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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, 63-33732, 63-33733, 63-33737, and 63-33738

**UNITED WATER'S REPLY IN
SUPPORT OF THE STATE OF
IDAHO'S MOTION FOR SUMMARY
JUDGMENT**

United Water Idaho Inc. ("United Water") hereby submits this Reply ("*Reply*") in support of the *State of Idaho's Motion for Summary Judgment* ("*Motion*") filed in the above-captioned subcases.

United Water joined in the State's *Motion* by and through *United Water's Joinder in State of Idaho's Motion for Summary Judgment* dated November 19, 2014. United Water hereby joins in and adopts the arguments set forth in the State's *Reply in Support of State of Idaho's Motion for Summary Judgment* ("*State's Reply*") filed on December 10, 2014. In addition, United Water files this *Reply* to address certain arguments raised in the *Surface Water Coalition's Memorandum in Opposition to the State of Idaho's Motion for Summary Judgment* /

Notice of Joinder (“SWC Brief”) and the *Boise Project Board of Control’s Memorandum in Opposition to State of Idaho’s Motion for Summary Judgment (“Boise Project Brief”)*.

As pointed out by the State in its *Motion* and in the *State’s Reply*, and also in the *United States Response in Support of State of Idaho’s Motion for Summary Judgment (“Response”)*, the Idaho Supreme Court’s decision in *U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007), and this Court’s prior application of that decision in its *Order Disallowing With Prejudice All Claims Filed by Irrigation Entities Under Consolidated Subcase No. 91-63, Subcase Nos. 63-303A, et al.* (Jun 27, 2007), requires dismissal of the above-captioned subcases. In short, this Court has already determined that where the United States Bureau of Reclamation (“Bureau”) and non-federal “irrigation entities” file separate claims to the same storage water rights in federal reservoir projects, the *Pioneer* decision mandates that the non-federal claims must be decreed disallowed. The same application of *Pioneer* is required in these subcases. There are no genuine issues of material fact to preclude the entry of summary judgment disallowing the non-federal claims.

The relevant undisputed facts here are identical to those in *Pioneer*. In *Pioneer*, “[t]he United States Bureau of Reclamation (United States or BOR) filed water right claims for irrigation storage, irrigation from storage, and other storage rights” associated with dams and reservoirs “authorized and developed pursuant to the Reclamation Act of 1902 and its subsequent amendments.” *Pioneer*, 144 Idaho at 108. So-called “irrigation entities” filed “separate claims to the same water rights consistent with their respective uses.” *Id.*

Here, as in *Pioneer*, the Bureau filed water right claims associated with federal dam and reservoir projects. The Boise Project Board of Control (“Boise Project”) and the Surface Water

Coalition¹ filed separate claims to the same water rights claimed by Bureau. The only significant difference between the claims in these subcases and those in *Pioneer*, is that the competing rights claimed here seek water to refill only portions of reservoirs after water has been vacated for flood control, while the rights claimed in *Pioneer* sought to store water to initially fill reservoirs. But this difference is not material. The bottom line is that both cases involved non-federal irrigation entities and the United States claiming the same storage water rights associated with the same federal reservoirs.

The various claims and their supporting documentation demonstrate that the Boise Project and Surface Water Coalition's claims are for the same rights to "refill" reservoirs as those filed by the Bureau. For example, the *United States' Memorandum In Support Of Standard Form 4 Motions To File Late Notices of Claim*, p.1 (Jan. 31, 2013) states that the Bureau's claims were filed to "protect its ability to 'refill' reservoir storage space vacated for flood control purposes through separate storage water rights with a junior priority." The Boise Project stated in its Notice of Claim Nos. 63-33737 and 63-33738 that the claims are for "the right to refill," and the *Motion to File: Late Notice of Claim* accompanying each stated that the claims were filed because "the issue of refill has been called into question." In addition, an essentially identical affidavit was filed in support of each of the Boise Project's claims, indicating that the claims are for "refill rights" to ensure the reservoirs would physically fill after flood control releases. *See e.g., Affidavit of Tim Page* ¶¶ 5-8, subcase no. 63-33737 (Jan. 30, 2013). And the Surface Water Coalition's *Memorandum In Support Of Motion To File Late Notices Of Claim* (Jan. 31, 2013) ("*SWC's Late Claim Memo*") states that its claims were filed

