6-9-2017

In re SRBA Case No. 39576 Respondent's Brief Dckt. 44636

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re SRBA Case No. 39576

SUBCASE NOS. 65-23531 & 65-23532

BLACK CANYON IRRIGATION DISTRICT,

Appellant,

v.

STATE OF IDAHO and SUEZ WATER IDAHO, INC.,

Respondents.

Supreme Court Docket No. 44636-2016

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

STATE OF IDAHO'S RESPONSE BRIEF

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

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

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

The District Court agreed the Late Claims were barred by *Payette Decree*, but rejected the Special Master's "alternative" recommendation on the grounds that he exceeded his jurisdiction in reaching administrative questions committed to the Idaho Department of Water Resources ("IDWR"), and by impermissibly revisiting decreed water rights. In this appeal, BCID essentially requests that this Court re-adjudicate the Decreed Water Rights on the basis of BCID's challenges to IDWR's administration of the Decreed Water Rights. Despite BCID's

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[1] The Late Claims are water right claim nos. 65-23531 (Cascade Reservoir), R.38, and 65-23532 (Deadwood Reservoir). R.2591. In this brief, the record will be cited by "R." followed by the page number, without the leading zeros (and without what appears to be an inadvertent duplication of the page numbers). Transcripts will be cited by "Tr." followed by the date, page number, and line number. Not that the transcript of the hearing of February 16, 2017, has a clerical error; it is incorrectly dated as February 16, 201**6**. *See* R.2630 ("A hearing on the objections was held before this Court on February 16, 2017.")

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

attempt to re-cast this case as presenting a vaguely-defined "flood control effect question" of "first impression,"[3] BCID's arguments unavoidably reduce to collateral attacks on the Decreed Water Rights, administrative challenges to IDWR's accounting system in the Payette River Basin,[4] or both. The State of Idaho ("State") respectfully requests that this Court affirm the District Court in full.

B. PROCEDURAL BACKGROUND

In January 2013, the United States moved for permission to file in the SRBA "beneficial use claims based on the storage and beneficial use of water prior to 1971." R.19; *see also* R.39, 2592 ("Basis of Claim: BENEFICIAL USE") (capitals in original). The proffered claims asserted water rights for federal reservoirs in Basin 1 (Snake River upstream from Milner Dam), Basin 21 (Henrys Fork), Basin 37 (Little Wood River), Basin 63 (Boise River), and Basin 65 (Payette River). R.17. Multiple irrigation districts in Basin 1 and in Basin 63 also moved for permission to file beneficial use late claims for the federal reservoirs in their basins. Tr., May 21, 2013, pp.4, 23, 36-37. BCID did not seek permission to file late claims; nor did any other irrigation district in the Payette River Basin (Basin 65) seek to file late claims.[5]

The District Court in May 2013 granted permission to file all late claims except one,[6] and referred them to IDWR for investigation and recommendation. R.41; Tr., May 21, 2013, pp.35-

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[3] *Appellant's Opening Brief* (May 12, 2017) ("*BCID Brief*") at 1, 12, 38.

[4] *See In re SRBA, Case No. 39576, Subcase No. 00-91017*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) ("*Basin-Wide Issue 17*") ("Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.")

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

[6] The exception was a claim by several irrigation districts that identified, as the basis of the claim, a water right license for which an SRBA partial decree had already issued. The claim sought to bring into the SRBA a challenge

36, 39, 43. The Director filed reports in December 2013, recommending the Late Claims at issue in this appeal be disallowed as "not claimed in prior adjudication." R.44, 2594. The United States filed objections to the Director's reports, R.52, 2602, and the State filed responses to the United States' objections. R.56, 2606. BCID did not file objections or responses; nor did any other Basin 65 irrigation district file objections or responses.

The District Court held a status conference hearing on September 9, 2014, to address the late claims and this Court's remand of Basin-Wide Issue 17. *In re SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 336 P.3d 792 (2014) ("*Basin-Wide Issue 17*"). The parties and the District Court agreed that nothing of Basin-Wide Issue 17 remained to be resolved in the SRBA. *See, e.g.,* Tr., Sep. 9, 2014, p.27, l.24—p.28, l.2. ("I agree there's nothing left to do on Basin-Wide Issue 17, I didn't want to make a ruling on that or a decision on that until I heard from everybody, but that's my feeling too.").

There was a dispute, however, over the extent of "overlap," if any, between the late claims and then-pending challenges to IDWR's administration of the United States' reservoir water rights in Basin 1 and Basin 63, and over whether the late claims were "necessary." *See, e.g.,* Tr., Sep. 9, 2014, p.13-14; p.19, l.7-10; p.21, l.25; p.23, l.8; p.29, l.7; p.33, l.14-20; p.34, l.7-9, 23; p.35, l.8 p.36, l.12. The State argued that as beneficial use-based claims, the late claims had nothing to do with IDWR's post-1971 accounting procedures and should be dismissed if, as the irrigation districts seemed to argue, the late claims were "predicated on the current accounting which has changed over time." Tr., Sep. 9, 2014, p.35, l.8-9; *see also id.*, pp.25-30 ("If accounting is the issue, I don't think there's anything more to proceed on in those late claims.") (argument of State's attorney). Counsel for the some irrigation districts responded

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to the IDWR's administration of the existing partial decree. Tr., May 21, 2013, pp.27-35. The District Court subsequently issued an order denying permission to file the claim. ADDENDUM, Tab A.

"it's not about attacking the accounting in these late claims. Not at all." Tr., Sep. 9, 2014, p.36, l.3-4. Counsel for the United States did not disagree with this representation; indeed, counsel for the United States said almost nothing over the entire course of the argument. BCID did not participate in the hearing, but BCID's appellate counsel participated on behalf of a different irrigation district. Tr., Sep. 9, 2014, pp.5-6, 24.

The District Court allowed the parties to address these questions in "scheduling proposals." Tr., Sep. 9, 2014, pp.36-37; p.40, l.9-13; R.69-122. Multiple parties, including the State, the Surface Water Coalition, and the Boise Project Board of Control, submitted "scheduling proposals." R.73-117. The United States and BCID did not. The Boise Project Board of Control in its scheduling proposal argued that before reaching the merits of the late claims, the District Court had to resolve the question of whether the late claims were "duplicative" of the previously decreed water rights for the United States' reservoirs and therefore "not necessary." R.75. The State argued that the only question posed by the late claims was whether the water claimed was actually put to beneficial use before 1971, and therefore the late claims should be referred to the Special Masters for resolution on this question. R.81, 83-86, 87-89; *see also* R.85 n.9 (arguing that the existing water right licenses and decrees "are not at issue in these subcases").

No party moved to re-open the Decreed Water Rights, which were final, conclusive, and binding on all parties under the *Final Unified Decree*. R.831, 839-40.[7] The District Court adopted the State's proposal and referred all late claims to the Special Masters. R.122. The Late Claims in this appeal were referred to Special Master Theodore R. Booth, R.129, 2611, and in

[7] While the SRBA had retained jurisdiction over the Late Claims in the *Order Regarding Subcases Pending Upon Entry Of Final Unified Decree* (Aug. 26, 2014), it had <u>not</u> retained jurisdiction over the Decreed Water Rights. R.61-62, 859-60.

April 2015 he approved a trial schedule based on a stipulation by the State, the United States, and Suez Water Idaho Inc. R.131.

BCID, which was not a party, filed a motion in May 2015 to vacate the trial schedule under the subcase numbers for both the Late Claims and for the by-then closed subcases for the Decreed Water Rights. R.137. BCID did not, however, state or imply that it sought "answer to the question of what effect, if any, flood control releases from on-stream reservoirs operated for the dual purposes of flood control and beneficial use (*i.e.,* irrigation) storage have on the existing storage rights for Deadwood and Cascade Reservoirs." *Appellant's Opening Brief* (May 12, 2017) ("*BCID Brief*") at 1. Rather, BCID asserted that settlement negotiations with IDWR were not going as BCID had expected. R.134-37, 148.

