# FINDING OF NO SIGNIFICANT IMPACT
# AND
# FINAL ENVIRONMENTAL ASSESSMENT

## Lucky Peak Water Service Contracts Renewal or Conversion

United States Department of the Interior
Bureau of Reclamation
Pacific Northwest Region
Snake River Area Office
Boise, Idaho

April 2004

*U.S. Department of the Interior*
*Mission Statement*

The mission of the Department of the Interior is to protect and provide access to our Nation's natural and cultural heritage and honor our trust responsibilities to Indian tribes and our commitments to island communities.

*Bureau of Reclamation*
*Mission Statement*

The mission of the Bureau of Reclamation is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public.

# FINDING OF NO SIGNIFICANT IMPACT

## LUCKY PEAK WATER SERVICE CONTRACTS RENEWAL OR CONVERSION

**Boise Project, Idaho**

**PN-FONSI 04-05**

### Introduction

The Bureau of Reclamation (Reclamation) is proposing to convert water service contracts held in Lucky Peak Reservoir to repayment contracts. Out of a total reservoir storage capacity of 293,100 acre-feet, approximately 71,000 acre-feet of water is allocated to 18 irrigation and water organizations in the Boise Valley (hereinafter referred to as contractors) under 19 water service contracts. The original contracts were executed between 1965 and 1968 and each remains in effect for a period of 40 years.

We propose that all of the water service contracts would be converted to repayment contracts written pursuant to subsection 9(d) of the Reclamation Project Act of August 4, 1939, for the use of up to 71,018 acre-feet of storage space, with the understanding the contractors would still have the right to request renewal, as opposed to entering into a repayment contract, if they so choose.

Reclamation is bound by both Federal statute and renewal clauses in the existing water service contracts to renew Lucky Peak water service contracts or convert them to repayment contracts if requested by the contractors. Specifically, the Act of July 2, 1956, provides that all water service contracts entered into after 1956 include provisions for renewal or conversion to repayment contracts "under stated terms and conditions mutually agreeable to the parties." See 43 U.S.C. Sec. 485h-1. Further, the Act provides that contractors "shall have a first right (to which 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."

On December 22, 2003, in accordance with the National Environmental Policy Act (NEPA), Reclamation distributed for public review and comment, a Draft Environmental Assessment (EA) analyzing the environmental effects of the proposed contract actions.

The Draft EA analyzed two action alternatives: the Preferred Alternative which would convert all water service contracts to repayment contracts for the same amount of storage currently held; and an alternative based on highest historic annual delivery of Lucky Peak storage to each contractor, which would reduce the total amount under contract by 6,405 acre-feet.

Since Reclamation must renew the contracts if requested, the No Action alternative presented in the Final EA is a continuation of the existing situation by renewal of the Lucky Peak water service contracts with no substantial change in contract terms. This is in accordance with Council on Environmental Quality (CEQ) guidance for implementing NEPA. CEQ made this same recommendation for the no action alternative for a similar contract renewal in the Central Valley Project of California (Federal Register 54:28477) concerning Reclamation's intent to renew long-term water contracts for the Orange Cove and other Friant Unit irrigation districts. The renewal provisions in the Lucky Peak water service contracts are identical to those in the Friant Unit.

**Proposed Action**

Reclamation proposes to implement the Preferred Alternative as described in the Final EA. Under the Preferred Alternative Reclamation would convert the existing water service contracts to repayment contracts for the amount of storage requested by the contractors, not to exceed the original contract amount, under mutually agreeable terms and conditions. Since all contractors have requested conversion for the same amount of storage under their current water service contracts, the total amount of storage that would be under contract would remain 71,018 acre-feet.

Analysis in the Final EA (pages 24-25) indicates the contractors will continue to provide irrigation water to farmland and developed urban areas into the future. This continued need along with multiple drought year protection shows the contractors have a reasonable ability to beneficially use the currently contracted amount of storage in the future.

The repayment contracts would contain assignment provisions similar to the existing water service contracts that would allow for contractors to assign all or part of their contract entitlement to another entity for irrigation use, subject to Reclamation's approval. Approval of assignments would be subject to compliance with NEPA, the Endangered Species Act (ESA), and other applicable laws and processes.

**Public Involvement, Consultation, and Coordination**

Reclamation issued a scoping document soliciting comments from agencies, Tribes, organizations and the general public on July 10, 2002. Reclamation received input from

12 agencies and organizations which was used to develop the issues, concerns, and alternatives analyzed in the Draft EA.

The predominant issue that came to light during scoping was a perception by several segments of the public that irrigation needs are diminishing because of development of agricultural land, and therefore, the Lucky Peak storage under consideration should be used to meet other needs such as instream flows and domestic water supplies. As explained above, Reclamation has very limited discretion with respect to contract renewals and conversions. Furthermore, by continuing to provide irrigation to new residential and commercial development, the contractors have a demonstrated need for their supplemental irrigation supply from Lucky Peak storage. For these reasons, alternative uses of the storage that were suggested during scoping were not analyzed in detail in the Draft EA.

The Draft EA was issued for public review and comment on December 22, 2003. Reclamation received written comments from 13 agencies and organizations, the Shoshone-Paiute Tribes, and 21 individuals.

Public comments on the Draft EA can be grouped into two general categories: those that favored the Preferred Alternative, generally irrigation organizations and individuals; and those that opposed the Preferred Alternative and believed that at least some of the storage should be used for other purposes such as instream flows and domestic water supplies. Many of these commentors opposed entering into permanent repayment contracts, as they believed it would eliminate any flexibility in reapportioning storage to other uses as agricultural land is developed. These comments were mostly made by environmental groups and the city of Boise.

The U.S. Fish and Wildlife Service provided a memorandum concurring with Reclamation's conclusion that ESA-listed species would not be affected. NOAA Fisheries did not respond to the Draft EA; however, concurrence is not required as Reclamation determined the Preferred Alternative would have no effect on listed Snake and Columbia River salmon and steelhead.

**Summary of Environmental Effects**

Future irrigation practices and operations under the Preferred Alternative (repayment contracts) were compared to irrigation practices and operations under the No Action alternative (water service contracts). The Preferred Alternative would provide contractors with the same amount of storage as under the No Action alternative, irrigation use would be similar, and no measurable operational changes would be expected to occur.

The Final EA analyzed effects to the following environmental parameters and issues identified during scoping:

Hydrology and Reservoir Operations.–There would be no measurable change in irrigation practices, reservoir storage and releases, and river flows compared to the No Action alternative (current practices).

Water Quality.–There will be no change in river and reservoir operations and irrigation practices compared to the No Action alternative; therefore, no effect to water quality.

Vegetation, Wildlife, and Fish.–No change in river and reservoir operations will occur compared to the No Action alternative; therefore, there will be no impacts to fish and wildlife habitat and vegetation communities.

Threatened and Endangered species.–There will be no change in river and reservoir operation; therefore, listed resident species (bull trout, bald eagle, gray wolf, and Canada lynx) or Snake and Columbia River salmon and steelhead will not be affected.

Recreation.–No change in reservoir levels and river flows are expected compared to the No Action alternative; therefore, there will be no effects to water-related recreation.

Economics.–The repayment provisions of a repayment contract under the Preferred Alternative would differ slightly from those of a water service contract; however, these differences are expected be minor and would not have a substantial economic effect.

Cultural Resources.–No impact to cultural resource properties, including traditional cultural properties will result compared to the No Action alternative.

Indian Trust Assets.–No impact to the Tribes' rights to fish, hunt, or gather or impacts to resources associated with these activities will occur compared to the No Action alternative.

Environmental Justice.–No low income or minority populations will be affected.

Cumulative Impacts.–Past, present, and reasonable foreseeable future actions when viewed with the Preferred Alternative will not result in cumulative significant impacts.

**Changes to the Draft EA**

Reclamation made several minor changes to the Draft EA based on public comments. Most of these changes involved minor factual corrections and clarifications. There were no substantial changes to the alternatives or the effects analyses.

## Finding

Based on the analysis of the environmental impacts in the EA and consultation with potentially affected agencies, Tribes, organizations, and the general public, Reclamation concludes that implementation of the Preferred Alternative would result in no measurable change; therefore, no significant impact to the quality of the human environment or natural and cultural resources in the project area. Conversion of the Lucky Peak water service contracts to repayment contracts for the currently contracted amount would continue to provide a needed supplemental irrigation supply and would continue to allow for reassignment of all or part of a contractor's storage to other entities, subject to Reclamation's approval, if the contractor chooses to do so. Preparation of an environmental impact statement is not required.

**Prepared by:**

Steve Dunn — 4/30/04

Area Office Environmental Specialist
Snake River Area Office
Boise, Idaho

Date

**Recommend:**

[signature] — 4/30/04

Area Manager
Snake River Area Office
Boise, Idaho

Date

**Concur:**

Daniel E. Ledwith — 4/30/04

Regional Environmental Officer
Pacific Northwest Region
Boise, Idaho

Date

**Approve:**

J. William McDonald — 4/30/2004

Regional Director
Pacific Northwest Region
Boise, Idaho

Date

# FINAL
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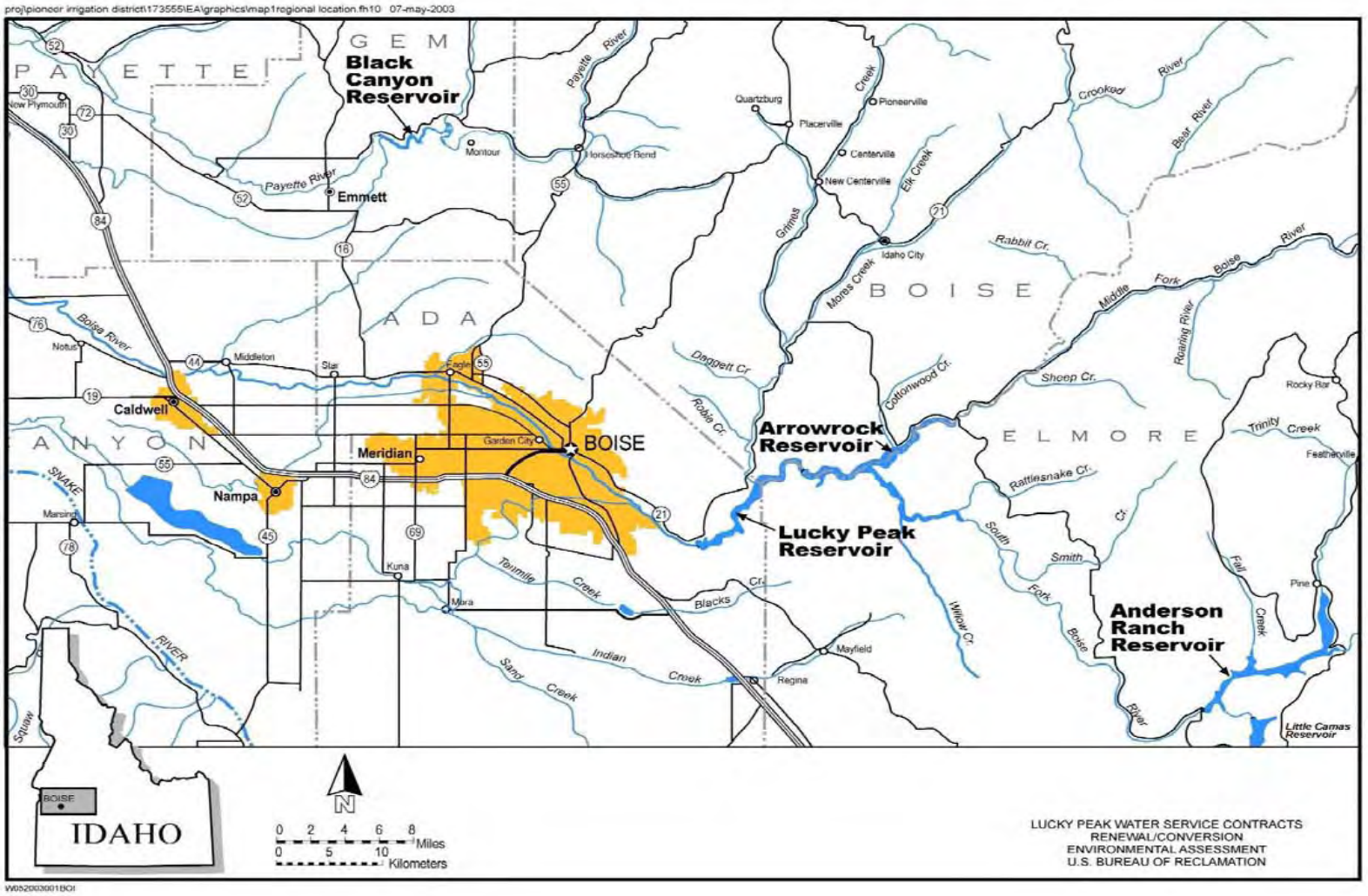


***Frontispiece*: Location Map**

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# ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| ac-ft | acre-feet |
| BA | Biological Assessment |
| BEA | Bureau of Economic Analysis |
| BO | Biological Opinion |
| BPA | Bonneville Power Administration |
| BPR | Boise Parks and Recreation |
| CVID | Capitol View Irrigation District |
| CEQ | Council on Environmental Quality |
| CHSU | Critical Habitat Subunits |
| cfs | cubic feet per second |
| COMPASS | Community Planning Association of Southwest Idaho |
| CWA | Clean Water Act |
| DPS | distinct population segments |
| District | Water District No. 63 |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| EO | Executive Order |
| ESA | Endangered Species Act |
| ESU | Evolutionarily Significant Units |
| FCRPS | Federal Columbia River Power System |
| FMO | foraging, migratory, and overwintering |
| FONSI | Finding of No Significant Impact |
| IDEQ | Idaho Department of Environmental Quality |
| IDFG | Idaho Department of Fish and Game |
| IDWR | Idaho Department of Water Resources |
| ITA | Indian Trust Assets |
| IWRB | Idaho Water Resources Board |

| | |
|---|---|
| NMID | Nampa and Meridian Irrigation District |
| NEPA | National Environmental Policy Act |
| NOAAFisheries | National Marine Fisheries Service |
| NOAA | National Oceanic and Atmospheric Administration |
| PCE | primary constituent elements |
| Reclamation | Bureau of Reclamation |
| RPM | reasonable and prudent measures |
| RRA | Reclamation Reform Act |
| SBMIC | South Boise Mutual Irrigation Company |
| SRBA | Snake River Basin Adjudication |
| TCP | Traditional Cultural Properties |
| TMDL | Total maximum daily loads |
| USACE | U.S. Army Corps of Engineers |
| USFS | U.S. Forest Service |
| USFWS | U.S. Fish and Wildlife Service |
| USGS | United States Geologic Survey |
| USRS | United States Reclamation Service |

# Chapter 1 PURPOSE AND NEED FOR ACTION

The Bureau of Reclamation (Reclamation) is proposing to renew the water service contracts held in Lucky Peak Reservoir or convert them to repayment contracts. Out of a total reservoir storage capacity of 293,100 acre-feet, approximately 71,000 acre-feet of water is allocated to 18 irrigation and water organizations in the Boise Valley (hereinafter referred to as contractors) under 19 water service contracts. The original contracts were executed between 1965 and 1968 and each remains in effect for a period of 40 years.

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.

## 1.1 Background

### 1.1.1 Location and General Description of Affected Area

Lucky Peak Dam and Reservoir are located on the Boise River approximately 10 miles southeast of Boise, Idaho (*Frontispiece*). The reservoir, when full (elevation 2955 feet), is 12 miles long. It has 45 miles of shoreline and 3,019 acres of surface area. The lake provides a total storage capacity of approximately 293,000 acre-feet at elevation 2955 feet.

The contractors that hold the water service contracts deliver water to meet the irrigation needs of approximately 90,000 acres of urban, suburban, and rural lands located in Ada and Canyon Counties in the Boise Valley. These lands are used for agricultural, residential, and commercial purposes.

### 1.1.2 Reclamation's Legal Authorities and Constraints

The Flood Control Act of 1946 (Public Law 79-526) authorized the U.S. Army Corps of Engineers (USACE) to construct Lucky Peak Dam and Reservoir "substantially in compliance with the recommendation of the Chief of Engineers in his report dated May 13, 1946." The May 13, 1946, report established flood control, irrigation, and power development as the authorized purposes of the Lucky Peak Project, with

recreational use of the reservoir as a recognized project benefit. Construction of Lucky Peak Dam was completed in 1955 at a cost in excess of $19 million.

For dam and reservoir projects constructed by the Secretary of the Army such as Lucky Peak, the Secretary of the Interior is authorized under the Flood Control Act of 1944 (43 U.S.C. Sec. 390) to "operate and maintain, under the provisions of the Federal Reclamation laws ..., such additional irrigation works in connection therewith as he may deem necessary for irrigation purposes." Through a 1953 Memorandum of Agreement and 1985 Memorandum of Understanding, Reclamation and USACE established a joint operating plan for Lucky Peak, Anderson Ranch, and Arrowrock Reservoirs. Lucky Peak is operated primarily for irrigation and flood control by USACE, although flood control operations are coordinated with Reclamation. The Boise River watermaster is responsible for ordering releases for irrigation and water accounting.

Reclamation holds a water right license from Idaho Department of Water Resources (IDWR) for the storage of 293,050 acre-feet per year in Lucky Peak Reservoir. The purpose and place of use for 111,950 acre-feet of the water right is irrigation of lands within the Boise Federal Reclamation Project. The license also authorizes 152,300 acre-feet of storage for streamflow maintenance and 28,800 acre-feet of storage for recreation purposes.

Between 1965 and 1968, pursuant to the authority of 43 U.S.C. Sec. 390 and the Federal Reclamation laws, Reclamation entered into water service contracts with 20 irrigation entities. Section 9(e) of the Reclamation Project Act of 1939 governs water service contracts (43 U.S.C. Sec. 485h(e)). Under the water service contracts, Reclamation agreed to make available water stored in Lucky Peak Reservoir for irrigation purposes for a period of 40 years in exchange for a fee.

The original water service contracts include the following renewal or conversion clause:

> This contract shall remain in effect for a period of forty (40) years from the date of its execution; Provided, That under the terms and conditions mutually agreeable to the parties hereto, renewals may be made for successive periods not to exceed forty (40) years each. The terms and conditions of each renewal shall be agreed upon not later than one (1) year prior to the expiration of the then existing contract; Provided further, That upon written request by the Contractor of the Secretary made not later than one (1) year prior to the expiration of this contract, whenever, account being taken of the amount then credited to the costs of construction of water supply works, the remaining amount of construction costs of water supply works which is properly assignable for ultimate return by the Contractor as established by the Secretary of the Interior pursuant to (3) of Section 1 of Public Law 643 (70 Stat. 483), probably can be repaid to the United States within the term of a contract under subsection (d), Section

> 9 of the 1939 Reclamation Project Act (53 Stat. 1187), this contract may be converted to a contract under said subsection (d) upon terms and conditions mutually agreeable to the United States and the Contractor. Notwithstanding any provisions of this contract, the Contractor reserves and shall have all rights and benefits under Public Law 643.

This contractual right to renew or convert is required by a 1956 statute. The 1956 Act requires that all water service contracts include a provision, if requested by the contractor, for renewal "under stated terms and conditions mutually agreeable to the parties" (43 U.S.C. Sec. 485h-1(1)). The 1956 Act also requires inclusion of a provision for conversion to a repayment contract "under stated terms and conditions mutually agreeable to the parties," subject to certain limitations related to the financial capacities of the contractor (43 U.S.C. Sec. 485h-1(2)).

Finally, the 1956 Act provides that each contractor with a water service or repayment contract "shall, during the term of the contract and of any renewal thereof …, have a first right … to a stated share or quantity of the project's available water supply for beneficial use" (43 U.S.C. Sec. 485h-1(4)). This provision reflects a fundamental tenet of Reclamation law. Under section 8 of the Reclamation Act of 1902, "beneficial use [is] the basis, the measure, and the limit" of "the right to the use of water" acquired under Reclamation law (43 U.S.C. Sec. 372). Therefore, all use of Reclamation project water is limited to that which can be put to beneficial use.

Recognized beneficial uses of water under Idaho law include but are not limited to, domestic, municipal, irrigation, hydropower generation, industrial, commercial, wildlife, recreation, stockwatering, and fish propagation uses for which permits to appropriate water can be issued as well as other uses which provide benefits to the user of the water as determined by the Director. Industrial use includes, but is not limited to, manufacturing, mining, and processing uses of water. See IDAPA 37.03.08(06).

