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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** **SURFACE WATER COALITION'S RESPONSE 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 *Order re: Statements of Issues and Responses; Order Adopting Deadlines; Amended Notice of*

[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.

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 response brief.

The Coalition is filing this joint response 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.

PARTIES' POSITIONS

In addition to the Coalition, the Aberdeen-Springfield Canal Company ("ASCC"), the City of Pocatello ("Pocatello"), Fremont-Madison Irrigation District et al. ("Upper Valley Storage Holders"), the Palisades Water Users Inc./City of Idaho Falls ("PWUI"), the Shoshone-Bannock Tribes ("Tribes"), and the U.S. Bureau of Indian Affairs ("BIA") all filed opening briefs regarding the legal question posed by the Director. While certain positions and arguments may vary, all of these parties agree that the decreed period of use does not require the Director to use a January 1st "reset date." In other words, all parties support an instruction to the Watermaster to begin filling the storage water rights sometime in the fall, prior to January 1st each year. The dispute falls to the particular "reset" date that should be adopted and which storage right is used for that administration.

The Coalition agrees that historically the Watermaster did not reset the federal onstream storage water rights on January 1st. However, the history of storage water right administration **did not just begin in 1988**. It's undisputed that the administration has varied over time as evidenced by the *Staff Memo* and the *Shaw Dec.* *See* Ex. B to *SWC Br.* This history shows that storage water right administration has been inconsistent, and has not been adopted pursuant to any formal rule, agreement, or administrative or judicial decision.

The Coalition submits that Idaho law requires the Director to administer the storage rights in a manner consistent with their original appropriation and development, and in a manner that does not injure existing water rights. The Watermaster had no authority, through the exercise of an accounting program or otherwise, to change that administration to the detriment of existing diversions, such as the natural flow rights held by AFRD#2 and Milner.[2] Further, if the Director looks to the Palisades Contracts for guidance, those agreements clearly recognize that Reclamation must pass water through American Falls and Minidoka Dams to satisfy "existing diversions." This provision, binding on all spaceholders, precludes storage operations and water right administration that would injure those existing water rights, including those held by AFRD#2 and Milner Irrigation District, whose rights are diverted below Minidoka Dam and above Milner Dam.

Finally, Milner's request to have available water delivered to its 1916 natural flow water right implicates this administration and the Director's duties under state law. If the partial decrees do not require the Director to "reset" or begin an annual period of administration on January 1st, the question turns to what date should the Director use, and how should the storage rights be administered as against existing natural flow rights (in particular water right 1-6 held by AFRD#2 and water right 1-17 held by Milner Irrigation District). The historical administration has varied and been changed without any notice to the water users. These factual issues may require the development of a complete administrative record.

Although the parties have submitted various information for the Director to consider as part of briefing the legal question, the Coalition reserves the right to request discovery and submit evidence and testimony if the case proceeds to hearing.

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[2] The Water District 01 accounting program was not adopted pursuant to formal rulemaking or as the result of any administrative or judicial proceeding. Although the Department initiated a review of the Water District 01 accounting program and its practices in recent years, that informal process is still ongoing and not finished.

RESPONSE TO OPENING BRIEFS

I. Interpretation of the Storage Water Right Decrees.

ASCC, BIA, Pocatello, PWUI, and the Upper Valley Storage Users interpret the partial decrees as being either "silent" or "ambiguous" with respect to the issue of a "reset" date. If the Director determines the decrees are subject to "reasonable conflicting interpretations," then discerning the intent of the period of use element is a "question of fact." *See Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 315 (2010); *see also*, *Lamprecht v. Jordan*, 139 Idaho 182, 185 (2003). Stated another way, if the Director accepts the position advocated by these parties then it appears the contested case must proceed to hearing and the parties should allowed to present evidence and testimony on the issues.

The Tribes, on the other hand, disagree with this position and argue the decreed period of use element is unambiguous on the theory that it has a "settled legal meaning." *Tribes Br.* at 8-11. The Tribes argue that the "1/1 to 12/31" language is "typical" for a storage water right with a "settled legal meaning at the time it was decreed."[3] *Id.* at 10. The Tribes go a step further and assert that the "settled legal meaning" is the "reset procedure in place for the last 29 years as described in the *Staff Reset Memo*."[4] *Id.* at 2. The Director should deny this argument for the reasons set forth below.

