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Department of Water Resources

Attorneys for Emmett Irrigation District

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

In Re: SRBA

Subcase Nos. 65-11412 and 65-11412A

Case No. 39576

**MEMORANDUM IN SUPPORT OF EMMETT
IRRIGATION DISTRICT'S MOTION FOR
SUMMARY JUDGMENT**

I.

INTRODUCTION

Emmett Irrigation District ("District"), by and through its counsel of record Moffatt, Thomas, Barrett, Rock & Fields, Chtd, lodges this Memorandum in Support of its Motion for Summary Judgment, filed concurrently herewith. The Motion, Memorandum, and the supporting Affidavits, also filed concurrently herewith, are brought pursuant to Idaho Rule of Civil Procedure 56, Administrative Order 1, and the Orders of the Special Master in the above-captioned subcases.

There are no genuine issues of material fact. The District is entitled to judgment as a matter of law that it is the owner of the water right used to drive the direct-connect pumps at the Black Canyon Dam. If the District is not the full owner of both legal and beneficial title of that water right, the District is at least entitled to beneficial ownership of the right, because without the District, the pumps would not exist, there would be no need for the pumps and the water which drives them, and the water used to drive the pumps would not be put to a beneficial use.

This matter is before the Special Master on summary judgment because the District and the United States Bureau of Reclamation (the "Bureau") have stipulated that this matter may be properly resolved as a matter of law, using relevant documents disclosed on or before January 24, 2003. The District and the Bureau have agreed to waive all objections to the documents except as to relevance.

The District respectfully requests that the Special Master grant summary judgment in its favor, for the reasons set forth herein. The District should be decreed the owner of the water right sought under SRBA Claim No. 65-11412A; that right should be decreed as claimed by the District. In the alternative, the District should be decreed the beneficial owner of SRBA Claim No. 65-11412, with the United States granted nominal title only.

II.

BACKGROUND AND HISTORY

A. The Nature of the Pumps and the Right

At the outset, the District desires to eliminate any potential confusion regarding the nature of the pumps and the water right at issue here. At various points, the pertinent

documents may refer to “direct-connected pumps,” “hydro pumps,” or even “hydro power pumps.” That term should not be confused with pumps or other mechanisms used to generate hydroelectricity.

The pumps at issue in this case are direct-connect pumps which convert the hydraulic force of channeled water to generate the mechanical power to pump water to into the District’s North Side Canal.¹ Affidavit of Roy Maxwell, ¶ 4 (“Maxwell Affidavit”). The pumps are not used to generate hydroelectricity. Operation of the pumps is further described in subsection II(C).

B. The History of Black Canyon Dam

The histories of the District and the Black Canyon Dam are inextricably intertwined. The central theme is the goal of the District to develop a reliable means of diverting and delivering its natural flow water rights into its canal system.² An integral component of the history involves the goal of the Bureau to ultimately provide water to the Black Canyon Irrigation District and to benefit other irrigation entities. These two goals produced a cooperative effort resulting in the construction of Black Canyon Dam, including the direct-connected pumps which are central to this matter.

An article from the Emmett Index dated May 8, 1924, sets forth some of the history preceding Black Canyon Dam’s construction. Ex. 1 to Affidavit of Scott L. Campbell (“Affidavit of Counsel”) at DIST 00217. The original dam used by the District was located above Montour, and completed in 1905. It washed out in 1907, although the District then built a

¹ The ownership of the water rights which the District delivers to landowners within the District is not at issue in this subcase.

² The District’s storage rights are also diverted through this system.

new crib dam. A resolution adopted by the District in 1921, which included the report of Charles E. MacLean, details the problems with the 16 miles of canal which ran from the Montour Dam to the District lands:

The crib dam is largely on a gravel foundation and has been in place for about fifteen years. It was badly damaged by an extraordinary run of ice during the winter of 1919-1920. The dam was never a very substantial [sic] structure and it is now somewhat weakened by [sic] decay. The repairs made during the spring of 1920 were of a quiet substantial [sic] nature and may prolong its life for many years. On the other hand no structure, except one of first class concrete or masonry on a solid rock base, can be depended upon as safe against such an ice run as occurred during the spring of 1920, and which, though fortunately of very rare occurrence on the Payette, is a constant menace [sic] to the safety of the dam upon which the supply of the canal depends.

Capacity [sic] of Canal. The canal to adequately supply the lands of the District, with the present losses, should have a capacity at the head of 500 second feet but, at the present time, probably has a maximum capacity of 350 second feet, of which 40 per cent is lost by seepage and the balance is [sic] delivered to 22,000 acres in the District, which is at the rate of about $\frac{3}{8}$ of an inch to the acre. It is felt that to make the canal safe the present excessive losses must be reduced to 25 per cent, which would call for a headgate capacity of 400 second feet.

Location and Character of Canal. The canal follows [sic] the right or north bank of the Payette, with a detour to secure a favorable crossing of Squaw Creek. The location may generally be described as most difficult and hazardous, [sic] in part from the nature of the material and in part from the steep slopes upon which it is located:

...

