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#2 and Minidoka Irrigation District*

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

)  
) **Subcase Nos.: Attachment A**  
)  
) **DECLARATION OF DAVID B.**  
) **SHAW IN SUPPORT OF SURFACE**  
) **WATER COALITION'S JOINT**  
) **MOTION TO DECREE GENERAL**  
) **PROVISION**  
)  
)  
)  
)  
)

I, DAVID B. SHAW, hereby declare and state as follows:

1. I am over the age of 18, and if called to testify herein, I could and would testify competently to the following information based upon personal knowledge. My work address is ERO Resources Corporation, 4001 E Main Street, Emmett, Idaho 83617. My telephone number is (208) 365-7684.

2. My educational background includes Bachelor of Science and Master of Science degrees in Agricultural Engineering from the University of Idaho in 1966 and 1972, respectively. I am a registered professional engineer in the States of Idaho, Arizona, Oregon and Colorado, and a registered professional land surveyor in the State of Idaho. I continue to attend seminars and short courses in the areas of water law, water rights and applicable technology. I have made numerous presentations at seminars covering water law and water right issues, most often regarding some aspect of water right adjudication.

3. My work experience includes five years of teaching at the University of Idaho in the College of Engineering from 1968 to 1973. I was with the Idaho Department of Water Resources (department) and its predecessor agencies from November 1973 until July 1996. With the department, I served in a number of technical and administrative positions including Regional Supervisor for the department's western region from 1978 to 1985 and Adjudication Bureau Chief from 1985 to 1996. As Adjudication Bureau Chief, I was responsible for all the department's obligations in the Snake River Basin Adjudication of water rights (SRBA). The SRBA is an adjudication of all water rights in the Snake River basin in Idaho and includes about 150,000 claims to water rights. The department's obligations included serving notice of the SRBA to all potential water users, assisting claimants file their claims to water rights, investigating each state law based claim and making a recommendation as to each state law based claim to the SRBA Court. If a recommendation was protested (contested), the department was obligated to put on the evidence to justify its recommendation. My experience with the department includes successfully managing the SRBA for 11 years and resolving a variety of water right, water supply and water distribution situations.

4. Since July 1996, I have been employed by ERO Resources Corporation (ERO) providing consulting services to clients in the areas of water rights, water right adjudication, and water distribution and management. In January 2003, I became a Principal of ERO, one of employee owners of the firm. ERO is a natural resources consulting firm based in Denver, Colorado with satellite offices in Emmett, Idaho, and Durango and Hotchkiss, Colorado. ERO has a long history of, among other services, providing expertise to clients in water resource matters around the West.

5. During preparation for the Surface Water Coalition delivery call litigation, I worked with Robert (Bob) Sutter, the original author of the computerized accounting program for Water District #1, to become familiar with and learn how to run and modify the program.

6. I participated and prepared questions and comments for the department's review of the 2013 draft titled "Concepts, Practices, and Procedures Used to Distribute Water Within Water District #1."

7. I prepared the initial draft of what are now Watermaster instructions for the distribution of water to water right no. 1-6 as part of the settlement of the issues surrounding that water right in the SRBA.

8. I have reviewed numerous annual Watermaster reports for Water District #1 and its predecessor District 36 as well as annual reports from other water districts. I have also reviewed numerous daily water right accounting records from Water District #1 as well as daily accounting records from other Water Districts.

9. I have reviewed the decree in the case of Burley Irrigation District, et.al., v Henry Eagle, Watermaster, District No. 36, State of Idaho, July 10, 1968, hereinafter the Eagle Decree.

10. I currently serve as the technical representative for the Committee of Nine on the Minidoka Dam Spillway Management Technical Team.

11. The computerized water right accounting for Water District #1 was implemented in 1978. At the time, I was employed by the department and selected and installed the data processing and communication equipment that allowed the District to communicate the relevant data to Boise where the accounting program was maintained and operated.

