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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	)	BRIEF ON "THRESHOLD ISSUE"
	)	
	)	

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**INTRODUCTION**

On January 3, 2018, the Director issued an order in the above-captioned case identifying and requiring briefing on a "threshold issue", which the Director framed as follows:

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 specify "1/1 to 12/31" as the time period for irrigation storage requires that the reset date for those rights be January 1?

As discussed below, the answer to this question is *no*. Rather, based on that plain language, which has a settled legal meaning, the computational accounting reset date calculation and procedure (in use for the last 29 years) described in the IDWR Staff Memorandum dated December 1, 2017 ("Staff Reset Memo") is *permitted* under the decree language. But, if there is

any ambiguity in that language, the Director must look to extrinsic evidence, and that evidence dictates the same result as the most reasonable construction of that language. Moreover, based on that settled legal meaning, the Department's longstanding interpretation of the same, judicial interpretations of the partial final decrees at issue, the bedrock principles of Idaho water law, reliance- and expectation-based interests, and the prohibition against arbitrary and capricious action, *the Director must retain the accounting and reset procedure in place for the last 29 years as described in the Staff Reset Memo.*

To summarize, the decreed water rights in question provide for a year-round Period of Use for Irrigation Storage, where a quantified volume of water may be accrued at any time between 1/1 and 12/31. These water rights also provide a Period of Use for Irrigation from Storage where a quantified volume of water may be released from storage at any time between 3/15 and 11/15. Provided both of these conditions are met, the computational accounting reset date is *not required* to be January 1. So long as the reset accounting methodology used by the Director only permits each storage right to fill once and to empty once in each calendar year – which, as explained by the Staff Reset Memo, is how the accounting system has worked for the past 29 years – the Director is within the four corners of the partial decrees.

In fact, the Director exceeded his discretion through his direction in the October 27, 2017 letter to the WD 01 Watermaster directing that the accounting for Lake Walcott fill not begin until January 1, 2018. As a result of that letter, the Lake Walcott storage water right (1-219) was not allowed to accrue any water in 2017. It was already full on January 1 of that year (as it has been for at least the last 16 years), and after that water was utilized during the irrigation season for irrigation purposes, that storage right should have been entitled to accrue water in and for

2017 in priority in the fall; by his October 27 letter, the Director has inappropriately allowed junior water rights to be satisfied (or unallocated storage to be accrued) ahead of a senior storage right that was in priority.

## **ANALYSIS**

The Tribes begin by noting four important points: (1) that the IDWR has a 29-year record of accounting for storage water right accrual volumes in the Upper Snake River Basin Reservoir System pursuant to the current administrative procedure without challenge on grounds of injury to existing water rights; (2) that use of that accounting procedure was authorized by the members of Water District 01 and applied to existing storage water rights with year-round period of use (as set out on the “seasons of use” on licenses issued by the Department beginning in the 1970s); (3) that the Tribes, and likely other parties as well, have reliance- and expectation-based legal rights in the longstanding interpretation and practice; and (4) use of that procedure has, as summarized in the Staff Reset Memorandum (as well as in the Water District 01 Accounting Manual<sup>1</sup>), maximized beneficial use of the water resource and minimized waste.

### **I. Canons of construction for interpreting the “plain language” of the decrees**

The Director’s framing of the threshold question as to the requirement of the “plain language” of the decree appears to contemplate that looking to the “plain language” forecloses

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<sup>1</sup> CONCEPTS, PRACTICES, AND PROCEDURES USED TO DISTRIBUTE WATER WITHIN WATER DISTRICT #1, Upper Snake River Basin, Idaho, Tony Olenichak (Mar. 2, 2015), available online at <http://www.waterdistrict1.com/water%20accounting%20manual.pdf> (last viewed Jan. 12, 2018). The Director can take official notice of the Department’s own publicly available publication. IDAPA 37.01.01.602. *See also* IDAPA 37.01.01.600 (“Evidence should be taken by the agency to assist the parties’ development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence.... The agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence.”)

any further discussion regarding the interpretation of that language. If so, that framing is incorrect.

The legal concept of “plain language” appears to have been initially set out in cases discussing the canons of statutory interpretation. Where there is a question of statutory interpretation, the court looks to the “plain language” of the statute. *See, e.g., State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015). However, in statutory interpretation, the “plain language” of a statute is not the end of the inquiry; it is just the beginning. “Statutory interpretation *begins* with the statute's plain language.” *Id.* (citations omitted). If the plain language of a statute is unambiguous, “we do not need to go beyond the statute's plain language to consider other rules of statutory construction.” *Id.* (citations omitted). However, the plain language of “[a] statute is ambiguous where the language is capable of more than one reasonable construction.” *Porter v. Bd. of Trs., Preston Sch. Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004).

