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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

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Subcase No. 63-03618

Case No. 39576

BRIEF IN SUPPORT OF UNITED STATES'
MOTION FOR SUMMARY JUDGMENT

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Introduction

For more than forty years, the Bureau of Reclamation ("Reclamation") has released water from Lucky Peak reservoir in the wintertime to maintain flows in the Boise River which promote a viable trout fishery, preserve wildlife habitat, and provide economic benefits, aesthetic value, and recreational activities to the citizens of the Treasure Valley. The beneficial use of water for winter flows – also referred to as "streamflow maintenance" – has been ratified through both a permit and a license issued by the Idaho Department of Water Resources ("IDWR").

That there is space available in Lucky Peak to store water for streamflow

maintenance purposes is the product, at least in part, of the collapse of a once contemplated irrigation project. Despite repeated failed attempts to develop new irrigation areas, several irrigation entities^{1/} ask this Court to upset a historic use of this water that is widely supported within Idaho and instead restrict the water to irrigation use. In effect, the irrigation entities ask this Court to re-examine an administrative decision made by IDWR more than twenty years ago. Unlike the “clarifications” to licenses recently affirmed by this Court, the objections here seek to eviscerate the water right so that the water can be available for irrigation use. Accordingly, the objections must be set aside as an improper collateral attack on the United States’ license.

Even if the objections could be heard in this Court, they could not be sustained. With the exception of the Boise Project Board of Control, each of the irrigation Objectors challenges the United States’ streamflow maintenance claim on two grounds: (1) that the use of water for streamflow maintenance is not a beneficial use, particularly if the water right is held by an entity other than the Idaho Board of Water Resources;^{2/} and (2) that the United States lacks

^{1/} Objections to streamflow maintenance were filed on behalf of Ballantyne Ditch Co., Boise Valley Irrigation Dist., Eagle Island Water Users Assn., Eureka Water Co., Nampa & Meridian Irrigation Dist. (“NMID”), New Dry Creek Ditch Co., South Boise Water Co., and Thurman Mill Ditch Co. (“Ballantyne, *et al.*”); Farmers Union Ditch Co., Canyon County Water Co., Middleton Irrigation Assn., and Middleton Mill Ditch Co. (“Farmers, *et al.*”); Pioneer Irrigation Dist. and Settlers Irrigation Dist. (“Pioneer, *et al.*”) These parties will be referred to collectively as “Objectors.” With the exception of NMID, the irrigation districts comprising the Boise Project Board of Control (“Board of Control”), New York Irrigation District, Big Bend Irrigation District, Boise Kuna Irrigation District, and Wilder Irrigation District, as well as the Board of Control itself, do not contest streamflow maintenance.

^{2/} Some of the Objectors also seek to have two remarks imposed on the decree: (1) a remark providing that any change to the elements of the water right requires a transfer pursuant to Idaho law and the Objectors’ approval of any change to the Objector’s portion of the water right; and (2) a remark requiring that uncontracted space be made available for irrigation use. No such remarks should be included. First, there is no need for a remark explaining that a transfer is required because such a remark would be no more than a restatement of the requirements of I.C. § 42-108. Second, even if a remark were appropriate, the irrigation entities have no interest in the non-irrigation portion of this water right and therefore there is no basis to require their consent.

authority to claim water for streamflow maintenance. Neither proposition has merit.

First, actions by the Idaho Department of Water Resources, the Idaho Water Resources Board, the Idaho Supreme Court and the Idaho legislature all confirm that maintaining stream flows for the benefit of fish and wildlife is a beneficial use of water under Idaho law. Further, the Objectors' suggestion that streamflow maintenance water rights can only be held by the Idaho Water Resources Board ignores the very presence of Lucky Peak dam. Because the dam serves as a diversion for the streamflow maintenance water right, the water right does not conflict with Idaho's instream flow statutes.

Second, the United States' long history of releasing water to maintain streamflows for the benefit of fish and wildlife is consistent with the purposes for which Lucky Peak was authorized. Indeed, Congress ratified the use of water for streamflow maintenance when it authorized the construction of a second outlet to "to assure maintenance of adequate flows along the Boise River."

Standard of Review for Summary Judgment

Summary judgment may only be granted upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "[I]f any genuine issue of material fact remains unresolved summary judgment is improper." *McKinley v. Fanning*, 100 Idaho 189, 190, 595 P.2d 1084, 1085 (1979); *Nielsen v. Provident Life and Accident Ins. Co.*, 100 Idaho 223, 596 P.2d 95 (1979). Further, in ruling on a motion for summary judgment, "all facts and inferences must be drawn in favor of the nonmoving party" *Thompson v. City of Idaho Falls*, 126 Idaho 587, 590, 887

Third, as the United States shows below, water from Lucky Peak Reservoir may be used for purposes other than irrigation and therefore there is no basis to require uncontracted space to be made available for irrigation use.

