project need not be answered. The State made this same argument in its *Cross-Motion for Summary Judgment*. See *State of Idaho's Memorandum in Support of Cross-Motion for Summary Judgment* (filed August 4, 2015) at 49. In the *Recommendation* this Special Master determined this issue to be moot and therefore did not address it. The State raises the issue again in its *Motion to Alter or Amend* but does not explain why the previous determination of mootness is incorrect.

This issue raised by the State involves a determination of law regarding the correctness of the State's legal theory that underlies this issue. The State's theory in this regard is that the actual beneficial use of the water stored in the Boise River Reservoirs can only occur under the authority of the existing storage rights irrespective of whether the legal authority to store the water is "historic practice." In other words, the State asserts that the above-captioned claims would have to be proven by showing the beneficial use of water above and beyond the use that annually occurs within the place of use for the existing storage rights. Given the holding in the *Recommendation*, which is not altered or amended herein, there is no reason to answer this question.

F. The Recommendation does not and Should not Determine Whether the Water Stored in the Boise River Reservoirs at the Time of Maximum Physical Fill was Stored “In Priority.”

In its *Motion to Alter or Amend*, Suez asserts that the *Recommendation* improperly determined that the existing storage rights “remain in priority until the time the Boise River’s federal on-stream reservoirs reach their maximum physical contents each year regardless of whether water is released, vacated, or bypassed for flood control purposes.” *United Water’s Motion to Alter or Amend the Special Master’s Recommendation* (filed November 27, 2015) at 2. Suez further asserts that the *Recommendation* states that the water in the Boise River Reservoirs at the time of maximum physical fill is “stored under the existing storage rights” without expressly stating whether such storage occurs “in priority” meaning “to the potential detriment of junior water users.” *Id.* at n. 2.

With respect to Suez’s assertion that the existing storage rights remain in priority for the entire storage season (i.e. November 1 through the time of maximum physical fill), it should be noted that this assertion is inconsistent⁴ with the following statement in the *Recommendation*: “United Water and the State are correct in their assertion that the quantity element of the existing storage right[s] cannot be exceeded for water that is stored pursuant to such rights.” *Recommendation* at 12-13.

With respect to Suez’s complaint that the *Recommendation* does not specify whether the storage of the water contained in the Boise River Reservoirs at the time of maximum physical fill occurs in priority and therefore to the “potential detriment of junior water users,” it is beyond the scope of these proceedings for this Special Master to opine regarding possible results of competition for scarce water between junior water users and the existing storage rights. That being said, for purposes of providing a sufficient explanation in response to Suez’s complaint that the *Recommendation* provides no guidance on when the existing storage rights are “in priority,” this Special Master makes the following observations. Priority is the means to allocate scarcity – i.e. it comes into play when the demand on a particular water resource exceeds the supply.

⁴ Assuming a year in which flood control operations occur.

As noted by Hydrologist Cresto in her *Affidavit*, “[t]he problem during the flood control period . . . is managing excess flows.” *Affidavit of Elizabeth Anne Cresto* ¶ 27. With respect to the Boise River Reservoirs, the accounting system used by IDWR since 1986 often utilizes the concept of priority not to allocate scarcity but rather to dictate to the Bureau and the water users what water IDWR considers to be stored under the existing storage rights (i.e. legally and physically available water beginning November 1) and what water is not stored under the existing storage rights (i.e. the water in the Boise River Reservoirs, in a flood control year, at the time of maximum physical fill).

In the absence of actual competition between junior and senior water rights under conditions of scarcity, a determination of “in priority” or “out of priority” is purely hypothetical or fictional. Accordingly, it would be improper for this Special Master to opine as to whether the storage of the water that is contained in the Boise River Reservoirs at the time of maximum physical fill was hypothetically “in priority” or “out of priority.” Presumably, any water that is stored under authority of a senior water right to the actual as opposed to “potential” detriment of a junior water user would necessarily have to count towards the satisfaction of the senior water right. Also, presumably, such stored water would count toward the senior’s right irrespective of whether the senior was able to store such water until the time it could be beneficially used; and the risk of such water having to be prematurely released would fall on the senior. But the above-captioned subcases do not present any issues that would require satisfying Suez’s complaint by mentioning one way or the other as to whether the storage of such water occurs under a hypothetical priority.

II. ANALYSIS OF SPECIFIC ALLEGATIONS OF ERROR

A. Existing Storage Rights were Historically Considered to be Satisfied at Time of Maximum Physical Fill.

We now turn to the specific instances where the State asserts that this Special Master improperly determined ultimate facts based upon disputed evidentiary facts. The first instance argued by the State is with respect to the point in time at which the existing storage rights were historically considered to be satisfied. This Special Master stated the

ultimate fact thusly: “The record in these subcases clearly demonstrates the undisputed fact that the existing storage rights were historically considered satisfied at the point in time that the reservoirs reached maximum physical fill” *Recommendation* at 21. This ultimate fact was restated on page 26 of the *Recommendation*: “The undisputed facts in the record indicate that the water stored in the Boise River Reservoirs at the time of maximum physical fill has historically been considered by the Bureau, the Idaho Department of Water Resources, the watermasters, and the water users as having been stored pursuant to the existing storage rights.” *Id.* at 26.

The State asserts that the evidentiary facts underlying this conclusion are disputed. Specifically, the State asserts that: “[S]ince 1986, the ‘maximum physical fill’ of the reservoirs has never been the measure of the satisfaction [of] the existing reservoir water rights” *State’s Motion* at 12, citing *Cresto Aff.* ¶¶ 12-13, 19, 22 & Ex. C at 9-11; *Second Sutter Aff.* ¶¶ 4-6. Before examining the evidentiary facts and inferences that underlie this conclusion it is important to note that the Bureau, the Ditch Companies, and the Boise Project not only have historically viewed the reservoir rights to be satisfied at the time of maximum physical fill, they also presently have this view. Therefore, the only question is whether the State of Idaho through the Idaho Department of Water Resources has historically held this view.

