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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CITY OF POCATELLO, Petitioner, vs. IDAHO DEPARTMENT OF WATER RESOURCES, and MATHEW WEAVER in his capacity as Director of the Idaho Department of Water Resources, Respondents.	Case No. CV01-25-19039 **CITY OF POCATELLO'S REPLY BRIEF** Fee Category: Exempt Idaho Code § 67-2301
IN THE MATTER OF THE ALLOCATION OF STORED WATER TO THE CITY OF POCATELLO BY WATER DISTRICT 01	

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Petitioner City of Pocatello ("Pocatello" or "City"), by and through undersigned counsel of record, submits this reply brief pursuant to paragraph 9 of the Court's *Procedural Order* dated October 20, 2025, the Court's *Order Granting Unopposed Motion to Amend Procedural Order* dated February 3, 2026, Rule 84(p) of the Idaho Rules of Civil Procedure ("I.R.C.P."), and Rules 34 and 35 of the Idaho Appellate Rules ("I.A.R.").

INTRODUCTION

In its January 10, 2024 *Amended Order on Cross-Motions for Summary Judgment* in Case No. CV42-23-1668, the Court rejected Pocatello's arguments that the last-to-fill provision ("LTF Provision") was facially unconstitutional. R. 231. The Court's reasoning involved contrasting a hypothetical "Water User A" renting irrigation water to a municipality with the City of Pocatello's use of its storage water. The Court observed that Water User A's actions were *per se* invalid because his water right authorized neither the rental of his water nor the use of his water for municipal purposes (R. 227-228), but went on to hold that Pocatello's use of water presents a "unique scenario, however, as to whether the legal analysis that applies to Water User A's water right should apply to [the City's] circumstances" due to the existence of Pocatello's contract, which provides for uses that are different from those authorized by the partial decree for water right 01-2068 (the "Decree"). R. 228-229. The Court noted that "counsel for the Defendants represented that the partial decree and the spaceholder contracts serve as the 'bookends' for the authorized purposes of a storage right", and that the WD01 Water Master had testified that an individual contract holder was entitled to use its water for the contracted-for purpose even if it was inconsistent with the decree, and concluding that "clearly some effect is given to the contract [by the Department through the actions of the Water Master]." R. 230.

The bidding in this case is quite a bit different from the arguments Respondents made in Case No. CV42-23-1668. The Idaho Department of Water Resources and Mathew Weaver ("IDWR" or "Department") and Spaceholders now argue that Pocatello's contracted-for use is inconsistent with the uses authorized by the Decree, thus the City cannot even use its storage water for its *own* mitigation. In other words, Pocatello's 1960 contract with the United States Bureau of Reclamation ("Bureau" or "Reclamation") has no legal effect and *any* use of Pocatello's storage water is properly subject to the LTF Provision.

Respondents argue that IDWR properly determined that Pocatello's use of its stored water in 2022 enlarged water right 01-2068 because the delivery to AFRD#2 constituted a change in place of use and purpose of use.[1] Their bases for these positions are: 1) that Condition No. 1 (the "*Pioneer* Remark") expressly modifies the "place of use" provision in the Decree, even though the plain language authorizes use of storage water anywhere above Milner Dam[2]; and 2) that the water Pocatello assigned to AFRD#2 for irrigation had, in part, been leased by other ESPA cities who are parties to the Cities' mitigation plan.

In making these arguments, Respondents do not explain why the Pioneer Irrigation District, located in WD63 and an equitable title holder to storage right decrees containing the *Pioneer* Remark, is not also subject to rental pool rules with a LTF provision that is imposed any time an entity leases its water for use outside of its service area. If the *Pioneer* Remark means that use of Pocatello's stored water outside of its service area is subject to the LTF Provision in the absence of an Idaho Code ("I.C.") section 42-222 transfer, then why are contract holders

[1] Throughout this brief the phrases "inconsistent with the partial decree" and "enlarged the use" are used interchangeably, and both refer to the IDWR's determination that, in 2022, Pocatello's storage water used for irrigation by AFRD#2 was used outside the decreed place of use and for an end use other than irrigation.

[2] As explained in Pocatello's *Opening Br.* at 5 n.8, "Above Milner" or "Above Milner Dam" is a colloquial shorthand term for the counties that are listed in the 01-2068 partial decree as the "place of use."

(including Pioneer Irrigation District) in Water District 63 not so constrained? Nor do Respondents explain why it was proper for IDWR to account for the use of Pocatello's stored water as "mitigation." *A&B Irrigation Dist. v. State*, 157 Idaho 385 (2014) requires IDWR to account for the "end" beneficial use. It is undisputed that the "end" beneficial use of Pocatello's stored water in 2022 was irrigation of crops by AFRD#2. In fact, *A&B* is not even addressed in Respondents' briefs.

The Court has two tasks in this case. The first is to determine whether Respondents have offered a lawful interpretation of the *Pioneer* Remark; if they have, the Court must require the Idaho Water Resource Board to only approve of rental pool rules that include a LTF Provision exactly like that in the WD01 rules. *See* R. 217-18. Second is to determine whether AFRD#2's irrigation use is the "end use", and if it is not, whether the Department can still penalize Pocatello for putting its storage water to its contacted-for use: mitigation.

Based on its arguments in the opening brief and within, Pocatello respectfully requests that the Court grant relief by declaring that IDWR's application of the LTF Provision in 2023 violated multiple provisions in the Idaho Constitution and Idaho Code, setting aside IDWR's order affirming the application of the LTF Provision against Pocatello in 2023, and directing IDWR to not apply the LTF Provision when a use of storage water does not enlarge the underlying water right.

ARGUMENT

I. THE COURT SHOULD REJECT RESPONDENTS' ARGUMENT THAT THE *PIONEER* REMARK IMPOSES A PLACE OF USE RESTRICTION ON WATER RIGHT 01-2068

a. *Pioneer* Dealt with the Ownership, Not the Place of Use, of Water Rights Associated with Bureau Reservoirs

As IDWR asserts, the "real issue" is "what is the effect of the *Pioneer* decision and the *Pioneer* Remark on the place of use of water right 01-2068." *IDWR Br.* at 15 n.9. However, Respondents' argument that the use of Pocatello's stored water in 2022 was outside the authorized place of use rests entirely on their misinterpretation of the *Pioneer* Remark. *See IDWR Br.* at 13-18[3]; Spaceholders Br. at 8-14.[4]

As explained in Pocatello's opening brief, *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106 (2007) involved a dispute between the United States Bureau of Reclamation ("Bureau" or "Reclamation") and contract holders regarding the ownership of water rights associated with reservoirs constructed and operated by the Bureau. *See Opening Br.* at 13-14. Respondents attempt to support the Department's conclusion below that a portion of the *Pioneer* Remark ("The interest of the consumers or users of the water is appurtenant to the lands within

[3] "The Pioneer Remark makes clear that the interest of the storage water contract holders in Palisades Reservoir is based on their beneficial use of the water on the lands within their service area boundaries…. Thus, the large 15-county place of use must be read together with the Pioneer Remark to define the place of use for water right 01-2068…. Pocatello's argument should be rejected by the Court because it ignores the connection made in *Pioneer* between the beneficial use, place of use, and equitable title…. The Hearing Officer found that Pocatello's municipal service area is the place of use to which Pocatello's storage water is appurtenant. This conclusion is consistent with the decree and the *Pioneer* decision, which recognized that the irrigation use was established when the water was put to beneficial use." (Citations omitted.)

[4] "The applicable storage right for Palisades Reservoir is unique because it does not list all individual spaceholders' project areas, but each spaceholder does have an authorized service area. The service areas and areas where irrigation water is used are incorporated by reference in the decree because the spaceholders are recognized as beneficial owners of the water right. It is not surprising that IDWR or the SRBA Court did not list all service areas approved under individual contracts to avoid promulgating documents stretching for thousands of pages, but impliedly, such service areas are incorporated nevertheless because of the spaceholders' ownership…. The City is an owner of space under the decree for water right 01-2068, therefore, the place of use for Pocatello's contracted space is the city service area, which is generally recognized as the legal city limits for the City of Pocatello."

the boundaries of or served by such irrigation organizations….") somehow operates to restrict the place of use for individual contract holders to their respective service areas and prohibits them from renting stored water without the specter of the LTF Provision being applied. *See IDWR Br.* at 14; *Spaceholders Br.* at 8. This interpretation is absurd.

