

Edmund C. Goodman, ISB No. 10288
HOBBS, STRAUS, DEAN & WALKER, LLP
516 SE Morrison Street
Suite 1200
Portland, OR 97214
Tel: 503.242.1745
Fax: 503.242.1072
Email: egoodman@hobbsstrauss.com

Attorney for Shoshone-Bannock Tribes

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JAN 22 2020
DEPARTMENT OF
WATER RESOURCES

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
)
) **SECOND DECLARATION OF**
) **EDMUND CLAY GOODMAN: IN**
) **SUPPORT OF TRIBES' REPLY TO**
) **STATE OF IDAHO'S**
) **CONSOLIDATED RESPONSE TO**
) **JOINT MOTION TO MODIFY**
) **PARTIAL DECREES FOR**
) **PURPOSES OF ADDING**
) **DIVERSION RATE AND "RESET"**
) **ADMINISTRATIVE REMARKS**

I, Edmund Clay Goodman, upon personal knowledge of the facts and circumstances recited herein, declare and state:

1. I am over the age of 18 years, and I am one of the attorneys representing the Shoshone-Bannock Tribes in this case. I submitted a Declaration in Support of the Tribes' Memorandum in Support of Joint Motion to Modify Partial Decrees for Purposes of Diversion Rate and "Reset" Administrative Remarks, dated October 30, 2019.

2. I submit this Second Declaration in Support of the Tribes' Reply to the *State of Idaho's Consolidated Response to Joint Motion to Modify Partial Decrees for Purposes of*

Adding Diversion Rate and "Reset" Administrative Remarks in the above captioned case.

3. The Tribes have limited financial resources to engage in litigation and settlement negotiations, and have to carefully choose when and to what extent to participate. The Tribes were involved in monitoring and conferring about the matters that produced the *Basin 1 Stipulation*. Based on that monitoring and discussions, the Tribes determined that enough of the existing parties were aligned with the Tribal position to ensure that the Tribes' storage rights would be protected by those parties' arguments and positions. However, the Tribes stayed engaged to the extent that if they determined there was a change to that situation, the Tribes were prepared to intervene.

4. The Tribes did not intervene in the *Basin 1 Stipulation* because it was determined that intervention and active participation was not necessary.

5. The Tribes engaged in negotiations as soon as the Tribes were made aware of the potential dispute over the reset issue because there were no other parties whose interests were exactly aligned with theirs and who could be relied upon to take a position that would protect the Tribes' storage rights.

6. As counsel for the Tribes, I did not appear in person at certain early status conferences (dated September 12, 2016, August 4, 2016, October 25, 2016, and December 20, 2016). However, for each of these calls, either I or another partner at my firm, Stephen Osborne, did call in to the conferences by telephone to keep abreast of the subcase.

7. I represented the Tribes during the settlement mediation presided over by Judge Melanson, which the Tribes fully participated in.

8. The Tribes immediately intervened in the matter of Milner Irrigation District's petition to change the reset protocol within days of the Director characterizing it as a contested

case. The Tribes' Petition to Intervene is attached hereto as Exhibit D.

9. The Tribes diligently engaged with IDWR and other parties once the proposed change in reset date was brought to its attention.

10. I have attached four Exhibits, marked A, B, C, and D to this Declaration and have referenced the same in the attached Reply brief.

11. I hereby certify that the attached Exhibits are true and correct copies of the original documents:

- A. Shoshone Bannock Tribes' Brief on "Threshold Issue" in the Reset Contested Case (January 19, 2018);
- B. Final Unified Decree, In Re SRBA, Case No. 39576 (Aug. 26, 2014);
- C. Order Denying Motions to Participate, Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33734A, 63-33734B, 63-33737 and 63-33738) (July 8, 2019); and
- D. Shoshone-Bannock Tribes' Petition to Intervene, In the Matter of the Petition Regarding Storage Reset in Water District 01 Filed By Miler Irrigation District, Docket No. P-WRA-2017-002 (October 17, 2017).

DECLARATION UNDER PENALTY OF PERJURY

I, Edmund Clay Goodman, declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 16th day of January, 2020.



Edmund C. Goodman, ISB No. 10288
HOBBS, STRAUS, DEAN & WALKER, LLP
516 SE Morrison Street
Suite 1200
Portland, OR 97214
Tel: 503.242.1745

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2020, I served a true and correct copy of the foregoing **Second Declaration of Edmund Clay Goodman and attached Exhibits A-D** on the persons listed below by email, if available, or U.S. Mail:

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
jrigby@rex-law.com

Craig Hobdey
P.O. Box 176
Gooding, ID 83330-0176
hobdeycraig@gmail.com

Randall C. Budge
T.J. Budge
Racine Olson, PLLP
P.O. Box 1391
Pocatello, ID 83201
randy@racineolson.com
tj@racineolson.com

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

Michael C. Orr, Deputy Attorney General
Natural Resources Division
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010
michael.orr@ag.idaho.gov

Kirk Bybee
P.O. Box 4169
Pocatello, ID 83201
kibybee@pocatello.us

Sarah A. Klahn
2701 Lawrence St., Ste 113
Denver, CO 80205
sklahn@somachlaw.com

Sarah W. Higer
Idaho Power Company
P.O. Box 70
Boise, ID 83707
shiger@idahopower.com

Charles F. McDevitt
P.O. Box 1543
Boise, ID 83701-1543
chas@mcdevitt.org

Andrew Waldera
P.O. Box 7985
Boise, ID 83707
andy@sawtoothlaw.com

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

Chris Meyer
Michael P. Lawrence
P.O. Box 2720
Boise, ID 83701-2720
chrismeyer@givenspursley.com

mpl@givenspursley.com

David W. Gehlert, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
David.Gehlert@usdoj.gov

William Kent Fletcher
Fletcher Law Office
PO Box 248
Burley, ID 83318
wkf@pmt.org

Norman M. Semanko
Parsons, Behle & Latimer
800 W. Main Street, Ste. 1300
Boise, ID 83702
nsemanko@parsonsbehle.com

Robert Lynn Harris
Holden, Kidwell, Hahn & Crapo, PLLC
PO Box 50130
Idaho Falls, ID 83405
rharris@holdenlegal.com

Candice M. McHugh
McHugh Bromley, PLLC
380 S. 4th Street, Ste. 103
Boise, ID 83702
cmchugh@mchughbromley.com



Eleanor Manning, Paralegal

ATTACHMENT A

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01-10620
01-10621A
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DEPARTMENT OF
WATER RESOURCES

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

RECEIVED

JAN 22 2020

DEPARTMENT OF
WATER RESOURCES

Edmund Clay Goodman, ISB #10288
Hobbs, Straus, Dean & Walker LLP
806 SW Broadway, Suite 900
Portland, Oregon
Telephone: (503) 242-1745
Facsimile: (503) 242-1072

Attorneys/Representatives for Shoshone-Bannock Tribes

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION	)	Docket No. P-WRA-2017-002
REGARDING STORAGE RESET IN	)	
WATER DISTRICT 01 FILED BY MILNER	)	SHOSHONE-BANNOCK TRIBES'
IRRIGATION DISTRICT	)	BRIEF ON "THRESHOLD ISSUE"
	)	
	)	

INTRODUCTION

On January 3, 2018, the Director issued an order in the above-captioned case identifying and requiring briefing on a "threshold issue", which the Director framed as follows:

Whether 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 specify "1/1 to 12/31" as the time period for irrigation storage requires that the reset date for those rights be January 1?

As discussed below, the answer to this question is *no*. Rather, based on that plain language, which has a settled legal meaning, the computational accounting reset date calculation and procedure (in use for the last 29 years) described in the IDWR Staff Memorandum dated December 1, 2017 ("Staff Reset Memo") is *permitted* under the decree language. But, if there is

any ambiguity in that language, the Director must look to extrinsic evidence, and that evidence dictates the same result as the most reasonable construction of that language. Moreover, based on that settled legal meaning, the Department's longstanding interpretation of the same, judicial interpretations of the partial final decrees at issue, the bedrock principles of Idaho water law, reliance- and expectation-based interests, and the prohibition against arbitrary and capricious action, ***the Director must retain the accounting and reset procedure in place for the last 29 years as described in the Staff Reset Memo.***

To summarize, the decreed water rights in question provide for a year-round Period of Use for Irrigation Storage, where a quantified volume of water may be accrued at any time between 1/1 and 12/31. These water rights also provide a Period of Use for Irrigation from Storage where a quantified volume of water may be released from storage at any time between 3/15 and 11/15. Provided both of these conditions are met, the computational accounting reset date is ***not required*** to be January 1. So long as the reset accounting methodology used by the Director only permits each storage right to fill once and to empty once in each calendar year – which, as explained by the Staff Reset Memo, is how the accounting system has worked for the past 29 years – the Director is within the four corners of the partial decrees.

In fact, the Director exceeded his discretion through his direction in the October 27, 2017 letter to the WD 01 Watermaster directing that the accounting for Lake Walcott fill not begin until January 1, 2018. As a result of that letter, the Lake Walcott storage water right (1-219) was not allowed to accrue any water in 2017. It was already full on January 1 of that year (as it has been for at least the last 16 years), and after that water was utilized during the irrigation season for irrigation purposes, that storage right should have been entitled to accrue water in and for

2017 in priority in the fall; by his October 27 letter, the Director has inappropriately allowed junior water rights to be satisfied (or unallocated storage to be accrued) ahead of a senior storage right that was in priority.

ANALYSIS

The Tribes begin by noting four important points: (1) that the IDWR has a 29-year record of accounting for storage water right accrual volumes in the Upper Snake River Basin Reservoir System pursuant to the current administrative procedure without challenge on grounds of injury to existing water rights; (2) that use of that accounting procedure was authorized by the members of Water District 01 and applied to existing storage water rights with year-round period of use (as set out on the “seasons of use” on licenses issued by the Department beginning in the 1970s); (3) that the Tribes, and likely other parties as well, have reliance- and expectation-based legal rights in the longstanding interpretation and practice; and (4) use of that procedure has, as summarized in the Staff Reset Memorandum (as well as in the Water District 01 Accounting Manual¹), maximized beneficial use of the water resource and minimized waste.

I. Canons of construction for interpreting the “plain language” of the decrees

The Director’s framing of the threshold question as to the requirement of the “plain language” of the decree appears to contemplate that looking to the “plain language” forecloses

¹ CONCEPTS, PRACTICES, AND PROCEDURES USED TO DISTRIBUTE WATER WITHIN WATER DISTRICT #1, Upper Snake River Basin, Idaho, Tony Olenichak (Mar. 2, 2015), available online at <http://www.waterdistrict1.com/water%20accounting%20manual.pdf> (last viewed Jan. 12, 2018). The Director can take official notice of the Department’s own publicly available publication. IDAPA 37.01.01.602. *See also* IDAPA 37.01.01.600 (“Evidence should be taken by the agency to assist the parties’ development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence.... The agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence.”)

any further discussion regarding the interpretation of that language. If so, that framing is incorrect.

The legal concept of “plain language” appears to have been initially set out in cases discussing the canons of statutory interpretation. Where there is a question of statutory interpretation, the court looks to the “plain language” of the statute. *See, e.g., State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015). However, in statutory interpretation, the “plain language” of a statute is not the end of the inquiry; it is just the beginning. “Statutory interpretation *begins* with the statute’s plain language.” *Id.* (citations omitted). If the plain language of a statute is unambiguous, “we do not need to go beyond the statute’s plain language to consider other rules of statutory construction.” *Id.* (citations omitted). However, the plain language of “[a] statute is ambiguous where the language is capable of more than one reasonable construction.” *Porter v. Bd. of Trs., Preston Sch. Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004).

Three recent Idaho Supreme Court decisions regarding water rights have used the “plain language” concept when interpreting the language of water right decrees. *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017); *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, 367, P.3d 193 (2016); *A & B Irr. Dist. v. Idaho Dep’t Of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012). While the arguments of the parties, and in some instances, the language of the Court itself, sometimes conflate the concept of “plain language” with “unambiguous,” the overall thrust of all three decisions is essentially the same as regards the use of “plain language” in the statutory interpretation context: the “plain language” is the *beginning* of the inquiry. The same rule applies to the interpretation of contracts. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003) (“In applying the rules of contract construction, the court

analyzes the document in two steps. *Beginning with the plain language of the [contract]*, the first step is to determine whether or not there is an ambiguity”) (citations omitted, emphasis added).

The next step is to determine whether that “plain language” is ambiguous.

When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. [*A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012)]. If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. *Cf. Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) (“If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own words.”). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf. Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 850, 367 P.3d 228, 245 (2016) (“Where terms of a contract are ‘reasonably subject to differing interpretations, the language is ambiguous....’” (quoting *Clark v. Prudential Prop. and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003))).

City of Blackfoot, 396 P.3d at 1188.

Thus, while the “Period of Use: 1/1-12/31” in the partial decrees is the “plain language” of the decrees, the first step is to determine whether or not there is an ambiguity, *i.e.*, whether that language is capable of more than one reasonable construction. *See, e.g., Pinehaven Planning Bd.*, 138 Idaho at 829, 70 P.3d at 667. If there is only one reasonable construction, then that construction governs.

Nor does the “ambiguity” analysis end by pointing to a common dictionary definition or a layperson’s understanding; if the term has a “settled legal meaning,” it is not ambiguous. “To determine whether a contract is patently ambiguous, a court looks at the face of the document and gives the words or phrases used their established definitions in common use *or settled legal meanings.*” *Swanson v. Beco Const. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) (emphasis added) (citing *Pinehaven Planning Bd. v. Brooks*, 70 P.3d at 667). *See also City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995) (“Words or phrases that have

established definitions in common use *or settled legal meanings* are not rendered ambiguous merely because they are not defined in the document where they are used.”) (emphasis added). For example, the Idaho Supreme Court has held, repeatedly, that “the mere fact that a term is undefined in [an insurance] policy does not make that term ambiguous *if it has a settled legal meaning.*” *Melichar v. State Farm Fire & Cas. Co.*, 143 Idaho 716, 721, 152 P.3d 587, 592 (2007) (citing *National Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon*, 141 Idaho 537, 540, 112 P.3d 825, 828 (2005)) (emphasis added).

If, after conducting that analysis, the plain language is subject to more than one reasonable construction, then the courts apply “rules of construction for guidance and consider the reasonableness of proposed interpretations.” *Stonebrook Constr., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 931, 277 P.3d 374, 378 (2012) (internal citations omitted). A similar analysis applies to disputed language in judicial decrees:

If the language of the decree is unambiguous, the determination of its meaning and legal effect is a question of law over which free review is exercised, *Grecian v. Grecian*, 140 Idaho 601, 603, 97 P.3d 468, 470 (Ct.App.2004); *Toyama*, 129 Idaho at 144, 922 P.2d at 1070, and matters outside the record should not be used to construe it. *State ex rel. Moore v. Scroggie*, 109 Idaho 32, 37, 704 P.2d 364, 369 (Ct.App.1985). If the language is reasonably susceptible to differing meanings, however, it is deemed ambiguous and determination of its meaning is a question of fact. *Pike v. Pike*, 139 Idaho 406, 408, 80 P.3d 342, 344 (Ct.App.2003).

McKoon v. Hathaway, 146 Idaho 106, 109, 190 P.3d 925, 928 (Ct. App. 2008).

As explained below, the Tribes submit that the “plain language” of the decrees – in light of legal precedent establishing a settled legal meaning – is reasonably subject to only one construction: that such language does *not* require a January 1 reset date in the computational methodology used to account for the accrual of water to storage water rights, and instead that it

requires utilization of the computational methodology and reset procedure used for the last 29 years, as described in the Staff Reset Memo.

Moreover, even if that “plain language” is reasonably susceptible to differing meanings, extrinsic evidence is permitted to resolve the ambiguity. *Rangen*, 367 P.3d at 202 (“Idaho law permits ‘[f]irst, the introduction of extrinsic evidence to show that the latent ambiguity actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.’”) (internal citations omitted). As the Tribes explain below, such extrinsic evidence (legal precedent, 29 years of Departmental practice, the language of storage water contracts, and the prior agreements and understandings of the parties – nearly all of which is subject to official notice as records of the Department), also demonstrates that the plain language is amenable to only one reasonable interpretation: the fill of storage water rights consistent with the reset computation methodology and procedure used for the last 29 years, as described in the Staff Reset Memo.

II. Reset computation methodology is distinct from distribution of water

As an initial point, it is important to clarify that the reset computation methodology described in the Staff Reset Memo is distinct from the distribution of water according to the decrees. Conflating the method of accounting for the accrual of water with the actual allocation and delivery of water rights serves to confuse the issues.

In resolving a dispute in the SRBA, the Idaho Supreme Court made clear that the distribution of water is distinct from the method of accounting applied by the Director. *In re SRBA (Basin-Wide Issue 17)*, 157 Idaho 385, 392–94, 336 P.3d 792, 799–801 (2014). And, contrary to the Surface Water Coalition’s assertion that the Tribes’ reliance on *In re SRBA* for

this point is “overstated,” *see* SWC Response to Statements of Issues at 9, nothing in SWC’s selected excerpt is contrary to the Tribes’ position. The Supreme Court’s statement that “the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user” is not only fully compatible with a fall computational accounting reset date, as the Staff Reset Memo explains, it is the methodology used for the last 29 years to maximize beneficial use of the water resource.

III. The “Period of Use: 1/1-12/31” language is *not* ambiguous because it has a “settled legal meaning” resolving the threshold issue

While the “Period of Use: 1/1-12/31” language may potentially be amenable to a lay interpretation, in this context it has a settled legal meaning, and under the above-described precedent, such settled legal meaning precludes any ambiguity. *See* discussion *supra* at 5-7. Courts have recognized that a January 1 to December 31 period of use is *not* a limitation on the storage right. The period of use for a storage water right is the season in which water may be diverted to storage. While the March-to-November irrigation period of use on the face of the decrees intentionally matches the natural growing season, the reservoir storage fill element of the decrees, due to the on-stream nature of the dams,² is unlimited, providing for a year-round storage season. Because on-stream reservoirs “divert” the entire flow of the river every day, the diversion season is perpetual, and the decrees thus list the season for diversion to storage as 1/1 to 12/31.

² “A long-standing tenet of that [prior appropriation] doctrine is the quantity element of a water right is measured at the point of diversion.” *Ballentyne Ditch Co. et al. v. Idaho Dep’t Of Water Res., et al. (In the Matter of the Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63)*, Case No. CV-WA-2015-21376, MEMORANDUM DECISION AND ORDER (Fourth Judicial District Idaho, Sept. 1, 2016) at 7. An on-stream dam is “a river-wide diversion structure that captures and regulates the entire flow of the river.” *Id.*

In *In re SRBA*, the Court distinguished between the limitations on the period of use for irrigation and the “year-round” period for storage water rights: “With respect to storage rights for irrigation, for example, it is typical for the ‘irrigation storage’ purpose of use to be a year-round use (January 1 to December 31), and the ‘irrigation from storage’ purpose of use *to be limited to the irrigation season* (e.g., March 15 to November 15).” 157 Idaho at 389 (emphasis added). The Court did not refer to the year-round period of use as a limitation, as it did for the irrigation use. Moreover, in framing this issue, the Court noted that this language is “typical,” and thus typically understood, as applying no limitation. *Id.*

The *Ballentyne Ditch Co. (Water District 63)* decision made this point expressly, twice. In affirming that the Director’s decision to compute accrual to the reservoir storage right as all natural flow that is entering the reservoir as consistent with the decrees in that case (which have the same January 1 to December 31 period of use for storage as here), the Court stated: “In addition to lacking flow limitations, the reservoir rights *lack period of use limitations on storage*. The partial decrees unambiguously provide for year-round use.” *Ballentyne Ditch Co. (Water District 63)* at 10 (emphasis added). Similarly, in affirming the Director’s determination that the reservoir water rights are satisfied when the amount of natural flow that has entered the reservoir in priority equals the quantity element of the right, the Court stated:

The legal analysis applicable to this finding is largely the same as that set forth in the preceding section [dealing with accrual]. ... It is further consistent with the elements of the partial decrees issues for reservoir rights. *Those decrees contain no ... period of use limitations in regard to storage.*

Id. at 13 (emphasis added). While the *Ballentyne Ditch Co. (Water District 63)* decision is on appeal, the Director has not challenged either of these holdings or the legal analysis supporting

them, but is arguing that the Supreme Court should affirm the lower court on both of these points.³

Thus, the “Period of Use: 1/1-12/31” language for the storage right is not a limitation, but rather the “typical” way that Idaho and other courts, as well as the Department, have described the ability to store water in reservoirs on a year-round basis. Based on the precedent described above, it is simply not reasonable to construe the 1/1 to 12/31 period of use language in the Upper Snake River reservoir storage rights decrees as imposing a limitation on period of use that requires a January 1 reset. That plain language was not created from whole cloth specifically for the Upper Snake River storage rights: it was “typical” language with a settled legal meaning at the time it was decreed. It authorizes year-round storage, in priority, limited to one fill of the right per year, and further cabined by the principles of maximizing beneficial use and minimizing waste.

