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In Re SRBA Case No. 39576 Respondent's Brief 3 Dckt. 44635

Docket No. 44635-2016

In the Supreme Court of the State of Idaho

In Re SRBA Case No. 39576, Subcase Nos. 65-23531 and 65-23532

THE UNITED STATES OF AMERICA,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENT SUEZ
(United States Appeal)

Appeal from the District Court of the Fifth Judicial District of
The State of Idaho, in and for the County of Twin Falls,
Honorable Eric J. Wildman, Presiding

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This is the response brief on appeal of Respondent Suez Water Idaho Inc. ("Suez"). This brief responds to the opening brief ("*US Brief*") filed by Appellant United States of America ("United States") in appeal No. 44635. Suez is filing a substantively identical brief in response to the opening brief ("*BCID Brief*") in related appeal No. 44636 brought by Black Canyon Irrigation District ("Black Canyon") (which is a respondent in this appeal and an appellant in appeal No. 44636). The other respondent is the State of Idaho ("State"). In this brief, Suez refers to the United States and Black Canyon collectively as the Appellants.

STATEMENT OF THE CASE

This is an appeal from a decision by the Snake River Basin Adjudication ("SRBA") Court to disallow the United States' late claim Nos. 65-23531 and 65-23532 (the "Late Claims") for so-called "second fill" or "refill" storage rights in connection with two federal on-stream reservoirs, Deadwood and Cascade, operated by the U.S. Bureau of Reclamation ("Bureau") in the Payette River basin.

The Late Claims assert water rights developed under the constitutional method that are in addition to the Bureau's decreed storage water rights for the Deadwood and Cascade Reservoirs (the "Storage Rights").[1] The Storage Rights authorize the storage and beneficial use of water for irrigation, municipal, and power purposes. Storage and release for the federal government's flood control operations are not authorized purposes of use of these rights.

According to the United States, the Late Claims were filed to secure water rights that operate under priority (*i.e.*, with the ability to call out or injure other rights)[2] to "complete one

[1] The Storage Rights are numbered 65-2927A and 65-2927B for Cascade Reservoir (partial decrees issued March 31, 2003); and 65-2917 and 65-9483 for Deadwood Reservoir (partial decrees issued May 6, 2003, and March 31, 2003, respectively). R. at 543-57 (copies of the Storage Rights' partial decrees).

[2] The phrase "under priority," "in priority," and "under right of priority" all mean the same thing in the context of this litigation. Saying that a diversion to storage occurs in or under priority simply means that that the

physical fill of [the Bureau's] reservoirs in years when it must release stored water for flood control." R. at 18. In other words, the Late Claims represent claimed entitlements to store water in addition to the annual volume authorized under the Storage Rights.

The Idaho Department of Water Resources ("IDWR" or "Department") recommended that the Late Claims be disallowed because they were "not claimed in [the] prior adjudication," R. at 44, *(i.e.,* the "Payette Adjudication").[3] The United States objected to IDWR's recommendation (Black Canyon later intervened). Ultimately, the SRBA Court disallowed the Late Claims on grounds that they are barred by the express terms of final judgment entered in the Payette Adjudication, by general principles of *res judicata*, and by operation of statute in effect during the Payette Adjudication. R. at 2511-18.

The SRBA Court did not address whether, absent the Payette Adjudication's preclusive effect, the Late Claims could or should be decreed on their merits. Indeed, the Appellants never even attempted to prove up the Late Claims with evidence or argument supporting "refill" rights by showing diversion and beneficial use under the constitutional method of appropriation. Instead, they took the position that their own Late Claims were "unnecessary" because, they argued, the underlying Storage Rights include the right to fill and refill under priority.[4] Essentially, the Appellants said, "Please instruct the Department to administer the Storage Rights in a way that makes the Late Claims redundant and unnecessary."

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storage right holder has the right to divert at that time pursuant to right of priority, *i.e.*, to the detriment of users with junior priorities.

[3] The Payette Adjudication is Gem County Case No. 3667, *In the Matter of the General Determination of the Right to the Use of Surface and Groundwater of the Payette River Drainage.*

[4] R. at 1882 (Black Canyon's footnote 3 stating that the Late Claims are "unnecessary"); R. at 2271 (United States' footnote 3 stating support for argument that Late Claims are "unnecessary"). *See also* R. at 2518 (SRBA Court recognizing Black Canyon's argument that the Late Claims are "unnecessary").

Thus, the core of the United States' and Black Canyon's litigation is an attack on the Department's accounting methodology. The SRBA Court wisely recognized that the claimants' argument amounted to a collateral attack on the previously decreed Storage Rights and that the SRBA is not the proper forum to address accounting issues. R. at 2518-19. The Storage Rights were decreed over a decade ago and were certified as final judgments under Rule 54(b). No appeal was taken, nor was any attempt made to reopen them in the SRBA under Idaho R. Civ. P. 60(b). The SRBA Court explained, correctly, that if the claimants or users wish to raise issues of administration now, "then the water right holder must take up the matter first with the Director, not the Court who issued the decree." R. at 2519.

As this Court noted in the Basin Wide 17 litigation, the Director of IDWR has discretion, subject to judicial review, to establish an accounting methodology and to distribute water accordingly. *A & B Irrigation Dist. v. State* ("*BW 17*"), 157 Idaho 385, 394, 336 P.3d 792, 801 (2014). The Director subjected his accounting methodology to review in a contested case in Basin 63, which is now on appeal to this Court. Neither Appellant elected to participate in that contested case, its judicial review, or the pending appeals.[5] The Appellants seek to end-run that process by using these Basin 65 Late Claims proceedings not to establish new water rights, but to reopen and modify the Storage Rights to address questions of administration. Specifically, they seek to avoid the deference owed to the Director by shoehorning their objections to the accounting methodology into their Late Claims case. Having given clear direction in its *BW 17* decision and elsewhere, this Court should not tolerate this end run.

[5] The Basin 63 appeals are pending with this Court under Docket Nos. 44677-2016, 44745-2017, and 44746-2017. The United States has storage rights directly at issue in the Basin 63 appeals. Black Canyon does not, but could have sought to participate in the proceedings below. In any event, either of them could have petitioned to initiate a similar proceeding specifically addressing their Basin 65 rights.

The simple answer to these appeals is to affirm the District Court's conclusion that the Appellants' arguments about accounting methods are procedurally and jurisdictionally barred. Suez addresses those jurisdictional issues, but will devote much of its brief to the merits of the accounting challenge and to proof issues on the Late Claims. In doing so, Suez does not wish to convey the impression that these issues are properly before the Court. Suez underscores its firm conviction that there is no reason for the Court to reach them. They are presented only out of an abundance of caution.

An affirmance of the District Court will have relatively limited impact beyond this case. In contrast, a reversal could have far-reaching consequences. A decision in favor of the Appellants would seriously undermine the finality of decrees entered in general stream adjudications. Moreover, a decision allowing storage water right holders to refill in priority would fundamentally up-end Idaho's Prior Appropriation Doctrine. In this case alone, it would allow the federal government to store and release water for essentially any purpose *ad infinitum* to the injury of juniors and future appropriators. This would transfer control of Idaho's water to the federal reservoir operators. Rather than fulfilling its statutory duty to distribute water rights in accordance with Idaho law, the Department would be relegated to observer status.

ADDITIONAL ISSUES PRESENTED ON APPEAL

In addition to the issues identified by the other parties, Suez presents the following issues that may become relevant if this Court determines not to affirm the District Court's decision that the Late Claims are precluded:

1. To prove up the Late Claims, must the claimant show that the release of water accrued to the original storage rights was necessary and not wasteful? [Yes.]

2. To prove up the Late Claims, must the claimant show that the quantity of water claimed was actually stored and beneficially used in quantities exceeding the amounts stored under the original storage rights? [Yes.]

3. To prove up the Late Claims, must the claimant show that the diversion and use of water was not merely an historical practice or undertaken pursuant to their ancillary right to store "excess water" under the Storage Rights? [Yes.]

4. If the Late Claims could be proven up in any quantity, would they be fully subordinated to future appropriations? [Yes.]

5. If the Late Claims could be proven up in any quantity, have they been fully or partially forfeited or abandoned? [Yes.]

6. Under Idaho's Prior Appropriation Doctrine and the Maximum Use Doctrine, are holders of on-stream storage rights entitled, even in the absence of a remark or other express authorization on the face of the water right, to store and put to beneficial use "excess water" after the water right has been satisfied once when sufficient water is available to also satisfy all other water rights then in priority? [Yes.]

7. Should this authority to take "excess water" without harming others be viewed as part of, ancillary to, or pursuant to the Storage Rights? [Yes.]

8. Is the practice of crediting all physically and legally available water to the Storage Rights consistent with and compelled by Idaho's Prior Appropriation Doctrine and the Maximum Use Doctrine? [Yes.]

