

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER OF WATER RIGHTS	)	
IN THE NAME OF UNITED WATER	)	ORDER DENYING OBJECTION
IDAHO, INC., INTEGRATED	)	TO CORRESPONDENCE
MUNICIPAL APPLICATION	)	
PACKAGE (IMAP)	)	
	)	

At the prehearing conference the parties discussed various issues that have been raised in this matter. One issue was identified as follows:

The attorney for the Applicant United Water Idaho, Inc. ("Applicant") indicated at the prehearing conference that he did not, at that time, know his client's position on coordination with the SRBA, and reserved taking a position on the issue. The Applicant subsequently submitted a letter to IDWR dated February 24, 2003, stating its opposition to a stay of this proceeding, with its reasoning. Nothing in the letter objected to the procedure agreed upon during the Prehearing Conference for resolving this issue.

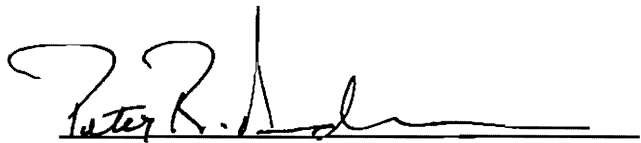
ORDER DENYING OBJECTION TO CORRESPONDENCE, Page 1

Eagle, Kuna Middleton and Star and the Star Sewer and Water District requested that the Hearing Officer strike the Applicant's February 24, 2003, letter from the record. This correspondence was not in the form of a pleading. IDAPA 37.01.01.301.

Based upon the foregoing the Hearing Officer **ORDERS** that:

1. The Applicant's letter dated February 24, 2003, is not part of the official record in this matter and cannot be the basis for a decision by the Hearing Officer. It constitutes a continuation of the "informal" prehearing conference which was off the record. Likewise, the correspondence dated February 27, 2003, from the Cities of Eagle, Kuna, Middleton and Star and the Star Sewer and Water District is not a pleading and will not be a part of the official record.
2. The *Objection to February 24, 2003 Correspondence re: SRBA v. Administrative Proceedings* is DENIED. Because the Applicant's letter is not a part of the official record this objection is moot. Further, to the extent this objection attempts to restrict the Applicant from informally stating its position on an issue, the objection is overruled pursuant to the provisions of IDAPA 37.01.01.510.

Dated this 16th day of April, 2003.


Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

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

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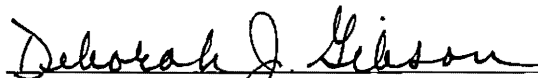
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Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER OF WATER RIGHTS	)	
IN THE NAME OF UNITED WATER	)	ORDER REGARDING NEW
IDAHO, INC., INTEGRATED	)	IMAP APPLICATIONS
MUNICIPAL APPLICATION	)	
PACKAGE (IMAP)	)	
	)	

ORDER REGARDING NEW IMAP APPLICATIONS, Page 1

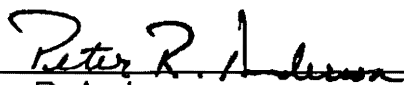
certain preliminary matters on March 14, 2003, and opportunity to see the precise changes that the Applicant was making to the IMAP.

The Applicant did not comply with this order. Instead, the Applicant filed a separate application for each water right included in the IMAP on February 28 and March 24, 2003. The separate applications do not explicitly show the changes requested in the Motion to Amend the IMAP. The Applicant did not request the Hearing Officer to amend the Second Prehearing Order to allow for this procedure chosen by the Applicant. See IDAPA 37.01.01.514.

THEREFORE the Hearing Officer ORDERS that:

1. The separate applications filed by the Applicant on February 27 and March 24, 2003, shall not be filed in the record until the preliminary motions filed on March 14, 2003, are resolved and the separate applications have been reviewed by Applicant with staff from IDWR.
2. The Applicant shall review the entire IMAP with staff from IDWR and hand mark all changes to the IMAP, including the executive summary, necessitated by the proposed amendments and the withdrawal. Counsel for the Applicant and IDWR staff will initial and date all such changes and the Applicant shall deliver a copy of the amended IMAP, with the exception of any unchanged, oversized maps, on all parties by **April 11, 2003**.
3. The deadline for filing reply briefs regarding preliminary issues 1, 2 and 3 is extended to **April 18, 2003**.

Dated this 2nd day of April, 2003.



Peter R. Anderson
Hearing Officer

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I HEREBY CERTIFY that on this 2nd day of April, 2003, the above and foregoing document was served on the following by faxing a copy of the same to the noted fax number of the following:

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ADDITIONALLY, I HEREBY CERTIFY that on this 2nd day of April, 2003, the above and foregoing, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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WATER RESOURCES

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Fax:	See attached Certificate of Service	Date:	April 2, 2003
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Re:	UWID IMAP Applications	CC:	

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Charles Honsinger, Bruce Smith or
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From: Deborah J. Gibson
(208) 327-7953

Fax: See attached Certificate of Service

Date: April 2, 2003

Phone:

Pages: 5

Re: UWID IMAP Applications

CC:

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

•Comments: See attached Order Regarding New IMAP Applications.

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Counsel for Applicant United Water Idaho Inc.

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Department of Water Resources

**BEFORE THE
IDAHO DEPARTMENT OF WATER RESOURCES**

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

**UWID'S RESPONSE TO
MOTION TO STAY**

This is United Water Idaho Inc.'s ("United Water" or "UWID") response to the joint *Motion to Stay and Memorandum in Support* filed by several Protestants on March 28, 2003 ("*Motion to Stay*").