Under these contractual and statutory provisions, Reclamation has only limited authority with respect to the Lucky Peak water service contracts. Reclamation has no authority to deny requests for the renewal or conversion of the Lucky Peak water contracts. Further, Reclamation may change the amount of water supplied under these contracts only to the extent the originally contracted amount of water cannot be beneficially used. See Renewal of Friant Unit Contracts, M-36961, 96 I.D. 289, 301 (Nov. 10, 1988) (Tarr Opinion); 1956 Act, Sec. 1(4). Although "[t]he Secretary has considerable discretion … to change other terms of the contracts" upon renewal or conversion, these changes must be "mutually agreeable to the parties" (1956 Act, Sec. 1(1), (2); 96 I.D. at 301).

### 1.1.3 Form of Contract

Water service contracts are executed pursuant to section 9(e) of the 1939 Reclamation Project Act (43 U.S.C.A. Sec. 485h(e)). These contracts are effective for a term of years, and typically provide that each contractor's payment to Reclamation is based on the amount of water the contractor uses. The rate of payment per acre-feet is calculated to cover costs attributable to constructing, operating, and maintaining the portion of the project that is dedicated to irrigation purposes. If the contractor uses more than the anticipated amount, it submits an additional payment after the irrigation season. If the contractor uses less, the excess payment is applied against amounts due for water requested in future years.

Repayment contracts are authorized by section 9(d) of the 1939 Reclamation Project Act (43 U.S.C. Sec. 485h(d)). A repayment contract is not limited to a term of years and requires the contractor to make annual payments for the total amount of the contractor's storage space, regardless of the quantity of storage the contractor actually uses. Although the contract is perpetual, there is a defined term for the repayment of construction costs.

### 1.1.4 Contractors' Use of Lucky Peak Storage for Supplemental Irrigation

The purpose of repayment and water service contracts is for Reclamation to operate and maintain the reservoir to store and deliver water to the contractors as a supplemental water supply to their natural flow water rights. The Lucky Peak contractors use their storage as a safety net to supplement natural flow water rights as water supplies decline and deliveries of natural flow water rights are curtailed. Use of this storage is relatively low in normal to good water years and unused storage is carried over into the next year. Several of the Lucky Peak contractors, hold repayment contracts for storage in Anderson Ranch and Arrowrock Reservoirs as well.

In dry years, storage use is relatively high as natural flows decline earlier in the year. If there are successive low water years, often, the storage accounts do not fill since Lucky Peak has the most junior storage rights in the Boise River reservoir system. In these instances, contractors have to balance a reduced supply with the need for carryover insurance the following year and for these reasons may use substantially less than their contracted storage space.

Chapter 3 contains a more detailed explanation of how Lucky Peak storage is used.

# 1.2 Scoping

Scoping under the National Environmental Policy Act (NEPA) is a process that solicits input from interested publics to help identify pertinent issues and alternatives related to the proposed action. Scoping for this project was initiated by Reclamation issuing a scoping letter to federal, state, and local agencies, interest groups, and interested individuals on July 10, 2002, announcing the intent to prepare a draft Environmental Assessment (EA) under NEPA. Reclamation also announced initiation of the Draft EA in the public news media. Reclamation received written scoping comments from the following agencies and organizations:

- Idaho Department of Fish and Game
- Idaho Department of Parks and Recreation (letter later withdrawn)
- Ada County Parks and Recreation
- Community Planning Association of Ada County
- City of Boise
- Trout Unlimited
- Moore Smith Buxton & Turke (on behalf of the city of Eagle)
- Boise Valley Fly Fishermen
- Idaho Rivers United
- Wilderness Ranch Owners Association
- Idaho Conservation League
- United Water Idaho

The major issues identified through public scoping were:

1. Development in Treasure Valley has and will continue to reduce irrigation demand. Excess Lucky Peak storage should be allocated to other uses.
2. A needs assessment and/or beneficial use of storage should be used to determine current and future irrigation storage requirements.
3. Permanent repayment contracts would not accommodate changing water needs such as changes in conservation and farming practices.
4. The range of alternatives presented in the scoping document is inadequate.

5. Ensure water conservation measures and compliance with Reclamation Reform Act (RRA) are included in alternatives and evaluated.
6. Effects to hydropower generation should be analyzed.
7. An Environmental Impact Statement (EIS) is required.
8. Evaluate flood control effects and river channelization/floodplain encroachment resulting from operating upstream projects.
9. Must take a hard look at effects to Boise River.
10. Cumulative effects should be analyzed.
11. Mitigation should be included.
12. Mitigation for Diversion Dam Power Plant rehabilitation should be included.
13. Contracting with Reclamation is preferable to uncertainties of the rental pool.
14. Must meet provisions of Endangered Species Act (ESA) and Clean Water Act (CWA).
15. Evaluate pricing differences such as municipal and industrial vs lawn irrigation.
16. Evaluate effects due to speculation in the water market.

The above issues and concerns can be categorized into two general types.

- Those that pertain to alternatives to be analyzed. These are addressed in Chapter 2.
- Those that pertain to environmental impacts that should be addressed. These are addressed in Chapter 3.

Several scoping issues were received that were outside the scope of the Draft EA or that would not be affected by any of the alternatives, and these were not addressed. Below is a summary of these issues and explanations of why they were not addressed in this Final EA:

*Mitigation for Diversion Dam Powerplant rehabilitation should be included*.–A final EA and Finding of No Significant Impact (FONSI) for the Diversion Dam Powerplant rehabilitation were issued in March 2002. No mitigation was proposed because environmental impacts were determined to be very minor. The decision regarding contract renewal or conversion at Lucky Peak Reservoir is not related to rehabilitation of Diversion Dam Powerplant.

*Salmon flow augmentation releases are in the summer when fish requirements are being met*.–The timing of flow augmentation is determined by National Oceanic & Atmospheric Administration, National Marine Fisheries Service (NOAA Fisheries). The action evaluated in this Final EA has no bearing on that timing required for flow augmentation although the effects of the action on Reclamation's ability to meet flow augmentation goals are analyzed.

*Effects to hydropower generation*.–Operational differences are so minor among the alternatives that effects to hydropower generation would not be measurable and are, therefore, not discussed.

*Evaluate pricing differences such as municipal and industrial vs lawn irrigation*.–The state of Idaho recognizes the use of water for irrigation of lawns, gardens, parks, and landscaping as irrigation. Under Reclamation policy, irrigation for agriculture, and noncommercial irrigation (lawns, gardens, parks, etc.) are all under the same pricing scheme. In addition, Reclamation has no authority to issue or convert contracts for Lucky Peak storage for municipal and industrial purposes from Lucky Peak Reservoir. Therefore, there is no analysis of pricing differences for these uses in this Final EA.

# 1.3 Related Actions and Activities

## 1.3.1 Assignment of Lucky Peak Contract Entitlements to Wilderness Ranch and Osprey Subdivisions and United Water Idaho, Inc.

Reclamation is currently evaluating proposed assignments of a portion of New Union Ditch Company's Lucky Peak contract entitlement to Wilderness Ranch Owners Association (200 acre-feet) and Osprey Property Owners Association (300 acre-feet), two subdivisions located between Boise and Idaho City and from Boise City Canal Company to United Water Idaho, Inc. (300 acre-feet). A separate environmental assessment is being prepared for these actions in compliance with NEPA. If these assignments are effective prior to renewal or conversion of the existing contracts, the new assignees will assume the role of the contractors.

### 1.3.2 Assignment of Contract Entitlement to Provide 800 Acre-Feet of Storage in Lucky Peak Reservoir to United Water Idaho, Inc.

In December 2001, Reclamation issued a FONSI for assigning contract entitlements formerly held by South Boise Mutual Irrigation Company (SBMIC) and Capitol View Irrigation District (CVID) for use of storage water from Lucky Peak Reservoir to United Water Idaho, Inc. All of SBMIC's and CVID's rights under their Lucky Peak water service contracts were assigned in 2003 to United Water for the balance of the contract terms. The CVID contract is for use of up to 300 acre-feet and expires in 2008. SBMIC's contract is for use of up to 500 acre-feet and expires in 2006. United Water Idaho, Inc. actually has two contracts with Reclamation, which is the reason currently 18 contractors hold 19 contracts.

### 1.3.3 Simplot/Micron Municipal and Industrial (M&I) Contract

In 1997, Reclamation issued a FONSI for a 25-year contract to the JR Simplot Company and Micron Technology to provide 3,000 acre-feet of storage in Anderson Ranch Reservoir. This storage was previously used for salmon flow augmentation. To replace this storage in Anderson Ranch Reservoir, Reclamation acquired 3,554 acre-feet of Lucky Peak storage from Simplot/Micron free of charge. As part of this transaction, Reclamation also purchased an additional 2,378 acre-feet of Lucky Peak storage from Simplot/Micron for salmon flow augmentation.

### 1.3.4 Purchase of Lucky Peak Reservoir Water Service Contract Entitlement from Nampa and Meridian Irrigation District

In July 1996, Reclamation issued a FONSI for purchasing Nampa and Meridian Irrigation District's (NMID) remaining water service contract entitlement to delivery of 35,000 acre-feet of storage in Lucky Peak Reservoir held under a water service contract. Since the rescission of the NMID water service contract, this storage is used for salmon flow augmentation. This action reduced the original number of contracts and contractors from 20 to 19.

# Chapter 2 ALTERNATIVES

## 2.1 Formulation of Alternatives

NEPA regulations require analysis of a reasonable range of alternatives to meet the purpose and need for action. In developing the range of alternatives, Reclamation considered alternatives requested by the contractors, alternatives developed internally, and those raised during scoping that meet the underlying purpose and need for action—in this case, to continue to provide a supplemental irrigation supply to the Lucky Peak contractors. Reclamation must then apply its limited discretion and authority with respect to renewal or conversion of the Lucky Peak water service contracts, as discussed in section 1.1.2 in order to determine the range of reasonable alternatives.

In considering the above factors, Reclamation developed two action alternatives which are analyzed in detail and the no action alternative required by NEPA. These alternatives are discussed in section 2.2. Alternatives raised during scoping but eliminated from detailed analysis are discussed in section 2.3.

## 2.2 Alternatives Analyzed

### 2.2.1 Alternative 1—No Action

For the purposes of this Final EA, the No Action alternative represents continuation by renewal of the Lucky Peak water service contracts with no substantial change in contract terms. The amount of storage under water service contracts would remain at 71,018 acre-feet available for beneficial irrigation use on lands served by the contractors (Table 2-1). Minor contract modifications may be required; however, to conform with Reclamation law and the agency's contract policy.

Because Reclamation has no discretion whether to renew these contracts under Reclamation law and the renewal language in the contracts, the No Action alternative is properly defined as no change from current management as allowed for by Council on Environmental Quality (CEQ) regulations for implementing NEPA. CEQ made this same recommendation for the no action alternative for a similar contract renewal in the Central Valley Project of California (Federal Register 54:28477) concerning Reclamation's intent to renew long-term water contracts for the Orange Cove and other

Friant Unit irrigation districts. The renewal provisions in the Lucky Peak water service contracts are identical to those in the Friant Unit.

### 2.2.2 Alternative 2—Convert to Repayment Contracts for Requested Amount (Preferred Alternative)

The Preferred Alternative is the conversion of existing contracts for the amount of storage requested by the contractors, not to exceed the original contract amount under mutually agreeable terms and conditions. The total amount of storage that would be under contract would remain 71,018 acre-feet (Table 2-1). At this time, all 18 of the contractors have advised Reclamation that they wish to convert to repayment contracts for continued delivery of the quantity of water stated in their existing contracts.

The repayment contracts would contain assignment provisions similar to the existing water service contracts that would require Reclamation's approval. Approval of assignments would be subject to separate NEPA, ESA, and other applicable processes.

### 2.2.3 Alternative 3—Convert to Repayment Contracts for Reduced Quantities Based on the Highest Historic Annual Delivery

This alternative was developed in response to scoping comments concerning the assumption that development of irrigated agricultural land in the Treasure Valley has reduced the need for supplemental storage for at least some contractors and that this reduced need should be reflected in reduced renewal amounts for these contractors. As discussed in section 1.3, Reclamation has very limited discretion to reduce the amount of renewed or converted storage so long as the storage can be put to beneficial use. This storage is used conservatively as drought protection for many of the contractors. However, just because it is infrequently used does not mean it is not needed nor that it cannot be beneficially used. Also, as discussed in section 3.1.1 use of the storage in recent dry years indicates the need for supplemental storage has not diminished.

Nevertheless, in an effort to develop a reasonable alternative that responds to the assertion of a reduced need in some scoping comments and that sufficiently meets the underlying purpose and need, Reclamation developed an alternative based on each contractor's highest historic annual delivery of their Lucky Peak storage over the approximately 35-year life of the contract. To develop this alternative, Reclamation identified the highest annual delivery of storage water from Lucky Peak Reservoir to each contractor since the contracts were executed.

In 2001, a very dry year, the contractors were given incorrect information on the amount of available Lucky Peak storage. Reclamation accepted affidavits from contractors,

where they could substantiate with the concurrence of the watermaster for Water District 63, that in 2001 additional water, up to their contract entitlements, would have been used during a single irrigation season if they had not received erroneous information that water was not available.

Under Alternative 3, the total quantity of storage provided for all 18 contractors would be 64,613 acre-feet. Eleven of the contractors would renew or convert for an amount less than their original storage quantity, while seven contractors would receive the same quantity (Table 2-1).

## 2.3 Alternatives Considered, but Eliminated from Detailed Analysis

Several comments were received during public scoping that suggested Reclamation should consider making the water provided to the Lucky Peak contractors available for alternative uses including:

- Winter stream flows
- Nonagricultural consumptive uses
- More and better salmon flow augmentation
- Minimum pool for bull trout
- Other irrigation needs
- More flood control space
- Exchange Lucky Peak space with Anderson Ranch space to accommodate nonirrigation uses

As discussed in section 1.1.2, Reclamation law and the Lucky Peak contracts provide the contractors with the right to renew or convert their water service contracts to repayment contracts. 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.

Furthermore, the purpose of the proposed action is to continue to provide supplemental irrigation water to the contractors. The unilateral reallocation of Lucky Peak storage now

**Table 2-1. Comparison of Delivery Amount (acre-feet) by Alternative**

| Lucky Peak Water User Organization | No Action Alternative | Preferred Alternative | Alternative 3[1] |
|---|---|---|---|
| Ballentyne Ditch Company, Ltd. | 1,300 | 1,300 | 1,139 (1994) |
| Boise City Canal Company | 1,000 | 1,000 | 818 (1972) |
| Boise Valley Irrigation Ditch Company | 2,500 | 2,500 | 2,457 (1966) |
| Canyon County Water Company | 6,000 | 6,000 | 4,430 (2001) |
| Eagle Island Water Users Association[2] | 1,718 | 1,718 | 1,718 (1977) |
| Farmer's Union Ditch Company, Ltd.[3] | 10,000 | 10,000 | 10,000 (1977) |
| Middleton Irrigation Association, Inc.[4] | 6,380 | 6,380 | 6,380 (2001) |
| New Dry Creek Ditch Company, Ltd. | 3,000 | 3,000 | 2,055 (1992) |
| New Union Ditch Company, Ltd. | 1,400 | 1,400 | 708 (1966) |
| Pioneer Ditch Company, Ltd. | 500 | 500 | 500 (1967) |
| Pioneer Irrigation District [3] | 16,000 | 16,000 | 16,000 (1977) |
| Settlers Irrigation District | 10,000 | 10,000 | 9,6404 (1994) |
| South Boise Water Company | 700 | 700 | 266 (1977) |
| The Eureka Water Company | 2,800 | 2,800 | 1,717 (2002) |
| The Middleton Mill Ditch Company [5] | 4,620 | 4,620 | 4,620 (2001) |
| Thurman Mill Ditch Company | 800 | 800 | 588 (2001) |
| United Water Idaho[6] | 800 | 800 | 800 |
| Fairview Acres | 1,500 | 1,500 | 777 (1994) |
| Total | 71,018 | 71,018 | 64,613 |

[1] Alternative 3 is based on highest historic annual delivery. The year in which the highest annual delivery occurred is shown in parentheses.
[2] Use prior to purchase by Micron/Simplot and United States was 2,176 ac-ft.
[3] Executed temporary contract for additional storage: Farmer's Union actual delivery was 11,006 ac-ft; Pioneer Irrigation District actual delivery was 16,974 ac-ft.
[4] Storage space did not fill. All stored water was delivered.
[5] Affidavit of premature water termination. The Association and Ditch Company would have used additional water, but were informed it was not available. The watermaster has agreed.
[6] The contracts formerly held by Capital View Irrigation District and South Boise Mutual Irrigation Company Ltd. were assigned to United Water Idaho for irrigation use in 2003 (section 1.3).

under contract to other uses or entities does not meet the underlying need for supplemental irrigation and is therefore outside the scope of analysis. These alternatives are not reasonable as defined in NEPA regulations and, therefore, not analyzed in detail.

As discussed in section 2.2.3, if Alternative 3 were to be implemented, 6,405 acre-feet of Lucky Peak storage would not be renewed for some contractors and would remain uncontracted. This storage could be used towards meeting some of the alternate needs raised in scoping. At this time, however, Reclamation is proposing no immediate action in designating a use for this uncontracted storage under Alternative 3.

Other comments suggested that the contracts should be of shorter duration and expressed concern that repayment contracts would not accommodate changing water needs. The majority of the contractors are exercising their statutory and contractual rights to convert their contracts to repayment contracts, which are perpetual.

# Chapter 3 AFFECTED ENVIRONMENT AND ENVIRONMENTAL CONSEQUENCES

The following discussions concerning the environmental consequences of implementing the contract renewal or conversion alternatives focus primarily on changes or lack of changes in ways Lucky Peak contractors may use their contracted storage and what that means to river and reservoir operations. The discussions focus on resources that have the potential to be affected by hydrological and operational changes.

## 3.1 Hydrology and Boise River Reservoir System Operations

### 3.1.1 Affected Environment

#### Hydrology

Lower elevations of the Boise River basin consist of wide valleys and are semiarid with warm, dry summers and cold winters. Upper elevations are forested and mountainous. Precipitation at the lower elevations averages approximately 10 inches annually. Precipitation at higher elevations averages up to 40 inches per year with most falling as snow during the winter (Reclamation 1997). Natural river flows are high in the spring and early summer as the snow melts, decline throughout the summer to a minimum, and remain low during the fall and winter.

The Boise River originates as three forks—the North Fork, Middle Fork, and South Fork—to the east and northeast of the city of Boise. Flow of the three forks is generally west and southwest to where they join to form the main stem approximately 20 miles east of the city of Boise. Mores Creek, and its major tributary, Grimes Creek, flow generally south, drain an area to the west of the three forks of the Boise River, and flow into Lucky Peak Reservoir. The Boise River continues west through the city of Boise and past the edge of the city of Caldwell to join the Snake River. Approximately 4,130 square miles, including parts of Ada, Boise, Camas, Canyon, Gem, Elmore, and Payette counties, are drained by the Boise River (Reclamation 1997).

## Boise River Reservoir Storage Allocations

There are three onstream storage reservoirs on the Boise River with a total storage capacity of over 1,000,000 acre-feet. Lucky Peak Reservoir was constructed by USACE and Arrowrock and Anderson Ranch Reservoirs were constructed by Reclamation. Table 3-1 shows the storage capacity and use of storage for each of these three reservoirs. Eighty percent of the reservoir system storage is contracted for irrigation.

Fiftytwo percent of the Lucky Peak Reservoir storage is assigned to provide winter flows below Lucky Peak Dam. The 71,018 acre-feet of storage allocated to the 19 water service contracts represents 24 percent of the Lucky Peak storage and about 7 percent of the total Boise River reservoir system storage. The remaining storage is used for salmon flow augmentation (14 pecent) or is inactive (10 percent).

## Boise River Reservoir System Operations

The dominant operating functions in the Boise River reservoir system are flood control, irrigation, and recreation, with additional releases for salmon flow augmentation and winter stream flows. Although storage space and the use of water are dedicated to specific purposes, the way water is moved among the reservoirs can provide incidental benefits to other purposes such as recreation, fish and wildlife enhancement, and power generation. Flood control operations of the reservoir system are based on several congressional acts, particularly the Flood Control Act of 1944. Flood control operations at Reclamation reservoirs on the Boise River are coordinated between Reclamation and USACE.

During construction of Lucky Peak Dam, USACE and Reclamation developed a coordinated plan for the operation of the three-dam system in consultation with related downstream diversion and storage facilities. The USACE and Reclamation developed a Memorandum of Agreement, dated November 20, 1953, and a Manual for Flood Control Operation of Boise River Reservoirs. Today, the Boise River reservoir system is operated under a supplement to the Memorandum of Agreement and the 1985 revision to the manual, entitled *Water Control Manual for Boise River Reservoirs, Boise River, Idaho*.

