William Bacon, ISB #2766
Shoshone-Bannock Tribes
PO Box 306
Fort Hall, Idaho 83203
Telephone: (208) 478-3815
Facsimile: (208) 237-9736

Edmund Clay Goodman, ISB #10288
Hobbs, Straus, Dean & Walker LLP
516 SE Morrison Street, Suite 1200
Portland, Oregon 97214
Telephone: (503) 242-1745
Facsimile: (503) 242-1072

Attorneys/Representatives for Shoshone-Bannock Tribes

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)) SHOSHONE-BANNOCK TRIBES') RESPONSE BRIEF ON) "THRESHOLD ISSUE")	

INTRODUCTION

On January 19, 2018, in response to the Director's Order (January 3, 2018) identifying and requiring briefing on the "threshold issue", the parties submitted opening briefs. This response brief is filed pursuant to the same Order. The Shoshone-Bannock Tribes concur with the reasoning of all parties (save for, perhaps, the Surface Water Coalition, hereinafter "SWC"[1]) that the "period of use" element of the storage water right partial decrees for federal onstream

[1] As we discuss in more detail below, SWC's position on whether the reset date must be January 1 is not clear from their opening brief.

reservoirs in Water District 01 that specify "1/1 to 12/31" as the time period for irrigation storage does ***not*** require that the reset of the computational accounting methodology begin on January 1 each year. As discussed below, while we concur with that point, the Tribes' position is that since the Director had posed the question of whether his discretion was limited by the decrees to a January 1 reset date, that it is appropriate to point out that the Director's discretion is actually restricted in the other direction: that he is ***required*** to use of the reset date and accounting methodology in place for the last 29 years, as described in the IDWR Staff Memorandum dated December 1, 2017 ("Staff Reset Memo"). As explained in the Tribes' Opening Brief, this result is dictated by the plain language of the decrees. 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: that the Director must retain the historical practice.

The Tribes dispute the legal argument by SWC, and, as discussed in more detail below, dispute its characterization of and inferences from the historical background contained in the SWC opening brief.

In sum, the Director is not required to move the reset date to January 1. Moreover, the Tribes submit that the Director ***must*** retain the reset date and accounting methodology in place for the last 29 years as described in the Staff Reset Memo.

ANALYSIS

The Director received seven opening briefs on the "threshold issue" from the following parties:

1. Shoshone Bannock Tribes.

2. United States Department of Interior, Bureau of Indian Affairs (hereinafter "BIA").

3. The Surface Water Coalition (which includes Milner Irrigation District, AFRD #2 and other irrigation districts and canal companies) (hereinafter "SWC").

4. Fremont-Madison Irrigation District, North Fork Reservoir Company, Idaho Irrigation District and New Sweden Irrigation District (hereinafter "Upper Valley Storage Holders").

5. City of Pocatello (hereinafter "Pocatello").

6. Palisades Water Users, Inc., and the City of Idaho Falls (hereinafter "PWUI/Idaho Falls").

7. Aberdeen-Springfield Canal Company (hereinafter "Aberdeen-Springfield").

I. Response to Briefs Filed by the BIA, Upper Valley Storage Holders, and PWUI/Idaho Falls

The Tribes agree with the position articulated by the BIA, Upper Valley Storage Holders, and PWUI/Idaho Falls that the "1/1 to 12/31" language on the storage decrees does not require a reset date of January 1. *See* Upper Valley Storage Holders Brf. at 2 ("the interpretation of said dates or period of use does not require a reset date of January 1"), PWUI/Idaho Falls Brf. at 3 ("the '1/1 to 12/31' period of use element on the Storage Water Rights does not unambiguously mandate a Reset Date of January 1st of each year..."), BIA Brf. at 3 ("The 'plain language' of the period of use element of the federal storage water right partial decrees does not address the question whether January 1 is the legally required reset date."). The Tribes join with these other parties in their clear answer to the Director's threshold question: a January 1 storage "reset" date is not required.

