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In Re SRBA Case No. 39576 Respondent's Brief 2 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 & 65-23532 THE UNITED STATES OF AMERICA, Appellant, v. 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

STATE OF IDAHO'S RESPONSE BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is an appeal from the District Court's order disallowing beneficial use-based storage water right claims for Cascade and Deadwood Reservoirs filed in the Snake River Basin Adjudication ("SRBA") by the United States after regular claims-taking had closed (the "Late Claims"[1]). The Special Master to whom the District Court referred the Late Claims recommended they be disallowed as barred by the "Partial Decree" issued on January 21, 1986, in the pre-SRBA general stream adjudication of the Payette River Basin. ("*Payette Decree*"). But in response to arguments raised by intervenor Black Canyon Irrigation District ("BCID"), the Special Master also made an "alternative" recommendation that the Late Claims be disallowed because the water claimed was "already appropriated" by water rights previously decreed in the SRBA for Cascade and Deadwood Reservoirs (the "Decreed Water Rights"[2]).

The District Court agreed the Late Claims were barred by the *Payette Decree*, but rejected the Special Master's "alternative" recommendation on the grounds that he exceeded his jurisdiction in reaching administrative questions committed to the Idaho Department of Water Resources ("IDWR"), and by impermissibly revisiting decreed water rights. The United States appealed the District Court's preclusion ruling but not its jurisdictional ruling. The United States nonetheless requests that this Court take up the merits of the "alternative" issues the District

[1] The Late Claims are water right claim nos. 65-23531 (Cascade Reservoir), R.38, and 65-23532 (Deadwood Reservoir). R.2591. In this brief, the record will be cited by "R." followed by the page number, without the leading zeros (and without what appears to be an inadvertent duplication of the page numbers). Transcripts will be cited by "Tr." followed by the date, page number, and line number. Note that the transcript of the hearing of February 16, 2017 has a clerical error; it is incorrectly dated as February 16, 201**6**. *See* R.2630 ("A hearing on the objections was held before this Court on February 16, 2017.")

[2] The Decreed Water Rights for Cascade Reservoir are 65-2927A and 65-2927B. The Decreed Water Rights for Deadwood Reservoir are water right nos. 65-9483 and 65-2917. R.544, 551, 555, 557. They were decreed in the SRBA in 2003. *Id.*; R.2518.

Court did not address or decide. The State of Idaho ("State") respectfully requests that this Court affirm the District Court in full.

B. PROCEDURAL BACKGROUND

In January 2013, the United States moved for permission to file in the SRBA "beneficial use claims based on the storage and beneficial use of water prior to 1971." R.19. The proffered claims asserted water rights for federal reservoirs in Basin 1 (Snake River upstream from Milner Dam), Basin 21 (Henrys Fork), Basin 37 (Little Wood River), Basin 63 (Boise River), and Basin 65 (Payette River). R.17. Multiple irrigation districts in Basin 1 and in Basin 63 also moved for permission to file beneficial use late claims for the federal reservoirs in their basins. Tr., May 21, 2013, pp.4, 23, 36-37. No Basin 65 irrigation district sought permission to file late claims.[3]

The District Court in May 2013 granted permission to file all late claims except one,[4] and referred them to IDWR for investigation and recommendation. R.41; Tr., May 21, 2013, pp.35-36, 39, 43. In December 2013 the Director recommended the Late Claims at issue in this appeal be disallowed as "not claimed in prior adjudication." R.44, 2594. The United States filed objections to the Director's reports, R.52, 2602, and the State filed responses to the United States' objections. R.56, 2606. BCID did not file objections or responses.

The District Court held a status conference hearing on September 9, 2014, to address the late claims and this Court's remand of Basin-Wide Issue 17. *In re SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 336 P.3d 792 (2014) ("*Basin-Wide Issue 17*"). The parties

[3] Idaho Power Company also moved for permission to file late claims, which were resolved by a subsequent settlement. Tr., May 21, 2013, pp.20-21. The claims of the United States and the irrigation districts in Basins 1, 21, and 37 also were resolved by settlements. R.1898 n.13, 1929 n.26.

[4] The exception was a claim by several irrigation districts that sought to resolve a disputed question of the administration of an existing partial decree. Tr., May 21, 2013, pp.27-35. The District Court therefore entered an order denying permission to file the claim. (Copy in ADDENDUM, Tab A.) The State requests that pursuant to I.R.E. 201 this Court take judicial notice of the ADDENDUM to this brief. Support for taking judicial notice of each document in the ADDENDUM is provided in the discussions of the ADDENDUM in the text and footnotes of this brief.

and the District Court agreed that nothing of Basin-Wide Issue 17 remained to be resolved in the SRBA. *See, e.g.,* Tr., Sep. 9, 2014, p.27, l.24—p.28, l.2. ("I agree there's nothing left to do on Basin-Wide Issue 17, I didn't want to make a ruling on that or a decision on that until I heard from everybody, but that's my feeling too.").

There was dispute, however, over the extent of "overlap," if any, between the late claims and then-pending challenges to IDWR's administration of the United States' reservoir water rights in Basin 1 and Basin 63, and over whether the late claims were "necessary." *See, e.g.,* Tr., Sep. 9, 2014, p.13-14; p.19, l.7-10; p.21, l.25; p.23, l.8; p.29, l.7; p.33, l.14-20; p.34, l.7-9, 23; p.35, l.8 p.36, l.12. The State argued the late claims should be dismissed they were meant to address IDWR's accounting procedures. Tr., Sep. 9, pp.25-30; *see also id.*, p.27, l.18-19 ("you can dismiss them"). Counsel for some irrigation districts responded "it's not about attacking the accounting in these late claims. Not at all." Tr., Sep. 9, 2014, p.36, l.3-4. Counsel for the United States did not disagree with this representation; indeed, counsel for the United States said almost nothing over the entire course of the argument.

The District Court allowed the parties to address these matters in "scheduling proposals." Tr., Sep. 9, 2014, pp.36-37; p.40, l.9-13; R.69-122. Multiple parties, including the State, the Surface Water Coalition, and the Boise Project Board of Control, submitted "scheduling proposals." R.73-117. The United States and BCID did not.[5] The Boise Project Board of Control in its scheduling proposal argued that before reaching the merits of the late claims, the District Court had to resolve the question of whether the late claims were "duplicative" of the previously decreed water rights for the United States' reservoirs and therefore "not necessary." R.75. The State argued that the only question posed by the late claims was whether the water

[5] BCID was not yet a party to the proceedings, although its appellate counsel participated in the hearing on behalf of another irrigation district. Tr., Sep. 9, 2014, p. 24, l.7-9.

claimed was actually put to beneficial use before 1971, and therefore the late claims should be referred to the Special Masters for resolution on the merits. R.81, 83-86, 87-89; *see also* R.85 n.9 (arguing that the existing water right licenses and decrees "are not at issue").

The District Court adopted the State's proposal and referred all the late claims to the Special Masters. R.122.[6] The Late Claims in this appeal were referred to Special Master Theodore R. Booth, R.129, 2611, and in April 2015 he approved a trial schedule based on a stipulation by the State, the United States, and Suez Water Idaho Inc. R.131.

BCID, which was not a party, moved in May 2015 to vacate the trail schedule, filing its motion under the subcase numbers for both the Late Claims and for the by-then closed subcases for the Decreed Water Rights. R.137. The State opposed the motion. R.139. BCID was allowed to participate as an intervenor after withdrawing its filings under the Decreed Water Rights, R.1579 (Tr., May 18, 2015, p.7, l.20-21), and representing BCID that it would take the case as it found it and file an I.R.C.P. 24 statement of claims and defenses. R.1580 (Tr., May 18, 2015, p.11, l.9-14); R.1582 (Tr., May 18, 2015, p.21, l.21—p.22, l.8). After BCID filed its statement of claims and defenses, the State moved for reconsideration on grounds that BCID sought to litigate the nature, extent, and/or administration of Decreed Water Rights. R.158-62, 361, 1588-1604. The Special Master denied the State's motion. R.430.

The State in August 2015 moved for summary judgment that the Late Claims should be disallowed on several grounds. R. 1571. Among other things the State argued the Late Claims should be disallowed because they were barred by the *Payette Decree*, were collateral attacks on

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[6] The *Final Unified Decree* had been entered approximately six weeks before the parties filed their scheduling proposals, and upon its entry the partial decrees for the Decreed Water Rights became final, conclusive, and binding. R.831, 837, 839-40. While the SRBA retained jurisdiction over the Late Claims in the *Order Regarding Subcases Pending Upon Entry Of Final Unified Decree* (Aug. 26, 2014), it did not retain jurisdiction over the Decreed Water Rights. R.859-60. No party moved to re-open the partial decrees for the Decreed Water Rights, or to refer them to the Special Masters.

the Decreed Water Rights, impermissibly sought administrative interpretations of the Decreed Water Rights, and/or were intended to obtain judicial review of IDWR's administration of the Decreed Water Rights. R. 1521, 1529, 1552. During and after the summary judgment proceedings, the United States repeatedly asserted it was not challenging IDWR's accounting system and administrative interpretation of the Decreed Water Rights. *See, e.g.,* Tr., Sep. 22, 2016, p.32, l.6-7 ("the supplemental storage claims do not challenge the accounting"); *id.*, p.20-21 ("We're not asking this Court to order the director administer the water rights in any way differently than he presently is"); R.1909-10 ("The Late Claims] do not seek to address a question of administration interpretation . . . . Rather the [Late Claims] accept the Director's interpretation of the [Decreed Water Rights] and his accounting of them.") (bold font and capitals omitted); R.2536 ("Here we've accepted the Director's interpretation that there is physical fill of water and paper fill of water, and those are two different things") (Tr., Oct.2, 2015, p.44, l.1-2); R.2201 ("[State counsel's] assertion that we are attempting to challenge the accounting system, that is simply not the case") (Tr., Mar. 1, 2016, p.73, l.22-24).

The Special Master agreed the *Payette Decree* barred the Late Claims and in November 2015 recommended they be disallowed on that basis, without addressing the rest of the State's summary judgment motion. R.1984, 1998-99 ("*Recommendation*"). In resolving subsequent motions to alter or amend the Special Master affirmed his original conclusion, but based on BCID's arguments also made an "additional" or "alternative" recommendation that the Late Claims be disallowed because the water "had already been appropriated" by the Decreed Water Rights ("*Alternative Recommendation*"). R.2206, 2215-16, 2221, 2518.

All parties filed "challenges" to the Special Master's recommendations. R.2223, 2231, 2234, 2242. The District Court in its *Memorandum Decision And Order On Challenges* (Oct. 7,

2016) (*"Challenge Order"*) affirmed the Special Master's original recommendation that the *Payette Decree* bars the Late Claims, R.2509, 2511, 2520, but rejected the "alternative" conclusion that the Decreed Water Rights "already appropriated" the water in question. R.2518, 2521. The District Court held that by taking up BCID's "already appropriated" arguments, the Special Master "exceeded his jurisdiction" and "strayed from the narrow focus on conducting proceedings on the beneficial use late claims." R.2518, 2521. This appeal followed. R.2556.

C. STATEMENT OF FACTS.

A general adjudication of rights to the use of the waters of the Payette River Basin was commenced in 1969 pursuant to chapter 14 of title 42 of the Idaho Code.[7] R.2513-14. The United States was joined and filed water right claims for Cascade and Deadwood Reservoirs based on pre-existing water right licenses, and an additional claim for Deadwood Reservoir based on "beneficial use." *Id.*; R.504-11; *Brief For Appellant The United States Of America* at 13 (May 12, 2017) (*"US Brief"*) at 13-14. The United States did not file claims for the beneficial use-based water rights asserted by the Late Claims. R.2512-13; R.455-86; *US Brief* at 13-14. The "vast majority" of the water right claims in the Payette Adjudication were "fully adjudicated" by the *Payette Decree* (January 21, 1986), which exhaustively listed all claims remaining to be resolved. R.2512-13; R. 455-86. The Payette Adjudication was consolidated with the SRBA in 2001. R.2512. The United States filed SRBA claims for the Decreed Water Rights based on the *Payette Decree*, R.772, 776, 778, 781, 783, 786, 789, and partial decrees for those claims issued in 2003. *See* R.2518,544, 551, 555, 557.

Water District 65 (Payette River Basin) was established in 1989, and was originally limited to the area downstream from Black Canyon Dam. R.573 (transcript of I.R.C.P. 30(b)(6) deposition of the United States, p.54, l.19-25); R.573 (*id.*, p.43, l. 16-25, p.44, l.16-25). Before

[7] A copy of the 1969 version of chapter 14, title 42, Idaho Code, is in the ADDENDUM, Tab B.

1989 there was no administration "whatsoever" of water rights in the Payette River Basin. Tr. Sep. 22, 2016, p. 24, l. 13-14 (argument of counsel for the United States); *see also US Brief* at 36 ("There was no formal system for administering water rights in Basin 65 until IDWR developed the 1993 accounting rules"); R.573 ("So prior to that, there was no watermaster. There was no accounting, per se.") (transcript of I.R.C.P. 30(b)(6) deposition of the United States, p.55, l.2-3).

In 1991-92, the United States' methods of accounting for the use of stored water led to "problems" in determining storage use and carryover, and raised the question of "how to avoid similar problems" in the future. R.573-74 (transcript of I.R.C.P. 30(b)(6) deposition of the United States, pp.57-58). As a result, Water District 65 was extended to include the area upstream from Black Canyon Dam, R.570 (*id.*, p.44, l.23-24, p.44, l.20-25), and IDWR "offered [its] water accounting system to the water district as a means of determining reservoir fill and use." R.574 (*id.*, p.58). The United States "worked together" with IDWR to implement the accounting system, *id.*, and it began operating in 1992-93. *Id.*; *US Brief* at 36.

In 2012, disputes arose in the SRBA "over the effect flood control releases have on storage water rights" that do not have "refill" remarks. *Basin-Wide Issue 17*, 157 Idaho at 390, 336 P.3d at 797. While this issue was pending before the District Court, motions were filed for permission to file late claims for Basins 1, 21, 37, 63, and 65. R.17. The United States represented that its late claims, including the Late Claims at issue in this appeal, are "beneficial use claims based on the storage and beneficial use of water prior to 1971." R.19. The United did not represent to the District Court that the Late Claims were "based on IDWR's accounting rules that were developed after" the Payette Adjudication, *US Brief* at 3, or "predicated on changed legal and factual circumstances" since the Payette Adjudication. *Id.* at 26.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

- Whether the United States' has waived its challenges to the preclusive effects of the *Payette Decree* and former Idaho Code § 42-1411;
- Whether the United States' has waived any challenge to the District Court's ruling that the Special Master exceeded his jurisdiction;
- Whether the United States' challenges to the Water District 65 accounting system may be heard in this appeal;
- Whether the United States' request that this Court determine whether the Late Claims are "unnecessary" is a collateral attack on the Decreed Water Rights;
- Whether the State is entitled to an award of attorney fees on appeal.

III. ARGUMENT

A. STANDARD OF REVIEW

The United States appealed from the District Court's *Challenge Order*, in which the District Court reviewed the Special Master's summary judgment decision. Thus, the summary judgment standard of the Idaho Rules of Civil Procedure is also the standard of review in this appeal. *Wyman v. Eck*, 161 Idaho 723, 390 P.3d 449, 451 (2017). "Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' I.R.C.P. 56(c)." *Id.* "This Court liberally construes all disputed facts in favor of the non-moving party and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion." *Id.*

B. THE LATE CLAIMS ARE BARRED BY THE PAYETTE DECREE AND THE DOCTRINE OF RES JUDICATA.

The District Court concluded that the Late Claims "are barred by operation of the final judgment entered in the Payette Adjudication and principles of *res judicata*." R.2511 (italics in original; bold font omitted). The District Court was correct.

1. The Payette Decree Bars The Late Claims.

The *Payette Decree* "ordered, adjudged and decreed" that with limited exceptions, the water rights of the Payette River Basin "are as described" in IDWR's "Proposed Finding of Water Rights Water Rights in the Payette River Drainage Basin" ("*Proposed Finding*"), as it had been amended by certain listed stipulations and orders. R.450, 452. The *Proposed Finding* recommended "findings of fact, conclusions of law and decree of water rights," R. 518, 450, listed individual water rights to be decreed, R.528-31, 533-34, and included the following:

> This recommended decree *includes all of the rights established before October 19, 1977 to the waters of the Payette River and its tributaries including groundwater*, and upon its adoption supercedes all prior judgments of the Court. Any water user who heretofore diverted surface water or groundwater from within the boundaries as described in Exhibit 1, or who owns lands to which previously established rights were appurtenant and who, upon being joined to this action, failed to claim such water rights has forfeited such rights as provided in Section 42-1411, Idaho Code.

R.2512 (quoting *Proposed Finding*) (italics and underlining in *Memorandum Decision and Order*); *see also* R. 524 (*Proposed Finding*). The *Payette Decree* exhaustively listed the "exceptions," R.452, 2512—that is, the only claims that remained to be resolved—in "Exhibits" attached to the decree. R.455-86.[8] "Of significance, the partial decree was certified by Judge Doolittle as a final judgment." R.2513.

As both the Special Master and the District Court concluded, the language of the *Payette Decree* is "plain and unambiguous," and compels three conclusions. R.2513. First, the *Payette Decree* is a "final judgment" and "conclusively establishes a list of *all* rights on the system established before October 19, 1977." *Id.* (italics in original). Second, the final judgment "extinguishes the claims of any water right holder who, being joined to the action, failed to claim a water right he asserts was established prior to that date." *Id.* And finally, "the late claims now

[8] The Exhibits do not include claims for the beneficial use-based water rights asserted by the Late Claims. R.455-86; R.2512-13; *US Brief* at 13-14.

asserted, if they were ever valid, were extinguished by operation of the plain language of the final judgment." *Id.*

2. The Doctrine of *Res Judicata* Precludes The Late Claims.

The District Court was also correct in concluding the Late Claims are barred by *res judicata* principles. R.2514-17. *Res Judicata* "bars a subsequent action between the same parties upon the same claim" or "claims 'relating to the same cause of action . . . which might have been made" in prior litigation. *Maravilla v. J.R. Simplot Co.*, 161 Idaho 455, 458, 387 P.3d 123, 126 (2016) (citation omitted; ellipses in original). Claims are precluded when the prior action involved (1) the same parties, (2) the same claim, and (3) a final judgment. *Id.* The parties are the same in this case because "each party to the Payette Adjudication is also a party to the SRBA," R. 2514, and the "final judgment" requirement is satisfied because the *Payette Decree* was certified as "final judgment." R.2513, 453, 489.

This leaves the second element: "the same claim." While the United States did not file Payette Adjudication claims for the water rights asserted by the Late Claims, such claims clearly could have and should have been filed—which satisfies the "same claim" element. *Maravilla*, 161 Idaho at 459, 387 P.3d at 127 ("whether claims are the same for purposes of res judicata is that the subsequent or present claim must be one that arose out of the same cause of action and should have been litigated in the first suit."). The Late Claims assert "Beneficial Use" as the "Basis of Claim" and September 30, 1965" as the "Date of Priority." R.38-39, 2591-92. By definition, therefore, the Late Claims assert the existence of water rights based on actual diversion and beneficial use of water on or before September 30, 1965. *See City of Pocatello v. Idaho*, 152 Idaho 830, 841, 275 P.3d 845, 856 (2012) ("When one diverts unappropriated water [under the constitutional method] and applies it to beneficial use, the 'right dates from the application of the water to a beneficial use.'") (citation omitted).

