7-21-2017

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re SRBA Case No. 39576 SUBCASE NOS. 65-23531 and 65-23532	**Supreme Court Docket No. 44636-2016**
BLACK CANYON IRRIGATION DISTRICT, Appellant, vs. STATE OF IDAHO and SUEZ WATER IDAHO, INC., Respondents.	SRBA CASE NO. 39576 Subcase Nos. 65-23531 & 65-23532

APPELLANT BLACK CANYON IRRIGATION DISTRICT'S REPLY BRIEF

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

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COMES NOW the Appellant Black Canyon Irrigation District ("BCID" or "District"), by and through undersigned counsel of record and Idaho Appellate Rule 35(c), and hereby submits its *Appellant's Reply Brief*, replying to the Respondent's briefs of the State of Idaho ("State") and Suez Water Idaho, Inc. ("Suez").

I.
INTRODUCTION

This Court was reluctant to address the flood control "legal effect" question absent a more developed record. That record was properly developed through the SRBA late claims process under the provisions of Idaho Code Sections 42-1410, 42-1411, 42-1412 and *SRBA Administrative Order 1* (Oct. 16, 1997) ("AO1").

Answering the flood control "legal effect" question does not infringe upon the administrative water right accounting function because the property rights determination of "what to count" is not the same as "how to count." The question of "what to count" is answered by the judiciary; the question of how to count consistent with the prior appropriation doctrine is first reserved for IDWR.

All else flows from determination of the flood control "legal effect" question. If the existing storage rights for Cascade and Deadwood Reservoirs authorize one physical fill of the reservoirs in flood control years, the inquiry is complete; one need not wade into questions regarding the merits/elements of the United States' late claims (including analysis of any potential preclusive effect of the prior Payette Adjudication) if the existing storage rights have already appropriated the water claimed by the pending late claims.

The historic diversion, storage, and end beneficial use of 863.0 kAF of physical water has been investigated, confirmed, licensed, claimed and decreed twice over by the Payette Adjudication and again by the SRBA. Also undisputed is that some portion of the water

diverted, stored, and used is that captured post-flood control releases as the flood risk wanes. These "spill and fill" flood control operations have occurred since 1957. That quantity of beneficial use "from storage" water (863.0 kAF) needs to be protected and cannot be diminished or taken—effectively re-adjudicated by State and agency whim through the evolution of novel legal theories.

II.
ARGUMENT

A. Additional Issues on Appeal

Both the State and Suez identify several additional issues on appeal. The State identifies the following:

1. Whether the Late Claims are barred by the Payette Decree and the doctrine of *res judicata*;

2. Whether BCID's appeal is a collateral attack on the Decreed Storage Rights for Cascade and Deadwood Reservoirs;

3. Whether BCID's challenges to the Water District 65 accounting system may be heard in this appeal; and

4. Whether the State is entitled to an award of attorney fees on appeal.

State of Idaho's Response Brief (Jun. 9, 2017) ("*State Response*"), p. 11.

In reality, the State raises only one "additional" issue on appeal: the attorney fee issue (No. 4, above). The remaining issues were already raised by BCID as central to its appeal. Issue No. 3 above is a recasting of BCID's arguments concerning the jurisdiction of the SRBA Court and the scope of the late claims proceedings (which is not an administrative accounting question or challenge). *See Appellant's Opening Brief*, pp. 17-27. Issue No. 1 above is the same question posed by BCID, and addressed by the District at pages 30 through 38 of its opening brief. *Id.*

Finally, BCID preemptively addressed the State's "collateral attack" contention (No. 2 above) in its opening brief as well. *Id.*, pp. 24-27. However, BCID further replies to each of the State's identified issues on appeal herein.

Suez raises the following additional issues on appeal:

1. To prove up the late claims, must the claimant show that the release of water accrued to the original storage rights was necessary and not wasteful?;

2. To prove up the late claims, must the claimant show that the quantity of water claimed was actually stored and beneficially used in quantities exceeding the amounts stored under the original storage rights?;

3. To prove up the late claims, must the claimant show that the diversion and use of water was not merely a historical practice or undertaken pursuant to their ancillary right to store "excess water" under the storage rights?;

4. If the late claims could be proven up in any quantity, would they be fully subordinated to future appropriations?;

5. If the late claims could be proven up in any quantity, have they been fully or partially forfeited or abandoned?;

6. Does Idaho law authorize storage right holders to divert, store, and apply to beneficial use "excess water"?;

7. Is the use of "excess water" under Idaho law otherwise known as "ancillary use" attributable to the existing storage water rights?;

8. Is the practice of "crediting all physically and legally available water" to the existing storage rights consistent with Idaho's prior appropriation doctrine and the "maximum use" doctrine?; and

9. Should Suez be awarded attorney fees on appeal?

Brief of Respondent Suez (Jun. 9, 2017) ("Suez Response"), pp. 9-10.

Suez-raised Issue Nos. 1 through 5 above are not proper issues within the scope of this appeal. Each of the issues raises contentions regarding the "proving up" of the late claims through the SRBA process—a process separate and apart from this appeal that may never occur if this Court: (1) deems the late claims unnecessary because they are duplicative of the property rights embodied by the existing storage rights; or (2) decides that the pending late claims are barred by operation of the prior Payette Adjudication. *See, e.g.*, IDAHO CODE §§ 42-1410, 42-1411, and 42-1412; *see also*, AO1 §§ 10; 13-15.

To this point, the SRBA Court has yet to make any findings of fact or reach any conclusions of law on the late claims bearing on the issues Suez seeks to inject in this appeal. Maybe the late claims will be difficult to "prove up," maybe not. *Suez Response*, pp. 16-22. That remains to be seen, and it is irrelevant to this appeal. At present, the only determinations that have been made regarding the late claims are two alternative grounds for disallowance—neither of which delved into the substantive merits/elements of the late claim water rights: (1) barred by operation of the prior *Payette Decree*; and (2) duplicative and unnecessary because the water claimed has already been appropriated by the existing reservoir storage rights as a matter of law. *See, e.g.*, R. 1992-99 (dismissing the State's various additional summary judgment claims as moot) and R. 2520 (likewise, leaving the State's additional claims unaddressed).

The applicability (or inapplicability) of *res judicata* based on the prior *Payette Decree* is not an element of the pending late claims. Rather the doctrine of *res judicata* is a threshold legal determination having no substantive bearing on the water right elements at issue in the late

claims under Idaho Code Sections 42-1409 and 42-1411. Application of the doctrine at the front end of the proceeding is not an indictment of, or an adverse finding against, the substantive elements of the claims. The application of *res judicata* to this point has simply delayed full consideration of the water right elements as claimed, assuming the claims are necessary (*i.e.*, assuming that the existing storage rights are somehow deficient in flood control years) and assuming that the claims are not barred by the prior Payette Adjudication.

Suez trolls this Court for preemptive rulings pre-trial (before development of a record on the actual merits/water right elements of the late claims) in hopes that it can avoid those issues in the future before the trial court. This Court is not a trial court, and Suez's requests are the very definition of an impermissible advisory opinion. *See, e.g., State v. Barclay*, 149 Idaho 6, 9, 232 P.3d 327, 330 (2010) (this Court does not issue advisory opinions to avoid issues in future cases); *see also, State v. Manzanares*, 152 Idaho 410, 419, 272 P.3d 382, 391 (2012) (this Court declines to issue advisory opinions on issues that would have no practical effect on the instant appeal). Consequently, Issue Nos. 1 through 5 above are premature and not ripe for review in this proceeding. Suez is free to raise them in the context of any late claims proceeding that may occur should there be a remand to the SRBA Court to adjudicate and decree the late claims.[1]

Suez additional Issue No. 8 is an administrative water right accounting-based question, also not at issue in this appeal. The District has consistently maintained throughout these proceedings that the issues involved in this appeal are questions of property rights determination, not questions over administrative water right accounting programs. *Appellant's Opening Brief*,

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[1] Suez concedes the hypothetical and advisory nature of its "proving up" additional issues on appeal. *Suez Response*, p. 22 ("there is no need for this Court to address how one proves up a late claim . . . there are ample reasons not to go there"). Nonetheless, Suez gratuitously invites the conversation over six pages of briefing "to address the obvious questions of what should happen" on remand to the SRBA Court. *Id.* This Court should not take the bait.

pp. 13; 19-27; *see also*, R. 2435-36. And, the State agrees that administrative water right accounting has no bearing on the property rights determination question. R. 2186 (Tr. 3/1/16) at 11:16-12:9. To the extent this Court finds Issue No. 8 above pertinent to this appeal, BCID adopts and incorporates by reference the counterarguments of the Ditch Companies in the context of the related Basin 63 appeals (Docket Nos. 44677-2016 and 44746-2016).[2]

