

JAN 22 2018

DEPARTMENT OF
WATER RESOURCES

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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
OPENING BRIEF RE: LEGAL
QUESTION**

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

¹ 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 re: Statements of Issues and Responses; Order Adopting Deadlines; Amended Notice of Status Conference (“Order”) dated January 3, 2018 as well as the Department’s Rules of Procedure (IDAPA 37.01.01 *et seq.*), and hereby submit the following opening brief.

The Coalition is filing this joint opening brief 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.

LEGAL QUESTION

The Director requested the parties to brief the following legal question:

[W]hether 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 specifies “1/1 to 12/31” as the time period for “irrigation storage” requires that the reset date for those rights be January 1.

ARGUMENT

I. Interpretation of the Storage Water Right Partial Decrees “Period of Use” Element.

The partial decrees for the federal onstream reservoirs in Water District 01 all contain a January 1 to December 31 “period of use” for irrigation storage purposes. *See* Ex. A (example 01-2064, American Falls). The Director seeks briefing on the designated question as to whether that decreed period of use requires a January 1st “reset date” for those rights in the Water District 01 computerized accounting program used for water right administration. The question concerns an interpretation of the partial decrees and then how that interpretation should be applied in administration by Water District 01.

The Idaho Supreme Court recently confirmed applicable legal principles in interpreting water rights in *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017). The Court stated:

When interpreting a water right decree this Court utilizes the same rules of interpretation applicable to contracts. *Id.*, 153 Idaho at 523, 284 P.3d at 248. 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))). Whether ambiguity exists in a decree "is a question of law, over which this Court exercises free review." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 202 (2016) (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)).

396 P.3d at 1188.

Based on the foregoing, the Coalition submits that the Director should determine the "meaning and legal effect" of the storage water right decrees from the "plain and ordinary meaning" of the period of use element. It is the Coalition's position that the decreed period of use element of January 1 to December 31 is plain and unambiguous. In other words, the decrees provide that the "irrigation storage"² period of use is a calendar year. The decrees contain no other explanatory remarks, conditions, or "other provisions necessary for administration" that would suggest the "1/1 to 12/31" period of use is something other than a calendar year.

Under well-established Idaho law, the Director can only find the decreed period of use element to be ambiguous "if it is reasonably subject to conflicting interpretations." *Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 367 P.3d 228, 245 (2016). The Coalition has not found a conflicting interpretation that would show the decreed period of use element means something other than January 1 to December 31. In sum, the Coalition believes the period of use element is unambiguous as a matter of law.

² Certain storage water rights have other year-round purposes of use as well (i.e. "power storage"). *See* Ex. A.

II. Administration of Storage Water Rights.

Apart from interpreting the decreed storage water rights, the Director and Watermaster must also administer the water rights pursuant to Idaho law. *See generally*, IDAHO CONST. Art. XV, § 3; I.C. §§ 42-602, 607. Further, an adjudicated water right is a judicially decreed property right. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, (2011). A decree is “binding on the IDWR” and “the Director has a ‘clear legal duty’ to distribute water” according to decreed water rights. *See City of Blackfoot*, 396 P.3d at 1191; *see also, Hinsch v. Morthorn*, 44 Idaho 539, 258 P. 540, 541 (1927) (“The contract being clear and unambiguous in its terms, it is the best evidence of the intention of the parties to it, and the legal effect of the agreement must be enforced according to the plain import of the language employed.”).

Despite the plain and unambiguous terms of the decreed period of use element, this case is unique given the circumstances and history of the storage water rights’ appropriation and administration. Although the storage rights include a year-round “period of use” based on a calendar year, the rights have not been administered in that manner at any point in history. To that end, it is the Coalition’s position that any unintended consequences of the SRBA process should not be implemented in a manner that would harm existing spaceholders and the continued efficient storage of water in the Upper Snake River Basin. Stated another way, where the storage water rights have been appropriated and administered to begin filling in the fall to ensure adequate irrigation supplies in future years, it certainly wasn’t the intent of the SRBA, through issuance of the partial decrees, to fundamentally change those operations. At the same time, the changes in accounting over time need to be properly addressed to ensure that existing natural flow irrigation water rights are not injured as well. *See e.g. State v. Nelson*, 131 Idaho 12, 16 (1998) (“Finality in water rights is essential.”).

