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

Docket No. P-WRA-2017-002

ABERDEEN-SPRINGFIELD CANAL
COMPANY'S RESPONSE BRIEF
REGARDING THRESHOLD LEGAL
QUESTION

COMES NOW, Aberdeen-Springfield Canal Company ("ASCC"), by and through Norman M. Semanko of the law firm Parsons Behle and Latimer, and hereby submits its *Response Brief Regarding Threshold Legal Question* pursuant to the *Order Re: Statements of Issues and Responses; Order Adopting Deadlines; Amended Notice of Status Conference* dated January 3, 2018, and the Department's Rules of Procedure, IDAPA 37.01.01, as follows:

INTRODUCTION

The Director ordered the parties in this matter to file opening and response briefs regarding the following threshold legal question:

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 right be January 1.

Opening briefs were filed by: (1) Surface Water Coalition; (2) Upper Valley Storage Holders; (3) Palisades Water Users and Idaho Falls; (4) Pocatello; (5) Shoshone-Bannock Tribes; (6) Bureau of Indian Affairs; and (7) ASCC.

For the reasons set forth below, it is apparent that the “period of use” language in the partial decrees does not require a January 1 reset date.

ARGUMENT

Any concern about whether there is a legal basis for a reset date other than January 1 should be put to rest by a review of the opening briefs in this matter.

The Upper Valley Storage Holders note that the term “reset date” is not addressed in the decrees. *Upper Valley Storage Holders Opening Brief* at 3. As a result of this omission or ambiguity, and given the fact that the reset date is “more of an accounting question,” they maintain that it is up to the Director to make such determination within his “sound discretion.” *Id.* at 5.

The Palisades Water Users and Idaho Falls assert that the specifics of accounting methodologies (including the reset date) are among the details of water administration left to the Director’s discretion. *Opening Brief of Palisades Water Users and Idaho Falls* at 3. They also observe that the plain language of the “period of use” element does not mandate a January 1 reset date for the storage rights. *Id.* at 4–5.

Pocatello makes plain that the partial decrees are silent on the matter of reset. *Pocatello’s Opening Brief* at 6. The city further concludes that the year ’round period of use element indicates that storage can be diverted any time of the year, but does not support a conclusion that the reset date is January 1. *Id.* at 6–7.

The Shoshone-Bannock Tribes, while wanting to race ahead to the question of what the reset date should be and requesting affirmative relief beyond the scope of the threshold question, agree with the other parties who argue that the “period of use” in the decrees does not require a January 1 reset date. *Shoshone-Bannock Tribes’ Opening Brief* at 11 (“the 1/1–12/31 period of use for storage rights does not impose a limitation that requires a reset on January 1 each year”).

The Bureau of Indian Affairs also concludes that the “plain language” of the period of use element does not address the question whether January 1 is the legally required reset date, and that the Director has discretion to determine the reset date. *Bureau of Indian Affairs Opening Brief* at 3.

The Surface Water Coalition (including petitioner Milner Irrigation District) concludes that the plain language of the “period of use” is unambiguous. *Surface Water Coalition’s Opening Brief* at 2–3. However, the Coalition does not explain how the plain language of the period of use relates to the question of a reset date. To the contrary, the Coalition recognizes the unique circumstances and history in this matter and the need to avoid fundamentally changing these operations. *Id.* at 4.

To summarize, some of the common legal positions in the opening briefs include: (1) the “period of use” element does not prescribe a “reset date”; (2) the decrees do not set forth a “reset date”; (3) the Director has discretion to determine the “reset date”; and (4) historic practices, as evidenced in the *IDWR Staff Memorandum Re: Reset Date* and the spaceholder contracts for the federal reservoirs, provide guideposts for the Director in exercising his discretion and determining the appropriate reset date. As evidenced in its own opening brief, ASCC agrees with these legal positions.

CONCLUSION

For the reasons set forth above, the Director should answer the threshold question in the negative and proceed with the parties' assistance to address the additional question of what the appropriate reset date is.

DATED this 25th day of January, 2018.

PARSONS BEHLE & LATIMER

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 25th day of January, 2018, by the following methods, in accordance with the agreement by the parties and intervenors to accept electronic service:

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