Three recent Idaho Supreme Court decisions regarding water rights have used the “plain language” concept when interpreting the language of water right decrees. *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017); *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367, P.3d 193 (2016); *A & B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012). While the arguments of the parties, and in some instances, the language of the Court itself, sometimes conflate the concept of “plain language” with “unambiguous,” the overall thrust of all three decisions is essentially the same as regards the use of “plain language” in the statutory interpretation context: the “plain language” is the *beginning* of the inquiry. The same rule applies to the interpretation of contracts. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003) (“In applying the rules of contract construction, the court

analyzes the document in two steps. *Beginning with the plain language of the [contract]*, the first step is to determine whether or not there is an ambiguity”) (citations omitted, emphasis added).

The next step is to determine whether that “plain language” is ambiguous.

When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. [*A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012)]. If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. *Cf. Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) (“If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own words.”). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf. Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 850, 367 P.3d 228, 245 (2016) (“Where terms of a contract are ‘reasonably subject to differing interpretations, the language is ambiguous....’” (quoting *Clark v. Prudential Prop. and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003))).

*City of Blackfoot*, 396 P.3d at 1188.

Thus, while the “Period of Use: 1/1-12/31” in the partial decrees is the “plain language” of the decrees, the first step is to determine whether or not there is an ambiguity, *i.e.*, whether that language is capable of more than one reasonable construction. *See, e.g., Pinehaven Planning Bd.*, 138 Idaho at 829, 70 P.3d at 667. If there is only one reasonable construction, then that construction governs.

Nor does the “ambiguity” analysis end by pointing to a common dictionary definition or a layperson’s understanding; if the term has a “settled legal meaning,” it is not ambiguous. “To determine whether a contract is patently ambiguous, a court looks at the face of the document and gives the words or phrases used their established definitions in common use *or settled legal meanings.*” *Swanson v. Beco Const. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) (emphasis added) (citing *Pinehaven Planning Bd. v. Brooks*, 70 P.3d at 667). *See also City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995) (“Words or phrases that have

established definitions in common use *or settled legal meanings* are not rendered ambiguous merely because they are not defined in the document where they are used.”) (emphasis added). For example, the Idaho Supreme Court has held, repeatedly, that “the mere fact that a term is undefined in [an insurance] policy does not make that term ambiguous *if it has a settled legal meaning.*” *Melichar v. State Farm Fire & Cas. Co.*, 143 Idaho 716, 721, 152 P.3d 587, 592 (2007) (citing *National Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon*, 141 Idaho 537, 540, 112 P.3d 825, 828 (2005)) (emphasis added).

If, after conducting that analysis, the plain language is subject to more than one reasonable construction, then the courts apply “rules of construction for guidance and consider the reasonableness of proposed interpretations.” *Stonebrook Constr., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 931, 277 P.3d 374, 378 (2012) (internal citations omitted). A similar analysis applies to disputed language in judicial decrees:

If the language of the decree is unambiguous, the determination of its meaning and legal effect is a question of law over which free review is exercised, *Grecian v. Grecian*, 140 Idaho 601, 603, 97 P.3d 468, 470 (Ct.App.2004); *Toyama*, 129 Idaho at 144, 922 P.2d at 1070, and matters outside the record should not be used to construe it. *State ex rel. Moore v. Scroggie*, 109 Idaho 32, 37, 704 P.2d 364, 369 (Ct.App.1985). If the language is reasonably susceptible to differing meanings, however, it is deemed ambiguous and determination of its meaning is a question of fact. *Pike v. Pike*, 139 Idaho 406, 408, 80 P.3d 342, 344 (Ct.App.2003).

*McKoon v. Hathaway*, 146 Idaho 106, 109, 190 P.3d 925, 928 (Ct. App. 2008).

As explained below, the Tribes submit that the “plain language” of the decrees – in light of legal precedent establishing a settled legal meaning – is reasonably subject to only one construction: that such language does *not* require a January 1 reset date in the computational methodology used to account for the accrual of water to storage water rights, and instead that it

requires utilization of the computational methodology and reset procedure used for the last 29 years, as described in the Staff Reset Memo.

Moreover, even if that “plain language” is reasonably susceptible to differing meanings, extrinsic evidence is permitted to resolve the ambiguity. *Rangen*, 367 P.3d at 202 (“Idaho law permits ‘[f]irst, the introduction of extrinsic evidence to show that the latent ambiguity actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.’”) (internal citations omitted). As the Tribes explain below, such extrinsic evidence (legal precedent, 29 years of Departmental practice, the language of storage water contracts, and the prior agreements and understandings of the parties – nearly all of which is subject to official notice as records of the Department), also demonstrates that the plain language is amenable to only one reasonable interpretation: the fill of storage water rights consistent with the reset computation methodology and procedure used for the last 29 years, as described in the Staff Reset Memo.

