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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. 63-3618
)
)
) **BOISE PROJECT BOARD OF**
) **CONTROL'S REPLY TO MOTIONS**
) **FOR PARTIAL SUMMARY**
) **JUDGMENT**
)
)

COMES NOW, the Boise Project Board of Control ("BOC"), by and through its attorneys of record, Barker, Rosholt & Simpson, LLC, and submits this *Reply to Motions for Partial Summary Judgment*.

INTRODUCTION

The uncontracted storage space in Lucky Peak reservoir is recommended for storage and for "stream flow maintenance from storage." No such category of water right is recognized in the Idaho Constitution, Idaho statutory law or in IDWR procedure or regulation.¹ The only place

¹ Indeed, a review of the Department's online database shows only two water right with "stream flow maintenance from storage" as a beneficial use. Water right 63-3618 and 27-2007.

any party can cite to a “stream flow maintenance” right in Idaho is in this recommended right. Make no mistake, this is an instream flow claim – no matter what words are used.

In addition, the recommendation does not include any provision to use this right for irrigation, even though the contracts between the Reclamation and the various irrigation entities with storage space in Anderson Ranch and Arrowrock Reservoirs *expressly require* Lucky Peak storage to be made available for irrigation purposes. Reclamation admits that it has a *duty* to supply waters from Lucky Peak for irrigation, when flood releases cause there to be insufficient water for the contracted irrigation uses. *Reclamation Resp.* at 2. Inexplicably, however, Reclamation objects to any language being placed on the water right that recognizes this obligation.

Reclamation’s argument, that the Minimum Stream Flow Act, I.C. §§ 42-1501, *et seq.* (the “Act”) does not apply to this right,² continues to conflict with the law. This argument is based solely on the idea that since the waters are stored in a reservoir before they are released for stream flow maintenance, Reclamation is somehow relieved from any obligation to comply with Idaho water law relating to the beneficial use of that water. This argument is not consistent with the legislative history of the Act and conflicts with the Legislature’s practice to enact special legislation whenever an instream flow right is granted for any entity other than the Idaho Water Resource Board (“Board”).

Reclamation and all the interveners agree that this “stream flow maintenance” right is intended to be used solely in the winter to provide winter flows in the Boise River below Lucky Peak. Yet, the water right contains no constraint on the season of use. The proper season of use

² Similar arguments are made by the State of Idaho (Department of Fish & Game), the City of Boise and Ada County.

for the non-irrigation season (November 1 –March 30) should be inserted. No argument has been advanced for a year round “stream flow maintenance” right.

BOC does not challenge the use of water right 63-3618 for winter instream flow purposes. However, the water right must comply with Idaho law and must be consistent with the usage of water from Lucky Peak. First, the right must indicate each beneficial use to which the water may put, including irrigation. Second, the right must recognize that the Board is the beneficial user of the instream flow water right, as required by the Act. Third, the correct season of use must be recognized as November 1 to March 30, to be consistent with the winter instream flow purpose of the statutes. Mere assurances from Reclamation that they will comply with the contracts – even though the water right does not recognize any use for irrigation or the correct season of use – does not provide adequate protection to the property interests of the contracted space holders in Anderson Ranch and Arrowrock Reservoirs. BOC’s request is consistent with the Supreme Court’s holding in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

ARGUMENT

I. Water Right 63-3618 Must Recognize Irrigation as a Beneficial Use of the Uncontracted Storage Space

Reclamation admits that it must provide the Arrowrock and Anderson Ranch space holders with water stored in Lucky Peak if its flood control actions result in a shortage in water stored in those reservoirs. *Reclamation Resp.* at 2. The record is clear that this has been the historical practice. *Reclamation Resp.* at 2 (“Reclamation has *never* failed to” compensate “for any water ‘lost’ to Anderson Ranch or Arrowrock as a result of flood control operations”) (italics in original); *id.* at 13-14 (discussing the 60,000 acre foot “last priority” water that is last to fill whenever there is a shortfall and indicating that, since 1985, there have been 3-years “in which

flood control operations lead to a shortfall in irrigation water,” which required usage of some or all of that 60,000 acre feet).

