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Jerry A. Kiser
STOPPELLO & KISER
ATTORNEYS AT LAW
620 W. Hays Street
Boise, ID 83702
Telephone: (208) 336-1020
Facsimile: (208) 336-1027
Idaho State Bar No. 3719

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DEPARTMENT OF
WATER RESOURCES

Attorneys for Canal Companies

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	)	
	)	RESPONSE TO BRIEF OF
	)	UNITED STATES AND
	)	MEMORANDUM OF ADA COUNTY
_____	)	AND CITY OF BOISE

COMES NOW, CANYON COUNTY WATER COMPANY; FARMERS UNION DITCH
COMPANY, LTD.; MIDDLETON IRRIGATION ASSOCIATION, INC.; and,
MIDDLETON MILL DITCH COMPANY, (hereinafter "Canal Companies") and
hereby submit this Brief in response to the Brief in Support of
United States Motion for Summary Judgment filed by the United
States and Memorandum in Support of Motion for Summary Judgment
filed on behalf of the City of Boise and Ada County.

I.

INTRODUCTION

Both the United States Brief and the Memorandum of the City
of Boise and Ada County (hereinafter "Participants") address the

RESPONSE BRIEF - 1.

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same issues although organized differently. Both Participants and the United States have arguments concerning beneficial use of stream flow maintenance which is in the United States Brief at Section 2 Page 16 and in the Participant's Memorandum at Section V.A., page 12. Both address federal authorization for stream flow maintenance with United States' argument at Section III, Page 19 and Participants' at Section V.B., page 14. The final issue raised by the United States and Participants pertains to the issue of a claimed collateral attack on the license/res judicata claim which is in the United States' Brief at Section I., page 15 and Participants' Memorandum at Section V.C., page 18. Due to the similarity of arguments of the United States and Participants, Canal Companies will respond by subject matter to both the United States' and Participants' arguments.

II.

STATEMENTS OF FACTS

Participants in their statement of undisputed facts recite many purported uses of the water released from Lucky Peak Dam and states this water, ". . . has historically been put to use by the citizens of Idaho and political bodies of the State of Idaho for a variety of recognized beneficial uses in addition to stream flow maintenance, . . . ," Participants' Memorandum, Statement of Undisputed Facts, paragraph 16, page 4. Two of the additional uses asserted to stream flow maintenance set forth in the

Participants' Statements of Facts include power generation and water quality. These uses, however, are not subject to any permit or license or other claim of any entity or person to Canal Companies' knowledge. These uses cannot be enforced by Participants. If an election were made by the United States not to release water in the winter months, Participants could not demand the water be released or seek remedy from the Department of Water Resources to protect any claimed right for power production or water quality as none exists. The Court should not consider other uses in its decision in this matter, other than the use at issue before this Court for stream flow maintenance. Any use by any person or entity other than the United States have no relevance to these proceedings. Facts alleged which pertain to other uses should be disregarded by the Court, as they are irrelevant and immaterial to the issues.

III.

ARGUMENT

A. Stream Flow Maintenance as Beneficial Use.

The United States and Participants' argument regarding stream flow maintenance as a beneficial use rests upon Chapter 15, Title 42 of the Idaho Code. Canal Companies do not dispute Chapter 15, Title 42 of the Idaho recognizes minimum stream flows can constitute a beneficial use of water. However, this statement of beneficial use is predicated upon the fact that

application for such use must be made by the Idaho Water Resource Board pursuant to the Idaho Minimum Stream Flow Act.

Appropriations of water for stream flow maintenance cannot be made by private individuals or governmental entities other than the Idaho Water Resource Board. If any person, association, municipality, county, state, or federal agency desires a minimum stream flow, a statutory procedure is provided by which they may request the Board of Water Resources consider appropriating minimum stream flow. I.C. § 42-1504. Thus, while minimum stream flows may (under the provisions of Chapter 15, Title 42) be a beneficial use, it is a beneficial use which may be held only by the Idaho Water Resource Board. In the present case, a water right issued to the United States of America for a use which can only be appropriated by the Idaho Water Resource Board is invalid under I.C. § 42-201(2) prohibiting use of public waters of the State of Idaho, except in accordance with the laws of the State of Idaho.

Participants do not appear to dispute that a water right for minimum stream flow under Chapter 15, Title 42 of the Idaho Code must be acquired by the Board of Water Resources. See Participants' Memorandum in Support of Motion for Summary Judgment, page 15. It is conceded by Participants that the Idaho Water Resource Board did not apply to the Idaho Department of Water Resources for a minimum stream flow appropriation in waters

of the Boise River, nor was a request made to the Board to make an application. Participants, at page 15 of their Memorandum, assert that the Idaho Water Resource Board has interpreted the requirements of I.C. § 42-1502 and made a decision not to seek ownership of minimum stream flow rights in the Boise River. This assertion is unsupported in the record. Participants refer to page 2 of the December 13, 1985 Minutes of the meeting of the Idaho Water Resource Board. Canal Companies are unable to locate these Minutes in the record submitted by Participants or anyone else.

B. Res Judicata/Collateral Estoppel Does Not Apply.

The United States and Participants have argued the objection of Canal Companies to the United States holding the water right for minimum instream flow is barred for failure to object to the permit and license issued to the United States. A license issued to the United States which grants a right in water for stream flow maintenance which cannot be held by the United States is not a valid water right. I.C. § 42-201(2) provides:

(2) No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

Idaho Code § 42-201(2).

