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

In Re SRBA,
Case No. 39576

Subcase No. 63-03618
(Lucky Peak Project)

**MEMORANDUM IN SUPPORT OF PIONEER
IRRIGATION DISTRICT'S AND SETTLER'S
IRRIGATION DISTRICT'S MOTION FOR
SUMMARY JUDGMENT**

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I.
INTRODUCTION

Pioneer Irrigation District (hereinafter “Pioneer”) and Settlers Irrigation District (hereinafter “Settlers”) (collectively, the “Districts”), by and through their counsel of record, MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD., and, in accordance with the Order Setting Trial Date, Final Pre-Trial Conference, Discovery Deadlines, Settlement Conference and Scheduling Pre-Trial Motions I.R.C.P. 16, entered by this Court on August 3, 2007, and Order Amending Schedule Deadlines, dated September 5, 2007, hereby respectfully submit this Memorandum in Support of their Motion for Summary Judgment, filed concurrently herewith. The Motion and Memorandum are further supported by the Affidavits of Scott L. Campbell and Jennifer A. Stevens, filed concurrently herewith (hereinafter “Campbell Aff.” and “Stevens Aff.,” respectively).

By their Motion for Summary Judgment, the Districts respectfully request this Court reject the recommendation of the Director of the Idaho Department of Water Resources (hereinafter the “Director” and “IDWR,” respectively) and deny the Notice of Claim to a Water Right Acquired Under State Law by the United States of America, acting through the Bureau of Reclamation (hereinafter “Bureau of Reclamation”), Identification Number A63-03618, for the purposes of “minimum instream flow storage” (in the amount of 152,300 acre feet per annum) and “minimum instream flow from storage” (in the amount of 152,300 acre feet per annum), and limit the nature of use to irrigation purposes.

The Districts contend summary judgment in their favor (and against the Bureau of Reclamation) is proper because said appropriation is contrary to the basis for construction of the Lucky Peak Dam and Reservoir Project (hereinafter “Lucky Peak Project”), is contrary to the representations and guarantees made to the Districts and other irrigation entities by the Bureau of

Reclamation regarding the availability of supplemental irrigation water from the Lucky Peak Project, and is contrary to Idaho water law applicable to minimum stream flow appropriations.

II. STATEMENT OF FACTS

A. Procedural Background

The Districts, other irrigation entities, the Bureau of Reclamation, and others, have filed claims before the SRBA for water from the Lucky Peak Project. Specifically, Pioneer filed SRBA Claim Number 63-03618A for water from Lucky Peak Project. Campbell Aff., Exhibit A (Second Amended Notice of Claim to a Water Right Acquired Under State Law). Settlers filed SRBA Claim Number 63-03618B for water from the Lucky Peak Project. Campbell Aff., Exhibit B (Second Amended Notice of Claim to a Water Right Acquired Under State Law). The Bureau of Reclamation filed SRBA Claim Number 63-03618 for water from the Lucky Peak Project.

The Director of IDWR issued his Director's Report on or about September 24, 2002, recommending the water rights claimed by the Bureau of Reclamation, including stream flow maintenance quantities, be decreed as claimed. Pioneer and Settlers timely filed objections and amended objections to the Director's Report. Campbell Aff., Exhibit C (Pioneer's Objections and Amended Objection) and Exhibit D (Settlers' Objections and Amended Objection). Various other parties also filed objections.

On June 23, 2003, this Court entered an Order Separating and Consolidating Common Issue from Subcases in "Exhibit A"; A01 §§ 11 and 16; I.R.C.P. 42; Order Rescinding Order of Reference to Special Master as to Consolidated Issue; and Order Designating Issue as Consolidated Subcase 91-63. The Order separated and consolidated the issue of ownership from the various subcases in which the ownership of certain water rights relating to Bureau of

Reclamation project water rights were at issue. The individual subcases remained before the Special Master and were stayed pending resolution of the Consolidated Subcase.

The Consolidated Subcase was resolved; on March 9, 2007, the Idaho Supreme Court issued its opinion, and on April 9, 2007, the Idaho Supreme Court filed the remittitur for the appeals. The remaining issues pertaining to the present subcase were deemed by this Court unrelated to the issue presented by the Consolidated Subcase, and this Court dissolved the Consolidated Subcase and allowed the objections originally filed in individual subcases to proceed within the individual subcases.

On June 27, 2007, this Court entered its Order Rescinding Order of Reference and Order Setting Scheduling and Status Conference on Remaining Issues, rescinding its Order of Reference to the Special Master and ordering the Court will preside over the remaining issues in the present subcase.

On August 3, 2007, this Court entered its Order Setting Trial Date, Final Pre-Trial Conference, Discovery Deadlines, Settlement Conference and Scheduling Pre-Trial Motions I.R.C.P. 16, which provided for deadlines governing, among other matters, the present summary judgment proceedings. Thereafter, on September 5, 2007, this Court entered its Order Amending Schedule Deadlines. The present Motion for Summary Judgment is submitted by the Districts in accordance therewith.

B. Factual Background

The factual section provided hereinafter details the history of the Districts and the Lucky Peak Project, for which the water rights are at issue in the present subcase.

1. Pioneer Irrigation District And Its History

Pioneer was organized as an irrigation district in 1903, and existed as an irrigation company prior thereto. It bears the distinction of being the first irrigation district formed in Idaho subsequent to the Idaho Legislature's enactment of statutes in 1903, which allowed for the creation of irrigation districts. It was a leader in the effort to create the Boise irrigation projects.

In 1901, the Board of Directors for Pioneer developed a plan for the District, after employing Mr. A.J. Wiley, who was an irrigation engineer. Campbell Aff., Exhibit E (Plans Adopted by the Board of Directors for the Irrigation of Pioneer District: General Plan). The plan noted that while Pioneer's total area was approximately 34,400 acres, only 4,000 acres were being irrigated due to limited canal capacity. Pioneer proposed to purchase the Phyllis and Caldwell Canals, and then to enlarge them. *Id.* It would then construct laterals to take water from the main canals to a point near each water users' property. *Id.* Pioneer further recognized that drainage facilities were a necessary component of irrigation within its boundaries, including "drainage channels to collect the waste water and convey them to lower laterals for redistribution." *Id.* Those plans were carried out.

As detailed throughout the remainder of the factual portion of this Memorandum, Pioneer continued to be a leader with respect to negotiations with the Bureau of Reclamation, and now holds contracts for water storage in all three facilities on the Boise River; namely, Arrowrock, Anderson and, the relevant facility, the Lucky Peak Project. Currently, Pioneer consists of approximately 34,000 acres located primarily in Canyon County, and it provides irrigation water to highly productive irrigated farmland and urban areas.

2. Settlers Irrigation District And Its History

What is now Settlers, and its canal system, originated in 1884. Christian R. Purdam, Aldolphus W. Purdam, and William H. Smith obtained the canal's first water right; the same year, they granted the water right to Settlers Ditch Company. Campbell Aff., Exhibit F (excerpts of *Economic and Ecological History Support Study: Case Study of Federal Expenditures on a Water and Related Land Resources Project: Boise Project, Idaho and Oregon*). Eventually, the company was sold at public auction in 1892 to John Lemp, a mortgage holder. In 1901, Mr. Lemp recorded a trust deed from himself to the Bank of Commerce and B.F. Olden, and the Settlers Canal Company, Ltd. incorporated on July 17, 1901. *Id.* On October 15, 1904, Settlers Canal Company reorganized as the Settlers Irrigation District.

