

Robert L. Harris (ISB # 7018)
rharris@holdenlegal.com
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Palisades Water Users, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF ACCOUNTING FOR
DISTRIBUTION OF WATER TO THE
FEDERAL ON-STREAM RESERVOIRS IN
WATER DISTRICT 1

**PALISADES WATER USERS, INC.
WRITTEN STATEMENT IN SUPPORT
OF CURRENT WATER DISTRICT 1
ACCOUNTING METHODS**

PALISADES WATER USERS, INC., (hereinafter "PWUP"), by and through its attorneys of record, Holden, Kidwell, Hahn & Crapo, PLLC, hereby submits this written statement in support of the current accounting methods used by Idaho Water District 1 ("Water District 1"). This statement is submitted pursuant to the *Notice of Contested Case and Formal Proceedings, and Notice of State Conference* (the "Order") issued by Director Gary Spackman (the "Director") of the Idaho Department of Water Resources ("IDWR") on October 22, 2013. The *Order* permits the submission of this statement in support of "how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs in Water District 1 . . ." *Order* at 6.

I. Introduction and Brief Background of Water District 1.

As noted by the Director in the *Order*, pursuant to Idaho Code § 42-602 *et seq.*, the State of Idaho, acting through IDWR, is charged with the orderly distribution of water consistent with the prior appropriation doctrine. Water District 1 is the instrumentality by which IDWR

administers water rights in the Upper Snake River Basin. Tens of thousands of acres are irrigated within Water District 1.

Water District 1, in coordination with local watermasters, delivers natural flow and storage water pursuant to the prior appropriation doctrine and other applicable Idaho law. This is accomplished by (1) computing daily reach gains in the system by using daily United States Geological Survey (USGS) river data, reservoir data, and diversion dates for each river reach; (2) inventorying the exercise of valid water rights based on IDWR's records (priorities, flow rates, and volume limitations) for diversions diverting water; and (3) distributing natural flow and storage water according to the water right requirements and supplies available to each diversion in each reach. In conjunction with the United States Bureau of Reclamation ("Bureau") and others, Water District 1 manages the storage and release of water in the Upper Snake River Reservoir System, which consists of Milner Reservoir, Lake Walcott, Jackson Lake, Henry's Lake, American Falls Reservoir, Island Park Reservoir, Grassy Lake Reservoir, Palisades Reservoir, and Ririe Reservoir. These reservoirs have a storage capacity of nearly 4.2 million acre-feet.

II. Statement in Support of Accounting for Distribution of Water to the Federal On-stream Reservoirs.

PWUI is fully supportive of the accounting methods of Water District 1 and believe its methodologies fully comply with the prior appropriation doctrine established under Idaho law, policies of the Idaho Water Resource Board, and other Idaho law.

It is unclear what concerns with Water District 1 accounting are being raised because the *Order* does not provide any specifics other than to say that "the Bureau and some water users have questioned or objected to the accounting methodologies and procedures for 'counting' or 'crediting' water towards the satisfaction or 'fill' of water rights for the federal on-stream reservoirs in Water District 1 . . ." *Order* at 2. If the Bureau and the other water users are objecting to Judge Wildman's decision on Basin-Wide Issue No. 17¹ or the principles espoused in that opinion, then these generalized objections to the Director are clearly misplaced. Ultimately, the Idaho Supreme Court will determine whether Judge Wildman's rationale and

¹ Basin-Wide Issue No. 17 is discussed in more detail below.

holding on this issue was correct and in accordance with the prior appropriation doctrine, and the Director will be bound by that precedent. If the objections are specific to Water District 1's accounting procedures outside of the Basin-Wide Issue No. 17 decision, they are likely related to objections raised in that decision, which we believe are unwise.

A. Basin-Wide Issue No. 17 and Prior Appropriation.

In order to ensure PWUI's support of Water District 1's accounting methods is clear, it is important for contextual purposes to understand Basin-Wide Issue No. 17 from the Snake River Basin Adjudication ("SRBA") which is currently on appeal to the Idaho Supreme Court. This is because it appears that some of the concerns voiced to the Director by the "Bureau and some water users" may stem from this legal proceeding.

On September 21, 2012, SRBA Judge Eric Wildman designated an issue as Basin-Wide Issue No. 17—shorthandedly referred to as the "second fill" issue—to answer the following question:

Does Idaho law require a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control?

