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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	)	Subcase No. 63-03618
	)	
Case No. 39576	)	RESPONSE BRIEF IN SUPPORT OF UNITED
	)	STATES' MOTION FOR SUMMARY
	)	JUDGMENT
_____	)	

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Introduction

At issue in this case is the license authorizing the use for streamflow maintenance of 102,300 acre feet of water stored in Lucky Peak reservoir. The license is the result of a 1985 application to amend the storage water right permit for the reservoir. The use of Lucky Peak water for streamflow maintenance had been recommended by a broad study group, which included the Boise Project Board of Control and the Nampa & Meridian Irrigation District ("NMID"). The Idaho Department of Water Resources ("IDWR") examined the application and found that water was available for streamflow maintenance use because irrigation interests had neither contracted for the water, nor ever applied it to beneficial use. Despite that, certain

irrigation interests now contend this Court must substitute its judgment for that of IDWR and re-assign the streamflow maintenance water to irrigation use. That the Court cannot do.

First, by asking this Court to substitute its judgment for that of IDWR, the irrigators demonstrate that their objections are an improper collateral attack on the license. Moreover there is no basis for the irrigators' assertion that irrigation is the paramount use of Lucky Peak water. Both Congress' actions and the 1985 Water Control Manual that now governs reservoir operations demonstrate that if there is a paramount use of Lucky Peak water, it is flood control; irrigation and streamflow maintenance are equally valid "other purposes" of the reservoir. The irrigators do not acknowledge that because they – especially Pioneer and Settlers Irrigation Districts – essentially ask this Court to ignore anything that happened after 1954.

Pioneer and Settlers rely heavily on the Corps of Engineer's 1946 report done to justify the reservoir. That report, however, anticipated that use of water from the reservoir would change as conditions changed. And change they did. The Mountain Home Project that was intended to generate the primary irrigation value from Lucky Peak was never built. In 1976 Congress directly authorized use of the reservoir to maintain the flows of the Boise River and the 1985 Water Control Manual affirmed streamflow maintenance as a use of the reservoir on par with irrigation.

Second, both the Board of Control and Pioneer and Settlers suggest that this Court's affirmation of the streamflow maintenance water right will deprive Reclamation of its ability to comply with its contractual obligations. Decades of history demonstrate that is not the case. Since 1954 Reclamation has been contractually committed to provide Anderson Ranch and Arrowrock contract holders with Lucky Peak water as compensation for any water "lost" to Anderson Ranch or Arrowrock as a result of flood control operations. Reclamation has *never*

failed to do so, even though for more than twenty years water has been officially allocated to streamflow maintenance use. This Court's reaffirming the *status quo* will not compromise Reclamation's ability to meet its contractual obligations.

Finally, as determined by both the Idaho Water Resources Board, the agency statutorily authorized to appropriate instream flow water rights, and the Idaho Department of Water Resources ("IDWR"), the agency charged with overseeing the appropriation of water, the streamflow maintenance water right is not subject to the instream flow provisions of Chapter 15 of Title 42. Lucky Peak dam itself serves as the diversion, and the water stored in Lucky Peak is not a natural body of water subject to appropriation.

In short, as demonstrated in more detail below, the irrigation objectors have failed to provide a cogent reason for this Court to disturb the decision made by IDWR more than two decades ago and relied on by the United States, the City of Boise and the citizens of Idaho ever since.

Argument

I. THE IRRIGATORS' ARGUMENTS CONFIRM THEY ARE COLLATERALLY ATTACKING THE WATER RIGHT LICENSE FOR LUCKY PEAK RESERVOIR.

The irrigation entities' briefs make two points clear: (1) their objections are in fact a collateral attack on IDWR's decision to license water stored in Lucky Peak reservoir for streamflow maintenance use; and (2) they have had repeated opportunities to object to the water right and have failed to do so.

First, the irrigation entities' objections are a collateral attack on IDWR's decision because they ask this Court to substitute its judgment for that of IDWR by re-writing the water right so that the water licensed by IDWR for stream flow maintenance use is, in effect, re-

licensed for irrigation use.^{1/} *E.g.*, Canal Companies Brief in Support of Motion for Summary Judgment at 8; Memorandum in Support of Pioneer Irrigation District's and Settler's Irrigation District's Motion For Summary Judgment ("P & S Mem.") at 37; Boise Project Board of Control Memorandum in Support of Motion for Partial Summary Judgment ("BOC Mem.") at 6.

