

RECEIVED

JUL 20 2020

WATER RESOURCES
WESTERN REGION

LAWRENCE G. WASDEN
Attorney General
DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division
MICHAEL C. ORR (ISB #6720)
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
michael.orr@ag.idaho.gov
Telephone: 208-334-4154
Facsimile: 208-854-8072

Attorneys for the Idaho Department of Fish & Game

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	IDFG'S MOTION FOR PARTIAL
FOR PERMIT NO. 63-34616 IN THE)	SUMMARY JUDGMENT RE:
NAME OF MICRON TECHNOLOGY,)	CONDITION TO PROTECT
INC.)	"STREAMFLOW MAINTENANCE"
)	STORAGE RELEASES
)	

MOTION FOR PARTIAL SUMMARY JUDGMENT

The Idaho Department of Fish and Game ("IDFG"), by and through its counsel of record, and pursuant to Rules 260 and 565 of the Idaho Department of Water Resources' Rules of Procedures (IDAPA 37.01.01.260 and .565), and Rule 56 of the Idaho Rules of Civil Procedure, hereby moves the Hearing Officer for partial summary judgment and an order that as a matter of law, the following condition will be imposed on any permit issued pursuant to application no. 63-34614:

This right does not authorize the diversion or use of water released from Lucky Peak Reservoir for streamflow maintenance purposes pursuant to water right 63-3618. Pursuant to water right 63-3618, the quantity, duration, and timing of streamflow maintenance releases from Lucky Peak Reservoir are determined according to joint written instructions from the United States Bureau of Reclamation and the Idaho Department of Fish and Game to the Idaho Department of Water Resources.

IDFG'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE:
CONDITION TO PROTECT "STREAMFLOW MAINTENANCE" STORAGE RELEASES - 1

This motion is made and based upon the pleadings and documents currently filed in this matter, the documents submitted herewith via the *Declaration of Michael C. Orr* (“*Orr. Dec.*”), and the following argument in support of the motion.

ARGUMENT IN SUPPORT OF MOTION

1. Undisputed Facts.

“Streamflow maintenance” is one of the purposes for which water is stored and released pursuant to water right nos. 63-3618, 63-33734A, and 63-33734B. These are storage water rights decreed in the Snake River Basin Adjudication (“SRBA”) for the three federal reservoirs on the Boise River: Lucky Peak, Arrowrock, and Anderson Ranch. Water right no. 63-3618, the so-called “Base Right” for Lucky Peak Reservoir, authorizes both the storage and release of water for “streamflow maintenance” purposes. *Partial Decree, Water Right No. 63-3618*.¹ Water rights 63-33734A and 63-33734B are the so-called “Refill 1” and “Refill 2” water rights, and authorize supplemental storage of “streamflow maintenance” water in any of the three reservoirs, under certain

¹ A copy of the partial decree for water right no. 63-3618 is attached to the *Orr Dec.* as Exhibit 1. The storage water rights for Lucky Peak, Arrowrock, and Anderson Ranch Reservoirs decreed in the SRBA prior to the “refill” settlement are often referred to as the “Base Rights,” to distinguish them from the supplemental “Refill 1” and “Refill 2” water rights: 63-33734A and 63-33734B. IDWR Memorandum, *Implementation of the Refill Stipulated Agreement in the Boise Water Right Accounting* at 3-4 (Feb. 27, 2020). A copy of this memorandum is attached to the *Orr Dec.* as Exhibit 2. The “Base Right” for Lucky Peak Reservoir is water right no. 63-3618. The “Base Rights” for Arrowrock Reservoir are water right nos. 63-303 and 63-3613. The “Base Right” for Anderson Ranch Reservoir is water right no. 63-3614.

circumstances and subject to certain conditions. *Partial Decrees, Water Right Nos. 63-33734A & 63-33734B*.²

The decreed “period of use” for storing and releasing “streamflow maintenance” pursuant to water right no. 63-3618 is from January 1 to December 31; that is, year-round. *Partial Decrees, Water Right Nos. 63-3618*. The decreed “place of use” for releases of “streamflow maintenance” storage is “[w]ithin the channel of the Boise River from Lucky Peak Dam downstream to the confluence with the Snake River.” *Id.* The partial decrees quantify “streamflow maintenance” as an annual volume—152,300 acre-feet per year—rather than as a release rate or in-stream flow rate. *Partial Decrees, Water Right Nos. 63-3618, 63-33734A, & 63-33734B*³; *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, In Re SRBA, Subcase No. 63-3618* at 22 (Sep. 23, 2008) (“*Lucky*

² Copies of the partial decrees for water right nos. 63-33734A and 63-33734B are attached to the *Orr Dec.* as Exhibit 3 and Exhibit 4. Unlike the “Base Rights,” the supplemental “refill” water rights do not explicitly authorize releases of water “from storage.” Rather, releases of water “from storage” for “streamflow maintenance” and other beneficial purposes are considered to take place under the “from storage” components of the “Base Rights.” See *Partial Decrees, Water Right Nos. 63-33734A & 63-33734B* (stating that water stored “under this right . . . will be allocated for storage end uses . . . as if it had accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.”).

³ While the “Refill 1” and “Refill 2” water rights facially authorize storage of more than 152,300 AFY for “streamflow maintenance,” they are supplemental to the “Base Rights” for Lucky Peak, Arrowrock, and Anderson Ranch Reservoirs. See *Partial Decrees, Water Right Nos. 63-33734A & 63-33734B* (“Water accruing to this right supplements water accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.”). Thus, for “streamflow maintenance” purposes, the Lucky Peak “Base Right,” the “Refill 1” water right, and the “Refill 2” water right together “are limited to the total combined annual diversion volume necessary to allocate” 152,300 acre-feet per year to “streamflow maintenance.” *Partial Decrees, Water Right Nos. 63-3618, 63-33734A, & 63-33734B*.

Peak Decision”).⁴ The partial decree for water right no. 63-3618 states: “The Bureau of Reclamation and Idaho Department of Fish and Game shall provide joint written instructions to [IDWR], for conveyance to the watermaster, regarding release of the Lucky Peak streamflow maintenance storage water.” *Partial Decree, Water Right No. 63-3618*.

“Streamflow maintenance” had its genesis in the Lucky Peak permit issued in 1964, which included a condition requiring that 50,000 acre-feet of storage space in Lucky Peak Reservoir be reserved to store water “for maintaining winter time flow” in the Boise River below Diversion Dam, “under a release pattern established from time to time by the director of the Idaho Fish and Game Department.” IDWR Staff Memorandum, *Origins of Water Right Condition 907 and Implementation of Water Rights with Conditions 907 and 908 in the Boise River Water Right Accounting Program* (Jan. 31, 2020) (“*Staff Memo*”) at 3. The Lucky Peak permit was amended in 1985 to specifically authorize year-round “streamflow maintenance” storage and releases of up to 152,300 AFY. *Staff Memo* at 3; *Lucky Peak Decision* at 9, 11.⁵

During the late 1980s and early 1990s, “streamflow maintenance” storage was released at the rate of approximately 150 cfs during the non-irrigation season. *Staff Memo* at 3; *IDFG Expert Report* at 5.⁶ Since the early 1990s, “streamflow maintenance”

⁴ A copy of the *Lucky Peak Decision* is attached to the *Orr Dec.* as Exhibit 5.

⁵ The Lucky Peak “Base Right” was licensed in 2002. *Lucky Peak Decision* at 12.

⁶ “*IDFG Expert Report*” refers to the report entitled *Rationale for recommended flow regimes for the Lower Boise River with respect to fish and wildlife management*, written by John Cassinelli, Regional Fisheries Manager, IDFG Southwest Region, and filed in this matter on January 8, 2020.

releases have been 240 cfs in most years, during the non-irrigation season. *Id.*; *see also*, e.g., *Letter from IDFG & BOR to Rob Whitney, IDWR Water Distribution Section Manager* (Sep. 10, 2019) (providing “joint written instructions . . . regarding release of streamflow maintenance pursuant to water right 63-03618.”).⁷ While “streamflow maintenance” generally “has not yet been applied toward supporting flows outside the low-flow non-irrigation period, such as maintaining periodic bankfull flows,” IDFG “is currently evaluating the use of the Streamflow Maintenance Account to support these high flows necessary to maintain riverine and riparian habitat.” *IDFG Expert Report* at 5. IDFG also “recently initiated discussions with BOR to evaluate increas[ing] winter flows using the Streamflow Maintenance Account” *Id.* at 6.

The Idaho Department of Water Resources (“IDWR”) has determined that certain “standard approval conditions” should be imposed “on new water right permits for unmitigated consumptive use of surface or shallow ground water” upstream of the Star Bridge in Basin 63. *Staff Memo* at 3. One of these “standard approval conditions” is Condition 907, *id.*, which prohibits diversions during certain times of the year unless flows at the point of diversion exceed “benchmark stream maintenance flows” of 240 cfs or 1,100 cfs, depending on the date. *Id.* at 1.

The 240 cfs flow rate referenced in Condition 907 was apparently derived from the “streamflow maintenance” release rate that has generally prevailed since the early 1990s. *Staff Memo* at 3. The basis for the 1,100 cfs release rate referenced in Condition 907, however, is “not documented.” *Id.* at 4. Nonetheless, the last sentence of Condition

⁷ A copy of this letter is attached to the *Orr Dec.* as Exhibit 6.

907 refers to both the 240 cfs and 1,100 cfs flows as “benchmark stream maintenance flows.” *Id.* at 1.

IDWR did not formulate the language of Condition 907 or otherwise play a role in developing the condition. *Staff Memo* at 2-3. Rather, the language of Condition 907 “was the product of settlement discussions” in 1998 regarding a protested transfer application. *Id.* at 2. The condition was also used to resolve protests to several other permit applications in subsequent years. *Id.* at 2-3. In 2004, one of these settlements added a sentence to the original language of the condition—the sentence that refers to both the 240 cfs and 1,100 cfs flows as “benchmark stream maintenance flows.” *Id.*⁸ In 2013, “IDWR added Condition 907 . . . to IDWR’s database of standard approval conditions.” *Id.* at 3.

IDFG does not support or oppose application no. 63-34614. *Letter from Bradley B. Compton, IDFG Southwest Regional Supervisor, to Nick Miller, IDWR Western Regional Manager, RE: Notice of Protest – Application for Permit No. 63-34614 – Micron Technology, Inc.* (Feb. 25, 2019). Rather, IDFG requests IDWR to condition any permit issued pursuant to the application “to protect water released from storage for the streamflow maintenance beneficial use.” *IDFG Expert Report* at 6. IDFG also recommends that the condition “acknowledge the potential for changes in flow rates established with releases from the Streamflow Maintenance Account.” *Id.*

⁸ IDFG was not a party to the 2004 settlement that added the last sentence to Condition 907, although the BOR was. *Id.* at 3.

2. IDFG's Proposed Condition Should Be Used to Protect "Streamflow Maintenance"

"Streamflow Maintenance" is a purpose for which water may be stored and released from Lucky Peak Dam pursuant to storage water rights decreed in the SRBA. Most storage releases from Lucky Peak Dam are intended to be diverted upstream from Middleton for consumptive uses, and "[t]he stored flow in the Middleton reach in excess of deliveries to existing water right holders is considered unused water leaving the system that is available for appropriation." Memorandum, *Implementation of the Refill Stipulated Agreement in the Boise Water Right Accounting* at 4.⁹ "Streamflow maintenance" is a significant exception to these general rules. "Streamflow maintenance" releases are intended to remain within the channel of the Boise River, all the way to the Snake River. *Partial Decree, Water Right No. 63-3618*. Thus, new water rights that divert from the Boise River should be conditioned to protect "streamflow maintenance" storage releases from diversion by water users, as IDWR has previously recognized.¹⁰

Any permit condition that is intended to protect "streamflow maintenance" should be consistent with the SRBA partial decrees that authorize the storage and release of water for "streamflow maintenance" purposes. As discussed below, IDFG's proposed condition is consistent with the applicable partial decrees. Condition 907, however, is not. Therefore, to ensure that "streamflow maintenance" storage releases are fully protected, and to avoid potential ambiguity or confusion in future administration, IDWR

⁹ *Orr Dec.*, Exhibit 2.

¹⁰ In 2013, IDWR designated Condition 907 one of its "standard approval conditions" for Basin 63. *Staff Memo* at 3.

should impose IDFG's proposed "streamflow maintenance" condition on any permit issued pursuant to application no. 63-34614.

a. IDFG's Proposed "Streamflow Maintenance" Condition Is Consistent With the SRBA's Partial Decrees and Fully Protects "Streamflow Maintenance" Storage Releases.

The partial decree for water right no. 63-3618 quantifies "streamflow maintenance" releases from storage as an annual volume of 152,300 acre-feet.¹¹ This partial decree does not require that "streamflow maintenance" storage be released from Lucky Peak Dam at any particular rate, nor does it require any particular "streamflow maintenance" flow rates at any location within the channel of the Boise River. Moreover, nothing in the partial decree for water right no. 63-3618 limits the release rate of "streamflow maintenance" storage from Lucky Peak Dam, or "streamflow maintenance" flow rates within the Boise River.

Further, the partial decree authorizes the release of "streamflow maintenance" storage water at any time during the year: the decreed period of use for "streamflow maintenance" releases "from storage" is January 1 to December 31. *Partial Decree, Water Right no. 63-3618*. Nothing in the partial decree for water right no. 63-3618 limits the timing or duration of "streamflow maintenance" releases from storage.

Thus, questions of the quantity, timing, and duration of "streamflow maintenance" storage releases are necessarily committed to the discretion of IDFG and the BOR. Indeed, this is clear on the face of the Lucky Peak "Base Right," which

¹¹ "Streamflow maintenance" releases "from storage" are governed by the Lucky Peak "Base Right"—water right no. 63-3618. The "Refill 1" and "Refill 2" water rights authorize storage that is supplemental to the "Base Rights," and the supplemental storage is allocated and released as if it had accrued under the "Base Rights."

expressly authorizes the BOR and IDFG to “provide joint written instructions to [IDWR], for conveyance to the watermaster, regarding release of the Lucky Peak streamflow maintenance storage water.” *Partial Decree, Water Right No. 63-3618*. Thus, BOR and IDFG have explicit authority and discretion to determine the quantity, timing, and duration of “streamflow maintenance” releases from storage, and can make adjustments in “streamflow maintenance” releases as they see fit. The only requirement is that the BOR and IDFG issue “joint written instructions” to IDWR, for conveyance to the watermaster, that set forth the quantity, timing, and duration of “streamflow maintenance” releases.¹²

This conclusion follows from the plain language of the partial decrees for water right nos. 63-3618, 63-33734A, and 63-33734B. It is also consistent with the history and purpose of “streamflow maintenance” releases. The original Lucky Peak permit stated that the 50,000 acre-feet reserved “for maintaining winter time flow” in the Boise River was to be released “under a release pattern established from time to time by the director of the Idaho Fish and Game Department.” *Staff Memo* at 3. In the *Lucky Peak Decision*, the SRBA District Court also pointed out that “[t]he BOR has flexibility in releasing the water when needed to accomplish [streamflow maintenance] purposes.” *Lucky Peak Decision* at 22. The BOR and IDFG have always had the authority and discretion to

¹² “Streamflow maintenance” storage is subject to a decreed condition stating that should flood control operations cause shortfalls in irrigation storage allocations, “the first 60,000 acre-feet of any shortfalls caused by flood control operations will come from uncontracted space in Lucky Peak Reservoir used for streamflow maintenance purposes.” *Partial Decrees, Water Right Nos. 63-33734A & 63-33734B*.

make the decisions “regarding release of the Lucky Peak streamflow maintenance storage water.” *Partial Decree, Water Right No. 63-3618*.

IDFG’s proposed “streamflow maintenance” condition is consistent with the partial decrees and the history of “streamflow maintenance” operations.¹³ IDFG’s proposed condition explicitly recognizes that partial decrees issued in the SRBA are the legal authority to store and release water for “streamflow maintenance” purposes, particularly the partial decree for water right no. 63-3618. Further, and consistent with the partial decrees, IDFG’s proposed condition does not define the quantity, timing, or duration of “streamflow maintenance” releases. Rather, IDFG’s proposed condition expressly recognizes that, pursuant to the partial decree for water right no. 63-3618, the “quantity, duration, and timing” of “streamflow maintenance” releases are defined by the “joint written instructions” that the BOR and IDFG provide to IDWR.

IDFG’s proposed condition also expressly provides that “streamflow maintenance” releases may not be diverted or used by the holder of the permit so conditioned. Thus, IDFG’s proposed “streamflow maintenance” condition fully protects “streamflow maintenance” releases from diversion by the permit holder. IDFG’s proposed condition also puts the permit holder on notice of an important limitation on the right to divert, using clear language that recognizes the legal basis for identifying and protecting “streamflow maintenance” releases from storage.

¹³ IDFG’s proposed “streamflow maintenance” condition is set forth above on the first page of this motion, and also in the “Conclusion” below.

b. Condition 907 Is Not Consistent With the SRBA's Partial Decrees And Does Not Adequately Protect "Streamflow Maintenance" Releases.

Condition 907 appears to be intended, in part, to protect "streamflow maintenance," because the condition prohibits diversions unless flows at the point of diversion exceed "benchmark stream maintenance flows" of 240 cfs or 1,100 cfs during certain specified time periods. *Staff Memo* at 1. Condition 907 does not recognize or acknowledge that partial decrees issued in the SRBA are the legal basis for protecting "streamflow maintenance," however. *Id.* Moreover, Condition 907 is not consistent with these partial decrees, and affirmatively conflicts with the partial decree for water right no. 63-3618.

While Condition 907 purports to protect certain "benchmark stream maintenance flows," the partial decrees for water right nos. 63-3618, 63-33734A, and 63-33734B do not quantify "streamflow maintenance" in terms of "benchmark" release rates or in-stream flows. Rather, the partial decrees quantify "streamflow maintenance" solely in terms of an annual storage and release volume. The partial decrees do not use the term "benchmark," and do not require any particular "streamflow maintenance" release rates or in-stream flow rates. Nothing in the partial decrees limits "streamflow maintenance" releases or in-stream flows to 240 cfs, or for that matter to 1,100 cfs.

The partial decrees also do not define or limit "streamflow maintenance" releases according to the date ranges referenced in Condition 907 (*i.e.*, June 16 to February 29, and March 1 to May 31). Rather, the partial decree for water right no. 63-3618 simply states that "streamflow maintenance" releases "from storage" are authorized year-round: January 1 to December 31. *Partial Decree, Water Right No. 63-3618*. Nothing in the

partial decree for water right no. 63-3618 limits “streamflow maintenance” releases to any particular dates or seasons.

With respect to “streamflow maintenance,” Condition 907 is at best misleading, because it does not acknowledge that “streamflow maintenance” is authorized by partial decrees issued in the SRBA, and defines “streamflow maintenance” in terms of “benchmark” flows and date ranges that are inconsistent with the decreed elements of water right nos. 63-3618, 63-33734A, and 63-33734B. At worst, Condition 907 fails to correctly identify and adequately protect “streamflow maintenance” releases at the times and in the amounts expressly authorized by the partial decree for water right no. 63-3618.

Condition 907 also conflicts with the provision in the partial decree for water right no. 63-3618 stating that the BOR and IDFG will provide IDWR with “joint written instructions . . . regarding release of the Lucky Peak streamflow maintenance storage water.” *Partial Decree, Water Right No. 63-3618*. As previously discussed, this provision recognizes that the authority and discretion to determine the quantity, timing, and duration of “streamflow maintenance” releases lies with the BOR and IDFG. Condition 907 conflicts with this decreed provision by defining “benchmark stream maintenance flows” in terms of in-stream flow rates measured at the point of diversion for the subject water right during certain times of the year, rather than recognizing that “streamflow maintenance” flows are defined by the “joint written instruction” that the BOR and IDFG provide to IDWR.

The mere fact that Condition 907 recognizes that the “benchmark” flows might “subsequently change,” *Staff Memo* at 1, does not resolve the inconsistency between Condition 907 and the partial decree for water right no. 63-3618. Condition 907 has been

designated as one of IDWR's "standard approval conditions," *Staff Memo* at 3, and yet Condition 907 does not reference or acknowledge that the authority and discretion to determine the quantity, timing, and duration of "streamflow maintenance" releases resides with the BOR and IDFG rather than IDWR. In the absence of such recognition, the fact that IDWR has adopted Condition 907 as a "standard approval condition" incorrectly suggests that the authority to "subsequently change" the "benchmark stream maintenance flows" resides with IDWR. *Staff Memo* at 1, 3.

An additional concern with Condition 907's status as a "standard approval condition" is that such conditions apparently are only imposed on new water rights for consumptive uses. *Staff Memo* at 3. Even non-consumptive uses can interfere with "streamflow maintenance" releases, however. This can occur when water is diverted out of the river channel for a non-consumptive use (such as for power generation or an aesthetic pond) only be returned to the channel some distance downstream. Such diversions may be non-consumptive but they divert "streamflow maintenance" water away from the decreed place of use (the river channel) and interfere with the purpose of "streamflow maintenance" releases. The fact that Condition 907 has been deemed a "standard approval condition" only for new consumptive uses could have the effect of suggesting that "streamflow maintenance" releases are subordinated to non-consumptive uses, which would be inconsistent with the partial decree for water right no. 63-3618.