It follows that late claims could and should have been claimed in the *Payette Adjudication*, which commenced in 1969. Indeed, the United States was obligated to bring the Late Claims forward in the Payette Adjudication, because it was a general stream adjudication. *See* R.2514 ("had a full and fair opportunity (indeed an obligation) to timely assert its water right claims . . . in that proceeding.") (parenthetical in original). The Late Claims are therefore barred by principles of *res judicata*. *Maravilla*, 161 Idaho at 458, 387 P.3d at 126 ("Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims 'relating to the same cause of action . . . which might have been made.'") (citation omitted) (ellipses in original); *see also* R.445 ("The SRBA cannot serve as a second opportunity for parties and their successors-in-interest to re-adjudicate their prior decreed or disallowed water rights.").

C. THE UNITED STATES WAIVED ITS CHALLENGES TO THE PAYETTE DECREE AND FORMER IDAHO CODE § 42-1411.

The United States argues the *Payette Decree* had "no independent preclusive effect" because it "did not specifically adopt the conclusions of law" in the *Proposed Finding*, had "no force apart from" former Idaho Code § 42-1411, and that former Idaho Code § 42-1411 would not have barred the Late Claims. *US Brief* at 2428. The United States also argues that by amending the statue in 1986, the Legislature intended "to delay finality in the Payette Adjudication, pending completion of the SRBA," *id.* at 28, and "[o]nce the SRBA was initiated, the 1986 Partial Decree in the Payette Adjudication became a *partial* decree in the SRBA." *Id.* at 29 (italics in original).

1. The United States' Did Not Raise Its Challenges To The Payette Decree And Former Idaho Code § 42-1411 Before The District Court.

The United States failed to raise *any* of these arguments before the District Court. *See generally* R.2270-77, 2366-73, 2481-85; Tr. Sep. 22, 2016, pp. 18-30, 65-70. The only *Payette Decree* argument the United States raised before the District Court was that the *res judicata*

"exception" of this Court's *Kuenzli* decision applies in this case. *See, e.g.,* R.2272 ("The United States' Notice of Challenge here addresses only those portions of the [Special Master's] Decision and Order by barring supplemental storage right claims which 'could not have been asserted during the earlier [Payette Adjudication.]' *U.S. Bank Nat'l Assn. v. Kuenzli*, 134 Idaho 222, 999 P.2d 877 (2000)"); Tr. Sep. 22, 2016, p. 18, l. 6 ("there is an exception to res judicata"). The United States thus waived its challenges to the *Payette Decree* and former Idaho Code § 42-1411, and its arguments regarding the effect of the 1986 amendment of the statute. *See Wolford v. Montee*, 161 Idaho 432, 436 n.1, 387 P.3d 100, 104 n.1 (2016) ("this argument was not raised by Appellants in the court below and is thus deemed waived. . . 'we will not consider issues that are raised for the first time on appeal.'") (citation omitted).

The United States likely did not raise these arguments before the District Court because the United States had previously taken exactly the opposite position in the SRBA regarding an identical decree entered in the Lemhi River Basin general stream adjudication ("*Lemhi Decree*"). Like the *Payette Decree*, the *Lemhi Decree* was a "partial decree" "ordered, adjudged and decreed" that, subject to certain exceptions and amendments, the water rights of the basin "are as described" in a "Proposed Finding of Water Rights" previously filed by IDWR.[9] That "Proposed Finding" contained "Conclusions of Law," including exactly the same preclusion and forfeiture provision as the *Proposed Finding* of the Payette Adjudication—right down to the reference to former Idaho Code § 42-1411.[10] Thus, the United States argued in the SRBA in 2010 (successfully) that: (1) "the Lemhi Decree is conclusive as to the nature and extent of all

[9] The *Lemhi Decree* was certified as final judgment. A copy of the *Lemhi Decree* is in the ADDENDUM, Tab C.

[10] Copies of excerpted pages of the Lemhi Adjudication "Proposed Finding" are the ADDENDUM, Tab D. The preclusion and forfeiture provision is "Conclusion of Law" no. 5. ADDENDUM, Tab D, page 9 (page no. 7 of "Proposed Finding")

water rights with claimed priorities" pre-dating commencement of the Lemhi Adjudication; (2) former Idaho Code § 42-1411 reflected a "bedrock principle concerning the finality of general adjudication decrees"; (3) and "these principles of finality" were restated in "the Lemhi Decree itself" by virtue of the preclusion and forfeiture provision in the "Proposed Finding."[11]

The United States, in short, wants to have it both ways. In the SRBA the United States previously took exactly the opposite position that it now takes in this appeal on exactly the same type of prior general adjudication decree, exactly the same preclusion and forfeiture language, and exactly the same statute. The United States' current arguments lack credibility and should be disregarded as contrary to its previous position in the SRBA.

2. The United States' Challenges To The *Payette Decree* And Former Idaho Code § 42-1411 Lack Merit.[12]

a. The Late Claims Are Barred Even If The United States' Theory Is Correct.

The Late Claims would be barred even if it is assumed for the sake of argument that the United States' theory of the *Payette Decree* is correct. The United States asserts the Legislature intended that the *Payette Decree* would not be preclusive until "merged into a final unified SRBA decree." *US Brief* at 29. That has already happened—the SRBA's *Final Unified Decree* was entered on August 26, 2014. R.831, 845. Thus, even under the United States' argument, the preclusive effect of the *Payette Decree* attached before the Late Claims were referred to the Special Master (January 9, 2015). R.129, 2611.

b. The *Payette Decree* Had Preclusive Effect.

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[11] These quotes are taken from *United States' Memorandum In Support Of Motion For Summary Judgment, In re SRBA, Case No. 39576, Lead Subcase 74-15051 (295 "High Flow" Claims")* (Oct. 4, 2010), at pages 20, 22.. Copies of excerpted pages of this brief are included in the ADDENDUM, Tab E.

[12] The State addresses the arguments the United States waived only to preserve its rights, and does not concede that the waived arguments are properly before this Court in this appeal.

The United States contends the *Payette Decree* had "no force" apart from former Idaho Code § 1411 because the *Payette Decree* "did not specifically adopt" the preclusive language in the *Proposed Finding*'s "conclusions of law." *US Brief* at 24-25. This argument is contrary to the natural reading of the plain language of the *Payette Decree*. R.2512-13, 1992-93, 2211-12.[13]

The *Payette Decree* specifically stated that the *Proposed Finding* included, among other things, "Conclusions of Law," R.450, and specifically "ordered, adjudged and decreed" that the water rights of the Payette River Drainage Basin "*are as described* in the PROPOSED FINDING." R.452 (italics and underlining added; capitals in original) (italics and underlining added). As both the Special Master and the District Court concluded, the natural and logical reading of the plain language of the *Payette Decree* is that it specifically adopted the entirety of *Proposed Finding*, including its "conclusions of law," except as amended by the listed orders and stipulations. *See, e.g.,* R.2512-13 (referring to language in the *Proposed Finding* as "terms of the final judgment."). Indeed, the United States came to the same conclusion in 2010 regarding identical language in the *Lemhi Decree* and the "Proposed Finding" it referenced.[14]

The record shows the parties to the Payette Adjudication also had this understanding. The Director filed the *Proposed Finding* in 1979, R.450, and it was the subject of objections by a number of water right claimants, including the United States, most of which were resolved by 1985. *See, e.g.,* R.452 (referring to "Stipulation Resolving Objection of United States – filed February 18, 1982") (capitals omitted). Thus, in early December 1985, the Director requested that the court issue a "final decree" for "all uncontested matters in the Proposed Finding," and all

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[13] Even BCID agrees that the *Payette Decree* incorporated the *Proposed Finding* and former Idaho Code § 42-1411. *Appellant's Opening Brief,* Supreme Court Docket No. 4444636-2016 (May 12, 2016) ("*BCID Brief*") at 30-31. The State requests that pursuant to I.R.E. 201 this Court take judicial notice of the *BCID Brief.*

[14] *See* ADDENDUM, Tab E, page 3 (page 22 of United States' brief) ("The Lemhi Decree itself restated these principles of finality . . . . ")

claimants were notified of this request. R.489. The matter was heard on December 20, 1985, *id.*, with the result that the district court issued "a decree of all uncontested matters in the Proposed Finding" on January 21, 1986—that is, the *Payette Decree*—and notified all parties that "any appeal of this partial decree must be filed with the District Court within 42 days of January 21, 1986." R.489. The United States (or any other party) could have sought reconsideration or appealed had it viewed the preclusion and forfeiture provision of the *Proposed Finding* as a "contested" rather than "uncontested" matter, but did not. The United States' current interpretation of the *Payette Decree* is simply a collateral attack on a final judgment that it never appealed.

c. Former Idaho Code § 42-1411 Embodied The Essential Principle Of Finality In General Stream Adjudications.

There also is no merit in the United States' argument that former Idaho Code § 42-1411 simply embodied common law *res judicata* principles.[15] *US Brief* at 26. Former Idaho Code § 42-1411 provided that any water user joined to a general stream adjudication who failed to submit proof of a claim "shall be barred and subsequently estopped from subsequently asserting any right theretofore acquired," and "shall be held to have forfeited all rights to any water theretofore claimed." Idaho Code § 42-1411 (1969).

A general stream adjudication is a purely statutory proceeding that did not exist at common law, and to which the Legislature devoted an entire chapter of title 42 of the Idaho Code.[16] While finality is important in common law civil actions, it is essential in adjudicating water rights, as this Court has recognized. *See IGWA v. IDWR*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016)

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[15] With respect to the *Lemhi Decree*, the United States argued that former Idaho Code § 42-1411 embodied a "bedrock principle concerning the finality of general adjudication decrees[.]" ADDENDUM, Tab E, page 2.

[16] Chapter 14, Title 42, Idaho Code.

("'[f]inality in water rights is essential.'") (citation omitted). In general stream adjudications, finality is paramount:

> The fundamental purpose of a general adjudication is to produce a judicial decree that is conclusive as to the nature and extent of all water rights in the adjudicated water system. *See, e.g.,* I.C. § 42-1420(1); I.C. § 42-1401A(5); I.C. § 42-1411 (1969). Finality is essential. The core purpose of undertaking a general adjudication is defeated if, after adjudication concludes, claimants can assert additional water rights premised on water uses predating the adjudication.

R.2515.

Contrary to the United States' argument, finality in a general stream adjudication does not "penalize" water users.[17] *US Brief* at 27. Rather it prevents open-ended and repetitious litigation, promotes certainty and predictability in water resource management, and makes it possible for IDWR to distribute water among appropriators in accordance with Idaho's prior appropriation doctrine. Idaho Code § 42-602.

Nor does finality in a general stream adjudication result in an "'arbitrary forfeiture of property rights.'" *US Brief* at 27 (quoting *Avista Corp. v. Wolfe*, 549 F.3d 1239, 1250-51 (9th Cir. 2008)).[18] Statutory provisions ensure that all water users are provided with notice and opportunity to file and prove their own water right claims and object to claims filed by others—and the fact that water users *must* file their claims or risk losing them simply reflects the unique, correlative nature of the property rights at issue. *See In re Snake River Basin Water Sys.*, 115 Idaho 1, 7, 764 P.2d 78, 84 (1988) ("'*by reason of the interlocking of adjudicated rights on any*

[17] In obliquely disparaging the doctrine of *res judicata* as a "penalty," the United States ignores the fundamental purposes the doctrine serves, which the District Court recognized: (1) preserving the acceptability of judicial dispute resolution "against the corrosive disrespect" that would follow from allowing the same matter to be litigated twice with inconsistent results; (2) serving "the public interest in protecting the courts against the burdens of repetitious litigation"; and (3) advancing "the private interest in repose from the from the harassment of repetitive claims." R. 2515 (citing *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002)).

[18] *Avista* did not involve a general stream adjudication or even water rights. Rather, it involved a question of whether "a court may declare a railroad right of way [in Montana] abandoned under the [federal] Abandoned Railway Right of Water Act." *Avista Corp.*, 549 F.3d at 1242.

stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceeding'") (quoting United States Senate Report on the "McCarran Amendment," 43 U.SC. § 666) (italics in *Snake River Basin Water Sys.*); *Nevada v. United States*, 463 U.S. 110, 140 (1983) ("each water rights claim by its 'very nature raise[s] issues inter se as to all such parties for the determination of one claim necessarily affects the amount available for the other claims.'") (citation omitted). If water users were allowed to sit on their claims indefinitely, a general stream adjudication could never be completed, and perpetual uncertainty would reign. Barring unclaimed water rights from being asserted in the future is necessary for "just apportionment" of water among those beneficially using it, and to "equally guard all the various interests involved." Idaho Code § 42-101.

None of this is changed by the argument that the *Payette Decree* was a "Partial Decree" that "adjudicated *most* rights" rather than "all" rights. *US Brief* at 28 (italics in original). The *Payette Decree* was still a final judgment entered in a general adjudication, and conclusive as to the actual and potential water right claims for rights to the use of water in the Payette River Basin. R.2512. The fact that specifically identified water right claims were excepted and remained pending, R.455-86, did not destroy the preclusive effect of the *Payette Decree* as to the actual and potential claims that it adjudicated. To the contrary, the fact that the *Payette Decree* specifically identified the only claims that remained pending shows that the intent was to bring finality to all other claims just as the United States successfully argued with respect to the *Lemhi Decree.*

d. The 1986 Revision Of Chapter 14, Title 42 Of The Idaho Code Had No Effect On The Finality Of The *Payette Decree*.

There is no support for the United States' argument that the 1986 "repeal" of former Idaho Code § 42-1411 "manifested the Legislature's intent to delay finality in the Payette Adjudication." *US Brief* at 28. Rather, former Idaho Code § 42-1411 was amended—along with the rest of the general stream adjudication chapter—to ensure joinder of the United States under the McCarran Amendment. *See In re Snake River Basin Water Sys.*, 115 Idaho at 3, 764 P.2d at 80 ("As part of this agreement the parties agreed to support legislation for the commencement of an adjudication of the water rights of the Snake River basin."). The preclusion and forfeiture principles of Idaho Code § 42-1411 were not discarded but rather re-enacted in Idaho Code § 42-1420, using updated and more detailed language.[19] *See* Idaho Code § 42-1420 ("Binding effect of decree—Exceptions"). Nothing in the statutory language or the record supports the assertion that any of this was intended "to delay finality" in the Payette Adjudication. *US Brief* at 28.

Indeed, the legislation was not even approved or enacted until after the period for appealing the *Payette Decree* had run. The appeal period ended on March 4, 1986, R.489, but the legislation was not approved until April 3, 1986, 1986 Idaho Sess. Laws 584, and did not take effect until July 1, 1986. Idaho Code § 67-510.[20] The legislation could not "delay finality" of the *Payette Decree*, *US Brief* at 28, because finality had already attached by the time the legislation was approved and took effect; and the legislation did not contain any provision authorizing retroactive application. *See State v. Leary*, 160 Idaho 349, 353, 372 P.3d 404, 408 (2016) ("statutory amendments are not deemed to be retroactive unless there is an express legislative statement to the contrary.").

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[19] The United States acknowledged this fact in the 2010 SRBA proceedings concerning the *Lemhi Decree*. ADDENDUM, Tab E, page 2 (page 20 of United States' brief).

[20] There was no "emergency provision" in the legislation that revised the adjudication statutes. Idaho Code § 67-510; *see generally* 1986 Idaho Sess. Laws 558-84 (1986 House Bill 642).

There is also no support in the statutory language or the record for the contention that commencement of the SRBA transformed the *Payette Decree* into "a *partial* decree in the SRBA." *US Brief* at 29. Rather, the Payette River Basin and other tributary basins were included in the SRBA for McCarran Amendment purposes. *In re Snake River Basin Water Sys.*, 115 Idaho at 9, 764 P.2d at 86; 43 U.S.C. § 666. While the Payette Adjudication was not fully completed when "consolidated" into the SRBA, the *Payette Decree* "fully adjudicated" the "vast majority" of the water right claims in the Payette River basin and "conclusively established a list of *all* rights on the system before October 19, 1977." R.2512-13 (italics in original).[21] The *Payette Decree* was not and is not analogous to an SRBA "partial decree," which by definition adjudicates a single water right. Idaho Code § 42-1412(6). Rather, in the SRBA the *Payette Decree* is a "prior decree" from an earlier water right adjudication. *State v. Hagerman Water Right Owners, Inc*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997); R.2517.

D. THE UNITED STATES' CLAIMS OF ACTUAL BENEFICIAL USE OF WATER IN 1965 WERE RIPE IN 1969.

The United States argues the Late 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 [Water District] 65, which were not developed until 1993." *US Brief* at 31.[22] "For these reasons," the United States asserts, "it 'would have been impossible'" to have filed claims in the Payette Adjudication for the water rights asserted in the Late Claims. *US Brief* at 31 (quoting *Kuenzli*, 134 Idaho at 226, 999 P.2d at 881).

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[21] The only unresolved claims that remained pending were listed in the attached "Exhibits." R.2512; R.455-86.

[22] The United States actually referred to "Basin 65" rather than "Water District 65," but it should be noted that they are not synonymous. "Basin 65" is a geographic or hydrologic term—it refers to the Payette River Basin. "Water District 65," in contrast, is "an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho." Idaho Code § 42-604.

The District Court correctly rejected this argument. R.2515-17. As the District Court recognized, the *Kuenzli* decision turned on the fact that the claim in that case "was not ripe" and "could not have been asserted" in the earlier litigation. *Kuenzli*, 134 Idaho at 226, 999 P.2d at 881; R.2516. That is not true of the Late Claims. R.2516.

The Late Claims speak for themselves and explicitly assert that the claimed beneficial use took place no later than September 30, 1965.[23] R. 38-39, 2591-92. It should go without saying that a claim to a water right based on actual beneficial use alleged to have occurred in 1965 could have been filed in the Payette Adjudication, which did not commence until four year later. R.2512. As the District Court stated, "[by] their very nature" the Late Claims were ripe in 1969:

> [T]he beneficial use late claims were ripe at the time of the Payette Adjudication. The late claims reflect claims for 1965 priority date storage water rights based on beneficial use. By their very nature, the claims assert that the United States has diverted and beneficially used the claimed water since 1965. If the late claims can be proven up now to have been established in 1965 based on diversion and beneficial use dating back to that date, they could have been proven up based on the same diversion and beneficial use in the Payette Adjudication.

R.2516.

