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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) Docket No. P-WRA-2017-002
REGARDING STORAGE RESET IN WATER)
DISTRICT 01 FILED BY MILNER) SHOSHONE-BANNOCK TRIBES'
IRRIGATION DISTRICT) STATEMENT OF ISSUES AND
) MEMORANDUM OF POINTS AND
) AUTHORITIES

COMES NOW, the Shoshone-Bannock Tribes (herein referred to as "Tribes"), by and through their undersigned counsel of record, and, pursuant to the Director's ORDER dated November 20, 2017, hereby submits its statement of issues and memorandum of points and authorities.

BACKGROUND

Over the past two years, many (although not all) of the parties to this proceeding have been engaged in discussions over whether it was proper for the Water District 01 Watermaster to continue to administer the accounting of storage water right accrual volumes in the Upper Snake River Basin Reservoir System in the manner that had been occurring for decades, with a "reset" of the storage accounting at some point in the early- to mid-fall. The administrative procedure

for the accounting of storage water rights accrual volumes via this “reset” mechanism is described in detail in the Reset Date Staff Memorandum by Tony Olenichak, Water District #1 Program Manager, dated December 1, 2017 (“Staff Reset Memorandum”). Two irrigation districts with relatively junior-priority rights,¹ Milner and AFRD #2, both asserted that under the language of the SRBA partial final decrees for storage water rights in the Upper Snake River Basin, which set the “season of use” as January 1 through December 31, these reservoir storage rights could not be reset in the fall if doing so would effectively require curtailment of the Milner and AFRD #2 surface water diversions under their water rights in favor of the senior-priority storage water rights. Based on those discussions, there were several proposals put forward in an attempt to resolve the matter.

The Tribes were invited to participate in those discussions after an initial settlement proposal was agreed upon by certain parties. The Tribes did not agree to that proposal. The Tribes’ position is that the Fort Hall Agreement of 1990 settled the Tribes’ water rights claims in the Snake River Basin Adjudication, and that the contract storage rights reserved by the Tribes in that Agreement established certain legally-enforceable expectations in those rights. Among those expectations was that the water that would accrue to those rights would be based on the administrative procedure for the accounting of storage water rights accrual volumes via the “reset” mechanism that was in place at the time of the Fort Hall Agreement, and that any change to such procedure that would result in a reduction of the amount of water available for those rights would be a violation of that Agreement and those expectation-based rights. Since that time, the parties have sought to reach an agreement that would address the Tribes’ concerns along with those of the other stakeholders, but to date such efforts have not resulted in a resolution.

On or about August 18, 2017, the Milner Irrigation District (“Milner”) submitted a letter to the Idaho Department of Water Resources (“IDWR”) asserting the “fall storage ‘reset’ for purposes of water right administration” in Water District 01 “is not authorized in the current

¹ Relative to the senior storage rights for Jackson Lake and Lake Walcott, which are the storage rights whose late season reset raises the conflict asserted by Milner Irrigation District and AFRD #2 in this proceeding.

storage water right partial decrees, including the Lake Walcott storage right (1-219)” and “has in effect curtailed Milner’s natural flow water right 1-17 (November 14, 1916 priority date) in recent years.” Milner requested that “the Water District and Director ensure Milner receives the appropriate natural flow as required by Idaho law.”

In a Notice and Order dated October 5, 2017, the Director determined that the letter from Milner was a “petition” as defined by the IDWR’s Rule of Procedure 230, and initiated formal proceeding to address the petition.² The Director scheduled a prehearing conference for November 13, 2017, and ordered that petitions to intervene be filed no later than the day before.

The Shoshone Bannock Tribes timely filed a petition to intervene on or about October 17, 2017, and appeared at the prehearing conference through its counsel, William Bacon and Edmund Clay Goodman.

On November 13, 2017, the Director, sitting as the Presiding Officer, convened a Pre-Hearing Conference in this matter. At the prehearing conference, the Director and several of the counsel for the parties discussed their varying perspectives on the issues before the Director in this proceeding. Since there did not appear to be consensus on the issues, the Director ordered the parties to submit a statement of the issues they believed to be before the Director, and a memorandum of points and authorities in support of the Director’s authority to determine those issues in this proceeding, subsequently formalized in a written order from the Director dated November 20, 2017.

STATEMENT OF ISSUES

Based on the factual and procedural background set out above, the Tribes assert that the Director should decide the following issues in the current proceeding. These issues are to be considered sequentially, and if the answer to the question posed in any issue is “no”, all subsequent issues are moot.