To make an approximate estimate of the cost of the necessary enlargement of the canal and the improvements [sic] that would be required to reduce the present excessive maintenance charges would call for a detailed survey with cross sections of the canal at frequent intervals. From the very meager notes available, supplemented by my own inspection, I estimate that it would cost at least \$800,000.00 to put the canal in condition to carry 400

second feet of water with reasonable safety and to reduce the maintenance charges to a reasonable amount.

Ex. 2 to Affidavit of Counsel at DIST 00049 - DIST 00051.

It appears that originally, the District intended to build Black Canyon Dam itself. District minutes contain a draft contract dated July 6, 1920, under which the District would have agreed to build the dam, and the United States would have given its permission to flood the United States' land behind the dam. Specifically,

That at its own expense and without cost or expense to the United States, and subject to the terms and conditions of this agreement the Emmett Irrigation District may construct and maintain perpetually the said proposed diversion dam at the said Black Canyon damsite, and for such purpose may flood and submerge the said reserved and withdrawn public lands of the United States above the said proposed dam.

Ex. 2 to Affidavit of Counsel at DIST 00020. A part of that arrangement was that water could be diverted at Black Canyon Dam to the Black Canyon Irrigation District, upon payment of a share of the construction costs to The District. *Id.*

Even in the early planning for the Black Canyon Dam, use of direct connected centrifugal pumps to lift the District's water to the North Side Canal was an integral part of the plans. Ex. 2 to Affidavit of Counsel at DIST 00051 - DIST 00052. Mr. MacLean's report provides:

In addition to raising the water level of the river 90 feet by means of the dam, it will be necessary to lift the water 32 feet higher into the North Side Canal of the Emmett Irrigation District. The amount of water necessary to serve the requirements of the lands of the district on the Bench, or north side of the river, is 262 second feet, (518 of an inch per acre plus 12% less in delivery). It is planned to make this lift by means of direct connected centrifugal pumps, the pipe or conduit being built in as a section of the spillway.

Id.

By 1921, the District had been unable to secure financing to build the dam. Ex. 2 to Affidavit of Counsel at DIST 00053. However, the Bureau and the District had recognized the benefits to each of building a dam at Black Canyon, particularly since the United States was strongly in favor of providing water to the Black Canyon project (now Black Canyon Irrigation District). The District first held a special election, for which the notice provided that:

an election will be held in the Emmett Irrigation District on Saturday, the 30th day of April, 1921, at which election there shall be submitted to the qualified electors of said District the question of the right of District to enter into a contract with the United States of America, and whether or not the Board of Directors of said District will be authorized to sign said proposed contract for the construction of a concrete diversion dam across Payette River at the Black Canyon dam site of sufficient height to raise the water to an elivation [sic] to be diverted by gravity into the south side canal, and the construction of a conduit [sic] from said dam to said canal, and a pumping plant of sufficient capacity to pump approximately 266 second feet of water, from the back water of said dam, into the District's north side canal, for the sum of \$1,200,000.00, payment of which is to be made in installments and under terms and conditions as provided by said proposed contract, provided, however, that in case the water is diverted from the back waters of said dam and used for the irrigation of lands within the Black Canyon Irrigation District, the Black Canyon Irrigation District shall pay for one-half of the cost of the construction of said dam, under such terms as provided in said contract, which contract is included in the general plan adopted by this Board of Directors under date of March 15, 1921, ...

Ex. 2 to Affidavit of Counsel at DIST 00068 - DIST 00069.

Later in 1921, the District and the United States executed a contract for the construction of Black Canyon Dam. Ex. 3 to Affidavit of Counsel at EID 0001-00040. Several provisions of that contract are important to resolution of the matters at issue. Noting problems inherent in the dam at Montour and the Canyon Canal, the recitals portion of the 1921 contract

stated that the District had spent an average of \$100,000 per year in the preceding five years to maintain the existing dam and canal. *Id.* at EID 00007. Moreover, it would cost more to rebuild the existing canal than to build a new dam at Black Canyon. *Id.* at EID 00008. The contract described the District's difficulties in securing feasible financing to build the dam, and the fact that it would be less expensive to have the United States build the facility, with repayment by the District. *Id.* at EID 00009.

However, there was a benefit to the United States as well:

18. AND WHEREAS, the Secretary of the Interior has caused plans and surveys to be made for the irrigation of about Fifty-six Thousand (56,000) acres of arid land in the Black Canyon Division of the Boise Project, located in the Black Canyon Irrigation District, a large part of which is public land of the United States, and most of the remainder thereof is land which was public land at the time of the initiation of the Boise Project and was entered under the provisions of the said Federal Reclamation laws and was settled upon in the expectation of receiving water for irrigation under said Acts of Congress.

19. AND WHEREAS, under the said plans the said proposed Black Canyon dam is necessary as a means of diverting the waters of the Payette River for the irrigation of the lands of the said proposed Black Canyon Division of the Boise Project.

20. AND WHEREAS, the cost of constructing the irrigation works necessary for the irrigation of said Black Canyon Division is such that the said Black Canyon Division is considered to be a feasible project if it can be built without charging the same with the entire cost of the Black Canyon Dam, but that the cost thereof is sufficiently high so that the feasibility of said Black Canyon Division of the Boise Project is considered doubtful, if it were necessary to charge to the said Black Canyon Division the entire cost of the Black Canyon Dam.

