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

No. 44635-2016

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

THE UNITED STATES OF AMERICA,

Appellant,

v.

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

Respondents.

REPLY BRIEF FOR APPELLANT THE UNITED STATES OF AMERICA

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

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INTRODUCTION

This appeal involves supplemental water-rights claims in the Snake River Basin Adjudication ("SRBA") for the Cascade and Deadwood Reservoirs, two on-stream reservoirs owned and operated by the United States Bureau of Reclamation ("Reclamation") in Basin 65. In most years, annual inflows from the watersheds above the reservoirs exceed available storage capacity. In such years, if Reclamation were to fill the reservoirs for irrigation storage as soon as possible after the prior year's irrigation use, Reclamation would have to "spill" unneeded water in mid to late spring when stream flows and flood risks are greatest. To help protect downstream communities and property, over fifty years ago Reclamation developed protocols for filling its reservoir in a manner that mitigates downstream flooding risks. Under these protocols, now set out in "flood-control rule curves," Reclamation passes or releases early inflows to create space for capturing peak flows later in the year.

In 1993, the Idaho Department of Water Resources ("IDWR") implemented a computerized accounting program to track water distribution in Basin 65. As an expedient, the program treats all reservoir inflows as "diversions" for water-rights purposes. Under this rule, in any year that Reclamation passes or releases water for flood-control purposes, the United States' decreed storage rights are satisfied "on paper" before Reclamation physically fills the reservoirs for irrigation use. Likewise, all reservoir inflows stored after the date of "paper fill" are deemed "unaccounted for" and available for appropriation by others. Reclamation filed the supplemental water rights claims to protect its historical reservoir operations in light of IDWR's novel accounting procedures. The supplemental claims accept the rule that all reservoir inflows are

diversions, which limits the United States' decreed storage rights to first-available flows. But Reclamation began flood-control operations before 1971, when water rights could be acquired under Idaho law simply by appropriating water for beneficial use. Under its flood control operations, Reclamation physically stored — and thereby appropriated for irrigation and other beneficial uses — the last water flows into the reservoirs (prior to the irrigation season). The supplemental claims assert beneficial-use rights in these last stream flows.

In a related ruling (on review of IDWR's similar accounting procedures for federal reservoirs in Basin 63), the district court acknowledged that the United States and its contract space holders had "acquired a vested constitutional method water right" through the beneficial use of waters stored in federal reservoirs after flood-control releases. *See* U.S. Add. 2 at 17. But the district court disallowed the United States' supplemental claims for the Cascade and Deadwood Reservoirs, on the erroneous view that the Basin 65 claims are precluded by the "Payette Decree," a 1986 partial decree of water rights in the Payette River system. As explained in the United States' opening brief (U.S. Br. at 29-40), claim preclusion does not apply because the United States' supplemental claims are predicated on IDWR's accounting rule (that all reservoir inflows are diversions), which was first imposed *after* the issuance of the Payette Decree and which departed from the usage of "diversion" in preexisting law.

In their response briefs, Respondents the State of Idaho and Suez Water Idaho, Inc. ("Suez") fail to refute that IDWR's accounting rule materially changed the rules for exercising reservoir storage rights. Instead, they make three sets of arguments that disregard the rule change and thus misconstrue the supplemental claims of the United States. First, Respondents

emphasize the need for "finality" in water adjudications to guard against the "enlargement" of decreed rights. But because the supplemental claims limit use to one physical fill, they do not assert enlarged *storage* rights; they assert enlarged *diversion* rights, predicated on the novel rule that all inflows are diversions and on the historic practice (in flood-control years) of passing and releasing unneeded inflows before physical storage and beneficial use.

Second, the State argues that this Court must disregard IDWR's reinterpretation of the United States' storage rights, because the district court lacked jurisdiction (upon review of the United States' supplemental claims) to set aside the accounting procedures. This argument is a non sequitur. The supplemental claims are *predicated* on IDWR's accounting procedures and *presume* IDWR's authority to count all reservoir inflows as "diversions" for water-rights purposes. Moreover, the validity of IDWR's accounting procedures is presently before this Court in a related set of appeals. Whether all reservoir inflows are "diversions" for water-rights purposes is a legal question pertinent to both sets of appeals. This Court need not (and should not) disregard that question in either case.

Third, the State and Suez argue that the United States failed to prove the supplemental claims and that affirmation of the claimed rights would injure other users and interfere with water-rights administration. These merits arguments misconstrue the supplemental claims, were never addressed by the district court, and are inconsistent with the district court's decisions on the United States' pending supplemental claims in Basin 63. The district court's res judicata ruling should be reversed, and the United States' supplemental claims in Basin 65 should be remanded for adjudication in the same manner as the Basin 63 claims.

ARGUMENT

I. The United States' Supplemental Claims Are Not Precluded by the 1986 Partial Decree in the Payette Adjudication

A. Claim Preclusion Does Not Apply

As previously explained (U.S. Br. at 29-30), under the doctrine of res judicata, claim preclusion applies only to claims that actually were or could have been litigated in a prior proceeding. *Berkshire Inv., LLC v. Taylor*, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012). Claim preclusion does not apply where changed factual or legal circumstances give rise to a new claim that could not have been brought at the time of the initial action. *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 226, 999 P.2d 877, 881 (2000); *Berry v. Koehler*, 84 Idaho 170, 181, 369 P.2d 1010, 1016 (1961); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945). The United States demonstrated that its supplemental claims for the Cascade and Deadwood Reservoirs could not have been brought in the Payette Adjudication prior to the 1986 Partial Decree ("Payette Decree") because the supplemental claims are premised on computerized accounting procedures that postdate the Payette Decree and reinterpreted the United States' storage rights in a manner not dictated by the Payette Decree or by preexisting water law. *See* U.S. Br. at 31-40. The response briefs of the State and Suez do not show otherwise.

1. IDWR's Accounting Procedures Departed from Existing Law

As the United States demonstrated (U.S. Br. at 31-40), IDWR's 1993 accounting procedures departed from preexisting law by adopting a novel use of the term "diversion." Specifically, for expedience, IDWR adopted a dictionary definition equating "diversion" with

any change in the physical course of a waterway. *See* U.S. Add. 3 at 65, ¶ 30 (citing *Webster's II New College Dictionary* 339 (3d ed. 2005) ("Diverted means '[t]o turn aside from a direction or course.")) Using this definition of "diversion," IDWR determined for the first time that "all natural flow[s] that enter[] a federal on stream reservoir" are "diverted" for water-rights purposes and must be charged toward the satisfaction of decreed rights, whether or not the flows are appropriated for irrigation or other use. *Id.*

This novel approach, the United States explained (U.S. Br. at 35), "disassociate[d] water diversions from water appropriation." Under longstanding Idaho water law, the term "diversion" had always been used together with, or as a synonym for, "appropriation." *See, e.g., Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208, 210 (1912); *Branstetter v. Williams*, 8 Idaho 257, 67 P. 800, 804 (1902). Reflecting this understanding, the Idaho Constitution enshrines "[t]he right to divert *and appropriate* the unappropriated waters of any natural stream to beneficial uses." Idaho Const., Article 15, § 3 (emphasis added). This Court has determined that water can be appropriated for water-rights purposes without a physical diversion, *e.g.*, to preserve instream recreational use. *See State Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 444-445, 530 P.2d 924, 928-29 (1974); *see also Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) (diversion not necessary for "valid appropriative right for stock watering"). But this Court has never held that water can be "diverted" for water-rights purposes without an appropriation. *Cf. In re SRBA*, 157 Idaho 385, 389, 336 P.3d 792, 796 (2014) (addressing the right of an "appropriator" to "divert" under a storage right).

