



U.S. Department of Justice

Environment and Natural Resources Division

DWG:DAJ

90-6-2-63c

David A. Jarvis
Labat-Anderson, Inc.
1961 Stout Street, 8th Floor
Denver, Colorado 80294

Telephone (303) 844-1485
Facsimile (303) 844-1350
E-mail: David.Jarvis2@usdoj.gov

February 14, 2008

RECEIVED

FEB 15 2008

DEPARTMENT OF
WATER RESOURCES

via FedEx Mail

Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

Re: SRBA Case No. 39576
Subcase No. 63-03618

Dear Ms. Delaney:

Enclosed for filing in the above listed subcase are the following documents:

1. **REPLY BRIEF IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT**
2. **THIRD AFFIDAVIT OF DAVID A JARVIS.**
3. **AFFIDAVIT OF ROBERT J. SUTTER**

Sincerely,

David A. Jarvis
Paralegal

Enclosures

RONALD J. TENPAS

Assistant Attorney General
Environment and Natural Resources Division

DAVID W. GEHLERT

Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado 80294
Phone: (303) 844-1386
Fax: (303) 844-1350

Counsel for the United States

**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	)	REPLY BRIEF IN SUPPORT OF THE UNITED
	)	STATES' MOTION FOR SUMMARY
	)	JUDGMENT
	)	

Introduction

The Objectors ask this Court to overturn a licensed water right first permitted by the Idaho Department of Water Resources ("IDWR") more than twenty years ago. As a threshold matter, their challenges must be barred because they are collateral attacks on the IDWR's decision to permit and license the streamflow maintenance water right. The Objectors' argument that the Director of the IDWR proceeded under the wrong statute in permitting and licensing the streamflow maintenance water right, if accepted, would obviate the water right entirely. In its decision in Subcase 91-63, this Court found that wholesale challenges to a water right such as the Objectors are improper collateral attacks which must be barred. That

conclusion applies equally here. Not only must all facial challenges to the water right be barred, but there is no persuasive reason to permit reconsideration of any of the elements of the water right.

Second, the Objectors' argument that the water right should have been established by the Idaho Water Resources Board ("IWRB") pursuant to the instream flow program in Idaho Code Title 42, Chapter 15 ignores a practical reality: without Lucky Peak Dam and Reservoir to divert and store the water, there could be no water right because the dam is necessary to divert and store the spring run off so that it can be released over the course of the winter.

Third, while the Objectors' desire to ensure that the Streamflow Maintenance water right does not interfere with their contractual entitlements is understandable, the remedy they seek – having the Streamflow Maintenance water right designated for irrigation purposes as well – is wholly unnecessary. The government's response brief explained that the irrigators have *never* been shorted the "make up" water they are entitled to under the 1953 Memorandum of Agreement and its implementing contracts. Below, we explain why: the "make up" water is not taken from the streamflow maintenance account; rather the "make up" water never goes into the streamflow maintenance account.

I. THE OBJECTIONS MUST BE BARRED BECAUSE THEY ARE IMPROPER COLLATERAL ATTACKS ON A LICENSED WATER RIGHT.

The objections must be barred because they are collateral attacks on an administrative decision by the Idaho Department of Water Resources that should have been raised more than twenty years ago. The Objectors argue they should be allowed to circumvent the process for review of state administrative decisions because their challenges fall within the exception to the rule barring collateral attacks that this Court recognized in Consolidated Subcase 91-63. To the contrary, this Court's analysis demonstrates that the objections must be barred.

First, the objections that the streamflow maintenance water right was licensed under the wrong statute, if accepted, would eviscerate the entire water right. As this Court observed, such challenges are improper collateral attacks because they “should have been raised in the prior proceedings.” Memorandum Decision and Order on Cross-Motions for Summary Judgment, SRBA Subcase No. 91-63 (Sept. 2, 2004) at 30 (“91-63 Order”). Second, the controlling law, as well as the facts are the same today as they were in 1985; therefore, there is no reason to re-examine the elements of the Lucky Peak storage water right.

