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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	)	Subcase No. 63-3618
	)	
Case No. 39576	)	REPLY BRIEF IN SUPPORT OF
	)	NAMPA & MERIDIAN IRRIGATION
	)	DISTRICT'S MOTION FOR
	)	SUMMARY JUDGMENT
	)	

COMES NOW Nampa & Meridian Irrigation District (hereinafter "NMID"), by and through its counsel of record, Ringert Clark, Chartered, and pursuant to the Court's Amended Scheduling Deadlines, hereby submit this Reply Brief in Support of NMID's Motion for Summary Judgment.

I. INTRODUCTION

The one thing that remains undisputed in this case is that the United States Bureau of Reclamation ("BOR") did not comply with Chapter 15, Title 42 of the Idaho Code with respect to the instream flow portion of water right no. 63-3618. Neither the BOR, Ada County or the City of Boise suggest that the mechanics of Chapter 15, Title 42 were followed. Rather, the BOR and the other participants attempt to defend this instream flow portion of the water right by asserting (1) this Court should not address the issue because it is a collateral attack to the license; and (2) because

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Lucky Peak Dam is considered a diversion structure, compliance with Chapter 15, Title 42 is not necessary.

With respect to the assertion that this Court should not address the issue because it amounts to a collateral attack of the license, the objecting parties have already thoroughly briefed the fact that the fact that a license was issued does not prevent this Court from ensuring that the water right complies with Idaho law. Whether it be IDWR's lack of authority to issue a license which does not comply with statutory law or this Court's ability to exercise review over questions of law, the fact remains that this Court cannot judicially sanction or decree a water right that does not comply with Idaho law. The defense of collateral attack of the license is nothing more than a red herring to avoid recognizing that the necessary steps of Chapter 15, Title 42 were not followed.

With respect to the argument that compliance with Chapter 15, Title 42 is not necessary, this argument is in direct conflict with statutory law and case law. The relevant portions of the water right are "minimum instream flow storage" (152,300 acre feet) and "minimum instream flow from storage" (152,300 acre feet). BOR suggestion that the diversion and storage for instream flow purposes does not require compliance with Chapter 15, Title 42 is misplaced because the BOR still has to divert and store the water for a valid purpose. BOR's attempt to circumvent Idaho law based upon the diversion to storage not requiring compliance with Chapter 15, Title 42 does nothing more than beg the question. The answer still remains that BOR is subject to the requirements of Chapter 15, Title 42, and those requirements have not been followed in this case.

II. ARGUMENT

A. BOR Cannot Circumvent the Requirements of Title 42, Chapter 15 of the Idaho Code.

The BOR asserts that the storage of water for instream flow purposes does not require compliance with Title 42, Chapter 15 because the storage of water for instream flow is a diversion.

However, such an argument is in conflict with the purpose of Title 42, Chapter 15, which is to require certain procedures to acquire a minimum stream flow water right. The BOR cannot circumvent the requirements by asserting that it can first store the water for minimum stream flow purposes and then it has the carte blanche right to release it for any purposes. This argument simply begs the question of whether the diversion for minimum stream flow storage complies with Title 42, Chapter 15 of the Idaho Code.

The storage of water must be for an intended beneficial use and the storage of water is directly connected with the beneficial use for which it is released. The storage of the water remains a non-consumptive use until it is released. Otherwise, anyone could get around the requirements of the Minimum Stream Flow Act by simply asserting that they are storing the water before it is released. The purpose of the Minimum Stream Flow Act and the protections envisioned by the legislature would become moot if one could non-consumptively store water and then release it for minimum stream flows without compliance with the Act. This also allows the United States to inappropriately circumvent the requirements that the Idaho Water Resource Board or a state entity hold the instream flow water right.

B. BOR is not Entitled to Hold an Instream Flow Water Right under Idaho Law.

BOR, the City of Boise and Ada County's suggestion that *State of Idaho v. United States*, 134

Idaho 106, 996 P.2d 806 (2000) is distinguishable from this case is also misplaced. In *State of Idaho v. United States*, the Court made it clear that the statutory requirements of Title 42, Chapter 15 are applicable to the United States, or in this case the BOR. This is true regardless of whether the BOR wants to characterize the instream flow as diversionary or non-diversionary. As previously discussed, despite BOR's invitation to perform legal gymnastics and twist the storage for instream flow as being diversionary, BOR still has to divert and store the water for a valid, recognized use which is in compliance with Idaho law. There remains no authority for a minimum stream flow water right, even if it is diverted to storage, to be held by the BOR. To the contrary, the Idaho Code and the Idaho Supreme Court have made it clear that the federal government must comply with I.C. § 42-1504 and request that the Idaho Water Resource Board file an application.

Not only has the Idaho Supreme Court made it clear that United States must comply with Chapter 15, Title 42, but the Idaho Legislature has gone to great lengths to provide legislation and statutory authority for instream flow water rights and the conversion or change in water rights to instream flow water rights. For example, when the BOR proposed to release water for flow augmentation, even though the water may have already been diverted and stored for other purposes, specific legislation was passed to allow such releases. I.C. § 42-1763B. BOR was not allowed to simply change existing water rights or licenses to flow augmentation. Moreover, when there was a proposal to change, donate, rent or modify water rights for instream flow purposes in the Wood River and Lemhi Basins, the State of Idaho did not simply change their permits, licenses or water rights to instream flow. Rather, the Idaho Legislature passed legislation specifically authorizing the minimum stream flows under Title 42, Chapter 15 and the rental of said water for instream flow

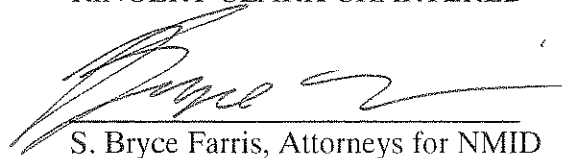
purposes under Title 42, Chapter 17. *See* I.C. §§ 42-1506, 42-1508, 42-1765A and 42-1765B. To allow the BOR to simply bypass or circumvent these requirements is contrary to this prior legislative action, contrary to Idaho law and contrary to the guidance from the Idaho Supreme Court.

III. CONCLUSION

There is no dispute that (1) a water right for minimum stream flow purposes must be established pursuant to Chapter 15, Title 42 of the Idaho Code; (2) that compliance with the requirements of Chapter 15, Title 42 did not occur with regard to water right no. 63-3618; and (3) the federal government, in this case the BOR, is not an entity allowed to hold a water right for minimum stream flow purposes. Nevertheless, BOR, the City of Boise and Ada County ask this Court to disregard Idaho law because it would somehow amount to a collateral attack on the license. This Court has the authority decide questions of law, is not bound by a license which is inconsistent with Idaho law, and should not decree or sanction that portion of the water right that does not comply with Idaho law.

DATED this 15th day of February, 2008.

RINGERT CLARK CHARTERED



S. Bryce Farris, Attorneys for NMID

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 2008, I caused to be served a true and correct copy of the foregoing document via U.S. mail, postage pre-paid, to the following:

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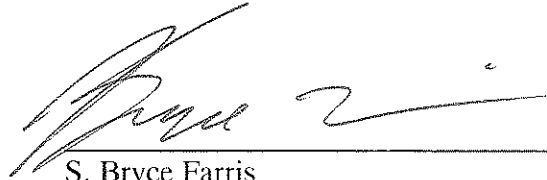
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