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**DEPARTMENT OF
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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. 63-3614
(Anderson Ranch Reservoir)

**REPLY BRIEF IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Pioneer Irrigation District and Settlers Irrigation District (the "Districts"), through undersigned counsel of record, hereby file this Reply Brief in Support of Motion for Summary Judgment, pursuant to Idaho Rule of Civil Procedure 56(c) and this Court's Order Extending Schedule Deadlines of January 29, 2008. This Reply Brief is supported by the Second Affidavit of Dylan B. Lawrence filed contemporaneously herewith (the "Second Lawrence Affidavit").

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	LEGAL ARGUMENT.....	1
A.	The Districts Have Not Argued That the Period of Use for Power Should Be Limited to the Irrigation Season	1
B.	The United States “Does Not Object” to the Inclusion of the Critical License Language in the Partial Decree for the Water Right.....	3
C.	The Critical License Language Should Be Included as a Defined Element of the Water Right	3
D.	The United States’ Explanation That the Boise Project Reservoirs Are Operated as a “Unitary System” Does Not Affect Whether the License Language at Issue Should Be Included in the Water Right	4
1.	The Terms of the MOA Are Not Relevant to the Definition of State Law-Based Water Rights	5
2.	The Revised Allocation and Repayment Report Is Not Relevant to the Definition of State Law-Based Water Rights	6
3.	Watermaster Reports and the Water Control Manual Raise Issues Regarding Injury to Irrigators	7
III.	CONCLUSION	10

TABLE OF CASES AND AUTHORITIES

Statutes

43 U.S.C. § 383.....	5
An Act of August 24, 1954, Pub. L. No. 660-909, 68 Stat. 794	6, 7
I.R.C.P. 56.....	1
IDAHO CODE § 42-220.....	2, 10

Other Authorities

WATER CONTROL MANUAL FOR BOISE RIVER RESERVOIRS, at 7-29 (U.S. Army Corps of Engineers, April 1985, revised July 1988).....	8, 9
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I. INTRODUCTION

This subcase involves water right 36-03614, which is the water right held by the United States for the storage of water in Anderson Ranch Reservoir (the “Water Right”). On or about February 28, 2008, the Districts filed their Motion for Summary Judgment, their Memorandum in Support of same, and the Affidavit of Dylan B. Lawrence. On or about May 5, 2008, the United States filed its Response to Pioneer and Settlers Irrigation Districts’ Motion for Summary Judgment (the “U.S. Response” or the “Response”) and the Affidavit of David A. Jarvis in support of same. This Reply Brief responds to the U.S. Response.

II. LEGAL ARGUMENT

A. The Districts Have Not Argued That the Period of Use for Power Should Be Limited to the Irrigation Season

In its Response, the United States “object[s] to the Districts’ efforts to needlessly restrict the [Water Right’s] season of use for power generation.” (U.S. Resp., p. 2.) The United States goes on to explain why this Court should not “impos[e] a restriction on the season of use [of the Water Right] which was not included in the license.” (U.S. Resp., pp. 5-7.) However, in their summary judgment materials, the Districts do not challenge this element of the recommendation for the Water Right. The only relief requested by the Districts was for this Court to restore the following language that appeared in the quantity element of the original Water Right license:¹

¹ The Districts note that the Department’s recommendation of the Water Right includes 487,961 acre-feet for irrigation storage, and 5,200 acre-feet for industrial and municipal storage. Therefore, the Districts suggest that the language from the license be revised and included in the partial decree as follows: “493,161 acre-feet for power that can be generated by the release of 487,961 acre-feet of water for irrigation and 5,200 acre-feet for industrial and municipal purposes.”

Amount: 493,161 ac.ft. for irrigation and such power as can be generated by use of water released for irrigation use.

(Districts' Mot. for Summ. J., p. 2; Districts' Mem. in Supp. of Mot. for Summ. J., pp. 2, 4, 9-10.)

