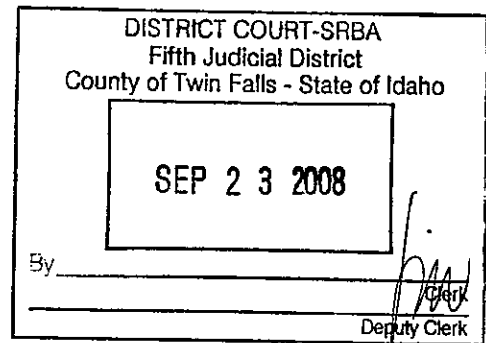




**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA) **Subcase: 63-03618**
) **(Lucky Peak Reservoir)**
Case No. 39576)
) **MEMORANDUM DECISION AND**
) **ORDER ON CROSS-MOTIONS FOR**
) **SUMMARY JUDGMENT RE: BUREAU**
) **OF RECLAMATION STREAMFLOW**
) **MAINTENANCE CLAIM**

Holding: Granting Summary Judgment in favor of the United States, City of Boise, Ada County and State of Idaho Department of Fish and Game; holding that provisions of Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.*, do not apply to the streamflow maintenance right at issue. License issued by Idaho Department of Water Resources is therefore valid and objections to purpose of use constitute impermissible collateral attacks on valid license. Streamflow maintenance right does not interfere with contractual obligations or guarantees made by Bureau of Reclamation to contract right holders in Lucky Peak Reservoir.

Also granting partial summary judgment, in part, in favor of Boise Project Board of Control; holding that a remark in *Partial Decree* is necessary to acknowledge interest and allow Bureau of Reclamation to meet obligations concerning flood evacuation to contract right holders in Anderson Ranch and Arrowrock Reservoirs without requiring temporary change in purpose of use.

**I.
APPEARANCES**

David W. Gehlert, Environment and Natural Resources Division, United States
Department of Justice, attorney for United States of America;

Scott L. Campbell, Tara Martens, Moffatt, Thomas, Barrett, Rock & Fields, Chartered ,
Boise, Idaho, attorneys for Settlers Irrigation District and Pioneer Irrigation District;

**MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY
JUDGMENT RE: STREAMFLOW MAINTENANCE CLAIM**

David J. Barber, Deputy Attorney General , Boise, Idaho, for State of Idaho Dept. of Fish and Game;

Daniel V. Steenson, S. Bryce Farris, Ringert Clark Chartered, Boise, Idaho, attorneys for South Boise Water Company and Nampa & Meridian Irrigation District;

Albert P. Barker, Shelly M. Davis, Paul L. Arrington of Barker Rosholt & Simpson LLP, Boise, Idaho, attorneys for Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District;

Jerry A. Kiser , Stoppello & Kiser, Boise, Idaho, attorney for Canyon County Water Company, Farmers Union Ditch Company, Middleton Irrigation Ass'n., Middleton Mill Ditch Company;

Robert A. Maynard, Erika E. Malmen, Perkins Coie LLP, Boise, Idaho, attorneys for Ada County & Board of Ada County Commissioners and City of Boise;

II. PROCEDURAL BACKGROUND

The water right claim in this case pertains to Lucky Peak Reservoir and Dam which are part of the Boise Project on the Boise River. At issue are two of the recommended purposes of use pertaining to streamflow maintenance. The issues involving the ownership of the irrigation and irrigation from storage purposes of use for this same claim, as well as other claims associated with the Boise Project, were decided in Consolidated Subcase 91-63. *See Memorandum Decision and Order on Cross-Motions for Summary Judgment and Notice of Status Conference (91-63 Ownership of Water Rights Between Irrigation Entities and Bureau of Reclamation)* (Sept. 2, 2004) *aff'd in part and remanded in part U.S. v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

The United States Bureau of Reclamation ("BOR" or "United States") claimed, and the Idaho Department of Water Resources ("IDWR") recommended, year 'round streamflow maintenance storage and streamflow maintenance from storage in the amount

of 152,300.00 AFY. The streamflow maintenance is for the channel of the Boise River downstream from Lucky Peak Dam to the confluence with the Snake River. The recommendation is based on and consistent with the license issued by IDWR in 2002 for this claim.

Numerous objections were filed to the recommended streamflow maintenance purpose of use by various irrigation districts, canal companies and other irrigation delivery entities as well as by the Boise Project Board of Control (collectively as "Objectors"). In general, the Objectors argue that the streamflow maintenance purpose of use cannot be decreed because under Idaho law only the Idaho Water Resource Board can hold a minimum instream flow claim. Further, the Objectors argue that allowing winter time releases for fish and game habitat is contrary to the irrigation and flood control purposes for which Lucky Peak Dam and Reservoir were constructed.

The State of Idaho, on behalf of the Idaho Department of Fish and Game (State of Idaho) filed a response to each of the objections. The City of Boise, Ada County and the Board of Ada County Commissioners were granted leave to participate in the proceedings as respondents. (collectively as "Respondents").

Motions for summary judgment were filed by the Objectors, Canyon County Water Co., Farmers Union Ditch Co., Ltd., Middleton Irrigation Ass'n. Inc. and Middleton Ditch Co.; Nampa & Meridian Irrigation District; and Pioneer and Settlers Irrigation Districts. Objector Boise Project Board of Control filed a motion for partial summary judgment. The United States, the City of Boise and Ada County filed cross-motions for summary judgment. The State of Idaho filed a response in opposition to the Objectors' motions.

A hearing was held on the cross-motions on June 19, 2008.

III. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in these matters on June 16, 2008. Thereafter, the matter was taken under advisement. On July 21, 2008, Pioneer and Settlers Irrigation Districts filed a *Notice of Additional Authority*. Parties were given until July 31, 2008, to respond to the *Notice*. Therefore, this matter is deemed fully submitted for decision the next business day, or August 1, 2008.

IV. FACTUAL HISTORY

The facts in this subcase are not in dispute. The record is nonetheless voluminous as circumstances surrounding the construction and operation of Lucky Peak Dam and Reservoir have a lengthy history. Lucky Peak Reservoir is the third and farthest downstream of the three on-river reservoirs of the Boise Project. Arrowrock Dam is located about 4 miles below the confluence of the main stem and the South Fork of the Boise River. Construction of Arrowrock Reservoir was completed in 1916. Anderson Ranch Dam is located 42 miles upstream from Arrowrock on the South Fork of the Boise River. Construction of Anderson Ranch Dam began in 1940. Prior to its completion, in 1943 a devastating flood occurred in the Boise Valley. As a result, the United States Army's Board of Engineers for Rivers and Harbors conducted a flood control study in 1946. The study ultimately concluded that a two reservoir system would not adequately control the problem of flooding and recommended the addition of a third reservoir at the Lucky Peak site located 12 miles below Arrowrock. *Jarvis Aff.*, Ex. B, pp. 107-08 (*Review of Survey Report Boise River Idaho with a View to Control Floods*, pp. 79-80). The study concluded that:

Although the storage in Lucky Peak Reservoir would be primarily for flood control, other uses would be made of it. Enough supplemental water would be made available to eliminate irrigation shortages. By maintaining a permanent pool at Lucky Peak Reservoir, the pumping lift to the

proposed Mountain Home project would be reduced by 80 feet, thereby enabling the power which would be required to overcome this lift to be made available for other uses in the general area. Construction of Lucky Peak Reservoir would permit the installation of a 13,000-kw. power plant at Arrowrock to supply mainly during the irrigation season. Other benefits which would be realized by the construction of a dam and reservoir at the Lucky peak site include added recreational facilities and its advantages to the people of the valley, betterments for fish and wildlife by the increased regulation of the streamflow, prevention of probable loss of life during floods, allaying the fear of floods, expansion of local business and residential areas, enlargement of local tax base, and increased social security.

