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DEPARTMENT OF
WATER RESOURCES

Jerry A. Kiser
STOPPELLO & KISER
ATTORNEYS AT LAW
620 W. Hays Street
Boise, ID 83702
Telephone: (208) 336-1020
Facsimile: (208) 336-1027
Idaho State Bar No. 3719

Attorneys for Canal Companies

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

)
) REPLY TO U.S. RESPONSE
) BRIEF AND PARTICIPANTS'
) RESPONSE
)

COPY

COMES NOW, CANYON COUNTY WATER COMPANY; FARMERS UNION DITCH
COMPANY, LTD.; MIDDLETON IRRIGATION ASSOCIATION, INC.; and,
MIDDLETON MILL DITCH COMPANY (hereinafter "Canal Companies") by
and through their attorney of record, JERRY A. KISER of the firm
STOPPELLO & KISER ATTORNEYS AT LAW, and hereby submits this Brief
in reply to the Response Brief filed by the United States on or
about November 14, 2007, and Participants' Response to Objectors'
Motions for Summary Judgment filed on or about November 14, 2007.

REPLY TO U.S. RESPONSE BRIEF
AND PARTICIPANTS' RESPONSE - 1.

I.

INTRODUCTION

Both the United States Response and the Participants' (City of Boise and Ada County) Response to the Canal Companies' Motion for Summary Judgment and Brief focus on the contention that the "stream flow maintenance" claim by the United States to the waters in Lucky Peak Reservoir are not subject to or governed by Idaho Code Chapter 15, Title 42 governing minimum stream flows in the State of Idaho. As more fully set forth below, when stripped to its basics, the claims of the United States for stream flow maintenance is nothing more than a minimum stream flow claim governed by and subject to the requirements of the Idaho Minimum Stream Flow Act. The requirements of the Act have not been complied with and therefore the United States has no valid water right for stream flow maintenance.

II.

LAW AND ARGUMENT

The United States and Participants assert the Bureau of Reclamation can hold an in stream flow water right, despite the provisions of the Idaho Minimum Stream Flow Act, because they contend the water in Lucky Peak Reservoir has already been diverted and stored and therefore because the water in Lucky Peak

is not a natural water body, the Act does not apply. The Idaho Minimum Stream Flow 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."

The fallacy of the United States and Participants' position is that water cannot be diverted and stored unless it is diverted and stored for a beneficial use. See, *Idaho Code* § 42-104.

Idaho Code § 42-1501 provides minimum stream flows can constitute a beneficial use of water, ". . . when made pursuant to this Act. . . ." While minimum stream flows under the provisions of the Minimum Stream Flow Act (Chapter 15, Title 42) may be a beneficial use, it is a beneficial use which may be held only by the Idaho Water Resource Board and only in accordance with the provisions of the Act. The United States and Participants do not appear to dispute that only the Idaho Water Resource Board can acquire and hold a minimum stream flow water right. There is no legal basis by which a party can simply divert and store water. In addition to diversion and storage, there must be beneficial use of the stored water. Beneficial use of water for in stream flow (stream flow maintenance) can only be held by the Idaho Water Resource Board as provided in the Act.

The United States Has Failed to Obtain Necessary
Legislative Approval for Changing the Nature
of Use From Irrigation to Stream Flow Maintenance.

The United States in 1963 submitted an amended application to construct a reservoir and appropriate and store public waters of the State of Idaho to the State Reclamation Engineer for Lucky Peak Reservoir (Exhibit B to Kiser Affidavit filed October 15, 2007). The application filed in 1963 stated at paragraph 10, "Water is to be used for irrigation purposes." In 1984, the United States filed an application for amendment of its permit to change the nature of use of 152,300 acre feet of space in Lucky Peak Reservoir from irrigation to stream flow maintenance storage, and stream flow maintenance from storage. (Exhibit E to Kiser Affidavit.) In September 2002, the Department of Water Resources issued water right license no. 63-03618 approving stream flow maintenance storage in the amount of 152,300 acre feet, and stream flow maintenance from storage in the same amount. However, in order for a permanent change in the nature of use of the water in Lucky Peak to be valid, the Legislature of the State of Idaho must approve the change of nature of use. Idaho Code § 42-108 provides in relevant part:

Any permanent or temporary change in period
or nature of use in or out-of-state for a
quantity greater than fifty (50) cfs or for a
storage volume greater than five thousand

(5,000) acre-feet shall require the approval of the legislature, except that any temporary change within the state of Idaho for a period of less than three (3) years may be approved by the director without legislative approval.

