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DEPARTMENT OF
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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
(Lucky Peak Reservoir)

**PIONEER AND SETTLERS' RESPONSE TO
UNITED STATES BUREAU OF
RECLAMATION'S MOTION FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION

Pioneer Irrigation District (hereinafter “Pioneer”) and Settlers Irrigation District (hereinafter “Settlers”) (collectively, the “Districts”), by and through their counsel of record, MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD., and, in accordance with the Order Setting Trial Date, Final Pre-Trial Conference, Discovery Deadlines, Settlement Conference and Scheduling Pre-Trial Motions I.R.C.P. 16, entered by this Court on August 3, 2007, and Order Amending Schedule Deadlines, dated September 5, 2007, hereby respond to the United States’ Motion for Summary Judgment, filed with this Court on or about October 15, 2007. The Districts respectfully request this Court deny the United States’ Motion for Summary Judgment.

Related hereto, on October 15, 2007, the Districts filed their Motion for Summary Judgment, and memorandum and affidavits in support thereof. By their Motion for Summary Judgment, the Districts requested this Court reject the recommendation of the Director of the Idaho Department of Water Resources (hereinafter the “Director” and “Department,” respectively) and deny the Notice of Claim to a Water Right Acquired Under State Law by the United States of America, acting through the Bureau of Reclamation (hereinafter the “Bureau of Reclamation”), Identification Number A63-03618, for the purposes of “minimum instream flow storage” (in the amount of 152,300 acre feet per annum) and “minimum instream flow from storage” (in the amount of 152,300 acre feet per annum), and limit the nature of use to irrigation purposes. By this reference, the Districts respectfully incorporate the following documents, as if set forth herein in full: Pioneer Irrigation District’s and Settlers Irrigation District’s Motion for Summary Judgment, Memorandum in Support of Pioneer Irrigation District’s and Settlers Irrigation District’s Motion for Summary Judgment (“Mem. in Supp. of Mot. for Summ. J.”), Affidavit of Scott L. Campbell in Support of Pioneer’s and Settler’s Motion for Summary

Judgment (“Campbell Aff.”), and Affidavit of Jennifer A. Stevens in Support of Pioneer and Settlers Irrigation Districts’ Motion for Summary Judgment, filed with this Court on October 15, 2007.

The Districts contend summary judgment in the Districts’ favor (and against the Bureau of Reclamation) is proper because said appropriation is contrary to the basis for construction of the Lucky Peak Dam and Reservoir Project (hereinafter “Lucky Peak Project”), is contrary to the representations and guarantees made to the Districts and other irrigation entities by the Bureau of Reclamation regarding the availability of supplemental irrigation water from the Lucky Peak Project, and is contrary to Idaho water law applicable to minimum stream flow appropriations.

II. HISTORICAL AND LEGAL CONTEXT

Before proceeding with a discussion of the specific legal issues raised in the Bureau of Reclamation’s motion, it is important to emphasize that this case involves the usurpation of authority from the Idaho Legislature by the Department. In Idaho, all water flowing in its natural channels is the property of the state:

Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, *its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved.* All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state *are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose*

IDAHO CODE § 42-101 (emphasis added).

As this statute and the Idaho Constitution provide, the ownership of surface waters by the state means that the Idaho Legislature controls their use:

The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, *and subject to the regulations and control of the state in the manner prescribed by law.*

IDAHO CONST., art. XV, § 1 (emphasis added). *See also* IDAHO CODE § 42-201(2) (“[n]o person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho”).

The Idaho Legislature has chosen to delegate its authority over the distribution and use of state water to the Department of Water Resources. IDAHO CONST., art. XV, § 7 (“[t]here shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe”); IDAHO CODE § 42-201(4) (“[t]his title delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state”).

Based upon this legal framework, the Department may only exercise its authority to issue new water rights and oversee the distribution of water within the specific parameters of the delegation of authority it has received from the Idaho Legislature. In this regard, the Idaho Supreme Court’s opinion in *Beker Industries Inc. v. Georgetown Irr. Dist.*, 101 Idaho 187, 610 P.2d 546 (Idaho 1980), is particularly instructive. In that case, an applicant sought to change the nature of use of its water right from agriculture to manufacturing pursuant to the then-existing version of Idaho’s water right transfer statutes. *Beker*, 101 Idaho at 188, 610 P.2d at 547. The court held that the Department lacked authority to approve a change in the nature of use because

the water right transfer statutes in effect at that time did not specifically authorize the Department to approve such a change. More specifically, the court stated:

[The applicant] requested the changes pursuant to I.C. §§ 42-108 and 42-222(1), the same sections relied upon by the DOWR in rendering its decision in this case. These sections speak to [the] power to grant changes in place of use and point of diversion, but not the nature of use. *There is no specific language allowing the director of DOWR to approve change in nature of use* In light of the more definitive action of the legislature outlined above, we cannot rely on a passing reference in § 42-222(3) for authority to allow the change in the nature of use requested here. *While it may not make sense to give the DOWR authority to grant changes in place of use and point of diversion while not giving them power to grant such changes in the nature of use, we leave that incongruity to the legislature to remedy if they see fit. Until the current statutory provisions are amended there is no authority to grant a change in nature of use of water.*

Beker, 101 Idaho at 191, 610 P.2d at 550 (emphasis added).

In short, the Idaho Supreme Court strictly limits the Department's authority to only those powers that have been expressly conferred by the Idaho Legislature. And, notably, after the *Beker* decision, the Legislature did in fact revise the transfer statute to allow for a change in the nature of use of a water right. See IDAHO CODE § 42-222(1); S.L. 1981, ch. 147, § 3. This confirms that it is the role of the courts to strictly construe the statutes granting powers to the Department, and the role of the Legislature to expand the Department's powers as it sees fit. As will be more fully discussed in this Memorandum, it is within this legal framework that the Districts object to the Department's actions regarding issuance of a stream flow maintenance water right to the Bureau of Reclamation when doing so was not authorized by the Idaho legislature.

The Bureau of Reclamation originally applied to the Department for water right 63-3618 on April 12, 1963, which the Department approved on March 20, 1964, resulting

in the issuance of a permit. At that time, however, the sole purpose of use for that water right was irrigation. (Campbell Aff., Exhibit L (October 15, 2007)). It was not until March 9, 1984, that the Bureau of Reclamation filed an application to amend that permit to include stream flow maintenance as a purpose of use for 63-3618, which the Department approved on February 14, 1985. (Campbell Aff., Exhibit M).

Critically, however, the Idaho Legislature enacted the minimum stream flow statutes in Title 42, Chapter 15 in 1978. IDAHO CODE §§ 42-1501 – 42-1505; S.L. 1978, ch. 345, § 11. Accordingly, at the time of the Bureau of Reclamation's application to include stream flow maintenance, there were statutes in effect that specifically governed the issuance of a minimum stream flow water right. As will be more fully explained later in this Memorandum, those statutes provide the *only* means for obtaining and issuing a minimum stream flow water right, a conclusion which is supported by the fact that the Legislature enacted legislation in 1971 making the permit and license method the exclusive means for obtaining a surface water right in Idaho. IDAHO CODE § 42-103; S.L. 1971, ch. 177, § 1.

However, it is undisputed that the Department did not comply with the minimum stream flow statutes in issuing the license for water right 63-3618. Critically, the Department did not issue the license to the Idaho Water Resources Board, nor did it submit the license to the Idaho Legislature, as is specifically required by Section 42-1503.

In short, the Department's issuance of the license for water right 63-3618 to the Bureau of Reclamation with stream flow maintenance as a purpose of use was not authorized by the Idaho Legislature and therefore violates separation of powers principles under Article II, Section 1 of the Idaho Constitution.

III. ANALYSIS

A. The Bureau of Reclamation's Claimed Water Right Does Not Comply With Mandatory State Law Requirements For Minimum Stream Flow Water Rights

In support of its claimed minimum stream flow water right, the Bureau of Reclamation asserts that stream flow maintenance is a beneficial use of water under Idaho law. (Mem. in Supp. of Mot. for Summ. J., pp. 16-19). First, it is important to clarify that whether stream flow maintenance is a recognized beneficial use in Idaho is not relevant to whether the Department properly issued the license without complying with the minimum stream flow statutes set forth in Title 42, Chapter 15, Idaho Code. Second, even if the issuance of the license to the Bureau of Reclamation complied with those statutes, the Bureau of Reclamation has not established as a matter of law that stream flow maintenance is a beneficial use in this context.