P.2d 1094, 1097 (Idaho Ct. App. 1994); *Ashby v. Hubbard*, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979) (“facts should be liberally construed in favor of the party against whom summary judgment is sought and all doubts are to be resolved against the moving party”).

Factual Background

For more than forty years water has been released from Lucky Peak Reservoir to maintain winter flows in the Boise River for the benefit of fish and wildlife. Lucky Peak is the newest and farthest downstream of the three on-river reservoirs of the Boise Project. When Reclamation’s Boise Project formally opened in 1909, it included Diversion Dam, which diverts water into the New York Canal roughly seven miles above Boise,^{3/} and Deer Flat, an off-river storage reservoir now called Lake Lowell. Arrowrock Reservoir followed in 1915. Anderson Ranch Reservoir, capable of holding more water than Deer Flat and Arrowrock combined, was authorized in 1940.

1. Lucky Peak is authorized for navigation, flood control and other purposes.

World War II stalled construction of Anderson Ranch. As a result, the reservoir was of no assistance when a 20,000 cfs flood ripped down the Boise River in 1943. Susan M. Stacy, *WHEN THE RIVER RISES* 10, 12-16 (Institute of Behavioral Sciences 1993) (pertinent pages attached as Exhibit A to the Affidavit of David Jarvis (“Jarvis Aff.”)). The 1943 flood prompted local interests to ask Congress to order the U.S. Army’s Board of Engineers for Rivers and Harbors to study flood control on the Boise River.^{4/} The resulting study, entitled *REVIEW OF SURVEY REPORT, BOISE RIVER, WITH A VIEW TO CONTROL OF FLOODS* (“SURVEY REPORT,”

^{3/} Diversion Dam now also serves to create head for a federal hydroelectric plant.

^{4/} The Army Corps of Engineers had been given the mission to control flooding nationwide in 1936. Flood Control Act of 1936, 49 Stat. 1570 (1936).

Jarvis Aff., Exhibit B), found that even with Anderson Ranch completed, a third reservoir would be needed to control floods and would also offer other benefits. Most germane here, the “other benefits” included “betterments for fish and wildlife by the increased regulation of streamflow.” SURVEY REPORT, Jarvis Aff., Ex. B at 78; *see also Id.* at 67 (“fish and wildlife would be benefited [sic] by the system of storage reservoirs through better regulation of stream flow”).

Congress accepted the report’s conclusion that a third reservoir was desirable and authorized the Corps to construct Lucky Peak Reservoir “for the benefit of navigation and the control of destructive flood-waters *and other purposes.*” Flood Control Act of 1946, 60 Stat. 641, 643, 650 (1946) (emphasis added). Congress went on to explain that Lucky Peak was being authorized “substantially in accordance with the recommendations” of the Survey Report.⁵¹ Thus, Congress was advised that Lucky Peak would be used to regulate streamflow for the benefit of fish and wildlife and endorsed that use, among others, by authorizing Lucky Peak for navigation, flood control, and other purposes.

Another of the “other purposes” to be served by Lucky Peak was irrigation. SURVEY REPORT, Jarvis Aff., Ex.B, at 64-69. In 1944 the Bureau of Reclamation had proposed an irrigation project intended to develop 200,000 acres of land in the Mountain Home desert and north of the Snake River. House Document No. 81-473, March 1950 at 221-222 (Jarvis Af., Exhibit C). The proposed Mountain Home project was unusually complex and expensive. It called for pumping water over two divides (from the Payette drainage to the Boise drainage, and from the Boise drainage to the Snake River drainage) by means of an array of diversions,

⁵¹ The statute refers to a “report dated May 13, 1946.” 60 Stat. at 650. That “report” was actually a memorandum by the Chief Engineer, which forwarded the Survey Report to Congress and recommended authorization of Lucky Peak reservoir “in accordance with the plans of the district engineer and the comments herein,” *i.e.*, the Survey Report. SURVEY REPORT, Jarvis Aff., Ex. B at 93.

reservoirs, hydroelectric plants, pump stations, canals, and ditches. Initial Unit, Mountain Home Project, Idaho, Project Planning Report No. 69-A (April 1944), frontispiece page “General Map” (“Report 69-A,” Jarvis Aff., Exhibit D). Water rights holders in the Boise Valley would be asked to “exchange” the project water for water from the Payette River. Report 69-A, Jarvis Aff., Ex.D at 1. Lucky Peak Reservoir’s role in the project would have been to receive and store the exchanged Payette River water. SURVEY REPORT, Jarvis Aff. Ex.B at 65-66.