However, the Tribes also assert arguments not articulated in these briefs, though we submit that these briefs ultimately point the way to the same result. It is the Tribes' position that the plain language of the decrees not only allows ***but unambiguously requires*** the utilization of

the reset date and accounting methodology used for the last 29 years, as described in the Staff Reset Memo. *See* Tribes' Brf. at 9-12.

The Tribes have explained that the storage water right period of use has an unambiguous, adjudicated, and settled legal meaning as determined by courts examining storage water rights and by the Department itself. See Tribes' Brf. at 8-11 (*citing In re SRBA (Basin-Wide Issue 17),* 157 Idaho 385, 389 (2014) ("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)..."); *Ballentyne Ditch Co. et al. v. Idaho Department of Water Resources, 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 10 ("The partial decrees unambiguously provide for year-round use.")). In addition to these binding court interpretations, the Department has interpreted the decrees in the same way. Staff Reset Memo at 5.

Accordingly, the Tribes submit that the briefs by these three parties overstate the Director's discretion[2] because the plain language of the "1/1 to 12/31" period of use requires the continuation of the 29-year IDWR practice. Milner's novel petition alone cannot render the decrees ambiguous. *See Matter of Permit No. 36-7200 in Name of Idaho Dept. of Parks and Recreation,* 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.").

[2] Upper Valley Storage Holders' Brf. at 5 ("it is up to the Director to make such determination [as to the appropriate reset date] within his 'sound discretion,'"); PWUI/Idaho Falls Brf. at 6 ("the determination of any date as the Reset Date is within the outer limits of the Director's discretion"); BIA Brf. at 3 ("the Director "has discretion to interpret the federal storage water right partial final decrees to determine the reset date").

And, even if an ambiguity is determined to exist, the Director's discretion must be cabined by the two "bedrock" principles of Idaho water law: "securing the maximum use and benefit, and the least wasteful use of Idaho's water resources." *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 131, 369 P.3d 897, 909 (2016), *reh'g denied* (May 9, 2016). The Tribes explained how the history of the Department's accounting of storage rights over the past 29 years evolved to maximize beneficial use and minimize waste. *See* Tribes' Brf. at 12-14. During those 29 years of consistent management, the common understanding of the storage decrees became a term of art meaning a year-long accrual right with a fall reset date, which, since 1988, has been on or before October 1. "[W]hen 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 Tribes and other parties have legally binding expectations that the Upper Snake River Reservoir System will continue to be managed in the same manner it has been since before the Fort Hall Agreement. The Tribes' water storage rights, 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, Public Law 101-602 (Nov. 16, 1990), 104 Stat. 3059. *See* Tribes' Brf. at 16-20. The BIA acknowledges the ongoing validity of these rights: "the State of Idaho made legal commitments to the Shoshone-Bannock Tribes that would be negatively implicated by a decision that the reset date is January 1," BIA Brf. at 3. The Tribes also describe other reliance-based interests, including the Bureau of Reclamation Flow Augmentation Program, the May 2008 NOAA Fisheries Biological Opinion,

and the Shoshone-Bannock Water Bank, which rely on a reset date on or before October 1 to ensure that the reservoirs are filled early in the year. *See* Tribes' Brf. at 18-20.

These reliance-based interests also include the parties to the Bureau of Reclamation water storage contracts which provide for an October 1 reset date that the Tribes and other parties have noted are related to the decrees. *See* Upper Valley Storage Holders Brf. at 4 ("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.'"); BIA Brf. at 3 ("the federal contracts establish October 1 of each year as the commencement of the storage season"); PWUI/Idaho Falls Brf. at 6 ("The Director must consider the Contract because the Contract defines PWUI's expectations and use of its storage water… The Contract explicitly defines a 'storage season' as 'the period beginning October 1 of one year and ending during the next year when, as to the particular reservoir, no more water is available for storage.'").

