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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA,
Case No. 39576

Subcase No. 63-3618
(Lucky Peak Reservoir)

**MOTION TO RECONSIDER ORDER ON
CROSS-MOTIONS FOR SUMMARY
JUDGMENT REGARDING BUREAU OF
RECLAMATION STREAMFLOW
MAINTENANCE CLAIM AND
MEMORANDUM IN SUPPORT THEREOF**

**I.
INTRODUCTION**

COMES NOW Pioneer Irrigation District and Settlers Irrigation District
(hereinafter the "Districts"), by and through their counsel of record, MOFFATT, THOMAS,
BARRETT, ROCK & FIELDS, CHARTERED, and, pursuant to Idaho Rule of Civil
Procedure 11(a)(2)(B), move this Court to reconsider its determination contained in its

**MOTION TO RECONSIDER ORDER ON CROSS-MOTIONS FOR SUMMARY
JUDGMENT REGARDING BUREAU OF RECLAMATION STREAMFLOW
MAINTENANCE CLAIM AND MEMORANDUM IN SUPPORT THEREOF - 1**

September 23, 2008 Memorandum Decision and Order on Cross-Motions for Summary Judgment Regarding Bureau of Reclamation Streamflow Maintenance Claim, whereby this Court granted 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 the Idaho Minimum Streamflow Act, Idaho Code Sections 42-1501, *et seq.* (the "Act"), do not apply to the claimed streamflow maintenance water right at issue.

This Motion is made and based upon the Idaho Legislature's declaration of purpose, as set forth in Idaho Code Section 42-1501, which was not directly addressed by the litigants or this Court with respect to the Court's Memorandum Decision and Order. By this Motion, which is intentionally narrowly constructed, the Districts do not intend to waive any appealable issue relevant to this Subcase.

This Motion is timely brought in accordance with Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure.

ARGUMENT

1. The Court's Memorandum Decision And Order, Finding The Idaho Minimum Streamflow Act Inapplicable To The Streamflow Maintenance Right At Issue, Fails To Consider Or Evaluate A Fundamental Declared Legislative Purpose Of The Act

By this Motion, the Districts respectfully submit that in interpreting the Idaho Minimum Stream Flow Act, finding it inapplicable to water right claim at issue, and creating a new category of minimum streamflow rights, this Court failed to properly recognize or consider the fundamental intent and policy of the Act, as stated by the Idaho Legislature. Specifically, the Idaho Legislature declared the following legislative purpose of the Idaho Minimum Stream Flow Act, at Idaho Code Section 42-1501:

42-1501. Legislative purpose – Minimum stream flow declared beneficial use. –

* * *

The legislature further declares that minimum stream flow is a beneficial use of water of the streams of this state for 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.

Id. While this Court quoted the entirety of Idaho Code Section 42-1501 in its Memorandum Decision and Order, it did not recognize or discuss this critical component of the Idaho Legislature's enactment and purpose of the Idaho Minimum Streamflow Act. Allowing the federal government to convert an irrigation water right in a federally-constructed reservoir to a minimum stream flow right without complying with the procedures of the Idaho Minimum Streamflow Act, permits precisely what the Idaho Legislature declared it intended to prevent. In addition to allowing the federal government to bypass the legislative reservation for review addressed at length in the Districts' briefing, by finding the Idaho Minimum Streamflow Act inapplicable, this Court has effectively circumvented the very purpose of the Act. Critically, the Act mandates that the Idaho Water Resource Board is the only entity which may hold such water rights, *not* the federal government.

As addressed by this Court in its Order, in interpreting the Idaho Minimum Streamflow Act, it is necessary for the Court to "ascertain the legislative intent by examining the language used, the reasonableness of the proposed interpretations, as well as the policy behind the statute." Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Streamflow Maintenance Claim, p. 20, *citing State v. Hagerman Water Right Owners*, 130 Idaho 727, 732, 947 P. 2d 400, 405 (1997). Applying said interpretive guidance, the Districts

respectfully submit it is appropriate for this Court to reconsider and evaluate this critical component of the Idaho Legislature's declared intent to protect Idaho water from interstate diversion and the federal government's use of Idaho water outside the boundaries of the state of Idaho.

Unfortunately, should the Court's decision stand in its present form, it will judicially authorize the federal government to pursue applications to change the nature and period of use of all irrigation storage water rights in federal reservoirs to minimum streamflow. Such authority is directly contrary to the stated purpose of the Act to "protect[ing] such waters from . . . diversion . . . by the federal government for use outside the boundaries of the state of Idaho." *Id.* Given the protracted litigation and legislation (Idaho Code Section 42-1763B) involving Endangered Species Act salmon flow augmentation water from Idaho, the Court should not inadvertently create a mechanism for the federal government to send Idaho water out of state for "use outside the boundaries of the state of Idaho." The Act specifically attempted to prevent such a result.

II. CONCLUSION

On the basis of the foregoing, the Districts respectfully submit it is appropriate for this Court to reconsider the history leading to adoption of the Act and the Idaho Legislature's declared intent and reverse its entry of summary judgment in favor of the United States, City of Boise, Ada County and State of Idaho Department of Fish and Game.

RESPECTFULLY SUBMITTED this 3rd day of October, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of October, 2008, I caused a true and correct copy of the foregoing **MOTION TO RECONSIDER ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT REGARDING BUREAU OF RECLAMATION STREAMFLOW MAINTENANCE CLAIM AND MEMORANDUM IN SUPPORT THEREOF** to be served by the method indicated below, and addressed to the following:

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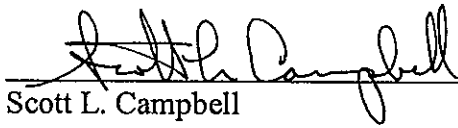
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