The State opposed non-party BCID's motion to vacate the trial schedule. R.139. At the hearing the Special Master allowed BCID to orally move to participate (intervene), and granted the intervention after BCID withdrew its filings under the Decreed Water Rights. R.1579 (Tr., May 18, 2015, p.6, l.20—p.7, l.24). BCID acknowledged that intervenors take the case as they find it, R.1580 (*id.*, p.11, l.9-14), and pursuant to the State's request, the Special Master required BCID to file an I.R.C.P. 24 statement of claims and defenses. R.1582 (*id.*, p.21, l.21—p.22, l.18); R.1583 (*id.*, p.26, l.22-25); R.1584 (*id.*, p.29, l.8—p.30, l.1).[8]

BCID's subsequently filed statement of claims and defenses asserted that the Decreed Water Rights "already provide the requisite legal basis for filling reservoir space held open, or

[8] The case as BCID found it had nothing to do with IDWR's administration of the Decreed Water Rights, as the United States confirmed in repeated representations during subsequent proceedings. *See, e.g.,* Tr., Sep. 22, 2016, p.32, l.6-7 ("the supplemental storage claims do not challenge the accounting"); *id.*, p.20-21 ("We're not asking this Court to order the director administer the water rights in any way differently than he presently is"); R.1909-10 ("The Late Claims] do not seek to address a question of administration interpretation . . . . Rather the [Late Claims] accept the Director's interpretation of the [Decreed Water Rights] and his accounting of them.") (bold font and capitals omitted); R.2536 ("Here we've accepted the Director's interpretation that there is physical fill of water and paper fill of water, and those are two different things") (Tr., Oct.2, 2015, p.44, l.1-2); R.2201 ("[State counsel's] assertion that we are attempting to challenge the accounting system, that is simply not the case") (Tr., Mar. 1, 2016, p.73, l.22-24).

evacuated for flood control purposes." R.159. It made no mention of any question of "first impression" as to "flood control effects" or "what effect, if any, flood control releases have on BOR's existing storage rights." *BCID Brief* at 1, 2 n.2, 4, 12, 13, 20, 38-40. Rather, BCID supported its position with contentions about how IDWR should account for the distribution of water to the Decreed Water Rights. R.160-61. The State moved for reconsideration on grounds that the BCID's purpose for intervening was to litigate the nature, extent, and/or administration of Decreed Water Rights, including issues resolved in this Court's *Basin-Wide Issue 17* decision. R.158-62, 361, 1588-1604. The Special Master denied the State's motion. R.430.

In August 2015 the State moved for summary judgment that the Late Claims should be disallowed because they were barred by the *Payette Decree*, were collateral attacks on the Decreed Water Rights, impermissibly sought administrative interpretations of the Decreed Water Rights, and/or were intended to obtain judicial review of IDWR's administration of the Decreed Water Rights. R.1571, 1521, 1529, 1552. The Special Master agreed the *Payette Decree* barred the Late Claims and in November 2015 recommended they be disallowed on that basis, without addressing the remainder of the State's summary judgment motion. R.1984, 1998-99 ("*Recommendation*"). The Special Master affirmed his original conclusion in April 2016, after considering motions to alter or amend. R.2206, 2221. But based on arguments raised by BCID, the Special Master also made the "additional" or "alternative" recommendation that the Late Claims be disallowed because the water "had already been appropriated" by the Decreed Water Rights ("*Alternative Recommendation*"). R.2215-16, 2221, 2518.

All parties filed "challenges" to the Special Master's recommendations. R.2223, 2231, 2234, 2242. The District Court in its *Memorandum Decision And Order On Challenges* (Oct. 7, 2016) ("*Challenge Order*") affirmed the Special Master's original recommendation that the

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

BCID filed a notice of appeal requesting, among other things, that several documents and a transcript from separate SRBA subcases addressing late claims for the federal reservoirs in the Boise River Basin (Basin 63) be included in the clerk's record in this case. R.2564, 2566, 2570. They were not included, and BCID objected, arguing the Basin 63 documents had to be included in the record because they were "directly relevant" and "it would be prejudicial to omit them." R. 2622-24. At the hearing on its objection, BCID argued this case "is a legal question regarding what the impacts of flood control release are on the existing storage rights." Tr., Feb. 16, 201[7], p.30, l.20-22. The District Court responded, "that's not what we're dealing with here. We're dealing with supplemental water rights for late claims for supplemental water rights for flood control." *Id.*, p.30, l.23—p.31, l.1. The District Court denied BCID's request to include the Basin 63 documents and transcript, finding that the Basin 63 documents were not part of the record, that the District Court "did not consider or rely upon those documents," and that they were "irrelevant" to this case. R.2631; *see also* Tr., Feb. 16, 201[7], p.40, l.16-17 ("those materials of Basin 63 are not relevant and the Court did not consider or rely on those materials in arriving at its decision.").

BCID also made a last minute request at the hearing to include in the record the District Court's *Memorandum Decision and Order* in the "challenge" proceedings on the Boise River Basin late claims, on the grounds that the District Court's *Challenge Order* in these case

included a block quote from the Boise River Basin challenge order. R.2519. The District Court denied this request as well. Tr., Feb. 16, 201[7], p.40, l.3-18. The District Court explained it had quoted that particular order only because "it was fresh, as an example, in everyone's mind" of "a law of the case proposition," *id.*, p. 37, l. 11-12; *id.*, p.40, l.11-12, and the District Court "could have cited to numerous other examples in the SRBA" that "relied on that same principle." *Id.*, p.37, l.13-16; R.2630-32.

C. STATEMENT OF FACTS.

A general adjudication of rights to the use of the waters of the Payette River Basin was commenced in 1969 pursuant to chapter 14 of title 42 of the Idaho Code. R.2513-14.[9] The United States was joined and filed water right claims for Cascade and Deadwood Reservoirs based on pre-existing water right licenses, and an additional claim for Deadwood Reservoir based on "beneficial use." *Id.*; R.504-11; *BCID Brief* at 12. The United States did not file claims for the beneficial use-based water rights asserted by the Late Claims. R.2512-13; R.504-14, 455-86.[10] The "vast majority" of the water right claims in the Payette Adjudication were "fully adjudicated" by the *Payette Decree* (January 21, 1986), which also exhaustively listed all contested claims remaining to be resolved. R.2512-13; R. 455-86. The Payette Adjudication was consolidated with the SRBA in 2001. R.2512. The United States filed SRBA claims for the Decreed Water Rights based on the *Payette Decree*, R.772, 776, 778, 781, 783, 786, 789, and partial decrees for those claims issued in 2003. *See* R.2518 (*Challenge Order*); R.544, 551, 555, 557 (partial decrees). The partial decrees identify the United States as the owner of the Decreed Water Rights. R.544, 551, 555, 557. While the partial decrees do not include the "remark" this

[9] ADDENDUM, Tab B (1969 version of chapter 14, title 42, Idaho Code).

[10] *Brief for Appellant the United States of America* (Supreme Court Docket No. 44635-2016) (May 12, 2017) ("*US Brief*") at 13-14. The State requests, pursuant to I.R.E. 201, that this Court take judicial notice of the *US Brief*.

Court ordered to be included in the partial decrees for the United States storage water rights in the Boise River Basin, *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007), "as a matter of Idaho constitutional and statutory law title to the use of the water" appropriated by the Decreed Water Rights "is held by the consumers or users of the water." *Id.* "Irrigation organizations" such as BCID "act on behalf of the consumers or users to administer the use of the water . . . in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations." *Id.*

Water District 65 (Payette River Basin) was established in 1989, and was originally limited to the area downstream from Black Canyon Dam. R.573 (transcript of I.R.C.P. 30(b)(6) deposition of the United States, p.54, l.19-25); R.573 (*id.*, p.43, l. 16-25, p.44, l.16-25). Before the water district was established, there was no administration "whatsoever" of water rights in the Payette River Basin. Tr. Sep. 22, 2016, p. 24, l. 13-14 (argument of counsel for the United States); R.573 ("So prior to that, there was no watermaster. There was no accounting, per se.") (transcript of I.R.C.P. 30(b) (6) deposition of the United States, p.55, l.2-3).

In 1991-92, the United States' methods of accounting for the use of stored water led to "problems" in determining storage use and carryover, and raised questions of "how to avoid similar problems" in the future. R.573-74 (*id.*, pp.57-58). As a result, Water District 65 was extended to include the area upstream from Black Canyon Dam, R.570 (*id.*, p.44, l.23-24, p.44, l.20-25), and IDWR "offered [its] water accounting system to the water district as a means of determining reservoir fill and use." R.574 (*id.*, p.58). The United States "worked together" with IDWR to implement the accounting system, *id.*, and it began operating in 1992-93. *Id.*; *BCID Brief* at 10.

