

RECEIVED

SEP 15 2003

Department of Water Resources

BRUCE M. SMITH, ISB #3425
TAMMY A. ZOKAN, ISB #5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
225 North 9th Street, Suite 420
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the Matter of United Water Idaho's)
Municipal Application Package, United Water) **STATEMENT OF FORFEITURE**
Idaho, Petitioner) **ALLEGATIONS**
)
)
_____)

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 present their statement regarding United Water's forfeiture of its water rights. The Third Prehearing Order ordered that protestants must identify the specific United Water water rights that they allege have been forfeited and do so on or before September 12, 2003. The Order also directed the parties to describe the factual basis for their forfeiture claims, whether all or part of the water right has been forfeited and describe the period of non-use. Because United Water, which is in control of the data regarding use of its water rights, has not provided sufficient information to allow the Protestants to analyze United Water's water rights, the Protestants cannot comply with the Court's Order at this time and should be allowed to make forfeiture allegations as United Water provides the requested information.

United Water has repeatedly admitted that all the water rights included in the IMAP are not being used. Because water rights must be put to beneficial use or risk forfeiture, Idaho Code

§ 42-222(2), the Protestants have alleged that some of United Water's water rights included in the IMAP may have been forfeited. Accordingly, the Protestants sought to gather information relevant to United Water's use of its individual water rights included in the IMAP. Unfortunately, United Water has refused to provide the information necessary to determine which water rights have been forfeited and which have not.

The Protestants attempted to gather water right information from United Water related to the forfeiture issue, in addition to other relevant information, through discovery. United Water has not responded in any meaningful way that would allow the Protestants to evaluate the current and historical use of the individual water rights that make up the IMAP. For example, the Protestants specifically asked United Water to identify whether each individual water right included in the IMAP is currently being pumped. According to United Water, the Protestant's question called for a legal conclusion and United Water objected to the Protestants' request on that basis. United Water also said it does not track its water rights in that fashion and that it is "not in a position at this time to assign particular quantities to particular rights." United Water then went on to explain how its water rights may be used in priority if confirmed by the Department or IDWR. These declarations do not convey the information needed to evaluate forfeiture on a water right by water right basis in accordance with the Hearing Officer's Order. Whether a water right has been used is a factual issue, not a legal one.

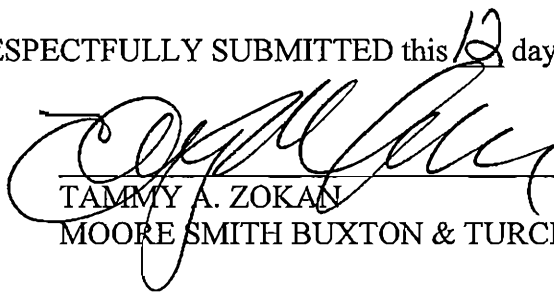
The Protestants also asked United Water to identify specifically which water rights included in the IMAP are being used and which are being held for future use or need. United Water responded by directing the Protestants to its earlier response, which is described above. The Protestants also asked United Water to describe its basis for its claim that individual water rights have not been forfeited. As before, United Water again referred the Protestants to its earlier response and asserted that its water rights could not be forfeited. The Protestants also

asked United Water to describe how long it has been since each water right included in the IMAP has been diverted and applied to beneficial use. United Water again failed to provide any meaningful information by again referencing its response to the Protestants' first interrogatory concerning the use of United Water's water rights, which response is described above.

United Water provided some production information for its individual wells in response to the Protestants' discovery. However, as indicated above, United Water has refused to assign quantities of water pumped to its water rights. United Water has also admitted that it has not pumped from all the wells included in the IMAP during the last five (5) years. Therefore, the production records for United Water's wells do not provide the information essential to the Protestants' evaluation of the status of the individual water rights included in the IMAP in accordance with the Hearing Officer's Order, and United Water has refused to answer the very questions specific to that issue.

For these reasons, the Protestants request that the Hearing Officer allow the Protestants to submit their information concerning the forfeiture of individual water rights included in the IMAP when United Water provides the information necessary for Protestants to do so.

RESPECTFULLY SUBMITTED this 12 day of September, 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 12 day of September, 2003, I caused to served a true and correct copy of the forgoing FORFEITURE STATEMENT, by the U.S. mail, addressed to the following:

Hearing Officer *Via hand-delivery TSZ*
Peter R. Anderson
729 W. Braemere Road
Boise, ID 83702

Ed Squires
1002 W. Franklin Street
Boise, ID 83702-5341

Kathleen Marion Carr
Office of the Field Solicitor
U.S. Department of the Interior
550 West Fort Street, MSC 020
Boise, ID 83724

Bureau of Reclamation
E. Gail McGarry, PN- 3100
1150 North Curtis Road, Suite 100
Boise, ID 83706

City of Caldwell Engineering Dept.
Gordan Law
621 East Cleveland Boulevard
Caldwell, ID 83605

City of Meridian Public Works
Gary D. Smith
660 E. Watertower
Meridian, ID 83642

United Water Idaho, Inc.
John M. Marshall
Givens Pursley, LLP
P.O. Box 2720
Boise, ID 83701

T.E. Terteling Company
Daniel V. Steenson
Ringert Clark Chartered
455 S. Third, P.O. Box 2773
Boise, Idaho 83701-2773

Nampa & Meridian Irrigation District
Charles L. Honsinger
Ringert Clark
P.O. Box 2773
Boise, ID 83701-2773

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

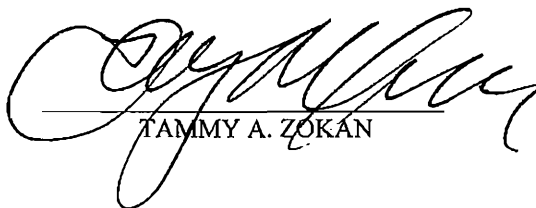
City of Boise
Matthew K. Wilde
Boise City Attorney's Office
P.O. Box 500
Boise, ID 83701-0500

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

Robert W. Talboy
Ellsworth, Kallas & Talboy
2402 W. Jefferson Street
Boise, ID 83702

Boise Project Board of Control
Albert P. Barker
Barker Rosholt & Simpson
P.O. Box 2139
Boise, ID 83701-2139

IDWR, State Office
P.O. Box 83720
Boise, ID 83720-0098


TAMMY A. ZOKAN

RECEIVED

SEP 15 2003

Department of Water Resources

Albert P. Barker, ISB #2867
Amy D. Chestnut, ISB#5904
BARKER ROSHOLT & SIMPSON LLP
205 North 10th Street, Suite 520
P. O. Box 2139
Boise, ID 83701-2139
Telephone: 208-336-0700
Facsimile: 208-344-6034

Robert W. Talboy, ISB#3603
ELLSWORTH KALLAS & TALBOY PLLC
2402 West Jefferson Street
Boise, ID 83702
Telephone: 208-336-1843
Facsimile: 208-345-8945

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.	)	
_____	)	
	)	

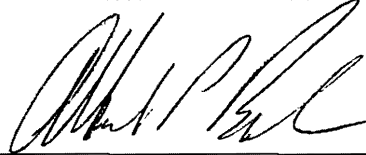
**NOTICE REGARDING
FORFEITURE OF UWID'S
WATER RIGHTS**

In compliance with the *Third Prehearing Order and Notice of Prehearing Conference*
issued June 20, 2003, the Boise Project Board of Control and its member districts, Boise-Kuna

Irrigation District, Wilder Irrigation District, and Big Bend Irrigation District, by and through their counsel of record, hereby provide notice that it does not intend to provide separate evidence relative to the forfeiture of United Water Idaho's individual wells and water rights in this proceeding. Based upon the application itself, it is evident that United Water has forfeited approximately one-half of its water rights since, from the face of the IMAP, United Water has only used a maximum of 147.5 cfs on a single day, yet asserts a right to over 303 cfs. The Boise Project Board of Control will rely upon evidence set forth in the proceedings relative to the forfeiture of specific wells by joining in other protestants evidence pertaining to forfeiture of individual water rights.

DATED this 12th day of September 2003.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'Albert P. Barker', is written over a horizontal line.

Albert P. Barker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 2003, I caused a true and correct copy of the foregoing **NOTICE REGARDING FORFEITURE OF UWID'S WATER RIGHTS**, served by the method indicated below, and addressed to the following individuals:

United Water Idaho, Inc.
Christopher H. Meyer
John M. Marshall
Givens Pursley
277 N. 6th Street, Ste 200
P. O. Box 2720
Boise, Idaho 83701-2720
Facsimile: (208) 388-1300

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile

E. Gail McGarry PN-3100
Bureau of Reclamation
1150 N. Curtis Road, Ste 100
Boise, Idaho 83706-1234
Facsimile: (208) 378-5305

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile

Kathleen Marion Carr MSC-020
Office of the Field Solicitor
U.S. Department of the Interior
550 W. Fort Street, MSC-020
Boise, Idaho 83724-0020
Facsimile: (208) 334-1378

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile

Nampa & Meridian Irrigation District,
City of Caldwell, City of Meridian, and the
Terteling entities
Attn: Charles Honsinger
Ringert Clark Chartered
455 S. 3rd Street
P. O. Box 2773
Boise, Idaho 83701-2273
Facsimile: (208) 342-4657

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile

Cities of Eagle, Kuna, Middleton
& Star and Star Sewer District
Attn: Tammy Zokan
Moore Smith Buxton & Turcke
225 N. 9th Street, Ste. 420
Boise, Idaho 83702
Facsimile: (208) 331-1202

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile

Pioneer & Settlers Irrigation Districts
Attn: Scott Campbell
Moffatt Thomas Barrett Rock & Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
P. O. Box 829
Boise, Idaho 83701-0829
Facsimile: (208) 385-5384

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile

Matthew K. Wilde
Office of the Boise City Attorney
P. O. Box 500
Boise, Idaho 83701-0500
Facsimile: (208) 384-4454

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile

Josephine Beeman
Beeman & Associates, PC
409 W. Jefferson
Boise, Idaho 83702
Facsimile: (208) 331-0954

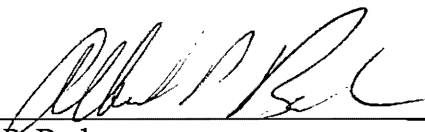
☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile

Robert W. Talboy
Ellsworth Kallas & Talboy
2402 W. Jefferson Street
Boise, Idaho 83702
Facsimile: (208) 345-8945

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile

Ed Squires
Hydro Logic, Inc.
1002 W. Franklin Street
Boise, Idaho 83702-5431
Facsimile: (208) 342-3100

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile



Albert P. Barker

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

RECEIVED

SEP 12 2003

Department of Water Resources

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.

**PIONEER IRRIGATION DISTRICT AND
SETTLERS IRRIGATION DISTRICT'S
ADDITIONAL INFORMATION IN SUPPORT OF
MOTION TO STAY**

Pioneer Irrigation District and Settlers Irrigation District (the "Districts"), by and through their counsel of record Moffatt, Thomas, Barrett, Rock & Fields, Chtd., and in accordance with the Hearing Officer's Third PreHearing Order, hereby provide additional information regarding the rights which it believes UWID may have forfeited, either wholly or partially. The Hearing Officer has requested "a list of the water right [sic] alleged to be forfeited and the factual basis for such forfeiture, including the time period of non-use and whether all or

part of the right has been forfeited.” Third Prehearing Order and Notice of PreHearing Conference, p. 2.

I. LEGAL BACKGROUND

Before proceeding to the factual basis for the Districts’ assertions of forfeiture, it is important to remember Idaho law regarding forfeiture. Idaho Code section 42-222 provides the beginning point for the analysis:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated. . . .

I.C. § 42-222(2). In 1997, the Idaho Supreme Court held that a water right may be partially forfeited. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997) (attached hereto as Attachment A).

Just this year, the Idaho Supreme Court addressed the resumption of use doctrine, which is a defense to forfeiture. The basic premise of that doctrine is that “statutory forfeiture is not effective if, after the five-year period of nonuse, use of the water is resumed prior to the claim of right by a third party.” *Sagewillow, Inc. v. Idaho Dep’t. of Water Resources*, 2003 WL 1847728 (Id. S.Ct. 2003) at *10 (Attachment B hereto). A third party may make a claim of right if the third party has instituted forfeiture proceedings, obtained a valid water right authorizing the use of the water with a priority date prior to resumption, or if the third party has used the water pursuant to an existing right. *Id.* If the forfeiting party resumes using only a portion of an allegedly forfeited water right, then the remainder of the right will be forfeited. *Id.* In addition, “[t]he resumption of use must also be upon land to which the water right is appurtenant.” *Id.*

II. FACTUAL INFORMATION

Based upon the review of the production log summaries created by UWID and produced earlier (but again, not based upon a detailed review of daily production reports), the Districts have determined that the following rights are subject to a claim that they have been forfeited in their entirety:¹

63-2500

63-19456

63-7204

63-2954

63-7896

63-7998

63-4114

63-3112

63-2808

63-10386

63-2506

63-2576

63-3293

63-3164

63-7577

63-2892

¹ These water rights may also be subject to a claim of partial forfeiture.

63-3457

63-3064

63-3294

63-3411

63-8059

63-4752

The Districts have also determined that the following rights are subject to a claim that they have been partially forfeited, based upon the fact that they and the well which is the assigned point of diversion for its respective water right have not been used/pumped at all during certain months for a period of five years or more:

63-9223

63-2668

63-7589

63-7658

63-3448

63-4015

63-7077

63-7479

63-4424

63-8890

63-3105

63-7066

63-3494

63-3172

63-7067

63-2874

63-9204

63-2595

63-9205

63-8432

63-9147

In addition, the following water rights may have been partially forfeited, because the production summaries received from UWID indicate significant usage fluctuations.

Therefore, a review of the more detailed production records just obtained may reveal that the following water rights may have been partially forfeited because their pumping levels during certain months, for a consecutive period of years, may result in a partial forfeiture. Note that there may be some duplication between this list and the preceding partial forfeiture list:

63-2874

63-7589

63-7658

63-3448

63-7348

63-4015

63-7077

63-4424

63-3202

63-8990

63-3105

63-9855

63-7066

63-3494

63-3172

63-7067

63-9204

63-3112

63-2808

63-3562

63-2595

63-8432

The Districts also note that there is a final category of water rights. There are significant production records missing for certain wells, making it impossible to determine whether the rights associated with those wells have been forfeited.

<u>Water Right #</u>	<u>Well</u>	<u>Priority Date</u> ²	<u>First Production Year Data</u>
63-8265	Brookhollow	2/23/1976	1999
63-9087	Country Squire	11/25/1977	1999

² This is the priority date asserted by UWID.

63-8011	Countryman Est.	7/18/1974	1999
63-9198	Five Mile #12	1/2/1979	1999
63-7641	Hidden Valley #1	8/7/1972	1999
63-8405	Hidden Valley #1	1/12/1977	1999
63-7979	Hidden Valley #2	5/13/1974	1999
63-9199	LaGrange	1/3/1979	1999
63-9106	Paradise (North)	1/23/1978	1999
63-8635	Sherman Oaks	8/17/1983	1999
63-8248	Victory	1/2/1976	1999
63-3457	Mesa #1 and 2	7/14/1965	1999
63-3291	Willow Lane 1	5/21/1962	missing from 1964-97
63-3411	Willow Lane 2	6/17/1964	1998
63-8059	Willow Lane 3	11/12/1974	1998

Finally, the monthly production reports the Districts received during the information exchange are conflicting as to use of the following wells during 1997: Arctic (63-2668 and 63-7204), Centennial (63-8236), Country Club (63-3073), Fisk (63-11558), MAC (63-11034), Marden (63-10386), Mountain View (63-2506), Oregon Trail (no water right number available), Roosevelt #3 (63-3293), Swift #1 (63-9147), Taggart #1 (63-3128), and Terteling (63-7577).

III. RESERVATION OF RIGHT TO SUPPLEMENT

The Districts have, to the best of their current abilities, attempted to provide the Hearing Officer with a list of those rights which they believe are subject to forfeiture or partial forfeiture. However, they provide it with the caveat that they have not completed their review of

UWID's full production records, due to their belated receipt of the same. Affidavit of Scott L. Campbell, ¶ 5.

UWID provided a monthly or yearly summary of its well production records during the informal information exchange phase of this proceeding. *Id.* On June 23, 2003, the Hearing Officer authorized formal discovery. Third PreHearing Order and Notice of PreHearing Conference, p. 1. After receiving that order, the Districts served three sets of discovery requests which requested information which was more detailed than the production summaries. Exhibit A, B and C to Campbell Affidavit. The information requested in the various discovery responses included the pumping records for each well, in addition to information about the facilities (pumps, discharge pipes, etc.) for each well, as well as other information pertinent to the IMAP. *Id.* Rather than producing documents, UWID's response to requests for production was an invitation to inspect its documents. Exhibits D, E and F to Campbell Affidavit.

The Districts' Third Set of Discovery Requests, which contained requests specific to well production and capacity, were served on August 6, 2003. Counsel for the Districts received UWID's responses on August 23, 2003, though they had been served the previous day. Campbell Affidavit, ¶ 4, and Exhibits D, E and F, thereto. Even before receiving those responses, and presuming that UWID would allow the Districts to inspect responsive documents, rather than producing them, the Districts contacted UWID's counsel on August 18, 2003, nine days before the discovery cutoff, to arrange a date and time to review the responsive documents. Affidavit of Angela Schaer Kaufmann, ¶ 2. UWID's counsel responded by indicating that August 26, 2003, would not work for UWID, which is somewhat understandable. *Id.*, ¶ 3. However, in addition to suggesting that the review could be conducted after the discovery

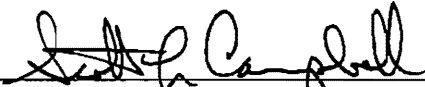
deadline (a possibility which the Districts viewed as impossible under the Third PreHearing Order), UWID attempted to place the burden upon the Districts to coordinate document review among all of the Protestants. *Id.*

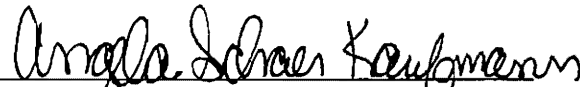
Although that requirement was ultimately dropped, the Districts' counsel was unable to arrange a mutually acceptable date to review responsive documents until August 29, 2003. Kaufmann Aff., ¶ 4. After being flagged, the documents had to be sent out for copying, and the Districts' counsel did not receive them until approximately 4:30 p.m. on Friday, September 5, 2003. Kaufmann Aff., ¶ 4. Due to the voluminous nature of the documents, as well as commitments to other clients and other matters, and other issues in the above-captioned proceeding, counsel for the Districts has simply been unable to conduct a thorough review and analysis of the daily pumping records and well-specific information. Campbell Aff., ¶5.

Therefore, the Districts specifically reserve the right to assert forfeiture, whether in whole or in part, to other water rights contained within the IMAP. The Districts have provided the lists above with the caveat that they represents the Districts' best effort to review the summary production logs provided by UWID. By no means should the lists be considered a final, comprehensive list of the water rights which the Districts believe UWID has forfeited.

DATED this 12th 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 15th day of September 2003, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S ADDITIONAL INFORMATION IN SUPPORT OF MOTION TO STAY** 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

☒ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Peter Anderson, Hearing Officer
729 W. Braemere Road
Boise, ID 83702

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Matt J. Howard
PO Box 190012
Boise, ID 83719
Fax: 333-8409

☒ 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

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Ed Squires
Hydrologic
1002 W. Franklin
Boise, ID 83702-5431
Fax: 342-3100

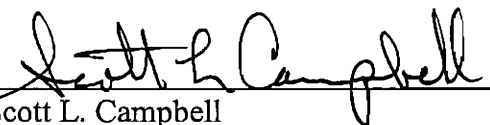
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Robert W. Talboy
Ellsworth Kallas Talboy, PLLC
2402 W. Jefferson Street
Boise, ID 83702
Fax: 345-8945

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

By 
Scott L. Campbell

State v. Hagerman Water Right Owners, Inc.

947 P.2d 400

130 Idaho 727

Supreme Court of Idaho,

Boise, February 1997 Term.

In re SRBA, Case Nos. 39576,
91-00010 ex rel. Partial Forfeiture Re
Basin-Wide Issue 10, Entered
4-26-96.

The STATE of Idaho, United States
of America, Idaho Ground Water
Appropriators, Inc., Chemical Lime
Company of Arizona and North
Snake Ground Water District,
Appellants,

v.

HAGERMAN WATER RIGHT
OWNERS, INC., Bogus Basin
Recreational Association, Inc., Lake
Reservoir Co., Newfoundland
Partners, Payette River Water Users
Association, Inc., Sinclair Oil
Corporation, d/b/a Sun Valley Co.,
Thompson Creek Mining Co. and
Thousand Springs Ranch,
Respondents,
and

Nampa and Meridian Irrigation
District, Allen Noble Farms, Inc.,
Allen Noble Farm Development
Corporation, Rim View Trout
Company, Clear Lakes Trout
Company, Inc., Rainbow Trout
Farm, C.H. Nicholson, Sailor Creek
Water Company, Patrick G. Morris,
Hulet Farm Management Company
and Grindstone Butte Mutual Canal
Company, Respondents-Intervenors.

No. 23214.
Sept. 10, 1997.

In proceedings in adjudication of water rights in river basin, the District Court of the Fifth Judicial District, Twin Falls County, Daniel C. Hurlbutt, Jr., J., issued decision holding that water rights are not subject to partial forfeiture for nonuse. Appeal was taken. The Supreme Court, Schroeder, J., held that: (1) statute declaring that "all rights to the use of water" shall be subject to forfeiture for nonuse for period of five years

does not unambiguously prohibit partial forfeiture of water right based on partial nonuse of water right for statutory period, and (2) Supreme Court would accord deference to Idaho Department of Water Resources' (IDWR) interpretation of statute to recognize partial forfeiture of water right for partial nonuse of right for statutory period.

Reversed.

West Headnotes

[1] Waters and Water Courses ⇨151

405 ----

405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Doctrine of "abandonment of water right" is common law doctrine involving intent to abandon and actual surrender of water right, which is separate and distinct from doctrine of "forfeiture of water right" predicated upon statutory declaration that rights to water are lost where appropriator fails to make beneficial use of water for continuous five year period. I.C. § 42-222(2).

[2] Appeal and Error ⇨842(1)

30 ----

30XVI Review
30XVI(A) Scope, Standards,
and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on
Whether Questions Are of Law or
of Fact
30k842(1) In General.

Question of whether statute declaring water rights forfeit if not used for statutory period provides for partial forfeiture of water right turns on interpretation of statute, which thus is question of law over which Supreme Court exercises free review. I.C. § 42-222(2).

[3] Statutes ⇨190

361 ----

361VI Construction and
Operation
361VI(A) General Rules of
Construction
361k187 Meaning of Language
361k190 Existence of
Ambiguity.

If statutory language is clear and unambiguous, court need merely apply statute without engaging in any statutory construction.

[4] Statutes ⇨188

361 ----

Attachment A

361VI Construction and
Operation
361VI(A) General Rules of
Construction
361k187 Meaning of Language
361k188 In General.

Statutory interpretation begins with words of statute, giving language its plain, obvious, and rational meanings.

[5] Waters and Water Courses ⇌151

405 ----

405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Statute declaring that "all rights to the use of water" shall be subject to forfeiture for non-use for period of five years does not unambiguously prohibit **partial forfeiture** of water right based on partial nonuse of water right for statutory period. I.C. § 42-222(2).

[6] Statutes ⇌181(1)

361 ----

361VI Construction and
Operation
361VI(A) General Rules of
Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) In General.

If it is necessary for court to construe statute, then it will attempt to ascertain legislative intent.

[7] Statutes ⇌181(2)

361 ----

361VI Construction and
Operation
361VI(A) General Rules of
Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) Effect and
Consequences.

[See headnote text below]

[7]

Statutes ⇌

184

361 ----

361VI Construction and
Operation
361VI(A) General Rules of
Construction
361k180 Intention of Legislature
361k184 Policy and Purpose of
Act.

[See headnote text below]

[7]

Statutes ⇌

188

361 ----

361VI Construction and
Operation
361VI(A) General Rules of
Construction
361k187 Meaning of Language
361k188 In General.

In construing statute, court may examine language used, reasonableness of proposed interpretations, and policy behind statute.

[8] Statutes ⇌215

361 ----

361VI Construction and
Operation
361VI(A) General Rules of
Construction
361k213 Extrinsic Aids to
Construction
361k215 Contemporary
Circumstances.

Application of statute is aid to construction, especially where public relies on that application over long period of time.

[9] Waters and Water Courses ⇌151

405 ----

405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Supreme Court would accord deference to Idaho Department of Water Resources' (IDWR) interpretation of statute to recognize **partial forfeiture** of water right for partial nonuse of right for statutory period of five years, in light of facts that IDWR was entrusted with responsibility to administer water resources in state, that statute failed to expressly treat precise issue of **partial forfeiture**, and that general public understood and depended upon prior IDWR interpretation, policy and practice to recognize concept of **partial forfeiture**. I.C. § 42-222(2).

[10] Waters and Water Courses ⇌151

405 ----

405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Interpretation of statute to recognize **partial forfeiture** of water right for partial nonuse of right for

- statutory period of five years was supported by important policy goals of securing maximum use and benefit of water resources; recognizing **partial forfeiture** would
- prevent rights holder from denying other appropriations even if rights holder was only putting part of right to beneficial use. I.C. § 42-222(2).

[11] Waters and Water Courses ⇌ 151

405 ----

405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Water user is not entitled to waste water, and thus, water rights holder cannot avoid **partial forfeiture** of right by wasting portion of right that cannot be put to beneficial use. I.C. § 42-222(2).

----- 947 P.2d 401 -----

[130 Idaho 728] Alan G. Lance, Attorney General; Cheri C. Copsey, Deputy Attorney General (argued), Boise, for appellant State of Idaho.

Betty H. Richardson, U.S. Attorney, Boise; William B. Lazarus (argued), Department of Justice, Washington, D.C., for appellant United States of America.

Givens, Pursley & Huntley, Boise, for appellants Idaho Ground Water Appropriators, Inc., and Chemical Lime Company of Arizona. Jeffrey C. Fereday argued.

Beeman & Hofstetter, P.C., Boise, for appellant North Snake Ground Water District. Dana L. Hofstetter argued.

Hepworth, Lezamiz & Hohnhorst, Twin Falls, for respondent Hagerman Water Right Owners, Inc. John C. Hohnhorst argued.

Elam, Burke, P.A., Boise, for respondents Bogus Basin Recreational Assoc., et al. Jeffery C. Ventrella argued.

Ringert Clark, Chtd., Boise, for Intervenor Nampa and Meridian Irrigation District, et al. Daniel V. Steenson argued.

SCHROEDER, Justice.

I.

FACTS AND PRIOR PROCEEDINGS

This case arises from the general adjudication of water rights in the Snake River water basin, commenced in 1987 pursuant to the Idaho Legislature's enactment of legislation in 1985 and 1986 requiring the Director ("Director") of the Idaho Department of Water Resources ("IDWR") to initiate a judicial proceeding to accomplish the adjudication within the terms of the McCarran Amendment. 43 U.S.C. § 666. On June 17, 1987, the Director filed a petition in the district court

on behalf of the State of the United States and other water users of the

----- 947 P.2d 402 -----

[130 Idaho 729] Snake River water basin as defendants and seeking an order from the court commencing a general stream adjudication. The Snake River Basin Adjudication ("SRBA") was commenced by order dated November 19, 1987. *In re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78 (1988), cert. denied, 490 U.S. 1005, 109 S.Ct. 1639, 104 L.Ed.2d 155 (1989).

In the course of conducting the SRBA, specialized rules of procedure have been developed. See SRBA Administrative Order 1, amended 9/30/96 ("SRBA AO1"). These rules of procedure allow "[a]ny party to the adjudication [to] file a *Motion to Designate Basin-Wide Issue* if that party believes an issue materially affects a large number of parties to the adjudication." SRBA AO1, 17.a. (1).

The Hagerman Water Rights Owners, Inc. ("HWRO") filed a motion to designate Basin Wide Issue Number 10 ("BW10") for a determination of whether Idaho's forfeiture statute contemplates **partial forfeiture** of a water right for non-use. On January 20, 1996, the district court designated BW10 as follows: **Are water rights in Idaho subject to partial forfeiture for nonuse?**

On April 26, 1996, the district court issued a decision holding, as a matter of law, that water rights in Idaho are not subject to **partial forfeiture** for non-use. The SRBA court determined that the issue is one of first impression to be resolved by construing Idaho's forfeiture statute, I.C. § 42-222(2). That section provides in relevant part:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated....

I.C. § 42-222(2) (1996) (emphasis added).

The district court focused on the word "all" in this section and reasoned that the plain and ordinary meaning of this provision is that "**partial forfeiture** is not provided for in this statute." The State of Idaho, the Chemical Lime Company of Arizona and Idaho Ground Water Appropriators, Inc., and North Snake Ground Water District, together with the United States ("appellants") filed a motion for reconsideration, or in the alternative, permission to take an interlocutory appeal pursuant to I.R.C.P. 11(e). HWRO, together with the other respondents, opposed the motion for reconsideration. The district court denied the motion for reconsideration and granted the motion for interlocutory appeal. This Court granted interlocutory appeal on August 5, 1996.

