

No. 137, ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, Defendants

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

Wyoming's Motion in Limine to Exclude Evidence of Operational Decisions at the
Tongue River Reservoir for the Purpose of Determining Montana's Rights Under
Article V(A)

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The State of Wyoming, through counsel, moves for an order excluding evidence and argument at trial related to the voluntary operational decisions at the Tongue River Reservoir to bypass available water outside of the irrigation season for the purpose of determining Montana's rights under Article V(A) of the Yellowstone River Compact. In support of this motion, Wyoming states as follows:

Authority

Wyoming's motion to exclude this evidence is proper under Rule 17.2 of this Court's rules and Rules 402 and 403 of the Federal Rules of Evidence. In original jurisdiction cases before this Court, the Federal Rules of Evidence may be taken as guides. Sup. Ct. R. 17.2. The rules state that evidence is relevant if "it has a tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. If evidence is irrelevant it is inadmissible. Fed. R. Evid. 402. Relevant evidence can also be excluded if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Background

The State of Montana claims that Wyoming violated the Yellowstone River Compact in years when the Tongue River Reservoir did not fill to its current enlarged

capacity¹ because Wyoming post-1950 uses depleted available flow that could have been stored by the Reservoir. *See* Book Expert Rpt. at 9, 19. In support of this claim, Montana seeks to introduce evidence regarding the operational guidelines for the Tongue River Reservoir to justify its failure to store all the available water in the years at issue. *See* Smith Expert Rpt. at 10-17; Aycock Expert Rpt. at 7-16. This anticipated testimony will likely include:

- Over forty years after the adoption of the Yellowstone River Compact, the Northern Cheyenne Compact established a five-member Advisory Committee for the operation of the Tongue River Reservoir. Smith Expert Rpt. at 10; Aycock Expert Rpt. at 14. The Advisory Committee developed the Operating Plan for the Tongue River Reservoir to govern the enlarged reservoir under the Northern Cheyenne Compact. Smith Expert Rpt. at 15; Aycock Expert Rpt. at 14. Actual day-to-day Reservoir operations and releases are under the direction of the Tongue River Water Users Association. Smith Expert Rpt. at 13.
- The Operating Plan recommends that “[t]he minimum flow of the Reservoir during the winter low flow period, from Oct. 1 to Mar. 1, will generally be the inflow or 175 cfs, whichever is less.” *Id.* at 15. According to Mr. Aycock, the minimum bypass flow required is 75 cfs. Aycock Expert Rpt. at 17. While Mr. Smith asserts that the flows “need to be maintained at the historic levels, which are

¹ Obviously, only the reservoir's original pre-1950 capacity is protected by Article V(A) of the Compact, and this portion of Montana's claim is the subject of a separate motion by Wyoming.

higher than 175 cfs” Smith Expert Rpt. at 16. The flows are necessary to meet downstream stock watering needs under the Miles City Decree, minimize ice jams and damage to the river, and support fish and wildlife. *Id.*; Smith Depo. at 153-54; Aycock Expert Rpt. at 11-12.

- The Operating Plan also recommends a maximum winter storage of 45,000 acre-feet. Smith Expert Rpt. Attach. 1 at 21. “This winter maximum helps prevent damage to the riprap and embankment from wind-driven waves and ice,” *Id.*, and aims to “minimize freeze-thaw damage to the dam by allowing water to remain at the bottom of the concrete walls.” Aycock Expert Rpt. at 10. The maximum winter storage recommendation also serves flood control purposes. Smith Depo. at 72 (“[T]he best time to fill your project is after the peak of a flood or peak of your runoff has come through, so you can fill on the downward side. So when you are filling, you don’t end up routing a peak runoff event straight through your system.”).

Montana claims that the operational guidelines of the Advisory Committee and the decisions made by the Tongue River Reservoir’s operators are a part of the Reservoir’s pre-1950 water right which the Reservoir can continue to enjoy under the doctrine of appropriation under Article V(A) of the Yellowstone River Compact. Accordingly, Montana asserts that the determination of whether or not the Reservoir filled in any given year does not count any of the water that could have been stored in the Reservoir but for these operational guidelines and decisions. Montana is wrong as a matter of law, and it

cannot forego storage opportunities to the detriment of upstream junior appropriators in Wyoming. These foregone storage opportunities must be counted when determining if the reservoir filled, and evidence or argument related to these voluntary operational decisions is irrelevant to any issue in these proceedings. Accordingly, any such evidence should be excluded from the trial of this matter.

