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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**

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Participants City of Boise and Ada County (“Participants”), body politics of the State of Idaho, by and through its counsel of record, Perkins Coie LLP, hereby submit the following Memorandum in Support of Motion for Summary Judgment. This memorandum is supported by the Affidavits of Mayor David H. Bieter, Robbin Finch, Selena O’Neal, Thomas P. Harmon, Victor A. Engel and Erika E. Malmen filed concurrently herewith.

I. INTRODUCTION

Participants City of Boise and Ada County bring this motion for summary judgment against the objections of Pioneer Irrigation District, Farmers Union Ditch Company, Canyon County Water Company, Middleton Irrigation Association, Middleton Mill Ditch Company, Boise Project Board of Control, Eagle Island Water Users Association, Inc., New Dry Creek Ditch Company, Boise Valley Irrigation Ditch Company, Eureka Water Company, South

Boise Water Company, Ballantyne Ditch Company, Nampa & Meridian Irrigation District, Thurman Mill Ditch Company, and Settlers Irrigation District (collectively referred to as “the Objectors”) because they are ripe for summary judgment as a matter of law, with no material fact in dispute.

II. STATEMENT OF UNDISPUTED FACTS

1. In an effort to comply with Idaho State statute governing the Snake River Basin Adjudication (“SRBA”), the United States, acting through the Bureau of Reclamation (“BOR”) filed a Notice of Claim to a Water Right Acquired under State Law for Water Right No. 63-03618. *See* Affidavit of Erika E. Malmen in Support of Motion for Summary Judgment (“Aff. Malmen”), Ex. A.

2. Claim No. 63-03618 asserts United States’ legal title to water stored at Lucky Peak used for irrigation storage, irrigation from storage, recreation storage, stream flow maintenance storage, and stream flow maintenance from storage. *See* Aff. Malmen, Ex. A.

3. The Idaho Department of Water Resources (“IDWR”) Adjudication Recommended Right Report for Water Right No. 63-03618, has recommended a water right acquired under Idaho law in the name of the United States of America, acting through the BOR for Claim Number 63-03618. *See* Aff. Malmen, Ex. B.

4. The IDWR Water Resource Board did not seek ownership of, or file a claim for, the stream flow maintenance portion of 63-03618 in the SRBA. *See* Aff. Malmen, Ex. G.

5. United States’ Claim Number 63-03618 mimics a valid existing license of the same number issued originally as a permit by IDWR in 1965. *See* Aff. Malmen, Ex. C.

6. IDWR has recognized stream flow maintenance as a beneficial use since at least 1986. *See* Aff. Malmen, Ex. C.

7. In 1992, IDWR issued Water Right License No. 63-03618 to the United States. *See* Aff. Malmen, Ex. C.

8. The United States' Claim, if ultimately confirmed by decree, will do nothing to alter the status quo. *See* Aff. Malmen, Ex. C.

9. The Objectors have had, at a minimum, notice and an opportunity to participate in, and many have actively participated in, negotiating the very same terms of the United States' license that they challenge today. *See* Aff. Malmen, Ex. F.

10. Permit Number 63-03618 has undergone several amendments before becoming a license. In 1985, Permit Number 63-03618 was amended to change 102,300 acre feet of storage space from irrigation to stream flow maintenance. *See* Aff. Malmen, Ex. D.

11. Permit Number 63-03618 was again amended in 1987. The application for amendment was filed by BOR pursuant to a stipulation between BOR, the Boise Project Board of Control, and other irrigation organizations. *See* Aff. Malmen, Ex. F.

12. The Permit was again amended in 1990 to allow for 32,500 acre-feet of stream flow maintenance water to be used for irrigation of lands served under existing storage water contracts in the Boise River system during the 1990 season. Such was a temporary amendment to expire as soon as stream flow maintenance water was repaid prior to the 1991 irrigation season. *See* Aff. Malmen, Ex. E.