Through a September 25, 2012 stipulation between IDWR and various water users, the Partial Final Decree 01-219 for Lake Walcott was amended to expressly reference the storage contracts. *See* Pocatello Brf. Exhibit 4. Accordingly, those storage contracts (and the October 1 reset date that was in effect in 2012) referenced in the Lake Walcott decree directly inform its interpretation. *Opportunity, L.L.C. v. Ossewarde*, 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002) ("[W]hen a subsequently executed agreement specifically references and relies on a former agreement, the two are to be interpreted together, if possible."); *see also Clinton Sheep Co. v. Ogee*, 34 Idaho 22, 198 P. 675 (1921) (a contract between two parties which expressly refers to another between one of them and a third party incorporates relevant provisions of the latter necessary for interpretation).

Because the Tribes and the other water users have established interests made in reliance on the settled legal meaning of the decrees, reversing the interpretation would be arbitrary and capricious unless buttressed by a reasoned analysis for the reversal in policy. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) ("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.").

Accordingly, while the Tribes concur that the decrees do not require a January 1 reset date, the Tribes further maintain that, in light of longstanding interpretations by both the Department and Idaho courts, the bedrock principles of Idaho water law, reliance- and expectation-based interests, and the prohibition against arbitrary and capricious action, the Director lacks discretion to depart from the reset date and accounting methodology in place for the last 29 years.

II. Response to Brief Filed by City of Pocatello

The Tribes agree with and adopt Pocatello's position that "the Department should continue to administer reset as described in the staff memo." Pocatello Brf. at 13. Pocatello states that "the Director should select an appropriate reset date for WD01 that promotes maximum utilization without waste, as required by the prior appropriation doctrine," *id.* at 2, which, as noted in the preceding section, the Tribes submit must be continuation of the current reset date and accounting methodology.

The Tribes also agree with and adopt Pocatello's arguments regarding the winter water savings storage program, *id.* at 4, and note that the partial decrees reflect bargained-for

concessions made by the program participants in consideration for storage rights senior to the American Falls storage rights. The Tribes further agree with and adopt Pocatello's position that the 2012 Stipulation in *In Re SRBA* Case No. 39576 (Fifth Judicial District Idaho, September 25, 2012) ("Stipulation"), *see* Pocatello Brf. Exhibit 4, is the basis of a settled expectation that the historic administration of Water District 01 water rights would continue into the future (thus further establishing reliance-based interests). The Stipulation states:

> Consistent with the temporary upstream, annual, and permanent storage exchange provisions in the Palisades [reservoir spaceholder] Contracts, *and historic administration of water rights in Water District 01,* the Parties hereby stipulate to, and the Department concurs with, the elements of water right 01-219 for Lake Walcott Reservoir as set forth in Exhibit A and attached hereto.

Stipulation at 4 (emphasis supplied). The IDWR was a party to, and remains bound by, the Stipulation, and may not now depart from the historical administration that formed the basis for the negotiated Stipulation.

III. Response to Brief Filed by Aberdeen-Springfield Canal Company

The Tribes agree with Aberdeen-Springfield's conclusion that "the decreed 'period of use' is year 'round," Aberdeen-Springfield Brf. at 3. The Tribes further agree that the October 1 date on the Bureau of Reclamation storage contracts is of "legal significance" in determining the "accounting year," *id.*, and is relevant to the reliance- and expectation-based interests of the water users. However, Aberdeen-Springfield's position that the interpretation of the period of use element "is left for the Director to make, within his sound discretion and based upon the record to be made in this matter" is overbroad because, as stated above and in the Tribes' Opening Brief, the meaning has been adjudicated by courts and fixed by the settled expectations of the water storage users.

The Tribes appreciate Aberdeen-Springfield's statements regarding the State of Colorado's interpretation of the "seasonal year," Aberdeen-Springfield Brf. at 2-3, but the Colorado approach is not binding on the Director in this proceeding, who must distribute water in accordance with Idaho code. Idaho Code § 42-602. More directly relevant to this proceeding are the storage contracts (with their October 1 beginning date for storage), Aberdeen-Springfield Brf. at 3-4, which, as the Tribes assert, establish certain reliance-based rights that govern here. *See* Tribes' Brf. at 16-20.