In addition to the primary issue on appeal, HWRO cross-appeals for an award of costs and attorney fees pursuant to I.C. § 12-121 and the private attorney general doctrine.

II.

THE ISSUE OF WHETHER I.C. §

**42-222(2) PERMITS PARTIAL
FORFEITURE OF WATER
RIGHTS HAS NOT BEEN RAISED
PREVIOUSLY AS AN ISSUE ON
APPEAL TO THIS COURT.**

The appellants maintain that case law establishes this Court's recognition of statutory **partial forfeiture**. However, the question of whether part of a water right may be forfeited pursuant to I.C. § 42-222(2) has not been raised directly as the issue on appeal to this Court, although the subject has been discussed by this Court in determining the issues that have been raised. The parties cite to several of these cases which are taken up below.

[1] In Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 P. 418 (1924), Albrethsen brought an action to have a portion of the respondent Wood River Land Company's water right declared forfeited. (FN1) The respondent,
----- 947 P.2d 403 -----

[130 Idaho 730] Wood River, was the predecessor in interest to Riley who was decreed 5,595 inches of water out of the Big Wood River, with a priority date of March 24, 1883, for use upon lands described in a decree entered in Frost et al. v. Alturas Water Co. (December 13, 1909). Albrethsen claimed that the evidence established that some 2,100 inches of the water right were not put to beneficial use between 1910 and 1914 and were allowed to flow back into the Wood River. Albrethsen and other farmers owning land in the Wood River Valley claimed that 3,850 inches of Wood River's water right were subject to reapplication by the watermaster. Albrethsen presented witnesses and evidence that Wood River's canal could not carry in excess of 3,850 inches. On rehearing, the Court concluded:

We are of opinion that this statute intends that a right to the use of water, although based upon a decree of a court, may be lost by abandonment, unless it thereafter be beneficially used, and that in any action to obtain a decree and to determine the question of abandonment or forfeiture evidence is admissible which shows or tends to show that after the water had been decreed it had not been put to a beneficial use, but had been abandoned for the statutory period, after the entry of such decree.

One of the most conclusive methods of showing that an amount of water decreed to a particular system has not been beneficially used is to show that the canal or other diverting works through which the appropriation must be diverted ... does not have the required carrying capacity to divert and distribute the full amount of the appropriation and carry the same to the point of intended use.

40 Idaho at 59-60, 231 P. at 421-22.

The issue before the Court in Albrethsen was limited to "the single assignment that the evidence is insufficient to sustain the findings of fact and conclusions of law and judgment entered thereon." 40 Idaho at 52, 231 P. at 419. Albrethsen involved resolution of the factual inquiry of whether the canal in question could have ever delivered the

quantity of water decreed, not whether the forfeiture statute provided for **partial forfeiture**. Nonetheless, the result was that a decreed water right was reduced by the amount of water that had not been applied to a beneficial use. **Partial forfeiture**, as a remedy, was assumed.

In Graham v. Leek, 65 Idaho 279, 144 P.2d 475 (1943), the appellant/defendant owned 160 acres, referred to as the Lenman Tract. Appellant was decreed 3.2 cfs of water from Three Mile Creek in the case of Frost et al. v. Alturas Water Co. (December 13, 1909) with a priority date of April 1, 1907. Respondent/plaintiff alleged that he began to divert and apply this water by adverse possession in March of 1916. It was respondent's theory that the appellant had abandoned the use of the water. The district court held for the respondent and, with respect to abandonment, found that the Lenman Tract was dry farmed, that no attempt had ever been made to use any part of the water with one exception, and that use of the water was abandoned upon the Lenman Tract. While acknowledging that there was evidence in the record to support the findings that the Lenman Tract had never been irrigated, the appellant nonetheless claimed error. In this case, the Court addressed only whether the findings were supported by competent,

----- 947 P.2d 404 -----

[130 Idaho 731] although conflicting evidence, in the record. Graham, 65 Idaho at 290-94, 144 P.2d at 481-83.

In Olson v. Bedke, 97 Idaho 825, 555 P.2d 156 (1976), lessors, the Olsons, brought an action to terminate a ten-year lease in part because the lessees allegedly failed to put to beneficial use "all decreed water on the ranch each year" and to "use and protect all existing water rights" which allegedly failed material terms of the lease. Id. at 827, 555 P.2d at 158. The "existing water rights" referred to included a decreed annual right to water from the Raft River and all of the waters of Rusty Spur Creek, which the lessor alleged was a private creek. The district court held that Olsons' claim regarding loss of water rights to the Raft River water was not well founded because the waters were distributed by a watermaster and therefore could not be lost. With respect to the Raft River water, the Court said:

Assuming as the trial court did in granting the motion for summary judgment that respondents Bedke had failed to use the full decreed water rights of the Raft River appurtenant to this property as alleged in the complaint, the unused water rights could be forfeited by non-use prior to the end of the lease, to the substantial injury of the reversionary interest. I.C. § 42-222(2).

Id. at 829, 555 P.2d at 160.

In determining whether Bedke was entitled to judgment as a matter of law, the Court held that the district court's reasoning that water could not be lost if distributed by a watermaster was erroneous. The question of whether there could be a **partial forfeiture** under I.C. § 42-222(2) was not directly presented to the Court, but it is clear that the Court assumed there could be a **partial forfeiture**.

Similarly, in Gilbert v. Smith, 97 Idaho 335, 552 P.2d 1220 (1976), the Court's discussion was limited to its determination that statutory forfeiture had not been shown because "the record does not identify any measurable five year period of non-use which would have supported the trial court in making the requisite finding to establish a statutory forfeiture." Id. at 740, 552 P.2d at 1225.

In Idaho Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (1983), the Court addressed the validity of subordination clauses in water licenses obtained by Idaho Power as a condition for obtaining FPC licenses to construct the Brownlee, Oxbow and Low Hells Canyon dams and the effect of these subordination clauses on Idaho Power's water rights at Swan Falls Dam. Among other theories, opponents of Idaho Power argued that it had lost its water rights at Swan Falls by forfeiture, abandonment, adverse possession, equitable estoppel and customary preference. This Court did not reach the issue of forfeiture. Id. at 588-89, 661 P.2d at 754-55.

In Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984), the plaintiffs/respondents argued that the defendants/appellants were not entitled to any part of 120 inches of water which was appropriated for the lands in two different parcels. In that case the Court said that for the plaintiffs to prevail, the defendants or their predecessor in interest "must have lost the [water] right in some other way, such as through adverse possession, prescriptive use, forfeiture, or abandonment," and found "no evidence in the record indicating that the right to use the water ... has been lost, under the facts found by the trial judge." Id. at 466, 690 P.2d at 921. The narrow inquiry engaged in by the Court was whether the evidence in the record supported the trial court's findings, not whether **partial forfeiture** was contemplated by the language of I.C. § 42-222(2).

Dovel v. Dobson, 122 Idaho 59, 831 P.2d 527 (1992), in part dealt with the approval of the Director of the IDWR for the transfer of a water right in order to supply water for property not covered in an original water right. The water right covered three different fields, totaling ninety-six (96) acres. The third field was six (6) acres. Dobson objected to the transfer, arguing that approving the transfer would result in an enlargement because, he alleged, part of the water right had been forfeited for non-use. In approving the transfer, the Director concluded that the consumptive use appurtenant to the six-acre field had been forfeited through nonuse, but did not reduce the amount which had historically

----- 947 P.2d 405 -----

[130 Idaho 732] been diverted for the fields, concluding that the transfer would not change the amount of use authorized by the water right. Dovel sought review by the district court. The district court concluded that the Director's decision was not clearly erroneous or an abuse of discretion. This Court affirmed, acknowledging that "[i]t appears that Dovel's argument was that some or all of the water right had been lost due to forfeiture," but holding that the agency's determination was supported by substantial and competent evidence. Id. at 63, 831 P.2d at 531. The decision in Dovel was limited to an examination of the facts and did not determine the issue of whether **partial forfeiture** is recognized under I.C. § 42-222(2) as a matter of law.

In sum, the issue whether a water right may be partially forfeited pursuant to I.C. § 42-222(2) has not been directly addressed by the Court, although that principle has been assumed on occasions by both the Court and the litigants.

III.

I.C. § 42-222(2) IS AMBIGUOUS.

It is established that a water right in Idaho, although affirmed by a court decree, may be abandoned and subject to subsequent appropriation. I.C. § 42-222(2); Graham v. Leek, 65 Idaho 279, 287, 144 P.2d 475, 479 (1943); Albrethsen v. Wood River Land Co., 40 Idaho 49, 59, 231 P. 418, 421-22 (1924) (opinion on rehearing). The parties before this Court agree that the legislature intended I.C. § 42-222(2) to provide for total forfeiture when all of a water right has gone unused for the statutory period. The parties disagree as to whether I.C. § 42-222(2) contemplates **partial forfeiture** when part of the water right is unused for the statutory period.

In Gilbert v. Smith, the Court said that forfeiture of a water right is

predicated upon a statutory declaration that all rights to use water may be lost where an appropriator fails to make beneficial use of the water for a statutory period regardless of the intent of the appropriator. In Idaho this concept is set forth in I.C. § 42-222(2). The effect of that provision is that an appropriator who fails to apply his water right to a beneficial use for a continuous five year period is regarded as having lost all rights to the use of such water.

97 Idaho at 738, 552 P.2d at 1223 (citations and footnote omitted).

[2][3][4] Thus, in Idaho, forfeiture is a statutory concept well distinguished from the common law concept of abandonment. Sears v. Berryman, 101 Idaho 843, 847, 623 P.2d 455, 459 (1981); Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 101 Idaho 677, 681, 619 P.2d 1130, 1134 (1980); Gilbert v. Smith, 97 Idaho at 738, 552 P.2d at 1223; see Jenkins v. State Dep't of Water Resources, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982). The question of whether I.C. § 42-222(2) provides for **partial forfeiture** of a water right turns on interpretation of a statute, which is a question of law over which the Court exercises free review. City of Sun Valley v. Sun Valley Co., 128 Idaho 219, 221, 912 P.2d 106, 108 (1996); State v. O'Neill, 118 Idaho 244, 245, 796 P.2d 121, 122 (1990). In applying I.C. § 42-222(2), if the statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction. Wolfe v. Farm Bureau Ins. Co., 128 Idaho 398, 404, 913 P.2d 1168, 1174 (1996); State v. McCoy, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996); Kootenai Elec. Co-op. v. Washington Water Power Co., 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995); Ada County Assessor v. Roman Catholic Diocese of Boise, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993); Ottesen on Behalf of Edwards v. Board of Comm'rs of Madison County, 107 Idaho 1099,

1100, 695 P.2d 1238, 1239 (1985). Statutory interpretation begins with the words of the statute, giving the language its plain, obvious, and rational meanings. *Wolfe*, 128 Idaho at 404, 913 P.2d at 1174; see *Grand Canyon Dories v. Idaho State Tax Comm'n*, 124 Idaho 1, 5, 855 P.2d 462, 466 (1993); *Nelson Bv and Through Nelson v. City of Rupert*, 128 Idaho 199, 201, 911 P.2d 1111, 1113 (1996).

The district court determined that I.C. § 42-222(2) unambiguously does not provide

----- 947 P.2d 406 -----

[130 Idaho 733] for partial forfeiture. This determination was incorrect.

[5] Section 42-222 of the Idaho Code states in relevant part:

(2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost though nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter....

I.C. § 42-222(2) (1996). The district court determined that:

"All" when used as an adjective means "the whole amount or quantity ... the whole number or sum of..." Webster's Ninth New Collegiate Dictionary 71 (9th ed.1991). Reviewing the plain and ordinary meaning of I.C. § 42-222(2), it is clear that partial forfeiture is not provided for within this statute. Under the current wording of I.C. § 42-222(2), forfeiture of "all" rights occurs if water is not beneficially used for a five (5) year period. I.C. § 42-222(2) is completely silent as to partial forfeiture.

I.C. § 42-222(2) has been amended numerous times without adding clarifying language providing for partial forfeiture as some other states have done. See, e.g., Ariz.Rev.Stat. § 45-188(a) (Supp.1996); Cal. Water Code § 1241 (1996); Colo.Rev.Stat. § 37-92-402(11) (1995); N.M. Stat. Ann. § 72-5-28(A) (Michie 1978); Wash. Rev.Code Ann. § 0.14.160 (West 1992).

Section 42-222(2) of the Idaho Code does not explicitly provide for partial forfeiture. In fact, the statute does not address any particular quantity of water at all that may be forfeited. The statute simply refers to "it" and "water."

Section 73-113 of the Idaho Code instructs that "[w]ords and phrases are construed according to the context and the approved usage of the language." I.C. § 73-113. The word "all" is an adjective. WEBSTER'S COLLEGIATE DICTIONARY 29 (10th ed.1993). In the ordinary use of the English language, adjectives precede or immediately follow the noun they modify. See WEBSTER'S CONCISE HANDBOOK FOR WRITERS, 151 (1991); STRUNK & WIGHT, THE ELEMENTS OF STYLE 30 (3d ed.1979). "All" in I.C. § 42-222(2) modifies the word "rights." It does

not modify the more constant word "water." See *State v. Troughton*, 126 Idaho 406, 411, 884 P.2d 419, 424 (Ct.App.1994) (relative and qualifying words are applied to words or phrases immediately preceding and not to words or phrases more remote). Had the legislature intended the word "all" to modify "water," it could have easily constructed a sentence that conveyed such an intent. The use of the word "all" in I.C. § 42-222(2) does not unambiguously close the door on the possibility of partial forfeiture.

IV.

PARTIAL FORFEITURE IS AN ADMINISTRATIVELY RECOGNIZED CONCEPT WHICH IS IN ACCORD WITH THE ASSUMPTION MADE IN IDAHO CASE LAW.

[6][7] If it is necessary for the Court to construe a statute, then it will attempt to ascertain legislative intent. *Kootenai Elec. Co-op.*, 127 Idaho at 435, 901 P.2d at 1336; *Sweitzer v. Dean*, 118 Idaho 568, 571, 798 P.2d 27, 30 (1990). In construing a statute this Court may examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute. *Sweitzer*, 118 Idaho at 571-72, 798 P.2d at 30-31; *Umphrev v. Sprinkel*, 106 Idaho 700, 706, 682 P.2d 1247, 1253 (1983).

A. Administrative Practices and Policies.

[8] A basic rule of statutory construction is that the application of a statute is an aid to construction, especially where the public relies on that application over a long period of time. SUTHERLAND STAT. CONST. (5th ed.1992). As Sutherland explains:

Statutes are documents having practical effects. It is therefore improper to construe them in the abstract, without taking into consideration the historical framework in which they exist.... Correlatively, such information is also relevant when deciding what the statute means to others

----- 947 P.2d 407 -----

[130 Idaho 734] because it is important to know how people affected by an act understand it.

SUTHERLAND, § 49.01 (footnotes omitted). "[W]here contemporaneous and practical interpretation has stood unchallenged for a considerable length of time it will be regarded as very important in arriving at the proper construction of a statute." *Id.* § 49.07. In fact, "[o]ne of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that the public has relied on the interpretation[.]" *Id.* This Court has and continues to adhere to those tenets.

In *J.R. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991), the Court established a four-part test for when agency construction of a statute should be accorded deference. This Court summarized this test as follows:

This four prong test states that an agency's construction of a statute will be given great weight if: (1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statute is reasonable; (3) the statutory language at issue does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present.

Garner v. Horkley Oil, 123 Idaho 831, 833, 853 P.2d 576, 578 (1993) (citing Simplot, 120 Idaho at 862, 820 P.2d at 1219).

There is no question that IDWR is entrusted with the responsibility to administer water resources in the state. I.C. §§ 42-1701--1778; §§ 42-1801--1806. Moreover, the statutory language does not "expressly treat the precise question at issue." As noted above, past cases from this Court indicate that **partial forfeiture** has been a recognized practice in Idaho. See Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984); Idaho Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (1983); Olson v. Bedke, 97 Idaho 825, 555 P.2d 156 (1976); Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976); Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 P. 418 (1924).

The case of Dovel v. Dobson, 122 Idaho 59, 831 P.2d 527 (1992), establishes that the practice of **partial forfeiture** has also been followed by the IDWR. The Director's finding in that case was that the "consumptive use appurtenant to the third field had been forfeited by nonuse...." Id. at 61, 831 P.2d at 529. Dovel indicates that the IDWR has made factual findings of **partial forfeiture** in the past. IDWR's practice of interpreting I.C. § 42-222(2) as allowing for a **partial forfeiture** is also apparent from its forms. The IDWR Application for Transfer of a Water Right asks applicants:

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of non-use?

Moreover, the record shows that some of those now opposing **partial forfeiture** advocated its use in their objections to the Director's report in the SRBA proceedings. A Hagerman water right owner filed an objection to a water right on the basis that the water right had been partially forfeited, stating:

The recommendation is for a greater quantity of water than has been beneficially used since at least before 1970. Thus, the right to *anything more than 3.5 cfs does not exist*. It has been forfeited or abandoned and/or the claimant is estopped from claiming the unused portion pursuant to agreement between the claimant and this objector.

(Emphasis added).

[9] Case law and the record in this case show that the general public did indeed understand and depend upon the prior IDWR interpretation, policy and practice that **partial**

forfeiture is a recognized concept in Idaho. That I.C. § 42-222(2) allows for **partial forfeiture** is a reasonable interpretation and otherwise meets the standards for according this interpretation deference. Simplot, 120 Idaho at 862, 820 P.2d at 1219. The Court declines to "unsettle[] the repose of all those who have detrimentally relied on ... agency interpretations," id. at 857, 820 P.2d at 1214, and will accord IDWR's interpretation deference in this case.

B. Recognition of **Partial Forfeiture** Promotes Important Policy Goals.

1. The Result of Reaching a Contrary Decision.

[10] If this Court were to find that I.C. § 42-222(2) does not authorize **partial forfeiture** of a water right, once the amount element

----- 947 P.2d 408.-----

[130 Idaho 735] of a water right is decreed, a water user could hold the water against all subsequent appropriators by using only a part of the water. Such a scheme is inconsistent with Idaho water law, which provides that if a water right is abandoned or forfeited it reverts to the state, following which third parties may perfect an interest therein. IDAHO CONST., art. 15, § 3; I.C. § 42-222(2); Idaho Power Co., 104 Idaho at 589, 661 P.2d at 755; Jenkins v. State Dep't of Water Resources, 103 Idaho 384, 387-88, 647 P.2d 1256; Sears v. Berryman, 101 Idaho 843, 848 623 P.2d 455, 460 (1981); Gilbert, 97 Idaho at 738, 552 P.2d at 1223 (1976). "The governmental function in enacting ... the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources." Nettleton v. Higginson, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977). See IDAHO CONST., art. XV, § 7. In Kunz v. Utah Power & Light Co., 117 Idaho 901, 792 P.2d 926 (1990), the Court commented:

The water of this arid state is an important resource. Not only farmers, but industry and residential users depend upon it. Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. The policy of the law of this [s]tate is to secure the maximum use and benefit, and least wasteful use, of its water resources.

Id. at 904, 792 P.2d at 929 (quotations and citations omitted).

Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. This is a continuing obligation. See Washington County Irrigation Dist. v. Talboy, 55 Idaho 382, 390, 43 P.2d 943, 946 (1935); Glavin v. Salmon River Canal Co., 44 Idaho 583, 589-90, 258 P. 532, 534 (1927). **Partial forfeiture** makes possible allocation of water consistent with beneficial use concepts.

2. Recognition of **Partial Forfeiture** Promotes Economical Use of Water.

[11] Contrary to the water users' claims, the Court's

- decision does not promote uneconomical use of water in order to avoid forfeiture. A water user is not entitled to waste water. Glavin, 44 Idaho at 589-90, 258 P. at 534; Coulson v. Aberdeen-Springfield Canal Co., 39 Idaho 320, 324, 227 P. 29, 30 (1924); Vineyard Land & Stock Co. v. Twin Falls Oaklev Land & Water Co., 245 F. 30, 33, 35 (9th Cir.1917); Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915). It follows that a water right holder cannot avoid a **partial forfeiture** by wasting that portion of his or her water right that cannot be put to beneficial use during any part of the statutory period. If a water user cannot apply a portion of a water right to beneficial use during any part of the statutory period, but must waste the water in order to divert the full amount of the water right, a forfeiture has taken place.

V.

CONCLUSION

We reverse the decision of the district court determining that I.C. § 42-222(2) does not allow for **partial forfeiture** of water rights. This Court holds that **partial forfeiture** is provided for by I.C. § 42-222(2).

Costs are awarded to the appellants. I.A.R. 40. No attorney fees are awarded on appeal or on cross-appeal.

TROUT, C.J., and JOHNSON, McDEVITT (FN*) and SILAK, JJ., concur.

(FN1.) The statute in effect at the time Albrethsen was decided used the term "abandonment" not forfeiture. That statute provided:

All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to the beneficial use for which it was appropriated, and when any right to the use of water shall be lost through nonuse or abandonment such rights to such water shall revert to the state and be again subject to appropriation under this chapter....

Albrethsen, 40 Idaho at 59, 231 P. at 421 (quoting C.S. § 5582 (1919)).

The Legislature repealed a later version of this statute which also described loss of a water right in terms of "abandonment" and reenacted the statute using "forfeiture" language. Act of May 26, 1969, ch. 303, § 2, 1969 Idaho Sess. Laws 906.

In the past, courts used the terms abandonment and forfeiture interchangeably. However, the two doctrines are separate and distinct. Gilbert v. Smith, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976). Abandonment is a common law doctrine involving intent to abandon and an actual surrender of the water right. Id. Forfeiture, on other hand, is predicated upon the statutory declaration that rights to water are lost where the appropriator fails to make beneficial use of the water for a continuous five year period. I.C. 42-222(2); Gilbert, 97 Idaho at 738, 552

P.2d at 1223; Jenkins v. State Dept. of Water Resources, 103 Idaho 384, P.2d 1256 (1982); Sears v. Berryman, 101 Idaho 843, 847, 623 P.2d 455, 459 (1981). Resolution of this issue does not involve an inquiry into the law of abandonment.

(FN*) Justice McDevitt participated in this decision prior to his resignation.

**Sagewillow, Inc. v. Idaho Dept. of Water
Resources**

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE PERMANENT
LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO
REVISION OR WITHDRAWAL.

Supreme Court of Idaho,

Idaho Falls, September 2002 Term.

SAGEWILLOW, INC.,
Plaintiff-Appellant,
v.
IDAHO DEPARTMENT OF
WATER RESOURCES, James Mays,
Mays Land and Livestock, Blaine
County Canal Company,
Defendants-Respondents.

No. 27534.
April 10, 2003.

Senior water appropriator filed transfer applications for water rights. The Department of Water Resources found that the water rights had been forfeited in whole or in part due to nonuse, and senior appropriator appealed. The District Court of the Seventh Judicial District, Butte County, James C. Herndon, J., affirmed, and senior appropriator appealed. The Supreme Court, 135 Idaho 24, 13 P.3d 855, held that the Snake River Basin Adjudication (SRBA) district court had exclusive jurisdiction to review Department's determination. Legislature in response enacted statute providing that judicial review of Department actions would not be heard in the SRBA district court, but in the district court authorized by the Administrative Procedure Act. After the SRBA district court transferred action back, the District Court of the Seventh Judicial District reissued its prior decision, and senior appropriator appealed. The Supreme Court, Eismann, J., held that: (1) junior water appropriators could defeat senior appropriator's resumption-of-use defense to statutory forfeiture of water rights only by establishing that they had used the available water for a beneficial purpose after the statutory period of nonuse; (2) legislature had not abolished the resumption-of-use defense; (3) resumption-of-use defense could be invoked by a successor in interest to the original appropriator; (4) Department was not barred under doctrines of res judicata or collateral estoppel from ordering that water rights had been forfeited as a result of its prior order approving senior appropriator's transfer application; (5) Department was not equitably or quasi estopped from declaring that senior appropriator had forfeited water

rights; and (6) Department could be a party in judicial review of its decision.

Vacated and remanded.

Kidwell, J., concurred in the result and filed opinion, in which Schroeder, J., concurred.

West Headnotes

[1] Administrative Law and Procedure ⇌683

15A ----

15AV Judicial Review of
Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak683 Scope.

On an appeal from a district court's decision on a petition for judicial review of a contested agency case, Supreme Court reviews the agency record independently of the district court's decision. I.C. § 67-5270.

[2] Administrative Law and Procedure ⇌683

15A ----

15AV Judicial Review of
Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak683 Scope.

On an appeal from a district court's decision on a petition for judicial review of a contested agency case, Supreme Court does not substitute its judgment for that of the agency as to the weight of the evidence presented; rather, Court defers to the agency's findings of fact unless they are clearly erroneous. I.C. § 67-5279(1).

[3] Administrative Law and Procedure ⇌741

15A ----

15AV Judicial Review of
Administrative Decisions
15AV(D) Scope of Review in
General
15Ak741 In General.

An agency order in a contested case may be overturned on appeal only where it: (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) was made upon unlawful procedure; (d) is not supported by substantial evidence in the record as a whole; or (e) is arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(4).

[4] Administrative Law and Procedure ⇌764.1

15A ----

15AV Judicial Review of
Administrative Decisions **Attachment B**

15AV(D) Scope of Review in
General
15Ak764 Harmless or
Prejudicial Error
15Ak764.1 In General.

An agency order in a contested case must be upheld on appeal if substantial rights of the appellant have not been prejudiced. I.C. § 67-5279(4).

[5] Waters and Water Courses ≈151

405 ----
405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Abandonments and forfeitures of water rights are not favored, and thus, although statutory abandonment may have actually occur, a forfeiture is not effective if, after the five-year statutory period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party. I.C. § 42-222(2).

[6] Waters and Water Courses ≈151

405 ----
405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

The mere existence of a junior appropriator for a water source does not defeat the resumption-of-use doctrine, which makes a statutory forfeiture ineffective when a senior appropriator resumes its use after abandonment has occurred prior to a claim of right by a third party; the junior appropriator must have also used available water for a beneficial purpose after the statutory period of nonuse and before resumption of use by the senior appropriator and/or its predecessors. I.C. § 42-222(2).

[7] Waters and Water Courses ≈151

405 ----
405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Legislature did not abolish the resumption-of-use doctrine by enacting provision allowing Department of Water Resources to extend, upon a application by a water appropriator, five year period that would otherwise result in statutory forfeiture due to nonuse; statutory extension and doctrine of resumption of use are both viable defenses to forfeiture, and operate independently of each other. I.C. § 42-222(2).

[8] Waters and Water Courses ≈151

405 ----
405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Resumption-of-use doctrine, which makes a statutory forfeiture of a water right ineffective when a senior appropriator resumes its use of the water source after abandonment has occurred prior to a claim of right by a third party, is not limited to resumption of use by the original appropriator, and can be invoked by a successor in interest to the original appropriator. I.C. § 42-222(2).

[9] Waters and Water Courses ≈151

405 ----
405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

A third party has made a "claim of right" to the water, for purposes of defeating the resumption of use doctrine making a statutory forfeiture ineffective when a senior appropriator resumes its use after abandonment has occurred prior to a claim of right by a third party, if

----- 2003 WL 1847728 -----

the third party has either instituted proceedings to declare a forfeiture, has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, or has used the water pursuant to an existing water right I.C. § 42-222(2).

[10] Waters and Water Courses ≈151

405 ----
405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Because there can be a partial forfeiture of water rights by nonuse for five years, a resumption of use of only a portion of a water right prior to a claim of right by a third party will only prevent the forfeiture of that portion of the water right, and the resumption must be upon land to which the water right is appurtenant. I.C. § 42-222(2).

[11] Waters and Water Courses ≈152(8)

405 ----
405VI Appropriation and
Prescription
405k152 Actions to Determine,
Establish, and Protect Rights
405k152(8) Weight and Sufficiency
of Evidence.

The party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by clear and convincing evidence. I.C. §

42-222(2).

[12] Waters and Water Courses ⇌ 152(6)

405 ----

405VI Appropriation and
Prescription
405k152 Actions to Determine,
Establish, and Protect Rights
405k152(6) Presumptions and
Burden of Proof.

Although the owner of the water right has the burden of raising defenses to statutory forfeiture, the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense. I.C. § 42-222(2).

[13] Waters and Water Courses ⇌ 151

405 ----

405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Water rights are not forfeited because of the failure to use them for a period of five years if such failure is caused by circumstances beyond the control of the water right holder. I.C. § 42-222(2).

[14] Administrative Law and Procedure ⇌ 501

15A ----

15AIV Powers and Proceedings of
Administrative Agencies, Officers and
Agents
15AIV(D) Hearings and
Adjudications
15Ak501 Res Judicata.

The doctrine of res judicata applies to administrative proceedings.

[15] Judgment ⇌ 585(2)

228 ----

228XIII Merger and Bar of Causes
of Action and Defenses
228XIII(B) Causes of Action and
Defenses Merged, Barred, or Concluded
228k585 Identity of Cause of
Action in General
228k585(2) What Constitutes
Identical Causes.

The "sameness" of a cause of action for purposes of application of the doctrine of res judicata is determined by examining the operative facts underlying the two lawsuits.

[16] Waters and Water Courses ⇌ 151

405 ----

405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

If forfeiture or abandonment is not actually raised as an issue in a proceeding to transfer the point of diversion or place of use of a water right, the final order in the transfer proceeding is not res judicata on the issue of whether the water right at issue had been forfeited or abandoned. I.C. § 42-222(2).

