

**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

**ORDER RE: STATEMENTS OF  
ISSUES AND RESPONSES; ORDER  
ADOPTING DEADLINES; AMENDED  
NOTICE OF STATUS CONFERENCE**

**BACKGROUND**

On August 18, 2017, Milner Irrigation District (“Milner”) submitted a letter to the Idaho Department of Water Resources (“Department”) asserting the “fall storage ‘reset’ for purposes of water right administration” in Water District 01 “is not authorized in the current storage water right partial decrees, including the Lake Walcott storage right (1-219)” (December 14, 1909 priority date) and “has in effect curtailed Milner’s natural flow water right 1-17 (November 14, 1916 priority date) in recent years.” Milner requests “the Water District and Director [of the Department] ensure Milner receives the appropriate natural flow as required by Idaho law.”

On October 5, 2017, the Director issued a *Notice of Prehearing Conference; Order Setting Deadline for Petitions to Intervene* explaining that Milner’s letter is a petition as defined by the Department’s Rule of Procedure 230 (*see* IDAPA 37.01.01.230); scheduling a prehearing conference for November 13, 2017; and ordering petitions to intervene be filed by November 12, 2017.<sup>1</sup>

On November 20, 2017, the Director issued an *Order Requesting Staff Memorandum; Order Adopting Deadlines; Notice of Status Conference; Notice of Hearing*. The Director ordered a December 8, 2017, deadline for parties “to submit to the Director a statement of issues the party believes the Director should address in this contested case;” a December 15, 2017, deadline “for any party to submit to the Director a response to statements of issues;” and a December 5, 2017,

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<sup>1</sup> The Department received and granted petitions to intervene filed by the Shoshone-Bannock Tribes; the Coalition of Cities (i.e. Bliss, Buhl, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, and Wendell); the Upper Valley Storage Holders (i.e. Fremont Madison Irrigation District, North Fork Reservoir Company; Idaho Irrigation District and New Sweden Irrigation District); the City of Pocatello; the Surface Water Coalition (i.e. A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company); Idaho Power Company; Aberdeen-Springfield Canal Company; the City of Idaho Falls; Palisades Water Users, Inc.; and the U.S. Bureau of Indian Affairs.

deadline “for the Director to issue an order regarding the parties’ statements of issues and responses.”

On December 8, 2017, the Department received statements of issues from the Shoshone-Bannock Tribes (“Tribes”); the City of Pocatello (“Pocatello”); the Surface Water Coalition (“SWC”); the U.S. Bureau of Indian Affairs (“BIA”); the Upper Valley Storage Holders (“UVSH”); the City of Idaho Falls (“Idaho Falls”); and Palisades Water Users, Inc. (“PWUI”).

On December 15, 2017, the Department received responses to the statements of issues from Aberdeen-Springfield Canal Company; the BIA; the Coalition of Cities<sup>2</sup>; Pocatello; Idaho Falls; PWUI; the Tribes; the SWC; and the UVSH.

## ANALYSIS

The Director will first respond to PWUI’s suggestion that this contested case is not the proper forum to address issues raised by Milner’s petition. The Director will then pose the threshold legal question that must be answered in this case.

### **A. This contested case is the proper forum to address issues raised by Milner’s petition.**

As stated above, Milner’s petition asserts the “fall storage ‘reset’ for purposes of water right administration” in Water District 01 “is not authorized in the current storage water right partial decrees.” Milner requests “the Water District and Director ensure Milner receives the appropriate natural flow as required by Idaho law.” Milner’s petition requires the Director to determine whether the procedures utilized by Water District 01 for resetting the accounting system’s reservoir water right accrual volumes for federal onstream reservoirs are consistent with the storage water right partial decrees.

PWUI suggests this contested case is not “the proper forum for this action” and “this matter should be decided on judicial review before Judge Wildman in the SRBA Court.” The Director disagrees. Idaho Code § 42-602 “gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts.” *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). Idaho Code § 42-1420(1) states that “decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.” “[T]he Director 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). “[T]he Director’s clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.” *In re SRBA*, 157 Idaho at 393-94, 336 P.3d at 800-01. It is the Director’s duty to interpret water right

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<sup>2</sup> In its response, the Coalition of Cities’ states its petition to intervene “erroneously listed the City of Buhl and omitted the City of Shoshone.” *Coalition of Cities’ Response to Statement of Issues and Request to Substitute City of Shoshone for City of Buhl as an Intervenor* (Dec. 15, 2017). The Coalition of Cities asks the Director to substitute the City of Shoshone for the City of Buhl as an intervenor. Hereafter, the Coalition of Cities will be comprised of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

partial decrees in the first instance. *See id.* at 394, 336 P.3d at 801.<sup>3</sup> Further, the Department's Rule of Procedure 104 authorizes the Director to conduct formal proceedings to address petitions. IDAPA 37.01.01.104. This contested case is the proper forum to address issues raised by Milner's petition.