The principle set forth in *Pioneer* is that contract holders hold "equitable title" to, or an "equitable interest" in, their share of the water right that the Bureau appropriated. *Pioneer*, 144 Idaho at 114-115. The contract holders in that case, including certain of the Spaceholders, advocated for the remark because "without an equitable interest, they are vulnerable" to the Bureau depriving them of water without adequate remedy. *Id.* at 115. In support of their claims, the Spaceholders cited cases involving Bureau contract holders from other regions of the west, such as the Klamath River Basin,[5] where the contract holders were unsuccessful in obtaining judicial relief despite the Bureau reducing their water supplies to satisfy ESA purposes. *Id.* Indeed, because of the experience in other regions, the contract holders argued that without the *Pioneer* Remark, there were insufficient protections in place for them to assert their equitable interest and prevent the Bureau from taking their water and delivering it elsewhere without their consent. *See Responsive Brief in Support of the Irrigation Organizations' Motion for Summary Judgment*, In re SRBA Case No. 39576, Consolidated Case No. 91-63, at 2-3, 9, 11 (Idaho Dist. Ct. May 26, 2004)[6]; *Boise Project and Committee of Nine's Reply in Support of Ballentyne Ditch*

[5] The controversy in *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005) involved the Bureau "reallocat[ing]" spaceholder contract water in Klamath Lake for environmental uses that was "already-committed" to irrigation uses, purportedly to protect endangered species. *See* 67 Fed. Cl. at 536 n.55.

[6] "[T]he irrigation portions of the water rights in this case . . . are exclusively dedicated to the lands of the Irrigation Organizations and cannot be taken, removed or deprived thereof without their consent. . . . water rights are appurtenant to the lands of the irrigation organizations because of beneficial use and/or exclusive dedication and the Irrigation Organizations have a [sic] protected ownership interest in the water rights that must be recognized by the decrees." Pocatello request that the Court take judicial notice of the *Responsive Brief in Support of the Irrigation Organizations' Motion for Summary Judgment*, which is attached hereto as Exhibit 1.

Company, et al.'s Motion for Reconsideration/Clarification, In re SRBA Case No. 39576, Consolidated Case No. 91-63, at 3-4 (Idaho Dist. Ct. Feb. 18, 2005).[7] The Idaho Supreme Court understood what was being litigated—all of the federal cases it relied on in *Pioneer* to reject the United States' arguments involved issues related to ownership of water rights in Bureau projects, not to the water rights' place of use.

While IDWR erroneously argues that *Pioneer* "connect[s]," or "link[s]," beneficial use, equitable title, and place of use (*IDWR Br.* at 16), the proper meaning of the "appurtenant" language in the *Pioneer* Remark is that contract holders' ownership rights are appurtenant to the lands within their respective service areas such that the Bureau is not free to take the water for other purposes. There is no basis to adopt an interpretation that would modify the plain language of the "place of use" provision in the Decree in a manner that would support applying LTF against every lease in WD01 that involves the use of water outside of a contract holder's service area. Moreover, the terms "equitable title" or "equitable interest" appear multiple times in the *Pioneer* opinion, and the term "beneficial use" is used even more frequently. *See* 144 Idaho at 109-115. Conversely, the terms "place of use" or "service area," or any variation thereof, do not appear once.

Thus, Respondents' contention that any use of Pocatello's storage water outside of Pocatello's city limits is unlawful in the absence of the LTF Provision is not supported by *Pioneer*. Respondents cite no other authority for their interpretation of the *Pioneer* Remark, nor

[7] "As described by the United States, there is no boundary except the counties of Ada and Canyon. Such a description might allow Reclamation to move the water away from the landowners in districts with equitable title, to other areas throughout Ada and Canyon County, even potentially to areas outside the lands currently served or to whole new areas in some undefined area." Pocatello request that the Court take judicial notice of the *Boise Project and Committee of Nine's Reply in Support of Ballentyne Ditch Company, et al.'s Motion for Reconsideration/Clarification*, which is attached hereto as Exhibit 2.

do they wrestle with the briefs filed in that case, which show that the Spaceholders and Committee of Nine were concerned with the Bureau depriving them of water, not contract holders' ability to rent water within the decreed place of use.[8]

b. The Point of Pocatello's Reference to Sub-Claim 01-2068Y was to Highlight the State's Historical Interpretation of *Pioneer*

The Respondents erroneously argue that Pocatello is trying to relitigate its sub-claim for water right 01-2068Y and is collaterally attacking the 01-2068 Decree. *Spaceholders Br.* at 5-7; *IDWR Br.* at 16. Pocatello's reliance on the SRBA Court adopting IDWR's recommendation to disallow *all* sub-claims associated with water right 01-2068 is simply a statement of fact. *Opening Br.* at 15. It is also a legal argument insofar as it forecloses reading the Decree to provide for distinct, implied water rights for each spaceholder that include a more restrictive place of use than the language on the face of the Decree. *See id.* The Court should adopt this view and reject the Respondents' arguments on this point.

II. THE COURT SHOULD REJECT RESPONDENTS' ARGUMENT THAT THE "END USE" IS NOT THE OPERATIVE USE WHEN EVALUATING THE PURPOSE FOR WHICH STORED WATER IS USED

a. Respondents Do Not Refute that *A&B* is Controlling Law and Holds that "End Use" is What Matters for this Inquiry

Pocatello argued that Idaho law—specifically, *A&B*, 157 Idaho 385—requires IDWR and this Court to look at the "end use" of storage water to determine the purpose for which the water was used. *Opening Br.* at 16-18. Respondents merely adopt the Hearing Officer's conclusion

[8] Alternatively, if the Respondents are correct that the *Pioneer* Remark implicitly modified the place of use authorized by the Decree, that implicit (i.e., silent) modification ought at least be limited to the canal companies based on the plain language of the remark, e.g., " . . . The United States Bureau of Reclamation holds nominal legal title. Beneficial or equitable title to this water right is **held in trust by the irrigation organizations**, in the quantities and/or percentages specified in the contracts between the Bureau [] **and the irrigation organizations, for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations pursuant to Idaho law. . .**" *Id.* at 109.

that Pocatello's storage water was used for the purpose of "mitigation," rather than "irrigation from storage," because Pocatello rented a portion of the water that was assigned to AFRD#2 to other cities as part of the mitigation plan approved in IDWR Docket No. CM-MP-2019-001. *IDWR Br.* at 18-19; *Spaceholders Br.* at 14-15. Neither Respondent cites any legal authority in support of their arguments; nor do they contest that *A&B* controls for purposes of evaluating whether the beneficial use of storage water is authorized by the water right. Indeed, Idaho law makes clear that storage water is not *used* until "application of the water to the beneficial use for which the water is appropriated." *A&B*, 157 Idaho at 389 (quoting *Pioneer,* 144 Idaho at 110).

Here, water right 01-2068 was appropriated for the purpose of "irrigation from storage," which is precisely the beneficial use to which Pocatello's storage water was applied in 2022, as that was the "end use" of the water by AFRD#2. The Court should find that this use was authorized because it was consistent with a use "identified under the purpose of use element of [the] water right." *City of Blackfoot v. Spackman*, 162 Idaho 302, 310 (2017).

Respondents' failure to meaningfully[9] respond to this argument should be taken as a concession that *A&B* is controlling law. *See Safeco Ins. Co. of Am. v. Russell*, 787 F. Supp. 3d 1146, 1152 n.4 (D. Idaho 2025) (not responding to an argument is a concession); *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1169 (D. Idaho 2011) (parties "concede the point" when they do "not respond to that argument"); *Tesla Labs., Inc. v. United States*, 172 Fed. Cl. 505, 534 (2024) ("A well-known litigation principle holds that failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue.") (citations and quotations omitted); *Freeman v.*

[9] The Spaceholders' sole, meager response on the subject, without any citation to authority, is: "It is vital that context be recalled—not just the end use of the lease." *Spaceholders Br.* at 14-15.

Spoljaric, 667 F. Supp. 3d 636, 660 (S.D. Ohio 2023) ("courts can and often do find parties concede arguments to which they do not respond").

