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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA

Case No. 39576

Subcase Nos. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, 01-10620, 01-10621, 01-10622, 01-10623, 21-13161, 37-22806, 63-33732, 63-33733, 63-33734, 63-33737, 63-33738, 65-23531 and 65-23532

**BOISE PROJECT BOARD OF CONTROL'S
MEMORANDUM IN OPPOSITION TO
STATE OF IDAHO'S MOTION FOR
SUMMARY JUDGMENT**

COMES NOW, the Claimant Boise Project Board of Control, by and through its counsel, the law firm Barker Rosholt & Simpson, LLP, and hereby submits this Memorandum in Opposition to the State of Idaho's Motion for Summary Judgment filed in sub-case nos. 63-33737 and 63-33738. The sole basis for the State of Idaho's Motion for Summary Judgment is that that this Court and the Idaho Supreme Court's decisions in *United States v. Pioneer Irrigation District* preclude, as a matter of law, any beneficial use claims by the Boise Project Board of Control, its member Districts and patrons. Based on the arguments and analysis set

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forth below, the Boise Project Board of Control respectfully requests that this Court deny the State of Idaho's Motion for Summary Judgment.

I. INTRODUCTION

The late claims filed by the Boise Project Board of Control, identified by water right claim nos. 63-33737 and 63-33738, are different from the licensed and decreed rights that were the subject of the *Pioneer* proceedings. In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), certain Reclamation reservoir spaceholder irrigation districts challenged the Department's recommendation that Reclamation held sole ownership of the water rights in the reservoirs. The basis for this objection was that, while Reclamation was the original appropriator of those rights, intervening law interpreting Reclamation's interest in state based water rights demonstrated that the patrons of the irrigation districts, as the beneficial users of the water should be the named owners of the water rights. The Supreme Court held pursuant to United States Supreme Court case law, the Reclamation Act, and Idaho constitutional, statutory and case law that the Irrigation Districts "act on behalf of those who have applied the water to beneficial use and repaid the United States for the costs of the facilities," and required inclusion of remarks in the partial decrees for the United States' licensed rights that "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." *Id.*, 144 Idaho at 115, 157 P.3d at 609 (2007).

Here the State has taken the position that water that enters the reservoir after flood control releases, in excess of the annual volume limit is "unallocated" or unappropriated water and belongs to no one. Therefore, according to the State's theory¹, neither Reclamation nor the irrigation entities have yet established any title to a water right for water entering the reservoirs

¹ The Boise Project Board of Control does not concede that the State's theory is correct, and believes that the existing water rights provide the basis for fill following flood control releases.

following a flood control release. The Boise Project's late claims are for the beneficial use of the water entering the reservoir following a flood control release; water the State contends is unappropriated or unallocated water. Thus the irrigation entities, whose landowners put the water to beneficial use are exactly the appropriate entities to assert a beneficial use claim. Indeed, the State, and others in the Basin Wide 17 subcase, had contended that the only way for the irrigation entities to get the water that they had been historically using since the completion of the Boise River reservoir system was to file a late claim for that water.

The State now argues that pursuant to *Pioneer*, the irrigation entities cannot claim the water that fills the Reclamation reservoirs and is delivered to the irrigation entities. However, as *Pioneer* recognizes, Reclamation does not put the water to beneficial use, it is the irrigation entities that complete the appropriation by applying the water to beneficial use. The Boise Project's late claims are necessary because "the right to the use of water acquired under the provisions of [the Reclamation] Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." *Id.* at 114 Idaho 112, 157 P.3d at 606, quoting *Ickes v. Fox*, 325 U.S. at 613-14, 65 S.Ct. at 1348-49 (1937). If the State's argument that *Pioneer* prevents the irrigation entities from making any beneficial use claims succeeds, then the State can, and likely will, later come to this Court and argue that because Reclamation does not beneficially use the water, then Reclamation also cannot assert any beneficial use late claims, leaving the irrigation entities without the rights to the water that they have historically relied upon to make irrigation deliveries to their landowners.

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

The Boise Project, during the Basin Wide 17 proceedings, provided this Court with a detailed history of the administration of storage rights in the Boise River Reservoir system including the irrigation entities reliance on water entering the reservoirs after water has been passed through the system for flood control. This Court had limited the scope of the Basin Wide 17 proceedings to questions of law, and as a result the facts and supporting documents were stricken from the record. Since the State has moved for summary judgment and since all facts must be construed against the moving party, that relevant history is provided herein.

