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

* * * * *

IN RE SRBA)
)
) REPORTER'S TRANSCRIPT
Case No. 39576)
) Subcase 63-3618
)
_____)

SUMMARY JUDGMENT MOTION
BEFORE THE HON. JOHN M. MELANSON
District Judge, Presiding

DATE: June 19, 2008
TIME: 1:35 p.m.
PLACE: COURTROOM OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
BUILDING - 253 3RD AVE. NORTH
TWIN FALLS, IDAHO

Reported by:
Maureen Newton, C.S.R. No. 321
P.O. Box 368
Rupert, ID 83350
(208) 436-9041

1 TRANSCRIPT OF PROCEEDINGS
2 June 19, 2008, 1:35 p.m.
3
4 THE COURT: Good afternoon. We're on record in
5 Case No. 39576, 63-3618. This is a subcase in the Snake
6 River Basin Adjudication. The case has generally been
7 referred to, at least by the court, as the Lucky Peak case.
8 There are six motions before the court to be heard this
9 afternoon.
10 I'll just go through them in the order in which
11 they appear on the subcase summary. They were all
12 entered -- or filed I should say, on the same day, with the
13 exception of one. We have a motion by Farmers Union Ditch
14 and others, represented by Jerry Kiser.
15 Do we have Mr. Kiser with us today or another
16 representative of Farmers Union?
17 MR. KISER: Yes, I'm on telephonic conference,
18 Your Honor.
19 THE COURT: Good afternoon, sir.
20 Also we have a summary judgment of Pioneer
21 Irrigation District and Settlers Irrigation District,
22 represented Mr. Scott Campbell. I see Mr. Campbell is
23 here.
24 MR. CAMPBELL: Also Tara Martens is present, Your
25 Honor.

2

1 by Mr. David Barber who is present. Good afternoon, sir.
2 Is there anyone else participating in these
3 matters or who wishes to offer argument in these matters
4 this afternoon?
5 It appears not.
6 Well, counsel, my thinking here is that some of
7 the parties are aligned on one side generally and some on
8 the other: The irrigation entities, of course, on one
9 side, and then Boise and Ada County and the United States
10 and the Department of Fish and Game on the other.
11 The order in which the parties offer argument on
12 each side isn't particularly important to me. My thought
13 is that we would take the motions of the irrigation
14 entities first, hear their arguments in whatever order the
15 irrigation entities may have decided to proceed, if they
16 have. If not, we'll just take them in the order we call
17 them, I guess.
18 Then we'll hear from the other entities: That
19 is, City of Boise, Ada County the United States and of
20 course Fish and Game on the other. Because there are cross
21 motions for summary judgment my thought was to give each
22 side argument and then rebuttal argument, too, so I'll hear
23 from both sides twice. Naturally, as you may know, my
24 policy has always been to allow the attorneys to be heard
25 if they wish, to at least within reason, so if any of you

4

1 THE COURT: Good afternoon, ma'am.
2 We have a motion for summary judgment from the
3 city of Boise and Ada County, represented by Perkins Coie,
4 Ms. Malmen.
5 MS. MALMEN: Present, Your Honor, with me is
6 Robert Maynard also representing the city and county.
7 THE COURT: Good afternoon, sir.
8 And the Boise Project Board of Control and others
9 have filed a motion for partial summary judgment,
10 represented by Mr. Barker. Good afternoon, sir.
11 Also we have a motion for summary judgment filed
12 be Nampa and Meridian Irrigation District and others, by
13 Mr. Steenson and Mr. Farris. Do we have either of those
14 counsel or another representative of Nampa and Meridian
15 Irrigation District with us today?
16 MR. FARRIS: This is Mr. Bryce Farris, and I'm
17 appearing by telephone.
18 THE COURT: Good afternoon, sir.
19 We also have a motion for summary judgment filed
20 by the United States Bureau of Reclamation by Mr. Gehlert.
21 Do we have Mr. Gehlert with us today?
22 MR. GEHLERT: Yes, Your Honor.
23 THE COURT: At this time participating, but not
24 having filed a motion in this case at this time, we have
25 the State of Idaho Department of Fish and Game represented

3

1 wish to speak further on the issue, I'd certainly entertain
2 that as well.
3 So I'll ask Mr. Campbell: Mr. Campbell, have the
4 parties on the irrigation entities side discussed who would
5 go first?
6 MR. CAMPBELL: I don't, Your Honor. We have not.
7 We're happy to proceed first, if that's appropriate. But
8 we'll go last for the irrigation entities also.
9 THE COURT: Is that all right for you, Mr.
10 Barker?
11 MR. BARKER: That's perfectly fine, Judge.
12 THE COURT: Okay. Well, we'll hear from Mr.
13 Campbell or Ms. Martens.
14 MR. CAMPBELL: Actually Tara Martens will be
15 presenting the initial argument.
16 MR. BROMLEY: Your Honor, before we begin, this
17 is Chris Bromley with the Department. I just wanted to
18 note that I'm on the phone.
19 THE COURT: Good afternoon.
20 MR. FEREDAY: And, Your Honor, this is Jeff
21 Fereday with Givens Pursley. I'm just listening in.
22 THE COURT: All right, sir.
23 Anyone else who will wishes to be identified for
24 the record, but not participating in argument?
25 Okay, it appears not. Go ahead, Ms. Martens.

5

1 MS. MARTENS: Thank you, Your Honor. May it
2 please the court and counsel, I represent Pioneer
3 Irrigation District and Settlers Irrigation District in
4 this matter.
5 Just simply for purposes of general historic
6 context, Pioneer Irrigation District was organized as an
7 irrigation district in 1903, Settlers Irrigation District
8 was organized in 1904. The Lucky Peak project was
9 authorized in the '40s and constructed in the '50s. So by
10 the time the Lucky Peak project was authorized and/or under
11 construction both of the entities that I represent had been
12 organized for many, many years as irrigation districts.
13 As the court is undoubtedly aware, this issue,
14 this Lucky Peak Project issue, has been comprehensively
15 briefed over a lengthy period of time, so I don't want to
16 just reiterate everything that's in the briefing, but I'd
17 of course be willing to respond to any specific questions
18 that the court has, so please feel free to interrupt me at
19 any time.
20 Specifically by their motions for summary
21 judgment the districts respectfully request that this court
22 reject the recommendation of the Director and deny the
23 portion of the United States' claim as set forth in
24 63-03618 for the purposes of, quote, "minimum instream flow
25 storage" end quote, in the amount of 152,300 acre feet per

1 interested water users and in consideration of the
2 irrigation benefits to be derived from the additional
3 storage in Lucky Peak Reservoir, they will agree to use of
4 Anderson Ranch and Arrowrock Reservoirs for flood control
5 as proposed in a present report of the district engineer.
6 We submit, Your Honor, that at that time it was
7 clear that the Bureau and the Army Corps of Engineers
8 viewed the irrigation support as critical to the
9 construction of the Lucky Peak Project. In addition, the
10 Army Corps of Engineer's basis for design for Lucky Peak
11 provides that the entire runoff of the Boise River is
12 committed to irrigation except in extremely high runoff
13 years. This demonstrates the importance of the irrigation
14 with respect to the basis of the construction of the
15 project.
16 Upon completion of the project the districts both
17 entered into contracts with the Bureau of Reclamation.
18 These contracts further demonstrate the importance of the
19 irrigation interest's use of the Lucky Peak Project water.
20 On these bases we submit that combined need for flood
21 control and supplemental irrigation water were the basis
22 for the construction of the project, and protection of
23 minimum stream flows in the Boise River was not a
24 consideration or a basis for the construction of the
25 facility.

1 annum and quote "minimum instream flow from storage", end
2 quote, in the amount of 152,300 acre feet per annum, and
3 also to limit the nature of use to irrigation purposes.
4 In this case the contract that guarantees
5 correspondence and historical information was presented
6 comprehensively in our initial brief. We submit that it
7 clearly demonstrates that the purposes of the construction
8 of the Lucky Peak Project were flood control and
9 irrigation, and not maintenance of minimum stream flows in
10 the Boise River. The only allowable uses under the
11 pertinent authorizations are flood control and irrigation.
12 In addition, such an appropriation by the United
13 States is contrary to the representations and guarantees
14 that were made to the districts and other irrigation
15 entities regarding the availability of supplemental
16 irrigation water from the Lucky Peak Project. As is
17 addressed and quoted within the briefing, in 1946 a report
18 was issued by the district engineer of the Board of
19 Engineers for Rivers and Harbors regarding the
20 recommendation to construct the Lucky Peak Project for
21 flood control and irrigation.
22 But specifically with regard to that
23 recommendation the engineer recommended -- and I'm quoting
24 here -- "initiation of the proposed construction be
25 conditioned upon obtaining satisfactory assurances from

1 In addition, in the context of winter releases
2 for power, the legal opinion offered by the Department of
3 Interior provided that such releases would constitute a
4 change in the basic operating plan of the Lucky Peak
5 Project and therefore use for winter power releases would
6 require consent of the irrigators. Your Honor, we submit
7 that this circumstance is the same or similar to any type
8 of winter releases for minimum stream flows as well and
9 that the same opinion should have applied; however, there's
10 been no required consent obtained from the irrigators for
11 winter releases for stream flow maintenance in the Boise
12 River.
13 The contracts and the guarantees that were
14 executed by the United States also includes supplemental
15 irrigation-supplied promises and guarantees. They
16 specifically provide that other than for debt storage,
17 flood control and power production in Anderson Ranch, the
18 project water will be, quote, "primarily considered as
19 available for irrigation", end quote. Again, there's no
20 stated consideration for minimum stream flows in the Boise
21 River in the contractual agreements between the parties.
22 Consistent with the historical basis for
23 construction as well as those representations and
24 guarantees, in 1954 the Bureau submitted an application for
25 a permit which provided that the water was to be used for

1 irrigation and that, quote, "Lucky Peak stored waters will
 2 be utilized in the Boise Valley on presently irrigated
 3 lands for supplemental irrigation water", end quote. In
 4 addition, it provided that, quote, "the water to be stored
 5 under this permit will be used to supplement lands having
 6 existing water rights in the Boise Valley who desire to
 7 contract therefore", end quote.

8 To be clear, Your Honor, the districts are and
 9 were during the relevant time frame water right holders who
 10 expressed a desire to contract for additional irrigation
 11 water. It's been suggested in opposition to the district's
 12 motions for summary judgment that the districts don't need
 13 any additional irrigation water. The very nature of these
 14 proceedings, Your Honor, I submit, demonstrate the falsity
 15 of this argument.

16 Furthermore, submitted with the record in this
 17 case is a copy of a letter from counsel in 2002 wherein
 18 additional contract water is requested. In addition to the
 19 historical basis for the construction of the project, as
 20 well as the representations and contractual obligations,
 21 summary judgment is also appropriate in favor of the
 22 districts because of the violation of Title 42, Chapter 15,
 23 Idaho's Minimum Stream Flow Act, as well as Idaho water
 24 law.

25 As this court is aware, with regard to

1 to make a direct application for appropriation of minimum
 2 stream flows. It's undisputed in this case that the
 3 Department did not comply with the statutes with respect to
 4 issuance of the license in this case. No party in this
 5 case has suggested that the minimum stream flow statute is
 6 ambiguous, and therefore because it is clear and
 7 unambiguous, the terms of the minimum stream flow statute
 8 have been violated by the Department in issuance of the
 9 license at issue; and because the federal agency has not
 10 complied with the statutory requirements, the districts are
 11 entitled to summary judgment in its favor, disallowing this
 12 inappropriately-processed claim.