Id. at 105-106.

Congress authorized the construction of Lucky Peak Reservoir “for the benefit of navigation and the control of destructive flood waters and other purposes.” Flood Control Act of 1946, 60 Stat. 641, 643, 650 (July 24, 1946).

Although the study concluded that the primary purpose of Lucky Peak would be flood control, one of the other recommended uses was for irrigation in conjunction with the proposed Mountain Home Project. In 1944, the BOR proposed a complex and expensive irrigation project intended to develop 230,000 acres of land in the Mountain Home desert. *Jarvis Aff.*, Ex. C, p. 132. The project called for a trans-basin diversion of surplus water from the Payette River drainage to the Boise River drainage and then from the Boise River drainage to the Snake River drainage through a complex and expensive system of reservoirs, hydroelectric plants, pump stations, tunnels and canals. *Jarvis Aff.*, Ex. C, pp. 140-41. In essence water would be diverted from the Boise River for the Mountain Home Project and replaced with water from the Payette River. *Jarvis Aff.*, Ex. D, p. 142.

In 1953, the United States Department of Interior and the United States Army Corp of Engineers entered into a “Memorandum of Agreement . . . for Flood Control Operation of Boise River Reservoirs, Idaho” (“MOA”). *Arrington Aff.*, Ex. A. The MOA provided that Lucky Peak would be operated under a coordinated plan of operation for all

three reservoirs and set forth the terms of a system-wide plan for the reservoir system. *Id.* at 3. The MOA acknowledged that the 983,000 acre-feet of the available 1,084,000 acre-feet “will be primarily considered as available for irrigation except as such amount must be reduced by evacuation requirements for flood control. *Id.* at 5. The MOA provided that:

No reregulation of storage or annual exchange of storage as provided in this plan, shall however, deprive any entity of water accruing to it under existing rights in Arrowrock, Anderson Ranch, and Lake Lowell Reservoirs.

Id. at 5. The MOA also provided:

In the event Anderson Ranch or Arrowrock Reservoirs are not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights to the extent of the space thus remaining unfilled at the end of the storage season but not to exceed the amount evacuated for flood control.

Id. at 10. The MOA was made contingent upon being formally accepted by the water users having storage rights in the reservoir system and Lake Lowell. *Id.* at 14.

Consistent with the MOA, in 1954 the BOR entered into Supplemental Contracts with each of the irrigation entities having storage rights in the upstream reservoirs. Among other things, the Supplemental Contracts confirmed to contract holders the use of storage waters in Lucky Peak for irrigation purposes in an amount equal to the unfilled storage capacity that results from the water having been evacuated from Anderson Ranch and Arrowrock Reservoirs for flood control purposes. The Supplemental Contracts were identical in substance and provided:

Guarantee:

7. Beginning with the first full flood control period after the agreement . . . there shall be a determination for each storage season as of the end of the season

- (a) of the amount of water to which the District would have been entitled under its storage rights in the reservoir system and Lake Lowell under its Government-District contracts had Anderson Ranch, Arrowrock and Lake Lowell reservoirs been operated in accordance with those contracts except for the provisions thereof relating to the use of capacity for flood control benefits. . . and
- (b) of the amount of water which is creditable to the storage rights of the District under its Government-District contracts taking account of actual operations under the flood control operating plan in accordance with this supplemental contract.

If the amount under (a) exceeds that under (b), there shall be credited and made available to the District, out of the water accrued to storage rights in Lucky Peak Reservoir, an amount of stored water equal to that difference.

Arrington Aff., Ex. B, pp.4-5 (Wilder Irr. Dist.); *Stevens Aff.*, Ex B and C (Pioneer and Settlers Irr. Dists.)

Lucky Peak dam was completed in 1955.

On December 18, 1957, the BOR filed permit application R-35086 with the Idaho Department of Reclamation¹ "To Construct a Reservoir and Appropriate and Store the Public Waters of the State of Idaho." The application was for 307,000 acre feet total capacity with 278,000 acre feet useable storage. The purpose of use stated was for "irrigation and power for irrigation pumping." *Kiser Aff.*, Ex A. Pursuant to publication notice, the last day to file timely protests to the approval of the application was January 27, 1958. *State of Idaho*, Ex B. A protest was filed by the State of Idaho on behalf of the Idaho Department of Fish and Game. *Jarvis Aff.*, Ex. I, pp. 176-79. Closures of the outlet of the dam during periods of annual maintenance resulted in low flows on the Boise River which caused problems for fish and wildlife. *Jarvis Aff.*, Ex. H. As a result, the Idaho Department of Fish and Game made application for a 100 cfs water right from

¹ Predecessor to the Idaho Department of Water Resources.

Lucky Peak and wanted a determination of its permit application prior to approval of the BOR's permit application. *Jarvis Aff.*, Ex. I, p. 176.

Protests were also filed by New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, Big Bend Irrigation District and Nampa & Meridian Irrigation District all of whom are Objectors in this proceeding. *Jarvis Aff.*, Ex. J, pp. 184-87. The irrigation entities were concerned that diverting waters for use in the Mountain Home Project and the Hillcrest Project would adversely impact their rights and the coordinated plan of administration then in effect. Notably, the irrigation entities also alleged that Lucky Peak was constructed primarily for flood control purposes and that changing the use to irrigation purposes would impair their existing use of the Boise River. *Jarvis Aff.*, Ex. J, p. 186.

Ultimately, the BOR resolved the protests through the filing of an amendment to the permit application. The application was amended to provide that "Lucky Peak stored waters will be utilized in the Boise Valley on presently irrigated lands for supplemental irrigation water" and also to include the following remark:

This permit is issued on condition – That the yield of water from 50,000 acre feet of space be available for maintaining winter time flow in the Boise River below Boise Diversion dam under a release pattern established from time to time by the Director of the Idaho Fish and Game Department.

The application for permit was approved on March 20, 1964. *Jarvis Aff.*, Ex. II.

In 1966, irrigation entities holding irrigation rights in Arrowrock and Anderson Ranch reservoirs entered into water service contracts with the BOR for supplemental water supplies. *Stevens Aff.*, Ex. D & E (Contracts for Pioneer and Settlers are identical except as to parties). The contracts acknowledged that "the United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses" *Id.* at 1.

In the mid 1970's the Mountain Home Project was abandoned. The result was that Lucky Peak had 116,250 acre-feet of storage space not under contract. In 1979, the BOR initiated a "Boise Power and Modification Study," which among other things addressed the issue of how to make best use of the uncontracted storage space. *Jarvis Aff.*, Ex. O, p.213, *Jarvis Aff.*, Ex. P, p. 223. Participants in the study included representatives from Nampa-Meridian Irrigation District and the Boise Project Board of Control. *Jarvis Aff.*, Ex. V, p.253. Ultimately, the study recommended using the uncontracted space in conjunction with the 50,000 acre feet dedicated to the Department of Fish and Game in order to provide a minimum streamflow release from Lucky Peak of 150 cfs. *Jarvis Aff.*, Ex. V.