21. AND WHEREAS, it is necessary to pump water for about one-third of the land proposed to be irrigated in said Black Canyon District, and whereas the Black Canyon Dam will furnish a

convenient and economical power site for generating the electric power necessary for such pumping.

Id. at EID 00009 - EID 00011. The basic terms (as set forth in the recitals) therefore provided that the District would repay the \$1.2 million cost of the dam in installments over 20 years.

However, if the dam was later used to divert water to the Black Canyon Division of the Boise Project, one-half the cost of the dam would be paid by Black Canyon Irrigation District bonds.

Id. at EID 00011 - EID 00012. Significantly, “the power possibilities of said dam ***not required for pumping water into the North Side Canal*** of the said the District (Emmett) are reserved to the United States.” *Id.* at 00012.

The substantive terms of the contract reflected the recitals. The 1921 contract provided that title to the pumping plant and its structures was with the United States. *Id.* at EID 00017. However, the United States also agreed to “furnish the District during the irrigation season of each and every year the use and benefit of said irrigation works . . . insofar as required . . . to pump into the District’s said North Side Canal such amount not exceeding Two Hundred Sixty-six (266) second-feet of water as may be ordered by the District . . .” *Id.* at EID 00015. In addition, the United States reserved all power rights and privileges “except the power required to pump (during the irrigation season) the necessary water not exceeding the said Two Hundred Sixty-six (266) second-feet of water into the District’s North Side Canal. *Id.* at EID 00018.

The District agreed to pay not only the construction charges, but also the costs for operating and maintaining the dam and pumping plant. *Id.* at EID 00019 - EID 00020. However, the costs would change after water was diverted for the Black Canyon Division.

2. 1923 – Further Developments

In 1923, a problem arose with the dam's construction. Specifically,

the construction of the Black Canyon dam was begun before the completion of the diamond drill borings. The diamond drill borings have now been finished and show that the maximum depth to bedrock is 75 feet below water surface instead of about 40 feet as was supposed at the time the contract of November 18, 1921 was made. The excavation of the foundation for the abutments of the dam has revealed that the material over a larg [sic] part of the north abutment is so badly shattered that it is necessary to excavate the same to a depth of about 30 feet grater [sic] than was supposed.

Ex. 4 to Affidavit of Counsel at DIST 00162. The District hired an engineer to investigate the matters set forth in the letter, because the United States was proposing to amend the 1921 contract to cover the increased costs. Subsequently, the United States and the District executed a supplemental contract. With the additional cost estimated at \$45,000, Ex. 5 to Affidavit of Counsel at EID 00045, the United States agreed to expend up to \$1.8 million to construct the dam, pumping plant, and related works. Importantly, however, even if the Black Canyon Division was never constructed, the maximum amount the District would repay would be \$1.2 million. If water was ultimately diverted to the Black Canyon Division, that division would pay ½ the cost of the dam (exclusive of the direct connected pumps), the cost of two extra feet in dam height, extra right of way and railroad protection due to the extra height, a track made for the power plant, and headgates for the Black Canyon Canal. Ex. 5 to Affidavit of Counsel at EID 00045-46.

Before the contract was signed, the District also sought and obtained the opinion of the State Commission of Reclamation (who would now be the IDWR Director). The director reminded the District that the dam was to be a *replacement* for the dam at Montour: "It is

assumed that your Board realizes the probably [sic] impossibility of delivering water to the lands in your District another year from existing canal above the dam, thus making it imperative that the dam be completed before next year's irrigation." Ex. 4 to Affidavit of Counsel at DIST 00179.

An additional wrench in the works was the inundation of part of the right of way of the Oregon Short Line Railroad, caused by the backwaters of the reservoir behind Black Canyon Dam. Notably, the District paid the damages to the railroad right of way. Ex. 4 to Affidavit of Counsel at DIST 00202 - DIST 00204.

3. 1924 and Beyond

In 1924, Black Canyon Dam was completed and its use began. Newspaper articles from Emmett described the history and initial operation of the dam, emphasizing its vital importance to the District. Ex. 1 to Affidavit of Counsel.

In 1932, the District and the United States executed a supplemental contract. As part of the 1932 Contract, the United States agreed to allow the District to install an electric pump to pump water into the North Side Canal. Ex. 7 to Affidavit of Counsel at EID 00090.

Article 47 of the 1932 Contract is particularly significant:

47. It is agreed that when there is being allowed to pass through or over the Black Canyon dam six hundred (600) second-feet or more of water in excess of the stored water from the Deadwood reservoir, determined as hereinafter defined, (and from such other reservoirs, if any, as may be hereafter constructed by the United States) such stored water being referred to hereafter as "Government stored water," the District will, as against the United States, be entitled to receive 300 second-feet in its North Side canal and 90 second-feet in its South Side canal, or so much thereof as the capacity of the diversion works will permit, and also such additional amount as is provided by means of the construction of the additional works authorized under article 45 of this contract.