9. Should Suez be awarded attorney fees on appeal? [Yes.]

ARGUMENT

I. THE PAYETTE ADJUDICATION BARS THE LATE CLAIMS.

The SRBA Court correctly held that the Late Claims are barred by the express terms of final judgment entered in the Payette Adjudication, by general principles of *res judicata*, and by operation of statute in effect during the Payette Adjudication. R. at 2511-18. The Appellants argue this was error. It is not.

The Department issued "*Proposed Findings of Water Rights in the Payette River Drainage Basin*" ("*Proposed Findings*") that expressly held that anyone who failed to claim water rights within the basin "has forfeited such rights." R. 2512 (SRBA Court); R. at 524 (*Proposed Findings*). The Appellants say this Court should ignore that provision because the *Proposed Findings* are not binding. This overlooks that fact that the *Partial Decree Pursuant To Rule 54(b) I.R.C.P.* ("*Payette Decree*") issued by the Payette Adjudication Court on January 26, 1986 referenced and (at least) implicitly adopted and incorporated the *Proposed Findings*. R. at 450-454.[6]

The *Payette Decree* addressed two categories of water rights: claims not being decreed, and claims being decreed. The category of claims not being decreed included those portions of the *Proposed Finding* "still involved in unresolved objections," plus some other specific rights not relevant here.[7] R. at 451-52. The category of claims being decreed included those listed in the *Proposed Findings*, as altered by certain orders and stipulations, and excluding the specific claims described in the first category. R. at 452.

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[6] The *Payette Decree* described the *Proposed Findings* as containing "Findings of Fact, Conclusions of Law, Statutory and Decreed Rights not Claimed, Claims Submitted: Recommended to be Disallowed; Surface Water Rights, and Groundwater Rights." R. at 450.

[7] The claims not being decreed included: (1) the specific claims being listed in its Exhibit A, (2) the federal reserved water right claims by the U.S. Forest Service (listed in its Exhibit B), and (3) those water rights which were part of the court decision in *Branson v. Miracle*, 107 Idaho 221 (1984).

These two categories described the universe of decreed and potential water rights in the Payette River Drainage Basin. R. at 452 ("the water rights of the Payette River Drainage Basin . . . are as described" in the *Proposed Finding*, as amended by certain orders and stipulations, and excluding the specific claims described in the first category). The Storage Rights fell within the category of claims being decreed. The Late Claims, of course, do not fall within either category. Thus, the *Payette Decree* did not leave the door open for any other (*i.e.*, late) claims. Nowhere does it suggest that additional claims could be filed.

The *Payette Decree* was certified as final under Rule 54(b) I.R.C.P. R. at 453. As plainly stated in the *Notice of Entry of Partial Decree* dated January 21, 1986, this required that "any appeal of this partial decree must be filed with the district court within 42 days of January 21, 1986. That is, on or before Tuesday, March 4, 1986, anyone objecting to the partial decree, must physically file a notice of appeal with the clerk of the Gem County District Court." R. at 487. No appeal was taken.

The United States was a party to the Payette Adjudication, but it did not claim rights like those asserted in the Late Claims. It filed storage water right claims for Cascade and Deadwood Reservoirs based on prior state-issued licenses, which were included in the *Payette Decree* and now are reflected in the Storage Rights decreed by the SRBA Court. The rights asserted under the Late Claims were not in the specific list of claims excluded from the *Payette Decree*. The *Payette Decree*, by incorporating the *Proposed Findings*, expressly decreed "all rights established before October 19, 1977," R. at 524, and further declared that "[a]ny water user who heretofore diverted surface water or ground water . . . and who, upon being joined to this action, failed to claim such water rights has forfeited such rights" under the forfeiture statute in effect at the time. R. at 524. Thus, the Late Claims are barred.

The timing of the *Payette Decree* and the commencement of the SRBA further support the conclusion that the SRBA is not merely an extension of the "unfinished" Payette Adjudication. Nor were these two pending actions consolidated under Rule 42, I.R.C.P. The Director of IDWR filed his petition to commence the SRBA on June 17, 1986—roughly five months after the *Payette Decree* was issued, and more than three months after the appeal deadline expired. In other words, the SRBA and the Payette Adjudication could not have been consolidated because they were never pending at the same time. Nothing in the *Payette Decree* suggests that Judge Doolittle intended the SRBA to be a continuation of the Payette Adjudication.

In addition to holding that the *Payette Decree's* express language bars the Late Claims, the SRBA Court also correctly held that the Late Claims are barred by the doctrine of *res judicata*.[8] A water rights decree is "conclusive proof of diversion of the water, and of application of the water to beneficial use, *i.e.*, the decree is *res judicata* as to the water rights at issue [in a subsequent proceeding]." *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984), quoted in *Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015). There is no exception to *res judicata* that would relieve the Late Claims from its operation.

The facts here are simple. The Late Claims reflect claims for 1965 priority date storage water rights under the constitutional method of appropriation. This requires evidence of actual

[8] "*Res judicata*, or claim preclusion, bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action." *Stoddard v. Hagadone Corp.*, 147 Idaho 186, 190, 207 P.3d 162, 166 -167 (2009) (internal quotation marks omitted). "[I]n an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit." *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437, 849 P.2d 107, 110 (1993). This Court has stated that "a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose." *Id.* at 437, 849 P.2d at 110.

diversion and beneficial use of water prior to 1971 (when the Idaho Legislature cut off beneficial use claims for surface water.)

If the Late Claims have any merit now (an issue that is not before the Court in this appeal, and which as described below Suez strongly questions), that same merit must have existed during the Payette Adjudication since it conclusively adjudicated all rights prior to 1977. The claimed 1965 priority date means the Late Claims, if they ever were valid, must have been appropriated—*i.e.*, come into existence—more than five years prior to the Payette Adjudication's commencement.

So if the Late Claims can be proven up now, they could have been proven up in the Payette Adjudication. The relevant evidence and legal principles were exactly the same then as they are now. Then, as now, the law requires evidence of actual diversion and actual beneficial use of water prior to 1971 to prove up a water right under the constitutional method. This legal standard has existed since 1971, when the Idaho legislature outlawed the constitutional method of appropriation. Obviously, it existed when the *Payette Decree* was issued in 1986. Even more obvious, all pre-1971 evidence that the Appellants might assert to support the Late Claims today must have existed during the Payette Adjudication.

The sole reason the Appellants contend the Late Claims could not have been claimed in the Payette Adjudication is because the Department adopted its Basin 65 computerized accounting system in 1992. But post-1971 evidence cannot change pre-1971 evidence. Even Black Canyon agreed with this simple notion in the proceedings below. R. at 1880-81 (Black Canyon arguing that post-1971 evidence in the record is not relevant). If the holder of a decreed water right has a "light bulb moment" when the Department does something administratively years after the decree, that is not a basis to re-open the decree. Indeed, the whole purpose of *res judicata* is to make litigants do their thinking before the decree is issued.

In any event, the Department's accounting methodologies (or lack thereof) at any given time do not define water rights or dictate Idaho's law of prior appropriation. The alleged lack of IDWR administration up to 1965 is not relevant to the definition of the Late Claims, and the Department's implementation of its computerized accounting system in 1992 did not define or retroactively change whatever rights were already appropriated. Again, even Black Canyon seemed to agree with this in the proceedings below. R. at 1890 (Black Canyon arguing that "[a]dministrative accounting methods, no matter how obtuse, do not define the property rights at issue.").

As discussed below (and which Suez's briefing in the Basin 63 appeals will address at length), the principles of one-fill, storable inflow, paper fill, and "excess water" refill are part and parcel of Idaho's Prior Appropriation Doctrine. These fundamental legal principles existed before the Department incorporated them into its computerized accounting programs, despite the fact that they may previously have been ignored. In other words, these principles have been confirmed and implemented, but were not created, by the Department's accounting systems.

Thus, even if an accounting protocol can define a water right (which it cannot), and even if post-1971 circumstances could change pre-1971 evidence of diversion and beneficial use (which it cannot), the fact that in 1992 the Department implemented accounting principles that adhere to Idaho's Prior Appropriation Doctrine does not mean the Late Claims could not have been asserted in the Payette Adjudication. If, as has been alleged, the federal reservoirs have "for decades" operated for flood control without flood control water rights, the Bureau could have and should have wondered how those operations affected its storage rights which authorize storage of water for beneficial uses but not flood control. The Bureau could have and should have claimed in the Payette Adjudication whatever additional rights might be necessary to refill

its reservoirs for beneficial uses after releasing or bypassing water for flood control. But it made no such claims. Now they are barred.

II. IF THE LATE CLAIMS ARE NOT BARRED BY THE PAYETTE ADJUDICATION, IT WILL BE NO EASY TASK TO PROVE THEM UP.

If this Court determines that the Late Claims are not precluded by the Payette Adjudication, the next question would be: can the Late Claims be proven up on their alleged merits? The record shows that neither the United States nor Black Canyon attempted to make this showing in the proceedings below. Indeed, they take the same approach on appeal, arguing that the Late Claims are unnecessary because, they contend, the Storage Rights already include priority refill entitlements. *US Brief* at 40-41; *BCID Brief* at 24-30. As explained in Sections III and IV below, this is not the appropriate proceeding to make that determination and, in any case, the Storage Rights do not include such entitlements. In this proceeding, where the issue involves whether the Late Claims can (and have been) be proven, the Appellants have utterly failed to take the opportunity to make that showing with evidence of actual diversion and beneficial use, and they should not get another chance.