Discussion

Wyoming does not dispute that Montana and the operators of the Tongue River Reservoir have great discretion in managing the Reservoir. But when Montana invokes its rights under Article V(A) of the Compact, those rights are limited to the beneficial use of water under the doctrine of appropriation as beneficial use is defined in the Compact. These discretionary operational decisions, including significant portions of the winter bypasses and the maximum winter storage, are not beneficial uses under the Compact and are not made to satisfy actual water rights. Thus, they are not protected under Article V(A) of the Compact, and it would be a significant waste of trial time to take evidence on these irrelevant decisions.

The doctrine of appropriation requires that the Tongue River Reservoir defer storage for downstream senior water rights and *only* downstream senior water rights. *See Arizona v. California*, 283 U.S. 423, 459 (1931) (noting that vested rights to the appropriation of water are "subject only to the right of prior appropriations"). Senior water rights for stock watering with winter periods of use do exist downstream of Tongue River Reservoir. *See Smith Depo.* at 153-54. But, the stated purposes of the Reservoir's

minimum winter flow and maximum winter storage guidelines include non-beneficial uses such as flood control, river deicing, and instream flows for fish and wildlife. *See* Smith Expert Rpt. at 10-17; Smith Depo. at 72, 153-54. Because the doctrine of appropriation does not require the Tongue River Reservoir to deliver water for these purposes, the Reservoir is effectively donating its water for these other purposes. While the Tongue River Reservoir's operators may have good policy reasons for making the donations, the Yellowstone River Compact does not entitle the Reservoir to pass the bill for its charitable contributions onto Wyoming.

Article V(A) only protects Montana's right to continue to enjoy pre-1950 rights for the beneficial use of water under the doctrine of appropriation. The Yellowstone River Compact specifically defines "beneficial use" as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Art. II(H). "A "beneficial use" within the meaning of the Compact, therefore, is a *type* of use that depletes the water supply." *Wyoming v. Montana*, ___ U.S. ___, 131 S. Ct. 1765, 1778 (2011) (emphasis in original). Typically, these uses are evidenced by a water right authorizing the holder of the right to divert and consume a portion of the water in the river.

Operating the Tongue River Reservoir specifically to prevent ice jams in the river is not a "beneficial use" because it is not depletive. In fact, deicing adds water to the river to prevent ice buildup. Smith Depo. at 154. Moreover, deicing is not recognized under the doctrine of appropriation because it is not being made to satisfy a downstream

senior pre-1950 water right. Some amount of water is necessary to ensure that water is transported down to the pre-1950 stock watering rights. However, any amount greater than necessary to get water down the river to the place where the stock can consume it, is not protected by Article V(A) of the Compact. In this case the only quantification of the amount of water necessary to satisfy the pre-1950 stock watering rights was made by the Chief of the Montana Department of Natural Resources and Conservation Water Management Bureau in 1982, who found that only 50 cfs was required to satisfy these rights. *See* Hinckley Expert Rpt. at 7-8. Any evidence of bypasses in excess of this amount is irrelevant.

Moreover, operating the Tongue River Reservoir for flood control purposes is not a beneficial use under the Yellowstone River Compact. Managing the Reservoir to ensure that there is enough vacant space during the runoff to prevent peak flows from causing flooding downstream is not a depletive use. Rather, it sends water downstream during the winter when it is not put to beneficial use by any appropriator prior to entering the Yellowstone River. Similarly, maintaining instream flows for fish or wildlife habitat, whether under a water right or not, is also not a “beneficial use” under the Compact because leaving or releasing water in the river for fish habitat is not depletive. Moreover, any instream flow rights are post-1950 water rights which are not protected by Article V(A) in any event. Accordingly, evidence related to bypasses for these purposes is not relevant to Montana's claims that Wyoming breached Article V(A) of the Compact.

The same result follows from application of the one-fill rule, which has been adopted by the Supreme Courts of both Montana and Wyoming. *Wheatland Irr. Dist. v. Pioneer Canal Co.*, 464 P.2d 533, 540 (Wyo. 1970); *Federal Land Bank v. Morris*, 116 P.2d 1007, 1011 (Mont. 1941). That rule provides:

[t]hat the reservoir having the priority right is entitled to fill the same first from the flow of the stream to the full extent of the capacity of the appropriation made therefor. But having once during any one season filled such reservoir, a later appropriation or a subsequent reservoir may take the surplus of the water flowing in the stream, after the prior reservoir has been once filled.

Wheatland Irr. Dist., 464 P.2d at 540 (quoting 2 Kinney on Irrigation and Water Rights, § 845, p. 1484 (2d ed.)); *see also Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 98 P. 729, 733 (Colo. 1908); *Federal Land Bank v. Morris*, 116 P.2d at 1011. Thus, when the Tongue River Reservoir could have filled once, but it voluntarily released or bypassed some portion of the available water, a call on Wyoming to fill the evacuated space of the Reservoir amounts to an unlawful attempt to refill the Reservoir.

