

COPY

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

DAVID J. BARBER (ISB #2597)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 334-2690

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. 63-03618
	)	
	)	STATE OF IDAHO, DEPARTMENT OF FISH AND
	)	GAME'S, BRIEF IN OPPOSITION TO MOTIONS FOR
Case No. 39576	)	SUMMARY JUDGMENT BY VARIOUS IRRIGATION
	)	ENTITIES AND IN SUPPORT OF MOTIONS FOR
	)	SUMMARY JUDGMENT FILED BY THE UNITED
	)	STATES AND CITY OF BOISE AND ADA COUNTY
_____	)	

The State of Idaho, Department of Fish and Game, hereinafter the "IDF&G," submits this brief in opposition to the motions for summary judgment filed by the Canyon County Water Company *et al.*, by Pioneer Irrigation District and Settlers Irrigation District, by the Boise

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Project Board of Control *et. al.*; and by Nampa & Meridian Irrigation District¹ and in support of the motions for summary judgment filed by the United States and by the City of Boise and Ada County.

STATEMENT OF THE CASE

i. The Nature of the Case

This subcase proceeding involves a challenge in the Snake River Basin Adjudication to the recommendation in a Director's Report by the Idaho Department of Water Resources, hereinafter "IDWR," of a licensed water right held by the U. S. Bureau of Reclamation for diversion to storage for stream flow maintenance at Lucky Peak Dam and for release of that storage to maintain flows in the Boise River during the non-irrigation season.

ii. The Course of the Proceedings

The U. S. Bureau of Reclamation filed application no. R-35086 with the Idaho Department of Reclamation on December 18, 1957. The water was to be used for "irrigation and power for irrigation pumping." Idaho Exhibit 1. The proposed service area included the following: (1) existing project lands of the Boise Project, (2) lands of the Hillcrest Unit of the Mountain Home Division of the Snake River Project, and (3) new lands to be served by the proposed Long Tom tunnel diversion from the South Fork of the Boise River to the Mountain Home area. The Notice of Application set the date of January 27, 1958 as the last date for a timely protest to approval of the application. Idaho Exhibit 2.

Graydon W. Smith, the Attorney General for the State of Idaho in 1958, and T. J. Jones, III, Assistant Attorney General, counsel for the IDF&G, filed a timely protest to the approval of

¹ The various irrigation companies and irrigation districts are collectively referred herein as "Irrigation Entities."
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application no. R-35086 on or about January 24, 1958. Jarvis Aff., Exhibit I. Various water users also filed protests to the approval of application no. R-35086. Jarvis Aff., Exhibit J.

The U. S. Bureau of Reclamation resolved these protests by filing an amendment to application no. R-35086 on April 12, 1963. The amendment removed language about diversion of water out of the Boise River watershed and added the following remark:

This permit is issued on condition – That the yield of water from 50,000 acre feet of space be available for maintaining minimum winter time flow in the Boise River below Boise Diversion Dam under a release pattern established from time to time by the Director of the Idaho Fish and Game Department.

The State Reclamation Engineer approved this application for permit on March 20, 1964. Jarvis Aff., Exhibit II.

The U. S. Bureau of Reclamation submitted an application for amendment of the permit dated March 9, 1984. This application requested the purpose of use be amended to read as follows:

<u>Amount (acre feet)</u>	<u>Use</u>	<u>Period: From</u>	<u>To</u>
111,950	Storage for Irrigation	Jan. 1	Dec. 31
152,300	Storage for Streamflow	Jan. 1	Dec. 31
	Maintenance		
152,300	Streamflow Maintenance	Jan. 1	Dec. 31
	from Storage		
28,800	Storage for Recreation	Jan. 1	Dec. 31
111,950	Irrigation from Storage	Mar. 15	Nov. 15

Jarvis Aff., Ex. X. The last date for filing protests to the approval of this amendment was April 23, 1984. Jarvis Aff., Ex. FF. No protests were filed. Jarvis Aff., Ex. W.

In accordance with Idaho Code § 42-1737, the Idaho Water Resource Board, hereinafter the "IWRB," reviewed the amendment for approval or disapproval in Agenda Item No. 8 on December 13, 1984. Agenda Item No. 8 described the propose amendment, in part, as follows:

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Two issues the Board may wish to consider are: 'Is streamflow maintenance from storage in conformance with the State Water Plan?' and 'Should the duration of the water right be conditioned?'. In regard to the first issue, Lucky Peak Reservoir is not a natural body of water and the stored quantities are not subject to the provisions of Chapter 15, Idaho Code. Most water rights require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

...

