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DEPARTMENT OF
WATER RESOURCES

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF INTEGRATED
MUNICIPAL APPLICATION PACKAGE
("IMAP") OF UNITED WATER IDAHO
INC., BEING A COLLECTION OF
INDIVIDUAL APPLICATIONS FOR
TRANSFERS OF WATER RIGHTS AND
APPLICATIONS FOR AMENDMENT OF
PERMITS.

**UNITED WATER'S RESPONSE TO
INITIAL STATEMENTS**

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INTRODUCTION

In compliance with the Hearing Officer's *Order Setting Schedule for Parties to Respond and Propose Timetables for Discovery and Hearing* ("Initial Statement Order") (Oct. 19, 2012), Applicant United Water Idaho Inc. ("United Water") submits this response to initial statements filed on October 31, 2012, by Pioneer Irrigation District ("Pioneer"), and the City of Star ("Star"), City of Middleton ("Middleton"), and Star Water & Sewer District ("Star Water & Sewer").¹

In separate filings submitted contemporaneously herewith, United Water objects to and moves to strike the October 31, 2012, filings submitted by City of Pocatello and City of Eagle, who are not parties to this proceeding and therefore are not entitled to file initial statements. Because the City of Pocatello's initial statement is improper and should be stricken from the record by the Hearing Officer, its substantive points are not addressed in this response. However, because City of Eagle's filing was jointly submitted with actual parties to this matter—namely, Star, Middleton, and Star Water & Sewer (the "Joint Parties")—the *Joint Initial Statement's* substance is addressed in this response.

United Water also objects to *Pioneer's Initial Statement* and *Pioneer's Statement of Issues* (defined in note 2 at 4) to the extent Pioneer asserts facts, issues, or arguments that are inconsistent with or contradict the testimony given at its 30(b)(6) deposition on September 3, 2003.

¹ The October 31, 2012 filing by Pioneer is referred to herein as "*Pioneer's Initial Statement*." The joint filing made by Star, Middleton, and Star Water & Sewer is referred to as the "*Joint Initial Statement*."

DISCUSSION

Pioneer and the Joint Parties mainly assert that certain issues must be addressed to determine the scope of discovery and hearing in this matter. Those issues are addressed in the first section below. In subsequent sections, United Water addresses Pioneer's and the Joint Parties' positions on the responsibilities of the parties and the scope of and timetables for discovery and the hearing.

I. ISSUES RAISED IN INITIAL STATEMENTS CONCERNING THE SCOPE OF DISCOVERY AND HEARING

In their initial statements, neither Pioneer nor the Joint Parties addressed the matters raised at the October 16, 2012, status conference or in "recent documents submitted by the parties," as the Hearing Officer directed. *Initial Statement Order* at 1.² Those matters are addressed in *United Water's Initial Statement* (Oct. 31, 2012).

United Water has previously responded to a handful of other issues raised in the October 15, 2012 filings by Pioneer and the Boise Project Parties at the last status conference. When we filed *United Water's Initial Statement*, we assumed those issues had been put to rest, but stated that we were prepared to address them to the extent they were raised again in the parties' initial statements. *United Water's Initial Statement* at 4. *Pioneer's Initial Statement* did not address any of those previously raised issues, and the Boise Project Parties did not file any initial statement. United Water therefore considers them resolved.

² The "recent documents submitted by the parties" are:

1. *United Water's Statement Updating and Explaining the IMAP Relaunch* ("Update Statement") (Aug. 14, 2012).
2. *Pioneer Irrigation District's Statement of Issues re United Water Idaho's IMAP Application* ("Pioneer's Statement of Issues") (Oct. 15, 2012).
3. *Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District and Boise-Kuna Irrigation District's Statement of Issues and Request for Clarification* ("Boise Project Parties' Statement of Issues") (Oct. 15, 2012).

The following subsections address the issues that Pioneer and the Joint Parties assert must first be addressed to determine the scope of discovery and hearing in this matter.