On March 9, 1984, the BOR submitted an application for amendment of the permit requesting that the purpose of use be amended as follows:

<u>Amount (acre feet)</u>	<u>Use</u>	<u>Period: From</u>	<u>To</u>
111,950	Storage for Irrigation	Jan. 1	Dec. 31
152,300	Storage for Streamflow	Jan. 1	Dec. 31
	Maintenance		
152,300	Streamflow Maintenance	Jan. 1	Dec. 31
	From Storage		
28,800	Storage for Recreation	Jan. 1	Dec. 31
111,950	Irrigation from Storage	Mar. 15	Nov. 15

Jarvis Aff., Ex. X, p.256. The deadline for filing protests to the approval of the amendment was April 23, 1984. *Jarvis Aff.*, Ex. FF. No protests were filed to the application for amendment.

In effect since 1965 (amended in 1967), the provisions of Idaho Code § 42-1737 require that "[a]ll project proposals involving the impoundment of water in a reservoir with an active storage capacity in excess of ten thousand (10,000) acre feet" to be approved by the Idaho Water Resource Board. The requirement was interpreted to also apply to applications to amend existing permits. *Kiser Aff.*, Ex. F, p. 2. In preparation of

the review of the amendment, David R. Tuthill, Jr., then Supervisor for the Water Allocation Section of IDWR (now Director), prepared an Issue Paper which concluded that the amendment being sought was not subject to the requirements of the minimum streamflow act as set forth in Idaho Code § 42-1501 *et. seq.*:

Chapter 15, Title 42, Idaho Code established that the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality can be considered to be beneficial uses, when the uses are recorded pursuant to the minimum stream flow act. The 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.” A minimum stream flow water right can be approved only in the name of the Idaho Water Resource Board, pursuant to the provisions of Chapter 15.

Lucky Peak Reservoir is not a natural body of water, and the stored quantities are not subject to the provisions of Chapter 15. Because Chapter 15 does recognize that certain instream uses can be beneficial, however, the precedent for recognizing such uses is established in Idaho water law. Most water rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

Kiser Aff., Ex. F, p. 3.

On December 13, 1984, in accordance with the provisions of Idaho Code § 42-1737, the Idaho Water Resource Board conducted the review of the application for amendment. The minutes from the proceeding provide the following:

The amendment proposes to maintain the 50,000 af streamflow, change the 28,800 af dead storage to storage for recreation, and change the 228,200 af for irrigation to 102,300 af streamflow maintenance and 111,950 af for irrigation (allowing 13,950 af flood control). Two issues the Board may wish to consider are: “Is streamflow maintenance from storage in conformance with the State Water Plan?” and “Should the duration of the water right be conditioned?”. In regard to the first issue, Lucky Peak Reservoir is not a natural body of water and the stored quantities are not subject to the provisions of Chapter 15, Idaho Code. Most water rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted. Historically, the BOR has not allowed the

102,300 acre feet of storage to be contracted except on a limited basis. On the issue of conditioning a water right, the Board may wish to consider the increased competition between the various uses of the limited water supplies in Idaho and the notion that “higher and better use” now may be viewed differently in the future.

Jarvis Aff., Ex. W, p. 254-255. Idaho Water Resource Board member F. David Rydalch, made the motion that “streamflow maintenance from storage” is a water use in conformance with the State Water Plan and recommended that the director approve the application for amendment. The motion passed with 8 Ayes and 0 Nays. A subsequent motion was made that the Board adopt a recommendation that the term of the Lucky Peak storage permit be thirty (30) years prior to review. This motion also passed with 8 Ayes and 0 Nays. *Jarvis Aff.*, Ex. W, p. 255. The amendment to the permit was approved by IDWR on February 14, 1985. *Jarvis Aff.*, Ex. X, p. 257. The amended permit did not incorporate the Board’s recommendation of a 30-year review.

On March 11, 1987, the BOR sought a temporary change of use of 44,700 acre feet from streamflow maintenance to irrigation to offset shortages due to the construction of the power plant at Lucky Peak Dam. Pioneer and Settlers Irrigation Districts filed protests to the amendment. *Jarvis Aff.*, Ex. AA, p. 276. Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District; Middleton Mill Ditch Company and Middleton Irrigation Assn, Inc. and others filed a petition for leave to intervene in the proceedings. *Jarvis Aff.*, Ex. AA, p. 273, *Jarvis Aff.*, Ex. BB, p. 283. None of the protests contested the validity of the streamflow maintenance purpose of use. The protests were eventually withdrawn pursuant to a stipulation making additional water available to the protestants during the 1987 irrigation season. *Jarvis Aff.*, Ex. BB, p. 283, 291-296. Another application for amendment was filed by BOR on July 11, 1990, in order to provide temporary supplemental water from the streamflow maintenance account for irrigation entities. No protests were filed. The application for the amendment was approved November 11, 1990.

A beneficial use examination memorandum recommending the issuance of the license for permit No. 63-03618 was prepared February 19, 2002. *Jarvis Aff.*, Ex. DD, pp. 300-304. On September 27, 2002, IDWR issued the license for water right no. 63-03618 which described the following purposes of use and quantities:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>ANNUAL DIVERSION VOLUME</u>
IRRIGATION FROM STORAGE	03/01 to 11/15	111,950.0 AF
IRRIGATION STORAGE	01/01 to 12/31	111,950.0 AF
RECREATION STORAGE (INACTIVE)	01/01 to 12/31	28,800.0 AF
STREAMFLOW MAINTENANCE STORAGE	01/01 to 12/31	152,300.0 AF
STREAMFLOW MAINTENANCE FROM STORAGE	01/01 to 12/31	152,300.0 AF

Jarvis Aff., Ex. EE. The *Director's Report* recommendation for water right no. 63-03618 was filed with the Court on September 30, 2004, and is based on the license. It describes the same purposes of use and quantities as in the license.

In 1985, the Army Corps of Engineers adopted a *Water Control Manual for Boise River Reservoirs* which set forth a "Water Control Plan to define reservoir regulation procedures and practices for joint use of the storage spaces in Anderson Ranch, Arrowrock, and Lucky Peak Reservoirs." 2nd *Jarvis Aff.*, Ex. KK, p. 11. The *Water Control Manual* provides that in the event flood control operations result in irrigation entities having less storage than they would otherwise, then the first 60,000 acre-feet of any shortfalls caused by flood control operations comes from the streamflow maintenance allocation. The system has been administered in this manner since 1985. Since 1985 there have been three years that Arrowrock and Anderson Ranch reservoirs did not fill due to flood releases. In only one of those years did the shortfall exceed the 60,000 acre-feet. The shortage beyond the 60,000 acre-feet was allocated proportionality among all the uses in Lucky Peak. Contract holders in Anderson Ranch and Arrowrock received their full allocation of storage water under their respective contracts for those reservoirs. *Mellema Aff.* pp. 3-4. Since the coordinated reservoir operations began in

1955, there have been seven (7) years in which the flood control operations resulted in a shortfall. *Id.*

In 2005, the 1966 water service contracts entered into by Pioneer and Settlers Irrigation Districts were converted to repayment contracts in accordance with Federal Reclamation laws. *Campbell Aff.* Ex. H & I (contracts identical except as to parties). The 2005 repayment contracts superseded the 1966 service contracts. *Id.* at 3. The repayment contracts specifically acknowledged that the “United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses, for which the United States holds License No. 63-03618 *Id.* at 2. The repayment contracts also provided:

WATER SUPPLY AND OPERATION OF THE RESERVOIR

16. (a) As of the date of this Contract, the United States holds License No. 63-03618, issued on September 27, 2002, by the State of Idaho to the United States for the storage of 307,000 acre-feet per annum of the waters of Boise River in Lucky Peak Reservoir. The primary purpose of the Reservoir is for flood control, for which it will be operated, in accordance with the Memorandum of Agreement between the Department of the Army and the Department of the Interior, dated November 20, 1953, and as it may be amended, the Act of August 24, 1954 (ch. 909, 68 Stat. 794), the 1954 Supplemental Arrowrock and Anderson Ranch Reservoir contracts approving the Boise River operating plan, and the Water Control Manual for Boise River Reservoirs, dated April 1985, copies of which are available for inspection at the office of the Contracting Officer. Subject to operations for flood control, the United States will operate the Project so as to store under existing storage rights all available water, and during each irrigation season, the Contracting Officer will make available to the Contractor for irrigation the Contractor’s proportionate share of the stored water that accrues in each year to the active capacity of the Reservoir, together with any stored water that may have been carried over in the Contractor’s share of such active capacity from prior water years.