A. History of the Development of the Boise Project:

The reservoirs on the Boise River Basin affected by flood control are Arrowrock (water right nos. 63-303 and 63-3613), Anderson Ranch (water rights no. 63-3614), and Lucky Peak (water right no. 63-3618). These are all federal reservoirs. The water rights were licensed to and are held in the name of the Bureau of Reclamation, but the equitable ownership of the rights is held by the irrigation entities (“spaceholders”) and their patrons. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

In 1906, private interests turned over the New York Canal to the United States to be incorporated into the Boise Project. *New York Canal Co. v. United States*, 277 F. 444, 445 (D. Idaho 1913). The New York Canal Company assumed the responsibility of managing the Reclamation works and operating the storage water delivery to landowners from Arrowrock Reservoir. *See New York Canal Co. v. Bond*, 265 F. 228, 229 (9th Cir. 1920); *also see New York Canal Co. v. Bond*, 273 F. 825 (D. Idaho 1921).

In 1926, the Boise Project districts each entered into substantially similar repayment contracts with the United States which provide that the districts purchased the space in

Arrowrock Reservoir built by the United States. *In Re Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 541, 136 P.2d 461 (1943), *also see U.S. v. Pioneer Irr. Dist.*, 144 Idaho at 114-115, 157 P.3d at 608-609 (2007).

By 1941, it was clear that there would be insufficient water supply in Arrowrock for proper reclamation and irrigation of lands within the districts. Accordingly, the districts entered into reimbursement contracts with the United States for storage rights in the Anderson Ranch Reservoir, which was then under construction. *In Re Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 541, 136 P.2d 461 (1943). Like the 1926 contracts, these new contracts were substantially similar among the five districts within the Board of Control. The 1941 contracts for ownership of space in Anderson Ranch reservoir were confirmed by the district court and the Idaho Supreme Court. *In Re Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461 (1943).

A number of irrigation entities acquired interests in the waters of Lucky Peak. A 1954 supplemental contract signed by the irrigation entities recognizes that the United States may jointly operate the Arrowrock, Anderson Ranch and Lucky Peak Reservoirs. Affidavit of Shelley M. Davis in Support of Memorandum in Opposition to the State of Idaho's Motion for Summary Judgment, (hereinafter "Davis Aff."), Ex. 1, 1954 Bureau of Reclamation Contract with Wilder Irr. Dist.² That contract also *expressly recognizes* that, if the flood control

² The Boise Project Board of Control hereby requests, pursuant to Idaho Rule of Evidence 201, that this Court take judicial notice of the documents appended to the Affidavit of Shelley M. Davis in Support of Memorandum in Opposition to the State of Idaho's Motion for Summary Judgment, submitted herewith. The Comprehensive State Water Plan excerpts for the Boise River are legislatively confirmed portions of the Idaho Water Resource Board's 1996 Idaho State Water Plan, the Boise River Flood Control Management Report of November 1974 are matters of State Public Record, as is the 1985 Water Control Manual for Boise River Reservoirs. Pursuant to Evidence Rule 201, these documents are not subject to "reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Further, the remaining documents are all "records, exhibits or transcripts from the court file" in SRBA sub-case no. 63-3618 or consolidated sub-case no. 00-91063 and copies of such records are provided for the Court's convenience. "A court shall take judicial notice if requested by a party and supplied with the necessary information," when the party requests judicial notice and the records are contained in the court's file in the same or a separate case. Id. R. Ev. 201.

operations and joint operations of the three reservoirs cause a shortage in water that would otherwise be made available to the districts, the United States must credit and make available to the districts, out of the water that accrued to the storage rights in Lucky Peak, an amount of stored water equal to the amount of water lost to the District in the other reservoirs as a result of the joint flood control operations. *Id.* at Art. 7. The Lucky Peak water right decrees also recognize this obligation. Water right 63-3618.

The Boise Project irrigation districts have faithfully carried out their obligations under the repayment contracts with the United States and have fully repaid the cost of construction of the Arrowrock and Anderson Ranch facilities. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 114-115, 157 P.3d 600, 608-609 (2007).

