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DEPARTMENT OF
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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	)	Subcases Nos.: 63-33732,63-33737,63-
	)	33733,63-33738,01-10622,01-10617,01-
Case No. 39576	)	10620,01-10616,01-10618,01-10621,01-
	)	10615,01-10623,01-10614
	)	
	)	UNITED STATES' REPLY
	)	IN SUPPORT OF STATE OF
	)	IDAHO'S MOTION FOR
	)	SUMMARY JUDGMENT

Background

The State's Motion for Summary Judgment addresses competing claims for storage water rights in federal reservoirs. "A storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse by means of a diversion structure such as a dam." *In re SRBA*, 157 Idaho 385, 336 P.3d 792, 796 (2014) ("*BWI 17*") (citation omitted). The State's Motion turns on the undisputed fact that all of the "dams" at issue here are federal reservoirs, which pursuant to federal law are entirely owned and solely operated by the United States.

The State's Motion emphasizes the Idaho Supreme Court's decision in *United States v. Pioneer Irr. Dist.* 144 Idaho 106, 157 P.3d 600 (2007). But *Pioneer* is just one case in a long line of Idaho Supreme Court authority instructing that the party that diverts water into a reservoir and stores it for later use is the appropriator of the storage water right—and thus holder of title to the water right. That same authority also instructs that when the United States diverted water for storage into the federal reservoirs, it removed the stored water from subsequent appropriation. As a result, the eventual use of the stored water to irrigate did not establish an independent water right. Rather, it completed the appropriation of irrigation storage water initiated by the United States. Of course, as *Pioneer* held, that use also vests the irrigators with an equitable interest. But that is an interest in the United States' water right, and one that is fully recognized in the United States' claims. In sum, both Idaho and federal law leave no question that the State's Motion must be granted because the United States is the sole entity with the legal ability to appropriate a storage water right in a federal reservoir.

Argument

I. THE STATE IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE UNITED STATES IS THE SOLE ENTITY WITH THE LEGAL ABILITY TO APPROPRIATE A STORAGE WATER RIGHT IN THE FEDERAL RESERVOIRS.

Through Section 6 of the Reclamation Act Congress directed that the federal reservoirs at issue here are to remain under federal ownership and control.¹ Congress ensured federal control by making use of the water stored in these reservoirs available only through a contract with the

¹ Although some of the irrigation entities hold what are referred to as "repayment" contracts, those contracts do not vest them with an ownership interest in the reservoirs. To the contrary, in Section 6 Congress instructed that regardless of payment, "title to and management and operation of the reservoirs and works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress." 43 U.S.C. § 498. No party asserts that Congress has acted to divest the United States of title to any of the reservoirs at issue here.

United States. 43 U.S.C. §§ 423d, 423e & 485h(d); *see also Israel v. Morton*, 549 F.2d 128, 129, 132-33 (9th Cir. 1977) (acknowledging terms for the use of Project water are set by contract).

Congress also authorized federal reservoirs, including those at issue here, to be used for multiple purposes including irrigation, flood control and power generation. In wet years, controlling floods can require that water previously stored in a reservoir be vacated to allow room to capture the spring freshets without water spilling over the top of the reservoir. For decades, Reclamation has physically “refilled” those reservoirs by diverting water into storage after the flood control releases are completed. While the ultimate question before this Court is whether that historic “refill” created a beneficial use storage water right, the only question presently before the Court is whether the United States is the sole entity that can hold a storage water right for a federal reservoir. As is explained below, it is.

A. Only the United States Can Hold a Valid Storage Water Right at a Federal Reservoir.

As the Idaho Supreme Court first held almost eighty years ago, diversion of water by the “appropriator[] and owner[] of the reservoir” initiates an appropriation of the water and renders the stored water “no longer ‘public water’ subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3).”² *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935). Because the stored water is no longer subject to appropriation, no subsequent action—not even the ultimate application of the stored water to a beneficial use—can establish an appropriation of that water by an entity other than the party

² In the decades since the Court has reiterated that point numerous times. *See Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945); *American Falls Reservoir District No. 2 v. Idaho Dep’t of Water Resources*, 143 Idaho 862, 154 P.3d 433, 449 (2007); *BWI* 17, 157 Idaho 385, 336 P.3d at 796.

storing the water. Thus, by instructing that only the party diverting and storing water may develop a storage water right, State law instructs that the United States is the only party able to hold a water right in the federal reservoirs.