IV. Response to Brief Filed by Surface Water Coalition

The SWC Brief appears to be the only brief to argue that the "plain language" of the decrees requires the Director to move to a January 1 date for the accounting reset. Yet even that much is not clear. Nowhere in the brief does SWC expressly state that the decree language requires the Director to use a January 1 reset date. SWC states that the period of use language is "unambiguous" and that such language "provide[s] that the 'irrigation storage' period of use is a calendar year." SWC Brf. at 3. That does not mean that the reset must be January 1, only that the period of use is year-round, which is the position of the Tribes and all other parties. SWC does state, in conclusion, that the decree language "clearly and unambiguously shows that the irrigation storage 'period of use' begins January 1" (*id.* at 11), which indicates what their position is, but fails to actually assert or demonstrate that the reset date must be January 1. However, the SWC then proceeds to contradict this position by stating "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", *id.*, which indicates that the Director is not bound to a January 1 reset date.

To the extent SWC provides any analysis of the "plain language," that analysis is flawed and the properly applied analysis (under the precedent applicable to decree interpretation) does not require a January 1 reset date. But the bulk of SWC's brief contains a discussion of the "administration of storage water rights," in order to assert the incongruous argument that while January 1 might be the required reset date, IDWR can nonetheless move the reset to an earlier date, but only to such date that allows Milner Irrigation District and AFRD#2 to appropriate natural flow for irrigation ahead of senior storage rights late in the season. This analysis, in which SWC seeks to have its cake and eat it too (by protecting these junior irrigation rights against senior storage rights while also seeking to increase storage rights for members of the Coalition – including AFRD#2 – by using the year-round storage accounting in place since 1978) essentially asks the Director to adopt a double standard in water rights administration. Yet SWC also makes the following assertion: "[W]here 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." *Id.* at 4. The Tribes agree. Yet SWC is seeking exactly that: a fundamental change to the Upper Snake River Reservoir system operation based on its interpretation of the decrees.

SWC's recitation of that history of administration is incomplete, and the missing pieces are critical for considering the present dispute. Moreover, the implications it draws from that history are flawed, and that history – as demonstrated by the Staff Reset Memo and SWC's own exhibits – supports the continued use of the 29-year reset date and accounting methodology described in the Staff Reset Memo.

a. SWC Legal Analysis of Decrees' "Plain Language" is Flawed

While unclear, it may be the SWC's position that the Director is required to move the reset date to January 1 based on the language of the decrees. SWC's argument for this position is perfunctory and incorrect. SWC correctly recites the applicable interpretive principles, but inappropriately conflates the concept of "plain language" with "unambiguous." *See* Tribes' Brf. at 3-5 (describing case law explaining the distinction and its implications for the current consideration of the "threshold issue"). Further, SWC also fails to acknowledge, as pointed out by the other parties, that the storage period of use in the decrees says nothing about a "reset" date, and thus cannot be read to unambiguously compel the Director to use January 1 as the reset date by its "plain language." SWC's own assertion that "the decrees contain no other explanatory remarks, conditions or 'other provisions necessary for administration' " (SWC Brief at 3) actually cuts against its argument. The decrees contain no express limitation as to the administration and accounting for the storage rights (other than references to the water storage contracts, which expressly use an October 1 start date). Since SWC argues that the decrees limit administration and accounting (not merely the period of use), they would need to point to some decree language that actually creates such a limitation. As even SWC acknowledges, there is none.