The fact that a portion of the volume of Pocatello's stored water delivered to AFRD#2 for irrigation end-use was first leased from Pocatello by various ESPA Cities that are parties to the Cities' mitigation plan is irrelevant, although this fact creates a major distraction for Respondents—apparently because of the financial compensation aspect of the rental. *IDWR Br.* at 19; *Spaceholders Br.* at 15. As discussed in section V, *infra*, that there was financial compensation for the rental, let alone whether there was a rental at all, is irrelevant to the inquiry of whether the stored water was "used within the parameters of its defined elements." R. 226. For the Spaceholders to argue that anything other than the "end use" of the stored water matters when IDWR evaluates whether water is being used for an authorized purpose is inconsistent with their arguments in *A&B*, and they are judicially estopped from doing so. *See McKay v. Owens*, 130 Idaho 148, 152 (1997) ("Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.").[10]

In sum, the operative use when IDWR and this Court evaluate whether water was used for an authorized purpose is the "end use." Respondents' contrary arguments are unpersuasive. Water stored under water right 01-2068 was appropriated for the purpose of "irrigation from storage," which is how Pocatello's storage water was applied to beneficial use in 2022. Accordingly, IDWR's erroneous application of the LTF Provision in 2023 on the basis that

[10] Certain of the Spaceholders' arguments in the *A&B* case are contained in the *Opening Br.* at 17 n.21.

Pocatello enlarged the purpose of use for water right 01-2068 violated the provisions of the Idaho Constitution and Idaho Code invoked in the *Opening Br.*

III. IF THE COURT FINDS THE USE OF POCATELLO'S STORED WATER IN 2022 DID NOT ENLARGE THE PLACE OF USE OR PURPOSE OF USE FOR WATER RIGHT 01-2068, THEN IT MUST FIND IDWR'S APPLICATION OF THE LTF PROVISION IN 2023 VIOLATED PRIOR APPROPRIATION AND TAKINGS PROVISIONS IN THE IDAHO CONSTITUTION AND IDAHO CODE

As argued in Pocatello's opening brief, IDWR's application of the LTF Provision in 2023 violated multiple provisions in the Idaho Constitution and Idaho Code that establish that prior appropriation is the law in Idaho, that an appropriator cannot be deprived of water to which they are entitled under the priority system without just compensation, and that IDWR is obligated to distribute water in accordance with the priority system. *See Opening Br.* at 18-21, 25. Respondents argue that no violation occurred, namely because Pocatello voluntarily participated in the WD01 Rental Pool. This argument misses the mark.

a. Pocatello Did Not Volunteer to Have its Water Right *Not* be Administered in Priority or Have its Property Taken Without Just Compensation

Respondents repeat ad nauseum that Pocatello's actions in this case were voluntary. *IDWR Br.* at 25, 27; *Spaceholders Br.* at 7, 14, 20-22, 24-27. This argument confuses what is at issue in this case and is flatly wrong.

Pocatello participated in the WD01 Rental Pool in 2022 and 2023. And while no one put a gun to the mayor's head to force the City to participate in the Rental Pool, following the law (even if wrong) cannot be described as "voluntary". Pocatello did so because, based on information and belief, it was the only mechanism by which its rental of storage water would be effectuated without occasioning additional problems—such as the Spaceholders challenging Pocatello's efforts to act outside of the Rental Pool. *See* R. 651-52; 878. When addressing the

Spaceholders' argument that Pocatello "waived their right to object due to continued voluntary participation in the Rental Pool," the Hearing Officer correctly concluded:

> As an initial matter, Pocatello's ongoing participation in the WD1 Rental Pool is not a confirmation that Pocatello agrees with how the WD1 Rental Pool is administered or a waiver of Pocatello's right to challenge the Rental Pool Procedures. The WD1 Rental Pool Procedures govern many activities, including common pool rentals to Reclamation for flow augmentation, which result in a payment to all participating spaceholders. Pocatello's decision to participate in the Rental Pool may be solely based on financial considerations and have nothing to do with its position on the administration of the provisions at issue in this contested case.

R. 802.

The same analysis applies here and the fact that the City received financial compensation from lessees for renting water has no bearing on whether IDWR's application of the LTF Provision contravened the prior appropriation system, violating Idaho Const. art. XV, § 3 and I.C. § 42-602, and effected a taking of Pocatello's property without just compensation, violating Idaho Const. art. I, § 14. However characterized, Pocatello did not consent to not "have [its] water right administered in priority" in 2023 (R. 226) and there was no waiver of its right to challenge that Department action. There can be no question that Pocatello disagrees with how IDWR administers the WD01 Rental Pool and with how IDWR administers the LTF Provision.

IV. EVEN IF THE COURT FINDS THAT WATER RIGHT 01-2068 WAS ENLARGED IN 2022, IT SHOULD HOLD THAT IDWR'S APPLICATION OF THE LTF PROVISION IN 2023 VIOLATED THE EQUAL PROTECTION PROVISIONS OF THE IDAHO CONSTITUTION AND IDAHO CODE, AND WAS ARBITRARY AND CAPRICIOUS

Pocatello also argued in its opening brief that, even if the use of Pocatello's stored water enlarged water right 01-2068 in 2022, IDWR's application of the LTF Provision in 2023 was still unlawful because it violates Idaho Const. art. I, § 2, and I.C. § 42-101, and was also arbitrary and capricious because the Director routinely reviews and IWRB routinely approves rental pool

procedures in WD63 and WD65 that do not impose the LTF Provision against rentals within the decreed place of use (as opposed to rentals outside the place of use, such as for flow augmentation). *See Opening Br.* at 21-26. Respondents argue that no violation occurred, namely because what IDWR does in WD63 and WD65 has no bearing on what IDWR does in WD01. This argument lacks merit.

a. The Application of the LTF Provision in Water Districts 63 and 65 is Within the Scope of This Case

Both Respondents attempt to argue that the differences in IDWR's administration of the rental pool procedures in WD63 and WD65 (no LTF) and WD01 is consistent with the law. *See IDWR Br.* at 26-27 ("the issue of how the Water District 63 or Water District 65 rental pool procedures are applied in those basins is outside the scope of Pocatello's as-applied challenge in this case."); *Spaceholders Br.* at 19 ("Pocatello does not own storage in WD63 or WD65, so those procedures are not applicable to the City nor subject to any order on judicial review before this Court."). Pocatello's appeal requires the Court to interpret the meaning of *Pioneer* as well as to apply the *A&B* decision in order to determine if Pocatello's storage water used by AFRD#2 was used consistent with the Decree. Whatever the outcome, these interpretations will apply statewide to all partial decrees that contain the *Pioneer* Remark and with regard to all end uses. *See Opening Br.* at 15 n.18 (demonstrating that the *Pioneer* Remark appears in water rights throughout the state, not just in WD01). Courts do not provide an interpretation of caselaw in one water district that is not also applicable in other water districts across the state, even if IDWR seeks such a result. *See* Idaho Const. art. V, § 26.[11] That means that, if Respondents

[11] "All laws relating to courts shall be general and of uniform operation throughout the state, and the organized judicial powers, proceedings, and practices of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments, and decrees of such courts, severally, shall be uniform."

prevail, the Department is not free to disparately apply the LTF Provision in WD01 versus WD63 and 65, and its decision to do so in 2023 was unlawful and prejudiced Pocatello.

V. POCATELLO IS NOT SEEKING A "SUPER RIGHT" AND RESPONDENTS' HYSTERIA IS BASELESS

Pocatello is not trying to "create a 'super right' that allows Pocatello to use its storage water in a way that other storage water users cannot." *IDWR Br.* at 16. Although "Pocatello presents a unique scenario," R. 228-229, and although its contract with Reclamation explicitly contemplates there being no direct deliveries to Pocatello's service area, R. 098, Pocatello is not seeking special treatment. Pocatello merely seeks to protect its "constitutional right to have [its] water right administered in priority . . . [if] the water right is being used within the parameters of its defined elements." R. 226.

Indeed, Respondents recognize that, if Pocatello prevails in this case, the holding applies to all WD01 contract holders. *See IDWR Br.* at 23 ("if Pocatello wins its argument, private leases from one irrigation spaceholder to another irrigation spaceholder within the large place of use of the Upper Snake would also not be subject to the LTF Provision."); *Spaceholders Br.* at 9 ("The City's argument would allow any spaceholder's storage to be used for irrigation purposes within any county listed on the decree."). Pocatello spent several years attempting to resolve these issues short of litigation; if the Respondents wanted a result that would only apply to Pocatello they should have taken those efforts seriously.

Respondents then posit a dystopian future where contract holders in WD01 can lease their water without the specter of the LTF Provision being applied, even though that is what their

compatriots do in WD63. *IDWR Br.* at 23-24[12]; *Spaceholders Br.* at 25-26.[13] It is entirely speculative that, if Pocatello prevails, senior contract holders in WD01 would begin to rent their excess storage water to the detriment of junior contract holders if the LTF Provision were not applied to rentals for irrigation above Milner. To whom would the seniors suddenly start renting their stored water? Respondents also vilify the potential result—contract holders renting stored water consistent with 01-2068's defined elements without the specter that the LTF Provision might be applied if the following year is dry—as if the operation of a free market in Idaho would be contrary to the current economic system.[14] Apparently, a rental pool with less red tape is acceptable to the WD63 community, but not to the WD01 community.

