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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
(Lucky Peak Reservoir)

**PIONEER IRRIGATION DISTRICT'S AND
SETTLERS IRRIGATION DISTRICT'S REPLY
BRIEF**

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I. INTRODUCTION

Pioneer Irrigation District (hereinafter “Pioneer”) and Settlers Irrigation District (hereinafter “Settlers”) (collectively, the “Districts”), by and through their counsel of record, MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD., and in accordance with the Court’s Orders entered on August 3, 2007, September 5, 2007, and December 11, 2007, hereby submit this Reply Memorandum in Support of the Motion for Summary Judgment, filed with this Court by Pioneer and Settlers Irrigation Districts.

On October 15, 2007, the Districts filed their Motion for Summary Judgment, and memorandum and affidavits in support thereof. By their Motion for Summary Judgment, the Districts respectfully request this Court reject the recommendation of the Director of the Idaho Department of Water Resources (hereinafter the “Director” and “Department,” respectively) and deny Water Right A63-03618, for the purposes of “minimum instream flow storage” (in the amount of 152,300 acre feet per annum) and “minimum instream flow from storage” (in the amount of 152,300 acre feet per annum), and limit the nature of use to irrigation purposes.

Summary judgment in the Districts’ favor is proper because instream flow water use is contrary to the basis for construction of Lucky Peak Dam and Reservoir (hereinafter “Lucky Peak Project”), is contrary to the representations and guarantees made to the Districts and other irrigation entities by the Bureau of Reclamation regarding supplemental irrigation water from Lucky Peak Project, and is contrary to Idaho water law concerning minimum stream flow appropriations, namely the Idaho Minimum Stream Flow Act, codified at Chapter 15, Title 42, Idaho Code (hereinafter “MSFA”).

By this reference, the Districts hereby incorporate the following filings, both in support of its motion for summary judgment and in response to the United States' Motion for Summary Judgment and the City of Boise's and Ada County's Motion for Summary Judgment: Pioneer Irrigation District's and Settlers Irrigation District's Motion for Summary Judgment; Memorandum in Support of Pioneer Irrigation District's and Settlers Irrigation District's Motion for Summary Judgment; Affidavit of Scott L. Campbell in Support of Pioneer's and Settler's Motion for Summary Judgment (hereinafter "Campbell Aff."); and Affidavit of Jennifer A. Stevens in Support of Pioneer and Settlers Irrigation Districts' Motion for Summary Judgment (hereinafter "Stevens Aff."), filed with this Court on October 15, 2007; and Pioneer and Settlers' Response to City of Boise and Ada County's Motion for Summary Judgment; and Pioneer and Settlers' Response to United States Bureau of Reclamation's Motion for Summary Judgment, filed with this Court on November 14, 2007. Filed herewith, in support hereof, is the Affidavit of Naida Kelleher (hereinafter "Kelleher Aff.") and the Supplemental Affidavit of Scott L. Campbell in Support of Pioneer's and Settlers' Motion for Summary Judgment (hereinafter "Supp. Campbell Aff.").

In addition, the Districts join the argument in the Responsive Brief in Support of Nampa & Meridian Irrigation District's Motion for Summary Judgment, filed with this Court on or about November 14, 2007, set forth at p. 2, that this Court is not precluded from determining whether Water Right No. A63-3618 complies with Idaho Law. *See* Response Brief in Support of Nampa & Meridian Irrigation District's Motion for Summary Judgment (hereinafter "Resp. Br. in Supp. of Nampa & Meridian Mot. for Summ. J."), p. 2.

This Memorandum is supplementary to the Districts' Memorandum in Support of Motion for Summary Judgment (hereinafter "Mem. in Supp. of Pioneer and Settlers Mot. for

Summ. J.”) and in reply to the following briefs filed in this matter: State of Idaho, Department of Fish and Game’s, Brief in Opposition to Motions for Summary Judgment by Various Irrigation Entities and in Support of Motions for Summary Judgment filed by the United States and City of Boise and Ada County, filed with this Court on or about November 14, 2007; Participants’ Response to Objectors’ Motions for Summary Judgment, filed with this Court on or about November 14, 2007; and Response Brief in Support of United States’ Motion for Summary Judgment, filed with this Court on or about November 14, 2007.

II. REPLY TO OPPOSITION

A. The Districts Were Not Included In Any “Broad Study Group” Recommendation

The United States argues the “use of Lucky Peak water for stream flow maintenance had been recommended by a broad study group, which included the Boise Project Board of Control and the Nampa & Meridian Irrigation District.” Response Brief in Support of United States’ Motion for Summary Judgment (hereinafter “Resp. in Supp. of U.S. Mot. for Summ. J.”), p. 1 (November 14, 2007). Actions taken by this so-called “study group” are not determinative of the matters at issue in this case. More significant, no party has presented any evidence that the Districts received notice, participated in, or were requested or permitted to participate in any such “study group.”

B. Argument Submitted By The United States Regarding Historical Use Of Water, Which Is Void Of Legal Or Factual Support, Should Be Rejected And Disregarded

The United States argues with no factual or legal support that “changing conditions” somehow justify the illegal conversion of irrigation water rights to instream flow water rights. It cites to the failure to build the Mountain Home Project, the authorization granted

by Congress in 1976, and affirmation of stream flow maintenance “as a use of the reservoir on par with irrigation” in the 1985 Water Control Manual. Resp. in Supp. of U.S. Mot. for Summ. J., p. 2. Further, the United States argues, again with no factual or legal support, that history demonstrates the Bureau of Reclamation has complied with its contractual obligations to the Districts. Resp. in Supp. of U.S. Mot. for Summ. J., pp. 2-3. This Court should reject argument presented by the United States which lacks the requisite factual or legal support.

Specifically, without citation to the record, the United States has attempted to recreate history to suggest the Districts would have supported or allowed dramatic changes to the operating regime of Arrowrock and Anderson Ranch projects, adversely impacting their water right property interests, without additional irrigation supplies from the Lucky Peak Project. Such unsupported argument is directly disproven by the extensive historical record detailed in the Districts’ briefing in support of their motion for summary judgment. Consequently, the Court should dismissively reject the United States’ subjective, unsupported, rewrite of the historical facts.