But when the amount of water so passing over or through said dam, exclusive of said Government stored water, is less than 600 second feet, it is agreed that the District will be entitled to receive, of all water flowing in the river above said dam in excess of said Government stored water, 30.3% in its North Side canal and 9.1% in its South Side canal, or so much thereof as the capacity of the diversion works will permit, and the remainder will be allowed to pass over or through said dam. It is agreed, however, that any and all diversions made by the District shall be made out of its own rights to natural flow and stored water without encroaching upon said Government stored water or the water agreed herein to be allowed to pass over or through said dam; and it is further agreed that at least 50% of the stored water released from the reservoirs of the Lake Reservoir Company and flowing in the Payette river immediately above the Black Canyon dam, as hereinafter defined, will be permitted to pass over or through said dam. It is understood, however, that time and use may result in some decrease in the efficiency and capacity of the pumps and other irrigation works, and that the United States does not guarantee the continuation of present capacities and under no condition shall the United States, or its officers, agents, or employees, be liable in damage on account of any such decreases or any alleged shortage or mistake in the amount of water delivered. For the purpose of determining the amount of water available at Black Canyon dam to which the United States and the District may be entitled, it is agreed that 98% of the stored water released from the Deadwood Reservoir will be considered available at Black Canyon dam 24 hours after the time of such release, and that 90% of the stored water released from the Big Payette Lake Reservoir will be considered available at Black Canyon dam five days after the time of such release.

Id. at EID 00092 - EID 00094. The language providing that “any and all diversions made by the District shall be made out of its own rights to natural flow and stored water . . .” is particularly important. The water used to drive the direct-connected pumps is diverted, for no matter how brief a period. Under the terms of the 1932 Contract, diversion could be made only out of the District’s own rights. Another contract in 1932 provided that the United States would provide

water for irrigation of the park at the dam. In turn, the District would irrigate the park and maintain it as such. Ex. 8 to Affidavit of Counsel.

By 1934, the Bureau had completed the so-called "Owyhee tunnels," and the District had installed the electric pump discussed in the 1932 Contract. Therefore, the United States agreed to supply electricity to operate the electric pump. Ex. 9 to Affidavit of Counsel at EID 00105 - EID 00106. In return, the District agreed to pay certain charges. *Id.* at EID 00110 - 00111. The contract expired by its terms in 1939, but was extended periodically from 1941 to 1955. Ex. 10 to Affidavit of Counsel at EID 00150 - EID 00164.

In 1955, the Bureau and the District executed another supplemental contract. Ex. 11 to Affidavit of Counsel at EID 00192. Under the contract, "reserved works" were defined as "Deadwood Dam and Reservoir, Black Canyon Dam and Reservoir, including the direct-connected pumping installation serving the north side lands of the District, but exclusive of the Black Canyon Powerplant." *Id.* Those reserved works were to be operated and maintained by the United States:

so as to make available to the District (1) the direct-connected pumping installations, (2) the District's share of the capacity in Deadwood Reservoir . . . ; and (3) the District's proportionate interest in Black Canyon Dam and Reservoir.

Id. at EID 00197.

The 1955 Contract provides that:

(a) Title to Black Canyon and Deadwood Dam and Reservoirs, including all properties incidental and appurtenant thereto, and all other reserved works, shall remain in the United States until otherwise provided by Congress.

Id. at EID 00199. That passage could conceivably be read to support an argument that the Bureau should be the owner of the water right for the direct-connected pumps. However, the next paragraph in the contract is equally important, and shows that the District should be, at the least, the beneficial owner of the water right under SRBA Claim Number 65-11412, if not the sole owner of the water right under SRBA Claim Number 65-11412A. That paragraph provides:

(b) *The United States may permit such uses of these dams and reservoirs as are not inconsistent with the rights of the District under this contract*, but, having regard for, among other things, the allocation of investment and the relative repayment responsibilities of the District and others having interests therein, miscellaneous revenues realized in connection with the operation and maintenance of these dams and reservoirs, less expenses incurred by the United States in connection therewith, shall be distributed annually as determined by the Secretary to be available pursuant to law . . .

Id. at EID 00199 (emphasis added). Another provision, which specifically relates to hydroelectrical power (as opposed to hydropower) provides:

(a) The Black Canyon Powerplant and any other hydroelectrical powerplant built in connection with the reserved works and water rights in connection therewith shall be and remain in the exclusive control, possession, and ownership of the United States unless and until otherwise provided by Congress, *but such water rights shall at no time be exercised to the detriment of the water rights held for the benefit of the District as provided in this contract.*

Id. at EID 00200 (emphasis added). As discussed more fully in the analysis portion of this Memorandum, that passage again shows that the District should be, at the least, the beneficial owner of the water right under SRBA Claim Number 65-11412. *See also id.* (stating that “[o]ut of the power and energy to be generated in the Black Canyon Powerplant, there is hereby set aside in perpetuity for the benefit of the District that power and energy required for the operation

of the pumping plants of the District to deliver water to the north side lands of the District exclusive of the water intended to be delivered by the direct-connected pumping plant . . .”).