In their summary judgment materials, the Districts did indeed refer to the fact that the Department's recommendation for the Water Right designates a season of use for power of January 1 to December 31—a season of use which was not specifically designated in the original license. (Districts' Mem. in Supp. of Mot. for Summ. J., p. 8.) However, the Districts' intent in discussing this particular issue was to further illustrate how the Department's recommendation of the Water Right redefines the relationship between the irrigation and power purposes that was established in the original license.

Whereas the original license provides that Anderson Ranch water can be used for power generation only when water is "released for irrigation use," the Department's recommendation for the Water Right contains no such restriction, potentially altering the priorities of water storage within Anderson Ranch to the detriment of the Districts and other irrigation interests. As the Districts have explained, the Department's alteration of the relationship between irrigation and power uses is unlawful for two reasons. First, it is unlawful because it ignores critical language from a previous water right license which, according to Idaho Code Section 42-220, is supposed to be "binding upon the state." (*See* Districts' Mem. in Supp. of Mot. for Summ. J., pp. 5-8.) Second, it is unlawful because it constitutes an enlargement of the original water right. (*Id.*, pp. 8-9.)

However, nowhere in their summary judgment materials do the Districts call for the restriction of the Water Right's period of use for power. Therefore, from the Districts' perspective, this Court need not address the United States' arguments on this issue.

B. The United States "Does Not Object" to the Inclusion of the Critical License Language in the Partial Decree for the Water Right

With respect to the critical license language that the Districts believe should be included in the partial decree for the Water Right, the United States asserts in its Response that it "does not object" to the Court's inclusion of such language in the partial decree. (U.S. Resp., p. 2.) Indeed, as the Districts have described, virtually the entire legal argument section of the U.S. Response is focused upon explaining why the Court should not restrict the season of use for power; it does not refute the inclusion of the license language at issue. (U.S. Resp., pp. 5-7.)

If that is indeed the United States' position, then perhaps this subcase can be resolved without further legal argument. However, the remainder of this Reply Brief will contain additional discussion of issues raised in the U.S. Response, to the extent this Court is not convinced that the critical language from the license should be restored in the partial decree for the Water Right.

C. The Critical License Language Should Be Included as a Defined Element of the Water Right

In stating that it does not object to the inclusion of the original license language at issue, the United States refers to such language as a "remark." (U.S. Resp., p. 2.) While the United States does not appear to actually advance this argument, the description of that language as a "remark" potentially implies that such language should be included as a general remark on the Water Right, rather than as a defined element of the Water Right.

To be clear, it is the Districts' position that the language at issue should be incorporated into the Water Right as a defined element of the Water Right, because it was specifically included as part of the quantity element of the original Water Right license. The Districts submit that the most logical place to include such language would be immediately after the section in the Water Right recommendation/partial decree in which specific storage quantities are assigned to each purpose and period of use.

D. The United States' Explanation That the Boise Project Reservoirs Are Operated as a "Unitary System" Does Not Affect Whether the License Language at Issue Should Be Included in the Water Right

In its description of the factual background of this subcase, the United States explains that the construction of Lucky Peak Reservoir led to the execution in 1953 of a Memorandum of Agreement between the Department of the Army and the Department of Interior that called for the coordinated operations of Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs (the "MOA"). (U.S. Resp., p. 2.) According to the United States, this 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 control and secondarily in the interest of power.'" (U.S. Resp., pp. 2-3 (quoting MOA, pp. 4-5).) In addition, according to the United States:

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.'

(U.S. Resp., p. 3 (quoting MOA, p. 5).)

While the United States does not advance any specific legal arguments based upon the MOA, the implication of including these excerpts from the MOA is that there are already existing legal protections in place for irrigators, obviating the need to include the license language at issue in the Anderson Ranch Water Right. The Districts must explain why this is not the case.

1. The Terms of the MOA Are Not Relevant to the Definition of State Law-Based Water Rights

First, the Districts note that the MOA language quoted above that the reservoirs are to be “operated primarily in the interests of irrigation and flood control and secondarily in the interest of power,” supports their overall position in this subcase—that the use of water for power purposes at Anderson Ranch is incidental to irrigation. However, it is also important to clarify that the presence of this language in the MOA does not obviate the need to restore the license language at issue in the partial decree for the Water Right.