13 Finally, Your Honor, based upon the briefing that
 14 we submitted in surreply, as well as the research of later
 15 case law, I anticipate that the United States and the
 16 participants will abandon their argument that the minimum
 17 stream flow statute legislative veto is unconstitutional.
 18 Nonetheless, in the event that they do continue with that
 19 argument, I do reserve the opportunity to affirmatively
 20 argue that the legislative veto provision is
 21 constitutional.

22 On the basis as submitted, the districts
 23 respectfully request that this court enter summary judgment
 24 as requested in the pleadings, and I thank Your Honor for
 25 your consideration of our oral argument.

1 reclamation projects, State water law controls the
 2 proposition of the water. In addition, State water law
 3 also controls the appropriation and distribution of water
 4 for maintenance of minimum stream flows in the Boise River.

5 In 1978 the legislature enacted these statutes
 6 which permit only the Idaho Water Resource Board to hold
 7 minimum stream flow rights and provides for legislative
 8 approval or veto of any proposed minimum stream flow right.
 9 The statute not only provides for the exclusive mechanism
 10 to appropriate a water right for minimum stream flows, but
 11 also directly references its applicability to federal
 12 agencies.

13 Further of note, as we have addressed, Your
 14 Honor, Section 42-1503(e) also provides that upon receipt
 15 of an application for minimum stream flow purposes, the
 16 Director shall forward a copy of the application to any
 17 public entity likely to have an interest or knowledge in
 18 the matter. This fundamental due-process right was also
 19 denied to the districts, who are clearly public entities
 20 and clearly have an interest or knowledge relevant to the
 21 appropriation of water for minimum stream flow purposes in
 22 the Boise River from the Lucky Peak Project.

23 Absent this legislative enactment, namely the
 24 minimum stream flow statutes, there is no available
 25 procedure under Idaho water law allowing a federal agency

1 Do you have any questions?
 2 THE COURT: I don't believe I do right now.
 3 Thanks a lot.
 4 Mr. Barker, do you wish to go next? Is that
 5 acceptable, sir?
 6 MR. BARKER: Thank you, Your Honor. Albert
 7 Barker on behalf of Boise Project Board of Control.
 8 I want to start off by saying that Boise Project
 9 Districts agree with a great deal of the positions taken by
 10 Pioneer and Settlers Irrigation Districts. We do differ
 11 slightly on some of the consequences of those legal
 12 positions. Also -- I'll describe as we go through here --
 13 but I also want to point out that the Nampa/Meridian
 14 Irrigation District is a member of the Boise Project Board
 15 of Control, and they're represented here by Mr. Farris here
 16 today, so he'll speak on behalf of the position of Nampa
 17 and Meridian.

18 The first point, and the basis for our summary
 19 judgment motion, was that under the agreements between the
 20 Boise Project Districts and the United States, the United
 21 States is required to make up shortages in irrigation water
 22 because of flood control releases or because of the United
 23 States moving water around among the three reservoirs.

24 And I want to back up a second so you
 25 understand -- so it's clear that what's going on in Boise

1 is probably a little different than when it happens
2 elsewhere, and that is, as a result of an agreement between
3 the irrigators and the United States, when Lucky Peak was
4 constructed there was the ability on behalf of the United
5 States to, instead of fill the reservoirs physically by
6 priority, which would have been Arrowrock, Anderson and
7 then Lucky Peak, they were allowed to move water around
8 within those three reservoirs as long as they did not harm
9 the fill priorities of the earlier reservoirs. And then
10 they also contractually agreed that in the event they did
11 harm the reservoir filling out of -- or into either
12 Anderson or Lucky Peak, the impact of storage rights of the
13 districts -- and this includes Pioneers and Settlers --
14 that they would have to make up that water out of water
15 stored in Lucky Peak Reservoir by the United States.
16 And what we've got now in the proposed
17 recommendation from the Director and in the water right
18 that the United States would like to have, is no
19 recognition that the water that's maintained, as what we
20 call uncontracted space, has an irrigation component to it
21 because the United States has in the past and will continue
22 to have the obligation to use that water for irrigation
23 purposes.
24 So we have requested a remark that says simply
25 that the uncontracted-space portion of the water stored in

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1 And this court has the obligation to carry out
2 the intent of the legislature, and that's exactly what
3 42-1501 says, is that we need to follow the terms of the
4 statute. That hasn't been done.
5 And the statute requires the beneficial use or
6 the ownership of the right to be held in the name of the
7 Water Resource Board, and that's not done here in the
8 instream flow portion of this right.
9 The other thing that is clear from the Supreme
10 Court's decisions in the predecessor case of this, that I
11 usually refer to as Pioneer and also the LU Ranches and
12 Joyce Livestock cases, is the United States does not put
13 the water to beneficial use.
14 Well, who does put these minimum stream flow
15 rights to beneficial use? It's not the Bureau of
16 Reclamation. And with deference to the position of the
17 city and county, it's not just the citizens of Ada and the
18 city of Boise. There are people downstream, in Canyon
19 County and the cities down there, who also would have the
20 same type of whatever interest the city and county has
21 here.
22 Our suggestion would be that if the court
23 recognizes that the United States has a right to put the
24 water to beneficial use, it has to recognize that the -- or
25 I'm sorry -- the United States has the right to hold this

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1 Lucky Peak that's held in the name of the Bureau of
2 Reclamation, has to have an irrigation component, because
3 otherwise they cannot deliver the irrigation water to us
4 pursuant to state law, that they were required to under the
5 contracts. And there's not really any dispute that they
6 have that obligation; they just simply do not want that
7 obligation recognized in the water right.
8 And as we discussed a long time ago in the first
9 part of this case, it is critical that the irrigation
10 district's interests and those of their space holders or
11 their landowners be recognized in the water right and not
12 just in the contract. And the Idaho Supreme Court agreed
13 with us and agreed with you that that was necessary. So
14 that's the first part of our motion for summary judgment.
15 We have agreed with the position of Pioneer and
16 Settlers that this attempt to create a minimum stream flow
17 right does not comply with Idaho Code Section 42-501. The
18 statute makes it clear that any instream flow right has to
19 be done pursuant to this act in order to be of beneficial
20 use of the water. And there's no more clearer way to say
21 that than the language of the statute. And I don't know
22 how anyone can stand up here and say that if it's an
23 instream flow right, we don't have to comply with 42-1501.
24 It's not a reasonable interpretation of the statute by the
25 United States, the Department, nor anyone else.

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1 right for minimum stream flow purposes, that it has to
2 recognize that the beneficial user, the owner of the
3 beneficial interest, is the State of Idaho, because there
4 can be no one else to put these minimum stream flows to
5 beneficial use -- or these instream flow rights to
6 beneficial use.
7 And then the last thing that has come up that
8 really is part and parcel of this discussion over how the
9 water is used: The United States has agreed that this
10 release from Lucky Peak is only for use in the wintertime
11 in its stream flow maintenance purposes, to make sure that
12 there's sufficient water in the river for fish and wildlife
13 purposes, or whatever their argument is; but they do not
14 contend that they have the right to use that water during
15 any season other than the wintertime. And we would request
16 therefore, based upon the admissions by the United States
17 and the clear factual record here, that these releases, to
18 the extent that they've been made, have been made only in
19 the non-irrigation season, and therefore we would request a
20 season-of-use provision, requiring that the water right
21 be -- or that any releases under minimum stream flows be
22 used only after November 1st and before the 1st of April.
23 And I'd be happy to answer any questions, if you
24 have any.
25 THE COURT: No, sir, I don't. Thank you very

17

1 much.
2 Mr. Farris or Nampa/Meridian and others?
3 MR. FARRIS: Thank you, Your Honor. As Ms.
4 Martens mentioned, these issues have been thoroughly
5 briefed, and I don't want to be redundant, but I join in
6 the arguments of Mr. Barker. And what I'd like to do is
7 reserve my arguments in the reply so that I don't, like I
8 say, redundantly address the same arguments that have been
9 briefed and argued by Ms. Martens and Mr. Barker.
10 THE COURT: All right, sir. Thanks.
11 Mr. Kiser for Farmers Union and others.
12 MR. KISER: Thank you, Your Honor. Again, as
13 with Mr. Farris, I don't want to beat a dead horse, as it
14 were, but I do think there are a few points that are
15 critically important in the court's analysis of the
16 applicability and requirements of the minimum stream flow
17 act.
18 Clearly the act, in my opinion, applies. The
19 definition of minimum stream flow is exactly what the water
20 right in the Director's recommendation basically
21 subscribes: It's not in compliance with the requirements
22 of the statute. And I think perhaps the biggest concern or
23 issue is that if this right is allowed, the precedent it
24 sets is frightening. If any individual or entity can
25 acquire a minimum stream flow water right, the implications

1 MR. GEHLERT: Thank you, Your Honor.
2 Your Honor, as the other counsel have pointed
3 out, this case addresses the portion of the water right for
4 Lucky Peak Reservoir that has been used for stream flow
5 maintenance since at least 1964. The water right of the
6 Lucky Peak reservoir actually has three components: One is
7 dedicated to supplemental irrigation use; there's a small
8 component that is dedicated to recreation, and that is
9 inactive storage, it doesn't come out of the reservoir; and
10 then the component that's at issue here today.
11 The other day I was reading the Times News
12 article on the recent Sun Valley conference that expressed
13 the view that all the presiding judges in the SRBA has an
14 interest in history.
15 I hope that's the case, because this case has an
16 interesting history. And Ms. Martens touched on it to some
17 extent, but I believe there are a few other points that
18 should be made.
19 As Ms. Martens mentioned, Lucky Peak was
20 authorized in 1946. The statute provides that it was
21 authorized for flood control and other purposes. Ms.
22 Martens gave great importance to a 1946 survey report that
23 was done prior to the authorization. She failed to mention
24 that as a matter of law those reports are not binding at
25 all. The 10th Circuit addressed that point in Thetford

1 are tremendous.
2 I think it's clear that the legislature
3 understood that when it adopted the Minimum Stream Flow Act
4 by requiring that those water rights be acquired only by
5 the Idaho Water Resource Board and be held only in the
6 Board's name. In that manner the State is able to protect
7 and assure that only appropriate uses of minimum stream
8 flow are acquired and that they're not something that is
9 widely or generally acquired.
10 I think that's an important thing that the court
11 should bear in mind in assessing the requirements of the
12 Minimum Stream Flow Act and the lack of compliance with the
13 act in this particular water right.
14 With that said, again, I don't want to belabor
15 the points that have been raised. I concur with the
16 arguments of the other irrigation entities counsel, and
17 we'll address any questions the court has, or respond in
18 rebuttal.
19 THE COURT: All right, sir. Thank you very much.
20 I don't believe I have any questions right now.
21 I guess that completes the argument then at this
22 point from the irrigation entities, and I guess we'll turn
23 then to the United States and Boise and the County and also
24 the State of Idaho Fish and Game.
25 Mr. Gehlert?

