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In Re SRBA Case No. 39576 Appellant's Brief Dckt. 44635

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No. 44635-2016

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: SRBA, CASE NO. 39576
SUBCASE NOS. 65-23531 & 65-23532

THE UNITED STATES OF AMERICA,
Appellant,

v.

BLACK CANYON IRRIGATION DISTRICT,
STATE OF IDAHO and
SUEZ WATER IDAHO, INC.,

Respondents.

BRIEF FOR APPELLANT THE UNITED STATES OF AMERICA

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

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STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises from consolidated subcases in the Snake River Basin Adjudication (“SRBA”) on the United States’ supplemental claims for storage water rights in Cascade and Deadwood Reservoirs in Water District 65. The United States’ supplemental claims do not assert rights to store water for beneficial use in amounts greater than amounts already decreed for the reservoirs. Rather, the United States filed the supplemental claims solely to protect historic reservoir operations, which were called into question by water-rights accounting rules adopted by the Idaho Department of Water Resources (“IDWR”) after the United States’ reservoir rights were decreed. The Black Canyon Irrigation District (“Black Canyon”) holds beneficial interests in the stored water. Black Canyon intervened in the subcases to argue that the United States’ supplemental claims are unnecessary because IDWR’s accounting rules are in error.

Cascade and Deadwood Reservoirs are on-stream reservoirs created by dams that capture all stream flows, subject to controlled releases by the Bureau of Reclamation (“Reclamation”). Reclamation sought and obtained permits and licenses from the State of Idaho to store waters for irrigation and power-supply purposes, in amounts essentially up to reservoir capacity. In most years, however, the annual runoff in the relevant stream basins exceeds reservoir capacity. To manage flood risks, Reclamation operates the reservoirs under a policy to capture peak stream flows. Specifically, as winter snows accumulate and provide a measure of available spring flows, Reclamation passes through or releases water that otherwise could be used for irrigation, to leave sufficient reservoir space available to capture predicted runoff during late winter and

spring when flooding is most likely. This allows Reclamation to store water for irrigation and other beneficial use in a manner that also provides flood protection to downstream communities.

In 1993, IDWR developed, for the first time, computerized procedures for administering water rights in Basin 65. Like similar procedures developed for other sub-basins, IDWR's procedures for Basin 65 include accounting rules for on-stream reservoirs that treat all incoming flows as diversions toward decreed storage amounts and deem a reservoir storage right satisfied "on paper" as soon as accumulated flows available in priority reach the decreed storage amount, whether or not those waters are physically stored. Under the IDWR procedures, waters that Reclamation diverts and stores after the date of "paper" fill are not considered stored under the reservoir storage right, but instead are deemed available for use and appropriation by others, threatening federal storage rights.

The United States, Black Canyon, and others sought to protect reservoir storage rights -- and particularly the right to store waters in priority after flood-control releases -- in an SRBA basin-wide proceeding designated "Basin Wide Issue 17." On appeal, this Court held that IDWR has authority to determine, in the first instance, when reservoir storage rights are satisfied. *See In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014). In October 2015, in an order addressing federal reservoirs in Basin 63 (and for the first time in any formal order), IDWR set out and affirmed its accounting rules for on-stream reservoirs. *See Final Order In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* (Oct. 15, 2015) ("*Basin 63 Accounting Order*") (U.S. Add. 3). That order was challenged in district court, and is now separately on appeal to this Court. *See* pp. 9, 21-22, *infra*.

In the meantime, recognizing that the opportunity for filing claims in the SRBA would soon pass, the United States filed conditional supplemental claims for its reservoirs in Basins 01, 37, 63, and 65. The United States asserted that – if IDWR’s accounting rules for on-stream reservoirs are upheld – the United States nonetheless possesses rights to store and use waters after flood-control releases based on the United States’ historic beneficial use of such waters. The supplemental claims assert the same storage amounts and beneficial uses stated in the United States’ decreed reservoir rights, but assert greater diversion rights, reflecting the amounts of water that Reclamation historically let pass or initially impounded and then released, in large flood-control years, before physically filling the reservoirs for beneficial use.

In a certified final decision on October 11, 2016, the district court disallowed the United States’ Basin 65 supplemental claims on grounds of res judicata. The district court reasoned that the United States’ rights in Basin 65 had been fully and finally adjudicated in a 1986 Partial Decree in the Payette Adjudication (an adjudication later consolidated with the SRBA proceedings). For the reasons explained herein, this ruling is in error. The United States’ Basin 65 supplemental claims could not have been brought in the Payette Adjudication, because they are based on IDWR accounting rules that were developed after the 1986 Partial Decree and that reinterpret the nature of on-stream reservoir rights. The district court should have treated the United States’ Basin 65 claims in the same manner as the United States’ Basin 63 claims, which remain pending. Alternatively, if this Court invalidates IDWR’s accounting rules for on-stream reservoirs and holds that flood-control releases do not count against the already-decreed federal storage rights, all of the pending supplemental claims would be moot.

B. Course of Proceedings

1. SRBA Decreed Claims

The State of Idaho initiated the SRBA in 1987 to determine all rights to water within the Snake River Basin. *See In re the Snake River Basin Water Sys.*, 115 Idaho 1, 2-5, 764 P.2d 78, 79-82 (1988) (history of suit). The United States is a party to the SRBA under the McCarran Amendment, *id.*, which grants Congress’s consent to the joinder of the United States in “any suit * * * for the adjudication of rights to the use of water of a river system or other source.” 43 U.S.C. § 666(a). The United States filed hundreds of notices of claimed water rights, including for multiple on-stream reservoirs that are part of federal reclamation projects. The United States filed claims for Cascade and Deadwood Reservoirs in July 1989. R. 772-789. In March 2003, following claims examination, *see* Idaho Code § 42-1411, the district court issued three separate “Order[s] of Partial Decree,” *see id.*, § 42-1412(7), declaring the United States’ rights in Cascade and Deadwood Reservoirs as follows:

Right	Reservoir	Purpose	Period of Use	Quantity
65-2927A	Cascade	Irrigation Storage	01-01 to 12-31	697,500 AFY
		Irrigation from Storage	01-01 to 12-31	697,500 AFY
		Power Storage	01-01 to 12-31	697,500 AFY
		Power from Storage	01-01 to 12-31	697,500 AFY
65-2927B	Cascade	Municipal Storage	01-01 to 12-31	2,500 AFY
		Municipal from Storage	01-01 to 12-31	2,500 AFY
65-9483	Deadwood	Irrigation Storage	01-01 to 12-31	163,000 AFY
		Irrigation from Storage	04-01 to 11-01	163,000 AFY
		Power Storage	01-01 to 12-31	163,000 AFY
		Power from Storage	01-01 to 12-31	163,000 AFY

R. 543-557. The district court issued a “Final Unified Decree” in the SRBA on August 25, 2014, *see* <http://srba.idaho.gov/finaldecree.htm>, but expressly retained jurisdiction over specified unresolved claims, including the United States’ supplemental claims in this case. R. 61-62.

2. *Supplemental Claims*

By statute, any SRBA claimant could “amend a notice of claim or file a late notice of claim after the final date for filing notices of claim * * * for good cause shown.” Idaho Code § 42-1409A(3). In January 2013, prompted by IDWR’s accounting procedures for federal on-stream reservoirs, the United States filed supplemental “beneficial use” claims for federal reservoirs in multiple basins, including the following claims for Basin 65. R. 17-35.

Right	Reservoir	Purpose	Period of Use	Quantity
65-23531	Cascade	Irrigation Storage	10-01 to 9-30	1,066,653 AFY
		Irrigation from Storage	01-01 to 12-31	697,500 AFY
		Power Storage	10-01 to 9-30	1,066,653 AFY
		Power from Storage	01-01 to 12-31	697,500 AFY
		Municipal Storage	10-01 to 9-30	1,066,653 AFY
		Municipal from Storage	01-01 to 12-31	2,500 AFY
65-23532	Deadwood	Irrigation Storage	10-01 to 9-30	268,113 AFY
		Irrigation from Storage	04-01 to 11-01	163,000 AFY
		Power Storage	10-01 to 9-30	268,113 AFY
		Power from Storage	01-01 to 12-31	163,000 AFY

R. 824-29. Consistent with IDWR’s accounting rules, these claims assume that the amount designated for storage is a *diversion* limit, and that all incoming stream flows, including amounts released for flood-control purposes, count toward the maximum annual storage right. The

United States claimed a 1965 priority date, R. 824, 827, not because Reclamation began flood-control operations in that year (such operations began earlier), but because 1965 was a year with historically high stream flows.¹ By claiming a right to divert up to maximum stream flows based on historical diversions, Reclamation did not claim the right to store and beneficially use all stream flows; rather, Reclamation accepted the view (per IDWR’s accounting rules) that all stream flows constitute diversions, and claimed the right, based on historic practice, to store the last flows diverted, for the same beneficial uses stated in its decreed rights. The United States explained that it sought to confirm its rights, based on historic operations, to release waters for flood-control purposes before filling the reservoirs for irrigation storage. R. 18.