[17] Waters and Water Courses ⇌ 151

405 ----

405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

If forfeiture or abandonment is not raised as an issue in a proceeding to transfer the point of diversion or place of use of a water right, collateral estoppel does not bar a subsequent order that the water right has been forfeited or abandoned, as issue of forfeiture or abandonment has not been actually litigated in the transfer proceeding. I.C. § 42-222(2).

[18] Judgment ⇌ 720

228 ----

228XIV Conclusiveness of
Adjudication
228XIV(C) Matters Concluded
228k716 Matters in Issue
228k720 Matters Actually Litigated
and Determined.

Collateral estoppel only applies to issues actually litigated and decided in the prior proceeding.

[19] Estoppel ⇌ 62.1

156 ----

156III Equitable Estoppel
156III(A) Nature and Essentials in
General
156k62 Estoppel Against Public,
Government, or Public Officers
156k62.1 In General.

Equitable estoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity.

[20] Estoppel ⇌ 52(1)

156 ----

156III Equitable Estoppel
156III(A) Nature and Essentials in
General
156k52 Nature and Application of

Estoppel in Pais
156k52(1) In General.

One of the elements of equitable estoppel is a false representation or concealment of a material fact with actual or constructive knowledge of the truth.

[21] Estoppel $\approx$ 62.2(2)

156 ----

156III Equitable Estoppel
156III(A) Nature and Essentials in
General
156k62 Estoppel Against Public,
Government, or Public Officers
156k62.2 States and United States
156k62.2(2) Particular
State Officers, Agencies or
Proceedings.

Department of Water Resources was not equitably estopped from declaring that senior water appropriator had forfeited water rights as a result of Department's prior approval of appropriator's application to transfer the place of use and point of diversion of groundwater rights; equitable estoppel ordinarily could not be invoked against a government or public agency functioning in a sovereign or governmental capacity, and appropriator failed to point to anything that constituted a false representation or concealment of a material fact by the Department.

[22] Estoppel $\approx$ 52(1)

156 ----

156III Equitable Estoppel
156III(A) Nature and Essentials in
General
156k52 Nature and Application of
Estoppel in Pais
156k52(1) In General.

Unlike equitable estoppel, quasi estoppel does not require as a necessary ingredient concealment or misrepresentation of existing facts.

[23] Estoppel $\approx$ 52(1)

156 ----

156III Equitable Estoppel
156III(A) Nature and Essentials in
General
156k52 Nature and Application of
Estoppel in Pais
156k52(1) In General.

Quasi estoppel applies when it would be unconscionable to allow a party to assert a right that is inconsistent with a prior position.

[24] Estoppel $\approx$ 62.2(2)

156 ----

156III Equitable Estoppel
156III(A) Nature and Essentials in
General
156k62 Estoppel Against Public,
Government, or Public Officers
156k62.2 States and United States
156k62.2(2) Particular
State Officers, Agencies or
Proceedings.

Doctrine of quasi estoppel did not bar Department of Water Resources from declaring that senior water appropriator had forfeited water rights, as a result of Department's prior approval of appropriator's application to transfer the place of use and point of diversion of those rights, though appropriator argued it made a substantial investment and changed its position as a result of the approval, where Department did not take the position in the transfer proceeding that the water rights

----- 2003 WL 1847728 -----

were valid, and expressly stated that the approval did not preclude later review of the validity of those water rights.

[25] Waters and Water Courses $\approx$ 151

405 ----

405VI Appropriation and
Prescription
405k151 Abandonment or
Forfeiture of Rights.

Department of Water Resources was authorized to participate as a party in judicial review of Department's decision that senior water appropriator had forfeited its water rights; definitions of "party" and "person" in Administrative Procedure Act indicated agencies could be both, and appropriator named Department as a party in its petition for judicial review. I.C. § 67-5201 (13, 15).

Barker, Rosholt & Simpson, Boise; Holden, Kidwell, Hahn & Crapo, Idaho Falls, for appellant Sagewillow, Inc. Norman M. Semanko and Kent W. Foster argued.

Hon. Alan G. Lance, Attorney General; Phillip J. Rassier, Deputy Attorney General, Boise, for respondent Idaho Department of Water Resources. Phillip J. Rassier argued.

Givens Pursley, LLC, Boise, for respondents James Mays, Mays Land and Livestock, and Blaine County Canal Company. Michael C. Creamer argued.

EISMANN, Justice.

----- 2003 WL 1847728 *1 -----

This is an appeal from an order of the Idaho Department of Water Resources declaring that various water rights owned by Sagewillow, Inc., had been forfeited in whole or in part due to nonuse. Because the Department incorrectly applied the resumption-of-use defense raised by Sagewillow, we vacate the order and remand this case for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

In 1989 and 1993, Sagewillow, Inc., purchased various parcels of real property, together with appurtenant water rights, located in Butte County. The properties acquired in 1989 were known as the Knollin Ranch, the Bird Ranch, the North of Road Place, and the Homestead Place. The property acquired in 1993 was known as the Frew Place.

The water rights appurtenant to the Knollin and Bird Ranches originally consisted of fourteen surface water rights for irrigation with priorities ranging from 1906 to 1913, a surface water right for soil root zone storage with a priority of 1949, and two groundwater rights for irrigation from a total of sixteen wells with priorities of 1950 and 1957. The North of Road Place and Homestead Place each originally had an appurtenant groundwater right for irrigation with priorities of 1959 and 1960 respectively. The water rights appurtenant to the Frew Place originally consisted of two groundwater rights for irrigation with priorities of 1959 and 1972.

The water rights originally appurtenant to the properties purchased by Sagewillow could irrigate 2,383 acres. For approximately twenty years, however, the land irrigated on those properties totaled 1,412 acres. After purchasing the properties, Sagewillow began increasing the number of acres irrigated. Sagewillow irrigated 2,000 acres in 1991, 2,100 acres in 1992, and 2,390 acres in 1993.

In October 1990, Sagewillow filed an application to transfer the place of use and point of diversion of a groundwater right on the Bird Ranch. Nobody protested the transfer, and the Department of Water Resources (Department) formally approved it in October 1992.

In 1994, Sagewillow filed seven more transfer applications with the Department seeking to change the places of use for its six groundwater rights. James Mays, Mays Land and Livestock, and the Blaine County Canal Company (herein collectively referred to as "Mays") filed protests to the requested transfers, and the proceeding was expanded to adjudicate whether Sagewillow's surface and ground water rights had been forfeited by nonuse. Following a hearing, the Department held that the water rights appurtenant to the North of Road Place and Homestead Place had been forfeited and that the water rights appurtenant to the Knollin and Bird Ranches and the Frew Place had been partially forfeited. Under the Department's order, Sagewillow would only be permitted to irrigate 1,412 acres. The Department also conditionally approved Sagewillow's requested transfers and voided the transfer that it had approved in 1992.

Sagewillow sought judicial review of the Department's order in the district court of the seventh judicial district, which affirmed the order. Sagewillow then appealed to this Court. We held that, under the statutes in effect at that time, the Snake River Basin Adjudication district court had exclusive jurisdiction to review the Department's decision and the District Court of the Seventh Judicial District lacked

jurisdiction to review the Department's order. We therefore vacated the decision of the district court and remanded this case to the Snake River Basin Adjudication district court. Sagewillow, Inc. v. Idaho Dept. of Water Resources, 135 Idaho 24, 13 P.3d 855 (2000).

----- 2003 WL 1847728 *2 -----

In response, the legislature enacted Idaho Code § 42-1401D to provide that judicial review of Department actions that are subject to review under the Idaho Administrative Procedure Act shall not be heard in the Snake River Basin Adjudication district court, but shall be heard in the district court authorized by Idaho Code § 67-5272. Ch. 31, § 2, 2001 Idaho Sess. Laws 47, 48. The statute also provided that it applied to all cases pending on its effective date (March 2, 2001) or thereafter initiated. *Id.* As a result, on March 7, 2001, the Snake River Basin Adjudication district court transferred this case back to the District Court of the Seventh Judicial District, in and for Butte County. On March 27, 2001, without further briefing, argument, or hearing, the district court reissued its prior memorandum decision. Sagewillow then appealed.

II. ISSUES ON APPEAL

A. Did the Department of Water Resources correctly apply the doctrine of resumption of use?

B. Is there substantial and competent evidence supporting the finding that water rights acquired by Sagewillow, Inc., had been forfeited?

C. Did the Department of Water Resources err in voiding the water rights transfer that it had approved in 1992?

D. Was the Department of Water Resources authorized to participate as a party in a proceeding for judicial review of the Department's decision?

III. ANALYSIS

[1][2][3][4] A party aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court. IDAHO CODE §§ 67-5270(3) (2001). On an appeal from the district court's decision on that petition, this Court reviews the agency record independently of the district court's decision. Sanders Orchard v. Gem County, Idaho, 137 Idaho 695, 52 P.3d 840 (2002). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. *Id.*; IDAHO CODE § 67-5279(1) (2001). Rather, this Court defers to the agency's findings of fact unless they are clearly erroneous. The agency order may be overturned only where it: (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) was made upon unlawful procedure; (d) is not supported by substantial evidence in the record as a whole; or (e) is arbitrary, capricious, or an abuse of discretion. In addition, the order must be upheld if substantial rights of the appellant have not been prejudiced. Sanders Orchard v. Gem County, Idaho, 137 Idaho 695, 52 P.3d 840 (2002); IDAHO CODE § 67-5279(4) (2001). If the order is

- not affirmed, it shall be set aside in whole or in part and the case remanded. IDAHO CODE § 67-521(e) (2001).

A. Did the Department of Water Resources Correctly Apply the Doctrine of Resumption of Use?

[5] Idaho Code § 42-222(2) (1990) provides:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter.

----- 2003 WL 1847728 *3 -----

Idaho law has contained a similar provision since 1903. (FN1) This Court has held, however, that abandonments and forfeitures are not favored. Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937). Therefore, "although statutory abandonment did actually occur, the forfeiture is not effective if, after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party." Carrington v. Crandall, 65 Idaho 525, 531-32, 147 P.2d 1009, 1011 (1944). Sagewillow contends that it resumed use of its water rights during the period from 1989 to 1993. The parties disagree as to whether the resumption-of-use doctrine still applies, and, if so, how it should be applied in this case.

The Department contends that resumption of use only applies if there are no junior appropriators in the same or an interconnected water source. If there are junior appropriators, then the resumption of use will not apply. According to the Department, as a matter of law the resumption-of-use doctrine only applies to the most junior appropriator. Thus, in this case the Department's conclusion of law regarding resumption of use was as follows:

17. Other users are not required to assert a specific claim to the water rights or water represented by rights held by the user attempting to resume his use. The existence or establishment of a junior water right is sufficient claim to the water. The resumption doctrine cannot restore portions of water rights forfeited by Sage Willow's [sic] predecessor in interest to the detriment of other water right holders.

In making its argument, the Department relies upon the following language in Jenkins v. State, Dept. of Water Resources, 103 Idaho 384, 387-88, 647 P.2d 1256, 1259-60 (1982) (citations omitted):

If a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. Other parties may then perfect a water right in those waters. Hence a person making a subsequent appropriation will be injured by resumption of the abandoned or forfeited water right. If a senior right has been abandoned or forfeited, the priority

of the original appropriator is lost, and the junior appropriators move up the ladder of priority. If a senior right which had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, clearly injury would result to otherwise junior appropriators. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.

The Department particularly emphasizes the statement, "If a senior right has been abandoned or forfeited, the priority of the original appropriator is lost, and the junior appropriators move up the ladder of priority." The Department construes this statement as holding that if there are junior appropriators, a senior appropriator cannot avoid a forfeiture by resuming use after a five-year period of nonuse. Jenkins did not so hold, however.

----- 2003 WL 1847728 *4 -----

In Jenkins, the water user did not raise the issue of resumption of use. Thus, this Court did not address the issue of whether resumption of use is applicable to prevent a forfeiture when there were junior water rights on the water source. Rather, the above-quoted statement merely holds that once a water user's rights have been forfeited by nonuse, allowing the water right to be reinstated through a transfer proceeding would harm junior appropriators because once there was a forfeiture the junior appropriators moved up the ladder in priority. As this Court stated in Jenkins, "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." 103 Idaho at 388, 647 P.2d at 1260. In Jenkins there was an express finding that the watercourse was overappropriated.

[6] There is, however, a connection between harm to junior appropriators as discussed in Jenkins and junior appropriators making a claim to water sufficient to defeat the defense of resumption of use. The junior appropriators would be harmed if there would not be sufficient water to fill their water rights due to the senior appropriator being permitted to resume his use. That would typically occur when the watercourse was overappropriated, as in Jenkins. Conversely, if the watercourse was overappropriated and, after the senior appropriator's five-year period of nonuse, the junior appropriators were using water to the extent it was available--water that would not have been available had the senior appropriator been filling his water right--then the junior appropriators would have made a claim to the water not used by the senior appropriator.

The mere existence of a junior appropriator, however, is not sufficient to show that the junior appropriator has made a claim of right to the water not used by the senior appropriator. The junior appropriator must also have used the water for a beneficial purpose. For example, in Albrethsen v. Wood River Land Company, 40 Idaho 49, 231 P. 418 (1924), the plaintiffs brought an action to have a portion of a senior appropriator's water right declared forfeited. Both the plaintiffs' and the defendant's water rights had been adjudicated under a prior

decree, but the plaintiffs contended that the defendant had for over five years not used its entire decreed water because its canal lacked the capacity to carry that quantity of water. The trial court ruled on behalf of the defendant, but this Court reversed that judgment on appeal. When doing so, this Court stated:

[I]t is clear that it [the canal] has never had the capacity to carry the maximum amount of water claimed by respondent and decreed to it in 1909, and from the whole record it is clear that this excess has not been diverted and applied to a beneficial use by respondent, *it is subject to the rights of subsequent appropriators under the Frost decree upon their showing that they have so applied this excess.*

----- 2003 WL 1847728 *5 -----
40 Idaho at 56-57, 231 P. at 420 (emphasis added).

The requirement that junior appropriators have used the water is consistent with this Court's statement of the resumption-of-use doctrine that the prior use must be resumed "prior to a claim of right by a third party." *Carrington v. Crandall*, 65 Idaho 525, 532, 147 P.2d 1009, 1011 (1944). Under the Department's argument, if the three most junior appropriators did not use their water rights for five years, the second and third most junior appropriators would forfeit their water rights, but the most junior appropriator would not. The most junior appropriator, by his mere existence, would be held to have made a claim of right to the water of the second and third most junior appropriators even though none of them used any water.

In the instant case, the Department did not make any finding that after the statutory period of nonuse and before resumption of use by Sagewillow and/or its predecessors, any junior appropriator used water that was available because of continued nonuse by Sagewillow and/or its predecessors. (FN2) The Department likewise did not make any finding that during such period any third party applied for and obtained a water right in the same or an interconnected watercourse. For example, the Department did not find that the two watercourses involved in this case were overappropriated and that because of continued nonuse by Sagewillow and/or its predecessors, junior appropriators received water that they would otherwise not have received. The Department's lack of findings on this issue is further complicated by the fact that because of their priority dates, Sagewillow's surface water rights at issue could be filled only during periods of high water flow. The Department did not find that after the statutory period of nonuse, there was water available that could have been used to fill some or all of Sagewillow's water rights. If no water was available, a third party obviously could not have made a claim to it by applying it to a beneficial purpose.

Mays argues that the legislature has abolished the resumption-of-use doctrine by the portion of Idaho Code § 42-222 that provides as follows:

Upon proper showing before the director of the

department of water resources of good and sufficient reason for non-application to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years.

This provision was first added to Idaho law in 1933. Ch. 193, 1933 Idaho Sess. Laws 382, 385. It does not by its terms expressly abrogate the resumption-of-use doctrine. Mays contends it did so by implication.

[7] Although this Court has not previously addressed Mays' argument, in 1982 this Court stated that the statutory extension of the five-year period provided by Idaho Code § 42-222(2) and the doctrine of resumption of use were both viable defenses to forfeiture.

----- 2003 WL 1847728 *6 -----

Statutory forfeiture is based upon the legislative declaration in I.C. § 42-222(2) that water rights may be lost if they are not applied to a beneficial use for a period of five continuous years. Certain defenses to forfeiture have been recognized. Extension of the five year period may be made upon a showing of good cause, providing the application for extension is made within the first five-year period. I.C. § 42-222(2). Also wrongful interference with a water right or failure to use the water because of circumstances over which the water right holder has no control have been recognized as defenses. Further, if use of the water right is resumed after the five year period, but before any third parties make a claim in the water, then the courts will decline to declare a forfeiture.

Jenkins v. State, Department of Water Resources, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982). The two defenses are not mutually exclusive. Both the statutory extension and the resumption-of-use doctrine can operate independently of each other.

This Court first acknowledged the resumption-of-use doctrine in 1937, Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937), four years after the enactment of the statutory provision for an extension of the period of nonuse. The statutory extension was obviously not enacted in order to eliminate the doctrine of resumption of use because that doctrine had not yet been announced in Idaho. After the enactment in 1933 of the statutory provision for extension of the five-year forfeiture period, this Court in several cases applied to resumption-of-use doctrine. Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937); Wagoner v. Jeffery, 66 Idaho 455, 162 P.2d 400 (1945); In re Boyer, 73 Idaho 152, 248 P.2d 540 (1952). In 1969, the legislature substantially amended the statute providing for the extension of the five-year forfeiture period by adding comprehensive procedures for processing and giving notice of applications for such extensions. Ch. 303, § 2, 1969 Idaho Sess. Laws 905, 908-09. When doing so, the legislature did not amend the

- statute to eliminate the resumption-of-use doctrine. There is simply no indication that the legislature intended to abolish the resumption-of-use doctrine by enacting the statutory provision for an extension of the five-year period of nonuse in order to avoid a forfeiture.

[8] Relying upon language in Carrington v. Crandall, 65 Idaho 525, 531-32, 147 P.2d 1009, 1011 (1944), Mays also contends that for the resumption-of-use doctrine to apply, it must be the original appropriator who resumes use of the water and not a successor in interest to the original appropriator. The first case in which this Court applied the resumption-of-use doctrine was Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937). In that case, this Court held that resumption of use of water before its appropriation by another prevented the statutory forfeiture of the water right. The resumption of use in that case was not by the original appropriator. Although it is unclear from the facts whether the owner of the water right at the time was the original appropriator, it is clear that the owner of the water right was not the one who resumed use of it. Use of the water right was resumed by persons using the water with permission of the owner of the right and the owner's lessee. This Court has not held that application of the resumption-of-use doctrine is limited to resumption of use by the original appropriator, and we decline to do so.

----- 2003 WL 1847728 *7 -----

Sagewillow argues that a "claim of right" by a third party must be the commencement of a judicial or administrative forfeiture action, or a new appropriation of the water, or conduct amounting to adverse possession that would provide notice that the third party is claiming the water. It contends that no such claim of right was shown in this case. This Court has not previously expressly addressed what constitutes a "claim of right" by a third party. There are three cases, however, in which this Court has applied the doctrine of resumption of use.

This Court first applied the resumption-of-use doctrine in Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937). The plaintiffs claimed a total water right of 500 miner's inches from Grimes Creek in Boise County with priority dates of 1933 for 270 inches and 1934 for 230 inches. The defendants claimed a water right of 1000 miner's inches with a priority date of 1905. The defendants' point of diversion was upstream from that of the plaintiffs. Neither the defendants nor their predecessors in interest had used water from Grimes Creek from 1905 to 1932. In 1934 the defendants diverted almost all of the water from Grimes Creek for their claimed 1000-inch water right, thereby shutting off the plaintiffs' supply of water. The plaintiffs immediately filed a lawsuit to enjoin the defendants' use of the water. The trial court ruled in favor of the plaintiffs, and the defendants appealed. The defendants' water right was called the "Noble" right because it was originally appropriated for use on the Noble placer claims.

After stating the facts, this Court then declared the resumption-of-use doctrine as follows:

It will be noticed that it is the nonuse for five years which works an abandonment. Abandonments and forfeitures are not favored. And even though forfeited and abandoned for five-year periods prior to the time respondents [plaintiffs] initiated their appropriation, if subsequent to such five-year periods, and prior to respondents' appropriation, appellants [defendants] or their predecessors in interest under claim of right and continuity of interest of diversion and application of the Noble water, as such, for mining purposes to the amount applied, rediverted and applied water, there would be no abandonment which could inure to the benefit of respondents.

57 Idaho at 713, 68 P.2d 50. Thus, to avoid forfeiture of their water rights, the defendants would have had to resume use of the water right before the plaintiffs' appropriation. At that time, the plaintiffs could appropriate the water either by diverting it and applying it to a beneficial use or by obtaining a permit from the State Reclamation Department. Silkey v. Tiegs, 51 Idaho 344, 5 P.2d 1049 (1931); Nielson v. Parker, 19 Idaho 727, 115 P. 488 (1911). The plaintiffs in Zezi acquired their 1933 water right for 270 inches by diversion and appropriation to a beneficial use, and they acquired their 1934 water right for 230 inches by obtaining a permit.

----- 2003 WL 1847728 *8 -----

A third party named Whittle & Company had the right to divert 500 miner's inches of water from a point upstream from both the plaintiffs' and the defendants' points of diversion. This water right was called the Howard right. The defendants had given Whittle & Company permission to use the Noble water right in 1932. During that year, Whittle & Company diverted 700 to 800 inches of water from Grimes Creek. Thus, the issue was whether the water diverted by Whittle & Company in 1932 consisted of 500 inches of the Howard right and 200 to 300 inches of the Noble right, or 700 to 800 inches of the Noble right and none of the Howard right, or some other combination. This Court resolved that issue by stating that the plaintiffs had the burden of proving that Whittle & Company did not use the Noble right.

Respondents' [plaintiffs'] suit to quiet title as against appellants [defendants] on the theory that there had been an abandonment of the Noble water right placed the burden of proof upon respondents to show that the 700 or 800 inches used by Whittle & Co. in 1932 consisted of the full Howard right for 500 inches, in other words, if the 700 or 800 inches was in fact Noble water, there was no abandonment.

57 Idaho at 714, 68 P.2d at 53. This Court then held that the plaintiffs had failed to prove that the water used by Whittle & Company was not entirely Noble water, and therefore the trial court should have held that the defendants retained a valid right to 700 miner's inches of water.

The uncontradicted evidence shows that Whittle & Co. used between 700 and 800 inches and there is not

sufficient evidence showing this was Noble water to sustain the burden cast upon respondents [plaintiffs]. Whittle & Co. had the right to use both Noble and Howard water. Appellants [defendants] ask no affirmative relief, merely resisted respondents' contention that the Noble water right had been abandoned, and the court should have found that appellants even though they had abandoned all in excess of 700 inches of their original claimed appropriation of 1,000 inches, still retained by Whittle & Co.'s use in 1932 of Noble water, a valid right for 700 inches, as such, which would prevent the barring application of the abandonment statute.

57 Idaho at 714-15, 68 P.2d at 53.

This Court next applied the resumption-of-use doctrine in Wagoner v. Jeffery, 66 Idaho 455, 162 P.2d 400 (1945). In 1927 the plaintiff drilled six wells on a forty-acre parcel of unappropriated public land and filed with the federal government an application for a right-of-way to construct a canal across the land to convey water from the wells to his real property. In 1930 he constructed the canal and used it to convey water from the wells to his property, but he did not attempt to use the wells again until 1943. In 1932 the defendants took possession of the land upon which the wells were located. In 1934 the federal government issued plaintiff a right-of-way for the wells and the canal. In 1938 the federal government granted defendants a patent to the land upon which the wells and canal were located, subject to existing water and ditch rights. In December 1943, the plaintiff began cleaning out the canal and enlarging the wells in order to resume use of the water for irrigation. The defendants ordered plaintiff and his employees off the property, and the plaintiff filed suit to enforce his right to the wells and canal. The defendants did not contend that they had ever used any water from the wells for irrigation or any other beneficial purpose. The trial court found in favor of the plaintiff, and the defendants appealed. This Court held that under the resumption-of-use doctrine plaintiff did not forfeit his water right by nonuse. In doing so, this Court stated:

----- 2003 WL 1847728 *9 -----

Abandonments and forfeitures are not favored, and even though forfeited and abandoned for five year periods, if subsequent to such five year periods, respondent again took possession of the right of way and wells in question, as found by the trial court, under a claim of right and continuity of interest, prior to the initiation of any right therein or claim thereto by appellants, there would be no abandonment which could inure to the benefit of appellants.

66 Idaho at 459-60, 162 P.2d at 402. This Court also stated:

In the instant case, at the time respondent again took possession of the right of way and the wells in question, Congress had not (and has not) declared a forfeiture, nor had appellants commenced a suit against respondent for the purpose of obtaining a decree of forfeiture.

66 Idaho at 460, 162 P.2d at 402. When summarizing its holding, this Court also stated that in December 1943 the plaintiff had retaken possession of the canal and wells "before any intervening right had attached." 66 Idaho at 461, 162 P.2d at 403.

The final case is In re Boyer, 73 Idaho 152, 248 P.2d 540 (1952). In 1946 Boyer applied to change the point of diversion and the place of use of his water right, both of which had previously been within the geographical confines of the Big Lost River Irrigation District. Boyer's property within the Irrigation District was called his Section 10 lands, and he also owned land outside the District called his Arco lands. When Boyer filed his application, no water had been used on his Section 10 lands for thirty to forty years. The Irrigation District objected to the transfer on the grounds that it would be harmed by the change and that Boyer had forfeited his water rights by nonuse for a period of five years. There was evidence that Boyer had been using the water on his Arco lands.

Boyer prevailed before the State Reclamation Department, and the Irrigation District appealed to the district court, where there was a trial de novo. The district court found no forfeiture, and the Irrigation District appealed to this Court. This Court resolved the forfeiture issue as follows:

The correct rule was thus, in essence, announced in Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009:

'Although statutory abandonment of a water right has occurred, forfeiture is not effective if, after five-year period original owner or appropriator resumes the use of the water prior to claim of right by a third party. (I.C.A., sec.41-216.)' now Section 42-222, I.C.

and similarly in Wagoner v. Jeffery, 66 Idaho 455, 162 P.2d 400.

No one claims this particular decreed water by adverse possession and clearly, so far as this proceeding is concerned, it was in part at least used by respondent on some of his Arco lands before it was claimed it had been forfeited.

The trial court was justified in holding that water had been so used by respondent that he had not abandoned or forfeited his water rights, correctly applying the principles announced in the Carrington and Wagoner cases, supra.

----- 2003 WL 1847728 *10 -----
73 Idaho at 160, 248 P.2d at 544.

In summary, in the Zezi v. Lightfoot case, this Court stated that the water user had resumed use of its water right prior to the time that others "initiated their appropriation." In the Wagoner v. Jeffery case, this Court stated that the water user had retaken possession of his wells and canal prior to "the initiation of any right therein" by others, before the adverse

* parties had "commenced suit against [him] for the purpose of obtaining a decree of forfeiture," and "before any intervening right had attached." In the *In re Boyer* case, this Court stated that no one claimed the water by adverse possession and the water user had used the water on other lands "before it was claimed it had been forfeited." Finally, although not involving the resumption-of-use doctrine, but also relevant, is this Court's statement in *Albrethsen v. Wood River Land Company* that where a senior appropriator failed to use all of its decreed water right for over five years, the unused excess was "subject to the rights of subsequent appropriators under the Frost decree upon their showing that they have so applied this excess." 40 Idaho at 56-57, 231 P. at 420.

[9][10] Under the resumption-of-use doctrine, statutory forfeiture is not effective if, after the five-year period of nonuse, use of the water is resumed prior to the claim of right by a third party. *Carrington v. Crandall*, 65 Idaho 525, 531-32, 147 P.2d 1009, 1011 (1944); *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937). A third party has made a claim of right to the water if the third party has either instituted proceedings to declare a forfeiture, *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400 (1945), or has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937), or has used the water pursuant to an existing water right, *Albrethsen v. Wood River Land Company*, 40 Idaho 49, 231 P. 418 (1924). (FN3) Because there can be a partial forfeiture of water rights by nonuse for five years, *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997), a resumption of use of only a portion of a water right prior to a claim of right by a third party will only prevent the forfeiture of that portion of the water right, *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) (where use of only 700 miner's inches of water was resumed before a claim of right by a third party, appropriator only retained a right to 700 inches of the original 1000-inch appropriation). The resumption of use must also be upon land to which the water right is appurtenant. *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001). Because the Department based its order upon an erroneous statement of the resumption-of-use doctrine, we must vacate the order and remand for further proceedings consistent with this opinion.

B. Is There Substantial and Competent Evidence Supporting the Finding that Water Rights Acquired by Sagewillow, Inc., had been forfeited?

----- 2003 WL 1847728 *11 -----

[11][12] The party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by clear and convincing evidence. *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944). Although the owner of the water right has the burden of raising defenses to statutory forfeiture, (FN4) *Jenkins v. State, Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982), the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense. *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) (the party asserting there was a

forfeiture of a senior water right had the burden of persuasion on issue that there was no resumption of use of the senior water right before the party's appropriation). See also *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (parties alleging forfeiture of water right have burden of proof).

