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DEPARTMENT OF
WATER RESOURCES

Attorneys for Nampa & Meridian Irrigation District.

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

In Re SRBA	)	Subcase No. 63-3618
	)	
Case No. 39576	)	MEMORANDUM IN SUPPORT OF
	)	NAMPA & MERIDIAN IRRIGATION
	)	DISTRICT'S MOTION FOR
	)	SUMMARY JUDGMENT

COMES NOW Nampa & Meridian Irrigation District (hereinafter "NMID"), by and through its counsel of record, Ringert Clark, Chartered, and pursuant to the Order Amending Scheduling Deadlines filed herein on September 5, 2007, hereby submit this Memorandum in Support of NMID's Motion for Summary Judgment.

I. INTRODUCTION

The Idaho Department of Water Resources (IDWR) recommended the water right for Lucky Peak Reservoir, water right no. 63-3618, in the name of the United States Bureau of Reclamation (BOR). NMID and other irrigation entities filed objections to the recommendations for the storage water right for Lucky Peak, Arrowrock and Anderson Ranch Reservoirs on the basis that the water right must reflect the irrigation entities beneficial use and ownership of the storage water rights. The

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Idaho Supreme Court affirmed the decision of this Court and held that the BOR holds the water rights in name only and the irrigation entities and their landowners/shareholders own the use and equitable right to the water rights.

In addition to the objection as to ownership, NMID and other irrigation entities filed objections to the portion of the recommendation for Lucky Peak Reservoir, water right no. 63-3618, which includes “streamflow maintenance storage” and “streamflow maintenance from storage” of 152,300 acre feet because the recommendation for streamflow maintenance is not consistent with Idaho law. Title 42, Chapter 15 of the Idaho Code provides the mechanics of how a water right for streamflow maintenance is developed and held by the State. In short, an application is filed with the Idaho Water Resource Board and it is the Idaho Water Resource Board or the State that holds the instream flow water right. The current status of the water right for Lucky Peak inappropriately places the ownership of the instream flow portion of the water right in the name of the BOR. This Court cannot judicially sanction the BOR holding an instream flow water right because it is not consistent with Idaho law.

II. BACKGROUND AND CASE PROCEEDINGS.

The BOR filed notices of claims for water rights for Lucky Peak, Arrowrock and Anderson Ranch Reservoirs for irrigation and other secondary uses, including storage for instream flows. Various irrigation organizations, including NMID, each filed their own claims for the portions of the water rights that are appurtenant to their respective lands. IDWR recommended that the rights be decreed as claimed by BOR, and recommended that the irrigation organizations’ claims be disallowed. The irrigation organizations filed objections to IDWR’s recommendations on the issue

ownership and with respect to the water right for Lucky Peak, 63-3618, objected to the portion of the water right listed as “streamflow maintenance storage” and streamflow maintenance from storage” of 152,300 acre feet.

This Court consolidated the water rights for all three reservoirs into one subcase, 91-63, as to the issue of ownership. Following motions for summary judgment by the BOR and the irrigation entities, this Court held that the irrigation entities hold equitable title to the subject water rights and that while the partial decrees for the rights should be issued in the name of the BOR, a remark clarifying the equitable ownership of the irrigation entities is necessary to define the water rights. This Court’s decision was later appealed to the Idaho Supreme Court and the Idaho Supreme Court affirmed the decision of this Court.

On June 29, 2007, this Court issued a *Final Order on Remaining Portion of Consolidated Subcase 91-63: Order Separating and Dissolving Consolidated Subcase 91-63 and Requiring Further Proceedings to be Conducted in Individual Subcases*. The further proceedings for this particular subcase, 63-3618, involves the objections by the irrigation entities to the portion of the recommendation relating to the storage for minimum streamflow maintenance purposes. This Court subsequently issued a scheduling order which required motions for summary judgment to be due on October 15, 2007.

III. STANDARD OF REVIEW

Motions for summary judgment are governed by IRCP 56 which provides in pertinent part that judgment “shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show 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); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court must liberally construe the facts in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party’s favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the summary judgment motion must be denied. *Stevenson*, 125 Idaho at 272, 869 P.2d at 1367. Because there are no genuine issues of material fact, the issue as to the ownership of the water rights is a question of law. *See, e.g., United States v. State of Idaho*, 135 Idaho 655, 23 P.3d 117 (2001).

IV. FACTS

The facts that are material to the legal issue for this matter are undisputed. On or about April 12, 1963, the BOR filed an application for permit to IDWR for Lucky Peak Reservoir. On or about March 20, 1964, the permit was approved for 278,200 acre feet for irrigation purposes and 28,800 acre feet for dead storage.

On or about March 15, 1984, the BOR filed an application for amendment of the permit change a portion of the water right to storage for streamflow maintenance and streamflow maintenance from storage. The application for amendment was later approved by IDWR on February 14, 1985. There was no application by the Idaho Water Resource Board to the Director for the minimum stream flow portion of the amendment.

On or about September 27, 2002, water right no. 63-3618 was licensed by IDWR in the name

of the BOR. The license provided for streamflow maintenance storage and streamflow maintenance from storage in the amount of 152,300 acre feet. IDWR subsequently recommended water right no. 63-3618 in the name of the BOR and included the same purposes provided in the license, namely streamflow maintenance storage and streamflow maintenance from storage in the amount of 152,300 acre feet.

