

**LAWRENCE G. WASDEN**  
Attorney General

**STEVE STRACK**  
Deputy Attorney General  
Acting Chief, Natural Resources Division

**GARRICK L. BAXTER, ISB #6301**  
**EMMI L. BLADES, ISB #8682**  
Deputy Attorneys General  
Idaho Department of Water Resources  
P.O. Box 83720  
Boise, ID 83711-0098  
Telephone: (208) 287-4800  
Facsimile: (208) 287-6700  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)  
[emmi.blades@idwr.idaho.gov](mailto:emmi.blades@idwr.idaho.gov)

*Attorneys for Respondents*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

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;  
PIONEER IRRIGATION DISTRICT;  
SETTLERS IRRIGATION DISTRICT;  
SOUTH BOISE WATER COMPANY; and  
THURMAN MILL DITCH COMPANY,

Petitioners,

vs.

BOISE PROJECT BOARD OF CONTROL,  
and NEW YORK IRRIGATION DISTRICT,

**Case No. CV-WA-2015-21376  
(Consolidated Ada County Case  
No. CV-WA-2015-21391)**

**RESPONDENTS' RESPONSE TO DITCH  
COMPANIES' MOTION TO STAY**

Petitioners,  
vs.  
THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN, in  
his capacity as the Director of the Idaho  
Department of Water Resources,  
Respondents,  
SUEZ WATER IDAHO, INC.,  
Intervenor.

IN THE MATTER OF ACCOUNTING FOR  
DISTRIBUTION OF WATER TO THE  
FEDERAL ON-STREAM RESERVOIRS IN  
WATER DISTRICT 63

Respondents, the Idaho Department of Water Resources (“Department”) and Gary Spackman in his capacity as Director of the Department (“Director”), by and through their undersigned attorney of record, hereby respond to the Ditch Companies’<sup>1</sup> *Motion to Stay* and supporting memorandum, filed March 8, 2016. As explained below, it is not appropriate to indefinitely stay this proceeding until Snake River Basin Adjudication (“SRBA”) consolidated subcase nos. 63-33732, et al. (the “Late Claims”) are fully litigated and resolved at some unknown point in the future. Therefore, Respondents request the Court exercise its discretion to deny the requested stay.

---

<sup>1</sup> The Ditch Companies are comprised of the 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, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

## BACKGROUND

In early 2013, the United States filed late claims to establish “supplemental beneficial use storage water rights—separate water rights with a junior priority—which, in conjunction with existing storage water rights, would allow [the Bureau of] Reclamation to complete one physical fill of its reservoirs in years when it must release stored water for flood control.” *The United States’ Memorandum in Support of Standard Form 4 Motions to File Late Notices of Claim*, SRBA Subcase Nos. 01-10620, et al., at 2 (filed Jan. 31, 2013). The Boise Project Board of Control also filed late claims for irrigation storage and “the right to refill” Arrowrock and Anderson Ranch Reservoirs (Nos. 63-33737 and 63-33738, respectively). *Notice of Claim to a Water Right*, SRBA Case Nos. 63-33737 & 63-33738, at 2 (both filed Jan. 31, 2013). Consistent with these characterizations of the claims, the SRBA Court explained the purpose of the Late Claims proceeding is to ascertain whether the claimants could “establish the two essentials for obtaining a water right under the constitutional method—diversion and application of the water to a beneficial use.” *Order Granting in Part and Denying in Part Motion for Summary Judgment*, SRBA Subcase Nos. 01-10614 et al., at 5 (Jan. 9, 2015).

In October of 2013, the Director initiated the contested case at issue in this proceeding. The Director found the contested case necessary “[t]o address and resolve concerns with and/or objections to how water is counted or credited toward the fill of water rights for the Federal on-stream reservoirs pursuant to existing procedures of accounting in Water District 63.” (R. 000007). The water rights for the Federal on-stream reservoirs in Water District 63 (referred to below as the “reservoir water rights”) are water right nos. 63-303 and 63-3613 (Arrowrock Reservoir), 63-3614 (Anderson Ranch Reservoir), and 63-3618 (Lucky Peak Reservoir), all of which are decreed in the name of the United States. In late December of 2014, the Director stayed the contested case pending the Idaho Supreme Court’s resolution of Basin-Wide Issue 17.

(R. 000088–89). On September 10, 2014, about one month after the Idaho Supreme Court issued its decision in *In Re SRBA, Case No. 39576, Subcase No. 00-91017*, 157 Idaho 385, 336 P.3d 792 (2014) (cited below as “*Basin-Wide Issue 17*”), the Director lifted the stay. (R. 000094–96).

One day earlier, on September 9, the SRBA Court held a status conference where it inquired into the relationship between this contested case proceeding and the Late Claims. At that time, counsel for the Ditch Companies stated “it may make sense to stay the late claims while that issue [of fill] is fleshed out front of the Director.” *Reporter’s Transcript* of Sept. 9, 2014 Status Conference 14:22–24 (statement of Mr. Farris), 22:12–15 (“[T]he decision of Pioneer anyway is to stay the late claims going forward. What ultimately happens with the department’s contested case proceedings remains to be seen.”) (statement of Mr. Waldera).<sup>2</sup> Then, in late October, 2014, the Ditch Companies moved to stay the contested case. Despite counsel’s earlier acknowledgement that the issue was before the Director, the Ditch Companies argued the contested case should be stayed because the issue of “‘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.” (R. 000259). The Director declined to stay the contested case because “the issue is squarely before the Director as the Idaho Supreme Court recently explained in the case involving Basin-Wide Issue 17.” (R. 000348).

Both the Late Claims and the contested case proceeded through the end of 2014 and into 2015. In October of 2015, Special Master Booth recommended that the Late Claims be disallowed and the Director issued his *Amended Final Order* in the contested case. The Director denied various motions for reconsideration in mid-November, 2015, and, on December 17, 2015,

---

<sup>2</sup> A copy of the September 9, 2014 Status Conference transcript is attached as Exhibit A.

the Ditch Companies, the Boise Project Board of Control, and New York Irrigation District filed the petitions for judicial review now pending before this Court. In February of this year, Special Master Booth denied the State of Idaho's and Suez Water Idaho's motions to alter or amend his recommendation. The State of Idaho and Suez Water Idaho have recently filed notices challenging the Special Master's recommendation.<sup>3</sup>

This judicial review proceeding and the challenges to Special Master Booth's recommendation on the Late Claims are both now before this Court, albeit in different actions.<sup>4</sup> Under the current schedule, this proceeding will be fully briefed by April 26, 2016, and argued on May 10, 2016. *Procedural Order Governing Judicial Review* (Dec. 17, 2015), as amended by *Order Granting Stipulated Motion for Extension of Time* (Feb. 22, 2016). On the other hand, the Late Claims are scheduled to be briefed by June 17, 2016, and argued on June 23, 2016.<sup>5</sup> *Challenge Scheduling Order*, Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734 (Mar. 14, 2016). The Ditch Companies now claim it is appropriate to stay this judicial review proceeding under Idaho Code § 67-5274 and Idaho Rule of Civil Procedure ("I.R.C.P.") 84(m).

---

<sup>3</sup> Respondents request, pursuant to Idaho Rule of Evidence 201, the Court take judicial notice of the *State of Idaho's Notice of Challenge* and *Suez's Notice of Challenge*, both filed in SRBA Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734 on March 11, 2016.

<sup>4</sup> As discussed below, there are stark differences between this judicial review proceeding under the Idaho Administrative Procedures Act and SRBA proceedings under Title 42, Chapter 14, Idaho Code. Moreover, the differences between the two proceedings appear to be a live issue in the challenges to Special Master Booth's recommendation.

<sup>5</sup> Counsel for the Department has recently become aware that counsel for the United States is seeking to move the date of the oral argument on the Late Claims to July of 2016, although no formal motion or request has been made yet.

## LEGAL STANDARD

Both Idaho Code § 67-5274 and I.R.C.P. 84(m) authorize a court presiding over a petition for judicial review to order “a stay on appropriate terms.” The Ditch Companies correctly point out that neither the statute nor the rule provides a standard for determining what “appropriate terms” may be, and there is no reported Idaho case that elaborates on the meaning of “appropriate terms.” However, the limited caselaw on the subject does indicate that the decision to stay or proceed with a case is committed to the Court’s sound discretion. *Platz v. State*, 154 Idaho 960, 969–70, 303 P.3d 647, 656–57 (Ct. App. 2013). In addition, I.R.C.P. 84(m) must be applied in a manner that “secure[s] the just, speedy and inexpensive determination” of this proceeding. I.R.C.P. 1(a).