There are three general operating seasons based on climatological pattern, runoff, and irrigation demand: (1) maintenance from November through March, (2) flood control and refill from April through July, and (3) drawdown from August through October. The beginning and ending of the three operating seasons can vary widely with weather conditions and the water supply (Reclamation 1997). Drawdown for flood control, storage release for irrigation demand, and reservoir refill may occur in the same

**Table 3-1. Boise River Reservoir System Space**

| | | Active Capacity | | | | | | |
|---|---|---|---|---|---|---|---|---|
| **Reservoir** | **Total Capacity** | **Active** | **Contracted[1]** | **Formally Assigned to Other Uses** | **Formally Assigned to Flow Augmentation** | **Inactive** | **Flood Surcharge[2]** | **Dead** |
| Anderson Ranch | 493,200 | 413,100 | 422,800 | 0 | 0 | 41,000[3] | 10,500 | 29,000 |
| Arrowrock | 272,200 | 272,200 | 286,600 | 0 | 0 | 0 | 14,250 | 0 |
| Lucky Peak | 293,100 | 264,370 | 71,018 | 152,420[4] | 40,932[5] | 28,730[6] | 13,905 | 0 |
| TOTAL | 1,072,900 | 964,070 | 780,418 | 152,420 | 40,932 | 69,730 | 38,655 | 29,000 |

[1] Except for Lucky Peak, all contracts are spaceholder (share of reservoir capacity) repayment contracts. Lucky Peak contracts are spaceholder Water Service Contracts. Contracted amount does not reflect loss of storage capacity to sedimentation in Arrowrock and Anderson Ranch.
[2] Above the spillway and not storable.
[3] Reserved for power head.
[4] Boise River streamflow maintenance of which 50,000 acre-feet is reserved for IDFG.
[5] Reacquired or acquired as mitigation by Reclamation for salmon augmentation flows.
[6] USACE dead pool for reservoir fishery.

time frame for different reservoirs because of elevation difference and the demand for irrigation at lower elevations.

Reservoir operations can vary greatly from year to year depending on water supply and other factors so that the above schedule is shifted to earlier or later months. For example, flood control operations may begin as early as January in years with high runoff forecasts. During dry years, reservoir drawdown may begin as early as April.

Water rights for irrigation are the primary basis for reservoir releases during the irrigation season, which is considered to be from April 1 to November 1. Irrigation diversions usually begin around April 15 and end by October 15, with the highest demand in July (Reclamation 2001b).

### Lucky Peak Dam Operations

Lucky Peak Dam is located on the Boise River approximately 11.4 river miles downstream from Arrowrock Dam. The USACE operates the dam primarily for flood control with storage for irrigation and other purposes. During the irrigation season, USACE continues to operate Lucky Peak Dam and Reservoir; however, operations are coordinated with Reclamation. The Boise River watermaster is responsible for ordering releases for irrigation and water accounting.

Unless drought or flood control conditions are overriding, Lucky Peak Reservoir is generally filled by Memorial Day to provide recreation opportunities. In good water years, Lucky Peak in usually maintained nearly full until Labor Day. It is drafted to meet irrigation demand during the latter part of the irrigation season as natural flows decline, and typically maintained at a low level during the winter months for flood control purposes. In drought years, Lucky Peak is drafted when releases from Arrowrock are insufficient to meet irrigation demand. This could be as early as late June. When irrigation season ends, releases from Lucky Peak are reduced to the winter minimum stream maintenance flow of 240 cfs in good water years or as low as 150 cfs in dry years. Water for winter flows is drawn from the 152,300 acre-feet of storage in Lucky Peak dedicated to this use. Lucky Peak Reservoir storage and outflow depend on many factors such as daily, seasonal, and annual precipitation; air temperature; natural streamflow; and irrigation demand, and as a result are highly variable. Figure 3-1 and Figure 3-2 illustrate typical end of month reservoir content and outflows for good (1983), average (1980), and low (1992) water supplies.

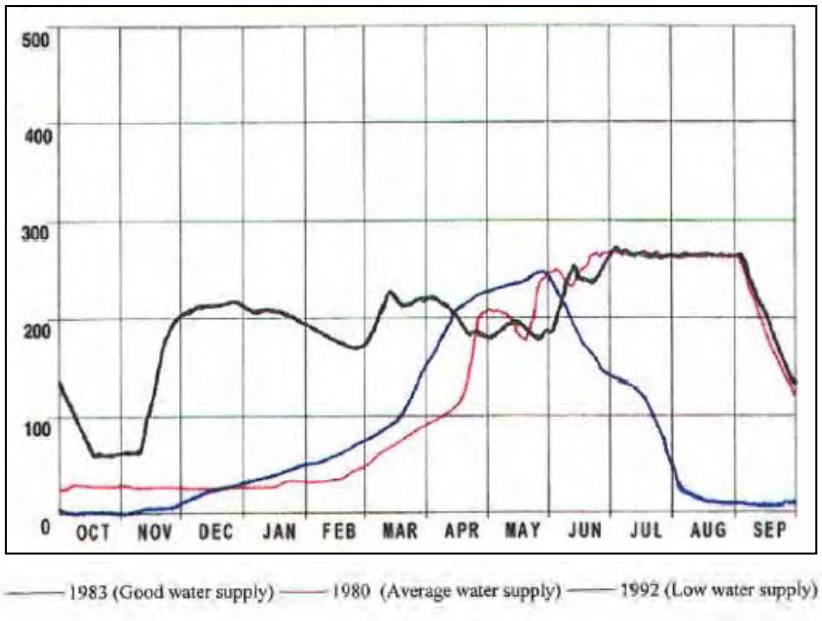


Figure 3-1. Contents of Lucky Peak Reservoir (1,000 acre-feet)

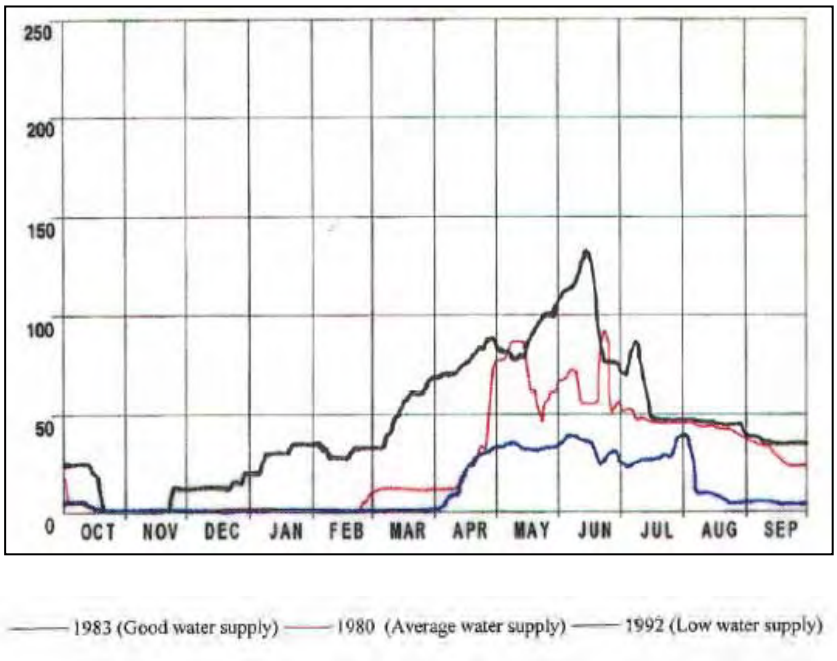


Figure 3-2. Outflow of Lucky Peak Reservoir (100 cfs)

## Other Boise River System Dams and Reservoirs

The following overview summarizes the other facilities of the Boise River reservoir system and the operation of those facilities. The reservoirs of the Boise River system are operated as a unified storage system to maximize the storage capability. More detailed accounts of individual facilities and operations can be found in *A Description of Bureau of Reclamation System Operation of the Boise and Payette Rivers* (Reclamation 1997).

The five major dams, including one diversion dam, of the Boise River reservoir system are as follows: Anderson Ranch, Arrowrock, Lucky Peak, Boise River Diversion, and Deer Flat Dams. Regulation of the reservoirs for flood control and refill is based on forecasts of expected runoff volumes from the Boise River watershed. Reclamation and USACE prepare independent runoff forecasts and jointly agree on the operational runoff volume forecast. To the extent possible, water is stored in the uppermost reservoir (Anderson Ranch Reservoir). Water rights accounting is maintained to ensure, regardless of where water is physically stored, the storage and use of water are properly accounted to the appropriate rights and spaceholders. Table 3-1 summarizes reservoir space in the Boise River basin.

### *Anderson Ranch Dam and Reservoir*

Anderson Ranch Dam on the South Fork Boise River and approximately 47.5 river miles upstream from Arrowrock Dam, was completed by Reclamation in 1950 as part of the Boise Project. The dam is a zoned earthfill structure 456 feet high. Anderson Ranch Reservoir is the largest of the three onstream Boise River reservoirs with an active capacity of approximately 413,100 acre-feet and a water surface area of more than 4,700 acres. The original active capacity of 423,200 acre-feet has been reduced due to sedimentation.

Releases from Anderson Ranch are managed conservatively to retain as much carryover as possible and to not exceed the powerplant capacity of approximately 1,600 cfs. Releases, however, of more than 5,000 cfs have been made during the flood control season. A release of 300 cfs is maintained from September 15 through the following March 31 and is increased to 600 cfs from April 1 until irrigation demand or flood control needs dictate higher releases.

### *Arrowrock Dam and Reservoir*

Arrowrock Dam, constructed in 1915, is located on the Boise River at river mile 75.4, approximately 17 river miles upstream from the city of Boise, Idaho. Arrowrock

Reservoir is contained in a moderately deep canyon carved by the Boise River. At full pool, water is backed up past the confluence of the Middle and South Forks, so the reservoir is shaped like the letter Y. Arrowrock Reservoir has an active capacity of 272,200 acre-feet, down from its original capacity of 286,000 acre-feet due to sedimentation, and a water surface area of approximately 3,100 acres.

Most of the runoff during the winter and early spring is held initially in Arrowrock Reservoir, which is the first reservoir in the Boise River system to be drafted to meet irrigation demand. Arrowrock Reservoir is drafted to a pool as low as 19,100 acre-feet (elevation 3078 feet) in very dry years; however, the average end-of-October elevation when the reservoir is near its lowest level is about 50,000 acre-feet.

### *Boise River Diversion Dam*

Boise River Diversion Dam is located approximately 7 miles southeast of Boise, Idaho, on the Boise River and approximately 2 miles downstream from Lucky Peak Dam. The Diversion Dam was completed in 1908 and is the diversion point for the New York Canal which delivers irrigation water to Lake Lowell and lands southwest of Boise and Nampa, and the much smaller Penitentiary Canal which serves northeast Boise.

Once the irrigation season begins in mid-April, water is released from Lucky Peak Dam and diverted at the New York and Penitentiary Canals, with the remaining flow passing over the Diversion Dam spillway to serve downstream irrigation and municipal and industrial use. Flood control releases in excess of irrigation and municipal and industrial use demands pass over the Diversion Dam in spring and early summer of normal to wet years.

### *Deer Flat Dams*

The Deer Flat Dams consist of four earthen embankments that impound Lake Lowell. Lake Lowell, an offstream reservoir located south of Nampa was constructed as part of the Boise Project. Lake Lowell has an active capacity of 159,400 acre-feet.

The normal operation of Lake Lowell is to fill the reservoir between irrigation seasons and release water as needed for irrigation. Filling is accomplished by release of water from Anderson Ranch and Arrowrock Dams. This water is passed through Lucky Peak Dam and diverted at the Boise River Diversion Dam to the New York Canal, which carries the flow to Lake Lowell. Water is diverted to fill Lake Lowell by a target date of April 1.

## Boise River Water Rental Pool

Water rental pools are operated for the purpose of renting storage water from willing lessors to other water users for any beneficial purpose recognized by the laws of the state of Idaho. Rental pool refers to the water leasing and rental activities administered by the local committee appointed by the Idaho Water Resources Board (IWRB).

Rental pool procedures provide incentives for those owning reservoir space and having stored water to make such space or water available to other users. Rental pools also allow willing lessors to be paid for this storage water use.

The Boise River rental pool for Water District No. 63 (District) was formed in 1988 pursuant to Idaho Code section 42-1765 (Riggin and Hansen 1992). The general purpose of the Boise River rental pool is to ensure that stored water is maintained and first made available for irrigation use (IDWR 1997). Supplies not rented revert to the lessor after the irrigation season.

Any contracting entity that owns reservoir space in the District may assign any portion of its space to the Boise River rental pool. The amount of space that fills in the spring is the amount of water available for rental. All space assigned to the rental pool is under the control of the watermaster and the committee for the duration of the lease.

Irrigators (lessors) that assign space to the rental pool before July 1 share proportionally in the proceeds from rentals attributable to that space (Riggin and Hansen 1992). Lessors that assign space after July 1 receive proceeds on a first come basis, whereby the first lessor to assign space is paid first. Payments to the lessor are made only if stored water is subsequently rented from the rental pool.

The storage space for water leased to the Boise River rental pool that is rented to users outside the hydrologic basin of the Boise River or below the confluence of the Boise River and the Snake River is the last space to fill in the ensuing year. The rental pool is designed to benefit water users in the basin. Irrigators (lessors) who place water in the Boise River rental pool can designate that their water be leased only within the basin (Sisco 2002).

Prior to June 1, the first priority in renting stored water from the rental pool is given to those irrigators owning contracted space in the District reservoirs. After June 1 and until July 15, priority extends to all other irrigation water users within the District. After July 15, priority is given to all other users within the District who desire to rent water for any beneficial purpose (Riggin and Hansen 1992). Rented water must be used by March 1 of the following year unless the committee grants an extension.

Rental pool rules and leasing prices are determined by the local water rental pool organization and then subsequently approved or denied by the IWRB. The rental price of stored water in the Boise River rental pool for users in the hydrologic basin of the Boise River is currently $6.50/acre-feet, which includes an administrative fee and a 10 percent surcharge paid to IWRB. The rental price of stored water to be used outside of the hydrologic basin of the Boise River is $6.93/acre-feet, which includes an administration fee and a 10 percent surcharge paid to IWRB.

In a normal water year, between 2,000 to 3,000 acre-feet of water is typically leased through the Boise River rental pool, of which approximately two-thirds comes from Lucky Peak Reservoir storage (Sisco 2002). In general, irrigators (lessors) with the most senior priority water rights have the smallest contract entitlements and are less likely to place water in the rental pool (Sisco 2002). Irrigators (lessors) with more junior water rights and larger contract entitlements place water in the rental pool conservatively.

### Salmon Flow Augmentation

Since 1991, Reclamation has provided up to 427,000 acre-feet annually from the upper Snake River for flow augmentation in the lower Snake River and Columbia River to aid migrating salmon smolts. Reclamation has acquired most of the water for flow augmentation on a year-to-year basis through water rentals and from uncontracted Reclamation storage in the upper Snake, Boise, and Payette River basins with less than 10 percent coming from the Boise River basin.

Water acquisition from the Boise River for flow augmentation has been primarily from uncontracted storage in Lucky Peak Reservoir and in very dry years from inactive space in Anderson Ranch Reservoir. In 1997 Reclamation acquired 40,932 acre-feet of space in Lucky Peak Reservoir for flow augmentation. Because all of the water used for flow augmentation passes through the Boise River rental pool and is subject to its last-to-fill rule when used outside the Boise River basin, in very dry years, it may not refill. The full 40,932 acre-feet of flow augmentation was provided from this acquired storage in 1998, 1999, and 2000; all fairly good water years. However, in 2001, a very dry year, none of this storage filled, and in 2002 and 2003 only a portion was refilled.

Flow augmentation water is usually released from Lucky Peak Dam in July and August and increases the flow in the river below Lucky Peak Dam by about 400 cfs over irrigation releases.

## Contractors' Use of Lucky Peak Storage

Lucky Peak contractors rarely call for delivery of their full Lucky Peak storage entitlement during a single irrigation season for several reasons, and those reasons are unique to each season. In the Boise River basin, storage provides a safety net, much like a savings account or insurance policy, to supplement natural flow water rights as water supplies decline and deliveries of natural flow water rights are curtailed. Natural flow is the flow of water produced by runoff from snow melt that passes through the reservoir system during the irrigation season, whereas storage is water captured and retained in reservoirs during the nonirrigation season.

In average and above-average water years, there is a greater supply of natural flow available for delivery during more of the irrigation season than in below-average water years, so that curtailments of natural flow water rights deliveries come later in the season. With a more plentiful supply of natural flow, the contractors have a decreased need for storage to supplement natural flow deliveries. During average and above average years, the Lucky Peak contractors may collectively use only about 2,000 to 4,000 acre-feet of their 71,000 acre-feet of storage, with the rest remaining in the reservoirs as carryover or a small amount placed in the water rental pool. This is shown in Figure 3-3 for years such as 1993 and 1996-1999.

An example of the amount of storage needed in a dry year to supplement the contractors' natural flow water rights as they are curtailed can be illustrated by examining a very dry year such as 1992. In 1992, when runoff was 41 percent of normal, the amount of storage needed to fully supplement the contractors' natural flow water rights (i.e., replace the lost water supply as the natural flow water rights are curtailed) was 303,712 acre-feet (appendix A). In the aggregate, the 18 contractors have a total of 140,534 acre-feet of storage space in Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs, resulting in an aggregate shortfall during a year such as 1992 of 163,178 acre-feet. None of the contractors have a sufficient amount of storage space to fully supplement their natural flow water rights during such a year. The actual shortfall during a year such as 1992 which followed two previous dry years is greater, because most of the contractors' storage space does not fill.

Over the past century of water delivery, the contractors have seen many cycles of below-normal and drought conditions. As a result of this experience, they understand that a low water year is often followed by more low water years, during which natural flow supplies are reduced and reservoir storage does not fill. For this reason, in low water years, the contractors balance their obligations to meet current water needs against the need to preserve as much storage as possible for use during the following irrigation season. If possible, they avoid withdrawing all remaining storage so that there will be storage

available during the following year. In anticipation of reduced natural flow and storage supplies, irrigators change cropping patterns and prepare to be out of water earlier in the year. As with a savings account, Lucky Peak storage provides security so long as there is water in the account. By carrying over storage, the contractors moderate the effects of successive low water years so that they can continue to supplement their natural flow water rights.

Table 3-2 indicates how during three consecutive dry years some contractors relied on carryover storage for drought protection. Two of the contractors, Fairview Acres and Canyon County Water Company, still had some carryover after three dry years, although it was greatly diminished; while two others, Farmers Union Ditch Company and Ballentyne Ditch Company, had exhausted their supply. Both Table 3-2 and Figure 3-3 show how the lower use of storage during a prolonged dry period is often related to a lack of supply rather than a reduced need. These and other contractors would have used their full supply if it had been available.

Storage use and need are affected by the timing as well as the total quantity of natural flow from snow melt. Atmospheric conditions (air temperatures and solar radiation) affect the rate and timing of runoff from snow melt. Cooler spring and summer temperatures can result in lower natural flows over a longer period of time, whereas warmer temperatures can result in higher natural flows during the early irrigation season and lower flows during the later irrigation season. These effects can be experienced during low, average, and high water years.

Figure 3-3 also shows that overall use of Lucky Peak storage for single dry years in 1977, 1994, and 2001 is very similar. This is an indication that the contractors' need for supplemental irrigation has not been significantly diminished with urbanization of farmland in their service areas and stored water from Lucky Peak continues to be beneficially used.

Another factor affecting available irrigation storage is sedimentation of Arrowrock and Anderson Ranch Reservoirs. Since storage contracts were entered into, Arrowrock has lost approximately 13,800 acre-feet of storage and Anderson Ranch has lost 10,100 acre-feet. The amount of storage under contract has been reduced proportionately for each contractor with storage in these reservoirs.

### Water Service Contract Assignment Provisions

The Lucky Peak water service contracts allow for the assignment of all or a portion of the contract entitlements with the approval of Reclamation. Reclamation's approval of assignments is subject to NEPA compliance. To date there have been two assignments of

Lucky Peak contract entitlements approved; three more are pending. These are listed in section 1.3.