1. Failure to find forfeiture by clear and convincing evidence. Forfeiture of water rights must be proven by clear and convincing evidence. *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001). In its order, the Department expressly found that with respect to the two ground water rights appurtenant to the Homestead Place, "Forfeiture was established by clear and convincing evidence." The Department did not state that the forfeiture of Sagewillow's other water rights was proven by clear and convincing evidence. The Department argues that this Court should review the evidence in the record and decide whether there is clear and convincing evidence supporting the Department's findings. To do so would require that we weigh the evidence, however. Our role on appeal is to determine whether there is substantial, competent evidence supporting findings of fact made by the trier of fact, not to make those findings. *Sowards v. Rathbun*, 134 Idaho 702, 8 P.3d 1245 (2000). Since the Department's order is being vacated, on remand the Department can make sure that any finding of forfeiture was proven by clear and convincing evidence.

[13] **2. Failure to find that Sagewillow, or its predecessors, did not exercise the surface water rights during five consecutive years that the water was available.** Water rights are not forfeited because of the failure to use them for a period of five years if such failure is caused by circumstances beyond the control of the water right holder. *Jenkins v. State, Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). The fourteen surface water rights appurtenant to the Knollin and Bird Ranches were later priority rights that could only be delivered during high water flows. Sagewillow raised the defense below that the evidence did not show water was available during the years of nonuse. The Department did not make any finding on that issue. Because water rights cannot be forfeited by nonuse if the water was not available and Sagewillow raised that issue, the Department must find that water was available for Sagewillow's use before it can find that Sagewillow forfeited water rights by nonuse of the water. Therefore, on remand the Department can address this issue.

----- 2003 WL 1847728 *12 -----

3. Lack of evidence regarding forfeiture of water rights appurtenant to the Frew place. In 1993, Sagewillow acquired from Terry and David Hawley 230 of the 260 acres of the Frew Place. Sagewillow contended that in connection with that purchase, it acquired all of the water rights appurtenant to the 260-acre Frew Place, not just the water rights appurtenant to the 230 acres it purchased. Sagewillow's transfer applications included the entire 260-acre water right. The Department limited Sagewillow's water rights appurtenant to the Frew Place to 230 acres. On appeal, Sagewillow contends that the Department based its finding of forfeiture upon acreage irrigated by Sagewillow after it purchased the

- * Frew Place and not upon a five-year period of nonuse. The respondents argue that the Department's order regarding the Frew Place can be upheld on the ground that Sagewillow failed to prove it acquired the entire 260-acre water right.

Although there is ambiguity in the Department's order, it appears that the Department ruled that the disputed 30-acre water right regarding the Frew Place had been forfeited. In its findings of fact, the Department stated as follows:

Forfeiture of a Portion of the Frew Place of Use

In the ARO [amended recommended order], the hearing officer held that the place of use for water right nos. 33-02086 and 33-07018 should be limited to 230 acres because of the testimony of Terry Scanlan (Scanlan) and corroborating evidence by Charles Brockway (Brockway), the expert for Sage Willow [sic]. Sage Willow [sic] states that Brockway's testimony and exhibits do not corroborate Scanlan's testimony. Sage Willow [sic] recites facts regarding the purchase of the water rights and the land by Sage Willow [sic] which were not introduced into evidence at the hearing and were not available to the hearing officer in reaching his decision. The number of acres in the Frew Place, authorized by water right nos. 33-02086 and 33-07018, will be limited to 230 acres.

In its conclusions of law, the Department stated, with respect to the Frew Place, as follows: "The combined testimony of Vance Hawley and Terry Scanlan regarding the total place of use for the remainder of the Bird Ranch, the Knollin Ranch, and the Frew Place, establishes a historically irrigated acreage of 1,412 acres during a period of at least two decades."

Even though the order refers to post-hearing evidence offered by Sagewillow to show that it acquired the entire 260-acre water right, it also refers to the amended recommended order by the hearing officer. That order refers exclusively to the issue of forfeiture, and not to any lack of evidence regarding whether Sagewillow acquired 260-acre or 230-acre water rights when it purchased the Frew Place. The amended proposed order states, "Sage Willow [sic] cannot argue that the Department should recognize 260 acres of irrigation in the Frew Place when its own expert does not identify, even in a liberal interpretation, more than 230 actual irrigated acres. This decision will recognize 230 acres irrigated in the Frew Place."

----- 2003 WL 1847728 *13 -----

The paragraph in the Department's order is entitled "Forfeiture of a Portion of the Frew Place of Use," and in its conclusions of law the Department also refers to evidence regarding the historical use of water on the Frew Place, not whether Sagewillow had acquired a 260-acre or 230-acre water right. There is no express finding that Sagewillow failed to prove that it acquired a 260-acre water right. Thus, it appears that the Department held that the 30-acre water right at issue regarding the Frew Place had been forfeited. Because we

are vacating the order based upon the Department's misapplication of the presumption-of-use doctrine, we need not address whether there was sufficient evidence of a five-year period of nonuse.

C. Did the Department of Water Resources Err in Voiding the Water Rights Transfer that It Had Approved in 1992?

In October 1990, Sagewillow filed an application to transfer the place of use and point of diversion of a groundwater right on the Bird Ranch. Nobody protested the transfer, and the Department formally approved it in October 1992. In its order in this case, the Department declared that transfer void because the evidence in this case showed that the water right was forfeited prior to the approval of the transfer. On appeal, Sagewillow argues that because the Department approved the transfer of this water right in 1990, the doctrines of res judicata and collateral estoppel prevent the Department from now declaring that the water right had been forfeited.

[14][15] The doctrine of res judicata applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990). In *Joyce v. Murphv Land & Irrigation Company*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922), this Court stated that the scope of the doctrine of res judicata was as follows:

We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.

The 'sameness' of a cause of action for purposes of application of the doctrine of res judicata is determined by examining the operative facts underlying the two lawsuits. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982).

For policy reasons, however, we have recognized certain exceptions to the rule stated in *Joyce*. *Heaney v. Bd. of Trustees of Garden Valley School Dist. No. 71*, 98 Idaho 900, 575 P.2d 498 (1978) (although former school superintendent could have joined his claim for damages for breach contract with his petition in earlier action for writ of mandamus to compel reinstatement, his failure to do so did not bar his damages claim); *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 663 P.2d 287 (1983) (where gun club's lawsuit to recover damages in trespass based upon homeowner's connection to gun club's waterline was dismissed upon a finding that gun club had granted homeowner a license to do so, and homeowner subsequently brought a lawsuit against the gun club because it later cut and capped the water line, the judgment in the first lawsuit did not preclude litigation in the second lawsuit of the issue of whether the license was revocable because that issue was not ripe for trial until the license was actually revoked); *Nash v. Overholser*, 114 Idaho

- 461, 757 P.2d 1180 (1988) (although tort action against spouse for assault and battery could have been brought in divorce proceeding, judgment in divorce action did not bar later tort action because mandatory joinder of tort claims with equitable divorce proceedings may be undesirable, as well as unfair).

----- 2003 WL 1847728 *14 -----

[16][17][18] An application to transfer the point of diversion or place of use of a water right is made by the party claiming the water right. Any claim that the water right had been abandoned or forfeited in whole or in part by nonuse would be an issue raised either by the Department or a third party. Ordinarily, issues of forfeiture or abandonment are not adjudicated in a transfer proceeding, although they can be. Jenkins v. State, Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982); In re Boyer, 73 Idaho 152, 248 P.2d 540 (1952). It would be a substantial burden upon the Department to require that in response to every transfer application it conduct an investigation into whether the water right(s) involved had been lost or reduced by forfeiture or abandonment. Therefore, we hold that if forfeiture or abandonment is not actually raised as an issue in a proceeding to transfer the point of diversion or place of use of a water right, the final order in the transfer proceeding is not res judicata on the issue of whether the water right at issue had been forfeited or abandoned. Collateral estoppel likewise does not apply because the issue whether the water right had been forfeited or abandoned was not actually litigated in the transfer proceeding. Collateral estoppel only applies to issues actually litigated and decided in the prior proceeding. Magic Valley Radiology, P.A. v. Kolouch, 123 Idaho 434, 849 P.2d 107 (1993).

[19][20][21] Sagewillow also alleges that equitable estoppel and/or quasi estoppel prevent the Department from declaring a forfeiture of the water right. Equitable estoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity. Young Elec. Sign Co. v. State ex rel. Winder, 135 Idaho 804, 25 P.3d 117 (2001). There is no basis for applying equitable estoppel in this case. One of the elements of equitable estoppel is a false representation or concealment of a material fact with actual or constructive knowledge of the truth. Id. Sagewillow has not pointed to anything that would constitute a false representation or concealment of a material fact by the Department.

[22][23][24] Unlike equitable estoppel, quasi estoppel does not require as a necessary ingredient concealment or misrepresentation of existing facts. Willig v. State, Dept. of Health and Welfare, 127 Idaho 259, 899 P.2d 969 (1995). It applies when it would be unconscionable to allow a party to assert a right that is inconsistent with a prior position. Id. Sagewillow argues that in reliance of the Department's approval of the transfer of the water right, it made a substantial investment and changed its position. In that transfer proceeding, however, the Department did not take the position that the water right was valid. When approving the transfer in 1992, the Department expressly stated that the approval did

not preclude later review of the validity of the water right. (FN5) Therefore, there was no basis for application of the doctrine of quasi estoppel under the facts of this case.

D. Was the Department of Water Resources Authorized to Participate as a Party in a Proceeding for Judicial Review of the Department's Decision?

----- 2003 WL 1847728 *15 -----

[25] Sagewillow contends that the Department is not authorized to participate as a party in this judicial review. It argues that the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 et seq., does not provide for participation by agencies in judicial review of actions or orders in contested cases that affect individual rights. Idaho Code § 67-5270(3) (2001) provides, "A party aggrieved by a final order in a contested case decided by an agency other than the industrial commission or the public utilities commission is entitled to judicial review under this chapter if the person complies with the requirements of sections 67-5271 through 67-5279, Idaho Code." The word "party" is defined as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." IDAHO CODE § 67-5201(13) (2001). The word "person" is defined as "any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character." IDAHO CODE § 67-5201(15) (2001). Sagewillow named the Department as a party respondent in its petition for judicial review, (FN6) and by statute "party" includes "each ... agency named ... as a party." Sagewillow has not pointed to any other provision of the Idaho Administrative Procedure Act providing that an agency cannot be a party on a petition for judicial review of that agency's action in a contested case. Therefore, the Department is properly a party to this appeal. Indeed, if a requested transfer or a point of diversion or place of application for a water right were denied by the Department and there were no third parties who protested the requested transfer, under Sagewillow's argument only the applicant for the transfer could participate in the petition for judicial review.

IV. CONCLUSION

For the above reasons, we vacate the order of the Department and remand this case for further proceedings. We award costs on appeal to the appellant.

Chief Justice TROUT and Justice WALTERS concur.

Justice KIDWELL, concurring in the result.

The doctrine of resumption of use is antiquated and without continued viability in light of the full appropriation of most water systems in Idaho. Therefore, I feel it is time to abandon this once useful doctrine. However, the result reached would be the same in this case. Therefore, I concur in the result reached by the majority.

ANALYSIS

In Idaho, a water right is forfeited after a five-year period

of non-use. IDAHO CODE § 42-222(2) (1992). The statute states a water right holder may avoid forfeiture upon a: "proper showing ... of good and sufficient reason for nonapplication to beneficial use of such water for ... five (5) years." *Id.* Upon such a showing: "the director of the department of water resources [may] grant an extension of time ... for forfeiture of title for nonuse" for up to five years. *Id.* Extension of the forfeiture period may only be granted when it will not impair existing water rights. *Id.*

----- 2003 WL 1847728 *16 -----

Previous Idaho case law suggests, in dicta, that resumption of use, a common law defense to abandonment, may apply in cases of statutory forfeiture. *See, e.g., Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937); *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944); *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400 (1945). Although somewhat obfuscated by prior case law, careful scrutiny of IDAHO CODE § 42-222(2) demonstrates that the legislature did not include the antiquated doctrine of resumption of use as a defense to forfeiture.

If a statute is clear, this Court need not engage in an exercise of statutory construction. *Hamilton ex rel. Hamilton v. Reeder Flying Service*, 135 Idaho 568, 572, 21 P.3d 890, 894 (2001). The statute will be given its plain meaning and this Court will not add to, or take away from, the unambiguous statute by means of statutory construction. *Canal/Norcrest/Columbus Action Committee v. City of Boise*, 136 Idaho 666, 670, 39 P.3d 606, 610 (2001). Further, the legislature may repeal the common law, either expressly or by enacting a statute that is inconsistent with the application of the common law. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 718, 791 P.2d 1285, 1297 (1990). Common law remains in effect only to the extent it is not inconsistent with the relevant statute. *Id.* at 719, 791 P.2d at 1299.

Application of the resumption of use doctrine is inconsistent with I.C. § 42-222(2), which states the method by which a water right holder may avoid forfeiture is to request an extension of time. The plain meaning of the statute does not support the conclusion that resumption of use is a defense to statutory forfeiture; nor can resumption of use be read into or inferred from the statute. By expressly identifying extension as the sole defense to forfeiture, the legislature eliminated resumption of use as a defense to forfeiture.

In addition to the legislature's intent to eliminate resumption of use as a defense to forfeiture through the plain language of I.C. § 42-222(2), the doctrine is antiquated and not viable in Idaho's current water rights system. As stated by this Court in *Jenkins*:

[i]f a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. Other parties may then perfect a water right in those waters. Hence a person making a subsequent appropriation will be injured by resumption of the abandoned or forfeited water right. If a senior right has

been abandoned or forfeited, the priority of the original appropriator is, and the junior appropriators move up the ladder of priority. If a senior right which had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, clearly injury would result to otherwise junior appropriators. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.

----- 2003 WL 1847728 *17.-----

Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 387-88, 647 P.2d 1256, 1259-60 (1982) (citations omitted). Due to the fact that most, if not all, of Idaho's water is appropriated, there are few, if any, practical opportunities to apply resumption of use. Allowing continued application of the doctrine is undesirable because any unused water in Idaho will be quickly put to beneficial use by junior appropriators, who would be injured by a resumption of use by a former senior user who forfeits their water right.

Justice SCHROEDER concurs.

(FN1.) The relevant portion of the statute enacted in 1903 provided:

All rights to the use of water acquired under this act or otherwise, shall be lost and abandoned by a failure, for the term of two years, to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through non-use or abandonment, such right to such water shall revert to the State and be again subject to appropriation under this act.

Sec. 11, 1903 Idaho Sess. Laws 223, 234. In 1905, the length of the period of nonuse for there to be a forfeiture was increased from two years to five years. Sec. 11, 1905 Idaho Sess. Laws 27.

(FN2.) The continued nonuse after the statutory five-year period need not be for any specific period of time. It need only be long enough for a third party to have made a claim to the water prior to any resumption of use by the party whose water rights were forfeited.

(FN3.) Prior to diversion, the water obviously cannot be identified as being the water entitled to be used by any particular appropriator. Whether or not a third party has made a claim to the water will usually depend upon evidence showing that the water source was overappropriated and, because of nonuse of water by the senior appropriator, water was available for use and used to fill junior water rights, or by evidence showing that resumption of use by the senior appropriator would diminish the quantity of water being used by junior appropriators from an interconnected water source.

(FN4.) The defenses that have been recognized are extension of the five-year period pursuant to Idaho Code § 42-222; wrongful interference with the water right by others; failure to use the water because of circumstances over

which the water right holder has no control; resumption of use after the five-year period of nonuse; it is before a claim of right by a third party; and where Indian reserved rights are involved. Jenkins v. State, Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982); Gilbert v. Smith, 97 Idaho 735, 738, 552 P.2d 1220, 1223 n. 2 (1976).

(FN5.) The approval included as a condition the statement, "Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication."

(FN6.) Sagewillow's petition for judicial review filed on May 7, 1996, was entitled "Sagewillow, Inc., Petitioner, v. Idaho Department of Water Resources, Respondent."

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

SEP 12 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. Although UWID provided monthly (and in some instances yearly) summaries of production reports for the wells within its system during the informal information exchange process, UWID did not provide copies of the actual production reports at that time.

3. Appended hereto as Exhibits A, B & C are true and correct copies of discovery requests I served on behalf of the Districts on July 17, 2003, July 23, 2003, and August 6, 2003, respectively.

4. Appended hereto as Exhibits D, E, and F are true and correct copies of discovery responses we received from UWID on or about August 1, 2003, August 7, 2003, and August 22, 2003, respectively.

5. Copies of the daily production reports, as well as other documents, totaling over 23,300 pages, were not received in my office until approximately 4:30 p.m. on Friday, September 5, 2003. Due to the fact that those voluminous documents were received so recently, Angela Schaer Kaufmann and I, as well as those working at our direction, have been unable to review the monthly production reports.

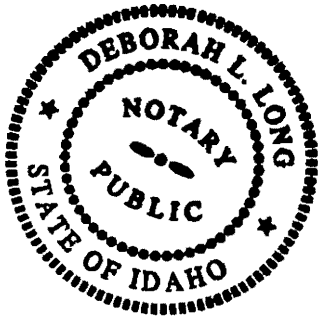
DATED this 12th day of September 2003.

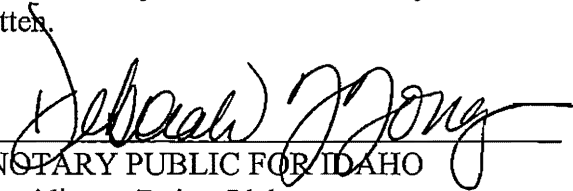
By Scott L. Campbell
Scott L. Campbell

STATE OF IDAHO)
) ss.
County of Ada)

On this 12th day of September 2003, before me, the undersigned notary public, personally appeared SCOTT L. CAMPBELL, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

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 10/10/07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of September 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

☒ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Peter Anderson, Hearing Officer
729 W. Braemere Road
Boise, ID 83702

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Matt J. Howard
PO Box 190012
Boise, ID 83719
Fax: 333-8409

☒ 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

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Ed Squires
Hydrologic
1002 W. Franklin
Boise, ID 83702-5431
Fax: 342-3100

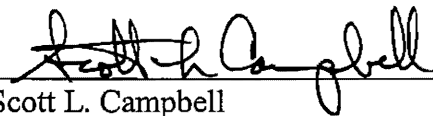
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Robert W. Talboy
Ellsworth Kallas Talboy, PLLC
2402 W. Jefferson Street
Boise, ID 83702
Fax: 345-8945

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

By 
Scott L. Campbell

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.

**PIONEER IRRIGATION DISTRICT AND
SETTLERS IRRIGATION DISTRICT'S FIRST
SET OF DISCOVERY REQUESTS TO
UNITED WATER IDAHO, INC.**

YOU WILL PLEASE TAKE NOTICE that Protestants Pioneer Irrigation District
and Settlers Irrigation District (collectively the "Districts") hereby require Applicant United
Water Idaho, Inc. ("UWID") to answer the Districts' First Set of Interrogatories, Requests for
Admission, and Requests for Production within fifteen days from the date of service herein,
pursuant to the Rules of Procedure of the Idaho Department of Water Resources, Rules 521

through 528, Idaho Rules of Civil Procedure 26(a), 26(b), 33(a), 34(a), and 36(a), and the Hearing Officer's Third PreHearing Order and Notice of PreHearing Conference.

GENERAL INSTRUCTIONS

A. Definitions and General Instructions

1. The term "you" or "your" refers to United Water Idaho, Inc. ("UWID"), its officers, directors, agents, employees, representatives, investigators, consultants, and attorneys.

2. The term "Application" or "IMAP" as used in this discovery refers to the Integrated Municipal Application Package filed by UWID with the Idaho Department of Water Resources.

3. The term "document" shall mean any kind of written, printed, typed, graphic, electronic, computerized or photographic matter of any kind or nature including, but not limited to, statements, however, produced or reproduced, and all mechanical and electronic sound recordings and written transcripts thereof, however produced or reproduced, whether in your control or not, and including without limitation, originals, all file copies, all other copies no matter how or by whom prepared, and all drafts of such documents whether used or not.

4. The term "identify" when used with respect to a document, or the description or identification of a document, shall be deemed to request the nature and subject matter of the document; the date thereof; the title or name thereof; the name, address and job title or job capacity of the person who prepared it or who has knowledge of it; the name, address, and job title or job capacity of the recipient thereof; and the Bates number or other identifier as applicable.

5. The term "identify" when used with respect to a person, shall be deemed to request the person's full name, job title, last known business and residence addresses, and respective telephone numbers.

6. The term "identify" when used with respect to oral communications, shall be deemed to request whether said communication was in person or by telephone, an identification of each person who participated in or heard any part of said communication, and the substance of what was said by each person who participated in said communication.

7. In answering these interrogatories and requests for production, please furnish all information which is known or available to you including, but not limited to, information known of your personal knowledge, information obtainable by the diligent search of sources of information available to you, and all information in the possession of, or available to, any person or persons acting on your behalf or under your control or under the control of any of your attorneys, agents, employees, experts, independent contractors, investigators, representatives, or others with whom you have a relationship and from whom you are capable of deriving information, documents, or material.

8. Any interrogatory which may be answered in whole or in part by reference to documents is deemed to request those responsive documents.

9. If any documents requested by a Request for Production or which should be produced in response to an interrogatory cannot be produced in full, you are required to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you have concerning the unproduced portions.

10. If any of the documents requested herein were at one time in existence, but are no longer in existence, please so state, specifying for each document:

- (a) The type of document;
- (b) The types of information contained therein;
- (c) The date upon which it ceased to exist;
- (d) The circumstances under which it ceased to exist;
- (e) The identity of all persons having knowledge of the circumstances

under which it ceased to exist; and

(f) The identity of each person having knowledge of the contents thereof.

11. With respect to any documents called for by this request but withheld due to any claim or privilege, list for each such document:

- (a) The paragraph to which the document is otherwise responsive;
- (b) Its title and general subject matter;
- (c) Its date;
- (d) The name(s) and title(s) of its author or preparer;
- (e) The name(s) and title(s) of the person(s) for whom it was prepared,

and all persons to whom it was sent or shown; and

- (f) The nature of the privilege claimed.

12. If you assert a privilege as to a portion of any category of the materials described, please produce the remainder of that category as to which you do not assert a privilege.

13. Please produce the documents and things for inspection and copying on the 1st day of August 2003, at 10:00 a.m. at the law offices of Moffatt, Thomas, Barrett, Rock & Fields, Chtd., 101 S. Capitol Blvd., 10th Floor, Boise, Idaho, 83702, or at such other time and place as may be mutually agreed by the parties. Inspection and copying will be conducted by the undersigned attorneys or their agents and will continue from time to time and from day to day until completed.

14. Each document requested to be produced shall be provided in a manner which preserves its sequential relationship with other documents being produced and shall include the file folder and folder tabs associated with its file location. If the file location is not apparent on the folder and tabs, the document shall be accompanied by information indicating from where the file was taken and such additional information as is necessary to enable the Applicants to determine the document's original pre-production location.

B. Instructions Regarding Supplementation

1. These interrogatories, requests for admission and requests for production are deemed continuing in nature, and your responses are to be supplemented as additional information and knowledge becomes available or known to you as provided in Rule 26(e) of the Idaho Rules of Civil Procedure.

2. Where knowledge or information in the possession of a party is requested, such request includes information and knowledge either in your possession, under your control, within your dominion, or available to you or which becomes subject to your possession, control, or dominion regardless of whether this information is in your personal possession or is possessed by your agents, attorneys, servants, employees, independent contractors, representatives,

insureds, or others with whom you have a relationship, and from whom you are capable of deriving information, documents, or materials.

**INTERROGATORIES, REQUESTS FOR ADMISSION
AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

REQUEST FOR ADMISSION NO. 1: Please admit that you have conducted no well interference studies and/or data gathering which you may use, in whole or in part, to support the IMAP.

REQUEST FOR PRODUCTION NO. 1: If your response to Request for Admission Number 1 is anything other than an unqualified admission, please provide a copy of each and every well interference study and/or data gathering which you have conducted which you may use, in whole or in part, to support the IMAP. By this request for production, the Districts seek a copy of the study methodology, raw data, and any reports generated as a result of the study.

REQUEST FOR ADMISSION NO. 2: Please admit that you will rely on no well interference studies or data, whether in whole or in part, to support the IMAP.

REQUEST FOR PRODUCTION NO. 2: If your response to Request for Admission Number 2 is anything other than an unqualified admission, please provide a copy of each and every well interference study or data set upon which you will rely, whether in whole or in part, to support the IMAP. By this request for production, the Districts seek a copy of the study methodology, raw data, and any reports generated as a result of the study.

REQUEST FOR ADMISSION NO. 3: Please admit that you have conducted no studies and/or data gathering regarding the effect of the IMAP, if approved, in whole or in part, on groundwater supplies.

REQUEST FOR PRODUCTION NO. 3: If your response to Request for

Admission Number 3 is anything other than an unqualified admission, please provide a copy of each and every study or data set which you have conducted regarding the effect of the IMAP on groundwater supplies. By this request for production, the Districts seek a copy of the study methodology, raw data, and any reports generated as a result of the study.

REQUEST FOR ADMISSION NO. 4: Please admit that you have conducted no

studies regarding the effect of the IMAP, if approved, in whole or in part, on surface water supplies.

REQUEST FOR PRODUCTION NO. 4: If your response to Request for

Admission Number 4 is anything other than an unqualified admission, please provide a copy of each and every study or data set which you have conducted regarding the effect of the IMAP on surface water supplies. By this request for production, the Districts seek a copy of the study methodology, raw data, and any reports generated as a result of the study.

REQUEST FOR ADMISSION NO. 5: Please admit that you will rely on no

studies or data regarding the effect of the IMAP on surface water supplies, whether in whole or in part, to support the IMAP.

REQUEST FOR PRODUCTION NO. 5: If your response to Request for

Admission Number 5 is anything other than an unqualified admission, please provide a copy of each and every well study or data set regarding the effects of the IMAP on surface water supplies, upon which you will rely, whether in whole or in part, to support the IMAP. By this request for production, the Districts seek a copy of the study methodology, raw data, and any reports generated as a result of the study.

REQUEST FOR ADMISSION NO. 6: Please admit that you possess no documents which were used or prepared to analyze the "Stepwise Function Exercise" referenced at page 6 of the September 1, 1997 memo attached hereto as Exhibit A.

REQUEST FOR PRODUCTION NO. 6: If your response to Request for Admission Number 6 is anything other than an unqualified admission, please provide each and every document which was used or prepared to analyze the "Stepwise Function Exercise."

REQUEST FOR PRODUCTION NO. 7: Please produce a list of all wells which were or are "replaced" wells, as that term is used on page 4 of the Memorandum to Ed Squires from Jeffrey C. Fereday and Christopher H. Meyer, attached hereto as Exhibit A.

REQUEST FOR PRODUCTION NO. 8: Please produce copies of "the historical production data for comparison with water right priority dates as suggested by Dave Tuthill" identified in the memorandum from Edward Squires to Norman Young, dated October 9, 1997, attached hereto as Exhibit B.

REQUEST FOR PRODUCTION NO. 9: Please produce copies of the "maps which expressly show that UWID is now serving as far away as Nampa and beyond," referenced in the January 19, 1999 memorandum from Edward Squires to Steve Lester, attached hereto as Exhibit C. By this request, the Districts seek copies of those specific maps.

REQUEST FOR PRODUCTION NO. 10: Please produce a copy of the "draft chart . . . showing on a well-by-well basis how much additional capacity is achievable, and what steps would be required to achieve it," referenced at page 4 in correspondence from Christopher H. Meyer to Karl J. Dreher, dated September 24, 1999, attached hereto as Exhibit D. By this request, the Districts specifically seek the draft chart referenced in that correspondence.

REQUEST FOR PRODUCTION NO. 11: Please provide copies of the information provided to IDWR in response to its request for “realistic information about the current and projected shape of the Company’s overall production curve for the agency’s planning purposes,” referenced in correspondence from Christopher H. Meyer to Karl J. Dreher, dated October 26, 1999, at page 2, attached hereto as Exhibit E. By this request, the Districts specifically seek the information which was provided in response to IDWR’s request.

REQUEST FOR ADMISSION NUMBER 7: Please admit that you have no information to verify the elements of beneficial use rights numbered 63-04015, 63-04395, 63-04414, 63-44254, and 63-04752.

REQUEST FOR PRODUCTION NO. 12: If your response to Request for Admission Number 7 is anything other than an unqualified admission, please produce each and every document which serves to verify any or all of the elements for any or all of the water rights listed in Request for Admission Number 7.

REQUEST FOR ADMISSION NO. 8: Please admit that the report entitled *United Water Idaho – Water System Master Plan* is the only document which describes the improvements which have been made, are in the process of being made, or will be made to UWID’s system to accommodate future needs above current demand

REQUEST FOR PRODUCTION NO. 13: If your response to Request for Admission Number 8 is anything other than an unqualified admission, please produce each and every document which supports your response to Request for Admission Number 8.

REQUEST FOR ADMISSION NO. 9: Please admit that the report entitled *United Water Idaho – Water System Master Plan* is the only document which describes the

improvements which have been made, are in the process of being made, or will be made to UWID's system to accommodate the gap between UWID's current demand and its "paper rights."

REQUEST FOR PRODUCTION NO. 14: If your response to Request for Admission Number 9 is anything other than an unqualified admission, please produce each and every document which supports your response to Request for Admission Number 9.