Notably, prior to the accounting program certain reservoir priorities were allowed to receive natural flow in the fall (i.e. American Falls) to ensure efficient storage of water for next year's use. *See Ex. B (Shaw Dec.)*. The accounting program was intended to aid in efficient administration, not serve as a tool to deprive existing rights of available water. Further, where the Lake Walcott priority was not used for purposes of the storage "reset" until sometime after 1988, that unilateral change cannot be justified as it curtailed natural flow rights held by Milner Irrigation District and American Falls Reservoir District #2. *See Staff Memo* at 4.

If the Director finds that the decreed period of use element to be ambiguous, then the information set forth below should be considered.³ *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 455 (2011) ("A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist."). Alternatively, if the Director believes further instruction to the Watermaster is needed for the efficient administration of the water rights based upon the system of operations that existed when the storage rights were appropriated and developed, then the information set forth below should be considered.

The water rights for the federal onstream reservoirs in Water District 01 were appropriated at various times in the twentieth century with the construction of various onstream dams (i.e. Jackson, Minidoka, American Falls, Island Park, Palisades, Ririe). To the Coalition's knowledge no storage water right, at the time of its appropriation, was ever administered on the basis that the Watermaster could not distribute water to the right (or reservoir) until January 1st.⁴

³ The Coalition reserves the right to submit and present additional evidence if the Director concludes the period of use element is ambiguous or that the Watermaster needs further instruction on any continued "reset" practice. *See Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 315 (2010) ("A contract is ambiguous if it is reasonably subject to conflicting interpretations, which will render interpretation of the contract a question of fact."). The Coalition submits that the Water District 01 accounting program did not match historical administration, whether by mistake or due to the nature and/or limitations of the program itself.

⁴ Although the Palisades storage water right was originally licensed with a "January 1 to December 31" period of use, the Water District did not use a "January 1" reset for purposes of administration. Other storage rights did not

Indeed, it was common practice to begin physically refilling the reservoirs in the fall, once natural flow supplies exceeded existing irrigation demands without further regulation by the Watermaster. *See Staff Memo* at 2. This practice helped maximize water storage to provide water for spaceholders' use in subsequent years. The Coalition submits this reservoir operation is beneficial and that all junior water right holders acquired their water rights subject to this operation and effective system of water right administration. In other words, there has never been an expectation that water rights junior to either the American Falls priority (3/31/1921) or at a minimum the Palisades priority (7/28/1939) could demand or curtail distribution to storage in the fall in order to satisfy such junior water rights.

Further, with the construction of Palisades Reservoir, spaceholders agreed to certain operations and administration to protect existing water rights while at the same time providing a system of reservoir operations that would provide the reservoir with the best chance of filling. Several concessions were made to ensure the Upper Snake Reservoirs were operated in coordination to ensure a maximum storage fill each year. This coordinated operation should not be un-done as a result of a computerized accounting program and its varied implementation over time.

A. Administration of Storage Water Rights Pre-1978.

The history of the administration of storage water rights in the Upper Snake River Basin is dependent upon which reservoirs were completed at the time. For purposes of the present brief, the Coalition focuses on American Falls and Lake Walcott, both pre and post 1978 (when the computerized water rights accounting program was first implemented).

include a period of use in prior decrees or licenses. As such, the element was added to the water right decree through the Snake River Basin Adjudication (SRBA). *See* I.C. § 42-1427.

Prior to 1978, the Water District 01 Watermaster typically did not regulate or administer water rights after the “end of regulation,” which typically occurred sometime during the fall. *See Staff Memo* at 2. As irrigation demand decreased, the reservoirs could store available natural flow in anticipation of the following irrigation season. The accounting for the following year’s storage water rights began with the calculation of holdover (carryover) storage after all canal diversions ended for the year.

For several decades Lake Walcott was typically drawn down in the fall and early winter to protect the dam from ice damage. *See Ex. B (Shaw Dec.)*. Lake Walcott is the furthest downstream federal reservoir in the basin and it always fills due to its location. Prior to 1978, the Lake Walcott water right (1-219) was never exercised toward the end of the irrigation season since this was the time of year storage was being released and the lake level was lowered to prepare for winter operations. The reservoir typically filled in March, but the fill time varied from February to April. Importantly, the Lake Walcott 1909 priority storage right always filled before the irrigation season and did not begin storing water in the fall to the detriment of canals still diverting in that irrigation season. Stated another way, the Watermaster never “reset” the Lake Walcott 1909 priority water right (1-219) in the fall.