B. The Scope and Jurisdiction of the SRBA Late Claims Proceeding

1. BCID's Participation in the Late Claims Proceedings was Appropriate and Legitimate

The State contends it is not proper for either the district court or this Court to render an opinion on the flood control release "legal effect" question BCID raises. *State Response*, pp. 23-41. The State contends that BCID abused the late claims process, and that it could (or should) have pursued a variety of other avenues, including filing: (1) a motion to set aside the existing storage right partial decrees; (2) its own motion for late water right claims; or (3) formal objections or responses to the United States' claims. *Id.*, pp. 32-35. Finally, the State contends BCID's arguments are really questions (or quarrels over) administrative water right accounting

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[2] Suez has noted throughout its participation in these Basin 65 proceedings that the issues it raises are "nearly identical" to those it raised in the Basin 63 proceedings. R. 2224, n. 2. Suez likewise understood Special Master Booth's Basin 65 holdings to be "identical" to his "reasoning and conclusion in the currently-pending Basin 63 late claims subcases." R. 2224. Consequently, Suez has incorporated by reference large amounts of its Basin 63-related briefing on what it considers to be "fundamental principle[s]" of Idaho's prior appropriation doctrine. R. 2078, n. 3; *see also*, *Suez Response*, pp. 29-30 (wherein Suez reiterates its arguments from the Basin 63 proceedings, that it will continue to address those issues in the Basin 63 proceedings, but that it also addresses them in this appeal in Section IV (pp. 29-47) of its respondent's brief) and R. 2186 (Tr. 3/1/16) at 14:19-15:15. It is for this reason, and because the arguments over Suez's legal theories are more thoroughly addressed in the context of the Basin 63 proceedings, that BCID turns this Court's attention to those proceedings rather than addressing Suez's "fundamental principles" in comparatively short shrift in this appeal. This said, BCID does address Suez's "ancillary use" and "excess water" theories (Issue Nos. 6 and 7 above) later herein.

and, therefore, must be addressed administratively first. *Id.*, pp. 39-40. Despite BCID's alleged abuse of the late claims process, ***all three*** of the State' alternative procedures are SRBA Court-based. Thus, the State must agree that the SRBA Court possesses the subject matter jurisdiction necessary to address the flood control "legal effect" question. And, two of the State's alternative procedures are SRBA ***late claims process-based*** vehicles (motion for late water right claims; and filing earlier objections or responses to the United States' late claims). While the State and BCID disagree over the nature and scope of the SRBA late claims proceedings, the ultimate jurisdiction of the SRBA Court is not in dispute.

The State's criticisms of BCID's allegedly tardy participation in the Basin 65 late claims subcases are irrelevant. *State Response*, pp. 32-34. What is relevant is that BCID availed itself of the opportunity to intervene (as did Suez before it) under AO1 § 10(k), and the SRBA Court granted that intervention. R. 155. Because of BCID's vested rights and interest in the existing storage rights and the late claims, it obtained fully party status ***as a matter of right***. *Id.* There is nothing improper or extra-procedural regarding BCID's participation in this matter. The District filed a Rule 24(c) Statement of Claims and Defenses (R. 158), and its claims and defenses withstood express challenge in opposition from the State. R. 430.

Special Master Booth held the State's attempts to preemptively narrow the scope of the late claims proceedings to be inappropriate. R. 430-32. Instead, Special Master Booth held that BCID's participation raised "some legitimate avenue of inquiry," *to wit*: "The use of water that would suffice to constitute a new appropriation of water could have only begun at a point where the use of water under the 'base' right was complete." R. 431-32. Thus, Special Master Booth was unwilling to "foreclose Black Canyon from properly presenting those issues for resolution." R. 432.

BCID addressed its arguments in response to those raised by the State on summary judgment—seeking its own competing grant of summary judgment as the non-moving party on the grounds that the existing storage rights for Cascade and Deadwood Reservoirs already appropriated the water sought by the United States' late claims. Special Master Booth agreed. *Appellant's Opening Brief*, pp. 4-6. Whether the Special Master exceeded his authority (and, by extension, that of the SRBA Court) is directly on appeal—the mechanics of BCID's participation in these proceedings is not.[3]

2. The Flood Control "Legal Effect" Question Addressed by BCID Was Squarely Raised by the United States at the Inception of the Proceedings

Contrary to the State's contentions otherwise, BCID did take the late claims subcases as it found them at the time of its intervention. *State Response*, p. 33. As explained in great detail in the District's *Rebuttal Brief on Challenge*, the United States made clear in its opening motion in support of its late claims that the claims were being filed as an alternative hedge against the legal theories of the State and others crystalized during the Basin-Wide Issue-17 proceedings ("BWI-17")—not based on theories shared by it or the other BWI-17 Petitioners (*i.e.*, irrigators). R. 2427-30. The United States filed the "supplemental" claims should "their theory" (that of the State and others, under which "all water entering a reservoir is considered diverted, including that released for flood control, with the result that releasing water for flood control can leave a reservoir full 'on paper' but not physically full") prevail. *Id.* If, on the other hand, BCID and the other irrigator Petitioner's "already appropriated" theory prevailed, the United States would

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[3] Though, again, the State apparently concedes that SRBA Court subject matter jurisdiction is proper to address the flood control "legal effect" question given the three alternative SRBA-based review vehicles it suggested at pages 32 through 34 of its respondent's brief.

withdraw the late claims as "unnecessary." *Id.*

The legal ramifications of flood control releases, if any, on the existing storage rights was expressly raised from Day One. Neither the State nor Suez objected to the United States' presentation of the issue. R. 41. Instead, the State incorrectly attributes the "already appropriated" theory to BCID, and that the issue was improperly "injected" by BCID. The record demonstrates the State's error in this regard. Moreover, BCID was free to pursue the alternative "already appropriated" theory of claim disallowance in response to the State's motion for summary judgment. *Farmers Nat'l Bank v. Green River Dairy, LLC*, 155 Idaho 853, 855, 318 P.3d 622 (2014) ; *see also*, *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001) (a motion for summary judgment allows a court to rule on issues placed before it as a matter of law; the moving party runs the risk that the court will find against it).

3. The Late Claims Process Compelled BCID's Arguments Regardless of Whether Alternative Procedures May Also Exist

So, the question becomes: What did the district court's grant of the United States' motion to file late water right claims beget? The answer resides in Idaho Code Sections 42-1410, 42-1411, and 42-1412, together with AO1 Sections 9-10, and 13-15. The moment the Presiding Judge granted the United States' motion, IDWR was obligated to investigate and recommend the pending late claims. IDAHO CODE §§ 42-1410 and 42-1411. That action required the Director to determine all of the elements of the water rights claimed, and report them to the court. *Id.*, § 42-1411(2) and (4). Upon doing so, the director's report enjoys presumptive *prima facie* weight. *Id.*, § 42-1411(4) and (5). It is then incumbent upon the claimant (and other parties to the subcase) to come forward "with the evidence" necessary to "establish any element of a water right which is in addition to ***or inconsistent with*** the description in a director's report," and to otherwise "rebut the director's report." *Id.*,

§ 42-1411(5) (emphasis added).

Procedurally, director's reports are subject to objections and responses by/from the water right claimants, as well as other parties to the SRBA. IDAHO CODE § 42-1412(1) and (2); *see also*, AO1 §§ 2(n), (p) and 10. Parties to the adjudication are also able to obtain full party status via intervention. IDAHO CODE § 42-1412(2) and AO1 § 10(k). The SRBA Court is then statutorily obligated to "hear and determine the objections to any water right," including the conduct of a bench trial, if necessary, to ultimately decree "each element of" the claimed water right(s). IDAHO CODE § 42-1412(3), (4), (5), and (6).

In the subcases that are the subject of this appeal (65-23531 and 65-23532), the director's reports recommended disallowance of the late claims for failure to claim the same in the prior Payette Adjudication. R. 44; 2594. Therefore, the Director denied the existence of all elements of the claimed water rights. Both the United States and BCID were "objectors" (the United States through the filing of its Standard Form 1 *Objections*; and BCID through its AO1 § 10(k) motion to participate and subsequent Rule 24(c) *Statement of Claims and Defenses*), and the State was a Respondent through the filing of its Standard Form 2 *Response to Objection*. R. 52, 2602, 56, 2606; and R. 137, 147, 155, and 158.

It was then incumbent upon each of the parties to present evidence and argument tipping the director's report's presumptive *prima facie* weight to the extent any of them took positions "inconsistent with" the water right descriptions in the director's report. IDAHO CODE § 42-1411(5). Consequently, it was incumbent upon the United States and BCID to present their evidence and argument in support or against the late claims (which both did under alternative theories that: (1) the late claims were not necessary because the existing storage rights already appropriated the post-flood control release water sought by the late claims; or

(2) the late claims, if necessary because the existing storage rights ultimately proved legally deficient in the face of flood control operations, should be granted as claimed under the constitutional method of appropriation), just as it was incumbent on the State to defend the Director's prior adjudication preclusive effect conclusion.

