Comment Letter No. 11

P.O. Box 219 Owyhee, Nevada 89832-0219 (775) 757-3161

February 5, 2004

Bureau of Reclamation
Snake River Area Office
ATTN: Mr. Steve Dunn
230 Collins Road
Boise, ID 83702

Subject: Review of Draft Environmental Assessment for Lucky Peak Water Service Contracts Renewal or Conversion (Action by February 6, 2004)

Dear Mr. Dunn:

The Shoshone-Paiute Tribes' position on the action alternatives is the no action alternative where Reclamation would renew the contracts as water service contracts with similar provisions to the existing contracts. 11-1

The Tribes also request that this paragraph be inserted prior to the last paragraph of Section 3.8.1 Affected Environment, page 3-60 and to state: 11-2

> The Shoshone-Paiute Tribes are a federally recognized Tribe located at the Duck Valley Reservation in southern Idaho and northern Nevada. The Reservation was established by Executive Orders dating from April 16, 1877; May 4, 1886; and July 1, 1910. The interests of the Tribes are also reflected in the Bruneau, Boise, Ft. Bridger, Box Elder, Ruby Valley, and other Treaties and Executive Orders which the Tribes' ancestors agreed to with the United States and which the Tribes have continued to observe in good faith, despite the fact that the Federal Government failed to ratify some of them. Therefore, the Tribes assert they have aboriginal title and rights to these areas. All such Treaties and Executive Orders recognized the need for the Tribes to continue having access to off-reservation resources because most of the reservations established were and continue to be incapable of sustaining their Tribal populations. This need continues and has not diminished from the time of the first Treaties and Executive Orders that established the Duck Valley Reservation.

Thank you for the opportunity to respond. Please contact my office should you wish to discuss any of the Tribes' recommendations.

Respectfully,

Terry Gibson, Chairman
Shoshone-Paiute Tribes

Cc: Mr. Ted Howard, Cultural Preservation Director
File

Responses to Letter No. 11

11-1 Please see response to comment 7-1.

11-2 We have revised section 3.8.1 of the Final EA to incorporate this comment. Thank you for your comments.

Comment Letter No. 12

CLAUDE V. MARCUS
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February 6, 2004

VIA FAX TO: 383-2237

Bureau of Reclamation
Snake River Area Office
Attn: Steve Dunn
230 Collins Road
Boise, ID 83702

Re: Draft EA for Lucky Peak Water Service Contracts Renewal or Conversion Dated December 2003

Dear Mr. Dunn:

We represent Osprey Subdivision Property Owners Association ("Osprey P.O.A.") and Osprey Land Company. We support the preferred alternative (Alternative #2) contained in the Draft EA. Osprey Land Company is the developer of the Osprey Subdivisions which consist of approximately 86 lots comprising approximately 260 acres. Approximately 45 lots have been sold, all for permanent residences. Eleven houses have been constructed or are being constructed. We expect that another 6-8 houses will be constructed this summer. The land within the Osprey Subdivisions is served by a pressurized irrigation system which has been constructed and is in operation. The diversion facility is located at a point that is near the confluence of Mores Creek and Grimes Creek. The Association is the assignee of a part of the Lucky Peak Reservoir storage contract owned by New Union Ditch Company ("NUDC"). The Association and NUDC have requested Bureau approval of the assignment. Both NUDC and the Association have requested conversion of the storage contract into a repayment contract under Section 9(d) of the Reclamation Project Act of 1939 (43 U.S.C. § 485(h)(d)). All of the water assigned to the Association will be used for irrigation within the subdivision to supplement its in-stream water rights. The Association has applied for use of the water, which has been assigned by NUDC, through the Boise River water rental pool. The water assigned will be used for irrigation within the subdivision this year and in each subsequent year, including the year that the NUDC contract is renewed or converted into a repayment contract.

12-1

We also are of the opinion that the Boise River rental pool has assured that the storage water, if used, is put to a beneficial use each year and not wasted. Whether or not all of the storage water owned by a contractor has actually been used by that contractor each year is irrelevant. Although it is true that the Reclamation project water cannot be wasted (i.e., put to a

non-beneficial use as defined in the Reclamation Project Act), it can be sublet by the contractor for beneficial use by others, or it can be held over in storage in anticipation of a future drought year or years. There is no provision in the federal law that affects a forfeiture of the contractor's storage right because the contractor did not actually use all of the stored water to which he is entitled—either in one of the contract years or in all of them. To the extent that actual use is required, it has been satisfied by operation of the rental pool. Nor can we find any provision in the federal law which dilutes the contractor's right of renewal or conversion, based on his own historical use of the storage water contracted. Under his contract the contractor has a "first right" to the storage water contracted. His power to exercise that right fully, partially or not at all is inherent in the contract right he purchased—as is his power to renew or convert the contract at the end of its initial term. The consideration for the contractor's first right to use the stored water is his payment of the contract price—not his promise to use all of the stored water he is purchasing. In fact, the federal law fully anticipates the situation where the contractor does not exercise his right of use, thus freeing up the stored water for beneficial use by others. The concept of a "first right" necessarily implies that the right may not be exercised, thus giving rise to a "second right". For these reasons we strongly oppose the third alternative in the draft EA which is premised on a partial forfeiture of the right of renewal or conversion based on non-use of the stored water by the contractor. We oppose the first alternative because we believe that federal law grants to the contractor the right of conversion. 12-2 12-3

Thank you for considering our comments.

Very truly yours,

MARCUS, MERRICK, CHRISTIAN & HARDEE, L.L.P.

Barry Marcus

Barry Marcus

BM:da

Response to Letter No. 12

12-1 Comment noted.

12-2 Please see response to comment 4-2.

12-3 Comment noted. See response to comment 7-1. Thank you for your comments.

Comment Letter No. 13

RINGERT CLARK
CHARTERED LAWYERS

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Samuel Kaufman (1921-1986)

February 6, 2004

Steve Dunn
Bureau of Reclamation
Snake River Area Office
230 Collins
Boise, ID 83702

Re: Draft Environmental Assessment (EA) for Lucky Peak Water Service Contract Renewal or Conversion

Dear Mr. Dunn:

I am providing comments on behalf of the following organizations that hold Lucky Peak water service contracts:

Ballentyne Ditch Company
Boise Valley Irrigation Ditch Company
Eagle Island Water Users Association
Eureka Water Company
Fairview Acres
New Dry Creek Ditch Company
South Boise Water Company
Thurman Mill Ditch Company

As you know, these organizations support Alternative 2, the Preferred Alternative. We do not support the assumption implicit in the analysis of Alternative 3 that Reclamation has any discretion to consider renewal or conversion of the contracts for "reduced quantities." As has been amply demonstrated during the analysis of the proposed renewal/conversion of the contracts, these organizations and the other holders of Lucky Peak contracts have the unqualified right to renew or convert their contracts, and they need and will continue to beneficially use the full quantities made available to them under their current contracts. The facts and legal authorities which establish the contractor's rights to renew or convert their contracts are discussed in the attached memorandum, which was provided to Reclamation last year. The organizations also assert that they and the other Lucky Peak contractors are the appropriators and owners of the irrigation component of the Lucky Peak storage right. Reclamation cannot consider denying the owners of the water right their full entitlement.

13-1
13-2
13-3

As you also know, the contractors have all along disputed Reclamation's position that NEPA applies to the renewal or conversion of their contracts. This position is explained in the attached January 15, 2003 letter from me to Alexandra Butler. 13-4

My clients, listed above, reserve the right to assert the positions stated in this letter and the attached documents should the need arise in the future.

My clients and I appreciate Reclamation's recognition of the importance of the Lucky Peak contracts to the contractors and the communities they serve throughout the Boise Valley.

Yours very truly,

Daniel V. Steenson

cc clients
Scott Campbell
Jerry Kiser
Norm Semanko

RINGERT
CLARK
CHARTERED
LAWYERS

January 15, 2003

BY FACSIMILE (334-1378)

Alexandra V. Butler
Field Solicitor's Office
U.S. Department of the Interior
550 West Fort Street, MSC 020
Boise, Idaho 83724-0020

Re: Lucky Peak Contract renewal/conversion: NEPA

Dear Alexandra:

I am writing to follow up on our discussions last week and during December regarding the Ninth Circuit cases holding that the requirements of the National Environmental Policy Act (NEPA) do not apply to a agency actions which maintain the status quo, such as the renewal or conversion of the Lucky Peak water service contracts.

As you know, most of the Lucky Peak contractors have serious reservations about the NEPA process and the associated costs. Last summer, in response to my request, you, Steve Dunn, Jerry Gregg and others met with various Lucky Peak contractors to discuss the NEPA process and the Bureau's position that it must prepare an Environmental Assessment (EA). In responding to our questions, Steve Dunn provided me with a copy of the Ninth Circuit's decision in *N.R.D.C. v. Houston*, the so-called "Friant" Case. Irrigation and water districts with water service contracts for water stored in the Friant dam unit of the Central Valley Project appealed a district court summary judgment decision that the Bureau violated the Endangered Species Act (ESA) by renewing the contracts without completing ESA consultations. The N.R.D.C. cross-appealed the district court's summary judgment decision that the Bureau was not required to comply with NEPA in renewing Friant water service contracts. The Ninth Circuit found that the NEPA issue was mooted by rescission of the contracts and the Central Valley Project Improvement Act (CVPIA) requirement that an EIS be completed prior to renewal of the contracts. The Ninth Circuit upheld the district court's decision that the ESA applied to renewal of the Friant contracts because negotiating and executing the contracts constitutes agency action under the ESA, and because the Bureau had discretion to alter contract terms, other than quantity.