A water right for stream flow maintenance to be valid must be in the name of the Idaho Water Resource Board, and it is the Board who must apply for a minimum stream flow water right. If any person or entity could appropriate waters of the state of Idaho for a minimum of stream flows, then I.C. § 42-1504 would not be needed. The legislature of the state of Idaho clearly has stated that the decision of whether or not to appropriate a minimum stream flow rests with the Idaho Water Resource Board. *Idaho Code* § 42-1504 provides in relevant part, "Any person, association, municipality, county, state or federal agency may, in writing, request the board consider the appropriation of a minimum stream flow of the unappropriated waters of any stream." *Idaho Code* § 42-1504 (Emphasis Added). Should the Board elect not pursue such an appropriation, the Board may reject the request from which there is no right of review. *Idaho Code* § 42-1504. By refusing any right of review of the decision of the Water Resource Board from a request that it appropriate a minimum stream flow, the Legislature has indicated that a right to appropriate and hold a minimum stream flow water right rests solely with the Idaho Water Resource Board, and should it reject a request, the individual or entity making the request has no recourse or right to pursue its own appropriation.

Because the water right for stream flow maintenance issued to the United States under license granted by the Idaho

Department of Water Resources is for an invalid water right, the right to challenge the validity of the water right is not barred by res judicata or collateral estoppel. The absence of objection to the United States' original permit or license, does not mean the United States can divert and store water under a water right which is not valid. Water which is diverted under an invalid water right cannot continue to be diverted and used under that right, and is subject to challenge at any time. Because the use of the water by the United States is not in accordance with the laws of the state of Idaho, the use by the United States for stream flow maintenance does not represent a valid water right. Without a valid water right, the United States cannot divert any water from a natural water course pursuant to I.C. § 42-201(2).

C. Federal Authorization for Stream Flow Maintenance.

The United States and Participants assert that Congress authorized use of Lucky Peak water for stream flow maintenance, pursuant to the Water Resources Development Act of 1976. It appears this Act is a funding bill authorizing and appropriating funds for modification of the outlet works in the Lucky Peak Dam. Even if Congress authorized minimum stream flows in the Boise River, the appropriation and use of water in the State of Idaho is determined by State water law. *United States v. Pioneer Irrig. Dist.*, 144 Idaho 109-110, 157 P.3d (2007).

A congressional authorization for funding to modify Lucky Peak Dam for stream flow maintenance cannot alter State water law and cannot purport to authorize a use of water which is invalid under Idaho State water law. Therefore, even if federal authorization exists, it cannot authorize use of water under an invalid water right in contravention of Idaho law.

IV.

CONCLUSION

Idaho law permits appropriations of water for minimum stream flow only by the Idaho Board of Water Resources. Because a water right for minimum stream flow held by the United States is invalid under Idaho law, Participants and United States' Motions for Summary Judgment should be denied. Canal Companies respectfully request this Court declare a minimum stream flow water right held by the United States is invalid under Idaho law, and, therefore, deny summary judgment sought by the United States and Participants.

RESPECTFULLY SUBMITTED this 14 day of November, 2007.

STOPPELLO & KISER
ATTORNEYS AT LAW

By 

Jerry A. Kiser, of the firm
Attorneys for Canyon County Water
Company; Farmers Union Ditch Company,
Ltd.; Middleton Irrigation Association,
Inc.; and, Middleton Mill Ditch Company

CERTIFICATE OF SERVICE: The undersigned does hereby certify that on this date he caused a true and correct copy of the within and foregoing RESPONSE TO BRIEF OF UNITED STATES AND MEMORANDUM OF ADA COUNTY AND CITY OF BOISE to be mailed by United States first-class, postage prepaid mail to the following:

BOISE PROJECT BOARD OF CONTROL
Represented by:
ALBERT P BARKER
SHELLEY M DAVIS
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139

PIONEER IRRIGATION DISTRICT
SETTLERS IRRIGATION DISTRICT
Represented by:
SCOTT L CAMPBELL
101 S CAPITOL BLVD, 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829

STATE OF IDAHO, DEPT OF F & G
Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

UNITED STATES OF AMERICA
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

ADA COUNTY
Represented by:
ERIKA E. MALMEN
PERKINS COIE LLP
251 EAST FRONT STREET
SUITE 400
BOISE, ID 83702-7310

BALLANTYNE DITCH COMPANY LTD
BOISE VALLEY IRRIGATION DITCH
EAGLE ISLAND WATER USERS ASSN
EUREKA WATER COMPANY
NAMPA & MERIDIAN IRRIGATION
NEW DRY CREEK DITCH COMPANY
SOUTH BOISE WATER COMPANY
THURMAN MILL DITCH CO
Represented by:
DANIEL V STEENSON
S BRYCE FARRIS
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773

DAVID W GEHLERT
GENERAL LITIGATION SECTION
ENVIRONMENTAL & NATURAL
RESOURCES DIV.
US DEPARTMENT OF JUSTICE
1961 STOUT ST., 8TH FLOOR
DENVER, CO 80294-1961

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

CITY OF BOISE
Represented by:
ERIKA E. MALMEN
PERKINS COIE LLP
251 EAST FRONT STREET
SUITE 400
BOISE, ID 83702-7310

DATED this 14 day of November, 2007.

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Jerry A. Kiser, of the firm Attorneys
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County Water Company; Middleton
Irrigation Association; and, Middleton
Mill Ditch Company