At the time the United States filed these claims, the question of reservoir “refill” rights were under review in the proceedings on Basin-Wide Issue 17. *Id.*, R. 22; *see also* pp. 20-21, *infra*. The United States explained that if the district court were to hold in the basin-wide proceedings (contrary to IDWR’s accounting rules) that decreed rights for the federal reservoirs already included the right to “refill” after flood-control releases, the United States would “withdraw[]” its supplemental claims as “unnecessary.” R. 22, n. 7.

3. *Proceedings on Supplemental Claims*

The district court (Judge Eric J. Wildman) accepted the United States’ supplemental claims for filing, and forwarded them to IDWR for review and recommendation. R. 41; *see also*

¹ The United States’ claims are based on streamflow data maintained by Reclamation in its “hydromet” archive. *See generally* <http://www.usbr.gov/pn/hydromet/arcread.html>.

Idaho Code § 42-1411. IDWR recommended that the Basin 65 supplemental claims be disallowed, because they had not been asserted in a prior adjudication (the Payette River Adjudication) that was ultimately consolidated with the SRBA. R. 44. The United States objected, R. 52-53, and the district court referred the dispute to special master Theodore R. Booth. R. 129. Black Canyon sought and obtained leave to intervene. R. 155-56. In its initial pleading, Black Canyon asserted that the supplemental claims are unnecessary, because the claimed rights are subsumed within the decreed reservoir rights. R. 158-162. The State of Idaho moved for summary judgment on multiple grounds, including claim preclusion.² R. 1572.

4. *Special Master's Recommendation*

By decision dated November 19, 2015, Special Master Booth recommended granting summary judgment on the grounds of claim preclusion, R. 1984-99, and declined to reach the merits of the State's other arguments. R. 1996-1999. All parties moved to alter or amend the recommendation. *See* R. 2070 (U.S.); R. 2057 (Idaho); R. 2033 (Black Canyon). Suez Water Idaho, Inc., filed a notice of participation in support of the State's motion. R. 2077. Special Master Booth issued a final recommendation on the State's summary judgment motion on April 22, 2016. R. 2206-2221. While finding that "at all times relevant to the filing of claims in the Payette Adjudication, there was no basis upon which" the United States could have filed the "beneficial use water right [now] claim[ed] in subcases 65-23531 and 65-23532," R. 2213-14,

² Idaho also argued that the supplemental claims are: (1) improper "collateral attacks" on the 2003 SRBA partial decrees; (2) improper attacks on IDWR's administrative authority; (3) improper attempts to obtain water rights for flood control purposes, and (4) not supported by proof of beneficial use of the alleged "additional storage water claimed." R. 1572.

Special Master Booth reiterated his view that those claims are barred by the language of the 1986 Partial Decree. R. 2214-15. On the other hand, Special Master Booth agreed with Black Canyon that the waters Reclamation “claimed * * * to have * * * appropriated” in 1965, via storage and use of waters after flood control releases, “was not subject to appropriation because it * * * was being stored * * * under the authority of the existing storage rights.” R. 2215.

5. *Final Order Disallowing Basin 65 Supplemental Claims*

All parties in the Basin 65 proceedings filed challenges to different parts of the Special Master’s recommendation. The district court resolved the challenges by order dated October 7, 2016. R. 2511-2518. The district court accepted Special Master Booth’s recommendation on claim preclusion, holding that the Payette Adjudication barred the Basin 65 supplemental claims. R. 2513-2518; *see also* pp. 22-23, *infra*. But the district court rejected the Special Master’s determination that the supplemental claims were already subsumed within the decreed federal storage rights. R. 2518. The district court reasoned that Black Canyon’s arguments on the scope of the decreed rights constituted a challenge to IDWR’s administrative practices that was beyond the scope of the SRBA. R. 2518-20.

6. *Related Proceedings on Basin 63 Supplemental Claims*

When it filed its supplemental claims for Cascade and Deadwood Reservoirs, the United States also filed supplemental claims for federal reservoirs in Basins 01, 37, and 63. R. 17-35. The United States has since settled its Basin 01 and 37 claims, but the Basin 63 claims remain pending. In rulings parallel to the above-described Basin 65 rulings, special Master Booth found the Basin 63 claims to be unnecessary because subsumed within the already decreed storage

rights, R. 2518; and the district court rejected this recommendation on the view that IDWR has exclusive authority to determine, in the first instance, when decreed reservoir rights are satisfied. *See Mem. Decision & Order*, SRBA Subcase 63-33732 at 6-7 (Sept. 1, 2016) (U.S. Add. 1). The district court held that the special master should have “proceeded with the [Basin 63 supplemental] claims based on the accounting methodology in place,” or stayed proceedings pending a challenge to the IDWR’s accounting procedures under the Idaho Administrative Procedure Act (“Idaho APA”). *Id.* at 9.

On the same date that he issued the above order in the SRBA, Judge Wildman, in his capacity as District Judge for Idaho’s Fourth Judicial District, issued a final decision in an Idaho APA action challenging IDWR’s *Basin 63 Accounting Order*. *See Mem. Decision & Order*, Case No. CV-WA-2015-21376 (Idaho 4th Dist.) (Sept. 1, 2016) (U.S. Add. 2); *see also Basin 63 Accounting Order* (U.S. Add. 3).³ That decision, which affirmed IDWR’s accounting rules in part (pp. 21-22, *infra*), is the subject of multiple appeals now pending in this Court. *See In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, S. Ct. No. 44677 (appeal by Ballentyne Ditch Co. *et al.*), No. 44745 (appeal by Boise Project Board of Control *et al.*), & 44746 (appeal by IDWR).

³ For the Court’s convenience, the *Basin 63 Accounting Order* (U.S. Add 3), the district court’s decision on that order (U.S. Add. 2), and the district court’s decision on the United States’ Basin 63 supplemental claims (U.S. Add. 1) are provided in a separately-bound addendum to this brief. This Court may take judicial notice of these orders under Idaho R. Evid. 201.

C. Statement of Facts

1. Boise Project

Cascade and Deadwood Reservoirs are part of the Boise Project (originally known as the Payette-Boise Project), a federal reclamation project constructed and operated under the Reclamation Act of 1902. R. 1714-1718; *see also Payette-Boise Water Users Ass'n v. Cole*, 263 F. 734, 736-37 (D. Idaho 1919) (describing early Boise Project). Cascade Reservoir is on the North Fork of the Payette River and Deadwood Reservoir is on Deadwood River, a tributary of the Payette River South Fork. R. 1717-1718. The Payette River and its tributaries are in Basin 65. The Boise Project includes three additional storage reservoirs –Arrowrock, Anderson Ranch, and Lucky Peak – on the Boise River system in Basin 63. R. 1716-1717.

Under federal law, the capital and operational costs of federal reclamation projects are allocated to project beneficiaries through contracts that set out repayment obligations and provide contractors with a percentage of reservoir storage space. R. 1719-1723; *see also United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007). Black Canyon is the principal “space holder” in Cascade Reservoir and, under Idaho law, holds a beneficial interest in the federal storage rights. *Id.* at 115, 157 P.3d at 609. To maximize storage capability, Reclamation operates Cascade and Deadwood Reservoirs as a unified system, sharing the combined storage space for the purposes of both reservoirs. R. 1727, 1775; *see also* R. 688.

2. State Licenses and Permits

When enacting the Reclamation Act of 1902 and thereby authorizing the Secretary of the Interior to “set forth on a massive program to construct and operate dams, reservoirs, and canals

for the reclamation of the arid lands in 17 Western States,” *California v. United States*, 438 U.S. 645, 650 (1978), Congress directed Reclamation to “proceed in conformity” with State laws governing the “appropriation, use, [and] distribution of water.” *Id.* at 665 (quoting 43 U.S.C. § 383). Like most western states, Idaho governs water use through rules of prior appropriation. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 5-6, 156 P.3d 502, 506-507 (2007). Under these rules, whoever is first to appropriate and beneficially use unappropriated water acquires a priority right of use over later appropriators. *Id.* In 1903, Idaho adopted a permit-and-license process for water appropriations, *see Fremont-Madison Irr. Dist. & Mitigation Group v. Idaho Ground Water Appropriators*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996), requiring users to obtain a permit from the State Engineer before constructing diversion works. Idaho Rev. Stat. § 3253 (1903). Upon examination of the permitted diversion structures and confirmation of beneficial use, the State Engineer would issue a certificate of water right. *Id.*, §§ 3257-58.