Idaho Code § 42-108 (Emphasis Added).

There is no evidence in the record that the Legislature has approved the change of nature of use of 152,300 acre feet of water in Lucky Peak Reservoir from irrigation use to stream flow maintenance use. The Department of Water Resources issuance of the license and approval of the water right without legislative approval is in contravention of *Idaho Code* § 42-108. The language of *Idaho Code* § 42-108 is mandatory, and provides that a change in the nature of use for a quantity of storage volume exceeding 5,000 acre feet shall require approval of the Legislature.

III.

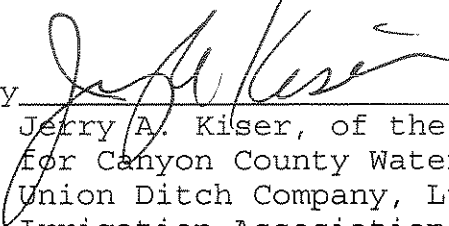
CONCLUSION

For the foregoing reasons, Canal Companies respectfully request this Court find that the United States, by and through the Bureau of Reclamation has not acquired a valid water right for stream flow maintenance, and requests this Court grant Canal Companies' Motion for Summary Judgment establishing the water rights under water right 63-3618 as 264,250 acre feet of water in

Lucky Peak Reservoir as irrigation storage and irrigation from storage, and that no stream flow maintenance water right be recognized.

RESPECTFULLY SUBMITTED this 15th day of February, 2008.

STOPPELLO & KISER
ATTORNEYS AT LAW

By 
Jerry A. Kiser, of the firm Attorneys
for Canyon County Water Company; Farmers
Union Ditch Company, Ltd.; Middleton
Irrigation Association, Inc.; and,
Middleton Mill Ditch Company

CERTIFICATE OF SERVICE: The undersigned does hereby certify that on this date he caused a true and correct copy of the within and foregoing RESPONSE TO BRIEF OF UNITED STATES AND MEMORANDUM OF ADA COUNTY AND CITY OF BOISE to be mailed by United States first-class, postage prepaid mail to the following:

BOISE PROJECT BOARD OF CONTROL
Represented by:
ALBERT P BARKER
SHELLEY M DAVIS
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139

STATE OF IDAHO, DEPT OF F & G
Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

PIONEER IRRIGATION DISTRICT
SETTLERS IRRIGATION DISTRICT
Represented by:
SCOTT L CAMPBELL
101 S CAPITOL BLVD, 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829

UNITED STATES OF AMERICA
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

NAMPA & MERIDIAN IRRIGATION
SOUTH BOISE WATER COMPANY
Represented by:
DANIEL V STEENSON
S BRYCE FARRIS
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773

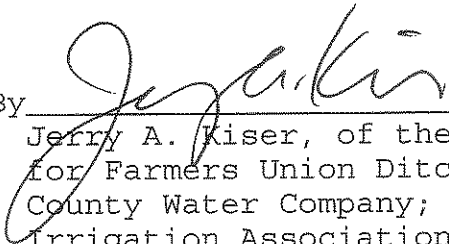
ADA COUNTY
CITY OF BOISE
Represented by:
ERIKA E. MALMEN
PERKINS COIE LLP
251 EAST FRONT STREET
SUITE 400
BOISE, ID 83702-7310

DAVID W GEHLERT
GENERAL LITIGATION SECTION
ENVIRONMENTAL & NATURAL
RESOURCES DIV.
US DEPARTMENT OF JUSTICE
1961 STOUT ST., 8TH FLOOR
DENVER, CO 80294-1961

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

DATED this 15th day of February, 2008.

STOPPELLO & KISER
ATTORNEYS AT LAW

By 
Jerry A. Kiser, of the firm Attorneys
for Farmers Union Ditch Company; Canyon
County Water Company; Middleton
Irrigation Association; and, Middleton
Mill Ditch Company