Order Designating Basin-Wide Issue, In re SRBA, Subcase No. 00-91017, at 7 (Sep. 21, 2012). A basin-wise issue is a broad, general issue of law that applies to all water rights, or a designated block of water rights within a specified administrative basin, in the Snake River Basin. See Idaho Code § 42-1412(6) (water right decrees may include "such general provisions necessary for the definition or efficient administration of the water rights."). The practical result of answering the second fill question is that if the answer is yes, then a general provision remark should be added to the SRBA partial decrees for certain storage water rights. If the answer is no, then no general provision is necessary, and the SRBA partial decrees will be limited by the plain terms of its elements.

The parties to Basin-Wide Issue No. 17 before the SRBA Court "coalesced into two groups based on how they answer the subject question." *Memorandum Decision, In re SRBA, Subcase No. 00-91017*, at 8 (Mar. 20, 2013) (hereinafter, "Memorandum Decision"). The legal

positions advocated by the two groups—referred to by Judge Wildman as the “Petitioners”² and the “Objectors”³—were summarized by Judge Wildman as follows:

Petitioners:

- [1.] The Petitioners assert that Idaho law permits a storage right holder to refill his storage right, under priority, when water diverted and stored under that right is used by the reservoir operator for flood control purposes.
- [2.] They assert the right to priority refill is inherent in the nature of a storage water right.
- [3.] Since they assert this is the state of Idaho law, it is their position that no remark is necessary on the face of a storage right to authorize such priority refill.
- [4.] The Petitioners contend that a storage right holder is entitled to put to the storage right’s end use that volume of water set forth in the quantity element of the right.
- [5.] If water diverted and stored under a storage right is used for flood control purposes by the reservoir operator, then it is the Petitioners’ position that the storage holder is entitled to refill that space, under priority, to ensure a sufficient quantity of storage water to complete the right’s end use.

Objectors:

- [1.] The Objectors assert that allowing a storage right holder to refill a storage water right under priority where water diverted and stored pursuant to that right is used by the reservoir operator for flood control purposes is contrary to Idaho’s doctrine of prior appropriation.
- [2.] Specifically, they assert that priority refill would
 - (1) unlawfully result in an un-quantified water right,
 - (2) constitute an unlawful enlargement of the storage water right, and
 - (3) conflict with the requirement of maximizing beneficial use and minimizing waste of water.

² The entities comprising the Petitioners are the Idaho Power Company, the United States Bureau of Reclamation, the Boise Project Board of Control and New York Irrigation District, the American Falls Reservoir District No. 2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, Twin Falls Canal Company, the Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers’ Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

³ The entities comprising the Objectors are the State of Idaho, the Fremont-Madison Irrigation District, Blackfoot Irrigation District, Idaho Irrigation District, United Water Idaho, Inc., and the City of Pocatello.

[3.] Therefore, the Objectors contend that any remark that authorizes storage refill, under the priority of the storage right, in excess of the licensed or decreed quantity would be contrary to Idaho law.

Memorandum Decision at 3.

In making these arguments, the definition of the seemingly straightforward term “fill” was asserted by the Petitioners and Objectors two very different ways:

The Court notes that the term “fill” may be used to describe (1) a reservoir physically filling with water, or (2) decreed volume of a storage water right being satisfied (i.e. when the total quantity that has been accounted to storage equals the decreed quantity). The distinction between the two uses of the term is significant, as there may be situations where the storage water rights associated with a particular reservoir are considered filled or satisfied even though the reservoir has not physically filled with water. Many of the reservoirs implicated in this proceeding are administered as a unified system where storage space can be exchanged between reservoirs within the system. For example, Palisades Reservoir can be holding and storing water that is decreed to American Falls Reservoir. As a result, the storage water rights in a reservoir may be considered filled or satisfied even though available space may exist in the reservoir to which the right was decreed.

Memorandum Decision at 9. The second definition of “fill” described in the above paragraph was adopted by Judge Wildman in his opinion:

For the purposes of this opinion, the term “fill” or “filled” is used to describe the decreed volume of a storage water right being satisfied.

Id.

Ultimately, Judge Wildman’s answer to the question posed by Basin-Wide Issue No. 17 was “no”—a general provision authorizing refill of storage rights in priority violated the prior appropriation doctrine:

The Court holds that under the prior appropriation doctrine established under Idaho law, a senior storage water right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights once. A remark authorizing such priority refill would be contrary to Idaho law. The fact that water diverted and stored pursuant to a valid storage water right is used by the reservoir operator for flood control purposes does not alter this analysis, *assuming, as the term “refill” necessarily implies, the storage right has been filled once during the period of use under priority.*

Id. at 13-14 (italics in original). Judge Wildman's decision is now on appeal to the Idaho Supreme Court.

