BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER OF WATER RIGHTS IN THE NAME OF UNITED WATER IDAHO, INC., INTEGRATED MUNICIPAL APPLICATION PACKAGE (IMAP)	)))))))	**ORDER RE MOTION FOR STAY**

The Idaho Department of Water Resources (IDWR) Hearing Officer in the above titled matter issued an *Order Re Motion for Stay and Scheduling Order* on November 12, 2003. The Order stayed "All issues relating to forfeiture or abandonment of United Water Idaho's pre-1987 water rights included in the IMAP ... pending resolution in the Snake River Basin Adjudication." The Order further provided that "All other issues in the IMAP proceeding, including any alleged forfeiture or abandonment of post-1987 water rights, shall be considered in this proceeding until and unless it becomes apparent at any point that a broader stay is necessary." Finally, the Order schedules a two-week hearing in January and February 2004 to address United Water Idaho's (UWID) reasonably anticipated future needs, and the changes proposed to be made to certain water rights which have been designated by the parties as representative of the various categories of rights at issue in this water rights transfer proceeding. The Order is an interlocutory order pursuant to IDAPA 37.01.01.710.

On December 5, 2003, the Hearing Officer issued an *Order Referring Order Re Motion for Stay to Director for Review*, pursuant to IDAPA 37.01.01.562. The referral order states, "Because the *Order Re Motion for Stay and Scheduling Order* has substantial implications for the costs that IDWR will incur in both this matter and the Snake River Basin Adjudication, and also affects the workload of other IDWR personnel, prudence suggests it should be reviewed by the Director of IDWR." The Hearing Officer thus refers the November 12, 2003 *Order Re Motion for Stay and Scheduling Order* to the Director "for review and modification pursuant to IDAPA 37.01.01.711 as the Director deems appropriate."

The Director has considered the orders of the Hearing Officer and the pleadings and supporting briefs and memoranda of the parties relative to the motion for stay. The Director concludes that a stay of any further processing of UWID's water rights in this transfer proceeding pending the rights being decreed by the SRBA District Court is appropriate. UWID states that it supports the protestants' request for a stay of those transfer issues over which the SRBA District Court has jurisdiction and also those transfer issues that otherwise may be affected by the SRBA's determinations. *UWID's Consolidated Reply Regarding Proposals For Partial Stay* at 1. These two categories of issues include an evaluation of UWID's pre-1987 water rights that will be reviewed by the SRBA District Court, and UWID's post-1987 water rights, which although not reviewed in the SRBA may be affected by the SRBA District Court's

determinations. UWID agrees that these two categories of issues should not be addressed by IDWR for any of UWID's rights until after the SRBA District Court has issued partial decrees for UWID's pre-1987 claimed rights. *Id* at 3.

UWID identifies a third category of issues in this transfer proceeding, which it argues should not be stayed. These issues relate to UWID's request that IDWR make a determination under Idaho Code § 42-222 establishing that UWID "qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon" proposed by UWID are consistent with the definitions of those terms as defined by Idaho Code § 42-202B. Specifically, UWID has proceeded under the definitions contained in Idaho Code § 42-202B(5) - (9) to assert that as a "municipal provider" providing water for "municipal purposes" within its authorized "service area" it claims a "planning horizon" of fifty (50) years and quantifies its "reasonably anticipated future needs" at approximately 416 cfs. *Id* at 4.

UWID states that these issues for which it seeks to proceed with a determination "are not dependent on the outcome of the SRBA and will provide critical guidance to water providers, local governments, planning entities, and other water users throughout Idaho." *Id* at 2. UWID further argues that early resolution of these issues "is vital to ongoing planning efforts by United Water" and that a multi-year delay in addressing these issues "would chill the development and implementation of the 1996 Act throughout the State." *Id* at 4.

The protestants, on the other hand, urge that UWID's entire transfer proceeding before IDWR should be stayed pending consideration of UWID's water right claims by the SRBA District Court. In this regard, the protestants assert that it would be better to have a clear picture of UWID's existing water right "portfolio" before moving forward with a determination of the appropriate planning horizon and the reasonably anticipated future needs of UWID as a municipal provider under the 1996 Act.

IDWR could bifurcate the planning horizon and the reasonably anticipated future needs issues from the other water right transfer issues required to be addressed under Idaho Code § 42-222 as suggested by UWID. The Director, however, is not convinced that this is the most efficient manner in which to proceed when taking into account the present strained resources of IDWR and the interests of the other parties to the proceeding.

The parties and IDWR will be expending considerable resources in addressing UWID's claims before the SRBA. The SRBA determinations will accomplish a first step necessary for the processing of the transfer applications before IDWR. Because the water right claims pre-date the 1996 Act it is conceivable that the SRBA District Court could address some of the issues for which UWID seeks a stay under applicable common law principles. Thus, proceeding simultaneously before the SRBA and IDWR could cause, to some extent, a double expenditure of time and funds. Another consideration is that it could be two or more years before the SRBA District Court makes a final determination of UWID's water rights. It is evident that Idaho Code § 42-222 anticipates that the determinations relating to the planning horizon and the reasonably anticipated future needs be made in conjunction with a transfer proceeding. For these reasons, the Director determines that it would best serve the interests of the parties and the Department to order a complete stay of this transfer proceeding pending a determination of UWID's water right claims before the SRBA District Court.

ORDER

IT IS THEREFORE HEREBY ORDERED that this transfer proceeding shall be stayed in full pending the issuance of partial decrees for UWID's water right claims by the SRBA District Court, provided that action may be taken by the IDWR Hearing Officer upon any motions pending on the date of this order.

IT IS FURTHER ORDERED that this is an interlocutory order, which may be reviewed by the Director at any time pursuant to the provisions of IDAPA 37.01.01.711.

Dated this 18th day of December, 2003.

Karl J. Dreher
Director

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of December, 2003, the Order Re Motion For Stay was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

CHRISTOPHER H MEYERS
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JOHN WESTRA
IDWR -WESTERN REGION MANAGER
2735 AIRPORT WAY
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Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER OF WATER RIGHTS IN THE NAME OF UNITED WATER IDAHO, INC., INTEGRATED MUNICIPAL APPLICATION PACKAGE (IMAP)	)))))))	**ORDER REFERRING ORDER RE MOTION FOR STAY TO DIRECTOR FOR REVIEW**

On November 12, 2003, the Hearing Officer issued an *Order re Motion for Stay and Scheduling Order* in this matter. The *Order re Motion for Stay and Scheduling Order* is an interlocutory order pursuant to IDAPA 37.01.01.710. Because the *Order re Motion for Stay and Scheduling Order* has substantial implications for the costs that IDWR will incur in both this matter and the Snake River Basin Adjudication, and also affects the workload of other IDWR personnel, prudence suggests it should be reviewed by the Director of IDWR. Therefore, pursuant to IDAPA 37.01.01.562, it is ORDERED that the *Order re Motion for Stay and Scheduling Order*, dated November 12, 2003, is referred to the Director of IDWR for review and modification pursuant to IDAPA 37.01.01.711 as the Director deems appropriate.

Dated this 5th day of December, 2003.

Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2003, the above and foregoing, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER OF WATER RIGHTS IN THE NAME OF UNITED WATER IDAHO, INC., INTEGRATED MUNICIPAL APPLICATION PACKAGE (IMAP)	**ORDER RE MOTION FOR STAY AND SCHEDULING ORDER**

The *Second Prehearing Order* issued in this matter identified the following issue raised by the parties:

Issue 14 Approval of the IMAP might preclude SRBA review.

In the *Second Prehearing Order* the Hearing Officer indicated that he would contact the SRBA District Court and proceed in accordance with its direction. A copy of the Hearing Officer's letter to the SRBA District Court is attached to this Order as Attachment A. The SRBA District Court's response is attached to this Order as Attachment B.

On March 28, 2003 several protestants in this matter jointly filed a *Motion to Stay and Memorandum in Support* (the "Stay Motion") requesting that the processing of the applications in this matter be stayed based upon the SRBA District Court's response. The Applicant, United Water Idaho Inc., filed *UWID's Response to Motion to Stay*, urging caution and arguing that, at most, only those issues that will also be raised in the Snake River Basin Adjudication be stayed in this proceeding. This Hearing Officer in the *Third Prehearing Order and Notice of Prehearing Conference* issued on June 20, 2003, indicated that additional information was needed before a ruling would be made on the Stay Motion, provided a time period for discovery, and directed the parties to provide information related to any alleged forfeiture of water rights to the Idaho Department of Water Resources ("IDWR") on September 12, 2003.

The Hearing Officer also requested a staff memorandum from IDWR staff regarding the current schedule for reporting United Water Idaho's water rights to the SRBA district court. On May 9, 2003, *IDWR's Staff Memorandum in Response to Request by Hearing Officer Pursuant to IDAPA 37.01.01.600 and IDAPA 37.01.01.602* was filed in this matter.

The Applicant then filed *UWID's Supplemental Response to Motion to Stay, Proposing a Partial Stay* which argued that issues regarding its applications be trifurcated, that two sets of those issues be stayed, and the third set of issues

be processed by IDWR. The City of Boise joined with the Applicant. Other parties responding to Applicant's proposal argued that a complete stay of this matter is still appropriate and opposed Applicant's proposed trifurcation of issues.

In response to the direction in the *Third Prehearing Order and Notice of Prehearing Conference* to provide information related to any alleged forfeiture of water rights to the IDWR the following documents were filed:

> *Statement of Forfeiture Allegations*, Cities of Eagle, Kuna, Middleton, Star and the Star Sewer and Water District.
>
> *Pioneer Irrigation District and Settlers Irrigation District's Additional Information in Support of Motion to Stay; Affidavit of Angel Schaer Kaufmann* dated September 12, 2003; *Affidavit of Scott L. Campbell* dated September 12, 2003.
>
> *Response to Hearing Officer's Request for Additional Information*, Nampa & Meridian Irrigation District, Cities of Meridian and Caldwell, and the Terteling Entities.

These documents indicate that allegations of forfeiture will be made regarding a substantial number of the water rights included in the IMAP.

Idaho Department of Water Resource's Responsibilities

In the IMAP United Water Idaho filed applications to change existing water rights pursuant to Idaho Code § 42-222 and to amend water right permits pursuant to Idaho Code § 42-211. The Applicant is entitled to have the Idaho Department of Water Resources process its applications. *See* Idaho Code §42-222(1) ("Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon.") and Idaho Code § 42-211 ("Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment ... and upon receipt thereof it shall be the duty of the department of water resources to examine same ....") The form and timing of IDWR's investigation and hearing are within its discretion, so long as the fundamental rights of the participants are not violated.

Under Idaho Code 42-222 the Director may change any existing water right so long as such change does not enlarge the right, injure existing water rights, or conflict with the local public interest and is consistent with the conservation of water resources within the State of Idaho. Determining whether a change does not enlarge a right or injure existing rights requires IDWR, in the

first instance to determine whether the right exists at all. The Idaho Supreme Court recognized that this means that IDWR may investigate whether a water right has been forfeited or abandoned. *Jenkins v. IDWR*, 103 Idaho 384, 387 (1982). A logical extension of the *Jenkins* analysis is that IDWR must also determine whether an unadjudicated, beneficial use or common law water right exists at all before it can be changed. The Idaho Supreme Court has also ruled, however, that forfeiture and abandonment do not necessarily need to be adjudicated in a change proceeding. *Sagewillow v. Idaho Department of Water Resources*, 2003 W.L. 1847728, 14 (Idaho S. Ct., April 10, 2003). No similar pronouncement has been made whether IDWR must determine whether a beneficial use right even exists, before it can be changed.

Interaction between IDWR and SRBA District Court

The relationship between IDWR and the SRBA District Court is not conceptually difficult. Water rights are a species of real property administered by IDWR. Ownership of water rights constantly changes, and the statutory change procedures as well as statutory forfeiture and common law abandonment allow for the location and nature of water rights to be changed. The Snake River Basin Adjudication will only provide a one-time snapshot of the water rights within the Snake River Basin. The difficulty in the present case arises because IDWR is being asked to carry out its ongoing duty to process the IMAP at the same time as the SRBA District Court is about to start of the process of taking a snapshot of many of the same rights.

The legislature provided in the adjudication statutes that while the SRBA District Court is taking its snapshot, IDWR will continue to administer water rights.

> (4) The director retains jurisdiction of all applications, permits and licenses under chapter 2, 3, 6 or 15, title 42 Idaho Code, to take action authorized by the conditions contained in any permit or license or by applicable law and action on any application for transfer under section 42-222, Idaho Code.
>
> (5) The director retains jurisdiction of all decreed water rights under chapter 2, 3, 6 or 15, title 42 Idaho Code, to take action authorized by the conditions contained in any permit or license or by applicable law and action on any application for transfer under section 42-222, Idaho Code.
>
> (6) The director retains jurisdiction of all beneficial use water rights under chapter 2, 3, 6 or 15, title 42 Idaho Code, to take action authorized by the conditions contained in any permit or license or by applicable law and action on any application for transfer under section 42-222, Idaho Code.

Idaho Code § 42-1421. Based upon this statutory language, and the applicability of Idaho Code § 42-222 to licensed as well as beneficial use water rights, the following statement by the SRBA District Court appears to be wrong, as a legal matter:

> I believe that the Snake River Basin has original jurisdiction for those water rights which have not been decreed and which have questions of forfeiture included. I cannot see where an unadjudicated water right which may or may not exist can then be transferred in an administrative proceeding. As such, it seems to me that the appropriate thing is to stay the administrative proceeding until all water rights can be adjudicated and then the administrative portion of the case can go forward based upon a clear record of what water rights exist.

Attachment B.

The SRBA District Court was correct, however, in two ways. First, as a practical matter and to conserve resources it makes little sense for both IDWR and the SRBA District Court to determine whether United Water Idaho's pre-1987 water rights[1] have been forfeited or abandoned. Further, United Water Idaho has indicated that one possible defense it has to forfeiture is that it has accomplished transfers of some of its pre-1987 water rights from wells it no longer uses to newer wells, under Idaho Code § 42-1425. IDWR does not have authority to consider such accomplished transfers in its forfeiture analysis. The SRBA District Court's forfeiture deliberations would be more comprehensive.

Although other concerns regarding conflicts between this proceeding and the SRBA may arise in the future—such as determining the exact scope of a previously unadjudicated beneficial use right—a decision at this time on such conflicts would be based on pure speculation. A host of fears can always be raised as reasons for not proceeding in a matter of this magnitude. The better approach is to proceed and deal with the actual problems as they arise.

Based upon the foregoing the Motion for Stay is GRANTED in part and DENIED in part as follows:

1. All issues relating to forfeiture or abandonment of United Water Idaho's pre-1987 water rights included in the IMAP are STAYED, pending resolution in the Snake River Basin Adjudication. Any transfer approved in the proceeding will be contingent upon the SRBA District Court's determination that the water right has not been forfeited.

[1] The SRBA District Court will only adjudicate United Water Idaho's water rights that have a pre-1987 priority date.

2. All other issues in the IMAP proceeding, including any alleged forfeiture or abandonment of post-1987 water rights, shall be considered in this proceeding until and unless it becomes apparent at any point that a broader stay is necessary. In order to proceed with this matter the following schedule shall apply:

a. By **November 28, 2003**, United Water Idaho shall file a document designating which water rights listed in Tab J, Spreadsheet 1, of the IMAP are beneficial use rights.

b. By **December 3, 2003**, United Water Idaho shall designate ten (10) water rights or permits which it wishes to have processed first. United Water Idaho should attempt to ensure that this set includes at least one (1) each of

1. A beneficial use right.
2. A licensed right.
3. A permit.
4. A right or permit for which the purpose of use is to be changed.
5. A right or permit for which the season of use is to be changed.
6. A right or permit for which the place of use is to be changed.

c. By **December 12, 2003**, each protestant may designate one additional water right or permit in the IMAP which that protestant wishes to have processed first.

d. A prehearing conference will be held in this matter at 9:00 a.m. on **January 8, 2003**. A formal notice of hearing will be served on the parties at a later date.

e. A two week hearing on the changes to the designated water rights and permits, and United Water Idaho's reasonably anticipated future needs, will be held on **January 26-30** and **February 2-6, 2004**. A formal notice of hearing will be served on the parties at a later date.

Dated this 12th day of November, 2003.

PETER R. ANDERSON
HEARING OFFICER

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of November, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Victoria Wigle
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March 7, 2003

Honorable Roger S. Burdick
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, ID 83303-2707

Re: Administrative Proceeding in IDWR Basin 63, part II

Dear Judge Burdick,

I have been appointed by IDWR Director Dreher to be hearing officer in an administrative contested case proceeding involving the water rights of United Water Idaho, Inc. United Water has applied for an administrative transfer involving nearly all of its rights in the Boise Valley under the title of the "Integrated Municipal Application Package" or "IMAP". Many of the water rights in the IMAP are due to be reported by IDWR to the SRBA District Court in the Director's Report for IDWR Basin 63, part II. This report currently is scheduled to be delivered to the SRBA early in 2004.

Many parties filed protests to United Water Idaho's transfer applications and are parties to the contested case proceeding. Most, if not all, of these protesting parties are also claimants in the SRBA. One basis for their protests is that many of United Water Idaho's water rights have been forfeited and are not eligible to be transferred. The parties are understandably concerned that the forfeiture issue is likely to be raised in the SRBA. Further, because of the complexity of the IMAP there would likely be a significant delay in the SRBA's consideration of these rights if the normal Notice of Administrative Proceeding ("NAP") process was followed. As a result, in a recent prehearing order I noted:

> The following issue was raised in the listing of issues:
>
> Issue 4: Approval of the IMAP might preclude SRBA review.
>
> The Snake River Basin Adjudication (SRBA) District Court and IDWR have concurrent jurisdiction over any water rights claimed in the SRBA and included in the IMAP. I.C. § 42-1421(4). Questions of timeliness, efficiency, finality and the avoidance of conflicting decisions suggest that

proceedings in this matter be coordinated with the proceedings before the SRBA District Court in whatever manner the SRBA District Court deems most appropriate. The Hearing Officer shall notify both the IDWR adjudication division and SRBA District Court of this issue and let the Court determine how it wishes to proceed.

I am writing to you to request direction on how you would like to proceed to coordinate the IMAP contested case hearing with the SRBA.

There is disagreement among the IMAP parties regarding the best way to proceed. For that reason I suggest that they come before you at the next scheduled status conference on March 18, 2003, to present their positions. If you would rather proceed in some other fashion, however, I am happy to accommodate. I am available to talk with you by telephone, or at the status conference, regarding this question. I look forward to hearing from you.

Sincerely,

Peter R. Anderson
Hearing Officer

Cc Dave Tuthill, IDWR
Certificate of Service

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of March, 2003, the above and foregoing **Letter by Peter Anderson, dated March 7, 2003**, were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
STATE OF IDAHO

RECEIVED
MAR 25 2003
Department of Water Resources

ROGER BURDICK
PRESIDING JUDGE
(208) 736-3011
FAX (208) 736-2121

SREA CHAMBERS
P.O. BOX 2707
TWIN FALLS, IDAHO 83303-2707

March 24, 2003

Peter Anderson
729 W. Braemere Rd.
Boise, Idaho 83702

Dear Mr. Anderson:

I'm in receipt of your 7th day of March letter. Thank you very much for recognizing that the SRBA may, in fact, be a partner in terms of this complicated process with United Water. I have some concerns which I will convey by letter to you as the hearing officer in the United Water case. In that regard, I believe that we do not have concurrent jurisdiction in this case. I believe that the Snake River Basin has original jurisdiction for those water rights which have not been decreed and which have questions of forfeiture included. I cannot see where an unadjudicated water right which may or may not exist can then be transferred in an administrative hearing. As such, it seems to me that the appropriate thing is to stay the administrative proceeding until all water rights can be adjudicated and then the administrative portion of the case can go forward based upon a clear record of what water rights exist.

If, however, the administrative procedure goes forward and you request a stay of the SRBA proceedings while that administrative procedure is going forward, I would advise the Master not to stay the proceedings. As I have been saying for a couple of months now, Notices of Administrative Proceeding (NAP) have been proven to be very inefficient ways of doing the SRBA business. In fact, we have found that prior to the Notice of a Completed Administrative Procedure (NCAP), the stay by the SRBA court based upon a NAP often leads to more work for the parties than less work. Therefore, I have previously instructed my Masters that we will follow Rule A01 explicitly in that, there will not be automatic stays based upon NAPs and that the hearing Master and myself must look with a discerning eye to the motions to stay the SRBA proceedings.

Having said all of those things, I do not have a case before me upon which I can rule nor order anyone to do anything. However, your letter requested a response, and that would be it. I don't believe that an informal conference between the Court and yourself would be productive. In fact, that type of conference may violate the judicial canons because I do not have a case in controversy before me and therefore could be prejudging a case.

ATTACHMENT B

Those are my original thoughts. I have talked these over with Special Master Cushman as well as, Eric Wildman, our staff attorney and believe that this is the best way to go forward. If you have any further questions, feel free to contact the court.

Sincerely,

Honorable Roger S. Burdick
Presiding Judge
Snake River Basin Adjudication

RSB:sb
CC: See attached Certificate of Mailing

CERTIFICATE OF MAILING

I certify that a true and correct copy of this **Letter To Peter Anderson** was mailed on March 24, 2003, with sufficient first-class postage to the following:

Idaho Department of Water Resources
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January 29, 2004

Ms. Victoria Wigle
Idaho Department of Water Resources
1301 N. Orchard St.
P.O. Box 83720
Boise, ID 83720-0098

Re: United Water Idaho Inc.—IMAP
Our File No. 30-71

Dear Victoria:

Enclosed for filing in the IMAP matter please find the original and one copy of *United Water and Boise City's Joint Reply in Support of Petition for Review of Director's Stay Order and Response to Motions to Strike*. Please conform the copy and return it to our office in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter. If you have any questions or require any additional information please call.

Sincerely,

Katrina Thomas

Katrina Thomas
Legal Secretary

Enclosures

:kdt S:\CLIENTS\30\71\KT Ltr to IDWR re Filing Joint Reply.DOC

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RECEIVED
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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 AND BOISE CITY'S JOINT REPLY IN SUPPORT OF PETITION FOR REVIEW OF DIRECTOR'S STAY ORDER AND RESPONSE TO MOTIONS TO STRIKE**

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INTRODUCTION

United Water Idaho Inc. ("United Water") and Boise City (collectively, "Petitioners") filed their *Joint Petition for Review of Director's Stay Order* ("Petition") on January 8, 2004. The Petition urges reconsideration of the order imposing a complete stay of the IMAP proceedings in favor of a partial stay that considers only United Water's quantification of its planning horizon and reasonably anticipated future needs. Petitioners crafted their request for partial stay to balance the Director's desire to avoid duplicative litigation and expenses with Petitioners' desire to move forward with their planning efforts under the 1996 Act and obtain a ruling on their time-sensitive and costly planning analysis made in accordance with the Act and guidance from the Department.

Petitioners point out (1) that the determinations in the SRBA have no bearing on the quantification of United Water's planning horizon or future needs, (2) that the proposed limited hearing could be accomplished quickly and efficiently, particularly if the Director accepted Petitioners' proposal for written expert testimony, and (3) a complete stay would prejudice Petitioners, and presumably other municipalities across the State, engaging in future needs planning under the 1996 Act.

Subsequently, on January 13, 2004, United Water filed its *Submission of Letter* from Paul D. Raymond to Karl J. Dreher urging reconsideration of the Stay Order consistent with the position of Petitioners.

Several Protestants have filed responses to the Petition and other pleadings advocating a complete stay.[1] Petitioners respond to these arguments and motions below.

ARGUMENT

I. CLEAR GUIDANCE ON HOW FUTURE NEEDS PLANNING WORKS UNDER THE 1996 ACT IS URGENTLY NEEDED.

The *Responses* filed this week underscore a central point in Petitioners' *Joint Petition*. Some of the principal players in water development in the Treasure Valley are operating under fundamentally conflicting interpretations of the future needs planning provisions of the 1996 Municipal Water Rights Act (the "1996 Act"). Effective regional planning efforts are hampered so long as these issues remain unresolved. Two examples follow.

A. The Department needs to rule on whether the 1996 Act contemplates that future needs planning may occur beyond an applicant's current water rights portfolio.

One Protestant argues that Petitioners are seeking to "put the cart before the horse" because "A Planning Horizon Cannot Be Considered or Approved for Non-Existent Water Rights." Nampa & Meridian's *Response* at 4. In other words, municipal providers (two of whom are represented by the same attorney making this statement) may not quantify their reasonably anticipated future needs over a planning horizon that exceeds their actual, current portfolio. To put this in the parlance of the "beaker," this Protestant contends that the top third

---

[1] The following Protestants have filed responses, motions and affidavits: 1) The Cities of Eagle, Kuna, Middleton, Star and the Star Sewer and Water District (collectively, the "City of Eagle" or "Eagle"); 2) Nampa & Meridian Irrigation District and the Terteling Entities (collectively, "Nampa & Meridian"), 3) Pioneer Irrigation District and Settlers Irrigation District (collectively "Pioneer & Settlers"), and 4) Boise Project Board of Control and its member districts (collectively "Boise Project"). We refer to them collectively as the "Protestants." This is shorthand only; not all Protestants filed responses. The Cities of Meridian and Caldwell are listed in the caption to these pleadings of Nampa & Meridian. However, we have confirmed with their counsel that those pleadings were submitted solely on behalf of their non-municipal clients, Nampa & Meridian Irrigation District and the Terteling Entities, as stated in the text of the pleadings.

of the beaker (above water rights in the provider's current portfolio) can never be quantified under the 1996 Act.

This assertion reflects a fundamentally different view of the purpose and intent of the 1996 Act than is held by Petitioners. It is Petitioners' bedrock assumption, and a fundamental premise of the entire IMAP, that municipal providers can, should, and must plan into the future and ascertain their reasonably anticipated future needs over the entire duration of their approved planning horizon. The fact that they may not have sufficient water rights within their portfolios to serve all those needs is precisely the point of this planning exercise.

Indeed, even if United Water were to lose a significant portion of its water rights that are reviewed by the SRBA, its planning horizon and its reasonably anticipated future needs will not change. All that will change will be the quantity of new water rights United Water will need to acquire moving forward.

If Nampa & Meridian's proposition is correct, municipal planning will grind to a halt; and may be allowed by the Department to proceed only on an incremental basis as each individual water right is identified for acquisition. A city would never know (and would never have to reveal) what its anticipated needs are over the course of its entire planning horizon.

The stay order would leave this question hanging, perhaps for years.

B. The Department needs to make clear whether a municipal provider's planning horizon is limited by the size of its current water rights portfolio.

Another example of fundamental conceptual disagreement over implementation of the 1996 Act is reflected in the following comment by Nampa & Meridian:

> For example, if United Water's water rights are reduced in the SRBA, the planning horizon that is to be attached to those rights

> will be reduced, because United Water, according to its own projections, will need to use those water rights prior to the end of its 50 year planning horizon.

Nampa & Meridian *Response* at 6.

This Protestant apparently believes that a reduction in a water provider's portfolio of rights will, in turn, cause a corresponding reduction in the planning horizon "attached" to the remaining rights. This concept is completely foreign to a basic premise of the IMAP. As perceived by Petitioners, if a portion of United Water's rights were "knocked out" by the SRBA, its planning horizon would be unaffected, and it would be up to United Water to replace those rights through acquisitions or appropriations.

These two examples are indicative of other important differences which have emerged over the course of this proceeding. Counsel for various municipalities are giving their clients fundamentally conflicting advice regarding what the 1996 Act means.

The result is gridlock. Direction from the Department is urgently needed to clear the path for effective regional planning.

II. THESE QUESTIONS ARE RIPE FOR DECISION BY THE DIRECTOR TODAY WITHOUT ANY NEED FOR INPUT FROM THE SRBA COURT.

The questions in need of resolution are not contingent in any way on what the SRBA court may do. Indeed, the Department and only the Department (subject to judicial review) has jurisdiction to implement the 1996 Act. These issues are ripe for determination. They have been carefully sorted out by the Hearing Officer and teed up for decision. It is not in the Department's or this State's interest to allow them to linger undecided during an indefinite stay.

Protestants contend that there is a sequential link between the task of ascertaining United Water's rights in the SRBA and the task of quantifying United Water's reasonably anticipated

future needs under the 1996 Act. As one Protestant puts it: "One cannot seriously engage in future planning until one knows what one currently possesses." Pioneer & Settlers' *Response* at 2.[2]

Petitioners submit that the opposite is true. The Department may and should proceed without delay to evaluate the planning efforts of municipal providers. This forward-looking exercise may readily be completed despite incomplete knowledge about a provider's existing portfolio.

After all, United Water's expert, John Church, has no specific knowledge of United Water's portfolio, much less how much of it will survive SRBA review. Yet he was quite able to predict to within one cfs how much water will be required to meet demand in each of the next fifty years.

III. PETITIONERS ARE ASKING FOR SPECIFIC RULINGS ON PENDING APPLICATIONS.

Protestants express concern that lifting the stay would result in advisory opinions outside the context of specific water right applications.[3] This is simply not true.

Petitioners seek a ruling on a set of issues raised by and central to the IMAP. The IMAP is a set of water right applications now pending before the Department. The fact that it would be

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[2] Another said: "For instance, it is impossible to determine how much water a provider needs if that provider does not know how much water it has. And, if a provider does not know how much water it has, it cannot determine if its future needs projections have been accurate." Eagle's *Response* at 4.

Yet another: "In addition, it is necessary to have a final, judicial determination of United Water's current portfolio prior to moving forward to consider what may be necessary for future needs. Boise Project's *Response* at 7.

[3] For example: "United Water asks the Department to hear and render a decision on United Water's planning horizon and anticipated future needs without reference to United Water's underlying water rights." Eagle's *Response* at 3.

In a similar vein: "A determination of future needs and a planning horizon can not be made separate from an application or transfer of a water right related to those needs." Boise Project's *Response* at 5.

an interlocutory ruling does not make it advisory. As noted in Petitioners' *Joint Petition* at 5, n.5, that interlocutory order could then be made final under Rule 710 in order to expedite any judicial review.

IV. PETITIONERS HAVE DISCLOSED NO CONFIDENTIAL INFORMATION, ONLY THEIR OWN POSITION.

The City of Eagle moved to strike the following paragraph of the *Joint Petition*:

> Moreover, United Water, Boise City and other municipal providers have initiated discussions aimed at the development of a regional, cooperative planning effort. This process has been described informally as the "RMAP" for Regional Municipal Application Package. This worthy exercise cannot begin until the "size of the beaker" determination is made for United Water. It is difficult to understand how staying and effectively prohibiting these efforts would "best serve the interests of the parties and the Department." See *Stay Order* at 2.

Petition's *Joint Petition for Review* at 13.

The quoted statement references discussions of the RMAP between the two named Petitioners and other unnamed "municipal providers." In fact, discussions regarding the concept of the RMAP have occurred in conferences of municipal water suppliers throughout Idaho. There is no secret about the RMAP concept.

Petitioners have made no disclosure regarding whether the RMAP idea was discussed at settlement conferences with the City of Eagle or any other Protestant.[4]

In any event, there is no legal issue here. The purpose of the rule protecting settlement discussions is to protect the confidences, secrets and settlement offers made by <u>others</u> in the course of a negotiation. If a party to a settlement discussion chooses to reveal a statement she

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[4] The City of Eagle has now made this disclosure, but Petitioners waive any objection.

made, she is free to do so. This point, and the supporting authorities, are discussed fully in a pleading filed previously in this proceeding, to which the City of Eagle offers no rebuttal. Rather than repeat those points here, we attach a copy as Exhibit A and adopt those arguments.

V. CITY OF NAMPA'S LETTER WAS PROPERLY SUBMITTED UNDER RULE 711.

Nampa & Meridian and Eagle have suggested that United Water's *Submission of Letter* was improper. They fail to cite the governing rule, which provides in pertinent part:

> Any party or person affected by an interlocutory order may petition the officer issuing the order to review the interlocutory order.

Rule 711, IDAPA 37.01.01.711 (emphasis supplied). Although the City of Nampa's letter did not expressly reference Rule 711, it was plainly a petition (*i.e.*, a request) that the issuing officer (*i.e.*, the Director) review the interlocutory order (*i.e.*, the stay order). The rule expressly provides that such a request may be submitted by a non-party. Consequently, such "person" need not first become a party through intervention or otherwise.

VI. THE PREJUDICE TO PETITIONERS IS REAL.

Protestants contend that an indefinite delay of the proceeding will not prejudice Petitioners, because they may simply pick up the IMAP where it was left off two, four, six or even eight years later. This is not credible. None of their expressions of non-concern were backed up with stipulations that they will not seize upon the delay as soon as the IMAP is resumed, contending that changed conditions, updated computer models, and new data demand a fresh start. If a stay interrupts this proceeding, the end result will be more factual uncertainty and legal complexity, more litigation and more Departmental staff time devoted to resolving what the proper starting point is. All this may be avoided by moving to hearing now.

VII. A COMPLETE STAY WILL ADVERSELY IMPACT OTHER MUNICIPALITIES THROUGHOUT IDAHO.

Protestants make the point that United Water voluntarily shouldered the burdens imposed by the 1996 Act.[5] That is true, and precisely the point. The tasks set out under the 1996 Act are burdensome. Perhaps the most burdensome aspect is the very uncertainty surrounding what is expected. Direction and precedent in the form of rulings on this applicant's future needs analysis will lessen the burden on other municipal users who are now considering whether to undertake the planning called for by the 1996 Act.

Protestants contend that, because each city's future needs analysis will be different, determination of United Water's future needs is of little consequence to other municipalities. The premise is true; the conclusion is not.

Obviously, the base population, rate of growth, and duration of the desired planning horizon will vary from city to city. These variables, in turn, will dictate the level of sophistication required of various applicants. But this does not negate the urgent need for resolution of the threshold questions of law and policy necessary to any evaluation of future needs. The "cart before the horse" criticisms these Protestants have leveled against United Water's planning efforts are equally applicable to any other city's. Whatever the Department

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[5] "The Act does not ***require*** that a municipal provider engage in future needs planning, nor that it include a future needs component any time it wishes to obtain or transfer a water right; instead, it sets forth requirements which must be followed ***if*** a municipal provider ***chooses*** to engage in future needs planning." Pioneer & Settlers *Response* at 4 (emphasis original).

Another Protestant takes a different tack, declaring that the planning effort undertaken are "burdensome requirements contrived by United Water." Eagle's *Response* at 6. If this is so, Petitioners have a considerable interest in being so advised and thereby relieved of such burdens.

says about the IMAP will provide important guidance to others, even if their particular circumstances differ.

VIII. PROTESTANTS WILL NOT BE HARMED BY A RULING QUANTIFYING FUTURE NEEDS.

It is not clear why these Protestants are so anxious to postpone the quantification of United Water's planning horizon. Petitioners have tried mightily to convey the understanding that any such subsequent acquisition or appropriation of water rights would be subject to all applicable rules of injury, and so forth. This includes, to the extent the Department deems appropriate in each case, re-examination of the planning horizon and future needs quantification itself. This position is confirmed in the proposed conditions submitted to the Department by United Water.

Thus, contrary to Petitioners' expressed fears, the ruling sought here will not serve as some sort of rubber stamp United Water may use to avoid scrutiny of its future water applications. To the contrary, it will serve as a vital planning tool available not only to United Water, but to the Department and to every other water user in the State.

IX. RENEWED REQUEST FOR STATUS CONFERENCE

Protestants' arguments against a status conference ring hollow. If the brakes are to be put onto one of the most important urban water planning exercises in the history of the State because the Department cannot find money in the budget to conduct the final hearing, the Parties are entitled to hear that and to explore with the Director whether a mechanism cannot be found to find a solution to the problem. For instance, the Director may wish to hear directly from the Protestants what is wrong with the proposal to streamline the hearing process through prefiled

testimony. The Director should also ask for rulings on the pending motions, the result of which might be to substantially reduce the number of parties and/or witnesses.

CONCLUSION

The ramifications of a complete stay are enormous. Important threshold questions about the 1996 Act are squarely presented and ripe for decision in the IMAP. Unless and until those questions are answered, planning processes under the 1996 Act throughout the Treasure Valley and across the state cannot move forward effectively.

The Department must not turn back the clock on the important work begun by the Legislature in 1996. The Department should allow United Water's future needs claims to proceed forthwith to hearing and determination.

RESPECTFULLY SUBMITTED this 29th day of January 2004.

OFFICE OF THE BOISE CITY ATTORNEY

By _____
Matthew K. Wilde
Attorneys for Protestant Boise City

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
John M. Marshall
Attorneys for Applicant United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January 2004, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 W. Fort Street Boise, ID 83724	x U.S. Mail x Email ____ Hand Delivery ____ Overnight Mail
Mr. Edward Squires Hydro Logic, Inc. 1002 W. Franklin Street Boise, ID 83702-5431	x U.S. Mail x Email ____ Hand Delivery ____ Overnight Mail

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Christopher H. Meyer

LIST OF EXHIBITS

Exhibit A. United Water's Answer in Opposition to Pioneer and Settler's Motion to Strike (dated Oct. 1, 2003, filed Oct. 3, 2003)

CONFIRMATION COPY

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OCT - 3 2003
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Counsel for Applicant United Water Idaho Inc.

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 ANSWER IN OPPOSITION TO PIONEER AND SETTLERS' MOTION TO STRIKE**

United Water Idaho Inc. ("United Water") hereby submits this answer in opposition to Pioneer Irrigation District and Settlers Irrigation District's (collectively, the "Districts") *Motion to Strike UWID's Motion to Dismiss Pioneer Irrigation District and Settlers Irrigation District's Protest and Preclude their Participation at Hearing and Memorandum in Support* dated September 29, 2003. This answer is filed pursuant to the Idaho Department of Water Resources' (the "Department") Rules of Procedure (in particular, IDAPA 37.01.01.270.02).

The Districts' motion seeks to dismiss United Water's pending motions to dismiss on the basis that United Water's motions refer to the certain proposed water right conditions offered by

United Water in aid of settlement. The Districts allege that this reference violates the Department's Rule of Procedure 610 (IDAPA 37.01.01.610).

A person reading the Districts' motion might conclude that United Water had disclosed confidential settlement offers made by a Protestant. This did not occur.

United Water said nothing about any condition or other offer made by any Protestant. United Water has not even disclosed whether any such offers have been made. The only thing United Water disclosed is that the 30(b)(6) witnesses proffered by the Districts knew nothing about the conditions offered by United Water and were therefore unable to explain how the IMAP, as conditioned, would injure them. The Districts now seek to hide behind Rule 610 to overcome the binding effect of the statements of their own witnesses.[1]

The Districts' theory lacks foundation and defies common sense. The central purpose of Rule 610 (and its counterpart, Rule of Civil Procedure 408) is to encourage settlement discussions by assuring parties that statements or offers they make in the course of negotiation will not later be turned against them.

> Since parties may be inhibited in making offers of compromise by the fear that these will be used against them if the compromise efforts fail, the law alleviates that fear and encourages the making of offers of compromise by making them privileged.

Wright and Graham, *Federal Practice and Procedure*, Rule 408, § 5302 at 170.[2] This rationale was adopted by drafters. "Hence, the Advisory Committee Note embraces McCormack's rationale, making the rule, in the words of the Reporter, a 'species of privilege.'" *Id.* at 173.

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[1] At the time the Districts' witnesses made these statements, the Districts' counsel raised no objection based on the confidentiality of settlement discussions. To the extent any privilege would have applied, it has now been waived.

[2] The Idaho and federal rules are identical. As noted in the motion which the Districts now seek to strike, Idaho courts look to federal authority where the rules are identical.

As a result, the person holding the privilege (that is, the person making the offer of settlement) is free to waive the privilege.

> Third, the privilege rationale restricts the scope of the rule by limiting the number of people who can invoke it; anyone can object to irrelevant evidence, but if the party who made the offer is willing to have it introduced, the privilege rationale does not provide any basis for objections by others.

Id. at 174 (emphasis supplied).

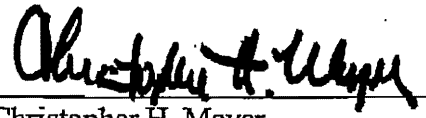
Case law interpreting Idaho Rule 408 also emphasizes that the prohibition is limited to circumstances in which the settlement offer is presented for the purpose of proving liability or invalidity of a claim. *Soria v. Sierra Pacific Airlines*, 111 Idaho 594, 726 P.2d 706 (1986). This underscores the point that the rule is designed to protect the person making the offer, not the one receiving it.

Obviously, the Department's Rule 610 is not identically worded to the Civil Rule 408. The underlying purpose of the two rules, however, appears to be identical. In any event, Rule 610 should be interpreted in the light of common sense. Common sense dictates that United Water can refer to its own proposed conditions any time it chooses.

In conclusion, the Districts' motion is frivolous and should be denied.

Respectfully submitted this 1st day of October, 2003.

GIVENS PURSLEY LLP

By: 

Christopher H. Meyer
John M. Marshall

Attorneys for Applicant
United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Water Resources State Office 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	x U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
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WATER RESOURCES
WESTERN REGION

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the Matter of United Water Idaho's Municipal Application Package, United Water Idaho, Petitioner	)	**RESPONSE TO UNITED WATER AND BOISE CITY'S PETITION FOR REVIEW OF DIRECTOR'S ORDER RE STAY**

The Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District (collectively referred to as "Protestants"), by and through their counsel of record, MOORE SMITH BUXTON & TURCKE, CHARTERED, hereby respond in objection to United Water and Boise City's Petition for Review of Director's Stay Order and move to strike references to confidential settlement negotiations and the letter written by a non-party.

INTRODUCTION

On December 18, 2003, the Director of the Department of Water Resources issued an interlocutory Order Re Motion for Stay in the Matter of United Water's Integrated Municipal Application Package. The Order stayed United Water's transfer proceeding in full pending the issuance of partial decrees on United Water's water rights in the Snake River Basin Adjudication (SRBA). On January 8, 2004, United Water and the City of Boise filed a Petition for Review of the Director's Stay Order. The Petition asks that the Director vacate the complete stay and order

a partial stay so that United Water may litigate certain issues while its water rights are decided in the SRBA.