To coordinate Lucky Peak’s operations with those of the existing Boise Project reservoirs, the Corps entered into a Memorandum of Agreement (MOA) with Reclamation on November 20, 1953. The 1953 MOA coordinated irrigation and flood control through a plan of operations addressing “flood control operation.” 1953 MOA at 4, ¶ 2 (Jarvis Aff., Exhibit E) Reclamation’s role in coordinating with the Corps was statutorily ratified through the Act of August 24, 1954, which authorized the Secretary of the Interior to coordinate operations with the Corps. 68 Stat. 794 (1954).^{6/}

2. Reclamation obtains a permit which creates an obligation to release water to maintain streamflow in the Boise River.

Even before construction of Lucky Peak dam was completed in 1955, a problem in the dam’s design surfaced. The Corps had designed Lucky Peak dam with only one outlet – a tunnel and “flip buckets” governed by valves and other controls. This design meant that during periods of annual maintenance, the tunnel had to be closed and water could not be released from the dam. The first closure of the tunnel occurred during construction in the fall of 1954 and lasted more than 120 days. Proceedings of Meeting, June 6, 1957 at 3 (Jarvis Aff., Exhibit F). Another long closure followed in 1955 and regular closures occurred into the early 1960s. *Id*;

^{6/} The statute did not otherwise affect the Corps’ authority with respect to Lucky Peak which is not at issue here.

Scanlan Engineering, February 25, 2004 Letter (Jarvis Aff., Exhibit G). Flows in the Boise River during these closures were as little as 4.8 cfs. Scanlan Letter, Jarvis Aff. Ex. G at 2.

The closures caused significant problems for fish and wildlife in and along the river. Below Boise's sewage treatment plant, insufficiently diluted chlorinated effluent threatened the fish. The near absence of flow in the river harmed the fishery and lead to fish kills. *See* Proceedings of Meeting, Nov. 23, 1954 at 3 (Jarvis Aff., Exhibit H). Concern over the deleterious effects of low flows on the river's fishery led the Idaho Department of Fish and Game ("IDF&G") to protest when Reclamation filed an application with the State Reclamation Engineer for a storage water right in December of 1957. IDF&G Protest (Jarvis Aff., Exhibit I). Numerous irrigation entities, including many of the Objectors here, also weighed in with their own protests. They feared that Lucky Peak would harm their interests by facilitating the diversion of water out of the Boise drainage into the Mountain Home area. They also asserted that the primary purpose of Lucky Peak was flood control, not irrigation. *E.g.*, Protest of the Farmer's Cooperative Ditch Company; Joint Protest of Board of Control Irrigation Districts (all attached to Jarvis Aff. as Exhibit J).

Eventually, each protest was accommodated. The irrigators dropped their protests when the Bureau agreed to amend its application to delete reference to lands outside of the Boise Valley. Letter From Regional Director to State Reclamation Engineer, Apr. 3, 1963 (Jarvis. Aff., Exhibit K). Idaho Fish and Game withdrew its protest when Reclamation agreed to a condition explaining that "the yield of water from 50,000 acre feet of space [would] be made available for maintaining minimum winter time flow...under a release pattern established from time to time by the Director of Idaho Fish and Game Department." Letter from IDF&G to State Reclamation Engineer, Feb. 27, 1964 (Jarvis Aff., Exhibit L). With the protests resolved, approval of the

United States' permit on March 20, 1964, formally authorized the practice of releasing water from Lucky Peak Reservoir to maintain winter stream flows for the benefit of fish and wildlife. That practice continues to this day.

3. Congress authorizes a second outlet on Lucky Peak dam to assure maintenance of adequate flows along the Boise River. 27

The same year that Lucky Peak received its permit, a statewide referendum ushered in a new era in Idaho's water law. The referendum approved Article XV, Section 7 of the Idaho constitution, which created a Water Resource Agency. The agency was tasked with creating "a state water plan for optimum development of water resources in the public interest." ID Const, Art. XV, Sec. 7. The water plan subsequently adopted in 1982, had as its first objective, to "follow a broader definition of the term 'beneficial use of water' to include all water uses, both consumptive and non-consumptive (for example, stream resource maintenance flows)..." 1982 Idaho State Water Plan at 19 (Jarvis Aff., Exhibit M).

As Idaho's water law was evolving, efforts to develop new federal irrigation projects in Southwest Idaho were failing. By the mid-1970s it was apparent that the Mountain Home project would never be realized. Even a proposal to irrigate the Dry Lake area of the Boise Valley, a small portion of the lands originally envisioned for the Mountain Home project, could not get off the ground. Minutes of the Idaho Water Resource Board, Dec. 13, 1984 at 1 (Jarvis Aff., Exhibit N). As the population of the Boise Valley grew, crop lands were converted into residential subdivisions. See Boise Project Power and Modification Study, Potential Solutions paper, April 15, 1982 at 9 (Jarvis Aff., Exhibit O). The end result is that the United States continued to have a large pool of uncontracted water stored in Lucky Peak and continued to use that water for streamflow maintenance. See Boise Project Power and Modification Study, Information Update at 4 (Jarvis Aff., Exhibit P).