Reclamation applied for a permit for Deadwood Reservoir in 1926, to provide a reliable supply of water to Black Canyon Dam, an existing downstream hydroelectric facility. R. 720, 1717. Reclamation completed Deadwood Reservoir in 1931, R. 1717, and received a “License and Certificate of Water Right” in 1942. R. 720. In 1937, Reclamation applied for a permit to construct Cascade Reservoir to store water for power and the irrigation of lands below the reservoir. R. 719. Reclamation completed construction in 1948, R. 1718, and received a license in 1962. R. 719. The standard-form licenses for both reservoirs granted “the right to use the waters” of the respective rivers, for the specified irrigation and power-supply purposes, up to specified maximum “amounts” that matched estimated reservoir capacity: 700,000 acre feet per

annum for Cascade and 163,000 acre feet per annum for Deadwood. R. 719-720; *see also* R. 1715. Both licenses confirmed that “said right[s] to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed.” R. 719-720.

3. *Payette Adjudication*

Although Idaho statutes have included water-appropriation procedures since 1881, *see Fremont-Madison Irr. Dist.*, 129 Idaho at 456, 926 P.2d at 1303; Idaho Rev. Stat. § 3160 (1887), this Court construed the early procedures to be non-exclusive. *See Nielson v. Parker*, 19 Idaho 727, 115 P. 488 (1911); *see also* Idaho Const., Art. XV, § 3 (“The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, except that the state may regulate and limit the use thereof for power purposes”). This left two methods for appropriating State waters: (1) the statutory method, and (2) the “constitutional method” under which a user could acquire a water right merely by “diverting * * * water and applying it to a beneficial use.” *Joyce Livestock*, 144 Idaho at 9, 156 P.3d at 510 (quoting *Sand Point Water & Light Co. v. Panhandle Dev. Co.*, 11 Idaho 405, 413, 83 P. 347, 349 (1905)).

In 1971, the Idaho Legislature made the statutory “permit and license procedure” the “only * * * means” for perfecting a State-law water right. *See* Idaho Code § 42-202(1); *see also Joyce Livestock*, 144 Idaho at 9, 156 P.3d at 510; Idaho Code §§ 42-103, 42-201(1)-(2). But rights already vested via beneficial use under the constitutional method were protected and preserved for general adjudication. *See* Idaho Code § 42-243; *Fremont-Madison Irr. Distr.*, 129 Idaho at 456, 926 P.2d at 1304. Two years earlier, in 1969, Idaho enacted a statute authorizing

IDWR to initiate the general adjudication of water rights on a stream system, upon the petition of water users. *See* 1969 Idaho Sess. Laws, ch. 279, § 4, p. 827 (adding Idaho Code § 42-1406).

Shortly after the 1969 enactment, the Director initiated a general adjudication, in the Third Judicial District, in and for Gem County, of the rights to water in the Payette River system. R. 518. Following statutory notice, more than 10,000 water-rights claims were filed. *Id.* The United States filed an initial notice of claims in 1971, R. 509-514, and individual claim forms for Cascade and Deadwood Reservoirs in 1976. R. 504-508. The United States based its reservoir claims on the State licenses, R. 510-511 (¶¶ 4-5); R. 504-505, 507-508 (¶ 10(c)), with one exception. In the license proceedings, the United States sought storage rights at Deadwood Reservoir for power supply only. R. 720. Based on subsequent developments, the United States claimed an irrigation storage right in Deadwood Reservoir (identical in amount to the power storage right) based on “beneficial use.” R. 506 (¶ 10(a)).

In 1979, IDWR issued a “Proposed Finding of Water Rights” (hereinafter, “1979 Director’s Report”) on all claims filed in the Payette Adjudication. R. 516-534. The report observed that State licenses constituted “prima facie” proof of a water right, R. 520, and recommended that water rights for Cascade and Deadwood Reservoirs be decreed as claimed, *i.e.*, based on the State licenses, plus the addition of an “irrigation from storage” right for Deadwood Reservoir based on beneficial use. *See* R. 533-34. The Director’s Report contained an index setting out specified elements, for each confirmed right. R. 528-34. For Cascade and Deadwood Reservoirs, the index specified “use[s]” for “irrigation storage,” “irrigation from

storage,” “power storage,” and “power from storage;” a “use period” of “1/1” to “12/31;”⁴ and a “max amount” of “700,000 AFA” for Cascade and “163,000 AFA” for Deadwood. R. 533-34. In general findings of fact, the Director found that “[t]he practice of holding stored water in a reservoir has normally been year around,” R. 524 (¶ 17), and that “water users in the Payette River Drainage Basin have historically diverted the so called ‘high water’ or ‘flood water’ generally during the months of May and June.” *Id.* (¶ 19).

Under conclusions of law, the Director stated that the “recommended decree includes all of the rights established before October 19, 1977 to the waters of the Payette River and its tributaries,” and that “[a]ny water user * * * who heretofore diverted * * * water [from the Payette River system] * * * and * * * failed to claim * * * water rights has forfeited such rights as provided in Section 42-1411, Idaho Code.” That code section likewise stated:

When a decree has been entered [in a statutory general adjudication], any water user who has been joined and who failed to appear and submit proof of his claim as provided in this act shall be barred and estopped from subsequently asserting any right theretofore acquired upon the waters included with the proceedings, and shall be held to have forfeited all rights to any water theretofore claimed.

See 1969 Idaho Sess. Laws, ch. 279, § 9, p. 832 (adding Idaho Code § 42-1411). This forfeiture provision was repealed in 1986 as part of the statutory amendments that preceded the SRBA.

See 1986 Idaho Sess. Laws, ch. 220, § 1, p. 560.

No party objected to the Director’s findings on federal storage rights in the Cascade and Deadwood Reservoirs. In January 1986, the district court issued a “Partial Decree” (R. 450-554)

⁴ Per Reclamation’s “beneficial use” claim, the report limited the “use period” for “irrigation from storage” at Deadwood Reservoir to “4/1” to “11/1”. R. 506, 534.

declaring “that the water rights of the Payette River Drainage Basin * * * are as described in [the Director’s] proposed findings,” subject to specified exceptions not relevant here. R. 452. The 1986 Partial Decree included a “Rule 54(b) Certificate” finding “no just reason for delay of the entry of a final [judgment]” and declaring the order final for appeal purposes. R. 453.

4. *Consolidation of Payette Adjudication and SRBA*

In 1985, the Idaho Legislature amended the 1969 water-adjudication statute to direct IDWR to commence an adjudication of all rights in the Snake River system. *See In re Snake River Basin Water Sys.*, 115 Idaho 1, 2-5, 764 P.2d 78, 79-82 (1988) (citing 1985 Idaho Sess. Laws, ch. 18, § 1, p. 28, ch. 118, § 1, p. 287); *see also In re SRBA*, 128 Idaho 246, 250, 912 P.2d 614, 618 (1995). The Snake River system includes the Payette River and three other tributaries that had previously been the subject of partial or completed adjudications. *See In re Snake River Basin*, 115 Idaho at 4, 764 P.2d at 81. The 1985 legislation directed IDWR not to include in the SRBA “any adjudicated tributary unless the United States * * * refuse[d] to consent to the jurisdiction of the district court” absent such inclusion. *Id.* (citing 1985 Idaho Sess. Laws, ch. 118, § 1, p. 287). When initiating the SRBA in 1987, in the Fifth Judicial District in and for the County of Twin Falls, the Director stated that he was unable to ascertain whether the United States “refused to consent to jurisdiction” in the absence of the tributaries. *Id.* at 4-5, 764 P.2d at 81-82. The United States filed a special appearance to explain that Congress’s consent to jurisdiction, via the McCarran Amendment, 43 U.S.C. § 666(a), required the adjudication to be comprehensive of the named stream system, whether or not water rights on parts of the system

previously had been adjudicated as to the owners of those rights. *Id.* at 5, 764 P.2d at 82. On appeal, this Court agreed. *Id.* at 5-9, 764 P.2d at 82-86.