The error alleged by the State is in regard to the historical view of the Idaho Department of Water Resources (“IDWR”) “since 1986.” However the relevant historical time period regarding the above-captioned claims is prior to 1971, not after 1986. In her *Affidavit*, Hydrologist Cresto states: “Prior to implementation of water rights accounting [in 1986] . . . [a]ccruals to reservoir water rights were not determined on a daily basis but rather on the date of maximum total reservoir fill.” *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) (footnote omitted). The inference to be drawn from this statement is that the time period of “prior to implementation of water rights accounting [in 1986]” includes the time period of prior to 1971. There are no evidentiary facts in the record that call into question whether or not during the time period that relates to the above-captioned claims (1965 for the Bureau’s claims) that anybody, including IDWR, viewed the existing storage rights as being satisfied by water that was released from the reservoirs for flood control purposes. While IDWR has

adopted a contrary view sometime after 1986, it would be a factually unsupported fiction to retrospectively assign the current view of IDWR to the time period prior to 1971.

The State points to evidentiary facts in Hydrologist Cresto's *Affidavit* and the *Second Affidavit of Robert J. Sutter Sutter* to show that prior to 1986, "there was no priority-based accounting or water rights administration during the 'storage season,' which ended on or near the date of 'maximum physical fill.'" *State's Motion* at 12, citing *Cresto Aff.* ¶ 17-18, 28 & Ex. C at 12; *Second Sutter Aff.* ¶ 7. Apparently, the State is urging that an inference be drawn from this undisputed evidentiary fact to the effect that IDWR did not hold the view (prior to 1971) that the existing storage rights were satisfied by the water actually in the reservoirs at the time of maximum physical fill.

For the following reasons this Special Master can draw no such inference. First, it is not at all clear what the State deems to be significant about the lack of "priority-based accounting" during the storage season. By way of explanation, let us assume the following hypothetical facts: 1) a year in which water is released from a reservoir for flood control purposes during the storage season; 2) the amount of "legally and physically available" water calculated for the reservoir has equaled the quantity of the water right; 3) the reservoir is not physically full; 4) all other water rights on the system are being "satisfied" either because they are receiving water or because they are not demanding water; and 5) water entering the reservoir continues to be captured, albeit "out of priority" as the State uses that term. Under these circumstances, the State insists that the reservoir can legally continue to fill so long as all other junior water rights are getting (or don't want) water. In other words, the State asserts that the existing reservoir rights can continue to fill during times when there is no scarcity. Priority is the system for allocating scarcity. So to say that there is "no priority-based accounting or water rights administration" during a time of the year when there is no scarcity is nonsensical.⁵

⁵ The peculiarity of applying priority based accounting and/or administration during a time of plenty is exemplified in the *Affidavit* of Hydrologist Cresto, wherein she states: "The problem during the flood control period . . . is managing excess flows. Water right priority determines distributions during times of shortage, and was not recognized or enforced during the flood control period in years before 1986." *Id.* at ¶ 27 (emphasis added). This begs the question: If priority determines distribution during times of shortage (which it does), then what is the manifestation of priority during the flood control period, which is by definition not a time of shortage?

Whatever the State thinks is the significance of there not having been “priority-based accounting and administration” during times of non-scarcity, this Special Master declines to arrive at the inference that IDWR historically viewed (meaning pre-1986) the existing storage rights to be satisfied by water that was released to make room for anticipated flood waters.

The second reason why this Special Master cannot draw such an inference regarding the historical perspective of IDWR is derived from the State’s argument that after 1986, things changed. If the “priority-based accounting and administration” (implemented in 1986) is the basis for “paper-fill” to have become the measure of the satisfaction of the existing storage rights, then it stands to reason that prior to 1986, “paper-fill” was not the measure of the satisfaction of the existing storage rights. Either the nature of the existing storage rights changed in 1986 or it didn’t. All the parties, including the State, agree that the method of accounting does not define the nature of the existing storage rights. In his *Affidavit*, Engineer Sutter states:

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

Affidavit of Robert J. Sutter (filed July 2, 2015) ¶ 6 (emphasis added). The crux of the “threshold” question is whether the water that is claimed by the Bureau to have been appropriated in 1965 was already appropriated under the existing storage rights. The historical view of IDWR is relevant to this inquiry. The State would have us believe that even before 1986 IDWR considered the existing storage rights to be satisfied by water that was released for flood control purposes, just that nobody was counting. In other words, the State seeks to retrospectively project its current view (i.e. post-1986 view) to 1965, even though it agrees that the method of accounting used by IDWR does not define the existing storage rights and even though the evidence in the record from Engineer Sutter is that “[t]he [1986] accounting system did not alter the above-described

principles or the accrual of water to storage pursuant to the reservoir operating plan of the Water Control Manual.”

As previously stated, either the nature of the existing storage rights changed in or after 1986 from being satisfied at the time of maximum physical fill to being satisfied upon the accrual of all “legally and physically available” water, or the rights did not change. If there was no change, such non-change cannot be explained by retrospectively applying the current view of IDWR to 1965; and it is beyond the scope of these proceedings to determine if IDWR’s 1965 view is applicable to the present.

In accordance with the foregoing, this Special Master declines to alter the factual finding that IDWR historically (meaning at times relevant to the above-captioned claims, i.e. prior to 1971) viewed the existing storage rights to be satisfied at the time of maximum physical fill.