After reviewing the opinion in August, I asked you or Steve Dunn to provide me with a copy of the district court's decision to learn why the district court determined that NEPA did not apply to contract renewal. You provided me a copy of the *N.R.D.C. v. Patterson* decision in December. After reading the district court's decision, the Ninth Circuit cases the district court relied upon, and more recent Ninth Circuit cases on point, it became clear to me that NEPA's requirements do not apply to renewal/conversion of the Lucky Peak contracts. I provided copies of the Ninth Circuit cases to you and the other attorneys representing Lucky Peak contractors. Jerry Kiser discussed this authority with you and Jack Hockberger on December 27th, and he reported to me that you and Mr. Hockberger agreed with our understanding that, under this authority, particularly *National Wildlife Federation v. ESPY*, 49 F.3d 1337 (9th Cir. 1995), preparation of an EA is not legally required. Mr. Kiser and I advised you that we need to know whether the Bureau intends to proceed with an EA in view of this authority, and if so, we conveyed our conviction that the contractors should not be required to pay the Bureau's NEPA-related costs. Your commitment to pursue this issue resulted in your internal meeting today.

Last week, you indicated that you may view the status quo issue as linked to the question of the Bureau's discretion to alter contract terms. As the district court made clear in the *Patterson* decision, under NEPA, the status quo issue arises and is evaluated independent of the question of an agency's discretion. NEPA applies when an agency contemplates a "major federal action." *Patterson*, p 5. The district court described discretion and status quo as "distinct principle[s]," as "threshold standards for major action," and as "summary determinations of no major federal action," that must be "independently satisfied." *Id.* at 10, 11. The district court distinguished these threshold issues from the question of whether a proposed action qualifies for a categorical exclusion (CE). The applicability of CE is a compliance issue and "summary determination of no impact," which arises only after the discretion and status quo standards for major action are met. *Id.* at 10.

> As such, the issue only arises if the standards for major federal action are independently satisfied -- that is, if the proposed agency action is both discretionary and alters the relevant status quo. If either prong fails, NEPA's procedural requirements are not triggered." *Id.* at 13.

After providing this introductory explanation of the threshold discretion and status quo standards for major action, the district court then considered the "status quo exemption."

> When an agency decision merely perpetuates the existing use or allocation of resources, the statute is not implicated. . . . [T]he relevant status quo is defined by the scope of the human activity. . . . [and is not altered when the action involves] 'nothing new, nor more extensive, nor other than that contemplated when the project was first operational.' [T]he status quo has been consistently defined in terms of the existing use. . . .

> Here, it is undisputed that the renewal contracts maintain the status quo as to water service. Deliveries under the new contracts will be for the same quantities and accomplished by the same scope of Friant Unit operations as deliveries under the previous long-term contracts. Accordingly, renewal will maintain the status quo as to diversion of the San Joaquin River, the scope of agricultural irrigation, and the terms of the contractual relationship between the federal and non-federal defendants. In this sense, the disputed action accomplishes 'nothing new, nor more extensive, nor other than that contemplated' when original water service contacts were executed. *Id.* at 15-16.

The court explained that, in *National Wildlife Federation v. ESPY*, the Ninth Circuit "foreclosed" any theory "that the status quo issue might turn on disposition of the discretion question." *Id.* at 17.

> . . . NEPA only applies if the particular exercise of discretion proposed by BOR changes the status quo as measured by the nature and scope of the human activity under the contracts. It does not. . . . [T]he rule of the circuit is that continued environmental degradation resulting from the same human use under different legal arrangements is not cognizable as a change to the status quo. National Wildlife, 45 P.3d at 1244.
>
> The status quo doctrine, as it has evolved in this circuit, limits NEPA's procedural requirements to those federal actions which change not the environment or the legal arrangements under which human beings affect the environment, but the nature and scope of the human activity at issue. The disputed Friant contracts may well alter the environmental status quo, and certainly constitute an new contractual predicate for performance by the contracting parties. The contracts do not, however, alter the quantities of water provided to the districts nor the scope of delivery services. Accordingly, they do not change the relevant status quo under Nat'l Wildlife. *Id.* at 17-18.

I provided you with copies of the *Nat'l Wildlife* and *Upper Snake River v. Hodel*, 921 F.2d 232 (9th Cir. 1990) cases cited by the district court, as well as subsequent Ninth Circuit cases that follow that authority. In *Nat'l Wildlife*, the court found that a federal agency's transfer of property containing wetlands was not subject to the requirements of NEPA because the wetlands were used for grazing before and after the transfer. The court responded as follows to the National Wildlife Federation's argument that preparation of an EIS was required because the decision to transfer the property was discretionary:

> An EIS is normally not required where agency action is mandatory, see *Forelaws on Board v. Johnson*, 743 F.2d 677, 681 (9th Cir. 1984) (collecting cases), but the converse is not true: agency action does not require an EIS simply because the action is discretionary. Discretionary action that does not alter the status quo does not require and EIS. *Upper Snake River*, 921 F.2d at 235.

As in the *Patterson* case, renewal or conversion of the Lucky Peak contracts "accomplishes 'nothing new, nor more extensive, nor other than that contemplated' when original water service contacts were executed.'" Water will continue to be stored in Lucky Peak Reservoir, and delivered to the contractors when they call for it to supplement their natural flow water rights. The contracts may provide a "new contractual predicate" for this activity, whether they are water service or repayment contracts, but they do not alter the allocation of water provided in the existing contracts. "When an agency decision merely perpetuates the existing use or allocation of resources, the statute is not implicated." *Patterson* at 15. Changes in contract terms that do not alter this human activity do not alter the status quo and render contract renewal or conversion a major federal action. Hypothetically, even if there were to be some discretionary alteration of the status quo (and there will be none), NEPA would only apply to the change under the "further major action rule", not the unaltered activity. *Snake River* at 234-235. *Patterson*, at 13-15. Renewal or conversion of the contracts to deliver more water than is provided under the existing contracts might alter the status quo so that NEPA might apply only to the allocation of additional storage. Even in this unlikely circumstance, NEPA requirements would not apply to the quantities provided under the existing contracts.

Your supposition last week that evaluating the status quo issue may turn on the Bureau's discretion is clearly at odds with these cases. The extent of the Bureau's discretion regarding the renewal/conversion of the Lucky Peak contracts is an independent consideration from whether there will be an alteration of the status quo. In other words, if there were to be a change in the status quo, the next threshold question would be whether that change is discretionary or mandatory. For example, conversion of the contracts changes only the contractual predicate for the continuation of the contractor's allocation and use of water stored in Lucky Peak, and therefore does not alter the status quo. If, however, the Bureau viewed conversion as a change in the status quo, that change is not discretionary, since conversion is a right provided by the contracts and Reclamation law which may be exercised at the discretion of the contractors. Therefore, conversion does not constitute a major federal action subject to NEPA's requirements. (As you know from the legal analysis we provided to you, it is our position that there is no also no discretion as to the quantities to be provided in the renewed or converted contracts.).

Please provide a copy of this letter to those who participate in your meeting today. I have not yet evaluated the legal basis of your assertion that the Bureau can choose, as a matter of policy, to prepare an EA despite the clear and long-standing rule that NEPA does not apply where, as here, the status quo will not be altered. In your response to our discussions and this letter, please advise

us whether, as a matter of voluntary internal policy, the Bureau chooses to prepare an EA, and state the legal basis for the Bureau's authority to make this choice.

I should also say that neither Jerry Kiser nor Scott Campbell have had an opportunity to review this letter, so you should not take it to be a representation of their positions, although I believe they do and will concur with my analysis. Thank you, Alex, for your assistance in this matter.

Sincerely,

Charles 2. Hoessin for

Daniel V. Steenson

cc: Clients
Jerry Kiser
Scott Campbell

Analysis of Reclamation Law, Renewal / Conversion Rights Under Existing Contracts and Limits of Discretion of the Bureau of Reclamation

1. Background

Lucky Peak Reservoir is a U.S. Army Corps of Engineers reservoir constructed in the late 1950s for flood control and supplemental irrigation purposes. In 1964, the Bureau of Reclamation (Reclamation) obtained approval from the Idaho Department of Water Resources (IDWR) for a permit to store water in the reservoir for use on irrigated lands in the Boise Valley as a supplemental supply of irrigation water. Between 1965 and 1968, pursuant to Federal Reclamation Law and an agreement with the U.S. Army Corps of Engineers, Reclamation entered 40-year water service contracts with several irrigation organizations in the Boise Valley in which Reclamation agreed to operate and maintain the reservoir to store and deliver irrigation water as a supplemental water supply, as authorized by the permit.

