

APPENDIX C

LETTERS AND RESPONSES

Comment Letters																			
Number	Name																		
1	Ada County Development Services																		
2	David E. Nagel																		
3	Boise City Canal Co.																		
4	Moffatt Thomas																		
5	Bryan Searle ¹																		
6	Idaho Water Users Association, Inc.																		
7	City of Boise																		
8	Flip Phillips																		
9	Trout Unlimited																		
10	Idaho Fish and Game																		
11	Shoshone-Paiute Tribes																		
12	Marcus, Merrick, Christain & Hardee, L.L.P.																		
13	Ringert Clark, Chartered Lawyers																		
14	Idaho Farm Bureau Federation																		
15	New Dry Creek Ditch Co.																		
16	Advocates for the West																		
17	U.S. Fish and Wildlife Service																		
<p>¹ Eighteen emails similar to Mr. Searle's letter were received from the following people:</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 33%;">Holly Hancock Rigby ID</td> <td style="width: 33%;">Ina De Boer Nampa ID</td> <td style="width: 33%;">Kris Long Chubbuck ID</td> </tr> <tr> <td>Tracy Walton Emmett ID</td> <td>Glen Edwards Nampa ID</td> <td>Dennis Tanikuni Wilder ID</td> </tr> <tr> <td>Jeanne Arnzen Cottonwood ID</td> <td>Grant Ipsen Boise ID</td> <td>Carl Montgomery Eden ID</td> </tr> <tr> <td>Nancy Shiozawa Pocatello ID</td> <td>Mark Trupp Driggs ID</td> <td>Russell Hendricks Nampa ID</td> </tr> <tr> <td>David Hart Eagle ID</td> <td>Gary Lemmon Hagerman ID</td> <td>Kent Miskin Terreton ID</td> </tr> <tr> <td>W. Greg Nelson Kuna ID</td> <td>David Ascuena Mtn Home ID</td> <td>Dave Veselka Indian Valley ID</td> </tr> </table>		Holly Hancock Rigby ID	Ina De Boer Nampa ID	Kris Long Chubbuck ID	Tracy Walton Emmett ID	Glen Edwards Nampa ID	Dennis Tanikuni Wilder ID	Jeanne Arnzen Cottonwood ID	Grant Ipsen Boise ID	Carl Montgomery Eden ID	Nancy Shiozawa Pocatello ID	Mark Trupp Driggs ID	Russell Hendricks Nampa ID	David Hart Eagle ID	Gary Lemmon Hagerman ID	Kent Miskin Terreton ID	W. Greg Nelson Kuna ID	David Ascuena Mtn Home ID	Dave Veselka Indian Valley ID
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**ADA COUNTY
DEVELOPMENT SERVICES**

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FAX (208) 287-7909

200 W. FRONT, BOISE, IDAHO 83702-7300



BUILDING • ENGINEERING • PLANNING • ZONING



January 5, 2004

Steve Dunn
Bureau of Reclamation
230 Collins Road
Boise, Idaho 83702

Re: Draft Environmental Assessment for Lucky Peak Water Service
Contracts.

Dear Mr. Dunn:

Nichoel Baird with this office has thoroughly reviewed the draft EA and has indicated she sees no conflicts with Ada County's long-range plans. Therefore, this office has no objection to the EA.

| 1-1

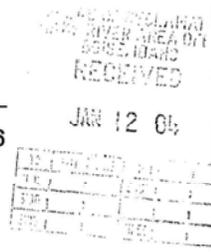
Sincerely,

Carla L. Olson
Interim Director

Response to Letter No. 1

1-1 Thank you for your comments.

Comment Letter No. 2



David E. Nagel

3844 E. Shady Glen Drive Boise, ID 83706

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

Dear Mr. Dunn:

I am writing to comment on the Draft Environmental Assessment for Lucky Peak Water Service Contracts Renewal or Conversion document.

Lucky Peak Dam was constructed at a time when the expansion of new agricultural lands was considered important for the people of the West. Dams were constructed without regard for fish, wildlife, or recreation, because these uses were not valued as highly as the desire for food production. The values of our society have changed, but unfortunately our water laws have not. However, whatever it's original intent, Lucky Peak Dam was constructed to provide for the public good. That concept of public good has shifted and it should be the Bureau's obligation, as a public entity, to see that the dam is operated to reflect this change in societal values.

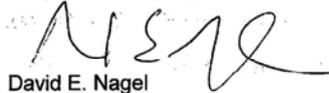
2-1

The Boise River is utilized by many people for a multitude of uses, however, I am most concerned with the salmonid populations below Lucky Peak Dam. The river is currently nothing but a stocking pond for thousands of hatchery trout that live for a short time before starving in the winter. Only about 1/3 of these fish are ever harvested, giving tax payers a poor return on the money invested in hatchery programs. The river is heavily stocked partially because of the fishing pressure, but also because the low winter flows limit insect populations and available cover for salmonids. The low winter flows are the limiting factor for trout survival and recruitment. An Idaho Fish and Game biologist recently confided in me that the low winter flows were the primary reason that management alternatives such as catch and release fishing are not considered. Thus, the stocking continues and a viable salmonid population cannot be maintained.

I would argue that a wild fishery in the river would serve hundreds of people in the metropolitan area with recreational opportunities, and would have economic benefits for the city, as tourists come to fish. For this reason, I believe that the Bureau should plan to convert some of the water capacity to help maintain winter flows, for the public good. This use should come before any more water is allocated to residential or commercial interests, which would benefit only a few.

2-2

Sincerely


David E. Nagel

Responses to Letter No. 2

- 2-1 With respect to renewal of the Lucky Peak Reservoir water service contracts, Reclamation is bound by the authorities granted by Congress and provisions of the existing contracts. As discussed in sections 1.1.2 and 2.3 of the Draft EA, Reclamation has no unilateral authority to assign Lucky Peak storage provided under these contracts to other uses so long as it is being put to beneficial use by the contractors.

- 2-2 See response to comment 2-1.
Thank you for your comments.

Boise City Canal Co.

P.O. Box 2157, Boise, Idaho 83701
Office Phone 208/387-3526 Ditch Rider 208/342-5994

Comment Letter No. 3

RECEIVED
JAN 21 04

January 14, 2004

Bureau of Reclamation
Snake River Area Office
ATTN: Steve Dunn
230 Collins Road
Boise, Idaho 83702-4520

Re: Review of Draft Environmental Assessment for Lucky Peak
Water Service Contracts Renewal or Conversion

Dear Mr. Dunn:

Boise City Canal Company has received a letter from Jerrold D. Gregg regarding the above referenced subject.

In his letter he lists two alternatives that are being evaluated in the Environmental Assessment: (1) the preferred alternative converting water service contracts to permanent repayment contracts for the existing contracted storage amount, and (2) an alternative that would also convert the water service contracts to repayment contracts, but for a quantity based on the highest historic annual delivery of storage water to each contractor.

Boise City Canal Company prefers Item #1, converting water service contracts to permanent repayment contracts for the existing contracted storage amount. | 3-1

If you have any questions regarding this matter, please call me at 861-9696.

Yours very truly,

BOISE CITY CANAL COMPANY



Robert Jahn, President

RJ:ijb

Response to Letter No. 3

- 3-1 Comment noted.
Thank you for your comment.

Comment Letter No. 4

Boise
Idaho Falls
Pocatello

Moffatt Thomas

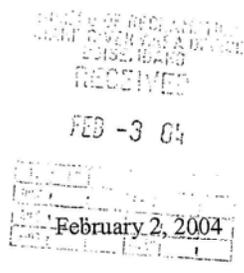
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Angela Schaefer Kaufmann
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Bradley J. Dixon
Mark C. Peterson
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Shawn C. Nunley

Willis C. Moffatt, 1907-1980
Kirk R. Helvie, 1956-2003



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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**
MTBR&F File No. 18946.15

Dear Mr. Dunn:

I am enclosing the revised correspondence on the above referenced matter. Please disregard the initial comments. Thank you for your cooperation and your attention to this matter. Please contact me if you have questions.

Very truly yours,


Scott L. Campbell

SLC/dll
Enclosure
cc: Pioneer Irrigation District
Settlers Irrigation District

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

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January 30, 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**
MTBR&F File No. 18946.15

Dear Mr. Dunn:

I am providing written comments on behalf of Pioneer Irrigation District and Settlers Irrigation District (the "Districts") with respect to the above referenced matter. Please acknowledge receipt of this correspondence in your official file by reply correspondence.

