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DEPARTMENT OF
WATER RESOURCES

Attorneys for Protestant:
Boise Project Board of Control

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED	)	
MUNICIPAL APPLICATION	)	
PACKAGE ("IMAP") OF UNITED	)	BOISE PROJECT BOARD OF
WATER IDAHO INC., BEING A	)	CONTROL, BIG BEND IRRIGATION
COLLECTION OF INDIVIDUAL	)	DISTRICT, WILDER IRRIGATION
APPLICATION FOR TRANSFERS OF	)	DISTRICT AND BOISE-KUNA
WATER RIGHTS AND	)	IRRIGATION DISTRICT'S MOTION
APPLICATIONS FOR AMENDMENT	)	TO DISMISS INTEGRATED
OF PERMITS	)	MUNICIPAL APPLICATION
	)	PACKAGE, MEMORANDUM IN
	)	SUPPORT THEREOF, AND
	)	RESPONSE TO INITIAL
	)	STATEMENTS

COMES NOW, Protestants, Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District, and Boise-Kuna Irrigation District, and hereby move the Director, pursuant to Idaho Administrative Procedure Rule 37.01.01.260, for an Order dismissing United Water of Idaho, Inc.'s Integrated Municipal Application Package ("IMAP"). The applications for transfer that the IMAP is based upon contain incorrect and outdated information, and, therefore, cannot be processed under Ch. 2, Title 42 Idaho Code, as well as the Department's rules and guidance. Further, United Water's request that the Director adopt a fifty (50) year planning

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horizon in connection with its requests for transfer is not authorized by statute, and cannot be granted based on the current state of Idaho law.

PROCEDURAL HISTORY AND STATE OF THE APPLICATION

United Water initially filed the IMAP in May 2001. The application was amended in March 2002, and again in April 2003. The procedural history of the IMAP is explained in detail in United Water's Statement Updating and Explaining the IMAP Relaunch, filed with the Idaho Department of Water Resources ("Department") on August 14, 2012. After United Water's second amendment of the IMAP, the hearing officer stayed the proceedings pending Snake River Basin Adjudication ("SRBA") outcomes in the multiple water right proceedings for United Water's water rights.

In its SRBA claims, United Water claimed the alternative points of diversion that it is seeking in this proceeding. United Water did not file SRBA claims for its water rights with post-SRBA commencement priority dates, and for one other right that was apparently overlapping with another right. According to United Water in its Statement Updating and Explaining the IMAP Relaunch, ("Relaunch Statement"), "of the 106 water rights remaining in the IMAP relaunch, 77 have partial decrees and 29 do not." For those rights that have gone to partial decree, United Water was granted between 12 and 43 alternative points of diversion for 67 of the claimed rights, and 10 went to partial decree with only one or two identified alternative points of diversion.

United Water explains that it has decommissioned certain wells that are claimed in the 2003 revised IMAP's 89 alternative points of diversion, and through its Relaunch Statement attempted to remove seven of the claimed alternative points of diversion. As an attempt to "Update" its transfer applications, United Water summarizes that "the list of 89 APODs in the

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2003 IMAP has been reduced to a list of 81 APODs, composed of the prior APOD list...minus the Ranney collectors at Marden...., the Veterans Park Ranney collectors....., and six other wells that have been decommissioned since the 2003 IMAP.” Relaunch Statement, p. 25. It goes on to state, “[t]he IMAP Relaunch will also have the effect of removing the 13th Street and Joplin wells as APODs for the 48 decreed rights with 42 APODs and the four decreed rights with 43 APODs.” *Id.*

In its Initial Statement filed October 31, 2012, United Water affirmed that “the central questions presented by the IMAP [are] the duration of the planning horizon and the quantification of RAFN.” United Water’s Initial Statement, p. 6. In its Relaunch Statement United Water had emphasized that its “existing municipal water rights are protected from forfeiture by the Growing Communities Doctrine and, for those rights with partial decrees, by *res judicata*,” but argued that “the 1996 Act provides more explicit statutory protection.” Relaunch Statement, p. 53. United Water also confirmed that it is in the process of recalculating its future needs projections because the data has become outdated since 2001 when the data was initially compiled, but that the process “is not yet completed.” Relaunch Statement, p. 54.

