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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,
Case No. 39576

Subcase No. 63-3618
(Lucky Peak Reservoir)

**SUR-REPLY MEMORANDUM IN SUPPORT
OF PIONEER IRRIGATION DISTRICT'S AND
SETTLERS IRRIGATION DISTRICT'S
MOTION FOR SUMMARY JUDGMENT**

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Pioneer Irrigation District and Settlers Irrigation District (collectively hereinafter the "Districts"), by and through undersigned counsel of record, hereby file this Sur-Reply Memorandum in Support of Pioneer Irrigation District's and Settlers Irrigation District's Motion for Summary Judgment, pursuant to this Court's Order Denying Motion to Strike Affidavits; Granting Alternative Relief; and Continuing Hearing on Motion for Summary Judgment, entered March 21, 2008.

Filed herewith in support hereof is the Second Supplemental Affidavit of Scott L. Campbell (hereinafter "2nd Supp. Campbell Aff.").

I. PROCEDURAL BACKGROUND

On or about October 12, 2007, the Districts, the United States, and the other parties to this case filed their motions for summary judgment, including their supporting affidavits. Then, on or about November 14, 2007, each party to this subcase filed their responses to motions for summary judgment, including any responsive/supplemental affidavits. Finally, on or about February 15, 2008, replies were filed. All filings were made by the parties in accordance with the scheduling orders of this Court. At the time, the parties' motions for summary judgment were scheduled to be heard on March 6, 2008, at 1:30 p.m.

On February 20 and 25, 2008, respectively, the Districts filed motions with this Court requesting orders striking the Affidavit of Robert J. Sutter, the Third Affidavit of David A. Jarvis (including the attachment thereto), and all related argument first advanced on or about February 15, 2008, by the United States in its reply brief in support of the motion for summary judgment. The Districts also requested an order striking the Affidavit of Sherri Pillow, and argument first advanced on or about February 15, 2008, by the City of Boise and Ada County (hereinafter "Participants") in their reply brief in support of the motion for summary judgment.

The identity of and testimony of Mr. Sutter and Ms. Pillow were not previously disclosed to the Districts. The United States and Participants had not previously made any argument relevant to the Idaho Attorney General Opinion No. 87-6, dated July 31, 1987, which the United States and Participants asserted support an argument first advanced by its reply memorandum to the effect a portion of the highly relevant Idaho Minimum Stream Flow Act is unconstitutional. Also, for the first time, the Participants argued that "vast swaths of the irrigation districts include residential subdivisions, indicating the water is not being used at all and/or not being used for agricultural purposes under federal law." As argued by the Districts, the Idaho Attorney General Opinion, and argument at issue were not supplemental to earlier factual showings or argument advanced by the United States and the Participants. Instead, the affidavits, attachments and argument presented new and different witness/affiant testimony, factual information and legal argument, in violation of the time limits set forth in Rule 56(c), Idaho Rules of Civil Procedure.

In the alternative to striking the testimony, attachments and argument, the Districts requested the previously-scheduled hearing on the motions for summary judgment be postponed pursuant to Rules 56(c) and 56(f), Idaho Rules of Civil Procedure, to permit the Districts an adequate opportunity to depose Robert J. Sutter and to respond, via sur-reply, to the new positions advanced by the United States and Participants.

By its Order Denying Motion to Strike Affidavits; Granting Alternative Relief; and Continuing Hearing on Motion for Summary Judgment, entered March 21, 2008, this Court denied the District's Motions to Strike, and granted the requested alternative relief by postponing the hearing to permit the Districts to depose Mr. Sutter and submit sur-reply argument on the newly presented testimony and argument. In accordance with said Order, this Sur-Reply is necessarily limited to the three issues, first raised by the United States' and Participants' reply

memoranda, addressed by the District's Motions to Strike, namely: (1) the constitutionality of the legislative veto contained in Idaho's Minimum Stream Flow Act (hereinafter "MSFA"); (2) the definition of "irrigation water" in the Federal Reclamation Reform Act of 1982; and (3) response to the testimony of Robert Sutter.

II. ARGUMENT

A. Constitutionality Of The Legislative Veto Contained In Idaho's Minimum Stream Flow Act

The United States and the Participants argue MSFA's legislative veto provision set forth in Idaho Code Section 42-1503 is unconstitutional. (Reply Br. in Supp. of the U.S. Motion for Summ. J., p. 5, n.3; Reply Mem. in Supp. of Participants' Mot. for Summ. J., pp. 7-8.) In making this argument, the United States and the Participants ignore Idaho Supreme Court case law specifically upholding as constitutional a very similar legislative veto provision. They also ignore the critical fact that the Department never presented the approved Water Right Application to the Legislature as required by Section 42-1503.