Judge Wildman's decision articulated what may be conveniently termed the "one-fill" rule, which means that a storage water right holder may take more than the stated annual volume limitation on the water right *if and only if* all other water rights on the system have been, or are being, satisfied—i.e., generally during high runoff periods when there are "free river" conditions such that plenty of water available to all users. This means that if water is both physically available at a dam and water is in priority for diversion based on the priority date of the reservoir's water right, those flows count toward the volumetric quantity limit listed on the face of the storage water right *regardless of what the storage right holder actually does with the water*. The meter is running, so to speak. The storage right holder may storage the water for irrigation, or he may let the in-priority flow simply go by, or he may store it and then later decide to release the stored water for flood control, or he may store it and release it to perform unexpected dam repairs. It doesn't matter. The available storable inflows are counted towards the storage right holder's right until the volumetric element of his storage right is completely met, at which point, the storage right is no longer entitled to further water in priority.⁴ The one-fill rule does not mean that a reservoir cannot be physically refilled during the year. It can, but only during free river conditions when water rights *are not* being regulated by priority.

PWUI agrees with Judge Wildman's decision and the concepts encompassed by the one-fill rule because they comply with the prior appropriation doctrine. Prior appropriation not only protects senior right holders, but it also protects a junior from acts of a senior in violation of the senior's water right. See e.g., *Van Camp v. Emery*, 13 Idaho 202, 89 P.2 752 (1907) (providing that a senior may divert the quantity to which he is entitled, but once he has done so he may not impede a junior from receiving the water to which the junior is entitled).

Even though the specific accounting procedures for Water District 1 were not at issue before Judge Wildman, for purposes of PWUI's statement in support for this contested case concerning Water District 1 accounting, it is important to recognize the overarching principles from the decision because we understand that Water District 1 accounts for water in accordance

⁴ For a more well-written and thorough explanation of these concepts, see *Brief on Respondent United Water Idaho, Inc.*, filed in conjunction with the appeal to the Idaho Supreme Court.

with the one-fill rule, and by extension, the prior appropriation doctrine. Water District 1's accounting makes water available to junior rights once the storage rights' volumetric limits are met, even if the reservoir to which the reservoir right is associated is not physically filled. This is in consistent with Judge Wildman's definition of the term "fill."

Lastly, it is important to recognize this is not a storage water right issue, but a prior appropriation issue. It may seem unusual for PWUI to be opposed to the Bureau's position because PWUI and the Bureau are the parties to a contract for PWUI's storage space.⁵ But the potential for abuse by those entitled to water from a different reservoir with a more senior water right, such as American Falls Reservoir, is real. American Falls spaceholders and the Bureau could operate American Falls Reservoir in a manner where it stays just one acre-foot shy of being physically filled, and under the theory advanced in the Basin-Wide Issue No. 17 proceedings of an un-quantified water right, these spaceholders could demand releases of water from Palisades under their senior right in excess of its stated volume when that water should instead be available to junior rights, such as the Palisades water right. As Judge Wildman described, the prior appropriation doctrine protects a junior from acts of a senior in violation of the senior's water right. PWUI is the beneficiary of a relatively junior Palisades water right, and is entitled to protection from abuse by seniors under the prior appropriation doctrine.

In short, PWUI is fully supportive of Water District 1's accounting procedures because they are based on the overarching principles contained in Judge Wildman's opinion, which we believe fully accord with the prior appropriation doctrine.

B. Water District 1 Accounting Specifics.

The *Order* describes the objections "the Bureau and some water users" have to Water District 1's accounting procedures to be directed toward the procedures for counting of "fill" of storage water rights. As stated above, to the extent these are generalized objections towards Judge Wildman's Basin Wide Issue No. 17 decision described herein, these objections to the Director have been made in an incorrect forum. They should, and will, be made to the Idaho Supreme Court.