In fact, for the past 29 years, applying that understanding and settled legal meaning, the Department itself has interpreted the 1/1-12/31 period of use dates (which dates did not appear for the first time in the partial final decrees, but were included on the licenses issued by the Department as early as the 1970s⁴ and in the Notice of Claims for storage rights filed in the SRBA) not as a limiting parameter, but as a year-round authorization:

³ See *IDWR Appellants' Brief* (Idaho Supreme Court, May 26, 2017) at 3-4, 22-23; *IDWR Appellants' Reply Brief* (Idaho Supreme Court, Sept. 8, 2017) at 7-26. We note that in the decision being appealed in this case (the Director's Amended Final Order dated Oct. 20, 2015), the Director expressly noted that he was not addressing the “reset” issue in Basin 63, yet these same principles would apply.

⁴ Examples of licenses issued in the 1970s and 1980s for various water storage uses with a “period of use” from January 1 through December 31 are attached as Exhibits A – E to the Declaration of Edmund C. Goodman (Jan. 18, 2018). These licenses and the information contained in them, including the “period of use”, are part of the public and official records of IDWR, and the Director may take official notice. IDAPA 37.01.01.602. See note 1, *supra*.

The period-of-use listed on the storage water rights is January 1 to December 31. The Watermaster has interpreted the water right period-of-use to mean the storage water rights are in effect each day of the *calendar year* when natural flow is available to the reservoir priorities and their unfilled volumes. The Watermaster has not interpreted the period-of-use as defining the beginning and the ending dates for the annual period of accounting for distributing natural flow to the reservoir water rights' priorities.

Staff Reset Memo at 5 (emphasis in original).

Thus, as is clear from the settled legal meaning according to the Idaho Supreme Court, the Fourth District Court, and the Department's own longstanding practice and interpretation, the 1/1-12/31 period of use for storage rights does not impose a limitation that requires a reset on January 1 each year, but authorizes a year-round accounting methodology. *So long as the storage right is allowed to accrue no more than its water right volume one-time from the natural flow in that calendar year*, the methodology squares with the plain language of the partial final decree language. The language, based on that well-settled legal meaning, is not ambiguous and it does not require a computational reset of January 1. Simply because a party can come up with and present "different possible interpretations" does not make the language ambiguous, since "if this were the case then all statutes that are the subject of litigation could be considered ambiguous." *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992) ("a statute is not ambiguous merely because an astute mind can devise more than one interpretation of it.").

IV. Even if the January 1 – December 31 period of use language were ambiguous, extrinsic evidence supports the continued use of the accounting methodology and computational accounting reset date described in the Staff Reset Memorandum

As described above, based on existing precedent and understanding, the utilization of a computational accounting reset date other than January 1 is at the very least a reasonable

These records are available at <https://www.idwr.idaho.gov/apps/ExtSearch/WRAJSearch/WRADJSearch.aspx> (last accessed Jan. 16, 2018).

interpretation of the plain language. If, *arguendo*, reading that “plain language” to require a January 1 water right accrual reset date is also reasonable, then the next step is to apply the canons of construction to determine the interpretation that accords with the understanding of the parties and the Court in fashioning that language in the decrees. In doing so, it is appropriate to consider context and information outside the four corners of the decrees. *See Rangen*, 367 P.3d at 202 (citing *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)); *Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010); *Snoderly v. Bower*, 30 Idaho 484, 487, 166 P. 265, 265 (1917)).

a. Precedent supports the Staff Reset Memorandum procedure

The precedent described in Section III, *supra*, provides the relevant framework for gauging the understanding and intent of the parties and the SRBA Court in crafting the decree language in that manner. The parties and the Court used this “typical” language, without further remark or clarification, and should be understood to have intended the same unlimited period of use as the use of that same “plain language” elsewhere.

b. The factual background supports the Staff Reset Memorandum procedure

The factual background indicates that the parties would have understood and intended such language to be consistent with the reset accounting methodology used by the Water District 01 Watermaster (and, indeed, in other Water Districts across Idaho), which has involved a year-round, unlimited period of use of the reservoir storage rights since 1978.

- Beginning in the 1970s and continuously since then, the IDWR has issued water rights licenses that contain the 1/1-12/31 period of use language. *See supra*, note 4.
- Continuing development of new water rights, non-irrigation uses, new diversions, reservoirs, and the 1977 drought increased water demand such that accounting of water rights could no longer be limited to the irrigation season, prompting the need

for stricter water right regulation. Staff Reset Memo at 2. In a February 23, 1978 Committee of Nine Meeting, IDWR Hydrology Section Manager Alan Robertson said, "Regulation on a longer season will help fill reservoirs and late (water) rights will be charged storage." *Id.*

- In response, Water District 01 formally adopted Resolutions 1 and 10, which respectively called for the Watermaster "to make such changes in the established water distribution practices as will result in more accurate deliveries of natural flow and stored water, improved regulation procedures to assure deliveries of water supply and diversion records to the water users, and to assure that all water users are charged for water deliveries on an accurate and equitable basis," and to "collect records of water diversions during the entire year." *Id.*
- New computation technology replaced hand calculation of water rights and removed previous constraints on year-round water accounting. Water District 01 Accounting Manual at 15. The computation methodology being used was authorized by the members of Water District 01 in 1978. Staff Reset Memo at 2.
- The authorized methodology was a move to a "*year-round* water right accounting," beginning in 1978, and further modified in 1988. *Id.* at 2-3 (emphasis added).
- "From this point forward [when WD01 authorized the year-round accounting], all water rights were regulated according to priorities *for the entire calendar year*. No distributions of natural flow to junior water rights were made ahead of *other unfilled senior water rights*." *Id.* at 2 (emphases added).
- The Staff Reset Memorandum repeatedly describes the computational methodology in place since 1988 as resulting in the senior storage water rights (e.g., Lake Walcott) as having their "annual volume" satisfied in the fall. *Id.* at 2, 3, 4.

The WD 01 Water Rights Accounting and Distribution Manual also describes the system in the same way. Section 8.15, pp. 80-81.

Further supporting this same understanding is the fact that the notice of claims filed for the various storage water rights in the SRBA (in the 1980s) all included the "typical" 1/1-12/31 period of use. All of the spaceholders with rights under those claims would have understood the interpretation and practice of IDWR at the time those notice of claims were filed. Yet no one asked for a remark or other modification of the decree that would have indicated that the system

in place when they filed those notices of claims – which governed the accounting for those rights prior to, during, and after the SRBA – was inappropriate or inconsistent with the 1/1-12/31 period of use language.

Moreover, nearly all the contracts for storage water in the Bureau of Reclamation reservoirs include an October 1 date to begin reservoir fill from natural flow. *See, e.g., Memorandum of Agreement between the Bureau of Reclamation and the Bureau of Indian Affairs Relating to a water supply for Michaud Division of the Fort Hall Irrigation Project as approved April 25, 1957 (“Michaud Contract”).*⁵ Further, with regard to this case, we note that the Michaud Contract and its October 1 storage season start date is expressly incorporated into the Shoshone Bannock water right partial final decree. *Shoshone-Bannock Consent Decree*, 11.B.3, page 15. Those contracts, in use in Water District 01, in other Idaho water districts, and in fact around the Western United States, indicate a widely-shared understanding that the accounting for reservoir storage fill begins in the fall, and would have informed how the parties understood the system to work at the time the decrees were finalized – which is consistent with the 29-year practice and interpretation of the Department as described in the Staff Reset Memo.

c. “Period of Use: 1/1-12/31” is a term of art in this context

If the “plain language” used is actually a term of art or technical term in the industry or context in which it is used, evidence regarding the use and understanding of that term of art may

⁵ The Michaud Contract is attached as Attachment D to the *Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* (August 13, 2014) (“*Shoshone-Bannock Consent Decree*”). Another typical contract (Enterprise Canal Co.) is attached as Exhibit F to the Goodman Declaration, and others with similar language about the storage season are publicly available upon request from the United State Bureau of Reclamation, Boise Office, upon request. See Goodman Declaration, ¶¶5-7. All such contracts are subject to official notice by the Director. *See supra* note 1.

be applied to interpret that language. *See, J.R. Simplot Co. v. Rycair, Inc.*, 138 Idaho 557, 562, 67 P.3d 36, 41 (2003), quoting *In re Marriage of Shaban*, 88 Cal.App.4th 398, 105 Cal.Rptr.2d 863, 867 (2001) (“Parol evidence, of course, may be received to interpret a term of art used within a contract.”). *See also Pac. Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 549 (9th Cir. 1949) (“If... the language of the contract is not plain, two situations may present themselves: (1) the contract may contain technical or trade terms, as to which the testimony of those skilled in the art or experts in the field is admissible, or (2) the contract may contain ambiguities which need extrinsic facts to explain”).

Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. *Rangen*, 367 P.3d at 202 (citing *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012)). Idaho courts regularly apply the Restatement (Second) of Contracts, including its Rules of Interpretation at § 202, to interpret contracts. *See, e.g., Idaho Falls Bonded Produce & Supply Co. v. Gen. Mills Rest. Grp., Inc.*, 105 Idaho 46, 49, 665 P.2d 1056, 1059 (1983); *Badell v. Badell*, 122 Idaho 442, 446, 835 P.2d 677, 681 (Ct. App. 1992). The Restatement’s Rules of Interpretation state clearly that “technical terms and words of art are given their technical meaning when used in a transaction within their technical field.” Restatement (Second) of Contracts § 202(b) (1981). When such a trade term is used in a contract, it is binding on those who would understand it that way: “when there is a known usage of a trade or business, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears.” *Commercial Ins. Co. v. Hartwell Excavating Co.*, 89 Idaho 531, 540, 407 P.2d 312, 317 (1965).

The “Period of Use: 1/1-12/31” language is a term of art in this context, based on how the IDWR technical staff have interpreted it, as demonstrated by the Staff Reset Memorandum and the Water District 01 Accounting Manual, and how other participants have understood it. The above-cited court precedent recognizes it as a term of art meaning a “year-round” period of use. Accordingly, the Director must treat the “Period of Use: 1/1-12/31” language as affirming a “year-round” period of use.

d. The Tribes have an expectation- and reliance-based interest in the reset accounting procedure in place at the time of the Fort Hall Agreement and for the past 29 years

“A water right is tantamount to a real property right, and is legally protected as such.” *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). Moreover, because “[s]torage rights by their very nature involve complexities not associated with other categories of water rights, including the right to store water for future use” (*Ballentyne Ditch Co. (Water District 63)*, *supra* note 2), it is imperative they be distributed in accordance with the decrees defining the elements of these rights. Since the Director distributes water pursuant to the partial decrees governing these reservoir rights, “[u]nder the law, it is those decrees that are conclusive as to the nature and extent” of the use. I.C. § 42-1420(1).” *Id.*, at 12.

The Tribes’ water rights, including the water storage rights at issue here, as provided in the Fort Hall Agreement, were “ratified, confirmed and approved” in the *Shoshone-Bannock Consent Decree*, and in Section 4 of the Fort Hall Indian Water Rights Act of 1990 (“Act”),

Public Law 101-602 (Nov. 16, 1990), 104 Stat. 3059. The Tribes' water rights, including its rights to water storage, are a unique and specially bargained for component of the Snake River Basin Adjudication and must be implemented strictly in accordance with their specific elements.

Included in the *Shoshone-Bannock Consent Decree*, as an essential element of the Tribes' water storage rights, are specific dates pursuant to which water would be stored. These dates also reflected the practice in place at the time of the Fort Hall Agreement and utilized ever since. The *Shoshone-Bannock Consent Decree* expressly incorporates, at paragraph II.B.3, page 15, the definitions of "irrigation season" and "storage season" contained in the Michaud Contract. The Fort Hall Agreement also explicitly noted that the Shoshone-Bannock right to stored water shall not be subject to "reduction of the quantity of water available under any other existing rights since any such reductions are mitigated by the express federal commitments in Article 12.3," and further provides that "[t]he State agrees not to take any action that will interfere with the nature, scope, spirit and purposes of the Shoshone-Bannock Water Bank." §7.3.5. The same restrictions against diminishing the Tribal storage water right are reiterated in the Fort Hall Indian Water Rights Act of 1990, §12, and reaffirmed in the Shoshone-Bannock Tribal Water Supply Bank Rules adopted by IDWR. IDAPA §37.02.04-001.03.

The understanding of the Tribes (and the United States) in negotiating and agreeing to the Fort Hall Agreement – including the mitigation being provided by the United States and the settlement of other asserted claims by the Tribes – was that the reservoir system was being operated in a certain manner and would continue to be operated in that manner. In other words, the Tribes had settled expectations, as well as reliance-based interests, in a system that began to reset and refill the reservoirs during the fall each year. These were not abstract expectations: the

Tribes had experts working with them to calculate and determine the value of the stored water rights set out at Section 7.3 based on that existing operation. While no specific amount of water was guaranteed, what was preserved and protected in the Fort Hall Agreement was a reservoir system operation that provided a level of predictability for the Tribes' storage water rights, one that maximized the amount of storage accrual.

e. Other parties have reliance- and expectation-based interests that require continuing use of the reset procedure set out in the Staff Reset Memorandum

Moreover, while the Tribes have a strong expectation-based interest in continuing operation of the reset accounting in the same manner as it has been operated for the last 29 years, other stakeholders also have reliance-based interests. As noted above, the Department's longstanding practice, based on existing 1/1-12/31 language in IDWR-issued licenses and on SRBA notice of claims, as well as the Bureau of Reclamation storage contracts with an October 1 start to the storage season, has been to reset the storage rights accounting in the fall. Various spaceholders have undertaken actions and expenditures in reliance upon that interpretation. The Idaho courts have long-recognized the legal basis for reliance-based interests under Idaho common law across a variety of contexts. *Sims v. State*, 94 Idaho 801, 802–03, 498 P.2d 1274, 1275–76 (1972) (public body has a reliance-based right to rely on existing case law) (*quoting Dawson v. Olson v. State Farm Insurance*, 94 Idaho 636, 640, 496 P.2d 97, 101 (1972)); *Willis v. Larsen*, 110 Idaho 818, 822, 718 P.2d 1256, 1260 (Ct. App. 1986) (recognizing reliance-based interest on finality of legal decision); *Altrua HealthShare, Inc. v. Deal*, 154 Idaho 390, 394–95, 299 P.3d 197, 201–02 (2013) (contract language creates reliance interest); *Washington Fed. v. Hulsey*, 162 Idaho 742, 405, P.3d 1, 8 (2017) (“Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved”)

(quoting *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991)); *McAmis v. State*, 155 Idaho 796, 799, 317 P.3d 49, 52 (Ct. App. 2013) (“if a defendant completes a task in reliance upon the plea agreement, withdrawal of the guilty plea could cause him to lose both the benefit of his bargain and his reliance interest”).

The same reliance-interest analysis would apply here. Established inter-agency reservoir storage management practices depend on shared understanding between the various agencies that the storage season described on the storage decrees means “year-round.” This includes the current practice of ensuring that senior reservoir rights are met before junior rights in the fall so that reservoirs have a complete storage fill season. As a sampling and by no means exhaustive description of various reliance-based interests that would be disrupted by a change to a January 1 reset would be the following:

- The United States Bureau of Reclamation Flow Augmentation Program, which rents surplus storage supplies from WD 01, WD 63, and WD 65 through their respective Rental Pools to provides flow augmentation to aid migration of juvenile salmonids,⁶ could be disrupted because the reservoirs would not have a complete storage fill season;
- In turn, a failure to fill the reservoirs would jeopardize the requirements of the 2004 Snake River Water Rights Agreement and the May 2008 NOAA Fisheries Biological Opinion on salmon recovery, issued in consultation with the Army Corps of Engineers, Bonneville Power Administration and Bureau of Reclamation;
- Failure to fill the reservoirs would put at risk municipal and industrial storage supplies in WD 01 and WD 63, which storage contract holders have acquired with an expected water supply yield based on historical practices;
- Failure to fill the reservoirs could potentially violate the State’s commitment in the Fort Hall Agreement to avoid any action that could “interfere with the nature, scope,

⁶ BUREAU OF RECLAMATION 2015 SALMON FLOW AUGMENTATION PROGRAM ANNUAL PROGRESS REPORT (April 5, 2016), available online at <https://www.usbr.gov/pn/fcrps/hydro/uppersnake/2015nmfsERRATA.pdf> (last viewed January 12, 2018).

spirit and purposes of the Shoshone-Bannock Water Bank.” Fort Hall Agreement § 7.3.5; and

- Decreased reservoir storage could threaten hydropower production, particularly in the summer peak demand season, which is determined by the storage available for release from the Upper Basin.
- f. It would be arbitrary and capricious for the Director to change longstanding and relied-upon policy and interpretation**

The Idaho Administrative Procedure Act (“APA”) at Idaho Code § 67–5279(3) sets out the standard for judicial review of the Director’s decisions, and requires that Idaho courts must affirm agency actions unless the “findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.” When an issue falls within the discretion of the Director, Idaho courts will affirm the decision if the Director “(1) perceived the issue in question as discretionary, (2) acted within the outer limits of [his] discretion and consistently with the legal standards applicable to the available choices, and (3) reached [his] own decision through an exercise of reason. *Idaho Ground Water Assoc. v. Idaho Dep’t of Water Res.*, 160 Idaho 119, 126, 369 P.3d 897, 904 (2016), *reh’g denied* (May 9, 2016). “If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.” (Citing I.C. § 67–5279(3)). The Idaho APA closely tracks the United States APA’s standard of judicial review. *See* 5 U.S.C. § 706.

Departing from the IDWR’s historical interpretation would effectively rescind the computational accounting procedure established and used by IDWR and upset the settled expectations of those who have relied on it for 29 years. The United States Supreme Court has

recognized that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983). In such cases, the agency must articulate “the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard.” *Id.* at 31. An agency is obligated to supply a reasoned analysis for a reversal in policy because “the revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency’s former views as to the proper course.... There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.” *Id.* at 41-42. However, no reasoned argument can be made for such a reversal because there is no basis within the decrees themselves for the position that a January 1 computational accounting reset date is required, and the extrinsic evidence points otherwise.

g. The “bedrock” principles of Idaho water law cabin the Director’s discretion and require application and use of the reset accounting methodology set out in the Staff Reset Memo

In its briefing on the *Water District 63* appeal IDWR identified the two following “bedrock” principles of Idaho water law: “securing the maximum use and benefit, and the least wasteful use of Idaho’s water resources.” *IDWR Appellants’ Reply Brief* at 30 (quoting *Idaho Ground Water Assoc.*, 160 Idaho at 131.)

Those bedrock principles are repeatedly recognized by the Idaho courts as the policy of the State of Idaho with regard to its water resources.

In *Niday v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909), we stated, “The theory of the law is that the public waters of this state shall be subjected to the highest and greatest duty.” In *Farmers’ Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909), we phrased it, “Economy must be required and

demanding in the use and application of water.” In *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960), we expressed the same concept by stating, “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.”

Clear Springs Foods v. Spackman, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011). And, as the Idaho Supreme Court repeatedly stated, the Director’s discretion is cabined by these bedrock principles. See, e.g., *In re SRBA*, 157 Idaho at 393; *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 880; 154 P.3d 433, 451 (2007).