Initially, the Districts assert a position they previously stated to the Bureau of Reclamation concerning the necessity of proceeding with an environmental assessment or other compliance with the National Environmental Policy Act ("NEPA"). As previously stated, the Districts do not believe that NEPA is triggered by the actions contemplated by the Bureau of Reclamation with respect to renewal or conversion of the Lucky Peak water service contracts. In correspondence dated January 14, 2003, to Alexandra Butler of the Field Solicitor's Office, U.S. Department of the Interior, by Daniel Steenson, he set forth in detail the legal analysis which results in this position. I have enclosed a copy of Mr. Steenson's correspondence for your ease of reference. The Districts concur in the arguments presented by Mr. Steenson in that correspondence to Ms. Butler.

4-1

Additionally, the Districts reassert the position that the status quo is not altered by renewal or conversion of the Lucky Peak water service contracts. The storage and release of water will be the same under either scenario, resulting no change in the status quo, the fundamental focus of any determination of applicability of NEPA. I direct your attention to the legal authority set forth in Mr. Steenson's correspondence, but also reassert the applicability of the decision of *National Wildlife Federation v. Espy*, 49 F.3d 1337 (9th Circuit 1995) and *Upper Snake River v. Hodel*, 921 F.2d 232 (9th Circuit 1990). Additionally, the District Court decision in *NRDC v.*

Patterson also provides significant support for this position. The 9th Circuit considered the ESA issues involved in that proceeding in *NRDC v. Huston*.

In addition to this issue, the Districts want to emphasize that Alternative 3 in the EA is completely unacceptable to them. They believe the Bureau of Reclamation is without legal authority to consider Alternative 3, and Alternative 3 does not meet the purpose and need statement of the proposed action.

4-2

In addition, the basis for Alternative 3 is invalid. The beneficial use determination with respect to the water subject to the contracts was conclusively determined by the State of Idaho when the Department of Water Resources issued a license for the Lucky Peak Reservoir. Under Section 8 of the 1902 Reclamation Act, that is the determination of "beneficial use" which the Bureau of Reclamation must follow. After such a state based determination of beneficial use has been made, the Bureau of Reclamation has no authority to render an independent evaluation of "beneficial use." Consequently, virtually all aspects of Alternative 3 in the EA are irrelevant.

4-3

Settlers Irrigation District needs to independently point out to you that it does not possess any water rights under the Bryan Decree. Therefore, with respect to this component of the analysis, the Bureau of Reclamation is in error. This further diminishes the amount of water that Settlers Irrigation District is legally entitled to utilize and further emphasizes the critical nature of the Lucky Peak contract for Settlers continued operation.

4-4

Settlers Irrigation District also wishes to inform the Bureau of Reclamation that it has frequently terminated its water diversions in the fall because of lack of sufficient water in the Boise River to allow diversions into its canal. If other canal companies or irrigation districts shut down their operations early, due to lack of storage water in late season, the flows in the Boise River diminish to such a point that diversion of water into the Settlers Canal is ineffective at delivering water to the lands within the District. In short, there needs to be an adequate head of water in the Boise River in the late irrigation season in order to allow sufficient diversions into the Settlers Canal. Therefore, Settlers has frequently shut off its diversions because of lack sufficient water storage by other irrigation entities. This point emphasizes the need for renewal of these storage contracts to the downstream irrigators, as well as renewal of Settlers Irrigation contract.

4-5

Additionally, both Districts want to point out the EA has failed to consider the reductions in storage allocations in Anderson Ranch and Arrowrock reservoirs, resulting from the sedimentation studies recently conducted by the Bureau of Reclamation. These reductions logically lead to the conclusion the Districts have a need for more storage water from Lucky Peak, not less. These facts make Alternate 3 even more unreasonable.

4-6

The Districts encourage the Bureau of Reclamation to adopt the preferred alternative and proceed forward to the execution of the required contracts. This process has taken far too long.

Steve Dunn
January 30, 2004
Page 3

The Districts commenced discussions and encouraged the Bureau of Reclamation to move forward with this project as early as 1996. Please do everything in your power to accelerate the process so that these contracts can be executed, prior to the end of 2004.

Thank you for your cooperation and your attention to this matter. Please contact me if you have questions.

Very truly yours,


Scott L. Campbell

SLC/dll

Enclosure

cc: Pioneer Irrigation District
Settlers Irrigation District

Responses to Letter No. 4

- 4-1 Regulations implementing NEPA provide that agencies may prepare an environmental assessment “on any action at any time in order to assist agency planning and decision making.” See 40 C.F.R. Sec. 1501.3(b). Here, the public scoping process demonstrated that several entities and individuals have an interest in the outcome of the renewal/ conversion process. Further, scoping indicated that there was a degree of controversy with respect to renewal/ conversion of these contracts and that some do not fully understand the statutory constraints under which Reclamation must function.

Reclamation has considered the argument that a NEPA analysis is not required in this case based on the “status quo” argument. Under this theory, NEPA’s requirements do not apply to proposed federal actions that do not change the “status quo.” *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). However, Reclamation disagrees with the commenter’s conclusion that a NEPA analysis is not required in this situation. In the unpublished decision *Natural Resources Defense Council v. Patterson*, Case No. Civ. S-88-1658 LKK (E.D. Cal. May 31, 1995), the court noted that “NEPA ... applies if the *particular exercise of discretion proposed by BOR* changes the status quo as measured by the nature and scope of human activity under the contracts.” Slip op. at 17 (emphasis added).

Here, Reclamation is in the process of deciding how it will exercise its discretion. The 1956 Act does not provide that the renewal or conversion of these contracts for the same quantities of water as under the original contracts is a mandatory, nondiscretionary action. Rather, Reclamation is obligated under Federal and State law to ensure that any water under the contracts will be put to beneficial use. In addition, the conversion of the existing contracts from water service to repayment contracts for all of the currently contracted water could be construed as changing the status quo, thereby requiring an analysis under NEPA.

Accordingly, Reclamation has chosen to prepare an EA.

We have included the April 21, 2003, letter regarding Reclamation’s position on NEPA compliance for Lucky Peak Reservoir contract renewals or conversions. The letter follows comment letter 4 responses.

- 4-2 Reclamation believes Alternative 3 is legal under NEPA. While not providing as much supplemental storage for some contractors, it would meet the stated

purpose and need by supplying a reasonable amount of supplemental storage based upon highest historic delivery of irrigation water stored in Lucky Peak.

The 1956 Act places an explicit limitation on the contractor's right of renewal/conversion: the contracted water must be put to beneficial use. See 43 U.S.C. Sec. 485h-1(4). The Solicitor of the Department of the Interior has confirmed this limitation. See *Renewal of Friant Unit Contracts*, M-36961, 96 I.D. 289, 301 (November 10, 1988). Reclamation has the authority to reduce the amounts of water in the renewed or converted contracts if the water is not beneficially used. Alternative 3, therefore, is within the scope of Reclamation's authority and discretion if it reflects an accurate estimate of the contractors' beneficial use.

Further, NEPA does not limit the analysis of alternatives to only those for which the action agency has authority. Indeed, CEQ regulations specifically require the agency to analyze alternatives that are reasonable, regardless of whether the action agency has the jurisdiction or the authority to carry out these alternatives. See 40 C.F.R. Sec. 1502.14(c).

- 4-3 See response to comment 4-2.
- 4-4 Appendix A has been revised to remove the reference to Settlers Irrigation District water rights under the Bryan Decree.
- 4-5 Comment noted.
- 4-6 We have revised the capacity numbers for Anderson Ranch Dam in Table 3-1 of the Final EA to reflect the recent reduction in storage due to sedimentation. We have also incorporated the reduction in storage at Anderson Ranch and Arrowrock Reservoirs into the discussion of Contractors' Use of Lucky Peak Storage in section 3.1.1 of the Final EA.
Thank you for your comments.



United States Department of the Interior

BUREAU OF RECLAMATION
Pacific Northwest Region
1150 N Curtis Road, Suite 100
Boise ID 83706-1234

PN-1000
ENV-1.10

APR 21 2003

Mr. Scott Campbell
Moffatt Thomas
P.O. Box 829
Boise, ID 83701-0829

Subject: National Environmental Policy Act (NEPA) Compliance for Lucky Peak Reservoir
Contract Renewals or Conversions

Dear Mr. Campbell:

Jerry Gregg and I appreciate having had the opportunity to meet with you and your clients on March 19, 2003, to discuss my February 26, 2003, letter (same subject as above) to the three of you. As agreed, I am writing to confirm the decisions I reached at this meeting.