Recently in the Snake River Basin Adjudication, an Idaho district court explained how the doctrine of appropriation prohibits a storage right from refilling space vacated for flood control at the expense of junior appropriators. *See In re SRBA*, Case No. 39576, Basin-Wide Issue 7, Subcase No. 00-91017, at 7-10 (5th Dist. Idaho Mar. 20, 2013) (attached hereto as Exhibit A). The Idaho court's analysis is particularly applicable here and worth quoting at length:

The assertion that a senior storage right holder can “fill,” or “satisfy,” his water right multiple times under

priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law. Idaho's prior appropriation doctrine provides protections to both senior and junior appropriators through a system of priority administration. A senior appropriator's water right is protected under the doctrine against interference from those whose rights are subsequent in priority. *See e.g.*, Idaho Const., Art XV, § 3 (providing "[p]riority of appropriations shall give the better right as between those using the water"); I.C. § 42-106 ("As between appropriators, the first in time is first in right"). At the same time, a junior appropriator's water right is protected against wrongful acts on the part of senior appropriators that would disturb the junior's rights to the use of water. *See e.g.*, *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (providing that a senior may divert the quantity to which he is entitled, but once he has done so he may not impede a junior from receiving the water to which the junior is entitled). One leading scholar sets forth the proposition in the following terms:

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

Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 50 (1968).

Storage water rights are integrated into Idaho's prior appropriation doctrine on the basis of relative priority the same as other rights. *American Falls Reservoir Dist. No. 2*, 143 Idaho 878, 154 P.3d at 449; I.C. § 42-202. As soon as a senior storage right is filled it is no longer in priority. Allowing a storage right holder to refill his right under priority after his right is filled, but before affected junior right holders are satisfied, is impermissible as it would wrongfully

disturb the junior appropriators' rights to the use of water, *Van Camp v. Emery*, 13 Idaho at 208, 89 P. at 754, and would diminish the junior right holders' priorities. *See e.g., Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (providing, "[p]riority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder"). Simply stated, under Idaho's doctrine of prior appropriation a senior storage holder may not fill or satisfy his water right multiple times, under priority, before rights held by affected junior appropriators are satisfied once. A remark authorizing such priority refill would be contrary to Idaho law. The fact that water diverted and stored pursuant to a valid storage water right is used by the reservoir operator for flood control purposes does not alter the above analysis, *assuming, as the term "refill" necessarily implies, the storage right has already been filled once during the period of use under priority.*

See In re SRBA, supra, at 9-10. (emphasis in original) (footnote omitted).

In re SRBA demonstrates that the one-fill rule is part of the doctrine of appropriation, and therefore, part of Article V(A) of the Compact. The one-fill rule limits Montana's ability to call for Wyoming post-1950 rights to provide water to refill space in the Reservoir that Montana voluntarily vacated for non-beneficial uses. Accordingly, the introduction of evidence by Montana that it called on Wyoming to refill the Tongue River Reservoir is irrelevant, and should be excluded from these proceedings.

Conclusion

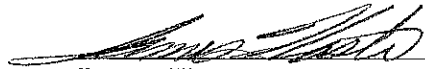
A claim by Montana that it can call for the regulation of Wyoming post-1950 water rights to replace water the Tongue River Reservoir could have stored but voluntarily released is clearly contrary to the law of the doctrine of appropriation and the Yellowstone River Compact. The doctrine of appropriation protects senior appropriators

and junior appropriators alike, and in this case, it is Wyoming that is entitled to protection from Montana's profligate winter bypasses. Any evidence Montana might attempt to introduce related to these bypasses or a maximum winter storage limitation is irrelevant to a determination of whether Tongue River Reservoir filled in a given year and would result in a waste of time at trial.

WHEREFORE the State of Wyoming requests that the Court exclude any evidence or argument offered by the State of Montana related to the voluntary operational decisions at the Tongue River Reservoir to bypass available water outside of the irrigation season for the purpose of determining Montana's rights under Article V(A) of the Yellowstone River Compact.

Dated this 24th day of September, 2013.

THE STATE OF WYOMING



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served by electronic mail and by placing the same in the United States mail, postage paid, this 24th day of September, 2013.

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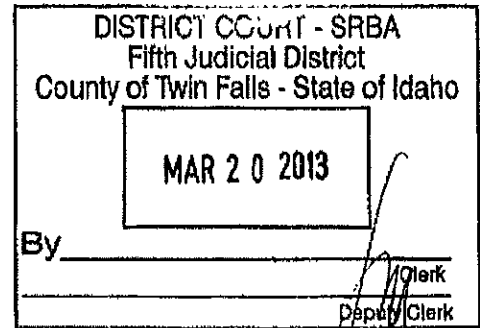
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA) Basin-Wide Issue 17
Case No. 39576) Subcase No.: 00-91017
)
) MEMORANDUM DECISION
)

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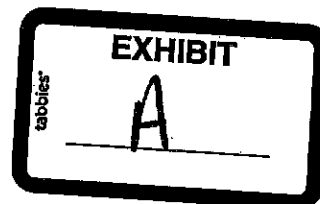
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I.