Today, Settlers consists of approximately 13,000 acres of productive farmland and urbanizing residential and commercial subdivisions. Settlers is located within portions of Boise and Meridian and includes unincorporated lands which are adjacent to those cities. Settlers holds water storage contracts with the Bureau of Reclamation in each of the three Boise River facilities, specifically including the subject Lucky Peak Project. Like Pioneer, Settlers has been a leader with respect to dealing with the Bureau of Reclamation over the course of the last century.

3. Lucky Peak Project History And Contracts

In 1946, following a devastating flood in the Boise Valley in April 1943, and in response to a resolution adopted October 12, 1943, by the Committee on Commerce of the United States Senate, the Board of Engineers for Rivers and Harbors reviewed the report on the Boise River with a view to determining whether improvements on the Boise River and its tributaries were advisable, and issued its report. See Stevens Aff., Exhibit A (1946 report

prepared by The War Department's Board of Engineers for Rivers and Harbors). The District Engineer recommended the construction of the Lucky Peak Project with gross capacity of 306,000 acre feet for flood control, and "that initiation of the proposed construction *to be conditioned upon obtaining satisfactory assurances from the interested water users that, in consideration of the irrigation benefits to be derived from the additional storage in Lucky Peak Reservoir, they will agree to use of Anderson Ranch and Arrowrock Reservoirs for flood control . . .*" *Id.* (emphasis added).

Subsequent to the outline of the existing irrigation facilities, said report provided:

Although all the storage is used for irrigation, some incidental flood control is obtained during the filling period. Penstocks for possible use in the development of hydroelectric power were included in Arrowrock Dam when it was constructed, but a power plant has not been provided for the reported reasons that the power plant discharge would not fit the irrigation demand for water and a reservoir below to suitably reregulate the power flows is not available. With these improvements the irrigated lands have experienced a shortage of water during about 60 percent of the seasons. . .

Id., p. 86 (emphasis added). The report further noted Anderson Ranch Dam was being constructed with some thought regarding flood control. However, such operations were not feasible at that time, due to irrigators' concerns:

The project contemplates coordinated operation of the Arrowrock and Anderson Ranch Reservoirs. The district engineer finds that use of the storage to maximum advantage, including flood control, would require drawdown of the reservoirs early in the year and refilling on the basis of runoff forecasts. Irrigationists oppose this method of operation as they fear that it might jeopardize the storage of water for irrigation. Hence, no definite agreement has been made for the use of Arrowrock storage for flood control.

Id., pp. 86-87. The report further documented the problems with flooding in the Boise Valley, even though Arrowrock had been constructed and irrigators allowed canals to be used as flood control devices. *Id.*, pp. 86-88.

Despite these concerns, local citizens, including irrigators, were interested in the construction of a new storage facility:

Local interests desire construction of additional reservoirs to regulate flows in the interest of flood control and irrigation; additional channel improvement along the full length of the river in the alluvial plain section to accommodate larger discharges without damage to adjacent property; development of power for pumping irrigation water; and the control of silt by reservoirs and watershed improvements.

Id., p. 88. The report provided that preservation of irrigation and fulfillment of irrigation interests were key considerations, finding Anderson Ranch and Arrowrock could be utilized for flood control “without endangering the irrigation water supply and that additional water for irrigation would be made available thereby.” *Id.*, p. 89. “[The district engineer] proposes to furnish this supplemental water to the irrigationists who use Arrowrock Reservoir water as a recompense for the proposed flood control use of the reservoir.” *Id.*, p. 89.

Throughout the report, and other documents discussing the history of Lucky Peak, a central theme is the Bureau of Reclamation’s valued relationship with irrigators. The Bureau of Reclamation and the Army Corps considered the irrigators’ support as a critical component of constructing the Lucky Peak Project. As quoted above, the district engineer recommended:

[I]nitiation of the proposed construction be ***conditioned upon obtaining satisfactory assurances from interested water users*** that, ***in consideration of the irrigation benefits to be derived from the additional storage in Lucky Peak Reservoir***, they will agree to use of Anderson Ranch and Arrowrock Reservoirs for flood control as proposed in the present report of the district engineer.

Id., p. 90 (emphasis added).

The Army Corps of Engineers then prepared a Basis for Design for Lucky Peak Dam. Appendix A to the document demonstrates the supply of water for irrigation was viewed as a permanent and paramount use:

After the ultimate development of the irrigable lands in the Boise watershed, *the entire run-off of the Boise River will be utilized for irrigation except in extremely high run-off years.* The ultimate acreage that can be irrigated, either directly or indirectly, by Boise River water is 383,000 acres. *By committing the entire run-off of the Boise River to irrigation,* the operation of the reservoirs in the basin must be so scheduled that no water is wasted. In this respect Lucky Peak will provide reserve capacity permitting greater flexibility of operation, and making possible the utilization of other reservoirs to effect a maximum amount of flood control.

Campbell Aff., Exhibit G, Appendix, p. A-8 (emphasis added). Thus, irrigation was deemed extremely important, not only to the irrigation entities, but to the United States as well.

In accordance with the authorizing reports referenced hereinabove, it was imperative that the Bureau of Reclamation obtain the agreement of irrigators for Arrowrock, Anderson Ranch, and Lucky Peak to be jointly operated for flood control. In 1954, Pioneer entered into a Supplemental Contract with the Bureau of Reclamation to allow the integrated operation of the three Boise River Facilities. Stevens Aff., Exhibit B (1954 Supplemental Contract - Pioneer). A key component of obtaining Pioneer's assent is found in Paragraph 7 of the 1954 Agreement, which sets forth an accounting and crediting system to be used to guarantee Pioneer's allocation of water. *Id.*, pp. 4-5. Settlers signed a similar agreement to that executed by Pioneer. Stevens Aff., Exhibit C (1954 Supplemental Contract – Settlers).

There is no discussion throughout the relevant reports indicating the Lucky Peak Project should be constructed for purposes of protection of minimum stream flows in the Boise River, and there is clearly no intention provided to override the irrigation interests in favor of

minimum stream flows. The historical documents show that the original intent for the Lucky Peak Project was clearly flood control and irrigation.

Additionally, the water storage contracts for Lucky Peak Reservoir between the Bureau of Reclamation and the Districts reflect the continued need for cooperation with the Districts. Pioneer executed its initial water service contract with the Bureau of Reclamation for the Lucky Peak Project in 1966. The contract provided:

(a) Water for purposes hereof shall be made available at the outlet works of Lucky Peak Reservoir and shall be delivered to the Contractor and measured at that point, except as hereinafter provided. *The Contractor shall receive said water at the delivery point and shall be wholly responsible for taking said water at that point and diverting, containing and utilizing it. . .*

* * *

(b) Water made available to the Contractor pursuant to this contract shall be used for the irrigation of lands described as follows:

The lands legally served by the Pioneer Irrigation District.

Stevens Aff., Exhibit D (1966 Water Service Contract – Pioneer), pp. 3-4 (emphasis added). The provisions of the 1966 contract with Settlers were the same, except that the words “Settlers Irrigation District” were substituted. Stevens Aff., Exhibit E (1966 Water Service Contract – Settlers), pp. 3-4. In addition, in 2005, the Districts entered into Repayment Contracts with the Bureau of Reclamation. Campbell Aff., Exhibits H and I (2005 Repayment Contract with Pioneer and Settlers, respectively). These documents demonstrate a long-standing recognition of the irrigators paramount use of the Lucky Peak Project water.

C. Summary Of Pertinent Facts

The facts set forth above provide the historical backdrop necessary to understand the importance of this issue, and the related irrigation water, to the Districts. The historical facts reflect the history of cooperation between the Bureau of Reclamation and Districts, and demonstrate that without the Districts and other irrigation entities, the Boise River facilities, specifically including the Lucky Peak Project, may never have been constructed. The Districts have been and remain critical components of the project.