Moreover, the United States’ criticism of the Districts for their discussion of the 1976 Field Solicitor Memorandum misses the point. Resp. in Supp. of U.S. Mot. for Summ. J., pp. 8-9, n. 11. As the Districts discuss in their memorandum in support of their motion for summary judgment, the 1976 memorandum, which analyzes various issues related to a proposal to use Lucky Peak Project for power generation, reflects the federal government’s belief at that time that the paramount purposes of Lucky Peak Project were flood control and irrigation, and that changes to the then existing operating regime would require approval of the Boise Valley irrigation entities. Mem. in Supp. of Pioneer and Settlers Mot. for Summ. J., pp. 13-17. The United States, however, argues that the memorandum cannot “bind” the United States. Resp. in

Supp. of U.S. Mot. for Summ. J., pp. 8-9, n. 11. The basis of the United States' argument is *Spirit Lake Tribe v. State of North Dakota*, 262 F.3d 732 (8th Cir. 2001).

However, the United States' reliance upon the *Spirit Lake* case is misplaced. The issue in *Spirit Lake* was whether an internal memorandum authored by a subordinate solicitor within the Department of the Interior was sufficient to legally abandon the federal government's claim to real property—in particular, the bed and banks of a lake located in North Dakota. *Id.* at 735-36, 739. Importantly, as the court noted, “[t]he Property Clause of the [U.S.] Constitution invests Congress with plenary power to dispose of real property belonging to the United States.” *Id.* at 740 (citing U.S. CONST. art. IV, § 3, cl. 2). *Spirit Lake* is therefore not applicable, as the case that is currently before this Court does not involve an alleged abandonment of property by the federal government. Even if the 1976 memorandum is not legally binding as a contractual matter, it is still persuasive evidence of the federal government's understanding of the underlying purposes of Lucky Peak Project. To simply argue that the 1976 memorandum cannot “bind” the United States is simplistic and ignores its evidentiary value.

In the present case, pursuant to Rule 30(b)(6) of the Idaho Rules of Civil Procedure, the United States designated Jerrold D. Gregg, the Area Manager for the Snake River Area Office, as the Bureau of Reclamation representative most knowledgeable of the United States' administration of and compliance with the obligations imposed upon the United States under the various contracts at issue in this case. Mr. Gregg provided testimony regarding the Bureau of Reclamation's consideration of Field Solicitor opinions. *See* Notice of Rule 30(b)(6), Idaho Rules of Civil Procedure, Deposition Duces Tecum (December 19, 2007); Supp. Campbell Aff., ¶ 3, Exhibit B (relevant portions of Volumes I and II of the transcript of the Deposition of Jerrold D. Gregg). During the course of his deposition, Mr. Gregg reviewed a copy of the

relevant Memorandum from the Boise Field Solicitor to the then Regional Planning Officer.

Id., pp. 199:25; 200:1-6. Mr. Gregg testified that in his capacity with the Bureau of Reclamation he has also requested written responses from the Field Solicitor's Office on several occasions.

Id., p. 202:6-25. Mr. Gregg further testified that such a responsive writing from the Field Solicitor's Office, whether it be legal advice, contract interpretation, legal review or research, is considered "important" because "they are our attorneys." *Id.*, pp. 205:20-25; 206:1-25.

Mr. Gregg's testimony on this point represents an additional basis to reject the argument advanced by the United States that the relevant opinion of the Field Solicitor in this matter should be disregarded. According to the representative of the Bureau of Reclamation designated by the United States as the person most knowledgeable of the administration of and compliance with the various contracts at issue in this case, such written memoranda are important advice, interpretation, research and/or review of its attorneys. *Id.*

C. Adoption Of The Water Control Manual Did Not Properly Comply With Requirements Of 1954 Supplemental Contract And 1953 Memorandum Of Agreement, And Therefore Does Not Control Or Contribute To Analysis Of Minimum Stream Flow Rights In This Matter

The United States argues the 1985 Water Control Manual now governs reservoir operations. It suggests the 1985 Water Control Manual amended the priorities of reservoir water use and the contractual obligations of the Bureau of Reclamation, contained in the 1953 Memorandum of Agreement Between the Department of the Army and the Department of the Interior incorporated into the 1954 Supplemental Contracts with the Districts. Resp. in Supp. of U.S. Mot. for Summ. J., pp. 2, 9-10. This argument is contrary to the express contractual provisions applicable to amendment of the 1953 Memorandum of Agreement, specific to operation of the reservoirs.

In the 1954 Supplemental Contracts between the Districts and the United States, the parties agreed:

The United States shall operate the net total active capacity of the reservoir system . . . during the flood control period of each year jointly for irrigation and flood control storage in accordance with the operating plan as set forth in the agreement of November 20, 1953, between the departments of the Army and Interior, a copy of which is attached hereto as Exhibit A, as that plan may be implemented by rules and regulations issued under authority of law; and the District, so far as its storage rights as defined in the existing Government-District contracts are concerned, hereby assent to such plan in substitution for the flood control plan reflected in the contract of November 10, 1943 between the United States and Pioneer [Settlers] Irrigation District.

Stevens Aff., Exhibits B and C (Supplemental Contract with Pioneer Irrigation District, dated August 3, 1954, pp. 3-4 and Supplemental Contract with Settlers Irrigation District, dated June 18, 1954, pp. 3-4, respectively).

The 1953 Memorandum of Agreement incorporated by the 1954 Supplemental Contracts with the Districts, which provided for the operating plan, contains the following Recital relevant to the understanding that changes in the method of operation might be made in the future:

WHEREAS, said report [recommendations of the Chief of Engineers in his report of May 13, 1946] concurred in the views and recommendations of the Board of Engineers for the Rivers and Harbors that Lucky Peak Reservoir be authorized for construction with the understanding that changes in the method of operation will be made in the future when the Secretary of War (now Secretary of the Army), upon the advice of the Chief of Engineers, finds that such changes *are in the best interest of flood control, irrigation, and power development*, and that they are agreeable to the Secretary of the Interior and to *the local interests concerned with flood control and use of irrigation water*;

Stevens Aff., Exhibits B and C (Memorandum of Agreement Between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs, Idaho, dated November 20, 1953, attached as Exhibit A to the Supplemental Contracts), p. 2 (emphasis added). Significantly, the provision says nothing about “instream flow maintenance.”

