BEFORE THE UNITED STATE ARMY CORPS OF ENGINEERS

IN RE PROPOSED RULEMAKING UNDER 33 CFR PART 209	)	**STATE OF IDAHO'S COMMENTS ON RULE PROPOSED TO BE CODIFIED AS 33 CFR § 209.231**
DOCKET NO. COE-2016-0016	)	

INTRODUCTION

The State of Idaho ("Idaho") hereby submits comments on a new rule proposed by the U.S. Army Corps of Engineers ("Corps") that would be codified as 33 CFR § 209.231. 81 Fed. Reg. 91588 ("Rule"). The Rule would address the "use of [Corps] reservoir projects for domestic, municipal, and industrial water supply." *Id.* The Rule was published in the Federal Register on December 16, 2016, with comments due by February 14, 2017. *Id.* at 91556-90. Subsequently, the period for submitting comments was extended to May 15, 2017. 82 Fed. Reg. 9555 (Feb. 7, 2017).

The Corps must exclude the Idaho from the scope of the Rule because it is based on theories of the nature, extent, and administration of state water rights devised by the Corps that are incompatible with Idaho water law. The Corps was required by the McCarran Amendment, 43 U.S.C. § 666, to assert in Idaho's Snake River Basin Adjudication any claim or argument that federal law requires Idaho to adopt the Corps' theories of the nature, extent, and administration of water rights for the Corps' reservoirs. Having failed to do so, the Corps is now precluded as a matter of law from attempting to impose through the Rule a system of water rights and water administration that conflicts with Idaho water law. Alternatively, if Idaho is not excluded from the scope of the Rule, the Rule must be changed significantly to prevent interference with Idaho water rights and with the use, distribution, and development of Idaho's water resources pursuant to Idaho law.

BACKGROUND

The Rule would "update and clarify [the Corps'] policies governing the use of its reservoir projects for domestic, municipal, and industrial water supply pursuant to Section 6 of the Flood Control Act of 1944 and the Water Supply Act of 1958." 81 Fed. Reg. 91556. The Rule addresses "specific issues that have arisen most notably in the Corps' Northwestern and South Atlantic Divisions," but purportedly would apply "nationwide." 81 Fed. Reg. 91558-59.

The Corps has constructed four dam and reservoir projects in Idaho: (1) the Lucky Peak project on the Boise River (278,300 acre-feet); the Dworshak project on the North Fork of the Clearwater River (2,016,000 acre-feet); the Albeni Falls project at Lake Pend Oreille (1,155,000 acre-feet); and the Ririe project on Willow Creek in Eastern Idaho (100,500 acre-feet). 33 CFR § 222.5, App. E. The Corps operates the Dworshak, Lucky Peak, and Albeni Falls projects; the Ririe project is operated by the Department of the Interior's Bureau of Reclamation ("Bureau"). The Corps coordinates its operation of the Lucky Peak project with two upstream reservoirs operated by the Bureau: Arrowrock (272,000 acre-feet) and Anderson Ranch (474,900 acre-feet). *Water Control Manual For Boise River Reservoirs* (U.S. Army Corps of Engineers, Walla Walla Dist.) (Apr. 1985), at 1-3—1-4. Arrowrock and Anderson Ranch are subject to Corps flood control regulations. 33 CFR § 208.11(e).[1]

State water right claims for the Lucky Peak and Ririe projects were filed in Idaho's Snake River Basin Adjudication ("SRBA") by the Bureau, and water rights for these projects were decreed in the Bureau's name.[2] No water rights were decreed in the SRBA for Dworshak (the Corps filed "notices of water usage" for Dworshak in 2011, but subsequently withdrew them[3]). The Albeni Falls project is not within any pending or completed adjudication. The Corps has not filed water right permit applications for any of its Idaho projects. Idaho Code § 42-202.

Idaho's comments on the Rule pertain mostly to Idaho's concern that the Rule is based on theories of the nature, extent, and administration of state water rights that are incompatible with Idaho law. The Rule as proposed by the Corps would adopt a system of state water rights and water administration apparently devised by the Corps that would interfere with the development, use, and distribution of water resources under Idaho water law. The Rule thus would have

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[1] The Bureau's Palisades Reservoir in the upper Snake River basin is also subject to the Corps' flood control regulations. 33 CFR § 208.11(e).

[2] The SRBA was a general stream adjudication under the "McCarran Amendment," 43 U.S.C. § 666, and the United States was a party to the SRBA. *United States v. ex rel. Director, Idaho Dep't of Water Resources*, 508 U.S. 1 (1993); *Final Unified Decree, In Re SRBA Case No. 39576* (Idaho 5th Jud. Dist., Twin Falls County) at 4, 7. The SRBA included the Corps' Ririe, Lucky Peak, and Dworshak projects. A copy of the text of the SRBA's *Final Unified Decree* is attached hereto as **Exhibit 1**. The *Final Unified Decree* incorporates by reference the partial decrees for approximately 160,000 individual water rights (including those issued for the Lucky Peak and Ririe water rights), which were attached to the *Final Unified Decree*. *Final Unified Decree* at 10. The voluminous attachments to the *Final Unified Decree* are not included in Exhibit 1. Copies of the partial decrees for the Lucky Peak water right (water right no. 63-3618) and the Ririe water right (water right no. 25-7004) are attached hereto as **Exhibit 2.**

[3] Copies of the 2011 Dworshak filings are attached hereto as **Exhibit 3.**

"'substantial direct effects" on the State of Idaho and "the relationship between the national government and the [State of Idaho]," and "on the distribution of power and responsibilities among the various levels of government.'" 81 Fed. Reg. 91587 (quoting Executive Order 13132, "Federalism"). These concerns are particularly important in Idaho because the Corps is bound by the decrees and decisions issued in the SRBA, 43 U.S.C. § 666, and may not through the Rule require Idaho to adopt the Corps' theories of nature, extent, and administration of water rights for the Corps' reservoirs in Idaho.

DISCUSSION

I. THE RULE MAY NOT BE APPLIED IN IDAHO BECAUSE IT ADOPTS A THEORY OF STATE WATER RIGHTS THAT CONFLICTS WITH IDAHO LAW.

A. Uses of Water From Corps Reservoirs In Idaho Must Be Authorized By Water Rights Defined And Administered According To Idaho Law Rather Than According To The Corps' Theories Of State Water Rights.

The Corps is correct in stating that "withdrawals" from Corps reservoirs for domestic, municipal, and industrials ("DMI") uses pursuant to Section 6 of the Flood Control Act of 1944 ("Section 6") and the Water Supply Act of 1958 ("WSA") must be "in accordance with State or other applicable law," 81 Fed. Reg. at 91559, and "consistent with a State water right." *Id.* at 91580-81. The Corps is also correct in stating that "whatever [state] water rights are necessary" to authorize the DMI uses must be obtained. *Id.* at 91563. The congressional policy declarations of the 1944 Flood Control Act and the WSA do not leave room for any other conclusions. *See* 33 U.S.C. § 701-1 ("Declaration of policy"); 43 U.S.C. § 390b(a) ("Declaration of Policy").

Under Idaho law, state water rights are required to divert and use the public waters of the state. Idaho Code § 42-201. Thus, any DMI use of water from the Corps' reservoirs in Idaho must be authorized by a water right issued pursuant to Idaho law, as the Corps recognizes. 81 Fed. Reg. at 91559, 91563, 91580-81.

The Corps does not recognize, however, that Idaho law defines the nature, extent, and administration of the state water rights necessary to authorize DMI uses of water from Corps reservoirs in Idaho. Rather, and as discussed in the following sections, the Corps through the Rule has adopted a theory of the nature, extent, and administration of state water rights that is fundamentally incompatible with Idaho law. The Corps is precluded from doing this by operation of 43 U.S.C. § 666, also known as the McCarran Amendment.

The McCarran Amendment waives the sovereign immunity of the United States in state court suits "for the adjudication of rights to the use of water of a river system or other source" and "for the administration of such rights," when "the United States is a necessary party." 43 U.S.C. § 666. The McCarran Amendment and its legislative history provide "[p]erhaps the most eloquent expression of the need to observe state water law." *California v. United States*, 438 U.S. 645, 678 (1978). The United States Supreme Court underscored this point by quoting from the Senate Report on the McCarran Amendment in the *California* decision:

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
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> . . . .
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> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

438 U.S. at 678-79 (quoting S.Rep.No. 755, 82d Cong., 1st Sess., 3, 6 (1951)) (underlining added).

Congress has never exempted the Corps from the McCarran Amendment, and has never authorized the Corps to promulgate rules interpreting the McCarran Amendment or excluding itself from the McCarran Amendment. The Rule cannot override the unambiguous language and intent of the McCarran Amendment, and cannot immunize the Corps from a McCarran Amendment lawsuit.

These principles are particularly important in Idaho. The SRBA was a general stream adjudication to which the United States was a necessary party and properly joined pursuant to the McCarran Amendment. *United States v. ex rel. Director, Idaho Dep't of Water Resources*, 508 U.S. 1 (1993). The SRBA encompassed the Corps' Ririe, Lucky Peak, and Dworshak projects, and adjudicated the water rights claimed (by the Bureau) for Lucky Peak and Ririe. The Corps made SRBA filings for Dworshak that the Corps styled as "notices of water usage," but withdrew them after the SRBA court interpreted them as "water right claims." [4] The SRBA's

[4] The Corps' 2011 Dworshak filings were standard SRBA forms entitled "Notice Of Claim To A Water Right Acquired Under State Law." The filings asserted a number of beneficial uses of water taking place at the Dworshak project (including power, irrigation storage, and domestic use uses), as well as other standards elements of water rights claimed under Idaho law. But in the captions the Corps crossed out the words "Claim To A" and "Acquired Under State Law," and replaced them with the word "Usage," thereby purporting to transform notices of "water

Final Unified Decree conclusively adjudicated all actual and potential claims for water rights antedating the commencement of the SRBA (1987), and disallowed all such claims that had not been decreed. *Final Unified Decree* at 9-10.[5]

Pursuant to the McCarran Amendment, the Corps is bound by all decisions and decrees of the SRBA court. Any argument or assertion that Section 6 or the WSA require that water rights for DMI uses of water from Corps reservoirs be defined or administered in any particular way could have and should have been raised in the SRBA. Having failed to make any such claims or arguments, the Corps may not through the Rule seek to impose in Idaho the Corps' theories of the nature, extent, and administration of state water rights. *See also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality."). Rather, the Corps must defer to Idaho law regarding the nature, extent, and administration of water rights for DMI uses of water from the Corps' reservoirs in Idaho.