B. It is Not Material Whether there was a Daily Accounting of Water Distributions for the Existing Storage Rights Prior to 1986.

The State argues that this Special Master improperly resolved a disputed issue of material fact by finding that whether or not there was a daily accounting of water distributions for the existing storage rights prior to 1986 is not material to the resolution of the issues presented on summary judgment. *State’s Motion* at 13. By way of background, the record in these subcases contains two conflicting descriptions of the daily accounting of the existing storage rights prior to 1986. In Exhibit C to her *Affidavit*, Hydrologist Cresto states (with regard to pre-1986 accounting): “Accruals to reservoir water rights were not determined **daily** . . .” *Affidavit of Elizabeth Anne Cresto*, Ex. C, p. 12 (emphasis added). However, in his *Affidavit*, Watermaster Sisco, in describing how he was trained by his predecessor Henry Koelling, states: “If outflows [of Lucky Peak] exceeded inflows, decreasing reservoir contents, Mr. Koelling reduced the **daily** allocation of natural flow to the reservoir storage rights accordingly.” *Affidavit of Lee Sisco* (filed August 25, 2015) ¶ 5 (emphasis added). This Special Master did not make a factual finding as to whether or not there was any daily accounting (before 1986) of the existing storage rights during the storage season, but rather simply pointed out, in a

footnote, that there appears to be a factual discrepancy in this regard and stated that such factual discrepancy is not material to the issues presented on summary judgment.

If the State is arguing that the fact of whether or not there was a daily accounting during the storage season prior to 1986 is material, it has provided no analysis as to why this would be the case. Accordingly, this Special Master declines to alter the conclusion that no factual findings need be made in this regard for the reason that the answer to the factual question would not change the outcome on summary judgment and is therefore not material.

C. The Statement in the *Recommendation* to the Effect that the Priority Element of a Water Right that has Both a Storage and Use Component has Significance Only with Respect to the Accumulation of Storage and Not Use is Not a Factual Finding.

The State argues that this Special Master improperly resolved disputed material fact in the following passage from the *Recommendation*:

The priority date for the previously decreed water rights has significance only with respect to the right to capture and store water in the Boise River Reservoirs to be subsequently used for the intended beneficial uses. Once such water has been captured and stored pursuant to a valid water right, there is no competing demand by junior water rights with respect to the “irrigation (and other uses) from storage” component of the right. Water stored in a reservoir pursuant to a valid water right is not available for use by other water rights, senior or junior, and hence it is not the priority date that protects the right to use such water; rather the priority date protects the right to capture and store such water. The priority date of a storage right protects the right to accumulate and store the water in the first place.

Recommendation at 7-8. As a preliminary matter it should be noted that the above-quoted passage is set forth in the introductory section of the *Recommendation* in a subsection that describes the summary judgment motions filed by the Ditch Companies and the Boise Project. The above-quoted passage does not impermissibly resolve a disputed issue of material fact. Rather it does not make any factual findings whatsoever. In the passage, this Special Master was simply making a comparison between the two components of a water right which allows for both the accumulation and storage of water and for the subsequent beneficial use of such water. The accumulation of flows into

storage necessarily must occur within the context of the tabulation of priorities relative to other hydraulically connected water rights. However, once the water is stored, such stored water is not subject to being used by others users under other water rights, and hence the priority element of the water right has no bearing on the use of the water previously stored. Perhaps this is stating the obvious, but it is in no way a determination of fact, disputed or otherwise.

In accordance with the foregoing, this Special Master declines to alter the above-quoted statement from the *Recommendation*.

D. Without a Protectable Priority-Based Property Right, the Bureau and the Water Users are Left with Little to no Means to Ensure the Continued Storage and Use.

The next passage from the *Recommendation* that the State says impermissibly resolved disputed issues of material fact is as follows:

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

Id. at 8 (emphasis in original). Again, it should be noted that the above-quoted passage is set forth in the introductory section of the *Recommendation* in a subsection describing the summary judgment motions filed by the Ditch Companies and the Boise Project. There are no factual findings set forth in the above-quoted passage. The State cites to large portions of the record to show that the Bureau and the water users do have the means to ensure that the water that has been historically used for beneficial purposes can continue into the future in the absence of a property right for the capture and storage of water after flood control releases have occurred. However the State does not explain what exactly is the means to be used by the Bureau and the water users. This Special

Master has re-reviewed the sections of the record cited by the State and has not discovered any such means.

In accordance with the foregoing, this Special Master declines to alter the above-quoted statement from the *Recommendation*.

E. Water Released for Purposes of Maintaining Vacant Reservoir Space for Flood Control Cannot Be Beneficially Used Under the Existing Storage Rights.

The State asserts that the *Recommendation* improperly determined that “flood control releases of water stored under the priorities of the decreed reservoir water rights cannot be put to beneficial use for irrigation or any other beneficial use.” *State’s Motion* at 14. The *Recommendation* does not say this. It does, however, say that water released from Lucky Peak for the purpose of maintaining vacant flood control space “cannot be used under the ‘irrigation from storage’ components of the existing storage rights.” *Id.* at 9. The State has mischaracterized this statement from the *Recommendation* in two regards. First, the *Recommendation* does not state that the water released for flood control purposes was “stored under the priorities of the decreed reservoir water rights.” Second, the *Recommendation* does not state that such water is forever foreclosed from being beneficially used as it makes its way down the river, but rather that such water cannot be used under the “irrigation from storage” component of the existing storage rights.