However, various Water District 01 annual reports from 1965 to 1973 also demonstrate that the American Falls Reservoir water right priority of March 30, 1921 was restored in September. *See Ex. B (Shaw Dec.)*. Since American Falls has a senior storage water right located in the lower basin, filling the right as early as possible allows upstream junior storage rights to begin storing water earlier. When natural flow exceeded 1,700 cfs, half of the available natural flow (or 850 cfs) was delivered to AFRD #2 under water right 1-6, and the balance was delivered to storage in American Falls Reservoir. In other words the American Falls Reservoir

storage water right was not considered “full” in the fall months as it began accruing water for the following year’s irrigation season. Water that passes American Falls and is not diverted before Milner Dam is “lost” to Water District 01. Other than the 1921 American Falls right, storage water right priorities were not administered to curtail the natural flow rights of irrigation entities that were still delivering water for irrigation purposes that season.⁵

With the advent of new reservoirs in the system it was clear that Reclamation, the Watermaster, and the spaceholders had to carefully account for available storage as water under one storage right could be held upstream at a different reservoir in an effort to maximize fill. The coordinated operations and exchanges were meant to aid maximum storage in the reservoirs while protecting senior water rights.

B. Administration / Storage Water Right Accounting Post-1978

In 1978, Water District 1 began using a new computerized accounting program as part of administration of water rights within the district. *See Staff Memo* at 3. That year the Water District passed two resolutions, one requiring the watermaster to administer “year round”, and the second requiring the watermaster to account for all diversions that could injure prior natural flow or storage diversions. *See id.* at 2. As part of the program, the Watermaster included a “reset” function for the storage rights described as follows:

The newly created year-round water right accounting necessitated the creation of a *reset date* following the *Day of Allocation* when filled reservoir water right accrual volumes were reset to allow distribution of natural flow to reservoir water rights for the next annual period.

Staff Memo at 3.

⁵ All canal companies and irrigation districts above Blackfoot hold natural flow rights pre-1900 that are not affected by any of the reservoir storage water rights. Most entities below Blackfoot hold natural flow rights pre-1909 that are similarly not affected by any of the reservoir storage rights. Milner Irrigation District’s senior natural flow right has a 1916 priority date, and AFRD#2’s natural flow right shares the same priority as American Falls Reservoir (March 30, 1921). Recent changes in the accounting program have resulted in distributing water to Lake Walcott’s storage water right 1-219 with a priority date of 1909 that has taken natural flow from these two districts in the fall.

In 1979, the unfilled storage water rights accrued additional water in the fall as the reservoirs stored available water. The ability to store such water was aided by the fact that Jackson Lake was restricted to a “safety of dams” condition between 1978 and 1987. Since Jackson could not store as much water the entire reservoir system needed about 500,000 acre-feet less to fill. Further, the Water District used a “reset date” of November 1st between 1978 and 1987. *See Staff Memo* at 3; Ex. B.

In 1988 the Watermaster programmed an August 1st “reset” date into the accounting program. *See Staff Memo* at 3. The date was chosen to assist the watermaster in allocating storage, maximizing storage for the following year, and to minimize unallocated storage in the system. In 1989 the “reset” date was changed to October 1st and in 1990 it was changed again to August 15th. *See id.* Finally, in 1997, as a result of extremely high flows, the reset date was changed to September 15th, the date that was used until 2017. *See id.; see also, Director Spackman Oct. 27, 2017 Letter to Lyle Swank.*

Adding the “reset” date in 1988 created a conflict with certain natural flow irrigation water rights, namely the 1916 water right (1-17) held by Milner Irrigation District, and the 1921 water right (1-6) held by AFRD#2. For the first time in Water District 01 history, the storage “reset” date allowed the 1909 Lake Walcott storage right to come back into priority before the end of the irrigation season. Between 1988 and 2011 the Walcott storage right was limited by its 2,500 cfs diversion rate limit, as previously decreed. However, when water right 1-219 was reported and decreed in the SRBA, the diversion rate limit was removed. Accordingly, from 2011 to the present, the Walcott storage right was allowed to take all available natural flow to the detriment of Milner and AFRD#2 that were finishing the irrigation season.

