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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

**STATEMENT OF ISSUES OF
PALISADES WATER USERS, INC. AND
THE CITY OF IDAHO FALLS**

Palisades Water Users, Inc. (“PWUI”) and the City of Idaho Falls (the “City”), by and through its counsel, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits its *Statement of Issues* as permitted under the *Order Requesting Staff Memorandum; Order Adopting Deadlines; Notice of Status Conference; Notice of Hearing* dated November 20, 2017 (the “Scheduling Order”). After production of a memorandum prepared by Tony Olenichak of Water District 01 (the “Olenichak Memo”), the *Scheduling Order* provides a deadline of December 8th to provide a statement of issues that “should include argument and authority in support of the party’s position that the Director should consider such issues.” PWUI and the City’s legal authority, and proposed statement of issues, are set forth below.

I. BACKGROUND AND LEGAL AUTHORITY

This contested case was initiated by Milner Irrigation District (“Milner”) by a letter, considered as a petition under IDAPA 37.01.01.230, asserting that the fall storage ‘reset’ practices of Water District 01 is “not authorized in the current storage water partial decrees, . . .” *Petition* at 2.

Idaho Code § 42-602 provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

The Idaho Supreme Court confirmed the Director’s governmental authority under this statute concerning matters of priority administration and water distribution in the case of *In re SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17—Does Idaho Law Require a Remark Authorizing Storage Rights to ‘Refill’, Under Priority, Space Vacated for Flood Control)*, 157 Idaho 385, 336 P.3d 792 (Aug. 4, 2014) (hereinafter, simply “BW 17”):

Appellants contend that the IDWR cannot decide whether a storage water right is satisfied using the IDWR’s “accounting methodologies” because water rights are property rights and administration should only be governed by water right decrees. They are correct that a water right is a property right. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). Storage water rights are entitled to the same protection as any other type of property right. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res. (AFRD# 2)*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007). Thus, the main issue is whether the Director is determining water rights, and therefore property rights, when he determines that a water right is “filled,” or if the Director is just distributing water.

The IDWR has a statutory duty to allocate water. The Idaho legislature gave the IDWR's Director the power to make appropriation decisions in Idaho Code

section 42–602: “[t]he director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the ... facilities diverting therefrom.” The Director also “shall distribute water in water districts in accordance with the prior appropriation doctrine.” *Id.* This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law.

Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). That statute gives the Director a “clear legal duty” to distribute water. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) (*abrogated on other grounds by Rincover v. State Dep't of Fin.*, 132 Idaho 547, 976 P.2d 473 (1999)). However, “the details of the performance of the duty are left to the director's discretion.” *Id.* Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.

This Court has recognized the Director's discretion to direct and control the administration of water in accordance with the prior appropriation doctrine. In *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522 (1929), downstream natural flow water users sued to enjoin upstream users with junior storage water rights from interfering with the downstream users' rights. The downstream users claimed that they had the right to receive their decreed water whenever they chose and that the upstream users had to fulfill the downstream users' right from the stored water. *Arkoosh*, 48 Idaho at 388, 283 P. at 523. The original decree made the downstream users the judges of when they could use the water, which the Court noted was too broad in that “their right to receive water at any time they may demand it is a matter finally adjudicated.” *Id.* at 395, 283 P. at 525. At the time the Commissioner of Reclamation occupied a similar position to the current Director, and the Court noted that this was a matter that should be determined by the Commissioner's department. *Id.* at 395, 283 P. at 526. Similarly, this Court has stated that the Director “is charged with the duty of direction and control of distribution of the waters from the streams to the ditches and canals.” *DeRousse v. Higginson*, 95 Idaho 173, 179, 505 P.2d 321, 327 (1973). More recently, this Court further articulated the Director's discretion: “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, 154 P.3d at 451. Thus, the 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.

BW 17, 157 Idaho at 393, 336 P.3d at 800.