At the outset the Tribes' affirmative request for relief exceeds the scope of the Director's legal question.[5] *See Order* at 3. The Coalition objects to the Tribes' de facto summary judgment

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[3] Contrary to the Tribes' implicit claim, not all storage water rights decreed in the SRBA have a "1/1 to 12/31" period of use. *See e.g.* Partial Decrees for Water Right Nos. 21-7081, 29-2558, 34-810, 34-811, 36-15540, 37-894B, and 45-294C. This list is just a sample of water rights that have an "irrigation storage" period of use that is not "1/1 to 12/31."

[4] Even the Tribes' request is unclear as the reset date has changed over the last 29 years. Do the Tribes seek a reset date of October 1st, August 1st, August 15th, or September 15th? *See e.g. Staff Memo* at 3. In other words there is no set practice in administration dating back 29 years.

motion and submits that it should not be considered for procedural reasons. *See* IDAPA 37.01.01.260; 270.02; 565 (providing parties with 14 days from the filing of a motion to respond).[6] Moreover, the Tribes have failed to demonstrate there are "no genuine issues of material fact" that would warrant a decision as a matter of law on their request. *See e.g.* I.R.C.P. 56. Since the Tribes' request exceeds the scope of the Director's order and the Coalition has not been provided with a full fourteen (14) days to respond, the Director should deny the Tribes' request to adopt the "reset procedure in place for the last 29 years."[7] *Tribes Br.* at 2, 24.

Next, even if the Director considers the request, it should be denied since the Tribes have not set forth a meritorious position. The Tribes claim their position is supported by "the Idaho Supreme Court, the Fourth District Court, and the Department's own longstanding practice and interpretation." *Tribes Br.* at 11. Each claimed basis is untenable and should be rejected. To the Coalition's knowledge no Idaho court has squarely addressed the issue of a storage "reset" date for water right administration where the rights have a decreed period of use of "1/1 to 12/31."

First, the Tribes misapply the "settled legal meaning" concept in interpreting the decrees. It is patently unreasonable to interpret a year-round calendar period of use as meaning a variable period of administration employed in the Water District 01 accounting program.[8] Under the Tribes' interpretation, the term "1/1 to 12/31" legally means "9/15 to Date of Allocation" (assuming Sept. 15th is the reset date the Tribes seek). There simply is no support for such a claim under the plain language of the decree.

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[6] If the Tribes' brief is considered to constitute a motion under the Department's rules, the shortened time to respond (7 days) is prejudicial to the Coalition and other parties.

[7] The Director should similarly deny Pocatello's request to the extent its opening brief asks for the same relief. *See Poc. Br.* at 13.

[8] Further, the period of use for storage right administration in the Water District 01 accounting program over the last 29 years is not a full annual period. Instead, it has admittedly been less than a full year. *See Staff Memo* at 3.

Further, the Idaho Supreme Court has already rejected a similar claim in the context of water right interpretation. *See Rangen, Inc. v. Idaho Dept. of Water Resources*, 159 Idaho 798 (2016). In *Rangen*, the water right holder challenged the Director's decision that the partial decree only authorized Rangen to divert water within the ten-acre legal subdivision identified in the point of diversion element. *See* 159 Idaho 804-05. Rangen contended that it was entitled to divert spring water arising outside the decreed point of diversion based upon its historical beneficial use. *See id.* at 806. The Supreme Court affirmed the Director and district court and found:

> The district court found that Rangen's argument was based on the idea that the decrees do not accurately reflect its historical beneficial use. The court held that this argument was an impermissible collateral attack on the decrees. This Court agrees and affirms the district court's holding that Rangen's partial decrees entitle it to divert only that water emanating from the Martin-Curren Tunnel and only within the decreed ten-acre tract. If Rangen wanted its water rights to be interpreted differently, it should have timely asserted that in the SRBA.

Rangen, 159 Idaho at 806.

The Tribes' argument is similar to what was rejected in *Rangen*, that is, the Tribes are seeking an interpretation different than the decreed period of use element based upon their version of historical use. The Director should reject this argument accordingly.

Next, it is even more unreasonable to claim that this varied and changing administration, not identified in the storage water right partial decrees, has a "settled legal meaning."[9] Notably, the Water District has changed the "reset" date five times since the inception of the accounting program, including four times in the last 29 years (from 1988-2017).[10] *See Staff Memo* at 3.

