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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, 63-33732, 63-33733, 63-33734, 63-33737, 63-33738, 65-23531, and 65-23532

**UNITED WATER'S
SCHEDULING PROPOSAL**

United Water Idaho Inc. ("United Water") files *United Water's Scheduling Proposal* ("Proposal") in the above-captioned subcases pursuant to the Presiding Judge's September 10, 2014 *Order Re: Scheduling Proposals* ("Order").¹

As further clarified below, United Water agrees with the proposed schedule set forth in the *State of Idaho's Scheduling Proposal* filed on October 10, 2014 ("*State's Proposal*"). Specifically, United Water agrees: (1) that the State of Idaho's summary judgment motion should be scheduled immediately to determine whether the non-federal claims can proceed on their merits, or whether they are barred by the Idaho Supreme Court's decision in *United States v.*

¹ As of the date of this filing, United Water is a party to only the Basin 63 subcases listed in the caption. However, contemporaneous with this *Proposal*, United Water is filing a *Motion to Participate* in the other subcases. As a result, and because the Court's *Order* requested proposals for scheduling all of the captioned subcases, United Water is filing this *Proposal* in each of them.

Pioneer Irr. Dist., 104 Idaho 106, 157 P.3d 600 (2007); (2) that proceedings on the federal claims (and any non-federal claims remaining after summary judgment) should move forward without delay and without consolidation after the Court decides the State’s summary judgment motion; and (3) that Court-ordered mediation (as proposed by the Surface Water Coalition) would delay rather than expedite matters. United Water’s offers the following additional comments concerning scheduling in these subcases.

Except to the extent that principles of Idaho’s prior appropriation doctrine might be addressed in other Basins, or the application of those principles in one Basin’s subcases might set a precedent in subcases with similar facts in other Basins, United Water is interested only in the Basin 63 proceedings. Other parties also appear to be primarily interested in subcases specific to certain Basins, but not others. It will not benefit United Water or these other parties to be involved in fact-specific proceedings concerning reservoirs and claims outside their Basins of concern. For this reason, in addition to the reasons set forth in the *State’s Proposal*, consolidating all of the above-captioned subcases into a single proceeding would not likely promote efficiency and would likely cause parties additional time and expense.

At the same time, however, following the determination of the State’s summary judgment motion, United Water sees some potential for increased efficiency and convenience by informally grouping the subcases by Basin. This is not to say that the subcases should be formally consolidated within each basin—as discussed in the *State’s Proposal*, the fact-specific inquiries necessary to determine each beneficial use claim will not lend themselves to formal consolidation of any of the subcases.

As for the general principles of Idaho’s prior appropriation doctrine that might be addressed in any of the Basins, or the application of those principles to similar facts among the

Basins or subcases, United Water believes consolidation of subcases should not be off the table. Despite the fact-specific nature of proving up each individual beneficial use claim, Idaho's prior appropriation doctrine applies equally to all of the claims. That would include, for example, these fundamental principles:

- Unless expressly provided otherwise on the face of the right, a storage right may be filled only once in priority (the "one-fill" rule).
- All water physically and legally available (i.e., in priority) under a storage right counts toward fill ("storable inflow" rule aka "paper fill" rule).
- Even without a storage right for additional fill, a reservoir may be filled multiple times under free river conditions (that is, when other rights, including juniors, are not impaired) if water initially stored for beneficial use is released for proper purposes, such as flood control.
- Beneficial use storage claims may not be based on historical evidence of second physical fill of reservoir storage during free river conditions.
- Storage rights for additional fill are subject to the rules of forfeiture and abandonment.
- A junior appropriator's water right is protected against wrongful acts on the part of senior appropriators that would disturb the junior's right to the use of water.

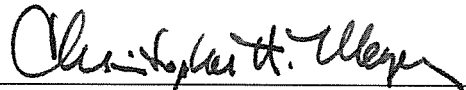
To the extent that the definition or application of fundamental prior appropriation principles such as these are put directly or indirectly at issue in any of these subcases, consolidated proceedings may be necessary so all of the potentially affected parties can participate. At this point, it is too early to tell what the claimants might argue to overcome the Director's Report recommendations that these claims be "disallowed," or whether their

arguments will implicate any common issues of law or similar facts among the subcases. But if common issues arise, all parties should be able to participate in their determination.

In summary, following the determination of the State's summary judgment motion, United Water proposes that the individual subcases move forward on their own schedules, grouped informally by Basin for convenience and efficiency, and that consolidated proceedings should be scheduled as necessary if common issues of law or fact arise. The Court should not order mediation.

DATED this 10th day of October, 2014.

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By 
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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:

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