(c) All space in Lucky Peak Reservoir shall be operated with like priority as to storage rights and all space will be treated proportionately

V.

ISSUES RAISED ON SUMMARY JUDGMENT

Summarily stated, the issues raised on motion for summary judgment are as follows:

Whether the arguments raised on summary judgment constitute collateral attacks upon a previously licensed water right?

Whether the license issued by IDWR for streamflow maintenance is valid?

Whether an entity other than the Idaho Water Resources Board can hold title to a water right for streamflow maintenance?

Whether streamflow maintenance can be decreed as a beneficial use?

Whether the streamflow maintenance claim interferes with the interests and guarantees held in Lucky Peak Reservoir by irrigation entities?

Whether the interests held in Lucky Peak Reservoir for flood evacuation pursuant to Supplemental Contracts should be reflected in the *Partial Decree*?

VI.

STANDARD OF REVIEW

Summary judgment shall be rendered when “the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). Generally, disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007). However,

[I]f an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct.App.1985) (citing *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)).

Here, opposing parties have moved for summary judgment on the same issues of law. The Idaho Supreme Court has explained the legal standards to be applied when deciding cross motions for summary judgment as follows:

In *Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996), this Court held that when both parties file a motion for summary judgment relying on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment. *Brown*, 129 Idaho at 191, 923 P.2d at 436. In *Wells v. Williamson*, 118 Idaho 37, 794 P.2d 626 (1990), this Court recognized that when opposing parties file cross motions for summary judgment, based upon different theories, the parties should not be considered to have effectively stipulated that there is no genuine issue of material fact. *Wells*, 118 Idaho at 40, 794 P.2d at 629.

Eastern Idaho Agricultural Credit Association v. Niebaur, 130 Idaho 623, 626-627, 944 P.2d 1386, 1389-1390 (1997).

VII.

DISCUSSION

A. The Arguments Raised on Summary Judgment Constitute Collateral Attacks on a Previously Licensed Water Right Unless the License is Determined to be Void.

The director's recommendation for water right 63-03618 is based on a license. Subject to certain noted exceptions, the SRBA Court has consistently prohibited licenses from being collaterally attacked in the SRBA. In a recent opinion this Court discussed the rationale:

Licenses are and have been consistently treated in the SRBA the same as prior decrees for purposes of binding the parties and their privies. In *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcases 36-02708 *et al.* (Dec. 29, 1999), the SRBA Court affirmed a special master's ruling that the SRBA was not the appropriate forum for collaterally attacking licenses previously issued through administrative proceedings.

The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alred.* Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844 693 P.2d 1046 (1984).

Id. (quoting *Supplemental Findings of Fact and Conclusions of Law* (Facility Volume) (July 31, 1998); *see also Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge*, subcase 36-08099 (Jan 11, 2000)(upholding subordination remark contained in a license for hydropower water right claim).

...

The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.

Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law (City of Pocatello - Federal Law Claims), Subcase No. 29-11609 (Oct. 6, 2006) at 12-13. This Court then discussed an exception to issuing a decree for a water right other than consistent with the elements stated in the license. Technically, however, this exception is not a collateral attack on the

elements of the license because it results from circumstances occurring after the license was issued.

Like a prior decree, a licensed right is not conclusive as to the extent of the water right, since a license does not insulate a claimant from practices occurring after the license was issued such as abandonment or forfeiture. However, unlike a prior decree, the binding effect of a license extends beyond the parties to the administrative proceeding and their privies. [FN Publication notice is given and any affected person can initiate a contested case.]. With respect to prior decrees, not all water users hydraulically connected to the source were always joined as parties. The Idaho legislature also acknowledged the binding effect of prior licenses and decrees in enacting Idaho Code § 42-1427 which provides a mechanism for defining elements of water rights not described in prior decrees or licenses. Accordingly, the City is also bound by its prior license for water right claim 29-07431. [Footnote omitted].

Id. at 13.

Another exception was applied by this Court in the portion of this case dealing with the ownership of storage rights for which irrigation entities hold repayment contracts. This Court held that the inclusion of a remark to clarify an otherwise ambiguous license and avoid future controversy did not constitute a collateral attack on a license. This Court reasoned:

This Court acknowledges the prohibition against collaterally attacking a license as well as the *res judicata* effect on parties to a prior decree. However, the Court does not view all of the relief sought nor the relief ultimately granted as being inconsistent with these principles. The inclusion of a remark regarding equitable interest is not inconsistent with the prior license or the decree. I.C. § 42-1412 and 42-1411(2) and (3) specify what elements to include in a partial decree. One of the elements includes “such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for the administration of the right by the director.” In the interest of uniformity and brevity, referring to existing law in individual partial decrees is the exception and not the rule. The Court generally views it as unnecessary because parties have the right to rely on the backdrop of existing law for the definition and administration of their water right. The exception is when the application of the existing law is at issue. Without clarification of applicable law, the issues raised here potentially make the decree

ambiguous without a clarifying remark. In such cases the Court allows a clarifying remark so as to avoid future controversy.

In the instant matter, the issue of the relationship between the BOR and project water users was never raised or litigated in either the licensing proceedings or in conjunction with the *Bryan Decree*. Project water users were entitled to rely on the backdrop of existing law in defining the relationship between the BOR and project water users, irrespective of whether or not it was incorporated into the decree. For example, when water rights are decreed in the name of an irrigation district, the license or partial decree does not contain language to the effect that the rights are held in trust for the water users within the district as the relationship is defined by law. *See* I.C. § 43-316. The fact that the rights are decreed in solely in the name of the irrigation district does not alter that relationship.

To the extent the Court is now being asked to clarify existing law against which the water right holders were entitled to rely, the Court does not view that as a collateral attack on a prior license or decree. The Court views the matter as a clarification of a prior decree or license. The Court also finds it necessary to include a remark regarding the same so as to avoid having to readdress the issue at some point in the future.

Conversely, to the extent the Irrigation Entities seek to obtain full title (on behalf of their members) to the subject water rights -- that is inconsistent with existing law and would be a collateral attack on the prior decree or license. That issue should have been raised in the former proceedings.

Memorandum Decision and Order on Cross-Motions for Summary Judgment and Notice of Status Conference (91-63 Ownership of Water Rights between Irrigation Entities and Bureau of Reclamation) at 29-30. The inclusion of the remark for a previously licensed right was upheld by the Idaho Supreme Court. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2006).

In the instant case, the Objectors assert that the issues raised in the objections do not constitute a collateral attack on the elements stated in the license because the license is not valid.² The Objectors argue that IDWR acted outside the scope of its authority in issuing the license for streamflow maintenance by failing to follow the exclusive

² The Boise Project Board of Control also argues that the objections do not constitute a collateral attack because the license was issued after the director's report and recommendation was filed.

procedure for licensing a minimum streamflow right as set forth in the Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.* This Court disagrees. The Court acknowledges that the failure of IDWR to follow statutory procedures in issuing a license may very well invalidate a license. The Court also acknowledges that an invalid license may also constitute an exception to the collateral attack prohibition. However, for the reasons discussed below the Court does not find that IDWR failed to follow proper procedures in issuing the license for the streamflow maintenance purpose of use. Therefore the Court finds that the license is not void.