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[9] The Tribes wrongly claim that "reset computation methodology . . . is distinct from the distribution of water according to the decrees." *Tribes Br.* at 7. The Water District's "reset" of the storage water rights in the fall resulted in the actual curtailment of the distribution of natural flow to Milner Irrigation District and AFRD#2 in recent years. *See Shaw Dec.*, Ex. B to *SWC Br.*

[10] The date has changed six times counting the Director's instructions to the Watermaster last fall.

None of the cases cited by the Tribes concerned a water right administration case or the interpretation of a storage water right's period of use element. *See Tribes Br.* at 5-6. Although the Director may interpret "1/1 to12/31" as not requiring a January 1st "reset" date, there is nothing in that calendar year description that denotes a "settled legal meaning." The Tribes are essentially asking for a legal ruling that the period of use element is defined by a changing accounting program that is beyond the four corners of the decree. Idaho case law forbids such an interpretation. *See e.g. State v. Gomez*, 153 Idaho 253, 257 (2012) ("If the language of the document is unambiguous, given its ordinary and well-understood meaning, we will not look beyond the four corners of the agreement to determine the intent of the parties.").

Moreover, the Tribes' strained interpretation does not comport with the Idaho Supreme Court's decisions where it reviewed terms with settled legal meaning in their particular contexts (i.e. the terms "working day," "occurs," or "determination."). *See Tribes Br.* at 5-6 (cases cited). Those cases are clearly distinguishable and did not involve what is at issue in this case. Indeed, nothing about the Tribes' argument demonstrates a "settled legal meaning" for the decrees' period of use. Just the opposite, the Tribes' interpretation is a truncated historical view of storage right administration that has admittedly changed four times during that timeframe. *See Staff Memo* at 3. If anything, the meaning of the water rights' period of use is "unsettled." As such, the Director should at a minimum reject the Tribes' claim that the period of use has "settled legal meaning." *See e.g. Rangen*, 159 Idaho at 808 ("adopting Rangen's perspective would render its partial decrees less, rather than more, clear.").

Further, the Tribes' misinterpret the Supreme Court's decision in *In re SRBA (Basin-Wide Issue 17)*, 157 Idaho 385 (2014). Contrary to the Tribes' claim, the storage water right's period of use element was not at issue in that case. Instead, the Court considered "whether the

SRBA court erred in its designation of Basin-Wide Issue 17." 157 Idaho at 391. The Court answered that question in the affirmative. *See id.* at 392. The Court's description of the example periods of use for "irrigation storage" and "irrigation from storage" did not decide anything. *See State v. Hawkins*, 155 Idaho 69, 74 (2013) ("If the statement is not necessary to decide the issue presented to the appellate court, it is considered to be dictum and not controlling."). While the Court observed than an "irrigation from storage" period of use matches up to an irrigation season (i.e. March 15 to November 15) and that period is less than a full calendar year, that does not mean the Court found that the full calendar year "irrigation storage" period of use is "unlimited" in the sense of approving an inter-year "reset" accounting practice. Again, the issue of an appropriate "reset" date was not at issue before the Court.

Similarly, the Ada County District Court did not decide the "reset" issue in its *Ballentyne Ditch Co. (Water District 63)* decision. Although the Court recognized the partial decrees at issue "unambiguously provide for year-round use," the Court did not confirm the Water District 01 "reset" practice. The Tribes admit that the Director did not address the "reset" provision in that case. *See Tribes Br.* at 10, n. 3. Again, the Court simply recognized that water can be distributed to the storage water right any day in the year, not how those rights should or should not be administered under the facts in this case, or what the appropriate reset date is, or what should be the appropriate annual period of administration.

Finally, Water District 01's varied practice the past 29 years does not establish a "settled legal meaning" for the storage rights' decreed period of use. Importantly, the storage water rights were at issue and subject to litigation during that time in the Snake River Basin Adjudication (SRBA). No party, to the Coalition's knowledge, objected to the Director's

recommended "1/1 to 12/31" period of use.[11] Further, the Water District interpreted the storage water rights' period of use as providing a November 1st "reset" from 1978 to 1987.[12] *See Staff Memo* at 3. In addition, the rights were administered differently prior to 1978. *See Shaw Dec.*, Ex. B to *SWC Br.* Again, the changed practices are anything but "settled," and demonstrate why it is necessary to have finality and certainty when administering water users' water rights, or real property right interests. *See State v. Nelson*, 131 Idaho 12, 16 (1998); *Rangen*, 159 Idaho at 806.

