

Christopher H. Meyer, Idaho State Bar No. 4461
Michael P. Lawrence, Idaho State Bar No. 7288
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for the United Water Idaho Inc.

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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

Subcase Nos. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, 01-10620, 01-10621, 01-10622, 01-10623, 21-13161, 37-22806, 65-23531, and 65-23532

UNITED WATER'S MOTION TO PARTICIPATE IN LATE STORAGE CLAIM SUBCASES PENDING IN BASINS 01, 21, 37, AND 65

United Water Idaho Inc. ("United Water") files *United Water's Motion to Participate in Late Storage Claim Subcases Pending in Basins 01, 21, 37, and 65* ("Motion") pursuant to SRBA Administrative Order #1 ("AO1") and the Idaho Rules of Civil Procedure. United Water requests that this Court grant United Water leave to participate in the above-captioned subcases to the extent necessary to protect United Water's interests in Basin 63.

United Water is a respondent in Basin 63 subcases concerning late claims filed by the U.S. Bureau of Reclamation ("Bureau") and the Boise Project Board of Control ("Boise Project") for storage water rights to "refill" reservoir space vacated for flood control purposes.¹

¹ Those subcases are: 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738.

The outcomes of those subcases may directly affect United Water's interests because United Water holds relatively junior priority surface water rights in Basin 63.

United Water is concerned that the Basin 01, 21, 37, and 65 subcases captioned above might also affect its interests if, for example, this Court's determination of law or application of law to fact in any of those subcases could be applied in the Basin 63 subcases. The beneficial use claims for storage water rights in all of these Basins appear to be premised on the same legal (and similar factual) theories. It is not clear at this point how the various subcases in the several Basins will develop, but United Water intends to be involved in any or all of them to the extent necessary to protect its Basin 63 interests.

At the same time, United Water has no intention of becoming involved in matters specific to the Basin 01, 21, 37, and 65 claims that have no bearing on matters in Basin 63. Indeed, it is possible that United Water will find nothing of concern in those other Basin's subcases, in which case its participation will be slight to non-existent. Only time will tell.

Accordingly, and for the reasons set forth below, United Water respectfully requests that the Court grant United Water leave to participate in the above-captioned subcases.

BACKGROUND

These subcases involve late claims for reservoir "refill" rights. These late claims were filed in January 2013 as a back-stop in case this Court determined in Basin Wide Issue No. 17 ("BWI 17") that storage rights do not implicitly contain a right to priority refill of reservoir space vacated for flood control. *See, e.g., The United States Memorandum in Support of SF4 Motions to File Late Notices of Claim*, Subcase Nos. 01-10620 *et al.* (Jan. 31, 2013). Indeed, this Court thereafter ruled that "a senior storage water right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights once." *In re SRBA, Case No.*

39576, Subcase No. 00-91017 (*Basin-Wide Issue 17*), *Memorandum Decision* at 13 (Mar. 20, 2013). The claimant and objectors have indicated their intention to continue to pursue the late claims in the above-captioned subcases now that the Idaho Supreme Court has issued its opinion on appeal of this Court's ruling in BWI 17.

On December 31, 2013, the Idaho Department of Water Resources ("IDWR" or "Department") issued a Director's Report for these late claims, recommending that the claims be decreed "disallowed." Objections to this recommendation were filed by the claimants and other parties by the March 20, 2014 objection deadline. The State of Idaho filed responses to the objections by the May 22, 2014 response deadline. Little has occurred since the State's response filings, aside from a status conference on September 9, 2014, and a scheduling proposal filed by the Surface Water Coalition on October 8, 2014.

United Water participated in the BWI 17 proceedings before this Court and in defense of this Court's decision in the Supreme Court appeal. In both proceedings, United Water argued that storage water rights do not have an implicit right to refill, in priority, reservoir space vacated for flood control. This matters to United Water because it holds surface water rights from the Boise River (in addition to its ground water rights) that are junior to decreed storage water rights and the rights asserted in pending late claims filed by the Bureau and Boise Project in Basin 63. United Water will be injured if Basin 63 refill claims are decreed without subordination to United Water's existing junior priority rights.

To protect its interests, United Water sought, and was granted, leave to file late responses in the Basin 63 subcases. It now seeks leave to participate in the Basin 01, 21, 37, and 65 subcases captioned above in order to protect its interests from determinations made in those subcases that may affect Basin 63.