B. Historic Treatment of Reservoir Fill After Flood Control in the Boise River Basin:

The total production of the Boise River in an average water year is 1.414 million acre-feet. Davis Aff., Ex. 2, Presentation of Brian Sauer, Bureau of Reclamation hydrologist to IDWR Water Supply Committee, April 2012. The file can be located at the Idaho Department of Water Resource's website at

<http://www.idwr.idaho.gov/Browse/WaterInfo/WaterSupply/Presentations/2012/April/>.

Arrowrock stores approximately 272,000 acre-feet, Anderson Ranch approximately 413,000 acre-feet, and Lucky Peak approximately 264,000 acre-feet, for a total of less than one million acre-feet of storage. Davis Aff., Ex. 3, Affidavit of Mary Mellema submitted Feb. 5, 2008, in SRBA sub-case No. 63-3618, *also see* water right nos. 63-303, 63-3613, 63-3614, and 63-3618. The largest flows recorded after construction of Lucky Peak dam exceed 3.6 million acre feet. Clearly, these reservoirs cannot capture the entire flow of the Boise River, and, since their construction, have released water to provide space for flood control.

In the 1950s, the Corps of Engineers and the Bureau of Reclamation entered into an agreement to memorialize how flood control operations would be coordinated between the two existing Reclamation facilities, Anderson Ranch and Arrowrock, and the Corps facility, Lucky Peak. Davis Aff., Ex. 4, Water Control Manual Excerpts, p. 1-1. For as long as the facilities have existed, flood releases have occurred and ‘refill’ behind those releases has taken place to ensure that the spaceholders water rights are filled, and that water actually held behind the reservoirs is available for beneficial use.

In May 1974, Governor Andrus requested that the Idaho Department of Water Resources conduct an analysis of how to improve flood control operations on the Boise River. Davis Aff., Ex. 5, November 1974 Review of Boise River Flood Control Management, p. iii. The Department’s report makes it clear that the Department understood that water to serve irrigation from storage water rights depends on the ability to refill the system after flood control releases occur. *Id.*, at p. 70. The Department’s Report concludes:

The effect of taking a greater refill risk on irrigated agriculture and reservoir recreation has not been evaluated. The purpose of this report has been to examine the various potentials for improving the flood control operation but not to select a preferred operation. Several levels of refill risk have been discussed and each would have a different impact. In the detailed studies for manual revision, the trade-offs between flood control and other reservoir uses should be evaluated before a new operating plan is selected.

Id. None of the risks the Department described mentioned the State’s current position that the spaceholders had no right to the water entering the reservoirs after flood control. In fact, the Report assumes that there is a right to put that water entering the reservoir after flood control releases to beneficial irrigation use. The manual referenced in the quoted statement is the Water Control Manual for Boise River Reservoirs (hereinafter “Control Manual”).

The 1985 Control Manual was prepared in response to the 1974 Flood Control Management Report to update the 1954 Memorandum of Agreement concerning flood control in the Boise River basin. Davis Aff., Ex. 4, Water Control Manual Excerpts, p. 1-1. Beginning in 1953, through the creation of the Water Control Manual in 1985, “the Boise River reservoirs were regulated under the terms of a Memorandum of Agreement between the Department of the Army and the Department of the Interior.” *Id.*, p. 3-4. The Control Manual recognizes that water to fulfill irrigation from storage largely depends on ‘refill’ of the reservoir system after flood control releases. The Control Manual states:

In many years the flood control regulation extends several weeks into the irrigation season. When Lucky Peak flood control releases are equal to or greater than the demand for irrigation water (all users are receiving an adequate supply), the entire release is considered surplus to the Boise River and the above computation of natural flow diversion by user is not necessary. During this period, no charges are made against stored water supplies.

Davis Aff., Ex. 4, pp. 7-26 (emphasis added). This represents an implicit recognition that water released for flood control is not released to fulfill irrigation from storage obligations, and that ‘refill’ of the system after flood control releases is necessary to meet existing irrigation water right demands, including the irrigation from storage component of the water rights.