Once a water right is decreed, it cannot be beneficially used for whatever purpose the water right owner deems appropriate. Indeed, one purpose of the SRBA is to define water rights, including the various beneficial uses to which the water may be placed. I.C. §§ 42-1409 to - 1413. Any subsequent attempt to use the water for purposes other than those specifically listed in the water right will necessitate a transfer application. *See* I.C. § 42-222. There should be no need for a transfer proceeding to provide the irrigation water to which the contractors are legally entitled. *See Pioneer, supra*. The failure to include “irrigation from storage” as a beneficial use of the uncontracted storage space creates uncertainty in the vested right of the contract holders.

Reclamation assures the Court that it will use the water for irrigation in accordance with the contracts, yet, at the same time, it objects to having the water right reflect this legal obligation. *See Reclamation Resp.* at 11-15. In *Pioneer*, the United States made a similar “trust me” argument. However, this Court and the Supreme Court both held that the water right must recognize the interests of the water delivery entities and their landowners.

Reclamation asserts that it can use the *contracted* storage space from Lucky Peak to make up for shortages caused by its flood control actions. *Reclamation Resp.* at 14 n.19 (“The [BOC] 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.”). In this argument, Reclamation contradicts the Supreme Court’s holding in *Pioneer, supra*, that contracted space holders have a property interest in their storage space. Is Reclamation suggesting that it will “take” one contractor’s space in Lucky Peak in order to comply with its obligations to deliver water to the Arrowrock and Anderson Ranch space holders

instead of providing water from uncontracted space? One hopes not. In any event, this argument demonstrates the need to recognize the irrigation obligation in the uncontracted space.

To further support its argument, Reclamation asserts that it “has been remarkably accurate in forecasting the spring run-off” for the reservoirs. *Id.* at 13. This argument is irrelevant. Past performance does not guarantee future results. There is no assurance that Reclamation will continue to operate the reservoirs with any accuracy, particularly with uncertainties inherent in potential climate change. Indeed, there is no guarantee that Reclamation’s future flood control actions will not lead to a shortage in storage water. In the 2006-2007 storage season Reclamation made a number of “flood-control storage releases” out of the reservoirs in the upper Snake River basin. *Affidavit of Ted Diehl in Support of Reply to Motions for Summary Judgment*. These releases “caused a 200,000 acre-foot shortfall in the storage accounts of the space holders at Palisades and Jackson Reservoirs.” *Id.* This error on the part of Reclamation led to a reduced storage allocation for contracted space holders in both Palisades and Jackson Reservoirs. *Id.* Reclamation cannot guarantee that the same thing will not happen in the Boise River reservoirs in the future.

Reclamation is obligated, pursuant to the contracts with the individual irrigation entities, to provide water to the storage users in Anderson Ranch and Arrowrock whenever its flood control activities prevent those storage users from receiving their full storage allotment. Water right 63-3618 must recognize this obligation and must be issued consistent with the law.

II. Absent Special Legislation, Reclamation does not have Authority to Hold an Instream Flow Water Right

There is only one relevant statute authorizing the use of water for instream flows. The Minimum Stream Flow Act provides that only the Board may beneficially use water for instream

flows. Neither Reclamation nor any of the other participants arguing otherwise have shown that the law provides any other method for acquiring such a right.

A. Legislative History of the Act Shows that only the Board may Hold Stream Flow Maintenance Water Rights

The Act was enacted in accordance with a mandate stemming from the 1976 State Water Plan ("1976 Plan"). See *Second Affidavit of Paul L. Arrington in Support of Reply to Motions for Summary Judgment* ("2nd Arrington Aff.") Ex. C. The 1976 Plan was comprised of three parts, with the second part including a list of policies – many of which would require legislative action. One such policy was a minimum stream flow provision (Policy 6). The 1976 water plan provided as follows:

*Water rights should be granted for instream flow purposes. The legislation authorizing this policy should recognize and protect existing water rights and priorities of all established rights and delegate responsibilities for determining flows and administrative authority to the Department of Water Resources. **The legislation should also direct that the Idaho Water Resources Board shall be the only applicant for instream flow.***

Instream flows are essential to many uses of the state's water resources, including hydropower production, fish and wildlife propagation, recreation and navigation.