Second, as Pioneer and Settlers' brief demonstrates, the irrigators have had numerous opportunities to challenge IDWR's approval of the water right. The brief recounts a series of actions in which IDWR addressed and confirmed the United States' streamflow maintenance water right. *See* P & S Mem. at 32-34. Although Pioneer and Settlers fail to acknowledge it, each of IDWR's actions, with the exception of the 2002 licensing, was subject to public participation and potential protest.

Thus, when the United States first submitted a permit application in 1957, public notice was provided and irrigators did in fact protest the application. In fact, the 1964 amended permit application, quoted by Pioneer and Settlers, was submitted in response to objections raised by Boise area irrigators who were concerned that the application called for exchanging water from Lucky Peak out of the Boise basin. Brief in Support of United States' Motion for Summary Judgment ("U.S. Mem.") at 7. The Idaho Department of Fish and Game ("IDF&G") also protested the 1957 permit application. At the end of the public process, IDWR approved a permit which allowed for irrigation use, but also responded to IDF&G's protest by setting aside 50,000 acre-feet for "maintaining minimum winter time flow." 1964 Permit, Exhibit II to the Affidavit of David Jarvis ("Jarvis Aff."). Similarly, IDWR's approval of the 1985 application to

^{1/} The Board of Control's position differs from that of the other irrigation entities. Rather than advocating that irrigation replace streamflow maintenance, the Board argues that the irrigation should be added as an additional use of the water licensed for streamflow maintenance. BOC Mem. at 5-6. The Board's specific arguments are addressed *infra* in Section II.B.

amend the United States' permit to expressly provide for the use of Lucky Peak water for streamflow maintenance,^{2/} and its temporary amendments of the permit in 1987 and in 1990, were all subject to public notice and again provided the irrigators with an opportunity to voice the objections they now pursue before this Court.^{3/} Cf. P & S Mem. at 33-34.

In short, while Pioneer and Settlers repeatedly contend that IDWR's approval of the use of Lucky Peak water for streamflow maintenance was "clearly beyond its authority,"^{4/} its own brief demonstrates that over a span of decades it, and all the other irrigation objectors, have had repeated opportunities to raise that objection. In each case, they failed to do so. Consequently, they are now barred from collaterally attacking the United States' license. U.S. Mem. at 15-17 (citing *e.g.*, **Memorandum Decision and Order on Challenge** (SRBA Subcase 29-11609) (Oct. 6, 2006)).

^{2/} Records from the 1985 proceedings suggest why the irrigators did not object. As is discussed *infra*, the Idaho Water Resources Board concluded that the existing Boise River valley irrigation entities could not prove they had beneficially used any of the uncontracted space. A public workshop followed (in which the Boise Project Board of Control and NMID participated) and concluded that the Lucky Peak noncontracted space should "be used for the Boise River streamflow maintenance jointly with the authorized flood control use." Idaho Water Resources Board Agenda Item No. 8, Jarvis Aff., Ex .W.

^{3/} Pioneer and Settlers even participated in the 1987 amendment proceedings. See U.S. Mem. at n.10.

^{4/} Pioneer and Settlers suggest that IDWR acted without authority because it approved the United States water right pursuant to I.C. § 42-220, rather than requiring the right to be established pursuant to the instream flow statute, I.C. § 42-1501, *et. seq.* *E.g.* P & S Mem. at 33. Pioneer and Settlers allegation is baseless because the agency has jurisdiction over both statutes. I.C. §§ 42-201(4) & 42-1503. Thus, at worst, IDWR acted in error rather than without authority. In any event, as is shown *infra*, IDWR properly found that the United States' application did not implicate the instream flow statute.