To refute the *Recommendation*, State points to Exhibit C of the *Affidavit of Elizabeth Anne Cresto* at 11-12, and Exhibit E of the *Affidavit of Robert J. Sutter*, at section 7-26. Exhibit E of the *Affidavit of Robert J. Sutter* is the Water Control Manual for Boise River Reservoirs, which states:

f. Distributions of Irrigation Water. Water rights for direct diversion of flow for irrigation are potentially valid only during the 1 April through 31 October irrigation season. The Boise River watermaster makes a daily calculation of natural (unregulated) flow at one or more locations near these points of diversion to sufficiently estimate the available natural flow supply. The Watermaster then credits the natural flow to appropriate users based on a list of water rights in force provided by the State of Idaho, Department of Water Resources. When the rate of diversion of a user is greater than the credited natural flow, the remainder is charged by the

Watermaster to the user's stored water supply, or lacking storage, the rate of diversion must be reduced.

In many years flood control regulation extends several weeks into the irrigation season. When Lucky Peak flood control releases are equal to or greater than the demand for irrigation water (all users are receiving an adequate supply), the entire release is considered surplus to the Boise River and the above computation of natural flow diversion by user is not necessary. During this period, no charges are made against stored water supplies.

Id. Simply stated, in some years when flood control releases are being made after the start of the irrigation season, the water so released may be used under the natural flow water rights. This is not inconsistent with the above-statement from the **Recommendation** which states that such flood-control released water is not used under the "irrigation from storage" component of the existing storage rights.

The **Recommendation** also states that "[in] years that the amount of water produced in the Boise River drainage upstream from the Boise River Reservoirs exceeds the volume of water that may be stored under the existing storage rights, such excess water must necessarily be released downstream during the non-irrigation season with no beneficial use being made thereof." *Id.* at 27. This statement is true for the majority of water that is released for flood-control purposes; with the exception being that in some years there is some overlap between the time of year when such flood control releases are being made and the irrigation season. This Special Master recognizes that there is such an exception. The State has not made clear however, what bearing this exception has on the "threshold" question of whether the water right claims represented by the above-captioned water right numbers are for unappropriated water or whether such water was already appropriated under the existing storage rights.

In accordance with the foregoing, this Special Master declines to alter or amend the **Recommendation** in this regard.

F. There is no Dispute Regarding Whether the Boise River Dams Divert Water Out of River Channels.

The State argues that this Special Master erred by resolving the disputed issue of material fact about whether the dams on the Boise River do, or do not, divert water out of

the natural river channel. The problem with the State's argument is that there is no such disputed issue of material fact. The statement in the *Recommendation* that the State takes issue with follows a quotation from the *Affidavit of Robert J. Sutter* (filed July 2, 2015) at ¶ 19. In his *Affidavit*, Engineer Sutter explains the difference between a direct diversion (i.e. a canal or other riverbank-side diversion) as compared to the dams for the Boise River Reservoirs. Engineer Sutter states that it can be assumed that all of the water diverted by a direct diversion is diverted for beneficial use, but this assumption does not apply to the Boise River Reservoir dams because, among other things, the diversion works do not limit the flow of water to the volume of water that may be stored for beneficial use. This Special Master was simply elaborating on what engineer Sutter said by pointing out that in the case of a dam and reservoir that is located in the river channel, all of the water that comes down the river channel must necessarily pass through the reservoir and dam, and therefore such water consists of water that is authorized to be stored pursuant to the existing storage rights and water that is not authorized to be stored under the existing storage rights (under conditions where the amount of water exceeds the quantity storable under the existing storage rights). Yes, there is a diversion structure (the dam) and yes water is diverted for purposes of Idaho water law. But because the diversion structure is not designed to take some water out of the channel and leave some water in the channel, all of the water that comes down the channel must pass through the diversion. All of the water that leaves the reservoir does so via the natural river channel (with the exception of seepage and evaporation). Hence, while the dams divert the water, the water does not leave the confines of the natural channel. There are no disputed facts in this regard, and again the State has failed to demonstrate how the error it alleges has a bearing on the threshold question of whether the water right claims represented by the above-captioned water right numbers are for unappropriated water or whether such water was already appropriated under the existing storage rights.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

G. There is not a Disputed Factual Question Regarding Whether Water has Historically Been Stored in the Boise River Reservoirs Following Flood-Control Releases.

The State alleges that this Special Master improperly resolved a disputed factual question by stating that the *Director's Report* for the above-captioned subcases is premised upon "historic practice" being the legal basis for the storage of the water after flood control releases, which implicitly means that the Director has determined that such water has not historically been stored under the authority of the existing storage rights. *State's Motion* at 14. There is not a factual dispute that water has historically been captured and stored in the Boise River Reservoirs following flood control releases. The dispute between the parties is in regard to the legal basis for the storage of such water. This Special Master did not resolve a disputed question of fact regarding the historic practice of capturing water in the Boise River Reservoirs following flood control releases.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

H. IDWR has Not Always Viewed the Storage of Water Following Flood-Control Releases as Occurring under the Legal Authority of "Historic Practice."

The State asserts that this Special Master improperly resolved a disputed question of material fact by stating in a footnote that "[t]he current view of the IDWR and the State appears to be a more recent development." *State's Motion* at 14, citing *Recommendation* at 21 n. 12. In its *Motion*, the State asserts that "since 1986, the 'maximum physical fill' of the reservoirs has never been the measure of the satisfaction [of] the existing reservoir water rights" *State's Motion* at 12. This Special Master has made the factual finding that during the time period relevant to the above-captioned water right claims (i.e. prior to the change in law in 1971), IDWR had the view that the water physically contained in the Boise River Reservoirs at the time of maximum physical fill was the water that satisfied the existing storage rights. The current view of IDWR, which is set forth in the *Director's Report*, is that some or all of the water in the