B. The Corps' Theory Of The Nature And Definition Of State Water Rights Conflicts With Idaho Law.

While the Corps recognizes that state water rights may be necessary to authorize DMI uses of water from Corps reservoirs, the Rule purports to exempt the Corps from complying with any such requirement. The Rule states, in relevant part, that the Corps "shall not obtain water rights," but rather "[i]t shall be the responsibility of private water supply users to secure and defend any state water rights necessary to use water withdrawn from a Corps reservoir." 81 Fed. Reg. 91590; *see also id.* at 91559 ("users . . . bear the sole responsibility to acquire and defend any water rights necessary to make withdrawals, in accordance with State or other applicable law"); *id.*at 91563 ("it remains the sole responsibility of the water supply users . . . to obtain

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right claims" into notices of "water usage." **Exhibit 3**. While the Corps asserted its notices of "water usage" were not claims to "water rights," the filings nonetheless asserted the SRBA "should acknowledge the quantities of water referenced in the notice[s] and supporting documentation without purporting to alter, deny, or restrict such use and control of water." The general stream adjudication statutes of the Idaho Code authorize the filing and adjudication of water right claims (which may be based on either state or federal law), Idaho Code §§ 42-1409—42-1412, but do not authorize the filing or adjudication of "notices of water usage." The distinction between the Corps' claims to "water usage" and a claim to a "water right" was illusory in any event, because as discussed below an Idaho water right is by definition a right of "usage." The Corps withdrew its Dworshak filings after the SRBA court interpreted them as "water right claims." *Amended Order Granting Motion To Withdraw With Prejudice, In re SRBA Case No. 39576, Subcase Nos. 83-07017* [et al.] (Idaho 5th Jud. Dist., Twin Falls County) (Mar. 20, 2012). A copy of this order is attached hereto as **Exhibit 4**. The Corps had also filed SRBA claims in 1993, copies of which are attached hereto as **Exhibit 5**.

[5] **Exhibit 1**.

whatever water rights may be necessary"); *id.* at 91570 ("individuals or entities entering into surplus water agreements with the Corps must obtain and defend all necessary water rights"); *id.* at 91570 ("it is the responsibility of private water supply users to secure any state water rights necessary to withdraw water from a Corps reservoir"); *id.* at 91576 (stating that the Corps' role under the WSA does not include "obtaining water rights or permits on behalf of water supply users").

The Corps justifies this position on a theory of state water rights devised by the Corps. The Corps theorizes that it need not obtain water rights because the Corps does not itself use water for DMI purposes under Section 6 and the WSA, but rather simply "makes water in a Corps reservoir available for water supply use by others." 81 Fed. Reg. 91559; *see also id.* at 91562 ("makes storage available"); *id.* at 91576 ("the Corps' role under the WSA is limited to making storage available in its reservoir projects"); *id.* at 91581 ("merely makes its reservoir storage space available"). The Corps also theorizes that its reservoirs are a "source" of water, *id.* at 91563, and therefore users of water from Corps reservoirs would obtain and exercise "separately-derived water rights." *Id.* at 91559. The Corps further theorizes that it need not obtain state water rights because the Corps does not assert "title" to the water itself, and does not "sell" water, but rather executes contracts for water supply. 81 Fed. Reg. 91563-64, 91576, 91583.

These theories of the nature of state water rights are contrary to Idaho law. Under Idaho law, water rights to use reservoir water are not derived "separately" from reservoir operations, and water rights authorizing the use of water from a reservoir must be sought and obtained by the reservoir operator rather than the consumers and users of the water. Further, reservoirs are "storage facilities" rather than "sources," and the reservoir operator must obtain a state water right even if the reservoir operator is not asserting "title" to the water or "selling" it, but rather "contracting" for water supply. These points are discussed below.

1. <u>The Corps Must Obtain Idaho Water Rights For DMI Uses Of Water From Its Idaho Reservoirs Even If The Corps Does Not Use The Water.</u>

The Corps' theory of state water rights assumes that a reservoir operator must obtain a state water right only if the reservoir operator is also the user of the water. This assumption is contrary to Idaho law. Under Idaho law, water diversion and distribution entities (such as irrigation districts, canal companies, or reservoir operators) must obtain water rights to divert

water that they make available for use by others. *See* Idaho Const. Art. XV §§ 1, 4, 5, 6 (addressing water rights for "rental, sale, or distribution"); *Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 163, 219 P.3d 804, 810 (2009) ("The various water users in the District are not appropriators of the storage water. . . . The District is the appropriator of that water."); *id.* at 158 n.1, 219 P.3d at 805 n.1 (2009) ("The Irrigation District holds title to the storage water rights in trust for the benefit of landowners within the district"). While the water users obtain "title to the use" of the water provided to them from federal reservoirs as a matter of Idaho constitutional and statutory law, the underlying water right is issued in the name of the United States, acting through the agency that operates the reservoir or administers the contracts for reservoir water. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). Indeed, the state water right for the Corps' Lucky Peak project was decreed in the SRBA in the name of the United States, acting through the Bureau, even though the Bureau does not use the water encumbered by the water right.[6]

The *Pioneer* decision also disposes of the Corps' theory that water users can obtain "separately-derived water rights" for DMI uses of water from Corps reservoirs in Idaho. 81 Fed. Reg. at 91559. As discussed in the *Pioneer* decision, it takes the cooperative efforts of at least three different entities to perfect water rights for federal reservoirs under Idaho law: the reservoir operator, the water distribution entities that enter into contracts with the reservoir operator, and the actual users of the water.

> There is no dispute that the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities. Irrigation of the lands serviced by the irrigation districts was the basis upon which original water right licenses were issued. Without the diversion by the irrigation districts and beneficial use of water for irrigation purposes by the irrigators, valid water rights for the reservoirs would not exist under Idaho law.

Pioneer Irr. Dist., 144 Idaho at 110, 157 P.3d at 604.

Under Idaho law, there is no such thing as "separately-derived water rights" for the use of water from a reservoir. 81 Fed. Reg. at 91559. The diversion of the state's public waters into a reservoir and their subsequent application to beneficial use are inextricably intertwined, and any water right authorizing DMI use of water from a Corps reservoirs must be issued in the name of the Corps, and with a "remark" reflecting the roles and interests of the water distribution entities

[6] **Exhibit 2.** The same is true of the all the storage water rights decreed in the SRBA for federal reservoirs, including the Ririe project, which the Corps built and the Bureau operates. *Id.*

and the water users in the perfection and exercise of the water right. *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609.

The Corps' theory that water users must obtain "separately-derived water rights" for DMI use of water from Corps reservoirs, 81 Fed. Reg. at 91559, conflicts with Idaho law regarding the nature and definition of state water rights. In Idaho the Rule would introduce an entirely new and novel theory of state water rights devised by the Corps that cannot be reconciled with Idaho water law. This result contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 and WSA authority. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

Any argument or claim that Section 6 or the WSA contemplate or require that water users will obtain "separately derived water rights" for DMI uses from Corps reservoirs in Idaho could have and should have been raised in the SRBA, and is now precluded as a matter of law. *See, e.g., Final Unified Decree* at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987") [7]; 43 U.S.C. § 666 (waiving sovereign immunity in state suits for the adjudication or administration of "rights to the use of the water of a river system or any other source").

2. DMI Uses Of Water From Corps Reservoirs In Idaho Pursuant To Section 6 And The WSA Are Distinguishable From The Corps' Flood Control, Hydropower, And Navigation Operations.

The Corps asserts, in the "supplementary information" preamble to the text of the Rule, that the Corps need not obtain state water rights for DMI uses under Section 6 and WSA because the Corps "does not secure water rights" for its flood control, navigation, and hydropower operations. 81 Fed. Reg. 91563. Supplying water from a Corps reservoir for DMI uses, however, is not the same thing as operating the reservoir for flood control, navigation, and hydropower purposes.

[7] **Exhibit 1.**

While the Corps asserts that flood control, navigation, and hydropower operations as "nonconsumptive," 81 Fed. Reg. 91563, Reg. 91563, DMI uses of water are by definition "consumptive" beneficial uses. *See, e.g.,* Idaho Code § 42-202B (defining "consumptive use"). The Corps conceded this point in a 1957 hearing on the legislation that became the WSA, admitting that DMI uses are "consumptive" beneficial uses that are distinct from the operation of Corps projects for the "nonconsumptive" purposes of navigation, flood control, and hydropower.[8]

Moreover, Section 6 and the WSA do not authorize the Corps to operate its reservoirs for "purposes such as flood control, navigation, and hydropower" or "regulate navigation and navigable waters." 81 Fed. Reg. 91563. Rather, they authorize the Corps to supply water from its reservoirs for DMI uses. 33 U.S.C. § 708; 43 U.S.C. § 390b(b).[9] Further, the congressional policy declarations in the 1944 Flood Control Act and the WSA explicitly confirm Congress' intent that the Corps must defer to state water law and water rights with respect to questions of the allocating and distributing water for beneficial uses. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a). The plain statutory language contradicts the Corps' assertion that Congress intended to equate supplying water from Corps reservoirs for DMI use by others with the Corps' operations to "regulate navigation and navigable waters." 81 Fed. Reg. 91563.

Thus, the Corps' theory that it need not obtain state water rights for its "nonconsumptive" reservoir operations such as flood control, hydropower, and navigation has no bearing on the question of whether the Corps must obtain state water rights to supply water from its reservoirs for DMI uses. Even if the Corps is correct in its view that it need not obtain state water rights for its navigation, flood control, and hydropower operations,[10] under Idaho law the Corps must still obtain state water rights to supply water from its Idaho reservoirs for DMI uses.

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[8] *Hearings Before a Subcommittee of the Committee on Public Works, United States Senate, Eighty-Fifth Congress, 1st Session, on S. 497* (Feb. 5, 7, 15, & 25, 1957) at 50 (testimony of Major General Emerson C. Itschner, Chief of Engineers).

[9] The WSA is not codified under Title 33 (Navigation and Navigable Waters), but rather under Chapter 12 of Title 43 (Reclamation and Irrigation of Lands by Federal Government). Further, while Section 6 of the 1944 Flood Control Act is codified under Title 33, the act specifically provides that in western states such as Idaho, "[t]he use of water for navigation" at Corps projects "shall only be such use as does not conflict with any beneficial consumptive use, present or future." 33 U.S.C. § 701-1(b).