## **II. Reset computation methodology is distinct from distribution of water**

As an initial point, it is important to clarify that the reset computation methodology described in the Staff Reset Memo is distinct from the distribution of water according to the decrees. Conflating the method of accounting for the accrual of water with the actual allocation and delivery of water rights serves to confuse the issues.

In resolving a dispute in the SRBA, the Idaho Supreme Court made clear that the distribution of water is distinct from the method of accounting applied by the Director. *In re SRBA (Basin-Wide Issue 17)*, 157 Idaho 385, 392–94, 336 P.3d 792, 799–801 (2014). And, contrary to the Surface Water Coalition’s assertion that the Tribes’ reliance on *In re SRBA* for

this point is “overstated,” *see* SWC Response to Statements of Issues at 9, nothing in SWC’s selected excerpt is contrary to the Tribes’ position. The Supreme Court’s statement that “the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user” is not only fully compatible with a fall computational accounting reset date, as the Staff Reset Memo explains, it is the methodology used for the last 29 years to maximize beneficial use of the water resource.

**III. The “Period of Use: 1/1-12/31” language is *not* ambiguous because it has a “settled legal meaning” resolving the threshold issue**

While the “Period of Use: 1/1-12/31” language may potentially be amenable to a lay interpretation, in this context it has a settled legal meaning, and under the above-described precedent, such settled legal meaning precludes any ambiguity. *See* discussion *supra* at 5-7. Courts have recognized that a January 1 to December 31 period of use is *not* a limitation on the storage right. The period of use for a storage water right is the season in which water may be diverted to storage. While the March-to-November irrigation period of use on the face of the decrees intentionally matches the natural growing season, the reservoir storage fill element of the decrees, due to the on-stream nature of the dams,<sup>2</sup> is unlimited, providing for a year-round storage season. Because on-stream reservoirs “divert” the entire flow of the river every day, the diversion season is perpetual, and the decrees thus list the season for diversion to storage as 1/1 to 12/31.

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<sup>2</sup> “A long-standing tenet of that [prior appropriation] doctrine is the quantity element of a water right is measured at the point of diversion.” *Ballentyne Ditch Co. et al. v. Idaho Dep’t Of Water Res., et al. (In the Matter of the Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63)*, Case No. CV-WA-2015-21376, MEMORANDUM DECISION AND ORDER (Fourth Judicial District Idaho, Sept. 1, 2016) at 7. An on-stream dam is “a river-wide diversion structure that captures and regulates the entire flow of the river.” *Id.*



In *In re SRBA*, the Court distinguished between the limitations on the period of use for irrigation and the “year-round” period for storage water rights: “With respect to storage rights for irrigation, for example, it is typical for the ‘irrigation storage’ purpose of use to be a year-round use (January 1 to December 31), and the ‘irrigation from storage’ purpose of use *to be limited to the irrigation season* (e.g., March 15 to November 15).” 157 Idaho at 389 (emphasis added). The Court did not refer to the year-round period of use as a limitation, as it did for the irrigation use. Moreover, in framing this issue, the Court noted that this language is “typical,” and thus typically understood, as applying no limitation. *Id.*

The *Ballentyne Ditch Co. (Water District 63)* decision made this point expressly, twice. In affirming that the Director’s decision to compute accrual to the reservoir storage right as all natural flow that is entering the reservoir as consistent with the decrees in that case (which have the same January 1 to December 31 period of use for storage as here), the Court stated: “In addition to lacking flow limitations, the reservoir rights *lack period of use limitations on storage*. The partial decrees unambiguously provide for year-round use.” *Ballentyne Ditch Co. (Water District 63)* at 10 (emphasis added). Similarly, in affirming the Director’s determination that the reservoir water rights are satisfied when the amount of natural flow that has entered the reservoir in priority equals the quantity element of the right, the Court stated:

The legal analysis applicable to this finding is largely the same as that set forth in the preceding section [dealing with accrual]. ... It is further consistent with the elements of the partial decrees issues for reservoir rights. *Those decrees contain no ... period of use limitations in regard to storage.*

*Id.* at 13 (emphasis added). While the *Ballentyne Ditch Co. (Water District 63)* decision is on appeal, the Director has not challenged either of these holdings or the legal analysis supporting

them, but is arguing that the Supreme Court should affirm the lower court on both of these points.<sup>3</sup>

Thus, the “Period of Use: 1/1-12/31” language for the storage right is not a limitation, but rather the “typical” way that Idaho and other courts, as well as the Department, have described the ability to store water in reservoirs on a year-round basis. Based on the precedent described above, it is simply not reasonable to construe the 1/1 to 12/31 period of use language in the Upper Snake River reservoir storage rights decrees as imposing a limitation on period of use that requires a January 1 reset. That plain language was not created from whole cloth specifically for the Upper Snake River storage rights: it was “typical” language with a settled legal meaning at the time it was decreed. It authorizes year-round storage, in priority, limited to one fill of the right per year, and further cabined by the principles of maximizing beneficial use and minimizing waste.

