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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 Nos. 63-03614
	)	
Case No. 39576	)	UNITED STATES' RESPONSE TO
	)	PIONEER AND SETTLERS IRRIGATION
	)	DISTRICTS' MOTION FOR SUMMARY
	)	JUDGMENT
	)	

Introduction

This is the United States' response to the motion for summary judgment filed by Pioneer Irrigation District and Settlers Irrigation District (collectively "the Districts").

This subcase addresses the United States' water rights for Anderson Ranch Dam and Reservoir, one of the facilities of the Boise Reclamation Project. Those water rights were licensed by the State Reclamation Engineer in 1956. See Water License No. R-698, Exhibit B to the Affidavit of Dylan B. Lawrence, filed on or about February 28, 2008. The Districts contend

that this Court must issue a water right which incorporates a remark originally included on the license. The United States does not object to this Court doing so. We do, however, object to the Districts' efforts to needlessly restrict the season of use for power generation because doing so would upset the *status quo* and disturb operations which have benefitted both the United States and the irrigators for more than 50 years.

Factual Background and Statement of the Case

The Boise Project utilizes three on-stream reservoirs, Arrowrock, authorized in 1911, Anderson Ranch, authorized in 1940 and Lucky Peak, authorized in 1943. Lucky Peak, located on the mainstem of the Boise River approximately 8 miles upstream from the City of Boise, is the most downstream reservoir; Arrowrock, also on the mainstem, is approximately 14 miles upstream. Anderson Ranch, located on the South Fork of the Boise River is approximately an additional 42 miles upstream.

The authorization of Lucky Peak, a Army Corps of Engineers facility, led to a Memorandum of Agreement between the Department of the Army and the Department of Interior which provided for coordinated operations of the three reservoirs to "achieve the greatest multiple-purpose use of the combined total usable flood control and irrigation storage . . . of water in all three reservoirs."^{1/} 1953 MOA at 3. The MOA effectively created a unitary system in which 983,000 acre-feet of the three reservoirs' total storage of 1,084,000 acre-feet would be treated as a single pool of water to be "operated primarily in the interests of irrigation and flood

^{1/} In Subcase 63-3618, addressing Lucky Peak Reservoir, the parties filed Affidavits which included voluminous exhibits providing copies of the contracts and other background material related to the Boise Project. Rather than burden the Court with additional paper, the United States will refer to the Court to those Affidavits where appropriate. The 1953 MOA was provided as Exhibit E to the Affidavit of David A. Jarvis, filed on or about October 15, 2007 in Subcase 63-03618.

control and secondarily in the interest of power.”^{2/} *See Id.* at 4-5. While the MOA anticipated movement of water between the reservoirs, it explained that “reregulation of storage” and the “exchange of storage as provided in this plan,” would not “deprive any entity of water accruing to it under existing rights in Arrowrock, Anderson Ranch, and Lake Lowell Reservoirs.” *Id.* at 5. Further, the MOA specifically required irrigation water to be delivered to the irrigation entities at the outlet works of Lucky Peak dam. *See Id.* at 11. Congress endorsed the coordinated operation of the three project reservoirs through Section 2 of the Act of August 24, 1954, 68 Stat 794 (1954).

Congress explained that it was acting to implement principles contained in the Revised Allocation and Repayment Report prepared by Reclamation in 1953 (“1953 Report”). That report explained that “[t]he Boise Project was initially considered only in relation to irrigation.” 1953 Report at 3. However, over time, power and flood control came to be recognized as significant benefits of the Project and “operating plans [were] altered to achieve effective multiple-purpose development” *Id.* Importantly here, the report also explained why the use of irrigation water for power purposes would not harm the irrigators:

Anderson Ranch Dam and Reservoir [is] ideally located for power production, inasmuch as the winter releases for power could be recaptured in Arrowrock Reservoir, thus assuring the production of a block of firm power without the loss of water for irrigation.

Report at 3-4.

Less than a year after that report was issued, the Districts entered into contracts in which they “recogniz[ed] the benefits to accrue from a system-wide operation of Anderson Ranch, Arrowrock, and Lucky Peak dams...including an attendant reduction in the amount of

^{2/} The remaining water was allocated to dead storage, maintenance of minimum power head and other related purposes. *See Id.* at 5.

construction costs of Anderson Ranch dam otherwise allocable to irrigation *and the assignment of irrigation costs for return from power revenues*” and agreed to “cooperate with the United States and the various other water users organizations to permit such system-wide and integrated operations.”^{3/} *E.g.* 1954 Supplement Contract with Pioneer Irrigation District, Contract No. 14-06-W-85, at 2, ¶ 4 (emphasis added).^{4/} Put more directly, the Districts were willing to consent to system-wide operation because the power revenues facilitated by such operations, *i.e.*, the release of water from Anderson Ranch and its recapture at Arrowrock, or Lucky Peak for delivery to the irrigators, would be used to offset their repayment obligations.

The United States’ license for its Anderson Ranch storage water rights followed in December of 1956. Two aspects of the license are pertinent here. First, the license authorized the use of water for “irrigation and power” purposes, with the proviso that hydropower was to be generated “by use of water released for irrigation use.” Water License No. R-698, Lawrence Aff., Ex. B. Second, the license, consistent with the coordinated operation of the reservoirs envisioned in the 1953 MOA, 1954 Contracts with the Districts and the 1954 Act, did not restrict the season of use for power.