The Late Claims reflect water rights claimed under the constitutional method of appropriation that are in addition to the Storage Rights. That was what the Appellants were supposed to show in the proceedings below. R. at 174 (SRBA Court order stating "the burden now rests with the claimants to come forward with evidence to . . . establish the existence of the rights under the constitutional method of appropriation. To do so, the claimants must establish the two essentials for obtaining a water right under the constitutional method—diversion and application of the water to a beneficial use."). The Appellants did not attempt to make that showing, and Suez believes they cannot.

In the proceedings below, the *State of Idaho's Motion for Summary Judgment* advanced the argument that there is no factual basis supporting the Late Claims. R. at 1572 ("The Bureau is incapable of carrying its burden of proving actual beneficial use of the additional storage water claimed under the Late Claims.") Under Idaho Rule of Civil Procedure 56, the Appellants were then obligated to put on evidence showing that material facts were in dispute concerning the merits of the Late Claims. They elected not to do so, instead simply relying on bald assertions that the Late Claims can be recognized because the United States has "for decades" physically refilled reservoirs following flood control releases and the Storage Rights demonstrate that "the quantity of water provided by one physical fill of the reservoirs has been applied to beneficial use." R. at 1904 (the United States' brief in response to summary judgment). *See also* R. at 1892-94 (similar assertions in Black Canyon's summary judgment brief).

The Appellants apparently believe that proving up a beneficial use claim for multiple fills of a reservoir that already has an existing storage right is a trivial task. They say, in essence: "Everybody knows that the reservoirs have refilled after flood releases. And everybody knows that the water in the reservoir is used to irrigate the lands described under the decreed storage rights. Based on those two facts, we are entitled to 'supplemental' beneficial use rights to store and release and store again, in priority, all of the storable water that comes down the river."[9]

That is their position in a nutshell. However, it is wrong. If the Late Claims proceed, the Appellants face substantial hurdles to prove them up.

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[9] The Appellants like to describe the Late Claims as "supplemental" water right claims, as though that moniker might make these unique, never-before-seen claims easier to digest. This Court has described a supplemental water right as "an additional appropriation of water to make up a deficiency in supply from an existing water right." *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 416, 18 P.3d 219, 221 (2001) (Walters, J.). If the Late Claims are intended to be supplemental water rights, they must be denied because they fail the definition set forth in *Barron*—there is no deficiency in supply in the flood control years when the Late Claims are asserted to be needed. Moreover, supplemental water rights typically are diverted from a different source when the "primary" water rights' source is no longer available (such as in the case of "primary" surface water rights and "supplemental"

First, in order to prove up a claim under the constitutional method of appropriation, the claimant must show that the claimed water was not diverted and put to beneficial use under some other right. Indeed, it appears that the Appellants have confessed this very point. By contending that the Late Claims are unnecessary (because, they contend, the Storage Rights allow refill in priority after paper fill), they have acknowledged the basic principle that one cannot obtain a second right for diversions authorized under an existing right.

Indeed, this is an elementary point of Idaho's water law, which does not allow hoarding or wasting of water, or the appropriation of more water than is needed to accomplish beneficial use. *Am. Falls Reservoir Dist. No. 2 v. IDWR* ("*AFRD#2*"), 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) (Trout, J.) ("Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use.") "The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate." *Idaho Ground Water Assoc. v. IDWR ("Rangen II")*, 160 Idaho 119, 369 P.3d 897, 911 (2016) (quoting *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 117, 32 S. Ct. 470, 471 (1912)).

In short, water lawfully diverted under the decreed Storage Rights may not form the basis for the Late Claims. As explained in Section IV.B below, Suez contends that the Storage Rights include the ancillary right to store "excess water" without injury to other rights once the Storage Rights have been satisfied once under priority. Thus, to prove up the Late Claims, the United States must show that the claimed storage did not occur under the Storage Rights in priority or

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ground water rights). That is not the case here. The Late Claims seek water from the very same source as the Storage Rights, and not because that source is no longer available but because that source has too much water.

under their ancillary entitlements to store excess water."[10] The Appellants have made no such showing, and it is unclear how they could.

Perhaps it is theoretically possible to establish a claim such as those described in the Late Claims, but doing so would not be easy. Unless the United States can show that the storage claimed under the Late Claims occurred other than under Storage Rights' priority or the ancillary right to divert excess water, what proof is there that some new right (*i.e.*, the right asserted under the Late Claims) was ever appropriated? There would have been no notice of such appropriation to other water right holders. Notice is fundamental. *Nielson v. Parker*, 19 Idaho 727, 115 P. 488, 490 (1911) ("the actual diversion of the water and its application to a beneficial use . . . constitutes actual notice to every intending appropriator of the water of such a stream.").[11]

Moreover, the Appellants must show that the "second fill" water was beneficially used. In other words, did storing that water make any difference? Suppose the federal government fills the reservoirs' 863,000 acre-feet capacity, releases 100,000 acre-feet for flood control, and then tops off the reservoirs with 100,000 acre-feet of refill. If the space holders only use 600,000 acre-feet of stored water, the refill did nothing (despite potential injury to other water users). If it is carried over, it may simply be spilled in the next year's flood control release. In other words, the fact that reservoirs refill does not equate to beneficial use.

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[10] If it were possible to prove up the Late Claims on the basis of storage of water under the United States' ancillary rights to refill with excess water, any such decrees should include provisions subordinating the rights to all existing and future appropriations so as to give effect to the nature of the right (*i.e.*, an appropriation that never was, and never will be, exercised to the detriment of other valid water rights).

[11] The *Nielson* Court also stated: "Water diverted from a stream naturally diminishes the volume. One seeking to acquire the right to the use of water must take notice of the amount available and visible, and it must be conclusively presumed that he inquires into the extent of the supply from which the water is to be drawn, and how that supply has been diminished by others whose rights are prior in time." *Nielson*, 19 Idaho 727, 115 P. at 489 (quoting with approval *Morris v. Bean*, 146 F. 423, 427 (D. Mont. 1906), *aff'd*, 159 F. 651 (9th Cir. 1908), *aff'd*, 221 U.S. 485, 31 S. Ct. 703, 55 L. Ed. 821 (1911)).

Obviously, water ostensibly stored under the Late Claims that was released for flood control (in the same or a subsequent year) does not prove beneficial use under the Late Claims. Moreover, simply carrying over water does not prove beneficial use. While an established storage right may lawfully carry over reasonable amounts of unused storage, carryover storage in itself does not demonstrate the beneficial use necessary to prove up a right. Consequently, to the extent water could be shown to be legitimately stored under the Late Claims, it would not be sufficient for the United States to rely on carryover as evidence that such water was beneficially used. It must instead prove actual beneficial use of the water stored.

Finally (or perhaps initially), the Appellants must show that the additional storage under the Late Claims was reasonable and necessary. That is, it must be shown that the United States needed to release or bypass storable inflow available for storage under the Storage Rights since that is the reason why the United States claims it needs to store additional water under the Late Claims in the first place.[12] Allowing the United States to obtain additional rights to store additional water in priority to replace water that never should have been released would reward (and encourage) sloppy reservoir operations and waste. The United States should not be able to obtain additional priority rights to refill an unnecessary shortfall of its own creation.

The problems with proving up the Late Claims might not be as difficult if the Late Claims asked for second rights from a different source, or to store water in a different reservoir, or to beneficially use water on different lands. In any of those circumstances, there would be a clearer distinction between the Storage Rights and the Late Claims, and the evidence to prove

[12] Concerning the standard for whether the United States needed to release water for flood control in order to justify the Late Claims, it would seem the United States should at least have to show reasonable necessity, and possibly strict necessity. This Court has consistently reaffirmed the State's policy against wasting water. *See, e.g., AFRD#2*, 143 Idaho at 880, 154 P.3d at 451 ("Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use.").

them up likely would be more straightforward. But that is not the case here, where the Late Claims seek to store water from the same source, in the same reservoirs, in the same total amounts, for the same beneficial use as the Storage Rights.

The discussion above is not intended to flesh out all of the mechanics for proving up claims such as the Late Claims. It is not Suez's burden to prove them up, it is the Appellants' burden. There may be (likely would be) more issues to address if the merits of the Late Claims had actually been litigated. But the Appellants did not put on any evidence to try to prove them up, and they should not be given another chance.