In fact, for the past 29 years, applying that understanding and settled legal meaning, the Department itself has interpreted the 1/1-12/31 period of use dates (which dates did not appear for the first time in the partial final decrees, but were included on the licenses issued by the Department as early as the 1970s<sup>4</sup> and in the Notice of Claims for storage rights filed in the SRBA) not as a limiting parameter, but as a year-round authorization:

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<sup>3</sup> See *IDWR Appellants' Brief* (Idaho Supreme Court, May 26, 2017) at 3-4, 22-23; *IDWR Appellants' Reply Brief* (Idaho Supreme Court, Sept. 8, 2017) at 7-26. We note that in the decision being appealed in this case (the Director's Amended Final Order dated Oct. 20, 2015), the Director expressly noted that he was not addressing the “reset” issue in Basin 63, yet these same principles would apply.

<sup>4</sup> Examples of licenses issued in the 1970s and 1980s for various water storage uses with a “period of use” from January 1 through December 31 are attached as Exhibits A – E to the Declaration of Edmund C. Goodman (Jan. 18, 2018). These licenses and the information contained in them, including the “period of use”, are part of the public and official records of IDWR, and the Director may take official notice. IDAPA 37.01.01.602. See note 1, *supra*.

The period-of-use listed on the storage water rights is January 1 to December 31. The Watermaster has interpreted the water right period-of-use to mean the storage water rights are in effect each day of the *calendar year* when natural flow is available to the reservoir priorities and their unfilled volumes. The Watermaster has not interpreted the period-of-use as defining the beginning and the ending dates for the annual period of accounting for distributing natural flow to the reservoir water rights' priorities.

Staff Reset Memo at 5 (emphasis in original).

Thus, as is clear from the settled legal meaning according to the Idaho Supreme Court, the Fourth District Court, and the Department's own longstanding practice and interpretation, 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, but authorizes a year-round accounting methodology. *So long as the storage right is allowed to accrue no more than its water right volume one-time from the natural flow in that calendar year*, the methodology squares with the plain language of the partial final decree language. The language, based on that well-settled legal meaning, is not ambiguous and it does not require a computational reset of January 1. Simply because a party can come up with and present "different possible interpretations" does not make the language ambiguous, since "if this were the case then all statutes that are the subject of litigation could be considered ambiguous." *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992) ("a statute is not ambiguous merely because an astute mind can devise more than one interpretation of it.").

**IV. Even if the January 1 – December 31 period of use language were ambiguous, extrinsic evidence supports the continued use of the accounting methodology and computational accounting reset date described in the Staff Reset Memorandum**

As described above, based on existing precedent and understanding, the utilization of a computational accounting reset date other than January 1 is at the very least a reasonable

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These records are available at <https://www.idwr.idaho.gov/apps/ExtSearch/WRAJSearch/WRADJSearch.aspx> (last accessed Jan. 16, 2018).

interpretation of the plain language. If, *arguendo*, reading that “plain language” to require a January 1 water right accrual reset date is also reasonable, then the next step is to apply the canons of construction to determine the interpretation that accords with the understanding of the parties and the Court in fashioning that language in the decrees. In doing so, it is appropriate to consider context and information outside the four corners of the decrees. *See Rangen*, 367 P.3d at 202 (citing *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)); *Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010); *Snoderly v. Bower*, 30 Idaho 484, 487, 166 P. 265, 265 (1917)).

**a. Precedent supports the Staff Reset Memorandum procedure**

The precedent described in Section III, *supra*, provides the relevant framework for gauging the understanding and intent of the parties and the SRBA Court in crafting the decree language in that manner. The parties and the Court used this “typical” language, without further remark or clarification, and should be understood to have intended the same unlimited period of use as the use of that same “plain language” elsewhere.

**b. The factual background supports the Staff Reset Memorandum procedure**

The factual background indicates that the parties would have understood and intended such language to be consistent with the reset accounting methodology used by the Water District 01 Watermaster (and, indeed, in other Water Districts across Idaho), which has involved a year-round, unlimited period of use of the reservoir storage rights since 1978.