F. Dave Rydalch, Member, moved the Board adoption that 'streamflow maintenance from storage' is a water use in conformance with the State Water Plan and recommended director approval of the application for amendment. Robert M. Hammes, Member, seconded the motion.

Motion passed by voice vote: 8 ayes, 0 Nays.

Jarvis Aff., Ex. W. The IDWR approved the application for amendment on February 14, 1985.

Jarvis Aff., Ex. X.

The U. S. Bureau of Reclamation submitted an application for amendment of the permit dated March 11, 1987. The purpose of the amendment was to provide a water supply to the Boise Board of Control to offset shortages due to construction of the powerplant at Lucky Peak Dam. Pioneer Irrigation District and Settlers Irrigation District filed protests and alleged that this proposal was "preferential treatment of one group of water users to the detriment of the protestants and other similarly situated users of Boise River water." Jarvis Aff., Ex. AA, at 2. The protests were resolved by making some additional water available to the protestants, and the application was approved May 20, 1987 subject to certain conditions. Jarvis Aff., Ex. BB.

The U. S. Bureau of Reclamation submitted an application for amendment of the permit dated July 11, 1990. The purpose of the amendment was to provide a temporary supplemental water supply to the Boise Board of Control and other water users because of water supply deficiencies in the Boise River watershed in 1990. The application was approved on November 11, 1990. Jarvis Aff., Ex. CC.

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The IDWR issued water right license no. 63-03618 on September 27, 2002. The purpose of use was described as follows:

BENEFICIAL USE	PERIOD OF USE	DIVERSION VOLUME
IRRIGATION FROM STORAGE	03/01 TO 11/15	111,950.0 AF
IRRIGATION STORAGE	01/01 TO 12/31	111,950.0 AF
RECREATION STORAGE (INACTIVE STORAGE)	01/01 TO 12/31	28,8000.0 AF
STREAMFLOW MAINTENANCE STORAGE	01/01 TO 01/01	152,300.0 AF
STREAMFLOW MAINTENANCE FROM STORAGE	01/01 TO 12/31	152,300.0 AF

Jarvis Aff., Ex. EE. The recommendation by IDWR in the Director's Report for licensed water right no. 63-3618 contained the same purpose of use description.

iii. Statement of Facts

The IDF&G incorporates by reference the Factual Background set forth on pages 4 through 14 of the Brief in Support of United States' Motion for Summary Judgment.

ISSUES PRESENTED

Do the Objections filed by the Irrigation Districts constitute an impermissible collateral attack on a water right license?

Did IDWR issue water right license no. 63-3618 in conformance with state law?

SUMMARY OF ARGUMENT

Lucky Peak Dam is the physical diversion of water for the storage of water in the reservoir formed behind that facility. The storage of water behind Lucky Peak Dam and the release of water from that facility for streamflow maintenance were first authorized in water right permit no. 63-3618 in 1964. The objections filed by the Irrigation Entities are an impermissible

collateral attack upon the water right license no. 63-3618, which was issued in 2002. The IDWR issued water right license no. 63-3618 in conformance with state law, since Lucky Peak Dam constitutes a physical diversion for that water right. Chapter 15, Title 42, Idaho does not apply, since that chapter applies to water rights where no physical diversion is contemplated.

ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The standard of review on motions for summary judgment is well established. “Summary judgment is appropriate ‘if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.’ I.R.C.P. 56(c).” *Chapin v. Linden*, 144 Idaho 393, ___, 162 P.3d 772, 774-775 (2007). “All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.” *Fenwick v. Idaho Dept. of Lands*, 144 Idaho 318, ___, 160 P.3d 757, 760 (2007); *quoting Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002). “When an action will be tried before the court without a jury, resolution of the possible conflict between the inferences is within the responsibilities of the trial court as fact finder.” 144 Idaho ___, 162 P.3d at 775.

II. THE IRRIGATION ENTITIES OBJECTION TO THE DIRECTOR’S RECOMMENDATION IS AN IMPERMISSIBLE COLLATERAL ATTACK ON LICENSED WATER RIGHT NO. 63-3618.