INTRODUCTION

Protestants' *Motion to Stay* follows comments from Presiding Judge Burdick to the Hearing Officer recommending that the Hearing Officer stay the IMAP. *Letter from Judge Burdick to Peter Anderson* (Mar. 24, 2003) ("*Burdick Letter*"). Judge Burdick's advisory opinion, offered without the benefit of any motion, hearing, briefing or argument, was to the effect that the Idaho Department of Water Resources (the "Department") lacks jurisdiction to consider transfers of unadjudicated water rights, including those which make up a portion of

United Water's IMAP. He also declared, in advance of any hearing on the matter, that the SRBA would likely not stay its processing of UWID's claims if the IMAP proceeding is still underway when the Director's Report on those claims is filed. *Burdick Letter* at 1.

Protestants have endorsed Judge Burdick's statements and are calling for an immediate and complete stay of the IMAP. United Water urges caution in this regard.

ARGUMENT

I. THE DEPARTMENT HAS JURISDICTION TO PROCESS THE IMAP.

As an initial matter, Judge Burdick's basic premise is incorrect. The Judge doubted the Department's jurisdiction to act on the IMAP (or, apparently, any application for transfer of an unadjudicated water right in which a forfeiture question might be raised).¹ However, the Legislature has been very clear that the Department has jurisdiction to evaluate unadjudicated water rights in transfer proceedings. The transfer statute provides:

1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

Idaho Code § 42-222(1). (emphasis added).

By this plain language, the Legislature has given the Department jurisdiction to process administrative transfers of all water rights, including licensed rights and beneficial use rights.

The Department's transfer jurisdiction is not limited to decreed rights. Indeed, it is our

¹ "In that regard, I believe that we do not have concurrent jurisdiction in this case. I believe that the Snake River Basin has original jurisdiction for those water rights which have not been decreed and which have questions of forfeiture included. I cannot see where an unadjudicated water right which may or may not exist can then be transferred in an administrative hearing." *Burdick Letter* at 1.

impression that the great majority of water right transfers the Department handles are of unadjudicated water rights.

In considering a contested application for transfer, the Director is authorized and required to consider issues of forfeiture and abandonment.² Our Supreme Court has been quite clear on this point:

[T]he director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer will injure other water rights.

Jenkins v. State, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982).

A pending general adjudication changes none of this. The statute identifying the Director's jurisdiction during adjudications directly addresses the issue:

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

Idaho Code § 42-1421(4) (emphasis added).

The enactment of section 42-1401D in 2001 further confirms the Legislature's intent that the administrative processing of transfers by the Director shall not be hampered or delayed by the SRBA process, and that judicial review thereof shall proceed to district court and appellate review as would ordinarily be the case, without any SRBA involvement. The statute reads:

Jurisdictional limitation. — Review of an agency action of the department of water resources, which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code, shall not be heard in any water rights adjudication proceeding commenced under this chapter. Venue and

² Even decreed water rights subsequently may be forfeited. Thus, all water rights inherently encompass questions of potential forfeiture.

jurisdiction over any such action pending on the effective date of this section [March 2, 2001], or initiated subsequent thereto, shall be in the district court as authorized under the provisions of section 67-5272, Idaho Code, without regard to any other provision of law.

Idaho Code § 42-1401D (emphasis added).

This statute was a direct legislative rejection of the Supreme Court's decision to the contrary in *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 135 Idaho 24, 13 P.2d 855 (2000).³ *Sagewillow* came before the Supreme Court on appeal from a decision in the Seventh Judicial District affirming the Director's order on applications for transfer, initiated after the commencement of the SRBA in 1990 and 1993. The district court's determination involved, among other things, review of the Department's forfeiture analysis. *Sagewillow*, 135 Idaho at 24-25, 13 P.2d at 855-56. The Supreme Court held, *sua sponte*, that the Seventh Judicial District did not have jurisdiction to review the Director's order because "Sagewillow's claim falls clearly within the exclusive jurisdiction of the SRBA district court." *Sagewillow*, 135 Idaho at 26, 13 P.2d at 857.

This, of course, was wrong. The error was swiftly corrected with the Legislature's enactment of section 42-1401D in the next session.

Thus, it is clear that the Department has the authority, and the responsibility, to process all water right transfer applications, including the IMAP. Moreover, the Department has full authority to evaluate and determine any relevant aspect or element of the water rights involved, just as occurred last week in *Sagewillow II*, and just as the Department does day in and day out.

II. THE DIRECTOR SHOULD PROCESS THE IMAP PRIOR TO MAKING RECOMMENDATIONS ON UWID'S CLAIMS TO THE SRBA.

In his letter, Judge Burdick also indicated that he would advise the Special Master not to

³ Another iteration of the *Sagewillow* case was decided by the Idaho Supreme Court last week. *Sagewillow v. Idaho Dept. of Water Resources*, No. 27534, slip op. (Idaho Apr. 10, 2003) ("*Sagewillow II*").

grant a stay of SRBA proceedings on United Water's claims (once he receives a Director's Report listing them) in order to allow the Department to complete processing of the IMAP. His reasoning was that, in recent experience, such stays have "proven to be very inefficient" and a stay "often leads to more work for the parties." *Burdick Letter* at 1.⁴

The issue of potential concurrent jurisdiction between the SRBA and the Department arose through a conversation initiated by the Hearing Officer between himself and David Tuthill. They discussed the timing of the Director's Report for Basin 63, Part II—a geographical area that encompasses UWID's claims. Mr. Tuthill indicated that it is targeted for early 2004. Because it is generally believed that IMAP processing will not be complete by this time, the Hearing Officer raised the concurrent jurisdiction issue and contacted the SRBA Judge, which as explained above, lead to the *Motion to Stay*.

Thus, the discussion on concurrent jurisdiction presupposes that the Director will make his recommendations on UWID's claims to the SRBA even though the IMAP processing is midstream. The Director might choose to do that. But this is hardly a foregone conclusion. In any event, we believe it would not be prudent, and urge the Hearing Officer and the Department to carefully consider the ramifications of such an action. At the very least, the Director should be consulted and his informed input obtained on the issue before any decision is made on a stay.

