

4-16

Attorneys for City of Pocatello

In Re SRBA
Case No. 39576

Subcase Nos. 1-2064, 1-2064A, 1-2064B,
1-2064C, 1-2064D, 1-2064E, 1-2064F,
1-2064L, 1-10042, 1-10042A, 1-10042B,
1-10053A, and 1-10190
(American Falls)

Subcase Nos. 1-2068, 1-2068D, 1-2068E,
1-2068F, 1-2068M, 1-2068Y, 1-10043,
1-10043A, 1-10043E, 1-10191, and 1-10389
(Palisades)

**AFFIDAVIT OF JOSEPHINE P.
BEEMAN IN SUPPORT OF CITY
OF POCA TELLO’S RESPONSE TO
STATE OF IDAHO’S JANUARY 25, 2012
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

I, Josephine P. Beeman, after first being duly sworn upon oath, depose and state:

AFFIDAVIT OF JOSEPHINE P. BEEMAN IN SUPPORT OF POCATELLO'S RESPONSE TO
STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT – Page 1

2. Attached hereto as Exhibit A is a true and correct copy of Approved Transfer No. 3310, dated July 6, 1988, for United States Bureau of Reclamation Water Right No. 63-3614.

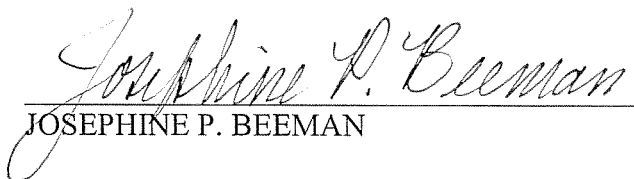
3. Attached hereto as Exhibit B is a true and correct copy of the SRBA's June 23, 2003 *Order Separating and Consolidating Common Issue from Subcases in "Exhibit A"; AOI 11 and 16, IRCP 42; Order Rescinding Order of Reference to Special Master as to Consolidated Issue; Order Designating Issue as Consolidated Subcase 91-63; Notice of Scheduling and Status Conference on Consolidated Issue.*

4. Attached hereto as Exhibit C is a true and correct copy of the United States' January 6, 2006 *Reply Brief* in Idaho Supreme Court Docket No. 31790, *United States of America v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2000).

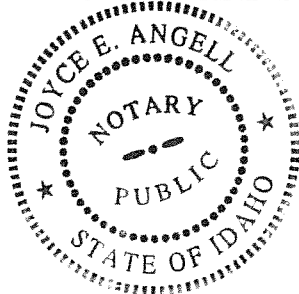
5. Attached hereto as Exhibit D is a true and correct copy of February 25, 2009 Partial Decree for the Bureau of Reclamation's Water Right 63-3614.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 13TH day of April 2012.


JOSEPHINE P. BEEMAN

SUBSCRIBED AND SWORN to before me this 13th day of April 2012.




Notary Public in and for the State of Idaho
My Commission Expires: July 29, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of April 2012, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail:

NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

US DEPARTMENT OF JUSTICE
ENVIRONMENT & NAT'L RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

JAMES C. TUCKER
IDAHO POWER COMPANY
P O BOX 70
BOISE ID 83707

ADAM DEVOE
BROWNSTEIN HYATT FARBER SHCRECK
410 17TH STREET, SUITE 2200
DENVER CO 80202

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CAPITOL LAW GROUP
P O BOX 32
GOODING ID 83330

ROGER LING
P O BOX 396
RUPERT ID 83350-0396

CANDICE MCHUGH
RACINE OLSON NYE BUDGE BAILEY
101 S CAPITOL BLVD, SUTIE 208
BOISE ID 83702

RANDALL C BUDGE
RACINE OLSON NYE BUDGE BAILEY
PO BOX 1391
POCATELLO ID 83204-1391

JERRY RIGBY
RIGBY ANDRUS RIGBY
P O BOX 250
REXBURG ID 83440

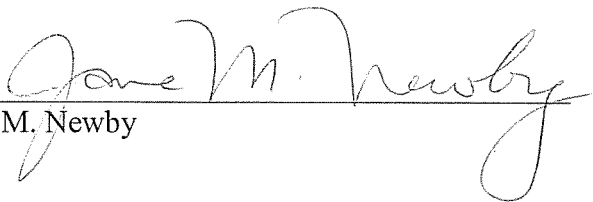
TRAVIS THOMPSON
PAUL ARRINGTON
BARKER ROSHOLT SIMPSON
P O BOX 485
TWIN FALLS ID 83303-0485

KENT FLETCHER
P O BOX 248
BURLEY ID 83318

DAVID GEHLERT
U.S. DOJ
999 18TH STREET, SOUTH TERRACE
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DENVER CO 80202

MATT HOWARD
BUREAU OF RECLAMATION PN 3100
1150 N CURTIS ROAD, SUITE 100
BOISE ID 83706-1234

JOHN K SIMPSON
BARKER ROSHOLT SIMPSON
PO BOX 2139
BOISE, ID 83701-2139


Jane M. Newby

Transfer No. 3310Water Right No. 63-3614

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT

To Change the Point of Diversion and/or the Place of Use

United States of America acting through Regional Director
Name of applicant Pacific Northwest Region, Bureau of Reclamation Phone 334-1165
Post Office address Box 043-550 West Fort St., Boise, Idaho 83724

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

- a. Decree No. _____ Decreed to _____ (Name)
in case of _____ vs _____
dated in _____ in _____ county of _____
(Name of court)
- b. License No. R-698 issued by the Idaho Department of Water Resources
- c. Claim No. _____ on file with the Idaho Department of Water Resources

2. If applicant is not the original holder of this right, explain how it was acquired and attach a copy of the deed or other evidence of ownership of the land to which the right is appurtenant _____

3. Source of water Boise River, South Fork GLS tributary to Boise River Snake River

4. Date of priority 12-9-40

5. Water is used for the following purposes:

amount 493,161 for Storage for Irrigation purposes from Jan 1 to Dec 31
amount 493,161 for Storage for Power purposes from Jan 1 to Dec 31
amount 493,161 for Irrigation From Storage purposes from March 15 to Nov. 15
493,161 Power From Storage 1/1 (month/day — both dates inclusive 12/31)

6. Total amount of water under right: a. _____ cubic feet per second
&/or
b. 493,161 acre feet per annum

7. Location of original point of diversion is U.S. lot 4 1/4 of _____ 1/4 of Section 1
Township 1 South Range 8 E, B.M., in Elmore County
Additional points of diversion, if any Secondary diversions from the Boise River are at various points downstream from Lucky Peak Reservoir.

8. Lands irrigated or place of use:

Irrigation of cultivated lands of the Boise Federal Reclamation Project in Ada and Canyon counties as more particularly described in Certificate of completion of works issued in connection with Permit No. R-698, including all lands for contracts under Federal Reclamation laws for space in Anderson Ranch Reservoir.

Townships 1,2,3,4,5, N.,	Range 1 E.,	B.M.	Townships 2,3,4,5, N.	Range 4W.,	G.M.
" 2,3,4, N.	" 2 "	" "	" 3,4,5, S N.,	" 5 "	" "
" 2 & 3 N.	" 3 "	" "	" 4,5,6, N.	" 6 "	" "
" 1 S.	" 1 W.	" "	" 21 & 22 S.	" 46 E	W.M.
" 1,2,3,4,5, N.	" 1 "	" "	" 21 S.	" 47 "	" "
" 1 S.	" 2 "	" "			
" 1,2,3,4 N.	" 2 "	" "			
" 2,3,4,5, N.	" 3 "	" "			

JUN 24 1992

Total number of acres to be irrigated 277,000

9. Describe any other water rights used for the same purpose as described above Deeds, Licenses, Permits, and beneficial use claims held for the Boise Federal Reclamation Project.

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of nonuse? No If yes, describe in item D, REMARKS.

Exhibit A
Affidavit of Josephine P. Beeman in Support of
Pocatello's Response to State's Motion for Partial
Summary Judgment — 1-2064 et al., and 1-2068 et al.
April 16, 2012

B DESCRIPTION OF PORTION OF RIGHT OWNED BY APPLICANT (If the entire right is owned by the applicant, omit part B).

1. Amount of water: a. _____ cubic feet per second
&/or
b. _____ acre feet per annum
2. Point of diversion _____ 1/4 _____ 1/4, Section _____ Township _____
Range _____, B.M., _____ County
Additional points _____
3. Place of use:

TWP.	RANGE	SEC	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

Total number of acres to be irrigated _____

C. DESCRIPTION OF RIGHT OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. General Information
 - a. Amount of water to be diverted _____ c.f.s. &/or 5200 _____ acre feet
 - b. Description of diverting works Storage water to be released from Anderson Ranch Reservoir through the outlet works and power penstocks.
 - c. Describe the reasons for the proposed changes 5200 acre-feet of water to be changed from joint irrigation and power to joint municipal-industrial and power use.

2. Change in point of diversion

Point of diversion No change 1/4 _____ 1/4, Section _____ Township _____
Range _____, B.M., _____ County
Additional points Secondary diversions from the Boise River channel may be from additional locations downstream from the Boise River Diversion Dam.

3. Change in place of use

- a. Are there liens, mortgages, or contracts on the lands from which you propose to transfer the water right which limit your authority to make the proposed change? Yes _____ No X If yes, provide a statement agreeing to the proposed change from the holder of the lien, mortgage or contract.
- b. Describe the affect on the land now irrigated if the place of use is changed pursuant to this transfer None - not with standing the uses listed in license No. R398, 5200 acre-feet of storage has been reserved exclusively for power head from the inception of the project. There will be no change in the quantity available for irrigation.

JUN 24 1992

c. Describe the lands. Place of use to which the right will be transferred:

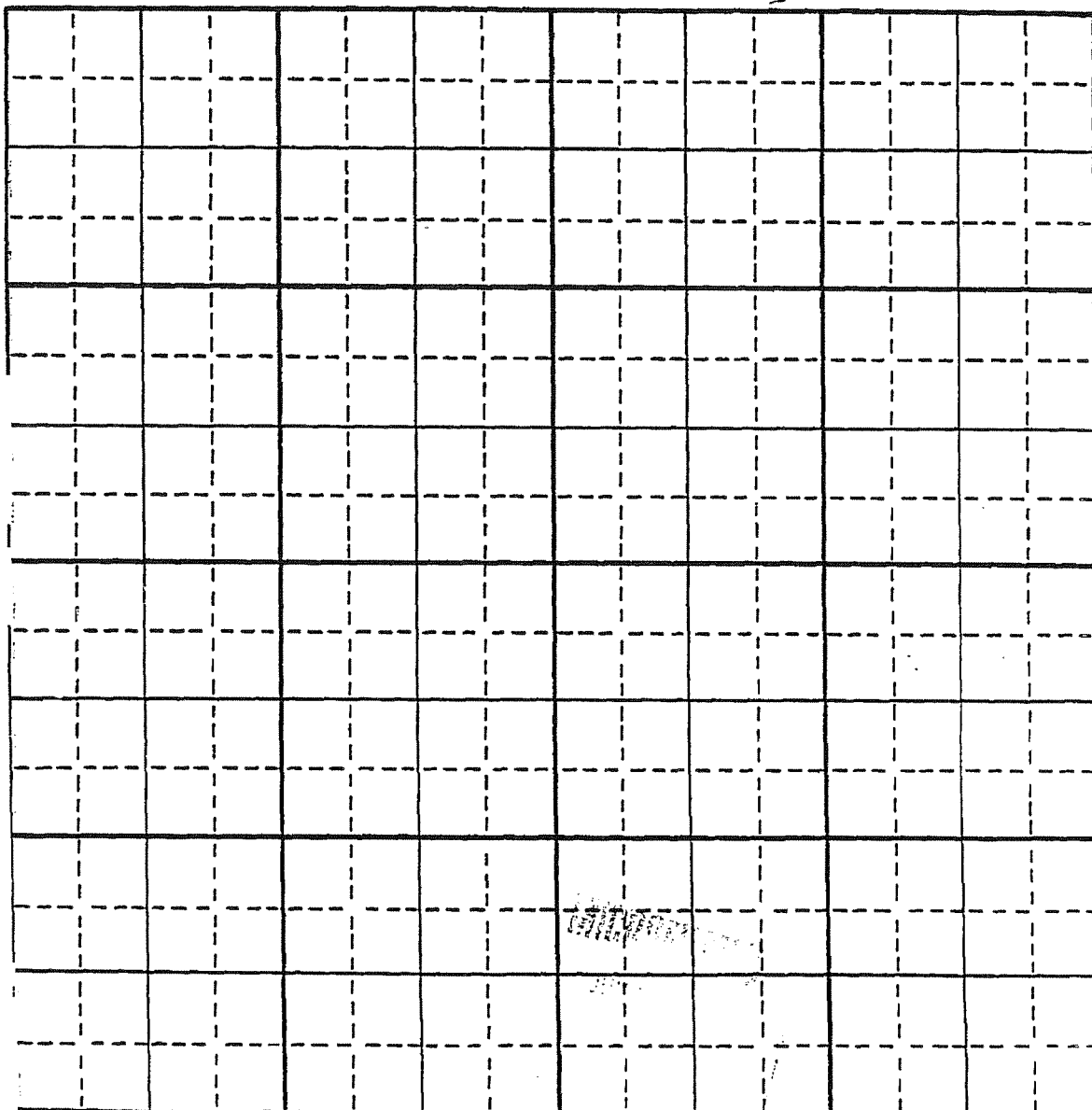
TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	

No change. The place of proposed Municipal Industrial use is included in the area listed in item 8.