None of this changes simply because "it 'would have been impossible'" in the Payette Adjudication to challenge a system of water distribution accounting that was not adopted until 1993. *US Brief* at 31. To the contrary, this fact simply confirms that the Water District 65 accounting system has nothing to do with the Late Claims. By definition, a water right claimed under the constitutional method of appropriation cannot be based on events occurring after 1971. *See Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) ("'new

[23] By definition, the priority date of a beneficial use claim is the date when actual beneficial use is claimed to have occurred. *See City of Pocatello*, 152 Idaho at 841, 275 P.3d at 856 ("When one diverts unappropriated water and applies it to a beneficial use, the 'right dates from the application of the water to a beneficial use.'"); *Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604 ("Under the constitutional method of appropriation, appropriation is completed upon application of the water to the beneficial use for which the water is appropriated.").

appropriations could not be made under the constitutional method after 1971'") (citation omitted); *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007) ("Since 1971 a party seeking a surface water right must file an application with the IDWR, obtain a permit, and perfect that right by obtaining a license.").[24]

Further, beneficial use water right claims cannot be based on administration by IDWR because they "focus [] purely on the actions of the appropriator." *Idaho Power Co. v. IDWR*, 151 Idaho 266, 275, 255 P.3d 1152, 1161 (2011). The claimant has the burden of proving "with definite evidence" rather than "speculation" that the claimed beneficial use actually took place in the year claimed. *City of Pocatello,* 152 Idaho at 841-42, 275 P.3d at 856-57. The evidence must be sufficient to enable a court to make "definite and certain findings as to the amount of water actually diverted and applied" to the claimed beneficial use (prior to 1971). *Head v. Merrick*, 69 Idaho 106, 109, 203 P.2d 608, 609 (1949).

These evidentiary burdens cannot be carried by pointing to (much less challenging) the accounting system adopted in Water District 65 in 1993. The Water District 65 accounting system says nothing about how much of the so-called "peak flows" were captured in the reservoirs for irrigation use during the "'refill' period" in 1965, *US Brief* at 18, much less how much (if any) of this "supplemental" storage water was actually applied to beneficial use by

[24] The United States' argument that during the Payette Adjudication "it had no reason to believe that it needed a separate water right or remark to conduct flood-control operations," *US Brief* at 37, is contrary to the record. The record shows that years before entry of the *Payette Decree* the United States was well aware it might need a separate water right to "refill" reservoir flood control space. In 1983, for instance, the United States filed statutory beneficial use-based "refill" claims for a number of its reservoirs with IDWR, pursuant to Idaho Code § 42-243. R.908, 910, 912, 914, 916-17. And as long ago as 1934, an attorney for the United States opined that under Idaho law, a storage water right is an entitlement to a specific quantity rather than a full reservoir, and that any right to "refill" would have to be perfected separately, under the constitutional requirement of showing actual beneficial use of the "refill" water. R.905-06. It should also be noted that some SRBA partial decrees <u>do</u> have administrative remarks or provisions for "refill," R.933, 940, 942, 943, and that IDWR has issued at least two water right licenses that include "flood control" as a purpose of use. ADDENDUM, Tab F.

irrigators in that year after their primary storage supplies were exhausted.[25] *See Barron v. IDWR*, 135 Idaho 414, 416, 18 P.3d 219, 221 (2001) (referring to "a 'supplemental right'" as "an additional appropriation of water to make up for a deficiency in supply from an existing water right"). As a matter of fact and law, the United States' argument that "it would have been impossible" to challenge the Water District 65 accounting in the Payette Adjudication has no relevance to whether the Late Claims were ripe at the time of Payette Adjudication. And it certainly does not resurrect beneficial use-based claims that were already precluded in 1993.

E. ANY CLAIMS FOR "HISTORIC" RESERVOIR OPERATIONS OR WATER RIGHT ADMINISTRATION WERE RIPE IN 1969.

The United States argues the Late Claims were filed "solely to protect historic reservoir operations" in the Payette River Basin. *US Brief* at 1. The "Basis of Claim" asserted in each of the Late Claims is "Beneficial Use," however, not "historic reservoir operations." R.39, 2592. While the United States may have subjectively intended to obtain rights "solely to protect historic reservoir operations," *US Brief* at 1, Idaho's prior appropriation doctrine does not contemplate such a species of water rights. Idaho water rights "protect" the beneficial use of water. *See IGWA*, 160 Idaho at 133, 369 P.3d at 911 ("'The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate.'") (citation omitted) (brackets in original). "Reservoir operations" are not themselves a beneficial use of water, as this Court has recognized. *See Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604 ("There is no dispute that the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities."); *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 209, 157 P.2d 76, 81 (1945)

[25] As the State pointed out to the District Court, USGS records the United States submitted for judicial notice showed that in 1965 irrigators would have had more than enough stored water even if the reservoirs had not "refilled." R.2458. It was, after all, a flood year; and in most flood years there is a considerable volume of water left in reservoirs after the irrigation season ends. This is especially true in the Payette, because of the large volume of non-contracted storage in Cascade Reservoir that almost always goes unused. R.570, 2294.

("Respondent operating company merely diverts, conveys, stores and distributes, it does not as such apply any water to a beneficial use, nor do the constituent organizations in the other reservoirs"); *Washington Cty. Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935) (stating that stored water is "impressed with the public trust to apply it to a beneficial use").[26]

Rather, "historic reservoir operations" are addressed, if necessary, through administrative provisions or "remarks" in water right decrees. Idaho Code § 42-1411(2)(j); 42-1412(6). This principle was well established at the time of the Payette Adjudication, as the District Court recognized. *See* R.2516 ("The notion of preserving a historical practice of administration in a decree or general provision is not a new concept. A majority of the provisions pertaining to historical administrative practices implicated in the SRBA were provisions that were decreed in prior adjudications.").

Any claim for an administrative provision or remark addressing "historic reservoir operations" was ripe at the time of the Payette Adjudication. The United States admits that its "historic reservoir operations" in the Payette River Basin include flood control operations that began long before the Payette Adjudication. *See, e.g., US Brief* at 17 ("Reclamation began such flood control operations . . . in or before 1957."); *see id.* at 6 ("such operations began earlier [than 1965]"). Under this "policy," *US Brief* at 1, the United States delayed storing water for irrigation purposes until what it calls "the peak-flow period," and therefore "risked not being able to fill the reservoirs, if late flows were less than anticipated." *US Brief* at 17. The United States' "historic reservoir operations," in short, effectively made irrigation storage secondary and

[26] The United States' current position that it needs a water right to "protect" its "historic reservoir operations" is inconsistent with its position in Basin-Wide Issue 17, where the United States argued that "to the extent State law were construed to preclude, or even hinder federal flood control mandates it would be pre-empted" and that the priority "refill" question "will have no effect on Reclamation's flood control operations." *The United States' Response Brief on Basin-Wide Issue No. 17, In re SRBA Case No. 39576, Subcase No. 00-91017* (Jan. 11, 2013), at 4 n.3, 5. ADDENDUM, Tab G.

subject to flood control predictions, and risked shortchanging storage contractors if the so-called "peak-flow period" turned out to be something less than "anticipated." *US Brief* at 17.[27]

Clearly, the United States could have filed claims in the Payette Adjudication for administrative remarks or provisions addressing this flood control-comes-first system of "historic reservoir operations." *US Brief* at 1. Just as clearly, such claims *should* have been filed, because the United States was taking a "risk" with irrigators' stored water supplies. *See id.* at 17 ("risked not being able to fill the reservoirs). As the District Court recognized, it "should not have been an arcane proposition" to seek an administrative provision or remark "to memorialize a certain method of reservoir operation to account for flood control." R.2516-17.[28]

For the same reasons, any claim for a remark or provision memorializing an historic "method" or "practice" of water right administration (as opposed to historic reservoir operations), *US Brief* at 35-36, also would have been ripe in 1969. But at the time there was no water rights administration to memorialize. As the United States conceded, "there was no administration whatsoever" before Water District 65 was established in 1989. Tr. Sep. 22, 2016, p. 24, l. 13-14. At the time of the Payette Adjudication, the United States diverted, stored, and released water without any oversight, administration, or regulation by a watermaster or by IDWR.

The *Payette Decree* could not (and did not) decree a historical "method" or "practice" of *non*-administration. The fact that the United States may have subjectively viewed its reservoir

[27] Indeed, the United States' admission that its flood control operations create a risk of not filling the reservoirs belies the United States' conflicting contention that flood control operations are "incidental" to irrigation storage operations and "do not implicate" the appropriation and use of water under Idaho law. *US Brief* at 37-38, 39.

[28] A remark "to memorialize a certain method of reservoir operation to account for flood control," R.2516-17, also could have been claimed in the SRBA proceedings on the Decreed Water Rights. The District Court ordered in 2008 that such a remark be included in the partial decree for the Lucky Peak Reservoir water right. *BCID Brief*, Appendix 2 at pp.33-36. The State requests that pursuant to I.R.E. 201 this Court take judicial notice of Appendix 2 to the *BCID Brief*.

operations during the period of non-administration as "consistent with the law of prior appropriation," *US Brief* at 36, was and is irrelevant. The United States, like every other Idaho water right holder, is subject to IDWR's administration of water rights under Idaho law, *see Pioneer Irr. Dist.*, 104 Idaho at 106, 157 P.3d at 604 (quoting Section 8 of the 1902 Reclamation Act, 43 U.S.C. § 383), and "has no property interest in being free from the State's regulation of water in accordance with the prior appropriation doctrine[.]" *In re IDWR Amended Final Order Creating Water District No. 170 (Thompson Creek Mining Co. v. IDWR)*, 148 Idaho 200, 213-14, 220 P.3d 318, 3231-32 (2009).

F. THE UNITED STATES DID NOT APPEAL THE DISTRICT COURT'S JURISDICTIONAL RULING AND HAS WAIVED ANY CHALLENGE TO IT.

The District Court rejected on jurisdictional grounds the Special Master's "alternative" recommendation to disallow the Late Claims because "the claimed water use is already memorialized under, and occurs pursuant to" the Decreed Water Rights. R.2518. This "alternative" recommendation was the product of intervenor BCID's argument that the Late Claims were "unnecessary" because "the water use claimed thereunder should rightfully be administered by the Director as accruing pursuant to the [previously decreed] reservoir water rights." R.2518. The District Court held that in reaching these arguments, the Special Master "exceeded his jurisdiction" and "strayed from the narrow focus of conducting proceedings on the beneficial use late claims," by "delving into the administration of the previously decreed reservoir water rights" and "revisiting the previously decreed reservoir water rights in the context of this proceeding." R.2518-19.

While the District Court specifically rejected the Special Master's "alternative" recommendation on jurisdictional grounds, R. 2518, the United States did not appeal and has not challenged the District Court's jurisdictional ruling. To be sure, the United States acknowledges

the District Court rejected the Special Master's "alternative" recommendation on the grounds "that IDWR has exclusive authority to determine, in the first instance, when decreed reservoir rights are satisfied," *US Brief* at 7, but the United States did not appeal this ruling, and has not submitted argument or any authority challenging it. Consequently, the United States has waived any argument that the District Court erred in holding the Special Master exceeded his jurisdiction. *See, e.g., Wurdemann v. State*, 161 Idaho 713, 390 P.3d 439, 448 (2017) ("[I]f 'issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.[ ] A party waives an issue cited on appeal if either authority or argument is lacking . . . .'") (citation omitted) (brackets in original).[29]

G. ALTERNATIVELY, THE DISTRICT COURT CORRECTLY HELD THAT THE SPECIAL MASTER EXCEEDED HIS JURISDICTION.

The District Court was correct in holding that the Special Master "exceeded his jurisdiction." R.2518. The SRBA is a not a general water court but rather a statutory general stream adjudication proceeding under chapter 14 of title 42 of the Idaho Code. Idaho Code § 42-1406A [uncodified]. While the courts adjudicate water rights, the authority to administer water rights is statutorily committed to the Director of IDWR. Idaho Code § 42-602; *see also Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800 (distinguishing "determining water rights, and therefore property rights" from "just distributing water."); *In re SRBA Case No. 39576 (State v. United States)*, 128 Idaho 246, 262, 912 P.2d 614, 630 (1995) (stating that if the Idaho Code allowed courts to administer water rights it "would create an unworkable, unconstitutional delegation of [executive] authority" to the judicial branch).

[29] As previously discussed, prior to this appeal the United States repeatedly asserted that it accepted the Water District 65 accounting system and IDWR's administrative interpretation of the Decreed Water Rights. R.1909-10; R.2201 (Tr., Mar. 1, 2016, p.73, l.22-24); R.2536 (Tr., Oct.2, 2015, p.44, l.1-2); Tr., Sep. 22, 2016, p.32, l.6-7; *id.*, p.20-21.

The Legislature has specifically provided, in the "jurisdictional limitation" statute of the general stream adjudication code, that challenges to water rights administration that are subject to judicial review under the Idaho Administrative Procedure Act "shall not be heard" in adjudications such the SRBA. Idaho Code § 42-1401D.[30] Moreover, this Court specifically held in 2014 that challenges to how the Director accounts for the distribution of water to a decreed storage water right must be raised through the Idaho Administrative Procedure Act:

> Here, the Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user. However, it is within the Director's discretion to determine when that number has been met for each individual decree. In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user. Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.

Basin-Wide Issue 17, 157 Idaho at 394, 336 P.3d at 801. This requirement may not be circumvented by characterizing an administrative challenge as a question of property rights. *See AFRD2 v. IDWR*, 143 Idaho 862, 871, 154 P.3d 433, 442 ("'to hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue.'") (citation omitted).

The District Court recognized these principles, and even citing the above-quoted portion of the *Basin-Wide Issue 17* decision. R.2519. Indeed, the arguments BCID made to the Special Master (which the United States has adopted in this appeal) were clearly foreclosed by this

[30] The Idaho Administrative Procedure Act, or "IDAPA," is codified in chapter 52 of title 67 of the Idaho Code.

Court's decision in *Basin-Wide Issue 17*. In that case, BCID and other irrigation organizations[31] sought to use an SRBA proceeding as a vehicle for arguing that storage water rights previously decreed "without a remark on refill rights" already included a "property right" to "refill, under priority, space vacated for flood control." *Basin-Wide Issue 17*, 157 Idaho at 387-88, 392-93, 336 P.3d at 794-95, 799-800. This Court held, however, that the "property right" defined by the decree is an entitlement "to a certain amount of water; a number that the Director must fill in priority," and therefore the issue of whether flood control space physically fills or refills "under priority" is a question of water distribution accounting committed to the Director (subject to IDAPA judicial review). *Id.* at 394, 336 P.3d at 801.

BCID's argument to the Special Master that the Decreed Water Rights had "already" appropriated the water sought by the Late Claims, R.2518, was legally indistinguishable from the arguments BCID and others presented to this Court in *Basin-Wide Issue 17*. The only difference is that while in *Basin-Wide Issue 17* the argument was that a "refill" remark was not necessary, in this case BCID argued that the Late Claims are not necessary. R.2518. The underlying argument is exactly the same, as the District Court implicitly recognized.[32]

Further, as the District Court also recognized, the Decreed Water Rights do not include any administrative remarks or provisions regarding BCID's question of "[w]hat effect, if any, do

[31] BCID was one of the irrigation districts that filed the petition requesting designation of Basin-Wide Issue 17. ADDENDUM, Tab H (*Petition To Designate Basin-Wide Issue, In re SRBA, Case No. 39576, Subcase No. 00-91017* (Jun. 8, 2012)).

[32] Even if it had been necessary for the Special Master to determine whether the water was "already appropriated" by the Decreed Water Rights, all he had to do was simply compare the quantities of water claimed in the Late Claims with the decreed quantities of the partial decrees for the Decreed Water Rights. The Late Claims assert appropriations far larger than those defined in the Decreed Water Rights. *Compare* R.38, 2591(Late Claims) *with* R. 544, 551, 555, 557 (partial decrees).

flood control releases have on the BOR's existing storage rights?"[33] R.2215. Rather, they simply "give the Director a quantity he must provide to each water user in priority," *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801; *see also* R.544, 551, 555, 557 (partial decrees), and the details of performing this duty "are left to the Director." *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 802. BCID's arguments amounted to collateral attacks on the partial decrees. *See IGWA*, 160 Idaho at 128, 369 P.3d at 906 (holding it to be a collateral attack when IGWA was "essentially arguing" that the source identified in a partial decree was "miscategorized"); *Rangen, Inc. v. IDWR*, 159 Idaho 798, 367 P.3d 193, 201 (2016) ("this argument was an impermissible collateral attack on the decrees"). If accepted, BCID's arguments would have "severely undermine[d] the purpose of the SRBA and create[d] uncertainty in water rights adjudicated in that process." *IGWA*, 160 Idaho at 128, 369 P.3d at 906.

H. THE UNITED STATES' OBJECTIONS TO THE WATER DISTRICT 65 ACCOUNTING SYSTEM ARE BEYOND THE SCOPE OF THIS APPEAL.

Rather than addressing the District Court's purely jurisdictional ruling regarding the Special Master's "alternative" recommendation, the United States argues as if District Court itself decided the very same accounting questions that it held the Special Master should not have reached. This mischaracterization impermissibly injects administrative challenges into this appeal.

1. The United States Must Present Its Challenges To The Water District 65 Accounting System To IDWR Before Seeking Judicial Review.

The United States asserts the District Court erred when it "presumed . . . that, upon implementation, the accounting procedures simply enforced the 'plain language' of the United

[33] When BCID argued in the hearing on its objections to the clerk's record that this case presents "a legal question regarding what the impacts of flood control releases are on the existing storage rights," the District Court stated "that's not what we're dealing with here. We're dealing with supplemental water rights for late claims . . . ." Tr., Feb. 16, 201[7], p. 30, l.20-25.

States rights as decreed in the 1986 Partial Decree," *US Brief* at 35, and by concluding that historic reservoir operations were "a departure from prior-appropriations law." *Id.* at 36. This is a mischaracterization of the District Court's decision. The District Court made no presumptions or holdings as to whether historic reservoir operations or the Water District 65 accounting system were "departure[s] from prior appropriation law." *Id.* at 36. The District Court simply (and correctly) held that administrative questions are beyond the scope of the Late Claims and indeed the SRBA. R.2518-19.[34] As discussed above, this conclusion was consistent with—indeed, required by—this Court's holding in *Basin-Wide Issue 17*.

The United States uses its mischaracterization of the District Court's decision as a springboard for introducing into this appeal the United States' new-found objections to the Water District 65 accounting system. Indeed, much of the United States brief is devoted to directly and indirectly attacking the Water District 65 accounting system, despite previous representations in these proceedings that the United States was not challenging the accounting.[35] *See, e.g., US Brief* at 3 (asserting "IDWR accounting rules . . . reinterpret the nature of on-stream reservoir rights"); *id.* at 19 ("Under IDWR's accounting . . . Reclamation loses the right to later store, under priority, the associated amount for irrigation purposes"); *id.* at 20 ("under IDWR's accounting rules, Reclamation cannot claim priority of use in the 'unaccounted for storage'"); *id.* at 32 ("IDWR's accounting rules for on-stream reservoirs are not based on the ordinary use of the term 'diversion' in water rights law"); *id.* at 34 ("IDWR's accounting rules for on-stream reservoirs leave Reclamation no discretion as to whether and when to exercise its storage rights."); *id.* at 35 ("IDWR's accounting procedures define on-stream reservoir 'diversions' in a

[34] Even BCID agrees that the District Court "did not address" these matters "out of jurisdictional concerns." *BCID Brief* at 6 n.4.

[35] *Supra* note 29.

manner that disassociates water diversion from water appropriation"); *id.* at 39 ("IDWR's accounting rules for on-stream reservoirs constitute a departure from [principles of prior appropriation]"); *id.* at 40 ("IDWR's accounting rules fundamentally altered the way in which water rights are described and enforced . . . [and] . . . are at odds with the law of prior appropriation").