Even if it could be shown that the refill was reasonable and the Late Claim water was put to put to beneficial use, the Appellants are still not out of the woods. Whatever Late Claims might be proven up based on pre-1971 events have been lost. With respect to the Late Claims, perhaps the only relevant fact about the Department's current accounting system is that no "refill" water has been stored under any priority since the Department implemented the accounting system in 1992. If any rights to priority "refill" ever existed (and there is no evidence they have), they were either abandoned in 1992 or have been forfeited subsequently.[13]

Clearly, recognizing such priority refill rights now—rights that have never been on the books—would diminish the priorities of junior water rights developed since 1992. Because those junior rights are entitled to have the system maintained as it existed when their rights were appropriated, any right to refill in priority (whether in the Storage Rights or in the Late Claims) would have to be subordinated to existing juniors.

[13] If the Appellants believe they are insufficiently protected by the existing rights to store extra water during free river conditions, they could file a new permit application for an additional right. Doing so would protect juniors who have acquired rights under the existing regime (*i.e.*, in a system where priority refill rights have never been on the books), would put everyone on notice, and allow the Department to determine whether and under what conditions to issue a permit and later a license.

Before closing on this subject, it bears emphasis that there is no need for this Court to address how one proves up a late claim for storage refill. That is a complicated subject, and there are ample reasons not to go there—notably *res judicata* and the failure of the Appellants to present anything approaching meaningful proof. Rather, this discussion is included to address the obvious question of what should happen if this Court does not agree with the SRBA Court that the Late Claims are barred by the Payette Adjudication. In short, the Late Claims would have to be remanded to the SRBA Court so the Appellants could attempt to clear the many evidentiary hurdles on their path to proving up these unique claims.

III. THIS IS NOT THE APPROPRIATE PROCEEDING TO DETERMINE WHETHER STORAGE RIGHTS INCLUDE PRIORITY REFILL ENTITLEMENTS (AS EXPLAINED BELOW THEY DO NOT).

Instead of offering evidence to prove up the Late Claims, the Appellants contend that the Late Claims are "unnecessary" because, in their view, the Storage Rights should be interpreted as including priority refill entitlements. *USA Brief* at 40; *BCID Brief* at 24-30. Section IV of this brief addresses why that contention is wrong. This Section III addresses why these proceedings on the Late Claims are not the proper avenue for re-defining or re-interpreting the nature or extent of the Storage Rights or addressing how they should be administered.

This Court should affirm the SRBA Court's holding that this is not the proper proceeding to address the scope or administration of the Storage Rights. Simply put, the Late Claims are not about the nature or extent of the Storage Rights. That ship sailed more than a decade ago when the SRBA Court issued the Storage Rights' partial decrees. If one needs to understand what the Storage Rights mean in order to determine the validity, nature or extent of the Late Claims, one need look no further than the face of their decrees, which contain no priority refill entitlements. The United States' and Black Canyon's attempts to re-examine the nature and extent of the Storage Rights calls into question the finality and conclusiveness of all SRBA partial decrees.

This appeal also is not about the administration of the Storage Rights' decrees—that is the Director of IDWR's duty (which is subject to judicial oversight but not in these Late Claims proceedings). The pending Basin 63 appeals are the appropriate proceedings to review whether the Director is correctly interpreting and administering federal on-stream storage rights' decrees according to Idaho law.

A. The Storage Rights' decrees issued more than a decade ago unambiguously define their nature and extent.

"Idaho courts interpret water decrees using the same interpretation rules that apply to contracts." *Rangen, Inc. v. IDWR* ("*Rangen I*"), 159 Idaho 798, 367 P.3d 193, 202 (2016) (J. Jones, C.J.). The "proper analysis is to look first only to the four corners of the divorce decree. . . . . The court's inquiry will move beyond the four corners of the decree . . . only when the decree is ambiguous and reasonably susceptible to conflicting interpretations." *Borley v. Smith*, 149 Idaho 171, 177, 233 P.3d 102, 108 (2010) (J. Jones, J.).

There is no ambiguity in the Storage Rights' decrees, so there is no reason to look beyond their four corners to determine what they mean. Each of the decrees clearly states the maximum annual volume of water allowed to be diverted into storage under the right's priority date. And that is all they say. They do not authorize flood control as a beneficial use or otherwise. There is no provision for refill and no special rule or remark saying that water released or bypassed for flood control does not count toward the authorized quantity. Accordingly, there is no reason to read these provisions into the rights.

Thus, to the extent it is necessary to understand the nature and extent of the Storage Rights to decide the Late Claims, the Court need look no further than the face of the decrees.[14]

[14] As discussed in Section IV below, even if the Storage Rights' decrees were ambiguous (which they are not), neither Idaho law nor the evidence in this case provide a basis for finding a priority refill entitlement associated with the Storage Rights.

B. The Storage Rights' decrees are final and should not be subject to collateral attack in these Late Claims proceedings.

The Storage Rights were partially decreed almost a decade ago. R. at 543-57. They were incorporated by reference into the SRBA Court's *Final Unified Decree*,[15] which is "binding against all persons," R. at 841, and "conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987 . . . ." R. at 839. "By statute, 'decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.'" *Rangen I*, 159 Idaho at ___, 367 P.3d at 200 (quoting I.C. § 42–1420(1)). The decrees were not appealed or set aside, and the SRBA Court did not retain jurisdiction over them in its *Pending Subcases Order*. See footnote 15 above. Simply put, the Storage Rights have been fully adjudicated. They were not re-opened and their nature and extent are not at issue in these subcases.

"Generally, final judgments, *whether right or wrong*, are not subject to collateral attack." *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337, 341 (2012) (emphasis in original; internal quotation marks omitted).[16] This Court has held that a water rights decree is "conclusive proof of diversion of the water, and of application of the water to beneficial use, *i.e.*, the decree is res judicata as to the water rights at issue [in a subsequent proceeding]." *Crow v. Carlson*, 107

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[15] The SRBA Court issued its *Final Unified Decree* in 2014, and the Storage Rights were not included in the list of claims over which the court retained jurisdiction. R. at 840 (*Final Unified Decree*); R. at 859-60 (*Order Regarding Subcases Pending Upon Entry of Final Unified Decree*, the "*Pending Subcases Order*"). Claim numbers listed in the *Pending Subcases Order* were excepted from the *Final Unified Decree* so they could continue to be processed. The Late Claims were included in the *Pending Subcases Order*, but the Storage Rights' partial decrees were not.

[16] The SRBA Court has consistently held that "a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding." *BCID Brief* App. 2 at 16 (*Memorandum Decision and Order on Cross-Motions for Summary Judgment re: Bureau of Reclamation Streamflow Maintenance Claim* ("*Lucky Peak Order*") at 16, *Subcase No. 63-03618* (Sept. 28, 2008)).

Idaho 461, 465, 690 P.2d 916, 920 (1984), *quoted in Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015). The *Crow* Court's "holding of the presumption of accuracy of the decree is in keeping with the judicial policy of deterring the reopening of judgments long after cases are decided and the files are closed." *Id.*

The time to determine the nature and extent of the Storage Rights—including whether they include any priority refill entitlements—was before their partial decrees were issued. The Storage Rights' partial decrees contain all of their elements and any remarks and other matters necessary for definition of the rights, for clarification of any element of the rights, or for administration of the rights by the Director. Idaho Code § 42-1412(6) ("The district court shall enter a partial decree determining the nature and extent of the water right . . . ."); Idaho Code § 42-1411(2) (describing elements, remarks, and other matters to be included in partial decrees). If the United States or Black Canyon believed the Storage Rights included a right to refill under priority after stored or storable water is vacated or released for flood control, they could have and should have attempted to have such elements or remarks included in the decrees. *See Rangen I*, 159 Idaho at ___, 367 P.3d at 201 ("If Rangen wanted its water rights to be interpreted differently, it should have timely asserted that in the SRBA."). But they made no such attempt, and the decrees contain no such elements or remarks. No timely or appropriate procedural mechanism has been used to request re-interpretation of the Storage Rights here.

Now the Appellants want to undo their earlier oversight (intentional or not) by challenging the decreed Storage Rights' nature and scope in these Late Claims proceedings. This strategy constitutes an improper attempt to re-adjudicate the Storage Rights under a new legal theory the Appellants find more favorable. But the Court should not indulge them. As the SRBA Court has stated, "[t]he late claim procedure was not intended to give claimants a second bite at the apple." R. at 356.

There is no merit to the Appellants contention that the property rights defined by the Storage Rights' partial decrees are subject to interpretation in these Late Claim proceedings. *See, e.g., BCID Brief* at 21 ("interpretation of the [Storage Rights] partial decrees against the legal backdrop of federal flood control operations ***is not*** a collateral attack on the existing partial decrees." (emphasis in original)). Disputing the "interpretation" of partial decrees rather than the partial decrees themselves is a "distinction without a difference." *Rangen I*, 159 Idaho at ___, 367 P.3d at 201. Any "interpretation" of the Storage Rights' partial decrees cannot be inconsistent with their plain language. *Id.* ("Any interpretation of . . . partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments . . . .").[17]

In sum, the Storage Rights contain no mention of any priority refill entitlements now sought by the Appellants, and that "cannot be disputed due to the SRBA partial decrees." *Mullinix*, 158 Idaho at 278, 346 P.3d at 295. Accordingly, the Appellants are precluded from re-litigating that issue.