A. Whether United Water must submit additional documentation to update the IMAP

Pioneer and the Joint Parties suggest that United Water must submit transfer application forms to update the IMAP with the water right changes that have occurred since the 2003 stay. *Pioneer's Initial Statement* at 3-5; *Joint Initial Statement* at 1-2. The Boise Project Parties made a similar suggestion in their October 15, 2012 filing, *Boise Project Parties' Statement of Issues* at 2-3, and at the last status conference. These suggestions ostensibly are made so there is a “clear and accurate application,” as Pioneer puts it.

First, it is important to note that the IMAP's transfer and permit amendment requests were filed on “forms furnished by the department,” which were included behind the original IMAP's Tabs H and I. The Department's Transfer Memo No. 24 (Dec. 21, 2009) (“Transfer Memo”), at 15-16, states that revisions to a transfer application that “are not substantial” may be made “by a letter describing the amendments in sufficient detail.” United Water accomplished this through *United Water's Statement Updating and Explaining the IMAP Relaunch* (“*Update Statement*”) (Aug. 14, 2012), which was formally submitted to the Department and served on all parties to this proceeding (and therefore had even greater import than a mere “letter”). Indeed, this submission was made at the request of the parties at a prior status conference and upon the direction of the Hearing Officer. It seems a waste of time to quibble over whether the changes to rights included in the IMAP were “substantial” enough to deserve new application forms to replace the original, as contemplated by the Transfer Memo at 15. The goal of the Transfer Memo's guidance appears to be achieving clarity rather than requiring formality.

United Water is not persuaded that there could be any misunderstanding about the water rights included in the IMAP, or the changes to those rights since the 2003 stay, given the level of detail in United Water's *Update Statement*. The *Update Statement* carefully documents that no new water rights have been included in the IMAP.³ The parties have failed to identify any aspect of the *Update Statement* that remains unclear to them. It is difficult to understand what further clarity would be accomplished by filing new "forms" that simply reference and attach as exhibits the relevant portions of the spreadsheet attached as Exhibit C to the *Update Statement*.⁴

In any event, even if the Hearing Officer instructs United Water to submit additional documents or forms to update the IMAP, there is no reason to re-advertise the IMAP, as suggested by the Joint Parties. *Joint Initial Statement* at 2. As noted in the *Update Statement*, "developments since the [2003] stay result in an IMAP Relaunch that is smaller and simpler than the 2003 IMAP." *Update Statement* at 6. The SRBA and licensing processes did not expand the IMAP in any way that would require re-advertisement. As Jeff Peppersack stated in his March 27, 2003 affidavit:⁵ "If the amendment will not increase the potential effect on other water users or the public, compared to the original application, then the application will not be republished." The changes to the water rights in IMAP do not meet this criterion, so re-advertisement is not in

³ The split of portions of right no. 63-02892 into three other water rights through the SRBA process did not really create new water rights. The combined diversion rate for all four of the split rights is equal to the original 15 cfs total for 63-02892 that was reflected in the 2003 IMAP.

⁴ United Water opposes filing individual transfer application forms for each water right. This approach to amending the IMAP was rejected in 2003 by then-Hearing Officer Peter Anderson. *Order Regarding New IMAP Applications* (Apr. 2, 2003). United Water also opposes hand marking changes to the existing IMAP, which was the method Hearing Officer Anderson required in 2003. That approach may have been appropriate for the handful of changes made in the 2003 IMAP amendment, but would prove more cumbersome here. Doing so would certainly not be any more clear than the explanation provided in the *Update Statement*.

⁵ Mr. Peppersack's affidavit was filed in this proceeding on March 28, 2003, as an exhibit to United Water's *Consolidated Response To Motions To Dismiss, Motion To Require Publication And Motion To Require Legislative Approval*. United Water is not aware of any change since 2003 to Mr. Peppersack's sworn statements concerning the Department policy on re-advertisement of applications.

order.⁶ In addition, it should also be borne in mind that United Water did not seek the stay, and vigorously opposed it. Subjecting United Water to the burdens and risk of re-publication as a result of the Department's own action in imposing the stay would raise due process issues.