In sum, contrary to the Tribes' argument, there is no "settled legal meaning" in the Water District's or the Department's historic administration of the water rights. Consequently, the Director should reject the Tribes' argument that the "1/1 to 12/31" period of use means some version of a "reset" practice used by Water District 01 within the last 29 years.

II. The Palisades Contracts Preclude Injury to Existing Diversions.

The Tribes contend that the BIA Contract's definition of "irrigation season" and "storage season" dictate Water District 01's administration of the storage water rights.[13] *See Tribes Br.* at 14, 17. The Tribes fail to acknowledge that AFRD2 does not have a Palisades storage contract. More importantly, the Tribes fail to disclose all of the BIA's Palisades Contract's terms and how those terms would affect administration. If the Director reviews the contracts, then he must consider all provisions, not just the isolated definitions offered by the Tribes. *See Henderson v.*

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[11] The Coalition has not reviewed every storage water right recommendation or subcase for every reservoir in Water District 01. Further, Idaho Power Company objected to the limiting remarks in the Director's Report for 01-2064, not the "1/1 to 12/31" period of use element.

[12] The Tribes allege the reset practice was "first agreed-to and authorized by the Water District 01 members in 1978." *Tribes Br.* at 22. Its unclear what exact reset practice is referred to in this statement, however the Water District used a November 1st reset date from 1978 to 1987. If anything was "agreed to" it would have been that date, not the one requested by the Tribes (presumably September 15th, date used from 1997-2017, but that is not the date that has been used every year for the last 29 years).

[13] PWUI similarly contends, while not binding, that the contracts inform the exercise of the Director's discretion in determining the Reset Date. *See PWUI Br.* at 6-8 ("The Contract contemplates that storage water begins accruing from October 1st of each year").

Henderson Inv. Properties, LLC, 148 Idaho 638, 640 (2010) ("When interpreting a term of a contract, this Court is obligated to view the entire agreement as a whole to discern the parties' intentions.").

The Tribes further argue that these "dates also reflected the practice in place at the time of the Fort Hall Agreement and utilized ever since."[14] *Id.* Finally, the Tribes assert unilateral interpretations and understandings of the meaning of the Fort Hall Agreement. *Id.*

Contrary to the Tribes' arguments, the BIA Contract's definitions of the "irrigation season" and "storage season" are not included in the elements of the storage water right decrees. *See* Ex. A to *SWC Opening Br.* (ex: 01-2064). The storage rights' "irrigation from storage" period of use is "3/15 to 11/15" and the "irrigation storage" period of use is "1/1 to 12/31." *Id.* The BIA Contract, by contrast, uses "April 1 to October 31" for the "irrigation season," and "October 1 of one year and ending during the next year when, as to the particular reservoir, no more water is available for storage" for the "storage season." *See* Ex. A (BIA Contract at 2, ¶ 3.c and d); *see also*, Ex. A to *PWUI Br.* Neither BIA nor the Tribes objected to Reclamation's notices of claim that included periods of use differing from the contract definitions.

Further, the Tribes have no basis to seek an interpretation of the For Hall Agreement in this contested case. Notably, any dispute as to its interpretation and implementation must first be addressed by the Intergovernmental Board. *See Fort Hall Agreement* at 63, Art. IX. As such, the Director should decline to determine the meaning and intent of the Fort Hall Agreement in this proceeding.

Even if the Director finds that the Watermaster can use a "reset" date prior to January 1st, the reservoirs must be operated (and the water rights administered) in a manner that does not

[14] The Fort Hall Agreement was executed in July 1990. The Water District changed the "reset" date to August 15th that year. The District changed it again in 1997 to September 15th. Contrary to the Tribes' assertion, October 1st has not been utilized as the "reset" date "ever since" the time of the Agreement.

injure existing diversions at the time Palisades Reservoir was constructed and brought into operation with the other reservoirs. Importantly, the Palisades Contracts include the following provision that is binding upon all spaceholders, including the parties to this contested case (example BIA Contract):

> 6. (a) ***Reclamation, in its operation of American Falls and Minidoka Dams during the storage season of each year is required to pass through enough water to satisfy existing diversion rights in the stretch of the river down to and including Milner Dam*** and certain power rights below Milner Dam, and has the privilege under an existing decree to use at Minidoka Dam 2,700 cubic feet per second of water for the development of power.

Ex. A; BIA Contract at 7 (emphasis added).