Total number of acres to be irrigated 277,000

- Describe any other water rights used for the same purpose as described above. Water Rights of the Boise Water Corporation, city of Boise, and various other water users.
- Draw a map indicating the new point(s) of diversion and/or the new land to be irrigated. Show clearly the land involved by section, township and range number.

No Change



D. REMARKS

I hereby assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge.

I understand that any willfull misrepresentations made in this application may result in voiding its approval.

Subscribed and sworn to before me this 27th day of November 1985
Asst. Regional Director

John W. Kays, III
(Signature of Applicant)

[Signature]
(Notary Public)

My commission expires 1-12-92

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. 63-3614
and said application is hereby APPROVED, subject to the following limitations and conditions:

Use of water under this right is subject to control by the watermaster of

State Water District No. 63, Boise River.

Witness my hand this 6th day of July, 19 88

[Signature]
Chief, Operations Bureau

FOR DEPARTMENT USE ONLY

Received by GLS Date 11/29/1985 Protest filed by None
Prelim. check by GLS Fee \$50.00
Receipted by JP Date 11/29/85
Published in MTN HOMER NEWS & STATESMAN 12/5/85 Copies of protest forwarded by _____
Pub. dates _____ Hearing held by _____ Date _____
Watermaster recommendation requested on _____ Recommended for approval denial
1/6/86 rec'd. 1/10/86 by DET 4/17/87

JUN 24 1992

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

Application For Transfer of Water Right
Supplemental Information for
CHANGE IN NATURE OF USE

1. Fully complete Form 222. Type or print in ink "CHANGE IN NATURE OF USE" at the top of page 1. If no change in point of diversion or place of use is desired, so note under items C.2 and/or C.3 C.

2. Describe fully the new use to which the water is intended to be applied:

a. Nature of use: Joint Power and Municipal Industrial use. Municipal-
Industrial uses will be by various secondary diversions from the Boise River
Chanel downstream from Boise River Diversion Dam.

b. Rate of flow: Not to exceed 100 cfs

c. Hours per day and days per year that the flow will be diverted: _____
Various irregular schedule

d. Season of use: Year-round

e. Return flows from the use: (quantity and quality of return flows, and location of discharge):

Returns are estimated at 60% of diversions. Quality of point source returns would
be regulated by municipal waste discharge permits. Non point discharge quantities
would be minor and generally located downstream of Boise.

3. Describe positive and negative effects on other waterusers predicted to result from the proposed change in nature of use. There are no known negative effects. The
change will help meet the increasing demands for municipal-industrial water
supplies in the Boise Valley. The change will also provide a surface water
source for the existing surface water component of diversions by the Boise
water corporation through their existing Ranney collectors.

RECEIVED

JUN 24 2003

Department of Water Resources

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2003 JUN 23 PM 2 15

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

) Consolidated Subcase: 91-63
)
) ORDER SEPARATING AND
) CONSOLIDATING COMMON ISSUE
) FROM SUBCASES IN "EXHIBIT A"; A01
) § 11 AND 16, I.R.C.P. 42;
)
) ORDER RESCINDING ORDER OF
) REFERENCE TO SPECIAL MASTER AS
) TO CONSOLIDATED ISSUE;
)
) ORDER DESIGNATING ISSUE AS
) CONSOLIDATED SUBCASE 91-63;
)
) NOTICE OF SCHEDULING AND
) STATUS CONFERENCE ON
) CONSOLIDATED ISSUE

On June 19, 2003, various irrigation entities, to wit: Pioneer Irrigation District and Settlers Irrigation District, by and through their counsel of record Moffatt, Thomas, Barrett, Rock & Fields, Chtd.; Nampa Meridian Irrigation District, New Dry Creek Ditch Company, Boise Valley Irrigation District Company South Boise Water Company, Eureka Water Company, Thurman Mill Ditch Company, Eagle Island Water Users Association, Farmers Cooperative Ditch Company and Ballantyne Ditch Company Limited, by and through their counsel of record Ringert Clark Chartered; and Farmers Union Ditch Company, Canyon County Water Company, Middleton Irrigation Association, and Middleton Mill Ditch Company, by and through their counsel of record Stoppello & Kiser, Attorneys at Law; (collectively "Irrigation Entities"), jointly filed a *Motion to Consolidate* a common issue regarding the ownership of water rights developed pursuant to the Reclamation Act of 1902 as between the Irrigation Entities and the

ORDER SEPARATING AND CONSOLIDATING COMMON ISSUE FROM SUBCASES
IN EXHIBIT A; A01 § 11 AND 16, I.R.C.P. 42; ORDER RESCINDING ORDER OF REFERENCE
TO SPECIAL MASTER AS TO CONSOLIDATED ISSUE; ORDER DESIGNATING ISSUE AS
CONSOLIDATED SUBCASE 91-63; NOTICE OF SCHEDULING AND STATUS CONFERENCE
ON CONSOLIDATED ISSUE
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United States Department of Interior, Bureau of Reclamation, (BOR), specifically pertaining to water rights for Arrowrock Dam and Reservoir, Lucky Peak Dam and Reservoir and Anderson Ranch Dam and Reservoir.

The ownership issue was raised in subcases presently pending before Special Master Thomas Cushman. Because the ownership issue primarily involves a question of law, the likelihood of similar issues arising in other sub-basins, and the need to have the issue decided in an expeditious manner, the Court intends to preside over and decide the issue directly as opposed to having the matter first proceed before a special master.

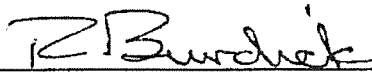
THEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

1. **Order Separating and Consolidating Issue:** Pursuant to A01 § 11 and I.R.C.P. 42, IT IS ORDERED that the common issue regarding the ownership of water rights as between the Irrigation Entities and the BOR is separated from those subcases listed in attached **Exhibit A** and is consolidated into a single subcase for purposes of resolution.
2. **Order Designating Issue as Consolidated Subcase 91-63:** IT IS FURTHER ORDERED that the consolidated subcase is hereby designated as consolidated subcase 91-63. All future filings pertaining to said consolidated issue should be filed under said subcase number.
3. **Order Rescinding Consolidated Issue from Order of Reference:** IT IS FURTHER ORDERED that the ownership issue separated from those subcases listed in **Exhibit A** and now consolidated into consolidated subcase 91-63 is hereby rescinded from the previously issued *Order of Reference to Special Master Thomas Cushman* which referred those subcases to Special master Cushman. Consolidated subcase 91-63 shall proceed before the Presiding Judge. All other matters and issues pertaining to said subcases in **Exhibit A** shall proceed before the Special Master. Any party asserting that issues regarding the other elements of the water rights cannot proceed until a resolution of the consolidated subcase is reached will have to take such matters up with the Special Master.
4. **Notice of Initial Hearing for Scheduling and Status Purposes:** Notice is hereby given that an initial hearing will be conducted for purposes of scheduling on **July 15, 2003 at the SRBA Courthouse, 253 3rd Ave. N., Twin Falls, Idaho**. Anyone wishing to participate by phone may do so by calling 1-918-583-3445 and entering the participant code 406128 when prompted.

ORDER SEPARATING AND CONSOLIDATING COMMON ISSUE FROM SUBCASES
IN EXHIBIT A; A01 § 11 AND 16, I.R.C.P. 42; ORDER RESCINDING ORDER OF REFERENCE
TO SPECIAL MASTER AS TO CONSOLIDATED ISSUE; ORDER DESIGNATING ISSUE AS
CONSOLIDATED SUBCASE 91-63; NOTICE OF SCHEDULING AND STATUS CONFERENCE
ON CONSOLIDATED ISSUE
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5. **Notices of Intent to Participate:** Any party to the adjudication not already a party to one of the enumerated subcases in **Exhibit A**, seeking to participate in the consolidated subcase may do so by filing and serving a response setting forth their position on the issue. The response must be served on the parties to the consolidated subcase (listed in the attached certificate of mailing) prior to the date set for the hearing.

DATED: June 23rd, 2003.



ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

63-00303
63-00303A
63-03613
63-03613A
63-03614
63-03614A
63-03614B
63-03614C
63-03614D
63-03614E
63-03614F
63-03618
63-03618A
63-03618B
63-03618C
63-03618D
63-03618E
63-03618F
63-03618G
63-03618H
63-03618J
63-03618K
63-03618L
63-03618M
63-03618N
63-03618P
63-05262
63-05262A
63-05262B
63-05262C

(Subcase list: CONCOMMON)
6/23/03

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER SEPARATING AND CONSOLI- DATING COMMON ISSUE; ORDER RESCINDING ORDER OF REFERENCE; ORDER DESIGNATING ISSUE was mailed on June 23, 2003, with sufficient first-class postage to the following:

BOISE PROJECT BOARD OF CONTROL

Represented by:
ALBERT P. BARKER
205 N 10TH ST, STE 520
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

PIONEER IRRIGATION DISTRICT
SETTLERS IRRIGATION DISTRICT

Represented by:
ANGELA SCHAEER KAUFMANN
101 S CAPITOL BLVD, 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

BOISE PROJECT BOARD OF CONTROL

Represented by:
CHESTNUT, AMY D
205 N 10TH ST, STE 520
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

BALLANTYNE DITCH COMPANY LTD
BOISE VALLEY IRRIGATION DITCH
EAGLE ISLAND WATER USERS ASSN
EUREKA WATER COMPANY
FARMERS COOPERATIVE DITCH CO
NAMPA & MERIDIAN IRRIGATION
NEW DRY CREEK DITCH COMPANY
SOUTH BOISE WATER COMPANY
THURMAN MILL DITCH CO

Represented by:
DANIEL V. STEENSON
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

CANYON COUNTY WATER COMPANY
FARMERS UNION DITCH COMPANY
MIDDLETON IRRIGATION ASSN
MIDDLETON MILL DITCH COMPANY

Represented by:
JERRY A. KISER
620 WEST HAYES
BOISE, ID 83702
Phone: 208-336-1020

COMMITTEE OF NINE (SEE NOTES)

Represented by:
JOHN K. SIMPSON
205 N 10TH ST, STE 520
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

STATE OF IDAHO, DEPT OF F & G

Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

BALLANTYNE DITCH COMPANY LTD
BOISE VALLEY IRRIGATION DITCH
EAGLE ISLAND WATER USERS ASSN
EUREKA WATER COMPANY
FARMERS COOPERATIVE DITCH CO
NAMPA & MERIDIAN IRRIGATION
NEW DRY CREEK DITCH COMPANY
SOUTH BOISE WATER COMPANY
THURMAN MILL DITCH CO