[10] The State of Idaho does not agree with the Corps' apparent argument that the federal power to regulate navigable waters means the Corps also has broad immunity from any requirement of obtaining water rights or complying with

The Corps' theory that its flood control, hydropower, and navigation operations mean that water users rather than the Corps must obtain water rights for DMI use of water from Corps reservoirs conflicts with Idaho law regarding the nature and definition of state water rights. In Idaho the Rule would introduce an entirely new and novel theory of state water rights devised by the Corps that cannot be reconciled with Idaho water law. This result contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 and WSA authority. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

Any argument or claim that Section 6 or the WSA contemplate or require that flood control, hydropower, and navigation operations will exempt the Corps from the requirement of obtaining state water rights to authorize DMI use of water from the Corps' reservoirs in Idaho could have and should have been raised in the SRBA, and is now precluded as a matter of law. *See, e.g., Final Unified Decree* at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987")[11]; 43 U.S.C. § 666 (waiving sovereign immunity in state suits for the adjudication or administration of "rights to the use of the water of a river system or any other source").

3. Under Idaho Law Reservoirs Are "Storage Facilities," Not "Sources."

The Corps' theory that it need not obtain water rights for DMI uses because Corps reservoirs are simply a "source" of water, 81 Fed. Reg. 91563, is also contrary to Idaho law. Idaho water rights are defined by "elements," including the "source" element. Idaho Code §§ 42-1411(2)(b), 42-1412(6). The "source" of reservoir water is not the reservoir itself, but rather the river or stream from which the water is diverted into the reservoir. *See* IDAPA 37.03.01.060.01.c (defining "Source of Water Supply" for water rights claims filed in a general stream adjudication under Idaho law). Federal reservoirs are not "sources" but rather "storage facilities." *Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604. These points are confirmed by

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Idaho state water law in operating its projects for flood control, hydropower, navigation, or any other purpose. The State of Idaho reserves its rights, positions, and arguments on this question.

[11] **Exhibit 1.**

the SRBA partial decree issued for the Corps' Lucky Peak project in Idaho, which identifies "Boise River" as the "source," and "Lucky Peak Reservoir" as the place of "storage."[12]

The Corps' theory that its reservoirs are "sources" of water rather than storage facilities conflicts with Idaho law regarding the nature and definition of state water rights. In Idaho the Rule would introduce an entirely new and novel theory of state water rights devised by the Corps that cannot be reconciled with Idaho water law. This result contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 and WSA authority. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

Any argument or claim that Section 6 or the WSA contemplate or require that Corps reservoirs in Idaho be viewed as "sources" of water rather than "storage facilities" could have and should have been raised in the SRBA, and is now precluded as a matter of law. *See, e.g., Final Unified Decree* at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987") [13]; 43 U.S.C. § 666 (waiving sovereign immunity in state suits for the adjudication or administration of "rights to the use of the water of a river system or any other source").

4. The Corps Must Obtain Idaho Water Rights For DMI Uses Of Water From Its Idaho Reservoirs Even If The Corps Simply Contracts For Water Supply Rather Than Asserting "Title" To The Water Or "Selling" It.

The Corps also theorizes that it need not obtain state water rights because in exercising its Section 6 and the WSA authority, the Corps does not assert "title" to the water itself and does not "sell" the water, but rather executes contracts for water supply. 81 Fed. Reg. 91563-64, 91576, 91583. The Corps also believes this fact distinguishes the Corps' water supply operations from those of the Bureau. *Id.* at 91564. This reasoning misunderstands both the nature of a water right in Idaho (and other prior appropriation states), and also federal reclamation law.

[12] **Exhibit 2.** Similarly, the SRBA partial decree for the Ririe project (built by the Corps but operated by the Bureau) identifies "Willow Creek" as the "source," and "Ririe Reservoir" as the place of "storage." *Id.*

[13] **Exhibit 1.**

An appropriative water right claimed or established under Idaho law is a right to *use* water, not own it. Idaho Const. Art. XV § 3; Idaho Code §§ 42-101, 42-202, 42-1409. The "title to the water itself," 81 Fed. Reg. 91564, is held by the State of Idaho:

> All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose,

Idaho Code § 42-101. Contrary to the Corps' theory of state water rights, a water right claimed or established under Idaho law does not imply or hinge upon "title to the water itself." 81 Fed. Reg. 91564. As the Idaho Supreme Court has explained:

> The state's ownership of the water that is the subject of the adjudication, is not before the SRBA court, nor is that ownership interest in any way diminished by the adjudication of claimants' rights. The proprietary rights to use water, which are the subject of the SRBA, are held subject to the public trust.

Joyce Livestock Co. v. United States, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) (quoting *Idaho Conservation League v. State*, 128 Idaho 155, 156-57, 911 P.2d 748, 749-50 (1995)). The water law of most western states is based on the same principle, as the United States Supreme Court explained in the *California* decision. 438 U.S. at 654 & n.9.

Thus, the fact that the Corps does not assert "title to the water itself" in exercising its Section 6 and WSA authority, 81 Fed. Reg. 91564, does not excuse the Corps from the requirement of obtaining state water rights in Idaho. To the contrary, this assertion simply confirms that in supplying water from its Idaho reservoirs for DMI use the Corps stands in the same place as any other reservoir operator under Idaho law—including the Bureau.

The Corps completely misunderstands federal reclamation law and Idaho water law in theorizing that under its Idaho water rights, the Bureau holds "title to the water itself." 81 Fed. Reg. 91564. Under both state and federal law, the Bureau simply holds the right to divert and store water that it provides to persons or entities that actually use the water—and it is the consumer or uses of the water, not the Bureau, that hold "title to the use" of the water. *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609[14]; *see also Ickes,* 300 U.S. at 94-95 ("Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners"); *Nevada v. United States*, 463 U.S. 110, 126 (1983) ("the Government is

[14] *See also* **Exhibit 2** (partial decrees issued in the SRBA for the water rights for the Lucky Peak and Ririe projects).

completely mistaken . . . that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit"). The Corps' theory that its water supply operations are legally distinguishable from the Bureau's reveals a fundamental misconception of federal reclamation law, of the water law of the western states generally, and of Idaho's prior appropriation doctrine in particular.

The mere fact that Section 6 and the WSA authorize the Corps to enter into "contracts" for water supply rather than "sell water," 81 Fed. Reg. 91563-64, 91576, 91583, also does not exempt the Corps from Idaho's requirement of obtaining a water right to provide water from its reservoirs for DMI uses. Contracting for water from a reservoir is the norm in Idaho. *See, e.g., Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609 ("The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations"); Idaho Code § 42-906 ("which amount may be fixed by contract"); Idaho Code § 42-915 ("When payment is made under the terms of a contract . . . the title to the use of said water can never be affected in any way by any subsequent transfer") (quoted in *Pioneer Irr. Dist.*, 144 Idaho at 114, 157 P.3d at 608).

Such contracts do not "sell" the water itself, because the water is the property of the State of Idaho. Idaho Code § 42-101. Rather, and like the water supply agreements contemplated in the Rule, such contracts set forth the terms and conditions of providing water from a reservoir to the consumers and users of the water. But as previously discussed, there must also be a valid Idaho water right authorizing the diversion and use of the water provided pursuant to the contracts.

The Corps' theory that it need not obtain state water rights for DMI uses of water from its reservoirs because the Corps does not assert "title" to the water and does not "sell" it, but rather "contracts" for it, conflicts with Idaho law regarding the nature and definition of state water rights. In Idaho the Rule would introduce an entirely new and novel theory of state water rights devised by the Corps that cannot be reconciled with Idaho water law. This result contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 and WSA authority. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also California*, 438 U.S. at 667-68

(referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

Any argument or claim that Section 6 or the WSA excuse the Corps from complying with Idaho's requirement of obtaining state water rights to provide water from its reservoirs for DMI uses pursuant to contracts could have and should have been raised in the SRBA, and is now precluded as a matter of law. *See, e.g., Final Unified Decree* at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987") [15]; 43 U.S.C. § 666 (waiving sovereign immunity in state suits for the adjudication or administration of "rights to the use of the water of a river system or any other source").

5. The Rule's Definition Of Domestic, Municipal, And Industrial Uses Is Contrary To Idaho's Authority To Define Beneficial Uses And Allocate Water Idaho Law.

The congressional policy of Section 6 and the WSA recognizes that the states have primary authority and control over the allocation of water for beneficial uses, including the use of water for "domestic, municipal, industrial, and other purposes." 43 U.S.C. §390b(a) (underlining added). The statutes authorize the Corps, however, to supply water only for domestic, municipal, and industrial uses—not for "other purposes" as well.

The Rule, however, defines domestic, municipal, and industrial uses to mean "*any* beneficial use" and "*all* uses of water" recognized by state law other than "irrigation." 81 Fed. Reg. 91569, 91575 (emphases added). The justifies this interpretation by asserting Section 6 and the WSA do not "clearly exclude other uses of water for agricultural or other purposes in accordance with State law," and "it does not seem reasonable to interpret" the statutes as precluding "agricultural purposes." *Id.* at 91569. The Corps also asserts that its broad interpretation of the statutory language is necessary to prevent interference with state water rights, *id.*, and to allow the Corps to "cooperate with State and local interests 'in developing water supplies for domestic, municipal, industrial, and other purposes.'" *Id.* at 91575 (quoting the WSA).

As an initial matter, the Corps is simply incorrect in asserting the statutory language "does not . . . clearly exclude" the use of water for "agricultural" or "other purposes." 81 Fed.

[15] **Exhibit 1.**

Reg. 91569. While the WSA declares that the states have "primary responsibility" in developing water supplies for both DMI uses "and other purposes," under Section 6 and the WSA the Corps is authorized to supply water for DMI uses alone; there is no authorization for "other purposes." 33 U.S.C. § 708; 43 U.S.C. § 390b(b). The statutory language thus directly answers the question of whether the Corps is authorized to supply water for uses other than DMI purposes: it is not. *See N.L.R.B. v. SW Gen., Inc.*, No. 15-1251, 2017 WL 1050977 at *10 (U.S., Mar. 21, 2017) (discussing "the interpretive canon, *expressio unius est exclusio alterius,* 'expressing one item of [an] associated group or series excludes another left unmentioned'") (italics and brackets in original) (citation omitted).

The WSA's legislative history confirms this conclusion. The WSA was enacted in 1958 under S. 3910, which also enacted the Flood Control Act of 1958. The legislation had been several years in the making, and involved hearings on previous versions of the legislation passed by Congress in 1956 and 1958 (H.R. 12080 and S. 497, respectively) but vetoed by the President.[16] The two vetoed bills were flood control acts to which had been added, at the request of the Corps, provisions to authorize the use of Corps projects for water supply purposes.[17] But while the Corps proposed the 1956 legislation should authorize water supply for any purpose the Secretary of the Army "considere[d] reasonable," and attempts were also made to include this language in the 1957-58 legislation, Congress never adopted it.[18] The bills that passed Congress authorized water supply at Corps reservoirs only for domestic, municipal and industrial purposes. This was also true of S. 3910, the bill that that the President finally approved. 72 Stat. 297, 319.[19]

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[16] *See* 104 Cong. Rec. 11094 ("This conference report is the result of about 4 years of very exhaustive studies and hearings . . . . This bill has been in process for more than 3 years and is the third bill which has been worked on by the committee.") (statements of Representatives Davis and Fallon) (Jun. 25, 1958).