**B. Threshold legal question.**

In responding to Milner's petition, the Director must determine whether Water District 01's procedures for resetting the accounting system's reservoir water right accrual volumes for federal onstream reservoirs are consistent with the storage water right partial decrees. The Director's interpretation of water right partial decrees must begin with the plain language of the decrees. *See U.S v. Black Canyon Irr. Dist*, Docket No. 44635, 2017 Idaho (Dec. 21, 2017); *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184, 1190 (2017); *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 201 (2016). The threshold legal question the Director must answer in this contested case is whether the plain language of the "period of use" element of the storage water right partial decrees for federal onstream reservoirs in Water District 01 that specifies "1/1 to 12/31" as the time period for "irrigation storage" requires that the reset date for those rights be January 1. The Director will order deadlines for the parties to submit briefs on this question pursuant to the Department's Rule of Procedure 564 (IDAPA 37.01.01.564).

If the plain language of the storage water right partial decrees for federal onstream reservoirs in Water District 01 does not require a January 1 reset date, the Director may consider other issues raised by the parties in their statements of issues and responses. An important issue would be: If the Director is authorized to reset the accounting system's onstream reservoir water right accrual volumes on a date other than January 1, what information is relevant to establish a reset date other than to January 1?<sup>4</sup> Further, if the partial decrees do not require a January 1 reset date, the parties will have an opportunity to submit additional information regarding the history of storage water right administration and accounting in response to the December 1, 2017, staff memorandum prepared by Tony Olenichak. *See SWC Statement of Issues* at 4 (Dec. 8, 2017).<sup>5</sup>

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<sup>3</sup> PWUI suggests the Director can consider whether he abused his discretion "regarding accounting methodologies." The courts, not the Director, review the Director's exercise of his discretion in challenges brought pursuant to the Idaho Administrative Procedure Act. *In re SRBA*, 157 Idaho at 394, 336 P.3d at 801.

<sup>4</sup> In response to Pocatello's suggestion that the Director should consider in this contested case "[h]ow any change in the reservoir reset date from the historical practice will affect the administration of AFRD's water right no. 1-6," the Director notes that he already issued a *Final Order Regarding Instructions to Water District 01 Watermaster*, In the Matter of Water Right No. 1-6 (Feb. 11, 2013). In that final order, which was not challenged, the Director instructed the watermaster of Water District 01 how to administer and account for water right no. 1-6 pursuant to the elements of the partial decree for that water right.

<sup>5</sup> Mr. Olenichak's staff memorandum is "properly considered" in this contested case pursuant to the Department's Rule of Procedure 602 (IDAPA 37.01.01.602). *See Statement of Issues of Palisades Water Users, Inc. and the City of Idaho Falls* at 8 (Dec. 8, 2017).

## ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that, pursuant to the Department's Rule of Procedure 564 (IDAPA 37.01.01.564), the parties must submit briefs regarding whether the plain language of the "period of use" element of the storage water right partial decrees for federal onstream reservoirs in Water District 01 that specifies "1/1 to 12/31" as the time period for "irrigation storage" requires that the reset date for those rights be January 1.

IT IS FURTHER ORDERED that the following deadlines are ADOPTED:

- January 19, 2018**      **Deadline for parties to submit opening briefs regarding the threshold legal question articulated herein.**
- January 26, 2018**      **Deadline for parties to submit response briefs.**
- February 9, 2018**      **Deadline for Director to issue order regarding the parties' briefs on the threshold legal question.**

### AMENDED NOTICE OF STATUS CONFERENCE

The Director hereby notifies the parties that the status conference scheduled in this matter for January 12, 2018, is rescheduled for **February 14, 2018, at 10:00 a.m. (MDT)**, at the Department's State Office, located at 322 E. Front Street, 6th Floor, Director's Conference Room, Boise, Idaho 83702.

All parties must be present at the status conference in person or by telephone. If participating by telephone, **please dial 1-720-279-0026 and enter the following guest code when prompted: 544840#.**

The status conference will be held in accordance with provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the adopted Rules of Procedure of the Department, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department or at <https://adminrules.idaho.gov/rules/current/37/0101.pdf>.

The status conference will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please contact Kimi White at (208) 287-4815, no later than five (5) days prior to the conference.

DATED this 3<sup>rd</sup> day of January 2018.



GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3<sup>rd</sup> day of January 2018, I served a true and correct copy of the foregoing document by U.S. mail, postage prepaid to the following:

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