## ARGUMENT

The Ditch Companies’ stay request requires this Court to accept the Ditch Companies’ premise that the Late Claims are the appropriate forum for determining when the decreed reservoir water rights fill.<sup>6</sup> Not only does this argument run contrary to *Basin-Wide Issue 17*, it misapprehends the basic distinction between administering decreed water rights and claiming water rights. The Late Claims raise the narrow, factual question of whether the claimants can establish “supplemental” storage water rights for “refill” purposes under the constitutional method. Yet the Ditch Companies would have this Court believe that the Late Claims are something else entirely—a vehicle for inserting the “issue of fill” back into the SRBA. But, as *Basin-Wide Issue 17* confirmed, that approach is improper. The orders under review here

---

<sup>6</sup> The Ditch Companies’ premise appears to be disputed in the Late Claims proceeding. For instance, the State of Idaho argues the Late Claims “subcases were designated to resolve the validity of the Claimants’ beneficial use-based late claims for additional water rights for the Boise River Reservoirs . . . , not to ‘interpret’ or re-determine the nature and extent of the previously decreed water rights, or to address the Claimants’ objections to IDWR’s water accounting methods and systems in Water District 63.” *State of Idaho’s Notice of Challenge*, Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734, at 2–3 (Mar. 11, 2016).

represent the Director's answer to the mixed question of law and fact the Idaho Supreme Court identified and committed to the Director in *Basin-Wide Issue 17*. Delaying review until after the Late Claims are decided would serve only to perpetuate the controversy about the accounting methodology, which the Department has employed in Water District 63 for decades. Staying judicial review will increase, not reduce, the danger of inconsistent decisions and would not provide for a "just, speedy and inexpensive determination" in this proceeding. The Ditch Companies have not identified any appropriate reason for such delay.

**A. The Court Can and Should Address the Accounting of the Reservoir Water Rights Because the Reservoir Water Rights Have Been Decreed.**

There is an immediate and ongoing need for a water rights accounting methodology in Water District 63. As found in the Director's *Amended Final Order*:

The Watermaster, as supervised by the Director, must be able to determine the natural flow supply, the water right priorities in effect, and storage entitlements in order to distribute natural flow in accordance with licensed and decreed water rights and to account for storage use. The reservoir system significantly complicates this task. As the Idaho Supreme Court and the SRBA District Court have recognized, "[a]n on-stream reservoir alters the stream affecting the administration of all rights on the source. Accordingly, some methodology is required to implement priority administration of affected rights." *Basin-Wide Issue 17*, 157 Idaho at 388, 336 P.3d at 795 (quoting SRBA District Court *Order Designating Basin-Wide Issue*, 6 (Sept. 21, 2012)). Particularly in a river carrying comingled storage and natural flow, the Watermaster cannot know which headgates or diversion facilities to "shut and fasten" in "times of scarcity" without knowing which diversions have "prior rights" to the water supply. Idaho Code § 42-607. The Water District 63 water right accounting and storage allocation programs are integral to water distribution and priority water right administration in Water District 63.

(R. 001291). In short, the accounting methodology is part and parcel of the Director's duty to direct and control the distribution of water in the Boise Basin. *See* Idaho Code § 42-602; *see*

also *Basin-Wide Issue 17*, 157 Idaho at 394, 336 P.3d at 801 (“[I]mplicit in providing each user its decreed water would be determining when the decree is filled or satisfied.”)

While accounting details are left to the Director, the “decrees give the Director a quantity he must provide to each water user in priority.” *Basin-Wide Issue 17*, 157 Idaho at 393–94, 336 P.3d at 800–01. All of the reservoir water rights were decreed in the SRBA years before the contested case began,<sup>7</sup> and those partial decrees were incorporated into the *Final Unified Decree*. With limited exceptions, the *Final Unified Decree* “is conclusive as to the nature and extent of all rights of the United States to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987 . . . .” *Final Unified Decree*, In Re SRBA Case No. 39575, at Conclusion of Law 5 (Aug. 26, 2014). Although the Court retained jurisdiction over the Late Claims, it did not retain jurisdiction over the reservoir water rights. *Order Regarding Subcases Pending Upon Entry of Final Unified Decree*, SRBA Subcase Nos. 01-00219 et al. (Aug. 26, 2014).

Because the nature and extent of the reservoir water rights has been adjudicated, the existence of the Late Claims has no bearing on how the Director administers those rights. Even if there were no Late Claims, the Director would have to decide when the decreed reservoir water rights “fill.” And, even if the Late Claims were ultimately decreed as claimed, the Director would still face the same question of “fill.” That question persists in Water District 63 not because of the Late Claims, but because the Director must distribute water in a system where the federal on-stream reservoirs comingle storage water and natural flow. Accordingly, the Late Claims are not, as the Ditch Companies claim, a “prerequisite to reviewing the issues raised in

---

<sup>7</sup> Water right no. 63-303 was decreed on June 23, 2007; 63-3613 on June 28, 2007; 63-3618 on December 18, 2008; and 63-3614 on February 25, 2009.

the Contested Case.” *Ditch Companies’ Memorandum in Support of Motion to Stay* at 7 (filed Mar. 8, 2016) (referred to below as “DCs’ Brief”).

Moreover, the Late Claims do not suspend the “Director’s clear duty to act” in accordance with decreed water rights and prior appropriation principles. *Basin-Wide Issue 17*, 157 Idaho at 393–94, 336 P.3d at 800–01. That duty to act and the need for action exist today. It is therefore essential that challenges to the Water District 63 accounting methodology be resolved without delay.

**B. This Proceeding Does Not Involve the Same Parties or the Same Cause as the Late Claims.**

The Ditch Companies admit their motion is not made pursuant to I.R.C.P. 12(b)(8) but argue that rule is “instructive” for “determining whether an action should proceed when a similar case is pending.” *DCs’ Brief* at 6 (emphasis added). Missing from this argument is I.R.C.P. 12(b)(8)’s text, which permits a dismissal or stay only when “another action [is] pending between the same parties for the same cause.” (emphasis added). The Ditch Companies fail to recognize that the Late Claims involve different parties and a different “cause.” To the extent I.R.C.P. 12(b)(8) and the cases applying it are instructive here, they teach that mere similarity between two pending lawsuits is not grounds for a stay.

For example, the Idaho Court of Appeals has upheld a trial court’s decision to proceed in the face of another “similar” lawsuit where the two suits “were not precisely identical.” *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 908, 684 P.2d 307, 310 (Ct. App. 1984), *overruled on other grounds by NBC Leasing Co. v. R & T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987). *Wing* involved two lawsuits over the proceeds of a sugar beet crop. In the first suit, the farm owner and the lessee-grower litigated responsibility for various costs and losses incurred by the farming operation. *Id.* at 907, 684 P.3d at 309. While the first suit was pending, the lessee sued

the crop purchaser, Amalgamated Sugar, claiming Amalgamated should have paid the lessee's share of the sugar beet proceeds via a separate check to the lessee. *Id.* The farm owner intervened in the second case, argued the lessee's entitlement to a separate payment depended on the outcome of the first case, and asserted the second case should be dismissed or a stayed pending the outcome of the first case. *Id.* Noting that the parties were different and the claims "were not entirely coextensive," the Idaho Court of Appeals found no abuse of discretion in allowing the second case to proceed. *Id.* at 908, 684 P.3d at 310.

The two cases in question here have even less in common. Neither the Director nor the Department are parties to the Late Claims. Indeed, Idaho Code § 42-1401B forbids the Director from being party to the Late Claims: "The director shall not be a party to an adjudication."