As described in detail in the Staff Reset Memo, the computational reset methodology was first agreed-to and authorized by the Water District 01 members in 1978 specifically to ensure the maximum use and benefit of the natural flow of the Upper Snake River and its tributaries. Staff Reset Memo at 2. Thus, in 1988, and in every year since then, according to the Department, “the annual period when natural flow could accrue to storage water rights and be allocated to reservoir spaceholders extended from the current year’s *Day of Allocation* to the following year’s *Day of Allocation*, or extended from the current year’s [computational accounting] *reset* date to the following year’s [computational accounting] *reset* date.” Staff Reset Memo at 5. Nor is this description new information developed for this contested case: the same approach is detailed, in nearly identical language, in the WD 01 Accounting and Distribution Manual. Section 8.15 (pp. 80-81). Thus, these “bedrock” principles cabin the Director’s discretion, and prohibit moving from the accounting and reset procedure used for the past 29 years.

V. The Director’s October 27 letter was outside the Director’s discretion

As described in the previous sections, the Director is not required to change to a January 1 computational accounting reset date. The Tribes submit that there is no ambiguity in the Period of Use language, because it has a settled legal meaning that authorizes the reset accounting that

has been in place for the last 29 years. Even if there is ambiguity regarding the potential for a January 1 water right accrual reset date, extrinsic evidence points to only one reasonable interpretation.

Further, while the Director has discretion regarding accounting procedures generally, that discretion is cabined here. As described above, the settled legal meaning of the “plain language,” the reliance- and expectation-based interests on the existing practice, the longstanding interpretation and practices, and the bedrock principles of Idaho water law (maximize beneficial use and minimize waste) require the Director to continue to use the existing reset accounting and procedure as described in the Staff Reset Memo. That procedure *ensures that each storage right is allowed to accrue no more than its water right volume one-time from the natural flow in that calendar year.*

The Director, however, issued a letter on October 27, 2017, directing the WD 01 Water Master to move the computational accounting reset date for the storage rights to January 1, 2018, thus precluding a late-season fill. Doing so was beyond the Director’s discretion, and the Director should reverse that instruction.

The Lake Walcott storage right (1-219) gets to fill once each calendar year. For each calendar year from 2000 through 2017 it was already full on January 1.⁷ The stored water was used for irrigation during the calendar year, and then refilled during the fall of that calendar year. The Lake Walcott right, therefore, filled only one time in each of those calendar years. The same thing would have occurred in 2017. On January 1, 2017, Lake Walcott was full. However, due to

⁷ See <http://idwr.idaho.gov/water-data/water-rights-accounting/WD01.html> (last viewed January 16, 2018).

the Director's improper October 27, 2017 letter, *Lake Walcott was not permitted to fill in 2017*. Instead, water that the senior Lake Walcott storage right was entitled to likely went to junior water rights or unallocated storage.

The Director must correct that error and can do so in this proceeding. The October 27 letter specifically references this contested case, and appears to have been issued in response to the petition from Milner that triggered this proceeding. That letter is thus inextricably part of this contested case.

CONCLUSION

Based on the foregoing, the Shoshone-Bannock Tribes respectfully request that the Director determine that the "plain language" of the decrees does not require a January 1 computational accounting reset date, but instead requires continuing with the existing 29-year practice and procedure.

Dated this 19th day of January, 2018.

SHOSHONE-BANNOCK TRIBES

By: William Bacon (by ECG)
William Bacon, General Counsel

By: Edmund Clay Goodman
Edmund Clay Goodman

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2018, I served a true and correct copy of the foregoing "Shoshone-Bannock Tribes Statement of Issues" on the Idaho Department of Water Resources by First Class U.S. Mail, postage prepaid, and on the following by electronic mail:

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

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

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

Sarah A. Klahn
Mitra M. Pemberton
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

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

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

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

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

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

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

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

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

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

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



Sarah R. Dandurand

ORIGINAL

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief Natural Resources Division
Office of the Attorney General
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment & Natural Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
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	_____ Deputy Clerk

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DEPARTMENT OF
WATER RESOURCES

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

FINAL UNIFIED DECREE

I. PROCEDURE

On June 17, 1987, the State of Idaho, ex rel. A. Kenneth Dunn in his official capacity as Director of the Idaho Department of Water Resources, filed a petition in the above-entitled Court seeking commencement of a "general adjudication inter se of all rights arising under state or federal law to the use of surface and ground waters from the Snake River basin water system and for the administration of such rights." *Petition* at 2. On November 19, 1987, this Court issued its *Commencement Order* thereby initiating the above-entitled general stream adjudication of all rights to the use of the waters of the Snake River Basin within the State of

FINAL UNIFIED DECREE

Idaho pursuant to Idaho Code § 42-1406A (Supp. 1987).¹ The *Commencement Order* adopted by reference this Court's October 14, 1987, *Memorandum Opinion on Commencement of Adjudication* as "further findings of fact and further conclusions of law as permitted by I.R.C.P. 52(a)." *Commencement Order* at 4.

As set forth in the *Memorandum Opinion on Commencement of Adjudication*, Idaho Code § 42-1406A (Supp. 1987) required that the adjudication be commenced within the terms of the McCarran Amendment, 43 U.S.C. § 666. This Court determined that for the adjudication to come within the terms of the McCarran Amendment the entire Snake River Basin water system within the State of Idaho had to be adjudicated. This Court defined the entire Snake River Basin water system within Idaho as follows:

Beginning at the point where the southern boundary line of the state of Idaho meets the western boundary line of the state of Idaho, then following the western boundary of the state north to the northern boundary of the Clearwater Basin, in Idaho, in section 36, T. 36 N., R. 6 W., B.M., then following the northern watershed divide of the Clearwater River Basin north and east to the eastern boundary of the state of Idaho in section 4, T. 42 N., R. 11 E., B.M., then following the eastern boundary of the state southeast to the northern boundary of the Bear River Basin in section 35, T. 10 S., R. 46 E., B.M., then following the northern watershed divide of the Bear River Basin, in Idaho, southwest to the southern boundary of the state of Idaho in section 26, T. 16 S., R. 28 E., B.M., then following the southern boundary line of the state of Idaho west to the point of beginning.

Commencement Order at 5. A map showing the boundaries of the Snake River Basin water system is attached for illustrative purposes as Attachment 1, as required by Idaho Code § 42-1413 (2003). The following counties are wholly located within the boundaries of the Snake River Basin water system:

Ada	Canyon	Idaho	Owyhee
Adams	Clark	Jefferson	Payette

¹ Idaho Code § 42-1406A was added by section 1 of chapter 18, 1985 Idaho Sess. L. at 28. Section 42-1406A was subsequently amended by section 11 of chapter 454, 1994 Idaho Sess. L. at 1452-53, and now appears as an uncodified law in the 1994 Idaho Session Laws.

Bingham	Clearwater	Jerome	Teton
Blaine	Custer	Lemhi	Twin Falls
Boise	Elmore	Lewis	Valley
Bonneville	Fremont	Lincoln	Washington
Butte	Gem	Madison	
Camas	Gooding	Minidoka	

Commencement Order at 5. The following counties are partly located within the boundaries of the Snake River Basin water system:

Bannock	Nez Perce
Caribou	Oneida
Cassia	Power
Latah	Shoshone

Id. at 6.

The *Commencement Order* also determined that “all classes of water uses . . . within the water system [must] be adjudicated as part of the Snake River Basin adjudication.” *Id.* At 6. On January 17, 1989, however, this Court entered its *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses* that allowed claimants of *de minimis* domestic and stock water rights, as defined in Idaho Code § 42-1401A(5) and (12) (Supp. 1988), to elect to defer adjudication of their claims; provided, all such claimants “shall be joined as parties in this proceeding and will be bound by all decrees entered in this case, including the final decree.” *Findings of Fact* at 3.

The *Commencement Order* directed the Director of the Idaho Department of Water Resources (“Director”): 1) to investigate the water system as provided in Idaho Code § 42-1410 (Supp. 1987); 2) to prepare the notice of order commencing a general adjudication containing that information required by Idaho Code § 42-1408A(1) (Supp. 1987); 3) to serve notice of the order commencing a general adjudication in accordance with chapter 14, title 42, Idaho Code; and 4) to file with this Court affidavits and other documents stating the

persons served with a notice of order commencing the adjudication. *Commencement Order* at 7-8.

Based upon the claims submitted; the files and records of the Idaho Department of Water Resources and the Court; the examination of the ditches, diversions, lands irrigated, and other uses of water within the water system; the Director's Reports and evidence herein, this Court enters the following findings of fact and conclusions of law:

II. FINDINGS OF FACT

1. All requirements for joinder of the United States as a party under state and federal law, including but not limited to 43 U.S.C. § 666, have been satisfied.
2. The Nez Perce Tribe participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Notice of Claim to a Water Right Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance* (March 18, 1993).
3. The Northwestern Band of the Shoshoni Nation participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Partial Protective Filing by the Northwestern Band of the Shoshoni Nation of Notices of Claim for Water Rights Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance on Behalf of the Northwestern Band of the Shoshoni Nation* (March 22, 1993).
4. The Shoshone-Bannock Tribes sought and were granted intervention in this proceeding. *Order Granting Permissive Intervention by the Shoshone-Bannock Tribes* (April 12, 1993).

5. The Shoshone-Paiute Tribes of the Duck Valley Indian Reservation sought and were granted intervention in this proceeding. *Motion to Intervene and Request for Expedited Hearing* (SRBA Consolidated Subcase No. 51-12756, Jan. 12, 1999); *Order Granting Tribes' Motion to Intervene, Order Requiring Written Status Reports and Order for Scheduling Conference Reports* (SRBA Subcases Nos. 51-12756 et al., Dec. 6, 1999).

6. The Director served notice of the commencement of the Snake River Basin Adjudication ("SRBA") in accordance with chapter 14, title 42, Idaho Code and the orders of this Court. This included service of the notice of commencement on the State of Idaho and the United States; service of the notice of commencement on all other persons by publication; service of the notice of commencement by posting in each county courthouse, county recorder's office and county assessor's office in which any part of the water system is located; service of the notice of commencement by mail on each person listed as owning real property on the real property assessment roll within the boundaries of the Snake River Basin water system; and filing of a copy of the notice of commencement in the office of the county recorder in each county in which any part of the water system is located.

7. In addition to the steps taken in paragraph 6, the Idaho Department of Water Resources also served notices of commencement on persons who may have used water within the water system, but were not listed as owners of real property. The sources of information the Idaho Department of Water Resources reviewed for this purpose were: 1) water right records of the Idaho Department of Water Resources for each basin wholly or partly within the water system; 2) cooperating farm/ranch operator records of the United States Department of Agriculture, Agricultural Stabilization and Conservation Service for each basin wholly or partly within the water system; and 3) mining claim records on federal

land of the United States Department of Interior, Bureau of Land Management for each basin wholly or partly within the water system.

8. The Director has completed an examination of the Snake River Basin water system and submitted Director's Reports to this Court in conformance with the requirements of chapter 14, title 42, Idaho Code and the orders of this Court.

9. As required by title 42, chapter 14, Idaho Code and this Court's orders, claims to water rights arising under state or federal law to the use of the surface and ground waters from the Snake River Basin water system have been adjudicated resulting in the issuance of partial decrees that have been certified as final pursuant to I.R.C.P. 54(b).²

10. Idaho Code § 42-1412(8) (2003) provides that: "Upon resolution of all objections to water rights acquired under state law, to water rights established under federal law, and to general provisions, and after entry of partial decree(s), the district court shall combine all partial decrees and the general provisions into a final decree." The Court finds that the conditions of Idaho Code § 42-1412(8) (2003) have been met with respect to the water rights identified in Attachments 2, 4, 5 and 6 and the general provisions in Attachment 3, enabling the Court to issue this Final Unified Decree.

III. CONCLUSIONS OF LAW

1. The SRBA is a general stream adjudication *inter se* of all water rights arising under state or federal law to the use of surface and ground waters from the Snake River Basin water system and for the administration of such rights.

2. The State of Idaho is a party to this proceeding.

² At the time of entry of this Final Unified Decree there are a total of 103 subcases pending final resolution. A separate *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* is being entered contemporaneously herewith, which provides for the continued processing of the subcases listed therein.

3. The Director was withdrawn as a party to this proceeding in 1994. Idaho Code § 42-1401B (2003); *State of Idaho, ex rel. Higginson v. United States*, 128 Idaho 246, 256-57, 912 P.2d 614, 624-25 (1995).

4. The United States is a party to this proceeding under 43 U.S.C. § 666.

5. This Final Unified Decree is conclusive as to the nature and extent of all rights of the United States to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, including, but not limited to, water rights held by the United States in trust for any Indian tribe, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

6. The Nez Perce Tribe, the Northwestern Band of the Shoshoni Nation, the Shoshone-Bannock Tribes, and the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation are parties to this proceeding.

7. The *Consent Decree Approving Entry of Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe and the Nez Perce Tribe to the Use of Water in the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resources Board* with its six attachments dated January 30, 2007 ("*Nez Perce Consent Decree*"), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Nez Perce Consent Decree* is conclusive as to the nature and extent of all rights of the Nez Perce Tribe to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

8. The *Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, dated August 13, 2014 (“*Shoshone-Bannock Consent Decree*”), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Bannock Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Bannock Tribes to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

9. The *Revised Consent Decree Approving Entry of Partial Decrees Determining the Rights of the United States as Trustee for the benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho* with its three attachments, dated December 12, 2006 (“*Shoshone-Paiute Consent Decree*”), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Paiute Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

10. This Final Unified Decree is conclusive as to the nature and extent of all rights of the Northwestern Band of the Shoshoni Nation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

11. Claimants in each of the SRBA basins received notice of the commencement of the SRBA in accordance with chapter 14, title 42, Idaho Code and orders of this Court. These notice procedures satisfy constitutional due process requirements. *LU Ranching Co. v. U.S.*, 138 Idaho 606 (2003).

IV. ORDER

NOW THEREFORE this Court ORDERS, ADJUDGES AND DECREES as follows:

1. This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987, except the following described water rights shall not be lost by failure to file a notice of claim, as provided in Idaho Code § 42-1420 (2003):

- a. Any domestic and stock water right, as defined in Idaho Code § 42-111 (1990), Idaho Code § 42-1401A(5) (1990), and Idaho Code § 42-1401A(12) (1990), the adjudication of which was deferred in accordance with this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*;
- b. A water right application for permit filed under chapters 2 or 15, title 42, Idaho Code;
- c. A water right permit issued under chapters 2 or 15, title 42, Idaho Code, unless the Director required the permit holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code;
- d. A water right license issued under chapters 2 or 15, title 42, Idaho Code, if proof of beneficial use was not filed with the Department of Water Resources

before November 19, 1987, unless the Director required the license holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code; and

- e. A claim to a water right under federal law, if the priority of the right claimed is later than November 18, 1987.

All other water rights with a priority before November 19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed.³ Any water rights with a priority date subsequent to November 18, 1987, were not required to be claimed in the SRBA, but to the extent any such water rights were claimed in the SRBA and a partial decree issued, the partial decree is conclusive as to the nature and extent of the right.

2. All partial decrees issued by this Court are set forth in Attachments 2 and 4 to this Final Unified Decree and are incorporated herein by reference.

3. Attachment 2 consists of a name index and a copy of all partial decrees issued by this Court.

4. General provisions decreed by this Court are set forth in Attachment 3 to this Final Unified Decree and are incorporated herein by reference.

5. Attachment 4 consists of the federal and tribal reserved water rights partially decreed and/or otherwise memorialized in a consent decree issued in conjunction with the approval of a federal reserved water right settlement, including all consent decrees and all attachments thereto; all partial decrees issued by this Court as part of the respective settlements; and all Federal, State and/or Tribal legislation necessary to enact and approve the water right settlements. In the case of any conflict between this Final Unified Decree and the partial

³ Excepting those claim numbers listed in the *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* entered contemporaneously herewith.

consent decrees approving reserved water right settlements, the partial consent decrees approving the reserved water right settlements as set forth in Attachment 4 shall control.

6. All claims to water rights filed in this proceeding that were decreed disallowed by this Court are set forth in Attachment 5 to this Final Unified Decree and are incorporated herein by reference.

7. The water right numbers for those water rights of record with the Idaho Department of Water Resources that were required to be claimed but were not claimed in this proceeding and therefore were decreed disallowed by this Court are set forth in Attachment 6 and are incorporated herein by reference. The portion of any disallowed water right that was deferrable pursuant to this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* is not affected by this paragraph.

8. This Final Unified Decree is binding against all persons including any persons that deferred filing of domestic and/or stock water claims pursuant to this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*, which is set forth in Attachment 7 to this Final Unified Decree and is incorporated herein by reference.

9. The adjudication of deferred domestic and stock water claims and the administration of such rights prior to their adjudication shall be governed by this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* and applicable state law.

10. All water rights based on beneficial uses, licenses, permits, posted notices, and statutory claims required to be claimed in this proceeding are superseded by this Final

Unified Decree. Provided, however, this Final Unified Decree does not supercede the third-party beneficiary contractual rights conferred on certain classes of water rights pursuant to the "Contract to Implement Chapter 259, Sess. Law 1983" as authorized by 1983 Idaho Sess. Laws 689 and codified as Idaho Code § 61-540 (2002). The scope of third-party beneficiaries and contract rights are defined in this Court's *Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2*. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011) included as Attachment 9.

11. All prior water right decrees and general provisions within the Snake River Basin water system are superseded by this Final Unified Decree except as expressly provided otherwise by partial decree or general provisions of this Court.

12. This Final Unified Decree shall not be construed to define, limit or otherwise affect the apportionment of benefits to lands within an irrigation district pursuant to chapter 7, title 43, Idaho Code.

13. This Final Unified Decree shall not be construed to supersede or affect otherwise the following: 1) any administrative changes to the elements of a water right completed after the entry of a partial decree but prior to the entry of this Final Unified Decree; or 2) elements of a water right defined by a license where, in accordance with Idaho Code § 42-1421(3) (2003), a partial decree was issued based on a permit prior to the issuance of the license.

14. The time period for determining forfeiture of a partial decree based upon state law shall be measured from the date of issuance of the partial decree by this Court and not from the date of this Final Unified Decree. State law regarding forfeiture does not apply to partial decrees based upon federal law.

15. The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state and tribal law, including the administrative provisions set forth in the federal reserved water right settlement agreements in Attachment 4.

16. Nothing in this Final Unified Decree shall be interpreted or construed as exempting the holder of a decreed water right based on state law from exercising or changing such right in compliance with applicable Idaho law.

17. This Court retains jurisdiction of this proceeding to: a) resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources; b) adjudicate any domestic or stock water rights deferred under this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*; and c) enter partial decrees, orders of disallowance, or other final determination for the pending subcases listed in the *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* entered contemporaneously herewith. Any order amending or modifying this Final Unified Decree, including the attachments hereto, will be entered on the register of action for Civil Case No. 39576 in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, and will be filed with the Idaho Department of Water Resources in lieu of issuing an Amended Final Unified Decree. Attachment 8 contains instructions on how to access any orders amending this Final Unified Decree.

18. The incorporation by reference of partial decrees and orders of this Court contained in the Attachments to this Final Unified Decree does not constitute a reissuance of such partial decrees and orders.

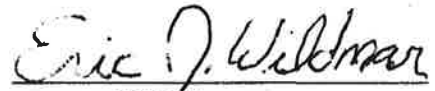
19. This Final Unified Decree, including the entirety of Attachments 1 through 10 listed below, shall be entered in the records of the clerk of the District Court for the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

Attachment 1	Snake River Basin Water System Map.
Attachment 2	Partially Decreed Water Rights, including a name index, consisting of 770 pages.
Attachment 3	General Provisions, consisting of 113 pages.
Attachment 4	Federal and Tribal Reserved Water Right Settlements, including all Consent Decrees and all Attachments thereto, all Partial Decrees issued by this Court as part of the Respective Settlements, and all Federal, State and/or Tribal Legislation Necessary to Enact and Approve the Water Right Settlements consisting of 2,857 pages.
Attachment 5	List of Water Right Numbers for Filed Water Right Claims Decreed as Disallowed consisting of 66 pages.
Attachment 6	List of Water Right Numbers for Unclaimed Water Rights Decreed as Disallowed consisting of 24 pages.
Attachment 7	June 28, 2012, <i>Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims</i> consisting of 6 pages.
Attachment 8	Instructions on Searching the Final Unified Decree consisting of 5 pages.
Attachment 9	<i>Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011).</i>
Attachment 10	<i>Register of Actions</i> , Twin Falls County Case No. 39576 (i.e., SRBA Main Case).