In hindsight, it appears that the Presiding Judge would have rather denied the late claims at their inception, but he did not. *See, e.g.*, Aug. Tr. at 30:23-32:17. Instead, the Presiding Judge granted the late claims, referred them to the Director for investigation and recommendation, and then referred the entirety of the proceedings to Special Master Booth without restriction under Idaho Rule of Civil Procedure 53(e) and AO1 § 9. R. 41 (*Order Granting Motions to File Late Notice of Claims*) and 129 (emphasis added) (*Order of Reference*, wherein the Presiding Judge charged Special Master Booth with "***conduct[ing] all proceedings necessary to issue a recommendation, consistent with SRBA Administrative Order 1, Rules of Procedure***.").

The unrestricted referral of the late claims to Special Master Booth was significant because it was seemingly within the Presiding Judge's authority to tailor and limit the scope of the special master's inquiry pursuant to Idaho Rule of Civil Procedure 53(e)(2) assuming *arguendo* that the mandatory statutory directives of Section 42-1411 and 42-1412 are malleable. He did not do so.[4]

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[4] The State acknowledges that the Presiding Judge's *post hoc* "narrow focus" rationalization of the scope of the late claims proceedings occurred *after one and one-half years of Special Master proceedings*. *State Response*, p. 30 ("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."); *compare*, R. 899 (wherein the Presiding Judge stated: "[T]he very validity and existence of the above-captioned water rights are at dispute and before the Court . . . Under Idaho Code § 42-1411(5) the burden now rests with the claimants to come forward with evidence to rebut the Director's recommendations, and establish the existence of the rights under the constitutional method of appropriation."). The district court was absolutely correct: ***the "very validity and existence of the above-captioned water rights" (i.e., the late claims) were in dispute <u>and</u> that dispute was properly before the district court***. BCID met its statutory burdens

Further, the State is incorrect that the SRBA Court's *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* (R. 61-62) did not retain jurisdiction over the existing storage rights for Cascade and Deadwood Reservoirs. *State Response*, p. 26. To the contrary, the order retained jurisdiction over the existing storage rights because the late claims over which jurisdiction was expressly retained (65-23531 and 65-25532) directly implicated the integrity, nature, and scope of the existing storage rights. The district court's grant of the late claims set in motion mandatory statutory processes that neither the State nor the Director can subsequently deny or restrict.[5]

The State's citation to Idaho Code Section 42-1401D (*State Response*, pp. 24; 26) is misplaced because the late claims process discussed in detail above is not, and did not originate as, the "[r]eview of an agency action of the department of water resources." The late claims process is a ***judicial process***, not an administrative process subject to later judicial review. And, the Director's role in that judicial process is, essentially, ministerial: he and IDWR are investigative fact gatherers whose tasks and findings are prescribed by statute, rebuttable, and ultimately subject to *de novo* review and confirmation (or rejection) by the SRBA Court. *See* IDAHO CODE §§ 42-1410, 42-1411(4) and (5), and 42-1412. The late claims process begins and ends with the district court, and the Director is simply a "technical assistant" whose participation

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by challenging the "validity and existence" of the late claims, arguing for their disallowance as a matter of law because the water claimed by them was already appropriated by the existing storage rights. BCID was statutorily bound to dispute the late claims, and the Presiding Judge correctly (at least early on) exercised jurisdiction over the pending "validity and existence" question.

[5] Idaho Code Sections 42-1411 and 42-1412 dictate that the Director and the court "shall" perform their respective functions, just as both statutes dictate that the parties to the subcases "shall" present their objections and evidence.

is intended to "assure that claims to water rights" are "accurately reported." IDAHO CODE § 42-1401B.

Finally, the State's contention that requests to clarify existing law against which water right holders are entitled to rely "must be done at the time the claimed water right claim is being adjudicated" is unfounded. *State Response*, pp. 26-27. In its opening brief, BCID cited the SRBA Court's *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Streamflow Maintenance Claim*; Subcase No. 63-3618 (Sept. 23, 2008) ("*Melanson MDO*") for the proposition that requests to clarify the law against which water right holders are entitled to rely is not a collateral attack on a prior decree or license. *Appellant's Opening Brief*, p. 22. While true that then Presiding Judge Melanson's collateral attack analysis occurred in the context of a pending water right claim, the proposition cited by him was of broader application. While addressed in the context of a water right claim, the legal proposition was used to protect the integrity of the prior license upon which the claim was based.

Nowhere does the decision state that such analysis or application is restricted to water right claims/adjudication proceedings. And, even if that were true, this appeal stems from late claim water right claim/adjudication proceedings. As further explained in Section II.D below, it is the State and Suez, not BCID, who are collaterally attacking the existing storage rights.

Assuming *arguendo* that the State is correct, that BCID "has had, and continues to have, ways of pursuing the so-called 'flood control effect question,'" does not necessarily mean that the pending late claims proceeding initiated by the United States ***and perpetuated by the district court*** was not an appropriate forum for raising and deciding the issue. *State Response*, p. 34. As a practical matter, and in direct response to the "shall"-based mandates of Idaho Code Sections 42-1411 and 42-1412, BCID was not only "entitled" to raise the flood control "legal

effect" question, it was ***required*** to do so. If the District otherwise sat on its hands, it guarantees that any such silence would be used against it by the State, IDWR, and others in future proceedings. Accepting such risk, and ignoring the plain language of the pertinent statutes, is as unreasonable as it is foolish.

4. The BWI-17 Overlay, and the Question of "First Impression"

The State is correct that BCID's existing storage right/already appropriated theory was argued during the course of the BWI-17 proceedings. *State Response*, pp. 25-27. However, the State is incorrect that the BWI-17 proceedings effectively disposed of the flood control "legal effect" question by committing it as one of administration before the Director. *Id.*, pp. 28-30. The State and BCID disagree over what this Court characterized as the question of "first impression." *A&B Irr. Dist. v. State (In re SRBA)*, 157 Idaho 385, 392, 336 P.3d 792, 799 (2014). But, both agree that this Court differentiated between activities that are administrative (and, therefore, reserved for the Director's first cut) and those that are judicial (and, therefore, reserved for the courts to decide). Merely distributing water, is a Director-first administrative activity. Determining water rights (*i.e.*, property rights) is a judicial activity not subject to the prior exhaustion of administrative remedies. *Id.*, 157 Idaho at 393, 336 P.3d at 800 ("Thus, the main issue here is whether the Director is determining water rights, and therefore property rights, when he determines that a water right is 'filled,' or if the Director is just distributing water."); *see also*, *State Response*, pp. 23-24 (acknowledging the distinction).

In BWI-17, this Court correctly identified the genesis of the dispute: "This case arose out of disputes over ***the effect flood control releases have*** on storage right holders . . . ." *A&B Irr. Dist. v. State*, 157 Idaho at 390, 336 P.3d at 797 (emphasis added). The Court then identified the "question" it was unwilling to answer on appeal absent the "development of a factual record" as:

"Whether flood control releases count toward the 'fill' of a water right." *Id.* at 157 Idaho 392, 336 P.3d 799. The Court characterized "that question" as a "mixed question of fact and law"; a "***water law issue[] of first impression*** with potentially far-reaching consequences." *Id.* (emphasis added). Consequently, the Court was unwilling to "issue an advisory opinion on 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.*[6]

The Court then identified, but left unanswered, the "main issue": "whether the Director is determining water rights, and therefore property rights, when he determines that a water right is 'filled,' or if the Director is just distributing water." *Id.*, 157 Idaho at 393, 336 P.3d at 800. The State concludes that this Court held the flood control effect question to be one of water right administration, not of water right adjudication. *State Response*, p. 28. BCID disagrees because: (1) it is not the Director's exclusive province to address questions of law; and (2) this Court left the question and the "fleshing out of these factual interpretations" (*i.e.*, the creation of appropriate records) to the SRBA Court if it "[chose] to address the issue of fill on remand." *Id.*, 157 Idaho at 392, 336 P.3d at 799. Unlike the State, BCID fails to find where this Court conclusively committed the flood control "legal effect" question to the Director's primary jurisdiction. If it had, it stands to reason that the SRBA Court would not have had the "choice" to address the matter on remand at all.

Special Master Booth, likewise, failed to reach the State's Director-first conclusion after careful review of this Court's BWI-17 opinion. *Memorandum Decision and Order Granting*

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[6] The Court's "water ***law***" characterization of the flood control effect question was correct and consistent with prior precedent involving Bureau of Reclamation reservoirs. *See Bray v. Pioneer Irr. Dist.*, 144 Idaho 116, 118, 157 P.3d 610, 612 (2007) (the right to use water "is specifically derived from law"; it is not a matter based exclusively in contract).

