

10-23-2013

A&B Irrigation District v. State Respondent's Brief 2 Dckt. 40974

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE SRBA, CASE N. 39576, SUBCASE NO. 00-91017 (BASIN-WIDE ISSUE 17 – DOES IDAHO LAW REQUIRE A REMARK AUTHORIZING STORAGE RIGHTS TO ‘REFILL,’ UNDER PRIORITY, SPACE VACATED FOR FLOOD CONTROL).

Supreme Court No. 40974-2013

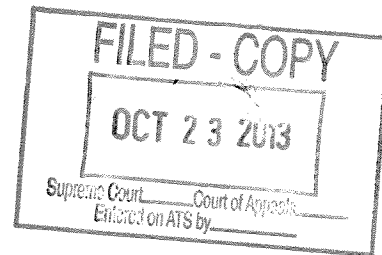
A & B Irrigation District, American Falls Reservoir District #3, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, Twin Falls Canal Company,

Appellants,

v.

State of Idaho, et al.,

Respondents.



RESPONDENT PIONEER IRRIGATION DISTRICT'S BRIEF

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho in and for the County of Twin Falls County
Snake River Basin Adjudication
Honorable Eric J. Wildman, District Judge, Presiding

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
A. Nature Of The Case	1
B. Course Of Proceedings	2
C. Statement Of Facts	4
II. ISSUES PRESENTED ON APPEAL	6
III. ATTORNEY FEES ON APPEAL	6
IV. ARGUMENT	7
A. Standard Of Review	7
B. Summary Of Argument	7
C. Irrigation-Based Storage Rights Are Not Filled (Satisfied) Until Water Is Stored And Made Available For End Irrigation Use	8
1. End Irrigation Use Forms The Basis Of An “Irrigation From Storage” Water Right, And Requires The Priority Refill Of Reservoir Space Evacuated For Flood Control Purposes	9
D. The Distribution Of Water Under An “Irrigation From Storage” Water Right Is Not A Discretionary Accounting Function	12
V. CONCLUSION	14

TABLE OF CASES AND AUTHORITIES

Page

Cases

American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources,
143 Idaho 862, 154 P.3d 433 (2007)..... 11, 13

Baranick v. North Fork Reservoir Co., 127 Idaho 482, 903 P.2d 71 (1995)..... 12

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011)..... 13

Morgan v. Udy, 58 Idaho 670, 79 P.2d 295 (1938) 10

Musser v. Higginson, 125 Idaho 392, 871 P.2d 809 (1994) 14

Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1977) 13

State v. U.S., 134 Idaho 106, 996 P.2d 806 (2000)..... 9

United States v. Pioneer Irr. Dist., 144 Idaho 106, 157 P.3d 600 (2007)..... 4, 10, 12

Watson v. Watson, 144 Idaho 214, 159 P.3d 851 (2007)..... 15

Statutes

IDAHO CODE § 42-202..... 13

IDAHO CODE § 42-223..... 12

IDAHO CODE § 42-602..... 13

IDAHO CODE § 42-603..... 13

IDAHO CODE § 42-607..... 13

IDAHO CODE § 55-101..... 13

I.
STATEMENT OF THE CASE

A. Nature Of The Case

Pioneer Irrigation District (“Pioneer”) responds to the appeal filed by A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively the “Surface Water Coalition”) against the Snake River Basin Adjudication (“SRBA”) District Court’s *Memorandum Decision*, filed March 20, 2013 (Clerk’s Record on Appeal (“R.”)), p. 883.

The case considers the question of whether flood control releases of stored water from reservoirs are chargeable against the “irrigation from storage”-based water rights of irrigators such as Pioneer. Pioneer contends that irrigation storage-based water rights contain two elements that must be satisfied before the rights fall out of priority: (1) “irrigation storage”; and (2) “irrigation from storage.” Without storing and releasing water for the necessary “irrigation from storage” end use which is an express element of the water rights at issue, and which constitutes the ultimate beneficial use validating and perfecting the water rights as a threshold matter, the “irrigation from storage” water rights go unfilled and remain in priority.