⁵ The contract is dated March 25, 1960, numbered as 14-06-100-1881, and is entitled "UNITED STATES DEPARTMENT OF THE INTERIOR Bureau of Reclamation Minidoka and Palisades Projects Idaho Contract PALISADES WATER USERS, INCORPORATED Concerning Storage Capacity in Palisades Reservoir PALISADES WATER USERS, INC. WRITTEN STATEMENT IN SUPPORT OF CURRENT WATER DISTRICT 1 ACCOUNTING METHODS - Page 7

To the extent the objections are directed at the specifics of Water District 1 accounting, these objections are misguided. Judge Wildman articulated the general principle of how “fill” is determined, and even used a Water District 1 example in his decision:

The distinction between the two uses of the term is significant, as there may be situations where the storage water rights associated with a particular reservoir are considered filled or satisfied even though the reservoir has not physically filled with water. Many of the reservoirs implicated in this proceeding are administered as a unified system where storage space can be exchanged between reservoirs within the system. For example, Palisades Reservoir can be holding and storing water that is decreed to American Falls Reservoir. As a result, the storage water rights in a reservoir may be considered filled or satisfied even though available space may exist in the reservoir to which the right was decreed.

Memorandum Decision at 9.

Water District 1’s accounting practices that permit water allocated to a particular storage right to be physically stored in another reservoir have been in place for many years. The Director described Water District 1’s operations in his *Order* as follows:

The operations of the federal on-stream reservoirs in Water District 1 . . . are coordinated such that water licensed or decreed to one reservoir often is physically stored in a different reservoir. The reservoirs are operated in this manner to maximize storage in the reservoir system and allow the Bureau the flexibility to operate their reservoir system accommodate recreation, fisheries, and other concerns without interfering with the accrual to the reservoir water rights.

Order at 2 (Findings of Fact ¶2).

During the storage fill and release process, Water District 1 essentially treats the Upper Snake Reservoir System as one 4.2 million acre-foot reservoir where water diverted under various reservoir water rights can be stored in any of the reservoirs. The total stored is then allocated and delivered during the irrigation season in priority of the reservoir storage space based on such entities’ federal contracts with the Bureau. This allows Water District 1 to strategically store and release water supplies throughout the system where it makes sense in order to maximize retention of storage. This allows Water District 1 to take into account a number of factors. For example, some reservoirs are located within smaller watersheds, which make them more difficult to refill, and therefore, water is retained in these reservoirs during the irrigation season for as long as possible until demands can no longer be physically satisfied

and Related Matters.”

elsewhere. Water District 1 also often retains water as high up the storage system as possible. These policies are in the best interests of irrigators and other water users.

For example, we understand that the Idaho Department of Fish & Game (“IDFG”) supports and appreciates the accumulation of Palisades storage for the eventual release of manageable flood-like flows to mimic pre-Palisades conditions on the South Fork if such releases can be accomplished without negative impact to the reservoir system fill. Attached is a news release from the Bureau from May of this year explaining the benefits to Yellowstone cutthroat trout from these storage water releases. The news release quotes Roland Springer from one of the local Bureau offices describing these benefits, and concludes by stating “American Falls Reservoir will store the water passed through Palisades Reservoir to be used farther downstream.” Effectively, these releases simply moved American Falls water being held in Palisades to American Falls Reservoir. Water District 1’s operations in this regard benefit trout in the South Fork of the Snake River. Otherwise, under a different accounting regime—such as one strictly based on physical fill—spaceholders in Palisades would certainly object to evacuation of water from Palisades for this purpose, and the flexibility to operate the reservoir system to accommodate IDFG’s request to aid fishery and recreation interests will be lost.

Similarly, Water District 1’s accounting methodology provides the Bureau flexibility with its flood control operations. In a press release from June 16, 2011, a copy of which is also attached, the Bureau described its intent to increase flows from Palisades. Palisades is operated consistent with what are commonly known as “flood control curves,” which describe the required vacant reservoir space at certain times of the year based on projected runoff. In 2011, Mike Beus of the Bureau’s office acknowledged that even more flood control space than was required was made available (bolding added):

“Flows are increasing to maintain a small margin of safety **above the required flood control space**, Beus explained.”

Under a strict physical fill accounting regime, we presume that all spaceholders in Palisades would object to any releases of storage water above what is required under the flood control curves up until all downstream reservoirs with senior water rights are physically full. With the current accounting methodology and the flexibility it affords, the Bureau in 2011 was able to

orchestrate water releases in a manner that masterfully captured and managed spring runoff in order to avoid flooding along the Snake River.

While we do not know the specifics of the Bureau's complaints to the Director, we are puzzled at why they would object to these practices when they have—through press releases—described the benefits their operations provide when those benefits could only be supported and realized under the current accounting practices of Water District 1. To the extent the “some other water users” have similar objections, we are likewise confused. The current Water District 1 operations provide flexibility that results in significant and numerous benefits to the various water interests present in Idaho.