Represented by:
S. BRYCE FARRIS
RINGERT CLARK, CHTD
PO BOX 2773
BOISE, ID 83701
Phone: 208-342-4591

(Certificate of mailing continued)

PIONEER IRRIGATION DISTRICT
SETTLERS IRRIGATION DISTRICT
Represented by:
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101 S CAPITOL BLVD, 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

UNITED STATES OF AMERICA ACTIN
REGIONAL DIRECTOR PN REGION
BUREAU OF RECLAMATION
1150 N CURTIS RD SUITE 100
BOISE, ID 83706-1234
Phone: 208-378-5322

COMMITTEE OF NINE (SEE NOTES)
Represented by:
TRAVIS L THOMPSON
205 N 10TH ST, STE 520
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

UNITED STATES OF AMERICA
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

PIONEER IRRIGATION DISTRICT
PO BOX 426
CALDWELL, ID 83605
Phone: 208-459-3617

PIONEER IRRIGATION DISTRICT
PO BOX 426
CALDWELL, ID 83606
Phone: 208-459-3617

SETTLERS IRRIGATION DISTRICT
PO BOX 7571
BOISE, ID 83707
Phone: 208-344-2471

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

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IDAHO SUPREME COURT
COURT OF APPEALS

ORIGINAL 48

No. 31790

JAN - 9 PM 1:15

IN THE SUPREME COURT OF THE STATE OF IDAHO

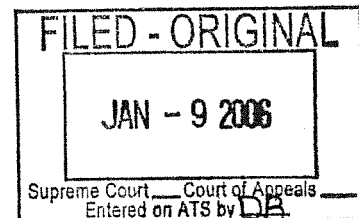
IN RE: SRBA, CASE NO. 39576, SUBCASE NO. 91-63
RE: OWNERSHIP OF WATER RIGHTS

UNITED STATES OF AMERICA,
Appellant-Cross Respondent,

v.

PIONEER IRRIGATION DISTRICT, et al.,
Respondents

UNITED STATES' REPLY BRIEF



On appeal from the Snake River Basin Adjudication, District Court of the
Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls,
Honorable John M. Melanson, Presiding

Counsel for Appellant United States of America:

DAVID L. NEGRI, ISB # 6697
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
550 W. Fort St. MSC033
Boise, ID 83724

KATHRYN E. KOVACS
United States Department of Justice
Environment and Natural Resources Division
Appellate Section
P.O. Box 23795
Washington, D.C. 20026

Counsel for other parties are listed on the Certificate of Service

Exhibit C
Affidavit of Josephine P. Beeman in Support of
Pocatello's Response to State's Motion for Partial
Summary Judgment -- 1-2064 et al., and 1-2068 et al.
April 16, 2012

ANNALS



TABLE OF CASES AND AUTHORITIES

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CASES:

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<u>Boise-Kuna Irrigation District v. Gross</u> , 118 Idaho 940, 801 P.2d 1291 (Ct. App. 1990)	30, 31
<u>Blackburn v. State Farm Mut. Auto. Ins. Co.</u> , 108 Idaho 85 (1985)	12
<u>Bradshaw v. Milner Low Lift Irrigation District</u> , 85 Idaho 528, 381 P.2d 440 (1963)	37
<u>California v. United States</u> , 438 U.S. 645 (1978)	5, 7
<u>Cantlin v. Carter</u> , 88 Idaho 179, 397 P.2d 761 (1964)	25
<u>Centrex Corp. v. United States</u> , 395 F.3d 1283 (Fed. Cir. 2005)	34, 37
<u>Condict v. Rice</u> , 333 P.2d 684 (Wyo. 1958)	8
<u>Cruz v. United States</u> , 219 F. Supp. 2d 1027 (N.D. Cal. 2002)	34
<u>D.C. Mac Watters</u> , 41 Pub. Lands Dec. 425 (1912)	14
<u>Del Puerto Water Dist. v. United States</u> , 271 F. Supp. 2d 1224 (E.D. Cal. 2003)	35
<u>Elephant Butte Irrigation District v. United States</u> , 269 F.3d 1158 (10 th Cir. 2001)	35
<u>Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist., Ltd.</u> , 14 Idaho 450, 94 P. 761 (1980)	21, 22, 24
<u>First Security Bank of Blackfoot v. State</u> , 49 Idaho 740, 291 P. 1064 (1930)	9
<u>Fort Hall Water Users Association v. United States</u> , 129 Idaho 39, 921 P.2d 739 (1996)	21
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ARGUMENT

The question presented in this appeal is whether the United States owns the irrigation water rights in the Boise Project. In the United States' opening brief, we showed that the district court's judgment improperly divested the United States of part of the interest it has held in these water rights for almost a century by dividing the title to the water rights and transferring the equitable interest to the irrigation entities. The Respondents' arguments to the contrary are based largely on mischaracterizations of the United States' opening brief. The United States did not assert in its opening brief that the water users' rights are governed exclusively by contractual terms. To the contrary, the brief acknowledged that the Idaho constitution protects landowners' rights as beneficial users of water. But this Court has held clearly and repeatedly that a beneficial user does not need to hold title to the water that will be applied to his property. Rather, in a situation like the one at bar, the original appropriator and owner of the storage facility -- here the United States -- retains title to the project water rights following distribution of the water. The remark the district court ordered inserted into the decrees was inconsistent with a century of this Court's precedents. Rather than simply noting that the water users make beneficial use of the water, it split the title to the water between the United States and the water users in a manner that has no foundation under Idaho law. In so doing, the district court relied mistakenly on federal law, even though section 8 of the 1902 federal Reclamation Act expressly defers to state law in the acquisition of water rights. The district court's judgment upset the status quo of the past one hundred years, was contrary to binding Idaho

precedent, and should be vacated.

I. Summary of the Argument

In our opening brief, we described the history of the Boise Project and the development of federal reclamation law. We explained that the United States obtained permits to appropriate water for the Project, perfected its water rights, proceeded through licensing and, in some cases, adjudication proceedings, and entered into contracts with irrigation entities to distribute some of the project water for irrigation. U.S. Br. at 3-13. Given that backdrop, we explained that section 8 of the federal Reclamation Act of 1902 provides that state law governs the appropriation of project irrigation water. U.S. Br. at 15-18. The Respondents agree with the United States that the title question presented here is governed by state law and make little effort to support the district court's errant reasoning. In particular, the Respondents largely abandoned on appeal their reliance on the Ickes v. Fox trilogy of U.S. Supreme Court cases. Those cases turned on the unique facts and water law of other states and, hence, do not dictate the outcome here.

The Respondents also failed to counter our argument that the district court misinterpreted the appurtenancy and beneficial use clause of section 8 of the federal Reclamation Act. Idaho law is consistent with section 8, because it requires appurtenancy and beneficial use. But Idaho does not require the landowner or beneficial user to also own title to the water rights. The United States cited Idaho Code § 42-219(5) -- which provides for the issuance of water rights licenses to the owner of projects with canals covering more than 25,000 acres -- to show that appurtenancy and beneficial use

do not imply unity of title under Idaho law. The Respondents contend that this provision does not apply to the United States. However, the United States' argument here does not turn on that provision, and, in any event, it clearly does include the United States. The Respondents in turn mistakenly rely on another Idaho Code provision and certain administrative materials that are either not relevant here or have been misread.

The central debate in this appeal concerns the application of Idaho law to large-scale irrigation enterprises such as those undertaken by the Bureau of Reclamation. We demonstrated in our opening brief that, for over 100 years, this Court has held clearly and repeatedly that, while the water user has a right to the use of water, the appropriator does not compromise its interest in the water rights by selling or distributing the water. First, the Respondents challenge our citation to article XV, section 1 of the Idaho Constitution, again contending that it does not apply to the United States. However, that provision contains no such exclusion and by its plain terms applies to the reservoirs at issue here. Second, the Respondents attempt to distinguish the cases upon which we relied in our opening brief. Contrary to the Respondents' assertion, the relevant statements in those cases were not dicta, but were necessary to the Court's judgments. The Respondents mistakenly rely on other Idaho cases to support their argument that title to the water rights at issue here should be split. No Idaho case has held that the title to water rights may be divided as the Respondents suggest.

Third, Ballentyne argues that the United States did not appropriate the water rights at issue here. The record in this case, however, shows that, for almost 100 years, the State has licensed these

water rights to the United States. Moreover, the Respondents' contracts with the United States recognize that the United States holds title to these water rights. Fourth, the Board of Control asserts that this Court has recognized the irrigation entities' ownership of these water rights in various repayment contract confirmation proceedings and that the United States is bound by language from those opinions, even though it did not participate in those cases. To the contrary, the United States cannot be bound by judgments in cases to which it was not a party. The United States had no reason or obligation to participate in those cases, because no federal property interests were implicated. In any event, those cases did not hold that the irrigation entities own the water rights at issue here.

The State contends that the United States holds these water rights "in trust" for the water users. The parties that participated in the district court proceedings abandoned this argument during the reconsideration stage below and on appeal, and the district court correctly rejected it. While landowners in Idaho enjoy a right to the use of water, and appropriators are bound to apply water to beneficial use, fiduciary duties may not be imposed on the United States absent its express consent. Such consent is lacking here, and other courts have recognized that the federal reclamation statutes do not impose fiduciary duties on the United States. The Idaho cases upon which the State relies apply only to irrigation districts, which, unlike the United States, are creatures of Idaho statutory law.

Finally, Ballentyne and Farmers cross appealed the district court's denial of their request to include in the remark an exhibit specifying the amount of water due to each of the irrigation entities. The district court concluded correctly that such an exhibit was not necessary for administering these

water rights, because references to the contracts between the parties would provide sufficient information. The Boise Project has operated effectively for almost 100 years without such specific information in the United States' certificates and decrees.

Ruling for the United States in this case will not put water users rights at risk or give the United States a malevolent monopoly over water rights in the Boise Project. Decreeing these water rights to the United States will merely continue the status quo of the past 100 years and not reduce the water users' rights in any way. The district court's judgment, on the other hand, would take part of the United States' title to these water rights and potentially interfere with the Bureau of Reclamation's ability to manage the Boise Project for its various purposes. That judgment conflicts with 100 years of Idaho administrative, legislative, and judicial precedent and should be overturned.

II. The United States' ownership of irrigation water rights in the Boise Project is governed by state law.

In our opening brief, we explained that, under section 8 of the Reclamation Act, 43 U.S.C. § 383, and the U.S. Supreme Court's interpretation of that section in California v. United States, 438 U.S. 645 (1978), Idaho law governs the question of what water rights the United States appropriated and continues to own here.¹ The Respondents agree that state law controls the title question in this appeal. State Br. at 1 ("Idaho law controls the question of who owns the water rights at issue in this case"); Board of Control Br. at 14 ("Idaho law controls"); Pioneer Br. at 38 ("the ownership question

¹ Some of the water rights at issue here are used not just for irrigation, but for other purposes as well, including industrial, power, municipal, recreation, and streamflow maintenance. Only the irrigation portion of the water rights are at issue in this case.

turns on the application of state law”), 42 (“under the Reclamation Act water rights are to be appropriated in accordance with state law”), 45 (similar); Ballentyne Br. at 8 (“the BOR’s appropriation of water is controlled by state law”); Farmers Br. at 17 (“The Reclamation Act expressly defers to state water law”).

III. The district court erred in relying on federal law for its conclusion that the United States holds only bare legal title to the water rights at issue here.

The district court in this case recognized that, under Idaho law, the United States could perfect its water rights without itself being the beneficial user of the rights and that the scope of the water users interests are defined by contract. R Vol. 5, p. 983. Despite the court’s apparent understanding of state law, however, it split the title to the water rights at issue in a manner that lacks support under Idaho law. Essentially, the court held that federal law overrides Idaho law. The court based its flawed conclusion on a misunderstanding of a trilogy of U.S. Supreme Court cases and misinterpretation of section 8 of the federal Reclamation Act and a 1989 opinion of the Solicitor of the Department of the Interior.