AFRD#2's water right 1-6 also experienced various changes in administration after 1978. Prior to the accounting program, available natural flow in the fall (Sept/Oct) was split between water rights 1-6 and 1-2064. Accordingly, AFRD#2 received up to 850 cfs of natural flow for irrigation purposes in the fall. From 1978 to 1987, water right 1-6 received all of the natural flow available to the March 30, 1921 priority because water right 1-2064 was deemed "full" or "satisfied" until the end of the irrigation season (i.e. until the November 1st reset date was used). When the August 1st reset date was added in 1988, AFRD#2 did not receive natural flow under 1-6 between 1988 and 2007 because the "winter water savings" space in American Falls Reservoir was assigned an "effective priority date" of one day senior in the accounting program. Since this storage space never completely filled in the fall before AFRD#2 ceased irrigation diversions, #1-6 did not receive any natural flow during this period. *See Ex. B.*

In 2008 the Water District determined that water right 1-6 was being treated as junior to the "winter water savings" space. Based upon a review of the water right licenses and decrees, the District determined that water right 1-6 should be treated as junior to that space since the "winter water savings" space was encompassed under water right 1-2064. Once water right 1-2064 was deemed full or satisfied for the year, 1-6 was allowed to receive the full 1,700 cfs until the end of the irrigation season. At that time the Water District assigned water right 1-6 an "effective priority date" of March 28, 1921, or one day senior to the "winter water savings" space, from the September 15th "reset" date until the end of the irrigation season. This determination was later affirmed by the Director in the *Final Order Regarding Instructions to Water District 01 Watermaster* (In the Matter of Water Right No. 1-6, Feb. 11, 2013).

However, despite the administration pre-1978 and the Director's 2013 order, the later use of the Lake Walcott 1909 priority and the removal of its diversion rate limitation precluded water

right 1-6 from receiving all of the water it was to entitled in this timeframe. Again, the Coalition submits that the Water District's accounting program should not be used in a manner that injures existing natural flow rights diverting for irrigation purposes. Whereas the storage rights were previously appropriated and administered in a manner that respected existing irrigation rights but still allowed for maximum storage fill, that practice should continue in a manner that provides certainty in administration moving forward.

CONCLUSION

A review of the storage water right decrees clearly and unambiguously shows that the irrigation storage "period of use" begins January 1. However, history and actual practice has shown that it is in the best interests of the storage system to begin storing water when it is available to store. The water users in Water District 1 made significant concessions with the building of Palisades to increase the opportunity for the reservoir system to fill. Although nothing in the decrees indicates that the Watermaster has a right to curtail natural flow rights junior to either American Falls or Palisades in order to fill reservoirs that have already filled that season, the Coalition supports a fall "reset" practice that maximizes storage of water so long as it does not interfere with natural flow rights with priorities senior to American Falls or Palisades.

DATED this 19th day of January, 2018.

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 19th day of January, 2018, I caused to be served a true and correct copy of the foregoing **SURFACE WATER COALITION'S OPENING BRIEF RE: LEGAL QUESTION** by email and U.S. mail to IDWR, and by electronic mail to the parties:

Director Gary Spackman c/o Kimi White IDWR 322 E Front St Boise, ID 83720-0098 *** service by U.S. Mail and electronic mail gary.spackman@idwr.idaho.gov kimi.white@idwr.idaho.gov garrick.baxter@idwr.idaho.gov	Sarah A. Klahn Mitra M. Pemberton White & Jankowski, LLP 511 Sixteenth Street, Suite 500 Denver, Colorado 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	William Bacon Shoshone-Bannock Tribes P.O. Box 306 Fort Hall, Idaho 83203 bbacon@sbtribes.com
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Travis L. Thompson

Exhibit A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

AMENDED

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 01-02064

RECEIVED

MAR 30 2017

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

MAR 29 2017

By

Clerk

Deputy Clerk

In Re SRBA

Case No. 39576

NAME AND ADDRESS:

UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PN CODE-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

SOURCE:

SNAKE RIVER TRIBUTARY: COLUMBIA RIVER

QUANTITY:

1540600.00 AFY

The American Falls Reservoir was originally licensed for a total quantity of 1,700,000 acre-feet. For purposes of administration, however, water right nos. 1-2064 and 1-10042 shall be limited to a total combined quantity equal to the active capacity of the water volume storable in American Falls Reservoir when filled to elevation 4354.5 and measured at the upstream face of the dam. Water right nos. 01-2064, 01-10042 and 01-10620 are limited to the total combined annual diversion volume necessary to allocate a total of 1,655,000 acre-feet of irrigation storage water per year to the consumers or users of the irrigation storage water.