Despite describing the question of initial “fill” as the “more important issue” during the course of the underlying proceedings, the SRBA Court failed to address the issue, holding instead that the question was beyond the scope of the basin-wide issue pending before it. R., p. 893.

B. Course Of Proceedings

During the course of SRBA proceedings regarding the Basin 01 storage water right claims for American Falls and Palisades Reservoirs,¹ the State of Idaho filed a Motion for Partial Summary Judgment regarding, among other things, the legal basis to fill and refill the reservoirs under the pertinent storage water rights. Specifically, the State sought the inclusion of the following remark within the forthcoming partial decrees for the Basin 01 reservoir storage water rights:

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

See, e.g., Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment (“SJ Memorandum”), dated February 21, 2012, pp. 6-7 and 15. R., p. 21; *see also*, R., p. 254.

Because of the potential state-wide implications of the State’s requested remark, irrigation entities located in Basins 63 (Boise River) and 65 (Payette River), including Black Canyon Irrigation District, New York Irrigation District, Pioneer Irrigation District, the Payette River Water Users Association, and the Boise Project Board of Control (the “Irrigation Entities”), felt the need to address the matter. To that end, the Irrigation Entities filed: (1) a Motion For Leave to File Amicus Brief: State of Idaho’s Motion Concerning “Refill” of Bureau

¹ The Basin 01 proceedings are Subcase Nos.: 01-02064, 01-02064A, 01-02064B, 01-02064C, 01-02064D, 01-02064E, 01-02064F, 01-02064L, 01-10042, 01-10042A, 01-10042B, 01-10053A, and 01-10190 (the “American Falls” Subcases); and 01-02068, 01-02068D, 01-02068E, 01-02068F, 01-02068M, 01-02068Y, 01-10043, 01-10043A, 01-10043E, 01-10191, and 01-10389 (the “Palisades” Subcases). R., p. 18.

of Reclamation Storage Rights (“Amicus Motion”) in the Basin 01 subcases; and (2) a concurrent Petition to Designate Basin-Wide Issue (“Petition”). The Irrigation Entities filed both documents on June 8, 2012, and the Amicus Motion included the Irrigation Entities’ proposed amicus brief. R., pp. 13 and 254.

The Irrigation Entities undertook these actions because the Basin 63 and 65 irrigation storage water rights, which have long been partially decreed by the SRBA Court, do not contain a “refill”-related remark, let alone the remark proposed by the State in the Basin 01 subcases. Moreover, for decades the Basin 63 and 65 projects have stored water after flood control releases without any remark, something the State initially contended was illegal in the Basin 01 proceedings. The State of Idaho contended that a “refill” remark, if decreed in the Basin 01 proceedings, applied state-wide and, therefore, governs reservoir operations in Basins 63 and 65. The Irrigation Entities disagreed.

On June 11, 2012, the SRBA Court issued a Notice of Hearing on Petition to Designate Basin-Wide Issue (“Notice”) in response to the Irrigation Entities’ June 8, 2012 Petition. The SRBA Court’s Notice set the matter for hearing on September 10, 2012. R., p. 196.

On September 21, 2012, the SRBA Court designated Basin-Wide Issue 17 at the request of several irrigation entities, including Pioneer. *See* Designating Order, *generally*. R., p. 251. The Basin-Wide Issue, as designated, read:

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

Designating Order, p. 7; R., p. 257. When designating the basin-wide issue, the Court characterized the storage refill issue as “fundamentally an issue of law.” *Id.*, p. 5; R., p. 255. Consequently, the Court noted that it “[would] not consider the specific factual circumstances, operational history, or historical agreements associated with any particular reservoir in conjunction with the basin-wide issue.” *Id.*

The parties completed a briefing schedule and the SRBA Court held oral argument on February 12, 2013. R., p. 885. Thereafter, the SRBA Court issued its *Memorandum Decision* on March 20, 2013. R., p. 883. The United States Bureau of Reclamation, the Boise Project Board of Control, and the Surface Water Coalition each filed timely notices of appeal. R., pp. 906, 913, and 920. However, the Bureau of Reclamation voluntarily dismissed its appeal prior to briefing. *See Order Granting Motion to Dismiss*, filed September 27, 2013.