The Districts now contend that the license is binding on IDWR and in particular, that the Department is barred from “redefin[ing] the use of a previously issued license.” Memorandum in Support of Pioneer and Settlers Irrigation District’s Motion for Summary Judgment (“Mem.”) at 7. Despite that correct statement of the law, the Districts go on to ask this

^{3/} The 1953 Report estimated that almost \$10,000,000 of the total of \$44,000,000 of costs allocated to irrigation would be paid by power revenues. 1953 Report at 16-17.

^{4/} The District’s 1954 Contracts were included as Exhibits B & C to the Affidavit Jennifer A. Stevens, filed on or about October 12, 2007 in Subcase 63-3618 (Lucky Peak Reservoir).

Court to redefine the use authorized by the license by imposing restrictions on the season of use which were not included in the license.^{5/}

Standard of Review

The United States agrees with the District that this matter may appropriately be resolved by summary judgment. Further the United States does not dispute the District's characterization of the standard to be applied to resolving a motion for summary judgment. In particular, the United States agrees that the Court is "free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." Mem. at 4 (citing *Land O' Lakes, Inc. v. Bray*, 138 Idaho 817, 819, 69 P.3d 1078, 1080 (Ct. App. 2003)). In this proceeding those "facts" are the terms of the relevant documents addressing the water rights and operations of Anderson Ranch Dam and Reservoir.

Argument

The United States agrees with the Districts that a license "is 'binding upon the state' and 'prima facie evidence as to such right.'" Mem. at 2. Importantly here, the United States also agrees that the SRBA is not the forum to "redefine the use of a previously issued license." Mem. at 7. Indeed, this Court has consistently directed that "the law of the case in the SRBA precludes the outcome of an administrative license proceeding from being collaterally attacked in the SRBA."^{6/} **Memorandum Decision and Order on Cross-Motions for Summary**

^{5/} Although the Districts implicitly acknowledge that power generation is a proper use of Anderson Ranch water during at least some portion(s) of the year, they do not offer a proposed season of use for power. Instead they merely argue that this Court cannot decree the water right with a year round season of use for power purposes.

^{6/} This Court's decision in Subcase 91-63 observed that the elements of a licensed water right are not entirely immune from re-examination because those elements "can subsequently be changed voluntarily such as through contract or by operation of law (*i.e.*, forfeiture or abandonment)." **Memorandum Decision** at 30. Here, however, the Districts have not argued

Judgment, p. 12 (Consolidated Subcase 91-63) (Sept. 1, 2004); *see also, e.g., Memorandum Decision and Order on Challenge*, pp. 16-17 (Subcase No. 36-8099) (Jan. 11, 2000); and **Memorandum Decision and Order on Challenge**, p. 12 (Subcase No. 29-11609) (Oct. 6, 2006). Collateral attacks on a license are barred because the exclusive remedy for challenging a permit is to “contest the permit application in the proper administrative proceeding and if necessary through judicial review pursuant to the Administrative Procedures Act.”

Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 12 (Consolidated Subcase 91-63) (Sept. 1, 2004). The Districts’ motion for summary judgment is an improper collateral attack on the license because it asks this Court to “redefine the use of a previously issued license” by imposing a restriction on the season of use which was not included in the license.

More substantively, even if the Districts’ attack on the season of use for power were not barred, the motion would have to be denied. Restricting the season of use for power generation would not only upset the *status quo* with respect to Anderson Ranch’s water right, it would undermine the coordinated operations endorsed by Congress, under which for more than fifty years the United States has generated power as it moves water down the system for later delivery to the irrigation entities.

The Districts ask this Court to restrict the season of use for hydropower, because, in their view, endorsing the year round generation of power which has taken place over the half century since the license was issued ⁷ would “enlarge[] the use of water for power purposes at the _____ that either the contracts or the applicable law has changed in any relevant respect in the half century since the license was issued.

⁷ Ten years of that period are briefly summarized in a series of charts available at [www://www.usbr.gov/power/date/sites/anderson/andersgr.pdf](http://www.usbr.gov/power/date/sites/anderson/andersgr.pdf). A chart of the second page of

expense of irrigation.” Mem. at 9. That is not the case.^{8/}

In order to facilitate the most efficient use of the reservoir system and the water stored therein, irrigation water can be released from Anderson Ranch at any time during the year. As noted in the 1953 report, this release of irrigation water does not harm the irrigators because the water can be recaptured by either of the downstream project reservoirs and later delivered to the District’s at the outlet works of Lucky Peak Dam. Thus rather than “enlarg[ing] the use of water for power purposes at the expense of irrigation,” a water right which follows the license and allows year round generation of hydropower would merely maintain the *status quo* that has been in place since the license was issued more than fifty years ago.

Conclusion

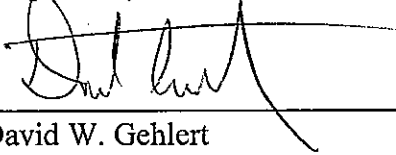
The Districts are absolutely correct that the SRBA is not the forum for redefining the use of water for power purposes allowed under the United States’ license. Accordingly, the Districts’ motion for summary judgment must be denied to the extent it asks this Court to impose a season of use on the use of water for power generation not included in the license. Moreover, a year round season of use would accord with Congressional intent and more than half a century of project operation, while not harming the irrigators’ interests.

that document demonstrates that power has been produced year round during that period by providing the average production for each month.

^{8/} Moreover, the Districts’ err when they assert that the terms of license make the use of water for power purposes “subordinate and subject to the use of water for irrigation purposes.” Instead, the remark merely recognizes that when water is “released for irrigation,” power can and will be generated. *See* Lawrence Aff., Ex. E.

DATED this 5th day of May, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David W. Gehlert", is written over a horizontal line.

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