13. All claimed uses and objections concern water diverted and stored at Lucky Peak Dam. *See* Aff. Malmen, Ex. D.

14. Lucky Peak Dam was constructed by the United States Army Corps of Engineers (“Corps”) pursuant to the Flood Control Act of 1946 and is currently operated by the Corps for flood control purposes. Pub. L. No. 79-526, 60 Stat. 641.

15. Lucky Peak Lake, upstream from Lucky Peak Dam, has a storage capacity of 306,000 acre-feet. BOR operates and maintains the structures at Lucky Peak Lake used for irrigation pursuant to Section 8 of the Flood Control Act of 1944 (58 Stat. 891), 43 U.S.C. § 390.

16. Water allocated to stream flow maintenance is diverted by the United States and has historically been put to use by the citizens of Idaho and political bodies of the State of Idaho for a variety of recognized beneficial uses in addition to stream flow maintenance, such as recreation, fish and wildlife enhancement, aesthetics, power generation and water quality. *See* Affidavit of Thomas P. Harmon in Support of Motion for Summary Judgment (“Aff. Harmon”), ¶¶ 4, 6, 8 and 9; Affidavit of Victor A. Engel in Support of Motion for Summary Judgment (“Aff. Engel”), ¶ 8; Affidavit of Robbin Finch in Support of Motion for Summary Judgment (“Aff. Finch”), ¶¶ 4 and 5.

17. In 1976, the Corps was specifically authorized to “assure maintenance of adequate flows along the Boise River” by Section 196 of the Water Resources Development Act of 1976, Pub. L. 94-587, 90 Stat. 2917, 2944.

18. If there is no winter release of water for stream flow maintenance in the Boise River there will be economic, social, environmental and legal consequences. *See* Affidavit of Selena O’Neal (“Aff. O’Neal”), ¶ 6; Aff. Engel, ¶ 7; Aff. Harmon, ¶ 9; and Aff. Finch, ¶ 2-8.

19. Fish and wildlife, particularly fish that overwinter in the Boise River depend on water being present in the Boise River for basic survival.

20. Over-wintering fish are a major food source for the bald eagle, a species recently de-listed under the federal Endangered Species Act. 72 Fed. Reg. 37, 346 (July 9, 2007) (to be codified at 50 C.F.R. pt. 17). *See* Aff. Harmon, ¶ 5.

21. The City of Boise benefits from stream flow maintenance and relies on such flow maintenance for the proper operation of its waste water treatment facilities for public health, safety, and water quality purposes. *See* Aff. Finch, ¶ 8.

22. Change in Boise River winter flows will affect the City's various Clean Water Act ("CWA") permits (including two national pollutant discharge and elimination system ("NPDES") permits and a municipal separate storm sewer ("MS4") permit) and may force amendment of total maximum daily loads ("TMDLs") for the entire Boise River system. *See* Aff. Finch, ¶¶ 4 and 7.

23. An amended TMDL will affect all permittees on the Boise River, not just the City. *See* Aff. Finch, ¶ 8.

24. If TMDLs must be amended, the Idaho Department of Environmental Quality ("DEQ") and U.S. Environmental Protection Agency ("EPA") will be forced to expend agency staff and resources on the amendment process. *See* Aff. Finch, ¶ 4.

25. Ada County has a lease with Fulcrum, Inc. to operate Barber Dam. *See* Aff. O'Neal, ¶ 4; Aff. Engel, ¶ 4.

26. 150 cfs of flow in the Boise River is the minimum flow rate necessary for power generation at Barber Dam. *See* Aff. Engel, ¶ 7.

27. If Barber Dam cannot generate power, Ada County stands to lose \$131,300/year and operator losses are estimated at \$241,046. *See* Aff. O’Neal, ¶ 6; Aff. Engel, ¶ 9.

28. Ada County operates Barber Park for year round public use, including winter recreation and other uses. *See* Aff. Harmon, ¶ 4.

29. At least 25 fishermen per day utilize the facilities at Barber Park in the winter, which include a handicapped fishing pier. *See* Aff. Harmon, ¶ 8.