PROCEDURAL BACKGROUND

1. On June 8, 2012, the Black Canyon Irrigation District, New York Irrigation District, Pioneer Irrigation District, Nampa-Meridian Irrigation District and the Boise Project Board of Control filed a *Petition* pursuant to *SRBA Administrative Order 1, Rules of Procedure*, § 16, requesting that the Court designate the following issue as a basin-wide issue in the Snake River Basin Adjudication ("SRBA"): "Does Idaho law require a remark authorizing storage rights to 'refill' space vacated for flood control?"

2. Parties to the SRBA were provided notice of the *Petition* pursuant to Docket Sheet procedure and were given the opportunity to participate in the proceedings.

3. On September 21, 2012, following hearing, the Court entered an *Order* designating the following issue as Basin-Wide Issue 17: "Does Idaho law require a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control." Thereafter, the parties to the proceeding were given the chance to submit briefing.

4. Opening briefs were filed by the following parties: (1) the Idaho Power Company; (2) the United States Bureau of Reclamation; (3) the State of Idaho; (4) the Pioneer Irrigation District; (5) the Boise Project Board of Control and New York Irrigation District (collectively, "Boise Project"); (6) the Fremont-Madison Irrigation District, Blackfoot Irrigation District and Idaho Irrigation District (collectively, "Upper Valley Water Users"); (7) the American Falls Reservoir District No. 2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, "Surface Water Coalition"); and (8) the 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, Settlers Irrigation District, South Boise Water Company and Thurman Mill Ditch Company (collectively, "Ditch Companies").

5. Response briefs were filed by the following parties: (1) the Idaho Power Company; (2) the United States Bureau of Reclamation; (3) the State of Idaho; (4) the Pioneer Irrigation District; (5) the Boise Project; (6) the Surface Water Coalition; (7) the Ditch Companies; and (8) United Water Idaho, Inc.

6. Reply briefs were filed by the following parties: (1) the Idaho Power Company; (2) the State of Idaho; (3) the Pioneer Irrigation District; (4) the Boise Project; (5) the Surface Water Coalition; and (6) the Ditch Companies.

7. The City of Pocatello did not file briefing, but did file a *Statement* joining in the positions taken by the State of Idaho and the Upper Valley Water Users.

8. Oral argument on Basin-Wide Issue 17 was heard before this Court on February 12, 2013. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or February 13, 2013.

II. ISSUE

Does Idaho law require a remark authorizing storage rights to "refill," under priority, space vacated for flood control?

III.

BACKGROUND BEHIND DESIGNATION OF BASIN-WIDE ISSUE 17

Basin-Wide Issue 17 arose out of two contested subcases in Basin 01: subcase nos. 01-2064 and 01-2086. Those subcases concern storage water rights claimed in the SRBA by the United States Bureau of Reclamation in American Falls and Palisades Reservoirs respectively. In his *Director's Report, Reporting Area Basin 01, IDWR Part 2*, filed on December 19, 2006, the Director recommended the water right claims in the name of the United States with the following elements:

| Right | Source | Quantity | Priority | Purpose | Period of Use |
|---------|-------------|------------------|------------|--|---------------|
| 01-2064 | Snake River | 1,672,590.00 afy | 03/30/1921 | Irrigation Storage (1,628,316.00 afy) | 01/01 – 12/31 |
| | | | | Irrigation from Storage (1,628,316.00 afy) | 03/15 – 11/15 |
| | | | | Power Storage (295,163.00 afy) | 01/01 – 12/31 |
| | | | | Power from Storage (295,163.00 afy) | 01/01 – 12/31 |
| 01-2068 | Snake River | 1,200,000.00 afy | 07/28/1939 | Irrigation Storage (1,200,000.00 afy) | 01/01 – 12/31 |
| | | | | Irrigation from Storage (1,200,000.00 afy) | 03/15 – 11/15 |
| | | | | Power Storage (1,200,000.00 afy) | 01/01 – 12/31 |
| | | | | Power from Storage (1,200,000.00 afy) | 01/01 – 12/31 |

The United States subsequently filed *Objections*, asserting that the Director's recommendations should be amended to include the following remark under the quantity element: "This water right includes the right to refill under the priority date of this water right to satisfy the United States' storage contracts." *United States' Standard Form 1 Objection*, Subcase Nos. 01-2064 & 01-2068 (April 19, 2007).

