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DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF PETITION REGARDING)	Docket No. P-WRA-2017-002
STORAGE RESET IN WATER DISTRICT 01)	
FILED BY MILNER IRRIGATION)	BUREAU OF INDIAN AFFAIRS
DISTRICT)	OPENING BRIEF
_____)	

The U.S. Bureau of Indian Affairs (“BIA”), pursuant to the Director’s *Order re: Statements of Issues and Responses; Order Adopting Deadlines; Amended Notice of Status Conference* dated January 3, 2018, submits this Opening Brief.

Introduction

In his January 3 Order, the Director set forth the following threshold legal issue to be addressed in this matter:

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....

A review of the partial final decrees issued for federal reservoir storage in Water District 01 finds that they include an element with the heading “Purpose and Period of Use.” The “Purpose of Use” lists “irrigation storage” as one of the purposes. The “Period of Use” for irrigation storage is identified as “January 1 to December 31.” The partial final decrees do not further define these terms and do not utilize the term “reset.”

Discussion

As the Director noted in his January 3 Order, the Director’s “interpretation of water right partial decrees must begin with the plain language of the decrees.” The Idaho Supreme Court decision

in *City of Blackfeet v. Spackman*, 162 Idaho 302; 396 P.3d 1184 (2017) is instructive. As the Court succinctly stated, “[w]ater rights are defined by [their] elements...” 396 P.3d at 1188. The Court continued:

Under Idaho Code section 42-1412(6), a water decree “shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable.” Purpose of use is one of those defining elements. I.C. § 42-1411(2)(f).

Id. At 1188-1189. In *City of Blackfoot*, the Idaho Supreme Court affirmed the Director’s conclusion that the water right in question did not authorize the beneficial use of recharge because that use was not included on the face of the water right and partial final decree.

BIA agrees with the Director’s statements in the January 3 Order concerning the Director’s responsibilities in situations where a question concerning one or more elements of a water right is raised: “It is the Director’s duty to interpret water right partial decrees in the first instance.” The Director’s discretion to make these determinations has been recognized by the Idaho Supreme Court. *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). In sum, if the element is clear on the face (as was the case in *City of Blackfeet*), then the decree governs, and if there are questions that cannot be fully addressed by the language of the decree, then the discretion to make determinations in the first instance lies with the Director.

Analysis

Turning to the threshold legal question as framed by the Director, the initial inquiry requires careful scrutiny of the language and terms of the partial final consent decrees. Based on our review, we first note that we found no discussion of the utilization of a reset date in the federal storage water right partial final decrees, nor does the term “reset” appear in the elements or the provisions of those decrees. Thus, there is no explicit discussion or direction on the face of the decree that specifies a particular reset date, or, for that matter, any reset date at all.

The date range in period of use element does indicate that the period of use is year-round, and a reasonable (implied) interpretation of the use of that time-frame is that all aspects of the administration of the storage water right, including the establishment of a reset date, must occur within a particular calendar year. Under this interpretation, then, a conclusion by the Director that January 1 is the “authorized” reset date would be reasonable.

Another reasonable interpretation, however, would be that the period of use is intended to reflect the fact that the management of storage water has occurred and is authorized to occur on a year-round basis without intending to establish beginning or ending dates. In fact, the Reset Date Staff Memorandum provided to the Director in this matter includes descriptions of the strong rationales for managing the federal storage water rights along these lines, including: “Continuing development of new water rights, new diversions, reservoirs and the severe drought

in 1977 prompted the need for stricter water right regulation.... From this point forward, all water rights were regulated according to priorities for the entire calendar year....”

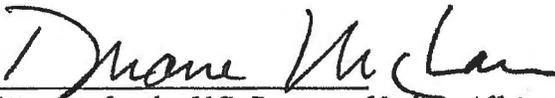
The reasonableness of this interpretation is further bolstered by the broader context of reservoir management in Water District 01. As BIA has previously noted, the federal contracts establish October 1 of each year as the commencement of the storage season. Accepting the reasonable interpretation that the plain language does not preclude a reset date prior to January 1 improves the Director’s ability to manage the federal storage water rights in concert with the Bureau of Reclamation’s management and distribution of stored water.¹ Finally, as also previously noted in BIA’s December 15, 2017 filing in this matter, the State of Idaho made legal commitments to the Shoshone-Bannock Tribes that would be negatively implicated by a decision that the reset date is January 1.

Conclusion

The “plain language” of the period of use element of the federal storage water right partial decrees does not address the question whether January 1 is the legally required reset date. Accordingly, the Director has discretion to interpret the federal storage water right partial final decrees to determine the reset date, and further has a reasonable basis to continue the practice of establishing a reset date prior to January 1 to allow the storage water rights to begin to fill in priority for the following irrigation season.

DATED this 19th Day of January, 2018.

U.S. Department of the Interior
Office of the Regional Solicitor


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¹ It is also relevant that the reset date issue is not restricted to Water District 01, and if a January 1 reset date is ordered, there will be broader implications State-wide.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2018, I served a true and correct copy of the foregoing "*Bureau of Indian Affairs Opening Brief*" on the following by electronic mail, and IDWR by U.S. mail:

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