1. Issuance Of The License Did Not Comply With Idaho's Minimum Stream Flow Statutes

The determination of whether stream flow maintenance is a beneficial use under Idaho law is a secondary issue that need not be addressed in this case. Regardless of whether stream flow maintenance is a beneficial use, the Bureau of Reclamation and the Department were required to comply with Title 42, Chapter 15 of the Idaho Code in order to issue a water right license for minimum stream flows. It is undisputed that they did not comply with the process and procedures required by those statutes.¹

¹ The Idaho Legislature enacted the minimum stream flow statutes in 1978. IDAHO CODE § 42-1501, *et seq.* The federal government submitted an application to amend its permit for water right 63-3618 to include stream flow maintenance for the first time in 1984. (Campbell Aff., Exhibit M). Accordingly, the minimum stream flow statutes were in full effect at the relevant time.

The minimum stream flow statutes set forth in Title 42, Chapter 15 are the *exclusive* means for issuing a minimum stream flow water right in Idaho.²

This conclusion is supported by three particular provisions within that enactment. First, as will be discussed in more detail in the following section, Section 42-1501 specifies in pertinent part that:

The preservation of the water of the streams of this state for [minimum stream flow] purposes *when made pursuant to this act* is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water.

IDAHO CODE § 42-1501 (emphasis added).

It would be difficult to state it more plainly. Section 42-1501 specifically provides that the use of water for minimum stream flow purposes is a beneficial use only when the water right is obtained pursuant to the procedures established in the minimum stream flow statutes. Curiously, in its quote of and citation to this same statute, the Bureau of Reclamation deleted the key phrase “when made pursuant to this act.” (Mem. in Supp. of Mot. for Summ. J., p. 18). Given the legal significance of that phrase with respect to the present analysis, such deletion is suspect, being either careless or intentionally disingenuous. Either way, the Bureau of Reclamation cannot be permitted to write this controlling language out of the statute.

Second, the only entity with the authority to obtain and maintain a minimum stream flow water right under the controlling statutes is the Idaho Water Resource Board. Idaho

² The exception would be if the Idaho Legislature had specifically authorized a minimum stream flow water right for the Boise River, as it has done only occasionally in Title 67, Chapter 43 and Sections 42-1506 – 42-1508 for other bodies of water. The legislature has not done so. This Court is well aware of the significance of Idaho Code Section 42-1507, because of its approval, by Order, of the Snake River Water Rights Agreement of 2004.

Code Section 42-1503 governs the preparation of applications for minimum stream flow water rights, which provides, in pertinent part:

Whenever *the board*³ desires to appropriate a minimum stream flow of the unappropriated waters of any stream, it shall submit an application to the director.

IDAHO CODE § 42-1503 (emphasis added).

There is no authority for any other party to apply for a minimum stream flow water right. The closest the Idaho Legislature came to providing such authority to a party other than the Idaho Water Resources Board is Section 42-1504, which provides in pertinent part:

Any person, association, municipality, county, state or *federal agency* may, in writing, request that *the board* consider the appropriation of a minimum stream flow of the unappropriated waters of any stream. Said request shall be in writing and provide the same information required *in the form provided for by section 42-1503*, Idaho Code. . . If the board decides that the request has merit, the board shall proceed *as provided in this act*.

IDAHO CODE § 42-1504 (emphasis added).

Far from providing parties other than the Idaho Water Resource Board with the legal authority to apply for and hold minimum stream flow water rights, this provision supports the conclusion that the Board is the only party with such authority. If other parties or entities such as the Bureau of Reclamation had such authority, there would be no need for Section 42-1504—the party could simply apply for a minimum stream flow water right directly, in their own name, and avoid the involvement of the Water Resource Board. The Legislature provided the authority for such application, but specifically required the application be made by the Idaho Water Resource Board.

³ “The board” is defined by Idaho Code Section 42-1502 as Idaho Water Resource Board.

Third, Section 42-1503 contains important checks and balances on the issuance of a minimum stream flow water right. For example, it requires the Director of the Department to forward any application “filed under the provisions of this act”—*i.e.*, filed by the Water Resource Board—to other state agencies for their review and comment. *Id.* It provides for a public hearing on the application. *Id.* And, it requires any application to satisfy the following five specific statutory criteria:

Approval of any such application must be based upon a finding that such appropriation of minimum stream flow:

(a) will not interfere with any vested water right, permit, or water right application with priority of right date earlier than the date of receipt in the office of the director of a complete application for appropriation of minimum stream flow filed under the provisions of this act;

(b) is in the public, as opposed to private, interest;

(c) is necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream;

(d) is the minimum flow or lake level and not the ideal or most desirable flow or lake level; and

(e) is capable of being maintained as evidenced by records of stream flows and water levels and the existing or future establishment of necessary gauging stations and bench marks.