20. A certified paper and electronic copy of the entire Final Unified Decree shall be provided to the Director. The Director shall record the Final Unified Decree excluding all

Attachments other than Attachments 7 and 8 in the office of the county recorder of each county in which the place of use or point of diversion of any individual decreed water right in the Final Unified Decree is located. The Director shall maintain a copy of the Final Unified Decree for public inspection.

DATED this 25th day of August, 2014.


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

ATTACHMENT 1

SNAKE RIVER BASIN WATER
SYSTEM MAP consisting of 1 page.

ATTACHMENT 2

PARTIALLY DECREED WATER RIGHTS, INCLUDING A NAME INDEX AND A WATER RIGHT NUMBER INDEX

(water right number index in electronic
copy only).

TABLE OF CONTENTS

- | | | |
|----|--|--------------------|
| 1. | NAME INDEX | Pages 1 to 770 |
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| 3. | PARTIAL DECREES | Beginning Page 771 |

ATTACHMENT 3

GENERAL PROVISIONS
consisting of 113 pages.

ATTACHMENT 4

FEDERAL AND TRIBAL
RESERVED WATER RIGHT
SETTLEMENTS, INCLUDING
ALL CONSENT DECREES AND
ALL ATTACHMENTS THERETO,
ALL PARTIAL DECREES
ISSUED BY THIS COURT AS
PART OF THE RESPECTIVE
SETTLEMENTS, AND ALL
FEDERAL, STATE AND/OR
TRIBAL LEGISLATION
NECESSARY TO ENACT AND
APPROVE THE WATER RIGHT
SETTLEMENTS CONSISTING OF
2,857 PAGES.

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<i>Public Law 101-602, 104 Stat. 3059 (November 16, 1990).</i>	288
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<i>Order of Partial Decree on Uncontested Federal Water Right Claims</i> , dated February 28, 2012 (Water Rights Agreement Between the State of Idaho and the United States for Yellowstone National Park).	2822

ATTACHMENT 5

LIST OF WATER RIGHT NUMBERS FOR FILED WATER RIGHT CLAIMS DECREED AS DISALLOWED consisting of 66 pages.

The disallowed water right numbers listed in Attachment 5 fall into two categories: (1) water right numbers where the actual claimed use of water was adjudicated to be disallowed; and (2) water right numbers where the water right was split subsequent to the filing of the director's report, with the claimed use of water being decreed under the water right numbers for the "children" rights, and the number for the "parent" right having been decreed disallowed for purposes of closing the subcase number in the court's register of action. Please consult the Idaho Department of Water Resources for further inquiry regarding any of the disallowed water right numbers listed in Attachment 5.

ATTACHMENT 6

LIST OF WATER RIGHT
NUMBERS FOR UNCLAIMED
WATER RIGHTS DECREED AS
DISALLOWED consisting of
24 pages.

ATTACHMENT 7

June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* consisting of 6 pages.

ATTACHMENT 8

INSTRUCTIONS ON
SEARCHING THE FINAL
UNIFIED DECREE consisting of
5 pages.

ATTACHMENT 9

*Order on State of Idaho's Motion for
Partial Summary Judgment on Issue
No. 2. Subcase No. 00-91013 (Basin-
Wide Issue 13) (July 12, 2011)*

ATTACHMENT 10

Register of Actions, Twin Falls Case
No. 39576 (i.e., SRBA Main Case)

DEPARTMENT OF
WATER RESOURCES

been the subject of significant, complex litigation in the five years since the Late Claims were filed. Many of the underlying issues affecting the Late Claims are concurrently being litigated in administrative proceedings before the Idaho Department of Water Resources ("Department" or "Director"). For purposes of judicial economy, the Late Claim proceedings in the SRBA were stayed for a time pending resolution of the administrative proceedings. During the stay of the SRBA litigation, the parties consistently worked on settling those issues. On February 19, 2019, the parties to the Late Claims notified the Court that they had reached a global resolution and filed motions seeking Court approval of the proposed settlement. The proposed settlement was submitted with the Department's concurrence.

On March 13, 2019, the City of Boise ("Boise") filed *City of Boise's Motion to Participate* in the above-captioned subcases. On April 15, 2019, the City of Mountain Home ("Mountain Home") filed a *Motion to Participate in Subcases 63-33734A, and 63-33734B; 63-303, 63-3613, 63-3614 and 63-3618; and 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738*. Attached as an exhibit to the *Motion* is a *Brief in Support of I.R.C.P. 12(b)(1)(2)(4)(5) and (6) Motion to Dismiss State's Motion to Decree Water Right 63-33734A and 63-33734B; and State's Motion to Alter or Amend 63-303, 63-3613, 63-3614 and 63-3618* ("Motion to Dismiss"). Concurrent with the filing of these *Motions*, Mountain Home also filed proposed *Standard Form 1 Objections* (SF1) to water right claims 63-33734A and 63-33734B.

B. Procedural Background.

The pending Late Claims have been litigated before this Court for over five (5) years. During this time, there has been significant litigation, beginning in 2013 with the filing of the Late Claims, to the present time when the parties filed a Settlement Agreement. In between those events, *Director's Reports* were filed, *Objections* were filed by several irrigation entities, and *Responses* were filed by the State of Idaho and Suez Water Idaho Inc. In addition, during the five-year time span, the parties have taken depositions, served discovery, and pursued motion practice including filing motions for summary judgment. It would be an understatement to say that significant time, effort, and resources have been expended during the litigation process.

For purposes of ruling on the *Motions to Participate*, it is useful to recount the process and procedural history prior to and after the filing of the Late Claims.

a. The Base Rights.

This Court previously entered *Partial Decrees* for water right numbers 63-303, 63-3613, 63-3614, 63-33737 and 63-33738. These are storage rights associated with Arrowrock, Anderson Ranch and Lucky Peak dams. The Court will refer to these rights as “Base Rights.” The Base Rights were decreed as follows:

Right	Point of Diversion	Source	Quantity	Priority	Purpose	Period
63-303	Arrowrock Dam	Boise River	271,600 afy	01/13/1911	Irrigation Storage Irrigation from Storage	01/01-12/31 03/15-11/15
63-3613	Arrowrock Dam	Boise River	15,000 afy	06/25/1938	Irrigation Storage Irrigation from Storage	01/01-12/31 03/15-11/15
63-3614	Anderson Ranch Dam	South Fork Boise River	493,161 afy	12/09/1940	Irrigation Storage Irrigation from Storage Industrial Storage Industrial from Storage Power Storage Power from Storage Municipal Storage Municipal from Storage	01/01-12/31 03/15-11/15 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31
63-3618	Lucky Peak Dam	Boise River	293,050 afy	04/12/1963	Irrigation Storage Irrigation from Storage Recreation Storage Streamflow Maintenance Storage Streamflow Maintenance from Storage	01/01-12/31 03/15-11/15 01/01-12/31 01/01-12/31 01/01-12/31

The Base Rights were claimed by the United States Bureau of Reclamation (“USBOR”) based on prior licenses. They are decreed in the name of the USBOR. However, title to the use of the water is held by the consumers or users of the water. *See, United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). *Partial Decrees* for the Base Rights 63-303 and 63-3613 were issued on June 28, 2007. A *Partial Decree* for 63-3614 was issued February 25, 2009, and a *Partial Decree* for 63-3518 was issued December 18, 2008. Together, the Base Rights provide for a cumulative storage capacity of 1,072,811 acre feet annually.

b. Basin-Wide Issue 17.

The issue of how filling a reservoir after the release of flood waters should be addressed in the SRBA began in earnest in 2007. During 2007, a controversy arose in Basin 01 (Main Stem of the Snake River) when the USBOR amended its claims for storage rights seeking a remark authorizing the right to refill under the priority date for any water released for flood control.² On June 8, 2012, various water delivery entities holding decreed Base Rights on the Boise River sought leave of court for *amicus* participation in the proceedings in Basin 01. Thereafter, on June 11, 2012, some of those same parties filed a *Petition to Designate a Basin-*

² See SRBA subcase nos. 01-2064 and 01-2068.

Wide Issue.³ The Court designated Basin-Wide Issue 17 as follows: “Does Idaho law require a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control?” *Order Designating Basin-Wide Issue, Basin-Wide Issue 17*, (Subcase no. 00-91017) (Sept. 21, 2012). This Court held *inter alia* that Idaho law did not allow a senior storage right to refill in priority water released for flood control purposes. *Memorandum Decision*, at 7-8 (Subcase no. 00-91017) (March 20, 2013).⁴ The Idaho Supreme Court reversed and instructed that contests to the Department’s accounting methodology for determining when a decreed water right has been filled should be addressed by the Department pursuant to the Administrative Procedures Act. *In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014). That Supreme Court ruling was followed by the administrative proceedings before the Department.

c. Administrative Proceedings.

On October 24, 2014, the Director commenced a contested case proceeding to address the controversy regarding how water is counted or credited towards the fill of water rights for the federal on-stream reservoirs located in the Boise River System. Following a five-day administrative hearing, the Director issued a *Final Order* (Oct. 20, 2015). On December 17, 2015, two *Petitions for Judicial Review* were filed seeking review of the *Final Order*. Hearings were held, and on September 1, 2016, this Court issued its opinion in the judicial review proceedings. See *Memorandum Decision and Order*, Case No. CV-WA-2015-21376 (Consolidated Ada County Case No. CV-WA-2015-21391) (Sept. 1, 2016). In that opinion this Court stated:

The Director has explicitly found that the irrigators have historically diverted, stored and used water identified as unaccounted for storage for irrigation following flood releases in flood control years. He acknowledges this use has occurred pursuant to a long-standing practice, and even condones the continued practice of diverting, storing, and using water consistent with how it has been done historically.

....

If unaccounted for storage water has been historically and continuously diverted, stored and used by the irrigators for irrigation dating back before 1971, as the Director expressly recognizes, then the United States and irrigators have acquired a vested constitutional method water right in that water under Idaho law. Indeed the United States and the various water users have claimed beneficial use water

³ SRBA subcase no. 00-91017.

⁴ In the opinion the Court noted “that since this issue has arisen some reservoir storage right holders have filed motions to file late claims for separate beneficial use rights to address refill.” *Memorandum Decision and Order* at 10, fn.7.

rights in the SRBA for that water identified by the Director as unaccounted for storage. See SRBA Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33737 and 63-33738.

Memorandum Decision and Opinion at 16-17 (internal citations to record omitted).

Thereafter, the parties filed *Petitions for Rehearing*. On November 14, 2016, the Court denied the *Petitions for Rehearing*. **Order Denying Rehearing**, Case No. CV-WA-2015-21376 (Consolidated Ada County Case No. CV-WA-2015-21391) (Nov. 14, 2016). Beginning in December 2016, multiple appeals and cross-appeals were filed with the Idaho Supreme Court. While the appeal was proceeding, the parties jointly sought a stay of the appeal based on pending settlement negotiations. On July 30, 2018, the Idaho Supreme Court granted the stay and suspended the appeal. **Order Granting Joint Motion to Suspend Appeal and Reset Oral Argument**, Docket No. 44677-2016, Ada County District Court CV-WA-2015-21376 (July 30, 2018).

d. Late Claims.

Meanwhile, litigation on the related Late Claims was proceeding. On January 31, 2013, prior to this Court issuing its ruling in Basin-Wide 17, the USBOR as well as the Boise Project Board of Control and various irrigation districts sought leave to file Late Claims based on beneficial use of water historically used to refill the reservoirs following flood releases. Notice was served pursuant to SRBA docket sheet procedure. A hearing was held on the Motions, and the Court granted leave to file the Late Claims on May 22, 2013. **Order Granting Motions to File Late Claims**, Water Right Claims: (01-10620, *et.al*-US-BOR) (May 22, 2013); **Order Granting Motions to File Late Claims**, Water Right Claims: 63-33737 & 63-33738 (May 22, 2013). The Late Claims were claimed as follows:

Right	Point of Diversion	Source	Quantity	Priority	Purpose	Period
63-33732 (USBOR)	Arrowrock Dam	Boise River	1,436,389 afy	09/30/1965	Irrigation Storage Irrigation from Storage	10/01-09/30 03/01-11/15
63-33733 (USBOR.)	Anderson Ranch Dam	South Fork Boise River	1,307,035 afy	09/30/1965	Irrigation Storage Irrigation from Storage Industrial Storage Industrial from Storage Power Storage Power from Storage Municipal Storage Municipal from Storage	10/01-09/30 03/01-11/15 10/01-09/30 01/01-12/31 10/01-09/30 01/01-12/31 10/01-09/30 01/01-12/31
63-33734 (USBOR)	Lucky Peak Dam	Boise River	3,672,732 afy	09/30/1965	Irrigation Storage Irrigation from Storage Recreation Storage Streamflow Maintenance Storage Streamflow Maintenance from Storage	10/01-09/30 03/01-11/15 01/01-12/31 10/01-09/30 01/01-12/31
63-33737 (Boise)	Arrowrock Dam	Boise River	177,816 afy	01/13/1911	Irrigation Storage	01/01-12/31

Project et al.)						
63-33738 (Boise Project et al.)	Anderson Ranch Dam	Boise River	241,144 afy	12/09/1940	Irrigation Storage	01/01-12/31

The Late Claims filed by the USBOR provide for a cumulative storage capacity of 6,416,156 acre feet annually.

i. Director's Reports.

The Late Claims were forwarded to the Department for investigation and filing of a *Director's Report and Recommendation*. The Late Claims were reported in the *Director's Report of Late and Miscellaneous Claims* ("*Director's Report*") filed with the Court on December 31, 2013. The *Director's Report* recommended that the Late Claims be decreed **disallowed**. Notice of the filing was pursuant to SRBA docket sheet notice. The *Director's Report* established *Objection* and *Response* deadlines as March 20, 2014 and May 22, 2014, respectively. Although the *Director's Report* recommended disallowance of the rights, the recommendation recognized that use of water captured in evacuated flood control space for irrigation and other beneficial purposes was a historical practice in Basin 63. The *Director's Report* recommended that the historical practice be recognized in the SRBA through a general provision rather than a water right. Therefore, the *Director's Report* filed in 2013 put parties on notice that the use of water captured after evacuation for flood control was considered a historic use.

ii. Proceedings on the Late Claims.

Following the expiration of the *Objection* and *Response* period on the Late Claims, Suez Water Idaho Inc. (formerly United Water) filed a *Motion to Participate* in the proceedings. The Court granted Suez's *Motion* on September 30, 2014. Thereafter, the State of Idaho filed a *Motion to Dismiss* the Late Claims filed by Boise Project Board of Control and other irrigation districts based on the holding in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). See *Order Granting in Part and Denying in Part Motion for Summary Judgment*, (Subcase Nos: 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, 01-10620, 01-10621, 01-10622, 01-10623, 63-33732, 63-33733, 63-33737 and 63-33738) (Jan. 9, 2015). Following a ruling on the legal issue, the Court referred the subcases to the Special Master for determination of the elements of the Late Claims. Thereafter, on September 17, 2015, the Special Master granted Pioneer Irrigation District leave to participate in the proceedings based on stipulation of

the parties. On October 9, 2015, the Special Master issued a lengthy *Memorandum Decision* and a *Special Master's Report and Recommendation*. The parties filed *Motions to Alter or Amend the Special Master's Report* on November 27, 2015. On February 26, 2016, the Special Master issued another lengthy opinion denying the *Motions to Alter or Amend*. Thereafter, on March 14, 2016, the parties filed *Notices of Challenge*. On September 1, 2016, following proceedings on the *Challenges*, this Court recommitted the matter back to the Special Master. *See Memorandum Decision and Order on Challenge and Order of Recommitment to the Special Master*, Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734 (Sept. 1, 2016).⁵ On February 2, 2017, the Special Master stayed the proceedings for purposes of judicial economy, pending resolution of the administrative proceedings by the Idaho Supreme Court.

e. Stipulated Settlement and Related Motions.

In the meantime, the parties to the Late Claims were working diligently to reach a settlement. In 2019, the parties informed the Court that they had entered into a stipulated settlement ("Settlement"). The terms of the Settlement call for: (1) joint support for passing legislation; (2) decreeing of two water rights to describe the Late Claims (these were given new numbers although they are derived from the original Late Claims); (3) amending the Base Claims to refer to the Late Claims; and (4) dismissing all other claims, appeals, and cross-appeals related to the Late Claims.

To effectuate the Settlement, all parties agreed to support the State's filing of the following three motions: (1) *Motion to Decree Water Right 63-33734A*; (2) *Motion to Decree Water Right No. 63-33734B and Disallow Water Right Claim Nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738*; and (3) *Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-3614, and 63-3618*. Each is explained below:

i. Motions to Disallow Late Claims

The *Motion to Disallow Water Right Claims* seeks the issuance of a decree disallowing the pending Late Claims. This *Motion* was to disallow the Late Claims filed under the original

⁵ On December 13, 2016, some of the parties filed motions seeking to have the Court's Order I.R.C.P. 54(b) certified for purposes of proceeding with an appeal. The Court denied the motions.

numbers. This is a standard practice in the SRBA to ensure that duplicate water rights are not decreed after the rights are assigned new numbers.

ii. Motions to Decree Water Rights 63-33734A and 63-33734B.

This *Motion* seeks the issuance of *Partial Decrees* for two rights identified as 63-33734A and 63-33734B. These two proposed rights incorporate the water usage described in the original Late Claims, but assigned them new numbers. The elements are as follows:

Right	Diversion	Source	Quantity	Priority	Purpose	Period
63-33734A	Arrowrock, Anderson Ranch, & Lucky Peak.	Boise River	3,672,732	9/30/1965	Irrigation Storage	01/01-12/31
					Municipal/Industrial Storage	01/01-12/31
					Streamflow Maintenance Storage	01/01-12/31
63-33734B	Arrowrock, Anderson Ranch, & Lucky Peak.	Boise River	587,056	03/16/1973	Irrigation Storage	01/01-07/31
					Municipal/Industrial Storage	01/01-07/31
					Streamflow Maintenance Storage	01/01-07/31

The two proposed *Partial Decrees* provide for a cumulative storage capacity of 4,259,788 acre feet annually. The proposed decrees also include certain remarks.

The proposed decree for 63-33734A contains the following subordination remark under the "**Priority**" element:

This water right is subordinate to all water rights established pursuant to Idaho law for uses within the IDWR Administrative Basin 63, except water rights to store more than 1,000 acre feet of surface water permitted or licensed after April 15, 2019. This water right shall not be administered as subordinate to water rights permitted or licensed for managed ground water recharge after April 15, 2019 or any water rights for the storage or use of water for power purposes.

Both proposed decrees include the following combined annual diversion limitation remark under the "**Quantity**" element:

Water right nos. 63-33734A, 63-303, 63-3613, 63-3614, 63-3618, and 63-33734B, are limited to the total combined annual diversion volume necessary to allocate a total of 1,044,011 acre-feet of storage water per year to the consumers or users of the storage water.

Both water right claims include the following remark in the "**other provisions**" element:

The annual time period for accruing natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources; provided however, the annual time period will begin (1) day after the day of allocation and when there is no natural flow available to water rights junior in priority to January 12, 1911, and (2) before natural flow has again become

available to water rights junior in priority to January 12, 1911, or on Nov. 1, whichever is earlier.

The "**Purpose and Period of Use**" elements for both water rights includes a comment providing that water "accruing to this right supplements water accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618." This explains how 63-33734A and B relate to the Base Claims.

Comment 5 to the "**Other Provision**" element of the proposed decree for 63-33734B, subordinates the right to all "surface water rights within . . . Basin 63 with a priority date earlier than May 1, 2014, with . . . a diversion rate of less than 0.1 CFS," and to a number of other listed rights.

iii. Motion to Alter or Amend Base Rights.