The Petition disclosed confidential information discussed during the parties' settlement negotiations. The Petitioners disclosed this confidential information despite the privileged nature of the information and without first obtaining the Protestants' permission. Subsequent to filing the Petition, United Water filed a letter from the City of Nampa in support of the Petition. The City of Nampa is not a party or public witness in this contested case.

LEGAL STANDARDS

1. Petition for Review of Interlocutory Order

> Any party or person affected by an interlocutory order may petition the officer issuing the order to review the interlocutory order. The officer issuing an interlocutory order may rescind, alter or amend any interlocutory order on the officer's own motion, but will not on the officer's own motion review any interlocutory order affecting any party' substantive rights without giving all parties notice and an opportunity for written comment.
>
> Department Rule 711.

2. Disclosure of Confidential Settlement Negotiations And Motion To Strike

"Settlement negotiations in a contested case are confidential, unless all participants to the negotiation agree to the contrary in writing." Department Rule 610. A tribunal may strike "any redundant, immaterial, impertinent, or scandalous matter." Idaho Rule of Civil Procedure 12(f).

3. Motion to Stay

Anyone affected by an interlocutory order may petition the Department for a stay of the order. Department Rule 780.

4. Participation By Non-Parties

The Department recognizes applicants, petitioners, complainants, respondents and interevenors as parties to a contested case. Department Rule 150; see also Department Rules

151-156. A person who is not a party may participate as a "public witness" in accordance with Department Rule 355. Department Rule 158. Rule 355 defines a public witness as a person, who is not a party, who has not been identified by a party as a witness, who will testify at hearing. Department Rule 355 (emphasis added).

ARGUMENT

I. Motion To Strike

A. The Protestants' Disclosure Of Confidential Settlement Information Is Improper And Must Be Stricken.

The second paragraph of section V on page 13 of the Petition, discloses matters discussed between the parties during confidential settlement negotiations. Since the Protestants have not agreed to disclose confidential settlement discussions, the paragraph should be stricken.

B. The City Of Nampa's Letter Should Be Stricken.

United Water Idaho wrongly submitted a letter from the City of Nampa in support of its Petition. The City of Nampa is not a party to this contested case, has not been designated as a public witness, has not petitioned for intervention, and has not been permitted to participate in this case. Furthermore, the letter was not identified or produced by United Water during discovery and United Water did not disclose the City of Nampa as witness in this matter. Since the City of Nampa does not have a recognized interest in this case, its comments should be stricken.

II. The Petition For Review Of The Director's Stay Order Should Be Denied.

A. A Complete Stay Is Warranted In This Case.

United Water asks the Department to hear and render a decision on United Water's planning horizon and anticipated future needs without reference to United Water's underlying water rights. The planning horizon and future needs issues are not justiciable because they are

not ripe and any decision rendered on the same would be an advisory opinion. Until the underlying water rights are determined, there is no actual case or controversy and the Department should decline to decide the hypothetical issues presented by United Water.

Neither the appropriation or transfer statutes, nor any other statutory provision, provides for the determination of the validity of a planning horizon term or the quantification of a future need outside Idaho Code §§ 42-202 or 42-222. There is simply no forum for the review and approval of a planning horizon term or future needs quantification, or the methodology therefore, other than making an application and completing an appropriation or transfer process. Common sense also mandates the understanding of underlying water rights as a precursor for any future needs analysis. This is especially true in United Water's situation, when so many water rights are questionable. For instance, it is impossible to determine how much water a provider needs if the provider does not know how much water it has.[1] And, if a provider does not know how much water it has, it cannot determine if its future needs projections have been accurate. Therefore it is both lawful and prudent to reserve judgment on future water needs until the quantity of current water rights is known.

Given the circumstances, the actual length of the eventual hearing on United Water's transfers, as proposed by United Water, is of no bearing on the matter. However, it is important to note that there has been no decision on the Petitioners' proposed limitation on the parties' rights to present their cases at hearing. See Petition at p. 4-6. The Protestants have objected to United Water's attempts to limit the presentation of witnesses and restrict the presentation of the Protestants' case.

[1] The Vice President and General Manager of United Water has acknowledged this dilemma. Responding to questions about United Water's plans for the 150 cfs of water alleged to have been forfeited, Mr. Wyatt stated, "I cannot make a plan on their use until I know that they are certain or if they are certain." Depo. of Greg Wyatt at 113-114.

B. The Petitioners Are Not Prejudiced By A Complete Stay.

Contrary to Petitioners' claims, the Department is not to blame for the position United Water finds itself in. United Water has its view of the requirements under the "1996 Act" and United Water's unilateral interpretation of the law must be recognized as just that. The "burdens" allegedly endured by United Water were self-imposed under its version of the law.

For instance, United Water argues the 1996 Act imposes a burden that "municipal providers document and display their entire portfolio of rights for all to scrutinize...beyond that required by the SRBA...[including] highly confidential planning data and strategic information." Petition at p. 8. Actually, no such requirements have been imposed by law. See Title 42, Chapter 2, Idaho Code. A brief overview of the relevant statutory provisions is appropriate at this point.

What the law really says about future planning is that a "planning horizon" is the length of time a municipal provider may hold water to meet future needs. Idaho Code § 42-202B(7). The law defines "reasonably anticipated future needs" as the amount of water needed to serve future needs and is determined using population and planning data. Idaho Code § 42-202B(8). The statutory procedure for obtaining a water right for future needs water is as follows: First, if the applicant (a) desires to change the nature of use to municipal purposes and (b) some or all of the right will be held to serve future needs, then the municipal provider shall produce sufficient information and documentation showing that the applicant qualifies as a municipal provider and the anticipated future needs, service area and planning horizon are consistent with the law. Idaho Code § 42-222(1).[2] If on the other hand, a municipal provider desires to appropriate water for future needs, it must support its application with sufficient information and documentation to show that it qualifies as a municipal provider and the anticipated future needs, service area and

[2] Significantly, United Water's application package seeks to change existing municipal water rights to municipal purposes. Not only does that not make sense, such a transfer is not provided for under the law.

planning horizon are consistent with the law. Idaho Code § 42-202(2). Notably absent from these statutory provisions is any reference to the burdensome requirements contrived by United Water.

United Water has further misconstrued the planning statutes in that it argues that the Department must "rule on a quantification methodology" before any municipal provider can proceed with water planning. Petition at 12. Again, as is clear after reviewing the law, that is not the case. Idaho Code § 202B(8) does not dictate a rigid methodology that must be applied in every case. To the contrary, future need is based on population and planning data within the individual municipal provider's service area. Thus, the methodology would be specific to the individual provider. United Water also claims planning must be "long term," however, Chapter 2, Title 42, Idaho Code, is silent as to what the term of a planning horizon should be. Idaho Code § 202B(7). In fact there is no mention of "long term planning" in the laws related to future water needs at all. Instead, an applicant must provide sufficient information, which information should consider population and planning data and "[t]he length of the planning horizon may vary according to the needs of the particular municipal provider." Id. The nuances of the individual municipal provider play a large role in the development of a planning horizon. Consequently, a rigid methodology should not and need not be developed.

The statutory language governing the permitting of future water needs clearly anticipates the actual transfer or appropriation of specific water rights for future needs so long as the future need can be shown. The statutes do not impose any specific planning term on future planning. This statutory process for future water planning is in place and available to every municipal provider desiring to transfer or appropriate water for future needs -- no matter what happens in this contested case.

C. United Water Has Been Treated Fairly.

United Water claims it has been treated unfairly because of the costs it has incurred during this contested case proceeding.[3] Notably, United Water is the applicant in this case. United Water chose to file its "IMAP;" no one forced United Water to do so. As the applicant, United Water is subject to the jurisdiction of the Department during the pendancy of its applications and contested case proceedings and, like all the parties, must comply with the Department's Orders. Like United Water, the Protestants and their citizens do not like having to incur costs to ensure their interests are protected; however, United Water has been treated no differently than any member of the public.

CONCLUSION

It is United Water's complicated, intrusive and expensive view of municipal planning that has a "chilling" effect on future water planning in Idaho. It is in the best interest of all concerned to hold municipal providers to the statutory standard for water planning rather than United Water's standard. The City respectfully requests that the Director strike the confidential settlement discussion information contained in the Petition and the non-party letter submitted in support of the Petition, uphold the Director's Order RE Stay, and deny Petitioners' request for a status conference.

[3] United Water alleges that the IMAP has cost its ratepayers hundreds of thousands of dollars. Petition at 7. However, it does not appear that United Water's customers have been billed for the IMAP and certainly they should not have been billed for costs associated with shareholder interests. According to representatives of United Water, United Water has not yet filed a rate case before the Idaho Public Utilities Commission for any of the costs associated with the IMAP, but it plans to do so shortly. Depo. of Greg Wyatt at 105-107.

DATED this 22 day of January, 2004.

MOORE SMITH BUXTON & TURCKE,
CHARTERED

TAMMY A. ZOKAN
Attorneys for the Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of January, 2004, I caused to served a true and correct copy of the forgoing RESPONSE by the U.S. mail, addressed to the following:

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RECEIVED
JAN 23 2004
WATER RESOURCES
WESTERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the Matter of United Water Idaho's Municipal Application Package, United Water Idaho, Petitioner	**AFFIDAVIT OF TAMMY A. ZOKAN**

STATE OF IDAHO)
)ss.
County of Ada)

I, TAMMY A. ZOKAN, based upon my personal knowledge and being first duly sworn upon oath, deposes and says:

1. I am an attorney employed by MOORE SMITH BUXTON & TURCKE, CHARTERED, attorneys for the Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District, in the above-entitled case.

2. I have attached to this Affidavit as Exhibit A, a true and correct photocopy of excerpts of the transcript of the August 18, 2003 deposition of Greg Wyatt. Specifically, I have attached photocopies of pages 1-5, and pages 102-117.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 22 day of January, 2004.

TAMMY A. ZOKAN

SUBSCRIBED AND SWORN TO before me this 22 day of January, 2004.

CATHRYN S. KORTH NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at: Nampa, Idaho
My Commission Expires: 3-6-2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of January, 2004, I caused to served a true and correct copy of the forgoing AFFIDAVIT by the U.S. mail, addressed to the following:

Kathleen Marion Carr
Office of the Field Solicitor
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550 West Fort Street, MSC 020
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TAMMY A. ZOKAN

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED)
MUNICIPAL APPLICATION PACKAGE)
(CONSISTING OF 99 APPLICATIONS FOR)
TRANSFERS OF WATER RIGHTS, AND 13)
APPLICATIONS FOR AMENDMENT OF)
PERMITS) IN THE NAME OF UNITED)
WATER IDAHO, INC.)
)

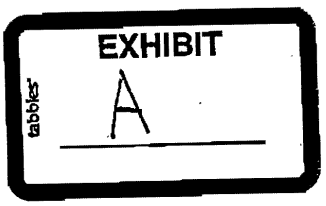
DEPOSITION OF GREG WYATT

AUGUST 18, 2003

REPORTED BY:

NANCY SCHWARTZ, CSR NO. 483

Notary Public



THE DEPOSITION OF GREG WYATT was taken on behalf of Pioneer and Settlers Irrigation District the offices of Moffatt Thomas Barrett Rock & Fields, Chartered, located at 101 South Capitol Boulevard, Boise, Idaho, commencing at 9:00 a.m. on August 18, 2003, before Nancy Schwartz, Certified Shorthand Reporter and Notary Public within and for the State of Idaho in the above-entitled matter.

APPEARANCES

For the Pioneer and Settlers Irrigation District:
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BY SCOTT L. CAMPBELL
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APPEARANCES (Continued.)

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GREG WYATT,
first duly sworn to tell the truth relating to said cause, testified as follows:

EXAMINATION

QUESTIONS BY MR. CAMPBELL:

Q. Would you please state your name, sir?

MR. MEYER: Scott, before we get started, I have a preliminary statement for the record, if I may.

We're here today in response to a 30(b)6 deposition duces tecum filed by Pioneer and Settlers. United Water contends that the information sought is overbroad and burdensome and has filed a motion for a protective order. The Hearing Officer has not yet ruled on that motion.

Pioneer and Settlers has filed a response seeking to justify their need for financial and corporation information about United Water. Pioneer and Settlers state that some of the information sought relates to the issue of water conservation. United Water recognizes water conservation as an issue properly before the Hearing Officer and does not object to discovery legitimately related to that subject. We will not object to inquiries related to

Q. Do you have any information, currently, as to the likelihood of either -- any of those events taking place?
A. I'm not aware of any eminent ones, no.
Q. Are you aware of any long-term actions of that nature?
A. No, I'm not.
Q. Do you know if anyone is at United Water?
A. No, I don't.
MR. CAMPBELL: We're past noon. Let's go ahead and break.
(Noon recess.)

EXAMINATION
QUESTIONS BY MR. SMITH:
Q. Greg, I have a few questions to clarify what I heard this morning. I'm Bruce Smith, representing the city of Eagle and other sorts of municipal entities.
Greg, who at United Water does the work to reach agreements with landowners?
A. They usually submit them, initially, to a fellow in our company by the name of John Lee, his position title is construction coordinator. He is an on-the-ground kind of guy who first interacts

with developers, engineers, and developers as they come in, relative to decision-making on things that are of a nonroutine nature that would be kicked up to one of the engineers and probably to Scott, depending on the circumstances.
Q. Does United Water have an agreement with the Chase Estate out in Eagle?
A. Oh, boy, you know, I don't know.
Q. When you reach agreement with these landowners or developers, do you put that on file with the PUC?
A. When you say, "When we reach agreement with," if we enter into a standard managed-extension agreement with a developer that's already on file with our Commission. I mean, the standard agreement is on file with our Commission, it's part of our rules and regulations. So, if we're entering into a standing managed-extension agreement, no we do not need to submit it again to the Commission. If we were to enter into any kind of a special facility agreement then we would file that with the Commission.
Q. At the time that you enter into the agreement?
A. Yes, at the time the agreement would be

signed.
Q. When do you propose to file a new rate case with the PUC?
A. Our current planning is that we would -- as we move foreward with the construction and bring online the Columbia Water Treatment Plant, which right now is targeted to June of 2005, that investment is going to be a significant enough investment that will warrant us filing for raise, so we would make a filing in conjunction with that plant. And the perfect timing, from our standpoint, would be that the rates would be in effect at the same time the plant came on, so June, '05, we would be seeking new rates.
Q. So, you anticipate your rate case being filed in June of 2005?
A. No, we anticipate having the rate case finished in June, 2005.
Q. So, when do you propose to file it?
A. I can only give you a range of time right now, because it's not a specific thing that we have nailed down hard and fast. Let me think about timelines here for a second and see if I can give a reasonable range. I would speculate that the fall of '04 -- 2004, would be the timeline.

Q. Anything going to be in that besides the Columbia Treatment Plant?
A. Oh, yes, any capital investment that the company has made, up to and including the treatment plant would be included in that case, along with operating expenses and any pro forma relating to those operating expenses.
Q. The cost of the IMAP won't be included?
A. Yes, it would be.
Q. That would be the cost incurred to-date or some other number?
A. We would anticipate including in the rate filing costs associated with that portion -- that which was designated as being in service.
Q. The use and used --
A. Correct. I would expect the Commission to make that determination.
Q. What figure would you put on that right now, what number?
A. Put on what?
Q. How many of the IMAP costs -- when is the IMAP cost to-date that you would anticipate putting in your PUC rate case?
A. I don't have a number that I could give you right now.

Q. Is it more than a million?
A. Related to the IMAP itself? I don't believe so.
Q. Is it related to something else?
A. Is what related? I'm not trying to be difficult. I'm just not quite sure I'm clear on what you are asking me when you say, "Is it --"
Q. You said you would put the cost of IMAP into your rate case.
A. Yes.
Q. I asked, would you include cost to-date for IMAP?
A. Today?
Q. No, to the date you filed it, would you include that?
MR. MEYER: May I offer a friendly suggestion, that you clarify by what you mean by IMAP cost? I don't know if you are talking about the cost of developing the IMAP or something else.
MR. SMITH: Neither do I. I'm trying to find out how much of the cost of the whole IMAP proceeding would you include in your rate case -- in your PUC rate case when you filed it.
THE WITNESS: We would anticipate filing for a recovery on all of the capitalized costs

related to the IMAP proceedings to the establishment of perfecting the -- of the IMAP.
Q. (BY MR. SMITH) So, when you started IMAP several years ago, the cost from that point forward?
A. Yes.
Q. Regarding one other of Mr. Campbell's questions about specific well use and water rights, does United Water own water rights for which the well no longer functions?
A. I would believe that we do.
Q. In your PUC case, do you intend to ask PUC to certificate a service area contiguous -- or, excuse me -- the same as your IMAP planning area?
A. No, I would not anticipate doing that at all. When you say contiguous --
Q. No, I take that back.
A. Let's rephrase here and maybe we will get this.
Q. Let me ask the question again. I want to know if the IMAP area is going to be consistent with -- the IMAP planning area will be consistent with your certificated area of service? That's what I'm looking for.
A. And your question is?

Q. Will you ask PUC to make your service area consistent with your IMAP planning area?
A. No.
Q. You may be aware I've asked your counsel several times for a copy of a map that was made available for us that shows your water rights, and points of diversion, and wells. And the explanation I've gotten is because of 9/11 concerns, that you-all wouldn't produce that map to us. Are you aware of that?
A. Yes.
Q. If you have 9/11 concerns that information will not be available in that form, right?
A. We've not been willing to provide well location maps to anyone since 9/11.
Q. Is there anything else that you haven't made available because of 9/11?
A. Not that I'm aware of.
Q. Is that a local decision or is that a company policy higher up the chain?
A. It's both a local decision and I wouldn't say it's company policy so much, but it's a recommendation by both the American Water Association, as well as the folks who helped us perform our vulnerability assessment, and I made the

decision locally for Idaho.
Q. The corporate structure, this morning, let me make sure I have this written down top to bottom. Suez is a french company?
A. Yes.
Q. Suez Environmental? I'm coming down the chain.
A. Uh-huh.
Q. United Water, Inc., United Water Resources, United Water Works, and United Idaho?
A. You missed Ondeo America in there. To the best of my recollection, that fits in below Suez Environmental and above United Water, Inc. Ondeo America in there, or it might be -- I have to beg your forgiveness. They continue to change names, so I do have some difficulty recalling.
Q. Us corporate guys do that, so that's okay.
And United Water Operations is the entity that actually does the agreement with Eagle, correct?
A. Yes, United Water Operations Idaho is the entity that the city of Eagle has contracted with for operations and management of their portion of the system, or their system that serves the portion of the city of Eagle.

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Q. And United Water Operations Idaho is an Idaho corporation?
A. Yes, it is.
Q. Do you carry a book value, your financial statements, for the value of your water rights?
A. Yes, we do.
Q. What is that?
A. I do not know.
Q. Would Scott know?
A. He would have a better idea, yes.
Q. Can you ask Scott to look at that before he shows up for his deposition?
A. I would be happy to.
Q. We had a discussion this morning about your current portfolio for water rights, assuming the 150 cfs translated into gallons per minute is correct, those numbers would be equal, as I understand it, you've got 150 cfs that you use for current service needs; correct? Whatever gallons per minute?
A. Peak demands, correct.
Q. And your portfolio has got 300 cfs in your primary groundwater, is what you testified to?
A. Right.
Q. Then you also testified that you were

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looking for surface water for the western end of your service area because groundwater is not a value out there; is that correct?
A. If I said western end, I should have been saying more to the eastern end. I did say it is difficult to obtain groundwater in the west-end when we're having a discussion about the ASR or the aquifer storage and recovery system situation. But, the area of the system where we're pursuing use of service water rights would be in conjunction with the proposed new Columbia Treatment Plant, which is on the east, southeast side of the city.
Q. So, I was incorrect with regards to the western end?
A. Unless I misstated it.
Q. So, you're looking for surface water for the eastern part?
A. For the Columbia Plant.
Q. The 150 cfs of groundwater rights in excess of 150 that you currently use for peak demand, what happens to that 150 cfs under IMAP?
MR. MEYER: Objection; calls for a legal conclusion.
MR. SMITH: I'm not asking for a legal conclusion, I'm asking him what he intends to do

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with the water.
THE WITNESS: I think it really will depend on what the SRBA decides and the whole issue regarding the adjudicated process, so I don't know that I can give you an answer yet.
Q. (BY MR. SMITH) Could you explain what you mean with regard to the SRBA?
A. Snake River Basin Adjudication.
Q. I'm familiar with that term. I mean, in regard to what the SRBA does.
A. I think they are charged with -- we're doing water rights in the entire valley, the entire basin, correct? And determining to extent, if any, certain water rights may be used and useful in excess, and potentially available for forfeiture. So, when you say what is United Water going to do with the water, I think it's predicated on what SRBA is going to do with it.
Q. If the SRBA determination is that those 150 cfs in excess of current demands are not forfeited, what are United Water's plans for those water rights?
A. It would hold them in our planning component, or planning horizon component portion of the beaker of water rights, assuming the IMAP is

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approved, and that we would use them as we continued to grow and build, meeting the system needs of the city of Boise as it grows.
Q. So, you couldn't make that determination until the SRAB court rules on the forfeiture question?
A. I really won't know for what extent the 150 is available.
Q. And you wouldn't know that until the SRAB court rules?
MR. MEYER: Objection. This is an issue that is pending. It's a legal and procedural question, and this witness doesn't know. I mean, you know as well as I do --
MR. SMITH: Chris, don't instruct your client while making comments to me.
MR. MEYER: I'm not instructing him. I'm objecting to the question.
MR. SMITH: Just object to the question.
Q. (BY MR. SMITH) Go ahead and answer, please.
A. I think I already stated that to the extent that those 150 are still hanging in the balance of the question, I cannot make a plan on their use until I know that they are certain or if they are

certain.
Q. So, before you can plan on using -- strike that. Let me start over.
Before you can plan on using them, you'd have to know if they are valid or not, correct?
A. I have to know whether they will be able to be retained as water rights in the portfolio.
MR. SMITH: That all I have. Thank you.

EXAMINATION

(Exhibit No. 3 was marked.)
QUESTIONS BY MR. CAMPBELL:
Q. Mr. Wyatt, this is Scott Campbell. I'm back in the saddle again.
A. I see you are.
Q. I would like to remind you that you are still under oath.
A. I appreciate that. Thank you.
Q. You've just been handed what has been labeled or marked as Exhibit Number 3. Can you please tell me if you can identify that document?
A. It is a document entitled, "Questions and Answers About United Water's IMAP," dated March 11, 2002, and it is marked as draft.
Q. Just to represent to you, Mr. Wyatt, this

is a copy of a document that you provided to me before your deposition commenced. Do you know who prepared this document?
A. I believe it was compilation of preparers; our counsel and folks in our office.
Q. Okay. And who are the folks in your office?
A. Primarily, Scott Rhead and I did review it.
Q. Can you tell me the purpose of this document?
A. This was a document which we were preparing in conjunction with a news release that the company put out in regard to the publication of the IMAP document, so it was intended for news media.
Q. Was it ever finalized?
A. I believe it was.
Q. You did not provide a copy of the final document to me this morning. Do you have a copy of that final document?
A. I do not.
Q. Do you know who would?
A. Scott might.
MR. CAMPBELL: Okay. Counsel, can that be provided to me before Mr. Rhead's deposition?
MR. MEYER: If it's available.
MR. CAMPBELL: I would appreciate it if it was provided several days beforehand. Is that a problem?
MR. MEYER: If it's available. I have no idea what the status is.
MR. CAMPBELL: If it's available.
MR. MEYER: Okay.
Q. (BY MR. CAMPBELL) So, in this document, can you tell me what is the -- and you may have already said all you know about it, but what the purpose of the document was?
A. Like I said, I think it was just a FAQ, frequently asked questions, kind of approach to provide news media with some basic information about what the IMAP was and what it was about.
Q. Turning your attention to page 2 of Exhibit 3, Mr. Wyatt, paragraph seven. Take your time -- and you don't need to read it out loud, but take your team to read that paragraph, so I can ask you a question. Tell me when you finish.
A. I'm finished.
Q. Can you tell me who the planning experts were who undertook extensive studies and projections that are described in paragraph seven?
A. I think that is referring, in my mind --

again, I did not write this document, but the first one that jumps to my mind would be John Church.
Q. Anyone else?
A. I think that the company concurred with other folks who put together Boise's comprehensive plan and those kinds of thing. No one else by name jumps in my mind.
Q. I'm just curious. It says, "United Water then retained planning experts." Are there any other planning experts that United Water retained that you can recall?
A. Other than John Church, I'm not aware of any.
Q. Did you have any role in approving the final version of Exhibit Number 3?
A. Yes, I reviewed it.
Q. And is that all? Did you render any decision with regard to its finalization or use?
A. Yes, I did.
Q. What was the decision?
A. To use it in a revised form. I don't know what the difference is between the draft and the finance are exactly.
Q. I don't know. I just don't have the final.
A. Me either.

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Department of Water Resources

Attorneys for Nampa & Meridian Irrigation District,
City of Caldwell, City of Meridian, and the Terteling entities

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND	MOTION TO STRIKE SUBMISSION OF LETTER AND RESPONSE TO JOINT PETITION FOR REVIEW OF DIRECTOR'S STAY ORDER

COMES NOW, protestants Nampa & Meridian Irrigation District and the Terteling entities (hereinafter "Protestants"), by and through their counsel of record Ringert Clark, Chartered, and, pursuant to IDAPA 37.01.01.260, hereby file their *Motion to Strike* United Water Idaho's *Submission of Letter* dated January 13, 2004, and, pursuant to IDAPA37.01.01.270, hereby file their *Response* to United Water Idaho's and Boise City's *Joint Petition for Review of Director's Stay Order* filed on January 8, 2004.

I. MOTION TO STRIKE

On January 13, 2004, United Water Idaho filed a *Submission of Letter* in this proceeding, to which was attached a letter to the Director of the Idaho Department of Water Resources from the Public Works Director of the City of Nampa, Idaho. The letter urges the Director to reconsider his

decision to stay these proceedings.

The letter has absolutely no place in these proceedings as the City of Nampa is not a party to this proceeding, has not filed a petition to intervene, and is not listed as a witness by any party hereto. United Water's Submission is simply nothing more than an improper attempt to influence the Director's decision on the pending *Joint Petition for Review of Director's Stay Order*. Accordingly, the letter should simply be stricken from the record.

II. RESPONSE TO JOINT PETITION FOR REVIEW OF DIRECTOR'S STAY ORDER

FACTS

UWID submitted its Integrated Municipal Application Package which encompassed the transfers of 93 water rights (including both licensed water rights, and beneficial use claims) and amendments to 19 permits on May 14, 2001. Protests were filed, discovery conducted, and a scheduling order issued. On January, 22, 2003, UWID filed its Notice of Withdrawal of Four Applications for Amendment of Permit From the IMAP, resulting in the removal of four applications to amend permits from this proceeding. Therefore, IMAP currently consists of applications to transfer 93 water rights, and applications for amendments of 15 permits. *Integrated Municipal Application Package* (as amended April 9, 2003), p. 1.

UWID states that the majority of its water rights are already "licensed for a municipal purpose of use." *Id*, p. 18. This is true. Of the 93 water rights subject to applications for transfer as part of IMAP, 63 are already held exclusively for municipal purposes of use. *Id*, Tab J. The other 30 rights for which applications for changes in use have been filed are currently held for one or more of the following purposes: domestic, fire protection, irrigation. Several water rights that are held as

domestic, fire protection or irrigation water rights, are also held for municipal purposes.

According to UWID, "[t]he IMAP establishes a planning horizon of fifty years. If the IMAP is approved by the Department, this will authorize UWID to acquire water rights for its portfolio sufficient to serve reasonably anticipated needs over the next fifty years. Water rights held for this purpose pursuant to a [*sic*] such a documented planning horizon are expressly declared to constitute "beneficial use" of the state's water." *Integrated Municipal Application Package* (as amended April 9, 2003), p. 5.

The total quantity of water authorized under water rights which are subject to either a transfer or permit amendment application as part of the Integrated Municipal Application Package is 302.84 cfs. *Integrated Municipal Application Package* (as amended April 9, 2003), p. 50. Therefore, according to UWID, it seeks to "change water rights and/or permits totaling 155.34 cfs of its portfolio of water rights" in order to hold those water rights for its "planning horizon needs." *Id.* UWID based its projections of the amount of water necessary to meet its future needs on the document entitled "United Water Idaho Monthly Water Demand Forecast: Annual Summary, 2000 to 2050, with Tiered Price Increases until 2021." Affidavit of Charles L. Honsinger, Ex. A (Deposition of John Church), p. 131, lns. 15 - 21. According to the Demand Forecast on which it based its projection of future needs, UWID will need 304.4 cfs to satisfy water demand on "peak days" in the year 2037. See *Integrated Municipal Application Package*, (as amended April 9, 2003), Ex. A., p. 4. After 2037, UWID's projected future needs continue to increase beyond the 302.84 cfs subject to the IMAP proceedings up to a maximum of 406.2 cfs in the year 2050. Through this proceeding, UWID is seeking authorization to acquire water rights up to the quantity of 406.2cfs,

and hold those rights for its future needs until 2050. *Integrated Municipal Application Package* (as amended April 9, 2003), p. 5.

The Director issued his *Order re: Motion for Stay* (hereinafter "*Order re: Stay*") on December 18, 2003. The Director correctly found that the IMAP proceedings should be stayed because proceeding in both IMAP and the SRBA could cause a "double expenditure of time and funds" for the parties and IDWR, and because the IMAP application needs to be considered in its entirety, and not piecemeal as UWID would prefer.

UWID argues in its *Joint Petition* that a stay in the IMAP proceedings will prejudice them, will not result in a double expenditure of funds, and will chill interest in long term planning by municipalities. UWID's arguments are based upon improper interpretation of the 1996 Municipal Water Rights Act, and upon an apparent sense that it is somehow entitled to prevail in this proceeding based upon the amount of money it has allegedly spent attempting to have its filing approved. The Director should ignore UWID's arguments, and deny the request to move forward with a portion of the IMAP proceeding.

ARGUMENT

A. A Planning Horizon Cannot be Considered or Approved for Non-Existent Water Rights

United Water is attempting, through this process, to have its proposed 50 year planning horizon "approved" before the proposed transfer of its water rights is approved. However, United Water's proposed planning horizon exceeds the time period within which its needs will be filled by the water rights it currently claims.

United Water Idaho is attempting to put the cart before the horse in this proceeding. It is

trying to show that its reasonably anticipated future needs alone justify its proposed planning horizon without taking into account the fact that there are no water rights to which its proposed planning horizon can apply. In essence, UWID seeks a planning horizon through this proceeding which enables it to acquire water rights it does not yet own or claim. Nothing in Title 42 of the Idaho Code permits such speculation.

The Director and the parties must remind themselves, that at its core, UWID's Integrated Municipal Application Package is nothing more than a transfer/permit amendment proceeding, and that the statutes and established procedures attendant to those types of proceedings must continue to be followed in this matter. When UWID's proposed transfers and permit amendments are evaluated under the proper legal standards, it becomes clear that it cannot obtain a "planning horizon" for non-existent water rights.

I.C. §42-202 states that "[a]n application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied" by information establishing that the planning horizon and "reasonably anticipated future needs" are consistent with the definitions and requirements in Chapter 2, Title 42, Idaho Code. I.C. §42-222 similarly provides that when "the water right is to be changed to municipal purposes" and held for reasonably anticipated future needs, the applicant must must provide information establishing that the planning horizon and "reasonably anticipated future needs" are consistent with the definitions and requirements in Chapter 2, Title 42, Idaho Code. Both I.C. §§42-202 and 42-222 contemplate proceedings in which the proposed water right or transfer are evaluated in the context of an existing water right (or in the case of an application to appropriate - a concrete proposal to create a new water right). Nothing in either of those statutes

in any way suggests that a "planning horizon" or "reasonably anticipated future needs" are to be approved outside of the context of a water right against which they can be evaluated. In fact, it is ludicrous to suggest that IDWR should consider a "planning horizon" beyond the water rights that UWID is proposing to transfer or amend through this proceeding - it simply makes no sense to do so.

By the same token, because UWID's water rights are subject to evaluation in the SRBA, the Director was correct in stating that such an evaluation "will accomplish a first step necessary for the processing of the transfer applications before IDWR." *Order re: Stay*, p. 2. For example, if United Water's water rights are reduced in the SRBA, the planning horizon that is to be attached to those water rights will also be reduced, because United Water, according to its own projections, will need to use those water rights prior to the end of its 50 year planning horizon. *See Honsinger Affidavit*, Ex. A. To take the example to its logical extreme, if United Water's water rights in the SRBA are reduced such that its existing water rights meet its current need, presumably, United Water would not need to hold those water rights to satisfy its reasonably anticipated future needs, because those water rights would be currently used, and consequently, no planning horizon would be attached to them. Obviously, the Director is correct in his conclusion, and a determination of the nature and extent of UWID's is necessary prior to processing of UWID's transfer and permit amendment applications.

B. No Prejudice to UWID Will Occur as a Result of the Stay

UWID argues that it will be prejudiced because of a stay in the IMAP proceedings based upon its own interpretation of the 1996 Act that such Act imposes burdens on municipal providers. First,

UWID is simply incorrect, nothing in the 1996 Act imposes such burdens. A quick glance (or even a thorough reading) of the 1996 Act reveals no requirement that municipal providers do anything unless they want to take advantage of the Act's provisions. The argument that a stay of IMAP will "chill" planning efforts by UWID and other municipal providers is similarly based upon the false conclusion that the 1996 Act requires municipal provider to do such planning. As discussed above, this conclusion is erroneous. Moreover UWID's argument does not even make sense; municipal providers will be able to (and will) continue to plan for the future needs of their citizens whether or not IMAP is stayed.

Second, UWID's argument that it has expended much money and effort in the IMAP proceeding, and that its planning efforts will be set back by years because of the stay must simply be discounted. The protestants have argued from the beginning of this proceeding that IMAP should be stayed until a determination of UWID's water rights is made in the SRBA . *See Motions to Stay.* UWID's attempts to establish that it has somehow been unfairly "blindsided" are nothing more than desparate pleas for sympathy.

Third, UWID's planning efforts will not be set back by years. It has done its planning; according to its own acknowledgments and arguments, it has sufficient water rights to satisfy its needs well into the future. It simply needs to use the water rights it asserts that it currently holds. Additionally, nothing in the Idaho Code, nor the *Order re: Stay* prevent UWID from either acquiring new water rights by purchase or from filing an application to appropriate new water rights if it believes they are needed. UWID will not be prejudiced by a stay in these proceedings, and the Director should not fall for this false argument.

C. The Director Should Not Accept UWID's Invitation to Explore "Alternative Means of Addressing IDWR's Budget Shortfalls

UWID argues that the Director's concerns that moving forward with IMAP will result in "a double expenditure" of funds by the parties and IDWR is not valid because UWID has already spent its money on Mr. Church, and may have to spend more money to have him do the same analysis all over again. This argument, like many of UWID's arguments, does not make sense. If Mr. Church's analysis is a good, valid effort now, it will be the same a couple of years down the road. In fact, such a delay may assist United Water in that Mr. Church's forecasts may prove to be correct, enhancing the credibility of his analysis. It is only if Mr. Church's analysis is incorrect that another forecast must be made. If UWID is confident in Mr. Church's analysis now, then it should have no concerns about its standing up to future scrutiny.

Of particular concern to the protestants is UWID's offer to consult with the Director about alternative means to explore the Department's budgeting and staffing issues. The protestants do not believe UWID would offer to assist in lobbying the legislature for additional funds for the Department, or assist the Director in finding a different Hearing Officer, but those positions seem implied in UWID's statements. Regardless, the Director should not even entertain the idea of meeting with a party to a proceeding in an effort to solve budgeting and staffing issues solely so that the proceeding may move forward as quickly as the party desires.

D. Conclusion

For the above discussed reasons, the *Joint Petition for Review of Director's Stay Order* should be denied, and the stay already issued in this proceeding should be maintained.

Submitted this 22nd day of January, 2004

RINGERT CLARK, CHARTERED

By _____
Charles L. Honsinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2004, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Department of Water Resources

Attorneys for Nampa & Meridian Irrigation District, City of Caldwell, City of Meridian, and the Terteling entities

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND	AFFIDAVIT OF CHARLES L. HONSINGER IN SUPPORT OF MOTION TO STRIKE SUBMISSION OF LETTER AND RESPONSE TO JOINT PETITION FOR REVIEW OF DIRECTOR'S STAY ORDER

STATE OF IDAHO)
) ss
COUNTY OF ADA)

CHARLES L. HONSINGER, being first duly sworn upon his oath, deposes and says that:

1. I am the attorney of record for Nampa & Meridian Irrigation District, and the Terteling Entities in the above captioned matter.

2. I make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

3. Attached this Affidavit as Exhibit A is a true and correct copy of a portion of the Deposition of John Church, taken on August 14 and 15, 2003.

Dated this 22nd day of January, 2004.

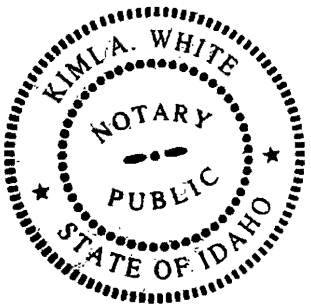
RINGERT CLARK, CHARTERED

By _____
Charles L. Honsinger

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

On this 22nd day of January, 2004, before me, the undersigned, a Notary Public, in and for said State, personally appeared Charles L. Honsinger, known to me to be the person whose name is subscribed above, and acknowledged to me that he executed this affidavit.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



_____
Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 04/04/04

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2004, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Charles L. Honsinger

EXHIBIT A

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED)
MUNICIPAL APPLICATION PACKAGE)
(CONSISTING OF 99 APPLICATIONS FOR)
TRANSFERS OF WATER RIGHTS, AND 13)
APPLICATIONS FOR AMENDMENT OF)
PERMITS) IN THE NAME OF UNITED)
WATER IDAHO, INC.)
)

DEPOSITION OF JOHN CHURCH

VOLUME I

AUGUST 14, 2003

REPORTED BY:

NANCY SCHWARTZ, CSR NO. 483

Notary Public

THE DEPOSITION OF JOHN CHURCH was taken on behalf of Pioneer and Settlers Irrigation District the offices of Moffatt Thomas Barrett Rock & Fields, Chartered, located at 101 South Capitol Boulevard, Boise, Idaho, commencing at 9:00 a.m. on August 14, 2003, before Nancy Schwartz, Certified Shorthand Reporter and Notary Public within and for the State of Idaho in the above-entitled matter.

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in this forecast, that the population is going to flow into those adjacent TAZs.

So, we're going to see ones where COMPASS stops start to fill up in the 50-year forecast. Some of that occurs down in this direction of southwest Boise. Most of it occurs to the west of Cloverdale Road. Some of the densities increase, but where we have some single-family growth going this direction, we still have some --

Q. Going which direction?

A. Southwest Boise. We still have some room in west Boise, essentially from Five Mile to Eagle, to be infilled thus far, still available in United Water's planning area. We'll see household growth occurring there, we'll see some household growth in this 50-year projection occurring out in southeast Boise.

But the mix of multifamily/single family does not get out of whack so that the single family is less, percentage wise -- total number of households -- than it is today.

Q. Okay. And in terms of increasing the densities in the TAZs that you forced households in the future to go to, do you know which TAZs were the recipients of those forced households?

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Is it in your appendix?

A. Not specifically, no. Not specifically.

Q. Okay. Well, then, how was that process conducted?

A. That process was conducted by essentially examining which TAZs COMPASS had projected population to go into, what were the changes in population and households over time. And then, in that initial period where COMPASS had done all their analysis about population growth and planning areas and densities and zoning requirements, population was then -- growth over and above that was forced into other TAZs outside of that area. So, perhaps adjacent TAZs that still were not full.

In the 50-year period, most of the growth still continued into adjacent TAZs that were not full. A little bit of it crept back and lifted the rest up by higher densities.

Q. In the core?

A. Not necessarily in the core but throughout the area, throughout the area.

Q. I see. Okay. So, the bulk of the forced households then were in the southwest fringe, the southeast?

A. No, not the southeast.

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Q. Okay.

A. Not the southeast. I essentially stuck with COMPASS's projections for the southeast, what was going to occur there.

Q. Okay. What about immediately south of --

A. No. Not --

Q. Excuse me. Let me finish.

A. I know where you are going, but okay. I'm sorry.

Q. Immediately south of the Boise City urban-service planning-area boundary?

A. By that, do you mean towards Gowen Road, Pleasant Valley Road, Kuna-Mora Road, south?

Q. Yes. Yes. Towards that area.

A. I did not force any households out there. COMPASS does not project any households out there, and I would agree with their projection. I don't think it's going to occur.

Q. Okay. All right. So, that's not reflected in your projections as to substantial increases --

A. Not substantial increases. There's increases out there, but they're not substantial increases.

MR. CAMPBELL: Okay. And the map that we're looking at here -- I hate to take if from you,

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so perhaps counsel can provide a duplicate.

MR. MEYER: We have. This is the same map that you've had for a year.

THE WITNESS: It's the same one as that. It's just a different --

MR. CAMPBELL: It's a different date.

THE WITNESS: It was just printed off the system -- no, that's --

MR. CAMPBELL: Okay.

MR. MEYER: This is the one that is attached to the IMAP itself.

MR. CAMPBELL: That's fine. I appreciate that clarification. But I don't want to take this particular one from Mr. Church as an exhibit. So, we'll just move on and perhaps we won't need to do that.

Q. (BY MR. CAMPBELL) So, in terms of your calculations, Mr. Church, for the TAZ areas, and your projections out in population, did you rely upon the map that is before us today?