1 versus the United States when it said that such reports
2 are, at most, a tentative plan.
3 It's also interesting to read the text of the
4 report itself, and I will read just a brief excerpt from
5 it: In the opinion of the Board of Engineers for Rivers
6 and Harbors, the plan should be flexible in regard to
7 combined operation of the reservoirs in order that the use
8 of storage may at different times conform to the changing
9 conditions and best serve the very needs of the locality.
10 In other words, the report itself recognizes that
11 conditions would change over time, and in fact as I'll
12 explain, may have. Lucky Peak, as I mentioned, was
13 authorized for flood control. As Mr. Barker talked about,
14 prior to the construction of Lucky Peak, the Bureau and the
15 irrigation contractors entered into an agreement.
16 The Bureau realized that it would be much more
17 efficient to operate all three reservoirs as a unified
18 system, rather than three distinct reservoirs. And that
19 was particularly the case for flood control, which as Your
20 Honor probably understands, was evacuating the water from
21 the reservoirs in the spring in order to make room for
22 runoff.
23 So, in essence, the United States reached an
24 agreement with the contractors who had a contractual
25 entitlement to water from Anderson Ranch and Arrowrock.

1 And that agreement was, if we operate the reservoirs for
2 the purposes of flood control and leave them with less
3 water than they otherwise have had, then we will make up
4 that water out of Lucky Peak Reservoir. And that's water
5 out of Lucky Peak Reservoir. As I will explain, that is
6 not the same as minimum stream flow maintenance of water.

7 So, as Mr. Barker said, there's no dispute that
8 obligation is out there, and photograph seven of the 1954
9 contracts that have been introduced into evidence makes it
10 clear that the obligation is limited to flood control
11 releases. In 1957 the United States applied for a permit.

12 That permit was noticed to the public and protested by a
13 number of entities, one of which was the Board of Control.

14 The Board of Control protested because at that
15 time it was contemplated that Lucky Peak would be used in
16 conjunction with the Mountain Home project and deliver
17 water out of the basin. The Board of Control at that time
18 argued that irrigation was not the primary purpose of Lucky
19 Peak Reservoir. Very different than what we're hearing
20 today from the irrigators.

21 The Idaho Department of Fish and Game also
22 protested, and in order to resolve the Idaho Department of
23 Fish and Game's protest the United States agreed to a
24 condition on their permit: 50,000 acre feet of Lucky Peak
25 water would be used for, quote, "maintaining wintertime

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1 flow in the Boise River." And that permit was issued in
2 1964, so water has been used for stream flow maintenance
3 for more than 40 years. That's important. It was used for
4 stream flow maintenance years before there was an instream
5 flow program under Idaho law.

6 Despite the condition on this permit calling for
7 the flows of the Boise River to be maintained, the design
8 outlets led to periodic de-watering of the river throughout
9 the '50s, '60s and '70s. Congress responded by granting
10 authority to modify the outlet works, quote: To assure
11 maintenance of adequate flows along the Boise River. So in
12 1976 you have Congress directing that they're to assure
13 maintenance of adequate flows along the Boise River.

14 Around the same time it became apparent that the
15 Mountain Home irrigation project would never be built. The
16 United States found itself with a large pool of
17 uncontracted water in Lucky Peak Reservoir. Rather than
18 add to unilaterally, the United States convened a public
19 process, including a workshop, in which several of the
20 objectors here today participated. That workshop
21 recommended that the uncontracted water would be best used
22 to maintain winter flows in the Boise River for the benefit
23 of the rivers, fishery, wildlife, recreation and
24 aesthetics.

25 The workshop group realized the importance of the

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1 Boise River to the citizens of the Treasure Valley and
2 wanted it to be maintained as a functioning river. And
3 Mr. Maynard will speak on behalf of the city as to the
4 importance of the river to the citizens in the Treasure
5 Valley today.

6 As a result of the recommendation of the work
7 shop group, the United States applied to amend its existing
8 permit. That application was reviewed and approved by both
9 the Idaho Department of Water Resources and the Idaho Water
10 Resources Board. That process is significant here for a
11 number of reasons.

12 First, no one protested. The United States
13 applied to use the water for stream flow maintenance, it
14 was publically noticed, and no one protested.

15 Secondly, both agencies expressly addressed the
16 use of that water for irrigation. The Idaho Department of
17 Water Resources found that even in severe drought there was
18 little need for additional irrigation water. That's not
19 surprising, because Anderson Ranch Reservoir had been built
20 to make up the shortfalls that had historically plagued the
21 basin, and the Idaho Board of Water Resources found that
22 the irrigators could not show that they had made any
23 beneficial use of the un-contracted water. Both agencies
24 also recognized that there was no conflict at all between
25 the United States' application and the State's instream

24

1 flow program for one simple reason: The dam. The dam is a
2 diversion.

3 As Mr. Barber addressed in his brief and will
4 address again today, the instream flow program simply has
5 no application when there is a diversion. So both agencies
6 agreed that the United States was entitled to a water right
7 for stream flow maintenance and the United States received
8 a license for stream flow maintenance. That has been the
9 status quo since 1986.

10 The irrigators are here today asking this court
11 to turn back the clock and give them another bite at the
12 apple: A bite they declined to take in 1986.

13 This court's decision in the 91-63 subcase
14 demonstrates that that is contrary to law and that the
15 irrigators objections are an improper collateral attack.

16 Your Honor, you're no doubt familiar with your
17 own decision, but at the risk of being redundant, I'll
18 point out that you made three observations:

19 One, that the time to protest an IDWR decision is
20 at the time that the permit is approved. That was more
21 than 20 years ago;

22 Second, that challenges to the very existence of
23 a licensed water right are improper collateral attacks.
24 That's exactly what we have here today;

25 And third, that individual elements of a water

25

1 right may be challenged, but only when justified by
2 operation of law, such as forfeiture, abandonment, or a
3 change in controlling legal authority. None of those
4 circumstances is present here.

5 What the irrigators ask this court to do is take
6 a water right that's been licensed for stream flow
7 maintenance use and convert it into an irrigation water
8 right. There's absolutely no justification for doing that.
9 In 91-63 this court found that there was a need to clarify
10 the existing license to account for the Supreme Court's
11 direction in the Ickes versus Fox and related line of
12 cases. There's no such inconsistent controlling authority
13 here.

14 Also in 91-63 the question of the nature of the
15 United States' ownership had never been addressed in any of
16 the underlying license proceedings.

17 Here, in contrast, the question of irrigation use
18 was expressly addressed. So, Your Honor, this case should
19 be disposed of simply on preclusion grounds. However,
20 because the irrigators have gotten into the merits of their
21 arguments, I do want to spend a few minutes addressing the
22 merits.

23 The issue before this court is whether the United
24 States has made an appropriation consistent with Idaho law.
25 There's no disputing that under Idaho law we need to divert

1 recognized with a water right, and it was recognized
2 through a remark.

3 Here the United States is not delivering the
4 water to another entity for use. We are putting it into
5 the stream for the purpose of using it through the stream,
6 and waters traveling through the stream is itself the
7 beneficial use. It doesn't require any other entity to
8 complete the beneficial use. So, yes, the United States is
9 the beneficial user. So we have diversion, we have
10 beneficial use, we have a water right.

11 I want to talk a little bit about the argument
12 that the water right needs to have an irrigation component
13 in order to allow compliance with the contracts. In the
14 Board of Control's brief they framed it in terms of, if the
15 water doesn't have a designation for irrigation use, the
16 United States will have to apply to have it transferred in
17 order to meet its contractual obligations.

18 Your Honor, as I said, we've been applying water
19 to beneficial use for stream flow maintenance purposes
20 since 1964. We have never had to apply for a transfer or
21 to amend our application in order to provide make-up
22 contract water. And I refer to the 1954 obligations as
23 make-up water because, as I said, it's water that is used
24 to keep the Anderson Ranch and Arrowrock irrigators whole
25 in the event that they're shortchanged through flood

1 water and apply it to beneficial use and create a water
2 right. Here, as I said before, it's obvious there's a
3 diversion: There's a dam. That dam is used to divert and
4 store the water. Without the storage, there would be no
5 water available. So it's absolutely essential to the
6 purpose.

7 It also, as I said, demonstrates that there's no
8 conflict with the instream flow statute, and I'll leave it
9 to Mr. Barber to address that further.

10 The second component is beneficial use. No one
11 has argued that the use itself is not beneficial. And
12 that's good, because it's well supported in Idaho law and
13 the law of other western United States, as I explained in
14 my brief.

15 Mr. Barker argues that the United States is not
16 applying the water to beneficial use: That this is no
17 different than the irrigation component of this case. But
18 the substance of this court and the Idaho Supreme Court's
19 finding in 91-63 was that the United States had
20 appropriated the water for irrigation use to be applied to
21 the ground by the irrigators. In other words, that the
22 irrigators would be the one who applied the water to use.
23 That they were the beneficial user.

24 The court found that they had more than a
25 contractual expectancy and that interest needed to be

1 control operations.

2 Your Honor, you're probably asking yourself,
3 Well, why is it that the United States has never had to
4 apply for a transfer or an amendment? It's a very simple
5 reason. It's because Anderson Ranch and Arrowrock
6 contractors get their water before any water goes into the
7 stream-flow-maintenance account. That, in one sentence, is
8 the main point of the affidavit from Bob Sutter, who was
9 the manager of the Idaho Department of Water Resources
10 accounting shop and actually wrote the program that
11 allocates water among the various uses. Because the
12 contractual obligations are fulfilled before any water goes
13 into the stream flow maintenance, there's no need for a
14 transfer.

15 This point also reiterates that there's been no
16 beneficial use of the water for irrigation because the
17 irrigation water never goes into the stream flow
18 maintenance account. I just want to reiterate: It's not
19 that stream flow maintenance water is taken out and used
20 for irrigation; it's that the irrigation water is set aside
21 first and then the stream flow maintenance water gets it
22 accounted. That's how the system has been able to work all
23 these years with no problems whatsoever.

24 Lastly, I want to respond to Mr. Barker's point
25 about the Pioneer decision. Mr. Barker characterized the

1 decision as saying that the irrigators interest in water
2 needs to be recognized in the decree.
3 The court did say that the irrigators interest,
4 in that context, needed to be recognized in the decree, but
5 the court found that because the irrigators were the end
6 user of the water, they had an interest that was larger
7 than, in their words, a contractual expectancy. It
8 emphasized that because the irrigators applied for the
9 beneficial use to the water, they had an ownership
10 interest, and that's what was reflected in the remark.
11 Here, the irrigators have never used this water
12 for beneficial use, and in fact Mr. Barker has asked the
13 court to conform the season of use so that it is clear that
14 it can't be used during the irrigation season.
15 Lastly, at the close of the decision, the Idaho
16 Supreme Court addressed the argument in advance, I believe,
17 by Nampa and Meridian, that particulars of the contracts
18 needed to be written into the decree. And that's
19 essentially what the irrigators are arguing today. And the
20 court said, No, they don't, because the system has worked
21 fine for decades. And, Your Honor, that's exactly the case
22 here.
23 With that, I'll close, and ask if you have any
24 questions.
25 THE COURT: No, sir. Thank you very much.