Respondents' discussion on this subject exposes the true intent behind IDWR's application of the LTF Provision in WD01 even when rented storage water is used for irrigation above Milner. Respondents are not concerned about water stored under water right 01-2068 being used in Bannock County versus Bingham County, as they have not once alleged that the end use of water in one location versus another results in injury to water users.[15] Rather, they

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[12] "It would create a system in which senior-priority storage water users could rent their water, obtain a financial gain, and then refill their space in priority the following season…. Thus, if Pocatello wins its argument in this case, it may find itself in a worse, not better, position in the future."

[13] "The theory that Pocatello is trying to posit is exactly what last-to-fill was designed to avoid—a water right holder failing to use its own water right, renting it to another entity, receiving money in exchange, and other spaceholders suffering as a consequence…. Not only would other spaceholders be impacted by the validation of Pocatello's arguments, but rights junior to the Palisades 1939 priority would be impacted by such a finding, including storage rights in Ririe Reservoir and other natural flow water rights."

[14] Public policy favors the eradication of the LTF Provision against rentals when the end use is irrigation above Milner. In a landscape where senior surface water users demand the delivery of storage water from junior ground water users to mitigate their pumping impacts, it behooves everyone involved to have a rental pool market where contract holders are not disincentivized from renting their storage water due to fear that the LTF Provision will penalize them in the following year.

[15] The only injury that IDWR discusses is one associated with the "hole" in the system that results from rentals of storage water. *IDWR Br.* at 20-23. This theory is fallacious, as there is a "hole" any time a contract holder evacuates water from storage, whether it be for an end use that authorized or unauthorized by the water right. As IDWR acknowledges, their theory *assumes* that the rented storage water would have otherwise remained in the reservoir as carryover (*id.* at 22), which is a baseless assumption—a contract holder could very well rent water instead of using it themselves.

take issue with the notion that a contract holder can rent their water and obtain a financial gain. *IDWR Br.* at 12, 23; *Spaceholders Br.* at 15, 21, 25-26; *see also* R. 466, 626. Even if these philosophical concerns have any merit, money envy is not a valid basis for IDWR to not administer a water right in priority. And, again, this concern apparently does not exist in WD63.

VI. THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDES THE DEPARTMENT'S CHANGE IN POSITION REGARDING THE EFFECT OF POCATELLO'S CONTRACT

In Case No. CV42-23-1668, IDWR argued that some effect should be given to Pocatello's contract because it serves as a "bookend" when evaluating the scope of a storage right. See R. 229-30. In the instant case, IDWR argues that a contract "may not expand or change the elements of the water right," and "the water right governs the storage and use of water, and all use of storage water must comply with the water right." IDWR Br. at 13 n.8. The Department is judicially estopped from changing its position regarding the effect of Pocatello's contract on Pocatello's use of its storage water. *McKay*, 130 Idaho at 152.

CONCLUSION

Respondents' arguments fail to establish that the *Pioneer* Remark imposes an implied limitation of the place of use for water right 01-2068 or that anything other than the "end use" is what controls when IDWR and this Court evaluate whether storage water is being used for an authorized purpose. If the Court finds that the use of Pocatello's storage water in 2022 was authorized by water right 01-2068, then the Court must hold that IDWR violated multiple provisions of the Idaho Constitution and Idaho Code regarding prior appropriation and takings by applying the LTF Provision in 2023. Even if the Court holds that IDWR was justified in not administering part of water right 01-2068 in priority in 2023, because it was enlarged in 2022, the Court should still hold that IDWR violated multiple provisions of the Idaho Constitution and

Idaho Code regarding equal protection by disparately applying the LTF Provision across the state without a rational basis, which is also arbitrary and capricious.

Pocatello requests that the Court grant relief as appropriate to remedy these errors and prevent future violations by IDWR.

DATED this 23rd day of March 2026.

SOMACH SIMMONS & DUNN, P.C.

By:_____
Sarah A. Klahn (ISB #7928)
Maximilian C. Bricker (ISB #12283)
Attorneys for City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2026, I served the foregoing document on the persons below via email and iCourt unless otherwise indicated:

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EXHIBIT 1

Responsive Brief in Support of the Irrigation Organizations' Motion for Summary Judgment

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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	**Consolidated Case No. 91-63**
Case No. 39576	**RESPONSIVE BRIEF IN SUPPORT OF THE IRRIGATION ORGANIZATIONS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW Ballentyne Ditch Company, Boise Valley Irrigation Ditch Co., Eagle Island Water Users Association, Eureka Water Co., Farmers Cooperative Ditch Co., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, South Boise Water Company, and Thurman Mill Ditch Co. (hereinafter these parties, and other irrigation districts and companies that claim ownership of portions of the rights involved in this consolidated case, are collectively referred to as "Irrigation Organizations"), by and through their counsel of record, Ringert Clark, Chartered, and pursuant to the Scheduling Order filed herein on November 4, 2003, hereby submit this Responsive Brief in Support of the Irrigation Organizations' Motion for Summary Judgment.

I. INTRODUCTION

The opening briefs have bracketed and refined the issue on summary judgment. The Irrigation Organizations and their landowners or shareholders divert, distribute and beneficially use the Boise River storage rights. According to the United States Supreme Court opinions and Idaho water law discussed in their opening briefs, they are the actual appropriators and owners of the irrigation portions of the Boise River storage water rights, which are appurtenant to their lands. If this is correct, the water rights should be decreed to recognize the Irrigation Organizations' status as appropriators and owners of the water rights. The United States Bureau of Reclamation (BOR) has either no ownership interest in the water rights or, at most, holds only nominal legal title.

The BOR stores water for irrigation use in Arrowrock, Anderson Ranch, and Lucky Peak reservoirs, and releases the water from the reservoirs when called for by the Irrigation Organizations. The BOR asserts that it appropriated and owns the Boise River storage rights pursuant to the Idaho constitutional provisions that allow water to "be appropriated for sale, rental or distribution." Const. Art. 15, §§ 1, 4, 5. Recognizing that it has never actually applied water to beneficial use, the BOR characterizes itself as a water "developer" that distributes the "developed water" to the Irrigation Organizations and their landowners or shareholders who actually apply the water to beneficial use. If the BOR is correct that it owns the storage rights under these provisions of the Idaho Constitution, then: the water rights are appurtenant to the lands served by the Irrigation Organizations and are exclusively dedicated to their use; the Irrigation Organizations have valuable, perpetual, constitutionally-protected property rights in the stored waters; and the Irrigation Organizations cannot be deprived of the annual use of the water rights without their consent, unless they fail to

make required annual payments. The BOR's conclusion that the Irrigation Organizations have only qualified contractual rights to the storage water is at odds with its reliance on these provisions of the Idaho Constitution. If the Court determines that the irrigation portions of the water rights should be decreed to BOR for sale, rental or distribution to the Irrigation Organizations, remarks which reflect exclusive dedication of the water rights to the Irrigation Organizations' use and the Irrigation Organizations' rights should be included ensure that the water rights are defined and administered consistent with the Idaho Constitution.

If the BOR is not correct that it appropriated the water rights under these provisions, then ownership of the water rights must be decreed to the Irrigation Organizations as the appropriators of the water rights.

II. STANDARD OF REVIEW

The BOR and Intervenors, Bray, Stuart III, Cade and Williams (Bray, Stuart III, Cade and Williams are hereinafter collectively referred to as "Intervenors") suggest that the Director's Reports issued for these water rights and the licenses create a presumption that must be overcome by the irrigation organizations. However, while a Director's Report may constitute prima facie evidence of the elements of a water right and creates an "evidentiary presumption", there is no evidentiary presumption that must be rebutted with respect to questions of law. In reviewing a question of law, the Court "exercises free review and is not bound by findings of the [lower] court, but is free to draw its own conclusions from the evidence presented." *Mutual of Enumclaw v. Box*, 127 Idaho 851, 852, 908 P.2d 153, 154 (1995).

The ownership of the Boise River storage water rights is purely a question of law. This Court

has previously stated that it "views the determination of the overriding issue of ownership as turning on resolution of issues of law." *Order Granting Participation* at 4. This Court exercises free review over questions of law and is not bound or constrained in any way by the Director's Report.