One reason the uncontracted water continued to be used for streamflow maintenance was that from the Governor of Idaho down through the Mayor of Boise and scores of interest groups, all wanted it to be used for that purpose. In July of 1976, the Governor of Idaho wrote the Corps urging it to seek funds for the construction of a second outlet for Lucky Peak dam in order to facilitate streamflow maintenance. The Governor called the second outlet project “one of the most important prospective public works projects in the State.” Letter from Idaho Governor, July 15, 1976 at 1 (Jarvis Aff., Exhibit Q). Among the benefits touted by the Governor were the elimination of the “no flow” condition during the annual maintenance period, which negatively affected the downstream fishery, and the “enhancement of the prospects for continuously meeting the minimum (interim stream resource maintenance) flow” provided in the draft State Water Plan. *Id.* The Mayor of Boise sent a similarly themed letter to Idaho’s congressional delegation. Letter from Boise Mayor, July 2, 1976 Letter (Jarvis. Aff., Exhibit R).

Congress evidently agreed with the Governor that equipping Lucky Peak to be able to more effectively maintain streamflow in the Boise River was an important public work project. Section 196 of the Water Resources Development Act of 1976, Pub. L. 94-587, 90 Stat. 2917, granted the Corps authority to modify the outlet works of the dam “to assure maintenance of adequate flows along the Boise River.”

4. The Board of Control irrigation districts obtain a FERC license which requires them to act to ensure that Lucky Peak operations do not adversely affect the maintenance of minimum flow releases.

Construction of the second outlet wound up being delayed by the government’s decision to allow a power plant to be constructed at Lucky Peak. Initially, the Corps planned to construct the power plant, but ultimately it agreed to allow the Boise Project Board of Control to do so. On January 26, 1979, the Boise Project Board of Control filed an application with the

Federal Energy Regulatory Commission seeking approval of a hydroelectric power plant to be constructed at the base of Lucky Peak Dam. *See* Order Issuing License, June 10, 1980 (Jarvis Aff., Exhibit S). The City of Boise and the U.S. EPA recommended a minimum flow of 160 cfs to protect water quality and the river's fishery. *Id.* at 3. FERC's license, issued in June of 1980, included Article 35, which required the Board of Control to continually discharge 160 cfs, subject to limited exceptions. *Id.* at 10.

The Corps, IDWR and the Board of Control all appealed Article 35. In light of the 1953 MOA and the 50,000 acre-feet of water dedicated to maintaining the river's fishery, FERC relieved the Board of the proposed obligation, but directed it to consult with Reclamation, the Corps and IDF&G "to determine the feasibility of providing a continuous minimum flow from Lucky Peak dam during the non-irrigation season." 13 FERC ¶ 61,032 (October 9, 1980). Internal wrangling within the Board of Control delayed construction of the second outlet until 1986. Stacy, *WHEN THE RIVER RISES supra*, at 61, n. 66. Thus it was not until 1987 that the Board's member irrigation districts returned in earnest to the Federal Energy Regulatory Commission.

Initially the irrigation districts "filed a minimum flow recommendation to protect fish and wildlife resources inhabiting the Boise River downstream of the Lucky Peak Power Plant Project during the non-irrigation season." As a result of that recommendation, FERC ordered the licensees to discharge a minimum flow of 150 cfs, again subject to limited exceptions. Order Setting Minimum Flows (April 7, 1987) (Jarvis Aff., Exhibit T). After the Board, the Corps and Reclamation informed FERC that the Board had no right to store water for maintaining minimum flows and that "the Corps maintains this minimum flow by releasing water stored in the reservoir that is allocated to [Reclamation] and IDFG," FERC again relieved the

Board's member districts of the obligation to maintain a minimum flow. Order Superseding the Amendment to Article 35 (May 6, 1987) (Jarvis Aff., Exhibit U). Instead, FERC directed the Board of Control irrigation districts to "cooperate fully with the Corps and consult with [Reclamation] and IDFG to ensure that operation of the Lucky Peak Power Project does not adversely affect the maintenance of the minimum flow releases needed to protect the fish and wildlife resources inhabiting the Boise River downstream of the project." *Id.*

5. Participants in the Boise Project Power and Modification Study endorse the use of uncontracted space within Lucky Peak water to provide additional flows for streamflow maintenance.

The potential for additional hydropower development led Reclamation to initiate the Boise Project Power and Modification Study in 1979. One question examined in the course of the study was how best to make use of the uncontracted water. The study process spanned several years and involved every agency, interest group and stakeholder who would come to the meetings and hearings, including several of the Objectors.²⁷ The participants examined six alternatives, one of which was to provide streamflow maintenance, for the benefit of fish and other aquatic life. Boise Project Power and Modification Study, Potential Solutions Paper, Jarvis Aff., Ex. O, System Operations page.