All parties to the Payette Adjudication thereafter were compelled to file notices of claim in the SRBA. *See* R. 494 (¶ D) (consolidation order). In its notices of claim for Cascade and Deadwood Reservoirs (p. 4, *supra*), the United States described its water rights as “decreed,” based on the 1986 Partial Decree in the Payette Adjudication. R. 772-789. In 2001, the district court issued an order formally consolidating the Payette Adjudication with the SRBA. R. 493-495. While acknowledging that the 1986 partial decree “resolved the majority of claims” in the Payette Adjudication, R. 493, the order noted that the “Payette Adjudication was never completed,” *id.*, and directed that “all matters concerning the Payette Adjudication” “[h]enceforth * * * be considered * * * in the proceedings relating to Basin 65 in the SRBA.” R. 495. As noted, *supra*, the SRBA district court issued partial decrees of the United States’ rights for Cascade and Deadwood Reservoirs in 2003. R. 543-557.

5. *Flood Control Operations*

As Reclamation developed Deadwood and Cascade Reservoirs in the upper Payette River basin, towns and communities grew on the lower Payette River. *See generally* R. 1761. In light of this development, Reclamation determined, early in its reservoir operations, that it was “necessary and prudent” to fill the reservoirs for irrigation storage in a manner that also would help provide flood control. R. 1661; *see also Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 792 P.2d 926 (1990) (duty of care owed by reservoir operators). Winter and spring flooding events occur on the Payette River when heavy rains fall on snow or frozen ground

and/or due to heavy snowmelt. R. 1661, 1673. Maximum flows in the Payette River usually occur in May or June. R. 1763, 1781. By filling the reservoirs for irrigation storage during this peak-flow period, Reclamation can minimize flood damages to communities below the dam. R. 1661, 1809.

Reclamation began such flood-control operations – *i.e.*, evacuating reservoir space in order to fill the reservoirs during periods of peak runoff – in or before 1957. R. 1809. By bypassing early flows, however, Reclamation risked not being able to fill the reservoirs, if late flows were less than anticipated. R. 1776. In 1974, Reclamation developed “flood control rule curves” to provide “reasonable assurance” of maximum physical fill for irrigation use, consistent with flood-control objectives. R. 1809. Reclamation revised the rule curves in 1995. R. 1809, 1817-1826. The flood-control target on the Payette River is a flow rate of 12,000 cubic feet or less at Horseshoe Bend. R. 1769. The rule curves identify the reservoir fill level and vacant space to be maintained over time to meet that targeted flow rate, in light of winter flood events and predicted snowmelt. R. 1808-1809.

As fall passes to winter and snows accumulate, flood risks change and Reclamation’s ability to predict spring snowmelt improves, causing the prescribed reservoir levels to change. Reclamation initially fills the reservoirs during the fall and winter up to a maximum winter “carryover” amount (maximum reservoir volume minus a set storage space dedicated to prevent flooding from winter storms),⁵ then vacates additional water determined to be replaceable by

⁵ The 1995 revision to the rule curves determined that Reclamation could safely reduce the required winter flood space (and increase winter carryover volume). R. 1819-24.

snowmelt, as snowmelt forecasts develop. In heavy precipitation years, this results in: (1) an early period of reservoir “fill” up to maximum carry-over, (2) an evacuation period as reservoir space is vacated to capture predicted snowmelt, and (3) a “refill” period during peak flows to capture storage for irrigation use. *See* R. 1778 (plotting reservoir levels over time).

6. *Basin 65 Accounting Procedures*

Idaho law charges the Director of IDWR with responsibility to “direct[] and control * * * the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom.” Idaho Code § 42-602. The “[d]istribution of water within water districts” is “accomplished by watermasters,” who are elected by water district and “supervised by the [D]irector.” Idaho Code §§ 42-602, 605(3). To carry out IDWR’s supervisory functions, the Director may “adopt rules and regulations for the distribution of water * * * as shall be necessary to carry out the laws in accordance with the priorities and rights of the users thereof.” *Id.* § 42-603.

In March 1993, IDWR prepared a memorandum for the Water District 65 watermaster and the Boise Project superintendent, announcing computerized accounting procedures for the distribution of water to water-rights holders in Basin 65. R. 1614-1619. The announced procedures were similar to computerized procedures that IDWR had developed in 1978 for Basin 01, and in 1986 for Basin 63. *See* R. 88 (n. 13); *see also* <https://www.idwr.idaho.gov/water-data/water-rights-accounting/> (overview of accounting system). For storage in Cascade and Deadwood Reservoirs, IDWR announced, *inter alia*, that “reservoirs can fill only once per year” and that “natural flow [would] be allocated to reservoir rights regardless of whether physical

storage actually occurs.” R. 1616. In its recent *Basin 63 Accounting Order*, IDWR further explained its accounting rules for federal on-stream reservoirs as follows:

- IDWR treats all incoming flows as diversions toward the reservoir storage right;
- IDWR begins to count incoming flows against a reservoir’s annual storage right on the date after irrigation releases are completed for the prior irrigation season;
- IDWR counts all flows that are available in priority to the reservoir storage right, excluding only those flows released to satisfy senior downstream rights;
- IDWR considers a reservoir’s storage right satisfied on paper, as soon as available incoming flows plus the prior year’s carryover equal the designated volume limit, whether or not the reservoir is physically filled; and
- IDWR considers water stored after the date of “paper fill” to be “unaccounted for” or “unallocated” storage, and not associated with any water right.

See Basin 63 Accounting Order at 36-36 (¶¶ 106-108) & 40-41 (¶¶ 116-124).

Under IDWR’s accounting, whenever Reclamation releases water for flood-control purposes, Reclamation loses the right to later store, under priority, the associated amount for irrigation purposes. This is so because IDWR charges the released water against the United States’ storage right even though the water is not actually physically stored for irrigation use. To date, IDWR’s accounting rules have impacted the United States’ storage rights largely only on paper. Flood control releases occur at Cascade and Deadwood reservoirs when forecasted runoff in the Payette River basin exceeds storage capacity. Because excess runoff varies in amount from year to year and occurs in spring at times of low irrigation need, it is not readily

appropriated for irrigation. In the absence of junior users to call on excess waters, IDWR permits Reclamation to “refill” after its storage rights are satisfied on paper, to accumulate “unaccounted” storage, and to distribute the “unaccounted” waters to its space holders. *See generally id.* at 75-56 (¶ 57). Nonetheless, under IDWR’s accounting rules, Reclamation cannot claim priority of use in the “unaccounted” storage, thus placing federal and space holder water rights at risk to future appropriation by others.

7. *Basin-Wide Issue 17*

Concerned that IDWR’s accounting rules might disrupt longstanding reservoir operations and impact the availability of water for irrigation and other uses by space holders, the United States, Black Canyon, and other federal-reservoir space holders petitioned the district court in 2012 to designate, for basin-wide adjudication, the status of reservoir “refill” rights, in light of IDWR’s accounting procedures. *See In re SRBA*, 157 Idaho at 388, 336 P.3d at 795. In response, the district court designated the following issue as “Basin-Wide Issue 17”: “Does Idaho law require a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control.” *Id.* In a 2013 ruling, the district court concluded that a remark was not required for the presumed self-evident reason that “a storage right that is filled cannot refill under priority before affected junior appropriators satisfy their water rights once.” *See id.* at 389, 336 P.3d at 796. In so ruling, the district court treated “filled” as meaning “satisfied” and declined to address what it means to satisfy a reservoir right in the first instance. *Id.*

On appeal by the space holders, this Court determined in 2014 that the district court abused its discretion by designating and answering a question that no party “actually sought to

have answered.” *Id.* at 392, 336 P.3d at 799. This Court observed that the parties actually wanted to adjudicate “whether flood control releases count toward the [initial] ‘fill’ of a water right.” *Id.* Nonetheless, this Court found that the district court did not abuse its discretion in refusing to designate that question for basin-wide proceeding, finding it to be a “mixed question of law and fact,” specific to each reservoir. *Id.* at 392, 336 P.3d at 799. In addition, this Court rejected the space holders’ argument that IDWR lacks discretion to determine, in the first instance, when a water right is satisfied. *Id.* Citing IDWR’s duty “to administer water according to [IDWR’s] technical expertise,” this Court held that it is “within [IDWR’s] discretion” to determine whether the “number that [IDWR] must fill in priority” “has been met for [any] individual decree.” *Id.* at 394, 336 P.3d at 801. This Court noted that “the Idaho Administrative Procedure Act provides procedures for challenging [IDWR’s] chosen accounting method.” *Id.*

8. *Basin 63 Accounting Order*

In October 2013, IDWR initiated “contested case” proceedings for its own administrative review of the accounting procedures used by IDWR for the distribution of water to federal on-stream reservoirs in Basin 63.⁶ IDWR issued a final administrative order in the contested case proceedings on October 15, 2015. *See Basin 63 Accounting Order* (U.S. Add. 3). This order set out – for the first time in any formal rule or order – IDWR’s accounting practices for federal on-stream reservoirs, and defended the rules against various challenges. *Id.* IDWR concluded by

⁶ The United States did not participate in these non-SRBA proceedings, which were not within the McCarran Amendment’s waiver of federal sovereign immunity. 43 U.S.C. § 666(a).

