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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: 63-03618

**REPLY MEMORANDUM IN SUPPORT
OF PARTICIPANTS' MOTION FOR
SUMMARY JUDGMENT**

Participants City of Boise and Ada County ("Participants"), body politics of the State of Idaho, by and through its counsel of record, Perkins Coie LLP, submit the following Reply Memorandum in Support of its Motion for Summary Judgment filed on October 15, 2007. This memorandum is further supported by the Affidavit of Sherri Pillow and Second Affidavit of Erika E. Malmen filed concurrently herewith.

I. INTRODUCTION

On October 15, 2007 Participants filed a Motion for Summary Judgment with respect to the objections of Pioneer Irrigation District, Settlers Irrigation District, Farmers Union Ditch Company, Canyon County Water Company, Middleton Irrigation Association, Middleton Mill Ditch Company, Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, Big Bend Irrigation

District and Nampa & Meridian Irrigation District (collectively referred to herein as “the Objectors”) and request this Court to grant Participants' Motion for Summary Judgment in favor of affirming the Idaho Department of Water Resources (“IDWR”) Director's Recommendation for Claim No. 63-03618 in this matter.

This case is about the United States Bureau of Reclamation (“BOR”) water license for *uncontracted* storage from Lucky Peak and whether IDWR complied with the law when issuing BOR's license. This case is *not* about the Objectors, their irrigation contracts in Anderson Ranch and Arrowrock dams, federal law or ancient history.¹ Unlike the situation in the Snake River Basin Adjudication (“SRBA”) Subcase 91-63, Objectors do not and can not claim beneficial use of the uncontracted water at issue.

Objectors assert a contractual expectancy for sporadic use of this uncontracted water under certain conditions. Such expectancy is based on federal contracts for irrigation water not at issue in this case. Participants urge this Court to evaluate the merits of this case based on Idaho law and the elements required to establish a water right under Idaho law. This Court should refuse to be sidetracked by any contract or federal law issues raised by Objectors because these issues have no bearing on the statutory elements of the water right at issue nor do they implicate the efficient administration of this water right.

Objectors argue that stream flow maintenance generally and stream flow maintenance specifically in the Boise River do not constitute beneficial use under Idaho law. Objectors assert that stream flow maintenance is a beneficial use *only* if it is held by the Idaho Water

¹ *Pioneer and Settlers' Response to City of Boise and Ada County's Motion for Summary Judgment* (“Pioneer and Settlers' Response”) at 6 characterize the issues before the Court as “whether Lucky Peak Project may be used to store and release water for minimum stream flow and, if so, whether the United States and the Department complied with the statutes that govern the issuance of minimum stream flow water rights.” Participants do not concur with this characterization of the issues properly before this Court.

Resources Board ("IWRB"), the procedures outlined in Chapter 15, Title 42 Idaho Code, (the "Minimum Stream Flow Act" or "MSFA") have been followed and the Boise River has been statutorily designated as an area where stream flow maintenance is a beneficial use.

The Objectors' interpretation of Idaho law is without precedent. Stream flow maintenance is a recognized beneficial use under Idaho law. The procedures outlined in the MSFA were candidly not followed because that statute doesn't apply. BOR is the proper owner of legal title because BOR has successfully shown all the required elements to establish a water right under Idaho law. Affirming BOR's license in this case does nothing to prevent the BOR from meeting its contractual obligations involving *contracted* water not at issue in this case. In fact, BOR has been operating under the license at issue here for years without any assertion by Objectors that administration of uncontracted stream flow maintenance water has resulted in irrigation contract violations. This Court must uphold the integrity of the administrative process and the SRBA, defer to IDWR and affirm the status quo.

II. ARGUMENT

A. Stream Flow Maintenance Is a Recognized Beneficial Use of Water in the Boise River and Properly Held by BOR; Chapter 15, Title 42 Idaho Code Does Not Apply.

Participants note that Objectors' *do* in fact concede that stream flow maintenance may be a beneficial use. However, Objectors incorrectly assert that stream flow maintenance is a beneficial use *only* if it occurs on a particular reach of a river specifically identified by statute, can be held *only* by the Idaho Department of Water Resources Board ("IWRB") and must be acquired *exclusively* under the Minimum Stream Flow Act. *See* Pioneer and Settlers' Response at 7. There is no legal precedent to support Objectors' view of beneficial use under Idaho law.