30. On January 24-26, 2008 Ada County plans on hosting “Bald Eagle Days” at the County’s newly constructed Education and Events Center at Barber Park. *See* Aff. Harmon, ¶ 7.

31. Barber Park is utilized by birdwatchers that come to Barber Park specifically to view the bald eagles. *See* Aff. Harmon, ¶ 6.

32. Idaho Code § 42-1501 states that “[t]he 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.”

33. Idaho Code § 42-1401A includes the United States in the definition of “Person” entitled to be a “Claimant” in the SRBA.

III. OVERVIEW

A. The Objections

The Objectors attack the United States' Claim on several fronts. Specifically, the Objectors challenge the United States' Claim based on perceived issues with the following: Name and Address, Quantity, Instream Flow Description, Purpose of Use and Place of Use.¹

1. Name and Address/Ownership

The Objectors do not take issue with the quantity of water identified for irrigation purposes but instead object to the United States' ownership of the irrigation portion of 63-03618. Participants do not address this argument for it has been recently decided by the Idaho Supreme Court. *In Re: SRBA Case No. 39576 (Subcase 91-63) Re: Ownership of Water Rights*, No. 31790, (Id. Mar. 9, 2007) (United States may hold nominal legal title to irrigation storage rights).

The Objectors launch a three-pronged attack on the ownership issue in the context of stream flow maintenance: (1) Stream flow maintenance is not a beneficial use so it necessarily follows that the United States can't hold title to this right; (2) If indeed stream flow maintenance is a beneficial use, only the Water Resource Board ("Board") may hold title; and (3) the United States lacks federal authorization to hold this right.

Participants counter that (1) Idaho law clearly recognizes stream flow maintenance as a beneficial use; (2) such right should not be held by the Board given that the water at issue is currently diverted, stored and put to beneficial use under existing license; (3) federal law does provide authority for the United States to claim a right for stream flow maintenance; and (4) even if lacking specific federal authorization, State law provides the only necessary authority and is wholly determinative of ownership. Curiously, an assertion of Objectors'

¹ This list is cumulative and represents all the objections made to Claim 63-03618. Not all Objectors objected to each and every item listed.

beneficial use of the water currently used for stream flow maintenance is nowhere to be found in the objections.

2. Quantity

In terms of quantity, Objectors argue any uncontracted storage space at Lucky Peak (i.e. stream flow maintenance storage) must be made available for irrigation purposes only. Objectors do not argue that the quantity set aside for stream flow maintenance has not been used for such purpose nor do they assert competing beneficial use of the water currently used for stream flow maintenance. They impliedly assert that because stream flow maintenance is not a beneficial use there can be no quantity associated with a use that is not beneficial.

There is no basis in Idaho law for the argument that uncontracted storage space must be dedicated to irrigation. It is indisputable that the uncontracted storage space at Lucky Peak, a project authorized for multiple use, consists of water that has been used to provide stream flow maintenance pursuant to a valid license. Because Objectors did not object specifically to the quantity allocated to stream flow maintenance, Participants need only show that stream flow maintenance is a beneficial use under State law to prevail.

3. Instream Flow Description

In regard to the instream flow description, it is somewhat unclear what the true nature of the objections are. Apparently the argument is that a stream flow maintenance right, if stream flow maintenance is beneficial use, should be held by the Board.

It is inappropriate under Idaho law for the Board to hold title to water diverted and stored under existing license. Additionally, there is no Idaho statute which precludes the United States from holding a stream flow maintenance right. Because stream flow maintenance is a beneficial use, the Participants should prevail on this argument.

4. Purpose of Use

The Objectors challenge the portion of 63-03618 allocated to stream flow maintenance in the Boise River. Objectors assert that stream flow maintenance is not a recognized beneficial use and even if it is, the United States lacks federal authorization to hold title to a right for such purpose. Participants respond that federal law is irrelevant to a determination regarding purpose of use as such determination is wholly controlled by State law. State statute confirms that stream flow maintenance is a recognized beneficial use.