C. The Director of IDWR has the duty and discretion to administer the Storage Rights according to their decrees and Idaho law.

This Court has held that the Director of IDWR has the duty and discretion to determine how water should be counted toward the "fill" or "satisfaction" of the Storage Rights and in accordance with their decrees and Idaho law. Whether the Director's methodology is a lawful exercise of his discretion is at issue in the Basin 63 appeals. That is the proper proceeding for answering the "refill" question, not this one.

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[17] The *Rangen I* Court pointed out that any interpretation of partial decrees inconsistent with their plain language "needed to be made in the SRBA itself." *Rangen I*, 159 Idaho at ___, 367 P.3d at 201. This, of course, implies the appropriate procedural mechanism is used, or else such an inconsistent interpretation would run afoul of the other judicial doctrines already discussed, such as *res judicata* and interpreting unambiguous court decrees by looking within their four corners.

Citing the Director's authority over this question, the SRBA Court in the Basin Wide Issue 17 proceeding declined to address "the issue of when the quantity element of a storage water right is rightfully considered to be 'filled' or 'satisfied.'" R. at 887. The SRBA Court explained:

> [A]ddressing the issue of fill may require factual inquiries, investigation and record development specific to a given reservoir and the water right or rights associated with the reservoir. Addressing the issue of fill will require a record as to how the Department accounts for fill in each individual reservoir under its accounting methodology. . . .
>
> Furthermore, the authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, the Idaho Department of Water Resources and its Director. . . .
>
> The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs. The Director's discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts. When review of the Director's discretion in this respect is brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.

R. at 887-88. *See also* R. at 885 (SRBA Court's footnote 6 stating that "the Department utilizes an accounting methodology for the purpose of determining when a storage water right has been 'filled.' . . . [T]he Department's accounting methodology is an administrative function which should be addressed on a case-by-case basis on a fully developed factual record and where the Department is a party to the proceeding.").[18]

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[18] The SRBA Court reached similar conclusions in its order designating Basin-Wide Issue No. 17:

> An on-stream reservoir alters the stream affecting the administration of all rights on the source. Accordingly, some methodology is required to implement priority administration of affected rights. Addressing the issue of reservoir fill may require factual inquiries, investigation and record development specific to a given reservoir, including how the State accounts for fill in each individual reservoir under its accounting program. As stated above, such factually specific inquiries do not lend themselves to review in a basin-wide setting involving multiple reservoirs. Furthermore, unlike the issue of priority refill which is directly related to the quantity element of a water right, the issue of fill is purely an issue of administration.

This Court agreed and also declined to decide how water should be counted toward the fill of a water right. "Nor will this Court answer that question on appeal." *BW 17*, 157 Idaho at 392, 336 P.3d at 799. This Court also agreed that the question must be answered by the Director: "That statute gives the Director a clear legal duty to distribute water. However, the details of the performance of the duty are left to the director's discretion." *BW 17*, 157 Idaho at 393, 336 P.3d at 800 (quotation marks and citation omitted).

Once partial decrees are issued, Idaho law provides that the Director of IDWR—not the SRBA Court or any court—has the sole duty and authority to distribute water accordingly. Idaho Code § 42-602 "require[s] the Director to interpret . . . partial decrees." *Rangen I*, 159 Idaho at ___, 367 P.3d at 204.

> 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.

BW 17, 157 Idaho at 394, 336 P.3d at 801.

The Director initiated the administrative proceeding at issue in the Basin 63 appeals "[t]o address and resolve concerns with and/or objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs pursuant to existing procedures of accounting in Water District 63." R. at 1507. *See also Addendum to US Brief*, Tab 2, p. 2.[19] As predicted by the SRBA Court in the quote above, R. at 887-88, that administrative proceeding produced a record as to how the Department accounts for fill in the Boise River reservoirs under

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BW 17, 157 Idaho at 388-89, 336 P.3d at 795-96 (quoting SRBA Court; emphasis added).

[19] Tab 2 of the *Addendum to US Brief* is a copy of the SRBA Court's *Memorandum Decision and Order* in *Ballentyne Ditch Co. et al. v. Idaho Dept. of Water Resources*, Case No. CV-WA-2015-21376 (Idaho 4th Dist.) (Sept. 1, 2016), the decision at issue in the Basin 63 appeals.

its accounting methodology, including factual inquiries, investigation and record development specific to the Boise River reservoirs and the decreed water rights associated with them. The Director's decision in that proceeding, based on its fully developed record, is before this Court in the Basin 63 appeals. As the United States points out, because the Department's Basin 63 and Basin 65 accounting systems use similar principles for accruing water to federal on-stream reservoirs, the outcome of the Basin 63 appeals may affect Basin 65 water rights accounting. Thus, the Basin 63 appeals are the proceeding where this Court has said the issue of determining on-stream reservoir fill should be determined. Not here.

IV. THE STORAGE RIGHTS DO NOT INCLUDE PRIORITY REFILL ENTITLEMENTS, BUT IDAHO'S PRIOR APPROPRIATION DOCTRINE NEVERTHELESS AUTHORIZES SECOND FILL WITH "EXCESS WATER" SO LONG AS OTHER RIGHTS ARE NOT HARMED.

Appellants argue that the Storage Rights include priority refill entitlements, and ask this Court to make that determination. *US Brief* at 43 ("this Court should . . . , in the alternative, affirm the district court on the grounds that the decreed rights for Cascade and Deadwood Reservoirs enable the United States to fill the reservoirs up to the decreed amounts after releases for flood-control purposes")[20]; *BCID Brief* at 40 ("BCID respectfully requests that this Court review and adopt the Special Master's reasoning and conclusions of law addressing the flood control effect question as its own.").[21] As explained above in Section III, this is not the right proceeding to make that determination.

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[20] The United States' statement fails to mention whether the relief sought includes rights to refill under priority after flood control releases. Presumably it does. If not, there is no dispute because Suez believes the United States' Storage Rights include entitlements to fill the reservoirs with excess water up to the decreed amounts following flood control releases so long as no other water rights are harmed (*i.e.*, not under a right of priority).

[21] Black Canyon's reference to the "Special Master's reasoning and conclusions of law" presumably refers to the Special Master's holding that the Storage Rights include priority refill entitlements. As described by Black Canyon, "Special Master Booth held, consistent with BCID's arguments, that the late claims should be disallowed on the additional basis that the water claimed by them was not subject to appropriation because it 'had already been appropriated through the existing storage rights' for the Reservoirs (*i.e.*, the late claims were not necessary because

If, however, the Court finds that it should in this proceeding reach the question of whether the Storage Rights include a right to refill under priority, it should rule that no such right exists. As explained in Section IV.B below, the United States may refill its reservoirs with "excess water" so long as other rights are not injured (*i.e.,* refill may occur, but not under priority).[22] This is all the United States is entitled to under the Storage Rights and Idaho's Prior Appropriation Doctrine, and this is all that it needs.

As Suez has urged throughout these proceedings, the Basin 63 proceedings, and the Basin Wide 17 proceedings, Idaho law must adhere to one-fill, storable inflow, and paper fill principles when water is distributed to on-stream reservoir water rights such as the Storage Rights. Indeed, the SRBA Court agreed that the incorporation of these principles in the Department's accounting is consistent with Idaho law. *Addendum to US Brief*, Tab 2, p.7-14. Of course, the SRBA Court's affirmation of those principles is squarely at issue in the Basin 63 appeals, and those are the appropriate proceedings to address such issues. Suez will address those principles, and the Storage Rights' entitlements to divert excess water, fully in its briefing in the Basin 63 proceedings but, given the arguments made by the Appellants in these Basin 65 appeals, feels compelled to address them here as well.

A. The Storage Rights are entitled to one fill under priority based on the amount of storable inflow entering the reservoirs.

The SRBA Court held in its Basin-Wide Issue 17 decision:

> Simply stated, under Idaho's doctrine of prior appropriation a senior storage holder may not fill or satisfy his water right multiple times, under priority, before rights held by affected junior

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the existing storage rights already authorized one physical fill of the reservoirs despite flood control releases in flood control years)." *BCID Brief* at 6.

[22] As discussed in Part IV.B below, "excess water" exists above and beyond all water rights, the diversion of which is lawful because (by definition) no other water right holder is entitled to that "excess water" at that time. Thus, diversion not under priority with "excess water" is in contrast to diversion under priority.

appropriators are satisfied once.

R. at 886 (*SRBA BWI 17 Decision* at 10). Put another way, "[t]he assertion that a senior storage right holder can 'fill,' or 'satisfy,' his water right multiple times under priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law." R. at 885 (*SRBA BWI 17 Decision* at 9). Suez refers to this principle as the "one-fill" rule.

On appeal, this Court did not address whether the SRBA Court was correct in recognizing the one-fill rule, although it did state that the question it answered was "relatively straightforward." *BW 17*, 157 Idaho at 392, 336 P.3d at 799.