...

The basic provisions of instream flow legislation should include:

...

9. Identify the Idaho Water Resource Board as the **only applicant** for instream flows.

Id. (italics in original) (emphasis added).

When the State water plan was presented to the Legislature for ratification on April 20, 1977, George Yost, then-chairman of the Board was available to answer questions from the Legislature. As to a question related to the minimum stream flow provisions, Mr. Yost stated:

Representative Little expressed his opinion that talk of minimum stream flow was stream flow was viewed by irrigators as a threat to their water needs. Mr. Yost explained that minimum flows were considered in the plan only for otherwise unappropriated waters. *The direction of the plan had been to require that minimum stream flow filings could only be made by the Water Resource Board in order to maintain coordination and control of such filings.* The right to water at Murphy, listed in the plan, was a right already held by Idaho Power and was not really at issue in the matter of minimum stream flows.

See *Id.* Ex. D at 6 (emphasis added). As evident from the legislative history of the Act, only the Board is authorized to hold a minimum stream flow water right in Idaho.

Since its enactment, the Act has undergone a number of amendments. See, e.g., *Id.* at Exs. E-G. At no point, however, has amendment ever been sought to allow any person or entity, other than the Board, to hold an instream flow water right. In 1991, legislation was proposed to allow private water rights to be used for instream flow purposes. *Id.* at Ex. E. However, such use was not authorized unless the water right holder first “offer[ed] to assign, grant, bequest, or devise all or part of the water right permanently or for a specified period of time to the **board.**” *Id.* at 4 (emphasis added). Again, in 1992 and 1995, amendments were sought to allow water rights owned by private individuals or entities to be used for instream flows. *Id.* at Exs. F & G. As before, those proposed amendments made clear that the rights must first be “acquire[d] or accept[ed]” by the Board. *Id.* (I.C. § 42-1506(a) in each proposed legislation). While these proposed amendments failed, they show, once again, that only the Board is authorized to hold instream flow water rights.

B. The Legislature has Historically Granted Special Authority for Stream Flow Maintenance Rights Acquired outside of the Act

It is true that certain entities other than the Board, and including Reclamation, have received statutory authority to hold certain instream flow rights in Idaho. However, such

authority has only come via special and specific authority granted by the Legislature and only in specified stream reaches. No such authority has been provided in this case.

One such example of the special legislative authority granted to a non-Board entity to appropriate waters for stream flow purposes is I.C. § 67-4307 – dealing with Malad Canyon. The State cites to this provisions as though it supports the contention that Reclamation is authorized to hold a stream flow maintenance right even, though it has not met the requirements of the Act. *See State Response* at 9-10. The State ignores the fact that no such special legislative authority has been provided to allow Reclamation to hold any stream flow maintenance water right at Lucky Peak. The legislature has authorized the use of water rights for instream flow purposes in the Lemhi, I.C. § 42-1506, and the Big Wood, *id.* at §§ 42-1508 & -1765B, but not in the Boise.

The Legislature has provided Reclamation with special authority to use water for instream flow purposes to “augment lower Snake River flows for anadromous fish listed under the endangered species act.” I.C. § 42-1763B. Section 42-1763B specifically authorizes Reclamation to rent stored water for instream flow purposes and to utilize its own uncontracted storage for the same purposes. No such legislative authority exists for stream flow releases from storage at Lucky Peak. If Reclamation and the participants’ arguments were accurate, and Reclamation could simply release water for instream flow purposes based solely on the fact that the waters were first stored behind a reservoir, then section 42-1763B would not be necessary. As is evident from the passage of this important exception, such legislation is necessary. Since no legislative authority has been provided in this case, Reclamation does not have the authority to hold an instream flow water right for water stored in Lucky Peak.