Ditch Companies' and Boise Project's Motions for Summary Judgment; Special Master's Recommendation of Disallowance of Claims, Subcase Nos. 63-33732, *et al.* (Oct. 9, 2015) (*Appellant's Opening Brief*, App. 1, pp. 18-21). As Special Master Booth correctly noted, the late claims process is not directed or defined by any administrative water right accounting process. *Id.*, p. 18 ("The nature of the property at issue does not change in relation to the accounting methodology used by the Idaho Department of Water Resources"). The void for the judiciary to fill (by interpreting the nature and scope of the existing storage rights—a property rights determination exercise) exists by virtue of the fact that "the legal descriptions of the existing storage rights do not describe what portion of the total [reservoir] inflows is authorized to be stored under those rights." *Id.*, p. 19. Said differently, the existing storage rights are "silent" on the flood control effect question. *Id.*, pp. 20; 32, n. 17; *see also*, R. 2518 (wherein the Presiding Judge agreed).

Taken to its logical conclusion for purposes of determining whether the late claims do, in fact, constitute the diversion and use of additional water, necessarily requires the determination of where the existing rights leave off (or end). R. 432. But, this late claims elements determination is a rabbit hole no one need descend if the express elements of the existing storage rights withstand the State and IDWR's theories concerning flood control releases:

> The *Partial Decrees* for the existing storage rights do not provide a description of what portion of such water is to be considered stored under the existing storage rights and what portion is not to be so considered . . . The above-captioned claims are to this second category of water that cannot be stored pursuant to the existing storage rights. However, the Ditch Companies and the Boise Project are not interested in having a water right to store water that cannot be beneficially used—i.e. the water that must be released pursuant to rule curves during a time of year when there is no irrigation demand for such water. Rather the Ditch Companies and the Boise Project desire to make sure that the Bureau has water rights to store water that can actually be used—i.e. the water in the Boise River Reservoirs at the time of maximum physical fill. If the existing storage rights authorize the storage of water that cannot be

> used, then the above-captioned late claims seek judicial recognition of the right to store the water that can be used. ***But proceeding further down the path toward such judicial recognition makes no sense if the existing storage rights already authorize the storage of water that can be, has been, and is beneficially used. The possible result of failing to ascertain the answer to this question is the issuance of duplicative water right decrees.***

Appellant's Opening Brief, App. 1, p. 20 (emphasis added). Further refined:

> The above-captioned [late] claims either are, or are not, for the same water authorized to be stored under the existing storage rights. If they are, they fail. ***It would be a futile endeavor to engage in additional fact finding and legal analysis if the claims fail upon the answer to the basic question of whether they are claims to water already stored under the existing storage rights.***

Id., pp. 33-34 (emphasis added).

This same analysis applies here in Basin 65 given the undisputed similarity of "spill and fill" flood control operations in the basin. *See, e.g.*, R. 1807-1810, 1877-79, 1989-92, and 2219-20. The State seeks to rigidly compartmentalize the overarching legal issues pending in both basins, but the overlap of issues and legal concepts (with the exception of application of *res judicata* owing to the *Payette Decree*) is undeniable. *Compare* R. 2067 (*State of Idaho's Motion to Alter or Amend*), and R. 2078, 2152-53, and 2224 (Suez filings incorporating by reference arguments it made in the Basin 63 proceedings, and raising issues *on Challenge* in the Basin 65 proceedings "nearly identical" to those it raised in the Basin 63 proceedings).

The presentation of the "legal effect" question, complete with a developed record, properly arrived before this Court through the adjudication (*i.e.*, late claims) process. The case was not initiated by a petition for administration, a delivery call, or some other administrative contested case proceeding. The case originated with an SRBA Standard Form 4 *Motion to File a Late Notice of Claim*, which motion cleared the courthouse threshold by grant of the Presiding Judge, thereby commencing a ***judicial process*** triggering mandatory statutory obligations and developing a record upon which decision of the "legal effect" question could be decided.

The United States' late claims necessarily implicated the existing storage rights for Cascade and Deadwood Reservoirs. The claims presumed (in response to the State and IDWR's BWI-17 arguments) that the existing storage rights no longer yielded the 863.0 kAF of "from storage" water (or one physical fill of the reservoirs) expressly stated on their face in flood control years. The late claims presumed a latent defect or deficiency in the existing storage rights that both BCID and the United States disagree with, but needed to file if these several years later the State's view of the law prevailed.

BCID did not abuse the SRBA process; rather, it took the process at face value and defended the integrity of the 863.0 kAF of use "from storage" water claimed and adjudicated twice over against the legal backdrop of "spill and fill" flood control operations occurring since 1957. The water right adjudication process is a property rights determination process, and property rights determination is reserved for the courts.[7] The late claims directly questioned the nature and scope of the property rights already embodied by the existing storage rights, contending that the 863.0 kAF of use "from storage" is a quantity less (sometimes far less) than that in flood control years. The SRBA Court had ample jurisdiction over the flood control "legal effect" question. *See, e.g., A&B Irr. Dist. v. State*, 157 Idaho at 392, 336 P.3d at 799 (this Court noting the "choice" on remand); *Bray v. Pioneer Irr. Dist.*, 144 Idaho 116, 118, 157 P.3d 610, 612 (2007) ("All claims arising in the SRBA are within the exclusive jurisdiction of the SRBA."); and *State Response*, pp. 33-34 (wherein the State suggests three alternatives available for BCID's presentation of the issue—***all of which*** are SRBA Court proceedings).

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[7] IDWR concedes this point before this Court. *See, e.g., IDWR Appellants' Brief* in Docket No. 44746-2016, pp. 59-60. BCID, therefore, requests this Court take Idaho Rule of Evidence 201(d) judicial notice of IDWR's concession because the agency's opening brief is a "record" in this Court's file "in the same or a separate case" and because judicial notice may be taken at any stage of a proceeding. I.R.E. 201(d) and (f).

C. The Effect of the Payette Adjudication

1. The Payette Adjudication Decreed 863.0 kAF of "Irrigation from Storage" Water

In support of its various *Payette Decree*-based arguments, the State cites the following quotation from *Thompson Creek Mining Co. v. IDWR*: "A water user has no property interest in being free from the State's regulation of water in accordance with the prior appropriation doctrine[.]" *State Response*, p. 22; *see also*, *Thompson Creek Mining Co. v. IDWR*, 148 Idaho 200, 213-14, 220 P.3d 318, 331-32 (2009). BCID agrees, provided that the regulation the State seeks to impose is, in fact, "in accordance with the prior appropriation doctrine." Thus, the corollary is that water users are free from regulations or legal positions taken by the State (and others) that are contrary to the prior appropriation doctrine. That is what is happening in this case, where the State's legal positions fail to honor the express 863.0 kAF quantity of "***irrigation from storage***" water decreed in the Payette Adjudication. Instead, that express quantity of water is something less in flood control years despite the facts that: (1) the mere diversion of water absent beneficial use does not a water right make (R. 2356); (2) flood control is not a "use" of water (R. 2356); (3) a storage right entitles one to divert and retain water until the same can be beneficially used (R. 2357-58); and (4) the water is sent downstream at a time of year when it cannot be used for irrigation (R. 1809, ¶ 8).

As explained in detail in BCID's *Appellant's Opening Brief*, the Bureau of Reclamation ("BOR") claimed and exited the Payette Adjudication with 863.0 kAF of physical "irrigation from storage" water. *Appellant's Opening Brief*, pp. 14-17; 27-30. The BOR's property interest in that aggregate quantity of physical water fully vested long before the Payette Adjudication via state water right license nos. R. 646 (issued 1962) and R. 403 (issued 1942)—property rights that could not have vested absent the diversion and end beneficial use of that quantity of physical

water. *Accord Morgan v. Udy*, 58 Idaho 670, 680, 79 P.2d 295 (1938) (diversion and application to beneficial use are the "two essentials" for a "valid appropriation" under Idaho law), and R. 719 and 720 (the licenses stating on their face that the "right to the use of said waters has been perfected in accordance with the laws of the State of Idaho and is hereby confirmed").

That aggregate quantity of physical water was decreed in the Payette Adjudication as a result of IDWR's "examination of the ditches, diversions [and] lands irrigated," and the agency's confirmation that: (1) the water as claimed "has been diverted and applied to beneficial use as described"; (2) the agency's water right recommendations memorialized the "past history of water use in the area"; and (3) the water use in the basin included the diversion and use of "the so called 'high water' or 'flood water' generally during the months of May and June." R. 525-26 (Conclusion of Law Nos. 3 and 14); R. 524 (Finding of Fact No. 19). The Payette Adjudication was litigated, and water rights decreed, against the backdrop of "spill and fill" flood control operations (occurring in the basin since 1957). There was no "paper" water, and the water ultimately diverted, stored, and used under the water rights previously licensed and later claimed and decreed was diverted, stored and used after flood control releases. *Appellant's Opening Brief*, pp. 14-17; 27-30. Neither the State nor Suez disputes these facts.

