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DEPARTMENT OF
WATER RESOURCES

Attorneys for Nampa & Meridian Irrigation District.

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

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

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

I. INTRODUCTION

The opening briefs of the parties to this subcase raise a number of issues as to the purpose of Lucky Peak Reservoir. However, one issues that is not in dispute is that the procedures outlined in Chapter 15, Title 42 have not been followed with respect to the instream flow portion of water right no. 63-3618. It is not in dispute that an application for an instream flow water right was not filed with the Idaho Water Resource Board and neither the Idaho Water Resource Board or the State

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hold the instream flow portion of water right no. 63-3618.

The United States Bureau of Reclamation (“BOR”) contends that this Court should disregard the requirements of Title 42, Chapter 15 because it amounts to a collateral attack on the license. Notwithstanding the fact that the Idaho Department of Water Resources (“IDWR”) issued the license after it filed the Director’s Report for water right no. 63-3618, this Court cannot judicially sanction, whether licensed or not, a water right that does not comply with Idaho law.

II. ARGUMENT

A. This Court is Not Precluded from Determining Whether Water Right No. 63-3618 Complies with Idaho Law.

BOR asserts that the objections to water right no. 63-3618 are barred because the objections amount to a collateral attack on the license. It is first important to put the timing of issuance of the license in context with the timing of the issuance of the Director’s Report for water right no. 63-3618. On or about September 24, 2002, the Director of IDWR issued his Director’s Report, which included his recommendation for water right no. 63-3618. NMID and several other irrigation entities timely filed objections to said recommendation. Three days after the Director’s Report, on or about September 27, 2002, IDWR issued a license for water right no. 63-3618. Thus, the license was issued after the Director’s Report and after the procedures for objecting to the recommendation had begun. Nevertheless, BOR contends that the license issued after the Director’s Report cannot be collaterally attacked.

First of all, the parties are not barred from objecting to the recommendation for this water right simply because IDWR issued a license after it issued the Director’s Report. More importantly,

this Court is not barred from considering the objections of the parties, including objections that the instream flow portion of the water right is not consistent with Idaho law. Whether or not the instream flow portion of the water right complies with Idaho law is a question of law, in which this Court “exercises free review and is not bound by findings of the [lower] court, but is free to draw its own conclusions from the evidence presented.” *Mutual of Enumclaw v. Box*, 127 Idaho 851, 852, 908 P.2d 153, 154 (1995). If this Court is not bound by the findings or conclusions of the lower court, it is certainly not bound by the Director’s Report or licenses as to questions of law.

Moreover, this Court has made it clear that “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.” *Memorandum Decision and Order on Cross-Motions for Summary Judgment*, p. 12 of 33 (Consolidated Subcase 91-63) (Sept. 1, 2004). In other words, the issuance of a license (especially one issued after the Director’s Report) does not preclude this Court from re-examining the elements of the water right to assure that the elements comply with Idaho law. This Court is not barred from reviewing the circumstances and background for this particular water right in order to properly evaluate the elements of the water right and to determine whether or not instream flow portion should be decreed as recommended. Regardless of whether a license has been issued, this Court cannot judicially sanction the portion of the recommendation for Lucky Peak Reservoir, water right no. 63-3618, which includes “streamflow maintenance storage” and “streamflow maintenance from storage” of 152,300 acre feet because the recommendation for streamflow maintenance is not consistent with Idaho law.

B. BOR Did Not Comply with Title 42, Chapter 15 of the Idaho Code.

BOR contends that streamflow maintenance is a beneficial use under Idaho law but fails to address the requirements under Title 42, Chapter 15. The fact remains that Title 42, Chapter 15 is explicit as to the procedures that must be followed for the development of a streamflow maintenance water right. Title 42, Chapter 15 is also explicit that the procedures are applicable to federal agencies, such as BOR. In this case, there is no dispute that the BOR did not request, pursuant to I.C. § 42-1504, that the Idaho Water Resource Board file an application for appropriation of minimum stream flow for the storage in Lucky Peak Reservoir. A recitation of the history of Lucky Peak Reservoir does not change this undisputed fact.