II. THERE IS NO BASIS TO REDESIGNATE THE STREAMFLOW MAINTENANCE WATER RIGHT AS AN IRRIGATION WATER RIGHT.

A. Irrigation Is Not the “Paramount” Use of Lucky Peak Water.

Pioneer and Settlers offer a truncated history^{5/} intended to demonstrate that “the original intent for the Lucky Peak Project was clearly flood control and irrigation.” P & S Mem. at 9. Those Districts further suggest that irrigation must be considered a “paramount” use of Lucky Peak water because the Corps of Engineer’s 1946 Report, undertaken to determine whether Lucky Peak could be financially justified, anticipated that after construction of the Mountain Home Project,^{6/} “the entire run-off of the Boise River will be utilized for irrigation except in extremely high run-off years.” The 1946 Report cannot be stretched to conclude that irrigation is a “paramount” use of the water stored in Lucky Peak Reservoir. Indeed, the Mountain Home Project, which the 1946 Report calculated to be the most valuable irrigation use of the reservoir, was never built.

1. The 1946 Report anticipated that the use of stored water would change in response to changing conditions.

As an initial matter, Pioneer and Settlers fail to understand the purpose of the 1946 Report. Such reports are done to estimate costs and benefits of a project in order to

^{5/} Except for passing references to their 1966 and 2005 contracts with the United States, the “history” offered by Pioneer and Settlers ends in 1954. Typical of their presentation, Pioneer and Settlers quote from their 1966 contracts without acknowledging that the 1966 contracts were “replaced by [the District’s 2005] Contract[s] and [are] no longer of any force and effect.” 2005 Contract, Campbell Aff., Ex. I, at p. 3, ¶ 7.

^{6/} Pioneer and Settlers neglect to explain that the “ultimate development” of irrigation envisioned in the 1946 Report included acreage that was to be irrigated “either directly *or indirectly* by Boise River water.” Definitive Project Report, at A-8 (attached as Exhibit G to the Affidavit of Scott L. Campbell) (emphasis added). The lands watered “indirectly” from the Boise River were those that would be irrigated via the exchange of water contemplated for the never-authorized Mountain Home project. *Id.* at A-9. Consequently, the “ultimate development” of irrigation envisioned in the report never occurred.

determine its feasibility. “[A]t most [such reports] are only a *tentative* plan for the project being initiated.” *Thetford v. United States*, 404 F.2d 301, 302 (10th Cir. 1968) (emphasis added).

Moreover, this Court need not rely on caselaw to realize the report was not intended to bind the government to any particular operational scheme; the language of the Report itself explained that operations would change over time as needs warranted:^{7/}

In the opinion of the Board [of Engineers for Rivers and Harbors], **the plan should be flexible in regard to combined operation of the reservoirs in order that the use of storage may at different times conform to changing conditions** and best serve the varying needs of the locality. It also believes that **construction should not be delayed for the time required to secure the contemplated agreements [with the irrigators].**^{8/}

1946 Report, Jarvis Aff., Ex. B, at 90 (emphases added). In short, the 1946 Report cannot be used to “read into the Act restrictions that do not exist.” *Thetford*, 404 F.2d at 302.

Here, Congress did not make irrigation a paramount use. Instead, Congress authorized Lucky Peak “for the benefit of navigation and the control of destructive flood-waters *and other purposes.*” Flood Control Act of 1946, 60 Stat. 641, 643, 650 (1946). Thus, to the extent Congress intended any purpose to be “paramount” it was clearly flood control; every other purpose was merely an “other purpose.”^{9/} Indeed, the contracts for irrigation water from Lucky

^{7/} Even so, the 1946 Report anticipated that the reservoir would be used to better conditions “for fish and wildlife by the increased regulation of streamflow.” 1946 Report, Jarvis Aff., Ex. B, at 78.

^{8/} This statement belies Pioneer and Settlers assertion that the “Corps considered the irrigators’ support as a critical component of constructing Lucky Peak.” *Cf.* P & S Mem. at 7.