V. ARGUMENT

A. **The Instream Flow Portion of Water Right No. 63-3618 Does Not Comply with Idaho Law.**

Title 42, Chapter 15 of the Idaho Code provides the mechanics for developing and holding a minimum stream flow water right. Idaho Code § 42-1501 provides that the “legislature further declares that minimum stream flow is a beneficial use of water of the streams of this state for the purpose of protecting such waters from interstate diversion to other states or by the federal government for use outside the boundaries of the state of Idaho.” (emphasis added). In order to further this purpose, authority is granted to receive, consider, approve or reject application for minimum stream flows. Idaho Code § 42-1503 provides that the Idaho Water Resource Board may file an application with the Director of IDWR whenever it desires to appropriate a minimum stream flow of the unappropriated waters of any stream. In addition, “[a]ny 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.” I.C. § 42-1504 (emphasis added). If the Idaho Water Resource Board approves the request, the Idaho Water Resource Board shall file an application pursuant to Title 42, Chapter 15. *Id.* Thus, an application

for a minimum stream flow must be filed by the Idaho Water Resource Board. In this case, the Idaho Water Resource Board has not filed an application to appropriate water for the storage of minimum stream flows in Lucky Peak Reservoir or to divert water from storage for minimum stream flows.

In *State of Idaho v. United States*, 134 Idaho 106, 996 P.2d 806 (2000), the Idaho Supreme Court addressed a similar claim by the United States. In that case, the United States filed a claim for 1.16 cfs based upon the constitutional method of appropriation, for waters from Smith Springs. The United States claimed that the claim was for the non-consumptive beneficial use of wildlife from January 1 to December 31 of each year. IDWR recommended the claim as disallowed on the basis that a valid appropriation required a physical diversion. The Idaho Supreme Court held that the United States may not claim a non-diversionary water right for purposes other than stock watering. *Id.* at 111, 996 P.2d at 811. The Court stated that “Idaho water law generally requires an actual diversion and beneficial use for the existence of a valid water right.” *Id.* (citations omitted). There are two exceptions to the diversion requirement: (1) no diversion is needed to establish a water right for stock watering; and (2) “State entities acting pursuant to statute [I.C. §§ 42-1501 to -1505] may make non-diversionary appropriations for the beneficial use of Idaho citizens.” *Id.* (emphasis added). The Court concluded that neither of those exceptions covered the United States claim. With respect to the second exception the Court specifically held:

The United States has not requested, pursuant to I.C. § 42-1504, that the Idaho Water Resource Board file an application for appropriating a minimum streamflow for Smith Springs. Therefore, the limited public purpose exception does not apply to its claim.

Id. at 112, 996 P.2d at 812.

While the above-referenced case involved the United States' claim under the constitutional method of appropriation, the Court makes it clear that the statutory requirements of Title 42, Chapter 15 are applicable to the United States, or in this case the BOR. A statutory prerequisite to a minimum stream flow water right is an application by the Idaho Water Resource Board. If approved, the water right may be held by a state entity or the Idaho Water Resource Board. However, there is no authority for a minimum stream flow water right to be held by the BOR. To the contrary, the Idaho Code and the Idaho Supreme Court have made it clear that the federal government must comply with I.C. § 42-1504 and request that the Idaho Water Resource Board file an application.

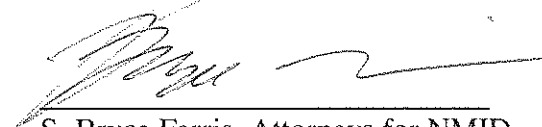
In this case, the BOR did not request, pursuant to I.C. § 42-1504, that the Idaho Water Resource Board file an application for appropriation of minimum stream flow for the storage in Lucky Peak Reservoir. More importantly, the BOR cannot hold a water right for streamflow maintenance purposes and this Court cannot sanction the water right as currently recommended.

VI. CONCLUSION

Idaho law is clear that a water right for minimum stream flow purposes must be established pursuant to Chapter 15, Title 42 of the Idaho Code. There was no request pursuant to I.C. § 42-1504 for the Idaho Water Resource Board to make an application to appropriate storage water in Lucky Peak for minimum stream flow purpose. Moreover, the federal government, in this case the BOR, is not an entity allowed to hold a water right for minimum stream flow purposes. Accordingly, this Court should not decree a water right that is inconsistent with Idaho law.

DATED this 15th day of October, 2007.

RINGERT CLARK CHARTERED


S. Bryce Farris, Attorneys for NMID

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of October, 2007, I caused to be served a true and correct copy of the foregoing document via U.S. mail, postage pre-paid, to the following:

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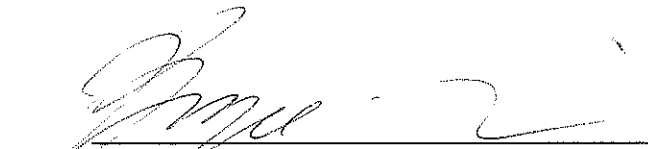
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