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DEPARTMENT OF
WATER RESOURCES

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Attorneys for City of Boise and Ada County

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

**SECOND AFFIDAVIT OF
ERIKA E. MALMEN**

STATE OF IDAHO)
 : ss.
County of Ada)

ERIKA E. MALMEN, being first duly sworn upon oath, deposes and says:

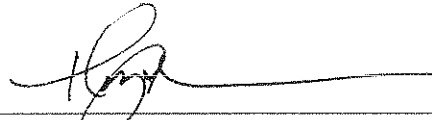
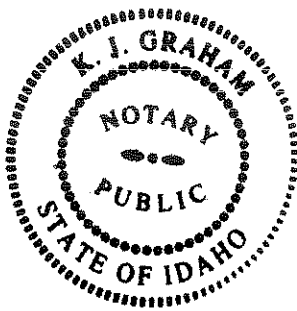
1. I am one of the attorneys of record for Participants City of Boise and Ada County, and as such have personal knowledge of the facts stated herein.
2. Attached hereto as Exhibit A is a true and correct copy of a June 18, 1984 letter from David R. Tuthill, Jr. with the Idaho Department of Water Resources to Ron Golus of the U.S. Bureau of Reclamation enclosing an Issue Paper regarding Application for Amendment of Permit No. 63-3618. This document was obtained from the Idaho Department of Water Resources.

FURTHER YOUR AFFIANT SAYETH NOT.



ERIKA E. MALMEN

SUBSCRIBED AND SWORN to before me this 15th day of February, 2008.



Notary Public for Idaho

Residing at NAMPA, IDAHO

My Commission Expires 02.05.13

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:

SECOND AFFIDAVIT OF ERIKA E. MALMEN

Clerk of the District Court
Snake River Basin Adjudication
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Twin Falls, Idaho 83303-2707

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Overnight Mail ☐

State of Idaho
c/o Natural Resources Div. Chief
Attorney General's Office
P.O. Box 44449
Boise, Idaho 83711-4449

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U.S. Mail ☒
Facsimile: (208) 334-2690 ☐
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United States of America
US Department of Justice
Envir. & Nat. Resources
550 West Fort Street, MSC 033
Boise, Idaho 83724

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Director
Idaho Dept. of Water Resources
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Erika E. Malmen



State of Idaho

DEPARTMENT OF WATER RESOURCES

STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS

Governor

A. KENNETH DUNN

Director

Mailing address:
Statehouse
Boise, Idaho 8372
(208) 334-4440

June 18, 1984

U.S. Bureau of Reclamation
Attn: Ron Golus
Box 043
550 West Fort St.
Boise, ID 83724

RE: Application for Amendment of Permit No. 63-3618

Dear Ron:

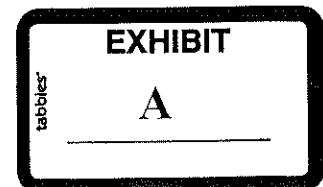
Enclosed please find a copy of an updated revision of the Issue Paper that has been prepared for the Board's review. Note that the only change is that on page 2 a Note 2 has been added per your telephonic request.

Sincerely,

DAVID R. TUTHILL, JR., P.E.
Supervisor, Water Allocation Section

DRT:ns

Enclosure



Review of Application for Amendment of Permit No. 63-3618

Lucky Peak Reservoir, U.S. Bureau of Reclamation

ISSUES

The U.S. Bureau of Reclamation has applied to amend the uses on their permit for storage at Lucky Peak Reservoir. Issue 1: Is "streamflow maintenance from storage" a reasonable beneficial use? Issue 2: Should the duration of the water right be conditioned?

BACKGROUND

The following dates describe the history of actions with respect to the storage water right at Lucky Peak Reservoir in the name of the U.S. Bureau of Reclamation.

- April 12, 1963 Application for Permit submitted to the IDWR
- March 20, 1964 Permit Approved for:
 - 278,200 acre-feet for Irrigation
 - 28,800 acre-feet for Dead Storage
- February 25, 1975
March 30, 1976
March 9, 1979
November 29, 1982 Extensions of Time to Submit Proof of Beneficial Use approved
- March 15, 1984 Application for Amendment of Permit submitted
- April 23, 1984 Final date for protests - no protests received

Pursuant to Section 42-1737, Idaho Code, "all project proposals involving the impoundment of water in a reservoir with an active storage capacity in excess of ten thousand (10,000) acre feet shall be submitted to the Board for approval or disapproval". This requirement in connection with Policy 16 of the State Water Plan has been interpreted to apply to an Application for Amendment of an existing permit.