PRIORITY DATE:

03/30/1921

POINT OF DIVERSION:

T07S R31E S30

SWSE

Within Power County

PURPOSE AND

PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	1495600.00 AFY
Irrigation from Storage	03-15 TO 11-15	1495600.00 AFY
Power Storage	01-01 TO 12-31	45000.00 AFY
Power from Storage	01-01 TO 12-31	45000.00 AFY

PLACE OF USE:

Place of use for storage is American Falls Reservoir, provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range 21E, sections 28 and 29, when determined by the Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources), the Water District 01 advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.

Place of use for irrigation from storage is within the following counties: Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, Teton and Elmore.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

1. The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address section of this partial decree. However, as a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for

OTHER PROVISIONS (continued)

the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations. The Idaho Power Company uses the water decreed for power purposes herein to generate hydropower.

2. The allocation of storage to federal contractors and the location of that storage, including carryover storage, in the reservoir system shall be determined by the United States Bureau of Reclamation pursuant to federal reclamation law and contracts entered into between the United States and federal contractors. The Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources) shall distribute the stored water in accordance with allocation instructions from the United States Bureau of Reclamation. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott, which store water for distribution pursuant to water right nos. 1-219, 1-2054, 1-2068, 1-4055, 1-10042, 1-10043, 1-10044, 1-10045, 1-10620, 1-10621A, 1-10621B, 1-10622, 1-10623, 21-2156, 21-4155, 21-10560, 21-13161, 21-13194, 25-7004, 25-14413A and 25-14413B.

3. This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

4. The operation, use and administration of this water right is subject to the terms and conditions of the Settlement Agreement signed on February 14, 2006 with Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District #2.

5. This decree does not alter, amend, or modify the contracts entered into between the various federal contractors and the United States Bureau of Reclamation, as amended, including but not limited to the contractual storage exchanges, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

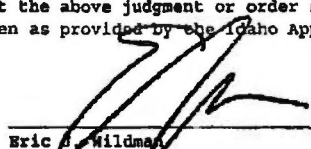

Eric S. Wildman
Presiding Judge of the
Snake River Basin Adjudication

Exhibit B

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DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
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MAY 15 2017

Clerk

Deputy Clerk

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

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

)
) Subcase Nos.: Attachment A
)
) **DECLARATION OF DAVID B.**
) **SHAW IN SUPPORT OF SURFACE**
) **WATER COALITION'S JOINT**
) **MOTION TO DECREE GENERAL**
) **PROVISION**
)
)
)
)
)

I, DAVID B. SHAW, hereby declare and state as follows:

1. I am over the age of 18, and if called to testify herein, I could and would testify competently to the following information based upon personal knowledge. My work address is ERO Resources Corporation, 4001 E Main Street, Emmett, Idaho 83617. My telephone number is (208) 365-7684.

DECLARATION OF DAVID B. SHAW

1

2. My educational background includes Bachelor of Science and Master of Science degrees in Agricultural Engineering from the University of Idaho in 1966 and 1972, respectively. I am a registered professional engineer in the States of Idaho, Arizona, Oregon and Colorado, and a registered professional land surveyor in the State of Idaho. I continue to attend seminars and short courses in the areas of water law, water rights and applicable technology. I have made numerous presentations at seminars covering water law and water right issues, most often regarding some aspect of water right adjudication.

3. My work experience includes five years of teaching at the University of Idaho in the College of Engineering from 1968 to 1973. I was with the Idaho Department of Water Resources (department) and its predecessor agencies from November 1973 until July 1996. With the department, I served in a number of technical and administrative positions including Regional Supervisor for the department's western region from 1978 to 1985 and Adjudication Bureau Chief from 1985 to 1996. As Adjudication Bureau Chief, I was responsible for all the department's obligations in the Snake River Basin Adjudication of water rights (SRBA). The SRBA is an adjudication of all water rights in the Snake River basin in Idaho and includes about 150,000 claims to water rights. The department's obligations included serving notice of the SRBA to all potential water users, assisting claimants file their claims to water rights, investigating each state law based claim and making a recommendation as to each state law based claim to the SRBA Court. If a recommendation was protested (contested), the department was obligated to put on the evidence to justify its recommendation. My experience with the department includes successfully managing the SRBA for 11 years and resolving a variety of water right, water supply and water distribution situations.