Boise River Reservoirs at the time of maximum physical fill (in an amount equal to the “unaccounted for storage” account) is not stored pursuant to the existing storage rights, but rather it is stored under the legal authority of “historic practice.” The State asserts that this change took place in 1986. There are evidentiary facts in the record to support this view. *See Cresto Aff.* ¶¶ 12, 13, 19, & 22. However, there are also evidentiary facts in the record that demonstrate this change did not take place in 1986. *See Sutter Aff.* ¶¶ 4, 5, 6, 13, 14, 20, and 21. Suffice it to say that the change took place sometime between 1986 and the present. The footnote complained of by the State was simply meant to acknowledge this discrepancy in the evidentiary facts, not resolve it. What is important to understand is that it does not matter whether the change took place in 1986 or 1996 or 2006; rather what is important is that prior to 1971 IDWR considered the existing storage rights to be satisfied by the water in the Boise River Reservoirs at the time of maximum physical fill. Any factual dispute regarding what took place after 1986 does not need to be resolved because it is immaterial to what took place before 1971.

I. It is Not Material Whether the Post-1986 Accounting Procedures Were or Were Not Operated in Accordance with the Premise that Water Physically Stored in the Reservoirs on the Date of Maximum Physical Fill is Water that was Stored Under the Existing Storage Rights

The State asserts that this Special Master improperly resolved disputed issues of fact by finding that the post-1986 accounting procedures are/were operated in accordance with the premise that the physical storage of water in the Boise River Reservoirs at the time of maximum physical fill is authorized by the existing storage rights. Nearly 30 years have come and gone since IDWR implemented the 1986 accounting system. The evidence in the record relative to the time period immediately following the transition in 1986 indicates that at that time the newly implemented accounting system was not intended to change the historical concept that the water stored in the Boise River Reservoirs at the time of maximum physical fill was stored pursuant to the existing storage rights. *See Affidavit of Robert J. Sutter* (filed July 2, 2015) ¶¶ 4, 5, 6, 13, 14, 20, & 21. However, this is not the present-day view of IDWR. *See Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) ¶¶ 12, 13, 19, & 22. The record in these subcases does

not pinpoint the exact time at which IDWR's historical view morphed into its current view. As explained by Engineer Sutter in his deposition testimony in subcase 63-3618, several changes have been made to the accounting system over the years. *Deposition of Robert J. Sutter, Volume II*, pp 188-191, attached as Ex. 19A to the *Fifth Affidavit of Michael C. Orr* (filed July 31, 2015).

This Special Master makes no factual findings regarding the exact nature of the transformation of the view of IDWR from its historical view that the water in the Boise River Reservoirs at the time of maximum physical fill was stored pursuant to the existing storage rights, to the present view that the water in the Reservoirs at the time of maximum physical fill in a year in which flood control releases were made is stored pursuant to historic practice. The statements complained of in the *Recommendation* were not intended to be findings of fact but rather an explanation that such a change has occurred. No specific factual findings need be made regarding any post-1986 transformation because it is not material to the resolution of the threshold issue on summary judgment. What is relevant and the factual finding that has been made is that prior to 1971, the view of IDWR was that the existing storage rights authorized the storage of the water in the Boise River Reservoirs at the time of maximum physical fill.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

J. The Recommendation Does Not Misinterpret or Misdescribe the Terms "Physically and Legally Available."

The State complains that the *Recommendation* improperly resolved disputed issues of material fact by misinterpreting and incorrectly describing the terms "physically and legally available." In the *Recommendation* this Special Master described the term "physically available" to mean "water that actually enters a particular reservoir, or water that would enter such reservoir but for being retained in an upstream reservoir."

Recommendation at 4. This statement cites to the *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) at ¶ 14. Therein Hydrologist Cresto states: "[T]he flows that the water right accounting program counts or 'accrues' towards the satisfaction or 'paper fill' of a reservoir water right is the quantity of natural flow determined to be physically

available for storage at the decreed point of diversion (the dam) under the priority of the reservoir's water right, or that would have been available but for being retained in an upstream reservoir." As to the term "legally available" this Special Master stated: "Legally available . . . means physically available water minus water that must be passed through the reservoir to satisfy a downstream senior water right and minus storage released from an upstream reservoir." *Recommendation* at 4. This statement again cites to the *Affidavit of Elizabeth Anne Cresto*, wherein Hydrologist Cresto states: "The amount of natural flow determined to be physically and legally available for storage under this approach cannot be determined by simply measuring a reservoir's inflows, because inflows can also include natural flow subject to senior downstream water rights, and/or storage released from an upstream reservoir(s)." *Affidavit of Elizabeth Anne Cresto* (filed July 21, 2015) at ¶ 15.

While this Special Master's descriptions of the terms "physically and legally available" do not use the exact same sequence of words as is used by Hydrologist Cresto, the State does not explain the exact nature of the misinterpretation or inaccurate description. Assuming *arguendo* that the *Recommendation* does misinterpret and inaccurately describe the concepts of "physically and legally available," the descriptions of these terms in the *Recommendation* was simply meant to familiarize the reader with the concepts and in no way can such descriptions be construed as resolving genuine issues of disputed material fact. Whatever these terms mean they became applicable in conjunction with the 1986 accounting system and hence are not relevant to the question of whether the water that is the subject of the above-captioned claims was unappropriated water prior to 1971.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

K. The Descriptions in the *Recommendation* of the 1986 Water Right Accounting Program are Not Factual Findings Regarding Disputed Issues of Material Fact.