Today, after several amendments to its permit and proof of beneficial use, Reclamation holds License No. 63-03618 for the storage of 293,050 acre-feet per annum of the waters of the Boise River in Lucky Peak Reservoir. The purpose and place of use for 111,950 acre-feet of the water stored pursuant to Permit No. 63-03618 is irrigation of lands within the Boise Federal Reclamation Project in Ada and Canyon Counties. The License also authorizes 152,300 acre-feet of storage for streamflow maintenance, and 28,000 acre-feet of storage for recreation purposes.

Currently, nineteen irrigation organizations hold water service contracts for an aggregate supplemental water supply of approximately 71,000 acre-feet.

2. The Proposed Action

The water service contracts are due to expire beginning in 2005. Pursuant to 43 U.S.C. §485h-1 and the terms of each expiring water service contract, each irrigation organization has the right to renew its contract, or to convert it to a repayment contract, under mutually agreeable terms and conditions. Each of the irrigation organizations has notified Reclamation of its intent to renew or convert its contract. Therefore, the proposed action is the negotiation and execution of water service contracts (renewal) and/or repayment contracts (conversion), without changes to the functions, operations, or maintenance of the existing facilities. The purpose of the proposed action for this project is to continue to provide current Lucky Peak contractors with a supplemental irrigation water supply in the amounts specified in their original contracts.

3. Scoping Letter and Comments Suggesting Alternative Uses for Storage Water

On July 23, 2002, Reclamation issued a "scoping letter" to initiate its evaluation of potential impacts of the proposed action (i.e., negotiation of mutually agreeable terms for contract renewal or conversion) to the human and natural environments pursuant to the National Environmental Policy Act (NEPA). NEPA review applies to matters over which Reclamation has discretion. Reclamation's discretion is affected by Reclamation law and the requirement that terms and conditions of the contracts be agreeable to Reclamation and the contractors. For this proposed action, NEPA requires analysis of the environmental impacts of contract terms and conditions which

Reclamation has discretion to change if exercise of that discretion would result in a change of the status quo.

However, NEPA review does not always apply to every matter over which Reclamation has discretion. In *National Wildlife Federation vs. Espy*, 45 F.3rd 1345 (9th Cir. 1998) the Court determined discretionary agency action that does not alter the status quo does not require an EIS or compliance with NEPA. In *Upper Snake River vs. Hodell*, 921 F.2nd 232 (9th Cir. 1990) the Court of Appeals held that where a proposed Federal action does not change the status quo, NEPA review is not required and environmental effects of mere continued operation of a facility need not be reviewed. In short, the Bureau is not required to comply with NEPA when the proposed action will result in the Bureau doing nothing new, more extensive, or other than what was contemplated when the project was first operational.

The scoping letter provided the public a 30-day opportunity to submit comments identifying concerns relating to the proposed action. Several comments suggested that Reclamation should consider "reallocating" portions of the 71,000 acre-feet to other entities and to other, non-irrigation uses of water, such as instream flows or domestic, commercial, municipal, and industrial uses (DCM&I). In this regard, it has been suggested that Reclamation should evaluate the extent of the existing contract holders' beneficial use of water and needs for water resulting from development within the Boise Valley.

The Reclamation Project Act of 1939 provides Reclamation the authority to execute repayment contracts, pursuant to section 9(d) of the Act, and water service contracts, pursuant to section 9(e) of the Act. These provisions were the subject of an extensive opinion by Ralph W. Tarr, Solicitor of the United States Department of the Interior, addressing water service contract renewals in the central valley project of California. Significant portions of this opinion are instructive concerning the legislative background of the Reclamation Act of July 2, 1956. Solicitor Tarr described the situation as follows:

> The contracts with irrigation and water districts are the so-called "9(e)" or "utility-type" contracts which were authorized by section 9(e) of the Reclamation Project Act of 1939. 43 U.S.C. 485h(e). Section 9(e) of the 1939 Act authorized the Secretary to enter into short- or long-term contracts not to exceed 40 years to supply water for irrigation purposes at rates fixed to cover operating costs and only such share of construction costs as the Secretary deems proper. Section 9(e) contracts must be contrasted with repayment contracts entered into pursuant to section 9(d) of the 1939 Act, under which a district repays the applicable costs of construction of a project over a 40-year period.
>
> The section 9(e) utility type contracts were first used in contracting with CVP users and soon generated accusations that the Bureau had, through the use of these contracts, "initiated a program of nationalization of the water resources of the Valley." Abel, "The Central Valley Project and the Farmers," 38 Calif. L. Rev. 653, 664 (1950). The Bureau was portrayed by some as having the status of a superior water utility while the users were concerned that, under 9(e) contracts, they had no assurance of continued water service upon expiration of these contracts.

Judicial and legislative responses to the users' concerns evolved almost simultaneously. In *Ivanhoe Irrigation District v. All Parties*, 47 Cal. 2d. 597 (1957), a Friant user challenged the use of section 9(e) contracts partly because they did not include a provision for automatic renewal. The California Supreme Court invalidated the contracts on several grounds including the fact that no provision was made for repayment of a stated amount within 40 years and that no permanent right to receive water was vested in the users. The United States Supreme Court reversed, partly on the ground that the users' objections had been rendered moot by the 1956 statute that extended renewal rights to 9(e) contractors. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958).

The Act of July 2, 1956, 43 U.S.C. §§ 485h-1-h-5, relating to the administration by the Secretary of subsections 9(d) and (e) of the Reclamation Project Act of 1939, was passed with very little objection or debate. The impetus for the Act was the concern, primarily on the part of California farmers, about renewability of and repayment under 9(e) contracts and, inherent in the first concern, the availability of a continuous supply of water. Both the Senate and House reports on H.R. 101, which became the 1956 Act, state that the major objections met by the bill are:

> (1) that no assurance can be given in the contract itself or in any other document binding upon the Government that the contract will be renewed upon its expiration; (2) that the water users who have this type of contract are not assured that they will be relieved of payment of construction charges after the Government has recovered its entire irrigation investment; and (3) that the water users are not assured of a "permanent right" to the use of water under this type of contract.

S. Rep. No. 2241, 84th Cong., 2d Sess. 2 (1956); H.R. Rep. No. 1754, 84th Cong., 2d Sess. 2 (1956).

The 1956 Act addressed concerns about contract renewals by requiring the Secretary of the Interior to include a renewal clause in any long-term contract entered into after the passage of the Act if the water user so requests. 43 U.S.C. § 485h-1.

It addressed concerns related to repayment by requiring the inclusion in any long-term section 9(e) contract of a clause allowing conversion of the contract to a section 9(d) contract at the request of the contractor. 43 U.S.C. § 485h-1(2). Concerns about a continuous supply of water were addressed by a provision which granted contractors a first right, during the term of the contract or any renewal thereof, to a stated share of water for beneficial use on irrigable lands of the contractors with a permanent right to that water once the project is repaid. 43 U.S.C. § 485h-1(4). (Footnotes omitted).

Pgs. 2-4, Solicitor Opinion M-36961, November 10, 1986.

There was apparently very little congressional debate surrounding the passage of the 1956 amendments to the reclamation law. However, one Senator did offer the following brief explanation:

> Mr. President, this bill is made necessary because of changes made in the reclamation law by the Reclamation Project Act of 1939. Under reclamation authorizations, the Department of the Interior got itself in the situation where irrigation districts could not be assured of renewal of the so-called 9(e) or utility irrigation contracts after 40 years. In doing so, we found it was necessary to say that the Secretary of the Interior could renew so-called 9(e) contracts or convert them to 9(d) contracts. When it comes to renewals, he can work out with the contracting organizations a procedure to go ahead on a basis which will be satisfactory to them and protect the interests of the Government. He can include in the long-term contracts provisions which take care of circumstances such as assurances of a share of whatever water is available or to change the terms and amounts in view of construction costs ...
>
> I may say to the Senator from California that most of these so-called 9(e) contracts are in the State of California. The irrigation districts there would like to have this bill, I am informed, and there has been no objections to it from any source. The purpose of the bill is to extend to the 9(e) contract districts the same conditions as under the standard provisions of the reclamation law.

102 Cong. Rec. 10635 (1956).

As indicated in this excerpt from the Tarr Opinion, in addition to providing for the right to renew or convert water service contracts, section 4 of 1956 Act addressed concerns about a continuous water supply by requiring that such contracts contain a provision granting contractors to a first right to a stated share of water and a permanent right to that water once the costs of the project are repaid:

> In administering subsections (d) and (e) of section 485h of this title, the Secretary of the Interior shall –
>
> (4) provide that the other party to any contract entered into pursuant to subsection (d) of section 485h of this title or to any long-term contract entered into pursuant to subsection (e) of section 485h of this title shall, during the term of the contract and of any renewal thereof and subject to fulfillment of all obligations thereunder, have a first right (to which right the rights of the holders of any other type of irrigation water contract shall be subordinate) to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within the boundaries of, or owned by, the party and a permanent right to such share or quantity upon completion of payment of the amount assigned for ultimate return by the party subject to the repayment of an appropriate share of such costs, if any, as may thereafter be incurred by the United States in its operation and maintenance of the project works. 43 U.S.C. §485h-1.