A. This Court’s Decision in Subcase 91-63 Establishes that Objections Which Seek to Obviate a Licensed Water Right, as Those Here Do, are Improper Collateral Attacks Which Must be Barred.

As this Court explained in its decision in Subcase 91-63, “[t]he law of the case in the SRBA precludes the outcome of an administrative license proceeding from being collaterally attacked in the SRBA.” 91-63 Order at 12. Collateral attacks are barred because “[t]he exclusive remedy is (was) to contest the permit application in the proper administrative proceeding and if necessary through judicial review pursuant to the Administrative Procedures Act.”^{1/} *Id.* Precluding collateral attacks is especially important in an adjudication because “[f]inality in water rights is essential.” *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). That is particularly true here, where the thousands of Idahoans who have come to rely on the winter flows in the Boise River made possible by the streamflow maintenance water right are not parties to the case. *See Nevada v. United States*, 463 U.S. 110, 144 (1983).

^{1/} This Court’s recognition that the proper time to challenge a licensed water right is at the time of the permit application demonstrates that there is no merit to Nampa & Meridian Irrigation District’s suggestion that the Lucky Peak water right is not entitled to preclusive effect because the license was not formally issued until three days after the Director’s Report. *See also Matter of Permit No. 47-7680*, 114 Idaho 600, 604-05, 759 P.2d 891, 895-6 (1988) (also illustrating that the proper time to challenge IDWR’s decisions regarding a water right is at the time a permit is issued or amended).

The Objector's primary argument is that the water right should have been licensed under the instream flow program, I.C. § 42-1501 *et seq.* It is undisputed that Objectors could have brought that argument at the time application to amend its permit was approved. Indeed, both the Idaho Board of Water Resources and the Idaho Department of Water Resources expressly considered that argument – and rejected it. *See* Idaho Water Resources Board, Agenda Item No. 8, Dec. 13, 1984 (Exhibit W to the AFFIDAVIT OF DAVID A. JARVIS); IDWR Issue Paper at 2 (Exhibit F to the AFFIDAVIT OF JERRY A. KISER, dated Oct. 12, 2007) (“KISER AFFID.”).

If this Court were to reconsider the administrative agencies' decisions and accept the Objectors' argument, the consequence would be divest the United States of its water right entirely, since only the Idaho Board of Water Resources can hold a water right established under Title 42, Chapter 15.²⁷ As this Court recognized in Subcase 91-63, collateral attacks which would have the effect of stripping the license holder of his right entirely cannot be heard:

[T]o the extent the Irrigation Entities seek to obtain full title (on behalf of their members) to the subject water rights - that . . . would be a collateral attack on the prior decree or license. That issue should have been raised in the prior proceedings.

Id. at 30. Accordingly, this Court's decision in Subcase 91-63 demonstrates that the Objectors' claim that IDWR proceeded under the wrong statutory program must be barred and the streamflow maintenance water right sustained.²⁸

²⁷ The Boise Project Board of Control (“BOC”) argues that its objection merely challenges the beneficial use of the water right. BOC RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT, dated Nov. 14, 2007 at 8 (“BOC RESP. BRF.”). But it does so by arguing that the beneficial use confirmed by the license can only be made by the Idaho Water Resources Board. *Id.* at 5. Thus, the Board of Control, like the other Objectors, attacks the validity of the entire water right.