The State of Idaho, which filed *Responses* to the *Objections*, disagreed with the United States' proposed storage refill remark. It proffered the following alternative remark to be placed on the face of the two water rights, arguing that it more accurately reflects Idaho law on storage refill:

This right is filled for a given irrigation season when the total quantity of water that has been accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.

State's *Motion for Partial Summary Judgment*, Subcase Nos. 01-2064 & 01-2068 (January 25, 2012). As a result of the remarks proposed by the United States and the State, a dispute arose in subcase nos. 01-2064 and 01-2068 over the state of Idaho law regarding the ability of a storage

water right holder to refill, under priority, water diverted and stored pursuant to a valid storage water right but which was used by the reservoir operator for flood control purposes.

As the parties to subcase nos. 01-2064 and 01-2068 litigated the issue within the confines of those subcases, other parties in the SRBA who are storage water right holders and/or reservoir spaceholders began to take note of the Basin 01 proceedings. Concerned over the ramifications the two subcases might have on their respective storage water rights, a group of interested parties filed the *Petition to Designate Basin-Wide Issue* with this Court. The *Petition* argued that the state of Idaho law as it pertains to the ability to refill, under priority, stored reservoir water vacated for flood control purposes is an issue of basin-wide significance.¹ After the Court entered its *Order* designating Basin-Wide Issue 17, subcase nos. 01-2064 and 01-2068 were stayed by the Special Master as they pertained to the issue of fill and refill of storage water rights.

IV. ANALYSIS

Whether Idaho law requires a remark authorizing storage rights to “refill,” under priority, space vacated for flood control is an issue of first impression. Resolution of the issue requires an analysis of the nature of storage water rights under the doctrine of prior appropriation as established in Idaho.

A. Nature of storage water rights.

Idaho law recognizes and provides for the appropriation of storage water rights. I.C. § 42-202. A storage water right entitles the appropriator to divert, impound and control water from a natural watercourse by means of a diversion structure such as a dam. The purpose of use element of a storage water right generally contains at least two authorized purposes of use.² The

¹ The remarks proposed and arguments set forth by the parties in subcase nos. 01-2064 and 01-2068 are not relevant to the instant basin-wide proceeding. Nor are the records from those subcases pertinent to this proceeding. The summary provided in Section III is included merely for context.

² This is not always the case. For instance, water right 63-3618 (storage water right for Lucky Peak Reservoir) includes a purpose of use for “Recreation Storage” which authorizes water to be stored, but does not contain a second associated purpose of use that the stored water be put to an end use. *SRBA Subcase No. 63-3618, Partial Decree* (Dec. 18, 2008).

first authorizes the storage of water for a particular purpose (i.e., “irrigation storage,” or “power storage”). The second authorizes the subsequent use of that stored water for an associated purpose, which is referred to herein as the “end use” (i.e., “irrigation from storage,” or “power from storage”). Each purpose of use is assigned its own quantity and period of use, which may or may not differ from one another.³ With respect to storage rights for irrigation, for example, it is typical for the “Irrigation Storage” purpose of use to be a year round use (01-01 to 12-31), and the “Irrigation from Storage” purpose of use to be limited to the irrigation season (e.g., 03-15 to 11-15).

Water diverted and stored pursuant to a storage water right need not be put to the end use immediately, but may be stored for a period of time prior to the end use:

There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

Rayl v. Salmon River Canal Co., 66 Idaho 199, 208, 157 P.2d 76, 80 (1945). Under certain circumstances, a storage water right holder may even carry over water diverted and stored in a given year into subsequent years before it is put to the end use. *See e.g., Id.* at 201, 157 P.2d at 77 (stating, the practice of holding storage water over from one season to the next “has become too well entrenched in the concept of our water law both by practice and prior and subsequent precept to be . . . denounced and forbidden”); IDAPA 37.03.11.042.01.g. (holder of a storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years).

Under Idaho law, “[o]ne may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right.” *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007); I.C. § 42-202. Therefore, storage water rights are integrated into Idaho’s prior appropriation doctrine on the basis of relative priority the same as other water rights. Once water is diverted and stored in a reservoir pursuant to a storage water right, it is no longer subject to diversion and appropriation,

³ See e.g., the Director’s recommended purpose of use element for storage water right claims 01-2064 and 01-2068, as set forth above in Section III.

but becomes property of the appropriators and owners of the reservoir. *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935).⁴ It follows that no one can make an appropriation from a reservoir “for the obvious reason that the waters so stored or conveyed are already diverted and appropriated. . . .” *Id.* at 389, 43 P.2d at 946.