Adding to the potential confusion arising from Condition 907's designation as a "standard approval condition" is the fact that the *Staff Memo* characterizes Condition 907 as one of the water right accounting system's "Flood Control Conditions," *Staff Memo* at 5, even while recognizing that "[t]he 240 cfs benchmark flow is not related to flood

control operations.” *Id.* at 3. Further, IDWR’s database of “standard approval conditions” seems to associate Condition 907 with mitigation requirements rather than the partial decree for water right no. 63-3618. *Id.*

In short, while Condition 907 refers to “benchmark stream maintenance flows,” the record suggests that Condition 907 may have been adopted as a “standard approval condition” for reasons other than, or in addition to, protecting “streamflow maintenance” releases from storage pursuant to the partial decree for water right no. 63-3618. If so, then it is possible that Condition 907 is justifiable as a “standard approval condition” on grounds other than protecting “streamflow maintenance,” such as, perhaps, accounting considerations or mitigation requirements. But for purposes of protecting “streamflow maintenance” releases from diversion and acknowledging the authority and discretion of the BOR and IDFG to determine the quantity, timing, and duration of “streamflow maintenance” releases, Condition 907 is inadequate, potentially misleading, and does not promote efficient administration of water rights in accordance with permits, licenses, and decrees.

c. IDWR Should Include IDFG’s Proposed “Streamflow Maintenance” Condition in Any Permit Issued Pursuant to Application No. 63-34614.

IDFG’s proposed “streamflow maintenance” condition is consistent with the SRBA partial decrees that authorize the storage and release of water for “streamflow maintenance” purposes. IDFG’s proposed condition fully protects “streamflow maintenance” storage releases from diversion by the permit holder, and puts the permit holder on notice of the nature and extent of an important limitation on the right to divert under the permit. IDFG’s proposed condition recognizes and protects the decreed

authority and discretion of the BOR and IDFG to determine the quantity, timing and duration of “streamflow maintenance” releases from storage. Condition 907 fails to satisfy any of these requirements.

Accordingly, IDFG’s proposed condition to protect “streamflow maintenance” releases should be included on any permit issued pursuant to application no. 63-34614. To the extent Condition 907 is also intended to protect “streamflow maintenance” releases, IDFG’s proposed condition should replace Condition 907. If inclusion of Condition 907 is warranted as a “standard approval condition” on grounds other than protecting “streamflow maintenance,” IDFG’s proposed “streamflow maintenance” condition should still be included in the permit. IDFG’s proposed condition will remedy Condition 907’s inadequacies in defining and protecting “streamflow maintenance” releases pursuant to the partial decree for water right no. 63-3618.

3. Conclusion.

For the reasons discussed above, the Hearing Officer should grant IDFG’s motion for partial summary judgment, and issue an order concluding that as a matter of law, the following condition will be included in any permit issued pursuant to application no. 63-34614 to protect “streamflow maintenance” releases, even if ultimately Condition 907 is also included in the permit:

This right does not authorize the diversion or use of water released from Lucky Peak Reservoir for streamflow maintenance purposes pursuant to water right 63-3618. Pursuant to water right 63-3618, the quantity, duration, and timing of streamflow maintenance releases from Lucky Peak Reservoir are determined according to joint written instructions from the United States Bureau of Reclamation and the Idaho Department of Fish and Game to the Idaho Department of Water Resources.

IDFG does not request oral argument regarding this motion.

Respectfully submitted this 17th day of July, 2020.

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division



MICHAEL C. ORR
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 17th day of July 2020, I caused the original of the foregoing to be filed with the Idaho Department of Water Resources, and copies to be served upon the following, in the manner listed below:

1. Original to:

NICK MILLER IDAHO DEPARTMENT OF WATER RESOURCES WESTERN REGIONAL OFFICE 2735 WEST AIRPORT WAY BOISE ID 83705-15082	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: 208-334-2348 <input checked="" type="checkbox"/> Email: nick.miller@idwr.idaho.gov
-----------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

2. Copies to the following:

KEVIN J BEATON STOEL RIVES LLP 101 SOUTH CAPITOL BLVD, STE 1900 BOISE ID 83702-7705	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: kevin.beaton@stoel.com
S BRYCE FARRIS SAWTOOTH LAW OFFICES, PLLC PO BOX 7985 BOISE ID 83707	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: bryce@sawtoothlaw.com
CHRISTOPHER H MEYER MICHAEL P LAWRENCE GIVENS PURSELY LLP PO BOX 2720 BOISE ID 83701	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: chrismeyer@givenspursley.com michaellawrence@givenspursley.com
ALBERT P BARKER BARKER ROSHOLT & SIMPSON LLP PO BOX 2139 BOISE ID 83701-2139	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: apb@idahowaters.com

LAURENCE J LUCAS BRYAN HURLBUTT ADVOCATES FOR THE WEST, INC PO BOX 1342 BOISE ID 83701	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: llucas@advocateswest.org bhurlbutt@advocateswest.org
CHARLES F MCDEVITT CHAS MCDEVITT LAW PO BOX 1543 BOISE ID 83701	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: chas@mcdevitt.org


MICHAEL C. ORR

RECEIVED

JUL 20 2020

WATER RESOURCES
WESTERN REGION

LAWRENCE G. WASDEN
Attorney General
DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division
MICHAEL C. ORR (ISB #6720)
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
michael.orr@ag.idaho.gov
Telephone: 208-334-4154
Facsimile: 208-854-8072

Attorneys for the Idaho Department of Fish & Game

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 63-34616 IN THE)
NAME OF MICRON TECHNOLOGY,)
INC.)
_____)

DECLARATION OF
MICHAEL C. ORR

I, MICHAEL C. ORR, declare:

1. I am an attorney licensed to practice in the State of Idaho and am in good standing with the Idaho State Bar. I am an attorney of record for the Idaho Department of Fish and Game ("IDFG") in the above-captioned matter. The following facts are personally known to me, and if called as a witness I would and could truthfully testify thereto. I make this declaration under Idaho Code Section 9-1406.

2. Attached hereto as **Exhibit 1** is a copy of the amended partial decree for water right no. 63-3618 issued in the Snake River Basin Adjudication ("SRBA") on July 19, 2019, which I downloaded from the SRBA website,
<http://www.srba.state.id.us/SRBA1.HTM>;

3. Attached hereto as **Exhibit 2** is a copy of a Memorandum from Matt Anders, IDWR Hydrology Section Supervisor, to Mat Weaver, IDWR Deputy Director, dated February 27, 2020, regarding *Implementation of the Refill Stipulated Agreement in the Boise Water Right Accounting*, that was provided to me by IDWR staff;

4. Attached hereto as **Exhibit 3** is a copy of the partial decree for water right no. 63-33734A issued in the SRBA on July 19, 2019, which I downloaded from the SRBA website, <http://www.srba.state.id.us/SRBA1.HTM>;

5. Attached hereto as **Exhibit 4** is a copy of the partial decree for water right no. 63-33734B issued in the SRBA on July 19, 2019, which I downloaded from the SRBA website, <http://www.srba.state.id.us/SRBA1.HTM>;

6. Attached hereto as **Exhibit 5** is a copy of the *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim* issued in SRBA subcase no. 63-3618 on September 23, 2008, which I downloaded from the SRBA website, <http://www.srba.state.id.us/SRBA1.HTM>;

7. Attached hereto as **Exhibit 6** is a copy of a joint letter from Bryan Horsburgh, Deputy Area Manager, Snake River Office, Pacific Northwest Region, United States DOI Bureau of Reclamation, and Brad Compton, Regional Supervisor, IDFG Southwest Region, to Rob Whitney, Water Distribution Section Manager, Idaho Department of Water Resources, dated September 10, 2019, that was provided to me by IDFG staff.

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

Executed this 17th day of July, 2020.


MICHAEL C. ORR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 17th day of July 2020, I caused the original of the foregoing to be filed with the Idaho Department of Water Resources, and copies to be served upon the following, in the manner listed below:

1. Original to:

NICK MILLER IDAHO DEPARTMENT OF WATER RESOURCES WESTERN REGIONAL OFFICE 2735 WEST AIRPORT WAY BOISE ID 83705-15082	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: 208-334-2348 <input checked="" type="checkbox"/> Email: nick.miller@idwr.idaho.gov
-----------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

2. Copies to the following:

KEVIN J BEATON STOEL RIVES LLP 101 SOUTH CAPITOL BLVD, STE 1900 BOISE ID 83702-7705	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: kevin.beaton@stoel.com
S BRYCE FARRIS SAWTOOTH LAW OFFICES, PLLC PO BOX 7985 BOISE ID 83707	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: bryce@sawtoothlaw.com
CHRISTOPHER H MEYER MICHAEL P LAWRENCE GIVENS PURSELY LLP PO BOX 2720 BOISE ID 83701	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: chrismeyer@givenspursley.com michaellawrence@givenspursley.com
ALBERT P BARKER BARKER ROSHOLT & SIMPSON LLP PO BOX 2139 BOISE ID 83701-2139	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: apb@idahowaters.com

LAURENCE J LUCAS BRYAN HURLBUTT ADVOCATES FOR THE WEST, INC PO BOX 1342 BOISE ID 83701	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: llucas@advocateswest.org bhurlbutt@advocateswest.org
CHARLES F MCDEVITT CHAS MCDEVITT LAW PO BOX 1543 BOISE ID 83701	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: chas@mcdevitt.org


 MICHAEL C. ORR

EXHIBIT 1

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

AMENDED

In Re SRBA

Case No. 39576

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 63-03618

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

JUL 19 2019

NAME AND ADDRESS:

UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PM CODE-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

SOURCE:

BOISE RIVER TRIBUTARY: SNAKE RIVER

QUANTITY:

293050.00 AFY

Maximum Volume Annually Diverted to Storage and Release from
Storage: 293,050.0 AF.
The reservoir storage capacity is 293,050 acre feet when filled
to elevation 3055.0 and measured at the upstream face of the
dam.

Lucky Peak Reservoir has 13,950 acre feet of capacity for flood
control purposes in addition to the volume of water authorized
for storage under this right.

Water right nos. 63-303, 63-3613, 63-3614, 63-3618, 63-33734A,
and 63-33734B are limited to the total combined annual diversion
volume necessary to allocate a total of 1,044,011 acre-feet of
storage water per year to the consumers or users of the storage
water.

PRIORITY DATE:

04/12/1963

POINT OF DIVERSION:

T02N R03E S11 LOT 7 (SENE) Within Ada County

PURPOSE AND

PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	111950.00 AFY
Irrigation from Storage	03-01 TO 11-15	111950.00 AFY
Recreation Storage	01-01 TO 12-31	28800.00 AFY
Streamflow Maintenance Storage	01-01 TO 12-31	152300.00 AFY
Streamflow Maintenance from Sto	01-01 TO 12-31	152300.00 AFY

PLACE OF USE:

PLACE OF USE:	Within Ada County
Irrigation from Storage	
T02N R03E S11 LOT 4 (NENE)	NENE
S12 (NWNW)	SWSW
R04E S04 (SWSW)	
S05 LOT 8 (SWNE)	LOT 6 (SWNW)
NESE	NWSE
SWSE	SESE
S06 (SWNE)	NESW
LOT 8 (SWSW)	LOT 9 (SESW)
LOT 6 (NESE)	NWSE
LOT 11 (SESE)	
S07 (NWNW)	SWNE
LOT 1 (NENW)	SESW
NESW	LOT 4 (NWSW)
NWSE	
	Within Boise County
T03N R04E S05 (SENE)	
S11 (SENE)	LOT 1 (NESE)
S12 (SWNW)	LOT 1 (NWSW)
	Within Elmore County
S22 LOT 3 (NENW)	SWNW
SESW	

PLACE OF USE (continued)

S12 LOT 1 (NWNE)	Within Ada County
LOT 5 (NWSE)	SWNE
	LOT 10 (SWSE)
Recreation Storage	Within Ada County
Same as Irrigation Storage	
Streamflow Maintenance Storage	Within Ada County
Same as Irrigation Storage	
Irrigation Storage	Within Ada County
Lucky Peak Reservoir	
Streamflow Maintenance from Storage	Within Ada County
Within the Channel of the Boise River from Lucky Peak Dam	
downstream to the confluence with the Snake River.	
The place of use is within the Boise Federal Reclamation Project	
within Ada, Canyon, Payette, and Gem Counties, Idaho; Malheur	
County, Oregon; and the above-listed tracks in Ada, Boise, and	
Elmore Counties, Idaho.	

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

Recreation Storage (inactive storage) shall not be released from storage for a beneficial use.

The name of the United States of America Acting Through the Bureau of Reclamation appears in the Name and Address Section 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 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.

The storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations. The Bureau of Reclamation and Idaho Department of Fish and Game shall provide joint written instructions to the Department, for conveyance to the watermaster, regarding release of the Lucky Peak streamflow maintenance storage water.

The annual time period for accruing natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources; provided, however, the annual time period will begin (1) after the day of allocation and when there is no natural flow available to water rights junior in priority to January 12, 1911, and (2) before natural flow has again become available to water rights junior in priority to January 12, 1911, or on November 1, whichever is earlier.

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

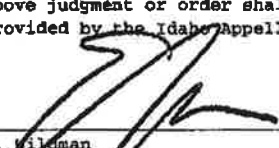
SRBA -Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

OTHER PROVISIONS (continued)

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.



Eric J. Wilman
Presiding Judge of the
Snake River Basin Adjudication

EXHIBIT 2

MEMO

State of Idaho
Department of Water Resources
322 E Front Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700

Date: 2/27/2020

To: Mat Weaver, Deputy Director

From: Matt Anders, Hydrology Section Supervisor *MA*

cc: Garrick Baxter, Deputy Attorney General
Sean Vincent, Hydrology Section Manager

Subject: Implementation of the Refill Stipulated Agreement in the Boise Water Right Accounting

Introduction

The contested case titled "*In the Matter of the Accounting for the Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*" ("Refill") was initiated in 2013 and settled through a stipulated agreement in 2019. The agreement included several stipulations related to the Idaho Department of Water Resources ("IDWR") Boise Water Right Accounting Program ("water right accounting"). The purpose of this memo is to document IDWR's proposed implementation of the stipulations included in the agreement related to water right accounting.

Background

Water Right Accounting

Water right accounting is a computational program that the Water District 63 ("WD63") Watermaster ("Watermaster") uses to (1) quantify the natural flow available for delivery to water rights, (2) track natural flow and storage use, and (3) determine the water right priority in each reach of the Boise River. The water right accounting is run after-the-fact. It distributes natural flow to water rights using a daily iterative loop and generates a daily record.

When executed, the water right accounting calculates the amount of natural flow that is available to satisfy water rights in each reach of the river. A river reach is defined as a river segment within a basin that has beginning and ending points that are measured or calculated. Natural flow is a calculated value of the water available in a given river reach expressed in cubic feet per second ("cfs"). If the calculated value is positive, the natural flow is said to be a "gain." If the calculated value is negative, the natural flow is said to be a "loss." The reach gain calculation is equal to the reach outflow minus the reach inflow, plus all reach diversions, plus the change in reservoir content, plus reservoir evaporation.

Reach Gain = Outflow – Inflow + Σ (Diversions) + Δ Reservoir Content + Reservoir Evaporation

Following the calculation of available natural flow in each reach, the water right accounting executes a water right accrual routine ("accrual routine") to determine the amount of natural flow diverted by each diversion. Natural flow delivery to diversions is based on the Prior Appropriation Doctrine. The priority date of a water right indicates when the water right was first developed and its relative delivery sequence when compared to other water rights. An earlier (or senior) priority water right is delivered natural flow ahead of a later (or junior) priority water right when the natural flow is insufficient to fill all water rights in a reach.

To determine the priority sequence of delivery, the accrual routine relies on a master water right list ("RTS") as an input file to the water right accounting. Water rights are generally arranged on the RTS by priority date with the most senior water right at the top of the list and the most junior at the bottom. When a new water right is added to the RTS, IDWR staff carefully review all of the elements of the water right, all conditions, and appurtenant stipulations to ensure the Watermaster administers the water right consistent with the requirements of the water right. Following a careful review, IDWR staff modify the RTS to include the new water right. Sometimes, depending on the elements of a water right, a water right can be placed in the RTS based on its effective priority date and not on its actual priority date.¹

When the accrual routine is executed, the first water right from the RTS is selected. Depending on how much natural flow is available in the river reach in which the water right point of diversion resides, the accrual routine will accrue a flow rate up to the diversion limits of the water right and subtract that accrual from the remaining natural flow available in that reach and all downstream reaches. The accrual routine then selects the next right from the RTS and implements the accrual process again. The accrual routine continues until either all the water rights on the list are satisfied, or the remaining natural flow in the most downstream reach of the river (the Middleton reach for the Boise River) is equal to zero. When the natural flow is insufficient to meet the entire amount of water diverted at a diversion, the diversion is charged storage in an amount equal to the difference between the natural flow available and the actual flow diverted. Any remaining natural flow in the Middleton reach of the river is considered unused water leaving the system that is available for appropriation.

The Day of Allocation occurs on the day when the reservoir fill available for spaceholders' allocations has reached its maximum. IDWR staff and the Watermaster currently use three criteria to determine the Day of Allocation for the Boise basin: 1) the remaining natural flow in the Middleton reach is zero, 2) the maximum physical contents of the reservoir system for the irrigation season has occurred, and 3) the last day of accrual to unfilled reservoir rights following the peak runoff has occurred. Reservoir water rights are out of priority after the Day of Allocation until later in the irrigation season when user demand decreases and the water right accrual values in accounting are reset to zero.

Flood Control Operations

The reservoir system is generally operated throughout the year to store as much water as possible. The exception to this general rule is the release of water from the reservoirs for flood control. Flood control releases are reservoir operations whereby stored water is evacuated from

¹ As an example, a hydro power water right could be licensed or decreed with a specific priority date, but subordinated through a condition or remark to all future non-hydro power water rights. In this instance, the hydro power water right's effective priority date would likely be junior to its actual priority date. In addition, the effective priority date changes every time a new junior non-hydro power water right is subsequently added to the water right accounting to ensure that it remains subordinate to "future uses."

a reservoir before and during peak inflows. These releases allow the reservoir to maintain adequate vacant space to capture water during peak inflows and to release less water from the reservoir than is entering the reservoir to prevent or lessen downstream flooding.

The United States Bureau of Reclamation ("Reclamation") and Army Corps of Engineers ("Corps") jointly operate the Arrowrock, Anderson Ranch, and Lucky Peak dams as a system to manage flood control and water storage needs. The Reclamation and Corps do not rely on the water right accounting to determine or inform their reservoir operations.

The refill water rights, which are the subject of this technical memo, were established to authorize the legal storage of water in the reservoirs during and after flood control releases when the primary reservoir water rights are satisfied. They will be discussed in greater detail below.

Implementation of the Refill Water Rights Stipulated Conditions

The following sections focus on how IDWR proposes to update water right accounting to implement the stipulated agreement. The primary intent of this technical memo is to sufficiently describe and detail the proposed changes to water right accounting such that the signatories to the stipulation and all water users in Water District 63 can evaluate the proposed changes and submit written feedback to IDWR if needed.

Stipulation Paragraph 16

Stipulation 16 on page 8 of the stipulated agreement reads as follows:

The Parties stipulate and agree that upon issuance of the partial decrees for water right nos. 63-33734A and 63-33734B, the Department will update the Water District 63 water right accounting system to account for the distribution of water to water right nos. 63-33734A and 63-33734B consistent with their partial decrees. The Department will provide the Parties, the Water District 63 Advisory Committee, the Water District 63 Watermaster, and all water right holders in Water District 63 with notice of, and an opportunity to submit comments on, the proposed updates to the accounting system. Any aggrieved Parties may request a contested case on these matters, but such a contested case will be limited to preclude raising any issues raised or addressed in the Contested Case that was the subject of the judicial review proceedings in Case No. CV-WA-2015- 21376 (Consolidated Ada County Case No.CV-WA-2015-21391).

IDWR added water rights 63-33734A ("Refill 1") & 63-33734B ("Refill 2") to the RTS used in water right accounting to satisfy this stipulation. The priority date and subordination clauses of the Refill 1 water right (see Attachment A) resulted in its sequential placement in the RTS as water right number 954. Refill 1's sequential location makes it the most junior water right in water right accounting (see Attachment G). The priority date and subordination clauses of the Refill 2 water right (see Attachment B) resulted in its sequential placement in the RTS as water right number 949. Refill 2's sequential location makes it the sixth most junior water right in water right accounting (see Attachment G). The sequential locations of the Refill 1 and 2 water rights in the RTS may change over time as new water rights are established on the Boise River and added to the water right list.

The Refill 2 water right has a provision stating that the Watermaster will only allow it to accrue water when he has received notice in writing from Reclamation that it intends to store water pursuant to the Refill 2 water right (see Attachment B). The ability to "turn on" the accrual of water to the Refill 2 water right, and subsequently "turn off" accrual to the water right, is unique to all other storage water rights in WD63. This provision is informally referred to as the "on/off switch." To implement the on/off switch provision, IDWR updated the water right accounting in two ways. First, IDWR added a new artificial diversion with the number "15201505" to the IDWR Watermaster Data Entry Software

(<https://idwr.idaho.gov/apps/wm/DiversionDataApplication>). This data entry software is used by watermasters throughout Idaho to enter water user diversion data. While the general public can view the data, only water district staff authorized by IDWR can enter data into the application. The Watermaster will enter a "1" in diversion "15201505" for each day of the year that the Refill 2 water right is authorized to accrue natural flow and a "0" for each day the Refill 2 water right is not authorized to accrue natural flow. IDWR selected this method because it creates a historical record of accrual to Refill 2 that can be viewed by the public in near-real-time. Second, to implement the new on/off switch provision, IDWR added new code to water right accounting (see Attachment C). The new code was added to the accrual routine to determine each day if the accrual of natural flow to the Refill 2 water right is authorized by the Watermaster. If the Watermaster has authorized accrual to Refill 2, all available natural flow in the reach is accrued to the water right until or unless its volume limit has been satisfied. If the Watermaster has not authorized diversions, the diversion rate for the Refill 2 water right is set to zero cfs for that accounting day.