Concerning its mandated governmental function to distribute water, the Director of IDWR, Gary Spackman, has not been shy in reminding water users of his duty, responsibility, and authority. After referencing BW 17 in a September 10, 2014 *Order Lifting Stay and Notice of Status Conference* in an administrative matter concerning the distribution of water to the federal on-stream reservoirs in Water District 1, Director Spackman, stated:

The decision affirms the Director’s authority to determine how much water is counted or credited toward the fill of a water right. The Court expressly rejected the argument raised by the Surface Water Coalition and the Boise Project Board of Control that the Director lacked the statutory authority to determine when a water right is satisfied. The Court stated:

Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. That statute gives the Director a “clear legal duty” to distribute water. However, “the details of the performance of the duty are left to the director’s discretion.” Therefore, from the statute’s plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.

In re SRBA at 7 (citations and quotations omitted).

The Court went on to discuss cases that recognize the Director’s discretion to direct and control the administration of water, concluding:

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.” Thus, the 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.

Id. at 8 (citations and quotations omitted).

Id. at 1-2; See also *Final Order, In the Matter of Petition to Amend Rule 50*, at 5 (August 29, 2014)

(Another order from Director Spackman quoting language from the BW 17 case after stating that

“[t]he Idaho legislature has granted the Director broad discretion in implementing his administrative responsibilities.”

In BW 17, the Idaho Supreme Court affirmed the SRBA Court’s (Judge Eric Wildman’s) decision on this issue concerning the director’s authority over water distribution by priority. In his *Memorandum Decision*, which was appealed by the Coalition, Judge Wildman held:

Furthermore, the authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, the Idaho Department of Water Resources and its Director. Idaho Code § 42-103 provides that “it shall be the duty of the department of water resources to devise a simple, uniform system for the measurement and distribution of water.” Chapter 6, Title 42 of the Idaho Code governs the “distribution of water among appropriators” and directs that the Director and the watermasters under his supervision are statutorily charged with distributing water to water rights. In particular, Idaho Code § 42-602 vests in the Director, the “direction and control of the distribution of water from all natural water sources with a water district to canals, ditches, pumps and other facilities diverted therefrom.” Similarly, Idaho Code § 42-603 instructs that the Director is “authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.”

The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs. The Director’s discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts. See *American Falls Reservoir Dist. No. 2*, 143 Idaho at 880, 154 P.3d at 451 (addressing court oversight on a properly developed record). When review of the Director’s discretion in this respect is brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.

Memorandum Decision, Basin Wide Issue 17, Subcase No. 00-91017, at 11-12 (emphasis added).

Judge Wildman also very clearly described the process for disputes over water distribution, and it is to review the Director’s discretion regarding such distribution which is “brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion . . .” *Id.* at 12.

Having established IDWR’s sole and exclusive governmental authority to regulate diversions during priority administration, the Idaho Code also gives IDWR the tools necessary to accomplish that daunting task. As described by Judge Wildman, Idaho Code § 42-603 allows the director to promulgate water distribution rules and Idaho Code § 42-604 allows the Director to create “water districts” staffed with state-employed watermasters and deputy watermasters. When this is done, “[e]ach water district created hereunder shall be considered an instrumentality of the state of Idaho for the **purpose of performing the essential governmental function of distribution of water among appropriators.**” Idaho Code § 42-604 (emphasis added).

Water District 1 is one such water district that was created to assist the Director in his responsibilities.¹ In 1991, the Idaho Attorney General’s office was asked for an opinion regarding the nature of Water District 1. The resulting letter confirms the principles described herein relative to the Director’s authority over water distribution. *Attorney General Opinion No. 91-7* (August 5, 1991)² (hereinafter, simply “*Opinion 91-7*”). The AG’s office concluded:

The existence and operation of state water districts, such as Water District 1, are governed by the provisions of chapter 5, Title 42, Idaho Code, first enacted in 1903. Act of March 11, 1903, 1903 Idaho Sess. Laws 223. **State water districts are instrumentalities of the state that exist for the purpose of assisting the IDWR in carrying out its duty under Idaho Code § 42-604 to provide for the distribution of the public waters of the state in accordance with rights of prior appropriation.**

...