² In a letter dated October 27, 2017, the Director also directed the District 01 Watermaster to move the reset date to January 1, in response to the Milner letter, but noting that the issue was also going to be addressed in this contested case.

Issue #1. Do the partial decrees entered in the Snake River Basin Adjudication establishing the “season of use” for storage water rights as January 1 to December 31 prohibit the Director and the Water District 01 Watermaster from continuing to administer the accounting of storage water right accrual volumes in the Upper Snake River Basin Reservoir System in the same manner that it has been administered since 1988, as described in the Staff Reset Memorandum?

If the answer to this question is “no,” the remaining issues are moot. If the answer is yes, move on to consider Issue #2.

Issue #2. If the answer to issue #1 is “yes”, do the partial decrees entered in the SRBA establishing the “season of use” for storage water rights as January 1 to December 31 prohibit the Director from ordering the Water District 01 Watermaster to administer the annual storage accounting in the same manner as it has been administered for the past 29 years, but with the additional guidance from the Director to ensure that storage water rights cannot fill or empty more than the total decreed storage or storage release volumes one time during that 12-month period between January 1 to December 31?

If the answer to this question is “no,” the remaining issues are moot. If the answer is yes, move on to consider Issue #3.

Issue #3. If the answer to issue #2 is “yes,” do the Tribe’s contract storage water rights, as reserved in the Fort Hall Indian Water Rights Agreement of 1990 and incorporated into the Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, dated August 12, 2014, as a matter of law, require the Director to order the Water District 01 Watermaster to administer the accounting of storage

water right accrual volumes in the Upper Snake River Basin Reservoir System in a manner that will allocate to the Tribes an amount of water that is consistent with the amounts that would have been allocated to the Tribal storage rights had the system of water rights administration in the Upper Snake River Reservoir System remained consistent with the “reset” accounting in effect since 1988, as described in the Staff Reset Memorandum?

If the answer to this question is “no,” the remaining issue is moot. If the answer is yes, move on to consider Issue #4.

Issue #4. If the answer to issue #3 is “yes”, in what manner should the Director order the Water District 01 Watermaster to administer the accounting of storage water right accrual volumes in the Upper Snake River Basin Reservoir System to meet the requirements of the Tribes’ rights?

ANALYSIS

Under the applicable statutes, IDWR regulations, case law, and the SRBA decrees, the Director has the authority to resolve each of the issues set out above in the context of this proceeding.

1. Director’s Authority Generally

Idaho Code (“I.C.”) § 42-1701A(3) sets out the general authority of the Director to hear contested cases, and that authority is broad:

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action....

The statute also authorizes the Director to “direct that a hearing be conducted by a hearing officer appointed by the director,” I.C. § 42-1701A(2), but does not require that a hearing officer be appointed, and the Director, per subsection 3, can preside. In this case, the Director has assumed the role of presiding officer. *See* Prehearing Notice and Order (October 5, 2017). The IDWR’s Rules of Procedure (IDAPA 37.01.01, hereinafter “Rules”) set out the authority of “hearing officers” at contested hearings and how that authority can be limited by the Director (Rules Secs. 411 and 413.02). However, the Director’s authority as the agency head sitting as a Presiding Officer is not so limited (Rules Secs. 411, 414). Our search of the relevant Idaho case law did not turn up any cases indicating that the Director’s authority was limited when acting as the presiding officer in a contested case. Thus, given that the Director’s authority to act when sitting as a presiding officer in a contested case is not constrained by the rule applicable to hearings officers nor by any applicable case law, the Director’s authority when presiding over a contested case is thus co-extensive with the Director’s authority to act generally, within the limits set out in I.C. § 42-1701A(3).

The scope of the Director’s authority in deciding contested cases is broad, especially when administering or enforcing water rights. The Director, for example, has authority under state law and the following provision of the Revised Partial Final Consent Decree Determining The Rights Of The Shoshone-Bannock Tribes To The Use Of Water In The Upper Snake River Basin (“Revised Partial Final Consent Decree”), entered August 13, 2014, to

. . . account for and administer the diversion of water from the Snake River by all water users, including the United States and the Tribes, in conformance with the SRBA Decree. The State, in administering such waters, shall ensure the delivery to all water users, including the United States and the Tribes, their legal entitlement to water from natural flow and storage.” *In re SRBA*, Case No. 39576, at page 19, ¶ II.C.12.1.