In 2012, disputes arose in the SRBA subcases for American Falls and Palisades Reservoirs "over the effect flood control releases have on storage water rights" that do not have "refill" remarks. *Basin-Wide Issue 17*, 157 Idaho at 390, 336 P.3d at 797. While both the United States and the State asserted that a "refill" remark was "'necessary,'"[11] the United States proposed a remark in which "refill" would occur "under the priority date" of the water right, while the State proposed a remark in which "refill" would be "incidental and subordinate to all existing and future water rights." *Id.* at 388, 336 P.3d at 795. This led BCID and several Boise River Basin irrigation districts to petition for designation of an SRBA "basin-wide issue" because the United States' water rights for their reservoirs had been decreed "without a remark on refill rights," *id.*, and both the State and the United States "have taken the position that a remark is 'necessary.'"[12]

The issue quickly reduced to a dispute over challenges to IDWR's methods of accounting for the distribution of water to the United States' reservoir water rights, and the Watermaster for Water District 65 testified in an affidavit submitted by the State that the "refill" remark proposed by the State "is consistent with how the water rights for the federal reservoirs in Water District 65 have been administered during my tenure." R.1485. During subsequent proceedings before the Special Master on the Late Claims, the Watermaster wrote to the Governor "in support of the

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[11]ADDENDUM, Tab C (*Petition To Designate Basin-Wide Issue, In re SRBA, Case No. 39576, Subcase No. 00-91017* (Jun. 8, 2012) at 2).

[12] The United States subsequently retreated from its position that a "refill" remark was "necessary," after the Special Master presiding over the American Falls and Palisades Reservoir subcases (former Special Master Terrence A. Dolan) denied the State's summary judgment motion in those proceedings. R.927. The United States now appears to be taking the position that the Decreed Water Rights "already include the right to fill the reservoirs after flood control releases." *US Brief* at 40. The real issue is not about whether "refill" is allowed, however, but rather whether it is "under priority"—which are entirely different questions. *See Basin-Wide Issue 17*, 157 Idaho at 390, 336 P.3d at 797 ("As the SRBA court noted, '[T]he crux of the issue [is] whether Idaho law authorizes the refill of a storage water right, under priority, where water diverted under that right is released for flood control.'") (copy of quoted page of the District Court's *Order Designating Basin-Wide Issue, In re SRBA, Case No. 39576, Basin-Wide Issue 17, Subcase No. 00-91017* (Sep. 21, 2012), included in ADDENDUM, Tab D.)

State of Idaho's, Department of Water Resources, water right accounting system, and the method used to account for the re-fill of on-stream reservoirs after flood control releases." R.2171.[13]

While *Basin-Wide Issue 17* was pending before the District Court, the several motions for permission to submit late claims were filed. The United States represented that its late claims, including the Late Claims at issue in this appeal, are "beneficial use claims based on the storage and beneficial use of water prior to 1971." R.19. The United States never stated or suggested that the Late Claims presented a "flood control effect question" of "first impression," *BCID Brief* at 1, 2 n.2, 4, 12, 13, 20, 38-40, or required a preliminary determination of whether the Late Claims were "unnecessary and duplicative of the existing storage rights." *Id.* at 3. None of the irrigation districts that filed late claim motions made such representations, either. *See generally* Tr., May 21, 2013, p.20, l.19—p.43, l.11 (hearings on late claim motions).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

- Whether The Late Claims Are Barred By *Payette Decree* and the doctrine of *res judicata*;
- The BCID's appeal is a collateral attack on the Decreed Water Rights;
- Whether BCID's challenges to the Water District 65 accounting system may be heard in this appeal; and
- Whether the State is entitled to an award of attorney fees on appeal.

III. ARGUMENT

A. STANDARD OF REVIEW

BCID appealed from the District Court's *Challenge Order*, in which the District Court reviewed the Special Master's summary judgment decision. Thus, the summary judgment

[13] The Watermaster also wrote that he was "in direct agreement with the State of Idaho's water right accounting and storage accounting methods . . . . because they properly apply the Prior Appropriations Doctrine, they properly administer the water rights, and the methods encourage the efficient operation of a basin with a storage system." R.2171.

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

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

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

1. The *Payette Decree* Bars The Late Claims.

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

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

failed to claim such water rights has forfeited such rights as provided in Section 42-1411, Idaho Code.

R.2512 (quoting *Proposed Finding*) (italics and underlining in *Memorandum Decision and Order*); *see also* R. 524 (*Proposed Finding*). The *Payette Decree* also listed the "exceptions," R.452, 2512—that is, the only claims that remained to be resolved—in "Exhibits" attached to the decree. R.455-86.[14] "Of significance, the partial decree was certified by Judge Doolittle as a final judgment." R.2513.

As both the Special Master and the District Court concluded, the language of the *Payette Decree* is "plain and unambiguous," and compels three conclusions. R.2513. First, the *Payette Decree* is a "final judgment" and "conclusively establishes a list of *all* rights on the system established before October 19, 1977." *Id.* (italics in original). Second, the final judgment "extinguishes the claims of any water right holder who, being joined to the action, failed to claim a water right he asserts was established prior to that date." *Id.* And finally, "the late claims now asserted, if they were ever valid, were extinguished by operation of the plain language of the final judgment." *Id.*[15]

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

The District Court was also correct in concluding the Late Claims are barred by *res judicata* principles. R.2514-17. *Res Judicata* "bars a subsequent action between the same parties upon the same claim" or "claims 'relating to the same cause of action . . . which might have been made" in prior litigation. *Maravilla v. J.R. Simplot Co.*, 161 Idaho 455, 458, 387 P.3d 123, 126 (2016) (citation omitted; ellipses in original)). Claims are precluded when the prior

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

[15] In contrast to the United States, BCID concedes the *Payette Decree* incorporated the *Proposed Finding*, and does not contend the *Payette Decree* lacked independent preclusive effect. *BCID Brief* at 30-31; *see US Brief* at 24 ("no independent preclusive effect").

action involved (1) the same parties, (2) the same claim, and (3) a final judgment. *Id.* The parties are the same in this case because "each party to the Payette Adjudication is also a party to the SRBA," R. 2514, and the "final judgment" requirement is satisfied because the *Payette Decree* was certified as a "final judgment." R.2513, 453, 489.

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

It follows that late claims could and should have been claimed in the *Payette Adjudication*, which commenced in 1969. Indeed, the United States was obligated to bring the Late Claims forward in the Payette Adjudication, because it was a general stream adjudication. *See* R.2514 ("had a full and fair opportunity (indeed an obligation) to timely assert its water right claims . . . in that proceeding.") (parenthetical in original). The Late Claims are therefore barred by principles of *res judicata*. *Maravilla*, 161 Idaho at 458, 387 P.3d at 126 ("Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims 'relating

to the same cause of action . . . which might have been made."') (citation omitted) (ellipses in original); *see also* R.2517 ("Claimants failing to have their water right or a portion of their water right adjudicated in the prior adjudication are barred from seeking redress in the SRBA."); R.445 ("The SRBA cannot serve as a second opportunity for parties and their successors-in-interest to re-adjudicate their prior decreed or disallowed water rights.").

C. BCID'S INTERPRETATION OF FORMER IDAHO CODE § 42-1411 IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE AND WOULD UNDERMINE THE FINALITY OF WATER RIGHT DECREES.

BCID argues the *Payette Decree* does not bar the Late Claims because the preclusion and forfeiture provisions of the statute it referenced, former Idaho Code § 42-1411, applied only to water users "who utterly failed to appear and submit evidence of their claimed water use." *BCID Brief* at 32. This is not what the statute said, however.

Rather, the statute provided that it applied to "any water user who has been joined and failed to appear and submit proof of his claim." Idaho Code § 42-1411 (1969) (underlining added).[16] The requirement, in other words, was for each water user joined to a general stream adjudication to appear and submit proof on each and every potential claim. Consequently, all potential claims of water users joined to an adjudication for which no filing was made or no proof submitted were "barred" and "forfeited," *id.*, or "extinguished," as the District Court put it. R. 2513. The language of the *Payette Decree* confirms this interpretation: "[a]ny water user who heretofore diverted surface water . . . and who, upon being joined to this action, failed to claim such water rights has forfeited such rights as provided in Section 42-1411, Idaho Code." R. 2512, 524 (first underlining added; second underlining in original). The United States was joined but failed to file claims for the water rights subsequently asserted in the Late Claims, and

[16] ADDENDUM, Tab B.

therefore was "amongst the class of water users" subject to the preclusion and forfeiture provisions of former Idaho Code § 42-1411. *BCID Brief* at 31.