A use of water that may constitute "beneficial use" is not limited to those uses expressly enumerated in statute or the Idaho Constitution. There is no exclusive list of beneficial uses to choose from when asserting a water right under Idaho law. It is well-settled under Idaho law that a use need not be statutorily or constitutionally identified as a "beneficial use" in order to be considered such. Idaho's constitution names only a few beneficial uses and the Idaho Supreme Court has held that this list is not an exclusive list. *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974).

"It is a given that state law is not static and changes over time, and this is particularly true with respect to what uses of water constitute 'beneficial uses.'" 2006 Id. Op. Att'y Gen. 55, at 3 (2006), 2007 WL 1461293. In many instances, statutes or the judiciary may be "behind the curve" when it comes to officially recognizing concepts in water law. In *Joyce Livestock Co. v. United States*, 156 P.3d 502, 512-13, 144 Idaho 1 (2007), the Idaho Supreme Court explains various discrepancies in time between when a particular water use started and when it was specifically judicially recognized. For example, the Supreme Court says that it was "not until 2000 that we held that a water right could be obtained for stock watering without diverting the water from the watercourse." *Id.* at 513.

Participants do not rely exclusively on the MSFA for the assertion that stream flow maintenance is a beneficial use, as some Objectors claim. In the same vein, Participants do not rely on any federal authorizations for the argument that stream flow maintenance is a beneficial use. Participants point to the MSFA and federal authorization as two pieces of a vast quantity of evidence that support the assertion that stream flow maintenance is a recognized beneficial use under Idaho law.

Any assertion by Objectors that stream flow maintenance is not a beneficial use is suspect because the term "beneficial use" has never been judicially or statutorily defined. *State of Idaho, Dep't of Parks* 96 Idaho at 443, 530 P.2d at 927. It is error for Objectors to suggest that there is a finite list of "beneficial uses" or that beneficial use is predicated on legal title when the Idaho legislature has not found fit to define the term "beneficial use" itself. "With the exception of those uses elevated to beneficial status by Article 15, § 3, of the Constitution, the concept of what is or is not a beneficial use must necessarily change with conditions . . . The notion of beneficiality of use must include a requirement of reasonableness." *Id.* at 447, 530 P.2d at 931 (Bakes, J. concurring).

Objectors focus on the fact that stream flow maintenance has been specifically identified in statute as a beneficial use in the context of certain reaches of river (*e.g.*, portions of the Lemhi) yet the legislature has not specifically identified the Boise River. Not only do these statutes support Participants' argument that stream flow maintenance has historically been, and continues to be, a recognized beneficial use but these statutes also recognize that an entity *other* than the IWRB may hold a stream flow maintenance right, even for *unappropriated* waters.

For example, Idaho Code § 67-4307 directs the *park and recreation board* to "appropriate in trust for the people of the state of Idaho the *unappropriated* natural spring flow" in Malad Canyon. (emphasis added).² Since the Idaho legislature currently tolerates entities *other* than the IWRB to hold unappropriated instream flow rights, Objectors' argument that the IWRB must hold the right for *appropriated water* in order for it to be valid

² See also Idaho Code § 67-4301 (authorizing the Governor to appropriate unappropriated waters in Big Payette Lake); Idaho Code § 67-4304 (authorizing the Governor to appropriate unappropriated waters in Priest, Pend d'Oreille and Coeur d'Alene Lakes).

has absolutely no merit. In sum, the absence of specific statute stating that stream flow maintenance is a beneficial use in the Boise River does not mean that stream flow maintenance is not a beneficial use in the Boise River.

The MSFA requirements do not apply to the facts in this case because the water at issue is diverted, stored and put to beneficial use under existing license and therefore can not be considered "unappropriated." *See* Participants' Memorandum in Support of Summary Judgment ("Participants' Oct. 15, 2007 Memo.") at 14-16 and Participants' Nov. 14, 2007 Resp. at 3.