Staff in IDWR's Hydrology Section tested the updates made to water right accounting to implement the Refill 1 and 2 water rights using data from the 2017 water year. The Refill 1 water right came into priority and began accruing natural flow after all the primary reservoir water rights were satisfied, and all natural flow demand was satisfied. The Refill 2 water right accrued water when it was in priority and authorized by the Watermaster to do so. Based on the testing results, IDWR concludes that its updates to water right accounting have produced the intended results.

Adding the Refill 1 and 2 water rights to water right accounting impacts the remaining natural flow below Lucky Peak Reservoir. When the Refill 1 and 2 water rights are in priority they accrue all available natural flow at Lucky Peak Dam. It is important to note that the accrual of water to the refill water rights does not necessarily mean that the accrued water is physically stored in the reservoirs. It will often be the case that water accrued to the refill water rights will physically flow through or be released from the reservoirs during times of accrual. As a result, accruals to the refill water rights will reduce the remaining natural flow available to satisfy water rights in reaches downstream of Lucky Peak Reservoir and increase the stored flow in the reaches downstream of Lucky Peak Reservoir (see Attachment D). The only natural flow available to satisfy junior water rights in reaches downstream of Lucky Peak Reservoir is the reach gains from those reaches. The addition of the Refill 1 and 2 water rights does not change the amount of water in the Middleton reach available for appropriation. The stored flow in the Middleton reach in excess of deliveries to existing water right holders is considered unused water leaving the system that is available for appropriation.

Adding the refill water rights to water right accounting impacts one of the criteria used to determine the Day of Allocation. Because the refill water rights do not have diversion rate limits, their addition to the water right accounting causes the remaining natural flow in the Middleton reach to equal zero cfs any time natural flow demand below Lucky Peak Reservoir exceeds the reach gains below Lucky Peak Reservoir. As a result, the remaining natural flow at Middleton is

no longer a useful criterion to determine the Day of Allocation. Moving forward, IDWR and the Watermaster will rely on only two criteria to determine the day of allocation. The Day of Allocation will be determined to have occurred when (1) the reservoir system has reached maximum physical contents for the irrigation season, and (2) the last day of accrual to unfilled reservoir rights following the peak runoff has occurred.

In compliance with this stipulation, IDWR has noticed water users of the proposed updates to water right accounting. IDWR presented the proposed water right accounting updates at the Water District 63 Advisory Committee Meeting on December 11, 2019, and the Water District 63 Annual Meeting on January 13, 2020. IDWR prepared this technical memo describing the proposed updates to water right accounting. IDWR will post this memo on its website and send it to the Watermaster, WD63 Advisory Committee, and each signatory of the stipulated agreement.

Consistent with this stipulation, WD63 water users can submit written comments regarding the proposed refill water right updates to water right accounting to IDWR in the manner described in the cover letter that will accompany the distribution of this technical memo. IDWR will try to respond to all comments in the form of a letter before implementing the new updates in the water right accounting.

Stipulation Paragraph 17

Stipulation 17 on page 8 of the stipulated agreement reads as follows:

For all future material modifications of the Water District 63 water right accounting system IDWR will provide notice and an opportunity to comment on the change(s). Any party aggrieved by the Director's action in making a material modification has the right to request a contested case in accordance with Idaho Code § 42-1701A and the provisions and standards set forth in chapter 52, title 67, Idaho Code.

IDWR will provide notice to WD63 water users of future proposed material modifications to the water right accounting to fulfill this stipulation. IDWR interprets "material modification" to be programming code changes to the water right accrual routine. Updates that do not change this routine (e.g., adding water rights, adding diversions, modifying the report, etc.) are not considered "material modifications." IDWR will prepare a technical memo describing future proposed material modifications to water right accounting and post it on the IDWR website. IDWR will also give a presentation describing future proposed material modifications at the WD63 Annual Meeting. IDWR will consider additional outreach surrounding future changes to the water right accounting as requested by WD63 water users.

WD63 water users are encouraged to review future modifications and submit comments to IDWR as needed. IDWR will try to respond to all comments in the form of a letter before implementing future updates into water right accounting.

Stipulation Paragraph 18

Stipulation 18 on page 8 of the stipulated agreement reads as follows:

The Parties stipulate and agree that the Department will update the Water District 63 water right accounting system to account for the distribution of water pursuant to

conditions on water rights authorizing diversions when the Boise River below Lucky Peak Dam is "on flood release."

In fulfillment of this stipulation, IDWR has identified all water rights that it is aware of with conditions related to flood control releases. To accomplish this task, IDWR queried its water right database to find water rights containing conditions related to flood control releases. The query was designed to exclude shoulder season conditions (see Attachment E). Shoulder season conditions allow a water right to divert water before April 1 or after October 31. Shoulder season conditions usually are not included in water right accounting and instead are regulated directly by the Watermaster. IDWR's query identified fifteen water rights with conditions related to flood control releases. These water rights are summarized in Attachment F. Water rights 63-31869 and 63-149 were not added to the water right accounting because their decreed uses are aesthetic or wildlife. Water rights with non-consumptive uses such as these are usually not included in the water right accounting. Water rights 63-32911 and 63-34334 are recently approved water rights that have not yet been added to water right accounting. When they are added, their elements and conditions will be reviewed and the water right accounting will be updated if necessary to implement the conditions related to flood control releases. Water right 63-20041 was not added to the water right accounting because the condition related to flood control releases is a shoulder season condition. Water right 63-34348 is a recently approved water right permit. When the water user installs the diversion works and begins diverting water, the elements and conditions of the water right will be reviewed and water right accounting will be updated if necessary to implement the conditions related to flood control releases.

Some water rights have a condition requiring watermaster authorization to divert flood control releases. IDWR developed a process for the watermaster to authorize these water rights to fulfill this stipulation. This process included adding a new artificial diversion with the number "15201501" to the IDWR Watermaster Data Entry Software (<https://idwr.idaho.gov/apps/wm/DiversionDataApplication>). The Watermaster will enter a "1" in diversion "15201501" for each day of the year that flood control releases are occurring and these water rights are authorized, and a "0" for each day of the year that flood control releases are not occurring. IDWR selected this method because it creates a historical record of the number of days that water rights with flood control diversion conditions that require authorization by the Watermaster diverted water that can be viewed by the public in near-real-time.

In fulfillment of this stipulation, IDWR has developed a method to "flag" water rights in the water right list that have conditions related to flood control releases. The RTS contains multiple fields (see Attachment G) describing different elements of a water right. The "Variable Right Field" is used to "flag" water rights for special calculations in water right accounting. IDWR has added administered water rights with conditions related to flood control releases to the water right list and it has populated the "Variable Right Field" with a number between 900 and 908 to indicate the specific type of flood control condition(s) on the water right.

IDWR added new code to the water right accounting program to implement the specific flood control condition(s) on water rights to fulfill this stipulation (see Attachment C). Programming code was added to the accrual routine that determines if a water right has a value between 900 and 908 in the "Variable Right Field." If the programming code detects a value between 900 and 908, it determines if the specific condition(s) on the water right related to flood control releases have been met. If the condition(s) have been met, the accrual routine accrues natural flow to the water right up to its diversion rate. If not, the water right diversion rate is set to zero cfs for that accounting day.

Staff in IDWR's Hydrology Section tested the updates made to water right accounting to implement the accrual of water to water rights that have conditions related to flood control releases using input data from the 2017 and 2018 water years. For the 2017 water year, implementation of the new code resulted in the "Surprise Valley/Micron" diversion diverting 30 acre-feet more natural flow, and subsequently being charged 30 acre-feet less storage use. This outcome was the result of the incorrect handling of this water right by prior versions of the accounting program. No other water rights with conditions related to flood control releases were affected because they were either not exercised in 2017 or they never came into priority. Similarly, in 2018, no water rights with limiting flood control conditions were affected because, again the water rights were either not exercised, or they never came into priority.

IDWR staff tested the updates related to the administration of water rights with flood control release conditions using input data from the 2018 water year that had artificially increased and decreased flow rates for the river and diversions. The testing results allow IDWR staff to conclude the updated water right accounting is functioning as intended. The new Watermaster authorization procedure allows/limits diversion of natural flow by water rights bearing flood control release limitations. As expected, water users can divert natural flow up to the total diversion rate of their water rights, including water rights with conditions related to flood control releases, but are charged storage for their diversion amounts that exceed their water right diversion limits. Based on its analysis, IDWR staff conclude that the updates do not adversely impact other parts of the water right allocation routine.

Attachment A – Refill 1 Partial Decree

RECEIVED

JUL 22 2019

DEPARTMENT
WATER RESOURCES

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

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

JUL 19 2019

In Re SRBA

PARTIAL DECREE PURSUANT TO
F.R.C.P. 54(b) FOR

Case No. 39576

Water Right 63-337349

By

Clerk

NAME AND ADDRESS

UNITED STATES OF AMERICA ACTING THROUGH
BUREAU OF RECLAMATION
REGIONAL DIRECTOR (N CONDE-1100)
1150 N CLINTON RD STE 100
BOISE ID 83706-1234

SOURCE

BOISE RIVER

TRIBUTARY: SNAKE RIVER

QUANTITY

3,672,732.00 AFY

Water right nos. 63-33734A, 63-303, 63-3613, 63-3614, 63-3618, and 63-33734B are limited to the total combined annual diversion volume necessary to allocate a total of 1,044,011 acre-feet of storage water per year to the consumers or users of the storage water.

PRIORITY DATE

9/30/1965

This water right is subordinate to all water rights established pursuant to Idaho law for uses within the IDWR Administrative Basin 63, except water rights to store more than 1,000 acre feet of surface water permitted or licensed after April 15, 2019. This water right shall not be administered as subordinate to water rights permitted or licensed for managed ground water recharge after April 15, 2019, or any water rights for the storage or use of water for power purposes.

POINT OF
DIVERSION

TWIN FALLS SITE 7 Within Ada County

PURPOSES AND
PERIOD OF USE

PURPOSE OF USE

PERIOD OF USE

QUANTITY

IRRIGATION STORAGE

01/01 12/31

3,672,732.00 AFY

MUNICIPAL/INDUSTRIAL
STORAGE

01/01 12/31

3,672,732.00 AFY

STREAMFLOW MAINTENANCE
STORAGE

01/01 12/31

3,672,732.00 AFY

Water accruing to this water right supplements water accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618. Water physically stored in any Boise River Reservoir under this water right on the day of allocation will be allocated for storage and uses as provided in the contracts entered into between the United States and federal contractors referenced in paragraph 2 below as if it had accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.

SRBA PARTIAL DECREE PURSUANT TO F.R.C.P. 54(b)
Water Right 63-33734A

Page 1

PLACE OF USE:

Place of use is on those lands identified under water right nos. 63-303, 63-3613, 63-5014, and 63-3618.

Water accruing under this right may be stored in Lucky Peak, Arrowrock, or Anderson Ranch Reservoirs, so long as the water is tributary to that reservoir, when determined by the United States and the Water District 63 Watermaster as supervised by the Director of the Department of Water Resources that such storage will maximize the storage of water in the three reservoirs.

(OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT)

1. 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 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.
2. The allocation of storage to federal contractors and the location of that storage, including carryover storage, in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs shall be determined by the United States Bureau of Reclamation pursuant to federal reclamation law and contracts entered into between the United States and federal contractors; provided, however, in the event flood control operations result in irrigation entities with contracts for space in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs having less storage than they would otherwise, then the first 60,000 acre-feet of any shortfalls caused by flood control operations will come from uncontracted space in Lucky Peak Reservoir used for streamflow maintenance purposes. The Water District 63 Watermaster (as supervised by the Director of the Department of Water Resources) shall distribute stored water in accordance with the allocation instructions from the United States Bureau of Reclamation.
3. The storage rights in Lucky Peak Reservoir, which consist of water right nos. 63-3618, 63-33734A, and 63-33746A, are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations.
4. This partial decree is subject to such general provisions necessary for the definition of the rights in for the efficient administration of the water rights as determined by the Court upon entry of a final unified decree as it may be amended. Section 42-1412(6), Idaho Code.
5. The exercise and administration of this water right is subject to the terms and conditions of the stipulation effective September 13, 2016, which is incorporated herein by reference.
6. The annual time period for accruing natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources; provided, however, the annual time period will begin (1) day after the day of allocation and when there is no natural flow available to water rights junior in priority to January 12, 1911, and (2) before natural flow has again become available to water rights junior in priority to January 12, 1911, or on November 1, whichever is earlier.
7. Nothing in this water right shall change the legal effect of the condition on certain water rights regarding limiting those water rights to diverting water when the Snake River is in flood release below Lucky Peak.
8. This decree does not alter, amend, or modify the agreements entered into between the various landward contractors and the United States Bureau of Reclamation, as amended.

RULE 54(b) CERTIFICATION

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 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.


Eric J. Wilkman
Presiding Judge of the
Snake River Basin Adjudication

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 07-07-2014 BY 60322

14712001

Attachment B – Refill 2 Partial Decree

RECEIVED

JUL 22 2019

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



In Re SRBA

Case No. 19576

PARTIAL DECREE PURSUANT TO
D.R.C.P. 54/61 FOR

Water Right #1-357416

NAME AND ADDRESS:

UNITED STATES OF AMERICA ACTING THROUGH
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PM CODE 3100
1140 N CURTIS RD STE. 100
BOISE ID 83706-1234

SOURCE:

BOISE RIVER

TRIBUTARY: SNARK RIVER

QUANTITY:

587,056 AFDY

Water right nos. #1-357416, #1-357417, #1-357418, #1-357419, #1-357420, and #1-357421 are limited to the total scheduled annual diversion volume necessary to allocate a total of 1,044,011 acre-feet of storage water per year to the compliance or users of the storage water.

The water right may be exercised only to replace water released for flood control purposes, as determined by the Water District #3 Watermaster, supervised by the Director of the Department of Water Resources. In determining the timing, duration, and magnitude of flood control releases for the purpose of administering this water right and distributing natural flow in accordance with state law, the Watermaster as supervised by the Director will consider, but will not be bound by, the November 20 1953, "Memorandum of Agreement Between the Department of the Army and the Department of the Interior for Flood Control Operation of Hager River Reservoirs, Idaho" (hereinafter "MOA") and the 1985 "Memorandum of Understanding for Confirmation, Ratification, and Adoption of the Water Control Manual-Boise River Reservoirs, Boise, Idaho" (hereinafter "Manual"). The Watermaster as supervised by the Director may also consider, but will not be bound by, the United States' determinations of the purposes for which water is being released from Lucky Peak Dam. The Watermaster as supervised by the Director may also consider any other information the Director deems relevant.

The Watermaster's determinations, as supervised by the Director, of the timing, duration, and magnitude of flood control releases shall not affect or limit the United States' determinations, authority, or discretion under federal law for purposes of operating its reservoir for flood control purposes in accordance with the 1946 Flood Control Act, 60 Stat 841, as amended or supplemented, and the MOA and Manual as they may be revised pursuant to the foregoing law.

Water will not accrue towards the satisfaction of this water right until the United States of America, acting through the Bureau of Reclamation, has notified the Water District #3 Watermaster of the calendar date on which it intends to store water pursuant to this water right. Following initial notification, the United States will provide notification directing the Water District #3 Watermaster to stop and start the accrual of water pursuant to this water right, until the water right has been satisfied. All notifications must be made in writing. Each notification must identify the

specific calendar date on which administrative action should occur. The identical sentence shall cannot provide the date of the written notification.

PRIORITY DATE: 7/16/1973

POINT OF DIVERSION: TURTLE ROCK Silt STONE Dam 7 William Adams County

PURPOSES AND PERIOD OF USE:	PURPOSE OF USE:	PERIOD OF USE:	QUANTITY:
	IRRIGATION STORAGE	01/01-7/31	587,036.00 AFY
	MUNICIPAL/INDUSTRIAL STORAGE	01/01-7/31	587,036.00 AFY
	STREAMFLOW MAINTENANCE STORAGE	01/01-7/31	587,036.00 AFY

Water accruing to this water right supplements water accrued under water right nos. 63-303, 63-3613, 63-3614, 63-3618. Water physically stored in any Bannock River Reservoir under this water right on the day of allocation will be allocated for storage and use as provided in contracts entered into between the United States and federal contractors referenced in paragraph 2 below as if it had accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.

PLACE OF USE: Place of use is on down lands identified under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.

Water accruing under this right may be stored in Lucky Peak, Arrowrock, or Anderson Ranch Reservoirs, so long as the water is tributary to that reservoir, when determined by the United States and the Water District 63 Watermaster as supervised by the Director of the Department of Water Resources that such storage will maximize the storage of water in the three reservoirs.

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

1. 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 within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contract between the Bureau of Reclamation and the irrigation organizations.
2. The allocation of storage to federal contractors and the location of that storage, including carryover storage in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs shall be determined by the United States Bureau of Reclamation pursuant to federal reclamation law and contracts entered into between the United States and federal contractors; provided, however, in the event flood control operations result in irrigation entities with contracts for space in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs, having less storage than they would otherwise, then the first 60,000 acre-feet of any shortfalls caused by flood control operations will come from uncontracted space in Lucky Peak Reservoir used for streamflow maintenance purposes. The Water District 63 Watermaster as supervised by the Director of the Department of Water Resources shall distribute stored water in accordance with the allocation instructions from the United States Bureau of Reclamation.

3. The storage rights in Lucky Peak Reservoir, which consist of water rights nos. 63-3618, 63-33734A, and 63-33734B, are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations.
4. 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 determined by the Court upon entry of a final implied decree as it may be amended. Section 42-14 (2)(4) Idaho Code.
5. This water right is subordinate to the following water rights:
 - a. All surface water rights within IDWR Administrative Basin 63 with a priority date earlier than May 1, 2014, with a decreed or licensed diversion rate of less than 0.1 CPS;
 - b. All water rights listed on attachment A.
6. The exercise and administration of this water right is subject to the terms and conditions of the stipulation effective September 13, 2018, which is incorporated herein by reference.
7. The annual time period for acquiring natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources, provided however, the annual time period will begin (1) day after the day of allocation and when there is no natural flow available to water rights junior in priority to January 1, 1911, and (2) before natural flow has again become available to water rights junior in priority to January 1, 1911, or on November 1, whichever is earlier.
8. Nothing in this water right shall change the legal effect of the condition in certain water rights expressly limiting those water rights to diverting water when the Boise River is in flood (down below Lucky Peak).
9. This decree does not alter, amend, or modify the contracts entered into between the various federal contractors and the United States Bureau of Reclamation, as amended.

RULE 54(b) CERTIFICATION

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with rule 54(b) of the Idaho Rules of Civil Procedure, that the court has determined that there is no just reason for delay of the entry of a final judgment and 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.