Regardless of whether these new-found objections have any merit—and the States does not concede they do—they are not before the Court in this appeal. If the United States desires to challenge the Water District 65 accounting system, then like any other water right holder it must present its objections to the Director first, and then seek judicial review pursuant to IDAPA. *See Basin-Wide Issue 17,* 157 Idaho at 394, 336 P.3d at 801 ("Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method."). The United States may not use SRBA water right claims as a pretext for circumventing the requirement of exhausting administrative remedies before seeking judicial review. *See AFRD2*, 143 Idaho at 871, 154 P.3d at 442 (holding that a water user may not "bypass" the requirement of exhausting administrative remedies "'by the simple expedient of raising a constitutional issue.'") (citation omitted).[36]

2. This Appeal Is Not A Substitute For The IDAPA Proceedings Required Under The Idaho Code And This Court's Decisions.

This Court should also reject the United States' attempt to cobble together an administrative record on the Water District 65 accounting system in order to avoid presenting its accounting challenges to the IDWR. *Addendum To The United States' Brief As Appellant* (May

[36] This Court's decision in *Basin-Wide Issue 17* decision suggests that water users sought to use an SRBA claim as pretext for reaching an administrative question in that case. *See Basin-Wide Issue 17* 157 Idaho at 391, 336 P.3d at 798 ("The Coalition assured the judge that the proposed issue was 'a fundamental legal question' . . . . the Coalition completely changed its tune once the issue was designated as a basin-wide issue.").

12, 2017) ("Addendum"). The Addendum documents are not part of the record in this case, and are not a substitute for a final agency order and a fully developed administrative record regarding IDWR's accounting system in the Payette River Basin. Idaho Code §§ 67-5270—67-5271, 67-5275. The administrative contested case regarding accounting in the Boise River Basin addressed water rights, storage contracts, and reservoir system flood control operations that are specific to that basin. It cannot and should not be assumed that the Addendum serves as a substitute for a fully developed administrative record and final order of the Director on the Water District 65 accounting system.[37] Even if this were not the case, judicial review of such a matter must be under deferential IDAPA standards that do not apply in SRBA proceedings, Idaho Code § 67-5279; *see also N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 522, 376 P.3d 722, 726 (2016) (discussing IDAPA standards of review), and the Director must be allowed to participate to defend against challenges to his orders, but the Director is not a party to the SRBA. Idaho Code § 42-1401B.

Compliance with these requirements in water administration matters is not a procedural technicality. As the District Court and this Court recognized in *Basin-Wide Issue 17*, "[a]n on-stream reservoir alters the stream affecting the administration of all rights on the source.

[37] The Director's order in the Addendum (the "Final Order") is not even the order that the District Court subsequently reviewed (i.e., the "Amended Final Order"). Further, there are significant differences between the Payette River Basin and the Boise River Basin. For instance, the Boise River Basin reservoirs are all tributary to one another, and water accruing to one reservoir's water right can be (and often is) physically stored in another reservoir. That is not the case in the Payette River basin; Cascade and Deadwood Reservoirs are on different streams. Further, because Lucky Peak Reservoir is a U.S. Army Corps of Engineers flood control project, reservoir system flood control operations in the Boise River Basin are under the jurisdiction and control of the Corps of Engineers, pursuant to Section 7 of the 1944 federal flood control act. 33 U.S.C. § 701-1. Cascade and Deadwood Reservoirs are not Corps of Engineers projects, and flood control operations at Cascade and Deadwood are conducted by the Bureau of Reclamation pursuant to federal reclamation law. *See* 43 U.S.C. § 383 (providing that the Bureau of Reclamation must comply with state law "relating to the control, appropriation, use or distribution of water used in irrigation"). In addition, the federal storage contracts for the Boise River Basin expressly allocate the risks of flood control operations among the various reservoirs and water user organizations, while the federal storage contracts for the Payette River Basin reservoirs do not. There are other significant differences between the two systems as well.

Accordingly, some methodology is required to implement priority administration of affected rights." *Basin-Wide Issue 17*, 157 Idaho at 388, 336 P.3d at 795 (quoting the District Court). "The Legislature has recognized the need for the Director's expertise" in such technical matters of water administration. *Id.* at 394, 336 P.3d at 801. As this Court has stated:

> [T]he state engineer is the expert on the spot, and we are constrained to realize the converse, that judges are not super engineers. The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state, and we must extend to his determinations and judgment, weight on appeal.

Id. (citation omitted).

It is for these very reasons that the Legislature prescribed deferential standards of review in IDAPA judicial review proceedings, and required that judicial review of administrative decisions be based on the record developed before the Director. Idaho Code §§ 67-5275, 67-5277, 67-5279. SRBA subcases are not a substitute for judicial review proceedings under IDAPA standards and requirements. *See* Idaho Code § 42-1401D (providing that review of IDWR actions subject to judicial review under IDAPA "shall not be heard" in the SRBA.).

The United States essentially asks this Court to ignore these legal principles. By mischaracterizing the District Court's decision as having "presumed" that "the accounting procedures simply enforced the 'plain language' of the United States' rights as decreed in the 1986 Partial Decree," *US Brief* at 35, and as having concluded that historic reservoir operations were "a departure from prior-appropriations law," *id.* at 36, the United States asks this Court to resolve the United States' objections to the Water District 65 accounting system. The United States would have this Court rely: (1) on documents the District Court "did not consider" in this case and found "irrelevant" to this appeal, R.2630, rather than upon a properly developed administrative record; and (2) upon counsel's gloss of how the Water District 65 accounting

system operates, *US Brief* at 18-20, 33-35, rather than a detailed explanation by "the state engineer . . . the expert on the spot." *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801.

Further, the District Court's IDAPA judicial review decision is before this Court in separate appeals, and the United States is not a party to those appeals. The United States should not be allowed in this proceeding to indirectly argue those separate appeals, or to collaterally attack the Director's order. *See, e.g., US Brief* at 38 (arguing that cases cited in the Director's order "are inapposite").

3. The United States' Addendum Improperly Augments The Record With Documents That Are Not Relevant To This Appeal.

While the United States argues as if this appeal and the IDAPA appeal address the same issue, and even implies that the Boise River Basin late claims pending before the Special Master also are part of this appeal, *see, e.g., US Brief* at 8-9, 19-22, 35 n.7, 36-40 (discussing the final Director's order and IDAPA judicial review decision regarding accounting in the Boise River basin, and/or the late claims in the Boise River Basin), the issues are not the same. The water right adjudication questions raised by beneficial use-based claims in the Payette River Basin are legally and factually distinct from the administrative questions issues raised by challenges to how IDWR accounts for the distribution of water to previously decreed storage water rights "in accordance with the prior appropriation doctrine." Idaho Code § 42-602; *see Basin-Wide Issue 17*, 157 Idaho at 392-94, 336 P.3d at 799-801 (distinguishing "determining water rights, and therefore property rights," from "just distributing water."). They are also distinct from the beneficial use-based claims in the Boise River Basin.[38]

[38] The United States' Boise River Basin late claims were consolidated with separate late claims filed by the Boise Project Board of Control, which is a "co-claimant" in those proceedings. R.899. BCID, in contrast, participated in the SRBA proceedings as an intervenor rather as a claimant, objector, or respondent.

The District Court recognized these principles and kept the proceedings separate. Indeed, the District Court denied BCID's request to include in the record "certain documents and a transcript" from the Boise River Basin late claim subcases because "they were not a part of the record," and the District Court "did not consider or rely upon those documents in reaching its decision." R.2630-32. The District Court also denied a request for I.R.C.P. 54(b) certification of the *Memorandum Decision and Order* regarding the Boise River Basin late claims.[39] No request was made to include in the record the Special Master decision that was the subject of review in the *Memorandum Decision and Order* regarding the Boise River Basin late claims; and if there had been such a request, the District Court very likely would have denied it for the same reasons.

None of the parties requested that the District Court include in the record in this appeal the Water District 63 administrative order, or the subsequent IDAPA judicial review decision. To the contrary, prior to this appeal the United States repeatedly represented that the Late Claims did *not* put at issue the Water District 65 accounting system or IDWR's "interpretation" of the Decreed Water Rights.[40] And rather than filing a motion to augment the record pursuant to Rule 30 of the Idaho Appellate Rules, the United States dropped the Boise River Basin documents into this appeal via the Addendum, and asked this Court as a matter of "convenience" to take judicial notice pursuant to I.R.E. 201. *US Brief* at 9 n.3.

This tactic improperly injects extraneous and irrelevant documents that are the subject of other pending proceedings, circumvents the I.A.R. 30 requirement of explaining why the

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[39] A copy of the District Court's order denying I.R.C.P. 54(b) certification of the *Memorandum Decision and Order* regarding the Boise River Basin late claims is in the ADDENDUM, Tab I. While the District Court's *Challenge Order* in this case included a block quote from the Basin 63 *Memorandum Decision and Order* remanding the Boise River Basin late claims back to the Special Master, R.2519, the District Court explained that it quoted that particular decision only because "it was fresh, as an example, in everyone's mind" of "a law of the case proposition." Tr., Feb. 16, 201[7], p. 37, l. 11-12; *id.*, p.40, l.11-12. The District Court explained that it "could have cited to numerous other examples in the SRBA" that "relied on that same principle." *id.*, p.37, l. 13-16. The District Court therefore denied BCID's request to include the quoted decision in the record in this appeal. *Id.*; R.2630-32.

[40] *Supra* note 29.

additional documents should be allowed into the record, and deprives the State of its right under I.A.R. 30 to oppose augmentation of the record. Further, the fact that much of the United States' briefing focuses on new-found objections to the Water District 65 accounting system suggests that the purpose of the Addendum is to provide a footing to circumvent IDAPA's prohibition against seeking judicial review before an administrative record has been developed and the Director has issued a final order. Idaho Code §§ 67-5270—67-5271, 67-5275.

This Court should strike the United States' Addendum and refuse to consider the United States' objections to the Water District 65 accounting system.[41] Further, this Court should hold that the United States must present its objections to the Water District 65 accounting system to IDWR before seeking judicial review. *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801.

4. Addressing The United States' Theories Of Priority Administration In This Appeal Would Have Significant And Adverse Unintended Consequences.[42]

The United States appears to argue that this Court should require IDWR to administer the Decreed Water Rights as being "in priority" until the United States has finished physically storing what it calls "peak flows" or "last" water during the "'refill' period'" of flood control operations. *US Brief* at 1, 6, 17, 18, 25, 36-38. The potential implications of the United States' theory of priority administration of Idaho water rights will have significant adverse consequences.

For instance, the United States' theory would significantly alter the historic *status quo*. It is undisputed that the Decreed Water Rights were never administered as being "in priority" during flood control "refill" operations prior to 1992-93—in fact they were never administered at

[41] For these reasons, the State has moved to strike the Addendum in a motion that accompanies this brief.

[42] The following is intended to be an illustrative discussion of some of the potential issues and adverse consequences of addressing the United States' accounting challenges in the context this appeal. The following discussion is not intended as a waiver of the State's position that the United States accounting challenges are not within the scope of the Late Claims and may not be raised or decided in this appeal. The State expressly reserves that position and all of its rights and arguments in support thereof.

all before 1992-93. And, as the United States admits, since then the Decreed Water Rights have not been administered as including a right of "priority refill." *See, e.g., US Brief* at 20 ("under IDWR's accounting rules, Reclamation cannot claim priority of use in the 'unaccounted for storage'"). It is not clear on this record the consequences of adopting the United States' theory that the Decreed Water Rights should remain "in priority" until the conclusion of flood control "refill" operations. This question should be approached with caution, and only upon a fully developed administrative record. *See, e.g., City of Pocatello*, 152 Idaho at 835, 275 P.3d at 850 ("An increase in the volume of water diverted is an enlargement . . . . 'there is *per se* injury to junior water rights holders anytime an enlargement receives priority.'") (italics in original; citation omitted).

The United States' theory of priority administration at a minimum would make water distribution in Water District 65 dependent upon the United States' flood control decisions. Because the Decreed Water Rights are quantified in terms of an annual volume (acre-feet per year) without any limiting diversion rate (cubic feet per second), there is no water legally available for use by junior appropriators as long as the Decreed Water Rights remain "in priority"—i.e., until the end of flood control "refill" operations under the United States' theory. In other words, the United States' flood control decisions would become the basis for determining whether water is legally available for diversion and use under junior water rights.

Moreover, the United States' theory of priority administration would put the United States in a position to assert that the priorities of the Decreed Water Rights encumber *all* runoff until flood control operations end, including water bypassed or released for flood control purposes.[43] This would directly conflict with fundamental principles of the prior appropriation

[43] This is exactly what the United States hopes to achieve with the Late Claims. *See US Brief* at 5 (asserting that under the Late Claims, "all incoming stream flows, including amounts released for flood-control purposes, count

doctrine as established by Idaho law. *See IGWA*, 160 Idaho at 133, 369 P.3d at 911 ("'The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate.'"); *id.* ("'There might be a great surplus of water in the stream . . . . [but] the plaintiff would have a cause of action to prevent such an appropriation.'"); *Village of Peck v. Dennison*, 92 Idaho 747, 750, 450 P.2d 310, 313 (1969) ("If the decree awards an uncertain amount of water to one appropriator whose needs are vague and fluctuating, it is likely that he will waste water and yet have the power to prevent others from putting the surplus to any beneficial use."); *Lee v. Hanford*, 21 Idaho 327, 332, 121 P. 558, 560 (1912) ("such surplus and overflow of water would be wasted . . . and the right to appropriate public unused waters of the state would be denied").[44]

The United States' theory of priority administration also would have the effect of shifting to junior appropriators the risks created by the United States' flood control predictions and release decisions. *See US Brief* at 17 ("Reclamation risked not being able to fill the reservoirs"). The United States could exercise the priorities of the Decreed Water Rights to curtail junior appropriators to make up for a failure to fill the reservoirs "if late flows were less than [the United States] anticipated." *US Brief* at 17. Under Idaho's prior appropriation doctrine, priority is exercised against junior appropriators to protect seniors against natural supply shortages "in times of scarcity," Idaho Code § 42-607, not to allow a senior to shift to a junior the risk of an artificial shortage created by the senior's water management decisions. Moreover, shifting the risk of the United States' flood control release decisions would be particularly problematic if

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toward the maximum annual storage right"); *id.* at 37 n.8 (arguing that flood control releases should not be subordinated to existing and future uses but rather should be protected by "priority of use.").

[44] The State is not challenging or objecting to federal flood control operations. The question, rather, is priority administration of Idaho water rights. *See, e.g., Basin-Wide Issue 17*, 157 Idaho at 390, 336 P.3d at 797 ("As the SRBA court noted, '[T]he crux of the issue [is] whether Idaho law authorizes the refill of a storage water right, under priority, where water diverted under that right is released for flood control.'") (copy of the quoted page of the District Court order designation "Basin-Wide Issue 17" in ADDENDUM, Tab J.)

flood control releases consisted of priority water to which "consumers or users of the water" rather than the United States hold "the title to the use" under Idaho law. *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609.

This is intended to be an illustrative rather than exhaustive discussion of the implications of accepting the United States' theory of priority administration of Idaho water rights. Questions such as these require careful consideration, and should not be decided in the context of an appeal from an SRBA decision disallowing two water right claims as barred by a prior adjudication. This is especially true when the United States has not alleged any injury from the Water District 65 accounting system, but rather only expressed vague concerns about potential injuries from future appropriations. *See, e.g., US Brief* at 19 ("To date, IDWR's accounting rules have impacted the United States' storage rights largely only on paper.").[45]

Questions of whether future appropriation may "reduce the quantity of water under existing water rights," or "that the water supply itself is insufficient for the purpose for which it is sought to be appropriated," must be resolved on a case-by-case basis when permit applications are submitted and pending before IDWR, Idaho Code § 42-203A(5), not by speculating about hypothetical injuries that may result from future development of the water supply. The purpose of the SRBA is adjudicate water rights claimed to have been established prior to its commencement date of November 19, 1987, R.831, not to determine the fate of future applications for permits to appropriate water.

[45] The United States has not identified what "paper" injury, if any, has occurred. Only in "very dry" or "really dry" years such as 1977, 1987, 1988, and 1992, when it is unlikely any flood control releases were necessary, have any of the Payette River Basin irrigation districts ever been at risk of exhausting their storage allocations. R.570-71. And in such years the United States typically protects the irrigators by supplementing their primary storage allocations with the "non-contracted" storage in Cascade Reservoir. R.570-71, 2458, 2294.

I. BY PRESENTING THE QUESTION OF WHETHER THE LATE CLAIMS ARE "UNNECESSARY" THE UNITED STATES IS COLLATERALLY ATTACKING THE DECREED WATER RIGHTS.

The United States requests that this Court determine whether the Late Claims are "unnecessary because the decreed rights for Cascade and Deadwood Reservoirs already include the right to fill the reservoirs after flood-control releases." *US Brief* at 29, 40.[46] The partial decrees were issued in 2003, however, and pursuant to the *Final Unified Decree* are final, conclusive, and binding as to the nature and extent of the Decreed Water Rights. R.831, 837, 839-40.[47] None of the Decreed Water Rights include any "refill" remarks or administrative provisions "to memorialize a certain method of reservoir operation to account for flood control." R.2516-17.

The United States' request for a determination of whether the Decreed Water Rights "already include" the Late Claims is therefore a collateral attack on the Decreed Water Rights. *See* R.2519 ("The Special Master erred in revisiting the previously decreed reservoir water rights in the context of this proceeding."); *IGWA*, 160 Idaho at 128, 369 P.3d at 906 (holding it to be a collateral attack when IGWA was "essentially arguing" that the source identified in a partial decree was "miscategorized"); *Rangen, Inc.*, 159 Idaho at 806, 367 P.3d at 201 ("this argument was an impermissible collateral attack on the decrees"); *Wright v. Atwood*, 33 Idaho 455, 461, 195 P. 625, 627 (1921) ("A collateral attack is an attempt to impeach a decree in a proceeding not instituted for th[at] express purpose . . . .").

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[46] As previously discussed, this is in essence the same question posed in *Basin-Wide Issue 17*.

[47] The SRBA did not retain jurisdiction over the Decreed Water Rights in the *Order Regarding Subcases Pending Upon Entry Of Final Unified Decree* (Aug. 26, 2014), R.859-60, and the United States did not move to re-open the partial decrees for the Decreed Water Rights.

This conclusion is confirmed by comparing the elements of the Decreed Water Rights with the elements of the Late Claims:[48]

RESERVOIR	DECREED "QUANTITY"	CLAIMED "QUANTITY"
Cascade	700,000	1,066,653
Deadwood	163,000	268,113

RESERVOIR	DECREED "IRRIGATION STORAGE"	CLAIMED "IRRIGATION STORAGE"
Cascade	697,500	1,066,653
Deadwood	163,000	268,113

The fact that the Late Claims assert appropriations far larger than those defined in the partial decrees for the Decreed Water Rights belies the United States' contentions that the Late Claims "do not assert rights to store water for beneficial use in amounts greater than amounts already decreed for the reservoirs," *US Brief* at 1, and "assert the same storage amounts" in the Decreed Water Rights. *US Brief* at 3. To argue that the Late Claims and the Decreed Water Rights both define the same appropriation is necessarily a collateral attack on the Decreed Water Rights.