^{9/} The 1946 report bears out the importance of flood control relative to other uses. The Corps estimated a total annual benefit from the construction of Lucky Peak reservoir of \$632,910, of which \$444,810 was provided by flood control and only \$96,900 from irrigation. 1946 Report, Jarvis Aff., Ex. B, at 64 & 67. Moreover, the calculation of the irrigation benefit illustrates that reduced costs for the never-authorized Mountain Home project was the primary irrigation benefit to be provided. The 1946 Report noted the then-existing shortages of irrigation water within the Boise River valley and explained that

Peak Pioneer and Settlers entered into in 2005 reiterate that the “primary purpose of [Lucky Peak] Reservoir is for flood control” and that storage of the water in the reservoir for any purpose is “[s]ubject to operations for flood control.” Campbell Aff. Ex. H at 8, ¶ 16. In short, while irrigation is no doubt an important use of Lucky Peak water, it is not an inherently “paramount” one.^{10/}

2. Congress has confirmed the use of Lucky Peak water to maintain streamflows in the Boise River.

As noted above, the 1946 Report anticipated that Lucky Peak reservoir would be used to better conditions “for fish and wildlife by the increased regulation of streamflow.” 1946 Report, Jarvis Aff., Ex. B at 78. In 1976 Congress expressly provided for Lucky Peak to be operated to maintain the flow of the Boise River. The Water Resources Development Act of 1976 authorized a second outlet structure for the dam “to assure maintenance of adequate flows along the Boise River.”^{11/} U.S. Mem. at 9 (quoting Pub. L. 94-587, 90 Stat. 2917 (1976)).

Anderson Ranch, now under construction, was planned to relieve this situation, and irrigation authorities are of the opinion that this shortage [i.e., Anderson Ranch] with contemplated trans-basin diversions always would provide adequate water for practically all lands, with the exception of some shortage in one dry season in 20.

Id. at 42. Lucky Peak was intended to provide supplemental water for Boise Valley irrigation to meet that 1 in 20 year need. *Id.* at 64-65. The Report ultimately valued the Boise Valley supplemental irrigation water at \$11,500, per year. *Id.* In contrast, the value to irrigation from reducing the pumping lift needed to deliver water to the Mountain Home project was valued at \$85,400 per year. *Id.* at 65-66.

^{10/} Indeed, not long after Lucky Peak was authorized, Boise Valley irrigators demonstrated that they understood that irrigation was not a “paramount” purpose of the reservoir. As the United States has explained, Boise basin irrigators protested the initial Lucky Peak permit application (which called for water to be exchanged into the Payette basin for the Mountain Home Project) protested the United States’ application on the grounds that irrigation was *not* a primary purpose of Lucky Peak. U.S. Mem. at 8 (citing *e.g.*, Joint Protest of Board of Control Irrigation Districts).

^{11/} Pioneer and Settlers cite to a 1976 Memoranda by a Field Solicitor within the Department of the Interior, apparently because the Field Solicitor suggested that winter time releases from

3. **The governing water control manual confirms that irrigation and streamflow maintenance are both primary uses of Lucky Peak water.**

Pioneer and Settlers' truncated history omits important events, such as the amendment of the 1953 Memorandum of Agreement they rely on. *Cf.* P & S Mem. at 22. After an extended public process, the Corps of Engineers adopted a new water control manual for Lucky Peak Reservoir in April of 1985.^{12/} The Corps and Reclamation then entered into a Memorandum of Understanding which amended the 1953 Memorandum of Agreement to adopt the new Water Control Manual as the operating plan for the reservoir system. 1985 MOU, Jarvis Aff., Ex. Y, at 2. The terms of the 1953 MOA remain in effect only to the extent they are "not inconsistent with [the 1985] Memorandum of Understanding and the Water Control Manual." *Id.* at 3, ¶ f.

The Water Control Manual directly addresses the priorities of the various uses of the reservoirs:

Flood control and irrigation are the primary uses for Anderson Ranch, Arrowrock and Lucky Peak storage spaces. Idaho Fish and Game's 50,000 acre-feet for stream flow maintenance and the noncontracted space of 102,300 acre-feet for **streamflow maintenance** and municipal and industrial uses **at Lucky Peak are also primary uses.**

Lucky Peak for power purposes would be inconsistent with the "supplemental irrigation storage potential" recognized in the 1946 Report. P & S Mem. at 16 (quoting Campbell Aff., Ex. J). The Field Solicitor's Memoranda is of no consequence here. First, like the 1946 Report, it was premised on the assumption that the proposed Mountain Home Project would one day be built. *See Id.* at 14. Second, the Memoranda represents the opinion of a single subordinate official which cannot bind the United States. *E.g., Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 740-41 (8th Cir. 2001) (Associate Solicitor not authorized to bind the United States). Third, the Field Solicitor's opinion was effectively mooted barely a month after it was offered by the Water Resources Development Act of 1976, which affirmed that Lucky Peak is authorized to maintain flows within the Boise River.

