

APR 17 2019

DEPARTMENT OF
WATER RESOURCES

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North Side Canal Company, and Twin Falls
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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

**STIPULATION AND JOINT MOTION
FOR ORDER APPROVING
STIPULATION / JOINT MOTION FOR
STAY**

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 (collectively "Surface Water Coalition" or "SWC"), Fremont Madison Irrigation District, Idaho Irrigation District, North Fork Reservoir Company, and New Sweden Irrigation District. (collectively "Upper Valley Storage Holders"), the

Coalition of Cities,¹ Idaho Power Company, Aberdeen-Springfield Canal Company, Palisades Water Users, Inc. and the City of Idaho Falls (collectively “PWUI”), the City of Pocatello, the Shoshone-Bannock Tribes, and the United States Department of Interior, Bureau of Indian Affairs (“BIA”), by and through their undersigned counsel of record, and pursuant to the Department’s Rules of Procedure 557 and 612 (IDAPA 37.01.01), hereby stipulate and jointly move the Department for an order approving the same, for an interim order including the following procedures in Water District 01 water right administration and accounting beginning in the 2019 irrigation season, and for an order staying the pending contested case to permit the parties to seek a remark adding this language to the final decree in the Snake River Basin Adjudication pursuant to a motion under IRCP 60(b).

PROCEDURAL BACKGROUND

Milner Irrigation District sent a letter to the Director of the Idaho Department Water Resources (IDWR) and the Water District 01 Watermaster on August 18, 2017. Milner inquired into the Basin 01 storage water rights “reset” accounting and how it would be implemented in the fall of 2017 vis-à-vis Milner’s 1916 natural flow irrigation water right 01-17. The Director responded by initiating this contested case. *See Notice of Prehearing Conference; Order Setting Deadline for Petitions to Intervene* (October 5, 2017) (“*Notice Order*”). The Director published the *Notice Order* in newspapers throughout Water District 01 and provided any interested person or water user the opportunity to appear and intervene.

The above-named parties all filed motions and were granted intervention. On November 20, 2017 the Director issued an order requesting a staff memorandum and setting deadlines for the parties to file and respond to statements of issues. Water District 01 staff filed its *Staff*

¹ The Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone and Wendell.

Memorandum on December 1, 2017. Various parties then submitted statements of issues and responses. On January 3, 2018 the Director issued his *Order re: Statements of Issues and Responses; Order Adopting Deadlines; Amended Notice of Status Conference (“Legal Question Order”)*. The Director requested the parties to brief the following legal question:

[W]hether the plain language of the “period of use” element of the storage water right partial decrees for federal onstream reservoirs in Water District 01 that specifies “1/1 to 12/31” as the time period for “irrigation storage” requires that the reset date for those rights be January 1.

Legal Question Order at 4.

Various parties then filed opening and response briefs addressing the above-referenced question. On February 7, 2018 the parties filed a *Stipulated Motion for Stay* requesting the Director to stay a pending decision on the legal question and allow the parties 30 days to continue settlement negotiations. The Director granted the motion. A second stipulated motion was filed on March 2, 2018, requesting the Director to continue the stay and vacate the previously scheduled hearing. The Director granted this motion and conducted a status conference on March 20, 2018. At the status conference the parties reported a settlement in principle and scheduled a follow up status conference for April 26, 2018. At that point, the parties reported that they had an agreement on the general outline of a settlement and entered into a stipulated agreement for an interim order to govern the accounting and administration of storage reset for the 2018 irrigation season, which was approved by the Director on June 1, 2018. *See Interlocutory Order Accepting 2018 Settlement*. The parties informed the Director, however, that they were still working on negotiating an agreement for a means of providing a “permanent” resolution to this matter in a manner that would satisfy all parties.

The parties report through this stipulation and motion that they have reached such agreement. For several reasons related to the nature of the settlement, the interests of the parties,

and the nature of the rights being settled, effectuating the settlement will involve the parties submitting the operative language of the settlement to the Snake River Basin Adjudication (SRBA) district court through an IRCP 60(b) motion to re-open the decree for the limited purpose of entering the operative language as remarks in the Final Decree.