MICROFILMED

Amended uses requested by the U.S. Bureau of Reclamation are summarized as follows:

<u>Amount(acre-feet)</u>	<u>Use</u>	Period: <u>From</u>	<u>To</u>
111,950	Storage for Irrigation	Jan. 1	Dec. 31
111,950	Irrigation from Storage	Mar. 15	Nov. 15
152,300	Storage for Streamflow	Jan. 1	Dec. 31
	Maintenance		
152,300	Streamflow Maintenance	Jan. 1	Dec. 31
	from Storage		
<u>28,800</u>	Storage for Recreation	Jan. 1	Dec. 31

Total of 293,050 acre feet

Note 1: Flood Control of an additional 13,950 acre-feet resulting from surcharging the reservoir is not considered to be a beneficial use and the allotment for this use will be shown in Remarks.

Note 2: The condition of approval on the original permit "That the yield of water from 50,000 acre-feet of space be available for maintaining a minimum winter-time flow in the Boise River below Boise Diversion Dam under a release pattern established from time to time by the Director of the Idaho Fish and Game Department" will be maintained after amendment.

ANALYSIS

Issue 1. 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 streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

Establishment of a resource maintenance flow as proposed would preclude the use of as much as 152,300 acre-feet per year for irrigation uses. As shown above, the Idaho Department of Fish and

ENCLOSURE

Game is allocated 50,000 acre-feet of Lucky Peak storage water pursuant to a condition of approval of the water right permit. This volume has been used to augment winter time natural flows in the Boise River, and the priority of fill is the same as for the 111,950 acre-feet of contracted irrigation storage water. Of the remaining 102,300 acre-feet of storage, the "firm yield" has been estimated by the Bureau of Reclamation to be limited to 30,000 acre-feet, because of the need to provide adequate security against flooding.

The Bureau of Reclamation (BOR) has indicated that the primary agricultural entity to have shown an interest in contracting storage space in Lucky Peak is a group of "Dry Lake irrigators". This group has found, however, that the cost of enlarging the New York and Mora canals to provide the required increased flows renders the use of Lucky Peak storage water infeasible.

Historically the BOR has not allowed the 102,300 acre-feet of storage to be contracted. One exception was 1977, when 76,643 acre-feet were available for contracting. That year an allotment of 50,000 acre-feet was contracted to nine irrigation entities, resulting in an actual combined use of 35,400 acre-feet. Thus, even in a severe drought year the additional storage water requirement for the irrigation of currently irrigated acres is very limited.

Regarding other proposed uses of storage water in the Boise River Basin, the BOR has indicated that the approximately 5,000 acre-feet for municipal-industrial uses have been requested by Boise Water Corporation. The BOR has indicated that this water will be provided from Anderson Ranch Reservoir. Storage water in that reservoir is currently totally appropriated for power generation use, and the municipal-industrial use would be filed as an additional use.

Issue 2. Because of increasing competition between various users of the limited water supplies in Idaho, the notion of "higher and better use" is receiving increasing attention. A use that is considered to be reasonable and beneficial in 1984 may be viewed differently in thirty years.

In order to provide for long-term options regarding interpretations of beneficial use, the following condition of approval has recently been utilized for the issuance of some permits to appropriate water for hydropower purposes:

"The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director thirty (30) years from the date of issuance of this permit. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised."

At this time, the addition of this condition of approval may be appropriate in conjunction with the change in nature of use from "irrigation from storage" to the more unconventional use of "streamflow maintenance from storage".

ALTERNATIVES

Issue 1.

A. Determine that "streamflow maintenance from storage" is not a valid, beneficial use. Recommend denial or amendment of the Application for Amendment.

B. Determine that an excessive amount of water has been proposed to be identified as "streamflow maintenance from storage". Recommend that a different quantity be allocated under this designation.

C. Determine that "streamflow maintenance from storage" is a valid, beneficial use. Recommend approval of the Application for Amendment.

Issue 2.

A. Recommend that the term of the permit be thirty (30) years prior to review.

B. Recommend that the term of the permit be some other duration prior to review.

C. Recommend that the permit not be conditioned with any term.