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Respondent's Name:

A & B Irrigation District

Attorney's Name & Address:

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

In Re SRBA

Subcase No. 36-02080

Case No. 39576

SUPPLEMENTAL STATEMENT TO S.F. 5

INTRODUCTION

In this subcase, A & B Irrigation District, the United States and Department of Water Resources of the State of Idaho have agreed to all elements of this water right, and are submitting Standard Form 5. Stipulated language in regard to the name and address of the claimant is included in the S.F. 5. This Supplemental Statement to the "required statement" is submitted in further support of said supplemental language.

Basis of Statement

To fully understand the basis for the language included

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In paragraph 1 of the S.F. 5 dealing with the name and address of the claimant, one must understand the nature of and the authority for the United States to hold this water right. In the SRBA, it is necessary first to determine whether or not a valid appropriation of water has been made, and thereafter to determine who is the owner of that right. In Sarret v. Hunter, 32 Idaho 536, 185 P. 1072 (1919), the Idaho Supreme Court in a quiet title action to certain water rights stated:

In determining whether a valid appropriation of water has been made, or the respective priorities of contending appropriators, the law does not concern itself with disputes relative to the title to the lands for which it is claimed the water was appropriated. . . . when one makes application for a permit to divert and appropriate water, the query is, not upon whose lands does he intend to apply it, but upon what lands he intends to apply it, and to what use does he expect to put it when so applied.

In further discussion of the issue, the court stated:

185 P. at p.1074.

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3 To encourage the settlement and reclamation of lands in
4 the arid western states, Congress passed the Reclamation Act of
5 1902. (32 Stat. 388, 43 U.S.C. §§372 et seq.) The reclamation Act
6 of 1902 and acts amendatory thereto provided a method by which the
7 United States could provide funds for the construction of water
8 storage and distribution systems to aid the reclamation of arid
9 lands and for the repayment of said construction costs by the
10 beneficiaries of the project. Congress did not intend to own and
11 operate project facilities in perpetuity constructed under the
12 Reclamation Act, but sought to retain ownership until costs of the
13 project allocated to irrigation were repaid by the project
14 beneficiaries.

15 The intent of Congress in adopting the Reclamation Act of
16 1902 can be found from a review of numerous provisions found within
17 the Act and acts amendatory thereto. It appears that Congress
18 recognized that water acquired for a reclamation project would
19 ultimately be owned by the owner of the land upon which the water
20 was applied for irrigation. This is clear from a portion of
21 Section 8 of the Reclamation Act of 1902, which provides:

22 The right to the use of water acquired under
23 the provisions of this Act shall be
24 appurtenant to the land irrigated, and
beneficial use shall be the basis, the
measure, and the limit of the right. (43
U.S.C. §372)

25 In the interpretation of Section 8 of the Act, many courts have
26 found that the right of the United States in the water of a
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reclamation project is that of diverter and distributor of the appropriated water. In Ickes v. Fox, 300 U.S. 82, 57 S.Ct. 412 (1937), the United States Supreme Court noted that although the government may have diverted, stored and distributed the water in question, ownership of the water or water rights had not become vested in the United States. In making this conclusion, the court stated at 57 S.Ct. 416:

Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. . . . The government was and remains simply a carrier and distributor of the water (Id.), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien upon the lands and the water rights appurtenant thereto--a provision which in itself imports that the water rights belong to another than the lienor, that is to say, to the landowner.

This view is supported by the Act of July 26, 1866 (14 Stat. 253; 43 U.S.C. §661) which provides that priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

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3 Although it was recognized under the Reclamation Act of
4 1902 that the water rights of a reclamation project were
5 appurtenant to the lands upon which the water was used, the United
6 States retained the right to cancel the water-right application of
7 any water-right applicant or entryman and, if he be a homestead
8 entryman, his entry also, in the event any installment of the
9 construction charges and penalties should become in default for one
10 year. (43 U.S.C. §480) Similar rights were retained by the United
11 States to cancel the water right or entry for nonpayment of
12 operation and maintenance charges. (43 U.S.C. §496) Finally, the
13 United States maintained the right to refuse to deliver water to
14 the lands for any water-right applicant or entryman who shall be in
15 arrears for more than one calendar year for the payment of any
16 charge for operation and maintenance. (43 U.S.C. §495) All of
17 these enforcement provisions were adopted by Congress in 1914. At
18 the same time, it was recognized by Congress that the management
19 and operation of the irrigation works of a reclamation project
20 should pass to the owners of the lands irrigated thereby as soon as
21 possible. Under Section 6 of the Reclamation Act of 1902, when the
22 payments required by the Reclamation Act were made for the major
23 portion of the lands irrigated from the waters of any of the works
24 provided under a reclamation project, the management and operation
25 of such irrigation works would pass to the owners of the lands
26 irrigated thereby, to be maintained at their expense under such
27 form of organization and under such rules and regulations as may be