III. THE IRRIGATION ORGANIZATIONS ARE THE OWNERS AND APPROPRIATORS OF THE IRRIGATION PORTIONS OF THE WATER RIGHTS.

This Court should follow the Idaho Supreme Court precedent and recognize the Irrigation Organizations' status as appropriators and owners of the water rights. The BOR and Intervenors have not provided a sufficient basis for this Court to disregard the clear holdings of the United States Supreme Court. The decisions in *Ickes v. Fox* and *Nevada v. United States* interpret the language of the Reclamation Act and clearly set forth the relationship between the BOR and the Irrigation Organizations. While the decisions may not have involved water right adjudications, the principles set forth in those decisions, and there interpretation of the Reclamation Act, are still controlling. The fact remains that the BOR operates under the Reclamation Act which provides that the water rights are appurtenant to the lands which are irrigated. 43 U.S.C. § 372.

Contrary to the BOR's suggestion, the contracts between the BOR and the Irrigation Organizations do not provide that the BOR owns the water rights or that the Irrigation Organizations have no ownership interest, beneficial or otherwise, in the water rights. The contracts provide the terms under which the BOR stores and releases water for the Irrigation Organizations, and the terms under which the Irrigation Organizations have reimbursed the BOR for the costs of construction and annual operation and maintenance of the storage facilities. The BOR is not be authorized to enter into contracts which are contrary to the Reclamation Act. Again, the language of the Reclamation

Act and the interpretations of the Act by the United States Supreme Court make it clear that the Irrigation Organizations are the true appropriators of the irrigation portions of the water rights for the reservoirs. Any construction or interpretation of the contracts is unnecessary given the Reclamation Act and the interpretations thereof.

IV. THE BOR IS NOT A "DISTRIBUTOR" OF WATER WITHIN THE MEANING OF ARTICLE XV, §§ 1, 4 OR 5 OF THE IDAHO CONSTITUTION

Since it is undisputed that the BOR has never applied any water to beneficial use upon any land in the Boise Valley to support any appropriation of any Boise River water right, the BOR and Intervenors have gone to great lengths to characterize the BOR as a "distributor" of water within the meaning of Article XV, §§ 1, 4 and 5 of the Idaho Constitution. In this revisionist attempt, the BOR turns itself into something it has never been, and imputes to the framers of the Idaho Constitution an intention that they never expressed.

The BOR built and operates the Boise River reservoirs to store water for the Irrigation Organizations. Through operation and maintenance of the reservoirs, the BOR has an ongoing role in the irrigation storage component of the water rights. But, except for the New York Canal[1], the Bureau has never had any role in the Irrigation Organizations' diversion, distribution, or use of the water once it is released from the reservoirs. The Irrigation Organizations have always diverted the water from the Boise River, and distributed it through their canal systems for use upon the lands they

[1]Operation and maintenance of the New York Canal system was transferred to the irrigation districts acting through the Boise Project Board of Control through the 1926 contract submitted with the Affidavit of David Gehlert as Exhibit 18.

serve.[2]

Article XV, §§ 1, 4 and 5 contemplates canal systems that deliver water for "sale, rental or distribution" to lands under the ditches. This is evident in the following excerpt from "Proceedings and Debates of the Constitutional Convention of Idaho, 1889," Volume II, p. 1178, which is attached hereto as Attachment 1 for the Court's ease of reference:

> Mr. Claggett. I will state to the committee that the heart of this bill lies in sections 5 (4) and 6 (5) as a practical measure. This portion of section 5 (4) amounts to this: that whenever **these canal owners** - if the gentleman will see 'for agricultural purposes under a sale, rental or distribution thereof ' - whenever one of these large **canals** is taken out for the purpose of selling, renting or distributing the water, or the appropriation is made hereafter for that purpose, and that after that has been done, inasmuch as priorities will immediately spring up along the line of that **canal** even before the **canal** is located; for instance, if a company should start in here to take a large quantity of water out to supply a given section of country, and should appropriate or give notice to the world that they were appropriating it for agricultural purposes 'under a sale, rental or distribution thereof,' the immediately, **just as soon as the ditch was surveyed, people would come in and begin to locate farms and improve them right along the line of the ditch; and therefore it is necessary in order to protect them**, in asmuch as they have spent this money in settling there under a promise, which was made by the company that the water should be used for agricultural purposes - that the water should not be allowed to be diverted from that purpose and applied to the running of manufactories or anything else.

(Emphasis added).

At page 1180 of the Proceedings and Debates, Mr. Claggett again refers to the "agricultural ditches, which are constructed for the purpose of selling the water or renting it or distributing it."

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[2] The BOR incorrectly characterizes itself as the "developer" of the water rights. The BOR had a role in building the three reservoirs, but it did not develop any of the water rights. As explained in prior briefing, a necessary requirement under Idaho law to perfect a water right is to apply the water to beneficial use. Other than building and operating the three reservoirs the BOR had no involvement in the diversion and beneficial use of the water for irrigation purposes.

Thirteen years before the BOR was created through the Reclamation Act in 1902, the framers of the Idaho Constitution contemplated appropriate of water rights for distribution to the place of use through canal systems. As evidenced by the priority dates of their natural flow water rights, the canal systems of the canal companies participating in this subcase, and the predecessors in interest to many of the irrigation districts, were among those that existed at the time of these constitutional debates and were certainly on the minds of the framers.

In 1904, in construing Article XV, §§ 4 and 5, the Idaho Supreme Court reflected on the relationship between the canal owners and the water users they serve:

> Counsel for respondent earnestly insists that under the provisions of section 4 . . . the user has no property interest in the water with he has teken from the respondent's canal. We cannot agree with this proposition.
>
> The fundamental law as well as the statutes of our state have both attempted to protect the canal owner as well as the user in their respective rights. In many instances, and in the case at bar, they must depend upon each other to be successful in their respective enterprises. The ditch should be valueless without users of the waters along the canal, and the lands now supplied with water by the canal company would be equally valueless without the canal to furnish water.

Hard v. Boise City Irr. Etc. Co. 9 Idaho 589, 596, 76 P. 331 (1904).

It is thus clear that the BOR has never been a distributor of water within the meaning of the constitutional provisions it now invokes to support its claimed status as appropriator of the Boise River storage rights.

V. IF THE BOR IS CORRECT, THE WATER RIGHTS ARE EXCLUSIVELY DEDICATED TO THE LANDS OF THE IRRIGATION ORGANIZATIONS AND CANNOT BE REMOVED WITHOUT THEIR CONSENT.

The BOR and Intervenors recognize that the BOR must obtain water rights in conformity

with state law. They argue that the BOR appropriated of the water rights for later sale, rental and/or distribution pursuant to Article XV, §§ 1, 4 and of the Idaho Constitution. If they are correct, the Irrigation Organizations have more than mere contract rights in the water the BOR stores for the Irrigation Organizations' use. Section 4 provides the following guarantee to the distributees:

> **Continuing rights to water guaranteed.** – Whenever any waters have been, or shall be, appropriated or used for agricultural purposes under a sale, rental, or distribution thereof, such sale, rental, or distribution **shall be deemed an exclusive dedication to such use**; and whenever such waters **so dedicated** shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, **shall not thereafter, without his consent, be deprived of the annual use of the same,** when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment thereof, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.

(Emphasis added).

During the constitutional proceedings and debates, Mr. Clagget, quoted above, explained that the purpose of this provision was to "protect" the:

> people [who] would come in and begin to locate farm and improve them . . . inasmuch as they have spend this money in settling there under a promise, which was made by the company that the water should be used for agricultural purposes - that the water should not be allowed to be diverted from that purpose and applied to the running of manufactories or anything else of that sort. . . . The first section protects the person who comes in, by making it 'an exclusive dedication' to agricultural uses after it has been so approriated and so used.

See Attachment 1, pp. 1178-1180.

In *Hard, supra,* the Court described the landowner's right to water sold, rented or distributed as a "property interest." 9 Idaho 594, 596. In Justice Ashlie's concurring opinion, relied upon by the BOR in its opening brief, he too described the landowner's interest in distributed water as a

"property right," and explained that Article XV, § 4 grants "a perpetual right to the use of such waters which can never be forfeited or defeated except upon one condition, and that is the he fails to pay the annual rents therefor. *Id.* at 601.