Further, the two cases involve distinct causes of action and different water rights, as can be seen by directly comparing the language of the Director's orders with this Court's January 9, 2015 summary judgment order in the Late Claims subcases:

<b><i>Contested Case</i></b>	<b><i>Late Claims</i></b>
<b>Purpose:</b> "To address and resolve concerns with and/or objections to how water is counted or credited toward the fill of water rights for the Federal on-stream reservoirs pursuant to existing procedures of accounting in Water District 63." (R. 000007).	<b>Purpose:</b> "In this matter, by contrast, the very validity and existence of the above-captioned water rights are at dispute and before the Court. The competing claims of the United States and the Irrigation Entities are based on historic beneficial use. . . . [T]he burden now rests with the claimants to come forward with evidence to rebut the Director's recommendations, and establish the existence of the rights under the constitutional method of appropriation. To do so, the claimants must establish the two essentials for obtaining a water right under the constitutional method—diversion and application of the water to a beneficial use." <i>Order Granting in Part and Denying in Party Motion for Summary Judgment</i> , SRBA Subcase Nos. 01-10614 et al., at 5 (Jan. 9, 2015).
<b>Water Rights at Issue:</b> 63-303, 63-3613, 63-3614, 63-3618. (R. 001234–35).	<b><u>Claimed</u> Water Rights at Issue:</b> 63-33732, 63-33733, 63-33734, 63-33737, 63-33738. <i>Order Granting in Part and Denying in Party Motion for</i>

The differences do not end there. This is a proceeding under the Idaho Administrative Procedures Act challenging the Director’s decision to continue using a decades-old method for determining, among other things, when the decreed reservoir water rights are satisfied. The Late Claims, by contrast, seek to appropriate specific volumes of water with a specific priority date according to the constitutional method of appropriation. This proceeding entails review of a final administrative record with due deference to the Director’s technical expertise and judgment as to the weight of the evidence. Idaho Code § 67-5279. The Late Claims, as currently postured, entail review of a Special Master’s recommendation to disallow the claims. *See* I.R.C.P. 53(e)(2). Additionally, the relief available from the two proceedings differs. Pursuant to Idaho Code § 67-5279, the relief available on judicial review of an agency action is either affirmance or vacatur and remand if necessary, whereas the relief available on the Late Claims is either allowance or disallowance of the claims. Moreover, “[r]eview of an agency action of the department of water resources . . . shall not be heard in any water rights adjudication proceeding,” including the Late Claims. Idaho Code § 42-1401D. These stark differences—not just in form, but also in the parties and the nature of relief available—highlight why a stay would not be authorized under I.R.C.P. 12(b)(8) and is not appropriate under I.R.C.P. 84(m) or Idaho Code § 67-5274 either.

**C. The Timing of the Two Proceedings Does Not Justify a Stay and Considering This Judicial Review Proceeding in Parallel With the Notice of Challenge Will Reduce the Possibility of Inconsistent Decisions.**

The Ditch Companies assert that the Late Claims proceeding is a “first in time[] case previously pending, and that the SRBA should not proceed with the later initiated Contested

Case until the Late Claims have been fully resolved for fear of inconsistent decisions and judicial economy.” *DCs’ Brief* at 6.

As discussed above, under the current schedule, this proceeding will be fully briefed by April 26, 2016, and argued on May 10, 2016. On the other hand, the Late Claims are scheduled to be briefed by June 17, 2016, and argued on June 23, 2016, or possibly later. This judicial review proceeding was filed before the notice of challenge and is on track to be submitted to the Court for consideration first. Because this proceeding is on track to be submitted to the Court for consideration first, there is no justification for staying this case and waiting for the later-in-time Late Claims case to be decided. The Ditch Companies’ timing argument is without merit.

The correct approach in this circumstance is not to stay this proceeding, but to instead expeditiously consider this judicial review proceeding *and* the Late Claim proceeding in parallel (or as close to parallel as possible). That way, the Court will be presented with the relevant facts and law together and not in a piecemeal fashion. This is not a situation where there may be inconsistent decisions because two different judges are hearing two similar or related cases. Here, the same judge is hearing both cases. Providing this Court with a full understanding of the issues and arguments raised in both cases will allow this Court to consider all issues together and will reduce, not increase, the possibility of inconsistent decisions.

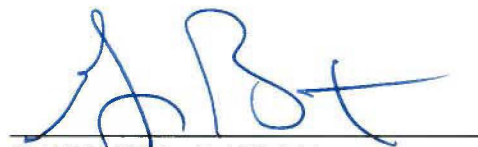
### **CONCLUSION**

Delaying judicial review of the Director’s order until some undecided time in the future would serve only to perpetuate the controversy about the accounting methodology. The Ditch Companies motion to stay fails because (1) the notice of challenge regarding the Late Claims and this judicial review proceeding involve different parties and a different “cause”; (2) this proceeding is set to be submitted for consideration first; and (3) considering the two cases in

parallel will reduce, not increase, the possibility of inconsistent decisions. Respondents respectfully request the Court deny the Ditch Companies *Motion to Stay*.

DATED this 18<sup>th</sup> day of March, 2016.

LAWRENCE G. WASDEN  
Attorney General

A handwritten signature in blue ink, appearing to read 'G. Baxter', is written over a horizontal line.

GARRICK L. BAXTER  
Deputy Attorney General  
Idaho Department of Water Resources

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18<sup>th</sup> day of March, 2016, I caused to be served a true and correct copy of the foregoing document by the methods indicated:

*Original to:*

Clerk of the Court  
SRBA DISTRICT COURT  
253 3rd Avenue North  
P.O. Box 2707  
Twin Falls, ID 83303-2707  
Facsimile: (208) 736-2121

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

Daniel V. Steenson  
S. Bryce Farris  
Andrew Waldera  
SAWTOOTH LAW OFFICES, PLLC  
P.O. Box 7985  
Boise, ID 83707  
[dan@sawtoothlaw.com](mailto:dan@sawtoothlaw.com)  
[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
[andy@sawtoothlaw.com](mailto:andy@sawtoothlaw.com)

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

Albert P. Barker  
Shelley M. Davis  
BARKER ROSHOLT & SIMPSON, LLP  
P.O. Box 2139  
Boise, ID 83701-2139  
[apb@idahowaters.com](mailto:apb@idahowaters.com)  
[smd@idahowaters.com](mailto:smd@idahowaters.com)

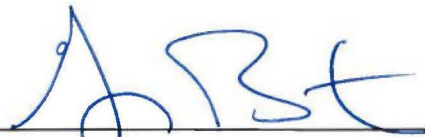
- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

Chas. F. McDevitt  
Dean J. Miller  
McDEVITT & MILLER, LLP  
P.O. Box 2564  
Boise, ID 83701  
[chas@mcdevitt-miller.com](mailto:chas@mcdevitt-miller.com)  
[joe@mcdevitt-miller.com](mailto:joe@mcdevitt-miller.com)

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

Christopher H. Meyer  
Michael P. Lawrence  
GIVENS PURSLEY, LLP  
P.O. Box 2720  
Boise, ID 83701-2720  
[chrismeyer@givenspursley.com](mailto:chrismeyer@givenspursley.com)  
[mpl@givenspursley.com](mailto:mpl@givenspursley.com)

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

  
\_\_\_\_\_  
Garrick L. Baxter  
Deputy Attorney General

# Exhibit A

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 ) REPORTER'S TRANSCRIPT  
 ) 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  
 )  
----- )

BEFORE: HON. ERIC J. WILDMAN, District Judge  
DATE: Tuesday, September 9, 2011  
TIME: 2:00 P.M.  
PLACE: Snake River Basin Adjudication Building  
253 Third Avenue North  
Twin Falls, Idaho 83301  
HEARING: Motion to File Late Response or to  
Participate filed by United Water and  
Status Conference