1 acceptable to the Secretary of the Interior. Section 6 of the Act
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3 further provided that the title to and the management and operation
4 of the reservoirs and the works necessary for their protection and
5 operation shall remain in the government until otherwise provided
6 by Congress. (43 U.S.C. §498) In 1914, Congress determined that
7 whenever any legally organized water-users' association or
8 irrigation district shall so request, the Secretary of the Interior
9 is authorized, in his discretion, to transfer to such water-users'
10 association or irrigation district the care, operation, and
11 maintenance of all or any part of the project works, subject to
12 such rules and regulations as he may prescribe. (43 U.S.C. §499)
13 By 1922, Congress had authorized the Secretary of the Interior to
14 enter into a contract with any legally organized irrigation
15 district whereby such irrigation district would agree to pay the
16 monies required to be paid to the United States and in such event
17 water-right applications on the part of the landowners and
18 entrymen, in the discretion of the Secretary of the Interior, may
19 be dispensed with. (43 U.S.C. §511)
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21 In 1924, as part of the Reclamation Act of 1924,
22 Congress provided that whenever 2/3 of the irrigable area of any
23 project, or division of a project, shall be covered by water-right
24 contracts between the water-users and the United States, said
25 project shall be required, as a condition precedent to receiving
26 the benefits of this Act, to take over, through a legally organized
27 water-users' association or irrigation district, the care,
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3 operation and maintenance of all or any part of the project works,
4 and thereafter the United States, in its relation to said project,
5 shall deal with a water-users' association or irrigation district.

6 To accommodate the Reclamation Act of 1902, as amended,
7 the numerous Western states, including Idaho, have adopted
8 legislation for that purpose. Chapter 1 of Title 43, Idaho Code,
9 provides for the method by which an irrigation district may be
10 formed in Idaho. I.C. §43-118 provides for the authority of an
11 irrigation district to purchase existing distribution works for the
12 benefit of the landowners within the district. I.C. §43-304 grants
13 the power to the board of directors of an irrigation district to
14 purchase lands and water rights, and other property necessary for
15 the construction, use and supply, maintenance, repair and
16 improvement of canals and works, lands and water rights necessary
17 for the distribution of water to lands within the district. I.C.
18 §43-316 provides:

19 **Legal title to property.** -- The legal title to
20 all property acquired under the provisions of
21 this title shall immediately and by operation
22 of law vest in such irrigation district, and
23 shall be held by such district in trust for,
24 and is hereby dedicated and set apart to, the
25 uses and purposes set forth in this title.
26 Said board is hereby authorized and empowered
27 to hold, use, acquire, manage, occupy and
28 possess said property as herein provided.

Chapter 18 of title 43 authorizes irrigation districts to enter
into contracts with the United States under the Reclamation Act for
the purposes of irrigation works and water rights, and to levy

assessments to meet payments to the government.

Water Right No. 36-02080 represents the appropriation of

ground water for the irrigation of lands within a reclamation
project known as the Northside Pumping Division of the Mindoka

Project, which lands have become and are a part of A & B Irrigation

District. Appropriate repayment contracts have been entered into

between the irrigation district and the United States as

contemplated by the Reclamation Act, and the irrigation district

operates and maintains the Project, assesses lands within the

district to meet its obligations to the United States, and pays its

annual payments to the United States under its contract. Subject

to the District's obligation to pay the construction charge for the

Project, the water rights used for the irrigation of lands within

the irrigation district are vested in the irrigation district, in

trust for the lands within the irrigation district. It is proper

and necessary that this right of the irrigation district be

recognized in any SRBA Decree.