The parties met in a status conference on October 16, 2012, and discussed the issues raised in United Water’s Relaunch Statement, as well as the issues raised by the submission of the Statements of Issues and Requests for Clarification by the Boise Project parties and Pioneer Irrigation District. After the conference, on October 29, 2012, the Director issued an Order Setting Schedule For Parties to Respond and Propose Timetables for Hearing and Discovery. In it he set a schedule for parties to respond “to the matters raised during the Status Conference including recent documents filed by United Water Idaho, Pioneer Irrigation District and the Boise Project Board of Control.” Order, p. 1. Both United Water and Pioneer filed subsequent

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initial statements, along with a number of other parties to the proceeding.¹ In its Initial Statement United Water clarified that it had two primary concerns in the IMAP proceeding, 1) securing the alternative points of diversion that it was not granted during the SRBA proceedings, and 2) establishing a planning horizon and bringing its current portfolio of water rights within the statutory protection of the Municipal Water Rights Act of 1996.

For the reasons set forth below, United Water cannot accomplish either of its stated goals under the current state of the law in Idaho.

ARGUMENT

I. United Water's Applications for Transfer No Longer Accurately Reflected Changes Sought in the Elements of the Water Rights in Violation of I.C. § 42-222 and Transfer Processing Memo No. 24, and Should be Dismissed:

Since the applications were last amended in 2003, United Water, through its Relaunch Statement document, made substantial efforts to clarify the manner in which the original applications are no longer current, and which of the original requested changes no longer pertain to the proceedings. In its Response to Initial Statements, United Water argues that these changes do not constitute substantial changes to the initial applications, and that it "seems a waste of time to quibble over whether the changes to [such rights] were 'substantial' enough to deserve new application forms." United Water's Response to Initial Statements, p. 5. Fortunately, Idaho law and the Departments guidance clearly spell out what changes constitute substantial changes. United Water also takes the position that:

United Water opposes filing individual transfer application forms for each water right. This approach was rejected in 2003 by then-Hearing Officer Peter

¹ The Boise Project parties did not file a subsequent Initial Statement as its Statement of Issues and Request for Clarification filed on October 15, 2012 had already been filed and a subsequent 'initial statement' would have been redundant.

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 cumbersome here. Doing so would certainly not be any more clear than the explanation provided in the Update Statement.

United Water's Response to Initial Statements, p. 6, fn. 4. As the changes sought to the applications for transfer meet the "substantial changes" definition requiring the filing of new applications, and as United Water opposes filing such a document, then the transfer applications should be denied as facially unacceptable, and the IMAP proceeding dismissed.

Idaho Code § 42-222 requires that changes in water rights "be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed[.]" In Transfer Processing Memo 20, the Department advised that "the department should treat other kinds of water right applications, including applications for transfer and applications to amend permits, the same as it does applications for permit." Transfer Memo 20, Jan. 12, 2000, p. 2. This means that the Department looks to the Water Appropriation Rules to help inform it about what constitutes a substantial change in an application. Water Appropriation rule, 37.03.08.35.04 applies and describes when a change necessitates the filing of an amended transfer application.

Rule 35.04.a states that a transfer application "shall be amended whenever significant changes to the place, period or nature of the use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended." Transfer Memo No. 24 clarified that any time "significant" changes are made to any of the elements of the water right set forth above, then it "will require filing a new application for transfer to replace the original application." Transfer Memo No. 24, p. 15. In this case United

Water has already had 42 or 43 of the alternative points of diversion sought in many of its transfer applications decreed to many of its water rights in the SRBA, therefore, for those water rights the applications must be amended to reflect that the applicant is no longer seeking those alternative points of diversion in these proceedings. It has also had certain water rights split into additional water rights, and so new applications must be filed for the newly created split rights. United Water has stated that it has decommissioned certain of the sought alternative points of diversion, and therefore, those must be removed from the transfer applications. All of these changes, taken separately, let alone taken together represent significant changes to the points of diversion, and therefore new applications should be filed.