A. The district court misread United States Supreme Court precedents.

The United States in its opening brief explained that the U.S. Supreme Court’s holdings in Ickes v. Fox, Nebraska v. Wyoming, and Nevada v. United States, upon which the district court relied, turned on the law of the states and individual contracts at issue in those cases. U.S. Br. at 25-28. None of the Respondents disputes that point. Pioneer asserts that the Ickes trilogy analyzed and applied federal law as well. Pioneer Br. at 39. However, when, in California v. United States, the

Court recounted its prior cases interpreting section 8 of the Reclamation Act, Ickes was conspicuously absent from that list. 438 U.S. at 651 n.5. Moreover, as Pioneer acknowledges, id. at 40, the Court's holdings in those three cases are consistent with its conclusion in California v. United States that, under section 8 of the Reclamation Act, state law governs the appropriation of reclamation project water. E.g., Nevada v. United States, 463 U.S. 110, 126 (1983) (quoting California v. United States). In each of those cases, the Court looked to state law to resolve the dispute at hand. Ickes v. Fox, 300 U.S. 82, 94-95 (1937);² Nebraska v. Wyoming, 325 U.S. 589, 612-14 (1945);³ Nevada, 463 U.S. at 126. The district court here erroneously failed to do likewise.

² It is also worth noting that, in contrast to the case at bar, the water rights discussed in Ickes were not derived from water initially appropriated by the United States. Since Ickes was decided on a motion to dismiss, both the D.C. Circuit and the U.S. Supreme Court accepted the plaintiffs' allegations as true, including the allegation that each plaintiff had appropriated and acquired water rights under Washington law prior to the establishment of the Yakima Project. See Ickes, 300 U.S. at 83, 88-89; Ickes v. Fox, 85 F.2d 294, 295 (1936). Rights to water the United States appropriated for storage in the Yakima Project were not at issue in Ickes. 85 F.2d at 295. Rather, the case concerned surface water rights the United States acquired from the Washington Irrigation Company. Id. ("Plaintiffs were appropriators and owners of water rights in the Sunnyside Canal . . . long prior to its purchase by the United States."); see also, 300 U.S. at 88-89. Thus, the D.C. Circuit labeled the United States a "carrier and distributor" of the previously appropriated, pre-project, surface water rights. 85 F.2d at 298. After Ickes, the Sunnyside Canal rights were decreed to the United States on behalf of the project water users. R Ex. 3 Gehlert Affidavit Ex. 34 at 496.

³ Nebraska is also distinguishable here, because it turned on Wyoming law, which is fundamentally different from Idaho law as applied to the Boise Project. Wyoming uses a dual permit system in which the owner of a reservoir obtains what is known as the "primary" permit or "construction" right, which grants the right to build a reservoir and impound water. Wyo. Stat. 41-3-302. An individual water user then arranges with the primary right holder for the use of the stored water. Once he does so, he can receive a "secondary" right or permit. The secondary permit is treated as a new appropriation of the water. Thus, in contrast to the primary permit, which "contemplates the authority from the state to construct a reservoir," the secondary permit "is the State's authority to

B. The district court misinterpreted section 8 of the Reclamation Act.

1. Appurtenancy and beneficial use by individual landowners does not divest the appropriator of title under Idaho law.

In its opening brief, the United States explained that the district court erroneously relied on the clause in section 8 of the Reclamation Act providing that water rights in reclamation projects are “appurtenant to the land irrigated” and are based on “beneficial use.” 43 U.S.C. § 372 (“The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.”). The district court reasoned that appurtenancy and beneficial use imply a unity of title between the land or the user and the water right. R Vol. 5, p. 970 n.8. We showed in our opening brief that the district court’s reasoning is not required by Idaho law, under which the landowner or beneficial user might not hold title to the water right for the water he uses. U.S. Br. at 28-34. The district court erred by interpreting section 8 of the federal Reclamation Act as mandating a judgment that is contrary to the principles of Idaho water law.

The Board of Control suggests that the district court’s reasoning was consistent with Idaho law, Board Br. at 29, but it fails to counter our showing that under Idaho law, the landowner and

appropriate the impounded water.” Condict v. Rice, 333 P.2d 684, 688 (Wyo. 1958). As a result, while stored water is considered unavailable for appropriation under Idaho law, under Wyoming law it is not, and the end users of water stored in a reservoir can obtain a water right instead of being considered “distributees” as they are in Idaho. Thus, naming the water users in Nebraska as “appropriators” on the water rights certificates was consistent with Wyoming law, see 325 U.S. at 613, but has no relevance to this case.

beneficial user need not hold title to the water rights. E.g., Aberdeen-Springfield Canal Company v. Peiper, 133 Idaho 82, 982 P.2d 917 (1999); First Security Bank of Blackfoot v. State, 49 Idaho 740, ___, 291 P. 1064, 1066 (1930). Idaho law is consistent with section 8, because it requires appurtenancy and beneficial use. But in Idaho, the United States, as project appropriator, may hold title to irrigation water rights even if it does not itself make direct beneficial use of the water or own the land to which the water rights are appurtenant. Indeed, if Idaho law required unity of title with the landowner, irrigation districts could not own water rights, because they do not generally own land or make beneficial use of water. Thus, contrary to the district court's holding, section 8's appurtenancy and beneficial use requirements do not override principles of Idaho institutional water law. None of the Respondents attempted to show otherwise.

2. Idaho Code section 42-219(5) applies to the United States.

In the United States' opening brief, we cited Idaho Code § 42-219(5) to illustrate that, contrary to the district court's reasoning, appurtenancy and beneficial use do not imply a unity of title under Idaho law. U.S. Br. at 31, 33.⁴ We also cited that section to demonstrate that the Idaho code

⁴ Section 42-219(5) provides:

For irrigation projects where the canals constructed cover an area of twenty-five thousand (25,000) acres or more, or within irrigation districts organized and existing as such under the laws of the state of Idaho, the license issued shall be issued to the persons, association, company, corporation or irrigation district owning the project, and final proof may be made by such owners for the benefit of the entire project. It shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient. The water diverted and the water right acquired thereby shall relate to the entire project

provides for the issuance of water rights licenses to developers of large irrigation projects, U.S. Br. at 19, consistent with the case law discussed in our brief, U.S. Br. at 19-24. The Board of Control and Pioneer argue that section 42-219(5) does not apply to the United States. Board Br. at 32; Pioneer Br. at 27-31. However, our argument does not turn on the application of that section to the United States. The district court's judgment was contrary to Idaho law, regardless of whether the precise terms of that provision apply here.⁵ The statute clearly reflects the principle that a major project appropriator like the United States holds title to the water rights.

In any event, section 42-219(5) applies to the United States as appropriator for Boise Project purposes. The text of section 42-219(5) is broad enough to encompass the United States; it simply does not contain the limitation the Board reads into it. Section 42-219(5) provides that when an irrigation project includes canals covering an area in excess of 25,000 acres, the water rights license

and the diversion of the water for the beneficial use under the project shall be sufficient proof of beneficial use without regard as to whether each and every acre under the project is irrigated or not.

⁵ The district court did not discuss section 42-219 in its opinion. The Board of Control contends that the United States waived any objection to the district court's comment in the remark that the irrigation entities' interests are appurtenant to the lands in each district, rather than the lands in the entire project. Board Br. at 16. However, that particular aspect of the court's holding is not directly relevant to the title issue on appeal. Moreover, we did not suggest in our opening brief that, since the water rights at issue are appurtenant to all of the lands within the Boise Project, the United States is free "to move the water around within the entire valley," Board Br. at 33, but that suggestion would not be directly relevant to the issue here either. Nonetheless, the United States in its opening brief clearly stated that Idaho Code § 42-219(5) makes Boise Project storage water rights appurtenant to the entire Project. U.S. Br. at 19, 31, 33; Idaho Code § 42-219(5) (project owner's water rights "relate to the entire project"). The district court provided no explanation for its departure from that clear statutory language. R Vol. 5, p. 1042.

shall be issued to the entity that owns the project. Since the reservoirs at issue in this case serve canals covering far more than 25,000 acres, and the United States owns them, section 42-219(5) directs that the water rights for the reservoir storage water ought to be awarded to the United States.

The Board reasons that since subsection 6 expressly includes the United States, subsection 5's failure to expressly include the United States necessarily excludes it. Board Br. at 33-34.⁶ However, section 42-219(6) was added to the Idaho code only in 1998. See Pioneer Br. at 31. There is no indication in the text or the legislative history of the 1998 amendment that the Idaho legislature intended to remove section 42-219(5)'s applicability to the United States. Indeed, if the 1998 amendment is read as the Board suggests, it should not apply retroactively to divest the United States of the water rights the State has permitted and licensed to it for almost a century. See State ex rel. Wasden v. Daicel Chemical Industries, Ltd., 141 Idaho 102, ___, 106 P.3d 428, 431 (2005).

Pioneer contends that the term "project" in section 42-219(5) does not include federal reclamation projects, since federal reclamation law did not include a definition of that term at the

⁶ Section 42-219(6) provides:

For an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for beneficial use by more than five (5) water users in an area of less than twenty-five thousand (25,000) acres, the license issued shall be issued to the permit holder. For the place of use description in the license issued for the irrigation project, it shall be sufficient to provide a general description of the area within which the total number of acres developed under the permit are located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights.

time section 42-219(5) was enacted in 1915. Pioneer Br. at 28. However, by at least 1906, Congress was using the term “project” frequently as it amended and expanded federal reclamation laws. See, e.g., Act of June 27, 1906, 34 Stat. 519, §§ 3, 5 (codified at 43 U.S.C. §§ 563, 448). Moreover, the term “project” is plainly broad enough to encompass federal reclamation projects, such as the Boise Project, which was authorized in 1905. By its plain terms the statute applies to “irrigation projects where the canals constructed cover an area of twenty-five (25,000) acres or more.” Idaho Code § 42-219(5). That accurately describes both the Boise Project and the canal systems served by Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs. There is no suggestion in the statute that the “irrigation projects” addressed in the statute cannot be federal reclamation projects or that the application of the statute was intended to turn on when or by whom the distribution canals were built. The statute is also plainly broad enough to apply to owners of storage facilities; the statute merely uses the area covered by the canals to describe the size of project that falls under the statute’s ambit. This Court should not read requirements into the statute that the Idaho legislature did not choose to place there. See Blackburn v. State Farm Mut. Auto. Ins. Co., 108 Idaho 85, 88, 697 P.2d 425, 428 (1985).

3. Idaho Code section 43-1829 is not applicable here.

Pioneer argues that Idaho code section 43-1829 shows that the Idaho legislature intended for irrigation districts to hold the water rights at issue here. Pioneer Br. at 30. Pioneer’s reliance on that provision is misplaced, and the district court correctly declined to adopt this reasoning. Section 43-

1829 provides that “an irrigation district * * * may * * * acquire, hold and own on behalf of the irrigation district storage rights, capacity, water and water rights in reservoirs constructed by the United States government in cooperation with the district.” The plain language of that provision reveals that it is merely a grant of authority; it does not say that irrigation districts must hold water rights, but only that they may. Moreover, the section authorizes irrigation districts to hold not just “water rights,” but also “water.” Thus, the statute does not conflict with the IDWR’s recommendation here and the century of Idaho precedent holding that the irrigation entities hold only a right to use project water defined by federal contract, not title to the diversionary state water rights themselves.

C. The district court’s reliance on a 1989 Solicitor’s Opinion was misplaced, as is the Board of Control’s reliance on other materials.

The United States explained in its opening brief that the district court’s reliance on a 1989 opinion of the Department of the Interior’s Solicitor was misplaced. R Vol. 5, p. 982 n.12, 983. There the Solicitor observed that, in states that (like Idaho) do not split water rights between storage and use, but keep the water rights unified in a single entity, if the United States “was the original applicant and received in its name the project water right, the project water user has no formal record of ownership” and “the only project water right which can be filed in this situation is the one enumerated in the appropriative permits, licenses or decrees issued by the state and held in the name of the United States.” U.S. Br. at 35. Like the district court, the Board of Control and Pioneer, Board Br. at 41, Pioneer Br. at 46-48, ignore this discussion in the Solicitor’s opinion and do not

respond directly to the United States' argument.