By treating all reservoir inflows as "diversions," the computerized accounting procedures count two types of "diversions" that are not associated with appropriations. First and foremost, when Reclamation allows natural stream flows to pass through an on-stream reservoir without physically filling the reservoirs — i.e., when dam outflows *equal or exceed* reservoir inflows — Reclamation is not removing water from the river or otherwise "appropriating" water in any meaningful sense. *See* U.S. Br. at 32-33. It is axiomatic that any owner of a water right may choose not to exercise the right. *Cf. Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388-390, 647 P.2d 1256, 1260-62 (1982) (addressing risks of nonuse). Likewise, when available water flows are more than sufficient to satisfy an owner's annual right of appropriation, the owner has discretion when to exercise the right within the temporal limits (if any) imposed by a relevant license or decree. *See, e.g., Dunn v. Boyd*, 46 Idaho 717, 217 P. 2, 3 (1928) (court may fix dates within which an appropriator "may divert"). Nothing in the law of prior appropriation suggests a different rule for on-stream storage reservoirs.

Second, as also explained (U.S. Br. at 37-38), inflows stored and released for flood-control purposes are not appropriated under Idaho law. If it were possible for Reclamation to perfectly predict winter and spring precipitation, associated snowmelt and runoff rates, and other factors influencing reservoir inflows, Reclamation could satisfy its reservoir storage rights and meet flood control objectives with one physical fill per year. Specifically, Reclamation could exercise its discretion (as above) to let unneeded natural stream flows pass, until the time it needs to begin storing natural flows to physically fill the reservoirs for the irrigation season. But because Reclamation cannot forecast reservoir inflows until it can assess actual winter snowfalls,

Reclamation starts forecasting in January. Reclamation begins filling its reservoirs earlier (pre-forecasts) on the assumption that there will be no runoff in excess of available reservoir capacity. Once reliable runoff forecasts can be made, Reclamation passes through inflow and, as necessary, releases a portion of the stored water as dictated by its flood-control rule curves, and then fills the reservoirs during peak flows. During years when inflows exceed available reservoir capacity,[1] this method of filling the reservoirs results in a partial physical "refill" (to compensate for flood-control releases), not simply the passing of unneeded flows prior to the exercise of reservoir storage rights.

Nonetheless, the net effect on water appropriation is the same. As the United States explained (U.S. Br. at 37-38), regulating stream flows to avert flooding is not a "use" of water per se, and has never been held to constitute an appropriation requiring a license or decreed water right under Idaho law. Thus, at the time of the Payette Adjudication, Reclamation's practice of passing and releasing water for flood-control purposes before filling the reservoirs for irrigation and power purposes was consistent with Idaho law and did not interfere with its licensed storage rights (ultimately confirmed in the decree).

2. The State and Suez Fail to Refute the Material Change in Circumstances

Contrary to the State's characterization (State Br. at 24-25), the foregoing argument does not rely on the United States' "subjective[]" view, at the time of the Payette Decree, that its

[1] The available capacity is total capacity minus carryover, after distributions for irrigation have been made and when the new storage season begins.

historic reservoir operations were consistent with the laws of prior appropriation. Rather, the United States relies on longstanding Idaho legal authority on water appropriation, together with the absence of any Idaho precedent treating flood-control as an appropriation, both of which the State ignores. Because the State cannot refute the United States' legal argument, the State instead argues (State Br. at 25-39) that this Court cannot consider the changed legal interpretation, because IDWR's accounting procedures cannot be challenged in the SRBA proceedings. But changed factual and legal circumstances are undisputedly relevant to claim preclusion. *Kuenzli*, 134 Idaho at 226, 999 P.2d at 881; *Berry*, 84 Idaho at 181, 369 P.2d at 1016; *State Farm Mut. Auto. Ins. Co.*, 324 U.S. at 162. Demonstrating that the 1993 accounting procedures effected changed circumstances is not the same as arguing that the procedures should be set aside. *See* pp. 22-26, *infra.*

For its part, Suez argues that treating all reservoir inflows as diversions for water-rights purposes has always been "mandated by Idaho's Prior Appropriation Doctrine," Suez Br. at 31, and that the "relevant * * * legal principles" at the time of the Payette Adjudication "were exactly the same as they are now," *id.* at 14. But Suez fails to make its case. First, Suez contends (Suez Br. at 31, 33-34) that Reclamation must be charged with diverting all available inflows toward its decreed rights to "prevent impermissible enlargement" of those rights and to ensure that Reclamation does not "stor[e] more water than authorized" under its decreed or licensed rights. This argument does not follow. The owner of a storage right (or any other water right) does not enlarge the right merely by declining to satisfy it with first available flows. As the United States' explained (U.S. Br. at 34), the risk of not storing first available flows — i.e.,

the risk that later flows will not be available to satisfy the full storage right — falls solely on the owner of the right.

Second, Suez argues (Suez Br. at 23) that a duty to use first available flows can be found in the "four corners" of the Payette Decree (or previous licenses). But Suez points to no specific text to support this assertion. The Payette Decree confirmed the United States' rights to "use" water from the Payette River, for "irrigation" and "power storage" and for "irrigation from storage" and "power from storage," in amounts up to 700,000 acre feet per annum ("AFA") for Cascade Reservoir and 163,000 AFA for Deadwood Reservoir. R. 533-34. The Payette Decree did not address "diversion" rights or impose "diversion" limits. *See* U.S. Br. at 38. To be sure, the United States' rights to appropriate water under the Payette Decree are limited to the decreed storage amounts. *See Glenn Dale Ranches v. Shaub*, 94 Idaho 585, 588, 424 P.2d 1029, 1032 (1972). But the Payette Decree simply confirmed that number based on the earlier state licenses. The Payette Decree (and earlier licenses) did not temporally limit when Reclamation may divert, nor specify that Reclamation must divert and appropriate first available flows.

Third, Suez argues (Suez Br. at 35) that Reclamation must be "incentivized" to use first available flows to "make more water available for juniors and maximize the use of the State's water resources." Suez correctly observes (Suez Br. at 18) that Idaho water law requires "beneficial use" and prohibits "waste." *See Idaho Ground Water Appropriators v. Idaho Dept. of Water Resources*, 160 Idaho 119, 131, 369 P.3d 897, 909 (2016). Suez fails to show, however, that Reclamation's flood-control operations contribute to waste. As the United States explained (U.S. Br. at 33), flows that Reclamation passes or releases for flood-control operations

are "never removed from the river or made unavailable to other water users or prospective appropriators." Suez's real argument is that flood-control operations change the timing of stream flows. Suez contends (Suez Br. at 35, 38) that Reclamation should be compelled to store first available flows in order to make more water available to junior appropriators during the irrigation season. But Reclamation passes or releases flows for flood-control purposes only in years when the failure to do so would cause stream levels to rise above the flow-rate target for flood control. *See* U.S. Br. at 17. Raising stream flow levels at times of flood risk does not make more water available at times of greatest irrigation need. For downstream water users with storage capacity and storage rights, the change in timing is irrelevant.

This leaves Suez with the anomalous argument (Suez Br. at 36-37) that reservoir inflows "must count toward the satisfaction" of the United States' decreed storage rights because "IDWR's distribution of water * * * has nothing to do with beneficial use." Suez argues (*id.*) that once IDWR "distributes" water to the United States' storage rights, Reclamation must store and put that water to beneficial use or lose such rights. But this assertion says nothing about whether IDWR's newfound "distribution" departed from preexisting law. IDWR did not begin "distributing" water to the United States via the accounting procedures until 1993.[2] As explained (pp. 4-7, *supra*), by "distributing" first-available flows to the United States storage rights — notwithstanding Reclamation's flood-control operations — IDWR took away Reclamation's

[2] IDWR does not physically distribute water to the reservoirs. The "distribution" is a paper exercise utilized by IDWR to track the satisfaction of water rights.

discretion to delay the exercise of its rights for flood-control purposes. This was (and is) a fundamental reinterpretation of the United States' storage rights.