[17] *See Hearings Before a Subcommittee of the Committee on Public Works, United States Senate, Eighty-Fifth Congress, 1st Session, on S. 497* (Feb. 5, 7, 15, & 25, 1957) at 56 (letter from the Assistant Director of the Bureau of the Budget to the Chair of the Senate Committee on Public Works); S. Rep. No. 168 (85th Cong., 1st Sess.) at 112 (same letter).

[18] S. Rep. No. 2784 (84th Cong., 2d Sess.) (Jul. 25, 1956) at 48; 104 Cong. Rec. 3424 (Mar. 11, 1958); *Hearings Before a Subcommittee of the Committee on Public Works, United States Senate, Eighty-Fifth Congress, 2d Session, on S. 3910* (May 16, 19, & Jun. 4, 1958) at 60; H.R. Rep. No. 2955 (Conference Report) (84th Cong., 2d Sess.) (Jul. 27, 1956); 102 Cong. Rec. 13777 (Jul. 27, 1956); H. R. Rep. No. 1588 (Conference Report) (85th Cong., 2d Sess.) (Mar. 31, 1958) at 21; 104 Cong. Rec. 5477 (Apr. 2, 1958).

[19] The majority of each of the three bills that Congress approved—H.R. 12080, S. 497, S. 3910—was flood control legislation. While H.R. 12080 and S. 497 did not segregate the water supply sections into a different title, this was done in S. 3910. In S. 3910 the water supply sections were segregated into "Title III—Water Supply," i.e., the "Water Supply Act of 1958."

In short, the plain language clearly limits the Corps to supplying water for DMI purposes, and the legislative history shows that Congress repeatedly declined to authorize uses for "any other purpose," including uses the Corps considered "reasonable." The Rule may not second-guess Congress by making judgments about whether this was a "reasonable" limitation, 81 Fed. Reg. 91569, and the Corps' interpretation of the DMI language as authorizing "*any* beneficial use" and "*all* uses of water" other than "irrigation," *id.* at 91569, 91575, is not entitled to deference. *See Kingdomware Techs., Inc. v. United States*, ___ U.S. ___, 136 S. Ct. 1969, 1979 (2016) ("we do not defer to the agency when the statute is unambiguous").

To the extent the Corps believes that "questions can arise as to what uses are covered" by the terms domestic, municipal, and industrial, 81 Fed. Reg. 91569, the congressional policy of Section 6 and the WSA requires the Corps to leave such questions to state law. The 1944 Flood Control Act declares Congress's policy of recognizing "the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." 33 U.S.C. § 701-1(a). The WSA declares Congress's policy of recognizing "the primary responsibility of the States and local interest in developing water supplies for domestic, municipal, industrial, and other purposes." 43 U.S.C. § 390b(a).

Further, and as the Corps specifically recognizes, "States define beneficial uses and water rights differently," and "what might constitute an irrigation use under the water rights allocation system of one State might be considered a public or domestic use under applicable systems in another State." 81 Fed. Reg. 91569. In Idaho, for instance, some irrigation is allowed under both "domestic" and "municipal" water rights. Idaho Code §§ 42-111, 42-202B(5)-(6). Further, some "commercial" use is allowed under a "municipal" water right, *id.* § 42-202B(6), even though water rights specifically for "commercial" uses are also recognized and allowed in Idaho. The congressional policy of the 1944 Flood Control At and the WSA does not allow the Corps—or any federal agency—to resolve such questions of state water law and water rights. As the United States Supreme Court recognized in the *California* decision, there is great variation in the nature of water resources issues across the nation, and likewise great variation in the state and local laws that developed to resolve these issues. 438 U.S. at 648-63. The policy of Congress has been to ensure that federal water legislation is understood as respecting and deferring to these distinctions rather creating a system of federal water law interpreted and applied by federal

agencies. *See id.* at 667-68 ("A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

The Rule by undertaking to resolve the "questions" the Corps perceives "as to what uses are covered" by the terms domestic, municipal, and industrial, 81 Fed. Reg. 91569, contravenes congressional policy and usurps the authority of the states to define the nature and extent of beneficial uses. While the Corps admits state "prerogatives" to make beneficial use determinations must be "protected," 81 Fed. Reg. 91560, the Corps' view of what constitutes domestic, municipal, and industrial uses conflicts with state prerogatives to determine what does—and does not—qualify as a DMI uses of the state's water. The Corps is correct that it must "cooperate" with states in developing DMI water supplies, *id.* at 91575, but such development is the "primary responsibility" of the states rather than the Corps. 43 U.S.C. § 390b(a). The states' determinations of what particular uses "are covered" by the DMI authorization, 81 Fed. Reg. 91569, are therefore controlling in "cooperative" DMI water supply developments in the various states.

The Rule by defining domestic, municipal, and industrial uses to also mean any other beneficial use recognized by state law other than "irrigation" conflicts with Idaho law and the sovereign authority of the State of Idaho to define beneficial uses of water under Idaho law. This result contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 and WSA authority. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

Any argument or claim that Section 6 or the WSA contemplates or requires that the terms domestic, municipal, or industrial be defined to encompass any beneficial use recognized by Idaho law other than "irrigation" could have and should have been raised in the SRBA, and is now precluded as a matter of law. *See, e.g., Final Unified Decree* at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987") [20]; 43 U.S.C. § 666

[20] **Exhibit 1.**

(waiving sovereign immunity in state suits for the adjudication or administration of "rights to the use of the water of a river system or any other source").

6. Idaho Law Does Not Authorize "Provisional" Water Rights And Limits "Temporary" Uses Of Water To One Year.

The Corps states that while the WSA should be used to accommodate "long-term and permanent water supply needs," Section 6 should be used to address water supply needs "provisionally, for as long as surplus water is available." 81 Fed. Reg. 91581; *see also id.* at 91561, 91566, 91574, 91571, 91574, 91581, 91582 (describing Section 6 water supply operations as "provisional," or as accommodating water supply needs "provisionally," for a "limited time," or in the "short-term"). The Corps' "policy" is that "surplus water" determinations will "normally" remain in effect for five years, and maybe longer. 81 Fed. Reg. 91570.

Idaho law does not contemplate or authorize water rights for the "provisional" or "short term" uses the Corps contemplates, however. 81 Fed. Reg. 91561, 91566, 91571, 91574, 91581, 91582. In Idaho "a water right is a property right," *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014), and the consumers and users of water supplied from a federal reservoir acquire "title to the use" of the water as a matter of Idaho constitutional and statutory law. *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609. An Idaho water right authorizing DMI use of water from a Corps reservoir could not simply be cancelled or terminated at the sole discretion of the Corps based on its determination that "surplus water" is no longer "available." 81 Fed. Reg. 91581.[21]

Further, while Idaho law authorizes applications for "temporary" water uses that "do not create a continuing right to use water," such "temporary" uses are limited to a period of one year, and a total volume of five (5) acre-feet. Idaho Code § 42-202A(5). The Rule, however, contemplates that "provisional" uses of "surplus water" under Section 6 will "normally" remain in effect for five years, and maybe longer, and presumably would consume considerably more than five acre-feet. 81 Fed. Reg. 91570.

[21] An Idaho water right can be subject to termination for non-use under forfeiture or abandonment principles. Idaho Code § 42-222; *Jenkins v. IDWR*, 103 Idaho 384, 647 P.2d 1256 (1982). If the Corps were to unilaterally forfeit or abandon an Idaho water right by declining to supply water for DMI purposes, the property interests of the "consumers or users" of the water would be implicated as a matter of Idaho constitutional and statutory law. *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609.

The Corps' theory of "provisional" water rights conflicts with Idaho law regarding the nature and definition of state water rights and "temporary" uses of water. In Idaho the Rule would introduce an entirely new and novel theory of state water rights devised by the Corps that cannot be reconciled with Idaho water law. This result contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 authority. 33 U.S.C. § 701-1(a); *see also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

Any argument or claim that Section 6 contemplates or requires "provisional" water rights for "surplus water" use of the type contemplated by the Rule could have and should have been raised in the SRBA, and is now precluded as a matter of law. *See, e.g., Final Unified Decree* at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987") [22]; 43 U.S.C. § 666 (waiving sovereign immunity in state suits for the adjudication or administration of "rights to the use of the water of a river system or any other source").

C. The Corps' Theory Of Administration Of State Water Rights Conflicts With Idaho Law.

The Corps' theory of state water rights assumes that the distinction between "natural flow" and "stored water" is irrelevant to the administration of water rights for DMI uses of water from Corps reservoirs, 81 Fed. Reg. 91558, 91565, 91567-68, 91571, and that the Corps has the authority to make the accounting determinations of when and how much water is available at a Corps reservoir for DMI use under state water rights. 81 Fed. Reg. 91562, 91580-81. The Corps' theory of state water rights also assumes under state law water distributions can be determined five years in advance through "coordination" between the Corps and state water administration officials. 81 Fed. Reg. 91570. These theories of state water rights administration conflict with Idaho law and are contrary to the State of Idaho's sovereign authority to allocate and distribute the public waters of the State in accordance with state water rights.

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[22] **Exhibit 1.**

1. Distributing Water Pursuant To Idaho Water Rights Requires Distinguishing "Natural Flow" From "Stored Water."

While the Corps reluctantly acknowledges the possibility of a difference between "natural flow" and "stored water," *see* 81 Fed. Reg. 91565 ("some withdrawals . . . could have been made from the river in the absence of a Corps project, and in that sense may not be dependent on reservoir storage"), the distinction is not abstract or theoretical in Idaho. It is fundamental to the definition of Idaho water rights and to distributing water pursuant to Idaho water law and water rights.[23]

"Natural flow" is water that is or would be present in a stream or river absent diversion, use, impoundment, or regulation of water. *See, e.g.,* IDAPA 37.02.03.010.07 ("Natural Flow. Water or the right to use water that exists in a spring, stream, river, or aquifer at a certain time and which is not the result of the storage of water flowing at a previous time."). A water right established under Idaho law authorizes the diversion and use of natural flow for specific purposes, including storage. *See, e.g.,* Idaho Code § 42-1411(c) ("storage"); *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) ("*AFRD2*") ("One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right").