- Beginning in the 1970s and continuously since then, the IDWR has issued water rights licenses that contain the 1/1-12/31 period of use language. *See supra*, note 4.
- Continuing development of new water rights, non-irrigation uses, new diversions, reservoirs, and the 1977 drought increased water demand such that accounting of water rights could no longer be limited to the irrigation season, prompting the need

for stricter water right regulation. Staff Reset Memo at 2. In a February 23, 1978 Committee of Nine Meeting, IDWR Hydrology Section Manager Alan Robertson said, "Regulation on a longer season will help fill reservoirs and late (water) rights will be charged storage." *Id.*

- In response, Water District 01 formally adopted Resolutions 1 and 10, which respectively called for the Watermaster "to make such changes in the established water distribution practices as will result in more accurate deliveries of natural flow and stored water, improved regulation procedures to assure deliveries of water supply and diversion records to the water users, and to assure that all water users are charged for water deliveries on an accurate and equitable basis," and to "collect records of water diversions during the entire year." *Id.*
- New computation technology replaced hand calculation of water rights and removed previous constraints on year-round water accounting. Water District 01 Accounting Manual at 15. The computation methodology being used was authorized by the members of Water District 01 in 1978. Staff Reset Memo at 2.
- The authorized methodology was a move to a "*year-round* water right accounting," beginning in 1978, and further modified in 1988. *Id.* at 2-3 (emphasis added).
- "From this point forward [when WD01 authorized the year-round accounting], all water rights were regulated according to priorities *for the entire calendar year*. No distributions of natural flow to junior water rights were made ahead of *other unfilled senior water rights*." *Id.* at 2 (emphases added).
- The Staff Reset Memorandum repeatedly describes the computational methodology in place since 1988 as resulting in the senior storage water rights (e.g., Lake Walcott) as having their "annual volume" satisfied in the fall. *Id.* at 2, 3, 4.

The WD 01 Water Rights Accounting and Distribution Manual also describes the system in the same way. Section 8.15, pp. 80-81.

Further supporting this same understanding is the fact that the notice of claims filed for the various storage water rights in the SRBA (in the 1980s) all included the "typical" 1/1-12/31 period of use. All of the spaceholders with rights under those claims would have understood the interpretation and practice of IDWR at the time those notice of claims were filed. Yet no one asked for a remark or other modification of the decree that would have indicated that the system

in place when they filed those notices of claims – which governed the accounting for those rights prior to, during, and after the SRBA – was inappropriate or inconsistent with the 1/1-12/31 period of use language.

Moreover, nearly all the contracts for storage water in the Bureau of Reclamation reservoirs include an October 1 date to begin reservoir fill from natural flow. *See, e.g., Memorandum of Agreement between the Bureau of Reclamation and the Bureau of Indian Affairs Relating to a water supply for Michaud Division of the Fort Hall Irrigation Project as approved April 25, 1957 (“Michaud Contract”).*<sup>5</sup> Further, with regard to this case, we note that the Michaud Contract and its October 1 storage season start date is expressly incorporated into the Shoshone Bannock water right partial final decree. *Shoshone-Bannock Consent Decree*, II.B.3, page 15. Those contracts, in use in Water District 01, in other Idaho water districts, and in fact around the Western United States, indicate a widely-shared understanding that the accounting for reservoir storage fill begins in the fall, and would have informed how the parties understood the system to work at the time the decrees were finalized – which is consistent with the 29-year practice and interpretation of the Department as described in the Staff Reset Memo.

**c. “Period of Use: 1/1-12/31” is a term of art in this context**

If the “plain language” used is actually a term of art or technical term in the industry or context in which it is used, evidence regarding the use and understanding of that term of art may

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<sup>5</sup> The Michaud Contract is attached as Attachment D to 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* (August 13, 2014) (“*Shoshone-Bannock Consent Decree*”). Another typical contract (Enterprise Canal Co.) is attached as Exhibit F to the Goodman Declaration, and others with similar language about the storage season are publicly available upon request from the United State Bureau of Reclamation, Boise Office, upon request. *See Goodman Declaration*, ¶¶5-7. All such contracts are subject to official notice by the Director. *See supra* note 1.

be applied to interpret that language. *See, J.R. Simplot Co. v. Rycair, Inc.*, 138 Idaho 557, 562, 67 P.3d 36, 41 (2003), quoting *In re Marriage of Shaban*, 88 Cal.App.4th 398, 105 Cal.Rptr.2d 863, 867 (2001) (“Parol evidence, of course, may be received to interpret a term of art used within a contract.”). *See also Pac. Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 549 (9th Cir. 1949) (“If... the language of the contract is not plain, two situations may present themselves: (1) the contract may contain technical or trade terms, as to which the testimony of those skilled in the art or experts in the field is admissible, or (2) the contract may contain ambiguities which need extrinsic facts to explain”).

Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. *Rangen*, 367 P.3d at 202 (citing *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012)). Idaho courts regularly apply the Restatement (Second) of Contracts, including its Rules of Interpretation at § 202, to interpret contracts. *See, e.g., Idaho Falls Bonded Produce & Supply Co. v. Gen. Mills Rest. Grp., Inc.*, 105 Idaho 46, 49, 665 P.2d 1056, 1059 (1983); *Badell v. Badell*, 122 Idaho 442, 446, 835 P.2d 677, 681 (Ct. App. 1992). The Restatement’s Rules of Interpretation state clearly that “technical terms and words of art are given their technical meaning when used in a transaction within their technical field.” Restatement (Second) of Contracts § 202(b) (1981). When such a trade term is used in a contract, it is binding on those who would understand it that way: “when there is a known usage of a trade or business, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears.” *Commercial Ins. Co. v. Hartwell Excavating Co.*, 89 Idaho 531, 540, 407 P.2d 312, 317 (1965).

The “Period of Use: 1/1-12/31” language is a term of art in this context, based on how the IDWR technical staff have interpreted it, as demonstrated by the Staff Reset Memorandum and the Water District 01 Accounting Manual, and how other participants have understood it. The above-cited court precedent recognizes it as a term of art meaning a “year-round” period of use. Accordingly, the Director must treat the “Period of Use: 1/1-12/31” language as affirming a “year-round” period of use.

**d. The Tribes have an expectation- and reliance-based interest in the reset accounting procedure in place at the time of the Fort Hall Agreement and for the past 29 years**

“A water right is tantamount to a real property right, and is legally protected as such.” *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). Moreover, because “[s]torage rights by their very nature involve complexities not associated with other categories of water rights, including the right to store water for future use” (*Ballentyne Ditch Co. (Water District 63)*, *supra* note 2), it is imperative they be distributed in accordance with the decrees defining the elements of these rights. Since the Director distributes water pursuant to the partial decrees governing these reservoir rights, “[u]nder the law, it is those decrees that are conclusive as to the nature and extent” of the use. I.C. § 42-1420(1).” *Id.*, at 12.

The Tribes’ water rights, including the water storage rights at issue here, as provided in the Fort Hall Agreement, were “ratified, confirmed and approved” in the *Shoshone-Bannock Consent Decree*, and in Section 4 of the Fort Hall Indian Water Rights Act of 1990 (“Act”),



Public Law 101-602 (Nov. 16, 1990), 104 Stat. 3059. The Tribes' water rights, including its rights to water storage, are a unique and specially bargained for component of the Snake River Basin Adjudication and must be implemented strictly in accordance with their specific elements.

Included in the *Shoshone-Bannock Consent Decree*, as an essential element of the Tribes' water storage rights, are specific dates pursuant to which water would be stored. These dates also reflected the practice in place at the time of the Fort Hall Agreement and utilized ever since. The *Shoshone-Bannock Consent Decree* expressly incorporates, at paragraph II.B.3, page 15, the definitions of "irrigation season" and "storage season" contained in the Michaud Contract. The Fort Hall Agreement also explicitly noted that the Shoshone-Bannock right to stored water shall not be subject to "reduction of the quantity of water available under any other existing rights since any such reductions are mitigated by the express federal commitments in Article 12.3," and further provides that "[t]he State agrees not to take any action that will interfere with the nature, scope, spirit and purposes of the Shoshone-Bannock Water Bank." §7.3.5. The same restrictions against diminishing the Tribal storage water right are reiterated in the Fort Hall Indian Water Rights Act of 1990, §12, and reaffirmed in the Shoshone-Bannock Tribal Water Supply Bank Rules adopted by IDWR. IDAPA §37.02.04-001.03.

The understanding of the Tribes (and the United States) in negotiating and agreeing to the Fort Hall Agreement – including the mitigation being provided by the United States and the settlement of other asserted claims by the Tribes – was that the reservoir system was being operated in a certain manner and would continue to be operated in that manner. In other words, the Tribes had settled expectations, as well as reliance-based interests, in a system that began to reset and refill the reservoirs during the fall each year. These were not abstract expectations: the

Tribes had experts working with them to calculate and determine the value of the stored water rights set out at Section 7.3 based on that existing operation. While no specific amount of water was guaranteed, what was preserved and protected in the Fort Hall Agreement was a reservoir system operation that provided a level of predictability for the Tribes' storage water rights, one that maximized the amount of storage accrual.