FACTUAL BACKGROUND

The parties and Water District 01 have identified various facts concerning administration of storage water rights in the Upper Snake River Basin above Milner Dam. In general, the administration has changed over time, including after implementation of the computerized accounting program beginning in 1978. Beginning in 1988, the storage water rights accounts were “reset” in the fall each year, whereby the rights were administered with all other water rights by priority until the following season’s “date of allocation.” The annual date of reset changed over time as well (i.e. October 1st, August 1st, September 15th); the Final Decree is silent on the reset date for the storage water rights. Further, the Lake Walcott storage water right (1-219) previously contained a decreed and licensed diversion rate limitation of 2,500 cfs for the rate of storage in the reservoir. IDWR removed the diversion rate limitation from the water right’s recommendation. Ultimately the court decreed the water right without the diversion rate limitation as well, leaving only an annual storage volume quantity.

The parties dispute the legal significance of the storage water rights prior administration. The parties have also raised various issues in responding to the Director’s threshold legal question. In the interests of settlement, this stipulation attempts to reach an equitable solution regarding the issue of “storage reset” through stipulated remarks to be included on the storage right decrees, including a diversion rate limitation for Lake Walcott (1-219).

STIPULATION

The parties hereby stipulate to the following:

1. Operative Language for Storage Reset: The parties agree to the following operative language (the “Operative Language”), which would direct the implementation of the following procedures and limitations for the reset and accounting of storage water right volumes in Water District 01:

Other Provisions Necessary for Definition or Administration of this Water Right [to be added to 1-219 et al.]:

September 15th shall begin the annual period for water right accounting in the Upper Snake River Basin upstream of Milner Dam. The September 15th beginning date for this annual period is known as the “reset date” for reservoir volumes. The “reset date” allows previously satisfied reservoir water right volumes to begin filling again for the next annual storage volume period. The annual storage volume period will extend from September 15th to the following September 14th. Consistent with Section 8.3 of the 1990 Fort Hall Indian Water Rights Agreement, nothing in this provision is intended to impact the rights described and administered pursuant to that Section.

1-219 [Quantity Element]:

The rate of diversion to storage shall be limited to 2,500 cfs from September 15th through and including October 15th.

2. Issuance of Interim Order and Stay of Proceedings by IDWR: The parties intend to present the Operative Language to the SRBA Court along with a motion pursuant to IRCP 60(b), for inclusion of the Operative Language, or such terms as required by the Court, as remarks in the SRBA Final Decree. The parties hereby move the Director for an order staying this contested case pending a decision by the SRBA Court on said motion, and further, in the interim, to instruct the Water District 01 Watermaster to apply the Operative Language to the accounting and administration of the storage water right volumes in Water District 01 until the SRBA Court rules on the 60(b) motion.

3. Additional Stipulation. The parties agree not to contest, oppose, object to or otherwise challenge the Shoshone-Bannock Tribes' assertion that pursuant to Section 8.3 of the Fort Hall Agreement and consistent with historical water right administration in Basin 27, the Blackfoot Reservoir and Gray's Lake have been and should continue to be administered separately from water rights in Water District 01.

4. Approval of Stipulation and Issuance of Interim Order by IDWR. The parties agree to support the Joint Motion for the orders set forth below. If for any reason IDWR does not approve the Stipulation and issue the orders pursuant to the terms of this Stipulation, this Stipulation is null and void and shall have no effect, and the parties shall have the option to file a motion to lift the stay in this contested case.

5. Stipulation Not to Be Used Against the Parties. The parties agree that this Stipulation has been entered into based upon good faith negotiations for the purpose of resolving legal disputes, including pending litigation, by compromise and settlement and that nothing in this Stipulation, or any offers or compromises made in the course of negotiating this Stipulation, shall be construed as admissions against interest or tendered or used as evidence to show the validity or invalidity of any water right claims made by the parties, or as an admission or concession of wrongdoing or liability, or shall be used in any manner by any party in any future administrative or judicial proceedings, other than those seeking approval of this Stipulation by IDWR, for interpretation or enforcement of this Stipulation, or for a purpose contemplated by Idaho Rule of Evidence 408.

6. Reservations. The parties agree that this Stipulation has been entered into based upon good faith negotiations for the purpose of resolving legal disputes, including pending

administrative litigation, by compromise and settlement and that nothing herein shall be construed as precedent in any other proceeding or context.

7. Voluntary Execution. This Stipulation was entered into and executed voluntarily by the parties in good faith, and without any fraud, misunderstanding, overreaching, misrepresentation, duress, or undue influence.

8. Binding Effect. This Stipulation shall be binding on any and all successors, assigns, heirs, executors, and administrators of each of the parties.

