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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA,
Case No. 39576

Subcase No. 63-3618
(Lucky Peak Reservoir)

**PIONEER AND SETTLERS' RESPONSE TO
CITY OF BOISE AND ADA COUNTY'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 Motion for Summary Judgment, filed by the City of Boise and Ada County (hereinafter “Participants”) with this Court on or about October 15, 2007. The Districts respectfully request this Court deny the Participants’ 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 respectfully request 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 “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.

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.

By this reference, the Districts hereby incorporate the following filings, 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.

II. HISTORICAL AND LEGAL CONTEXT

Before proceeding with a discussion of the specific legal issues raised in the Participants' 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 United States when doing so was not authorized by the Idaho legislature.

The United States 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). It was not until March 9, 1984, that the United States 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 United States' 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 United States 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. Participants Mischaracterize The Issues And Assert No Legal Water Right

While Participants have filed a Motion for Summary Judgment in this subcase, Participants have not alleged any water right or legal title to use of water, in favor of the Participants, in accordance with Idaho law.

Instead, the Participants attempt to convert this case into a debate regarding the general merits of winter flows in the Boise River. For example, they describe the potential effects of a “waterless” Boise River in the winter as “too numerous to adequately address here.” (Mem. in Supp. of Mot. for Summ. J., p. 9). This mischaracterizes the issue and is unnecessarily inflammatory.

The issues before this Court with respect to this subcase are whether Lucky Peak Project may be used to store and release water for minimum stream flows and, if so, whether the United States and the Department complied with the statutes that govern the issuance of minimum stream flow water rights. This is a much narrower inquiry, and this Court should resist the Participants’ efforts to turn this case into a choice between winter flows in the Boise River and no winter flows in the Boise River. The Participants’ characterization of this case as such is a false dichotomy, because there are other avenues available to the Participants if they wish to ensure winter flows in the Boise River. Whether Lucky Peak Project may be used for such purposes is not determinative of whether any winter flows can be present in the Boise River.

Related to this point is the fact that the Participants make many factual assertions regarding the need to maintain winter flows that, upon closer examination, illustrate the weakness of their position. More specifically, the Participants assert that fish and wildlife, the City’s waste water treatment facilities, and the County’s Barber Dam hydroelectric facility all

depend upon minimum stream flows. (Mem. in Supp. of Mot. for Summ. J., pp. 4-6; 9-11). If such uses of water are so important to the Participants, then they should take the actions necessary to obtain water rights for such uses in accordance with Idaho water law. The Participants have failed to take any such actions.

It is well-settled that the Department may issue water rights for both municipal and hydropower purposes, a fact which is supported by the many references to those uses of water in Idaho's water statutes. *See, e.g.*, IDAHO CODE §§ 42-108A (leasing of water for hydropower purposes), 42-202(2) (water right application requirements applicable to municipal providers), 42-202(5) (water right application requirements applicable to power generation), 42-202B(4)-(6) (definitions of "municipal" water uses). And, the Participants could have petitioned the Idaho Water Resource Board to obtain a minimum stream flow water right for the protection of fish and wildlife. IDAHO CODE § 42-1504. They have not done so.

Participants have not asserted that they own any such water rights. If the Participants do claim to own such water rights, the proper method to protect the water rights is to initiate a water delivery call if they are indeed being deprived of water to which they are entitled. That is the framework for obtaining and protecting water rights under Idaho law, and it is a framework that the Participants have avoided and/or, more likely, are not entitled to undertake because they recognize their lack of legal title to applicable water rights.

B. Minimum Stream Flows Are a Beneficial Use Only When Expressly Declared By the Idaho Legislature

Without adequate legal basis, the Participants argue stream flow maintenance in this context is a beneficial use under Idaho law. (Mem. in Supp. of Mot. for Summ. J., pp. 12-14). The Participants begin their analysis by responding to the argument of another objector that "[a]llowing wintertime release for fish and game purposes is contrary to the

purposes for which Lucky Peak Dam and Reservoir were constructed.’ ” (Mem. in Supp. of Mot. for Summ. J., p. 12). According to the Participants:

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.

Mem. in Supp. of Mot. for Summ. J., p. 12.

While the Participants are indeed correct that state law determines beneficial use, Participants are confusing two issues. Whether there is authorization pursuant to federal statute to use Lucky Peak for stream flow maintenance is an entirely separate inquiry from whether state law recognizes stream flow maintenance as a beneficial use. This Memorandum discusses the lack of federal authorization in a subsequent section. The remainder of this section discusses beneficial use under state law.