Further underscoring this point, as Pocatello accurately points out, "[t]he period of use element is not a decreed reset date," but per IDWR's own regulations, the period of use is defined as "'[t]he time period during which water under a given right *can be beneficially used.*'" Pocatello Brf. at 6 (*quoting* Idaho Admin. Rules 37.03.02.010.20 (2017) (emphasis added)). As the Tribes explain in their Opening Brief, the method for accounting is different than

distribution and beneficial use. Tribes' Brf. at 7-8. Moreover, SWC fails to acknowledge that the case law has consistently held that this 1/1-12/31 "period of use" is not a limitation but in fact shows that the right is unlimited, *i.e.,* that it can be exercised year-round. *In re SRBA (Basin-Wide Issue 17)*, 157 Idaho at 389, 336 P.3d at 796; *Ballentyne Ditch Co. et al.*, Case No. CV-WA-2015-21376 at 10, 13. *See also* cases cited and analysis in Pocatello Brf. at 6-7.

As is clear from the precedent of 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 reset date of January 1. Simply because SWC can come up with and present a "different possible interpretation" 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." *Matter of Permit No. 36-7200 in Name of Idaho Dept. of Parks and Recreation*, 121 Idaho at 823, 828 P.2d at 852.

b. SWC History of the "Administration of Storage Water Rights" is Flawed

The bulk of SWC's brief is dedicated to providing a history of the administration of water rights in the Upper Snake River Reservoir System. Yet that history is, in certain key instances, incomplete. And those missing pieces of the history are not only critical to the resolving the issue before the Director, they are found (or relied upon) in the very documentation cited by SWC.

SWC begins its discussion of the history with the statement that "[t]he accounting program [begun in 1978 and refined in 1988] was intended to aid in efficient administration, not serve as a tool to deprive existing rights of available water." SWC Brief at 5. While SWC goes on to cite the Staff Reset Memo, it ignores the following critical points. First, it was "the continuing development of new water rights, non-irrigation uses, new diversions, reservoirs, and the 1977 drought [which] prompted the need for stricter water right regulation" and made it clear that "the previous accounting methods were insufficient . . ." Staff Reset Memo at 2. The Memo cites to a February 23, 1978 Committee of Nine Meeting, at which 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.*

Second, in response to those changing conditions, 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.* Third, 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). Increased and more accurate regulation means that certain "existing water rights" would be curtailed in favor of senior water rights coming back into priority. Under the prior appropriation doctrine, that does not "deprive" those juniors of water, since that was not water they were entitled to take under law.

SWC goes on to state, regarding storage in Lake Walcott: "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." SWC Brf. at 5 (citing Staff Reset Memo at 4). Yet this assertion does not mention that the 1978 and 1988 accounting were changed for the purposes of better administration of water right priorities over an entire calendar year, instead of administering priorities for only the irrigation season and not conducting any administration for the remainder of the year. Milner and AFRD #2 would have enjoyed fall-season deliveries ahead of a senior priority Lake Walcott right prior to 1978 because of relaxed administration, not because of the right to do so under prior appropriation. Such history is not justification to continue relaxed administration in the fall season.

The SWC Brief also speaks to the accounting regime in place prior to 1978, SWC Brf. at 6-9, but fails to completely describe that regime. The Tribes note that the Staff Reset Memo indicates that prior to 1978, the Department regulated water rights for only a portion of the calendar year. Staff Reset Memo at 2; accord SWC Exh. B (Shaw Aff.) at ¶15. During this period, Milner and the other SWC users would have enjoyed unregulated fall season water diversions for decades, not due to any decreed right but simply as a result of a lack of late-season water regulation and the technology to calculate accrual volumes year-round. The WD 01 spaceholders themselves realized that this system was not consistent with the requirements of Idaho water law, and voted to direct the Watermaster to a year-round accounting system in 1978, in recognition of the need to square regulation and accounting with the requirements of such water law, and because the technology to do so had become available. Staff Reset Memo at 2.

The changes subsequently made in 1988 were consistent with the direction of WD 01 in 1978, and were intended to maximize beneficial use and avoided waste. Staff Reset Memo at 3-5, 6-7. And until SWC came up with its recent novel interpretation of the language of the decrees, there have been no assertions or challenges to this system as injuring anyone's water rights.