1. The Legislative Veto Is Constitutional Pursuant To The Idaho Supreme Court's Opinion In *Mead v. Arnell*

To support their assertion that the legislative veto provision of Section 42-1503 is unconstitutional, the United States and the Participants both rely upon an Idaho Attorney General opinion issued in 1987, 1987 Idaho Op. Atty. Gen 45, Idaho Op. Atty. Gen. No. 87-6, 1987 WL 247591 (July 31, 1987) (hereinafter, the "IAG Opinion"). (Reply Br. in Supp. of the U.S. Motion for Summ. J., p. 5, n.3; Reply Mem. in Supp. of Participants' Mot. for Summ. J., pp. 7-8, n.5.) In that opinion, the Idaho Attorney General concluded the legislative veto provision contained in Section 42-1503 may be unconstitutional on two separate grounds. IAG Opinion at 1.

First, the Attorney General concluded Section 42-1503 violated the enactment and presentment requirements of Article 3, Section 1 and Article 4, Section 10 of the Idaho Constitution, because it allows the legislature to use a concurrent resolution to rescind an administrative rulemaking. IAG Opinion, pp. 2-5. According to the Attorney General, such a legislative act is constitutional only if it complies with the full bill/law enactment provisions in the Idaho Constitution. *Id.* Second, the Attorney General opined that Section 42-1503 may violate the separation of powers principles embodied in Article 2, Section 1 of the Idaho Constitution. *Id.*, pp. 5-7.

While opinions of the Attorney General may be deemed persuasive in some contexts, it is important to emphasize that the Attorney General's opinions are not binding on this Court. *See, e.g., Echo Ranch, Inc. v. State ex rel. Evans*, 107 Idaho 808, 811, 693 P.2d 454 (1984). Furthermore, reliance upon the opinion in this case is inappropriate because the opinion—which was issued in 1987—predates a highly relevant 1990 Idaho Supreme Court decision which upholds a similar legislative veto as constitutional.

Specifically, in *Mead v. Arnell*, the Idaho Supreme Court addressed the constitutionality of a statute which allowed the legislature to rescind administrative rulemaking by concurrent resolution. *Id.*, 117 Idaho 660, 662, 791 P.2d 410, 412 (1990) (“[t]he issue before the Court is whether the Idaho Legislature may rescind the rules promulgated by an executive department board or agency by concurrent resolution pursuant to I.C. § 67-5218”). The court ultimately upheld as constitutional the legislative veto provision at issue in the case. *Id.*, 117 Idaho at 670, 791 P.2d at 420. In doing so, the court specifically rejected the two alternative theories set forth in the IAG Opinion as a basis for suggesting Section 42-1503 may be unconstitutional, namely: enactment/presentment and separation of powers.

With respect to the enactment/presentment issue, the Idaho Supreme Court in its decision in *Mead* held a concurrent resolution rescinding an administrative action “is not a law and need not comply with article 4, § 10 of the Idaho Constitution.” *Id.*, 117 Idaho at 667, 791 P.2d at 417. In so holding, the court quoted with approval from the *dissent* in *I.N.S. v. Chadha*—a federal case invalidating a legislative veto provision pursuant to the United States Constitution: “The power to exercise a legislative veto is *not the power to write a new law* without bicameral approval or presidential consideration.” *Id.* (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 980 (1983) (White, J., dissenting) (emphasis added)). This represents approval of the use of a concurrent resolution as a legislative veto in Idaho, and a rejection of the argument that a legislative veto by concurrent resolution violates the presentment/enactment requirements of the Idaho Constitution. Moreover, in *Mead*, the Idaho Supreme Court specifically justified the different results in *Mead* and *Chadha* by noting the differences between the federal and Idaho Constitutions, *i.e.*, that the formality requirements of the Idaho Constitution are “much more limited.” *Id.*, 117 Idaho at 668, 791 P.2d at 418.

Similarly, the Idaho Supreme Court in *Mead* also rejected the argument that the legislative veto provision at issue in that case violated separation of powers principles. *Id.*, 117 Idaho at 667, 791 P.2d at 417 (“[t]he Board’s argument [that a legislative veto provision violates the doctrine of separation of powers] is misapplied to this case”). Of particular importance to the Court was the fact that—as in the case currently before this Court—the administrative action that the legislature sought to rescind was a result of a legislative delegation of power to the agency:

[I]n this case, the Board’s rule making power comes from a legislative delegation. Rule making that comes from a legislative delegation of power is neither the legal nor functional equivalent of constitutional power. It is not constitutionally mandated; rather it comes to the executive department through delegation from the legislature.