A. To identify the boundaries, yes.

Q. Okay. The boundaries of the TAZs?

A. Well, I didn't need this map to identify the boundaries of the TAZs. I have a map of just TAZs. But the boundaries that specifically are for

United Water's planning area for the IMAP.
Q. Okay. So, you relied upon this for that purpose?
A. Yes.
Q. Did you rely on this map for any other purpose?
A. No.
MR. CAMPBELL: Okay. Well, let's fold it up for now. I think that answered that series of questions.
Q. (BY MR. CAMPBELL) Mr. Church, when you forced out -- excuse me, I will let you fold that up first.
When you did this forcing of households out of the TAZs that COMPASS had identified into other TAZs for your 50-year projection, did you utilize any kind of formula or equation, or was it based mostly upon your professional judgment?
A. It was based upon judgment. Most growth, in my view, and the growth that we've seen historically in Ada and Canyon Counties has gone adjacent to existing areas, so it tends to be contiguous to already-growing areas. There are a few exceptions but, by and large, very few exceptions.

Q. All right. Well, the cities try to do that. It makes sense.
Okay. Turning back to page 3. I know we're making slow progress, but this is very complicated and I'm very dense when it comes to these types of things. So, I hope you'll bear with me.
The column that suggests or is entitled, "September Peak-Month Water," can you tell me what that caption means?
A. In the analysis of -- forecast historic analysis and forecast of water production and use. In other words, total system water, sales, losses, and company use. That is projected by month.
Summed here on this summary sheet on page 3 and then, subsequently, on page 4 and page 5 -- which are other summaries of different forecasts, different scenarios of the same forecast -- September was found to be the peak month for water production, typically. Now, that can vary back and forth. Usually August/September, somewhere in that time frame. But more often than not, September is the parameter. So, we identified that peak month.
The key, though, to the whole process is peak-day water production. That one-time

daily-production figure. And even that is an understatement, if you will, a minimization of what United Water's demand would be. I mean, really, technically, it is an understatement. It's an annual-peak day. Well, that's an average for the day. Peak-hour production is probably a more reflection of what they have to produce, capacity wise. So, this tends to understate it by averaging it for a day.
In the electricity business, peak hours are the key. Do you have enough capacity to meet peak hour? Because if you don't, the lights go out. This -- this is somewhat different in that it's not instantaneous production and demand. But this peak day tends to minimize, essentially, the capacity they have to have.
In trying to find that peak-day number, historically, United Water supplied me with a series of peak-day production numbers for a period of years.
Q. Is that information in the documents you --
A. It is in Appendix A and -- so it's -- but it's in here, if I -- would -- find the page here. "Historic-Production Totals," page 177.
Q. Okay. Now, the actual documentation

supplied by United Water is not contained in that document; is that correct? Or is that actually from them?
A. It's from them.
Q. Okay. So, page --
A. 177 --
Q. -- 177?
A. Yeah. "United Water Idaho Identification of Annual Peak Day Water Production, 1982 through 1999."
Q. And the handwritten notations on the left-hand side, are those yours?
A. No. No. Someone from United Water. I don't -- no. They gave me the date for them -- key --
Q. You don't know who made those notations?
A. No, I do not. I do not.
Q. What significance do those notations have to you?
A. The day of the year that that peak occurred on. So --
Q. Oh, so -- okay.
A. That is, 7/28/1994, for example.
Q. Okay. So, the actual date of max day was on the document when you received it?

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A. Yes, it was already on there.
Q. Okay. And who provided this to you, which individual at United Water; do you know? Was it Mr. Reading?
A. Most of the documents came through Mr. Reading.
Q. Okay. All right. So, how did you utilize this particular document in terms of the peak-day and peak-month projections?
A. Okay. That -- those were -- those were peak-day actual-historic numbers. I needed to find a relationship between peak day, and some parameter of production. And what was found, that -- that peak day -- well, it may occur in January, it may occur in August -- I'm sorry, January.
Q. I was going to say --
A. I misspoke. Sorry. I misspoke. July. I got my "J" months mixed up.
It may occur in July, it may occur in August. But in terms of billing-cycle numbers, it's probably going to show up in a September billing month. And billing month -- the largest month for the year is going to be September.
And in doing a whole host of examinations -- okay, let's say peak day as a function of June

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sales, as a function of July sales, as a function of the composite of the two, as a function of August sales. It turns out that peak day as a percentage of the biggest peak cumulative sales for the year, September turns out to be a pretty constant percentage of September peak-month sales.
And so, that's how that parameter was built, since we were taking that September sales month and finding over historic periods a factor that builds a relationship between that large sales month and that peak day. And that peak day is usually within that sales month.
Q. Okay. And that's the historical period from 1984 through --
A. 2000.
Q. -- 2000?
A. Yes.
Q. Okay.
A. Yes. And from -- so, given that parameter that was established over historic numbers -- that projected September month, the biggest sales month of the year -- leads to the projected biggest production day of the year. Or an estimate of it. And even that is minimized because total demand during that day is probably actually higher than the

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average for the day.
Q. But they've got some storage, too --
A. Well, that's true.
Q. -- and that's part of it.
A. That's true.
MR. MEYER: I apologize for interrupting. May I ask a question in clarification -- I'm just confused --
MR. CAMPBELL: Well, you'll have your --
MR. MEYER: On what September means --
MR. CAMPBELL: You'll have your chance when I'm finished.
MR. MEYER: All right.
MR. CAMPBELL: I would rather finish my examination and then you can have your chance to examine him.
Q. (BY MR. CAMPBELL) From the standpoint, Mr. Church, of the annual peak-day water column, if you could -- this is on page 3. If you could describe for me the last column of figures. That is the -- I assume that's the average cubic feet per second --
A. Yes.
Q. -- during the peak --
A. Day.

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Q. -- day. Each year; correct?
A. For that year.
Q. For that year.
A. Yes.
Q. Yes. For 2000, it's 146.8 CFS.
A. Yes.
Q. For 2001, it's 151.5 CFS?
A. Yes.
Q. Okay.
A. The projected.
Q. Projected. And does that projected figure include the weather weighting and -- what is it, lag?
A. The lagging of the -- lagging and weight. It's included in the sense that the residential forecast includes that. The residential forecast is by month. The commercial forecast includes that, and it's by month. That, in turn, by month, is going to come up to a September forecast for residential, commercial, public --
Q. Right.
A. -- and others. And they are all going to have those factors in there --
Q. Okay.
A. So, it's --

Q. Okay. Well, I just wanted to --
A. -- and prices.
Q. And prices?
A. And prices.
Q. Well, I guess we haven't gotten to that aspect yet. Where is that reflected in these projections? You have the 1.3 percent real-price increases. But I can't see from page 3, for example, how that has an impact upon these total numbers of projections of water usage.
A. Yes, you can't see that from page 3. Page 3 of that is a summary of a forecast. It predicts water use by month. And if I recall correctly, it was page 130 of Appendix of A.

And on page 130 of Appendix A we have, again, a "Static Simulation of Estimated Regression Equation at the Mean for Residential Water Use Per Customer." So, essentially this is a statistical equation that was derived for water use per customer.

The second term down -- there's a line in the middle of the page -- "Regression Coefficients, Independent Variables." Looking at the middle of the page -- this is, essentially, the regression equation represented here for residential water use

per customer, and at the middle of the page, there's a line crossing -- or the top half, middle of the page, "Regression Coefficients," and some numbers, a column of numbers underneath that. And the "Independent Variables" next to that, and a column of descriptions of these independent variables underneath that.

The second variable down, with a coefficient of minus 10.455, is the marginal cost of 100 cubic feet of water in constant, real 1999 dollars. The price term is in this regression analysis -- this forecast, so to speak -- of residential water use per customer.

So, as the price increases in real terms -- you can see it's got a negative term, as the price increases in real terms over and above the rate of inflation, it will have the effect of lessening water use. People respond to high prices by using less of it.

And so, it is built into the equations. It's built into the residential forecast, a price variable, so to speak.
Q. Is it built into the other forecasts?
A. It is built into the commercial forecast and not to the other part. So, residential,

commercial.
Q. And is it on the next page, page --
A. Commercial is on page 131.
Q. Okay.
A. And the second term down there, again, listed under "Independent Variables." And this is "Commercial Water Use Per Customer, Static Simulation of the Estimated Regression Equation at the Mean," page 131.

The second term down is "Marginal Cost of 100 Cubic Feet of Water, cost at $99," and tested for -- you know, moving the effects of inflation, real prices. And it has a term of minus 18.253, which reveals a stronger response to price changes in real terms in the commercial class than it does in the residential class.
Q. Explain to me how the negative number is utilized and what that represents.
A. The negative, essentially, is the statistical analysis, indicates the response that water use per customer will have by a change in that variable. So, you've gone through a historic analysis of, say, water use per customer over a long period of time -- '84 through mid-year 2000 -- and water use per customer as a function of a term cost

to water, marginal cost -- so that's a cost of the next 100 cubic feet -- precipitation, average temperature, and then these series of seasonal variables, these binary variables that reflect different seasons of the year.

The analysis tells us, going through that statistical analysis, it will come out as a result that says as this term goes up -- marginal cost of water, use -- water use per customer, goes down. Now, in and of itself that's not quite enough. The regression term could tell me the opposite result, too. But the theory says, economic theory says, as prices increase, the quantity demanded will tend to decrease. So, if prices go up, people want less of it. We will see that occur at the grocery store, we see that occur at the gas station. As prices go up, we want less of it. Inverse relationship. This term should have a negative sign. It does. It fits the theory. And it fits the theory quite well. Amazingly well. Sometimes these theories can have some noise to them, but this is a very strong response to prices.
Q. Okay. Explain to me how the numbers on the left-hand column, far left-hand column on page 130 of Exhibit A, how those are calculated together.

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Are they simply added together or --
A. No.
Q. -- subtracted?
A. No. These are, essentially, looking at the response of a change in that independent variable, what it does to the dependent variable, the dependent variable being hundreds of cubic feet of water use per residential customer in each bimonthly billing period. In other words, water use per customer in that billing period. And the June variable, if it happens to be June, would have an effect -- the June variable at that point in time, if it is the month of June, would have a value of a one, and we would see water use per customer increased by 14.516 100 cubic feet per residential customer. Just because of the seasonality of what's occurring there, that month of June, that desire to use water more during that month than you would, say, in January. Okay?

The precipitation variable. If that were to change and were to increase, more precipitation -- that's got a negative sign -- that means that people would use less water. It's typically -- that's logical. As it rains, people would irrigate less.

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And the temperature variable. If that were to go up, then people would tend to use more water. It's got a positive sign -- or it has no sign, but a positive implied. So, as temperature increases, that would indicate that water use will increase. And the same thing with the prices of water. If the price of water increases in real terms, adjusting that for inflation, then use per customer will go down.

This -- page 3 assumes 1.3 percent real-price increases every year between 2000 and 2021. Now, while that's a simulation, that's not the simulation that United Water used to base their IMAP upon. That is one scenario, that's all.
Q. Okay. Which assumption did United Water use to base their production projections on, then?
A. Page 4. "United Water Idaho Monthly Water Demand Forecast: Annual Summary, 2000 to 2050, with Tiered Price Increases until 2021." Thereafter, constant real prices. In other words, no real-price increases.

Page 3, being a simulation -- a different scenario, so to speak -- it assumes 1.3 percent real increases in prices every year between 2000 and 2021. Well, that's all well and good, but that's

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not reality. Reality is, United Water is going to go to the Public Utility Commission for a price increase on a periodic basis, not every year. This is a simulation that looks at the effects if you did it every year, if you went for a price increase every year, but they won't do that.
Q. What is "this"? You say "this" is --
A. The page 3 simulation. This page 3 simulation. And it is a just a simulation to see the effects of price increases in real terms, over a period of time. Now, 1.3 percent, I believe, was based upon -- if I recall correctly -- historic price increases on average over a period of, like, 15, 16 years. You know, what's the average number over that long period of time, historically. What would happen if that occurred for the next 20 years.

The reality is, though, that United Water will do periodic rate increases. They will go to the Public Utilities Commission and request a rate increase as they add infrastructure that needs to be put into the rate base as they have costs that change. And they probably will not go back year after year after year after year and they say -- you know, on January 1, file another rate-increase request with the Public Utilities Commission. So,

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we will have a stepped sort of function for price increases. Now, that's nominal. It will go up by 5 percent, 6 percent, 7 percent, maybe 15, 20 percent.

And then, over time, as they don't go in for a price increase, well, inflation occurs and the real price goes down as we adjust, inflation of all goods and services goes up, and it becomes cheaper and cheaper and cheaper to us as inflation occurs.

So, the simulation that United Water used was essentially the simulation that's summarized on page 4 for their IMAP application. Now, page 3's -- they're both exactly the same, in terms of column headings and everything, but the results on page 4 are the ones that were used as the basis for the IMAP applications.
Q. So, what is page 3 for, then? Why is it here?
A. Scenarios. It was listed as a scenario, the base-case forecast that is used is middle scenario. One's a little lower, higher price increases -- you know, not really absolutely higher, but in terms of up-front present value, higher price increases.

The one with no price increases, listed on page 5 -- no real price increases -- has a higher

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF 99 APPLICATIONS FOR TRANSFER AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS, KNOWN AS THE INTEGRATED MUNICIPAL APPLICATION PACKAGE (IMAP) BY APPLICANT UNITED WATER IDAHO, INC.	**ANSWER TO UNITED WATER AND BOISE CITY'S JOINT PETITION FOR REVIEW OF DIRECTOR'S STAY ORDER**

The Boise Project Board of Control and its member districts, Boise-Kuna Irrigation

District, Wilder Irrigation District, and Big Bend Irrigation District ("Board of Control"), by and through their counsel of record, hereby respectfully submit this answer to *United Water and Boise City's Petition for Review of Director's Stay Order* ("*Joint Petition for Review*") pursuant to IDAPA 37.01.01.270, Rules of Procedure of the Idaho Department of Water Resources. The Board of Control requests that the Director deny the Joint Petition for Review for the reasons discussed herein.

Argument

I. The Stay Order is not prejudicial to the Petitioners and does not result in unfair hardship.

Petitioners claim that a complete stay of the proceedings is prejudicial and imposes "unfair hardship" due to the immense time and expenditures used in compiling the application. *Joint Petition for Review*, at 6-7. The burdens imposed upon United Water in submitting this application package are imposed by statute and would be applicable regardless of the Stay Order. As an applicant undertaking a change in a water right, that applicant bears the burden of demonstrating that its application does not violate the criteria of I.C. §42-222(1). *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 418 (2001). The statute requires an applicant to present sufficient evidence so the Director can make an informed determination of the transfer application. *Id.* Additionally, where an applicant is seeking to change the nature of use of a water right to municipal purposes "...and some or all of the right will be held by a municipal provider or 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 definition and requirements specified in this chapter." I.C. §42-222(1). As the applicant, United Water chose to undertake

this process and is then required to comply with the statutory requirements.

Petitioners also allege that the 1996 Municipal Water Rights Act encourages municipalities to undertake long term planning efforts. *Joint Petition for Review*, at 7. Although the intention of the 1996 Municipal Water Rights Act is to provide flexibility to municipal providers in obtaining water rights for future needs, the legislation also intended to "...define and limit the authority of municipal water providers to develop and hold water rights for reasonably anticipated future needs and to allow water to be supplied to expanding service areas. This statute addresses future licensing of water rights for municipal purposes (including those currently permitted) as well as future changes in water rights to municipal purposes." *Statement of Purpose*, SB 1535 (1996). The Petitioners, more specifically United Water, claim that this process began in order to bring their water rights into compliance with the Municipal Water Rights Act and the "growing communities doctrine". IMAP, at 4 (April 9, 2003). However, the Idaho Supreme Court has not adopted the terminology "growing communities doctrine." See *In Re SRBA Case No. 39576, Water Right No. 34-10030, Special Master's Report, Findings of Fact; Conclusions of Law*, at 3, n.2 (1997).[1] Idaho courts, nonetheless, have recognized that "special circumstances" may apply to municipal rights. *Id.*

The court has addressed the question as to whether or not a municipality may acquire and hold additional water for supplying future needs when it is also acquiring water to supply existing needs. *Beus v. City of Soda Springs*, 107 P.2d 151, 153 (1940). It held that a municipality has the power to supply water. If, at the time water is acquired to supply existing needs, it is also necessary to acquire water for an additional supply for future needs, a municipality has power to do so. *Id.* In this case, recognizing that a municipality may hold

[1] As the court noted, this clarification was in response to Mr. Meyer's attempt to draw a similarity between Idaho

water for future needs is done in conjunction with a water right application. Common law recognizes a municipality's ability to obtain water for future needs but identifies this power in conjunction with an application for existing needs. The Municipal Water Rights Act is a codification of this case law. "The appropriation doctrine as applied throughout the western states provides flexibility for municipal providers to obtain and hold water rights needed to assure an adequate water supply for reasonably anticipated future needs. While this concept is recognized in Idaho case law, it should be further described in statutes in order to guide the actions of the Department of Water Resources, water users and the courts, and to assure that the use of this concept is appropriately controlled." *Statement of Purpose*, SB 1535 (1996). As a result, the purpose of the Municipal Water Rights Act is to recognize that a municipality can hold water for reasonably anticipated future needs. Determination of whether or not an applicant meets the statutory requirements and definitions is then made in conjunction with an application for permit or transfer.

The purpose of the Municipal Water Right Act is to address future changes to water rights or future applications for permit for a water right that includes water being held for not only current use but also a quantity held for future needs. As indicated in I.C. §42-222(1), the determination of whether or not an applicant qualifies as a municipal provider as well as complying with the definitions of reasonably anticipated future needs, service area and planning horizon is made in relation to an application seeking to change the nature of use of a water right to municipal purposes.[2] Determining compliance with the statutory definitions of reasonably anticipated future needs and a planning horizon is to be made in conjunction with an application, as was recognized in the *Stay Order*. "It is evident that Idaho Code §42-222 anticipates that the

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case law and other states like Colorado. *Special Master's Report,* at 3, n.2..

determinations relating to the planning horizon and the reasonably anticipated future needs be made in conjunction with a transfer proceeding." *Stay Order*, at 2. This statement is consistent with the Municipal Water Rights Act. A determination of future needs and a planning horizon can not be made separate from an application or transfer of a water right related to those needs.

II. Petitioners allegation of unfair burdens and due process violations are not ripe for review.

Petitioners claim that the Stay Order results in denial of findings promised under the Municipal Water Rights Act as well as a violation of due process. *Joint Petition for Review*, at 8-9. However, issuance of the *Stay Order* does not result in final determination of the application. An interlocutory order "...are orders that do not decide all previously undecided issues presented in a proceeding, except the agency may by order decide some of the issues presented in a proceeding and provide in that order that its decision on those issues is final and subject to review by reconsideration or appeal, but is not final on other issues." IDAPA 37.01.01.710. The only issue referred to the Director for his review was the *Order Re Motion for Stay and Scheduling Order* of November 12, 2003. *Order Re Motion for Stay*, at 1. The Director has not denied the application or addressed the issues of future planning needs with this Stay Order.[3] At this time, the Petitioners have not been deprived of the right to have those findings made by the Department, but rather the findings pertaining to the planning horizon and reasonably foreseeable future needs has been stayed due to the overlap with the SRBA determinations.

III. Impact from the Stay Order upon United Water's planning efforts as well as upon other municipalities' long-term planning is unfounded.

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[2] The same provision is included in I.C. §42-202(2) regarding an application to appropriate water.
[3] See also *In Re SRBA Case No. 39576, Order on Challenge (Consolidated Issues) of "Facility Volume" Issues and "Additional Evidence" Issue*, at 28 (1999) (not be denied due process protection when the cause of action has not yet matured).

Petitioners allege that the Stay Order will inhibit United Water's ability to meet demands of its customer base and it will have to submit other applications that may require "1996 Act determinations." *Joint Petition for Review*, at 9. However, based on information in its own application, United Water has a total of 302.84 cfs in its current portfolio.[4] IMAP, at 50 (April 9, 2003). The immediate demand is only 147.5 cfs. *Id.* Therefore, there is 155.34 cfs to serve future demand. *Id.* Even based upon its own projections, the current portfolio would supply any future demand through 2037. Attachment A, IMAP, at 3. As a result, the *Stay Order* will not hinder the Petitioners ability to supply water for future needs. Validation of these rights in the current portfolio does impact the proceeding of the IMAP in that it is necessary to determine the extent of water rights available for current and future use.

The Municipal Water Rights Act allows a municipal provider to hold a water right to serve reasonably anticipated future needs. I.C. §42-222(1). To make this evaluation, the applicant has to provide the department sufficient information to determine that the definitions and requirements of being a municipal provider, reasonably anticipated future needs, service area, and planning horizon are met. *Id.* This determination is made on a case-by-case basis. For example, 'planning horizon' is defined as "...the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider." I.C. §42-202B(7). Although the Petitioners may intend for the IMAP to serve as an example for other municipalities or that a regional application may be filed, the statutory provisions require the Department to review an application for permit or transfer that

[4] The determination of the total amount in the current portfolio is dependent upon the findings of the SRBA and evaluation of the issues of forfeiture and abandonment. This reference does not constitute an acceptance of the amount referenced in the IMAP without further determination by the SRBA.

includes holding a portion of that water right for reasonably foreseeable needs on an individual basis. Although the IMAP proceeding may serve as precedent, applications by other municipalities as well as by United Water will have to stand on its own merits.

In addition, if the IMAP is to serve as the threshold requirement for other municipalities seeking to hold water for future needs, it is a heavy burden to impose. As the Petitioners state in the Joint Petition, years of work and expenditure were used to finalize the IMAP. *Joint Petition for Review*, at 7. This expense was passed to ratepayers and this investment culminated in the IMAP. *Id.* However, other municipalities may not have the rate base or ability to invest the years and monies in developing complex models like those used by United Water. Using the IMAP as an example and basis for other municipalities to proceed in obtaining water rights to hold for future needs could be unfair. Additionally, the regional focus intended by Petitioners is not a factor in the Department's determination and evaluation of the IMAP.

IV. Determination of United Water's rights in the SRBA is necessary before proceeding with the IMAP.

Petitioners claim that it is not necessary to have the SRBA proceedings complete prior to considering the IMAP, particularly the issue of the time period it should plan for and quantification of its customers' future needs. *Joint Petition for Review*, at 11. However, processing in the SRBA will not significantly hinder the planning efforts of United Water. At this time, the Department's forecast for reporting claims in Basin 63 is 2004. See IDWR Forecasting for SRBA. The additional time for completion of the SRBA process will not impair United Water's ability to supply water for pending future needs. United Water has not demonstrated an immediate harm as a result of the Stay Order.

In addition, it is necessary to have a final, judicial determination of United Water's current portfolio prior to moving forward to consider what may be necessary for future needs.

United Water seeks a quantification of its future needs and approval of the planning horizon so that further planning can begin. *Joint Petition for Review*, at 12. However, determination of the existing portfolio is necessary before approval of applications seeking to hold water for future needs can be evaluated. Otherwise, United Water's attempts to obtain or lock up water resources for long-term future needs would be speculative and possibly unnecessary depending upon the outcome of the SRBA.

Petitioners also contend that if the Stay Order is not modified, the result will be double expenditure in the future as the projections made in relation to the IMAP may be obsolete. *Joint Petition for Review*, at 11-12. Determination of whether or not an application is sufficient and complies with the definitions of I.C. §42-202B is made pursuant to the application at hand. As previously stated herein, evaluation of a municipality's application that includes a portion of water for future needs is made in relation to that application and is not a separate, independent analysis. If the Stay Order is modified, resources will be inefficiently used due to the overlap of issues with the SRBA proceedings.

Conclusion

The Joint Petition for Review should be denied. The Stay Order is not prejudicial to the Petitioners and has not resulted in an unfair burden or denial of due process. The interlocutory Stay Order is by nature not a final determination of the Petitioner's rights. As a result, the claim that due process has been violated is not ripe for review at this time.

The consideration of whether or not Petitioners have met the definitions of "reasonably foreseeable future needs" and have defined an acceptable "planning horizon" can not be made by itself and separate from an application for transfer. The intent of the Municipal Water Rights Act is to allow a municipality to hold water for future needs. To do so, it has to be determined

that the applicant complies with the definitions and such an evaluation is made in conjunction with an application for permit or transfer. A hearing addressing solely those definitions violates the statutory provisions.

This proceeding, the IMAP, should not serve as a regional determination for other municipalities of what is acceptable to the Department regarding 'reasonably foreseeable future needs' and a 'planning horizon' as those determinations are made on an individual basis. Denial of the *Joint Petition for Review* will not hinder other municipalities and will not prevent those entities from moving forward with their individual planning efforts. As for United Water, it has submitted evidence in its own application that the current supply is sufficient for years to come. Staying the proceedings until the SRBA evaluates the claims will not result in harm to United Water.

Due to the reasons discussed herein, the Board of Control respectfully requests the Petition for Review be denied and the Stay Order remain in full effect.

DATED this 22nd day of January 2004.

BARKER ROSHOLT & SIMPSON LLP

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Amy D. Chestnut

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2004, I caused a true and correct copy of the foregoing ANSWER TO UNITED WATER AND BOISE CITY'S JOINT PETITION FOR REVIEW OF DIRECTOR'S STAY ORDER, served by the method indicated below, and addressed to the following individuals:

United Water Idaho, Inc.
Christopher H. Meyer
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City of Caldwell, City of Meridian, and the
Terteling entities
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Cities of Eagle, Kuna, Middleton
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Amy D. Chestnut

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Department of Water Resources

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Attorneys for the Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the Matter of United Water Idaho's Municipal Application Package, United Water Idaho, Petitioner	)	**RESPONSE TO UNITED WATER AND BOISE CITY'S PETITION FOR REVIEW OF DIRECTOR'S ORDER RE STAY**

The Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District (collectively referred to as "Protestants"), by and through their counsel of record, MOORE SMITH BUXTON & TURCKE, CHARTERED, hereby respond in objection to United Water and Boise City's Petition for Review of Director's Stay Order and move to strike references to confidential settlement negotiations and the letter written by a non-party.

INTRODUCTION

On December 18, 2003, the Director of the Department of Water Resources issued an interlocutory Order Re Motion for Stay in the Matter of United Water's Integrated Municipal Application Package. The Order stayed United Water's transfer proceeding in full pending the issuance of partial decrees on United Water's water rights in the Snake River Basin Adjudication (SRBA). On January 8, 2004, United Water and the City of Boise filed a Petition for Review of the Director's Stay Order. The Petition asks that the Director vacate the complete stay and order

a partial stay so that United Water may litigate certain issues while its water rights are decided in the SRBA.

The Petition disclosed confidential information discussed during the parties' settlement negotiations. The Petitioners disclosed this confidential information despite the privileged nature of the information and without first obtaining the Protestants' permission. Subsequent to filing the Petition, United Water filed a letter from the City of Nampa in support of the Petition. The City of Nampa is not a party or public witness in this contested case.

LEGAL STANDARDS

1. Petition for Review of Interlocutory Order

> Any party or person affected by an interlocutory order may petition the officer issuing the order to review the interlocutory order. The officer issuing an interlocutory order may rescind, alter or amend any interlocutory order on the officer's own motion, but will not on the officer's own motion review any interlocutory order affecting any party' substantive rights without giving all parties notice and an opportunity for written comment.
>
> Department Rule 711.

2. Disclosure of Confidential Settlement Negotiations And Motion To Strike

"Settlement negotiations in a contested case are confidential, unless all participants to the negotiation agree to the contrary in writing." Department Rule 610. A tribunal may strike "any redundant, immaterial, impertinent, or scandalous matter." Idaho Rule of Civil Procedure 12(f).

3. Motion to Stay

Anyone affected by an interlocutory order may petition the Department for a stay of the order. Department Rule 780.

4. Participation By Non-Parties

The Department recognizes applicants, petitioners, complainants, respondents and interevenors as parties to a contested case. Department Rule 150; see also Department Rules

151-156. A person who is not a party may participate as a "public witness" in accordance with Department Rule 355. Department Rule 158. Rule 355 defines a public witness as a person, who is not a party, who has not been identified by a party as a witness, who will testify at hearing. Department Rule 355 (emphasis added).

ARGUMENT

I. Motion To Strike

A. The Protestants' Disclosure Of Confidential Settlement Information Is Improper And Must Be Stricken.

The second paragraph of section V on page 13 of the Petition, discloses matters discussed between the parties during confidential settlement negotiations. Since the Protestants have not agreed to disclose confidential settlement discussions, the paragraph should be stricken.

B. The City Of Nampa's Letter Should Be Stricken.

United Water Idaho wrongly submitted a letter from the City of Nampa in support of its Petition. The City of Nampa is not a party to this contested case, has not been designated as a public witness, has not petitioned for intervention, and has not been permitted to participate in this case. Furthermore, the letter was not identified or produced by United Water during discovery and United Water did not disclose the City of Nampa as witness in this matter. Since the City of Nampa does not have a recognized interest in this case, its comments should be stricken.

II. The Petition For Review Of The Director's Stay Order Should Be Denied.

A. A Complete Stay Is Warranted In This Case.

United Water asks the Department to hear and render a decision on United Water's planning horizon and anticipated future needs without reference to United Water's underlying water rights. The planning horizon and future needs issues are not justiciable because they are

not ripe and any decision rendered on the same would be an advisory opinion. Until the underlying water rights are determined, there is no actual case or controversy and the Department should decline to decide the hypothetical issues presented by United Water.

Neither the appropriation or transfer statutes, nor any other statutory provision, provides for the determination of the validity of a planning horizon term or the quantification of a future need outside Idaho Code §§ 42-202 or 42-222. There is simply no forum for the review and approval of a planning horizon term or future needs quantification, or the methodology therefore, other than making an application and completing an appropriation or transfer process. Common sense also mandates the understanding of underlying water rights as a precursor for any future needs analysis. This is especially true in United Water's situation, when so many water rights are questionable. For instance, it is impossible to determine how much water a provider needs if the provider does not know how much water it has.[1] And, if a provider does not know how much water it has, it cannot determine if its future needs projections have been accurate. Therefore it is both lawful and prudent to reserve judgment on future water needs until the quantity of current water rights is known.

Given the circumstances, the actual length of the eventual hearing on United Water's transfers, as proposed by United Water, is of no bearing on the matter. However, it is important to note that there has been no decision on the Petitioners' proposed limitation on the parties' rights to present their cases at hearing. See Petition at p. 4-6. The Protestants have objected to United Water's attempts to limit the presentation of witnesses and restrict the presentation of the Protestants' case.

[1] The Vice President and General Manager of United Water has acknowledged this dilemma. Responding to questions about United Water's plans for the 150 cfs of water alleged to have been forfeited, Mr. Wyatt stated, "I cannot make a plan on their use until I know that they are certain or if they are certain." Depo. of Greg Wyatt at 113-114.

B. The Petitioners Are Not Prejudiced By A Complete Stay.

Contrary to Petitioners' claims, the Department is not to blame for the position United Water finds itself in. United Water has its view of the requirements under the "1996 Act" and United Water's unilateral interpretation of the law must be recognized as just that. The "burdens" allegedly endured by United Water were self-imposed under its version of the law.

For instance, United Water argues the 1996 Act imposes a burden that "municipal providers document and display their entire portfolio of rights for all to scrutinize...beyond that required by the SRBA...[including] highly confidential planning data and strategic information." Petition at p. 8. Actually, no such requirements have been imposed by law. See Title 42, Chapter 2, Idaho Code. A brief overview of the relevant statutory provisions is appropriate at this point.

What the law really says about future planning is that a "planning horizon" is the length of time a municipal provider may hold water to meet future needs. Idaho Code § 42-202B(7). The law defines "reasonably anticipated future needs" as the amount of water needed to serve future needs and is determined using population and planning data. Idaho Code § 42-202B(8). The statutory procedure for obtaining a water right for future needs water is as follows: First, if the applicant (a) desires to change the nature of use to municipal purposes and (b) some or all of the right will be held to serve future needs, then the municipal provider shall produce sufficient information and documentation showing that the applicant qualifies as a municipal provider and the anticipated future needs, service area and planning horizon are consistent with the law. Idaho Code § 42-222(1).[2] If on the other hand, a municipal provider desires to appropriate water for future needs, it must support its application with sufficient information and documentation to show that it qualifies as a municipal provider and the anticipated future needs, service area and

[2] Significantly, United Water's application package seeks to change existing municipal water rights to municipal purposes. Not only does that not make sense, such a transfer is not provided for under the law.

planning horizon are consistent with the law. Idaho Code § 42-202(2). Notably absent from these statutory provisions is any reference to the burdensome requirements contrived by United Water.

United Water has further misconstrued the planning statutes in that it argues that the Department must "rule on a quantification methodology" before any municipal provider can proceed with water planning. Petition at 12. Again, as is clear after reviewing the law, that is not the case. Idaho Code § 202B(8) does not dictate a rigid methodology that must be applied in every case. To the contrary, future need is based on population and planning data within the individual municipal provider's service area. Thus, the methodology would be specific to the individual provider. United Water also claims planning must be "long term," however, Chapter 2, Title 42, Idaho Code, is silent as to what the term of a planning horizon should be. Idaho Code § 202B(7). In fact there is no mention of "long term planning" in the laws related to future water needs at all. Instead, an applicant must provide sufficient information, which information should consider population and planning data and "[t]he length of the planning horizon may vary according to the needs of the particular municipal provider." Id. The nuances of the individual municipal provider play a large role in the development of a planning horizon. Consequently, a rigid methodology should not and need not be developed.

The statutory language governing the permitting of future water needs clearly anticipates the actual transfer or appropriation of specific water rights for future needs so long as the future need can be shown. The statutes do not impose any specific planning term on future planning. This statutory process for future water planning is in place and available to every municipal provider desiring to transfer or appropriate water for future needs -- no matter what happens in this contested case.

C. United Water Has Been Treated Fairly.

United Water claims it has been treated unfairly because of the costs it has incurred during this contested case proceeding.[3] Notably, United Water is the applicant in this case. United Water chose to file its "IMAP;" no one forced United Water to do so. As the applicant, United Water is subject to the jurisdiction of the Department during the pendancy of its applications and contested case proceedings and, like all the parties, must comply with the Department's Orders. Like United Water, the Protestants and their citizens do not like having to incur costs to ensure their interests are protected; however, United Water has been treated no differently than any member of the public.

CONCLUSION

It is United Water's complicated, intrusive and expensive view of municipal planning that has a "chilling" effect on future water planning in Idaho. It is in the best interest of all concerned to hold municipal providers to the statutory standard for water planning rather than United Water's standard. The City respectfully requests that the Director strike the confidential settlement discussion information contained in the Petition and the non-party letter submitted in support of the Petition, uphold the Director's Order RE Stay, and deny Petitioners' request for a status conference.

[3] United Water alleges that the IMAP has cost its ratepayers hundreds of thousands of dollars. Petition at 7. However, it does not appear that United Water's customers have been billed for the IMAP and certainly they should not have been billed for costs associated with shareholder interests. According to representatives of United Water, United Water has not yet filed a rate case before the Idaho Public Utilities Commission for any of the costs associated with the IMAP, but it plans to do so shortly. Depo. of Greg Wyatt at 105-107.

DATED this 22 day of January, 2004.

MOORE SMITH BUXTON & TURCKE,
CHARTERED

TAMMY A. ZOKAN
Attorneys for the Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of January, 2004, I caused to served a true and correct copy of the forgoing RESPONSE by the U.S. mail, addressed to the following:

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TAMMY A. ZOKAN

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the Matter of United Water Idaho's Municipal Application Package, United Water Idaho, Petitioner	)	**AFFIDAVIT OF TAMMY A. ZOKAN**

STATE OF IDAHO)
)ss.
County of Ada)

I, TAMMY A. ZOKAN, based upon my personal knowledge and being first duly sworn upon oath, deposes and says:

1. I am an attorney employed by MOORE SMITH BUXTON & TURCKE, CHARTERED, attorneys for the Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District, in the above-entitled case.

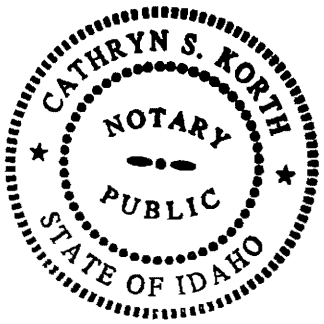
2. I have attached to this Affidavit as Exhibit A, a true and correct photocopy of excerpts of the transcript of the August 18, 2003 deposition of Greg Wyatt. Specifically, I have attached photocopies of pages 1-5, and pages 102-117.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 22 day of January, 2004.

TAMMY A. ZOKAN

SUBSCRIBED AND SWORN TO before me this 22 day of January, 2004.



NOTARY PUBLIC FOR IDAHO
Residing at: Nampa, Idaho
My Commission Expires: 3-6-2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of January, 2004, I caused to served a true and correct copy of the forgoing AFFIDAVIT by the U.S. mail, addressed to the following:

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Boise, Idaho 83701-2773

TAMMY A. ZOKAN

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED)
MUNICIPAL APPLICATION PACKAGE)
(CONSISTING OF 99 APPLICATIONS FOR)
TRANSFERS OF WATER RIGHTS, AND 13)
APPLICATIONS FOR AMENDMENT OF)
PERMITS) IN THE NAME OF UNITED)
WATER IDAHO, INC.)
)

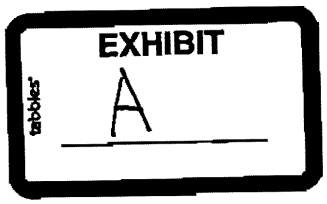
DEPOSITION OF GREG WYATT

AUGUST 18, 2003

REPORTED BY:

NANCY SCHWARTZ, CSR NO. 483

Notary Public



THE DEPOSITION OF GREG WYATT was taken on behalf of Pioneer and Settlers Irrigation District the offices of Moffatt Thomas Barrett Rock & Fields, Chartered, located at 101 South Capitol Boulevard, Boise, Idaho, commencing at 9:00 a.m. on August 18, 2003, before Nancy Schwartz, Certified Shorthand Reporter and Notary Public within and for the State of Idaho in the above-entitled matter.

APPEARANCES

For the Pioneer and Settlers Irrigation District:
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
Attorneys at Law
BY SCOTT L. CAMPBELL
101 South Capitol Boulevard, 10th Floor
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APPEARANCES (Continued.)

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GREG WYATT,
first duly sworn to tell the truth relating to said cause, testified as follows:

EXAMINATION

QUESTIONS BY MR. CAMPBELL:

Q. Would you please state your name, sir?

MR. MEYER: Scott, before we get started, I have a preliminary statement for the record, if I may.

We're here today in response to a 30(b)6 deposition duces tecum filed by Pioneer and Settlers. United Water contends that the information sought is overbroad and burdensome and has filed a motion for a protective order. The Hearing Officer has not yet ruled on that motion.

Pioneer and Settlers has filed a response seeking to justify their need for financial and corporation information about United Water. Pioneer and Settlers state that some of the information sought relates to the issue of water conservation. United Water recognizes water conservation as an issue properly before the Hearing Officer and does not object to discovery legitimately related to that subject. We will not object to inquiries related to

Q. Do you have any information, currently, as to the likelihood of either -- any of those events taking place?
A. I'm not aware of any eminent ones, no.
Q. Are you aware of any long-term actions of that nature?
A. No, I'm not.
Q. Do you know if anyone is at United Water?
A. No, I don't.
MR. CAMPBELL: We're past noon. Let's go ahead and break.
(Noon recess.)

EXAMINATION

QUESTIONS BY MR. SMITH:

Q. Greg, I have a few questions to clarify what I heard this morning. I'm Bruce Smith, representing the city of Eagle and other sorts of municipal entities.
Greg, who at United Water does the work to reach agreements with landowners?
A. They usually submit them, initially, to a fellow in our company by the name of John Lee, his position title is construction coordinator. He is an on-the-ground kind of guy who first interacts

with developers, engineers, and developers as they come in, relative to decision-making on things that are of a nonroutine nature that would be kicked up to one of the engineers and probably to Scott, depending on the circumstances.
Q. Does United Water have an agreement with the Chase Estate out in Eagle?
A. Oh, boy, you know, I don't know.
Q. When you reach agreement with these landowners or developers, do you put that on file with the PUC?
A. When you say, "When we reach agreement with," if we enter into a standard managed-extension agreement with a developer that's already on file with our Commission. I mean, the standard agreement is on file with our Commission, it's part of our rules and regulations. So, if we're entering into a standing managed-extension agreement, no we do not need to submit it again to the Commission. If we were to enter into any kind of a special facility agreement then we would file that with the Commission.
Q. At the time that you enter into the agreement?
A. Yes, at the time the agreement would be

signed.
Q. When do you propose to file a new rate case with the PUC?
A. Our current planning is that we would -- as we move foreward with the construction and bring online the Columbia Water Treatment Plant, which right now is targeted to June of 2005, that investment is going to be a significant enough investment that will warrant us filing for raise, so we would make a filing in conjunction with that plant. And the perfect timing, from our standpoint, would be that the rates would be in effect at the same time the plant came on, so June, '05, we would be seeking new rates.
Q. So, you anticipate your rate case being filed in June of 2005?
A. No, we anticipate having the rate case finished in June, 2005.
Q. So, when do you propose to file it?
A. I can only give you a range of time right now, because it's not a specific thing that we have nailed down hard and fast. Let me think about timelines here for a second and see if I can give a reasonable range. I would speculate that the fall of '04 -- 2004, would be the timeline.

Q. Anything going to be in that besides the Columbia Treatment Plant?
A. Oh, yes, any capital investment that the company has made, up to and including the treatment plant would be included in that case, along with operating expenses and any pro forma relating to those operating expenses.
Q. The cost of the IMAP won't be included?
A. Yes, it would be.
Q. That would be the cost incurred to-date or some other number?
A. We would anticipate including in the rate filing costs associated with that portion -- that which was designated as being in service.
Q. The use and used --
A. Correct. I would expect the Commission to make that determination.
Q. What figure would you put on that right now, what number?
A. Put on what?
Q. How many of the IMAP costs -- when is the IMAP cost to-date that you would anticipate putting in your PUC rate case?
A. I don't have a number that I could give you right now.