In our view, staying the administrative processing of the IMAP is not the best way to resolve the issue of concurrent jurisdiction. The better approach would be for the Department to

⁴ When a transfer application is submitted for a water right on which a Director's Report was previously submitted to the SRBA, the Department files a Notice of Administrative Proceeding ("NAP") with the Court. Rule 17(b)(3) of Administrative Order 1 ("AO1") authorizes the Court to stay its own proceeding upon such notice, but this is discretionary. It is our understanding that, until recently, such stays were routinely granted. Judge Burdick's letter seems to indicate that the pendulum now has swung to the opposite extreme, and the court is not likely to grant stays when the Department files a NAP. It should be noted that our situation is a little different. AO1 presumes that the transfer is subsequent to the Director's Report. Here the Director's Report will be subsequent to the IMAP. Presumably, the Court has the same discretion to stay its own proceedings, regardless of the order of events.

withhold the Director's recommendations on UWID's rights to the SRBA until after the IMAP is complete.

The Director has discretion to control the timing of a Director's Report:

[t]he director shall commence an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system for water rights acquired under state law. The examination shall continue in a manner and for such period of time as the director determines is necessary to evaluate the extent and nature of each water right for which a notice of claim under state law has been filed.

Idaho Code § 42-1410(1) (emphasis added). Moreover, he has authority to submit particular groups of claims (such as those corresponding to the IMAP) on their own schedule:

The director shall prepare a director's report on the water system. The director may file the director's report in parts as the director deems appropriate.

Idaho Code § 42-1411(1) (emphasis added).

There are compelling reasons for the Department to withhold the Director's Report on United Water's claims until the IMAP is completed. The IMAP process is the ideal forum for the Director to conduct his examination of UWID's SRBA claims and then make fully-informed, relevant, up-to-date recommendations of the nature and extent of UWID's claims. Awaiting IMAP completion also allows the Director to incorporate the requirements and protections of the Municipal Water Rights Act of 1996 (the "1996 Act" or the "Act"), and any other conditions, in his recommendations.

In contrast, if the Department simply submits raw claims to the SRBA, without benefit of IMAP evaluation, we can expect costly and entirely unnecessary disputes over what law applies to their evaluation. Should the SRBA Court evaluate United Water's portfolio of rights on the basis of pre-1996 common law (e.g., the Growing Communities Doctrine)? Is the common law

informed by the passage of the 1996 Act, even though the Act's application is triggered only by new appropriations and transfers? Must the SRBA Court ignore post-commencement events affecting United Water's system? This potential quagmire of legal issues can be avoided by keeping the proceeding alive before the Department, where the 1996 Act plainly governs.

Given these circumstances, it is imperative that the Director be given the opportunity to carefully consider how he is going to proceed with the timing and substance of his recommendations of UWID's claims. If the Director determines to proceed along the lines suggested by Judge Burdick, so be it. But the Hearing Officer should not preclude the Director's exercise of discretion, and should allow the Director to be fully informed of the issues raised.

III. RETAINING DEPARTMENTAL JURISDICTION OF THE IMAP WILL NOT RESULT IN CONFLICTING DECISIONS.

At the last conference, some Protestants expressed concern that continuing administrative processing of the IMAP to its conclusion will lead to results that will simply be reconsidered by the SRBA. Thus, they say, it is pointless to continue the administrative process.

This is wrong. If the administrative process is allowed to play out, it will result, almost certainly, in some party bringing a judicial review action in Ada County District Court, and from there to the Idaho Supreme Court. Perhaps there will be remands along the way, but at some point, a final decision on the merits will be reached. The Supreme Court will rule and will establish precedent. Any subsequent SRBA review will follow that precedent. The hard questions will have been answered at that point.

The concern that someone not a party to this proceeding might seek to challenge that result is hypothetical but largely irrelevant. First, it is unlikely that they would be allowed to do so, having foregone the opportunity to participate in a process that was advertised statewide. But even if they were allowed to make an argument, as a practical matter, it will fall on deaf ears, the

Supreme Court already having fully adjudicated the controlling issues.

IV. THE SRBA HAS JURISDICTION OF ONLY A FRACTION OF CLAIMS AND ISSUES PRESENTED BY THE IMAP.

Staying the IMAP proceeding is not an all-or-nothing proposition. The IMAP is a collection of applications for change in water rights and for amendment of permits. These applications raise both conventional issues, such as injury and forfeiture, as well as entirely new ones under the 1996 Act, such as departmental approval of a planning horizon and quantification of long term demand.

While the conventional questions could be resolved by the SRBA (after a battle over what law should apply), the Department will still be required to take up where the SRBA leaves off. This will be so regardless of how United Water's portfolio fares at the SRBA. At the end of the day, that portfolio will be back before the Department, and the Department will still have to grapple with the full panoply of planning horizon issues.

In any event, the Department also will need to deal with these issues in the context of United Water's recent permits included in the IMAP (which will not be before the SRBA).⁵

V. IF A STAY IS IMPOSED ON THE IMAP, IT SHOULD BE A PARTIAL STAY, ALLOWING THE REMAINING ISSUES TO BE RESOLVED WITHOUT DELAY.

If the Hearing Officer determines to grant a stay, he should stay only those parts of the IMAP proceeding over which the SRBA has jurisdiction. Most notably, any stay issued should not affect the ongoing determination of United Water's planning horizon and long term needs. A delay in that process, which could last for two years or more, would serve no one's interest.

Enormous costs have been sunk into this proposal by the Applicant, the Protestants and the Department. It is ripe for review now. It is timely. The experts are available and up to

⁵ Several of UWID's permits are not required to be filed in the SRBA. If the outcome of the IMAP is not going to inform the Director's Reports, UWID will not claim them in the SRBA.

speed. Discovery is well underway. And the analysis is still fresh. Indeed, the passage of some time since the submission of the IMAP application allows UWID's projections to be truth checked against recent trends, without allowing the entire analysis to become dated.