The BOR equates its appropriation and its role to the role of the Boise Valley's irrigation districts. Assuming, agruendo, that this comparison is valid, the rights of the Irrigation Organizations to the Boise River storage water should correspond to the rights of a landowner within an irrigation district, as described in *Bradshaw v. Milner Low Lift Irrigation District*, 85 Idaho 528, 381 P.2d 440 (1963), as follows:

> The owners of the old lands, through and by means of the irrigation district, acquired, and for many years applied to the irrigation of their lands, valuable water rights, which had become appurtenant to and dedicated to their lands, and which are held in trust by the district for their use. They could not thereafter, without their consent, be deprived of the use of that water when need to irrigate their lands.

Id. at 545 (citing Const. Art. 15, § 4). The Court went on to conclude that interference with those rights "would effect an invasion of the **constitutionally protected priority rights, and property rights**, of the owners of the old lands, hereinbefore cited." *Id.* at 548 (emphasis added). In other words, the landowners acquired, and own, valuable property rights which were dedicated the their lands and held in trust by the irrigation district. Thus, applying the reasoning of the BOR and Intervenors, the irrigation portions of the water rights in this case (identificd as "irrigation storage" and "irrigation from storage") are exclusively dedicated to the lands of the Irrigation Organizations and cannot be taken, removed or deprived thereof without their consent. The Irrigation Organizations have acquired and own valuable, constitutionally protected, property rights in the irrigation portions of the water rights which are simply held in trust by the BOR.

Article XV, § 4 does provide that the person or entity beneficially using the water is not entitled to the delivery of said water without paying for it, however, that does not change the fact that the water right remains exclusively dedicated to the land and such use. The irrigation district or canal company (or BOR as the BOR and Intervenors may argue) may deny water during non-payment of assessments or charges but that does not mean that the water right is removed or can be taken away for nonpayment alone. For instance, an irrigation district is authorized to refuse to deliver water when assessments are delinquent for more than ninety (90) days. I.C. § 43-327. However, the water rights remain appurtenant to the lands until after the issuance of a tax deed and the water right is repossess, redeemed or repurchased. *See generally* I.C. §§ 43-801 to 43-806 (providing Irrigation District's with a process for repossession of water rights upon issuance of a tax deed). Before the water right is no longer appurtenant or dedicated, there must be a statutory process to repossess, redeem or remove the water right. The contractual right to receive the water and the water right which is appurtenant and dedicated to the land are separate and distinct.[3] The fact remains that water rights are exclusively dedicated to the lands of the Irrigation Organizations, and they have protected property right in the irrigation portions of the water rights which is separate and distinct from their contractual rights with the BOR.

VI. CONCLUSION

The United States Supreme Court in *Ickes v. Fox*, 300 U.S. 82 (1937) and *Nevada v. United*

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[3] It should be noted that Nampa & Meridian Irrigation District (NMID) disagrees with the BOR contention that because it sold its "contract entitlement" to water stored in Lucky Peak Reservoir in 1996, NMID should be estopped from now claiming that it holds an interest in the water right. However, the quantity of each Irrigation Organizations respective interest in the water rights is not before this Court and not at issue in this subcase.

States, 463 U.S. 110 (1983) make it clear that the decrees must recognize the Irrigation Organization's status as appropriators and owners of the irrigation portions of the water rights involved in this case and the water rights are appurtenant to the lands they serve. The irrigation portions of these water rights were perfected by the Irrigation Organizations' diversion and beneficial use of the water on the lands they serve. At the very most, the BOR would hold only nominal legal title and the Irrigation Organizations would be recognized as the beneficial owners.

On the other hand, the BOR and Intervenors contend that the decisions of the United States Supreme Court are not applicable and that Idaho law provides that the BOR is the owner of the water right pursuant to Article XV, § 4. However, as discussed, *supra*, the BOR's role under Article XV, § 4, is to simply hold the water rights in trust for the Irrigation Organizations. The Irrigation Organizations own a valuable protected water right that is appurtenant to the lands they serve, and in fact is exclusively dedicated and cannot be taken, removed or deprived thereof without their consent. Either way one looks at it, water rights are appurtenant to the lands of the irrigation organizations because of beneficial use and/or exclusive dedication and the Irrigation Organizations have an protected ownership interest in the water rights that must be recognized by the decrees.

DATED this 26th day of May, 2004.

RINGERT CLARK CHARTERED

Bryce Farris

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing document, was mailed on May 26th, 2004, to the following via U.S. mail.

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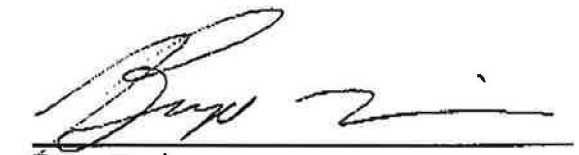

Bryce Farris

Attachment 1

PROCEEDINGS AND DEBATES

OF THE

CONSTITUTIONAL CONVENTION

OF IDAHO

1889

Edited and Annotated by
I. W. HART
Clerk of the
Supreme Court of Idaho

VOLUME II.

CALDWELL, IDAHO
CAXTON PRINTERS, LTD.
1912

sequent locator except a little labor to hunt up the records.

Mr. SWEET. I do not see my way clear to support the additional section offered by Mr. Heyburn, because I do not see that the person who takes up the land is compelled to use it. I do not believe in any law that permits a man to appropriate a stream of water or a mining claim or anything else and do nothing with it, and at the same time prevent other people from using their property adjoining it by simply appropriating the land or the water or anything else. Perhaps that might be treated by the legislature in such a way that if a person were to take up a tract of land as suggested by Mr. Heyburn, and did not utilize the water within a certain time he should lose it. But on the broad proposition that he can take this land and hold it as long as he pleases and practically, if not absolutely, prevent men from making improvements farther up the gulch, it strikes me as bad policy.

("Question, question.")

The vote was taken on Mr. Heyburn's proposed section and the motion was lost.

Mr. CLAGGETT. I move the adoption of Section 3 as amended. (Seconded. Vote and carried).

SECTION STRICKEN OUT.

Section 4 was read, and it was moved and seconded that it be adopted.

Mr. CLAGGETT. I move to strike it out for the reason that it is all embodied in the Bill of Rights which we had up the other day. It is a duplication. (Seconded.)

Mr. STANDROD. I will state further that the section in the Bill of Rights, the gentleman will remember, was prepared as a substitute and offered after these reports had been prepared by the joint committee on Agriculture and Mining. ("Question.") (Vote.)

The CHAIR. The chair is in doubt. (On the rising vote, ayes 24, nays 3; and Section 4 is stricken out).

SECTION. 4.

Section 5 (4) was read.

Mr. CLAGGETT. Mr. Chairman, in the fourth line there is a typographical error. Strike out the word "have" and insert the word "once."

The CHAIR. If there is no objection it will be done. It is so ordered.

Mr. HAMPTON. I have an amendment, Mr. Chairman. If amended it will read like this: "Whenever any waters have been or shall be used for agricultural purposes, under an appropriation, sale, rental, or distribution thereof, such appropriation, sale, rental or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law." It will be seen that the rights granted in the latter part of the section, do not appear to read, as it appears, to apply to appropriations, but only to such rights as may be granted or sold.

Mr. GRAY. Mr. Chairman, I cannot see that it should be a dedication to such use. Suppose I hire water for a year. Is that a dedication to that use? I cannot understand this.

SECRETARY reads: I move to amend section 3 by striking out the words "appropriated or" in the first line, and by inserting after the word "under" in the second line the words "an appropriation" and after the word "such" in the second line the word "appropriation." Hampton.

Mr. GRAY. Then shall it be deemed an exclusive dedication to such use. If I have a ditch I may sell it to a man for a year, and if he doesn't want it any longer, I won't sell it to him; but it seems by this it would make it a dedication for that particular use. Perhaps somebody can explain it to me.

Mr. CLAGGETT. It is easy enough explained.

Mr. GRAY. Thank you.

Mr CLAGGETT. I will state to the committee that the heart of this bill lies in sections 5 (4) and 6 (5) as a practical measure. This portion of section 5 (4) amounts to this: that whenever these canal owners—if the gentleman will see "for agricultural purposes under a sale, rental or distribution thereof"—whenever one of these large canals is taken out for the purpose of selling, renting or distributing water, or the appropriation is made hereafter for that purpose, and that after that has once been done, inasmuch as priorities will immediately spring up along the line of that canal, even before the canal is located; for instance, if a company should start in here to take a large quantity of water out to supply a given section of country, and should appropriate or give notice to the world that they were appropriating it for agricultural purposes "under a sale, rental or distribution thereof," then immediately, just as soon as the ditch was surveyed, people would come in and begin to locate farms and improve them right along the line of the ditch; and therefore it is necessary in order to protect them, inasmuch as they have spent this money in settling there under a promise, which was made by the company that the water should be used for agricultural purposes—that the water should not be allowed to be diverted from that purpose and applied to the running of manufactories or anything else of that sort.