IDAHO CODE § 42-1504.

Perhaps most importantly, the Idaho Legislature believed that decisions to grant minimum stream flow water rights were so significant that it retained its authority to review and approve or deny any proposed minimum stream flow water right by specifically requiring Legislative review and approval of the application:

Approved applications shall be submitted to each legislature by the fifth legislative day of each regular session, and: (i) shall not become finally effective until affirmatively acted upon by

concurrent resolution of the Idaho legislature; or (ii) except that if the legislature fails to act prior to the end of the regular session to which the application was submitted, the application shall be considered approved.

Id.

None of these checks and balances would apply to an application submitted by a party other than the Water Resource Board. Again, this is because these checks and balances only apply to applications “filed under the provisions of this act.” This is necessarily a reference to applications filed by the Water Resource Board, since that is the only entity with authority to file such an application under the minimum stream flow statutes. It certainly would be a perverse state of affairs if any other party or entity or member of the public could apply for and obtain a minimum stream flow water right without complying with these procedures that *do* apply to an application submitted by the Water Resource Board. The Idaho Legislature could not have intended such a result.

Because the clear and unambiguous terms of the minimum stream flow statutes do not provide for the issuance of a minimum stream flow water right in the name of any party other than the Idaho Water Resource Board, it must be assumed that the Legislature intended what is clearly stated in the statutes. *See Idaho Department of Parks and Recreation v. Higginson*, 121 Idaho 819, 822-23, 828 P.2d 848, 851-52 (1992). The clearly expressed intent of the Legislature must be given effect and there is no occasion for the construction where the language of the statute is unambiguous. *Id.*, citing, *Sherwood v. Carter*, 119 Idaho 246, 254, 805 P.2d 452 (1991); *Ottensen ex. rel. Edwards v. Board of Commr’s of Madison County*, 107 Idaho 1099, 695 P.2d 1238 (1985). The best guide to legislative intent is the words of the statute itself. *Id.*, 121 Idaho at 853, 828 P.2d at 824.

Public policy strongly supports the position that the Water Resource Board is the exclusive party provided with the authority to apply for and obtain a minimum stream flow water right, unless such authority is otherwise specifically granted by the Idaho Legislature. When a minimum stream flow right is granted, it essentially “locks up” that water so that it is no longer available for appropriation and use by Idahoans for irrigation, municipal use, domestic use, or any other use. A decision to reduce the water supply that is available to water users in our arid climate is a very important one that must be made carefully and at the highest levels of state government. Allowing any party to obtain a minimum stream flow water right would take these decisions out of the hands of the Water Resource Board and the Idaho Legislature, whose review and approval is specifically reserved pursuant to Title 42, Chapter 15 of the Idaho Code.

To be clear, it is not the Districts’ position that a Lucky Peak minimum stream flow water right could never be granted in the name of the Idaho Water Resource Board. The Districts do argue, however, that applications for minimum stream flow water rights must undergo proper review, including legislative review and approval, to ensure it is in the best interests of the state of Idaho and its citizens. The only way for this to happen is to read the minimum stream flow statutes as they are written: as requiring such applications to be filed by the Water Resource Board, with the opportunity for the Idaho Legislature to review and approve or reject the same.

Additionally, the actions of the Bureau of Reclamation and the Department are incongruent with the mandatory requirements of the minimum stream flow statutes to an even higher degree because the acquisition of the illegal instream flow water right component of the Lucky Peak Reservoir storage took place via the change in nature of use provisions of Idaho Code Section 42-222. Given the mandatory requirements of Idaho Code Section 42-1501, *et*

seq., the Idaho Legislature obviously did not contemplate that instream flow water rights could be created in this back-handed fashion.

2. The Bureau of Reclamation Has Not Established That Stream Flow Maintenance Is A Beneficial Use In This Context

Even if, on some basis, this Court is persuaded by the Bureau of Reclamation that the minimum stream flow statutes set forth in Title 42, Chapter 15 are not the exclusive means for applying for, obtaining, and holding a minimum stream flow water right, the Bureau of Reclamation has failed to establish minimum stream flows are a beneficial use of water in the context of this particular case.

