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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)	RESPONSE TO STATEMENTS OF
)	ISSUES FILED BY OTHER PARTIES
)	

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 response to the statements of issues filed by other parties.

The Director's November 20, 2017 ORDER informed the parties that if they wanted to submit a statement of issues to be considered in this contested case, they must do so by December 8, 2017. The Director received six filings on December 8, 2017, from the following parties:

1. Shoshone Bannock Tribes.
2. United States Department of Interior, Bureau of Indian Affairs (adopting the Tribes' statement of issues).
3. The Surface Water Coalition (which includes Milner Irrigation District, AFRD #2 and other irrigation districts and canal companies) (hereinafter "SWC").

4. Upper Valley Storage Holders (consisting of four irrigation districts in the Upper Valley) (adopting the Surface Water Coalition statement of issues).
5. City of Pocatello (hereinafter “Pocatello”).
6. Palisades Water Users, Inc., and the City of Idaho Falls (hereinafter “PWUI/Idaho Falls”).

The Director’s November 20, 2017 ORDER stated that if any party wanted to file a response to any statement of issues, it must do so by December 15, 2017.

I. GENERAL RESPONSE

The Tribes have reviewed the statements of issues filed by the parties listed above. With the exception of the issues discussed specifically below, it is the Tribes’ position that the issues raised by the other parties can and should be subsumed within the Tribes’ framing of the issues, and in particular the Tribes’ proposed sequencing of issues. Framing and resolving the issues in the manner proposed in the Tribes’ statement of issues would result in efficient use of the Director’s and IDWR’s time and resources, as resolving Issues #1 or #2 in the negative would render most if not all of the issues raised by the other parties moot.

In particular, certain issues advanced by Pocatello (issues 1 and 2b) and the PWUI/Idaho Falls (issues 1 – 4), specifically address the Director’s discretion to account for the accrual and allocation of storage water in the Upper Snake River Basin Reservoir System. Both also indicate the need for the Director to consider whether to continue 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 submitted by Tony Olenichak. Moreover, issues 1 – 4 in the SWC statement of issues would be resolved under a negative response to the Tribes’ Issue #1. The benefit of using the Tribes’ framing and sequencing of the issues is that resolution of the Tribes’ Issue #1, if answered in the negative, would either resolve these issues or render them moot:

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?

As the Tribes noted in its initial Statement of Issues, in addressing Issue #1, 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 and beneficial use of the water resource. The Tribes' framing of this issue generally is consistent with the framing of issues in the other parties' statements of issues.

Moreover, it is noteworthy that the Director's past exercise of that administrative discretion has a 29-year record of accounting of storage water right accrual volumes in the Upper Snake River Basin Reservoir System pursuant to the current administrative procedure without challenge on grounds of material injury to existing water rights; and, further, use of that procedure has, as summarized in the Staff Reset Memorandum, increased beneficial use of the water resource. Except where a party can demonstrate that continued reliance on that procedure is outside the outer limits of the Director's discretion or inconsistent with legal standards applicable to available choices, or not based on an exercise of reason, the Director's decision to adhere to that administrative procedure should be sustained. *See, e.g., Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814 (2011); *see also, Idaho Groundwater Association v. Idaho Dept. of Water Resources*, 160 Idaho 119, 134-137 (2016).

Only if the Director determines that Issue #1 must be answered in the affirmative would he need to address the second issue as framed by the Tribes:

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?

Again, as with the Tribes' Issue #1, resolving this issue requires the Director to consider 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 and the Director's discretion. The Tribes' Issue #2 incorporates within its scope the questions about historical usage and parameters that are raised explicitly or implicitly by Pocatello (issues 1, 2a, 3, 4, and 5) and the PWUI/Idaho Falls (issues 4 and 5). It would also appear to encompass the questions posed by each of the SWC statement of issues (we address this point further below).

Moreover, as with Issue #1, the Director's decision to adhere to an administrative procedure comparable to that currently used¹ would be entitled to deference, except where a party can demonstrate that continued reliance on that procedure is outside the outer limits of the Director's discretion or inconsistent with legal standards applicable to available choices, or not based on an exercise of reason. *See, e.g., Clear Springs Foods*, 150 Idaho at 814; *Idaho Groundwater Association*, 160 Idaho at 134-137.

Although not expressly mentioned by any of the parties, another set of questions implicated in consideration of this issue is how will the Water District 01 Rental Pool be impacted by the Director's decision, what are the implications of those impacts, and what can the Director do, if anything, with regard to those impacts. We note that the Rental Pool was established and continues to operate as a means of meeting certain legal obligations set out in the SRBA Consent Decree for the Nez Perce Tribe (January 30, 2007), including the incorporated attachments thereto, and the Snake River Water Rights Act of 2004 (hereinafter collectively the "Nez Perce Decree"); a change to the administrative procedure for reset will likely have a substantial adverse impact on the operation of the Rental Pool, thereby reducing or possibly

¹ The Staff Reset Memorandum, in addition to describing the history and operation of the current accrual accounting procedure, sets out several alternatives that would accomplish the same goal of maximizing beneficial use, minimizing unaccounted storage, and maintaining consistency with the decrees. Staff Reset Memorandum at 5-7.

eliminating the ability of the Rental Pool to meet the legal obligations of that Agreement or provide water leases to Upper Snake River Basin irrigators.