Just as Reclamation has no discretion to deny renewal or conversion of a water service contract once a contractor exercises one of these rights, Reclamation has no discretion to reduce or "reallocate" to others the quantity of water to be supplied under a renewed or converted contract.

Several comments suggest that a portion of the 71,000 acre-feet may be available for "reallocation" because some of the contractors may not have put the full quantity of water identified in their water services to beneficial use. IDWR issued Water Right License No. 63-03618 to Reclamation on September 27, 2002. Under Idaho law, issuance of the license is premised on Reclamation's submission of proof of beneficial use. Reclamation's proof establishes full beneficial use by the contractors of the 111,950 acre-feet of water stored in and released from Lucky Peak Reservoir for irrigation of lands in Ada and Canyon Counties.

The 1956 Act specifically recognizes the operation of state laws pertaining to water rights:

> Nothing in sections 485h-1 to 485h-5 of this title shall be construed as affecting or intended to affect or in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of such sections shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right. 43 U.S.C. §485h-4

In addition to beneficial use, License No. 63-03618 also establishes that the irrigation component of the water right is appurtenant to the lands of the contractors for whom Reclamation diverted, stored, and distributed the water pursuant to the Reclamation Act. As stated by the United States Supreme Court:

> Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property of the government in the irrigation works. . . . The government was and remained simply a carrier and distributor of the water . . . , with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.

Ickes v. Fox, 300 U.S. 82 at 95 (1937).

The Court reasoned that state law provides that the right to use the water can only be acquired by prior appropriation for a beneficial use, and that such right when obtained is a property right which becomes part and parcel of the land upon which it is applied. *Id.* at 95-96. *See also, Nevada v. United States*, 463 U.S. 110, 126 (1983); *California v. United States*, 438 U.S. 645 (1978).

The purpose of irrigation portion of License No. 63-03618 is to provide the lands to which the water right is appurtenant with a supplemental water supply. Neither federal nor state law requires that the landowners apply the full quantity of this supplemental right if the water is not needed during a given irrigation season. In fact, the water service contracts specifically provide for credit to an irrigation organization for "holdover" or "carryover" water.

United States Department of the Interior Solicitor Ralph Tarr also addressed the issue of the Secretary of the Interior's discretion with respect to contract renewal in his November 10, 1986 opinion:

> In reviewing the applicability of NEPA to the renewal of Friant contracts, then, we must review the questions of whether the Secretary has discretion in the renewals and whether those renewals affect a change in the *status quo*. to the extent that the Secretary has discretion and utilizes that discretion to make changes in the renewed contracts, we must determine whether the changes are subject to a categorical exclusion from NEPA's required impact analysis.
>
> With respect to those contracts that contain a clause granting the contractor a *right* to renewal, the Secretary has no discretion but to follow the terms of the clause. All contracts executed subsequent to the 1956 Act must include, pursuant to the provisions of that Act, such a clause when requested by the contractor. 43 U.S.C. § 485h-1.
>
> . . .
>
> We start with the basic premise that the 1956 Act was enacted to assure continuity of water service to all water users. Both the House and the Senate reports on the bill which became the 1956 Act emphasized the fact that the bill was introduced to meet three major objections raised primarily by California farmers. Two of those objections related to continuity of water service: (1) the objection that no assurance could then be given that contracts would be renewed upon their expiration; and (2) the further objection that no assurance could then be given that water users could ever gain a permanent right to water under the service contracts. S. Rep. No. 2241, *supra* at 2; H.R. Rep. No. 1754 *supra* at 2.
>
> the 1956 Act addressed these concerns through several provisions. The Act required the Secretary to include a renewal clause in any long-term contract executed after 1956, if requested by the water user, and further authorized the Secretary to conform any pre-1956 contracts to the provisions of the Act. In addition, the Act granted contractors a first right, during the term of a contract or any renewal thereof, to a stated share of water for beneficial use on the contractor's land and a permanent right to the water once the project is repaid.
>
> Water users, such as those in the Orange Cove District, supported the Act as a method of assuring them that their water would not be taken away after 40 years of use. Representative Sisk, Congressman for the Orange Cove District, stated during committee consideration that the Act provided the assurance needed by Orange Cove and similar districts that the federal government could not, at the end of the contract term, put the water previously supplied on the auction block and auction it off to the highest bidder or make a contract with someone else after the district had developed a farm economy for 30 or 40 years. *See* Report of Proceedings, Hearing Held Before the Committee on Interior and Insular Affairs, Subcommittee on Irrigation and Reclamation on H.R. 101 84th Cong., 2d Sess. 10 (1956). Representative Engle, the

> bill's chief sponsor, stated that the bill was intended to assure water districts of continued water service and to dedicate facilities already built to the purpose of delivering water. *Id.* at 5. The Senate Report on the bill that became the 1956 Act emphasized this fact when it said " . . . [it] does give assurance of the right to ***permanent water service*** to the extent that a water supply is available." S. Rep. No. 2241, *supra* at 1 (emphasis added).
>
> . . .
>
> We conclude, therefore, that the Bureau properly interpreted the Act not to require the Secretary to affirmatively review and amend each existing contract, but at the same time not to deny districts that contracted for water prior to 1956 a right to renewal of their contract, if they so request. The Secretary, then has no discretion as to whether to amend a contract to include a renewal clause, if requested to do so. Further, once a contract contains a renewal clause, the Secretary has no discretion to deny renewal of the contract.

Moreover, the Tarr opinion makes is clear that the Secretary of the Interior has no discretion with respect to the quantity of water to be supplied under a renewed contract:

> As discussed, there is no discretion with respect to the quantity of water to be supplied under a renewed contract. Section 4 provides "a first right . . . to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within the boundaries of, or owned by, the [contracting] party. . . ." 43 U.S.C. § 485h-1(d). Assuming that water supplied under a contract is beneficially used within the service area, and assuming that other terms and conditions of the contract have been met, the renewal of the contract must include the same quantity of water as under the original contract.

Reclamation's operation of Lucky Peak Reservoir and its storage and delivery of water pursuant to License No. 63-03618 serve multiple, changing water needs in the Boise Valley. The 152,300 acre-feet of water Reclamation stores and releases for streamflow maintenance and the 28,000 acre-feet Reclamation stores for recreation represents 62% of the total quantity Reclamation stores in the reservoir. The 71,000 acre-feet Reclamation makes available for irrigation use under the water service contracts to be renewed or converted represents 24% of the total quantity Reclamation stores in the Reservoir. The nineteen irrigation organizations that hold these contracts deliver water to meet the irrigation needs of approximately 90,000 acres urban, suburban, and rural lands that are used for agricultural, residential, and commercial purposes. Activity through the Water District 63 Local Rental Pool, assignments, construction of pressurized irrigation systems, and many other recent and pending innovations demonstrate that these irrigation organizations will continue to meet the changing water demands within the Boise Valley, as they have for nearly 140 years. Renewal or conversion of the existing Lucky Peak water service contracts will facilitate this continued development.

4. Scoping Letter and Comments suggesting Conditions for Renewed Contracts

In addition to comments received by Reclamation in response to the July 23, 2002 'Scoping

Letter' requesting the Bureau to consider alternate uses for the water currently stored and used under contracts by irrigation entities, other comments recommended any new contracts entered into by Reclamation include water conservation requirements. Pursuant to the Reclamation Reform Act of 1982 (RRA), Reclamation requires development of water conservation plans under specific circumstances. The RRA includes exemptions from the requirements of the Act. In 1984, shortly after Congress enacted the RRA, Reclamation reviewed the contracts currently being considered for conversion or renewal. Reclamation determined that since the Lucky Peak contracts involved a facility constructed by the Army Corps of Engineers, they were exempt from the water conservation provisions of the RRA. As a result, Reclamation has no authority to mandate contractors include conservation plans in renewed or converted water contracts. *See*, 43 U.S.C. §§ 390 jj and 390 ll.

5. Supplemental Water Storage Needs for Lucky Peak Storage Contract Holders

The purpose of the water service contracts that are being either renewed or converted to repayment contracts is to provide for storage and delivery of water to supplement the natural flow water rights held by the following irrigation organizations:

1. Ballentyne Ditch Company, Ltd. (BDC)
2. Boise City Canal Company (BCCC)
3. Boise Valley Irrigation Ditch Company (BVIDC)
4. Canyon County Water Company (CCWC)
5. Capital View Irrigation District (CVID)
6. Davis
7. Eagle Island Water Users Association (EIWUA)[1]
8. Eureka Water Company (EWC)
9. Farmers Union Ditch Company (FUDC)
10. Little Pioneer Ditch Company (LPDC)
11. Middleton Mill Canal Company (MMCC)
12. Middleton Mill Irrigation District (MMID)
13. New Dry Creek Ditch Company (NDCDC)
14. New Union Ditch Company (NUDC)
15. Pioneer Irrigation District (PID)
16. Settlers Irrigation District (SID)
17. South Boise Mutual Canal Company (SBMCC)
18. South Boise Water Company (SBWC)
19. Thurman Mill Ditch Company (TMDC)

Each of these organizations owns natural flow water rights that are defined by a decree issued by district court Judge George H. Stewart on January 18, 1906 in *Farmers Cooperative Ditch Company v. Riverside Irrigation District, et al.* Since that time, the decree has been referred to as the "Stewart Decree." Pioneer Irrigation District and Settlers Irrigation District also own natural flow water rights that are defined by a subsequent decree issued by district court Judge E. L. Bryan

[1] The Eagle Island Water Users Association consists of the following canal companies: Conway & Hamming, Graham & Gilbert, Hart & Davis, Mace Catlin, Mace & Mace, Seven Suckers, Thomas Aikin, and Warm Springs Ditch.

on February 14, 1929 in *Pioneer Irrigation District v American Ditch Association*, et al, known as the "Bryan Decree." All water rights decreed in the Bryan Decree are junior in priority to water rights decreed in the Stewart Decree.