The *Motion to Amend* the Base Rights is brought pursuant to I.R.C.P. 60(b)(6) and seeks to add remarks to the *Partial Decrees* previously issued for the Base Rights. Specifically, the Base Rights would be amended with a volumetric limitation.

In the "**Quantity**" element, the following combined volume limit remark would apply:

Water rights nos. 63-303, 63-3613, 63-3614, 63-3618, 63-33734A, and 63-33734B are limited to the total combined annual diversion volume necessary to allocate a total of 1,044,011 acre-feet of storage water per year to the consumers or users of the storage water.

In the "**Other Provisions**" element, the following remark addressing "**reset**" would apply:

The annual time period for accruing natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources; provided, however, the annual time period will begin (1) after the day of allocation and when there is no natural flow available to water rights junior in priority to January 12, 1911, and (2) before natural flow has again become available to water rights junior in priority to January 12, 1911, or on Nov. 1, whichever is earlier.

Mountain Home is focused primarily on language proposed to be included under the elements which would settle the subcases, in part, by subordinating 63-33734A and 63-33734B to certain other rights.

II. ANALYSIS

A. Legal standard for participation/intervention.

The Late Claims for Arrowrock, Anderson Ranch and Lucky Peak Reservoirs were filed in 2013, and have been before the Court for more than five years. The overarching question which must be answered is whether Boise's and Mountain Home's *Motions to Participate* are timely and well grounded. As non-parties to the Late Claims, the *Motions* for Mountain Home and Boise request leave to participate under *SRBA Administrative Order 1 (AO1)*, §10.k. Rule 10.k establishes the parameters:

Any party to the adjudication who is not a party to a subcase may seek leave to participate in a subcase by filing a timely *Motion to Participate*. A *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master. A party to the adjudication who does not file an objection, a response or a timely *Motion to Participate* waives the right to be a party to the subcase and to receive notice of further proceedings before the Special Master, except for *Motions to Alter or Amend*.

AO1 10.k. Boise and Mountain Home must obtain leave to participate because they are not currently parties to the Late Claim subcases. **AO1 2.p.** defines "party to a subcase" as follows:

The claimant, any objector or respondent to a water right recommendation, any party to a subcase which has been consolidated with another subcase, any party to the adjudication granted leave to participate in a subcase by the Presiding Judge or Special Master, and any party to the adjudication filing a *Motion to Alter or Amend the Special Master's Recommendation*.

AO1 2.p In order to determine whether Boise or Mountain Home may participate at this late time in the proceedings, the Court looks to I.R.C.P. 24(a). Rule 24(a) sets forth the standard for intervention of right:

On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by an Idaho statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede

the movant's ability to protect its interest, unless existing parties adequately represent that interest.

I.R.C.P. 24(a). The Idaho Supreme Court distinguished the timeliness standard for intervention of right in the context of the SRBA. *State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000) (hereafter "*Smith Springs*"). The Supreme Court held that intervention of right in subcases to which a party has a generalized interest was timely in the context of the SRBA if filed within the response period. The Court rejected the argument that intervention of right was timely if filed prior to the date set for trial and held:

Given the monumental scope of the SRBA, which is adjudicating the rights of all water rights holders in the Snake River Basin, we agree with the SRBA court that a "generalized interest is insufficient to intervene in a subcase as a matter of right because the requirements for filing timely objections or responses under I.C. § 42-1412 would become meaningless[,] depriving the court and all parties to the SRBA the structure necessary to administer the case."

Id. at 110, 996 P.2d at 810.

In *Smith Springs*, the Idaho Supreme Court also addressed the standard for permissive intervention. "I.R.C.P. 24(b) allows permissive intervention by a person '[u]pon timely application' and 'when an applicant's claim . . . and the main action have a question of law or fact in common.'" *Id.* at 110, 996 P.2d at 810. Further, "[t]he decision of whether to grant the motion to intervene is discretionary with the trial court. A court acts within its discretion if it perceives the issue as discretionary, acts within the outer boundaries of its discretion and consistently with applicable legal standards, and reaches its decision by exercise of reason." *Id.* at 110, 996 P.2d at 810.

B. Arguments of the Parties.

The Court has considered the arguments of the movants and parties, their briefs and affidavits in reaching its conclusions.

a. Mountain Home.

i. Intervention as of right.

Mountain Home argues that it meets the requirements for intervention under both I.R.C.P. 24(a) and 24(b) and should be allowed to intervene in subcases 63-33734A, and 63-33734B; 63-303, 63-3613, 63-3614 and 63-3618; and 63-33732, 63-33733, 63-33734, 63-33737

and 63-33738. Specifically, Mountain Home asserts that its *Motion* is timely because the rights proposed in the Settlement, 63-33734A and 63-33734B, constitute *new* water rights which have only been opened as of February 2019. Mountain Home bases this conclusion on the allegation that the Settlement resulting in the two renumbered water rights is not within the parameters of the *Director's Reports and Claims*. It argues that the Department has sidestepped SRBA procedures by not requiring new claim forms and providing notice by issuing new or amended *Director's Reports*. In sum, Mountain Home argues that the two renumbered water right numbers are really new claims rather than settlement of existing claims.

The first argument is Mountain Home's assertion that if the Department had followed proper SRBA procedure for new claims, its participation would be timely.

Second, Mountain Home asserts that its interest in the Late Claims is based on a conditional permit for groundwater recharge filed by Elmore County. The new permit authorizes groundwater recharge near the City of Mountain Home. Mountain Home argues that the settlement of the Late Claims results in water rights with priority dates senior to the Elmore County permit. The Late Claim settlement thus has the potential to impact the groundwater recharge.

Third, Mountain Home argues that the early priority dates and quantities of 63-33734A and B, compared to the junior priority date of the Elmore County permit, would result in impairment of groundwater recharge under the permit. The argument is that previously unappropriated water from the South Fork Boise River would not be available. As a result, Mountain Home contends that its interest in Elmore County's permit will not be protected by the terms of the Settlement.

Last, Mountain Home argues its interests are not adequately represented by existing parties as they are all irrigators in Basin 63, and outside the Mountain Home area.

ii. Permissive Intervention.

In the alternative to intervention as a matter of right, Mountain Home also asks the Court to consider permissive intervention under Rule 24(b). Mountain Home asserts that its Motion is timely and would not unduly delay or prejudice the rights of the other parties.

iii. Other Arguments.

In addition to its arguments for intervention pursuant to Rule 24(a) and 24(b), Mountain Home asserts three reasons why the Court should dismiss the State's Motions: (1) the Court

lacks jurisdiction to consider subcases 63-33734A and 63-33734B; and (2) the subcases cannot be decreed because there are no claim forms or *Director's Reports*.

b. Boise.

i. Intervention as of right.

Boise argues it is entitled to participate as a matter of right because the terms of the Settlement could alter administration of its own water rights from the Boise River and its particularized interest in the Lucky Peak Base Right 63-03618. Boise's two main arguments for intervention of right are that the merits of the Late Claims have not been addressed by the parties or the Court and that the reopening of the Lucky Peak Base Right could affect Boise's interests as a party to that subcase.

ii. Permissive intervention.

In the alternative, Boise requests the Court to allow it permissive intervention with reasonable conditions. Such reasonable conditions would involve limiting its participation in the Late Claims to those issues that could affect its own water rights, and particularly amendments to the Lucky Peak Base Right.

C. Discussion.

a. Proposed water rights 63-33734A and 63-33734B are not new water right claims.

Mountain Home argues that proposed claims 63-33734A and 63-33734B constitute new claims, and therefore should be required to follow SRBA procedure for new claims. This view of the pleadings would give Mountain Home a hook to get into these subcases on a timely basis. That is because new claims require the filing of a *Director's Report* and allow parties to file objections and responses.

This Court disagrees that the proposed claims in the Settlement constitute new claims. Only the nomenclature for the claim numbers is different. The water use that is the subject of the proposed claims is the same water use described in the original Late Claims. As explained below in this opinion, the elements for the proposed claims are within the parameters of the Late Claims. No new water use or additional quantity was added. The water claims were simply reconfigured and renumbered. Put differently, the proposed claims do not claim anything

beyond what was in the original Late Claims. Of course, the parties could have labeled the proposed claims with the existing numbers for the Late Claims. Apparently, the parties saw merit in using different numbers in the interest of avoiding later confusion. However, the mere renumbering of the claims did not expand them or transform them into new claims. In order to make a colorable argument that the Settlement established new claims, the parties would have to establish that the claims when compared to the previously filed Late Claims asserted a greater quantity of water, or water from a different source, or added additional places of use, earlier priorities, a larger period of use, or new purposes of use. The movants did not make any such assertions.

The Court is unaware of any rules or IDWR policies which require new claims and new *Director Reports* be filed when claims are merely renumbered. Indeed, movants did not cite to any rules, policies or procedures. The Court finds that assigning different numbers to the proposed Late Claims does not implicate new claims or raise any due process issues for third parties.

b. The Court has jurisdiction to preside over the proposed water rights.

Mountain Home argues that the Court is without jurisdiction to address the proposed water rights because the subcase numbers were not identified in the *Final Unified Decree* as pending subcases over which the SRBA Court retained jurisdiction at the time of entry of the *Final Unified Decree*. This argument is without merit. The subcase numbers for each of the Late Claims were identified in the *Final Unified Decree* and in a separate order the Court issued in each of the subcases prior to entry of the *Final Unified Decree*. See *Order Regarding Subcases Pending Upon Entry of Final Unified Decree*, Subcase Nos. 01-00219 et al, (see attached list) (Aug. 26, 2014). Indeed the Court retained jurisdiction by this *Order* over the subject matter of the Late Claims. Proposed water rights 63-33734A and B are a compilation of the Late Claims. The fact that the proposed water rights use different numbers does not divest the Court of jurisdiction over the proposed water rights.

c. An Amended Claim/Director's Report is not required for the proposed water rights.

Mountain Home argues 63-33734A and B are not within the parameters of the original Late Claims and *Director's Reports*. It therefore asserts amended claims are required along with amended *Director's Reports* and new objection and response periods. Although no additional

quantity was added, Mountain Home asserts that the subordination clause included in 63-33734A puts the Settlement outside the original Late Claims. This argument lacks merit.

The parties sought approval of the Settlement through the filing of motions. This motion practice is consistent with *AOI 4.d.(3)* which establishes that when parties reach agreement, they may file a *Standard Form 5* or some other stipulation acceptable to the court. Alternatively, the parties could have submitted *Standard Forms 5* ("*SF5s*") for each of the two proposed water rights. Whether the parties use an *SF5* or some other form of stipulation, the process is the same.

Where the Department concurs with a proposed settlement, the Court is not required to conduct a hearing on the settlement. *AOI 4.d.(3)(c)*. Here, the Department is a signatory to the proposed Settlement; therefore a hearing is not required. Moreover, even where a hearing is required, the hearing process for approving the settlement does not reopen the subcase to new parties, subject to those instances where the settlement expands the water right beyond what was originally claimed.

The law of the case for amended claims is well established in the SRBA. In settlement proceedings, an amended claim and *Director's Report* are required only where the settlement expands the right beyond the parameters of the original claim and the director's recommendation.⁶ *Memorandum Decision and Order Granting in Part, and Denying in part, Motion to Stay Subcases* (Case 39576) (Feb. 13, 1998). In that *Memorandum Decision and Order*, the SRBA Court recognized notice issues where claims are amended to enlarge the burden on the stream system. Therefore, motions to amend claims "seeking quantity of water/additional places, periods, or purposes of use; or to assert a different [earlier] priority than originally claimed shall be noticed on the Docket Sheet allowing sufficient time for SRBA parties to seek subcase participation on the motion prior to hearing. Claim amendments for a change of ownership or reduction or elimination of a) diversion rate, b) volume, or c) purposes of use are not required to be noticed on the Docket Sheet." *Id* at 9. The policies of this

⁶ The law of the case was codified in the procedural rules for the CSRBA. It provides:

If the settlement results in an expansion of the water right beyond what was originally claimed (i.e. increase in rate of diversion, acreage, more consumptive purpose of use etc.), or results in a change that would potentially affect a party not already a party to the Subcase, then an Amended Claim/Director's Report is required to provide notice to third parties not already parties to the Subcase. The Amended Claim/Director's Report shall appear on the Docket Sheet to provide notice and an opportunity to object to persons not already a party to the Subcase.

Amended CSRBA Administrative Order 1, §4.d.(4).(e).

Memorandum Decision were incorporated in the Department's policies for new claims and *Amended Director's Reports*. The policy is based on principles that third parties are on notice of the claims and the *Director's Reports* and should expect that a settlement will fall somewhere between the *Director's Report* recommendation and the claim. Settlements routinely represent a compromise between the right as claimed and the right as recommended. To the extent third parties have an interest in the outcome of the proceedings, they were afforded the opportunity to enter the subcase at its inception through the filing of an objection or a response. The settlement process would be severely undermined if third parties were permitted to enter a subcase as a matter of right every time a settlement is reached. This concept is particularly true where, as here, there was no expansion of the claims, and indeed the Settlement involved a reduction of sorts in that the Settlement involved subordination to a large group of water rights.

The Idaho Supreme Court acknowledged the problem in a situation similar to the present circumstances. In *N. Snake Groundwater Dist. v. Gisler*, 136 Idaho 747, 750, 40 P.3d 105, 108 (2002), the Court held that parties who tried to come into a subcase after it was settled were untimely. The Court instructed, "To allow a new party to enter a subcase after it has been settled through the SF5 process would unfairly burden the claimant, who would be forced to try a case in which he had just reached a settlement, obviously defeating the purpose of the SF5 process." *Id.*

In this case, the proposed water rights fall within the parameters of the *Director's Report* recommendation and the original claims. In reviewing 63-33734A and B, the Court finds no expansion of the Late Claims. The combined quantities for the proposed water rights (4,258,988 afy) are considerably less than the combined quantities for the original Late Claims filed by the USBOR (6,416,156 afy). The priority date for proposed water right 63-33734A is the same as that of the Late Claims. The priority date for proposed water right 63-33734B is junior to that of the Late Claims. The periods of use for the proposed rights, although shifted for some of the purposes, are not expansive of the Late Claims.

Mountain Home points to the subordination clause, which does not apply to water rights outside of Basin 63, as making the proposed water rights expansive of the Late Claims. Mountain Home further asserts the subordination clause may be improper because the State is a party to a Settlement that treats parties differently. Specifically the water users in Basin 63 which benefit from the subordination clause are treated differently than water users outside of Basin 63

where the subordination clause does not apply. Mountain Home argues that if the approval of the Settlement were before a Special Master, the City would be able to enter the subcase and raise questions of law on a motion to alter or amend. *See Memorandum Decision and Order on Challenge*, Subcase Nos. 36-00061, 36-00062 and 36-00063, 9/27/1999 ("Morris") (acknowledging that "litigants who were not parties to a subcase should be able to argue about the propriety of matters of law." *Morris* at 16, fn. 12). These arguments are without merit.

As an initial matter, the Late Claims filed by the USBOR did not include a subordination remark. The entire 6,416,156 afy claimed under the three USBOR Late Claims was unsubordinated to any water rights.

Next, parties to a subcase can agree to a variety of terms in a settlement agreement so long as the terms are within the scope of the *Director's Report* recommendation and the original claim. *See Morris* at 15-16. This analysis is unchanged when applied to subordination remarks. There is nothing contrary to law or public policy about the Court decreeing a subordination remark if agreed to by all of the parties to the subcase. It is not unheard of for parties in Idaho water cases to include voluntary subordination provisions that depart from standard water law principles. *See Idaho Power Co. v. State*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) (noting that a voluntary agreement, like the one at issue between Idaho Power and future upstream water users, "not to assert ownership rights to their fullest are common in today's society"). In the Nez Perce Consent Decree proceedings, the parties agreed to subordinate certain of the tribal claims to certain existing junior state-law based claims to reach a settlement. *See Memorandum Decision and Order Dismissing Objections in Part with Prejudice and In Part without Prejudice* (Consolidated Subcases No. 92-00080 (Nez Perce Tribe Multiple-Use Claims), p.6 (Sept. 5, 2006).⁷

In the subcases at issue here, all parties to the adjudication were provided notice of the Late Claims had and ample opportunity to participate in the subcases. Because the Settlement claims (63-33734A and B) fall within the parameters of the *Director's Report* recommendation and the Late Claims, and there is nothing improper about the parties agreeing to a subordination

⁷ That provision provided:

Notwithstanding the Priority Date of this water right, the Tribe and the United States shall exercise this right in a manner that ensures persons lawfully diverting water prior to April 20, 2004, will continue to receive their full entitlement under state law.

remark as a term of the Settlement, amended claims and *Director's Reports* are not required to put third parties on notice of the Settlement.

d. Mountain Home's and Boise's *Motions* are not timely under I.R.C.P. 24(a) or (b).

Both Mountain Home and Boise have interests relating to the Late Claims. Boise has water rights from the Boise River and argues that administration of the Late Claims could impact the administration of its rights and that the disposition of the Late Claims may impair Boise's ability to protect its interests. Mountain Home's interest relates to an unperfected conditional permit for groundwater recharge in Basin 61 held by Elmore County. The groundwater rights held by Mountain Home would benefit from Elmore County's recharge permit and Mountain Home's interest is not represented by any other party to the Late Claims. The Court agrees with these assertions.

However, the Court finds both Boise and Mountain Home's *Motions to Participate* to be untimely. As previously illustrated, these subcases have been going on for over five years and have involved a significant amount of litigation as well as extensive settlement negotiations. The resolution of water disputes relies extensively on settlement negotiations and contested cases are routinely set on dual litigation and settlement tracks. Allowing third parties to enter a subcase and pick apart the terms after a settlement is reached undermines the entire settlement process. In fact, it largely makes the process more expensive than sitting on the sidelines, and makes participation throughout the litigation process pointless and potentially never ending. The Idaho Supreme Court discussed this problem in *Gisler*. Allowing a new party to enter a subcase after it has been settled unfairly burdens the claimant and parties who would be forced to try a case in which they had just reached a settlement, obviously defeating the purpose of the settlement process. *Id.* at 750, 40 P.3d at 108. Allowing a new party to enter the subcases at this point in these proceedings would be extremely prejudicial to the parties. Both Boise and Mountain Home had the opportunity to participate in the subcases, including through the objection and response periods, filing motions to participate early in the proceedings like Suez and Pioneer Irrigation District, and by filing a motion to alter or amend the *Special Master's Report and Recommendation* issued October 9, 2015. For whatever reason, the movants elected not to participate. For these reasons the *Motions to Participate* are denied.

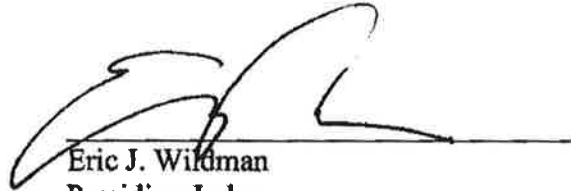
III.

ORDER

Therefore, IT IS HEREBY ORDERED that Mountain Home's *Motion to Participate* is **denied**. IT IS FURTHER ORDERED that Boise's *Motion to Participate* is **denied**.

IT IS SO ORDERED.

Dated July 8, 2019.