Finally, and particularly with regard to this Issue #2, we agree with PWUI/Idaho Falls that “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.” PWUI/Idaho Falls Statement of Issues at 3.

In sum, the Tribes’ position is that the issues raised by the other parties are generally subsumed within or mooted by Issues #1 and #2 as framed by the Tribes, and that as a matter of judicial economy and clarity, those issues should be taken up in the sequence proposed by the Tribes.

We note that while none of the parties (aside from the Tribes and the United States) raised the issues related to the impact to the Tribes’ rights and mitigation of the same (and the legal expectations upon which the Tribes’ claim is based), none of the issues raised by any of the parties would foreclose consideration of the legal questions raised by the Tribes in their Issues #3 and #4, should the Director determine that the answer to both Issues #1 and #2 is yes. As the Tribes set out in their initial statement of issues, Milner’s position here is based on the 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 SRBA, which established a legally-enforceable expectation in conflict with the position taken by Milner. The Director, therefore, is faced with two directly competing legal claims about SRBA decreed rights. Although the Tribes are 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.

Further, we note that the SWC and PWUI/Idaho Falls both reference provisions set out in storage contracts as relevant to the proceedings. While the Tribes reserve the right to question the relevance of those provisions to resolving the questions before the Director, we note that the Michaud Contract provisions relied upon (in part) by the Tribes *are* in fact incorporated into the

partial Final Decree establishing the Tribal rights put at issue here, and thus are indisputably relevant to and must instruct the Director in resolving the issues here.

2. Surface Water Coalition Statement of Issues

There are three additional points we would like to make specifically with regard to the SWC statement of issues.

First, it is important to note that this proceeding was initiated by the Milner Irrigation District, which is a member of the Surface Water Coalition. 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."

Yet the SWC statement of issues shies away from the implications of initiating a contested case in this matter. The SWC states, under Issue #1, that it "does not concede that an administrative contested case must be held" prior to implementing a significant change to the administrative procedure for 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. The Tribes submit that the Director in fact must do so, and that by initiating the case through its letter, Milner specifically has to meet certain burdens in order to prevail in its attempt to have the Director implement such a significant change. In its initiating letter, 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*, 150 Idaho 790, 814 (2011); *A & B Irrigation District v. Spackman (In re A & B Irrigation Dist.)*, 155 Idaho 640, 652 (2013).

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. The need to do so here is underscored by the history described in the Staff Reset Memorandum, which indicates that many of the same parties to this proceeding in fact agreed to the administrative procedure for “reset” that has been in place since 1988, and that that procedure was established in significant part to assure the maximum beneficial use of water and to avoid unallocated storage in the reservoir system.

Second, we note that the SWC statement suggests that the Director should resolve the following issue: “How is available natural flow distributed under the spaceholder contracts’ “Winter Power Operation: Minidoka Powerplant” provision, and which storage rights will receive that water in administration?” The Tribes question how this issue falls under the question raised by the Milner petition, to wit, whether the operation of the administrative procedure for “reset” is within the Director’s discretion and consistent with the applicable decrees. The Tribes do not object to the consideration of this issue if the Director determines he must change the existing administrative reset procedure *and* such change allegedly results in conflicts with other decree provisions; such consideration is, of course, generally analogous to the Tribes’ position with regard to its Issues #3 and #4, which come into play if the Director takes actions that will result in a change to the Tribes’ expectation-based rights in the Fort Hall Agreement and its decreed water rights. Similarly, as noted above, another issue that will be directly implicated, and that the Director will need to take up if he moves beyond Issue #2, is the impact on the WD 01 Rental Pool, and the potential conflicts with certain legal obligations set out in the Nez Perce Decree. Further, we note that issues related to these same Minidoka Power Rights were the subject of litigation in the SRBA. *In Re SRBA*, Case No. 39576, Memorandum Decision and Order on Challenge (February 9, 2011). This contested case should not be the forum for re-litigation of issues already decided in the earlier proceeding.

Third, SWC statement of issues 6 proposes that the contested case should afford the parties “an opportunity to submit facts and reports regarding a complete history of storage water right administration and accounting, *including pre-1978* in order to develop a complete record on the subject.” (Emphasis added.) The Tribes, again, do not object to including such analysis and record development to the extent it is relevant and does not impose an undue burden on the

Director and the parties for matters that may only be marginally informative. We note that the efforts made post-1978 have been aimed at better water accounting and management consistent with the water rights, utilizing computational technology not previously available, and were agreed to by the various stakeholders. If the Director permits this issue to be included, it should be appropriately limited to avoid irrelevance and undue burdens.

CONCLUSION

Based on the foregoing, the Shoshone-Bannock Tribes respectfully request that the Director consider and rule on the four issues set out by the Tribes in its initial statement of issues, and in the sequencing set out therein.

Dated this 15th day of December, 2017.

SHOSHONE-BANNOCK TRIBES

By: William Bacon (by ECG)
William Bacon, General Counsel

By: Edmund Clay Goodman
Edmund Clay Goodman

CERTIFICATE OF SERVICE

I hereby certify that on this 15th 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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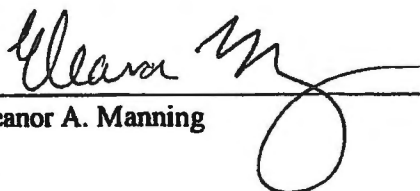
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