Ownership of storage water rights has some unique characteristics. In some instances, the reservoir operator may own the storage water rights associated with a reservoir. In other instances, the reservoir operator may not. In the case of federal Reclamation Act reservoirs, the reservoir operator, the United States Bureau of Reclamation, holds the storage water rights associated with the reservoir in name, but title to the use of the water is held by the consumers or users of the water. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). However, for the purpose of this Court’s “refill” analysis, the distinctions between who operates the reservoir and who holds the storage water rights associated with the reservoir are distinctions without a difference.

B. Under the doctrine of prior appropriation as established by Idaho law, a senior storage water right holder may not “refill” his storage water right under priority before affected junior appropriators satisfy their water rights once.

A conflict exists in many of the reservoirs represented in this proceeding between water used by a reservoir operator for flood control purposes and water diverted and stored by storage right holders for all other purposes. The parties assert and recognize circumstances where water that has been diverted and stored in a reservoir pursuant to a valid storage right is used by the reservoir operator for flood control purposes before it is put to the authorized end use by the right holder. This is particularly problematic in reservoirs where there is an absence of any water right identifying “flood control” as an authorized purpose of use.⁵ In such instances, the entire storage capacity of the reservoir may be allocated via the issuance of storage water rights to water appropriated for other uses, such as “irrigation storage and irrigation from storage.” When a reservoir operator uses stored water for flood control purposes in such a reservoir he is using

⁴ A Storage right is still subject to other requirements of the prior appropriation doctrine. *American Falls Reservoir Dist. No. 2*, at 879, 154 P.3d at 450.

⁵ A review of the water rights associated with the reservoirs represented in this proceeding reveal that it is most often the case, if not unanimously the case, that no water right exists associated with these reservoirs that identify “flood control” as an authorized purpose of use.

water that was stored by a storage water right holder under state law for some other authorized purpose. The question presented to this Court is whether Idaho law permits a storage water right holder to “refill” that water used for flood control purposes under the priority of his storage right. The significance of this issue is understood in the reality that such priority refill may necessitate delivery calls and the curtailment of junior appropriators. Also, the fill in the first place may have occurred at the expense of juniors (i.e., in the instance where juniors are not allowed to use their water rights while the senior storage right is filling).

The parties have coalesced into two groups based on how they answer the subject question. The first group, referred to herein collectively as the “Petitioners”, includes the Idaho Power Company, the United States, the Boise Project, the Surface Water Coalition, and the Ditch Companies. The Petitioners assert that Idaho law permits a storage right holder to refill his storage right, under priority, when water diverted and stored under that right is used by the reservoir operator for flood control purposes. They assert the right to priority refill is inherent in the nature of a storage water right. Since they assert this is the state of Idaho law, it is their position that no remark is necessary on the face of a storage right to authorize such priority refill. The Petitioners contend that a storage right holder is entitled to put to the storage right’s end use that volume of water set forth in the quantity element of the right. If water diverted and stored under a storage right is used for flood control purposes by the reservoir operator, then it is the Petitioners’ position that the storage holder is entitled to refill that space, under priority, to ensure a sufficient quantity of storage water to complete the right’s end use.

The second group, referred to herein collectively as the “Objectors,” includes the State of Idaho, the Upper Valley Water Users, United Water Idaho, Inc., and the City of Pocatello. The Objectors assert that allowing a storage right holder to refill a storage water right under priority where water diverted and stored pursuant to that right is used by the reservoir operator for flood control purposes is contrary to Idaho’s doctrine of prior appropriation. Specifically, they assert that priority refill would (1) unlawfully result in an un-quantified water right, (2) constitute an unlawful enlargement of the storage water right, and (3) conflict with the requirement of maximizing beneficial use and minimizing waste of water. Therefore, the Objectors contend that any remark that authorizes storage refill, under the priority of the storage right, in excess of the licensed or decreed quantity would be contrary to Idaho law.

The term “refill” is not a legal term of art under Idaho law, but its common meaning is “to fill again.” *The American Heritage Dictionary of the English Language*, p.1467 (4th ed., 2000). The term “fill” means to “to satisfy or meet.” *The American Heritage Dictionary of the English Language*, p.659 (4th ed., 2000). Thus, the question whether a storage water right may be “refilled” under priority necessarily assumes that the storage water right has already been “filled” or satisfied once under priority as determined by the Department. The Court notes that the term “fill” may be used to describe (1) a reservoir physically filling with water, or (2) the decreed volume of a storage water right being satisfied (i.e. when the total quantity that has been accounted to storage equals the decreed quantity). The distinction between the two uses of the term is significant, as there may be situations where the storage water rights associated with a particular reservoir are considered filled or satisfied even though the reservoir has not physically filled with water. Many of the reservoirs implicated in this proceeding are administered as a unified system where storage space can be exchanged between reservoirs within the system. For example, Palisades Reservoir can be holding and storing water that is decreed to American Falls Reservoir. As a result, the storage water rights in a reservoir may be considered filled or satisfied even though available space may exist in the reservoir to which the right was decreed. Further, many storage right holders also hold natural flow rights that are used in conjunction with their storage rights.⁶ For the purposes of this opinion, the term “fill” or “filled” is used to describe the decreed volume of a storage water right being satisfied.

