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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF IDAHO; IDAHO  
DEPARTMENT OF WATER RESOURCES  
An agency of the State of Idaho; and GARY  
SPACKMAN, in his official capacity as  
Director of the Idaho Department of  
Water Resources,

Defendants.

v.

IDAHO HOUSE OF  
REPRESENTATIVES; MIKE MOYLE,  
in his official capacity as Majority Leader  
of the House; IDAHO SENATE; and  
CHUCK WINDER, in his official  
capacity as President Pro Tempore of the  
Senate,

Case No. 1:22-cv-00236-DKG

**REPLY IN SUPPORT OF MOTION  
OF THE SHOSHONE-BANNOCK  
TRIBES FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF IN  
SUPPORT OF PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT [Dkt. 38]**

Intervenor-  
Defendants.

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**REPLY IN SUPPORT OF MOTION OF THE SHOSHONE-BANNOCK TRIBES FOR  
LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT [Dkt. 38]**

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## INTRODUCTION

The Shoshone-Bannock Tribes (“the Tribes”) file this consolidated reply to the *Response to Motion of the Shoshone-Bannock Tribes for Leave to File Amicus Curiae Brief in Support of Plaintiff’s Motion for Summary Judgment* (January 10, 2023) (Dkt. 39) (“*State Defendants’ Response*”) and *Joinder in State Defendants’ Response [Dkt. 39] to Motion of the Shoshone-Bannock Tribes for Leave to File Amicus Curiae Brief [Dkt. 38]* (January 11, 2023) (Dkt. 40) filed on behalf of Intervenor-Defendants the Idaho House of Representatives, House Majority Leader Megan Blanksma, the Idaho Senate, and Senate President Pro Tempore Chuck Winder.<sup>1</sup>

The *State Defendants’ Response* incorrectly argues that the Tribes’ motion should be denied or limited. First, the *Response* fails because, contrary to the State Defendants’ assertions, the 1990 Fort Hall Indian Water Rights Agreement by and between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, the State of Idaho, the United States, and Certain Idaho Water Users (July 10, 1990) (“Fort Hall Agreement”) does provide the Tribes with both an interest in this case and a unique perspective on the issues, as the actions by the Legislature impermissibly seek to unilaterally revise the terms of water rights settlements like the Fort Hall Agreement. Second, the State Defendants incorrectly assert that the Tribes’ *Motion* seeks to

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<sup>1</sup> By referencing the *Joinder* filed by Leader Blanksma and President Pro Tempore Winder, the Tribes do not concede that either legislative officer has standing to intervene in this case on behalf of their respective legislative bodies. The Tribes have reviewed the record in this case, as well as the available records of the Idaho legislature, and note that there is no evidence in either source indicating that either house of the Idaho legislature authorized either of these two officials to intervene in this matter on its behalf. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997) (finding that individual legislators did not meet the requirements to demonstrate Article III standing as they alleged no injury to themselves as individuals but rather their alleged injury was generalized to the institution and they notably did not have a vote of the membership authorizing them to represent their respective Houses of Congress in the action, meaning they do not show any delegation to act on the legislature’s behalf). Additional informal inquiries by undersigned counsel did not yield any evidence of such authorization.

enlarge the issues and claims for relief in this case by noting that the Tribes' proposed *amicus* brief discusses the potential for a takings claim. The *State Defendants' Response* mischaracterizes the proposed role and intention of the Tribes' *Motion* and participation as *amicus curiae*. The Court should reject these arguments as inapposite and incorrect, and grant the Tribes' motion to participate as *amicus*.

#### ARGUMENT

##### **I. The Tribes Appropriately Seek Participation as *Amicus Curiae* to Point Out the Potential Larger Implications of a Ruling in Favor of the State.**

State Defendants argue that the Tribes' *Motion* should be denied because the statute being challenged in this case (Idaho Code § 42-224) does not directly impact any of the Tribes' water rights under the Fort Hall Agreement or subsequent Consent Decree. *See State Defendant's Response* (Dkt. 39 at 3–6). The Tribes agree that its rights under the Fort Hall Agreement do not fall under Idaho Code § 42-224. However, the State Defendants incorrectly conclude that the Tribes therefore have no interest in or valuable perspective on the issues in this case. Dkt. 39 at 4–6.