Id.

In this case, the legislative delegation of power through the MSFA is the authority for the Department to approve minimum stream flow water rights—but only under the conditions specified in the MSFA, including the requirement in Section 42-1503 to present an approved minimum stream flow application to the legislature. Because the Department’s authority to approve such water rights was created by the legislature, under *Mead*, it is a valid subject of a legislative veto. Again, on this issue, the Idaho Supreme Court quoted with approval the dissent in *Chadha*:

If the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breadth, is legislative or “quasi-legislative” in character, I cannot accept that Art. 1 [of the U.S. Constitution]—which is, after all the source of the non-delegation doctrine—should forbid Congress to qualify that grant with a legislative veto.

Id., 117 Idaho 668, 791 P.2d 418 (quoting *Chadha*, 462 U.S. at 989 (White, J., dissenting)).

2. The Holdings In The *Chadha* And *Idaho Power* Cases Relied Upon In The IAG Opinion Are Not Applicable To This Case

The IAG Opinion relies heavily on the United States Supreme Court’s opinion in the *Chadha* case. IAG Opinion, pp. 3-5. Initially, the *Chadha* decision addresses whether legislative vetoes comply with the United States Constitution—not the Idaho Constitution. The holding in *Chadha*, therefore, has no binding or precedential effect on this Court in its interpretation of the Idaho Constitution. And, as this Sur-Reply argument previously explained, the Idaho Supreme Court in *Mead* quoted with approval from the *dissent* in *Chadha*, and relied upon the differences between the United States Constitution and the Idaho Constitution in upholding a legislative veto. Therefore, *Chadha* and the Idaho Attorney General’s analysis of

that case in its Opinion do not support the United States' and the Participants' argument in this case.

The IAG Opinion also relies upon another judicial opinion that is distinguishable from this case: *Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983). IAG Opinion, pp. 2, 4, 5. In *Idaho Power*, the Idaho Supreme Court held that a joint resolution revising the State Water Plan adopted by the Idaho Water Resource Board (the "IWRB") was unconstitutional. *Id.*, 104 Idaho at 574, 661 P.2d at 740. Critically, in that case, the IWRB had *constitutional* authority to adopt the State Water Plan. IDAHO CONST. art. 15, § 7; *see Idaho Power*, 104 Idaho at 574, 661 P.2d at 740. This is a critical distinction, as the Department's authority to approve minimum stream flow water rights derives from a legislative enactment—the MSFA—and not the Idaho Constitution.

Also critical to the *Idaho Power* case was the fact that the constitutional provision at issue subjected the IWRB only to the "laws" prescribed by the legislature. IDAHO CONST. art. 15, § 7. Due to the use of the word "laws," any legislative attempt to amend the State Water Plan were required to be in accordance with the enactment/presentment requirements of Article 3, Section 1 and Article 4, Section 10 of the Idaho Constitution. In the subcase currently before this Court, there is no such requirement that the legislature's action on an approved minimum stream flow application be by a "law"; it only requires a "concurrent resolution." IDAHO CODE § 42-1503.

3. The Application In This Subcase Has Never Been Presented To The Legislature

This Sur-Reply has explained that the legislative review provision in Section 42-1503 is constitutional in Idaho. Even if, for the sake of argument, the legislative review provision were found to be unconstitutional, such a finding does not excuse the fact that

the Department did not present the approved application to the Legislature at any time. Such failure on the part of the Department deprived the Legislature of the ability to act in a constitutional manner. In this regard, the sequence of events with respect to the MSFA, the proposed Water Right, and legislative veto jurisprudence is illustrative.

The MSFA—including the legislative review provision in Section 42-1503—was originally enacted in 1978. S.L. 1978, ch. 345, § 11. The United States Supreme Court's opinion in *Chadha*, which invalidated a federal legislative veto provision pursuant to the United States Constitution, was issued in 1983. The Bureau of Reclamation submitted an application to amend its permit for 63-3618 to include stream flow maintenance for the first time in 1984¹, which the Department approved on February 14, 1985.²

Pursuant to Section 42-1503, the Department should have forwarded the approved application to the Legislature by the fifth legislative day of the 1986 regular session. The Legislature may have reviewed the approved application and, if deemed appropriate, to revise or reject the approval; and may have determined it appropriate to act in a manner that addressed the concerns raised in the *Chadha* opinion regarding the validity of legislative vetoes.

However, by completely disregarding the requirement to present the approved application to it, the Legislature was deprived of the opportunity to act in an otherwise constitutional manner. Simply arguing potential constitutional issues raised by Section 42-1503 does not excuse the Department's failure to present the approved application to the Legislature, as required by the applicable statute.