First, in light of the fact that the contracts to be renewed or converted are for irrigation only, the purpose and need statement for the action will be reworded as follows (changes shown relative to the statement as set forth in my February 26, 2003, letter):

The purpose of the proposed action is to continue to provide current Lucky Peak contractors with a supplemental irrigation water supply for beneficial use from storage, consistent with applicable law, up to the percentage of active capacity in the reservoir allocated to each contractor under their original contract. Renewal or conversion is needed because the 40-year contract periods for the 19 contracts will expire between 2005 and 2008, and the contractors have a continuing need for irrigation water.

Second, with respect to analyzing the effects of the three pending assignments of contract rights, I have concluded, upon reconsideration, that these are actions which can be analyzed separately. These assignments do not depend on the renewal process for their approval or disapproval and thus are not interdependent with the proposed action. Therefore, these three assignments will be addressed through a separate NEPA process rather than being analyzed in the environmental assessment (EA) for the renewal or conversion of Lucky Peak contracts. However, this EA will acknowledge, in the cumulative effects analysis, these assignments.

Third, as I explained at the meeting, I had not intended for the third full paragraph on page 3 of my letter to imply that the EA which the Bureau of Reclamation will prepare would endeavor to provide NEPA coverage for potential future assignments of renewed or converted contracts. It will not. Rather, the EA will acknowledge, in the cumulative effects analysis that Reclamation intends for the renewed or converted contracts to contain Reclamation's standard article regarding the assignment of contracts. Should such assignments of renewed or converted contracts in fact be proposed in the future, then the assignments actually proposed will be subject to whatever environmental compliance is appropriate at that time.

Fourth, I confirmed at the meeting that I have concluded that NEPA does apply to this action and that, in light of the purpose and need statement, the EA will evaluate the alternatives described in my February 26, 2003, letter. I acknowledge that you hold a different view of the legal requirements regarding the application of NEPA in this situation. As discussed at the meeting, however, we have agreed to disagree on these points without prejudice to any party's legal position, recognizing that the contractors will have the opportunity to comment in regard to their position on NEPA or other issues.

In this context, we discussed questions regarding the factual information which is available to document contractors' historic use. This will confirm that we will work with you to review any information which you wish to bring to our attention and to consider your views on the proper presentation and interpretation of historical records before we make final determinations as to the facts regarding contractors' historic use.

Finally, we discussed the fact that the fourth paragraph on page 3 of my February 26, 2003, letter was not meant to imply that we have already concluded that the renewal or conversion of the contracts will have adverse environmental impacts. To the contrary, a determination as to the environmental effects, if any, of the alternatives to be analyzed in the EA awaits the preparation of the EA and the proper depiction in the EA of the environmental conditions under the "No Action Alternative" against which all action alternatives will be compared in accordance with the Council on Environmental Quality regulations.

We look forward to moving ahead to complete the NEPA compliance process.

Sincerely,

/s/ J. William McDonald

J. William McDonald
Regional Director

Identical Letter Sent To:

Mr. Jerry Kiser
Stoppello & Kiser
620 West Hays
Boise, ID 83702

Continue on next page.

Mr. Daniel V. Steenson
Ringert Clark
P.O. Box 733
Boise, ID 83701

cc: Mr. H. Scott Rhead
Director – Special Projects
United Water Idaho
P.O. Box 7488
Boise, ID 83707

Mr. Barry Marcus
Marcus, Merrick, Christian & Hardee, LLP
737 North 7th Street
Boise, ID 83702

Mr. Michael C. Creamer
Givens Pursley, LLP
P.O. Box 2720
Boise, ID 83701

Mr. Norman M. Semanko
Idaho Water Users Association Inc.
410 South Orchard #144
Boise, ID 83705

Mr. Joe King
President
Ballantyne Ditch Company, Ltd.
325 N Park Lane
Eagle, ID 83616

Mr. George Transtaum
President
New Union Ditch Company, Ltd
P.O. Box 31
Eagle, ID 83616

Mr. Robert Jahn
President
Boise City Canal Company
P.O. Box 2157
Boise, ID 83701

bc: W-1000, W-1500, W-6000, W-6331
PN-1000, PN-1050, PN-1010, PN-3000, PN-3300, PN-6306, PN-1150
SRA-1000, SRA-6123

Comment Letter No. 5

From: "Bryan Searle" <mrsrud@iglide.net>
To: "Mr. Steve Dunn" <sdunn@pn.usbr.gov>
Date: 2/4/04 9:43PM
Subject: Renewal Of Water Contracts

Bryan Searle
538 E. 1250 N.
Shelley, IDAHO 83274

February 4, 2004

Mr. Steve Dunn
Bureau of Reclamation, Snake River Area Office
214 Broadway Ave.
Boise, ID 83702

Dear Mr. Dunn:

I am writing about the Draft Environmental Assessment (EA) for the Bureau of Reclamation's Proposed Renewal or Conversion of Water Service Contracts for Lucky Peak Reservoir. I strongly support Alternative 2-Convert to Repayment Contracts for Requested Amount.

5-1

I support the Alternative because it will benefit irrigators. According to the contracts presently held by the irrigators, they have the option to convert water service contracts to repayment contracts at their request. The BOR laws and rules give the contractor first right of refusal to convert the full amount of storage water from water service to repayment. Therefore, Alternative 2 follows BOR law and rules especially since all contractors have asked for conversion.

Alternative 2 shows that there would be minimal to no impact on the vegetation, bull trout, bald eagle, and anadromous fish. Furthermore, the pattern of Lucky Peak storage use would not be altered, and is not expected to change the pattern of use of Boise River storage. It is important that there are no altering effects to the surrounding area and habitat. Alternative 2 supports these concerns.

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

5-2

Thank you for the opportunity to comment on this important issue.

Sincerely,

Bryan Searle

Responses to Letter No. 5

- 5-1 Comment noted.
- 5-2 See response to comment 4-2
Thank you for your comments.



Idaho Water Users Association, Inc.

205 N. 10th St., Suite 530 • BOISE, IDAHO 83702
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WEBSITE - www.iwua.org

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February 6, 2004

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Assistant Director

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

Re: Draft Environmental Assessment - Lucky Peak Water Service
Contracts Renewal or Conversion

Dear Steve:

These comments are submitted on behalf of the Idaho Water Users Association (IWUA), regarding the Bureau's Draft Environmental Assessment on Lucky Peak Water Service Contracts Renewal or Conversion (Draft EA).

IWUA is a non-profit corporation, representing approximately 300 canal companies, irrigation districts, water districts, ground water districts, municipal and public water providers, hydroelectric companies, aquaculture interests, agri-businesses, professional firms and individuals, all dedicated to the wise and efficient use of our water resources. We are proud to count the majority of the Lucky Peak contractors among our members.

On January 29, 2004, at IWUA's 66th Annual Convention, our membership readopted the enclosed Resolution No. 2003-19 regarding Lucky Peak Contracts. The resolution notes that "Reclamation law and the existing contracts provide the right to convert the existing contracts to repayment contracts". This is confirmed by the Bureau in Section 1.1.2 of the Draft EA, which notes that "Reclamation has no authority to deny requests for the renewal or conversion of the Lucky Peak water contracts." IWUA's resolution requests that: "The Bureau of Reclamation agree to renew or convert existing water service contracts for the full amount of water included in the contracts, upon request by the contractors."

Mr. Steve Dunn
February 6, 2004
Page 2

Consistent with this formal resolution, IWUA supports the Preferred Alternative, Alternative 2, set forth in Section 2.2.2 of the Draft EA. IWUA also supports the comments submitted on the Draft EA by or on behalf of the various contractors.

6-1

Alternative 3, set forth in Section 2.2.3, would eliminate 6,405 acre-feet of Lucky Peak storage from the "contracted" category. To the extent the contractors want to retain a right to this water, Alternative 3 is not legally authorized for adoption by the Bureau. The storage of water for later use in irrigation, whether it is needed for irrigation every year or not, is a beneficial use of water, recognized under State law. Therefore, there is no basis for the Bureau to conclude that any of the water is not being beneficially used. Furthermore, such determinations must be made under State law and procedures, not by the Bureau. Finally, the full amount of contracted water is needed for current and future growth in the Treasure Valley, as evidenced by United Water Idaho's recent acquisitions of existing contract entitlements. Putting any of the contracted water into the "uncontracted" category would severely limit the ability to use the water for consumptive, beneficial purposes in the Treasure Valley. If anything, irrigators and other water users in the valley need more water made available, not less.