The Board of Control also cites an administrative decision of the Department of the Interior from 1912 to support its argument that equitable title rests with the irrigation entities. Board Br. at 40 (citing D.C. Mac Watters, 41 Pub. Lands Dec. 425 (1912)). However, that decision is inapposite here, and the district court properly declined to cite it. Mr. Watters sought an easement to construct a reservoir on government land in the Minidoka Project. Id. at 425-26. The Acting Secretary held that the application must be denied, because it would interfere with operation of the Project. Id. at 428. However, he also suggested that Mr. Watters could approach the Bureau of Reclamation about building the reservoir pursuant to section 2 of the Warren Act, 36 Stat. 925 (1911), which authorized the government to cooperate with private individuals and organizations for the construction of reservoirs. The Secretary explained that the government would hold title to and operate the reservoir to ensure that it did not interfere with the operation of the Minidoka Project, and the applicant, who would pay to construct the reservoir, would hold "equitable right to the stored water." Id. at 427. Since those facts are distinguishable from the facts of this case, the Watters decision is not applicable here.

The Board of Control also asserts that, in 1921, the Acting Secretary of the Interior testified to Congress that irrigation districts would hold title to water rights. Board Br. at 41 (citing R Ex. 22 Second Barker Affidavit Ex. 4, H.R. Rep. No. 67-425 (1921)). The Board takes a single sentence of that testimony out of context. The Acting Secretary was referring to the right to use project water,

not title to water rights. House Report 67-425 concerned a bill that became Public Law Number 67-219, 42 Stat. 541 (1922). That act authorized the Secretary of the Interior to contract with irrigation districts, instead of individual water users, for the repayment of reclamation project costs. In his letter to the Senate Committee on Irrigation and Reclamation of Arid Lands, the Acting Secretary explained that previously “each person applying for a right to the use of water” from a federal reclamation project would have to file a “formal water-right application.” H.R. Rep. No. 67-425 at 7 (emphasis added). Thus, the “water-right application” would not give the landowner title to the water right, but rather the contractual “right to the use of” project water. The requirement that individuals file such “water-rights applications” was inconsistent with “the irrigation-district plan,” the Acting Secretary continued, because “the water-right vests in the irrigation district * * * , and the individual water user has no separable water right.” Id. Read together with the preceding sentence, the Assistant Secretary here was clearly referring to the contractual right to use project water, not title to the state-issued water rights. Id.

The Board of Control also contends that an internal Interior memorandum, which the district court did not cite, “recognizes the irrigation districts’ rights in the water.” Board Br. at 41 (citing R Vol. 5, p. 954). In that memorandum, the Regional Director of the BOR asked the Field Solicitor for legal advice concerning the financing of the SRBA. The Regional Director stated, among other things, that, since the BOR “holds water rights in trust for many irrigation districts,” it would be “heavily involved” in the adjudication. The first part of that statement was incorrect and not relevant

to the substance of the memo. Moreover, the memorandum does not set forth the legal position of the United States or the BOR, but is merely a request for legal advice from client to attorney. Thus, the district court correctly declined to rely on that document.

IV. Under Idaho law, the United States holds title to the water rights in the Boise Project.

The United States' opening brief demonstrated that, under Idaho law, the United States owns the water rights at issue here. This Court has held repeatedly that the developer of a storage or irrigation system holds title to the water rights for that system following sale or distribution of the water. The water user has a right to the use of the water, but the original appropriator retains full title to the water rights.⁷ In this case, the United States appropriated the waters at issue, obtained permits, stored the appropriated water, and, with beneficial use by the water users, perfected the irrigation water rights under state law. The State licensed the water rights to the United States, which allocated the project water by contract to the irrigation entities. Under this Court's precedents, the United States did not compromise its title to the water rights by distributing the water for beneficial use. The parties' disagreement in this case is largely semantic. All of the parties recognize that the Idaho Constitution protects the usufructuary rights of landowning irrigators to some extent. See, e.g., U.S. Br. at 20-21 (discussing Idaho Const. art. XV, § 4). However, the precise nature of landowners' use rights is not before the Court here. The landowners' use rights do not diminish the United States'

⁷The Board of Control suggests that the United States treats irrigation entities as "superfluous" here. Board Br. at 14. However, the role of irrigation entities is simply not at issue in this appeal. The question is whether the IDWR correctly recommended decreeing the water rights at issue here to the United States.

title as the original appropriator, and the United States' title need not conflict with the landowners' use rights.

A. The Idaho Constitution acknowledges that water may be appropriated for later sale.

In our opening brief, we pointed out that the Idaho Constitution recognizes that water may be appropriated for "sale, rental or distribution." Idaho Const. art. XV, § 1. Pioneer and Ballentyne contend that Article XV of the Idaho Constitution does not apply to the United States. They contend that sections 1, 4, and 5 govern only canal systems; since the United States does not own or operate a canal system, they reason, these provisions do not cover the United States. Ballentyne Br. at 12-15; Pioneer Br. at 31-35.⁸ This argument misses the mark, because these provisions concern the use of water, not ownership of water rights. The Court explained in Wilterding v. Green that "[t]he Idaho constitution does not pretend or assume to control or interfere with private property rights in such waters." 4 Idaho 773, ___, 45 P. 134, 137-38 (1896). Rather, the Idaho Constitution concerns "the 'use' of water," but does not diminish "the property rights of appropriators." Id. at 138; see also Washington County Irrigation District v. Talboy, 55 Idaho 382, ___, 43 P.2d 943, 945-46 (1935).

In any event, article XV, section 1 does not contain the limitations Pioneer and Ballentyne read into it. In State v. Idaho Dept. of Water Administration, 96 Idaho 440, 442, 530 P.2d 924, 926 (1974), the Court refused to read article XV, section 3 as prohibiting state agencies from appropriating water, since the plain language of the provision contained no such limitation.

⁸The United States in fact owns many of the Boise Project canals and distribution systems, including the majority of those operated and maintained by the Board of Control.

Similarly, here the Court should refuse to read article XV, section 1 as excluding the United States when its plain language contains no such limitation. The text of this provision is clearly broad enough to cover storage facilities, such as the Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs. Article 1 declares that the use of water “appropriated for sale, rental or distribution” is a “public use,” and does not even mention canals. Idaho Const. art. XV, § 1.⁹ Furthermore, in Talboy, the Court held that water stored in a reservoir was “‘appropriated for sale, rental or distribution’ in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution.” Talboy, 43 P.2d at 945. Thus, article XV of the Idaho Constitution covers more than just canal systems.

Pioneer asserts that since the Idaho Constitution predates the federal Reclamation Act, the framers “obviously did not intend that those provisions would apply to the federal government.” Pioneer Br. at 34-35. Again, article XV, section 1 merely recognizes that water may be appropriated for sale, rental, or distribution. It does not exclude the United States expressly or by implication, nor could it. Cf. Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 751 (1961) (“If anything is settled in the law, it is that a State may not discriminate against the Federal Government.”). The fact

⁹ The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.

Idaho Const. art. XV, § 1.

that Congress had not yet passed the Reclamation Act in 1890 is of no moment. Just as the First Amendment protects electronic speech although it did not exist in 1791, see Reno v. ACLU, 521 U.S. 844, 870 (1997) (invalidating portions of the Communications Decency Act; “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to” the internet), article XV of the Idaho Constitution recognizes that the United States may appropriate water for sale, rental or distribution although the Reclamation Act did not yet govern such acquisitions in 1890.

This Court has recognized the United States’ ability to appropriate water for sale, rental or distribution. For example, in Nampa & Meridian Irr. Dist. v. Petrie, 28 Idaho 227, 153 P. 425 (1915), the Court said that the United States “acquired for sale and distribution ample water for the proper irrigation of the lands” in the Boise Project and “offered to the irrigation district the right to the use of [] surplus water under the stipulations contained in the proposed contract. Having the authority under the law to dispose of the right to the use of water thus acquired, it is in a position to fix the terms and conditions of its use.” Id. at 430; see also, e.g., State v. United States, 134 Idaho 940, 943, 12 P.3d 1284, 1287 (2000) (“If, however, the water is only necessary for a secondary purpose of the reservation, the United States is left to ‘acquire water in the same manner as any other public or private appropriator.’”) (quoting United States v. New Mexico, 438 U.S. 696, 702 (1978)). The IDWR and its predecessor agencies have also long acknowledged the United States’ ability to appropriate water for distribution and use. R Ex. 3 Gehlert Affidavit Ex. 9, 22, 28. That unbroken administrative interpretation is entitled to respect. Cf. State v. Hagerman Water Rights Owners, Inc.,

130 Idaho 727, 734, 947 P.2d 400, 407 (1997) (according deference to IDWR's statutory interpretation where it was not inconsistent with statutory text and where the public understood and relied on it).

The State contends that vesting title to water rights in the original appropriator is inconsistent with article XV, section 4's protection of the water users' right to use the water. State Br. at 5. To the contrary, this Court has recognized for more than a century that while the water user has a right to the use of water, the appropriator and developer of a storage system retains title. Here, the irrigation entities gained the right to use project water through contracts with the United States. Nebraska, 325 U.S. at 640 ("no State and no water users within a State are entitled to the use of storage facilities or storage water unless they contract for the use"); Petrie, 28 Idaho at ___, 153 P. at 430 ("Having the authority under the law to dispose of the right to the use of water thus acquired, it is in a position to fix the terms and conditions of its use"); Israel v. Morton, 549 F.2d 128, 132-133 (9th Cir. 1977) ("The terms upon which [project water] can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix."); 43 U.S.C. §§ 485h(d), (e) (requiring contract before Secretary of the Interior may release water for irrigation), 511 (authorizing the Secretary of the Interior to contract with irrigation districts). Those contracts entitle the irrigation entities to the use of project water for an unlimited period of time, contingent on their compliance with the contracts and other applicable regulation. Thus, vesting title to the water rights in the United States as the original appropriator and distributor does not interfere with the irrigation

entities' or landowners' rights to use the water. The district court's judgment, on the other hand, disturbed the United States' vested rights and the status quo of the past one hundred years.

B. Controlling case law holds that the original appropriator retains title to the water rights following sale or distribution of the water.

No Idaho case holds that the title to water rights may be split as the district court did here. The district court's judgment was based not on Idaho law, but on a misapplication of federal law, which the Respondents, for the most part, have not attempted to justify on appeal. As discussed in our opening brief, this Court's precedents hold that the developer of a storage or irrigation system holds title to the water rights for that system following sale or distribution of the water. U.S. Br. at 18-24 (discussing Wilterding v. Green, 4 Idaho at ___, 45 P. at 138; Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist., Ltd., 14 Idaho 450, ___, 94 P. 761, 763 (1908); Murray v. Public Utilities Comm'n, 27 Idaho 603, ___, 150 P. 47, 50-51 (1915); Nampa & Meridian Irr. Dist. v. Barclay, 56 Idaho 13, ___, 47 P.2d 916, 919 (1935); Fort Hall Water Users Association v. United States, 129 Idaho 39, 43, 921 P.2d 739, 743 (1996)).

The State challenges the United States' reliance on that line of authority.¹⁰ State Br. at 19-27.

First, the State contends that the Court in those cases was not presented with the question of what interest an appropriator holds in water rights for water it distributes. State Br. at 19-20. Even if the

¹⁰ Pioneer's contention that these cases do not apply here because they do not mention "the United States" expressly, Pioneer Br. at 24-26, 35-36, is specious. Nothing in those cases excludes the United States from the rules of law announced therein, and Pioneer's suggestion that the United States should be treated differently from other similarly-situated entities is constitutionally suspect. See Moses Lake Homes, Inc. v. Grant County, 365 U.S. at 751.