It is precisely because the Tribes are not the owners of water rights at issue in this litigation that the Tribes properly seek to participate as *amicus curiae* rather than to seek intervention as a party plaintiff, since they would arguably lack standing. But a party does not have to demonstrate that it has standing in a case to participate as *amicus*. By asserting such a standard, the State Defendants take a position contrary to the authority they cite in their *Response*. Dkt. 39 at 3 (citing *Miller-Wohl Co., Inc. v. Comm'r of Lab. & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir. 1982)). The *Miller-Wohl Co., Inc.* decision expressly notes that an *amicus curiae* is not a party to the litigation, but rather that “[t]he ‘classic role’ of amici is threefold: (1) to assist in a case of general public interest; (2) to supplement the efforts of

counsel; and (3) to draw the court’s attention to law that has escaped consideration.” *Id.*; *see also California v. United States Dep’t of Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019).

Further, “[t]here are no strict prerequisites that must be established prior to qualifying for amicus status”; rather a party seeking to appear as an amicus “must merely make a showing that [their] participation is useful or otherwise desirable to the court,” and the court has broad discretion to permit such amicus briefs. *California v. United States Dep’t of Interior*, 381 F. Supp. 3d at 1164. (“The salient question is whether such brief is helpful to the Court.”). Finally, whether to allow amici to file a brief is solely within the discretion of the court, and generally courts have exercised “great liberality” in permitting such amicus briefs. *Id.*

Here, the Tribes’ participation fits into the classic role of an amicus and presents valuable information and perspective for the Court to consider. First, the Tribes are seeking to assist the Court in a case of general public interest (as is indicated by the fact that the Plaintiffs and Defendants are governmental entities operating on behalf of their respective publics, as well as by the fact that changes to bargained-for water rights by legislative enactment is inherently of public interest). Second, the Tribes seek to supplement the efforts of Plaintiff’s counsel by more fully articulating several Constitutional arguments that Plaintiff’s counsel briefly address but do not, from the Tribes’ perspective, address completely. Third, the Tribes seek to draw the Court’s attention to law and factual information that, aside from the Tribes’ participation, would go unconsidered (the broader implications of a decision upholding the Legislature’s actions).

Moreover, simply because the Tribes do not have water rights that are the subject of the Idaho Legislature’s statutory scheme here does not mean the Tribes do not have an interest in the outcome of this litigation or a valuable perspective for this Court to consider. *See Funbus Sys., Inc. v. California Pub. Util. Comm’n.*, 801 F.2d 1120, 1125 (9th Cir. 1986). Specifically, the

Tribes' *Motion* and attached *Brief of Amicus Curiae* seek to inform this Court of the broader implications of ruling in favor of the State in this litigation. The actions of the Idaho Legislature, if upheld, could unwind or reverse the recognition and use of water rights by the United States that were negotiated and agreed-upon through various water rights settlement agreements — including rights of the United States that were secured as part of the Fort Hall Agreement — that were incorporated into the SRBA Final Unified Decree.<sup>2</sup> In other words, the Tribes not only have bargained-for rights under the same type of settlement agreements as the rights of the United States at issue here — they have bargained-for rights under one of the specific agreements that would be modified (with respect to the United States' rights) by the actions of the Idaho Legislature challenged in this litigation. Moreover, the Tribes rely on several of the United States' water rights (through the Bureau of Land Management) that would be impacted by the legislation because the Tribes hold grazing permits on at least one impacted BLM allotment. *See e.g.* Price Decl., Ex. 3 (Dkt. 36-3 at 46) (discussing *In Re SRBA*, Case No. 39576, Stipulation to Resolve Subcases (July 1, 1999), including water right 29-12746 owned by BLM for Rocks Allotment #16086 for which the Tribes hold the grazing permit). Thus, the Tribes