The Bureau of Reclamation relies heavily upon the “*Malad Canyon*” case, *State, Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (Idaho 1974), to support its general assertion that the use of water for minimum stream flows is a beneficial use. (Mem. in Supp. of Mot. for Summ. J., pp. 17-18). That case is of little relevance here. In *Malad Canyon*, the Idaho Legislature had enacted a statute declaring scenic beauty and recreation to be beneficial uses within a particular, identified stretch of the canyon. *Id.*, 96 Idaho at 441, 530 P.2d at 925. The Idaho Supreme Court simply wrote that it “[found] no basis upon which to disturb that declaration of the legislature. . . .” *Id.*, 96 Idaho at 444, 530 P.2d at 928.

Here, the Idaho Legislature has made no such declaration with respect to the Boise River. Without this declaration, the only possible basis for concluding that the use of water for minimum stream flows in the Boise River is a beneficial use is by reference to Section 42-1501. Indeed, the Bureau of Reclamation specifically relies upon that statute to support its position. (Mem. in Supp. of Mot. for Summ. J., pp. 18-19). Again, the statute provides:

The preservation of the water of the streams of this state for such purposes *when made pursuant to this act* is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water.

IDAHO CODE § 42-1501 (emphasis added).

Therefore, as this Memorandum has explained, Section 42-1501 only establishes minimum stream flows as a beneficial use when the water right is obtained via the minimum stream flow statutes in Title 42, Chapter 15. The fact that the Bureau of Reclamation and the Department did not act in accordance with those statutes is not in dispute. Accordingly, the Bureau of Reclamation's reliance upon Section 42-1501 is unpersuasive. And, by implication, the use of water for minimum stream flow purposes that is not made pursuant to Title 42, Chapter 15, and which has not been declared to be a beneficial use elsewhere by the Idaho Legislature (as was the case in *Malad Canyon*), cannot be deemed a beneficial use in accordance with Idaho water law.

B. The Districts' Objections Are Not Collateral Attacks On The License Issued By The Department

The Bureau of Reclamation argues that the Districts' objections to the Bureau of Reclamation's claimed minimum stream flow water right are barred because they constitute a collateral attack upon the previously issued license. (Mem. in Supp. of Mot. for Summ. J., pp. 15-16). To support its assertion, the Bureau of Reclamation cites to a number of SRBA district court opinions which hold, as a general matter, that a party may not use the SRBA to "collaterally attack" a previously issued license. (Mem. in Supp. of Mot. for Summ. J., p. 15).

The distinction the Bureau of Reclamation fails to address, however, is that those SRBA decisions deal with the ability of a party to challenge a particular element of the water right license. Here, the Districts contend the Department wholly lacked statutory authority to

issue the license pursuant to state statute and the Idaho Constitution, and in disregard of the Idaho Legislature's reservation of authority to review and approve or reject a minimum stream flow water right. Thus, the error in issuing the license is a fundamental one. And, because the Water Resource Board is the only party with authority to hold such a right, and because the Legislature has not been afforded its reserved right to review and approve or reject the claimed water right, the error is ongoing, and cannot be waived.

As the previous section of this Memorandum explains, the statutes in Title 42, Chapter 15 of the Idaho Code are the exclusive means for obtaining a minimum stream flow water right in Idaho. Accordingly, those statutes were binding upon the Department when it issued the Director's Report recommending the Bureau of Reclamation's minimum stream flow water right. A specific requirement, applicable to the approval of any minimum stream flow water right, is that it be submitted for review by the Idaho Legislature, which retains the right to approve or reject the application. More specifically:

Approved applications shall be submitted to each legislature by the fifth legislative day of each regular session, and: (i) shall not become finally effective until affirmatively acted upon by concurrent resolution of the Idaho legislature; or (ii) except that if the legislature fails to act prior to the end of the regular session to which the application was submitted, the application shall be considered approved.

IDAHO CODE § 42-1503.

Here, the Department did not submit the approved permit application for review by the Idaho Legislature. The failure to do so was not only a violation of Section 42-1503 itself, but also of the Idaho Constitution, which provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any

powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

IDAHO CONST. art. II, § 1.