In short, United Water has acknowledged the need to update the IMAP's water right information to reflect the changes to water rights since the 2003 stay, and it believes the *Update Statement* accomplished that goal. The changes to United Water's rights since 2003 make the IMAP "smaller and simpler" and are not grounds for re-advertising the IMAP, which would essentially restart the entire process from square one.

B. Whether non-RAFN municipal water rights can be changed to RAFN water rights.

Pioneer suggests there is a question as to whether existing non-RAFN municipal water rights can be changed through a transfer process into RAFN water rights under the 1996 Act. *Pioneer's Initial Statement* at 5. It is too late in the day to make this argument. United Water, the Department, and the parties have invested substantially in this proceeding. If this transfer is not permissible, the Department would not have advertised it.

In any event, the IMAP is consistent with the express direction provided by the Department on this very point:

⁶ Pioneer cites the split of portions of right no. 63-02892 into three other water rights through the SRBA process (described in note 3 at page 5) as an example of how United Water's portfolio is "far different" today than in 2003. *Pioneer's Initial Statement* at 3. This split of one right into four arguably is the biggest change in IMAP rights. But this split did not "increase the potential effect on other water users or the public" because the combined diversion rate for all of the split rights is equal to the original 15 cfs total for 63-02892 that was reflected in the 2003 IMAP. In other words, the split resulted in no change in potential effect on other water users. Pioneer also cites the SRBA Court's APOD designation for many of United Water's rights as changing "the configuration of those rights." *Pioneer's Initial Statement* at 3-4. Again, however, this change did not "increase the potential effect on other water users or the public" in a way that would require re-advertisement. The SRBA Court's APOD designation resulted in about half of the IMAP rights having about half of the 81 APODs requested in the IMAP. In other words, the SRBA Court gave United water some, but not all, of the APODs being requested in the IMAP. This means that, post-SRBA, United Water is asking for less through the IMAP than it asked for pre-SRBA, which obviously means there is less potential effect on other water users and to the public when compared to the original application.

To initiate the process through which a determination can be made whether a portion of the water rights held by United Water could be considered necessary to provide for reasonably anticipated future needs, United Water could file an application under Idaho Code § 42-222 to change the point of diversion authorized under each water right for ground water to include as alternate points of diversion some or most of the wells in United Water's system that are currently operated as production wells. . . . Similarly, for those water rights wherein the place of use is defined differently than the service area of United Water, the application could also propose to change the place of use for those water rights to the service area.

Letter from Karl J. Dreher to Christopher H. Meyer, at 1-2 (June 14, 1999) (adopted as *IDWR Administrative Memorandum, Application Processing No. 63* (June 15, 1999)).

This guidance to United Water is law of the case in this proceeding, and United Water is entitled to rely on it. Moreover, the guidance is correct. Idaho Code § 42-222 reads:

When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter.

The same section later states:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided . . . the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code § 42-222(1). In short, the transfer statute envisions that water rights can be changed to municipal purposes to serve reasonably anticipated future needs, and that such use is a beneficial use.

A municipal provider transferring one of its existing municipal water rights to secure the 1996 Act's RAFN protection is perhaps the most obvious situation where these provisions in the

transfer statute would come into play. It makes no sense to read the statute as allowing an applicant to change another type of water right, like an irrigation right, to obtain the 1996 Act's RAFN protection but not allowing a municipal provider to do the same with existing municipal water rights.

Of course, United Water's municipal water right portfolio already is protected from forfeiture under the common law "Growing Communities Doctrine."⁷ The doctrine recognizes that long-term planning by municipalities is prudent and necessary, and that the prior appropriation doctrine can accommodate the need for cities to hold water rights for long periods before they are put to use. Idaho case law consistently has recognized and accommodated the special burdens on municipal water providers—providing them a measure of protection from the statutory forfeiture laws and common law abandonment principles. See *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913) (*aff'd*, *Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914)); *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940); *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969). Most recently, the doctrine's validity was effectively confirmed by the SRBA Court when it decreed 90 of United Water's water rights (77 of which are in the IMAP Relaunch).