The Modification Study progressed to a public workshop which developed a "workshop recommended plan" for the Boise River portion of the study. Objectors NMID and

²⁷ Included among the Modification Study participants were representatives of the Boise Project Board of Control, Nampa-Meridian Irrigation District, City of Boise, Ada County, IDWR, Idaho Public Utilities Commission, Environmental Protection Agency, Boise Water Corporation, Boise Valley Fly Fisherman, Boise River Watch, Idaho Boaters Association, Lucky Peak Springs Shores Marina, U.S. Forest Service, Corps of Engineers, IDF&G, U.S. Fish and Wildlife Service, and Reclamation. Letter from Regional Planning Director to IDWR Director with enclosed "Workshop Recommended Plan" and "Listing of Workshop Participants," July 16, 1982 (Jarvis Aff., Exhibit V).

the Boise Project Board of Control participated in that workshop, which recommended that a 150 cfs minimum streamflow release be provided. Water for that release would come from the 50,000 acre-feet of storage previously earmarked for IDF&G use and uncontracted water stored in Lucky Peak for a total of 152,300 acre feet.^{8/} July 16, 1982 Letter, Jarvis Aff., Ex. V at Enclosure B & C. Consistent with that recommendation, the power modification study ultimately found that the best use of the uncontracted space was to provide water for streamflow maintenance. See July 16, 1982 Memo, Proposed Boise River System Operation Changes, Jarvis Aff., Ex. V.

6. Reclamation obtains a permit which authorizes the release of 152,300 acre feet of water for streamflow maintenance.

The Modification Study's endorsement of streamflow maintenance led Reclamation to submit an amended permit application in March of 1984. The amended application sought approval for the use of 152,300 acre-feet of water for streamflow maintenance. Given the broad-based participation in the power modification study, it came as no surprise when no one objected to the amendment. Nonetheless, the size of the reservoir required the permit to be considered by the Idaho Water Resources Board.^{9/} The Board expressly addressed one of the issues raised here: whether a streamflow maintenance water right was an improper claim to an instream flow water right, which under Idaho law, could only be held by the

^{8/} The workshop participants did note that a "winter minimum flow release of 80 ft³/s may be all that can be maintained in the Boise River during a dry or water short period." *Id.* at Enclosure B.

^{9/} Under I.C. § 42-1737. "[a]ll project proposals involving the impoundment of water in a reservoir with an active storage capacity in excess of ten thousand (10,000) acre-feet shall be submitted to the board [the IWRB] for its approval or disapproval." The IWRB is tasked with giving notice and conducting hearings, administering oaths, requiring attendance of witnesses and production of documents as necessary, and "mak[ing] findings of fact and conclusions of law leading to [the project's] approval or disapproval." *Id.*

Board. The Board observed the obvious in sweeping that issue aside: “[t]he dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.” Idaho Water Resources Board, Agenda Item No. 8, Dec. 13, 1984 (Jarvis Aff., Exhibit W). The Board’s unanimous vote in favor of the proposed water right amply demonstrated that the Board considered streamflow maintenance to be a beneficial use. IDWR followed suit and formally approved the permit on February 14, 1985. Permit for Water Right 63-3618 (Jarvis Aff., Exhibit X).

7. Reclamation and the Corps adopt a Water Control Manual which finds that providing water for streamflow maintenance is a primary use of Lucky Peak Reservoir.

The Power Modification Study also prompted a revision of the 1953 MOA. In September of 1985, Reclamation and the Corps entered into a Memorandum of Understanding (MOU) which adopted a revised WATER CONTROL MANUAL FOR BOISE RIVER RESERVOIRS. 1985 MOU at 2 (Jarvis Aff., Exhibit Y). The WATER CONTROL MANUAL, jointly developed by Reclamation and the Corps, presently governs operation of the three Boise River reservoirs. It explains that Lucky Peak “is multipurpose project which . . . provides flood control, irrigation water, recreation, *and fish and wildlife water.*” MANUAL at 2-15 (emphasis added, Jarvis Aff., Exhibit Z). The MANUAL includes specific provisions addressing the use of water for fish and wildlife. Those provisions explain that the 50,000 acre-feet of space allocated for the IDF&G “is a primary use within Lucky Peak and equal to flood control and irrigation” and that “the purpose of this space allocation is to provide minimum fish and wildlife streamflows below Lucky Peak Dam during the nonirrigation season” in conjunction with the “additional 102,300 acre-feet of space in Lucky Peak [that] is used for streamflow maintenance along with the Idaho Department of Fish and Game space.” MANUAL, Jarvis Aff., Ex.Z at 7-30 - 7-31.