Eric J. Wildman
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTIONS TO PARTICIPATE was mailed on July 08, 2019, with sufficient first-class postage to the following:

BOISE PROJECT BOARD OF CONTROL

Represented by:
ALBERT P BARKER
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

PIONEER IRRIGATION DISTRICT

Represented by:
ANDREW J WALDERA
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

STATE OF IDAHO

Represented by:
CHIEF NATURAL RESOURCES DIV
OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO
PO BOX 83720
BOISE, ID 83720-0010
Phone: 208-334-2400

SUEZ WATER IDAHO INC

Represented by:
CHRISTOPHER H MEYER
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

BALLENTYNE DITCH COMPANY

BOISE VALLEY IRRIGATION
CANYON COUNTY WATER COMPANY
EUREKA WATER COMPANY
FARMERS' CO-OPERATIVE DITCH CO
MIDDLETON IRRIGATION ASSN INC
MIDDLETON MILL DITCH COMPANY
NAMPA & MERIDIAN IRRIGATION
NEW DRY CREEK DITCH COMPANY
PIONEER DITCH COMPANY
SETTLERS IRRIGATION DISTRICT
SOUTH BOISE WATER COMPANY
THURMAN MILL DITCH COMPANY

Represented by:
ORDER DENYING MOTIONS TO PARTICIPATE

DANIEL V STEENSON

SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

CITY OF MOUNTAIN HOME

Represented by:
FRITZ X HAEMMERLE
HAEMMERLE LAW OFFICE
PO BOX 1800
HAILEY, ID 83333
Phone: 208-578-0520

CITY OF BOISE

Represented by:
GERMAINE, ABIGAIL R
BOISE CITY ATTORNEY'S OFFICE
150 N CAPITOL BLVD
PO BOX 500
BOISE, ID 83701-0500
Phone: 208-384-3870

CITY OF MOUNTAIN HOME

Represented by:
MATTHEW J MC GEE
SPINK BUTLER LLP
PO BOX 639
BOISE, ID 83701
Phone: 208-388-1000

SUEZ WATER IDAHO INC

Represented by:
MICHAEL P LAWRENCE
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

BALLENTYNE DITCH COMPANY

BOISE VALLEY IRRIGATION
CANYON COUNTY WATER COMPANY
EUREKA WATER COMPANY
FARMERS' CO-OPERATIVE DITCH CO
MIDDLETON IRRIGATION ASSN INC
MIDDLETON MILL DITCH COMPANY
NAMPA & MERIDIAN IRRIGATION

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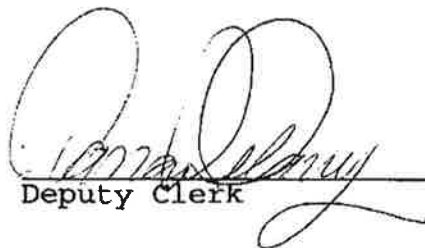
NEW DRY CREEK DITCH COMPANY
PIONEER DITCH COMPANY
SETTLERS IRRIGATION DISTRICT
SOUTH BOISE WATER COMPANY
THURMAN MILL DITCH COMPANY

Represented by:
S. BRYCE FARRIS
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

BOISE PROJECT BOARD OF CONTROL
Represented by:
SHELLEY M DAVIS
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

UNITED STATES OF AMERICA
USDI BUREAU OF RECLAMATION
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098



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OCT 17 2017
Department of Water Resources
Eastern Region

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

Edmund Clay Goodman, ISB #10288
Hobbs, Straus, Dean & Walker LLP
806 SW Broadway, Suite 900
Portland, Oregon
Telephone: (503) 242-1745
Facsimile: (503) 242-1072

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JAN 22 2020
DEPARTMENT OF
WATER RESOURCES

Attorneys/Representatives for Shoshone-Bannock Tribes

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION	)	Docket No. P-WRA-2017-002
REGARDING STORAGE RESET IN WATER	)	
DISTRICT 01 FILED BY MILNER IRRIGATION	)	SHOSHONE-BANNOCK TRIBES'
DISTRICT	)	PETITION TO INTERVENE
	)	

COMES NOW, the Shoshone-Bannock Tribes (herein referred to as "Tribes"), by and through their undersigned counsel of record, and, pursuant to the *Notice of Prehearing Conference; Order Setting Deadline for Petitions to Intervene* dated October 5th, 2017, as well as the Department's Rules of Procedure 350-354 (IDAPA 37.01.01), hereby petitions to intervene in the above-captioned matter.

FACTS

On October 5, 2017, the director issued a *Notice of Pre-Hearing Conference; Order setting Deadlines for Petition to Intervene* requiring all who wish to participate to file Petition to Intervene by November 12, 2017.

ANALYSIS

1. The Shoshone-Bannock Tribes' Petition is Timely.

There is no formal hearing date set and this Petition is filed prior to the prehearing conference (which is scheduled for November 13, 2017).

Receipt - E043417

2. The Shoshone-Bannock Tribes' and the Tribes' Direct and Substantial Interest.

a. Name and Address

The name of the potential intervenor is the Shoshone-Bannock Tribes ("Tribes"). The address is:

Shoshone-Bannock Tribes
PO Box 306
Fort Hall, Idaho 83203

b. Attorneys/Representatives

All filings and other correspondence should be served on the following Attorneys/Representatives of the Tribes:

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

Edmund Clay Goodman, ISB #10288
Hobbs, Straus, Dean & Walker LLP
806 SW Broadway, Suite 900
Portland, Oregon
Telephone: (503) 242-1745
Facsimile: (503) 242-1072

c. Direct and Substantial Interest in Petition

In 1990 the Shoshone-Bannock Tribes entered into an agreement with the State of Idaho and the United States, entitled "*The 1990 Fort Hall Indian Water Rights Agreement*" (hereinafter the "Fort Hall Agreement"). The Fort Hall Agreement was subsequently approved by the United States in P.L. 101-602, 104 Stat. 3061, on November 16, 1990; and approved by the State of Idaho in 1991 Idaho Session Laws, Chapter 228 at 547.2. The Agreement settled claims of the Shoshone-Bannock Tribes in the Upper Snake River Basin. The Agreement was submitted to the Snake Basin River Adjudication Court and was entered into a Partial Decree entitled: "*Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in Upper Snake River Basin*," dated August 2, 1995.

The *Final Unified Decree* of the Snake River Basin Adjudication of August 25, 2014, and the *Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use* Shoshone-Bannock Tribes Petition to Intervene

of Water in the Upper Snake River Basin, dated August 12, 2014, enumerates the rights of the Shoshone-Bannock Tribes to use of water in the Upper Snake River Basin, which includes federal contract storage rights.

Section II. B., of the *Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* identifies federal contract storage rights held by the United States for the benefit of the Shoshone-Bannock Tribes for the Fort Hall Reservation. Those contract storage rights are in the American Falls and Palisades Reservoirs.

The Tribes' water rights and Fort Hall Reservation water supply will be directly and substantially impacted by the outcome of the current Milner Irrigation District demand, which, if granted, could result in a reduction of the amount of water available to satisfy the Tribes' contract storage rights. The Tribes seek to fully participate in any and all issues related to Milner Irrigation District's assertion and demand that: *"The 'fall storage 'reset' is not authorized in the current storage water right partial decrees, including the Lake Walcott storage right (1-219). Therefore, if conditions arise this fall, we would request the Water District and Director ensure Milner receives the appropriate natural flow as required by Idaho law."* Granting the Milner Irrigation District's demand will result in a significant alteration in the storage and allocation of water in the American Falls and Palisades Reservoirs, and could thus result in a reduction in the amount of stored water available to meet the Tribes' contract water rights. Those rights were negotiated as a part of and guaranteed by the Fort Hall Agreement and subsequent decrees and statutory law incorporating that Agreement.

The Tribes thus have a direct and substantial interest in this proceeding.

3. The Shoshone-Bannock Tribes' Petition Does Not Unduly Broaden the Issues.

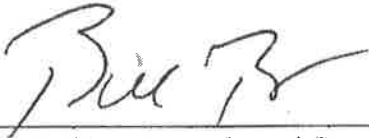
The Shoshone-Bannock Tribes seek to intervene to advance factual and legal arguments related to the issues raised by the Milner Irrigation District, to demonstrate that the Milner Irrigation District's claims are without merit and that granting the relief sought would result in a legally impermissible reduction in the Tribes' contract storage water rights. Therefore, this Petition does not unduly broaden the issues.

CONCLUSION

Based on the foregoing, the Shoshone-Bannock Tribes respectfully request that this petition to intervene be granted.

Dated this 16th day of October, 2017

SHOSHONE-BANNOCK TRIBES

By: 
William Bacon, General Counsel

By: 
Edmund Clay Goodman

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2017, I served a true and correct copy of the foregoing "Shoshone-Bannock Tribes Petition to intervene," by U.S. Postal Service to the following:

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

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

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



William Bacon, Tribal Attorney

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JAN 22 2020

DEPARTMENT OF
WATER RESOURCES

Edmund C. Goodman, ISB No. 10288
HOBBS, STRAUS, DEAN & WALKER, LLP
516 SE Morrison Street
Suite 1200
Portland, OR 97214
Tel: 503.242.1745
Fax: 503.242.1072
Email: egoodman@hobbsstrauss.com

William F. Bacon, ISB No. 2766
SHOSHONE-BANNOCK TRIBES
P.O. Box 306
Fort Hall, ID 83203
Telephone: 208.478.3822
Facsimile: 208.237.9736
Email: bbacon@sbtribes.com

Attorneys for Shoshone-Bannock Tribes

**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**
)
) **TRIBES' REPLY TO STATE OF**
) **IDAHO'S CONSOLIDATED**
) **RESPONSE TO JOINT MOTION**
) **TO MODIFY PARTIAL DECREES**
) **FOR PURPOSE OF ADDING**
) **DIVERSION RATE AND "RESET"**
) **ADMINISTRATIVE REMARKS**
)
)

COME NOW, the Shoshone-Bannock Tribes ("Tribes") by and through their undersigned attorneys of record, and hereby submit this reply to the *State of Idaho's Consolidated Response to Joint Motion to Modify Partial Decrees for Purpose of Diversion Rate and "Reset" Administrative Remarks* (December 20, 2019) ("State's Response"). The Tribes are parties to the underlying *Joint Motion to Modify Partial Decrees for Purpose of Adding "Reset" Administrative Remarks* ("Joint Motion") as well as the Stipulated Settlement being presented to

**REPLY TO STATE OF IDAHO'S CONSOLIDATED
RESPONSE TO JOINT MOTION TO
MODIFY PARTIAL DECREES**

13-VI-0038
08-11-19
10-20-19
APPROVED
this Court.¹ The State's Response opposes the Joint Motion and addresses both the Surface Water Coalition's memorandum in support of the Joint Motion ("SWC Brief"), which the Tribes incorporated, and the Tribes' memorandum in support of the Joint Motion ("Tribes' Brief").² The Tribes concur in and adopt by reference the arguments set out in the concurrently filed Reply in Support of Joint Motion to Modify Partial Decrees for Purpose of Diversion Rate and "Reset" Administrative Remarks ("SWC Reply") and United States' Reply in Support of Joint Motion to Modify Partial Decrees ("U.S. Reply"). The Tribes file this separate reply to the State's Response to address the arguments specific to the Tribes that support the unique and compelling circumstances that justify the relief sought in the Joint Motion.

INTRODUCTION

After years of good faith, but often-difficult negotiations, all parties to the Reset Contested Case before the Idaho Department of Water Resources ("IDWR"), and the United States Bureau of Reclamation ("USBR"), a non-party to the Reset Contested Case, reached a Stipulated Settlement which allows for final resolution of the longstanding and complex reset dispute in Water District 01. This Stipulated Settlement provides agreement on three critical, interlocking and equally-necessary provisions. First, it provides "Operative Language" defining September 15th as the annual reset date for the upper Snake River basin.³ Second, it provides

¹ See Ex. G to Travis Thompson Declaration In Support of Joint Motion to Modify Partial Decrees For Purpose of Diversion Rate and "Reset" Administrative Remarks (Oct. 30, 2019), Stipulation and Joint Motion for Order Approving Stipulation / Joint Motion for Stay (hereinafter "Stipulated Settlement"), IN THE MATTER OF THE PETITION REGARDING STORAGE RESET IN WATER DISTRICT 01 FILED BY MILNER IRRIGATION DISTRICT [HEREINAFTER "RESET CONTESTED CASE"], Docket No. P-WRA-2017-002 (April 10, 2019).

² State's Resp. at 2 n.1.

³ See Stipulated Settlement at 5.

“Operative Language” limiting the rate of diversion for the USBR’s storage water right for Lake Walcott (1-219) to 2,500 cubic feet per second (“cfs”) from September 15th to October 15th.⁴ Third, it provides that the parties must present the above “Operative Language,” along with a motion pursuant I.R.C.P. 60(b), to this Court for inclusion as remarks in the Snake River Basin Adjudication (“SRBA”) Final Decree.⁵ The requirement to incorporate the remarks into the SRBA Final Decree, and therefore the relief requested in the Joint Motion, is an integral part of the Stipulated Settlement and represents the only agreed-upon mechanism available to the parties to reach a comprehensive and permanent resolution of the underlying lengthy judicial and administrative proceedings.⁶ The Stipulated Settlement and the relief requested pursuant to the Joint Motion is limited in scope, is necessary for the efficient administration of the rights, and is unopposed by any other water user in the basin.

Indeed, the State does not oppose the substantive elements of Stipulated Settlement defining September 15th as the annual reset date for the upper Snake River basin and limiting the rate of diversion for the USBR’s Lake Walcott storage right.⁷ The State does, however, oppose the Joint Motion’s request, and the Stipulated Settlement’s requirement, to modify the SRBA Partial Decrees to include these agreed-upon reset administrative remarks.⁸

⁴ *Id.*

⁵ *Id.*

⁶ *See Tribes’ Br.* at 3, 13.

⁷ *State’s Resp.* at 2–3.

⁸ *Id.* at 3.

Rather than recognizing the significance of the Stipulated Settlement and how its key pieces fit together to provide the opportunity for this negotiated solution to the reset dispute, the State picks and chooses the parts of the settlement it supports and then invents its own preferred mechanism to implement the “Operative Language” that no party to the Reset Contested Case, nor the USBR, has agreed to. Specifically, the State proposes that the “agreed-upon ‘reset’ date and diversion rate limitation can and should be set out in a stipulation to be submitted to the Director [of the IDWR (“Director”)] in the pending contested case addressing ‘reset,’” with the parties thereto jointly moving the Director for an order instructing the Watermaster to reset on the specified date and also to limit diversion under the Lake Walcott storage right.⁹

As demonstrated below, the State’s invented remedy picks apart the Stipulated Settlement and removes an integral element of it, the result of which is to leave the parties with no settlement at all, much less one that could be submitted to the Director. Without the *entire* Stipulated Settlement, including the provision for entering a judicial decree, there is no negotiated agreement. The State’s fictive remedy ignores the position of the USBR that it can agree to the modification of the flow rate for its Lake Walcott right *only* if it is accomplished through judicial decree. Further, even if the USBR could agree to an administrative settlement, such an Order by the Director would be unacceptable because it would be far from permanent and therefore would leave the Tribes and other water users with a high degree of uncertainty in the administration of these rights moving forward.

⁹ *Id.*

To support its own preferred remedy, the State relies on hyper-technical arguments, misconstrues the nature of the underlying dispute as one concerning the administration of water rights in priority, and misstates the Tribes' long involvement in this dispute. The State's Response is riddled with inaccuracies and mischaracterizations, large and small, regarding the Tribes. Of particular concern, the State casually dismisses the importance and relevance of the 1990 Fort Hall Indian Water Rights Agreement ("FHA") to this dispute, and would have the Court ignore that the FHA has been incorporated into the SRBA Final Unified Decree.¹⁰ Nor does the State address, much less explain, how its invented remedy establishes the permanence and finality that is a necessary element of this negotiated resolution. The State's position and brief only further serve to demonstrate the necessity for a permanent and comprehensive resolution to this dispute, as opposed to continuing to allow the State to exercise its purported discretion to administer water rights in violation of the Tribes' rights under the FHA and the SRBA Final Unified Decree.

ARGUMENT

The State's Response boils down to two main arguments: that reopening the partial decrees is unnecessary because the State has its own invented remedy that would work just as well; and that the Rule 60(b) standard is not met because the circumstances here are not "unique and compelling," and granting the motion would undermine the permanence of the SRBA Final Unified Decree itself because some unspecified participants would use it as a basis to come forward with motions challenging the finality of the decree. The State's Response fails on both

¹⁰ *Id.* at 47–49.

counts. First, there is no alternative remedy available to settle this dispute (as the parties themselves, through their diligent efforts over several years, have learned), and the State's invented remedy is a fiction. Second, there are no other circumstances like those presented in this case, nor does the State's Response point to any. These circumstances, involving a negotiated settlement among 35 spaceholders, a federally-recognized Indian tribe (relying on the terms of a negotiated settlement of its *Winters*'¹¹ rights claims), and the United States, regarding storage reservoirs on the Upper Snake River, are not to be found anywhere else. The circumstances here are unique and compelling.

1. The Joint Motion is the *Only* Remedy Available to Resolve the Dispute without Costly and Extensive Litigation

The State's keystone argument—that the remedy sought here is not necessary—is based on the State's creation of a fictional alternative settlement mechanism, a mechanism that is simply not available as a means of resolving this complex and longstanding dispute. The Joint Motion is the only agreed-upon solution, and thus the only available mechanism to permanently resolve the reset dispute. A fictional administrative settlement, to which at least two of the key parties to the settlement cannot and will not agree, is no alternative at all.

A. The Joint Motion is the Result of Good Faith Negotiations and Represents the Sole Means of Resolving the Dispute Short of Extensive Litigation

As stated above, the Stipulated Settlement reached between all parties to the Reset Contested Case and the USBR provides that the parties must present the "Operative Language," along with a motion pursuant I.R.C.P. 60(b), for inclusion as remarks in the SRBA Final

¹¹ *Winters v. United States*, 207 U.S. 564 (1908).

Decree.¹² The requirement to incorporate the remarks into the SRBA Final Decree, and therefore the relief requested in the Joint Motion, is an essential component of the Stipulated Settlement.¹³

The parties have diligently pursued the resolution of this lengthy and complex dispute resulting in a Stipulated Settlement that is comprehensive and, crucially, permanent. The Stipulated Settlement creates finality for the parties and does not undermine the finality of any other water adjudication or proceeding because all other adjudications and proceedings are similarly subject to I.R.C.P. 60(b)(6), which requires a showing of *unique* and *compelling* circumstances that justify relief. Moreover, the parties to the Joint Motion do not request relief pursuant to I.R.C.P. 60(b)(6) to relitigate any issue previously decided in the adjudication. Rather, they use it because the storage rights at issue have been finally decreed, and it is the only mechanism available to the parties to implement this global, permanent settlement of the reset dispute, which was still pending at the time the final decree was issued.

Importantly, I.R.C.P. 60(b)(6) relief is an appropriate mechanism for implementation of the Stipulated Settlement because the addition of the remarks is “narrow in scope and necessary for the efficient administration” of the storage water rights.¹⁴ The Stipulated Settlement and the relief requested pursuant to the Joint Motion are unopposed by any other water user in the basin and no prejudice will result in granting the requested relief. Indeed, the Stipulated Settlement arose from a public-record, contested case before the Director, in which all parties with a

¹² Stipulated Settlement at 5.

¹³ See Tribes’ Br. at 3, 13.

¹⁴ See Order Granting Motion to Alter or Amend Partial Decrees; Order of Amended Partial Decree, *In Re SRBA Case No. 39576*, 5 (July 19, 2019); see also State of Idaho, Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-314, and 63-318, *In re SRBA Case No. 39576*, 2–3 (Feb. 19, 2019) (State of Idaho requesting similar relief in Administrative Basin 63).

potential stake in the issue intervened, and all those parties signed on to the Stipulated Settlement. Further, the Joint Motion filed in this matter involves notice to all parties in the related subproceedings, and none have objected.

B. The State's Proposed Alternative Remedy is a Fiction and Is Not an Available Means of Resolution

Despite the clear agreement of the both the parties to the Reset Contested Case and the USBR that it is necessary to incorporate the reset remark into the SRBA Partial Decrees, as well as change a portion of a decreed water right held by the USBR for storage water in Lake Walcott, the State objects to this proposed procedure, proposing instead that the “agreed-upon ‘reset’ date and diversion rate limitation can and should be set out in a stipulation to be submitted to and approved by the Director ... in the pending contested case addressing ‘reset...’.”¹⁵ The State reasons that because the Partial Decrees are silent with respect to reset, the issue of reset is purely one of administration which is committed to the Director.¹⁶

The State's invented solution is, at its heart, based upon a fundamental mischaracterization of the nature of the dispute and the negotiated settlement. This mischaracterization leads the State to conclude, incorrectly, that this dispute is about the priority of previously decreed rights that can be resolved through the administration of rights in priority, which is within the purview of the IDWR. However, the Stipulated Settlement here involves something fundamentally different, the settlement of a thicket of disputed claims: claims as to the meaning and scope of the Tribes' storage water rights as bargained-for in the FHA (and

¹⁵ State's Resp. at 3.

