

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

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DEPARTMENT OF
WATER RESOURCES

Attorneys for the United Water Idaho Inc.

**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, and 21-13161

**UNITED WATER'S REPLY TO
SURFACE WATER COALITION'S
OPPOSITION TO UNITED
WATER'S MOTION TO
PARTICIPATE**

United Water Idaho Inc. ("United Water") hereby submits this reply ("Reply") to the *Surface Water Coalition's Opposition to United Water's Motion to Participate in Late Storage Claim Subcases Pending in Basins 01, 21, 37, and 65* ("Opposition Brief").¹

The Surface Water Coalition² accurately states that United Water is "concerned that a decision from this Court relating to these late claims may somehow apply to the late claims in Basin 63." *Opposition Brief* at 4. This concern was clearly stated in United Water's *Motion*:

¹ United Water's *Motion to Participate in Late Storage Claim Subcases Pending in Basins 01, 21, 37, and 65* ("Motion") included subcase nos. 37-22806, 65-23531, and 65-23532 in addition to the subcases listed in this Reply's caption. Those three subcases are omitted from the caption, however, because the Surface Water Coalition's *Opposition Brief* was filed only in the above-captioned subcases. The Surface Water Coalition takes no position on United Water's motion to participate in Basins 37 and 65. *Opposition Brief* at 2 n.1.

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.

Motion at 2.

Nevertheless, The Surface Water Coalition argues that United Water “does not have any interest in these proceedings.” *Opposition Brief* at 3 (emphasis in original). In doing so, the Surface Water Coalition mischaracterizes the concern United Water asserted in its *Motion*. United Water does not contend that the late claims “seek to establish a right to ‘refill’ under the priority of the primary storage rights.” *Opposition Brief* at 3. Rather, these late claims seek to create storage rights with “more senior priority dates than could be obtained by filing a new appropriation . . . today.” *Motion* at 6. This matters to United Water because it holds existing natural flow water rights with priority dates that are junior to the priority dates asserted in the late claims, but that would be senior to any new appropriation. United Water's interest, therefore, is in protecting its existing water rights from being injured by the creation of new water rights with relatively senior priority dates. *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (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.”); *Jenkins v. Idaho Dept. of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982) (same).

² The Surface Water Coalition is comprised of American Falls Reservoir District #2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company. *Opposition Brief* at 1.

United Water’s interests extend outside of Basin 63 to the extent that precedent developed in other basins may apply to Basin 63. The Surface Water Coalition and other parties generally aligned with them have indicated their belief that general questions of Idaho water law concerning the issue of “fill” might be decided by this Court in these subcases. For example, nearly a year ago, the Surface Water Coalition told the Director of Department of Water Resources that the “the issue of ‘fill’ is pending before the Idaho Supreme Court and may be further addressed by the SRBA Court in the future . . .” *Joint Statement of Initial Issues* at 3, *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 01* (Dec. 4, 2013) (emphasis added). More recently, the Ditch Companies³ asserted to the Director that “the issue which the Idaho Supreme Court and the SRBA Court defined as the more important issue, ‘whether water released for flood control purposes counts toward the initial fill of a water right,’ is before the SRBA Court as part of the late claims.” *Pre-Hearing Motions Submitted by the Ditch Companies*, p. 5, *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* (Oct. 28, 2014).

United Water generally agrees with the Surface Water Coalition’s contention that “these late claims will succeed (or fail) based on their own distinct factual record before the respective special masters.” *Opposition Brief* at 4. United Water is not concerned with the factual records developed in non-Basin 63 subcases unless the application of law to those facts would apply similarly to similar facts developed in Basin 63.

United Water seeks to participate in the non-Basin 63 subcases because it is not clear whether the issue of “fill” (or some other generally applicable rule of prior appropriation

³ The Ditch Companies are Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

doctrine) will be raised or decided in any of the subcases, let alone in which one. These are not United Water's claims, and United Water does not and cannot know which legal theories the claimants and objectors might assert. All United Water knows is that certain objectors have suggested that the Court's determination in the various subcases may implicate broadly applicable principles of Idaho water law. United Water therefore seeks to participate so it can protect its Basin 63 interests from unfavorable precedent developed in other Basins.

The Surface Water Coalition certainly understands this strategy. It sought and was granted intervention in the Department's Basin 63 contested case concerning storage accounting.⁴ In its *Joint Petition to Intervene* in that matter, the Coalition stated:

The Coalition has a direct and substantial interest in how "fill" is determined in this [Water District 63] proceeding since its members are the beneficial and equitable owners of storage water rights in federal reservoirs in Water District 1. . . . The Coalition has a right to participate in any proceeding that could affect the definition or administration of storage water rights in federal reservoirs in the state of Idaho.

Joint Petition to Intervene at 2, *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 01* (Dec. 4, 2013) (emphasis added). The Coalition's logic supporting its participation in the Basin 63 administrative proceeding supports United Water's participation in the non-Basin 63 judicial proceedings.

The State of Idaho does not adequately represent United Water's interests. The State may advance arguments or settlement positions that benefit the general public but do not adequately address the interests of individual water right holders like United Water. Certainly

⁴ United Water sought and was granted intervention in the pending administrative proceeding concerning storage water right accounting in Basin 01. Similar to here, United Water sought intervention in that proceeding because "[i]t is not clear at this point how the Water District 01 and Water District 63 proceedings might develop or how their common issues may be set up. United Water seeks intervention in the Water District 1 proceeding so it can ensure it is entitled to participate fully in matters that may affect its interests in Water District 63." *United Water's Petition to Intervene* at 2, *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 01* (October 6, 2014).

the Surface Water Coalition (whose members' interests also are generally represented by the State) understands this.

United Water's *Motion* clearly is timely for purposes of Rule 24(b) intervention under the Idaho Supreme Court's decision in *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000), a case in which the Court upheld the SRBA Court's determination that motion to participate was timely when filed more than three years after a Director's Report was issued, after an extended response period had ended, and after a Motion for Summary Judgment had been filed. Here, United Water filed its *Motion* seeking participation less than one year after the Director's Report was issued. After that, virtually nothing happened in these subcases while the Basin Wide 17 appeal was pending before the Idaho Supreme Court. United Water filed its *Motion* and at the same time the parties were scheduled to submit scheduling proposals to the Court, and on the same day the State of Idaho filed a *Motion for Summary Judgment* in several of the subcases. United Water's *Motion* is timely and will not cause prejudice to any party as there has been no discovery and no litigation on the merits of these subcases.

In short, United Water at least 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). That decision is discretionary with the Court. The Court would be acting within its discretion if it grants United Water's *Motion*.

For the foregoing reasons, United Water respectfully requests the Court grant its motion to participate.

DATED this 10th day of November, 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 November, 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
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☒	Facsimile (208) 736-2121
☐	E-mail: ddelaney@idcourts.net

DOCUMENT SERVED:

Milner Irrigation District
Represented by:
Paul L. Arrington
Barker Rosholt & Simpson LLP
195 River Vista Pl Suite 204
Twin Falls, ID 83301-3029
pla@idahowaters.com

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

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
tlr@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
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ 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

☐

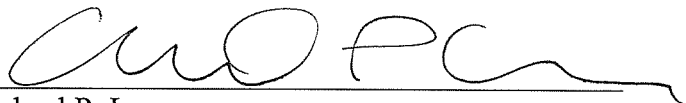
Overnight Mail

☐

Facsimile

☐

E-mail



Michael P. Lawrence