8. Reclamation obtains a license for its streamflow maintenance water right.

Administrative proceedings before the IDWR did not end with approval of the permit amendment in 1985. Two years later, a drawdown of water to facilitate construction of the Lucky Peak powerplant led the Board of Control irrigation districts to ask Reclamation for water from the streamflow maintenance account in Lucky Peak reservoir to supplement their irrigation supplies. Reclamation then sought IDWR's approval of a temporary change of use of water from streamflow maintenance to irrigation. Although a number of the other Objectors here protested Reclamation's application on other grounds,¹⁹ no party contested the legitimacy of streamflow maintenance as a valid, beneficial use under water right permit 63-3618. *See* Application for Amendment of Permit dated Mar. 11, 1987; Stipulation for Withdrawal of Protest dated May 14, 1987; Application for Amendment of Permit dated June 5, 1987; Memorandum Decision and Order Granting Amendment to Permit Dated June 5, 1987 (all attached to Jarvis Aff., as Exhibit BB).

Again in 1990, some of the irrigation entities sought to borrow water from the streamflow maintenance account in Lucky Peak to supplement their irrigation supplies. Again, no one contested streamflow maintenance as an authorized beneficial use and again the application was approved. *See* Application for Amendment of Permit dated July 11, 1990 (Jarvis Aff., Exhibit CC).

Finally, in 2002, IDWR examined Reclamation's beneficial use of water from Lucky Peak under its permit. The Department's Beneficial Use Examination found

¹⁹ The other irrigation districts protested on the grounds that it was unfair to allow the Board of Control districts to obtain additional water without allowing other districts that could use the water to do so. *See* Protest filed by Settlers and Pioneer Irrigation Districts dated Apr. 6, 1987; Petition for Leave to Intervene by Middleton Mill Ditch Co., *et al.*, dated May 8, 1987 (Jarvis Aff., Exhibit AA).

that 152,300 acre feet of water was used for “fish habitat use (‘streamflow maintenance’).”

February 19, 2002 Memorandum at 4 (Jarvis Aff., Exhibit DD). IDWR approved the United States’ license on September 27, 2002. License for Water Right 63-3618 (Jarvis Aff., Exhibit EE). It is that licensed use the Objectors ask this Court to void.

Argument

I. THE OBJECTIONS ARE A COLLATERAL ATTACK ON LICENSE 63-3618 WHICH MUST BE BARRED.

This Court has consistently made clear that “the law of the case in the SRBA precludes the outcome of an administrative license proceeding from being collaterally attacked in the SRBA.” **Memorandum Decision and Order on Cross-Motions for Summary Judgment**, p. 12 (Consolidated Subcase 91-63) (Sept. 1, 2004); *see also, e.g.,* **Memorandum Decision and Order on Challenge**, pp. 16-17 (Subcase No. 36-8099) (Jan. 11, 2000); and **Memorandum Decision and Order on Challenge**, p. 12 (Subcase No. 29-11609) (Oct. 6, 2006). Collateral attacks on a license are barred because the exclusive remedy for challenging a permit is to “contest the permit application in the proper administrative proceeding and if necessary through judicial review pursuant to the Administrative Procedures Act.” **Memorandum Decision and Order on Cross-Motions for Summary Judgment**, p. 12 (Consolidated Subcase 91-63) (Sept. 1, 2004); *see also* *Bills v. State Dept. of Revenue and Taxation*, 110 Idaho 113, 714 P.2d 82 (Idaho Ct. App. 1986) (holding that having failed to appeal administratively, Bills could not attack the Department’s determination in an independent action).

The rule against collateral attacks on water right licenses “extends beyond the parties to the administrative proceeding and their privies.” **Memorandum Decision and Order on Challenge**, p. 13 (Subcase No. 29-11609) (Oct. 6, 2006). Because “[p]ublication notice is given . . . any affected person can initiate a contested case.” *Id.* Thus, any entity which had an

opportunity to contest a license is barred from collaterally attacking that license in the SRBA. *Id*

As recounted above, the Objectors had every opportunity to challenge the United States' application to amend its permit to change of a portion of the Lucky Peak water right to streamflow maintenance. IDWR published notice informing the public of the proposed change. Affidavit of Publication, April 12, 1984 (Jarvis Aff., Exhibit FF). Because of the size of the reservoir, additional public processes were held before the Idaho Water Resources Board. No protests were ever filed. Moreover, the streamflow maintenance water rights were the subject of additional proceedings before the IDWR in 1987 and 1990. Many of the Objectors here participated in the 1987 proceedings. None questioned the validity of the streamflow maintenance water right.

Now, twenty years later, the Objectors contend that "IDWR erroneously approved the amendment of the permit." *E.g.*, Objections of NMID, Settlers Irrigation District, Pioneer Irrigation District (all attached to Jarvis Aff., as Exhibit GG). The objections speak for themselves and demonstrate the Objectors want what amounts to a fourth bite at the apple – yet another opportunity to challenge the Director's administrative decision. The time for bringing that challenge lapsed decades ago. Consequently, the Objectors are now barred from doing so. *E.g.*, *Ag Air, Inc. v. Idaho State Tax Commission*, 132 Idaho 345, 972 P.2d 313, 316 (1999).