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Q. Is it more than a million?
A. Related to the IMAP itself? I don't believe so.
Q. Is it related to something else?
A. Is what related? I'm not trying to be difficult. I'm just not quite sure I'm clear on what you are asking me when you say, "Is it --"
Q. You said you would put the cost of IMAP into your rate case.
A. Yes.
Q. I asked, would you include cost to-date for IMAP?
A. Today?
Q. No, to the date you filed it, would you include that?
MR. MEYER: May I offer a friendly suggestion, that you clarify by what you mean by IMAP cost? I don't know if you are talking about the cost of developing the IMAP or something else.
MR. SMITH: Neither do I. I'm trying to find out how much of the cost of the whole IMAP proceeding would you include in your rate case -- in your PUC rate case when you filed it.
THE WITNESS: We would anticipate filing for a recovery on all of the capitalized costs

Page 107

related to the IMAP proceedings to the establishment of perfecting the -- of the IMAP.
Q. (BY MR. SMITH) So, when you started IMAP several years ago, the cost from that point forward?
A. Yes.
Q. Regarding one other of Mr. Campbell's questions about specific well use and water rights, does United Water own water rights for which the well no longer functions?
A. I would believe that we do.
Q. In your PUC case, do you intend to ask PUC to certificate a service area contiguous -- or, excuse me -- the same as your IMAP planning area?
A. No, I would not anticipate doing that at all. When you say contiguous --
Q. No, I take that back.
A. Let's rephrase here and maybe we will get this.
Q. Let me ask the question again. I want to know if the IMAP area is going to be consistent with -- the IMAP planning area will be consistent with your certificated area of service? That's what I'm looking for.
A. And your question is?

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Q. Will you ask PUC to make your service area consistent with your IMAP planning area?
A. No.
Q. You may be aware I've asked your counsel several times for a copy of a map that was made available for us that shows your water rights, and points of diversion, and wells. And the explanation I've gotten is because of 9/11 concerns, that you-all wouldn't produce that map to us. Are you aware of that?
A. Yes.
Q. If you have 9/11 concerns that information will not be available in that form, right?
A. We've not been willing to provide well location maps to anyone since 9/11.
Q. Is there anything else that you haven't made available because of 9/11?
A. Not that I'm aware of.
Q. Is that a local decision or is that a company policy higher up the chain?
A. It's both a local decision and I wouldn't say it's company policy so much, but it's a recommendation by both the American Water Association, as well as the folks who helped us perform our vulnerability assessment, and I made the

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decision locally for Idaho.
Q. The corporate structure, this morning, let me make sure I have this written down top to bottom. Suez is a french company?
A. Yes.
Q. Suez Environmental? I'm coming down the chain.
A. Uh-huh.
Q. United Water, Inc., United Water Resources, United Water Works, and United Idaho?
A. You missed Ondeo America in there. To the best of my recollection, that fits in below Suez Environmental and above United Water, Inc. Ondeo America in there, or it might be -- I have to beg your forgiveness. They continue to change names, so I do have some difficulty recalling.
Q. Us corporate guys do that, so that's okay.
And United Water Operations is the entity that actually does the agreement with Eagle, correct?
A. Yes, United Water Operations Idaho is the entity that the city of Eagle has contracted with for operations and management of their portion of the system, or their system that serves the portion of the city of Eagle.

Page 110

Q. And United Water Operations Idaho is an Idaho corporation?
A. Yes, it is.
Q. Do you carry a book value, your financial statements, for the value of your water rights?
A. Yes, we do.
Q. What is that?
A. I do not know.
Q. Would Scott know?
A. He would have a better idea, yes.
Q. Can you ask Scott to look at that before he shows up for his deposition?
A. I would be happy to.
Q. We had a discussion this morning about your current portfolio for water rights, assuming the 150 cfs translated into gallons per minute is correct, those numbers would be equal, as I understand it, you've got 150 cfs that you use for current service needs; correct? Whatever gallons per minute?
A. Peak demands, correct.
Q. And your portfolio has got 300 cfs in your primary groundwater, is what you testified to?
A. Right.
Q. Then you also testified that you were

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looking for surface water for the western end of your service area because groundwater is not a value out there; is that correct?
A. If I said western end, I should have been saying more to the eastern end. I did say it is difficult to obtain groundwater in the west-end when we're having a discussion about the ASR or the aquifer storage and recovery system situation. But, the area of the system where we're pursuing use of service water rights would be in conjunction with the proposed new Columbia Treatment Plant, which is on the east, southeast side of the city.
Q. So, I was incorrect with regards to the western end?
A. Unless I misstated it.
Q. So, you're looking for surface water for the eastern part?
A. For the Columbia Plant.
Q. The 150 cfs of groundwater rights in excess of 150 that you currently use for peak demand, what happens to that 150 cfs under IMAP?
MR. MEYER: Objection; calls for a legal conclusion.
MR. SMITH: I'm not asking for a legal conclusion, I'm asking him what he intends to do

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with the water.
THE WITNESS: I think it really will depend on what the SRBA decides and the whole issue regarding the adjudicated process, so I don't know that I can give you an answer yet.
Q. (BY MR. SMITH) Could you explain what you mean with regard to the SRBA?
A. Snake River Basin Adjudication.
Q. I'm familiar with that term. I mean, in regard to what the SRBA does.
A. I think they are charged with -- we're doing water rights in the entire valley, the entire basin, correct? And determining to extent, if any, certain water rights may be used and useful in excess, and potentially available for forfeiture. So, when you say what is United Water going to do with the water, I think it's predicated on what SRBA is going to do with it.
Q. If the SRBA determination is that those 150 cfs in excess of current demands are not forfeited, what are United Water's plans for those water rights?
A. It would hold them in our planning component, or planning horizon component portion of the beaker of water rights, assuming the IMAP is

Page 113

approved, and that we would use them as we continued to grow and build, meeting the system needs of the city of Boise as it grows.
Q. So, you couldn't make that determination until the SRAB court rules on the forfeiture question?
A. I really won't know for what extent the 150 is available.
Q. And you wouldn't know that until the SRAB court rules?
MR. MEYER: Objection. This is an issue that is pending. It's a legal and procedural question, and this witness doesn't know. I mean, you know as well as I do --
MR. SMITH: Chris, don't instruct your client while making comments to me.
MR. MEYER: I'm not instructing him. I'm objecting to the question.
MR. SMITH: Just object to the question.
Q. (BY MR. SMITH) Go ahead and answer, please.
A. I think I already stated that to the extent that those 150 are still hanging in the balance of the question, I cannot make a plan on their use until I know that they are certain or if they are

certain.
Q. So, before you can plan on using -- strike that. Let me start over.
Before you can plan on using them, you'd have to know if they are valid or not, correct?
A. I have to know whether they will be able to be retained as water rights in the portfolio.
MR. SMITH: That all I have. Thank you.

EXAMINATION

(Exhibit No. 3 was marked.)
QUESTIONS BY MR. CAMPBELL:
Q. Mr. Wyatt, this is Scott Campbell. I'm back in the saddle again.
A. I see you are.
Q. I would like to remind you that you are still under oath.
A. I appreciate that. Thank you.
Q. You've just been handed what has been labeled or marked as Exhibit Number 3. Can you please tell me if you can identify that document?
A. It is a document entitled, "Questions and Answers About United Water's IMAP," dated March 11, 2002, and it is marked as draft.
Q. Just to represent to you, Mr. Wyatt, this

is a copy of a document that you provided to me before your deposition commenced. Do you know who prepared this document?
A. I believe it was compilation of preparers; our counsel and folks in our office.
Q. Okay. And who are the folks in your office?
A. Primarily, Scott Rhead and I did review it.
Q. Can you tell me the purpose of this document?
A. This was a document which we were preparing in conjunction with a news release that the company put out in regard to the publication of the IMAP document, so it was intended for news media.
Q. Was it ever finalized?
A. I believe it was.
Q. You did not provide a copy of the final document to me this morning. Do you have a copy of that final document?
A. I do not.
Q. Do you know who would?
A. Scott might.
MR. CAMPBELL: Okay. Counsel, can that be provided to me before Mr. Rhead's deposition?
MR. MEYER: If it's available.
MR. CAMPBELL: I would appreciate it if it was provided several days beforehand. Is that a problem?
MR. MEYER: If it's available. I have no idea what the status is.
MR. CAMPBELL: If it's available.
MR. MEYER: Okay.
Q. (BY MR. CAMPBELL) So, in this document, can you tell me what is the -- and you may have already said all you know about it, but what the purpose of the document was?
A. Like I said, I think it was just a FAQ, frequently asked questions, kind of approach to provide news media with some basic information about what the IMAP was and what it was about.
Q. Turning your attention to page 2 of Exhibit 3, Mr. Wyatt, paragraph seven. Take your time -- and you don't need to read it out loud, but take your team to read that paragraph, so I can ask you a question. Tell me when you finish.
A. I'm finished.
Q. Can you tell me who the planning experts were who undertook extensive studies and projections that are described in paragraph seven?
A. I think that is referring, in my mind --

again, I did not write this document, but the first one that jumps to my mind would be John Church.
Q. Anyone else?
A. I think that the company concurred with other folks who put together Boise's comprehensive plan and those kinds of thing. No one else by name jumps in my mind.
Q. I'm just curious. It says, "United Water then retained planning experts." Are there any other planning experts that United Water retained that you can recall?
A. Other than John Church, I'm not aware of any.
Q. Did you have any role in approving the final version of Exhibit Number 3?
A. Yes, I reviewed it.
Q. And is that all? Did you render any decision with regard to its finalization or use?
A. Yes, I did.
Q. What was the decision?
A. To use it in a revised form. I don't know what the difference is between the draft and the finance are exactly.
Q. I don't know. I just don't have the final.
A. Me either.

GIVENS PURSLEY LLP

RECEIVED
JAN 14 2004
Department of Water Resources

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January 13, 2004

Ms. Victoria Wigle
Idaho Department of Water Resources
1301 N. Orchard St.
P.O. Box 83720
Boise, ID 83720-0098

Re: United Water Idaho Inc.—IMAP
Our File No. 30-71

Dear Victoria:

Enclosed for filing in the IMAP matter please find the original and one copy of a *Submission of Letter*. Please conform the copy and return it to our office in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter. If you have any questions or require any additional information please call.

Sincerely,

Katrina Thomas

Katrina Thomas
Legal Secretary

Enclosures

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RECEIVED
JAN 14 2004
Department of Water Resources

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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.	**SUBMISSION OF LETTER**

United Water Idaho Inc. ("United Water") hereby submits for the record, with copies to Protestants, a true and correct copy of the letter from Paul D. Raymond to Karl J. Dreher dated January 12, attached hereto as Exhibit A.

RESPECTFULLY SUBMITTED this 13th day of January 2004.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer
John M. Marshall
Attorneys for Applicant United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January 2004, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Official file copy to: Idaho Department of Water Resources State Office 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	x U.S. Mail ____ Email ____ Hand Delivery ____ Overnight Mail
Mr. Karl J. Dreher Director Idaho Department of Water Resources 1301 N. Orchard St. P.O. Box 83720 Boise, ID 83720-0098	x U.S. Mail ____ Email ____ Hand Delivery ____ Overnight Mail
Peter R. Anderson, Esq. Hearing Officer 729 W. Braemere Rd. Boise, ID 83702	x U.S. Mail ____ Email ____ Hand Delivery ____ Overnight Mail
Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 W. Fort Street Boise, ID 83724	x U.S. Mail x Email ____ Hand Delivery ____ Overnight Mail
Mr. Edward Squires Hydro Logic, Inc. 1002 W. Franklin Street Boise, ID 83702-5431	x U.S. Mail x Email ____ Hand Delivery ____ Overnight Mail

E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	x U.S. Mail x Email _____ Hand Delivery _____ Overnight Mail
Bruce M. Smith, Esq. Tammy Zokan, Esq. Moore, Smith, Buxton & Turcke 225 N. 9th Street, Ste. 420 Boise, ID 83702	x U.S. Mail x Email _____ Hand Delivery _____ Overnight Mail
Matthew K. Wilde, Esq. Assistant City Attorney Boise City Attorney's Office 150 N. Capitol Boulevard P.O. Box 500 Boise, ID 83701-0500	x U.S. Mail x Email _____ Hand Delivery _____ Overnight Mail
Charles L. Honsinger, Esq. Daniel V. Steenson, Esq. Ringert Clark, Chtd. 455 S. Third Street P.O. Box 2773 Boise, ID 83701-2773	x U.S. Mail x Email _____ Hand Delivery _____ Overnight Mail
Scott L. Campbell, Esq. Angela D. Schaer, Esq. Andrew J. Waldera, Esq. Moffatt, Thomas, Barrett, Rock & Fields 101 S. Capital Boulevard, 10th Floor P.O. Box 829 Boise, ID 83701-0829	x U.S. Mail x Email _____ Hand Delivery _____ Overnight Mail

Albert P. Barker, Esq. Travis L. Thompson, Esq. Barker, Rosholt & Simpson 205 N. 10th Street, Ste. 520 P.O. Box 2139 Boise, ID 83701-2139	x x 	U.S. Mail Email Hand Delivery Overnight Mail
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Christopher H. Meyer

Paul Raymond, P.E.
Public Works Director

Carla Carrell
Executive Assistant

Public Works Department

RECEIVED
JAN 12 2004
Givens Pursley, LLP

January 12, 2004

Mr. Karl J. Dreher
Idaho Department of Water Resources
1301 N. Orchard St.
P.O. Box 83720
Boise ID 83720-0098

RE: Integrated Municipal Application Package ("IMAP") of United Water Idaho

Dear Mr. Dreher:

The City of Nampa is not a formal party to the IMAP proceeding, but is very much interested in the outcome. Nampa has been in the process of developing its own long term projections for future needs and has inventoried all our existing rights and facilities and has made supply and distribution related decisions based upon IMAP methodology. We have not completely finalized our projections or submitted any application, because we have been waiting for direction from the Department in the form of a ruling on United Water's IMAP. We have spent a considerable amount of money to date and cannot proceed further in this important undertaking without knowing whether the methodology and assumptions employed by the IMAP are correct and usable.

For these reasons, I urge you on behalf of the City to reconsider your decision of December 18, 2004 to stay the entire IMAP proceeding. I understand that there may be reasons to stay other parts of the IMAP that overlap with the Snake River Basin Adjudication. However, the determination and evaluation of the planning horizon and anticipated future needs should be concluded.

Thank you for the opportunity to offer these comments.

Sincerely,

Paul D. Raymond, P.E.
Public Works Director

City of Nampa, 411 Third St. So., Nampa, ID 83651 (208) 468-5422, raymondp@ci.nampa.id.us

EXHIBIT A

RECEIVED
JAN 13 2004
Department of Water Resources

Paul Raymond, P.E.
Public Works Director

Carla Carrell
Executive Assistant

Public Works Department

January 12, 2004

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Idaho Department of Water Resources
1301 N. Orchard St.
P.O. Box 83720
Boise ID 83720-0098

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Public Works Director

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Department of Water Resources

Paul Raymond, P.E.
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Carla Carrell
Executive Assistant

Public Works Department

January 12, 2004

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Idaho Department of Water Resources
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Boise ID 83720-0098

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Paul Raymond
Public Works Director

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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 AND BOISE CITY'S JOINT PETITION FOR REVIEW OF DIRECTOR'S STAY ORDER**

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SUMMARY OF PETITION

United Water Idaho Inc. ("United Water") and Boise City have proposed a partial stay in this proceeding designed to avoid the potential for duplicative litigation in the IMAP proceeding and the Snake River Basin Adjudication ("SRBA") while allowing United Water to move forward with critical future planning components of the IMAP without further delay. *UWID's Supplemental Response to Motion to Stay, Proposing a Partial Stay* (July 29, 2003) ("*Supplemental Response*").[1]

Under United Water's proposal most of the IMAP would be stayed until the SRBA District Court issues partial decrees on all of United Water's claims. Only issues related to the 1996 Municipal Water Rights Act, for which the outcome of the SRBA has no bearing, would proceed. Specifically, the stay would not apply to consideration of United Water's requested fifty-year planning horizon or the quantification of United Water's reasonably anticipated future needs. We refer to these herein as the "1996 Act Issues." They are the same as those described in detail under "Category II" in United Water's *Supplemental Response*. They are also known informally as "size of the beaker" issues.

The Director of the Idaho Department of Water Resources (the "Department") has rejected United Water's proposal in favor of a complete stay. *Order Re Motion for Stay* (Dec.

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[1] This *Supplemental Response* followed a May 9, 2003 Staff Memorandum prepared by IDWR at the request of the Hearing Officer stating IDWR's intent not to withhold recommendations on UWID's water rights in the SRBA pending resolution of the IMAP. Once it became apparent that the Department would not exercise its discretion to withhold United Water's recommendations in the Director's Report to the SRBA, United Water and Boise City urged a "trifurcation" of the IMAP proceeding coupled with a partial stay. United Water's trifurcation proposal was laid out in *UWID's Supplemental Response to Motion To Stay, Proposing a Partial Stay* (July 29, 2003) and *UWID's Consolidated Reply Regarding Proposal for Partial Stay* (Aug. 18, 2003). Boise City joined in the proposal. *Boise City's Notice of Joinder in UWID's Consolidated Reply Regarding Proposal for Partial Stay* (Aug. 22, 2003).

18, 2003) (hereinafter "*Stay Order*"). The effect of the *Stay Order* is to halt the entire IMAP proceeding.[2] This will set back the decision-making process a minimum of one or two years, and probably more. Although the Director's *Stay Order* only stays the proceeding through the issuance of partial decrees, presumably it would be extended through any appeals and remands. Thus, the delay could last many years.

United Water and Boise City ("Petitioners") jointly submit this petition for review of the Director's *Stay Order* and urge the Department to amend the *Stay Order* to allow resolution of the IMAP's 1996 Act issues prior to completion of SRBA review of United Water's water rights. All other issues (except pending motions) should remain subject to the stay.[3]

ARGUMENT

I. PETITIONERS PROPOSE A STREAMLINED HEARING THAT WILL TAKE NO MORE THAN A FEW DAYS, MAYBE LESS.

The limited stay proposed by Boise City and United Water boils down to allowing a hearing on the testimony of United Water's expert witness, John Church, together with opposing experts, if any.[4] The conduct of such a limited hearing would not be a substantial burden on the

---

[2] The *Stay Order* contained one exception; it authorized the Hearing Officer to issue orders addressing then pending motions. He has not done so.

[3] The Hearing Officer has before him a *Motion for Reference of Stipulation to Director* (Dec. 18, 2003) submitted by the Cities of Meridian and Caldwell, and *Request for Approval of Stipulation Under Procedure Rule 612* (Dec. 17, 2003) submitted by United Water. Both seek the same thing: review of conditions in aid of settlement. Presumably these would be treated as "motions pending" and fall within the Director's currently stated exception to the *Stay Order*.

It is in the best interest of the Department to devote the modest resources necessary to review these conditions, which, if determined to be approvable, will significantly streamline the IMAP proceeding through the withdrawal of protests. It is always in the Department's interest, and the public interest, to encourage such settlements, particularly where, as here, they are premised upon important new cooperative undertakings.

[4] A small amount of testimony from Scott Rhead and/or Greg Wyatt may also be presented to explain UWID's future planning.

Department, or on any Party. All the work has been done—years of it—except to hear the evidence and make a decision.

The resulting order could be issued either as an interim order or as a final order under Rule 710.[5] Issuance of a final order is preferable, and would allow the quantification of future needs to be fully litigated and decided by the time SRBA review is complete (or even before the SRBA Court takes up United Water's claims).

The hearing itself should be simple and short. United Water has only one expert witness, John Church, to produce in support of its quantification of future needs. The Protestants collectively have identified only one expert witness, Don Reading, to rebut Mr. Church.[6] Even if both of these expert witnesses (and any ancillary witnesses) were heard from without restriction, the entire hearing should take no longer than three days.

Moreover, United Water has already sought leave to submit Mr. Church's direct testimony in the form of pre-filed written testimony, and to require all other experts (which would include only Dr. Reading under the circumstances) to submit their direct testimony in written format. United Water's *Motion Regarding Expert Witnesses* (Nov. 19, 2003). If granted, this would further expedite the hearing by limiting live expert testimony on quantification to cross-examination and re-direct.

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[5] "[T]he agency may by order decide some of the issues presented in a proceeding and provide in that order that its decision on those issues is final and subject to review by reconsideration or appeal, but is not final on other issues." IDAPA 37.01.01.710 (Rule 710).

[6] Dr. Reading as been identified only by Pioneer and Settler's Irrigation Districts. If either of two pending motions are granted, he will not be a witness. Ed Squires has been designated by various Protestants as an expert witness on hydrology (*i.e.*, injury). Under any scenario, this part of the IMAP would be stayed, so Mr. Squires would not be a witness in the proposed hearing.

It is possible that the hearing could be expedited even further. United Water currently has pending before the Hearing Officer a motion to exclude Dr. Reading as a witness because Pioneer Irrigation District and Settlers Irrigation District, the Protestants who have designated Dr. Reading, insist that Dr. Reading has not formulated any opinions in this matter.[7] If Dr. Reading is excluded from the hearing, and Mr. Church submits his testimony in written format, the hearing would consist of little more than cross-examination and rehabilitation testimony from Mr. Church.

II. A TOTAL STAY WILL PREJUDICE PETITIONERS.

United Water and Boise City appreciate the Department's desire to conserve its presently strained resources. However, we submit that the very limited scope of hearing achieves this goal without unfairly prejudicing United Water, its customers or Boise City.

On the other hand, a complete stay of this proceeding will create a severe and unfair hardship on United Water (and indirectly on Boise City) without achieving any significant procedural efficiencies. This prejudice to Petitioners can be avoided by amending the stay, as proposed above, to allow the 1996 Act issues to proceed to hearing.

A. United Water has expended hundreds of thousands of dollars developing and defending its planning under the 1996 Act

As the Director has observed in frequent public forums, the 1996 Municipal Water Rights Act is an important piece of planning legislation. It reflects the Legislature's desire that municipal water providers move beyond the era in which municipal water systems, and the water right portfolios that support them, were developed and managed on a largely *ad hoc* basis.

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[7] United Water's motions to dismiss the two Districts altogether have been pending before the Hearing Officer since September 15, 2003. These and other pending motions have the potential to substantially simplify these proceedings. The Director should require the Hearing Officer to rule on these motions.

Looking to the pattern of conflict and crisis that has characterized the development of water supplies in so many other growing metropolitan areas throughout the West, our Legislature boldly declared that Idaho does not intend to follow suit. Speaking through the 1996 Municipal Water Rights Act, the Legislature encouraged municipalities to undertake the process of long term planning for the state's municipal water supplies. Obviously, none of this can happen without the Department's participation.

United Water has taken the lead in implementing the 1996 Act. Prior to the IMAP's filing, United Water worked for years with the Director and his staff in the development of the application package—and the 1996 Act itself. The IMAP has been before the Department since its filing on May 4, 2001, and has been in active litigation since the Director's appointment of a hearing officer on August 5, 2002. This undertaking has cost United Water and its ratepayers several hundreds of thousands of dollars. Boise City and other Protestants also have incurred considerable litigation expenses since the Department's initiation of this case.

These expenses have been incurred in reliance on directives from the Department. The Hearing Officer has issued numerous orders establishing schedules for identification of issues, motions, discovery, briefing, selection of test cases, and the like. He also directed several specific orders at United Water demanding that particular actions be taken by set deadlines.

When the Department initiated this contested case, it was fully aware of the overlap between the SRBA and the IMAP.[8] For years the Department has actively directed the course of this litigation in which United Water has spent hundreds of thousands of dollars and devoted

[8] The Department could have eliminated (and still could eliminate) the overlap simply by withholding its recommendations on United Water's claims from the Director's Report until such time as the IMAP is completed. This approach was rejected by *IDWR's Staff Memorandum in Response to Request by Hearing Officer Pursuant to IDAPA 37.01.01.600 and IDAPA 37.01.01.602* (May 9, 2003). United Water continues to favor this approach.

extensive internal resources in reliance on the Department's evident view—which certainly is correct—that the IMAP could proceed despite the looming SRBA. For the Department suddenly to reverse its position and stay this proceeding is unfair and prejudicial to United Water, Boise City and to all citizens of the Treasure Valley who will benefit from sound municipal water planning.

B. United Water has endured all the burdens of the 1996 Act without achieving any of the benefits.

The burden placed on municipal providers by the 1996 Act is significant. The IMAP has proven just how significant. We have already mentioned the financial burden; that is just the beginning. The 1996 Act also requires that municipal providers document and display their entire portfolio of rights for all to scrutinize. The disclosure goes beyond even what is required under the SRBA (which involves only a backward-looking "snapshot" of water rights as of November 19, 1987). In contrast, the 1996 Act requires municipal applicants affirmatively to develop and disclose what would otherwise be highly confidential planning data and strategic information.

Although these requirements are unique to municipal providers, and expose them to attacks and risks unknown to other water users, Petitioners have no quarrel with the approach of the 1996 Act. Petitioners recognize that the unique disclosure requirements are a cost of compliance and a necessary step to obtaining the unique protections afforded by the 1996 Act.

However, the *Stay Order* has thwarted this process and, in so doing, has unfairly disadvantaged United Water and the people it serves. The practical effect of the *Stay Order* is to require unprecedented one-sided disclosure by one municipal provider to other potential litigants well in advance of the SRBA. Thus, the Department has imposed on United Water all the

financial and disclosure burdens of the 1996 Act, while denying it (for many crucial years) the process and findings promised under the Act. These planning processes and findings accrue, by the way, not only to United Water, but to municipal entities throughout the Treasure Valley that will gain a better understanding of growing demands on our shared water supply. As written, the stay is both bad policy and a violation of Petitioners' due process rights.

C. United Water's planning efforts will be set back by years.

United Water is the largest municipal provider in the State. It has obligations both to Boise City and to the Idaho Public Utilities Commission to protect and develop its water right portfolio to ensure that it will continue to be able to meet the demands of its growing customer base. It cannot simply put its water right acquisition activities on the shelf for two, four or even eight years while the SRBA litigation unfolds. In the near future, United Water will find it necessary to put before the Department other appropriation or transfer applications (not subject to SRBA review) that will require the same 1996 Act determinations. It would be prejudicial to United Water and Boise City, and wasteful of the Department's limited resources, to have to begin that process all over again without the benefit of conclusive findings on the current future needs projections.

The future planning issues before the Department now must be confronted before long in any event. The most efficient approach is to proceed directly to hearing. Doing so will enable a final resolution of all IMAP issues to be achieved literally years earlier than would be possible if the entire IMAP is stayed. The longer these proceedings are stayed, the more opportunity there will be for confusion and controversy to arise.

D. United Water has a right to have its application processed.

When a water right application is filed, the applicant is entitled to have the Department process the application.

> Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon.

Idaho Code § 42-222(1).

> Whenever a permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of the diversion or proposed use or uses of the water, he shall file an application for amendment . . . and upon receipt thereof [of an application for amendment of a permit] it shall be the duty of the department of water resources to examine same . . . .

Idaho Code § 42-211 (bracketed language added).

The Department's Hearing Officer expressly recognized this entitlement when he denied motions by some Protestants for a complete stay in his *Order Re Motion for Stay and Scheduling Order* of November 12, 2003. The Hearing Officer summed it unequivocally: "The Applicant is entitled to have the Idaho Department of Water Resources process its applications." *Id.* at 2.

The Hearing Officer continued: "The form and timing of IDWR's investigation and hearing are within its discretion, so long as the fundamental rights of the participants are not violated." *Id.* at 2. Petitioners do not disagree that the Department has considerable discretion with respect to scheduling. However, as the Hearing Officer noted, that discretion is not unlimited. Under the current circumstances, having actively engaged the parties in litigation over the course of sixteen months, the Director's indefinite *Stay Order* constitutes an abuse of discretion in violation of Petitioners' due process rights.

III. DETERMINATION OF UNITED WATER'S PRE-1987 RIGHTS IS NOT A NECESSARY "FIRST STEP" TO DETERMINATION OF 1996 ACT ISSUES.

The *Stay Order* concludes that the SRBA deterimination is a necessary "first step" to the Department's consideration of the IMAP, and that the two proceedings may to some extent rest on the same analysis.[9] We disagree.

The issues that will be decided by the SRBA Court relate to the evaluation and determination of the pre-1987 water rights existing in United Water's portfolio based on pre-1987 facts. It is true that the common law Growing Communities Doctrine may be considered by the SRBA Court in determining whether United Water has or has not forfeited some of the rights it held as of 1987. However, that entails legally and factually distinct questions from the ones Petitioners urge the Department to answer now: How far out should United Water plan today, and how much water will customers demand many years from now?

Pointedly, John Church's projection of United Water's future water demand does not even consider the extent of United Water's current portfolio. In short, the SRBA is backward-looking while the 1996 Act issues are forward-looking. The application of the law of forfeiture and the Growing Communities Doctrine, and all the other issues the SRBA will address, are simply not relevant to the question Mr. Church's testimony will address.

IV. CONCLUDING THE HEARING ON 1996 ACT ISSUES WILL NOT ENTAIL A "DOUBLE EXPENDITURE OF TIME AND FUNDS."

The Department has expressed the view that a complete stay is necessary to avoid "a double expenditure of time and funds." *Stay Order* at 2. Petitioners urge that the opposite is the

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[9] "The SRBA determinations will accomplish a first step necessary for the processing of the transfer applications before the IDWR. . . . Because the water right claims pre-date the 1996 Act it is conceivable that the SRBA District Court could address some of the issues for which UWID seeks a stay under applicable common law principles." *Stay Order* at 2.

case. Failing to bring to a prompt conclusion the 1996 Act issues presented in the IMAP after so many years of effort will undoubtedly involve a double expenditure of time and funds for everyone concerned.

The quantification undertaken by Mr. Church is based on year 2000 data. If it is put on the shelf for many years, it may be rendered largely obsolete—an extraordinary waste. In any event, the parties and the Department will have to undergo another round of costly discovery, motion practice and hearing preparation. It is essential that the Department rule without further delay on that quantification methodology so that further planning (by United Water and every other municipality in the State) may begin based on the Department's determination and guidance.

United Water has recognized, and we presume the Department agrees, that it is appropriate for the future needs quantification to be periodically re-evaluated. United Water has committed to do so at least once every ten years.[10]

Thus, the sooner United Water's future needs are quantified, the sooner those conclusions may be considered by other municipal, state and federal planning entities, the sooner a baseline for future analysis may be established, and the sooner the next iteration of those projections may get underway. There is simply nothing to be gained by delaying the first quantification. Then, and only then, will the Petitioners and other Parties know whether the Department is satisfied with the approach United Water has taken, or whether changes must be made before proceeding further.

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[10] See Condition No. 1 of Exhibit A to *Stipulation and Withdrawal of Protests of the City of Meridian and the City of Caldwell* (Nov. 24, 2003). This proposed condition has not yet been reviewed by the Department.

V. STAYING THE 1996 ACT ISSUES WILL CHILL INTEREST IN LONG TERM PLANNING.

The Department's treatment of United Water and Boise City sends the wrong message to the very municipal entities that the Department is now encouraging to come into compliance with the 1996 Act. The experience thus far provides discouragement to those municipal entities and "chills" their enthusiasm to undertake the planning called for under the 1996 Act.

Moreover, United Water, Boise City and other municipal providers have initiated discussions aimed at the development of a regional, cooperative planning effort. This process has been described informally as the "RMAP" for Regional Municipal Application Package. This worthy exercise cannot begin until the "size of the beaker" determination is made for United Water. It is difficult to understand how staying and effectively prohibiting these efforts would "best serve the interests of the parties and the Department." See *Stay Order* at 2.

CONCLUSION

The Department, United Water, Boise City and all the citizens of the Treasure Valley share a common interest in sound municipal water supply planning. Punishing Petitioners with an indefinite stay of the IMAP will severely undercut that objective and discourage other municipalities from undertaking their own long term planning. To the extent that the Department wishes to avoid an overlap of issues with the SRBA, this may be readily accomplished by a streamlined partial stay that halts everything except pending motions and a determination of the proper planning horizon and the quantification of reasonably anticipated future needs. Such a determination will advance the goal of sound municipal water planning in Idaho. A total stay will seriously undercut it.

REQUEST FOR STATUS CONFERENCE

Both the Hearing Officer and the Director have identified the financial burden on the Department as a principal reason for the indefinite stay of the IMAP.[11] Petitioners request an opportunity to meet with the Director in a status conference to explore the Department's budget and staff concerns, and alternative means of addressing those issues short of a total stay.

RESPECTFULLY SUBMITTED this 8th day of January 2004.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
John M. Marshall
Attorneys for Applicant United Water Idaho Inc.

OFFICE OF THE BOISE CITY ATTORNEY

By _____
Matthew K. Wilde
Attorneys for Protestant Boise City

[11] The Hearing Officer identifies concerns about "costs that IDWR will incur" and "the workload of other IDWR personnel" as the sole reasons for referral. *Order Referring Order* at 1. The Director, in turn, identifies "the present strained resources of IDWR" as a principal reason for the indefinite stay. *Stay Order* at 2.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January 2004, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Official file copy to: Idaho Department of Water Resources State Office 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	_____ U.S. Mail _____ Email __x__ Hand Delivery _____ Overnight Mail
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Christopher H. Meyer

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER OF WATER RIGHTS IN THE NAME OF UNITED WATER IDAHO, INC., INTEGRATED MUNICIPAL APPLICATION PACKAGE (IMAP)	)))))))	**NOTICE OF VACATED HEARINGS**

Pursuant to the Order re Motion for Stay issued on December 18, 2003, the prehearing conference previously scheduled for 9:00 a.m. on January 8, 2004, is **VACATED,** and the hearing scheduled to commence on January 26, 2004, is **VACATED**.

Dated this 6th day of January, 2004.

Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2004, the above and foregoing, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**WITHDRAWAL OF JOINT PETITION FOR RECONSIDERATION**

Pioneer Irrigation District and Settlers Irrigation District ("Districts"), by and through their counsel of record Moffatt, Thomas, Barrett, Rock & Fields, Chtd., hereby withdraw their Joint Petition For Reconsideration of Order Referring Order Re: Motion to Stay to Director for Review. The Districts reserve the right to re-file the Joint Petition in the future should it become necessary, but at this time withdraw the same from consideration.

DATED this 22nd day of December 2003.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Angela Schaer Kaufmann – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of December 2003, I caused a true and correct copy of the foregoing **WITHDRAWAL OF JOINT PETITION FOR RECONSIDERATION** to be served by the method indicated below, and addressed to the following:

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S REPLY RE: JOINT PETITION FOR RECONSIDERATION OF ORDER REFERRING ORDER RE: MOTION FOR STAY TO DIRECTOR FOR REVIEW**

Pioneer Irrigation District ("Pioneer") and Settlers Irrigation District ("Settlers"), by and through their counsel of record Moffatt, THOMAS, BARRETT, ROCK & FIELDS., CHTD., hereby reply to United Water Idaho's Reply to Pioneer and Settlers' Joint Petition and Submission to the Director.

Pioneer and Settlers reply, for the most part, to restate the matters set forth in their original petition, because it appears United Water Idaho ("UWID") has misunderstood. UWID asserts that "Pioneer and Settlers allege that they require an opportunity to present information to

the Director in connection with his consideration of this matter. . . ." UWID's Reply, p. 2. That was not what Pioneer and Settlers said, nor was it their intent. The Hearing Officer's Referral Order referenced the costs to IDWR and the workload of its employees. Referral Order, p. 1. Pioneer and Settlers then noted that such information was not in the record, and stated that:

> To reference information which is not in the record, and request the Director's ruling based on information not in the record does not comport with due process. ***At the least, the parties should be given the opportunity to review and comment on any specific information regarding the impact of the SRBA and the IMAP on IDWR,*** prior to the time the Director reviews the Order re: Motion to Stay.

Joint Petition, pp. 2-3 (emphasis added).

Pioneer and Settlers do not seek to provide that information which is not part of the record, contrary to UWID's assertions. That fact was clear from a careful reading of their Joint Petition. Instead, they merely noted that the information was not part of the record in this matter. This is the case even though it appears that the Hearing Officer may have relied upon such information in making his Referral Order, or that he anticipates that the Director may rely on such information. If that is the case, due process mandates that the information be made part of the record and that the parties have an opportunity to review it, comment on it, and rebut it with other evidence, as appropriate.

UWID makes much of its fundamental rights, and then asserts that Pioneer and Settlers "request appears aimed more at delay than any legitimate due process concern." UWID's Reply, p. 2. That statement is offensive. Pioneer and Settlers are entitled to procedures in which any information which forms the basis for a decision of the Hearing Officer and/or the Director in this matter is properly part of the record. Due process requires it, the Idaho Administrative Procedures Act requires it (I.C. §§ 67-5249 and 67-5251), and the concern is not

only legitimate, but critical. Pioneer and Settlers did not, by their Joint Petition, seek to delay these proceedings. A careful reading would make that obvious, and Pioneer and Settlers are offended at the insinuation that their Joint Petition was anything other than legitimate.

On another note, Pioneer and Settlers fail to see how the fact that the Hearing Officer has not yet ruled on UWID's Motion to Dismiss Pioneer and Settlers is preventing UWID from preparing for the hearing in this matter. UWID will have the same burden of proof and persuasion no matter whether Pioneer and Settlers are involved or not.

Pioneer and Settlers continue to respectfully request that the Hearing Officer grant their Joint Petition, for the reasons set forth in that document, and as further stated herein.

DATED this 18th day of December 2003.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Angela Schaer Kaufmann – Of the Firm
Attorneys for Pioneer Irrigation District and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of December 2003, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S REPLY RE: JOINT PETITION FOR RECONSIDERATION OF ORDER REFERRING ORDER RE: MOTION FOR STAY TO DIRECTOR FOR REVIEW** to be served by the method indicated below, and addressed to the following:

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Kathleen M. Carr
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Bruce M. Smith Tammy A. Zokan Moore Smith Buxton & Turcke 225 N. 9th Street, Suite 420 Boise, ID 83702 Fax: 331-1202	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Meridian Public Works Gary D. Smith 660 E. Watertower Meridian, ID 83642 Fax: 887-1297	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Caldwell Engineering Department Gordon Law 621 E. Cleveland Blvd. Caldwell, ID 83605 Fax: 455-3003	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
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By _____
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Attorneys for Cities of Caldwell and Meridian

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND	MOTION FOR REFERENCE OF STIPULATION TO DIRECTOR

COMES NOW, protestants City of Caldwell and City of Meridian, by and through their counsel of record Ringert Clark, Chartered and, pursuant to IDAPA 37.01.01.270 and IDAPA 37.01.01.612 hereby move the Hearing Officer to refer to the Director the *Stipulation and Withdrawal of Protests of the City of Meridian and the City of Caldwell* filed in this matter on November 24, 2003 for his review and approval.

The grounds for this request are that the *Stipulation and Withdrawal* is contingent upon IDWR's approval of certain conditions on the water rights subject to this proceeding, and the parties need to know whether or not the cities of Meridian and Caldwell will be participating at the hearing currently scheduled for January 26, 2004 - February 6, 2004. Additionally, the *Stipulation and Withdrawal* was entered into by the parties on the basis of the Hearing Officer's November 12, 2003 *Order re: Motion for Stay and Scheduling Order*. See also *UWID's Reply to Pioneer and Settlers'*

Joint Petition and Submission to the Director, p. 1 (December 16, 2003). Specifically, the parties entered the *Stipulation* on the basis of the portion of the November 12, 2003 Order which specified that the "issues relating to forfeiture or abandonment of United Water Idaho's pre-1987 water rights included in the IMAP are STAYED, pending resolution in the Snake River Basin Adjudication." *Order re: Motion for Stay and Scheduling Order*, p. 4.

On December 4, 2003, the Hearing Officer entered his *Order Referring Order Re: Motion for Stay to Director for Review*. It is important that both the Hearing Officer and the Director be made aware that the basis for the settlement between the cities of Meridian and Caldwell was in part, the portion of the *Order Re: Motion for Stay and Scheduling Order* staying forfeiture issues until they are resolved in the SRBA, and that modification of that *Order* by the Director may result in nullification of the *Stipulation* entered into in good faith by the parties.

Based upon the above argument, the cities of Meridian and Caldwell respectfully request that the Hearing Officer enter an *Order* referring the *Stipulation and Withdrawal of Protests of the City of Meridian and the City of Caldwell* to the Director for his review and approval, and that within his Order so referring, the Hearing Officer point out to the Director that the Stipulation and Withdrawal may be nullified by any modification of the *Order Re: Motion for Stay and Scheduling Order*.

Submitted this 18th day of December, 2003

RINGERT CLARK, CHARTERED

By _____
Charles L. Honsinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Christopher Meyer
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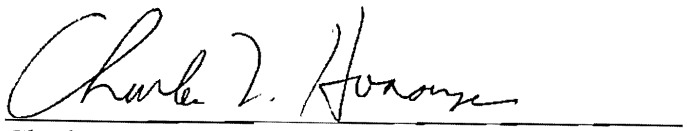
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Counsel for Applicant United Water Idaho Inc.

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.	**REQUEST FOR APPROVAL OF STIPULATION UNDER PROCEDURE RULE 612**

United Water Idaho Inc. ("United Water") filed a *Stipulation and Withdrawal of Protests* ("Stipulation") with the Idaho Department of Water Resources ("Department") on November 24, 2003. United Water hereby requests approval of the Stipulation by the Department pursuant to Procedure Rule 612. IDAPA 37.01.01.612.

The Stipulation is entered into by United Water and the Cities of Meridian and Caldwell (the "Cities"). By seeking approval of the Stipulation, United Water does not seek to have the Department prejudge the IMAP. Rather, United Water seeks to have the Department review the conditions United Water and the Cities propose in the Stipulation to determine whether such conditions may be added to any application included in the IMAP that may be approved.

The operative provision of the Stipulation deems the Cities' protests withdrawn upon "statement of the Department" that the conditions attached to the Stipulation "are approved and

will be made a part of the approval of said applications." Accordingly, to finalize the settlement, United Water and the Cities need the Department to review and approve the proposed settlement conditions (subject, as stated above, to ultimate approval of individual IMAP applications).