1 December 1957, and the Attorney General for the State of
2 Idaho -- somewhat unusual -- signed the protest, along with
3 special counsel for Fish and Game to that, and the
4 consequence of that protest and the other protests by the
5 irrigation entities, as explained by Mr. Gehlert, was that
6 there was a condition placed in the amended application and
7 a condition that was going to be put in the permit, and it
8 said basically that the yield of water from 50,000 acre
9 feet of space be available for maintaining minimum
10 wintertime flow in the Boise River, below the Boise
11 diversion dam, under a release pattern established from
12 time to time by the Director of the Idaho Fish and Game
13 Department.
14 And so we've had a vital interest in the Boise
15 River, certainly in terms of the wintertime flows, since
16 April 1963. What I find pretty amazing is that that
17 application was approved in March 1974, and in all the
18 history that the irrigation entities brought forward today,
19 not one of them brought that to the attention of the State
20 Reclamation engineer and said, No, there's a problem with
21 this.
22 And, really, that's when it should have been
23 addressed. And from my perspective, it's pretty outrageous
24 this many years later, that now they bring this up and say,
25 Well, what you did back in 1964 was improper and you had no

1 City of Boise and Ada County? Ms. Malmen or Mr.
2 Maynard?
3 MR. BARBER: Your Honor, I would like to go next.
4 THE COURT: Go ahead, sir.
5 MR. BARBER: Thank you, Your Honor.
6 May it please the court, my name is David J.
7 Barber, I'm a deputy attorney general, I represent the
8 Idaho Department of Fish and Game in these proceedings.
9 First, I would like to concur in the argument
10 that Mr. Gehlert made today. He went into a great deal of
11 detail. I don't intend to repeat that today, but there are
12 a few highlights I would like to make.
13 As the court certainly acknowledged, the Idaho
14 Department of Fish and Game did not file its own motion for
15 summary judgment. Rather, we filed a brief in support of
16 the position of the United States and Ada County and the
17 City of Boise and in opposition to the various irrigation
18 entities.
19 Nonetheless, the Idaho Department of Fish and
20 Game has been a participant in the administrative
21 proceedings at Lucky Peak from the very beginning, and I
22 would like to reiterate some of that history because I
23 think it is important to understand that today, and I hope
24 the court will bear with me.
25 The initial application was filed back in

1 basis for that.
2 Now, my brief outlined a number of opportunities
3 when each of the irrigation entities had further
4 opportunities to challenge the release of water stored
5 behind Lucky Peak Dam. There was an amendment that Mr.
6 Gehlert mentioned in March 1984 where the amount stored for
7 stream flow maintenance was increased to 152,300 acre feet
8 a year, yet no challenge occurred. If that had been such a
9 major concern to the irrigation entities, why didn't they
10 explain that to the State Reclamation and get a court to
11 judicially determine it back then?
12 It just amazes me that they have basically sat on
13 their hands, done nothing, and now, 40-some-odd years
14 later, are coming into this court and saying, Oh, by the
15 way, there was a mistake made way back then.
16 This court, in a series of past decisions, has
17 included that it will not consider in the SRBA collateral
18 challenges to licensed rights. And this case certainly is
19 a good illustration of why you should not do that, and you
20 should resolve the matter on that basis alone.
21 However, I would like to touch a little bit on
22 the substantive issue that they have raised, and they have
23 throughout their briefing characterized this as a minimum
24 stream flow. And as Mr. Gehlert certainly has pointed out,
25 here we have a diversion. We have a great big diversion.

1 We have Luck Peak Dam. And, simply, the minimum stream
2 flow statute doesn't apply. Chapter 15 doesn't apply.
3 Now let's understand a little bit about why that
4 is the case. The history behind Chapter 15 goes back
5 certainly to 1971, when there was a protection of Malad
6 Canyon being considered by the Idaho legislature. It
7 passed an act that directed the Idaho Department of Parks
8 to appropriate the unappropriated waters of that source for
9 aesthetic purposes. An application was filed and
10 essentially the Department of Water Resources -- I believe
11 it probably was a State Reclamation Engineer at that point
12 time -- but in any event, that entity essentially denied
13 the application, because one of the conclusions it made was
14 that there was no physical diversion of water.
15 And, again, the irrigation entities challenged
16 it. They said, first off, it wasn't beneficial use; and
17 secondly, that there was no physical diversion. It went up
18 to a District Court for review, the District Court
19 concluded that, yes, those purposes were beneficial uses;
20 and secondly, a physical diversion was not required by the
21 Idaho Constitution.
22 Again, it was appealed by both the predecessor
23 State Agency, the State Reclamation Engineer or the
24 Department of -- I forget now what the designation was --
25 but in any event, that was appealed, along with the other

34

1 had, in addition to the Idaho Constitution that essentially
2 provided for a constitutional-based water agency, the
3 legislature then followed up that provision of the Idaho
4 Constitution, Article 15, Section 7, and designated the
5 Idaho Water Resource Board as that special agency that had
6 that authority to develop that expertise on that area. And
7 so what we have here is, I've got something better than
8 just the statute: I've got the specialized agency,
9 constitutional agency saying this is a beneficial use,
10 eight-zip. And that ought to be good enough for this
11 court, and from my perspective, answers completely that
12 issue, even if you accept their myopic view of Malad Canyon
13 that that determination of beneficial use doesn't apply
14 except in the existence of a statute.

15 So where does that put us? Well, it puts us,
16 very simply: Chapter 15 doesn't apply. And so all these
17 concerns about how you didn't get to go through the
18 legislature in terms of review, et cetera, none of that
19 applies to this case. Simply, there is a diversion, there
20 is a determination of beneficial use; and as a consequence,
21 this court should certainly affirm or essentially agree and
22 decree the Lucky Peak water right in conformance with the
23 Director's recommendation.

24 I'd be happy to stand for any questions the court
25 might have.

36

1 people, and ultimately the Idaho Supreme Court concluded a
2 physical diversion was not required under the Idaho
3 Constitution; and secondly, that those were beneficial uses
4 of water. And from my perspective that declaration in that
5 case resolved the issue of whether aesthetic recreation can
6 in fact or is in fact a beneficial use recognized as
7 beneficial use under Idaho law.

8 Now, the little nuance of the irrigation entities
9 put on this is simply they say, Well, only when you get it
10 declared in the statute can it be considered a beneficial
11 use. If it's not declared in the statute specifically for
12 the water source, it's not a beneficial use.

13 Well, I don't think that is a correct reading of
14 the Malad Canyon case, but let's assume for a minute that
15 they're right on that. They still are wrong on the
16 ultimate issue here.

17 Let me explain to you why: Because this matter
18 was, surprisingly, taken to the Idaho Water Resource Board,
19 it was put on their agenda, and it was acted upon by that
20 agency and essentially concluded: Number one, that there
21 was a physical diversion; and number two, that the purpose
22 of the stream flow maintenance was a beneficial use, and it
23 passed eight-zero. Now you say, That's just an opinion of
24 one agency, what difference does it make?

25 Let me put this in context for Your Honor. We

35

1 THE COURT: I don't believe I have any. Thank
2 you very much.

3 Mr. Maynard?

4 MR. MAYNARD: Thank you, Your Honor. I'm Bob
5 Maynard here representing the city of Boise and Ada County
6 today. With respect to our motion for summary judgment, it
7 supports the BOR and the United State's motion, and has
8 certainly allied with the Idaho Fish and Game brief and Mr.
9 Barber's remarks. The city and county interest in this
10 proceeding should be obvious, and it's summarized in our
11 briefing and supporting material: We are the direct
12 beneficiaries of maintaining stream flow in the Boise River
13 from storage in the Lucky Peak Dam. We've been relying on
14 that for decades now. It's very important economically,
15 and it's also more difficult to quantify quality-of-life
16 issues for the county and our citizens. It's not
17 exclusive. There's people in Canyon County that benefit
18 and so on, but we're the ones here in court on this
19 subcase.

20 Beyond the Fish and Wildlife recreation and
21 aesthetic resources that are served directly by the
22 beneficial use of this water, meeting federal and state
23 water-quality requirements with existing treatment plants
24 is quite dependent on this flow, as well as numerous other
25 benefits. That's not to mention what I call the iconic

37

1 draw of this flowing stream, really, through the heart of
2 our urban area, and what that means for attracting and
3 retaining the businesses, work force and other economic and
4 cultural drivers in the city and county.

5 The Mayor Bieter affidavit and speech text that
6 we submitted in our opening brief summarized the reliance
7 by the city and the surrounding area on this stream flow
8 well, I think, and the city and county are entitled to rely
9 on continuation of this stream flow maintenance in
10 accordance with the elements of the BOR Lucky Peak storage
11 water right licenses.

12 We agree with BOR and the Fish and Game strongly
13 that the objectors should not be allowed to collaterally
14 remove or change elements of that license in this
15 proceeding. No changes are needed to protect their federal
16 contract rights. Confirming a license will just continue
17 the status quo that's been in place for many years.

18 And I think the court can focus on a few points
19 to determine the pending motions and we hope confirm the
20 water rights as licensed and as recommended by the
21 Department of Water Sources in a decree.

22 I want to emphasize basically up to four of these
23 today. This is going to be points I think that probably
24 have already been covered by Mr. Gehlert and Mr. Barber,
25 and I'll try not to belabor them, but give our perspective

1 cited in the briefs regarding bars against such collateral
2 attack don't support any kind of blanket exception for
3 separation of powers or other constitutional claims or
4 claims that the Agency acted outside its authority.

5 Generally, if the legal theory or claim could
6 have been asserted in the prior administrative proceeding,
7 it's barred in later proceedings; otherwise the judicial
8 efficiency and civic repose protected by these principles
9 could be easily circumvented by parties coming up later
10 with whatever constitutional ultra vires theory they might
11 muster to second guess and sidestep the prior result.

12 We think that's precisely what the objectors are
13 doing in this case, and there's no compelling reason to
14 allow them to get away with it.

15 Turning to the minimum stream flow statute:
16 Irrespective of collateral attack that should bar these
17 challenges, it simply doesn't. Those procedures do not
18 apply in water right, so the court doesn't need to address
19 the constitutional arguments about that statute that the
20 objectors suggest. And I think Mr. Barber and Mr. Gehlert
21 covered this well, but it simply doesn't apply because the
22 water is diverted into storage in the Lucky Peak Reservoir,
23 and the statute procedures clearly apply only to
24 appropriations of unappropriated instream flows, in-place
25 flows, in natural water bodies, without such diversion in

1 on them and some emphasis.

2 First of all, the objectors effort to remove the
3 minimum stream flow maintenance as a beneficial use for
4 this uncontracted water and irrigation use for that water
5 or otherwise change the elements of the license, should be
6 barred as a very belated collateral attack. This isn't
7 about clarifying administration or ownership of the water
8 rights, as was the case in the 91-63 ownership subcase.

9 They're seeking to change longstanding basic
10 components of the water right that are set out in the
11 license, and it's based on arguments they could have and
12 should have brought up many years ago in the permit
13 application proceedings, as Mr. Gehlert and Mr. Barber both
14 went through. As I think they both pointed out, the
15 50,000-some acre feet allocated for IDF&G administration
16 occurred in 1960s and the remaining 100-some thousand acre
17 feet under the permit amendment proceeding for the license
18 occurred in the 1980s.

19 There's no dispute about actual notice of
20 participation by at least some of the objectors, and
21 published notice to all, as is proper in the application
22 and amendment procedures. These objectors had a clear
23 opportunity to voice objections or deny their consent at
24 that time and they didn't.

25 I want to note that the SRBA and other cases

1 application to the beneficial use.

2 That's clear in the definition section of the
3 statute. People on both sides are arguing about that
4 statute's contents, but if you'd just go to the definition
5 sections in Idaho Code 42-1502 (a), (e) and (g), that is
6 quite clear.