**Table 3-2. Examples of Lucky Peak Storage Use in Three Consecutive Dry Years (1990-1992)**

| Lucky Peak Contractor | 1990 64% Normal Runoff | 1991 55% Normal Runoff | 1992 43% Normal Runoff |
|---|---|---|---|
| **Fairview Acres (1,500 ac-ft contracted)** | | | |
| Carryover | 934 | 1,117 | 616 |
| New fill | 466 | 112 | 312 |
| Available | 1,400 | 1,229 | 928 |
| Used | 283 | 614 | 599 |
| **Canyon County Water Co. (6,000 ac-ft contracted)** | | | |
| Carryover | 3,134 | 3,506 | 2,324 |
| New fill | 1,863 | 449 | 1,247 |
| Available | 4,997 | 3,955 | 3,571 |
| Used | 1,489 | 1,631 | 1,874 |
| **Farmers Union Ditch Co. (10,000 ac-ft contracted)** | | | |
| Carryover | 2,160 | 653 | 0 |
| New fill | 3,105 | 748 | 2,079 |
| Available | 5,265 | 1,400 | 2,079 |
| Used | 4,612 | 1,400 | 2,079 |
| **Ballentyne Ditch Co. (1,300 ac-ft contracted)** | | | |
| Carryover | 877 | 956 | 14 |
| New fill | 404 | 97 | 270 |
| Available | 1,281 | 1,054 | 284 |
| Used | 325 | 1,040 | 284 |
| **All Contractors (71,018 ac-ft contracted)** | | | |
| Carryover | 42,020 | 37,774 | 11,709 |
| New fill | 17,836 | 5,003 | 17,133 |
| Available | 59,856 | 42,777 | 28,842 |
| Used | 22,082 | 31,068 | 16,991 |

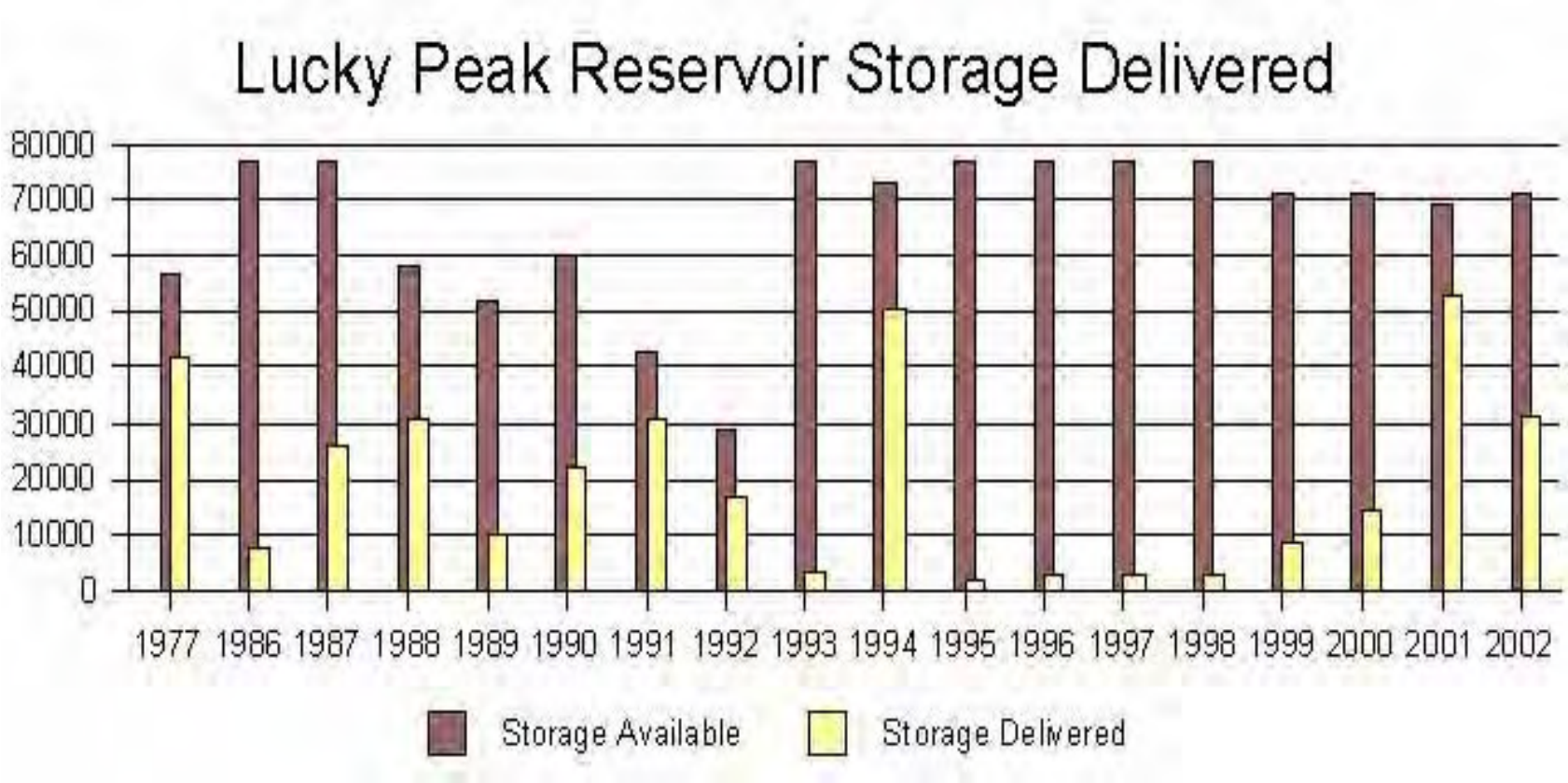


Figure 3-3. Lucky Peak Storage Available and Storage Delivered (source: District 63 Watermaster Annual Reports)

## 3.1.2 Environmental Consequences

### No Action Alternative

Reservoir operations and river flows would be expected to exhibit the annual patterns similar to those of the last 10 to 15 years. Operations would continue to vary depending on annual changes in runoff. Irrigation and flood control would continue to be dominant functions, and releases for instream flows and salmon flow augmentation, and maintaining the Lucky Peak pool for reservoir recreation would continue.

Lucky Peak contractors would continue to use Lucky Peak supplemental storage as they have in the past as described in section 3.1.1. Use would be low and carryover high in wet to normal water years and use high and carryover lower in dry periods.

The contractors would continue to supply water to many areas that are being urbanized within their service area through means such as pressurized irrigation systems in residential subdivisions. Data from the most recent drought year in 2001 indicates the use of Lucky Peak storage is similar to dry years such as 1994 and 1977 (Figure 3-3).

Operation of the Boise River rental pool would remain the same relative to current operations and prevailing climatic conditions. Additional contract assignments may occur in the future as entities such as United Water Idaho seek to improve their water supply through storage acquisitions.

### Preferred Alternative

Operations and flows would be the same as for the No Action alternative. Contract conversion from water service to repayment would not alter the pattern of Lucky Peak storage use. Boise River rental pool operations would be similar to the No Action alternative. The new repayment contracts would contain similar assignment provisions to those in the existing contracts.

### Alternative 3

Under Alternative 3 there would be approximately 6,405 acre-feet less storage under contract than either the No Action or Preferred Alternative. This is 9 percent of the 71,018 acre-feet Reclamation makes available under the existing Lucky Peak water service contracts and 2.4 percent of the reservoir's active capacity (Table 3-1). The storage not placed under contract would be held in the reservoir as uncontracted storage.

There would be very little effect on reservoir operations under Alternative 3 because the 6,405 acre-feet of uncontracted storage would usually be left as carryover under the No Action alternative as well. The two lowest years of carryover storage since the Lucky Peak contracts were executed occurred in 1991 and 1992. In each year over 11,000 acre-feet of carryover remained at the end of the irrigation season and most of that was in accounts of the 11 contractors who would receive less storage under Alternative 3.

Reducing some of the contractors' supplemental water supplies could reduce or eliminate the amount of water available for lease by willing lessors through the Boise River rental pool.

# 3.2 Water Quality

## 3.2.1 Affected Environment

Boise River water quality is managed by the state of Idaho under a framework provided through the CWA. Idaho establishes water quality standards for specific physical and chemical parameters in order to provide suitable conditions to support beneficial uses, including irrigation, public water supply, recreation, and aquatic life (IDEQ 2000a). Section 303(d) of the CWA requires that states develop and implement water quality management plans or Total Maximum Daily Loads (TMDL), including pollutant load allocations for stream segments where water quality is inadequate to fully support designated beneficial uses (IDEQ 2000b).

Designated beneficial uses for the South, Middle, and North Forks of the Boise River, including Arrowrock and Anderson Ranch Reservoirs, Lucky Peak Reservoir, and the Boise River in the lower Boise subbasin are domestic water supply, agricultural water supply, cold water biota, salmonid spawning, primary contact recreation, special resource water, aesthetics, wildlife habitat, and industrial water supply. Lake Lowell designated uses include agriculture water supply, industrial water supply, wildlife habitat, aesthetics, warm water aquatic life, primary contact recreation, and special resource water (IDEQ 2000a).

The lower Boise River is the 64-mile reach that flows from Lucky Peak Dam above Boise, Idaho, to the Snake River below Parma, Idaho. A TMDL allocation plan documents the amount of a pollutant a water body can assimilate without exceeding a state's water quality standards, and allocates that amount as loads to point and nonpoint sources. The lower Boise River TMDL defines targets for sediment on three segments and for bacteria on two segments on the lower Boise River (IDEQ 2002).

Table 3-3 summarizes pollutants in Boise River reaches and tributaries downstream of Reclamation facilities and Lucky Peak Reservoir.

**Table 3-3. Water Quality Impacted Waterbodies Upstream and Downstream of Reclamation Facilities and Lucky Peak Reservoir**

| Stream | Reach | Pollutant |
|---|---|---|
| South Fork Boise River | Anderson Ranch Reservoir to Arrowrock Reservoir | Sediment |
| Hydrologic Unit Code 17050114 | | |
| Boise River | Lucky Peak to Barber Diversion | Flow alteration |
| Boise River | Barber Diversion to Star | Sediment, temperature |
| Boise River | Star to Notus | Nutrients, sediment, temperature, bacteria |
| Boise River | Notus to Snake River | Bacteria, temperature, nutrients, sediment |
| Lake Lowell | Reservoir | Dissolved oxygen, nutrients |
| Mason Creek and Sand Hollow Creek | Headwaters to Boise River | Nutrients, sediment, channel alteration |
| Willow Creek | Headwaters to Boise River | Unknown |
| Source: 1998 Idaho 303(d) list and EPA's Additions to the 1998 Idaho 303(d) List | | |

## 3.2.2 Environmental Consequences

### No Action Alternative

Reservoir levels and outflows would continue to follow the general annual patterns that have occurred in recent years (Figure 3-1 and Figure 3-2). Water quality related to river flows and fluctuations such as in the Lucky Peak to Barber Diversion reach would likely remain the same since flow patterns would remain similar (Table 3-2). Water bodies and stream reaches currently not meeting water quality standards may improve through implementation of TMDL actions that reduce input of pollutants.

### Preferred Alternative

The conversion of water service contracts to repayment contracts is not expected to change the pattern of use of Boise River storage compared to the No Action alternative. Impacts to water quality would be similar.

**Alternative 3**

As with the Preferred Alternative, there is no distinction between this alternative and the No Action alternative. Reservoir operation levels and outflows would continue to follow the annual patterns that have occurred over the past 35 to 40 years (Figure 3-1 and Figure 3-2). Implementation of this alternative would not change water quality relative to existing conditions.

# 3.3 Vegetation, Wildlife, and Fish

## 3.3.1 Affected Environment

### Vegetation

#### *Reservoirs*

The vegetation surrounding Lucky Peak, Arrowrock, and Anderson Ranch Reservoirs is predominantly sagebrush-steppe. There are small pockets of riparian vegetation along the shoreline and in the many intermittent drainages. Riparian vegetation is particularly noticeable where tributaries enter the reservoirs. The draw-down area around the reservoirs is mostly either devoid of vegetation or inhabited by exotic annual grasses and weeds.

#### *Boise River*

The entire riparian zone below Lucky Peak Dam has been altered by reservoir operations for flood control and irrigation and by channel alteration primarily near the more developed and populated areas. The upstream reservoirs (1) collect and prevent downstream movement of streambed sediments and (2) decrease peak floodflows that historically scoured side channels and built gravel bars and islands in the river. These bars are necessary to establish new cottonwood communities. The riparian community along the reach downstream from Lucky Peak Dam is limited to a narrow band of black cottonwood forest which lies between developed areas and normal high water line. The cottonwood forest is dominated by relatively mature trees with little understory or recruitment of young trees.

Many nonnative riparian species have become naturalized along the river. These include silver maple, black locust, box elder, Siberian elm, and Russian olive (Sather-Blair and Blair 1983). The exotic shrub false indigo has become widely established in the riparian zone and has displaced many native shrub species along the river. Temporary and

seasonally flooded emergent wetlands are dispersed throughout the riparian communities along the river.

## Wildlife

More than 150 species of birds, 37 species of mammals, and a variety of reptiles and amphibians are found along the Boise River (Sather-Blair and Blair 1983). The valley serves as an important breeding and wintering ground for many species of waterfowl. Year-round resident waterfowl include Canada geese and mallards. As many as 60 species of birds are also year-long residents of riparian and wetland habitats along the Boise River. Great blue herons are common year-round residents along the river and heron rookeries have been identified at several locations. Neotropical songbirds include a wide variety of species including warblers, vireos, flycatchers, and others. Some of these species migrate through the valley while others remain to breed in the Boise River valley before migrating south for winter.

Upland game birds such as California quail, chukar, and gray partridge inhabit riparian zones along the reservoirs and river, as well as the steep slopes above the reservoirs.

Mammals associated with the Boise River and the reservoirs include skunk, beaver, river otter, mink, porcupine, and several species of bats. Important wintering and transitional habitat for mule deer and elk surround Arrowrock and Lucky Peak Reservoirs. Winter forage such as bitterbrush occupies the south-facing, snow-free slopes and is very important for the winter survival of mule deer. Deer occasionally drown in the reservoirs when they break through thin ice during crossing attempts.

Amphibians and reptiles found along the river and near the reservoirs include bullfrog, western toad, northern leopard frog, western garter snake, sagebrush lizard, and western fence lizard.

## Fish

### *Boise River Below Lucky Peak Reservoir*

Native, nongame fish species present in this reach of the Boise River include northern pikeminnow, chiselmouth, and suckers (Reclamation 2000a). Game fish include brown trout, rainbow trout, and mountain whitefish. Idaho Department of Fish and Game (IDFG) stocks rainbow trout in the Boise River between Barber Park and the town of Star. Some naturally reproducing rainbow and brown trout also are present in this reach. IDFG (2001) reported that from Lucky Peak Dam downstream to Star, mountain

whitefish make up most of the game fish biomass, while hatchery-reared rainbow trout, wild rainbow trout, and brown trout support most of the fishing pressure.

Downstream of Star, warmwater fish species become more common as water temperature increases and water quality declines (IDFG 2001). This reflects a preference by warmwater species for higher water temperatures and their generally higher tolerance of pollution over coldwater species (Zaroban et al. 1999). Warmwater fish species include channel catfish, smallmouth bass, and largemouth bass.

### *Lucky Peak Reservoir*

Two fisheries exist in Lucky Peak Reservoir: a warm, inshore-water fishery supporting smallmouth bass and a cold, mid-water fishery dominated by rainbow trout and kokanee (IDFG 1995). The rainbow and kokanee fisheries are supplemented by IDFG stocking and from entrainment through Arrowrock Dam. Warmwater fish spawn along the shoreline. There are also yellow perch and mountain whitefish in the reservoir, plus several species of nongame fish.

### *Arrowrock Reservoir*

This reservoir supports a mixed fishery consisting of yellow perch, smallmouth bass, mountain whitefish, rainbow trout, and bull trout, which is listed as a threatened, federally protected species under the ESA. The rainbow trout population is primarily supported by IDFG stocking though wild redband trout, considered the rainbow's interior native subspecies, are also present. IDFG stocked approximately 120,000 rainbow trout fingerlings, 15,000 Kamloops/steelhead hybrids, and 8,000 fall chinook salmon fingerlings from 1996 to 1998 (USFWS 1999a). Other reservoir nongame fish species include chiselmouth, northern pikeminnow, redside shiner, bridgelip sucker, and largescale sucker (Flatter 1999).

Arrowrock Reservoir is managed as a general rainbow trout fishery by IDFG. Their management plan calls for seeking a minimum fishery conservation pool through cooperation with Reclamation and annual stocking with fingerling rainbow trout.

### *Anderson Ranch Reservoir*

A variety of game fish, including rainbow trout, bull trout, smallmouth bass, yellow perch, and kokanee, are found in Anderson Ranch Reservoir. Rainbow trout include both wild and hatchery stocks. Hatchery fingerlings and catchable size fish are stocked in the reservoir.

## 3.3.2 Environmental Consequences

### Vegetation

#### *No Action Alternative*

Reservoir operations and flows in the lower Boise River would not change relative to existing conditions. Vegetation around Lucky Peak and other reservoirs would remain similar to current conditions. 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.

#### *Preferred Alternative*

Since reservoir levels and river flows would not change, implementation of the Preferred Alternative would have the same effect on vegetation as that discussed for the No Action alternative.

#### *Alternative 3*

Under Alternative 3, the total quantity of water allocated to contract holders annually would be slightly less than the other alternatives. In any given year, however, the difference in the total water released from Lucky Peak Reservoir would be insignificant compared to the No Action alternative. Vegetation around the reservoirs and along the Boise River would not be expected to change from existing conditions. Therefore, effects to vegetation would be the same as that discussed for the No Action and Preferred Alternatives.

### Wildlife

#### *No Action Alternative*

Reservoir operations and flows in the lower Boise River would not change relative to existing conditions. Habitat around Lucky Peak and the other reservoirs would remain unchanged from current conditions. Habitat along the lower Boise River would remain unchanged. There would be no additional wildlife effects over current conditions.

#### *Preferred Alternative*

Implementation of the Preferred Alternative would have the same effect on wildlife as that discussed for the No Action alternative.

***Alternative 3***

Under Alternative 3, the total quantity of water allocated to contract holders annually would be slightly less than the other alternatives. However, the difference in the total water released from Lucky Peak Reservoir would be insignificant compared to the No Action alternative. Habitat around the reservoirs and along the Boise River would not be expected to change from existing conditions. Therefore, effects to wildlife would be the same as that discussed for the No Action alternative.

**Fish**

***No Action Alternative***

Reservoir operations and flows in the lower Boise River would not change relative to existing conditions. Habitat in Lucky Peak and the other reservoirs would remain unchanged from current conditions. Annual and seasonal flows in all forks of the Boise River, Mores Creek and tributaries, and the lower Boise River would be the same as the current climatic and diversion influenced flows. There would be no additional aquatic resources effects over the No Action alternative.

***Preferred Alternative***

Implementation of the Preferred Alternative would have the same effect on fish and other aquatic resources as the No Action alternative.

***Alternative 3***

Lower Boise River flows and operation of the reservoirs would be similar to existing conditions under this alternative. Implementation of Alternative 3 would, therefore, have the same effect on fish and other aquatic resources as the No Action alternative.

# 3.4 Threatened and Endangered Species

The following species listed or proposed by USFWS under ESA for Ada, Canyon, and Boise Counties (SP #1-4-03-SP-842 dated September 15, 2003) may occur in the project area:

- Bull trout (*Salvelinus confluentus*) – threatened
- Bull trout (*Salvelinus confluentus*) critical habitat – proposed
- Bald eagle (*Haliaeetus leucocephalus*) – threatened

- Gray wolf (*Canis lupus*) – experimental/nonessential population
- Canada lynx (*Lynx canadensis*) (Boise County only) – threatened
- Since the gray wolf and Canada lynx, are not associated with reservoir or riparian areas around or downstream of Reclamation reservoirs, and would not be affected by any of the proposed alternatives, they are not discussed further. Slick spot peppergrass (*Lepidium papilliferum*) is no longer proposed for listing under ESA.

Anadromous fish species listed by NOAA Fisheries that have the potential to be affected by the proposed action include the following evolutionarily significant units (ESU):

- Snake River spring/summer chinook salmon (*Onchorynchus tshawytscha*) – threatened
- Snake River fall chinook salmon (*O. tshawytscha*) – threatened
- Snake River steelhead (*O. mykiss*) – threatened
- Snake River sockeye salmon (*O. nerka*) – endangered
- Upper Columbia River spring chinook salmon (*O. tshawytscha*) – endangered
- Upper Columbia River steelhead (*O. mykiss*) – endangered
- Middle Columbia River steelhead (*O. mykiss*) – threatened
- Lower Columbia River chinook salmon (*O. tshawytscha*) – threatened
- Lower Columbia River steelhead (*O. mykiss*) – threatened
- Columbia River chum salmon (*O. keta*) – threatened
- Upper Willamette River chinook salmon (*O. tshawytscha*) – threatened
- Upper Willamette River steelhead (*O. mykiss*) – threatened

### 3.4.1 Reclamation Consultations Under Section 7 of the ESA

Reclamation submitted a biological assessment (BA) to USFWS and NOAA Fisheries in April 1998 describing the effects to listed species resulting from operation and maintenance of its projects in the Snake River basin above Lower Granite Reservoir (Reclamation 1998). The Boise River reservoir system was included in this consultation. In October 1999, the USFWS issued a biological opinion (BO) on the effects to federally listed species resulting from Reclamation's operation and maintenance of projects within the Snake River basin above Lower Granite Reservoir (USFWS 1999b). Within the Boise River basin, bull trout was the only species identified as being adversely affected.