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<sup>2</sup> The three water rights include: Right No. 27-11562 – Basis of Right: Beneficial Use. Purpose Stock Water. (note “Water will be used for stock water for range cattle for the grazing rights associated with Blackfoot Reservoir.”); Right No. 27-11563 – Basis of Right: Beneficial Use. Purpose Stock water (note “Water will be used for stock water for range cattle for the grazing rights associated with Equalizing Reservoir.”); and Right No. 25-13616 – Basis of Right: Beneficial Use. Purpose Stock water (note “Water will be used for stock water for range cattle for the grazing rights associated with Grays Lake.”). *See* Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of the Water in the Upper Snake River Basin, *In Re SRBA*, Case No. 39576 (Idaho 5<sup>th</sup> Jud. Dist. Ct., Nov. 12, 2014) at 62–65. *See also* Dkt. 36-12, Declaration of Fred Price, Ex. 12 (Letter from Director Gary Spackman dated August 24, 2018, transmitting list of federal water rights required by the Legislature's statutory scheme, which list included these rights and was served on the Bureau of Indian Affairs).

have an interest and an essential and unique perspective. It would therefore be valuable for the Court to consider the broader implications of the legislative attempts to unwind such settlement agreements in order to ensure that the Legislature is prevented from expanding its approach in Idaho Code § 42-224 to unwind the Tribal water rights bargained-for in the Fort Hall Agreement. As such, the Tribes' *Motion* and attached *Brief of Amicus Curiae* contains additional information, including information concerning the larger implications of this litigation, that is valuable for this Court to consider when ruling on the Plaintiff's Motion for Summary Judgment.

Moreover, the State Defendants' assertion that the Tribes' *amicus* brief is not necessary because it is purportedly full of "hypotheticals" [Dk. 39 at 4–5] indicates a misunderstanding of the role of an amicus and, more generally, of a court considering a case. It is a regular, indeed routine practice of courts to pose hypothetical scenarios to counsel arguing a case in order to understand the implications of the legal issues before the court. Posing such hypotheticals through an amicus brief — particularly where the hypotheticals concern potential impacts to the Tribes — is consistent with the role of an amicus. Further, many of the concerns raised by the Tribes are not at all hypothetical. It is not hypothetical, for example, that the Legislature's actions may impact existing water rights that were negotiated through settlement agreements, including the Fort Hall Agreement. *See* note 2, *supra*. It is not hypothetical that water is and will continue to be a scarce resource and that its use is heavily-contested. It is not hypothetical that the legislation enacted here will benefit some water users at the expense of others. And it is not hypothetical that the population of the Tribes is small relative to the population of the State overall, and that the role of the courts in our political system is to ensure that majoritarian political pressures do not overrun the rights of political minorities.

Given its role in elucidating these issues, through hypotheticals and well as through the lens of its legitimate concerns about future legislative actions, the Tribes' *Motion* is proper and the Tribes respectfully request that the Court grant the *Motion* and thus allow the Tribes' *Brief of Amicus Curiae* to be filed in this case.

**II. The Tribes' Participation as *Amicus Curiae* Cannot Enlarge the Issues or Claims for Relief in This Case.**

The State Defendants also incorrectly argue that the Tribes seek to “actively participate in this case by raising new issues and claims, and to seek rulings from this Court regarding any future application of the statutes to the water rights decreed in the SRBA pursuant to the Fort Hall Agreement.” Dkt. 39 at 6. In support of this erroneous conclusion, State Defendants point to the Tribes' *Brief of Amicus Curiae*, Section II.3 “Idaho's Statutory Scheme Constitutes an Impermissible Taking Under the United States and Idaho Constitutions,” which is not one of the claims for relief alleged by Plaintiff. Dkt. 39 at 6. This argument misrepresents the Tribes' *Motion*.