The assertion that a senior storage right holder can “fill,” or “satisfy,” his water right multiple times under priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law. Idaho’s prior appropriation doctrine provides protections to both senior and junior appropriators through a system of priority administration. A senior appropriator’s water right is protected under the doctrine against interference from those whose rights are subsequent in priority. *See e.g.*, Idaho Const., Art XV, § 3 (providing “[p]riority of appropriations shall give the better right as between those using the water”); I.C. § 42-106 (“As between appropriators, the first in time is first in right”). At the same time, a junior appropriator’s water right is protected against wrongful acts on the part of

⁶ Accordingly, the Department utilizes an accounting methodology for the purpose of determining when a storage water right has been “filled.” The methodologies employed by the Department for determining when a right has been filled are beyond the scope of these proceedings. In the *Order* designating the basin-wide issue this Court determined that the Department’s accounting methodology is an administrative function which should be addressed on a case-by-case basis on a fully developed factual record and where the Department is a party to the proceeding.

senior appropriators that would disturb the junior's right to the use of water. *See e.g., Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (providing that a senior may divert the quantity to which he is entitled, but once he has done so he may not impede a junior from receiving the water to which the junior is entitled). One leading scholar sets forth the proposition in the following terms:

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

Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 50 (1968).

Storage water rights are integrated into Idaho's prior appropriation doctrine on the basis of relative priority the same as other water rights. *American Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449; I.C. § 42-202. As soon as a senior storage right is filled it is no longer in priority. Allowing a storage right holder to refill his right under priority after his right is filled, but before affected junior right holders are satisfied, is impermissible as it would wrongfully disturb the junior appropriators' rights to the use of water, *Van Camp v. Emery*, 13 Idaho at 208 89 P. at 754, and would diminish the junior right holders' priorities. *See e.g., Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (providing, "[p]riority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder"). Simply stated, under Idaho's doctrine of prior appropriation a senior storage holder may not fill or satisfy his water right multiple times, under priority, before rights held by affected junior appropriators are satisfied once. A remark authorizing such priority refill would be contrary to Idaho law. The fact that water diverted and stored pursuant to a valid storage water right is used by the reservoir operator for flood control purposes does not alter the above analysis, *assuming, as the term "refill" necessarily implies, the storage right has already been filled once during the period of use under priority.*⁷

⁷ The Court notes that since this issue has arisen some reservoir storage right holders have filed motions to file late claims for separate beneficial use rights to address refill.

C. This basin-wide proceeding does not address the issue of when the quantity element of a storage water right is rightfully considered to be “filled” or “satisfied.”

Approaching the issue from the perspective of priority refill of a storage water right, which assumes a priority fill of that right has already occurred, misses the mark. It is the quantity element of a water right that defines the duration of priority administration during its authorized period of use. Thus, the more important issue pertains to when the quantity element of a storage right is considered filled. Namely, is water that is diverted and stored under a storage right counted towards the quantity of that right if it is used by the reservoir operator for flood control purposes? That is an accounting issue which this basin-wide proceeding does not address.⁸

As explained in the *Order Designating Basin-Wide Issue*, the issue of when a storage water right is filled does not lend itself to a basin-wide proceeding, and is not before the Court here. As an initial matter, addressing the issue of fill may require factual inquiries, investigation and record development specific to a given reservoir and the water right or rights associated with the reservoir. Addressing the issue of fill will require a record as to how the Department accounts for fill in each individual reservoir under its accounting methodology. Such fact specific inquiries do not lend themselves to review in a basin-wide proceeding.

Furthermore, the authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, the Idaho Department of Water Resources and its Director. Idaho Code § 42-103 provides that “it shall be the duty of the department of water resources to devise a simple, uniform system for the measurement and distribution of water.” Chapter 6, Title 42 of the Idaho Code governs the “distribution of water among appropriators” and directs that the Director and the watermasters under his supervision are statutorily charged with distributing water to water rights. In particular, Idaho Code § 42-602 vests in the Director, the “direction and control of the distribution of water from all natural water sources within a water district to canals, ditches, pumps and other facilities diverting therefrom.” Similarly, Idaho Code § 42-603 instructs that the Director is “authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other

⁸ The Court also notes that this basin-wide proceeding does not address claims (contractual, statutory, constitutional or otherwise), if any, a storage right holder or reservoir spaceholder may have against a reservoir operator where the reservoir operator uses water diverted and stored by that storage right holder or spaceholder for flood control purposes.

natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.”

