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DEPARTMENT OF WATER RESOURCES

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Canal Company*

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION
REGARDING STORAGE RESET IN
WATER DISTRICT 01 FILED BY MILNER
IRRIGATION DISTRICT

Docket No. P-WRA-2017-002
**SURFACE WATER COALITION'S
STATEMENT OF ISSUES**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal
Company, and Twin Falls Canal Company (hereafter collectively referred to as "Surface Water
Coalition" or "Coalition"), by and through their undersigned counsel of record, pursuant to the
Order Requesting Staff Memorandum; Order Adopting Deadlines; Notice of Status Conference;
Notice of Hearing dated November 20, 2017 as well as the Department's Rules of Procedure

¹ Mr. Reagan is currently practicing under a legal intern limited license (I.B.C.R. 226). Mr. Reagan also recently passed the bar exam and is the process of being admitted to the Idaho State Bar.

(IDAPA 37.01.01 *et seq.*), and hereby submit the following statement of issues in the above-captioned matter.

The Coalition is filing this joint statement of issues solely for convenience and in the interests of filing efficiency. The individual Coalition members reserve the right to participate as individual parties if deemed necessary at any point during this proceeding.

BACKGROUND

Milner sent a letter to the Director and the Water District 01 Watermaster on August 18, 2017. Milner inquired into the storage water rights “reset” accounting and how it would be implemented in the fall of 2017 vis-à-vis Milner’s 1916 natural flow irrigation water right. The Director responded by initiating a contested case. *See Notice of Prehearing Conference; Order Setting Deadline for Petitions to Intervene* (October 5, 2017). Several parties, including the Coalition, filed petitions to intervene and the Director held a pre-hearing conference on November 13, 2017. The Director set a deadline for parties to file an optional “statement of issues.” The Coalition submits the following for the Director’s consideration.

STATEMENT OF ISSUES

1. What does the “1/1 to 12/31” period of use on the storage water right decrees mean?

The Basin 01 storage water rights list a “1/1 to 12/31” period of use.² Water District 01 has identified how it currently interprets the water right element. *See Staff Memo* at 1. The Director should consider and identify what the period of use means for purposes of water right administration. The Director is statutorily required to supervise and administer decreed water rights in accordance with Idaho law. *See I.C. § 42-602*. The Director further has a “clear legal duty” to distribute water “according to decreed water rights.” *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184, 1191 (2017).

Although the Coalition does not concede that an administrative contested case must be held prior to implementing such water right administration in Water District 01, the Director has initiated this proceeding and therefore should address this issue to provide clarification and certainty moving forward.

² Most storage water rights throughout Idaho list a period of use from 1/1 to 12/31.

2. Can the Watermaster “reset” storage water rights that have already been satisfied in that calendar year?

This is the crux of the issue identified in Milner’s August 18, 2017 letter. As documented in the Staff Memo, since 1988, Water District 01 has reset the storage water rights in a manner during the irrigation season that has prevented certain irrigation water rights from receiving available natural flow. *See Staff Memo* at 3-4. The Director should consider and identify whether the Watermaster can continue the practice under Idaho law. If so, the Director should consider and identify the appropriate reset date. The Director is statutorily required to supervise and administer decreed water rights in accordance with Idaho law. *See* I.C. § 42-602. The Director further has a “clear legal duty” to distribute water “according to decreed water rights.” *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184, 1191 (2017).

3. How should available natural flow be distributed to storage water rights following the Day of Allocation if those storage water rights have already been satisfied in that calendar year?

This is essentially a restatement of Issue #2.

4. How should available natural flow be distributed to storage water rights following the Day of Allocation if those storage water rights have not already been satisfied in that calendar year?

This is essentially the converse of Issue #2. If storage water rights are not satisfied prior to the Day of Allocation, should the Watermaster distribute water to those rights later in the calendar year ahead of storage water rights that have been satisfied that year? Issues #1 through #3 all revolve around the storage water rights’ period of use and how that is considered for purposes of administration.

5. How is available natural flow distributed under the spaceholder contracts’ “Winter Power Operation; Minidoka Powerplant” provision, and which storage water rights will receive that water in administration?

In general, spaceholder contracts entered into with the U.S. Bureau of Reclamation (Reclamation) require Reclamation to curtail the release of additional water from American Falls during the storage season for power production at Minidoka if it would result in the loss of water that could otherwise be stored for irrigation. The exchange allows Reclamation to store water for irrigation purposes (in American Falls, Island Park, and Palisades Reservoirs) that would otherwise be available and diverted under the senior hydropower water rights at Minidoka Dam (up to 2,700 cfs). The contracts further identify how the stored water is to be credited pursuant to the respective reservoirs and storage water rights. The Director should consider and identify how this exchange is implemented in Water District 01 administration in relation to the issues identified above.

The Director is statutorily required to supervise and administer decreed water rights in accordance with Idaho law. *See* I.C. § 42-602. The Director further has a “clear legal duty” to distribute water “according to decreed water rights.” *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184, 1191 (2017). The Director should address this issue to provide clarification and certainty moving forward, particularly to properly account for natural flow that is being stored during the winter pursuant to reservoir storage water rights pursuant to the 1909 hydropower water right exchange.

6. History of storage accrual and the development of a “reset” in the accounting program.

The *Staff Memo* provides a general overview of the history of reset dates in the water right accounting program. The parties should be afforded an opportunity to submit facts and reports regarding a complete history of storage water right administration and accounting, including pre-1978 in order to develop a complete record on the subject. How the storage water rights were appropriated and administered when the reservoirs were developed is an important issue to review in this matter. The Director should consider this issue accordingly.

CONCLUSION

The Coalition submits the Director has the authority and should consider the issues identified above for purposes of this contested case. The proper and lawful administration of natural flow and storage water rights in Water District 01 is important to the Coalition and should be defined and implemented to provide certainty moving forward.

DATED this 8th day of December, 2017.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2017, I caused to be served a true and correct copy of the foregoing **SURFACE WATER COALITION'S STATEMENT OF ISSUES** by email and U.S. mail to IDWR, and by electronic mail to the parties:

<p>Director Gary Spackman c/o Kimi White IDWR 322 E Front St Boise, ID 83720-0098 *** service by U.S. Mail and electronic mail gary.spackman@idwr.idaho.gov kimi.white@idwr.idaho.gov garrick.baxter@idwr.idaho.gov</p>	<p>Sarah A. Klahn Mitra M. Pemberton White & Jankowski, LLP 511 Sixteenth Street, Suite 500 Denver, Colorado 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<p>William Bacon Shoshone-Bannock Tribes P.O. Box 306 Fort Hall, Idaho 83203 bbacon@sbtribes.com</p>
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