Eric T. Williams
Presiding Judge of the
Snake River Basin Adjudication

Attachment C – Programming Code Updates

Code Update for Refill 2

BoiseAccountingModel.cs - Approximately Line 206

```
//Set activeRefill2 variable and zero Active Refill2 diversion
var activeRefill2 = diversions[13201505].LaggedFlow > 0.0;
diversions[13201505].LaggedFlow = 0; //cancel value
```

BoiseAccountingModel.cs - Approximately Line 814

```
//Set no Refill2 not authorized and set diversion rate to 0
if (!activeRefill2)
{
    wr.TemporaryDiversionRate = 0;
}
```

Code Update For Water Rights with Flood Control Conditions

BoiseAccountingModel.cs - Approximately Line 206

```
//Set activeFlood variable to flood condition and zero Active Flood diversion
var activeFlood = diversions[13201501].LaggedFlow > 0.0;
diversions[13201501].LaggedFlow = 0; //cancel value
```

BoiseAccountingModel.cs - Approximately Line 814

```
//Flood Control Water Rights - Set temporary water right to zero if conditions are not
satisfied. DJS 5/13/2016
```

```
//Instantiate flow variables required for flood conditional evaluation
var glnwdFlow = reaches.GetReachBySiteID(13210050).ReachInflow; //Glenwood gage. Flow at
Glenwood is the inflow to the Middleton Reach
```

```
var lpFlow = reaches.GetReachBySiteID(13203600).ReachInflow; //Lucky Peak flow is inflow
to the reach ending at 13203600 (Boise River blw Diversion Dam)
```

```
var parmaFlow = reaches.GetReachBySiteID(13213000).MeasuredDischarge; //Boise River at
Parma is reach outflow of reach ending at 13213000 (Boise River at Parma)
var usbrFlow = diversions[13201991].LaggedFlow; //USBR diversion
var idfgFlow = diversions[13201990].LaggedFlow; //IDFG diversion
var nycFlow = diversions[13203000].LaggedFlow; //New York Canal diversion
```

```
//10-31-19: MAnders - update flood condition code
var lpMinusNyc = lpFlow - nycFlow; // Lucky Peak minus New York Canal
//10-31-19: MAnders - end
```

```

//Evaluate flood control water right conditions with VariableRight indicator
switch (wr.VariableRight)
{
    case 900:
        if (!activeFlood)
        {
            //set water rights with flood control 900 = 0
            wr.TemporaryDiversionRate = 0;
        }
        break;

    case 901:
        if (glnwdFlow < 240)
        {
            //set water rights with flood control 901 = 0
            wr.TemporaryDiversionRate = 0;
        }
        break;

    case 902:
        if (usbrFlow + idfgFlow > 0)
        {
            //set water rights with flood control 902 = 0
            wr.TemporaryDiversionRate = 0;
        }
        break;

    case 903:
        if (usbrFlow + idfgFlow > 0 && usbrFlow + idfgFlow >= parmaFlow)
        {
            //set water rights with flood control 903 = 0
            wr.TemporaryDiversionRate = 0;
        }
        break;

    //10-31-19: MAnders - update flood condition code
    case 904:
        var fcDate4 = isLeap ? 290 : 289; // October 16
        var fcDate5 = isLeap ? 320 : 319; // November 15
        var fcDate6 = isLeap ? 76 : 75;   // March 16
        var fcDate7 = isLeap ? 106 : 105; // April 15

        if (laggedDay.DayOfYear >= fcDate4 && laggedDay.DayOfYear <= fcDate5 &&
lpMinusNyc <= 240)
        {
            wr.TemporaryDiversionRate = 0;
        }

        if (laggedDay.DayOfYear >= fcDate6 && laggedDay.DayOfYear <= fcDate7 &&
lpMinusNyc <= 1100)
        {
            wr.TemporaryDiversionRate = 0;
        }
        break;

    //10-31-19: MAnders - end

    case 908:

```

```

//10-31-19: MAnders - update flood condition code
//var lpMinusNyc = lpFlow - nycFlow; // Lucky Peak minus New York Canal
//10-31-19: MAnders - end

var fcDate1 = isLeap ? 61 : 60; //March 1
var fcDate2 = isLeap ? 122 : 121; //May 31
var fcDate3 = isLeap ? 168 : 167; //June 16

if (!activeFlood)
{
    wr.TemporaryDiversionRate = 0;
}
else
{
    if (laggedDay.DayOfYear >= fcDate1 && laggedDay.DayOfYear < fcDate2
    && lpMinusNyc < 1100) //flood condition 907 and 908)
    {
        wr.TemporaryDiversionRate = 0;
    }
    if (laggedDay.DayOfYear < fcDate1 && lpMinusNyc < 240 ||
    laggedDay.DayOfYear >= fcDate3 && lpMinusNyc < 240)
    {
        wr.TemporaryDiversionRate = 0;
    }
}
break;
}

```

**Attachment D – Example of the Change to Remaining Natural Flow and Stored Flow
Caused By Adding Refill 1 & 2 Water Rights to Water Right Accounting**

• **Existing Water Right Accounting**

WATER DISTRICT 63 - BOISE RIVER FLOW ACCOUNTING (VER NOT PUBLISHED-debug) - Apr 7, 2017												
REACH	ACTUAL	NATURAL	FLOW	ACTUAL	REMAINING	FLOW	NAT	FLOW	OPERATN	STORED	RESERVOIR	REACH
IN CFS	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE
1 TWIN SPRINGS	ADI 7	4720.	4720.	4720.	4720.	4720.	4720.	4720.	0.	0.	0.	4720.
2 FEATHERVILLE	ADI 7	2970.	2970.	2970.	2970.	2970.	2970.	2970.	0.	0.	0.	2970.
3 FTHRYL TO ANDERSEN RANCH	ADI 7	4421.	4421.	2830.	0.	0.	2830.	21.	4421.	0.	0.	19401209
4 ANDSEN RANCH TO ARROWROCK	ADI 7	10930.	8310.	6509.	0.	0.	1801.	10.	0.	0.	0.	19401209
5 MORES CREEK	ADI 7	1600.	1600.	1600.	1600.	1600.	1600.	11.	0.	0.	0.	19401209
6 ARROWROCK TO LUCKY PEAK	ADI 7	12329.	9080.	7908.	0.	0.	1172.	0.	1180.	1180.	0.	20051228
7 LUCKY PEAK TO DIVSN DAM	ADI 7	12329.	7908.	6728.	0.	0.	1172.	0.	1180.	1180.	0.	20051228
8 DIVSN DAM TO BOISE	ADI 7	12329.	7718.	6547.	0.	0.	1172.	0.	182.	182.	0.	20051228
9 BOISE TO GLENWOOD BR	ADI 7	12544.	7880.	6708.	0.	0.	1172.	0.	53.	53.	215.	20051228
10 GLENWOOD BR TO MIDDLETN	ADI 7	12754.	7990.	6568.	250.	250.	1172.	0.	100.	100.	210.	20051228
11 MIDDLETON TO CALDWELL	ADI 7	13086.	8091.	6870.	50.	50.	1172.	0.	231.	231.	332.	20051228
12 CALDWELL TO NOTUS	ADI 7	13342.	8347.	7126.	50.	50.	1172.	0.	0.	0.	256.	20051228
13 NOTUS TO PARMA	ADI 7	13535.	8540.	7368.	0.	0.	1172.	0.	0.	0.	0.	20051228

• **Water Accounting With Refill 1 & 2 – Remaining Natural Flow is reduced and Stored Flow is increased.**

WATER DISTRICT 63 - BOISE RIVER FLOW ACCOUNTING (VER NOT PUBLISHED-debug) - Apr 7, 2017												
REACH	ACTUAL	NATURAL	FLOW	ACTUAL	REMAINING	FLOW	NAT	FLOW	OPERATN	STORED	RESERVOIR	REACH
IN CFS	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE
1 TWIN SPRINGS	ADI 7	4720.	4720.	4720.	4720.	4720.	4720.	4720.	0.	0.	0.	4720.
2 FEATHERVILLE	ADI 7	2970.	2970.	2970.	2970.	2970.	2970.	2970.	0.	0.	0.	2970.
3 FTHRYL TO ANDERSEN RANCH	ADI 7	4421.	4421.	2830.	0.	0.	2830.	21.	4421.	0.	0.	19401209
4 ANDSEN RANCH TO ARROWROCK	ADI 7	10930.	8310.	6509.	0.	0.	1801.	10.	0.	0.	0.	19401209
5 MORES CREEK	ADI 7	1600.	1600.	1600.	1600.	1600.	1600.	11.	0.	0.	0.	19401209
6 ARROWROCK TO LUCKY PEAK	ADI 7	12329.	9080.	7908.	0.	0.	1172.	0.	1180.	1180.	0.	20051228
7 LUCKY PEAK TO DIVSN DAM	ADI 7	12329.	7908.	6728.	0.	0.	1172.	0.	182.	182.	0.	20051228
8 DIVSN DAM TO BOISE	ADI 7	12329.	7718.	6547.	0.	0.	1180.	0.	53.	53.	215.	20051228
9 BOISE TO GLENWOOD BR	ADI 7	12544.	7880.	6708.	250.	250.	1180.	0.	100.	100.	210.	20051228
10 GLENWOOD BR TO MIDDLETN	ADI 7	12754.	7990.	6568.	50.	50.	1180.	0.	231.	231.	332.	20051228
11 MIDDLETON TO CALDWELL	ADI 7	13086.	8091.	6870.	50.	50.	1180.	0.	0.	0.	256.	20051228
12 CALDWELL TO NOTUS	ADI 7	13342.	8347.	7126.	0.	0.	1180.	0.	0.	0.	193.	20051228
13 NOTUS TO PARMA	ADI 7	13535.	8540.	7368.	0.	0.	1180.	0.	0.	0.	0.	20051228

Attachment E – Example of a Water Right Shoulder Season Condition

Diversion for irrigation under this water right prior to April 1 and after October 31 shall occur only as authorized by the Water District 63 Watermaster and only when water is being released by the United States from the Lucky Peak Dam outlet under procedures and requirements for the Memorandum of Agreement between the U.S. Department of the Army and the U.S. Department of the Interior for Flood Control Operations of the Boise River Reservoirs, dated November 20, 1953, the Water Control Manual for Boise River Reservoir dated April 1985 and any future amendments or revisions made thereto pursuant to state or federal procedures or law; provided that any such use of this water right prior to April 1 and after October 31 shall be subordinated to water rights for storage in Lucky Peak Reservoir or Lake Lowell as decreed in SRBA Case No. 39576.

Attachment F - Water Rights with Conditions Related to Flood Control Releases

Water Right	Point of Diversion	Summary of Conditions Related Flood Control Releases	Implemented in Water Right Accounting
63-11439	Trinity Springs	Water right is active with watermaster authorization.	Y
63-12550	Canyon County Canal	Water right is active when flows in Boise River at Glenwood Bridge are greater than 240 cfs.	Y
63-12577	Shakespeare	Water right is active when USBR plus IDFG diversions equal to zero.	Y
63-31869	Ferguson	Water right is active when USBR plus IDFG diversions equal to zero.	N (Aesthetic)
63-32066	Andrews	Water right is active when USBR plus IDFG diversions are less than the flow in the Boise River.	Y
63-32467	Andrews	Water right is active when USBR plus IDFG diversions are less than the flow in the Boise River.	Y
63-32911	Tree Top Ranches	Water right is active when USBR plus IDFG diversions are less than the flow in the Boise River.	N (On Hold)
63-34334	Thorpe	Water right is active when USBR plus IDFG diversions are less than the flow in the Boise River.	N (On Hold)
63-147B	Surprise Valley / Micron	Water right is active from October 16 to November 15 when flow in Boise River is greater than 240 cfs. Water right is active from March 16 to April 15 when flow in Boise River is greater than 1,100 cfs.	Y
63-149	Rossi Mill	Water right is limited to 10 cfs from November 15 to March 1 when the flow in the Boise is less than 240.	N (Wildlife/ aesthetic)
63-20041	Boise City Canal	Water right is limited to 1 cfs and 25 af from March 1 to March 31 and November 1 to November 15 when the flow in the Boise River is less than 240 cfs.	N (Shoulder season)
63-12420	Surprise Valley / Micron	Water right is active from June 16 to February 29 when flow in the Boise River is greater than 240 cfs. Water right is active from March 1 to May 31 when flow in the Boise River is greater than 1,100 cfs Water right is active with watermaster authorization.	Y
63-12399	Surprise Valley / Micron	Water right is active from June 16 to February 29 when flow in the Boise River is greater than 240 cfs. Water right is active from March 1 to May 31 when flow in the Boise River is greater than 1,100 cfs Water right is active with watermaster authorization.	Y
63-31409	Suez	Water right is active from June 16 to February 29 when flow in the Boise River is greater than 240 cfs. Water right is active from March 1 to May 31 when flow in the Boise River is greater than 1,100 cfs Water right is active with watermaster authorization.	Y
63-34348	Elmore County	Water right is active from June 16 to February 29 when flow in the Boise River is greater than 240 cfs.	N (On Hold)

Water Right	Point of Diversion	Summary of Conditions Related Flood Control Releases	Implemented in Water Right Accounting
		<p>Water right is active from March 1 to May 31 when flow in the Boise River is greater than 1,100 cfs</p> <p>Water right is active with watermaster authorization.</p> <p>Water Right is active when flow in the Boise River is less than 800 cfs.</p>	

Attachment G – Table Fields and Water Right Order in the Water Right List Input File

Order	Priority Date	Diversion Rate X 1000 (cfs)	Hydro-logic ID	Variable Right Code	Right Type Code	Volume Limit	Start Day Julian	End Day Julian	Note
75	18650601	840	13211725	0	0	0	60	319	
76	18650601	2382	13203527	904	0	0	60	319	Flood Control Condition
77	18650601	336	13212887	0	0	0	60	319	
Break in Table									
374	18650601	210	13211725	0	0	0	60	319	
375	18650601	595	13203527	904	0	0	60	319	Flood Control Condition
376	18650601	84	13212887	0	0	0	60	319	
Break in Table									
630	18650601	350	13211725	0	0	0	60	319	
631	18650601	993	13203527	904	0	0	60	319	Flood Control Condition
632	18650601	140	13212887	0	0	0	60	319	
Break in Table									
934	19861115	560	13212994	0	0	126	60	319	
935	19910222	1000	13189600	900	0	13	0	0	Flood Control Condition
936	19930908	24800	13204200	0	0	0	0	0	
937	19940425	120	13212999	0	0	18	60	319	
938	19970606	3400	13203527	908	0	0	74	319	Flood Control Condition
939	19970606	15000	13203527	908	0	0	0	0	Flood Control Condition
940	19991012	5000	13209990	901	0	0	0	0	Flood Control Condition
941	19991202	110	13203715	902	0	0	0	0	Flood Control Condition
942	20000101	130000000	13194000	0	5	0	0	0	
943	20000102	226886816	13190000	0	6	0	0	0	
944	20000103	133284600	13201500	0	7	0	0	0	
945	20000104	20000000	13190000	0	8	0	0	0	
946	20011116	20000	13204200	908	0	0	0	0	Flood Control Condition

Order	Priority Date	Diversion Rate X 1000 (cfs)	Hydro-logic ID	Variable Right Code	Right Type Code	Volume Limit	Start Day Julian	End Day Julian	Note
947	20041208	20500	13212832	903	0	0	319	74	Flood Control Condition
948	20051228	20000	13212832	903	0 1	81.5	319	60	Flood Control Condition
949	19730316	133284600	13201500	0	10	0	158	191	Refill 2
950	19820708	440	13206274	0	0	49.5	74	319	
951	19850809	450	13199924	0	0 2	2.8	0	0	
952	19860319	5290	13206096	0	0	40.9	0	0	
953	19891102	70	13189600	0	0	13.9	0	0	
954	19650930	133284600	13201500	0	9	0	0	0	Refill 1

EXHIBIT 3

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

In Re SRBA)
Case No. 39576)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(B) FOR
Water Right 63-33734A

JUL 19 2019

By

Clerk

Deputy Clerk

NAME AND ADDRESS: UNITED STATES OF AMERICA ACTING THROUGH
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PN CODE-3100
1150 N CURTIS RD STE 100
BOISE ID 83706-1234

SOURCE: BOISE RIVER

TRIBUTARY: SNAKE RIVER

QUANTITY: 3,672,732.00 AFY

Water right nos. 63-33734A, 63-303, 63-3613, 63-3614, 63-3618, and 63-33734B are limited to the total combined annual diversion volume necessary to allocate a total of 1,044,011 acre-feet of storage water per year to the consumers or users of the storage water.

PRIORITY DATE: 9/30/1965

This water right is subordinate to all water rights established pursuant to Idaho law for uses within the IDWR Administrative Basin 63, except water rights to store more than 1,000 acre feet of surface water permitted or licensed after April 15, 2019. This water right shall not be administered as subordinate to water rights permitted or licensed for managed ground water recharge after April 15, 2019, or any water rights for the storage or use of water for power purposes.

POINT OF
DIVERSION:

T02N R03E S11 SENE Lot 7 Within Ada County

PURPOSES AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION STORAGE	01/01 12/31	3,672,732.00 AFY
MUNICIPAL/INDUSTRIAL STORAGE	01/01 12/31	3,672,732.00 AFY
STREAMFLOW MAINTENANCE STORAGE	01/01 12/31	3,672,732.00 AFY

Water accruing to this water right supplements water accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618. Water physically stored in any Boise River Reservoir under this water right on the day of allocation will be allocated for storage end uses as provided in the contracts entered into between the United States and federal contractors referenced in paragraph 2 below as if it had accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.

PLACE OF USE:

Place of use is on those lands identified under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.

Water accruing under this right may be stored in Lucky Peak, Arrowrock, or Anderson Ranch Reservoirs, so long as the water is tributary to that reservoir, when determined by the United States and the Water District 63 Watermaster as supervised by the Director of the Department of Water Resources that such storage will maximize the storage of water in the three reservoirs.

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

1. 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 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.
2. The allocation of storage to federal contractors and the location of that storage, including carryover storage, in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs shall be determined by the United States Bureau of Reclamation pursuant to federal reclamation law and contracts entered into between the United States and federal contractors; provided, however, in the event flood control operations result in irrigation entities with contracts for space in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs, having less storage than they would otherwise, then the first 60,000 acre-feet of any shortfalls caused by flood control operations will come from uncontracted space in Lucky Peak Reservoir used for streamflow maintenance purposes. The Water District 63 Watermaster (as supervised by the Director of the Department of Water Resources) shall distribute stored water in accordance with the allocation instructions from the United States Bureau of Reclamation.
3. The storage rights in Lucky Peak Reservoir, which consist of water right nos. 63-3618, 63-33734A, and 63-33734B, are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations.
4. 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 determined by the Court upon entry of a final unified decree as it may be amended. Section 42-1412(6), Idaho Code.
5. The exercise and administration of this water right is subject to the terms and conditions of the Stipulation effective September 13, 2018, which is incorporated herein by reference.
6. The annual time period for accruing natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources; provided however, the annual time period will begin (1) day after the day of allocation and when there is no natural flow available to water rights junior in priority to January 12, 1911, and (2) before natural flow has again become available to water rights junior in priority to January 12, 1911, or on November 1, whichever is earlier.
7. Nothing in this water right shall change the legal effect of the condition on certain water rights expressly limiting those water rights to diverting water when the Boise River is on flood release below Lucky Peak.
8. This decree does not alter, amend, or modify the contracts entered into between the various federal contractors and the United States Bureau of Reclamation, as amended.

RULE 54(b) CERTIFICATION

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 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.



Eric J. Wilman
Presiding Judge of the
Snake River Basin Adjudication

EXHIBIT 4

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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 63-33734B

NAME AND ADDRESS:

UNITED STATES OF AMERICA ACTING THROUGH
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PN CODE-3100
1150 N CURTIS RD STE 100
BOISE ID 83706-1234

SOURCE:

BOISE RIVER

TRIBUTARY: SNAKE RIVER

QUANTITY:

587,056.00 AFY

Water right nos. 63-33734B, 63-303, 63-3613, 63-3614, 63-3618, and 63-33734A, are limited to the total combined annual diversion volume necessary to allocate a total of 1,044,011 acre-feet of storage water per year to the consumers or users of the storage water.

This water right may be exercised only to replace water released for flood control purposes, as determined by the Water District 63 Watermaster, supervised by the Director of the Department of Water Resources. In determining the timing, duration, and magnitude of flood control releases for the purpose of administering this water right and distributing natural flow in accordance with state law, the Watermaster as supervised by the Director will consider, but will not be bound by, the November 20, 1953, "Memorandum of Agreement Between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs, Idaho" (hereinafter "MOA") and the 1985 "Memorandum of Understanding for Confirmation, Ratification, and Adoption of the Water Control Manual-Boise River Reservoirs, Boise, Idaho" (hereinafter "Manual"). The Watermaster as supervised by the Director may also consider, but will not be bound by, the United States' determinations of the purposes for which water is being released from Lucky Peak Dam. The Watermaster as supervised by the Director may also consider any other information the Director deems relevant.

The Watermaster's determinations, as supervised by the Director, of the timing duration, and magnitude of flood control releases shall not affect or bind the United States' determinations, authority, or discretion under federal law for purposes of operating its reservoirs for flood control purposes in accordance with the 1946 Flood Control Act, 60 Stat 641, as amended or supplemented, and the MOA and Manual as they may be revised pursuant to the forgoing law.

Water will not accrue towards the satisfaction of this water right until the United States of America, acting through the Bureau of Reclamation, has notified the Water District 63 Watermaster of the calendar date on which it intends to store water pursuant to this water right. Following initial notification, the United States can provide notification directing the Water District 63 Watermaster to stop and start the accrual of water pursuant to this water right, until the water right has been satisfied. All notifications must be made in writing. Each notification must identify the

specific calendar date on which administrative action should occur. The identified calendar date cannot predate the date of the written notification.

PRIORITY DATE: 3/16/1973

POINT OF
DIVERSION: T02N R03E S11 SENE Lot 7 Within Ada County

PURPOSES AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION STORAGE	01/01 7/31	587,056.00 AFY
MUNICIPAL/INDUSTRIAL STORAGE	01/01 7/31	587,056.00 AFY
STREAMFLOW MAINTENANCE STORAGE	01/01 7/31	587,056.00 AFY

Water accruing to this water right supplements water accrued under water right nos. 63-303, 63-3613, 63-3614, 63-3618. Water physically stored in any Boise River Reservoir under this water right on the day of allocation will be allocated for storage end uses as provided in contracts entered into between the United States and federal contractors referenced in paragraph 2 below as if it had accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.

PLACE OF USE: Place of use is on those lands identified under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.

Water accruing under this right may be stored in Lucky Peak, Arrowrock, or Anderson Ranch Reservoirs, so long as the water is tributary to that reservoir, when determined by the United States and the Water District 63 Watermaster as supervised by the Director of the Department of Water Resources that such storage will maximize the storage of water in the three reservoirs.