The Idaho Water Resource Board’s 1990 Comprehensive State Water Plan: South Fork of the Boise River Sub-Basin, states, “[s]ince January 1980, the Idaho Department of Water Resources has issued no water right permits for consumptive use of water during the period June 15 to November 1 on the Boise River and its tributaries above Lucky Peak Reservoir. Water in the affected area has been judged to be fully appropriated, and therefore no additional consumptive use can be permitted.” Davis Aff., Ex. 6, Excerpt of 1990 Comprehensive State Water Plan, South Fork Boise River Sub-Basin, 1990, Re-adopted 1996, p. 21. In 1977 the Department of Water Resources had issued a moratorium on all new consumptive water rights in

the Boise River basin during the irrigation season because the Boise River was “determined to be fully appropriated.” Davis Aff., Ex. 11, 1977 Moratorium Order.

When the Idaho Water Resource Board adopted the Upper Boise River Basin Plan B portion of the State Water Plan in December 1992, the Board again recognized:

Since January 1980, the IDWR has issued no water right permits for consumptive uses during the period June 15 to November 1 on the Boise River and its tributaries above Lucky Peak Reservoir. In May 1992, a moratorium on most new ground and surface water uses was imposed by IDWR for the duration of the current drought. ...All Arrowrock’s active capacity of 286,000 AF has been allocated by the Bureau of Reclamation for irrigation. (IDWR, 1974). Lucky Peak, on the other hand, has 111,950 AF allocated to irrigation companies or canal districts, and 152,300 AF that is allocated or reserved for stream flow maintenance, 50,000 AF of which IDFG can use (USACE, 1988a).

Davis Aff., Ex. 7, Excerpt of Comprehensive State Water Plan, Upper Boise River Basin, December 1992, p. 30. At least as early as 1977, IDWR and by 1980, the Idaho Water Resource Board recognized that the Boise River system was fully appropriated. Yet, today the State’s current position is that there is ‘unallocated’ space in the Boise River reservoir system to be made available for other users to the detriment of the spaceholders.

As further evidence of the Department’s recognition of the fully allocated nature of the Boise River system, natural flow water rights identified by the Department in the Boise River basin were issued with remarks that limit the ability of those junior natural flow water rights to exercise those rights only during those times when flood control water is being released in the system. *See e.g.*, Water Right 63-31409 (Condition No. 14); Davis Aff., Exs. 8 and 9, List of Junior Natural flow water rights provided by IDWR, and exemplar Basin 63 water rights containing the above discussed limiting remarks. A review of the list of remarks demonstrates that the remarks are not only included on irrigation rights, but applied to any consumptive right below Lucky Peak and above Star Bridge, even those senior to the reservoir rights.

During proceedings in SRBA sub-case no. 63-3618, Robert J. Sutter, provided an affidavit explaining the water rights accounting system in the Boise River basin. Davis Aff., Ex. 10, Affidavit of Robert J. Sutter, sub-case no. 63-3618, dated Feb. 12, 2008. Mr. Sutter was the hydrology section manager for IDWR from 1995 to 2002, and “[i]n 1986...developed the Boise River Water Right Accounting computer program....and the Boise River Storage Allocation computer program...for the Boise River.” *Id.*, pp.1-2. Mr. Sutter explains the distinction between the terms ‘paper fill’ and ‘physical fill’ in the accounting program:

For each day after November 1, the Accounting Program calculates the amount of water that is credited to each of the Boise River Reservoirs, Arrowrock, Anderson Ranch, and Lucky Peak, according to their respective storage rights. The accumulated amount of storage credited to the right is often termed “paper fill,” as opposed to the measured contents of the reservoir, which are termed “physical fill.” The physical fill in a reservoir seldom equals the paper fill because: a) the system (Arrowrock, Anderson Ranch, and Lucky Peak reservoirs) storage fill and use is not reconciled until the end of the irrigation year; and b) the three Boise River reservoirs are operated as a system and therefore storage water credited “on paper” to one reservoir can physically be stored in a different reservoir. The Accounting Program only accounts for the fill of the reservoir storage right. The Accounting Program does not calculate the amount of storage water that accrues to individual space entitlement.

Id., pp. 2-3.

Mr. Sutter explains here that physical storage fill has always, including even after the advent of the accounting program in the Boise River basin in 1986, been credited to the spaceholders accounts and then beneficially used by them to make irrigation deliveries to their landowners. *Id.*

Mr. Sutter recognizes the importance of storage ‘refill’ to the actual physical fill of the reservoir, which as he explains is the full storage right or allocated space of the reservoir.