Moreover, BCID's alternative interpretation of former Idaho Code § 42-1411 is implausible because it would undermine the finality of a general stream adjudication. This Court has held that "'[f]inality in water rights is essential.'" *IGWA v. IDWR*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016) (citation omitted). Indeed, the District Court held that finality is the "fundamental" and "core" purpose of a general stream adjudication proceeding under Idaho law:

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

R. 2515.

BCID's interpretation of former Idaho Code § 42-1411 assumes the Legislature intended that no general stream adjudication would ever be final or conclusive as the parties who actually did appear and submit proof on any claim. Rather, they would be allowed to make an unlimited number of additional claims into the future, simply by alleging new evidence had been discovered or by offering novel argument or a new legal theory. This would undermine the "fundamental" and "core" purpose of a general stream adjudication. R. 2515. BCID's interpretation of former Idaho Code § 42-1411 must therefore be rejected as a matter of law. *See The David & Marvel Benton Trust v. McCarty*, 161 Idaho 145, 384 P.3d 392, 398 (2016) ("This Court will not read a statute to create an absurd result.").[17]

[17] The parties to the Payette Adjudication clearly did not have BCID's view that they would be free to file additional claims in the future. The *Payette Decree* included an exhaustive list of the "contested" claims that remained pending, and also listed the stipulations and orders deemed to have "amended" the Proposed Finding—including a stipulation resolving the United States' objection the Proposed Finding. R. 452-52, 455-86. There would have been no reason to identify these "exceptions" and "amendments" had the district judge (Judge Jim R. Doolittle) and the

Further, the record contradicts BCID's assertion that the District Court's finality concerns were "unfounded." *BCID Brief* at 33. To the contrary, as the District Court said in the hearing on the parties' challenges to the Special Master's recommendations, it is not unusual to have situations where historic administration was "in a certain way and nobody has brought it up in the SRBA" and "the rights go to decree." Tr., Sep. 22, 2016, p.25, l.9-10. And then later "that water users says, hey, wait a minute, I'm not getting—the water isn't being administered the way it's historically been administered, but there's nothing in the decree that memorializes that." *Id.*, l.14-18. In fact, the District Court said, "this happens a lot." *Id.*, l.8. The District Court's finality concerns were indeed well founded—and based on first-hand experience.

D. THE LATE CLAIMS WERE RIPE IN 1969 AND COULD HAVE BEEN ASSERTED IN THE PAYETTE ADJUDICATION.

BCID argues that *res judicata* does not bar the Late Claims because of two "exceptions" to the doctrine: "(1) the might have and should litigated exception; and (2) the new facts/ripeness exception." *BCID Brief* at 35. BCID argues that "both exceptions apply in this case." *Id.* at 37. These are not "exceptions" to the doctrine of *res judicata.* Rather the so-called "exceptions" are simply two different ways of expressing the basic principle that claim preclusion applies when claims could have and should have been asserted in prior litigation. But regardless of the label applied to it, this legal principle does not rescue the Late Claims.

As the District Court recognized, the "exceptions" BCID identifies reduce to assertions that the Late Claims were "not ripe" at the time of the Payette Adjudication. R.2516 (citing *U.S. Bank Nat'l Assn. v. Kuenzli*, 134 Idaho 222, 226, 999 P.2d 877, 881 (2000)). That is not true. R.2516. The Late Claims speak for themselves and explicitly assert that the claimed beneficial

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parties viewed the *Payette Decree* and former Idaho Code 42-1411 as having no preclusive effect on the parties who actually had made appearances.

use took place no later than September 30, 1965.[18] R. 38-39, 2591-92. It should go without saying that a claim to a water right based on actual beneficial use alleged to have occurred in 1965 could have been filed in the Payette Adjudication, which did not commence until four year later. R.2512. As the District Court stated, "[by] their very nature" the Late Claims were ripe in 1969:

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

R.2516.

This fact is not altered by BCID's contention that it was a "chronological impossibility" to challenge in the Payette Adjudication a system water distribution accounting that was not adopted until 1992-93. *BCID Brief* at 38. To the contrary, the "impossibility" of challenging IDWR's accounting methods at the time of the Payette Adjudication simply confirms that the Water District 65 accounting system has nothing to do with the Late Claims. By definition, a water right claimed under the constitutional method of appropriation cannot be based on events occurring after 1971. *See Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) ("'new appropriations could not be made under the constitutional method after 1971'") (citation omitted); *Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604 ("Since 1971 a party seeking a surface water right must file an application with the IDWR, obtain a permit, and perfect that right by obtaining a license.").

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

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

These evidentiary burdens cannot be carried by pointing to (much less challenging) the accounting system adopted in Water District 65 in 1993. The Water District 65 accounting system says nothing about how much of what BCID calls "'second-in' water" was captured in the reservoirs "after the flood risk wane[d]" in 1965, *BCID Brief* at 8; much less the amount (if any) of this "supplemental" storage, *id.* at 3, 35, that was actually applied to beneficial use by irrigators in that year after their primary storage supplies were exhausted.[19] *See Barron v. IDWR*, 135 Idaho 414, 416, 18 P.3d 219, 221 (2001) (referring to "a 'supplemental right'" as "an additional appropriation of water to make up for a deficiency in supply from an existing water right"). As a matter of fact and law, the BCID's argument that it was a "chronological impossibility" to challenge the Water District 65 accounting system in the Payette Adjudication, *BCID Brief* at 38, has no relevance to whether the Late Claims were ripe at the time of Payette

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

Adjudication. And, it certainly does not resurrect beneficial use-based claims that were already precluded in 1993.

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

Also ripe at the time of the Payette Adjudication was any claim "necessary to preserve the historic storage and use or post flood-release water," *BCID Brief* at 14, or for "second-in' water—that which is stored and retained for end beneficial use after the flood risk wanes." *Id.* at 8. BCID asserts that the United States has operated Cascade and Deadwood Reservoirs "in this dual purpose, rule-curve based flood control fashion (*i.e.,* 'spill and fill') since at least 1957," *BCID Brief* at 9, while the Payette Adjudication commenced years later, in 1969. R.2512.

As a matter of law, however, such a claim could not assert a priority right to a system of "spill and fill" storage operations. *BCID Brief* at 9. Idaho water rights protect the beneficial use of water. *See IGWA*, 160 Idaho at 133, 369 P.3d at 911 ("'The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate.'") (citation omitted) (brackets in original). Storage facility operations are not themselves a beneficial use of water, as this Court has recognized. *See Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 604 ("There is no dispute that the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities."); *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 209, 157 P.2d 76, 81 (1945) ("Respondent operating company merely diverts, conveys, stores and distributes, it does not as such apply any water to a beneficial use, nor do the constituent organizations in the other reservoirs"); *Washington Cty. Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935) (stating that stored water is "impressed with the public trust to apply it to a beneficial use").

Rather, a historic system of reservoir operations such as that described by BCID is addressed, if necessary, through administrative provisions or "remarks" in water right decrees.

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

Further, claims for such administrative provisions *should* have been filed, because as BCID admits, the United States' "spill and fill" system makes irrigation storage secondary to flood control objectives. As BICD puts it, the water actually retained for beneficial use is "*second-in*' water," that is, water stored "*after* the flood risk wanes." *Id.* at 8 (italics and underlining added); *see also id.* at 14 (referring to the storage and use of "post flood-release water"). In short, the United States' "dual purpose, rule-curve based flood control" system of storing water, *BCID Brief* at 9, necessarily puts irrigators' stored water supplies at risk. If the United States overestimates the amount of "second-in" runoff, and/or releases too much water early in the year, the reservoirs may not fully fill before the flood runoff period ends. As the District Court recognized, it "should not have been an arcane proposition" to seek an administrative provision or remark "to memorialize a certain method of reservoir operation to account for flood control." R.2516-17.