B. The Idaho Minimum Stream Flow Act does not apply to the Streamflow Maintenance Claim.

The arguments raised by the Objectors rest on the assumption that the streamflow maintenance claim at issue is in all respects a minimum streamflow claim as defined by the Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.* (“IMSFA” or “Act”). The Respondents argue that because the claim involves a diversion, namely the dam, the IMSFA does not apply. The facts of this case present somewhat of an anomaly and a case of first impression regarding the application of the IMSFA. There are colorable arguments on both sides of the issue. While on one hand there is a diversion, the place of use is still located within the natural channel of the river. On the other hand, the entire flow of river is diverted and then artificially released. In other words, the claim does not involve the appropriation of a natural flow within the channel. In arriving at the decision that the IMSFA does not apply to the licensed streamflow maintenance claim, this Court relies on the following: 1) A plain reading and application of the IMSFA; 2) the interpretation of the Act as applied by the Idaho Department of Water Resources, 3) the interpretation of the Act as applied by the Idaho Water Resource Board, 4) the minutes from the House Resources and Conservation Committee on the IMSFA, and 5) the Idaho Supreme Court’s analysis in *In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge, State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000) (“*Smith Springs*”). Each is discussed below.

1. **Based on the plain meaning of the statutory language, the IMSFA does not apply to the streamflow maintenance claim.**

It is well established that the interpretation of a statute begins with an examination of the statute's literal words. *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 68 (Ct. App. 2000). The language of the statute must be given its plain, obvious and rational meaning. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). If the language is clear and unambiguous, it must be applied according to its plain terms, and there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Id.* However, if it is necessary for the Court to interpret a statute, then it will attempt to ascertain legislative intent by examining the language used, the reasonableness of the proposed interpretations, as well as the policy behind the statute. *Id.*

Idaho Code § 42-1501 of the IMSFA provides:

42-1501. Legislative purpose – Minimum stream flow declared beneficial use. – The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality. The preservation of the water of the stream of this state for such purposes when made pursuant to this act is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water. The legislature further declares that minimum stream flow is a beneficial use of water of the streams of this state of the purpose of protecting such waters from interstate diversion to other states or by the federal government for use outside the boundaries of the state of Idaho. Minimum stream flows as established hereunder shall be prior in right to any claims asserted by any other state, government agency, or person for out of state diversion. It is, therefore, necessary that authority be granted to receive, consider, approve or reject applications for permits to **appropriate water of the streams of this state to such beneficial uses to preserve such water from subsequent appropriation to other beneficial uses under the provisions of chapter 2, title 42, Idaho Code.** [emphasis added].

The “definitions” section of the Act defines “appropriate” as “the identification of a beneficial use and **place of in-stream use of waters of a stream.** It shall not be

construed to require any kind of physical structure or physical diversion from the stream. . . .” I.C. § 42-1502(a) (emphasis added). “Stream” is defined as any lake, spring, creek, stream, river **or other natural body of standing or moving water which is subject to appropriation** under the laws of the state of Idaho.” I.C. § 42-1502(e) (emphasis added). “Minimum stream flow” is defined as **the minimum flow of water in cubic feet per second of time . . .** required to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of a stream in the public interest” I.C. § 42-1502(f) (emphasis added). The Act defines “Unappropriated water” as “water which is not subject to diversion and use under any prior existing water right established by diversion and application to a beneficial use or by application, permit or license on file or issued by the director under the provisions of chapter 2, title 42, Idaho Code, with a priority of water right date earlier than an application for appropriation of minimum stream flow filed under the provisions of this act.” I.C. § 42-1502(g).

While there are apparent similarities between the subject streamflow maintenance water right and a water right perfected under the IMSFA, a plain reading of the statutory language of the IMSFA indicates that they are not the same. A water right perfected under the IMSFA is an *insitu* right, meaning the water is appropriated in its natural or original state. The purpose of the appropriation is to leave a portion of the unappropriated natural flow of a stream in its natural channel to accomplish such stated purposes as “protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.” The IMSFA works by appropriating an in-stream flow through the identification of a defined quantity of a natural stream flow measured in cubic feet per second of time. Once the right is perfected, the appropriator, the Idaho Water Resource Board, need not take any action to implement the use of the water authorized under the right. No diversion works need to be constructed and no pipes, ditches or other means of conveyance need be utilized. In other words, the Idaho Water Resource Board need not do anything to implement the use of water under the right. The effect of the right is that the natural body of water is protected from subsequent appropriations to the extent of the minimum flows. Put differently,

otherwise appropriable water is removed from the potential for future appropriation. Pursuant to the Idaho Constitution, such a protection from future appropriations could only be accomplished through the creation of a water right as opposed to the Legislature simply passing legislation prohibiting unappropriated water from being appropriated.³ Prior to the enactment of the IMSFA – and a few similar water rights created by the Idaho legislature on a case-by-case basis – such a water right did not exist because of the diversion requirement. *See e.g.* I.C. § 67-4307 (Malad Canyon) and discussion *infra*; I.C. § 67-4308 (Niagra Springs); I.C. § 67-4309 (Big Springs); I.C. § 67-4310 (Box Canyon); 67-4311 (Thousand Springs).

While the subject streamflow maintenance water right accomplishes a number of the same purposes for which the IMSFA was created, it does so in a different manner. The water right is not an *insitu* right in that the water is not being appropriated in its natural state. Instead, the entire flow of the natural stream has been diverted and stored and become subject to controlled releases. The storage and releases are made possible by the massive and costly structure known as the Lucky Peak dam and reservoir. The BOR has flexibility in releasing the water when needed to accomplish such purposes. Rather than taking no action, as is the case with an IMSFA water right, the BOR monitors and manages the stream flow releases from the reservoir on a day-to-day if not hour-to-hour basis. This is not the same “no action” water right as is contemplated by the IMSFA. A water right perfected under the IMSFA is defined and measured in cubic feet per second within the natural channel. *See* I.C. § 42-1502(f) (defining minimum flow of water in cubic feet per second of time); I.C. § 42-1502(e) (defining stream as natural body of water subject to appropriation). Unlike a claim under the IMSFA, the subject streamflow maintenance claim is not defined or measured in terms of cubic feet per second within its natural stream channel. Rather, the claim is measured in terms of total acre feet per year within the body of the reservoir. Releases from the reservoir are also measured in terms of total acre feet per year.

³ Article XV § 3 of the Idaho Constitution provides in relevant part: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.”

One argument raised over the application of the IMSFA concerns the purpose and meaning of the language of I.C. § 42-1502(a) which provides: “It shall not be construed to require any kind of physical structure or physical diversion from the stream. . . .”⁴ This language has been argued to support the proposition that the IMFSA applies whether or not a diversion exists. This Court disagrees with that interpretation. Such an interpretation would result in an internal inconsistency in the application of the statute. Simply put, if the Act also applies to a diversion “from a stream” as the term “stream” is defined by I.C. § 42-1502(e) then by the statutes’ own terms it would not be an appropriation of an in-stream flow in its natural channel, which is the purpose of the Act. To the extent the provision can be argued to make the application of the IMSFA ambiguous, the Court notes the following cannon of statutory interpretation.