Indeed, it is straightforward. It is mandated by Idaho's Prior Appropriation Doctrine. Under Idaho law, multiple fills of a water right, under right of priority, would be an enlargement of a water right, and this Court has held that enlargement constitutes *per se* injury. "An increase in the volume of water diverted is an enlargement . . . ." *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (Eismann, J.) (quoting *Fremont–Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (Schroeder, J.)). "[T]here is *per se* injury to junior water rights holders anytime an enlargement receives priority. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Id.* (citation omitted). *See also Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001) (Walters, J.) ("Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use.").

To avoid enlarging the Storage Rights in violation of the one-fill rule, all legally and physically available water must be counted toward their satisfaction. Suez calls this the "storable inflow" principle. The storable inflow principle requires that if water is coming into a reservoir

and is "in priority" to the associated storage water right, it counts towards the fill of the storage right. The term "in priority" simply means that it is legally available to store, *i.e.*, is not required to be bypassed for delivery to a downstream senior.

In short, if water is physically and legally available to store, the storage right holder is expected to store it. If a storage right holder decides not to store storable inflow, or stores it and later releases some of it—for whatever reason—that does not reduce or otherwise affect the right's accrued fill. The right holder may not say, "Well, I think I'll just let this water pass and then take my single fill later."

The storable inflow principle works in conjunction with the "paper fill" concept to give effect to the one-fill rule. Counting all "storable inflow" toward fill of a storage water right is frequently described as "paper fill"—a term perhaps coined by the Department when it implemented its computerized accounting systems, but that nonetheless is required by Idaho's Prior Appropriation Doctrine.[23]

"Paper fill" captures two points: (1) all storable inflow counts toward filling the right, whether it is captured or not, and (2) releasing previously captured water does not reduce the accrued fill. Thus, once sufficient storable inflow (*i.e.*, legally and physically available water) reaches the reservoir to satisfy the quantity element of the on-stream storage right, the right is considered satisfied and has been filled on paper (*i.e.*, it has achieved paper fill).

As will be discussed below, the one-fill, storable inflow, and paper fill rules properly enforce the Storage Rights' quantity and priority elements, assure junior water rights receive water at the times and in the amounts they are entitled to, promote the maximum use and least

[23] Throughout this brief, the term "paper fill" is not used as an accounting term, but rather as shorthand for the principle that one fill of a storage right has occurred under the storable inflow principle. Although the one fill, storable inflow, and paper fill principles are incorporated into the Department's accounting system, they are not merely accounting principles. Rather, they are mandated by Idaho's Prior Appropriation Doctrine.

wasteful use of Idaho's water resources, and protect the State of Idaho's control over the distribution of its public waters. In contrast, the Appellants' suggestion that the Storage Rights include priority refill entitlements in wholly inconsistent with Idaho's Prior Appropriation Doctrine.

(1) The essential elements of priority date and quantity must be given effect.

Together, the one-fill, storable inflow, and paper fill principles operate to enforce what this Court has called "the essential elements of priority date and quantity"[24] and to prevent impermissible enlargement of the Storage Rights' elements by limiting priority diversions to the decreed quantities (*i.e.,* volumes) of the water rights. This Court has not had occasion to deal with the quantity issue in the context of storage refill. But it has been clear enough on the fundamental principle that quantity matters and that "vague and fluctuating" quantities do not fit under the Prior Appropriation Doctrine.

> This Court has imposed the measurement requirement as a corollary to the basic policy of the conservation of water resources for beneficial use. [Citing the Idaho Constitution and Water Code.] The Court has required such a measurement when the decree is intended to settle the rights of various appropriators who claim and use fluctuating amounts of water from the same source. Thus, 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. [Reference to cases rejecting decrees for unspecified amounts.] The practice condemned by these cases was not simply the issuance of unmeasured decrees but that of awarding to one competing appropriator more water than he could beneficially use. These cases express a policy against waste irrespective of the technical legal error found to have permitted it.

[24] *State of Idaho v. Idaho Conservation League* ("*ICL II*"), 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) (Silak, J.).

Village of Peck v. Denison, 92 Idaho 747, 750-51, 450 P.2d 310, 313-14 (1969) (McQuade, J.) (emphasis added).

That hits the nail on the head. If the federal government is allowed to store, release, and store again more water than it takes to reach the Storage Rights' authorized quantities, it will have stored more water than it can beneficially use, and it is "likely that that [it] will waste water and yet have the power to prevent others from putting the surplus to any beneficial use." *Id.*

The United States correctly recognizes that the storable inflow and paper fill principles consider the Bureau as storing water towards the Storage Rights' satisfaction "even when Reclamation is physically lowering or simply maintaining reservoir levels." *USA Brief* at 40. As well it should! To do otherwise would be contrary to Idaho law by allowing the storage of more water than authorized under the Storage Rights' partial decrees.

Take, for example, the Bureau's Cascade and Deadwood reservoirs, whose water rights total 863,000 acre-feet. Say the Bureau physically stored 600,000 acre-feet, and later vacated 100,000 acre-feet of that stored water for flood control. If the Bureau was then allowed to physically refill the 100,000 acre-feet and also physically fill the remainder of the 863,000 acre-feet of total reservoir space (*i.e.,* the remaining 363,000 acre-feet), the total amount physically stored during this year would be 1,063,000 acre-feet (600,000 + 363,000 + 100,000 = 1,063,000). In other words, by storing that 100,000 acre-foot block twice, the Bureau would exceed the total authorized volume of storage allowed under the Storage Rights. Thus, if the Bureau could physically store water under the Storage Rights' priority without counting it as water stored under the rights' priority, there would be no limit to how much water it could store under priority.

The unlimited ability to satisfy a water right would be deeply problematical for Idaho's water law, particularly with respect to on-stream reservoirs. Unlike natural flow water rights and

off-stream storage rights, which are limited to diversions based on flow rates (cfs), the Storage Rights' quantity elements are described in terms of annual volume only, with no flow rate limitations. The lack of flow rate limitations in the Storage Rights' decrees is not an oversight or an ambiguity. The Storage Rights purposely—and prudently—were decreed with no flow limit so they could capture all of the Payette River's available flows while the rights were in priority. In other words, these on-stream rights authorize the federal government to control every drop of water in the river—but only when they are in priority during a single fill. This maximizes the potential the reservoirs will fill completely and do so at a time least in conflict with other water users. This makes more water available for juniors and maximizes the use of the State's water resources.

Thus, when the Storage Rights are in priority, the federal government is entitled (and incentivized) to store all stream flow entering the reservoir that is not required to be delivered to senior water rights. Juniors are not entitled to call for water until the Storage Rights' decreed volumes have been satisfied (*i.e.,* "paper fill" has been achieved).

Contrary to Black Canyon's contentions,[25] considering the Storage Rights satisfied based on their respective reservoirs' maximum physical fill would violate the Storage Rights' quantity elements. It is no limit at all to measure the satisfaction of an on-stream storage right (whose quantity is defined only as an annual volume limit) by the amount of water in the reservoir on the day of maximum physical fill. The decree might as well read, "Take and release all the water you want, whenever you want, and always take it priority until there is no more water to take." Such an unlimited right, exercised in priority, would enable the reservoir operator—in this case

[25] *See, e.g., BCID Brief* at 18 (arguing that the Storage Rights included the water "physically present in the Reservoirs at the point of maximum physical fill").

the federal government—to control the entire river (except for the rights senior to the Storage Rights).

The Appellants also contend that flood releases do not count toward fill because flood releases are not beneficial uses.[26] They are correct that beneficial use is a fundamental prerequisite in the creation and continued existence of any water right, but it has nothing to do with the accrual of water to an on-stream storage right. If a water right holder does not beneficially use the water distributed to it, that holder may suffer consequences. But it does not change the fact that the distribution of water has been made.

The Storage Rights' decrees include no flood control exceptions to their quantity elements. Accordingly, if the storage right holders release stored or storable water—whether for beneficial uses or not—they must allow other water users to fill their rights before taking a second fill of the storage rights. This might sound harsh, but that is how the prior appropriation doctrine works when water is scarce.[27] It does not allow "do-overs" when a user wastes the water to which they are legally entitled. The storable inflow and paper fill principles represent strict enforcement of the quantity and priority date elements, not the reservoir owner-friendly "discretion" advocated by the Appellants.

The United States' and Black Canyon's beneficial use arguments do not address the fact that water stored, but later spilled for flood control, must count toward the satisfaction of a storage right. The reason is simple. The Department's distribution of water to various water rights has nothing to do with beneficial use. Applying water to beneficial use (or otherwise

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[26] *See, e.g., US Brief* at 41 ("waters stored and released solely for flood-control purposes are not appropriations"); *BCID Brief* at 14 (stating that flood control releases are not beneficial uses of water, and that such releases frustrate the purpose of a storage water right).