The USFWS's BO requires Reclamation to implement certain reasonable and prudent measures to minimize adverse effects to bull trout (USFWS 1999b).

NOAA Fisheries also issued a BO, in December 1999 on Reclamation's Snake River basin operations above Lower Granite Reservoir (NMFS 1999). In this BO, NOAA Fisheries determined that Reclamation's operations are consistent with the operations envisioned in NOAA Fisheries' 1995 BO and 1998 BO on the Federal Columbia River Power System (FCRPS) (requesting annual delivery of 427,000 acre-feet of flow augmentation water), and that their continued operation and maintenance would not jeopardize federally listed salmon and steelhead or result in destruction or adverse modification of their habitat.

In April 2001, Reclamation (2001a) provided a supplemental BA to NOAA Fisheries. This BA addresses the 1-year operation (April 2001 through March 2002) of Reclamation's projects in the Snake River basin above Lower Granite Reservoir. It was prepared for three reasons: (1) ten Reclamation projects were not covered in NOAA Fisheries' December 2000 BO for the FCRPS which superceded NOAA Fisheries December 1999 BO, (2) recent Federal listing of Columbia River chum salmon, and (3) pending Snake River Basin Adjudication (SRBA) may affect Reclamation's operations. NOAA Fisheries (NMFS 2001) issued a new BO in May 2001 covering this 1-year period. The intent of this interim BO was to allow for certain SRBA negotiations to conclude, after which Reclamation would reconsult with both NOAA Fisheries and USFWS on long-term operations.

In November 2001, Reclamation provided an amended BA to NOAA Fisheries because NOAA Fisheries, May 2001, BO was due to expire on April 1, 2002 (Reclamation 2001a). The amended BA presents the results of new work and recent analysis by Reclamation and supercedes Reclamation's April 2001 supplemental BA. In their January 2002, supplemental BO, NOAA Fisheries (NMFS 2002) concluded that Reclamation's Preferred Alternative in 2001, an extremely dry year in which the 427,000 acre-feet of flow augmentation water could not be released, conformed with NOAA Fisheries' expectations for the performance of Reclamation's flow augmentation program. NOAA Fisheries (NMFS 2002) extended the period covered by their May 2001 BO to March 31, 2005.

USFWS also reviewed Reclamation's November 2001 amended BA, and in April 2002 concluded that all aspects of the USFWS 1999 BO consultation with Reclamation should remain in effect until December 31, 2004 (USFWS 2002a).

## 3.4.2 Affected Environment

### Bull Trout

Bull trout are a char in the scientific family Salmonidae and are recognized as a separate species from the somewhat similar appearing Dolly Varden (*Salvelinus malma*). The USFWS issued a final rule on June 10, 1998, listing the Columbia River and Klamath River distinct population segments (DPS) of bull trout as a threatened species (Federal Register 63:31647) under ESA. Bull trout in the Boise River basin are members of the Columbia River DPS (Federal Register 67:71235).

The USFWS proposed the designation of critical habitat for the Columbia River DPS on November 29, 2002 (Federal Register 67:71235). Lucky Peak Reservoir is within the boundaries of proposed Critical Habitat Unit 17: Southwest Idaho River Basins, which includes the Boise River basin as well as the Payette and Weiser River basins. The Boise River basin contains three proposed critical habitat subunits (CHSU) (Lucky Peak, Arrowrock, and Anderson Ranch CHSUs). Proposed designated critical habitat in each CHSU consists of the following:

- Lucky Peak CHSU–Lucky Peak Reservoir and its tributaries, principally the Mores Creek watershed
- Arrowrock CHSU–Boise River watersheds upstream of Arrowrock Dam, including the North Fork Boise River, Middle Fork Boise River, and South Fork Boise River downstream from Anderson Ranch Dam
- Anderson Ranch CHSU–South Fork Boise River watershed upstream from Anderson Ranch Dam (Federal Register 67:71235)

The USFWS announced the availability of the *Bull Trout Draft Recovery Plan* for the Columbia River DPS on November 29, 2002. The project area is within the boundaries of the proposed Southwest Idaho Recovery Unit and the Boise River Recovery Subunit. This proposed subunit contains three bull trout core areas (Lucky Peak, Arrowrock, Anderson Ranch) with distinct local bull trout populations present in each. The Boise River downstream from Lucky Peak Dam is within the Boise River Recovery Subunit, but it has not been proposed as a bull trout core area or as critical habitat (USFWS 2002b; Federal Register 67:71235).

Today, distribution of the Columbia River bull trout DPS is more fragmented than in the past, and there are fewer adult migratory fish and fewer and smaller spawning reaches than historically (USFWS 2002c). Bull trout populations within the Columbia River DPS have declined from historic levels and are generally considered to be isolated and

remnant (USFWS 1999b). Strong bull trout populations tend to be associated with cold, mid-sized streams having high channel complexity that are located in forested areas with low road densities and at elevations exceeding 5000 feet. Even in undisturbed habitats, bull trout distribution tends to be patchy (USFWS 2002c).

Bull trout typically only occur upstream of unsuitable habitat and dams (USFWS 2002b). In the Boise River basin, Lucky Peak Dam and Arrowrock Dam on the mainstem Boise River and Anderson Ranch Dam on the South Fork Boise River are impassable barriers to upstream fish movements.

### *Life History and Habitat Requirements*

Bull trout can exhibit resident and migratory life history strategies. Resident fish complete their life history cycle in the same or a nearby stream where they spawn and rear. Migratory fish spawn and rear in a stream for 1 to 4 years before migrating to a lake or reservoir (adfluvial life form), river or larger stream (fluvial life form), or the ocean (anadromous life form) where they grow to sexual maturity, then migrate to natal areas to spawn. Extensive migrations are characteristic of this species. Bull trout become sexually mature between 4 and 7 years and can live up to 12 years (USFWS 2002c).

Bull trout spawn between August and November, usually in cold (39°F to 51°F), low-gradient streams with uniform flow and loose, clean gravel or small cobble. Migratory adults often return downstream in November and December, following spawning (Reclamation 2001a). Bull trout eggs incubate in stream gravels over winter, hatching and emerging as fry the following April through May (depending on water temperature). Spawning and incubation habitat for bull trout is limited and valuable because of this species' narrow habitat requirements.

Migratory bull trout use a variety of habitats, depending on season and life stage, varying from spawning and rearing in tributary streams to maturing, feeding, and overwintering in lower elevation lakes, reservoirs, and rivers (USFWS 2002c). Reclamation (2001a) reported that adfluvial bull trout spend about half the year (generally November to May) associated with a lake or reservoir. While in the reservoir, adfluvial fish probably forage in shallow areas where prey is more abundant. Depending on water conditions, these fish may occupy deeper, cooler reservoir waters with temperatures of approximately 45°F to 54°F, or occur near the reservoir surface when surface water temperature is about 54°F or less (Reclamation 2001a).

Food items of resident and juvenile migratory bull trout include aquatic and terrestrial insects, zooplankton, crayfish, and small fish. Adult migratory bull trout primarily eat other fish, including trout, salmon, whitefish, sculpin, and other available species. Total

lengths of resident adult bull trout typically range from approximately 6 to 12 inches but commonly reach 24 inches for migratory individuals (USFWS 2002c). The Idaho bull trout record is a 32-pound fish taken from Pend Oreille Lake in 1949 (Reclamation 2001a).

Nine categories of limiting factors have been identified as contributing to the decline of bull trout populations in the Boise River Recovery Subunit (USFWS 2002b). These factors include the effects of dams, forest management practices, livestock grazing, agricultural practices, transportation networks, mining, residential development and urbanization, fisheries management, and isolation and habitat fragmentation. Reclamation (2001a) reported that impacts on bull trout generally result from three types of resource management practices (land, water, and fisheries) and noted that catastrophic events, also can limit bull trout.

## Environmental Baseline

### *Lucky Peak Core Area and CHSU*

Bull trout present in the Lucky Peak core area include resident fish in the headwaters of Mores Creek (the Mores Creek local population) and migratory fish in Lucky Peak Reservoir. It is unknown whether these migratory fish have all been entrained from Arrowrock Reservoir or whether some originate in the Mores Creek watershed (USFWS 2002c).

Reclamation (2001a) reported that bull trout appear to be lost to Lucky Peak Reservoir each year during normal operations of Arrowrock Dam. Bull trout are entrained from Arrowrock Reservoir into Lucky Peak Reservoir by passing over the spillway and through the dam's ensign valves (Reclamation 2001a). Studies by IDFG during 1997 and 1998 suggest that perhaps approximately 10 to 15 percent of bull trout present in Arrowrock Reservoir are entrained into Lucky Peak Reservoir annually (Reclamation 2001a). Reclamation began trapping and hauling bull trout from Lucky Peak Reservoir to Arrowrock Reservoir in 2000 as part of the *USFWS Biological Opinion Terms and Conditions for Reclamation Operations* (USFWS 1999a).

Scheduled replacement of the lower row of ensign valves with clamshell gates at Arrowrock Dam by 2004 will allow for deeper water releases from the reservoir and is anticipated to result in decreased entrainment rates and beneficial long-term impacts to bull trout (Reclamation 2001b).

### *Arrowrock Core Area and CHSU*

There are 15 local bull trout populations in the Arrowrock core area that utilize habitat in Arrowrock Reservoir and its tributaries. Resident and migratory fish are present in this core area (USFWS 2002b). Arrowrock Reservoir provides overwintering and foraging habitat for a relatively strong adfluvial population of bull trout (Reclamation 2001a). The South, Middle, and North Forks of the Boise River provide foraging, migratory, and overwintering (FMO) habitat for bull trout, while some portions of these drainages and numerous smaller tributaries provide migratory, spawning, and early rearing habitat for bull trout (Federal Register 67:71235). Bull trout have not been documented spawning in the South Fork of the Boise River upstream from Arrowrock Dam, although water temperatures during much of June through October are suitable (50°F to 54°F) for adult bull trout migration (Reclamation 2001a). Proposed critical habitat in the Arrowrock CHSU consists of Boise River watersheds upstream from Arrowrock Dam, including the North Fork Boise River, Middle Fork Boise River, and South Fork Boise River downstream from Anderson Ranch Dam.

Arrowrock Reservoir provides important habitat for adult and subadult bull trout from November through late spring or early summer. In addition, some juvenile bull trout are reported to reside in the reservoir year-round until sexually mature (Reclamation 2001a). Estimated numbers of bull trout approximately 12 inches or longer occurring in the reservoir totaled 471 individuals in 1997 and 354 individuals in 1998 (Federal Register 67:71235). As discussed previously, some of these bull trout are entrained into Lucky Peak Reservoir each year. Some adult bull trout in Arrowrock Reservoir migrate to the North Fork and Middle Fork of the Boise River in May and June where the waters are cooler. They spawn in these upper tributaries in August and September and then, following spawning, return to Arrowrock Reservoir.

### *Anderson Ranch Core Area and CHSU*

There are 15 local bull trout populations in the Anderson Ranch core area that utilize habitat in Anderson Ranch Reservoir and its tributaries. Both resident and migratory fish are present in this core area (USFWS 2002b). Anderson Ranch Reservoir provides overwintering and foraging habitat while the upper South Fork Boise River and its tributaries provide FMO, spawning, and early rearing habitat for bull trout (Federal Register 67:71235). Studies by IDFG showed that bull trout in Anderson Ranch Reservoir exhibit migratory behavior similar to that described for bull trout in Arrowrock Reservoir (Reclamation 2001a). Proposed critical habitat in the Anderson Ranch CHSU consists of the South Fork Boise River watershed upstream from Anderson Ranch Dam (Federal Register 67:71235).

## Required Actions from Previous ESA Consultations

The USFWS BO for Reclamation's project operation and maintenance in the Snake River basin upstream from Lower Granite Reservoir (USFWS 1999b) identified reasonable and prudent measures (RPM) that Reclamation is required to implement in order to be exempt from section 9 prohibitions of ESA. USFWS believes the following RPMs are necessary and appropriate to minimize the take of bull trout at Reclamation projects in the Boise River basin:

- Reduce the incidence of bull trout entrainment due to reservoir operations.
- Within existing authorities and voluntary partnerships, work toward ensuring reservoir operations do not result in dewatering of Reclamation reservoirs to the extent that adfluvial bull trout resident there during part of their life history are stressed or killed.
- Investigate methods to provide safe fish passage around Reclamation dams for bull trout.

The operations and maintenance BO (USFWS 1999b) outlined specific terms and conditions to implement for each RPM. These include ongoing research studies and recommendations based on these studies.

RPMs were also required by USFWS in their BO for the replacement of ensign valves at Arrowrock Dam (Salow 2002). These actions include the following:

- Ensure that reservoir operations do not result in dewatering of Arrowrock Reservoir to the extent that adfluvial bull trout present in the reservoir are stressed or killed as a result of the project.
- Investigate methods for safe fish passage upstream around Arrowrock Dam.
- Initiate a capture and transport program in Lucky Peak Reservoir to mitigate for entrainment.
- Complete a water quality monitoring plan for the project.
- Form an advisory group to advise on responsive actions and to aid in analyzing data collected during the project related to the fishery.
- Conduct population estimates for bull trout prior to and following the construction project.

Specific actions to implement these RPMs are either completed or ongoing.

## Bald Eagle

### *Life History and Habitat Requirements*

The bald eagle was listed as endangered on March 11, 1967, because of severe population declines resulting from organo-chlorine pesticides and habitat loss. As organo-chloride pesticide use has declined, eagle populations have rebounded in all areas of its range. The population increase resulted in a reclassification from endangered to threatened on July 12, 1995 (Federal Register 60:36000). Critical habitat is not designated for the bald eagle.

Recent threats to the bald eagle throughout its range are primarily from shooting or poisoning; however, these threats have been reduced since the species was federally listed in the 1970s. An additional threat to the species is from disturbance during nesting and fledging which may cause reproduction to fail. Individual birds vary widely in their response to human disturbance at nesting and roosting sites. Losing large trees for nesting and roosting near large water bodies is a moderate threat (USFWS 1986).

The nesting season generally extends from January 1 to mid-August (USFWS 1994). Young fledge in July. The forage base consists of fish, waterfowl, and during the winter, mammalian carrion (USFWS 1994).

Bald eagles are closely associated with lakes and large rivers in open areas, forests, and mountains. They nest near open water in late-successional forests with many perches or nest sites, and generally low levels of human disturbance (McGarigal 1988; Wright and Escano 1986). The nest site is usually within 0.25 mile to 1 mile of open water having less than 5 percent of the shore developed within 1 mile. Perches are generally at the edge of forest stands, near foraging areas, or near the nest tree and have panoramic views of surrounding areas. They need large trees along lake shores and rivers with good visibility, preferably snags; but they also use trees or boulders for perching. Protected deep ravines with large trees are often used as night roosts, especially during the winter. Bald eagles' diet largely consists of fish, especially salmon, waterfowl, seabirds, and carrion.

Important winter habitat is near food sources, such as lakes, rivers, and uplands with big game winter range (carrion source). These sites have adequate perches and sheltered roost sites. Human activity may be a major factor limiting bald eagle distribution on wintering habitats (Steenhof 1976).

## Environmental Baseline

The number of occupied bald eagle territories within Idaho has continued to increase over the past decade, and is currently stable (Sallabanks 2003). In 2000, 2001, and 2002 there were 84, 80, and 83 nesting territories, respectively, statewide that fledged young (Beals and Melquist 2001; Sallabanks 2002, 2003).

There are currently no known bald eagle nests at Lucky Peak Reservoir; however, nesting bald eagles are found around Arrowrock and Anderson Ranch Reservoirs. There are three nesting territories at Arrowrock Reservoir, two of which were occupied in 2003; one near the confluence of the South and Middle Fork arms, one near Arrowrock Dam, and another at the upper end of the South Fork arm. Nesting eagles forage for fish and waterfowl in both Arrowrock and Lucky Peak Reservoirs, as well as in the South Fork Boise River. Winter-killed deer and elk may be an important food source in the early part of the nesting season.

The Boise River, upstream and downstream from Lucky Peak and Arrowrock Reservoirs, is also an important area for wintering bald eagles when free of ice. Kaltenecker and Bechard (1995) found up to 50 eagles using Anderson Ranch Reservoir, 2 to 25 eagles using the South Fork Boise River below Anderson Ranch Dam, and up to 15 wintering eagles around Arrowrock and Lucky Peak Reservoirs. Up to 35 eagles have been counted downstream from Lucky Peak Dam (USFWS 1996; Riggin and Hansen 1992). Wintering bald eagles usually arrive along the Boise River in November and leave by early to late March, depending on weather conditions. The Barber Pool area and a drainage near Mores Creek have been documented as important communal night roost areas.

## Required Actions from Previous ESA Consultations

Reclamation's consultation on operation and maintenance of its projects evaluated the effects of storing and delivering irrigation water, including Lucky Peak storage (Reclamation 1998). USFWS in its 1999 BO concurred with Reclamation's determination that operating and maintaining the Boise River reservoir system would not adversely effect bald eagles (USFWS 1999b).

Reclamation also completed consultation with USFWS for the Arrowrock Dam outlet works rehabilitation project. The deep drawdown of Arrowrock Reservoir required for this project was determined to adversely affect bald eagles. USFWS (2001) required preparation of nest site management plans and the evaluation of the need for supplemental feeding after construction is complete in their BO for this project.

Management plans are currently being prepared, and it has been determined that supplemental feeding is unnecessary.

**Anadromous Fish Species**

None of the listed salmon or steelhead ESUs occur above the Hells Canyon Complex on the Snake River. Under NOAA Fisheries' 1995 BO and subsequent BOs, Reclamation, pursuant to state law procedures, seeks to release 427,000 acre-feet of water from the upper Snake River Basin (including the Boise River) to aid juvenile salmon and steelhead outmigration in the mainstem Columbia River. Reclamation has provided this amount annually from 1993 to 2000. Less was provided in 2001, 2002, and 2003 because of drought conditions (see flow augmentation in section 3.1.1.).

However, as noted earlier in this section, NOAA Fisheries (NMFS 2002) concluded in their January 2002 supplemental BO that Reclamation's Preferred Alternative for operating its projects in 2001 conforms with NOAA Fisheries' expectations for the performance of Reclamation's flow augmentation program when NOAA Fisheries reached its no jeopardy conclusion in its 1995 BO. NOAA Fisheries (NMFS 2002) extended the period covered by their May 2001 BO to March 31, 2005.

## 3.4.3 Environmental Consequences

**Bull Trout**

***No Action Alternative***

The delivery of all or part of the 71,000 acre-feet of supplemental storage would not change reservoir operations and flows in the lower Boise River relative to existing conditions. Annual and seasonal flows in all forks of the Boise River, Mores Creek and tributaries, and the lower Boise River would be similar to the current climatic/diversion-influenced flows. The No Action alternative would have no effect on bull trout populations.

The USFWS (Federal Register 67:71235) listed nine physical and biological features essential to the conservation of bull trout that were used in identifying proposed critical habitat areas. These features are known as primary constituent elements (PCE) and were determined from studies of bull trout habitat requirements, life history characteristics, and population biology. USFWS further stated that activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the value of critical habitat for both the survival and recovery of bull trout is appreciably reduced. Adverse

effects to proposed critical habitat resulting from such activities have been defined by USFWS (Federal Register 67:71235) to include one or more of the following:

- Significant and detrimental alteration of the minimum flow or the natural flow regime
- Alterations that could directly or indirectly cause significant and detrimental actions to bull trout habitat
- Significant and detrimental alteration of the channel morphology
- Significant and detrimental alterations to the water chemistry
- Activities that are likely to result in the introduction, spread, or augmentation of nonnative aquatic species
- Activities that are likely to create significant instream barriers to bull trout movement

Implementation of the No Action alternative would not result in any of the above adverse effects on bull trout proposed critical habitat in Lucky Peak Reservoir, Mores Creek, or upstream in the Arrowrock and Anderson Ranch CHSUs.

***Preferred Alternative***

The Preferred Alternative would not change reservoir operations and river flows below and above Reclamation facilities on the Boise River compared to the No Action alternative and would not alter the environmental baseline. Like the No Action alternative, the proposed action would have no effect on bull trout.