III. CONCLUSION.

PWUI is fully supportive of the accounting methods of Water District 1 and believe its methodologies fully comply with the prior appropriation doctrine established under Idaho law, policies of the Idaho Water Resource Board, and other Idaho law. We agree with the language from the *Order* that these methods maximize storage in the reservoir system and allow the Bureau the flexibility to operate their reservoir system to accommodate recreation, fisheries, and other concerns without interfering with the accrual to reservoir water rights. See *Order* at 2 (Findings of Fact ¶2). There is no reason to change Water District 1's accounting methodologies because of a few complaints when the current methodology benefits so many.

DATED this 3rd day of December, 2013.



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

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 3rd day of December, 2013.

DOCUMENT SERVED: **PALISADES WATER USERS, INC. WRITTEN
STATEMENT IN SUPPORT OF CURRENT WATER
DISTRICT 1 ACCOUNTING METHODS**

ORIGINAL TO: Gary Spackman, Director
 c/o Idaho Department of Water Resources
 Eastern Region Office
 900 North Skyline Drive, Suite A
 Idaho Falls, ID 83402-1718



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

G:\WPDATA\RLH\0691 PALISADES WATER USERS, INC\07\WD1.Comments.doc

Pacific Northwest Region
Boise, Idaho

Tweet

2

Recommend

3

Media Contact: John Redding Art Hill
(208) 378-5212 (208) 678-0461 ext 25

Released On: May 13, 2013

Snake River Flows Increasing to Benefit Native Fish

BURLEY, Idaho - The Bureau of Reclamation will increase flows in the Snake River below Palisades Dam this week to about 18,000 cubic feet per second (cfs). Each day, starting May 13, the flow will increase about 15 percent until the maximum is reached on May 18. After the high flow is sustained for two days, it will be slowly decreased. The flow will return to the 30-year average of about 13,000 cfs during Memorial Day weekend.

"One objective of this operation is to approach 20,000 cfs at the gage near Heise, approximately 48 river miles downstream of Palisades," said Roland Springer, Assistant Area Manager for Reclamation's Upper Snake Field Office. "Providing high flows at the same time that nature would provide them benefits native fish."

These water releases will not affect Reclamation's ability to meet its water delivery obligations. American Falls Reservoir will store the water that is passed through Palisades Reservoir to be used farther downstream.

The river will be fast and cold during the high flow period. Please use caution and be aware when recreating near the river.

#

Reclamation is the largest wholesale water supplier and the second largest producer of hydroelectric power in the United States, with operations and facilities in the 17 Western States. Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. Visit our website at www.usbr.gov.

Pacific Northwest Region
Boise, Idaho

Tweet

1

Recommend

0

Media Contact: John Redding Mike Beus
(208) 378-5212 (208) 678-0461 ext. 27

Released On: June 16, 2011

Upper Snake Flood Control Operations Continue

The Bureau of Reclamation will increase flows below Palisades Dam from 15,000 cubic feet per second to 17,000 cfs Thursday night to slow the rate of fill of Palisades Reservoir. Palisades Dam is located on the Snake River about 50 miles east of Idaho Falls, Idaho.

SNAKE RIVER flows below Palisades Dam were reduced last week to lessen the effect of flood flows from the Henrys Fork on the Snake River downstream of the Henrys Fork confluence. Flood control space in Palisades Reservoir and Jackson Lake Dam remains slightly more than required, but the margin is shrinking.

"As snow melts and reservoir space fills, reservoir operations must respond to changes in the weather and watershed conditions," said Mike Beus, Reclamation Water Operations Manager. "The unprecedented amount of snow that still remains this late in June will result in especially dynamic river flows."

Flows are increasing to maintain a small margin of safety above the required flood control space, Beus explained.

Although the reports of snow water equivalents over four times the average for this date are correct, the averages are now very low and falling quickly. Many of the SnoTel stations above Palisades Dam normally reach a zero recording before this date and are not considered in the computation. The snow water equivalent at this time of year is usually about 15 percent of the seasonal peak; however, this year there is a 71 percent of the average seasonal peak remaining.

Palisades Reservoir is 44 percent full and 678,000 acre-feet of empty space remains to reduce downstream flows. An additional 340,000 acre-feet of space remains in Jackson Lake Dam which is at 60 percent of capacity.

Palisades Dam was constructed by Reclamation in 1957 as part of the Palisades Project. It is a multipurpose facility that provides irrigation, flood control, hydropower, and recreation.

###

Reclamation is the largest wholesale water supplier and the second largest producer of hydroelectric power in the United States, with operations and facilities in the 17 Western States. Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. Visit our website at www.usbr.gov.