As the flood control operation typically progresses, the reservoirs cease storage releases and begin to physically refill as the high runoff is then stored to prevent downstream flooding. The Accounting Program tracks the amount of natural flow

stored during the refill phase of a flood operation as “unaccounted for” storage. When the accumulation of “unaccounted for” storage ends, the flood operation is completed. The end of flood operations typically occurs sometime from April through July. At the end of the flood operation, ideally the amount of “unaccounted for” storage will be equal to the amount of storage released for flood control so that the amount of water stored physically in the reservoirs will be equal to the paper fill, which is 100 percent of the storage right (or allocated storage). If the “unaccounted for” storage is less than the storage released for flood control, this shortfall is termed the “failure to refill due to flood control.”

Davis Aff., Ex. 10, pp. 4-5. Mr. Sutter explains that “unaccounted for storage” is not the space emptied during the flood control operations, but rather the water that is stored in the reservoirs following those releases; water that is then allocated to the spaceholders through the storage program, and which is and has been delivered to the Irrigation District’s landowners.

In the same sub-case proceedings, Mary Mellema of the Bureau of Reclamation submitted an affidavit stating that “[a]fter flood control operations have occurred and the reservoirs fill to the maximum reservoir level expected to occur during that irrigation season, IDWR uses the Boise River Storage Program to allocate storage to the various contractors and purposes. At this time, any shortages that need to be made up to the various Reclamation contractors in Anderson and Arrowrock, due to flood control operations in the Boise Project, pursuant to the 1985 Water Control Manual and contracts, occurs.” Davis Aff., Ex. 3, p. 3. Ms. Mellema’s statement that allocation to contractors occurs “after flood control operations have occurred and the reservoirs fill to the maximum reservoir level expected to occur during that irrigation season,” confirms Mr. Sutter’s observation that ‘refill’ after flood control operations has historically been allocated to contractors in the storage system, and that water has been beneficially used by those contractors throughout the Boise River system.

After adoption of the accounting program for the Boise River basin, Mr. Sutter drafted a document entitled “Water Delivery Accounting Boise River WD-63” explaining the policies and

procedures underlying the implementation of the accounting program for this Basin. Davis Aff.,

Ex. 12, Water Delivery Accounting Boise River WD-63. This document expressly states:

Flood control releases occur in more than seventy percent of all years. These do not affect accrual. Accrual continues in accordance with the rights in effect, but the released water is water that was stored earlier. Actual storage may continue to occur after the storage rights are all filled ‘on paper’ as a result of the flood control releases. The second fill, called ‘unaccounted for storage,’ may, but usually does not, result in a total system fill.

Id., (emphasis added). For purposes of the beneficial use claims filed by the Boise Project, the architect of the accounting program agrees that the water stored under the original right is released, new water is stored in the reservoirs, and it is this new water that is available for beneficial use by the landowners.

C. Refill Proceedings Prior to the Filing of the Late Claims:

The State takes the position that a reservoir storage water right goes out of priority once it reaches an annual volumetric limit even if that water is not available to fulfill irrigation from storage deliveries and that the right holder cannot rely upon water refilling the reservoir after such water is passed for flood control. This assertion did not come to the attention of the Basin 63 water users until the issue was raised in certain Basin 01 sub-case proceedings, long after the Basin 63 water rights had already been partially decreed. *See* Brief of Amicus Curiae Re: State of Idaho’s Motion for Partial Summary Judgment Concerning “Refill” of Bureau of Reclamation Storage Rights, sub-cases 01-2064, 01-2064A-G, and L, 01-10042, *et al.* Reclamation had requested a remark recognizing the right to refill under the priority date of its original water right. *Id.* The State argued that once a water right has reached its volumetric limit it is out of priority and no water may accrue to the storage account from water entering the reservoir after the limit has been met. *See* State of Idaho’s Response to Motion for Leave to File Amicus Brief. This claim was not raised in the proceedings relating to the Boise River reservoir storage rights,

and it is not consistent facts surrounding the historical operation of the Boise River reservoir system. *Also see* Affidavit of Scott Campbell submitted in sub-case no. 00-91017, ¶9.

