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DEPARTMENT OF  
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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

**RESPONSE BRIEF OF  
PALISADES WATER USERS, INC.  
AND THE CITY OF IDAHO FALLS  
RE: THRESHOLD LEGAL QUESTION**

Palisades Water Users, Inc. ("PWUI") and the City of Idaho Falls (the "City"), by and through their counsel, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit their *Response Brief of Palisades Water Users, Inc. and the City of Idaho Falls Re: Threshold Legal Question* as permitted under the *Order re: Statements of Issues and Responses; Order Adopting Deadlines; Amended Notice of Status Conference* dated January 3, 2018 (the "Deadline Order"). Pursuant to the *Deadline Order*, this brief is timely submitted to address the threshold legal question posed therein and respond to other parties' briefs on the threshold legal question. For the sake of brevity, PWUI and the City will use the same terms previously defined in their *Opening Brief of Palisades Water Users, Inc. and the City of Idaho Falls Re: Threshold Legal Question*.

## I. ARGUMENT

The threshold legal question posed by the Director is “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 for ‘irrigation storage’ requires that the reset date for those rights be January 1.” *Deadline Order*, p. 3. While there are various rationales advanced in briefing by the parties to this proceeding (the “Parties”), the consensus among the Parties is that the Director is not required by the plain language of the period of use element of the water right partial decrees for federal onstream reservoirs to use January 1<sup>st</sup> as the Reset Date.<sup>1</sup>

### **A. The plain language of the period of use element of the Storage Water Rights does not describe the Reset Date.**

Given use of the term “plain language” in the threshold legal question, the Director framed the issue of whether the period of use element of the Storage Water Rights’ partial decrees was ambiguous or unambiguous as it relates to the Reset Date. The framing of the issue in this manner perhaps suggests that briefing on the legal question should only focus on the items set forth of the relevant partial decrees, and not on the question of how those items should be viewed in water administration. While taking slightly varied legal paths to get there, all of the Parties, except the Surface Water Coalition (“SWC”), nevertheless reached the same conclusion in direct response to the Director’s narrowly-framed question: **neither the period of use element nor any other portion of the partial decrees dictate a Reset Date.**

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<sup>1</sup> Specifically, all of the Parties except the Surface Water Coalition conclude that the language of the period of use element does not require that January 1<sup>st</sup> be the Reset Date. The Surface Water Coalition argues that the period of use element is unambiguous, requiring diversion to begin on January 1<sup>st</sup>, but nevertheless concludes that the Director should set the Reset Date in the Fall (while respecting senior water rights) based on historical practices. While PWUI and the City do not agree with the Surface Water Coalition’s analysis, all Parties nevertheless agree that the Director can and should establish the Reset Date in the Fall of each year.

The period of use element is patently unambiguous as to the period of use of the Storage Water Rights (*i.e.*, it allows the diversion of water for the purpose of “Irrigation Storage” during the period of “01-01 TO 12-31”). *Amended Partial Decree for Water Right No. 01-219* (filed March 29, 2017) (capitalization in original); *see also* the partial decrees for the other Storage Water Rights. This unambiguously means that water may be diverted and stored “year-round.” *In re SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17—Does Idaho Law Require a Remark Authorizing Storage Rights to ‘Refill’, Under Priority, Space Vacated for Flood Control)*, 157 Idaho 385, 389, 336 P.3d 792, 796 (2014) (hereinafter, simply “*BW 17*”). Thus, every day of the year, the Storage Water Rights authorize in-priority diversion of water to storage. There is nothing in this year-round authorization to divert water to storage that specifies (or relates to) the Reset Date.

The SWC asserts that the period of use as it relates to the **Reset Date** is plain and unambiguous and dictates a “calendar year” accounting beginning on January 1<sup>st</sup>. *Surface Water Coalition’s Opening Brief Re: Legal Question* at 3. The SWC cites no legal authority in support of this interpretation as it relates to the Reset Date, but instead relies upon its own view of what “1/1 to 12/31” means. However, the SWC ignores the *BW 17* case which holds that “1/1 to 12/31” means “year-round,” not a calendar year that begins on January 1<sup>st</sup>. The SWC’s position also ignores the *Ballentyne Ditch Co.* district court case discussed in detail in the Shoshone-Bannock Tribes’ brief, wherein the court likewise held that “the reservoir rights lack period of use limitations on storage. The partial decrees **unambiguously provide for year-round use.**” *Ballentyne Ditch Co. et al. v. Idaho Dep’t of Water Res., et al. (In the Matter of the Accounting of Distribution of Water to the Federal On-Stream Reservoirs in Water District 63)*, Case No. CV-

SW-2015-21376, MEMORANDUM DECISION AND ORDER (Fourth Judicial District of Idaho, Sept. 1, 2016) at 10 (emphasis added).