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

“to protect its interest in water used to physically fill and refill storage space at various storage reservoirs operated by the United States Bureau of Reclamation” following flood control releases. *SWC’s Late Claim Memo* p. 2. In short, there is no dispute that the federal and non-federal claims encompass the same asserted water rights—rights to physically refill reservoir space vacated for flood control. *Pioneer* dictates that any such rights are properly claimed by the federal government.²

Contrary to the Surface Water Coalition’s arguments, minor differences in the elements claimed are immaterial to the application of *Pioneer*. See *SWC Brief* p. 5. The *Pioneer* Court recognized that the irrigation entities in that case filed “separate claims to the same water rights” as the Bureau, but only “consistent with their respective uses.” *Pioneer*, 144 Idaho at 108. For example, Pioneer Irrigation District’s Claim No. 63-3614A was for 25,582 acre-feet of irrigation storage in Anderson Ranch Reservoir rather than the reservoir’s entire irrigation storage volume of 487,961 acre-feet claimed by the Bureau under right no. 63-3614. Other irrigation entities such as Settlers Irrigation District, Farmers Union Ditch Company, New Dry Creek Ditch Company, Boise Valley Irrigation Ditch Company, and Nampa & Meridian Irrigation District similarly filed claims for some, but not all, of Anderson Ranch Reservoir’s irrigation storage volume. See generally Subcase Nos. 63-3614B, 63-3614C, 63-3614D, 63-3614E, and 63-3614F. Other elements of the irrigation entities’ claims in *Pioneer* also differed from the Bureau’s claim. But none of the differences between the claims precluded the *Pioneer* Court from finding that all of the claims were for the “same water rights.”

There also is no merit to the argument that the Idaho Supreme Court’s holding in *Joyce Livestock v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2007) alters the application of *Pioneer*. The very

² United Water in no way concedes or admits that the Bureau’s claims have merit, and nothing in this *Reply* should be construed or interpreted as a concession or admission otherwise.

same Court issued the *Joyce Livestock* decision one month prior to its *Pioneer* decision. But that Court obviously did not think the cases were related since it did not even mention *Joyce Livestock* in deciding *Pioneer*.

Moreover, the *Joyce Livestock* Court recognized that “Idaho law could not authorize anyone to trespass upon federal land,” and that one “cannot water its livestock at water sources located on federal rangeland unless the government grants it permission to have its livestock on such land.” *Joyce Livestock*, 144 Idaho at 19. But here, the Boise Project and Surface Water Coalition ask the Court to recognize rights for them to store water at federal reservoirs using federal dam facilities without the federal government’s permission. The fact that the federal government has not given such permission is evidenced by the United States’ *Response*, in which the federal government states its support of the State’s *Motion* and asks the Court to disallow the Boise Project’s and Surface Water Coalition’s claims.

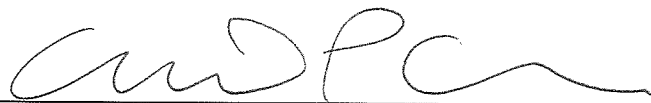
The Surface Water Coalition and, mainly, the Boise Project make additional factual assertions presumably for purposes of trying to establish a disputed issue of material fact. United Water disagrees with the substance of many of these factual assertions, and reserves the right to rebut them later if necessary rather than address them here. These factual allegations, even if true, do not create a genuine issue of material fact, and therefore are irrelevant to the State’s *Motion* and this Court’s determination of summary judgment.

For the foregoing reasons, as well as those set forth in the State’s *Motion*, the State’s *Reply*, and the United States’ *Response*, this Court should grant the State’s request for summary judgment and should decree the Boise Project’s and Surface Water Coalition’s claims disallowed.

DATED this 10th day of December, 2014.

GIVENS PURSLEY LLP

By



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 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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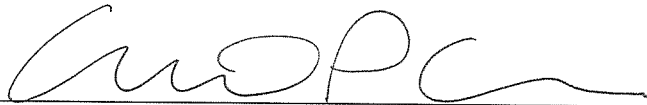
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