The United States seeks to avoid this conclusion by arguing the Late Claims are harmless because they merely seek "a *diversion* limit" that is "consistent with IDWR's accounting rules." *US Brief* at 5 (italics in original). By definition, however, an enlargement in the volume of water diverted under a priority constitutes injury to junior appropriators. *See City of Pocatello*, 152

[48] *Compare* R.38, 2591 (Late Claims) *with* R.544, 551, 555, 557 (partial decrees). All quantities are in acre-feet per year; the Decreed Water Rights and the Late Claims both define the appropriation in in terms of an annual volume that is not limited by a diversion rate (i.e., there is no "CFS" limitation on priority diversions). The "decreed 'quantity'" for Cascade is taken from its two partial decrees, water right nos. 65-2927A and 65-2927B. The partial decrees for the two Deadwood water rights (65-9481 and 65-2917) both define the same volume (163,000 AFY), but they are not additive because one is a water right for power generation at Black Canyon Dam (65-2917).

Idaho at 835, 275 P.3d at 850 ("An increase in the volume of water diverted is an enlargement . . . . 'there is *per se* injury to junior water rights holders anytime an enlargement receives priority.'") (italics in original; citation omitted).

The United States' characterization of the Late Claims as "supplemental," *US Brief* at 1, does not alter the conclusion that they are in fact collateral attacks on the Decreed Water Rights. A true "supplemental right" is "an additional appropriation to make up a deficiency in supply from an existing water right," *Barron*, 135 Idaho at 416, 18 P.3d at 221, by diverting from a secondary source—usually ground water, as in *Barron*. The so-called "supplemental" Late Claims, however, divert from the same source as the Decreed Water Rights, and would appropriate additional water in flood years rather than in years of "deficiency in supply." *Id.*

The administrative provision in the "supplemental" Late Claims (which was crafted by the United States rather than by a court or by IDWR) also is not present in the Decreed Water Rights, and would operate to make the Late Claims enlargements rather than "supplemental" rights. The provision would require the Late Claims to be administered "in combination with" the Decreed Water Rights, R.38-39, 2591, and the combined diversion volumes of the Late Claims and the Decreed Water Rights would encumber *all* inflows to the reservoirs until the United States stops releasing water for flood control purposes and "complete[s] one physical fill of its reservoirs in years when it must release stored water for flood control." R.18.[49] In other words, the water encumbered by the priorities of the Decreed Water Rights and the Late Claims in combination would be not limited to the "last flows diverted," *US Brief* at 6, or the "refill" water that "replaces" water released for flood control purposes, *see US Brief* at 17-18

[49] The combined diversion volumes of the Late Claims and the Decreed Water Rights almost always would exceed the total volume of runoff arising above Cascade and Deadwood reservoirs, because the volumes asserted in the Late Claims are based on 1965, "a year with historically high stream flows." *US Brief* at 6; *see* R.20 ("the year in which the largest inflow to the reservoir occurred prior to 1971").

("replaceable"), but would also include water released for flood control purposes in the interim. *See id.* at 5 ("all incoming stream flows, including amounts released for flood-control purposes, count toward the maximum annual storage right").

Indeed, the United States admitted in its discovery responses to the State that the Late Claims are intended to be open-ended priority entitlements to whatever quantity of water may be necessary in flood years to replace flood control releases. In response to the State's interrogatories asking how much of the "supplemental" storage water claimed had actually been applied to irrigation use in the year claimed, the United States had this to say:

> The United States does not claim that a specific quantity of storage water under [the Late Claims] was used for irrigation purposes in 1965. The intent of the [Late Claims] is to establish priority in a manner consistent with our understanding of the state's present accounting system for "refill" in years where water has been vacated for flood control purposes and to enhance Reclamation's ability to close the gap between the "paper fill" and the "physical fill."

R.727, 728-29 (underlining and brackets added).

In other words, the United States admitted it is impossible to define "in terms of quantity of water per year" how much water the United States claims, *A & B Irr. Dist. v. ICL,* 131 Idaho 411, 416, 958 P.2d 568, 573 (1997), and that for this reason the United States asserts priority over <u>whatever</u> quantity is required to make up for flood control releases in any given year. There is no such entitlement in the Decreed Water Rights, nor could there be; under Idaho law the United States may not have priority control over an indefinite, open-ended quantity of excess flood water. *See id.* ("there cannot be a prior relation to excess water.").

The priorities of the Decreed Water Rights standing alone, rather, are limited to definite annual quantities, and "flood control releases" are not authorized or quantified by the Decreed Water Rights. R.542-47. Priority only protects the beneficial uses actually decreed in a water right, *see IGWA*, 160 Idaho at 133, 369 P.3d at 911 ("'The extent of beneficial use [is] an

inherent and necessary limitation upon the right to appropriate'"), and may not, "under any pretext," be invoked to protect or encumber more water than is actually applied to the authorized beneficial use. *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907). Any assertion that the Decreed Water Rights "already appropriated" the open-ended volumes of water over which the Late Claims seek to assert priority is a collateral attack on the Decreed Water Rights. 1987, R.831.

J. THE STATE IS ENTITLED TO ATTORNEY FEES ON APPEAL.

The State is entitled to an award of attorney fees on appeal pursuant to Idaho Code § 12-117 because, for the reasons discussed above, the United States acted without a reasonable basis in fact and/or law by challenging in this appeal the preclusive effect of the *Payette Decree*, by raising in this appeal objections and challenges to the Water District 65 accounting system, and by collaterally attacking in this appeal the Decreed Water Rights. Under the McCarran Amendment the United States is subject to the adjective laws of the state of Idaho. United States v. Idaho, 508 U.S. 1, 8 (1993). The State therefore respectfully requests that this Court award the State reasonable attorney fees and costs incurred in this appeal.

IV. CONCLUSION

The State requests, for the reasons discussed above, that this Court affirm the District Court's *Challenge Order* in full.

REPECTFULLY SUBMITTED this 9TH day of June, 2017.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General

Michael C. Orr

MICHAEL C. ORR
Deputy Attorney General

ADDENDUM

State Of Idaho's Response Brief - Supreme Court Docket No. 44635-2016

Tab A: Order Denying Motion To File Late Notice Of Claim, *In re SRBA, Case No. 39576, Subcase No. 01-10619* (Jun. 4, 2013).

Tab B: Chapter 14, Title 42, Idaho Code (1969).

Tab C: Partial Decree Pursuant to Rule 54(b), I.R.C.P., *In the Matter of the General Determination of the Rights to the Use of Surface Waters and Tributaries From Whatever Source of the Lemhi River Basin* (7th Jud. Dist., Lemhi County Dist. Ct., Civil Case No. 4948) (Dec. 30, 1982).

Tab D: [excerpts of] *Proposed Finding of Water Rights in the Lemhi River Basin* (7th Jud. Dist., Lemhi County Dist. Ct., Civil Case No. 4948) (Jul. 9, 1974).

Tab E: [excerpts of] United States Memorandum In Support Of Motion For Summary Judgment, *In re SRBA, Case No. 39576, Lead Subcase 74-15051 (295 "High Flow" Claims)* (Oct. 4, 2010).

Tab F: *Water Right License, Water Right No. 96-09284* (Idaho Dep't of Water Res., Jan. 26, 2009); and *Water Right License, Water Right No. 96-09285* (Idaho Dep't of Water Res., Jan. 6, 2009).

Tab G: [excerpts of] The United States' Response Brief on Basin-Wide Issue No. 17, *In re SRBA Case No. 39576, Subcase No. 00-91017* (Jan. 11, 2013).

Tab H: Petition To Designate Basin-Wide Issue, *In re SRBA, Case No. 39576, Subcase No. 00-91017* (Jun. 8, 2012).

Tab I: Order Denying Motion For I.R.C.P. 54(b) Certificate, *In re SRBA, Case No. 39576, Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33738 (consolidated subcase no. 63-33738), and 63-33734* (Jan. 6, 2017).

Tab J: [excerpts of] Order Designating Basin-Wide Issue, *In re SRBA, Case No. 39576, Subcase No. 00-91017* (Sep. 21, 2012).

Tab A

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JUN - 4 2013
By _____ Clerk
Deputy Clerk

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

In Re SRBA	)	**Subcase: 01-10619**
	)	
Case No. 39576	)	**ORDER DENYING MOTION TO FILE LATE NOTICE OF CLAIM**

I
PROCEDURAL BACKGROUND

1. On January 31, 2013, the A&B Irrigation District, American Falls Reservoir District No. 1, American Falls Reservoir District No. 2, Burley Irrigation District, Falls Irrigation District, Hillsdale Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively "Claimants") filed a *Motion to File Late Notice of Claim* ("*Motion*") for the above-captioned water right claim.

2. The late claim is a surface water claim to divert 116,330 acre feet annually of water from the Snake River for irrigation storage and irrigation from storage purposes at American Falls Dam. The late claim is based on prior license numbers 15134 and R-269, and seeks a priority date of March 30, 1921.

3. A hearing on the *Motion* was held before this Court on May 21, 2013. At the hearing, the State of Idaho appeared in opposition to the *Motion*. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or May 22, 2013.

II.

ANALYSIS

Pursuant to *SRBA Administrative Order 1 § 4d(2)(d)*, motions to file a late notice of claim are reviewed under the criteria set forth in Idaho Rule of Civil Procedure 55(c). Rule 55(c) provides that the entry of a default can be set aside for good cause shown. The primary considerations in determining good cause are: (1) whether the default was willful; (2) whether a meritorious defense has been presented; and (3) whether setting aside the default would prejudice the opponent. *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993). For the reasons set forth below, the Court finds that the Claimants have failed to present a meritorious defense and have also failed to establish a lack of prejudice to other parties resulting from the *Motion*.

A. Meritorious Defense.

A review of the record establishes that the basis for the instant late claim is prior license numbers 15134 and R-269. However, the water available under those prior licenses has already been claimed, and in the case of license 15134 partially decreed, in the SRBA. License number 15134 was issued in the name of the United States Bureau of Reclamation ("USBOR") and authorized the diversion of 1,700 c.f.s. from the Snake River under a March 30, 1921, priority date. It is undisputed that the water use authorized under license number 15134 was claimed in the Snake River Basin Adjudication ("SRBA") by the USBOR as water right claim 01-6. Claim 01-6 was partially decreed in the SRBA on May 1, 2012.[1] License number R-269 was issued in the name of the USBOR and authorized the diversion of 1,800,000 acre feet annually under a

---

[1] Although water right 01-6 was partially decreed in the name of the USBOR, the *Partial Decree* contains the following remark clarifying that title to the use of the water is held by the consumers or users of the water:

> The name of the United States of American acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

Partial Decree, subcase no. 01-6, (May 1, 2012). The irrigation organization that benefits from water right 01-6 is the American Falls Reservoir District #2 and its patrons.

March 30 1921, priority date. It is undisputed that the water use authorized under license number R-269 was claimed in the SRBA by the USBOR as water right claim 01-2064.[2] That claim is presently pending before the Special Master. The present late claim seeks to claim water based on the prior licenses in addition to that already claimed, and in the case of license 15134 partially decreed, in the SRBA. Since the full quantity of water available under the prior licenses has already been claimed and litigated in the SRBA, the Claimants have failed to present a meritorious defense in support of their *Motion.*

B. Prejudice.

At this late stage in the SRBA proceeding, the Court's primary concern when addressing late claims is prejudice to other parties. A lot of work has gone into settling and otherwise resolving disputes in the SRBA, and the Court scrutinizes with particularly whether the granting of a *Motion to File Late Notice of Claim* has the potential to upset such previous settlements to the prejudice of other parties. In this case, the Court finds that the instant late claim has the potential to upset a previous settlement entered into by various parties to the SRBA in subcase no. 01-6.

The instant late claim identifies license number 15134 as a basis for the claim. As set forth above, license number 15134 was claimed in the SRBA by the USBOR as water right claim 01-6. A recommendation for the claim was included in the Director's *Director's Report, Irrigation & Other Uses, IDWR Lower Basin 01 (Part I)* filed on May 15, 2006. Numerous issues were raised by *Objections* and *Responses* filed in response to the Director's recommendation for the claim, resulting in substantial litigation that spanned several years. The parties endured summary judgment and permissive review proceedings before ultimately reaching settlement and filing a *Standard Form 5* stipulation on March 13, 2012. Permitting the late claim to proceed at this late stage in the SRBA prejudices the parties to subcase 01-6, including the State of Idaho, who spent substantial time, effort and resources to litigate and settle that claim. At the time of settlement, the parties did not have knowledge of the instant late

[2] As with water right 01-6, water right claim 01-2064 was recommended with a remark clarifying that title to the use of the water is held by the consumers or users of the water, in this case the various spaceholders in American Falls Reservoir and their patrons. *Director's Report, Reporting Area Basin 01, IDWR Part 2* (December 19, 2006).

claim. Those parties may have altered their settlement position had they known another claim would be asserted in the SRBA that also derives from license no. 15134.

Moreover, although the stated basis of the claim is the two prior licenses referred to herein, the Claimants also include a remark in the late claim that provides "[t]his water right is recognition of refilling storage space in American Falls Reservoir under the split provisions of water right 1-6 after releases for irrigation have occurred earlier in the same water year." This remark indicates that the late claim is based at least in part on the "split provisions of water right 1-6." The split provision referred to by the Claimants is the following remark contained in the quantity element of the *Partial Decree* for water right claim 01-6. It provides:

> The right to divert as natural flow during each irrigation season under this water right, having a March 30, 1921, priority, as follows: From May 1 of each irrigation season continuing during that season so long as there is natural flow available for that priority, the first 1,700 cubic feet per second of flow to be available one-half (1/2) to American Falls Reservoir District No. 2 and one-half (1/2) to American Falls Reservoir, except that in any year in which American Falls Reservoir is full to capacity on April 30 or fills after that date, taking into account any water that may be temporarily stored to its credit in upstream reservoirs, all water diverted by American Falls Reservoir District No. 2 within the maximum of 1,700 cubic feet per second during the year prior to the initial storage draft on American Falls Reservoir after the reservoir finally fills in that year shall be considered as natural flow under water right No. 1-6. Nothing herein shall prevent American Falls Reservoir District No. 2 from diverting water under said license prior to May 1 of a given irrigation season but all such diversions shall be charged as storage in the event the reservoir is not full on April 30 of that season or does not fill after April 30 of that season.

Partial Decree, subcase no. 01-6, p.1 (May 1, 2012).

It appears from the Claimant's remark in their late claim, and from comments made in open court, that the impetus for the filing of this late claim is a dispute regarding the interpretation of the above-quoted remark in the *Partial Decree* for water right claim 01-6. That such is the case is supported by comments made by counsel for both the Claimants and the State of Idaho at the May 21, 2013, hearing, informing the Court that there presently exists a dispute regarding the interpretation of the above-quoted provision, and that an administrative proceeding has been commenced before the Director as a result. This late claim attempts to bring the conflict regarding the interpretation of the above-captioned remark back into the SRBA to the prejudice of the parties that stipulated to the remark's language in subcase 01-6. While there may be a dispute regarding the proper interpretation of the above-quoted provision, the provision

certainly does not act as the basis on which the Claimants can file a late claim in the SRBA. Permitting such a late claim to go forward is highly prejudicial to the parties who stipulated to the provision's language in subcase 01-6.

Given the forgoing, the Court finds that the Claimants have failed to establish a lack of prejudice to other parties resulting from the *Motion*.

III.

ORDER

Therefore, IT IS ORDERED that the *Motion to File Late Notice of Claim* **is hereby denied.**

DATED: June 4, 2013.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

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

DATED: June 4, 2013.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO FILE LATE NOTICE OF CLAIM was mailed on June 04, 2013, with sufficient first-class postage to the following:

AMERICAN FALLS RESERVOIR
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY
Represented by:
BARKER ROSHOLT & SIMPSON LLP
195 RIVER VISTA PL STE 204
TWIN FALLS, ID 83301-3029
Phone: 208-733-0700

AMERICAN FALLS RESERVOIR
Represented by:
C THOMAS ARKOOSH
ARKOOSH LAW OFFICES
802 W BANNOCK ST SUITE 900
PO BOX 2900
BOISE, ID 83701
Phone: 208-334-5105

MINIDOKA IRRIGATION DISTRICT
Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318-0248
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Deputy Clerk

Tab B

If a majority of the total outstanding shares shall vote at said election in favor of borrowing said money and mortgaging and/or pledging said assets, then said association, through its president and secretary, shall be authorized to borrow said money and mortgage and/or pledge its assets. [I. C., § 42-1309, as added by 1957, ch. 59, § 1, p. 101.]

Compiler's note. Section 2 of S. L. 1957, ch. 59 declared an emergency. Approved February 20, 1957.

CHAPTER 14—ADJUDICATION OF WATER RIGHTS

42-1401. Examination of stream by department of reclamation.— Whenever suit shall be filed in the district court by private parties for the purpose of adjudicating the priority of rights to the use of water from any water system including streams, lakes, ground waters, or any other body of water, tributaries and contributory sources thereto in the state, and before such adjudication is made the judge of such court may request the department of reclamation to make an examination of such water system, and the canals and ditches or other works diverting water therefrom, and of all the land being irrigated by such canals and ditches and other works, and the other uses being made of water diverted from such source, in the manner provided in sections 42-1408 through 42-1412, Idaho Code, and such department shall prepare a map showing such stream, canals and ditches, and the lands thereunder and location of other uses, and a report in the nature of a proposed finding of water rights, as provided in said sections. Prior to referring any such determination of water rights to the department of reclamation for a survey and report the judge of the district court shall ascertain from the department whether it has personnel and funds available to assist the court in preparation of such survey and report and an approximation of the time when such information could be completed. In cases where it appears to the department that the area specified by the court to be included in the survey and report should be modified to better enable the department to conduct the necessary investigations and supervise the delivery of water to those entitled thereto after the decree has been entered, the department may petition the court for an order to modify the area to be considered. [1903, p. 223, § 37; am. 1905, p. 357, § 4; reen. R. C. & C. L., § 4620; C. S., § 7032; I. C. A., § 41-1301; am. 1969, ch. 279, § 1, p. 822.]

Sec. to sec. ref. This chapter is referred to in § 42-237f. This section is referred to in § 42-238a.

42-1402. Decreed rights appurtenant to land.—In allotting the waters of any stream by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, and when such water is used for irrigation, the right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land which is irrigated by such water, and such right will pass with the conveyance

of such land, and such decree shall describe the land to which such water shall become so appurtenant. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed. [1903, p. 223, § 38; reen. R. C., § 4621; am. 1913, ch. 35, § 1, p. 133; C. L., § 4621; C. S., § 7033; I. C. A., § 41-1302; am. 1969, ch. 279, § 2, p. 822.]

Compiler's note. Section 3 of S. L. 1969, ch. 279 repealed § 42-1404, and section 4 of S. L. 1969, ch. 279 is compiled herein as § 42-1406.

42-1404. [Repealed.]

Compiler's note. This section, which comprised S. L. 1903, p. 223, § 40; reen. R. C. & C. L., § 4623; C. S., § 7035; I. C. A., § 41-1304, was repealed by S. L. 1969, ch. 279, § 3.

42-1405. Summary supplemental adjudication of water rights.

Proof of Right.

Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present sufficient evidence to enable the court to make definite and certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed. Head v. Merrick, 69 Idaho 106, 203 Pac. (2d) 608.

42-1406. **Action to adjudicate water rights.**—The state reclamation engineer, upon his own initiative or upon petition signed by five (5) or more or a majority of the users of water from any water system requesting a determination of the rights of the various users of water from that system, if he deems that the public interest and necessity will be served by a determination of the water rights, shall be authorized to designate all of [or] any part of a water system which shall include streams, lakes, ground waters, or any other body of water, tributaries and contributory sources thereto and commence an action in the district court for the adjudication of the water rights of the water system. [I. C., § 42-1406, as added by 1969, ch. 279, § 4, p. 822.]

Compiler's notes. The bracketed word "or" was inserted by the compiler. Section 3 of S. L. 1969, ch. 279 repealed § 42-1404.

42-1407. **Action commenced — Notice — Investigation — Order.** — The state reclamation engineer shall commence the action by filing a petition in a district court in which any part of the water system is located describing the boundaries of the water system and requesting authorization for the commencement of an adjudication of the water rights from the water system. Upon filing a petition with the district court, the state reclamation engineer shall cause notice to be published for three (3) consecutive weeks in a newspaper of general circulation published in each county in which any part of the water included within the boundaries of the water system is located, stating that any person claiming a right to the use of water within the system shall be given an opportunity to object to the issuance on an order authorizing the state reclamation engineer to commence investigation and prepare a proposed finding of water rights. If there is no newspaper published within a county, then the notice shall be published in a newspaper having general circulation in that county. The notice shall include the time set for holding a hearing on the proposed adjudication which shall be not less than 20 days after the date of the last publication. The district judge may also hear testimony on the question of whether the waters included in the water system to be adjudicated are interconnected and if he finds that the petition includes waters which are not tributary or excludes waters which are tributary and which should be included to achieve a complete adjudication of all rights which might be affected thereby, and if funds are available to the state reclamation

engineer to enable him to undertake the investigation under the procedure outlined in this act, he shall issue an order defining the boundaries of all or the part of the water system to be adjudicated and authorizing the state reclamation engineer to commence an investigation and determination of the various rights existing within the water system. [I. C., § 42-1407, as added by 1969, ch. 279, § 5, p. 822.]

Compiler's note. The words "this act" which is compiled herein as §§ 42-1401, probably refer to S. L. 1969, ch. 279, 42-1402, 42-1406—42-1413.

42-1408. Examination of water system.—In accordance with the order, the state reclamation engineer shall commence an examination of the water system, the canals and ditches and other works diverting water therefrom, all the land being irrigated by such canals and ditches and other works, and the other uses being made of the water diverted from the system. The state reclamation engineer and other employees of the department of reclamation shall have authority to go upon all lands, both public and private, for the purpose of investigating the uses of water from the water source, and may require the cooperation of all water users in the preparation of the maps showing the points of diversion and places of use of the water. The state reclamation engineer shall prepare a map or maps showing the water system, the canals and ditches and the lands thereunder, listing thereon the names of the users of water and the location of their uses. The state reclamation engineer shall be authorized to request the district court to issue subpoenas to require the attendance of any witness or the production of documents in the same manner as a party in a civil action under the Idaho Rules of Civil Procedure. [I. C., § 42-1408, as added by 1969, ch. 279, § 6, p. 822.]

Sec. to sec. ref. This section is referred to in §§ 42-1401, 42-1409.

42-1409. Order—Notice—Claim.—Upon completion of the state reclamation engineer's investigation under section 42-1408, he shall be authorized to request the district judge to join all claimants to water from the system. Upon entering of the order authorizing the joinder of any claimant by the state reclamation engineer, a copy of the court's order authorizing the determination of water rights from the water system, together with a summons and the order requiring joinder, shall be served upon each claimant by publication in a newspaper of general circulation published in the county in which the use is located for three (3) consecutive weeks and a copy of the summons, petition, and order shall be sent by certified mail to each claimant at his last known post-office address as shown by the records of the county in which land is located. Where there is no newspaper published in a county in which a use is located, then notice shall be published in a newspaper having general circulation in the county and one which will most likely give notice to the person served. The order of joinder shall direct each claimant to file a notice of claim with the state reclamation engineer. The notice of claim shall be upon forms furnished by the department of reclamation and shall be signed by the claimant and verified on oath and shall include the following:

(a) the name and post-office address of the claimant;
(b) the quantity of water claimed to be used in cubic feet per second or the quantity of water stored in acre-feet per year;
(c) the date of priority claimed and the date when the water was first applied to beneficial use, and if the right is founded upon a license or permit, the number thereof;

(d) the legal description of the location of the diversion works;
(e) the nature of the use and the period of the year when water is used for such purposes;
(f) a legal description of the place of use;
(g) the dates of any changes or enlargements in use, including the dimensions of the diversion works as originally constructed and as enlarged;
(h) such other facts as the state reclamation engineer may require to show the extent and nature of the right and show compliance with the law in acquiring the right claimed.

The order shall also direct the claimant to file his notice of claim with the state reclamation engineer within 60 days of the date of such service. The maps prepared by the state reclamation engineer under section 42-1408 shall be available at the office of the state reclamation engineer and at such places as he shall designate, for the purpose of aiding any claimant to the waters in preparing and filing his claim. [I. C., § 42-1409, as added by 1969, ch. 279, § 7, p. 822.]

Sec. to sec. ref. This section is referred to in § 42-1401.

42-1410. **Report—Objections—Hearing—Decree.**—The state reclamation engineer shall examine the claims filed and conduct such further investigation as is necessary to evaluate and ascertain the extent and nature of each water right existing within the system. Upon completion of his investigation he shall prepare a report in the nature of a proposed finding of water rights. The state reclamation engineer shall then file the report, together with each claim filed in his office under the preceding section with the district court and a copy of the report shall be sent to each claimant or his attorney at his last known post-office address. The report of the state reclamation engineer shall constitute prima facie evidence of the nature of the rights existing within the water system. Any claimant who desires to object to the report shall file his objections with the court within 60 days of the date of mailing of such report by the state reclamation engineer and shall also send a copy of such objection to the state reclamation engineer. The state reclamation engineer shall, within 20 days of receipt of a notice of objection, file his response thereto with the district court. Hearing shall be had by the district judge, without a jury, on each objection to the report of the state reclamation engineer. The report of the state reclamation engineer, the statements of claims or claimants and the notice of objections made to the report of the state reclamation engineer shall constitute the pleadings. The court may allow such additional or amended pleadings as may be necessary for a final determination of the proceedings. All proceedings on the hearing shall be held in accordance with the rules governing civil actions. The district court may take additoinal evidence on any issue and may, if necessary, defer the case for such further evidence to be taken by the state reclamation engineer as the court may direct, any may require a further determination by the state reclamation engineer. Upon conclusion of the hearing the district judge shall determine the nature of each right where a notice of objection has been filed and enter a decree accordingly. Where no objection is filed with regard to any right found to exist by the state reclamation engineer as evidenced by his report, the district judge shall affirm the right as therein found. The decree shall in every case declare as to the water rights adjudged to each party, the priority, amount, season of use, purpose of use, point of diversion and place of use of the water and acreage of the tract of land to which the water

right is appurtenant, together with such other facts as may be necessary to define the right. [I. C., § 42-1410, as added by 1969, ch. 279, § 8, p. 822.]

Sec. to sec. ref. This section is referred to in § 42-1401.

42-1411. Decree—Forfeiture of right.—The decree shall be conclusive as to the rights of all existing claimants upon the water system which shall lawfully embrace any determination. When a decree has been entered, 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 within the proceedings, and shall be held to have forfeited all rights to any water theretofore claimed. [I. C., § 42-1411, as added by 1969, ch. 279, § 9, p. 822.]

Compiler's note. For words "this act" see compiler's note, § 42-1407.

Sec. to sec. ref. This section is referred to in § 42-1401.

42-1412. Appeals.—Appeals from the decree may be taken to the Supreme Court by the state reclamation engineer or any claimant in the same manner and with the same effect as in other civil actions in the district court. [I. C., § 42-1412, as added by 1969, ch. 279, § 10, p. 822.]

Sec. to sec. ref. This section is referred to in § 42-1401.

42-1413. Severability.—The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act. [I. C., § 42-1413, as added by 1969, ch. 279, § 11, p. 822.]

Compiler's note. For words "this act" see compiler's note, § 42-1407.

CHAPTER 15—CONSERVATION OF WATER FOR IRRIGATION PURPOSES

SECTION.
42-1501—42-1506. [Repealed.]

42-1501—42-1506. [Repealed.]

Compiler's note. These sections, which comprised S. L. 1937, ch. 95, §§ 1, 4-6, 8, p. 132; 1939, ch. 27, § 1, p. 58, were repealed by S. L. 1969, ch. 469, § 2.

CHAPTER 17—DEPARTMENT OF RECLAMATION—WATER RESOURCE BOARD

SECTION.
42-1707, 42-1708. [Repealed.]
42-1710. Intent of legislature — Construction, maintenance and operation of dams.
42-1711. Definitions.
42-1712. Construction, enlargement, alteration or repair of dams—Submission of duplicate plans, drawings and specifications.
42-1713. Fees.
42-1714. Rules and reegulations.
42-1715. Inspection by department during construction, enlargement, alteration, repair or removal of dams—Effect of noncompliance.
42-1716. Notice of completion to department—Filing of supplementary drawings or descriptive matter.
42-1717. Jurisdiction of department over supervision of maintenance, operation and inspection of dams.

Tab C

RECEIVED BY
JUL 24 2007
OFFICE OF THE ATTORNEY GENERAL
MAIL 93379
DECREE10006

RECEIVED
APR 3 1985
Department of Water Resources
Western Regional Office

COPY

Filed in District Court Lemhi County
Idaho, Jan 4 1983
at 40 minutes past 2 o'clock P M.
Clerk
By Deputy

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 10 day of May 1996

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHT TO THE USE OF SURFACE WATERS AND TRIBUTARIES FROM WHATEVER SOURCE OF THE LEMHI RIVER DRAINAGE BASIN.	CIVIL NO. 4948 PARTIAL DECREE PURSUANT TO RULE 54(b), I.R.C.P.

The report of the Idaho Department of Water Resources ("Water Resources" herein) entitled PROPOSED FINDING OF WATER RIGHTS IN THE LEMHI RIVER BASIN was filed with this court on July 9, 1974. The report contains FINDINGS OF FACT, CONCLUSIONS OF LAW, and a LISTING OF WATER RIGHTS.

As a result of objections filed to the PROPOSED FINDINGS, changes were made to the Findings of Fact, Conclusions of Law, and the Listing of Water Rights. These amendments, additions, and deletions to the PROPOSED FINDINGS are set forth in two documents already on file with the court: (1) the "Special Master's Report on Specific Objections," filed April 7, 1982 and adopted by order on September 16, 1982; and (2) the "Stipulation Resolving General Objections" filed February 12, 1982. A third document, "Order Correcting Clerical Oversights in Proposed Finding of Water Rights," filed November 16, 1982, corrects typographical errors in the PROPOSED FINDINGS. Finally, permits listed in the PROPOSED FINDINGS which have become licensed on or before the date of this partial decree will be decreed in their licensed form.

This partial decree does not include any of the rights on Geertson Creek and its tributaries because they were already the subject of a partial decree which is on appeal to the Idaho Supreme Court. The rights of the United States Department of Agriculture, Forest Service, are also not included because they

have yet to be resubmitted following the decision of U.S. v. New Mexico.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the water rights of the Lemhi River Basin with the exceptions noted above are as described in the PROPOSED FINDING OF WATER RIGHTS IN THE LEMHI RIVER BASIN, as amended by:

1. Special Master's Report on Specific Objections;
2. Stipulation Resolving General Objections;
3. Order Correcting Clerical Oversights in Proposed Finding of Water Rights; and
4. Licenses issued on or before the date of this partial decree for permits listed in the PROPOSED FINDINGS;

all of which are incorporated herein by reference.

DATED this 30th day of December, 1982.

ARNOLD T. BEEBE
District Judge

Rule 54(b) Certificate

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

DATED this 30th day of December, 1982.

ARNOLD T. BEEBE
District Judge

STATE OF IDAHO)
COUNTY OF LEMHI) ss

NO. 175352

This instrument was filed for record at the request of Dept. of Water Resources
at 11:10 A.M. April 3, 19 85
and duly filmed and indexed in the file of JUDGMENTS Records of Lemhi County, Idaho.

Alberta Wiederrick
Ex-Officio Recorder
By Paulette Brown Deputy
Fee None

Return to: Josephine Beeman,
Deputy Attorney General
Dept. of Water Resources
Statehouse
Boise, Idaho 83720

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

Case No. 4948

IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHT TO THE USE OF SURFACE WATERS AND TRIBUTARIES FROM WHATEVER SOURCE OF THE LEMHI RIVER DRAINAGE BASIN

Plaintiff,

vs.

Defendant.

NOTICE

I hereby certify that, pursuant to Rule 77(d), I. R. C. P., Notice is hereby given to the following that Docume noted as:

Order dated .....

Judgment dated December 30, 1982

was filed of record in the District Court of the Seventh Judicial District, Lemhi County, Idaho, this 4th day

January ....., 19 83, to: enter PARTIAL DECREE PURSUANT TO RULE 54(b).

Copies to:

George C. Peterson, Jr.
485 "E" Street
Idaho Falls, ID 83401

Kent W. Foster
P.O. Box 129
Idaho Falls, ID 83401

Honorable H. Reynold George
585 N. Capital Avenue
Idaho Falls, ID 83401

Honorable Milton A. Slavin
P.O. Box 1103
Salmon, ID 83467

James C. Herndon
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Salmon, ID 83467

Jack G. Voshell
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Sherman F. Furey, Jr.
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Dean A. Gardner, Esq.
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Ogden, Utah 84401

Fred Snook
P.O. Box 1227
Salmon, ID 83467

Alberta Wiederrick, Clerk of District Court
by Beverly A. Laughlin Deputy

MOTION FOR PARTIAL DECREE;

The foregoing is a true and certified copy of the document on file at the department of Water Resources.

Signed this 10 day of May, 1996

David E. Shaw
Adjudication Bureau Chief

Tab D

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR

LEMHI COUNTY

Filed in District Court, Lemhi County
Idaho, July 9 1914
at 57 minutes past 5 o'clock P.M.
[illegible] Clerk
By _____ Deputy

PROPOSED FINDING OF WATER RIGHTS

IN THE

LEMHI RIVER BASIN

CIVIL CASE NO. 1948

TABLE OF CONTENTS

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE

OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHTS TO THE USE OF THE SURFACE WATERS AND TRIBUTARIES FROM WHATEVER SOURCE OF THE LEMHI RIVER DRAINAGE BASIN.	CIVIL NO. 4948 PROPOSED FINDINGS OF WATER RIGHTS

The above-entitled cause was initiated under provisions of Section 42-1406, Idaho Code, by the submission of a petition from eight (8) water users in the Lemhi River Basin, requesting that the Department of Water Administration obtain authority from the Court to prepare a proposed finding of water rights in the Lemhi River Basin. The petitioners specifically requested that the study reflect the present practice and use of water within the drainage.

Pursuant to Section 42-1407, Idaho Code, R. Keith Higginson, Director of the Department of Water Administration petitioned the Court on April 30, 1970, for an order of authorization for the commencement of an adjudication of water rights in the Lemhi River Drainage.

An order was signed on August 13, 1970, by District Judge Arnold T. Beebe, authorizing the Department to commence an investigation and determination of the various rights to the use of the water of the Lemhi River and its surface tributaries including ground water which may be either tributary to the Lemhi River or its surface tributaries within the Lemhi River Drainage Basin, such waters lying or being used within Lemhi County.

An order of joinder signed on June 17, 1971, made approximately 457 land owners and possible water users party to the adjudication. An additional 351 water users were joined by an order signed November 1, 1971. Approximately 1,900 claims of water rights were submitted to the Department.

Based upon the claims submitted, the files and records of the Department and the Court, the examination of the Lemhi River Drainage Basin and the various ditches and other diversions of water therein and the lands irrigated or other uses of water, the Department of Water Administration recommends these findings of fact, conclusions of law and decree of water rights, in which the following definitions apply:

a. "Director" means the Director of the Department of Water Administration.

b. "Department" means the Idaho Department of Water Administration.

c. "Ident. No." is the abbreviated form of "Identification Number". An identification number is assigned to each water right for purposes of identification. The first two (2) numerals of an identification number indicate the basin number as reflected in Department files, i.e., "74" indicates the Lemhi River Basin.

d. "Name and address" are self-explanatory and indicate the owner of the right at the time the "Notice of Claim to a Water Right" was submitted to the Department.

e. "Priority" indicates the priority date of the water right and is generally the date when the water was first applied to a beneficial use.

f. "Purpose" is self-explanatory except for "Fish Return" as shown on numerous Idaho Department of Fish and Game rights. Fingerling fish are prevented from entering irrigation ditches by means of a screen across the irrigation ditch and a by-pass pipe for the fish to return through to the river. Hence, the term "Fish Return". This is a non-consumptive use.

g. "Period of use" indicates the time when a particular right may be used each year.

h. "Acre-foot" is a volume of water sufficient to cover one acre of land one foot deep with water and is equal to 43,560 cubic feet.

i. "Maximum rate of diversion, c.f.s." indicates the rate of diversion from a water source in cubic feet per second. The term "miner's inch" formerly used in hydraulic mining and irrigation is also a measure of a rate of flow. The miner's inch in Idaho is defined as the quantity of water which will flow through an orifice one inch square under a four inch head. One cubic foot per second is equal to fifty miner's inches in Idaho, or 0.02 c.f.s. equals one miner's inch.

j. "Place of use and lands irrigated" indicate the number of irrigated acres and legal description of the places of use within each 40-acre subdivision.

k. Under the general heading "Basis of Right":

"Beneficial Use" indicates the right is based on a Constitutional right or so called "use right".

"Permit" indicates the right has been initiated under the Statutes of the State of Idaho but has not yet been perfected by submission of proof of beneficial use, with subsequent field examination by the Department. Rights based on permit must be completed according to statutory procedures.

"License" indicates the right has been initiated through the Department with appropriate statutory proof submitted in the past with subsequent examination by the Department. The license is evidence of the water right.

"Decree" indicates that the right has been adjudicated in a court of law prior to this general determination of water rights.

l. "Domestic purposes" is defined as water for household use or livestock and water used for all other purposes including irrigation of up to one-half (½) acre of land in connection with said household where total use is not in excess of 13,000 gallons per day. Idaho Code, 42-230 (d).

m. "H. E. S." as used in this report describes a place of use of a water right and means Homestead Entry Survey. There is a number following the H.E.S. designation that refers to the particular homestead entry in question, i.e., H.E.S. No. 236.

n. "High water" or "Flood water" as used in the Findings of Fact and Conclusions of Law is intended to describe a natural flow of "water over and above the amounts required to fulfill (1) existing quantified rights as shown in the recommended decree of water rights and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho."

FINDINGS OF FACT

1. The Lemhi River Drainage lies entirely within Lemhi County, State of Idaho, with its mouth at its confluence with the Salmon River near Salmon, Idaho, and with its source comprised of tributaries rising in the surrounding mountains and hills. There are periods during each year when the amount of water flowing in the Lemhi River and its tributaries is insufficient to meet and satisfy the various demands by claimants of appropriative rights. These periods of scarcity normally occur prior to the spring runoff and during the latter part of the summer.