II. STREAMFLOW MAINTENANCE IS A BENEFICIAL USE.

As was explained above, the streamflow maintenance flows are used to maintain a viable stream and to protect fish and other aquatic life. Use of water to sustain fish and wildlife is recognized as a beneficial use of water throughout the west.^{11/} More importantly here, the

^{11/} *E.g.*, *Helderman v. Wright*, 152 P.3d 855 (Okla. 2006); *Phelps Dodge Corp. v. Arizona Dept. of Water Resources*, 118 P.3d 1110 (Ariz. Ct. App. 2005); *City of Thornton v. City of Fort Collins*, 830 P.2d 915, 930 (Colo.1992); *In re Adjudication of the Existing Rights to the Use of*

Idaho Department of Water Resources, the Idaho Supreme Court and the Idaho Legislature have all endorsed fish and wildlife purposes as a beneficial use.

The IDWR has long recognized wildlife use as a beneficial use of water, and has issued water right licenses for wildlife purposes. *See, e.g.*, License Nos. 31-7301, 43-7007, 98-7003, 98-7004 and 98-7366 (Jarvis Aff., Exhibit HH). Indeed, it has repeatedly sanctioned Reclamation's use of water to maintain streamflows for the benefit of fish and wildlife as a beneficial use. 1964 Permit for Water Right 63-3618 (Jarvis Aff., Exhibit II); 1985 Amended Permit, Jarvis Aff., Ex. X; License for Water Right 63-3618, Jarvis. Aff., Ex. EE; January 21, 1994 IDWR Memo RE: Conveyance of Boise River Maintenance Storage Flows at 2 ("the beneficial use [of water right no. 63-03618] is streamflow maintenance throughout the Boise River channel") (Jarvis Aff., Exhibit JJ).

Although no Idaho Supreme Court decision has expressly considered whether fish and wildlife purposes are beneficial uses, several of the court's decisions recognize that they are. *Stott By and Through Dougall v. Finney*, 130 Idaho 894, 950 P.2d 709 (Idaho 1997) (dams and reservoirs serve "beneficial uses such as flood control, power generation, recreation, and providing beneficial environments for fish and wildlife"); *State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (Idaho 2000) (the exception to requirement of a diversion for stockwater uses "does not extend to beneficial use for wildlife habitat"); *Idaho Dept. of Parks v. IDWA*, 96 Idaho 440, 443-444, 530 P.2d 924, 927-28 (1974) (affirming that use of water for providing recreational and aesthetic pleasure is a beneficial use).

Idaho Dept. of Parks is particularly instructive here. In that case the court

All the Water, 55 P.3d 396, 400 (Mont. 2002); *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855 (S.D. 1994); Nev. Rev. Stat. §533.030(2); Tx. Water Code Ann. §11.023.

construed I.C. § 67-4307, which authorized the state park board to appropriate the waters of a spring in order to maintain flows through Malad Canyon. That statute declared that the preservation of water in the Canyon for its scenic beauty and recreational purposes is a beneficial use. The court began its analysis by rejecting the proposition that only those uses specifically mentioned in Idaho's constitution can be considered beneficial uses. *Idaho Dept. of Parks*, 96 Idaho at 443, 530 P.2d at 927. Thus, the court established that whether a use is beneficial would have to be considered on a use-by-use basis.

Turning to the question of whether scenic beauty and recreational uses are beneficial, the court observed that numerous western states had adopted legislation declaring such uses to be beneficial. *Idaho Dept. of Parks*, 96 Idaho at 443, 530 P.2d at 927. It found that Idaho had joined those states through I.C. § 67-4307, which recognized "aesthetic and recreational values and benefits which will accrue to the people of the state" through preservation of the waters of Malad Canyon. The court then concluded that there was no basis for it to disturb the legislature's instruction that such uses are beneficial uses. *Idaho Dept. of Parks*, 96 Idaho at 444, 530 P.2d at 928.

Four years after the Idaho Supreme Court's decision in *Idaho Dept. of Parks*, the Idaho legislature joined other western states in recognizing fish and wildlife as a beneficial use by declaring that "preserv[ing] the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, [and] aesthetic beauty. . ." is a beneficial use of water. I.C. § 42-1501. Thus the Idaho legislature removed any doubt that maintaining streamflows for the benefit of fish and wildlife is a beneficial use of water.^{12/} Accordingly, the Objectors'

^{12/} In addition to its declaration in I.C. § 42-1501, the Idaho legislature has endorsed fish and wildlife purposes as a beneficial use of water through its consent to the Idaho State Water Plan. See Idaho Const. art. XV, Sec. 7 ("[t]he Legislature of the State of Idaho shall have the authority

argument to the contrary must be rejected.