C. The Act Provides the Sole Method for Acquiring a Minimum Stream Flow Water Right in Idaho

The Minimum Stream Flow Act provides the sole authority governing the acquisition of a water right to protect instream flows. Neither Reclamation, nor any of the Participants, provides any other authorization for instream flow rights. The Act clearly recognizes that instream flow may be a beneficial use when “*made pursuant to this act.*” I.C. § 42-1501 (emphasis added). The legislature made it clear that, unless a minimum stream flow right is acquired pursuant to the terms of the Act, *it is not recognized in Idaho law.*³ Absent special legislative authority, *Idaho law does not recognize stream flow maintenance as a beneficial use, outside of the scope of the Act.* The Act makes clear that it is the “Board,” and only the Board, that has the authority to apply for and hold an instream flow water right. See I.C. §§ 42-1503 (“Whenever the *board* desires to appropriate a minimum stream flow of the unappropriated waters of any stream...”) & 42-1504 (“Any person, association ... may, in writing, *request that the board consider the appropriation* of a minimum stream flow of the unappropriated waters of any stream”) (emphasis added). Idaho has granted no such authority to private parties or the federal government. *State of Idaho v. United States*, 134 Idaho 106, 111-12, 996 P.2d 806, 811-12 (2000) (recognizing that the United States was required to comply with the Act in seeking a minimum stream flow water right).

Reclamation and the other participants continue to argue that, since the water has been stored in the reservoir, the water is no longer subject to the provisions of the Act. No law is cited to support this remarkable notion. In essence, they argue that the waters are no longer “unappropriated waters” and, therefore, can be used in any manner that Reclamation sees fit. Idaho law does not support such a view. One purpose of the SRBA is to define water rights,

³ The Participants, City of Boise and County of Ada (the “City”), wholly ignore this language. *City Response* at 2.

including the various beneficial uses to which the water may be placed. I.C. §§ 42-1409 to - 1413. Time and time again in the SRBA, this Court has decreed the beneficial use of storage water in two components: (1) the “storage” component; and (2) the subsequent beneficial use component, for example, “irrigation from storage.” Certainly, even after the water has been stored, the appropriator must still comply with Idaho law in regards to putting that water to beneficial use. This includes the Act.

Furthermore, just because water may be “appropriated” does not mean that the Board’s ownership is not longer required. As was made clear in the proposed legislative amendments to the Act in 1991, 1992 and 1995, 2nd *Arrington Aff.* Exs. E-G, even appropriated waters must be transferred to the Board before their use for instream flows would be authorized. Idaho Code section 42-1756B makes this point clear. That section, in conjunction with section 42-1508, and similar to the 1991, 1992 and 1995 proposed amendments, authorizes the use of private water rights (i.e. “appropriated” waters), in the Big Wood, for instream flow. *Id.* However, the waters must first be transferred to the Board.

Accordingly, consistent with the Court’s holding in *Pioneer, supra*, the instream flow right ***must be held*** by Reclamation for the beneficial users of the water right. Reclamation does not claim that it puts the winter instream flow right to beneficial use. That right is reserved to the Board through the Act. Water right 63-3618 must recognize that the Board is the beneficial user of the instream flow waters, not Reclamation. Otherwise there is no beneficial use consistent with Idaho law.

D. The Department Does not Have the Authority to Recommend a Water Right that is not in Accordance with Idaho Law

The Idaho Department of Water Resources is a creature of statute, created with a specific purposes and specific responsibilities. *See* I.C. §§ 42-1701 *et seq.* The Department is an

“administrative agency [] limited to the power and authority granted it by the legislature.”

Roberts v. Tran. Dept., 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991).