2. There exist numerous separate decrees on the tributaries of the Lemhi River adjudicating the various priorities to the use of the water on those tributaries. Diversion and beneficial use of water on these decreed tributary streams has in the past been without regard for uses or rights claimed on the Lemhi River proper, and users on the Lemhi River proper have made no demand on these tributary streams for water to fill prior rights on the main stem.

3. Beneficial use rights from surface water sources are those rights which were commenced by diversion and application of the water for a beneficial use prior to May 20, 1971. Beneficial Use rights from underground water sources are those which were commenced by diversion

and application of the water to a beneficial use prior to March 25, 1963. All other rights to the use of water must have been initiated by an application filed with the Department of Water Administration. The only exception to this is for domestic wells where total use does not exceed 13,000 gallons per day pursuant to Section 42-227, Idaho Code.

4. The irrigation water requirement at the field headgate is found to be 3.0 acre feet per acre per calendar year regardless of the source or sources of supply. The loss in acre-feet from the point of diversion at the source to the field headgate varies dependent on length, slope and capacity of ditch together with the type of soil through which it passes.

   Consumptive use or evapotranspiration of water from the land and crops is a total of 1.8 AF/acre per growing season of which precipitation normally furnishes 0.35 acre feet per acre, giving a net consumptive irrigation requirement of 1.45 AF/acre to be applied from some water source. The balance of 1.55 AF/acre (3.0 acre feet per acre minus 1.45 acre feet per acre) reflects application losses that under present physical and economical conditions may be liberal, but are not unreasonable for the present methods of water application in the Lemhi River Basin.

5. The normal irrigation season is found to be from April 1 to November 1 of each year. However, there appear to be periods before April 1 and later than November 1 in some years in which water diverted for agricultural purposes has been applied to a beneficial use.

6. The use of water under previously decreed rights in the Lemhi River Basin was found, in many cases, to be different from the use as described in the original decrees. Changes in places of use, changes in point of diversion, apparent errors in the original decrees, abandonment or forfeiture of use, and the updating and improvement of irrigation systems through the years were some of the reasons for recommendations of decreed rights different from the original decrees.

7. The Lemhi River Basin presently has almost non-existent storage facilities in which to preserve water for use later in the irrigation season when the flow in surface water sources diminishes.

   Water users in the basin have diverted flood flows occurring in May and June onto their lands in an effort to "hold or reservoir" the water in the soil of the basin.

8. The amount of water required for stockwatering purposes is found to be 12 gallons of water per day per head for cows, calves, and horses, and 2 gallons per day per head for sheep. For domestic or household use, the requirement is 1,000 gallons of water per day per household.

9. The United States has submitted claims of water right based on the "Reserved Rights" principle which are enumerated in Exhibit "I" and has also claimed unspecified minimum stream flows in various creeks, streams and water sources enumerated in Exhibit "J" of the United States of America Notice of Claim to a Water Right submission together with various other exhibits. The water rights of the United States are subject to adjudication in this proceeding under the provisions of 43 USC 666.

10. The State of Idaho, Department of Fish and Game has claimed minimum stream flows at the mouth of the Lemhi River, at the mouth of Hayden Creek and on the Lemhi River below the mouth of Big Springs Creek on three claims to a water right identified as 74-1768, 74-1769 and 74-1770, which claims are not based upon a diversion and application of the water to a beneficial use.

11. This proposed finding of water rights includes rights initiated by application and permit from the Department of Water Administration. These permit rights are subject to the requirement that proof of beneficial use of the water must be submitted to the Department and the right will be limited to and confirmed by such license as may subsequently be issued by the Department.

12. Regulation of the diversion and use of water from the Lemhi River and its tributaries requires that each user who diverts water must install and maintain a suitable headgate and measuring device for the use of the watermaster.

13. Among the various water rights in the numerous licenses issued by the Department of Water Administration and the court decrees which adjudicated water rights within the Lemhi River Drainage are several which describe rights which were unclaimed by the present land owner. For the most part, these include uses which no longer exist because of forfeiture or abandonment of the right. These unclaimed "rights" are listed in the recommended decree.

14. Water has been diverted and applied to a beneficial use as described in the recommended decree of water rights. In addition, the water users in the Lemhi River Basin have historically diverted the so called "high water or flood water" generally during the months of May and June.

CONCLUSIONS OF LAW

1. The United States holds rights to the use of water on reserved forest lands within the Lemhi River Drainage Basin with priorities based upon the dates when the various forest reserves were established, to the extent such water has been diverted and applied to a beneficial use prior to the date of this action or to the extent that future potential uses have been reasonably identified in its claims. The United States holds no rights either expressly or impliedly to the maintenance of continuous, uninterrupted flows of water and minimum stream levels for the various creeks, streams, and water sources enumerated on Exhibit "J", of the United States of America Notice of Claim to a Water Right nor any rights to the present or future use of water of Lemhi River or its tributaries not specifically claimed and identified as to quantity and place of use except as set forth in these findings of fact, conclusions of law and decree of water rights.

2. The State of Idaho, Department of Fish and Game claims of water rights to maintain minimum stream flows at the mouth of the Lemhi River, at the mouth of Hayden Creek, and on the Lemhi River below the mouth of Big Springs Creek identified as Claim Nos. 74-1768, 74-1769 and 74-1770, are not based upon a diversion and application of the water to a beneficial use and are therefore invalid.

3. An adjudication of water rights should recognize the past history of use of water in the area. Since there exist numerous and separate decrees on tributaries to the Lemhi River and on other sources of water in the Lemhi River Basin, and since the water users on these stream systems have distributed their waters under direction of a watermaster independently and without regard for prior claimed uses on the Lemhi River proper, the water users on those tributaries or water sources have adversed any prior right to demand water from the tributary streams to fill rights claimed on the Lemhi River proper. For the purposes of water distribution in the Lemhi River Basin following adoption of these proposed findings by the Court, the following water sources, to the extent recommended herein, are not considered tributary to the Lemhi River:

1. Agency Creek and tributaries
2. Alder Creek and tributaries
3. Basin Creek (incl. McNutt & Schwartz) and tributaries
4. Bohannon Creek and tributaries
5. Bull Creek and tributaries
6. Canyon Creek (Junction Creek) and tributaries
7. Eightmile Creek (Big) and tributaries
8. Eightmile Creek (Little) and tributaries
9. Geertson Creek and tributaries
10. Hawley Creek and tributaries
11. Haynes Creek and tributaries
12. Jake Canyon Creek and tributaries
13. Kirtley Creek and tributaries
14. Lee Creek and tributaries
15. Mill Creek and tributaries
16. Pattee Creek and tributaries
17. Peterson Creek and tributaries
18. Pratt Creek and tributaries
19. Sandy Creek and tributaries
20. Sawmill Creek (Little) and tributaries

21. Texas Creek and tributaries
22. Timber Creek (Big & Little) and tributaries
23. Walter Creek and tributaries
24. Warm Springs Creek (Near Pratt Creek) and tributaries
25. Wimpey Creek and tributaries
26. Withington Creek and tributaries
27. Yearian Creek and tributaries
28. Zeph & Swartz Creeks and tributaries

Future appropriations of water on the above streams or any other water source or stream in the Lemhi River Basin, however, are considered to be tributary to the Lemhi River proper for the purposes of distribution.

Water sources or creeks not included in the listing above are tributary to the Lemhi River for the purposes of distribution if in fact water from the water source or creek would reach the Lemhi River.

4. Water users whose rights are described in this recommended decree should be required to install and maintain headgates and measuring devices at their points of diversion for use by a watermaster.

5. This recommended decree includes all of the existing rights to the waters of the Lemhi River and its tributaries and upon its adoption supercedes all prior judgments of the Court. Any water user who heretofore diverted water from the Lemhi River or its tributaries of who owns lands to which previously established rights were appurtenant and who, upon being joined in this action, failed to claim such water rights have forfeited such rights as provided in Section 42-1411, Idaho Code.

6. The normal irrigation season is from April 1 to November 1 of each year. The practice of diverting water during the pre-irrigation and post irrigation season as well as diverting the so called "high waters or flood waters" in addition to the quantified rights as described in the recommended decree of water rights (and future rights that may be established pursuant to statutory procedures) should be allowed provided:

   (a) the waters so diverted are applied to a beneficial use.

   (b) the existing quantified rights (including future appropriations of water) are first satisfied.

7. The duty of water for irrigation purposes in the Lemhi River Basin is 3.0 AF/acre at the field headgate. In addition, every water user is entitled to a reasonable loss in acre feet between the point of diversion at the source and the field headgate. However, regulation of diversion by the watermaster should be on the basis of the rates of diversion herein specified rather than by the acre-foot allotment.

8. The watermaster(s) should be authorized to allow diversion of water for agricultural uses before April 1 and after November 1 provided the conditions in paragraph six (6) in these Conclusions of Law are satisfied.

9. Water has been diverted and applied to a beneficial use as described in the following recommended decree of water rights.

RECOMMENDED DECREE OF WATER RIGHT

The following tabulation of recommended rights are grouped by drainage in alphabetical order. For example, Agency Creek and tributary rights are in the first part of the report and are shown in chronological order. Next are Alder Creek and tributary rights and so on:

The tabulation of rights with spring sources and groundwater sources has been compiled in an alphabetical order according to the last name of the water right owner.

The tabulation of rights on the Lemhi River itself has been compiled by diversion, beginning at the downstream end of the river. For example, the diversion furthest downstream on the Lemhi River has been identified as Lemhi River diversion 1 or Div. L-1. The rights of users in this ditch have been tabulated in order of priority with the oldest right showing first. The next upstream diversion on the Lemhi River is designated Lemhi River diversion 2 or Div. L-2. The rights are tabulated in a like manner as for L-1. The rights tabulated under a particular Lemhi River diversion have a common point of diversion from the Lemhi River. Pump diversions from the Lemhi River have been tabulated in a separate section of the report.

Tab E

ORIGINAL

LODGED

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
OCT - 4 2010
By _____ Clerk
_____ Deputy Clerk

IGNACIA S. MORENO
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
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Environment and Natural Resources Division
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Phone: (208) 334-1936; Fax: (208) 334-1414

Attorneys for the United States

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

In Re SRBA	)	Lead subcase 74-15051 (295 "High Flow" Claims)
Case No. 39576	)	**UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

recommended the 2003 Irrigation Claims – claims it concedes it cannot distinguish from any other junior irrigation claim – for massive additional quantities of water.

III. ARGUMENT

A. The 2003 Irrigation Claims are barred by Idaho statute, Idaho Supreme Court precedent, the Lemhi decree and principles of *res judicata*.

1. The Lemhi Decree is conclusive as to the nature and extent of all water rights as of April 1, 1972.

The 2003 Irrigation Claims are barred by Idaho statute, Idaho Supreme Court precedent, the terms of the Lemhi Decree and principles of *res judicata*. These authorities dictate that the Lemhi Decree is conclusive as to the nature and extent of all water rights with claimed priorities senior to April 1, 1972. Claims for irrigation water rights alleged to have been appropriated prior to that date cannot now be re-litigated.

The version of Idaho Code, Section 42-1411 (now I.C. 42-1420(1))[8] in effect at the date of entry of the Lemhi Decree provided:

> Decree–Forfeiture of Right.– The decree shall be conclusive as to the rights of all existing claimants upon the water system which shall lawfully embrace any determination. When a decree has been entered, 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 within the proceedings, and shall be held to have forfeited all rights to any water theretofore claimed.

The Idaho Supreme Court has confirmed this bedrock principle concerning the finality of general adjudication decrees stating: "The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system . . . ."

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[8] The current version of the statute, Idaho Code, Section 42-1420(1), provides that "The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system . . . ."

State v. Hagerman Water Right Owners, Inc., 947 P.2d 409, 414 n. 2 (Idaho 1997) (quoting I.C. § 42- 1420).

The version of Idaho Code 42-1401 (now I.C. 42-1401A(5))[9] in effect at the date of the Lemhi Decree further made it clear that water rights decrees were final as to joined parties, providing that decrees entered for adjudication of "any water system . . . shall be deemed conclusive in accordance with section 42-1411, Idaho Code.[quoted above] [now I.C. 42-1420(1)]."

Current Idaho Code, Section 42-1409(4) further codified this principle of finality and the proposition that water users joined in a general adjudication are required to file claims for all water rights the user asserts he is has appropriated: "All claimants of water rights that are included in a general adjudication shall file with the director a notice of claim for all water rights . . . ." I.C. 42-1409(4) (emphasis added). See also I.C. 42-1408(1)© (failure to claim water right will result in a court determination that "no water right exists for the use of water for which the required notice of claim was not filed").

As noted above, the Orders of Joinder served on water users on June 17, 1971 and November 11, 1971 made those users parties to the adjudication and required them to file "a Notice of Claim to a Water Right for any water right which he may have, within sixty (60) days

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[9] The current version of the statute, Idaho Code, Section 42-1401A(5), continues to make it clear that general adjudications constitute a judicial determination of all water rights in a water system:

> "'General adjudication' means an action . . . for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of the rights to the use of water in the adjudicated water system . . . ."

of the date of service" of the Order. Order of Joinder, June 17, 1971; Order of Joinder, November 11, 1971.

The Lemhi Decree itself restated these principles of finality concerning that general adjudication decree:

> Any water user who heretofore diverted water from the Lemhi River or its tributaries or who owns lands to which previously established water rights were appurtenant and who, upon being joined to this action, failed to claim such water rights has forfeited such rights .... as provided in Section 42-1411, Idaho Code [now I.C. 42-1420] ....

Lemhi Decree (Attachment 10), Conclusion of Law 5.

It is undisputed that LID and all private water rights claimants under the 2003 Irrigation Claims were parties to the Lemhi adjudication. Indeed, IDWR takes the position that the 2003 Irrigation Claims can only be recommended and adjudicated if there is a "base right" for the claim, i.e., an irrigation water right adjudicated for the point of diversion claimed by the 2003 Irrigation Claim with a place of use served by that point of diversion. See Supp. Director's Report at 14 ("The Department does not intend to recommend a high flow right that is not associated with a non-high flow/base right"). It is therefore axiomatic that claimants or their predecessors-in-interest were parties to and filed irrigation claims in the Lemhi Adjudication.[10]

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[10] While LID was not a claimant of any water rights in the Lemhi Adjudication, it was a party to the adjudication and is bound by the Lemhi Decree. See LID's Response to United States' First Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents (Attachment 12), Response to Request for Admission 1 at 3 (admitting that LID was a party to the Lemhi Adjudication).

LID's Notices of Claim note that LID is not the owner of the claimed places of use, but does not identify the authority under which it claims the rights. See Notices of Claim, Attachments 1-3, 6-9, ¶ 12 at 2. LID does not own any water rights in the basin. LID does not own any irrigated land within the basin. LID does not own any irrigation facilities within the basin. And LID has never appropriated any water within the basin. Shaff Tr. (Attachment 21) at

As explained above, many of these claims were for quantities exceeding the amount the Lemhi Court adjudicated. But, whether claimants of the "base rights" claimed more than was adjudicated or not, the above-cited authority makes clear that users were required to file claims for all water rights to the user asserted he had appropriated by the cut-off date of the Lemhi Decree.

The above-referenced authorities are based on legislative directives and policies concerning the importance of obtaining finality in general adjudication decrees based on the principle of *res judicata* and avoiding re-litigation of water rights claimed to have been appropriated as of the cut-off date of the decree. As explained in Andrus v. Nicholson, 186 P.3d 630, 633-34 (2008), the elements of *res judicata* are that: (1) the actions must involve the same parties or their privies; (2) the actions must involve the same claim; and (3) there must have been a final judgment rendered on the merits in the previous action. The Supreme Court explained that "claim preclusion under the doctrine of res judicata is not limited to theories that were actually litigated." Id. at 633. The Court concluded that the doctrine precludes "every matter that

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270–71; Smith Tr. (Attachment 23) at 54, 59; Sager Tr. (Attachment 24) at 87-88. There is a significant difference of opinion among the owners of the base right concerning whether LID, as claimant of the 2003 Irrigation Claims, is the owner of the rights claimed, is merely seeking to adjudicate the claims on behalf of the base right owners who would own any rights adjudicated, or whether LID is even the appropriate claimant. Some base right owners have filed competing claims. See e.g., Claim Nos. 74-15084 (Santos) and 74-15085 (Olson) (claiming same 34.0 cfs at point of diversion L-8A as LID's Claim No. 74-15112). Some owners of base rights did not consent to LID's filing of claims and some owners were totally unaware that LID was going to and did file claims. Sager Tr. (Attachment 24) at 153. Moreover, LID has acknowledged that it has never diverted any water in the basin, that it has no familiarity with the claimed places, and that it does not know what the irrigation requirements of the places of use are. Smith Tr. (Attachment 23) at 130, 131; Sager Tr. (Attachment 24) at 171. If the 2003 Irrigation Claims are not denied pursuant to this motion, the United States reserves the right to file further motions and/or present arguments concerning whether LID has the necessary consent and authority to make these claims.

which might have and should have been litigated in the first suit," and that the prior adjudication extinguishes all claims that could have been made in the prior adjudication. Id., (quoting Joyce v. Murphy Land & Irrigation Co., 208 P. 241, 242-43 (1992)).

Here, the actions involve the same parties or their predecessors or privies. The United States was a party to the Lemhi adjudication. See Lemhi Decree, Finding of Fact 9, Conclusion of Law 1. It is further undisputed that all claimants of the 2003 Irrigation Claims were parties to the Lemhi adjudication. Indeed, all claimants or their predecessors had to have filed claims in the Lemhi adjudication given the assertion that the 2003 Irrigation Claims are for points of diversion and places of use adjudicated in that prior adjudication.

The actions also involve the same claim – the claim for irrigation water rights asserted to have been established prior to April 1, 1972. It would be nonsensical to suggest that an irrigation claim for the same point of diversion and the same place of use, but for an additional quantity of water or for a different priority preceding the cut-off date of the prior decree, constitutes a different claim. As noted above, Idaho's water adjudication statutes required users to file claims for all water rights claimed to have been appropriated prior to the cut-off date of the adjudication. The claims filed in the Lemhi adjudication are for the amounts asserted to have been appropriated prior to April 1, 1972. Allowing claimant to characterize a subsequent irrigation claim for the same point of diversion and place of use, but for an increased amount, as a different claim for purposes of *res judicata* would undermine all notions of finality in water rights adjudications.

Finally, it is uncontroverted that the Lemhi Decree was entered as a final judgment. This Court has previously determined that consolidation of the Lemhi Adjudication with the SRBA

was not necessary because a final decree had been issued in the Lemhi Adjudication and that "final decree would have the same legal effect in the SRBA as other prior decrees addressed in the SRBA." Order Re: In the Matter of the General Determination of the Right to the Use of Surface Waters and Tributaries from Whatever Source of the Lemhi Drainage Basin (Lemhi Adjudication), May 25, 2004. See also Special Master Report and Order, Subcases 74-50A, 74-380A, 74-381A and 74-10146 (Carlson), September 24, 2008, at 5.