12. Prior to the recent rebuild of Minidoka Dam and spillway, Lake Walcott was typically drawn down in the fall and early winter to protect the dam from icing damage during the winter. Lake Walcott is the furthest downstream reservoir in Water District #1 and the reservoir always fills due to its location. Prior to 1978 I could not find any record of the 1909 priority of water right no. 1-219 for Lake Walcott being exercised near the end of the irrigation season since this was the time of year storage was typically being released and the Lake level was being physically lowered. The reservoir normally filled in March but the fill time varied from February to April.

13. Prior to 1978 the 1916 priority water right no. 1-17 for Milner Irrigation District (Milner Low Lift), the 1921 priority water right no. 1-6 used by American Falls Reservoir District #2 (AFRD#2) and the 1921 priority water right no. 1-2064 for storage in American Falls Reservoir would typically come back into priority simultaneously when demand by more senior rights decreased and river discharge increased late in the irrigation season. Diversions of natural flow (normal flow) by AFRD#2 were limited to 850 cfs as described in the Eagle Decree and diversions of more than that amount were charged to storage even when the 1921 priority was being delivered.

14. Prior to 1978, American Falls Reservoir storage, for the next irrigation season, began each year when water became available for the 1921 priority water right, typically in September or October. Since American Falls Reservoir has a senior storage water right in the lower basin of Water District #1, filling the right as early as possible allows the upstream junior storage rights to begin storing water earlier in the season and maximizes the storage in the basin. Water passing American Falls Reservoir and not diverted will pass Milner Dam and be lost to Water District #1.

15. Prior to 1978, Water District #1 had a year-round Watermaster, but water delivery accounting occurred only during the irrigation season when natural flow was not sufficient to meet the demands of all water users. Year-round accounting of water delivery, including delivery to storage rights during the non-irrigation season, began after the computerized water accounting was implemented in 1978.

16. The computerized accounting is designed to calculate the available natural flow at each river location in Water District #1. The program makes this computation on a daily basis and then allocates the available natural flow to water rights based on location and priority. Most water rights include a diversion rate and when such a right is diverting, the accounting program checks the available natural flow, the amount of the diversion and the priority date of that diversion. If natural flow is available to satisfy the current diversion rate for the priority of the right the next priority right is checked to determine if the remaining natural flow can satisfy the second right. This process continues until all natural flow has been used or all rights have been satisfied, whichever occurs first. If there is insufficient natural flow to fill all rights, those rights not filled completely or in part by natural flow are assumed to be diverting storage water.

17. This same methodology could not be applied to water rights for storage since storage water rights do not usually have a diversion rate associated with the right. To overcome the lack of diversion rate, the accounting program was programmed to assume that all water available to a storage water right was accrued to storage on each day the water is available until the amount of water accrued to storage equals the amount of the storage water right. At that point, the storage water right is considered satisfied by the accounting program and cannot store any additional water until the program is changed either manually or on a future date built into the program. The initial implementation of the computerized accounting used this procedure. Once a storage water right accrued its storage entitlement that right could not accrue additional storage until the amount of accrual was changed in the program. Initially this occurred on November 1, apparently considered by the Watermaster to be the beginning of a new irrigation year, and the storage accounts were "reset" in the computerized accounting to the amount of carryover storage in the various reservoirs. This method of accounting for storage was similar to the accounting that was done manually prior to 1978. In the Water District annual reports prior to 1978, I did not find any occasion when water deliveries continued until November 1, but some irrigation water rights in the basin, 1-6 and 1-17 included, do have a season of use that extends until November 15 of each year and could be impacted by storage water rights coming back into priority on November 1.

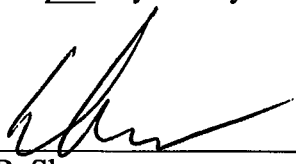
18. Attached to this Declaration as Exhibit A is a Memorandum dated September 29, 2015 from Mr. Tony Olenichak to Mr. Lyle Swank providing a history of the reset date in the computerized accounting for Water District #1. I have reviewed this Memorandum and the information is consistent with my review of the Water District #1 accounting records beginning in 1978.