¹⁶ *Id.* at 34.

incorporated into the Final Unified Decree); claims by the members of the SWC as to the meaning and scope of the “period of use” language in the decrees; and claims regarding the scope and limits of the Director’s discretion in carrying out reset and accrual accounting in this particular and unique context. In fact, the State incorrectly suggests (by quoting one party’s brief) that all of the parties in the Reset Contested Case agreed that the Director had broad discretion to administer the reset and accrual accounting in this context.¹⁷ The Tribes, in contrast, argued that the Director’s discretion here was in fact *limited* by the FHA and the Michaud Contract (which it incorporated).¹⁸ Further, a central component of the resolution is the voluntary participation of and agreement by the USBR to diminish its decreed Lake Walcott storage water right. These are all issues beyond simple administration of priority, and can be addressed only by judicial decree.

Seeking judicial inclusion of the reset and diversion rate remarks in the SRBA Final Decree is a key component of the Stipulated Settlement, and without this portion of the Stipulated Settlement there is in fact no settlement at all.¹⁹ Indeed, as we explain below in the next sections of this brief, there are at least two parties to the Stipulated Settlement that are unable to agree to an administrative order as the means of implementing the substantive provisions of the Stipulated Settlement—the USBR and the Tribes.

¹⁷ State’s Resp. at 20 n.65.

¹⁸ See Shoshone Bannock Tribes’ Brief on “Threshold Issue” in the Contested Case (January 19, 2018) *at passim*, Ex. A to Second Declaration of Edmund Clay Goodman (January 15, 2020) (“Second Goodman Dec.”).

¹⁹ See Stipulated Settlement at 5.

C. The USBR Cannot Agree To Seek An Administrative Order

For the purposes of this subsection, we adopt and incorporate by reference the arguments made in the United States' Reply.

As proposed by the State, an administrative order from the Director would be based upon a hypothetical stipulated settlement of the Reset Contested Case that includes the USBR's consent to limit its diversion under its Lake Walcott storage water right. However, the USBR is not a party to the Reset Contested Case. As the State is well aware, the USBR has taken the consistent position that it would support the effort to have its storage water right modified, provided a judicial order is entered, and that judicial approval is required to add the diversion rate limitation to the right.²⁰ As such, contrary to the State's assertions, the USBR is not "free to agree" to this limitation that would allow the Director to issue the administrative order.²¹

Without the limitation on the USBR's Lake Walcott storage right, the parties are left without a negotiated solution to the reset dispute. And the only way that USBR will agree to such a limitation is by amending the decree.

D. The Tribes Cannot Agree To Resolution Through an Administrative Order

The Tribes cannot agree to seek the administrative order by the Director as proposed by the State for several reasons. First, as explained above, the USBR would not be a participant to

²⁰ State's Resp. at 22; *see also* Ex. 25 to Declaration of Michael Orr in Support of State of Idaho's Consolidated Response to Joint Motion to Modify Partial Decrees for Purpose of Diversion Rate and "Reset" Administrative Remarks, Letter from Jeremiah I. Williamson, United States Department of the Interior, Office of the Solicitor, to Gary Spackman, Director, Idaho Department of Water Resources (July 8, 2019) ("Because this negotiated approach coincides with much of Lake Walcott's operational history, Reclamation supports the effort to have this storage right modified, provided a judicial order is entered that establishes through remarks the September 15 reset date and 2,500 cubic feet per second diversion limitation from September 15 to October 15.").

²¹ *See* State's Resp. at 35.

an administrative order and will not agree to the modification of its storage water right in the administrative case. Even if the USBR could agree, any such administrative order would in no way be binding on the USBR as a non-party to the proceeding. This would leave the Tribes without a permanent solution as it allows the USBR to change its position at a later time resulting in uncertainty for the Tribes and other water users in the administration of the reservoir system in the future.

Second, the State's proposed implementation of the substantive pieces of the Stipulated Settlement through an administrative order lacks the permanence and finality required by the Tribes to reach settlement of its claims here, which concern impacts to its water rights as determined in the FHA and incorporated in the SRBA Final Decree. For example, a future Director could review the order at his or her own motion or upon request from another party to the underlying settlement based upon any party's change in positions at a later date.

The State, in repeatedly asserting that the Director has discretion to adopt the Stipulated Settlement, fails to note that it has in the past argued, with some success, that such discretion would also allow the IDWR to change its position—particularly if the State asserts that such change was based on a change in policy.²² Any such order would thus not provide the Tribes

²² See, e.g., *Bldg. Contractors Ass'n of Sw. Idaho v. Idaho Pub. Util. Comm'n*, 151 Idaho 10, 15, 253 P.3d 684, 689 (2011) (holding that where the Commission made a policy change, it was exercising its legislative functions, and that "so long as regulatory bodies adequately explain their departure from prior rulings so that a reviewing court can determine that their decisions are not arbitrary or capricious, orders based upon positions substantially different than those taken in previous proceedings can be upheld") (quoting *Intermountain Gas Co. v. Idaho Pub. Util. Comm'n*, 97 Idaho 113, 119, 540 P.2d 775, 781 (1975)). *Intermountain Gas Company* involved a State regulatory body exercising both legislative, as well as quasi-judicial functions—including scheduling hearings, receiving testimony, hearing witnesses, and issuing orders—to determine natural gas rates.

adequate protection in the future, the very protection that is at the heart of the current Stipulated Settlement, which seeks to ensure a permanent resolution to the reset dispute.

Third, the State's proposal leaves the Tribes' claims regarding its negotiated water rights to the discretion of the Director. The State makes clear its assertion that the issue of reset is "purely one of administration" and therefore committed to the Director.²³ Leaving discretion in the hands of future IDWR directors is, of necessity, a path that the Tribes cannot agree to take. And for good reason. The Director was acting in his discretion when, upon a request by Milner Irrigation District, he initiated formal contested case proceedings and, without a hearing, directed the Watermaster to move the storage reset date to January 1 despite this being a drastic change in decades of administration of these water rights.²⁴ The effect of this discretionary action by the Director greatly impacted the Tribes' water rights as negotiated in the FHA and incorporated into the SRBA Final Decree. This exercise of the Director's purported discretion demonstrates why the Tribes need a judicial order to ensure the finality of the Stipulated Settlement.

And finally, as explained below, the State's mischaracterizations as to the FHA and other issues further demonstrates why the Tribes require permanence in any negotiated settlement of this reset dispute.

²³ See State's Resp. at 34.

²⁴ Tribes' Br. at 11 n.12; Letter to Lyle Swank, Water District 01 Watermaster from Gary Spackman, Director IDWR, Re: Reset of Reservoir Water Rights and Recharge (Oct. 27, 2017), Ex. D to Declaration of Edmund Clay Goodman in Support of Memorandum in Support of Joint Motion to Modify Partial Decrees for Purposes of Diversion Rate and "Reset" Administrative Remarks (Oct. 30, 2019) ("First Goodman Dec.").

E. State's Mischaracterizations Underscore the Need for Judicial Remedy

First, the State asserts that “[a]t some point the during the course of those proceedings, the Coalition and the Tribes apparently decided that the Lake Walcott storage right *should have been* decreed with the 2,500 CFS diversion rate limitation....”²⁵ However, neither the Tribes nor SWC, nor any other party, took this position. Rather, the parties could not reach a settlement of this contentious issue without the USBR agreeing to diminish its Lake Walcott right, not that the right “should have been decreed” with the cap in the first instance. The distinction is subtle, but critically important. The State relies on this mischaracterization of the parties’ position to argue that the parties had the opportunity to resolve this question in the SRBA, but simply failed to do so because at the time they did not see it as a concern.²⁶ Rather, the circumstance present here is that the parties could only reach a resolution of the issue once USBR came on board and committed—as part of the settlement—to seek a diminishment of its decreed Lake Walcott right.

Second, the State acknowledges the parties’ need for permanence and finality, but dismisses that reality with the catchy but ultimately empty assertion that doing so comes at a “great cost: the ‘permanence’—i.e., finality—of the SRBA itself.”²⁷ But the State fails to point to an even remotely analogous situation for which this case could serve as precedent, and repeatedly dismisses or diminishes the truly novel and unique circumstances involved here—not to mention misconstruing the Tribes’ involvement and the relevance of the FHA.²⁸

²⁵ State’s Resp. at 28 (emphasis added).

²⁶ *Id.*

²⁷ State’s Resp. at 32.

²⁸ *See infra* at 15–20.

Third, in seeking to distinguish this resolution from the successful resolution of the Basin 63 matter through a similar mechanism, the State asserts that the Basin 63 matter was more complex because it had involved litigation up and down to the Idaho Supreme Court, as well as other contested cases and matters, all of which were interconnected and resolved through this one mechanism.²⁹ Yet, if this case is not resolved through the Stipulated Settlement, there is a high likelihood of litigation that will raise complex questions involving interpretation of key language in the decrees, the scope of the Director's discretion, the scope of the FHA, and the Tribes' takings claims. The State's position appears to be that the parties will not have a dispute sufficiently ripe or complex for a Rule 60(b) motion until they spend years in litigation and hundreds of thousands of dollars in attorney fees to get to the same stipulated settlement.

Fourth, it is important to clarify that the reset computation methodology at issue here is, contrary to the State's repeated assertions, distinct from the distribution of water according to the decrees. In resolving a dispute in the SRBA, the Idaho Supreme Court made clear that the distribution of water is distinct from the method of accounting applied by the Director.³⁰ Conflating the method of accounting for the accrual of water with the actual allocation and delivery of water rights serves to confuse the issues. Stored water rights "involve complexities not associated with other categories of water rights, including the right to store water for future use."³¹

²⁹ State's Resp. at 39–44.

³⁰ *In re SRBA (Basin-Wide Issue 17)*, 157 Idaho 385, 392–94, 336 P.3d 792, 799–801 (Idaho, 2014).

³¹ *Ballentyne Ditch Co. et al. v. IDWR, et al. (In the Matter of the Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63)*, Case No. CV-WA-2015-21376, MEM. DEC. AND ORDER (Idaho 4th Jud. Dist. 2016) at 6.

In sum, the State's invented remedy is illusory because without the parties' agreement as to the mechanism for inclusion of the remarks in the SRBA Partial Decrees there is no Stipulated Settlement. The State's proposal lacks the finality needed to achieve protection of the Tribes' bargained-for water rights and the efficient administration of the water rights moving forward. In contrast, inclusion of the requested remarks into the Partial Decrees pursuant to I.R.C.P. 60(b)(6) is justified because this case presents unique and compelling circumstances as the requested relief is limited in scope, protects the Tribes from a great inequity, provides finality to a longstanding and complex litigation, comes from a global settlement that will not prejudice any water users, and is necessary for the efficient administration of the water rights moving forward.

2. The Tribes' History with Regard to Their Bargained-For Storage Water Rights Present Unique and Compelling Circumstances that Require Incorporating the Stipulated Settlement into the Partial Decrees to Avoid an Inequitable Result

The Tribes concur that the arguments set out in the SWC Brief and SWC Reply demonstrate sufficient unique and compelling circumstances to justify the requested Rule 60(b) relief. But the Tribes also assert arguments specific to the Tribes' unique claims in this litigation that simply underscore that resolution of such claims provide additional unique and compelling circumstances supporting the requested relief. The State's response to the Tribes' arguments³² are based on an unfounded dismissal of the significance of the FHA as well as on numerous misrepresentations of the Tribes' position and participation. These arguments not only miss the mark; that the State felt compelled to offer them here affirms the wisdom of and need for a judicial decree to protect the bargained-for settlement expressed and codified in the FHA.

³² State's Resp. at 47–59.

A. The FHA Was Approved by SRBA Decree, and the Tribes' Federal Contract Storage Rights Are Unique and Binding on the Director

One of the most troubling aspects of the State's Response to the Tribes' Brief is its casual and unfounded dismissal of the relevance of the FHA to the dispute being resolved through the Stipulated Settlement. Most obviously, the Tribal storage rights at issue in the reset dispute are a critically-important component of the FHA and the Tribal Water Bank established thereunder.³³ So the FHA is, of necessity, at the very heart of this dispute from the Tribes' perspective.

The Tribes, the United States, the State of Idaho, and various private parties spent five years negotiating the terms of that Agreement in order to "settle the nature and extent of the Tribes' water rights reserved under the *Winters* doctrine within the Snake River Basin in Idaho to avoid litigation."³⁴ Those negotiations arose out of the SRBA, were specifically directed by Idaho statute,³⁵ and were based on the Tribes' "longstanding tradition of favoring negotiation as a means of resolving conflicts."³⁶ The Agreement resolved with finality Tribal claims that would otherwise have taken decades to adjudicate. That resolution provided certainty and clarity for numerous stakeholders in the upper Snake River basin, allowing farmers, ranchers, cities, and other stakeholders to plan and develop with much greater certainty. It likely saved the parties hundreds of thousands of dollars in attorney and expert fees. It also provided for significant

³³ See FHA § 7.3, Ex. A to First Goodman Dec.

³⁴ *Id.*, §§ 3.2, 3.10.

³⁵ H. Con. Res. 16, 48th Idaho Leg., 1st Sess. 1985.

³⁶ FHA §§ 3.1–3.3, Ex. A to First Goodman Dec.

contributions by the United States for purchase of land, grazing rights, and other mitigation.³⁷

And it recognizes that the Tribes' water rights claims, settled under the Agreement, are "unique."³⁸

Yet the State asserts that since the federal storage rights (that were described as "Tribal Water rights" under the FHA³⁹) are defined and quantified under distinct partial decrees, the FHA is not binding on the Director for the purposes of the Stipulated Settlement. According to the State, "[t]here is no Idaho statute or court decision that requires the Director to administer the storage rights in the Upper Snake Basin on the basis of the *FHA* or the Tribes' 'federal contract storage rights.'"⁴⁰ This assertion is simply wrong, on several levels.

The State was a party to the FHA. The Agreement was executed by the Governor and the Attorney General,⁴¹ and was "approved, ratified and confirmed" by the Idaho Legislature.⁴² The Agreement was also approved by the U.S. Congress,⁴³ and was submitted to the SRBA Court for approval "as a decree in the SRBA," which, approved the FHA in a partial final consent decree which ordered and decreed that "the provisions of the [Agreement] for which this court has jurisdiction are ratified, confirmed and approved and ... the water rights of the United States for

³⁷ *Id.*, Art. 13.

³⁸ *Id.*, § 11.2.

³⁹ The storage water rights described in Section 7.3 of the FHA fall under the general definition of "Tribal Water rights." FHA § 4.54, Ex. A to First Goodman Dec.; *see also id.*, preamble paragraph to Article 7, which describes all the water rights set out in Article 7—including the storage water rights—as "Tribal water rights."

⁴⁰ State's Resp. at 49.

⁴¹ FHA at 74 (signatures), §§ 5.1, 5.2 (authority of officials to execute), Ex. A to First Goodman Dec.

⁴² Chapter 228, §1, 1991 Idaho Sess. Laws 547.

⁴³ Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, § 4, 104 Stat. 3059, 3060 (1990).

the [Tribes] in the Upper Snake River Basin, for the Bureau of Indian Affairs, Fort Hall Agency, and the Fort Hall Irrigation Project are as follows,” followed by a recitation of terms from the Agreement.⁴⁴ The Partial Final Consent Decree was revised on August 13, 2014.⁴⁵ The Revised Partial Final Consent Decree notes that the Consent Decree “ratified, confirmed, and approved the provisions of the [FHA].”⁴⁶ The Revised Partial Final Consent Decree ordered and decreed that “the provisions of the [FHA] for which this court has jurisdiction are ratified, confirmed, and approved,” followed by a recitation of terms from the FHA.⁴⁷ Among the terms recited is the provision providing for the Tribes’ federal contract storage rights in the American Fall and Palisades Reservoirs provided in § 7.3.1 of the FHA.⁴⁸

Ultimately, in August 25, 2014, the SRBA Court incorporated the Revised Partial Final Consent Decree into the Final Unified Decree by reference.⁴⁹ The FHA is thus an integral component of the Final Unified Decree resolving the SRBA, and the separate partial decrees underlying the Final Decree cannot be cherry-picked—as the State attempts here—to avoid the obligations it agreed to assume in exchange for settling the Tribes’ *Winters*’ claims.

Under the FHA the Tribes’ storage rights are *not* identical to other storage rights, because certain additional protections adhere to them. The unique nature and importance of these storage

⁴⁴ Partial Final Consent Decree Determining the Rights of the Shoshone Bannock Tribes to the Use of the Water in the Upper Snake River Basin (Aug. 2, 1995) (“Partial Final Consent Decree”) at 2.

⁴⁵ See Revised Partial Final Consent Decree Determining the Rights of the Shoshone Bannock Tribes to the Use of the Water in the Upper Snake River Basin (Aug. 13, 2014) at 2 (“Revised Partial Final Consent Decree”).

⁴⁶ *Id.*

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 14–15.

⁴⁹ Final Unified Decree at 8, Ex. B to Second Goodman Dec. (emphasis added).

water rights to the Tribes was expressly articulated in Section 7.3.6 of the FHA, which identified, among others, the following purpose of the Shoshone Bannock Water Bank: to “provide a mechanism for the Tribes to realize the value of their federal contract storage rights resulting from settlement of this litigation.”⁵⁰ To ensure that the Tribes would “realize the value” of those rights, the FHA also provided that those storage rights “shall not be subject to any limitation based on,” among other things, the following: “any reduction of the quantity of water available under any other existing water rights since any such reductions are mitigated by the express federal commitments in Article 12.3”; “any conflict with the public welfare or local public interest of the citizens of Idaho or the conservation of its water since any such conflicts are mitigated by the express federal commitments in Article 12.3.”⁵¹ While no specific amount of water was guaranteed, what was recognized and protected in Section 7.3 of the FHA was a reservoir system operation that provided a level of predictability for the Tribes’ storage water rights, one that maximized the amount of storage accrual.

The State also makes the hyper-technical yet wholly-irrelevant argument that the Tribes’ storage water rights are not *Winters*’ reserved rights.⁵² While it is true that such storage rights are not *Winters*’ rights themselves, these Tribal water rights were incorporated into, defined under, and protected by the FHA as part of the overall settlement of the Tribes’ *Winters* right claims.⁵³ These rights are not defined nor treated differently than *Winters*’ rights for the purposes of the

⁵⁰ FHA § 7.3.6(iv), Ex. A to First Goodman Dec.

⁵¹ *Id.* §§ 7.3.5, 7.3.5(ii), 7.3.5(iii).

⁵² State’s Resp. at 49–50.

⁵³ FHA §§ 10.4 and 11.2, Ex. A to First Goodman Dec.

FHA; rather, they have the same status as “Tribal water rights” as do the reserved rights protected under the *Winters* doctrine because they were incorporated into the Agreement as part of the settlement of those claims (including *Winters*’ claims that the Tribes compromised out in exchange for the finality and protection of the FHA). These rights are not to be subjected to some of the limitations that might apply to other contract storage rights.⁵⁴

The State’s attempt to treat these Tribal water rights as distinct from and not impacted by the promises, representations, and bargains made in the FHA flies directly in the face of the Agreement and the Final Unified Decree that incorporates it. That the State is willing to make such an argument provides yet another compelling reason for the Tribes to seek finality through a judicial decree rather than leaving such decisions to the purported discretion of a State official.

B. The Tribes’ Need for Finality is a Central Component of the Stipulated Settlement and Thus of the Requested Relief

As shown above, inclusion of the reset and diversion rate administrative remarks into the SRBA Partial Decrees is a crucial component of the Stipulated Settlement, and no alternate remedy, including an order by the Director in the Reset Contested Case, would permit this negotiated approach to be implemented with the element of finality necessary to protect the Tribes’ rights.⁵⁵ In the absence of implementing the Stipulated Settlement, there is the likelihood of protracted litigation, including the Tribes’ claim of breach of the FHA and of a taking.

⁵⁴ See *id.* § 7.3.5.

⁵⁵ See *supra* 8–12.