As explained in its opening brief, PWUI and the City maintain that the determination of the Reset Date is afforded to the sound discretion of the Director, subject to provisions of Idaho law. Details concerning the administration of the Storage Water Rights are not specified in the decrees; nor should they be. The determination of the Reset Date is, like all accounting matters, an administrative consideration. Such “details ... are left to the [D]irector’s discretion.” *BW 17*, 157 Idaho at 393, 336 P.3d at 800 (citations omitted).

But even if the Parties are constrained by the plain language interpretation framework of the Director’s drafted threshold legal question—which appears to attach legal significance to the “1/1 to 12/31” period of use as to the determination of the Reset Date—at best, the period of use element is latently ambiguous as applied here. That is, the period of use element is ambiguous when applied to the determination of a Reset Date. *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (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”).

In the interpretation analysis, upon a finding of ambiguity, 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). Accordingly, the Director should look to other elements contained in the partial decree to weigh the reasonableness of proposed interpretations. The only other water right element that aids in this analysis is consideration of the “the quantity of water used” element. Idaho Code § 42-1411(2)(c); *see also* Idaho Code § 42-1412(6). The Storage Water Rights’ partial decrees each specify the quantity of water that may be diverted (during the “01-01 TO 12-31”

Period of Use) for purposes of irrigation storage. *Amended Partial Decree for Water Right No. 01-219* (filed March 29, 2017) (capitalization in original); *see also* the partial decrees for the other Storage Water Rights. Notably, there is nothing in the quantity of water used element that implicates a Reset Date. Instead, the Idaho Supreme Court has held that a Storage Water Right “is a property right to a certain amount of water: a number that the Director must **fill** in priority to that user. However, **it is within the Director’s discretion to determine when that number has been met for each individual decree.**” *Id.* at 394, 336 P.3d at 801 (emphasis added). The issue of “fill” for Storage Water Rights “is purely an issue of administration,” within the discretionary determination of the Director. *See BW 17*, 157 Idaho at 392, 336 P.3d at 799.

Determining this “fill” is accomplished by means of accounting and an accounting year, administered within the Director’s discretion. The quantity of water element of the Storage Water Rights’ partial decrees is specified in terms of “AFY”, or acre-feet per year. *See id.* Thus, the Storage Water Rights are limited in the quantity of water (measured in acre-feet) that may be diverted (stored in the associated reservoir) on a **per year** basis. *See id.* It is this year in the quantity of water element that is not specifically defined by the period of use element. This is the “year” during which each Storage Water Right is entitled to one fill. This is the accounting year. *See Aberdeen-Springfield Canal Company’s Opening Brief Regarding Threshold Legal Question* at 2-4 (explaining the difference between a calendar year and a “seasonal year” or “accounting year”). And the determination of the accounting year (*i.e.*, the determination of the Reset Date) is a detail of administration left to the Director’s discretion. *BW 17*, 157 Idaho at 393, 336 P.3d at 800; *see also Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) (“Somewhere between the absolute right to use a decreed water right

and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director").

In sum, there is nothing in the plain language of the water right partial decrees relevant to this proceeding that mandates a January 1<sup>st</sup> Reset Date. The period of use element does not address a Reset Date. Even if a latent ambiguity exists in the period of use element, examination of the quantity of water used element does not support the conclusion that the Reset Date must be January 1<sup>st</sup>. Rather, the determination of the appropriate Reset Date (and the designation of an accounting year) is an exercise of discretion by the Director, subject to existing Idaho law and contracts as described in the following section.

**B. The Director's exercise of discretion on designating a Reset Date is not unfettered and is restricted by federal storage contracts and other Idaho law.**

As part of the administration of water diverted pursuant to valid water rights, the accounting methodology generally and the Reset Date specifically lie within the Director's discretion. Having previously discussed all of the requirements to properly exercise this discretion, PWUI and the City focus in this response brief on the most important requirements: that the Director "act[] within the outer limits of [his] discretion and consistently **within the legal standards applicable to the available choices**, and [] reach [his] decision [as to the Reset Date] **through an exercise of reason.**" *Rangen*, 160 Idaho at 255, 371 P.3d at 309 (citing *Haw v. Idaho State Bd. of Med.*, 143 Idaho 51, 54, 137 P.3d 438, 441 (2006) (emphasis added)).

Specifically, PWUI and the City again submit that the Director's exercise of discretion must be within the appropriate legal standards and can only be reasonably exercised by including proper deference to the Contract's definition of the "storage season" as beginning October 1<sup>st</sup>. Contract, ¶ 5. Under the Contract, PWUI has the "right to have stored to its credit **during each storage season**, [a total of approximately 4.4692%] of all water stored in Palisades Reservoir

during that season under the Palisades storage right” and to have the right to carryover from one season to the next. Contract, ¶ 10(a) (emphasis added). The Contract is illustrative of many such contracts entered between BOR and entities throughout the state of Idaho. The Contract’s assumption that the storage season would begin on (*i.e.*, the Reset Date would be) October 1<sup>st</sup> of each year is a fact that the Director must consider in exercising his discretion to select a Reset Date.