State were correct that the relevant statements in those cases were dicta, the consistency of those statements over the course of 100 years is significant. But the Court's repeated statements about the developer of a storage project retaining title to the water rights following distribution of the water were central to the reasoning in those cases and thus were not dicta. For example, in Wilterding, the plaintiff claimed that he was entitled to use water from the defendant's canal. The Court rejected the defendant's reliance on a Colorado case, pointing out that Idaho's constitution does not touch on "private property rights" of appropriators. 45 P. at 138. Further distinguishing Colorado water users' interests from those of Idaho water users, the Court explained that, in Idaho, the sale, rental, or distribution of the water "in no sense destroys or abrogates the property rights of the appropriator therein." Id. In Farmer's Co-operative, the Court held that the water users did not need to be joined as parties to a suit to determine priorities among appropriators. Central to that holding was the Court's conclusion that "[t]he appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company." 94 P. at 763. Similarly, in Barclay, the Court held that water users did not have to be joined in an action between appropriators, because they did not own the water or "acquire the rights of an appropriator, but simply acquire[d] the rights of a user and consumer, as distributee of the water." 47 P.2d at 919.¹¹ Had the water users owned a property interest in the water rights, they would have been

¹¹ The State accuses the United States of mischaracterizing the Nampa & Meridian v. Barclay opinion. State Br. at 21. However, contrary to the State's assertion, the Court not only rejected the notion that the water users were necessary parties, it also unambiguously rejected the notion that the water users acquired the rights of an appropriator:

necessary parties in those cases.

We do not dispute that these cases also recognize the landowner's right to the use of the water, and we do not suggest that the United States' water rights "eclipse" the interests of the beneficial users. State Br. at 20, 23. The State has misconstrued both our argument and this Court's precedents. This Court has held clearly and repeatedly that, while the irrigator has a right to the use of water, the appropriator does not compromise its interest in the water rights by selling or distributing the water.¹² Affirming the United States' ownership of these water rights will not reduce the irrigation entities' rights to use the water as they have for almost a century, but will merely preserve the status quo.

The State overstates the holding of Hard v. Boise City Irrigation & Land Co., 9 Idaho 589, 76 P. 331 (1904). State Br. at 2, 8-10. Hard did not establish that the user of water sold, rented or

The issue with which we are here confronted is founded on an erroneous theory which has been advanced from time to time by counsel for some of the ditch and irrigation companies and water users, to the effect that a water user who has acquired his right through "sale, rental or distribution" from a ditch or canal company or an irrigation or drainage district, acquires the rights of an appropriator of the water and is entitled to the same consideration in all litigation involving the original appropriation to which the canal or ditch company or irrigation or drainage district is entitled. Such is not the law and it has never been so held or recognized in this state.

47 P.2d at 918 (emphasis added).

¹² The Board of Control asserts in a parenthetical that Murray recognized the dividing of title between the appropriator and the user. Board Br. at 32. To the contrary, Murray acknowledged that the water user "acquires a right to the use" of water, "dependent upon user and payment," but it held that the appropriator retains the water right following distribution. 150 P. at 50-51.

distributed has equitable title to the water rights. Rather, it held that the water user may change the point of diversion, so long as others are not injured. 76 P. at 333. The Court in Hard did refer to the water user as having “appropriated water by his contract with the canal company,” 76 P. at 332, but that appears to have been a loose use of the term “appropriate.” As Justice Ailshie explained in his concurrence in Hard, the irrigation company builds the canal and diverts the water, but it is the use of the water by the land owner that “aid[s] the company in perfecting and completing the water appropriation.” Id. at 335.

Under the State’s interpretation, Hard conflicts with Wilterding, decided just eight years earlier, in which the Court held that the sale, rental or distribution of water “in no sense destroys or abrogates the property rights of the appropriator therein.” 45 P. at 138. The State would also read Hard to conflict with Farmer’s Co-operative, decided four years later, in which Justice Ailshie, writing for the Court, distinguished between “water users, who have no right by appropriation, but whose right is founded upon one of use, and is purely a rental right, as distinguished from a right by appropriation and diversion.” 94 P. at 763. Justice Ailshie acknowledged the Court’s observation in Hard that the appropriator’s water right “is practically valueless without water consumers,” but relied on Wilterding for the ultimate conclusion that the original appropriator owns the water right and is the only party necessary to determine water rights priorities. Id.

Later, in Talboy, 55 Idaho 382, 43 P.2d 943, the Court explained that “no one can make an appropriation from a reservoir or canal for the obvious reason that the waters so stored or conveyed

are already diverted and appropriated.” Id. at ___, 43 P.2d at 946. To establish that their use of water gave them water rights, Respondents must establish that the water used was available for appropriation. Rabido v. Furey, 33 Idaho 56, ___, 190 P. 73, 74-75 (1920); Cantlin v. Carter, 88 Idaho 179, ___, 397 P.2d 761, 765-66 (1964). Water that has been diverted from its natural channel, stored, and put to beneficial use is not available for appropriation. Rabido, 190 P. at 75. Here, the water users gained the right to use Project water not through their own appropriation under state law, but through contracts with the United States. Nebraska, 325 U.S. at 640; Petrie, 153 P. at 430; Israel v. Morton, 549 F.2d at 132 -133; 43 U.S.C. §§ 485h(d), (e), 511.

The State also misplaces its reliance on Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 246, 118 P. 296, 299 (1911). State Br. at 11-12. In Hewitt, the Court affirmed evidentiary rulings in a mortgage foreclosure action. Among other things, the appellant, who brought the action, contended that, since all water rights the debtor sold or rented after taking on the mortgage were junior to the mortgage, the district court erred in admitting documents related to those transactions. 118 P. at 297. The Court noted that the mortgage necessarily incorporated the state code, including what is now Idaho Code § 42-915, which provides in part:

When any payment is made under the terms of a contract, by means of which payment a perpetual right to the use of water necessary to irrigate a certain tract of land is secured, said water right shall forever remain a part of said tract of land, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch property or by any foreclosure or any bond, mortgage or other lien thereon * * *. And said payment for said water right shall be a release of any bond or mortgage upon the canal property.

The Court explained that the purpose of that provision was to protect the “purchaser of water rights.” Id. at 299. However, Hewitt concerned both persons who had purchased water rights and persons who had merely contracted for the use of water. Id. at 297; see also id. (reviewing district court’s decision to admit into evidence “water rights, water deeds, and contracts”); id. at 298, 299 (similar). The Court did not distinguish between the two in its opinion, because it was not necessary to the discussion. Ultimately, the Court held that it could not reverse the district court’s evidentiary ruling, since the challenged documents were not in the record on appeal. Id. at 299, 300. Thus, the entire discussion to which the State refers was dicta.

Moreover, contrary to the State’s assertion, the code provision cited in Hewitt does not say who owns the title to water rights. Rather, it states that “the water right shall forever remain a part of said tract of land” and that “the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch company.” Idaho Code § 42-915 (emphasis added). Again, we do not deny that the water users have a right to use the water for which they contract. But the State’s interpretation of this provision as vesting title to the water rights in the water user would conflict with the Wilterding line of cases discussed in our opening brief and above.

The State cites Scott v. Nampa Meridian Irrigation District, 55 Idaho 672, 676, 45 P.2d 1062, 1063 (1934), for the proposition that an irrigation entity is just a distributor, but “does not hold title to the use of the irrigation water.” State Br. at 12. The State quotes from the case: “Respondent, a statutory irrigation district, owner of Ridenbaugh canal system, is merely the statutory distributor of

the water rights decreed to it and does not hold title to the use of any water it distributes.” 55 Idaho at ___, 45 P.2d at 1063. However, that imprecise statement was merely part of the Court’s background discussion and not accompanied by any reasoning. The issue in Scott was whether the irrigation district could cut off water deliveries to the appellants, whose lands lay outside the boundaries of the district, id., when court orders in another case reduced the district’s appropriation, id. at 1064. The Court clarified that it was not “considering members of an irrigation district,” but rather users whose rights should be “governed by the doctrine that priority in use, or first in time of use, gives superiority of right.” Id. Thus, the facts of Scott are distinguishable from the case at bar. Moreover, the State’s reading of this case would conflict with the holding in Nampa & Meridian v. Barclay, issued one month after Scott, in which the Court stated: “One who acquires the right to use water from an appropriator, whose right was initiated by appropriation under section 1, art. 15, ‘for sale, rental or distribution,’ is not the owner of the appropriation and does not acquire the rights of an appropriator, but he simply acquires the rights of a user and consumer, as distributee of the water under sections 4 and 5, art. 15, of the Constitution.” 47 P.2d at 919.¹³

In short, this Court has long recognized that, while water users have a right to the use of water, the appropriator does not compromise its water rights by distributing the water. The parties here have acted consistent with that precedent for almost a century: the United States has acquired water rights and distributed the water to the irrigation entities pursuant to contracts. The scope of

¹³ We discuss in part D below the cases on which the State relied for its incorrect suggestion that the United States holds the water rights in trust.

the irrigation entities' rights may be fleshed out in future cases; the only issue before the Court at this juncture is whether the United States holds title these water rights. This Court's precedents hold that it does.¹⁴

C. The record shows that the United States appropriated the waters at issue and owns the water rights.

Ballentyne argues that the United States did not appropriate the water rights at issue here. Ballentyne Br. at 9, 15. That assertion is clearly incorrect, as the record in this case demonstrates. We showed in our opening brief that the United States appropriated the waters at issue, obtained permits, stored the appropriated water creating project water, and perfected the water rights under state law. The State licensed the water rights at issue to the United States, which allocated the project water by contract to the irrigation entities. U.S. Br. at 3-13 (discussing, *inter alia*, R Ex. 3 Gehlert Affidavit Ex. 3 at pp. 13-14 (deed assigning water rights permit to the United States); *id.* Ex. 10 (water rights certificate); Ex. 11 (water rights certificate); Ex. 20 at 331 (decree); Ex. 22 (permit); Ex. 24 (water rights certificate); Ex. 28 (permit); Ex. 30 (water rights certificate)). Nothing in the record indicates that these water rights ever transferred to the districts or the individual water users. The irrigation entities' claim to equitable title is unsupported by any record evidence. Rather, the documentary evidence shows that the water rights at issue here have been licensed and decreed to the United States.

¹⁴ As we pointed out in our opening brief, though, the United States has agreed in other cases to the inclusion of a remark in water rights decrees stating that the landowners make beneficial use of the water. U.S. Br. at 36. Such a remark would be consistent with both federal and state law here.

Respondents' contracts with the United States also recognize that the United States appropriated and holds title to the water rights at issue here.¹⁵ For example, the most recent contracts with the five irrigation districts comprising the Board of Control all provide that the water "is to be stored in Arrowrock Reservoir under water rights held by the United States." E.g., R Ex. 3 Gehlert Affidavit Ex. 35 Art. 11(a). Similarly, the contracts for Lucky Peak recognize that the water "was appropriated by the United States pursuant to the laws of Idaho for beneficial use under the Federal Reclamation Laws." Id. Ex. 27 Art. 2. The 1977 Drought Emergency Contracts explained that the United States has constructed a system of multipurpose reservoirs on the Boise Project, has impounded therein a quantity of water that can be used for irrigation of land and other beneficial uses, and has appropriated the use of such water pursuant to the laws of the State of Idaho. Id. Ex. 38 at 577. The 1987 temporary water service contracts again recognized that the United States holds title to the water rights for Lucky Peak. Id. Ex. 32 Art. 2 (water stored in Lucky Peak "was appropriated by the United States pursuant to the laws of Idaho"). When the United States purchased "all of [Nampa & Meridian Irrigation District's] right, title, and interest in and to 35,000 acre-feet of storage rights located in the Lucky Peak Reservoir" in 1996, the District agreed that it held only a "contractual entitlement." Id. Ex. 39 at 585.