Objectors gloss over the question of whether the MSFA applies at all and instead focus on whether the procedural provisions of the statute were followed. Objectors argue, with no support whatsoever, that BOR illegally appropriated the water at issue so there is no valid appropriation and that the purpose of the phrase "unappropriated waters" in Section 42-1503 is to emphasize that MSF water rights cannot be granted on a source of water fully allocated to other water users. Pioneer and Settlers' Response at 10. Objectors conveniently ignore the statutory definition of "unappropriated water" which is "water which is not subject to *diversion* and use under any *prior existing water right*."³ Accepting Objector's argument requires this Court to ignore the plain language, statutory definition, legislative history, and case law concerning statutory construction. *See A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 424, 958 P.2d 568, 581 (1998) ("[t]he courts have a duty not to deprive any statutory provisions of their meaning."). On the contrary, the plain language, statutory definition and the legislative history of the MSFA provides support for Participants', the State's, IDWR's and IWRB's interpretation of the MSFA. There is ample evidence in the

³ Idaho Code § 42-1502 (emphasis added). *See also* Participants' Oct. 15, 2007 Memo. at 15.

statute itself, and the legislative history confirms IDWR's consistent position that the MSFA does not apply to stored water and that the legislature was aware of then current instream flows developed by storage and diversion when the MSFA was passed.⁴ Since the MSFA does not apply in the first instance, any procedural requirements contained in the MSFA, including application by the IWRB, also do not apply.

B. IDWR Acted Within Its Statutory Authority and is Entitled to Deference.

Pioneer and Settlers' Memorandum in Support of Motion for Summary Judgment at 29 and Response at 6 argue that IDWR's issuance of BOR's license exceeds IDWR's statutory authority under the MSFA and as such waiver does not prevent Objectors from attacking BOR's license. As discussed above, the MSFA is not the only means by which to acquire a water right for stream flow maintenance. IDWR has not exceeded its statutory authority and thus Objector's arguments in this case have been waived and are barred by *res judicata*. The parties and the issues in this case are identical to the parties and issues involved in the license proceeding and therefore the requirements for Participants to prevail are met.

As Objectors' brief explains, IDWR has been given "exclusive authority over the appropriation of the public surface and ground waters of this state." Pioneer and Settlers' Response at 3, Idaho Code § 42-201(4). Further, Idaho Code § 42-1503 delegates authority to the director of IDWR to make decisions concerning the MSFA. Objectors later argue, however, that the legislature has ultimate authority over appropriation of instream flow and that therefore a separation of powers violation is implicated if IDWR grants a license for stream flow maintenance without legislative oversight.⁵ Pioneer and Settlers Response at 17.

⁴ See *United States' Resp.* at 17, n. 25; Second Affidavit of Erika E. Malmen, Ex. A.

⁵ It is questionable whether the MSFA provision regarding legislative approval of IDWR's appropriation of instream flow rights is constitutional in the first instance. See 1987 Id. Op. Att'y Gen. 45 at 1 (1987), 1987 WL 247591 ("Despite the presumption in favor of a statute's

Objectors' argument concerns procedural requirements contained in the MSFA that require legislative approval for the IWRB actions. However, since the statute's requirements do not apply in the first instance, this argument is moot. "[O]nce a function has been delegated to the Executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation." 1987 Id. Op. Att'y Gen. at 5 (*citing* General Education Provisions Act, 43 Id. Op. Att'y Gen. No. 25, 9 (1980)). In the context of the SRBA specifically, IDWR's mission is to "accurately determine the water rights in the Snake River Basin Adjudication."⁶ The bottom line is that it is well within IDWR's statutory authority to make determinations regarding the elements of a water right and whether the MSFA applies in the first instance.

Objectors' citation to *Beker Industries Inc. v. Georgetown Irr. Dist.*, 101 Idaho 187, 610 P.2d 546 (Idaho 1980) as "particularly instructive" in the context of IDWR's statutory authority is indeed not instructive. Pioneer and Settlers' Response at 3. *Beker* is entirely irrelevant to their argument that IDWR acted in excess of its statutory authority. The *Beker* case involved a *transfer* of use. The uncontracted Lucky Peak water at issue in this case has *never* met the requirement for beneficial use for irrigation purposes, and thus has not been "transferred" from irrigation to stream flow maintenance.

The Boise Project Board of Control ("BOC") argues that IDWR does not deserve

constitutionality, our opinion is the provision in Idaho Code § 42-1503 that purports to authorize the legislature to reject, by concurrent resolution, a minimum stream flow approved by the Director of the Idaho Department of Water Resources would be found by the Idaho Supreme Court to contravene article 2, section 1; article 3, sections 1 and 15; and article 4, section 10 of the Idaho Constitution." It is ironic that Objectors' argue that IDWR's actions here violate separation of powers when the provisions that they allege are violated are most likely violative of that principle themselves.