²⁸ The Objectors, particularly Pioneer and Settlers, strive mightily to avoid that conclusion by urging this Court to construe their argument that IDWR acted under the wrong statute as alleging the Director exceeded his statutory authority in violation of Idaho's constitution. That argument must fail because the Director has been tasked with implementing both water rights

B. There is No Compelling Reason to Re-examine any of the Elements of the Streamflow Maintenance Water Right.

This Court's decision in Subcase 91-63 observed that the *elements* of a licensed water right are not entirely immune from re-examination because those elements "can subsequently be changed voluntarily such as through contract or by operation of law (*i.e.*, forfeiture or abandonment)." *Id.* Some of the Objectors ask this Court to add an irrigation component to the Streamflow Maintenance water right in order to protect contractual interests established by a 1953 Memorandum of Agreement and implementing contracts.^{4/} As is explained in Section III, *infra*, there is no basis to do so because the irrigators have not made beneficial use of the streamflow maintenance water and no need to do so because the State's accounting program is hardwired to protect those contractual interests.

Even if that were not the case, the objections should be barred because the

program at I.C. § 42-201, *et seq.*, and the instream flow water rights program at I.C. § 42-1501, *et seq.* Accordingly, even if the Director had acted under the wrong program, he would merely have erred; he would not have exceeded the authority available to him by statute. Even if that were not the case, allegations that statutory authority has been exceeded are not constitutional questions. *E.g., Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-97 (1971) (distinguishing between "actions contrary to [a] constitutional prohibition," and those "merely said to be in excess of the authority delegated . . . by the Congress"). Finally, there is no merit to Pioneer and Settlers' argument that the Director violated Idaho's constitution because the permit approval was not presented for approval by "concurrent resolution of the Idaho legislature" as would have been required under the instream flow statute. *See* I.C. § 42-1503. First, as is explained *infra*, the instream flow statute is inapplicable because the streamflow maintenance water right is predicated on the diversion and storage of water. Second, the Idaho Supreme Court has repeatedly found that legislative actions taken by concurrent resolution violate the enactment and presentment provisions of the Idaho Constitution. *E.g., Idaho Power Co. v. State*, 104 Idaho 570, 574, 661 P.2d 736, 740 (1983). Indeed, in light of that, the Idaho Attorney General has concluded that I.C. § 42-1503 is itself unconstitutional. Attorney General Opinion No. 87-6 (Exhibit MM to the THIRD AFFIDAVIT OF DAVID A. JARVIS).

^{4/} The 1953 Memorandum of Agreement was attached as Exhibit E to the AFFIDAVIT OF DAVID A. JARVIS. Examples of the implementing contracts were provided at Exhibits B and C to the AFFIDAVIT OF JENNIFER A. STEVENS.

rationale which led this Court to re-examine and clarify the title issue does not apply here. In Subcase 91-63 this Court found that the title element of the water rights needed to be clarified in light of the Supreme Court's direction in *Ickes v. Fox*; some of the United States water rights had been decreed prior to the decision and even those licensed after did not reflect the decision. Here, in contrast, there is no judicial decision (re)defining an element of the water right. Moreover, in 91-63 there was a significant dispute between the parties over the terms of the governing law. Here, in contrast, there is no dispute over the terms of the governing contracts. Indeed, the United States has reiterated its commitment to the provisions of the 1953 Agreement and implementing contracts. See RESPONSE BRIEF IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT, Dated Nov. 14, 2007 at 11-12. In short, there is no compelling reason today, twenty years after the Objectors had an opportunity to protest the terms of the permit, to allow them to collaterally attack and redefine the elements of the Streamflow Maintenance water right.

II. THE LUCKY PEAK LICENSE AND WATER RIGHT DO NOT CONFLICT WITH TITLE 42, CHAPTER 15 OF THE IDAHO CODE.

Each of the irrigation entities argues that the streamflow maintenance water right for Lucky Peak cannot be affirmed because it was not licensed pursuant to the requirements of the instream flow statute found at I.C. § 42-1501 *et seq.*^{5/} Pioneer and Settlers Irrigation Districts additionally assert that the establishment of the United States water right was "backhanded" because it was done by a transfer rather than as a new appropriation. PIONEER

^{5/} Several of the irrigation entities also characterize the United States as arguing that federal law pre-empts state law and allow it to release water for streamflow maintenance purposes regardless of the storage water rights. That is not the case. Several of the objections filed suggested that the irrigators believe that Lucky Peak Reservoir is not authorized to release water for streamflow maintenance. Accordingly the United States explained the statutory basis for Lucky Peak's operation authorizes releasing water to maintain streamflows.