5. Place of Use

Objectors object to the place of use description because the Objectors assert that the only appropriate place of use is irrigable acres because irrigation is the only authorized beneficial use under federal law. This argument is easily overcome by the fact that Lucky Peak is authorized for multiple uses and stream flow maintenance is a beneficial use under Idaho law.

B. The Resource Subject to Objection – the Boise River

The practical implications of the objections are nothing short of disastrous. The Objectors assert that stream flow maintenance is not a beneficial use, which in this case means that there will be no winter release of water to sustain wildlife or support a number of other uses that depend upon the mere presence of water in the Boise River. The direct and indirect social, cultural, environmental, legal and economic consequences of a waterless Boise River in the winter are too numerous to adequately address here. Suffice it to say that a healthy Boise River is essential to sustaining our economy, environment and way of life.

Mayor Bieter said it best back in 2004 when he remarked “[t]hat river is why there is a Boise; it’s why people came here, stayed here, built here.” The Boise River is “nothing less than our community’s lifeblood . . . [i]ts health will largely determine the course and

vitality of Boise's future." *See* Affidavit of Mayor David H. Bieter in Support of Motion for Summary Judgment ("Aff. Bieter"), Ex. A. The stretch of river that runs through the City of Boise and parts of Ada County is the most heavily used recreational water in the state in terms of sheer numbers of people. *See* Aff. Bieter, Ex. A. Such recreation significantly contributes to the economy. Not many communities can boast of a healthy trout stream in the middle of downtown, the ability to see bald eagles and blue herons, and miles upon miles of greenbelt used for biking, walking, jogging, swimming, and fishing, amongst a multitude of other uses. *See* Aff. Bieter, Ex. A.

There will be tremendous water quality implications of no winter release. Currently, the Boise River is one of the cleanest urban rivers in the nation and about 20% percent of Boise's drinking water comes from the river. *See* Aff. Bieter, Ex. A. The City of Boise depends on winter flows for the operation of its waste water treatment facilities and compliance with CWA permitting requirements. *See* Aff. Finch, ¶ 5. In sum, the importance of a healthy Boise River simply can not be overstated and the objections in this subcase directly threaten the health of this invaluable public resource.

The effects of no winter flow will be felt by everyone, not just the City of Boise and Ada County residents. The unraveling of this 40-plus year process of negotiations between various parties that finally culminated into a license in 1992 may have other serious implications in addition to the immediate environmental, recreation and economic consequences. If winter stream flow maintenance were to cease, there may be noticeable effects on the operation of the entire Boise and Snake Rivers system. Such implications may include changing operations at hydroelectric facilities along the river system, for example, and subjecting the entire system to another round of Endangered Species Act, National

Environmental Policy Act, and Clean Water Act processes, to name just a few. The fact that winter stream flow is integral to river operations provides more than adequate support for Participants' claim that water used for winter stream flow maintenance has been put to beneficial use for decades.

IV. LEGAL STANDARD FOR SUMMARY JUDGMENT

In ruling on a motion for summary judgment made pursuant to Rule 56(2) of the Idaho Rules of Civil Procedure, the Court must review the pleadings, depositions and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.

The moving party bears the burden of proving absence of material facts. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). Once the moving party has met this burden, the nonmoving party "may not rest upon the mere allegations or denials of [that party's] pleadings, but the party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). In other words, the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Baxter*, 135 Idaho at 170, 16 P.3d at 267.

"Summary judgment is appropriate if there are no genuine issues of material fact and the case can be decided as a matter of law." *In Re: SRBA Case No. 39576 (Subcase 91-63) Re: Ownership of Water Rights*, No. 31790, Slip op. at 5 (Id. Mar. 9, 2007).

V. ARGUMENT

There are no genuine issues of material fact to be decided in this case. Because all the objections either relate to beneficial use or legal title, the questions for this Court to address are whether stream flow maintenance is a beneficial use under State law; and if stream flow maintenance is a beneficial use, whether the United States may hold title to water used for stream flow maintenance under controlling State law.