Reported by: Sabrina Vasquez, CSR #377

<p>1 (Transcript of Proceedings.)</p> <p>2</p> <p>3 THE COURT: Okay. Let's go on the record in</p> <p>4 case number 39576, in the matter of the Snake River</p> <p>5 Basin Adjudication, September 9, 2014. It's 2:00 P.M.</p> <p>6 There are two matters that are currently</p> <p>7 set before the court. The first is a hearing on a</p> <p>8 motion to file late response or to participate filed by</p> <p>9 United Water Idaho Incorporated in subcase numbers</p> <p>10 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738.</p> <p>11 Second is a status conference set in</p> <p>12 subcase number 00-91017, also referred to as Basin Wide</p> <p>13 Issue 17 and also the related 18 subcases involving late</p> <p>14 claims.</p> <p>15 So there's a lot of people on the phone</p> <p>16 today. I'll start by identifying the parties. Do we</p> <p>17 have somebody appearing on behalf of Boise Project Board</p> <p>18 of Control?</p> <p>19 MS. DAVIS: Yes, Your Honor, Shelley Davis.</p> <p>20 THE COURT: Thank you.</p> <p>21 Pioneer Irrigation District?</p> <p>22 (No response.)</p> <p>23 THE COURT: And we have Mr. Orr present in the</p> <p>24 courtroom on behalf of the state of Idaho.</p> <p>25 Who was that that just joined us?</p> <p>2</p>	<p>1 MR. FARRIS: This is Bryce Farris, Your Honor.</p> <p>2 THE COURT: Okay. On behalf of Ballentyne Ditch</p> <p>3 Company, et al?</p> <p>4 MR. FERRIS: Yes, Your Honor.</p> <p>5 THE COURT: Do we have somebody on behalf of</p> <p>6 American Falls Reservoir District Number 2, Minidoka</p> <p>7 Irrigation District?</p> <p>8 MR. FLETCHER: Kent Fletcher here, Your Honor.</p> <p>9 THE COURT: Okay. Fremont Madison Irrigation</p> <p>10 District?</p> <p>11 MR. RIGBY: Yes, Your Honor, Jerry Rigby.</p> <p>12 THE COURT: A &amp; B Irrigation District, et al?</p> <p>13 MR. THOMPSON: Travis Thompson, Your Honor.</p> <p>14 THE COURT: United States Bureau of Reclamation?</p> <p>15 MR. GEHLERT: Yes, Your Honor, David Gehlert.</p> <p>16 THE COURT: Idaho Power?</p> <p>17 (No response.)</p> <p>18 THE COURT: City of Pocatello?</p> <p>19 MS. KLAHN: Sarah Klahn, Your Honor.</p> <p>20 THE COURT: United Water?</p> <p>21 MR. LAWRENCE: Yes, Your Honor. Mike Lawrence</p> <p>22 appearing for United Water.</p> <p>23 THE COURT: Okay. Big Wood Canal Company?</p> <p>24 (No response.)</p> <p>25 THE COURT: Black Canyon Irrigation District and</p> <p>3</p>
<p>1 New York Irrigation District?</p> <p>2 (No response.)</p> <p>3 THE COURT: And Aberdeen-American Falls Ground</p> <p>4 Water District, et al?</p> <p>5 (No response.)</p> <p>6 THE COURT: Okay. Is there anyone that I did</p> <p>7 not call who wishes to make a record of their</p> <p>8 appearance?</p> <p>9 MR. BAXTER: Your Honor, this is Garrick Baxter</p> <p>10 for the department.</p> <p>11 THE COURT: Oh, excuse me, Mr. Baxter. I should</p> <p>12 have called the department.</p> <p>13 Anybody else?</p> <p>14 MR. SIMPSON: Your Honor, John Simpson appearing</p> <p>15 with Travis Thompson.</p> <p>16 THE COURT: All right. Then briefly, by way of</p> <p>17 background, these matters have been on hold during the</p> <p>18 Idaho Supreme Court's consideration of the appeals that</p> <p>19 were filed with respect to Basin Wide Issue 17. The</p> <p>20 Supreme Court issued its written decision in the matter</p> <p>21 on August 4th, and then issued the remittitur on</p> <p>22 August 27th, 2014.</p> <p>23 So the court set this hearing to take up</p> <p>24 the motion to file the late response or to participate</p> <p>25 filed by United Water on July 31st, 2014, and then set</p> <p>4</p>	<p>1 this matter for a status conference to hear from the</p> <p>2 parties on how the proceedings should go forward in</p> <p>3 light of the Idaho Supreme Court's ruling.</p> <p>4 So with that, we'll take up United Water's</p> <p>5 motion first. Mr. Lawrence, we'll hear from you in</p> <p>6 support of your motion to file the late responses.</p> <p>7 MR. LAWRENCE: Thank you, Your Honor.</p> <p>8 As I noted in the briefing in support of</p> <p>9 the motions, I was able to contact several of the</p> <p>10 parties prior to filing motions, including the state of</p> <p>11 Idaho and Nampa-Meridian District, et al, and the Ditch</p> <p>12 Companies and also --</p> <p>13 THE COURT: Go ahead.</p> <p>14 MR. LAWRENCE: I was not able to contact the</p> <p>15 U.S. Bureau of Reclamation or the Boise Project Board</p> <p>16 of Control prior to filing the motion. The Ditch</p> <p>17 Companies and the state of Idaho, as noted in the</p> <p>18 briefing, indicated they have no opposition --</p> <p>19 THE COURT: Mr. Lawrence, can I have you speak</p> <p>20 closer to the phone; or if you are on a speaker phone,</p> <p>21 I'll have you pick up the handset.</p> <p>22 MR. LAWRENCE: Yes, Your Honor. Actually, I am</p> <p>23 on the handset, but I'll try to speak closer to the</p> <p>24 mouthpiece.</p> <p>25 THE COURT: Thank you.</p> <p>5</p>

1 MR. LAWRENCE: To recap, the Ditch Companies and  
2 the state of Idaho, prior to filing United Water's  
3 motions, they both indicated that they had no opposition  
4 to United Water's motions. I have since been able to  
5 speak to counsel for Boise Project Board of Control and  
6 the U.S. Bureau of Reclamation, and they too have  
7 indicated they do not oppose United Water's motions.  
8 The motions for the three Bureau of Reclamation claims  
9 and with respect to Boise Project claims, the substance  
10 of the motions are similar in all material respects.  
11 I don't want to spend any more of the  
12 court's time or the other parties' time than necessary,  
13 particularly in light of the fact that the other parties  
14 do not oppose United Water's motions. I will simply  
15 just state that as stated in the briefs there is good  
16 cause for granting United Water's motions to file late  
17 responses.  
18 Their failure to not file a response by the  
19 deadline was not willful. It was inadvertent. There  
20 will be no prejudice to any of the parties of the  
21 proceedings. Nothing has happened since -- really has  
22 happened since the response deadline passed, and United  
23 Water can assert meritorious positions with respect to  
24 all of these claims. United Water has junior water  
25 rights that could be affected by the disposition of

6

1 I sit here?  
2 THE COURT: As long as you pull the microphone  
3 close enough so that everybody can hear.  
4 MR. ORR: May it please the court: Michael Orr  
5 for the state of Idaho.  
6 Well, Your Honor, addressing Basin Wide 17,  
7 as we have read the Supreme Court's decision and  
8 interpret it, it's our opinion that there is nothing  
9 left to Basin Wide 17 to resolve in the SRBA. The  
10 Supreme Court in that decision held that the issues the  
11 petitioners actually sought to have resolved through  
12 the basin-wide issue vehicle was a question of  
13 methodologies for determining when the storage water  
14 rights for the reservoirs in the Upper Snake Basin and  
15 the Boise River Basin are to be considered satisfied or  
16 filled.  
17 Now this court determined in framing and  
18 limiting the issue, Basin Wide 17 that is, that the  
19 accounting methodology question should be determined in  
20 the first instance by the director in administrative  
21 proceedings and subject to judicial review, of course,  
22 under all the usual standards, if necessary. The Idaho  
23 Supreme Court in its decision strongly and unambiguously  
24 affirmed that conclusion and the supporting rationale  
25 and pointed towards the administrative proceedings for

8

1 these subcases.  
2 In any case, I will stand for questions from  
3 the court in the event there are any.  
4 Thank you.  
5 THE COURT: Thanks, Mr. Lawrence.  
6 Let me just ask, is there anybody appearing  
7 on the phone that is in opposition to the court granting  
8 the motion to file the late responses?  
9 Hearing none. The court has reviewed your  
10 motion, Mr. Lawrence, and will find good cause to allow  
11 the late responses to go forward; and also, as  
12 indicated, there has been nothing that has taken place  
13 in these subcases during the pendency of the appeal, so  
14 we'll go ahead and grant the motion to file the late  
15 responses.  
16 That brings us to the next matter which we  
17 need to hear from the parties on the next steps that  
18 need to be taken now that we've received a remittitur  
19 from the Idaho Supreme Court, not only with respect to  
20 Basin Wide Issue 17, but also the 18 related late  
21 claims, and whether or not the Supreme Court's decision  
22 affected how we should proceed.  
23 So I think since Mr. Orr made the effort to  
24 come to the court, I'll hear from you first, Mr. Orr.  
25 MR. ORR: Thank you, Your Honor. Is it okay if

7

1 the director for resolution of that question.  
2 So, consequently, as we view it, there's  
3 really nothing left for SRBA purposes of the issues that  
4 were sought to be resolved by Basin Wide 17 since the  
5 director is not a party to the SRBA, and the accounting  
6 methodology questions that were sought to have resolved  
7 under the umbrella issue are not SRBA questions. If  
8 those issues are still alive, they are committed to the  
9 first instance to the director in administrative  
10 proceedings.  
11 In connection with that, the court may be  
12 aware of this, but I wanted to bring it to your  
13 attention, the director has, in fact, initiated such  
14 proceedings. In October of last year the director  
15 initiated contested cases in Basin 63 and Basin 01,  
16 specifically for the purpose of addressing and  
17 resolving -- and I'll quote it here from his order -- to  
18 quote, "to address and resolve concerns with or  
19 objections to how water is counted or credited towards  
20 the fillable water rights for the federal on-stream  
21 reservoirs pursuant to existing procedures of  
22 accounting."  
23 There's a separate case for Basin 01 and  
24 for Basin 63. Those were filed in October of last  
25 year. I believe all the parties on the phone were

