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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: **63-03618**

**PARTICIPANTS' RESPONSE TO
OBJECTORS' MOTIONS FOR SUMMARY
JUDGMENT**

Participants City of Boise and Ada County ("Participants"), body politics of the State of Idaho, by and through its counsel of record, Perkins Coie LLP, submit the following Response Memorandum to Pioneer Irrigation District, Settlers Irrigation District, Farmers Union Ditch Company, Canyon County Water Company, Middleton Irrigation Association, Middleton Mill Ditch Company, Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, Big Bend Irrigation District and Nampa & Meridian Irrigation District (collectively referred to herein as "the Objectors") Motions for Summary Judgment and request this Court to grant Participants' Motion for Summary Judgment in favor of affirming the Idaho Department of Water Resources ("IDWR") Director's Recommendation for Claim No. 63-03618 in this matter.

I. INTRODUCTION

This case is about a precious *public* resource, the use and ownership of which has already been determined in favor of the City and County Participants. The Objectors' Motions for Summary Judgment are flooded with legalese - yet there is a pervasive drought of any discussion regarding the practical implications of their arguments. The Objectors argue that Lucky Peak water used to keep water in the Boise River in the winter to support fish, wildlife, water quality, recreation, and aesthetics should be stored in the winter given the possibility that existing water contracts may not provide enough water for irrigation in the urbanized City of Boise and surrounding areas. Participants assert that stream flow maintenance is a recognized beneficial use under Idaho precedent no matter the owner, there is no basis for changing the nature of use from stream flow maintenance to irrigation and that the Bureau of Reclamation ("BOR") is the proper owner of legal title because stored water used for stream flow maintenance is diverted and put to beneficial use pursuant to existing license and therefore not subject to Chapter 15, Title 42 Idaho Code.

II. ARGUMENT

A. **Stream Flow Maintenance Is a Beneficial Use Regardless of Who Holds Legal Title and Chapter 15, Title 42 Idaho Code Does Not Apply.**

Objectors argue that stream flow maintenance is a beneficial use *only* if held by the Idaho Water Resources Board. There is no apparent logic to this argument that beneficial use is dependent upon who holds legal title. Objectors rely on Chapter 15, Title 42 Idaho Code ("Minimum Stream Flow Act") to support this argument. As explained in Participants' *Memorandum in Support of Motion for Summary Judgment* and the *Brief in Support of United States' Motion for Summary Judgment* and further supported by the June 18, 1984 Issue Paper prepared by IDWR Director David R. Tuthill attached as Exhibit F to the Kiser

Affidavit ("Tuthill Memo"), the storage right at issue is not subject to Chapter 15 because the water is currently appropriated and diverted under existing license. Application of the Minimum Stream Flow Act is limited to unappropriated water. Idaho Code § 42-1502; *See also Participants' Memorandum in Support of Motion for Summary Judgment* at 14-16. Because the water at issue is appropriated, the Minimum Stream Flow Act is inapplicable in the first instance.

Objectors improperly rely on the Tuthill Memo, taking a sentence out of context when they quote "A minimum stream flow water right can be approved only in the name of the Idaho Water Resources Board pursuant to the provisions of Chapter 15" to support their argument that stream flow maintenance is a beneficial use of water only when made "pursuant to the [Minimum Stream Flow Act]." *Canyon County Water Company, Farmers Union Ditch Company, LTD., Middleton Irrigation Association, Inc. and Middleton Mill Ditch Company* (hereinafter "Canal Companies") *Brief in Support of Motion for Summary Judgment* at 6-7.

Objectors ignore the very next paragraph of the Tuthill Memo which states "Lucky Peak Reservoir is not a natural body of water, and the stored quantities are not subject to the provisions of Chapter 15." Tuthill Memo at Page 2. IDWR, the agency that administers water rights in Idaho and entitled to deference, has taken the position since at least 1984 that the water at issue is not subject to Chapter 15. It is equally clear that Objectors have been aware of this since 1984, have had ample opportunities to object and yet have not raised any objections until now.

B. It is Entirely Appropriate Under Idaho Law for BOR to Hold a Right for Stream Flow Maintenance and *Smith Springs* is Inapplicable to the Instant Facts.

Since stream flow maintenance is a beneficial use and water diverted and stored

under United States' license 63-03618 is not subject to the Minimum Stream Flow Act, there is no reason under Idaho law that BOR can not hold legal title. Objectors point to *State of Idaho v. United States*, 134 Idaho 106, 996 P. 2d 806 (2000) ("*Smith Springs*") for the proposition that only the Water Resources Board may hold a water right for minimum streamflow. See, e.g., *Memorandum in Support of Nampa & Meridian Irrigation District's Motion for Summary Judgment* at 6-7. However, the facts of *Smith Springs* are not remotely analogous to the instant facts. *Smith Springs* involved a claim under the constitutional method of appropriation - not a claim pursuant to a valid existing license. In addition, there was no actual diversion of the water at issue in *Smith Springs*. The water at issue is diverted and stored under existing license and the United States is not making a claim under the constitutional method of appropriation.

