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DEPARTMENT OF  
WATER RESOURCES

John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
Jonas A. Reagan, ISB#<sup>1</sup>  
**BARKER ROSHOLT & SIMPSON LLP**  
163 Second Avenue West  
P.O. Box 63  
Twin Falls, Idaho 83303-0063  
Telephone: (208) 733-0700  
Facsimile: (208) 735-2444  
Email: [jks@idahowaters.com](mailto:jks@idahowaters.com)  
[tlr@idahowaters.com](mailto:tlr@idahowaters.com)  
[jreagan@idahowaters.com](mailto:jreagan@idahowaters.com)

W. Kent Fletcher, ISB #2248  
**FLETCHER LAW OFFICE**  
P.O. Box 248  
Burley, Idaho 83318  
Telephone: (208) 678-3250  
Facsimile: (208) 878-2548  
Email: [wkf@pmt.org](mailto:wkf@pmt.org)

*Attorneys for American Falls  
Reservoir District #2 and Minidoka  
Irrigation District*

*Attorneys for A&B Irrigation District, Burley  
Irrigation District, Milner Irrigation District,  
North Side Canal Company, and Twin Falls  
Canal Company*

**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**

**SURFACE WATER COALITION'S  
RESPONSES TO PARTIES'  
STATEMENTS OF ISSUES**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley  
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal  
Company, and Twin Falls Canal Company (hereafter collectively referred to as "Surface Water  
Coalition" or "Coalition"), by and through their undersigned counsel of record, pursuant to the

<sup>1</sup> Mr. Reagan is currently practicing under a legal intern limited license (I.B.C.R. 226). Mr. Reagan also recently passed the bar exam and is the process of being admitted to the Idaho State Bar.

*Order Requesting Staff Memorandum; Order Adopting Deadlines; Notice of Status Conference; Notice of Hearing* dated November 20, 2017 as well as the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*), and hereby submit the following response to the statement of issues filed by the City of Pocatello ("Pocatello"), the Palisades Water Users, Inc. & City of Idaho Falls (collectively "PWUI"), and the Shoshone-Bannock Tribes ("Tribes") in the above-captioned matter.

The Coalition is filing this joint response solely for convenience and in the interests of filing efficiency. The individual Coalition members reserve the right to participate as individual parties if deemed necessary at any point during this proceeding.

#### **SCOPE OF CONTESTED CASE**

In reviewing the parties' statements of issues the Director should first consider and define the appropriate scope of the contested case in relation to its procedural context. First, Milner Irrigation District, through its counsel, submitted a letter requesting the Watermaster to distribute available water to its 1916 natural flow right (1-17) in the fall rather than to storage water rights that had already filled in 2017. *See Travis L. Thompson Letter August 18, 2017*. The Director considered the letter to constitute a "petition" under the Department's Rules of Procedure and initiated a contested case. *See Notice of Prehearing Conference* at 1 (Oct. 5, 2017).

Several parties then filed "petitions to intervene."<sup>2</sup> The Director granted all petitions to intervene, finding that "the petitioners have a direct and substantial interest in this matter and will not unduly broaden the issues." *See Order Granting Petitions to Intervene* (Nov. 21, 2017). Idaho courts have advised that an intervener "takes the case as he finds it" and cannot "raise new claims outside the scope of the original parties' pleadings." *See Wing v. Amalgamated Sugar*

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<sup>2</sup> The Shoshone-Bannock Tribes, the Coalition of Cities, the Upper Valley Storage Holders, the City of Pocatello, the Surface Water Coalition, Idaho Power Company, Aberdeen-Springfield Canal Company, the City of Idaho Falls / Palisades Water Users, Inc., and the U.S. Bureau of Indian Affairs all filed separate petitions to intervene.

Co., 106 Idaho 905, 908 (Ct. App. 1984) (overruled by *NBC Leasing Co. v. R & T Farms, Inc.*, 112 Idaho 500 (1987)); *Anderson v. Ferguson*, 56 Idaho 554 (1936).