Even if the contracts' "storage season" beginning October 1st applies, it's clear that Reclamation has a duty to pass through "enough water to satisfy existing diversion rights" to finish the irrigation season.[15] In this case, that would include diversions under the natural flow rights held by AFRD#2 and Milner. As such, any interpretation of the partial decrees' period of use element that implicates the Palisades Contracts must take that provision into account as well.

IV. The Varied "Reset" Practice was Not the Basis of the2012 SRBA Stipulation.

Pocatello claims the "continuation of historical administration (including reset) was the basis" of the 2012 Stipulation entered into for the storage water right subcases in the SRBA. *See Poc. Br.* at 7. Pocatello doesn't define "historic administration" yet the city apparently supports the reset practice employed between 1997 and 2017 (i.e. September 15th). *See id.* at 13. Further, Pocatello doesn't allege that the Stipulation has been breached by any party, including the Coalition.

[15] Nothing in the BIA Contract, including the definition of "irrigation season," implies that the storage water rights can be administered in that period in a manner that would injure existing diversion rights, i.e. natural flow irrigation rights. Just the opposite the contract contemplates stored water being delivered for use during the "irrigation season" and storage occurring only during the "storage season." *See* Ex. A (BIA Contract at 3, ¶ 4.c).

The 2012 Stipulation included certain language addressing the elements and remarks on the storage water rights. *See* Ex. 4 to *Poc. Br.* (¶¶ 2-10). As noted earlier, however, no party objected to the "1/1 to 12/31" period of use element, or claimed that a certain "reset" practice was included within that definition. Stated another way, the period of use was simply not discussed or at issue. Moreover, the elements objected to and the issues actually raised were settled with similar prefatory language: "Consistent with the temporary upstream, annual, and permanent storage exchange provisions in the Palisades 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 ..." *Id.* That general reference did not mean the parties stipulated to a particular "reset" practice. Even if it did, Pocatello does not identify which "reset date" was agreed upon (i.e. November 1st, October 1st, August 1st, etc.). Clearly, Pocatello's reliance upon the 2012 Stipulation is misplaced.

Further, Pocatello's current argument and efforts to use the Stipulation against any signatory party in this proceeding violates the terms of the agreement. The Stipulation expressly provides:

> 13. The Parties agree, and the Department concurs, that this Stipulation has been reached in the process of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, without any determination on the merits. ***The Parties agree, and the Department concurs, that nothing herein or resulting herefrom shall constitute an admission against interest or be used in any proceeding as legal support or precedent, except as to effectuate this specific stipulation.***

Stipulation at 7 (emphasis added); Ex. 4 to *Poc. Br.*

As set forth above, Pocatello previously agreed that the Stipulation would not be used "in any proceeding as legal support or precedent" including as constituting an admission against interest. Pocatello's current argument cuts against the above provision. Therefore, the Director

should reject Pocatello's argument that the Stipulation specifically addressed a particular "reset" practice which is not identified anywhere in the agreement.

V. The Tribes' Claim Regarding the Oct. Letter is Beyond the Scope of this Case.

In their final request the Tribes take issue with the Director's October 27, 2017 letter and ask him to "correct that error . . . in this proceeding." The Tribes' request goes beyond the scope of the legal question as well as the subject of this contested case. Whereas the Tribes are essentially asking the Director to undo the 2017 accounting in the context of this case, that request should be denied.

First, the Tribes and Pocatello challenged the Director's letter and requested a hearing on the same pursuant to Idaho law. In response the Director designated a separate contested case which was stayed. *See Order Granting Petitions for Hearing; Order Staying Hearings* (P-WRA-2017-003; 004; Nov. 20, 2017). While the Director acknowledged that the "question of the proper reset date for the onstream Snake River Reservoir water rights" is already before him, he did not state that the Tribes could pursue their requested relief in this case. Instead, the Tribes' case was stayed. The Director should deny the Tribes' request on this issue accordingly.

CONCLUSION

In summary, the parties appear to have substantial agreement on seeking to continue a "reset" practice that allows the storage water rights to begin filling sometime in the fall rather than on January 1st. The Coalition seeks a reasonable resolution that would help sustain maximum fill of the reservoirs while not injuring natural flow water rights existing prior to the creation of Palisades Reservoir.