Potential modifications to the “method of operation” required a finding the modification was “in the best interest of flood control, irrigation, and power development” *and* the agreement of “the local interests concerned with flood control and use of irrigation water.”

Id.

Furthermore, said Memorandum of Agreement provides, at Article 7:

If operating experience indicates the desirability therefor or if justified by future changes or improvements in the Boise River system, the Chief of Engineers and the Commissioner of Reclamation or their duly authorized representatives, after consultation with the Reclamation Engineer of the State of Idaho or his authorized representative, the Watermaster, Boise River, and the Project Manager, Boise Project Board of Control, may, within the general objective of this agreement, modify from time to time the operating plan herein described with respect to allowable releases and the amount of space allocated each year to flood control on the basis of advanced forecasts of runoff. However, *no modification which would affect in any substantial way any storage rights in the reservoir system and Lake Lowell, shall be made without the concurrence of all entities having rights in the reservoir system and Lake Lowell.*

Id., p. 13 (emphasis added).

The Water Control Manual, dated April 1985, was adopted by representatives of the Bureau of Reclamation and the Chief of Engineers by a Memorandum of Understanding for Confirmation, Ratification, and Adoption of Water Control Manual, Boise River Reservoirs, Boise River, Idaho, on September 25, 1985 and June 21, 1985, respectively. Significantly, the United States presents *no* evidence of authorization or acknowledgment by the other required

entities and no evidence of concurrence by the Districts, which are clearly “entit[ies] having rights in the reservoir system.” *See* Kelleher Aff. In addition, Mr. Gregg, the representative designated by the United States as the person most knowledgeable regarding the Memorandum of Agreement, has confirmed the Districts would be included as entities “having rights in the reservoir system” for purposes of this provision. Supp. Campbell Aff., ¶ 3, Exhibit B, pp. 153:15-25; 154:1-3. Therefore, to the extent the 1985 Water Control Manual modifies storage rights or the original operating plan, those actions violate contractual rights of the Districts, and cannot be relied upon to support the asserted instream flow rights.

Consequently, the United States’ argument that the 1985 Water Control Manual “now governs reservoir operations” is contrary to the record, the contractual obligations of the United States, and the contractual rights of the Districts, and is therefore without merit. Furthermore, contrary to the United States’ position, it did *not* legally amend the 1953 Memorandum of Agreement “to adopt the new Water Control Manual as the operating plan for the reservoir system,” or to modify the priorities of the various uses of the reservoirs to maintain the winter flows of the Boise River. In short, the 1953 Memorandum of Agreement was never amended, in accordance with its terms, with the required concurrence of the Districts. *See* Kelleher Aff. And, there was no finding that instream flows in the Boise River would be in the best interest of flood control, irrigation, and power development and/or that such modifications were agreeable to the Districts, being local interests concerned with use of irrigation water. The record demonstrates the United States’ assertions are baseless.

D. The Water Resources Development Act Of 1976 Provides No Authority For Instream Flow Water Rights

Again, in its response brief, the United States argues that the Water Resources Development Act of 1976 is supportive of its position, and suggests “Congress confirmed the use of Lucky Peak water to maintain stream flows in the Boise River.” Resp. in Supp. of U.S. Mot. for Summ. J., p. 8. This argument has no merit. The Districts have previously explained that the Act of 1976 is nothing more than authorization provided to the U.S. Army Corps of Engineers to modify Lucky Peak Project’s original single discharge outlet to add the capability of releasing water into the Boise River while conducting routine maintenance on the outlet.

The United States cites to no record evidence demonstrating these outlet modifications were ever implemented. Moreover, reference to Corps of Engineers’ studies does not change the substantial and unequivocal record that flood control and irrigation water storage were the fundamental, historical bases for proceeding with construction of the Lucky Peak Project. Besides, nothing in the Act of 1976 conveys preemptive authority to the Bureau of Reclamation to create instream flow water rights contrary to the MSFA, the Idaho water law specific to minimum stream flows.

However, to reiterate the Districts’ previously briefed position, even if this Court finds some support for federal authorization of instream flows in the Boise River from the Lucky Peak Project, the Bureau of Reclamation has, nonetheless, failed to demonstrate that the relevant Director’s Report and license issued by the Department in this subcase are in compliance with the MSFA. As the Districts’ argued in their brief in support of summary judgment, pursuant to Idaho and federal authority, Idaho water law, *not* federal pronouncements, control appropriation and distribution of water from Lucky Peak Project. *See* Mem. in Supp. of Pioneer and Settlers

Mot. for Summ. J., pp. 25-26. Idaho law does not authorize creation of an instream flow water right absent adherence to the procedures of the MSFA.

E. Contrary To Its Argument, The United States Has Not Met Its Contractual Obligations To The Districts, And Testimony Of Mary Mellema Is Not Admissible

With respect to the 1954 Supplemental Contracts with the Districts (which incorporate the 1953 Memorandum of Agreement for flood control operation) the United States argues it met its contractual obligations in every year since coordinated operations for flood control began in 1955. Resp. in Supp. of U.S. Mot. for Summ. J., pp. 11-12. The United States relies upon affidavit testimony of a Bureau of Reclamation hydrologist, Mary Mellema, to support this argument. Resp. in Supp. of U.S. Mot. for Summ. J., p. 12. However, as was discovered during the course of the deposition of Ms. Mellema, she has been employed by the Bureau of Reclamation only since 2001, has no personal knowledge of flood control operations in any year other than 2006, has not reviewed or examined any contracts with the Districts, and has not examined or considered any data or calculations relevant to actual flood control operations, as required by said contracts. Supp. Campbell Aff., ¶ 2, Exhibit A (relevant portions of the transcript of Volumes I and II of the Deposition of Mary Mellema), pp. 42:6-10; 99:21-25; 100:1-12; 104:3-25; 105:1-25; 106:9-25; 107:1-4, 10-15; 108:1-14; 154:24-25; 155:1; 179:18-25; 180:1-2, 16-25; 181:1-25; 182:1-4; 183:23-24; 187:5-17; 188:8-9; 190:4-6.