19. As noted in the attached memorandum, the computerized accounting has been modified several times since 1978 regarding the accrual of storage to the various storage water rights. As the program currently exists, it is hard coded in the program to reset all storage accounts to zero on September 15 (September 14 of leap years) regardless of the current contents of any reservoir. Since all of the storage accounts are then able to accrue additional storage, the accounting program looks to the most senior storage right and accrues all available natural flow under that storage right's priority to that storage account. Junior diversion rights, like junior storage rights, are not allowed to divert natural flow. This accounting procedure differs from the procedure used prior to 1978, because the 1909 Lake Walcott storage right never stored water in the fall prior to 1978 and did not store water prior to November 1 until 1988.

20. The Lake Walcott storage right is the senior storage right in the lower basin and the current accounting program accrues all natural flow available to the 1909 priority to the Lake Walcott storage water right contrary to the historical practices that were used consistently prior to 1988. 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.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

Dated this 15 day of May 2017.

  
\_\_\_\_\_  
David B. Shaw

## CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of May, 2017, I served a true and correct copy of the foregoing **DECLARATION OF DAVID B. SHAW** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

Idaho Department of Water Resources  
P.O. Box 83720  
Boise, ID 83720-0098

U.S. Bureau of Reclamation  
Regional Director, PN Region  
1150 N. Curtis Rd., Ste. 100  
Boise, ID 83706-1234

Jerry R. Rigby  
P.O. Box 250  
Rexburg, ID 83440-0250

Craig Hobdey  
P.O. Box 176  
Gooding, ID 83330-0176

Randall C. Budge  
T.J. Budge  
P.O. Box 1391  
Pocatello, ID 83201

U.S. Department of Justice  
Division of Env. & Natural Resources  
550 W. Fort Street, MSC 033  
Boise, ID 83706-1234

Idaho Attorney General's Office  
Natural Resources Division  
P.O. Box 83720  
Boise, ID 83720-0010

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Boise, ID 83701-2720

  
Travis L. Thompson

## **ATTACHMENT A**

01-219  
01-2064  
01-2068  
01-4055  
01-10042  
01-10043  
01-10044  
01-10045  
01-10620  
01-10621A  
01-10621B  
01-10622  
01-10623  
21-02156  
21-04155  
21-10560  
21-13161  
25-07004

# Exhibit A

## MEMORANDUM

To: Lyle Swank  
From: Tony Olenichak  
Date: 9/29/2015  
RE: History of the "reset date" for new storage accrual in the computerized water right accounting.

The purpose of a "reset or restart date" for year 'round storage water rights in the computerized water right accounting is used to indicate when previously filled storage water rights (allocated 100% fill on the Day of Allocation) can begin filling again under their water right priorities after storage has been used from their allocated volumes during the irrigation season.

The traditional practice of having the watermaster have an "end of regulation" date as listed in the older watermaster annual books from 1977 and earlier ended in 1978. At the 1978 annual meeting two new resolutions were introduced and adopted. Resolution 4 required the duties of the watermaster to be a year 'round watermaster. Resolution 10 resolved for the Watermaster to account for all diversions which might adversely affect any prior natural flow or storage diversions.

When the computerized accounting was initially developed in 1978, there wasn't an automatic "reset date" for the storage water rights coded into the computer program. If a storage water right had previously filled to a 100% during the irrigation season and came back into priority in September or October the computerized water right accounting would not allow any additional natural flow accrual to that 100% filled storage water right. However, it would allow additional natural flow accrual to any storage water right that had not filled to 100%.