Moreover, in the exercise of that authority, the Director has broad authority. For example, in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011), the Supreme Court

determined that the Director's adoption of the hearing officer's finding of "material injury"³ to water rights based on a calibrated ground water model the IDWR had developed and reformulated to use in the application of rules concerning conjunctive management of ground water and surface water was reasonable. The Director had found that the model represented "the best available science for determining the effects of ground water diversions and surface water uses on the [Aquifer] and hydraulically-connected reaches of the Snake River and its tributaries." *Id.* at 814. The Court held that the district court did not err in upholding the Director's reliance on the model:

[The Director] perceived the issue of utilizing the model as discretionary, he acted within the outer limits of his discretion and consistently with the legal standards applicable to the available choices, and he reached his decision through an exercise of reason. The district court did not err in upholding the Director's reliance upon the model. *Id.*

Similarly, in *A & B Irrigation District v. Spackman (In re A & B Irrigation Dist.)*, 155 Idaho 640 (2013), the Supreme Court upheld the Director's use of a baseline methodology as a predictive tool "both for management of the resource and in determining material injury in the context of a water call" (*id.* at 650) and explained its rationale:

The authority of the Director to prepare and implement a water allocation plan as part of his management responsibility has not been challenged by any party in this proceeding, perhaps in recognition of the fact that an interconnected system of ground and surface water as complicated as the Snake River Basin, with as many variables, moving parts, and imponderables that present themselves during any particular irrigation season, simply cannot be managed without a great deal of prior analysis and planning toward determining the proper apportionment of water to and among the various water right holders according to their priority. The use of a baseline methodology in this context is, therefore, not inconsistent with Idaho law. *Id.* at 651. In

³ The Idaho Rules for Conjunctive Management of Surface and Water Resources, IDAPA 37.03.11.042 (Rule 42), provide a number of factors the Director can consider in determining whether the holder of a water right is suffering "material injury and using water efficiently and without waste."

the *Ballentyne Ditch Company* MEMORANDUM DECISION AND ORDER, Case No. CV-WA 2015-21376 (September 1, 2016), in addressing the Director's discretion, Judge Wildman noted:

It is without doubt the Director is the appropriate individual to determine how water is to be distributed under the reservoir water rights. After all it is he who is statutorily vested with a clear legal duty to distribute water. I.C. § 42-602. Given this endowment of authority, the details of how the Director chooses to distribute water are largely left to his discretion. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). Such details will not be disturbed so long as they are reconcilable with prior appropriation and true to the elements of the subject water right(s). *Id.*; I.C. § 42-602.

Ballentyne Ditch Company at 6.

Finally, what is at issue in this proceeding is the method employed by the Director to administer the accounting of storage water right accrual volumes in the Upper Snake River Basin Reservoir System. In a challenge by the Surface Water Coalition and the Boise Project Board to the Director's accounting methodology for storage water rights, raised in the context of the Snake River Adjudication, the SRBA court determined, and the Idaho Supreme Court affirmed, that "this accounting methodology was an administrative function which should be addressed on a case-by-case basis on a fully developed factual record and where the IDWR is a party." *In re SRBA*, 157 Idaho 385, 392 (2014). The Idaho Supreme Court went on to quote and affirm the SRBA Court as follows: "The [SRBA Court] Order also noted that 'unlike the issue of priority refill which is directly related to the quantity element of a water right, the issue of fill is purely an issue of administration.' Thus, the court stated that the IDWR's methodologies for determining when a water right is filled were beyond the scope of the basin-wide issue." *Id.* Thus, the question posed by this proceeding regarding the accounting methodology was not resolved in the SRBA, but concerns a matter "within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method." 157 Idaho at 394.

These and the additional authorities referenced below demonstrate that the Director has the broad authority in contested cases to administer and enforce water rights, the broad discretion

to determine the appropriate system for accounting for storage rights, and that he therefore has the authority to consider the four issues set out above in sequence.

In the following sections we address the Director's authority to consider each of the specific issues set out above.

2. Director's Authority to Decide Specific Issues

Issue #1:

Milner has invoked the Director's authority, alleging that 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," and has curtailed Milner's natural flow water right in recent years. Accordingly, Milner requests that the Director "ensure Milner receives the appropriate natural flow as required by Idaho law." Milner presents itself as an aggrieved party, claiming that the Director is allocating water out of priority and inconsistent with decree, resulting in material injury to Milner's water rights. The Director clearly has authority to resolve contested cases and determine whether an aggrieved party has suffered "material injury" to water rights. *See, e.g.*, Rule 42 of Rules for Conjunctive Management of Surface and Groundwater Resources, IDAPA 37.03.11; *American Falls Reservoir No. 2 v. IDWR*, 143 Idaho 862, 876 (2007); *Clear Springs Foods, Inc. v. Spackman, supra*, 150 Idaho at 814; *A & B Irrigation District v. Spackman (In re A & B Irrigation Dist.)*, 155 Idaho 640, 652 (2013).