Why? Because the legal effect of the MOA is a matter of contract law involving two federal agencies and signatory irrigation entities. The presence of contractual terms in the MOA that might protect irrigators is simply not relevant to the definition of the terms of the Anderson Ranch Water Right pursuant to state law. And, under the Reclamation Act, the United States and its operation of Anderson Ranch Dam and Reservoir are subject to Idaho water law. *See* 43 U.S.C. § 383 (“[n]othing in this [Reclamation] Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . .”). Moreover, the mere presence of contractual

terms in the 1953 MOA certainly does not establish as a factual matter that the operation of the reservoirs as a “unitary system” has not adversely impacted downstream irrigation interests.

2. The Revised Allocation and Repayment Report Is Not Relevant to the Definition of State Law-Based Water Rights

A similar analysis applies to the United States’ reliance upon language contained in the 1953 Revised Allocation and Repayment Report (the “Repayment Report”). (*See* U.S. Response, p. 3.)² That Repayment Report is simply not relevant to the definition of the terms of the Anderson Ranch Water Right under state law.

In addition, it is notable that the language from that Repayment Report that is quoted by the United States states that “winter releases for power could be recaptured in Arrowrock Reservoir.” (Report, pp. 3-4; U.S. Response, p. 3) (emphasis added). The Report does not state that such water “shall” be recaptured. And, because the Report was issued in 1953, it certainly does not document as a factual matter that such winter releases are actually recaptured in Arrowrock Reservoir such that there are no adverse effects to irrigation interests.

Moreover, a general reference to the “principles” set forth in the Repayment Report in legislation authorizing the coordination of federal installations on the Boise and Payette Rivers does not change this analysis.³ *See* An Act of August 24, 1954, Pub. L. No. 660-

² The copy of the Repayment Report attached to the Affidavit of David A. Jarvis was incomplete. After the Districts’ counsel requested David Gehlert to provide the missing pages, a complete copy of that document was provided by Mr. Jarvis and is attached as Exhibit A to the Second Affidavit of Dylan B. Lawrence.

³ By way of clarification, the legislation cited by the United States on page 3 of its Response only authorizes the Secretary of the Interior to coordinate operations of federal facilities on the Boise and Payette Rivers. It provides no such authority to the Secretary of the Army—the operator of Lucky Peak. *See* An Act of August 24, 1954, Pub. L. No. 660-909, 68 Stat. 794.

909, 68 Stat. 794; (U.S. Resp., p. 3). Simply put, the Repayment Report is not relevant to the definition of the terms of the Anderson Ranch Water Right.

One other aspect of the United States' discussion of the Repayment Report is worth clarifying. The United States notes that the Districts entered into contracts with the federal government shortly after the Repayment Report was issued, and quotes one of the non-binding recitals to that contract in which Pioneer recognizes the general benefits of the joint operation of the reservoirs. (U.S. Response, pp. 3-4.) The United States goes on to state that, "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." (U.S. Response, p. 4.)

The United States does not actually explain or cite to any contractual provision pursuant to which either of the Districts' repayment obligations were offset as alleged by the United States. (*See* U.S. Response, p. 4.) A review of the 1954 contract between Pioneer and the federal government cited by the United States does not reveal any such provision. While some of the irrigation storage holders in Anderson Ranch may have benefited from such an arrangement, nothing in the record demonstrates that either of the Districts so benefited.

3. Watermaster Reports and the Water Control Manual Raise Issues Regarding Injury to Irrigators

Sections V.A and V.B, *supra*, explain as a legal matter why the Districts believe the documents referred to in the U.S. Response do not obviate the need to recognize the proper relationship between the power and irrigation uses of water within the terms of the Anderson Ranch Water Right itself. In addition, the Districts believe there are unresolved questions

regarding the effect of the joint operation of the three Boise River reservoirs on Anderson Ranch contract holders as a factual matter.