If the Department were to put the IMAP's planning analysis on hold for years while the SRBA does its analysis of other issues, we can predict that the first thing we will hear from the Protestants is that the analysis needs to be thrown out and redone.

Moreover, United Water is entitled to an answer without delay. The water market is tightening, and it needs to make long term acquisitions and other planning decisions. These matters cannot simply be left in limbo.

The Protestants have not identified any sound reason for staying this portion of the IMAP. They point out, correctly, that the IMAP is an integrated compilation of applications. But so what? United Water believes this is the most honest and straightforward way to analyze its portfolio of water rights. However, the entire, system-wide planning horizon and future needs analysis can be performed just as easily via a single water permit application. There will be plenty of test cases left before the agency to allow this to proceed. It would be unwise, and fundamentally unfair, to stay these as well.

In contrast, progress in resolving these 1996 Act issues will benefit everyone. United Water, other parties, and the Department itself need to know as soon as possible what are the long term needs of the largest municipal supplier in the state. Too much is at stake to simply fold up the tent and wait for the SRBA to make determinations that will shed little if any light on the forward-looking determinations which must still be made by the Department.

CONCLUSION

The Department has jurisdiction over the IMAP, and will continue to for so long as it

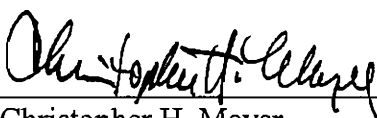
chooses. We urge caution in considering whether a stay would be helpful. The assumption that the Department and the SRBA Court will have concurrent jurisdiction over United Water's rights may be incorrect. Perhaps the Director will include United Water's rights in the Director's Report before the IMAP is completed. Perhaps he will not. The Director needs to be consulted, fully informed, and allowed to exercise his full discretion in this regard.

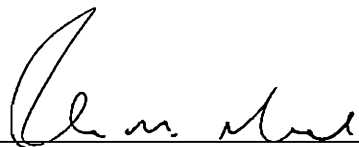
In our view, the path we are on is far more straightforward than the convoluted one we may have to chart if the SRBA is allowed to become entangled in this process before the IMAP is completed. That is a call the Department must make after careful reflection.

In any event, if a stay is issued, it should not apply to the distinct planning need questions that arise under the 1996 Act. United Water's compliance with the 1996 Act will not be before the SRBA. Consequently, the Department should retain jurisdiction and active processing of those issues. It may readily do so in the context of ongoing processing of one or more permits included in the IMAP.

Respectfully submitted this 14th day of April, 2003.

GIVENS PURSLEY LLP

By: 
Christopher H. Meyer

By: 
John M. Marshall

Attorneys for Applicant
United Water Idaho Inc.

CERTIFICATE OF SERVICE

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

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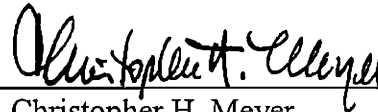
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Christopher H. Meyer

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APR 11 2003

Department of Water Resources

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Email: chm@givenspursley.com; jmm@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 NOTICE OF COMPLIANCE
WITH ORDER REGARDING NEW IMAP
APPLICATIONS**

NOTICE

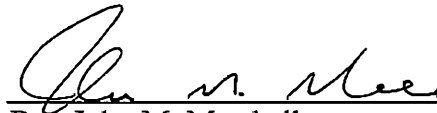
On April 9 and 10, 2003 United Water Idaho, Inc. ("UWID") reviewed the entire IMAP (the official filed version dated May 4, 2001, as amended March 20, 2002) with Steve Lester and Karilynn Townsend of the Idaho Department of Water Resources ("IDWR") and hand marked all changes to the IMAP, including the executive summary, necessitated by UWID's Notice of Withdrawal of Four Applications for Amendment of Permit from the IMAP and Motion to Amend the IMAP. Counsel for UWID and IDWR staff initialed and dated the changes.

Please note that two hand-marked changes in the margins on pages 7 and 8 noting acre-foot calculations are not made by UWID. They appear on the file copy of the IMAP at IDWR and apparently were made by IDWR staff.

Today, April 11, 2003, UWID has delivered a copy of the amended IMAP, excluding the large map in Appendix B that has not been affected by the changes, to all parties to the IMAP proceeding and each of IDWR's Regional Offices.

Respectfully submitted this 11th day of April, 2003.

GIVENS PURSLEY LLP

A handwritten signature in cursive script, appearing to read "John M. Marshall", is written over a horizontal line.

By: John M. Marshall

Attorneys for Applicant
United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Peter R. Anderson, Esq.
Hearing Officer
729 W. Braemere Rd.
Boise, ID 83702

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Regional Manager
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Southern Regional Office
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1341 Fillmore St., Ste. 200
Twin Falls, ID 83301-3033

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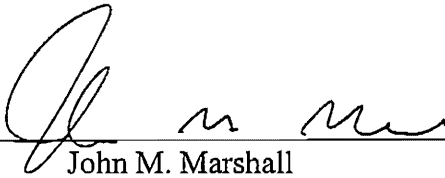
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John M. Marshall

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WEBSITE: www.givenspursley.com

Via U.S. Mail

April 3, 2003

Ms. Debbie Gibson
Idaho Department of Water Resources
1301 N. Orchard St.
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Boise, ID 83720-0098

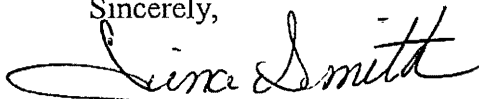
Re: In The Matter of Integrated Municipal Application Package ("IMAP") of United Water Idaho Inc., Being a Collection of Individual Applications for Transfers of Water Rights and Applications for Amendment of Permits.
Our File No. 30-71

Dear Debbie:

Enclosed for filing in the above referenced matter please find UWID's Motion for Clarification. I have also enclosed a copy of the motion. Please date stamp the copy and return it to me in the self-addressed, stamped envelope, which I have provided. - done 4/4 dg

If you have any questions please call.