6-2

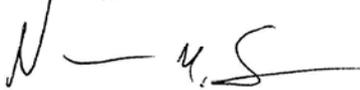
6-3

We agree with the analysis in Section 2.3 of the Draft EA regarding the alternatives considered, but eliminated from detailed analysis. These alternatives, including reallocation of the contracted water for winter stream flows, non-agricultural consumptive uses, flow augmentation for salmon, and a minimum pool for bull trout, are not legally authorized. They are also inconsistent with the purpose of the proposed action, which is to continue supplying supplemental irrigation water for the contractors.

6-4

We appreciate the opportunity to provide these comments and look forward to seeing the EA finalized and new contracts executed in the near future.

Sincerely,



Norman M. Semanko
Executive Director and
General Counsel

NMS:p
Enclosure

IDAHO WATER USERS ASSOCIATION, INC.
RESOLUTION NO. 2003-19
LUCKY PEAK CONTRACTS

WHEREAS, Water users in the Boise Project service area hold water service contracts to receive water from Lucky Peak Reservoir for irrigation purposes; and

WHEREAS, Lucky Peak Dam and Reservoir were constructed for the purposes of flood control and irrigation storage; and

WHEREAS, The Bureau of Reclamation holds water right license no. 63-03618, which authorizes storage of 111,950 acre-feet in Lucky Peak Reservoir for irrigation of lands within the Boise Project; and

WHEREAS, The irrigation component of license no. 63-03618 was perfected by irrigation districts and canal companies that hold or have held water service contracts with the Bureau of Reclamation; and

WHEREAS, Of a total reservoir storage capacity of approximately 293,000 acre-feet, approximately 71,000 acre-feet of water is delivered pursuant to current water service contracts held by 19 irrigation contractors; and

WHEREAS, The current contracts are 40-year contracts which are set to expire between 2005 and 2008 and need to be renewed one year prior to expiration; and

WHEREAS, Reclamation law and the existing contracts provide the right to convert the existing contracts to repayment contracts; and

WHEREAS, Repayment contracts are permanent and provide for repayment of the costs of constructing the dam, usually over a 40-year period, in exchange for a right to a proportionate amount of space in the reservoir; and

WHEREAS, Some have questioned the need to renew or convert the contracts for the full amount of water previously contracted for; and

WHEREAS, The Bureau of Reclamation's current policy is to charge water users for the cost of contract renewal or conversion, including National Environmental Policy Act (NEPA) studies and administrative costs, as operation and maintenance expenses, where payment is required in advance of any contract renewal process; and

WHEREAS, Several water users are doing their own environmental studies in order to keep these costs down.

NOW, THEREFORE, BE IT RESOLVED, By the Idaho Water Users Association that we hereby respectfully request that:

- (a) The Bureau of Reclamation agree to renew or convert existing water service contracts for the full amount of water included in the contracts, upon request by the contractors.
- (b) During the contract renewal process, the Bureau of Reclamation expediently make available to each contractor all information requested by the contractors in exercising their rights to convert their water service contracts to repayment contracts.
- (c) The Bureau of Reclamation acknowledge that maintaining the availability of the contractors' natural flow and storage water rights for existing and

future use is essential for the welfare of the people in the Boise Valley and the State of Idaho.

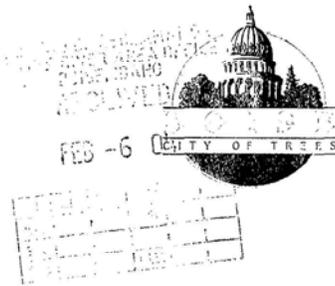
- (d) The Bureau of Reclamation acknowledge that the purpose of the irrigation storage water in Lucky Peak is to supplement the natural flow water rights of the contractors.
- (e) The Bureau of Reclamation acknowledge that the contractors' need for the quantities of water delivered pursuant to the existing contracts to supplement their natural flow water rights has been amply demonstrated.
- (f) The Bureau of Reclamation acknowledge that controlling Ninth Circuit decisions state that NEPA does not apply to proposed federal actions that do not change the status quo, and that the renewal/conversion of the Lucky Peak contracts does not change the status quo.
- (g) The Bureau of Reclamation not assess or analyze the contractors' historic use of the Lucky Peak storage water prior to renewing or converting their existing water service contracts.
- (h) There be no cost collection by the Bureau of Reclamation from contractors, for costs associated with the renewal/conversion of their existing Lucky Peak contracts.
- (i) Any sums paid to the Bureau of Reclamation by the contractors for renewal or repayment purposes be refunded to such contractors by the Bureau of Reclamation. In addition, any costs incurred by the contractors during the contract renewal or conversion process that would otherwise have been incurred by the Bureau of Reclamation, such as the cost of any NEPA studies, be reimbursed to the contractors by the Bureau of Reclamation.
- (j) Congress adopt any legislation and make appropriations as may be necessary to carry out the provisions of this resolution.

Responses to Letter No. 6

- 6-1 Comment noted.
- 6-2 See response to comment 4-2
- 6-3 Under Alternative 3, any storage that would remain uncontracted would not necessarily remain so over the long term. However, a decision on whether to contract or otherwise commit the storage would not be made at this time.
- 6-4 Comment noted.
Thank you for your comments.

Comment Letter No. 7

OFFICE OF THE MAYOR
DAVID H. BIETER



COUNCIL MEMBERS

M. JEROME MAPP VERNON L. BISTERFELDT
COUNCIL PRESIDENT ELAINE CLEGG
MARYANNE JORDAN DAVID EBERLE
COUNCIL PRO TEM ALAN W. SHEALY

February 4, 2004

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

Dear Mr. Dunn,

Thank you for the opportunity to comment on the Draft Environmental Assessment (Draft EA) for the Lucky Peak Service Contracts Renewal or Conversion, issued in December 2003.

Of the alternatives presented, Boise City strongly supports Alternative 1, No Action. The city requests that the Bureau consider a shorter term than 40 years for the renewal contracts. The city further supports an additional requirement for this alternative that includes a determination of beneficial use according to state law. The city does not support the other alternatives because of the final and unassailable aspects of contracting with private entities without provisions for public review or evaluation of the use of the water in the future. This is contrary to the public interest and is contrary to the intent of Idaho water law. 7-1 7-2

Boise City is concerned with the Bureau pursuing any alternative that converts leased service contracts to repayment contracts. The primary reason for concern is the finality of the decision. Since the repayment contracts will put control of the water permanently in the hands of private entities, the public will never again have the chance to evaluate whether its resource is being used appropriately. Secondly, the Draft EA does not present information concerning the payment structure or provide economic analysis of the proposed conversion of the existing contracts to repayment contracts. The city believes that this information is essential for the public and interested stakeholders to make an informed decision concerning conversion of the contracts. Finally, the Draft EA determines that there is no difference in the impacts of any of the alternatives. The city could not find sufficient information in the Draft EA to support this conclusion concerning the Conversion Alternatives given the significant impacts and consequences of selection of these alternatives. 7-3 7-4 7-5

In addition to the above-stated concerns regarding the Conversion Alternatives, the city is concerned with the rigor of the analyses contained in the Draft EA. The City of Boise finds inconsistencies in Section 2.3, "Alternatives Considered, but Eliminated from Detailed Analysis," that result in incomplete consideration of the effects of alternatives. The lack of rigor in the Bureau's analysis, when taken in conjunction with other actions that are available to the Bureau through the recontracting process, removes alternatives from consideration that would benefit the City of Boise and the public. For instance, "Reclamation has no unilateral discretion to allocate the water provided under the contracts to other entities or uses *so long as that storage can be put to beneficial use as determined by the state of Idaho*" (emphasis added.) The Idaho Department of Water Resources is currently evaluating the extent of beneficial use in the Boise River drainage as part of the Snake River Basin Adjudication (SRBA). The extent of beneficial use will be determined by the SRBA Court, a District Court within the state of Idaho. Since the Bureau is required 7-6 7-7

to comply with state water law in the administration of the water in Lucky Peak, logic dictates that the Bureau would allow the state to determine the extent of beneficial use and consider their renewal agreement options accordingly.

7-7

A second analysis that concerns the city is the Bureau's interpretation of the language of the "1956 statute." The Reclamation Act calls for renewal "under stated terms and conditions mutually agreeable to the parties." This language can often be found in contracts in order to allow for renewal should both parties be satisfied with renewal conditions. The Bureau has chosen to interpret this language as a requirement to acquiesce to all of the demands of the contract holders without requiring anything other than unspecified cash payments in return. In doing so, the Bureau has effectively eliminated flexibility in water use, concurrently eliminating the public's voice from ever again evaluating whether its resource is being used appropriately.