The Participants rely heavily upon Idaho Code Section 42-1501 in concluding that stream flow maintenance is a beneficial use in Idaho. (Mem. in Supp. of Summ. J., pp. 13-14).

That 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, Section 42-1501, by its terms, 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. Participants assert no other basis for Legislative authority for a finding of minimum stream flows as a beneficial use in this context. The fact that the Bureau and the Department did not act in accordance with the Idaho minimum stream flow statutes is not in

dispute. Accordingly, the Participants' 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 it has done numerous times in Idaho Code Title 67, Chapter 43 and Sections 42-1506, 42-1507, and 42-1508—is not a beneficial use.

The Participants also rely upon the Idaho Water Resource Board's previous statement that, “ ‘[Lucky Peak] 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.’ ” (Mem. in Supp. of Mot. for Summ. J., pp. 15-16 (emphasis added)). According to the Participants:

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.

Mem. in Supp. of Mot. for Summ. J., p. 16.

The Board's statement upon which the Participants rely is of little import. The Board specifically stated that a valid water right can be constituted “*if*” stream flow maintenance is a beneficial use. *Id.* (emphasis added). Again, this is conditional language that does not support the conclusion that stream flow maintenance is a beneficial use of water if Idaho Code Sections 42-1501, *et seq.* have not been satisfied, which is clearly not the case in this matter.

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

Participants next argue that the federal government is the proper owner of the minimum stream flow water right. (Mem. In Supp. of Mot. for Summ. J., p. 14). More specifically, they argue that Section 42-1503, which requires minimum stream flow water rights to be obtained by the Water Resource Board, is wholly inapplicable to water right 63-3618.

Participants' primary argument in this regard is based upon a confused reading of the minimum stream flow statutes. The Participants first observe that Section 42-1503 only allows the Board to appropriate "unappropriated waters" for minimum stream flows. (Mem. In Supp. of Mot. for Summ. J., p. 15). The Participants then argue that Section 42-1503 is inapplicable because the water to be used for minimum stream flows in the Boise River is already "appropriated" by the Lucky Peak Project. (Mem. In Supp. of Mot. for Summ. J., p. 15).

This argument fails for a number of reasons. First, water stored in Lucky Peak Project must be appropriated legally, pursuant to statute, since the water right for Lucky Peak Project was developed as a permit. Since the sole statutory procedure for legally appropriating water was not used for the instream use, no valid appropriation occurred.

More specifically, the Idaho Constitution provides that "[t]he right to divert and appropriate the *unappropriated waters* of any natural stream to beneficial uses, shall never be denied. . . ." IDAHO CONST., art. XV, § 3 (emphasis added). Similarly, Idaho Code Section 42-103 provides:

The right to the use of the *unappropriated waters* of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.

IDAHO CODE § 42-103 (emphasis added).

The purpose of the use of the phrase "unappropriated waters" in Section 42-1503 is to emphasize that minimum stream flow water rights cannot be granted on a source of water that is already fully allocated to other water uses. This is the case with *any* water right in Idaho, as the above constitutional and statutory provisions demonstrate. Under the Participants' interpretation of the phrase "unappropriated waters," the water permit for the Lucky Peak

Project, prior to amendment in 1985, demonstrated that all of the permitted quantity of water was “appropriated” for irrigation use. Consequently, the water was *not available* for instream flow appropriation as the time of the amendment of the permit because it was *not* “unappropriated waters.” The Participants’ reliance upon the phrase “unappropriated waters” is misplaced and legally ineffective.

Second, if the minimum stream flow statutes in Title 42, Chapter 15 do not govern the issuance of 63-3618 as the Participants insist, then there is no other basis for issuing a minimum stream flow water right on the Boise River. This is because those statutes are the *exclusive* means for issuing a minimum stream flow water right in Idaho.¹

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 states 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. It

¹ 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. It 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.

is undisputed that the federal government and the Department did not comply with those statutes in obtaining and issuing 63-3618.

Second, the only entity with the authority to obtain a minimum stream flow water right under these statutes is the Idaho Water Resource Board. Section 42-1503 is the statute that governs the preparation of applications for minimum stream flow water rights. It provides in pertinent part:

Whenever *the board*² 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 other authority for any other party to apply for a minimum stream flow water right. The closest the minimum stream flow statutes come to providing such authority to a party other than the 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 and entities, specifically including municipalities, counties and federal agencies, 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 exclusive party with such authority. If other parties and entities

² “The board” is defined by Idaho Code Section 42-1502 as Idaho Water Resource Board.

had such authority, then there would be no need for Section 42-1504—the party could simply apply for a minimum stream flow water right in its own name and avoid the involvement of the Water Resource Board and the Idaho Legislature.