First, as State Defendants correctly point out, an *amicus* is not to assume the function of a party and may not initiate, create, extend, or enlarge the issues. Dkt. 39 at 3 (citing *WildEarth Guardians v. Jeffries*, 370 F. Supp. 3d 1208, 1228 n.2 (D. Or. 2019); *Kingdom v. Biden*, 2021 WL 4956507, at \*1 (D. Haw. Sept. 30, 2021). Further, as noted in *Kingdom v. Biden*, “[w]hen determining whether to grant leave to file an amicus brief, courts consider whether the briefing supplements the efforts of counsel, and draws the court's attention to law that escaped consideration.” *Kingdom v. Biden*, 2021 WL 4956507, at \*1 (citing *Miller-Wohl Co., Inc. v. Comm'r of Lab. & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir. 1982)); permitting amicus brief and noting that the amicus may not assume the functions of a party). Finally, *amici*

may take a legal position and present legal arguments in support of such a position. *See Funbus Sys., Inc.*, 801 F.2d at 1125.

The Tribes do not seek to initiate, create, extend, or enlarge the issues here. In fact, the Tribes' *Motion* and *Brief of Amicus Curiae* never requests or seeks to add any additional claims for relief, does not request to expand the scope of the issues in this case, and does not seek a ruling on potential future legislative actions.

Instead, the Tribes have taken the case as they found it, and are supplementing legal arguments made by Plaintiff's counsel and are further informing this Court of the broader implications of ruling in favor of the State in this litigation. *See Kingdom v. Biden*, 2021 WL 4956507, at \*1. As stated in the Tribes' *Brief of Amicus Curiae*, the "Tribes support the position of the United States and seek to clarify that, although the Tribes are not the direct target of this legislation, the State's statutory scheme has the potential to be applied to certain stockwater rights held by the United States that are an integral and interwoven part of the Tribes' bargained-for settlement of its water right claims as represented in the Tribes' Consent Decree," and that as a result, "any attempt by the State to apply its statutory stockwater scheme to water rights contained in the Consent Decree must be held to be unconstitutional as applied." Dkt. 38-1 at 25 (Conclusion). Thus, as stated, the Tribes do not seek any additional ruling in this litigation, but are making the Court aware of the potential implications of the State's actions where Tribal water rights may be concerned should the State seek to apply these statutes or other future statutory schemes to the Tribes water rights.

Likewise, the Tribes raise the issue of a potential takings claim not because the Tribes seek a ruling in the current litigation that an unconstitutional taking has occurred, but rather to inform this Court that such takings claim litigation is a likely consequence of allowing the Idaho

Legislature to unilaterally legislatively alter or unwind vested water rights, as they have done in the currently challenged statutory scheme to the vested water rights of the United States. As stated in the Tribes' *Brief of Amicus Curiae*, allowing such unilateral legislative acts would only embolden the Idaho Legislature to continue its long running attempts to erode the settled expectation of the Tribes and other parties to the SRBA and would further threaten the finality of the SRBA. Dkt. 38-1 at 25.

The Tribes do not seek a ruling in this case that Idaho Code § 42-224 results in an unconstitutional taking. Including such an argument to demonstrate the potential implications of actions like those taken by the Legislature is permissible, as it is asserting a legal position and presenting arguments in support, in the service of assisting the Court in seeing the broader legal implications of its decision here. *Funbus Sys., Inc.*, 801 F.2d at 1125.

#### CONCLUSION

For the reasons set forth above, the Shoshone-Bannock Tribes respectfully request that the Court grant the Tribes' *Motion* and allow for the filing of the Tribes' *Brief of Amicus Curiae The Shoshone-Bannock Tribes*.

Respectfully submitted this 24 day of January, 2023.

*s/ Edmund Clay Goodman*

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**CERTIFICATE OF SERVICE**

I hereby certify that, on January 24, 2023, I filed the foregoing document with the Clerk of the Court using this Court's CM/ECF system, which will send a notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D. Idaho L.R. 5.1(k).

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