All of the elements of *res judicata* are met and claimants are barred from now attempting to re-litigate their claims for irrigation water rights claimed to have been established prior to April 1, 1972.

2. IDWR's guidance documents concerning preparation of recommendations dictate that the 2003 Irrigation Claims are barred by the Lemhi Decree.

IDWR's own guidance documents concerning preparation of recommendations dictate that the 2003 Irrigation Claims are barred by the Lemhi Decree. IDWR's current (undated) Claims Investigation Handbook notes the preclusive effect of prior decrees and the fundamental principle that "If a water right was required to be claimed in an adjudication, and was not, the claimant may be barred from claiming a water right with a priority date preceding the date of the adjudication decree. . . ." IDWR Claims Investigation Handbook (undated) at 5.

IDWR's 1993 Claims Investigation Handbook sets forth guidance for the Department's determination concerning whether a claimed right was decreed in a previous adjudication, and provides that:

> For purposes of preparing the director's report, a right will be deemed to have been decreed where the decree determines the amount, priority, and source of the right as against claimants of other water rights.

Tab F

State of Idaho
Department of Water Resources

Amended Water Right License Amended

WATER RIGHT NO. 96-09284

Priority: May 31, 2006 Maximum Diversion Volume: 0.1 AF

It is hereby certified that CATHERINE PHANEUF
And/Or DEAN PHANEUF
1433 CEDAR HILL DR
RIVERSIDE CA 92507 has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated May 26, 2006; and has submitted Proof of Beneficial Use on July 06, 2007. An examination indicates that the works have a storage capacity of 0.24 AF of water from:

SOURCE
UNNAMED STREAM **Tributary:** JOHNSON CREEK

and a water right has been established as follows:

BENEFICIAL USE	PERIOD OF USE	ANNUAL DIVERSION VOLUME
FLOOD CONTROL STORAGE	01/01 to 12/31	0.1 AF
WILDLIFE STORAGE	01/01 to 12/31	0.1 AF

LOCATION OF POINT(S) OF DIVERSION:
UNNAMED STREAM NW¼NW¼ Sec. 28, Twp 57N, Rge 03W, B.M. BONNER County

PLACE OF USE: FLOOD CONTROL STORAGE and WILDLIFE STORAGE

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
57N 03W 28						X											

CONDITIONS OF APPROVAL

1. Wildlife storage and flood protection storage uses are for a pond.
2. Use of water under this right shall be non-consumptive.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 26th day of January, 2009.

DAVID R. TUTHILL, JR.
Director

State of Idaho
Department of Water Resources

Water Right License

WATER RIGHT NO. 96-09285

Priority: May 31, 2006 Maximum Diversion Volume: 0.1 AF

It is hereby certified that HUNTER HORVATH
And/Or PHYLLIS HORVATH
113 "B" EUCLID AVE
SANDPOINT ID 83864 has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated May 26, 2006; and has submitted Proof of Beneficial Use on July 06, 2007. An examination indicates that the works have a storage capacity of 0.3 AF of water from:

SOURCE
UNNAMED STREAM **Tributary:** JOHNSON CREEK

and a water right has been established as follows:

BENEFICIAL USE	PERIOD OF USE	ANNUAL DIVERSION VOLUME
FIRE PROTECTION STORAGE	01/01 to 12/31	0.1 AF
FLOOD CONTROL STORAGE	01/01 to 12/31	0.1 AF

LOCATION OF POINT(S) OF DIVERSION:
UNNAMED STREAM NW¼NW¼ Sec. 28, Twp 57N, Rge 03W, B.M. BONNER County

PLACE OF USE: FIRE PROTECTION STORAGE and FLOOD CONTROL STORAGE

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
57N 03W 28						X											

CONDITIONS OF APPROVAL

1. Fire protection storage and flood protection storage uses are for a pond.
2. Water shall not be diverted from storage for fire protection use under this right except to fight or repel an existing fire.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 6th day of January, 2009.

David R. Tuthill, Jr. for

DAVID R. TUTHILL, JR.
Director

Tab G

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Counsel for the United States of America

LODGED
DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN 1 1 2013
By
Clerk
Deputy Clerk

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

In Re SRBA	)	Subcase Nos.: 00-91017
	)	
	)	THE UNITED STATES' RESPONSE
	)	BRIEF ON BASIN-WIDE ISSUE NO. 17

Introduction

In the interest of economy the parties supporting priority refill have divided the responsibility of responding to the State of Idaho's Opening Brief ("State Brf."). The United States responds only briefly to explain that the Court need not address certain State arguments which do no more than attempt to interject irrelevant issues into this proceeding, question the legality of flood control, and impugn the integrity of the Bureau of Reclamation's ("Reclamation") operations.

with the irrigation spaceholders. It does not address the day-to-day mechanics of Reclamation's interactions with its spaceholders – those are handled by contract – and thus the State's attempt to use Section 4 to do so is simply misplaced.[2]

II. FLOOD CONTROL OPERATIONS ARE INDEPENDENT OF THE WATER RIGHT SYSTEM AND NOT CONTRARY TO LAW.

The State contends that "[t]he argument that reservoir space vacated by flood control operations must be refilled under priority because flood control releases are not beneficially used for irrigation flies in the face of Idaho water law." State Brf. at 28. While the logic of the State's argument in support of that contention is difficult to discern, the State appears to suggest that flood control releases are illegal, at least as a matter of Idaho water law. *See id.* at 27. As the United States explained in its opening brief, State law has long recognized an obligation to operate reservoirs to limit potential damage from floods. U.S. Brf. at 2. Regardless, even if State law did not require flood control releases, flood control operations are required by federal law – as the State concedes.[3] State Brf. at 28 (citing 64 Stat. 1083).

In any event, the State's argument is no more than a distraction. As the State appears to acknowledge, State Brf. at 28, flood control operations and obligations are not a

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[2] Although the United States' argument naturally focuses on Reclamation, the State's argument applies to all reservoir operators. The essence of the State's argument is that Section 4 makes all reservoir operators liable to spaceholders if flood control obligations result in a reduction in the quantity of water available for distribution to spaceholders – even though the reservoir operators are legally required to operate for flood control. State Brf. at 24. As the State suggests, State Brf. at 28 n. 9, the United States' contracts preclude such an action against the United States. The same may not be true of private reservoir operators.

[3] Moreover, to the extent State law were construed to preclude, or even hinder federal flood control mandates it would be pre-empted. *U.S. v. California Water Resource Board*, 694 F.2d 1171, 1177 (9th Cir. 1982) (conditions imposed by state water law are pre-empted to the extent they "clash[] with express or clearly implied congressional intent or works at cross-purposes with an important federal interest.").

matter of water law. Indeed, flood control operations are entirely independent of the water rights system – which is one good reason why flood water passed through, or released from, a reservoir in flood control operations should not count against the exercise of a storage water right.

III. THIS ISSUE SHOULD NOT BE DECIDED BY CONSIDERATION OF "INCENTIVES."

The State argues that priority refill would "remove a legal incentive to carefully manage stored water supplies" and instead create incentives to expand flood control operations and "waste" water. State Brf. at 18-19. This speculation does no more than cast unwarranted aspersions at Reclamation's integrity in operating its reservoir systems and should be ignored. As the United States has explained, the outcome of this proceeding will have no effect on Reclamation's flood control operations. U.S. Brf. at 5. In any event, the State's incentive argument is without foundation.

First, Reclamation has ample incentive to maximize storage regardless of the outcome of these proceedings. The State's speculation is entirely at odds with the terms of Reclamation's contracts with its spaceholders, which require Reclamation to operate its reservoir systems, consistent with its statutory obligations, to maximize the amount of water available to its spaceholders. Supplemental Contract with Wilder Irrigation District (Contract No. 14-06-W-82) at § 7 (Exhibit 1 to Affidavit of Shelley M. Davis in Support of Opening Brief .... dated December 20, 2012). Further, the Nez Perce Agreement, ratified by both state and federal statute, as well as a decree of this Court, gives Reclamation additional incentive to maximize storage because the vast majority of water made available for Reclamation's use through the Agreement must come from storage.

Tab H

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DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JUN - 8 2012
By _____ Clerk
Deputy Clerk

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

In Re SRBA	00-91017 PETITION TO DESIGNATE BASIN-WIDE ISSUE
Case No. 39576	

COMES NOW, Black Canyon Irrigation District, New York Irrigation District, Pioneer Irrigation District, Nampa-Meridian Irrigation District, and the Boise Project Board of Control, by and through their undersigned attorneys, and hereby move this Court for an order designating the issue described below as a Basin-Wide Issue.

MAIL 116186

For the reasons explained below, the following issue, stated in conformation with Rule 16, AO1, as a Basin-Wide issue:

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

In certain on-going SRBA proceedings[1] on Basin 01 storage water rights in American Falls and Palisades reservoirs, the Bureau of Reclamation ("Reclamation") and the State of Idaho have taken the position that a remark is "necessary" on those storage water rights for those reservoirs to administer water entering Reclamation reservoirs after water has been released from those reservoirs for flood control, or other operational mandates. While the parties disagree substantially on the form of remark, those parties nevertheless agree that some remark is required.

Of concern to the Petitioners, the State of Idaho has argued broadly that, 1) there can be no refill of any kind of storage rights unless there is a remark authorizing refill, and 2) that "Idaho law requires that storage 'refill' be subordinate to all existing and future water rights[.]"[2] The State's argument is not limited to only the storage subcases at issue in that proceeding, but appears on its face to have broad applicability to all storage rights in all reservoirs in the State of Idaho.

Most of the storage water rights within the jurisdiction of the SRBA have already been issued partial decrees without any remark concerning refill, much less the remark urged by the State in the Basin 01 proceedings. The Basin 63 Boise River storage rights, and the Basin 65 Payette River storage rights have no such remark and have historically refilled to protect the spaceholders in priority, and the State's position in the Basin 01 subcases may have an after the

[1] See attached Exhibit A for list of water right numbers.
[2] Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment (in Basin 01 Palisades and American Falls subcases), Feb. 21, 2012, p. 3.

fact adverse impact on those rights. Because a determination of this issue in the Basin 01 storage subcases could arguably apply to all storage water rights in all reservoir facilities throughout the State, and a determination of the issue in the Basin 01 subcases could call into doubt the administration and enforceability of storage water right holders "refill" rights throughout the state, then this matter should be designated a Basin Wide Issue so that all potentially affected parties may have notice and an opportunity to participate.

Early resolution of this issue through designation as a Basin Wide Issue will serve the purpose of judicial economy by ensuring an early and unified legal determination in the SRBA which can then be applied to individual storage water rights, even those which have already gone to partial decree. Without a Basin Wide Issue to resolve this matter prior to the SRBA's entry of a Unified Partial Decree, then storage rights in other than American Falls and Palisades Reclamation facilities would be prejudiced.

CONCLUSION

For all of the foregoing reasons, these Petitioners respectfully request that this Court designate as a Basin Wide Issue the issue of whether water rights for storage purposes in Bureau of Reclamation facilities must contain a remark concerning the ability to "refill" after water has been passed out of the system to satisfy flood control and other operational mandates of the Bureau of Reclamation.

Dated this 8 day of June, 2012.

BARKER ROSHOLT & SIMPSON LLP

Shelley M. Davis
Attorneys for Boise Project Board of Control

McDEVITT & MILLER, LLP

Charles F. McDevitt
Attorneys for Black Canyon Irr. Dist.
And New York Irrigation District

MOFFATT THOMAS BARRETT
ROCK & FIELDS, CHTD.

Scott L. Campbell
Attorneys for Pioneer Irr. Dist.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2012, I served a true and correct copy of the foregoing **PETITION TO DESIGNATE BASIN-WIDE ISSUE** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

Idaho Department of Water Resources
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A. Dean Tranmer
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Pocatello, Idaho 83201

Shelley M. Davis

EXHIBIT A

American Falls Subcases:

01-2064

01-2064A

01-2064B

01-2064C

01-2064D

01-2064E

01-2064F

01-2064L

01-10042

01-10042A

01-10042B

01-10053A, and

01-10190

Palisades Subcases:

01-2068

01-2068D

01-2068E

01-2068F

01-2068M

01-2068Y

01-10043

01-10043A

01-10043E

01-10191

01-10389

Tab I

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN - 6 2017
Clerk
Deputy Clerk

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

In Re SRBA	Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734
Case No. 39576	
	ORDER DENYING MOTION FOR I.R.C.P. 54(b) CERTIFICATE

I.
BACKGROUND

On September 1, 2016, the Court entered a *Memorandum Decision and Order on Challenge* in the above-captioned subcases ("*Memorandum Decision*"). On that same date, the Court entered an *Order* recommitting the subcases to the Special Master for further proceedings consistent with the *Memorandum Decision.* On December 6, 2016, the Ditch Companies filed a *Motion for Rule 54(b) Certification*, requesting that this Court certify the *Memorandum Decision* as a final judgment.[1] The Boise Project Board of Control joins in the *Motion.* Briefing in opposition to the *Motion* was filed by the State of Idaho and Suez Water Idaho Inc. The Court rescinded the order of reference to the Special Master for the limited purpose of hearing the *Motion.* A hearing on the *Motion* was held on December 20, 2016.

[1] The term "Ditch Companies" refers collectively to Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

II.

ANALYSIS

The Ditch Companies ask the Court to certify the *Memorandum Decision* as a final and appealable judgment under Rule 54(b). The Court in an exercise of its discretion declines to do so. In denying the *Motion*, the Court first finds that the Court did not direct entry of a final judgment as to any of the claims involved in the above-captioned subcases. That is, the Court did not enter a *Partial Decree* either allowing or disallowing any of the water right claims involved. Therefore, the *Memorandum Decision* is an interlocutory order. The Court next finds that the movants did not timely seek appeal of the *Memorandum Decision* by permission under Idaho Appellate Rule 12. Moving for a Rule 54(b) certification is not a substitute for timely seeking appeal by permission of an interlocutory order under Idaho Appellate Rule 12.

Finally, the Court is unable to make a determination under Rule 54(b) that there is no just reason for delay. The State of Idaho raised numerous issues in the summary judgment proceedings before the Special Master. The Special Master failed to reach any of these issues due to the limited scope of his ruling. As a result, the only issue the Court would be certifying as final for purposes of appeal pertains to the proper jurisdiction for resolving disputes implicating the scope of decreed water rights. The substantive issue regarding the scope of the decreed reservoir rights is at issue in the administrative cases currently on appeal. Depending on the outcome of the appeal the reservoir right holders can determine whether or not to further pursue the late claims. Therefore, while it may promote judicial economy to motion the Special Master to stay the late claim proceedings pending the outcome of the administrative appeal, it would not promote judicial economy to create a situation potentially requiring further appeals once the issues raised by the State have been ruled on.

Therefore, the Court will deny the *Motion* and recommit the subcases to the Special Master for further proceedings.

III.

ORDER

THEREFORE, BASED ON THE FOREGOING THE FOLLOWING ARE HEREBY ORDERED:

1. The *Motion for Rule 54(b) Certification* **is denied.**

2. The subcases are recommitted to the Special Master for further proceedings consistent with the Court's *Memorandum Decision.*

IT IS SO ORDERED.

DATED: January 6, 2017

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION FOR I.R.C.P. 54(B) CERTIFICATE was mailed on January 06, 2017, with sufficient first-class postage to the following:

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Represented by:
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BOISE, ID 83720-0098

Julie Murphy
Deputy Clerk

Tab J

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
SEP 2 1 2012
By _____ Clerk
_____ Deputy Clerk

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

In Re SRBA	**Basin-Wide Issue 17**
	Subcase No: 00-91017
Case No. 39576	
	ORDER DESIGNATING BASIN-WIDE ISSUE

I.
PROCEDURAL BACKGROUND

On June 8, 2012, a *Petition to Designate Basin-Wide Issue* was filed by the Black Canyon Irrigation District, New York Irrigation District, Pioneer Irrigation District, Nampa-Meridian Irrigation District and the Boise Project Board of Control (collectively, "Petitioners"). The *Petition* requests that this Court designate the following issue as a basin-wide issue:

> **Does Idaho law require a remark authorizing storage rights to 'refill' space vacated for flood control?**

Petition, at 2. Parties to the adjudication were provided notice of the *Petition* pursuant to Docket Sheet procedure and were given the opportunity to participate in the proceedings. *Notices of Intent to Participate* were filed by numerous parties.[1] The Petitioners subsequently filed a brief in support of their *Petition*. *Response Briefs* were filed by the Surface Water

[1] *Notices of Intent to Participate* were filed by the Fremont Madison Irr. Dist., Idaho Irr. Dist., United Canal Company, American Falls Reservoir Dist. No. 2, Payette River Water Users Assoc., Aberdeen-American Falls Ground Water Dist., Bingham Ground Water Dist., Bonneville-Jefferson Ground Water Dist., Jefferson-Clark Ground Water Dist., Madison Ground Water Dist., Magic Valley Ground Water Dist., North Snake Ground Water Dist., Idaho Power Company, Big Wood Canal Company, United States Bureau of Reclamation, State of Idaho, Minidoka Irr. Dist., City of Pocatello, A&B Irr. Dist., Burley Irr. Dist., Milner Irr. Dist., North Side Canal Company, Twin Falls Canal Company, and United Water Idaho, Inc.

issue. Therefore, the Court finds that the Petitioners' proposed issue affects a large number of parties to the adjudication and is broadly significant.

The Court further finds that the issue raised by the Petitioners is better resolved as a basin-wide issue. The storage refill issue is fundamentally an issue of law. When asked if the issue could be addressed in a basin-wide setting without the need to develop factual records specific to individual reservoirs, the Petitioners represented that little, if any, factual record development would be necessary. Having this Court address the Petitioners' issue in a basin-wide proceeding also avoids the potential of the same issue being litigated in multiple unrelated subcases before the Special Masters. Hearing the Petitioners' issue in a basin-wide proceeding will therefore promote a timelier and more efficient litigation process for the parties and the Court. And in the setting of a basin-wide issue, all parties interested in the issue of storage refill will be able to equally participate and advocate their respective positions in one setting.

That said, the Court in its review of the file and the briefing submitted by the parties reads the crux of the issue as whether Idaho law authorizes the refill of a storage right, *under priority*, where water diverted under that right is released for flood control. Therefore, the Court in its discretion will frame the basin-wide issue as follows: **"Does Idaho law require a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control?"**

The State in its opposition raises several concerns with designating the issue proposed by the Petitioners as a basin-wide issue. The State's concern regarding "issue drift" is well noted. In response to the State's concern, the Court will not consider the specific factual circumstances, operational history, or historical agreements associated with any particular reservoir in conjunction with this basin-wide issue. Such specific factual inquiries do not lend themselves to review in a basin-wide proceeding involving many parties and many reservoirs. Rather, the basin-wide issue will be limited to the above-identified issue of law. Furthermore, as set forth below, the Court will not consider the various other issues proposed by the Surface Water Coalition or the United States.

The State also argues that the Petitioners' issue should not be considered in a basin-wide setting because Special Master Dolan has recently determined as a matter of law that the *Partial Decrees* for water right claims 01-2064 and 01-2068 should not include the State's proposed "refill" remark. *Amended Order Granting United States Motion, Certification, and Partial Special Master Report and Recommendation*, Subcase Nos. 01-2064 & 01-2068 (Sept. 14, 2012)