The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs. The Director’s discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts. *See American Falls Reservoir Dist. No. 2*, 143 Idaho at 880, 154 P.3d at 451 (addressing court oversight on a properly developed record). When review of the Director’s discretion in this respect is brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.

D. This basin-wide proceeding does not address pursuant to what state law authority water that is diverted and stored pursuant to a valid storage water right is used for flood control purposes by the reservoir operator where no water right exists authorizing that use.

Idaho state law directs that “[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, *or apply it to purposes for which no valid water right exists.*” I.C. § 42-201(2) (emphasis added). That statute recognizes only two exceptions to this rule: (1) water used to extinguish or prevent the spread of an existing fire, and (2) water used for forest practices as defined in section 38-1303(1), Idaho Code, and forest dust abatement. I.C. § 42-201(3). The statute does not create an exception for flood control purposes. To the contrary, Idaho law recognizes that an appropriator may file an application with the Department to “appropriate and store flood ... waters.”⁹ I.C. § 42-202(3). However, the parties to this subcase did not address pursuant to what state authority water that is diverted and stored pursuant to a valid storage water right is used for flood control purposes by the reservoir operator (in either a federal or non-federal reservoir) where no water right exists under state law authorizing such use. Therefore the Court does not reach that issue. Likewise, whether or not federal law authorizes the use of storage water for flood control purposes in

⁹ The statute does not define “flood water.” However, in the context of water law the term has been used interchangeably with “excess water” and used to describe the circumstance where water in the system at a given time exceeds the quantity necessary to satisfy existing non-flood rights on the system.

federal reservoirs without a valid state water right or otherwise supersedes state law for this particular purpose is beyond the scope of this basin-wide issue.¹⁰

E. The Petitioners' reliance on state law providing that there can be no forfeiture if a water right holder is prevented from exercising his right by circumstances over which he has no control is misplaced.

In support of the argument that state law allows a storage right holder to refill his storage right, under priority, when water diverted and stored under that right is used by the reservoir operator for flood control purposes, the Petitioners cite to Idaho Code § 42-223(6). That statute sets forth defenses to forfeiture and provides in part that "no portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control." I.C. § 42-223(6). The Petitioners assert that in a reservoir where the storage water right holder or spaceholder is not the reservoir operator, the storage right holder or spaceholder has no control over the reservoir operator's use of stored water for flood control. However, this basin-wide proceeding does not deal with the forfeiture of storage water rights, and no assertion has been made that storage water rights are forfeited when water diverted and stored under a storage right is used for flood control purposes. Rather this proceeding is limited to whether Idaho law requires a remark authorizing storage rights to "refill," under priority, space vacated for flood control. That issue is addressed by this *Order*. Therefore, the statute on which Petitioners' rely is not applicable here.

V.

CONCLUSION

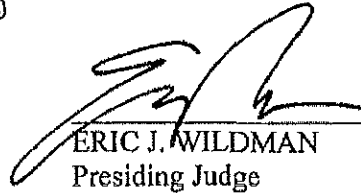
The Court holds that under the prior appropriation doctrine as established under Idaho law, a senior storage water right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights once. A remark authorizing such priority refill would be contrary to Idaho law. The fact that water diverted and stored pursuant to a valid storage water right is used by the reservoir operator for flood control purposes does not alter this analysis, *assuming, as the term "refill" necessarily implies, the storage right has been filled*

¹⁰ With respect to federal reclamation act reservoirs, the Idaho Supreme Court has held that "federal law defers to state law in determining the rights to water in the reclamation projects," and that "the [Reclamation] Act clearly provided that state water law would control in the appropriation and later distribution of the water." *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007).

once during the period of use under priority. The Court does not address the issue of whether water that is diverted and stored under a storage right is rightfully accounted towards the quantity of that right if it is used by the reservoir operator for flood control purposes. That issue is beyond the scope of this basin-wide proceeding and not before the Court here.

IT IS SO ORDERED.

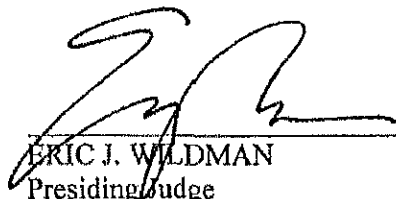
DATED: March 20, 2013


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: March 20, 2013


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

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ORDER

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ORDER

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DOES IDAHO LAW REQUIRE A
REMARK AUTHORIZING STORAGE
RIGHTS TO REFILL SPACE VACATED
FOR FLOOD CONTROL

ORDER

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FILE COPY FOR 91017

Deputy Clerk

A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is positioned to the right of the typed name "Deputy Clerk".