Mr. GRAY. Suppose he won't pay for it.

Mr CLAGGETT. It is dedicated to the use, and when it has once been sold to any one particular party

in one year, then he shall have the right to demand it annually thereafter upon paying for it.

Mr. GRAY. Put that in.

Mr. CLAGGETT. It is in. You don't suppose the committee was going to give a man the right to take water from a canal without paying therefor? "Upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law."

("Question, question.")

The chair put the question upon the adoption of the amendment offered by Mr. Hampton. (Vote and lost.)

Mr. GRAY. I move that the section be stricken out.

Mr. POE. I move to amend that by adopting the section as it is.

The CHAIR. The motion to strike out met with no second.

Mr. CLAGETT. I move the adoption of the section.

The chair put the question on the adoption of section 5 (4). (Vote and carried.)

Mr. SWEET. I would like to ask if that word "have" in the fourth line is changed?

Mr. CLAGGETT. That is corrected to the word "once."

SECTION 5.

Section 6 (5) was read.

Moved and seconded that Section 6 (5) be adopted.

Mr. ALLEN. I call attention to a clerical error; the word "proceeding" in line 3 should be "preceding."

Mr. GRAY. (After reading the section.) I have a farm away down here; I sell water when I have a plenty, but I want to use it if I need it all. Now, what effect does this have on it? In the event I have more than I need for my own use I sell it. Have I got to sell it all the time? What is the view of this committee on that? This bill is a puzzling bill, I will admit that right here, and it will puzzle both the legislatures and the people after they have got it into practical use.

I believe the statute as it now stands should be corrected; that is, if a ditch is built for the purpose of selling water, that they should have it from the head down that you could not cross a man's land without giving it to him; it makes no difference when his location was; and that it should be used as it comes down, the first man has the first right, provided he pays for the water. When he complies with the requirements he is the man that shall have it first; and so it shall go down, without saying any time of location of lands; I don't believe that should have anything to do with it.

Mr. CLAGGETT. Mr. Chairman, both of these sections apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, saying to those cases where waters are "appropriated or used for agricultural purposes under a sale, rental or distribution." The first section protects the person who comes in, by making it "an exclusive dedication" to agricultural uses after it has been so appropriated and so used. But then the question come in with regard to where there is more than one person who settles beneath the line of one of those agricultural ditches, which are constructed for the purpose of selling the water or renting it or distributing it, or which are used for that purpose, although they may not originally have been so constructed. Now, when these two or three or four or five or six or seven parties come in, what are you going to do? Are you going to give the first man the right to the water? Suppose the first man comes along and the first year he breaks up and calls for water for twenty acres of land. The next year he calls for water for forty acres, and the next year for sixty acres, and the next year for two or three hundred acres, enough to practically exhaust it. Anyone can see that by recognizing absolute priority of right in that way, that the first person settling under the line of the ditch would have the first call on the water to the extent that he

might be able to go ahead and improve the land afterwards. This thing has got to be regulated by statute, and the constitution proposes simply to point out the line of the principles within which legislation must be carried on; that is to say, to recognize the right of priority in the order of time of settlement or improvement, as the case may be; and then when the water runs short or anything of that kind, it has got to be regulated from time to time and from year to year as the legislatures meet, and as experience shall suggest, in such manner as to promote the greatest good to the greatest number, bearing in mind constantly the fact of the prior right of the first man as well as the necessities of the second, and you cannot get it any closer than that.

("Question, question.")

The question was put upon the adoption of section 6 (5). Vote and carried.

SECTION 6.

Section 7 (6) was read.

Mr. SHOUP. Mr. Chairman, I would like to call attention to section 4, if it is in order, which was stricken out, and which I have been reading again. When the article on Bill of Rights was under discussion you yourself called the attention of the committee in regard to a single person owning a piece of land below everybody else, and asked, "Do you think it is true as to its giving him the right to bring water across to his land?" It was then stated that this section 4 covered that, and now, in committee of the Whole it was agreed it should be adopted. But now this very section has been stricken out.

Mr. MORGAN. It appeared so to me at the time. I thought this section was necessary, as also the section in the Bill of Rights.

Mr. AINSLIE. Well, I think the section was read awhile ago from the Bill of Rights that covers what is in this section.

Mr. CLAGGETT. Well, we must be very careful that it does.

Mr. AINSLIE. I will call for the reading of section 14 in the Bill of Rights.

Mr. CLAGGETT. The inquiry of the gentleman from Custer is with regard to an individual having the right to go across another's land?

Mr. SHOUP. Yes, the right of way across a farm above him.

Mr. CLAGGETT. I am satisfied that is broad enough to cover it in the Bill of Rights. "Any useful or beneficial purpose."

SECRETARY reads section 14 of the Bill of Rights.

Mr. CLAGGETT. That clearly covers it. There is no limit on the character of ditches or the number of people who may have them dug.

The CHAIR. (Mr. Morgan.) It occurs to me it could only come in that section by inference or implication. It certainly does not mean that one person shall take the property of another for the purpose of constructing his ditch over the land.

Mr. STANDROD. It certainly provides a right of way for an individual or number of persons or corporations. It is a broad clause. It does not confine it to an individual or any number of persons; it is intended to cover the whole ground, and I think it does.

Mr. CLAGGETT. (After reading section 14 as amended.) It is as broad as the English language can be made, and covers every case that the legislature does not see fit to except; or rather, it covers every case the legislature might see fit to embrace.

SECRETARY again reads section 7 (6).

Moved and seconded that section 7 (6) be adopted. Vote and carried.

Mr. AINSLIE. I move that the article as amended now be adopted. (Seconded. Vote and carried).

The CHAIR. What is the pleasure of the committee?

Mr. McCONNELL. I move the committee now rise, report progress and recommend the adoption of the

article as adopted by committee of the Whole. (Seconded. Vote and carried).

CONVENTION IN SESSION.

Mr. McConnell in the chair.

Mr. MORGAN. Mr. President, your committee of the Whole House having under consideration the report of the committee on Manufactures, Agriculture and Irrigation, have adopted and recommend for adoption sections 1 and 2 and 4, as amended in committee of the Whole, and recommend the adoption of the article as amended.

The CHAIR. The question is now upon the adoption of the article as amended. The secretary will read it as amended, section by section.

Mr. AINSLIE. I move that it lay on the table and that the convention now adjourn until tomorrow morning at nine o'clock.

Mr. CLAGGETT. I would like to suggest to the gentleman from Boise that I do not think it will take very long to get through with this. We have an engrossing clerk, and it is a good deal of work to do it, and if we pass this now in ten or fifteen minutes, she can do the work in the meantime.

Mr. AINSLIE. Very well, I will withdraw my motion.

SECTION 1.

Section 1 was read, and it was moved and seconded that it be adopted. (Vote and carried.)

SECTION 2.

Section 2 was read, and it was moved and seconded that it be adopted. (Vote and carried.)

SECTION 3.

Section 3 was read by the secretary as amended. Moved and seconded that section 3 as amended be adopted. (Vote and carried.)

SECTION STRICKEN OUT.

Section 4 was read by the secretary.

Mr. HASBROUCK. That section was stricken out.

Mr. SHOUP. I understand that has been stricken out, but I am not satisfied with it. The provision in the Bill of Rights reads that "private property may be taken for public use, but not until a just compensation," etc., and then goes on and says what a public use is. Now, I don't understand that that can be construed that one may use all the water belonging to one man for a public use; and therefore I think it is necessary to have section 4 in the constitution in order to give an individual the right to use the water. I think it is important that that section should be in the constitution. I move that section 4 be adopted. (Seconded.)

Mr. AINSLIE. Mr. President, I do not see any use of repeating in this constitution the same thing twice. That article in the Bill of Rights, section 14, as the president says, is as broad as the English language can put it, and I do not see that we can put it any stronger, and it would be foolish to repeat the same thing in these articles of the constitution. I think it is strong enough for any use on earth, and I do not see any need of repeating it.

("Question, question.")

The question was put upon the adoption of section 4 heretofore stricken out in committee of the Whole.

Vote and lost, and Section 4 is stricken out in convention.

SECTION 4.

Section 5 (4) was read, and it was moved and seconded that Section 5 (4) be adopted. Vote and carried.