7-8

The Bureau seems to be a willing participant in an effort that will result in a loss of flexibility and public review of the use of water, in favor of transferring contracted water in perpetuity to private entities. If the Bureau moves forward with the preferred alternative, there will never again be public evaluation to the extent of beneficial use of the contracted water. Potential users will be required to enter into a seller's market with a private entity, rather than enter into negotiations with the Bureau to contract for the water at a price comparable to other contract holders. The Bureau will become a facilitator of the process that will result in private entities profiting from the sale of a public resource with no benefit to the public.

7-9

In conclusion, of the alternatives presented, the City of Boise recommends that the Bureau adopt Alternative 1: The No Action Option, as the preferred option at this time for the reasons described above.

This concludes our comments on the Draft EA. Should you have any questions concerning these comments or would like to discuss the city's position further with us, please feel free to contact Chuck Mickelson, P.E., Boise City Public Works Director at 384.3903.

Sincerely,

David Bieter
Mayor

cc: Chuck Mickelson
Matthew Wilde
Jim Hall

Responses to Letter No. 7

- 7-1 The No Action alternative, to continue as water service contracts with no substantial change in contract terms, is presented as a means of comparing the environmental effects of the action alternatives to the effects of continuing the existing situation.

As explained on pages 1-2 and 1-3 of the Draft EA, Reclamation is bound by both Federal statute and water service contracts or, at the request of the contractors, to convert them to repayment contracts. The Solicitor of the Department of the Interior has determined that this statutory and contractual language gives each contractor “a right to renewal.” *See Renewal of Friant Unit Contracts*, M-36961, 96 I.D. 289, 297 (November 10, 1988) (emphasis original). Indeed, “once a contract contains a renewal clause, the Secretary has no discretion to deny renewal of the contract.” *Id.* at 300. By analogy, once a contract contains a conversion clause, the Secretary has no discretion to deny conversion of the contract to a repayment contract.

Here, all Lucky Peak contractors have requested conversion of their water service contracts to repayment contracts. Thus, Reclamation has no discretion to deny conversion of the contracts. By definition, repayment contracts are perpetual contracts.

For clarification, we have added the clauses from the existing contracts pertaining to renewal and conversion in section 1.1.2 of the Final EA.

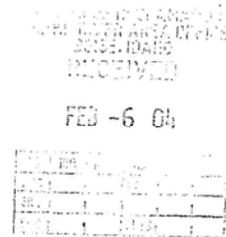
- 7-2 Beneficial use is determined by the state of Idaho in accordance with state law. If through this State process it is determined that a contractor is not capable of beneficially using their contracted water, the contract would be amended to reflect the State’s determination of beneficial use.
- 7-3 It is expected that the new repayment contracts under either of the action alternatives would have assignment provisions similar to those in the existing water service contracts that would enable the contractors to assign all or part of their contracted storage to other parties. As described in section 1.3 of the Draft EA, these assignments have occurred in the past and some are currently pending. Reclamation’s approval of the assignments has been and will continue to be subject to NEPA regulations, and an appropriate level of public review will occur prior to making a decision.
- 7-4 As stated on page 3-55 of the Draft EA, payment structure and costs are not expected to be significantly different than payments under the No Action

- alternative (water service contract). We have added additional payment information to section 3.6.2 in the Final EA.
- 7-5 The execution of a certain type of contract for a certain amount of storage has no effect on the human environment by itself. The environmental effects of the action alternatives would primarily occur from operational changes in the reservoir system or changes in irrigation deliveries, compared to the No Action alternative. As discussed in the Draft EA, there would be no measurable operational change under the Preferred Alternative and only a very slight change under Alternative 3.
- 7-6 It is unclear from the comment what inconsistencies in section 2.3 of the Draft EA are being referred to. Section 2.3 lists suggestions that are either not available to Reclamation because of the limited discretion under the contract terms and Reclamation law or those that do not meet the purpose and need for action described in section 1.0 of the Draft EA. NEPA does not require detailed analysis of alternatives that do not meet the stated purpose and need for action. As explained in section 2.3, these alternatives were eliminated for the stated reasons.
- 7-7 Reclamation has limited discretion to postpone entering into long-term contracts with the Lucky Peak contractors until completion of the SRBA. However, the contracts will conform to any state determinations of beneficial use as well as applicable federal laws.
- 7-8 This EA is not intended to include all of the various terms and conditions that may be included in the final contracts. Reclamation recognizes its discretion and responsibilities associated with negotiation of the mutually agreeable terms and conditions for the Lucky Peak contract conversions. The negotiation of these contracts will be conducted in accordance with 43 CFR Sec. 426.22, Reclamation law, and Reclamation policy. See response to comment 7-3.
- 7-9 See response to comment 7-2.
Thank you for your comments.

2/4/04

Comment Letter No. 8

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



Re: Comments on draft EA for Lucky Peak
Water Service Contracts Renewal or Conversion

Dear Sir:

As a shareholder in Foothills Water Company and Canyon County Water Company, I urge the Bureau of Reclamation to support the Preferred Alternative of converting water service contracts to repayment contracts, on the night of renewal for the existing contracted storage amounts. This would meet the intent and purpose of the water service

8-1

Page 2 of 2

contracts for the Lucky Peak
reservoir as mutually agreed
upon nearly forty years ago.

Sincerely,

Flip Phillips

Flip Phillips
7830 N Star Road
Meridian ID 83642

(208) 286-9627

Responses to Letter No. 8

- 8-1 Comment noted.
 Thank you for your comment.



February 6, 2004

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

RECEIVED
FEB -6 04

RE: Trout Unlimited Comments to the U.S. Bureau of Reclamation's Lucky Peak Water Service Contracts Renewal or Conversion Draft Environmental Assessment

Dear Steve:

The Ted Trueblood Chapter of Trout Unlimited (TU) and TU Idaho Water Office submit the following comments regarding the U.S. Bureau of Reclamation's (BOR) Lucky Peak Water Service Contracts Renewal or Conversion Draft Environmental Assessment (DEA).

As you are aware from our National Environmental Policy Act (NEPA) scoping comments in 2002 and subsequent meetings between TU and the BOR, our organization is very interested in the long-term watershed health of the Boise River system and the wild trout fishery. This interest translates into a desire to partner with the BOR on a variety of study and research efforts being contemplated in the Boise River system, and the belief that the BOR – through careful planning and broad stakeholder participation – can ensure river stewardship and improved water management in future years. The Boise River system currently suffers from inadequate winter streamflows in the lower river that hinder the long-term health of the fishery.

In light of the resource issues and pressures facing the Boise River system, future water storage and management decisions will be critical to both meeting irrigation demands and fishery needs. With this in mind, we offer a number of comments regarding the BOR's contemplated actions concerning water storage contracts and irrigation needs of current Lucky Peak Reservoir contract holders. We are convinced that the BOR can provide for long-term irrigation needs while still making future contracts flexible enough to allow for water market and water transfer approaches to improve streamflows in the lower Boise River. While we are disappointed that the DEA too narrowly and arbitrarily defines the purpose and need for action and the range of alternatives, we do believe these defects can be addressed in a Final EA by incorporating an additional alternative (proposed below) that would have widespread support.

In addition to our specific comments to the DEA outlined below, we believe it is also necessary to raise the issue of timing and whether or not the BOR proposal to renew or convert the contracts is "putting the cart ahead of the horse." The state water rights of the Lucky Peak Reservoir contract holders are part of the larger Snake River Basin Adjudication (SRBA). Until important analysis is complete regarding water right and title (for the storage rights) issues, it is questionable whether now is the best time for the BOR to enter into either a long-term service

9-1

contracts or convert to repayment contracts. It may be more prudent to instead enter into year-to-year or short-term contracts until the SRBA analysis is more complete. The State of Idaho has taken this issue seriously enough to formally stay certain proceedings until key SRBA issues have been addressed.¹ It certainly seems prudent to not make long-term and irreversible decisions regarding storage contracts until stakeholders and the BOR have a clear picture of the existing water right “portfolio” of the Boise Valley irrigation community and substantive and procedural issues pertaining to water rights in the Boise River Basin are fully assessed.