A statute is passed as a whole and not in parts or sections and is animated by one general purpose or intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

Vol. 2A Sutherland, *Statutes and Statutory Construction* § 46:05 (2001).

The more rational explanation for the inclusion and purpose of the provision is to resolve any ambiguity and make clear that the Idaho Legislature waived the statutory diversion requirement that would otherwise be required to establish a water right after the issue presented itself in *State of Idaho, Dep’t of Parks v. Idaho Dep’t of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974) (“*Malad Canyon*”). The *Malad Canyon* case involved one of the above-referenced case-by-case in-stream flows created by the Idaho legislature prior to the enactment of the IMSFA. In 1971, the Idaho legislature enacted I.C. § 67-4307 directing the Department of Parks of the State of Idaho to appropriate in trust for the citizens of the State of Idaho certain unappropriated natural flows of the Malad Canyon. One of the challenges to the appropriation was whether the Idaho Constitution required an actual physical diversion in order to perfect a water right. The Idaho Supreme Court

⁴ Some previous legislative case-by-case appropriations included the language “and no proof of completion of any diversion works shall be required.” See 67-4301 (Big Payette Lake); 67-4304 (Priest, Pend d’Orielle, and Coeur d’Alene Lakes).

held that the Idaho Constitution did not require a physical diversion and that the requirement was a statutory requirement. The provisions of Idaho Code § 67-4307 did not expressly state that the statutory diversion requirement had been waived. In resolving the conflict between the general statutory diversion requirement and the application of I.C. § 67-4307, the Idaho Supreme Court resorted to established rules of statutory interpretation and held by implication that the Legislature did away with the diversion requirement:

It is axiomatic that where a general statute and a specific statute deal with the same subject matter and are in conflict, the provisions of the specific statute must control. . . . It is also clear that where two statutes conflict the latest expression of the legislative will must prevail.

We deem it to be the intent of the Idaho legislature to dispense with any physical diversion requirement in the case of the appropriation directed in I.C. § 67-4307. Any other construction would nullify the obvious purpose of I.C. § 67-4307. Courts should if possible in construing a statute give it an interpretation which does not in effect nullify the statute.

Id. at 444-45, 530 P.2d at 928-29 (citations omitted).

The IMSFA was enacted in 1978 as an alternative to the Idaho Legislation having to enact specific legislation on a case-by-case basis to appropriate in-stream flows. 1978 Idaho Sess. Laws ch. 345. Accordingly, in an effort to avoid the same conflict as arose in the *Malad Canyon* case, the Idaho Legislature included the provision “[i]t shall not be construed to require any kind of physical structure or physical diversion from the stream. . . .”

Therefore, based on a literal reading of the statutory language of the IMSFA this Court holds that the IMSFA does not apply to the streamflow maintenance claim at issue.

2. **The interpretations of the agencies responsible for applying the provisions of the IMSFA also conclude that the IMSFA does not apply to the streamflow maintenance claim.**

Although this Court does not find the IMSFA to be ambiguous, this Court's analysis regarding its application is consistent with IDWR's interpretation and historic application of the Act. As recited previously in the factual history section of this decision, Director Tuthill, then Supervisor for the Water Allocation Section of IDWR, prior to granting an amendment to the permit concluded that "Lucky Peak Reservoir is not a natural body of water and stored quantities are not subject to the provisions of Chapter 15." *Kiser Aff.*, Ex. F, p. 3. The Court's analysis is also consistent with the conclusions of the Idaho Water Resource Board (IWRB), which determined:

Lucky Peak Reservoir is not a natural body of water and the stored quantities are not subject to the provisions of Chapter 15, Idaho Code. Most water rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

Jarvis Aff., Ex. W, p. 254-255.

In *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400, (1997), the Idaho Supreme Court set forth the criteria regarding when a Court should accord deference to an agency's construction of a statute.

In *Jr. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991), the Court established a four-part test for when agency construction of a statute should be accorded deference. This Court summarized this test as follows:

This four prong test states that an agency's construction of a statute will be given great weight if (1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statute is reasonable; (3) the statutory language at issue does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present.

Garner v. Horkley Oil, 123 Idaho 831, 833, 853 P.2d 576, 578, (1993) (citing *Simplot*, 120 Idaho at 862, 820 P.2d at 1219).

Hagerman Water Right Owners at 734, 947 P.2d at 407. The rationales underlying the rule of deference were set forth in *Garner v. Horkley Oil*.

These rationales include situations when an agencies interpretation has been relied upon for a number of years; when the agency's interpretation represents a practical interpretation; when the statutory test has not been altered by the legislature in light of the interpretation, or when the interpretation is formulated contemporaneously with the enactment of the statute; and when the interpretation involves an area of expertise developed by the agency.

Id. at 834, 853 P.2d 579 fn.3.

In applying the above-stated criteria, the IWRB and IDWR are the agencies charged with implementing and administering the provisions of the IMSFA. Idaho Code § 42-1504 authorizes any person, agency etc. to make a request in writing with the IWRB to consider the appropriation of a minimum stream flow of unappropriated waters. The IWRB is authorized to accept or reject the proposal and may hold hearings in reaching a decision. There is no right of review of the rejection of a proposal. I.C. § 42-1504. If the IWRB accepts the proposal, it then submits an application to the Director of IDWR. The Director, pursuant to notice, is authorized to conduct an investigation and hold hearings for the purpose of making findings either "approving the application in whole, or in part, or upon conditions or rejecting said application." I.C. § 42-1503. The IWRB or any party, who testified at a hearing, aggrieved by the decision of the Director may seek judicial review. *Id.* The conclusions of both IDWR and the IWRB that the IMSFA does not apply to the subject streamflow maintenance claim are reasonable. This Court arrived at the same conclusion by way of an independent analysis.

The IMSFA does not expressly address the question at issue. Although in this Court's opinion, a plain reading of the statute answers the question at issue. The arguments raised in the context of these proceedings would suggest that the statute does adequately address the issue.

The Court also finds that one or more criteria of the rationales underlying the rule of deference are satisfied. The interpretation and application of the IMSFA by both IDWR and the IWRB have been in existence at least since 1984 when the application to amend the permit was filed and reviewed. The Boise River has been administered in accordance with the amended permit since it was approved. There has been considerable reliance on the administration of the River since that time. *See e.g. Finch Aff.; O'Neal*

Aff.; *Harmon Aff.*; *Engel Aff.*; *Bieter Aff.* Moreover there were multiple opportunities for affected parties to contest the permit since 1964 when the permit for the 50,000 acre-feet was approved. Almost forty-years elapsed since the objections to the permit and license were filed. Finally, the agencies' interpretations represent a practical interpretation of the application of the Act.

Accordingly, the Court's finds it appropriate that weight and deference also be given to the interpretations of the scope of the IMSFA as applied by both IDWR and the IWRB.

3. The minutes from the Resources and Conservation Committee conclude that the IMSFA does not apply to a diversionary right.

The minutes from the Idaho State House Resources and Conservation Committee wherein the IMSFA was discussed also reflect an interpretation consistent with this Court's analysis of the IMSFA and the interpretations of IDWR and the IWRB.

Policy No. 6: INSTREAM FLOWS

Water rights should be granted for instream flow purposes. The legislation authorizing this policy should recognize and protect existing water rights and priorities of all established rights and delegate responsibilities for determining flows and administrative authority to the Department of water resources. The legislation should also direct that the Idaho Water Resource Board shall be the only applicant for instream flow.

Rep Tibbitts: Would you define instream flows?

Mr. Allred: Those flows by which there is no diversion. They are instream flows for some purpose whether fisheries, recreation, or water quality. There is no physical diversion.