The Department's Rules of Procedure specifically require the Department to review and approve settlements. Procedure Rule 612 provides that all "[s]ettlements must be reviewed under this rule." The rule states "[w]hen a settlement is presented to the presiding officer, the presiding officer will prescribe procedures appropriate to the nature of the settlement to consider the settlement." In formulating the appropriate procedure, the presiding officer is "to consider the reasonableness of the settlement and whether acceptance of the settlement is consistent with the agency's charge under the law."

United Water requests that the Department initiate the review of the Stipulation under Procedure Rule 612 without delay. The hearing in this matter is less than six weeks away. United Water needs to know whether its preparation for hearing needs to include issues raised by the Cities. The Cities need to know whether they will participate at hearing. To complete this review, the Department simply needs to review the proposed conditions attached to the Stipulation and ascertain whether the Department is able to include them as part of its conditions of approval if any applications in the IMAP are approved.

Because the Director ultimately will determine whether he can approve the conditions, and to expedite the review process, United Water requests that the Hearing Officer refer the Stipulation to the Director for his review pursuant to Procedure Rule 562.

RESPECTFULLY SUBMITTED this 17th day of December 2003.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
John M. Marshall
Attorneys for United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 W. Fort Street Boise, ID 83724	__x__ U.S. Mail __x__ Email _____ Hand Delivery _____ Overnight Mail
Mr. Edward Squires Hydro Logic, Inc. 1002 W. Franklin Street Boise, ID 83702-5431	__x__ U.S. Mail __x__ Email _____ Hand Delivery _____ Overnight Mail
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	__x__ U.S. Mail __x__ Email _____ Hand Delivery _____ Overnight Mail
Bruce M. Smith, Esq. Tammy Zokan, Esq. Moore, Smith, Buxton & Turcke 225 N. 9th Street, Ste. 420 Boise, ID 83702	__x__ U.S. Mail __x__ Email _____ Hand Delivery _____ Overnight Mail

Matthew K. Wilde, Esq. Assistant City Attorney Boise City Attorney's Office 150 N. Capitol Boulevard P.O. Box 500 Boise, ID 83701-0500	x x _____ _____	U.S. Mail Email Hand Delivery Overnight Mail
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Robert W. Talboy, Esq. Ellsworth, Kallas & Talboy 2402 W. Jefferson Street Boise, ID 83702	x x _____ _____	U.S. Mail Email Hand Delivery Overnight Mail
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James A. McClure
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Raymond D. Givens
RETIRED

John A. Miller, LL.M. *
TAX CONSULTANT
*Licensed in Kentucky only

December 16, 2003

Ms. Victoria Wigle
Idaho Department of Water Resources
1301 N. Orchard St.
P.O. Box 83720
Boise, ID 83720-0098

Re: United Water Idaho Inc.—IMAP
Our File No. 30-71

Dear Victoria:

Enclosed for filing in the IMAP matter please find the original and one copy of *UWID's Reply to Pioneer and Settlers' Joint Petition*. Please conform the copy and return it to our office in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter. If you have any questions or require any additional information please call.

Sincerely,

Katrina Thomas

Katrina Thomas
Legal Secretary

Enclosures

:kdt S:\CLIENTS\30\71\KT Ltr to IDWR re Filing Reply to Joint Petition.DOC

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Attorneys for United Water Idaho Inc.

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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.	**UWID'S REPLY TO PIONEER AND SETTLERS' JOINT PETITION AND SUBMISSION TO THE DIRECTOR**

United Water does not join in Pioneer and Settlers' *Joint Petition for Reconsideration of Order Referring Order Re: Motion for Stay to Director for Review.* On the other hand, United Water respectfully points out that the Hearing Officer's prior ruling was relied upon in good faith by various parties in their ongoing settlement discussions. Having the earlier ruling now suspended for further proceedings is not conducive to settlement. Moreover, the delay attendant to such a review threatens the hearing date now set to begin on January 26, 2004. Nevertheless, if the Hearing Officer believes that involvement by the Director is called for at this time, the Applicant simply urges that the process be concluded with all deliberate speed.

In their Joint Petition, Pioneer and Settlers allege that they require an opportunity to present information to the Director in connection with his consideration of the matter. If they in fact have relevant additional information, they should simply have presented it. They have not done so, have not supplemented discovery, and have not offered any description of what the information would be. Their request appears aimed more at delay than at any legitimate due process concern.

In contrast, the Applicant's due process rights are very much in play, and are threatened by further delay in the processing of this Application. The Hearing Officer has recognized that the "Applicant is entitled to have the Idaho Department of Water Resources process its applications." November 12, 2003 Order at 2. The Hearing Officer's failure to rule on pending motions, coupled with Pioneer and Settlers' stated refusal to engage in discovery until those motions are ruled on, is hampering United Water's ability to prepare for hearing. United Water's ongoing planning efforts and water right acquisition activities, in turn, are hampered by the delays and uncertainty surrounding the IMAP.

United Water urges the Hearing Officer and/or the Director to act swiftly to bring all pending matters to a prompt conclusion, in order that the parties may conclude essential preparations in time for the hearing scheduled beginning on January 26, 2004. This is the only way to ensure that "the fundamental rights of the participants are not violated" while also conserving the resources of the parties and the Department. *Id.*

RESPECTFULLY SUBMITTED this 16th day of December 2003.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
John M. Marshall
Attorneys for United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Water Resources State Office 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	x U.S. Mail ____ Email ____ Hand Delivery ____ Overnight Mail
Peter R. Anderson, Esq. Hearing Officer 729 W. Braemere Rd. Boise, ID 83702	x U.S. Mail x Email ____ Hand Delivery ____ Overnight Mail
Mr. Karl J. Dreher Director Idaho Department of Water Resources 1301 N. Orchard St. P.O. Box 83720 Boise, ID 83720-0098	x U.S. Mail x Email ____ Hand Delivery ____ Overnight Mail
Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 W. Fort Street Boise, ID 83724	x U.S. Mail x Email ____ Hand Delivery ____ Overnight Mail
Mr. Edward Squires Hydro Logic, Inc. 1002 W. Franklin Street Boise, ID 83702-5431	x U.S. Mail x Email ____ Hand Delivery ____ Overnight Mail
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	x U.S. Mail x Email ____ Hand Delivery ____ Overnight Mail

Bruce M. Smith, Esq. Tammy Zokan, Esq. Moore, Smith, Buxton & Turcke 225 N. 9th Street, Ste. 420 Boise, ID 83702	x x _____ _____	U.S. Mail Email Hand Delivery Overnight Mail
Matthew K. Wilde, Esq. Assistant City Attorney Boise City Attorney's Office 150 N. Capitol Boulevard P.O. Box 500 Boise, ID 83701-0500	x x _____ _____	U.S. Mail Email Hand Delivery Overnight Mail
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Scott L. Campbell, Esq. Angela D. Schaer, Esq. Andrew J. Waldera, Esq. Moffatt, Thomas, Barrett, Rock & Fields 101 S. Capital Boulevard, 10th Floor P.O. Box 829 Boise, ID 83701-0829	x x _____ _____	U.S. Mail Email Hand Delivery Overnight Mail
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Robert W. Talboy, Esq. Ellsworth, Kallas & Talboy 2402 W. Jefferson Street Boise, ID 83702	x x _____ _____	U.S. Mail Email Hand Delivery Overnight Mail

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Christopher H. Meyer

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Attorneys for Nampa & Meridian Irrigation District,
City of Caldwell, City of Meridian, and the Terteling entities

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE IN THE NAME OF UNITED WATER IDAHO INC.	NOTICE OF PROTESTANTS' REQUESTS TO PROCESS WATER RIGHTS

COMES NOW, protestants Nampa & Meridian Irrigation District, and the Terteling entities, by and through their counsel of record, Ringert Clark, Chartered, and pursuant to the Hearing Officer's November 12, 2003 Order Re: Motion for Stay and Scheduling Order, hereby designate the water rights that they desire to have processed first in this proceeding. The water rights Protestants desire to have processed first are as follows:

Nampa & Meridian Irrigation District	63-02668
The Terteling Company	63-03457
Terteling Trust No. 7	63-10945

Submitted this 12th day of December, 2003

RINGERT CLARK, CHARTERED

By _____
Charles L. Honsinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Facsimile: 208-344-6034

Attorneys for Boise Project Board of Control,
Boise-Kuna Irrigation District,
Wilder Irrigation District, and
Big Bend Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF 99 APPLICATIONS FOR TRANSFER AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS, KNOWN AS THE INTEGRATED MUNICIPAL APPLICATION PACKAGE (IMAP) BY APPLICANT UNITED WATER IDAHO, INC.	**BOISE PROJECT BOARD OF CONTROL, BOISE-KUNA IRRIGATION DISTRICT, WILDER IRRIGATION DISTRICT, AND BIG BEND IRRIGATION DISTRICT'S DESIGNATION OF WATER RIGHT FOR TEST CASE**

The Hearing Officer's Order Re: Motion for Stay and Scheduling Order of November 12, 2003, ("Order") asked that each protestant designate one additional water right in the IMAP that protestant wishes to have processed first.

Pursuant to that Order, Boise Project Board of Control, Boise-Kuna Irrigation District, Wilder Irrigation District, and Big Bend Irrigation District designate the Broadway Well point of diversion, as shown on UWID's Exhibit B, Current UWID Wells, October 27, 2003, and all associated water rights.

DATED this 12th day of December, 2003.

BARKER ROSHOLT & SIMPSON LLP

Albert P. Barker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2003, I caused a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL, BOISE-KUNA IRRIGATION DISTRICT, WILDER IRRIGATION DISTRICT, AND BIG BEND IRRIGATION DISTRICT'S DESIGNATION OF WATER RIGHT FOR TEST CASE** to be served by the method indicated below, and addressed to the following individuals:

United Water Idaho, Inc.
Christopher H. Meyer
John M. Marshall
Givens Pursley LLP
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960 Broadway Ave., Ste. 400
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City of Caldwell, City of Meridian, and the
Terteling entities
Attn: Charles Honsinger
Ringert Clark Chartered
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Cities of Eagle, Kuna, Middleton
& Star and Star Sewer District
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Albert P. Barker

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**JOINT PETITION FOR RECONSIDERATION OF ORDER REFERRING ORDER RE: MOTION FOR STAY TO DIRECTOR FOR REVIEW**

Pioneer Irrigation District and Settlers Irrigation District (collectively, the "Districts"), by and through their counsel of record MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED, and in accordance with Idaho Department of Water Resources Rule of Procedure 711 (IDAPA 37.01.01.711) and petition the Hearing Officer to review his Order Referring Order re: Motion for Stay to Director for Review.

I.
BACKGROUND

On November 12, 2003, the Hearing Officer issued his Order re: Motion to Stay and Scheduling Order. In that Order, he held, *inter alia*, that:

ORIGINAL

> 1. All issues relating to forfeiture or abandonment of United Water Idaho's pre-1987 water rights included in the IMAP are STAYED, pending resolution in the Snake River Basin Adjudication. Any transfer approved in the proceeding will be contingent upon the SRBA District Court's determination that the water right has not been forfeited.
>
> 2. All other issues in the IMAP proceeding, including any alleged forfeiture or abandonment of post-1987 water rights, shall be considered in this proceeding until and unless it becomes apparent at any point that a broader stay is necessary. . . . .

IMAP Order Re: Motions to Compel and Motion for Protective Order, pp. 4-5 (November 12, 2003).

On or about December 5, 2003, the Hearing Office issued his Order Referring Order Re: Motion for Stay to Director for Review ("Referral Order").

II.
ARGUMENT AND ANALYSIS

The Districts have filed this Petition first because they are concerned about the due process implications of the Referral Order. The Referral Order provides in pertinent part:

> Because the *Order re Motion for Stay and Scheduling Order* has substantial implications for the costs that IDWR will occur both in this matter and the Snake River Basin Adjudication, and also affects the workload of other IDWR personnel, prudence suggests it should be reviewed by the Director of IDWR.

Referral Order, p. 1. The concern of Pioneer and Settlers is that evidence regarding the costs IDWR will incur and the workloads of IDWR personnel were not introduced by a party during the Hearing Officer's consideration of the Motion to Stay. In fact, to the best of Pioneer and Settlers' knowledge, such information does not appear in the record at all.[1] To reference information which is not in the record, and request the Director's ruling based on information not

[1] It is true that the moving parties noted concern about the costs in terms of time and money, but did not have nor did they provide any specific information regarding the effect that proceeding in the SRBA and administratively as well might have on IDWR.

in the record does not comport with due process. At the least, the parties should be given the opportunity to review and comment on any specific information regarding the impact of the SRBA and the IMAP on IDWR, prior to the time the Director reviews the Order re: Motion to Stay. Moreover, additional costs and workload burdens imposed upon IDWR are not legitimate grounds to modify procedural due process rulings which affect the substantive rights of parties to this proceeding.

Second, the Idaho Department of Water Resources Rules of Procedure do not provide for review, by the agency head, of interlocutory orders. Rule 710, which was cited by the Hearing Officer, provides in pertinent part that:

> Interlocutory orders are orders that do not decide all previously undecided issues presented in a proceeding, except the agency may by order decide some of the issues presented in a proceeding and provide in that order that its decision on those issues is final and subject to review by reconsideration or appeal, but is not final on other issues. Unless an order contains or is accompanied by a paragraph containing one (1) of the paragraphs set forth in Rules 720, 730 or 740 or a paragraph substantially similar, the order is interlocutory. . . . Interlocutory orders may be ***reviewed by the officer issuing the order pursuant to Rules 711, 760, and 770.***

IDAPA 37.01.01.710 (emphasis added). Under those standards, the Districts agree with the Hearing Officer that his Order re: Motion to Stay is interlocutory.

However, the Department's Rules of Procedure do not provide for review by the agency head (*i.e.*, the Director) of an interlocutory order. Instead, Rule 711 provides:

> Any party or person affected by an interlocutory order may petition the officer issuing the order to review the interlocutory order. The officer issuing the interlocutory order may rescind, alter or amend any interlocutory order on the officer's own motion, but will not on the officer's own motion review any interlocutory order affecting any party's substantive rights without giving all parties notice and an opportunity for written comment.

IDAPA 37.01.01.711. Therefore, a party could have asked the Hearing Officer to review the Order re: Motion to Stay, or the Hearing Officer could do so on his own motion, but there is no provision for referral of an interlocutory order to the Director.

Similarly, Rule 760, which is referenced in Rule 710, provides that the Hearing Officer may modify an order upon his or her own motion. However, such modification must be done within 14 days from the time the order is issued, and there is no provision for referral to the Director. IDAPA 37.01.01.760. Rule 770 pertains to clarification of orders, but provides that a party or person affected by such an order may petition to clarify the order. Again, there is no provision in Rule 770 for referral to the Director. IDAPA 37.01.01.770.

The Hearing Officer has also cited Rule 562 in support of the Order Referring Order Re: Motion For Stay. However, that rule, by its terms applies only to orders issued at hearing:

> The presiding officer rules on motions and objections ***presented at hearing***. When the presiding officer is a hearing officer, the presiding officer's rulings may be reviewed by the agency head in determining the matter on its merits and the presiding officer may refer or defer rulings to the agency head for determination.

IDAPA 37.01.01.562 (emphasis added). Therefore, that rule provides no support for referring the Interlocutory Order re: Motion to Stay to the Director for review.

If the Hearing Officer nevertheless determines that he has authority under IDWR's Rules of Procedure to refer the Order re: Motion to Stay to the Director for review, Pioneer and Settlers request that the Hearing Officer provide Pioneer and Settlers the opportunity to review the information relied upon regarding "the costs that IDWR will incur in both this matter and the Snake River Basin Adjudication, and [] the workload of other IDWR personnel. . .", as well as the opportunity to provide additional briefing regarding the Motion to Stay. Additionally, should the Hearing Officer deny these requests, Pioneer and Settlers further request

that they be permitted to review that information and provide briefing prior to the Director's review of the Order Re: Motion to Stay.

III.
CONCLUSION

Pioneer and Settlers first request that the Hearing Officer reconsider and withdraw the Referral Order, because the IDWR Rules of Procedure do not provide for review of an interlocutory order by the Director, if that interlocutory order was not made at hearing. If the Hearing Officer nevertheless determines that he has authority to refer the Motion re: Order to Stay to the Director, Pioneer and Settlers respectfully request that they be provided with the opportunity to review information and provide briefing regarding the costs in terms of money and human resources to IDWR, as outlined above in Section II.

DATED this 12th day of December 2003.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Angela Schaer Kaufmann – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December 2003, I caused a true and correct copy of the foregoing **JOINT PETITION FOR RECONSIDERATION OF ORDER REFERRING ORDER RE: MOTION FOR STAY TO DIRECTOR FOR REVIEW** to be served by the method indicated below, and addressed to the following:

Director Idaho Department of Water Resources 1301 N. Orchard Street PO Box 83720 Boise, ID 83720 Fax: 327-5400	(X) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Peter Anderson, Hearing Officer 729 W. Braemere Road Boise, ID 83702	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Gary Spackman Idaho Department of Water Resources 1301 North Orchard P.O. Box 83720 Boise, ID 83720 Fax: 327-5400	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
John M. Marshall Givens Pursley, LLP PO Box 2720 Boise, ID 83701 Fax: 388-1300	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Charles L. Honsinger Ringert Clark 455 South 3rd Street PO Box 2773 Boise, ID 83701-2773 Fax: 342-4657	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Matthew Wilde Boise City Attorney's Office PO Box 500 Boise, ID 83701-0500 Fax: 384-4454	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Josephine P. Beeman Beeman & Associates P.C. 409 W. Jefferson Street Boise, ID 83702 Fax: 331-0954	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Boise Boise Public Works Department Beth K. Baird Environmental Programs Coordinator 150 N. Capitol Blvd. PO Box 500 Boise, ID 83701-0500 Fax: 384-3905	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Albert P. Barker Barker Rosholt & Simpson PO Box 2139 Boise, ID 83701-2139 Fax: 342-4657	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Bureau of Reclamation E. Gail McGarry, PN-3100 1150 N. Curtis Road, Suite 100 Boise, ID 83706-1234 Fax: 378-5019	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Kathleen M. Carr U.S. Department of the Interior Office of the Solicitor Pacific Northwest Region , Boise Field Office 550 West Fort Street, MSC 020 Boise, ID 83724-0020 Fax: 334-1378	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Matt J. Howard PO Box 190012 Boise, ID 83719 Fax: 333-8409	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

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Gary D. Smith
660 E. Watertower
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Mr. Michael Chase
70 W. Floating Feather Road
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By _____
Scott L. Campbell

RECEIVED
DEC 12 2003
Department of Water Resources

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**PIONEER IRRIGATION DISTRICT'S DESIGNATION OF WATER RIGHT TO BE PROCESSED**

Pioneer Irrigation District, by and through its counsel of record Moffatt, Thomas, Barrett, Rock & Fields, Chtd., and in accordance with the Hearing Officer's Order Re: Motion to Stay and Scheduling Order, dated November 12, 2003, hereby designate the water right they wish to have processed in the IMAP proceeding. That water right is number 63-02892, and it is a licensed water right.

ORIGINAL

DATED this 12th day of December 2003.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Angela Schaer Kaufmann – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December 2003, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT'S DESIGNATION OF WATER RIGHT TO BE PROCESSED** to be served by the method indicated below, and addressed to the following:

Director Idaho Department of Water Resources 1301 N. Orchard Street PO Box 83720 Boise, ID 83720 Fax: 327-5400	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Peter Anderson, Hearing Officer 729 W. Braemere Road Boise, ID 83702	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Gary Spackman Idaho Department of Water Resources 1301 North Orchard P.O. Box 83720 Boise, ID 83720 Fax: 327-5400	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
John M. Marshall Givens Pursley, LLP PO Box 2720 Boise, ID 83701 Fax: 388-1300	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Charles L. Honsinger Ringert Clark 455 South 3rd Street PO Box 2773 Boise, ID 83701-2773 Fax: 342-4657	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Matthew Wilde Boise City Attorney's Office PO Box 500 Boise, ID 83701-0500 Fax: 384-4454	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

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Albert P. Barker Barker Rosholt & Simpson PO Box 2139 Boise, ID 83701-2139 Fax: 342-4657	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Bureau of Reclamation E. Gail McGarry, PN-3100 1150 N. Curtis Road, Suite 100 Boise, ID 83706-1234 Fax: 378-5019	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
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Matt J. Howard PO Box 190012 Boise, ID 83719 Fax: 333-8409	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

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Mr. Michael Chase
70 W. Floating Feather Road
Eagle, ID 83616-3802

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( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

By _____
Scott L. Campbell

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DEC 12 2003
Department of Water Resources

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**SETTLERS IRRIGATION DISTRICT'S DESIGNATION OF WATER RIGHT TO BE PROCESSED**

Settlers Irrigation District, by and through its counsel of record MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., and in accordance with the Hearing Officer's Order Re: Motion to Stay and Scheduling Order, dated November 12, 2003, hereby designate the water right they wish to have processed in the IMAP proceeding. That water right is number 63-10688, and it is a licensed water right.

ORIGINAL

DATED this 12th day of December 2003.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Angela Schaer Kaufmann – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December 2003, I caused a true and correct copy of the foregoing SETTLERS IRRIGATION DISTRICT'S DESIGNATION OF WATER RIGHT TO BE PROCESSED*** to be served by the method indicated below, and addressed to the following:

Director Idaho Department of Water Resources 1301 N. Orchard Street PO Box 83720 Boise, ID 83720 Fax: 327-5400	(X) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Peter Anderson, Hearing Officer 729 W. Braemere Road Boise, ID 83702	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
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Bruce M. Smith Tammy A. Zokan Moore Smith Buxton & Turcke 225 N. 9th Street, Suite 420 Boise, ID 83702 Fax: 331-1202	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Meridian Public Works Gary D. Smith 660 E. Watertower Meridian, ID 83642 Fax: 887-1297	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Caldwell Engineering Department Gordon Law 621 E. Cleveland Blvd. Caldwell, ID 83605 Fax: 455-3003	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Ed Squires Hydrologic 1002 W. Franklin Boise, ID 83702-5431 Fax: 342-3100	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Robert W. Talboy Ellsworth Kallas Talboy, PLLC 2402 W. Jefferson Street Boise, ID 83702 Fax: 345-8945	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Mr. Michael Chase 70 W. Floating Feather Road Eagle, ID 83616-3802	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

By _____
Scott L. Campbell

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Department of Water Resources

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DEC 12 2003
WATER RESOURCES
WESTERN REGION

BRUCE M. SMITH, ISB #3425
TAMMY A. ZOKAN, ISB #5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
225 North 9th Street, Suite 420
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Telephone: (208) 331-1800
Facsimile: (208) 331-1202

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE IN THE NAME OF UNITED WATER IDAHO INC.	NOTICE OF PROTESTANTS' REQUESTS TO PROCESS WATER RIGHTS

The Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District (collectively referred to as "Protestants"), by and through their counsel of record, MOORE SMITH BUXTON & TURCKE, CHARTERED, and pursuant to the Hearing Officer's November 12, 2003 Order Re: Motion for Stay and Scheduling Order, hereby designate the water rights that they desire to have processed first in this proceeding. The water rights Protestants desire to have processed first are as follows:

City of Eagle	63-12362
City of Kuna	63-19456
City of Middleton	63-02874
City of Star	63-07067
Star Sewer and Water District	63-09147

RESPECTFULLY SUBMITTED this 12 day of December, 2003.

TAMMY A. ZOKAN
MOORE SMITH BUXTON & TURCKE, CHARTERED

Attorneys for the Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Christopher Meyer
John Marshall
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701

Josephine P. Beeman
Beeman & Associates PC
409 W. Jefferson
Boise, Idaho 83702

E. Gail McGarry PN-3100
Bureau of Reclamation
1150 N. Curtis Rd., Ste. 100
Boise, Idaho 83706-1234

Bruce Smith
Moore Smith Buxton & Turcke
255 N. 9th St., Ste. 420
Boise, Idaho 83702

Kathleen Marion Carr MSC-020
Office of the Field Solicitor
US Dept. of Interior
550 W. Fort Street, Room 365
Boise, Idaho 83724

Scott L. Campbell
Moffatt Thomas
P.O. Box 829
Boise, Idaho 83701-0829

Albert Barker
Barker Rosholt & Simpson
P.O. 2139
Boise, Idaho 83701-2139

Matt Wilde
City of Boise
P.O. Box 500
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Tammy A. Zokan

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DEC 16 2003
Department of Water Resources

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DEC 12 2003
WATER RESOURCES
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550 West Fort Street, MSC-020
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Office: 208-334-1911 Fax: 208-334-1919
Attorney-Advisor for the U.S. Bureau of Reclamation

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER OF WATER RIGHTS IN THE NAME OF UNITED WATER IDAHO, INC. (UWID), INTEGRATED MUNICIPAL APPLICATION PACKAGE, ("IMAP")	)	**Bureau of Reclamation's Designation of Water Right for Test Case**

The Hearing Officer's *Order re Motion for Stay and Scheduling Order*, of November 12, 2003, ("Order") asked that each protestant designate one additional water right in the IMAP that protestant wishes to have processed first.

Pursuant to that Order, Reclamation designates the Hidden Valley Estates #1 Well. This well includes two water rights: 63-07641 and 63-08405.

RESPECTFULLY SUBMITTED this 11th day of December, 2003.

U.S. BUREAU OF RECLAMATION

By Kathleen M. Carr
Kathleen Marion Carr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of December 2003, that Kathleen Marion Carr served **the Bureau of Reclamation's Designation of Water Right for Test Case** on the following addressees and served by the method as indicated below:

cc: Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720
Fax: 327-5400

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Peter R. Anderson, Esq.
Hearing Officer
729 West Braemere Road
Boise, ID 83702

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

John Westra
Regional Manager
Idaho Department of Water Resources
Western Regional Office
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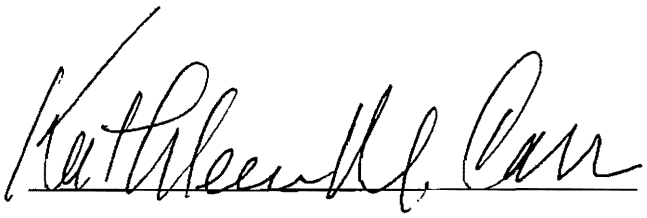
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Attorney-Advisor for the U.S. Bureau of Reclamation

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER OF WATER RIGHTS IN THE NAME OF UNITED WATER IDAHO, INC. (UWID), INTEGRATED MUNICIPAL APPLICATION PACKAGE, ("IMAP")	**Bureau of Reclamation's Designation of Water Right for Test Case**

The Hearing Officer's *Order re Motion for Stay and Scheduling Order*, of November 12, 2003, ("Order") asked that each protestant designate one additional water right in the IMAP that protestant wishes to have processed first.

Pursuant to that Order, Reclamation designates the Hidden Valley Estates #1 Well. This well includes two water rights: 63-07641 and 63-08405.

RESPECTFULLY SUBMITTED this 11th day of December, 2003.

U.S. BUREAU OF RECLAMATION

By Kathleen M. Carr
Kathleen Marion Carr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of December 2003, that Kathleen Marion Carr served **the Bureau of Reclamation's Designation of Water Right for Test Case** on the following addressees and served by the method as indicated below:

cc: Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720
Fax: 327-5400

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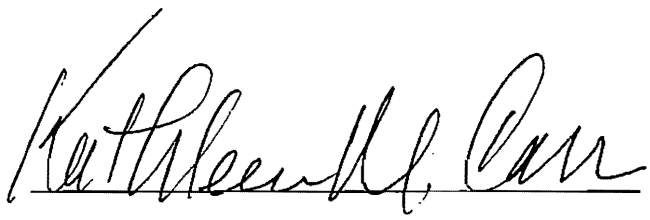
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Attorneys for United Water Idaho Inc.

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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	**NOTICE OF SERVICE**

On behalf of United Water Idaho Inc., I, John M. Marshall, of the law firm Givens Pursley LLP, hereby certify that on this date I caused a true and correct copy of UWID'S GENERAL SUPPLEMENTAL DISCOVERY RESPONSE #6 to be served by the method indicated below and addressed to the following:

Idaho Department of Water Resources 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	_X_ U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail

ORIGINAL

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Mr. Edward Squires Hydro Logic, Inc. 1002 West Franklin St. Boise, ID 83702-5431	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
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Matthew K. Wilde, Esq. Assistant City Attorney Boise City Attorney's Office 150 N. Capitol Blvd. P.O. Box 500 Boise, ID 83701-0500	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail

Charles L. Honsinger, Esq. Daniel V. Steenson, Esq. Ringert Clark, Chtd. 455 S. Third Street P.O. Box 2773 Boise, ID 83701-2773	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
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Robert W. Talboy, Esq. Ellsworth, Kallas & Talboy, PLLC 2402 West Jefferson Street Boise, ID 83702	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail

DATED this 8th day of December 2003.

GIVENS PURSLEY LLP

By _____
John M. Marshall
Attorneys for United Water Idaho Inc.

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Attorneys for United Water Idaho Inc.

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.	**UWID'S COMBINED REPLY IN SUPPORT OF MOTION REGARDING EXPERT WITNESSES**

On November 19, 2003, United Water Idaho Inc. ("United Water") filed its *Motion Regarding Expert Witnesses*. The motion sought leave to pre-file prepared expert testimony in the upcoming hearing and to require other parties to do so as well.

Pioneer Irrigation District and Settlers Irrigation Districts ("Pioneer & Settlers"), Nampa & Meridian Irrigation District ("NMID"), the Terteling entities ("Terteling), and the Cities of Eagle, Kuna, Middleton, Star and the Star Sewer and Water District (collectively, "Cities") filed responses.

This is United Water's combined reply.

I. TESTIMONY WILL BE PRESENTED IN AN ORDERLY AND SENSIBLE FASHION.

Pioneer & Settlers express concern that prepared testimony will not result in the orderly and sensible presentation of evidence. In fact, the principal advantage of prepared testimony is that it promotes the orderly and sensible presentation of evidence. It allows the witness to carefully think through the testimony and present it in the most orderly, coherent and compelling way possible. Counsel's involvement and oversight of the preparation further ensures that foundation is laid and issues are addressed without repetition, backtracking, leaps and gaps, as sometimes occurs with live testimony.

II. THE HEARING OFFICER WILL HAVE AMPLE OPPORTUNITY TO OBSERVE DEMEANOR.

Pioneer & Settlers object that prepared testimony will deprive the Hearing Officer of the opportunity to evaluate the demeanor and credibility of the expert. The Hearing Officer will have ample opportunity to do so during cross-examination and re-direct, both of which will be live. As a practical matter, these later parts of the testimony are the ones that truly test the witness.

III. WRITTEN TESTIMONY DOES NOT INVITE IMPROPER INFLUENCE OF COUNSEL.

Pioneer & Settlers contend that written testimony "will foster opportunities for insertion of the improper direction of counsel." This suggestion is offensive to the experts involved in this matter. Mr. Church, Dr. Reading and Mr. Squires are each highly regarded professionals. None is likely bend to the influence of counsel and submit sworn testimony contrary to their carefully considered professional opinions. If Protestants think that has happened, they are free to bring it out on cross.

IV. TEN DAYS ADVANCE FILING SHOULD BE SUFFICIENT.

United Water proposed that prepared testimony be pre-filed ten days prior to the February 2, 2004 hearing (that being January 21, 2004). NMID, Terteling and the Cities ("NMID et al.)", propose 30 days prior to hearing (that being December 31, 2003). Pioneer & Settlers propose 45 days prior to hearing (that being December 19, 2003).

United Water believes that the ten days it has proposed is ample. Protestants complain that ten days does not give them enough time to prepare. This does not follow. Preparation for hearing is supposed to occur during discovery, not after the direct testimony is heard. After all, when the testimony is live, the Protestants have no advance access to the testimony. They hear the direct testimony of the Applicant and then proceed immediately to cross-examination, without any preparation time (or, at most, overnight). Protestants should not be heard to complain about receiving ten days advance notice when they usually receive none.

Moreover, Protestants already have a very clear idea of what the testimony will be. The basis for the testimony is laid out in detail in the application itself. In addition, Protestants have engaged in extensive discovery including months of unlimited informal access to Mr. Church and two days of formal deposition. If they are given Mr. Church's testimony ten days in advance of hearing, they will be in an even better position to prepare for effective cross. Protestants are in no position to complain.

V. MOTION PRACTICE REGARDING PREPARED TESTIMONY IS NOT LIKELY AND, IN ANY EVENT, MAY BE RESOLVED AT HEARING.

Pioneer & Settlers also express concern that the pre-filed testimony may contain leading questions, lack proper foundation, or the like. In fact, pre-filed testimony is much less likely to have these defects than oral testimony, simply because of the preparation process. Those familiar with the use of prepared testimony at the Idaho Public Utilities Commission ("IPUC")

will confirm that such objections are rare (because counsel have ample time to avoid making the mistakes that lead to objections).

As for the concern expressed by Pioneer & Settlers and others that they may need to engage in motion practice challenging the prepared testimony prior to the hearing, that should not be necessary. The testimony will not be spread on the record until the time of the hearing. If an objection has been filed, it may be resolved the morning of the hearing. Should any party submit pre-filed testimony that contains numerous such problems that cannot be readily corrected, the simple solution is for the Hearing Officer to reject the prepared testimony and require the party to proceed by way of live testimony.

In any event, moving the deadline earlier to allow for motion practice will pose a material hardship on United Water. United Water has already been prejudiced by the refusal of Pioneer & Settlers to allow its expert to develop and share his opinions through discovery. (Pioneer & Settlers confirmed in their response that they continue to refuse to engage their expert.) It is urgently necessary for the Hearing Officer to rule on the pending motions bearing on Pioneer & Settlers and their expert witness.

VI. IT IS NOT AN UNREASONABLE BURDEN TO REQUIRE EXPERTS TO PROVIDE WRITTEN TESTIMONY.

Pioneer & Settlers complain that requiring them to file written testimony would impose "an additional financial burden" on them. This comes from parties whose protests have caused the Applicant to incur litigation costs measured in the hundreds of thousands of dollars. If persons wish to engage in administrative litigation challenging other person's water rights, they should be prepared to shoulder the cost of presenting their testimony in the most effective and helpful manner appropriate under the circumstances.

Litigants before the IPUC have managed to bear this burden for many years without adverse consequences. It is our understanding that the Department adopted Rules 413.01.b and 605 specifically to enable the Department to adopt the IPUC's practice where appropriate. If there was ever a case where prepared testimony is appropriate, this is it.

The approach employed at the IPUC is somewhat different (and somewhat more radical) than what we have proposed here. Before the IPUC, prepared testimony typically serves a discovery function, as well as streamlining the presentation of evidence. (Discovery does occur, but, as a practical matter, it is typically based on what the parties learn from the pre-filed testimony.) Indeed, the applicant's direct testimony is often filed with the application. Consequently, in IPUC practice, the pre-filing deadlines are set much further back into the discovery timeframe. Moreover, filing of direct testimony by proponents and opponents is staggered.

The situation here is different. In light of the fact that the parties to the IMAP have already enjoyed a vigorous and thorough discovery of United Water's expert witness, there is no need for long lead times or staggered filing of direct testimony. Indeed, as pointed out above, doing so would be prejudicial under current circumstances.

VII. PROTESTANTS SHOULD NOT BE ALLOWED TO CONTINUE TO KEEP THEIR EXPERT'S OPINIONS SECRET.

Perhaps one reason Protestants object so strongly to the request that they submit prepared testimony is that it would force them, finally, to disclose their experts' opinions and the bases for those opinions. To date, no Protestant has disclosed to United Water any opinion of any expert. Nor has any Protestant disclosed any explanation for their experts' opinion. The Protestants have withheld this information despite direct discovery requests for this information. The Hearing Officer is aware of Pioneer & Settlers refusal to provide Don Reading's opinions.

NMID *et. al* have been no more forthcoming. To date, their only explanation of Mr. Squires' testimony is that he "may testify regarding the potential effect of the IMAP on the groundwater resource." *Response to Interrogatory No. 3, Nampa & Meridian Irrigation District's Responses to United Water Idaho's First Set of Discovery Requests.* Presumably, the Protestants intend to withhold this information until hearing, or to force United Water into additional motion practice to compel the testimony.

VIII. CROSS-EXAMINATION AND RE-DIRECT SHOULD BE LIVE.

United Water agrees with Protestants that cross-examination of witnesses filing prepared testimony should be live and under oath. The same, obviously, goes for re-direct and re-cross.

IX. UNITED WATER OBJECTS TO LATE DESIGNATION OF WITNESSES.

The Cities have never designated any expert witnesses in this matter. They conclude their response by mentioning that they may finally designate an expert "[n]ow that these issues have been decided and the hearing scheduled." United Water objects vigorously to any such late designation. The Hearing Officer ended discovery months ago. The Cities may not unilaterally set aside the Hearing Officer's timelines and announce their own based on their desire "to conserve resources."

Likewise, United Water objects to Pioneer & Settler's late designation of Mr. Squires as their expert witness, particularly in light of the fact that they continue to refuse any explanation of how Mr. Squires may testify on their behalf.

RESPECTFULLY SUBMITTED this 4th day of December 2003.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
John M. Marshall
Attorneys for United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 W. Fort Street Boise, ID 83724	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
Mr. Edward Squires Hydro Logic, Inc. 1002 W. Franklin Street Boise, ID 83702-5431	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
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Christopher H. Meyer

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WATER RESOURCES
WESTERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the Matter of United Water Idaho's Municipal Application Package, United Water Idaho, Petitioner	)))))	**RESPONSE TO UNITED WATER'S MOTION REGARDING EXPERT WITNESSES**

The Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District (collectively referred to as "Protestants"), by and through their counsel of record, MOORE SMITH BUXTON & TURCKE, CHARTERED, hereby respond to United Water's Motion Regarding Expert Witnesses, dated November 19, 2003. The Protestants do not object to United Water's request to pre-file the written testimony of John Church; however, Protestants object to United Water's attempts to limit the testimony of the other parties' witnesses. Protestants also object to United Water's proposal to limit the parties' review of Mr. Church's written testimony to the ten (10) day period immediately preceding the two (2) week hearing of this matter.

The Department's Rules allow the Hearing Officer "to require the advance filing of expert testimony, when authorized before the agency." Rule 413.01(b). The Department's Rules permit the Hearing Officer to "order a witness's prepared testimony previously distributed to all parties to be included in the record of hearing as if read." Rule 605. Prepared testimony is subject to Rule 600. Id. The Department's Rules do not impose any requirement that a Hearing Officer must require or accept written testimony in a contested case proceeding.

ORIGINAL

1. United Water's Request to Submit Written Testimony of Mr. John Church Should be Granted

United Water desires to submit the direct testimony of Mr. John Church in writing, and in advance of the hearing. The Protestants have no objection to the presentation of Mr. Church's testimony in written form so long as (1) Mr. Church's testimony is limited to the written testimony; and (2) Mr. Church's written testimony is provided to all the parties well in advance of the scheduled hearing. Ten (10) days before hearing does not allow sufficient time for the parties to review Mr. Church's testimony, prepare for the two-week hearing, deal with objections, as well as tend to other pending matters. Given the complexity of Mr. Church's testimony and the amount of time which otherwise must be devoted to preparation of the lengthy hearing on this matter, the Hearing Officer should allow thirty (30) days for review of Mr. Church's written testimony.

2. United Water's Request to Limit All the Parties to Written Testimony Should be Denied

The Protestants desire to present expert testimony at the hearing scheduled in this matter. Presentation of the parties' expert testimony at hearing will give the Protestants sufficient opportunity to be heard and will be valuable to the Hearing Officer's consideration of the Protestant's case. United Water is the applicant and presents its case first. The Protestants must then respond to United Water's case in chief. The Protestants cannot do so before the fact via written testimony. The Protestants must be given an opportunity to respond to the actual evidence presented at hearing. Additionally, the interactive nature of live testimony should paint a more understandable picture of the matters pending before the Hearing Officer. Consequently, the Hearing Officer should allow the parties who wish to present live testimony to do so.

The status of the pending applications and hearing thereon has been in flux for quite some time. The Protestants have desired to conserve resources until such time that United Water

settled on the applications before the Department, proposed changes were made clear, and the matter of the stay decided. Now that these issues have been decided and the hearing scheduled, the Protestants may identify an expert and/or rely on the expert testimony presented by another party. As soon as the Protestants identify an expert they will immediately notify United Water of their selection.

RESPECTFULLY SUBMITTED this 3 day of December, 2003.

TAMMY A. ZOKAN
MOORE SMITH BUXTON & TURCKE, CHARTERED

Attorneys for the Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of December, 2003, I caused to served a true and correct copy of the forgoing REPLY by the U.S. mail, addressed to the following:

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Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S RESPONSE TO MOTION REGARDING EXPERT WITNESSES**

Pioneer Irrigation District and Settlers Irrigation District ("Districts"), by and through their counsel of record MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., and in accordance with Idaho Department of Water Resources' Rules of Procedure 217.02,.413.01, 530, 600, and 605 (IDAPA 37.01.01.217.02, 37.01.01.413.01, 37.01.01.600, and 67.01.01.605) hereby respond to United Water Idaho's ("UWID") Motion Regarding Expert Witnesses. For the reasons set forth herein, the Districts respectfully request that the Motion be denied.

I.
LEGAL BACKGROUND

Rule 413.01.b provides authorization for the Hearing Officer to require advance filing of expert testimony. IDAPA 37.01.01.413.01.b. Moreover, Rule 605 provides that such testimony, when properly distributed to all parties in advance, will be included in the hearing record. IDAPA 37.01.01.605.

It is also important to remember, however, that Rule 600 provides that while hearings before IDWR are not subject to the Idaho Rules of Evidence:

> The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho.

IDAPA 37.01.01.600. Moreover, in order to ensure a clear record, it is important that testimony and evidence be presented in an orderly fashion.