As in the No Action alternative, the Preferred Alternative would not include any of the adverse effects to bull trout habitat listed above or otherwise alter bull trout PCE to the extent that adverse effects to bull trout critical habitat would occur. Proposed habitat for bull trout would not be adversely modified or destroyed.

***Alternative 3***

Boise River flows and system operation under Alternative 3 would generally remain the same as operations over the past 10 to 15 years. The 6,405 acre-feet of storage no longer under contract would be held as uncontracted storage and remain in the reservoir system. This storage could provide a relatively minor amount of additional overwintering habitat for bull trout during multiple successive dry years compared to the No Action and Preferred Alternatives. The benefit would be substantially less than the full 6,405 acre-feet; since under the No Action and Preferred Alternatives in most years much of the

water accruing to this storage would be held by the contractors as carryover for additional dry year protection. Because of operational flexibility, the uncontracted storage could be held in any of the three reservoirs.

## Bald Eagle

### *No Action Alternative*

There would be no effects on either nesting or wintering bald eagles or their habitat compared to current conditions as a result of implementing the No Action alternative. Boise River flows and reservoir levels would remain similar to operations over the past 10-15 years. Fish populations in the reservoirs and rivers which bald eagles rely on for food would not be affected. Over time, population growth in the area may result in increased recreational use of Lucky Peak and other Boise River reservoirs. This could translate into an increase in direct disturbance to nesting and foraging of bald eagles, but may not necessarily impact bald eagle productivity or habitat use.

### *Preferred Alternative*

As with the No Action alternative, Boise River flows and reservoir operations would remain similar to current practices if the Preferred Alternative is implemented. The bald eagles' primary prey base of fish would likewise be similar to the environmental baseline condition. The Preferred Alternative would have no effect on bald eagles.

### *Alternative 3*

Under Alternative 3, the total quantity of water allocated to contractors annually would be slightly less than the other alternatives. However, in any one year, the difference in the total water released from Lucky Peak Reservoir would probably not change compared to existing conditions. Compared to the No Action alternative, a small amount of additional carryover water may be left in the reservoir system during multiple successive dry years, which may have a slight benefit to fish habitat and the bald eagle food base.

## Anadromous Fish

### *No Action Alternative*

Reservoir operations and flows in the lower Boise River would not change relative to existing conditions or to conditions assessed by Reclamation (2001a) in their amended BA. Streamflow conditions below Reclamation's Boise Project during the primary juvenile salmon migration period (April through August) would not change. Storage used for flow augmentation from the Boise River reservoir system would remain the

same. Therefore, effects conclusions reached by Reclamation in their amended BA would still apply with implementation of the No Action alternative. None of the referenced 11 salmon and steelhead ESUs would be affected.

***Preferred Alternative***

As described previously for bull trout, there would be no hydrologic change under the Preferred Alternative compared to existing operations and the No Action alternative. None of the referenced 11 salmon and steelhead ESUs would be affected.

***Alternative 3***

As described previously for bull trout, Boise River flows and system operation and Lucky Peak Reservoir water levels under Alternative 3 would remain very similar to operations under the No Action alternative even with 6,405 acre-feet of storage not renewed or converted and remaining as uncontracted storage, since water filling the storage space is normally held in the reservoir as carryover under the current operating situation. It is possible that with a prolonged drought that a portion the 6,405 acre-feet in question might be delivered for irrigation if it were under contract. Therefore, by retaining this stored water in the reservoir as uncontracted storage under Alternative 3, there could be a very minor, probably undetectable, reduction in irrigation deliveries and return flows below the Boise Project during the summer.

# 3.5 Recreation

## 3.5.1 Affected Environment

Boise River reservoirs provide accessible, varied recreational opportunities within urban, rural, and wild settings to the largest population center in Idaho. The location of the lower Boise River within Boise, in addition to the Boise River Greenbelt and the adjoining parks along its banks, is a tremendous asset within the city of Boise and Ada County. Water-based recreation opportunities on the river and reservoirs include fishing, boating, inner tube floating, canoeing, and whitewater boating (in certain reaches and water levels). Water-based recreation in the Snake River basin, which includes the Boise River system, contributes more than $180 million per year to the state's economy (Reclamation 2001b). Camping, hiking, hunting, and other land-based recreation also occur along the reservoirs and rivers.

Current river operations for flood control and irrigation water supply directly influence the availability and quality of recreational opportunities on a seasonal basis. Following is

detailed information including site description, facilities and fees, recreation activities, and recreation use for Arrowrock Reservoir, Lucky Peak Reservoir, and the lower Boise River.

### Arrowrock Reservoir

Arrowrock Reservoir is formed behind Arrowrock Dam located 17 river miles upstream from the city of Boise (east). It is part of the Boise Project and is managed by USFS as part of the Boise National Forest. The reservoir is an 18-mile-long narrow canyon reservoir and has a surface area of 3,150 acres and 60 miles of shoreline. The steep hillsides on both sides of the reservoir offer very limited potential for recreational development along the shoreline of Arrowrock Reservoir. The reservoir can only be accessed from a dusty, rough, narrow, gravel road that winds along the north shoreline for much of the length of the reservoir. As a result, little development has occurred along the reservoir providing a remote setting with an uncongested recreational experience.

Under an agreement between Reclamation and USACE, stored water at Arrowrock Reservoir is used to maintain a high recreation pool elevation in Lucky Peak Reservoir within the limits of water supply and irrigation demand (Shalkey Walker and Associates Inc. 1995). Low pool elevations at Arrowrock Reservoir are common in the late summer and fall. Full pool elevation is 3216 feet.

Arrowrock Reservoir receives the least recreational use of the three Boise River reservoirs (Beck and Baird 1993). It is mostly visited in the spring, summer, and fall by recreationists and the peak use period is May through August. Winter use is minimized by severe weather conditions and hazardous road conditions. The predominant recreational activity at Arrowrock Reservoir is fishing, with approximately 4,000 visitor-days for fishing (Reclamation 2001b). Fishing season is open year-round and generally peaks in June, July, and August. Winter fishing use has not been determined, but is considered to be low.

Upland bird hunters look for chukar, gray partridge, and California quail on the dry slopes above the reservoir. Big game hunters park along the road to access the slopes above the reservoir during deer and elk season (Beck and Baird 1993). A small number of hunters boat across the reservoir to hunt.

### Lucky Peak Reservoir

Lucky Peak Reservoir is the most popular recreation site within the Boise River system due to its proximity (10 miles) to the city of Boise. The reservoir receives approximately 790,000 visits per year and 95 percent of the visitors are from Ada County. Typically,

the number of visitors per year depends on several factors including pool elevation, weather, and access problems due to construction activities. The USACE maintains a counter on Forest Road 286 just east of Spring Shores State Park; an estimated 153,916 visitors passed that point in the one-year period from October 1, 1998, to September 30, 1999. Although Lucky Peak is open to visitors year-round, the recreation season at Lucky Peak generally extends from Memorial Day to Labor Day. The primary recreation activities at Lucky Peak Reservoir include boating, camping, day-use activities (e.g., picnicking), swimming, fishing, volleyball, and waterskiing.

Many of the recreation sites around the reservoir are accessible only by water due to lack of road access and are oriented to boaters. There are 10 major and 10 minor recreation sites along the lake including the sites associated with the popular Lucky Peak State Park. Lucky Peak State Park is composed of three day-use areas: Sandy Point and Discovery Point State Park located just downstream from Lucky Peak Dam and Spring Shores.

Anglers spent an estimated 162,505 hours or roughly 31,250 recreation visits fishing at Lucky Peak Reservoir during the 1990 to 1991 fishing season (Beck and Baird 1993). Fishing season is open year-round; the majority of fishing is from the bank or by boat. Some ice fishing occurs in the winter.

Slopes adjacent to Lucky Peak Reservoir afford upland bird and big game hunting opportunities. Chukar, gray partridge, and California quail live on the steep grassy slopes and are hunted heavily. Deer are also hunted on the lands around Lucky Peak Reservoir, especially during the archery season. Hunting pressure is reported to be high in this area (Beck and Baird 1993).

Wildlife viewing is popular, especially in the winter. Visitors park to observe herds of deer and bald and golden eagles wintering in the area.

### Lower Boise River

Approximately 64 miles of Boise River flows between Lucky Peak Dam and the confluence with the Snake River. The land bordering this river reach is predominantly privately owned but also includes some public land (city, county, and state parks). Most recreational use occurs from Barber Park to Glenwood Bridge, a 10-mile river reach through the city. In this protected riparian corridor, the city developed five large urban parks connected by the Greenbelt. These form an extremely popular pedestrian-bike path paralleling the river from Lucky Peak Dam to Eagle Island State Park. In this reach, land-based recreation assumes great importance in contrast to land-based recreation at reservoirs.

The most popular river run extends 4 river miles from Barber Park downstream to Ann Morrison Park (Beck and Baird 1993). Approximately 10,000 river floaters per day launch from Barber Park during the summer months July through September (Ada County 2000).

The mainstem Boise River is open to fishing year-round and provides a popular put-and-take urban fishery which is managed to provide a high percentage return-to-creel. In 1994, fisheries managers estimated 70,000 hours of fishing effort between Barber Park and Glenwood Bridge, up from an estimated 50,000 hours of effort in 1987. During the same interval, the number of fly fishermen increased an estimated 10 percent, to account for 18 percent of fishermen (Reclamation 2001b). In 1999, IDFG stocked approximately 40,000 catchable hatchery rainbow trout between Barber Park and the Glenwood Bridge.

Wildlife viewing is a popular activity occurring along the Greenbelt, in Barber Park, and on the lower Boise River. Numerous songbirds, water birds, and birds of prey are found in the riparian corridor. In the winter, watching bald eagle's foraging on the river is a popular activity.

## 3.5.2 Environmental Consequences

### No Action Alternative

Impacts on recreational use of Boise River reservoirs and the lower Boise River associated with the No Action alternative would be the same as those associated with current conditions. The Boise River reservoir system would be operated to maximize recreation at Lucky Peak and Anderson Ranch Reservoirs; recreational use of Arrowrock Reservoir would continue to be a lower priority. Nonwater-dependent activities such as sightseeing and wildlife viewing occur throughout the year, but may be less appealing during periods of low water levels, thereby reducing year-round use of the reservoirs.

### Preferred Alternative

Impacts on recreational use of Boise River reservoirs and lower Boise River associated with conversion of the water services contract would be the same as those described for the No Action alternative. No additional impacts are anticipated.

### Alternative 3

Because Boise River flows and Lucky Peak Reservoir levels would remain similar to operations over the past several years under Alternative 3, impacts on recreational use of the Boise River reservoirs and lower Boise River associated with conversion of the water

service contracts at reduced quantities, would be the same as those described for the No Action alternative. No additional impacts are anticipated.

# 3.6 Economics

## 3.6.1 Affected Environment

The percentages of the workforce within the various industrial sectors for Ada, Boise, Canyon, and Elmore Counties, collectively, are: services, supporting 28 percent of the workforce; retail trade, supporting 17 percent of the workforce; manufacturing, supporting 13 percent of the work force; and state and local government, supporting 10 percent of the workforce (BEA 2002).

The 2000 employment data indicates that only a small percentage of employment within the state of Idaho is associated with farming. In the four-county area, the percent of farm-related employment within the individual counties ranged from 1 to 8 percent. Only 1 percent of employment within Ada County, which comprises 70 percent of the four-county area work force, is farm related and is likely to slightly lower the percentage of the farm-related workforce within the four-county area. Statistics from the Bureau of Economic Analysis (BEA) generally indicate a decline in farm-related incomes and work force. Although the work force and earned incomes associated with the farming sector in Ada County have consistently stayed less than 1 percent over the last decade, the farming sector in Canyon County shows a sharp drop from 10 to 5 percent for work-related income and a less dramatic decline in the work force related to farming from 8 percent to 6 percent between 1990 and 2000.

**Agricultural Economy Information**

The current water service contracts supply supplemental irrigation water to approximately 90,000 acres of urban, suburban, and rural lands in Ada and Canyon Counties. Boise and Elmore Counties do not receive irrigation water associated with the current water service contracts and are not included in the following discussion regarding the agricultural economy of the affected environment.

The land within Ada and Canyon Counties is considered highly productive and much of these lands have been irrigated since the early 1900s. Table 3-4 provides 1997 census of agriculture data by county. This information shows that a total of 3,119 farms comprising 586,107 acres of farmland are within Ada and Canyon Counties. The average size for farms is just less than 190 acres for both counties. An estimated 88 percent of the total farms or 51 percent of the farmland within both counties are irrigated.

The total sales reported for the 1997 Census of Agriculture for Ada and Canyon Counties exceeded $405 million, with farms in Ada and Canyon Counties averaging $76,756 and $164,066 per farm, respectively. In Ada County, farms with sales of more than $10,000 account for 89 percent of all farmland, 88 percent of irrigated farmland, and 97 percent of all farm sales. Similarly, farms with sales of more than $10,000 in Canyon County account for 79 percent of all farmland; 94 percent of irrigated farmland; and 99 percent of all farm sales.

**Table 3-4. Summary of 1997 Census of Agriculture Data by County**

| | Ada County | | Canyon County | | |
|---|---|---|---|---|---|
| | County Total | Farms with sales over $10,000 | County Total | Farms with sales over $10,000 | Two-County Total |
| Farms (number) | 1,221 | 413 | 1,898 | 979 | 3,119 |
| Land in farms (acres) | 231,188 | 207,791 | 354,919 | 280,492 | 586,107 |
| Average size of farm (acres) | 189 | 489 | 187 | 287 | 376 |
| Irrigated land (farms) | 1,060 | 375 | 1,684 | 915 | 2,744 |
| Irrigated land (acres) | 78,112 | 68,872 | 221,051 | 208,525 | 299,163 |
| Market value of agricultural products sold | $93,719,000 | $91,413,000 | $311,397,000 | $308,493,000 | $405,116,000 |
| Market value of agricultural products sold-average per farm | $76,756 | $221,338 | $164,066 | $315,111 | $129,887 |
| Note: Data from the 2000 Census of Agriculture is not currently available for comparison. | | | | | |

## 3.6.2 Environmental Consequences

### No Action Alternative

Renewal of the existing contract terms implies there would not be a substantial increase in costs to irrigators or changes to current water flows, storage practices, and operation and maintenance. Annual payments would still be based on the amount of storage released in a given year. The rate of payment would continue to be calculated to cover

costs attributable to constructing, operating, and maintaining the portion of the project that is dedicated to irrigation purposes. Eventually construction costs allocated to irrigation would be repaid, after which annual costs to contractors would only be for operation and maintenance, thereby reducing costs and economic burden to irrigators in the long term. Under the current contracts, the construction charge is $1.71 per acre-foot.

### Preferred Alternative

Conversion of the existing water service contracts to repayment contracts would not change current water flows, storage practices, or operation and maintenance. Conversion would require annual payments for the contractors' allocated costs for construction, and operation, and maintenance of Lucky Peak Dam regardless of the quantity of storage the contractor actually uses, as opposed to annual payments related to amount of storage water released under the No Action alternative. The annual costs are not expected to be substantially different between alternatives during the estimated 40-year repayment period. Once the construction costs have been repaid, the contractors would be assessed only the cost of operating and maintaining the dam, resulting in savings to the contractors in the long term, similar to the No Action alternative.

Reclamation has determined that the total construction costs to be repaid by the contractors is $72.21 per acre-foot. After subtracting the construction costs paid to date under the original water service contracts, the remaining unpaid construction costs by contractor range from $56.00 to $71.00 per acre-foot. The remaining unpaid costs for each contractor would be repaid in equal annual payments over a 40-year repayment period, along with annual operation and maintenance charges.

### Alternative 3

During dry years, reducing the supplemental supply of irrigation water provided under the Lucky Peak contracts could diminish the economic productivitiy of lands served by the contractors through conversion to less profitable crops, lower yield, and even crop failure, resulting in economic losses to those irrigators. The repayment obligation would be similar to the Preferred Alternative except for contractors receiving less storage, whose repayment obligation would be proportionately less.

# 3.7 Cultural Resources

## 3.7.1 Affected Environment

In southwestern Idaho, prehistoric human use of the Snake River region and its tributaries was one of increasing complexity in settlement and subsistence through time. Lifestyles of past inhabitants ranged from highly nomadic groups of big-game hunters during the Paleo-Indian Period to small groups of foragers operating from semi-permanent villages by the Late Archaic Period into historic times. At the time of European incursion into southwest Idaho, the Snake River Shoshone (represented by the Shoshone and Bannock peoples) and Northern Paiute groups occupied the Boise River and the Payette River basins. The Shoshone populations resided within the lower Snake River area, while the Northern Paiute resided exclusively throughout the middle and upper drainages. In addition to the resident populations of the Shoshone and Paiute, southwestern Idaho also attracted numerous visitors from elsewhere across the regions including Shoshonean parties from the Fort Hall and Lemhi areas, and the White Knife Shoshone from northern Nevada, the northern Paiute from eastern Oregon, as well as the Nez Perce, the Cayuse, the Umatilla, the Flathead, and the Blackfeet.

Several French explorers may have visited the project area in the late 1700s, but the first long-term non-Indian occupants in southwest Idaho were fur traders. The Pacific Fur Company expedition led by Wilson Price Hunt was the first recorded visit to the project area in 1811. By 1813, a trading post was established near the mouth of the Boise River, however within less than 30 years the fur trade had essentially ended. Permanent Euro-American settlement of southwestern Idaho began with the discovery of gold. This spurred the need for supplies and in 1863, groups began to settle along the Boise River to raise produce and hay to sell to miners. Settlers soon occupied all lands located on the river bottoms or on portions of the first bench that could be watered by simple gravity-flow irrigation ditches. By the 1880s, the Boise Valley was having difficulty meeting existing water supply demands and was unable to provide for new commercial enterprises. By 1900, private irrigation companies or cooperatives were providing water service to about 148,000 acres between Boise and Nampa.

On March 27, 1905, Congress authorized the United States Reclamation Service (USRS), now known as the Bureau of Reclamation, to construct the Payette-Boise Project (now called the Boise Project). Between 1905 and 1909, USRS constructed the Boise Diversion Dam, the Deer Flat Embankments (Lake Lowell), twice enlarged and extended the New York Canal, and began to construct canals to deliver water stored in Lake Lowell to lands south and west of Nampa. Construction of Arrowrock Dam began in 1911 and was completed in 1915. In 1912, the powerplant was constructed at the Boise

Diversion Dam to generate hydroelectric power needed for the construction of Arrowrock Dam. Arrowrock Reservoir was the initial water storage system in the area designed to provide water storage to promote irrigation expansion in the Boise Valley. Once construction of Arrowrock Dam was complete, the electrical power generated by the Boise Diversion Dam Powerplant, which consisted of three 500-kW (at 80 percent power factor) generator units, was marketed by the Bonneville Power Administration (BPA). The Boise Diversion Dam Powerplant operated until 1982 when it was retired due to age and increasing maintenance costs.

## Historic Sites

There are several prehistoric archaeological sites in the general area of Lucky Peak Reservoir and Arrowrock Reservoir. Most of the banks and basin of Lucky Peak Reservoir were surveyed for cultural resources. Archaeological surveys conducted in the Arrowrock Reservoir vicinity were predominantly located along the river downstream from Arrowrock Dam near the shores of Lucky Peak Reservoir. Prehistoric sites were found to be relatively rare and usually lacking dateable material. Generally, site types include: talus burials, isolated debris, lithic scatters, hunting blinds, a prehistoric quartz quarry, and rock cairns. A cave site (Site 10AA99) located above the Boise River (within 0.5 mile of the Boise River Diversion Dam), has yielded a remarkable array of artifacts, including cordage, basketry, dried fish, harpoon points, and small maize cobs. Excavations at the Lydle Gulch site (Site 10AA72), a stratified campsite below Lucky Peak Dam, indicates the area was intermittently occupied during the past 4,500 years. One additional area of notable mention (Site 10BO300) was identified within the reservoir pool and may be exposed during periods of extreme low-water. It is an 1860s temporary reservation encampment site that was inhabited by several hundred people for several years and may have particular historical value to the Shoshone-Paiute and Shoshone-Bannock Tribes. At the present time, no prehistoric archaeological sites are recorded near the high water mark of the reservoir.

The cultural resource surveys that have occurred in the project area reported a number of historic sites and associated cultural materials mostly dating from the late 1840s to the early 20th century. These include remnants of the Oregon Trail; an unnamed wagon road; structures and features associated with placer mining sites; ditches, utensils, and a wooden flume; sheepherder camps; the archaeological remnants of the Mary Hallock Foote House; and a refuse dump containing a very complete assemblage of late 19th and early 20th century domestic artifacts, cisterns, and homestead and foundation remains.