“ordering” that its “current method of accounting for the ‘fill’ or ‘satisfaction’ of Water District 63 federal on-stream reservoir rights” be continued. *Id.* at 79.

Space holders in the Basin 63 reservoirs sought judicial review of the *Basin 63 Accounting Order* under the Idaho Administrative Procedures Act. The case was filed in the Fourth Judicial District in and for the County of Ada, and assigned to the same district court judge (Eric J. Wildman) who presides over the SRBA. Judge Wildman issued a decision on the *Basin 63 Accounting Order* on the same day that he issued his SRBA decision (pp. 8-9, *supra*) on the Basin 63 supplemental claims. In the decision on the accounting procedures, Judge Wildman upheld IDWR’s view that “reservoir water rights [are] satisfied when the amount of natural flow that has entered the reservoir in priority equals the quantity element of the right.” *See Memorandum Decision*, SRBA Subcase 63-33732 at 13 (Sept. 1, 2016) (U.S. Add. 1)

But Judge Wildman rejected IDWR’s practice of treating water diverted and stored after “paper fill” as “unaccounted for storage.” *Id.* at 14-17. Judge Wildman observed that Reclamation’s flood-control operations in Basin 63 (like those in Basin 65) began before 1971 and that “in all of those years, water [now] identified * * * as unaccounted for storage * * * was diverted, stored, and ultimately used by the irrigators for irrigation.” *Id.* at 16. Because pre-1971 Idaho law only required diversion and beneficial use for the perfection of a water right, Judge Wildman concluded that the later-diverted waters likely were not “unaccounted for” and thus “remanded for further proceedings.” *Id.* at 17. As explained *supra*, the district court did not reach the same conclusion for the United States’ supplemental claims in Basin 65, only because the district court deemed those claims barred by the Payette Adjudication.

ISSUES PRESENTED

The issues presented on appeal are:

1. Whether the United States' supplemental claims in Basin 65 are precluded by the Payette Adjudication and res judicata; and
2. Whether the United States' supplemental claims in Basin 65 are unnecessary because the decreed rights for Cascade and Deadwood Reservoirs already include the right to fill the reservoirs after flood-control releases.

STANDARD OF REVIEW

“Whether a prior adjudication bars a claim asserted in a subsequent lawsuit is a question of law over which this Court exercises free review.” *Taylor v. Riley*, 157 Idaho 323, 330, 336 P.3d 256, 263 (2014) (citing *Andrus v. Nicholson*, 145 Idaho 774, 777, 186 P.3d 630, 633 (2008)). Whether the United States' decreed reservoir rights include the right to fill the reservoirs after flood-control releases is also a question of law subject to *de novo* review. *State v. Nelson*, 131 Idaho 12, 15, 951 P.2d 943, 946 (1997).

ARGUMENT

I. THE UNITED STATES' SUPPLEMENTAL CLAIMS ARE NOT PRECLUDED BY THE 1986 PARTIAL DECREE IN THE PAYETTE ADJUDICATION

The district court determined that the United States' Basin 65 supplemental claims are precluded for three reasons: (a) “by operation of the final judgment entered in the Payette Adjudication,” R. 2512-13; (b) “by operation of statute,” namely, the forfeiture provision in Idaho Code § 42-1411 (1969) (repealed), R. 2517-2518; and (c) by principles of res judicata. R.

2514-1417. Contrary to the district court’s ruling, the 1986 Partial Decree and the 1969 Idaho statute it references (via the 1979 Director’s Report) do not provide independent bases for claim preclusion. Both simply reference the rule of res judicata, which does not apply.

A. The Terms of the 1986 Partial Decree in the Payette Adjudication Have No Independent Preclusive Effect

The 1979 Director’s Report in the Payette Adjudication stated, as a proposed conclusion of law, that the “recommended decree includes all of the [established] rights * * * to the waters of the Payette River,” and that, “upon its adoption” by the Payette Adjudication court, the “recommended decree” would result in the “forfeiture” of any unclaimed water rights “as provided in Section 42-1411, Idaho Code.” R. 524; *see also* p. 14, *supra*. Quoting this language, the district court determined that the “plain language” of the 1986 Partial Decree precludes an adjudication of the United States’ supplemental claims in Basin 65. R. 2512-13.

This is a *non sequitur*. The “plain language” quoted by the district court (R. 2512-13) is from the 1979 Director’s Report, R. 524, not the 1986 Partial Decree in the Payette Adjudication. To be sure, the 1986 Partial Decree “ordered, adjudged, and decreed” that “the water rights of the Payette River Drainage Basin * * * are as described in the [Director’s Report].” R. 452. But the 1986 Partial Decree did not specifically adopt the conclusions of law in the 1979 Director’s Report. *Id.* More to the point, the 1979 Director’s Report merely stated that, if adopted by the Payette Adjudication court, the “recommended decree” would result in forfeiture “as provided” by then-applicable Idaho law (Idaho Code § 42-1411 (1969) (repealed)). R. 542. This statement

has no force apart from the referenced statute. The relevant question is simply whether statutory forfeiture applies. *See* pp. 26-29, *infra*.

The district court's reliance on "issue preclusion" (R. 2514-2516) is similarly misplaced. Issue preclusion applies to issues "actually * * * litigated and resolved in [a] prior suit." *Pocatello Indus. Park Co. v. Steel West, Inc.*, 101 Idaho 783, 786, 621 P.2d 399, 402 (1980). Although the district court stated that the 1986 Partial Decree "addressed and adjudicated" the "very issue * * * placed before [the court]" in the United States' supplemental claims, R. 2514-15, the district court did not actually find (and could not conceivably find) that the 1986 Partial Decree addressed the United States' supplemental claims *on the merits*. The Payette Adjudication confirmed – without contest – the United States' rights to store water for beneficial use per the State licenses, plus the United States' right, based on beneficial use, to use Deadwood Reservoir storage for irrigation purposes. *See* pp. 12-15, *supra*. In so doing, the 1986 Partial Decree did not address the issues prompted by IDWR's subsequently-developed accounting procedures and raised in the United States' supplemental claims, including: (1) whether all flows into an on-stream reservoir are "diversions" toward storage rights; (2) whether the United States "diverted" the amounts claimed in its supplemental claims (assuming all incoming flows are "diversions"); and (3) whether the United States historically stored and delivered, for beneficial use, the last diverted waters, *i.e.*, water stored after releases for flood-control purposes.

In asserting that the Payette Adjudication court addressed the "validity" of the United States' supplemental claims (R. 2514-15), the district court did not find that the Payette Adjudication court actually adjudicated any of the above issues; rather, the district court referred

to the Payette Adjudication court's assertion (via statutory reference) that the 1986 Partial Decree would result in the loss of claims not therein specified. In other words, the district court held that the Payette Adjudication court had conclusively addressed and prejudged the "issue" of claim preclusion, by declaring future claims barred. This holding stands claim preclusion on its head and is plainly incorrect. All courts expect and intend their "final" judgments to be final; but no court can prejudge the preclusive effect of a judgment on claims that have yet to arise. The United States' supplemental claims are predicated on changed legal and factual circumstances that *postdate* the 1986 Partial Decree. *See* pp. 29-40, *infra*. The district court's task was to evaluate whether claim preclusion applied, in light of these changed circumstances that were *unknown* to the Payette Adjudication court. Issue preclusion was not implicated.

B. The 1969 Statutory Forfeiture Provision Merely Memorializes Res Judicata Principles and, In Any Event, Does Not Apply

For three reasons, the district court erred in holding the United States' supplemental claims barred by statutory forfeiture. R. 2517-19. First and foremost, former § 42-1411 (1969) cannot reasonably be interpreted to impose a forfeiture rule more stringent than *res judicata*. Section 42-1411 imposed the penalty of forfeiture on "any water user who [was] joined" in the adjudication and "failed to * * * submit proof of his claim." *See* 1969 Idaho Sess. Laws, ch. 279, § 9, p. 832 (adding Idaho Code § 42-1411). This language tracks the rule of claim preclusion and manifests the Legislature's intent to apply claim preclusion to any all claims that could have been brought in a general adjudication, upon the entry of a final decree in the adjudication. *See Joyce v. Murphy Land & Irrig. Co.*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922).