7 The Idaho Water Resources Board, as well as the
8 Department of Water Resources, declined to apply the
9 statute to require the Idaho Water Resources Board to hold
10 the Lucky Peak water right for these very reasons. That's
11 all been set out in the record and has been explained by
12 Mr. Barber. And Mr. Barber referenced the Idaho Department
13 of Parks, the IDWR court decision in 1974 that's in the
14 briefs, which came before enactment of the minimum stream
15 flow statute, and which did affirm that physical diversion
16 was not required for instream flow beneficial use
17 appropriations by the Idaho constitution and could be
18 authorized. In that case the specific statute did
19 authorize the Department of Parks to appropriate the waters
20 in the Malad River Canyon for scenic and other beneficial
21 use, in-place, without any diversion.

22 The Minimum Stream Flow Statute Act then was
23 enacted to provide a more general statute for the State, on
24 its own initiative or upon application by a party, to make
25 such in-place appropriations without first placing the

1 water in storage or other diversion, and without the need
2 for specific additional legislation each time you wanted to
3 do that. The statute, by its own clear language, is not
4 broader than that.

5 And I also want to note the legislative history,
6 where the Department of Water Resources Director at that
7 time made it clear that the need for the statute was for
8 minimum stream flow appropriations, in addition to those
9 already available through storage diversion. You'll find
10 that in the second Jarvis affidavit that the BOR has
11 submitted, Exhibit LL, and I've got it noted as page 21.

12 Third, in terms of emphasis, stream flow
13 maintenance is a recognized beneficial use that's not
14 limited to instream dedications under the minimum stream
15 flow statute procedures. So the diversion storage in Lucky
16 Peak, in application to stream flow maintenance/beneficial
17 use, is a valid basis for the licensed stream flow,
18 maintenance, storage and use rights.

19 The Idaho Constitution and the court decision
20 cited in the BOR and our own briefs do not limit beneficial
21 use to what's recognized in the minimum stream flow
22 statute, or otherwise, to any specified list. The
23 Department of Parks v. IDWR Idaho Supreme Court decision in
24 1974 that we've talked about, prior to the enactment of the
25 minimum stream flow statute, recognizes that there's no set

1 There's another sentence that follows it, that
2 doesn't have "pursuant to the statute", that talks about it
3 being a beneficial use to prevent diversion to out-of-state
4 uses. In any case, the statute doesn't employ the words
5 "only" or "exclusive". Those are the words that the
6 objectors use. It's not in the statute. One of the
7 objectors, I think, points to the word "only" in Idaho Code
8 42-203(a)(5) that references the minimum stream flow
9 statute; but my review indicates that was only recently
10 enacted in 2003, long after the allowance of stream flow
11 maintenance in the permit amendment proceedings for the
12 BOR; and in any case, that should be interpreted to apply
13 to the instream inflow designations under the minimum
14 stream flow statute.

15 Now, confirming the license and recommended right
16 of beneficial use for what is diverted stored water in this
17 subcase does not cause problems for future instream flow
18 dedications under the minimum flow statute or other
19 specific legislation or other adverse precedent. I think
20 one of the objectors' counsel today called that some kind
21 of frightening or tremendous precedent. That's not
22 reflected in the record or otherwise. There are many, what
23 are called, aesthetic-recreation-wildlife type uses that
24 encompass diversion by private parties that are in the
25 records of the SRBA.

1 list of beneficial uses, as well as specifically affirming
2 the allowance of instream flow as a beneficial use in that
3 case.

4 The stream flow maintenance was recognized in the
5 1960s as the beneficial use for the 50,000 acre feet of
6 stream flow maintenance allocated in the BOR Lucky Peak
7 water right permit long before enactment of the minimum
8 stream flow statute, as Mr. Barber explained.

9 The addition of 100-some thousand acre feet of
10 uncontracted storage water for the same purpose, by
11 amendment of the permit in the 1980s, was no less of a
12 beneficial use, and there's other examples provided that
13 the other attorneys have talked about and in the briefs.

14 Now, the recognition in the minimum stream flow
15 statute of instream flow as a beneficial use, even without
16 a physical diversion, is itself -- that does not limit that
17 use to instream flow rights designated under the statute's
18 procedures. Again, under the clear language of the
19 statute, that recognition is an example, but it's not an
20 exclusive determination of beneficial use. You can find
21 that in the Idaho Code 42-1501 statement-of-purpose section
22 that everyone's referencing. There's one sentence of that
23 that states that recognition of instream flow use for all
24 these purposes, when it's done pursuant to the statute, is
25 a beneficial use.

1 The allowance of this particular storage
2 diversion right doesn't change anything with respect to
3 those or to any future specific instream flow designations
4 that the State wants to make, so I just don't see that
5 precedent there.

6 The ruling that we seek from this court in terms
7 of the decree will simply reject some very belated
8 collateral attacks upon what is a status-quo-beneficial use
9 of this diverted, stored and uncontracted water that's been
10 in place for decades and which the legislature has not seen
11 fit to disrupt over all these years.

12 As a final primary point, I want to emphasize
13 that the objectors show no irrigation or other beneficial
14 use that they claim for this uncontracted water, so there's
15 really absolutely no basis under Idaho law for changing the
16 stream flow maintenance water use to irrigation or adding
17 irrigation as a beneficial use of that water. They assert
18 that they've been left short under their contracts at
19 certain times, but they've not affirmatively shown in this
20 case that they've had a shortfall that's attributable to
21 stream flow maintenance allocation.

22 Mr. Gehlert described the accounting, how that
23 works, or that they suffered any material injury from any
24 shortfall over the last 20 years; or that they lack a
25 remedy against BOR or the United States under their

1 contracts for any violation of their contract rights that
2 they assert. The 2002 letter that counsel for Pioneer and
3 Settlers reference, in it he alleged, I believe, that they
4 were short in September of 2001, but requested just the
5 first opportunity for contracting for any added supplies
6 that came available. That's not any kind of showing of
7 substantial need for 100,000 acre feet of uncontracted
8 water that's already appropriated for stream flow
9 maintenance. There's no remark added regarding irrigation
10 use or contract rights. I think Mr. Gehlert alluded to the
11 91-63 subcase ownership case where the court provided these
12 entities adequate assurance regarding their ownership
13 interest in the contracted water, and held there that there
14 was no need for anymore specificity for even their
15 contracted water, to protect their rights: That the system
16 had worked quite well without that kind of specificity.
17 So, Your Honor, the City and the County are
18 asking this court to simply decree the water right as
19 stated in the license and recommendation.
20 And if you do have any questions at this point,
21 I'd be happy to address them.
22 THE COURT: No questions, sir. Thank you very
23 much.
24 Well, we've heard from all the parties one time
25 now, so we'll go back where we started.

46

1 our clients consider to be -- illegal permit amendment
2 process, was that amount of water converted to minimum
3 instream flow use.
4 Mr. Gehlert made reference to the reports,
5 indicating they're not binding as a matter of law. We're
6 not saying they're binding, Your Honor. We're saying
7 they're historical context.
8 Mr. Gehlert also made reference to the fact that
9 the Bureau of Reclamation has never had to use stream flow
10 maintenance water with that designation in Lucky Peak to
11 make up a shortfall.
12 In fact, we believe that's completely false. In
13 1989 the testimony of Mr. Sutter indicated that there was a
14 shortfall because of flood control operations in the Boise
15 River reservoir system of 126,473 acre feet. It's
16 discussed in detail on page 17 of our surreply memorandum.
17 And upon questioning by me, he stated, and I quote: Just
18 so I am following you, you are saying then that you
19 calculated out the failure-to-fill-due-to-flood-control
20 amount in 1989 as being 126,473 acre feet? His response:
21 Correct. Further, by Tara Martens: Referring back to 1989
22 and the 126,000 acre feet shortage, was there an error that
23 year that resulted in such a significant shortage?
24 Response: I believe there was a forecasting error, yes.
25 And then it goes on to describe how that

48

1 We'll take a short break. We'll take a
2 ten-minute recess.
3 Recess.
4 THE COURT: We're back on record in subcase
5 63-3618, in the matter of the Snake River Basin
6 Adjudication. When we recessed, Mr. Campbell was about to
7 begin argument, so you may proceed, sir.
8 MR. CAMPBELL: Thank you, Your Honor. Again for
9 the record, Scot Campbell on behalf of Pioneer and Settlers
10 Irrigation Districts. I will try to speak slowly, ma'am.
11 Your Honor, I apologize for any disjointed nature
12 of my comments. I'm going to be responding in order, to
13 the degree I can keep order, to first Mr. Gehlert, then Mr.
14 Barber, then to Mr. Maynard. And some of the points that
15 Mr. Gehlert made I think need to be addressed.
16 Mr. Gehlert suggested that the stream flow
17 maintenance use of this water has existed since 1964,
18 implying, by not being specific, that all of the water,
19 152,300 acre feet, has been used for that purpose since
20 1964. That certainly is not the case. In 1964 the
21 50,000 acre feet was apparently first used and has been
22 used for periods of time since then. However, not until
23 1985 was the balance of water, uncontracted water in Lucky
24 Peak, which had originally been permitted for irrigation
25 purposes, only then, after this what we consider to be --

47

1 shortfall is made up, and in fact, he explains, as does
2 Jerry Gregg in his deposition, which is in the record, that
3 the first 60,000 acre feet of the instream flow water is
4 just allocated to irrigation use, even though the
5 entitlement to store that water is pursuant to this
6 instream-flow component of the water right. So the U.S.,
7 the State, those who say there's never been a shortfall,
8 there's no need to have the irrigation component added as a
9 State element of the water right, are simply ignoring the
10 record. Ignoring what actually has been done.
11 Additionally, the record shows that in 1989 -- I
12 believe that's the year, I don't have the exact cite, I
13 apologize, Your Honor -- that a transfer application was
14 filed by the Bureau of Reclamation to convert the instream
15 flow, a portion of it, to irrigation use because of the
16 construction of the Lucky Peak Power Project and the need
17 to evacuate a substantial portion of the storage in those
18 reservoirs; and because of the shortfall, the Bureau
19 cooperated with the irrigation entities and actually
20 modified that permit again, to convert it to irrigation
21 use. So the suggestion that this stream-flow-maintenance
22 water has never been used for irrigation is just flat
23 wrong.
24 Mr. Gehlert mentioned this so-called 1984 public
25 workshop. My client has made clear in the record, through

49

1 the affidavit of Nada Kelleher, that no notice of this
2 public workshop was ever provided to them. And supposedly
3 this public workshop recognized the importance of
4 wintertime releases and that no one protests this
5 determination. Well, in fact, if the minimum stream flow
6 statute requirements of actual written notice of the
7 application under Idaho Code 42-1503, if it had been
8 provided to my client as a public entity, perhaps the story
9 would have been different.

10 But that procedure was not followed. Instead,
11 they relied upon their own interpretation of what they
12 could do, convincing the Department, without any apparent
13 legal review -- I highly respect David Tuthill -- he's not
14 a lawyer -- there's no indication in the record there was
15 any legal review of what was being done there. And
16 notwithstanding Mr. Barber's characterization that: I've
17 got a constitutionally- created entity, the Idaho Water
18 Resource Board saying 8 to 0 that this is a beneficial use
19 of water, my response is, So what? Even if they're a
20 constitutional entity, they cannot violate State law. They
21 are still bound by the statutes the legislature adopts
22 unless those statutes are deemed unconstitutional. And
23 we've heard nothing today in their oral argument from any
24 of the parties on the other side that they still believe
25 that the instream flow statute 1501, et sequentia, is

50

1 definitional section found in Idaho Code Section
2 42-1502(a), for the proposition that because there's a
3 diversion, the Instream Flow Act doesn't apply. That
4 provision of Idaho Code states, I quote -- and this is a
5 quote within a quote -- Appropriate, or -- quote within a
6 quote -- appropriation, mean -- there's a typo so they put
7 in brackets [means] -- the identification of a beneficial
8 use and place of instream use of the waters of a stream.