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

1. 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 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.
2. The allocation of storage to federal contractors and the location of that storage, including carryover storage, in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs shall be determined by the United States Bureau of Reclamation pursuant to federal reclamation law and contracts entered into between the United States and federal contractors; provided, however, in the event flood control operations result in irrigation entities with contracts for space in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs, having less storage than they would otherwise, then the first 60,000 acre-feet of any shortfalls caused by flood control operations will come from uncontracted space in Lucky Peak Reservoir used for streamflow maintenance purposes. The Water District 63 Watermaster (as supervised by the Director of the Department of Water Resources) shall distribute stored water in accordance with the allocation instructions from the United States Bureau of Reclamation.

3. The storage rights in Lucky Peak Reservoir, which consist of water right nos. 63-3618, 63-33734A, and 63-33734B, are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations.
4. 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 determined by the Court upon entry of a final unified decree as it may be amended. Section 42-1412(6), Idaho Code.
5. This water right is subordinate to the following water rights:
 - a. All surface water rights within IDWR Administrative Basin 63 with a priority date earlier than May 1, 2014, with a decreed or licensed diversion rate of less than 0.1 CFS;
 - b. All water rights listed on attachment A.
6. The exercise and administration of this water right is subject to the terms and conditions of the Stipulation effective September 13, 2018, which is incorporated herein by reference.
7. The annual time period for accruing natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources; provided however, the annual time period will begin (1) day after the day of allocation and when there is no natural flow available to water rights junior in priority to January 12, 1911, and (2) before natural flow has again become available to water rights junior in priority to January 12, 1911, or on November 1, whichever is earlier.
8. Nothing in this water right shall change the legal effect of the condition on certain water rights expressly limiting those water rights to diverting water when the Boise River is on flood release below Lucky Peak.
9. This decree does not alter, amend, or modify the contracts entered into between the various federal contractors and the United States Bureau of Reclamation, as amended.

RULE 54(b) CERTIFICATION

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 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.

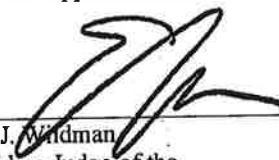

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

Exhibit A

Subordination Summary - Surface Water Rights - 4/22/18

Row #	WRN	Priority	Right ID	Diversion
1	63-7866	9/12/1973	557848	0.48
2	63-31290A	4/1/1974	572177	0.52
3	63-8004	7/1/1974	556833	0.20
4	63-19543	1/20/1975	554371	0.14
5	63-8199	8/29/1975	557220	0.12
6	63-8380	10/26/1976	556166	0.20
7	63-8993	12/9/1976	556140	0.20
8	63-8647	4/1/1977	555114	0.11
9	63-8960	6/16/1977	556141	0.18
10	63-9433	8/11/1980	556057	0.76
11	63-9438	9/8/1980	56983	0.11
12	63-9642	11/6/1980	577389	0.44
13	63-9688	2/17/1981	557569	0.15
14	63-9684	2/27/1981	557573	0.53
15	63-9699	3/31/1981	556171	0.40
16	63-9683	4/14/1981	557574	0.20
17	63-9942	7/16/1982	557481	0.20
18	63-9982	2/3/1983	57523	0.20
19	63-10111	7/20/1983	57650	0.30
20	63-10254	7/19/1984	57789	0.19
21	63-10279	4/6/1985	556078	0.13
22	63-10324	9/17/1985	657871	0.36
23	63-10325	9/17/1985	657870	0.36
24	63-9750	8/10/1987	556120	1.00
25	63-10560	11/18/1987	16211	0.96
26	63-10776	3/6/1989	89991	0.20
27	63-7226	3/14/1989	54740	0.17
28	63-11619	12/31/1991	59098	0.18
29	63-12567	8/13/1999	547801	0.20
30	63-32016	12/6/2004	592234	1.76
31	63-11439	2/22/1991	667738	1.00
32	63-12055	9/8/1993	36385	24.80
33	63-12399	6/6/1997	672197	3.40
34	63-12420	6/6/1997	671689	5.00
35	63-31409	11/16/2001	559840	20.00
36	63-9346	2/19/1980	638003	0.50
37	63-9944	8/11/1982	600805	1.00
38	63-32537	11/15/1986	607915	0.56
39	63-10810	6/12/1989	15042	4.10
40	63-12113	4/25/1994	613711	0.12
41	63-33905	1/30/2014	671170	0.40
				71.83

Exhibit A

Subordination Summary - Ground Water Rights - 4/21/18

Row #	WRN	Priority	Right ID	Diversion
1	63-7754	3/20/1973	55284	0.04
2	63-4284	4/15/1973	53350	0.04
3	63-7792	5/8/1973	55323	0.04
4	63-7794	5/17/1973	553394	0.04
5	63-4766	6/1/1973	53855	0.04
6	63-15335	6/15/1973	377273	0.02
7	63-15406	6/15/1973	377553	0.04
8	63-19090	6/15/1973	373130	0.04
9	63-7824	7/10/1973	55355	0.04
10	63-7822	7/12/1973	55353	0.04
11	63-7826	7/13/1973	378714	0.04
12	63-7835	7/19/1973	372954	0.04
13	63-15123	7/20/1973	378844	0.04
14	63-7807	8/3/1973	555963	0.04
15	63-4563	8/20/1973	53630	0.04
16	63-4571	8/22/1973	53638	0.04
17	63-7781	8/29/1973	557020	0.44
18	63-19423	9/4/1973	373296	0.04
19	63-7856	9/4/1973	55386	0.04
20	63-15129	10/15/1973	378848	0.04
21	63-7901	12/5/1973	55436	0.02
22	63-15069	12/31/1973	376355	0.04
23	63-15421	12/31/1973	377560	0.04
24	63-7943	3/1/1974	55477	0.04
25	63-30441	5/1/1974	145925	0.06
26	63-18966	5/10/1974	379529	0.04
27	63-15279	5/24/1974	377260	0.04
28	63-19269	6/1/1974	344556	0.04
29	63-19270	6/1/1974	344557	0.04
30	63-15431	7/1/1974	368155	0.06
31	63-19052	8/9/1974	553368	0.02
32	63-19053	8/9/1974	406969	0.02
33	63-19054	8/9/1974	406970	0.02
34	63-19614	8/15/1974	373377	0.04
35	63-24097	8/15/1974	141904	0.04
36	63-19896	1/1/1975	379678	0.04
37	63-8067	1/6/1975	660521	5.49
38	63-19484	5/14/1975	373325	0.02
39	63-19142	5/30/1975	373160	0.04
40	63-19333	5/30/1975	406386	0.04
41	63-15420	6/1/1975	377559	0.04
42	63-15303	7/1/1975	319522	0.04
43	63-29396	7/1/1975	406986	0.04

Exhibit A

Subordination Summary - Ground Water Rights - 4/21/18

Row #	WRN	Priority	Right ID	Dlversion
44	63-19462	9/1/1975	373314	0.04
45	63-8204	9/7/1975	378726	0.04
46	63-30487	9/16/1975	193220	0.04
47	63-15177	9/26/1975	379891	0.04
48	63-8224	10/20/1975	55760	0.04
49	63-8237	12/4/1975	406437	0.04
50	63-30404	12/31/1975	368271	0.04
51	63-24106	3/6/1976	406312	0.04
52	63-19720	5/1/1976	379590	0.04
53	63-19159	5/24/1976	553853	0.04
54	63-19630	5/29/1976	373385	0.04
55	63-30347	6/1/1976	406329	0.04
56	63-30349	6/1/1976	406331	0.04
57	63-30352	6/1/1976	406333	0.04
58	63-8317	6/1/1976	557570	0.13
59	63-18965	6/8/1976	379528	0.04
60	63-30436	6/15/1976	391930	0.03
61	63-15109	7/1/1976	378832	0.04
62	63-15141	7/1/1976	378857	0.04
63	63-15363	7/1/1976	377539	0.04
64	63-22114	7/1/1976	370819	0.04
65	63-4667	7/1/1976	53749	0.04
66	63-15138	7/10/1976	378854	0.04
67	63-19451	8/6/1976	406300	0.04
68	63-19429	9/10/1976	373297	0.04
69	63-4559	10/30/1976	400345	0.04
70	63-15203	2/1/1977	377233	0.04
71	63-8500	2/25/1977	552831	0.04
72	63-15114	3/1/1977	378835	0.04
73	63-16361	3/2/1977	377449	0.02
74	63-8714	3/11/1977	372956	0.04
75	63-8643	4/1/1977	556062	0.22
76	63-8678	4/7/1977	56217	0.04
77	63-8691	4/20/1977	56230	0.03
78	63-15061	6/1/1977	378800	0.01
79	63-18331	6/1/1977	379453	0.04
80	63-8961	6/13/1977	372958	0.02
81	63-8957	6/15/1977	378736	0.02
82	63-15160	7/1/1977	378869	0.04
83	63-15284	7/1/1977	377261	0.04
84	63-8976	7/11/1977	557482	0.08
85	63-15413	7/15/1977	376356	0.04
86	63-30217	7/20/1977	370830	0.04

Exhibit A

Subordination Summary - Ground Water Rights - 4/21/18

Row #	WRN	Priority	Right ID	Diverslon
87	63-15081	8/1/1977	378815	0.06
88	63-16175	8/15/1977	377373	0.06
89	63-15128	8/20/1977	376090	0.04
90	63-15189	9/1/1977	377225	0.04
91	63-15118	9/15/1977	378839	0.02
92	63-19694	9/30/1977	379578	0.09
93	63-15066	10/1/1977	378805	0.04
94	63-27142	10/1/1977	141937	0.04
95	63-32439	10/15/1977	604957	0.01
96	63-15403	10/20/1977	377551	0.04
97	63-15404	10/20/1977	377552	0.04
98	63-9061	10/24/1977	552783	0.04
99	63-26301	11/15/1977	406316	0.04
100	63-26830	11/15/1977	406320	0.04
101	63-19306	11/29/1977	406297	0.04
102	63-28349	12/31/1977	376105	0.04
103	63-28504	12/31/1977	126810	0.04
104	63-15147	2/1/1978	378862	0.04
105	63-31106	3/1/1978	568537	0.04
106	63-30216	3/30/1978	368218	0.04
107	63-15068	5/24/1978	378807	0.04
108	63-15119	5/31/1978	378840	0.04
109	63-15102	6/1/1978	396957	0.02
110	63-19229	6/1/1978	373206	0.04
111	63-25728	6/1/1978	406313	0.04
112	63-27063	6/10/1978	145365	0.08
113	63-15394	6/15/1978	376098	0.02
114	63-15314	6/22/1978	377269	0.04
115	63-19160	7/9/1978	553854	0.04
116	63-19063	7/25/1978	406971	0.04
117	63-19440	7/27/1978	373302	0.05
118	63-15096	7/31/1978	378822	0.04
119	63-16034	7/31/1978	377307	0.04
120	63-19232	8/1/1978	373209	0.04
121	63-9169	8/3/1978	378738	0.04
122	63-23396	8/7/1978	141668	0.02
123	63-30439	8/30/1978	396163	0.04
124	63-15104	9/1/1978	378828	0.04
125	63-30150	10/1/1978	368213	0.06
126	63-9189	10/18/1978	404613	0.01
127	63-15146	11/6/1978	378861	0.04
128	63-8384	11/15/1978	556068	0.18
129	63-30363	12/21/1978	368236	0.04

Exhibit A

Subordination Summary - Ground Water Rights - 4/21/18

Row #	WRN	Priority	Right ID	Diversion
130	63-9217	3/7/1979	552860	0.06
131	63-26644	4/15/1979	406319	0.03
132	63-9226	4/16/1979	404615	0.02
133	63-9227	4/16/1979	404616	0.02
134	63-9228	4/16/1979	404617	0.01
135	63-24108	5/3/1979	411185	0.03
136	63-9240	5/23/1979	378742	0.04
137	63-15107	5/29/1979	378830	0.04
138	63-24078	6/12/1979	141897	0.04
139	63-9256	6/22/1979	56798	0.04
140	63-20316	6/30/1979	406415	0.04
141	63-15230	7/1/1979	377243	0.04
142	63-15574	7/1/1979	396959	0.04
143	63-22161	7/1/1979	406308	0.04
144	63-15429	8/1/1979	377562	0.04
145	63-9273	8/6/1979	404618	0.01
146	63-15315	8/16/1979	377270	0.04
147	63-15060	9/14/1979	378799	0.04
148	63-15090	9/15/1979	376088	0.02
149	63-30444	9/17/1979	145443	0.04
150	63-30306	11/1/1979	370831	0.01
151	63-15217	4/1/1980	401352	0.06
152	63-24043	4/8/1980	141886	0.04
153	63-9381	5/19/1980	378746	0.04
154	63-15218	5/20/1980	396958	0.03
155	63-15210	6/1/1980	319515	0.04
156	63-15359	6/1/1980	377538	0.04
157	63-15648	6/1/1980	137945	0.04
158	63-18482	6/1/1980	379471	0.02
159	63-19194	6/1/1980	373184	0.05
160	63-15201	6/5/1980	377231	0.04
161	63-9394	6/10/1980	552824	0.08
162	63-9402	6/12/1980	556045	0.04
163	63-15245	7/1/1980	377249	0.02
164	63-19775	7/1/1980	379617	0.04
165	63-22269	7/1/1980	406975	0.04
166	63-15121	7/10/1980	378842	0.04
167	63-9425	7/29/1980	404620	0.02
168	63-15248	7/30/1980	377250	0.04
169	63-15029	8/7/1980	376085	0.04
170	63-30215	8/26/1980	370826	0.03
171	63-19433	9/24/1980	406298	0.04
172	63-15277	10/1/1980	377259	0.04

Exhibit A

Subordination Summary - Ground Water Rights - 4/21/18

Row #	WRN	Priority	Right ID	Diversion
173	63-15288	10/1/1980	377264	0.04
174	63-15808	10/14/1980	372971	0.04
175	63-9651	12/5/1980	553422	0.08
176	63-15619	12/31/1980	376100	0.04
177	63-31457	1/1/1981	558779	0.03
178	63-26144	1/22/1981	406980	0.04
179	63-30329	1/22/1981	406328	0.04
180	63-27340	3/25/1981	139901	0.04
181	63-15135	5/15/1981	376091	0.04
182	63-15932	5/19/1981	406293	0.08
183	63-28747	6/1/1981	368200	0.04
184	63-15228	6/4/1981	377241	0.02
185	63-15354	7/1/1981	377537	0.04
186	63-19491	7/5/1981	373328	0.06
187	63-26175	7/15/1981	406982	0.06
188	63-29959	7/31/1981	376107	0.04
189	63-19705	8/25/1981	379584	0.04
190	63-19076	9/2/1981	373128	0.04
191	63-9821	9/28/1981	378754	0.03
192	63-22836	10/1/1981	160025	0.04
193	63-9748	10/12/1981	556173	0.07
194	63-17396	11/4/1981	379050	0.04
195	63-9900	4/30/1982	552864	0.06
196	63-15287	5/20/1982	377263	0.04
197	63-15072	5/31/1982	376086	0.04
198	63-15105	6/1/1982	378829	0.04
199	63-18484	6/1/1982	376102	0.04
200	63-19477	6/1/1982	406269	0.04
201	63-9924	6/22/1982	57465	0.04
202	63-18964	7/6/1982	379527	0.04
203	63-15034	7/14/1982	406438	0.04
204	63-19268	8/20/1982	406344	0.02
205	63-32240	1/1/1983	604376	0.06
206	63-9974	1/20/1983	560226	0.04
207	63-19455	3/15/1983	373308	0.04
208	63-10011	3/29/1983	372963	0.08
209	63-10045	5/18/1983	372964	0.02
210	63-19449	5/20/1983	550845	0.04
211	63-15510	5/30/1983	376099	0.04
212	63-10068	6/9/1983	404630	0.04
213	63-10080	6/9/1983	404631	0.01
214	63-10135	6/9/1983	404632	0.02
215	63-10148	6/9/1983	404633	0.01

Exhibit A

Subordination Summary - Ground Water Rights - 4/21/18

Row #	WRN	Priority	Right ID	Diversion
216	63-25957	6/13/1983	368190	0.04
217	63-10089	6/15/1983	57629	0.08
218	63-10083	6/21/1983	553418	0.05
219	63-10087	6/21/1983	556089	0.04
220	63-10082	6/22/1983	57622	0.04
221	63-10192A	6/22/1983	378767	0.04
222	63-10192B	6/22/1983	557578	0.02
223	63-10092	6/23/1983	378763	0.04
224	63-15468	6/25/1983	377566	0.04
225	63-33445	6/28/1983	637243	0.12
226	63-33446	6/28/1983	637244	0.08
227	63-15095	7/1/1983	378821	0.07
228	63-28936	7/21/1983	368202	0.02
229	63-30445	10/10/1983	373846	0.02
230	63-30272	1/1/1984	368234	0.04
231	63-26374	4/30/1984	406318	0.04
232	63-15145	5/17/1984	378860	0.01
233	63-15286	6/1/1984	377262	0.04
234	63-15113	7/1/1984	378834	0.04
235	63-15298	7/1/1984	319128	0.04
236	63-19029	7/1/1984	406295	0.03
237	63-15140	8/5/1984	378856	0.04
238	63-15202	8/20/1984	377232	0.04
239	63-19191	10/2/1984	406296	0.04
240	63-19834	10/23/1984	379644	0.04
241	63-30255	1/1/1985	368232	0.04
242	63-15142	4/30/1985	378858	0.04
243	63-19458	6/1/1985	373310	0.04
244	63-18967	6/15/1985	379530	0.04
245	63-30470	6/30/1985	556467	0.04
246	63-19617	8/1/1985	373378	0.04
247	63-10318	8/9/1985	547746	0.45
248	63-19257	9/1/1985	411084	0.04
249	63-19271	9/15/1985	373226	0.04
250	63-15036	9/23/1985	372968	0.02
251	63-31531	9/25/1985	561550	0.02
252	63-15263	10/16/1985	377257	0.04
253	63-10332	10/25/1985	404634	0.02
254	63-15033	1/1/1986	372967	0.02
255	63-29748	3/31/1986	376106	0.04
256	63-15149	5/5/1986	378864	0.04
257	63-30391	5/10/1986	406988	0.08
258	63-15179	5/31/1986	377222	0.04

Exhibit A

Subordination Summary - Ground Water Rights - 4/21/18

Row #	WRN	Priority	Right ID	Diverslon
259	63-15790	6/1/1986	376848	0.04
260	63-19741	6/16/1986	379604	0.02
261	63-18858	6/27/1986	379512	0.04
262	63-18969	8/6/1986	144413	0.04
263	63-30442	8/6/1986	396219	0.04
264	63-15633	11/1/1986	380085	0.02
265	63-10457	3/24/1987	552894	0.18
266	63-30440	5/11/1987	145921	0.04
267	63-15007	6/1/1987	372965	0.02
268	63-19732	6/1/1987	406305	0.04
269	63-10506	6/16/1987	557478	0.04
270	63-26364	6/19/1987	406317	0.04
271	63-15064	7/1/1987	378803	0.03
272	63-19653	8/17/1987	379553	0.07
273	63-27344	8/19/1987	344373	0.04
274	63-10529	8/24/1987	58066	0.04
275	63-15378	9/10/1987	319558	0.09
276	63-31228	9/10/1987	570110	0.13
277	63-17402	11/12/1987	378589	0.04
278	63-15152	11/17/1987	319378	0.04
279	63-10559	11/18/1987	58094	0.06
280	63-31474	5/31/1988	559221	0.02
281	63-10641	6/17/1988	411503	0.01
282	63-15222	8/1/1988	319114	0.03
283	63-16033	10/7/1988	376101	0.04
284	63-27069	10/8/1988	376103	0.04
285	63-30332	12/1/1988	376109	0.04
286	63-10771	2/23/1989	58289	0.11
287	63-19708	4/1/1989	406303	0.04
288	63-19709	4/1/1989	406304	0.04
289	63-10787	5/1/1989	58305	0.04
290	63-10796	5/12/1989	556013	0.07
291	63-10800	5/19/1989	58317	0.04
292	63-10797	5/23/1989	101360	0.08
293	63-26300	6/26/1989	406983	0.03
294	63-19728	9/1/1989	379598	0.04
295	63-11013	9/27/1989	555411	0.03
296	63-9171	10/6/1989	56709	0.22
297	63-11070	10/16/1989	550744	0.13
298	63-11078	11/14/1989	98741	0.06
299	63-11083	11/24/1989	58572	0.04
300	63-11079	11/29/1989	58569	0.04
301	63-11080	11/29/1989	58570	0.02

Exhibit A

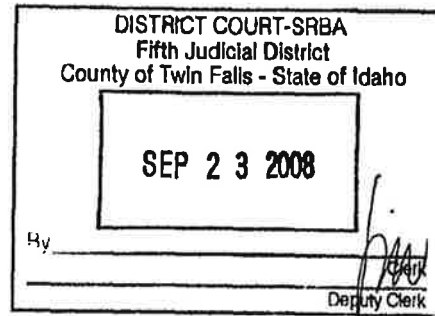
Subordination Summary - Ground Water Rights - 4/21/18

Row #	WRN	Priority	Right ID	Diversion
302	63-11061	12/5/1989	101743	0.04
303	63-11513	3/14/1991	594903	9.68
304	63-11514	5/10/1991	594912	9.68
305	63-30359	7/26/1991	406487	0.07
306	63-29419	8/19/1991	406321	0.06
307	63-11596	10/9/1991	17450	0.04
308	63-11637	2/5/1992	7803	0.05
309	63-10802	4/21/1992	103333	0.38
310	63-31468	6/11/1992	559146	0.02
311	63-30341	6/29/1992	406483	0.07
312	63-11936	9/21/1992	97295	0.04
313	63-11957	9/29/1992	102074	0.02
314	63-11943	10/15/1992	4346	0.15
315	63-11958	10/16/1992	102077	0.04
316	63-29443	6/1/1993	368203	0.04
317	63-12041	7/31/1993	671226	0.09
318	63-30086	8/14/1993	368210	0.04
319	63-12059	9/28/1993	103377	0.12
320	63-30371	6/23/1994	376110	0.01
321	63-12128	7/27/1994	103145	0.04
322	63-12146	9/20/1994	611488	0.04
323	63-12153	11/10/1994	620453	0.40
324	63-32239	11/14/1994	604375	0.06
325	63-30190	12/5/1994	370823	0.06
326	63-30365	6/3/1995	368237	0.04
327	63-30364	9/7/1995	369762	0.04
328	63-12317	2/6/1996	663368	0.10
329	63-30369	3/14/1996	368239	0.04
330	63-31285	4/8/1996	557504	0.04
331	63-30370	4/10/1996	369763	0.04
332	63-12350	8/1/1996	103326	0.04
333	63-33044	9/15/1996	621257	0.04
334	63-30421	10/13/1996	406337	0.04
335	63-12537	7/7/1999	630730	0.14
336	63-12558	12/9/1999	551761	0.03
337	63-12608	11/27/2000	658112	0.11
338	63-31218	3/23/2001	556578	0.14
339	63-31311	8/27/2001	559183	0.04
340	63-31503	5/28/2002	657845	0.04
341	63-12507	8/2/2004	110175	0.08
342	63-32180	3/3/2005	596264	0.15
343	63-32393	3/2/2006	627706	0.04
344	63-32945	11/27/2007	630788	0.12

Exhibit A**Subordination Summary - Ground Water Rights - 4/21/18**

Row #	WRN	Priority	Right ID	Diversion
345	63-33933	9/25/2008	671262	0.02
346	63-33321	12/21/2009	649729	0.06
347	63-33379	5/17/2010	639436	0.04
348	63-33532	6/13/2011	651391	0.09
349	63-33677	7/30/2012	669655	0.04
350	63-33800	6/26/2013	671975	0.04
351	63-33888	1/3/2014	671931	0.67
				42.65

EXHIBIT 5



**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: 63-03618**
) **(Lucky Peak Reservoir)**
Case No. 39576)
) **MEMORANDUM DECISION AND**
) **ORDER ON CROSS-MOTIONS FOR**
) **SUMMARY JUDGMENT RE: BUREAU**
) **OF RECLAMATION STREAMFLOW**
) **MAINTENANCE CLAIM**

Holding: Granting Summary Judgment in favor of the United States, City of Boise, Ada County and State of Idaho Department of Fish and Game; holding that provisions of Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.*, do not apply to the streamflow maintenance right at issue. License issued by Idaho Department of Water Resources is therefore valid and objections to purpose of use constitute impermissible collateral attacks on valid license. Streamflow maintenance right does not interfere with contractual obligations or guarantees made by Bureau of Reclamation to contract right holders in Lucky Peak Reservoir.