⁶ <http://www.idwr.idaho.gov/water/srba/mainpage/>.

judicial deference and that Participants failed to address each prong of the four prong test⁷ for determining whether an agency's interpretation of a statute is subject to judicial deference. BOC Response to Motions for Partial Summary Judgment ("BOC Response") at 6. Participants' Oct. 15, 2007 Memo. at 15-16 discusses judicial deference in the context of a five prong test taken from a different Idaho case and have therefore persuasively addressed this issue. In any event, IDWR can easily meet the four prong test suggested by BOC.

An agency's interpretation of statutes it administers is entitled to deference. *Simplot*, 120 Idaho at 862, 820 P.2d at 1219. This case involves the interpretation of the MSFA by IDWR. The *Simplot Test* for judicial deference is: (1) the court must determine whether the agency has been entrusted with the responsibility to administer the statute at issue, (2) the agency's statutory construction must be reasonable, (3) the court must determine that the statutory language at issue does not treat the precise issue, and (4) a court must ask whether any of the rationales underlying the rule of deference are present. *Id. at 862, 820 P.2d at 1219*. If this test is met, the court must give "considerable weight" to the agency's interpretation. *Id.*

As to the first prong, there is no question that IDWR has Constitutional and statutory authority to administer the MSFA and the SRBA. ID. CONST., art. XV, § 7; Idaho Code § 42-201(4).

In regard to the second prong, IDWR's interpretation of the statute is reasonable because, as explained above, the plain language of the statute and the legislative history

⁷ BOC cites *Pearl v. Bd. Of Prof. Discipline of Idaho State Bd. Of Medicine*, 137 Idaho 107, 44 P.3d 1162 (2002). The four prong test for whether an agency's interpretation of its statutes is entitled to deference was originally articulated in *Simplot v. Idaho State Tax Comm'n*, 120 Idaho 849, 863, 820 P.2d 1206, 1220 (1991) (hereinafter referred to as the "Simplot Test").

support IDWR's interpretation that the MSFA applies only to waters not diverted or otherwise appropriated.

Regarding the third prong, the language of the statute simply clearly supports IDWR's interpretation, deference aside. However, to the extent that Objectors assert ambiguity regarding whether an entity other than the IWRB may hold a right for stream flow maintenance and/or whether stream flow maintenance itself is a beneficial use, IDWR is entitled to deference because statutory language and legislative history confirm that only unappropriated water is covered by the MSFA and because it is reasonable to conclude that stream flow maintenance is a beneficial use, as explained above and in prior briefs.

Addressing the fourth prong of the *Simplot Test*, the rationales underlying the rule of deference are that interests have arisen in reliance on the agency's statutory interpretation, that the agency has a practical interpretation, that the legislature acquiesces to the interpretation, and that agency expertise is required. *Simplot*, 120 Idaho at 858-860, 820 P.2d at 1215-1217. It is clear that BOR's, the State's, and Participants' interests in this case have arisen in reliance on IDWR's statutory interpretation; such interpretation is practical given statutory language and legislative history; the legislature has not acted in response to IDWR's historically consistent interpretation; and IDWR's expertise is required in order to accurately determine and administer water rights. Because the four prongs and rationale underlying the rule of deference set forth in *Simplot* are met, IDWR's decision to issue a license and the Director's Report affirming the license must be accorded considerable weight by this Court.

C. Federal Law, MOU's and Contracts between Objectors and the BOR are Not Relevant to the Disposition of this Case Concerning *Uncontracted* Water

Objectors revisit history and authorizations for the Boise Project and painstakingly describe various memoranda of understanding, contracts, and contract amendments that have

developed over the years. Pioneer and Settlers' Response at 20-21 notes that the historical basis of Lucky Peak construction was irrigation and flood control and that "discussion or support for minimum stream flow maintenance was virtually nonexistent." While Participants don't find these arguments relevant, let alone persuasive, Participants could just as easily argue that the Objectors are using contracted irrigation water contrary to the historical basis of construction for Lucky Peak. "Irrigation Water" is defined in United States Code as "water made available for agricultural purposes." 43 U.S.C. § 390bb. As illustrated in the maps attached as Exhibits A-D to the Affidavit of Sherri Pillow, vast swaths of the irrigation districts include residential subdivisions, indicating the water is not being used at all and/or not being used for agricultural purposes under federal law.