The SRBA District Court has considered challenges on a number of occasions to the recommendation of the IDWR in a Director’s Report for a licensed water right that seek to change elements of the licensed water right. *Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and Additional Evidence Issue* (Subcase no. 36-02708 *et al.*; December

29, 1999); *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge*, (Subcase no. 36-08099; January 11, 2000); *Memorandum Decision and Order on Cross-Motions for Summary Judgment*, (Consolidated subcase no. 91-63, September 2, 2004); *Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law*, (Subcase no. 29-11609; October 6, 2006). This Court has uniformly held that the proper forum for consideration of those challenges is the administrative proceeding that considered the initial application for permit to appropriate water. As this Court recently concluded: “[T]he binding effect of a license extends beyond the parties to the administrative proceeding and their privies.⁴ [Publication notice is given and any affected person can initiate a contested case. . . .] . . . The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.” *Id.* at 13.

Here, the use of stored water for streamflow maintenance first occurred after the State Reclamation Engineer approved this amended application for permit on March 20, 1964. If the various Irrigation Entities disagreed with the conditions of that permit, those Irrigation Entities should have sought judicial review of that administrative action by the State Reclamation Engineer. The Irrigation Entities had another opportunity for protest and judicial review of the streamflow maintenance purpose of use when the U. S. Bureau of Reclamation submitted an application for amendment to the permit dated March 9, 1984. SOC at 3. This amendment increased the amount of water used for streamflow maintenance from 50,000 acre feet per year to 152,300 acre feet per year. Yet, no protests were filed after published notice. Statement of the Case, hereinafter “SOC,” at 3.

Two other amendments also provided an opportunity for challenges to the purpose of use in 1987 and 1990. On both occasions, the Irrigation Entities sought and obtained some irrigation use of the water stored for streamflow maintenance under temporary changes in water right 63-03618 that allowed the temporary use. SOC at 4. Accordingly, the position of the Irrigation Entities, who have benefited from the streamflow maintenance storage, is that that storage is illegal and that the SRBA District Court should reverse the initial administrative decision made over forty years ago that allowed such use. The Irrigation Entities arguments come many years too late, and the SRBA District Court should follow its own precedent and reject these arguments.

III. THE IDWR'S RECOMMENDATION FOR WATER RIGHT LICENSE NO. 63-3618 IS IN CONFORMANCE WITH STATE LAW.

The IDWR issued a license for water right no. 63-3618 on September 27, 2002, which described the beneficial use as follows:

BENEFICIAL USE	PERIOD OF USE	DIVERSION VOLUME
IRRIGATION FROM STORAGE	03/01 TO 11/15	111,950.0 AF
IRRIGATION STORAGE	01/01 TO 12/31	111,950.0 AF
RECREATION STORAGE (INACTIVE STORAGE)	01/01 TO 12/31	28,8000.0 AF
STREAMFLOW MAINTENANCE STORAGE	01/01 TO 01/01	152,300.0 AF
STREAMFLOW MAINTENANCE FROM STORAGE	01/01 TO 12/31	152,300.0 AF

SOC at 5. The recommendation of IDWR in its Director's Report for water right no. 63-3618 was identical to this description.

The Irrigation Entities challenge this determination of beneficial use as being in violation of Chapter 15, Title 42, Idaho Code, because that chapter only authorizes the IWRB to apply for

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and hold water rights for instream flows in accordance with Chapter 15, Title 42 Idaho Code. The Irrigation Entities are in error because Chapter 15 does not apply to the factual situation presented by licensed water right no. 63-3618. A brief historical review will provide the context for resolving this issue.

The Idaho Legislature enacted Idaho Code § 67-4307 in 1971, which directed the Idaho Department of Parks to appropriate the unappropriated waters of Malad Canyon for “scenic beauty and recreational purposes.” The Idaho Department of Parks then filed an application to appropriate water with the Idaho Department of Water Administration, a predecessor in function of IDWR. Various water users protested the application, and three issues were identified as dispositive: “(1) Is it constitutional for a state agency to appropriate, without express constitutional authorization, the waters of a natural stream, thereby obtain a water right having priority over water rights on the same stream which may be subsequently appropriated by private parties? (2) Are the uses described in I. C. § 67-4307 (scenic beauty and recreational purposes) ‘beneficial uses which support a water appropriation under the Idaho Constitution? (3) Can there be created in Idaho a valid appropriative water right without an actual physical reduction to possession of the claimed water through an actual diversion of the water from, or artificial control of the water in, the water’s natural locus or condition.” *State, Department of Parks v. Idaho Department of Water Resources*, 96 Idaho 440, 442, 530 P.2d 924, 926 (1974). The Idaho Department of Water Administration issued a decision that reached three critical conclusions: (1) a state agency could appropriate water in Idaho; (2) recreation and aesthetic uses are beneficial uses of water; (3), the Idaho Department of Water Administration was not authorized to issue a permit to the State of Idaho, Department of Parks, since the application did not propose to divert or otherwise reduce the waters of Malad Canyon to possession. *Id.* The State of Idaho,