Also granting partial summary judgment, in part, in favor of Boise Project Board of Control; holding that a remark in *Partial Decree* is necessary to acknowledge interest and allow Bureau of Reclamation to meet obligations concerning flood evacuation to contract right holders in Anderson Ranch and Arrowrock Reservoirs without requiring temporary change in purpose of use.

**I.
APPEARANCES**

David W. Gehlert, Environment and Natural Resources Division, United States
Department of Justice, attorney for United States of America;

Scott L. Campbell, Tara Martens, Moffatt, Thomas, Barrett, Rock & Fields, Chartered ,
Boise, Idaho, attorneys for Settlers Irrigation District and Pioneer Irrigation District;

**MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY
JUDGMENT RE: STREAMFLOW MAINTENANCE CLAIM**

David J. Barber, Deputy Attorney General , Boise, Idaho, for State of Idaho Dept. of Fish and Game;

Daniel V. Steenson, S. Bryce Farris, Ringert Clark Chartered, Boise, Idaho, attorneys for South Boise Water Company and Nampa & Meridian Irrigation District;

Albert P. Barker, Shelly M. Davis, Paul L. Arrington of Barker Rosholt & Simpson LLP, Boise, Idaho, attorneys for Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District;

Jerry A. Kiser , Stoppello & Kiser, Boise, Idaho, attorney for Canyon County Water Company, Farmers Union Ditch Company, Middleton Irrigation Ass'n., Middleton Mill Ditch Company;

Robert A. Maynard, Erika E. Malmen, Perkins Coie LLP, Boise, Idaho, attorneys for Ada County & Board of Ada County Commissioners and City of Boise;

II. PROCEDURAL BACKGROUND

The water right claim in this case pertains to Lucky Peak Reservoir and Dam which are part of the Boise Project on the Boise River. At issue are two of the recommended purposes of use pertaining to streamflow maintenance. The issues involving the ownership of the irrigation and irrigation from storage purposes of use for this same claim, as well as other claims associated with the Boise Project, were decided in Consolidated Subcase 91-63. *See Memorandum Decision and Order on Cross-Motions for Summary Judgment and Notice of Status Conference (91-63 Ownership of Water Rights Between Irrigation Entities and Bureau of Reclamation)* (Sept. 2, 2004) aff'd in part and remanded in part *U.S. v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

The United States Bureau of Reclamation ("BOR" or "United States") claimed, and the Idaho Department of Water Resources ("IDWR") recommended, year 'round streamflow maintenance storage and streamflow maintenance from storage in the amount

of 152,300.00 AFY. The streamflow maintenance is for the channel of the Boise River downstream from Lucky Peak Dam to the confluence with the Snake River. The recommendation is based on and consistent with the license issued by IDWR in 2002 for this claim.

Numerous objections were filed to the recommended streamflow maintenance purpose of use by various irrigation districts, canal companies and other irrigation delivery entities as well as by the Boise Project Board of Control (collectively as "Objectors"). In general, the Objectors argue that the streamflow maintenance purpose of use cannot be decreed because under Idaho law only the Idaho Water Resource Board can hold a minimum instream flow claim. Further, the Objectors argue that allowing winter time releases for fish and game habitat is contrary to the irrigation and flood control purposes for which Lucky Peak Dam and Reservoir were constructed.

The State of Idaho, on behalf of the Idaho Department of Fish and Game (State of Idaho) filed a response to each of the objections. The City of Boise, Ada County and the Board of Ada County Commissioners were granted leave to participate in the proceedings as respondents. (collectively as "Respondents").

Motions for summary judgment were filed by the Objectors, Canyon County Water Co., Farmers Union Ditch Co., Ltd., Middleton Irrigation Ass'n. Inc. and Middleton Ditch Co.; Nampa & Meridian Irrigation District; and Pioneer and Settlers Irrigation Districts. Objector Boise Project Board of Control filed a motion for partial summary judgment. The United States, the City of Boise and Ada County filed cross-motions for summary judgment. The State of Idaho filed a response in opposition to the Objectors' motions.

A hearing was held on the cross-motions on June 19, 2008.

III.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in these matters on June 16, 2008. Thereafter, the matter was taken under advisement. On July 21, 2008, Pioneer and Settlers Irrigation Districts filed a *Notice of Additional Authority*. Parties were given until July 31, 2008, to respond to the *Notice*. Therefore, this matter is deemed fully submitted for decision the next business day, or August 1, 2008.

IV.
FACTUAL HISTORY

The facts in this subcase are not in dispute. The record is nonetheless voluminous as circumstances surrounding the construction and operation of Lucky Peak Dam and Reservoir have a lengthy history. Lucky Peak Reservoir is the third and farthest downstream of the three on-river reservoirs of the Boise Project. Arrowrock Dam is located about 4 miles below the confluence of the main stem and the South Fork of the Boise River. Construction of Arrowrock Reservoir was completed in 1916. Anderson Ranch Dam is located 42 miles upstream from Arrowrock on the South Fork of the Boise River. Construction of Anderson Ranch Dam began in 1940. Prior to its completion, in 1943 a devastating flood occurred in the Boise Valley. As a result, the United States Army's Board of Engineers for Rivers and Harbors conducted a flood control study in 1946. The study ultimately concluded that a two reservoir system would not adequately control the problem of flooding and recommended the addition of a third reservoir at the Lucky Peak site located 12 miles below Arrowrock. *Jarvis Aff.*, Ex. B, pp. 107-08 (*Review of Survey Report Boise River Idaho with a View to Control Floods*, pp. 79-80). The study concluded that:

Although the storage in Lucky Peak Reservoir would be primarily for flood control, other uses would be made of it. Enough supplemental water would be made available to eliminate irrigation shortages. By maintaining a permanent pool at Lucky Peak Reservoir, the pumping lift to the

proposed Mountain Home project would be reduced by 80 feet, thereby enabling the power which would be required to overcome this lift to be made available for other uses in the general area. Construction of Lucky Peak Reservoir would permit the installation of a 13,000-kw. power plant at Arrowrock to supply mainly during the irrigation season. Other benefits which would be realized by the construction of a dam and reservoir at the Lucky peak site include added recreational facilities and its advantages to the people of the valley, betterments for fish and wildlife by the increased regulation of the streamflow, prevention of probable loss of life during floods, allaying the fear of floods, expansion of local business and residential areas, enlargement of local tax base, and increased social security.

Id. at 105-106.

Congress authorized the construction of Lucky Peak Reservoir “for the benefit of navigation and the control of destructive flood waters and other purposes.” Flood Control Act of 1946, 60 Stat. 641, 643, 650 (July 24, 1946).

Although the study concluded that the primary purpose of Lucky Peak would be flood control, one of the other recommended uses was for irrigation in conjunction with the proposed Mountain Home Project. In 1944, the BOR proposed a complex and expensive irrigation project intended to develop 230,000 acres of land in the Mountain Home desert. *Jarvis Aff.*, Ex. C, p. 132. The project called for a trans-basin diversion of surplus water from the Payette River drainage to the Boise River drainage and then from the Boise River drainage to the Snake River drainage through a complex and expensive system of reservoirs, hydroelectric plants, pump stations, tunnels and canals. *Jarvis Aff.*, Ex. C, pp. 140-41. In essence water would be diverted from the Boise River for the Mountain Home Project and replaced with water from the Payette River. *Jarvis Aff.*, Ex. D, p. 142.

In 1953, the United States Department of Interior and the United States Army Corp of Engineers entered into a “Memorandum of Agreement . . . for Flood Control Operation of Boise River Reservoirs, Idaho” (“MOA”). *Arrington Aff.*, Ex. A. The MOA provided that Lucky Peak would be operated under a coordinated plan of operation for all

three reservoirs and set forth the terms of a system-wide plan for the reservoir system. *Id.* at 3. The MOA acknowledged that the 983,000 acre-feet of the available 1,084,000 acre-feet "will be primarily considered as available for irrigation except as such amount must be reduced by evacuation requirements for flood control. *Id.* at 5. The MOA provided that:

No reregulation of storage or annual exchange of storage as provided in this plan, shall however, deprive any entity of water accruing to it under existing rights in Arrowrock, Anderson Ranch, and Lake Lowell Reservoirs.

Id. at 5. The MOA also provided:

In the event Anderson Ranch or Arrowrock Reservoirs are not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights to the extent of the space thus remaining unfilled at the end of the storage season but not to exceed the amount evacuated for flood control.

Id. at 10. The MOA was made contingent upon being formally accepted by the water users having storage rights in the reservoir system and Lake Lowell. *Id.* at 14.

Consistent with the MOA, in 1954 the BOR entered into Supplemental Contracts with each of the irrigation entities having storage rights in the upstream reservoirs. Among other things, the Supplemental Contracts confirmed to contract holders the use of storage waters in Lucky Peak for irrigation purposes in an amount equal to the unfilled storage capacity that results from the water having been evacuated from Anderson Ranch and Arrowrock Reservoirs for flood control purposes. The Supplemental Contracts were identical in substance and provided:

Guarantee:

7. Beginning with the first full flood control period after the agreement . . . there shall be a determination for each storage season as of the end of the season

- (a) of the amount of water to which the District would have been entitled under its storage rights in the reservoir system and Lake Lowell under its Government-District contracts had Anderson Ranch, Arrowrock and Lake Lowell reservoirs been operated in accordance with those contracts except for the provisions thereof relating to the use of capacity for flood control benefits. . . and
- (b) of the amount of water which is creditable to the storage rights of the District under its Government-District contracts taking account of actual operations under the flood control operating plan in accordance with this supplemental contract.

If the amount under (a) exceeds that under (b), there shall be credited and made available to the District, out of the water accrued to storage rights in Lucky Peak Reservoir, an amount of stored water equal to that difference.

Arrington Aff., Ex. B, pp.4-5 (Wilder Irr. Dist.); *Stevens Aff.*, Ex B and C (Pioneer and Settlers Irr. Dists.)

Lucky Peak dam was completed in 1955.

On December 18, 1957, the BOR filed permit application R-35086 with the Idaho Department of Reclamation¹ "To Construct a Reservoir and Appropriate and Store the Public Waters of the State of Idaho." The application was for 307,000 acre feet total capacity with 278,000 acre feet useable storage. The purpose of use stated was for "irrigation and power for irrigation pumping." *Kiser Aff.*, Ex A. Pursuant to publication notice, the last day to file timely protests to the approval of the application was January 27, 1958. *State of Idaho*, Ex B. A protest was filed by the State of Idaho on behalf of the Idaho Department of Fish and Game. *Jarvis Aff.*, Ex. I, pp. 176-79. Closures of the outlet of the dam during periods of annual maintenance resulted in low flows on the Boise River which caused problems for fish and wildlife. *Jarvis Aff.*, Ex. H. As a result, the Idaho Department of Fish and Game made application for a 100 cfs water right from

¹ Predecessor to the Idaho Department of Water Resources.

Lucky Peak and wanted a determination of its permit application prior to approval of the BOR's permit application. *Jarvis Aff.*, Ex. I, p. 176.

Protests were also filed by New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, Big Bend Irrigation District and Nampa & Meridian Irrigation District all of whom are Objectors in this proceeding. *Jarvis Aff.*, Ex. J, pp. 184-87. The irrigation entities were concerned that diverting waters for use in the Mountain Home Project and the Hillcrest Project would adversely impact their rights and the coordinated plan of administration then in effect. Notably, the irrigation entities also alleged that Lucky Peak was constructed primarily for flood control purposes and that changing the use to irrigation purposes would impair their existing use of the Boise River. *Jarvis Aff.*, Ex. J, p. 186.

Ultimately, the BOR resolved the protests through the filing of an amendment to the permit application. The application was amended to provide that "Lucky Peak stored waters will be utilized in the Boise Valley on presently irrigated lands for supplemental irrigation water" and also to include the following remark:

This permit is issued on condition – That the yield of water from 50,000 acre feet of space be available for maintaining winter time flow in the Boise River below Boise Diversion dam under a release pattern established from time to time by the Director of the Idaho Fish and Game Department.

The application for permit was approved on March 20, 1964. *Jarvis Aff.*, Ex. II.

In 1966, irrigation entities holding irrigation rights in Arrowrock and Anderson Ranch reservoirs entered into water service contracts with the BOR for supplemental water supplies. *Stevens Aff.*, Ex. D & E (Contracts for Pioneer and Settlers are identical except as to parties). The contracts acknowledged that "the United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses" *Id.* at 1.

In the mid 1970's the Mountain Home Project was abandoned. The result was that Lucky Peak had 116,250 acre-feet of storage space not under contract. In 1979, the BOR initiated a "Boise Power and Modification Study," which among other things addressed the issue of how to make best use of the uncontracted storage space. *Jarvis Aff.*, Ex. O, p.213, *Jarvis Aff.*, Ex. P, p. 223. Participants in the study included representatives from Nampa-Meridian Irrigation District and the Boise Project Board of Control. *Jarvis Aff.*, Ex. V, p.253. Ultimately, the study recommended using the uncontracted space in conjunction with the 50,000 acre feet dedicated to the Department of Fish and Game in order to provide a minimum streamflow release from Lucky Peak of 150 cfs. *Jarvis Aff.*, Ex. V.

On March 9, 1984, the BOR submitted an application for amendment of the permit requesting that the purpose of use be amended as follows:

<u>Amount (acre feet)</u>	<u>Use</u>	<u>Period: From</u>	<u>To</u>
111,950	Storage for Irrigation	Jan. 1	Dec. 31
152,300	Storage for Streamflow	Jan. 1	Dec. 31
	Maintenance		
152,300	Streamflow Maintenance	Jan.1	Dec. 31
	From Storage		
28,800	Storage for Recreation	Jan. 1	Dec. 31
111,950	Irrigation from Storage	Mar. 15	Nov. 15

Jarvis Aff., Ex. X, p.256. The deadline for filing protests to the approval of the amendment was April 23, 1984. *Jarvis Aff.*, Ex. FF. No protests were filed to the application for amendment.

In effect since 1965 (amended in 1967), the provisions of Idaho Code § 42-1737 require that "[a]ll project proposals involving the impoundment of water in a reservoir with an active storage capacity in excess of ten thousand (10,000) acre feet" to be approved by the Idaho Water Resource Board. The requirement was interpreted to also apply to applications to amend existing permits. *Kiser Aff.*, Ex. F, p. 2. In preparation of

the review of the amendment, David R. Tuthill, Jr., then Supervisor for the Water Allocation Section of IDWR (now Director), prepared an Issue Paper which concluded that the amendment being sought was not subject to the requirements of the minimum streamflow act as set forth in Idaho Code § 42-1501 *et. seq.*:

Chapter 15, Title 42, Idaho Code established that the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality can be considered to be beneficial uses, when the uses are recorded pursuant to the minimum stream flow act. The act can apply to "any lake, spring, creek, stream, river or other natural body of standing or moving water which is subject to appropriation under the laws of Idaho." A minimum stream flow water right can be approved only in the name of the Idaho Water Resource Board, pursuant to the provisions of Chapter 15.

Lucky Peak Reservoir is not a natural body of water, and the stored quantities are not subject to the provisions of Chapter 15. Because Chapter 15 does recognize that certain instream uses can be beneficial, however, the precedent for recognizing such uses is established in Idaho water law. Most water rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

Kiser Aff., Ex. F, p. 3.

On December 13, 1984, in accordance with the provisions of Idaho Code § 42-1737, the Idaho Water Resource Board conducted the review of the application for amendment. The minutes from the proceeding provide the following:

The amendment proposes to maintain the 50,000 af streamflow, change the 28,800 af dead storage to storage for recreation, and change the 228,200 af for irrigation to 102,300 af streamflow maintenance and 111,950 af for irrigation (allowing 13,950 af flood control). Two issues the Board may wish to consider are: "Is streamflow maintenance from storage in conformance with the State Water Plan?" and "Should the duration of the water right be conditioned?". In regard to the first issue, Lucky Peak Reservoir is not a natural body of water and the stored quantities are not subject to the provisions of Chapter 15, Idaho Code. Most water rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted. Historically, the BOR has not allowed the

102,300 acre feet of storage to be contracted except on a limited basis. On the issue of conditioning a water right, the Board may wish to consider the increased competition between the various uses of the limited water supplies in Idaho and the notion that "higher and better use" now may be viewed differently in the future.

Jarvis Aff., Ex. W, p. 254-255. Idaho Water Resource Board member F. David Rydalch, made the motion that "streamflow maintenance from storage" is a water use in conformance with the State Water Plan and recommended that the director approve the application for amendment. The motion passed with 8 Ayes and 0 Nays. A subsequent motion was made that the Board adopt a recommendation that the term of the Lucky Peak storage permit be thirty (30) years prior to review. This motion also passed with 8 Ayes and 0 Nays. *Jarvis Aff.*, Ex. W, p. 255. The amendment to the permit was approved by IDWR on February 14, 1985. *Jarvis Aff.*, Ex. X, p. 257. The amended permit did not incorporate the Board's recommendation of a 30-year review.

On March 11, 1987, the BOR sought a temporary change of use of 44,700 acre feet from streamflow maintenance to irrigation to offset shortages due to the construction of the power plant at Lucky Peak Dam. Pioneer and Settlers Irrigation Districts filed protests to the amendment. *Jarvis Aff.*, Ex. AA, p. 276. Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District; Middleton Mill Ditch Company and Middleton Irrigation Assn, Inc. and others filed a petition for leave to intervene in the proceedings. *Jarvis Aff.*, Ex. AA, p. 273, *Jarvis Aff.*, Ex. BB, p. 283. None of the protests contested the validity of the streamflow maintenance purpose of use. The protests were eventually withdrawn pursuant to a stipulation making additional water available to the protestants during the 1987 irrigation season. *Jarvis Aff.*, Ex. BB, p. 283, 291-296. Another application for amendment was filed by BOR on July 11, 1990, in order to provide temporary supplemental water from the streamflow maintenance account for irrigation entities. No protests were filed. The application for the amendment was approved November 11, 1990.