The State argues that this Special Master improperly resolved disputed issues of material fact by describing the 1986 accounting system. The State does not explain what it perceives to be the error in the descriptions contained in the recommendation, nor does it explain the nature of the asserted dispute regarding the operation of the 1986 accounting system. Whatever the perceived error it is immaterial. The purpose of describing the 1986 accounting system in the *Recommendation* was to explain the basis of the State's argument that the existing storage rights authorize the storage of all water that is deemed to be legally and physically available until the accumulation of such water equals the quantity of the existing storage rights irrespective of whether such water must be released to maintain vacant reservoir space, and thereafter any water that is subsequently stored and accounted under the "unaccounted for storage" account is excess water to which no water right may attach. This Special Master is not aware of any material factual disputes about the way IDWR has operated its accounting system since 1986. If there were such a factual dispute it would not be relevant to the question of whether the water stored in the Boise River Reservoirs at the time of maximum physical fill prior to 1971 was or was not stored pursuant to the existing storage rights and hence whether it was subject to appropriation under the above-captioned constitutional water right claims.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

L. The Description in the *Recommendation* Regarding the 1986 Accounting System's Allocation of Water First to the "Existing Storage Right" Account and thereafter to the "Unaccounted for Storage" Account, and the Reason Therefor, is Not a Factual Finding Regarding a Disputed Issue of Material Fact.

The State argues that this Special Master improperly resolved a disputed issue of material fact by stating the following:

Because reservoir inflows are measured/calculated and attributed to one of these accounts [existing storage right account or unaccounted for storage] on a daily basis, such inflows necessarily have to be first attributed to the accounts for the existing storage rights. This is because the respective existing storage right accounts are limited by the annual volume of the water rights, whereas the “unaccounted for storage” account is unlimited. If water were attributed to the “unaccounted for storage” account first, there is nothing that would trip the accounting system to begin filling the existing storage right account.

Recommendation at 14. The above-statement is not a resolution of a disputed issue of material fact; rather it is an *a priori* observation that is self-evident based on a thing [in this case water] being attributed to two different accounts, one of which is limited and the other is unlimited. The filling of the limited account is what triggers the accounting system to begin filling the unlimited account. If the thing were first attributed to the unlimited account then nothing would ever be attributed to the limited account.

In accordance with the foregoing, this Special Master declines to alter or amend the **Recommendation** in this regard.

M. Natural Flow that is Physically Stored in the Reservoirs after Paper Fill is Attributed to the “Unaccounted For Storage” Account.

The State asserts that this Special Master improperly resolved a disputed issue of material fact by stating that after paper fill, the “legally and physically available” inflows that are stored in the Boise River Reservoirs are attributed to the “unaccounted for storage” account in the 1986 accounting system. This Special Master recognizes that calculation of “physically” available water may be different for water attributed to the accounts for the existing storage rights as compared to the calculation of water “physically” stored after paper fill. This Special Master also recognizes that the legal authority, as contemplated by IDWR, for the storage of paper fill water is different than the legal authority asserted for post-paper fill water (i.e. legally authorized storage under the existing storage rights as opposed to legally authorized storage under IDWR’s “historic practice” theory). Nevertheless, for purposes of resolving the issue presented by the Ditch Companies and the Boise Project on summary judgment, this distinction is not material. Therefore, while the description of exactly what water gets attributed to the

“unaccounted for storage” account may not have been as carefully crafted as might have been; the distinctions are without a difference.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

N. The Recommendation Did Not State that the Water District 63 Water Rights Accounting Program Allocates “Stored Water” to the Accounts for the Existing Reservoir Water Rights.

The State argues that this Special Master improperly resolved a disputed issue of material fact by “determin[ing] that the Water District 63 water rights accounting program distributes or allocates ‘stored water’ to the accounts for the existing reservoir water rights.” *State’s Motion* at 15. The State derives this allegation of error from a footnote on page 16 of the *Recommendation* that alerts the reader that the word “allocate” as used by Engineer Sutter describes two separate accounting procedures – one for the allocation of water under the water rights accounting program, and the other for the allocation stored water to the placeholders. *Recommendation* at 16, n. 10. Not only is there no factual dispute about this and certainly no resolution of a factual dispute, but the footnote does not even say what the State asserts. With regard to the two different connotations for the word “allocate” the footnote states in part: “One is the ‘allocation’ of inflows and/or stored water to the respective water accounts (i.e. ‘existing storage right’ or ‘unaccounted for storage’” *Id.* Calculated inflows are allocated to the existing storage right accounts, whereas stored water is allocated to the “unaccounted for storage” account. It is a stretch to construe the footnote complained of by the State as making a factual finding that stored water is allocated to the existing storage right accounts.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

O. The 1986 Water Rights Accounting System is Used to Account for the “Irrigation From Storage” Component of the Existing Storage Rights.

The State argues that this Special Master improperly resolved a disputed issue of material fact by finding that “the Water District 63 water rights accounting program administers or accounts for the ‘irrigation from storage’ component of the decreed reservoir water rights.” *State’s Motion* at 15. There are a couple of problems with the State’s contention regarding this matter. First, on the pages of the *Recommendation* complained of by the State, this Special Master was pointing out that the evidence in the record reveals that under the 1986 water rights accounting system, irrespective of whether the water physically stored in the Boise River Reservoirs is considered to be authorized pursuant to the existing storage rights or whether it is considered to be stored under the authority of historic practice, the beneficial use of the water is considered to be authorized under the “irrigation from storage” component of the existing storage rights. There is no dispute among the parties that the 1986 accounting system considers that the stored water that is subsequently beneficially used for irrigation (and other uses) is used under the “irrigation from storage” component of the existing storage rights. Hence, this Special Master’s statements in this regard can in no way be construed as resolving a disputed issue of material fact – improperly or otherwise.