AND SETTLERS' RESPONSE TO UNITED STATES BUREAU OF RECLAMATION'S MOTION FOR SUMMARY JUDGMENT, dated November 14, 2007 at 11 ("P & S RESP.")).

Pioneer and Settlers' argument merely illustrates one reason why the Objectors are wrong in arguing that Lucky Peak could only have been established pursuant to the instream flow program. At the time the United States filed an application to amend its permit in 1984, it had a permit which authorized it to store up to the full content of Lucky Peak reservoir. Permit No. R 1183 (Exhibit II to the AFFIDAVIT OF DAVID A. JARVIS). Consequently, there was no water available for appropriation under Title 42, Chapter 15.

Further, there was no basis for the water right to have been established under the instream flow program. Title 42, Chapter 15, was enacted to "provide an express, generally applicable procedure for the appropriation of water *where no physical diversion is involved.*" STATE OF IDAHO, DEPARTMENT OF FISH AND GAME'S BRIEF. . . dated Nov. 14, 2007 at 10 ("STATE BRF.") (emphasis added). Here, in contrast, the natural flow of the Boise River is diverted into Lucky Peak Reservoir and stored. *See* BOC RESP. BRF. at 5-6; STATE BRF. at 5. The dam and reservoir are critical to the operation of the water right because they allow water to be captured during the high flows of the spring and stored so that it is available for use over the winter when it is needed to maintain streamflows for the benefit of fish, wildlife, recreation, aesthetics and other purposes. Thus, as the Idaho Board of Water Resources, the entity charged with administering Title 42, Chapter 15, explained "[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., Ex. W).

Only Pioneer and Settlers argue that streamflow maintenance is not a beneficial

use. P & S RESP. at 12-13. Those irrigation districts suggest that because the instream flow statute provides that the preservation of “the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality” is a beneficial use when done pursuant to the instream flow act, similar uses cannot be beneficial in any other context. *Id.* at 7. Pioneer and Settlers again miss the point.

First, as IDWR recognized in its consideration of the permit application, in light of Title 42, Chapter 15, “the precedent for recognizing such uses is established in Idaho law.” IDWR Issue Paper at 2 (KISER AFFID., Ex. F). Apart from that, the fact that providing water to protect fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality purposes, as the streamflow maintenance releases do, is a beneficial use in the context of the instream flow program, does not mean that those uses cannot be beneficial when applied to a water right predicated on the diversion of water. Indeed, if that were the case, no fish farm could establish beneficial use. *Cf. Faden v. Hubbell*, 28 P.2d 247, 250-51 (Colo. 1933) (“[i]t is self-evident that water diverted and employed for the propagation of fish is devoted to a useful purpose”).

Not surprisingly, the uses encompassed within the umbrella term “streamflow maintenance” are widely accepted as beneficial uses. As the United States explained in its opening brief, the use of water to sustain fish and wildlife is recognized as a beneficial use of water throughout the west, including Idaho. U.S. OPEN. BRF. at 16 n. 11; *Stott By and Through Dougall v. Finney*, 130 Idaho 894, 950 P.2d 709 (Idaho 1997) (dams and reservoirs serve “beneficial uses such as flood control, power generation, recreation, and providing beneficial environments for fish and wildlife”); *State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (Idaho 2000)