REQUEST FOR ADMISSION NO. 10: Please admit that the report entitled *United Water Idaho – Water System Master Plan* is the only document which describes the investments made in UWID's system to accommodate future needs above current demand.

REQUEST FOR PRODUCTION NO. 15: If your response to Request for Admission Number 10 is anything other than an unqualified admission, please produce each and every document which supports your response to Request for Admission Number 10.

REQUEST FOR ADMISSION NO. 11: Please admit that the report entitled *United Water Idaho – Water System Master Plan* is the only document which describes the investments made in UWID's system to accommodate the gap between UWID's current demand and its "paper rights."

REQUEST FOR PRODUCTION NO. 16: If your response to Request for Admission Number 11 is anything other than an unqualified admission, please produce each and every document which supports your response to Request for Admission Number 11.

REQUEST FOR PRODUCTION NO. 17: Please produce all planning documents regarding the interconnection of UWID wells, surface diversions, mains, treatment facilities, storage and distribution systems and surface area.

REQUEST FOR ADMISSION NO. 12: Please admit that Boise Water Corporation's Report for Water Conservation Plan, August 1993, and the report entitled *United Water Idaho – Water System Master Plan*, are the only documents which contain the water conservation plans of UWID.

REQUEST FOR PRODUCTION NO. 18: If your response to Request for Admission Number 12 is anything other than an unqualified admission, please produce each and every document which contains, in whole or in part, the water conservation plans of UWID.

REQUEST FOR ADMISSION NO. 13: Please admit that Boise Water Corporation's Report for Water Conservation Plan, August 1993, and the report entitled *United Water Idaho – Water System Master Plan*, are the only documents which contain studies comparing water usage by UWID customers with other western cities.

REQUEST FOR PRODUCTION NO. 19: If your response to Request for Admission Number 13 is anything other than an unqualified admission, please produce each and every document which contains, in whole or in part, the water conservation plans of UWID.

REQUEST FOR PRODUCTION NO. 20: Please provide a complete copy of Boise Water Corporation's Report for Water Conservation Plan, August 1993.

REQUEST FOR PRODUCTION NO. 21: Please provide a complete copy of the report entitled *United Water Idaho – Water System Master Plan*.

REQUEST FOR ADMISSION NO. 14: Please admit that the well titled "Barber #1" did not produce any water from 1935 through 2002.

INTERROGATORY NO. 1: If your response to Request for Admission Number 14 is anything other than an unqualified admission, please set forth each and every fact

of which you are aware which supports or tends to support, in whole or in part, your response to Request for Admission Number 14.

REQUEST FOR ADMISSION NO. 15: Please admit that the well known as Barber #1 is one of the licensed points of diversion for water right number 63-04395.

REQUEST FOR PRODUCTION NO. 22: If your response to Request for Admission Number 15 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 15.

REQUEST FOR ADMISSION NO. 16: Please admit that the well known as Barber #1 is one of the licensed points of diversion for water right number 63-08385.

REQUEST FOR PRODUCTION NO. 23: If your response to Request for Admission Number 16 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 16.

REQUEST FOR ADMISSION NO. 17: Please admit that the well known as Barber #1 is one of the licensed points of diversion for water right number 63-10150.

REQUEST FOR PRODUCTION NO. 24: If your response to Request for Admission Number 17 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 17.

REQUEST FOR ADMISSION NO. 18: Please admit that the well known as Barber #1 is one of the licensed points of diversion for water right number 63-12464.

REQUEST FOR PRODUCTION NO. 25: If your response to Request for Admission Number 18 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 18.

REQUEST FOR ADMISSION NO. 19: Please admit that the well designated Barber #2 did not produce any water from 1935 through 2002.

INTERROGATORY NO. 2: If your response to Request for Admission Number 19 is anything other than an unqualified admission, please set forth each and every fact of which you are aware which supports or tends to support, in whole or in part, your response to Request for Admission Number 19.

REQUEST FOR ADMISSION NO. 20: Please admit that the well known as Barber #2 is one of the licensed points of diversion for water right number 63-10150.

REQUEST FOR PRODUCTION NO. 26: If your response to Request for Admission Number 20 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 20.

REQUEST FOR ADMISSION NO. 21: Please admit that the well known as Barber #2 is one of the licensed points of diversion for water right number 63-12464.

REQUEST FOR PRODUCTION NO. 27: If your response to Request for Admission Number 21 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 21.

REQUEST FOR ADMISSION NO. 22: Please admit that the well known as Brookhollow #1 is one of the licensed points of diversion for water right number 63-08265.

REQUEST FOR PRODUCTION NO. 28: If your response to Request for Admission Number 22 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 22.

REQUEST FOR ADMISSION NO. 23: Please admit that the well known as Five Mile #2 is one of the licensed points of diversion for water right number 63-07998.

REQUEST FOR PRODUCTION NO. 29: If your response to Request for Admission Number 23 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 23.

REQUEST FOR ADMISSION NO. 24: Please admit that the well known as Foxtail is one of the licensed points of diversion for water right number 63-12334.

REQUEST FOR PRODUCTION NO. 30: If your response to Request for Admission Number 24 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 24.

REQUEST FOR ADMISSION NO. 25: Please admit that the well known as Foxtail is one of the licensed points of diversion for water right number 63-00012.

REQUEST FOR PRODUCTION NO. 31: If your response to Request for Admission Number 25 is anything other than an unqualified admission, please provide each and

every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 25.

REQUEST FOR ADMISSION NO. 26: Please admit that the well known as Foxtail is one of the licensed points of diversion for water right number 63-12516.

REQUEST FOR PRODUCTION NO. 32: If your response to Request for Admission Number 26 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 26.

REQUEST FOR ADMISSION NO. 27: Please admit that the well known as Lizaso Well is one of the licensed points of diversion for water right number 63-09384.

REQUEST FOR PRODUCTION NO. 33: If your response to Request for Admission Number 27 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 27.

DATED this 17th day of July 2003.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Angela Schaefer Kaufmann
Scott L. Campbell - Of the Firm

By Angela Schaefer Kaufmann
Angela Schaefer Kaufmann - Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of July 2003, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S FIRST SET OF DISCOVERY REQUESTS TO UNITED WATER IDAHO, INC.** 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Peter Anderson, Hearing Officer
729 W. Braemere Road
Boise, ID 83702

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

United Water Idaho Inc.
John M. Marshall
Givens Pursley, LLP
PO Box 2720
Boise, ID 83701
Fax: 388-1300

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Nampa & Meridian Irrigation District,
City of Meridian, City of Caldwell, Terteling
Company, and Terteling Trust No. 7
Charles L. Honsinger
Ringert Clark
455 South 3rd Street
PO Box 2773
Boise, ID 83701-2773
Fax: 342-4657

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

City of Boise
Matthew Wilde
Boise City Attorney's Office
PO Box 500
Boise, ID 83701-0500
Fax: 384-4454

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Boise Project Board of Control
Albert P. Barker
Barker Rosholt & Simpson
PO Box 2139
Boise, ID 83701-2139
Fax: 342-4657

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Estate of Eleanor I. Chase
Matt J. Howard
PO Box 190012
Boise, ID 83719
Fax: 333-8409

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Cities of Eagle, Kuna, Middleton & Star and
Star Sewer District
Bruce M. Smith
Tammy A. Zokan
Moore Smith Buxton & Turcke
225 N. 9th Street, Suite 420
Boise, ID 83702
Fax: 331-1202

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Ed Squires
Hydrologic
1002 W. Franklin
Boise, ID 83702-5431
Fax: 342-3100

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile


Scott L. Campbell

LAW OFFICES
GIVENS PURSLEY & HUNTLEY LLP
A Limited Liability Partnership

MEMORANDUM

TO: Edward Squires, United Water Idaho

FROM: Jeffrey C. Fereday
Christopher H. Meyer *CHM*

RE: United Water Idaho - Municipal Water Rights
GPH File No. 30-71

DATE: September 1, 1997
(Revised October 9, 1997 for release to IDWR)

CONTENTS

I.	Name Changes	3
A.	Licensed Rights	3
B.	Permits	3
C.	SRBA	3
D.	Timing	3
E.	Any Other Clerical Corrections	3
II.	SRBA Claims	4
A.	File Omitted Claims	4
B.	Correct Any Understated Quantities	4
C.	File Post-SRBA Claims	4
III.	Capture Old Priorities	4
IV.	Convert Existing Rights to Bring Under Municipal Statute	6
A.	Single, Expanding Service Area	6
	(1) Departmental Support	6
	(2) The "Change" Procedure	7
	(3) Practical Effect	7
B.	Future Needs Component	8
C.	Universal Alternate Points of Diversion	9

This follows up on our meeting on Tuesday, August 26, 1997, at the Department of Water Resources.

In attendance for the Department were Norm Young, David Tuthill, Glen Saxton, Gary Spackman, Jim Johnson and Phil Rassier. UWID was represented by Ed Squires, Jeff Fereday and Chris Meyer.

These are the key points:

- The Department supports a single, expanding service area. This will allow water to be shifted around within the system, so long as there are not increases in individual well capacity.
- The Department supports a universal alternate points of diversion approach. This will further expand the flexibility by allowing reallocation of system capacity by increasing the capacity of certain wells. This will be subject, however, to a prohibition against changes which result in well interference or other localized injury to water rights.
- The Department supports the systematic retention of older priority water rights, up through 1987 (the date of the accomplished transfer statute). This will entail application of a "stepwise function" illustrated in Figure 1 on page 5.
- We need to have further discussions with the Department in order to refine system capacity concepts and further develop a strategy for the "future needs" component of the company's water rights.
- To accomplish all this we need to file a comprehensive change application with the Department. As this will take some time to complete, we should proceed simultaneously with any site specific change applications (such as Lexington Hills) which require faster turn around.
- The company's SRBA filings are in need of supplementation.

The following is a more detailed review of the issues we explored.

I. Name Changes

A. Licensed Rights

We will file "change of ownership notification forms" with the IDWR for every licensed water right held by UWID which is not in the name of UWID. This will be accompanied by (1) a summary/explanation of changes in corporate names and corporate structure over time and (2) documentation of ownership with respect to purchased water rights. No fee is required.

B. Permits

In each case where a permitted (but not yet licensed) right is not in the name of UWID, we will file a "water right assignment form." There is a fee associated with this.

C. SRBA

There is no need to file name change forms in the SRBA, so long as the forms described above are filed with the IDWR before Basin 63 (the Treasure Valley) is reported.

D. Timing

These name changes are ministerial actions, and will not require a hearing process at IDWR. We should proceed at once with this cleanup. It is possible that, once the comprehensive transfer or SRBA review is completed, some of the water rights may be disqualified due to nonuse. At this point, however, it is difficult if not impossible to predict which rights might be eliminated. (Our objective is to retain as much senior priority as possible, but this is a complicated process. See discussion accompanying graph below.) Consequently, we recommend that UWID update the names on all of its water rights.

E. Any Other Clerical Corrections

At this point, we are not aware of other clerical corrections in UWID's water rights which need to be made. But we should be alert to this as we move through the process.

II. SRBA Claims

A. File Omitted Claims

We need to go through UWID's entire portfolio to insure that claims are made accurately on all rights.

B. Correct Any Understated Quantities

It appears that many of UWID's SRBA claims may have been made for less than the full certificated quantity of flow. Instead, apparently, claims were filed on the basis of pumping levels at a particular point in time—even when the well may have produced more. These claims should be amended to reflect the full claim based on total installed pump capacity.

C. File Post-SRBA Claims

For water rights licensed after the SRBA was initiated, filing claims in the SRBA is optional. If the holder files an SRBA claim, they will be adjudicated. If the owner does not file, the rights will not be adjudicated. Instead, they will be left as unadjudicated licenses.

Given that there is very little marginal cost to filing the recent claims and moving them through the SRBA along with the other claims, it probably makes sense to do so. The advantage is that those rights will be decreed, and *res judicata* will attach, making them less vulnerable to attack in the future.

III. Capture Old Priorities

Ed Squires coined the phrase "the younging of our water rights." This refers to the unintended loss of priority on UWID's system resulting from the inadvertent failure to formally transfer older water rights as wells decline or are taken out of production.

One of the significant issues explored with the Department was the subject of retaining the priority dates of water rights on older wells which have been "replaced" by more junior filings on newer wells. The Department agreed that the older priorities could be retained as "accomplished transfers" up until 1987, the date of the accomplished transfer statute.

However, the Department indicated that we would not be allowed simply to round up all the old priorities, and declare them to be reassigned to newer wells. Rather, the

methodology for recapture would be fairly complex, based on an annual "stepwise function" as illustrated by the graph in Figure 1.

For each year, the Department will approve water rights up to, but no more than, the total production capacity of UWID's system.¹ Any "paper" rights in excess of this will not be approved for transfer (or for inclusion in the Director's Report to the SRBA). For each year, the Department will seek to assign the oldest priority water rights first, setting aside those junior rights added in that year which are not needed to support production capacity in that year. Once a water right is set aside, it can be recaptured only if new production is brought on line within five years.²

Let's take one example. Suppose that in 1970 UWID takes out of production one

well which previously produced 1 cfs, and adds three new wells totaling 3 cfs, for a total net gain of 2 cfs in production capacity.

Meanwhile, UWID files new 1970 priority water rights claiming a total of 3 cfs. For that year, the Department would retain the senior priority on the abandoned well. Next, it would retain any earlier priorities from rights "set aside" for five years or less. If there were none set aside, it would allow 2 cfs of new (1970 priority) water rights for that year, corresponding to the net increase in production capacity. The remaining 1 cfs "paper" right would be set aside, subject to retention (or

Annual Water System Increment

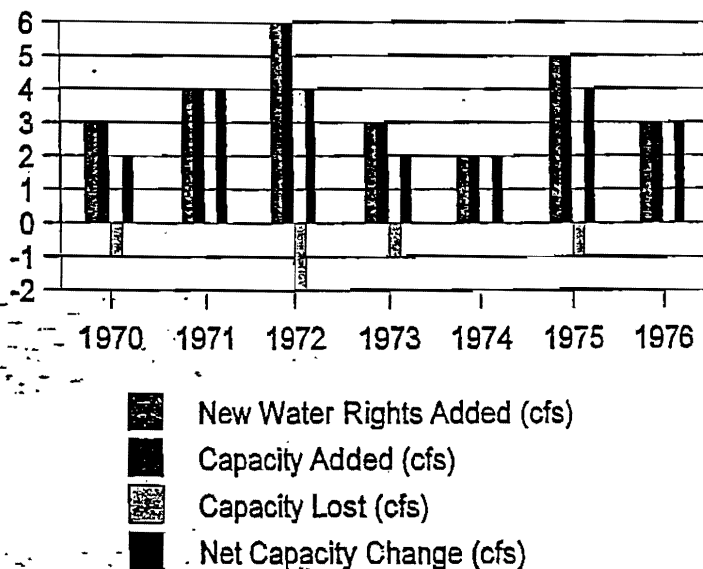


Figure 1
Annual Additions and Subtractions to a Hypothetical
Municipal Water Rights Portfolio

¹We had an extended discussion about what "total production capacity" means. Essentially, it refers to the total physical potential of the system to produce in any given year. This may correspond to the high peak on the production hydrograph, or it might exceed it by some if the system did not produce up to its full capacity in that year. This is an issue which will require further discussion and refinement with the Department. Norm Young promised to get back to us after further IDWR internal discussions.

²This five year retention rule is a function of the five year period in the forfeiture statute. Norm Young seemed open to grafting this provision onto the stepwise function, but said that would require further departmental analysis.

recapture) within five years.³ In 1971 4 cfs of new capacity is brought on line, and none is lost. The "retained" 1970 priority would be assigned to the first cfs of new capacity added in 1971, and the remaining 3 cfs would be assigned a 1971 priority, with the fourth cfs set retained for potential reassignment in 1972.

Based on our preliminary review, it appears likely that UWID should be able to retain many of its older priorities. However, we need a complete run of this stepwise function exercise to determine exactly how we will fare. (And before we commit to this as the appropriate means of analysis.)

IV. Convert Existing Rights to Bring Under Municipal Statute

A. Single, Expanding Service Area

(1) Departmental Support

The Department was in agreement that it makes sense to establish a single, expanding service area for all (or virtually all⁴) of UWID's water rights.⁵ Moreover, the Department agreed that the description ought to be quite broad—covering the entire metropolitan area.

Rather than having each water-right describe a service area, each water right would reference a centrally described service area. That single description would describe the current service area and would also contain a narrative and graphic discussion of how that service area is expected to expand over time. From time to time,

³This "loss" and "recapture" language is merely a description of how the model would operate. It does not correspond to the legal status of these water rights, which would not be lost until the five year period expired.

⁴Water rights with special geographic restrictions (such as acquired agricultural rights, or appropriative rights with ground water protection provisions) would need to be carved out of this process and handled separately.

⁵It is possible that objectors would point out that the "physical" service area of a given well may be less than the entire system service area, because, in some instances, it is not physically possible to get water from here to there.

We believe that we can defeat this argument. The whole purpose of the municipal statute is to bring the administration of municipal water rights into line with modern realities. The modern reality is that water is accounted for systemwide, not on a molecule by molecule basis. Moreover, this is a constantly changing system, with new links being added all the time. Breaking down the service area on a well-by-well basis would defeat in large part the statute's goal of simplifying the administration of these rights and building in flexibility to respond to changing circumstances.

that description may be updated, without the need to modify each of the company's water rights.

Following our meeting, a "global" description of our service area was filed with the Western Regional Office of the Department on September 24, 1997. The Department has not yet provided any feedback on that filing.

(2) The "Change" Procedure

UWID certainly could take the position that because all of its municipal water rights are subject to an expanding service area under the common law of municipal water rights, it is unnecessary to go through a formal change proceeding to implement this. A more cautious approach would be to file a change application stating our position that the company's service area is expanding under the common law, but seeking the clarity and certainty of the new statute. As Norm Young pointed out in the meeting, a court might find that even though a municipal provider's service area grew under the common law in the past, that aspect of the common law may have been cut off by establishment of the SRBA, the adoption of the municipal water rights statute, or some other legislative action. Furthermore, relying solely on the common law approach likely would postpone a determination on this subject to a final ruling in the SRBA or some other equally indefinite time. The simplest and surest approach is to have the expanding service area confirmed through a change application.

(3) Practical Effect

Once a single, expanding service area is established, the law would recognize that water from any well is entitled to be delivered anywhere within UWID's delivery system which it is physically capable of reaching. The practical effect would be to allow any given well to be pumped up to its full licensed flow rate to meet demand anywhere in the system. (This is subject, of course, to any special constraints such as moratorium conditions, instances of interference, or ground water management conditions which might limit the use of a particular well.) Moreover, it would allow UWID to alter or expand the delivery system at will, without notice to or approval of IDWR, so long as the changes are consistent with the general description of the expanding service area. If the company so chose, it could bring water all the way from Nampa to serve users in the Columbia Village area.

Note, however, the single, expanding service area alone would not allow UWID to reallocate capacity within its system by enlarging some wells and pumping less from others. (That could be accomplished under the "universal points of diversion" option

discussed below.) But it would allow UWID to shift capacity around to the extent it can without altering the pumping capacity of existing wells.

B. Future Needs Component

We had quite a discussion of the implementation of the future needs component. It is the Department's view (as articulated by David Tuthill) that under the common law, municipal water rights are limited only by their certificated rate of pumping or diversion, and therefore are entitled to increase the hours of full diversion as needed over time. However, the Department does not believe that a city can reserve within an existing water right the right to improve the well in the future and expand its capacity. In other words, under Dave Tuthill's view of the common law, a municipal user is granted the flexibility to "fill out the graph," by pumping at or near the full certificated cfs for longer periods—thus gradually increasing the total annual diversion volume up to the full physical potential. But a municipal user cannot enlarge the well and increase its capacity without obtaining a new, junior water right for the incremental use.

After Dave left, we had a further discussion about what might be allowed under the statute. We acknowledged that the statute contains the following limitation: "A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit . . ." Idaho Code § 42-219(1). Thus, no matter how real its "future needs," a municipal provider may not appropriate water simply by declaring that future need without an accompanying on-the-ground investment of some sort to expand system capacity.

However, it is our position that this statute would allow a municipal provider to demonstrate its "on-the-ground" commitment to expanding system capacity by sizing some significant system component or by taking some other concrete step associated with the water right to accommodate the future growth. Significantly, we would contend that the entire system need not be simultaneously expanded to correspond to the new component. We explored two examples. In the context of an appropriation to serve the new water treatment plant, it should be sufficient to size the physical plant to meet the larger need, even if, for instance, some of the system components were not added until later. Likewise, we would contend, if UWID could demonstrate that it is constructing a well specifically so that it may be easily upgraded and expanded later, then the company ought to be able to obtain a future needs component (under the municipal statute) for the full "build out" of the well.

Plainly, this is a departure from the traditional notion that current pumping capacity serves as an upper limit on the quantity for which a municipal water right license can be issued. But this view does not take into account a variety of investments

(other than merely "pumping capacity") that we might assert as a basis for arguing that we have constructed a "system" of a particular size. Norm Young reserved judgment on this point until he explores it further.

Ed Squires pointed out that it would be enormously advantageous to municipal providers if they could obtain water rights with a volume component based on total current, year-round pumping capacity, but no flow limitation. This would enable the user to improve the well and to add higher peaking ability. So long as the annual volume limit based on the lower pumping capacity was not needed, no change application would be required. Such an approach would change the current informal rule, which limits the typical municipal water right only to its flow rate, without regard to annual volume. Making annual volume the limit, without regard to flow rate, would allow the municipal provider to increase flow rate capacity at will, so long as an annual volume cap is not exceeded. Norm Young promised to engage in further departmental discussions on this point, and get back to us.

C. Universal Alternate Points of Diversion

The Department was entirely supportive of the concept of changing UWID's water rights to make each diversion point an alternate to each other--the so-called "universal alternate points of diversion" concept. (Again, this would exclude water rights with special limitations.)

This would allow UWID to correct imbalances in which some wells are producing less than their certificated quantity and some wells are producing more. It would allow UWID to take full advantage of its most senior priorities and to shift well capacity around without individual change applications (e.g., abandon one well and enlarge another). Thus, it would enable UWID to respond flexibly to physical constraints (e.g., aging of wells) and legal constraints (e.g., ground water management restrictions).

Of course, alternate points of diversion cannot be added if doing so will injure other rights, and IDWR would be expected to impose conditions to protect against well interference. We explored how this might work. The basic approach we anticipate would be to avoid injury simply by including a condition which protects and preserves the rights of others to claim well interference at such time as a problem arises. Thus, if UWID enlarged a well next to another person's domestic well and sought to pump from the enlarged well based on senior priorities elsewhere in UWID's system to the extent that production declined in the neighbor's well, the neighbor could raise an objection at that time (and UWID's pumping probably would be curtailed). However, if, due to a drought, a senior call or some new regulatory restriction, the Department found it necessary to administer water rights on a system-wide basis, UWID could reallocate its

priorities throughout the system in the manner most beneficial to it. Thus, it could reallocate an older priority water right from a declining well to the newly enlarged well (without going through a change procedure), and thus reduce the likelihood of the new well being curtailed.

We were encouraged by the Department's unqualified support for the general concept of universal alternate points of diversion (or "homogenous points of diversion" as Jim Johnson referred to them).

CHM:baf

United Water



United Water Idaho
8248 West Victory Road
PO Box 7488
Boise, ID 83707-1488
telephone 208-362-1300
facsimile 208-362-1479

October 9, 1997

Mr. Norman C. Young, Administrator
Idaho Department of Water Resources
1301 North Orchard Street
Boise, ID 83706-2237

Re: United Water Idaho -Municipal Water Rights Discussion

Dear Norm:

This letter is to follow up on our meeting of August 26, 1997 at the Department and our discussions concerning the implications and implementation of the municipal water rights statute. We very much appreciate the time and energy you and your staff have committed to this undertaking. The individual perspectives from each represented Bureau, Section, and branch within IDWR was very helpful and, from my perspective, much progress was made.

Following the meeting, Chris Meyer, Jeff Fereday, and I reconvened to review our impressions and I asked Chris Meyer to prepare the attached memorandum to summarize our understanding of what is on the table, to identify areas of consensus, and to highlight key issues to be resolved. United Water Idaho has had a chance to digest the memorandum and I am now forwarding it to you and your staff, who were present at the August meeting, so that we can keep the subject fresh and the discussions moving along.

We are busy developing the historical production data for comparison with water rights priority dates as suggested by Dave Tuthill. This information may be compiled by the end of October and I hope that we may be able to meet a second time in mid November.

Please convey your collective thoughts to me after you have had a chance to review the document. We look forward to exploring these issues further.

Sincerely,

United Water Idaho

Edward Squires
Hydrogeologist

c: Jeff Fereday
Jim Johnson
Chris Meyer
Phil Rassier
Glen Saxton
Gary Spackman
David Tuthill

United Water

United Water Idaho
8248 West Victory Road
PO Box 7488
Boise, ID 83707-1488
telephone 208 362 1300
facsimile 208 362 1479

January 19, 1999

Mr. Steve Lester
Water Rights Supervisor
Idaho Department of Water Resources
Western Regional Office
2735 Airport Way
Boise, ID 83705-5082

Subject: United Water Idaho's Coventry Place Application for Permit

Dear Mr. Lester:

This letter follows United Water Idaho's (UWID) Application for Permit to Appropriate Water filed with your office on the 15th of January, 1999. The filing makes reference to UWID's "*Description of Service Area for United Water Idaho*" relative to Place of Use. Because this most recent filing, for our service area south of Nampa, Idaho (Coventry Place Subdivision), is presently non-contiguous to our Boise service area, we reviewed the current version of the service area description and believe that it is sufficiently broad to encompass this new service area in Nampa. The Description states:

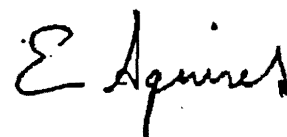
UWID serves customers and other water users within the city of Boise, Idaho, as well as a number of nearby communities, unincorporated areas and rural customers within the Treasure Valley. . . .

From time to time, however, UWID will provide service to adjacent or outlying areas within the general vicinity which are not immediately connected to UWID's main distribution system. . . .

Even though this description is broad enough to cover the Coventry Place application, we are in the process of updating the Description again. Specifically will supply maps which expressly show that UWID is now serving as far away as Nampa and beyond.

I hope this explanation is helpful to your consideration of UWID's application.

Sincerely,



Ed Squires

GIVENS PURSLEY LLP

LAW OFFICES

277 North 8th Street, Suite 200
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300

DIRECT DIAL: (208) 388-1236
EMAIL: chm@givenspursley.com

Gary G. Allen
Christopher J. Beeson
Michael C. Creamer
Thomas E. Dvorak
Roy Lewis Elgren
Jeffrey C. Fereday
Richard W. Jankowski
Amanda L. Keating
Karl T. Klein
David R. Lombardi
Kimberly D. Maloney

John M. Marshall
Kenneth R. McClure
Cynthia A. Melillo
Christopher H. Meyer
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery
Angela K. Nelson
W. Hugh O'Riordan
Kenneth L. Pursley
Virginia L. Stukel

Conley Ward
Stephanie C. Westemeier
Robert B. White

Raymond D. Givens
James A. McClure
OF COUNSEL

September 24, 1999

Mr. Karl J. Dreher
Director
Idaho Department of Water Resources
1301 N. Orchard St.
Statehouse Mail
Boise, ID 83720-9000

Re: Municipal Water Rights
Our File No. 30-71

Dear Mr. Director:

As you know, United Water Idaho ("UWID") is developing a comprehensive transfer application to bring its water rights portfolio under the Municipal Water Rights Act of 1996. Your guidance and the assistance of your staff have been invaluable in that process. As we develop the application, however, additional questions have arisen which, I believe, call for further discussions with the Department.

I request a meeting at your earliest convenience to explore the issues outlined below. I will contact your staff to inquire about possible times.

I. Flow rate and annual volume dimensions of municipal water rights held for future needs

One of the issues UWID has explored is how to describe and quantify a municipal water right, particularly in the context of a future needs analysis. As you know, municipal rights are ordinarily quantified solely by a flow measurement. In the case of a ground water right, that flow measurement is typically the installed capacity of the well with which the right is associated.

Mr. Karl J. Dreher
September 24, 1999
Page 2

The lack of a volume limitation reflects the Department's recognition of the authority of a municipal provider to fully "grow into" each of its municipal water rights. Another way of putting this is that the annual volume which corresponds to a municipal water right is the volume associated with pumping at full capacity year round. This would be the maximum volume physically capable of being produced in a year. (By the way, this "capacity" measure—and how to handle potential future increases in well capacity—is explored in part II below.)

Of course, at any given point in time, a municipal provider will have an actual, instantaneous production quantity associated with its portfolio of rights (in other words, the sum of flows from each of its wells). This production level will vary over the course of the year, obviously, with a peak during the summer months and demand tapering off on both sides toward a lower year-round base demand. This "annual production curve" may be plotted on a graph, with instantaneous flow rate on the vertical axis and the months of the year on the horizontal axis. The area under the curve would reflect the annual production volume.¹ A set of hypothetical annual production curves is sketched in Appendix A.

In a given year, the base demand will be filled by the most senior water rights in the municipal provider's portfolio of rights. (At least, this is the way it will work after we transfer all of the company's rights so that each is an alternative point of diversion for each other.) In other words, the rights serving the base will be drawn upon at the full diversion rate 365 days a year—thus achieving their full potential annual volume.