The SWC Brief also misstates how the Lake Walcott storage right (01-219) has been accounted for during the last 29 years. The Lake Walcott storage right gets to fill one time, and one time only, each calendar year. For each calendar year from at least 2000 through 2016, the Lake Walcott right filled in the fall before January 1 of the following year,[3] and that fill was then used for irrigation during the following calendar year. 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) having their "annual volume" satisfied in the fall. *Id.* at 2, 3, 4. The Lake Walcott right, therefore, filled only one time in each of those calendar years.[4] That right was in priority and was entitled to the natural flow over junior irrigation rights.

SWC asserts that "The [Lake Walcott] 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." SWC Brf. at 7. Yet that last

---

[3] *See* http://idwr.idaho.gov/water-data/water-rights-accounting/WD01.html (last viewed January 16, 2018).

[4] As the Tribes' note in their Opening Brief, (Tribes' Brf. at 23) the same thing would have occurred in 2017. On January 1, 2017, Lake Walcott was full. However, due to the Director's improper directive in his 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.

sentence does not follow from the prior sentences. The decision as to when to physically fill Lake Walcott would have been a U.S. Bureau of Reclamation decision not exercise their storage fill right in the fall, as opposed to the Director curtailing such right.[5] These are critically different, and the Bureau's decision about when to fill the reservoir has no bearing on the question of whether the Director would have had to curtail other junior irrigation rights if the Bureau had chosen to fill Lake Walcott in the fall.

SWC also speaks nostalgically about a "coordinated operation [that] should not be un-done as a result of a computerized accounting program and its varied implementation over time." SWC Brf. at 6. This statement mischaracterizes the accounting program and reset protocol as described in the Staff Reset Memorandum. The system that has been in place since 1988 has not "varied" over time: the reset date has been flexible on an annual basis to respond to actual conditions and ensure maximum beneficial use of water. Staff Reset Memo at 3-7. The WD 01 Water Rights Accounting and Distribution Manual also describes the system in the same way. *See* Section 8.15, at 80-81. Despite the windfall advantage conferred by the pre-computerized, old-school "coordinated system," SWC's nostalgia is belied by the last 29 years of actual coordinated practice by the Department that does a more accurate and more specific job of regulating water use, as requested by the WD 01 stakeholders themselves back in the 1970s. SWC also refers vaguely to "concessions" made by water users in the Upper Snake River to facilitate the construction of the Palisades Dam and the storage of water in that facility, without specifying what those concessions were or how they might be relevant to the present dispute.

[5] The Shaw Affidavit confirms this point: noting that he could not find any record prior to 1978 of the Lake Walcott right being "exercised" near the end of the irrigation season. SWC, Exh. B, ¶12.

SWC Brief at 11. Moreover, any such "concessions" were made to benefit those same users, by increasing the amount of available storage water on the entire system, and are simply not relevant here. See Pocatello Opening Brief at 3-4. Finally, SWC's assertions about "concessions" and a purported agreement "to certain operations and administration to protect existing water rights" (SWC Brf. at 6) lack any specificity relevant to this proceeding. If there were bargained-for and agreed-upon operations and administration, those should be clearly and specifically referenced so that the Director and parties can review the language of such agreements and determine if there is any relevance to such statements. As far as the record shows, the only action taken by IDWR since the 1970's is improved administration of water rights (as described in detail in the Staff Reset Memo). If such improved administration runs contrary to any purported agreements, such agreements should be produced. The lack of documentation suggests, again, that SWC simply prefers the system to operate the way it did prior to the improvements by IDWR.

Finally, SWC's history does not include 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.

The complete factual background indicates that the parties would have understood and intended the plain language of the decrees to be consistent with the reset date and 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, and a system in place since 1988 that maximizes use of water and minimizes waste.