On May 31, 1919, Judge Bryan issued a continuing order, which is still in effect, providing for the distribution of water from the Boise River as follows:

> The various rights, as adjudicated in the so-called 'Stewart Decree,' shall receive 100 percent, until the natural flow of the waters of the Boise River shall decrease, until all the rights in said decree cannot receive 100 percent, at which time the various rights as adjudicated in the so-called 'Stewart Decree' shall first be cut to 75 percent of the amount of water decreed by the 'Stewart Decree' as the natural flow of the Boise River decreases, beginning with the latest right and proceeding to the earliest rights in the order fixed in said 'Stewart Decree,' and after all of the rights shall have been reduced to 75 percent of the amount fixed in the 'Stewart Decree,' should the natural flow of the waters of the Boise River decrease below the amount necessary to supply said 75 percent of the water rights as decreed in said 'Stewart Decree,' then the various rights beginning with the latest and proceeding to the earliest, as aforesaid, shall be reduced to 60 percent of the amount specified in the 'Stewart Decree,' . . ..

All natural flow water rights defined by the Stewart and Bryan Decrees continue to be distributed by the Watermaster for Water District 63 according Judge Bryan's May 31, 1919 continuing order. Every year, delivery of all Stewart and Bryan decree rights is reduced to 75% by the beginning of July, and to 60% by the middle of August. The earliest these reductions have been documented since the 1960s when the Lucky Peak contracts were executed was in 1992, when all natural flow rights were reduced to 75% by June 1st, and to 60% by June 8th.[2] Since the reductions are made in order of priority, the latest priority water rights were reduced to 75% beginning _____, and to 60% beginning _____. During 1992, all natural flow water rights with priorities of 1869 and later were totally curtailed by July 28th.

The quantity of water Reclamation stores and delivers for each irrigation organization pursuant to its Lucky Peak contract must be sufficient to replace the loss of natural flow what each organization loses in natural flow rights when the cuts occur. The following table quantifies this need in terms of the dates on which all natural flow water rights were reduced by 75% and 60% and finally curtailed during 1992. This table does not show the total shortfall for the more junior rights that were reduced earlier than June 1st, June 8th and August 15th, and it therefore understates the aggregate shortfall and need. The conversion from flow rate in cubic feet per second (cfs) to volume in acre feet (af) is 1 cfs = 1.9835 af per day.

[2] This information was provided by Lee Sisco, Watermaster for Water District 63.

		Natural Flow Rights	All Rights 25% Need 6/1-6/7 7 days	1869 40% Need 6/8-7/27 50 days	1869 100% Need 7/28-10/15 79 days	1868 40% Need 6/8-10/15 129 days	Total '92 Need	L.P. Storage	Shortfall
1. BDC	(69)	15.3526 cfs	53.29 af	609.04 af	2, 405.71 af		3,068.04 af	1,300 af	1,768.04 af
2. BCCC	(68)	34.838 cfs	120.93 af			3,565.63 af	3,686.56 af	1,000 af	2,686.56 af
3. BVIDC	(68)	51.81 cfs	179.84 af			5,302.69 af	5,482.53 af	2,500 af	2,982.53 af
4. CCWC	(68)	79.37 cfs	275.50 af			8,123.42 af	8,398.92 af		
	(69)	1.00 cfs	3.47 af	24.79 af	156.70 af		184.96 af		
		80.37 cfs					8,583.88 af	6,000 af	2,583.88 af
5. CVID								300 af	
6. Davis	(69)	13.94 cfs	48.39 af	1,382.50 af	2,184.36 af		3,615.25 af	1,500 af	2,115.25 af
7. EIWUA	(68)	8.358 cfs	29.01 af			855.43 af	884.44 af		
	(69)	37.392 cfs	129.79 af	1,483.84 af	5,859.21 af		7,472.84 af		
		45.75 cfs					8,357.28 af		
8. EWC	(68)	33.32 cfs	115.66 af			3,410.26 af	3,525.92 af	2,800 af	725.92 af
9. FUDC	(68)	25.2855 cfs	87.77 af			2,587.94 af	2,675.71 af		
	(69)	168.014 cfs	583.20 af	6,665.12 af	26,327.29 af		33,575.61 af		
		193.2995 cfs					36,251.32 af	10,000 af	26,251.32 af
10.LPDC	(68)	25.72 cfs	89.28 af			2,632.41 af	2,721.69 af		
	(69)	1.10 cfs	3.82 af	43.64 af	172.37 af		219.83 af		
		26.82 cfs					2,941.52 af	500 af	2,441.52 af
11.MMCC	(68)	15.71 cfs	54.53 af			1,607.90 af	1,662.43 af		
	(69)	48.852 cfs	*169.57 af*	*1,937.96 af*	*7,654.96 af*		9,762.49 af		
		64.562 cfs					11,424.92 af	4,620 af	6,804.92 af
12.MMID	(68)	3.28 cfs	11.39 af			335.47 af	346.86 af		
	(69)	109.51 cfs	380.12 af	4,344.26 af	17,159.89 af		21,884.27 af		
		112.79 cfs					22,231.13 af	6,380 af	15,851.13 af
13.NDCDC	(68)	13.34 cfs	46.30 af			1,365.33 af	1,411.63 af		
		48.7442 cfs	169.20 af	1,933.68 af	7,638.07 af		9,740.95 af		
		62.0842 cfs					11,152.58 af	3,000 af	8,152.58 af
14.NUDC	(68)	13.76 cfs	47.76 af			1,408.32 af	1,456.08 af	1,400 af	56.08 af
15.PID	(68)	21.715 cfs	75.38 af			2,222.50 af	2,297.88 af		
	(69)	670.50 cfs	2,327.39 af	26,598.73 af	105,065.33 af		133,991.45 af		
		692.215 cfs					136,289.33 af	16,000 af	120,289.33 af
16.SID	(68)	11.323 cfs	39.30 af			1,158.90 af	1,198.20 af		
	(69)	175.47 cfs	609.08 af	6,960.89 af	27,495.62 af		35,065.59 af		
		186.793 cfs					36,263.79 af	10,000 af	26,263.79 af
17.SBMCC	(68)	2.3 cfs	7.98 af			235.40 af	243.38 af		
	(69)	14.61 cfs	50.71 af	579.58 af	2,289.34 af		2,919.63 af		
		16.91 cfs					3,163.01 af	500 af	2,663.01 af
18.SBWC	(68)	9.93 cfs	34.47 af			1,106.32 af	1,140.79 af	700 af	440.79 af
19.TMDC	(68)	20.038 cfs	69.55 af			2,050.87 af	2,120.42 af		
	(69)	14.80 cfs	51.37 af	587.12 af	2,319.12 af		2,957.61 af		
		34.838 cfs					5,078.03 af	800 af	4,278.03 af
		1,689.38 cfs	5,864.26 af	53,151.15 af	206,727.97 af	37,968.79 af	303,711.96 af	71,018 af	232,693.96 af

LUCKY PEAK CONTRACTORS WITH OTHER STORAGE

(from Water District 63 1999 Water Delivery Report, p. 43)

	Arrowrock	Anderson	Lucky Peak	Total
1. BDC		376 af	1,300 af	1,676 af
3. BVIDC		961 af	2,500 af	3,461 af
5. CVID		460 af	300 af	760 af
9. FUDC	2,874 af	5,272 af	10,000 af	18,601 af
10.LPDC		2,174 af	500 af	2,674 af
13.NDCDC		1,296 af	3,000 af	4,296 af
15.PID	21,018 af	25,582 af	16,000 af	62,600 af
16.SID	2,878 af	6,082 af	10,000 af	18,960 af
17.SBMCC	_____	543 af	500 af	1,043 af
	26,770 af	42,746 af		114,071 af

Total Aggregate Storage:

Lucky Peak	71,018 af
Anderson	42,746 af
Arrowrock	26,770 af
	140,534 af

Total Aggregate Shortfall: 303,711.96 af - 140,534 af = 163,177.96 af

Response to Letter No. 13

13-1 Comment noted.

13-2 Please see response to comment 4-2.

13-3 Please see response to comment 4-2.

13-4 Please see response to comment 4-1.
Thank you for your comments.