2. If the Payette Adjudication Decreed Something Less Than 863.0 kAF of "Irrigation from Storage" Water in Flood Control Years, That Conclusion is Based on New Facts and New Law Arising Post-Adjudication

To the extent there was any administration (or administrative change) in the basin, the parties agree that the change did not occur until after the 1986 close of the Payette Adjudication. *Compare State Response*, p. 22, and *Appellant's Opening Brief*, pp. 10-11, 29, 37-38. The "change" brought to the basin occurred in 1992/93, and involved the implementation of "year

around" water right accounting resulting in the accrual of water to the existing storage rights "regardless of whether physical storage occurs." R. 688.

The State makes clear that the advent of administration and accounting in the basin (*circa* 1992/3) works a detriment to the use "from storage" quantities of the existing storage rights. *See, e.g.*, R. 374, including n. 24. The accrual and use of water under the rights is not based on physical fill or predicated on the opportunity for end irrigation beneficial use; rather, flood control releases effectively "use" water otherwise accrued to the express irrigation purposes of use and quantities of the decreed storage rights. *Id.*; *see also*, R. 2007-19, and 2171.

Regardless of the propriety of the State's legal position (which BCID and the United States vehemently disagree with), there is no question that BOR had no good faith basis during the pre-1986 pendency of the Payette Adjudication to claim more water than the 863.0 kAF it did claim. That aggregate quantity of water already represented the physical capacity of the reservoirs and already met the irrigation needs of the Lower Payette Valley water users. The water rights decreed in the Payette Adjudication already resulted in physically full reservoirs, and physically full irrigation storage water accounts until at least 1993. *See, e.g.*, R. 2212-14. Even the State points out the impossibility of BOR or BCID seeking preservation of historic operations in the basin during the pendency of the Payette Adjudication because:

> [A]t the time of the Payette Adjudication . . . there was no water rights administration to memorialize . . . 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 <u>non</u>-administration.

State Response, p. 22 (emphasis in original). The late claims were not ripe during the Payette Adjudication because, as the United States noted at the inception of these proceedings, the late

claims were filed ***in response to, and "[c]onsistent with***," the arguments of the State, Suez, and others during the 2012 BWI-17 proceedings. R. 18-20.

The State is correct, water users do not have a property interest in being free from the State's regulation of water; provided that the regulation is consistent with the prior appropriation doctrine (*see* Sections II.D and II.E below). But the converse is also true: The State is not free to take inconsistent positions and alter the landscape in such a manner as to diminish or take vested property rights (water rights). *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977) (citations omitted).

The above-discussed and undisputed changed circumstances ***after the close of the Payette Adjudication*** make clear that the BOR could not have reasonably appreciated the need to file the pending late claims in the context of the prior Payette Adjudication. The fact pattern at issue in this appeal is tailor-made for the well-settled *res judicata* exceptions (and corresponding policy considerations) explained by this Court in *Heaney v. Board of Trustees*, 98 Idaho 900, 575 P.2d 498 (1978), *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 663 P.2d 287 (1983), *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 804 P.2d 319 (1990), and as consistently applied by this Court since. *Appellant's Opening Brief*, pp. 35-38.

Further, this Court should not to fall prey to the State's (and the district court's) superficial, semantics-based argument that the late claims are, by necessity, claims for the diversion and use of "additional water"; thereby shoe-horning them into the category of "unclaimed" water rights otherwise barred by operation of the prior *Payette Decree* and former Idaho Code Section 42-1411 (1969). *State Response*, pp. 15-20. The claims are "supplemental" only if flood control releases have a detrimental effect upon the express beneficial use "from storage" quantities of the existing storage rights. But they are not "additional" because the

claims seek nothing more than to preserve the one physical fill of the reservoirs (863.0 kAF) that the BOR ***already claimed and obtained*** in the Payette Adjudication but for the State and IDWR's latent legal theories crystalized during the BWI-17 proceedings. The late claims were filed to match the State and IDWR's theories as an alternative hedge to cover the possibility that those legal positions eventually prevailed. The reservoirs are no larger now than they were upon their construction completion, and the water users have not broken out additional ground needing the actual use of more water.

BCID finds the State's premise that BOR needs water rights of many more thousands of acre-feet to yield and protect the 863.0 kAF of use "from storage" water previously perfected and decreed absurd. The legal entitlement to 863.0 kAF of physical water did not change, but according to the State (and IDWR) the need to divert and encumber more than that quantity of water "to storage" apparently did somewhere along the line.

D. The District's Appeal is Not a Collateral Attack on the Existing Storage Rights

As explained in BCID's opening brief, the District's arguments concerning the existing storage rights work within their existing, express elements. *Appellant's Opening Brief*, pp. 24-30. The United States was decreed twice over in the Payette Adjudication and the later SRBA an aggregate 863.0 kAF of use "from storage" water. BCID's contentions honor that express quantity element, the State and Suez's do not. Seeking the interpretation of existing water rights in a manner consistent with their express elements is not an impermissible collateral attack on the underlying water rights. *State Response*, pp. 32; 34-38; *see also*, and *compare*, R. 2354-58.

The United States and BCID have repeatedly maintained that each seeks to preserve one physical fill of the reservoirs in flood control years under the authority and priority of the existing storage water rights—the aggregate 863.0 kAF of use "from storage" water previously licensed, claimed, and decreed. Neither the United States nor BCID seek to re-open, augment, or change the elements of the existing storage rights. R. 1886. The entire premise of BCID's position is that the existing storage rights already authorize the storage and use of the water that ultimately is stored and used in the Payette Basin in flood control years (that which is diverted and stored after the majority of flood control releases occur, when it is safe to do so as the flood risk wanes). The late claims are invalid because the water they claim is already appropriated by the existing storage rights, and the elements of the existing storage rights remain unchanged.

Conversely, to the extent the late claims are necessary to preserve the undisputed status quo of dual purpose reservoir operations in the basin, those late claims are "supplemental" to, not "replacements" or the "re-opening" of, the existing storage rights. If needed, and later decreed, the late claim-based water rights would be separate water rights working "in conjunction with [the] existing storage water rights, [ ] allow[ing] Reclamation to complete one physical fill of its reservoirs when it must release stored water for flood control." R. 18. The late claims would begin where the existing storage rights left off, also leaving the elements of the existing storage rights untouched.

As former SRBA Presiding Judge Melanson observed:

> The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.

Melanson MDO, p. 16 (citation omitted). However, requests to clarify the law against which water rights operate—requests of clarification of a prior decree or license that do not otherwise

seek express amendment of the existing water right elements are not an impermissible collateral attack. *Melanson MDO*, p. 18 (citation omitted). *See also*, *Gile v. Laidlaw*, 52 Idaho 665, 670-71, 20 P.2d 215, 216-17 (1933) (mere interpretation of a water right decree does not set aside, overrule, or interfere with the same), and *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 522-23, 284 P.3d 225, 248 (2012) (water right decrees do not necessarily contain all germane aspects of their administration and enforcement within their four corners).

BCID has no interest in altering the express elements of the existing storage rights. It believes that the existing storage rights already contain the diversion authority necessary to preserve the 863.0 kAF of use "from storage" water previously licensed and decreed. But, answer to the flood control "legal effect" question may dictate otherwise. That remains to be seen. In the meantime, BCID seeks clarification of the ultimate quantity of water the existing storage rights provide when weighed against the legal backdrop of federal flood control releases. Answer to the flood control "legal effect" question will not alter the elements of the existing storage rights in any way; rather answer to the question contrary to BCID's "already appropriated" arguments would simply lead one down the path of proving up and employing the late claims to make up for the deficiency (depending, of course, on the outcome of the *Payette Decree*/preclusive effect question).[8]

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[8] The State's reliance on *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016), *Rangen, Inc. v. IDWR*, 159 Idaho 798, 367 P.3d 193 (2016), and *Wright v. Atwood*, 33 Idaho 455, 195 P. 625 (1921) is misplaced because BCID embraces the existing elements of the decreed storage rights. BCID merely seeks clarification of what those elements mean with respect to flood control releases in light of the rights' "silence" on the issue. *Appellant's Opening Brief*, App. 1, pp. 20; 32, n. 17; *see also*, R. 2518. BCID seeks a property rights determination in light of the live controversy surrounding the integrity of the existing storage rights.