^{12/} The water control manual governs operation of the three dams and reservoirs. *Arkansas Game and Fish Com'n v. United States*, 74 Fed.Cl. 426, 428 (Fed. Cl. 2006); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1029 (8th Cir. 2003).

Water Control Manual, Jarvis Aff., Ex. Z at 7-2 (emphasis added).

In short, the Corps, Reclamation, and Congress have always contemplated that Lucky Peak water would be used for multiple uses. Moreover, it has been clear for at least two decades that using Lucky Peak water may be used to maintain the winter flows of the Boise River.

4. There is no basis to substitute irrigation for the streamflow maintenance use licensed by IDWR.

As noted above, some of the irrigation entities ask this Court to decree the United States' water right so that the water now licensed for streamflow maintenance is re-licensed as irrigation water. Both the Idaho Department of Water Resources and the Idaho Water Resources Board considered whether the then-uncommitted water should – and even could – be licensed for irrigation use.

IDWR found that there was only a “very limited” need for additional water to support irrigation within the Boise valley. IDWR began by noting that although 102,300 acre-feet of water was then uncommitted, the need to provide adequate security against flooding left relatively little water even potentially available – 30,000 acre feet according to Reclamation's estimate of the firm yield. IDWR Issue Paper at 3 (Exhibit F to Affidavit of Jerry Kiser).^{13/} Even had more water been reliably available, IDWR found the prospect of that water being used for irrigation was slight. The “primary agricultural entity to have shown interest in contracting storage space in Lucky Peak,” a group of “Dry Lake irrigators,” had found it cost prohibitive. *Id.* Moreover, history had shown that “even in a severe drought year the additional storage

^{13/} The Canal Companies' Memorandum mis-labels its exhibits. The United States identifies the exhibits according to the exhibit letters on the documents themselves rather than the letters referenced in the brief.

requirement for the irrigation of currently irrigated acres is very limited.”

While IDWR found that there was little need for irrigation water, the IWRB determined that the “the existing Boise River valley irrigation entities could not prove beneficial use for supplemental water from the uncontracted space.” *Id.* In short, the State agencies concluded there was neither a need to designate the uncontracted space for irrigation, nor any beneficial use that could provide a basis for doing so.

B. The United States Has Met its Contractual Obligations Since its Streamflow Maintenance Water Right was Permitted in 1985 Belying Board of Control’s Contention That the Streamflow Maintenance Water Right Will Impede the United States’ Ability to Continue to Do So.

In contrast to the other irrigation entities, the Board of Control does not argue that the stream flow maintenance component of the Lucky Peak storage water right must be re-designated for solely irrigation purposes. Rather, the Board argues that the streamflow maintenance component must be re-designated by this Court so the purpose of use includes irrigation as well as streamflow maintenance. BOC Mem. at 4. The Board suggests that doing so is necessary to protect the operations called for in both the 1953 MOA and in the supplemental contracts for Anderson ranch and Arrowrock storage water entered into in 1954. It is not.

Those contracts^{14/} call for Lucky Peak water to be used as “make up” water to keep the irrigators whole with respect to the water they would have received from Anderson Ranch or Arrowrock Reservoir, if the reservoirs had not been operated for flood control purposes. The United States disputes that the streamflow maintenance water right “leaves no water for the Bureau of Reclamation to use pursuant to the requirements of the 1953 Agreement

^{14/} Although this Court may consider the provisions of the contracts to the extent relevant to the water rights issues joined in this case, the construction and interpretation of the contracts themselves is not within the scope of this subcase.

and Supplemental Contracts.” *Cf.* BOC Mem at 6. As decades of history amply demonstrate, the Board is simply wrong because Reclamation’s ability to meet its contractual obligations is a matter of operational accounting, not water rights. Consequently, there is no need to re-designate the purpose of use of the streamflow maintenance water right.