II.
ARGUMENT AND ANALYSIS

A. The Motion Should Be Denied

The Districts are mindful that even though the parties and the Hearing Officer have worked diligently to simplify the IMAP and to weed out those issues which are more appropriately decided in the SRBA District Court, the proceeding will not be short, nor simple. In fact, the Hearing Officer has set the hearing for two weeks at the end of January and first part of February, 2004.

Because the hearing will be long, it may at first seem to make sense to require the parties to submit their direct expert testimony in writing, prior to the hearing. By submitting

pre-filed direct expert testimony, one may think that the time for hearing may be shortened. However, the Districts do not believe that to be the case.

Even though the Hearing Officer is not bound by the Idaho Rules of Evidence, it is still important that testimony and evidence be presented in an orderly and sensible fashion. In order to accomplish that goal, the Districts believe that it is necessary to require that counsel ask non-leading questions of the expert, with responses, and that the proper foundation be laid for the facts and opinions elicited from the expert. It may be possible to do so in the form of pre-filed written testimony, but it is much easier to ensure orderly testimony if it is presented orally rather than in writing. While administrative proceedings such as the IMAP are generally more informal than court proceedings, there is much at stake in the IMAP, and it is critical that testimony be presented appropriately.

In addition, it is anticipated that the parties may object to certain portions of the opposing party's expert testimony. If direct testimony is pre-filed, objections will need to be made via motion and resolved prior to commencement of the hearing. It would be much more efficient to simply require each party to present its testimony live, and in response to appropriate questioning from counsel. Any objections can then be resolved as they arise. Moreover, demeanor and credibility are two essential aspects determined by live testimony. It is impossible to assess either in written testimony.

Finally, it is much more likely that written testimony will foster opportunities for insertion of the improper direction of counsel into the testimony. Such influence improperly interferes with the role of expert opinion testimony. The expert's voice, not that of counsel, should be heard.

B. If The Hearing Officer Grants The Motion, The Districts Request Certain Parameters

At the outset, the Districts note that the Hearing Officer has not yet ruled on UWID's Motion to Dismiss the District's Protests. Until such time as the Hearing Officer makes his ruling on that motion, the Districts remain hesitant to incur additional costs in preparing for hearing (including asking Don Reading to formulate opinions and do any work necessary to formulate those opinions). It makes little sense for the Districts to incur that expense if they will be dismissed from the IMAP proceeding.

Relatedly, UWID hints in its Motion Regarding Expert Witnesses that it may raise an objection to Dr. Reading's testimony at hearing, presumably because as of this date, he has not disclosed his opinions (because he has not been asked by the Districts to formulate them). As the Districts emphasized in their response to UWID's Motion to Dismiss, if the Districts are not dismissed, they will ask Dr. Reading to continue his work and will disclose his opinions in as timely a manner as possible.

It is true that the Districts have named Ed Squires as a possible expert witness. However, he remains largely the expert witness of Nampa & Meridian Irrigation District and the Terteling Entities, and any opinions which the Districts would elicit from Ed Squires would likely be the same as those elicited by NMID and the Terteling Entities. Moreover, as with Dr. Reading, the Districts will not incur any expense regarding Mr. Squires until such time as the Hearing Officer rules on UWID's Motion to Dismiss.

That aside, if the Hearing Officer grants UWID's Motion, the Districts request that they be permitted to present Dr. Reading's testimony orally, at the hearing in this matter. While Dr. Church has previously prepared at least some form of written documentation of his opinions, Dr. Reading has not done so, nor was he required to do so. Therefore, to require him to

prepare written testimony in the form of a report would impose an additional financial and time-consuming burden on Dr. Reading and the Districts, a burden which they decline to assume.

If the Hearing Officer grants UWID's Motion Regarding Expert Witnesses, either in whole (as to all parties) or in part (as to UWID), the Districts respectfully request the following:

1. That UWID be required to file Dr. Church's direct expert testimony no later than December 19, 2003.

2. That any objections to Dr. Church's testimony be filed no later than December 31, 2003.

3. That any expert testimony on behalf of the protestants, if it is required to be pre-filed, be filed no later than January 12, 2004.

4. That any objections to the Protestants' expert testimony be filed no later than January 23, 2003.

5. That cross-examination be conducted live, on the record, and under oath.

The Districts anticipate that any objections would be resolved the first day of the hearing. In addition, the Districts have requested a staggered filing schedule because their expert testimony will be, at least in part, in response to Dr. Church's testimony. Because testimony which is part of the record before IDWR must be made under oath, the Districts further respectfully request that the Hearing Officer require each witness providing written testimony to provide an affidavit swearing or affirming "that the testimony the witness will give before the agency is the truth, the whole truth, and nothing but the truth." IDAPA 37.01.01.559.

III.
CONCLUSION

For the reasons set forth in Sections I and II.A, the Districts respectfully request that the Hearing Officer deny UWID's Motion Regarding Expert Witnesses. If the Hearing Officer grants UWID's Motion Regarding Expert Witnesses, the Districts respectfully request

that the Hearing Officer deny that portion of the Motion that requests that all parties be required to pre-file their direct expert witness testimony in written form. Finally, if the Hearing Officer grants UWID's Motion, the Districts respectfully request that the Hearing Officer order the parameters described in Section II.B, above.

DATED this 3rd day of December 2003.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Angela Schaer Kaufmann – Of the Firm
Attorneys for Pioneer Irrigation District and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of December 2003, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S RESPONSE TO MOTION REGARDING EXPERT WITNESSES** to be served by the method indicated below, and addressed to the following:

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BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND	RESPONSE TO MOTION REGARDING EXPERT WITNESSES

COMES NOW, protestants Nampa & Meridian Irrigation District and the Terteling entities (hereinafter "Protestants"), by and through their counsel of record Ringert Clark, Chartered, and, pursuant to IDAPA 37.01.01.270.02, file this Response to United Water Idaho's *Motion Regarding Expert Witnesses* filed on November 19, 2003.

ARGUMENT

Through its *Motion Regarding Expert Witnesses*, United Water Idaho requests an order from the hearing officer which seeks the following: (1) permission to pre-file written testimony of its expert witness, John Church, distributing the same to the parties ten days prior to the start of hearing; and (2) a requirement that the parties submit the direct testimony of any other expert witnesses in written form in lieu of oral testimony at hearing. The Protestants respectfully request that the *Motion*

ORIGINAL

Regarding Expert Witnesses be denied in part and granted in part with the modification discussed below.

IDWR's Rules of Procedure provide that hearing officers in contested cases have authority to "require advance filing of expert testimony, when authorized before the agency." IDAPA 37.01.01.413.b. The Rules of Procedure also provide that the Hearing Officer may "order a witness's prepared testimony previously distributed to all parties to be included in the record of hearing as if read." IDAPA 37.01.01. 605. Notably, however, the Rules of Procedure do not require that a Hearing Officer accept written testimony in lieu of direct oral testimony at hearing.

The Protestants do not object to United Water Idaho's request to pre-file the written direct testimony of John Church. However, United Water Idaho itself states "that oral direct testimony sufficient to present the necessary details from Mr. Church's analysis could take up to four days." *Motion Regarding Expert Witnesses*, p. 3. United Water Idaho also notes that Mr. Church's testimony is expected to be "complex and highly detailed." *Id.* Because of the nature of Mr. Church's testimony, and because Protestants and their attorneys will be engaged in preparing for what is anticipated to be a two week hearing, United Water's suggestion that the Mr. Church's written testimony be distributed to the parties 10 days prior to the hearing is inappropriate. The written testimony should instead be distributed 30 days prior to hearing to give the parties sufficient time to review and analyze Mr. Church's testimony, to object to those portions of the testimony to which an objection is appropriate, to prepare for his cross-examination, and to complete all other necessary tasks prior to the anticipated lengthy hearing.

The Protestants do object to United Water Idaho's request for an Order requiring the testimony of all other experts to be written and pre-filed. The testimony presented by Protestants'

expert will be at least in part determined by the evidence presented by United Water Idaho. To require protestants to present testimony in writing prior to the time that they determine precisely what the testimony that should be elicited through the expert will be simply does not make sense, and results in the inefficiencies which UWID is trying to avoid through its *Motion*. As opposed to Mr. Church, Protestants' expert was not required to document his opinions in writing. To force the Protestants to submit their expert's testimony in writing will force them to incur expenses they would otherwise not incur. Moreover, although they do not object to United Water Idaho's decision not to have the Hearing Officer and other parties observe the credibility and demeanor of its expert witness observed during a direct examination at the hearing of this matter, Protestants should not be required to forego a similar observation of their own expert against their wishes.

In sum, Protestants do not object to the presentation of Mr. Church's direct testimony in writing so long as it is distributed 30 days prior to the hearing date. Protestants object to any requirement that they present the testimony of their own expert in writing for the reasons stated above. Accordingly, Protestants respectfully request that the Hearing Officer deny United Water Idaho's Motion Regarding Experts as it relates to Protestants' expert, and grant the motion as it relates to John Church with the requirement that Mr. Church's testimony be distributed 30 days prior to hearing.

Submitted this 3rd day of December, 2003

RINGERT CLARK, CHARTERED

By _____
Charles L. Honsinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Attorneys for United Water Idaho Inc.

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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	**UWID'S DESIGNATION OF WATER RIGHTS OR PERMITS FOR TEST CASES**

DESIGNATION OF TEST CASES

The Hearing Officer's *Order re Motion for Stay and Scheduling Order* of November 12, 2003 ("Order") requires United Water Idaho Inc. to "designate ten (10) water rights or permits which it wishes to have processed first." The Order further directs that United Water shall attempt to include several categories of rights or permits in its designation.

Pursuant to the Order, United Water designates the following rights and permits as test cases:

ORIGINAL

UWID's Designation of Water Rights for Test Cases						
Water Right No.	**Priority Date**	**Stage**	**Change of Points of Diversion**	**Change Nature of Use**	**Change Place of Use**	**Change Season of Use**
63-2500	8/30/1934	License	Change to integrated PODs	No change	No change	No change
63-2506	6/5/1935	License	Change to integrated PODs	No change	Change to UWID Service Area	No change
63-2954	8/27/1953	License	Change to integrated PODs	Change to municipal	Change to UWID Service Area	No change
63-4752	1/1/1947	Beneficial Use	Change to integrated PODs	No change	No change	No change
63-7979	5/13/1974	License	Change to integrated PODs	Change to municipal	Change to UWID Service Area	Change to year round
63-10150	7/1/1983	License	Change to integrated PODs	Change to municipal	Change to UWID Service Area	Change to year round
63-11990	1/27/1993	License	Change to integrated PODs	Change to municipal	Change to UWID Service Area	No change
63-12055	9/8/1993	Permit	Add one POD	No change	No change	No change
63-12140	10/19/1994	Permit	Change to integrated PODs	No change	No change	No change
63-12192	3/31/1995	License	Change to integrated PODs	No change	No change	No change

RESPECTFULLY SUBMITTED This 3rd day of December 2003.

GIVENS PURSLEY LLP

By _____

Christopher H. Meyer
John M. Marshall
Attorneys for United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Mr. Edward Squires Hydro Logic, Inc. 1002 West Franklin St. Boise, ID 83702-5431	_x_ U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
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Attorneys for United Water Idaho Inc.

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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	**UWID'S GENERAL SUPPLEMENTAL DISCOVERY RESPONSE #5**

In accordance with its ongoing obligation to supplement its discovery responses, Applicant United Water Idaho Inc. ("UWID"), hereby provides the following recently created map showing the general location of UWID's current ground water points of diversion.

DATED this 25th day of November 2003.

GIVENS PURSLEY LLP

By _____
John M. Marshall
Attorneys for United Water Idaho Inc.

COPY

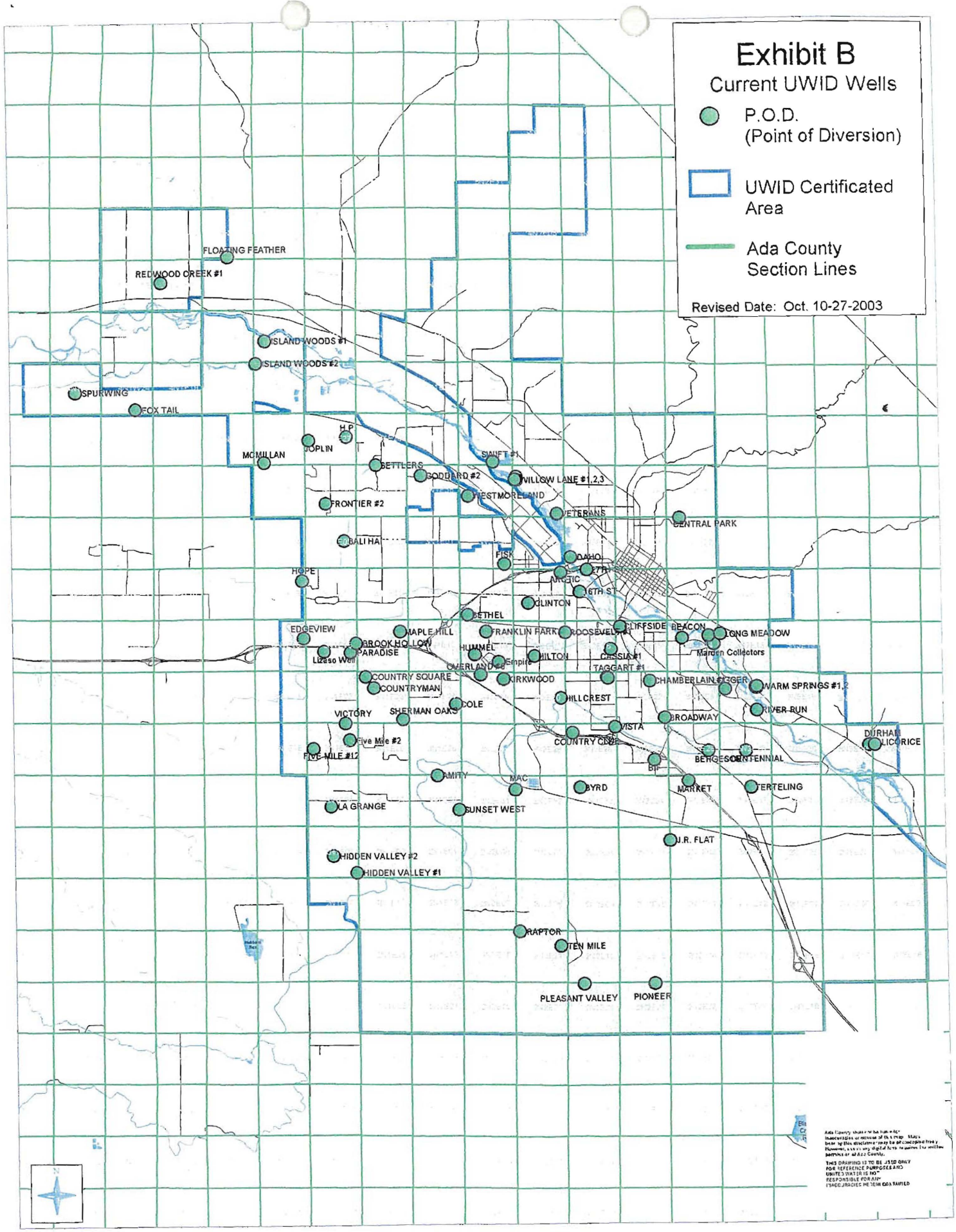
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I hereby certify that on this 25th day of November 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Mr. Edward Squires Hydro Logic, Inc. 1002 West Franklin St. Boise, ID 83702-5431	✓ U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	✓ U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
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John M. Marshall


Exhibit B
Current UWID Wells
P.O.D.
(Point of Diversion)
UWID Certificated Area
Ada County Section Lines
Revised Date: Oct. 10-27-2003
FLOATING FEATHER
REDWOOD CREEK #1
ISLAND WOODS #1
ISLAND WOODS #2
SPURWING
FOX TAIL
H.P.
JOPLIN
MCMILLAN
SETTLERS
GODDARD #2
SWIFT #1
WILLOW LANE #1,2,3
WESTMORELAND
FRONTIER #2
VETERANS
CENTRAL PARK
BALI HA
FISK
IDAHO
ARCTIC
16TH ST
HOPE
CLINTON
BETHEL
EDGEVIEW
MAPLE HILL
FRANKLIN PARK
ROOSEVELT #1
CLIFFSIDE
BEACON
LONG MEADOW
BROOK HOLLOW
PARADISE
Lizaso Well
HUMMEL
Empire
HILTON
CASSIA #1
Marden Collectors
OVERLAND #6
TAGGART #1
COUNTRY SQUARE
COUNTRYMAN
KIRKWOOD
CHAMBERLAIN CROSSING
WARM SPRINGS #1,2
HILLCREST
COLE
VICTORY
SHERMAN OAKS
RIVER RUN
BROADWAY
VISTA
Five Mile #2
FIVE MILE #12
COUNTRY CLUB
DURHAM
LICORICE
BETHESDA
CENTENNIAL
BIF
AMITY
MAC
BYRD
MARKET
TERTELING
LA GRANGE
SUNSET WEST
J.R. FLAT
HIDDEN VALLEY #2
HIDDEN VALLEY #1
RAPTOR
TEN MILE
PLEASANT VALLEY
PIONEER

Christopher H. Meyer, Esq. [ISB No. 4461]
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Email: chrismeyer@givenspursley.com; jmm@givenspursley.com
Attorneys for United Water Idaho Inc.

RECEIVED
NOV 25 2003
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.	**WITHDRAWAL OF PROPOSED CONDITIONS OF SEPTEMBER 25, 2003**

On September 25, 2003 United Water Idaho Inc. ("United Water") submitted *United Water's Submission of Proposed Conditions* to the Department ("Proposed Conditions of September 25, 2003").

In the Proposed Conditions of September 25, 2003, United Water noted that "the development of final conditions is a dynamic, iterative and interactive process that remains underway." Subsequent to submitting the Proposed Conditions of September 25, 2003, United Water engaged in further settlement discussions with the Cities of Meridian and Caldwell. As a result of those negotiations, the wording, order and format of the conditions has been altered. In some cases, new conditions have been adopted, replacing others.

ORIGINAL

These changes are reflected in Exhibit A to the *Stipulation and Withdrawal of Protests of the City of Meridian and the City of Caldwell* filed with the Department and served on all parties on November 24, 2003 ("Stipulation of November 24, 2003"). Exhibit A is a replacement set of conditions proposed for inclusion in the approval of any of the applications that are a part of the IMAP.

Because the conditions included in the Stipulation of November 24, 2003, if adopted by the Department, would be appended to the approval of any IMAP application, the benefits of these conditions inure not just to the settling Parties, but to all the Parties (and to non-parties).

In sum, the September 25, 2003 Proposed Conditions are no longer operative, and have been replaced by the proposed conditions included as Exhibit A to the November 25, 2003 stipulation. To avoid any confusion, United Water hereby withdraws the September 25, 2003 Proposed Conditions.

RESPECTFULLY SUBMITTED This 25th day of November, 2003.

GIVENS PURSLEY LLP

By: _____

Christopher H. Meyer
John M. Marshall
Attorneys for United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Water Resources State Office 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	_____ U.S. Mail _____ Facsimile __✓__ Hand Delivery _____ Overnight Mail
Peter R. Anderson, Esq. Hearing Officer 729 W. Braemere Rd. Boise, ID 83702	__✓__ U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 West Fort Street Boise, ID 83724	__✓__ U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
Mr. Edward Squires Hydro Logic, Inc. 1002 West Franklin St. Boise, ID 83702-5431	__✓__ U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	__✓__ U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
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Matthew K. Wilde, Esq. Assistant City Attorney Boise City Attorney's Office 150 N. Capitol Blvd. P.O. Box 500 Boise, ID 83701-0500	✓ U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Charles L. Honsinger, Esq. Daniel V. Steenson, Esq. Ringert Clark, Chart 455 S. Third Street P.O. Box 2773 Boise, ID 83701-2773	✓ U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Scott L. Campbell, Esq. Angela D. Schaer, Esq. Andrew J. Waldera, Esq. Moffatt Thomas Barrett Rock & Fields, Chartered 101 S. Capital Blvd., 10th Floor P.O. Box 829 Boise, ID 83701-0829	✓ U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Albert P. Barker, Esq. Travis L. Thompson, Esq. Barker, Rosholt & Simpson, LLP 205 North 10th, Suite 520 P.O. Box 2139 Boise, ID 83701-2139	✓ U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
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Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	✓ U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail

John M. Marshall

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Attorneys for United Water Idaho Inc.

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	**NOTICE OF SERVICE**

On behalf of United Water Idaho Inc., I, John M. Marshall, of the law firm Givens Pursley LLP, hereby certify that on this date I caused a true and correct copy of UWID'S GENERAL SUPPLEMENTAL DISCOVERY RESPONSE #5 to be served by the method indicated below and addressed to the following:

Idaho Department of Water Resources 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	_____ U.S. Mail _____ Facsimile __X__ Hand Delivery _____ Overnight Mail

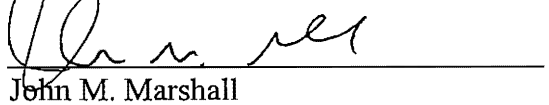
ORIGINAL

Peter R. Anderson, Esq. Hearing Officer 729 W. Braemere Rd. Boise, ID 83702	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
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Matthew K. Wilde, Esq. Assistant City Attorney Boise City Attorney's Office 150 N. Capitol Blvd. P.O. Box 500 Boise, ID 83701-0500	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail

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Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail

DATED this 25th day of November 2003.

GIVENS PURSLEY LLP

By 
John M. Marshall
Attorneys for United Water Idaho Inc.

Christopher H. Meyer [ISB No. 4461]
John M. Marshall [ISB No. 5628]
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Attorneys for United Water Idaho Inc.

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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	**UWID'S NOTICE IDENTIFYING BENEFICIAL USE RIGHTS IN THE IMAP**

NOTICE

The Hearing Officer's *Order re Motion for Stay and Scheduling Order* requires United Water Idaho Inc. to submit a document identifying the rights listed in Tab J, Spreadsheet 1 of the IMAP that are beneficial use water rights. This *Notice* provides the required list. The following rights from Tab J, Spreadsheet 1, in the IMAP are beneficial use rights:

1. 63-4015
2. 63-4395
3. 63-4414
4. 63-4424
5. 63-4752
6. 63-19456

ORIGINAL

RESPECTFULLY SUBMITTED This 25th day of November 2003.

GIVENS PURSLEY LLP

By _____
John M. Marshall
Attorneys for United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	✓ U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail

John M. Marshall

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Department of Water Resources

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RINGERT CLARK CHARTERED
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Boise, Idaho 83701-2773
Office: (208) 342-4591
Fax: (208) 342-4657
Counsel for the City of Meridian and the City of Caldwell

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.	**STIPULATION AND WITHDRAWAL OF PROTESTS OF THE CITY OF MERIDIAN AND THE CITY OF CALDWELL**

RECITALS

1. This Stipulation and Withdrawal of Protests is entered into by United Water Idaho Inc. ("United Water"), the City of Meridian and the City of Caldwell.

2. The City of Meridian and the City of Caldwell are represented by the firm Ringert Clark Chartered whose attorneys are authorized to enter into this Stipulation. United Water Idaho Inc. is represented by the firm Givens Pursley LLP whose attorneys are authorized to enter into this Stipulation.

3. On May 4, 2001 United Water filed a set of applications for transfer of water right and applications for amendment of permit titled the Integrated Municipal Application Package ("IMAP") with the Idaho Department of Water Resources ("Department"). United Water amended the IMAP on March 20, 2002 and April 9, 2003.

4. The Cities of Meridian and Caldwell each filed a Notice of Protest to the IMAP with the Department on April 22, 2002.

5. To resolve the protests, the parties have negotiated a series of conditions, attached as Exhibit A, to be included by the Department in any approval of any application included in the IMAP (the "Conditions").

STIPULATION AND WITHDRAWAL OF PROTESTS

6. The conditions set out in Exhibit A are hereby submitted to the Department by the undersigned Parties for consideration as conditions on each of the applications that make up the IMAP.

7. Upon statement of the Department that such conditions are approved and will be made a part of the approval of said applications, the protests of the City of Meridian and the City of Caldwell shall be deemed withdraw with prejudice.

AGREED AND SUBMITTED this 24th day of November, 2003.

GIVENS PURSLEY LLP

By: _____
Christopher H. Meyer
John M. Marshall
Attorneys for Applicant
United Water Idaho Inc.

RINGERT CLARK CHARTERED

By: _____
Daniel V. Steenson
Charles L. Honsinger
Attorneys for the City of Meridian and the City of Caldwell

EXHIBIT A

SETTLEMENT CONDITIONS
PROPOSED BY SETTLING PARTIES
NOVEMBER 24, 2003

Condition No. 1

The Department retains the right to initiate proceedings to re-evaluate the quantification of United Water's reasonably anticipated future needs when new population and other planning data become available. All interested parties shall be afforded an opportunity to participate in such proceedings, which shall be conducted pursuant to rules for contested cases. If no such proceeding has been initiated in any ten-year period, United Water shall petition the Department to initiate such a proceeding. In the event the Department finds that changed conditions justify a reduction in the reasonably anticipated future needs, water rights held in excess of such adjusted quantity would then be subject to forfeiture.

Condition No. 2

Any claim that diversion of water from any of the points of diversion for this water right is interfering with another ground or surface water right shall be evaluated on the basis of the priority of the pre-transfer/amendment water right(s) originally associated with the point of diversion which is the subject of the claim of interference.

Condition No. 3

Approval of this transfer/amendment shall not be construed to change or resolve the applicable law governing either conjunctive management of ground and surface water rights, or the recapture and re-use of water.

Condition No. 4

Approval of this transfer/amendment does not limit the rights of any entity to supply water for any purpose at any location.

Condition No. 5

The right holder's reasonably anticipated future needs in excess of its valid water rights do not constitute water rights and shall not serve as a basis for asserting injury.

Condition No. 6

Approval of this transfer/amendment does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.

Condition No. 7

The Department's findings with respect to future needs made in connection with this transfer/amendment may be submitted by the right holder or by any other person in any future water right proceeding. The Department shall give such effect, weight or deference to its prior findings as it shall determine appropriate under law.

Condition No. 8

The right holder may not divert from any point of diversion authorized for this water right at a rate in excess of the licensed/permitted quantity of the water right associated with such point of diversion prior to the approval of this transfer/amendment.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Water Resources State Office 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	_____ U.S. Mail _____ Facsimile ✓ Hand Delivery _____ Overnight Mail
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Attorneys for United Water Idaho Inc.

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.	**MOTION REGARDING EXPERT WITNESSES**

United Water Idaho Inc. ("United Water") hereby moves the Hearing Officer for two orders regarding the presentation of direct testimony from expert witnesses in this matter. First, United Water seeks permission from the Hearing Officer pursuant to Procedure Rules 413.01(b) and 605 allowing it to pre-file written direct testimony from its expert witness, John Church, for inclusion into the record. Second, United Water requests an order, also pursuant to Procedure Rules 413.01(b) and 605, requiring that all direct testimony from any expert witness in this matter must be presented in written format and pre-filed. The grounds for these motions are discussed below.

ORIGINAL

ARGUMENT

I. United Water seeks permission to pre-file written expert testimony to be included in the Record.

The Hearing Officer has set this matter for a two-week hearing beginning January 26, 2004. A primary issue for consideration during this hearing will be the population and water demand forecasts underlying the IMAP's requested 50-year planning horizon. United Water seeks to streamline the presentation of its evidence supporting these forecasts by submitting written expert testimony in lieu of direct examination at hearing. In addition to saving time, submission of written testimony will also assure the completeness and accuracy of this complex testimony.

Procedure Rule 413.01(b) provides that a hearing officer has authority "to require advance filing of expert testimony, when authorized before the agency." Procedure Rule 605 then provides for inclusion of this testimony in the record without having to recite the testimony at hearing: "The presiding officer may order a witness's prepared testimony previously distributed to all parties to be included in the record of hearing as if read." In accordance with these rules, United Water seeks authorization to present the direct testimony of John Church in this matter through pre-filed, written testimony.

By now all parties to this case are familiar with Mr. Church and his population and water demand forecasts for United Water through the year 2050. These forecasts are presented and explained in the IMAP, and Mr. Church has explained the forecasts on several occasions, including at his two-day deposition on August 14-15, 2003.[1] Moreover, United Water identified

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[1] Mr. Church made a detailed presentation at the first prehearing conference on June 11, 2002 (prior to the Hearing Officer's appointment). He did so again in a special technical meeting following the second prehearing conference on September 23, 2002. On April 11, 2003, Mr. Church attended an informal meeting with Don Reading at the request of Pioneer and Settlers. Finally, John Church attended the two-day deposition noticed by Pioneer and Settlers on August 14-15, 2003.

Mr. Church as its expert witness and provided summaries of his expert opinions in *United Water's Initial Disclosures,* dated October 31, 2002.[2]

United Water intends to present testimony from Mr. Church to explain his population and water demand forecasts at hearing. Because of the complex and highly detailed nature of this testimony, and in the interest of its efficient and accurate presentation, United Water requests permission to present the direct testimony of Mr. Church in the form of prepared, written testimony. Mr. Church will be available at hearing to confirm his pre-filed direct testimony and for cross-examination and rebuttal testimony.

As directed by Rule 605, United Water will distribute the written testimony to all parties prior to the start of hearing. United Water proposes an order requiring United Water to distribute the testimony to all parties no later than ten days prior to the start of hearing. This will allow parties sufficient time to review the testimony and to prepare cross-examinations and any objections. Any such objections would be presented and resolved prior to the testimony being accepted in the record.

An order permitting written testimony by Mr. Church would result in considerable timesavings at hearing. United Water anticipates that oral direct testimony sufficient to present the necessary details from Mr. Church's analysis could take up to four days. In addition to saving time, written presentation of Mr. Church's direct testimony will ensure an accurate and clear record upon which to review his complex analysis (both by the hearing officer and appellate reviewers).

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[2] No other party has done this. The Hearing Officer required United Water to disclose, among other things, any expert witnesses it intends to call at hearing accompanied by a report containing the expert's opinions and bases and reasons therefore on October 31, 2002. *Prehearing Order.* The Hearing Officer has not required the same of the Protestants.

No party will be prejudiced by the availability of pre-filed testimony. Indeed, such pre-filed testimony will benefit all parties and facilitate their effective preparation for hearing. The result should be more thorough and effective cross-examination.

For all these reasons, United Water requests an order allowing it to present written direct testimony from Mr. Church for inclusion into the record provided, the written testimony is submitted to all parties no later than ten days prior to hearing.

II. The hearing officer should require written direct testimony from all expert witnesses.

In addition to and separate from the order allowing United Water to submit written testimony from its expert, United Water requests an order that requires all parties to submit the direct testimony of any expert witness in written form in lieu of oral testimony at hearing. Such an order would further streamline the hearing and ensure and complete and accurate record.

The Protestants collectively have identified two expert witnesses in this matter: Dr. Don Reading,[3] an economist, and Ed Squires, [4] a hydrologist. At this time, the Protestants have yet to provide United Water with any opinions formed by these two individuals or the facts and data relied on by them in forming their opinions. Accordingly, the existence, scope and detail of expert testimony on behalf of Protestants are unknown at this time. However, United Water anticipates that at least some parties may seek to present expert opinions at hearing. To the

---

[3] Only Pioneer and Settlers have identified Don Readings as a potential expert witness. The circumstances surrounding Dr. Reading are known to the Hearing Officer through he pending *United Water's Motion in Limine to Exclude Don Reading.* In summary, Pioneer and Settlers have stated that Dr. Reading has not formulated any opinions in this matter and will not until after the Hearing Officer rules on United Water's motions to dismiss Pioneer and Settlers.

[4] The Cities of Meridian and Caldwell, the Nampa & Meridian Irrigation District and the Terteling Entities identified Ed Squires as a possible expert witness but have not provided his opinions. Several weeks after the close of discovery, Pioneer and Settlers also identified Ed Squires for the first time as a possible expert witness without disclosing his opinions. United Water has postponed filing objections regarding the untimely identification and lack of disclosure regarding Mr. Squires pending resolution of pending discovery-related motions. United Water anticipates filing such a motion(s) soon.

extent parties are permitted to do so by the Hearing Officer, these opinions likely will involve complex economic or hydrologic information.[5] To save time at hearing, and to ensure a complete and accurate presentation of these experts' testimony, it should be presented in written format and pre-filed with all parties. This testimony should be ordered served, along with that of John Church, ten days prior to the hearing.[6]

RESPECTFULLY SUBMITTED This 19th day of November 2003.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer
John M. Marshall
Attorneys for United Water Idaho Inc.

[5] Any order requiring pre-filed written testimony should not alleviate parties from their discovery obligations or the consequences of failing to meet these obligations. United Water is entitled to know the opinions of any expert critical of the IMAP and its supporting information well before written testimony is due. As explained in footnotes 3 and 4, the Protestants to date have been entirely unforthcoming with this information.

[6] It is conceivable that United Water will identify an expert hydrologist as a rebuttal witness assuming the Protestants are allowed to present expert hydrologic testimony that has not been disclosed to United Water.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 W. Fort Street Boise, ID 83724	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Mr. Edward Squires Hydro Logic, Inc. 1002 W. Franklin Street Boise, ID 83702-5431	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
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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.	**UWID'S REPLY TO THE DISTRICTS' RESPONSE TO UWID'S MOTION TO EXCLUDE DON READING**

This is United Water Idaho Inc.'s ("United Water") reply to Pioneer Irrigation District's and Settlers Irrigation District's (the "Districts") *Response to UWID's Motion to Exclude Don Reading* ("*Response*").

REPLY

United Water has moved the Hearing Officer for an order excluding the Districts' expert witness Dr. Don Reading from testifying in this matter. The motion, which is akin to a motion *in limine* in a civil court proceeding, asks the Hearing Officer to exercise his authority to control the course of this proceeding to exclude an expert who, according to the Districts, has no opinions in this matter and has been instructed by them not to form opinions anytime soon. The motion is the third in a series of motions aimed at curbing further discovery abuses in this proceeding by

ORIGINAL

forcing the Districts to live with consequences of their choices to frustrate United Water's discovery of the factual and legal bases of their position in this matter.

The Districts do not dispute the record set forth in United Water's motion that the Districts have been utterly unforthcoming about the substance of Dr. Reading's opinions or the bases therefore.[1] The Districts candidly admit that:

- They have not provided United Water any indication of Dr. Reading's opinions in this matter, either informally or through formal discovery.
- Dr. Reading has no opinions to offer in this matter.
- The District have instructed Dr. Reading not to form any opinions.

The Districts believe these facts are of no consequence. They argue "all that is required" of them is that they provide United Water with Dr. Reading's opinions and the bases therefore "in time to allow [United Water] to prepare for hearing." Response at 2 and 5. Apparently the Districts believe it is their judgment, not the Hearing Officer's, that dictates the timing of their disclosures. They also conclude UWID is "in no way prejudiced" by their conduct. Response at 3. They complain that by insisting that the Districts provide information about their expert's opinions several weeks after the discovery deadline has passed, United Water has "unilaterally created and imposed" a requirement that they disclose their expert's opinions in an "arbitrary timeframe." Response at 6.

Missing from the Districts' explanation of their conduct is any recognition of the Hearing Officer's orders. They make no mention of the Hearing Officer's direction in the Second Prehearing Order that the "parties ***shall*** informally disclose information by responding to reasonable oral or written requests for information from other parties." Second Prehearing Order at 4 (emphasis added). The Districts also ignore the Hearing Officer's direction that "Discovery

[1] They argue that they have made a few documents available from Dr. Reading's files, which is true. These documents, however, do not provide any clue as to Dr. Reading's thinking.

shall be completed by **August 29, 2003**." Third Prehearing Order and Notice of Prehearing Conference at 1 (emphasis in original).

Rather than recognize or obey the Hearing Officer's Orders, the Districts have taken it upon themselves to determine when and how they will distribute information about their case. In the meantime, United Water is prejudiced by an inability to prepare for hearing, particularly the opportunity to present dispositive motions based on the absence of factual disputes and perhaps the opportunity to adjust its population and water demand projections in response to criticism from an opposing expert.

United Water's motion asks the Hearing Officer to respond to the Districts' defiance by holding them to the consequences of their professed lack of information. Unbelievable as it is that Dr. Reading has no opinions to share at this point, the Districts should be taken at their word. He has no opinions and will not even begin to form them for at least several weeks. Dr. Reading therefore has nothing to offer to assist the Hearing Officer's review of the case, and his testimony should be excluded.

RESPECTFULLY SUBMITTED this 17th day of October, 2003.

GIVENS PURSLEY LLP

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Christopher H. Meyer

By: _____
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United Water Idaho Inc.

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**RESPONSE TO UWID'S SUPPLEMENTAL AUTHORITY**

Pioneer Irrigation District and Settlers Irrigation District ("Districts"), by and through their counsel of record, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., and in accordance with the Idaho Department of Water Resources Rules of Procedure, hereby respond to UWID's submission of supplemental authority. The submission is untimely and not permitted under the Rules of Procedure. Moreover, the authority is irrelevant and unnecessary.

On September 15, 2003, the Districts were served, via hand delivery, with UWID's Motion to Dismiss the protests of Pioneer and Settlers, and to preclude their participation in the hearing of this matter. That Friday, September 19, 2003, the Hearing Officer

held a PreHearing Conference in this matter. At that PreHearing Conference, the Hearing Officer instructed Pioneer and Settlers that a response to the Motion would be due 14 days after their receipt of the same (or September 29, 2003) and that any replies would be due one week after that time, or October 6, 2003.[1] The Districts duly filed their response brief on time and hand-delivered a copy to counsel for UWID on September 29, 2003. UWID then served its reply on October 6, 2003.

Eight days later, the Districts received UWID's "Submission of Supplemental Authority." That pleading is clearly untimely, and should be disregarded. UWID has attempted to effectively avail itself of a fifteen day period to reply, an attempt which is directly contrary to the Hearing Officer's verbal order in this matter. Moreover, it is disingenuous to term the document a "Submission of Supplemental Authority" when it is, in fact, additional reply argument. Supplemental authority could include a new decision from the Idaho Supreme Court or Court of Appeals, or a recent decision from the Idaho Department of Water Resources. However, the information provided by UWID in its Submission is merely documentation which allegedly supports one of its arguments. In other words, each and everyone of the documents submitted is a pleading, not a court order. It is in no way "authority" which would even guide the Hearing Officer or the Department, much less bind it. For that reason, the Submission should be disregarded.

UWID's explanation that the fact that the state archives were closed October 6 and 7, 2003, resulted in this delay rings hollow. UWID received the Districts' response briefing on September 29, 2003, and therefore had at least four business days in which it could

[1] The Districts note that the Department's Rules of Procedure do not provide for replies, and that UWID was allowed to file a reply only because the Hearing Officer specifically allowed it.

have obtained the now belatedly-filed documents. The fact that the state archives were closed on the day UWID's reply was due, and the day after, is of little or no consequence. The fact that the archives were closed October 6 and 7 also does not explain why the "Submission of Supplemental Authority" was not served until October 13, 2003, several days later.

Moreover, it is irrelevant whether the depositions in *Frost* were Rule 30(b)(6) depositions or depositions taken under another Rule of Civil Procedure, and UWID's analysis is simply wrong. The *Frost* court's analysis of Rule 37(d) was not "dictum," as asserted by UWID. Instead, it was an integral part of the Court's analysis, designed to support the Court's ultimate conclusion that "[n]o section of Rule 37 is applicable to allow assessment of costs absent a motion to compel discovery when a non-party refuses to answer questions at deposition." *Frost v. Hofmeister*, 97 Idaho 757, 554 P.2d 935 (1976). Therefore, the Rule 37(d) analysis was integral, necessary to the Court's opinion, and clearly not *dicta*.

In the event that UWID seizes upon the "non-party" language in the preceding quote to argue that the Court's decision should apply only to a non-party deponent, it is critical to remember that Rule 37(d) specifically applies to parties to a case, and specifically incorporates Rule 30(b)(6). Therefore, applying *Frost* to this case, UWID cannot obtain sanctions against the Districts under Rule 37(d), because witnesses appeared, were sworn, and answered questions. It cannot obtain sanctions under the other provisions of Rule 37, because the predicate motion to compel was not filed.

Finally, the Districts express their surprise that UWID, which once expressed frustration at the delay in the IMAP process, now files pleadings which are not in accordance with the Department's Rules of Procedure, pleadings which serve only to delay the process further. At the most recent PreHearing Conference, the Hearing Officer made it quite clear that

at least the "planning horizon" component of the IMAP would move forward. The Districts would have thought that UWID would be pleased, and would refrain from filing documents which serve only to take up the Hearing Officer's time, further delaying the process for UWID.

For the reasons set forth herein, the Hearing Officer should disregard the Submission of Supplemental Authority.

DATED this 14th day of October 2003.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Angela Schaer Kaufmann – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of October 2003, I caused a true and correct copy of the foregoing **RESPONSE TO SUPPLEMENTAL AUTHORITY** to be served by the method indicated below, and addressed to the following:

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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.	**SUBMISSION OF SUPPLEMENTAL AUTHORITY**

This is United Water Idaho Inc.'s ("United Water") submission of supplemental authority in support of its Motions to Dismiss Pioneer and Settlers.

SUPPLEMENTAL AUTHORITY

United Water submits copies of the following documents from the case of *Everett Hofmeister v. New York Life Insurance Company*, Case No. 33243 for the Hearing Officer's review in connection with United Water's *Motions to Dismiss*:[1]

1. *Application for Alternative Writ of Prohibition and Writ of Review;*
2. *Brief of Respondents*;
3. *Subpoena Duces Tecum (deposition)* to Larry Darling;

[1] Copies of these documents are attached as exhibits to the Affidavit of Michael V. Woodhouse filed herewith.

4. *Subpoena Duces Tecum (deposition)* to Robert Wilcox;

5. *Subpoena Duces Tecum (deposition)* to William Kice; and

6. *Subpoena Duces Tecum (deposition)* to Dale Coffelt.