Comment Letter No. 14

IDAHO FARM BUREAU FEDERATION
P.O. Box 167 • 500 West Washington Street
Boise, Idaho 83701-0167 • (208) 342-2688
FAX (208) 342-8585

February 2, 2004

Bureau of Reclamation
Snake River Area Office
ATTN: Mr. Steve Dunn
230 Collins Road
Boise, ID 83702

Mr. Dunn,

The Idaho Farm Bureau Federation (IFBF) takes this opportunity to comment on the Draft Environmental Assessment (EA) for the Bureau of Reclamation's (BOR) Proposed Renewal or Conversion of Water Service Contracts for Lucky Peak Reservoir, Boise River Basin, Idaho.

The IFBF is the largest general farm organization in Idaho, with a membership of 61,000 families. Many of our members currently hold BOR water service contracts in Lucky Peak.

IFBF strongly supports Alternative 2 – Convert to Repayment Contracts for Requested Amount. This alternative follows the irrigators' contracts with BOR, allowing for the conversion from water service contracts to repayment contracts at the request of the contractor (irrigator). All contractors have asked for conversion. BOR law and rules give the contractors first right of refusal to convert the full amount of storage water from water service to repayment. Alternative 2 follows those rules and law. **14-1**

Of the 293,000 acre feet of storage capacity in Lucky Peak, only 71,000 acre feet are irrigation contracts. The remaining storage is devoted for other multiple uses, including salmon flow augmentation and winter minimum flows in the Boise River. Alternative 2 will not affect those other uses, nor change the environment in any manner from its present form. Alternative 2 does not alter the vegetation, wildlife or fish habitat, or water quality.

IFBF highly questions the need for an EA document when there will be no changes in the environment from what is presently occurring. Under the contracts, BOR law, and BOR rules, BOR must convert the contracts, if requested, and for the full amount of water. BOR does not have discretion to do otherwise. Without discretion, there are no choices to be made. With no choices to be made, there is no need for an EA. BOR's manual states that conversion of **14-2**

contracts are not a "major federal action" and qualify for a Categorical Exclusion (CE) with no EA or EIS required.

This NEPA document has cost our members' irrigation assessments to increase due to additional legal bills and other costs. This entire NEPA exercise has placed great stress on our farm families. In addition to worrying over increased irrigation costs, our members have grave concerns if they will be able to retain their water. In the Boise Valley, an irrigated farm without water is no longer profitable for farming. Instead, this highly productive agriculture land will end up subdivided and paved over. In addition to losing a way of life and important food production, open space and valuable wildlife habitat are also lost. This should be of concern to the entire community.

After careful review, Alternative 2 is the only logical, and legal, alternative for BOR to chose.

Thank you for the opportunity to comment on this most important document.

Sincerely,

Frank Priestley, President
Idaho Farm Bureau Federation

Responses to Letter No. 14

14-1 Comment noted.

14-2 Please see response to comment 4-1.
Thank you for your comments.

Comment Letter No. 15

Bureau of Reclamation
Snake River Office
Steve Dunn
230Collins Road
Boise ID 83702

February 5, 2004

Mr. Dunn,

I am writing about the Draft Environmental Assessment for the Bureau of Reclamation's Renewal or Conversion of Water Service Contracts for Lucky Peak Reservoir. I strongly support Alternative 2-Convert to Repayment Contracts for the Current Amount of Contracted Water. Alternative 2 is supported by Reclamation Law and Policy. **15-1**

I support this Alternative because it will benefit irrigators in the Treasure Valley Permanently. The use of surface water for irrigation is a vital key to the preservation of ground water. This water is a Vested Water Right and if the Government were to hold back any of our contracted amount, the result would be a Taking.
Water users in the city's of Boise, Meridian, Eagle, Star, Middleton and surrounding Ada and Canyon County's will benefit permanently from the renewal of these water contracts. The need for surface water in this Valley will only increase as the area is further urbanized. This water is our insurance policy and is treated like gold.

Alternative 2 also supports concerns raised in Secretary Norton's 2025 plan, which realizes the need to keep surface water in areas that may be short in the future. Keeping this water in this Valley will eliminate the need to look for water elsewhere in the future.

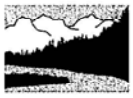
Alternative 2 is the only legal and sensible alternative for BOR to choose.

Dana Purdy
Dana Purdy
President, New Dry Creek Ditch Co.

Response to Letter No. 15

15-1 Comment noted.
Thank you for your comment.

Comment Letter No. 16



ADVOCATES for the WEST
Public Interest Environmental Law

February 12, 2004

Bureau of Reclamation
Snake River Area Office
Attn: Mr. Steve Dunn
230 Collins Road
Boise ID 83702

Re: Comments on Draft Environmental Assessment For Lucky Peak Water Service Contracts Renewal or Conversion

Dear Mr. Dunn:

I am writing to submit the following comments on behalf of Idaho Rivers United and Idaho Conservation League, concerning the above-referenced Draft Environmental Assessment (Draft EA) for Lucky Peak water contracts. Idaho Rivers United is a non-profit, statewide river conservation organization representing over 2,600 members throughout the state of Idaho, many of whom live, work and recreate along the Boise River. All of our members support IRU's mission to protect and restore the biological integrity of Idaho's rivers. The Idaho Conservation League (ICL) is a non-profit, conservation organization with 3,000 members. The mission of ICL is to protect and restore the water, wildlands and wildlife of Idaho through citizen action, public education and professional advocacy.

These comments are in addition to comments previously provided by these groups, and any further comments they or other conservation organizations may submit, which are all expressly incorporated by reference here.

We understand that the Bureau extended the deadline for submission of these comments through communication with Jenna Borovansky of IRU.

As an initial comment, we are shocked to find, on Table 5-1, "Preparers and Their Qualifications," that the Bureau evidently has not sought legal advice or input from any responsible federal attorney, either within the Interior or Justice Departments. Instead, Table 5-1 lists three irrigation attorneys – Scott Campbell, Dan Steenson, and Jerry Kiser – as "reviewers" who apparently provided the Bureau with its sole source of legal advice for the proposed contract renewal or conversion that directly benefits their clients. **16-1**

This is wholly improper, and may violate state or federal legal or ethical provisions. In any event, we strongly suggest that the Bureau perform an independent legal analysis using experienced and qualified attorneys who are not beholden to the contract beneficiaries.

I. The Bureau Has Wrongly Limited Its Discretion.

P.O. Box 1612, Boise, ID 83701 208-342-7024 Fax: 208-342-8286 www.AdvocatesWest.org

Perhaps the most significant flaw in the Draft EA for the Lucky Peak contracts is the Bureau's assertion – set forth first on pages 1-1 through 1-3, but which pervades the entire document – that it has only very limited legal discretion in terms of renewal or conversion of the contracts.

As the legal discussion below emphasizes, the Bureau in fact has far more legal discretion in this arena than the Draft EA supposes. Accordingly, the assumptions and conclusions set forth in the document need to be thoroughly revamped to accurately reflect the applicable legal principles.

A. The Bureau Has Discretion To Alter The Terms Of New Contracts. **16-2**

The Draft EA asserts that the Bureau essentially lacks discretion in renewing or converting the expiring contracts in many respects. This is patently not the case.

Indeed, the U.S. Court of Appeals for the Ninth Circuit has specifically held that the Bureau of Reclamation has discretion over the terms of renewed water service contracts, in various respects. In NRDC v. Houston, 146 F.3d 1118, 1126 (9th Cir. 1998), the appeals court rejected the very argument which the Bureau again asserts here, that it had no discretion over the renewal of water contracts, especially with regard to the quantity of water delivered. The Ninth Circuit specifically noted that the contracts are to be renewed, under the relevant statutes, on "mutually agreeable" terms, and thus found that the Bureau "clearly" has discretion in negotiating new contracts. Id.

In addition, the court in NRDC v. Houston further rejected the Bureau's argument that it had no discretion in determining the available project supply for contracts, which appears to be the same position the Bureau is adopting here. Id.

Furthermore, contrary to the Bureau's statements in the Draft EA, the contracts do not deprive the Bureau of its authority to control the use of project water. The Ninth Circuit has held that the Bureau retains its sovereign power over management of project water "unless surrendered in unmistakable terms." O'Neill v. United States, 1906 (9th Cir. 1995), quoting Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 US 130, 148 (1982). In this case, the Bureau has not cited any contract terms by which it surrendered its power to control water.

In fact, the contracts themselves give the Bureau discretion over the terms of the new contracts. The Bureau itself notes that pursuant to 43 USC §485h-1(1), the current contracts state that contractors are entitled to renew water service contracts "under terms and conditions mutually agreeable to the parties." This language gives the government veto power over any new contract term it does not agree with, including greater water deliveries than is being beneficially used or reallocating the available project supply.

In short, the Bureau is not obliged to renew contracts on terms with which it does not agree; and it must consider a wide range of interests and factors, including those discussed below, that are relevant to the new contract decisions.

B. The Bureau Must Limit Future Contracts To Reasonable, Beneficial Use Requirements; But Has Failed To Assess That Requirement Here. 16-3

Furthermore, in determining the terms and conditions upon which it will agree to new Lucky Peak contracts, the Bureau must adhere to the requirement of Reclamation and state law that the Bureau may not deliver water to contractors beyond the amount the user can put to reasonable beneficial use.