ARGUMENT

United Water is entitled to participate under the Court's rules in AO1, which allow participation in a subcase under the following standard:

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.

AO1 § 10.k. Rule 24 allows intervention as a matter of right, and also by the Court's permission.

Under Rule 24(a), an applicant has the right to intervene if (1) the motion is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, and (4) the applicant's interest is not adequately represented by existing parties. United Water satisfies this standard.

First, this *Motion* is timely because it is being filed before anything of significance has occurred in any of the subcases. Nothing had occurred in any of the subcases until this Court held a status conference on September 9, 2014, following the Idaho Supreme Court's decision on appeal of BWI 17. At that status conference, many of the parties to the subcases indicated their desire to stay proceedings for many more months while an administrative proceeding in front of the Department plays out. In light of the parties' disagreement on that issue, among others, this Court asked the parties to submit scheduling proposals by October 10, 2014 (the date this *Motion* is being filed). Since then, the Surface Water Coalition filed *Surface Water Coalition's Proposed Trial Schedule / Motion for Settlement Conference & Court Ordered Mediation* on October 8, 2014, setting forth a proposed schedule commencing with a hearing on motions for late claims (nos. 25-14413 and 21-13193) on November 18, 2014. In short, United Water has

not missed anything in the above-captioned subcases, and it will not cause any prejudice by being allowed to participate now in the limited extent anticipated.

Second, United Water has an interest in the late claims because they involve asserted beneficial use claims for water rights to refill storage space vacated for flood control—the same type of beneficial use claims filed in Basin 63 to which United Water filed its late responses.

Third, United Water’s interests may be impaired or impeded by these subcases’ disposition. United Water’s junior water rights will be injured if this Court rules that late claims for storage refill rights in Basins 01, 21, 37, or 65 can be decreed without subordination to existing junior rights and that such a ruling would establish a precedent applicable to the late claims in Basin 63.

Fourth, United Water’s interests are not adequately represented by any existing party. While the State of Idaho’s and United Water’s interests generally were aligned throughout the BWI 17 proceedings and appear to be aligned in these proceedings as well, the State does not represent the interests of individual water right holders like United Water—it represents the interest of the public at large. United Water must participate to ensure that its specific interests are adequately represented.

United Water also satisfies the criteria for permissive intervention under Rule 24(b), which “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.’” *State v. U.S.*, 134 Idaho 106, 110, 996 P.2d 806, 810 (2000). “The 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 an exercise of reason.”

Id. Again, this *Motion* is timely. And the questions of law and fact already at issue in these subcases—namely, whether the late claims should be decreed and, if so, with what elements and conditions—are the same questions United Water is concerned about.

The whole point of these late claims is to create rights to refill reservoir space vacated for flood control under a more senior priority dates than could be obtained by filing a new appropriations for that purpose today. United Water will be injured if the Court rules that such rights may be decreed in Basin 63 without subordination to existing junior priority rights. *A & B Irr. Dist. v. Idaho Dept. Of Water Resources*, 153 Idaho 500, 514, 284 P.3d 225, 239 (2012) (“Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.”). To protect its junior water rights, United Water fully participated in the BWI 17 proceedings before this Court and the Idaho Supreme Court. These late claims were filed as an insurance policy in case the BWI 17 case ultimately was determined against the claimants’ and the objectors’ interests. In light of the Idaho Supreme Court’s decision in the BWI 17 appeal, the claimants appear intent on proceeding with these claims. United Water therefore must continue to participate to protect its interests.

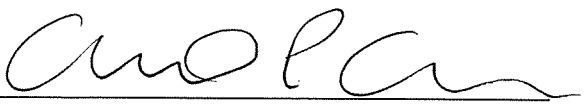
CONCLUSION

For the foregoing reasons, United Water respectfully requests the Court grant its motion to participate in the above-captioned subcases.

DATED this 10th day of October, 2014.