Sincerely,



Tina Smith

Assistant to John M. Marshall

Enclosures

S:\CLIENTS\30\71\Tina to Debbie Gibson re filing mtn for clarif.DOC

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APR - 4 2003

Department of Water Resources

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Email: chm@givenspursley.com; jmm@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 MOTION FOR CLARIFICATION

MOTION

United Water Idaho Inc. ("UWID" or "United Water") moves for clarification of the Hearing Officer's Orders of April 2, 2003 and February 27, 2003.

DISCUSSION

UWID is attempting to comply with the Hearing Officer's Orders of April 2, 2003 and February 27, 2003. In those orders, he has instructed United Water to mark changes made to the IMAP reflecting *UWID's Notice of Withdrawal of Four Applications for Amendment of Permit from the IMAP* and *Motion to Amend the IMAP* (both dated January 22, 2003).

It is our understanding that the Hearing Officer desires these changes to be shown as hand-marked edits on the affected pages of the March 20, 2002 version of the IMAP on file at

the Department, and that copies thereof should be made for each Protestant. The purpose of the orders is to provide Protestants and IDWR with a single document tracking all changes made to date.

The Hearing Officer's orders address only those changes identified in *UWID's Notice of Withdrawal of Four Applications for Amendment of Permit from the IMAP and Motion to Amend the IMAP*.

UWID inquires whether the Hearing Officer desires to have any of the following changes also noted on the IMAP. UWID seeks this guidance now in order that it may avoid further repetitions of the process of reproduction of the IMAP.

1. On July 15, 2002, UWID filed an Errata sheet and explanatory cover letter with the Department. A copy was provided at that time to each Protestant. Those typographical-type corrections have not been interlineated into the original IMAP. If desired, those changes could also be noted at this time.

2. As noted previously (*e.g., UWID's Consolidated Response* dated March 28, 2003), several permits included in the IMAP have recently been licensed. The original IMAP anticipated this development and requested that in all such instances they be treated as applications for change of water right rather than applications for amendment of permit. If desired, UWID will update the original IMAP to reflect these recent developments. Indeed, this was done in the resubmitted version of the IMAP filed on February 28, 2003 and March 24, 2003.

3. Eight points of diversion included in the master spreadsheet of alternate points of diversion failed to print properly and were omitted at the end of the list of alternate points of diversion set out in Tab N of the March 20, 2002 version of the IMAP. These points were

correctly listed in all other IMAP submissions: (1) in the original IMAP submitted on May 4, 2001, (2) the revised table for Tab N list submitted in connection with *UWID's Notice of Withdrawal of Four Applications for Amendment of Permit from the IMAP* and *Motion to Amend the IMAP*, (3). the resubmitted IMAP of February 28, 2003, and (4) the IMAP submission of March 24, 2003. The omitted points also appear in the computer spreadsheet from which the list was printed. It is unknown why they did not print out properly in the March 20, 2002 version. This inconsistency was first discovered today.

UWID requests guidance from the Hearing Officer as to which, if any, of the above-three items should also be incorporated into the original IMAP.

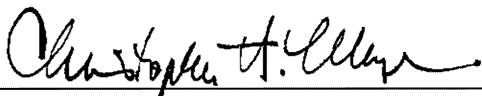
UWID does not believe that it is required, under the Water Code or the Department's rules, to interlineate or otherwise hand-mark post-filing changes made to water right applications or to supporting materials, so long as those changes are clearly stated in any filing with the Department. Nor is such a requirement consistent with Departmental practice. Nevertheless, UWID wishes to comply with the desires of the Hearing Officer in this regard, and consequently seeks his guidance.¹

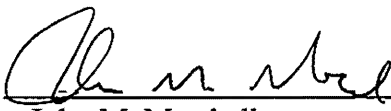
The changes identified above may raise issues regarding whether republication of the IMAP should be required. The republication question and other issues are now before the Hearing Officer. UWID does not intend by this request for clarification to resolve that question. In the interest of time, UWID urges that the republication issue be addressed as a separate matter.

¹ UWID did not intend to disregard the Hearing Officer's Order of February 27, 2003. That order was received the day before the filing deadline on a project that took over a week to complete. UWID's resubmission of separate applications, rather than an interlineated version of the original IMAP, was intended not only to comply with the order but to go further than required in an effort to simplify this proceeding. That continues to be the goal of UWID.

Respectfully submitted this 3rd day of April, 2003.

GIVENS PURSLEY LLP

By: 
Christopher H. Meyer

By: 
John M. Marshall

Attorneys for Applicant
United Water Idaho Inc.

CERTIFICATE OF SERVICE

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

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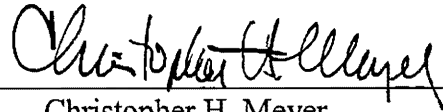
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Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

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MAR 31 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.

**OBJECTION TO CONTINUED
AMENDMENT/SUPPLEMENTATION OF
THE IMAP**

Pioneer Irrigation District and Settlers Irrigation District (the "Districts"), by and through their counsel of record Moffatt, Thomas, Barrett, Rock & Fields, Chtd., hereby object to United Water Idaho's ("UWID") continued amendment / supplementation of the IMAP. The continual changes make it difficult for any party to fully comprehend the exact nature and extent of the IMAP. Moreover, the IMAP has continued to change so significantly that republication of notice is important, if not imperative.

The Districts note that in accordance with the Hearing Officer's Second PreHearing Order, they filed their Motion to Dismiss on March 14, 2003, based upon the

amended and resubmitted IMAP. Subsequently, on March 22, 2003, the Districts received correspondence from UWID's counsel dated March 20, 2003, in which UWID noted that the water rights in the amended application were out of sequence, and submitted an index. The Districts are not concerned about that issue, although it certainly was confusing to review the IMAP without the index.