In the Basin 01 proceeding Special Master Dolan held that “the State has no one-fill rule,” and that the issue regarding reservoir storage rights “arose after IDWR amended its accounting program to measure stored water quantities, all without direction from the courts or legislature.” Ultimately “if the State’s suggested refill remark merely describes present state water law, the same remark could apply to any storage water right held by Reclamation in any reservoir in the state whether stated in the license or not.” *See* Order on Motions for Partial Summary Judgment, sub-cases 01-2064, et al and 01-2068 et all, p. 18.

The Boise Project and others petitioned this Court to hear the issue of whether water released for flood control and no longer stored in the reservoir system could be counted against the storage rights of the spaceholders. *See* SRBA file for Basin Wide case no. 00-91017. This Court determined to limit the question to merely a question of law, namely “[w]hether Idaho law requires a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control.” *Id.* This Court declined to address the question of what water is counted toward the fill of a water right. The State argued, however, that as a matter of law allowing water that enters a reservoir after the storage right has been filled “on paper,” would result in an enlargement of the right. *See* State of Idaho’s Opening Brief, Basin Wide Issue No. 00-91017.

The logical conclusion reached by the irrigation entities as the Basin Wide 17 proceedings advanced was that the irrigation entities and/or Reclamation should file a water right claim in an attempt to protect the water that the irrigation entities have relied upon to fulfill the irrigation component of the storage water rights since the reservoirs were built, in the event that the ultimate decision was that “paper fill” actually “satisfied” the storage water right even though

the water released for flood control was not available for its intended beneficial use. The Boise Project filed late claims assigned water right nos. 63-33737 and 63-33738, and Reclamation filed water right assigned nos. 63-33732 and 63-33733, all of which were beneficial use claims, while the Basin Wide 17 proceedings were ongoing. The Director recommended the rights be disallowed and instead recommended the adoption of a Basin 63 general provision stating that “[t]he use of floodwaters captured in evacuated flood control space in on-stream reservoirs in Basin 63 for irrigation and other beneficial purposes is a historical practice.” *See* Recommendations for above-referenced claimed water rights. This recommendation for an historical practice remark was not proposed as a water right and thus gave the Boise Project little comfort. Therefore, it filed objections to the recommendations that are now proceeding before this Court to recognize the historic practice of allocating the water to the spaceholders for beneficial use by their landowners.

In its Motion for Summary Judgment, the State does not question that a beneficial use water right can or should be awarded. Rather, it argues that such a beneficial use right, based on the Boise River operations, cannot be held by the irrigation entities for their landowners.

III. STANDARD OF REVIEW

Summary judgment is appropriate if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *State v. Rubbermaid*, 129 Idaho 353, 356, 924 P.2d 615, 618 (1996), *citing McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). The burden of proving the absence of a genuine issue of material fact rests upon the moving party. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). A motion for summary judgment must be denied if the record contains conflicting

inferences or if reasonable minds might reach different conclusions. *Id.* “If uncontroverted facts exist which lead to a definite disposition as a matter of law,” and no triable issues remain, then summary judgment is appropriate. *Id.* at 524, 808 P.2d at 861.

As the trier of fact, the district court is free to arrive at the most probable inferences based upon the evidence before it and to grant summary judgment, despite the possibility of conflicting inferences. *Loomis v. Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). Resolution of the possible conflict between the inferences is within the responsibilities of the fact finder. *Riverside, supra*, 103 Idaho at 519, 650 P.2d at 661.

IV. ARGUMENT

A. Pioneer Supports the Boise Project’s Beneficial Use Claims as a Matter of Law:

There is an important distinguishing characteristic between the water rights that were at issue in *United States v. Pioneer*, 144 Idaho 106, 157 P.3d 600 (2007), and those at issue here. The rights at issue in *Pioneer* had originally been appropriated by the United States and permitted by the State through construction of the federal dam facilities. These rights subsequently were transferred to the irrigation entities through contracts, but remained licensed in the name of the United States. Here, the State argues that the water claimed by Reclamation and the Boise Project is unappropriated water. Since the State argues this water is unappropriated despite the historic use, either or both Reclamation and the Boise Project are entitled to appropriate such flows where they can demonstrate that they have been diverting and putting to beneficial use such water.