Over time, as municipal production expands, the production curve will rise, including the base. As each water right in the portfolio reaches maturity, it will serve year-round base demand. Assuming continued growth, each water right eventually will become part of the base and will be used to its full annual volume capacity.

¹During the summer peak, most wells are literally producing at full capacity 24 hours a day. Demand, of course, falls off a bit at night and during midday, but these times are used to refill the reservoirs on a daily basis. During the non-peak season, the wells typically do not produce at full diversion rate 24 hours a day. If the data are based on historic records of daily volumetric totals (gallons/day), the flow rate shown on the vertical axis is not truly instantaneous, but a daily average. Consequently, it may readily be translated into an annual volume in acre-feet at all times of the year (by multiplying by 723.795). To the extent historical data based on gallons/minute are used (virtually equating to instantaneous flow), this translation may not be accurately made without some adjustment.

This is the practical way in which the Department has implemented the flexibility accorded to municipal providers under the common law. The question we pose is whether the analysis ought to be any different in the context of a future needs analysis under the Municipal Water Rights Act of 1996. We think not. But we wish to squarely pose the question, invite discussion, and make sure that we are proceeding with the same understanding as the Department.

The question is posed graphically by the figure shown in Appendix A. As noted above, the area under each hypothetical annual production curve reflects the total volume of water produced in that year. The 25 numbered horizontal lines represent 25 hypothetical ground water rights in order of priority, with the most senior at the bottom. (Their widths vary, reflecting the diversion volume of each right.)

The hypothetical 1999 production curve, in green, shows that water rights 1 through 13 were required to meet the peak flow this year, while water right 1 through 4 would have been sufficient to satisfy the year-round base demand. UWID would suggest that under this hypothetical, water rights 1 through 13 are "current use" water rights. Per current departmental practice, they should be quantified solely in terms of diversion rate, allowing UWID to "grow into" the red-shaded part of the rights.

Let us suppose also that the Department were to approve a 50 year planning horizon with projected needs as reflected in the purple curve. (The length of the planning horizon is discussed in part III below.) In the Appendix A hypothetical, this justifies holding water rights 14 through 25 as "future needs" water rights.

UWID would contend that the future needs water rights, just like current needs rights, should be quantified in terms flow. That is, they should have no volume component (or the volume component should equate to year round use at peak flow). Thus, as UWID continues to grow its service area, it may continue to "grow into" its water rights held for future needs. If the future needs predictions comes to pass, by year 2049 UWID would grow into the red-shaded area of water rights 4 through 13 and the purple shaded area of water rights 14 through 25.

We want to call to your attention the fact that this approach contemplates not growing into the yellow-shaded portion of water rights 14 through 25 for more than 50 years—that is, not until some time beyond the planning horizon. For instance, if all goes as predicted in this hypothetical, in the year 2049, UWID will have grown into a

Mr. Karl J. Dreher
September 24, 1999
Page 4

relatively small part of water right number 50 (about two month's use), which will be needed to fill in the top of the summer peak. In the years beyond 2049, UWID would presumably continue to grow more fully into water right numbers 14 through 50, using more and more of them until, at some point, their entire volume became part of UWID's base production.

Of course, UWID fully recognizes that all water rights, including municipal water rights, are subject to an ongoing beneficial use requirement. If, for instance, dramatic changes in demographic trends had occurred by the year 2049, and it appeared that UWID would never grow into its full portfolio of future needs water rights, some part of UWID's portfolio might be subject to challenge on the basis of partial forfeiture.

In the absence of such a startling reversal in the growth pattern, however, UWID would take the position that it should be allowed to continue to grow fully into each of its water rights, including those held for future needs. And including those which it will be using only "partially" by the end of its planning horizon.

We would appreciate your guidance on this issue. Obviously, how one views the measure of a municipal water right will have a significant impact on how UWID goes about analyzing and documenting its current and future needs.

II. Peak capacity

The discussion above assumes that "peak capacity" is a fixed number for each well. In fact, for a substantial number of UWID's wells, there is a measurable potential increase in production which is, if you will, "built into" the well.

UWID has prepared a draft chart, which we will be pleased to share with you, showing on a well-by-well basis how much additional capacity is achievable, and what steps would be required to achieve it. Typical actions include increasing the pump capacity, lowering the pump, adjustment of screens, etc.

In some cases, the well was expressly designed from the beginning, at increased cost, to facilitate future production increases.² In other cases, the wells were designed to

²The clearest example of this is the 13th Street Well. It was drilled in 1934 to accommodate a 1,000 gallon per minute pump, but only a 300 gallon pump was installed. (Consequently it was licensed

Mr. Karl J. Dreher
September 24, 1999
Page 5

facilitate future production increases, but that design may have served multiple purposes—thus making it less clear whether there was an original “intent” to expand production at a later time. In other cases, the potential production increases are not reflected at all in the original design of the well, but are nonetheless feasible.

We would appreciate guidance from the Department as to whether and under what circumstances UWID may assert a claim, presumably a “beneficial use” claim with priority dating back to the original well construction, based on the higher potential production capacity of a well.

III. Planning horizon

We intend to request the Department’s approval of a 50 year planning horizon. We believe that this level of forward planning is justified and appropriate for a major municipal supplier in a rapidly growing area such as the Treasure Valley.

Obviously, looking this far out will entail extrapolation beyond the time horizon of other planning agencies in the region. We would like to discuss this with you, and make certain that it is consistent with what the Department envisions.

IV. Overlapping inconsistent comprehensive plans

As you well know, the 1996 Act contains special provisions prohibiting the recognition of future needs water rights to serve areas overlapped by conflicting, inconsistent comprehensive plans. Specifically, the Act defines “reasonably anticipated future needs” with these two provisos:

Proviso 1: “Reasonably anticipated future needs’ refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each

according to the installed capacity of 0.8 cfs, see Water Right No. 63-2500.) Two decades later, in accordance with the long-term plan, the original pump was removed and replaced with a 1,000 gallon pump (see beneficial use Water Right No. 63-19456 adding an additional 1.6 cfs for a total of 2.4 cfs out of the well).

Mr. Karl J. Dreher
September 24, 1999
Page 6

municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality."

Proviso 2: "Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans."

Idaho Code § 42-202B(5) (definition of "reasonably anticipated future needs") (emphasis supplied).

A. Do we need to map our future service area?

The first question is which municipalities are we talking about? Those served today, or those which might be served 50 years out?

In our case, the question is somewhat academic, in that UWID, at this point, does not expect to claim future need water rights on the basis of expanding its service areas into municipal areas it does not serve today.³

Nevertheless, it seems conceptually troubling for the statute to recognize, on the one hand, that a provider has a growing service area which has no clear boundaries, and then, on the other hand, to expect the provider to predict exactly which areas it will be serving 50 years from now for purposes of projecting future demand.

We want to make sure that we are on the same page with the Department as we approach this process. Does the Department anticipate that a municipal provider will base its future demand projections on the basis of identified expansions in its service area, or simply upon more generalized projections of regional growth?

B. Is it the planning horizon of the municipality or the provider?

³Specifically, UWID does not assert future needs based on service to Nampa, Meridian, Kuna, or Star. Rather, its future needs are based entirely on expansion of the municipal areas it serves today: Boise, Eagle and Ada County. UWID also serves two isolated residential developments in Canyon County. UWID is not claiming future need water rights for these, however.

The first provision is somewhat difficult to decipher. Future needs are defined (perhaps in error) in the context of "the planning horizon of each municipality within the service area." But it is the municipal provider (UWID, in this case) which has a planning horizon, not the municipalities it serves. So what, then, is meant by the "planning horizon of each municipality"? We think that the legislature must have meant "for" when it said "of." Thus, the provision should be read to refer to water "required within the planning horizon [of the provider] for [use within] each municipality within the service area [of the provider] ..." This reading makes sense of the statute, and avoids the need to define separate planning horizons for each municipality.

C. How do we show "consistency" with comprehensive plans?

This leaves the final clause: "not inconsistent with comprehensive land use plans approved by each municipality." A threshold question for the Department is, what does "inconsistent" mean.

We attribute a limited role to this proviso. If, for instance, a comprehensive plan contained specific provisions bearing on water use, those should be reflected in the future needs assessment. For example, if a comprehensive plan declared that all future development shall be xeriscaped, dual irrigated (e.g., with water from paved irrigation district land), or the like, then such requirements should be reflected in and factored in some reasonable way to the projected future needs. However, not too sharp a point should be put on this.

D. Areas of impact

The second provision quoted above contains the more specific requirement. It apparently requires that the comprehensive plans for each municipality (including counties) within the service area be reviewed to determine if any conflict with each other.

Again, the question is, what is a "conflict"? We assume here that "conflict" reaches only conflicts having some bearing on growth, population, water demand and the like.

An example of such a conflict, and the primary one, we assume, would be

Mr. Karl J. Dreher
September 24, 1999
Page 8

overlapping area of impact zones.⁴ Fortunately, this is not a common problem in Idaho due to the nature of planning and zoning law and practice. But it does arise—in fact, twice in Ada County.

In any event, UWID has undertaken a preliminary review of all comprehensive plans in Ada County (including the County's). The only conflict we have been able to identify to date is with respect to the area of impact zone for the Cities of Kuna and Star. Apparently these cities and Ada County are in disagreement as to where their respective area of impact boundaries should fall. (In short, the cities have more expansive visions of their future growth than does Ada County.)

Does this mean that UWID must exclude any population growth attributable to these disputed areas from its future needs analysis? How, exactly, should we go about making an adjustment to reflect this? We assume that we need to draw a map of UWID's projected future service area which excludes these areas of conflict, and to base future demands only on areas not so excluded. Are we putting too fine a point on this exercise? May we ignore "de minimus" inclusion of "overlapped areas" in our future service area (as in the case of Star)?

V. Approaches to the growth projections

We are now in the process of quantifying the growth projections on which UWID will base its future needs claims. The statute provides no guidance whatsoever on how this is to be accomplished, other than to say that its future needs should be based on "population and other planning data." Idaho Code § 42-202B(5).

There are a number of ways this might be approached, including uses of UWID historical production data, population trend data, water consumption data, and various interactions among them. We would like to lay out for you our current approach, and make certain that we are progressing in a direction that is consistent with your expectations.

⁴Of course, this does not prohibit actual water service to such an area. Rather, it means that a provider's future needs claim may not be based on projected growth in demand within this particular area.

VI. Integration of ground and surface rights

It is our assumption that the Department will want to look at both the ground water and surface rights components of UWID's portfolio in analyzing the company's current and future needs. We view this as a fairly straightforward exercise whereby ground and surface rights are added together to present a total flow number for the entire portfolio. We raise it here, however, in the event that you may prefer a different approach, or perceive special issues or difficulties in quantification.

VII. Water conservation

UWID has an active program promoting water conservation by its customers. We wish to discuss with you how this program should enter into the analysis of future needs.

VIII. Isolated Areas

As mentioned above, UWID serves two residential developments in Canyon County: Coventry Place and Carriage Hills. These areas are not interconnected to UWID's Ada County system. Since UWID does not currently plan to extend its service area through Meridian and Nampa, it is not clear whether these areas (and others which might be added in Canyon County) will ever be integrated with UWID's Ada County system.

We would appreciate the Department's guidance on how to handle these areas. Should they be reflected in UWID's future needs portfolio? Should UWID's service area description address these areas? Or should we treat them as distinct components which do not figure in at all to UWID's future needs application?

Conclusion

I appreciate that this letter has been quite a mouthful, and that it will take some time and concentration to hash through each of these issues. We continue to believe, however, that the "up front" effort put into this by both the Department and the company will pay off for all concerned with a carefully reasoned application and, ultimately, a more manageable water rights system. Once again, allow me to thank you and your staff for your help in achieving this goal.

Mr. Karl J. Dreher
September 24, 1999
Page 10

Sincerely,



Christopher H. Meyer

Attachment: Future needs chart (hypothetical)

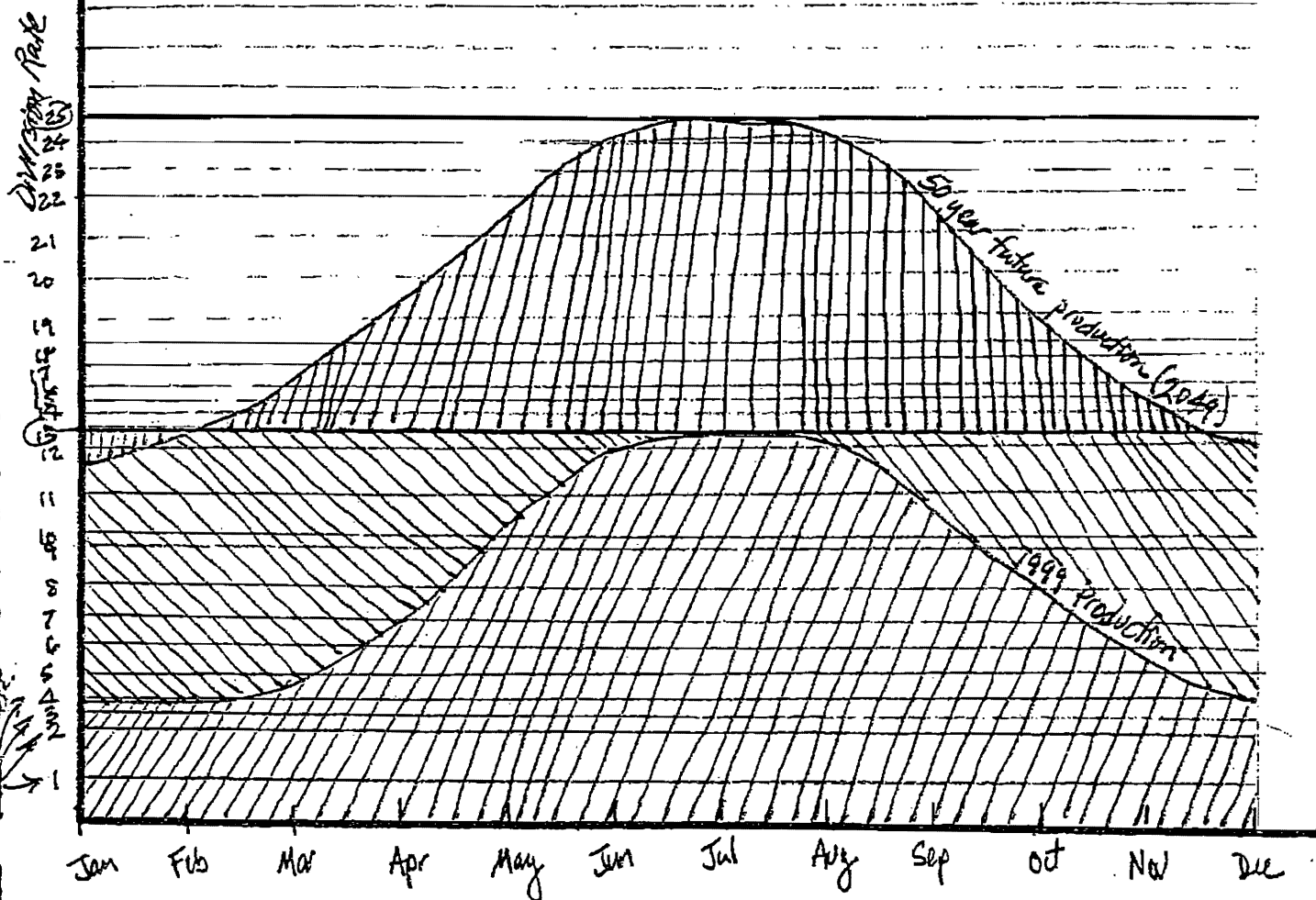
cc: Norm Young, IDWR
Phil Rassier, IDWR
Scott Rhead, UWID
Joe Miller, McDevitt & Miller

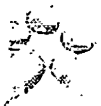
CHM:baf

S:\Clients\30\71\Corr\1999-09-24 CHM Draft Ltr to K.Dreher - Re municipal issues.wpd

APPENDIX A TO CHM LETTER (9-24-99)

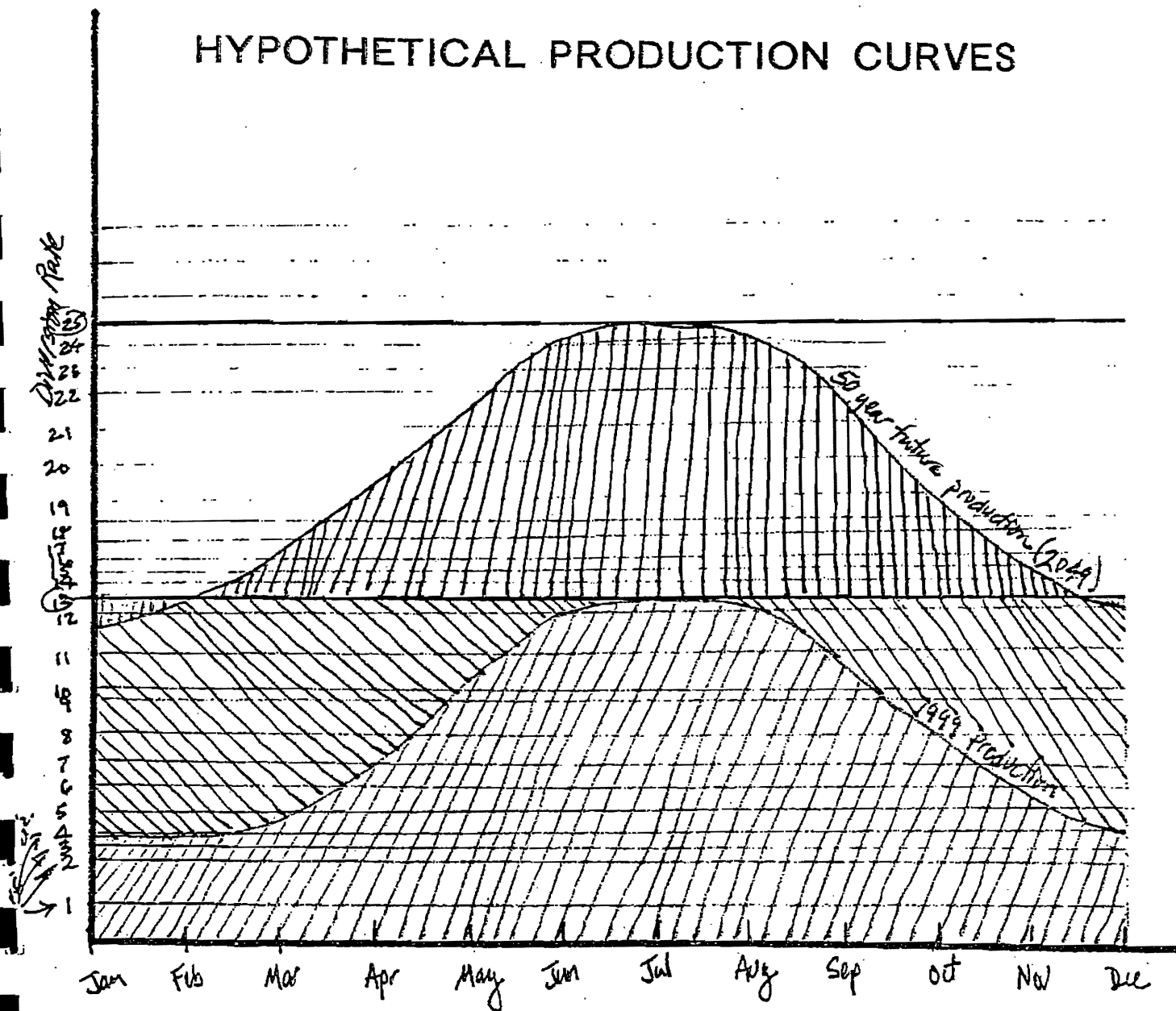
HYPOTHETICAL PRODUCTION CURVES





APPENDIX A TO CHM LETTER (9-24-99)

HYPOTHETICAL PRODUCTION CURVES



GIVENS PURSLEY LLP

LAW OFFICES

277 North 6th Street, Suite 200
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300

DIRECT DIAL: (208) 388-1236
EMAIL: chm@givenspursley.com

Gary G. Allen
Christopher J. Beeson
Michael C. Creamer
Thomas E. Dvorak
Roy Lewis Eiguren
Jeffrey C. Fereday
Richard W. Jankowski
Amanda L. Keating
Karl T. Klein
Franklin G. Lee
David R. Lombardi

Kimberly D. Maloney
John M. Marshall
Kenneth R. McClure
Cynthia A. McEllo
Christopher H. Meyer
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery
Angela K. Nelson
W. Hugh O'Riordan
Kenneth L. Pursley

Virginia L. Stukel
Conley Ward
Stephanie C. Westemeier
Robert B. White

Raymond D. Givens
James A. McClure
OF COUNSEL

October 26, 1999

Mr. Karl J. Dreher
Director
Idaho Department of Water Resources
1301 N. Orchard St.
Statehouse Mail
Boise, ID 83720-9000

Re: Municipal Water Rights
Our File No. 30-71

Dear Mr. Director:

On behalf of United Water Idaho ("UWID" or the "Company"), I would like to thank you very much for the opportunity to meet with you, Norm Young and Phil Rassier last Monday, October 18, 1999, regarding implementation of the Municipal Water Rights Act of 1996. Ed Squires, Don Alloway and I appreciated the good discussion and progress made in ironing out a number of issues. As I mentioned, Scott Rhead of United Water would have participated but was out of town.

As always, your guidance was most helpful on a number of fronts. I thought it would be a good idea to briefly recap where we left things. For simplicity, I will follow the same outline of issues used in my September 24, 1999 letter on behalf of UWID.

I. Flow rate and annual volume dimensions of municipal water rights

We discussed the Department's longstanding practice of quantifying municipal water rights in terms of instantaneous flow rate without a volumetric component (other than the implicit quantity based on year-round operation at peak). You indicated, and we agree, that nothing in the 1996 Act suggests that any departure from this practice is

Mr. Karl J. Dreher
October 26, 1999
Page 2

appropriate.

The effect of this is that when a new water right is first added to a municipal provider's portfolio, it will be used at peak flow only for a few months of the year. As the municipal provider's service demand continues to grow over time, the water right will eventually be put to use year round to serve a steadily growing base demand. This idea of "growing into" a municipal water right is illustrated on the colored Attachment A to my letter to you of September 24, 1999.

On the other hand, as a practical matter, you made it clear that the Department needs realistic information about the current and projected shape of the Company's overall production curve for the agency's planning purposes. We agreed to provide such information.

II. Peak capacity

Our September 24, 1999 letter raised the question of how we measure the peak capacity of the Company's existing water rights. For instance, should the water right be limited to the capacity of each well as installed? Or should it take into account the inherent potential for increasing the capacity?

We did not spend very much time on this subject at our meeting last week. In large part this is because the factual issues are not yet fully developed.¹

In the meantime, we follow the more conservative approach of using the original installed capacity (as proved up, in the case of a licensed right) as the measure of each water right in UWID's current portfolio.

III. Planning horizon

We discussed our intention, at this point, to seek the Department's approval of a planning horizon of at least fifty years. You asked for additional documentation, but seemed generally comfortable with this.

¹For instance, I am advised that the suggestion in my September 24, 1999 letter that the Company incurred additional expense at the time of original drilling in order to accommodate subsequent capacity enhancements may not be accurate.

Mr. Karl J. Dreher

October 26, 1999

Page 3

IV. Overlapping inconsistent comprehensive plans

A. Do we need to map our future service area?

We inquired whether it made sense to require applicants for 1996 Act water rights to map out their projected service area fifty years into the future. (After all, one might ask, isn't this inconsistent with the idea reflected in the statute of a flexible, expanding service area whose boundaries are not delineated?)

You acknowledged that there is indeed some irony in requiring the mapping of precise boundaries fifty years out when it is not required in year one. But you observed that you can not meaningfully evaluate and quantify an application under the 1996 Act without having a clear delineation of the area for which long-term service obligations are to be calculated.

We both noted that any map provided to the Department is no more than a prediction. Moreover, it intentionally excludes areas which are likely to be served, but which may not fit the statute's rules governing conflicting comprehensive plans. Consequently, we agreed to call this fifty-year projection a "planning area" to distinguish it from the current or future "service area".

Fifty years from now, the actual service area will have evolved extensively and may not end up matching the planning area as submitted. This is of no consequence, so long as the water is needed somewhere within the service area. Water rights approved under the 1996 Act may be used anywhere within the provider's evolving service area, whatever that area turns out to include. In other words, the fact that a particular area has been excluded from the "planning area" at the time of application will correspondingly reduce the total quantity of water approved under the 1996 Act. But failure to include an area within the planning area does not in any way restrict the applicant from actually serving the excluded area (then or in the future).

B. Is it the planning horizon of the municipality or the provider?

We identified a semantic drafting problem with the 1996 Act. Section 42-202B(5) refers to "the planning horizon of each municipality within the service area". This does not fit with the definitions in the Act. Municipalities which are not in the water business do not have planning horizon as the term is used in the statute.

Mr. Karl J. Dreher

October 26, 1999

Page 4

By the way, out of curiosity, I went back to my original draft of the bill (dated November 27, 1995) to see how this language compared. Sure enough, the language that you and I were working from refers to "the planning horizon of the municipal provider ...". Who knows how this got changed along the way.² In any event, I feel confident that the switch from "municipal provider" to "municipality" was inadvertent.

The bottom line is that you read this provision the way it was originally intended: requiring that there be no inconsistency between the provider's articulation of its long-term service obligations and the comprehensive plans of each municipality within the area to be served.

C. How do we show "consistency" with comprehensive plans?

We had an interesting, philosophical discussion about the purpose of the section of the 1996 Act which prohibits the inclusion of "areas overlapped by conflicting comprehensive land use plans." I observed that the statute is aimed at prohibiting water hoarding by nearby municipalities each of whom envision growing into the same adjacent area. This is the "Front Range" phenomenon.

In Idaho, with very few exceptions, this problem does not exist. Idaho is blessed with a very effective Local Land Use Planning Act which provides a strong impetus for municipalities to work out their differences, in coordination with planning at the county level. What results, almost always, are precisely negotiated, non-overlapping areas of impact. Thus, conflicts between municipalities in Idaho over conflicting geographical growth projections are relatively few.

Rather, the type of conflict which you must deal with is between competing private municipal providers, or between a private municipal provider and a municipality. Frankly, the statute does not directly address this issue. It says that the Director must deny a 1996 Act water right where comprehensive plans are in conflict. But private providers do not have comprehensive plans. For instance, in Eagle, there are three potential providers but only one comprehensive plan—which says nothing about who

²I recall your changing "generally consistent with" to "not inconsistent with". And I recall your adding the additional sentence: "Reasonably anticipated future needs shall include uses of water within areas overlapped by conflicting comprehensive land use plans." But I do not recall the other wording changes, and am inclined to attribute them to poltergeists within the office of legislative drafting.

Mr. Karl J. Dreher
October 26, 1999
Page 5

will provide water (or how much). The statute does not tell you how to resolve this, or whether it even needs to be resolved.

You indicated at our meeting that, regardless of what the statute says or fails to say, you think the intent of the statute is exclude from the benefit of the 1996 Act any land subject to any planning conflict (including conflicting service claims between private providers). (Of course, the exclusion of such an area from the calculation under the 1996 Act would not prevent a municipal provider from serving that area or any area ultimately approved by the PUC.)

I promised to explore this issue further with United Water to evaluate whether, from a practical perspective, the Company objects to this interpretation of the statute. I will be following up.

In any event, at the risk of stating the obvious, United Water will expect consistent application of such a rule. For instance, United Water will not exclude an area from its "planning area" only to see another entity claim long-term service responsibility and/or water rights for that same area.

D. Areas of impact

We identified two areas in which the areas of impact have not been fully resolved within Ada County: Kuna and Star. You suggested that we leave all disputed rural areas surrounding these cities out of UWID's planning area. We believe that some of these disputes fall outside the statute's "conflicting comprehensive plans" prohibition, but are looking into this further. We certainly do not wish to pick a fight over an academic concern.

V. Approaches to the growth projections

A considerable portion of the meeting was given to a discussion of how we are approaching the quantification of the Company's claim under the 1996 Act. Following extensive discussion and explanation, you seemed to be generally comfortable with our proposed approach.

The basic thrust is this:

Mr. Karl J. Dreher
October 26, 1999
Page 6

1. Determine the current baseline population served by UWID within the planning area today.
2. Project Ada County's population out for fifty years. We have been using Idaho Power data for this. At Phil Rassier's suggestion, we will also look at some other sources.
3. Allocate the proper fraction of the county's year 2050 population to UWID's planning area.
4. Compare the baseline population for the planning area with the fifty-year projection to produce a "growth multiple".
5. Adjust the growth multiple to take into account anticipated changes in:
 - (a) water conservation;
 - (b) lot size;
 - (c) dual irrigation; and
 - (d) family size.
6. Apply the adjusted "growth multiple" to current peak production. For instance, if the adjusted growth multiple is 2.5, and the Company's current peak production is Y gpm, then the sum of our current and long-term needs would be $2.5 \times Y$ gpm.

VI. Integration of ground and surface rights

We did not address this issue, but we think the answer is obvious. We assume that the Department will want both the ground water and surface rights to be evaluated together as part of a comprehensive determination of UWID's service obligations in Ada County.

