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DEPARTMENT OF WATER RESOURCES

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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

)	Docket No. P-WRA-2017-002
)	
IN THE MATTER OF THE PETITION)	FREMONT MADISON
REGARDING STORAGE RESET IN WATER)	IRRIGATION DISTRICT; NORTH
DISTRICT 01 FILED BY MILNER IRRIGATION)	FORK RESERVOIR COMPANY;
DISTRICT)	IDAHO IRRIGATION DISTRICT
)	AND NEW SWEDEN
)	IRRIGATION DISTRICT
)	OPENING BRIEF REGARDING
)	THRESHOLD LEGAL QUESTION

Fremont Madison Irrigation District, North Fork Reservoir Company, Idaho Irrigation District and New Sweden Irrigation District, acting for and on behalf of their members and electors (hereinafter collectively referred to as "Upper Valley Storage Holders") hereby file this opening brief regarding the threshold legal question as ordered by Director Spackman pursuant to his Order dated January 3, 2018.

Issue Presented: 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 specifies "1/1 to 12/31" as the time period of "irrigation storage" requires that the reset date for those rights be

January 1?

Argument & Caselaw

The issue of when “reset” should be applied to a water storage claim or decree has not yet been specifically addressed before the Courts in Idaho. Because of this, storage right holders have been debating and attempting to resolve this issue for several years past the “finalization” of the Snake River Adjudication. The Parties to this Opening Brief (Upper Valley Storage Holders) maintain that although the language in the storage decrees states “1/1 to 12/31”, the interpretation of said dates or period of use does not **require** a reset date of January 1. The Parties filing this Opening Brief submit that the correct interpretation of the “1/1 to 12/31” is that the storage right is available 365 days of the year providing all other elements of the right allow for it.

When interpreting a water decree, Idaho Courts utilize the same rules of interpretation applicable to contracts. *A & B Irr. Dist. V. Idaho Dept. Of Water Resources*, 153 Idaho at 523, 284 P.3d at 248. Generally, if a decree's terms are unambiguous, courts will “determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words.” *Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013). Nevertheless, ambiguities can be either patent or latent. See *Swanson v. Beco Constr. Co., Inc.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). Although “Idaho courts look solely to the face of a written agreement to determine whether it is [patently] ambiguous.” *Ward v. Puregro Co.*, 128 Idaho 366, 369, 913 P.2d 582, 585 (1996), “A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist.” *In re Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995). “A contractual

provision will be found ambiguous if it is reasonably subject to conflicting interpretations.” *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 46, 72 P.3d 877, 886 (2003). See also *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))). The *Huber* decision also requires a Court to determine what a “reasonable person” would have understood the language to mean.

Furthermore, 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, 807, 367 P.3d 193, 202 (2016) (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)). As described below, because there is at least one other interpretation of the meaning of 1/1 to 12/31, the Director should exercise free review to hear facts in support of the interpretation.

A. Ambiguity as to Reset Date Allows for Consideration of Other Issues.

While “period of use” is defined in the storage decree as “1/1 to 12/31” as the time period for irrigation storage, the term “reset date” is not addressed in the decrees. Using contract principles, as allowed in cases cited above and most recently in *City of Blackfoot v. Spakman*, 162 Idaho 302, 396 P.3d 1184 (2017), if there is another interpretation of the “1/1 to 12/31” meaning, the Court may look beyond the decree for interpretation of appropriate reset dates. Although the Supreme Court in the *Blackfoot* decision applied the principle and then found that there was no ambiguity as to the claims made by the City, the case nevertheless confirmed the

right and obligation to make this determination on a case by case basis.

As opposed to a specified period of use which is less than the entire year (i.e. From April 1 to October 31 which cannot be interpreted any other way), a storage decree which has a period of use described as January 1 to December 31, allows for a reasonable interpretation to be that it's "period of use" is ALWAYS available ("always on") providing it is in priority and it has not exceeded the other elements of the water right, including it's volume limitation. Once this additional interpretation is realized, any ambiguity as to the determination of when a "reset" of the storage right occurs following its maximum volume having been met, would require one to review the "facts as they exist" which go beyond the elements of the decree itself.

As will be evidenced at the hearings in this matter, most storage contracts with the BOR will evidence that a date of October 1 could be interpreted to be the "reset" date. Furthermore, as evidenced by the Memorandum of Tony Olenichak, Water District #1 Program Manager, the history of "reset" of the 01 reservoirs occurred at several different dates over the years, none of which were January 1. Additionally, none of the reasons cited by Mr. Olenichak for the various reset dates used over the years have anything to do with or could justify the January 1 date as the reset date. Clearly, using the "reasonable person" test proves that the Water Master (presumed to be a "reasonable person") has always deemed the reset date to be something other than January 1.

B. If Not January 1, Then What Date is Appropriate?

In his Order, the Director presents the followup question: if the plain language of the decree is not controlling, what would be the appropriate reset date? Although we specifically reserve the right to further respond to this question at a later date to be determined by the

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Director, such questions were initially addressed in the prepared report by Mr. Olenichak submitted herein. However, because we believe that it is more of an accounting question than an interpretation of the Decree, we maintain that it is up to the Director to make such determination within his “sound discretion”.

Conclusion.

Although an interpretation that January 1 is the “reset date” of the water storage decrees would often help the Upper Valley Storage Holders, most of whom are junior storage right holders whose unfilled storage rights would come back in priority in the fall of many years, it is nevertheless their position that a January 1 reset date is NOT in the best interest of the O1 storage system and therefore, they respectfully request that the Director determine that the “1/1 to 12/31” not be interpreted as the reset dates.

Dated this 19th day of January, 2018.

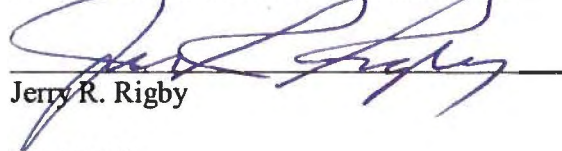

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I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 19th day of January, 2018.

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