9. Effective Date. This Stipulation shall become effective upon execution by all of the parties.

JOINT MOTION FOR ORDER APPROVING STIPULATION

The parties hereby jointly move IDWR to approve the foregoing Stipulation and issue an order incorporating the same into Water District 01 water right administration and accounting procedures. The parties further request that this procedure be implemented starting in the 2019 irrigation season. The parties intend to present the joint motion, including any evidence required by IDWR to approve the same, at a hearing scheduled at the Director's convenience.

DATED this 10th day of April, 2019.

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson
Travis L. Thompson

*Attorneys for A&B Irrigation District,
Burley Irrigation District, Milner Irrigation
District, North Side Canal Company, and
Twin Falls Canal Company*

FLETCHER LAW OFFICE



W. Kent Fletcher

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

DATED this 12th day of April, 2019.

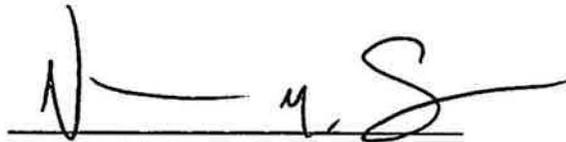
BARKER ROSHOLT & SIMPSON LLP



John K. Simpson
Attorneys for Idaho Power Company

DATED this 12 day of April, 2019.

PARSONS BEHLE & LATIMER

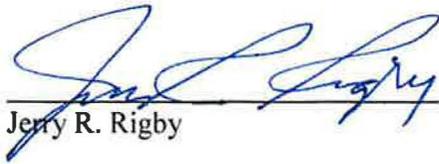
A handwritten signature in black ink, appearing to read "N. M. S.", written over a horizontal line.

Norman M. Semanko

Attorneys for Aberdeen-Springfield Canal Company

DATED this 4th day of APRIL, 2019.

RIGBY ANDRUS & RIGBY, CHTD.



Jerry R. Rigby

*Attorneys for Fremont Madison Irrigation District,
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and New Sweden Irrigation District*

DATED this 10th day of April, 2019.

HOBBS STRAUS DEAN & WALKER LLP



Ed Goodman

Attorneys for Shoshone-Bannock Tribes

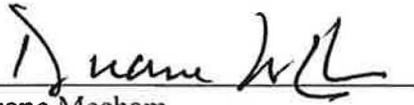
TRIBAL ATTORNEY FOR SHOSHONE-BANNOCK TRIBES



Bill Bacon

Attorneys for Shoshone-Bannock Tribes

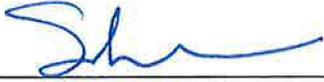
DATED this 15th day of April, 2019.


Duane Mecham

Attorneys for U.S. Dept. of Interior, Bureau of Indian Affairs

DATED this 10th day of April, 2019.

SOMACH SIMMONS & DUNN

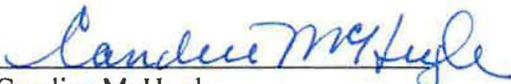


Sarah A. Klahn

Attorneys for the City of Pocatello

DATED this 3rd day of April, 2019.

MCHUGH BROMLEY PLLC


Candice McHugh

*Attorneys for the Cities of Bliss, Burley,
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Heyburn, Jerome, Paul, Richfield, Rupert,
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DATED this 12th day of April, 2019.

HOLDEN KIDWELL HAHN & CRAPO PLLC



Robert L. Harris

*Attorneys for Palisades Water Users, Inc. and
the City of Idaho Falls*

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2019, I served a true and correct copy of the foregoing *Stipulation and Joint Motion for Order Approving Stipulation / Motion for Stay* on the following by the method indicated:

| | | |
|---|--|---|
| <p>Director Gary Spackman c/o Kimberle English IDWR 322 E Front St Boise, ID 83720-0098 *** service by U.S. Mail and electronic mail gary.spackman@idwr.idaho.gov kimberle.english@idwr.idaho.gov garrick.baxter@idwr.idaho.gov</p> | <p>Sarah A. Klahn Somach Simmons & Dunn 2701 Lawrence St. #113 Denver, Colorado 80205 sklahn@somachlaw.com</p> | <p>William Bacon Shoshone-Bannock Tribes P.O. Box 306 Fort Hall, Idaho 83203 bbacon@sbtribes.com</p> |
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/s/

Travis L. Thompson