Suez's contention that IDWR's "accounting methodologies * * * do not define water rights or dictate Idaho's law of prior appropriation" is misplaced. IDWR's task is to "distribute water * * * in accordance with the prior appropriation doctrine." *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800 (citing Idaho Code § 42-602). In this regard, IDWR is charged with "follow[ing] the law," not making the law. *Id.* Nonetheless, this Court has recognized IDWR's discretion "to determine when [the quantity amount] has been met for each individual decree[d]" right, *id.* at 394, 336 P.3d at 801, including the discretion to regulate the "use [of] decreed water right[s]" in light of the "public's interest in [the] valuable commodity" of water. *See American Falls Reservoir Distr. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). In the present case, this Court could affirm IDWR's accounting procedures as an accounting expedient, or it could find the procedures consistent with prior appropriation in the abstract (i.e., without regard to how reservoir storage rights historically have been exercised). Neither determination would be inconsistent with the United States' argument that the accounting procedures changed the rules when adopted. In other words, as previously explained (U.S. Br. at 40), the fact that IDWR's accounting procedures depart from preexisting law does not make the procedures *per se* improper. If this Court affirms IDWR's *Basin 63 Accounting Order*, the rule that all inflows are diversions presumably will carry the force of law.

3. *The United States' Supplemental Claims Were Not "Ripe" at the Time of the Payette Adjudication*

The State's argument (State Br. at 19-25) that the United States' supplemental claims were "ripe" in 1969 (when the Payette Adjudication was initiated) is readily controverted. The United States acknowledged (U.S. Br. at 30-31) that its supplemental claims "are based on the diversion and beneficial use of water that dates back to before 1965." But as the United States explained (*id.* at 31-35), the supplemental claims are also "inextricably bound up with" the logic of the 1993 accounting procedures, which postdate the Payette Adjudication. Following IDWR's accounting procedures, the supplemental claims disassociate "diversions" from "appropriations" and assert diversion rights (rights to divert for irrigation and power storage) in amounts that exceed appropriation rights (rights to use stored water for irrigation and power). These claims are possible (and understandable) only in the context of the new rule that all reservoirs inflows are diversions, a rule that did not control the United States decreed rights until after the 1993 accounting rules were implemented.[3]

4. *The United States Was Not Obligated to Seek a Flood-Control "Remark" in Anticipation of the Present Legal Controversy*

There is likewise no merit to the State's attempt (State Br. at 22-25) to ground claim preclusion on the United States' supposed failure to seek a "refill" remark in the Payette

[3] Contrary to the State's argument (State Br. at 20), the United States does not contend that claim preclusion is inapplicable because it would have been "impossible" to challenge IDWR's 1993 accounting procedures at the time of the Payette Adjudication. The supplemental claims do not challenge the accounting procedures, just the opposite; the supplemental claims are predicated upon the accounting procedures. See pp. 22-26, *infra*.

Adjudication to protect its flood-control operations. While acknowledging (*id.* at 22) that reservoir operations are not themselves a "beneficial use" of water, the State fails to appreciate the corollary point: not all reservoir operations are a "use" of water for purposes of water-rights regulation. Reservoir operations that do not implicate the availability of water for appropriation and use by others are simply outside of Idaho water-use law (law of prior appropriation). To be more precise, the United States' historic flood-control operations *were* outside of such law, until IDWR adopted accounting procedures that treat all reservoir inflows as "diversions" subject to water-rights administration.

In this context, the repeated assertions by the State and Suez that the Payette Decree did not authorize flood-control operations are beside the point. *See* State Br. at 22-25, 43, Suez Br. at 6, 15, 23, 43. If a water right historically has been exercised in a manner contrary to principles of prior appropriation — e.g., if a group of water users on a tributary historically have allowed out-of-priority use under certain conditions — the beneficiaries of such an arrangement reasonably must seek a remark memorializing such practice when the user's water rights are formally adjudicated. *See* U.S. Br. at 35-36. This is so because the historic practice would be unprotected by law and contrary to the terms of a decree if not memorialized therein. *Id.* But neither the State nor Suez argue that the United States needed a license or decreed water right to conduct flood-control operations incidental to irrigation and power storage, or that the United States could have acquired such right. The absence of flood-control authorization — either as a "use" of the decreed storage rights or by way of a "remark" — can be a material omission with claim-preclusive effect only if authorization was (and is) required.

At the time of the Payette Adjudication, the United States' flood-control operations were not contrary to the terms of its licenses or to Idaho water law. There was no Idaho statute, regulation, or case precedent identifying flood control operations incidental to reservoir storage as a "use" of water requiring a separate water right. Indeed, there is no such authority to this day. In its *Basin 63 Accounting Order*, IDWR justified its accounting procedures on the view that all inflows are diversions toward reservoir storage rights. *See* U.S. Add., Tab 3 at 37-38 (¶¶106-111) 40-41 (¶¶ 116-124), 65 (¶ 30). IDWR did not determine that the flood-control operations are a "beneficial use" of water. This is not, as Suez alone suggests (Suez Br. at 20), because flood-control operations are "sloppy" or "waste[ful]." The United States' flood-control operations have broad public benefits, which neither IDWR nor Suez denies. *See* Suez Br. at 46. Because flood control is undisputedly *beneficial*, it is not a "beneficial use" of water only because it does not implicate water appropriation and *use*.[4] As IDWR acknowledged in the *Basin 63 Accounting Order*, this fact makes flood-control operations "independent of the water rights system and prior appropriation." *Id.* at 74 (¶ 53).

[4] The State and Suez cannot have it both ways. If regulating flows for flood-control purposes is not a water use, a license or decreed right cannot be required. To the extent that the State and Suez are arguing that flood-control operations are water uses, they are arguing for a change to Idaho law. The United States' supplemental claims do not assert storage rights for flood control, because IDWR has never treated flood-control as a water use. If this Court determines that flood-control operations are a water use, it should remand to enable the United States to conform its supplemental claims accordingly. Except for the addition of the flood-control purpose, the supplemental claims (and proof required) would not change.

Suez speculates (Suez Br. at 15) that, in the absence of Idaho precedent specifically excluding flood-control operations from water-use regulation, Reclamation "could have and should have wondered" whether its flood-control operations required a water-rights license or decree. But the ability to "wonder" about potential legal issues is not the same as the ability to assert a claim on a specific accounting rule not yet adopted.[5] As just explained, IDWR's accounting procedures for federal on-stream reservoirs are not based on the view that storing water or regulating flows for flood-control purposes constitutes a water use. IDWR's accounting procedures are based on the rule that all inflows are diversions, which prevents Reclamation from letting any available inflows pass *for any reason*. The supplemental claims make no sense and could not have been filed in the absence of this novel accounting rule.[6]

Contrary to the State's argument (State Br. at 23-24 & n. 27), the "risk" that flood-control operations pose to the United States' ability to physically fill the Cascade and Deadwood Reservoirs is not germane to whether the United States could or should have brought its supplemental claims in the Payette Adjudication. The United States acknowledged (U.S. Br. at

[5] For this reason, issues about "refill" or flood-control operations that arose in other contexts (*see* State Br. at 21 n. 24) prior to or around the time of the Payette Adjudication do not prove that the supplemental claims could have been filed in the Payette Adjudication.

[6] The State's observation (State Br. at 24 n. 28) that the district court adjudicated a federal reservoir claim with a flood-control remark after IDWR adopted its accounting procedures says nothing about Reclamation's obligations at the time of the Payette Decree. Nor is there any significance to the State's argument (*id.*) that the United States could have sought a flood control remark when the United States' decreed rights were confirmed in the SRBA. *See* U.S. Br. at 4-5, 16. The State has never argued that the 2003 partial decrees have claim-preclusive effect.

17) that Reclamation's flood-control operations make it more difficult for Reclamation to physically fill the reservoirs to maximum capacity for irrigation use. Reclamation assumed this risk to provide a reasonable degree of protection against downstream flooding, and Reclamation developed flood-control rule curves to manage the risk of non-filling. It does not follow, as the State intimates (State Br. at 23-24 & n. 27), that the United States assumed the risk of claim preclusion by not raising the legal status of its flood-control operations at the time of the Payette Adjudication. These are completely different issues.