The Districts do, however, object to the fact that Application for Amendment of a Permit from Water Right Number 63-12432 was initially omitted from the amended and resubmitted IMAP, and then belatedly included. The parties (and potential additional protestants) are prejudiced by the ever-changing nature of this massive proceeding.

The Districts incorporate by reference the arguments set forth in their Memorandum in Support of Motion to Dismiss and documents filed concurrently therewith, on or about March 14, 2003. They further respectfully request that the Hearing Officer consider such remedy as may be appropriate, including republication of the notice for the IMAP.

DATED this 28th day of March 2003.

**MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED**

By Scott L. Campbell
Scott L. Campbell - Of the Firm

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

amended and resubmitted IMAP. Subsequently, on March 22, 2003, the Districts received correspondence from UWID's counsel dated March 20, 2003, in which UWID noted that the water rights in the amended application were out of sequence, and submitted an index. The Districts are not concerned about that issue, although it certainly was confusing to review the IMAP without the index.

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DATED this 28th day of March 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 28th day of March 2003, I caused a true and correct copy of the foregoing **OBJECTION TO CONTINUED AMENDMENT/SUPPLEMENTATION OF THE IMAP** to be served by the method indicated below, and addressed to the following:

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Idaho Department of Water Resources
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Peter Anderson, Hearing Officer
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City of Meridian, City of Caldwell, Terteling
Company, and Terteling Trust No. 7
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Cities of Eagle, Kuna, Middleton & Star and
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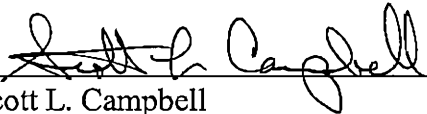
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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

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

**MOTION TO STAY AND MEMORANDUM IN
SUPPORT**

*3/31/03 - Mo. to
stay & Memo in
support*

RECEIVED
MAR 31 2003
Department of Water Resources

Pioneer Irrigation District and Settlers Irrigation District, (the "Districts"), by and through their counsel of record, Moffatt, Thomas, Barrett, Rock & Fields, Chtd.; Nampa & Meridian Irrigation District, City of Meridian, City of Caldwell, Terteling Company, and Terteling Trust No. 7, (collectively "NMID"), by and through its counsel of record, Ringert Clark, Chtd.; and the Boise Project Board of Control, ("BPBC"), by and through its counsel of record, Barker, Rosholt & Simpson, LLP (collectively the "Irrigation Entities"), hereby move the Hearing Officer for an order staying the IMAP proceedings in their entirety until such time as United Water Idaho's ("UWID") SRBA Claims are partially decreed in the SRBA. The Idaho Department of Water Resources and therefore the Hearing Officer might retain jurisdiction to proceed on the permit amendment component of the IMAP (to the extent those permitted rights have not been claimed in the SRBA). However, for the reasons discussed below, the Hearing Officer should stay administrative proceedings on the entire IMAP until the SRBA court has duly considered the nature and extent of UWID's water rights and issued partial decrees.

Staying the administrative proceedings as to the transfer component of the IMAP is appropriate given the SRBA District Court's March 24, 2003, response to the Hearing Officer's March 7, 2003 correspondence. The SRBA District Court concluded that "it seems to me that the appropriate thing is to stay the administrative proceeding until all water rights can be adjudicated and then the administrative portion of the case can go forward based upon a clear record of what water rights exist." March 24, 2003 letter from the Honorable Roger Burdick to Hearing Officer Peter Anderson. The Irrigation Entities agree, and believe that such reasoning is sound.

The intent of the Legislature and the decisions of the Idaho Supreme Court support that result. The Idaho Legislature has stated that one of the purposes behind the 1986

and 1994 amendments to Chapter 14, Title 42, Idaho Code, was “to provide a more efficient method for adjudications.” I.C. § 42-1401(2). Moreover, a decree entered in an adjudication is “conclusive as to the nature and extent of all water rights in the adjudicated water system”, with enumerated exceptions not applicable here. I.C. § 42-1420.

The Idaho Supreme Court first discussed the sole jurisdiction of the SRBA District Court in *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993). While the Court was specifically addressing the issue whether other Idaho district courts could have jurisdiction to decide the nature and extent of a water right, its decision made clear that the only authority with jurisdiction to adjudicate water rights within the Snake River Basin during the pendency of the SRBA is the SRBA District Court. While the Hearing Officer would not, per se, be adjudicating the water rights (as they still would have to be adjudicated in the SRBA), the Hearing Officer would be deciding integral issues such as forfeiture. It makes much more sense to allow the SRBA District Court to perform its statutory duty of determining the nature and extent of UWID’s water rights first.

Because post-1987 permits are not a part of the SRBA, the Hearing Officer would retain jurisdiction to consider the permit amendment component of the IMAP for such post-1987 permits. However, as a practical matter, and given the nature of the IMAP, it is difficult to see how the IMAP proceedings could move forward at all until UWID’s water rights are partially decreed in the SRBA. The document entitled “Information and Documentation in Support of IMAP” plainly states that:

the Company wishes to integrate its *entire* ground and surface water right portfolio into the new statutory framework for municipal planning needs and to update the portfolio to reflect *the integrated nature* of UWID’s municipal supply system in Ada County.

... By this change, UWID seeks to update its *water right portfolio* to better match the configuration of the supply system and to recognize that a portion of the current portfolio is held to meet demand during the Company's planning horizon.

To accomplish these goals, UWID proposes the following for each of the water rights included in this IMAP:

- ✓ Recognize each well *within the interconnected system* as an alternate point of diversion for each ground water right.
- ✓ Establish a municipal nature of use for each water right, per the 1996 Act.
- ✓ Establish a consistent place of use description *for all its water rights*, based on the service area concept in the 1996 Act.
- ✓ Amend the season of use for all ground water rights to consistently reflect full year usage.
- ✓ Adjust diversion quantities for volume limited rights to reflect a continuous flow rate.
- ✓ Designate a portion of the *total diversion rate reflected in the portfolio* as the planning horizon component ("PHC") under the 1996 Act.