Moreover, while BOR contends that it has authority under federal law to deliver water for streamflow maintenance, Idaho law is clear that the Idaho Water Resource Board or the State must hold the water right under Idaho law. As explained in NMID's opening brief, the requirements of Title 42, Chapter 15 are applicable to BOR and it is the Board or State agencies which may hold and instream flow water right for the citizens of the State of Idaho. *See State of Idaho v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) (holding that United States may not claim a non-diversionary water right for purposes other than stock watering).

C. The Uncontracted Space should include "Irrigation from Storage" as a Beneficial Use.

The Boise Project Board of Control ("BPBOC"), which NMID is a member, contends that the uncontracted space in Lucky Peak Reservoir should include irrigation from storage as a beneficial use. NMID concurs with this argument.

Pursuant to the 1953 Agreement for the operation and maintenance the three reservoirs,

Lucky Peak, Arrowrock and Anderson Ranch, along with Supplemental Contracts with the irrigation entities, the three reservoirs would be operated so that if “Anderson Ranch or Arrowrock are not filled by reason of having evacuated water for flood control, storage for Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights.” *See Affidavit of Paul L. Arrington*, Ex. A, at 10. BPBOC correctly points out that there was a guarantee that “should flood control actions prevent the filling of the upstream reservoirs then storage water from Lucky Peak may be used to supply water pursuant to the irrigation storage contracts of the upstream reservoirs.” *BPBOC Memorandum* at. 3.

The uncontracted space in Lucky Peak may be necessary to fulfill the guarantee to supply irrigation storage contracts of the upstream reservoirs, and the uncontracted space in Lucky Peak Reservoir, 111,950 acre feet, should include “irrigation from storage” as a beneficial use. Thus, regardless of the Court’s decision as to the legality and validity of the instream flow portion of the water right, the uncontracted space, 111,950 acre feet, must include the ability of BOR to meet its obligations to provide irrigation water to the irrigation entities and must include irrigation from storage as a beneficial use.

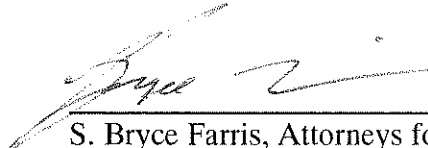
III. CONCLUSION

The BOR does not dispute a water right for minimum stream flow purposes must be established pursuant to Chapter 15, Title 42 of the Idaho Code. The BOR also does not dispute that there was no request pursuant to I.C. § 42-1504 for the Idaho Water Resource Board to make an application to appropriate storage water in Lucky Peak for minimum stream flow purpose. Lastly, there is no dispute that the federal government, in this case the BOR, is not an entity allowed to hold

a water right for minimum stream flow purposes. The fact that IDWR issued a license for the water right after it had issued its recommendation does not alter the fact that the minimum stream flow portion of water right no. 63-3618 does not comply with Idaho law. This Court should not decree or sanction that portion of the water right that does not comply with Idaho law. Lastly, in order to correctly define the water right so that it complies with the guarantees and obligations of BOR, along with the proper administration of all three reservoirs, the uncontracted space of water right no. 63-3618 should include "Irrigation from Storage" in the purpose of use.

DATED this 14th day of November, 2007.

RINGERT CLARK CHARTERED


S. Bryce Farris, Attorneys for NMID

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2007, I caused to be served a true and correct copy of the foregoing document via U.S. mail, postage pre-paid, to the following:

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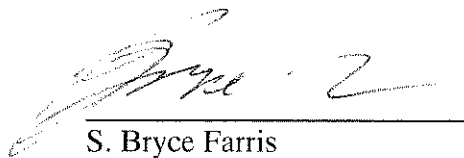
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