C. Statement Of Facts

The SRBA Court did not make any findings of fact, having perceived the issue presented in Basin-Wide Issue 17 as “fundamentally an issue of law.” R., p. 255. Instead, the SRBA Court’s *Memorandum Decision* included a general “Background” Section illustrating the nature of the “refill” issue presented. R., pp. 886-87.

Pioneer is a duly organized irrigation district under Idaho law and a beneficial owner of a portion of the storage water stored in Lucky Peak, Arrowrock, and Anderson Ranch Reservoirs in the Boise River Basin (Administrative Basin No. 63). *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). Pioneer, together with a number of other

irrigation entities, have repaid their proportionate shares of the facility construction costs, and are the end beneficial users of the irrigation storage water developed in the reservoirs. *Id.* at 144 Idaho 110. Periodically, water is contemporaneously passed through or actively released from the storage reservoirs for flood control purposes. *R.*, pp. 889-90.

Notwithstanding these flood control releases, the SRBA Court correctly noted that the storage water rights at issue contain use-based elements, each with express quantities of water dedicated to the particular use:

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

R., pp. 887-88. For illustrative purposes, the SRBA Court identified water right nos. 01-02064 and 01-02068 showing the respective “Irrigation Storage” and “Irrigation from Storage” quantities afforded under the rights in American Falls and Palisades Reservoirs (1,628,316.00 AFY and 1,200,000.00 AFY, respectively). *R.*, p. 886.²

² The Boise River Basin (Basin 63) analogs are known as water right nos. 63-03618, 63-00303, and 63-03614, each with their own specific “Irrigation Storage” and “Irrigation from Storage” quantities. *R.*, pp. 414-20.

II.
ISSUES PRESENTED ON APPEAL

Pioneer does not raise any additional issues on appeal. Pioneer also does not join, adopt, or contest the issues or arguments raised on appeal by the Surface Water Coalition except those expressly addressed herein. Specifically, Pioneer joins the Surface Water Coalition's presentation and argument of the following issues:

1. Whether the SRBA Court erred in failing to define "fill," an integral and material term for purposes of resolving the designated basin-wide "refill" issue; and
2. Whether the SRBA Court erred in concluding that distribution of water to satisfy a storage water right's "irrigation from storage" beneficial use element is a discretionary act by the Director of the Idaho Department of Water Resources.³

III.
ATTORNEY FEES ON APPEAL

Pioneer does not seek attorney fees or court costs on appeal.

³ These issues on appeal largely mirror Issues Presented on Appeal Nos. 4 and 5 raised by the Boise Project Board of Control in Supreme Court Docket No. 40975-2013. *See* Appellant's Opening Brief, p. 12. Because of this overlap, and in the interests of economy, Pioneer addresses these issues in the context of Supreme Court Docket No. 40974-2013 only, though Pioneer's arguments on these issues applies equally in Docket No. 40975-2013.

IV. ARGUMENT

A. Standard Of Review

Pioneer agrees with, and incorporates by reference herein, the Standard of Review articulated by the Surface Water Coalition. *See* Surface Water Coalition’s Opening Brief, filed September 25, 2013, pp. 5-6.

B. Summary Of Argument

End beneficial use of a storage water right is determinative of its ultimate satisfaction (“fill”) and, therefore, its priority ordering. This is because end beneficial use is determinative of a water right’s legal existence as a threshold matter. Neither “storage” nor “flood control” are beneficial uses of water, though flood control releases are an inherent and necessary component of prudent reservoir management.