The facilities at Black Canyon are used to supply water to the District, as well as Black Canyon District. However, Black Canyon dam is not a storage facility; it is used to raise the river level and divert water. A section of the 1955 Contract sheds more light on the operations of the Dam:

(a) The United States will furnish the District during the irrigation season of each year the use and benefit of the irrigation works constructed by the United States pursuant to this contract and the Government-District contract so far as required (i) to divert into the Black Canyon main canal such amount not to exceed 120 cubic feet per second of water for delivery as provided in article 15, (ii) to pump by means of the direct-connected pumping installation at Black Canyon Dam into the District's North Side Canal such amount not exceeding 330 cubic feet per second of water, and (iii) to permit the diversion by means of the electric pump of the District as described in article 14 into the District's North Side Canal such amount not exceeding 150 cubic feet per second of water, each such amount as may be ordered by the District . . . *To the extent that any river flow at Black Canyon Dam is being passed downstream from Black Canyon Dam to supply natural flow water rights or irrigation storage rights, that water shall be available first to operate the direct-connected pumping installation.* Such use and benefit of the irrigation works for said diversions is subject to such limitations as may be placed by decree or order of court upon the right of the District to divert the water of the Payette River and to the priorities decreed by court, if such decree is made. . . . Except as to the stored water entitlement of the District in Deadwood Reservoir as provided in this article, the United States shall not be obligated to furnish the District any stored water out of any reservoir constructed by the United States and the water supply to be delivered to the District shall be out of the unregulated flow of the Payette River, and out of stored water, if any, under rights obtained by the District itself.

Id. at EID 00205 (emphasis added).

C. Operations Today

The construction of Black Canyon Dam required the movement of the District's original point of diversion serving the North Side irrigation canal. Because of this change in point of diversion, the District is almost totally dependent upon the operation of two hydro pumps at the Black Canyon Dam for diversions into the Canal. Maxwell Affidavit, ¶ 2. Those pumps utilize the hydraulic power generated by channeled, falling water to lift water from Black Canyon Reservoir upward approximately 30 feet and into the District's North Side Canal. *Id.* at ¶¶ 3 and 4, Ex. A.

The operation of the hydro pumps is elegant in its simplicity. The hydro pumps utilize a minimum of mechanical parts as they harness the hydraulic power of flowing water (220 cubic feet per second), and convert that hydraulic power into the mechanical power used to lift the District's irrigation water (up to 330 cubic feet per second) against gravity (roughly 30 feet in elevation) into the North Side Canal. Essentially, water from Black Canyon Reservoir enters two penstocks contained within the dam at a height of approximately 30 feet below the top of the dam. The penstocks channel the force of the flowing water, and further increase that force, by dropping the water approximately another 60 feet in elevation, ultimately channeling the falling water into the two hydro pumps located in the District's powerhouse. *Id.* at ¶¶ 6 and 7, Ex. C, E and F. Each hydro pump receives its "drive" water from its own penstock. *Id.* at ¶ at 6.

Each hydro pump converts the hydraulic energy received into the mechanical energy needed by having the penstocks "fork" at the hydro pump. *Id.* at ¶ at 8. One fork channels water down to a turbine located at the bottom of the pump/drive shaft. *Id.* at 8. That water flow spins the turbine which in turn drives the impeller at the top of the pump/drive shaft.

Id. at 8, Ex. D. That impeller spin forces and elevates the other penstock fork of water up and into the District's North Side Canal. *Id.* at 7. The "turbine fork" water is discharged back into the Payette River just below the powerhouse after it passes through the turbine, while the "impeller fork" water is what is raised into the District's North Side Canal. *Id.* at 9.

In sum, each penstock leading to its corresponding hydro pump diverts approximately 275 cfs. The fork at the hydro pump diverts approximately 110 cfs to the turbine, while remaining 165 cfs is raised by the impeller into the District's North Side Canal. Since there are two hydro pumps in operation, this creates a total of 220 combined cfs driving the two turbines, and 330 combined cfs being raised by the impellers into the District's North Side Canal. *Id.* at 8 and 10.

III.

SUMMARY JUDGMENT STANDARDS

In recent years, the Idaho Supreme Court has reiterated the proper standards for considering a motion for summary judgment brought pursuant to Idaho Rule of Civil Procedure 56:

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *First Security Bank v. Murphy*, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). The determination is to be based on the pleadings, depositions, and admissions on file, together with the affidavits, if any. *Id.*, see I.R.C.P. 56(c). However, the Court will liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences from the evidence. *Mitchell*, 130 Idaho at 422, 942 P.2d at 546.

United States v. State, 135 Idaho 655, 660, 23 P.3d 117, 122 (2001). In the SRBA, matters are tried without a jury, and in this particular matter, the District anticipates that there will be cross-motions for summary judgment. Under those circumstances,

If the case is to be tried by the court without a jury, where cross-motions for summary judgment are filed, based upon the same evidentiary facts and upon the same theories and issues, the parties effectively have stipulated that no genuine issues of material fact exist. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 518 n. 1, 650 P.2d 657, 660 n. 1 (1982). The trial court is granted broader discretion when both parties have moved for summary judgment despite the possibility of conflicting inferences because the court will be responsible for resolving the conflict between those inferences.