4. Since July 1996, I have been employed by ERO Resources Corporation (ERO) providing consulting services to clients in the areas of water rights, water right adjudication, and water distribution and management. In January 2003, I became a Principal of ERO, one of employee owners of the firm. ERO is a natural resources consulting firm based in Denver, Colorado with satellite offices in Emmett, Idaho, and Durango and Hotchkiss, Colorado. ERO has a long history of, among other services, providing expertise to clients in water resource matters around the West.

5. During preparation for the Surface Water Coalition delivery call litigation, I worked with Robert (Bob) Sutter, the original author of the computerized accounting program for Water District #1, to become familiar with and learn how to run and modify the program.

6. I participated and prepared questions and comments for the department's review of the 2013 draft titled "Concepts, Practices, and Procedures Used to Distribute Water Within Water District #1."

7. I prepared the initial draft of what are now Watermaster instructions for the distribution of water to water right no. 1-6 as part of the settlement of the issues surrounding that water right in the SRBA.

8. I have reviewed numerous annual Watermaster reports for Water District #1 and its predecessor District 36 as well as annual reports from other water districts. I have also reviewed numerous daily water right accounting records from Water District #1 as well as daily accounting records from other Water Districts.

9. I have reviewed the decree in the case of Burley Irrigation District, et.al., v Henry Eagle, Watermaster, District No. 36, State of Idaho, July 10, 1968, hereinafter the Eagle Decree.

10. I currently serve as the technical representative for the Committee of Nine on the Minidoka Dam Spillway Management Technical Team.

11. The computerized water right accounting for Water District #1 was implemented in 1978. At the time, I was employed by the department and selected and installed the data processing and communication equipment that allowed the District to communicate the relevant data to Boise where the accounting program was maintained and operated.

12. Prior to the recent rebuild of Minidoka Dam and spillway, Lake Walcott was typically drawn down in the fall and early winter to protect the dam from icing damage during the winter. Lake Walcott is the furthest downstream reservoir in Water District #1 and the reservoir always fills due to its location. Prior to 1978 I could not find any record of the 1909 priority of water right no. 1-219 for Lake Walcott being exercised near the end of the irrigation season since this was the time of year storage was typically being released and the Lake level was being physically lowered. The reservoir normally filled in March but the fill time varied from February to April.

13. Prior to 1978 the 1916 priority water right no. 1-17 for Milner Irrigation District (Milner Low Lift), the 1921 priority water right no. 1-6 used by American Falls Reservoir District #2 (AFRD#2) and the 1921 priority water right no. 1-2064 for storage in American Falls Reservoir would typically come back into priority simultaneously when demand by more senior rights decreased and river discharge increased late in the irrigation season. Diversions of natural flow (normal flow) by AFRD#2 were limited to 850 cfs as described in the Eagle Decree and diversions of more than that amount were charged to storage even when the 1921 priority was being delivered.

14. Prior to 1978, American Falls Reservoir storage, for the next irrigation season, began each year when water became available for the 1921 priority water right, typically in September or October. Since American Falls Reservoir has a senior storage water right in the lower basin of Water District #1, filling the right as early as possible allows the upstream junior storage rights to begin storing water earlier in the season and maximizes the storage in the basin. Water passing American Falls Reservoir and not diverted will pass Milner Dam and be lost to Water District #1.

15. Prior to 1978, Water District #1 had a year-round Watermaster, but water delivery accounting occurred only during the irrigation season when natural flow was not sufficient to meet the demands of all water users. Year-round accounting of water delivery, including delivery to storage rights during the non-irrigation season, began after the computerized water accounting was implemented in 1978.

16. The computerized accounting is designed to calculate the available natural flow at each river location in Water District #1. The program makes this computation on a daily basis and then allocates the available natural flow to water rights based on location and priority. Most water rights include a diversion rate and when such a right is diverting, the accounting program checks the available natural flow, the amount of the diversion and the priority date of that diversion. If natural flow is available to satisfy the current diversion rate for the priority of the right the next priority right is checked to determine if the remaining natural flow can satisfy the second right. This process continues until all natural flow has been used or all rights have been satisfied, whichever occurs first. If there is insufficient natural flow to fill all rights, those rights not filled completely or in part by natural flow are assumed to be diverting storage water.