But this provision does not show legislative intent to penalize water users for not bringing claims that could not have been filed. Statutory “[c]onstrutions that lead to absurd or unreasonably harsh results are disfavored,” *Jasso v. Camas Cty.* 151 Idaho 790, 798, 264 P.3d 897, 905 (2011), and statutes are generally construed to “avoid * * * arbitrary forfeiture of property rights.” *Avista Corp. Inc. v. Wolfe*, 549 F.3d 1239, 1250-51 (9th Cir. 2008). Under these canons, Section 42-1411 is properly construed as “memorializ[ing] * * * the application of res judicata to [the] water adjudication.” *See State Dept. of Ecology v. Acquavella*, 112 Wash. App. 729, 739, 51 P.3d 800, 805 (Wash. App. 2002) (construing similar Washington statute). Such clarification is not an empty gesture. Claim preclusion generally applies to claims arising out of the same “transaction or series of transaction.” *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012). A water claimant may possess water rights arising from multiple distinct “transactions.” Section 42-1411 (1969) clarified that a general-adjudication decree would have preclusive effect on all water-rights claims that could be brought in the proceeding, without regard to the “transactions” giving rise to the rights.

Second, even if § 42-1411 (1969) somehow could be construed as compelling preclusion beyond the above-stated rule, it is not applicable in this case. Section 42-1411 addressed the preclusive impact of “[t]he decree” in a general adjudication. *See Idaho Code § 42-1411 (1969)* (as added by 1969 Idaho Sess. Laws, ch. 279, § 9, p. 832) (emphasis added). The statute provided that “[t]he decree shall be conclusive as to the rights of all existing claimants upon the water system” and that “when [such] a decree has been entered, any water user who has been joined and who failed to * * * submit proof of his claim * * * shall be held to

have forfeited all rights to any water theretofore claimed.” *Id.* (emphasis added). Although the 1986 *Partial Decree* in the Payette Adjudication adjudicated *most* rights in the system and was certified “final” for appeal purposes, it was not “conclusive as to [all] rights.” *See* R. 450-486. Under the terms of former Section 42-1411, forfeiture was triggered only by the entry of a comprehensive decree that was conclusive of all rights. Idaho Code § 42-1411 (1969).

Third, the Idaho Legislature repealed former § 42-1411 *before* the issuance of a final decree conclusive of all rights in the Payette Adjudication. Indeed, this repeal manifested the Legislature’s intent to delay finality in the Payette Adjudication, pending completion of the SRBA. As explained (pp. 15-16, *supra*), in 1985, the Idaho Legislature directed IDWR to commence an adjudication of the entire Snake River system including “adjudicated” tributaries, as was necessary to acquire jurisdiction over the United States and its claims. *In re Snake River Basin Water Sys.*, 115 Idaho at 2-5, 764 P.2d at 79-82; 1985 Idaho Sess. Laws, ch. 18, § 1, p. 28, ch. 118, § 1, p. 287. In July 1986 (just after the entry of the January 1986 Partial Decree in the Payette Adjudication, R. 450), the Idaho Legislature further amended the general adjudication statute to “ensure that state laws and procedures [were] adequate as a matter of federal law to adjudicate the water rights of all federal reserved water right claimants.” 1986 Idaho Sess. Laws, ch. 220, § 2, p. 560. These enactments included the repeal of § 42-1411 (1969), and the substitution of a new provision on finality, codified at § 42-1420. *See* 1986 Idaho Sess. Laws, ch. 220, § 1, p. 560 (repealing former § 42-1411) & § 20, p. 580 (adding current § 42-1420).

This Court subsequently held that the SRBA had to incorporate Payette Adjudication claims in order to comport with federal law (the McCarran Amendment). *See In re Snake River*

Basin Water Sys., 115 Idaho at 5-9, 764 P.2d at 82-86. The net result was to fold the *unfinished* Payette Adjudication into the SRBA, subject to a newly-enacted provision on the finality of claims. As presently codified, the general adjudication statute directs the SRBA court to “combine all partial decrees * * * into a final decree,” Idaho Code § 42-1412(8), and states that “[t]he decree entered in a general adjudication” – *i.e.*, the final unified decree – “shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.” *Id.* § 42-1420. Once the SRBA was initiated, the 1986 Partial Decree in the Payette Adjudication became a *partial* decree in the SRBA, which remained to be merged into a final unified SRBA decree along with all other partial decrees. Section 42-1420 speaks to the preclusive effect of “[t]he decree” in a general adjudication, *id.*, but the statute does not specify the preclusive effect to be given partial decrees, prior to the issuance of a final unified decree or when combining such decrees into a unified decree. This leaves general estoppel principles as the controlling law for determining the preclusive effect (if any) of the 1986 Partial Decree. *Cf. State v. Hagerman Water Rights Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997).

C. The United States’ Supplemental Claims are not barred by Claim Preclusion

Under the doctrine of res judicata (claim preclusion), a final judgment bars subsequent litigation between the parties as to any claim that “could have been brought” in relation to the “transaction or series of transactions” that was the subject of the original suit, whether or not the claim was actually litigated. *Berkshire Investments, LLC*, 153 Idaho at 81, 278 P.3d at 951; *see also Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho at 553, 208 P. at 242-43. Conversely, where a change in fact or law gives rise to a new claim that could not have been brought at the

time of the initial action, claim preclusion does not apply. *U.S. Bank Nat. Ass'n v. Kuenzli*, 134 Idaho 222, 226, 999 P.2d 877, 881 (2000); *Berry v. Koehler*, 84 Idaho 170, 181, 369 P.2d 1010, 1016 (1961); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945). This is true even when the subsequent claim involves the same general subject matter as the initial adjudication. *Kuenzli*, 134 Idaho at 226, 999 P.2d at 881.

Kuenzli involved disputes over the sale of a farm. In the initial lawsuit, the seller sought specific performance of a repurchase option. *Id.* at 224, 999 P.2d at 879. During the pendency of the suit, the seller did not make payments that were due under the option. *Id.* at 225, 999 P.2d at 880. Once the seller won a judgment of specific performance, the purchaser filed a notice of default for back payments, which the seller paid in escrow under protest, prompting a second suit over whether those payments were owed. *Id.* Observing that it “would have been impossible for the [seller] to have claimed the disputed money before that money had been demanded or deposited with the escrow agent,” this Court held that the second action was not barred by claim preclusion. *Id.* at 226, 999 P.2d at 881. This is true even though both the initial sales agreement and repurchase option were before the district court in the initial suit. *Id.* The Court cited the RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) for the proposition that “[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.” *Id.*

That precept applies here. Like the subsequent claim in *Kuenzli*, the United States’ supplemental claims are bound up in the “same subject matter” as the federal claims adjudicated

in the Payette Adjudication. *See id.* Nonetheless, as in *Kuenzli*, the supplemental claims are not barred by claim preclusion, because they are dependent on material operative facts that post-date the Payette Adjudication, namely: IDWR’s accounting procedures for Basin 65, which were not developed until 1993, and which (if confirmed) would impose limits on the United States’ water rights that are not compelled by the State licenses or any legal authority that preexisted the Payette Adjudication. For these reasons, it “would have been impossible” for the United States to have brought the supplemental claims in the Payette Adjudication. *Id.*; *see also* R. 2213-14 (special master’s finding).

The district court erred in finding *Kuenzli* to be “readily distinguishable” on two grounds. First, in the district court’s view, the present case implicates issue preclusion in addition to claim preclusion. R. 2516. That determination is mistaken for reasons already stated (pp. 25-26, *supra*). Second, in the district court’s view, the United States could and should have filed its supplemental claims in the Payette Adjudication because such claims are based on operative facts that preexisted the Payette Adjudication, and because the United States (purportedly) sought to “preserv[e] a historical practice of administration” that was contrary to the rules of prior appropriation. *Id.* These views are mistaken for the reasons that follow.

1. *The United States’ Supplemental Claims Are Cognizable Only in the Context of IDWR’s Accounting Procedures*

The district court correctly observed (R. 2516) that the United States’ supplemental claims are based on the diversion and beneficial use of water that dates back to before 1965. But it does not follow, as the district court thought (*id.*), that the United States “could have proven

up” the supplemental claims in the Payette Adjudication. The district court considered only half of the picture. Although based on diversions and beneficial use prior to the Payette Adjudication, the supplemental claims are inextricably bound up with IDWR’s post-adjudication accounting rules and, in particular, IDWR’s newfound understanding of what it means to “divert” water toward an on-stream reservoir’s storage right.

As explained (pp. 4-6, *supra*), aside from the claimed priority dates, the only difference between the United States’ supplemental claims and its decreed reservoir rights is the greater diversion amounts (up to maximum annual stream flow) in the supplemental claims. The United States claimed the additional diversion rights not because the United States claims to have impounded or intends to impound all such waters for irrigation and power storage, but because IDWR’s accounting rules charge Reclamation with diverting all stream flows for such storage, whether or not Reclamation actually impounds the flows for storage.