Furthermore, the contracts and historical documents demonstrate that the licenses and permits illegally issued to the Bureau of Reclamation for minimum stream flows in the Boise River are not only contrary to Idaho water law, but are also contrary to the basis for construction of the Lucky Peak Project, and are contrary to the representations and guarantees made to the Districts.

III. STATEMENT OF THE ISSUES

The matters at issue in the present Motion for Summary Judgment are:

(1) whether the Director's Report recommendations, the license issued to the Bureau of Reclamation by IDWR, dated September 27, 2002, and the related underlying amended permits for stream flow maintenance rights are valid and enforceable; (2) whether the Bureau of Reclamation should be decreed the legal and beneficial owner of such minimum stream flow water right(s); and (3) whether the nature of use should be limited to irrigation purposes.

It is the position of the Districts that the Director's Report, amended permits and license are illegal and invalid, contrary to the basis for construction of the Lucky Peak Project and issued in contravention of Idaho water law, including the Idaho minimum stream flow statutes, Idaho Code Section 42-1501, *et seq.* The Bureau of Reclamation's claim for said water right should be denied, and the nature of use limited to irrigation purposes.

IV. SUMMARY JUDGMENT STANDARD

The present Motion for Summary Judgment is brought pursuant to Rule 56, Idaho Rules of Civil Procedure. As advanced by this Court, summary judgment is appropriate where the pleadings, depositions, admissions and affidavits on file show there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See* Memorandum Decision and Order on Cross-Motions for Summary Judgment (September 2, 2004), *citing* I.R.C.P. 56(c); *City of Idaho Falls v. Home Indemnity Co.*, 126 Idaho 604, 606, 888 P.2d 383 (1995); *see also United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 109, 157 P.3d 600, 603 (2007).

In addition, summary judgment is appropriate to dismiss a claim when a party fails to submit evidence to establish an essential element of their claim. *Ambrose ex. rel. Ambrose v. Buhl Joint School District No. 412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Ct. App. 1994); *Nelson ex. rel. Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1113 (1996). Facts in dispute cease to be material facts when a claimant fails to establish a *prima facie* case; in such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992); *Ambrose ex. rel. Ambrose, supra.*

Typically, the nonmoving party is entitled to the benefit of all inferences which might reasonably be drawn from the evidence. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Kline v. Clinton*, 103 Idaho 116, 120, 645 P.2d 350, 354 (1982). The nonmoving party may not, however, rest on mere allegations or denials of that party's pleadings to avoid summary judgment. *Theriault v. A.H. Robbins Company*, 108 Idaho 303, 698 P.2d 365 (1985). The nonmoving party's case must not rest on mere speculation, because a "scintilla of evidence" is not enough to create a genuine issue of material fact. *G&M Farms, supra*; *Kline, supra*.

In addition, in the Snake River Basin Adjudication proceedings, cases are tried without a jury; in such circumstances:

When an action is to be tried without a jury, however, the court is not compelled to draw inferences in favor of the party opposing the motion; rather, the court is "free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." [Citations omitted].

Land O' Lakes, Inc. v. Bray, 138 Idaho 817, 819, 69 P.3d 1078, 1080 (Ct. App. 2003).

This case may be resolved as a matter of law and may be properly decided on summary judgment. As is supported by the facts and legal argument set forth herein, the Director's Report recommendations, and the Bureau of Reclamation's amended permits, license, and claim related to minimum stream flows are contrary to the basis for the construction of the Lucky Peak Project, are contrary to the representations and guarantees made to the Districts and other irrigation entities, are contrary to Idaho water law, including minimum stream flow statutes, and are based upon IDWR agency action violative of Idaho law.

V.
ARGUMENT

A. Director's Report Recommendations, Amended Permits, And License Issued To The Bureau Of Reclamation By IDWR For Minimum Stream Flows Are Contrary To The Basis For The Construction Of The Lucky Peak Project, And Contrary To The Representations And Guarantees Made To The Districts

As discussed above with respect to the history relevant to the construction of the Lucky Peak Project, the fundamental basis for the Army Corps of Engineers to construct the Lucky Peak Project was flood control, pursuant to the federal Flood Control statutes, 33 U.S.C.A., Chapter 15, §§ 701, *et seq.* However, also of significant importance was guaranteeing the irrigation interests, including the Districts, supplemental irrigation water. The combined need for additional flood control and irrigation was the basis for the Lucky Peak Project. Protection of minimum stream flows in the Boise River was not a consideration or basis for construction of the facility.

On September 21, 1976, in a memorandum from William N. Dunlop, Acting Field Solicitor of the United States Department of the Interior, to the regional planning officer, Bureau of Reclamation, Mr. Dunlop summarized the then-existing status of the uncommitted space in Lucky Peak Reservoir, and provided the following analysis relevant to the basis for the construction of the Lucky Peak Project, as well as representations and guarantees made to the irrigation entities, including the Districts. In relevant part, Mr. Dunlop wrote¹:

Lucky Peak was authorized by Act of July 24, 1946, in accordance with the Corps' report which was submitted to the Commerce Committee on May 13, 1946. This report recommended authorization of Lucky Peak primarily for flood control, but to achieve favorable cost benefit ratios the report also recommended

¹ The purpose for the analysis was then-contemplated power generation and a proposal involving winter storage releases for peaking power.

that the reservoir be used to permit power generation at Anderson Ranch, to supply supplemental water for the Boise valley, as well as in conjunction with the Bureau's "proposed Mountain Home Project."

Since the proposed Lucky Peak flood control plan involved flood releases from Anderson Ranch and Arrowrock, the report recognized that construction be conditioned on the approval of existing Bureau storage contractors. The report also indicated that such storage contractors would have an interest in the additional irrigation storage potential in Lucky Peak. On this point, the report stated:

He [the District Engineer] proposes to furnish the supplemental water to the irrigation entities who use Arrowrock water as a recompense for the proposed flood control use of that reservoir.

And

. . . that initiation of the proposed construction be conditioned upon obtaining satisfactory assurances from interested water users that, in consideration of the irrigation benefit to be derived from the additional storage in Lucky Peak Reservoir, they will agree to use of Anderson Ranch and Arrowrock Reservoirs for flood control as proposed in the present report of the district engineer.

In respect to future operations of Lucky Peak (irrigation, power at Anderson Ranch, recreation), the report recommended as follows:

Accordingly, the Board proposes that accomplishment of the plan be initiated by construction of Lucky Peak Reservoir, for operation as a flood control facility, by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers with the other understanding that complete or partial joint use of the storage in the three reservoirs may be undertaken at such time as may be mutually agreed upon by the Secretary of War, the Secretary of the Interior and *local interest concerned with* flood control and the *use of irrigation water.*

And further

The Board is of the opinion that the reservoir should be authorized for construction at this time and for operation initially for flood control with the understanding that changes in the method of operation will be made in the future when the Secretary of War, upon the advise of the Chief of Engineers, finds that such changes are in the best interest of flood control, *irrigation* and power development, and that they are agreeable to the Secretary of the Interior, and to *local interest concerned with* flood control and *the use of irrigation water*.

The Lucky Peak operating plan for flood control purposes was established by the Corps – Interior agreement of November 20, 1953. Approval of the operating plan was then secured from the various storage contractors in Anderson Ranch and Arrowrock. A revised Bureau allocation report for the Boise Project dated September 21, 1953, was then submitted to Congress for approval. This approval was necessary because the proposed use of Anderson Ranch and Arrowrock for flood control purposes was inconsistent with previous authorizations respecting these reservoirs. (Secretary's Letter of October 30, 1953.) *Use of the space for irrigation* by Interior also *required legislative approval* under section 8 of the 1944 Flood Control Act. The September 21, 1953, report indicated that Lucky Peak, in conjunction with the two upstream reservoirs, would *be used "jointly for flood control and irrigation."* This report was approved by Congress on October 24, 1954 (68 Stat. 794), and the Secretary was authorized to administer the project pursuant to this report.