SECTION 5.

Section 6 (5) was read, and it was moved and seconded that Section 6 (5) be adopted. Vote and carried.

SECTION 6.

Section 7 (6) was read and it was moved and seconded that Section 7 (6) be adopted. Vote and carried.

The CHAIR. What is now the pleasure of this convention with regard to this matter?

ARTICLE XV. ADOPTED.

Mr. HEYBURN. I move that we adopt the entire article. (Motion seconded. Vote and carried).

Mr. HEYBURN. I move that the article be engrossed, passed to third reading and set for tomorrow at 2 o'clock. (Seconded. Vote and carried).

Mr. HEYBURN. Mr. President, I move now that we go into committee of the Whole for the further consideration of the report of the committee on Public and Private Corporations. We have but one section left, and I think we can dispose of it and have it engrossed.

The CHAIR. I will swear in the young lady who was elected as engrossing clerk.

The motion was then put that the convention resolve itself into committee of the Whole for further consideration of the report of the committee on Public and Private Corporations. (Vote and carried.)

COMMITTEE OF THE WHOLE IN SESSION.

Mr. McConnell in the chair.

ARTICLE XI., SECTION 18.—PUBLIC AND PRIVATE CORPORATIONS.

The CHAIR. Gentlemen of the committee, the subject of your consideration is section 21 (18) of the report of the committee on Public and Private Corporations.

Mr. REID. Mr. Chairman, who offered this amendment?

Mr. MORGAN. Mr. Mayhew presented it.

Mr. REID. I would ask unanimous consent that the matter go over until he can be present.

EXHIBIT 2

Boise Project and Committee of Nine's Reply in Support of Ballentyne Ditch Company, et al.'s Motion for Reconsideration/Clarification

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Aberdeen-Springfield Canal Co.,
Fremont-Madison Irrig. Dist., Peoples Canal
& Irrigation, Snake River Valley Irrig.,
Idaho Irrig. Dist., Egin Bench Canals, Inc.,
North Fremont Canal Systems, Inc.,
Progressive Irrig. Dist., Enterprise Irrig. Dist.,
New Sweden Irrig. Dist., Harrison Canal & Irrig. Co.,
Burgess Canal & Irrigation

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	Consolidated Subcase: 91-63
Case No. 39576	**BOISE PROJECT AND COMMITTEE OF NINE'S REPLY IN SUPPORT OF BALLENTYNE DITCH COMPANY, ET AL.'S MOTION FOR RECONSIDERATION/ CLARIFICATION**

COMES NOW, the Boise Project Board of Control et al. and the Committee of Nine et al. (hereinafter "Board of Control") and files this Reply in Support of the Motion for Reconsideration/Clarification filed by Ballentyne Ditch Company, et al., and in opposition to the responses filed by the United States and by Gene Bray, et al. The Board of Control largely agrees with the points made by Ballentyne, et al. The Board of Control recognizes that this Court, in its original Memorandum Decision, relied upon the U.S. Supreme Court opinions concerning the interest of the water users vis-à-vis the United States. Accordingly, it appears that the remark language in the Final Order drafted by this Court is derived from that case authority. The Court has recognized that beneficial, equitable title is vested in the landowners. As between the landowners and the United States, that concept may be valid under the U.S. Supreme Court cases. However, under the law of the State of Idaho, any title to the water right used by the landowners is vested in the irrigation districts and canal companies on behalf of the individual landowners. Once the court has determined that the landowners have a valid legal interest, that interest or title must be held by the district or canal company on behalf of the landowners. This is required both by the Idaho case law and Idaho Code § 43-316, cited by Ballentyne. Consequently, the Board of Control agrees with the suggestion that the beneficial or equitable title should be held by the irrigation organizations in trust for the landowners using the water. That remark language as proposed by Ballentyne is consistent with Idaho law.

The United States misstates the irrigation entities' position. The United States argues that the irrigation entities are asking the remark to recognize that "legal title" rests with them. Memo, p. 4. That is not the purpose of the motion for clarification. It asks

that the equitable or beneficial title for the water right which this Court found be held in the name of the irrigation entities on behalf of their patrons.

Even the United States recognizes the interest of the irrigation districts and canal companies. The Bureau of Reclamation lists the amount of storage right held by each individual district and canal company. The Bureau of Reclamation keeps no track of the storage rights of the individual landowners within any irrigation district or canal company. That is the function of the irrigation district and canal company which hold the rights for the landowners. Moreover, the United States argues that the landowners' interests derive in part from the contracts. These contracts are all between the United States and the irrigation entities. So, under the United States' theory of the case, some interest in the water right rests with the irrigation entity. Under Idaho law, the irrigation entity holds the interest in trust for the landowner.

The Board of Control suggests that the appurtenance language in the proposed remark submitted by Ballentyne be amended to state, "This water right is appurtenant to the lands within the boundaries of or served by such irrigation organization."

This change would more clearly recognize that lands entitled to receive water within irrigation district and canal company boundaries are not static, but from time to time water rights are moved from one parcel to another parcel included within the boundaries of or served by the district or canal company. Such movement does not, under Idaho law, require a transfer application, as long as the water right remains within the boundaries. *See* Idaho Code § 42-219(5).

The water right is not, as suggested by the United States, appurtenant to the entire "Boise Project." As described by the United States, there is no boundary except the

counties of Ada and Canyon. Such a description might allow Reclamation to move the water away from the landowners in districts with equitable title, to other areas throughout Ada and Canyon County, even potentially to areas outside the lands currently served or to whole new areas in some undefined area. *See* Idaho Code § 42-219(6). The United States' suggestion is inconsistent with the procedures that the Boise River irrigation entities have been laboring under, at the direction of IDWR, to identify their individual boundaries and the lands irrigated with those boundaries. If the water of one district is appurtenant to the entire "Boise Project," then the IDWR and the districts have been wasting their time in describing their boundaries. The United States' interpretation is also inconsistent with Idaho Code § 42-102 regarding organization and descriptions of irrigation districts. The United States' interpretation of appurtenance also directly conflicts with the Supreme Court's holding in *Jensen v. Boise-Kuna Irrigation District,* 75 Idaho 133, 141 (1954), that any water "dedicated to irrigation of lands within the district cannot be supplied to lands outside the district, so long as it is needed for proper irrigation of lands within the district." The United States' suggestion that storage of water rights are appurtenant to all lands in the "Boise Project" wherever they may be found points to the need to clarify the appurtenance of those water rights as requested by Ballentyne.

The Board of Control does not believe that the Court's reference to the contract in the remark implies that beneficial title is limited by the contracts, as concerns Ballentyne. The Board of Control believes that the Court's reference to the contracts was intended to provide a shorthand way to determine the identity of those irrigation organizations. Nothing in the remark or in the Court's opinion suggests that the beneficial interest is

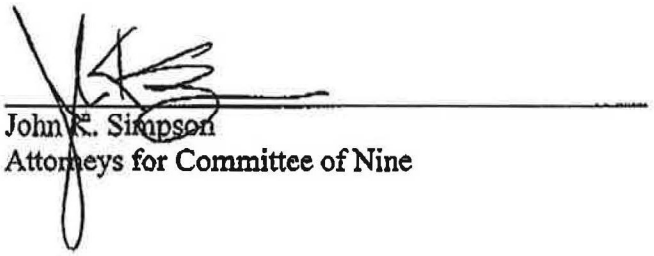
somehow limited to the contract. In fact, this Court specifically found that there is an additional interest in addition to the contractual interest. *See* Memorandum Opinion, p. 31. That remark did not change that legal determination.

Recognition of the proper legal relationship between the particular districts and canal companies and their patrons under Idaho law is necessary. Accordingly, Board of Control agrees that clarification of the remark proposed by Ballentyne would be in order with the minor modifications suggested herein.

DATED this 18th day of February, 2005.

BARKER ROSHOLT & SIMPSON LLP

Albert P. Barker
Attorneys for Boise Project Board of Control



John K. Simpson
Attorneys for Committee of Nine

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February, 2005, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT AND COMMITTEE OF NINE'S REPLY IN SUPPORT OF BALLENTYNE DITCH COMPANY, ET AL.'S MOTION FOR RECONSIDERATION/CLARIFICATION**, by the method indicated below, and addressed to each of the following:

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Boise Valley Irrigation Ditch Co.
Eagle Island Water Users Assn.
Eureka Water Company
Farmers Cooperative Ditch Co.
Nampa & Meridian Irrigation District
New Dry Creek Ditch Company
South Boise Water Company
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