A. There is No Question that Stream Flow Maintenance Is a Recognized Beneficial Use Under State Law

Objector Middle Mill Ditch Company stated the issue as follows: “[a]llowing wintertime releases for fish and game purposes [sic] is contrary to the purposes for which Lucky Peak Dam and Reservoir were constructed. The only allowable uses under the pertinent authorization are irrigation and flood control.” Besides being archaic, this argument asserts that federal law controls how water can be put to use in this State. Participants disagree that federal law is determinative of beneficial use and assert that State law controls the issue of beneficial use. It is well-settled, as a matter of law, that State law determines beneficial use. *See, Idaho Code* §§ 42-201 (1), 42-217; *Nevada v. United States*, 463 U.S. 110, 126, 103 S.Ct. 2906, 2916 (1983) (Nevada law controls perfecting of a water right), *California v. United States*, 438 U.S. 645, 653-54, 98 S.Ct. 2985, 2990 (1978) (deference to local law in the determination of water rights).

The term “beneficial use” in itself has never been statutorily or judicially defined. *State of Idaho, Dep’t of Parks v. Idaho Dep’t of Water Admin.*, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974). Idaho Constitution article XV, Section 3 states “[t]he right to divert and appropriate the *unappropriated* waters of any natural stream to beneficial uses, shall never be denied” (emphasis added). Further *Idaho Code* § 42-104 states that “[t]he appropriation must be for some useful or beneficial purpose” The concept that

beneficial use is the basis, measure and limit of an appropriated right is widely recognized on both the state and federal level. Such concept is based on the fact that a water right is not a right to the water itself, but rather is a *right to use water that is owned by the people of the State*. *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-24, 227 P. 29, 30-31 (1924).

Fortunately Idaho Code § 42-1501 provides statutory authority for the assertion that stream flow maintenance is a beneficial use:

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*. 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.

Idaho Code § 42-1501 (emphasis added).

The rationale articulated in the Idaho statute quoted above regarding the importance of having water in the streams for the protection of the environment, public health, safety, and welfare is not dependent upon whether one uses the term “minimum stream flow” or “stream flow maintenance.”

Idaho statute is clear that the presence of water in a stream (whether you prefer to call such presence “minimum stream flow” or “stream flow maintenance”) constitutes beneficial use. Both minimum stream flow and stream flow maintenance serve the purpose of

protecting the streams of this State and their environments from loss of water supply and the associated ills of such loss. The fact that there is generally no diversion implicated in a minimum stream flow right does not change the beneficial use analysis.

Objectors argue that stream flow maintenance may be a beneficial use only if held by the Board. Essentially, the Objectors are saying that stream flow maintenance's status as a beneficial use depends upon who owns legal title. Ownership is of no consequence when making a beneficial use determination. Either a particular use is "beneficial" in itself or it is not.

B. The United States is the Proper Named Claimant and Legal Owner of Water Diverted and Used for Stream Flow Maintenance

Since stream flow maintenance is a beneficial use, Objectors' first argument regarding United States' title has been addressed.

Objectors' second argument in terms of ownership is that if stream flow maintenance is a beneficial use, then the Board must hold title to the water pursuant to the "Minimum Stream Flow" statute. Idaho Code §§ 42-1501 to 42-1505, 42-1736B. As stated earlier, this statute recognizes that instream flows for "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality" constitutes beneficial use. Idaho Code § 42-1501. Idaho Code § 42-1507 provides the authority and proper procedure for the Board to claim a water right for minimum stream flow. Said statute directs the Board to file claims for such rights in the SRBA. The Board filed no such competing claim for the stream flow maintenance portion of 63-03618. *See* Aff. Malmen, Ex. G.