⁷ The phrase "growing communities doctrine" is used in reference to a body of case law. The label has been employed by the Washington Supreme Court, *State of Washington, Dept. of Ecology v. Theodoratus*, 957 P.2d 1241 (Wash. 1998) (dissent), and by a number of commentators, e.g., Janis A. Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest*, 27 *Env'tl. L.* 127 (1997); Sandra Zellmer, *The Anti-Speculation Doctrine and its Implications for Collaborative Water Management*, 8 *Nevada L. J.* 994 (2008); A. Dan Tarlock, *The Progressive Growth Doctrine Meets Old and New Stresses on the West's Variable and Perhaps Shrinking Water Supplies*, 11 No. 2 *ABA Water Resources Committee Newsletter* 12 (2009); Lora Lucero and A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era?*, 42 *Nat. Resources J.* 803 (2003); A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?*, 27 *Pub. Land and Res. L. Rev.* 33 (2006). Although this shorthand description has not yet been employed by the Idaho Supreme Court, and differs somewhat from the "great and growing cities doctrine" which has taken hold in Colorado, it captures the idea. The doctrine plainly applies to all growing communities, large and small, not just to great cities. For instance, in *Village of Peck v. Denison*, 92 Idaho 747, 751, 450 P.2d 310, 314 (1969), the doctrine was applied to a community of 200 inhabitants.

The 1996 Act codified the common law doctrine to provide explicit statutory protection from forfeiture. In theory, seeking statutory forfeiture protection under the 1996 Act is optional. But there is no longer any practical alternative. Under IDWR's 2009 guidance authored by Jeff Peppersack, IDWR no longer will allow municipal providers to obtain new water rights for which they cannot show a short term need.

In sum, the nature of use change from common law to statutory forfeiture protection is a real change. To the extent that other parties assert it is not a real change, they implicitly recognize that United Water's municipal portfolio already is protected under the common law and that statutory forfeiture protection is not necessary. Regardless, however, United Water will continue its pursuit of statutory protection through the IMAP to ensure that its water rights are protected.

Statutory protection is particularly important to United Water in light of comments made at the last status conference and in parties' earlier submissions to the effect that the Growing Communities Doctrine somehow does not apply to United Water's municipal portfolio, and that the rights instead are subject to forfeiture after five years of non-use. *See, e.g., Pioneer's Statement of Issues* at 14. United Water seeks the 1996 Act's explicit statutory protection now because it does not want to be confronted with that argument sometime in the future.

C. Whether United Water will proceed with its APOD request

Pioneer suggests that United Water may decide to not proceed with its APOD request. At this time, United Water intends to proceed with the IMAP's APOD request. However, as discussed in *United Water's Initial Statement*, there is good reason to bifurcate the proceedings, which would delay discovery and hearings on issues concerning APODs. In short, at this time the question is not whether United Water will proceed with its APOD request, but rather when it

will proceed with its APOD request. United Water will address issues related to APODs (including injury issues) in due course following that determination.

United Water has not heard any strong objection to the bifurcation concept, which was discussed at length during the last status conference. Despite some initial questions, the concept seems to be gaining more traction. United Water outlined this concept formally in *United Water's Initial Statement* and welcomes feedback from the other parties so the Department can make a decision that moves the proceeding along in an efficient manner. If bifurcation is approved, we may proceed efficiently with the key issue in the proceeding: quantification of long term needs. If that is established to United Water's satisfaction, there is every reason to believe that the parties will be motivated to resolve the remaining issue of APODs without substantial further proceedings.

II. SCOPE OF DISCOVERY AND HEARING

Pioneer asserts that the scope of discovery and hearing cannot proceed until the issues described above are decided. United Water agrees that the bifurcation issue requires a decision so that the parties understand how to proceed with discovery and prepare for hearing.