In other words, the Idaho Constitution specifically prohibits one branch of government from exercising the powers that belong to another branch of government. By allowing the permit amendment and issuing the minimum stream flow license without having submitted the approved minimum stream flow application for legislative approval as required, the Department was essentially “exercis[ing] . . . powers properly belonging to” the Idaho Legislature. This was a direct violation of the separation of powers provision quoted above. *See State v. Lukens*, 48 Idaho 357, 283 P. 527, 528 (Idaho 1929) (“it is the duty of an official whose action . . . is prescribed [by a legislative enactment] to abide by its terms”). As such, the issuance of the license, which included the instream flow use, was a fundamental constitutional error that is ongoing.

In addition, the Bureau of Reclamation’s position that the Districts are precluded from challenging the illegally issued license for an invalid water right in this case is also contrary to this Court’s analysis and decision regarding challenges to the same formerly issued license (water right claim 63-03618)⁴ related to ownership aspects of the license, which was affirmed by

⁴ As this Court noted, with respect to the formerly issued license:

The B[ureau] [of] R[eclamation] applied to the State for a permit to appropriate at Lucky Peak Reservoir in 1963. After several extensions, water right license 63-03618 was issued to the B[ureau] [of] R[eclamation] on September 27, 2002. The license allowed 111,950 acre feet of water for irrigation storage and irrigation from storage, 28,800 acre-feet for recreation/inactive storage and 152,300 acre-feet for stream flow maintenance storage and stream flow maintenance from storage. No protests were filed to the B[ureau] [of] R[eclamation] being named the owner of the water rights, although apparently protests were filed seeking to

the Idaho Supreme Court in *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007).⁵ The issue of collateral attack regarding the formerly issued licenses was raised by the Bureau of Reclamation before this Court, and rejected in its Memorandum Decision and Order on Cross-Motions for Summary Judgment, entered September 2, 2004. With respect to the effect of the prior license, as considered by the SRBA, this Court wrote:

The law of the case in the SRBA precludes the outcome of an administrative license proceeding from being collaterally attacked in the SRBA. *See Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* (December 29, 1999) (citing *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984)). The exclusive remedy is (was) to contest the permit application in the proper administrative proceedings and if necessary through judicial review pursuant to the Administrative Procedures Act. *Id.* Prior decrees in private adjudications are only binding on the parties or their privies to the prior adjudication. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 741, 947 P. 2d 409, 414 (1997). ***However, a license or a prior decree is only evidence of the water right in the SRBA, it is not conclusive proof, because the elements of the water right are not insulated from re-examination.*** Elements can subsequently be changed voluntarily such as through contract or by operation of law (*i.e.*, forfeiture or abandonment).

Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 12 (emphasis added).

clarify that the Lucky Peak water would be limited to supplying supplemental water for presently irrigated lands.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 21-22 (September 2, 2004).

⁵ The Idaho Supreme Court affirmed the decision in part and remanded the decision in part. However, the remand was only to substitute the Idaho Supreme Court's remark for the remark adopted by this Court, which is not relevant to the current analysis regarding whether the Districts are permitted to challenge the previously illegally issued license with respect to the minimum flow components of the license.

In the present case, the Director's Report recommendation, amended permits and license were illegally granted, outside the scope of the authority of the Department and without required legislative review and approval, and are invalid with respect to the minimum stream flow components. *Id.* It is therefore proper for this Court to re-examine the illegal nature of the amended permits and licenses, reject the recommendations of the Department, and deem it improper and inappropriate to decree minimum stream flow water rights in favor of the Bureau of Reclamation. This is especially important in this case where the Idaho Legislature has specifically reserved the rights, pursuant to the above-quoted enacted statute, to review and approve any water rights for purposes of minimum stream flow, and the Bureau of Reclamation and the Department seek to avoid such review and approval, via illegal process.

C. The Historical Context And Authorization For The Construction Of The Lucky Peak Project Is Contrary To The Bureau of Reclamation's Arguments Concerning Federal Authorization And Delivery Of Water For Stream Flow Maintenance

The Bureau of Reclamation relies upon the Flood Control Act of 1946, 60 Stat. 641, 643, 650, for its argument that construction of the Lucky Peak Project was authorized "for the benefit of navigation and the control of destructive flood-water and other purposes," and suggests at the time of authorization that Congress was advised that the project would be utilized to regulate stream flow for the benefit of fish and wildlife and endorsed that use, among others. (Mem. in Supp. of Mot. for Summ. J., pp. 5, 19). However, the Bureau of Reclamation's reference to the provisions of the Flood Control Act of 1946 are not specific to the Lucky Peak Project, but apply to dozens of projects throughout the country. *See*, Flood Control Act of 1946, 60 Stat. 643-651.