The United States has examined the Lucky Peak water accounting records since coordinated operations for flood control began in 1955. In every year, the irrigators contracting for water from Anderson Ranch and Arrowrock Reservoirs have received their full entitlement of storage water. *See* Affidavit of Mary Mellema at ¶ 5. That fact belies Pioneer and Settlers unsupported assertions that the United States has “largely ignored or denied” its contractual obligations. *Cf.* P & S. Mem. at 22. It also demonstrates that the Board of Control’s argument that the United States cannot meet its obligations under the 1953 MOA and 1954 contracts without a change to the streamflow maintenance water right is without merit.

In addition to providing for streamflow maintenance use, the Lucky Peak storage water right provides that 116,250 acre feet of water from Lucky Peak will be devoted to *supplemental* irrigation use.¹⁵ That water is allocated to various irrigation entities through contracts which recognize that “[t]he primary purpose of [Lucky Peak] Reservoir is for flood control” and that the United States’ obligation to provide water for irrigation, like its ability to provide water for streamflow maintenance, is “subject to operations for flood control.” Campbell Aff., Exhibit I at p. 8, ¶ 16(a).

¹⁵ Supplemental irrigation water from Lucky Peak reservoir was expected to provide water during water short years in which Anderson Ranch and Arrowrock reservoirs do not provide sufficient water to irrigate Boise Project land. *See* 1946 Report, Jarvis Aff., Ex. B, at 65. At the time the government was evaluating whether construction of Lucky Peak was warranted, Reclamation estimated that would occur once every twenty years. *Id.* at 64-65. The Corps estimated that in two additional years there would be “minor shortages.” *Id.*

Flood control operations generally require water to be vacated from the reservoir early in the spring so that there is sufficient space in the reservoir to capture the expected run-off.^{16/} Reservoir operations deal with the same tension every spring: ensuring that enough space is available to safely capture the run-off and prevent a flood versus minimizing the release of water so that the reservoir will wind up as full as possible at the end of the run-off season. Water Control Manual, 2nd Jarvis Af, Ex. KK, at 7-2. The Water Control Manual addresses this tension directly. Recognizing that it is impossible to precisely forecast the expected run-off every year, the Manual explains that operations are to err on the side of flood control, *i.e.*, to ensure that enough water is vacated to prevent damaging floods. *Id.* at 7-17. The Manual also provides a “remedy” in the event that the flood control operations leave the reservoir with less storage than otherwise would have occurred. Under the Manual, up to 60,000 acre feet of the 102,300 acre-feet of water licensed for streamflow maintenance water is considered “last priority.”^{17/} In other words, the Manual requires that the first 60,000 acre-feet of any shortfall caused by flood control operations come from the streamflow maintenance allocation.

Over the years, Reclamation has been remarkably accurate in forecasting the spring run-off. *See* Affidavit of Mary Mellema at ¶ 5. Since the permitting of the streamflow maintenance water right in 1985, there have only been three years in which flood control operations lead to a shortfall in irrigation water and in only one of those three years did the

^{16/} Vacating water early in the spring also works to the irrigators’ advantage. They may divert any water released for flood control purposes and the water diverted is not counted against the quantity they are entitled to under their contracts. Water Control Manual, 2nd Jarvis Aff., Ex. KK at 7-26

^{17/} The same provision of the Manual emphasizes the importance of streamflow maintenance by directing that the agencies “try to refill the space because the water stored in the space is critical to maintaining minimum Boise River stream maintenance flows.” *Id.* at 7-16.

shortfall exceed 60,000 acre-feet.^{18/} *See Id.* In other words, in all but one of the years since 1985, the streamflow maintenance account bore the full brunt of any shortage. In the one year in which it did not, 1989, the shortage beyond 60,000 acre-feet was assigned proportionately among all uses, as is called for in the irrigators contracts for Lucky Peak water.^{19/}

The Lucky Peak contracts provide that “subject to operations for flood control, the United States will operate the Project so as to store under existing storage rights all available water.” *E.g.*, 2005 Settlers Contract, Campbell Aff., Ex. I, at ¶ 16 (a). Thus the contracts acknowledge that flood control operations may reduce the amount of water stored and, consequently, the amount of water available under the Lucky Peak contracts.^{20/} Further, each contract provides the contractor a “proportionate share of the stored water that accrues in each year to the active capacity of the Reservoir.”^{21/} *Id.* In other words, the contracts acknowledge that each user of water stored in Lucky Peak is to suffer a proportionate share of any water lost to flood control operations. Up until the adoption of the Water Control manual in 1985, that is exactly how the stored water was allocated. The Water Control Manual, however, reflected Reclamation and the Corps’ decision to give the irrigators a *better* deal than that called for in