Zollinger v. Carrol, 137 Idaho 397, 399, 49 P.3d 402, 404 (2002).

This case may be resolved as a matter of law. After applying the appropriate legal standards, summary judgment in favor of the District should be granted. The District should be decreed the owner of the water right under SRBA Claim Number 65-11412A. At the least, the District should be decreed the beneficial owner of the water right under SRBA Claim Number 65-11412.

IV.

LEGAL AUTHORITY AND ANALYSIS

Since enactment of the Reclamation Act in 1902, Congress has expressed and courts have duly noted and approved continued deference to state water law. Moreover, the United States Supreme Court has repeatedly noted that users of water taken from Bureau of Reclamation storage facilities are at least the beneficial owners of the water rights. The Bureau is the nominal owner only. That same principle should be applied to this matter.

A. Federal Reclamation Law Has Shown a Continuing Deference to State Law

Beginning with the Reclamation Act of 1902, Congress has demonstrated a deference to state law:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to

the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. *See also California v. United States*, 438 U.S. 645, 653, 98 S. Ct. 2985, 2290

(1978) (stating that “the history of the relationship between the Federal Government and the

States in the reclamation of the arid lands of the Western States is both long~~and~~ involved, but through it runs the *consistent thread of purposeful and continued deference to state water law by Congress.*”) (Emphasis added).

The *California v. United States* court also discussed the precise nature of the deference to state law:

From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects: First, and of controlling importance in this case, the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. . . . The Secretary of the Interior could not take any action in appropriating the waters of the state streams “which could not be undertaken by an individual or corporation if it were in the position for the Government as regards the ownership of its lands.”

....

Second, once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law.

California v. United States, 438 U.S. at 666, 98 S. Ct. at 2996. Congress’ reasons for the deference to state law were sound: if federal law applied to reclamation projects and water therefrom, two potentially inconsistent systems would be operating within each state: a federal water law system and a state water law system. *Id.* at 668-69, 98 S. Ct. at 2998. Legal and practical chaos would be the order (or disorder) of the day.

Finally, the Court disavowed *dicta* in an earlier case and held that:

Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, *but it also requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water."* Nor, as the United States contends, does § 8 merely require the Secretary of the Interior to file a notice with the State of his intent to appropriate but to thereafter ignore the substantive provisions of state law. *The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.*

Id. at 674, 98 S. Ct. at 3001 (overruling in part *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 78 S. Ct. 1174 (19xx)) (emphasis added).

With that backdrop in mind, an analysis of federal authority and state water law shows that the District should be at deemed least the beneficial owner of the water right under SRBA Claim Number 65-11412, if not the full owner of the water right sought under SRBA Claim Number 65-11412A.

B. The United States Supreme Court has Held That Irrigation Entities are the Beneficial Owners of Water rights Diverted for Irrigation Within the Entities' Boundaries

As part of the 1902 Reclamation Act, Congress declared that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. Several significant decisions have interpreted that provision and in so doing held that when water is supplied from a Reclamation facility to irrigators, title to the water right belongs to the irrigators. As the District will demonstrate, the same principle should hold in this matter, where

the water right at issue is used to drive pumps which supply water for irrigation. The District is the true beneficial user of the right, and should be, at the least, the beneficial owner of that right.

The seminal case is *Ickes v. Fox*, 300 U.S. 82, 47 S. Ct. 412 (1937), in which the central disagreement was as follows:

The United States, under the Reclamation Act, constructed an irrigation system for the purpose of storing and distributing water for irrigation of arid lands. Respondents own water rights under the system for lands of that kind; and these lands require artificial irrigation to render them productive. So far as these respondents are concerned, the government did not become the owner of the water rights, because those rights by act of Congress were made "appurtenant to the land irrigated" and by a Washington statute, in force at least since 1917, were "to be and remain appurtenant to the land."

Id. at 93-94, 57 S. Ct. at 416. The Court agreed with the respondent irrigations' position.

The underlying issue was whether the United States could reduce the amount of water delivered from 4.84 acre feet of water to 3.0 acre feet of water. The Court held that the United States could not. The length of time (more than 20 years) during which water had been delivered at a quantity of 4.84 acre feet certainly played a role in the Court's decision. However, even more significant was the law:

Respondents had made all stipulated payments and complied with all obligations by which they were bound to the government, and, long prior to the issue of the notices and orders here assailed, had acquired a vested right to the perpetual use of the waters as appurtenant to their lands. . . .

Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.

Id. at 94-95, 57 S. Ct. at 416 (emphasis added). *See also id.* at 96, 57 S. Ct. at 417 (stating that “respondents have fully discharged all their contractual obligations; . . . their water rights have become vested; and . . . ownership is in them and not in the United States.”).

The Court also focused on the role state law plays in Reclamation project-related water rights, while discussing the Desert Land Act of 1877 (19 Stat. 377). The conclusion was that state water law would apply to the rights at issue. In fact:

Acquisition of the government title to a parcel of land was not to carry with it a water right; but all nonnavigable waters were reserved for the use of the public under the laws of the various arid-land states. [Citation omitted]. And in those states, . . . it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

Id. The concept of the applicability of state water law, and its effect on this case, will be discussed below.