Likewise, the State's reliance on *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001) and *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907) is also misplaced. *Barron* does not stand for the proposition that "supplemental" water rights must divert from different sources to

If anyone is collaterally attacking the existing storage rights for Cascade and Deadwood Reservoirs it is the State and Suez. The State and Suez decouple and disassociate the "to storage" and "from storage" quantities of the existing storage rights. They read the use "from storage" quantity out of the rights altogether which is nonsensical because storage for storage's sake does not perfect or sustain a water right—only end beneficial use does. *See, e.g., Morgan v Udy, supra.*

This disassociation takes the form of Suez's "storable inflow" theory. *Suez Response*, pp. 31-32. The theory reads into the existing storage rights a term or an element that is not otherwise present within them: the requirement that all priority inflows must be stored and retained, or risk loss for failure to do so. The theory, cousin of the State's enlargement-based "encumbrance" theory (*State Response*, pp. 30-32; 35-37), ignores the space and timing mandates of the flood control rule curves (*i.e.*, prescribing what space is legally and physically available for beneficial use storage as the flood risk wanes), and likewise ignores the appropriator discretion afforded under Idaho law. It is a well-settled tenet of Idaho's prior appropriation doctrine that appropriators possess the discretion to divert up to the limits of their

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be "supplemental." *State Response,* p. 35. Idaho's inventory of water rights is replete with "stacked" (*i.e.*, "supplemental") water rights diverted from the same source. One need look no further than the *Stewart* and *Bryan Decrees* on the Boise River, which contain a number of stacked water rights all diverted from the same source—the Boise River. Likewise, the storage water rights for the Boise River Reservoirs (Arrowrock, Anderson Ranch, and Lucky Peak) are all ***supplemental*** to the spaceholders' natural flow-based rights, and all are diverted from the same source—the Boise River.

Regarding *Van Camp*, BCID agrees that it is absurd to think that Idaho law requires more than 863.0 kAF of diversion "to storage" water to yield the 863.0 kAF of use "from storage" water previously licensed, claimed, and decreed twice over. The late claims only appropriate more "to storage" water if the State's legal theories prevail. The State's arguments are disingenuous—the late claims only seek one physical fill of the reservoirs; the State's criticisms over the alleged claiming/encumbering of more water are a product of its own creation, a strawman argument it incorrectly attributes to the United States and BCID.

water rights, but not necessarily to the limits of those rights at all times. *McGinnes v. Stanfield*, 6 Idaho 372, 374-75, 55 P. 1020, 1021 (1898) (emphasis added) ("[S]o long as the appropriator of water applies the same to a beneficial or useful purpose, ***he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used***."); *see also*, *United States v. American Ditch Ass'n.*, 2 F.Supp. 867, 869 (D. Idaho 1933) (emphasis added) ("A water right is the right, in due order of priority and within the maximum appropriated, to use the amount of water ***which reasonably suffices for the owner's needs at any particular time. The factors variable, the amount is variable, not only season to season, but any day by day, even hour by hour . . . It must be left to the honest judgment of the [water right] owner in application***, subject to control by the court's watermaster, who interferes in any the owner's abuse . . .").[9]

The State and Suez's strawman arguments, and their collateral attacks on the existing storage rights, were not lost on Special Master Booth. *Appellant's Opening Brief*, App. 1, pp. 12-13 (noting the State and Suez's "strawman contentions" that the irrigators seek to exceed the quantity elements of the existing storage rights); p. 17 (rejecting the *Van Camp v. Emery*-based "all 'storable inflow'"/improper additional "encumbrance" arguments); pp. 31-33 (rejecting the State and Suez's collateral attack arguments); and pp. 35-36 (noting that the State

[9] When exercised, diversion discretion does not encumber the river system or preclude the diversion of un-diverted/unused flows by others. Instead, the un-diverted and un-stored flood control releases are treated as unappropriated water, available for use by others with valid water rights to do so. *Knutson v. Huggins*, 62 Idaho 662, 668-69, 115 P. 2d 421, 424 (1941), *quoting Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909) (when a senior appropriator is not diverting their full entitlement, or any at all, the un-diverted water is treated as unappropriated, available for use by junior right holders "for such period of time" as the senior lets the flow past un-diverted).

and Suez's interpretation of the existing storage right decrees ***does*** constitute an impermissible collateral attack on the same).

Upon what body of law are the water users like BCID entitled to rely? Upon what body of law is the State (or IDWR) able to come in several years after the fact and diminish the express "irrigation from storage" quantity of water previously licensed and decreed? Flood control operations are in jeopardy and the State's position is not only inconsistent with the plain language of the existing partial decrees, but it is also inconsistent with the State Water Plan's dual use reservoir provisions that are binding on the State and its agencies. R. 1750-76; and IDAHO CODE §§ 42-1734A, 42-1734B, and 42-1734C.

E. Suez's "Ancillary Use" and "Excess Water" Theories Are Baseless

The State, Suez, and IDWR make clear that the post-flood control release water ultimately diverted, stored and beneficially used in the Payette Basin ***is not*** diverted, stored, and used under the existing storage rights for Cascade and Deadwood Reservoirs. *Compare* R. 374, including n. 24, 2171, 1633-35, 2186 (Tr. 3/1/16) at 14:19-15:15, and 2006-12. They variously recognize the "historic practice," but equate the diversion and use of post-flood control release water to something less than a water right—the "ancillary use" of "excess water." Moreover, the argument goes, one cannot ever perfect a fully vested water right in the "excess water" used. These theories are contrary to Idaho law.[10]

First, the "ancillary use" theory violates the plain language of Idaho Code Sections 42-103 and 42-201(2), both of which require a valid water right prior to the diversion and use of water. In particular, Idaho Code Section 42-201(2) unambiguously provides that

[10] Suez additional Issue Nos. 3 and 7 address the same "ancillary use" of "excess flows" issue. Because there is no such doctrine under Idaho law both questions posed by Suez are properly answered in the negative.

outside of few exceptions (none of which apply in this case): "[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so . . . ." Compare IDAHO CODE §§ 42-201(2) and 42-201(3).[11] This Court recognizes this water right requirement. *See, e.g., Cantlin v. Carter*, 88 Idaho 179, 186, 397 P.2d 761, 765 (1964) (one desiring to appropriate water must do so under the available constitutional or statutory methods to accomplish a "legal appropriation").

Idaho's "maximum use" doctrine does not side-step the valid water right requirement either. *Suez Response*, pp. 38-41. Suez's common law-based arguments fail to account for the well-settled presumption of statutory construction that the Legislature knew of all pertinent statutes and other legal precedent existing at the time the statute was enacted. *Twin Lakes Canal Co. v. Choules*, 151 Idaho 214, 218-19, 254 P.3d 1210, 1214-15 (2011) (citation omitted). This includes existing common law, which the Legislature is empowered to modify and abrogate. *Id.*

Idaho Code Section 42-201 was last amended in 2016, and the plain and unambiguous language of Section 42-201(2) remained unchanged. Idaho Sess. Laws, 2016, Ch. 139, § 1. Idaho's "maximum use" doctrine works within, not independent of, Idaho's prior appropriation doctrine. To hold otherwise, and to apply the "maximum use" doctrine in the manner Suez asserts (*i.e.*, that the "maximum use" doctrine authorizes water users to divert, store, and use water absent a valid water right to do so) impermissibly renders the plain language of the statute (and that of Section 42-351(1)) a nullity. *Twin Lakes Canal Co.*, 151 Idaho at 218, 254 P.3d at 1214 (citation omitted).

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[11] This same forceful admonition is found in Idaho Code Section 42-351(1): "It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert or use water not in conformance with a valid water right."

To the extent Suez argues that the water right requirements of Idaho Code Sections 42-201(2) and 42-351(1) are met by the existing storage rights, the fully subordinated nature of its so-called "ancillary use" theory does not square. Water rights absent a protectable priority date are not legally cognizable under Idaho law. IDAHO CODE §§ 42-1409, 42-1411, and 42-1412 (priority is an express element of water rights); IDAHO CODE § 42-106 (first in time is first in right, a provision that is nullified by subordination to existing junior and all future rights); and *State v. ICL*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) (priority is an "essential" element, the absence of which "vitiates the existence of a legal water right").

Second, Suez's characterization of "excess flows," and the suggestion that "free river" conditions are not subject to the perfection of bona fide water rights are incorrect. *Suez Response*, pp. 44-47. This case does not involve the interpretation or application of a general provision as was the case in *State v. ICL*, 131 Idaho 329, 955 P.2d 1108 (1998), and the companion case *A&B Irr. Dist. v. ICL*, 131 Idaho 411, 958 P.2d 568 (1997). The cases also did not address Idaho Code Section 42-201(2)'s requirements, nor whether the historic use of so-called "excess water" or "high flows" ripened into vested and perfected water rights under the constitutional method of appropriation. Consequently, Suez's and the State's cited authorities regarding "excess flows" have no bearing on the analysis of the circumstances pending in this appeal—where there are existing claims to the so-called "excess water" and where Idaho Code Section 42-201(2) has been raised and argued.