17. This same methodology could not be applied to water rights for storage since storage water rights do not usually have a diversion rate associated with the right. To overcome the lack of diversion rate, the accounting program was programmed to assume that all water available to a storage water right was accrued to storage on each day the water is available until the amount of water accrued to storage equals the amount of the storage water right. At that point, the storage water right is considered satisfied by the accounting program and cannot store any additional water until the program is changed either manually or on a future date built into the program. The initial implementation of the computerized accounting used this procedure. Once a storage water right accrued its storage entitlement that right could not accrue additional storage until the amount of accrual was changed in the program. Initially this occurred on November 1, apparently considered by the Watermaster to be the beginning of a new irrigation year, and the storage accounts were "reset" in the computerized accounting to the amount of carryover storage in the various reservoirs. This method of accounting for storage was similar to the accounting that was done manually prior to 1978. In the Water District annual reports prior to 1978, I did not find any occasion when water deliveries continued until November 1, but some irrigation water rights in the basin, 1-6 and 1-17 included, do have a season of use that extends until November 15 of each year and could be impacted by storage water rights coming back into priority on November 1.


18. Attached to this Declaration as Exhibit A is a Memorandum dated September 29, 2015 from Mr. Tony Olenichak to Mr. Lyle Swank providing a history of the reset date in the computerized accounting for Water District #1. I have reviewed this Memorandum and the information is consistent with my review of the Water District #1 accounting records beginning in 1978.

19. As noted in the attached memorandum, the computerized accounting has been modified several times since 1978 regarding the accrual of storage to the various storage water rights. As the program currently exists, it is hard coded in the program to reset all storage accounts to zero on September 15 (September 14 of leap years) regardless of the current contents of any reservoir. Since all of the storage accounts are then able to accrue additional storage, the accounting program looks to the most senior storage right and accrues all available natural flow under that storage right's priority to that storage account. Junior diversion rights, like junior storage rights, are not allowed to divert natural flow. This accounting procedure differs from the procedure used prior to 1978, because the 1909 Lake Walcott storage right never stored water in the fall prior to 1978 and did not store water prior to November 1 until 1988.

20. The Lake Walcott storage right is the senior storage right in the lower basin and the current accounting program accrues all natural flow available to the 1909 priority to the Lake Walcott storage water right contrary to the historical practices that were used consistently prior to 1988. I have reviewed the proposed General Provision offered by the Joint Motion of the Surface Water Coalition and if approved it will more closely restore the administration of storage water rights and natural flow water rights that occurred prior to 1988.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

Dated this 15 day of May 2017.



David B. Shaw

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2017, I served a true and correct copy of the foregoing **DECLARATION OF DAVID B. SHAW** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

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Regional Director, PN Region
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Jerry R. Rigby
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Rexburg, ID 83440-0250

Craig Hobdey
P.O. Box 176
Gooding, ID 83330-0176

Randall C. Budge
T.J. Budge
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Pocatello, ID 83201

U.S. Department of Justice
Division of Env. & Natural Resources
550 W. Fort Street, MSC 033
Boise, ID 83706-1234

Idaho Attorney General's Office
Natural Resources Division
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Michael P. Lawrence
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Boise, ID 83701-2720


Travis L. Thompson

ATTACHMENT A

01-219
01-2064
01-2068
01-4055
01-10042
01-10043
01-10044
01-10045
01-10620
01-10621A
01-10621B
01-10622
01-10623
21-02156
21-04155
21-10560
21-13161
25-07004

DECLARATION OF DAVID B. SHAW

Exhibit A

MEMORANDUM

To: Lyle Swank
From: Tony Olenichak
Date: 9/29/2015
RE: History of the "reset date" for new storage accrual in the computerized water right accounting.

The purpose of a "reset or restart date" for year 'round storage water rights in the computerized water right accounting is used to indicate when previously filled storage water rights (allocated 100% fill on the Day of Allocation) can begin filling again under their water right priorities after storage has been used from their allocated volumes during the irrigation season.