In the context of the historical basis and authorization for the construction of the Lucky Peak Project, this Court's attention is directed to the Districts' briefing in support of their

motion for summary judgment, which the Districts respectfully submit demonstrates the “other purposes,” with regard to the Lucky Peak Project, included primarily irrigation. Specifically, in 1976, with regard to the Flood Control Act of 1944 and the federal authorization, William N. Dunlop, Acting Field Solicitor of the United States Department of the Interior, wrote to the Bureau of Reclamation:

Use of the space for irrigation by Interior also required legislative approval under section 8 of the 1944 Flood Control Act. The September 21, 1953, report indicated that Lucky Peak, in conjunction with the two upstream reservoirs, would be used “*jointly for flood control and irrigation.*” This report was approved by Congress on October 24, 1954 (68 Stat. 794), and the Secretary was authorized to administer the project pursuant to the report.

Mem. in Supp. of Pioneer and Settlers’ Motion for Summ. J., p. 15, *quoting* Campbell Aff., Exhibit J (United States Department of the Interior Memoranda, dated September 21, 1976, pp. 1-4) (emphasis added). In addition, with respect to the other purposes for which the Lucky Peak Project was authorized, the same report provided:

Since the proposed Lucky Peak flood control plan involved flood releases from Anderson Ranch and Arrowrock, the report recognized that construction be conditioned on the approval of existing Bureau storage contractors. The report also indicated that such storage contractors would have an interest in the additional irrigation storage potential in Lucky Peak. On this point, the report stated:

He [the District Engineer] proposes to furnish the supplemental water to the irrigation entities who use Arrowrock water as a recompense for the proposed flood control use of that reservoir.

And

. . . that initiation of the proposed construction be conditioned upon obtaining satisfactory assurances from interested water users that, in consideration of the irrigation benefit to be derived from the additional storage in Lucky Peak Reservoir,

they will agree to use of Anderson Ranch and Arrowrock Reservoirs for flood control as proposed in the present report of the district engineer.

Id. (emphasis added).

A review of the historical basis for the construction of the Lucky Peak Project, clearly demonstrates representations and promises made to the irrigation entities and the significance placed upon irrigation as a purpose for the construction of the Lucy Peak Project, and any discussion or support for minimum stream flow maintenance was virtually non-existent. (Mem. in Supp. of Pioneer and Settlers' Motion for Summ. J., pp. 5-25).

D. The Water Resources Development Act Of 1976 Provides No Authority For Instream Water Rights

The Bureau of Reclamation wrongfully asserts the Water Resources Development Act of 1976 (the "Act") supports their claim for an instream flow water right for the Lucky Peak Project. The cited references do no more than provide the U.S. Army Corps of Engineers with authority to modify the Lucky Peak Project's original single discharge outlet to add the capability of releasing water into the Boise River while routine maintenance was conducted on the outlet.

The Bureau of Reclamation cites to no record evidence which demonstrates such outlet modifications were ever implemented. Moreover, reference to federal agency studies by the Corps of Engineers do nothing to change the substantial and unequivocal record evidence that flood control and irrigation water storage were the fundamental, historical bases for proceeding with construction of the Lucky Peak Project. Regardless, nothing in the Water Development Act conveys preemptive authority to the Bureau of Reclamation to create an instream flow water right contrary to State law requirements, which has been attempted in this case.

However, even in the event this Court finds some insignificant support for federal authorization for minimum stream flow in the Boise River from the Lucky Peak Project, the Bureau of Reclamation has not demonstrated that the license and Director's Report issued in this case are in compliance with Idaho minimum stream flow statutes. As is addressed in the Districts' brief in support of its motion for summary judgment, pursuant to Idaho and federal authority, Idaho state water law controls the appropriation and distribution of water from the Lucky Peak Project at issue in this subcase. (Mem. in Supp. of Pioneer and Settlers' Motion for Summ. J., pp. 25-26).

IV. CONCLUSION

On the bases of the foregoing, the Districts respectfully submit denial of the Bureau of Reclamation's Motion for Summary Judgment is proper.

RESPECTFULLY SUBMITTED this 14th day of November, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2007, I caused a true and correct copy of the foregoing **PIONEER AND SETTLERS' RESPONSE TO UNITED STATES BUREAU OF RECLAMATION'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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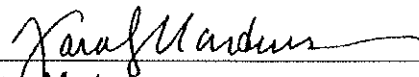
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