Until water is stored and released (or available for release) for the decreed beneficial end use up to the corresponding quantity limit, the water right goes unsatisfied (unfilled) and remains in priority. Diversion of water to storage is only part of the equation. End beneficial use of stored water is what perfects and validates a storage water right under Idaho law. The SRBA Court erred by failing to address the threshold question of “fill” despite characterizing the question as the “more important issue.”

The SRBA Court further erred by holding that what constitutes the initial “fill” of a storage water right is a discretionary accounting function of the Director of the Idaho Department of Water Resources. All water rights, including storage rights, are real property rights that must be distributed and administered according to the prior appropriation doctrine.

The nature and measure of water rights are determined by end beneficial use, and cannot be diminished by the accounting decisions of the Department.

C. Irrigation-Based Storage Rights Are Not Filled (Satisfied) Until Water Is Stored And Made Available For End Irrigation Use

The SRBA Court designated the following basin-wide issue for decision:

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

R., p. 257. Pioneer respectfully submits that one cannot decide the issue of “refill” without first defining the meaning of the term “fill.” One need not concern themselves with evaluating the need for a “refill”-based remark, let alone a priority refill remark, when a senior irrigation storage water right has not fully filled (or been satisfied) as a threshold matter. Put differently, one cannot “refill” what has not been “filled” in the first place.

Pioneer agrees with the SRBA Court’s holdings that: (1) senior storage right holders cannot “fill” or “satisfy” their water rights multiple times under priority before an affected junior water right is satisfied once; and (2) as soon as a senior storage right is filled it is no longer in priority. R., pp. 891-92. Pioneer further agrees with the SRBA Court’s subsequent observation that a remark authorizing priority refill would be contrary to Idaho law “*assuming, as the term ‘refill’ necessarily implies, the storage right has already been filled once during the period of use under priority.*” R., p. 892 (emphasis in the original). But, it is that question of initial “fill” that the court failed to answer, opting instead to “assume” that initial fill occurred despite flood control releases.

The SRBA Court recognized the importance of the initial “fill” question, referring to it as “the more important issue,” and framing it accordingly: “Namely, is water that is diverted and stored under a storage right counted towards the quantity of that right if it is used by the reservoir operator for flood control purposes?” R., p. 893. Pioneer emphatically answers the Court’s question: “No.” But, the Court, unfortunately, treated the question rhetorically, holding that the issue of initial fill is one of water right accounting left to the discretion of the Director of the Idaho Department of Water Resources, and beyond the scope of the basin-wide issue. R., pp. 893-94. Pioneer respectfully disagrees.

1. End Irrigation Use Forms The Basis Of An “Irrigation From Storage” Water Right, And Requires The Priority Refill Of Reservoir Space Evacuated For Flood Control Purposes

There is no such thing as irrigation storage “refill” when water is not actively diverted to storage, or when stored water is later released for non-irrigation purposes. In those instances where: (1) reservoir inflows are contemporaneously spilled from a reservoir; or (2) when water previously and intentionally diverted to storage (through active reservoir management designed to capture and hold reservoir inflows) is later evacuated for flood control or other operational (*i.e.*, non-irrigation-related) purposes, the underlying *irrigation*-based storage water right has yet to fill and, therefore, remains in priority.

Perfected water right appropriation under Idaho law requires: (1) physical diversion from a natural source; *and* (2) the subsequent application of the water diverted to a recognized beneficial use. *See, e.g., State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806 (2000) (“Idaho water law generally requires an actual diversion and beneficial use for the existence of a

valid water right”); *see also*, *Morgan v. Udy*, 58 Idaho 670, 680, 79 P.2d 295 (1938) (“diversion and application to beneficial use” are the “two essentials” in the state of Idaho for a “valid appropriation”). The ultimate beneficial use of the water diverted is the essence of a water right. *See, e.g.*, *U.S. v. Pioneer*, 144 Idaho 106, 113 (“In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation . . . Beneficial use is enmeshed in the nature of a water right”).