¹ Affidavit of Scott L. Campbell in Support of Pioneer's and Settlers' Motion for Summary Judgment, ¶ 16, Exhibit M (October 10, 2007).

² *Id.*

Additionally, the general rule in Idaho is that statutes are presumed valid and all reasonable doubts as to constitutionality must be resolved in favor of validity. *State ex rel. Idaho State Park Board v. City of Boise*, 95 Idaho 380, 381, 509 P.2d 1301, 1302 (1973); *see also*, *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990), *In re Bermudes*, 141 Idaho 157, 161, 106 P.3d 1123, 1127 (2005). Therefore, in this Subcase, and provided the relevant statutory provision has yet to be sufficiently challenged constitutionally, no basis for refusal to present the application to the Legislature has been adequately asserted by the United States and/or Participants.

B. Definition Of “Irrigation Water” In The Federal Reclamation Reform Act Of 1982

In response to the Districts’ argument that using Lucky Peak Project water for stream flow maintenance is contrary to the purposes of the Lucky Peak Project, the Participants assert they “could just as easily argue that the Objectors are using contracted irrigation water contrary to the historical basis of construction for Lucky Peak,” because “vast swaths of the irrigation districts include residential subdivisions, indicating the water is not being used at all and/or not being used for agricultural purposes under federal law.” (Reply Mem. in Supp. of Participants’ Mot. for Summ. J., p. 11.) Participants rely upon the definition of “irrigation water” set forth in 43 U.S.C. § 390bb as “water made available for agricultural purposes.” *Id.*

1. The Use Of Lucky Peak Water To Irrigate Residential Areas Is Irrelevant To This Subcase

This Sur-Reply will explain why there is no legal basis for the Participants’ argument on this issue. As an initial matter, however, it is important to emphasize that the issue to be resolved in this subcase is the legality of the portion of Water Right A63-03618 for Lucky Peak Project water designated for utilization for minimum stream flow maintenance, which the

Districts and other parties submit, is contrary to the purposes of the construction of the facility and contrary to Idaho water law concerning minimum stream flow appropriations. The Participants' argument regarding the Districts' use of water for irrigation of residential properties does not have any relevance to this issue.

2. The Statute Relied Upon By The Participants Is Inapplicable

The Participants base their suggestion that the Districts' use of Lucky Peak water for residential areas is "contrary to the historical basis of construction for Lucky Peak" on 43 U.S.C. § 390bb. (Reply Mem. in Supp. of Participants' Mot. for Summ. J., p. 11.) That statute defines the term "irrigation water" as "water made available for agricultural purposes from the operation of reclamation project facilities pursuant to a contract with the Secretary." 43 U.S.C. 390bb(5).

As an initial matter, the Participants' reliance upon that statute is in error. Section 390bb is part of the Reclamation Reform Act of *1982* (the "RRA"). *See* 43 U.S.C. § 390aa. The Lucky Peak Project was constructed in *the 1950s*. The Participants do not explain why it is appropriate to refer to a statute enacted nearly 30 years after completion of construction to determine its "historical basis of construction."

Even more to the point is the fact that the RRA does not apply to or govern the Lucky Peak storage contracts. The Lucky Peak Project was constructed by the Army Corps of Engineers—not the Bureau of Reclamation. The general rule under the RRA is that it does not apply to projects constructed by the Corps. 43 U.S.C. § 390ll(a). While there are two statutory exceptions to this general rule, *id.* at § 390ll(a)(1), (2), the Participants have not presented evidence or otherwise explained why either of those two exceptions apply in this subcase.

C. Response To The Affidavit And Deposition Of Robert Sutter

The United States filed the Affidavit of Robert J. Sutter contemporaneously with its reply brief (the “Sutter Affidavit”). In general, the purpose of the Sutter Affidavit is to support the United States’ claim that downstream irrigation interests have never been injured by the streamflow maintenance portion of the Lucky Peak water right. That affidavit is unpersuasive on this issue for a variety of reasons. Before addressing those specific deficiencies, however, it may be helpful to begin by summarizing the arguments the parties presented on this issue in the briefing before this Court.

1. Summary Of Arguments Regarding Injury To Irrigators

In light of the fact that irrigation storage was one of the primary purposes for constructing Lucky Peak, it is inappropriate to decree “streamflow maintenance storage” and “streamflow maintenance from storage” as purposes of use for the Lucky Peak Project water right. The United States has not historically fulfilled its contractual obligations to irrigators, which further supports this position.