C. The Memorandum of Agreement and Water Contracts Do Not Support Objectors' Argument that Irrigation is the Only Acceptable Use for Lucky Peak Storage.

Objectors point to a November 20, 1953 Memorandum of Agreement ("1953 MOA") between the Department of the Army and the Department of the Interior and water contracts with the BOR to support their argument that irrigation is the only appropriate use of uncontracted storage space. Participants counter that the 1953 MOA and contracts, to the extent they are relevant at all, clearly recognize and allow for other uses for storage water, as do federal authorizations for Lucky Peak. See, e.g., *Brief in Support of United States' Motion for Summary Judgment* at 4-5, 8-9.

The MOA contains language indicating that multi-purpose use was contemplated for Lucky Peak storage since its inception. For example, the MOA contains clauses that support achieving the "greatest multiple-purpose use" and the "maintenance of permanent pools for

the preservation and propagation of fish and wildlife." 1953 MOA at 3, 5.

D. This Court is Unable to Provide Relief for the "Nature of Use" Objections in this Case.

Even if this Court were to entertain the argument that water contracts between BOR and the Objectors are sufficient basis to revisit the United States' license, such reevaluation must occur at the administrative level. Any change in purpose of use from stream flow maintenance to irrigation is changing an element of the license. Under Idaho statute, any change in an element (or transfer) of a water right must be evaluated at the administrative level utilizing beneficial use, no injury, conservation, local public interest, and the rule against enlargement analysis. Idaho Code §§ 42-222, 42-223, 42-203. This process is separate and distinct from the SRBA process as explained in SRBA AO1 17. (3).

It is clear from the facts of this case that the Objectors' would not be able to prevail under the initial beneficial use analysis, let alone the public interest test, since Objectors' do not claim competing beneficial use of the water at issue.

E. The "Law of the Case" in the SRBA Precludes These Objections to the United States' License.

The "law of the case in the SRBA precludes the outcome of an administrative license proceeding from being collaterally attacked in the SRBA." *See In Re: SRBA Case No. 39576 (Subcase 91-63) Re: Ownership of Water Rights*, No. [31790?], Slip op. at 15 (Id. Sept. 1, 2004) and *Brief in Support of United States' Motion for Summary Judgment* at 15. It is improper for Objectors' to request that this court overturn a license that has been sanctioned by a statutorily mandated administrative process. As a practical matter, the opportunity for public participation in the administrative process is a component of compliance with Idaho law regarding transfer, and this Court is not a venue to circumvent that process and

participation.

F. Objectors Are Not and Should Not be the Owners of the Storage Right at Issue.

If Objectors were in fact the owners of the uncontracted storage used for stream flow maintenance, then prior amendment of BOR's permit/license to provide stream flow maintenance water for irrigation would not have been necessary. As evidenced by cooperation in past administrative proceedings to amend the United States' license, BOR has demonstrated flexibility and a willingness to work with Objectors to meet any unmet need for water for irrigation. The present arrangement has worked for over 40 years and there is no valid basis for arguing otherwise. *See In Re: SRBA Case No. 39576 (Subcase 91-63) Re: Ownership of Water Rights*, No. 31790, Slip op. at 15 (Id. March 9, 2007).

G. This Court Must Reject Objectors' Arguments on the Basis of Waiver and Res Judicata.

As more fully articulated in the *Brief in Support of United States' Motion for Summary Judgment* at 7-15 and in *Participants' Memorandum in Support of Motion for Summary Judgment* at 18-19, the Objectors have waived any objections to the United States' claim as they have failed to raise these objections in administrative proceedings. The doctrine of *res judicata* applies to administrative proceedings and accordingly Objectors are barred from raising the objections raised in this case.

III. CONCLUSION

It is fundamentally unjustified and unfair for the Objectors to be raising any arguments regarding the United States' license. Objectors have had *more than* ample opportunity to raise these arguments in administrative proceedings and have not done so. In any case, these arguments are without merit. Stream flow maintenance is a beneficial use of

water in Idaho and properly held by BOR because the water is diverted and put to beneficial use under existing license. The United States' license, as recommended by the agency with the expertise, IDWR, should be affirmed by this Court.

DATED: November 14, 2007

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that, on this 14 day of November, 2007, he/she/they caused to be served on the person(s) listed below in the manner shown:

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