Subsequently, the Bureau acquired Idaho Water Permit No. 1183, dated March 20, 1964, for the storage of 307,000 af in Lucky Peak, including 29,000 af of dead storage. The Bureau's records of this permit are presently unavailable, but I understand that the permit is limited to irrigation use. Water service contracts based on this permit were entered into with downstream water users pursuant to section 8 of the December 22, 1944, Flood Control Act. In addition, I understand that 50,000 af of storage has been assigned for downstream fish and wildlife releases which apparently is tied into the proposed Mountain Home Division.

The remaining balance of uncommitted space, as I understand it, is 116,250 af. Your four questions pertaining to use of this space are answered as follows:

1. Is there any existing legislative basis for the disposition of the 116,250 acre-feet of uncommitted space in Lucky Peak reservoir? If so, what is it?

There is in Lucky Peak legislation and legislative history no reference to construction of a power plant at Lucky Peak. Although the Corps' 1946 report recommended, in addition to flood control, future uses such as irrigation, recreation, and power generation at Anderson Ranch, the report is completely silent respecting generation at Lucky Peak. Such generation, if winter releases were involved, would, of course, be inconsistent with the *supplemental irrigation storage potential which was specifically recognized in that report.*

* * *

The uncommitted space in Lucky Peak, although covered by a permit, has not yet been put to beneficial use. To this extent, it may be argued that winter releases for power would only be subordinate to presently committed spaceholders. However, it appears within the above article that such winter power releases would not be consistent with the operating plan previously approved by the storage contractors in 1954. In addition, it appears that any future uses for winter power releases *would require consent of the irrigators* and Interior as appears below.

* * *

3. Are there any existing legal commitments for use of the 116,250 acre-feet of Lucky Peak space? If there are, would the commitment of space for power be subordinate to the prior commitments?

Winter power releases would constitute a change in the basic operating plan for Lucky Peak approved by both Interior and Bureau storage contractors in 1953 and 1954. Accordingly, *it is clear that both Interior and the storage contractors would be required to consent to such a change*, both by the terms of the agreement executed as well as by the Corps' commitments embodied in the 1946 report. Such amendment, among other things, would have to identify and account for such winter power releases in respect to present flood control releases.

In addition, the Lucky Peak water users must be considered. The water service contracts executed by Reclamation in substance provide that, subject to the primary operation of the reservoir for flood control, the United States will store all available water which

shall have an equal priority as to storage rights. If, and to the extent that the operation of the proposed power plant interferes with the storage rights, the rights of existing storage contractors would be impaired. In this respect, it should also be noted that under Article 8 of the 1953 Corps-Interior agreement, it was agreed that a future power plant would be operated in subordination to valid water rights, which would include the present Lucky Peak storage contractors.

In addition, before the Corps can dip into the uncommitted space for power purposes, there is the question of the necessity of the approval of the basic proposition by both Interior and local irrigation interests. The necessity of such approval is embedded in the 1946 report transmitted to Congress and in the language of the 1953 Corps-Interior agreement.

Campbell Aff., Exhibit J (United States Department of the Interior Memoranda, dated September 21, 1976), pp. 1-4 (emphasis added).

In the referenced letter, dated May 13, 1946, R.A. Wheeler, Lieutenant General, Chief of Engineers of the War Department, wrote to the Chairman of the Committee on Commerce as follows:

My dear Mr. Chairman:

1. The Committee on Commerce of the United States Senate by resolution adopted October 12, 1943, requested the Board of Engineers for Rivers and Harbors to review the report on the Boise River, Idaho, contained in House Document numbered 957, Seventy-sixth Congress, with a view to determining whether or not additional improvements in the interest of flood control are advisable at the present time. Under date of November 10, 1943, the Committee on Flood Control of the House of Representatives requested the Board of Engineers for Rivers and Harbors to review the report on the Boise River and tributaries in Idaho, published as House Document No. 957, Seventy-sixth Congress, Third Session, with a view to determining whether improvements for flood control on the Boise River and tributaries are advisable at this time. I inclose [sic] the report of the Board in response thereto.

Stevens Aff., Exhibit A (May 13, 1946, letter from Office of the Chief of Engineers, War Department). In addition, in a letter dated February 4, 1946, S.E. Nortner, Colonel, Corps of

Engineers, wrote to the Chief of Engineers for the U.S. Army; Mr. Nortner indicated federal flood control improvements had been authorized to supplement the then-existing basic control of floods in the Boise River valley. At the time, those improvements consisted of Anderson Ranch Reservoir (then under construction) and changes to Arrowrock Dam, which were to provide increased control of flood incidental to its primary purpose of irrigation water storage. Mr. Nortner also indicated, collectively, the then-existing and authorized improvements for control of floods were inadequate. Mr. Nortner wrote:

Additional protection against floods is economically feasible only by scientific and system operation of Arrowrock reservoir, Anderson Ranch reservoir, and the proposed Lucky Peak reservoir in the combined interest of flood control, *irrigation* and power. Such operation would be accomplished through the efficient forecasting of runoff from data obtained from an adequate network of meteorological and hydrological stations. Interest in the operation of those reservoirs as a system is three-fold, since *local water users*, the Bureau of Reclamation, and the Corps of Engineers are vitally concerned in them.

The District Engineer's recommended plan of improvement would provide a large measure of additional protection from floods, and *more dependable water supply for irrigation* and power.

Stevens Aff., Exhibit A (Letter from Division Engineer to the Chief of Engineers, U.S. Army, Washington, D.C., dated February 4, 1946) (emphasis added).

Further, pursuant to the 1946 report of the Board of Engineers for Rivers and Harbors, discussed above with respect to the historical context, it was recognized that coordinating the operation of the Arrowrock and Anderson Ranch Reservoirs to maximum advantage, including flood control, would require drawdown of the reservoirs early in the year and refilling on the basis of runoff forecasting. Stevens Aff., Exhibit A, p. 86. Further, it was recognized that irrigation entities opposed this method of operation as they were fearful that it might jeopardize the storage of water for irrigation. *Id.*, pp. 86-87. The District Engineer

presented a plan in the interest of flood control, irrigation, and hydroelectric power development which provided for construction of Lucky Peak Project. *Id.*, p. 88. The District Engineer further found that with this added reservoir and use of an adequate factor of safety and forecasting runoff, additional storage space in Anderson Ranch and Arrowrock Reservoirs could be used for flood control when needed without endangering the irrigation water supply, and that “additional water for irrigation would be made available thereby.” *Id.*, p. 89. He proposed to furnish the supplemental water to the irrigation entities who use Arrowrock Reservoir water as a recompense for the proposed flood control use of that reservoir. *Id.* In addition, the average annual tangible benefits evaluation included a value attributable to supplemental water for irrigation. *Id.*

The District Engineer recommended:

that Lucky Peak Reservoir with gross capacity of 306,000 acre-feet to be used primarily for flood control be authorized for construction and operation by the War Department; that the described power plant at Arrowrock Dam be authorized for construction and operation by the Bureau of Reclamation, this facility to wait until justified by the demand for power; but the War Department be authorized to install and operate the flood forecasting network of climatological and hydrological stations; and that ***initiation of the proposed construction be conditioned upon obtaining satisfactory assurances from interested water users that, in consideration of the irrigation benefits to be derived from the additional storage in Lucky Peak Reservoir, they will agree to use of Anderson Ranch and Arrowrock Reservoirs for flood control as proposed in the present report of the District Engineer.***

Stevens Aff., Exhibit A, p. 90 (emphasis added). Pursuant to the Definite Project Report on Lucky Peak Dam and Reservoir, dated October 3, 1949, prepared by the Corps of Engineers, the Lucky Peak Project was authorized by P.L. 526, 79th Cong., 2d Sess., approved July 24, 1946. Campbell Aff., Exhibit G (Definite Project Report on Lucky Peak Dam and Reservoir), Syllabus.