Several historical sites in the National Register of Historic Places (National Register) were identified within the project area. Irrigation systems older than 50 years and associated with events or processes important in the history of the area may be eligible

for the National Register of Historic Places. In 1972, the Arrowrock Dam and Power Plant (built between 1910 and 1915) was listed in the National Register for its significance in engineering technological development and contribution to regional agricultural economic growth. The 1915 truss bridge at Arrowrock Dam is also eligible for the National Register but is not yet listed. In 1976, the unique character of the Boise Diversion Dam and Powerplant was recognized when the facility was listed on the National Register of Historic Places. Lucky Peak Dam, constructed in 1957, is less than 50 years old and is currently ineligible for the National Register. The Barber Diversion Dam and lumber mill, which parented Barber, one of the last mill towns built in Idaho, was included in the National Register in 1978.

The potential for locating unrecorded sites within the Boise River corridor and associated reservoirs is variable, depending on location, proximity to the Boise River or other drainages, topography, and urban development. The Lydle Gulch site and several other prehistoric sites located in this area are indicative of a moderate potential for unrecorded prehistoric sites. There is, however, little potential for intact, unrecorded cultural resources in the immediate vicinity of Arrowrock Dam. This is due to extensive surface and subsurface ground disturbance during dam construction, subsequent dam modifications, and severe erosion from operation of both Arrowrock and Lucky Peak Reservoirs. The Oregon Trail follows the Boise River throughout most of the corridor indicating a significant potential for unrecorded sites associated with this historic trail.

**Indian Sacred Sites and Traditional Cultural Properties**

Executive Order (EO) 13007, Indian Sacred Sites, directs agencies to avoid adverse impacts to Indian sacred sites. The EO defines a sacred site as a "specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion." The tribe or representative of an Indian religion is responsible for informing the agency of the existence of such a site.

Traditional Cultural Properties (TCP) are locations or resources identified by an Indian tribe or other group as being important in the survival and continuation of traditional cultural practices. These can include natural resources used for traditional crafts, ceremony, or religion, or locations with unique characteristics for the practice of traditional activities, including Indian sacred sites.

The Shoshone-Bannock and Shoshone-Paiute Tribes indicated that there are places along the Snake River that still retain sufficient integrity to enable tribal members to conduct traditional ceremonial practices. Representatives from the Tribes have specifically

indicated ancestral graves and sites of historical or traditional cultural value exist beneath the Lucky Peak Reservoir including Site 10BO300. In addition, various natural and physical features on the landscape such as mountains, foothills, springs, lakes, etc., hold spiritual or religious significance to the aboriginal Snake River Tribes. All of the known and unknown sacred sites and TCPs continue to be of traditional cultural importance to both of these Tribes, although the locations and nature of these sacred places has not been disclosed. If these sites do exist, it is not known if they are currently being utilized by tribal members for ceremonial purposes.

## 3.7.2 Environmental Consequences

### No Action Alternative

Arrowrock Reservoir has been operating for almost 90 years and Lucky Peak Reservoir for almost 50 years, causing erosion and redeposition of sediment in the reservoir pools. Therefore, many of the adverse impacts to cultural resource properties, including traditional cultural properties that can result from reservoir operations have already occurred. If existing maintenance and operation of the reservoirs continues, these effects would continue, but would not expand to impact additional undisturbed shoreline. During periods of drawdown there is the potential for cultural resources to be exposed and become vulnerable to vandalism, unintentional damage by users, and surface erosion. Damage by users or vandals, however, is unlikely due to the limited accessibility and boat launching ability as well as the decreased numbers of visitors during the late season of the drawdown. No additional impacts are anticipated for the renewal of the current contract conditions.

### Preferred Alternative

The impacts to cultural resources associated with conversion to a repayment contract would be the same as those described for the No Action alternative. No additional impacts are anticipated.

### Alternative 3

The impacts to cultural resources associated with conversion to a repayment contract for reduced quantities would be the same as those described for the No Action alternative. No additional impacts are anticipated.

# 3.8 Indian Trust Assets

## 3.8.1 Affected Environment

Indian Trust Assets (ITA) are legal interests in property held in trust by the United States for Indian tribes or individuals, or property, which the United States is charged by law to protect for Indian tribes or individuals (U.S. Department of Interior 2000). Examples of ITAs include lands, minerals, hunting and fishing rights, and water rights. While most ITAs are on-reservation, they may also be found off-reservation. The United States has an Indian trust responsibility to protect and maintain rights reserved by or granted to Indian tribes or Indian individuals by treaties, statues, and executive orders. These are sometimes further interpreted through court decisions and regulations.

The Shoshone-Bannock Tribes are a federally recognized tribe located at the Fort Hall Indian Reservation in southeastern Idaho. They have both on- and off-reservation trust assets as documented by the Fort Bridger Treaty, which was signed and agreed to by the Bannock and Shoshone headman on July 3, 1868. The treaty states in article 4, that members of the Shoshone-Bannock Tribe "…shall have the right to hunt on the unoccupied lands of the United States…" Unoccupied lands are defined as unoccupied federal lands. The Tribes also believe their rights include the right to fish, which was affirmed by the Idaho Supreme Court in *State of Idaho v. Tinno*.

The Nez Perce Tribes are a federally recognized tribe located at the Nez Perce Reservation in northern Idaho. The United States and the Tribes entered into three treaties and one agreement, treaties of 1855, 1863, and 1868 as well as an agreement of 1893. The rights of the Nez Perce Tribes include the right to hunt, gather, and graze livestock on open and unclaimed lands, and the right to fish in all usual and accustomed places.

No other federally recognized tribes have off-reservation rights in southwestern Idaho outside their executive order reservations.

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.

According to the Shoshone-Paiute Tribes, the interests of the Tribes are also reflected in the Bruneau, Boise, Fort 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 continue to observe in good faith, despite the fact that some of them were not ratified by the Federal Government. Therefore, the Tribes assert they have aboriginal

title and rights to those areas. All such treaties and executive orders recognize 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.

### 3.8.2 Environmental Consequences

#### No Action Alternative

Under the No Action alternative, Indian Tribes and individual's right to fish, hunt, or gather and the resources associated with these activities are not anticipated to be impacted by the renewal of the Lucky Peak water service contracts under the current contract terms. Any adverse or beneficial impacts presently associated with the current river flow fluctuations, water diversion, and water service contracts would remain the same.

#### Preferred Alternative

Under the Preferred Alternative, Indian Tribes and individual's right to fish, hunt, or gather and the resources associated with these activities are not anticipated to be impacted by the conversion of the Lucky Peak water service contracts. Any adverse or beneficial impacts presently associated with the current river flow fluctuations, water diversion, and water service contracts would remain the same.

#### Alternative 3

The impacts to Indian Trust Assets associated with conversion to a repayment plan for reduced quantities would be the same as those described for the Preferred Alternative. No additional impacts are anticipated.

## 3.9 Environmental Justice

### 3.9.1 Affected Environment

Executive Order 12898 requires federal agencies to make environmental and human health conditions in minority and low-income populations a priority in their policies, programs, and activities. No minority or low-income populations were identified within the area affected by the project.

### 3.9.2 Environmental Consequences

**No Action Alternative**

No minority or low-income populations were identified within the area affected by the project; therefore, there are no anticipated impacts to these communities associated with the No Action alternative.

**Preferred Alternative**

No minority or low-income populations were identified within the area affected by the project; therefore, there are no anticipated impacts to these communities associated with the Preferred Alternative.

**Alternative 3**

No minority or low-income populations were identified within the area affected by the project; therefore, there are no anticipated impacts to these communities associated with Alternative 3.

## 3.10 Cumulative Impacts

Cumulative impacts are those environmental effects resulting from the incremental consequences of a proposed action when added to other past, present, and reasonably foreseeable future actions regardless of who undertakes these actions. Cumulative impacts can result from individually minor, but collectively significant actions taking place over a period of time.

The proposed contract conversions would result in virtually no changes in Boise River Reservoir operations under the Preferred Alternative, and very minor operational changes under Alternative 3. Cumulative effects analysis is, therefore, applicable only for Alternative 3.

Reclamation has completed three previous contract actions in recent years involving storage in the Boise River reservoirs. Separate NEPA compliance in the form of an EA and FONSI was completed for each of these actions. These actions are discussed in section 1.3 and listed below:

- Reclamation's purchase of 35,000 acre-feet of Lucky Peak Reservoir storage from Nampa & Meridian Irrigation District for salmon flow augmentation (1996)

- Contract actions with Simplot/Micron for storage in Anderson Ranch and Lucky Peak Reservoirs (1997)
- Assignment of contract entitlements to Provide 800 acre-feet of storage in Lucky Peak Reservoir to United Water Idaho, Inc.

In addition to the above completed actions, there are pending contract assignments of Lucky Peak storage totaling 800 acre-feet to Wilderness Ranch and Osprey subdivisions and United Water Idaho Inc, also discussed in section 1.3 of this EA.

Multi-agency planning studies as well as scoping comments for this project indicate that in the future municipal water providers will have to rely increasingly on surface water to meet demands in the rapidly growing Boise Valley. Existing contract holders will be able to meet some of this demand through expansion of current practices such as providing pressurized irrigation to subdivisions and commercial properties. However, municipal suppliers may also acquire surface water by free market acquisition or transfer of natural flow water rights and storage entitlements.

It is not possible to accurately estimate the quantity of natural flow rights or storage that may be acquired or transferred for future municipal use. However, analysis in previous NEPA documents for similar acquisitions and transfers of storage entitlements in the past totaling over 42,000 acre-feet indicate these actions, even when added to known future transfers (Wilderness Ranch and Osprey subdivisions), would have very little cumulative effect on reservoir operations and river flows or other environmental resources. Water demand and deliveries from reservoirs would continue to be highest in the summer, as it currently. Furthermore, the amount of storage required to meet the expanding needs of municipal providers is a small portion of the more than 1 million acre-feet in the Boise River reservoir system.

Considered altogether, the hydrologic and corresponding impacts to other aspects of the human environment from these past present and future actions are minor in the context of the normal yearly and seasonal changes in Boise River hydrology.

# Chapter 4 CONSULTATION AND COORDINATION

## 4.1 Public Involvement

On July 10, 2002, Reclamation mailed a scoping letter to more than 100 potentially interested agencies, organizations, tribal governments, and individuals describing the potential project and soliciting assistance on identifying issues, concerns, and alternatives. In addition to the scoping letter, a notice was published in The Idaho Statesman as required by Reclamation contracting procedures. A discussion of the issues identified through public scoping is presented in Chapters 1 and 2 of this document.

Reclamation met with the Lucky Peak contractors and their representatives during preparation of the Draft EA. Meetings were held to collect information and discuss issues and concerns.

On December 22, 2003, Reclamation mailed copies of the Draft EA to the agencies, Tribes, organizations, and individuals indicated in appendix B asking for written comments on the document. The Draft EA was also posted on Reclamation's Pacific Northwest Region website. Sixteen written comments were received by mail and 19 comments were received by email. These comments and Reclamation's responses are included in appendix C.

## 4.2 Agency Coordination

In addition to scoping letter activities, Reclamation has contacted the USFWS and NOAA Fisheries about consultation under section 7 of the ESA. Both USFWS and NOAA Fisheries were consulted to obtain the list of species to be addressed in Section 7 consultation. A meeting was held with USFWS on April 25, 2003, to discuss the project. A determination was made that threatened and endangered species would be addressed in this document and a separate BA would not be needed for Section 7 compliance. Reclamation received a memorandum from USFWS on February 16, 2004, concurring with Reclamation's determinations of "no effect" to ESA listed species under their oversight (appendix C).

Reclamation coordinated with IDFG on the status of bull trout in the Boise River system. IDFG also provided scoping comments on the issues of minimum flows in the lower Boise River and fish and wildlife pools in the reservoirs. On February 3, 2004

Reclamation met with representatives from IDFG to discuss the Draft EA and clarify the impact assessment and future reservoir and river operations if the Preferred Alternative was implemented.

Scoping comments were also received from IDWR. Their concerns were increased costs of contracted water, loss of water rights, instream flow, and ESA consultation.

Local agency scoping comments were received from the city of Eagle, Community Planning Association of Southwest Idaho (COMPASS), Ada County, city of Boise mayor's office, and Boise Parks and Recreation. The issue for Eagle was the fate of contracts not renewed and if other entities could apply for these. Issues for COMPASS included domestic and commercial use of water, winter instream flows, and additional flood storage space. Ada County inquired about using contract water to irrigate certain parks. City of Boise comments were related to concerns about the effects of converting to repayment contracts and alternative uses for the stored water.

# Chapter 5 LIST OF PREPARERS

The responsibilities and qualifications of the individuals that contributed to the preparation of the environmental assessment are listed below.

**Table 5-1. Preparers and Their Qualifications**

| Preparer/ Affiliation | Role | Education and Experience |
|---|---|---|
| Chuck Blair CH2M HILL | Biological Resources | M.S., Wildlife Biology; B.S., Wildlife Ecology; 25 years experience. |
| Jody Fagan CH2M HILL | Graphics | B.F.A.; Associate Applied Science; 26 years experience. |
| Maria Dudash CH2M HILL | Socioeconomics | B.S., Environmental Resource Management; 6 years experience. |
| Judy Ferguson CH2M HILL | Biological Resources | M.S., Rangeland Ecology; B.S., Range Resources; B.S., Wildlife Biology; 8 years experience. |
| Lynn Foster CH2M HILL | Biological Resources | M.S., Fisheries; B.S., Biological Sciences; 25 years experience. |
| Jenny Kindig CH2M HILL | Water Quality | B.S., Engineering; 3 years experience. |
| Denny Mengel, Ph.D. CH2M HILL | EA Team Leader | Ph.D., Soil Sciences; M.S., Forestry; B.S., Wildlife Resources; 20 years experience. |
| Jim Sharpe CH2M HILL | Cultural Resources | M.S., Resource Management; B.S., Anthropology; 10 years experience. |
| Jenni York CH2M HILL | Editor | B.S., General Studies; 15 years experience. |
| Scott Campbell Moffatt Thomas | Reviewer | J.D., 25 years experience. |
| Dan Steenson Ringert Clark | Reviewer | J.D., 14 years experience. |
| Jerry Kiser Stoppello and Kiser | Reviewer | J.D., 15 years experience. |
| Steve Dunn Reclamation | NEPA Specialist | B.S., Biology, 22 years experience |
| Sue Tholen Reclamation | Activity Manager | B.S., Forestry Management, 25 years experience |

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# APPENDIX A

# STORAGE NEEDS TO SUPPLEMENT NATURAL FLOW WATER RIGHTS

The purpose of the water service 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)1
6. Eagle Island Water Users Association (EIWUA)2
7. Eureka Water Company (EWC)
8. Farmers Union Ditch Company (FUDC)
9. Little Pioneer Ditch Company (LPDC)
10. Middleton Mill Ditch Company (MMDC)
11. Middleton Irrigation Association (MIA)
12. New Dry Creek Ditch Company (NDCDC)
13. New Union Ditch Company (NUDC)
14. Pioneer Irrigation District (PID)
15. Settlers Irrigation District (SID)
16. South Boise Mutual Canal Company (SBMCC)3
17. South Boise Water Company (SBWC)
18. Thurman Mill Ditch Company (TMDC)
19. Village of Garden City (GC)

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

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[1] The contract formerly held by Capital View Irrigation District was assigned to United Water Idaho for irrigation use.

[2] 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.

[3] The contract formerly held by South Boise Mutual Canal Company was assigned to United Water Idaho for irrigation use.

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 also owns natural flow water rights that are defined by a subsequent decree issued by district court Judge E. L. Bryan 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. These are the Stewart and Bryan decrees referred to in Reclamation's permit application to store water in Lucky Peak Reservoir.

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 percent by the beginning of July, and to 60 percent by the middle of August. During 1992, all natural flow water rights with priorities of 1869 and later were totally curtailed by July 28th.

The following data quantify the storage needed to replace the loss of natural flow in terms of the dates on which natural flow water rights were reduced to 75 percent and 60 percent and finally curtailed to 300 during 1992, one of the lowest water years on record, with runoff of only 41 percent of normal. The data compares this storage need to the storage held by the contractors in Lucky Peak, Anderson Ranch and Arrowrock Reservoirs. Natural flow water rights are identified by quantity and priority (those with priority dates of 1868 and earlier, and those with priority dates of 1869 and later). The actual shortfall during a year such as 1992 is greater because most of the contractors' storage space will not fill. This data 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 (ac-ft) is 1 cfs = 1.9835 af per day.

| | | | | **All Rights 25% Need** | **1869 40% Need** | **1869 100% Need** | **1868 40% Need** | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Natural Flow Rights | 6/1-6/7 7 days | 6/8-7/27 50 days | 7/28-10/15 79 days | 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 | 3.74 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 | 1,718 af | 6,639.28 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 | 2,721.61 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 | | |

| | | | | **All Rights 25% Need** | **1869 40% Need** | **1869 100% Need** | **1868 40% Need** | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Natural Flow Rights | 6/1-6/7 7 days | 6/8-7/27 50 days | 7/28-10/15 79 days | 6/8-10/15 129 days | Total '92 Need | L.P. Storage | Shortfall |
| | | | 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 | | |
| | | (69) | 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 | | |

| | All Rights 25% Need | 1869 40% Need | 1869 100% Need | 1868 40% Need | | | |
|---|---|---|---|---|---|---|---|
| Natural Flow Rights | 6/1-6/7 7 days | 6/8-7/27 50 days | 7/28-10/15 79 days | 6/8-10/15 129 days | Total '92 Need | L.P. Storage | Shortfall |
| 34.838 cfs | | | | | 5,078.03 af | 800 af | 4,278.03 af |
| 1,689.37 cfs | 5,864.05 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 | 0 | 376 f | 1,300 af | 1,676 af |
| 3.BVIDC | 0 | 961 af | 2,500 af | 3,461 af |
| 5.CVID | 0 | 460 af | 300 af | 760 af |
| 9.FUDC | 2,874 af | 5,272 af | 10,000 af | 18,146 af |
| 10.LPDC | 0 | 2,174 af | 500 af | 2,674 af |
| 13.NDCDC | 0 | 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 | 0 | 543 af | 500 af | 1,043 af |
| | 26,770 af | 42,746 af | 44,100 af | 113,616 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