^{18/} Since coordinated reservoir operations began in 1955, there have been a total of seven (7) years in which flood control operations led to a shortfall. *See Id.*

^{19/} The Board of Control errs in asserting that Lucky Peak contract water cannot be used to make up flood control shortfalls at Anderson Ranch and Arrowrock. The contracts do not include any such prohibition. After all, if Lucky Peak had been fully developed for irrigation, as the irrigators contend was originally envisioned, then *all* of the shortfall water would have come from Lucky Peak contract water.

^{20/} As was explained above, any shortfalls in water available to the Anderson Ranch and Arrowrock contracts is made up from water stored in Lucky Peak.

^{21/} The contracts also recognize that the contractors may have carry over water from prior years. *Id.*

their contracts. Instead of allocating shortages equally among all uses, Reclamation and the Corps agreed that the streamflow maintenance water would suffer the first 60,000 acre feet of shortage.

In short, Reclamation's operations since the streamflow maintenance water right was permitted in 1985 have not only been in full compliance with its contractual obligations, they have given the irrigators a greater benefit than is called for under the contracts.^{22/} This Court's re-affirming the streamflow maintenance water right would merely preserve that *status quo*.

III. IDWR PROPERLY CONFIRMED THE UNITED STATES' WATER RIGHT FOR STREAMFLOW MAINTENANCE USE PURSUANT TO CHAPTER 2 OF TITLE 42 OF THE IDAHO CODE RATHER THAN THROUGH THE INSTREAM FLOW PROGRAM, IDAHO CODE 42-1501 *ET. SEQ.*

With the exception of the Board of Control, each of the irrigation entities ask this Court to void the Lucky Peak water right license and rule that water rights for streamflow maintenance can only be established under Chapter 15 of Title 42, I.C. § 42-1501 *et. seq.*, which allows the Idaho Water Resources Board to appropriate water without a diversion. In doing so, the irrigators ask this Court to set aside a recommendation by the Idaho Water Resources Board and a decision by the Idaho Department of Water Resources, the agency given exclusive authority over the appropriation of Idaho's water. I.C. § 42-201(4). Even setting aside the fact that the irrigators are more than twenty years too late with their request, there is no basis for this

^{22/} Pioneer and Settlers assert that a 2002 letter from their Counsel to Reclamation demonstrates the "prejudice" the Districts have suffered. P & S Mem. at 24-25. It is unclear what prejudice Pioneer and Settlers believe they have suffered, but as explained above, Reclamation has fully met its contractual obligations to the irrigators. Indeed, the letter does not allege otherwise. The letter merely informed Reclamation that if any contractors did not renew their contracts, "the Districts want to be among the first considered for contracting that additional space for their supplies." P & S Mem. at 24 (quoting Campbell Aff., Ex. K). No contractors failed to renew and, as a consequence, no additional water became available.

Court to substitute its judgement for that of the IDWR because this storage water right does not fall within the scope of the instream flow statute.

First, this Court must give “considerable weight” to IDWR’s construction of the statutes. *Mason v. Donnelly Club*, 135 Idaho 581, 583 21 P.3d 903, 906 (2001). As noted above, IDWR has exclusive authority over the appropriation of water. Its decision on the United States’ application is entitled to deference because the decision is a product of the agency’s expertise. *J.R. Simplot Co., Inc. v. Idaho State Tax Commission*, 120 Idaho at 862, 820 P.2d 1206, 1219-20 (1991). Moreover, the agency reasonably construed the application as outside the scope of Chapter 15. As now-Director David Tuthill explained in a memorandum,

Lucky Peak Reservoir is not a natural body of water, and the stored quantities are not subject to the provisions of Chapter 15 [I.C. § 42-1501 et seq.]. . . . Most water rights in Idaho 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.

IDWR Issue Paper at 2 (Exhibit F to Affidavit of Jerry Kiser) (emphases added). Finally, the agency’s decision has been relied on by the United States, the City of Boise and the citizens of Idaho for decades. *Simplot*, 120 Idaho at 864, 820 P.2d at 1221.