The 1902 Reclamation Act provides that "the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 USC § 372. Congress again reiterated this basic principal of water law in its 1956 amendment to Section 9 of the Reclamation Project Act of 1939. 43 USC § 485h-4. The legislative history on the 1902 Reclamation Act further makes clear that an irrigator's right to project water "lapses if he fails to put the water to beneficial use." U.S. v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983), quoting 35 Cong. Rec. 6679 (1902).

Thus, the right to use project water is tied to beneficial use. In order to enforce this requirement, the Bureau must have the discretion to reduce water deliveries where contractors have not beneficially used the full contracted amount of water. Indeed, the 1902 Reclamation Act empowers the Secretary of the Interior "to perform any and all acts . . . as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect." 43 USC § 373.

Congress's directive that project water use be limited by beneficial use is meaningless unless the Bureau actively supervises the use of project water to determine if it is being put to beneficial use. Thus, the Ninth Circuit has held that section 8 of the Reclamation Act requires that the Bureau inquire into beneficial use. U.S. v. Alpine Land & Reservoir Co., 697 F.2d 851, 855 (9th Cir.), cert denied 464 U.S. 863 (1983).

We are glad that the Draft EA at least acknowledges this beneficial use restriction and requirement, on page 1-3. But the Draft EA does not contain any further analysis of the proposed contractors' reasonable beneficial use needs; or exploration of how the beneficial use requirement applies to the contract renewal or conversion proposed by the Bureau.

Instead, the Draft EA simply sets forth the historical **maximum** deliveries that have been made to the various contractors since the 1960's (Table 2-1), in order to derive Alternative 3. It is striking that the Draft EA does not report either annual deliveries; average deliveries; or minimum deliveries during this same time frame. It is also striking that the Bureau goes back forty years, to the 1960's, to identify the maximum deliveries for certain contractors. Thus, even Alternative 3 is severely flawed; and it should be reformulated by conducting a more thorough analysis of this type. 16-4

But more importantly, missing from this analysis is any recognition and evaluation that the Treasure Valley areas served by the Boise Project have undergone tremendous changes in the last forty years. The population of the Boise area has increased at least ten-fold in that period; and the accompanying pace of urbanization and related factors have led to a widespread conversion and loss of farmland; changed cropping patterns; etc. These trends will likely continue, if not accelerate – yet the Bureau has not even acknowledged this fact. 16-5

Absent a final adjudication of Treasure Valley water rights in the SRBA – a process that will likely take several more years – the Bureau is required, under these circumstances, to conduct a real analysis of the reasonable, beneficial use needs of the proposed project contractors. We note that the Bureau knows how to conduct such analysis, as its experience in the Carson-Truckee projects over the last two decades, and with the Imperial Irrigation District more recently, has demonstrated. 16-6

Among the factors that the Bureau should analyze are the amount of water actually delivered to contractors as compared to contract amounts; the amount of natural flow rights or other storage rights put to use by contractors; the number of acres actually irrigated by contractors historically and presently; and the amount of waste and conveyance loss for each irrigator. The new contracts must be reduced by the amount of water which is unused, lost through excessive conveyance loss, or applied to the land over and above the amount necessary for the number of acres being irrigated. U.S. v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (1983). 16-7

If such analysis were included, we suspect it would show that the project contractors have typically not required nearly the amount of water specified in the current contracts, or provided even under Alternative 3; and in fact, their water use needs are far less than these amounts. Accordingly, the Bureau should construct a new, preferred alternative based on the reasonable beneficial use analysis required by federal and state law. For several years, the Idaho Water Resources Department has been reviewing water allocation and land use throughout the entire Lower Boise River system. Information from the Draft Comprehensive State Water Plan for the Lower Boise River Basin and other sources should be used to review current and future water use in the basin in relation to the contracted water amounts.

C. The Bureau Should Not Allow Conversion Of The Contracts.

Along with failing to assess reasonable beneficial use requirements or its broad range of discretionary authority, the Bureau asserts in the Draft EA that conversion from water service to "repayment" contracts is the preferred option. The Draft EA utterly fails to explain the basis for this preference; and in fact, it appears the Bureau has simply followed the directives of the irrigators in this regard, again reflecting their undue influence on the process. 16-8

It is unsurprising that irrigators would want conversion of the contracts into what the Draft EA describes as "perpetual" repayment contracts. This term alone is confusing, and should be more clearly explained; since repayment contracts by their very nature are not "perpetual" but limited in time. 16-9

In any event, the analysis in the Draft EA shows that Lucky Peak reservoir was federally funded, constructed and remains operated as a federal facility; with only a small fraction of its reservoir space having been historically contracted for irrigation water deliveries (and some of that space was returned by Nampa-Meridian Irrigation District recently). As already noted, the trend of urbanization in the Treasure Valley indicates that, into the future, irrigation demands for crops will continue to decline sharply. At the same time, other interests in how water is stored and released from Lucky Peak will grow in significance, including for municipal, recreational, wildlife, and other uses.

There is certainly no legal mandate requiring the Bureau to cave into irrigator demands and convert these Lucky Peak storage contracts into "perpetual" contracts. Because the Bureau has discretion to determine the terms upon which it will agree to new contracts, it should insist on maintaining water delivery contracts that are limited in time, to no more than 10 years; so that the Bureau will retain the ability and discretion in the future to again evaluate whether the existing contracts are fully complying with federal and state laws as well as the public interest. **16-10**

D. The Bureau Must Comply With All Federal Laws, Including The ESA.

The Bureau's discretionary authority with respect to renewal or conversion of the Lucky Peak contracts also derivers from other federal environmental laws, including the Endangered Species Act.

The Bureau must ensure that the new contracts do not violate the Endangered Species Act, and must also retain its discretionary authority to modify contracts, if necessary, to prevent violations of the ESA in water management of Lucky Peak and other related projects. Again, the Ninth Circuit has previously addressed these issues. See Klamath Water Users Protective Association v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 2000) ("It is well settled that contractual arrangements can be altered by subsequent Congressional legislation."); O'Neill v. United States, 50 F.3d 677, 686 (9th Cir. 1995) (an agency can deliver less than a contractually agreed upon amount of water in order to comply with subsequently enacted federal law) **16-11**

The Draft EA essentially asserts that the ESA is not an issue, with respect to listed bull trout, salmon or steelhead. But it relies on the Bureau's inadequate ESA consultations to come to this assertion, including Upper Snake consultations that are currently being challenged by IRU and other groups as legally inadequate in U.S. District Court. The Bureau should refrain from assuming the adequacy of these consultation documents, until that litigation is resolved. **16-12**

In any event, the current consultation documents expire by March 2005; and will be replaced by a new consultation. The Bureau should hold off on completing the NEPA review at least until a new, valid ESA consultation is in place, and then assess potential ESA issues at that time. **16-13**

II. OTHER COMMENTS

A. If it has not already, the Bureau must assign a portion of evaporation loss from the reservoir to water users in apportioning shares of storage space. **16-14**

In the discussion of reservoir storage and operations, the Draft EA apparently does not address how evaporation is accounted for in project operations.

Given the location of Lucky Peak reservoir in this arid climate with hot summers, evaporation is surely a significant factor. It should be addressed in full in the final NEPA document (as discussed below, this should be an EIS and not an EA).

Further, in considering the amount of water available for delivery to storage contract holders, the Bureau must assign an evaporation loss to each contractor. The Bureau cannot act on the fiction that whatever amount of water enters the reservoir will stay put for later use until it is diverted, as appears to be the case from the Draft EA. If the Bureau does not assign a proportionate share of evaporation losses to contractors, then non-irrigation water uses will unfairly bear the brunt of evaporation losses.

B. Better analysis of trends and economics is needed.

The discussion and table addressing economic benefits from the irrigation water (Section 3.6) suffers from several defects, similar to the flaws discussed above.

In general, what is missing from the Draft EA is a frank discussion of the trends of population growth and urbanization in the Treasure Valley over the last forty years; and what they mean for water stored and released from Lucky Peak. **16-15**

Not only should the final NEPA document address these trends and their impacts with respect to reasonable beneficial use and similar legal requirements, but also with respect to assessing the true value of the water in the area. The Table 3.4 simply relies on a 1997 census of agricultural data, without any effort to chart trends. Comparison of this data with, say, 1960's data should be very revealing and add considerable new information for the Bureau's analysis.