In *Pioneer* the Idaho Supreme Court analyzed *Ickes v. Fox*, where the U.S. Supreme Court had held that “the irrigators had therefore, ‘long prior to the issue of the notices and other orders of the here assailed...acquired a vested right to the perpetual use of the waters as

appurtenant to their lands.”” *Id.* at 110, 157 P.3d at 605, *citing Ickes v. Fox*, 300 U.S. 82, 95, 57

S.Ct. 412, 416-17 (1937). The Pioneer Court also recognized that the *Ickes* court had found:

[A]ppropriation 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.

Id.

In *Pioneer* the Court also looked to United States Supreme Court’s opinion in *Nebraska*

v. Wyoming, wherein the Supreme Court there held:

‘The property right in the water right is separate and distinct from the property right acquired in the reservoirs, ditches or canals’ and was ‘acquired by perfecting and appropriation, i.e., by an actual diversion followed by and application within a reasonable time of the water to a beneficial use.’ The Court reiterated the rule stated in *Ickes*: ‘the right to the use of water acquired under the provisions of [the Reclamation] Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.’

United States v. Pioneer, 144 Idaho at 116, 157 P.3d at 606, *citing Nebraska v. Wyoming*, 325

U.S. at 613-14, 65 S.Ct. 1348-1349 (1945).

In its Basin Wide 17 opinion, the Supreme Court again recognized symbiotic relationship between the diversion made to storage by Reclamation, and the beneficial use made of the diverted water by the irrigation entities, stating:

The purpose of use element of a storage water right generally contains at least two authorized purposes of use. The first authorizes the storage of water for a particular purpose (i.e., ‘irrigation storage,’ or ‘power storage’). The second authorizes the subsequent use of that stored water for an associated purpose, which is often referred to as the ‘end use’ (i.e. ‘irrigation from storage,’ or ‘power from storage’). Each purpose of use is assigned its own quantity and period of use, which may or may not differ from one another.

A&B Irr. Dist. v. State, 2014 Ida. LEXIS 203, p. 9 (Aug. 4, 2014).

The Court in *Pioneer* also recognized the distinction between a beneficial use right claimed under the constitutional method and perfected under the statutory method.

When following the constitutional method, one ‘must depend upon actual appropriation, that is to say, actual diversion and application to a beneficial use.’

U.S. v. Pioneer Irr. Dist., 144 Idaho at 110, 157 P.3d at 600, *quoting Basinger v. Taylor*, 36 Idaho 591, 598, 211 P. 1085, 1086-87 (1922). The Court went on to observe, “[t]here is no dispute that the BOR does not beneficially use the water for irrigation.” *Id.* Because of this dichotomy between the need to establish beneficial use for a beneficial use claim and the recognition that Reclamation does not actually put the water to beneficial use, the Boise Project believed it may be necessary for the entity whose landowners do put the water to beneficial use to make the beneficial use claims. For, as the Court observed:

The Districts act on behalf of the landowners within the districts to put the water to beneficial use. It is that beneficial use that determines water right ownership.

Id. at 113, 157 P.3d at 603.

The State’s summary judgment motion takes a swipe at just the right of the Boise Project and its districts to assert the beneficial use claims. The State is tellingly silent on whether it believes Reclamation can even assert a beneficial use claim. The districts act as trustees and stand in the place of the landowners in cases involving appropriation of water. *Id.* at 114, 157 P.3d at 604. Therefore, they felt obliged to stand in the place of the landowners here, and protect them from the State’s claim that no one, not the districts, not Reclamation, can make a beneficial use claim.

Based on the decision of the Supreme Court in *Pioneer*, there is no question that the Boise Project landowners put the water that the Department’s accounting system refers to as “unallocated flows” to beneficial use. *Id.*, *also see* Davis Aff., Ex. 10, Affidavit of Robert J. Sutter, sub-case no. 63-3618, dated Feb. 12, 2008. The United States is not the beneficial user of the stored water, and the basis of both Reclamation and the Boise Project’s claims is beneficial

use. Therefore, the entities putting the water to beneficial use are the appropriate entities to assert a beneficial use claim. *U.S. v. Pioneer*, 144 Idaho at 115, 157 P.3d at 605 (2007).