In addition, Ms. Mellema did not review data regarding flood control operations in each year “since coordinated operations for flood control began in 1955.” *Id.*, pp. 107:1-25; 108:1-14. Rather, Ms. Mellema selected criteria to sort certain years and, based upon said criteria, selected the following years for analysis: 1986, 1999, 1993, 1989, 1972, 1975, 1976, 1978, and later included 1974. *Id.*, p. 158:16-20. With due respect to Ms. Mellema, certain

testimony in her affidavit, specifically related to the Bureau of Reclamation's compliance (or lack thereof) with its contractual obligations to the Districts, lacks the requisite personal knowledge and competency required for admissibility, and therefore such testimony must be disregarded.

With respect to contractual obligations owed to the Districts, Ms. Mellema testified:

Q: (BY MS. MARTENS) Do you intend to testify in this case or have you ever stated an intent to testify in this case that in every year, meaning beginning in 1955, the irrigators contracting for water from Anderson Ranch and Arrowrock Reservoirs have received their full entitlement of storage water?

A: (BY MS. MELLEMA) No.

Q: You have not reviewed the 1953 and/or 1954 contracts; correct?

A: Correct.

Q: So you will not testify that the United States can or cannot meet its obligations under those contracts; correct?

MR. GEHLERT: We have already noted that there has been no discussion of what her trial testimony will or will not be. So to ask the witness about what her intent is regarding something that has not been said serves no purpose.

MS. MARTENS: Whether it serves a purpose or not, I think she can answer my question.

THE WITNESS: Could you repeat it, please?

Q: (BY MS. MARTENS) Yes. Have you testified or do you at this point intend to testify whether or not the United States can or cannot meet its obligations under the 1953 and 1954 contracts?

A: No.

Q: At this point, and at the point you executed your affidavit, you have never even reviewed those contracts; correct?

A: Correct.

Id., pp. 191:22-25; 192:1-25; 193:1-2. Furthermore, contrary to her affidavit, other than her knowledge of the existence of the water right accounting system, Ms. Mellema's deposition testimony also demonstrates she has no real familiarity with the system or allocation of storage to various contractors; she does not use the program, she did not participate in the development of the system, she does not participate in allocation, and has never been involved in the analysis. *Id.*, pp. 115:4-25; 116:1-25; 117:1-21.

Use of affidavits in summary judgment practice is governed by Rule 56(e), Idaho Rules of Civil Procedure, which provides in relevant part:

Rule 56(e). Form of Affidavits – Further testimony –Defense required.

Supporting or opposing affidavits *shall be made on personal knowledge*, set forth such facts as would be admissible in evidence, and *shall show affirmatively that the affiant is competent to testify to the matters stated therein*. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

I.R.C.P. 56(e).

This Rule requires affidavits: (1) be based upon the affiant's personal knowledge; (2) the facts set forth therein be admissible in evidence; and (3) the affiant be competent to testify as to the matters stated within the affidavit. *Id.* The Affidavit of Mary Mellema contains statements, testimony, and/or opinions which are not based upon the affiant's personal knowledge, are beyond her competency, and are not admissible in evidence. Furthermore, to the

extent the United States attempts to rely upon statements of the affiant related to compliance with contracts she has never reviewed or evaluated, the witness is not competent to testify concerning such subjects.

The admissibility of evidence is an issue separate from whether the testimony is sufficient to raise a genuine issue of material fact to preclude summary judgment. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45 P.3d 816 (2002), citing *Kolln v. Saint Luke's Regional Medical Center*, 130 Idaho 323, 940 P.2d 1142 (1997); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994). With regard to a determination of whether testimony offered in connection with a motion for summary judgment is admissible, the liberal construction standard and reasonable inferences standards related to summary judgment determinations do not apply. *Id.* “The trial court must look at the witness’ affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, would render the testimony of the witness admissible.” *Dulaney, supra, citing Rhodehouse, supra.*

In order for the affidavit testimony and attached documents to be acceptable, the affiant must assert facts and/or opinions that are admissible into evidence and are within the affiant’s personal knowledge. In addition, the affiant must be competent to testify as to the statements or opinions. Ms. Mellema should not be allowed to testify as to the statements, testimony, and/or opinions set forth in her affidavit on the basis of lack of personal knowledge, lack of foundation, and failure to establish she is competent to testify to the statements and opinions.

Her affidavit does not provide she has personal knowledge of the matters set forth therein, and her deposition testimony makes it clear she does not have the requisite personal knowledge and/or competency. Furthermore, she did not perform the analysis attributed to her

by the United States' briefing and/or her affidavit. Ms. Mellema's affidavit fails to meet the requirements of Rule 56(e), and therefore, cannot be deemed admissible to support argument of the United States. The United States' reliance upon the testimony of Ms. Mellema to support its argument it has complied with its contractual obligations to the Districts is in error.¹

F. The United States Cannot Establish It Complied With The Contractual Guarantees Made To The Districts

Also, contrary to the United States' position that it complied with its contractual obligations to the Districts, is the United States' inability to establish compliance with the guarantees made to the Districts by the 1954 Supplemental Contracts, which provide at Paragraph 7:

Beginning with the first full flood control period after the agreement set forth in Exhibit A has become operative, there shall be a determination for each storage season as of the end of that season

(a) of the amount of water to which the District would have been entitled under its storage rights in the reservoir system and Lake Lowell under its Government-District contracts had Anderson Ranch, Arrowrock, and Lake Lowell reservoirs been operated in accordance with those contracts except for the provisions thereof relating to the use of capacity for flood control