9

1 served, and most of them made filings, initial filings  
2 in those proceedings. Now those initial filings, a  
3 common request in them was to stay this until we hear  
4 what the Supreme Court says.  
5 So the director in December -- let's see,  
6 excuse me, I'll get the date here -- December 27th of  
7 last year issued orders in both proceedings staying  
8 them pending the Supreme Court's decision in Basin Wide  
9 17, and that's the status of them right now.  
10 So the state's position is that the director  
11 has already initiated the very type of proceedings that  
12 we need to really get these issues that were intended  
13 by the petitioners for Basin Wide 17 to get them moving  
14 forward if they're still interested.  
15 I think that's it, Your Honor. I have  
16 copies of these if you would like them. The parties  
17 already -- the director's orders -- the parties already  
18 have them.  
19 THE COURT: Well, is that going to -- and maybe  
20 this is -- I'll give all the parties a chance to respond  
21 to this, but what about the late claims, the beneficial  
22 use late claims for the refill?  
23 MR. ORR: Well, as I understood the claims  
24 looking at them, they would not fall under these  
25 contested cases. They're still late claims to be

10

1 director's methodology of the late claims may not be  
2 necessary?  
3 MR. ORR: Your Honor, if we get there, I think  
4 from our point of view that would be the case. If it  
5 became clear to us that these late claims were really  
6 intended in fact, if not in form, to go after the  
7 accounting, I think we view that as subject to a  
8 dispositive motion.  
9 THE COURT: Okay. Ms. Davis.  
10 MS. DAVIS: Yes. Thank you, Your Honor.  
11 From the Boise Project Board of Control's  
12 point of view is that we don't disagree substantially  
13 with the interpretation that the state of Idaho has of  
14 the Supreme Court's opinion regarding the Basin Wide 17  
15 matter. There was a reference in the opinion to the  
16 court having an administrative tool available to it in  
17 order to move forward with making determination  
18 concerning fill; although, it's not clear what that tool  
19 might be.  
20 There has been some discussion amongst the  
21 parties about whether or not that tool might be  
22 requesting a 706 report of the department in order to  
23 move forward with the late claims, but it's not clear  
24 if that would be sufficient in order to address them.  
25 As far as the Basin Wide 17 matter is

12

1 resolved in the SRBA.  
2 I don't want to get too much into the merits  
3 of it. I think from the state's point of view they're  
4 really intended to address the same type of question  
5 largely, that the administrative proceedings are really  
6 intended for, but the state believes that the claims on  
7 the faces probably need a little further development  
8 before we can get to anything along those lines.  
9 So we're not seeking to have the late claims  
10 derailed or anything like that. We're going to propose  
11 that the parties -- we're in negotiations right now. As  
12 part of those negotiations, see if we can arrive at a  
13 stipulated schedule and submit that in about two weeks.  
14 If we can't agree, we could each submit our own schedule  
15 at that time, proposed schedule.  
16 So the late claims would still be SRBA  
17 issues as we see it, at least at this point. Again,  
18 we reserve all of our positions and arguments and  
19 objections on the merits. We understand this is mainly  
20 a procedural question before the court right now.  
21 THE COURT: Well, and along those same lines, if  
22 we move forward with the late claims, which are to  
23 address the concerns of the methodology and how the  
24 director accounts for fill, are we getting into a  
25 situation where, depending on what the outcome is, the

11

1 concerned, Your Honor, unless Your Honor feels otherwise  
2 that there is something more to be taken up as a result  
3 of the remittitur, the Boise Project Board of Control  
4 doesn't have any suggestion as to what that might be.  
5 As far as the late claims are concerned,  
6 the Boise Project hasn't been privy to the negotiations  
7 that Mr. Orr alluded to regarding working on a schedule  
8 for moving forward with the late claims, so I'm at a  
9 little bit of a loss to know what has been discussed in  
10 that regard; although, it seems like it might be an  
11 appropriate way to address how to get everyone on the  
12 same page moving forward with the late claims.  
13 THE COURT: Okay. Thank you.  
14 Mr. Fletcher.  
15 MR. FLETCHER: Yes, Your Honor.  
16 I don't disagree with Mr. Orr's  
17 interpretation of Basin Wide 17.  
18 As far as the late claims, I think at least  
19 in my discussions with folks, we're all concerned about  
20 the issue the court has pointed out in that how the  
21 issue of fill is ultimately determined. In other words,  
22 if the definition of filled is currently being used, at  
23 least in Basin 01 were to change, that may get rid of  
24 the need for these late claims. If it remains as is,  
25 then the late claims are, we believe, valid under this

13

1 accounting system.  
2 How the court wants to deal with that, we  
3 haven't really come to grips with as far as making a  
4 suggestion to my knowledge. I'll let some of the others  
5 speak to that, but, you know, it would not seem to be  
6 very economical or efficient to be litigating the fill  
7 issue at the same time we're litigating the late claims  
8 since they're somewhat dependent upon one another.  
9 But, so one of the things that was discussed  
10 was staying the pending late claims until resolution is  
11 reached on the fill issue in the administrative  
12 proceeding, just as a thought. I'm throwing it out  
13 there for that purpose.  
14 THE COURT: Okay. Thank you.  
15 Mr. Farris.  
16 MR. FARRIS: Thank you, Your Honor.  
17 For the most part, I agree with what  
18 Mr. Fletcher said. As far as the late claims, I've  
19 always viewed those as alternative claims, and I think  
20 you asked a good question as to whether or not they may  
21 become moot given how the issue is dealt with by the  
22 director. So it may make sense to stay the late claims  
23 while that issue is fleshed out in front of the  
24 director.  
25 I also have not been privy to any of these

14

1 the other is going to be on a fast track anyway. I  
2 guess that's my recommendation.  
3 THE COURT: That was going to be my question  
4 maybe for you or for Mr. Orr. What type of track is it  
5 on?  
6 MR. BAXTER: Your Honor, this is Garrick.  
7 THE COURT: Mr. Baxter.  
8 MR. BAXTER: Yes, Your Honor. If it's okay, I  
9 think I can jump in and field this question.  
10 THE COURT: Great. Thank you.  
11 MR. BAXTER: Mr. Orr correctly identified that  
12 the matters are currently stayed. My hesitation in  
13 recommending to the court that it stay its current  
14 proceedings is that the parties to that contested matter  
15 did file numerous different responses to the director's  
16 intent to implement such an administrative proceeding.  
17 For example, the Surface Water Coalition even challenged  
18 the director's authority to undertake an administrative  
19 proceeding to evaluate this issue, suggesting that it  
20 must either be done through rule making or just the  
21 whole process lacks and it's not properly before the  
22 agency itself. So my guess is that this isn't going to  
23 be resolved before the director in any near time frame.  
24 I think the court can recognize that there  
25 is a distinct difference between a question of how fill

16

1 discussions Mr. Orr referenced relating to some sort of  
2 a scheduling agreement. One of the things I would want  
3 to remind the court is at least my clients are not  
4 involved in all of the --  
5 THE COURT: Right. Go ahead.  
6 MR. FERRIS: -- that deal with the issue of  
7 there's different claims for different reservoirs for  
8 different basins and how those would proceed forward,  
9 whether they're bifurcated and what type of track they  
10 would proceed on. At least my clients are only involved  
11 in claims that would involve Basin 63, and they would  
12 request that those be bifurcated from any claims related  
13 to Basin 01 at a minimum.  
14 THE COURT: Okay. Mr. Rigby.  
15 MR. RIGBY: Your Honor, we would concur with the  
16 general response by everyone as to Basin Wide 17.  
17 As to the late claims, I guess my concern  
18 is because the hearings before the director could and,  
19 we hope, would resolve a lot of the issues that would  
20 be also issues presented in the late claims that I tend  
21 to believe that it's probably best for judicial economy  
22 and to insure that we don't have two different issues  
23 going up that maybe perhaps staying it would be the best  
24 alternative for right now. Not a great deal of time,  
25 but I don't think the other is going to be -- I think

15

1 is done in the first place and a question of whether or  
2 not these claims before the court are properly  
3 recognized as water rights and whether there has been  
4 additional beneficial use associated with them to  
5 justify a claim. I think those are two distinctly  
6 different issues.  
7 So I don't necessarily agree that there's  
8 overlap, and I also don't agree that a decision from  
9 the director as to the contested proceedings will be  
10 done in any proper timely time frame.  
11 Thank you, Your Honor.  
12 THE COURT: Thanks, Mr. Baxter.  
13 Anything further from you, Mr. Rigby?  
14 MR. RIGBY: Only, Your Honor, that although I  
15 concur with Mr. Baxter as far as the late claims,  
16 certain aspects of the late claims being unique, I still  
17 believe that a decision before the director as to what  
18 the director will be addressing will most likely resolve  
19 the major stumbling block that's still before those that  
20 are trying to negotiate this. Therefore, I still  
21 believe that will be a resolution of the case and  
22 therefore the late claims in their entirety.  
23 Having said that, I fully recognize what  
24 Mr. Baxter says. I'm just trying to not have to deal  
25 with that if we don't have to.