A few years later, the Supreme Court again considered the issue of ownership of reclamation project water rights in the interstate case of *Nebraska v. Wyoming*, 325 U.S. 589, 614, 65 S. Ct. 1332, 1349 (1945). The Court quoted *Ickes*, and then emphasized the point:

The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. ***The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.***

Id. (emphasis added).

Later, the United States Supreme Court again had occasion to consider the nature of water rights associated with irrigation projects, in a case in which the United States attempted

to essentially reallocate water rights from irrigators to the Pyramid Lake Indian Reservation. The Court was blunt in telling the United States that it did not have ownership interests in the water rights which would allow it to take that action:

we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" ~~on the water rights~~ was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

Nevada v. United States, 463 U.S. 110, 126, 103 S. Ct. 2906, 2916 (1983). *See also id.* at 127, 103 S. Ct. at 2917 (stating that the Government had obligations "that necessarily devolve upon it from having mere title to the water rights for the Newlands Project, when the beneficial ownership of these water rights resides elsewhere.").

C. Emmett Irrigation District Is At Least The Beneficial Owner Of The Water Right Used To Power the Direct-Connect Pumps

The United States claimed SRBA Claim Number 65-11412. The District claimed SRBA Claim 65-11412A, which the Director recommended be disallowed. The contracts are silent as to ownership of the water right to drive the direct-connect pumps. However, application of the principles set forth above shows that the District is entitled to be at least the beneficial owner of SRBA Claim Number 65-11412, or is entitled to have SRBA Claim Number 65-11412A decreed to the District.

Water was so important to Idaho's early settlers that an entire Article of the Idaho Constitution is dedicated to water rights. Article XV, § 3 provides that "[t]he right to divert the

unappropriated waters of any natural stream *to beneficial uses*, shall never be denied . . .” Idaho Const., Art. XV, § 3. Similarly, Idaho has devoted an entire title of the Idaho Code to water rights, and the very first section provides:

Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state *depending upon its just apportionment to*, and economical use by, *those making a beneficial application of the same*, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment *to those diverting the same therefrom for any beneficial purpose*, . . . the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but *such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied*; . . .

I.C. § 42-101. *See also* I.C. § 42-104 (stating that “[t]he appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.”)

Under Idaho law, once a water right has been established, it becomes appurtenant to the land upon which it is beneficially used. *See Anderson v. Cummings*, 81 Idaho 327, 335, 340 P.2d 1111, 1115 (1959) (stating that “Appellants’ decreed water right constitutes real property; such right is appurtenant to appellants’ lands to which the water represented thereby has been beneficially applied.”); *Parke v. Bell*, 97 Idaho 67, 539 P.2d 995 (1975) (stating that “[t]he water right thus perfected is appurtenant to the land which receives the benefit of the water.”).

The District is the entity which beneficially uses the water which drives the direct-connect pumps. While the pumps themselves might be the property of the United States, without the District's need to pump irrigation water into the North Side Canal, there would be no need for the pumps and thus no beneficial use of the water used to drive the pumps. Therefore, ownership of the water right under SRBA Claim Number 65-11412 (or 65-11412A) should be decreed in full to the District, in accordance with Idaho law.

Stated differently, while the hydro pumps are fixtures of the Bureau facility (Black Canyon Dam), their sole purpose for existence is to lift the District's irrigation allotment into the North Side Canal, pursuant to Bureau's contractual obligations incurred as the result of the District allowing the government to move its senior, original point of diversion downstream to its current location at the Black Canyon facility. The hydro pumps serve no other purpose, nor do they benefit any party other than the District.

If the Special Master determines that ownership should not lie fully with the District, the District should still be decreed the beneficial owner of the water right under SRBA Claim Number 65-11412, with the United States holding only nominal legal title. The historical documents discussed in the factual portion of this memorandum are clear that Black Canyon Dam was constructed, in part (and initially in full) for the benefit of the District. Even more importantly, the direct connect pumps were constructed and continue to be operated solely for the benefit of the District. The relative cost apportionments for Black Canyon Dam, as set forth in the various contracts, support that allocation of the benefits. The District paid ½ the cost of the Dam, and the entire cost of the direct-connect pumps. The District is the sole user of the pumps

(Maxwell Affidavit, ¶ 3), and should be decreed, at the least, the beneficial owner of the water right necessary to operate the pumps.

IV.

RES JUDICATA DOES NOT APPLY UNDER THE FACTS AND CIRCUMSTANCES OF THIS MATTER

The Bureau may argue that the District is barred from challenging the legal ownership of water right 65-11412 by the doctrine of *res judicata* and/or collateral estoppel (by not challenging the claim filed in the Payette Adjudication). However, that argument is fundamentally flawed, for the reasons discussed herein.