“Water District 1 is an instrumentality of the state established by a predecessor of the Director (Director) of the Department of Water Resources, pursuant to Idaho Code § 42-604, **for the purpose of assisting the Department in carrying out its responsibility to distribute the public waters of the state in accordance with the rights of prior appropriation.**”

¹ Water District 1’s website is www.waterdistrict1.com. As described on the website, the current watermaster for Water District 1 is Lyle Swank.

² This document and is available at <http://www.ag.idaho.gov/publications/op-guide-cert/1991/OP91-07.pdf>

Opinion 91-7 at 3, 1 (emphasis added).³ *Opinion 91-7* also discusses case law supporting the conclusion that, as water district watermasters, such individuals are governmental officers:

The Idaho Supreme Court has held that a watermaster is a public administrative officer who holds office until a successor is elected or appointed and qualified. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927). A watermaster does not serve as an agent of the water users, but is a ministerial office. *Bailey v. Idaho Irrigation Co.*, 39 Idaho 354, 227 P. 1055 (1924).

Id. at 5; See also *Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969)

(The watermaster is not the agent of the water company or water user, but is a ministerial officer.).

Under its authority delegated by the Director, watermasters are accorded the duty described in Idaho Code § 42-607:

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply[.]

Overall, these authorities are clear that it is IDWR and Water District 1 possesses discretion under Idaho Code § 42-603 “to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.” As to those “rules and regulations,” in the event they are challenged, then review of the Director’s discretion in this respect should be brought before the courts in an appropriate proceeding, and upon a properly

³ This letter also describes the geographic extent of Water District 1: “Water District 1 includes all of the area of the state served by water from the Snake River from the Wyoming border to the Milner diversion dam near Twin Falls.” *Id.* at 3.

developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.

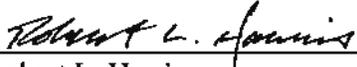
It is unclear whether the petition seeks an interpretation of SRBA partial decrees, is a challenge to the Director's discretion to distribute water under Idaho Code § 42-602, is a challenge to the Water District 01 watermaster's discretion delegated to him by the Director under Idaho Code §§ 42-604 and 42-605, or a combination of the above. Despite this uncertainty, and based upon the legal authority set forth herein, PWUI and the City submit the below issues for consideration in this matter.

II. STATEMENT OF ISSUES

- 1) Is this the proper forum for this action, or (as described by Judge Wildman above) should this matter be decided on judicial review before Judge Wildman in the SRBA Court, because it challenges the exercise of the Director's discretion—implemented through the Water District 01 watermaster and staff—under Chapter 6 of Title 42 of the Idaho Code for the 'reset' date of September 15th as described in *Olenichak Memo*?
- 2) If this contested case before an administrative agency is the proper forum for this action, is it the Director's and Water District 01's position that it has abused its discretion regarding accounting methodologies and this contested case has been initiated to consider anew evidence and argument as to what the proper "reset" date should be? Or, in the alternative, is it the Director's and Water District 01's position that it has not abused its discretion in its accounting methodologies and both will defend the exercise of discretion in its use of the most recent "reset" date of September 15th?
- 3) Are the bulleted items listed on page 6 of the *Olenichak Memo* properly considered in the Director's and Water District 01's exercise of discretion in establishing the "reset" date?
- 4) What is the legal effect of the placeholder contracts with the Bureau of Reclamation which define "storage season" as "the time period from October 1 to the date when no more water is available for storage in a particular reservoir"?⁴
- 5) How will any change to the September 15th reset date affect the administration of Water Right No. 1-6 (AFRD#2) and other water rights?

⁴ This definition is found under paragraph 5 of PWUI's placeholder contract.

Dated this 8th day of December, 2017.



Robert L. Harris
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2017, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed by the methods indicated.

Document Served: STATEMENT OF ISSUES OF PALISADES WATER USERS, INC. AND THE CITY OF IDAHO FALLS

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