More specifically, in their initial summary judgment brief, the Districts argue that the federal government has “largely ignored or denied” its contractual obligations to provide makeup storage water from Anderson Ranch and Arrowrock Reservoirs in those instances in which the Districts have been injured by the operation of those facilities for flood control purposes in conjunction with Lucky Peak. (Mem. in Supp. of Districts’ Mot. for Summ. J., p. 23.) The Board of Control takes a similar stance, essentially arguing that designation of a use that is exclusively dedicated to streamflow maintenance means that the federal government will be unable to meet its obligations to irrigators under the 1953 Memorandum of Agreement between the Department of the Interior and the U.S. Army Corps of Engineers and the

subsequent Lucky Peak storage contracts. (Mem. in Supp. of Mot. for Partial Summ. J., pp. 4, 5-6.)

In its response brief, the United States argues that, “[i]n every year [since coordinated operations for flood control began in 1955], the irrigators contracting for water from Anderson Ranch and Arrowrock Reservoirs have received their full entitlement of storage water.” (Resp. Br. in Supp. of U.S. Mot. for Summ. J., p. 12.) The United States bases this argument upon the Affidavit of Mary Mellema. *Id.*

However, in their reply brief, the Districts establish that the Mellema Affidavit is not admissible on these issues. (Districts’ Reply Br., pp. 11-15.) More specifically, the Districts established through deposition testimony of Ms. Mellema that she lacked the requisite personal knowledge to testify regarding the federal government’s compliance with the storage contracts, in part because she was not personally familiar with the contracts and/or the water storage allocation program used by IDWR. *Id.* While the United States attempted to rehabilitate the Mellema Affidavit by filing an Amended Affidavit of Mary Mellema, the Districts have already explained why that effort to rehabilitate Ms. Mellema’s original affidavit is also unsuccessful. (Districts’ Reply Br., p. 15, n.1.)

Now, the United States has attempted to support its “no injury” argument by filing the Sutter Affidavit. For the reasons discussed below, this Court should not consider the Sutter Affidavit in any determination regarding the United States’ past and future ability to comply with its contractual obligations to irrigators. In short, the United States has not sufficiently established that it has historically satisfied its obligations to downstream irrigation interests pursuant to the Boise Project reservoir storage contracts or that it will be capable of doing (or willing to do so) in the future.

2. The Sutter Affidavit Is Only Offered To Provide Background Information Regarding IDWR's Allocations Program; It Is Not Relevant To Injury

As an initial matter, it is important to note the limited purposes for which the Sutter Affidavit is offered. As the United States freely admits, it offers Mr. Sutter's testimony for the limited purpose of describing how IDWR's water storage allocation and water rights accounting computer programs operate.

During his deposition, Mr. Sutter was questioned regarding his understanding of the Bureau of Reclamation's contractual responsibilities to the irrigation entities with storage rights in the Boise Project reservoirs. *See, e.g., 2nd Supp. Campbell Aff., ¶ 2, Exhibit A (Sutter Depo.) at 166:25-178:9.* During that questioning, counsel for the United States offered the following:

MR. GEHLERT: And before Mr. Sutter answers the question – and you can answer it – I will just object on the basis that *Mr. Sutter is not being offered as a witness to interpret the contracts.*

Sutter Depo. at 168:19-22 (emphasis added).

Similarly, later in the questioning, counsel for the United States stated:

MR. GEHLERT. * * * I have already explained that *he is not being offered as a witness to interpret the contracts. He is being offered as a witness to explain IDWR's accounting process.*

Sutter Depo. at 173:3-6 (emphasis added).

This is consistent with Mr. Sutter's understanding of the role that his testimony would play in this subcase, as reflected in the following exchange:

Q. (BY MS. MARTENS): Go ahead. I am sorry. The question that I had asked was what you were told was relevant, for purposes of this case, and that you utilized to render your opinions that are set forth in your affidavit.

A. (BY WITNESS): It was my perception that what was relevant in this case were the *procedures used to account for the storage water fill* in the Allocations Program for Lucky Peak Reservoir.

Q. Anything else?

A. In particular, *the accounting of the fill of the stream maintenance account* in a flood control situation.

Q. Anything else?

A. The only other thing would be *how that accounting also affected Anderson Ranch and Arrowrock*.

Q. Anything else?

A. Just, in general, *the water right accounting procedure* that the Department and the watermaster used to account for water throughout the irrigation year.

Sutter Depo. at 197:12–198:5 (emphasis added).