**e. Other parties have reliance- and expectation-based interests that require continuing use of the reset procedure set out in the Staff Reset Memorandum**

Moreover, while the Tribes have a strong expectation-based interest in continuing operation of the reset accounting in the same manner as it has been operated for the last 29 years, other stakeholders also have reliance-based interests. As noted above, the Department's longstanding practice, based on existing 1/1-12/31 language in IDWR-issued licenses and on SRBA notice of claims, as well as the Bureau of Reclamation storage contracts with an October 1 start to the storage season, has been to reset the storage rights accounting in the fall. Various stakeholders have undertaken actions and expenditures in reliance upon that interpretation. The Idaho courts have long-recognized the legal basis for reliance-based interests under Idaho common law across a variety of contexts. *Sims v. State*, 94 Idaho 801, 802–03, 498 P.2d 1274, 1275–76 (1972) (public body has a reliance-based right to rely on existing case law) (*quoting Dawson v. Olson v. State Farm Insurance*, 94 Idaho 636, 640, 496 P.2d 97, 101 (1972)); *Willis v. Larsen*, 110 Idaho 818, 822, 718 P.2d 1256, 1260 (Ct. App. 1986) (recognizing reliance-based interest on finality of legal decision); *Altrua HealthShare, Inc. v. Deal*, 154 Idaho 390, 394–95, 299 P.3d 197, 201–02 (2013) (contract language creates reliance interest); *Washington Fed. v. Hulsey*, 162 Idaho 742, 405, P.3d 1, 8 (2017) (“Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved”)

(quoting *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991)); *McAmis v. State*, 155 Idaho 796, 799, 317 P.3d 49, 52 (Ct. App. 2013) (“if a defendant completes a task in reliance upon the plea agreement, withdrawal of the guilty plea could cause him to lose both the benefit of his bargain and his reliance interest”).

The same reliance-interest analysis would apply here. Established inter-agency reservoir storage management practices depend on shared understanding between the various agencies that the storage season described on the storage decrees means “year-round.” This includes the current practice of ensuring that senior reservoir rights are met before junior rights in the fall so that reservoirs have a complete storage fill season. As a sampling and by no means exhaustive description of various reliance-based interests that would be disrupted by a change to a January 1 reset would be the following:

- The United States Bureau of Reclamation Flow Augmentation Program, which rents surplus storage supplies from WD 01, WD 63, and WD 65 through their respective Rental Pools to provides flow augmentation to aid migration of juvenile salmonids,<sup>6</sup> could be disrupted because the reservoirs would not have a complete storage fill season;
- In turn, a failure to fill the reservoirs would jeopardize the requirements of the 2004 Snake River Water Rights Agreement and the May 2008 NOAA Fisheries Biological Opinion on salmon recovery, issued in consultation with the Army Corps of Engineers, Bonneville Power Administration and Bureau of Reclamation;
- Failure to fill the reservoirs would put at risk municipal and industrial storage supplies in WD 01 and WD 63, which storage contract holders have acquired with an expected water supply yield based on historical practices;
- Failure to fill the reservoirs could potentially violate the State’s commitment in the Fort Hall Agreement to avoid any action that could “interfere with the nature, scope,

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<sup>6</sup> BUREAU OF RECLAMATION 2015 SALMON FLOW AUGMENTATION PROGRAM ANNUAL PROGRESS REPORT (April 5, 2016), available online at <https://www.usbr.gov/pn/fcrps/hydro/uppersnake/2015nmfsERRATA.pdf> (last viewed January 12, 2018).

spirit and purposes of the Shoshone-Bannock Water Bank.” Fort Hall Agreement § 7.3.5; and

- Decreased reservoir storage could threaten hydropower production, particularly in the summer peak demand season, which is determined by the storage available for release from the Upper Basin.
- f. It would be arbitrary and capricious for the Director to change longstanding and relied-upon policy and interpretation**

The Idaho Administrative Procedure Act (“APA”) at Idaho Code § 67–5279(3) sets out the standard for judicial review of the Director’s decisions, and requires that Idaho courts must affirm agency actions unless the “findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.” When an issue falls within the discretion of the Director, Idaho courts will affirm the decision if the Director “(1) perceived the issue in question as discretionary, (2) acted within the outer limits of [his] discretion and consistently with the legal standards applicable to the available choices, and (3) reached [his] own decision through an exercise of reason. *Idaho Ground Water Assoc. v. Idaho Dep’t of Water Res.*, 160 Idaho 119, 126, 369 P.3d 897, 904 (2016), *reh’g denied* (May 9, 2016). “If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.” (Citing I.C. § 67–5279(3)). The Idaho APA closely tracks the United States APA’s standard of judicial review. *See* 5 U.S.C. § 706.

Departing from the IDWR’s historical interpretation would effectively rescind the computational accounting procedure established and used by IDWR and upset the settled expectations of those who have relied on it for 29 years. The United States Supreme Court has

recognized that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983). In such cases, the agency must articulate “the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard.” *Id.* at 31. An agency is obligated to supply a reasoned analysis for a reversal in policy because “the revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course.... There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.” *Id.* at 41-42. However, no reasoned argument can be made for such a reversal because there is no basis within the decrees themselves for the position that a January 1 computational accounting reset date is required, and the extrinsic evidence points otherwise.