A remark "to memorialize a certain method of reservoir operation to account for flood control," R.2516-17, also could have been claimed in the SRBA proceedings on the Decreed Water Rights. The District Court ordered that such a remark be included in the partial decree for the Lucky Peak Reservoir water right. *BCID Brief*, Appendix 2 at pp.33-36. Several irrigation districts had argued that even though the underlying license did not address flood control

operations, the partial decree needed to include one to protect their storage allocations against losses due to flood control releases, and the District Court agreed. *Id.*

Any claim for a remark or provision memorializing an historic "method" or "practice" of water right administration (as opposed to historic reservoir operations) also would have been ripe at the time of the Payette Adjudication. But at the time there was no water rights administration to memorialize. As the United States conceded in the "challenge" hearing, "there was no administration whatsoever" before Water District 65 was established in 1989. Tr. Sep. 22, 2016, p. 24, l. 13-14. At the time of the Payette Adjudication, the United States diverted, stored, and released water without any oversight, administration, or regulation by a watermaster or by IDWR. The *Payette Decree* did not and could not decree a historical "method" or "practice" of non-administration. *See In re IDWR Amended Final Order Creating Water District No. 170 (Thompson Creek Mining Co. v. IDWR)*, 148 Idaho 200, 213-14, 220 P.3d 318, 3231-32 (2009) "A water user has no property interest in being free from the State's regulation of water in accordance with the prior appropriation doctrine[.]").

Further, the fact that water rights administration did not begin until after Water District 65 was established was not (and is not) unusual or prejudicial. As this Court recognized in the *Water District No. 170* decision, the Idaho Code provides that water rights must be adjudicated before a water district is established and priority administration is implemented. *See id.* at 211, 220 P.3d at 329 ("Idaho Code § 42–604 is unambiguous. Paragraph one plainly mandates that the Director of IDWR divide the state into water districts in a designated manner, provided the priorities of appropriation for water rights within that area have been adjudicated."). This does not leave water right holders without remedy if they believe IDWR does not administer their water right correctly. Administrative and judicial remedies are available under the Idaho

Administrative Procedures Act ("IDAPA"). *See, e.g., Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801 ("the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user . . . Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.").

F. THE DISTRICT COURT CORRECTLY HELD THAT THE SPECIAL MASTER EXCEEDED HIS JURISDICTION BY REACHING BCID'S ARGUMENTS.

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

The SRBA is a not a general water court but rather a general stream adjudication proceeding under chapter 14 of title 42 of the Idaho Code. Idaho Code § 42-1406A [uncodified]. While the SRBA adjudicates water rights, the authority to administer water rights is statutorily committed to the Director of IDWR. Idaho Code § 42-602; *see also Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 800 (distinguishing "determining water rights, and therefore property

rights" from "just distributing water."); *In re SRBA Case No. 39576 (State v. United States)*, 128 Idaho 246, 262, 912 P.2d 614, 630 (1995) (stating that if the Idaho Code allowed courts to administer water rights it "would create an unworkable, unconstitutional delegation of [executive] authority" to the judicial branch).

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

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

Basin-Wide Issue 17, 157 Idaho at 394, 336 P.3d at 801. This requirement may not be circumvented by characterizing an administrative challenge as a question of property rights. *See AFRD2 v. IDWR*, 143 Idaho 862, 871, 154 P.3d 433, 442 (2007) (""to hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue.'") (citation omitted).

The District Court recognized these principles, even cited the above-quoted portion of the *Basin-Wide Issue 17* decision. R.2519. Indeed, the arguments BCID made to the Special Master

(which the United States has adopted in this appeal) were clearly foreclosed by this Court's decision in *Basin-Wide Issue 17*. In that case, BCID and other irrigation organizations[20] used an SRBA proceeding as a vehicle for arguing that storage water rights previously decreed "without a remark on refill rights" already included a "property right" to "refill, under priority, space vacated for flood control." *Basin-Wide Issue 17*, 157 Idaho at 387-88, 392-93, 336 P.3d at 794-95, 799-800. This Court held, however, that the "property right" defined by the decree is an entitlement "to a certain amount of water; a number that the Director must fill in priority," and therefore the issue of whether flood control space physically fills or refills "under priority" is a question of water distribution accounting committed to the Director (subject to IDAPA judicial review). *Id.* at 394, 336 P.3d at 801.

BCID's argument to the Special Master that the Decreed Water Rights had "already" appropriated the water sought by the Late Claims, R.2518, was legally indistinguishable from the arguments BCID and others presented to this Court in *Basin-Wide Issue 17*. The only difference is that while in *Basin-Wide Issue 17* the argument was that a "refill" remark was not necessary, in this case BCID argued that the Late Claims are not necessary. R.2518. The underlying argument is exactly the same, as the District Court implicitly recognized.[21]

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

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[20] BCID was one of the irrigation districts that filed the petition requesting designation of Basin-Wide Issue 17, although BCID did not actively participate in the appeal of that matter.

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

flood control releases have on the BOR's existing storage rights?"[22] R.2215. Rather, they simply "give the Director a quantity he must provide to each water user in priority," *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801; *see also* R.544, 551, 555, 557 (partial decrees), and the details of performing this duty "are left to the Director." *Basin-Wide Issue 17*, 157 Idaho at 393, 336 P.3d at 802.

There is no merit in BCID's argument that under Idaho Code §§ 1-1603 and 1-1901(2) the SRBA retained jurisdiction to interpret or "enforce" the Decreed Water Rights. *BCID Brief* at 21. The *Final Unified Decree* specifically limited retained jurisdiction to issues "that are not reviewable under the Idaho Administrative Procedures Act and/or the rules if the Idaho Department of Water Resources," R.843, and the SRBA did not retain jurisdiction over the Decreed Water Rights in the *Order Regarding Subcases Pending Upon Entry Of Final Unified Decree* (Aug. 26, 2014). R.61-62, 859-60. While Idaho Code §§ 1-1063 and 1-1901(2) describe general "powers" of the courts and judicial officers, these statutes do not override the specific jurisdictional limitations of Idaho Code § 42-1401D and the *Final Unified Decree*, or the requirement of presenting challenges to water right administration to IDWR before seeking judicial review. Idaho Code § 67-5271; *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801; *AFRD2*, 143 Idaho at 871, 154 P.3d at 442.

While BCID is correct that clarifying remarks or administrative provisions may be decreed in the SRBA for previously licensed or decreed water rights, as was done in SRBA proceedings on the Lucky Peak Reservoir water right, *see BCID Brief* at 22 (citing *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Streamflow Maintenance*

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

Claim, Subcase No. 63-3618), this must be done at the time the claimed water right claim is being adjudicated. *See* Idaho Code § 42-1411(2)(j) ("such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the Director"); *Id.* § 42-1412 ("The district court shall enter a partial decree . . . . The decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable."). Nothing in the Lucky Peak decision cited by BCID or in Idaho Code §§ 42-1411 and 42-1412 authorizes using a beneficial use-based late claim to bring a previously decreed water right back into the SRBA and thereby obtain a clarification or interpretation for purposes of resolving an administrative dispute. *See* R.802 ("The late claim procedure was not intended to give claimants a second bite at the apple.").[23]

G. BCID RAISES ISSUES THAT ARE OUTSIDE THE SCOPE OF THIS APPEAL.

BCID argues this case presents a question of "first impression" and the District Court erred by holding the Special Master should not have resolved that question. There is nothing new here, however; BCID's arguments reduce to collateral attacks on the Decreed Water Rights, and/or to challenges to IDWR's administration of the Decreed Water Rights. Questions of the nature, extent, and/or administration the Decreed Water Rights were outside the scope of the Late Claims, and are outside the scope of this appeal. R.2511 (italics in original; bold font omitted). The District Court was correct.

[23] The District Court denied the motion to file late no. 01-10619 because it impermissibly "attempt[ed] to bring the conflict regarding the interpretation" of a partial decree "back into the SRBA." ADDENDUM, Tab X, page 4. That motion was unique among the various late claim motions, because the claim it proffered did not assert "beneficial use" as the basis of claim; rather it asserted a pre-existing water right license as the basis for the claim—and a partial decree had already been issued for that license. Tr., May 21, 2103, p.27, l.3-17.