Information and Documentation in Support of IMAP, p. 3-4 (emphasis added). That passage, as well as a number of others throughout the IMAP (or Information and Documentation in Support of IMAP) show UWID's clear intent that the IMAP be considered as a single, integrated package. Therefore, it is most sensible and appropriate to stay the entire IMAP proceeding pending partial decrees of UWID's water rights from the SRBA. After all, even UWID has recognized that "dual track proceedings are fraught with danger." February 24, 2003, letter from Christopher Meyer to Peter R. Anderson, p. 3. Counsel for UWID also noted that:

to the extent that the SRBA court takes jurisdiction over UWID's water rights, while the Department continues to process UWID's permits, both would be required to address and answer many of the

same questions. Substantive conflicts, and procedural conflicts over the order in which they should be decided, are exceedingly cumbersome to resolve when two decision-making entities are involved.

Id. at 4. Counsel is correct in his assessment that there is a great potential for conflicts if the Hearing Officer and the SRBA court proceed on dual tracks. Since the SRBA court has the exclusive jurisdiction to decide the nature and extent of UWID's water rights which have been claimed in the SRBA, the Hearing Officer should stay the entire IMAP proceeding pending the SRBA district court's full consideration of UWID's SRBA claims.

CONCLUSION

For the reasons set forth herein, the Irrigation Entities respectfully request that the Hearing Officer stay the entire IMAP proceeding until partial decrees are entered and final in the SRBA with regard to all of UWID's SRBA claims. If the Hearing Officer does not stay the entire IMAP proceeding, the Irrigation Entities respectfully request that the Hearing Officer stay the transfer component of the IMAP.

DATED this 28th day of March 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

DATED this 28th March day of ~~January~~ 2003.

RINGERT CLARK, CHARTERED

By: Angela Schaefer Kaufmann for
Charles L. Honsinger
Attorneys for Nampa & Meridian Irrigation
District

DATED this 28th March day of ~~January~~ 2003.

BARKER, ROSHOLT & SIMPSON

By: Angela Schaefer Kaufmann for
Albert P. Barker.
Attorneys for Boise Project Board of Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of March 2003, I caused a true and correct copy of the foregoing MOTION TO STAY AND MEMORANDUM IN SUPPORT 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

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729 W. Braemere Road
Boise, ID 83702

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Givens Pursley, LLP
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Company, and Terteling Trust No. 7
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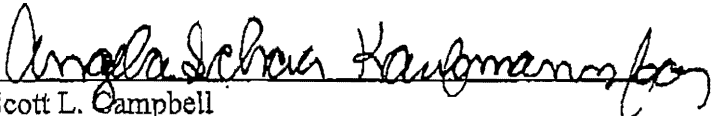
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Mr. Michael Chase
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Scott L. Campbell



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MAR 31 2003

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*Licensed in Oregon only
**Licensed in Washington, D.C. only
***Licensed in Kentucky only

Via U.S. Mail

March 28, 2003

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

Re: 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.
Our File No. 30-71

Dear Debbie:

Enclosed for filing in the above referenced matter please find UWID's Motion to Dismiss Boise-Kuna Irrigation District's Protest. I have also enclosed a copy of the motion. Please date stamp the copy and return it to me in the self-addressed, stamped envelope, which I have - done 1/2 - provided.

If you have any questions, please call.

Sincerely,

John M. Marshall

Enclosures

JMM:tns S:\CLIENTS\30\71\JMM ltr to Gibson re filing docs.DOC

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MAR 31 2003

Department of Water Resources

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Counsel for Applicant United Water Idaho Inc.

**BEFORE THE
IDAHO DEPARTMENT OF WATER RESOURCES**

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

**UWID'S MOTION TO DISMISS BOISE-
KUNA IRRIGATION DISTRICT'S
PROTEST.**

MOTION

United Water Idaho Inc. ("United Water") moves for an order dismissing the Protest filed by the Boise-Kuna Irrigation District ("Boise-Kuna") in this matter.

ARUGMENT

The grounds for this motion are as follows:

1. On October 11, 2002 the Hearing Officer issued a Prehearing Order requiring United Water to circulate a statement of the issues to the Protestants by January 17, 2003, which United Water did, including service on counsel for the Boise-Kuna Irrigation District. Exhibit A is a copy of the facsimile confirmation sheet highlighting that United Water faxed Boise-Kuna's counsel a copy of the statement of the issues on January 17, 2003.

2. The Prehearing Order required all Protestants to either sign off on United Water's statement of the issues or file their own no later than January 31, 2003. Boise-Kuna did neither.

3. The Prehearing Order states "[a]ny issues that are not precisely identified will be waived."

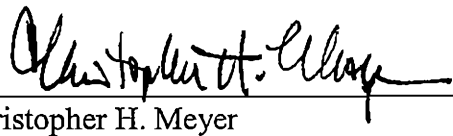
4. Following a prehearing conference on February 21, 2003, the Hearing Officer issued a Second Prehearing Order giving Protestants until March 14, 2003 to file a list of any additional issues. Boise-Kuna did not file any statement of the issues by March 14, 2003.

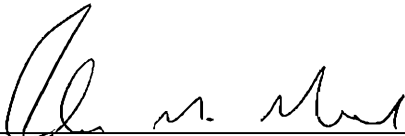
Because Boise-Kuna has failed to identify its issues of contention with the IMAP as required by the Hearing Officer's prehearing orders, and has taken no other action to demonstrate that it is engaged in this proceeding, it has waived its right to participate in this matter, and its Protest should be dismissed.

We presume that such an order would come in the form of a recommended order to the Director of the Idaho Department of Water Resources.

Respectfully submitted this 28th day of March, 2003.