9 Now, where is this water being used? It's used
10 in the Boise River. In a stream. "It shall not be
11 construed" -- and this is very important to understand the
12 falsity of their argument about a dam being a diversion and
13 therefore the act does not apply -- it states: "It shall
14 not be construed to require any kind of physical structure
15 or physical diversion from the stream." It's not required
16 that you have a physical diversion. It doesn't say you
17 can't have one if there is a physical diversion, it says
18 it's not required.

19 And that was the key to the Malad Canyon case and
20 to the other cases. The irrigators at that point in time
21 were saying: You can't create the water right because
22 there's no diversion. The legislature said in response:
23 We want to clarify this area of the law. We don't want
24 anymore litigation over it -- dreamers that they were.
25 They adopted Idaho Code Section 42-1501, et sequentia, and

52

1 unconstitutional.

2 I would like to follow up just a bit on
3 Mr. Barber's comment, because our reading of the record
4 indicates that, in fact, the Water Resource Board, even if
5 you assume that they had the right to ignore State law, did
6 not say what he said they said. At page nine of our
7 initial response brief to City of Boise and Ada County we
8 cite what was in the record with respect to the Idaho Water
9 Resource Board. The Idaho Water Resource Board, from what
10 we can see from the record, said that, quote, in brackets:
11 Lucky Peak Dam is considered to be the diversion for a
12 storage water right, and if stream flow maintenance uses
13 can be considered to be beneficial, a valid water right can
14 be constituted. Mr. Barber would leave out the word "if".

15 The other point that I think is worthy of being
16 addressed is the reference to, somehow because there's a
17 dam here, because there's a diversion, somehow Lucky Peak
18 Reservoir, created by blocking the Boise River, is not a
19 natural water body. Okay. Well, it was created by a dam,
20 admittedly. But where is this water used? Where is this
21 minimum stream flow water right used? Apparently the Boise
22 River is not a natural water body. I don't understand the
23 argument.

24 The other aspect of it that is very strange, in
25 my judgment, is the reliance upon apparently the

51

1 they said: You can have beneficial uses for instream flow
2 maintenance, but those uses are beneficial purposes,
3 beneficial uses, when made pursuant to this act.

4 Now, for this court to ignore that language, to
5 say that the Department of Water Resources, acting in
6 concert with the Bureau of Reclamation, without satisfying
7 the statutory actual notice to my clients, can change an
8 irrigation water right to a minimum stream flow water
9 right, in clear derogation of the mandatory language of
10 this statute, is, to utilize the term of Mr. Barber, I
11 believe, outrageous.

12 There was also the comment that the Idaho
13 Department of Water Resources or the Water Resource Board
14 said that there was little need for additional water:
15 Additional irrigation water. Well, they didn't ask my
16 client when they made that determination. They didn't
17 provide notice to my client that they were doing this,
18 pursuant to the statute that required it.

19 They assert that the time for challenging this
20 was back in 1964. Well, Your Honor, I would submit that
21 they need to keep to in mind that a permit is not a fully
22 developed water right. A permit is an inchoate right to
23 prove that beneficial use actually is being made.

24 Now, I would concede for purposes of argument
25 that had the Bureau of Reclamation or Fish and Game in 1964

53

1 proceeded to actually license the water right for Lucky
2 Peak at that point in time, the 50,000 acre feet would be
3 off the table. But what did they do instead? Instead?
4 They waited almost 60 years, from 1964 to 2002 in
5 September, three days after this recommendation was
6 presented to this court, thereby opening the challenge
7 procedure of objections before the license was issued with
8 the modified versions that we are challenging. They had
9 ample opportunity. They had decades of opportunity to get
10 their license.

11 They accuse us of sitting on our hands?

12 Outrageous.

13 I'm looking over my notes. I'm maybe close to
14 finishing, Your Honor.

15 I think it's important for the court to keep in
16 mind that these porters of the United States are attempting
17 to contaminate the concept of aesthetic, recreation and
18 wildlife use, with the concept of minimum instream flow
19 use. This license, this recommendation, says minimum
20 instream flow. It doesn't say aesthetic, it doesn't say
21 recreation, for the purposes we're challenging. It says
22 minimum stream flow.

23 They're not the same. The statute doesn't deal
24 with the same issues, in our judgment. And as of Tuesday
25 you're going to be dealing with that issue anyway, so to

54

1 comment is, the legislature does not enforce statutory
2 constructions; the courts do, with parties participating.
3 So the legislature would not have an occasion to disrupt
4 the status quo. They probably don't even know about it.

5 If they do, they don't have the resources to file suit
6 every time someone may have violated State law.

7 Finally, in conclusion, the reference that the
8 letter of 2002 to the Bureau of Reclamation does not
9 constitute a substantial showing of the need for additional
10 water: I would ask this court to take judicial notice of
11 the fact that the irrigation season in the southern portion
12 of this state extends beyond September of each year. And
13 clearly that letter documents that my clients needed
14 additional water.

15 Thank you. I'll answer any questions.

16 THE COURT: Thank you, sir. I don't believe I
17 have any questions at this time.

18 Mr. Barker?

19 MR. BARKER: Thank you, Your Honor. Albert
20 Barker on behalf of the Boise Project irrigation districts
21 again. I though Mr. Campbell did a commendable job
22 explaining and clarifying the position that the irrigation
23 entities have taken here.

24 I want to add a couple of points. And in part
25 of this I'm going to reiterate something that Mr. Campbell

56

1 confuse and confront the two, I think, is inappropriate.

2 Mr. Maynard stated that the city and the county
3 have relied upon the minimum instream flow. Well, okay.

4 I, as a citizen of the city of Boise, having been born
5 there January 11, 1952, have relied upon the Boise River as
6 well, but the Boise River hasn't always been the way it is
7 today. It's changed. And it's changed pursuant to valid
8 State law, except for this instance, where the Federal
9 government convinced a few people in the Department of
10 Water Resources, without complying with statutorily
11 required actual notice to other interested entities, that
12 they could somehow ignore the minimum stream flow statutes,
13 because the federal government did not want the Idaho
14 Resource Board to hold this portion of the water right.
15 They could have applied to the Water Resource Board for
16 that portion of the water right, but they weren't about to
17 do that.

18 Mr. Maynard also said that these have been in
19 existence since 1964. I've already addressed that issue,
20 only with respect to the 102,300 acre feet that was
21 illegally changed to instream flow maintenance in 1985:
22 Does that apply to that quantity of water.

23 And moreover, he made allusions to the status
24 quo, and has recognized that as a beneficial use, and the
25 legislature has not disrupted that status quo. Well, my

55

1 said, because this is just astounding for the United States
2 to say that they have never made this water available to
3 the irrigators. And it's simply not supported by the
4 record.

5 Mr. Gregg has testified in his deposition that
6 what happens is, is that the United States takes the first
7 60,000 acre feet of storage in Lucky Peak, this
8 uncontracted space, and make that available to fill the
9 water rights in Anderson and Arrowrock. That's just how
10 this has worked throughout the system -- I mean, ever since
11 the agreement has been in place. And, in fact, the
12 evidence is undisputed that there have been shortfalls over
13 the last 50 years this has been in operation, and that the
14 water has been made available to the irrigation districts
15 to use for irrigation out of the uncontracted space in
16 Lucky Peak. So there's no question about that.

17 The other thing I would point to is that, in
18 addition to Jerry Gregg's affidavit, we filed an affidavit
19 from Ted Diehl of the North Side Canal Company, and
20 Mr. Diehl explains that in the winter of 2006 - the spring
21 of 2007, the Bureau of Reclamation made a huge mistake in
22 the Snake River and ended up with a 200,000-acre foot
23 shortfall on the space holders of Palisades and Jackson and
24 ended up taking water out of their allocations. And I'm
25 not saying that because the space in Lucky Peak is subject

57

1 to those water rights, I'm just saying that the Bureau of
2 Reclamation makes mistakes in forecasts, and when they do
3 they're required to make that up by contract, and they need
4 to have the ability under State water law to make that up.
5 And we need to have recognition that this uncontracted
6 space has an irrigation component, because we have, in
7 effect, put this to beneficial use over the past 50 years.
8 And the first part of this case, the Pioneer decision,
9 makes it clear that our landowners have that right because
10 the water has in fact been put to beneficial use.
11 Mr. Gehlert poo-pooed the season-of-use argument
12 that I made, but what we're saying there is quite simple:
13 If there's water going to be released for minimum stream
14 flow, it has to be in the non-irrigation season. I didn't
15 say that irrigation water was going to be released during
16 the non-irrigation season. So the remark: If there is
17 going to be one -- if there is going to be a release for
18 minimum stream flow, it needs to say that releases for
19 minimum flow need to be in the non-irrigation season,
20 because that's the only time this has been used. That's
21 not an attack on the existence of a license or the water
22 right; that's a clarification.
23 The court recognized that we can, and the Supreme
24 Court in the Pioneer case recognized, that when you go in
25 and try to make sure that the water right contains adequate

58

1 together and decide that they're going to release 527 - 627
2 - a million acre feet of stored water, and they don't need
3 anybody's permission because it is already of beneficial
4 use. That's the concern that the legislature is trying to
5 deal with in 42-1501, and that's the concern that Mr. Kiser
6 alluded to earlier.
7 The other point about the diversion argument is,
8 you will look long and hard and never find in the instream
9 flow statute any exception for water that's for
10 diversion -- or water that's been diverted to storage. It
11 says -- the statute says: The preservation of water of the
12 streams of this state for such instream flow purposes when
13 made pursuant to this act is necessary and desirable for
14 all the inhabitants of the state, not just the counties and
15 the cities, and is in the public interest and is declared
16 to be a beneficial use of water.
17 Now, what Mr. Barber would like you to say is:
18 Preservation of water in the streams of this state for such
19 purposes when made pursuant to this act, or such other
20 methods as the Idaho Water Resource Board may decide, is in
21 the public interest and therefore of beneficial use. He's
22 essentially asking you to amend the statute, and you can't
23 do that. You don't have the authority, and neither does
24 Mr. Barber, and neither does the Idaho Water Resource
25 Board.