EXPLANATION

In their *Answer of Pioneer and Settlers to United Water's Motion to Dismiss Both Districts' Protests and Preclude Their Participation at Hearing* ("Answer"), Pioneer and Settlers (the "Districts") relied on *Frost v. Hofmeister*, 97 Idaho 757, 761-64, 554 P.2d 935, 939-41 (1976). The Districts cite *Frost* to support their argument that Idaho Rule of Civil Procedure 37(d) does not apply to situations where a deponent appears for a deposition and is sworn. Answer at 15-16, 25. In its reply, United Water argues *Frost* is distinguishable. United Water observes:

> Although not specifically called out, it is quite apparent the depositions involved in the *Frost* case were not Rule 30(b)(6) depositions. "In June, 1975, Hofmeister sought to depose several law enforcement officers who participated in the investigation of June Hofmeister's death." *Frost*, 97 Idaho at 759, 554 P.2d at 939. The depositions were of individual, natural persons, not an organization. Thus, the brief discussion of Rule 37(d) sanctions may be characterized as dictum.

UWID's Reply in Support of Its Motions to Dismiss Both Districts and Preclude Their Participation at Hearing ("Reply Brief") at 14.

At the time of submission of the Reply Brief (on a shortened time schedule), United Water was unable to review the record in the *Frost* case to confirm these conclusions.[2] Subsequent efforts to obtain documents from the record confirm the *Frost* case indeed did not

[2] Applicant's Reply Brief was due Monday, October 6, 2003. The state archives containing the original briefing and record in the case were closed on Monday, October 6, 2003 and Tuesday, October 7, 2003 due to budget constraints. Once the archive opened, it took the better part of a day to get the documents delivered out of storage. *Affidavit of Michael V. Woodhouse.*

involve 30(b)(6) depositions. The Subpoenas Duces Tecum at issue in *Frost,* listed above and attached to the *Affidavit of Michael V. Woodhouse,* clearly were served on four individual, natural persons. The depositions did not involve public or private corporations, partnerships, associations or governmental agencies under Rule 30(b)(6). Consequently, as United Water observed in its Reply Brief, the court's discussion of Rule 37(d) in *Frost* is dictum and factually distinguishable from the 30(b)(6) depositions at issue in this matter.[3]

MOTION

To the extent the Hearing Officer believes a motion is required to submit supplemental authority, this *Submission of Supplemental Authority* may be treated as a motion.

RESPECTFULLY SUBMITTED this 13th day of October, 2003.

GIVENS PURSLEY LLP

By: _____
Christopher H. Meyer
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Attorneys for Applicant
United Water Idaho Inc.

[3] The briefing before the Idaho Supreme Court further confirms that the case did not address the consequences under Rule 37(d) of designating a vacant witness pursuant to a Rule 30(b)(6) notice. The *Application for Alternative Writ of Prohibition* (akin to an opening brief under the circumstances) discusses the sanctions based on a motion brought under "rule 37 (b) and (e)." *Application for Alternative Writ of Prohibition* at 10 (Exhibit A to the *Affidavit of Michael V. Woodhouse.)* The *Brief of Respondent* confirms the dispute at issue concerned "Rule 37(b)(2)(E)," not Rule 37(d). *Brief of Respondents* at 2 (Exhibit B to the *Affidavit of Michael V. Woodhouse*).

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Department of Water Resources

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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.	**AFFIDAVIT OF MICHAEL V. WOODHOUSE IN SUPPORT OF SUBMISSION OF SUPPLEMENTAL AUTHORITY**

STATE OF IDAHO)
) s.s.
County of Ada)

MICHAEL V. WOODHOUSE, being first duly sworn upon oath, deposes and says:

1. I am an attorney licensed to practice law in the State of Idaho (Idaho State Bar no. 6751) and am providing legal representation to United Water Idaho Inc. through the law firm of Givens Pursley LLP.

2. I have personally made copies of the documents listed below, which documents I personally obtained from the Idaho State Archives.

3. Attached hereto as Exhibit A and incorporated herein by this reference is a true and correct copy of *Application for Alternative Writ of Prohibition and Writ of Review* in the case of *Everett Hofmeister v. New York Life Insurance Company*, Case No. 33243.

4. Attached hereto as Exhibit B and incorporated herein by this reference is a true and correct copy of *Brief of Respondents* in the case of *Everett Hofmeister v. New York Life Insurance Company*, Case No. 33243.

5. Attached hereto as Exhibit C and incorporated herein by this reference is a true and correct copy of a *Subpoena Duces Tecum (deposition)* to Larry Darling in the case of *Everett Hofmeister v. New York Life Insurance Company*, Case No. 33243.

6. Attached hereto as Exhibit D and incorporated herein by this reference is a true and correct copy of a *Subpoena Duces Tecum (deposition)* to Robert Wilcox in the case of *Everett Hofmeister v. New York Life Insurance Company*, Case No. 33243.

7. Attached hereto as Exhibit E and incorporated herein by this reference is a true and correct copy of a *Subpoena Duces Tecum (deposition)* to William Kice in the case of *Everett Hofmeister v. New York Life Insurance Company*, Case No. 33243.

8. Attached hereto as Exhibit F and incorporated herein by this reference is a true and correct copy of *Subpoena Duces Tecum (deposition)* to Dale Coffelt in the case of *Everett Hofmeister v. New York Life Insurance Company*, Case No. 33243.

9. The Idaho State Archives containing the original briefing and record in the case were closed on Monday, October 6, 2003 and Tuesday, October 7, 2003 due to budget constraints. Once the archive opened, it took the better part of a day to get the documents delivered out of storage.

DATED this 13th day of October, 2003.

By: _____
Michael V. Woodhouse

Subscribed and sworn to before me this 13th day of October, 2003.

S
E
A
L



Notary Public
Residing at: Boise Idaho
My Commission Expires: 3-22-2007

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Water Resources State Office 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Peter R. Anderson, Esq. Hearing Officer 729 W. Braemere Rd. Boise, ID 83702	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 West Fort Street Boise, ID 83724	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Mr. Edward Squires Hydro Logic, Inc. 1002 West Franklin St. Boise, ID 83702-5431	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Bruce M. Smith, Esq. Tammy Zokan, Esq. Moore, Smith, Buxton & Turcke, Chtd. 225 North 9th St., Ste. 420 Boise, ID 83702	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail

Matthew K. Wilde, Esq. Assistant City Attorney Boise City Attorney's Office 150 N. Capitol Blvd. P.O. Box 500 Boise, ID 83701-0500	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
Charles L. Honsinger, Esq. Daniel V. Steenson, Esq. Ringert Clark, Chart 455 S. Third Street P.O. Box 2773 Boise, ID 83701-2773	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
Scott L. Campbell, Esq. Angela D. Schaer, Esq. Andrew J. Waldera, Esq. Moffatt Thomas Barrett Rock & Fields, Chartered 101 S. Capital Blvd., 10th Floor P.O. Box 829 Boise, ID 83701-0829	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
Albert P. Barker, Esq. Travis L. Thompson, Esq. Barker, Rosholt & Simpson, LLP 205 North 10th, Suite 520 P.O. Box 2139 Boise, ID 83701-2139	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
Robert W. Talboy, Esq. Ellsworth, Kallas & Talboy, PLLC 2402 West Jefferson Street Boise, ID 83702	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail
Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	X U.S. Mail _____ Facsimile _____ Hand Delivery _____ Overnight Mail

John M. Marshall

A

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS C. FROST, Applicant, v. EVERETT D. HOFMEISTER, Real Party in Interest and The Honorable JAMES G. TOWLES, District Judge, First Judicial District of the State of Idaho, Respondents.	)	No. APPLICATION FOR ALTERNATIVE WRIT OF PROHIBITION AND WRIT OF REVIEW

TO: The Supreme Court of the State of Idaho

The application of Thomas C. Frost respectfully shows:

1. Applicant resides at 4117 Starlington Drive, City of Boise, County of Ada, State of Idaho, and is a party benficially interested in this application; Respondent Towles is a duly qualified and acting judge of the District Court of the First Judicial District of the State of Idaho. Respondent Hofmeister is the Plaintiff in an action entitled Hofmeister vs. New York Life Insurance Company, No. 33243, which is pending in the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, and the moving party in a proceeding conducted pursuant to the said action by virtue of which your applicant was held to be in contempt of court. Copy of said motion is attached hereto as Exhibit "A".

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2. During the latter part of November, first part of December, 1975, Applicant received notice that the motion of Everett D. Hofmeister to have applicant held in contempt would be heard in Wallace, Idaho before the respondent Towles at 9:30 a.m. on the 8th day of December, 1975.

3. That said contempt as alleged was indirect and out of the presence of the court and no affidavit in support of the said contempt motion was filed and the District Court was without jurisdiction to proceed. An unsworn brief filed with the said motion recited that the alleged contempt had occurred when the applicant acting as special prosecuting attorney for Bonner County, had instructed certain deponents at depositions not to answer certain questions relating to a pending investigation into the death of one June Hofmeister, wife of Everett Hofmeister. A copy of said brief is attached hereto as Exhibit "B".

4. On Friday, December 5, 1975, Deputy Attorney General, Lynn E. Thomas, representing applicant, notified respondent Towles by telephone that Applicant objected to the proceedings on jurisdictional grounds and that applicant would not appear at the scheduled hearing. On the same day, applicants' formal objection to jurisdiction was mailed in the United States mail by special delivery letter addressed to the clerk of the District Court in the County of respondent Towles residence chambers. A copy of said objection is attached

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hereto as Exhibit "C".

5. On Monday, December 8, 1975, Respondent Towles, after a proceeding in which applicant was not present, found applicant in contempt of court and imposed against applicant monetary sanctions in the total amount of nine hundred and ninety one dollars ($991.00) for attorneys fees and costs arising out of the depositions aforesaid and the December 8, 1975 hearing.

6. On Thursday, December 11, 1975, respondent Towles signed a formal order imposing such sanctions on applicant which acknowledged the jurisdictional defect but purported to be authorized by Rule 37, Idaho Rules of Civil Procedure which said order is in excess of the Court's jurisdiction as Rule 37 does not authorize such sanctions against applicant, the order resulted from alleged contempt and no notice of any non-contempt proceeding was given. A copy of said order is attached hereto as Exhibit "D".

7. At the time of the alleged contempt, applicant was serving as duly appointed Special Prosecuting Attorney for Bonner County and was working with a duly constituted grand jury of said County which was making inquiry into the death of June Hofmeister as aforesaid which grand jury indicted the said Everett Hofmeister on a charge of murder in the first degree; questions posed to deponents which applicant instructed deponents not to answer related to the then pending investigation of the slaying of respondent Hofmeister's wife.

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8. The order of the Court upon which the said contempt is based was without or in excess of jurisdiction and no future action for contempt may be based on the violation thereof in that (1) the information sought to be discovered was privileged; (2) the court below had no authority under rule or statute to issue the order allegedly violated; (3) The discovery order of the Court below is not one upon which any finding of contempt could be founded; (4) No affidavit was filed in support of the motion for contempt sanctions setting out the alleged contemptuous acts of applicant; (5) The award of attorneys fees and costs was in excess of the courts jurisdiction in that no award of attorneys fees is authorized in excess of expense necessarily incurred by movant as a result of the alleged contempt.

9. Applicant has no plain, speedy or adequate remedy by appeal or otherwise for the reason that the order of the District Court may not be appealable and the respondent Hofmeister may immediately execute upon the property of applicant.

10. Respondent Hofmeister has, since the last part of October, 1975, attempted repeatedly to harass and embarrass applicant, as more fully set out in applicant's supporting affidavit, and applicant believes therefore that the said Hofmeister will attempt execution upon the order of contempt before this court can act if the writ prayed for does not immediately issue.

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WHEREFORE, Applicant prays for:

1. The issuance of an alternative Writ of prohibition by this Court directed to the respondent, the Honorable James G. Towles, directing said Judge to have prepared a transcript of the record and proceedings in all the hearings and proceedings on Motion for Contempt against the applicant above named, and to certify and transmit the same to this Court for review as to applicant's claim that said district court exceeded its jurisdiction, and further requiring the said respondent, the Honorable James G. Towles to desist from further proceedings in the matter and to further refrain from enforcing such order until said matter has been determined by this Court.

2. The issuance of an Alternative Writ of Prohibition against the respondent, Everett D. Hofmeister, restraining said respondent from taking any action in enforcement or execution of said order against the applicant until further order of the court.

3. The issuance of a Writ of prohibition against both respondents directing them to refrain and desist from instituting or hearing any future action for contempt against applicant based upon any advice given by applicant to any deponent in the civil matter of Everett Hofmeister and New York Life Insurance Company, No. 33243.

4. That this court in connection with its alternative Writ of prohibition require the said respondents to show cause before this Court at a time to be determined, why said respon-

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dent should not be permanently restrained from further proceedings or enforcement of contempt proceedings against applicant on account of the matters considered by the Order of December 11, 1975.

STATEMENT OF REASONS FOR ISSUING THE WRIT

INTRODUCTORY STATEMENT

Applicant has been penalized by the District Court for allegedly contumacious actions while serving as special prosecuting attorney for Bonner County, Idaho. The alleged contempt was indirect. The specific basis of the contempt is unclear inasmuch as the issues were never properly framed by the affidavit, which is required to initiate contempt proceedings. However, it appears that the motion for contempt was based upon advice by Applicant to deponents in a civil case not to answer questions about a pending criminal investigation. In so doing, Applicant had endeavored to protect the integrity and confidentiality of investigative materials and grand jury proceedings from improper efforts to make unauthorized criminal discovery by civil process.

A few hours prior to the time the civil depositions

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commenced, the District Court heard a motion for a protective order initiated by the present Applicant to protect the criminal investigation from civil discovery. The District Court orally denied the protective order in some particulars and granted it in others, and the depositions commenced shortly thereafter in Sandpoint, Idaho. Applicant has not seen a transcript of the Court's order. No written order was executed. This is the order upon which the contempt finding is based. It does not comport with the requirements of Rule 37, IRCP in that no specific order to answer was ever sought.

The sanctions imposed by the district court were couched in terms of Rule 37 sanctions. However, the sanctions were in the nature of Rule 37 penalties for contempt and they were imposed on account of allegedly contumacious conduct. Moreover, no motion was made nor notice given for the consideration of any non-contempt sanction.

Applicant herein requests that (1) the Writ issue to restrain all proceedings arising out of the motion of December 11, 1975, and the County order thereon and (2) all future proceedings for contempt or other sanctions arising out of Applicants advice to deponents in the matter of Hofmeister v. New York Life Insurance Co.

JURISDICTION RE THE DISTRICT COURTS ORDER OF DECEMBER 11, 1975

Proceedings conducted or decisions made by a court are void where there is an absence of jurisdiction. State v. Mowrey,

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91 Idaho 693, 429 P.2d 425 (1967); State ex rel. Pickrell v. Downey, 430 P.2d 122 (Ariz. 1967); Garner v. Garner, 189 P.2d 397 (Ore.).

A proceeding relating to an alleged indirect contempt requires, as a jurisdictional prerequisite, that an affidavit reciting on its face with particularity the substantive facts constituting the contempt be filed. No jurisdiction is acquired by the court in the absence of such an affidavit. Bandelin v. Quinlan, 94 Idaho 858, 861, 499 P.2d 557 (1972); Harkness v. Hyde, 31 Idaho 784, 176 P.2d 885 (1918).

There is good reason for such a rule. A contempt proceeding is quasi-criminal in nature, Bandelin v. Quinlan, supra; State v. Mowrey, supra, and the person charged with contempt is entitled to be specifically informed of the accusations made against him. Gompers v. Buck's Stove and Range Co., 221 U.S. 418, 315 S.Ct. 492. The right to be heard is a due process right guaranteed by the Fourteenth Amendment to the Federal Constitution. Re Petition For Green, 369 U.S. 689, 8 L.Ed.2d. 198. For the same reason, no intendments or presumptions will be indulged to aid the sufficiency of the affidavit. Bandelin v. Quinlan, supra; Jones v. Jones, 91 Idaho 578, 428 P.2d 497 (1967).

The District Court's order imposing sanctions on applicant acknowledges that the court had no jursidiction. However, the court believed that it had separate authority to impose

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sanctions under Rule 37 of the Idaho Rules of Civil Procedure. There are several flaws in this theory. First, no notice was given that any sanctions other than those arising out of contempt were sought or would be heard on the scheduled day and the court had no jurisdiction to consider such other sanctions. Secondly, Respondent Hofmeister's motion was one solely for sanctions on account of contempt and the Court's order recites only allegedly contumacious acts as a basis for the sanctions imposed. Also see "Inapplicability of Rule 37", infra.

The due process clause forbids the taking of property without due process of law and due process requires adequate notice of the basis for judicial action and an opportunity to respond to the allegations made by the moving party. Re Green, 369 U.S. 689, 8 L.Ed.2d. 198 (1962); Holt v. Virginia, 381 U.S. 131, 14 L.Ed.2d 296 (1965); Bell v. Burson, 402 U.S. 535, 29 L.Ed2d 90 (1971); Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556 (1972); Johnson v. Mississippi, 403 U.S. 212, 29 L.Ed.2d 423 (1971); Re Buffalo, 390 U.S. 544, 20 L.Ed.2d 117 (1968).

The right to be heard necessarily implies the right to adequate notice of the claims of the opposing party.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'

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> [citations omitted.] Fuentes v. Shevin, 32 L.Ed 2d at 556. [emphasis added]

Applicant had no notice that anything but a contempt question was to be heard on December 8, 1975. The moving language of the pleading reads:

> "Comes Now the Plaintiff and moves that the court hold Thomas Frost in contempt for failure to comply with the rulings of the above captioned Court made and given at that hearing of June 11, 1975."

The "motion" then recites that it is "based upon" rule 37 (b) and (e), which contain certain contempt sanctions and sanctions for non-contemptuous actions. The motion concludes with the words:

> "It is further moved that Plaintiff, in accordance with the foregoing, recover attorneys fees and costs by reason of the conduct of the said Thomas Frost." [emphasis added]

Thus, no notice was given that any proceedings other than those for contempt were to be conducted. The motion clearly recites that the sanctions sought were to be sanctions based upon the allegedly contemptuous conduct of Applicant.

The result is not changed by references in the motion to Rule 37, which contains certain non-contempt sanctions. The due process requirements are not satisfied by notice given by implication. Specific notice of what is to be litigated must be given in advance. Re Buffalo, supra.

A departure from the established requirements of law which deprives one of a constitutional right constitutes as

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much of an excess of jurisdiction as where there exists a lack of power from the start, Wuest v. Wuest, 127 P.2d 934 (Cal.App.) or, put differently, a court exceeds its jurisdiction when it acts beyond powers given it by constitution, statute or rules of court. Pazos v. Superior Court In and For Pima County, 448 P.2d 130 (Ariz. 1968); Miller v. Superior Court of Los Angeles County, 442 P.2d 663 (Cal. 1968). The court was not empowered to dispense with notice that it intended to consider other than contempt sanctions against applicant and thus exceeded its jurisdiction, should its order be read as one imposing other than contempt sanctions.

The foregoing analysis is offered to show that the court had no power to impose the sanctions it ordered at the December 8 hearing even if they were not contempt sanctions. In fact, however, the order of the court recites that it is entered on account of "...Thomas Frost having flagrantly violated the Order of this Court..." Clearly, the order was one imposing sanctions for contumacious conduct, irrespective of what it was called.

Rule 37 merely provides some additional sanctions for contempt. It does not even speak to the question of jurisdiction or the procedure for initiating contempt actions. No separate law of contempt can be found in the rule and the jurisdictional rule of Bandelin v. Quinlan, supra continues to apply to actions for contempt.

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IMMEDIACY; LACK OF ADEQUATE REMEDY

Following the murder trial of Everett Hofmeister, Hofmeister embarked upon an apparent vendetta against Applicant who served as prosecutor at the trial and prior thereto. These actions have continued, as set forth in Applicant's Affidavit. Applicant believes that the Respondent is actuated by malice and will attempt immediate execution upon his order unless restrained by this court.

Applicant has no other remedy at law inasmuch as a contempt order is not appealable. Idaho Code, §7-614; Poff v. Scales, 36 Idaho 762 213 Pac. 1019; Mathison v. Felton, 90 Idaho 87 408 P.2d 457.

PERMANENT RESTRAINT OF CONTEMPT PROCEEDINGS OR PROCEEDINGS FOR OTHER SANCTIONS.

Applicant also seeks a writ of prohibition permanently prohibiting any future proceeding for sanctions based on Applicant's advice to deponents in the civil action.

There are three grounds for this part of the application:

(1) The district court has no jurisdiction to impose any sanction upon Applicant because the court's discovery requirement invaded a privilege and was invalid. Contempt or other sanctions may not be based on an order void because the court had no jurisdiction to make it. Re Green, 369 U.S. 689 8 L.Ed. 2d 198 (1962); State v. Mowrey, 91 Idaho 693; State ex rel Pickrell v. Downey,

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403 P.2d 122 (Ariz. 1967).

(2) The court's discovery directive does not meet due process standards of specificity and no action for sanctions can be based upon it.

(3) Rule 37 may not be the basis for imposing sanctions against an attorney for a non-party deponent who has not been ordered to answer specific questions.

The argument for permanent prohibition is based on lack or excess of jurisdiction. While it is true that:

> "If the court has jurisdiction of the parties, the subject matter and the authority or power to make the order it did, the disobedience of such order constitutes contempt, regardless of whether the order was correct or incorrect..." Barnett v. Reed, 93 Idaho 319,

the key to the courts power to impose sanctions is its "authority or power to make the order it did." For if the court has no such authority its orders are void as being made in excess of jurisdiction. State v. Mowrey, supra; Pazos v. Superior Court, supra; State ex rel Pickrell v. Downey, supra; Garner v. Garner, supra; In Re Woodside-Florence Irr. Dist., 194 P.2d 241 (Mont.); Arizona Securities, Inc. v. Keene, 360 P.2d 221 (Ariz.)

Applicant contends that the directive of the lower court upon which sanctions are based is not merely erroneous, but beyond the power and authority of the court.

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Privilege

It is well settled that courts have no authority to invade a privilege. Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.Ed.2d 678, United States v. Cohen, 385 F.2d 464 (1967). If the rule were otherwise, a privilege would have no meaning. A Criminal defendant could be ordered, on penalty of contempt, to give incriminating testimony in civil discovery proceedings and his statements then used against him in criminal proceedings.

Respondent Hofmeister attempted a variation on the same kind of invasion of privilege in the instant matter. While the investigation which led to murder charges against him was still in progress and while the grand jury was in session, Hofmeister, through the same attorney who represented him in the criminal case, attempted to use civil discovery procedures to discover investigative materials which he could not discover under Rule 16 of the Rules of Criminal Procedure. The nature of this effort is more specifically described in Appellant's supporting Affidavit.

Obviously, a criminal investigation in progress could be seriously compromised by allowing a prospective defendant to have access to investigative information. To countenance such a process would be to invite destruction of evidence and the intimidation of witnesses by criminal defendants or their agents before the investigative process could be completed.

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Accordingly, courts have recognized a privilege running in favor of the government which permits officials to refuse discovery of investigative materials. United States v. Kohler Co., 9 FRD 289; United States v. Krulewitch, 145 F.2d 76; United States v. Deere and Co., 9 FRD 523. Pitchess v. Superior Court of Los Angeles County, 522 P.2d 305 (Cal. 1974). Crest Catering Co. v. Superior Court of Los Angeles County, 398 P.2d 150 (Cal. 1965). State v. Tinado, 458 P.2d 957 (Ariz. 1969). Hastings v. Thurston, 413 P.2d 767 (Ariz. 1966). The public policy underlying the privilege, although not stated in terms of privilege, is recognized in Rule 16, Idaho Rules of Criminal Procedure, which restricts discovery of investigative information, even after criminal charges have been instituted.

More importantly, the privilege has been codified in Idaho Code, §9-203, which provides, as a matter of public policy, that "a public officer may not be examined as to communications made to him in official confidence, when the pulbic interests would suffer by disclosure." I.C. 9-203(5). This is not to say that a court may not hold in camera proceedings to determine the applicability of the privilege and set the limits of discovery. United States v. Reynolds, 345 U.S. 1, 976 Ed. 727.* However, the argument cannot be made

*United States v. Reynolds concerns potential compromise of military secrets. However, the public policy against compromise of criminal investigation is equally compelling.

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here that the court's discovery ruling was in conformity with such procedures. No such inquiry was undertaken. The District Court was not authorized by law to require general discovery into the happenings of a criminal investigation. United States v. Reynolds, supra; Idaho Code, §9-203(5); Rule 16, Rules of Criminal Procedure.

Due Process Standards

The Court's discovery ruling was not sufficiently specific to meet the standards of due process for specific notice of what conduct was forbidden. There standards have been previously discussed and it is clear that a claim for quasi-criminal sanctions may not properly be based on an order too broad in its scope to afford meaningful guidance.

Inapplicability of Rule 37

The following discussion of Rule 37 is based, first, on the premise that the lower court had no authority (and thus no jurisdiction) to impose sanctions under the only applicable part of Rule 37, that is, Rule 37 (b)(1), because Respondent Hofmeister did not secure an order to answer specific questions following the refusal of deponents to answer. This jurisdictional argument is separate from that relating to the governmental privilege, which bars any sanction.

In the alternative, Applicant requests the Court, in the exercise of its review powers, to find Rule 37 inapplicable for the reasons stated. This alternative argument is directed

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to any possible future proceedings in the event the Court should find that the lower court would have jurisdiction, should the question of sanctions be properly raised.

It should first be observed that Rule 37 (a) concerns itself with orders compelling discovery upon the motion of a party. While the Court's discovery order was not based upon a motion by a party, but rather upon a motion by witnesses for protective orders, and is thus not applicable, it is nonetheless illustrative of the general scheme of Rule 37. Rule 37(a) requires that the aggrieved party move for an order to answer questions ordered in a deposition as a prerequisite to any sanctions. Rule 37(a)(2). No such motion was made.

Rule 37(b) is relevant only in respect to part (1), which provides for contempt sanctions only when a deponent fails to answer. Part (2) deals with the refusal of parties to answer and sanctions appropriate only to parties or their attorneys. Applicant was never a party nor an attorney for a party.

A caveat of Rule 37(b) provides that attorneys fees and expenses may be awarded against an attorney advising a deponent in lieu of or in addition to other sanctions set out in Rule 37(b), but the language of the caveat relates back to the prior provisions of Rule 37(b). Thus considered, such an award of fees and expenses may be made only "If a deponent fails to be sworn or to answer a question after being directed to do so by the court...", in which case "..the failure may be

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considered a contempt of that court," Rule 37(b)(1), Idaho Rules of Civil Procedure. The plain language of the rule says that the power to impose sanctions depends upon the party seeking sanctions making an application to the court, requiring an order compelling answers to the specific questions which were declined during the deposition. At that point, the aggrieved party may recover fees and expenses "caused by the failure" unless the court finds such sanctions unjustified. Respondent Hofmeister took no action following the depositions to obtain an order to answer and the district court has no power to impose sanctions.

In short, only sanctions arising out of a contempt may be imposed against a non-party deponent or his attorney under Rule 37(b) and a contempt finding can only follow an order to answer specific questions. The due process requirement of specificity, apart from the rule, dictates this result. The attorneys fee sanction may be imposed in lieu of contempt sanctions, but only in cases where the deponent or his attorney is first found to have been guilty of contempt.* As before noted, a contempt cannot be considered without the filing of an affidavit.

*This point is also signifigant in the consideration of the lower court's theory that Rule 37 provides separate sanctions apart from contempt. Such authority cannot be found in Rule 37(b) since the sanction is dependent upon the existence of actual contempt. The caveat lists only sanctions which may be imposed. The basis for such sanctions must be found in parts (1) or (2) of the Rule and the only applicable part deals with contemptuous actions.

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Moreover, the attorneys fee sanction of Rule 37(b) does not apply if there is "substantial justification" for the refusal to answer. In this case, the applicant was substantially justified by the governmental privilege.

Rule 37(e) provides for general sanctions including attorneys fees but, by its language, governs only the actions of parties and their attorneys and has no applicability to the present case.

INVALIDITY OF AWARD

In addition to the questions already discussed, the award of fees is invalid. There is authority only for the award of attorneys fees in a proceeding to compel discovery. The Respondent did not resort to such a proceeding. Moreover, most of the time taken at the depositions resulted in answers by the deponents. Even if Respondent were entitled to attorneys fees, he would only be entitled to fees for the expense caused by failure to answer. He would not be entitled to claim fees for the entirety of his discovery including that part which resulted in the discovery of information.

DATED This 18th day of December, 1975.

WAYNE L. KIDWELL
Attorney General

LYNN E. THOMAS
Attorney for Applicant

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VERIFICATION

I HEREBY Verify that I have read the foregoing Application for Alternative Writ of Prohibition and Writ of Review and that the factual matters therein stated are true and correct upon my information and belief.

THOMAS C. FROST
Applicant

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the State of Idaho, this 15th day of December, 1975.

Kathleen Elliott
Notary Public for Idaho
Residing in Boise, Idaho
My Commission Expires: 9-15-76

B

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS C. FROST, Applicant, -vs- EVERETT D. HOFMEISTER, Real Party in Interest, and The Honorable JAMES G. TOWLES, District Judge, First Judicial District of the State of Idaho, Respondents.	Case No. 12130 BRIEF OF RESPONDENTS

COMES NOW the Respondents and, pursuant to Idaho Code 7-306, 7-404, and in support of their Answer herein, and in answer to the Writ of Review, submit the following:

I. APPLICANT WAS NOT HELD IN CONTEMPT

II. APPLICANT'S PROPER REMEDY IS BY APPEAL

III. THE ATTORNEY GENERAL HAS A CONFLICT OF INTERESTS

IV. THE ATTORNEY GENERAL LACKS AUTHORITY TO REPRESENT THE APPLICANT

V. RESPONDENTS SHOULD BE AWARDED DAMAGES, COSTS AND ATTORNEYS FEES

SUPREME COURT OF IDAHO
FILED
JAN 16 1976
R. H. YOUNG
CLERK

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I.

APPLICANT WAS NOT HELD IN CONTEMPT. Rule 37(b)(2)(E) of the Federal Rules of Procedure and of the Idaho Rules of Civil Procedure are identical:

> "In lieu of any of the foregoing orders or in addition thereto, the Court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorneys fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make the award of expenses unjust.

Pursuant to the foregoing Rule, on December 11, 1975, Judge James G. Towles entered findings and an order requiring a non-party, Thomas Frost, to pay attorneys fees and expenses because of his violation of an order previously entered on June 11, 1975. Judge Towles expressly ruled that Mr. Frost was not in contempt, but did impose sanctions against him.

Sanctions can include dismissing or striking pleadings, entering default, and may take various forms. In Philadelphia Housing Authority v. American Radiator, 50 F.D.R. 13, 438 F2d 1187, the Court entered a protective order pursuant to stipulation of the parties wherein the defendants agreed to answer certain interrogatories of the plaintiff. The appelate Judge pointed out that the trial court could have dismissed the plaintiff's claims as a sanction for their failure to comply with the protective order in not answering the interrogatories, and the defendant's motion to dismiss was granted.

It should be noted that, unlike the State Courts, the Federal Courts are required to rely on 18 U.S.C., Sec. 401 and 18 U.S.C.A. Sec. 401, which provide in part as follows:

> " * * * shall have power to punish by fine or imprisonment, at its discretion, such contempts of its authority, and none other as * * * (3) Disobedience or resistance to its lawful * * * order."

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The Federal Courts have to rely upon the above particular statute but, as has been pointed out in Green v. U.S., 356 U.S. 165, 78 S.Ct. 632, that the same powers were possessed by the English Courts at Common Law and that the statute was intended to give the Federal Court system that same power that Courts following the Common Law possessed. Thus, it appears that a State Court can impose sanctions in accordance with the Common Law without the necessity of relying upon Rules of Procedure. However, our Rules, as above shown, have the power to impose sanctions without the necessity of finding contempt.

> "The District Court has broad discretion with regard to sanctions and should take into account the full record of the case."
>
> Krieger v. Texaco, 373 F.Supp. 108

> "The application of sanctions is entrusted to the trial Court and over leniency should be avoided."
>
> Diaz v. Southern Drilling Corp., 427 F.2d 1118, Cert. denied 91 S.Ct. 118, 400 U.S. 878

Mr. Frost, the Applicant, was given notice of a hearing and the opportunity to appear prior to the imposition of the sanctions by Judge Towles. At that time, the Applicant, as pointed out by the Advisory Committee of Rules commenting on the Federal Rules, had the opportunity for hearing:

> "The provision places the burden on the disobedient party to avoid expenses by showing that the circumstances make an award of expenses unjust."

Just as the Advisory Committee did not deal with contempt per se, although contempt could be founded upon the foregoing section, contempt was not found and the Court imposed sanctions.

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It is submitted that the Applicant entered the case in chief voluntarily and on the same day that he obtained the discovery and protective order rendered by Judge Towles, violated the order, with the result that sanctions were imposed by Judge Towles on December 8, 1975, at a hearing for that purpose and by his formal order of December 11, 1975.

II.

APPLICANT'S PROPER REMEDY IS BY APPEAL. In the Federal system the general rule is that one who is not a party to a suit has no standing to appeal. U.S. v. McFaddin Exp., Inc., 310 F2d 799. The Federal system also appears to view an appeal as a privilege and is given only to a party to the action. Penwell v. Newland, 180 F2d 551.

28 U.S.C. 1291 provides that the Court of Appeals shall have jurisdiction from "all final decisions of the District Courts of the United States."

Orders regarding attorneys fees are considered questions of law and not of fact and are appealable in the Federal system. Preston v. U.S. 284 F2d 514; Farmer v. Arabian American Oil Co., 324 F2d 359 (reversed by Supreme Court upon other grounds.); U.S. v. Arizona Canning Co., 212 F2d 532; Rogers v. Paul, 345 F2d 117 (remanded by Supreme Court on other grounds).

A judgment finding a person not a party to a suit guilty of contempt in violating a restraining order and imposing a fine is reviewable in the Circuit Court except under Title 28, Secs. 1252 and 1253 U.S.C. (Sections 1252 and 1253 allow direct appeals to the Supreme Court of interlocutory matters dealing with a finding that an Act of Congress is unconstitutional and for interlocutory matters by District Courts of three Judges.)

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In Nelson v. U.S., 26 S.Ct 358, 201 U.S. 92, Writs of Error were not prosecuted by the parties but by witnesses who violated a Court order. The Supreme Court held that the basis of their privilege to appeal was personal and different than the issues between the parties and that the Fourth and Fifth Amendment rights of the witnesses were affected.

Although a judgment of contempt against a party is not normally reviewable until final judgment, a judgment for civil contempt against a non-party can support an appeal without dependence upon the related action if the judgment of contempt is final. Hyde Construction v. Koehing Company, 348 F2d 643 (reversed by the Supreme Court on other grounds). It is, therefore, evident in the Federal system, a finding of contempt or a sanction imposed against a non-party having "finality" is appealable. The Courts of appeals have both the authority and the responsibility to determine that the power to punish for contempt is not abused, and they even revise contempt sentences. Board of Education v. York, 429 F2d 66 (Cert. denied, 91 S.Ct 968, 401 U.S. 954); Cheff v. Schnackenberg, 384 U.S. 397, 86 S.Ct. 1523; Green v. U.S., 356 U.S. 165, 78 S.Ct. 632.

There is no reason to believe that the Federal courts would handle findings of contempt any different than the imposition of sanctions. The Federal Rules became effective on July 1, 1970, and prior to that time Rule 37 had been silent regarding the awarding of expenses as a sanction, but the Courts, nevertheless, awarded them. United Sheeplined Clothing Co. v. Arctic Fur Cap Corp., 165 F.Supp. 193, S.D. N.Y. 1958; Austin Theater, Inc. v. Warner Brothers, 22 F.R.D. 302, 1958.

Since appeal is the proper remedy for a non-party who is agrieved by the imposition of sanctions against him in the

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Federal system there is little reason to believe that appeal is not the proper remedy in the State courts. Idaho Code 13-103 provides that any "party agrieved may appeal in the cases prescribed in this Code." The Idaho Supreme Court has defined "party agrieved" as any person injuriously affected by judgment, irrespective of whether he be named as plaintiff, defendant or intervenor. He does not have to be named either in the caption, pleadings or judgment. State v. Eves, 6 Ida. 144, 53 Pac. 543; Washington County Abstract Co. v. Stewart, 9 Ida. 376, 74 Pac. 955.

Idaho Code 13-201 provides:

> "An appeal may be taken to the Supreme Court from the District Court"

and defines with exactness the judgments and orders that are appealable. It is to be noted that the first provision of the statute uses the word "may" and deals primarily with the time for taking appeals.

It is submitted that the order of Judge Towles of June 11, 1975, was not an appealable order. However, the sanctions imposed by Judge Towles on December 8, 1975, and his order of December 11, 1975, are items subject to appeal and allowing a remedy at law.

III.

THE ATTORNEY GENERAL HAS A CONFLICT OF INTERESTS. Although the following issues might properly be better made by seeking an Application for a Writ of Prohibition or Quo warranto, such would merely mean circuity which is deemed best avoided by raising the issues by answer.

> Idaho Code, Sec. 67-1401. Duties of Attorney General. It is the duty of the attorney general:
> 1. To attend the Supreme Court and prosecute or defend all causes to which the state or any officer thereof, in his official capacity is a party; * * * Also to prosecute and defend all the above mentioned causes in the United States Courts.

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It is submitted that as compared to a prosecuting attorney, who is a County official, a District Judge has greater indicia of being an officer of the State. The uniformity of salaries, powers, qualifications and controls stemming from the Constitution, statutes and rules applicable to a District Judge indicate he is a State officer. A prosecuting attorney has been deemed by the legislature as a County officer:

> Idaho Code, Sec. 31-2001. County Officers Enumerated: The officers of a County are:
> * * *
> 5. A prosecuting attorney.
>
> Idaho Code 31-2015. Bond of Officers - Amount of Penalty. County, district and precinct officers must execute official bonds in the following amounts:
> * * *
> 9. Prosecuting attorneys each in the sum of $2,000.

When a special prosecutor is appointed he steps into the shoes of the County prosecuting attorney, and is not a State officer:

> Idaho Code, Sec. 31-2601. Qualifications.
> * * * No prosecuting attorney shall hold any other county or state office during his term of office as prosecuting attorney provided, however, that a prosecuting attorney or a deputy prosecuting attorney may be appointed by the attorney general as a special assistant attorney general for the performance of duties pursuant to such appointment in any other county than the county in which such prosecutor or deputy prosecutor serves. Nothing in this section, as amended, shall be construed to authorize the appointment of a special assistant attorney general except upon the request in writing of the prosecuting attorney in the county in which such special assistant attorney general is to serve, nor shall this section authorize the appointment of a prosecuting attorney as special assistant attorney general without his consent.
>
> Idaho Code, Sec. 31-2603. Special Prosecutor - Appointment.
> * * * the district court may, upon petition of the prosecuting attorney, by an order entered in its minutes, stating the cause therefor, appoint some suitable person to perform for the time being, or for the trial of such accused person, the duties of such prosecuting attorney, and the person so appointed has all the powers of the prosecuting attorney, while so acting as such.
>
> (emphasis added.)

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IV.

THE ATTORNEY GENERAL LACKS AUTHORITY TO REPRESENT THE APPLICANT.

The Attorney General, under the Idaho Constitution, is a member of the executive branch of government. Article 5 of the Idaho Constitution deals with the judicial branch of government and Section 18 thereof creates the office of prosecuting attorney, and it is submitted that a prosecuting attorney is a quasi judicial County officer.

The present prosecuting attorney of Bonner County, Idaho, has not in any manner disqualified herself from acting, as had her predecessor in office whose disqualification caused the appointment of the applicant as special prosecutor, and it is submitted that the applicants term as special prosecutor terminated therefore in January, 1975, upon assumption of the office of prosecuting attorney by its present holder.

Without admitting, but for the sake of presentation, it is further submitted that the present prosecuting attorney of Bonner County, Idaho, rather than the attorney general, is proper counsel for the applicant. (Professional Ethics Opinion No. 29, Idaho State Bar; Padgett v. Williams, 82 Idaho 28, 348 P2d 944; Idaho Code 31-2604). The applicant's status and authority has not been determined by an inferior Court and the submission of appropriate evidence. The authority, therefore, of the attorney general to act, as well as the authority of the applicant to act, is lacking.

It is submitted that, at the very least, the attorney general has an equal obligation to refrain from representing either a District Judge or a County prosecutor, both of whom are members of the judicial branch of government, and if one is to be represented it should be the State officer, to-wit, the District Judge.

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V.

RESPONDENTS SHOULD BE AWARDED DAMAGES, COSTS AND ATTORNEYS FEES.

Idaho Code 7-312 provides damages may be recovered by an applicant. However, there is no provision for mutuality of remedies and the statute should be extended to include respondents or deemed unconstitutional as a deniel of the equal protection of the law.

DATED this 14 day of January, 1976.

Respectfully submitted,

Thomas A. Mitchell, counsel
for Respondents.

Everett D. Hofmeister, Attorney
At Law.

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

EVERETT HOFMEISTER, :

Plaintiff, :

vs. :

NEW YORK LIFE INSURANCE COMPANY, :

Defendant. :

No. 33243

SUBPOENA DUCES TECUM
(deposition)

THE STATE OF IDAHO TO: Larry Darling

You are hereby commanded to appear in the office of Stephen Bistline, at 101 North 1st Street, Sandpoint, Idaho on the 11th day of June, 1975, at 11:30 o'clock, A .M., as a witness in the above matter, to testify by deposition.

YOU ARE FURTHER COMMANDED to bring with you the following items and documents: copies of all notes and reports and diagrams made by you or for you in your investigation of Hofmeister matter.

YOU ARE FURTHER NOTIFED That if you fail to appear at the place and time specified above, you may be held in contempt of court, and that the aggrieved party may recover from you the sum of $100 and all damages he may sustain by your failure to attend.

Dated this 9th day of June, 1975, by order of the Court.