(the exception to requirement of a diversion for stockwater uses “does not extend to beneficial use for wildlife habitat”). Similarly, recreation and aesthetic beauty are also well established as beneficial uses. See e.g. *Phelps Dodge Corp. v. Arizona Dept. of Water*, 118 P.3d 1110, 1112 (Ariz. Ct. App. 2005) (Arizona’s statute for “general water usage rights” recognizes recreation and fish and wildlife as beneficial uses); *In re Adjudication of the Existing Rights to the Use of all of the Water, Both Surface and Underground, Within the Missouri River Drainage Area*, 55 P.3d 396 (Mont. 2002) (affirming water rights established by diverting water for fish, wildlife and recreational uses); *Hallauer v. Spectrum Properties, Inc.*, 18 P.3d 540 (Wash. 2001) (beneficial uses include fish and wildlife maintenance and enhancement, recreation and preservation of environmental and aesthetic value); see also *Idaho Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 443-444, 530 P.2d 924, 927-28 (1974) (noting that “numerous other western states have recognized through legislation that utilization of water for scenic or recreational purposes is a beneficial use.”).

In short, the streamflow maintenance component of the Lucky Peak storage water right “was perfected in accordance to Idaho law” because the dam serves as a diversion device and the water is applied to a beneficial use. See STATE BRF. at 10.

III. THERE IS NO BASIS TO DESIGNATE THE STREAMFLOW MAINTENANCE WATER RIGHT FOR IRRIGATION USE.

The final issue raised by the irrigators does not go to whether the streamflow maintenance water right should exist, but rather, whether the “purpose of use” element should include irrigation as well as streamflow maintenance. The irrigation entities claim that designation is necessary to preserve the United States’ ability to continue to meet its obligations under the 1953 Memorandum of Agreement and its implementing contracts. The United States does not dispute that the 1953 Agreement and its implementing contracts require Reclamation to

make Anderson Ranch and Arrowrock irrigation contractors whole when flood control operations leave less water in Anderson Ranch or Arrowrock Reservoirs than would have been there in the absence of flood control operations.^{6/} The Objectors' arguments, however, proceed from a fundamental misunderstanding. Contrary to their assertions, the "make up" water is not taken from the streamflow maintenance water right. Instead, IDWR's accounting program ensures that the Anderson Ranch and Arrowrock contractors are made whole before any water is made available to the streamflow maintenance account.

The AFFIDAVIT OF MARY MELLEMA explained that watermaster records demonstrate that Anderson Ranch and Arrowrock spaceholders have been kept whole in each year flood control operations have occurred since coordinated reservoir operations began in 1955. AFFIDAVIT OF MARY MELLEMA, dated Nov. 13, 2007 at ¶ 6. Ms. Mellema is a Reclamation employee and did not have the expertise to explain how IDWR's water rights accounting ensures that will happen. The attached AFFIDAVIT OF ROBERT J. SUTTER, former Hydrology Section Manager for the IDWR and author of the programs used to account for the reservoir water rights, provides that explanation.^{7/}

^{6/} Flood control operations are explained *infra*. The Board of Control argues that the contracts require Reclamation to provide water "whenever flood control activities have prevented the filling of the upstream reservoirs." BOC RESP. BRf. at 2. That is not correct. The measure is not whether the reservoirs have filled. Rather it is whether flood control operations have left less water than would have been there absent those operations. See 1954 Contracts, Exhibits B and C to the AFFIDAVIT OF JENNIFER A. STEVENS at ¶ 7(a).

^{7/} Counsel for Pioneer and Settlers' deposition of Ms. Mellema illustrated that she (like most Reclamation employees) has had no direct experience with IDWR's accounting system. The conclusions she drew however, relied on after-the-fact records and therefore did not require knowledge of the accounting process. In any event, Mr. Sutter has affirmed her conclusions and provided a detailed explanation of IDWR's water rights accounting. In the event counsel want to depose Mr. Sutter pursuant to I.R.C.P. 56(e), he can be available for deposition on February 21, or such other date as is mutually convenient for the parties.