17

1 THE COURT: Okay. Thank you.  
2 Mr. Thompson or Mr. Simpson.  
3 MR. THOMPSON: This is Travis. I guess I'll  
4 agree with what Mr. Fletcher said. I do think, I guess,  
5 I also disagree with Mr. Orr's statement that the  
6 accounting methodology would somehow be attacked or at  
7 issue in the late claim proceeding. I think looking at  
8 the late claims, they're sort of based on the  
9 presumption that all water that reaches the face of the  
10 dam must be accounted for in some way under a water  
11 right and what that form ultimately takes to accomplish  
12 a physical fill to satisfy a beneficial use. That's  
13 what the late claims are based on.  
14 I do think that the fill case, the  
15 administrative proceeding before the director, how it  
16 ultimately is determined may affect whether or not there  
17 is a need for such a late claim given how fill is  
18 ultimately accounted for under the existing storage  
19 rights.  
20 So I do think there would be some merits in  
21 staying the current subcases just given the multiple  
22 parties involved, the dual track litigation that may be  
23 undertaken, but certainly can recognize the court's  
24 schedule when we need to get this completed. One of the  
25 unique --

18

1 and the resolution of the contested cases and therefore  
2 would not object to the proposal to stay the late  
3 claims.  
4 THE COURT: Okay. Ms. Klahn.  
5 MS. KLAHN: Your Honor, thank you.  
6 I would just, I guess, build on what  
7 Mr. Gehlert said and suggest that if there is a concern  
8 that staying the late claims would somehow let this  
9 linger for too long a period of time, maybe there could  
10 be a time period in which the late claims are to be  
11 stayed for six months or something, and then the parties  
12 could have a status conference with the court and advise  
13 them about the progress they're making with the director  
14 and what issues remain to be decided, or if nothing is  
15 moving and it's necessary to start setting deadlines in  
16 the SRBA.  
17 With regard to Basin Wide 17, I agree with  
18 what everyone else has said. I don't believe there's  
19 anything else, at least from my reading of the order  
20 from the Supreme Court, that can be done with this  
21 remittitur.  
22 That's what I would suggest.  
23 THE COURT: Okay. Mr. Lawrence.  
24 MR. LAWRENCE: Thank you, Your Honor.  
25 I'll echo everyone else's comments as to

20

1 THE COURT: We're already passed that. Go ahead.  
2 MR. THOMPSON: Oh, excuse me. Oh, you mean the  
3 signing? Yeah, it's too late.  
4 THE COURT: Go ahead.  
5 MR. THOMPSON: One of the other things in the  
6 Basin 01 case is we have outstanding motions to file  
7 late claims, I believe, on Henry's Lake and Ririe that  
8 are set to be heard in November. So coming up with an  
9 agreed upon schedule in two weeks may be difficult given  
10 that those two outstanding claims would likely be joined  
11 with the rest of them and would need to be resolved in  
12 a central forum so we don't have piecemeal subcases out  
13 there. I think those should all be considered together  
14 if those motions are granted and the late claims are to  
15 be filed.  
16 That's all I have.  
17 THE COURT: Mr. Gehlert.  
18 MS. DAVIS: Thank you, Your Honor.  
19 I have nothing to add with respect to Basin  
20 Wide 17.  
21 With respect to the proceedings before the  
22 director, there is some question about the United  
23 States' ability to participate in those that I'm still  
24 working with my clients on. But I do recognize that  
25 there is potential for overlap between the late claims

19

1 whether there's anything left to resolve on the Basin  
2 Wide 17 issues. It doesn't appear that there's anything  
3 left for the court to do on that.  
4 As for the late claims and the department's  
5 proceedings, I certainly appreciate the comment that  
6 perhaps the late claims should be stayed pending the  
7 outcome of the contested case given that they're somehow  
8 overlapping or intertwined, however you want to phrase  
9 it. In any respect, one affects the other. I think  
10 everybody realizes that.  
11 I guess I would suggest that not only would  
12 the contested cases affect the refill claim cases, but  
13 perhaps it goes the other way as well. If the refill  
14 claim cases are resolved, perhaps that affects how the  
15 department's proceedings would proceed.  
16 So I guess I'm not sure whether there's a  
17 great benefit to staying the proceedings for judicial  
18 economy. Perhaps there is. Although, I know the court  
19 wants to close the SRBA as soon as we can.  
20 I also appreciate the fact that the other  
21 attorneys and the other parties don't want to be  
22 fighting or dealing with issues on two fronts when they  
23 can just deal with them on one.  
24 So those are my comments. I'm sorry I'm  
25 just thinking out loud. I'm not quite sure what the

21

1 best way to proceed is. I see benefits to staying, as  
2 everybody, or as many others suggested, but I also see  
3 the benefit of moving along with the refill subcases.  
4 THE COURT: Is there anybody else that joined us  
5 that I have not heard from that wishes to make a  
6 statement?  
7 MR. WALDERA: Judge Wildman, this is Andy  
8 Waldera, Pioneer Irrigation District. I apologize for  
9 calling in late.  
10 Just kind of piecing together what I've been  
11 hearing and having participated in a meeting of others  
12 earlier this week, the decision of Pioneer anyway is to  
13 stay the late claims going forward. What ultimately  
14 happens with the department's contested case proceedings  
15 remains to be seen.  
16 I don't think there's anything further to  
17 be gained on the remand order from the Idaho Supreme  
18 Court, but would rather not be dealing with these issues  
19 on two separate fronts from judicial economy and,  
20 frankly, resource based economy perspectives. So it  
21 would be our preference to stay the late claims at this  
22 point.  
23 THE COURT: Okay. Thank you.  
24 Response, Mr. Orr, or anybody else? Well,  
25 let's start with Mr. Orr.

22

1 by filing late claims in order to get an accounting  
2 decision. If we treat them that way, we're going to end  
3 up with the same problem. We're going to be back in the  
4 SRBA, where the director is not a party, trying to  
5 review the actions of the director and how the  
6 accounting is done, and that's just what the Supreme  
7 Court just told us, that's not what the SRBA is for.  
8 There's even a jurisdictional limitation in  
9 Chapter 14 that addresses this. I can't recall the  
10 statute to mind. It might be 42-1417. But to view the  
11 late claims as a second vehicle for addressing  
12 accounting is just forum shopping. It's looking for  
13 another bite at the apple.  
14 I would like to go back to the petition to  
15 designate the basin wide issue. The petitioners put --  
16 formulated the issue that the Supreme Court found so  
17 confusing. The petitioners formulated that, put it  
18 before this court, and then virtually the very first  
19 thing that was said in the hearing is, well, what we  
20 actually want to go after is the accounting, and we were  
21 off to the races. That's what, frankly, the state was  
22 worried about all along.  
23 And throughout Basin Wide 17 proceedings it  
24 was all a matter of accounting. Accounting.  
25 Accounting. Accounting. So that's what Basin Wide 17