A subsequent exchange further illustrates that while Mr. Sutter may be competent to testify as to IDWR's procedures for allocating storage water during his previous term with the IDWR, he is not competent to testify regarding whether the Bureau of Reclamation actually complies (or historically complied) with its contractual obligations. In response to a question on this issue, Mr. Sutter responded:

A. (BY WITNESS): *I don't feel qualified to interpret the contracts of the Bureau of Reclamation.*

Q. (BY MS. MARTENS): So you do not know whether or not it met its contractual obligations to those spaceholders without having to rely on water from the Streamflow Maintenance account?

A. *I'm not sure what all of their contractual obligations are.*

Sutter Depo. at 208:7-14 (emphasis added).

In short, while the Sutter Affidavit may provide explanation of how IDWR's water right allocation program worked, in general, during his term with IDWR, it does not

provide competent evidence as to whether the Bureau of Reclamation has complied with its contractual obligations to the Districts in the past, or whether it is likely to comply with them in the future.

3. Sutter Only Analyzed A Limited Set Of Data In Forming His Conclusions

It is also notable that, by its terms, the Sutter Affidavit is only relevant to operations at Lucky Peak since 1986, because that is when IDWR's allocation computer program was first used. (Sutter Aff., ¶ 7.) This ignores approximately 30 years' worth of operations at Lucky Peak, construction of which was completed in the 1950s. This fact further supports limiting this Court's reliance upon the Sutter Affidavit to general background information regarding IDWR's allocations computer program, and not relying upon that affidavit in drawing conclusions regarding compliance with contractual obligations Mr. Sutter testified he was not qualified to interpret or injury to downstream irrigation interests.

4. Sutter's Conclusions Do Not Relate To The Federal Government's Compliance With Lucky Peak Storage Contracts

In his affidavit, Mr. Sutter testifies that from 1986 to 2007, there were 10 years in which flood control releases were made from the Boise Project reservoir system. (Sutter Aff., ¶ 9.) According to Mr. Sutter, "in all [ten] cases, Arrowrock and Anderson Ranch entitlements received 100 percent allocation." *Id.* It is important to keep in mind that this conclusion is only relevant to the United States' compliance with Arrowrock and Anderson Ranch storage contracts; it does not establish that the federal government has complied with its Lucky Peak storage delivery obligations for those same years.

Moreover, it is important to note that the conclusion described above in the Sutter Affidavit only relates to whether the reservoirs filled "on paper:"

Q. (BY MR. FARRIS): And in your note, Exhibit 33, you have listed ten years. Those are the years that Lucky Peak did not fill?

A. (BY WITNESS): Those ten years are years in which there was a flood control operation.

Q. So between 1986 and 2007, those are the ten years that there was a flood control operation?

A. Correct.

Q. And so Arrowrock and Anderson Ranch filled those ten years?

A. And Lucky Peak.

Q. And Lucky Peak filled those ten years?

A. On paper.

Q. On paper? Okay. But there were some of the years that they filled on paper but did not physically fill, due to miscalculations or errors?

A. *I'm not sure about the physical. I just looked at the paper. Anderson Ranch and Arrowrock always fill on paper -- and Lucky Peak.*

Sutter Depo. at 238:13–239:6 (emphasis added).

In other words, Mr. Sutter's conclusions only establish that the Boise Project reservoirs initially filled "on paper" during the ten years that he identified as flood control years between 1986 and 2007; his conclusions do not take into account potential injury to irrigators that may have occurred after this initial fill, when water is released from Lucky Peak for flood control purposes.

Indeed, Mr. Sutter specifically testified during his deposition that, in four of the ten flood control years that he examined, there was a failure to physically fill the reservoir system that was specifically due to flood control operations:

Q. (BY MR. FARRIS): But it didn't fill – I use the term “physically,” but maybe that is not the right term. It didn't –

A. (WITNESS) I think the term here – if you look at the second column in my notes, I called it a failure to fill due to flood control.

MS. MARTENS: Is that helpful?

MR. FARRIS: Yes.

THE WITNESS: In four of those years – let's see – one, two, three – in four of those years, there was a failure to fill due to flood control. *So in four out of the ten years, there was a failure to fill due to flood control.* In the other six, it filled completely on paper, again, the second time.

Sutter Depo. at 239:14–240:2 (emphasis added).

Critically, in 1989, the reservoir system under-filled by 126,000 acre-feet, even though the system initially filled on paper:

Q. (BY MR. CAMPBELL): Just so I am following you, you are saying, then, that *you calculated out the failure to fill due to flood control amount in 1989 as being 126,473 acre-feet?*

A. (BY WITNESS): *Correct.*

* * * * *

Q. (BY MS. MARTENS): Referring back to 1989 and the 126,000 acre-feet shortage, *was there an error that year that resulted in such a significant shortage?*

A. (BY WITNESS): *I believe there was a forecasting error, yes.*

Q. Do you recall that year and what happened?

A. Not specifically, except that *the forecast was in error and they released too much water and could not refill.*

Q. *Do you know whether, in 1989, the reservoirs initially filled?*

A. *On paper?*

Q. Yes.

A. Oh, yes, they did.

Sutter Depo. at 136:2-5; 224:20–225:7 (emphasis added).