Another problem with the State’s argument is that the record in these subcases absolutely and clearly demonstrates that the 1986 water rights accounting program is in fact used to account for the “irrigation from storage” component of the existing storage rights. In his *Affidavit*, Engineer Sutter states: “The water right accounting program is used to account for all Boise River natural flows and all Boise River diversions of natural flow and stored water, whether the diversion is a dam, a canal, or a pump.” *Affidavit of Robert J. Sutter*, ¶ 6 (emphasis added). The State cites to the *Affidavit of Elizabeth Anne Cresto* ¶¶ 11, 33 and the *Second Affidavit of Robert J. Sutter* ¶¶ 2-6 to show that the water rights accounting program is not used to account for the use of stored water from the Boise River Reservoirs under the “irrigation from storage” components of the existing storage rights. This Special Master has reviewed the citations offered by the State and can find nothing that refutes the above-quoted statement from Engineer Sutter. The *Memorandum* (Ex. C to her *Affidavit*) authored by Hydrologist Cresto also shows that the

water rights accounting program is used to account for the use of stored water under the “irrigation from storage” components of the existing storage rights. In the *Memorandum*, Hydrologist Cresto states: “The storage program is run to determine the total storage available to the individual spaceholder and the results are entered into the water rights accounting program.” *Affidavit of Elizabeth Anne Cresto*, Ex. C, p. 11 (emphasis added).

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

P. The Recommendation Does Not Resolve a Disputed Issue of Material Fact by Quoting a Definition of the Phrase “Day of Allocation.”

The State asserts that this Special Master improperly resolved a disputed issue of material fact by defining the phrase “day of allocation.” *State’s Motion* at 15. The *Recommendation* does explain what the day of allocation is by quoting from the *Affidavit of Tim Page*, which states: “[The day of allocation] is the day the reservoirs reached maximum physical fill and senior irrigation demand equals or exceeds inflow into the reservoirs and there is no more water available to put into storage.” The State would prefer to use the explanations of the “day of allocation” offered by Hydrologist Cresto, who supplies the record with two versions. The first states: “The ‘day of allocation’ is defined by three factors: (1) the physical storage in the reservoir system has stopped increasing; (2) the reservoir water rights have ‘filled on paper’; and (3) the ‘remaining natural flow’ at Middleton as calculated in the water rights accounting program has dropped to zero.” *Affidavit of Elizabeth Anne Cresto* ¶ 20. The other explanation offered by Hydrologist Cresto states that the day of allocation occurs “after: (1) the last day of reservoir accrual to reservoir rights has occurred in the water rights accounting; (2) diversion demand is equal to or greater than the available natural flow; and (3) the maximum physical total reservoir contents has occurred.” *Id.*, Ex. C at 11.

The exact nature or definition of the phrase “day of allocation” was not an issue in the motions for summary judgment filed by the Ditch Companies and the Boise Project, and hence this Special Master made no such findings of fact in this regard. However, for purposes of understanding the context of the dispute between the parties to the above-captioned subcases, it is important to have a basic understanding of the “day of

allocation.” If the precise nature and operation of the “day of allocation” were an issue in these subcases, then such a determination could not be made upon the factual record on summary judgment; rather testimony at trial would have to be heard from Hydrologist Cresto and Boise Project Manager Tim Page and whomever else might offer relevant evidence regarding the day of allocation. But there is no such factual issue that needs to be resolved in these subcases. Of the three different definitions quoted above, any one of them would suffice for a general understanding of what must occur before the water physically in the reservoirs is allocated among the spaceholders. The fact that this Special Master quoted one of the definitions and not the others cannot be construed as improperly resolving a disputed issue of material fact.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

Q. The Storage Allocation System is used to Allocate the Water Stored in the Boise River Reservoirs to Individual Spaceholder Accounts.

The State asserts that this Special Master improperly resolved a disputed issue of material fact by determining that “spaceholder storage allocations determined via the storage allocations program on the ‘day of allocation’ are determined solely on the basis of the amount of water physically in the reservoirs on the ‘day of allocation.’” *State’s Motion* at 15. The State derives this allegation of error from a footnote on page 16 of the *Recommendation* that alerts the reader that the word “allocate” as used by Engineer Sutter describes two separate accounting procedures – one for the allocation of water under the water rights accounting program and the other for the allocation stored water to the spaceholders. *Recommendation* at 16, n. 10. The footnote states in relevant part: “[T]he term [allocate] is used to describe the process of allocating the water stored in the reservoirs (whatever amount that may be) to the respective spaceholders.” The footnote does not contain the word “solely.” The State cites to the *Affidavit of Elizabeth Anne Cresto* to show that the statement in the footnote is incorrect. In her *Affidavit*, Hydrologist Cresto states: “On the day of allocation, the storage allocations program is used to allocate the water stored in the reservoir system to individual spaceholder accounts.” *Id.* at ¶ 21. This Special Master is unable to see the distinction between the

statement in the footnote and the statement in the *Affidavit* of Hydrologist Cresto, and the State does not explain the distinction. Assuming *arguendo* that this Special Master somehow imprecisely stated exactly what water is being allocated by the allocations program on the day of allocation, such imprecision is not material to the resolution of the issue presented in the motions for summary judgment filed by the Ditch Companies and the Boise Project. The above-captioned subcases do not present a disputed material question regarding the operation of the allocations program, and this Special Master made no factual findings in that regard.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

R. The Holding in the *Recommendation* does not Rely on a Factual Finding of whether the 1986 Accounting System does or does not Include an Adjustment that Occurs Contemporaneously with the day of Allocation.