[27] "These principles [of the prior appropriation doctrine] become even more difficult, and harsh, in their application in times of drought." *Am. Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007) (Trout, J.).

releasing it, such as for flood control) is the business and concern of the storage right holder. It is not a factor in distribution or in determining fill of a storage water right. Once water is distributed to a right holder, that person may release it to irrigate crops (a beneficial use), to irrigate rocks (a waste of water that could lead to forfeiture), or to vacate space to capture predicted flood waters (a potentially reasonable and lawful but nevertheless non-beneficial use under the decreed storage rights[28]). None of these actions—which occur at some point after the distribution of water—has any bearing on the quantity of water that person is entitled to receive under priority. The water right holder is not entitled to a second helping at the expense of juniors if they fail to apply their first helping to an authorized beneficial use—no matter what the reason.

(2) Junior water rights are entitled to protection.

Idaho's Prior Appropriation Doctrine protects not only the senior's right against interference by juniors. It also protects the junior's right to be shielded from wrongful or wasteful acts that effectively enlarge the rights of seniors. "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State, Dept. of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). "[T]here is *per se* injury to junior water rights holders anytime an enlargement receives priority. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Id.* (citation omitted). *See also Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (holding that a senior may divert the quantity of water to which he is entitled to in priority but after filling the right *once*, may not "hinder or impede the flow of the remaining stream" to the junior); *City of Pocatello*, 152 Idaho at 835, 275 P.3d at 850 ("An increase in the volume of water diverted is an enlargement . . . ."). Any

[28] If reasonably compelled by the need to prevent flooding, such releases presumably would be protected from forfeiture under Idaho Code § 42-223(6), but this question is not before the Court.

contention that the Storage Rights may be filled multiple times under right of priority cannot be reconciled with these foundational principles of water law. As the SRBA Court held: "[U]nder the prior appropriation doctrine as established under Idaho law, a senior storage right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights once." R. at 889 (*SRBA BWI 17 Decision* at 13).

(3) Idaho law and policy requires the maximum use of the State's water resources.

The storable inflow and paper fill principles also are necessary to ensure "the maximum use and benefit, and least wasteful use of Idaho's water resources." *Idaho Ground Water Assoc. v. IDWR* ("*Rangen II*"), 160 Idaho 119, 129, 369 P.3d 897, 907 (2016) (J. Jones, C.J.); *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) (Bakes, J.). These principles require on-stream storage right holders to store all water that is legally and physically available until their decreed volumes are met, or else suffer the consequences if they choose otherwise. If they are not held to this standard, water that could and should have been stored will flow downstream in quantities and at times when other users do not expect it and cannot use it, and then reservoirs will be filled later with water that other users are expecting.

It has long been the law in Idaho that a senior may not take his water inefficiently so as to deprive others:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much by proper application.

Van Camp v. Emery, 13 Idaho 202, 202, 89 P. 752, 752 (1907) (Ailshie, C.J.).

Similarly, the U.S. Supreme Court in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912), held that that there is "no right under the constitution and laws of the State of Idaho to

appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses." *Schodde*, 224 U.S. at 117 (1912). The *Schodde* Court cited one of its earlier cases in concluding that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *Schodde*, 224 U.S. at 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)).

In the same year as *Schodde*, this Court held that extending priority to "all the waters that flow" during the high runoff period is contrary to the constitutional principle that right to appropriate unappropriated flows may never be denied:

> To say that the respondents are entitled to all the waters that flow in the stream, when there is more water flowing at some seasons of the year than respondents are able to divert and apply to a beneficial use, would deny the right of appropriation by any other person, notwithstanding the fact that the respondents were not diverting or applying the excess to a beneficial use.

Lee v. Hanford, 21 Idaho 327, 331, 121 P. 558, 560 (1912) (Stewart, C.J.).

Citing nearly a century of precedent, this Court observed in 1990: "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) (Bakes, J.).

In 2011, this Court reiterated the State's longstanding commitment to this principle:

> In *Niday v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909), we stated, "The theory of the law is that the public waters of this state shall be subjected to the highest and greatest duty." In *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909), we phrased it, "Economy must be required and demanded in the use and application of water." In *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960), we expressed the same concept by stating,

> "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (Eismann, C.J.).

And, just last year, this Court again reinforced this principle: "As we recently stated in *Clear Springs*, the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy in Idaho." *Rangen II*, 160 Idaho at 129, 369 P.3d at 907. This Court also explained that *Schodde* is not just about a reasonable means of diversion. It established a general principle of maximum beneficial use:

> [T]he principles stated in *Schodde* apply equally in this water management case where the senior appropriator seeks to assert control over practically the entire aquifer, regardless of the minimal benefit to the senior and the great detriment to the juniors.

Rangen II, 160 Idaho at 133, 369 P.3d at 911.

This maximum use principle is of great import here. By their very nature, on-stream reservoirs control the entire river. That control is reflected on the face of the associated storage right in that, unlike other rights, they are decreed with no instantaneous flow limit. The only quantity limit is their annual volume. Thus, they may take every drop of water when they are in priority. This unique quantity limitation gives storage rights both the ability and the obligation to capture all legally available water when they can, as early in the accounting year as possible.

This Court has recognized that storage rights are different than natural flow rights.

> There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

Rayl v. Salmon River Canal Co., 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) (Givens, J.). The SRBA Court also has recognized this difference: "An on-stream reservoir alters the stream affecting the administration of all rights on the source." *BW 17*, 157 Idaho at 388, 336 P.3d at 795 (quoting SRBA Court).

These fundamental attributes of storage rights require the conclusion that an on-stream reservoir operator may not fill its reservoir at the operator's convenience. Idaho's Prior Appropriation Doctrine expects the holders of the Storage Rights (which authorize storage for beneficial uses and do not include flood control) to store as much water was possible when it is available. *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) ("the entire water distribution system under Title 42 of the Idaho Code is to further the State's policy of securing the maximum use and benefit of its water resources."). To the extent possible, this should happen before or early in the irrigation season when plenty of water is available. When storable inflow is released or bypassed during these periods, it rarely provides benefit to downstream holders of water rights (most of whom desire diversions during the irrigation season), and the water flows irretrievably out-of-state.

(4) The State of Idaho must retain control over the distribution of water.

The United States contends that the Bureau must have "discretion to determine how and when to impound flows in satisfaction of its storage rights . . . ." *US Brief* at 41. It already has that discretion when its rights are in priority or when there is "excess water" in the river. However, the degree of discretion sought by the United States—to take a second fill to the detriment of other users—would take away the Director's authority under Idaho Code 42-602 to administer the State's public waters in the Payette River according to the Storage Rights' stated quantities. The proposal would impermissibly allow the federal government to take any quantity

it chooses, thereby vitiating the quantity element of their decreed rights, blocking future appropriations, and effectively abdicating State control to the federal reservoir operators.

Because high flows simply are unappropriated waters, the approach urged by the Appellants would effectively give the federal government a priority entitlement to all of the unappropriated waters in the streams harnessed by Cascade and Deadwood Reservoirs. But the federal government has no right to prevent future appropriations. Idaho Const. art. 15, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied"); *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982) ("The right to appropriate unappropriated water is guaranteed by article XV, section 3 of the Idaho Constitution").

The Appellants improperly conflate reservoir operations and water rights.[29] The United States has and will continue to have control over its reservoir operations. Like any dam operator, it has the authority (and the duty) to bypass or release water to in the interest of downstream flood control.[30] But that has no bearing on when its water rights are filled or how the State distributes water.

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[29] The United States says that "Reclamation treated flood control to be independent of the water rights system and prior appropriation." *US Brief* at 37 (internal quotation marks omitted). Perhaps so. But the Reclamation Act of 1902—the law under which Cascade and Deadwood Reservoirs were constructed, *US Brief* at 10—requires that the federal government defer to Idaho's laws "relating to the control, appropriation, use, [and] distribution of water . . . ." 43 U.S.C. § 383 (Sec. 8 of Act of June 17, 1902, 32 Stat. 388). Again, whether the Late Claims could be proven up, or whether the Storage Rights include priority refill entitlements, is a question of Idaho water law. Thus, the federal government may operate its reservoirs however it pleases but, as required by the Reclamation Act, the storage of water for beneficial use (*i.e.*, the control, appropriation, use, and distribution of water) is dictated by Idaho's Prior Appropriation Doctrine.

[30] Idaho's common law of torts imposes obligations on dam owners, and the federal government may pose further and more stringent duties on its own facilities, but these are not obligations imposed by the prior appropriation doctrine or the Storage Rights' decrees. The Bureau's release of water stored for beneficial use is found in the federal policies that provide for the Payette River reservoirs to be operated in part for flood control, and also in Idaho's common law that requires all reservoir owners to operate reasonably. *Burgess v. Salmon River Canal Co.*, 119 Idaho 299, 305, 805 P.2d 1223, 1229 (1991) ("we conclude that there is a similar duty of reasonableness upon the operator of a dam who, once having impeded the flow of a natural stream by impounding it in a reservoir, thereby exercising control of the flow of the water in the stream, subsequently discharges water from

The key distinction that must be made is that the one-fill, storable inflow, and paper fill principles—and the quantity element of a storage water right—have nothing to do with whether reservoirs are actually physically full. These principles—and Idaho's Prior Appropriation Doctrine in general—are concerned with water rights, not reservoir operations (which are not dictated by Idaho law and, in this case, are at the federal government's discretion).