The Director of the Idaho Department of Water Resources must distribute the available natural flow according to Idaho's prior appropriation doctrine, including the elements of Idaho water rights. Idaho Code § 42-602.[24] This includes distributing natural flow to reservoirs in

[23] The distinction between "natural flow" and "stored water" is well-established in Idaho statutes and decisions. *See, e.g.,* Idaho Code §§ 202(3) & (6), 42-240(6), 42-605, 42-610, 42-613A, 42-801, 42-802, 42-1763B, 42-1765A, 42-1737(a), 42-2211, & 42-4223 (distinguishing "natural" or "normal" flow from "stored" or "storage" water); *see also Nelson*, 148 Idaho at 159, 163 & n.1, 219 P.3d at 806, 810 & n.1; *In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 643–44, 648, 315 P.3d 828, 831–32, 836 (2013); *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 867, 154 P.3d 433, 438 (2007); *State v. Nelson*, 131 Idaho 12, 13, 951 P.2d 943, 944 (1998); *Weeks v. McKay*, 85 Idaho 617, 621, 382 P.2d 788, 790 (1963); *Application of Johnston*, 69 Idaho 139, 145, 204 P.2d 434, 438 (1949); *Bd. of Directors of Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461, 474 (1943) (Givens, J., dissenting); *Knutson v. Huggins*, 62 Idaho 662, 115 P.2d 421, 423–24 (1941); *In re Robinson*, 61 Idaho 462, 103 P.2d 693, 694 (1940); *Blaine Cty. Inv. Co. v. Mays*, 49 Idaho 766, 291 P. 1055, 1056 (1930); *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522, 523 (1929); *Vineyard v. N. Side Canal Co.*, 47 Idaho 272, 274 P. 1069, 1069 (1929); *Capital Water Co. v. Pub. Utilities Comm'n of Idaho*, 44 Idaho 1, 262 P. 863, 865 (1926); *Columbia Trust Co. v. Eikelberger*, 42 Idaho 90, 245 P. 78, 81-82 (1925); *Vineyard v. N. Side Canal Co.*, 38 Idaho 73, 223 P. 1072, 1073 (1923); *Boley v. Twin Falls Canal Co.*, 37 Idaho 318, 217 P. 258, 260–61 (1923) (distinguishing "natural" or "normal" flow from "stored" or "storage" water).

[24] The Director also supervises watermasters in performing this duty. Idaho Code § 42-602.

accordance with the elements of the storage water rights for the reservoirs. *See In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) ("The decrees give the Director a quantity he must provide to each water user in priority"). This duty is complicated by the inherent variability of the natural flow supply, and by the correlative relationship of senior and junior priority water rights under the prior appropriation doctrine: no water right can be administered in isolation from other water rights diverting from the same source. *See Nevada*, 463 U.S. at 140 ("[I]n the western States . . . each water rights claim by its 'very nature raise[s] issues inter se as to all such parties for the determination of one claim necessarily affects the amount available for the other claims.'") (citation omitted). It is also complicated by the fact that on-stream reservoirs result in a comingling of "natural flow" and "stored water," *Nelson v. Big Lost River Irr. Dist.*, 148 Idaho 157, 159, 219 P.3d 804, 806 (2009), but "stored water" is distributed according to contracts between the reservoir operator and the consumers or users of the water rather than according to state water rights.[25] *See* Idaho Code § 42-801 ("Distribution of Stored Water"); *Id.* §§ 42-901—42-916 ("Distribution of Water to Consumers").

This means that in distributing water in accordance with Idaho law, the Director "must determine the relative amounts of natural flow and storage water at the various diversion points on the river. If that determination is not made, an appropriator of the natural flow may receive some of the . . . storage water." *Nelson*, 148 Idaho at 163, 219 P.3d at 810. The "diversion point" for an on-stream reservoir in Idaho, *id.*, is the dam that spans the river and creates the reservoir.[26] Thus, under Idaho law, the Director is required to, and does, make daily determinations of how much "natural flow" is available at federal dams for storage and use under the storage water rights for those reservoirs. *See In re SRBA*, 157 Idaho 385, 388, 336 P.3d 792, 795 (2014) ("An on-stream reservoir alters the stream affecting the administration of all rights on the source. Accordingly, some methodology is required to implement priority administration of affected rights.").

The Corps' theory that the distinction between "natural flow" and "stored water" has no relevance for purposes of providing water from Corps reservoirs for DMI uses directly conflicts with Idaho law regarding the nature, extent, and administration of state water rights. In Idaho the

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[25] Stored water "'is impressed with the public trust to apply it to a beneficial use.'" *AFRD2,* 143 Idaho at 879, 154 P.3d at 450 (quoting *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935)).

[26] *See, e.g.,* "Point of Diversion" elements in the SRBA Partial Decrees for Lucky Peak and Ririe reservoirs. **Exhibit 2.**

Rule would introduce an entirely new and novel theory of water administration devised by the Corps that cannot be reconciled with Idaho water law. This result contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 and WSA authority. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

Any argument or claim that Section 6 or the WSA require Idaho water administration officials to ignore the fundamental distinction between "natural flow" and "stored water" for purposes of distributing water could have and should have been raised in the SRBA, and is now precluded as a matter of law. *See, e.g., Final Unified Decree* at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987") [27]; 43 U.S.C. § 666 (waiving sovereign immunity in state suits for the adjudication or administration of "rights to the use of the water of a river system or any other source").

2. The Rule's "Accounting Mechanisms" Provision Conflicts With Idaho Law And Idaho's Authority To Allocate And Distribute The State's Water Pursuant To State Water Rights.

The Rule provides that "appropriate mechanisms" of accounting "for actual storage usage *and* available water supply storage" will be included in the Corps' water supply agreements. WSA agreements. 81 Fed. Reg. 91589 (italics and underlining added). The Rule also purports to establish an accounting "principle" that "all inflows to and losses from the Corps reservoir are charged or credited proportionately to each water supply account." *Id.* Both of these provisions conflict with Idaho law governing the distribution of water pursuant to state water rights, and are contrary to Idaho's sovereign authority to determine the use, distribution and development of its water resources.

As previously discussed, under Idaho law and the McCarran Amendment the Corps must obtain Idaho storage water rights to authorize DMI use of water from its reservoirs in Idaho. An Idaho storage water right authorizes both the storage of water by a reservoir operator, and the subsequent beneficial use of the water by consumers or users. *AFRD2*, 143 Idaho at 878-79,

[27] **Exhibit 1**.

154 P.3d at 449-50; *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609; *BWI-17*, 157 Idaho at 389, 336 P.3d at 796. The "quantity" element of the storage water right defines how much water may be stored and applied to the authorized beneficial uses. *See BWI-17,*157 Idaho at 394, 336 P.3d at 801 ("The decrees give the Director a quantity he must provide to each water user in priority"). But contracts define the stored water entitlements of the individual consumers or users of reservoir water. *See Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609 ("in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations").

Thus, under Idaho law, and contrary to the Corps' theory, the Corps has no authority to determine the "water supply storage" available in a Corps reservoir for DMI use pursuant to a state storage water right. 81 Fed. Reg. 91589. The determination of how much water in the reservoir is available for DMI use pursuant to a state storage water right, rather, is a question of distributing water in accordance with Idaho's prior appropriation doctrine. Idaho Code § 42-602; *BWI-17*, 157 Idaho at 393-94, 336 P.3d at 800-01. The authority to make this determination lies with the Director of the Idaho Department of Water Resources, *id.*, not with the Corps. Further, as previously discussed, this determination must be made on an ongoing basis, and must take in account the natural flow supply and all other water rights on the river.

For the same reasons, the Corps' theory that "all inflows" to a Corps reservoir are to be "credited" as part of the water supply storage" available for DMI use under a state water right, 81 Fed. Reg. 91589, conflicts with Idaho law. At a Corps reservoir, the "inflows" constitute the entire flow of the river, but Idaho storage water rights are quantified in terms of a fixed number of acre-feet per year or "AFY," not in terms of "inflows." Idaho Code §§ 42-1411(2)(c); 42-1412(6).[28] Further, any "inflow" to a Corps reservoir that is encumbered by senior priority water right downstream may not be "credited" to the storage water right for the Corps reservoir; and none of the "inflow" may be "credited" to the storage water right once its annual volume limit has been reached. 81 Fed. Reg. 91589. The authority to determine which "accounting mechanism" to use for these purposes resides with the Director of the Idaho Department of Water Resources rather than with the Corps. *See In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) ("Which accounting method to employ is within the Director's discretion and the

[28] This is confirmed by the SRBA Partial Decrees for the Lucky Peak and Ririe storage water rights, which have decreed quantities of 293,050 acre-feet per year and 90,500 acre-feet per year, respectively. **Exhibit 2.**

Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method."). The Idaho Department of Water Resources ("IDWR") has implemented such accounting systems for a number of river systems in Idaho.[29]

The Rule by purporting to define the "accounting mechanism" for determining the "available storage supply" for DMI uses of water from Corps reservoirs in Idaho 81 Fed. Reg. 91589, impermissibly addresses a question of how water is distributed for beneficial uses pursuant to Idaho water law and water rights. Under Idaho law such matters are determined by the Director of the Department of Water Resources "in accordance with the prior appropriation doctrine" as established by Idaho law. Idaho Code § 42-602. The Rule by putting this determination in the hands of the Corps conflicts with the Idaho's sovereign authority to distribute water according to state water rights, and contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 and WSA authority. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

Any argument or claim that Section 6 or the WSA require Idaho water administration officials to account for the distribution of water according to the accounting "mechanisms" and "principle" of the Rule could have and should have been raised in the SRBA, and is now precluded as a matter of law. *See, e.g., Final Unified Decree* at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987") [30]; 43 U.S.C. § 666 (waiving sovereign immunity in state suits for the adjudication or administration of "rights to the use of the water of a river system or any other source").

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[29] Some water user organizations have raised administrative challenges to the accounting methodology for Water District 63, which includes the Boise River and the Corps' Lucky Peak project. These challenges are currently pending before the Idaho Supreme Court. This is the appropriate procedure and forum for raising and resolving such challenges. *In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014).

[30] **Exhibit 1**.

3. The Rule's "Coordination" Provisions Are Inadequate To Ensure That The Corps' Water Supply Operations Do Not Interfere With State Water Rights.