Water right 65-11412 was a late claim to the Payette Adjudication, which commenced in 1969. The Payette Adjudication resulted in the entry of partial decrees on January 21, 1986, April 7, 1986, October 4, 1988, January 4, 1989, and May 15, 1990. Ex. 6 to Affidavit of Counsel. The partial decrees entered in January and April of 1986 resolved the majority of the claims. The partial decrees entered in 1988, 1989, and 1990 consisted of only 62 claims. *Id.* The Payette Adjudication was never completed because it was subsumed and incorporated into the more comprehensive Snake River Basin Adjudication commenced on November 19, 1987. *Order Consolidating the Payette Adjudication With the SRBA, and Order Dismissing the Director (IDWR) as a Party* pp. 1-2 (2001).

Both the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) require a final judgment on the merits to trigger their operation. *See Hindmarsh v. Mock*, __ Idaho __, 57 P.3d 803, 805 (2002) (“Under principals of claim preclusion, a valid final judgment on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action...”); *see also Rodriguez v. Department of Correction*, 136 Idaho 90, 93 (2001) (“This

Court has determined that five factors must be evident in order for collateral estoppel to bar the relitigation of an issue determined in a prior proceeding . . . (4) there was a final judgment on the merits in the prior litigation; . . .”). Regarding water right 65-11412, there has not yet been a final judicial determination decreeing that water right, and without such final adjudication, the bars of *res judicata* and collateral estoppel do not apply.

Water right 65-11412 was claimed late, by stipulation, in the Payette Adjudication on November 21, 1988 (post SRBA commencement), and was subsequently decreed in the 1989 partial decree of that Adjudication. Ex. 12 to Affidavit of Counsel. While it is ordinarily true that a decreed water right is a valid final judgment concerning the water right in question, in this instance the district court in the Payette Adjudication lacked the subject matter jurisdiction necessary to decree water right 65-11412 once the SRBA commenced in 1987. In fact, there was never a valid claim in the Payette Adjudication for the court to decree, since the claim itself was stipulated and accepted post SRBA commencement in 1988.

The Idaho Supreme Court and the *Order Consolidating the Payette Adjudication* make clear that none of the water rights claimed in the Snake River Basin are finalized until they are adjudicated in the Snake River Basin Adjudication,

It is clear from the Idaho statutes governing general adjudications and SRBA that the legislature contemplated a *single adjudication of claims* within the scope of a general adjudication . . . *Thus, once the SRBA was commenced, jurisdiction to resolve all of the water right claims within the scope of the general adjudication is in the SRBA district court only .*

..

Walker v. Big Lost River Irrigation District, 124 Idaho 78, 81 (1993) (emphasis added).

Additionally, “Following the commencement of the SRBA, *all parties* to the Payette

Adjudication, *whether or not their water right claims had been partially decreed*, were required

to file new claims in the SRBA.” *Order Consolidating the Payette Adjudication With the SRBA, and Order Dismissing the Director (IDWR) as a Party*, at ¶ D (2001) (emphasis added).

The United States, through the Bureau of Reclamation (“Reclamation”) was further made aware of the need to seek a final determination of water right 65-11412 in the SRBA, in a November 7, 1988 letter stating, “The Payette Drainage is within the larger Snake River Basin Drainage and will now be part of the Snake River Adjudication . . .” Ex. 13 to Affidavit of Counsel. The letter continues, laying out two different strategies for Reclamation to consider for entering its claim in the SRBA. Reclamation could either have its claim dismissed without prejudice from the Payette Adjudication, and subsequently re-file in the SRBA by paying the filing fee, or Reclamation could wait for a decree in the Payette Adjudication and then file that claim in the SRBA without having to pay the filing fee. Reclamation chose the latter route, seemingly to avoid having to pay another filing fee.

Regardless of the strategy implications, the letter evidences that Reclamation was clearly informed that the Payette Adjudication was no longer the proper proceeding in which to seek a final determination of water right 65-11412. As such, and in addition to jurisdictional issues raised concerning the dates of the late claim filing and the partial decree, until water right 65-11412 is adjudicated by the SRBA there has been no valid final judgment on the merits, and any *res judicata* and collateral estoppel arguments raised are inapplicable.

CONCLUSION

The District has cooperated with the United States, through the Bureau of Reclamation, for over 80 years. Because of that cooperation, the Black Canyon Dam and the Black Canyon Irrigation District became a reality. Without the willingness of the District to step

forward with Reclamation to invest in the construction of Black Canyon Dam, the reality would be much different.

The use of water to operate the hydro pumps can only legally occur under the authorization granted by a water right. The fundamental basis of the water right at issue in this case is the beneficial use of that water. There is absolutely nothing in the record before this Court which could lead to a conclusion that the United States has beneficially used the water right needed to operate the hydro pumps. The historical record before this Court is clear. The only beneficial use of the water right has been made by the District. Under Idaho law and the applicable United States Supreme Court decisions, the District is the rightful owner of the water right. Accordingly, summary judgment should be granted in favor of the District.

DATED this 7th day of February 2003.

MOFFATT, THOMAS, BARRETT, ROCK &
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CERTIFICATE OF SERVICE

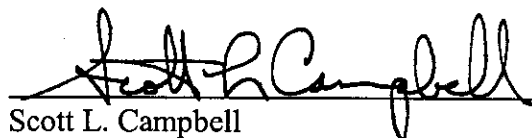
I HEREBY CERTIFY that on the 7th day of February 2003, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF EMMETT IRRIGATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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