[W]here, as here, the legislature enacts a statute requiring that an administrative agency carry out specific functions ... that agency cannot validly subvert the legislation ... As administrative agency is limited to the power and authority granted it by the legislature. Such delegated authority is primary and exclusive in the absence of a clearly manifested expression to the contrary. An agency must exercise any authority granted by the statute within the framework of that statutory grant. It may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered.

Id. Indeed, while the “court shall not substitute its judgment for that of the agency,” the court must reject any agency action that is “in violation of constitutional or statutory provisions” or is “in excess of the statutory authority of the agency.” I.C. § 67-5279.

The Department may only act within the bounds of the statutory authority granted to it. It does not have the authority, absent a “clearly manifested expression to the contrary,” to issue a stream flow maintenance permit to Reclamation. Such a right must be held by the Board. It has not been disputed that no such special legislative authority has been granted. The recommendation for water right 63-3618 is in error and must be corrected to comply with Idaho law.

III. Water Right 63-3618 Should Recognize the Appropriate Season of Use (November 1 – March 30)

Reclamation, the State Fish & Game, the City and County and the Department all agree that this water, when released for instream flow, is to be used only in the winter or non-irrigation season. *Reclamation Br.* at 13 (recognizing that “the 50,000 acre-feet of space allocated for IDF&G ... is to provide minimum fish & wildlife stream flows below Lucky Peak Dam *during the nonirrigation season*”) (emphasis added); *Reclamation Resp.* at 10 (“[I]t 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); *State Resp.* at 2 (indicating that the “Director’s Report” was for the “diversion to storage for stream flow maintenance at Lucy Peak Dam and for release of that storage to maintain flows in the Boise River *during the non-irrigation season*”) (emphasis added); *City Br.* at 4-6 (listing as “Undisputed Facts” the various impacts of “*winter release* for stream flow maintenance in the Boise River”) (emphasis added); *City Resp.* at 2 (same). The water right recognizes no such limitation. The Court should impose a non-irrigation season of use for the portion of the right recognized for instream flow purposes.

IV. This Action is Not a Collateral Attack on a Licensed Water Right and is not Barred by Res Judicata

Reclamation and the other participants continue to argue that this action is barred by *res judicata* and that it is an impermissible collateral attack on a licensed water right. For the reasons set forth in BOC’s *Response to Motions for Summary Judgment*, BOC’s actions in this matter are not so barred. Indeed, the mere fact that water right 63-3618 was not licensed until after the Director’s Recommendation for water right 63-3618 was issued, demonstrates that such arguments are wholly without merit.

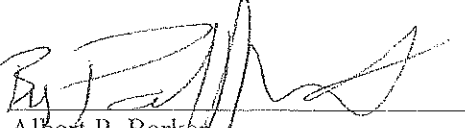
CONCLUSION

Water right 63-3618 does not comply with Idaho law. The Director’s Recommendation fails to provide Reclamation with the authority to meet its contractual obligations to delivery irrigation water. There is no legal support to contend that Reclamation has a right to hold a water right for “stream flow maintenance.” The right must recognize the Board as the beneficial user of any instream flow rights. The season of use must recognize that the right is to be used solely for winter instream flows. Since the license for water right 63-3618 was not issued until after the recommendations were released, this challenge is not a collateral attack on a license and

is not barred by *res judicata*. Accordingly, the Court should deny the City's and Bureau's motions for summary judgment, and amend the water right as suggested herein.

Dated this 15th day of February, 2008.

BARKER ROSHOLT & SIMPSON, LLP


Albert P. Barker
Attorneys for BPBOC

CERTIFICATE OF SERVICE

I certify that on February 15, 2007, I served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S REPLY TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT** via first class mail, postage paid, and addressed:

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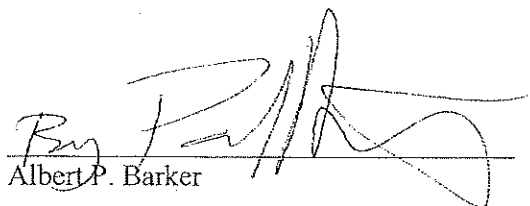
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