Other contracts recognized the United States' appropriations implicitly. For example, many

¹⁵ The Court does not have jurisdiction here to adjudicate the terms of these contracts. See 43 U.S.C. § 390uu. We cite these provisions only to demonstrate as a factual matter that Respondents have repeatedly acknowledged that the United States appropriated water for Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs and appropriately holds title to those water rights.

of the contracts specify that the United States retains the right to waste, seepage and return flow. E.g., id. Ex. 21 Art. 36. Those provisions implicitly recognize that the United States is the appropriator of the water. See Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 101 Idaho 677, 680, 619 P.2d 1130, 1133 (1980) (“it has long been settled law in Idaho that a senior appropriator of water retains his right to surface waste and seepage water”); United States v. Haga, 276 F. 41, 43 (D. Id. 1921). Similarly, the United States reserved the ability to withhold 75,000 acre-feet of capacity at Anderson Ranch for power purposes and a combined 45,000 acre-feet at Anderson Ranch and Arrowrock for flash flood control. R Ex. 3 Gehlert Affidavit Ex. 21 Art. 18(c), (d). The United States could not have reserved such water if the parties to the contract did not agree that the United States owns the underlying storage water right. The 1961 contract with the Board of Control explains that the United States is renting water to the Board on an annual basis for up to twenty years. Id. Ex. 36 ¶¶3, 5. The United States could not “rent” a right to use water it did not own. The member districts of the Board of Control also agreed that “[t]he United States holds water rights from the State of Idaho” in a letter agreement in 1988. Id. Ex. 37 at 571.

D. This Court has not held that the irrigation entities own the water rights at issue here.

The Board of Control asserts that the United States failed to participate in actions concerning ownership of the water rights at issue here, and that, even though it was not a party, the United States is bound by the judgments in those cases. Board Br. at 22-23 (citing Jensen v. Boise-Kuna Irrigation District, 75 Idaho 133, 269 P.2d 755 (1954); Boise-Kuna Irrigation District v. Gross, 118 Idaho 940,

801 P.2d 1291 (Ct. App. 1990)). Settled Idaho law provides that an entity cannot be bound by a judgment in a case in which it was not a party. See, e.g., McKay v. Boise Project Board of Control, 141 Idaho 463, ___, 111 P.3d 148, 154 (2005); Vaught v. Dairyland Ins. Co., 131 Idaho 357, 361, 956 P.2d 674, 678 (1998) (“as a general rule ‘a nonparty is not precluded from relitigating matters decided in a prior action simply because it passed by an opportunity to intervene.’ 18 Wright et al., Federal Practice and Procedure, § 4452, p. 446 (West 1981).”). The United States was not a party to those actions and, hence, is not bound by decisions in them.

Moreover, the United States had no obligation or reason to participate in those actions, because no federal interests were implicated, and neither of those cases held that the irrigation districts own the water rights at issue here. In Jensen, the plaintiff landowners sought damages when the District failed to supply water pursuant to contract. The District claimed, among other things, that the contract was ultra vires and, hence, not binding. The Court held to the contrary that the District had the authority to contract to provide “surplus and waste” water to lands outside the district. 269 P.2d at 759-60. The question of whether the waste and seepage water had originally been appropriated by the United States or the District was not before the court. Instead the court simply assumed that the District held a sufficient interest in the seepage water to contract for its distribution. In Gross, the District sought to enjoin a landowner from using water in a ditch. The Court rejected the landowner’s claim that he had acquired the right to use the water through adverse possession. 118 Idaho at 943, 801 P.2d at 1294. Again, the United States’ interests were not

implicated in that case -- no judgment in those cases could impact the United States' title to water rights, so the United States had no reason or obligation to participate -- and the Court did not hold that the District owns the water rights at issue here.

The Board also cites a 1926 district court decree that authorized the Boise-Kuna Irrigation District to purchase "water rights" from the United States. Board Br. at 9. However, since the United States was not a party to that confirmation proceeding, it is not bound by the imprecise language of that decree.¹⁶ Furthermore, the language used in the decree conflicts with the contract provisions discussed above. Boise-Kuna's most recent contract, for example, provides that the water "is to be stored in Arrowrock Reservoir under water rights held by the United States." E.g., R Ex. 3 Gehlert Affidavit Ex. 35 Art. 11(a); see also Ex. 21 Arts. 18(c), (d), & 36.

The Board also asserts that this Court in In re Wilder Irrigation District v. Jorgensen, 64 Idaho 538, 136 P.2d 461 (1943), agreed that the irrigation district obtained water rights in its contract with the United States. Board Br. at 10. But that opinion states nothing of the sort. In that case, landowners challenged the district's contract with the United States as ultra vires because it put distribution in Board of Control's hands, id. at 463, and allowed the United States to substitute Salmon River water in the future, id. at 464. The Court did not discuss the nature of the district's interest. Indeed, the term "water rights" only appears in the Court's opinion in a discussion of

¹⁶ Federal law requires confirmation proceedings to ensure that state-chartered irrigation entities contracting with the United States are legally bound to make payments and perform duties. See 43 U.S.C. § 423e.

another case. Id. at 465. In any event, the United States was not a party to that proceeding either.

V. The district court correctly rejected the suggestion that the United States holds the water rights at issue “in trust” for the water users.

The State suggests that the United States holds the water rights at issue “in trust” for the water users. State Br. at 2, 4, 16. Tellingly, the parties that presented this argument in the district court abandoned it during the reconsideration stage and did not assert it in this Court on appeal. Only the State, which did not participate in the district court, pursues this incident of ownership here. The district court correctly rejected this argument.¹⁷

The United States is not impressed with a trust here. Landowners in Idaho enjoy a right to

¹⁷ In their summary judgment briefs, Ballentyne and the Board of Control assumed that the United States’ ownership of the reservoir storage rights creates a trust responsibility on the part of the United States. Board Response in Support of Motion for Summary Judgment at 13 (filed 5/26/04); Ballentyne Response in Support of Motion for Summary Judgment at 11 (filed 5/26/04). The district court in its summary judgment opinion indicated that it would decree some of the water rights at issue to the United States “with a remark to the effect that the beneficial use of the water represented by the decree is held *in trust* for the landowners within the respective irrigation districts as a matter of law and pursuant to contracts between the Bureau of Reclamation and the Irrigation Districts.” R Vol. 5, p. 986-87 (emphasis added). The court later granted the United States’ motion for clarification, stating that “[t]he inclusion of the words *in trust* in Paragraph 5 was intended to describe the relationship between the water users and the irrigation districts as specified by I.C. §43-316. It was unnecessary and confusing, and shall be stricken from the opinion.” R Vol. 5, p. 996. Pioneer then asked the court to clarify that “the irrigation districts hold equitable title to the water rights in trust for their landowners,” id. p. 1000, and Ballentyne asserted that the United States holds the water rights in trust for the irrigation entities, id. p. 1006. The parties submitted proposed remark language, id. pp. 1012-30, and the district court ordered that the remark would state in part: “the landowners’ interest is held in trust by the various irrigation organizations.” Id. p. 1031. Ballentyne moved for clarification, but did not again suggest that the United States holds the water rights in trust. Id. p. 1035. In its final order, the district court revised the remark again to read in part: “equitable title to this water right is held in trust by the irrigation organizations * * * for the benefit of the landowners.” Id. p. 1042. Thus, the irrigation entities correctly abandoned this argument.

the use of water, and appropriators are bound to apply water to beneficial use. Talboy, 43 P.2d at 945. The United States is further bound (via its contracts with the irrigation entities) by an implied covenant of good faith and fair dealing. See Centex Corp. v. United States, 395 F.3d 1283, 1305 (Fed. Cir. 2005). However, outside the context of its relations with Indian tribes, the government must “expressly state its intent” to assume the responsibilities of a trustee in order for a trust to be imposed on the United States. Hohri v. United States, 782 F.2d 227, 244 n.39 (D.C. Cir. 1986), vacated on other grounds, 482 U.S. 64 (1987).¹⁸ Generally, that intent must be expressed in a statute or regulations. Id. at 243-44; see also United States v. Wilson, 881 F.2d 596, 599-600 (9th Cir. 1989) (absent an authorizing statute or regulation, use of the term “trust” in a permit for use of federal property did not create a trust relationship with the U.S.); Cruz v. United States, 219 F. Supp. 2d 1027, 1045 (N.D. Cal. 2002) (“Outside the context of Indian tribes, the Court is aware of no case where the United States was found to owe a fiduciary duty based on contractual obligations.”).¹⁹

¹⁸ The district court in Hohri held that the United States did not have any fiduciary duty to Japanese-Americans held in internment camps during World War II, because “[n]o act of Congress evidences an intent to create” such a relationship. Hohri v. United States, 586 F. Supp. 769, 792 (D.D.C. 1984). The court of appeals agreed. Hohri, 782 F.2d at 243-44. The U.S. Supreme Court did not discuss the merits of that issue, but held that the appeal should have been heard in the Federal Circuit, rather than the D.C. Circuit. Hohri, 482 U.S. at 76.

¹⁹ The Board of Control mentions this issue briefly, Board Br. at 27, but provides no support for the assertion that the United States holds the water rights in trust except for a citation to an internal Interior memorandum, R Vol. 5, p. 954. In the memorandum, the Regional Director of the BOR asked the Field Solicitor for legal advice and only mentioned trust in an offhand manner. A memorandum such as this cannot show the express consent required to impose a trust on the United States. See Wilson, 881 F.2d at 599-600; Hohri, 782 F.2d at 243-44. Moreover, the memorandum does not set forth the legal position of the United States or even discuss the merits of this issue.

Federal courts have recognized that federal reclamation law does not impose fiduciary duties on the United States. For example, in Elephant Butte Irrigation District v. United States, 269 F.3d 1158 (10th Cir. 2001), the court of appeals held that neither the Omnibus Adjustment Act of 1926 (“OAA”) -- which authorizes many of the United States’ contracts with the irrigation entities -- nor a 1924 amendment to the Reclamation Act imposed fiduciary duties on the United States. While the 1924 amendment entitled the irrigation district to certain moneys, the court held that “the creation of an entitlement is different from the creation of a fiduciary duty.” Id. at 1167. Likewise, the Tenth Circuit found that the OAA’s mandate to rehabilitate federal reclamation projects and insure their future success was inadequate to impose a fiduciary duty on the Department of the Interior. Id. at 1166; see also Klamath Water Users Protective Ass’n v. U.S. Dept. of Interior, 189 F.3d 1034, 1040 (9th Cir. 1999) (“While the Bureau of Reclamation has obligations under the Reclamation Act and contract to these irrigators, it owes them not the slightest fiduciary duty.”); Del Puerto Water Dist. v. United States, 271 F. Supp. 2d 1224, 1248-49, 1250-51 (E.D. Cal. 2003) (rejecting irrigation district’s assertion that BOR had a trust duty to give its contract priority over other districts; citing Israel v. Morton, 549 F.2d at 132). Here, the State has not identified any federal statute or regulation which expresses the United States’ consent to serve as trustee and hence no grounds for imposing a fiduciary type of trust on the United States.

The State contends that the Idaho Constitution, article XV, section 4 was intended to “to ensure that water appropriated for sale, rental or distribution for agricultural purposes would be held

in trust for the beneficial users.” State Br. at 7. The United States recognizes that landowners in Idaho enjoy a right to the use of water, and that appropriators are bound to apply water to beneficial use. Talboy, 43 P.2d at 945. However, the Idaho Constitution cannot impose fiduciary duties on the United States, and even if it could, that provision does not discuss title to water rights at all, Wilterding v. Green, 45 P. at 137-38, and does not use any trust language.

The State also cites to Idaho case law holding that irrigation districts hold property in trust for landowners. State Br. at 11, 14-15, 18. This Court has explained that the Idaho legislature created irrigation organizations by statute “for the purpose of performing a public duty,” namely operating an irrigation system for the benefit of their members. State v. Twin Falls Canal Co., 21 Idaho 410, ___, 121 P. 1039, 1042 (1911); see also, e.g., Lewiston Orchards Irrigation Dist. v. Gilmore, 53 Idaho 377, ___, 23 P.2d 720, 722 (1933). Thus, this Court has held that when an irrigation entity acquires property, it is impressed with a duty to hold title to that property in trust for its constituents and for “the uses and purposes set forth in the law.” Jensen, 75 Idaho at 141, 269 P.2d at 760; see also Yaden v. Gem Irr. Dist., 37 Idaho 300, ___, 216 P. 250, 252 (1923).