For example, the 1979 computerized water right accounting printouts show that Jackson Lake, Lake Walcott, American Falls, and Palisades Reservoir water rights filled to 100% prior to the Day of Allocation. The Island Park (1935 priority), Grassy Lake (1936 priority), and Henrys Lake (1965 priority) water rights did not fill to 100%. The 100% filled reservoir water rights were not "reset" after their storage was used during the irrigation season following the Day of Allocation and, when the 1935 priority was restored on October 15, 1979, the unfilled Island Park storage water right began accruing additional natural flow into its storage water right volume according to the computerized accounting. On October 25, 1979, the 1965 priority was restored and both Grassy Lake and Henrys Lake unfilled storage rights (in addition to the unfilled Island Park storage water right) were accruing additional natural flow into their storage rights while the senior Jackson Lake, Lake Walcott, American Falls, and Palisades Reservoir water rights remained 100% full in the computerized program at least through October 31, 1979.

During the 1978-1987 time period, Jackson Lake Reservoir was under safety of dams capacity restrictions. Consequently there was up to nearly ½ million acre-feet (847,000 AF-284,450 AF) less storage needed to fill the system due to the restricted storage space needed to fill Jackson. Additionally, an equivalent amount of storage water then was available to fill other reservoir storage water rights. The other reservoir storage rights either filled or water was spilled past Milner making carryover calculations inconsequential in these years.

In the 1988 final accounting, a reset date of August 1<sup>st</sup> was programmed into the computerized accounting for the first time to account for the new accrual into reservoir water rights following when storage was used by spaceholders after the Day of Allocation had occurred.

In an attempt to use the water right accounting program as a tool to assist the watermaster and staff allocating storage water, a reset date was used to maximize storage accrued to the respective water rights and minimize the unallocated storage available for distribution. In 1988, the reset date was August 1<sup>st</sup>. In 1989, the reset date was October 1<sup>st</sup>. In 1990, the reset date was August 15<sup>th</sup>

- The latest month of when the historical Day of Allocation occurred was in July, so August 1<sup>st</sup> may have been an appropriate reset date.
- October 1<sup>st</sup> was defined as the start of the storage season in the USBR spaceholder contracts, and therefore October 1<sup>st</sup> may have been a more appropriate reset date than August 1<sup>st</sup>.
- Because the reservoir water rights come back into priority after the Day of Allocation in some years prior to October 1<sup>st</sup>, perhaps August 15<sup>th</sup> is a more appropriate reset date because it is closer to the midpoint between the historical Day of Allocation and when reservoir priorities are restored in September or October.

In hindsight, if any of the three dates (August 1<sup>st</sup>, October 1<sup>st</sup>, August 15<sup>th</sup>) were chosen for any of the three years 1988-1990, it would have resulted in the exact same distribution of natural flow because the earliest storage water right priority (Jackson Lake-1906) wasn't restored in any of these three years until after October 5<sup>th</sup>, so any reset date chosen between the Day of Allocation and October 6<sup>th</sup> would have resulted in the same water distribution. The reset date coded into the computerized water right accounting remained August 15<sup>th</sup> (August 14<sup>th</sup> on a leap year) from 1990 through 1996.

In 1997, I played a part in changing the reset date in the computerized water right accounting from August 15<sup>th</sup> to September 15<sup>th</sup>. The 1997 water year was one of the biggest floods and wettest years on record. All reservoir storage water rights were allocated 100% fill in that year and the 1906 priority wasn't cut until August 23, 1997, and was restored again on September 16, 1997. My understanding of the reset date at that time was that it must come after the Day of Allocation and after the priorities had been cut below all storage rights but before the priority for the earliest storage water right was restored towards the end of the irrigation season. The 1997 water year illustrated water right priorities for the storage rights may not get cut until the last week of August and wouldn't likely get restored before the third week in September. Therefore, the restart date for allowing senior reservoir rights to begin accruing natural flow to their water rights was changed in the computerized accounting from August 15<sup>th</sup> to September 15<sup>th</sup> for the 1997 irrigation season, and has remained that date in the computerized accounting since that time.