GIVENS PURSLEY LLP

By


Michael P. Lawrence
Attorneys for United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2014, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

DOCUMENT FILED:

Clerk of the District Court	☒	U. S. Mail
Snake River Basin Adjudication	☐	Hand Delivered
253 Third Avenue North	☐	Overnight Mail
P.O. Box 2707	☒	Facsimile (208) 736-2121
Twin Falls, ID 83303-2707	☐	E-mail: ddelaney@idcourts.net

DOCUMENT SERVED:

Ballentyne Ditch Company	☒	U. S. Mail
Boise Valley Irrigation	☐	Hand Delivered
Canyon County Water Company	☐	Overnight Mail
Eureka Water Company	☐	Facsimile
Farmers' Co-Operative Ditch Co.	☒	E-mail
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Nampa & Meridian Irrigation		
New Dry Creek Ditch Company		
Pioneer Ditch Company		
Settlers Irrigation District		
South Boise Water Company		
Thurman Mill Ditch Company		
Represented by:		
Daniel V. Steenson		
S. Bryce Farris		
Sawtooth Law Offices PLLC		
1101 W. River Street Suite 110		
P.O. Box 7985		
Boise, ID 83707		
dan@sawtoothlaw.com		
bryce@sawtoothlaw.com		

Milner Irrigation District	☒	U. S. Mail
Represented by:	☐	Hand Delivered
Paul L. Arrington	☐	Overnight Mail
Barker Rosholt & Simpson LLP	☐	Facsimile
195 River Vista Pl Suite 204	☒	E-mail
Twin Falls, ID 83301-3029		
pla@idahowaters.com		

American Falls Reservoir
Represented by:
C. Thomas Arkoosh
Arkoosh Law Offices
802 W. Bannock St Suite 900
P.O. Box 2900
Boise, ID 83701
tom.arkoosh@arkoosh.com

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☒	E-mail

Fremont Madison Irrigation
Represented by:
Jerry R Rigby
25 N. 2nd E
P.O. Box 250
Rexburg, ID 83440-0250
jrigby@rex-law.com

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☒	E-mail

A&B Irrigation District
American Falls Reservoir
Burley Irrigation District
Hillsdale Irrigation District
Milner Irrigation District
Minidoka Irrigation District
North Side Canal Co Ltd
North Side Canal Company
Twin Falls Canal Company
Represented by:
John K. Simpson
Shelley M. Davis
1010 W. Jefferson St. Suite 102
P.O. Box 2139
Boise, ID 83701-2139
jks@idahowaters.com
smd@idahowaters.com

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☒	E-mail

A&B Irrigation District
American Falls Reservoir
Burley Irrigation District
Hillsdale Irrigation District
Milner Irrigation District
Minidoka Irrigation District
North Side Canal Co Ltd
North Side Canal Company
Twin Falls Canal Company

Represented by:

Paul L. Arrington
Travis L. Thompson
195 River Vista Pl. Suite 204
Twin Falls, ID 83301-3029
tlt@idahowaters.com
pla@idahowaters.com

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☒	E-mail

City of Pocatello
Represented by:
Sarah A. Klahn
White & Kankowski LLP
Kittredge Building
511 16th St. Suite 500
Denver, CO 80202
sarahk@white-jankowski.com;
MitraP@white-jankowski.com

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☒	E-mail

American Falls Reservoir District No. 2
Minidoka Irrigation District
Represented by:
W. Kent Fletcher
1200 Overland Avenue
P.O. Box 248
Burley, ID 83318-0248
wkf@pmt.org

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☒	E-mail

United States of America
Represented by:
David Gehlert
U.S. Department of Justice
Natural Resources Section
Environmental & Natural Resources Division
19601 Stout Street – 8th Floor
Denver, CO 80294
david.gehlert@usdoj.gov

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☒	E-mail

USDI Bureau of Reclamation
Represented by:
David Gehlert
US Department of Justice
Environment & Natural Resources
550 West Port Street, MSC 033
Boise, ID 83724
david.gehlert@usdoj.gov

☒	U. S. Mail
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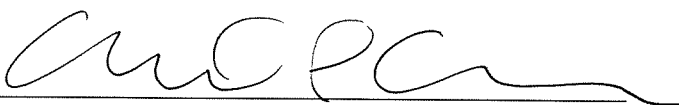
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☐	Facsimile
☐	E-mail

State of Idaho
Represented by:
Lawrence W. Wasden, Attorney General
Clive J. Strong, Deputy Attorney General, Chief
Natural Resources Division
Michael C. Orr, Deputy Attorney General
JRW Building, Second Floor
700 West State Street
P.O. Box 44449
Boise, ID 83711-2400

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☐	E-mail

Chief Natural Resources Division
Office of the Attorney General
State of Idaho
700 West State Street
P.O. Box 44449
Boise, ID 83711-0449

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☐	E-mail



Michael P. Lawrence