B. The United States' Supplemental Claims Are Not Precluded by Statutory Forfeiture or By Decree Language Referencing Statutory Forfeiture

As explained in the United States' opening brief (U.S. Br. at 23-24), the district court disallowed the United States' supplemental claims on the grounds of res judicata and two additional, purportedly independent reasons: (1) because the Payette Decree purportedly referenced forfeiture under former Idaho Code § 42-1411 (1969) (repealed), and (2) by operation of that 1969 finality statute. *See* R. 2512-2518. As explained (U.S. Br. at 26-27), these are not independent grounds for claim preclusion. The 1969 finality statute is properly construed as "memorializ[ing] * * * the application of res judicata to water adjudications." *See State Dept. of Ecology v. Acquavella*, 112 Wash. App. 729, 739, 51 P.3d 800, 805 (Wash. App. 2002) (interpreting an analogous state statute). Because the statute did not dictate the forfeiture of claims beyond the rule of claim preclusion, there can be no statutory forfeiture or forfeiture by reference to the statute for the reason already addressed: claim preclusion does not apply.

1. *The 1969 Finality Statute Embodied Res Judicata Principles and Limitations*

While asserting that the United States' interpretation of the 1969 finality statute lacks merit (State Br. at 15-17), the State offers no alternative interpretation. Instead, the State makes generic observations about finality that are not disputed. For example, the State observes (*id.* at 15) that general stream adjudications are unique statutory proceedings warranting their own finality rule. The United States agrees. As the United States explained (U.S. Br. at 26-27), claim preclusion — the loss of claims that "could have been" brought in earlier an earlier action whether or not the claims were actually litigated — applies to claims arising from the "same transaction or series of transactions." *Marivalla v. J.R. Simplot Co.*, 161 Idaho 455, 459, 387 P. 3d 123, 127 (2016) (citing *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012)). This "transactional" test does not fit general stream adjudications, which are not limited to any particular transaction or series of transactions giving rise to water rights, but instead are initiated by a statutorily-authorized notice calling out all claims to the use of water from a particular water system or source. *See* Idaho Code § 42-1407. Accordingly, the manifest purpose of former § 42-1411 (1969) was to clarify that claim preclusion would apply to any all claims that could be filed in response to such notice.

The State also stresses that finality is "essential" to general stream adjudications. *See* State Br. at 16 (quoting *Idaho Ground Water Assoc. v. Idaho Dept. of Water Resources*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016)); *see also State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998)). Again, the United States concurs. The State cites a 2010 brief that the United

States filed in the district court in proceedings on the "*Lemhi Decree*," a 1982 partial decree of water rights on the Lemhi River similar to the Payette Decree. *See* State Br. at 12-13 & 15 n. 15. In that brief, the United States observed that the 1969 finality statute reflected (1) "a bedrock principle concerning the finality of general adjudication decrees," *see* State Br. at Tab E at 20; and (2) the "importance of obtaining finality in general adjudication decrees *based on the principle of res judicata*," *id.* at 23 (emphasis added). The State mistakenly implies (State Br. at 15 n. 15) that the United States has changed its position on these issues. It has not. As reflected in the 2010 brief, the United States has consistently interpreted the 1969 finality statute as mandating finality "based on the principle of res judicata." State Br., Tab E at 23.

The State misconstrues this argument by failing to acknowledge that res judicata has equitable limitations. Specifically, res judicata bars claims not actually litigated by the parties in a prior suit (claim preclusion) only when the claims *could have been* brought in that prior proceeding. *U.S. Bank Nat. Ass'n v. Kuenzli*, 134 Idaho 222, 226, 999 P.2d 877, 881 (2000); *Berry v. Koehler*, 84 Idaho 170, 181, 369 P.2d 1010, 1016 (1961); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945). As previously explained (U.S. Br. at 27), the language of the 1969 finality statute implied the same equitable limitation. The statute provided for forfeiture in the event of a water user's "*fail[ure]* to appear and submit proof of [a] claim." *See* Idaho Code § 42-1411 (1969) (emphasis added). A litigant cannot "fail" at a task the litigant had no reasonable ability to perform. To construe the 1969 finality statute as mandating the forfeiture for claims that could not have been brought in a general adjudication would be "unreasonably harsh" and "arbitrary," contrary to ordinary rules of statutory construction. *See*

Jasso v. Camas Cty. 151 Idaho 790, 798, 264 P.3d 897, 905 (2011); *Avista Corp., Inc. v. Wolfe*, 549 F.3d 1239, 1250-51 (9th Cir. 2008).

The State does not dispute this analysis. Instead, the State incorrectly describes the United States' position as "disparaging" the "doctrine of res judicata" itself. *See* State Br. at 16 n. 17. Contrary to the State's characterization (*id.* at 16), the United States did not argue that the 1969 finality statute would unfairly "penalize" water users or result in an "arbitrary forfeiture of property rights" in the ordinary circumstance, i.e., when applied to water-rights claims that could have been asserted in a properly-noticed general stream adjudication. The United States simply demonstrated that the 1969 finality statute cannot reasonably be construed as mandating the forfeiture of claims that could not have been brought in the subject general adjudication. *Again, the State and Suez do not argue otherwise.* It is true that the State and Suez argue that the United States reasonably could have (and thus should have) brought its supplemental claims in the Payette Adjudication. But that argument is erroneous for reasons already discussed above and is *no response* to the issue of statutory interpretation.

2. The 1969 Finality Statute Did Not Apply to Partial Decrees

In addition to demonstrating that the 1969 finality statute is properly interpreted as embodying the principles of res judicata, the United States also made the further point (U.S. Br. at 27) that the forfeiture provision of the 1969 finality statute did not apply to the Payette Decree, because that decree was a *partial* decree. The 1969 finality statute stated in relevant part that the "[t]he decree" in a comprehensive stream adjudication "shall be conclusive as to the rights of all existing claimants upon the water system," and that "when [such] a decree has been entered, any

water user who has been joined and who failed to * * * submit proof of his claim * * * shall be held to have forfeited all [then existing] rights." Idaho Code § 42-1411 (1969). It is undisputed that that this forfeiture provision was repealed *before* the entry of such a decree in the Payette Adjudication, and that the Payette Adjudication remained incomplete at the time it was consolidated with the SRBA. Accordingly, under the plain terms of the statute, forfeiture under § 42-1411 (1969) never attached to the Payette River system.

In making this argument, the United States did not contend, as the State implies (State Br. at 13-15) that the 1986 Payette Decree was not a "final" judgment, or that the decree lacked claim-preclusive effect under res judicata principles. To the contrary, the United States acknowledged that the Payette Adjudication court certified the 1986 partial decree as "final" under Idaho R. Civ. P. 54(b), with the intent of entering a final judgment as to all claims that were or could have been brought within the Payette River basin, except for expressly excluded claims. Consistent with this understanding, the United States argued below (R. 1907-08, R. 2273-77, 2366-69) and in its opening brief (U.S. Br. at 29-40) that its supplemental claims fall outside the rule of claim preclusion only because they could not have been brought in the Payette Adjudication. The United States did not argue that the Payette Decree lacked claim-preclusive effect as to claims that *could have been brought* in the Payette Adjudication.

As for the 1969 finality statute, the United States observed (U.S. Br. at 27-29) that if former § 42-1411 "somehow could be construed as compelling preclusion beyond the [equitable] rule" of claims preclusion — i.e., if the statute is construed as mandating forfeiture of water-rights claims that *could not have been brought* within the Payette Adjudication — such *arbitrary*

forfeiture should be limited, per the plain terms of the statute, to decrees "conclusive as to the rights of all existing claimants upon the [subject] water system." The State acknowledges (State Br. at 17) that the 1986 Payette Decree was not "conclusive" of all rights on the Payette River, but insists that the "partial" nature of the 1986 decree makes no difference with respect to the forfeiture, because the Payette Adjudication court intended the 1986 partial decree to trigger statutory forfeiture.