B. The State has Attacked Reclamation's Ability to Assert a Beneficial Use Claim:

Left unsaid in the State's Motion is the question of whether Reclamation can assert a beneficial use claim under state law. The State does not concede this point. The Boise Project is concerned that, if the Boise Project claims are dismissed, then the State will assert that Reclamation cannot sustain a beneficial use claim.

As the *Pioneer* analysis makes clear, when Reclamation initially built the facilities and appropriated the water for transfer to the ultimate beneficial users of the same, the Reclamation Act section 8 made clear the manner in which that water would be initially appropriated. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho at 110, 157 P.3d at 605, *citing Ickes v. Fox*, 300 U.S. 82, 95, 57 S.Ct. 412, 416-17 (1937). Here, where the State claims that Reclamation's dams divert all of the water flowing in the Boise River, but Reclamation is not the ultimate beneficial user, it is foreseeable that if the State's Motion succeeds, and the Boise Project's claims are dismissed, that the State will take the position that Reclamation similarly cannot appropriate the water on its own under a beneficial use theory.

In proceedings before this Court in Basin Wide 17 and also during the Boise Project's Amicus participation in the Basin 01 sub-cases, the State asserted that the refill issue had already been litigated and resolved in the proceedings related to water right no. 63-303 and 63-5262. *See* State of Idaho's Response to Motion for Leave to File Amicus Brief, June 20, 2012, pp. 4-5. A review of the files for those sub-cases demonstrates that was not the case, and the Affidavit of Scott Campbell, submitted in Basin Wide 17 proceedings should have put the matter to rest. *See* Campbell Affidavit, sub-case no. 00-91017, ¶¶ 2-9. Nevertheless, the Boise Project remains

concerned that the State may attempt to prevent Reclamation's independent claims from moving forward under a theory of collateral estoppel, without the placeholders there to demonstrate facts to the contrary.

Additionally, in the context of the Basin Wide 17 proceedings, both in its Response Brief to Petition to Designate Basin Wide Issue, and its opening brief on appeal to the Supreme Court, the State raised the issue that "the Bureau filed separate 'statutory' claims in the SRBA basin on claims filed in 1983 with the Department for storage 'refill' based on historic beneficial use," which were decreed disallowed by the Department. *See* Brief of Respondent State of Idaho in the Basin Wide 17 appeal, p. 3, fn. 3, *also see* State of Idaho's Response to Petition to Designate Basin Wide Issue and Motion to Consolidate Issue Regarding "Refill" of the Bureau of Reclamation Storage Rights, sub-case no. 00-91017, p. 4, fn. 4. The water right claim nos. cited there as claimed by Reclamation and disallowed by the Department were 01-4052, 01-4055, 01-4056, 21-2156 and 63-5262. Based on these arguments raised by the State, it also seems very likely that the State will again claim that Reclamation's claims to beneficial use rights would be barred by *res judicata* or collateral estoppel. The import of this gamesmanship by the State is that they suggest in this motion that Reclamation is the proper party to make the beneficial use claim, in order to rid themselves of the placeholders and then turn around and later argue that Reclamation cannot bring these claims.

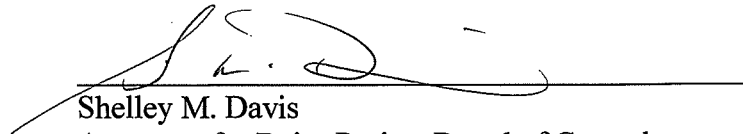
The Campbell affidavit submitted in Basin Wide 17, and the accompanying records and documents, make it very clear that this issue was never actually litigated on the merits. Further this issue was never raised by the Boise Project or its member districts. Hence, *res judicata* and collateral estoppel could not be applied against the Boise Project. For this further reason, the State's Motion for Summary Judgment should be denied.

V. CONCLUSION

For the foregoing reasons, the Boise Project Board of Control respectfully requests that this Court deny the State of Idaho's Motion for Summary Judgment.

Dated this 3rd day of December, 2014.

BARKER ROSHOLT & SIMPSON LLP



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Attorneys for Boise Project Board of Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 2014, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S MEMORANDUM IN OPPOSITION TO STATE OF IDAHO'S MOTION FOR SUMMARY JUDGMENT** by the method indicated below, and addressed to each of the following:

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