

6-9-2017

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

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

In Re SRBA Case No. 39576

SUBCASE NOS. 65-23531 and 65-23532

THE UNITED STATES OF AMERICA,

Appellant,

vs.

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

Respondents.

**Supreme Court Docket  
No. 44635-2016**

SRBA CASE NO. 39576  
Subcase Nos. 65-23531 & 65-23532

**BRIEF FOR RESPONDENT  
BLACK CANYON IRRIGATION DISTRICT**

APPEAL FROM THE SNAKE RIVER BASIN ADJUDICATION DISTRICT COURT  
OF THE FIFTH JUDICIAL DISTRICT, TWIN FALLS COUNTY, IDAHO  
Honorable Eric J. Wildman, District Judge, Presiding

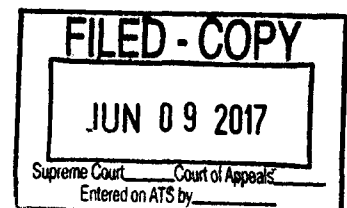
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COMES NOW Black Canyon Irrigation District (“District”), by and through undersigned counsel of record and Idaho Appellate Rules 34 and 35, and hereby submits its *Respondent’s Brief* in the above-captioned appeal.

**I.  
STATEMENT OF THE CASE**

The District acknowledges and agrees with the Statement of the Case presented by Appellant United States of America (“Bureau of Reclamation” or “BOR”), but clarifies the following statement:

Black Canyon intervened in the subcases to argue that the United States’ supplemental claims are unnecessary because IDWR’s accounting rules are in error.

*Brief for Appellant United States of America* (“BOR Brief”), p. 1. The District has consistently argued that this appeal (and that in companion appeal, Docket No. 44636) involves resolution of the flood control release “legal effect” question: What effect, if any, do flood control releases have on the BOR’s existing storage rights? *Appellant’s Opening Brief*, Docket No. 44636 (May 12, 2017) (“District Brief”), p. 24. The above-referenced question is not a water right accounting mechanics-based question. Rather, it is a question of law regarding the legal theory and presumption upon which the State contends the program operates.

The District does not seek review of the inner workings of IDWR’s computerized water right accounting program. The internal details of the program are irrelevant because: (1) the BOR’s late claims accepted the Department’s water right accounting construct (*i.e.*, “paper fill” methodology by which flood control releases count against the existing storage rights) as true and were filed during the pendency of the Basin-Wide Issue 17 proceedings as a hedge against

the potential legal consequences of the program; (2) the accounting program *should* have no legal effect upon the water rights ultimately adjudicated in the Payette Adjudication; and (3) the accounting program does nothing to effect or inform the diversion and use of water post-flood control releases under the constitutional method of appropriation pre-1971 (should supplemental water rights ultimately prove necessary to mitigate the State’s legal theories and preserve historic water storage and use patterns in the basin). *Accord* R. 2236; 2265-66; 2435-36; *see also*, R. 2219, n. 3 and Tr. (Mar. 1, 2016) at 12:5-9 (State concessions that IDWR’s accounting program does not “create, define, or alter water rights.”).<sup>1</sup>

The general aspects of water right accounting that are relevant include: (1) the legal conclusion and ultimate impact the State assigns to the program (*i.e.*, the program’s one-fill rule/paper fill rule premise—whereby, flood control releases count against the existing storage rights for Cascade and Deadwood Reservoirs as a matter of law); and (2) the timing of adoption of the accounting program in Basin 65 (1992/3), which informs the application of various exceptions to the *res judicata* doctrine (the “might and should have been litigated” and the “new facts/claim ripeness” exceptions) argued by the District and BOR.

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<sup>1</sup> Special Master Booth appreciated the “*should* have no legal effect” concern despite confirming the State’s legal proposition concession: “As a *de jure* proposition, counsel for the State is absolutely correct; however what is left out of this statement is that as a *de facto* proposition, water rights accounting by the administrative agency of the State with the authority to administer water rights can, as a practical matter, define water rights.” R. 2219, n. 3. While the program *should* have no effect on the existing storage rights, the parties involved in this appeal are here because the State contends that the program’s “paper fill” construct *does* have a detrimental legal effect under the State’s one-fill theory. According to the State, on-stream reservoirs necessarily divert and store all water flowing into them; therefore flood control releases are necessarily the release of water diverted and stored under the existing storage rights.