The State asserts that the parties' wish to avoid future litigation is not unique and compelling, but rather is "simply a fact of life under the prior appropriation doctrine priority and priority administration."⁵⁶ But the State misunderstands the issue of remedy raised by the Tribes.⁵⁷ It is not only the parties' desire to avoid future litigation that is unique and compelling. The parties to the Reset Contested Case and the USBR have reached a global negotiated settlement and the only mechanism to implement settlement is through the requested limited amendments to the Partial Decrees.⁵⁸ The Tribes understand that there is the possibility of continuing to litigate the contested case, including judicial review of that case. However, as the USBR is not a party to the Reset Contested Case, any resolution to the contested case would necessarily not involve the USBR and the key component of the Stipulated Settlement that the USBR agree to a limitation of the flow rate for its Lake Walcott storage right. Without the USBR's involvement, the outcome of such litigation is uncertain but undeniably will *not* be what all parties to the Joint Motion seek here, the implementation of the agreed-upon approach to resolution of the reset dispute.

The State argues the Tribes' claim of a taking based on the Director's administration of water rights is not unique and compelling.⁵⁹ Rather, the State alleges that this is "one of the more common" arguments made by water right holders when they disagree with the Director's administration, including the assertion by one water right holder that their water is or will be

⁵⁶ State's Resp. at 54.

⁵⁷ See Tribes' Br. at 20–21.

⁵⁸ See *supra* at 8–12.

⁵⁹ State's Resp. at 56.

distributed to some other water user.⁶⁰ The State in fact goes on to argue that there is no “taking” when the Director regulates a junior off the system in favor of a senior water right holder, and that juniors often improperly assert a taking anytime they are regulated.⁶¹ This statement is catchy but wrong. As is well-established, a junior can suffer an injury to its water right when regulated in favor of a senior under certain circumstances, such as when a senior changes a place of use or other element of the senior water right, or abandons the right but seeks to use it again.⁶² The Tribes’ argument is that a similar injury to the Tribes’ water right would occur from such a drastic change in administration, and that would give rise to a takings claim.

Again, the State’s arguments misunderstand the issue of remedy raised by the Tribes. The Tribes are not arguing that a takings claim is unique to the Tribes or that the sole existence of such a claim creates unique and compelling circumstances to justify relief pursuant to I.R.C.P. 60(b)(6). Rather, what is unique and compelling is that the parties to the Reset Contested Case and the USBR have reached a global settlement and that the only mechanism to implement this agreed-upon approach is through the requested limited amendments to the Partial Decrees. The Tribes raise the takings claim to demonstrate that even that litigation would not provide the remedy sought here: the implementation of the terms of this negotiated settlement among the parties to the Reset Contested Case and the USBR. Moreover, without the implementation of the agreed-upon approach, the inevitable litigation flies in the face of judicial efficiency.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 387–88, 647 P.2d 1256, 1259 (Idaho, 1982).

Notwithstanding, the State's arguments with respect to the validity of the Tribes' takings claim again demonstrate a lack of regard for and misunderstanding of the FHA, its meaning within the SRBA, and the State's obligations to administer water rights in accordance with those judicially-decreed rights. Moreover, a taking claim against the State of Idaho by the Tribes is fundamentally not about whether the Tribes' water is or will be distributed to some other water user out of priority.⁶³ Rather, it is based on the fact that IDWR's proposed change in reset accounting hinders the Tribes from receiving the full amount of their property right, negotiated in the FHA and incorporated into the SRBA, in a way that amounts to a physical taking.⁶⁴

C. The Tribes' Justifiable Expectations Under the FHA Concerning Reset Present Unique and Compelling Circumstances

The State contests the expectations of the Tribes that the reset accounting mechanism in effect before and at the execution of the Agreement would continue to be operated in the same manner. First, the State argues that the Tribes did not participate in Basin Wide Issue 17, the Late Claims, or negotiations that produced the *Basin 1 Stipulation*,⁶⁵ and that this "casts doubt" on the Tribes' stated expectations.⁶⁶ This assertion ignores several critical facts. The Tribes have limited resources to expend on legal and expert fees, and have to carefully choose where and when they get involved. The Tribes actively monitored and conferred about the matters that produced the *Basin 1 Stipulation*, and determined that enough of the existing parties were aligned with the

⁶³ State's Resp. at 56.

⁶⁴ See Tribes' Br. at 20.

⁶⁵ See State's Resp. at 13–14.

⁶⁶ See State's Resp. at 50.

Tribal position to ensure that the Tribes' storage rights would be protected (USBR was a party to the *Basin 1 Stipulation*); the Tribes were prepared to intervene when and if that changed. It did not, and intervention and active participation was not necessary.⁶⁷

By contrast, as soon as the Tribes were made aware of the potential dispute over the reset issue, the Tribes engaged in negotiations, because there were no other parties whose interests were exactly aligned with theirs and who could be relied upon to take a position that would protect the Tribes' storage water rights.⁶⁸ The State cites to a series of transcripts of status conferences regarding the reset negotiations to argue that the Tribes did not participate, but the transcripts in fact show otherwise. Although the Tribes were not a party to the subcase at the time of the status conferences, the parties reported to the Court that the Tribes were engaged and reviewing a settlement affecting their rights. In the first of several status conferences cited by the State, for example, the attorney for the State informed the Court: "The state and water users have prepared a proposed reset provision, which has been provided to the United States and the Tribe. Earlier this week we had a conference call with the United States and Tribe to brief them on the reset issue. They have that language under advisement."⁶⁹ Later status conferences were to the same effect.⁷⁰

⁶⁷ See Second Goodman Dec., ¶ 3–4.

⁶⁸ See *id.*, ¶ 5.

⁶⁹ Ex. 4 to the Declaration of Michael C. Orr in Support of State of Idaho's Consolidated Response to Joint Motion, Reporter's Transcript, SRBA Subcases 1-219, et al., Status Conference ("Tr.") (Aug. 4, 2016) 7–8.

⁷⁰ Ex. 4 to the Declaration of Michael C. Orr in Support of State of Idaho's Consolidated Response to Joint Motion, Tr. (Sept. 12, 2016) 4–5 ("Last week we received a response to a settlement proposal submitted to the United States and the Tribe. Their response came in early last week. We're in the process of coordinating amongst the parties to see if we can resolve the remaining differences."); Tr. (Oct. 25, 2016) 11–12 ("There was a meeting last week between the federal entities and the private water entities to discuss the issue. My understanding is that they made

Further, although counsel for the Tribes did not appear at these status conferences in person, since the Tribes were not parties at that time, the Tribes' counsel did call in to the conferences by telephone to keep abreast of the subcase.⁷¹ The Tribes also participated fully in the settlement mediation presided over by Judge Melanson.⁷² And the Tribes immediately intervened in the matter of Milner Irrigation District's petition to change the reset protocol within days of the Director characterizing it as a contested case.⁷³

The State cites this Court's *Basin 63 Challenge Decision*,⁷⁴ for the proposition that issues regarding historical practices in administering water rights must be adjudicated at the time the water rights are adjudicated,⁷⁵ but that case did not involve a motion to amend the judgment. Further, *Basin 63 Challenge* cited *Rangen, Inc. v. IDWR*⁷⁶ in support of the proposition for which it is cited. In *Rangen*, Appellant Rangen, Inc., initiated a contested case by filing a petition for a delivery call before the Director alleging that junior ground water pumping in the Eastern Snake

some progress and had productive discussions and the – I'm sorry, the Tribes were involved in the meeting as well, and the U.S. and the Tribes are going to have some additional discussion and then get back in touch with the water users."); Tr. (Dec. 20, 2016) 34 ("Since the last status conference, a number of the spaceholders have had continued discussions with the United States and the Tribes regarding this, what we call the reset issue, and attempting to resolve proposed language that we would then submit to the Court in probably what would be a general provision. We continue to have those discussions with the United States and the Tribes.").

⁷¹ Second Goodman Dec., ¶ 6.

⁷² *Id.* ¶ 7.

⁷³ *Id.* ¶ 8.

⁷⁴ Ex. 27 to Orr Declaration of Michael C. Orr in Support of State of Idaho's Consolidated Response to Joint Motion, excerpted pages of the *Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master, Subcase Nos 63-33732 (consolidated subcases no, 630-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734 (September 1, 2016).*

⁷⁵ State's Resp. at 51.

⁷⁶ 159 Idaho 798, 798, 367 P.3d 193, 201 (Idaho, 2016).

Plains Aquifer was materially injuring its water rights. The court rejected Rangen's arguments because they were contradicted by the language of Rangen's partial decrees by the SRBA. "Any interpretation of Rangen's partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself."⁷⁷ Neither *Rangen* nor its progeny provide an argument against amending a decree, especially where, as here, every placeholder supports the amendment. Similarly, the *Basin 65 Challenge Decision* cited by the State⁷⁸ involved late claims, and not a joint motion to amend a judgment.

The State next notes that because the FHA does not explicitly address reset, or expressly preserve past practice regarding reset, the reset is to be administered by the Director at his discretion. The State points to various provisions of the FHA concerning administration to argue that the Tribes could have negotiated for a similar provision regarding reset.⁷⁹ The cited provisions, were, as is obvious, necessary to resolve disputes existing or known at the time. There was no such dispute known or existing at the time regarding the accounting and reset process. That existing accounting and reset process was, to use the State's phrase, a "fact of life,"⁸⁰ akin to application of the system of prior appropriation itself (which, we note, is the system used to administer each of the rights set out in the FHA without the FHA anywhere using

⁷⁷ 159 Idaho at 798, 367 P.3d 193, 201.

⁷⁸ Ex. 28 to Orr Declaration of Michael C. Orr in Support of State of Idaho's Consolidated Response to Joint Motion, excerpted pages of the *Memorandum Decision and Order on Challenges; Final Order Disallowing Water Right Claims, Subcase Nos. 65-23531 and 63-23532* (October 7, 2016).

⁷⁹ State's Resp. at 51-55.

⁸⁰ State's Resp. at 54.

the term “prior appropriation”). Moreover, as the Tribes have argued in the Reset Contested Case itself, the FHA does by its own terms require a reset date no later than October 1.⁸¹

Further, in making this argument, the State does not contest the basic facts laid out by the Tribes concerning the past administration of the reset by the Director. The State does not explain why the parties to the FHA should have anticipated this later change (when there was no dispute over this issue at that time) and negotiated to prevent it back in 1990. Nor does the State contest that moving the reset date to January 1 was prejudicial to the Tribes’ interests in their federal contract storage rights. For the reasons stated previously, moving the reset to January 1 was a change so far removed from past practice that it is not “simply a fact of life,”⁸² but actually substantially changed the water rights of the Tribes. The change is such that if this Court does not grant the motion and amend the judgment, there is no other remedy available to the Tribes, save for a takings claim.⁸³

In order to grant the joint motion, the Court need not decide the merits of the Tribes’ underlying reset or takings claims. That the Tribes assert a strong claim is sufficient to establish unique circumstances supporting the motion to amend where all placeholders support the motion.

⁸¹ See Shoshone Bannock Tribes’ Brief on “Threshold Issue” in the Contested Case (January 19, 2018) at 14, n.5, Ex. A to Second Goodman Dec. (explaining how incorporation of the Michaud Contract into the FHA defines reset requirements).

⁸² State’s Response at 54.

⁸³ See *supra* at 22–23.

D. The Status of the Tribes and the United States as Sovereigns and their Willingness to Collaborate Presents a Unique and Compelling Circumstance

The State's argument that the sovereignty of the Tribes and the United States is not relevant to the unique and compelling circumstances standard⁸⁴ misses the mark. The Tribes are not arguing that different legal standards apply to the administration of the water rights of the Tribes or the United States. Rather, the Tribes are noting the unique factors governing the rights at issue here, and the resolution of the dispute. The FHA itself notes the critical and unique importance of the fact that it involved not just the concurrence but the ongoing cooperation of three sovereign entities.⁸⁵

As noted in the Tribes' Brief and discussed further above, a critical component of the proposed settlement—the agreement of the USBR to a 2,500 cfs flow cap on its Lake Walcott right for thirty days—cannot be accomplished administratively because it requires a reduction to the USBR's water right. The State cites *Board of Directors of Wilder Irrigation Dist. v. Jorgensen*,⁸⁶ for the proposition that the USBR holds water rights in its proprietary capacity,⁸⁷ but the cited passage is merely dictum from a concurring opinion, and in any event is inapposite to the Tribes' argument here.

⁸⁴ State's Resp. at 57–59.

⁸⁵ See FHA § 8.1 (the parties “recognize and respect the sovereignty” of each of the three sovereigns, agree to “strike a balance among these sovereign interests” and “agree to cooperate in the administration of water resources”); Art. 9 (setting out an Intergovernmental Board and process for resolving disputes among the three sovereigns), Ex. A to First Goodman Dec.

⁸⁶ 64 Idaho 538, 136 P.2d 461, 467 (1943) (Ailshie, J., concurring).

⁸⁷ State's Resp. at 58.

Further, the FHA expresses “[t]he policy of the Congress and the federal Executive Branch ... to facilitate negotiations among Indian tribes, states, private water users and federal agencies to avoid litigation.”⁸⁸ The FHA also notes that “[t]he Tribes have a long-standing tradition of favoring negotiation as a means of resolving conflicts.”⁸⁹ As the Tribes previously noted, the Western States Water Council, a water policy body affiliated with the Western Governors’ Association, and the Native American Rights Fund have issued a joint statement supporting settling rather than litigating tribal water rights claims.⁹⁰ The FHA and its ratification by Congress and the State is testimony to the value of negotiation and compromise rather than litigation.

The State’s assertion that “the Tribes’ real objective is to re-litigate or revisit their original ‘water right claims,’”⁹¹ is completely off-base, and is belied by the procedural posture of this case. The Tribes are parties to a joint motion to incorporate a stipulated settlement into the partial decrees. The Tribes did not file any action nor can the State point to any such attempt to “re-litigate” its original claims. The Stipulated Settlement is unopposed by any water user and is specifically intended to *avoid* further litigation. And further litigation over this point *will be avoided* if the Court grants the Joint Motion. Only if this settlement is rejected and the Joint Motion is denied based will there be a high likelihood of further litigation.

⁸⁸ FHA § 3.4, Ex. A to First Goodman Dec.

⁸⁹ *Id.*, § 3.3.

⁹⁰ Tribes’ Br. at 22–23.

⁹¹ State’s Resp. at 57–58.

E. The Motion is Made Within a Reasonable Time

For the reasons stated in the Tribes' Brief and the SWC Brief, the time for purposes of this motion began not with the filing of the partial decrees, but with the Director's order to the Watermaster to change the reset date to January 1. Even assuming the filing of the partial decrees is the appropriate start date, however, the movants have still filed within a reasonable time under the circumstances. The Tribes diligently engaged with IDWR and other parties once the proposed change in reset date was brought to its attention.⁹² No placeholder has been prejudiced by the failure to file this motion sooner, nor has the State been prejudiced, and in fact all placeholders support the motion. In the *Basin 63* subcases, this Court in 2019 granted the motion to amend partial decrees that had been entered into over ten years previously.⁹³

The State argues that the failure to file post-judgment motions after mediation failed and by a deadline set by the Court (May 16, 2017) in the "*Basin 1 Stipulation*" subcases means that this motion is out of time. But the Court's orders in those subcases were merely procedural orders relating to those subcases, and not a determination on the reasonable time for bringing a motion to amend the partial decrees. As the Court is aware, although the mediation failed, the parties continued negotiating and reached the settlement which they propose to have adopted by

⁹² See Second Goodman Dec., ¶ 8.

⁹³ Ex. 29 to Declaration of Michael C. Orr in Support of State of Idaho's Consolidated Response to Joint Motion, excerpted pages of *Order Granting Motion to Alter or Amend Partial Decrees* (Subcase Nos. 63-303, 63-3613, 63-3614, and 63-3618) (July 19, 2019). The *Basin 63* Order incorporated the background statement from an earlier order relating to the same water rights. *Id.* at 1, n.1. That order stated that the partial decrees for water rights had been issued in 2007, 2008, and 2009. See *Order Denying Motions to Participate* at 3 (Subcase Nos. 63-33732, 63-33733, 63-33733, 63-33734, 63-33734A, 63-33734B, 63-33737 and 63-33738) (July 8, 2019), Ex. C to Second Goodman Dec.

amending the decrees. Further, as the State acknowledges⁹⁴, when the Court dismissed the Surface Water Coalition's motion for a reset general provision after mediation on the reset issue failed the Court did so without prejudice, stating that if the Coalition wished to refile the motion then it would have to reopen the subcases consistent with the Idaho Rules of Civil Procedure.⁹⁵ And that is exactly what Surface Water Coalition, along with all other parties, have done by submitting the Joint Motion.

CONCLUSION

For the reasons set out herein, as well as in the Tribes' Brief, the SWC Brief, the SWC Reply, and United States' Reply, the Tribes respectfully request that this Court grant the Joint Motion.

DATED this 16th day of January, 2020.



Edmund C. Goodman, ISB No. 10288
HOBBS, STRAUS, DEAN & WALKER, LLP
516 SE Morrison Street
Suite 1200
Portland, OR 97214
Tel: 503.242.1745
Fax: 503.242.1072
Email: egoodman@hobbsstrauss.com
Attorneys for Shoshone-Bannock Tribes



William F. Bacon, ISB No. 2766
SHOSHONE-BANNOCK TRIBES
P.O. Box 306
Fort Hall, ID 83203
Telephone: 208.478.3822
Facsimile: 208.237.9736
Email: bbacon@sbtribes.com

⁹⁴ State's Resp. at 17.

⁹⁵ Ex. 18 to Declaration of Michael C. Orr in Support of State of Idaho's Consolidated Response to Joint Motion, Order *Sua Sponte Dismissing Motion Without Prejudice* 6-7 (May 18, 2017).

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2020, I served a true and correct copy of the foregoing **Tribes' Reply to State of Idaho's Consolidated Response to Joint Motion to Modify Partial Decrees for Purpose of Adding Diversion Rate and "Reset" Administrative Remarks** on the persons listed below by email, if available, or U.S. Mail:

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
jrigby@rex-law.com

Craig Hobdey
P.O. Box 176
Gooding, ID 83330-0176
hobdeycraig@gmail.com

Randall C. Budge
T.J. Budge
Racine Olson, PLLP
P.O. Box 1391
Pocatello, ID 83201
randy@racineolson.com
tj@racineolson.com

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

Michael C. Orr, Deputy Attorney General
Natural Resources Division
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010
michael.orr@ag.idaho.gov

Kirk Bybee
P.O. Box 4169
Pocatello, ID 83201
kibybee@pocatello.us

Sarah A. Klahn
2701 Lawrence St., Ste 113
Denver, CO 80205
sklahn@somachlaw.com

Sarah W. Higer
Idaho Power Company
P.O. Box 70
Boise, ID 83707
shiger@idahopower.com

Charles F. McDevitt
P.O. Box 1543
Boise, ID 83701-1543
chas@mcdevitt.org

Andrew Waldera
P.O. Box 7985
Boise, ID 83707
andy@sawtoothlaw.com

**REPLY TO STATE OF IDAHO'S CONSOLIDATED
RESPONSE TO JOINT MOTION TO
MODIFY PARTIAL DECREES**

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

Chris Meyer
Michael P. Lawrence
P.O. Box 2720
Boise, ID 83701-2720
chrismeyer@givenspursley.com
mpl@givenspursley.com

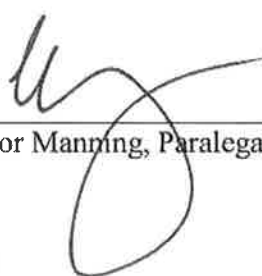
David W. Gehlert, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
David.Gehlert@usdoj.gov

William Kent Fletcher
Fletcher Law Office
PO Box 248
Burley, ID 83318
wkf@pmt.org

Norman M. Semanko
Parsons, Behle & Latimer
800 W. Main Street, Ste. 1300
Boise, ID 83702
nsemanko@parsonsbehle.com

Robert Lynn Harris
Holden, Kidwell, Hahn & Crapo, PLLC
PO Box 50130
Idaho Falls, ID 83405
rharris@holdenlegal.com

Candice M. McHugh
McHugh Bromley, PLLC
380 S. 4th Street, Ste. 103
Boise, ID 83702
cmchugh@mchughbromley.com



Eleanor Manning, Paralegal

ATTACHMENT A

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