9-1

Pages 1-1 to 1-4 – Purpose and Need

The correct purpose for the proposal analyzed in the DEA is to provide adequate water supplies for irrigators who will continue to need supplemental irrigation storage water into the future. The DEA confuses the underlying purpose and need with the proposed action to renew or convert these water contracts.² The need is for the water; the need is not for a new contract.³

9-2

The Purpose and Need section in the DEA discloses the BOR’s interpretation of federal reclamation law as it applies to whether or not, and to what extent, the Bureau has discretion regarding the renewal of these contracts. We agree that the provisions of the 1956 Act do indeed provide Boise Valley irrigators a first right to renew these contracts for storage water that they are actually putting to beneficial use. But the DEA is one dimensional in emphasizing the limited discretion of the BOR regarding the question of whether to renew, while ignoring the plain language in the statute directing that new contract terms can be developed with “terms and conditions mutually agreeable to the parties.”

9-3

The 1989 recommendations from the Council of Environmental Quality regarding NEPA implementation and BOR contract renewal issues make it clear that the Bureau should exercise independent judgment in the development of contracts and not just agree to terms dictated by the contractors. With that in mind we believe it is very important for the BOR to use this discretion in the Lucky Peak situation so that future water management is not unnecessarily constrained. Our preferred alternative (see below) for analysis in the Final NEPA document explores this in more detail.

9-4

Page 1-3, end of top paragraph

The BOR needs to include some discussion in this section regarding what constitutes a beneficial water use. While beneficial use is defined by the federal Reclamation Act as the “basis, measure, and the limit” of the right to use water stored by a federal project, state law is the actual determinant for what uses are beneficial. In recent years, most state water codes have evolved to include non-consumptive types of water use such as those necessary for fishery, aquatic health,

9-5

¹ Idaho Department of Water Resources. In the Matter of Application for Transfer of Water Rights in the Name of United Water Idaho, Inc., Integrated Municipal Application Package. December 18, 2003 (ordering that water transfer proceeding be stayed pending issuance of partial decrees for United Water Idaho’s water right claims by the SRBA District Court).

² Federal regulations state that an environmental document should “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. 1502.13. The proposed action and the underlying need cannot be the same. Such circular reasoning has been found by the courts to violate the National Environmental Policy Act *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666-70 (7th Cir. 1997).

³ By focusing only on the contractual alternatives the DEA overlooks the role of water conservation and system improvements as an option to help ensure irrigation water delivery. Indeed, provisions could be added to a contract renewal to improve water conservation and delivery so that not only supplemental irrigation needs are met but also other important goals such as improved streamflows.

or aesthetic values as a beneficial use of water. Idaho is no different, and streamflows to protect fishery resources are recognized by state law as beneficial.

Page 1-3, second paragraph, second and third sentences

The DEA asserts Reclamation has no authority to deny requests for renewal or conversion of the Lucky Peak contracts. The BOR also asserts that the amount of water supplied in the contract cannot be changed unless the contracted amount of water is not beneficially used. There is no explanation of how the Bureau intends to enforce the provisions when lands are no longer irrigated or converted to subdivisions as is the trend in the Boise Valley. The DEA does not discuss incorporating new terms into the renewed or converted contracts that retain future flexibility to respond to changing conditions, including the ability to re-allocate water that is no longer being used for irrigation purposes. Again, this is not arguing the point about the BOR's lack of discretion regarding contract renewal, but emphasizing that the BOR has the legal authority ability to negotiate new contract provisions that preserve future flexibility.

9-6

Page 1-3, second paragraph, last sentence

We agree that the Secretary of Interior has considerable discretion to change the terms of the water service contract when renewal or conversion occurs. Please discuss in the DEA text who the entities are that must "mutually agree to the terms of the contracts" before they are signed. Further, there should be some discussion regarding opportunities for non-irrigation stakeholders, such as Trout Unlimited and other interests, to participate in the development of those contract terms.

9-7

9-8

Since the BOR is a federal agency and entering into a contract would constitute a federal action under Section 7 of the Endangered Species Act, it would be useful to disclose the role of the consulting agencies (U.S. Fish and Wildlife Service and National Marine Fisheries Service) in the development of terms and conditions of the contract which would need to be mutually agreeable to the parties.

9-9

Page 1-4, 1.2 Scoping

We would suggest including the date when the BOR NEPA scoping letter was sent out for public and agency comment.

9-10

Chapter 2, Preferred Alternative

Of the three options presented, Trout Unlimited believes that BOR's preferred alternative should be the No Action option. This scenario would include status quo Lucky Peak water service contracts that could be extended for a few more years until a more comprehensive, community based water needs analysis is completed by BOR.

9-11

Page 2-10, 2.2.3 -- Alternative 3.

Alternative 3 is based on the highest historical annual use determination for each contractor. For many of those contractors the highest water use year was early in the original contract term, and therefore, may not reflect current use or trends. The amount of water provided pursuant to these

9-12

renewed contracts - whatever the terms - should reflect an accurate, consistent and current determination regarding the amount that is currently being put to beneficial use. This is required by the Reclamation Act and subsequent federal laws pertaining to water delivered from federal storage projects. Further, it makes some sense that new contract terms are incorporated to allow the water use and beneficial use determination to be revisited/recalculated so that if predictions are accurate and the amount of Treasure Valley irrigable lands continues to diminish, then the BOR is able to revisit annual water use allocation and management decisions made pursuant to the new contracts.

9-12

9-13

Despite the flaws pointed out above, the concept of an alternative based on actual water use would have merit if there were additional alternatives based on other measures such as long-term average use or projected use based on continued loss of irrigated lands in the subject water districts.

Chapter 2, alternatives not analyzed that need to be

Conditions are ripe in the Boise Valley for conducting a project reauthorization study relative to Lucky Peak water use. The proposed action in the DEA is not based on a true water needs assessment for irrigators or for the Treasure Valley. Instead, both substantive alternatives focus on preserving historic contract terms and water uses. In light of the continuing rapid conversion of farm land to suburban and commercial land uses – estimated by some sources to be about 5,000 acres per year – permanently committing 71,000 acre-feet of water represents a short sighted proposal. Such an approach will preclude some possible water management alternatives that could meet a broader array of stakeholder water needs. In the near term, Trout Unlimited does support the use of much of the 71,000 acre-feet of Lucky Peak storage for supplemental irrigation needs, but certainly not the entire amount as presently proposed in the DEA, and not in the “permanent” form identified in the preferred alternative.

9-14

The Final EA should include an additional alternative that takes advantage of the discretion the BOR has to negotiate "terms and conditions mutually agreeable to the parties." The terms and conditions should explore a range of options for the following variables for example:

9-15

- different pricing levels or rates for water, including charging a higher rate for lands that are sold for subdivision development and a lower rate for water that when not used for irrigation is made available for improving wintertime flows in the lower Boise River;
- conditions that provide built-in incentives to facilitate water transfers to improve streamflows and provide financial compensation to irrigators from the multitude of funding sources designed specifically for fish and wildlife enhancement projects in the Columbia River Basin (e.g., Northwest Power Planning Council Fish and Wildlife Program, Idaho Power Company off-site mitigation, etc.);
- adaptive management provisions that allow water use and beneficial use determinations to be revisited/recalculated if the amount of irrigated lands in the Treasure Valley continues to diminish. The BOR would then be able to revisit annual water use allocations; and

- financial and other incentives for contractors to participate in BOR-financed water conservation projects.

9-15

This additional alternative will provide a comparison between the irretrievable commitment of resources associated with a permanent repayment contract and a new water service contract that allows the BOR and the contractor to respond to changes in water use dynamics and afford the ability to take affirmative steps to improve habitat for threatened and endangered species or the wild trout fishery.

Page 3-19, Figure 3-2

The vertical scale on this graphical display should be in true cfs increments rather than 100 cfs units. This will enable the reader to better see the true winter minimum flow levels in the Boise River below Lucky Peak Dam. These seasonal flows appear to be non-existent in the graph as depicted in the DEA. For the higher end of spring flow occurrences, the scale could be broken at 5000 cfs and then shown in 100 cfs units.

9-16

Page 3-23, Salmon Flow Augmentation, second paragraph

The reader is told that the acquired 40,932 acre-feet of salmon flow augmentation water must be run through the Boise River water rental pool. Please explain whether there is a cost associated with this and if so, what the charge is for releasing salmon water storage.

9-17

Page 3-26, No Action Alternative, last paragraph

Please explain why United Water Idaho and other municipal water users seem to have priority for Lucky Peak water service contract assignments. Why aren't similar assignment arrangements available for non-consumptive water uses?