As identified below, certain statements raise issues or “claims” beyond the scope of Milner’s August letter and the delivery of water to water right 1-17. Moreover, the Director already provided the requested relief by directing the Watermaster to correct any out-of-priority deliveries and ensure Milner’s and others’ junior water rights received any available natural flow ahead of previously filled storage water rights. *See Director Spackman Oct. 27, 2017 Letter to Lyle Swank (“Oct. Letter”)*. Challenges to that action have been filed and are pending in separate contested cases. *See Order Granting Petitions for Hearing; Order Staying Hearings* (Docket Nos. P-WRA-2017-003; 004) (Nov. 20, 2017). Although the Director apparently intends to address “the question of the proper reset date for the onstream Snake River Reservoir water rights”, that does not mean unrelated or additional claims filed by certain Interveners should be heard. *See id.* at 3. Accordingly, in the interests of economy and efficiency (the hearing set to begin in about four months), the Director should clarify and limit the context of this matter so that the parties can focus on the discrete issues to be presented and heard. To that end the Coalition has identified specific issues that should be denied.

## **RESPONSE TO STATEMENTS OF ISSUES**

### **I. City of Pocatello Statement of Issues**

The Coalition objects to Issue #2.a. The proposed issue is hypothetical and unduly broad. To the extent Pocatello is attempting to limit the future beneficial use of unspecified natural flow water rights in Water District 01 that issue is clearly beyond the scope of this proceeding. If Pocatello disagrees with the distribution of water to a particular natural flow water right in the

future, it has the ability to file a complaint with the Watermaster and/or the Director as necessary. The Director should deny hearing that issue accordingly.

The Coalition also objects to Issue #3. Pocatello asserts that resolving the “reset issue” may “undermine” a stipulation and partial decrees entered for water rights 01-10620, 01-10621A, 01-10622, 01-10623 (collectively “Refill #1”) and 01-10621B (“Refill #2”) and “how unallocated storage will be administered.” Again, the Coalition submits the issue is hypothetical and would unnecessarily broaden the issues to be addressed in this proceeding. Further, contrary to the implication, “unallocated storage” is not “administered” like a water right. The Director should deny hearing the issue accordingly.

Finally, the Coalition objects to Issue #4. To the extent Pocatello is attempting to limit the future beneficial use of the “Winter Water Savings” storage water rights (01-10042 and 01-10043) that issue is beyond the scope of this proceeding. If Pocatello disagrees with the distribution of water to a particular storage water right in the future, it has the ability to file a complaint with the Watermaster and/or the Director as necessary. Further, there is no basis to decide this unrelated issue in comparison to the historic use of natural flow.

However, administration of the referenced “Winter Water Savings” storage water rights pursuant to Idaho law is an issue that should be considered since they all contain the same “January 1 to December 31” season of use.

## **II. PWUI Statement of Issues**

Issue #1 is confusing in that it appears to raise a jurisdictional question. To be clear, Milner’s letter did not challenge or seek to set aside any of the SRBA partial decrees. Instead, Milner requested clarification that the Director and Watermaster would deliver available water to decreed water right 1-17 in accordance with Idaho law. *See* I.C. §§ 42-602, 607. The Director

complied with the request. *See Oct. Letter*. Contrary to PWUI's assertion, the legality of Water District 01's "reset" function in the accounting program should likely first be examined by the Director with a complete administrative record anyway.<sup>3</sup> *See e.g., AFRD#2 v. IDWR*, 143 Idaho 862 (2007), *In re SRBA*, 157 Idaho 385, 392 (2014) ("should be addressed on a case-by-case basis on a fully developed factual record and where the IDWR is a party"). Accordingly, if PWUI challenges IDWR's jurisdiction in this matter it should file the appropriate motion, or separate judicial action challenging the proceeding instead of asking the Director to address the issue in the abstract.