¹ The United States has attempted to amend the Affidavit of Mary Mellema to correct paragraph 5 to include the year 1974, which Ms. Mellema had apparently previously omitted. Notice of Filing of Affidavit of Mary Mellema (February 8, 2008). Not only was the submission of the affidavit seriously delinquent in that Ms. Mellema discovered her error prior to the initial session of her deposition, but the amended affidavit also contains supplementation, reference to additional records, and amendments which were not disclosed by the accompanying Notice of Filing of Amended Affidavit of Mary Mellema. In addition, also in violation of Rule 56(e), Idaho Rules of Civil Procedure, the exhibits stated to be attached to the affidavit are not attached, and were not served with the affidavit or filed with the Court. Most significant, her amended submission does not provide her affidavit is based upon personal knowledge, does not address the issues discovered to be beyond her knowledge, review, and competency during the course of her deposition, and does not cure the Rule 56 deficiencies addressed herein. *See* Amended Affidavit of Mary Mellema (February 8, 2008). Therefore, the Amended Affidavit of Mary Mellema, and the United States reliance upon her testimony therein, fails on the same basis.

benefits and without regard to the flood control plan referred to in article 6, and

(b) of the amount of water which is credible to the storage rights of the District under its Government-District contracts taking account of actual operations under the flood control operating plan and in accordance with this supplemental contract.

If the amount under (a) exceeds that under (b), there shall be credited and made available to the District, out of the water accrued to storage rights in Lucky Peak Reservoir, an amount of stored water equal to that difference. Determinations under this article shall be by a committee of three comprising the state water master of District No. 12 A, a representative of the water users to be selected by the Boise Project Board of Control, and the officer of the United States in charge of the Boise Project; and, so far as practicable, shall be made within thirty (30) days of the end of the storage season involved.

Stevens Aff., Exhibit B (Supplemental Contract with Pioneer), pp. 4-5; Stevens Aff., Exhibit C (Supplemental Contract with Settlers), pp. 4-5.

As is discussed hereinabove, Ms. Mellema, upon whose testimony the United States relies to argue it has complied with its contractual obligations with the Districts, cannot testify regarding compliance with the above-quoted guarantee as she has no knowledge concerning the Supplemental Contracts and has never reviewed the contracts.

Similarly, Mr. Gregg, the individual designated as the representative of the Bureau of Reclamation with the most knowledge concerning compliance with the 1954 Supplemental Contracts, has no knowledge regarding whether the procedures described in the above-quoted provision were ever complied with. On this issue, Mr. Gregg testified as follows:

Q: (BY MR. CAMPBELL) To your knowledge, as the 30(b)(6) representative of the Bureau of Reclamation, do you know if the procedures that are described in the last sentence of Paragraph 7 of Exhibit 4 and 5 have ever been followed the way they are written in the documents?

A: (BY MR. GREGG) Prior to 1985? No. I mean, prior to the Water Control Manual being adopted, no. I have no knowledge of that.

Supp. Campbell Aff., ¶ 3, Exhibit B, p. 83:4-12.

The United States failure to establish its compliance with the above-quoted guarantee is further basis for a rejection of its argument that it has met its contractual obligations to the Districts.

G. United States' Argument That The Districts Have No Need For Additional Irrigation Water Is Inaccurate And Contrary To Representations, Guarantees And The Historical Context Of The Lucky Peak Project

Without factual support and contrary to requests made by irrigation water interests, the United States argues that “[s]tate agencies have determined there was neither a need to designate the uncontracted space for irrigation, nor any beneficial use that could provide a basis for doing so.” Resp. in Supp. of U.S. Mot. for Summ. J., p. 11.

It is uncontroverted, however, that no irrigation water interests (specifically including the Districts) were contacted regarding a need for additional irrigation water, and no statements were made by them indicating additional irrigation water was unnecessary. The very nature of this litigation makes it clear that the United States inaccurately represents that irrigation entities do not need additional irrigation water from the Lucky Peak Project. In addition, that assertion is directly contrary to the historical context of the construction of the Lucky Peak Project, as well as the representations and promises made to the Districts, previously detailed by the Districts’ briefing in this matter.

Finally, as is demonstrated by the letter written by the Districts’ counsel to the Bureau of Reclamation on August 27, 2002 (prior to issuance of the license and/or the Director’s Report in September 2002), quoted in the Memorandum in Support of Pioneer’s and

Settlers' Motion for Summary Judgment, at page 24, the Districts have been significantly prejudiced by the United States' refusal to comply with the purposes and guarantees underlying the construction of the Lucky Peak Project. The Districts' formal request to the Bureau of Reclamation for supplemental irrigation water stated, "in 2001, both Districts had to cease water deliveries to their landowners in the first week of September because of low water supplies after they had completely exhausted their storage supplies in Lucky Peak Reservoir . . ." and "[i]n view of the history of the Lucky Peak Reservoir project, and the primary purpose of the project for flood control and irrigation storage, the Districts believe that they should be afforded a first opportunity for contracting of any additional water supplies made available." Campbell Aff., Exhibit K.

On the basis of the foregoing, the United States' argument that the irrigation interests have no need for supplemental irrigation water from the Lucky Peak Project is inaccurate, unpersuasive, and unsupported.

H. Idaho MSFA Applies To The Bureau of Reclamation's Claimed Minimum Stream Flow Water Right

The United States, the Participants, and the State argue the MSFA does not apply to water right A63-3618. Resp. in Supp. of U.S. Mot. for Summ. J., pp. 15-18; Participants' Response to Objectors' Motions for Summary Judgment (hereinafter "Participants' Resp. to Objectors' Mot. for Summ. J."), pp. 2-3 (November 14, 2007); State of Idaho, Department of Fish and Game's Brief in Opposition to Motions for Summary Judgment by Various Irrigation Entities and in Support of Motions for Summary Judgment filed by the United States and City of Boise and Ada County (hereinafter "State Br. in Opp. to Irrig. Entities Mot. Summ. J."), pp. 8-11 (November 14, 2007). This argument ignores the plain, unambiguous language of

Section 42-203A(5), which specifically states that, “minimum stream flow water rights may not be established under the local public interest criterion, *and may only be established pursuant to chapter 15, title 42, Idaho Code.*” IDAHO CODE § 42-203A(5) (emphasis added). This language specifically incorporates the MSFA and could not be more explicit in doing so.