Significantly, IDWR’s accounting rules for on-stream reservoirs are not based on the ordinary usage of the term “diversion” in water-rights law. To establish a water right, an appropriator generally must divert the natural flow of a river or stream for a particular beneficial use. *See Joyce Livestock*, 144 Idaho at 5-7, 156 P.3d at 506-508; *see also Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680, 619 P.2d at 1130, 1133 (1980). When the owner of a diversion dam diverts water to a ditch and laterals for irrigation, or to a ditch and off-stream reservoir for irrigation storage, such diversion physically removes water from the river system for a particular use and makes it unavailable to other appropriators. *See, e.g., Keller v. Magic Water Co.*, 92 Idaho 276, 279, 284, 441 P.2d 725, 728, 733 (1968); *see also*

Idaho Code § 42-201(2). In contrast, if the owner of a diversion dam operates the dam in a manner that allows all stream flows to pass downstream, the “diversion” of flows through or around the dam structure is not itself an appropriation. No water is “removed from the natural water course” or made unavailable to other users. *See* Idaho Code § 42-201(2).

For dams and other diversion structures that remove water from a stream channel for off-stream storage and beneficial use, the amount of water appropriated toward beneficial use or for satisfying an existing water right can be readily measured by gauging outgoing flows at the point of diversion. On the other hand, determining whether and when waters are appropriated at on-stream reservoirs is more complicated. River flows entering an on-stream reservoir do not physically leave the river channel and need not be impounded. When an on-stream impoundment dam is releasing as much or more water than the reservoir is receiving in natural flow – *i.e.*, when the dam is operated in a manner to *maintain* or *lower* reservoir levels – the dam operates like any other diversion structure when not in use: the dam does not take water from the river or make it unavailable to other appropriators. Similarly, when Reclamation releases water as part of flood control operations, the temporarily impounded and released waters are never removed from the river or made unavailable to other water users or prospective appropriators.

As this Court explained in the Basin-Wide Issue 17 appeal, “[a] storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse” for later beneficial use. *In re SRBA*, 157 Idaho at 389, 336 P.3d at 796. Reclamation impounds water in Cascade and Deadwood Reservoirs by limiting releases, and then delivers stored water for beneficial use by making designated releases to the downstream channel: (a) on the demand

of space holders, who divert for irrigation use at points downstream, and (b) to meet power-production demands at the Black Canyon Dam. In all of its reservoir operations – whether Reclamation is releasing stored water, natural flows, or amounts less than incoming natural flows – Reclamation necessarily controls the stream flow. But Reclamation need not – and when annual runoff exceeds Reservoir capacity, Reclamation *cannot* – impound all of the water entering its reservoirs for irrigation storage or other beneficial use.

Nonetheless, under IDWR’s accounting rules, Cascade and Deadwood Reservoirs are deemed to be “diverting” all incoming flows for appropriative purposes, and IDWR charges all such “diversions” against the United States’ irrigation storage rights (excluding only those amounts released to satisfy senior downstream rights) as soon as flows are available, without regard for whether Reclamation is actually impounding water from the Payette River system for irrigation or power storage. Stated differently, IDWR’s accounting rules for on-stream reservoirs leave Reclamation no discretion as to whether and when to exercise its storage rights. This is a highly unusual interpretation of a water right. Water rights are often restricted to particular periods of use. *See* Idaho Code §§ 42-202(1)(c), 42-1409(1)(g). And if the owner of a water right fails to exercise the right when flows are first available for appropriation, the owner risks being unable to appropriate to the full extent of the right. *Cf. Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388-390, 647 P.2d 1256, 1260-62 (1982) (addressing risks of complete nonuse). But there is no authority for compelling an owner to use a water right at first available opportunity, where the owner assumes the risk of nonuse.

The United States' supplemental claims can only be understood in this context. Absent IDWR's determinations (1) that all incoming flows are diversions, and (2) that all incoming flows available in priority therefore must be charged against the United States' irrigation storage right as soon as the prior-year's irrigation releases are completed, the United States' supplemental claims would make little (if any) sense. The United States claimed rights to divert for "irrigation storage" in amounts well in excess of its decreed "irrigation from storage" rights and reservoir capacity, only because IDWR's accounting procedures define on-stream reservoir "diversions" in a manner that disassociates water diversion from water appropriation.

2. *IDWR's Accounting Procedures Do Not Enforce the State Licenses or Any Pre-existing Legal Authority*

The district court acknowledged that IDWR's accounting procedures for Basin 65 were developed and implemented years *after* the 1986 Partial Decree in the Payette Adjudication. The district court presumed, however, that, upon implementation, the accounting procedures simply enforced the "plain language" of the United States' rights as decreed in the 1986 Partial Decree, and that the United States sought to preserve a "historical method of administration" that was not in conformity the rules of prior appropriation.⁷ R. 2516. The district court explained that there

⁷ On review of IDWR's *Basin 63 Accounting Order*, the district court affirmed IDWR's practice of "accru[ing] all natural flow entering the reservoirs in priority to the reservoir water rights," ruling that the objections to that practice were "inconsistent with the prior appropriation doctrine and the plain language of the partial decrees" for the Basin 63 reservoirs. *See Memorandum Decision*, Case No. CV-WA-2015-21376 at 10 (Idaho 4th Dist.) (Sept. 1, 2016) (U.S. Add. 2). Although the district court did not expressly make the same finding in its October 7, 2016 final order on the Basin 65 reservoirs, there is no material difference in the language of the decrees.

are “numerous examples” of water rights that “historically [have] been administered in a manner that promotes the most efficient use of water given the peculiarities of a particular system * * * even though the administrative scheme may not pass muster if the rights were to be administered strictly in accordance with the prior appropriation system.” *See Memorandum Decision and Order*, SRBA Subcase 63-33732 at 6 (Sept. 1, 2016) (U.S. Add. 1). Where “adopted through the consent of all affected users,” such administrative schemes can be “memorialized” in a water rights decree. *Id.* The district court reasoned that, because the United States failed to “memorialize” such a “method of administration” for its reservoir flood-control operations when presented the opportunity in the Payette Adjudication, the United States cannot belatedly “circumvent that omission” through its supplemental claims in the present case. R. 2517.

This analysis misapprehends the circumstances that prompted the United States’ supplemental claims. The United States does not seek to preserve an “historical administrative practice” that it knew or had reason to know, at the time of the Payette Decree, might not “pass muster” under the law of prior appropriation. *See* R. 2516. There was no formal system for administering water rights in Basin 65 until IDWR developed the 1993 accounting procedures. The United States’ preexisting exercise of its licensed and decreed water rights was (and remains) consistent with the law of prior appropriation and was not challenged or contradicted until the 1993 accounting procedures. The district court erred in failing to recognize that it was IDWR’s 1993 accounting procedures – and not the prior reservoir operations – that marked a departure from prior-appropriations law.

Up to and through the Payette Adjudication, the United States exercised its reservoir rights under the State permits and licenses. Although the permits and licenses did not authorize flood control operations, there was (and remains) no Idaho statute or other authority for the proposition that storing water to regulate stream flows and avert downstream flooding constitutes an appropriation requiring a State permit or license or decreed water right. At least one jurisdiction has determined that “the capture and storage of flood waters may be a ‘beneficial use’ underlying an appropriation of water.” *Pueblo West Metropolitan Dist. v. Southeastern Colo. Water Cons. Distr.*, 689 P.2d 594, 603 (1984). But in that case, the Colorado Supreme Court relied on a distinctive Colorado statute that, in the court’s view, “granted conservancy districts the right to acquire a water right for the purpose of preventing floods.” *Id.*

Significantly, storing water to prevent flooding is not “using” water in any ordinary sense. To recognize flood-control storage as a beneficial *use* could prevent appropriations for other uses.⁸ For those reasons, Reclamation treated flood control to be “independent of the water rights system and prior appropriation,” and IDWR concurs with that view. *See Basin 63 Accounting Order* at 74 (¶ 53). Thus, during the Payette Adjudication, Reclamation had no reason to believe that it needed a separate water right or remark to conduct flood-control operations incidental to its irrigation and power storage at Cascade and Deadwood Reservoirs.

⁸ Idaho argued below that “there may be circumstances in which recognizing a ‘flood control’ right would not offend prior appropriation principles,” *e.g.*, by “fully subordinating ‘flood control’ to all existing and future uses.” R. 1558 (citing *Meridian, Ltd. v. San Francisco*, 13 Cal. 2d 424, 449-50, 90 P.2d 537, 549 (1939)). This is just another way of saying that flood control is outside the rules of prior appropriation. A water right that cannot be asserted in priority against any *present or future* use is not a right based on prior appropriation or with priority of use.