Issue #2 is similarly confusing in that it appears to mix judicial review standards with what is being addressed in this case. It is not the Director's role (as presiding officer) to declare whether the Watermaster has "abused his discretion" in administering water rights. Courts, not the agencies themselves, review actions under that standard. Again, the Director supervises and is responsible for the administration of water rights within the State. The Director did just that with regards to administration in Water District 01 when he sent the Watermaster a letter last fall. *See Oct. Letter*. Whether a "reset" date can and will be included in future administration is apparently the issue the Director will consider now. The parties will be provided an opportunity to present evidence, and Water District 01 has already submitted a staff memorandum. Further, the Coalition understands that the Director and Watermaster are not "parties" to this proceeding. *See* IDAPA 37.01.01.150 (parties); 201 (participation by agency staff); 602 (reference to "staff memorandum"). Accordingly, PWUI's Issue #2 is out of context and should be denied to the extent it misstates Idaho law or the proper procedure in this case.

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<sup>3</sup> Based upon the Director's *Oct. Letter* the Coalition is unsure if the "reset" function still exists in the accounting program and procedures. Indeed, the Director required the Watermaster to revise the fall deliveries and not deliver water to previously satisfied onstream Snake River Reservoir water right until January 1, 2018.

Issue #3 vaguely references “bulleted items listed on page 6” of the staff memorandum (Dec. 1, 2017). There are six bulleted items listed on that page, including the last four related to the topic of a “reset date” occurring after the Day of Allocation and before reservoir water right priorities are restored near the end of the irrigation season. PWUI further poses the vague question as to whether these bulleted items are “properly considered in the . . . exercise of discretion in establishing a ‘reset’ date?” *PWUI SOI* at 8. It is not clear if PWUI believes the bulleted items should be separately addressed in this case or whether the Director’s and Watermaster’s discretion in general should be evaluated. To the extent PWUI seeks a decision on something beyond the scope of Milner’s letter, the Coalition objects and submits that this case should not be a broad examination of the Director’s/Watermaster’s discretion in any and all cases.

The Coalition objects to Issue #4. The Coalition does not agree that the Director is authorized to determine “the legal effect of the spaceholder contracts” between the U.S. Bureau of Reclamation (Reclamation) and respective spaceholders. Although the contracts may contain a description of a “storage season” that differs from the water rights’ “season of use,” the Director does not have jurisdiction to review and declare rights under the spaceholder contracts. Moreover, Reclamation is not a party in this case. Therefore, the issue is beyond the scope of the proceeding and should be denied.

### **III. Shoshone Bannock Tribes / U.S. Bureau of Indian Affairs Statement of Issues**

The Tribes filed a statement of issues in which the U.S. Bureau of Indian Affairs (BIA) concurs. The Coalition objects to the following in the Tribes’ filing.

First, the Coalition objects to the Tribes’ characterization and description of protected settlement discussions in the “Background” section. Not only is it poor legal practice, the

disclosure violates the Department's rules of procedure and Idaho's evidentiary rules. *See* IDAPA 37.01.01.502; 600; I.R.E. 408. Critically, what was or was not asserted in any of the referenced discussions is not appropriate to disclose in a formal filing to the presiding officer. Any statements made during the course of settlement negotiations by the Coalition or others are protected under Idaho law. I.R.E. 408. The Coalition requests the Director to disregard or strike the first three paragraphs of the "Background" section accordingly. *See Tribes SOI* at 1-2.

The Coalition also objects to Issues #3 and #4. The Tribes apparently seek an interpretation and declaratory ruling on the scope of their "contract storage water rights" identified in the *1990 Fort Hall Indian Water Rights Agreement* ("Fort Hall Agreement"). Contrary to the Tribes' assertion, BIA is the actual storage contract holder, not the Tribes. The United States, not the State of Idaho, holds the federal storage contract rights in trust for the Tribes. *See Revised Partial Final Consent Decree* at 14, ¶ II.B.1 (August 13, 2014). Moreover, Reclamation, a non-party to this case, is the legal title holder to the referenced storage water rights (01-2064 and 01-2068) and the other party to the BIA contract. Accordingly, the scope of the trust obligation and the interpretation of the BIA contract is beyond the scope of this contested case.