That argument cannot be sustained. As the United States explained (U.S. Br. at 24), the 1979 Director's Report included a "recommended decree" comprehensive of "all of the rights * * * to the waters of the Payette River." R. 524. In this context, the report recommended a "conclusion of law" that entry of the "recommended decree" would result in the forfeiture of rights "as provided in Section 42-1411." *Id.* In contrast, the Payette Adjudication court issued a "partial decree" that excluded specified claims and did not reference statutory forfeiture. R. 452. Thus, while it is undisputed that the Payette Adjudication court entered a final decree with claim-preclusive effect, there is nothing in the text of Payette Decree specifically addressing whether the final partial decree would trigger statutory forfeiture. Moreover, even if the court had made such a proclamation, it cannot be given effect where the statute required a decree comprehensive of all claims. *See* Idaho Code § 42-1411 (1969). No court can by fiat change the terms of a statute. On this issue of statutory interpretation, the State has no response.

Instead, the State argues (State Br. at 11-13) that the United States waived its "challenges" to the 1969 finality statute and 1986 Payette Decree by not raising them in district court. But the United States is not challenging the 1969 statute or the Payette Decree; the United

States merely notes that the district court misconstrued the plain terms of the statute and the decree. Moreover, the United States made these observations (U.S. Br. at 27-29) in response to the district court's holding that the 1969 statute and the 1986 Payette Decree operate independently of res judicata principles and claim preclusion. R. 2512-2518. The State did not make that argument below. *See, e.g.*, R. 2288-89 (equating the terms of the 1986 Partial Decree and 1969 forfeiture statute with the "principles of res judicata"). In any event, as just noted, the State and Suez do not argue on appeal for an interpretation of the 1969 finality statute that would provide for the forfeiture of claims that could not have been brought within the Payette Adjudication. Therefore, the question whether the Payette Decree (as a partial decree) triggered forfeiture under the 1969 finality statute need not be resolved.

II. This Court May Consider Whether IDWR's Accounting Procedures Departed from Preexisting Law

Instead of attempting to refute the United States' argument that IDWR's 1993 accounting procedures fundamentally reinterpreted the United States' storage rights (*see* pp. 4-7, *supra*), the State erroneously contends (State Br. at 25-39) that this Court may not consider the change. To consider the departure from preexisting law, the State argues, would sanction a challenge to IDWR's accounting procedures, which may only be brought in proceedings under the Idaho Administrative Procedure Act ("Idaho APA"). This argument cannot stand.

A. The United States' Supplemental Claims Presume the Validity of the 1993 Accounting Procedures

To begin with, the United States' supplemental claims plainly do not challenge IDWR's 1993 accounting procedures. In demonstrating that the accounting procedures departed from the

preexisting law, the United States showed why its supplemental claims could not have been brought in the Payette Adjudication. Contrary to the State's arguments (State Br. at 26 n.29, 30), this demonstration was not a refusal to "accept" the accounting procedures or a request that the accounting procedures be set aside. The supplemental claims can only proceed if the accounting procedures (and rule all reservoir inflows are diversions) remain in place.

Nor is the State correct to suggest (State Br. at 30) that the United States' present argument was not made below. The United States explained below that the IDWR's accounting procedures "upended" the historic practice of storing for irrigation use after flood control releases, R. 2273, and left federal storage rights "unprotected," R. 2271. This is so, the United States showed, because the accounting procedures introduced the concept of "paper fill," which "severed the connection between physical fill and * * * reservoir accounting," leaving the existing storage rights "incapable of protecting" physical storage following flood-control releases. R. 2273-74. This is a just another way of saying that the accounting procedures disassociated diversions from appropriations. *See* pp. 4-7, *supra.*

The State is also mistaken in arguing (State Br. at 30) that the United States' arguments are based on a "mischaracteriz[ation]" of the district court's decision. In finding the United States' supplemental claims foreclosed by the Payette Decree, the district court relied in part on the proposition that "a claimant wishing to preserve a historical method of administration * * * must raise that issue at the time [a] claim is adjudicated." R. 2515-2516. The district court used the term "historical method of administration" to mean a "scheme" for water distribution that "might not pass muster" under the "prior appropriation system." *See Memorandum Decision and*

Order, SRBA Subcase 63-33732 at 6 (Sept. 1, 2016) (U.S. Add. 1). By invoking this rule, the district court necessarily (and mistakenly) assumed (1) that the United States' flood-control operations — which do not involve any appropriation or claim of priority use — would not "pass muster" under the law unless "memorialized" in a decree; and (2) that IDWR's accounting procedures simply enforced the preexisting rules of prior appropriation. *See* U.S. Br. at 35-36.

In any event, whether or not the district court recognized the relevance of the issue, the fact that IDWR's diversion rule departed from preexisting law matters to claim preclusion. The State seems to argue (State Br. at 31) that the United States was required to challenge IDWR's accounting procedures as a condition precedent to filing its supplemental claims. This Court has held that the Idaho APA "provides the procedures for challenging [an] accounting method" adopted by IDWR, *In re SRBA*, 157 Idaho at 394, 336 P.3d at 801, and that a party may not bring an "as applied" challenge to the constitutionality of IDWR regulations without exhausting administrative remedies. *American Falls Reservoir Distr. No. 2*, 143 Idaho at 870-72, 154 P.3d at 441-43. But neither decision supports the self-contradictory argument (State Br. at 31) that a party must challenge accounting procedures in order to bring claims based on the procedures.

Nor is there any merit to the State's argument (State Br. at 31-36) that the United States improperly augmented the record on appeal by citing IDWR's *Basin 63 Accounting Order* and two related district court decisions, which are included in the addendum to the United States' brief. The United States cited the district court decisions (U.S. Add. 1-2) to advise this Court of the status of the United States' supplemental claims for federal on-stream reservoirs in Basin 63 and the status of the district's court related decision on review of IDWR's *Basin 63 Accounting*

Order, which is presently on appeal to this Court. *See* U.S. Br. at 8-9, 21-22, 40-42. The State does not argue that it is improper to advise this Court of related claims, decisions, and appeals.

As for IDWR's *Basin 63 Accounting Order* (U.S. Add. 3), the United States did not cite that order, as the State contends (State Br. at 31), to "cobble together an administrative record" to challenge the order or to challenge IDWR's informal accounting procedures for Basin 65. As previously explained (U.S. Br. at 18), IDWR's computerized accounting procedures for Basins 01, 63, and 65 were all adopted informally, without an administrative order or rule making. *Id.* at 18, 21. In 2013, on its own volition, IDWR initiated "contested case" proceedings[7] to review its accounting procedures for Basin 63. *Id.* at 21. Those proceedings culminated in the *Basin 63 Accounting Order*, which is the first (and only) formal action setting out IDWR's accounting rules for federal on-stream reservoirs and the rationale for those rules. *Id.* at 21-22. The United States cited the *Basin 63 Accounting Order* as legal authority that explains the accounting rules and their departure from preexisting law. *See* U.S. Br. at 9, 18-20, 21-22, 37-39. While mistakenly arguing (State Br. at 31) that the departure is irrelevant to claim preclusion, the State does not argue (nor could it) that the *Basin 63 Accounting Order* is not final agency action on matters committed by law to IDWR. *See In re SRBA*, 157 Idaho at 393-94, 336 P.3d at 800-801.

Instead, the State argues that "it cannot and should not be assumed" that the *Basin 63 Accounting Order* "serves as a substitute for a fully developed administrative record and final

[7] A "contested case" is any [agency] proceeding * * * that may result in the issuance of an order." Idaho Code § 67-5240.

order of the Director on the Water District 65 accounting system." To the extent the State is arguing that a "fully developed administrative record" is a prerequisite for challenging the Basin 65 accounting procedures, the State's argument is misplaced. For reasons stated, the United States' supplemental claims do not challenge the Basin 65 accounting procedures. To the extent the State is arguing that the *Basin 63 Accounting Order* is not relevant for understanding the Basin 65 accounting procedures, the State is simply mistaken.[8] The State does not contend (and cannot show) that IDWR's accounting rule treating all reservoir inflows as diversions operates differently in Basin 65 from its operation in Basin 63. Nor does the State explain how the state engineer's expertise (*see* State Br. at 34) could matter on this issue. Whether Reclamation had discretion, prior to IDWR's accounting procedures, to determine when to exercise its reservoir storage rights is a question of law. That IDWR's accounting procedures eliminated any discretion possessed by Reclamation is beyond dispute.