**g. The “bedrock” principles of Idaho water law cabin the Director’s discretion and require application and use of the reset accounting methodology set out in the Staff Reset Memo**

In its briefing on the *Water District 63* appeal IDWR identified the two following “bedrock” principles of Idaho water law: “securing the maximum use and benefit, and the least wasteful use of Idaho’s water resources.” *IDWR Appellants’ Reply Brief* at 30 (quoting *Idaho Ground Water Assoc.*, 160 Idaho at 131.)

Those bedrock principles are repeatedly recognized by the Idaho courts as the policy of the State of Idaho with regard to its water resources.

In *Niday v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909), we stated, “The theory of the law is that the public waters of this state shall be subjected to the highest and greatest duty.” In *Farmers’ Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909), we phrased it, “Economy must be required and

demanding in the use and application of water.” In *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960), we expressed the same concept by stating, “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.”

*Clear Springs Foods v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011). And, as the Idaho Supreme Court repeatedly stated, the Director’s discretion is cabined by these bedrock principles. See, e.g., *In re SRBA*, 157 Idaho at 393; *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 880; 154 P.3d 433, 451 (2007).

As described in detail in the Staff Reset Memo, the computational reset methodology was first agreed-to and authorized by the Water District 01 members in 1978 specifically to ensure the maximum use and benefit of the natural flow of the Upper Snake River and its tributaries. Staff Reset Memo at 2. Thus, in 1988, and in every year since then, according to the Department, “the annual period when natural flow could accrue to storage water rights and be allocated to reservoir spaceholders extended from the current year’s *Day of Allocation* to the following year’s *Day of Allocation*, or extended from the current year’s [computational accounting] *reset* date to the following year’s [computational accounting] *reset* date.” Staff Reset Memo at 5. Nor is this description new information developed for this contested case: the same approach is detailed, in nearly identical language, in the WD 01 Accounting and Distribution Manual. Section 8.15 (pp. 80-81). Thus, these “bedrock” principles cabin the Director’s discretion, and prohibit moving from the accounting and reset procedure used for the past 29 years.

#### **V. The Director’s October 27 letter was outside the Director’s discretion**

As described in the previous sections, the Director is not required to change to a January 1 computational accounting reset date. The Tribes submit that there is no ambiguity in the Period of Use language, because it has a settled legal meaning that authorizes the reset accounting that

has been in place for the last 29 years. Even if there is ambiguity regarding the potential for a January 1 water right accrual reset date, extrinsic evidence points to only one reasonable interpretation.

Further, while the Director has discretion regarding accounting procedures generally, that discretion is cabined here. As described above, the settled legal meaning of the “plain language,” the reliance- and expectation-based interests on the existing practice, the longstanding interpretation and practices, and the bedrock principles of Idaho water law (maximize beneficial use and minimize waste) require the Director to continue to use the existing reset accounting and procedure as described in the Staff Reset Memo. That procedure *ensures that each storage right is allowed to accrue no more than its water right volume one-time from the natural flow in that calendar year.*

The Director, however, issued a letter on October 27, 2017, directing the WD 01 Water Master to move the computational accounting reset date for the storage rights to January 1, 2018, thus precluding a late-season fill. Doing so was beyond the Director’s discretion, and the Director should reverse that instruction.

The Lake Walcott storage right (1-219) gets to fill once each calendar year. For each calendar year from 2000 through 2017 it was already full on January 1.<sup>7</sup> The stored water was used for irrigation during the calendar year, and then refilled during the fall of that calendar year. The Lake Walcott right, therefore, filled only one time in each of those calendar years. The same thing would have occurred in 2017. On January 1, 2017, Lake Walcott was full. However, due to

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<sup>7</sup> See <http://idwr.idaho.gov/water-data/water-rights-accounting/WD01.html> (last viewed January 16, 2018).

the Director's improper October 27, 2017 letter, *Lake Walcott was not permitted to fill in 2017*. Instead, water that the senior Lake Walcott storage right was entitled to likely went to junior water rights or unallocated storage.

The Director must correct that error and can do so in this proceeding. The October 27 letter specifically references this contested case, and appears to have been issued in response to the petition from Milner that triggered this proceeding. That letter is thus inextricably part of this contested case.

### CONCLUSION

Based on the foregoing, the Shoshone-Bannock Tribes respectfully request that the Director determine that the "plain language" of the decrees does not require a January 1 computational accounting reset date, but instead requires continuing with the existing 29-year practice and procedure.

Dated this 19th day of January, 2018.

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 19th day of January, 2018, I served a true and correct copy of the foregoing “Shoshone-Bannock Tribes Statement of Issues” on the Idaho Department of Water Resources by First Class U.S. Mail, postage prepaid, and on the following by electronic mail:

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