III. LUCKY PEAK IS AUTHORIZED TO DELIVER WATER FOR STREAMFLOW MAINTENANCE.

Federal law authorizes uses of water from Lucky Peak reservoir for purposes other than irrigation and flood control. For example, the reservoir was expressly authorized “for the benefit of navigation and the control of destructive flood-waters *and other purposes....*” Flood Control Act of July 24, 1946, 60 Stat. at 650. Indeed, as discussed above, Congress authorized the project after being informed that the reservoir’s benefits would include “better regulation of streamflow” so that “[f]ish and wildlife would be benefitted.” SURVEY REPORT, Jarvis Aff., Ex. B at 67. Moreover, the Corps had specifically identified improved flows for fish and wildlife as a benefit to be realized:

Other benefits which would be realized by the construction of a dam and reservoir at the Lucky Peak site include recreational facilities and . . . *betterments for fish and wildlife by the increased regulation of streamflow . . .*

Id. at 78.

Thus, even if the reservoir had not initially been authorized to release water for streamflow maintenance, Congress provided such authorization through the Water Resources Development Act of 1976, Pub. L. 94-587, 90 Stat. 2917. Section 196 of the Act granted the Corps funding and authority to modify the outlet works of the dam “to assure maintenance of

to amend or reject the state water plan in a manner provided by law”); I.C. 42-1734B(6) (the water plan is subject to review and amendment by the legislature at the regular session immediately following adoption of the plan). Since 1986 the Idaho State Water Plan provides that “[i]t is the policy of Idaho that beneficial uses include certain nonconsumptive water uses.” Policy 1C. The current water plan, adopted in 1996, explains that the policy is “affirmed by Idaho Code 42-1501 and is reflected in the policies adopted by the Idaho Water Resources Board that ‘beneficial use’ includes, but it not limited to, water required for the protection and fish and wildlife habitat, aquatic life, recreation, aesthetics, navigation, water quality . . . as well as the traditional uses for agriculture, manufacturing, mining, hydropower, and human consumption.”

adequate flows along the Boise River.” 90 Stat. at 2944. By doing so, Congress impliedly ratified the use of Lucky Peak for streamflow maintenance. *See Young v. Tennessee Valley Authority*, 606 F.2d 143, 147 (6th Cir. 1979); *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386, 1394 (Ct. Cl. 1974); *Reactor Development Co. v. International Union of Electrical Radio and Machine Workers*, 367 U.S. 396, 414-15 (1961).

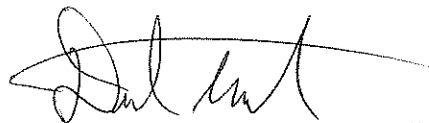
Apart from ratifying the use of Lucky Peak to provide streamflow maintenance water, Section 196 removed any doubt that water stored in Lucky Peak reservoir can be used for streamflow maintenance by directing that Section 102(b) of the Water Pollution Control Amendments of 1972 would apply to construction of the second outlet. Section 102(b) required Reclamation and the Corps to consider the use of “storage for regulation of streamflow.” Pub. Law. 92-500, 86 Stat. 816, 819 (1972) (codified at 33 U.S.C. § 1252). Thus to hold that the dam and reservoir cannot be operated to maintain the flows of the Boise River would vitiate the direction Congress provided in the Water Resources Development Act of 1976.

Conclusion

Water has been released from Lucky Peak Reservoir for “streamflow maintenance” for decades. Over the course of nearly half a century, the use of Lucky Peak water for that purpose has been the subject of at least four administrative proceedings before IDWR and one before the Idaho Board of Water Resources. In none of those proceedings did any Objector here – or anyone else – ever take issue with the United States using its Lucky Peak water rights to release water to maintain streamflows and benefit fish and wildlife. Accordingly, the Objectors cannot be heard attempting to undo those proceedings through collateral attack on the United States’ license.

Even if the objections could be heard in this court, they have no merit. First, actions of the Idaho legislature, Idaho Department of Water Resources, the Idaho Board of Water Resources and the Idaho Supreme Court have repeatedly endorsed the use of water to benefit fish and wildlife is a beneficial use. Finally, releasing water for streamflow maintenance is consistent with the purposes for which Lucky Peak was authorized and has been ratified by Congress.

Dated this 15th day of October 2007.

A handwritten signature in black ink, appearing to read "David W. Gehlert", written over a horizontal line.

David W. Gehlert, Trial Attorney
Natural Resources Section
United States Department of Justice

CERTIFICATE OF SERVICE

I certify that on this ____ day of October 2007, I served a true and correct copies of the foregoing **UNITED STATES' MOTION FOR SUMMARY JUDGMENT, BRIEF IN SUPPORT**, and **AFFIDAVIT OF DAVID A. JARVIS** as indicated below:

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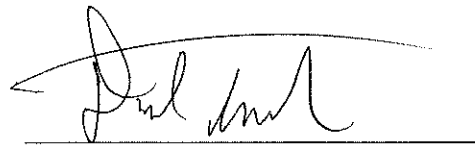
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