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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:

Case No. 39576

)
) Subcase No. 63-3618
)
)
) **MEMORANDUM IN SUPPORT OF**
) **MOTION FOR PARTIAL**
) **SUMMARY JUDGMENT**
)
)

COMES NOW, the Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District (hereinafter collectively referred to as "BPBOC"), by and through its attorneys of record, Barker, Rosholt & Simpson, LLP, and submits this *Memorandum in Support of Motion for Partial Summary Judgment*. For the following reasons, this Court should grant BPBOC's motion and include "Irrigation from Storage" as a beneficial use for the uncontracted storage space in Lucky Peak.

STATEMENT OF FACTS

Water Right 63-3618, in the name of the Bureau of Reclamation, has been recommended with the following beneficial uses: Irrigation Storage, Irrigation From Storage, Recreation

Storage, Streamflow Maintenance Storage, and Streamflow Maintenance from Storage. For “Irrigation from Storage,” the Department recommends 111,950 acre-feet – or enough water to provide irrigation from storage pursuant to the storage contracts in place for the Lucky Peak Reservoir.

In 1953, the Department of the Interior (“DOI”) and the US Army Corp of Engineers (“COE”) entered into a Memorandum of Agreement for “Flood Control Operation of Boise River Reservoirs.” *See Affidavit of Paul L. Arrington in Support of Motion for Partial Summary Judgment (“Arrington Aff.”)* Ex. A. This agreement recognized that Lucky Peak Reservoir would be part of a “three-reservoir system,” and that the operations of Lucky Peak may impact the upstream reservoirs. The 1953 Agreement stated:

WHEREAS, [the Chief of Engineers May 13, 1946] report concurred in the views and recommendations of the Board of Engineers for Rivers and Harbors ***that the Lucky Peak Reservoir be constructed with the understanding that complete or partial joint use of the 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 ... the Secretary of the Interior, and local interests concerned with flood control and the use of irrigation water; and

...

WHEREAS ... Lucky Peak Dam and Reservoir “shall be operated in such manner as not materially to interfere with the operation of said Arrowrock Reservoir;” and

WHEREAS, the [DOI] ... has constructed and is operating Arrowrock Dam and Reservoir on the Boise River and Anderson Ranch Dam and Reservoir on the south fork of the Boise River, both upstream from the Lucky Peak Dam; and

WHEREAS, there are storage rights in Arrowrock, Anderson Ranch and Lake Lowell Reservoirs by virtue of appropriations under the laws of Idaho ... and there are other existing rights in and to the use of waters of the Boise River, both stored and natural flow

...

WHEREAS, to comply with ... Congressional declaration of operational policy in regard to Lucky Peak and Arrowrock Dams, and to achieve the greatest multiple-purpose use of the combined total usable flood control and irrigation storage ... in all three reservoirs, *a coordinated plan of operation is necessary for this reservoir system on the Boise River.*

Id. at 1-4 (emphasis added).

The 1953 Agreement proceeded to define and set forth the terms of a coordinated plan of operations for the reservoir system. In particular, Paragraph 6.d provides:

In the event Anderson Ranch or Arrowrock Reservoirs are not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights to the extent of the space thus remaining unfilled at the end of the storage season but not to exceed the amount evacuated for flood control.

Id. at 10 (emphasis added). In other words, should flood control actions prevent the filling of the upstream reservoirs then storage water from Lucky Peak may be used to supply water pursuant to the irrigation storage contracts of the upstream reservoirs.

The DOI subsequently entered into a Supplemental Contract with each of the BPBOC irrigation districts with storage rights in the upstream reservoirs. *See Arrington Aff. Ex. B.*¹ The Supplemental Contracts affirmed the use of Lucky Peak storage waters for irrigation purposes and required Reclamation to provide irrigation from storage to the districts:

7. Guarantee: Beginning with the first full flood control period after the agreement ... 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 until its storage rights in the reservoir system ... had Anderson Ranch, Arrowrock and Lake Lowell reservoirs been operated in accordance with those contracts ... and

¹ *Arrington Aff. Ex. B* is a copy of the Supplemental Contract entered on July 7, 1954 with Wilder Irrigation District. Substantively identical Supplement Contracts were entered with each of the irrigation districts of the BPBOC. The Wilder Supplemental Contract is offered as an exemplar of the contracts of the other BPBOC Districts.

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

(b) of the amount of water which is creditable to the storage rights of the District under its Government-District contracts ...

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.*

Id. at 4-5 (emphasis added).

Notwithstanding this clear language, water right 63-3618 does not include “Irrigation from Storage” as a beneficial use for the storage waters that would be used for irrigation pursuant to terms of the 1953 Agreement and the Supplemental Contracts. The 111,950 acre-feet of storage space recommended for “Irrigation from Storage” under water right 63-3618 cannot be used pursuant to the terms of the 1953 Agreement and Supplemental Contracts as it is storage water that has otherwise been contracted and set aside for irrigation uses. Thus, for Reclamation to fulfill its Guarantee to the Districts, the water right for the uncontracted space must include the ability to provide irrigation from storage to the Districts.