Aside from their concern about United Water submitting ““updated applications” (described above), the Joint Parties assert that the scope of the hearing cannot be determined because there are “questions regarding the Municipal Act, the IDWR”’s interpretation of the Act, and pending legislative changes to the Act.”“ *Joint Initial Statement* at 1. The Joint Parties provide no further explanation about these purported “questions,” and do not provide enough information for United Water to respond to the concerns they might raise. United Water will respond if and when the Joint Parties articulate specific issues.

Concerning discovery, the Joint Parties assert—again, without further explanation—that it “should be limited as much as possible and could be substantially less with updated, amended,

or new applications.” *Joint Initial Statement* at 2. United Water agrees that discovery should be limited as much as possible so that parties are protected from irrelevant and abusive discovery requests, and so the proceeding is not delayed by such practices. Before it can respond any further, however, United Water needs some explanation as to how or why the Joint Parties believe discovery might be “substantially less with updated applications with updated, amended, or new applications.”

III. SCOPE OF RESPONSIBILITY OF THE PARTIES

Pioneer correctly points out that United Water has the burden of presenting a *prima facie* case, and has the ultimate burden of proof, on most of the criteria listed in Idaho Code Section 42-222. *Pioneer’s Initial Statement* at 7. *United Water’s Initial Statement*, at 11-13, contains a detailed discussion of the parties’ respective burdens, which is incorporated herein by this reference.

Pioneer also questions the “duties, rights, and obligations” of participants who are not the applicant or a protestant, such as “intervenor” and “interested parties.” *Pioneer’s Initial Statement* at 6-7. The Joint Parties assert that “responsibilities are set forth in Idaho Code.” *Joint Initial Statement* at 2.

Actually, the various participants’ rights and responsibilities are set forth in the Idaho Code, and more specifically in the Department’s Rules of Procedure, IDAPA 37.01.01. The Rules of Procedure describe who is a “party” to the proceeding. *See* IDAPA 37.01.01.150 (“Parties to contested cases before the agency are called applicants or claimants or appellants, petitioners, complainants, respondents, protestants, or intervenors.”) Under Rule 157, “[s]ubject to Rules 558, 560, and 600, all parties and agency staff may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments.” IDAPA 37.01.01.157. On the other hand, under

Rule 158, persons who are not parties but who have an interest in a proceeding are called “interested persons,” who “may participate in a proceeding as ‘public witnesses’ in accordance with Rule 355.” IDAPA 37.01.01.158. Public witnesses’ participation is very limited—they “do not have parties’ rights to examine witnesses or otherwise participate in the proceedings as parties,” including the right of discovery. IDAPA 37.01.01.355, .522.

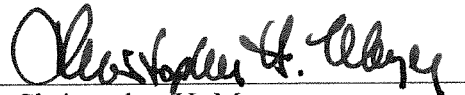
IV. TIMETABLES FOR DISCOVERY AND HEARING

The Joint Parties suggest “it is unlikely a hearing could be accomplished before the fall of 2013,” and that it will take more than the two and a half weeks needed for the M3 Eagle hearing which was “much less complicated than IMAP.” *Joint Initial Statement* at 2. As shown by the timetables proposed in *United Water’s Initial Statement*, at 14-15, United Water concurs that a hearing in a non-bifurcated proceeding likely could not occur before fall of 2013. However, the same timetables show that the first hearing in a bifurcated proceeding (on RAFN and planning horizon issues) could occur in summer of 2013. *Id.*

United Water believes it is too early to tell whether the IMAP hearing will be more or less complicated than any other proceeding. Frankly, the IMAP is unique and it makes little sense to compare it with any other proceeding. That said, United Water believes it is reasonable to assume the hearing will take a total of two weeks (altogether, or one week for each phase in a bifurcated proceeding).

Respectfully submitted this 14th day of November, 2012.

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I HEREBY CERTIFY that on the 14th day of November, 2012, the foregoing was filed, served, and copied as follows:

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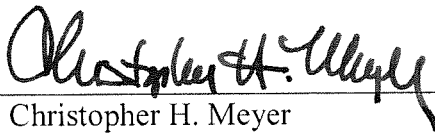
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