60

1 protection for the water right holders, that that's not a
2 collateral attack and we can bring that up. So the
3 argument that this is a collateral attack is simply wrong.
4 The Malad Canyon case, coupled with Mr. Barber's
5 argument, possesses exactly the kind of threat that Mr.
6 Kiser alluded to. If you take their reading of Malad
7 Canyon, then anytime you put water to use in a stream,
8 that's a beneficial use, and you say that the actions of
9 the Water Resource Board are better than the actions of the
10 legislature? They rise to some plain that's higher than a
11 statute? There is no protection.
12 And I can give you a very concrete example, and
13 that's Idaho Code 14-1763(b). The legislature said that
14 we're going to allow you to release stored water up to
15 427,000 acre feet for fish benefits downstream, and they
16 amended that statute to allow a release of up to 60,000
17 acre feet of natural flow.
18 Now, if you take the argument of the United
19 States and Mr. Barber, that once you put the water to --
20 once you divert it to storage, and once somebody has put a
21 beneficial use tag on that water right, then -- or on that
22 particular type of use, and he claims that minimum stream
23 flow has already been given that tag, then there is
24 absolutely no reason why to even authorize 1763(b), because
25 the Department or the Bureau or the State could get

59

1 And I don't have anything else to add, unless you
2 have some questions.
3 THE COURT: No questions. Thank you very much,
4 sir.
5 Mr. Farris for Nampa/Meridian?
6 MR. FARRIS: Thank you, Your Honor. I just want
7 to make a few brief points.
8 The first is that this issue has been addressed
9 by the Idaho Supreme Court in State versus U.S. in 2000,
10 where the court made it clear that there's only two
11 exceptions to the diversion requirement under Idaho state
12 law: One is for stock water, and the other they said,
13 quote: State, acting pursuant to statute, may make
14 non-diversionary appropriations for the beneficial use of
15 Idaho citizens. They went on in that case to make it clear
16 that this requirement, this statutory requirement, applied
17 to the United States and the federal government, and
18 rejected the United States' arguments in that case. So the
19 Idaho Supreme Court has made it clear that the statutory
20 requirements of Chapter 15, Title 42 are applicable to the
21 United States. And I haven't heard any argument or dispute
22 that they haven't complied with Chapter 15, Title 42.
23 Instead, the arguments that I've heard are that this is a
24 collateral attack on a license.
25 Let's call a spade a spade. The license was

61

1 issued three days after the recommendation of the
2 Director's Report for this water right. So you can put
3 whatever value or weight you want on a license issued after
4 the recommendation; but more importantly, this court has
5 previously recognized that a license is not insulated from
6 review and examination by this court, especially as to a
7 legal issue. And that's what we're talking about. We're
8 talking about a legal issue as to whether or not the
9 requirements of Idaho law, Title 42, Chapter 15, have been
10 complied with. And this court cannot judicially sanction a
11 water right that is not consistent with Idaho law,
12 regardless of whether or not a license has been issued
13 after the recommendation.

14 The other argument that Mr. Barker addressed, but
15 I want to touch on it also, is they're asking the court to
16 engage in, essentially, legal gymnastics on this issue of,
17 We've already diverted the water for storage and therefore
18 the requirements of Chapter 15, Title 42 are not required.

19 Well, you first have to have a storage right for
20 authorized use. The components of this water right are
21 storage for instream flow, and then instream flow from
22 storage. So to ask the court to engage in those gymnastics
23 and say that they don't have to meet the requirements of
24 Chapter 15 because it's a storage water right first, is not
25 consistent with the statute; and as Mr. Barker mentioned,

62

1 touches on Mr. Farris' position he just argued on the
2 collateral-attack position raised by the United States and
3 Ada County and Boise city -- as I indicated in my response
4 brief to the U.S. and the participants, Idaho Code Section
5 42-201(2) provides that: No person in the State shall use
6 public waters except in accordance with the laws of the
7 state. If, in fact, this water is invalid, it can be
8 challenged at any time. The fact that it hasn't been
9 challenged doesn't make valid a water right that is
10 invalid. You can't fix an invalid water right just because
11 nobody's spoken against it. If, in fact, it's invalid, it
12 is a invalid water right. So the attack, whether it's now,
13 whether it's long ago, doesn't affect the fact that an
14 invalid water right cannot be enforced or legitimized under
15 Idaho law.

16 The other issue that I did want to briefly touch
17 on is the statement by Mr. Gehlert that no one has
18 contested the beneficial use argument. And I think that's
19 a misstatement, because we do contest the position of the
20 United States that this is a beneficial use, because under
21 the Idaho Minimum Stream Flow Act it is a beneficial use of
22 water as defined in the act for those purposes of minimum
23 stream flows, but only when those water rights are made
24 pursuant to the act. The act requires application to the
25 Idaho Water Resource Board, and the Board has to apply to

64

1 not consistent with their own actions regarding flow
2 augmentation; and creates the problematic precedent that
3 Mr. Kiser brought up, allowing them to argue we can store
4 the water for, essentially, an inappropriate purpose, and
5 then we can willy-nilly decide how we want to release the
6 water, whether it be for flow augmentation, instream flow,
7 or whatnot, and it doesn't matter about the statutes that
8 have been passed by our Idaho legislature.

9 The only other argument I wanted to bring up is
10 essentially the same collateral attack argument Mr. Barber
11 brought up that there's been this long history of -- he's
12 argued that the irrigators have sat on their hands. Again,
13 I think that argument is irrelevant and moot because, for
14 argument's sake, even so, this court can't rely on that and
15 judicially sanction a water right that is not consistent
16 with Idaho law.

17 That's all I have at this point.

18 THE COURT: All right, sir. Thank you very much.

19 Mr. Kiser for Farmers Union and others?

20 MR. KISER: Thank you, Your Honor. Jerry Kiser
21 again for Farmers Union, Canyon County Canal Company and
22 Middleton Irrigation entities. I'll just touch on a couple
23 of points and try to keep this as brief as possible because
24 I think we're hitting things over and over again.

25 One of the points I did want to make -- and it

63

1 the Department to acquire that stream flow right.

2 That was not done in this case. The act hasn't
3 been complied with and therefore there is no beneficial use
4 unless it is made pursuant to the Minimum Stream Flow Act.

5 So those are the only two points that I wanted to
6 respond to in the arguments, Your Honor. Thank you.

7 THE COURT: All right, sir. Thank you.

8 Mr. Gehlert?

9 MR. GEHLERT: Just a couple of points, Your
10 Honor. First, as to Mr. Campbell's allegation that the
11 United States' application in 1985 was part of some secret
12 process between the State and the United States which
13 nobody else had notice. The affidavit of publication of
14 notice in the Idaho Statesman is Exhibit FF to the Jarvis
15 affidavit. It's part of the record. This was not some
16 secret gathering of government entities in cahoots with
17 each other. This was part of the statutory process for
18 amendment of a permit. That process was followed in full.

19 Your Honor, your decision in the 91-63 case
20 recognized that the time to protest an administrative
21 decision regarding water rights is at the time the permit
22 is approved. That was more than 20 years ago. The
23 irrigation entities who are challenging the water right
24 here today had notice, had opportunity, and didn't take
25 advantage of it.

65

1 Mr. Campbell mentioned the 1989 amendment. That
2 was actually done in 1987. It was not done for contractual
3 compliance purposes; it was done, in fact, to help out the
4 irrigation districts. As Mr. Campbell explained, the
5 construction of the power plant at Lucky Peak Reservoir
6 left much less water in the reservoir than there typically
7 would have been. The Bureau amended its permit to provide
8 them with additional water in light of that hardship that
9 they faced. It was actually a loan of water, as the
10 documents made clear, and on its face it says expressly
11 that this use of water does not constitute a change of use
12 of the water. So it was alone and not intended to create
13 any change to the water right. That material is -- Excuse
14 me, Your Honor, I'll give you the citation -- Exhibit BB to
15 the Jarvis affidavit at page 282.
16 As to Mr. Campbell's letter in 2002 about the
17 shortfall of water in 2001, what he didn't say was 2001 was
18 a drought year. Everyone could have used more water that
19 year.
20 Mr. Barker said that we need to change the
21 elements of this existing licensed water right so that the
22 government will have the ability to make sure that the
23 irrigators are kept whole. Both Ms. Mellema for the Bureau
24 of Reclamation and Mr. Sutter, who, as I said, was the
25 manager at IDWR, went through water master records and

66

1 operations. And under the contracts we are required to
2 make sure that the Anderson Ranch and the Arrowrock
3 contractors are kept whole in those years.
4 THE COURT: And you've done that.
5 MR. GEHLERT: And we've done that. And that's
6 what Mr. Sutter testified to.
7 In his surreply Mr. Campbell said: Well, Mr.
8 Sutter said he wasn't here to testify about contracts. And
9 that's true. I said that, myself, to Ms. Martens, and Mr.
10 Campbell quoted me on that. But the point that he doesn't
11 recognize is Mr. Sutter doesn't need to know anything about
12 the contracts. As Mr. Sutter testified, IDWR gets a list
13 of contractual entitlements from the Bureau and they
14 operate to achieve that. So you don't have to know what
15 the contract says, you just have to read the list that says
16 Settlers Irrigation District, for instance, if I'm
17 remembering right, is entitled to 28-68 worth of water out
18 of Anderson Ranch. In order to find out whether that's
19 happened or not you don't have to be an expert in anything
20 beyond looking at charts and telling what numbers are the
21 same.
22 If you look at Ms. Mellema's affidavit, Exhibit A
23 are water master records for the flood control years. An
24 example of one would be 1989, and that's at pages 31 and 32
25 of her exhibit. Chart eight lists all the entitlements in

68

1 concluded that, in fact, the irrigators had been kept whole
2 in every year for which there was flood control operations,
3 as is required by the contracts.
4 Now, Mr. Campbell --
5 THE COURT: Excuse me, Mr. Gehlert. Wouldn't you
6 expect that? I mean, in flood control years there'd be a
7 lot of water.
8 MR. GEHLERT: See, what happens -- there is a lot
9 of water, but every year the Bureau has to make an
10 estimation whether so much water is going to come that it's
11 going to overtop the dam and cause a flood. And obviously
12 they don't want to cause a flood, so what they do is they
13 vacate water before the spring runoff comes. Now, as I
14 said in my opening remarks, it's a very complicated
15 calculation. I mean, it's not just looking at how much
16 snow. They've got to balance the weather, and no one
17 knows: It may be hot, the water may come off fast; it may
18 be cold and the water may not come off fast. So, anyway,
19 they evacuate water and they essentially dig a hole to
20 catch what's coming.
21 So some years they dig a hole that's too big,
22 because they want to error on the side of preventing
23 floods. So some years they may evacuate more water than
24 they catch that comes off in the spring runoff. Those are
25 the years where there's this shortfall due to flood control

67

1 the reservoirs, and if the reservoirs were full that's how
2 much water these folks would get. Chart nine is how much
3 water they actually got. So it's just a simple matter of
4 looking at the chart and saying, Settlers is entitled to
5 28-68, what did they get? Look at chart nine. They got
6 28-68. Then when I said that they've been kept whole every
7 year pursuant to the contracts --
8 THE COURT: Let me interrupt one more time.
9 MR. GEHLERT: Please, do.
10 THE COURT: If that's the case, why wouldn't the
11 United States be willing to agree, for instance, to a
12 remark that provides that the instream flow right is
13 subordinate to these irrigation claims --
14 MR. GEHLERT: Well, Your Honor --
15 THE COURT: -- if it always works?
16 MR. GEHLERT: -- in our view the fact that it's
17 always worked demonstrates that that's unnecessary. And we
18 believe that's what the Idaho Supreme Court was talking
19 about at the close of the edition on the title case.
20 But I would say, Your Honor, that if you feel
21 that's there's some necessity to address the contracts in
22 some manner, a remark would be the appropriate manner; not
23 changing the actual elements of the water right. Even in
24 the title case, where the Idaho Supreme Court found that
25 the irrigators had more than a contractual expectancy, they