The report provides that one of the benefits of the Lucky Peak Project other than flood control was supplemental irrigation water. *Id.*, p. 79. The report placed an “ultra-conservative value” of \$11,500 annual irrigation benefit for supplemental water, and indicated that “it is believed that the value of supplemental irrigation water used in the future may be several times greater.” *Id.*

1. Contracts And Guarantees

At the time the Lucky Peak Project was under consideration, promises and inducements were made to the irrigation interests, including the Districts, to encourage them to agree to the modification of the reservoir system. The promises included supplemental irrigation supply.

a. Memorandum Of Agreement Between The Department Of The Army And The Department Of The Interior For Flood Control Operation Of Boise River Reservoirs (1953 Agreement)

On or about November 20, 1953, the Department of the Army entered into an agreement with the Department of the Interior, entitled “The Memorandum of Agreement Between the Department of the Army and The Department of the Interior for Flood Control Operation of Boise River Reservoirs, Idaho,” at a time when the Department of the Army, through the Corps of Engineers, was engaged in constructing the Lucky Peak Project on the Boise River. Stevens Aff., Exhibit B, (Memorandum of Agreement Between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs, Idaho). The agreement provides that the Lucky Peak Project was being constructed substantially in accordance with the recommendations of the Chief of Engineers, as set forth in his report of May 13, 1946. *Id.*, p. 1. The agreement further provides that the report concurred in the views and recommendations of the Board of Engineers for Rivers and Harbors that the

Lucky Peak Project be constructed with the understanding that complete or partial joint use of this storage in the three-reservoir system, viz., Lucky Peak, Arrowrock, and Anderson Ranch Reservoirs, may be undertaken at such time as may be mutually agreed upon by the Secretary of War (now Secretary of the Army), the Secretary of the Interior, and *local interests concerned with flood control and the use of irrigation water*. *Id.*, pp. 1-2. The agreement indicates that to attain the maximum benefits from the reservoir system, the total capacity of 1,084,000 acre-feet would be utilized as follows:

- a. 983,000 acre-feet (418,000 acre-feet in Anderson Ranch, 285,000 acre-feet in Arrowrock Reservoir, and 280,000 acre-feet in Lucky Peak Reservoir) would be operated primarily in the interests of *irrigation and flood control* and secondarily in the interests of power, as governed by forecasts of runoff. The allocation of flood control space is shown on Plate 2.
- b. 5,000 acre-feet in Anderson Ranch Reservoir will be used exclusively for power production.
- c. 96,000 acre-feet (70,000 acre-feet in Anderson Ranch and 26,000 acre-feet in Lucky Peak Reservoirs) will be reserved for dead storage and allocated exclusively to the maintenance of minimum power head, maintenance of permanent pools for preservation and propagation of fish and wildlife and for silt control.

The above designated 983,000 acre-feet or any part thereof in storage at the end of each flood season will be *primarily considered as available for irrigation* except as such amount must be reduced by evacuation requirements for flood control.

Id., pp. 4-5 (emphasis added).

Pursuant to said Memorandum of Agreement, releases of water for irrigation were to be made from Lucky Peak Reservoir, “at such times and at such rates, pursuant to rights established under law, as requested by the owners thereof, or by officials or agencies authorized to make such requests.” *Id.*, p. 11.

Again, while it is clear from this agreement that flood control and irrigation are of significant import, there is no mention of, nor consideration given to, minimum stream flows in the Boise River.

b. Supplemental Contract (1954 Agreement)

On August 3, 1954, the United States Department of the Interior, Bureau of Reclamation, entered into the Supplemental Contract with Pioneer. Stevens Aff., Exhibit B (Supplemental Contract with Pioneer Irrigation District). The Recitals set forth within said agreement included the recognition by Pioneer that the benefits to accrue from a system-wide operation of Anderson Ranch, Arrowrock and Lucky Peak Dams is in the interest, jointly, of flood control and irrigation, and Pioneer's desire to cooperate with the United States and various other water user organizations to permit such system-wide and integrated operations. *Id.*, pp. 1-2. The Memorandum of Agreement, quoted hereinabove in Section V.A.1.a, is attached to the Supplemental Contract. *Id.*, Exhibit A. In addition, as is addressed hereinabove, Settlers entered into a similar Supplemental Contract, dated June 18, 1954. Stevens Aff., Exhibit C.

The Supplemental Contracts contain the following guarantees, at Paragraph 7:

Beginning with the first full flood control period after the agreement set forth in Exhibit A has become operative, there shall be a determination for each storage season as of the end of that season

(a) of the amount of water to which the District would have been entitled under its storage rights in the reservoir system and Lake Lowell under its Government-District contracts had Anderson Ranch, Arrowrock, and Lake Lowell reservoirs been operated in accordance with those contracts except for the provisions thereof relating to the use of capacity for flood control benefits and without regard to the flood control plan referred to in article 6, and

(b) of the amount of water which is credible to the storage rights of the District under its Government-District contracts taking account of actual operations under the flood control operating plan and in accordance with this supplemental contract.

If the amount under (a) exceeds that under (b), there shall be credited and made available to the District, out of the water accrued to storage rights in Lucky Peak Reservoir, an amount of stored water equal to that difference. Determinations under this article shall be by a committee of three comprising the state water master of District No. 12 A, a representative of the water users to be selected by the Boise Project Board of Control, and the officer of the United States in charge of the Boise Project; and, so far as practicable, shall be made within thirty (30) days of the end of the storage season involved.

Stevens Aff., Exhibit B (Supplemental Contract with Pioneer), pp. 4-5; Stevens Aff., Exhibit C (Supplemental Contract with Settlers), pp. 4-5.

The guarantee quoted hereinabove has been largely ignored or denied, and the relevant minimum stream flows at issue in this subcase are directly contrary to the contractual guarantees.

c. Water Service Contract Between The United States Of America And Pioneer Irrigation District/Settlers Irrigation District Providing For The Conservation Use Of Lucky Peak Dam And Reservoir (1966 Agreement) and Repayment Contract Between the United States and Pioneer and Settlers Irrigation Districts Providing for Lucky Peak Reservoir Storage (2005 Agreement)

As is discussed above in the historical context, later contracts and agreements between the Bureau of Reclamation and the Districts reflect the continued need for cooperation regarding the Lucky Peak Project, and the significant importance of irrigation water.

On or about August 24, 1966, Pioneer and the Bureau of Reclamation, entered into the Water Service Contract between the United States of America and Pioneer Irrigation District, providing for the conservation use of Lucky Peak Dam and Reservoir. Stevens Aff.,

Exhibit D (Water Service Contract – Pioneer). In addition, on May 5, 1966, Settlers entered into a similar agreement. Stevens Aff., Exhibit E (1966 Water Service Contract – Settlers).

Further, on or about September 8, 2005, Pioneer entered into an agreement with the Bureau of Reclamation, entitled “Repayment Contract Between the United States of America and Pioneer Irrigation District Providing for Lucky Peak Reservoir Storage.” Campbell Aff., Exhibit H. In addition, Settlers entered into a similar Repayment Contract with the Bureau of Reclamation on September 20, 2005. Campbell Aff., Exhibit I.