The Corps "acknowledges" that "the allocation of waters for beneficial use is a prerogative of the States, and that the Corps may not deviate from Congressional direction—in its existing practice, or under the proposed rule—by interfering with beneficial uses authorized by the States when it makes contracts for surplus water uses from Corps reservoirs." 81 Fed. Reg. 91567. In Idaho and many other western states, the determination of whether there is unlawful interference with beneficial use taking place under state water rights is a determination made by state water administration officials. *See* 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a) (recognizing the states' "interests and rights" and "primary responsibility" in "water utilization and control," and in "determining the development of the[ir] watersheds" and "water supplies for domestic, municipal, industrial, and other purposes.").

The Rule, however, purports to give the exclusive authority to make "non-interference" determinations to the Corps. *See* 81 Fed. Reg. 91563 ("Such [surplus water] contracts reflect the Corp's determination that the withdrawal of surplus water will not interfere with any then existing lawful use of water") (underlining added). The Rule seeks to limit the role of state water administration officials to a preliminary "coordination" meeting with the Corps before water supply operations begin. *See id.* at 91567 ("The proposed rule would require that before making surplus water determinations, the Corps will coordinate with States"). Moreover, the Corps' theory implausibly assumes that this preliminary "coordination" will "ensure" five or more years of non-interference with state water rights. *See id.* at 91570 (stating that "the Corps will coordinate with States . . . to ensure that surplus water uses . . . will not interfere" with any existing or future state water rights during "the period of the Corps' surplus water determination," which would "normally" be limited to five years, but could last longer). 81 Fed. Reg. 91570; *see also id.* at 91560 (stating the Rule requires "require[s] coordination before decisions are made . . . to ensure that State water rights prerogatives . . . are protected."); *id.*at 91565 (stating the Rule provides "for coordination of surplus water determinations" with States "to respect their prerogatives" and "to ensure that proposed surplus water withdrawals will not interfere with any then existing lawful uses.").

"Coordination" with the State before even beginning Section 6 water supply operations cannot "ensure" five-plus years of non-interference with existing Idaho water rights. The

determination of whether the Corps' reservoir water supply operations will interfere with existing Idaho water rights for five-plus years in advance cannot be made by simply reviewing a stack of water right decrees and licenses and discussing the Corps' plans with state officials. As previously discussed, distributing water and regulating diversions in accordance with state water rights and Idaho's prior appropriation doctrine is a day-by-day task that must take into account a changing natural flow supply and changing demands under state water rights of differing priority dates diverting at various locations along the river. The Corps' theory that all this can be determined five years in advance reveals a fundamental lack of understanding of the nature and administration of water rights under Idaho's prior appropriation doctrine. *See, e.g., A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 414, 958 P.2d 568, 571 (1997) ("Administering a water right is not a static business."). The Corps' theory also ignores the fact that "most conflicts between State and Federal law arise in the administration and operation of a project rather than in its planning or construction stage." 104 Cong. Rec. 5475 (Apr. 2, 1958) (citation omitted).

Moreover, the "coordination" approach obviously cannot "ensure" that Section 6 water supply operations will not interfere with <u>future</u> water rights that may be established under Idaho law—i.e., those that do not exist at the time of the "surplus water" determination but that may take effect during the 5+ year duration of such a determination. 81 Fed. Reg. 91570. The nature and extent of an Idaho water right is established through state licensing and adjudication procedures,[31] not through "coordination" with the Corps. "Coordination" meetings cannot make reliable advance determinations of whether Section 6 operations will interfere with state water rights that have not yet been permitted, licensed, or adjudicated.

For these and other reasons, the Rule is fundamentally flawed in assuming that determinations of whether the Corps' water supply operations will interfere with existing state water rights can be made for 5+ years in advance via a one-time "coordination" with state officials—much less that this procedure would "ensure" non-interference. 81 Fed. Reg. 91556, 91559, 91560, 91561, 91564, 91565, 91570. By limiting the role of state water administration officials to a preliminary "coordination" with the Corps, and precluding ongoing, real-time administration and regulation of the Corps' Section 6 water supply operations by state officials in accordance with state water law and water rights, the Rule conflicts with Idaho law regarding the

[31] *See* Idaho Code §§ 42-201—42-250; *id.* §§ 42-1401—42-1428.

distribution of water "in accordance with the prior appropriation doctrine." Idaho Code § 42-602.

The Rule's "coordination" framework would implement in Idaho a system of determining when, whether, and how much water is necessary to satisfy state water rights devised by the Corps that is incompatible with the nature, extent, and administration of water rights under Idaho law. This result contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 and WSA authority. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality.").

Any argument or claim that Section 6 or the WSA authorize the Corps rather than Idaho water administration officials to make determinations of whether the Corps DMI water supply operations interfere with state water rights, and/or that Section 6 and the WSA limit the authority of Idaho water administration officials to administer and regulate DMI uses of water from Corps reservoirs in accordance with Idaho law, could have and should have been raised in the SRBA, and is now precluded as a matter of law. *See, e.g., Final Unified Decree* at 9 ("This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987") [32]; 43 U.S.C. § 666 (waiving sovereign immunity in state suits for the adjudication or administration of "rights to the use of the water of a river system or any other source").

4. The McCarran Amendment Overrides The Rule's Provision That The Corps Shall Not Become A Party To Any Water Rights Dispute.

The Rule in addressing its "[r]elation to State . . . water rights" provides that the Corps "shall not . . . become, by virtue of any agreement executed pursuant to [Section 6 or the WSA], a party to any water rights dispute." 81 Fed. Reg. 91590. This blanket provision is contrary to the McCarran Amendment, which waives the sovereign immunity of the United States in state court suits "for the adjudication of rights to the use of water of a river system or other source" or "for the administration of such rights" when "the United States is a necessary party." 43 U.S.C. § 666.

[32] **Exhibit 1**.

Congress has never exempted the Corps from the McCarran Amendment, and has never authorized the Corps to promulgate rules interpreting the McCarran Amendment or excluding itself from the McCarran Amendment. The Rule cannot override the unambiguous language and intent of the McCarran Amendment, and the Corps cannot unilaterally immunize itself from a McCarran lawsuit. Pursuant to the McCarran Amendment, the United States was properly joined as party to the SRBA and is bound by its decisions and decrees. If an Idaho court deems the Corps to be a "necessary party" to a lawsuit for "adjudication" or "administration" of water rights decreed in the SRBA, then the Corps can be made a party to the lawsuit despite the Rule's contrary provision.[33]

II. THE RULE WOULD HAVE TO BE SIGNIFICANTLY CHANGED BEFORE IT COULD LAWFULLY BE APPLIED IN IDAHO.

For all of the reasons discussed to this point, the Rule as a matter of law may not be applied in Idaho, and the Corps must explicitly exclude Idaho from the scope of the Rule. The State of Idaho recognizes, however, that the Corps may elect to modify the Rule to avoid conflicting with Idaho law, rather than to exclude Idaho from the scope of the Rule. This subject is discussed in the sections below. By offering the comments below, the State of Idaho does not waive any of its legal rights, and expressly reserves all of its legal rights, arguments, claims, and defenses for purposes of this rulemaking proceeding, and for any other administrative or legal proceedings pertaining to the matters arising in this rulemaking proceeding.

A. The Rule Must Explicitly Recognize The Congressional Policy Of Deferring To State Water Law.

The Rule is a policy declaration. Most its provisions are categorized as "Policies," 81 Fed. Reg. 91589-90, and the Rule's asserted purpose is "to update and clarify [Corps] policies" governing use of its reservoirs for domestic, municipal, and industrial water supply purposes pursuant to Section 6 of the Flood Control Act of 1944, 33 U.S.C. § 708 ("Section 6"), and the Water Supply Act of 1958, 43 U.S.C. § 390b ("WSA"). 81 Fed. Reg. 91556. Conspicuously and inexplicably missing from the Rule, however, are the congressional declarations of the "policy" of Section 6 and the WSA. 33 U.S.C. § 701-1; 43 U.S.C. § 390b(a).

[33] Two other general stream adjudications are also pending in northern Idaho: the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") and the Palouse River Basin Adjudication ("PBRA"). Pursuant to the McCarran Amendment, these adjudications will be binding on the Corps when completed, and the Corps can be joined to any lawsuit for administration of the adjudicated water rights if the court determines the Corps is a "necessary party." 43 U.S.C. § 666.

a. Congressional Policy Requires Deference To State Water Law And State Water Rights When The Corps Exercises Its Water Supply Authority Under Section 6 And The WSA.

Section 1 of the 1944 Flood Control Act is a "Declaration of policy." 33 U.S.C. § 701-1. Section 1 "declare[s] [it] to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." *Id.* § 701-1(a). The first section of the WSA is also a "Declaration of policy." 43 U.S.C. § 390b(a). In this provision "[i]t is declared to the policy of Congress to recognize the primary responsibility of the States and local interest in developing water supplies for domestic, municipal, industrial, and other purposes." *Id.*

The intent of these provisions is plain. They were intended to ensure that when the Corps exercises its Section 6 and the WSA authority to supply water for domestic, municipal, and industrial ("DMI") uses, it will defer to state law with respect to "the development of the watersheds within [state] borders," "water utilization and control," and "developing water supplies for domestic, municipal, industrial, and other purposes." 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also* S. Rep. No. 1710 (85th Cong., 2d Sess.) (Jun. 14, 1958) at 132-33 ("The committee believes that [the Water Supply Act] prescribes a sound division of water-supply responsibility between the Federal Government and State and local interests by declaring it to be the policy of Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, and other purposes").

This conclusion is consistent with the Supreme Court's interpretation of the congressional "policy" of the 1944 Flood Control Act in the *California* decision. In that case the Court reviewed in detail "the consistent thread of purposeful and continued deference to state water law by Congress." 438 U.S. at 653. The Court determined this policy was motivated principally by congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality." *Id.* at 667-68. The Court quoted a previous decision in which the Court stated there are only "two limitations to the States' exclusive control of its streams—reserved rights, 'so far at least as may be necessary for the beneficial uses of the government property,' and the navigation servitude." *Id.* at 662 (quoting *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899)). The Court "was careful to emphasize" that outside of these two exceptions, "the State has total authority over its internal

waters. 'Unquestionably the State . . . has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the [river] be disturbed.'" *Id.* (quoting 174 U.S. at 709) (brackets and ellipsis in original). The Court interpreted the congressional "policy" of the 1944 Flood Control Act as confirming rather than undermining these principles. *Id.* at 678.[34]

The 1944 Flood Control Act goes even further in deferring to water law of the western states, eliminating or significantly circumscribing "the navigation servitude" exception to "total" and "exclusive" state control over consumptive beneficial uses of the state's water. *Id.* at 662. Part of the "policy" of the 1944 Flood Control Act is that "[t]he use for navigation" of waters arising in the States wholly or partly west of the ninety-eighth meridian "shall only be such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eight meridian, of such waters for domestic, municipal, stock water, irrigation, or mining purposes." 33 U.S.C. § 701-1(b).