B. This Court May Determine the Validity of IDWR's Accounting Rule on Diversions

In addition to explaining that claim preclusion does not apply (U.S. Br. at 29-40), the United States also explained (*id.* at 40-42) that the supplemental claims would be unnecessary if IDWR's accounting rule on diversions is set aside. Stated differently, if this Court determines

[8] The State argues (State Br. at 32, n. 37) that there are "significant differences" between the Payette River Basin (Basin 65) and the Boise River Basin (Basin 63). But none of the differences proffered by the State is relevant to the application of IDWR's accounting rule treating all inflows as diversions. Among other things, the proffered differences in the federal statutes and contracts that govern the operation of the reservoirs are irrelevant to whether historic reservoir operations resulted in beneficial-use water rights under State law.

that flows passed or released for flood control purposes are not properly counted toward the satisfaction of federal storage rights, even as an accounting expedient, there would be no legal basis for the United States supplemental claims.[9] *See* U.S. Br. at 5-6, 35.

Contrary to the State and Suez's argument (State Br. at 26-29, Suez Br. at 26-29), this Court has jurisdiction to address that issue on appeal. In arguing that the district court lacked jurisdiction (*id.*), the State and Suez mistakenly rely on this Court's decision on Basin-Wide Issue 17. *See In re SRBA*, 147 Idaho 385, 336 P.3d 792; *see also* U.S. Br. at 20-21 (explaining proceedings). In that case, this Court recognized that IDWR has broad authority to oversee the distribution of water to water rights and to choose accounting methodologies to determine when the quantity element of a water right is satisfied. *In re SRBA*, 147 Idaho at 393-94, 336 P.3d at 800-801. This Court held that the district court did not "abuse its discretion" when "declining to address when the quantity element of a storage right is considered filled" or in "stating that such

[9] As explained (U.S. Br. at 7), Black Canyon Irrigation District ("Black Canyon") objected to the United States' supplemental claims on the theory that the claims were unnecessary. The United States did not similarly object to its own supplemental claims, but did note that the issue of reservoir "refill" was then pending in the proceedings on Basin-Wide Issue 17. *See* R. 22 & n. 7. The United States advised that it would withdraw its supplemental claims as unnecessary if the district court determined, in the basin-wide proceedings, that the United States' decreed rights could be exercised consistent with flood-control operations. *Id.* That question was subsequently taken up in the "contested case" proceedings on the Basin 63 Accounting Procedures. *See* U.S. Br. at 9, 21-22. In its opening brief, the United States noted Black Canyon's objection and the related appeal regarding the *Basin 63 Accounting Order* to explain the relatedness of all pending appeals. *See id.* at 40-41. Thus, there is no merit to the State's argument (State Br. at 25-26) that the United States' "waived" a challenge it did not make to the district court's ruling on Black Canyon's objection. The United States presents its view herein on the jurisdictional question, solely in response to the State's extended argument on the issue (State Br. at 26-29).

a determination was within [IDWR's] discretion." *Id.* at 394, 336 P.3d at 801. In so holding, this Court did not find that IDWR has *exclusive* authority to resolve all legal issues relevant to the satisfaction of water storage rights. *Id.* Nor did this Court preemptively address the district court's jurisdiction to address the "refill" issue in connection with the adjudication of the United States' supplemental water-rights claim. *Id.*

The State also errs in relying on Idaho Code § 42-1401D. State Br. at 27. That section provides that "[r]eview of an agency action * * * shall not be heard in any water rights adjudication." Idaho Code § 42-1401D. But this mandate is limited to agency "action * * * subject to judicial review" under the Idaho APA. *Id.* As just noted, IDWR has not issued a final rule or order on its Basin 65 accounting procedures. *See* § 67-5201(3)(a) ("'agency action' means * * * the whole or part of a rule or order"). A district court's consideration of a legal issue that arises with respect to the adjudication of a water right does not constitute "review of * * * agency action" simply because the same issue arises in a related "contested case" proceeding.

In any event, as the United States further explained (U.S. Br. at 41), IDWR's *Basin 63 Accounting Order* is now before this Court in a related set of appeals. The question whether all reservoirs inflows are diversions is a legal issue common to those appeals (involving IDWR's *Basin 63 Accounting Order*), and the present appeals (involving the United States Basin 65 supplemental claims). This Court can and should resolve all of the appeals with an understanding of the interlocking legal issues.

III. The Merits of the Supplemental Claims Should Be Resolved on Remand

The State asserts (State Br. at 39) that the United States' supplemental claims raise issues requiring "careful consideration" that should not be decided in this appeal, and that the appeal is no place for "speculating about hypothetical injuries." Similarly, Suez argues (Suez Br. at 22) that the United States' supplemental claims raise "complicated issues" on the merits that cannot be decided on appeal but "would have to be remanded to the SRBA court." Yet both the State and Suez proceed to argue the merits of the claims and expound on the supposed harms that will be unleashed if the supplemental claims are confirmed. These arguments misconstrue the supplemental claims, are not pertinent to the appeal, and should be disregarded.

A. The United States Presented Sufficient Proof of Its Supplemental Claims

As explained in the United States' opening brief (U.S. Br. at 6 & n. 1), the United States' supplemental claims are based on undisputed historic stream-flow data showing flows into the Cascade and Deadwood Reservoirs. The United States claimed a priority date of 1966 for its supplemental claims because that was a year of historically high stream flows. The United States averred that in 1966, like other years with flows in excess of available reservoir capacity, the United States passed or released (for flood-control purposes) all stream flows in excess of the flows stored for irrigation and power use. Based on these actual "diversions" (inflows), the United States claimed the right to divert total annual inflow up to the amount recorded in 1966.

But the United States expressly limited its "use" rights to the amounts previously decreed.[10] *See* R. 20 (memo supporting supplemental claims); R. 824-29 (supplemental claims). In this manner, the United States claimed beneficial use of the last flows into the reservoir before irrigation use (i.e., the water physically stored after flood-control releases). In arguing (Suez Br. at 16-22) that "it will be no easy task to prove * * * up" these rights, Suez erects imaginary "hurdles" (*id.* at 17) that vanish once the United States' claims are properly construed.

First, Suez argues (*id.* at 18) that the United States "must show that the claimed water was not diverted and put to beneficial use under some other right." To the contrary, the United States claims extra diversions only to account for waters that are passed and released through the reservoir system and *not appropriated for use*. Because the supplemental claims do not assert beneficial use rights (to store water for irrigation and power uses) beyond the amounts already decreed, there is no threat of "hoarding or wasting" and the authorities Suez cites on those points (*id.*) are inapposite.[11] Nor is the State correct in arguing (State Br. at 22), that the limited nature of the supplemental claims is a question of "subjective" intent. When stating its claims, the United States specifically provided that the "total quantity appropriated" — i.e., the amount

[10] As explained (U.S. Br. at 5), the diversion right is reflected in the right claimed for storage; the use right is reflected in the right claimed for irrigation and power use "from storage."

[11] Suez's mathematical examples (Suez Br. at 19, 34) also fail to show "waste." In one breath, Suez mistakenly argues (*id.* at 34) that the physical "refill" that results from reservoir operation under the flood-control rule curves (pp. 6-7, *supra*) constitutes an improper enlargement of use rights. In the next breath, Suez concedes (Suez Br. at 19) that waters released during flood control operations do "nothing" and are not a water "use." Suez cannot have it both ways.

nominally diverted under the rule that all inflows are diversions — would be "limited" to the storage and use permitted under its decreed storage rights. R. 825, 827.