And, because only the first 60,000 acre-feet of the streamflow maintenance storage portion of the Water Right is considered “last to fill” by the Bureau, the irrigators share in that shortfall:

Q. (BY MR. FARRIS): So if there is more than 60,000 – if there is a shortfall of more than 60,000 and you proportionally take or however you want to say it –

A. (BY WITNESS) Either way. You could proportionally reduce everybody’s account or you could only give them – *they suffer that deficit.*

* * * * *

Q. (BY MR. FARRIS): So in a situation where you have them completely filled and the carry-over is wiped out, how do you reconcile that with the Streamflow Maintenance account?

A. (BY WITNESS): If there is a flood control operation, all of the accounts fill to 100 percent initially. So carry-over doesn’t become an issue. Everybody has 100 percent.

If there’s a shortfall, then it goes back to this special calculation where the 60,000 is considered like a separate reservoir. It’s separate. Everybody left shares proportionally.

So the Streamflow Maintenance account – if you are talking about the Bureau of Reclamation’s stream maintenance account, it would show 42,000.

Let’s say that the rest of the – what it does is it computes the percent. *Let’s say that the shortfall was greater than 60,000 and there was a 10-percent deficit or a 90-percent fill of the rest of the space.*

Then it simply takes 90 percent of everybody’s entitlement and gives them that. So everybody would get 90 percent. Now, the stream maintenance account doesn’t have the 102,000. It says 40,000, so they would get 36,000.

Sutter Depo. at 255:15-20; 256:6–257:5 (emphasis added). On the basis of the foregoing, Mr. Sutter’s limited review of allocations data, relevant to ten years of operations, is not sufficient to support the broad, all-encompassing opinions set forth in his affidavit related to compliance with contractual obligations.

5. The Sutter Deposition Establishes That The Allocations Program Is Not “Hardwired” To Protect The Arrowrock And Anderson Ranch Spaceholders

In its reply brief, the United States relies upon the Sutter Affidavit for the proposition that “IDWR’s accounting system is *hardwired* to ensure that Arrowrock and Anderson Ranch remain full on paper regardless of which reservoir(s) may not have physically refilled during flood control operations and regardless of the status of any account in Lucky Peak.” (U.S. Reply Br., p. 12 (emphasis added).) The implication of the use of the term “hardwired” is that, regardless of what has happened in the past, IDWR’s Allocations Program has been immutably written to protect Arrowrock and Anderson Ranch spaceholders and can never be changed.

However, Mr. Sutter’s deposition testimony demonstrated *no* such protection actually exists. During his deposition, Mr. Sutter specifically rejected the proposition that IDWR’s water storage allocation program is “hardwired.” For example, Mr. Sutter referred to the program as “a dynamic tool for which modifications are made several times in order to accomplish the correct storage allocations on the Boise.” Sutter Depo. at 39:16-18. In addition, the following exchange took place on this issue:

Q. (BY MS. MARTENS): And I do not want to put words in your mouth, but I have notes here that you testified that the system is a dynamic tool.

A. (BY WITNESS): Yes.

Q. Would you characterize the program as, quote, "hardwired," end quote?

A. What is your definition of "hardwired"?

Q. I don't know. You can tell me if you have a definition of "hardwired."

A. *You know, people will say, "Oh, it's hardwired; it's a black box." I don't go along with that because it's just a tool. It's like a desk calculator. You punch in the numbers or whatever. No, it is not hardwired.*

Q. *It can be changed at any time?*

A. *Yes, if you are smart enough.*

Sutter Depo. at 190:25–191:15 (emphasis added).

In fact, during his deposition, Mr. Sutter, who retired from IDWR in 2002, described his knowledge of multiple changes that have been made to the allocations program, as well as the lack of any formal procedure within IDWR for making changes to the program:

Q. (BY MS. MARTENS): My understanding is that Weimin Li made modifications to the Allocations and Accounting Programs; is that correct?