The mere fact that a dam spans a river from bank to bank does not mean the facility necessarily captures and holds (*i.e.*, diverts and stores) all flows of the river on which it is located. And, even if that were the case—which it is not—the ultimate act of irrigation use by the downstream irrigators is what perfects and perpetuates an “irrigation from storage” water right. *See Pioneer*, 144 Idaho at 110 (emphasis added) (“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. The beneficial use theme is consistent with federal law . . . beneficial use shall be the basis, measure, and limit of the right***”).

The “irrigation storage” and “irrigation from storage” water rights at issue in the Basin-Wide Issue 17 proceeding are expressly quantified. The irrigation portion of the rights is quantified either as “X” cubic feet per second (“cfs”) for “irrigation from storage,” or “Y” acre-feet per year (“AFY”) for “irrigation from storage,” or some combination thereof. For example,

the SRBA Court’s references to water right nos. 01-02064 and 01-02086 demonstrate that their authorized “Irrigation from Storage” quantities are 1,628,316.00 AFY and 1,200,000.00 AFY, respectively. “Irrigation from storage” means that water must be stored and then released (or available for release) from a reservoir to facilitate irrigation uses on the ground. Consequently, the administration of “irrigation from storage” water rights is ultimately determined by the release (or availability for release) of water *from* a reservoir (*i.e.*, storage) for irrigation purposes as opposed to the release of stored water for other non-irrigation-related purposes such as flood control.

Diversion of water to “irrigation storage” alone does not satisfy or perfect the “irrigation from storage” element (and corresponding quantity) of the water right. Instead, water diverted into storage for irrigation purposes must also be physically available when needed to satisfy the end beneficial use. *See, e.g., American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 880, 154 P.3d 433 (2007) (emphasis added) (“Storage water is water held in a reservoir *and is intended to assist the holder of the water right in meeting their decreed needs.*”; “Concurrent with the right to use water in Idaho ‘first in time,’ is the obligation to put that water to beneficial use”).

Just because a reservoir may physically fill (or refill) more than once, does not necessarily mean that the senior storage water rights within it are likewise “filling” multiple times. As the Surface Water Coalition correctly noted: “[Because] water that is released for protective flood control purposes is not beneficially used by the storage right holder, there is no multiple fill or ‘double’ satisfaction of the water right when empty flood control space is

physically refilled.” Surface Water Coalition’s Opening Brief, pp. 32-33. To hold otherwise diminishes the quantity and viability of the storage water rights and punishes the water right owners for prudent reservoir management activities beyond their control. That is not the law in Idaho, nor an equitable or desired result. *See, e.g.*, IDAHO CODE § 42-223(6) (by analogy precluding water right loss or forfeiture for nonuse when the nonuse results from circumstances over which the water right owner has no control), and *Baranick v. North Fork Reservoir Co.*, 127 Idaho 482, 484, 903 P.2d 71 (1995) (noting that dam and reservoir operators must operate their facilities in a non-negligent manner, and also reiterating the importance of irrigated agriculture to Idaho’s economy).

Under Idaho law, on-the-ground irrigation use is what defines an “irrigation from storage” water right. *See Pioneer, supra*. Until water is intentionally stored and then released (or is available for release) to the irrigators in the field up to the “irrigation from storage” quantities expressly authorized in the water rights, the rights have not “filled” as a threshold matter. The senior storage rights, therefore, remain in priority against all other junior rights and the concept of “refill” is an irrelevant anachronism.

D. The Distribution Of Water Under An “Irrigation From Storage” Water Right Is Not A Discretionary Accounting Function

Pioneer disagrees with the SRBA Court’s statement that: “[t]he Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs.” R., p. 894. Therefore,

Pioneer joins the Surface Water Coalition's arguments in this regard. *See* Surface Water Coalition's Opening Brief, pp. 33-35.

The Director may have the authority to craft and implement mechanisms administering the water resource in conformance with the prior appropriation doctrine. However, the Director does not have the discretion to employ "accounting methodologies" that contravene the prior appropriation doctrine or diminish the valuable property right that water rights comprise.