9-18

Page 3-28, Preferred Alternative

This short paragraph indicates that new repayment contracts would contain assignment provisions "similar" to those in the existing water service contracts. The BOR should discuss the kinds of things those provisions might include and explain whether repayment contract assignments would require the BOR to comply with NEPA and other federal environmental laws.

9-19

Page 3-28, Environmental Consequences, Alternative 3

It is not clear why the 6,405 acre-feet of water identified in Alternative 3 would remain in uncontracted Lucky Peak storage carryover. This water could be used to meet other contemporary community needs such as municipal water, water quality improvements, hydropower generation, ESA needs, and winter instream flow improvements. The storage could be managed to meet a combination of the aforementioned needs and a variety of multi-objective, non-irrigation water demands.

9-20

Page 3-33, Fish, Boise River Below Lucky Peak Reservoir, first paragraph

Rainbow trout also reproduce naturally in the river reach between Barber Park and Star.

9-21

Page 3-45 to 3-47, Bull Trout and Bald Eagles

The DEA states there is little or no difference between the alternatives and their effects on the listed bull trout. However, current BOR operations in the Boise River system do have a negative impact on bull trout, including the correlation between current operations of Arrowrock Reservoir and loss of bull trout into Lucky Peak Reservoir; bull trout that migrate into Lucky Peak Reservoir have no way of returning upstream to access natal spawning and rearing habitat. There may be future water management alternatives that better protect bull trout that are constrained by less flexible alternatives that lock-in current management.

9-22

Similar to our comments about bull trout, there are impacts on Bald Eagles that may be perpetuated by the decision to continue similar management by renewal or conversion of the contracts. The DEA erroneously claims there would be "no effect" by renewing or conversion of the contracts when in fact it should state that the negative effects would continue. The most likely location where negative effects will continue will be in the lower Boise River where winter time flows are constrained resulting in limitations to the fishery and therefore on available forage for Bald Eagles.

9-23

The Bureau may want to consider, and disclose in the Final EA, the ramifications of a conversion to a repayment contract and continued negative impacts to bull trout and Bald Eagles. Because the contract will be perpetual, current negative impacts on both species will be harder to avoid because future management flexibility is lost. The US Fish and Wildlife Service will likely have to give greater weight to the perpetual nature of the permanent contract as opposed to a service contract that includes more flexible terms, and include more stringent terms and conditions in its Biological Opinion.

Environmental Consequences associated with Alternative 3

Most of the environmental effects related to Alternative 3 have not been properly evaluated in the DEA. This alternative identifies 6,405 acre-feet that would not be available for repayment contracts to Lucky Peak irrigators because of a lack of historical use. In the DEA, the BOR assumes that this "new" uncontracted water would remain in the Boise River reservoir system as carry over. In contrast, Trout Unlimited's position is that this represents reservoir space that should be made available to meet other uses, both consumptive (DMCI water) and non consumptive needs (instream flow). The failure to include mitigation measures in the alternatives is another reason why the BOR should examine alternative uses for the water in the Final EA.

9-24

We believe that Reclamation should reevaluate the environmental consequences of actually using the 6,405 acre-feet to show the true benefit to each of the resource groups identified as the Affected Environment. For instance, how much flow improvement could be expected in the lower Boise River if this water was released in the winter and then stored in the Idaho Power Company's Hells Canyon reservoirs for subsequent ESA salmon flow augmentation? If fully

contracted for DMCI purposes, what would the year round flow increases be in the Boise River that could benefit river fisheries?

9-24

Failure to discuss the options for ultimate disposition of the 6,405 acre feet of space appears to be an arbitrary and short-sighted decision. While BOR officials have indicated in the past that they would like to deal later with the question of what to do with left over water, the agency has not provided a road-map regarding future public and administrative processes that lead to the eventual disposition of these issues.

The environmental effects analysis is also insufficient because there is little or no data and information for the reader to evaluate. Despite the fact that the alternatives are in fact different, the reader is treated to generic statements that the impacts "would be the same" for alternatives when compared to one another. Such declarations are essentially meaningless without providing some information to back it up.⁴

9-25

Also missing from the effects analysis is disclosure and discussion of indirect effects that the preferred alternative will have on precluding the BOR from being able to respond to changes in water needs in the Boise Valley.

9-26

If in fact there are no differences in effects when comparing alternatives the Bureau needs to ask itself if it has failed regarding the agency's legal duty under NEPA to provide for a reasonable range of alternatives. Without making corrections in the Final EA to increase the number and variety of alternatives and consider and disclose direct and indirect effects, the BOR many have unwittingly placed itself and the contractors in a legally vulnerable position. Trout Unlimited believes these defects can be corrected with additional effort.

Page 3-53, Agricultural Economy Information

The DEA says that the Lucky Peak water service contracts supply supplemental irrigation water to approximately 90,000 acres. This is the present snapshot in time. The document should include a past snapshot of what the service acreage was when the contracts were first signed some 40 years ago, and if and how land uses have changed in the original water service areas. Further, based on land use trends in the Treasure Valley, the DEA should project into the future - say 10, 20, and 40 years, as to how much of the Lucky Peak served lands will be converted to suburban and urban uses. This should also be done for all of Ada and Canyon counties to better portray overall future conditions. Such information can probably be derived from information generated by the Community Planning Association of Southwest Idaho.

9-27

Given anticipated farmland conversions throughout the Boise Valley, a discussion should be included on what the irrigation districts would be expected to do, such as market transfers, with all the water they no longer needed for irrigation.

⁴ *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (declaring that "[f]ederal officials are duty-bound to make data available to the public. Relying on "expert opinion without hard data either vitiates a plaintiffs ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions")

Mitigation Measures

We have no page numbers to reference concerning mitigation measures because the DEA is bereft of the topic. The lack of discussion about mitigation measures probably emanates from the flawed thinking that the proposed action and alternatives have no effects and therefore there is nothing to mitigate. A hard look at the alternatives makes clear that there are continuing effects on the Boise River, both throughout the reservoir system and downstream. The limited discretion of the BOR regarding the question of whether to renew contracts does not relieve the duty to take a hard look at the effects of the decision, disclose the effects to the public, and discuss mitigation measures that can be incorporated into the proposed action and alternatives.

9-28

Mitigation Proposal

Trout Unlimited believes a feasible mitigation measure exists that could be incorporated into the EA to address the low winter streamflow issue in the Lower Boise River. The BOR controls nearly 41,000 acre feet of space in Lucky Peak dedicated to flow augmentation releases in the summer months for anadromous fish in the lower Snake and Columbia Rivers. Similar BOR-controlled space in Payette River reservoirs is also dedicated to the flow augmentation program. However, approximately half the water from Cascade Reservoir is managed for winter release as is nearly 40 percent of the water from Deadwood Reservoir.

We believe the BOR should engage Idaho Power Company and the other affected parties to develop an operation change that allows for a similar percentage of the Boise River flows to be released in the winter months. For example, even a small change in the timing of water releases of just one-third of the stored water – about 13,000 acre feet – would provide an additional 35 cfs in the lower Boise River for 180 days. This would constitute a 15 percent improvement over the typical winter flows of 240 cfs.

9-29

Trout Unlimited appreciates the opportunity to comment regarding the Lucky Peak DEA. We value our current partnerships with the BOR in Idaho and look forward to working with the agency and water users on important wild and native trout protection and restoration efforts throughout the state. We do have two additional requests regarding future Luck Peak issue. First, please include TU on the distribution list to review the BOR NEPA compliance documents pertaining to pending and future Lucky Peak water contract assignments. Second, in anticipation of the need to define contract terms in any future Lucky Peak water service contract assignments or renewals, TU would like to be involved to the maximum extent possible in developing such terms and conditions.

9-30

9-31

Please do not hesitate to contact us regarding any questions about these comments.

Sincerely,


Richard Prange – President
TU Ted Trueblood Chapter


Scott Yates – Director
TU Idaho Water Office

Responses to Letter No. 9

- 9-1 See responses to comments 7-1 and 7-7.
- 9-2 The purpose and need for a proposed action must answer the question of why the agency has proposed the particular action. Under existing statutory and contractual constraints, Reclamation must either renew or convert the Lucky Peak water service contracts. Reclamation, therefore, properly focused the underlying purpose and need upon the unique mandates requiring Reclamation's proposed action in this situation. Also see response to comment 7-1.
- 9-3 See response to comment 7-8.
- 9-4 See responses to comments 7-1, 7-3, and 7-8.
- 9-5 We agree and have added language to section 1.1.2 describing beneficial uses under Idaho law.
- 9-6 As stated on page 1-6 of the Draft EA, the state of Idaho recognizes irrigation of lawn parks and gardens as irrigation. The Draft EA acknowledges that lands served by the contractors are being developed into residential and commercial uses; however, many of the contractors currently are providing irrigation water for these new land uses and will continue to do so. (pg 3-28 of Draft EA).