# APPENDIX B

# DISTRIBUTION LIST FOR THE DRAFT EA

| Local Governments/Agencies | |
|---|---|
| Ms. Donna M. Griffin<br>Ada County Parks & Waterways<br>4049 S. Eckert Road<br>Boise ID 83706 | Honorable Carolyn Terteling-Payne<br>Mayor-City of Boise<br>650 Main<br>Boise ID 83702 |
| Board of Ada County Commissioners<br>650 W. Main<br>Boise ID 83702 | Honorable Garret Nancolas<br>Mayor-City of Caldwell<br>621 Cleveland Blvd.<br>Caldwell ID 83605 |
| Mr. Robbin Finch<br>City of Boise, Environmental Division-Water Quality<br>PO Box 500<br>Boise ID 83701-0500 | Honorable Tom Dale<br>Mayor-City of Nampa<br>411 3rd Street South<br>Nampa ID 83651 |
| Ada County Planning & Zoning<br>650 W. Main<br>Boise ID 83702 | Honorable Robert Corrie<br>Mayor-City of Meridian<br>City Hall, 33 East Idaho Ave<br>Meridian ID 83642 |
| Mr. James R. Hall, Director<br>Boise Parks and Recreation<br>1104 Royal Blvd.<br>Boise ID 83706 | Honorable Rick Yzaguirre<br>Mayor-City of Eagle<br>PO Box 520<br>Eagle ID 83616 |
| Ms. Sally Goodell<br>Community Planning Association of Southwest Idaho<br>800 S. Industry Way<br>Meridian ID 83642 | Honorable Craig Nelson<br>Mayor-City of Kuna<br>329 W 3rd<br>Kuna ID 83634 |
| Mr. Brent Cornwall<br>Ada County Sheriff's Department<br>7200 Barrister Drive<br>Boise ID 83704 | |
| **State Government/Agencies** | |
| Mr. Lee Sisco<br>District 63 Watermaster<br>6616 Overland Rd<br>Boise ID 83709 | Mr. Al Van Vooren,<br>Regional Supervisor<br>Idaho Department of Fish & Game<br>3107 Powerline Road<br>Nampa ID 83686 |
| Mr. Jim Yost<br>Office of the Governor<br>Statehouse Mail<br>Boise ID 83720 | Mr. Stephen E. West<br>Idaho Department of Environmental Quality<br>1445 N. Orchard<br>Boise ID 83706-2239 |
| Idaho Association of Counties<br>700 West Washington Street<br>Boise ID 83701 | Mr. Gary Spackman<br>Idaho Department of Water Resources<br>2735 Airport Way<br>Boise ID 83705-5082 |

| Local Governments/Agencies | |
|---|---|
| Mr. Patrick A. Takasugi, Director<br>Idaho State Dept of Agriculture<br>PO Box 790<br>Boise ID 83701-0790 | Mr. Karl Dreher, Director<br>Idaho Department of Water Resources<br>1301 North Orchard<br>Boise ID 83720 |
| Mr. Rick Collignon, Director<br>Idaho State Parks & Recreation<br>PO Box 83720<br>Boise ID 83720 | Dr. Kenneth Reid<br>Idaho State Historic Preservation Office<br>210 Main Street<br>Boise ID 83702 |
| Mr. Chris Hoosick<br>Lucky Peak State Park<br>9725 E. Highway 21<br>Boise ID 83716 | Mr. Jerry Rigby, Chairman<br>Idaho Water Resources Board<br>1301 North Orchard<br>Boise ID 83720 |
| Office of the Governor State of Idaho Attn: Chief of Staff<br>700 West Jefferson, 2nd Floor<br>PO Box 83720<br>Boise ID 83720-0034 | Mr. Eric Leitzinger<br>Idaho Department of Fish and Game<br>3101 S Powerline Rd<br>Nampa ID 83686 |
| **Federal Government/Agencies** | |
| Boise National Forest<br>1249 South Vinnell Way<br>Boise ID 83709 | Mr. Greg Martinez<br>US Army Corps of Engineers<br>Boise Regulatory Field Office<br>304 N 8th Street, Rm 140<br>Boise ID 83702 |
| Ms. Kathy Peter, District Chief<br>US Geological Survey<br>230 Collins Road<br>Boise ID 83702 | Mr. Robert Ruesink, Supervisor<br>U.S. Fish & Wildlife Service<br>1387 South Vinnell Way, Rm 368<br>Boise ID 83709 |
| State Director<br>Bureau of Land Management<br>1387 South Vinnell Way<br>Boise ID 83709 | Mr. Eric LaPointe, Superintendent<br>Fort Hall Agency<br>PO Box 220<br>Fort Hall ID 83202-0220 |
| Mr. Jim Werntz<br>EPA-Idaho Operations Office<br>1435 N Orchard Street<br>Boise ID 83706 | Bureau of Indian Affairs, Superintendent<br>Eastern Nevada Agency<br>1555 Shoshone Circle<br>Elko NV 89801 |
| Natural Resources Conservation Service<br>9173 W. Barnes Drive, Suite C<br>Boise ID 83709 | Bureau of Indian Affairs, Superintendent<br>Warms Springs Agency<br>PO Box 1239<br>Warm Springs OR 97761-1239 |
| Mr. Brian Brown<br>NMFS-Hydropower Program<br>525 NE Oregon Street<br>Portland OR 97232-2737 | Bureau of Indian Affairs, Superintendent<br>Northern Idaho Agency<br>PO Drawer 277<br>Lapwai ID 83540-0277 |

| Local Governments/Agencies | |
|---|---|
| National Marine Fisheries Service<br>10215 W. Emerald, Suite 180<br>Boise ID 83704 | Mr. John Parker<br>Bureau of Indian Affairs<br>PO Box 220<br>Fort Hall ID 83203 |
| Mr. Dave Brownell<br>USACE Lucky Peak Project<br>9723 E. Hwy 21<br>Boise ID 83716 | Mr. Michael Crouse<br>Assistant Regional Administrator<br>National Marine Fisheries Service<br>525 NE Oregon Street<br>Portland OR 97232-2737 |
| Corps of Engineers<br>Walla Walla District<br>201 N. 3rd Street<br>Walla Walla WA 99362 | |
| **Irrigation Interests** | |
| Mr. Ken Henley<br>Boise Project Board of Control<br>2465 Overland Road<br>Boise ID 83705 | Mr. Bob Birch, Secretary<br>Farmers' Union Ditch Company Ltd<br>2153 N Pollard Lane<br>Star ID 83669 |
| Boise-Kuna Irrigation District<br>PO Box 330<br>Kuna ID 83634-2201 | Ms. Janie Foote, Secretary-Treasurer<br>Middleton Irrigation Association Inc<br>PO Box 214<br>Middleton ID 83644 |
| Nampa & Meridian Irrigation District<br>1503 First Street South<br>Nampa ID 83651 | Ms. Janie Foote, Secretary-Treasurer<br>Middleton Mill Ditch Company<br>PO Box 214<br>Middleton ID 83644 |
| New York Irrigation District<br>6616 Overland Road<br>Boise ID 83709 | Ms. Kari Rosti, Secretary<br>New Dry Creek Ditch Co. Ltd.<br>PO Box 430<br>Eagle ID 83616 |
| Mr. Scott Rhead<br>United Water Idaho<br>8248 W Victory Rd<br>Boise ID 83709 | Mr. Barry Marcus<br>Marcus, Merrick, Christian & Hardee<br>737 N 7th St<br>Boise ID 83702-5595 |
| Mr. Albert P. Barker<br>Barker, Rosholt & Simpson LLP<br>PO Box 2139<br>Boise ID 83701-2139 | Mr. Charles Carlise, Secretary-Treasurer<br>New Union Ditch Company Ltd.<br>PO Box 31<br>Eagle ID 83616 |
| Mr. Jerry Kiser<br>Stopello & Kiser, Attorneys & Counselors at Law<br>620 W. Hays<br>Boise ID 83702 | Mr. Ronald Kuenzli, Secretary-Treasurer<br>Pioneer Ditch Company Ltd.<br>451 S. Star Rd.<br>Star ID 83669 |

| Local Governments/Agencies | |
|---|---|
| Wilder Irrigation District<br>PO Box 416<br>Caldwell ID 83606-0416 | Ms. Naida E. Kelleher, Secretary-Treasurer<br>Pioneer Irrigation District<br>PO Box 426<br>Caldwell ID 83606 |
| Mr. Scott Campbell<br>Moffatt Thomas Barrett Rock & Fields, Chtd.<br>PO Box 829<br>Boise ID 83701 | Mr. Nathan Draper, Manager<br>Settlers Irrigation District<br>PO Box 7571<br>Boise ID 83707 |
| Mr. Dan Steenson<br>Ringert and Clark Chartered<br>PO Box 2773<br>Boise ID 83701 | Ms. LaVonda Milton, Secretary<br>South Boise Mutual Irrigation Company<br>1120 Chamberlin Street<br>Boise ID 83706 |
| Mr. Bruce M. Smith<br>Moore Smith Buxton & Turke Chartered Atty.<br>225 North 9th Street Ste 420<br>Boise ID 83702 | Mr. Barry Eschen, President<br>South Boise Water Company<br>PO Box 6005<br>Boise ID 83707 |
| Mr. James Schuck, Secretary-Treasurer<br>Ballantyne Ditch Company Ltd<br>655 N Park Lane<br>Eagle ID 83616 | Ms. Bonnie DeChambeau<br>Secretary-Treasurer<br>Thurman Mill Ditch Company Ltd.<br>11532 West Joplin Rd.<br>Boise ID 83714 |
| Mr. Robert Jahn, President<br>Boise City Canal Company<br>PO Box 2157<br>Boise ID 83701 | Mr. Mike Cramer<br>Givens Pursley<br>PO Box 2720<br>Boise ID 83701 |
| Mr. Steve Birkinbine, Manager<br>Boise Valley Irrigation Ditch Company<br>8750 N. Bogart Lane<br>Boise ID 83703 | Secretary-Treasurer<br>Fairview Acres Lateral Water Users Association<br>PO Box 6377<br>Boise ID 83707 |
| Ms. Judy Mautz, Secretary-Treasurer<br>Canyon County Water Company<br>PO Box 11<br>Star ID 83669 | Big Bend Irrigation District<br>747 Red Top Road<br>Adrian OR 97901 |
| Mr. Peter Newton, Secretary-Treasurer<br>Capitol View Irrigation District<br>PO Box 208<br>Eagle ID 83616 | Farmers' Co-op Ditch Company<br>PO Box 430<br>Parma ID 83660 |
| Mr. Terry Wickstrom, Secretary-Treasurer<br>Eureka Water Company<br>5590 W. Joplin Rd.<br>Meridian ID 83642 | Trinity Springs Ltd<br>PO Box 1630<br>Ketchum ID 83340 |
| **Businesses and Organizations** | |
| Mr. Thomas Haislip Jr.<br>CH2M Hill<br>PO Box 8748<br>Boise ID 83707-2748 | Mr. Norman M. Semanko<br>Idaho Water Users Assoc. Inc<br>205 North 10th Street Suite 530<br>Boise ID 83702 |

| Local Governments/Agencies | |
|---|---|
| Mr. Terry Scanlon PE PG<br>Scanlon Engineering<br>600 E. River Park Lane Suite 105<br>Boise ID 83706 | Idaho Whitewater Association<br>3964 Yorktown Way<br>Boise ID 83706 |
| Mr. Terry T. Ulhling, Assist. Gen. Council<br>JR Simplot Company<br>PO Box 27<br>Boise ID 83707 | Idaho Wildlife Federation<br>1655 Fairview Suite 209<br>Boise ID 83707 |
| Micron Technology<br>General Council<br>Mail Stop 507<br>PO Box 6<br>Boise ID 83707-006 | Mr. Laird Lucas<br>Land & Water Fund of Idaho<br>PO Box 1612<br>Boise ID 83701 |
| Mr. Bill Clayton<br>Boise River 2000<br>PO Box 46<br>Star ID 83669 | Mr. Bob Steed<br>Southwest Basin Native Fish WAG<br>1445 N. Orchard<br>Boise ID 83706 |
| Mr. Jeff Smith<br>Boise Valley Fly Fisherman Inc<br>PO Box 311<br>Boise ID 83701 | Nature Conservancy-Idaho Chapter<br>2015 Sunrise Rim Road<br>Boise ID 83705 |
| Mr. Doug Dingledein<br>Fly Fishers of Idaho<br>PO Box 8861<br>Boise ID 83707 | Wilderness Society<br>2600 Rose Hill, Suite 201<br>Boise ID 83705 |
| Golden Eagle Audubon Society<br>PO Box 8261<br>Boise ID 83707 | Mr. Randall C. Fredricks<br>Law Offices<br>PO Box 2835<br>Boise ID 83701-2835 |
| Mr. Bert Cleveland<br>Idaho Audubon Council<br>1411 Melrose<br>Boise ID 83706 | Mr. Richard Prange, Pres<br>Ted Trublood Chapter 523<br>Trout Unlimited<br>PO Box 1971<br>Boise ID 83701 |
| Mr. Justin Hayes<br>Idaho Conservation League<br>PO Box 844<br>Boise ID 83701 | Wilderness Ranch Owners Assoc Inc<br>45 Wilderness Ranch Rd<br>Boise ID 83716 |
| Idaho Rivers United<br>PO Box 633<br>Boise ID 83701 | Lucky Peak Power Plant Project<br>9731 E. Hwy 21<br>Boise ID 83716 |
| **Tribal Governments** | |
| Ms. Gwen T. Davis, Chairperson<br>Northwestern Band of the Shoshone Nation<br>427 N Main Suite 101<br>Pocatello ID 83204-3015 | Mr. Anthony Johnson, Chairman<br>Nez Perce Tribal Exec Committee<br>PO Box 305<br>Lapwai ID 83540-0305 |

| Local Governments/Agencies | |
|---|---|
| Mr. Bruce Parry, Executive Director<br>Northwestern Band of the Shoshone Nation<br>826 S Main Suite 6<br>Brigham City UT 83402-3300 | Mr. Mike Penney, Exec Director<br>Nez Perce Tribe<br>PO Box 305<br>Lapwai ID 83540 |
| Mr. Fred Auck Chairman<br>Fort Hall Business Council<br>Shoshone-Bannock Tribes<br>PO Box 306<br>Fort Hall ID 83203-0306 | Mr. Terry Gibson, Chairman<br>Shoshone-Paiute Tribal Council<br>PO Box 219<br>Owyhee NV 89832-0219 |
| Ms. Willie Preacher<br>Department of Environment<br>Shoshone-Bannock Tribes<br>PO Box 306<br>Fort Hall ID 83203-0306 | Mr. John Meisinger, Chief Executive Officer<br>Shoshone-Paiute Tribes<br>PO Box 219<br>Owyhee NV 89832-0219 |
| Mr. Chad Colter, Director<br>Department of Fisheries<br>Shoshone-Bannock Tribes<br>PO Box 306<br>Fort Hall ID 83203-0306 | Mr. Albert Teeman, Chairman<br>Burns Paiute General Council<br>HC71, 100 Pasigo Street<br>Burns OR 97720-9303 |
| Ms. Elese Teton<br>Department Water Resourecs<br>Shoshone-Bannock Tribes<br>PO Box 306<br>Fort Hall ID 83203-0306 | General Manager<br>Burns Paiute Tribes<br>HC71, 100 Pasigo Street<br>Burns OR 97720-9303 |
| **Libraries** | |
| Boise Public Library<br>715 Capital Blvd<br>Boise ID 83702 | Nampa Public Library<br>11th Ave<br>Nampa ID 83651 |
| Caldwell Public Library<br>1010 Dearborn Street<br>Caldwell ID 83605 | Meridian Public Library<br>1326 West Cherry Lane<br>Meridian ID 83642 |
| Idaho State Library<br>325 West State Street<br>Boise ID 83702 | |
| **Congressional Delegation** | |
| Honorable C.L. "Butch" Otter<br>Member, United States House of Representatives<br>304 N 8th St, Room 454<br>Boise ID 83702 | Honorable Larry E. Craig<br>United States Senator<br>304 N. 8th St., Rm. 149<br>Boise ID 83702 |
| Honorable Mike Simpson<br>Member, United States House of Representatives<br>304 N. 8th Street, Rm. 325<br>Boise ID 83702 | Honorable Mike Crapo<br>United States Senator<br>304 N. 8th Street, Rm. 338<br>Boise ID 83702 |

| Local Governments/Agencies | |
|---|---|
| **State Legislators** | |
| Mr. Doug Jones<br>Idaho House-Chair, Agriculture Affairs<br>3515 N 2300 E<br>Filer ID 83328 | Mr. Jerry Thorne<br>Idaho State-Chair<br>Local Government & Taxation<br>331 Winther Blvd<br>Nampa ID 83651 |
| Mr. Jack Barraclough<br>Idaho House-Chair, Environmental Affairs<br>3018 Westmoreland Circle<br>Idaho Falls ID 83402 | Mr. Laird Noh<br>Idaho Senate-Chair<br>Resources & Environmental<br>3442 Addison Ave E<br>Kimberly ID 83341 |
| Mr. Ric Branch<br>Idaho House-Chair, Agriculture Affairs<br>3770 N Crane Road<br>Midvale ID 83645 | Mr. Dean L. Cameron<br>Idaho Senate-Chair, Finance<br>1101 Ruby Drive<br>Rupert ID 83350 |
| Mr. Grant Ipsen<br>Idaho Senate-Chair, Health & Welfare<br>1010 Houston Road<br>Boise ID 83706 | Mr. Cameron Wheeler<br>Idaho House-Chair<br>Resources & Conservation<br>PO Box 335<br>Ririe ID 83443 |

# 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 |

[1] Eighteen emails similar to Mr. Searle's letter were received from the following people:

| | | |
|---|---|---|
| Holly Hancock<br>Rigby ID | Ina De Boer<br>Nampa ID | Kris Long<br>Chubbuck ID |
| Tracy Walton<br>Emmett ID | Glen Edwards<br>Nampa ID | Dennis Tanikuni<br>Wilder ID |
| Jeanne Arnzen<br>Cottonwood ID | Grant Ipsen<br>Boise ID | Carl Montgomery<br>Eden ID |
| Nancy Shiozawa<br>Pocatello ID | Mark Trupp<br>Driggs ID | Russell Hendricks<br>Nampa ID |
| David Hart<br>Eagle ID | Gary Lemmon<br>Hagerman ID | Kent Miskin<br>Terreton ID |
| W. Greg Nelson<br>Kuna ID | David Ascuena<br>Mtn Home ID | Dave Veselka<br>Indian Valley ID |

**Comment Letter No. 1**


# ADA COUNTY
# DEVELOPMENT SERVICES

PHONE (208) 287-7900
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 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.

**Comment Letter No. 3**

**Boise City Canal Co.**

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



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**


*Moffatt Thomas*

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Boise
Idaho Falls
Pocatello

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise, Idaho 83701 0829

208 345 2000
800 422 2889
208 385 5384 Fax
www.moffatt.com






February 2, 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 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

Boise
Idaho Falls
Pocatello

*Moffatt Thomas*

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Eugene C. Thomas
John W. Barrett
R. B. Rock
Richard C. Fields
Robert E. Bakes
John S. Simko
John C. Ward
D. James Manning
Gary T. Dance
Larry C. Hunter
Morgan W. Richards
Mark A. Ellison
Randall A. Peterman
Mark S. Prusynski

Stephen R. Thomas
Glenna M. Christensen
Gerald T. Husch
Scott L. Campbell
Robert B. Burns
James C. Dale
Michael E. Thomas
Patricia M. Olsson
James C. deGlee
Bradley J Williams
Lee Radford
Michael O. Roe
David S. Jensen
James L. Martin

C. Clayton Gill
David P. Gardner
Julian E. Gabiola
Angela Schaer Kaufmann
Benjamin H. Schwartz
Jon A. Stenquist
Bradley J. Dixon
Mark C. Peterson
Andrew J. Waldera
Shawn C. Nunley

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

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise, Idaho 83701 0829

208 345 2000
800 422 2889
208 385 5384 Fax
www.moffatt.com

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.

The Districts commenced discussi ns and encouraged the Bureau of Reclamation to move forward with this project as early a s 1996. Please do e erything in your power to accelerate the process so that these contracts can e executed, prior tc 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 2 1 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

WBR:JWMcDonald:kstinson:4-7-03:208-378-5276
m:\pn6300\sue\lucky peak meeting nepa ltr.

**Comment Letter No. 5**

**From:** "Bryan Searle" <mrspud@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.

**Comment Letter No. 6**


# Idaho Water Users Association, Inc.

205 N. 10th St., Suite 530 • BOISE, IDAHO 83702
OFFICE - 208-344-6690 • FAX - 208-344-2744
E-MAIL - iwua@iwua.org
WEBSITE - www.iwua.org






February 6, 2004

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."

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.

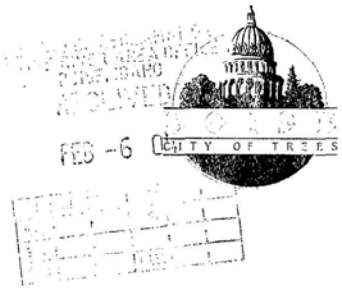
6-2 See response to comment 4-2

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






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

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**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.

**Comment Letter No. 8**

2/4/04



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 Eureka 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 right of renewal for the existing contracted storage amounts. This would meet the intent and purpose of the water service 8-1

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.

TROUT UNLIMITED



February 6, 2004

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

**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

*151 North Ridge Avenue, Suite 120 • Idaho Falls, ID 83402*
*(208) 552-0891 • Fax (208) 552-0899*

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

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[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 uses 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. 9-7
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. 9-8

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.

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[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. 9-30 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. 9-31

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 to 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



**Dirk Kempthorne** / Governor
**Steven M. Huffaker** / Director

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

**Responses to Letter No. 10**

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

**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
CRAIG MARCUS
BARRY MARCUS*
GALE M. MERRICK
MICHAEL CHRISTIAN†
TRENT MARCUS
DANIEL R. HARDEE

*Also Admitted to the California State Bar
† Also Admitted to the Washington State Bar

LAW OFFICES
MARCUS, MERRICK, CHRISTIAN & HARDEE LLP
THE MARCUS LAW BUILDING
737 NORTH 7TH STREET
BOISE, IDAHO 83702-5595

TELEPHONE
(208) 342-3563
TELEFAX
(208) 342-2170

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



Laura E. Burri
Jeffrey R. Christenson
D. Blair Clark
Michael J. Doolittle
S. Bryce Farris
Patrick D. Furey
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
William F. Ringert
Daniel V. Steenson
Allyn L. Sweeney

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.

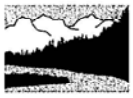
Alternative 2 is the only legal and sensible alternative for BOR to choose.

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
1387 S Vinnell Way, Suite 368
Boise, Idaho 83709

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.