Federal law provides the legal means through which the water stored in federal reservoirs for irrigation purposes is put to beneficial use: contracts between the United States and irrigation organizations such as the member districts of the Board of Control and the Surface Water Coalition.³ *E.g.*, 43 U.S.C. § 423e. Thus, by vesting control over the diversion, storage and ultimate use of the water in the United States, federal law reiterates that the United States is the only entity that can appropriate water at a federal reservoir.

The irrigation water made available to the irrigation organizations by contract is then distributed to the members of those organizations who apply it to beneficial use in growing crops. Whether a storage water right is established pursuant to the statutory method or the constitutional method, that beneficial use serves to complete the appropriation initiated by the diversion and storage of the water:

When following the constitutional method, one must depend upon actual appropriation, that is to say, actual diversion and application to beneficial use. Under the statutory method of appropriation, the appropriation is not complete and a license will not issue until there is proof of application to beneficial use for the purpose for which it was originally intended.

³ The contracts held by the members of the Board expressly recognize that the water distributed pursuant to the contract is stored “under water rights held by the United States.” *E.g.*, Boise-Kuna Irrigation Dist., 1987 Supplemental Contract at Art. 11, Exhibit 35 to the Affidavit of David W. Gehlert, Subcase 91-63 (April 29, 2004). The contracts of the members of the Coalition similarly recognize that the storage water rights are “held by the United States.” Minidoka Irrigation District, July 1957 Contract at Art. 4. Exhibit 20 to the Affidavit of Travis L. Thompson, Subcases 01-02064 et al. (April 16, 2012).

United States v. Pioneer Irr. Dist., 144 Idaho 106, 110, 157 P.3d 600, 604 (2007) (quoted in *BWI 17*, 336 P.3d at 796).⁴

The *Pioneer* court reconciled the interests of the parties involved in the appropriation of storage water rights for, and beneficial use of, the water stored in the federal reservoirs in Basin 63 by instructing that the irrigators hold “title to the use of the water” that is “specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the [irrigators],” and for which the United States was decreed storage water rights.⁵ 157 P.3d at 609. *Pioneer* has greater significance here, however, because it is another in the long line of Idaho cases holding that title to a storage water right vests in the entity diverting and storing the water—in this case, the United States.⁶ Thus, the decision confirms that because neither the Board, nor the Coalition, nor their constituents divert water and store it in a federal reservoir, none can appropriate a storage water right. Consequently, *Pioneer* confirms their claims must be denied and the State’s motion granted. Despite that, both the Board and the Coalition insist summary judgment is inappropriate. Those arguments are without merit.

⁴ The Coalition recognized this bedrock principle of law in a memorandum before the Idaho Supreme Court in *BWI 17* litigation explaining that water use by its members “complet[es] the appropriation of storage water rights.” *In Re SRBA*, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17), Reply Brief of Surface Water Coalition, 2013 WL 6203972 at 5-6.

⁵ As this Court and several federal courts have recognized the equitable interest held by the irrigators does not impose a trust obligation on Reclamation. ORDER CLARIFYING, Consolidated Subcase 91-63 (Oct. 4, 2004); *Del Puerto Water Dist. v. United States*, 271 F. Supp. 2d 1224, 1248 (E.D. Cal. 2003) (to impose a trust obligation would turn “federal reclamation law on its head.”); *Elephant Butte Irrigation District v. United States*, 269 F.3d 1158 (10th Cir. 2001) (refusing to impose a trust obligation on Reclamation); *Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977) (Reclamation sets the terms upon which project water may be used).

⁶ The decision is also consistent with a line of United Supreme Court cases in which the storage water rights for Reclamation reservoirs were “confirmed to the Government.” See 157 P.3d at 606 (quoting *Nevada v. United States*, 463 U.S. 110, 126 (1983)).

B. The Board Has Not Established That It, or Its Members, Can Appropriate a Storage Water Right in a Federal Reservoir.

The Board's memorandum does not discuss the legal constraints which preclude it from appropriating a storage water right in a federal reservoir. Instead, the memorandum merely (albeit correctly) asserts that its members make beneficial use of the stored water, while ignoring that the beneficial interest created by that use is an interest in the United States storage water rights, not an independent water right. Without a legal basis to a claim to a water right of its own, the Board's opposition to the State's Motion has no merit.