Second, even if IDWR’s decision were not entitled to considerable deference it would have to be affirmed because it carries persuasive force. *Id.* 120 Idaho at 862-63, 820 P.2d at 1219-20. Perhaps the best evidence that IDWR was correct are the actions of the Idaho Water Resources Board, the agency charged with administering the statute the irrigators contend should have been applied. I.C. § 42-1734. As the United States discussed in its opening brief, the permit application was reviewed by the Idaho Water Resources Board pursuant to I.C. § 42-

1737.^{23/} The Board expressly considered whether the application for a streamflow maintenance water right was an improper claim to an instream flow water right, which under Idaho law, could only be held by the Board. It concluded that the application did not claim an instream flow water right and applied essentially the same rationale as IDWR: “[t]he 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.” Idaho Water Resources Board, Agenda Item No. 8, Dec. 13, 1984 (Jarvis Aff., Exhibit W).

Both agencies were on solid ground in finding that the dam is a diversion structure.^{24/} *Tulalip Tribes v. Federal Energy Regulatory Corp.*, 732 F.2d 1451 (9th Cir. 1984). In addition, both correctly recognized that water in a reservoir is not subject to appropriation. *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935). In doing so, both agencies acted in accord with the statutory definitions within Chapter 15, which restricts appropriation under that statute to “natural bodies” of water subject to appropriation under the laws of the state of Idaho.^{25/} I.C. § 42-1502(e). None of the irrigators dispute that streamflow

^{23/} I.C. § 42-1737 makes “[a]ll project proposals involving the impoundment of water in a reservoir with an active storage capacity in excess of ten thousand (10,000) acre-feet” subject to approval by the IWRB.

^{24/} Because the dam is a diversion structure, *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000), cited by NMID, is readily distinguishable. In that case the United States claimed a non-diversionary water right established under the “constitutional” method of appropriation. Here, in contrast, the United States claims a right that is premised on the diversion of water and was established pursuant to permit.

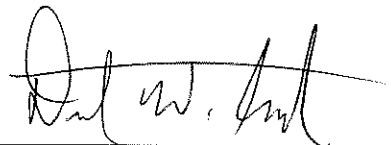
^{25/} The Idaho legislature understood that water from reservoirs would not be subject to appropriation under the statute. As the statute was being debated, Steve Allred of IDWR explained to the legislature that Chapter 15 would be a new means of appropriation, distinct from the already existing ability to “develop instream flows by storage.” Idaho House of Representatives, Resource and Conservation Committee Minutes, Jan. 17, 1978, 2d Jarvis Aff., Ex. LL, at 3.

maintenance is a beneficial use of water.^{26/} Accordingly, there is no question that the streamflow maintenance water right was properly established pursuant to Chapter 2 of Title 42 of the Idaho Code.

Conclusion

The irrigators' briefs demonstrate that they are collaterally attacking a decision made by IDWR more than two decades ago. The irrigators did not object to streamflow maintenance then and they should not be heard to do so now. Even if the irrigators' objection could properly be heard, they have no merit. The irrigators attempt to establish that irrigation is the paramount use of Lucky Peak water, but their arguments ignore critical events – such as Congress' and the 1985 Water Control Manual's affirmation of streamflow maintenance – that demonstrate otherwise. Moreover, their insinuations that Reclamation has not met, or will not be able to meet, its contractual obligations are belied by Reclamation's long history of doing so. Finally, both IDWR and the Idaho Board of Water Resources properly concluded that the streamflow maintenance water right is not subject to requirements of the instream flow water right statute.

Dated this 14th day of November 2007.



David W. Gehlert, Trial Attorney
Natural Resources Section
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^{26/} Nor could they. See U.S. Mem at 17-18.

CERTIFICATE OF SERVICE

I certify that on this 14th day of November 2007, I served a true and correct copies of the foregoing **RESPONSE BRIEF IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT, SECOND AFFIDAVIT OF DAVID A. JARVIS, and AFFIDAVIT OF MARY MELLEMA** as indicated below:

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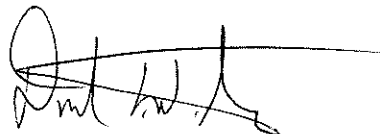
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