24

1 MR. ORR: Yes, Your Honor. Excuse me, thank you.  
2 Well, it was beneficial to hear from the  
3 other parties. It sounds like on balance I may be the  
4 odd man out saying we don't want to stay these late  
5 claims, but it was illuminating to hear what I  
6 understood were frank admissions that the late claims  
7 are to go after the accounting. That's what I heard  
8 time and time again. Same issue. We're going to have  
9 to deal with the same issue in two different types of  
10 proceedings and want to be able to go after the  
11 accounting in the late claims. That's what it's all  
12 about.  
13 Well, these late claims are for beneficial  
14 use of water. They stand or fall on whether there has  
15 been actual beneficial use. The Idaho Supreme Court's  
16 precedents on that are crystal clear. Accounting is not  
17 a beneficial use. It's an administrative function of  
18 the executive branch.  
19 Now if the parties don't agree with how  
20 the accounting is done, that is not an SRBA issue. The  
21 Supreme Court was crystal clear on that in its decision  
22 on Basin Wide Issue 17. The way to address that is in  
23 proceedings before the director. If they don't like the  
24 director's resolution, the judicial resolution of that  
25 is through the Idaho Administrative Proceedings Act, not

23

1 turned into. The Supreme Court said, no, we don't do  
2 that in the SRBA. We have to be consistent with the  
3 Idaho Code and prior precedent.  
4 And now we're back in the same situation,  
5 as I see it, where the same parties are saying, well,  
6 the beneficial use claims are how we want to address the  
7 accounting. We would rather do it that way, but that  
8 has the same problems as the basin-wide issue in terms  
9 of it's not the proper procedure.  
10 Under the Idaho Code it's simply not the  
11 judicial function to determine how water is distributed.  
12 The director determines that in the first instance,  
13 subject to judicial review, of course, but that's how  
14 the legislature has laid it out. It's been that way  
15 for a long time.  
16 So to the extent I've been hearing here that  
17 we need to stay the late claims because it's all the  
18 same thing as the accounting cases, I think you can  
19 dismiss them based on representations made that they're  
20 not actually seeking beneficial use. They're seeking  
21 judicial review of the accounting system.  
22 THE COURT: Well, that was one of my questions  
23 at the beginning of this. Not only does it affect Basin  
24 Wide Issue 17, which I agree there's nothing left to do  
25 on Basin Wide 17, I didn't want to make a ruling on that

25

1 or a decision on that until I heard from everybody, but  
2 that's my feeling too.  
3 But the question I had was with respect to  
4 the late claims. When you look at the Supreme Court's  
5 decision, are we talking about methodology and how you  
6 determine when the storage right is considered filled  
7 as opposed to, you know, we decreed -- these water  
8 rights were decreed with a quantity certain on them. So  
9 what is the methodology that the department uses to  
10 determine when that quantity has been satisfied? And  
11 how do they treat water that has been evacuated for  
12 flood control? Also, originally when we were debating  
13 over how to frame the basin-wide issue, there was also  
14 for other uses as well: ESA, maintenance, and what have  
15 you.  
16 If the department in the methodology is not  
17 counting those releases towards fill, then there  
18 wouldn't be a need for these beneficial use late claims.  
19 The problem I'm having is I've decreed that -- we've  
20 decreed that right. And are we just talking about an  
21 administrative function as to how the water right is  
22 accounted for, how it's determined to be filled?  
23 MR. ORR: Today, Your Honor, I would respond that  
24 I was a little cautious at the outset because I didn't  
25 have the benefit of the explanations of the other

26

1 MR. ORR: I think Ms. Davis and maybe Mr. Farris  
2 and possibly Mr. Waldera mentioned they hadn't been  
3 privy to discussions. Well, actually, neither am I.  
4 I'm not involved in them, but it's my understanding  
5 most of the negotiations that are going on so far have  
6 been in Basin 01. I think the department has had  
7 separate discussions with Basin 63, but I was  
8 referencing the Basin 01 negotiations. So I understand  
9 where they're coming from. I didn't mean to make  
10 misrepresentations about their knowledge.  
11 I don't think in those discussions there  
12 has been actual proposals made for scheduling. What I  
13 was suggesting is that they would be a vehicle where the  
14 parties might be able to work out scheduling. Again, we  
15 would rather see them scheduled, if beneficial use is  
16 the issue, rather than stayed. If accounting is the  
17 issue, I don't think there's anything more to proceed on  
18 in those late claims.  
19 THE COURT: Who was that? Any responses?  
20 MR. FLETCHER: This is Kent Fletcher, Your Honor.  
21 It almost sounds like Mr. Orr wants to  
22 litigate a whole other issue before the court today  
23 rather than how to deal with these claims, but just to  
24 address some of the statements he's making, you know,  
25 the state is putting everyone here in a real catch-22.

28

1 parties, but after I finished speaking, what I heard  
2 was, it's clear to me that the beneficial use claims  
3 are intended and specifically want to reserve them as a  
4 way to, I don't know, challenge, revisit, review the  
5 accounting. That that's what they're there for.  
6 We've heard a lot of discussion that there's  
7 a significant overlap between the two. That you need to  
8 stay one so we're not proceeding on the issues in two  
9 forums simultaneously. Well, if that's the case, if  
10 that's truly how counsel sees these cases, then I think  
11 we're done because beneficial use claims are about  
12 beneficial use of water, not how accounting is done. If  
13 the accounting is the problem, there's a different way  
14 for addressing that. So that's why I was a little  
15 cautious at the outset.  
16 But what I've heard today confirms to me  
17 we're back where we were with designating the basin-wide  
18 issue. Beneficial use claims have been put forward, but  
19 really, the target is the accounting. They're just a  
20 vehicle to get to the accounting, and I think counsel  
21 was admitting that.  
22 Before I --  
23 MR. FLETCHER: Your Honor, can I address --  
24 THE COURT: One minute. I'll give you a chance  
25 to respond.

27

1 You know, our clients need water to irrigate with. The  
2 director is accounting for water that is released for  
3 flood control and therefore not available to be used  
4 for irrigation as though it was stored for irrigation.  
5 So if it is determined that that is an  
6 appropriate accounting mechanism for water, and the  
7 director can therefore define the water right in that  
8 fashion, then all of these years there have been  
9 continuing, ongoing storage following these flood  
10 control releases that has then been put to beneficial  
11 use.  
12 So for Mr. Orr to characterize the late  
13 claims as an attack on the accounting system is just a  
14 misstatement of what's going on. What's going on is  
15 people are trying to protect their rights to store water  
16 so that it can be used and diverted for irrigation as  
17 has been done. For the state to continually bounce us  
18 between the administrative forum and the judicial forum  
19 in an attempt to achieve its goals is, in my opinion,  
20 inappropriate.  
21 The real question is if the accounting, as  
22 it is now being done, stands up, then there have been  
23 beneficial uses of diversions of water under this  
24 accounting system following releases for flood control  
25 that we believe generate the right for a new water

29

1 right. If, in fact, flood control releases do not count  
2 against a water right, then the necessity of the late  
3 claims is probably not as apparent. So that's what  
4 we're talking about.

5 We're not talking about attacking the  
6 accounting with the late claims. The purpose of the  
7 late claims is to address how do we deal with the water  
8 that has been stored and used if this accounting system  
9 that's currently in place is upheld. That's what the  
10 late claims are. Our clients need water.

11 So we're not asking for anything more than  
12 what our water rights say we are allowed to store, but  
13 we want that water to be available for the beneficial  
14 use that's intended, and that's irrigation. So in a  
15 nutshell, I just disagree with what Mr. Orr's  
16 characterization of these claims is.

17 MS. DAVIS: This is Shelley Davis, Special  
18 Master, if it is appropriate to speak at this time, or  
19 Your Honor.

20 THE COURT: Go ahead.

21 MS. DAVIS: I wholeheartedly agree with what  
22 Mr. Fletcher has just stated and just have to express  
23 my disappointment in Mr. Orr once again trying to  
24 inflame the situation and allege that we're somehow  
25 improperly bringing before this court issues that are

30

1 THE COURT: Go ahead.

2 MR. RIGBY: Thank you.

3 Well rather than argue whose argument is  
4 inflaming whose argument, the real issue here is the  
5 question asked by the court, and I think addressed by  
6 the state to begin with, and that's, are these  
7 beneficial use claims necessary? I would just want to  
8 say that I would concur with those who have filed the  
9 claims that they may be necessary for the very reason  
10 that others have indicated.

11 We are clearly not challenging the  
12 accounting, but we recognize that if the accounting, as  
13 argued before the court in Basin Wide 17, is upheld,  
14 that would mean that, as indicated by the other counsel,  
15 when the extra water beyond the water right itself is  
16 stored, that would mean there is no water right without  
17 some additional water right being granted by this court.  
18 That's the purpose, that's the reason for the beneficial  
19 use claims.

20 Again, we all hope it is not necessary to  
21 actually have them adjudicated, and that's why we're  
22 asking for the stay. But in the end, that's why they're  
23 necessary, and they cannot be dismissed at this point.