A beneficial use examination memorandum recommending the issuance of the license for permit No. 63-03618 was prepared February 19, 2002. *Jarvis Aff.*, Ex. DD, pp. 300-304. On September 27, 2002, IDWR issued the license for water right no. 63-03618 which described the following purposes of use and quantities:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>ANNUAL DIVERSION VOLUME</u>
IRRIGATION FROM STORAGE	03/01 to 11/15	111,950.0 AF
IRRIGATION STORAGE	01/01 to 12/31	111,950.0 AF
RECREATION STORAGE (INACTIVE)	01/01 to 12/31	28,800.0 AF
STREAMFLOW MAINTENANCE STORAGE	01/01 to 12/31	152,300.0 AF
STREAMFLOW MAINTENANCE FROM STORAGE	01/01 to 12/31	152,300.0 AF

Jarvis Aff., Ex. EE. The *Director's Report* recommendation for water right no. 63-03618 was filed with the Court on September 30, 2004, and is based on the license. It describes the same purposes of use and quantities as in the license.

In 1985, the Army Corps of Engineers adopted a *Water Control Manual for Boise River Reservoirs* which set forth a "Water Control Plan to define reservoir regulation procedures and practices for joint use of the storage spaces in Anderson Ranch, Arrowrock, and Lucky Peak Reservoirs." 2nd *Jarvis Aff.*, Ex. KK, p. 11. The *Water Control Manual* provides that in the event flood control operations result in irrigation entities having less storage than they would otherwise, then the first 60,000 acre-feet of any shortfalls caused by flood control operations comes from the streamflow maintenance allocation. The system has been administered in this manner since 1985. Since 1985 there have been three years that Arrowrock and Anderson Ranch reservoirs did not fill due to flood releases. In only one of those years did the shortfall exceed the 60,000 acre-feet. The shortage beyond the 60,000 acre-feet was allocated proportionality among all the uses in Lucky Peak. Contract holders in Anderson Ranch and Arrowrock received their full allocation of storage water under their respective contracts for those reservoirs. *Mellema Aff.* pp. 3-4. Since the coordinated reservoir operations began in

1955, there have been seven (7) years in which the flood control operations resulted in a shortfall. *Id.*

In 2005, the 1966 water service contracts entered into by Pioneer and Settlers Irrigation Districts were converted to repayment contracts in accordance with Federal Reclamation laws. *Campbell Aff.* Ex. H & I (contracts identical except as to parties). The 2005 repayment contracts superseded the 1966 service contracts. *Id.* at 3. The repayment contracts specifically acknowledged that the "United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses, for which the United States holds License No. 63-03618 *Id.* at 2. The repayment contracts also provided:

WATER SUPPLY AND OPERATION OF THE RESERVOIR

16. (a) As of the date of this Contract, the United States holds License No. 63-03618, issued on September 27, 2002, by the State of Idaho to the United States for the storage of 307,000 acre-feet per annum of the waters of Boise River in Lucky Peak Reservoir. The primary purpose of the Reservoir is for flood control, for which it will be operated, in accordance with the Memorandum of Agreement between the Department of the Army and the Department of the Interior, dated November 20, 1953, and as it may be amended, the Act of August 24, 1954 (ch. 909, 68 Stat. 794), the 1954 Supplemental Arrowrock and Anderson Ranch Reservoir contracts approving the Boise River operating plan, and the Water Control Manual for Boise River Reservoirs, dated April 1985, copies of which are available for inspection at the office of the Contracting Officer. Subject to operations for flood control, the United States will operate the Project so as to store under existing storage rights all available water, and during each irrigation season, the Contracting Officer will make available to the Contractor for irrigation the Contractor's proportionate share of the stored water that accrues in each year to the active capacity of the Reservoir, together with any stored water that may have been carried over in the Contractor's share of such active capacity from prior water years.

(c) All space in Lucky Peak Reservoir shall be operated with like priority as to storage rights and all space will be treated proportionately

V.

ISSUES RAISED ON SUMMARY JUDGMENT

Summarily stated, the issues raised on motion for summary judgment are as follows:

Whether the arguments raised on summary judgment constitute collateral attacks upon a previously licensed water right?

Whether the license issued by IDWR for streamflow maintenance is valid?

Whether an entity other than the Idaho Water Resources Board can hold title to a water right for streamflow maintenance?

Whether streamflow maintenance can be decreed as a beneficial use?

Whether the streamflow maintenance claim interferes with the interests and guarantees held in Lucky Peak Reservoir by irrigation entities?

Whether the interests held in Lucky Peak Reservoir for flood evacuation pursuant to Supplemental Contracts should be reflected in the *Partial Decree*?

VI.

STANDARD OF REVIEW

Summary judgment shall be rendered when “the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). Generally, disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007). However,

[I]f an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct.App.1985) (citing *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)).

Here, opposing parties have moved for summary judgment on the same issues of law. The Idaho Supreme Court has explained the legal standards to be applied when deciding cross motions for summary judgment as follows:

In *Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996), this Court held that when both parties file a motion for summary judgment relying on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment. *Brown*, 129 Idaho at 191, 923 P.2d at 436. In *Wells v. Williamson*, 118 Idaho 37, 794 P.2d 626 (1990), this Court recognized that when opposing parties file cross motions for summary judgment, based upon different theories, the parties should not be considered to have effectively stipulated that there is no genuine issue of material fact. *Wells*, 118 Idaho at 40, 794 P.2d at 629.

Eastern Idaho Agricultural Credit Association v. Niebaur, 130 Idaho 623, 626-627, 944 P.2d 1386, 1389-1390 (1997).

VII.

DISCUSSION

A. The Arguments Raised on Summary Judgment Constitute Collateral Attacks on a Previously Licensed Water Right Unless the License is Determined to be Void.

The director's recommendation for water right 63-03618 is based on a license. Subject to certain noted exceptions, the SRBA Court has consistently prohibited licenses from being collaterally attacked in the SRBA. In a recent opinion this Court discussed the rationale:

Licenses are and have been consistently treated in the SRBA the same as prior decrees for purposes of binding the parties and their privies. In *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcases 36-02708 *et al.* (Dec. 29, 1999), the SRBA Court affirmed a special master's ruling that the SRBA was not the appropriate forum for collaterally attacking licenses previously issued through administrative proceedings.

The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alred.* Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844 693 P.2d 1046 (1984).

Id. (quoting *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)* (July 31, 1998); *see also Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge*, subcase 36-08099 (Jan 11, 2000)(upholding subordination remark contained in a license for hydropower water right claim).

...

The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.

Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law (City of Pocatello - Federal Law Claims), Subcase No. 29-11609 (Oct. 6, 2006) at 12-13. This Court then discussed an exception to issuing a decree for a water right other than consistent with the elements stated in the license. Technically, however, this exception is not a collateral attack on the

elements of the license because it results from circumstances occurring after the license was issued.

Like a prior decree, a licensed right is not conclusive as to the extent of the water right, since a license does not insulate a claimant from practices occurring after the license was issued such as abandonment or forfeiture. However, unlike a prior decree, the binding effect of a license extends beyond the parties to the administrative proceeding and their privies. [FN Publication notice is given and any affected person can initiate a contested case.]. With respect to prior decrees, not all water users hydraulically connected to the source were always joined as parties. The Idaho legislature also acknowledged the binding effect of prior licenses and decrees in enacting Idaho Code § 42-1427 which provides a mechanism for defining elements of water rights not described in prior decrees or licenses. Accordingly, the City is also bound by its prior license for water right claim 29-07431. [Footnote omitted].

Id. at 13.

Another exception was applied by this Court in the portion of this case dealing with the ownership of storage rights for which irrigation entities hold repayment contracts. This Court held that the inclusion of a remark to clarify an otherwise ambiguous license and avoid future controversy did not constitute a collateral attack on a license. This Court reasoned:

This Court acknowledges the prohibition against collaterally attacking a license as well as the *res judicata* effect on parties to a prior decree. However, the Court does not view all of the relief sought nor the relief ultimately granted as being inconsistent with these principles. The inclusion of a remark regarding equitable interest is not inconsistent with the prior license or the decree. I.C. § 42-1412 and 42-1411(2) and (3) specify what elements to include in a partial decree. One of the elements includes "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for the administration of the right by the director." In the interest of uniformity and brevity, referring to existing law in individual partial decrees is the exception and not the rule. The Court generally views it as unnecessary because parties have the right to rely on the backdrop of existing law for the definition and administration of their water right. The exception is when the application of the existing law is at issue. Without clarification of applicable law, the issues raised here potentially make the decree

ambiguous without a clarifying remark. In such cases the Court allows a clarifying remark so as to avoid future controversy.

In the instant matter, the issue of the relationship between the BOR and project water users was never raised or litigated in either the licensing proceedings or in conjunction with the *Bryan Decree*. Project water users were entitled to rely on the backdrop of existing law in defining the relationship between the BOR and project water users, irrespective of whether or not it was incorporated into the decree. For example, when water rights are decreed in the name of an irrigation district, the license or partial decree does not contain language to the effect that the rights are held in trust for the water users within the district as the relationship is defined by law. *See* I.C. § 43-316. The fact that the rights are decreed in solely in the name of the irrigation district does not alter that relationship.

To the extent the Court is now being asked to clarify existing law against which the water right holders were entitled to rely, the Court does not view that as a collateral attack on a prior license or decree. The Court views the matter as a clarification of a prior decree or license. The Court also finds it necessary to include a remark regarding the same so as to avoid having to readdress the issue at some point in the future.

Conversely, to the extent the Irrigation Entities seek to obtain full title (on behalf of their members) to the subject water rights -- that is inconsistent with existing law and would be a collateral attack on the prior decree or license. That issue should have been raised in the former proceedings.

Memorandum Decision and Order on Cross-Motions for Summary Judgment and Notice of Status Conference (91-63 Ownership of Water Rights between Irrigation Entities and Bureau of Reclamation) at 29-30. The inclusion of the remark for a previously licensed right was upheld by the Idaho Supreme Court. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2006).

In the instant case, the Objectors assert that the issues raised in the objections do not constitute a collateral attack on the elements stated in the license because the license is not valid.² The Objectors argue that IDWR acted outside the scope of its authority in issuing the license for streamflow maintenance by failing to follow the exclusive

² The Boise Project Board of Control also argues that the objections do not constitute a collateral attack because the license was issued after the director's report and recommendation was filed.

procedure for licensing a minimum streamflow right as set forth in the Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.* This Court disagrees. The Court acknowledges that the failure of IDWR to follow statutory procedures in issuing a license may very well invalidate a license. The Court also acknowledges that an invalid license may also constitute an exception to the collateral attack prohibition. However, for the reasons discussed below the Court does not find that IDWR failed to follow proper procedures in issuing the license for the streamflow maintenance purpose of use. Therefore the Court finds that the license is not void.

B. The Idaho Minimum Stream Flow Act does not apply to the Streamflow Maintenance Claim.

The arguments raised by the Objectors rest on the assumption that the streamflow maintenance claim at issue is in all respects a minimum streamflow claim as defined by the Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.* ("IMSFA" or "Act"). The Respondents argue that because the claim involves a diversion, namely the dam, the IMSFA does not apply. The facts of this case present somewhat of an anomaly and a case of first impression regarding the application of the IMSFA. There are colorable arguments on both sides of the issue. While on one hand there is a diversion, the place of use is still located within the natural channel of the river. On the other hand, the entire flow of river is diverted and then artificially released. In other words, the claim does not involve the appropriation of a natural flow within the channel. In arriving at the decision that the IMSFA does not apply to the licensed streamflow maintenance claim, this Court relies on the following: 1) A plain reading and application of the IMSFA; 2) the interpretation of the Act as applied by the Idaho Department of Water Resources, 3) the interpretation of the Act as applied by the Idaho Water Resource Board, 4) the minutes from the House Resources and Conservation Committee on the IMSFA, and 5) the Idaho Supreme Court's analysis in *In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge, State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000) ("*Smith Springs*"). Each is discussed below.

1. **Based on the plain meaning of the statutory language, the IMSFA does not apply to the streamflow maintenance claim.**

It is well established that the interpretation of a statute begins with an examination of the statute's literal words. *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 68 (Ct. App. 2000). The language of the statute must be given its plain, obvious and rational meaning. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). If the language is clear and unambiguous, it must be applied according to its plain terms, and there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Id.* However, if it is necessary for the Court to interpret a statute, then it will attempt to ascertain legislative intent by examining the language used, the reasonableness of the proposed interpretations, as well as the policy behind the statute. *Id.*

Idaho Code § 42-1501 of the IMSFA provides:

42-1501. Legislative purpose – Minimum stream flow declared beneficial use. – The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality. The preservation of the water of the stream of this state for such purposes when made pursuant to this act is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water. The legislature further declares that minimum stream flow is a beneficial use of water of the streams of this state of the purpose of protecting such waters from interstate diversion to other states or by the federal government for use outside the boundaries of the state of Idaho. Minimum stream flows as established hereunder shall be prior in right to any claims asserted by any other state, government agency, or person for out of state diversion. It is, therefore, necessary that authority be granted to receive, consider, approve or reject applications for permits to **appropriate water of the streams of this state to such beneficial uses to preserve such water from subsequent appropriation to other beneficial uses under the provisions of chapter 2, title 42, Idaho Code.** [emphasis added].

The “definitions” section of the Act defines “appropriate” as “the identification of a beneficial use and **place of in-stream use of waters of a stream.** It shall not be

construed to require any kind of physical structure or physical diversion from the stream. . . .” I.C. § 42-1502(a) (emphasis added). “Stream” is defined as any lake, spring, creek, stream, river or other natural body of standing or moving water which is subject to appropriation under the laws of the state of Idaho.” I.C. § 42-1502(e) (emphasis added). “Minimum stream flow” is defined as the minimum flow of water in cubic feet per second of time . . . required to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of a stream in the public interest” I.C. § 42-1502(f) (emphasis added). The Act defines “Unappropriated water” as “water which is not subject to diversion and use under any prior existing water right established by diversion and application to a beneficial use or by application, permit or license on file or issued by the director under the provisions of chapter 2, title 42, Idaho Code, with a priority of water right date earlier than an application for appropriation of minimum stream flow filed under the provisions of this act.” I.C. § 42-1502(g).

While there are apparent similarities between the subject streamflow maintenance water right and a water right perfected under the IMSFA, a plain reading of the statutory language of the IMSFA indicates that they are not the same. A water right perfected under the IMSFA is an *in situ* right, meaning the water is appropriated in its natural or original state. The purpose of the appropriation is to leave a portion of the unappropriated natural flow of a stream in its natural channel to accomplish such stated purposes as “protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.” The IMSFA works by appropriating an in-stream flow through the identification of a defined quantity of a natural stream flow measured in cubic feet per second of time. Once the right is perfected, the appropriator, the Idaho Water Resource Board, need not take any action to implement the use of the water authorized under the right. No diversion works need to be constructed and no pipes, ditches or other means of conveyance need be utilized. In other words, the Idaho Water Resource Board need not do anything to implement the use of water under the right. The effect of the right is that the natural body of water is protected from subsequent appropriations to the extent of the minimum flows. Put differently,

otherwise appropriable water is removed from the potential for future appropriation. Pursuant to the Idaho Constitution, such a protection from future appropriations could only be accomplished through the creation of a water right as opposed to the Legislature simply passing legislation prohibiting unappropriated water from being appropriated.³ Prior to the enactment of the IMSFA – and a few similar water rights created by the Idaho legislature on a case-by-case basis – such a water right did not exist because of the diversion requirement. *See e.g.* I.C. § 67-4307 (Malad Canyon) and discussion *infra*; I.C. § 67-4308 (Niagra Springs); I.C. § 67-4309 (Big Springs); I.C. § 67-4310 (Box Canyon); 67-4311 (Thousand Springs).

While the subject streamflow maintenance water right accomplishes a number of the same purposes for which the IMSFA was created, it does so in a different manner. The water right is not an *insitu* right in that the water is not being appropriated in its natural state. Instead, the entire flow of the natural stream has been diverted and stored and become subject to controlled releases. The storage and releases are made possible by the massive and costly structure known as the Lucky Peak dam and reservoir. The BOR has flexibility in releasing the water when needed to accomplish such purposes. Rather than taking no action, as is the case with an IMSFA water right, the BOR monitors and manages the stream flow releases from the reservoir on a day-to-day if not hour-to-hour basis. This is not the same “no action” water right as is contemplated by the IMSFA. A water right perfected under the IMSFA is defined and measured in cubic feet per second within the natural channel. *See* I.C. § 42-1502(f) (defining minimum flow of water in cubic feet per second of time); I.C. § 42-1502(e) (defining stream as natural body of water subject to appropriation). Unlike a claim under the IMSFA, the subject streamflow maintenance claim is not defined or measured in terms of cubic feet per second within its natural stream channel. Rather, the claim is measured in terms of total acre feet per year within the body of the reservoir. Releases from the reservoir are also measured in terms of total acre feet per year.

³ Article XV § 3 of the Idaho Constitution provides in relevant part: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.”

One argument raised over the application of the IMSFA concerns the purpose and meaning of the language of I.C. § 42-1502(a) which provides: "It shall not be construed to require any kind of physical structure or physical diversion from the stream. . . ." ⁴ This language has been argued to support the proposition that the IMFSA applies whether or not a diversion exists. This Court disagrees with that interpretation. Such an interpretation would result in an internal inconsistency in the application of the statute. Simply put, if the Act also applies to a diversion "from a stream" as the term "stream" is defined by I.C. § 42-1502(e) then by the statutes' own terms it would not be an appropriation of an in-stream flow in its natural channel, which is the purpose of the Act. To the extent the provision can be argued to make the application of the IMSFA ambiguous, the Court notes the following canon of statutory interpretation.

A statute is passed as a whole and not in parts or sections and is animated by one general purpose or intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

Vol. 2A Sutherland, *Statutes and Statutory Construction* § 46:05 (2001).

The more rational explanation for the inclusion and purpose of the provision is to resolve any ambiguity and make clear that the Idaho Legislature waived the statutory diversion requirement that would otherwise be required to establish a water right after the issue presented itself in *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974) ("*Malad Canyon*"). The *Malad Canyon* case involved one of the above-referenced case-by-case in-stream flows created by the Idaho legislature prior to the enactment of the IMSFA. In 1971, the Idaho legislature enacted I.C. § 67-4307 directing the Department of Parks of the State of Idaho to appropriate in trust for the citizens of the State of Idaho certain unappropriated natural flows of the Malad Canyon. One of the challenges to the appropriation was whether the Idaho Constitution required an actual physical diversion in order to perfect a water right. The Idaho Supreme Court

⁴ Some previous legislative case-by-case appropriations included the language "and no proof of completion of any diversion works shall be required." See 67-4301 (Big Payette Lake); 67-4304 (Priest, Pend d'Orielle, and Coeur d'Alene Lakes).

held that the Idaho Constitution did not require a physical diversion and that the requirement was a statutory requirement. The provisions of Idaho Code § 67-4307 did not expressly state that the statutory diversion requirement had been waived. In resolving the conflict between the general statutory diversion requirement and the application of I.C. § 67-4307, the Idaho Supreme Court resorted to established rules of statutory interpretation and held by implication that the Legislature did away with the diversion requirement:

It is axiomatic that where a general statute and a specific statute deal with the same subject matter and are in conflict, the provisions of the specific statute must control. . . . It is also clear that where two statutes conflict the latest expression of the legislative will must prevail.

We deem it to be the intent of the Idaho legislature to dispense with any physical diversion requirement in the case of the appropriation directed in I.C. § 67-4307. Any other construction would nullify the obvious purpose of I.C. § 67-4307. Courts should if possible in construing a statute give it an interpretation which does not in effect nullify the statute.

Id. at 444-45, 530 P.2d at 928-29 (citations omitted).

The IMSFA was enacted in 1978 as an alternative to the Idaho Legislation having to enact specific legislation on a case-by-case basis to appropriate in-stream flows. 1978 Idaho Sess. Laws ch. 345. Accordingly, in an effort to avoid the same conflict as arose in the *Malad Canyon* case, the Idaho Legislature included the provision “[i]t shall not be construed to require any kind of physical structure or physical diversion from the stream. . . .”

Therefore, based on a literal reading of the statutory language of the IMSFA this Court holds that the IMSFA does not apply to the streamflow maintenance claim at issue.

2. **The interpretations of the agencies responsible for applying the provisions of the IMSFA also conclude that the IMSFA does not apply to the streamflow maintenance claim.**

Although this Court does not find the IMSFA to be ambiguous, this Court's analysis regarding its application is consistent with IDWR's interpretation and historic application of the Act. As recited previously in the factual history section of this decision, Director Tuthill, then Supervisor for the Water Allocation Section of IDWR, prior to granting an amendment to the permit concluded that "Lucky Peak Reservoir is not a natural body of water and stored quantities are not subject to the provisions of Chapter 15." *Kiser Aff.*, Ex. F, p. 3. The Court's analysis is also consistent with the conclusions of the Idaho Water Resource Board (IWRB), which determined:

Lucky Peak Reservoir is not a natural body of water and the stored quantities are not subject to the provisions of Chapter 15, Idaho Code. Most water rights in Idaho require diversion and beneficial use. The dam is considered to be the diversion for a storage water right, and if the streamflow maintenance uses can be considered to be beneficial, a valid water right can be constituted.

Jarvis Aff., Ex. W, p. 254-255.

In *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400, (1997), the Idaho Supreme Court set forth the criteria regarding when a Court should accord deference to an agency's construction of a statute.

In *Jr. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991), the Court established a four-part test for when agency construction of a statute should be accorded deference. This Court summarized this test as follows:

This four prong test states that an agency's construction of a statute will be given great weight if (1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statute is reasonable; (3) the statutory language at issue does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present.