Participants and Objectors *seem* to agree that State law governs the issues in this case, yet Objectors ask this Court to determine whether the Lucky Peak Project may be used to store and release water for minimum stream flows⁸ and BOC asks this Court to acknowledge their "ownership" based entirely on language in federal contracts that are centered around a different water right. BOC Response at 8. There is no question that state law governs the issue of ownership. "A review of the cases makes it clear that federal law defers to state law in determining the rights to water in the reclamation projects." *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600, 604 (2007). BOC and other Objectors cannot "own" any water at issue in this case because they have not complied with the constitutional or statutory requirements under Idaho law to establish ownership. "Under either the constitutional or statutory method of appropriation, the appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho." *Id.* Objectors have not

⁸ See footnote 1 *infra*.

appropriated the water at issue in the first instance, let alone put it to beneficial use.

Objectors' are quick to point out that Participants have not asserted legal title to the water at issue and imply that Participants' interest in the water at issue is geared towards, essentially, sensationalism. Pioneer and Settlers' Response at 6. This is inaccurate. Participants have asserted legitimate claims for beneficial use of the water for wildlife, recreation, water quality, power generation, etc. which elevates the interests of the Participants *over* those of the Objectors'. "There are several phrases used in the Idaho Constitution and the Idaho Code that signify that the beneficial users have an interest that is *stronger* than mere contractual expectancy." *Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d at 608 (emphasis added). Two fundamental differences between Objectors and Participants in the instant case is the Participants' stake in the beneficial use of the water and the conviction that Idaho law governs this case.

In any event, Objectors' unsupported assertion that their existing irrigation contracts give them rights to this *particular uncontracted* stream flow maintenance water right is lacking any factual basis. Whether or not Lucky Peak was federally authorized to store water for stream flow maintenance is not relevant to this disposition of this case. What matters is that stream flow maintenance is a beneficial use under Idaho law and that all the requirements of a valid water right have been met under Idaho law.

If Objectors want to assert violations of a 1953 Memorandum of Understanding or contract by BOR then Objector's may seek relief in a different proceeding. This proceeding is not the proper forum to assert contract violations that have no bearing on any required element or the administration of the right at issue. For the same reasons, any holding by this Court in the context of a remark is inappropriate. Idaho Code § 42-1411(2)(j) grants the

IDWR director the authority to include remarks that "are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." The right at issue has historically been effectively administered without such a remark and the Objectors can not point to any evidence to the contrary. It is not coincidental that in no instance can Objectors point to an irrigation contract violation due to the BOR's administration of uncontracted stream flow maintenance water. Objector's claims and request for a remark lack the statutorily required elements of a water right and are not necessary for the definition, clarification of any element, or administration of the right at issue.

D. Objectors Arguments are Barred by *Res Judicata*, Collateral Estoppel, the "Law of the Case," and Waiver.

The "law of the case in the SRBA precludes the outcome of an administrative license *proceeding* from being collaterally attacked in the SRBA." *Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d at 602-03 (emphasis added); *See also* United States' Oct. 15, 2007 Brief at 15. Nampa & Meridian Irrigation District ("NMID") points out that IDWR issued BOR's license three days after the Directors Report was issued for Basin 63. This minor fact is not relevant; NMID doesn't explain what the legal implications of this fact are, if any. The license *proceeding* was complete well before the license was actually issued by IDWR and it is exactly the proceeding in which NMID challenges in this case. *See* United States' Oct. 15, 2007 Brief at 7-15 and Participants' Oct. 15, 2007 Memo. at 18-19.

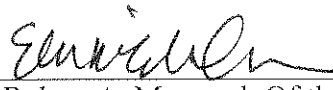
III. CONCLUSION

IDWR made a determination that stream flow maintenance in the Boise River is a beneficial use and that the MSFA does not apply because the water at issue is diverted and stored. These determinations by IDWR are well within IDWR's statutory authority, are

reasonable, and entitled to judicial deference. It is reasonable for the BOR to assert, and reasonable for IDWR to conclude, that Boise River stream flow maintenance supporting wildlife, recreation, the economy and our overall quality of life is a beneficial use. Objectors have had *more than* ample opportunity to raise any arguments regarding BOR's license in administrative proceedings and have not done so. The BOR's license, as recommended by IDWR, should be affirmed in the decree by this Court.

DATED: February 15th, 2008

PERKINS COIE LLP

By: 
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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that, on this 15th day of February, 2008, he/she/they caused to be served on the person(s) listed below in the manner shown:

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