2. Districts’ Request For Additional Storage Water From Lucky Peak Project

On August 27, 2002, through counsel, Pioneer and Settlers wrote to the Bureau of Reclamation requesting supplemental water supply, as follows:

As you know, I represent Pioneer and Settlers Irrigation Districts in the Lucky Peak Water Service Contract Renewal and Conversion process. In addition to both Districts’ participation in that process, I would like to formally advise the Bureau of Reclamation of the Districts’ desire to obtain additional storage water from Lucky Peak Reservoir as a supplemental water supply. The Districts are aware that some irrigation storage water may not be renewed by certain contractors. If that occurs, the Districts want to be among the first considered for contracting that additional storage space for their supplies. As you know, in 2001, both Districts had to cease water deliveries to their landowners in the first week of September because of low water supplies after they had completely exhausted their storage supplies in Lucky Peak Reservoir. In view of the history of the Lucky Peak Reservoir project, and the primary purpose of the project for flood control and irrigation storage, the Districts believe that they should be afforded a first opportunity for contracting of any additional water supplies made available.

Campbell Aff., Exhibit K. While the requests made by the Districts were not granted, this correspondence demonstrates the prejudice upon the Districts with regard to the refusal of the Bureau of Reclamation to comply with the purposes and guarantees underlying the construction

of the Lucky Peak Project, and the contrary nature of the illegally granted minimum stream flow rights.

B. Issuance of Director's Report Recommendations, License And Amended Permits In Favor Of The Bureau Of Reclamation For Minimum Stream Flows In Violation Of Idaho Water Law and Idaho Code Section 42-1501, *et seq.*

In addition to the foregoing historical basis, promises and guarantees, it is also proper for this Court to reject to Director's Report recommendations and to deny the Bureau of Reclamation's claim for minimum stream flow in the Boise River on the basis the recommendations, amended permits and license were issued by IDWR in violation of the provisions of Idaho water law, including Idaho Code Section 42-1501, *et seq.*, applicable to appropriation of minimum stream flows.

1. Deference To State Water Law

In its recent decision in *United States v. Pioneer Irrig. Dist.*, the Idaho Supreme Court discussed and analyzed the history, importance and application of federal deference to state water law with regard to Reclamation projects, as follows:

The "Reclamation Act of 1902 set in motion a massive program to provide federal financing, construction and operation of water storage and distribution projects to reclaim arid lands in many Western States." *Orff. v. United States*, 545 U.S. 596, 598, 125 S.Ct. 2606, 2608, 162 L.Ed.2d 544, 547 (2005) (*citing California v. United States*, 438 U.S. 645, 650, 98 S.Ct. 2985, 2988, 57 L.Ed.2d 1018, 1023 (1978)). Federal law provides that the United States holds title to Reclamation projects works and the right to manage and operate Reclamation projects. 43 U.S.C. §§ 491, 498. While "[t]he 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 . . . ***through it runs the consistent thread of purposeful and continued deference to state water law by Congress.***" *California*, 438 U.S. at 653, 98 S.Ct. at 2990, 57 L.Ed.2d at 1025. Even before many of the Western States had been admitted to the Union, Congress deferred to the growing local law. *Id.* at 654, 98 S.Ct. at 2990, 57 L.Ed.2d

at 1025 (citing *Broder v. Water Co.*, 101 U.S. 274, 276, 25 L.Ed. 790, 791 (1979), in which the Court noted that local appropriation rights were “rights which the government had, by its conduct, recognized and encouraged and was bound to protect”). Section 8 of the Reclamation Act provides, “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.” 43 U.S.C. § 383. The United States Supreme Court has determined that where the federal government has undertaken reclamation projects for the public benefit, the United States retains control of the operation of the project and distribution of its benefits to ensure they are properly used. *Arizona v. California*, 373 U.S. 546, 589, 83 S. Ct. 1468, 1492-93, 10 L.Ed.2d 542, 571 (1963). However, “*the Act clearly provided that state water law would control in the appropriation and later distribution of water.*” *California*, 438 U.S. at 664, 98 S.Ct. at 2995, 57 L.Ed.2d at 1032.

Pioneer Irrig. Dist., 144 Idaho at 109-10, 157 P.3d at 603-04 (emphasis added).

In accordance with the above-quoted analysis, with respect to the matter at issue, Idaho state water law controls the appropriation and distribution of water from the Lucky Peak Project at issue in this subcase. Specifically, Idaho Code Section 42-1501, the Idaho minimum stream flow statutes, control the appropriation and distribution of water for maintenance of minimum stream flow in the Boise River.

2. Legal Authority For Conveying Minimum Stream Flows

Instream water rights have been recognized in the state of Idaho as water rights., and just like any other water right, minimum flow rights must be approved by the state. In Idaho, the Idaho Water Resource Board is responsible for water planning and holding minimum stream flow water rights. I.C. §§ 42-1734, *et. seq.*, and 42-1736B.

In 1978, the Idaho Legislature enacted the Idaho minimum stream flow statutes. I.C. § 42-1501, *et. seq.* The legislation expressly recognized that instream flows for “fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality” are beneficial uses. I.C. § 42-1501.

The statutes provide that the Idaho Water Resource Board may apply to the Department of Water Resources for a permit and license establishing a minimum stream flow. I.C. § 42-1503. Any person or entity, including a federal agency, may request the Board to file such an application. I.C. § 42-1504.

With respect to the minimum stream flow water rights advanced by the Bureau of Reclamation, it has not complied with any element of Idaho state water law, specifically including the Idaho minimum stream flow statutes, for purposes of supporting issuance of a water right by the State to the Bureau of Reclamation.

3. Idaho Code Section 42-1501, *et seq.*, Minimum Stream Flow Statutes

Since 1978, the establishment of minimum stream flows has been controlled by Idaho Code Section 42-1501, *et seq.*, the Idaho minimum stream flow statutes, and said rights are held by the Idaho Water Resource Board. Idaho Code Section 42-1502 defines “minimum stream flow” as: “the minimum flow of water in cubic feet per second of time or minimum lake level in feet above mean sea level required to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of a stream in the public interest.” *Id.*

Idaho Code Section 42-1503 governs the requisite application for the appropriation of a minimum stream flow, which application is to be submitted to the Director² of the IDWR by the Idaho Water Resource Board.³ *Id.* The minimum stream flow application process is appropriate where the Board desires to appropriate a minimum stream flow with respect to unappropriated waters of any stream. *Id.* In the event a person, association, municipality, county, state or, in this case, a *federal agency*, wishes to request the Idaho Water Resource Board consider the appropriation of a minimum stream flow, the requesting party is required to make the request, in writing, to the Idaho Water Resources Board and provide the same information required by the application process. I.C. § 42-1504. In the event the Idaho Water Resource Board rejects such a request, there is no right to review; however, if the Board decides the request has merit, the Board proceeds with the same application procedure discussed hereinabove. *Id.* There is no available procedure under Idaho water law allowing the federal agency to make a direct application for appropriation of minimum stream flow to IDWR, or to obtain direct legislative approval thereof.

Applications made by the Idaho Water Resources Board, if approved by the Director of IDWR, are submitted to the Idaho Legislature, and are not deemed fully effective until such time as the matter is affirmatively acted upon by concurrent resolution of the Legislature. *Id.*⁴ Said provision provides the Legislature with the opportunity to veto the permit.

² See Idaho Code Section 42-1502 for the definition of “Director.”

³ See Idaho Code Section 42-1502 for the definition of “Board.”