A copy of Article 25 of the contract referred to in the

remarks to the name and address of the claimant is attached hereto

as Exhibit "A." Paragraph (a) of Article 25 recognizes the right

of the irrigation district to prosecute legal action in defense and

protection of its water rights. (Emphasis added.) This provision

recognizes that the water rights are the water rights of the

irrigation district, and are held by the United States as a

lienholder as indicated by the United States Supreme Court in Ickes

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3 v. Fox, supra. Paragraph (b) of Article 25 recognizes that upon
4 the payment by the irrigation district of the construction charge
5 obligation, the title of the irrigation district to the water
6 rights shall become permanent.

7 The inclusion of the remarks added to the name and
8 address of the claimant in the S.F. 5 will establish that A & B
9 Irrigation District has the necessary standing to allow it to seek
10 relief from the court in regard to these water rights. As the
11 Idaho Supreme Court stated in Miles v. Idaho Power Co., 116 Idaho
12 635, 778 P.2d 757, 763 (1989), in determining whether a party has
13 standing, the focus is on the party seeking relief and not on the
14 issue the party desires to be adjudicated. This added language is
15 also necessary to show that legal title to the water right under
16 Water Right No. 36-02080 is vested in A & B Irrigation District,
17 subject to its obligation to the United States, and is held by the
18 Irrigation District in trust for the landowners of the District.
19 Finally, by the inclusion of such language, it will be clear to the
20 Director of the Idaho Department of Water Resources that there is
21 a legal basis for dealing directly with A & B Irrigation District
22 in the administration of this right.

23 It should also be noted that the proposed language found
24 in S.F. 5 is the product of extended negotiations between the
25 United States and A & B Irrigation District, and has been deemed by
26 the parties to adequately describe the respective rights of the
27 entities to the water right.

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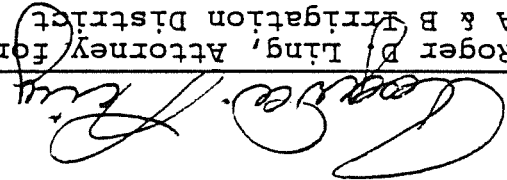
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SUPPLEMENTAL STATEMENT TO S.F. 5 - 10 -

CONCLUSION

For the above reasons, it is respectfully submitted that the proposed addition to the name and address of the claimant under water right No. 36-02080, as shown by the S.F. 5 filed herein, should be approved and recommended by the Special Master. Respectfully submitted this 30th day of August, 1996.

LING, NIELSEN & ROBINSON

By: 
Roger D. Ling, Attorney for
A & B Irrigation District

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CERTIFICATE OF MAILING

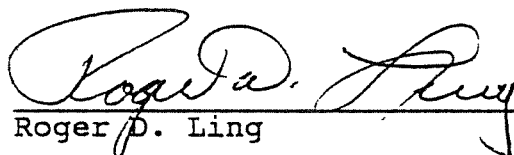
I hereby certify that on the 30th day of August, 1996, I served a copy of the foregoing **SUPPLEMENTAL STATEMENT TO S.F. 5** upon:

Chief, Natural Resource Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, Idaho 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, Box 33
Boise, Idaho 83734

Daria J. Zane
Attorney at Law
U.S. Department of Justice
Environmental and Natural Resource Division
Washington, D.C. 20004

by depositing a copy thereof in the United States mail, postage prepaid, in an envelope addressed to said persons at the foregoing addresses.


Roger D. Ling

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RUPERT, IDAHO 83350

of this contract.

of the District's operation and maintenance obligations under the provisions charge obligation, such right shall become permanent subject to the payment water supply and, upon completion of payment of the District's construction superior to any other contract of the United States for such share of the its share of the water supply for beneficial use on the project lands to the fulfillment of all its obligations hereunder, shall have a right to

(b) The District, during the term of this contract and subject

prosecuted by the District.

tection of its water rights, and such proceedings may be brought and dispute and take all other measures necessary toward the defense and pro- bring and prosecute judicial proceedings for the determination of such under this contract, the United States may, independently of the District, United States for the benefit of the District in connection with its rights priority or validity of any of the water rights held in the name of the

25. (a) In case any dispute arises as to the character, extent,

Protection of Water Rights