*c. **SWC Draws Incorrect Inferences from its Incomplete History***

SWC also seeks to draw a number of flawed inferences from its incomplete history. One of the key errors that SWC's brief makes is to repeatedly assert that Milner's and AFRD#2's rights were somehow injured by the reset and filling of senior storage rights in the late season. SWC Brf. at 5, 8 n. 5, 9. These natural flow irrigation rights are junior to the Lake Walcott storage right. Prior appropriation dictates that a junior right may be "considered filled" even though the decree holder accrued less than the full volume on the decree, or no water at all, in scarce conditions. *See, e.g., R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 26, 752 P.2d 625, 628 (Ct. App. 1988) ("[e]ach junior appropriator is entitled to divert water only when the rights of previous appropriators have been satisfied."). Curtailing a junior right in favor of a senior right is how the prior appropriation system works. There is no injury in doing so.

Yet SWC asserts that "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." SWC Brf. at 6. Such assertion, of course, is simply a request to apply a double-standard: certain senior rights should be protected from junior appropriations, but Milner and AFRD#2

should benefit from a system that prevents a senior storage right (01-219) from storing water in priority to their junior rights.

SWC suggests that that its version of history supports moving back to the system that was in place before 1978 – or, perhaps, to the system that was in place between 1978 and 1988. SWC Brf. at 6-11; *see also* Exhibit B, Shaw Aff. at ¶19. Yet the Staff Reset Memo indicates that prior to 1978, the Department regulated water rights for only a portion of the calendar year, and thus surface water diversions for irrigation would have been unregulated in the late fall. Staff Reset Memo at 2. Such diversions would not square with the imperative under Idaho law to maximize the beneficial use of the water system, and as soon as the technology for year-round regulation became available, what were essentially windfall diversions would have ended.

The WD 01 spaceholders themselves realized that this system was not consistent with the requirements of Idaho water law, and voted to direct the Watermaster to a year-round accounting system in 1978, in recognition of the need to square regulation and accounting with the requirements of such water law, and because the technology to do so had become available. Staff Reset Memo at 1-4. The changes subsequently made in 1988 were consistent with the direction of WD 01 in 1978, and were intended to ensure maximum beneficial use and avoided waste. *Id.* And until SWC came up with its recent novel interpretation of the language of the decrees, there have been no assertions or challenges to this system as injuring anyone's water rights.

This part of SWC's argument is based, ultimately, on the assertion that in 1988, "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," SWC Brf. at 9, with the clear implication that this was improper. But it was not. The reason it was the first time

in history was because of the new, more accurate, and more appropriate year-round, administration. The fact that historically AFRD#2 and Milner diversions were not curtailed in favor of a senior storage right does not mean doing so was proper administration or that the Director should return to such a practice.[6]

SWC also implies that certain "concessions" made with regard to construction and fill of the Palisades Reservoir (without identifying what those concessions are or acknowledging that such concessions involved trade-offs much to their benefit) somehow support a return to a pre-1978 accounting process that allows junior irrigation rights to divert natural flow at the expense of senior storage rights, to the overall detriment of storage in the Upper Snake River Reservoir System. Those "concessions," such as they were, do not and cannot compel the Director to ignore the decreed rights and their year-round storage use language, much less a 29-year practice developed to maximize beneficial use and minimize waste.[7]

Moreover, the Tribes note that SWC's vague assertions regarding such concessions is particularly hollow, given SWC's vehement opposition to consideration of the Tribes' very specific expectation-based rights in this proceeding. SWC Response Brief on Issues (December 15, 2017) at 7-8. The Fort Hall Agreement actually spells out the concessions made by the Tribes in those negotiations, as well as the financial contributions made by the United States, to secure

---

[6] The same incorrect assertion is echoed in the Shaw Affidavit at ¶20. "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." But the practice since 1988 has been in place because there was no water right accounting prior to 1978, and from 1978 to 1988 there was no need to conduct water right administration because of favorable hydrology. Staff Reset Memo at 2-3. Again, there is no legal or factual basis to revert to the pre-1988 system, other than that SWC liked that system better.