Mr. Karl J. Dreher
October 26, 1999
Page 7

VII. Water conservation

As mentioned above in item V.5(a), this is a factor which would be reflected in the adjusted growth multiple.

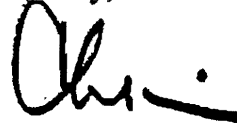
VIII. Isolated Areas

You and I agreed, at least for the time being, that it made sense to exclude UWID's two small and non-interconnected Canyon County operations from the Company's long-term service analysis under the 1996 Act. If and when UWID develops a larger footprint in Canyon County with a more tightly integrated delivery system, it may seek to readdress the issue. For instance, the Company may always approach the Department in the future with a separate application under the 1996 Act to serve its Canyon County operations and/or a revised comprehensive application to serve both Ada and Canyon Counties.

Conclusion

Once again, allow me to thank you on behalf of United Water Idaho for the time and effort you and your staff have put into this undertaking. As a result, we are making real progress in developing the comprehensive transfer application which will enable UWID to bring all its water rights within the 1996 Act. As we discussed, we anticipated the transfer application being followed (or accompanied) by an application for a new ground water right to fill out UWID's long-term service obligation.

Sincerely,



Christopher H. Meyer

cc: Norm Young, IDWR
Phil Rassier, IDWR
William C. Linam, UWID
Scott Rhead, UWID
Ed Squires, UWID
Joe Miller, McDevitt & Miller

CHM:baf

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.

PIONEER IRRIGATION DISTRICT AND
SETTLERS IRRIGATION DISTRICT'S
SECOND SET OF DISCOVERY REQUESTS
TO UNITED WATER IDAHO, INC.

YOU WILL PLEASE TAKE NOTICE that Protestants Pioneer Irrigation District
and Settlers Irrigation District (collectively the "Districts") hereby require Applicant United
Water Idaho, Inc. ("UWID") to answer the Districts' First Set of Interrogatories, Requests for
Admission, and Requests for Production within fifteen days from the date of service herein,
pursuant to the Rules of Procedure of the Idaho Department of Water Resources, Rules 521

FILE COPY

through 528, Idaho Rules of Civil Procedure 26(a), 26(b), 33(a), 34(a), and 36(a), and the Hearing Officer's Third PreHearing Order and Notice of PreHearing Conference.

GENERAL INSTRUCTIONS

A. Definitions and General Instructions

1. The term "you" or "your" refers to United Water Idaho, Inc. ("UWID"), its officers, directors, agents, employees, representatives, investigators, consultants, and attorneys.
2. The term "Application" or "TMAP" as used in this discovery refers to the Integrated Municipal Application Package filed by UWID with the Idaho Department of Water Resources.
3. The term "document" shall mean any kind of written, printed, typed, graphic, electronic, computerized or photographic matter of any kind or nature including, but not limited to, statements, however, produced or reproduced, and all mechanical and electronic sound recordings and written transcripts thereof, however produced or reproduced, whether in your control or not, and including without limitation, originals, all file copies, all other copies no matter how or by whom prepared, and all drafts of such documents whether used or not.
4. The term "identify" when used with respect to a document, or the description or identification of a document, shall be deemed to request the nature and subject matter of the document; the date thereof; the title or name thereof; the name, address and job title or job capacity of the person who prepared it or who has knowledge of it; the name, address, and job title or job capacity of the recipient thereof; and the Bates number or other identifier as applicable.

5. The term "identify" when used with respect to a person, shall be deemed to request the person's full name, job title, last known business and residence addresses, and respective telephone numbers.

6. The term "identify" when used with respect to oral communications, shall be deemed to request whether said communication was in person or by telephone, an identification of each person who participated in or heard any part of said communication, and the substance of what was said by each person who participated in said communication.

7. In answering these interrogatories and requests for production, please furnish all information which is known or available to you including, but not limited to, information known of your personal knowledge, information obtainable by the diligent search of sources of information available to you, and all information in the possession of, or available to, any person or persons acting on your behalf or under your control or under the control of any of your attorneys, agents, employees, experts, independent contractors, investigators, representatives, or others with whom you have a relationship and from whom you are capable of deriving information, documents, or material.

8. Any interrogatory which may be answered in whole or in part by reference to documents is deemed to request those responsive documents.

9. If any documents requested by a Request for Production or which should be produced in response to an interrogatory cannot be produced in full, you are required to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you have concerning the unproduced portions.

10. If any of the documents requested herein were at one time in existence, but are no longer in existence, please so state, specifying for each document:

- (a) The type of document;
- (b) The types of information contained therein;
- (c) The date upon which it ceased to exist;
- (d) The circumstances under which it ceased to exist;
- (e) The identity of all persons having knowledge of the circumstances under which it ceased to exist; and
- (f) The identity of each person having knowledge of the contents thereof.

11. With respect to any documents called for by this request but withheld due to any claim or privilege, list for each such document:

- (a) The paragraph to which the document is otherwise responsive;
- (b) Its title and general subject matter;
- (c) Its date;
- (d) The name(s) and title(s) of its author or preparer;
- (e) The name(s) and title(s) of the person(s) for whom it was prepared, and all persons to whom it was sent or shown; and
- (f) The nature of the privilege claimed.

12. If you assert a privilege as to a portion of any category of the materials described, please produce the remainder of that category as to which you do not assert a privilege.

13. Please produce the documents and things for inspection and copying on the 7th day of August 2003, at 10:00 a.m. at the law offices of Moffatt, Thomas, Barrett, Rock & Fields, Chtd., 101 S. Capitol Blvd., 10th Floor, Boise, Idaho, 83702, or at such other time and place as may be mutually agreed by the parties. Inspection and copying will be conducted by the undersigned attorneys or their agents and will continue from time to time and from day to day until completed.

14. Each document requested to be produced shall be provided in a manner which preserves its sequential relationship with other documents being produced and shall include the file folder and folder tabs associated with its file location. If the file location is not apparent on the folder and tabs, the document shall be accompanied by information indicating from where the file was taken and such additional information as is necessary to enable the Applicants to determine the document's original pre-production location.

B. Instructions Regarding Supplementation

1. These interrogatories, requests for admission and requests for production are deemed continuing in nature, and your responses are to be supplemented as additional information and knowledge becomes available or known to you as provided in Rule 26(e) of the Idaho Rules of Civil Procedure.

2. Where knowledge or information in the possession of a party is requested, such request includes information and knowledge either in your possession, under your control, within your dominion, or available to you or which becomes subject to your possession, control, or dominion regardless of whether this information is in your personal possession or is possessed by your agents, attorneys, servants, employees, independent contractors, representatives,

insureds, or others with whom you have a relationship, and from whom you are capable of deriving information, documents, or materials.

**INTERROGATORIES, REQUESTS FOR ADMISSION
AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

INTERROGATORY NO. 3: Please identify the lay witnesses who you may call to testify at the hearing in this matter.

INTERROGATORY NO. 4: Please identify the expert witnesses who you may call to testify at the hearing in this matter. In addition to the identity of any expert witness who you may call, the Districts seek:

- (a) The subject matter upon which each expert is expected to testify;
- (b) The substance of the opinions to which each expert is expected to testify;
- (c) The underlying facts and data upon which each expert opinion is based.

REQUEST FOR PRODUCTION NO. 35: Please produce the curriculum vitae of each person identified in your response to Interrogatory Number 4.

REQUEST FOR PRODUCTION NO. 36: Please produce each and every document upon which you relied in preparing your response to Interrogatory Number 13.

REQUEST FOR PRODUCTION NO. 37: Please produce each and every exhibit which you may utilize or rely upon at the hearing in this matter.

DATED this 23rd day of July 2003.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Angela Schen Kaufmann for
Scott L. Campbell - Of the Firm

By Angela Schaefer Kaufmann
Angela Schaefer Kaufmann - Of the Firm
Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of July 2003, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S SECOND SET OF DISCOVERY REQUESTS TO UNITED WATER IDAHO, INC.** 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Peter Anderson, Hearing Officer
729 W. Braemere Road
Boise, ID 83702

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

United Water Idaho Inc.
John M. Marshall
Givens Pursley, LLP
PO Box 2720
Boise, ID 83701
Fax: 388-1300

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Nampa & Meridian Irrigation District,
City of Meridian, City of Caldwell, Terteling
Company, and Terteling Trust No. 7
Charles L. Honsinger
Ringert Clark
455 South 3rd Street
PO Box 2773
Boise, ID 83701-2773
Fax: 342-4657

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

City of Boise
Matthew Wilde
Boise City Attorney's Office
PO Box 500
Boise, ID 83701-0500
Fax: 384-4454

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Boise Project Board of Control
Albert P. Barker
Barker Rosholt & Simpson
PO Box 2139
Boise, ID 83701-2139
Fax: 342-4657

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Estate of Eleanor I. Chase
Matt J. Howard
PO Box 190012
Boise, ID 83719
Fax: 333-8409

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Cities of Eagle, Kuna, Middleton & Star and
Star Sewer District
Bruce M. Smith
Tammy A. Zokan
Moore Smith Buxton & Turcke
225 N. 9th Street, Suite 420
Boise, ID 83702
Fax: 331-1202

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Ed Squires
Hydrologic
1002 W. Franklin
Boise, ID 83702-5431
Fax: 342-3100

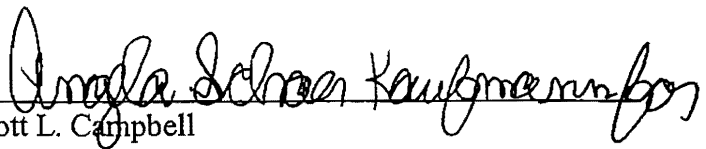
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Robert W. Talboy
Ellsworth Kallas Talboy, PLLC
2402 W. Jefferson Street
Boise, ID 83702
Fax: 345-8945

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

RECEIVED

AUG 07 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.

**PIONEER IRRIGATION DISTRICT AND
SETTLERS IRRIGATION DISTRICT'S THIRD
SET OF DISCOVERY REQUESTS TO UNITED
WATER IDAHO, INC.**

YOU WILL PLEASE TAKE NOTICE that Protestants Pioneer Irrigation District
and Settlers Irrigation District (collectively the "Districts") hereby require Applicant United
Water Idaho, Inc. ("UWID") to answer the Districts' Third Set of Interrogatories, Requests for
Admission, and Requests for Production within fifteen days from the date of service herein,
pursuant to the Rules of Procedure of the Idaho Department of Water Resources, Rules 521
through 528, Idaho Rules of Civil Procedure 26(a), 26(b), 33(a), 34(a), and 36(a), and the
Hearing Officer's Third PreHearing Order and Notice of PreHearing Conference.

GENERAL INSTRUCTIONS

A. Definitions and General Instruction

1. The term “you” or “your” refers to United Water Idaho, Inc. (“UWID”), its officers, directors, agents, employees, representatives, investigators, consultants, and attorneys.

2. The term “Application” or “IMAP” as used in this discovery refers to the Integrated Municipal Application Package filed by UWID with the Idaho Department of Water Resources.

3. The term “document” shall mean any kind of written, printed, typed, graphic, electronic, computerized or photographic matter of any kind or nature including, but not limited to, statements, however, produced or reproduced, and all mechanical and electronic sound recordings and written transcripts thereof, however produced or reproduced, whether in your control or not, and including without limitation, originals, all file copies, all other copies no matter how or by whom prepared, and all drafts of such documents whether used or not.

4. The term “identify” when used with respect to a document, or the description or identification of a document, shall be deemed to request the nature and subject matter of the document; the date thereof; the title or name thereof; the name, address and job title or job capacity of the person who prepared it or who has knowledge of it; the name, address, and job title or job capacity of the recipient thereof; and the Bates number or other identifier as applicable.

5. The term “identify” when used with respect to a person, shall be deemed to request the person’s full name, job title, last known business and residence addresses, and respective telephone numbers.

6. The term “identify” when used with respect to oral communications, shall be deemed to request whether said communication was in person or by telephone, an

identification of each person who participated in or heard any part of said communication, and the substance of what was said by each person who participated in said communication.

7. In answering these interrogatories and requests for production, please furnish all information which is known or available to you including, but not limited to, information known of your personal knowledge, information obtainable by the diligent search of sources of information available to you, and all information in the possession of, or available to, any person or persons acting on your behalf or under your control or under the control of any of your attorneys, agents, employees, experts, independent contractors, investigators, representatives, or others with whom you have a relationship and from whom you are capable of deriving information, documents, or material.

8. Any interrogatory which may be answered in whole or in part by reference to documents is deemed to request those responsive documents.

9. If any documents requested by a Request for Production or which should be produced in response to an interrogatory cannot be produced in full, you are required to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you have concerning the unproduced portions.

10. If any of the documents requested herein were at one time in existence, but are no longer in existence, please so state, specifying for each document:

- (a) The type of document;
- (b) The types of information contained therein;
- (c) The date upon which it ceased to exist;
- (d) The circumstances under which it ceased to exist;

(e) The identity of all persons having knowledge of the circumstances under which it ceased to exist; and

(f) The identity of each person having knowledge of the contents thereof.

11. With respect to any documents called for by this request but withheld due to any claim or privilege, list for each such document:

(a) The paragraph to which the document is otherwise responsive;

(b) Its title and general subject matter;

(c) Its date;

(d) The name(s) and title(s) of its author or preparer;

(e) The name(s) and title(s) of the person(s) for whom it was prepared, and all persons to whom it was sent or shown; and

(f) The nature of the privilege claimed.

12. If you assert a privilege as to a portion of any category of the materials described, please produce the remainder of that category as to which you do not assert a privilege.

13. Please produce the documents and things for inspection and copying on the 21st day of August 2003, at 10:00 a.m. at the law offices of MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., 101 S. Capitol Blvd., 10th Floor, Boise, Idaho, 83702, or at such other time and place as may be mutually agreed by the parties. Inspection and copying will be conducted by the undersigned attorneys or their agents and will continue from time to time and from day to day until completed.

14. Each document requested to be produced shall be provided in a manner which preserves its sequential relationship with other documents being produced and shall include the file folder and folder tabs associated with its file location. If the file location is not apparent on the folder and tabs, the document shall be accompanied by information indicating from where the file was taken and such additional information as is necessary to enable the Applicants to determine the document's original pre-production location.

B. Instructions Regarding Supplementation

1. These interrogatories, requests for admission and requests for production are deemed continuing in nature, and your responses are to be supplemented as additional information and knowledge becomes available or known to you as provided in Rule 26(e) of the Idaho Rules of Civil Procedure.

2. Where knowledge or information in the possession of a party is requested, such request includes information and knowledge either in your possession, under your control, within your dominion, or available to you or which becomes subject to your possession, control, or dominion regardless of whether this information is in your personal possession or is possessed by your agents, attorneys, servants, employees, independent contractors, representatives, insureds, or others with whom you have a relationship, and from whom you are capable of deriving information, documents, or materials.

INTERROGATORIES, REQUESTS FOR ADMISSION, AND REQUESTS FOR PRODUCTION OF DOCUMENTS

INTERROGATORY NO. 4: Please identify each well which is included as a point of diversion in the IMAP. By "identify," the Districts request that you provide, for each well:

- (a) the exact location of the well, by metes and bounds legal description;

- (b) the water right number (s) with which the well is licensed or associated, assuming that the points of diversion within the IMAP are not integrated;
- (c) the "name," if any, attributed to the well.

REQUEST FOR PRODUCTION NUMBER 38: For each well included as a point of diversion in the IMAP, please produce all well construction information, included but not limited to well drillers reports, well construction information, and/or well completion logs.

REQUEST FOR PRODUCTION NUMBER 39: Please identify each and every piezometer test area or monitor well drilled in conjunction with a well included as a point of diversion in the IMAP. By "identify," the Districts request that you provide the metes and bounds legal description for the location of each piezometer test area or monitor well.

REQUEST FOR PRODUCTION NUMBER 40: For each well included as a point of diversion in the IMAP, please provide the pumping records for each well.

REQUEST FOR PRODUCTION NUMBER 41: For each well included as a point of diversion in the IMAP, please provide the electrical records for each well and/or its associated pump.

REQUEST FOR PRODUCTION NUMBER 42: For each well included as a point of diversion in the IMAP, please provide the size and horse power of each pump for each well.

REQUEST FOR PRODUCTION NUMBER 43: For each well included as a point of diversion in the IMAP, please provide the diameter of the discharge pipe for each pump.

INTERROGATORY NUMBER 5: Please describe and quantify the financial impact on UWID which is likely to result if the IMAP is approved.

INTERROGATORY NUMBER 6: Please describe and quantify the financial impact on UWID which is likely to result if the IMAP is denied.

INTERROGATORY NUMBER 7: Please identify each and every well owned by UWID from which water is no longer diverted. By the word "identify," the Districts request that you provide the metes and bounds legal description as well as any "popular name."

INTERROGATORY NUMBER 8: For each and every well identified in your response to Interrogatory Number 7, please state what happened to the water rights associated with each well (*i.e.*, was the right abandoned, declared forfeited, transferred, etc.).

DATED this 6th day of August 2003.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August 2003, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S THIRD SET OF DISCOVERY REQUESTS TO UNITED WATER IDAHO, INC.** to be served by the method indicated below, and addressed to the following:

Director	☒ U.S. Mail, Postage Prepaid
Idaho Department of Water Resources	☐ Hand Delivered
1301 N. Orchard Street	☐ Overnight Mail
PO Box 83720	☐ Facsimile
Boise, ID 83720	
Fax: 327-5400	

Peter Anderson, Hearing Officer	☒ U.S. Mail, Postage Prepaid
729 W. Braemere Road	☐ Hand Delivered
Boise, ID 83702	☐ Overnight Mail
	☐ Facsimile

Gary L. Spackman, Regional Manager	☒ U.S. Mail, Postage Prepaid
Idaho Department of Water Resources	☐ Hand Delivered
Western Region Office	☐ Overnight Mail
2735 Airport Way	☐ Facsimile
Boise, ID 83705	
Fax: 334-2348	

United Water Idaho Inc.	☒ U.S. Mail, Postage Prepaid
John M. Marshall	☐ Hand Delivered
Givens Pursley, LLP	☐ Overnight Mail
PO Box 2720	☐ Facsimile
Boise, ID 83701	
Fax: 388-1300	

Nampa & Meridian Irrigation District,	☒ U.S. Mail, Postage Prepaid
City of Meridian, City of Caldwell, Terteling	☐ Hand Delivered
Company, and Terteling Trust No. 7	☐ Overnight Mail
Charles L. Honsinger	☐ Facsimile
Ringert Clark	
455 South 3rd Street	
PO Box 2773	
Boise, ID 83701-2773	
Fax: 342-4657	

City of Boise
Matthew Wilde
Boise City Attorney's Office
PO Box 500
Boise, ID 83701-0500
Fax: 384-4454

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Boise Project Board of Control
Albert P. Barker
Barker Rosholt & Simpson
PO Box 2139
Boise, ID 83701-2139
Fax: 342-4657

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Estate of Eleanor I. Chase
Matt J. Howard
PO Box 190012
Boise, ID 83719
Fax: 333-8409

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Cities of Eagle, Kuna, Middleton & Star and
Star Sewer District
Bruce M. Smith
Tammy A. Zokan
Moore Smith Buxton & Turcke
225 N. 9th Street, Suite 420
Boise, ID 83702
Fax: 331-1202

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Ed Squires
Hydrologic
1002 W. Franklin
Boise, ID 83702-5431
Fax: 342-3100

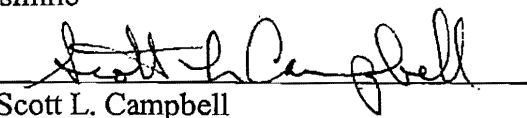
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Robert W. Talboy
Ellsworth Kallas Talboy, PLLC
2402 W. Jefferson Street
Boise, ID 83702
Fax: 345-8945

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

By 
Scott L. Campbell

RECEIVED

AUG 02 2003

MOFFATT THOMAS BARRETT
ROCK & FIELDS

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: chrmeyer@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

**UWID'S RESPONSES TO PIONEER
IRRIGATION DISTRICT AND SETTLERS
IRRIGATION DISTRICT'S FIRST SET OF
DISCOVERY REQUESTS TO UNITED
WATER IDAHO INC.**

Applicant United Water Idaho Inc. ("United Water" or "UWID"), hereby submits the following responses to Pioneer Irrigation District and Settlers Irrigation District's First Set of Discovery Requests to United Water Idaho Inc.

PRELIMINARY STATEMENT

United Water has used its best efforts in conducting a thorough investigation of its records in an effort to comply with the Irrigation Districts' discovery requests. United Water is conducting an ongoing factual investigation into the issues of the pending action, however, and may discover additional matters. In the event that United Water discovers additional information

**UWID'S RESPONSES TO PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION
DISTRICT'S FIRST SET OF DISCOVERY REQUESTS TO UNITED WATER IDAHO INC.—**

S:\CLIENTS\30471\UWID Response to Pioneer & Settlers 1st Requests.DOC

Exhibit D

relevant to these requests, it will endeavor to provide that to the Irrigation Districts in a timely manner.

United Water assumes the Irrigation Districts do not seek confidential information protected by a privilege. To the extent that the Irrigation Districts are requesting privileged information, United Water objects. These responses do not include any such confidential material.

United Water has made a good faith attempt to make these responses as informative as possible. However, United Water does not waive any objections it may have to the production and/or admissibility of any matter following.

REQUEST FOR ADMISSION NO. 1: Please admit that you have conducted no well interference studies and/or data gathering which you may use, in whole or in part, to support the IMAP.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Denied.

REQUEST FOR PRODUCTION NO. 1: If your response to Request for Admission Number 1 is anything other than an unqualified admission, please provide a copy of each and every well interference study and/or data gathering which you have conducted which you may use, in whole or in part, to support the IMAP. By this request for production, the Districts seek a copy of the study methodology, raw data, and any reports generated as a result of the study.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: United Water has not performed any specific study regarding well interference for the IMAP. However, there is voluminous information at United Water in the form of raw data and reports concerning well interference issues. We have previously provided you with United Water's well production

reports for the years 1935 through 2002. If you would like to make an appointment to inspect additional documents at United Water, please call us to arrange a time.

REQUEST FOR ADMISSION NO. 2: Please admit that you will rely on no well interference studies or data, whether in whole or in part, to support the IMAP.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Denied.

REQUEST FOR PRODUCTION NO. 2: If your response to Request for Admission Number 2 is anything other than an unqualified admission, please provide a copy of each and every well interference study or data set upon which you will rely, whether in whole or in part, to support the IMAP. By this request for production, the Districts seek a copy of the study methodology, raw data, and any report generated as a result of the study.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: United Water has not yet determined what evidence it will present at the hearing in this matter to support the IMAP. While United Water has not performed any specific study regarding well interference for the IMAP, it has voluminous information at United Water in the form of raw data and reports concerning well interference issues. We have previously provided you with United Water's well production reports for the years 1935 through 2002. If you would like to make an appointment to inspect additional documents at United Water, please call us to arrange a time.

REQUEST FOR ADMISSION NO. 3: Please admit that you have conducted no studies and/or data gathering regarding the effect of the IMAP, if approved, in whole or in part, on groundwater supplies.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Denied.

REQUEST FOR PRODUCTION NO. 3: If your response to Request for Admission Number 3 is anything other than an unqualified admission, please provide a copy of each and

every study or data set which you have conducted regarding the effect of the IMAP on groundwater supplies. By this request for production, the Districts seek a copy of the study methodology, raw data, and any reports generated as a result of the study.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3: United Water has voluminous information at United Water in the form of raw data and reports concerning the effects of the IMAP on ground water supplies. We have previously provided you with United Water's well production reports for the years 1935 through 2002. If you would like to make an appointment to inspect additional documents at United Water, please call us to arrange a time.

REQUEST FOR ADMISSION NO. 4: Please admit that you have conducted no studies regarding the effect of the IMAP, if approved, in whole or in part, on surface water supplies.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Denied.

REQUEST FOR PRODUCTION NO. 4: If your response to Request for Admission Number 4 is anything other than an unqualified admission, please provide a copy of each and every study or data set which you have conducted regarding the effect of the IMAP on surface water supplies. By this request for production, the Districts seek a copy of the study methodology, raw data, and any report generated as a result of the study.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4: United Water has voluminous information at United Water in the form of raw data and reports concerning the effects of the IMAP on surface water supplies. We have previously provided you with United Water's well production reports for the years 1935 through 2002. If you would like to make an appointment to inspect additional documents at United Water, please call us to arrange a time.

REQUEST FOR ADMISSION NO. 5: Please admit that you will rely on no studies or data regarding the effect of the IMAP on surface water supplies, whether in whole or in part, to support the IMAP.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: Denied.

REQUEST FOR PRODUCTION NO. 5: If your response to Request for Admission Number 5 is anything other than an unqualified admission, please provide a copy of each and every well study or data set regarding the effects of the IMAP on surface water supplies, upon which you will rely, whether in whole or in part, to support the IMAP. By this request for production, the Districts seek a copy of the study methodology, raw data, and any reports generated as a result of the study.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5: United Water has voluminous information at United Water in the form of raw data and reports concerning the effects of the IMAP on ground water supplies. We have previously provided you with United Water's well production reports for the years 1935 through 2002. If you would like to make an appointment to inspect additional documents at United Water, please call us to arrange a time.

REQUEST FOR ADMISSION NO. 6: Please admit that you possess no documents which were used or prepared to analyze the "Stepwise Function Exercise" referenced at page 6 of the September 1, 1997 memo attached hereto as Exhibit A.

RESPONSE TO REQUEST FOR ADMISSION NO. 6: Denied.

REQUEST FOR PRODUCTION NO. 6: If your response to Request for Admission Number 6 is anything other than an unqualified admission, please provide each and every document which was used or prepared to analyze the "Stepwise Function Exercise."

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: As indicated to you previously, Ed Squires directed the preliminary exploration of the “step-wise function” when he was employed by the United Water. Mr. Squires is no longer employed by United Water and has been retained by other protestants in this matter. We are unaware of what documents Mr. Squires used or prepared to analyze the “stepwise function exercise.” In a February 6, 2003 letter, we provided you with information compiled by Ed Squires. We believe he used these documents as part of his preliminary analysis of the stepwise function.

REQUEST FOR PRODUCTION NO. 7: Please produce a list of all wells which were or are “replaced” wells, as that term is used on page 4 of the Memorandum to Ed Squires from Jeffrey C. Fereday and Christopher H. Meyer, attached hereto as Exhibit A.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: We know of no such list.

REQUEST FOR PRODUCTION NO. 8: Please produce copies of “the historical production data for comparison with water right priority dates as suggested by Dave Tuthill” identified in the memorandum from Edward Squires to Norman Young, dated October 9, 1997, attached hereto as Exhibit B.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8: We have previously responded to this request through informal information exchanges. United Water letters dated January 6, 7, 17, 20 and 30, 2003 include attachments concerning UWID’s production. We provided further responsive documentation in a February 6, 2003 letter.

REQUEST FOR PRODUCTION NO. 9: Please produce copies of the “maps which expressly show that UWID is now serving as far away as Nampa and beyond,” referenced in the January 19, 1999 memorandum from Edward Squires to Steve Lester, attached hereto as Exhibit C. By this request, the Districts seek copies of those specific maps.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9: Objection. The water rights associated with these wells have been withdrawn from the IMAP. Consequently, this request calls for information that is neither relevant to the IMAP nor reasonably calculated to lead to the discovery of admissible evidence. Further, United Water Idaho is not aware of which maps were referred to in the letter you identify, which was written several years ago by a former United Water employee. The map produced by the Bureau of Reclamation and provided to all the protestants identifies locations of wells owned and operated by United Water in the area identified in your request.

REQUEST FOR PRODUCTION NO. 10: Please produce a copy of the “draft chart . . . showing on a well-by-well basis how much additional capacity is achievable, and what steps would be required to achieve it,” referenced at page 4 in correspondence from Christopher H. Meyer to Karl J. Dreher, dated September 24, 1999, attached hereto as Exhibit D. By this request, the Districts specifically seek the draft chart referenced in that correspondence.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10: We have not been able to locate any such chart.

REQUEST FOR PRODUCTION NO. 11: Please provide copies of the information provided to IDWR in response to its request for “realistic information about the current and projected shape of the Company’s overall production curve for the agency’s planning purposes,” referenced in correspondence from Christopher H. Meyer to Karl J. Dreher, dated October 26, 1999, at page 2, attached hereto as Exhibit E. By this request, the Districts specifically seek the information which was provided in response to IDWR’s request.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11: To the best of our knowledge, United Water never provided any such information to IDWR.

REQUEST FOR ADMISSION NUMBER 7: Please admit that you have no information to verify the elements of beneficial use rights numbered 63-04015, 63-04395, 63-04414, 63-44254, and 63-04752.

RESPONSE TO REQUEST FOR ADMISSION NUMBER 7: Denied.

REQUEST FOR PRODUCTION NO. 12: If your response to Request for Admission Number 7 is anything other than an unqualified admission, please produce each and every document which serves to verify any or all of the elements for any or all of the water rights listed in Request for Admission Number 7.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12: We have previously provided you with well-by-well production documents. See United Water letters dated January 17, 20 and 30 and February 20, 2003.