Despite this clear and unambiguous language, however, the United States argues that “this Court must give ‘considerable weight’ to the Department’s construction of the statutes” that the MSFA does not apply. Resp. in Supp. of U.S. Mot. for Summ. J., p. 16 (*citing Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001)). Importantly, the United States’ reliance upon the *Mason* and *Simplot* cases for such a broad proposition is conclusory, incomplete, and disingenuous.

Had the United States more thoroughly quoted from *Mason*, the content would have shown that it is only when a particular “*four-prong test* is met [that] courts must give ‘considerable weight’ to the agency’s interpretation of the statute.” *Id.*, 135 Idaho at 583, 21 P.3d at 905 (emphasis added) (*citing J.R. Simplot v. Tax Com’n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991)). More specifically:

In determining the appropriate level of deference to be given to an agency construction of a statute, we are of the opinion that a court must follow a four-prong test. The court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue The second prong of the test is that the agency’s statutory construction must be reasonable The third prong . . . is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue. An agency construction will not be followed if it contradicts the clear expressions of the legislature because ‘the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’ (*citing Chevron*, 467 U.S. at 842-43). . . [U]nder the fourth prong of the test a court must ask whether any of the rationales underlying the rule of deference are present. If the underlying rationales are absent then their absence may present

‘cogent reasons’ justifying the court in adopting a statutory construction which differs from that of the agency.

J.R. Simplot, 120 Idaho at 862, 820 P.2d at 1219.

The United States did not discuss any of the elements of this four-prong test or any of the rationales recognized by the Idaho Supreme Court for applying the rule of deference. Resp. in Supp. of U.S. Mot. for Summ. J., p. 16. Moreover, as the Idaho Supreme Court has repeatedly stated, “[i]t is fundamental that the judiciary has the ultimate responsibility to construe legislative language to determine the law.” *J.R. Simplot*, 120 Idaho at 853, 820 P.2d at 1210. Given this rule, together with the United States’ failure to establish any basis for deference, this Court is not required to defer to the Department’s construction of the MSFA, as the United States argues.

To support its position that the MSFA does not apply to the issuance of water right A63-3618, the United States, the Participants and the State rely primarily upon an “issue paper” attached to a 1984 letter from David Tuthill Jr., current Director of the Department, who was at that time supervisor of the Department’s water allocation section. The issue paper provides:

Chapter 15, Title 42, *Idaho Code* established that the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality can be considered to be beneficial uses, ***when the uses are recorded pursuant to the minimum stream flow act.*** The act can apply to ‘any lake, spring, creek, stream, river or other natural body of standing or moving water which is subject to appropriation under the laws of Idaho.’ ***A minimum stream flow water right can be approved only in the name of the Idaho Water Resource Board, pursuant to the provisions of Chapter 15.***

Lucky Peak Reservoir is not a natural body of water, and the stored quantities are not subject to the provisions of Chapter 15. Because Chapter 15 does recognize that certain instream uses can be

beneficial, however, the precedent for recognizing such uses is established in Idaho water law. 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 stream flow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

“Review of Application for Amendment of Permit No. 63-3618,” at 2, Affidavit of Jerry Kiser (hereinafter “Kiser Aff.”), Exhibit F (emphasis added).

With due respect to Director Tuthill, he is not an attorney, and the above-quoted material contains flawed legal analysis. The most critical error is the statement that, “[b]ecause [the MSFA] does recognize that certain instream uses can be beneficial, however, the precedent for recognizing such uses is established in Idaho water law.” This is flawed analysis. The MSFA *only* recognizes stream flow maintenance as a beneficial use *when the stream flow maintenance water right is obtained pursuant to the MSFA*, which specifically provides:

The preservation of the water of the streams of this state for such purposes *when made pursuant to this act* is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water.

IDAHO CODE § 42-1501 (emphasis added).

In other words, stream flow maintenance is a beneficial use of water only when the Board has applied for the water right in accordance with the applicable process and procedure and when the approval of the proposed right has undergone legislative review. *See* IDAHO CODE § 42-1503.

This statutory language is clear and unambiguous, and the United States, the State, and the Participants have not established any ambiguity. Therefore, it is unnecessary for this Court to engage in any statutory construction of the MSFA. *See, e.g., State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997) (“if the statutory

language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction”). This Court should give effect to the clearly expressed intent of the Idaho Legislature. *See, e.g., Idaho Department of Parks and Recreation v. Higginson*, 121 Idaho 819, 822-23, 828 P.2d 848, 851-52 (1992).

Here, that intent is for instream flow to be considered a beneficial use of water only when the procedures established by the MSFA are complied with, or when the Legislature specifically addresses the issue for a particular body of water. Accordingly, the Idaho MSFA provides no “precedent” for recognizing stream flow maintenance as a beneficial use in this case, because it is undisputed that the Bureau of Reclamation and the Department did not comply with the process, procedures, and legislative review required by Idaho law. Other than specific legislative statutory enactment, the MSFA provides the exclusive legal basis for issuing a proposed water right for minimum stream flows. If the process, procedures, and legislative review provisions are not followed, use of water for minimum stream flows is not a beneficial use of water. IDAHO CODE §§ 42-203(A)(5), 42-1501.

Also related to this point is the issue paper’s statement that, “[t]he dam is considered to be the diversion for a storage water right, and *if* the stream flow maintenance uses can be considered to be beneficial, a valid water right can be constituted.” Kiser Aff., Ex. F at 2, “Review of Application for Amendment of Permit No. 63-3618” (emphasis added). The Districts agree that Lucky Peak Dam is considered a diversion of water under Idaho law; however, this fact is of no legal import in the relevant analysis. More importantly, the conditional language used in the second portion of the quoted statement confirms the Districts’ position. The error in the United States’, the Participants’, and the State’s arguments is that

stream flow maintenance is *not* a beneficial use in this case because the water right was not obtained pursuant to Idaho water law, as previously explained.