⁴ Or, if the Legislature fails to act on the application prior to the end of the applicable regular session, the application is deemed approved. *Id.*

In accordance with the foregoing minimum stream flow statutes, minimum stream flows have been appropriated in the Lemhi River in 2001; Snake River in 2005; and Wood River Basin in 2007. *See* I.C. §§ 42-1506, 42-1507, and 42-1508, respectively.

There is no provision for appropriation of minimum stream flows in the state of Idaho in accordance with the method employed by the Bureau of Reclamation with respect to the Boise River, and any attempt by IDWR to appropriate minimum stream flows outside of the application and legislative approval and/or veto processes set forth hereinabove is beyond the agency's authority, and beyond the scope of the legislative authority granted to the agency.

The Idaho minimum stream flow statutes are clear and unambiguous regarding the controlling issues of this subcase, specifically the party entitled to apply for and hold minimum stream flow rights, namely, the Idaho Water Resource Board.

It is not clear what constitutional or statutory basis for appropriation of the minimum stream flow water rights was relied upon by the Director or the Bureau of Reclamation. However, a review of relevant IDWR minutes and correspondence indicates there was a lack of Idaho water law analysis, and no legal review. IDWR appears to have recognized the Idaho minimum stream flow statutes, but refused to comply with the statutes, and/or rely upon an alternative basis to support the water rights it intended to appropriate. *See* Campbell Aff., Exhibit Q, pp. PID0018-20; PID0021-24; PID0345-51.

4. Idaho Department Of Water Resources Must Comply With State Water Law And Within The Statutory Authority Granted To It

IDWR, an administrative agency, has only those powers that have been specifically granted to it by the Idaho Legislature. An administrative agency is a creature of statute, limited to the power and authority granted to it by the Legislature and it may not exercise sub-legislative powers to modify, alter, or enlarge the legislative act which it administers.

Simpson v. Louisiana-Pacific Corp., 134 Idaho 209, 212, 998 P.2d 1122, 1125 (2000), *citing Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996). Specifically, in addressing action by the IDWR, the Idaho Supreme Court wrote: “[a]n administrative agency like the [I]D[WR] has only such powers as the statute or ordinance confers.” *Beker Indus., Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 191, 610 P.2d 546, 550 (1980), *citing* IDAHO CONST. art. 15, § 7; I.C. §§ 42-1734, 42-1736; 1 Am.Jur.2d § 69, p. 865; . . . *Peters v. Hobby*, 349 U.S. 331, 345, 75 S.Ct. 790, 797, 99 L.Ed. 1129, 1140-41 (1955). Pursuant to the Idaho Administrative Procedures Act, an agency action is in error if it is “in violation of . . . statutory provisions,” if it is “in excess of the statutory authority of the agency,” if it is “made upon unlawful procedure,” or if it is “arbitrary, capricious, or an abuse of discretion.” I.C. §§ 67-5279(3)(a), (b), (c), (e).

In the present subcase, Idaho water law does not permit appropriation of a minimum stream flow to any person or entity other than the Idaho Water Resource Board. IDWR clearly lacked authority to issue a minimum stream flow permit and license, or to issue a recommendation in favor of any entity other than the Idaho Water Resource Board. Accordingly, issuance in favor of the Bureau of Reclamation was “in violation of . . . statutory provisions” and “in excess of the statutory authority” and, therefore, in violation of the Idaho Administrative Procedures Act, in error, and invalid. *See* I.C. §§ 67-5279(3)(a) and (b). In addition, the action was made upon unlawful procedure, in violation of Idaho water law and the action of IDWR was arbitrary, capricious and/or an abuse of discretion. I.C. §§ 67-5279(3)(c) and (e).

5. Pursuant To Idaho Minimum Flow Statutes, The Only Entity Permitted To Apply For And/Or Hold A Water Right For Minimum Stream Flows In The Boise River Is The Idaho Water Resource Board

The proper method by which the Bureau of Reclamation, a federal agency covered by Idaho Code Section 42-1504, may seek appropriation of a minimum stream flow in the Boise River is to request, pursuant to Idaho Code Section 42-1504, that the Idaho Water Resource Board file an application for appropriating a minimum stream flow. I.C. § 42-1504, *see also, State v. United States*, 134 Idaho 106, 112, 996 P.2d 806, 812 (2000) (“The United States has not requested, pursuant to Idaho Code Section 42-1504, that the Idaho Water Resource Board file an application for appropriating a minimum stream flow for Smith Springs.”). There is no language set forth in the applicable statutes allowing any party other than the Idaho Water Resources Board to make application to the IDWR; and, there is no authority within said statutes permitting the IDWR to issue a permit, license, or make a recommendation for any party other than the Idaho Water Resources Board for minimum stream flows. *See* I.C. § 42-1501, *et seq.* Again, an administrative agency, such as IDWR, only has such powers as the statute or ordinance confers. *Beker Indus., Inc. v. Georgetown Irrig. Dist.*, 101 Idaho 187, 191, 610 P.2d 546, 550 (1980).

Because the clear and unambiguous terms of the Idaho minimum stream flow statutes do not provide for for a minimum stream flow in the Boise River, and/or for the issuance of a permit, recommendation and/or license to a party other than Idaho Water Resources Board, it must be assumed that the Legislature intended what is clearly stated in the statutes. *See Idaho Department of Parks and Recreation v. Higginson*, 121 Idaho 819, 822-23, 828 P.2d 848, 851-52 (1992). The clearly expressed intent of the Legislature must be given effect and there is no occasion for construction where the language of a statute is unambiguous. *Id.*, *citing, Sherwood*

v. *Carter*, 119 Idaho 246, 254, 805 P.2d 452, 460 (1991); *Ottensen ex. rel. Edwards v. Board of Commr's of Madison County*, 107 Idaho 1099, 695 P.2d 1238 (1985). The best guide to legislative intent is the words of the statute, itself. *Id.*, 121 Idaho at 853; 828 P.2d at 824.

Furthermore, any contrary statutory interpretation by IDWR is not entitled to judicial deference, because the interpretation would directly contradict the clear and unambiguous expression of the Legislature. *See Idaho Department of Parks and Recreation v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). Judicial deference is not applicable in this subcase in favor of the IDWR because the issuance of the Director's Report recommendation, amended permits, and license in favor of the Bureau of Reclamation for minimum stream flows in the Boise River was not reasonable, and was in direct violation of the applicable statutory provisions, including permissible party to apply for and hold such water rights, as well as required legislative approval. *See Simplot v. Idaho State Tax Commission*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991).

6. Permits, As Amended, License, And Director's Report Recommendations

a. Applications And Permits, As Amended

i. Application For Permit (1964)

In 1964, the Bureau of Reclamation submitted an Application for Permit to Construct a Reservoir and Appropriate and Store the Public Waters of the State of Idaho to the State of Idaho, related to construction of the Lucky Peak Project. Campbell Aff., Exhibit L. The application indicated the total reservoir capacity to be 307,000 acre feet with 278,200 usable storage. *Id.* The application further indicated, in section 10, that the water was to be used for "irrigation." *Id.* (emphasis added). In addition, the permit provided: "***Lucky Peak stored waters will be utilized in the Boise Valley on presently irrigated lands for supplemental irrigation***"

water”; and “[t]he water to be stored under this permit will be used to supplement lands having existing water rights in the Boise Valley who desire to contract therefor.” Id. (emphasis added).