24 MR. THOMPSON: Your Honor, this is Travis  
25 Thompson.

32

1 strictly administrative. That's absolutely not the  
2 case.

3 Depending on the outcome of the  
4 administrative determinations and how that methodology  
5 has taken place historically, which has not been clear  
6 to any of the parties to this point and the state has  
7 been unable to provide us with any kind of demonstration  
8 of how that accounting takes place to support the  
9 position that they were taking before this court in  
10 Basin 01 and again before the Supreme Court, until  
11 there's a resolution that makes a determination about  
12 whether that is the appropriate method to be applying  
13 to our water rights, we won't know whether or not these  
14 beneficial use rights are necessary in order to preserve  
15 the status quo for our clients to be able to continue to  
16 provide the end irrigation that those rights are  
17 intended to serve.

18 For that reason, these claims need to  
19 continue to stand before this court until there is some  
20 resolution about whether or not they're necessary based  
21 on whatever is determined about and when the state  
22 determines to tell us how the accounting methodology  
23 works.

24 THE COURT: Anybody else?

25 MR. RIGBY: Your Honor, this is Jerry Rigby.

31

1 THE COURT: Go ahead, Mr. Thompson.

2 MR. THOMPSON: Yeah, just completely disagree  
3 again with Mr. Orr's assertion that this is all about  
4 attacking the accounting. That's not what I said. I'll  
5 say it again. The issue of the late claims, whether or  
6 not it covers all the diversion and use of water that's  
7 gone on with these reservoirs, whether or not that's  
8 necessary is predicated on the current accounting which  
9 has changed over time.

10 The state of Idaho in our storage right  
11 claims in Basin 01 came in and said, you know what, you  
12 can't do what you've been doing unless you have a remark  
13 on the water right. Well that was defeated by summary  
14 judgment. It was not appealed by the state. So we have  
15 to have some proper mechanism to cover the storage of  
16 the water. And if every drop is accounted for under a  
17 water right, then we've got to have the necessary water  
18 rights to cover what's being done.

19 So I'm not sure what the state wants to do  
20 here by trying to foreclose any proper effort to define  
21 necessary water rights to cover the existing storage  
22 operations. And if we find out it's a fill case that  
23 yes that the accounting method that we've implemented  
24 over time and we've changed is appropriate, then we do  
25 have to have water rights to cover the necessary volumes

33

1 needed to store in those facilities due to those flood  
2 control operations.  
3 So it's not about attacking the accounting  
4 in these late claims. Not at all. I hope Mr. Orr heard  
5 that.  
6 MR. ORR: I did, Travis.  
7 THE COURT: He's sitting in the courtroom.  
8 Anybody else?  
9 (No response.)  
10 THE COURT: All right. Well, depending on whose  
11 perspective you take, there may or there may not be  
12 overlap between the issues. I think when I tried to  
13 narrow an issue for resolution, obviously the Supreme  
14 Court told me differently.  
15 So I think what I'll do is, even though  
16 there might be some overlap, but being sensitive to the  
17 fact that we don't want to get things going on or the  
18 parties' concerns over having a dual litigation track,  
19 I think what I'll do is give the parties 30 days to come  
20 up with a proposal. That can also include a stay for a  
21 period of time. I don't want to go longer than six  
22 months, but, you know, between three and six months a  
23 stay but then have a comprehensive schedule. I'll give  
24 them 30 days.  
25 If the parties can't come up with a

34

1 but it's another refill issue that's out there, but I  
2 just wanted to bring it to your attention from a case  
3 management standpoint.  
4 THE COURT: Okay. I'll take a look at that. I  
5 haven't looked at it, so I'll have to pull the files  
6 and take a look at it.  
7 Any comment, Mr. Thompson?  
8 MR. THOMPSON: Yes, Your Honor.  
9 Those base storage rights in Basin 01 are  
10 still at issue with objections to, I believe, remarks  
11 that initially were filed, requested by the bureau, not  
12 recommended, objected to, and then I believe reclamation  
13 attempted to file or did file some withdrawal of  
14 pursuing that. But not being the beneficial titleholder  
15 of the water right, that may not be sufficient to take  
16 the issue off the table.  
17 One question I did have, Your Honor, are  
18 you handling these late claims or these subcases that  
19 you referred to special masters?  
20 THE COURT: No, I'm the handling late claims.  
21 MR. THOMPSON: Okay.  
22 THE COURT: Oh, you mean these current ones? I'm  
23 sorry. I thought you were referring to the ones that  
24 you had forthcoming that the court hadn't addressed.  
25 MR. THOMPSON: No.

36

1 stipulated schedule, they can submit their own. If  
2 there is an agreement, the court will look at what's  
3 submitted and set its own scheduling and get things  
4 moving along. But the parties can propose a stay period  
5 for, like I said, three months, three to six months.  
6 MR. ORR: May I ask a question, Your Honor?  
7 THE COURT: Yes.  
8 MR. ORR: This is a little off point, but it  
9 might be an opportune time to raise it. I think  
10 Mr. Thompson referred to it.  
11 THE COURT: His late claims?  
12 MR. ORR: Well, there's four subcases, license  
13 based subcases: two for American Falls and two for  
14 Palisades. The numbers are 2064, 10042, 2068, and  
15 10043.  
16 If you look at the stipulation in those  
17 subcases dated September 25, 2012, page six, it states  
18 that -- I'm going to paraphrase here -- that an issue  
19 that's reserved is, quote, the objections filed by North  
20 Side, Twin Falls, A & B, all the Surface Water Coalition  
21 entities, objections filed by them and responses thereto  
22 concerning a, quote, refill remark for those enumerated  
23 subcases.  
24 Now Special Master Dolan stayed that pending  
25 the outcome of Basin Wide 17. Nothing has been done,

35

1 THE COURT: These ones right here, I haven't  
2 decided yet.  
3 MR. THOMPSON: Okay.  
4 MR. BAXTER: Your Honor, this is Garrick Baxter.  
5 THE COURT: Go ahead.  
6 MR. BAXTER: I would just add I believe in your  
7 August 26th, 2014, order regarding subcases pending upon  
8 entry of filing the unified decree -- and this is just  
9 for housekeeping matters -- I think there's eight listed  
10 on there that are the, what I would call the base or the  
11 primary rights associated with the federal reservoirs  
12 in 01.  
13 THE COURT: Right.  
14 MR. BAXTER: It's actually the first eight there  
15 on the list of pending subcases. I think the four that  
16 Mr. Orr pointed out are four of those eight. So just  
17 so the court doesn't believe there's only just the four,  
18 I think there's the other four are out there; although,  
19 I think per the stipulation, if my reading of the  
20 stipulation is correct, I don't think there's been  
21 anything outstanding left on the -- what is it --  
22 01-219, which I think is Jackson. No, actually 219 is  
23 Walcott; and then the 01-4055, which is Jackson Lake;  
24 and then the 1-10044, which is also Jackson Lake; and  
25 then 1-1044, or excuse me, 1-10045, which is also

37

1 Jackson Lake. Just so the court is aware of those that  
2 are out there as well. I wanted to make sure we got  
3 them all included.

4 Thank you.

5 THE COURT: Okay. I'm making a note of that.  
6 Thank you.

7 All right. Anything else?

8 (No response.)

9 THE COURT: All right. Well, I will send out an  
10 order, a written order to the effect of what I just put  
11 on the record and give the parties 30 days to come up  
12 with something. If not, then I'll just go ahead and  
13 get things moving. Okay.

14 MR. ORR: Thank you, Your Honor.

15 THE COURT: All right.

16 MR. THOMPSON: Thank you.

17 THE COURT: We'll be adjourned.

18 MS. DAVIS: Thank you, Your Honor.

19 (Proceedings Concluded.)  
20  
21  
22  
23  
24  
25

REPORTER'S CERTIFICATE

STATE OF IDAHO                    )  
                                      )  
County of Twin Falls            )

I, SABRINA VASQUEZ, duly appointed, qualified and acting official reporter of the Fifth Judicial District of the State of Idaho, DO HEREBY CERTIFY that I reported in stenotype the evidence and proceedings adduced in the above and foregoing cause, and that I thereafter transcribed said stenotype notes in longhand typewriting, and that the within and foregoing constitutes and is a true and correct copy of the transcript of said proceedings, said transcript consisting of pages 1 through 39, inclusive.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of September, 2014.

---

Official Reporter  
Fifth Judicial District  
Twin Falls, Idaho  
CSR #377