United Water has also taken the position that its Update Statement memo filed in this proceeding on August 14, 2012, fully explains all of the changes to the transfer applications. However, under department Transfer Memo 20, “[a] memo to the file may also be appropriate to further explain an application as long as it is not the mechanism for a change to the application document.” Transfer Memo 20, p. 2. The Update Statement is facially inadequate as a substitute for a properly filed new application for transfer.

Additionally, United Water has filed a new “pink-line map” which designates new service areas, which also constitutes a substantial change to the place of use requiring the filing of new applications.

The IMAP proceeding must be dismissed because the underlying transfer applications, upon which the entire proceeding rests, are all facially insufficient. Under Idaho Law, the Department’s appropriation rules, and the Department’s guidance documents, United Water is required to file new applications reflecting the actual elements of its water rights, and including an accurate description of the changes that it seeks to accomplish in the transfer proceeding.

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II. The Director Does Not Have the Legal Authority to Establish A Planning Horizon for United Water's Existing Water Rights Pursuant to I.C. § 42-222:

The current state of the law in Idaho does not allow the Director to establish a planning horizon or to bring United Water's current portfolio of water rights within the protection of the Municipal Water Rights Act of 1996.

Idaho Code § 42-222 provides in pertinent part:

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 requirements apply to applications for new appropriations for municipal purposes under Idaho Code § 42-202.

United Water is not seeking to change the nature of the use of any of its water rights to municipal purposes, because its water rights are already designated for municipal purposes. United Water argues that "[i]t 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." United Water's Response to Initial Statements, p. 9. However, the literal words of the statute control.

When interpreting a statute the inquiry "must begin with the literal words of the statute; those words must be given their plain, usual and ordinary meaning; and the statute must be construed as a whole." *A&B Irr. Dist. v. Id. Dept. of Water Resources*, 2012 WL 4055353, Sept. 14, 2012 (Idaho). Here, the language appears in I.C. § 42-222, which pertains to transfers in

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water rights. In this instance, no transfer or change in the water right is sought to be accomplished, rather United Water wishes to establish a planning horizon and demonstrate its reasonably anticipated future needs in a vacuum. That is not what is contemplated or allowed under the statute.

Even if the Director allowed amendment of the transfer applications, or he dismissed the applications and required refiling of the applications, those applications would still not be subject to the planning horizon analysis currently authorized by I.C. § 42-222. The Director cannot grant the relief sought by United Water under the current state of the law.

CONCLUSION

United Water has made it clear that it has two goals in this proceeding. Its primary goal it has stated is to establish a planning horizon for reasonably anticipated future needs protection. This cannot be accomplished pursuant to the plain language of I.C. § 42-222. Second, it seeks to have alternative points of diversion granted through a transfer proceeding. However, its current applications are facially unacceptable, and new applications must be filed pursuant to the Department's guidance. For these reasons, the IMAP proceeding should be dismissed.

ORAL ARGUMENT is requested on this Motion at the convenience of the Director and other parties.

Dated this 14th day of November, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2012, I served a true and correct copy of the foregoing, **BOISE PROJECT BOARD OF CONTROL, BIG BEND IRRIGATION DISTRICT, WILDER IRRIGATION DISTRICT AND BOISE-KUNA IRRIGATION DISTRICT'S MOTION TO DISMISS INTEGRATED MUNICIPAL APPLICATION PACKAGE, MEMORANDUM IN SUPPORT THEREOF, AND RESPONSE TO INITIAL STATEMENTS** upon the following persons via the method indication below:

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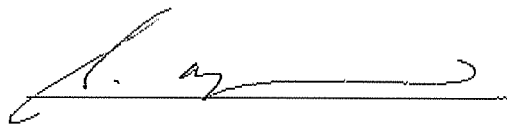
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