As Mr. Sutter explains, the accounting for the project reservoir water rights is done by IDWR, in conjunction with the Boise River Watermaster, pursuant to two computer programs administered by the IDWR. One, the Accounting Program, accounts for the water rights of the three reservoirs. The second, the Allocations Program, allocates storage within each reservoir to the various spaceholders. *See* AFFIDAVIT OF ROBERT J. SUTTER at ¶ 2.

The water year for the reservoir system begins November 1. *Id.* at ¶ 3. As the reservoirs begin storing water, the Accounting Program accounts for the volume of water stored in each of the three reservoirs, but no water is allocated to individual accounts within each reservoir. *Id.* at ¶ 4. At some point, typically in April or May but sometimes as late as July, the three reservoirs reach the maximum storage credit they will achieve during the year. *Id.* at ¶ 5. Whenever that maximum storage point is reached, the Allocations Program is run to allocate the water within each reservoir to the specific accounts, including the irrigation contractors and the Streamflow Maintenance account. *Id.* Delivery of the Streamflow Maintenance water does not occur until months later in the fall. *Id.* at ¶ 11. In “normal” years where there are no flood control operations, water is allocated proportionally according to the contracts, and the specific contractual provisions the irrigation entities have raised here do not come into play. *See id.* at ¶ 6a.

The accounting process is more complicated in the years when water has been released for flood control purposes. Flood control operations occur during high water years and result in water being evacuated from the reservoirs in order to ensure that there is space available to capture the spring run off. *Id.* at ¶ 6(b). While the water is being physically released from the reservoir system, water flowing into the reservoirs is credited to the reservoirs on paper. *Id.* at ¶¶ 7-8. After the reservoir rights have filled on paper, that refill water is designated as

“unaccounted for” storage. *Id.* at ¶ 8. As the reservoirs begin to refill, the “unaccounted for” storage account continues to be credited on paper as long as excess natural flow is available to the system. *Id.* at ¶¶ 7-8. The reservoirs remain filled on paper for the duration of the season. *Id.* at 9.

Ideally, the reservoirs capture enough “unaccounted for” storage to match the paper fill in the accounting system. *Id.* at ¶8. In some years, however, more water is released for flood control than is subsequently captured from the run off. When that happens, the shortfall is termed “failure to refill due to flood control” *Id.* Regardless of where the shortfall is physically located, the Allocations Program then subtracts the “failure to refill” amount from the Lucky Peak Reservoir paper fill because Lucky Peak is the junior reservoir.^{8/} *Id.* at ¶ 10. As noted above, the Arrowrock and Anderson Ranch water rights were already filled on paper prior to the operation of the Allocations Program and remain full throughout the process. *Id.* at 9. That explains why the United States has unfailingly met its contractual obligations to the Arrowrock and Anderson Ranch spaceholders *without* having to rely on water from the Streamflow Maintenance account: IDWR’s accounting system is hardwired to ensure that Arrowrock and Anderson Ranch remain full on paper regardless of which reservoir(s) may not have physically refilled during flood control operations and regardless of the status of any account in Lucky Peak.

In short, the irrigation water needed to fulfill the United States’ contractual obligation is not taken *from* the streamflow maintenance account. Rather, the water needed for

^{8/} The accounting can ignore the physical location of the shortfall because the three reservoirs are operated as a unitary system and the contracts allow water to be provided from any of the reservoirs. *See* Act of August 24, 1954, 68 Stat. 794 (1954); *see also* AFFIDAVIT OF ROBERT J. SUTTER at ¶ 4.

the irrigation contracts never goes into the streamflow maintenance account.^{9/} Because water need for irrigation never enters the streamflow maintenance account, the irrigators do not make beneficial use of the streamflow maintenance water right and there is no basis to burden the streamflow maintenance water right with an irrigation designation.