C. Better analysis of ecological impacts is needed.

The discussion of environmental consequences is completely inadequate. Discussion of environmental impacts and mitigation for these impacts is entirely absent. The statement that all three alternatives will have the same impact on water quality, vegetation and fish and wildlife as is not supported by any meaningful analysis. **16-16**

The Bureau has an obligation under the Clean Water Act to contribute to the restoration of water quality. Table 3-3 identifies water quality impacted waterbodies upstream and downstream of reclamation facilities and Lucky Peak Reservoir, but the Draft EA simply states that "waterbodies and stream reaches currently not meeting water quality standards may improve through implementation of TMDL actions that reduce input of pollutants." There is no discussion or inclusion of any alternative that analyzes potential changes in operations, including reallocating contract water, for the purpose of improving water quality. Increased flows during targeted time periods could contribute to the improvement of water quality downstream from Lucky Peak. **16-17**

The Draft EA states that "the extent of riparian areas along the river below Lucky Peak Dam would remain similar to current conditions although the lack of flood flows and encroachment of development may continue to degrade these communities over time." There is no analysis that explores potential mitigation for the negative impacts of these reduced flows. The Bureau must review the potential environmental benefit of increased flows or other mitigation measures on restoring riparian vegetation. 16-18

The Draft EA also asserts that wildlife and fisheries habitat will remain unchanged from current conditions. The current condition is a degraded state; therefore, wholesale acceptance of this state in the Draft EA is completely inappropriate. Low seasonal flows in winter must be improved, and an alternative that analyzes the potential benefits of reallocating storage water for beneficial uses in such a way that water quality standards in the Boise River can be maintained year-round, and fish and wildlife protected year-round by adequate streamflows. Historical winter flows in the Boise River average about 400 cfs - far above the 90-150 cfs for which the Boise River has been managed in recent years. An alternative that looks at ways to reach 400 cfs winter flows should be considered in order to benefit fish and wildlife populations. 16-19

D. A full EIS should be performed.

As the discussion above should indicate by now, the issues surrounding expiration and renewal or conversion of the Lucky Peak contracts are many, and have barely been explored by the Bureau. In fact, we submit that the implications for the management of the Boise River, the population of the Treasure Valley, and impacts upon environmental, social and other factors are large, and certainly surpass the "significance" threshold for an EIS under NEPA.

In short, the facts and circumstances presented here show that the Bureau is proposing to undertake major federal action that may significantly affect the environment, thus triggering the EIS requirement. 16-20

NEPA requires that an EIS be prepared for all major Federal actions that "may significantly affect the quality of the human environment." 42 U.S.C. § 4332(2)(C); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 336, 349 (1989). If there is a substantial question that a proposed action may be "significant," then the agency is required by NEPA to perform a full EIS.

As the U.S. Court of Appeals for the Ninth Circuit has repeatedly held, federal agencies must prepare an EIS rather than an EA when a proposed action is controversial, scientifically uncertain, or plaintiffs have raised "substantial questions" that it may have significant environmental effects. See National Parks Conservation Assoc. v. Babbitt, 241 F.3d 722 (9th Cir. 2001)("NPCA"); Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000); Muckleshoot Indian Tribe v. USFS, 177 F.3d 800 (9th Cir. 1999); Blue Mtn. Biodiversity v. Blackwood, 161 F.3d 1207 (9th Cir. 1998), cert. denied 527 U.S. 1003 (1999); Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998) (all reversing EAs).

Whether there may be a significant impact on the environment requires consideration of two broad factors: "context" and "intensity." 40 C.F.R. § 1508.27; 42 U.S.C. § 4332(2)(C). Context means the "significance of an action must be analyzed in several contexts such as society as a whole . . . , the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). Intensity indicates the "severity of impact," which includes consideration of, *inter alia*, the unique characteristics of the geographic area; the degree to which the effects on the environment are likely to be highly controversial; the degree to which the possible effects on the environment are highly uncertain or involve unique or unknown risks; and whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Id. at § 1508.27(b).

Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent "speculation on potential . . . effects. The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action." See NPCA, 732 F.3d at 732.

Conclusion

In summary, the Draft EA fails to address the true scope of the Bureau's discretionary authority with respect to entry into new Lucky Peak contracts; fails to address the true importance of the contracts to the economic, social and environmental interests at stake; fails to follow Reclamation Act requirements relating to limitations on reasonable, beneficial use; and otherwise does not comport with the requirements of NEPA or other federal laws.

We thus encourage the Bureau to conduct a full EIS; and to ensure that renewal of water delivery contracts for Lucky Peak comports fully with all federal and state laws.

Very truly yours,

Sara Denniston Eddie
Attorney for the conservation groups

Cc: Idaho Rivers United
Idaho Conservation League

Responses to Letter No. 16

16-1 Reclamation has received legal advice from attorneys with the Department of Interior Field Solicitor's Office throughout preparation of the EA. The three attorneys listed in Table 5-1 represent the Lucky Peak storage contractors. They served as reviewers of documents submitted by 3rd party contractor CH2M HILL, hired by the Lucky Peak contractors to prepare a preliminary NEPA document. The attorneys also provided information from their clients regarding use of the Lucky Peak storage in the past, present, and future.

16-2 Reclamation agrees that it has a certain degree of discretion when negotiating the terms of any renewed or converted contracts under the 1956 Act. As the Act states, the contracts must be renewed or converted upon mutually agreeable terms and conditions. Reclamation, however, has no discretion to deny renewal or conversion. See response to 8-1. Further, Reclamation has only limited discretion to alter the amount of water available to the contractors. See response to 8-1. The Ninth Circuit's opinion in *NRDC v. Houston*, 146 F.3d 1118 (9th Cir. 1998), does not expand Reclamation's authority or discretion in renewing or converting the Lucky Peak contracts. The Court in their opinion merely noted that, when determining how much project water is "available" for contracting, the total amount of available water may be reduced to comply with the ESA. This scenario is not implicated here. Reclamation has determined that the renewal or conversion of the Lucky Peak contracts as described in the Preferred Alternative will have "no effect" on threatened or endangered species.

16-3 See responses to comments 7-2 and 9-6.

16-4 Minimum and average deliveries are not applicable because as explained in the Draft EA, most of the contractors use the storage as drought protection. As explained in the Draft EA (pages 3-23 to 3-27) many contractors use little of their storage during good water years and all storage is not used in a single drought year. Reclamation believes Alternative 3 represents a reasonable alternative under NEPA regulations that still meets the underlying purpose and need. See responses to comments 4-2 and 9-12.

16-5 See responses to comments 9-6 and 9-27.

16-6 See responses to comments 7-2 and 7-7.

16-7 The Draft EA provides information on the contractors' use of Lucky Peak storage and their natural flow rights as they relate to the need for supplemental

storage. Reclamation has no discretion to limit the contracted amounts as long as it is being beneficially used, as defined by the State.

16-8 See response to comment 7-1.

16-9 Section 1.1.3 of the Final EA has been revised to differentiate between contract term and repayment term.

16-10 See response to comment 7-1.

16-11 Operations related to the storage under contract in Lucky Peak Reservoir are and would continue to be subject to ESA BOs after renewal/ conversion. Also see response to comment 9-9.

16-12 Reclamation is operating under current BOs in compliance with the ESA.

16-13 See response to comment 16-11.

16-14 Evaporative losses are accounted for by the Boise River Watermaster (District 63) using methodologies developed by IDWR. Evaporation losses are calculated proportionate to the amount of reservoir storage.

16-15 Growth trends are briefly discussed, and use of Lucky Peak storage over the last 17 years is presented in the EA. See responses to comments 9-6, 9-12, and 9-27.

16-17 See responses to comments 7-5, 9-25, and 9-28.

16-17 See responses to comments 2-1, 7-6, and 9-6.

16-18 Since the condition of riparian areas would be the same under both action alternatives as No Action, there would be no adverse effect and no mitigation proposed. See response to comment 9-28.

16-19 There would be no change when comparing the wildlife and fisheries habitat conditions under the action alternatives to the conditions under No Action, as required by CEQ NEPA regulations.

16-20 Comment noted.
Thank you for your comments.

Comment Letter No. 17

United States Department of the Interior
FISH AND WILDLIFE SERVICE
Snake River Fish and Wildlife Office
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TAKE PRIDE IN AMERICA

FEB 16 2004

Memorandum

To: Area Manager, Snake River Area Office, Bureau of Reclamation, Boise, Idaho (Attention: Steve Dunn)

From: Acting Supervisor, Snake River Fish and Wildlife Office, U.S. Fish and Wildlife Service Boise, Idaho

Subject: Lucky Peak Water Service Contracts Renewal or Conversion – Lucky Peak Reservoir, Boise River Basin, Idaho – Response to Draft Environmental Assessment
File #1008.0000 OALS #04-164

The Fish and Wildlife Service (Service) is writing in response to the Bureau of Reclamation's (Bureau) draft Environmental Assessment (Assessment) for the proposed renewal or conversion of water service contracts for Lucky Peak Reservoir, Boise River Basin, Idaho. The Assessment analyzes potential environmental impacts from alternatives that meet the supplemental irrigation storage needs of current Lucky Peak Reservoir contract holders. The preferred alternative consists of converting the water service contracts to permanent repayment contracts for the existing contracted storage amount.

The Bureau intended the Assessment to serve as a biological assessment for potential impacts to listed and proposed species and critical habitat in order to meet the consultation requirements of section 7 of the Endangered Species Act (Act). The Bureau concluded that the proposed action would not affect bull trout, bald eagle, gray wolf, Canada lynx, slickspot peppergrass, or proposed bull trout critical habitat. Based on the information provided in the Assessment, the Service agrees that this is the appropriate conclusion for these species. The Service would also like to note that slickspot peppergrass *(Lepidium papilliferum)* is no longer proposed for listing under the Act, and therefore the Bureau does not need to address it in future consultations. **17-1**

The Service is not providing further written comments on the Assessment at this time. Thank you for your continued interest in endangered species conservation. Please contact Kendra Womack at (208) 685-6955 if you have any questions.

Response to Letter No. 17

17-1 Comment noted.
Thank you for your comment.