These congressional policy directives reflect the fact that supplying water from a Corps reservoir for consumptive beneficial uses pursuant to Section 6 and the WSA is distinct from operations "to regulate navigation and navigable waters." 81 Fed. Reg. 91563.[35] The Corps may not exercise its Section 6 and WSA authority to supply water for DMI uses in ways that interfere with or usurp the states' authority to allocate water for consumptive beneficial uses under state water law and water rights.

The "supplementary information" that precedes the text of the Rule, 81 Fed. Reg. 91556-88, repeatedly confirms this principle. The Corps acknowledges that the allocation of water and water rights for consumptive beneficial uses is a core "prerogative" of the States that must be "protected." 81 Fed. Reg. 91560. The Corps also recognizes that "Congress did not intend for the Corps . . . to interfere with State . . . allocations of water when exercising its discretion under

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[34] In *California* the United States had argued that new legislative "directives" enacted after the 1902 Reclamation Act "'leave no room for state controls on the operation of a project or on the choice of uses it will serve.'" *California*, 438 U.S. at 677-78 (quoting the United States' brief). The Court rejected this argument, holding that subsequent enactments "have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives," and citing as an example Section 1 of the 1944 Flood Control Act. *Id.* at 678.

[35] In the congressional hearings on the legislation that became the WSA, the Corps agreed that domestic, municipal, and industrial uses are "consumptive" beneficial uses and distinct from the "nonconsumptive" beneficial uses involved in operating Corps reservoirs to regulate navigation and navigable waters. *See Hearings Before a Subcommittee of the Committee on Public Works, United States Senate, Eighty-Fifth Congress, 1st Session, on S. 497* (Feb. 5, 7, 15, & 25, 1957) at 50 (testimony of Major General Emerson C. Itschner, Chief of Engineers).

Section 6 or the WSA." 81 Fed. Reg. 91563; *see also id.* at 91564 ("[Section 6] does not authorize the Corps . . . to interfere with lawful uses of water"); *id.*at 91565 ("Congress expected that the Corps would use this authority to authorize withdrawals, consistent with state allocations of water for beneficial uses"); *id.* (referring to "Congress's intent that the Corps should make surplus water available when doing so would not . . . interfere with then existing lawful uses"); *id.* at 91567 ("The Corps acknowledges that . . . the Corps may not deviate from Congressional direction . . . by interfering with beneficial uses authorized by the States when it makes contracts for surplus waters from Corps reservoirs"); *id.* at 91569 (referring to "Congress's clear concern that uses of surplus water should not adversely affect any then existing lawful use"); *id.* at 91587 ("Congress did not intend for the Corps to interfere with State allocations of water when exercising its discretion under Section 6 or the WSA").[36]

The "supplementary information" also recognizes that in exercising its Section 6 and WSA authority, the Corps may not usurp states' authority to determine "how water supply needs should be satisfied within a region," to "allocate water rights," 81 Fed. Reg. 91563, or determine "the allocation of water for beneficial use." *Id.* at 91567; *see also id.* at 91564 ("The authority conferred under Section 6 does not involve . . . the issuance of water rights"); *id.* at 91575 ("the Corps does not allocate water rights"); *id.* at 91576 ("under the WSA, the Corps does not determine how water supply needs should be satisfied within a region, allocate water rights, or sell water. Nor does the Corps take on the role of a water distributer"); *id.* at 91580 ("the Corps does not determine or allocate water rights"); *id.*at 91581 (referring to "the basic principle that the Corps does not acquire, adjudicate, or allocate water rights when it accommodates water supply uses from its reservoirs").

The "supplementary information" further recognizes that "the Corps does not make judgments about beneficial uses of water, as that is the prerogative of the States." *Id.* at 91565; *see also id.* at 91567 ("The Corps does not determine beneficial uses; such determinations are made through water rights allocation systems"); *id.*at 91567 ("without interfering with state

[36] The Corps asserts that the Rule has been structured so that DMI withdrawals and releases "will not interfere" with lawful uses of water under state water rights. 81 Fed. Reg. 91565; *see also id.* at 91559 ("not interfere with State, Tribal, or other water rights"); *id.*at 91563 ("not expected to interfere with the prerogatives of the States to allocate water within their borders for consumptive use"); *id.*at 91566 ("to reaffirm the Corps' intention not to interfere with State . . . water rights"); *id.*at 91567 ("the Corps operates its reservoirs for federal purposes in a manner that does not interfere with beneficial uses of water under [state water right allocation] systems"). This assertion is incorrect in Idaho because, as previously discussed, it relies on theories of the nature, extent, and administration of state water rights devised by the Corps that directly conflict with Idaho law.

prerogatives to determine beneficial uses"); *id.*at 91569-70 (recognizing that the Corps must "respect the States' ability to define and allocate lawful uses within their boundaries"); *id.* at 91575 ("the Corps does not . . . determine what beneficial uses are made of water that is withdrawn from its reservoirs"); *id.* at 91580 ("determining beneficial use rights to water—that is the prerogative of the States").

The "supplementary information" specifically acknowledges that "withdrawals" from Corps reservoirs for DMI uses must be "in accordance with State or other applicable law," *id.* at 91559, and that "whatever [state] water rights are necessary" must be obtained. *Id.* at 91563; *see also id.* at 91580-81 ("a user may withdraw water from its allocated water supply storage, consistent with a State water right"); *id.*at 91570 (recognizing that State water resources agencies must "verify that the proposed surplus water withdrawals are consistent with applicable water rights").[37]

The "supplementary information" also confirms that the Rule is intended to implement the congressional policy of Section 6 and WSA. The Corps states that "[t]he overall intent of the proposed rule is to enhance the Corps' ability to cooperate with State and local interests . . . in a manner that . . . does not interfere with lawful uses of water under State law," 81 Fed. Reg. at 91556, and "[t]he proposed rule seeks to clarify the Corps' understanding of the Congressional intent behind Section 6 and the WSA." *Id.* at 91559.

> The proposed rule is intended to bring transparency and certainty to the Corps' contract practices under [Section 6 and the WSA] and to ensure those practices align with Congressional intent. Their goal is to enhance the Corps' ability to cooperate with State, Tribal, Federal, and local interested in facilitating water supply uses at Corps' reservoirs in a manner that is consistent with the authorized purposes of those reservoirs, and does not interfere with lawful uses of water.

Id. at 91585 (underlining added).

b. The Rule Does Not Include The Congressionally Declared Policy Of Deference To State Water Law And Water Rights.

The Rule as proposed by the Corps, however, does not explicitly state, recognize, or incorporate the policy declared by Congress in the 1944 Flood Control Act and again in the WSA. The Rule also downplays the federalism principle at the core of congressional policy: that

[37] For reasons previously discussed, the Corps' theory that obtaining state water rights is "the sole responsibility of the water supply users" is legally incorrect in Idaho, and precluded as a matter of law in Idaho pursuant to the McCarran Amendment, 43 U.S.C. § 666.

the states have "exclusive control" and "total authority" over the development, use, and distribution of their water resources, subject only to two narrow exceptions—federal reserved water rights and the navigation servitude. *California*, 438 U.S. at 662.[38] The failure to explicitly incorporate and reflect these policy principles in a Rule intended to update and clarify "policies," 81 Fed. Reg. 91556, means the Rule must be changed to specifically recognize and incorporate the congressional policy of Section 6 and the WSA.

c. The Rule's Description Of Its Relation To State Water Rights Is An Incomplete And Incorrect Gloss Of The Congressional Policy Of Deference To State Water Law And Water Rights.

The only acknowledgement of the policy of Section 6 and the WSA is a short paragraph at the end of the Rule addressing the Rule's "[r]elation to State . . . water rights." 81 Fed. Reg. 91590. This paragraph is essentially an afterthought that only partially acknowledges the congressional policy of deference to state prerogatives over the allocation of water for beneficial uses. It simply states that "the exercise by the Corps of authority under [Section 6 or the WSA] shall not adversely affect any then-existing State water rights." *Id.* The Rule then limits the effect of this minimal concession by requiring "private water supply users to secure and defend any [necessary] state water rights," and stating "[t]he Corps shall not obtain water rights" or become "a party to any water rights dispute." *Id.* This provision does not provide a complete or accurate description of the congressional policy stated in 1944 Flood Control Act and the WSA, particularly when compared to the expansive interpretations of that policy in the *California* decision, and even in the Corps' own "supplementary information."

Further, by referring to the Corps' "exercise" of its Section 6 and WSA authority, 81 Fed. Reg. 91590, the provision incorrectly implies that avoiding interference with state water rights is solely a matter of planning that has nothing to do with ongoing reservoir operations.[39] This is

[38] Rather, the Corps emphasizes its authority "to regulate navigation and navigable waters." 81 Fed. Reg. 91563 (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824) & *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940)). Operating a reservoir to regulate navigation and navigable waters is distinct from operating a reservoir to provide a supply of water for consumptive beneficial uses under state law, however; and Section 6 and the WSA authorize the Corps to supply water for certain consumptive beneficial uses rather than to regulate navigation and navigable waters. Further, the Corps' discussion of its navigation authority ignores the fact that Congress has forbidden the exercise of that authority from interfering with the "present or future" consumptive beneficial uses of water in western states such as Idaho. 33 U.S.C. § 701-1(b).

[39] *See* 104 Cong. Rec. 5475 (Apr. 2, 1958) ("most conflicts between State and Federal law arise in the administration and operation of a project rather than in its planning or construction stage") (quoting Official News Letter of the American Farm Bureau Federation of March 17, 1958).

because the only "exercise" of Section 6 and WSA authority addressed in the Rule is the making of preliminary "determinations" regarding whether "surplus" water exists or "storage may be included" in a Corps reservoir, and the executing of "agreements" under Section 6 and the WSA. *Id.* at 91589-90. The Rule does not address the Corps' performance of its contractual and statutory obligations to make storage "available" for withdrawal for DMI uses under Section 6 and the WSA—even though the "supplementary information" acknowledges that operational decisions are also an exercise of Section 6 and WSA authority. *See id.* at 91559 ("Section 6 and the WSA . . . authorize the Secretary of the Army to make Corps reservoirs available for water supply use"); *id.* ("the Corps makes water in a Corps reservoir available for water supply use by others." 81 Fed. Reg. 91559; *see also id.*at 91562 ("the Corps makes storage available"); *id.*at 91576 ("the Corps' role under the WSA is limited to making storage available in its reservoir projects"); *id.*at 91581 ("the Corps merely makes its reservoir storage space available").