Conclusion

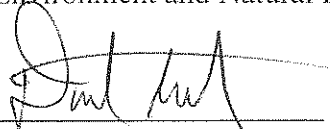
The Objectors bring collateral attacks that seek to eviscerate entirely the water right licensed to the United States. Those attacks come more than twenty years after the fact and there is no compelling reason to allow them to be heard now. Even if the objections were not required to be barred as improper collateral attacks, they must be rejected because the licensed water right was established in full conformity with Idaho law. Lucky Peak dam serves as the diversion and there is no question that fish propagation and the other uses encompassed with the streamflow maintenance label are beneficial uses under Idaho law. Finally, the United States' contractual obligations provide no basis for redefining the purpose of use element of the water right. The United States meets, and unfailingly has met, its contractual obligations, without using streamflow maintenance water for irrigation purposes, and the reservoir accounting system used by the watermaster and IDWR renders Objectors' request for relief inapposite and unnecessary.

^{9/} Moreover, the system of accounting used effectively gives the irrigators a better deal than called for under their contracts. The contracts provided that any "shortage" of storage caused by flood control operations would be split pro-rata among all water uses. 1954 Contracts, Exhibit B and C to the AFFIDAVIT OF JENNIFER A. STEVENS at ¶ 7(a). Thus under the contracts, each irrigation contractor and the streamflow maintenance account would share the shortage in direct proportion to their share of the total storage space. In contrast, under the accounting specified in the Water Control Manual, when the available water is allocated among the various accounts, 60,000 af of the streamflow maintenance account is treated as "last to fill" water. Thus, as a practical matter the first 60,000 acre-feet of any shortage is borne by the streamflow maintenance account rather than other Lucky Peak spaceholders.

Dated this 14th day of February, 2008.

Respectfully submitted,

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division

A handwritten signature in black ink, appearing to read "David W. Gehlert", written over a horizontal line.

DAVID W. GEHLERT
U.S. Department of Justice
Environment & Natural Resources Division
1961 Stout Street, 8th Floor
Denver, CO 80294
Phone: (303) 844-1386
Fax: (303) 844-1350
david.gehlert@usdoj.gov

ATTORNEYS FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I certify that on this 14th day of February 2008, I served a true and correct copies of the foregoing **REPLY BRIEF IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT, THIRD AFFIDAVIT OF DAVID A. JARVIS, and AFFIDAVIT OF ROBERT J. SUTTER** as indicated below:

via FedEx mail:

CLERK OF THE SRBA COURT (Original)
SRBA Courthouse
253 Third Ave. North
Twin Falls, Idaho 83301
Phone: (208) 736-3011

Chief, Natural Resources Division
State of Idaho
Office of the Attorney General
700 W. State Street, 2nd Floor
Boise, ID 83701

Albert P. Barker
Paul L. Arrington
Shelley M. Davis
Barker, Rosholt & Simpson LLP
205 N. 10th Street, Suite 520
Boise, ID 83709

Scott L. Campbell
Tara Martens
Moffatt Thomas Barrett Rock & Fields
Chtd.
101 S. Capitol Blvd., 10th Floor
Boise, ID 83701

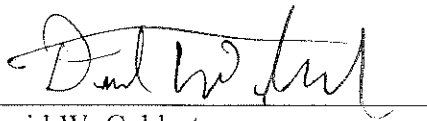
Daniel V. Steenson
S. Bryce Farris
Ringert Clark Chartered
455 S. 3rd Street
Boise, ID 83701

Jerry A. Kiser
Stoppelo and Kiser
620 West Hayes
Boise, ID 83702

Robert Maynard
Erika E. Malman
Perkins Coie LLP
251 E. Front Street, Suite 400
Boise, ID 83702-7310

Gloria Baimbridge
United States Dept. of Justice – ENRD
c/o U.S. Attorney's Off., Dist of Idaho
800 Park Blvd., Suite 600
Boise, ID 83712-9903

IDWR
Document Depository
Idaho Water Center
322 E. Front Street
Boise, ID 83701


David W. Gehlert