In addressing this issue, however, the Director must consider and differentiate between what is contained within the partial decrees and what has been established as the administrative procedure for the accounting of storage water right accrual volumes in the Upper Snake River Basin Reservoir System. In doing so, the Director operates with broad discretion to manage and account for the water resource consistent with the language and intent of the decrees. *In re SRBA*, 157 Idaho at 392-94. The question about whether Milner has in fact suffered "material injury" under these circumstances requires the Director to consider whether the administrative procedure that IDWR has been utilizing for the accounting of storage water right accrual volumes in the Upper Snake River Basin Reservoir System does result in "material injury" to

Milner, and whether such administrative procedure to manage and account for the water resource consistent with decreed water rights, is within his discretion. This issue requires considering that the “season of use” simply establishes a year-round storage season, and so long as any particular storage right only fills once and completely empties one time during that season, such fill is within the parameters of the decree. The Staff Reset Memorandum is instructive on this question, as it provides the legal and factual foundation for the operation of that administratively-determined accounting system, as distinct from – but consistent with – establishing the water rights as set out in the Partial Final Decrees. If the answer to this issue is “no,” then the Director must also reverse his determination in the October 27, 2017 letter to the District 01 Watermaster, since otherwise Lake Walcott will not have been filled one time within the calendar year (since it was last filled in the fall of 2016).

Issue #2:

The Director has authority to impose an administrative framework that can resolve legal issues. In *Clear Springs, supra*, the Director determined that it was reasonable to use a ground water model as the “best available science” for determining whether there was “material injury” to the Spring User’s water rights, and in *A & B Irrigation District, supra*, he used a baseline methodology as a predictive tool to manage the water resource in the face of a delivery call by senior surface water rights holders alleging material injury caused by the pumping of groundwater by junior ground water rights holders. In *In re SRBA*, the Court specifically held that the development of an administrative accounting methodology for storage water rights “was an administrative function which should be addressed on a case-by-case basis on a fully developed factual record and where the IDWR is a party.” 157 Idaho at 392.

These situations are analogous to the Director’s authority in this matter to direct the Watermaster to develop and/or apply an administrative mechanism for the accounting of storage water right accrual volumes in the Upper Snake River Basin Reservoir System, including policies that define the use of carryover within the season of use, so that the reservoir system can continue to be operated in a manner that maximizes water use and benefits to the Upper Snake

River Basin, and essentially in the same manner as the system has been since 1988, based on the storage reset date tied to the priority date of the storage water rights.

Moreover, in *A & B Irrigation District, supra*, 155 Idaho at 651, the Supreme Court discussed the essential role of the Director in managing the water resource in the face of conflicting claims and priorities:

In *AFRD #2*, after discussing and upholding the [Conjunctive Management] Rules, this Court recognized the critical role of the Director in managing the water resource to accommodate both the first in time and beneficial use aspects: 'Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.' *AFRD #2*, 143 Idaho at 880.

In addressing this issue, as with Issue #1, the Director should consider and differentiate between what is contained within the partial decrees and what he can establish as administrative policy with regard to storage carryover and refill, exercising appropriate discretion to manage and account for the water resource consistent with the language and intent of the decrees. The question about whether Milner has in fact suffered "material injury" under these circumstances requires the Director to consider whether IDWR can (and to what extent it must) utilize an alternative administrative procedure for the accounting of storage water right accrual volumes in the Upper Snake River Basin Reservoir System, whether such procedure is within his discretion to implement the decreed water rights, whether such procedure ultimately results in a storage accounting mechanism which is essentially the same as the current one, and whether such procedure results in "material injury" to Milner.

As with Issue #1, this issue requires considering that the "season of use" simply establishes a January 1 to December 31 storage season, and so long as any particular storage right only fills once and completely empties one time during that season, such fill is within the parameters of the decree. If the answer to this issue is "no," then the Director must also reverse his determination in the October 27, 2017 letter to the District 01 Watermaster, since otherwise Lake Walcott will not have been filled one time within the calendar year (since it was last filled in the fall of 2016).