The statement in the issue paper that, “Lucky Peak Reservoir is not a natural body of water, and the stored quantities are not subject to the provisions of [the MSFA],” is similarly flawed. Presumably, this is a reference to the provisions which allow the Board to apply for a stream flow maintenance right on “any lake, spring, creek, stream, river or other natural body of standing or moving water which is subject to appropriation under the laws of the state of Idaho.” IDAHO CODE §§ 42-1502, 42-1503. This is a false distinction.

First, the Boise River, itself, is a “river or other natural body of . . . moving water” covered by the MSFA. Lucky Peak Project is an impoundment of the Boise River and is therefore within the purview of the MSFA.

Second, and perhaps more critical, the purpose of the stream flow maintenance portion of the water right is to maintain minimum stream flows in the Boise River downstream of Lucky Peak Project—not to maintain minimum stream flows in Lucky Peak Project itself. Therefore, Lucky Peak Project’s status as a “natural body of standing or moving water” is completely irrelevant to whether the proposed minimum stream flow water right should have been processed pursuant to the MSFA. The purpose of the proposed water right is to maintain minimum stream flows in the Boise River downstream of Lucky Peak Project, so that downstream portion of the Boise River is the only body of water which must qualify as a “natural” body of water in order to subject it to the applicable process, procedures, and legislative review. It is undisputed that the Boise River is a “river or other natural body of . . . moving water.” Therefore, any minimum stream flow water right for the Boise River must comply with the MSFA statutory provisions.

I. Objections Are Not A Collateral Attack, *Res Judicata* Is Not Applicable To This Subcase, And The Districts Have Not Waived Their Objections

In its response brief, the United States argues the Districts' objection in this subcase constitutes a "collateral attack" on the water right license. Resp. in Supp. of U.S. Mot. for Summ. J., pp. 3-5. The Participants and the State of Idaho also rely upon this theory, together with related arguments based upon *res judicata* and waiver. Participants' Resp. to Objectors' Mot. for Summ. J., pp. 5-6; State Br. in Opp. to Irrig. Entities Mot. Summ. J., pp. 6-8. These arguments fail on several bases.

First, the Districts adopt the argument set forth in the Responsive Brief In Support of Nampa & Meridian Irrigation District's Motion for Summary Judgment, filed with this Court on or about November 14, 2007, set forth at p. 2, that this Court is not precluded from determining whether Water Right No. A63-3618 complies with Idaho Law. *See* Resp. Br. in Supp. of Nampa & Meridian Mot. for Summ. J., p. 2.

As Nampa & Meridian Irrigation District explained, the timing of the Department's issuance of the license and the Director's Report recommendation eviscerates the "collateral attack" theory advanced by the United States, the State, and the Participants. Resp. Br. in Supp. of Nampa & Meridian Mot. for Summ. J., p. 2. The Department issued the Director's Report recommendation for the Water Right on September 24, 2002. The Department issued the license for the Water Right on September 27, 2002—*after* it issued the recommendation. Campbell Aff., Exhibit P.

Before the license was issued, the United States simply had a water permit. This is critical because, as the Idaho Supreme Court has held on a number of occasions, a water permit is merely an "inchoate" or "contingent" right that ripens into a vested interest only

“following proper statutory adherence.” *See, e.g., Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 625, 636 P.2d 745 (1981); *see also Hardy v. Higginson*, 123 Idaho 485, 490-91, 849 P.2d 946, 951-52 (1993); *Big Wood Canal Company v. Chapman*, 45 Idaho 380, 263 P. 45, 52 (1927). In other words, until the license was issued, the “right” held by the United States was subject to challenge in the SRBA on its merits. And, the process for challenging the right in the SRBA was initiated prior to the Department’s issuance of the license. Therefore, the Districts’ objections cannot be a “collateral attack” on the license, because the license was issued *after* the recommendation that gives rise to this entire proceeding in the SRBA.

In addition, as explained in their response to the United States’ Motion for Summary Judgment, the Districts’ argument regarding legality of the Department’s issuance of an instream flow water right without complying with Idaho’s MSFA cannot be barred or waived because it involves separation of powers principles under the Idaho Constitution. *See Pioneer and Settlers’ Response to United States Bureau of Reclamation’s Motion for Summary Judgment*, pp. 14-15 (November 14, 2007). A specific requirement, applicable to the approval of any minimum stream flow water right application in Idaho, is that the Department submits the application for review by the Idaho Legislature, which retains the right to approve or reject the application:

Approved applications shall be submitted to each legislature by the fifth legislative day of each regular session, and: (i) shall not become finally effective until affirmatively acted upon by concurrent resolution of the Idaho legislature; or (ii) except that if the legislature fails to act prior to the end of the regular session to which the application was submitted, the application shall be considered approved.

IDAHO CODE § 42-1503.

Here, it is undisputed the Department failed to submit the approved permit amendment for review by the Idaho Legislature, as required. The failure to do so was not only a violation of Section 42-1503 itself, but also of the Idaho Constitution, which provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

IDAHO CONST. art. II, § 1.

Pursuant to this Article, the Idaho Constitution specifically prohibits one branch of government from exercising the powers that belong to another branch of government. *Id.* By allowing the permit amendment and issuing the license without having submitted the approved minimum stream flow application for legislative approval as required, the Department was essentially “exercis[ing] . . . powers properly belonging to” the Idaho Legislature. This is a direct violation of the separation of powers provision quoted above. *See State v. Lukens*, 48 Idaho 357, 283 P. 527, 528 (Idaho 1929) (“it is the duty of an official whose action . . . is prescribed [by a legislative enactment] to abide by its terms”). As such, the issuance of the license, which included the instream flow use, is a fundamental constitutional error that is ongoing. *Id.*

On this point, the Ninth Circuit Court of Appeals has confirmed the Districts’ arguments, writing:

On its most fundamental plane, the separation of powers doctrine protects the whole constitutional structure by requiring that each branch retain its essential powers and independence. . . . Statutes or governmental actions which violate the separation of powers doctrine in its systemic aspect should be invalidated, as a general rule, *despite waiver by affected private parties*.

Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 544 (9th Cir. 1984) (emphasis added).