The Board attempts to avoid that problem by suggesting its claims should not be terminated at this point because the State may someday challenge the United States' storage claims on *res judicata* or collateral estoppels grounds. Those preclusion doctrines are affirmative defenses best asserted at the equivalent of the pleading stage of this proceeding—in response to the United States' motion for leave to file the claims.⁷ Further, preclusion is no defense in this case, where the United States was not put on notice of the State's position regarding refill of storage water rights until long after the United States' initial refill claims were recommended disallowed. See *e.g.*, *Durrant v. Quality First Marketing, Inc.*, 127 Idaho 558, 561 (Id. Ct. App. 1995). But more fundamentally, putative defects in the United States' claims could not provide a legal basis for the otherwise meritless claims of another party. Thus, whether the State ultimately raises a preclusion claim against the United States, and even whether it ultimately succeeds on that claim, is of no consequence to the merit of the Board's claims. Because the Board's claims to an independent storage water right are without foundation, they must be denied.

⁷ A claim barred by *res judicata* or collateral estoppel would not meet the "good cause" standard. See *Bach v. Miller*, 148 Idaho 549, 553, 224 P.3d 1138, 1142 (2010).

C. The Coalition Has Not Established That It, or Its Members, Can Appropriate a Storage Water Right in a Federal Reservoir.

Though the Coalition at least argues it has a legal basis to appropriate water in a federal reservoir, in the end it fares no better than the Board because the Coalition's arguments rely on an inapposite analogy to *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) and the immaterial assertion that its claims are different from those of the United States.

i. *Joyce Livestock* does not stand for the proposition that a private party can appropriate water at a federal reservoir.

In *Joyce Livestock*, the Idaho Supreme Court rejected the United States' argument that a water right could not be appropriated on public domain land unless a claimant could show "the right to exclude others from those lands." 156 P.3d at 508. The court concluded that an ability to exclude others was not required because "two or more parties can obtain a right to use water from the same source." The case is inapposite here because the Coalition is not merely claiming that it can appropriate water from the same source as the United States, it is claiming that it can appropriate water already diverted and stored by the United States and therefore water that is no longer "public water" subject to appropriation. *E.g., Washington Cnty.* 43 P.2d at 945.

Not only does *Joyce Livestock* not support the Coalition's position, but the case reiterates that only the United States can hold title to the storage water rights at issue here. In *Joyce*, the company owned and controlled the livestock which were the means of diversion⁸ and initiated an appropriation by turning its livestock out to drink on the public domain. 156 P.3d at 509. Here, it is the United States which controls the means of diversion and initiated an appropriation by diverting water into storage. In that respect *Joyce* is entirely consistent with the *Washington*

⁸ The court instructed that no diversion of water from a water course was necessary because cows put water to beneficial use by drinking directly from the water source. 156 P.3d at 509. Thus, the court treated the cows' lips as the functional equivalent of a diversion.

Cnty. line of authority and demonstrates the United States is the proper party to hold the storage water rights for the federal reservoirs.

ii. Whether the Coalition's claims are identical to those of the United States is immaterial.

The Coalition's other argument asserts that its claims must survive summary judgment because they are not exactly the same as the United States' claims. That is true enough—but also wholly immaterial. Because there is no legal basis for the Coalition to hold a storage water right in a federal reservoir, its claims must fail whether they are entirely coterminous with the United States' claims or not.⁹

Conclusion

Both State and federal law preclude the Board and the Coalition from holding a storage water right in any of the federal reservoirs at issue here and consequently compel the Court to grant the State's Motion. Under Idaho law it is the diversion and storage of water which serves as the legal foundation for a storage water right and vests title to the appropriation. Neither the Board, nor the Coalition nor any of its constituents divert or physically store water in a federal reservoir. Federal law similarly precludes both the Board and the Coalition from appropriating storage water in a federal reservoir because it vests the United States with the sole ability to divert and store water into the federal reservoirs and dictates the terms under which that stored water can be made available for use by non-federal entities.

⁹ Further, the Coalition's claims are essentially subsumed in the United States' claims. Because the United States claimed water for all uses and contractors at the federal reservoirs, the United States consistently claimed more water and a broader place of use than the Coalition, which presumably claimed only water used by its members. The sole exception is the Coalition's claim 01-10618, a small claim at American Falls Reservoir the United States understands to be for refill of storage water released for irrigation purposes. Regardless of its purpose, that claim, like the Coalition's other claims, is without foundation.

DATED this 10th day of December, 2014.

Respectfully submitted,



David W. Gehlert

CERTIFICATE OF SERVICE

I certify that on December 10, 2014, I served true and correct copies of the foregoing UNITED STATES' REPLY IN SUPPORT OF STATE OF IDAHO'S MOTION FOR SUMMARY JUDGMENT as follows:

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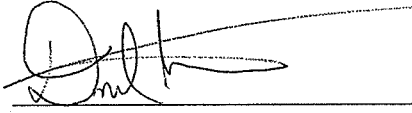
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