Garner v. Horkley Oil, 123 Idaho 831, 833, 853 P.2d 576, 578, (1993) (citing *Simplot*, 120 Idaho at 862, 820 P.2d at 1219).

Hagerman Water Right Owners at 734, 947 P.2d at 407. The rationales underlying the rule of deference were set forth in *Garner v. Horkley Oil*.

These rationales include situations when an agencies interpretation has been relied upon for a number of years; when the agency's interpretation represents a practical interpretation; when the statutory test has not been altered by the legislature in light of the interpretation, or when the interpretation is formulated contemporaneously with the enactment of the statute; and when the interpretation involves an area of expertise developed by the agency.

Id. at 834, 853 P.2d 579 fn.3.

In applying the above-stated criteria, the IWRB and IDWR are the agencies charged with implementing and administering the provisions of the IMSFA. Idaho Code § 42-1504 authorizes any person, agency etc. to make a request in writing with the IWRB to consider the appropriation of a minimum stream flow of unappropriated waters. The IWRB is authorized to accept or reject the proposal and may hold hearings in reaching a decision. There is no right of review of the rejection of a proposal. I.C. § 42-1504. If the IWRB accepts the proposal, it then submits an application to the Director of IDWR. The Director, pursuant to notice, is authorized to conduct an investigation and hold hearings for the purpose of making findings either "approving the application in whole, or in part, or upon conditions or rejecting said application." I.C. § 42-1503. The IWRB or any party, who testified at a hearing, aggrieved by the decision of the Director may seek judicial review. *Id.* The conclusions of both IDWR and the IWRB that the IMSFA does not apply to the subject streamflow maintenance claim are reasonable. This Court arrived at the same conclusion by way of an independent analysis.

The IMSFA does not expressly address the question at issue. Although in this Court's opinion, a plain reading of the statute answers the question at issue. The arguments raised in the context of these proceedings would suggest that the statute does adequately address the issue.

The Court also finds that one or more criteria of the rationales underlying the rule of deference are satisfied. The interpretation and application of the IMSFA by both IDWR and the IWRB have been in existence at least since 1984 when the application to amend the permit was filed and reviewed. The Boise River has been administered in accordance with the amended permit since it was approved. There has been considerable reliance on the administration of the River since that time. *See e.g. Finch Aff.; O'Neal*

Aff.; *Harmon Aff.*; *Engel Aff.*; *Bieter Aff.* Moreover there were multiple opportunities for affected parties to contest the permit since 1964 when the permit for the 50,000 acre-feet was approved. Almost forty-years elapsed since the objections to the permit and license were filed. Finally, the agencies' interpretations represent a practical interpretation of the application of the Act.

Accordingly, the Court's finds it appropriate that weight and deference also be given to the interpretations of the scope of the IMSFA as applied by both IDWR and the IWRB.

3. The minutes from the Resources and Conservation Committee conclude that the IMSFA does not apply to a diversionary right.

The minutes from the Idaho State House Resources and Conservation Committee wherein the IMSFA was discussed also reflect an interpretation consistent with this Court's analysis of the IMSFA and the interpretations of IDWR and the IWRB.

Policy No. 6: INSTREAM FLOWS

Water rights should be granted for instream flow purposes. The legislation authorizing this policy should recognize and protect existing water rights and priorities of all established rights and delegate responsibilities for determining flows and administrative authority to the Department of water resources. The legislation should also direct that the Idaho Water Resource Board shall be the only applicant for instream flow.

Rep Tibbitts: Would you define instream flows?

Mr. Allred: Those flows by which there is no diversion. They are instream flows for some purpose whether fisheries, recreation, or water quality. There is no physical diversion.

2nd Jarvis Aff., Ex. LL, p. 21.

While not conclusive of legislative intent concerning the application of the IMSFA, the explanation is consistent with the Court's interpretation and those of IDWR and the IWRB.

4. The Idaho Supreme Court's analysis in the *Smith Springs* case distinguished between the significance of diversionary and non-diversionary rights used for wildlife purposes.

The Idaho Supreme Court also weighed in on the application of the IMFSA in its analysis in *In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge, State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000) ("*Smith Springs*"). In *Smith Springs*, the United States filed a state-law based beneficial use in-stream flow claim for wildlife habitat. The issue was framed as whether the United States could claim a non-diversionary water right for purposes other than stock-watering. The Idaho Supreme Court rejected the United States' claim for wildlife habitat solely on the basis that there was no diversion. The Supreme Court's entire analysis focused on a comprehensive history of the diversion requirement and its two exceptions, which include in-stream stock-watering and state agencies acting pursuant to statute (i.e. the IMSFA). The Supreme Court determined "neither of these exceptions covers the United States' claim." *Id.* at 110, 996 P.2d at 810. The entire basis for the decision turned on the absence of a physical diversion. Presumably, if the only way to perfect a water right for wildlife habitat was through the IMSFA, whether or not a diversion existed, the issue would have more appropriately focused on the purpose of use as opposed to the exceptions to the diversion requirement. The logical inference is that the United States could have perfected an in-stream non-consumptive use claim for wildlife habitat so long as a physical diversion of some type was present.

In sum, based on the cumulative weight of all of the above-discussed factors, this Court holds that the IMSFA does not apply to the licensed streamflow maintenance claim at issue. Having concluded that the IMSFA does not apply to the license, the Court cannot conclude that IDWR acted outside of its authority by failing to following the procedures set forth in the IMSFA.

C. Objections to the Streamflow Maintenance Purpose Of Use Constitute Collateral Attacks on a Valid License.

The Objectors also argue that even if the IMSFA only applies to non-diversionary rights, the only way to perfect a water right for the underlying purposes of the streamflow maintenance claim such as those enumerated in the IMSFA including "protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality" is through the IMSFA. This Court disagrees. First, the claim, including the purpose of use, is based on a license. This Court already determined that IDWR did not act outside the scope of its authority in issuing the license without complying with the IMSFA. The Court therefore views challenges to the purpose of use as impermissible collateral attacks on the license. IDWR is the administrative agency charged with administering water rights in the State including the administration of the application, permit and licensing process for perfecting a water right. The fact that IDWR issues a license for a purpose of use that has not previously been affirmed by the Idaho Constitution, the Idaho Legislature or the Idaho Supreme Court does not mean the agency is acting outside of its authority by issuing a license for such a purpose.⁵ If this were to be the case, then every time an application for a novel use for water is made IDWR would have to either go to the legislature or seek a declaratory judgment prior to proceeding with processing such a permit application. Furthermore, in the course of the licensing process the fact that IDWR may make a decision argued to be legally incorrect does not mean IDWR is acting outside the scope

⁵ In Justice Bakes special concurrence in the *Malad Canyon* case he stated: "I therefore conclude that the uses other than those enumerated in Article 15, § 3, can be beneficial uses." *Malad Canyon* at 447, 530 P.2d at 931 (Bakes special concurrence). He also stated:

With the exception of the uses implicitly declared to be beneficial by Article 15, § 3, there is always a possibility that other uses beneficial in one era will not be in another and *vice versa*. As stated in *Tulare Irrig. Dist. v. Lindsay-Stratmore Irrig. Dist.*, 3 Cal.2d 489, 45 P.2d 972, 1007 (1935):

What is a beneficial use, of course depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

Id. at 448-49, 530 P.2d at 932-33.

of its delegated authority. Instead the permit and licensing process affords any aggrieved party the opportunity to contest the purpose of use and seek judicial review of the matter.

In this case the streamflow maintenance purpose of use was not contested at the permitting stage. In fact, just the opposite occurred. The initial 50,000 acre-foot for streamflow maintenance purpose of use came about as a result of a settlement of protests to out of basin diversions filed by many of the same parties who are objectors in this subcase. Parties also had the opportunity to protest the purpose of use in 1984 when the BOR made application to amend the quantity. Therefore, based on the previously discussed law-of-the case, the Court finds that objections to the streamflow maintenance purpose of use constitute impermissible collateral attacks on the license.

The Objectors cite no authority supporting the proposition that the exclusive means for perfecting a water right – involving a diversion - for the “protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality” is through the IMSFA. In *Smith Springs*, the Idaho Supreme Court rejected the United States’ claim for wildlife habitat solely on the basis that there was no diversion. The Idaho Supreme Court’s entire analysis focused on the diversion requirement and its two exceptions. Simply stated, if the only means for perfecting such a wildlife habitat water right were through the IMSFA or some other statute, the issue as framed - whether the United States could claim a non-diversionary water right for purposes other than stock-watering – as well as the comprehensive discussion over the diversion requirement would have been irrelevant. Again, the issue would have focused on the purpose of use as opposed to whether or not a physical diversion was present.

1. **Although the *Director’s Report* was issued prior to the license, the objections still constitute impermissible collateral attacks.**

The Boise Project Board of Control argues that no impermissible collateral attack on the license occurred because the *Director’s Report* including the recommendation for the water right was filed prior to the issuance of the license. This Court disagrees.

The beneficial use exam occurred on February 19, 2002. The *Director’s Report* which included the recommendation for the water right claim was filed on September 24,

30

2002. The recommendation specifically states that it is based on the license as opposed to a permit. If the recommendation was based on a permit, it would have stated as such. See I.C. § 42-1421. The license was issued three days later on September 27, 2002. The first objections to the *Director's Report* were filed January 14, 2003.

The Court fails to see the legal relevance of the timing of the issuance of the license. The prohibition on collateral attacks to licenses results from the permit and licensing process being a separate administrative proceeding. Remedies are sought through the Idaho Administrative Procedures Act and judicial review. The Idaho Legislature made it clear that the SRBA is not the proper forum for reviewing administrative decisions. I.C. § 42-1401D. The Court recognizes that there can be jurisdictional overlap between actions originating administratively and those arising in the SRBA. In such circumstances, the SRBA Court holds a hearing to determine whether the matter should continue to proceed administratively or whether the administrative proceeding should be stayed and the matter continued in the SRBA. However, once a final administrative order is issued and no right of review is preserved, the proceedings on the license become final.

At the time the license was issued, on September 27, 2002, the Boise Project Board of Control should not have assumed that judicial review of the license would be conducted solely through the SRBA and not through the Idaho Administrative Procedures Act. Particularly after the enactment of I.C. § 42-1401D in 2001. To the extent there was any uncertainty about the proper forum for judicial review, any protestors could have pursued grievances in both forums, i.e. they could have sought judicial review through the APA and filed an objection in the SRBA.

D. The Operation of Idaho Code § 39-104(4) is Consistent with this Court's Decision on the Application of the IMSFA.

On July 21, 2008, Pioneer and Settlers Irrigation Districts filed a *Notice of Additional Authority* citing I.C. § 39-104(4). Idaho Code § 39-104(4) is part of the Idaho

Environmental Protection and Health Act, I.C. §§ 39-101 *et. seq.* Idaho Code § 39-104 establishes the Department of Environmental Quality. Paragraph (4) provides:

No provision of this title shall be interpreted as to supersede, abrogate, injure or create rights to divert or store water and apply water to beneficial uses established under section 3, article XV of the constitution of the state of Idaho and title 42, Idaho Code. Nothing in this title shall be construed to allow the department to establish a water right for minimum water levels in any lakes, stream flows, or impoundments. *Minimum stream flows and minimum water levels may only be established pursuant to chapter 15, title 42, Idaho Code.*

(emphasis added).⁶ The provisions of I.C. §39-104(4) do not alter this Court's prior analysis.

First, no provision of Title 39 is being relied upon to establish the streamflow maintenance right at issue. Second, although I.C. §39-104(4) provides that "minimum stream flows" can only be established pursuant to the IMSFA, for the reasons discussed previously, the streamflow maintenance right at issue is not the same type of water right as the "minimum stream flow" right contemplated under the IMSFA. As such, the Court holds that I.C. §39-104(4) is of no effect in this matter.

E. The Streamflow Maintenance Claim does not Interfere with the Interests Held in Lucky Peak Reservoir by Irrigation Entities.

The Objectors also argue that the streamflow maintenance claim should be denied because the claim is contrary to the representations and guarantees made to irrigation entities by the BOR. This Court disagrees. In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the Idaho Supreme Court held that storage right holders have a property interest in the water rights for which they hold contracted storage space. In this case, the irrigation entities do not hold contracts for the entire capacity of Lucky Peak Reservoir. In 1966, the same irrigation entities holding irrigation rights in Arrowrock and Anderson Ranch Reservoirs entered into water service contracts with the BOR for supplemental water supplies. In 2005, the water service contracts were

converted to repayment contracts. According to the terms of the 2005 repayment contracts “[a]ll space in Lucky Peak Reservoir shall be operated with like priority as to storage rights and all space will be treated proportionately” These rights are acknowledged in the *Director’s Report* in the amount of 111,950 acre-feet for irrigation storage and irrigation from storage. The 152,300 acre-feet of storage space used to satisfy the streamflow maintenance water claim at issue represents storage space for which these entities do not hold contracts. As such, these irrigation entities do not have a property interest in this space as a result of these repayment contracts, nor do they have a senior priority. The Court cannot find that the streamflow maintenance rights interfere with these rights. Accordingly, the holding and reasoning in *United States v. Pioneer Irr. Dist.* does not apply to this storage space for which no contracts are held.

The Court also finds no merit in the argument, that second to flood control, the primary purpose of Lucky Peak was for irrigation and therefore the space may only be used for the storage and release of irrigation water rights. The 1966 water service contracts for the supplemental water supplies specifically acknowledged that “the United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses” *Stevens Aff.*, Ex. D & E at 1. The repayment contracts also specifically acknowledged that the “United States has constructed and operates the Lucky Peak Dam and Reservoir on the Boise River in which there is water stored which can be used for the irrigation of land and for other beneficial uses, for which the United States holds License No. 63-03618” The irrigation entities entered into these contracts acknowledging that the reservoir could be used for purposes other than irrigation.

- 1. Irrigation entities holding repayment contracts in Anderson Ranch and Arrowrock Reservoirs have an interest in Lucky Peak which should be reflected in the *Partial Decree* in the form of a remark.**

⁶ The term “department” as used in the statute means the Department of Environmental Quality. I.C. §39-103(4)

Prior to the establishment of the 50,000 acre-feet for maintaining winter time flows and prior to the existence of the contracts for supplemental water supplies, the BOR entered into contracts which amended or supplemented the repayment contracts held by each of the irrigation entities having storage rights in Arrowrock and Anderson Ranch Reservoirs. The "Supplemental Contracts" guaranteed to those contract holders the use of storage waters in Lucky Peak for irrigation purposes in an amount equal to the unfilled storage capacity resulting from the water having been evacuated from Anderson Ranch and Arrowrock Reservoirs for flood control purposes. *Arrington Aff.*, Ex. B, pp.4-5; *Stevens Aff.*, Ex B and C. Since 1985, pursuant to the *Water Control Manual for Boise River Reservoirs*, the first 60,000 acre-feet of any shortfalls caused by flood control operations comes from the streamflow maintenance allocation. Any shortages beyond the 60,000 acre-feet are allocated proportionality among all the uses in Lucky Peak.

The Boise Project Board of Control argues that this contract interest should be reflected in the *Partial Decree* to allow water otherwise used for streamflow maintenance to be released for irrigation purposes in order to satisfy these contractual obligations. This Court agrees for two reasons. First, pursuant to the Idaho Supreme Court's holding in *United States v. Pioneer Irr. Dist.*, the repayment contract holders in Arrowrock and Anderson Ranch Reservoirs also have an interest in the storage space in Lucky Peak Reservoir *viz- a-viz* the terms of these Supplemental Contracts. This interest for flood evacuation is paramount to all other rights to storage space in Lucky Peak, including space for which these same entities hold separate repayment contracts (formerly water service contracts). The Court acknowledges that the repayment contract right holders in Anderson Ranch and Arrowrock are the same entities also holding separate repayment contracts (formerly water service contracts) for water out of Lucky Peak. Nonetheless, the repayment contracts in Anderson Ranch and Arrowrock are distinct from the repayment contracts in Lucky Peak. The Supplemental Contracts regarding flood evacuation are tied to the repayment contracts held in Anderson Ranch and Arrowrock and are senior to all other interests in Lucky Peak.

Second, although the BOR has historically administered the flood evacuation from Anderson Ranch and Arrowrock Reservoirs into Lucky Peak as being paramount,

there is no authorization for it on the face of the *Partial Decree*. This is particularly true with respect to releasing water designated for streamflow maintenance for irrigation purposes in order to satisfy the obligation without having to apply for a statutorily required temporary change in purpose of use.

This Court holds that, consistent with the holding in *United States v. Pioneer Irr. Dist.*, that the interest in Lucky Peak held by contract right holders in Anderson Ranch and Arrowrock should be reflected in the *Partial Decree* in the form of a remark included in the "*Other Provisions Necessary for the Definition or Administration of this Water Right*," which provides:

The storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations.

Accordingly, the Boise Project Board of Control's *Motion for Partial Summary Judgment* is **granted in part**.

VI.

CONCLUSION AND ORDER

For the above-stated reasons, this Court holds that the streamflow maintenance claim at issue is outside the scope of the IMSFA. IDWR did not act outside its authority in the license for a streamflow maintenance purpose of use and, therefore, the license is valid. Objections to the purpose of use therefore constitute impermissible collateral attacks to the license. The Court holds further that a remark in the partial decree is


necessary to acknowledge and administer the interests held in Lucky Peak that are related to contract rights held in Anderson Ranch and Arrowrock Reservoirs.

VII.

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.

Dated Sept. 23, 2008


JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT RE: BUREAU OF RECLAMATION STREAMFLOW MAINTENANCE CLAIM** were mailed on September 23, 2008, by first-class mail to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Jerry A. Kiser
620 West Hayes
Boise, ID 83702

United States Department of Justice
Environment & Natural Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

Scott L. Campbell
Po Box 829
Boise, ID 83701-0829

Albert P. Barker
Shelley M. Davis
PO Box 2139
Boise, ID 83701-2139

State of Idaho
Natural Resources Division
Attorney General's Office
PO Box 44449
Boise, ID 83711-4449

Daniel V. Steenson
S. Bryce Farris
PO Box 2773
Boise, ID 83701-2773

Erika E. Malmen
251 E. Front St. Ste. 400
Boise, ID 83702-7310


Julie Murphy
Deputy Clerk

EXHIBIT 6



BUREAU OF RECLAMATION
Pacific Northwest Region
Snake River Area Office
230 Collins Road
Boise, ID 83702-4520

IN REPLY REFER TO:
MSF- 1100
2.2.4.23



IDAHO DEPARTMENT OF
FISH AND GAME
Southwest Region
15950 North Gate Boulevard
Nampa ID 83687

SEP 10 2019

Mr. Rob Whitney
Water Distribution Section Manager
Idaho Department of Water Resources
322 East Front Street
Boise, ID 83720

Dear Mr. Whitney:

The intent of this letter is to provide joint written instructions from the U.S. Bureau of Reclamation (BOR) and Idaho Department of Fish and Game (IDFG) to the Idaho Department of Water Resources (IDWR), for conveyance to the water master, regarding release of streamflow maintenance pursuant to water right 63-03618. Historically, a winter release of 240 cfs is utilized from the water right when the streamflow maintenance water supply is adequate. Given the adequacy of the water supply in 2019, BOR and IDFG request that 240 cfs be held in the Boise River over the winter of 2019-2020 beginning no later than November 1, 2019.

If you have questions regarding the information provided in this letter please contact Bryan Horsburgh, BOR, Snake River Area Office Deputy Area Manager at 208-383-2251 or Bill Bosworth, IDFG, Southwest Region, Staff Biologist at 208-854-8967.

Sincerely,

Bryan Horsburgh
Deputy Area Manager
Snake River Area Office, PN Region
Bureau of Reclamation

Brad Compton
Regional Supervisor
Southwest Region
Idaho Fish and Game

cc: Matt Anders, IDWR
matthew.anders@idwr.idaho.gov

Rex Barrie, Water District 63
Waterdistrict63@qwestoffice.net



RECEIVED

JUL 20 2020

WATER RESOURCES
WESTERN REGION

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

July 17, 2020

Nick Miller, P.E.
Western Regional Manager
Idaho Department of Water Resources
2735 West Airport Way
Boise, Idaho 83705-15082
nick.miller@idwr.idaho.gov

Via U.S. Mail and Email

Re: Application No. 63-34614 in the Name of Micron Technology, Inc. - IDFG's Motion for Partial Summary Judgment Regarding "Streamflow Maintenance" Condition

Dear Mr. Miller:

Please find enclosed, for filing the proceedings on Micron Technology Inc.'s application no. 63-34614, the Idaho Department of Fish & Game's motion for partial summary judgment, and a supporting "Declaration," with attached exhibits. The motion seeks partial summary judgment that any permit issued pursuant to the application will include the following "streamflow maintenance" condition:

This right does not authorize the diversion or use of water released from Lucky Peak Reservoir for streamflow maintenance purposes pursuant to water right 63-3618. Pursuant to water right 63-3618, the quantity, duration, and timing of streamflow maintenance releases from Lucky Peak Reservoir are determined according to joint written instructions from the United States Bureau of Reclamation and the Idaho Department of Fish and Game to the Idaho Department of Water Resources.

Hard copies of the motion and Declaration are being sent to you via U.S. Mail. Copies are being served on the parties via U.S. Mail and email.

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael C. Orr".

MICHAEL C. ORR
Deputy Attorney General

cc: All Counsel of Record