If the history of administration is to be considered, the entire history of administration should be considered, not just administration since 1988. The changes in administration starting

in 1988, which were a direct result of the operations of an accounting program, were not agreed to or mandated through any formal proceeding or process. No one has argued that Milner and AFRD2 subordinated their natural flow rights. It appears this matter can be resolved in a fashion that continues fall storage operations while allowing water rights existing at the time of the creation of Palisades Reservoir to finish out the irrigation season for the benefit of their landowners.

DATED this 26th 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 26th day of January, 2018, I caused to be served a true and correct copy of the foregoing **SURFACE WATER COALITION'S RESPONSE BRIEF RE: LEGAL QUESTION** by email and U.S. mail to IDWR, and by electronic mail to the parties:

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Travis L. Thompson

Exhibit
A

UNITED STATES
DEPARTMENT OF THE INTERIOR

MEMORANDUM OF AGREEMENT
Between
THE BUREAU OF RECLAMATION
and
THE BUREAU OF INDIAN AFFAIRS
Relating to
Water Supply for
MICHAUD DIVISION OF THE FORT HALL INDIAN RESERVATION, IDAHO

Contents

(c) "Irrigation season" shall mean a period of each year beginning April 1 and ending October 31 of that year.

(d) "Storage season" shall mean, with respect to the reservoir involved, 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.

(e) "Reservoir system" shall mean the existing and authorized Federal reclamation reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

(f) "Upper valley" shall mean the irrigated areas of the Snake River Basin that are served by canals diverting from the Snake River and its tributaries above American Falls Dam.

(g) "Lower valley" shall mean the irrigated areas of the Snake River Basin that are served by canals diverting from the Snake River and its tributaries between American Falls Dam and Milner Dam.

(h) "Watermaster" shall mean the officer of the State of Idaho charged by law with the distribution of Snake River water in the lower and upper valleys, or such other officer properly authorized by law and designated by mutual agreement of the Secretary and the Advisory Committee.

(i) "Advisory Committee" shall mean the committee defined by article 14 of this agreement or its duly authorized representative.

(j) "Delivery" when used herein in relation to stored water, shall mean direct delivery from the reservoir system and delivery accomplished in the manner provided in article 8.

No such temporary holding of water or such annual exchanges shall, however, deprive any entity of water accruing to space held for its benefit.

(b) During any storage season, Reclamation, after consultation with the Advisory Committee, may release stored water from Palisades Reservoir for the maintenance of power production at Palisades Dam powerplant, and may store such water in American Falls Reservoir. The release of such water will be confined, however, in storage seasons when it appears that American Falls, Palisades, and Jackson Lake Reservoirs will fail to fill to water required for the maintenance of a minimum firm power production (estimated to be about 11,000,000 kilowatt-hours per month at an average production of 15,000 kilowatts) and which can be stored in American Falls Reservoir, and no such release shall be made that will preclude the later delivery of water, by exchange or otherwise, to the upper valley entities entitled thereto.

Winter Power Operation; Minidoka Powerplant

6. (a) Reclamation, in its operation of American Falls and Minidoka Dams during the storage season of each year is required to pass through enough water to satisfy existing diversion rights in the stretch of river down to and including Milner Dam and certain power rights below Milner Dam, and has the privilege under an existing decree to use at Minidoka Dam 2,700 cubic feet per second of water for the development of power. While Reclamation must operate the American Falls and Minidoka Dams so as not to interfere with these third-party rights, it will be the objective of Reclamation in the operation of both its American Falls and Minidoka powerplants to curtail the release of

additional water from American Falls Reservoir for power production at those powerplants during the storage season of any year whenever operation of those powerplants to the full extent of their respective water rights for power production would result in loss of irrigation water otherwise storable in the reservoir system. Accordingly, except as it is determined by the Secretary that additional water may be passed through American Falls and Minidoka Dams without the loss of water that could be stored for irrigation in the reservoir system, Reclamation will, during each storage season beginning October 1, 1952, and continuing so long as the provisions of (c) of this article remain operative, limit the release of water through those dams as follows:

> To the amount of water required to provide flows below Minidoka Dam sufficient to meet existing diversion rights in the reach of the river through Milner Dam and the power rights required to be recognized under the provisions of the contract of June 15, 1923, between the United States and the Idaho Power Company (Symbol and No. Ilr-733), as those diversion and power rights may be modified from time to time.

To the extent that it is practicable to do so, the Advisory Committee will be informed in advance of any plans for the release of water in excess of the foregoing limitations; and that Committee will be furnished written reports, as of the close of the storage season of each year, showing, among other things, the releases actually made and the minimum releases required to be made.