1. There Is No Question Of "First Impression."

BCID argues that this appeal presents a question of "first impression" because this Court "characterized the 'flood control' effect question as one of 'first impression" in its *Basin-Wide Issue 17* decision. *BCID Brief* at 1 (quoting *Basin-Wide Issue 17*, 157 Idaho at 392, 336 P.3d at 799); *see also BCID Brief* at 12, 38 ("first impression"). What this Court actually said, however, was that while *Basin-Wide Issue 17* "arose out of disputes over the effect flood control releases have on storage water right holders," *Basin-Wide Issue 17*, 157 Idaho at 390, 336 P.3d at 797 (underlining added), the question of "first impression" was "whether water stored under a storage right counts toward the fill of that right if it is used by the reservoir operator for flood control purposes." *Id.* at 392, 336 P.3d at 799. Further, this Court held that this question is one of water right administration rather than water right adjudication that must be presented to IDWR before seeking judicial review: "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." *Id.* at 394, 336 P.3d at 801. Further, "[w]hich accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method." *Id.*[24]

This clear and unambiguous holding means there is no question of "first impression" left to be resolved in the SRBA. The parties and the District Court came to this very conclusion at the September 2014 status conference addressing this Court's remand of *Basin-Wide Issue 17*. As the District Court said: "I agree there's nothing left to do on Basin-Wide Issue 17, I didn't

[24] And this is precisely why, as BCID admits, the so-called "flood control effect question" is pending before this Court in three appeals from an IDAPA judicial decision regarding IDWR's water distribution accounting system for the Boise River Basin. *BCID Brief* at 2 n.1. But BCID is incorrect in asserting that BCID's appeal raises "[t]he same flood control effect question" that is pending in the IDAPA judicial review appeals. *Id.* They are entirely different matters, legally and factually.

want to make a ruling on that or a decision on that until I heard from everybody, but that's my feeling too." Tr., Sep. 9, 2014, p.27, l.24—p.28, l.2. Moreover, when disputes arose in the same hearing over the scope of the issues to be addressed in the Late Claims, counsel for several irrigation district in Water District 1 (the Snake River upstream from Milner Dam) forcefully asserted, "[s]o it's not about attacking the accounting these late claims. Not at all. I hope Mr. Orr heard that." *Id.*, p.36, l.3-5. The United States did not disagree. *Id.* Further, and contrary to BCID's assertions in this appeal, no one argued at the hearing or in the subsequent "scheduling proposals" that the Late Claims rather than IDAPA proceedings would be the vehicle for obtaining "a more developed record" on the administrative question. *BCID Brief* at 1; *see generally* Tr., Sep. 9, 2014 (hearing transcript); R.69-122 (scheduling proposals).[25]

The District Court therefore referred all the late claims to the various Special Masters for resolution on the merits. R.122, 129, 2611; *see also* R.899 ("the burden now rests with the claimants to come forward with evidence to rebut the Director's recommendations, and to establish the existence of rights under the constitutional method of appropriation."). BCID nonetheless persuaded the Special Master to whom these Late Claims were referred that he should take up the question of "[w]hat effect, if any do flood control releases have on the BOR's existing storage rights," R.2215—the issue that BCID characterizes in this appeal as a questions of "first impression." *BCID Brief* at 1, 12, 38.

Both the Special Master and the District Court recognized, however, that the so-called "flood control effect question," *BCID Brief* at 1, 2, 14, 20, 39, 40, is simply another way of asking whether the Decreed Water Rights "already" appropriated the water claimed in the Late Claims. R.2215 (Special Master); R.2518 (District Court). The District Court held that question

[25] BCID had the opportunity to make such arguments at the time, but did not even participate in the hearing. Tr., Sep. 9, 2014, p.5-6; although BCID's appellate counsel appeared on behalf of a different irrigation district. Tr., Sep. 9, 2014, p.24, l.7-9.

this was not within the scope of the Late Claims referred to the Special Master. R.2518-19. The District Court confirmed the "narrow focus" of the Late Claims, R.2518, in the subsequent hearing on BCID's objections to the clerk's record. When BCID argued the Late Claims present "a legal question regarding what the impacts of flood control releases are on the existing storage rights," the District Court quickly responded, but that's not what we're dealing with here. We're dealing with supplemental water rights for late claims for supplemental water rights for flood control releases." Tr., Feb. 116, 201[7], p.30,l.20—p.31, l.1.

While the District Court granted the late claim motions in 2013, it referred them to the Special Masters for the sole purpose of addressing the beneficial use-based late claims. The late claims never raised or implicated BCID's so-called issue of "first impression." *BCID Brief* at 1, 12, 38.

2. There Was No Need To Revisit The Decreed Water Rights.

BCID argues that despite the "narrow focus" of the Late Claims, R.2518, the District Court erred by failing to recognize that "the Special Master still needed to determine the nature and scope of the existing property rights," that is, "the quantity of water already encumbered by the existing storage rights." *BICD Brief* at 22. This argument completely ignores the fact that partial decrees were issued for the Decreed Water Rights in 2003, R.2518, 544, 551, 555, 557, and became final, conclusive, and binding upon entry of the *Final Unified Decree*—which occurred long before the Late Claims were referred to the Special Master. R.831, 837, 839, 840, 841, 843 (*Final Unified Decree*); R.129, 2611 (Orders of Reference). Further, the *Final Unified Decree* and the *Order Regarding Subcases Pending Upon Entry Of Final Unified Decree*, R.61-62, did not retain jurisdiction over the Decreed Water Rights, as previously discussed.

The Special Master was bound by the partial decrees and had no authority to revisit them or go behind them. To the extent there may have been any need for the Special Master "to determine the nature and scope of the existing property rights" and "the quantity of water already encumbered by the existing storage rights," *BCID Brief* at 22,[26] all he had authority to do was simply consult the partial decrees issued in 2003. And that was all he *needed* to do—the partial decrees and the Late Claims speak for themselves, and comparing the elements of the Decreed Water Rights with the elements of the Late Claims shows that the Late Claims assert appropriations far larger than "the quantity of water already encumbered by the existing storage rights":[27]

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

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

The Special Master erred by concluding the mere fact that the Decreed Water Rights re "'silent' on the flood control effect question," *BCID Brief* at 20, automatically authorized him to re-open the Decreed Water Rights and re-adjudicate them on the basis of "federal flood control

[26] The State does not concede that it was necessary for the Special Master to make any such determination because by filing the Late Claims effectively admitted that the "refill" water captured in 1965 was not appropriated by the Decreed Water Rights.

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

operations" and BCID's objections to IDWR's administration of the Decreed Water Rights. *See id.* at 23 (admitting that the Special Master "defined the extent of the existing property rights against the backdrop of federal flood control operations"). To the contrary, the partial decrees' "silence" on these matters is significant: it means that they are *not* elements of the Decreed Water Rights.

As this Court has held, "'[f]inality in water rights is essential,'" *IGWA*, 160 Idaho at 128, 369 P.3d at 906 (citation omitted), and for BCID to have argued that partial decrees "silence" on flood control operations means that flood control operations govern priority administration of the Decreed Water Rights was plainly a collateral attack on the partial decrees. *See id.* (holding it to be a collateral attack when IGWA was "essentially arguing" that the source identified in a partial decree was "miscategorized"); *Rangen, Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016) (holding that an argument "based on the idea that the decrees do not accurately reflect [an appropriator's] historic beneficial use" is "an impermissible collateral attack on the decrees"). Nothing in Idaho law, the Late Claims, or the Special Master's orders of reference supported the Special Master's decision to ignore the partial decrees and determine anew the nature and extent of the Decreed Water Rights. The District Court was correct in concluding that the Special Master "erred in revisiting the previously decreed water rights in the context of this proceeding." R.2519.

3. BCID Was Not Entitled To Inject Questions Of The Nature, Extent, Or Administration Of The Decreed Water Rights Into The Late Claim Proceedings.

BCID argues that it was entitled to inject into the Late Claims proceedings extraneous questions of the nature, extent, and/or administration of the Decreed Water Rights simply because BCID viewed the Late Claims as "impugning" the Decreed Water Rights or implying a

"deficiency," thereby leaving BCID with "no choice" but to address these issues. *BCID Brief* at 4, 13-14 17, 18, 23, 35, 40. This argument mischaracterizes the record and is contrary to law.