2nd Jarvis Aff., Ex. LL, p. 21.

While not conclusive of legislative intent concerning the application of the IMSFA, the explanation is consistent with the Court's interpretation and those of IDWR and the IWRB.

4. The Idaho Supreme Court's analysis in the *Smith Springs* case distinguished between the significance of diversionary and non-diversionary rights used for wildlife purposes.

The Idaho Supreme Court also weighed in on the application of the IMFSA in its analysis in *In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge, State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000) ("*Smith Springs*"). In *Smith Springs*, the United States filed a state-law based beneficial use in-stream flow claim for wildlife habitat. The issue was framed as whether the United States could claim a non-diversionary water right for purposes other than stock-watering. The Idaho Supreme Court rejected the United States' claim for wildlife habitat solely on the basis that there was no diversion. The Supreme Court's entire analysis focused on a comprehensive history of the diversion requirement and its two exceptions, which include in-stream stock-watering and state agencies acting pursuant to statute (i.e. the IMSFA). The Supreme Court determined "neither of these exceptions covers the United States' claim." *Id.* at 110, 996 P.2d at 810. The entire basis for the decision turned on the absence of a physical diversion. Presumably, if the only way to perfect a water right for wildlife habitat was through the IMSFA, whether or not a diversion existed, the issue would have more appropriately focused on the purpose of use as opposed to the exceptions to the diversion requirement. The logical inference is that the United States could have perfected an in-stream non-consumptive use claim for wildlife habitat so long as a physical diversion of some type was present.

In sum, based on the cumulative weight of all of the above-discussed factors, this Court holds that the IMSFA does not apply to the licensed streamflow maintenance claim at issue. Having concluded that the IMSFA does not apply to the license, the Court cannot conclude that IDWR acted outside of its authority by failing to following the procedures set forth in the IMSFA.

C. Objections to the Streamflow Maintenance Purpose Of Use Constitute Collateral Attacks on a Valid License.

The Objectors also argue that even if the IMSFA only applies to non-diversionary rights, the only way to perfect a water right for the underlying purposes of the streamflow maintenance claim such as those enumerated in the IMSFA including “protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality” is through the IMSFA. This Court disagrees. First, the claim, including the purpose of use, is based on a license. This Court already determined that IDWR did not act outside the scope of its authority in issuing the license without complying with the IMSFA. The Court therefore views challenges to the purpose of use as impermissible collateral attacks on the license. IDWR is the administrative agency charged with administering water rights in the State including the administration of the application, permit and licensing process for perfecting a water right. The fact that IDWR issues a license for a purpose of use that has not previously been affirmed by the Idaho Constitution, the Idaho Legislature or the Idaho Supreme Court does not mean the agency is acting outside of its authority by issuing a license for such a purpose.⁵ If this were to be the case, then every time an application for a novel use for water is made IDWR would have to either go to the legislature or seek a declaratory judgment prior to proceeding with processing such a permit application. Furthermore, in the course of the licensing process the fact that IDWR may make a decision argued to be legally incorrect does not mean IDWR is acting outside the scope

⁵ In Justice Bakes special concurrence in the *Malad Canyon* case he stated: “I therefore conclude that the uses other than those enumerated in Article 15, § 3, can be beneficial uses.” *Malad Canyon* at 447, 530 P.2d at 931 (Bakes special concurrence). He also stated:

With the exception of the uses implicitly declared to be beneficial by Article 15, § 3, there is always a possibility that other uses beneficial in one era will not be in another and *vice versa*. As stated in *Tulare Irrig. Dist. v. Lindsay-Stratmore Irrig. Dist.*, 3 Cal.2d 489, 45 P.2d 972, 1007 (1935):

What is a beneficial use, of course depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

Id. at 448-49, 530 P.2d at 932-33.

of its delegated authority. Instead the permit and licensing process affords any aggrieved party the opportunity to contest the purpose of use and seek judicial review of the matter.

In this case the streamflow maintenance purpose of use was not contested at the permitting stage. In fact, just the opposite occurred. The initial 50,000 acre-foot for streamflow maintenance purpose of use came about as a result of a settlement of protests to out of basin diversions filed by many of the same parties who are objectors in this subcase. Parties also had the opportunity to protest the purpose of use in 1984 when the BOR made application to amend the quantity. Therefore, based on the previously discussed law-of-the case, the Court finds that objections to the streamflow maintenance purpose of use constitute impermissible collateral attacks on the license.

The Objectors cite no authority supporting the proposition that the exclusive means for perfecting a water right – involving a diversion - for the “protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality” is through the IMSFA. In *Smith Springs*, the Idaho Supreme Court rejected the United States’ claim for wildlife habitat solely on the basis that there was no diversion. The Idaho Supreme Court’s entire analysis focused on the diversion requirement and its two exceptions. Simply stated, if the only means for perfecting such a wildlife habitat water right were through the IMSFA or some other statute, the issue as framed - whether the United States could claim a non-diversionary water right for purposes other than stock-watering – as well as the comprehensive discussion over the diversion requirement would have been irrelevant. Again, the issue would have focused on the purpose of use as opposed to whether or not a physical diversion was present.

- 1. Although the *Director’s Report* was issued prior to the license, the objections still constitute impermissible collateral attacks.**

The Boise Project Board of Control argues that no impermissible collateral attack on the license occurred because the *Director’s Report* including the recommendation for the water right was filed prior to the issuance of the license. This Court disagrees.

The beneficial use exam occurred on February 19, 2002. The *Director’s Report* which included the recommendation for the water right claim was filed on September 24,

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2002. The recommendation specifically states that it is based on the license as opposed to a permit. If the recommendation was based on a permit, it would have stated as such. See I.C. § 42-1421. The license was issued three days later on September 27, 2002. The first objections to the *Director's Report* were filed January 14, 2003.

The Court fails to see the legal relevance of the timing of the issuance of the license. The prohibition on collateral attacks to licenses results from the permit and licensing process being a separate administrative proceeding. Remedies are sought through the Idaho Administrative Procedures Act and judicial review. The Idaho Legislature made it clear that the SRBA is not the proper forum for reviewing administrative decisions. I.C. § 42-1401D. The Court recognizes that there can be jurisdictional overlap between actions originating administratively and those arising in the SRBA. In such circumstances, the SRBA Court holds a hearing to determine whether the matter should continue to proceed administratively or whether the administrative proceeding should be stayed and the matter continued in the SRBA. However, once a final administrative order is issued and no right of review is preserved, the proceedings on the license become final.

At the time the license was issued, on September 27, 2002, the Boise Project Board of Control should not have assumed that judicial review of the license would be conducted solely through the SRBA and not through the Idaho Administrative Procedures Act. Particularly after the enactment of I.C. § 42-1401D in 2001. To the extent there was any uncertainty about the proper forum for judicial review, any protestors could have pursued grievances in both forums, i.e. they could have sought judicial review through the APA and filed an objection in the SRBA.

D. The Operation of Idaho Code § 39-104(4) is Consistent with this Court's Decision on the Application of the IMSFA.

On July 21, 2008, Pioneer and Settlers Irrigation Districts filed a *Notice of Additional Authority* citing I.C. § 39-104(4). Idaho Code § 39-104(4) is part of the Idaho

Environmental Protection and Health Act, I.C. §§ 39-101 *et. seq.* Idaho Code § 39-104 establishes the Department of Environmental Quality. Paragraph (4) provides:

No provision of this title shall be interpreted as to supersede, abrogate, injure or create rights to divert or store water and apply water to beneficial uses established under section 3, article XV of the constitution of the state of Idaho and title 42, Idaho Code. Nothing in this title shall be construed to allow the department to establish a water right for minimum water levels in any lakes, stream flows, or impoundments. *Minimum stream flows and minimum water levels may only be established pursuant to chapter 15, title 42, Idaho Code.*

(emphasis added).⁶ The provisions of I.C. §39-104(4) do not alter this Court's prior analysis.