More specifically, the annual reports that are prepared by the Boise River watermaster do not clearly establish that the Anderson Ranch Reservoir irrigation storage accounts fill every year, yet there are references in the record to wintertime releases from Anderson Ranch. Attached as Exhibits B and C to the Second Lawrence Affidavit are two charts summarizing reservoir storage data obtained from the Boise River watermaster reports for the years 1956 through 2007. (Second Lawrence Aff., ¶¶ 3-5, Ex. B, C, D.) As Exhibit B indicates, there appear to have been several years in which Anderson Ranch did not meet its total storage allocation goal for that year. (Second Lawrence Aff., ¶ 4, Ex. C.)

As is reflected in Exhibit E to the Second Lawrence Affidavit, the Water Control Manual that the United States uses to operate the three Boise River reservoirs describes in general terms winter releases of water from Anderson Ranch for power production purposes. WATER CONTROL MANUAL FOR BOISE RIVER RESERVOIRS, at 7-29, 7-32 (U.S. Army Corps of Engineers, April 1985, revised July 1988) (Second Lawrence Aff., ¶¶ 6-8, Ex. E).⁴ In addition, the Water Control Manual states that:

At Anderson Ranch, the Bureau of Reclamation has a verbal agreement with the Idaho Fish and Game Department to maintain minimum releases from Anderson Ranch Dam of 300 cfs during the nonirrigation season and 600 cfs during the irrigation season. The maximum flow release during the irrigation season is about 1,600 cfs. This verbal agreement is contingent upon having ample

⁴ The entire Water Control Manual is available in the Record for the Lucky Peak Reservoir subcase (63-3618). (See Second Lawrence Aff., ¶¶ 6-8). Due to the voluminous nature of that document and its thus-far limited use in this subcase, the Second Lawrence Affidavit only includes the particular chapter of the Water Control Manual that the Districts cite directly.

storage water and favorable forecasts to indicate that it is practical to make these minimum releases.

WATER CONTROL MANUAL, at 7-31.

The Districts' concern is the fact that, when taken together, the watermaster reports and the Water Control Manual appear to indicate that winter releases may occur from Anderson Ranch, even in years in which Anderson Ranch does not fill. Critically, the Districts were unable to locate further explanation of what constitutes "ample storage water" and a "favorable forecast[]" that would make it "practical" to make the winter releases described in the Water Control Manual. And, conspicuously absent is any indication of whether, and to what extent, this oral contingency is intended to protect Anderson Ranch contract holders, or any more general explanation of how irrigation interests are protected when winter releases are made.

There may very well be an explanation that would allay the Districts' concerns by establishing that the operation of the Boise River reservoirs does not adversely affect Anderson Ranch contract holders. As the United States has stated, "winter releases for power could be recaptured in Arrowrock Reservoir." (Report, pp. 3-4; U.S. Response, p. 3) (emphasis added). However, there is nothing in the record for this subcase which actually establishes that the contract holders are not adversely affected.

The bottom line is that the documents cited by the United States do not adequately establish or ensure that the operation of Anderson Ranch Dam and Reservoir for power purposes does not adversely affect the irrigation storage contract holders. And, as has been explained, pursuant to the Anderson Ranch water right license, irrigation is the paramount use of Anderson Ranch, with power being incidental to irrigation because it can only be generated "by use of water released for irrigation use." Therefore, it is critical that this Court restore the original

language from that license that establishes this relationship between the irrigation and power uses of water at Anderson Ranch.

III. CONCLUSION

The original license for the Water Right included critical language defining the relationship between the power and irrigation uses of water within Anderson Ranch Reservoir. Importantly, that language was incorporated into the license through the quantity element of the Water Right. Pursuant to Idaho Code Section 42-220 and this Court's *Facility Volume* decision, such licenses are "binding upon the state," including in the SRBA. The documents cited by the United States are not relevant to defining the elements of state law-based water rights as a legal matter, and do not establish that the joint operation of the three Boise River reservoirs has not adversely affected Anderson Ranch contract holders as a factual matter. Therefore, this Court should restore the original license language as a defined element of the partial decree for the Water Right.

DATED this 2nd day of June, 2008.

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I HEREBY CERTIFY that on this _____ day of June, 2008, I caused a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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