The traditional practice of having the watermaster have an "end of regulation" date as listed in the older watermaster annual books from 1977 and earlier ended in 1978. At the 1978 annual meeting two new resolutions were introduced and adopted. Resolution 4 required the duties of the watermaster to be a year 'round watermaster. Resolution 10 resolved for the Watermaster to account for all diversions which might adversely affect any prior natural flow or storage diversions.

When the computerized accounting was initially developed in 1978, there wasn't an automatic "reset date" for the storage water rights coded into the computer program. If a storage water right had previously filled to a 100% during the irrigation season and came back into priority in September or October the computerized water right accounting would not allow any additional natural flow accrual to that 100% filled storage water right. However, it would allow additional natural flow accrual to any storage water right that had not filled to 100%.

For example, the 1979 computerized water right accounting printouts show that Jackson Lake, Lake Walcott, American Falls, and Pallsades Reservoir water rights filled to 100% prior to the Day of Allocation. The Island Park (1935 priority), Grassy Lake (1936 priority), and Henrys Lake (1965 priority) water rights did not fill to 100%. The 100% filled reservoir water rights were not "reset" after their storage was used during the irrigation season following the Day of Allocation and, when the 1935 priority was restored on October 15, 1979, the unfilled Island Park storage water right began accruing additional natural flow into its storage water right volume according to the computerized accounting. On October 25, 1979, the 1965 priority was restored and both Grassy Lake and Henrys Lake unfilled storage rights (in addition to the unfilled Island Park storage water right) were accruing additional natural flow into their storage rights while the senior Jackson Lake, Lake Walcott, American Falls, and Pallsades Reservoir water rights remained 100% full in the computerized program at least through October 31, 1979.

During the 1978-1987 time period, Jackson Lake Reservoir was under safety of dams capacity restrictions. Consequently there was up to nearly ½ million acre-feet (847,000 AF-284,450 AF) less storage needed to fill the system due to the restricted storage space needed to fill Jackson. Additionally, an equivalent amount of storage water then was available to fill other reservoir storage water rights. The other reservoir storage rights either filled or water was spilled past Milner making carryover calculations inconsequential in these years.

In the 1988 final accounting, a reset date of August 1st was programmed into the computerized accounting for the first time to account for the new accrual into reservoir water rights following when storage was used by spaceholders after the Day of Allocation had occurred.

In an attempt to use the water right accounting program as a tool to assist the watermaster and staff allocating storage water, a reset date was used to maximize storage accrued to the respective water rights and minimize the unallocated storage available for distribution. In 1988, the reset date was August 1st. In 1989, the reset date was October 1st. In 1990, the reset date was August 15th.

- The latest month of when the historical Day of Allocation occurred was in July, so August 1st may have been an appropriate reset date.
- October 1st was defined as the start of the storage season in the USBR spaceholder contracts, and therefore October 1st may have been a more appropriate reset date than August 1st.
- Because the reservoir water rights come back into priority after the Day of Allocation in some years prior to October 1st, perhaps August 15th is a more appropriate reset date because it is closer to the midpoint between the historical Day of Allocation and when reservoir priorities are restored in September or October.

In hindsight, if any of the three dates (August 1st, October 1st, August 15th) were chosen for any of the three years 1988-1990, it would have resulted in the exact same distribution of natural flow because the earliest storage water right priority (Jackson Lake-1906) wasn't restored in any of these three years until after October 5th, so any reset date chosen between the Day of Allocation and October 6th would have resulted in the same water distribution. The reset date coded into the computerized water right accounting remained August 15th (August 14th on a leap year) from 1990 through 1996.

In 1997, I played a part in changing the reset date in the computerized water right accounting from August 15th to September 15th. The 1997 water year was one of the biggest floods and wettest years on record. All reservoir storage water rights were allocated 100% fill in that year and the 1906 priority wasn't cut until August 23, 1997, and was restored again on September 16, 1997. My understanding of the reset date at that time was that it must come after the Day of Allocation and after the priorities had been cut below all storage rights but before the priority for the earliest storage water right was restored towards the end of the irrigation season. The 1997 water year illustrated water right priorities for the storage rights may not get cut until the last week of August and wouldn't likely get restored before the third week in September. Therefore, the restart date for allowing senior reservoir rights to begin accruing natural flow to their water rights was changed in the computerized accounting from August 15th to September 15th for the 1997 irrigation season, and has remained that date in the computerized accounting since that time.