Reclamation does not have the unilateral authority to reallocate Lucky Peak storage water to meet other water needs. See response to comment 7-1. Any renewed or converted contracts, however, will include a provision permitting assignment of the contract to third parties under certain circumstances. This assignment provision will ensure the flexibility needed to address changing water needs and land use in the future. The provision will require Reclamation's approval prior to any assignments, and Reclamation will complete a separate analysis for each assignment to ensure that it complies with state and federal laws, including NEPA, ESA, and section 8 of the Reclamation Act limiting use of Reclamation project water to that which can be beneficially used.

If in the future, the state of Idaho determines that stored water under contract cannot be beneficially used, the water would return to Reclamation. See also response to 7-2.

- 9-7 The entities that must mutually agree are the parties in the contract. The parties are the United States of America, represented by the contracting officer who is the Secretary of Interior or his duly authorized representative, in this case the Reclamation Regional Director; and the contractors, who are the irrigation and water user organizations receiving water service.
- 9-8 See responses to comments 7-3 and 7-8.
- 9-9 Reclamation has completed its requirement under section 7 of ESA through its determination of “no effect” to listed species in section 3.4 of the EA. Although concurrence from USFWS and NOAA Fisheries is not required for this determination, USFWS has concurred via memorandum of February 16, 2004 (letter no. 17).
- 9-10 The date of the scoping letter has been added to section 1.2, first paragraph, of the Final EA.
- 9-11 See response to comment 7-1.
- 9-12 As discussed in this section 2.2.3 of the Draft EA, and presented in the Contractors’ Use of Lucky Peak Storage discussion in section 1.1, the storage is used conservatively by many of the contractors for multiple year drought protection. The contractors typically preserve as much stored water as possible for use during the following irrigation season to help meet future shortages. The information presented in Figure 3-3 indicates that the pattern of use during recent drought year in 2001 is similar to drought years as far back as 1977. Reclamation believes that using highest annual delivery information is a reasonable measure of an amount of storage that would still meet the underlying purpose and need. See responses to comments 7-2 and 9-6.
- 9-13 See responses to comments 7-2 and 9-6.
- 9-14 See responses to comments 7-1 and 9-6.
- 9-15 The alternatives suggested for fish and wildlife enhancement are either outside the scope and purpose of the project, or are already present in proposed contract terms and state water leasing mechanisms. See response to comment 9-6. Annual water transfers already occur and would continue through the water rental pool, as discussed in section 3.1 of the Draft EA. Provisions for permanent assignment of storage would also be a part of the action alternatives, as stated in section 3.1 of the Draft EA. Also see response to comment 7-3. With regard to beneficial use determinations, see responses to

comments 7-2 and 9-6. Water conservation programs that provide Reclamation technical and financial assistance to water user entities, such as those under the Reclamation Reform Act and Water 2025 are available.

- 9-16 The graphs on page 3-19 of the Draft EA are intended to portray very general differences among good, average, and low water supply years. The discussion of releases from Lucky Peak Dam on page 3-18 describe in cfs, the different releases under normal and dry conditions. Only general information is provided because these storage and release patterns would not change under the Preferred Alternative and would change very little under Alternative 3 compared to the No Action alternative.
- 9-17 Reclamation pays Water District 63, \$0.75 per acre-foot to run salmon augmentation flow water through the Boise River Water rental pool.
- 9-18 United Water and others have arranged assignments through purchase of interest in the irrigation entities which does not require Reclamation's involvement. Reclamation's role is only to approve or disapprove the assignments to formalize the contractual arrangement. Reclamation is willing to entertain any arrangements that have merit, provided that they are within project, water right, and contracting authorities.
- 9-19 Section 2.2.2 of the Final EA has been revised to clarify that assignment provisions would be subject to NEPA compliance. See responses to comments 7-3 and 9-6.
- 9-20 See response to comment 6-3.
- 9-21 Section 3.3.1, under Boise River Below Lucky Peak Reservoir of the Final EA has been revised to indicate natural reproduction also occurs.
- 9-22 The entrainment issue is addressed in Reclamation's current BO for its operation, as indicated on page 3-42 of the Draft EA. The attached USFWS memorandum has concurred that implementation of the Preferred Alternative would have no effect on entrainment rates (See response to comment 9-9.) Concerning alternatives that would benefit bull trout, see responses to comments 2-1, 7-1, and 9-6.
- 9-23 Please refer to the attached memorandum from USFW regarding the "no effect" determination for bald eagles of Lucky Peak contract renewal. As stated on page 3-45 of the Draft EA, USFWS has concurred that continued operation of Reclamation's Boise River projects would not adversely affect bald eagles.

- 9-24 See response to comment 6-3. The use of any uncontracted storage is outside the scope of the analysis of this EA. Through the scoping process, and other means, Reclamation is aware that there are a variety of interests in any storage that would be made available through the renewal process, including contracting to other entities for irrigation. Because no decision is being made at this time, we cannot speculate on where any uncontracted storage may be committed under Alternative 3 and what the environmental effects might be.
- 9-25 Operationally, there would be no difference between the Preferred Alternative and the No Action alternative. The reasons operations would change very little under Alternative 3 are explained on page 3-29 of the Draft EA.
- 9-26 See response to comment 7-3. Reclamation's role in this sense would be the same under the Preferred Alternative as the No Action alternative.
- 9-27 The Draft EA acknowledges that land uses have and continue to change and that the contractors continue to supply irrigation water to these changing land uses. As discussed on page 3-28 of the Draft EA, some of the storage would be expected to be transferred through yearly water bank leases or assignments. Because assignment provisions would be similar, the rate or magnitude of these transfers would be the same under the Preferred Alternative as No Action. As stated in the Draft EA, they may be reduced under Alternative 3.
- 9-28 Mitigation under NEPA regulations pertains to avoiding, minimizing, rectifying, reducing, or compensating for environmental impacts. Since virtually no adverse environmental impacts have been identified, no mitigation is proposed.
- 9-29 See response to comment 9-28 regarding the applicability of mitigation. Because mitigation would not apply, the measures suggested would be environmental enhancement and are outside the scope of this EA.
- 9-30 Trout Unlimited will continue to be on Reclamation's mailing list for NEPA documents.
- 9-31 We will continue to keep Trout Unlimited involved in future Lucky Peak contract activities. Trout Unlimited will be given an opportunity to provide comments on the draft contract in accordance with 43 CFR 426.22.
Thank you for your comments.



Comment Letter No. 10

IDAHO FISH & GAME
SOUTHWEST REGION
3101 South Powerline Road
Nampa, Idaho 83686

BOISE RIVER AREA OFFICE
BOISE, IDAHO
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Dirk Kempthorne / Governor
Steven M. Huffaker / Director

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February 4, 2004

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

Subject: Lucky Peak Water Service Contracts

Dear Mr. Dunn:

The Idaho Department of Fish and Game (Department) has reviewed the draft Environmental Assessment (EA), Lucky Peak Water Service Contracts, Renewal or Conversion and have the following comments.

The preferred alternative in the EA is to convert the existing water service contracts, as they expire in the near future, to repayment contracts. The main differences between the two contracts are that the repayment contracts do not need to be renewed (i.e. they are permanent) and there is a set fee charged the contract holder regardless of the amount of water used each year. Under the current water service contracts, holders of a contract are charged based on the amount of water used each year and the contracts had to be renewed at intervals not to exceed 40 years.

Based on our review of the EA and information provided by you and other Bureau of Reclamation staff, it does not appear that conversion of the water service contracts to repayment contracts will impact future operational flexibility, nor will it result in any change to current operations. Therefore, it does not appear this action will have an adverse impact on fish, wildlife, or recreation resources at Lucky Peak Reservoir or in the Boise River downstream.

10-1

Thank you for the opportunity to comment.

Sincerely

Al Van Vooren
Southwest Regional Supervisor

Cc: Southwest Region (Dillon, Flatter)
NRPB

AV/el

Keeping Idaho's Wildlife Heritage

Responses to Letter No. 10

10-1 Comment noted.
Thank you for your comment.