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DEPARTMENT OF
WATER RESOURCES

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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	)	
	)	Subcase No. 63-3618
Case No. 39576	)	
	)	BRIEF IN SUPPORT OF
	)	MOTION FOR SUMMARY JUDGMENT
	)	
_____	)	

COPY

COMES NOW, CANYON COUNTY WATER COMPANY; FARMERS UNION DITCH COMPANY, LTD.; MIDDLETON IRRIGATION ASSOCIATION, INC.; and, MIDDLETON MILL DITCH COMPANY (hereinafter "Canal Companies") by and through their attorney of record, JERRY A. KISER of the firm STOPPELLO & KISER ATTORNEYS AT LAW, and hereby submits this Brief in support of Canal Companies' Motion for Summary Judgment filed concurrently herewith. The Canal Companies' Motion seeks Judgment from this Court decreeing the purpose of use for 264,250 acre feet of water in Lucky Peak Reservoir as irrigation storage and irrigation from storage.

I.

HISTORY AND BACKGROUND

Lucky Peak Reservoir was the third reservoir constructed in what is commonly referred to as the Boise Project. Preceding Lucky Peak Reservoir was Arrowrock Reservoir impounding the Middle and North Forks of the Boise River and, Anderson Ranch Reservoir impounding the South Fork of the Boise River. In December 1957, the United States of America, through the Bureau of Reclamation, filed an Application for Permit to construct a reservoir and appropriate and store the public waters of the State of Idaho, Application No. 35086 for waters in Lucky Peak Reservoir. Exhibit 1 to Affidavit of Jerry A. Kiser (hereinafter "Kiser Affidavit"). The Permit Application identified use of the water as "irrigation and power for irrigation pumping purposes." In April 1963, the United States Bureau of Reclamation submitted an Amended Application for permit to construct a reservoir and appropriate and store the public waters of the State of Idaho to the State Reclamation Engineer (IDWR) (Exhibit B to Kiser Affidavit). The Amended Application was submitted with a cover letter dated April 3, 1963 from the Regional Director of the Bureau of Reclamation explaining the Application was amended to resolve protests to the 1957 Application (Exhibit C to Kiser Affidavit). The purpose of use for the water, the subject of the

Amended Application, was stated in the Application as "irrigation purposes". The Application went on to state in paragraph 21 the remarks section, "The 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 therefore." On March 20, 1964, the Application was approved and a permit issued as permit no. 1183 (Exhibit D to Kiser Affidavit).

On April 23, 1984, an Application was filed with the Idaho Department of Water Resources seeking amendment to the permit for Lucky Peak Reservoir by changing 152,300 acre feet from irrigation storage and irrigation from storage to 152,300 acre feet for streamflow maintenance storage and streamflow maintenance from storage. The Application for Amendment of Permit was approved in February 1985. (Exhibit E to Kiser Affidavit). On September 27, 2002, the Idaho Department of Water Resources issued a water right license to the U.S. Department of Interior, Bureau of Reclamation for Lucky Peak Reservoir, which license identifies as beneficial uses irrigation from storage and irrigation storage in the amount of 111,950 acre feet, recreation storage (inactive storage) 28,800 acre feet, and streamflow maintenance storage and streamflow maintenance from storage in the amount of 152,300 acre feet. Exhibit F to Kiser Affidavit.

II.

STANDARD ON SUMMARY JUDGMENT MOTION

The standard to be applied on summary judgment motions has been stated by the Idaho Supreme Court when considering a motion for summary judgment pursuant to Rule 56 of the Idaho Rules of Civil Procedure:

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, 134 Idaho 655, 660, 23 P.3d 117, 122 (2001).

When an action is tried without a jury as in SRBA proceedings, the Court is not required to draw inferences in favor of one party or the other but:

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 Court may rule on Canal Companies' protest as a matter of law and the protest may be decided on summary judgment. Summary judgment in favor of the Canal Companies in this matter should be granted, in that Idaho law provides the only entity capable of holding a water right for the purpose of in stream flow (streamflow maintenance) is the Idaho Water Resource Board.