Indeed, there was no Idaho statute, regulation, or case precedent to support the view that Reclamation could have claimed a separate flood-control storage right.

Further, when granting the reservoir licenses, Idaho did not impose any terms that can be construed to restrict the manner in which Reclamation could fill the reservoirs for irrigation and power use. The licenses imposed a “per annum” maximum amount (essentially matching reservoir capacity) on the right to “*use* the water” of the Payette River system for the specified irrigation and power purposes (emphasis added). R. 719-720. But the licenses contained no “diversion” or “storage” limits distinct from the “use” limit, much less limits on the timing of diversions for storage. *Id.* This can be explained, in part, by the standard form of the licenses, which was not tailored to storage rights or to the unique circumstances of on-stream reservoirs. But the license form only underscores the focus of the water-rights system. The licenses governed appropriations for *use*; they did not and were not intended to regulate incidental reservoir operations that do not implicate water *appropriation*.

In its *Basin 63 Accounting Order*, IDWR cited three decisions of this Court for the proposition that all natural flows entering a reservoir are “diverted,” as a matter of law, for water-rights purposes. *See Basin 63 Accounting Order* at 66 (¶ 30) (U.S. Add. 3). But the cited cases are inapposite. In *Glenn Dale Ranches v. Shaub*, 94 Idaho 585, 588, 424 P.2d 1029, 1032 (1972), this Court held that “waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use.” *Id.* But this Court was addressing an appropriators’ duty to construct “flumes, pipes, or other lining” of diversion works to prevent “unreasonable [transportation] loss.” *Id.* This Court was not addressing the unique circumstances of federal

on-stream reservoirs and did not hold that all waters flowing through such reservoirs are “appropriated” toward storage rights. *Id.*; see also *United States v. State*, 135 Idaho 655, 666, 23 P.3d 117, 128 (2001) (the creation of waterfowl refuges on “islands” within reclamation-project reservoir did not include reserved water-right for wildlife); *Keller*, 92 Idaho at 284-85, 441 P.2d at 733-34 (1968) (appropriator may use stream bed as part of diversion structure that diverts “entire stream” for irrigation use).

Thus, both at the time the United States obtained its permits and licenses for Cascade and Deadwood Reservoirs and at the time the United States’ reservoir rights were confirmed in the Payette Adjudication, the rules of prior appropriation reflected two principles pertinent to understanding such rights: (1) water flowing around or through a diversion structure is not “diverted” for beneficial use (or for the satisfaction of an existing water right) simply because it is available in priority to be diverted; see pp. 32-34, *supra*, and (2) storing waters to regulate flows and to avert flooding does not implicate prior appropriation and the water rights system, see *Basin 63 Accounting Order* at 74 (¶ 53). IDWR’s accounting rules for on-stream reservoirs constitute a departure from both principles.

In this context, the district court’s determination that the United States could have and should have preemptively raised concerns about its own flood-control operations is untenable. At the time of the Payette Adjudication, IDWR had not developed its accounting procedures for Basin 65. Nor had IDWR issued rules for on-stream reservoirs in any final regulation or formal order for any stream basin. In the absence of any procedures, regulation, statute, or case adopting IDWR’s novel interpretation of the term “diversion,” the United States could not have

claimed rights to “divert” waters that are merely passed through Cascade and Deadwood Reservoirs before physical impoundment. Such a claim would have lacked any legal foundation.

This is not to argue that IDWR lacked statutory authority to issue rules that enable computerized accounting and administration of all rights in a stream basin, *see In re SRBA*, 157 Idaho at 394, 336 P.3d at 801, or that IDWR’s accounting rules for on-stream reservoirs are *per se* improper. The critical point for res judicata purposes is this: by defining “diversion” in the context of on-stream reservoirs in a manner not dictated or anticipated by pre-existing water-rights law, IDWR’s accounting rules fundamentally altered the way in which water rights are described and enforced. Because the 1986 Partial Decree adjudicated the United States’ reservoir rights under a materially different understanding of the term “divert,” res judicata does not bar the United States’ supplemental claims, which merely seek to describe Reclamation’s longstanding reservoir operations in the context of IDWR’s newfound terminology (or usage of terms). *See generally Berry*, 84 Idaho at 181, 369 P.2d at 1016; *State Farm Mut. Auto. Ins. Co.*, 324 U.S. at 162 (res judicata inapplicable in the event of a change in law).

II. THE UNITED STATES SUPPLEMENTAL CLAIMS ARE UNNECESSARY IF THE UNITED STATES’ DECREED RIGHTS ALREADY INCLUDE THE RIGHT TO FILL THE RESERVOIRS AFTER FLOOD-CONTROL RELEASES

As explained above, IDWR’s accounting rules for federal on-stream reservoirs are at odds with the law of prior appropriation. They strip Reclamation of all discretion in the exercise of federal storage rights, construe Reclamation as impounding water toward federal storage rights even when Reclamation is physically lowering or simply maintaining reservoir levels, and charge flood-control releases against federal storage rights even though IDWR otherwise

acknowledges flood-control storage is outside the rules of prior appropriation. IDWR's *Basin 63 Accounting Order* is presently before this Court in a separate appeal. That order adopts the same accounting rules for the federal on-stream reservoirs in Basin 63 that IDWR adopted for the Basin 65 Reservoirs. If this Court sets aside the *Basin 63 Accounting Order* on the grounds that Reclamation possesses discretion to determine how and when to impound flows in satisfaction of its storage rights and that waters stored and released solely for flood-control purposes are not appropriations, those rulings would govern the Basin 65 reservoirs, and IDWR's accounting rules for those reservoirs also could not stand. In such circumstances, the United States would voluntarily withdraw the supplemental claims as unnecessary or moot.

* * *

The United States filed the Basin 63 and Basin 65 supplemental claims as a protective measure, not knowing how challenges to IDWR's accounting procedures would be resolved and out of respect for IDWR's authority to direct the administration of water rights. Idaho Code § 42-602; *In re SRBA*, 157 Idaho at 394, 336 P.3d at 801; *see also Hagerman*, 130 Idaho at 733-34, 947 P.2d at 406-7. The United States appreciates IDWR's desire to develop computerized accounting procedures to aid in the administration of water rights, and the United States appreciates the challenge of developing rules to account for federal storage rights in on-stream reservoirs. The United States' supplemental claims are an effort to meet IDWR's desire for accounting efficiency in a manner that enables Reclamation to exercise its full storage rights (albeit with a later priority date), while continuing important flood-control operations that all parties recognize as beneficial.

In his decision on IDWR's *Basin 63 Accounting Order* (pp. 21-22, *supra*), Judge Wildman rejected IDWR's practice of treating diversions after "paper fill" as "unaccounted for" flows, in recognition that such flows historically have been diverted and beneficially used as a result of Reclamation's longstanding flood-control operations. *See Memorandum Decision*, Case No. CV-WA-2015-21376, at 16-17 (Idaho 4th Dist.) (Sept. 1, 2016) (U.S. Add. 2). This conclusion is equally valid for the United States' Basin 65 reservoirs.

The district court disallowed the United States' supplemental claims for the Basin 65 reservoirs – while allowing the United States' Basin 63 claims to proceed – largely as a matter of happenstance. The United States acquired water rights for all Boise Project reservoirs via the State's permit and license process. The district court issued partial decrees in the SRBA for all Boise Project Reservoirs before the reservoir "refill" controversy came to a head. Reclamation filed its supplemental claims for all Boise Project reservoirs thereafter. The district court disallowed the Basin 65 supplemental claims (and not the Basin 63 supplemental claims) only because the 2003 SRBA partial decrees for the Basin 65 reservoirs were preceded by the 1986 Partial Decree in the Payette Adjudication. But following the Legislature's initiation of the SRBA and the incorporation of the Payette Adjudication into the SRBA, there was no legal or equitable basis for treating the Payette Adjudication as a separate adjudication or for treating the 1986 and 2003 partial decrees differently. If IDWR's accounting procedures are upheld and the United States' Basin 65 supplemental claims are disallowed, the United States would be left with no ability to exercise its water right as it historically has done, *i.e.*, in a manner designed to reduce downstream flooding risks. This result can and should be avoided.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the district court dismissing the United States' supplemental claims or, in the alternative, affirm the district court on the grounds that the decreed rights for Cascade and Deadwood Reservoirs enable the United States to fill the reservoirs up to the decreed amounts after releases for flood-control purposes.

Respectfully Submitted,

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