In addition to discussion of the Contract, other Parties have submitted considerable information for the Director to consider in his exercise of reason to designate the Reset Date. In particular, the City of Pocatello and the Shoshone-Bannock Tribes have thoroughly and persuasively explained that, in addition to the provisions of the various placeholder contracts describing an October 1<sup>st</sup> Reset Date, the Director’s discretion is further constrained by (1) prior appropriation under Idaho law, which includes maximum utilization and least wasteful use of Idaho’s water resources; (2) maintenance of “zero flow” at Milner Dam; (3) historical reliance by water users on a Fall time period Reset Date; and (4) the historical precedent established by Water District 01 in having a Fall time period reset date. See *City of Pocatello’s Opening Brief* at 8-13; *Shoshone-Bannock Tribes’ Brief on “Threshold Issue”* at 16-22. PWUI and the City join in the position of the Parties that these legal and factual reasons limit the Director’s exercise of discretion in establishing a Reset Date.<sup>2</sup> Based on these reasons, it does not appear reasonable for the Director

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<sup>2</sup> While PWUI and the City join with the Shoshone-Bannock Tribe on the described legal principles that limit the Director’s exercise of discretion on selecting a Reset Date, PWUI and the City do not agree with the Tribe’s position that “the storage right is allowed to accrue no more than its water right volume one-time from the natural flow in that **calendar year**.” *Shoshone-Bannock Tribes’ Brief on “Threshold Issue”* at 11, 23 (*italics omitted, emphasis added*). PWUI’s and the City’s position is that “accounting year” should be substituted for “calendar year” in this statement. Doing so makes this statement consistent with the historical practices of Water District 01, which has described the accounting year concept for purposes for allocating reservoir water right volumes as follows:

The date on which full reservoir water right accruals are reset is defined as the *reset date* in the water right accounting. The *reset date* determines the annual period natural flow can be distributed to

to establish a Reset Date any later than October 1<sup>st</sup>—the date of the commencement of the storage season under the Contract. Selection of a Reset Date prior to October 1<sup>st</sup>, which has been done previously by Water District 01 as described in the *Staff Memo*, would be a proper exercise of the Director’s discretion as it would maximize use of Idaho’s water resources and minimize waste.

## II. CONCLUSION

The plain language of the period of use element does not mandate a Reset Date of January 1. On its face, the plain language of the period of use element indicates a “year-round” ability to divert water to storage under the Storage Water Rights. *BW 17*, 157 Idaho at 389, 336 P.3d at 796. The quantity of water element allows a certain amount of water to be diverted and stored on a per year basis. This is the accounting year, which is commenced as of the Reset Date. As administrative details, the Reset Date and the accounting methodology are left to the Director’s discretion, subject to Idaho law. In exercising that discretion, the Director must consider PWUI’s Contract and (1) prior appropriation under Idaho law, which includes maximum utilization and least wasteful use of Idaho’s water resources; (2) maintenance of “zero flow” at Milner Dam; (3) historical reliance by water users on a Fall time period Reset Date; and (4) the historical precedent established by Water District 01 in having a Fall time period reset date. Consideration of this information informs the actual use, expectation, and contractual rights of storage water users.

Accordingly, it does not appear reasonable for the Director to establish a Reset Date any later than October 1<sup>st</sup>—the date of the commencement of the storage season under the Contract.

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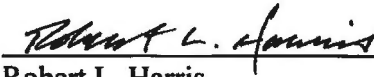
previously filled reservoir water rights. For example, if the reset date is September 15<sup>th</sup>, the annual period natural flow can be distributed to reservoir water right volumes is from September 15<sup>th</sup> of the current year to September 14<sup>th</sup> of the following year.

*Staff Memo* at 2.



Selection of a Reset Date prior to October 1<sup>st</sup>, which has been done by Water District 01 as described in the *Staff Memo*, would be a proper exercise of the Director's discretion as it would maximize use of Idaho's water resources and minimize waste.

Dated this 26<sup>th</sup> day of January, 2018.

A handwritten signature in black ink, reading "Robert L. Harris", is written over a horizontal line.

Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

## CERTIFICATE OF SERVICE

I hereby certify that on this 26<sup>th</sup> day of January, 2018, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed by the methods indicated.

**Document Served:** RESPONSE BRIEF OF PALISADES WATER USERS, INC. AND THE CITY OF IDAHO FALLS RE: THRESHOLD LEGAL QUESTION

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