Issue #3:

Milner's position here is based on the uncompromising assertion that under the language of the SRBA decree, which sets the "season of use" for storage water rights as January 1 through December 31, the reservoir storage rights cannot be reset in the fall season if doing so would effectively require curtailment of the Milner and AFRD #2 surface water diversions under their water rights. That assertion, however, is met by the Tribes' assertion of its decreed water rights in the Snake River Basin Adjudication, which established a legally-enforceable expectation in conflict with the position taken by Milner.

Specifically, the Tribes' legal position is that the Fort Hall Agreement of 1990 settled the Tribes' water rights claims in the SRBA, and that the contract storage rights reserved by the Tribes in that Agreement established certain legally-enforceable expectations with regard to the amount of storage accrual. Further, unlike the parties in the *Ballentyne Ditch Company* case, who unsuccessfully sought to rely on contracts and other documents not referenced or incorporated into the decrees at issue (see *Ballentyne Ditch Company* MEMORANDUM AND ORDER at 16, quoting *Rangen, supra*), the Michaud Contract – which sets a "storage season" of October 1 to September 30 – is attached to, specifically incorporated within, and repeatedly referenced in the Tribes' PARTIAL FINAL CONSENT DECREE in the SRBA (August 3, 2014) (see, e.g., Section B.3).

Thus, as a corollary to those rights in the context of this specific proceeding, the Tribes assert that, as a matter of law, those decreed rights require the Director to order the Water District 01 Watermaster to administer the water rights in the Upper Snake River Reservoir System in a manner that will allocate to the Tribes' an amount of water that is consistent with the amounts that would have been allocated to the Tribes had the system of water rights administration in the Upper Snake River Reservoir System remained as it had prior to any change determined to be required under Issue #1 (i.e., the reset system described in the Staff Reset Memorandum).

The Director, therefore, is faced with two directly competing legal claims about SRBA decreed rights. Although the Tribe is not the “aggrieved party” who has filed the petition in this matter, the Director can and should resolve this legal issue as it is presented in the nature of a counter or cross-claim to the Milner petition. The Director’s authority, indeed obligation, to address this legal issue is required by the terms of the Revised Partial Final Consent Decree, entered on August 13, 2014, which requires “The State [i.e., the Director of IDWR], in administering such waters, [to] ensure the delivery to all water users, including the United States and the Tribes, their legal entitlement to water from natural flow and storage.” *See In re SRBA*, Case No. 39576, at page 19, ¶ II.C.12.1 (full text cited, *supra*, at page 6).

Issue #4:

If the Director determines, as the Tribes assert, that the Tribes’ decreed water rights require the Director to administer the water rights in the Upper Snake River Reservoir System in a manner that will allocate to the Tribes’ an amount of water that is consistent with the amounts that would have been allocated had the system of water rights administration in the Upper Snake River Reservoir System remained as it was prior to any change determined to be required under Issue #1, the Director then must determine what administrative mechanism is appropriate to achieve that result and thus avoid a taking of the Tribes’ decreed water rights.

The Staff Reset Memorandum summarizes the administrative procedures used during the last three decades to account for and allocate the water resources of the System, and discusses the potential effects of different reset scenarios on both reservoir storage and natural flow rights. Among these scenarios is one that approximates the administrative procedure used during the last three decades for the allocation of water, and which protects decreed water rights in priority while maximizing beneficial use of the water resources. The Director has the authority to employ such administrative mechanism in discharging his duty “to ensure the delivery to all water users, including the United States and the Tribes, their legal entitlement to water from natural flow and storage.” *See Revised Partial Final Consent Decree, supra*, at page 19.

Thus, within the authority to consider and rule on Issue #3 is the responsibility, per the legal authorities set out under Issue #2, above, to remedy the potential harm to the Tribes' water rights and to avoid exposing the State to a takings claim.

CONCLUSION

Based on the foregoing, the Shoshone-Bannock Tribes respectfully request that the Director consider and rule on the issues set out above.

Dated this 8th day of December, 2017

SHOSHONE-BANNOCK TRIBES

By: William Bacon by SDO
William Bacon, General Counsel

By: Edmund Clay Goodman by SDO
Edmund Clay Goodman

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2017, I served a true and correct copy of the foregoing "Shoshone-Bannock Tribes Statement of Issues" on the following by electronic mail:

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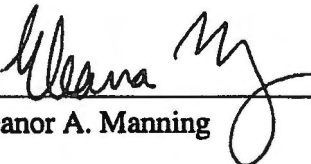
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