69

1 didn't change the elements of the water right; they gave
2 them a remark.
3 So if you feel that the contracts need to be
4 addressed in some manner, a remark is certainly the
5 appropriate way to do that.
6 THE COURT: That's not so much a question of
7 whether I think the contract should be modified or not;
8 it's more of a question of, if the United States is so
9 confident that -- I'm not sure how to word this exactly --
10 that there'll never be a need to use this stream flow
11 maintenance water to make up for irrigation shortfalls
12 because of flood control or other operations, why not just
13 agree that the water for stream flow -- the water right
14 stream flow is subordinate to the other claims?
15 MR. GEHLERT: Well, Your Honor, I guess a couple
16 of responses. One, their briefs and arguments haven't been
17 phrased in terms of asking for a remark. It's always been,
18 Change the nature of use to irrigation. So --
19 THE COURT: Sure. And I'm speaking
20 hypothetically.
21 MR. GEHLERT: I'm taking a second to try to think
22 this thing through, because I'm thinking on my feet and
23 obviously don't have an opportunity to consult with my
24 clients, but our view has been that the system as it exists
25 today works, and the contracts themselves are a means to

1 of Idaho to, quote: Follow a broader definition of the
2 term "beneficial use of water", to include all water uses,
3 both consumptive and non-consumptive. For example: Stream
4 resource maintenance flows.
5 Now I will remind Your Honor that the State water
6 plans are subject to review and approval by the State
7 legislature. In 1996 the State water plan continues -- in
8 a different language -- but also continues to affirm that
9 those uses are, in fact, beneficial uses.
10 The last point on the diversion: As Mr. Barber
11 said in his remarks, the Idaho Water Resources Board is the
12 very entity charged with administering the instream flow
13 statute program. They said that the program was
14 inapplicable.
15 And as to Mr. Kiser's argument that this use is
16 not beneficial, I think I've addressed that through the
17 reference to the State water plan. I would add that in
18 Stock v. Finney, which is cited in my brief, the Idaho
19 Supreme Court noted that dams and reservoirs are for
20 beneficial uses such as flood control, power generation,
21 recreation, and providing beneficial environments for fish
22 and wildlife.
23 With that, I thank you for your patience today,
24 Your Honor. Do you have any further questions?
25 THE COURT: No, sir. Thank you very much.

1 ensure their enforcement. And there are remedies available
2 under the contracts.
3 Let me take a second to address a couple of the
4 other arguments while I try to think about your question
5 again, Your Honor.
6 As to Mr. Barker's reference to 42-1763(b), which
7 was a special statute addressing the use of water over a
8 short term for flow augmentation, a statute was required
9 because that was addressing the release of water; not an
10 appropriation.
11 Mr. Farris argued that this decision has been
12 decided by State versus United States, which said that
13 there were only two exceptions to the diversion
14 requirement. Again, our point is that there is a
15 diversion, and we're not talking about an exception to the
16 diversion requirement.
17 As to the precedent as part of the basin-wide 14
18 process, IDWR did a report in which they concluded that
19 there were 1400 claims, partial decrees and Directors
20 Reports recommending or affirming water rights for
21 aesthetics, recreation or wildlife purposes. The
22 designation "instream flow maintenance" is essentially a
23 umbrella term that encompasses all of those uses. The use
24 actually comes out of the State water plan. The very first
25 State water plan in 1982 expressed the policy of the State

1 Mr. Barber?
2 MR. BARBER: Yes. Very briefly. David Barber,
3 Deputy Attorney General for the Idaho the Department of
4 Fish and Game.
5 One minor note: The name of the Department of
6 Idaho Water Resources in the Malad Canyon case was the
7 Idaho Department of Water Administration. I apologize for
8 not remembering that. Sometimes I forget exactly the year
9 and the name changes, but it was a predecessor and function
10 of Water Resources.
11 Mr. Gehlert actually stole most of my thunder in
12 terms of things I was going to say. He addressed them all
13 very well. I just have a couple of things I'd like to note
14 and then I will respond to any further questions the court
15 might have.
16 Mr. Campbell claimed, if I understood him
17 correctly, I was misquoting some things about what the
18 Water Resource Board did in its agenda item eight. I don't
19 think I misquoted anything. Certainly if I did, it wasn't
20 my intent to do so. I did quote quite a lot of the agenda
21 item eight on page four of my brief, but of course that's
22 an excerpt itself, and certainly sometimes it's better to
23 see the entire document. I'd refer the court to Exhibit B
24 of the David Jarvis affidavit, and that has the complete
25 document there, so that there's no issue about a

1 misunderstanding as to what it indicates.
2 But I would like to point out that certainly the
3 portion that I quoted in my brief made it very clear that
4 the stored quantities in Lucky Peak are not subject to the
5 provisions of Chapter 15. And the point I was trying to
6 make about the Idaho Water Resource Board is what was
7 ultimately the conclusion of the court in another case, but
8 since it's been brought up I will refer the court to it:
9 It's Idaho Power Company versus the State of Idaho
10 Department of Water Resources, 104 Idaho 570, and that, of
11 course, is the case that involved the State water plan and
12 we had this approval changed by the Idaho legislature and
13 then essentially we had two water plans, and the Idaho
14 Supreme Court had to determine which was the real water
15 plan and which one applied, and they concluded that the
16 Idaho Water Resource Board had the authority to formulate
17 and implement, and that's the one that applied.
18 I should point out to the court that subsequently
19 there was an amendment to the Idaho Constitution passed
20 after that case that did provide the review authority that
21 the legislature thought was necessary.
22 The point I'm trying to make is that here we have
23 an entity that has a very narrow focus on water resources
24 and has developed a lot of expertise. When it says
25 something, it ought to mean something. And I think it

1 they're not babes in the woods and neither are their
2 counsel, and they're fully capable of paying attention to
3 that sort of thing if Lucky Peak's important to them.
4 The complaint about the timing of the license.
5 The pertinent proceedings were back during the permit
6 application and amendment process for the license. The
7 kind of coincidental and later issuance of the license is
8 really of no consequence, from my review of your decisions
9 and others, Your Honor, regarding barring collateral
10 attacks. I would add that if they really wanted to
11 challenge the license, they had an option when it was
12 issued, no later than 2002, within the time limits provided
13 for that kind of proceeding, to take it on then in a proper
14 court action, where the Department of Water Resources could
15 properly defend itself as a party and other parties could
16 participate, without collaterally going after it in this
17 SRBA proceeding.
18 I think it was Mr. Campbell who talked about --
19 whoever brought it up -- conflating aesthetic, recreation,
20 wildlife beneficial use with the stream flow maintenance
21 use in this case. The record clearly reflects fish,
22 wildlife, aesthetic and other purposes for the stream flow
23 maintenance, storage and use rights there in Lucky Peak.
24 After all, the license itself provides for the Department
25 of Fish and Game, with the Bureau of Reclamation, to

1 does, and it did certainly in the agenda item eight and its
2 actions on that.
3 I'd be happy to respond to any further questions
4 the court might have.
5 THE COURT: Thanks very much again, Mr. Barber.
6 And Mr. Maynard or --
7 MR. MAYNARD: Thank you, Your Honor. For the
8 record, again, Bob Maynard for the city of Boise and Ada
9 County. I just want to go through a few points with my
10 notes.
11 Mr. Gehlert already covered, I think, Mr.
12 Campbell's allusion to a transfer application that
13 basically was a loan of water for irrigation purposes back
14 in the late '80s or early '90s. That's another instance of
15 these irrigation entities being on clear notice of a stream
16 flow maintenance provision in the permit, changing that --
17 or loaning water from that temporarily, as I understand it,
18 to irrigation use. It's showing the mechanisms that BOR
19 has used to meet their needs in that instance.
20 But that aside, and really kind of moving onto
21 this complaint about some kind of lack of notice back then
22 and some kind of sneaky deal, that's just totally without
23 basis. Proper published notice was followed under the
24 permit application and permit amendment provisions. And
25 these irrigation entities have been around a long time,

1 administer that component. It's stream flow maintenance
2 active management of that water, including diversion to
3 storage and release from storage, to maintain stream flows
4 for a whole series of uses that includes aesthetic,
5 recreation, wildlife uses.
6 And that kind of gets to all this debate about
7 the instream flow statute and what's the difference between
8 what's going on at Lucky Peak and what's covered by the
9 instream flow statute. There's a major difference between
10 diverting water to storage, a well-established form of
11 diversion recognized in the legislative history of the
12 stream flow statute, as well as the act itself; and where
13 you're actively physically diverting the water from a
14 naturally flowing stream with a dam and reservoir. You're
15 actively managing and releasing that water later on, as
16 opposed to just reserving instream in-place natural flow in
17 a stream or other natural water body, which is what the
18 instream flow statute is specific to. You don't have that
19 water when you need it for instream flow maintenance
20 but/for the artificial storage diversion, and then release
21 of that water at the proper times for the fish, wildlife
22 and other purposes.
23 Going back to all the arguments about contract
24 needs and whether they've been met or not and whether there
25 should be some kind of a remark of subordination or what

1 the objectors have alleged, which is that you should add
2 irrigation use as a right or you should switch it to that
3 use. What I would add to that is that this is not the
4 place. This is not the proceeding to resolve any water
5 contract disputes. And going back to the 91-63 ownership
6 subcase, the conclusion there for the contracted water,
7 which you didn't need to get into those specifics, the city
8 and county aren't going to agree that the stream flow
9 maintenance is subordinate to all contract rights or
10 anything like that, but those disagreements have been
11 presented in this case, there's remedies for those to be
12 resolved, and you just don't need -- and it's not
13 appropriate in our perspective -- to add something to a
14 decreed license to try and get it back, beyond what the
15 Supreme Court and this court has already added about
16 clarifying ownership.

17 And I really think that's all I've got at this
18 point. I've run out of steam in keeping track of all the
19 rebuttal and re-rebuttal. But if you have any questions,
20 I'd be happy to address them.

21 THE COURT: I don't have any. Thank you, sir.

22 At the risk of opening the floodgates, this is a
23 fairly complicated case, there are six motions altogether,
24 two them I guess I'll refer to them as cross-motions. If
25 the parties wish to be heard further, I would entertain

1 that, as long as you would be brief, I guess.

2 MR. CAMPBELL: Your Honor, I would challenge any
3 counsel to a wrestling match outside if anybody says
4 anything else.

5 THE COURT: We could charge admission for that.
6 Does anyone else wish to be heard in this matter?

7 MR. BARBER: We'd like to know whether we could
8 resolve it that way.

9 THE COURT: Well, counsel, thank you all very
10 much for the excellent briefing and argument in this case.
11 As you know, one of the best things about being the SRBA
12 presiding judge is the quality of the work that the
13 attorneys do here, and I do appreciate that. I'll take the
14 matter under advisement and issue a written decision in due
15 course.

16 Thank you very much.

17 Court is in recess.

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1 REPORTER'S CERTIFICATE

2
3
4 STATE OF IDAHO)
5)
6 COUNTY OF MINIDOKA)
7

8 I, MAUREEN NEWTON, Official Court Reporter and
9 Notary Public, in and for the Fifth Judicial District of
10 Minidoka County, Idaho, do hereby certify that the above
11 and foregoing typewritten pages contain a true and correct
12 transcription of my shorthand notes taken upon the occasion
13 set forth in the caption hereof, as reduced by means of
14 computer-aided transcription by me or under my direction.

15
16 Witness my hand, this the 3rd day of November,
17 2004.

18
19
20
21
22 _____
23 MAUREEN NEWTON, CSR #321
24 Court Reporter and Notary Public
25 For the State of Idaho
My commission expires 9-10-2006