Second, Suez argues (*id.* at 19) that the United States cannot show beneficial use of the "second fill" water. But there is no genuine dispute that the United States stored and delivered water for irrigation and power during the years in question. Under Suez's view (and IDWR's accounting procedures), the beneficial use was not "as of right" under the United States' decreed rights, because the diversion limits were satisfied by first-available flows, which were passed and released before Reclamation fully filled the reservoirs and released water for irrigation use. But this reinterpretation of the decreed rights (which prompted the need for the supplemental claims) does not raise genuine disputes of fact about the beneficial use of "second fill" water.

Third, Suez argues (*id.* at 20) that the United States cannot show that "the additional storage under the [supplemental claims] was reasonable and necessary." Suez's argument is predicated on the general rule that diversions in excess of beneficial use are wasteful. *See Ward v. Kidd*, 87 Idaho 216, 226-27, 392 P.2d 183, 190 (1964). This rule cannot reasonably be applied in the context of IDWR's accounting procedures for on-stream reservoirs, where *unappropriated* inflows are counted as diversions. As the United States' explained (U.S. Br. at 16) and as Suez itself acknowledges in a footnote (Suez Br. at 42, n. 30), because the United States owes a duty of care to downstream communities, the United States' flood control operations are not "sloppy" and "waste[ful]" as Suez otherwise argues (Suez Br. at 20), nor a mere matter of "convenience" as the State implies (State Br. at 41). The United States reasonably "diverts" more water than necessary to fill its reservoirs — i.e., reasonably passes and releases inflows that otherwise

would be available to satisfy its storage rights — to meet its duty of care to downstream communities.

B. The United States' Supplemental Claims Are Not a Collateral Attack on the 2003 Partial Decrees

The State and Suez's failure to properly construe the United States' supplemental claims is also fatal to their arguments (State Br. at 40-44; Suez Br. at 24-26) that the supplemental claims are a "collateral attack" on the 2003 partial decrees that reaffirmed the United States' licensed and decreed rights for the Cascade and Deadwood Reservoirs after the Payette Adjudication was consolidated with the SRBA. *See* U.S. Br. at 4-5, 15-16. The State and Suez do not contend that the 2003 partial decrees have claim-preclusive effect. *See* State Br. at 40-44; Suez Br. at 24-26. Instead, they argue that the supplemental claims contradict limits allegedly imposed in the 2003 partial decrees. Those implied limits do not exist.

The 2003 partial decrees are based on the 1986 Payette Decree and the prior State licenses. The licenses confirmed rights to "use" water, for irrigation and power purposes, up to specified amounts tied to reservoir capacity. R. 719-20. The licenses did not purport to limit reservoir inflows to the stated amount of "use." *Id.* Since the watersheds regularly produce flows in excess of reservoir capacity and Reclamation had (and has) no ability to prevent inflows, such an interpretation is untenable. The "refill" issue arose only after IDWR determined, as a matter of water-rights accounting, that all inflows are to be counted as diversions. The only right asserted in the supplemental claims that arguably goes beyond the licensed and decreed rights is the claimed right, in years when total inflows exceed available

reservoir capacity, to pass or release unneeded inflows *before* physically filling the reservoirs for irrigation and power use. Because that issue was not presented in the proceedings on the 2003 partial decrees, the United States' supplemental claims cannot be a collateral attack on those decrees.

Nor is the State correct in arguing (State Br. at 40), that the United States "collaterally attack[ed]" the 2003 partial decrees by noting Black Canyon's objection that the supplemental claims are unnecessary. Should this Court determine that reservoir inflows released for flood control purposes cannot be counted toward reservoir storage rights — even as a matter of administrative expedience — such a ruling plainly would not "impeach" the 2003 partial decrees. *See* State Br. at 40 (citing *Wright v. Atwood*, 33 Idaho 455, 461, 195 P. 625, 627 (1921)). Such a ruling would simply mean that the decrees must be implemented on their plain terms in accordance with the conventional use of "diversion" (as limited to water appropriations).

C. The United States Supplemental Claims Do Not Threaten Junior Users or Water-Rights Administration

1. The Supplemental Claims Cannot Injure Other Water Users

Finally, there is no support for the various assertions by the State (State Br. at 36-44) and Suez (Suez Br. at 9, 18-19, 31, 37-38) that the United States' supplemental claims threaten injury to other water users or other "significant and adverse unintended consequences" (State Br. at 36). As explained (pp. 9-10, *supra*), the United States' flood-control operations — as distinct from the storage of water for power and irrigation use — do not remove water from the Payette River system; they impact water availability only as a matter of the timing of stream flows. If

Reclamation were to fill the reservoirs with first-available flows, Reclamation would be compelled to "spill" excess flows generally during times of peak flows and greatest flood risk. When Reclamation began flood-control operations around 1957, Reclamation started passing and releasing unneeded flows before fully filling the reservoirs in order to leave reservoir space for capturing peak flows and potential flood waters. If the United States' beneficial-use rights are confirmed, these longstanding stream flow patterns would continue, and the United States would retain priority rights in waters physically stored in the reservoirs.

The confirmation of these rights *cannot* injure other water users in the Payette River system for two reasons. First, any user who appropriated water (and water rights) under the river flow pattern that prevailed before federal flood-control operations began (or the 1966 priority date of the supplemental claims) would have a senior right. Confirmation of the United States' beneficial-use rights would not enable the United States to physically store any flows required to satisfy senior (pre-1966) downstream rights. Second, any users who appropriated waters of the Payette River system after 1966 acquired rights that are subject to the United States' senior beneficial-use rights and the river flow patterns resulting from flood-control operations. Confirmation of the United States' beneficial-use rights cannot injure junior (post-1966) users because it would not alter the stream flows that were available to junior users when they acquired their water rights and that would remain available for the satisfaction of those rights.

2. The State and Suez Misconstrue the Supplemental Claims

Because the State and Suez cannot show injury in light of the above circumstances, they rely instead on the notion that confirmation of the supplemental claims would cause "per se"

injury. *See* State Br. at 37, 41-42; Suez Br. at 31, 37. As the State and Suez note (*id.*), an increase in the amount of water diverted ordinarily constitutes an "enlargement" of a water right, and there is "per se injury to junior water users anytime an enlargement receives priority." *City of Pocatello v.* Idaho, 152 Idaho 830, 835, 275 P.2d 845, 850 (2012) (quoting *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005)). This "per se" injury rule was adopted, however, in the context of conventional diversions associated with "enlarged use[s]." *See A & B Irrigation Dist.*, 141 Idaho at 752, 118 P.3d at 84. Consistent with IDWR's accounting rule (that all inflows are diversions), the United States' supplemental claims assert diversion rights greater than use rights (rights to store for irrigation and power uses) solely to account for water passed through the reservoirs for flood-control purposes. More to the point, although the supplemental claims assert diversion rights greater than the United States' decreed rights (as interpreted by IDWR's accounting rule), the supplemental claims do not assert diversion rights greater than historical practice. The supplemental claims simply describe historical practice in accordance with IDWR's accounting rule. In other words, even if the supplemental claims implicate an "enlargement" in relation to the decreed rights, they do not seek such "enlargement" under the priority date of the decreed rights. They claim a junior priority date (of 1966), matching the date of historical "diversions" (inflows) toward beneficial use. Accordingly, the "per se" injury rule is not implicated.