BCID sought to become a party to the Late Claims more than two years after the Late Claims had been filed, on grounds that settlement discussions with IDWR were not progressing as expected. R.134-36. The State objected, and BCID was allowed to participate as an intervenor only after agreeing that intervenors must take a case as they find it. R.1579-80 (Tr., May 18, 2015; *id.*, p.7, l.20-21; *id.*, p. 11, l.9-14); R.1582 (Tr., May 18, 2015, p.21, l.21—p.22, l.8). And prior to this appeal, the United States repeatedly represented that the Late Claims did not raise or implicate questions of the nature, extent, or administration of the Decreed Water Rights. *See, e.g.,* Tr., Sep. 22, 2016, p.32, l.6-7 ("the supplemental storage claims do not challenge the accounting"); R.1909-10 ("Rather the [Late Claims] accept the Director's interpretation of the [Decreed Water Rights] and his accounting of them.").[28]

The record also belies BCID's contentions that the Late Claims forced it into a corner and left it with no other choice but to inject the so-called "flood control effect question," *BCID Brief* at 1, 4, 13, 39, 40, into the Late Claim proceedings. BCID has been involved in the flood control "refill" issue since the beginning—it was one of the entities that filed the petition to designate *Basin-Wide Issue 17*. BCID could have filed motions to set aside the Decreed Water Rights to add the same priority "refill" remarks the United States' had asserted for American Falls and Palisades Reservoirs, *see Basin-Wide Issue 17*, 157 Idaho at 388, 336 P.3d at 795 (""This water right includes the right to refill under the priority date of this water right to satisfy the United States' storage contracts"") (quoting the United States' proposed "refill" remark); but it did not. BCID could have sought permission to file its own late claims while Basin-Wide

[28] *See also* Tr., Sep. 22, 2016, p.20-2; R.2201 (Tr., Mar. 1, 2016, p.73, l.22-24); R.2536 (Tr., Oct.2, 2015, p.44, l.1-2).

Issue 17 was pending in the SRBA, as did some irrigation districts in Water District 1 and Water District 63; but it did not. BCID could have filed its own objections or responses regarding the United States Late Claims, Idaho Code § 42-1412(2); but it did not. BCID could have filed a "scheduling proposal" after the September 2014 status conference that asserted, like the Boise Project Board of Control's scheduling proposal, that before reaching the merits of the Late Claims the District Court had to make a preliminary determination of whether the late claims were "duplicative" of decreed water rights and therefore "not necessary," R.75; but it did not. BCID could have filed a petition for a contested case before IDWR regarding the Water District 65 accounting system; but it has not.

Rather, BCID moved to intervene in the Late Claims only when BCID became dissatisfied with the direction of settlement discussions with IDWR. R.134-36. Be that as it may, it does not change the fact that BCID has had, and continues to have, ways of pursuing the so-called "flood control effect question." It also does not change the fact that as a matter of law: (1) the partial decrees for the Decreed Water Rights are final, conclusive, and binding in this proceeding pursuant to the *Final Unified Decree*; and (2) any judicial review of BCID's challenges to IDWR's administration and accounting of the Decreed Water Rights must be sought pursuant to IDAPA procedures, not through SRBA claims for additional water rights. *Basin-Wide Issue* 17, 157 Idaho at 394, 336 P.3d at 801. BCID's assertions that it was entitled to raise the so-called "flood control effect question" in the context of proceedings on the Late Claims has no factual or legal merit.

4. BCID's Arguments Are Collateral Attacks On The Decreed Water Rights.

BCID argues in this appeal that the Decreed Water Rights "already appropriated" the water claimed in the Late Claims, *BCID Brief* at 27-30. There is no factual or legal basis for this argument.

a. The Late Claims Seek Far More Water Than Was Appropriated By The Decreed Water Rights.

As previously discussed and shown in the table above, the "claimed" quantities far exceed the "decreed" quantities. An argument claiming that final, conclusive, and binding partial decrees issued years ago actually appropriated far more acre-feet per year than the annual volumes plainly stated in their "quantity" elements is about as clear and unambiguous example of collateral attack as there can be.

The fact that the United States characterized the Late Claims as "supplemental," *BCID Brief* at 35, does not alter this conclusion. A true "supplemental right" is "an additional appropriation to make up a deficiency in supply from an existing water right," *Barron*, 135 Idaho at 416, 18 P.3d at 221, by diverting from a secondary source—usually ground water, as in *Barron*. The so-called "supplemental" Late Claims, however, divert from the same source as the Decreed Water Rights, and would appropriate additional water in flood years rather than in years of "deficiency in supply." *Id.*

Further, the Late Claims contain an administrative provision (crafted by the United States rather than by a court or by IDWR) that is not present in the Decreed Water Rights, and would operate to make the Late Claims enlargements rather than "supplemental" rights. The provision would require the Late Claims to be administered "in combination with" the Decreed Water Rights, R.38-39, 2591, and the combined diversion volumes of the Late Claims and the Decreed Water Rights would encumber *all* inflows to the reservoirs until the United States stops releasing water for flood control purposes and "complete[s] one physical fill of its reservoirs in years when

it must release stored water for flood control." R.18.[29] In other words, the water encumbered by the priorities of the Decreed Water Rights and the Late Claims in combination would be not limited to what BCID calls "'second-in' water" captured in the reservoirs "after the flood risk wane[d]" in 1965, *BCID Brief* at 8, but would also include water released for flood control purposes until the United States "complete[d] one physical fill of its reservoirs." R.18

Indeed, the United States admitted in its discovery responses to the State that the Late Claims—which were filed by the United States, not BCID—are intended to be open-ended priority entitlements to whatever quantity of water may be necessary in flood years to replace flood control releases. In response to the State's interrogatories asking how much of the "supplemental" storage water claimed had actually been applied to irrigation use in the year claimed, the United States had this to say:

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

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

In other words, the United States admitted it is impossible to define "in terms of quantity of water per year" how much water the United States claims, *A & B Irr. Dist. v. ICL,* 131 Idaho 411, 416, 958 P.2d 568, 573 (1997), and that for this reason the United States asserts priority over <u>whatever</u> quantity is required to make up for flood control releases in any given year. There is no such entitlement in the Decreed Water Rights, nor could there be; under Idaho law

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

the United States may not have priority control over an indefinite, open-ended quantity of excess flood water. *See id.* ("there cannot be a prior relation to excess water.").

The priorities of the Decreed Water Rights standing alone, rather, are limited to definite annual quantities, and "flood control releases" are not authorized or quantified by the Decreed Water Rights. R.542-47. Priority only protects the beneficial uses actually decreed in a water right, *see IGWA*, 160 Idaho at 133, 369 P.3d at 911 ("'The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate'"), and may not, "under any pretext," be invoked to protect or encumber more water than is actually applied to the authorized beneficial use. *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907). BCID's assumption that it is possible for the priorities of the Decreed Water Rights (or the Late Claims) to "encumber more" water than is actually applied to beneficial use, *BCID Brief* 24, is contrary to a consistent line of decisions of this Court going back for more than a century.

b. BCID's "Interpretation" Of The Decreed Water Rights Is A Collateral Attack.

BCID also argues that its "interpretation" of the partial decrees for the Decreed Water Rights "is the more reasonable one." *BCID Brief* at 24. The "interpretation" that BCID puts on the partial decrees, however, is that their "silence" on the question of whether they should be administered on the basis of the United States' flood control operations, *id.*, means that they *must* be administered on the basis of flood control operations. *See id.* at 25 ("The State and IDWR's theories . . . the opportunity too meaningfully store water in a dual purposes reservoir system.").[30] BCID's attempt to use the Late Claims and this appeal to obtain an administrative

[30] Contrary to BCID's assertion, the States did not adopt any "theory" or "interpretation" of the Decreed Water Rights for purposes of administration. The State consistently asserted, rather, that the partial decrees are final, conclusive, and binding as to the nature and extent of the Decreed Water Rights; and that under this Court's decision in *Basin-Wide Issue 17*, any question or theory of interpreting the partial decrees for purposes of administration was outside the scope of the Late Claims. *See, e.g.*, R.2301-09 (arguments in State's opening challenge brief).

interpretation of the Decreed Water Rights that is inconsistent with their plain terms is a collateral attack on the Decreed Water Rights. *See IGWA*, 160 Idaho at 128, 369 P.3d at 906 (holding it to be a collateral attack when IGWA was "essentially arguing" that the source identified in a partial decree was "miscategorized"); *Rangen, Inc.*, 159 Idaho at 806, 367 P.3d at 201 (holding that an argument "based on the idea that the decrees do not accurately reflect [an appropriator's] historic beneficial use" is "an impermissible collateral attack on the decrees"); *Wright v. Atwood*, 33 Idaho 455, 461, 195 P. 625, 627 (1921) ("A collateral attack is an attempt to impeach a decree in a proceeding not instituted for th[at] express purpose . . . .").