The federal government's reservoir operations do not define the scope or administration of the Storage Rights or Idaho's Prior Appropriation Doctrine. The Storage Rights, in fact, authorize only storage and beneficial uses from storage. Neither they nor Idaho's water law authorizes flood control or any other reservoir operations inconsistent with those decreed purposes.

Physical fill is simply a function of reservoir operations—operations that are controlled by the federal government in the case of the Boise River reservoirs. It is not a water right concept, and it has nothing to do with accounting for the fill of the Storage Rights. Likewise, paper fill based on storable inflow has nothing to do with whether a reservoir is actually physically filled. It is a principle necessary for the proper administration of on-stream storage water rights under Idaho law.

The corollary to this is that achieving paper fill means that sufficient storable inflow has reached the reservoirs to satisfy the water right and completely fill the reservoirs. Thus, if complete paper fill is achieved, any failure to physically fill the reservoirs results from the federal reservoir operators' operational decisions, such as deciding to bypass or release water for flood control (or for some other federal objective). No one but the federal government controls the timing or quantity of flood control releases (or any other operational decisions for that

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the reservoir into the natural stream bed.") See also *Kunz v. Utah Power& Light Co.*, 526 F.2d 500 (9th Cir. 1975) (holding that an on-stream reservoir owner may assume a duty of flood control).

matter) from the federal on-stream reservoirs. These operational decisions do not affect accrual of water to the Storage Rights under Idaho law. Accordingly, the United States and its contractors—not other water users—should bear any adverse consequences resulting from the federal government's operational decisions.

B. The Bureau's existing Storage Rights inherently authorize the capture of excess water so long as other rights are not injured.

The Appellants raise the alarm that if they are not allowed to refill in priority, the federal reservoirs may not fill. This is a false alarm. In accordance with the one-fill, storable inflow, and paper fill principles described above, the federal reservoirs fill just fine in wet years (when there are flood releases) because Idaho law allows them to capture "excess water."

"Excess water" is sometimes called "high flows" occurring under "free river" conditions. Excess flows, high flows, and free river all mean the same thing: that there is more than enough water in the system to satisfy all water rights. In other words, at that moment the system contains some unappropriated water. As this Court has recognized, "excess water inherently relates to water that has not been decreed." *A & B Irrigation Dist. v. Idaho Conservation League* ("*ICL I*"), 131 Idaho 411, 416, 958 P.2d 568, 573 (1997) (McDevitt, J.).

This Court has approved the practice of allowing "those who otherwise have water rights . . . to use excess water when it is available." *State of Idaho v. Idaho Conservation League* ("*ICL II*"), 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) (Silak, J.). Thus, the capture of high flows when that can be done without injury to others can be recognized as an inherent, or ancillary, part of every on-stream storage right.[31] Accordingly, excess water stored after paper fill is water lawfully stored under the Storage Rights.

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[31] *ICL I* and *ICL II* dealt with general provisions contained in prior decrees, but this does not alter the conclusion that Idaho's Prior Appropriation Doctrine allows free river water to be captured ancillary to an existing right. These decisions support the conclusion that the use of excess water by existing water right holders is allowed under Idaho law whether or not the practice is decreed in a general provision.

To be clear, the Storage Rights' ancillary entitlement to take a second fill with excess water is not a distinct water right that can be exercised under priority. "[T]here cannot be a prior relation to excess water." *ICL I*, 131 Idaho at 416, 958 P.2d at 573. In other words, Idaho law recognizes that excess water may be stored and used when it is available by "those who otherwise have water rights," *ICL II*, 131 Idaho at 333, 955 P.2d at 1112, but such capture of excess water may not impair existing rights or prevent future appropriations of that water. In other words, the right to take excess water is subordinated to all existing and future water rights. In short, the ancillary right to store and use excess waters can be viewed as a part and parcel of decreed on-stream storage rights, including the United States' Storage Rights in Basin 65 (and elsewhere).

Indeed, in the context of storage rights, allowing the storage of high flows is compelled by the principle of maximum beneficial use. That is, if water is available for storage without injury to others—even after paper fill—the constitutional principle of maximum use compels the right to its capture and storage because, otherwise, that water would flow down the river unused.

Obviously, the right to refill with excess water is different than the right to store under priority. Excess water is simply unappropriated water that, like all of Idaho's unappropriated water, is subject to appropriation. Idaho Const. art. XV § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . ."). Nevertheless, it is an entitlement that any storage right holder should embrace. Why would any water user disavow an entitlement that could only benefit them by increasing the amount of water they could lawfully divert?

Although excess water is not stored under priority, once stored, the right holder has a legally protected right to its use. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 879, 154 P.3d 433, 450 (2007) (quoting *Washington County Irrigation Dist.*

v. Talboy, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935)) ("when water is stored, it becomes 'the property of the appropriators . . . impressed with the public trust to apply it to a beneficial use.'") Thus, the federal government owns and controls its lawfully stored excess water—just as it does water stored under priority. Once captured, no other right holder may call for its release. The reservoir operator may release the water for beneficial use by the spaceholders, carry it over for future use, or release it for flood control.

Excess water and unappropriated water are the same thing; but the terms address different things that might happen to that water. When a storage right holder takes excess water, it does not become appropriated because he already was allowed to take it as excess water under his existing water right. In contrast, as soon as someone else appropriates today's free river water, it will not be excess anymore.[32]

There is no dispute that flood control provides benefits to flood-threatened landowners and communities (some who may not be water right holders). Likewise, there can be no dispute that flood control is not an authorized purpose of use of the Storage Rights. Flood control obligations exist, but they are not part of and they do not dictate Idaho's Prior Appropriation Doctrine, which is concerned with diversion and beneficial use of water, not flood control. Dam operators must (and do) balance their flood control obligations and their duty to store water for beneficial use. Given that flood control happens in times of high water, the federal reservoirs are virtually always refilled without injury to others by capture of excess water ancillary to the

[32] This Court must reject any argument that the only excess water that is available for appropriation is water released from Cascade and Deadwood Reservoirs for flood control purposes. If that is the case, then the availability of unappropriated water is fully dependent on the federal government's reservoir operational decisions (as they evolve over time). If all future appropriations are thus subordinated, the federal government has effectively appropriated every last drop of those streams. It also means that there is no such thing as unappropriated water upstream from each reservoir's outlet—which, of course, is where the vast majority of excess waters originate. Neither of these outcomes is consistent with Idaho law or interests. Idaho Const. art. XV § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . .")

Storage Rights. The clock is not broken. Replacing it with priority refill is an unnecessary and dangerous proposition.

V. SUEZ IS ENTITLED TO ATTORNEY FEES ON APPEAL.

In addition to costs, Suez seeks attorney fees on these appeals under Idaho Code § 12-117(1). To the extent Suez prevails on only a portion of the issues it has presented on appeal and cross-appeal, it seeks attorney fees for the portion of the case on which it prevailed under Idaho Code § 12-117(2). Suez is entitled to attorney fees because the positions taken by the Appellants are without a reasonable basis in fact or law.

The Late Claims are water right claims based on the alleged pre-1971 diversion and beneficial use of water. However, neither Black Canyon nor the United States concern themselves with proving beneficial use for those claims. Instead, they ask that the Late Claims be deemed unnecessary. If they are unnecessary, they should have withdrawn them. What they really seek—redefinition of the Storage Rights and/or changes in the Department's administration of those rights—is beyond the scope of these Late Claim proceedings. They could have sought to re-open the Storage Rights in the SRBA under I.R.C.P. 60. Or they could have asked the Department to initiate proceedings to examine its accounting methodology. But instead they pursued their unfounded arguments on appeal here.

The District Court carefully and thoroughly explained this to the Appellants in its decision. That explanation should have been heeded. Instead, they have continued to pursue the Late Claims on appeal, advocating for priority refill entitlements in the Storage Rights, which are not before this Court. Their arguments are procedurally barred. They are also wrong on the merits.

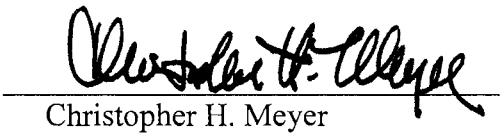
Accordingly, Suez is entitled to its attorney fees on appeal because these strategies are without a reasonable basis in fact or law.

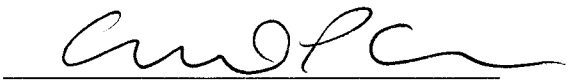
CONCLUSION

Suez asks that his Court affirm the SRBA Court's ruling in these appeals.

Respectfully submitted on June 9, 2017.

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

By 
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2017, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

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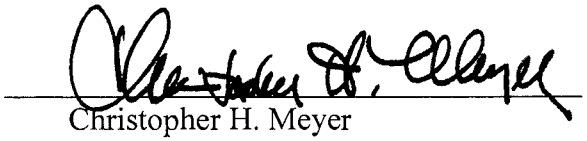

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