STANDARD OF REVIEW

A motion for summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. IRCP 56(c); *First Security Bank v. Murphy*, 131 Idaho 787, 790 (1998). In reviewing a summary judgment motion, all facts and inferences must be drawn in favor of the nonmoving party. *Thompson v. City of Idaho Falls*, 126 Idaho 587, 590 (Ct. App. 1994). Nonetheless, when the motion for summary judgment has been properly supported with evidence supporting the absence of factual issues, the burden shifts to the nonmoving party to make a showing that a genuine issue of material fact exists that would preclude summary judgment. *Willie v. Board of Trustees*, 138 Idaho 131 (2002). If both parties have filed motions for summary judgment, “each motion must be separately considered on its

own merits, with the court drawing all reasonable inferences against the party whose motion is under consideration.” *Treasure Valley Gastroenterology Specialists v. Woods*, 135 Idaho 485, 488-89 (Ct. App. 2001).

ARGUMENT

I. In light of the Unambiguous Provisions of the 1953 Agreement and the Supplemental Contracts, water right 63-3618 Should Include “Irrigation from Storage” as a Beneficial Use for the Uncontracted Storage Space at Lucky Peak.

The language of the 1953 Agreement, and the Supplemental Contracts, is unambiguous. Interpretation of an unambiguous contract “is a question of law.” *State v. Shafter*, 144 Idaho 370, 161 P.3d 689 (2007). “An unambiguous contract will be given its plain meaning” in order to determine the intent of the parties. *Intermountain Eye & Laser Centers, PLLC v. Miller*, 142 Idaho 218, 127 P.3d 121 (2005). Indeed, “unambiguous contracts must be interpreted as written.” *Culp v. Tri-County Tractor, Inc.*, 112 Idaho 894, 736 P.2d 1348 (App. Ct. 1987).

Since at least 1954, the Lucky Peak and upstream reservoirs have been operated in accordance with the 1953 Agreement and the Supplemental Contracts. Under these contracts Reclamation has an obligation, when the flood control practices of the reservoir system have prevented the upstream reservoirs from filling, to providing storage water from Lucky Peak Reservoir to the contracted space holders of the upstream reservoirs for irrigation purposes. Importantly, this Lucky Peak storage water, provided pursuant to the terms of the 1953 Agreement and the Supplemental Contracts, can not come from space that has been contracted for irrigation purposes. Contracted water represents 111,950 acre-feet of storage space in Lucky Peak. Those storage right holders have a property right in that contracted storage space which Reclamation cannot simply give away. *United States v. Pioneer Irr. Dist*, 144 Idaho 106, 157

P.3d 600 (2007). Accordingly, waters provided pursuant to the 1953 Agreement and the Supplemental Contracts should be drawn from the uncontracted space in Lucky Peak.

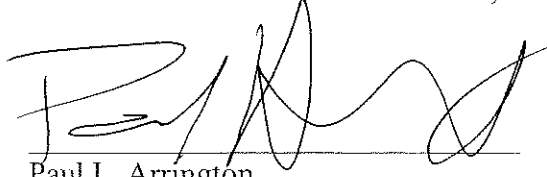
Notwithstanding these obligations, water right 63-3618 was recommended with only 111,950 acre-feet of irrigation from storage. This recommendation only allows enough water to fulfill the obligations of the existing storage contracts and leaves no water for the Bureau of Reclamation to use pursuant to the requirements of the 1953 Agreement and Supplemental Contracts. In order to comply with the terms of those agreements, water right 63-3518 should be recommended to allow "Irrigation from Storage" for the uncontracted waters of Lucky Peak.

CONCLUSION

Water Right 63-3618 should include "Irrigation from Storage" as a beneficial use for the uncontracted storage waters in Lucky Peak. The clear language of the 1953 Agreement and the Supplemental Contracts supports this conclusion. Accordingly, BPBOC's motion for partial summary judgment should be granted.

Dated this 15th day of October, 2007.

BARKER ROSHOLT & SIMPSON, LLP

A handwritten signature in black ink, appearing to read 'Paul L. Arrington', is written over a horizontal line.

Paul L. Arrington

Attorneys for BPBOC

CERTIFICATE OF SERVICE

I certify that on October 15, 2007, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** via first class mail, postage paid, and addressed as follows:

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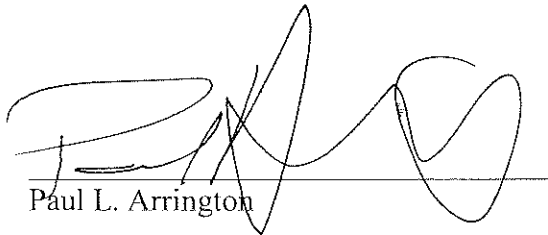
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