REQUEST FOR ADMISSION NO. 8: Please admit that the report entitled *United Water Idaho—Water System Master Plan* is the only document which describes the improvements which have been made, are in the process of being made, or will be made to UWID's system to accommodate future needs above current demand.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: Denied.

REQUEST FOR PRODUCTION NO. 13: If your response to Request for Admission Number 8 is anything other than an unqualified admission, please produce each and every document which supports your response to Request for Admission Number 8.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13: As we indicated in our February 6, 2003 letter concerning your informal requests for information, United Water has voluminous and non-reproducible documents that pertain to the past, present and future

improvements to its system. If you care to inspect these documents, please contact us to arrange a time.

REQUEST FOR ADMISSION NO. 9: Please admit that the report entitled *United Water Idaho—Water System Master Plan* is the only document which describes the improvements which have been made, are in the process of being made, or will be made to UWID's system to accommodate the gap between UWID's current demand and its "paper rights."

RESPONSE TO REQUEST FOR ADMISSION NO. 9: Objection. This Request for Admission is vague and ambiguous. United Water does not know what Pioneer and Settlers mean by the phrase "accommodate the gap between UWID's current demand and its 'paper rights.'" On this basis, the request is Denied.

REQUEST FOR PRODUCTION NO. 14: If your response to Request for Admission Number 9 is anything other than an unqualified admission, please produce each and every document which supports your response to Request for Admission Number 9.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14: See Response to Request for Admission No. 9.

REQUEST FOR ADMISSION NO. 10: Please admit that the report entitled *United Water Idaho—Water System Master Plan* is the only document which describes the investments made in UWID's system to accommodate future needs above current demand.

RESPONSE TO REQUEST FOR ADMISSION NO. 10: Denied.

REQUEST FOR PRODUCTION NO. 15: If your response to Request for Admission Number 10 is anything other than an unqualified admission, please produce each and every document which supports your response to Request for Admission Number 10.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15: See Response to Request for Production No. 13.

REQUEST FOR ADMISSION NO. 11: Please admit that the report entitled *United Water Idaho—Water System Master Plan* is the only document which describes the investments made in UWID's system to accommodate the gap between UWID's current demand and its "paper rights."

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Objection. This Request for Admission is vague and ambiguous. United Water does not know what Pioneer and Settlers mean by the phrase "accommodate the gap between UWID's current demand and its 'paper rights.'" On this basis, the request is Denied.

REQUEST FOR PRODUCTION NO. 16: If your response to Request for Admission Number 11 is anything other than an unqualified admission, please produce each and every document which supports your response to Request for Admission Number 11.

RESPONSE TO REQUEST FOR PRODUCTION NO. 16: See Response to Request for Admission No. 11.

REQUEST FOR PRODUCTION NO. 17: Please produce all planning documents regarding the interconnection of UWID wells, surface diversions, mains, treatment facilities, storage and distribution systems and surface area.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17: See Response to Request for Production No. 13.

REQUEST FOR ADMISSION NO. 12: Please admit that Boise Water Corporation's Report for Water Conservation Plan, August 1993, and the report entitled *United Water*

Idaho-Water System Master Plan, are the only documents which contain the water conservation plans of UWID.

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Denied.

REQUEST FOR PRODUCTION NO. 18: If your response to Request for Admission Number 12 is anything other than an unqualified admission, please produce each and every document which contains, in whole or in part, the water conservation plans of UWID.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18: Additional documents concerning conservation plans may be reviewed at United Water Idaho Inc. If you care to inspect these documents, please contact us to arrange a time.

REQUEST FOR ADMISSION NO. 13: Please admit that Boise Water Corporation's Report for Water Conservation Plan, August 1993, and the report entitled *United Water Idaho-Water System Master Plan*, are the only documents which contain studies comparing water usage by UWID customers with other western cities.

RESPONSE TO REQUEST FOR ADMISSION NO. 13: United Water is without sufficient information to answer this request and therefore denies the request.

REQUEST FOR PRODUCTION NO. 19: If your response to Request for Admission Number 13 is anything other than an unqualified admission, please produce each and every document which contains, in whole or in part, the water conservation plans of UWID.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19: United Water is not currently aware of any other responsive documents in its possession. However, there may be other documents that containing studies compare water usage by UWID customers with other western cities.

REQUEST FOR PRODUCTION NO. 20: Please provide a complete copy of Boise

Water Corporation's Report for Water Conservation Plan, August 1993.

RESPONSE TO REQUEST FOR PRODUCTION NO. 20: As we indicated in a

January 20, 2003 letter, you are welcome to make a copy of this document at our offices.

REQUEST FOR PRODUCTION NO. 21: Please provide a complete copy of the

report entitled *United Water Idaho-Water System Master Plan*.

RESPONSE TO REQUEST FOR PRODUCTION NO 21: As we indicated to you in

a February 6, 2003 letter, this document contains sensitive information that cannot be released.

You are welcome to review the Master Plan as often as you like at United Water Idaho Inc. or at Givens Pursley LLP upon signing a confidentiality agreement.

REQUEST FOR ADMISSION NO. 14: Please admit that the well titled "Barber #1"

did not produce any water from 1935 through 2002.

RESPONSE TO REQUEST FOR ADMISSION NO. 14: Denied.

INTERROGATORY NO. 1: If your response to Request for Admission Number 14 is

anything other than an unqualified admission, please set forth each and every fact of which you are aware which supports or tends to support, in whole or in part, your response to Request for Admission Number 14.

RESPONSE TO INTERROGATORY NO. 1: On January 17, 2003 we sent you a

letter attaching well production records for 1997 through 2001. On January 20, 2003 we sent another letter attaching well production records for 2002. These records indicate the Barber #1 well was pumped during 2000 through 2002. United Water acquired the system including the Barber #1 in 2000. United Water is checking its records to determine whether it has production records from the former owner.

REQUEST FOR ADMISSION NO. 15: Please admit that the well known as Barber #1 is one of the licensed points of diversion for water right number 63-04395.

RESPONSE TO REQUEST FOR ADMISSION NO. 15: Denied.

REQUEST FOR PRODUCTION NO. 22: If your response to Request for Admission Number 15 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 15.

RESPONSE TO REQUEST FOR PRODUCTION NO. 22: Water right number 63-04395 is not a licensed water right.

REQUEST FOR ADMISSION NO. 16: Please admit that the well known as Barber #1 is one of the licensed points of diversion for water right number 63-08385.

RESPONSE TO REQUEST FOR ADMISSION NO. 16: Admit.

REQUEST FOR PRODUCTION NO. 23: If your response to Request for Admission Number 16 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 16.

RESPONSE TO REQUEST FOR PRODUCTION NO. 23: See Request for Admission No. 16.

REQUEST FOR ADMISSION NO. 17: Please admit that the well known as Barber #1 is one of the licensed points of diversion for water right number 63-10150.

RESPONSE TO REQUEST FOR ADMISSION NO. 17: Admit.

REQUEST FOR PRODUCTION NO. 24: If your response to Request for Admission Number 17 is anything other than an unqualified admission, please provide each and every

document which supports or tends to support, in whole or in part, your response to Request for Admission Number 17.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24: See Request for Admission No. 17.

REQUEST FOR ADMISSION NO. 18: Please admit that the well known as Barber #1 is one of the licensed points of diversion for water right number 63-12464.

RESPONSE TO REQUEST FOR ADMISSION NO. 18: Admit.

REQUEST FOR PRODUCTION NO. 25: If your response to Request for Admission Number 18 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 18.

RESPONSE TO REQUEST FOR PRODUCTION NO. 25: See Request for Admission No. 18.

REQUEST FOR ADMISSION NO. 19: Please admit that the well designated Barber #2 did not produce any water from 1935 through 2002.

RESPONSE TO REQUEST FOR ADMISSION NO. 19: Denied.

INTERROGATORY NO. 2: If your response to Request for Admission Number 19 is anything other than an unqualified admission, please set forth each and every fact of which you are aware which supports or tends to support, in whole or in part, your response to Request for Admission Number 19.

RESPONSE TO INTERROGATORY NO. 2: See Response to Interrogatory No. 1.

REQUEST FOR ADMISSION NO. 20: Please admit that the well known as Barber #2 is one of the licensed points of diversion for water right number 63-10150.

RESPONSE TO REQUEST FOR ADMISSION NO. 20: Admit.

REQUEST FOR PRODUCTION NO. 26: If your response to Request for Admission Number 20 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 20.

RESPONSE TO REQUEST FOR PRODUCTION NO. 26: See Request for Admission No. 20.

REQUEST FOR ADMISSION NO. 21: Please admit that the well known as Barber #2 is one of the licensed points of diversion for water right number 63-12464.

RESPONSE TO REQUEST FOR ADMISSION NO. 21: Admit.

REQUEST FOR PRODUCTION NO. 27: If your response to Request for Admission Number 21 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 21.

RESPONSE TO REQUEST FOR PRODUCTION NO. 27: See Request for Admission No. 21.

REQUEST FOR ADMISSION NO. 22: Please admit that the well known as Brookhollow #1 is one of the licensed points of diversion for water right number 63-08265.

RESPONSE TO REQUEST FOR ADMISSION NO. 22: Admit.

REQUEST FOR PRODUCTION NO. 28: If your response to Request for Admission Number 22 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 22.

RESPONSE TO REQUEST FOR PRODUCTION NO. 28: See Request for

Admission No. 22.

REQUEST FOR ADMISSION NO. 23: Please admit that the well known as Five Mile #2 is one of the licensed points of diversion for water right number 63-07998.

RESPONSE TO REQUEST FOR ADMISSION NO. 23: Admit.

REQUEST FOR PRODUCTION NO. 29: If your response to Request for Admission Number 23 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 23.

RESPONSE TO REQUEST FOR PRODUCTION NO. 29: See Request for Admission No. 23.

REQUEST FOR ADMISSION NO. 24: Please admit that the well known as Foxtail is one of the licensed points of diversion for water right number 63-12334.

RESPONSE TO REQUEST FOR ADMISSION NO. 24: Admit.

REQUEST FOR PRODUCTION NO. 30: If your response to Request for Admission Number 24 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 24.

RESPONSE TO REQUEST FOR PRODUCTION NO. 30: See Request for Admission No. 24.

REQUEST FOR ADMISSION NO. 25: Please admit that the well known as Foxtail is one of the licensed points of diversion for water right number 63-00012.

RESPONSE TO REQUEST FOR ADMISSION NO. 25: Denied.

REQUEST FOR PRODUCTION NO. 31: If your response to Request for Admission Number 25 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 25.

RESPONSE TO REQUEST FOR PRODUCTION NO. 31: United Water believes that water right 63-00012 is a surface water right.

REQUEST FOR ADMISSION NO. 26: Please admit that the well known as Foxtail is one of the licensed points of diversion for water right number 63-12516.

RESPONSE TO REQUEST FOR ADMISSION NO. 26: Admit.

REQUEST FOR PRODUCTION NO. 32: If your response to Request for Admission Number 26 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission No. 26.

RESPONSE TO REQUEST FOR PRODUCTION NO. 32: See Request for Admission No. 26.

REQUEST FOR ADMISSION NO. 27: Please admit that the well known as Lizaso Well is one of the licensed points of diversion for water right number 63-09384.

RESPONSE TO REQUEST FOR ADMISSION NO. 27: Admit.

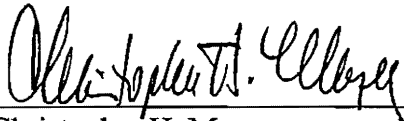
REQUEST FOR PRODUCTION NO. 33: If your response to Request for Admission Number 27 is anything other than an unqualified admission, please provide each and every document which supports or tends to support, in whole or in part, your response to Request for Admission Number 27.

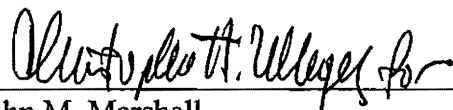
RESPONSE TO REQUEST FOR PRODUCTION NO. 33: See Request for

Admission No. 27

DATED this 19th day of August 2003.

GIVENS PURSLEY LLP

By: 
Christopher H. Meyer

By: 
John M. Marshall

Attorneys for Applicant
United Water Idaho Inc.

VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

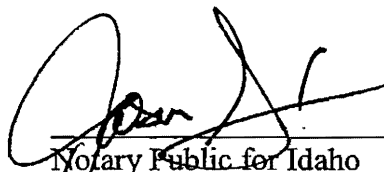
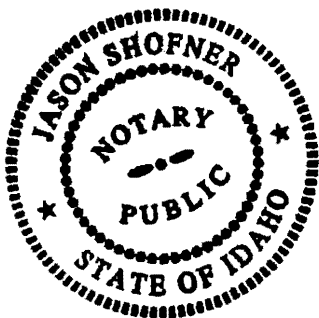
H. SCOTT RHEAD, being first duly sworn upon oath, deposes and states to the best of his knowledge:

That he is the Chief Engineer for Applicant United Water Idaho Inc. in the above captioned action and makes this verification for and on behalf of United Water Idaho Inc., that he has read the foregoing *UWID's Responses to Pioneer Irrigation District and Settlers Irrigation District's First Set of Discovery Requests to United Water Idaho Inc.*, knows the contents thereof, and that the facts therein stated are true and correct to the best of his knowledge and belief.



H. Scott Rhead

Subscribed and sworn to before me this 01 day of August, 2003.



Notary Public for Idaho

Residing at Bose

My Commission Expires 08-01-2008

CERTIFICATE OF SERVICE

I hereby certify that on this 1st 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

☒ 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

Bruce M. Smith, Esq.
Tammy Zokan, Esq.
Moore, Smith, Buxton & Turcke, Chtd.
225 North 9th St., Ste. 420
Boise, ID 83702

☒ 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

☒ 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 + Email
☐ 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

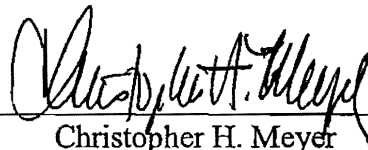
☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Mail

Robert W. Talboy
Ellsworth, Kallas & Talboy, PLLC
2402 West Jefferson Street
Boise, ID 83702

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Mail

Josephine P. Beeman, Esq.
Beeman & Associates PC
409 West Jefferson
Boise, ID 83702-6049

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Mail


Christopher H. Meyer

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.

RECEIVED

AUG 08 2003

Moffatt, Thomas, Bennett Beck and Fields

**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 RESPONSES TO PIONEER
IRRIGATION DISTRICT AND SETTLERS
IRRIGATION DISTRICT'S SECOND SET
OF DISCOVERY REQUESTS TO UNITED
WATER IDAHO INC.**

Applicant United Water Idaho Inc. ("United Water" or "UWID"), hereby submits the following responses to Pioneer Irrigation District and Settlers Irrigation District's Second Set of Discovery Requests to United Water Idaho Inc.

PRELIMINARY STATEMENT

United Water has used its best efforts in conducting a thorough investigation of its records in an effort to comply with the Irrigation Districts' discovery requests. United Water is conducting an ongoing factual investigation into the issues of the pending action, however, and may discover additional matters. In the event that United Water discovers additional information

**UWID'S RESPONSES TO PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION
DISTRICT'S SECOND SET OF DISCOVERY REQUESTS TO UNITED WATER IDAHO INC.—1**

S:\CLIENTS\30171\UWID Response to Pioneer & Settlers 2nd Requests.DOC

Exhibit E

relevant to these requests, it will endeavor to provide that to Irrigation Districts in a timely manner.

United Water assumes the Irrigation Districts do not seek confidential information protected by a privilege. To the extent that the Irrigation Districts are requesting privileged information, United Water objects. These responses do not include any such confidential material.

United Water has made a good faith attempt to make these responses as informative as possible. However, United Water does not waive any objections it may have to the production and/or admissibility of any matter following.

INTERROGATORY NO. 3: Please identify the lay witness who you may call to testify at the hearing in this matter.

RESPONSE TO INTERROGATORY NO. 3:

See United Water's Initial Disclosures dated October 31, 2002.

INTERROGATORY NO. 4: Please identify the expert witnesses who you may call to testify at the hearing in this matter. In addition to the identity of any expert witness who you may call, the Districts seek:

- (a) The subject matter upon which each expert is expected to testify;
- (b) The substance of the opinion to which each expert is expected to testify;
- (c) The underlying facts and data upon which each expert opinion is based.

RESPONSE TO INTERROGATORY NO. 4:

See United Water's Initial Disclosures dated October 31, 2002.

REQUEST FOR PRODUCTION NO. 35: Please produce the curriculum vitae of each person identified in your response to Interrogatory Number 4.

RESPONSE TO REQUEST FOR PRODUCTION NO. 35:

See United Water's Initial Disclosures dated October 31, 2002.

REQUEST FOR PRODUCTION NO. 36: Please produce each and every document upon which you relied in preparing your response to Interrogatory Number 13.

RESPONSE TO REQUEST FOR PRODUCTION NO. 36:

United Water is unsure what Pioneer and Settlers mean by this request. They have only propounded interrogatories through Interrogatory No. 4.

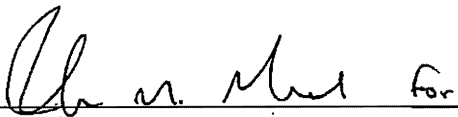
REQUEST FOR PRODUCTION NO. 37: Please produce each and every exhibit which you may utilize or rely upon at the hearing in this matter.

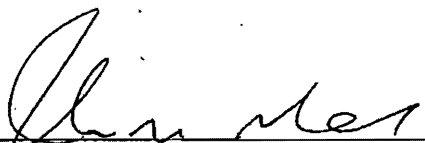
RESPONSE TO REQUEST FOR PRODUCTION NO. 37:

See United Water's Initial Disclosures dated October 31, 2002. United Water may update its response after it learns through discovery the factual bases for the various protests in this matter.

DATED this 7th day of August 2003.

GIVENS PURSLEY LLP

By:  For
Christopher H. Meyer

By: 
John M. Marshall

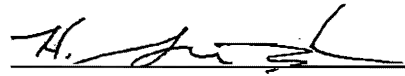
Attorneys for Applicant
United Water Idaho Inc.

VERIFICATION

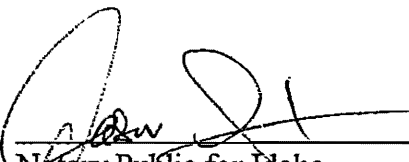
STATE OF IDAHO)
) ss.
County of Ada)

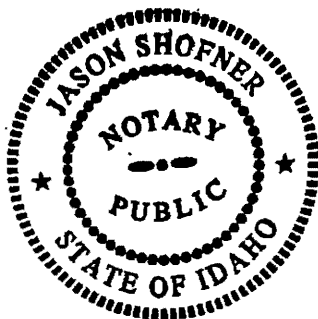
H. SCOTT RHEAD, being first duly sworn upon oath, deposes and states to the best of his knowledge:

That he is the Chief Engineer for Applicant United Water Idaho Inc. in the above captioned action and makes this verification for and on behalf of United Water Idaho Inc., that he has read the foregoing *UWID's Responses to Pioneer Irrigation District and Settlers Irrigation District's Second Set of Discovery Requests to United Water Idaho Inc.*, knows the contents thereof, and that the facts therein stated are true and correct to the best of his knowledge and belief.


H. Scott Rhead

Subscribed and sworn to before me this 57 day of August, 2003.


Notary Public for Idaho
Residing at Boise
My Commission Expires 08/01/2008



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:

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

☒ 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

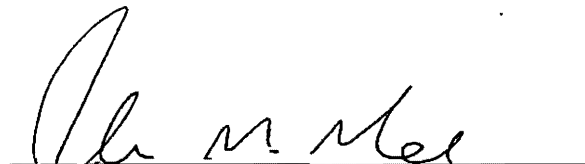
☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Mail

Robert W. Talboy
Ellsworth, Kallas & Talboy, PLLC
2402 West Jefferson Street
Boise, ID 83702

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Mail

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

RECEIVED

AUG 23 2003

MOFFATT THOMAS BARRETT
ROCK & FIELDS

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: chrmeyer@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

**UWID'S RESPONSES TO PIONEER
IRRIGATION DISTRICT AND SETTLERS
IRRIGATION DISTRICT'S THIRD SET OF
DISCOVERY REQUESTS TO UNITED
WATER IDAHO INC.**

Applicant United Water Idaho Inc. ("United Water" or "UWID"), hereby submits the following response to Pioneer Irrigation District and Settlers Irrigation District's Third Set of Discovery Requests to United Water Idaho Inc.

PRELIMINARY STATEMENT

United Water has used its best efforts in conducting a thorough investigation of its records in an effort to comply with the Irrigation Districts' discovery requests. United Water is conducting an ongoing factual investigation into the issues of the pending action, however, and may discover additional matters. In the event that United Water discovers additional information

**UWID'S RESPONSES TO PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION
DISTRICT'S THIRD SET OF DISCOVERY REQUESTS TO UNITED WATER IDAHO INC.**
S:\CLIENTS\30171\UWID Response to Pioneer & Settlers 3rd Requests.DOC

ORIGINAL

COPY
Exhibit F

relevant to these requests, it will endeavor to provide that to the Irrigation Districts in a timely manner.

United Water assumes the Irrigation Districts do not seek confidential information protected by a privilege. To the extent that the Irrigation Districts are requesting privileged information, United Water objects. These responses do not include any such confidential material.

United Water has made a good faith attempt to make these responses as informative as possible. However, United Water does not waive any objections it may have to the production and/or admissibility of any matter following.

INTERROGATORY NO. 4: Please identify each well which is included as a point of diversion in the IMAP. By “identify,” the Districts request that you provide, for each well:

- (a) the exact location of the well, by metes and bounds legal description;
- (b) the water right number(s) with which the well is licensed or associated, assuming that the points of diversion within the IMAP are not integrated;
- (c) the “name,” if any, attributed to the well.

RESPONSE TO INTERROGATORY NO. 4: Please see IMAP Tab N. We do not have a metes and bounds legal description describing the locations of the wells.

REQUEST FOR PRODUCTION NUMBER 38: For each well included as a point of diversion in the IMAP, please produce all well construction information, included but not limited to well drillers reports, well construction information, and/or well completion logs.

RESPONSE FOR REQUEST FOR PRODUCTION NUMBER 38: We will make our well records available for inspection.

REQUEST FOR PRODUCTION NUMBER 39: Please identify each and every piezometer test area or monitor well drilled in conjunction with a well included as a point of diversion in the IMAP. By "identify," the Districts request that you provide the metes and bounds legal description for the location of each piezometer test area or monitor well.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 39: We will make our records available for inspection.

REQUEST FOR PRODUCTION NUMBER 40: For each well included as a point of diversion in the IMAP, please provide the pumping records for each well.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 40: We previously provided you with pumping records for the years 1935 through 2002. We will make our records available for inspection.

REQUEST FOR PRODUCTION NUMBER 41: For each well included as a point of diversion in the IMAP, please provide the electrical records for each well and/or its associated pump.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 41: Objection. This request is overbroad, burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding this objection, we will make our records available for inspection.

REQUEST FOR PRODUCTION NUMBER 42: For each well included as a point of diversion in the IMAP, please provide the size and horse power of each pump for each well.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 42: We will make our records available for inspection.

REQUEST FOR PRODUCTION NUMBER 43: For each well included as a point of diversion in the IMAP, please provide the diameter of the discharge pipe for each pump.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 43: We will make our records available for inspection.

INTERROGATORY NUMBER 5: Please describe and quantify the financial impact on UWID which is likely to result if the IMAP is approved.

RESPONSE TO INTERROGATORY NUMBER 5: United Water has not attempted to describe and quantify the financial impact.

INTERROGATORY NUMBER 6: Please describe and quantify the financial impact on UTWD which is likely to result if the IMAP is denied.

RESPONSE TO INTERROGATORY NUMBER 6: United Water has not attempted to describe and quantify the financial impact.

INTERROGATORY NUMBER 7: Please identify each and every well owned by UWID from which water is no longer diverted. By the word "identify," the Districts request that you provide the metes and bounds legal description as well as any "popular name."

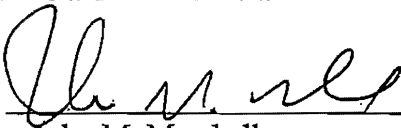
RESPONSE TO INTERROGATORY NUMBER 7: United Water has not compiled a list of these wells. We have provided you with pumping records for each well that provide the information you request. We do not have metes and bounds descriptions for the wells.

INTERROGATORY NUMBER 8: For each and every well identified in your response to Interrogatory Number 7, please state what happened to the water rights associated with each well (*i.e.*, was the right abandoned, declared forfeited, transferred, etc.).

RESPONSE TO INTERROGATORY NUMBER 8: The fact that water is no longer diverted from a well does not trigger a change in the status of the water right. If a well is not diverting, the water right(s) by which United Water has diverted from the well still exist. Our position on this issue is more fully explained in our Response to Interrogatory No. 4 propounded to the City of Eagle *et al.* We understand that you have a copy.

DATED this 22nd day of August 2003.

GIVENS PURSLEY LLP

By: 

John M. Marshall

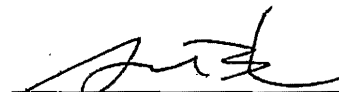
Attorneys for Applicant
United Water Idaho Inc.

VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

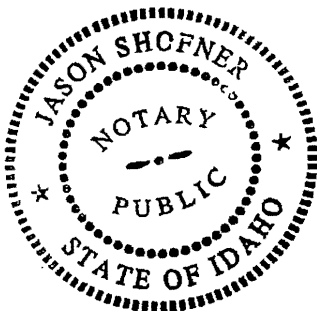
H. SCOTT RHEAD, being first duly sworn upon oath, deposes and states to the best of his knowledge:

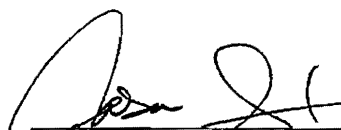
That he is the Chief Engineer for Applicant United Water Idaho Inc. in the above captioned action and makes this verification for and on behalf of United Water Idaho Inc., that he has read the foregoing *UWID's Responses to Pioneer Irrigation District and Settlers Irrigation District's Third Set of Discovery Requests to United Water Idaho Inc.*, knows the contents thereof, and that the facts therein stated are true and correct to the best of his knowledge and belief.



H. Scott Rhead

Subscribed and sworn to before me this 22 day of August, 2003.





Notary Public for Idaho
Residing at Boise
My Commission Expires 08-01-2008

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd 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

☒ 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

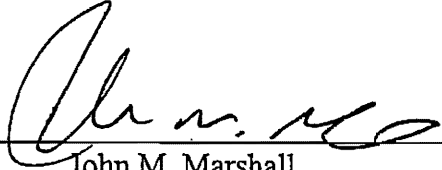
☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Mail

Robert W. Talboy
Ellsworth, Kallas & Talboy, PLLC
2402 West Jefferson Street
Boise, ID 83702

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Mail

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

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

RECEIVED

SEP 12 2003

Department of Water Resources

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.

**AFFIDAVIT OF ANGELA SCHAEER
KAUFMANN**

STATE OF IDAHO)
) ss.
County of Ada)

ANGELA SCHAEER KAUFMANN, 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. On August 18, 2003, I contacted counsel for UWID to arrange a date and time to review the documents UWID offered for inspection in response to our discovery requests. I did so even though responses to one set of requests were still pending, in anticipation that UWID would not produce copies of the documents, but instead allow us to inspect them.

3. UWID responded by stating that the first available date I provided to UWID (August 26, 2003) was not acceptable due to scheduling issues. In addition, UWID initially placed the burden on the Protestants to coordinate a time when all Protestants would review documents together. Those issues were eventually resolved.

4. However, we were unable to arrange to inspect UWID's documents until August 29, 2003. After review by other Protestants, UWID's counsel sent the documents out for copying. We did not receive our set of copies in our offices until approximately 4:30 p.m. on Friday, September 5, 2003.

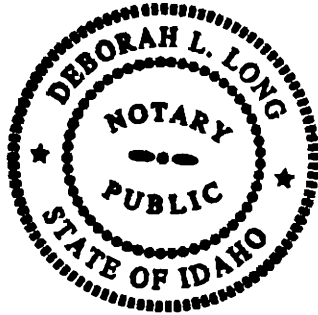
DATED this 12th day of September 2003.

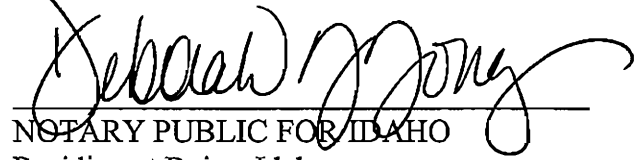
By Angela Schaefer Kaufmann
Angela Schaefer Kaufmann

STATE OF IDAHO)
) ss.
County of Ada)

On this 12th day of September 2003, before me, the undersigned notary public, personally appeared ANGELA SCHAEER KAUFMANN, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

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 10/10/07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of September 2003, I caused a true and correct copy of the foregoing **AFFIDAVIT OF ANGELA SCHAER KAUFMANN** 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

☒ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Peter Anderson, Hearing Officer
729 W. Braemere Road
Boise, ID 83702

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Matt J. Howard
PO Box 190012
Boise, ID 83719
Fax: 333-8409

☒ 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

☒ 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

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Ed Squires
Hydrologic
1002 W. Franklin
Boise, ID 83702-5431
Fax: 342-3100

☒ 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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

By 
Angela Schaefer Kaufmann