While the Corps must operate its reservoirs to make water "available" for withdrawal or release for DMI uses, *see, e.g.,* 81 Fed. Reg. 91588 (recognizing that "making storage available for water supply" may require "changing the operations of an existing reservoir project"); *id.* at ("the report shall include an evaluation of any operational changes"), the Rule does not address this exercise of Section 6 and WSA authority. Day-to-day reservoir operations, however, are equally if not more likely to "adversely affect" state water rights than preliminary determinations and agreements, as even the Corps recognizes. 81 Fed. Reg. 91590; *see also id.* at 91557 ("the Corps' operation of its reservoir projects in connection with water supply has come under increased scrutiny"); *id.* at 91587 ("the Corps endeavors to operate its projects . . . in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State authorities"); *id.* at 91558 (referring to "litigation regarding the Corps' operation of reservoir projects" in which "two federal courts found that the Corps' actual or potential operation of [a Corps project]. . . to accommodate water supply uses . . . exceeded the Corps' authority under the WSA"). Thus, the Rule must be changed to explicitly ensure that the Corps does not adversely affect state water rights in performing its water supply agreements, operating its reservoir projects for water supply uses, and/or making water available for DMI uses.

Further, the Rule's limited interpretation of its "[r]elation to State . . . water rights" would impermissibly allow the Corps to preclude future water development and beneficial uses of water

under state water law and water rights. By limiting the Corps' exercise of Section 6 or WSA authority only with respect to "*then-existing* State water rights," 81 Fed Reg. 91590 (italics and underlining added), the Rule allows the Corps to interfere with uses under future state water rights. But the congressional policy of Section 6 and the WSA prohibits the Corps from adversely affecting any *additional* development or use of water resources that may occur pursuant to state law. *See* 33 U.S.C. § 701-1(a) (declaration of congressional policy "recogniz[ing] the interests and rights of the States *in determining the development of the watersheds within their borders*") (italics and underlining added); 43 U.S.C. § 390b(a) (declaration of congressional policy recognizing "the primary responsibilities of the States and local interests *in developing water supplies for domestic, municipal, industrial, and other purposes*.") (italics and underlining added). These principles govern in Idaho and other western states even if Section 6 and the WSA are characterized as an exercise of the federal constitution's Commerce Clause authority "to regulate navigation and navigable waters." 81 Fed. Reg. 91563; *see also* 33 U.S.C. U.S.C. § 701-1(b) ("The use for navigation of waters arising in the [western] States . . . shall only be such use as does not conflict with any beneficial consumptive use, *present or future*, in [such] States . . . of such waters for domestic, municipal, stock water, irrigation, or mining purposes") (emphases added).[40] Given that the Corps' "supplementary information" also recognizes this principle, *see* 81 Fed. Reg. 91576 ("under the WSA, the Corps does not determine how water supply needs should be satisfied within a region, allocate water rights, or sell water. Nor does the Corps take on the role of a water distributer"), the Rule's provision addressing the Corps' exercise of authority under Section 6 and the WSA should not be limited to "then-existing" state water rights.

In short, the provision of the Rule addressing its "[r]elation to State . . . water rights, 81 Fed. Reg. 91590, fails to adequately reflect or recognize the explicit congressional policy of deference to state water law and state water rights that circumscribes the Corps' Section 6 and WSA authority. The provision is also inconsistent with the United States Supreme Court's

[40] Under Idaho water law, which like that of most western states is based the prior appropriation doctrine, the Corps can protect beneficial uses of water from a Corps reservoir against future development of the water supply by obtaining a state water right, which has a "priority date." Idaho Const. art. XV § 3; Idaho Code §§ 42-103; 42-104; 42-106; 42-202(1); 42-219(3)-(4); 42-220; 42-602; 42-607; 42-1411(2)(d); 42-1412(6); *see also* **Exhibit 2** (partial decrees issued in the SRBA for water rights for the Lucky Peak and Ririe projects). The "priority date" protects the authorized beneficial uses from subsequent ("junior priority") development and uses. *Id.* Under Idaho law, however, the Corps rather than the users of the water supply would have to seek and obtain state water rights to authorize DMI uses of water from Corps reservoirs.

interpretation of that policy in the *California* decision, and even the Corps' own interpretation of the policy in the "supplementary information" preamble to the text of the Rule. 81 Fed. Reg. 91556-88.

Accordingly, the Rule must be changed to include plain statements of the deference to state water law and state water rights required under the 1944 Flood Control Act and the WSA. The Rule should expressly set forth or incorporate by reference the congressional policy of the 1944 Flood Control Act and the WSA, and acknowledge the deference owed to state water law and water rights in the clear terms used in the Supreme Court's holdings in *California*, and in the Corps' own "supplementary information." 81 Fed. Reg. 91556-88.

Contrary to the Corps' view, these changes are necessary despite the fact that the Rule makes it "the responsibility of private water users to secure and defend any state water rights necessary to use water withdrawn from a Corps reservoir," and provides that "[t]he Corps shall not obtain water rights on behalf of the water users" and will not become "a party to any water rights dispute." 81 Fed. Reg. 91590. As previously discussed, these provisions directly conflict with Idaho water law and water rights.

B. The Rule Must Be Changed To Acknowledge The McCarran Amendment's Waiver Of Sovereign Immunity.

The Rule in addressing its "[r]elation to State . . . water rights" provides that the Corps "shall not . . . become, by virtue of any agreement executed pursuant to [Section 6 or the WSA], a party to any water rights dispute." 81 Fed. Reg. 91590. As previously discussed, the McCarran Amendment waives the sovereign immunity of the United States in state court suits "for the adjudication of rights to the use of water of a river system or other source" or "for the administration of such rights" when "the United States is a necessary party." 43 U.S.C. § 666. The Corps cannot unilaterally exempt itself from the scope of the McCarran Amendment, but that is precisely what the Rule purports to do. The Rule must therefore be changed to explicitly recognize that the McCarran Amendment's waiver of sovereign immunity applies to the Corps, and to acknowledge that the Corps is bound by decrees and decisions entered in general stream adjudications in state courts, and any subsequent state court suits for the administration of the water rights.

C. The Rule Must Defer To State Law Regarding The Definition Of Domestic, Municipal, And/Or Industrial Uses.

The Rule by defining domestic, municipal, and industrial uses to also mean "any other beneficial use" recognized by state law other than "irrigation" contravenes explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its Section 6 and WSA authority. 33 U.S.C. § 701-1(a); 43 U.S.C. § 390b(a); *see also California*, 438 U.S. at 667-68 (referring to congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side-by-side in the same locality."). The Rule must be changed to explicitly defer to the individual states' determinations of what specific uses of water are covered by DMI uses.

D. "Surplus Water" Must Be Defined To Be Limited To Amounts In Excess Of Senior-Priority State Water Rights As Determined By State Water Administration Officials.

In addressing its newly proposed definition of "surplus water" under Section 6, the Corps recognized that "a number of States have expressed their views that the 'natural flows' (*i.e.,* waters which would have been available even without the Corps' reservoirs) of the Missouri River remain subject to the States' authority to allocate for beneficial use." 81 Fed. Reg. 91567 (parenthetical in original). The Corps also "specifically invite[d]" comments on "an alternative definition of 'surplus water' that would exclude 'natural flows' from stored water . . . thereby precluding the 'natural flows' from being considered surplus water for purposes of Section 6." *Id.* at 91568.

As previously discussed, in Idaho the distinction between "natural flow" and "stored water" is fundamental to determining whether Section 6 water supply operations would interfere with the distribution and use of natural flow "in accordance with the prior appropriation doctrine." Idaho Code § 42-602. Recognizing this distinction in Idaho is not, as the Corps would have it, a discretionary question of whether the Corps chooses "to adopt a policy" distinguishing "natural flow" and "stored water." 81 Fed. Reg. 91567. Rather it is a foundational requirement for compliance with congressional policy forbidding the Corps' DMI water supply operations from interfering with the allocation and distribution of water pursuant to Idaho water law and water rights. 33 U.S.C. § 701-1; 43 U.S.C. § 390b(a).

As previously discussed, the duty of distributing water in accordance with Idaho water law and water rights requires the Director of the Idaho Department of Water Resources to make determinations of the relative amounts of "natural flow" and "stored water" that are "available at" any particular location, because Idaho water rights are licensed or decreed with a "point of diversion" that is binding on water users and the Director. Idaho Code §§ 42-202(1)(d); 42-220; 42-1411(2)(e); 42-1412(6).[41] The Director in distributing water "in accordance with the prior appropriation doctrine," Idaho Code § 42-602, must therefore determines the relative amounts of "natural flow" and "stored water" that are "available at" the diversion structures along a river or stream system. This is consistent with the Corps' view that "the appropriate inquiry" is whether "surplus water" is "available at" a Corps reservoir. 81 Fed. Reg. 91565. In Idaho the systems necessary for making such determinations have been developed and are in use; this may be true in other states as well.

Therefore, the Rule's definition of "surplus water" should provide that "surplus" water exists for Section 6 purposes only to the extent of a determination by state water administration officials that water in excess the amount of "natural flow" necessary to satisfy all senior-priority state water rights diverting from the system is actually "available at" the reservoir when the withdrawal or release is made. This would be more consistent with congressional policy and the Corps' view of the "appropriate inquiry," 81 Fed. Reg. 91565, and in Idaho would not require the Corps to make water allocation and distribution determinations that can and should be made by the Director.

Explicitly limiting "surplus water" to the quantity of water in excess of that necessary to satisfy all senior-priority state water rights is also more consistent with the "surplus water" language of Section 6, which "is plain enough," according to the United State Supreme Court. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 506 (1988). The Court said that "surplus water' is all water that can be made available from the reservoir without adversely affecting other lawful uses of the water." *Id.* (underlining added). The phrase "other lawful uses of the water" is most naturally interpreted to include uses under state water rights, as even the Corps recognizes. 81 Fed. Reg. 91563, 91564, 91587, 91590.

[41] *See, e.g.,* **Exhibit** 2 (SRBA partial decrees for the Lucky Peak and Ririe water rights).

E. Proposed Changes To The Rule.

Because the structure and language of the Rule incorporates a number of incorrect assumptions and fundamental misunderstandings regarding the nature, extent, and administration of state water rights under Idaho law, the Rule would have to be extensively and significantly changed to avoid conflicts with Idaho law. This may also be true with respect to the laws of other states.

The State of Idaho respectfully submits that the Rule is so flawed that it should be withdrawn. The State of Idaho further submits that the Corps should establish a cooperative process with the states to develop and propose a new version of the Rule that would avoid conflicts with state law and address the states' federalism concerns.

Respectfully submitted this 12th day of May, 2017.

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