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 Idaho Water Resource Board—to other state agencies for their review and comment. *Id.* It provides for a public hearing on the application. *Id.* The statutory process and procedure requires any application to satisfy five specific 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 Idaho 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 Idaho 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 Idaho Water Resource Board. The Idaho Legislature could not have intended such a result.

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 Project 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 would be created in this back-handed fashion.

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 Idaho Water Resource Board is the exclusive party provided with the authority, under Idaho law, 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 Idaho Water Resource Board and the Idaho Legislature, 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.

D. Waiver And *Res Judicata* Do Not Bar The Districts' Objections

Participants next argue that the Districts' claims regarding the legality of the minimum stream flow portion of 63-3618 have been waived and are barred by *res judicata*. (Mem. In Supp. of Mot. for Summ. J., p. 18). However, the Districts respond that the Department wholly lacked statutory authority to issue the license pursuant to minimum stream flow statutes and the Idaho Constitution. 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 the Idaho Legislature reserved the right to review and approve or disapprove the application, the error is an ongoing error that 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. One of the specific requirements that applies to the approval of any minimum stream flow water right is that it be submitted for review and approval or rejection by the Idaho Legislature. The statutory process specifically requires:

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 amendment 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 in pertinent part:

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 or rejection, 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 Participants’ 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)³ related to ownership aspects of the license, which was affirmed by the Idaho Supreme Court in *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007).⁴ The issue of preclusion regarding the formerly issued licenses was raised 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

³ 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 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).

⁴ 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.

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).

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 license, 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.

E. The Historical Context And Authorization For The Construction Of The Lucky Peak Project Is Contrary To Participants' Arguments Concerning Federal Authorization And Delivery Of Water For Stream Flow Maintenance

Participants acknowledge the Bureau of Reclamation operates and maintains the structures at the Lucky Peak Project used for irrigation pursuant to Section 8 of the Flood Control Act of 1944. (Mem. In Supp. of Mot. for Summ. J., p. 17).

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 its motion for summary judgment, which the Districts respectfully submit demonstrates, in addition to flood control, the primary purpose for the construction of the Lucky Peak Project was 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.

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).

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

Boise City and Ada County wrongfully assert 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.

Boise City and Ada County disingenuously claim the Act "directed the Corps to 'assure maintenance of adequate flows along the Boise River.' " Boise City Mem. in Sup., at 16. Section 196 of the Act does *not* "direct" the Corps to take any actions. Instead, the language of Section 196 states:

The project for Lucky Peak Lake, Idaho, authorized by the Flood Control Act of 1946, is hereby modified to authorize the Secretary of the Army, acting through the Chief of Engineers, to modify the outlet works in the Lucky Peak Dam at a Federal cost not to exceed \$4,100,000, to assure maintenance of adequate flows along the Boise River: Provided, That provisions of section 102(b) of the Federal Water Pollution Control Amendments of 1972 (86 Stat. 816), shall apply to this modification.

Id.

“Authorizing” the Corps of Engineers to take action is dramatically different than “direct(ing)” the Corps to take action. In fact, use of the term “authorize” by Congress is merely the first step in the two step federal process for modifications to water projects. Only after Congress passes legislation approving “appropriations,” the second step of the process, can federal agencies proceed with “authorized” actions.

Boise City and Ada County cite to no record evidence which demonstrates such outlet modifications were ever implemented by the Corps of Engineers. Moreover, reference to federal agency “authorizations” of unfunded future actions 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 United States to create an instream flow water right contrary to State law requirements, which has been attempted in this case.

As is addressed above, Participants confuse the issue of ownership under state water law with the issue of whether federal law authorizes the use of the Lucky Peak Project for stream flow maintenance. 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 Participants have not demonstrated that the license and Director’s Report issued

in this case are in compliance with Idaho's 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 Participants' Motion for Summary Judgment is proper.

RESPECTFULLY SUBMITTED this 14th day of November, 2007.

MOFFATT, THOMAS, BARRETT, ROCK &
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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 CITY OF BOISE AND ADA COUNTY'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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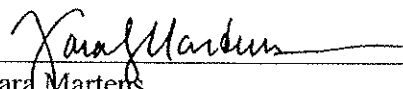
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