III.

LAW AND ARGUMENT

The Idaho Department of Water Resources has recommended in the SRBA that water right number 63-3618 be adjudicated with beneficial use of water as 111,950 acre feet irrigation storage and irrigation from storage; 28,800 acre feet recreation storage; and, 152,300 acre feet stream flow maintenance storage and stream flow maintenance from storage. It is Canal Companies' position that the recommendation of the Department for 152,300 acre feet of stream flow maintenance storage and stream flow maintenance from storage is not authorized under Idaho law, in that stream flow maintenance is in reality "in stream flow", and therefore a right which can only be held by the Idaho Water Resource Board and not the United States of America, Bureau of Reclamation. Chapter 15, Title 42 of the Idaho Code (hereinafter "Minimum Stream Flow Act") became law in 1978 and provides minimum stream

flows can be declared a beneficial use under certain circumstances. *Idaho Code* § 42-1501 provides in part:

The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality. The preservation of the water of the streams of this state for such purposes when made pursuant to this act is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water.

Idaho Code § 42-1501.

Idaho Code § 42-1501 recognizes in stream flows can constitute a beneficial use of water, ". . . when made pursuant to this act. . . ." The Minimum Stream Flow Act requires applications to appropriate waters of the state of Idaho for minimum stream flows be submitted to the Director of the Idaho Department of Water Resources by the Idaho Water Resource Board. Upon receipt of an application from the Idaho Water Resource Board, the Director of the Idaho Department of Water Resources must follow certain procedures set forth in *Idaho Code* § 42-1503. The Idaho Minimum Stream Flow Act provides only the Idaho Water Resource Board can submit applications to the Director to

appropriate water for minimum stream flows. Idaho Code § 42-1504 provides:

Any person, association, municipality, county, state or federal agency may, in writing, request that the board consider the appropriation of a minimum stream flow of the unappropriated waters of any stream. Said request shall be in writing and provide the same information required in the form provided for by section 42-1503, Idaho Code. The board shall consider said request within six (6) months after it is filed and may proceed to reject or accept the proposal. There shall be no right of review of any board decision rejecting a request under this section. If the board decides that the request has merit, the board shall proceed as provided in this act. The board may hold hearings in reaching its decision and shall notify the requesting party of its decision.

Idaho Code § 42-1504 (Emphasis added).

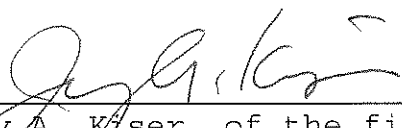
The Idaho Department of Water Resources has recognized that a minimum stream flow water right can be approved only in the name of the Idaho Water Resource Board, pursuant to the provisions of Chapter 15, Title 42, Idaho Code. On June 18, 1984, David Tuthill Jr. with the Idaho Department of Water Resources sent a letter to the United States Bureau of Reclamation and enclosed an issue paper prepared by the Department. See Exhibit F to Kiser Affidavit. This issue paper stated, "A minimum stream flow water right can be approved only in the name of the Idaho Water Resource Board pursuant to the provisions of Chapter 15."

The license issued to the United states of America acting through the Bureau of Reclamation for Water Right No. 63-03618 includes 152,300 acre feet of stream flow maintenance and storage for stream flow maintenance violates the Idaho Minimum Stream Flow Act, which provides only the Idaho Water Resource Board may hold a water right for in stream flow.

The Canal Companies respectfully request this Court grant Summary Judgment that the United States Bureau of Reclamation cannot hold a water right in Lucky Peak Reservoir for stream flow maintenance, and that only the Idaho Water Resource Board can hold such a right. The Canal Companies further request judgment be entered by the Court that the purpose of use for Water Right No. 63-03618 be decreed as having purpose of use of 264,250 acre feet irrigation storage and irrigation from storage, and 28,800 acre feet for recreation storage.

RESPECTFULLY SUBMITTED this 12 day of October, 2007.

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By 
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