The above-quoted representations set forth in this initial application are consistent with the representations and guarantees made by the Bureau of Reclamation to the irrigation entities, including the Districts, and was consistent with the underlying basis for the construction of the Lucky Peak Project.

ii. Application For Amendment Of A Permit (1985)

Thereafter, in 1984, the Bureau of Reclamation submitted an Application for Amendment of a Permit, attempting to change the nature of use to include 152,300 acre feet for storage for stream flow and 152,300 acre feet for stream flow maintenance from storage. Campbell Aff, Exhibit M. The application for amendment was approved by the Director of IDWR on February 14, 1985.

Such action by the Director was clearly beyond his authority under Idaho water law and was in error. Pursuant to minimum stream flow statutes, the Bureau of Reclamation does not qualify to apply for or hold water rights for minimum stream flows, and the Director and Bureau of Reclamation did not comply with the application and legislative approval processes required by Idaho Code Sections 42-1501, *et seq.*

iii. Application For Amendment Of A Permit (1987)

In 1987, the Bureau of Reclamation filed an Application for Amendment of a Permit, again attempting to amend the nature of use of the water stored by the Lucky Peak Project. Campbell Aff., Exhibit N. By the application, the Bureau stated an intent not to seek to permanently alter the distribution of uses for storage, but to authorize use of up to 44,700 acre

feet of stream flow maintenance water for irrigation of Boise Project Board of Control in the 1987 season to offset shortages due to evacuation of Lucky Peak Reservoir during power plant construction, and up to 57,600 acre feet of irrigation storage to guarantee stream flow maintenance capacity through April 15, 1990. *Id.*

The application for amendment was approved by IDWR on May 20, 1987. However, any suggestion that this application for amendment, approved by the IDWR, supports a water right for minimum stream flows to be held by the Bureau of Reclamation is without merit, as it is, again, contrary to the purposes of construction of the Lucky Peak Project, and in violation of Idaho water law.

iv. Application For Amendment Of A Permit (1990)

Once again, in 1990, the Bureau of Reclamation filed an Application for Amendment of Permit referencing 152,300 acre feet for storage for stream flow maintenance and stream flow maintenance from storage. Campbell Aff., Exhibit O. The application was approved by IDWR, with conditions, on November 19, 1990. *Id.*

The approval by the Director of IDWR was another action beyond its authority, in violation of Idaho water law, and contrary to the basis for the construction of the Lucky Peak Project.

b. License Issued By State Of Idaho Department Of Water Resources, No. 63-03618

Following several extensions after the original application, water right license 63-03618 was issued to the Bureau of Reclamation on September 27, 2002, by the IDWR. The license provides for 111,950 acre feet of water for irrigation storage and irrigation from storage, 28,800 acre-feet for recreation/inactive storage and 152,300 acre-feet for stream flow maintenance storage and stream flow maintenance from storage. Campbell Aff., Exhibit P.

This water right, as it relates to minimum stream flows, is in error, and is invalid. Under Idaho water law specific to minimum stream flows, the Bureau of Reclamation is not entitled to apply for or hold such a water right. In addition, the applicable requisite application and legislative approval processes, a necessary condition precedent for a water right to minimum stream flows, was never undertaken. No minimum stream flow water right in the Boise River in favor of the Bureau of Reclamation has been addressed by the Idaho Water Resource Board or the Idaho Legislature in accordance with Idaho Code Section 42-1501, *et seq.*

c. Report Of The Director, No. 63-03618

The Director of IDWR issued a report in 2002, recommending a water right in favor of the Bureau of Reclamation, including stream flow maintenance storage and stream flow maintenance from storage in the amount of 152,000 acre feet per annum. However, this recommendation is in error, beyond the scope of the authority of the agency, in violation of statutory provisions, issued on improper procedure, and is not entitled to deference.

As was noted by this Court in its prior Memorandum Decision and Order on Cross-Motions for Summary Judgment, the Bureau of Reclamation is not entitled to rely on the presumptive weight of the *Director's Report* with respect to legal issues or the application of law to presumed facts:

The *Director's Reports* recommended the rights in the name of the [Bureau of Reclamation] and recommended disallowed the corresponding claims filed by the Irrigation Entities. The Director's Report has prima facie weight as set forth in I.C. § 42-1411(4)-(5). The prima facie weight constitutes a rebuttable evidentiary presumption. *See, e.g. State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745, 947 P.2d 409, 418 (1997). The rebuttable presumption shifts the burden of production, which means the party in whose favor the presumption operates is relieved from having to introduce further evidence of the presumed facts until the opponent introduces substantial evidence to the contrary. *Id.* at 745, 947 P.2d at 418. Once the presumption is

rebutted, the facts upon which the presumption are based are weighted with all other relevant facts. *Id.* (citing MCCORMICK, EVIDENCE § 345, at 823 (1972)).

However, the presumptive weight accorded the Director's Report goes only to facts *and not to the law or the application of law to the facts*. *In re SRBA Case No. 39576 State v. United States*, 128 Idaho 246, 912 P.2d 614 (1995), the Idaho Supreme Court made this clear in the context of the Court's role with respect to the "unobjected to" portions of the Director's Report. "Stripping the district court of the ability to review the contents of the Director's Report and apply the law to the facts as established in that report is an unconstitutional intrusion of the province of the judicial department of the government." *Id.* at 259, 912 P.2d at 627. *Simply put, a party is not entitled to rely on the presumptive weight of the director's report as concerns legal issues or the application of law to presumed facts.*

Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 11

(September 1, 2004) (emphasis added). In the present subcase, because the issues center around the application of Idaho water law and the application of said law to the existing facts before this Court, the Director's Report is not entitled to presumptive weight concerning said legal issues and/or the application of the law to the facts.

In addition, once again, the Director's statutory interpretation is also not entitled to judicial deference where the interpretation and application contradict the clear and unambiguous expression of the Legislature. *Idaho Department of Parks and Recreation v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). In this subcase, the Director's Report recommendations, amended permits, and license directly contradict the clear language and procedure of Idaho water law governing minimum stream flows.

**d. Objections By Pioneer Irrigation District And Settlers
Irrigation District**

The Districts timely objected to the Director's Report. Consistent with the argument set forth hereinabove, the objections provided:

If the right is decreed, the claimed purposes for use of stream flow maintenance storage or stream flow maintenance from storage should not be decreed. Those uses are not beneficial uses of water under Idaho law, particularly if held by any individual or entity other than the Idaho Water Resource Board. Those quantities should be decreed for irrigation purposes, as reflected in the water permit before the Idaho Department of Water Resources erroneously approved the amendment of the permit.

Moreover, allowing wintertime releases and releases for fish and game purposes is contrary to the purposes for which Lucky Peak Dam and Reservoir were constructed. The only allowable uses under the pertinent authorizations are irrigation and flood control.

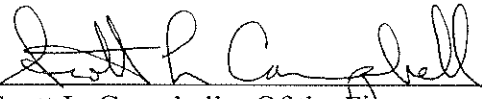
Campbell Aff., Exhibits C and D.

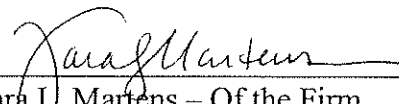
VI. CONCLUSION

On the bases of the foregoing, Pioneer Irrigation District and Settlers Irrigation District respectfully request this Court reject the recommendation of the Director of the Idaho Department of Water Resources to decree minimum stream flow water rights in favor of the Bureau of Reclamation, and limit the nature of use to irrigation purposes.

DATED this 10th day of October, 2007.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Scott L. Campbell – Of the Firm

By 
Tara L. Martens – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October, 2007, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PIONEER IRRIGATION DISTRICT'S AND SETTLER'S IRRIGATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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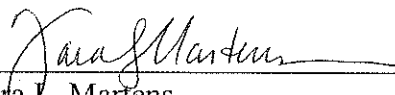
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