The State and Suez also argue (State Br. at 37, 42-43, Suez Br. at 35-36) that the supplemental claims must be improper because they would give the United States control over all stream flows. As Suez acknowledges (Suez Br. at 40), however, on-stream reservoirs by

"their very nature * * * control the entire river." There is a fundamental difference between (a) controlling the river to regulate stream flows for flood-control purposes, and (b) appropriating all of the water of the river for beneficial use. By claiming the right to divert all flows (assuming all inflows to be diversions), the United States is not claiming the right to appropriate all river water or to control the distribution of all river water for water-rights purposes. In this regard, the State and Suez are simply mistaken in their assertions that the supplemental claims, if confirmed, would leave "no water legally available for use by junior appropriators," State Br. at 37,[12] or would "prevent future appropriations." Suez Br. at 42. To be sure, confirmation of the supplemental claims would preclude junior users from calling on water physically stored in the Cascade and Deadwood Reservoirs. But Reclamation must pass or release any water not needed to physically fill the reservoirs up to the decreed storage rights, and any user is free to appropriate or use any unappropriated flows, including all flows passed or released for flood-control purposes. Likewise, IDWR would remain free to monitor federal use of reservoir storage rights (e.g., to ensure a single physical fill considering prior-year carry-over) and to permit and license new appropriations of unappropriated water.

Finally, the State and Suez argue that confirmation of the supplemental claims would alter the "historic status quo" established by IDWR's 1993 accounting procedures, State Br. at

[12] This quotation is from the State's argument (State Br. at 37) addressing the alleged consequences of allowing the United States' decreed rights to remain in priority notwithstanding flood-control releases. The State similarly makes essentially the same argument (*id.* at 42-43) regarding the supplemental claims. The State is mistaken in both cases.

36, and thus "diminish the priorities of junior water rights developed since [1993]," Suez Br. at 21. But IDWR adopted the accounting procedures informally before the final adjudication of the United States' reservoir rights in the SRBA, the impact of the accounting procedures on the United States' storage rights remains unresolved, and reservoir operations did not change. Thus, the mere adoption of the 1993 accounting procedures did not alter the status quo for purposes of water appropriation. Moreover, the principal import of the 1993 accounting procedures was to remove the United States' ability to store water under its decreed rights after the date of "paper fill." As Suez acknowledges (Suez Br. at 35), the rationale for this rule — apart from mere administrative expedience — was to "incentivize" the United States to store first-available flows and thus leave later-in-season stream flows to other users. If the United States were to follow this course, flows after physical fill would generally arrive downstream when seasonal river flows are the highest, when flood risks are greatest, and when irrigators would have little (if any) ability to put the water to beneficial use. The State and Suez do not argue that post-1993 appropriators relied on that outcome (which has yet to occur); nor do they advocate for that result.

To the contrary, the State specifically notes (State Br. at 38, n. 44) that it is "not challenging or objecting to federal flood control operations," and Suez goes out of its way to construct a theory (Suez Br. at 44-47) as to how Reclamation may continue to "capture" and store "excess" water after "paper fill" as an "ancillary right." These arguments betray the State's and Suez's true agenda. As Suez acknowledges (Suez Br. at 45-46), the proposed "ancillary right" cannot be enforced in "priority" against any other water user; it is merely the ability to store water (by sufferance) until any

other water user claims it.[13] Thus, the "status quo" imagined by the State and Suez is one where flood control operations continue and where the waters physically stored in the reservoirs (after "paper fill") are made available for distribution by IDWR to junior appropriators. In this manner, in any year of flood-control releases, such other users would obtain the benefits of flood-control and priority rights in the stored waters, notwithstanding the fact that these other users — unlike Black Canyon and other contract space holders — do not pay for reservoir storage. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 114-115, 157 P.3d 600, 608-09 (2006) (contract space holders pay share of reservoir construction and operations and maintenance costs).

While the State and Suez argue (State Br. at 39; Suez Br. at 44-46) that the United States and the contract space holders have yet to be injured by the 1993 accounting procedures (which to date have largely been a paper exercise), no water user needs to show injury as a precondition to asserting beneficial use rights. Moreover, there can be no dispute that if the United States' supplemental claims are disallowed, the United States will be injured. The United States will lose the ability, in years where inflows exceed available reservoir capacity, to exercise its storage rights *as a matter of right* without discontinuing flood-control operations. It is no response for the State and Suez to argue (*id.*) that actual harm has yet to occur.

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[13] Suez argues (Suez Br. at 45-46) that "no other right holder may call for [the] release" of "excess" water, once captured in the federal reservoirs. When Reclamation physically stores natural flows that are not needed for and cannot be used in association with downstream water rights at the time of storage, the stored waters (which otherwise would be wasted) should not be subject to later delivery calls. *Cf. Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 386, 43 P.2d 943, 946 (1935) ("No one can make an appropriation from a reservoir * * * for the obvious reason that the waters so stored * * * are already diverted and appropriated * * *). But if Reclamation cannot store inflows after "paper fill" as a matter of right, the inflows (as natural flows) would be subject to future appropriation by downstream users.

IV. The State and Suez Are Not Entitled To Attorney Fees

For reasons explained above and in the United States opening brief, the United States' arguments on appeal are well grounded in law and fact and are meritorious. The State and Suez have not demonstrated any basis for their claims (State Br. at 44; Suez Br. at 47) for attorneys' fees under Idaho Code § 12-117, which authorizes attorney-fee awards to prevailing party only if the "nonprevailing party acted without a reasonable basis in fact or law."

In addition, the United States is not subject to attorney fee awards under Idaho Code § 12-117. As the State observes (State Br. at 44), the McCarran Amendment's waiver of sovereign immunity "submits the United States *generally* to state adjective law, as well as to state substantive law of water rights." *United States v. Idaho ex rel. Director, Idaho Dept. of Water Resources*, 508 U.S. 1, 8 (1993) (emphasis added) (construing 43 U.S.C. § 666(a)). But this "general" submission to "state adjective law" is not absolute. *Id.* at 7. The United States Supreme Court emphasized that waivers of sovereign immunity must be "unequivocally expressed," *id.* at 6, and that courts must be "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable" for "monetary exactions * * * in litigation." *Id.* at 8-9.

The McCarran Amendment provides "[t]hat no judgment for costs shall be entered against the United States." 43 U.S.C. § 666(a). In light of this provision, the United States Supreme Court held that Idaho may not collect *filing fees* from the United States under Idaho Code § 42-1414, despite the State's contention that filing fees are not like "costs," a term traditionally reserved for "items of expense incurred in litigation that a prevailing party is

allowed by rule to tax against the losing party." *Idaho*, 508 U.S. at 7-8. Attorneys' fee awards under Idaho Code § 12-117 are more like "costs" as defined above than the filing fees the United States Supreme Court has already held to be non-recoverable. Given the proviso prohibiting a judgment of "costs," the McCarran Amendment cannot be construed as providing a "specific waiver" for such attorneys' fee awards.[14] *See Idaho*, 508 U.S. at 8-9.

[14] At the time the McCarran Amendment was enacted, the United States was generally immune from any method of cost-shifting in litigation, whether by a judgment for costs or by otherwise requiring litigants to pay litigation expenses, attorneys' fees, or interest. *See United States v. Chem. Found.*, 272 U.S. 1, 20-21 (1926) (recognizing the United States' "sovereign prerogative not to pay costs"); *see also The Antelope*, 25 U.S. (12 Wheat.) 546, 550 (1827). If Congress had intended to waive the United States' long-standing immunity from costs and attorneys' fees, it would have done so explicitly. *See United States Dept. of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (Congress is presumed to be aware of the "common rule" that "any waiver of the Government's sovereign immunity must be unequivocal").

CONCLUSION

For the foregoing reasons and the reasons stated in the United States' opening brief (May 12, 2017), this Court should reverse the decision of the district court dismissing the United States' supplemental claims or, in the alternative, affirm the district court on the grounds that the decreed rights for Cascade and Deadwood Reservoirs enable the United States to fill the reservoirs up to the decreed amounts after releases for flood-control purposes.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

In accordance with I.A.R. 20, I HEREBY CERTIFY that on this 21st day of July, 2017, I caused true and correct copies of the *Reply Brief for Appellant the United States of America* and the *Addendum to the United States Brief as Appellant* to be filed and served in the quantities and by the methods indicated below, and addressed to the following:

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