The subtle threat about "potential harm to the Tribes' water rights [ ] to avoid exposing the State to a takings claim" should be similarly rejected. *See Tribes SOI* at 14. Whether the Tribes have a valid "takings" claims regarding water right administration is clearly beyond the scope of this case as IDWR has no authority to rule on such matters. Further, if the Tribes dispute the Director's administration and believe any of their rights identified in the Fort Hall Agreement are being injured, they have a duty to raise that issue with the Intergovernmental

Board established under Article 9 of the Fort Hall Agreement.<sup>4</sup> Stated another way, the Director does not have authority or jurisdiction to determine what the Tribes' rights are under the Fort Hall Agreement. Indeed, the Intergovernmental Board was established specifically to mediate such "disputes" regarding the interpretation of the Agreement.

Next, the Tribes' reference to the Revised Partial Final Consent Decree is similarly misplaced. The Tribes claim that the consent decree requires the Director "in administering such waters, [to] ensure the delivery to all water users, including the States and the Tribes, their legal entitlement to water from natural flow and storage." *Tribes SOI* at 13 (emphasis added). The Watermaster ensures delivery of water to natural flow rights and from storage during the irrigation season. Delivery of water from upstream storage is accomplished using the Snake River. *See* I.C. § 42-801 et seq. The Tribes have not claimed they did not receive delivery of natural flow or water they called from storage last season.<sup>5</sup> Therefore the Director should not consider the Tribe's proposed issues as stated.

Finally, the Tribes' reference to other conjunctive administration cases is misplaced and does not apply in this situation. *See Tribes SOI* at 6-7. This is not a proceeding under the Department's conjunctive management rules (IDAPA 37.03.11 et seq.). Accordingly, references to "material injury" and particular CM Rules do not apply. *See id.* at 9-10. Moreover, this case has nothing to do with the use of "groundwater models" or a "baseline methodology" for predicting injury in conjunctive administration. The Director's "discretion" in such matters is simply not at issue in this proceeding.

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<sup>4</sup> The Tribes initiated a contested case and requested a hearing on the *Oct. Letter*. To the extent that dispute is covered by the *Revised Partial Consent Decree* and 1990 Fort Hall Agreement, the Tribes have a duty to raise that issue with the Intergovernmental Board, not unilaterally initiate an administrative contested case before IDWR.

<sup>5</sup> Moreover, the Tribes have no storage right interests in Jackson Lake Reservoir or Lake Walcott Reservoir, the reservoirs with storage water rights senior to Milner's 1916 natural flow water right 1-17. Therefore, the Tribes have no standing to allege any injury resulting from the administration of those storage rights.



The Tribes also rely upon the Idaho Supreme Court's decision in Basin-Wide Issue No. 17 to analogize what is at issue in this case. *See Tribes SOI* at 8, citing *In re SRBA*, 157 Idaho 385 (2014) ("*BW17*"). The Tribes assert that the Director has "broad discretion to determine the appropriate system for accounting of storage rights, and that he therefore has the authority to consider the four issues set out above in sequence." *Id.* at 8-9. The Tribes overstate the holding in *BW17* and fail to recognize what Idaho law provides in administration. Notably, the Tribes leave out the following from the Supreme Court's opinion:

Here, the Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user. However, it is within the Director's discretion to determine when that number has been met for each individual decree. In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user. Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.

157 Idaho at 394.

In this case the storage water rights at issue were filled or satisfied in early 2017. *See Oct. Letter*. The Watermaster distributed the natural flow to the storage water rights in priority up to their stated quantities. Milner requested delivery of available water to its water right 1-17 in the fall in priority. The Director and Watermaster did not have "discretion" to ignore that request and deliver water to storage water rights that had already filled. The Director responded through his October 27, 2017 letter.<sup>6</sup>

The Director's determination was "governed by the decrees" and the Director did not have "broad discretion" to disregard the decreed elements. *The Revised Partial Final Consent*

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<sup>6</sup> The Tribes request "reversal" of the determination in the October 27, 2017 letter. That issue is beyond the scope of this proceeding and should be denied as the Director has initiated separate contested cases on that action. *See Order Granting Petitions for Hearing; Order Staying Hearings* (Docket Nos. P-WRA-2017-003; 004). Further, the 2017 irrigation season has concluded.