Water rights are real property rights that must be afforded the protection of due process before they may be taken by the State. *See, e.g.,* IDAHO CODE § 55-101; *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048 (1977). This is particularly true of adjudicated (*i.e.*, "proven") water rights, which are entitled to administration preference. *See* IDAHO CODE § 42-607; *see also, Nettleton*, 98 Idaho at 90. Storage water rights are entitled to the same protection. *See, e.g., American Falls Reservoir Dist. No. 2*, 143 Idaho at 878; and IDAHO CODE § 42-202.

While it is true that the Director of the Idaho Department of Water Resources has the direction and control over the distribution of water, and that he is authorized to adopt rules and regulations governing the distribution of the same, the Director may only do so in a manner complying with the prior appropriation doctrine. *See* IDAHO CODE §§ 42-602 and 42-603. Further, water "shall" be distributed according to the "adjudicated, decreed, permit or licensed right." IDAHO CODE § 42-607; *see also, Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71 (2011) (emphasis added) ("The amounts of the Spring Users' rights had already

been decreed based upon the amounts of water that they had diverted and applied to beneficial use . . . Subject to the rights of senior appropriators, *they are entitled to the full amount of water they have been decreed for that use*”), and *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809 (1994) (emphasis added) (holding, in part, that the Director had no reasonable basis in law or fact to fail to perform priority administration from the source on the basis of decreed water rights priorities: “the director’s duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director’s discretion, the director has the duty to distribute water”).

Any discretion the Director may enjoy is minimal. At bottom, the Director must distribute and administer the “irrigation from storage” rights at issue according to their decreed priorities and quantities. What constitutes the “fill” of those rights is not a discretionary accounting function; rather the express quantities dedicated to the “irrigation from storage” purpose of use element of the rights is wholly determinative of the issue. Either stored water is available for irrigation use or it is not. If the water is not available for irrigation use, the “irrigation storage” and “irrigation from storage” elements of the storage water rights have not filled. Accordingly, the water rights remain in priority.

V. CONCLUSION

Pioneer respectfully submits that the SRBA Court erred when it addressed the issue of “refill” without substantively addressing or defining the “more important issue” of “fill.” One need not and cannot “refill” what has not been “filled” in the first place, and it was improper

for the SRBA Court to “assume,” as it did, that “the storage right ha[d] already been filled once during the period of use under priority.”

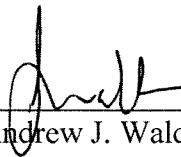
In the context of “irrigation from storage”-based water rights, “fill” does not occur until water is diverted, stored, and released (or available for release) for end irrigation use. This is because end irrigation use is the “basis, measure, and limit” of an “irrigation from storage” water right. Without end beneficial use, there is no valid water right under Idaho law.

Pioneer also agrees with the Surface Water Coalition that the SRBA Court erred by holding that what constitutes the initial “fill” of a storage water right is left to the discretion and “accounting methodologies” of the Director of the Idaho Department of Water Resources. Water rights are real property rights, and their proper distribution under the prior appropriation doctrine is a mandatory duty under Idaho law. The express quantity of water decreed and dedicated to “irrigation from storage” use means something, and water users such as Pioneer’s landowners are entitled to the full amount of water they have been decreed for irrigation use.

Pioneer perceives the above-referenced issues as questions of law over which this Court exercises free review. *See, e.g., Watson v. Watson*, 144 Idaho 214, 217, 159 P.3d 851 (2007). Consequently, Pioneer submits that remand of these issues back to the SRBA Court is not necessary. Instead, Pioneer respectfully requests that this Court address these questions of law in this proceeding within the purview of the Court’s free review.

DATED this 25th day of October, 2013.

MOFFATT, THOMAS, BARRETT, ROCK &
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By  _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2013, I caused a true and correct copy of the foregoing **RESPONDENT PIONEER IRRIGATION DISTRICT'S BRIEF** to be served by the method indicated below, and addressed to the following:

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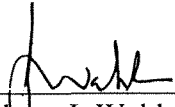
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