[7] SWC also spends a significant portion of its brief discussing the resolution of issues regarding water right 1-6 (and the Director's 2013 order). SWC Brf. at 10-11. Yet the administration of matching priority dates between 1-6 and the American Falls storage right is not relevant to determining how ***the Lake Walcott 1909 right*** is administered against a 1921 AFRD#2 right.

and protect the bargained-for rights in that Agreement. 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.

As noted in the Tribes' Opening Brief (at 16-18), in the *Shoshone-Bannock Consent Decree*, the specific dates pursuant to which the water would be stored and used are an essential element of the Tribes' water storage rights. These dates also reflected the historic 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 (also incorporated into the Agreement and Decree). 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 late irrigation season of 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 there was no guarantee of a specific amount of water, 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.

CONCLUSION

All the parties to this proceeding, save perhaps one, expressly recognize that the "plain language" of the decrees does not require a reset accounting date of January 1. The one party that appears to disagree, SWC, does not provide any reasoned analysis as to why the Director is compelled to use January 1, other than to conflate the concept of "plain language" with "unambiguous." The Tribes concur with those other parties in their response to the Director's "threshold" question, but further assert that by posing such a threshold question it is therefore necessary to point out that the Director's discretion is in fact cabined by precedent, long-standing practice, the "bedrock principles" of Idaho water law, and expectation- and reliance-based interests. He must reinstate use of the reset date and accounting methodology that has been in place for the last 29 years.

Dated this 26th 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 26th day of January, 2018, I served a true and correct copy of the foregoing "Shoshone-Bannock Tribes Response Brief on 'Threshold Issue' " on the Idaho Department of Water Resources by First Class U.S. Mail, postage prepaid, and on the following by electronic mail:

Director, Gary Spackman
c/o Kimi White
Idaho Department of Water Resources
322 E Front Street
Boise, Idaho 83720-0098
gary.spackman@idwr.idaho.gov
kimi.white@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

Travis L. Thompson
Barker Rosholt & Simpson, LLP
PO Box 63
Twin Falls, Idaho 83303-0063
tlt@idahowaters.com

Lyle Swank, Watermaster
Water District 01
900 N. Skyline Dr., Ste A
Idaho Falls, Idaho 83402-1718
Lyle.swank@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

John K. Simpson
Travis L. Thompson
Jonas A. Reagan
Jessica Nielsen
Barker Rosholt & Simpson, LLP
P.O. Box 63
Twin Falls, Idaho 83303-0063
jks@idahowaters.com
tlt@idahowaters.com
jar@idahowaters.com
jf@idahowaters.com

Chris M. Bromley
Candice McHugh
McHugh Bromley, PLLC
380 S. 4th Street, Suite 103
Boise, Idaho 83702
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Jerry R. Rigby
Rigby, Andrus & Rigby Law, PLLC
25 North Second East
Rexburg, Idaho 83440
jrigby@rex-law.com

John K. Simpson
Barker Rosholt & Simpson, LLP
P.O. Box 2139
Boise, Idaho 83701-2139
jks@idahowaters.com

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, Idaho 83318
wkf@pmt.org

Norman M. Semanko
Parsons Behle & Latimer
800 West Main Street, Suite 1300
Boise, Idaho 83702
nsemanko@parsonsbehle.com
ecf@parsonsbehle.com

Robert L. Harris
D. Andrew Rawlings
Holden, Kidwell, Hahn & Crapo, PLLC
P.O. Box 50130
Idaho Falls, Idaho 83405
rharris@holdenlegal.com
arawlings@holdenlegal.com

Duane Mecham
U.S. Department of the Interior
Bureau of Indian Affairs
805 SW Broadway, Suite 600
Portland, Oregon 97205
duane.mecham@sol.doi.gov

Mr. Steve Howser
Aberdeen-Springfield Canal Co.
P.O. Box 857
Aberdeen, Idaho 83210
steveh@ascanal.org

Kirk Bybee
City of Pocatello
911 North 7th Ave.
P.O. Box 4169
Pocatello, Idaho 83201
kibybee@pocatello.us

Sarah Dandurand