If the water used for stream flow maintenance was not diverted, stored and put to beneficial use under an existing license, Participants may be more inclined to agree with the

Objectors. However, the Board's acquisition of a right pursuant to Idaho's Minimum Stream Flow statute is limited to "unappropriated water" defined as "water which is not subject to diversion and use under any *prior existing water right* established by *diversion* and application to a beneficial use or by application, permit or license" Idaho Code § 42-1502, (emphasis added), *see also* § 42-1503 ("Whenever the Board desires to appropriate a minimum stream flow of the *unappropriated* waters of any stream, it shall submit an application to the director.") (emphasis added).

The waters at issue are diverted, stored and released under a valid existing license, and therefore are not "unappropriated water" as that term is defined by statute. The Board is well aware of these facts and the nature of the beneficial use claimed, and did not seek to assert a claim to this right in the SRBA. On page 2 of the December 13, 1985 minutes of the meeting of the Idaho Water Resource Board regarding the Claim, the Analysis by the Board states that "Lucky Peak Reservoir is not a natural body of water, and the stored quantities are not subject to the provisions of Chapter 15. Because Chapter 15 does recognize that certain instream uses can be beneficial, however, the precedent for recognizing such uses is established under Idaho law. Most rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted." The Board's interpretation of statute and its decision not to seek ownership of the stream flow maintenance portion of 63-03618 is entitled to judicial deference:

The five rationales justifying judicial deference to an agency's interpretation of a statute . . . include [1] situations when the agency's interpretation has been relied upon for a number of years; [2] when the agency's interpretation represents a practical interpretation; [3] when the statutory test has not been altered by the legislature in light of the interpretation; or [4]

when the interpretation is formulated contemporaneously with the enactment of the statute; and [5] when the interpretation involves an area of expertise developed by the agency.

Garner v. Horkley Oil, 123 Idaho 831, 834 n. 3, 853 P.2d 576, 579 n. 3 (1993).

There is no question that the Board's interpretation of the law as applied to these facts has been relied upon for many years. Stream flow maintenance has been recognized as a beneficial use since at least 1986. Because the water at issue is diverted and stored under existing license, it is practical, appropriate and reasonable for the Board to decline to seek title. The Minimum Stream Flow statute was enacted prior to IDWR's recognition of stream flow maintenance as a beneficial use and the legislature has not changed the law in response to United States' Claim or IDWR's issuance of a license. Finally, there is little doubt that the interpretation at issue here involves an area of expertise developed by IDWR.

Objectors' third argument in the context of ownership is that the United States is not authorized under federal law to hold title to water for the purpose of stream flow maintenance. Participants counter that (1) federal law does recognize stream flow maintenance as an authorized use of Lucky Peak Dam and Lake; and (2) even if federal law is devoid of specific authorization, federal law does not determine an ownership for water rights acquired under State law.

Section 196 of the Water Resources Development Act of 1976, Pub. L. 94-587, 90 Stat. 2917, 2944, directed the Corps to "assure maintenance of adequate flows along the Boise River." In a Senate floor debate concerning Lucky Peak, Idaho Senator James McClure noted that no releases from Lucky Peak would cause "severe problems for the fish resources of the Boise River, and violates national pollutant control standards." 122 Cong. Rec. 32, 910 (1976).

BOR operates and maintains the structures at Lucky Peak used for irrigation pursuant to Section 8 of the Flood Control Act of 1944. 58 Stat. 891, 43 U.S.C. § 390. Lucky Peak's federal authorizations contemplate that Lucky Peak water may be used for a variety of beneficial purposes. Here, the United States has designated the BOR as the proper agent of the United States to hold title to water allocated for stream flow maintenance and put to beneficial use by the people of Idaho. An analogous arrangement in terms of title was recently affirmed by the Idaho Supreme Court in *In Re: SRBA Case No. 39576 (Subcase 91-63) Re: Ownership of Water Rights*, No. 31790 (Id. Mar. 9, 2007) (U.S. may hold nominal legal title to irrigation storage rights).