However, that case law is limited to the acquisition of property by irrigation entities. Unlike irrigation districts, the United States was not created by the Idaho legislature, and its powers are not limited to those granted in the Idaho code. None of the cases cited by the State discuss the United States’ operation of reclamation projects or ownership of water rights. State Br. at 14-15 & n.6, 18. Jones v. Big Lost River Irr. Dist., 93 Idaho 227, 459 P.2d 1009 (1969), Bradshaw v. Milner Low Lift

Irrigation District, 85 Idaho 528, 381 P.2d 440 (1963), Jensen, 75 Idaho 133, 269 P.2d 755, and Yaden, 37 Idaho 300, 216 P. 250, discussed irrigation districts, not developers of storage projects and not the United States. The State contends that Hard, 9 Idaho 589, 76 P. 331, “compels the conclusion that the United States holds the Boise Project water rights in trust for the benefit of the project water users.” State Br. at 11. But the Hard opinion does not even contain the word “trust,” much less impose a fiduciary obligation on the United States in the absence of congressional authorization. Likewise, Talboy did not discuss trusts of a fiduciary nature or the United States, but held only that stored water is “impressed with the public trust to apply it to a beneficial use.” 43 P.2d at 945 (emphasis added). Neither this Court nor any other court has held that the United States holds property in trust for non-Indian water users.

The United States agrees with the State that water users in Idaho enjoy a right to the use of water that is protected by the Idaho Constitution and that the United States could only perfect its water rights under Idaho law by showing beneficial use. Furthermore, the United States owes its contracting partners a duty of good faith and fair dealing. Centex Corp., 395 F.3d at 1305. However, the State goes too far when it contends that the United States has a fiduciary duty to the water users, since the United States has never consented to the imposition of a trust here. The district court properly rejected this argument, the other parties properly abandoned it, and this Court should reject it as well.

VI. The district court correctly declined to specify in the remark the amounts of water held by each of the Respondents.

Ballentyne and Farmers cross-appealed the district court's denial of their request to include in the remark an exhibit specifying the specific amount of water held by each of the irrigation entities. The district court held that such an exhibit was "not necessary for purposes of defining or administering the water rights," because the references to the contracts between the irrigation entities and the United States would provide sufficient information. R Vol. 5, p. 1041. The court further explained that the general practice in the SRBA is to not include "every administrative term pertaining" to the water right in partial decrees; the SRBA court often references contracts or other documents "specifying how a right is to be administered . . . without including all of the terms of the contract or documents in the face of the decree." *Id.* If the Court rules in favor of the United States and vacates the district court's judgment, it need not reach this issue. On the other hand, if the Court affirms the district court's judgment, it should also affirm the district court's denial of this request.

Ballentyne and Farmers argue that the remark in the decrees should specify the quantity of water to which each irrigation entity owns beneficial title. Absent such information, Ballentyne contends the decrees will not "provide an adequate basis for administration and delivery of water by the watermaster." Ballentyne Br. at 15; see also Farmers Br. at 22.²⁹ The district court determined

²⁰ The logical result of Ballentyne and Farmer's argument is that every distributor of water should have listed on its water rights decree the names of the water users with the specific quantity to which each user is entitled. For example, Farmer's Union Ditch Company, which has a natural flow right that it distributes to its shareholders, would have that information listed on its water right decrees.

correctly that Ballentyne and Farmer's proposed exhibit is unnecessary, because the contracts between the United States and the irrigation entities already clearly define which organizations receive water and the quantity they may receive. In addition, the parties and quantities addressed in the contracts may change over time by mutual consent of the contracting parties and inadvertently mislead those relying on the decree for certainty. Thus, specifically incorporating the current information into the decrees might require further judicial involvement.

Nor is Ballentyne and Farmer's proposed exhibit necessary for administration of the water rights at issue. The Boise Project has operated successfully for almost a century without such specificity in the decrees or licenses, and Ballentyne and Farmers do not identify any circumstances under which the need for such specificity might arise. The district court's partial decree as written provides everything necessary for the system to operate as it has in the past.

Ballentyne and Farmers contend that the reference to the contracts suggests that the irrigation entities' interests derive from the contracts. Ballentyne Br. at 16, Farmers Br. at 22. The district court rejected that contention, pointing out that it had clearly held to the contrary in its summary judgment opinion, but revised the remark to remove any ambiguity. R Vol. 5, p. 1041-42. The final remark states that the irrigation entities' interests are "derived from law and [] not based exclusively on the contracts." Id. p. 1042.

CONCLUSION

The Board of Control speculates that the United States' position in this case would put water users' rights at risk. Board Br. at 42-44. In particular, the Board argues that the United States sought to restrict irrigation districts' remedies for breach of reclamation contracts in Klamath Irrigation District v. United States, 67 Fed. Cl. 504 (2005), and Orff v. United States, 125 S. Ct. 2606 (2005). The Board fails to mention, though, that Klamath is currently proceeding on a breach of contract claim. 67 Fed. Cl. at 540; Klamath, __ Fed. Cl. __, 2005 WL 3485956, *2 (Dec. 20, 2005) (denying motion to certify interlocutory appeal). The Board also neglects to explain that Orff did not hold the United States "completely immune" from reclamation contract actions in federal district courts under 43 U.S.C. § 390uu. Board Br. at 43. Rather, Orff held that the United States may be joined as a necessary party defendant in suits to adjudicate reclamation contracts. 125 S. Ct. at 2611. Thus, the Board's speculation is unfounded; the water users' rights have been protected for the past 100 years and will continue to be protected.

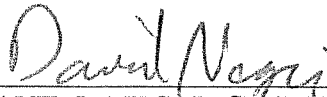
If the Court accepts the Respondents' argument that the irrigation entities here have not just a right to the use of water, but also an equitable property interest in the water rights, that precedent would apply to other entities and utilities that are situated similarly to the United States here, including potentially the United Water Company, canal companies, and municipal governments. Such a precedent would thereby create a large group of equitable title holders who might seek to test the boundaries of their new property rights in future litigation against distributors. If the Court also

accepts the State's argument that the United States holds these water rights in trust, that precedent would impose fiduciary duties on similarly situated entities. That would expand the relationships between distributors and end users beyond contracts into the realm of trust law, confusing settled relationships and potentially leading to even more litigation.

Finally, the State asserts that holding for the United States here would give it a monopoly over water rights in the Boise Project. State Br. at 18. That assertion is incorrect. The United States is not seeking a new declaration of water rights that would enable it to reap monopolistic profits from the Boise Project; rather, the United States seeks preservation of its existing title to water rights that are currently contracted out for beneficial use at cost. See 43 U.S.C. § 485h (Interior may only charge irrigation water users for the portion of estimated construction costs allocated to irrigation). Decreeing the water rights at issue here to the United States, as the State of Idaho has since the inception of the Boise Project, will merely continue the status quo and not reduce the irrigation entities' or ultimate water users' rights in any way. The district court's judgment, on the other hand, would diminish the United States' interests and potentially undermine the Bureau of Reclamation's ability to manage the units of the Boise Project for the purposes for which Congress authorized them: not just irrigation, but also power generation and flood control, among others. The district court's judgment conflicts with 100 years of Idaho administrative, legislative, and judicial precedent and should be overturned.

For the foregoing reasons, the judgment of the district court should be vacated and this case remanded for entry of water rights decrees in the name of the United States.

Respectfully submitted,



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I hereby certify that on January 6, 2006, a copy of the foregoing was served by FedEx upon the following:

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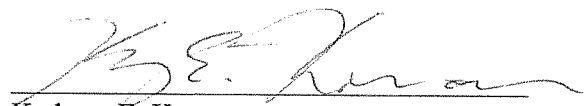
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Kathryn E. Kovacs

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)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 63-03614

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

FEB 25 2009

NAME AND ADDRESS: UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
1150 N CURTIS RD SUITE 100
BOISE, ID 83706-1234

SOURCE: SOUTH FORK BOISE RIVER TRIBUTARY: BOISE RIVER

QUANTITY: 493161.00 AFY

TOTAL RESERVOIR CAPACITY IS 493,161 ACRE FEET WHEN FILLED TO
ELEVATION 4196.0 FEET AND MEASURED AT THE UPSTREAM FACE OF THE
DAM.

PRIORITY DATE: 12/09/1940

POINT OF DIVERSION: T01S R08E S01 LOT 4 (NWSE) Within Elmore County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	487961.00 AFY
Irrigation from Storage	03-15 TO 11-15	487961.00 AFY
Industrial Storage	01-01 TO 12-31	5200.00 AFY
Industrial from Storage	01-01 TO 12-31	5200.00 AFY
Power Storage	01-01 TO 12-31	493161.00 AFY
Power from Storage	01-01 TO 12-31	493161.00 AFY
Municipal Storage	01-01 TO 12-31	5200.00 AFY
Municipal from Storage	01-01 TO 12-31	5200.00 AFY

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS
EARLY AS MARCH 1 AND MAY CONTINUE TO AS LATE AS NOVEMBER 15,
PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE
OF WATER BEFORE MARCH 15 UNDER THIS REMARK IS SUBORDINATE TO ALL
WATER RIGHTS HAVING NO SUBORDINATED EARLY IRRIGATION USE AND A
PRIORITY DATE EARLIER THAN THE DATE A PARTIAL DECREE IS ENTERED
FOR THIS RIGHT.

493,161 ACRE-FEET FOR POWER THAT CAN BE GENERATED BY THE RELEASE
OF 487,961 ACRE-FEET OF WATER FOR IRRIGATION AND 5,200 ACRE-FEET
FOR INDUSTRIAL AND MUNICIPAL PURPOSES.

PLACE OF USE:

THE PLACE OF USE IS WITHIN THE BOISE FEDERAL RECLAMATION PROJECT
WITHIN ADA, CANYON, ELMORE COUNTIES, IDAHO AND MALHEUR COUNTY
OREGON (BIG BEND IRRIGATION DISTRICT).

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THE NAME OF THE UNITED STATES OF AMERICA ACTING THROUGH THE
BUREAU OF RECLAMATION APPEARS IN THE NAME AND ADDRESS SECTIONS OF
THIS PARTIAL DECREE. HOWEVER, AS A MATTER OF IDAHO CONSTITUTIONAL
AND STATUTORY LAW, TITLE TO THE USE OF THE WATER IS HELD BY THE
CONSUMERS OR USERS OF THE WATER. THE IRRIGATION ORGANIZATIONS
ACT ON BEHALF OF THE CONSUMERS OR USERS TO ADMINISTER THE USE OF
THE WATER FOR THE LANDOWNERS IN THE QUANTITIES AND/OR PERCENTAGES
SPECIFIED IN THE CONTRACTS BETWEEN THE BUREAU OF RECLAMATION AND
THE IRRIGATION ORGANIZATIONS FOR THE BENEFIT OF THE LANDOWNERS
ENTITLED TO RECEIVE DISTRIBUTION OF THIS WATER FROM THE
RESPECTIVE IRRIGATION ORGANIZATIONS. THE INTEREST OF THE
CONSUMERS OR USERS OF THE WATER IS APPURTENANT TO THE LANDS

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

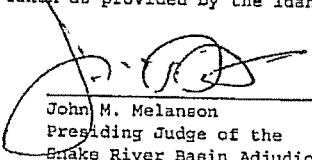
OTHER PROVISIONS (continued)

WITHIN THE BOUNDARIES OF OR SERVED BY SUCH IRRIGATION ORGANIZATIONS, AND THAT INTEREST IS DERIVED FROM LAW AND IS NOT BASED EXCLUSIVELY ON THE CONTRACTS BETWEEN THE BUREAU OF RECLAMATION AND THE IRRIGATION ORGANIZATIONS.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

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.



John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **MEMORANDUM DECISION AND ORDER OF PARTIAL DECREE** were mailed on February 25, 2009, by first-class mail to the following:

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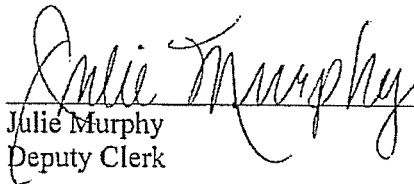
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