The State asserts that this Special Master improperly resolved a disputed issue of material fact by stating that the water right accounting procedures in place since 1986 include an adjustment or “retrospective accounting [occurring contemporaneously with the day of allocation] necessary for the accounting system to recognize that the water that is put to beneficial use is the water that is physically stored in the reservoir on the day of maximum physical fill” *Recommendation* at 16. During the course of these proceedings the State has attempted to demonstrate its view of the nature of the existing storage rights (i.e. that they are for all physically and legally available water irrespective of whether such water may actually be stored given the flood control mission of the Boise River Reservoirs) by showing how such water rights have been accounted for by IDWR since 1986.⁶ The statement complained of by the State attempts to show that the State is not looking at the entire “accounting” picture. The evidence in the record has numerous references that demonstrate under the 1986 accounting system the water actually stored in the reservoirs at the time of maximum physical fill is allocated to the existing storage

⁶ As explained above in Section II. A., another problem with the State’s argument in this regard is that the implications of the post-1986 accounting system would have to be retrospectively applied to the period prior to 1971.

rights. *See, e.g. Affidavit of Robert J. Sutter* ¶¶ 20-21. Indeed the State's own argument demonstrates this point. Specifically, the State has repeatedly argued that the above-captioned claims must fail because the claimants cannot carry their burden of demonstrating beneficial use of water above and beyond the amount used pursuant to the existing storage rights. *See, e.g. State's Motion* at 16. In other words, the State argues that the beneficial use of the water in the Boise River Reservoirs can only occur under the existing storage rights irrespective of whether the storage of such water was authorized under a legal theory of "historic practice." The logical extension of this argument is that the water stored under the authority of "historic practice" must at some point be converted to water beneficially used under authority of the existing storage rights.

But the holding in the *Recommendation* does not rely on a factual finding of whether the 1986 accounting system does or does not include an adjustment that occurs contemporaneously with the day of allocation whereby "historic practice" water is recognized to be "existing storage right" water. The *Recommendation* specifically states that the accounting system does not define the existing storage rights. *Id.* at 16. At oral argument on the *State's Motion* counsel for the State agreed that the accounting system does not define the water rights.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

S. The Accounting System Utilized by IDWR does not Define the Existing Storage Rights.

The State argues that this Special Master improperly resolved a disputed issue of material fact by "determin[ing] that the accounting an allocation procedures on the 'day of allocation' are intended to ensure that the annual volume limits of the decreed reservoir water rights are not exceeded, and the water physically in the reservoirs is designated as having been stored under the priorities of the decreed reservoir water rights." *State's Motion* at 16, citing *Recommendation* at 15-16. It should be noted that the *Recommendation* says nothing about what IDWR "intends" for the accounting system to do or not do. Rather the *Recommendation* simply points out that the description provided by Engineer Sutter as to how the accounting system works includes

several statements to the effect that after maximum reservoir fill the water physically stored in the reservoirs, including “unaccounted for storage” is allocated to the reservoir storage rights. *See Affidavit of Robert J. Sutter ¶¶ 20-21.*

But as stated above, the holding in the *Recommendation* does not rely on a factual finding of whether the 1986 accounting system does or does not include an adjustment that occurs contemporaneously with the day of allocation whereby “historic practice” water is recognized to be “existing storage right” water. The *Recommendation* specifically states that the accounting system does not define the existing storage rights. *Id.* at 16. At oral argument on the *State’s Motion* counsel for the State agreed that the accounting system does not define the water rights.

In accordance with the foregoing, this Special Master declines to alter or amend the *Recommendation* in this regard.

III. ORDER

In accordance with the foregoing, the State’s and Suez’s *Motions to Alter or Amend* are **denied**.

Dated Feb 26, 2016



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTIONS TO ALTER OR AMEND was mailed on February 26, 2016, with sufficient first-class postage to the following:

BOISE PROJECT BOARD OF CONTROL
Represented by:
ALBERT P BARKER
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

PIONEER IRRIGATION DISTRICT
Represented by:
ANDREW J WALDERA
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

STATE OF IDAHO
Represented by:
CHIEF NATURAL RESOURCES DIV
OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720-0010
Phone: 208-334-2400

SUEZ WATER IDAHO INC
Represented by:
CHRISTOPHER H MEYER
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

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

SOUTH BOISE WATER COMPANY
THURMAN MILL DITCH COMPANY
Represented by:
DANIEL V STEENSON
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

SUEZ WATER IDAHO INC
Represented by:
MICHAEL P LAWRENCE
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

BALLENTYNE DITCH COMPANY
BOISE VALLEY IRRIGATION
CANYON COUNTY WATER COMPANY
EUREKA WATER COMPANY
FARMERS' CO-OPERATIVE DITCH CO
MIDDLETON IRRIGATION ASSN INC
MIDDLETON MILL DITCH COMPANY
NAMPA & MERIDIAN IRRIGATION
NEW DRY CREEK DITCH COMPANY
PIONEER DITCH COMPANY
SETTLERS IRRIGATION DISTRICT
SOUTH BOISE WATER COMPANY
THURMAN MILL DITCH COMPANY
Represented by:
S. BRYCE FARRIS
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

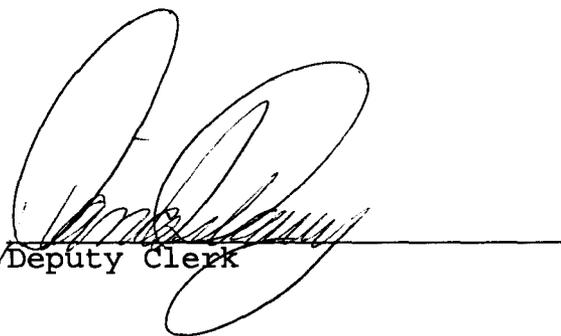
BOISE PROJECT BOARD OF CONTROL
Represented by:
SHELLEY M DAVIS
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

USDI BUREAU OF RECLAMATION

(Certificate of mailing continued)

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

A handwritten signature in black ink, appearing to be "D. J. [unclear]", is written over a horizontal line. The signature is stylized and cursive.