First, no provision of Title 39 is being relied upon to establish the streamflow maintenance right at issue. Second, although I.C. §39-104(4) provides that "minimum stream flows" can only be established pursuant to the IMSFA, for the reasons discussed previously, the streamflow maintenance right at issue is not the same type of water right as the "minimum stream flow" right contemplated under the IMSFA. As such, the Court holds that I.C. §39-104(4) is of no effect in this matter.

E. The Streamflow Maintenance Claim does not Interfere with the Interests Held in Lucky Peak Reservoir by Irrigation Entities.

The Objectors also argue that the streamflow maintenance claim should be denied because the claim is contrary to the representations and guarantees made to irrigation entities by the BOR. This Court disagrees. In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the Idaho Supreme Court held that storage right holders have a property interest in the water rights for which they hold contracted storage space. In this case, the irrigation entities do not hold contracts for the entire capacity of Lucky Peak Reservoir. In 1966, the same irrigation entities holding irrigation rights in Arrowrock and Anderson Ranch Reservoirs entered into water service contracts with the BOR for supplemental water supplies. In 2005, the water service contracts were

converted to repayment contracts. According to the terms of the 2005 repayment contracts “[a]ll space in Lucky Peak Reservoir shall be operated with like priority as to storage rights and all space will be treated proportionately” These rights are acknowledged in the *Director’s Report* in the amount of 111,950 acre-feet for irrigation storage and irrigation from storage. The 152,300 acre-feet of storage space used to satisfy the streamflow maintenance water claim at issue represents storage space for which these entities do not hold contracts. As such, these irrigation entities do not have a property interest in this space as a result of these repayment contracts, nor do they have a senior priority. The Court cannot find that the streamflow maintenance rights interfere with these rights. Accordingly, the holding and reasoning in *United States v. Pioneer Irr. Dist.* does not apply to this storage space for which no contracts are held.

The Court also finds no merit in the argument, that second to flood control, the primary purpose of Lucky Peak was for irrigation and therefore the space may only be used for the storage and release of irrigation water rights. The 1966 water service contracts for the supplemental water supplies specifically acknowledged that “the United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses” *Stevens Aff.*, Ex. D & E at 1. The repayment contracts also specifically acknowledged that the “United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses, for which the United States holds License No. 63-03618” The irrigation entities entered into these contracts acknowledging that the reservoir could be used for purposes other than irrigation.

- 1. Irrigation entities holding repayment contracts in Anderson Ranch and Arrowrock Reservoirs have an interest in Lucky Peak which should be reflected in the *Partial Decree* in the form of a remark.**

⁶ The term “department” as used in the statute means the Department of Environmental Quality. I.C. §39-103(4)

Prior to the establishment of the 50,000 acre-feet for maintaining winter time flows and prior to the existence of the contracts for supplemental water supplies, the BOR entered into contracts which amended or supplemented the repayment contracts held by each of the irrigation entities having storage rights in Arrowrock and Anderson Ranch Reservoirs. The "Supplemental Contracts" guaranteed to those contract holders the use of storage waters in Lucky Peak for irrigation purposes in an amount equal to the unfilled storage capacity resulting from the water having been evacuated from Anderson Ranch and Arrowrock Reservoirs for flood control purposes. *Arrington Aff.*, Ex. B, pp.4-5; *Stevens Aff.*, Ex B and C. Since 1985, pursuant to the *Water Control Manual for Boise River Reservoirs*, the first 60,000 acre-feet of any shortfalls caused by flood control operations comes from the streamflow maintenance allocation. Any shortages beyond the 60,000 acre-feet are allocated proportionality among all the uses in Lucky Peak.

The Boise Project Board of Control argues that this contract interest should be reflected in the *Partial Decree* to allow water otherwise used for streamflow maintenance to be released for irrigation purposes in order to satisfy these contractual obligations. This Court agrees for two reasons. First, pursuant to the Idaho Supreme Court's holding in *United States v. Pioneer Irr. Dist.*, the repayment contract holders in Arrowrock and Anderson Ranch Reservoirs also have an interest in the storage space in Lucky Peak Reservoir *viz- a-viz* the terms of these Supplemental Contracts. This interest for flood evacuation is paramount to all other rights to storage space in Lucky Peak, including space for which these same entities hold separate repayment contracts (formerly water service contracts). The Court acknowledges that the repayment contract right holders in Anderson Ranch and Arrowrock are the same entities also holding separate repayment contracts (formerly water service contracts) for water out of Lucky Peak. Nonetheless, the repayment contracts in Anderson Ranch and Arrowrock are distinct from the repayment contracts in Lucky Peak. The Supplemental Contracts regarding flood evacuation are tied to the repayment contracts held in Anderson Ranch and Arrowrock and are senior to all other interests in Lucky Peak.

Second, although the BOR has historically administered the flood evacuation from Anderson Ranch and Arrowrock Reservoirs into Lucky Peak as being paramount,

there is no authorization for it on the face of the *Partial Decree*. This is particularly true with respect to releasing water designated for streamflow maintenance for irrigation purposes in order to satisfy the obligation without having to apply for a statutorily required temporary change in purpose of use.

This Court holds that, consistent with the holding in *United States v. Pioneer Irr. Dist.*, that the interest in Lucky Peak held by contract right holders in Anderson Ranch and Arrowrock should be reflected in the *Partial Decree* in the form of a remark included in the “*Other Provisions Necessary for the Definition or Administration of this Water Right*,” which provides:

The storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations.

Accordingly, the Boise Project Board of Control’s *Motion for Partial Summary Judgment* is **granted in part**.

VI.

CONCLUSION AND ORDER

For the above-stated reasons, this Court holds that the streamflow maintenance claim at issue is outside the scope of the IMSFA. IDWR did not act outside its authority in the license for a streamflow maintenance purpose of use and, therefore, the license is valid. Objections to the purpose of use therefore constitute impermissible collateral attacks to the license. The Court holds further that a remark in the partial decree is

necessary to acknowledge and administer the interests held in Lucky Peak that are related to contract rights held in Anderson Ranch and Arrowrock Reservoirs.

VII.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated Sept. 23, 2008


JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT RE: BUREAU OF RECLAMATION STREAMFLOW MAINTENANCE CLAIM** were mailed on September 23, 2008, by first-class mail to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Jerry A. Kiser
620 West Hayes
Boise, ID 83702

United States Department of Justice
Environment & Natural Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

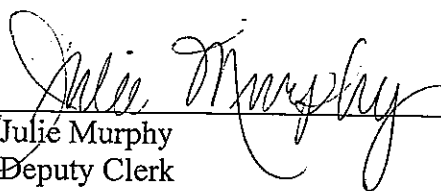
Scott L. Campbell
Po Box 829
Boise, ID 83701-0829

Albert P. Barker
Shelley M. Davis
PO Box 2139
Boise, ID 83701-2139

State of Idaho
Natural Resources Division
Attorney General's Office
PO Box 44449
Boise, ID 83711-4449

Daniel V. Steenson
S. Bryce Farris
PO Box 2773
Boise, ID 83701-2773

Erika E. Malmen
251 E. Front St. Ste. 400
Boise, ID 83702-7310


Julie Murphy
Deputy Clerk