The support BCID marshals for its "interpretation" argument confirms the argument is a collateral attack on the Decreed Water Rights. BCID cites, for instance, to the water right licenses that were the basis of the United States' claims in the Payette Adjudication, and argues that the proof of beneficial use submitted in support of those licenses must have been "based on maximum physical fill" following flood control releases. *Id.* at 27-28. These are facts and arguments that could have and should have been submitted along with the United States' Payette Adjudication claims, or even earlier, when the United States submitted proof of beneficial use to IDWR for purposes of obtaining the water right licenses. *Id.*; *see, e.g.,* Idaho Code § 42-219 ("Such license shall bear the . . . the date when proof of beneficial use of such water was made . . . "). To re-argue these facts in this appeal is to collaterally attack the original licenses, the *Payette Decree*, and the SRBA partial decrees.

5. BCID's Arguments Are Challenges To IDWR's Administration Of The Decreed Water Rights.

The ultimate target of BCID's arguments is IDWR's administration of the Decreed Water Rights, and in particular how IDWR accounts for the distribution of water to the Decreed Water Rights. BCID criticizes IDWR for using what BCID calls a "'store it or lose' paradigm," rather

than basing the distribution of water on flood control operations. *BCID Brief* at 2, 25-25. As previously discussed, however, BCID's objections to IDWR's administration of the Decreed Water Rights may not be raised or resolved in an appeal of an order disallowing SRBA claims for additional water rights based on assertions of pre-1971 beneficial use. *See* claims of beneficial use of water before 1971. *See Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801 (Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method."); *AFRD2*, 143 Idaho at 871, 154 P.3d at 442 (holding that a water right holder may not "'bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue.'").

Moreover, and as discussed in the *State Of Idaho's Brief As Respondent* filed in the United States' related appeal (Supreme Court Docket No. 44635-2016) on June 9, 2017,[31] SRBA water right claims and this appeal are not a substitutes for IDAPA judicial review proceedings, which require a final order of the Director and a fully developed administrative record, and in which deferential standards of review apply. *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 522, 376 P.3d 722, 726 (2016); *see also* Idaho Code §§ 67-5270—67-5279 (IDAPA judicial review provisions). As this Court stated in *Basin-Wide Issue* 17, "the Legislature has recognized the need for the Director's expertise":

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

Basin-Wide Issue 17, 157 Idaho at 394, 336 P.3d at 801 (citation omitted).

[31] The State requests, pursuant to I.R.E. 201, that this Court take judicial notice of the *State Of Idaho's Response Brief* filed in the United States' related appeal (Supreme Court Docket No. 44635-2016) on June 9, 2017. Copies of pages of that brief particularly relevant to this discussion are included in the ADDENDUM, Tab E

Further, BCID's theory of priority administration of water rights raises many of the same concerns as the United States' similar theory of priority administration, including but not limited to upsetting the historic *status quo*, surrendering control of the use, distribution and development of Idaho's water to the United States, and shifting risks created by the United States flood control decisions to junior and future appropriators. These questions should not be taken up in this appeal, particularly in light of fact that no actual injury has been alleged, and questions of whether future applications may injure the Decreed Water Rights must be addressed by IDWR when the applications are submitted. *See* Idaho Code § 42-203A(5) (providing that the Director may reject permit applications when the evidence shows "(a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated"). The purpose of the SRBA is to adjudicate claims for water rights SRBA established prior to its commencement in 1987, R.831, not to determine the fate of future applications for permits to appropriate water.[32]

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

The State is entitled to an award of attorney fees on appeal pursuant to Idaho Code § 12-117, because BCID acted without a reasonable basis in fact and/or law by challenging in this appeal the preclusive effect of the *Payette Decree*, by raising in this appeal objections and challenges to IDWR's administration of the Decreed Water Rights, and by collaterally attacking the Decreed Water Rights. The State therefore respectfully requests that this Court award the State reasonable attorney fees and costs incurred in this appeal.

[32] The matters discussed above are discussed and supported in more detail in the excerpted pages of the *State Of Idaho's Brief As Respondent* filed in the United States' related appeal (Supreme Court Docket No. 44635-2016) on June 9, 2017 that are included in the ADDENDUM, Tab F.

IV. CONCLUSION

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

REPECTFULLY SUBMITTED this 7th day of June, 2017.

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

MICHAEL C. ORR
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 9th day of June, 2017, I caused the foregoing *State of Idaho's Response Brief* to be filed with the Court and copies served on the following by the methods indicated:

1. Original to:

CLERK OF THE IDAHO SUPREME COURT and COURT OF APPEALS 451 W. STATE STREET BOISE , ID 83702	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Federal Express ☐ Facsimile:

2. Copies to the following:

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Michael C. Orr

ADDENDUM

State Of Idaho's Response Brief - Supreme Court Docket No. 44636-2016

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

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

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

Tab D: [excerpts of] *Order Designating Basin-Wide Issue, In re SRBA, Case No. 39576, Basin-Wide Issue 17, Subcase No. 00-91017* (Sep. 21,2012).

Tab E: [excerpts of] *State Of Idaho's Response Brief* (Supreme Court Docket No. 44635-2016) (Jun. 9, 2017).

TAB A

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

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

I
PROCEDURAL BACKGROUND

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

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

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

II.

ANALYSIS

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

A. Meritorious Defense.

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

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

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

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

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

B. Prejudice.

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

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

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

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

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

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

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

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

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

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

III.

ORDER

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

DATED: June 4, 2013.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

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

DATED: June 4, 2013.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

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

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TWIN FALLS CANAL COMPANY
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AMERICAN FALLS RESERVOIR
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MINIDOKA IRRIGATION DISTRICT
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BURLEY, ID 83318-0248
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DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Deputy Clerk

TAB B

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

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

CHAPTER 14—ADJUDICATION OF WATER RIGHTS

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

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

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

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

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

42-1404. [Repealed.]

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

42-1405. Summary supplemental adjudication of water rights.

Proof of Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42-1411. Decree—Forfeiture of right.—The decree shall be conclusive as to the rights of all existing claimants upon the water system which shall lawfully embrace any determination. When a decree has been entered, any water user who has been joined and who failed to appear and submit proof of his claim as provided in this act shall be barred and estopped from subsequently asserting any right theretofore acquired upon the waters included within the proceedings, and shall be held to have forfeited all rights to any water theretofore claimed. [I. C., § 42-1411, as added by 1969, ch. 279, § 9, p. 822.]

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

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

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

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

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

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

CHAPTER 15—CONSERVATION OF WATER FOR IRRIGATION PURPOSES

SECTION.
42-1501—42-1506. [Repealed.]

42-1501—42-1506. [Repealed.]

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

CHAPTER 17—DEPARTMENT OF RECLAMATION—WATER RESOURCE BOARD

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

TAB C

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated this 8 day of June, 2012.

BARKER ROSHOLT & SIMPSON LLP

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Attorneys for Boise Project Board of Control

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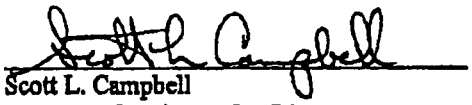

Scott L. Campbell
Attorneys for Pioneer Irr. Dist.

CERTIFICATE OF SERVICE

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

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Shelley M. Davis

EXHIBIT A

American Falls Subcases:

01-2064

01-2064A

01-2064B

01-2064C

01-2064D

01-2064E

01-2064F

01-2064L

01-10042

01-10042A

01-10042B

01-10053A, and

01-10190

Palisades Subcases:

01-2068

01-2068D

01-2068E

01-2068F

01-2068M

01-2068Y

01-10043

01-10043A

01-10043E

01-10191

01-10389

TAB D

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

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

I.
PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

TAB E

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re SRBA Case No. 39576 SUBCASE NOS. 65-23531 & 65-23532 THE UNITED STATES OF AMERICA, Appellant, v. BLACK CANYON IRRIGATION DISTRICT, STATE OF IDAHO and SUEZ WATER IDAHO, INC., Respondents.	Supreme Court Docket No. 44635-2016 SRBA CASE NO. 39576 Subcase Nos. 65-23531 & 65-23532

STATE OF IDAHO'S RESPONSE BRIEF
Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Eric J. Wildman, Presiding

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

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

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

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

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

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

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

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

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

[35] *Supra* note 29.

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

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

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

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

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

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

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

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

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

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

Id. (citation omitted).

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

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

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

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

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

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

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

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

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

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

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

[40] *Supra* note 29.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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