The State's overarching legal theory of the one-fill/paper fill rule crystallized during the Basin-Wide Issue 17 proceedings; the State defends the one-fill/paper fill rule (citing the accounting program as the embodiment of that rule), and the District and BOR disagree with it as a matter of law. *Accord* R. 2441-43. These are legal questions regarding the legal effect of flood control releases requiring a determination (or declaration) of the nature and scope of the existing property rights (storage rights) weighed against the backdrop of flood control operations.

The nature, scope, and integrity of the property rights embodied by the existing storage rights was implicated (impugned) the moment the BOR's late claims were granted and accepted by the SRBA Court. The District was statutorily obligated under Idaho Code Section 42-1411 to defend the existing storage rights, which it did as a matter of opportunity and right within the applicable SRBA late claims process. The hydrograph of spill and fill flood control operations is undeniable; water users in Basin 65 have been diverting, storing and using post-flood control release water for decades—the “historic practice” and “status quo” according to IDWR.

The legal authority and corresponding property right under which post-flood control release water is stored and used in Basin 65 is the existing storage rights for Cascade and Deadwood Reservoirs. The accounting program is not a rule, regulation or law. It does not, and cannot, answer the underlying flood control “legal effect” question pending before this Court.

## **II. ISSUES ON APPEAL**

The District presents no additional issues on appeal other than those raised by the BOR herein. Any additional issues on appeal are already pending in Docket No. 44636.



**III.  
ATTORNEY FEES ON APPEAL**

Consistent with its appeal in Docket No. 44636, the District does not seek costs or attorney fees on appeal.

**IV.  
ARGUMENT**

The District agrees with and adopts the BOR's arguments as a general matter, and insofar as they are consistent with the discussion contained in the Statement of the Case above. The District agrees that: (1) the late claims are unnecessary because the water claimed by them is already appropriated by the existing storage rights for Cascade and Deadwood Reservoirs; and (2) the late claims, if necessary to preserve the historic diversion and use of post-flood control release water, are not barred by application of *res judicata*. In addition to the BOR's arguments, the District incorporates by reference those contained in the District's Brief filed May 12, 2017, in Docket No. 44636.

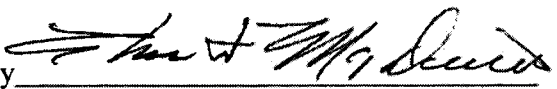
**V.  
CONCLUSION**

Consistent with its argument and conclusion in Docket No. 44636, the District requests that this Court determine that the BOR's pending late claims are unnecessary and duplicative because the water claimed by them is already appropriated by the existing storage rights for Cascade and Deadwood Reservoirs. In the alternative, and to the extent this Court determines that the existing storage rights are insufficient to preserve one physical fill of the reservoirs in flood control years, the District requests that this Court reverse the SRBA Court's "preclusive effect" holdings with respect to the prior Payette Adjudication (whether those holdings are based

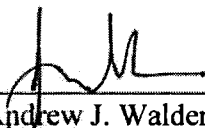
on prior decree, former statute, the doctrine of *res judicata*, or some combination thereof) so that the property right perfected by the pre-1971 diversion and use of post-flood control water can be properly memorialized and protected by bona fide water rights stemming from the late claims.

RESPECTFULLY SUBMITTED and DATED this 9<sup>th</sup> day of June, 2017.

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By   
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### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9<sup>th</sup> day of June, 2017, I caused a true and correct copy of the foregoing **BRIEF FOR RESPONDENT BLACK CANYON IRRIGATION DISTRICT** to be served by the method indicated below, and addressed to the following:

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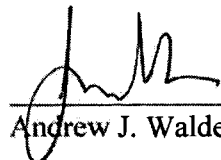
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