Department of Parks, appealed this decision regarding the requirement for a physical diversion to the district court, and participating water users cross-appealed on the first two issues. The district court denied the appeal of the various water users on the first two issues, and held that a valid appropriation could be effected in the absence of a physical diversion. The Idaho Department of Water Administration and various water users appealed, arguing, among other things, that the Idaho Constitution required a physical diversion of water for a valid appropriation. The Idaho Supreme Court affirmed the district court and held that its previous holdings regarding the requirement of a physical diversion were based on statutory requirements and not on the Idaho Constitution. 96 Idaho at 444, 530 P.2d at 928.

The Idaho Legislature added chapter 15 of Title 42, Idaho Code, to provide an express, generally applicable procedure for the appropriation of water where no physical diversion is involved. Idaho Code § 42-1502(a). Idaho Code § 42-1503 limits the applicant for such water rights to the IWRB. Here, Lucky Peak Dam constitutes the physical diversion of the water into storage behind that structure. The IWRB reviewed the proposed changes to the water right at Lucky Peak Dam and likewise concluded as follows:

Lucky Peak Reservoir is not a natural body of water and the stored quantities are not subject to the provisions of Chapter 15, Idaho Code. Most water rights require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

SOC, at 3-4; Jarvis Aff., Ex. W. The IWRB then recommended approval of the amendment because the beneficial use described as “streamflow from storage” was a water use in conformance with the State Water Plan. *Id.*

Simply put, the water rights at issue in this proceeding were perfected in accordance with Idaho law.

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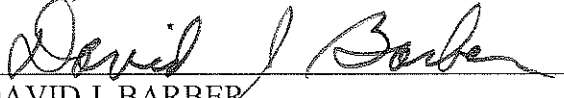
CONCLUSION

The Court should deny the objections filed by the Irrigation Entities because the objections are impermissible collateral attacks on water right license no. 63-3618. The Court should also conclude that the IDWR issued water right license no. 63-3618 in conformance with Idaho Law.

RESPECTFULLY SUBMITTED this 14th day of November 2007.

STATE OF IDAHO
LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES DIVISION



DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 14th day of November 2007, I caused to be served the original and/or copy of the STATE OF IDAHO, DEPARTMENT OF FISH AND GAME'S, BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT BY VARIOUS IRRIGATION ENTITIES AND IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT FILED BY THE UNITED STATES AND CITY OF BOISE AND ADA COUNTY on each of the following persons by the indicated method:

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Snake River Basin Adjudication
253 Third Avenue North
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Twin Falls, ID 83303-2707

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Canyon County Water Company,
Farmers Union Ditch Company, Ltd,
Middleton Irrigation Association and
Middleton Mill Ditch Company
c/o Jerry A. Kiser
STOPPELLO & KISER
620 W. Hays St.
Boise, ID 83702

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Pioneer Irrigation District and Settlers
Irrigation District
c/o Scott L. Campbell
MOFFAT THOMAS BARRETT
ROCK & FIELDS
101 S. Capitol Blvd, 10th Floor
PO Box 829
Boise, ID 83701-0829

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☐ Facsimile: _____
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Boise Project Board of Control,
New York Irrigation District,
Wilder Irrigation District, Boise-
Kuna Irrigation District, and
Big Bend Irrigation District
c/o Albert P. Barker
BARKER ROSHOLT & SIMPSON
LLP.
1010 West Jefferson, Suite 102
PO Box 2139
Boise, ID 83701-2139

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Nampa & Meridian Irrigation District
c/o Daniel V. Steenson
RINGERT CLARK CHARTERED
455 S. Third St.
P.O. Box 2773
Boise, ID 83701-2773

- ☒ U.S. Mail, postage prepaid
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- ☐ Statehouse Mail

City of Boise and Ada County
c/o Robert A. Maynard
PERKINS COIE LLP
251 East Front Street, Suite 400
Boise, ID 83702-7310

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Environment and Natural Resource
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550 West Fort Street, MSC 033
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Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable



DAVID J. BARBER
Deputy Attorney General