In addition to being misplaced, Suez (and the State (*see State Response*, pp. 36-37)) misapprehends this Court's holding that "excess water" (or "high flow") could not be decreed as a water right. This Court did not generally hold that one cannot establish bona fide water rights in "excess flows." Rather this Court held that general provisions in and of themselves do not

establish water rights, and that the particular general provisions at issue in *A&B* and *ICL* (using the vague terms "excess" and "high" flows) should not be decreed because they were incapable of (or not "necessary") for defining or administering the water rights otherwise decreed in conformance with Idaho Code Sections 42-1411(2) and 42-1412(6). *A&B Irr. Dist.*, 131 Idaho at 414; 416, 958 P.2d at 7-8; 13; *accord, State v. ICL*, 131 Idaho at 332-333, 955 P.2d at 1111-12.

On remand from this Court's *State v. ICL* decision, the SRBA Court squarely addressed, and rejected, the contention that "excess water" is somehow a category of water in which no vested right may be established. Instead, the Reynolds Creek water users who were the subject of the "excess water" general provision at issue subsequently filed claims to the "excess water" thereby mooting the need for the general provision.

The Reynolds Creek water users (like BCID) were not interested in relying on a general provision authorizing their use of "excess water" (to the extent that could result contrary to the plain language of Idaho Code Section 42-201(2)), rather they wanted to secure protectable water rights in that "excess water"—something the general provision could not provide. *See Special Master's Report and Recommendation for General Provisions in Basin 57 Designated as Basin-Wide Issue 5-57*, Subcase No. 91-0005-57 (Sept. 11, 2002), pp. 3-5; 6-7. After IDWR issued compliant water right recommendations for the pending "excess water" claims ("compliant" in the sense that IDWR's recommendations contained "all of the elements of a water right"), Special Master Cushman determined that "the issue of 'excess water' no longer need[ed] to be addressed via a general provision." *Id.* at p. 4. Bona fide water rights to the so-called "excess water" were then decreed by the court. *See Order of Partial Decree for Rotation Irrigation General Provision in Basin 57 (Reynolds Creek)*, Subcase No. 91-0005-57 (Nov. 20, 2002).

As further explained by the SRBA Court in its *Memorandum Decision and Order on Challenge*, Subcase Nos. 74-15051, *et al.* ("Lemhi High Flows Claims") (Feb. 12, 2012), this Court's decisions in *ICL* and *A&B Irr. Dist.* stand only for the proposition that general provisions do not create a water right. *Id.* at 25. "Excess flows," "high flows," and "excess water" are nothing more than unappropriated water." *Id.* Suez agrees. *Suez Response*, pp. 44 and 46 (Excess water, high flows, and "free river" all mean the "same thing . . . at that moment the system contains some unappropriated water"; "Excess water and unappropriated water are the same thing"). And, "unappropriated" water is subject to claim and appropriation. IDAHO CONST. Art. XV, § 3.

There is no categorical prohibition against establishing priority-based protectable water rights in "excess" or "high" flows (*i.e.*, otherwise unappropriated water), no matter how variable those flows may be. The Reynolds Creek water users perfected water rights in the "excess water" in that drainage; water flows "occurring during the spring runoff when the flow of Reynolds Creek is high and contains more water than can be used under the established rights during periods of high flows." *Special Master's Report and Recommendation for General Provisions in Basin 57 Designated as Basin-Wide Issue 5-57*, Subcase No. 91-0005-57 (Sept. 11, 2002), p. 2. Likewise, Suez has done the same in the Boise River basin. *See, e.g.*, A.R., Ex. 3012 (water right report for permit No. 63-31409, a flood water right Suez is authorized to divert when flood control releases are being made/spilled from Lucky Peak Reservoir).[12]

[12] BCID requests this Court to take Idaho Rule of Evidence 201(d) judicial notice of Exhibit 3012 from the related appeals pending in Docket Nos. 44677-2016, 44745-2016, and 44746-2016. The exhibit is part of the record (*i.e.*, exhibits and file) in another case before it. And, judicial notice may be taken at any stage of a proceeding. I.R.E. 201(f). Both Suez and the State are well aware that "excess flows" are routinely appropriated, ripening into fully vested and protectable real property interests. In fact, the *Bryan Decree* on the Boise River is known as

Both Special Master Booth and Presiding Judge Wildman roundly rejected these "excess flows/free river" and "ancillary use" arguments regardless of who presented them (*i.e.*, the State, IDWR, and Suez). *See, e.g., Appellant's Opening Brief* (BCID's opening brief in this appeal), App. 1, pp. 27-31 (Special Master Booth's *Memorandum Decision and Order Granting Ditch Companies' and Boise Project's Motions for Summary Judgment*, Subcase Nos. 63-33732, *et al.* (Oct. 9, 2015) encapsulating and rejecting the "State's and United Water's" legal theories regarding all "storable inflow"; water that is "legally and physically available" for diversion; and the "ancillary use/excess water" theory of use); and *United States' Brief as Appellant*, App. 2, pp. 14-17 (the District Court's *Memorandum Decision and Order*, Case No. CV-WA-2015-21376 (Sept. 1, 2016) encapsulating and rejecting IDWR's "excess flow"-based arguments). This Court should do the same.[13]

Finally, Suez's "distribution" and junior "protection" arguments are misplaced. *Suez Response*, pp. 36-38. First, Suez contends that water released for flood control purposes must count against the existing storage rights despite the lack of end beneficial use (let alone the opportunity for the same) for the "simple" reasons that the prior appropriation doctrine is "harsh . . . ***when water is scarce***," and "[t]he Department's distribution of water to various water rights has nothing to do with beneficial use." *Id.*, pp. 36-37 (underline in original and emphasis added). Beneficial use "is not a factor in distribution or in determining fill of a storage water right." *Id.*, p. 37.

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the "flood water suit," decreeing numerous water rights established in the Boise River flood flows to that point in time (1929)—including the storage water right for Arrowrock Reservoir.

[13] Because Idaho law is clear that water users can and do perfect fully vested water rights, in so-called "excess water," "flood flows," and/or "high flows," Suez's additional Issue No. 4 on appeal must be answered in the negative should this Court entertain it. Priority is a necessary element of a water right which precludes subordination to future appropriations.

Suez's "distribution"-related contentions fail for at least two reasons: (1) flood control operations (both releases and physical filling as the flood risk wanes) occur during times of plenty ***not scarcity***; and (2) a storage water right under Idaho law is the right to meaningfully hold and retain water until it can be beneficially used. *See IDWR Appellants' Brief*, Docket No. 44746-2017, pp. 2; 48 (posing the question of how to allocate water "when there is too much rather than too little—when the risk is flooding rather than scarcity") and *A&B Irr. Dist. v. State*, 157 Idaho 385, 389-90, 336 P.3d 792, 796-97 (2014) (*quoting Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) ("Storage water is water held in a reservoir and intended to assist the holders of the water right in meeting their decreed needs"; "the very purpose of storage is to retain and hold for subsequent use.")).

In part, these Basin 65 appeals and those in Basin 63, stem from IDWR's attempt to administer the storage water rights year-round—to superimpose statutory "distribution" authority during times of plenty (flood control years) contrary to the scarcity-based premise of Idaho Code Title 42, Chapter 6. *See, e.g.*, IDAHO CODE § 42-607 (emphasis added) (the administrative "distribution" duty arises "***when in times of scarcity*** of water it is necessary" to "shut and fasten" headgates or otherwise police the diversion and use of water "in order to supply the prior rights of others in the stream or water supply").

Suez's junior "protection" arguments likewise fail because junior appropriators have no vested right in, or reasonable expectation in the "store it or lose it" (or all "storable inflow") theories. For one, the theories do not exist under, and are not supported by, Idaho law. And, junior water right appropriators take a stream as they find it at the time of their appropriation, complete with on-stream dams and reservoirs and the operations those facilities bring. *Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 9-10, 154 P.2d 507, 510 (1944).

The District and United States seek the one physical fill of the reservoirs (863.0 kAF) that has been occurring for decades in the Payette Basin in conjunction with dual purpose flood control operations. The only "risk" that current and future junior appropriators face under one physical fill paradigm is being the junior appropriators that they are. The BOR took the Payette River Basin as it found it when Cascade and Deadwood Reservoirs were built (*i.e.*, junior to Lake Reservoir Company and other senior storage water right holders in the basin), and those subsequent to the BOR do the same—that is the prior appropriation doctrine. *See, e.g.*, IDAHO CODE § 42-106.

F. Water Right Accounting Has No Bearing on Constitutional Method Appropriations

To the extent the Court determines that the existing storage rights for Cascade and Deadwood Reservoirs do not authorize the storage and use of "second in" water during flood control years, the storage and use of that water prior to 1971 still creates a valid water right regardless of what the advent of water right accounting wrought in 1993. Until a "deficiency" is determined in the so-called "base rights," there is no need for the "supplemental" late claims.