Even if this Court should conclude that federal law does not provide specific authority for the BOR to hold a water right for stream flow maintenance, Participants assert that federal law does not determine an ownership because ownership is a creature of state law. "A review of the cases makes it clear that federal law defers to state law in determining the rights to water in the reclamation projects." *In Re: SRBA Case No. 39576 (Subcase 91-63) Re: Ownership of Water Rights*, No. 31790, Slip op. at 7, 12 (Id. Mar. 9, 2007) ("Idaho law determines ownership . . ."). As previously noted, Idaho Code § 42-1401A specifically lists the "United States" as a "person" entitled to be a "claimant" under Idaho law. Therefore, there appears to be no legislative intent disfavoring the United States' Claim of ownership and the United States should be on equal footing with all other claimants in the SRBA under State law. "If anything is settled in the law, it is that a state may not discriminate against the Federal Government." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 751, 81 S. Ct. 870, 874 (1961).

C. The Objectors Have Waived any Objections and are Barred by *Res Judicata* from Attacking the United States' License

Whether an action is barred by *res judicata* or collateral estoppel is a question of law over which the Court exercises free review. *Lohman v. Flynn*, 139 Idaho 312, 320, 78 P.3d 379, 387 (2003); *State v. Rhoades*, 134 Idaho 862, 863, 11 P.3d 481, 482 (2000). *Res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002).

The doctrine of *res judicata* applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. David Constr. v. Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990). In *Joyce v. Murphy Land & Irrigation Company*, the Idaho Supreme Court characterized the scope of the doctrine of *res judicata* as follows:

We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies *not only as to every matter offered* and received to sustain or defeat the claim *but also as to every matter which might and should have been litigated* in the first suit.

35 Idaho 549, 553, 208 P. 241, 242-43 (1922), (emphasis added). Objectors have had since at least 1985 to raise the issue that stream flow maintenance is not a beneficial use and/or the United States is an improper owner of legal title. Participants are unable to locate any evidence in the administrative record that indicates they did so. Certainly they could have. Moreover, each time the permit was amended, IDWR published proper notice and the Objectors had an opportunity to challenge the permit/license. Objectors have had the opportunity to raise *all* the arguments they make in this case at least three (3) times over the course of the last twenty-two (22) years and yet they have not, until now. The Objectors

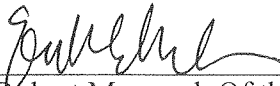
have had more than ample opportunity to raise these issues in prior administrative proceedings and should not now be allowed to abuse the SRBA by collateral attack of the United States' license.

VI. CONCLUSION

There are no questions of material fact in dispute. Stream flow maintenance is a recognized beneficial use under Idaho law. Water allocated to stream flow maintenance under 63-03618 has been put to ultimate beneficial use by the people of this State, political bodies on behalf of their constituents, as well as being essential to the fish and wildlife who depend on this water for survival. Stream flow maintenance is crucial to the health of the River, surrounding communities and downstream users. If winter stream flow maintenance were to cease, there will be serious direct and indirect consequences. The United States is a proper owner of legal title to Claim Number 63-03618 and the Idaho Supreme Court has recently upheld the validity of United States' ownership of legal title to water put to beneficial use by others. Federal authorization is not relevant to ownership as Idaho law provides exclusive authority for determination of ownership. Regardless, there is federal authorization for the United States to hold title to water used for stream flow maintenance. Finally, Objectors have waived these objections because they have had more than ample opportunity in IDWR administrative proceedings to raise the objections made here and certainly should have raised such objections in prior administrative proceedings. As such, the objections raised by these Objectors have been waived and are barred by the doctrine of *res judicata*.

DATED: October 18, 2007

PERKINS COIE LLP

By: 
Robert Maynard, Of the Firm
Erika E. Malmen, Of the Firm
Attorneys for the City of Boise
and Ada County

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that, on this 15th day of October, 2007, he/she/they caused to be served on the person(s) listed below in the manner shown:

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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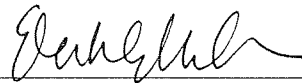
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