The Idaho MSFA requires that any minimum stream flow water right undergo Legislative review and approval. IDAHO CODE § 42-1503. It is undisputed that the Department—an administrative agency within the executive branch of government—issued a minimum stream flow water right to the Bureau of Reclamation without submitting the application to the Legislature. This was, therefore, a usurpation of power from the Legislature, which violates separation of powers principles under the Idaho Constitution.

Accordingly, while the Districts disagree with the suggestion that they have waived their objections in this matter, even in the event waiver could be established, the violation of the mandates of the MSFA, requiring consent of the Idaho Legislature, must be reviewed. As the Districts have already asserted (and pursuant to Ninth Circuit authority), this Court must address the violation because it is a fundamental issue that relates to the constitutional structure of government.

The United States', the Participants', and the State's assertions that the Districts' objection should be barred as a "collateral attack" on the license is also ineffective for another reason. The MSFA specifically provides, in pertinent part:

Upon the receipt of an application filed under the provisions of [MSFA], the director shall forward a copy thereof to the departments of fish and game, environmental quality, parks and

recreation, *and any other public entity likely to have an interest or knowledge in the matter.*

IDAHO CODE § 42-1503 (emphasis added).

In other words, the MSFA requires a heightened level of Due Process that exceeds mere publication notice; it specifically requires the Department to provide a copy of a minimum stream flow water right application to “any other public entity likely to have an interest or knowledge in the matter.” *Id.* As irrigation districts formed pursuant to Title 43 of the Idaho Code, the Districts qualify as “public entities” for the purposes of Section 42-1503. *See, e.g., Indian Cove Irr. Dist. v. Prideaux*, 25 Idaho 112, 136 P. 618, 621 (1913) (“[i]t is settled law that irrigation districts are public corporations although not strictly municipal. . . .”); *Little Willow Irr. Dist. v. Haynes*, 24 Idaho 317, 133 P. 905, 906 (1913) (“under the law of this state an irrigation district, when created in accordance with the statute, becomes a quasi municipal or public corporation”). And, given the Districts’ contractual, property and other rights in the irrigation water stored in Lucky Peak Project, the Districts would certainly be “public entit[ies] likely to have an interest or knowledge in the matter.” *Id.*

Therefore, the Department was required to provide a copy of the water right application to the Districts to include minimum stream flow purposes for Lucky Peak Project if the MSFA had been followed. It is undisputed that it did not. Given that the Districts did not receive the form of notice required by the MSFA when the Department reviewed the application to amend the water permit, the Districts cannot now be barred from challenging the license resulting from this defective process. This is another reason the United States’, the Participants’, and the State’s assertions that the Districts are “collaterally attacking” the license or have waived their objections are unpersuasive.

J. Whether The Department Acted “In Error,” And/Or “Beyond Its Authority,” The License And Director’s Report Are Contrary To Statutory Law

Related to its argument concerning collateral attack, the United States posits the Districts “suggest that [the Department] 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.*” Resp. in Supp. of U.S. Mot. for Summ. J., p. 5, n. 4. Although not relied upon by the Districts, Idaho Code Section 42-220 provides that a water right license, once issued, is binding upon the state; the statutory provision does not relate to a water permit amendment. *Id.*

To the extent the United States intended to assert the Department approved the challenged water right pursuant to the water right approval statutes set forth in Idaho Code Sections 42-201 – 42-219, rather than the MSFA, its argument still lacks merit. According to the United States, “[the Department] has jurisdiction over both [sets of] statutes,” and, accordingly, “at worst, [the Department] acted in error rather than without authority.” Resp. in Supp. of U.S. Mot. for Summ. J., p. 5, n. 4. Of course, as this Reply Brief has already noted, Section 42-203A(5) specifically requires all minimum stream flow water rights to be processed pursuant to the MSFA. Therefore, the statutes in Title 42, Chapter 2 are not an alternative to the MSFA.

Moreover, the United States does not elaborate on the claimed distinction between the Department having acted “in error” rather than “without authority.” The implication of this argument seems to be that, even if the Department followed the wrong set of procedures, it was essentially a harmless error because the Department has jurisdiction to process water right applications under either set of procedures.

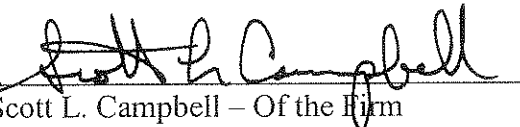
The fundamental flaw in this particular argument is that the applicable procedures the Department should have followed (the MSFA) requires special due process notification of entities (including the Districts), requires the water right to be held by the Board (not the Bureau of Reclamation), and requires review and approval of the proposed water right application by the Idaho Legislature. The procedures that the United States claims were followed do not require adherence to these mandatory hurdles. IDAHO CODE §§ 42-201 – 42-219, 42-1503. Accordingly, as the Districts have explained, the Department’s use of the wrong application processing procedures violates not only Idaho water law and the Due Process rights of the Districts, but also separation of powers principles under the Idaho Constitution. This was, therefore, a fundamental error involving the constitutional structure of government, which belies the United States’ apparent attempt to minimize the effect of the Department’s use of the wrong statutory procedures.

III. CONCLUSION

On the bases of the foregoing, together with the record herein, the Districts respectfully submit it is proper for this Court to grant summary judgment in their favor, rejecting the recommendation of the Director and rejecting the portion of Water Right A63-03618, for the purposes of “minimum instream flow storage” (in the amount of 152,300 acre feet per annum) and “minimum instream flow from storage” (in the amount of 152,300 acre feet per annum), and limit the nature of use to irrigation purposes.

RESPECTFULLY SUBMITTED this 14~~th~~ day of February, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Scott L. Campbell – Of the Firm
Attorneys for Pioneer Irrigation District
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of February, 2008, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT'S AND SETTLERS IRRIGATION DISTRICT'S REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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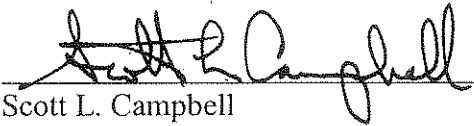
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