As discussed above, the State and Suez presuppose there is a deficiency, and the State further makes several attempts at rewriting what its Reclamation Engineer licensed in 1942 and 1962, respectively; what IDWR recommended during the context of the Payette Adjudication; what Judge Doolittle ultimately decreed in the Payette Adjudication; and what the district court reconfirmed and adjudicated again in the context of the SRBA: the vested right to 863.0 kAF of beneficial use "from storage" water, 860.5 kAF of which is dedicated to irrigation purposes of use. It is the State and Suez, not BCID or the United States, who argue that it takes 1.3 mAF to net the 863.0 kAF of beneficial use "from storage" water already licensed, claimed, and adjudicated.

The hydrograph of flood control operations—the physical filling of Cascade and Deadwood Reservoirs and the end beneficial use of the water physically stored after and as flood control release conclude—is undisputed. It is the "historic practice" and the "status quo." R. 2006-12; *State Response*, p. 22 (apparently, the result of a lack of formal administration prior to 1993); and *Suez Response*, pp. 44-47 (the so-called "ancillary use" of "excess flows."). And, it has been occurring since at least 1957. R. 1809, ¶ 7.

Prior to 1971, Idaho law recognized two equally valid methods of securing a water right: (1) the constitutional (or beneficial use) method; and (2) the statutory method. *Fremont-Madison Irr. Dist. v. IGWA*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996). Under the constitutional method, a valid water right vests and perfects upon the simple diversion of water from a natural source and beneficial use of the water diverted. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 8, 156 P.3d 502, 509 (2007). Constitutional method-based water rights are no less enforceable than one based on the statutory method, and the appropriator need not have intended to establish a vested water right, or even understood that his actions of diversion and use secured a perfected water right. *Id.* at 11, 156 P.3d at 512. The district court agrees. *United States' Brief as Appellant*, App. 2, pp. 14-17 (The district court's *Memorandum Decision and Order*, Case No. CV-WA-2015-21376 (Sept. 1, 2016) finding constitutional method water rights embedded in the post-flood control release water ultimately stored and released for end beneficial use under the "spill and fill" flood control operations hydrograph[14]).

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[14] *See also, United States' Brief as Appellant*, App. 1 (the SRBA Court's *Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master* (Sept. 1, 2016) is the separate order of remand for purposes of proving and decreeing the constitutional method water rights embedded within the post-flood control release water the Director categorizes as "unaccounted for storage.").

At a minimum, this Court should preserve the constitutional method late claims pending in these subcases as an alternative method of preserving what all agree is the pattern of ultimate diversion, storage, and end beneficial use of water in the Payette Basin in flood control years. That pre-1971 diversion and use of post-flood control release water perfected protectable, priority-based property rights.

G. The State and Suez's Requests for Attorney Fees on Appeal Should Be Denied

The State and Suez seek an award of their attorney fees on appeal pursuant to Idaho Code Section 12-117. *State Response*, p. 40; *Suez Response*, p. 47. Their respective requests should be denied.

Idaho Code Section 12-117 provides, in pertinent part:

> [I]n any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

IDAHO CODE § 12-117(1). Regardless of whether an award issues under subsections (1) or (4) of the statute, the award must be based on this Court's finding that BCID: (1) is the non-prevailing party; and (2) that it "acted without as reasonable basis in fact or law." *See, e.g., Hobson Fabricating Corp. v. SE/Z Construction, LLC*, 154 Idaho 45, 53, 294 P.3d 171, 179 (2012) (citation omitted). A party does not act without a reasonable basis in fact or law if it raises an issue of first impression or presents a legitimate question for this Court to address. *Id.* (citation omitted).

First, the State and Suez's requests for attorney fees on appeal should be denied on the grounds that this Court already characterized the flood control "legal effect" question as one of

"first impression" that it did not otherwise address further in the context of BWI-17 for lack of a sufficiently developed record. *A&B Irr. Dist. v State*, at 157 Idaho 392, 336 P.3d 799. The SRBA late claims process provided the platform upon which the factual record was developed, and the SRBA Court (at least Special Master Booth) then addressed the question. Section 12-117-based fee awards are denied on questions of first impression. *See Hobson Fabricating Corp., supra.*

Second, assuming BCID is the non-prevailing party either in whole or in part (which result remains to be seen), the District acted with reasonable basis in fact and law. The SRBA late claims initiated a mandatory statutory process by which the claimant (and other parties to the subcase) were required to come forward "with the evidence" necessary to "establish any element of a water right which is in addition to ***or inconsistent with*** the description in a director's report." *Id., see also,* IDAHO CODE § 42-1411(5) (emphasis added). The Director denied the existence of all of the claimed water right elements. The process then required BCID to present evidence and argument rebutting the Director's Report's presumptive *prima facie* weight to the extent BCID took positions "inconsistent with" the water right descriptions in the Director's Report. BCID did so under alternative theories that: (1) the late claims were not necessary because the existing storage rights already appropriated the post-flood control release water sought by the late claims; or (2) the late claims, if necessary because the existing storage rights ultimately proved legally deficient in the face of flood control operations, should be granted as claimed under the constitutional method of appropriation.

The plain language of the Presiding Judge's Order of Reference speaks for itself: "***conduct all proceedings necessary to issue a recommendation, consistent with SRBA Administrative Order 1, Rules of Procedure***." R. 129 (emphasis added). BCID and Special

Master Booth took the order at face value. And, BCID further did so to avoid the risk that failing to litigate the flood control "legal effect" question would be used against it in future proceedings.

Third, BCID's good faith application of the *Joyce* (might and should have litigated) and *Duthie* (new facts/ripeness) exceptions to the *res judicata* doctrine are supported by the record. Not only did Special Master Booth agree that the "undisputed evidentiary facts" revealed that "there was no basis" upon which the BOR could have advanced the late claims during the pendency of the Payette Adjudication, but the State likewise acknowledged that "[A]t the time of the Payette Adjudication . . . there was no water rights administration to memorialize." *Compare* R. 2212-14, and *State Response*, p. 22.

Finally, Suez's request for attorney fees particularly lacks merit. Suez is a municipal water provider in the Boise River Basin (Basin 63). It conducts no operations in Basin 65. As it has noted throughout its comparatively limited participation in these Basin 65 proceedings, the arguments it raises here are "nearly identical" to those it raised in the Basin 63 proceedings. R. 2224, n. 2.[15] Suez has incorporated by reference large amounts of its Basin 63-related briefing on what it considers to be "fundamental principle[s]" of Idaho's prior appropriation doctrine. R. 2078, n. 3; *see also*, *Suez Response*, pp. 29-30 (wherein Suez reiterates its arguments from the Basin 63 proceedings, that it will continue to address those issues in the Basin 63 proceedings, but that it also addresses them in this appeal in Section IV (pp. 29-47) of its respondent's brief).

Suez has, and is availing itself of, ample opportunity to argue issues important to it in the course of the Basin 63 appeals. In other words, Suez was not compelled to participate in these

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[15] Unlike BCID, who was granted full party status as a matter of right under Rule 24(a) given its direct interest in the water rights at issue (R. 155), Suez was granted only ***limited participation*** in the Basin 65 subcases under Rule 24(b) because of its more direct and available argument opportunities in Basin 63. R. 125-26.

Basin 65 proceedings over lack of other available forum. Rather, it voluntarily injected itself in these proceedings to double its argument opportunities; and even it concedes it is simply recycling and repeating its Basin 63 arguments here. Consequently, Suez should be required to pay its own way in these Basin 65 proceedings.

III.
CONCLUSION

The threshold flood control "legal effect" question raised by BCID is properly before this Court. This includes BCID's arguments that the existing storage rights for Cascade and Deadwood Reservoirs have already appropriated the water sought by the pending late claims.

The pre-1971 pattern of diversion and use of water in the Payette Basin during flood control years is undisputed. Instead, the dispute centers upon how that diversion and use (the diversion and use that has "historically occurred" and been "allowed" (R. 2010)) can be preserved and protected. Regardless of the parties' dispute over "how" the diversion and use can (or should) be protected, there is no question that the diversion and use must be protected. Anything less amounts to an impermissible diminution and taking of the District's vested property rights.

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RESPECTFULLY SUBMITTED and DATED this 21st day of July, 2017.

CHAS. F. MCDEVITT, LAW OFFICE

By _____
Chas. F. McDevitt

SAWTOOTH LAW OFFICES, PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of July, 2017, I caused a true and correct copy of the foregoing **APPELLANT BLACK CANYON IRRIGATION DISTRICT'S REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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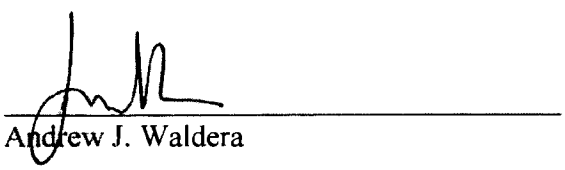

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