A. (BY WITNESS): Yes.

Q. And Pam Pace made modifications?

A. Yes.

Q. And Liz Cresto made modifications?

A. I'm not aware of any modifications that she made.

Q. And Cheryl Kramer, a part-time employee, had made modifications?

A. Yes.

Q. Are you aware of any other modifications made by any other individuals?

A. Possibly, Sheryl Howe.

Q. Anybody else?

A. No.

Q. Are you consulted with respect to those modifications?

A. While I was the head of the Hydrology Section, I would have been consulted with major modifications but probably not minor modifications.

Q. And since that time, you would not have been consulted –

A. No.

Q. – in any respect?

A. No.

Q. And you would agree with me that, as I go through and note modifications, not all modifications provide for the individual that made the change?

A. Correct.

Q. It also appears, as I go through the records, beginning in 1995, others were in charge of the Water Right Accounting and Allocations Systems, rather than you; is that correct?

A. Yes.

Q. And those individuals that were in charge of the Water Right Accounting and Allocations Systems included Sheryl Howe?

A. Yes.

Q. Pamela Pace?

A. Yes.

Q. And Liz Cresto?

A. Yes.

Q. Anybody else who you are aware of that, between the time of 1995 and 2008, has been in charge of that system – those systems?

A. No.

Q. Was there any policy or procedure after 1995 that you would be consulted with respect to any modifications to those systems?

A. No.

Q. Is there any formal system in place regarding modifications to the system?

A. No.

Q. Is there any policy or procedure or rule that prevents those persons who are in charge of the Water Right Accounting and Allocations Systems from making modifications to the program?

A. No.

Sutter Depo. at 188:15–190:24.

In summary, the United States asserts that the storage allocation program is “hardwired” to protect spaceholders in Arrowrock and Anderson Ranch Reservoirs in order to minimize the concerns that have been expressed by the Districts and the Board of Control. However, Mr. Sutter’s testimony demonstrates that the program is not “hardwired”; rather, it is a “dynamic tool” capable of being modified without procedure, review or notice to any party. This further supports the concerns of the Districts and the Board of Control regarding the contractual obligations they are owed, and the lack of compliance with those contract terms.

III. CONCLUSION

The United States and the Participants argue that the MSFA’s legislative veto is unconstitutional. This argument is based upon an Idaho Attorney General opinion letter which predates the *Mead v. Arnell* case, in which the Idaho Supreme Court specifically upheld as constitutional a legislative veto provision that is highly analogous to the one at issue in this subcase. After the holding in *Mead*, there is simply no basis for concluding that the MSFA’s legislative veto provisions is unconstitutional. Therefore, the arguments the Districts have raised

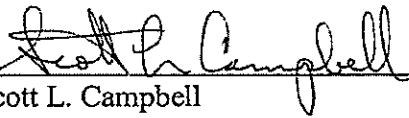
in this subcase regarding IDWR's failure to seek legislative review of the streamflow maintenance portion of the Lucky Peak water right, as required by the applicable statutory provisions, remain valid.

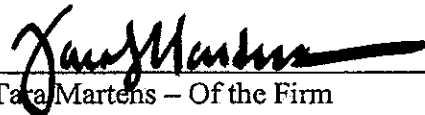
The Participants suggest the Districts are using Lucky Peak water contrary to the purposes of the construction of that reservoir because they use such water on residential areas within their boundaries. This argument has no relevance to this subcase. Moreover, to support this argument, the Participants cite to the federal Reclamation Reform Act of 1982—legislation that, as the Districts have explained, is not legally applicable to Lucky Peak, and that was enacted nearly 30 years after the construction of the Lucky Peak Project.

The United States has offered the Sutter Affidavit in support of its argument that it has historically satisfied its contractual obligations to downstream irrigation interests, and that it will continue to do so. As the Districts have explained, and counsel to the United States confirmed, the testimony is only relevant insofar as it attempts to explain how IDWR's water storage allocation and water rights accounting programs worked—programs that have only been in use since 1986, and that, far from being “hardwired,” are “dynamic” tools that have been changed several times in the past and that are capable of being changed in the future without formal procedures, review or notice. Simply put, the United States cannot demonstrate that it has satisfied its contractual obligations to downstream irrigation interests. Under these circumstances, it would be inappropriate to decree the Lucky Peak water right with purposes of use of “streamflow maintenance” and “streamflow maintenance storage.”

DATED this 5th day of June, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Scott L. Campbell

By 
Tara Martens – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2008, I caused a true and correct copy of the foregoing **SUR-REPLY MEMORANDUM IN SUPPORT OF PIONEER IRRIGATION DISTRICT'S AND SETTLERS IRRIGATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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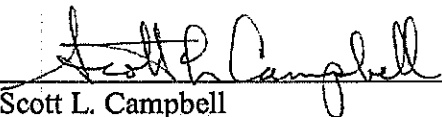
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