CAROL DEITZ
Clerk of the District Court

By Janie Auster
Deputy

D

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

EVERETT HOFMEISTER, :
Plaintiff, :
vs. :
NEW YORK LIFE INSURANCE COMPANY, :
Defendant. :

No. 33243

SUBPOENA DUCES TECUM
(deposition)

THE STATE OF IDAHO TO: ROBERT WILCOX

You are hereby commanded to appear in the office of Stephen Bistline, at 101 North 1st Street, Sandpoint, Idaho on the 11th day of June, 1975, at 1:00 o'clock, P .M., as a witness in the above matter, to testify by deposition.

YOU ARE FURTHER COMMANDED to bring with you the following items and documents: Copy of all reports re June Hofmeister death in your possession or control, and all physical evidence re same.

YOU ARE FURTHER NOTIFED That if you fail to appear at the place and time specified above, you may be held in contempt of court, and that the aggrieved party may recover from you the sum of $100 and all damages he may sustain by your failure to attend.

Dated this 9th day of June, 1975, by order of the Court.

CAROL DEITZ
Clerk of the District Court

By Janie Curtis
Deputy

E

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

EVERETT HOFMEISTER, :

Plaintiff, :

vs. :

NEW YORK LIFE INSURANCE COMPANY, :

Defendant. :

No. 33243

SUBPOENA DUCES TECUM (deposition)

THE STATE OF IDAHO TO: WILLIAM KICE

You are hereby commanded to appear in the office of Stephen Bistline, at 101 North 1st Street, Sandpoint, Idaho on the 11th day of June, 1975, at 1:30 o'clock, P. .M., as a witness in the above matter, to testify by deposition.

YOU ARE FURTHER COMMANDED to bring with you the following items and documents: Copy of all reports re June Hofmeister death in your possession or control, & all physical evidence re same.

YOU ARE FURTHER NOTIFED That if you fail to appear at the place and time specified above, you may be held in contempt of court, and that the aggrieved party may recover from you the sum of $100 and all damages he may sustain by your failure to attend.

Dated this 9th day of June, 1975, by order of the Court.

CAROL DEITZ
Clerk of the District Court

By Janie Custer
Deputy

F

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

EVERETT HOFMEISTER, :
Plaintiff, :
vs. :
NEW YORK LIFE INSURANCE COMPANY, :
Defendant. :

No. 33243

SUBPOENA DUCES TECUM (deposition)

THE STATE OF IDAHO TO: DALE COFFELT

You are hereby commanded to appear in the office of Stephen Bistline, at 101 North 1st Street, Sandpoint, Idaho on the 11th day of June, 1975, at 11:00 o'clock, A .M., as a witness in the above matter, to testify by deposition.

YOU ARE FURTHER COMMANDED to bring with you the following items and documents: Copy of every report received or given by you relating to June Hofmeister, and all photographs of her.

YOU ARE FURTHER NOTIFED That if you fail to appear at the place and time specified above, you may be held in contempt of court, and that the aggrieved party may recover from you the sum of $100 and all damages he may sustain by your failure to attend.

Dated this 9th day of June, 1975, by order of the Court.

CAROL DEITZ
Clerk of the District Court

By Janie Custer
Deputy

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

Scott L. Campbell, ISB No. 2251
Angela Schaer Kaufmann, ISB No. 5436
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone: (208) 345-2000
Facsimile: (208) 385-5384
18946.26

RECEIVED
OCT 14 2003
Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	AFFIDAVIT OF SCOTT L. CAMPBELL

State of Idaho)
) ss.
County of Ada)

SCOTT L. CAMPBELL, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record providing legal representation to Pioneer Irrigation District and Settlers Irrigation District in the above-captioned matter. I have knowledge of the files pertinent to this matter, and I make this affidavit based upon personal knowledge.

2. Appended hereto as Exhibits A & B are true and correct copies of the Notice of Deposition regarding Don Reading and the Amended Notice of Deposition, respectively, served by United Water Idaho ("UWID") in the above-captioned matter.

3. Appended hereto as Exhibit C is a true and correct copy of Pioneer Irrigation District and Settlers Irrigation District's Supplemental Response to United Water Idaho's First Set of Discovery Responses, dated September 9, 2003.

4. Appended hereto as Exhibit D is a true and correct copy of a letter I sent to John Marshall, counsel for UWID informing him that Dr. Don Reading had been directed to suspend his work on the IMAP matter pending the Hearing Officer's resolution of UWID's Motion to Dismiss.

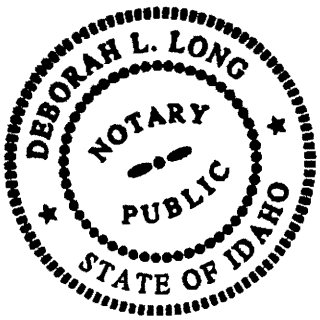
5. Given matters as they now stand, assuming that the Hearing Officer denies UWID's Motion to Dismiss as to Pioneer and Settlers, Pioneer and Settlers will make Dr. Reading available for deposition at any mutually agreeable date and time in the future, either before or after Dr. Reading forms his opinions. If, for some reason, UWID decides not to depose Dr. Reading, Pioneer and Settlers will seasonably supplement their discovery responses in accordance with Idaho Rule of Civil Procedure 26(b)(4). That supplementation, if needed, will be done prior to the hearing in this matter, and in accordance with any deadline which may be imposed by the Hearing Officer.

6. When UWID filed its Motion to Dismiss the protests of Pioneer and Settlers, I instructed Dr. Reading to suspend his work in this matter. I did so in order that my clients might avoid incurring costs which could ultimately prove unnecessary, if the Hearing Officer were to grant UWID's Motion to Dismiss.

DATED this 10th day of October 2003.

By _____
Scott L. Campbell

SUBSCRIBED AND SWORN to before me this 10th day of October 2003.



_____
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 10/10/07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of October 2003, I caused a true and correct copy of the foregoing **AFFIDAVIT OF SCOTT L. CAMPBELL** to be served by the method indicated below, and addressed to the following:

Director Idaho Department of Water Resources 1301 N. Orchard Street PO Box 83720 Boise, ID 83720 Fax: 327-5400	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Peter Anderson, Hearing Officer 729 W. Braemere Road Boise, ID 83702	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Gary L. Spackman, Regional Manager Idaho Department of Water Resources Western Region Office 2735 Airport Way Boise, ID 83705 Fax: 334-2348	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
John M. Marshall Givens Pursley, LLP PO Box 2720 Boise, ID 83701 Fax: 388-1300	(X) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Charles L. Honsinger Ringert Clark 455 South 3rd Street PO Box 2773 Boise, ID 83701-2773 Fax: 342-4657	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Matthew Wilde Boise City Attorney's Office PO Box 500 Boise, ID 83701-0500 Fax: 384-4454	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Josephine P. Beeman Beeman & Associates P.C. 409 W. Jefferson Street Boise, ID 83702 Fax: 331-0954	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Boise Boise Public Works Department Beth K. Baird Environmental Programs Coordinator 150 N. Capitol Blvd. PO Box 500 Boise, ID 83701-0500 Fax: 384-3905	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Albert P. Barker Barker Rosholt & Simpson PO Box 2139 Boise, ID 83701-2139 Fax: 342-4657	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Bureau of Reclamation E. Gail McGarry, PN-3100 1150 N. Curtis Road, Suite 100 Boise, ID 83706-1234 Fax: 378-5019	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Kathleen M. Carr U.S. Department of the Interior Office of the Solicitor Pacific Northwest Region , Boise Field Office 550 West Fort Street, MSC 020 Boise, ID 83724-0020 Fax: 334-1378	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Matt J. Howard PO Box 190012 Boise, ID 83719 Fax: 333-8409	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Bruce M. Smith Tammy A. Zokan Moore Smith Buxton & Turcke 225 N. 9th Street, Suite 420 Boise, ID 83702 Fax: 331-1202	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Meridian Public Works Gary D. Smith 660 E. Watertower Meridian, ID 83642 Fax: 887-1297	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Caldwell Engineering Department Gordon Law 621 E. Cleveland Blvd. Caldwell, ID 83605 Fax: 455-3003	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Ed Squires Hydrologic 1002 W. Franklin Boise, ID 83702-5431 Fax: 342-3100	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Robert W. Talboy Ellsworth Kallas Talboy, PLLC 2402 W. Jefferson Street Boise, ID 83702 Fax: 345-8945	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Mr. Michael Chase 70 W. Floating Feather Road Eagle, ID 83616-3802	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

By _____
Scott L. Campbell

Christopher H. Meyer, Esq. (Idaho State Bar No. 4461)
John M. Marshall, Esq. (Idaho State Bar No. 5628)
GIVENS PURSLEY LLP
277 North 6th Street, Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
Email: chrismeyer@givenspursley.com; jmm@givenspursley.com
www.givenspursley.com
Counsel for Applicant United Water Idaho Inc.

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	**NOTICE OF DEPOSITION DUCES TECUM OF DON READING**

TO: DON READING

YOU WILL PLEASE TAKE NOTICE that on the 26th day of August 2003 at the hour of 9:00 a.m. at the offices of Givens Pursley LLP, 277 North 6th Street, Suite 200, Boise, Idaho, the Applicant United Water Idaho Inc. will take the deposition of Don Reading in the above-entitled action upon oral examination pursuant to Rule 30 and other applicable rules of the Idaho Rules of Civil Procedure, before a Notary Public, or before some other officer authorized by law to administer oaths, and continuing from day to day thereafter, until said deposition is completed.

Exhibit A

Pursuant to Idaho Rule s of Civil Procedure 26, 30(b)(5) and 34, you are further instructed to bring to the deposition all documents examined, analyzed, relied upon, incorporated or utilized in your review of the IMAP in forming the basis of you opinions regarding IMAP.

DATED this 7th day of August 2003.

GIVENS PURSLEY LLP

By _____
John M. Marshall
Attorneys for Applicant United Water

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Water Resources
State Office
1301 N. Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

___ U.S. Mail
_X_ Facsimile
___ Hand Delivery
___ Overnight Mail

Peter R. Anderson, Esq.
Hearing Officer
729 W. Braemere Rd.
Boise, ID 83702

_X_ U.S. Mail
___ Facsimile
___ Hand Delivery
___ Overnight Mail

Gary L. Spackman
Regional Manager
Idaho Department of Water Resources
Western Regional Office
2735 Airport Way
Boise, ID 83705

___ U.S. Mail
_X_ Facsimile
___ Hand Delivery
___ Overnight Mail

Kathleen Marion Carr, Esq.
Office of the Field Solicitor
U.S. Department of the Interior
550 West Fort Street
Boise, ID 83724

___ U.S. Mail
_X_ Facsimile
___ Hand Delivery
___ Overnight Mail

Mr. Edward Squires
Hydro Logic, Inc.
1002 West Franklin St.
Boise, ID 83702-5431

___ U.S. Mail
_X_ Facsimile
___ Hand Delivery
___ Overnight Mail

E. Gail McGarry, P.E.
Program Manager
Water Rights & Acquisitions
PN-3100
U.S. Bureau of Reclamation
Pacific Northwest Region
1150 N. Curtis Road
Boise, ID 83706-1234

____ U.S. Mail
__X__ Facsimile
____ Hand Delivery
____ Overnight Mail

Bruce M. Smith, Esq.
Tammy Zokan, Esq.
Moore, Smith, Buxton & Turcke, Chtd.
225 North 9th St., Ste. 420
Boise, ID 83702

____ U.S. Mail
__X__ Facsimile
____ Hand Delivery
____ Overnight Mail

Matthew K. Wilde, Esq.
Assistant City Attorney
Boise City Attorney's Office
150 N. Capitol Blvd.
P.O. Box 500
Boise, ID 83701-0500

____ U.S. Mail
__X__ Facsimile
____ Hand Delivery
____ Overnight Mail

Charles L. Honsinger, Esq.
Daniel V. Steenson, Esq.
Ringert Clark, Chart
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

____ U.S. Mail
__X__ Facsimile
____ Hand Delivery
____ Overnight Mail

Scott L. Campbell, Esq.
Angela Schaer Kaufmann, Esq.
Andrew J. Waldera, Esq.
Moffatt Thomas Barrett Rock & Fields, Chartered
101 S. Capital Blvd., 10th Floor
P.O. Box 829
Boise, ID 83701-0829

____ U.S. Mail
__X__ Facsimile
____ Hand Delivery
____ Overnight Mail

Albert P. Barker, Esq.
Travis L. Thompson, Esq.
Barker, Rosholt & Simpson, LLP
205 North 10th, Suite 520
P.O. Box 2139
Boise, ID 83701-2139

_____ U.S. Mail
__X__ Facsimile
_____ Hand Delivery
_____ Overnight Mail

Robert W. Talboy
Ellsworth, Kallas & Talboy, PLLC
2402 West Jefferson Street
Boise, ID 83702

_____ U.S. Mail
__X__ Facsimile
_____ Hand Delivery
_____ Overnight Mail

Josephine P. Beeman, Esq.
Beeman & Associates PC
409 West Jefferson
Boise, ID 83702-6049

_____ U.S. Mail
__X__ Facsimile
_____ Hand Delivery
_____ Overnight Mail

Dr. Don C. Reading
Consulting Economist
Ben Johnson Associates, Inc.
6070 West Hill Road
Boise, ID 83703

_____ U.S. Mail
__X__ Facsimile
_____ Hand Delivery
_____ Overnight Mail

John M. Marshall

RECEIVED
AUG 2 8 2003
Moffatt, Thomas, Barrett Rock and Fi

Christopher H. Meyer, Esq. (Idaho State Bar No. 4461)
John M. Marshall, Esq. (Idaho State Bar No. 5628)
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
Email: chrismeyer@givenspursley.com; jmm@givenspursley.com
www.givenspursley.com
Counsel for Applicant United Water Idaho Inc.

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	**AMENDED NOTICE OF DEPOSITION DUCES TECUM OF DON READING**

TO: DON READING

YOU WILL PLEASE TAKE NOTICE that on the 17th day of September 2003 at the hour of 9:00 a.m. at the offices of Givens Pursley LLP, 601 West Bannock Street, Boise, Idaho, the Applicant United Water Idaho Inc. will take the deposition of Don Reading in the above-entitled action upon oral examination pursuant to Rule 30 and other applicable rules of the Idaho Rules of Civil Procedure, before a Notary Public, or before some other officer authorized by law to administer oaths, and continuing from day to day thereafter, until said deposition is completed.

Exhibit B

FILE COPY

Pursuant to Idaho Rules of Civil Procedure 26, 30(b)(5) and 34, you are further instructed to bring to the deposition all documents examined, analyzed, relied upon, incorporated or utilized in your review of the IMAP in forming the basis of your opinions regarding IMAP.

DATED this 27th day of August 2003.

GIVENS PURSLEY LLP

By _____
John M. Marshall
Attorneys for Applicant United Water

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 West Fort Street Boise, ID 83724	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Mr. Edward Squires Hydro Logic, Inc. 1002 West Franklin St. Boise, ID 83702-5431	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Bruce M. Smith, Esq. Tammy Zokan, Esq. Moore, Smith, Buxton & Turcke, Chtd. 225 North 9th St., Ste. 420 Boise, ID 83702	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Matthew K. Wilde, Esq. Assistant City Attorney Boise City Attorney's Office 150 N. Capitol Blvd. P.O. Box 500 Boise, ID 83701-0500	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail

Charles L. Honsinger, Esq. Daniel V. Steenson, Esq. Ringert Clark, Chart 455 S. Third Street P.O. Box 2773 Boise, ID 83701-2773	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Scott L. Campbell, Esq. Angela Schaer Kaufmann, Esq. Andrew J. Waldera, Esq. Moffatt Thomas Barrett Rock & Fields, Chartered 101 S. Capital Blvd., 10th Floor P.O. Box 829 Boise, ID 83701-0829	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Albert P. Barker, Esq. Travis L. Thompson, Esq. Barker, Rosholt & Simpson, LLP 205 North 10th, Suite 520 P.O. Box 2139 Boise, ID 83701-2139	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Robert W. Talboy Ellsworth, Kallas & Talboy, PLLC 2402 West Jefferson Street Boise, ID 83702	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail
Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	X U.S. Mail ____ Facsimile ____ Hand Delivery ____ Overnight Mail

John M. Marshall

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

Scott L. Campbell, ISB No. 2251
Angela Schaer Kaufmann, ISB No. 5436
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone: (208) 345-2000
Facsimile: (208) 385-5384
18946.26

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**SUPPLEMENTAL RESPONSES OF PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT TO UWID'S FIRST SET OF DISCOVERY REQUESTS**

Pioneer Irrigation District ("Pioneer") and Settlers Irrigation District ("Settlers) (collectively the "Districts") hereby supplement their responses to UWID's First Set of Discovery Requests, pursuant to the Idaho Rules of Civil Procedure, the Idaho Department of Water Resources' Rules of Procedure, and the Hearing Officer's Third PreHearing Order.

GENERAL OBJECTIONS

1. The Districts have not completed their own investigations and/or discovery. Accordingly, the responses that follow are based upon the best knowledge, information, and belief of the Districts at this time. The Districts reserves the right to make any further responses if it appears that any omission or error has been made in connection with these

FILE COPY

Exhibit C

responses or that more accurate information is or has become available. These responses are made without prejudice to the Districts' rights to use in later discovery or to present at trial, such evidence as may later be discovered or evaluated.

2. The Districts object to the definitions and instructions to the extent they purport to require discovery requests beyond that required under the Idaho Rules of Civil Procedure. These responses are provided in accordance with the Idaho Rules of Civil Procedure irrespective of any definitions and instructions that may accompany these discovery requests.

3. These responses are made subject to all objections as to competence, relevance, materiality, and admissibility. These responses are subject to all objections that would require the exclusion of any statement, material, or information herein provided if such interrogatory were asked of or any statement, material, or information provided were made by witnesses present and testifying in court. All such objections are reserved and may be interposed at the time of trial.

4. The Districts specifically object to these discovery requests to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, and the rules governing the discovery of facts of experts as set forth in Rule 26(b)(4), Idaho Rules of Civil Procedure. This objection is intended to apply to all of the discovery requests that seek such information and will not necessarily be repeated for each request to which it applies. The Districts have, to the extent possible, construed each request as requesting only information and/or documents not subject to any applicable protection.

5. No incidental or implied admissions are intended. The fact that the Districts have responded to any discovery request or part thereof should not be taken as an admission that the Districts accept that the discovery request or the response or objection thereto

constitutes admissible evidence. Similarly, the fact that the Districts have responded to all or part of an interrogatory is not intended to and shall not be construed to be a waiver by the Districts of all or part of any objection to other interrogatories. The Districts' answers to any discovery requests herein do not constitute a waiver of the Districts' right to object to any future additional, or supplemental discovery requests regarding the same or similar matter.

6. The Districts further object to these discovery requests because they appear to attempt to separate out the transfer component of the IMAP from the applications for permit, and from the other significant legal issues involved in the IMAP, including but not limited to the appropriateness of an integrated points of diversion system, the appropriateness of a fifty year planning horizon and the applicability of the forfeiture doctrine to municipal water rights. UWID has consistently maintained that this is an "Integrated Municipal Application Package," and the Districts maintain that it is impossible to consider the transfers of water rights contained within that package prior to and apart from the significant legal issues (as well as others) just described.

SUPPLEMENTAL RESPONSES TO INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS

INTERROGATORY NO. 3: Please identify each and every witness the Protestant intends to call (or may call) at the hearing in this matter. With respect to each of the witnesses so identified, please identify the person as a fact or expert witness, and state the subject matter and general substance of the facts and opinions to which he or she is expected to testify.

RESPONSE TO INTERROGATORY NUMBER 3: In addition to the responses previously provided by Pioneer and Settlers, they may call the following individuals as fact witnesses:

David R. Tuthill, Jr.
Idaho Department of Water Resources
1301 N. Orchard
P.O. Box 83720
Boise, ID 83720

Phillip J. Rassier
Water Resources
1301 N. Orchard
P.O. Box 83720
Boise, ID 83720-0098

Hal Simmons
Boise City Planning and
Development Services
Boise City Hall
150 N. Capitol Blvd.
Boise, ID 83701

Kathleen Lacey
Boise City Planning and
Development Services
Boise City Hall
150 N. Capitol Blvd.
Boise, ID 83701

Norman Young
ERO Resources Corp.
1106 N. Cole Road, Suite C
Boise, ID 83401-8661

Ed Squires
Hydrologic
1002 W. Franklin
Boise, ID 83702-5431

Mr. Young, Mr. Tuthill and Mr. Rassier are expected to testify regarding conversations involving United Water Idaho representatives and employees of the Idaho Department of Water Resources.

Mr. Simmons and Ms. Lacey are expected to testify regarding the Boise City Comprehensive Plan and related Boise City planning policies and procedures.

Mr. Squires is expected to testify regarding the hydrology of the Treasure Valley and the potential of the IMAP changes to injure the water rights of Pioneer and Settlers Irrigation Districts' or the likelihood of IMAP to reduce the quantity of water available to Pioneer and Settlers' water rights.

REQUEST FOR PRODUCTION NO. 5: Please produce all documents concerning the District's evaluation of the Applicant's planning horizon.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5: In addition to the responses previously provided by Pioneer and Settlers, the Districts have potentially responsive documentation which will be made available for inspection and copying at your expense in the

offices of Moffatt, Thomas, Barrett, Rock & Fields. Please contact Tiffiny Hudak at Moffatt Thomas to make arrangements if you desire such inspection and copying.

DATED this 9th day of September 2003.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Angela Schaer Kaufmann – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

DATED this 8 day of September 2003.

By Kenneth Brush
Kenneth E. Brush, Board President
Pioneer Irrigation District

STATE OF IDAHO)
) ss.
County of Canyon)

On this 8 day of Sept, 2003, before me, the undersigned notary public in and for said state, personally appeared **KENNETH E. BRUSH**, President of the Board of Directors of **PIONEER IRRIGATION DISTRICT**, an irrigation district organized and existing under and by virtue of the laws of the State of Idaho, known or identified to me to be the person whose name is subscribed to the forgoing instrument and acknowledged to me that he has the authority to execute and executed the same for the purposes therein contained on behalf of **PIONEER IRRIGATION DISTRICT.**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

DELORES M. COPELAND NOTARY PUBLIC STATE OF IDAHO

Delores M Copeland
NOTARY PUBLIC FOR IDAHO
Residing at Caldwell, Id.
My Commission Expires 10-21-04

DATED this 2nd day of September 2003.

By Richard E Allen
Richard Allen, Board President
Settlers Irrigation District

STATE OF IDAHO)
) ss.
County of Ada)

On this 2nd day of September, 2003, before me, the undersigned notary public in and for said state, personally appeared **RICHARD ALLEN**, President of the Board of Directors of **SETTLERS IRRIGATION DISTRICT**, an irrigation district organized and existing under and by virtue of the laws of the State of Idaho, known or identified to me to be the person whose name is subscribed to the forgoing instrument and acknowledged to me that he has the authority to execute and executed the same for the purposes therein contained on behalf of **SETTLERS IRRIGATION DISTRICT**.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

DEBORAH L. LONG NOTARY PUBLIC STATE OF IDAHO

Deborah L Long
NOTARY PUBLIC FOR IDAHO
Residing at Boise Idaho
My Commission Expires 10/10/07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of September 2003, I caused a true and correct copy of the foregoing **SUPPLEMENTAL RESPONSES OF PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT TO UWID'S FIRST SET OF DISCOVERY REQUESTS** to be served by the method indicated below, and addressed to the following:

John M. Marshall
Givens Pursley, LLP
PO Box 2720
Boise, ID 83701
Fax: 388-1300

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Charles L. Honsinger
Ringert Clark
455 South 3rd Street
PO Box 2773
Boise, ID 83701-2773
Fax: 342-4657

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Matthew Wilde
Boise City Attorney's Office
PO Box 500
Boise, ID 83701-0500
Fax: 384-4454

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Josephine P. Beeman
Beeman & Associates P.C.
409 W. Jefferson Street
Boise, ID 83702
Fax: 331-0954

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

City of Boise
Boise Public Works Department
Beth K. Baird
Environmental Programs Coordinator
150 N. Capitol Blvd.
PO Box 500
Boise, ID 83701-0500
Fax: 384-3905

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Albert P. Barker
Barker Rosholt & Simpson
PO Box 2139
Boise, ID 83701-2139
Fax: 342-4657

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Bureau of Reclamation E. Gail McGarry, PN-3100 1150 N. Curtis Road, Suite 100 Boise, ID 83706-1234 Fax: 378-5019	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Kathleen M. Carr U.S. Department of the Interior Office of the Solicitor Pacific Northwest Region , Boise Field Office 550 West Fort Street, MSC 020 Boise, ID 83724-0020 Fax: 334-1378	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Matt J. Howard PO Box 190012 Boise, ID 83719 Fax: 333-8409	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Bruce M. Smith Tammy A. Zokan Moore Smith Buxton & Turcke 225 N. 9th Street, Suite 420 Boise, ID 83702 Fax: 331-1202	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Meridian Public Works Gary D. Smith 660 E. Watertower Meridian, ID 83642 Fax: 887-1297	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Caldwell Engineering Department Gordon Law 621 E. Cleveland Blvd. Caldwell, ID 83605 Fax: 455-3003	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Ed Squires Hydrologic 1002 W. Franklin Boise, ID 83702-5431 Fax: 342-3100	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Robert W. Talboy
Ellsworth Kallas Talboy, PLLC
2402 W. Jefferson Street
Boise, ID 83702
Fax: 345-8945

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Mr. Michael Chase
70 W. Floating Feather Road
Eagle, ID 83616-3802

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

By _____
Scott L. Campbell

RECEIVED
SEP 10 2003
Department of Water Resources

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

Scott L. Campbell, ISB No. 2251
Angela Schaer Kaufmann, ISB No. 5436
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone: (208) 345-2000
Facsimile: (208) 385-5384
18946.26

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**NOTICE OF SERVICE**

NOTICE IS HEREBY GIVEN that on the 9th day of September 2003, true copies of **SUPPLEMENTAL RESPONSES OF PIONEER IRRIGATION DISTRICT AND SETTLERS' IRRIGATION DISTRICT TO UWID'S FIRST SET OF DISCOVERY REQUESTS** were served by placing same in the U.S. Mail, postage prepaid, addressed to all parties listed below.

DATED this 9th day of September 2003.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Angela Schaer Kaufmann – Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

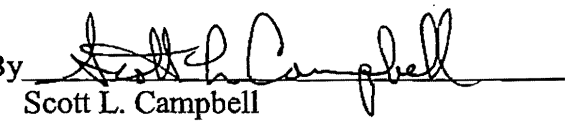
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of September 2003, I caused a true and correct copy of the foregoing **NOTICE OF SERVICE** to be served by the method indicated below, and addressed to the following:

Director Idaho Department of Water Resources 1301 N. Orchard Street PO Box 83720 Boise, ID 83720 Fax: 327-5400	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Peter Anderson, Hearing Officer 729 W. Braemere Road Boise, ID 83702	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Gary L. Spackman, Regional Manager Idaho Department of Water Resources Western Region Office 2735 Airport Way Boise, ID 83705 Fax: 334-2348	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
John M. Marshall Givens Pursley, LLP PO Box 2720 Boise, ID 83701 Fax: 388-1300	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Charles L. Honsinger Ringert Clark 455 South 3rd Street PO Box 2773 Boise, ID 83701-2773 Fax: 342-4657	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Matthew Wilde Boise City Attorney's Office PO Box 500 Boise, ID 83701-0500 Fax: 384-4454	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Josephine P. Beeman Beeman & Associates P.C. 409 W. Jefferson Street Boise, ID 83702 Fax: 331-0954	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Boise Boise Public Works Department Beth K. Baird Environmental Programs Coordinator 150 N. Capitol Blvd. PO Box 500 Boise, ID 83701-0500 Fax: 384-3905	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Albert P. Barker Barker Rosholt & Simpson PO Box 2139 Boise, ID 83701-2139 Fax: 342-4657	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Bureau of Reclamation E. Gail McGarry, PN-3100 1150 N. Curtis Road, Suite 100 Boise, ID 83706-1234 Fax: 378-5019	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Kathleen M. Carr U.S. Department of the Interior Office of the Solicitor Pacific Northwest Region , Boise Field Office 550 West Fort Street, MSC 020 Boise, ID 83724-0020 Fax: 334-1378	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Matt J. Howard PO Box 190012 Boise, ID 83719 Fax: 333-8409	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Bruce M. Smith Tammy A. Zokan Moore Smith Buxton & Turcke 225 N. 9th Street, Suite 420 Boise, ID 83702 Fax: 331-1202	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Meridian Public Works Gary D. Smith 660 E. Watertower Meridian, ID 83642 Fax: 887-1297	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
City of Caldwell Engineering Department Gordon Law 621 E. Cleveland Blvd. Caldwell, ID 83605 Fax: 455-3003	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Ed Squires Hydrologic 1002 W. Franklin Boise, ID 83702-5431 Fax: 342-3100	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Robert W. Talboy Ellsworth Kallas Talboy, PLLC 2402 W. Jefferson Street Boise, ID 83702 Fax: 345-8945	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Mr. Michael Chase 70 W. Floating Feather Road Eagle, ID 83616-3802	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

By 
Scott L. Campbell

Boise
Idaho Falls
Pocatello

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Eugene C. Thomas
John W. Barrett
R. B. Rock
Richard C. Fields
Robert E. Bakes
John S. Simko
John C. Ward
D. James Manning
Gary T. Dance
Larry C. Hunter
Morgan W. Richards
Mark A. Ellison
Randall A. Peterman
Mark S. Prusynski
Stephen R. Thomas
Glenna M. Christensen
Gerald T. Husch
Scott L. Campbell
Robert B. Burns
James C. Dale
Michael E. Thomas
Patricia M. Olsson
James C. deGlee
Bradley J Williams
Lee Radford
Michael O. Roe
David S. Jensen
James L. Martin
C. Clayton Gill
David P. Gardner
Casey C. Robertson
Julian E. Gabiola
Angela Schaer Kaufmann
Benjamin H. Schwartz
Jon A. Stenquist
Peter Benjamin McLaughlin
Bradley J. Dixon
Mark C. Peterson
Andrew J. Waldera
Shawn C. Nunley

Willis C. Moffatt, 1907-1980
Kirk R. Helvie, 1956-2003

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise, Idaho 83701 0829

208 345 2000
800 422 2889
208 385 5384 Fax
www.moffatt.com

September 23, 2003
via Facsimile

John M. Marshall
Givens Pursley LLP
601 W. Bannock Street
PO Box 2720
Boise, ID 83701

Re: United Water Idaho - IMAP
MTBR&F File No. 18946.26

Dear John:

I am responding to your recent correspondence in which you make numerous demands, misstatements, and false accusations involving my clients' discovery responses and efforts to coordinate the deposition of Dr. Don Reading. I do not intend to respond to any of your accusations or misstatements of the circumstances involving this aspect of this litigation. I will, however, address the demand that we provide you with the basis for Dr. Reading's opinions prior to rescheduling his deposition.

As I stated to you previously, Dr. Reading has not yet reached any conclusions or formed any expert opinions in this matter. He was awaiting receipt of the deposition transcript of John Church's testimony prior to proceeding with the analysis of Mr. Church's report and opinions. Unfortunately, on September 15, 2003, you and Chris Meyer elected to file the pending Motions to Dismiss and Preclude Participation at Hearing against both of my clients. After I received copies of the Motions via hand delivery on September 15, 2003, I instructed Dr. Reading to suspend any further work on his analysis and formation of his expert opinions. Frankly, there is no reason for my clients to incur any additional expense for Dr. Reading's services if they are to be excluded from the proceeding, as your Motions request. Consequently, until there has been a ruling from Peter Anderson on your Motions, Dr. Reading will not proceed to complete his analysis and will have no expert opinions for you to examine. If your Motions are granted, there will be no opinions from Dr. Reading as far as my clients are concerned, since they will not be participants in this proceeding.

FILE COPY

Very truly yours,



Scott L. Campbell

SLC/dll
cc: Clients

TRANSACTION REPORT

Transmission
Transaction(s) completed

No.	DATE/TIME	DESTINATION	DURATION	PGS.	RESULT	MODE
432	SEP-23 11:14	208 388 1201	0' 00' 56"	003	OK	Normal

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
208 385 5384 Fax
208 385 5323 Direct

FACSIMILE

From: Scott L. Campbell **Date:** September 23, 2003

Re: United Water Idaho - IMAP **File No.:** 18946.26

Number of pages being transmitted including the cover page: 3
Please call fax operator at (208) 345-2000 if all pages are not received.

	Name	Organization	Fax No.	Voice No.
To:	John M. Marshall	Givens Pursley LLP	388-1300	388-1200

Message:

Letter of today's date from Scott L. Campbell.

PLEASE DELIVER IMMEDIATELY

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately notify us by telephone to arrange for return of the original document to us. Thank you.

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

Scott L. Campbell, ISB No. 2251
Angela Schaer Kaufmann, ISB No. 5436
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone: (208) 345-2000
Facsimile: (208) 385-5384
18946.26

RECEIVED
OCT 14 2003
Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE (CONSISTING OF 99 APPLICATIONS FOR TRANSFERS OF WATER RIGHTS, AND 13 APPLICATIONS FOR AMENDMENT OF PERMITS) IN THE NAME OF UNITED WATER IDAHO, INC.	**PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S RESPONSE TO UWID'S MOTION TO EXCLUDE DON READING**

Pioneer Irrigation District and Settlers Irrigation District ("Districts"), by and through their counsel of record Moffatt, Thomas, Barrett, Rock & Fields, Chtd., and in accordance with the Idaho Department of Water Resources Rule of Procedure and the Hearing Officer's orders, hereby respond to United Water Idaho's ("UWID") Motion to Exclude Don Reading. For the reasons set forth herein, the Motion should be denied.

UWID served its Motion via United States mail on September 26, 2003. It may have arrived in the office of the Districts' counsel on Saturday, September 27, but counsel for the Districts did not review the document until the next business day, September 29, 2003.

I.
PIONEER HAS NOT DENIED, NOR WILL IT DENY, UWID'S OPPORTUNITY TO DEPOSE DR. DON READING

The Districts generally begin their briefing with a statement of the law. However, in this case, it is important for the Hearing Officer to realize that there should be no dispute here, based upon the facts. The Districts have always been willing to make Dr. Reading available for deposition, and have done so on at least two occasions. *See* Exhibits A & B to the Affidavit of Scott L. Campbell, filed concurrently herewith. UWID chose to vacate those deposition dates. However, let the Districts be very clear: assuming that the Hearing Officer denies UWID's Motion to Dismiss, the Districts will make Dr. Reading available for deposition at any mutually agreeable date and time in the future, either before or after Dr. Reading develops his opinions. If UWID chooses not to depose Dr. Reading, the Districts will supplement their discovery responses in a seasonable manner. Campbell Aff., ¶ 5. One way or the other, UWID will have the information described in I.R.C.P. 26(b)(4) prior to the hearing in this matter, in time to allow it to prepare for hearing. That is all that is required. Therefore, there is no reason to exclude Dr. Reading's testimony.

Moreover, UWID neglects to mention that on September 16, 2003, counsel for UWID examined documents responsive to UWID's Request for Production Number 5. That Request asked the Districts to "produce all documents concerning the District[s'] evaluation of the Applicant's planning horizon." Exhibit C to Campbell Aff. In a supplemental response, the Districts invited UWID to review potentially responsive documents. *Id.* UWID did so and had copies made of those documents, all of which were from Dr. Reading's files.

It important to remember that as of the date this Response is filed, the parties have not received the Hearing Officer's scheduling order. No hearing date has been set at this time. UWID expressed a desire that the hearing be held in November, but at the most recent

PreHearing Conference, the Hearing Officer indicated that the hearing would not be held before January at the earliest. That gives UWID ***at least*** 2 and 1/2 months to depose Dr. Reading and learn his opinions and the basis therefore. That is all that need be disclosed prior to hearing. *See* I.R.C.P. 26(b)(4). Therefore, UWID is in no way prevented from deposing Dr. Reading, and is in no way prejudiced. UWID has "jumped the gun" by filing the motion to exclude Dr. Reading's testimony (once again, without a predicate motion to compel), and its motion should be denied.

II.
LEGAL ARGUMENT AND ANALYSIS

At the heart of UWID's argument is its perception that the Districts must supplement their responses to UWID's discovery requests regarding Don Reading before Dr. Reading's deposition. UWID has cited to no legal authority in support of the proposition that discovery responses must be supplemented prior to an expert's deposition, nor that they must be supplemented by any date certain.. It cannot, because no Idaho law exists on that point. Idaho Rule of Civil Procedure 26(b)(4), which is incorporated into the Idaho Department of Water Resources Rules of Procedure by virtue of Rule 520 (IDAPA 37.01.01.520), provides that a party may use interrogatories to require the opposing party to disclose the subject matter on which the opposing party's expert is expected to testify (which the Districts' have already done, *see* Exhibit C to Campbell Aff.). That rule provides that the party may also ask the opposing party to state the substance of the opinions to which the expert is expected to testify, and the underlying facts and data upon which the opinions are based. I.R.C.P. 26(b)(4). However, that is not the exclusive way in which the information may be obtained: it may be obtained by deposition as well. *Id.*

In fact, the Districts have gone beyond what is required by the Idaho Rules of Civil Procedure by allowing Dr. Reading to be deposed without an order from the Hearing Officer. I.R.C.P. 26(b)(4) actually provides that an order is required before information may be obtained from an expert by any means other than interrogatories. The Districts would be well within their rights to simply provide the information set forth in I.R.C.P. 26(b)(4)(A)(i) via answers to interrogatories, and refuse to make Dr. Reading available for deposition. However, in the spirit of cooperation and openness, the Districts have continually made Dr. Reading available for deposition without requiring UWID to obtain an order.

The Districts concede that I.R.C.P. 26(e) requires that a discovery response regarding the substance of an expert witness's testimony must be supplemented. I.R.C.P. 26(e). However, there is ***no*** requirement in that rule that the supplementation be done prior to the expert's deposition. Let us not forget the purpose of discovery: to allow a party to prepare for trial (or in this case, hearing), and to prevent surprise. The Idaho Supreme Court discussed that principle when it held that:

> It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved. . . . Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he [or she] must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he [or she] often will have too little time to recognize and expose vulnerable spots in the testimony.

Clark v. Klein, 137 Idaho 154, 158, 45 P.3d 810, 814 (2002). The Districts could not agree more: the purpose of pretrial discovery, in whatever form, is to allow a party to discover, *inter alia*, an expert's opinions prior to trial. As discussed above in Section I, UWID is in ***no way*** being prevented from discovering the substance of Dr. Reading's opinions and the basis

therefore. It may fully do so when it deposes Dr. Reading, and/or when the Districts supplement their discovery responses ***after*** Dr. Reading forms his opinions.

The Districts note that in *Clark*, the Court held that the lower court improperly allowed an expert to testify when the party presenting the expert had not supplemented its discovery responses to requests propounded under 26(b)(4). However, in that case, the opposing party did not seek to depose the expert, and the only means that the opposing party had of discovering the expert's opinions and basis for those opinions was via Rule 26(b)(4). *Id.* In contrast, here UWID is seeking to do both. As noted above, the Districts have not attempted to prevent UWID from doing both. The Districts will provide Dr. Reading's opinions and the basis therefore as soon as Dr. Reading forms those opinions. And it will be done in time to allow UWID to prepare for trial. That is all that is required.

The Districts can only assume that UWID's insistence that the Districts supplement their discovery responses prior to Dr. Reading's deposition is based upon a misguided notion that UWID is entitled to conduct a "mini trial" of Dr. Reading at his deposition. In other words, it appears that UWID intends to cross-examine Dr. Reading regarding his opinions and the basis therefore at his deposition. That is not the purpose of a deposition; the purpose of a deposition is to allow a party to discover the expert testimony which will be offered by an opposing party, so that the party may be prepared to counter such testimony ***at trial***. A deposition is not a mini-trial.

UWID makes much of the fact that it offered to make Dr. Church available for a period of time preceding formal discovery. That is irrelevant to this motion; there is no requirement that a party speak to an opposing party's expert within any particular time frame. Moreover, it would be folly for Dr. Reading to form his opinions for a trial on anything other

than Dr. Church's documents and sworn testimony. Stated differently, Dr. Church's work and opinions were explored during his deposition, and it is upon that testimony, Dr. Church's documents, and potentially Dr. Reading's own research, that Dr. Reading will rely in forming his own opinions.

The Districts understood the informal discussions Dr. Church and Dr. Reading had to be just that: informal discussions, used to gather and exchange ideas and information. If the Districts had known that those meetings would be used as ammunition for an unmeritorious motion, the Districts would have instructed Dr. Reading to wait until Dr. Church's deposition to begin any work on this matter. There is no requirement that an expert form his or her opinions within an arbitrary time frame unilaterally created and imposed by an opposing party. Dr. Reading's opinions will be formed and disclosed (along with the basis therefore) prior to trial.

Relatedly, as counsel for the Districts informed counsel for UWID (Exhibit D to Campbell Aff.), when UWID filed its Motion to Dismiss the Districts' protests, counsel instructed Dr. Reading to suspend his work on this matter. Campbell Aff., ¶ 6. There is no need for the Districts to increase their already-considerable expenses incurred in this matter by having Dr. Reading perform tasks which will prove needless if the Districts' protests are dismissed. If the Hearing Officer denies UWID's motion to dismiss, as the Districts have requested, the Districts will instruct Dr. Reading to resume his work. As repeatedly stated throughout, the Districts will make Dr. Reading available for deposition.

III.
CONCLUSION

UWID's Motion in Limine should be denied. It is premature, and lacks a factual and legal basis. Therefore, the Districts respectfully request that the Hearing Officer deny UWID's Motion in Limine in its entirety.

DATED this 10th day of October 2003.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By Angela Schaer Kaufmann for
Scott L. Campbell – Of the Firm

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of October 2003, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S RESPONSE TO UWID'S MOTION TO EXCLUDE DON READING** to be served by the method indicated below, and addressed to the following:

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