*Decree* specifically states the same: “The State shall 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.” *Revised Partial Final Consent Decree* at 19, ¶ II.C.12.1 (Aug. 13, 2014) (emphasis added). Accordingly, contrary to the Tribes’ assertion, there is no basis to “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.” *See Tribes SOI* at 9.

While the Tribes seek to broaden the Director’s authority and jurisdiction in this case, the Director should decline to address such issues.

### CONCLUSION

The Coalition objects to the proposed issues that go beyond the scope of this proceeding. While the proper and lawful administration of natural flow and storage water rights in Water District 01 is important to the parties and should be defined and implemented to provide certainty moving forward, this case should not be expanded into unrelated matters. The Coalition respectfully requests the Director to deny designating the issues referenced above.

DATED this 15<sup>th</sup> day of December, 2017.

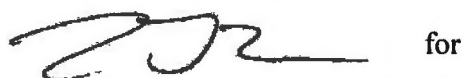
**BARKER ROSHOLT & SIMPSON LLP**



Travis L. Thompson

*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation,  
North Side Canal Company, and Twin Falls  
Canal Company*

**FLETCHER LAW OFFICE**

 for


W. Kent Fletcher

*Attorneys for Minidoka Irrigation  
District and American Falls  
Reservoir District #2*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of December, 2017, I caused to be served a true and correct copy of the foregoing **SURFACE WATER COALITION'S RESPONSE TO PARTIES' STATEMENTS OF ISSUES** by email and U.S. mail to IDWR, and by electronic mail to the parties:

<p>Director Gary Spackman c/o Kimi White IDWR 322 E Front St Boise, ID 83720-0098 *** service by U.S. Mail and electronic mail <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:kimi.white@idwr.idaho.gov">kimi.white@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a></p>	<p>Sarah A. Klahn Mitra M. Pemberton White &amp; Jankowski, LLP 511 Sixteenth Street, Suite 500 Denver, Colorado 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></p>	<p>William Bacon Shoshone-Bannock Tribes P.O. Box 306 Fort Hall, Idaho 83203 <a href="mailto:bbacon@sbtribes.com">bbacon@sbtribes.com</a></p>
<p>Edmund Clay Goodman Hobbs, Straus, Dean &amp; Walker LLP 806 SW Broadway, Suite 900 Portland, Oregon 97205 <a href="mailto:egoodman@hobbsstraus.com">egoodman@hobbsstraus.com</a></p>	<p>Chris M. Bromley Candice McHugh McHugh Bromley, PLLC 380 S. 4<sup>th</sup> Street, Suite 103 Boise, Idaho 83702 <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>	<p>Jerry R. Rigby Rigby, Andrus &amp; Rigby Law, PLLC 25 North Second East Rexburg, Idaho 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a></p>
<p>John K. Simpson Barker Rosholt &amp; Simpson, LLP P.O. Box 2139 Boise, Idaho 83701-2139 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a></p>	<p>W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, Idaho 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p>Norman M. Semanko Parsons Behle &amp; Latimer 800 West Main Street, Ste 1300 Boise, Idaho 83702 <a href="mailto:nsemanko@parsonsbehle.com">nsemanko@parsonsbehle.com</a></p>
<p>Robert L. Harris D. Andrew Rawlings Holden, Kidwell, Hahn &amp; Crapo, PLLC P.O. Box 50130 Idaho Falls, Idaho 83405 <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a> <a href="mailto:arawlings@holdenlegal.com">arawlings@holdenlegal.com</a></p>	<p>Duane Mecham U.S. Dept. of the Interior Bureau of Indian Affairs 805 SW Broadway, Suite 600 Portland, Oregon 97205 <a href="mailto:duane.mecham@sol.doi.gov">duane.mecham@sol.doi.gov</a></p>	<p>Lyle Swank Water District 01 900 N. Skyline Drive, Suite A Idaho Falls, Idaho 83402-1718 <a href="mailto:lyle.swank@idwr.idaho.gov">lyle.swank@idwr.idaho.gov</a></p>

  
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 Travis L. Thompson