GIVENS PURSLEY LLP

By: 
Christopher H. Meyer

By: 
John M. Marshall

Attorneys for Applicant
United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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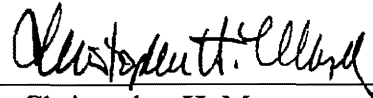
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Christopher H. Meyer

EXHIBIT A

Facsimile Confirmation Sheet

FAX COVER SHEET

DATE: Friday, January 17, 2003

PAGES (INCLUDING COVER): 11

ORIGINAL TO FOLLOW: No

From:

CHRISTOPHER H. MEYER
GIVENS PURSLEY LLP
Suite 200, Park Place
277 North Sixth Street
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Boise, Idaho 83701-2720
Telephone: (208) 388-1236
Facsimile: (208) 388-1300
Email: chm@givenspursley.com
Web: www.givenspursley.com

RE: United Water Idaho – Integrated Municipal Application Package
Our File No. 30-71

TO:

		Voice	Fax
Charles L. Honsinger Daniel V. Steenson	Ringert Clark, Chtd.	342-4591	342-4657
Matt J. Howard	Law Offices	333-0622	333-8409
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Matt Wilde	City of Boise	384-3870	384-4454
Bruce Smith Tammy Zokan	Moore Smith Buxton & Turcke	331-1800	331-1202
Albert P. Barker Travis L. Thomspson	Barker Rosholt & Simpson	336-0700	344-6034
E. Gail McGarry	U.S. Bureau of Reclamation	378-5306	378-5305
Ed Squires	Hydro Logic, Inc.	342-8369	342-3100
Kathleen Carr	U.S. Bureau of Reclamation	334-1911	334-1378
* Robert W. Talboy	Ellsworth, Kallas & Talboy	336-1843	345-8945
Josephine P. Beeman	Beeman & Associates	331-0950	331-0954
Scott Rhead	United Water Idaho	362-7345	362-7069

MESSAGE:

Please see attached. Please note that in order to cut down on copying expenses this is being sent via facsimile only. If you would like to receive a hard copy through the mail please let me know.

— Chris

If this fax does not transmit fully or is difficult to read, please contact me or my secretary at (208) 388-1227.

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	18:46	208 384 4454	0° 05' 00"	011	OK	N ECM
	18:51	MOORE SMITH BUXTON	0° 05' 03"	011	OK	N ECM
	18:57	208 344 6034	0° 03' 43"	011	OK	N ECM
	19:02	208 378 5017	0° 03' 39"	011	OK	N ECM
	19:06	208 342 3100	0° 03' 38"	011	OK	N ECM
	19:11	2083341378	0° 03' 39"	011	OK	N ECM
	* 19:15	227#30#71#3458945	0° 05' 01"	011	OK	N ECM
	19:22	3310954	0° 03' 39"	011	OK	N ECM
	19:26	2083627069	0° 03' 39"	011	OK	N ECM

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Via Hand Delivery

March 28, 2003

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

Re: 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.
Our File No. 30-71

Dear Debbie:

Enclosed for filing in the above referenced matter please find the following documents:

1. UWID's Consolidated Response to Motion to Dismiss, Motion to Require Publication and Motion to Require Legislative Approval; and
2. Original Affidavit of Jeffrey M. Peppersack.

If you have any questions regarding these documents please call.

Sincerely,



Christopher H. Meyer

Enclosures

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MAR 28 2003

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MAR 28 2003

Department of Water Resources

**BEFORE THE
IDAHO DEPARTMENT OF WATER RESOURCES**

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

**UWID'S CONSOLIDATED RESPONSE TO
MOTIONS TO DISMISS, MOTION TO
REQUIRE PUBLICATION AND MOTION
TO REQUIRE LEGISLATIVE APPROVAL**

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INTRODUCTION AND BACKGROUND

I. SUMMARY OF PENDING MOTIONS

On February 27, 2003, the Hearing Officer issued his *Second Prehearing Order*. Item 2 of that Order set a March 14, 2003 deadline for filing dispositive motions regarding three procedural issues relating to the above-captioned applications of United Water Idaho Inc. (“UWID”) known collectively as the Integrated Municipal Application Package (“IMAP”):

- Issue 1** The notice in this matter did not comport with the requirements of Idaho Code § 42-203A.
- Issue 2** The water rights described in IMAP involve quantities greater than 50 cfs requiring legislative approval.
- Issue 3** The IMAP was not submitted “upon forms furnished by the Department.”

In response, Protestants filed various motions. Several Protestants went beyond the three issues identified by the Hearing Officer, and have urged the Hearing Officer to order republication of public notice. Interwoven throughout these issues is the threshold question of whether any of the Protestants have standing to raise these issues. The motions are summarized below:

- | | |
|------------------|--|
| Boise Project | Protestant Boise Project Board of Control (“Boise Project”) filed a single Motion to Dismiss. The Motion was not accompanied by a brief or memorandum. However, the Motion briefly set out three arguments in support of dismissal, corresponding to Issues 1, 2 and 3 above. |
| Nampa & Meridian | Protestants Nampa & Meridian Irrigation District, the cities of Meridian and Caldwell, and the Terteling entities (collectively, “Nampa & Meridian”) filed a <i>Motion to Require Publication of Notice of the Amended Application</i> (addressing Issue 1 and the need for notice of the resubmitted IMAP) and a <i>Motion to Require Legislative Approval</i> (addressing Issue 2). Neither motion was accompanied by separate brief or memorandum, but each motion included a brief argument. |

- Pioneer Protestants Pioneer Irrigation District and Settlers Irrigation District (collectively, "Pioneer") filed a single *Motion to Dismiss* and accompanying *Memorandum in Support of Motion to Dismiss*. The motion and brief addressed Issues 1, 2 and 3. Pioneer also urges publication of notice of the resubmitted IMAP.
- Eagle Protestants Cities of Eagle, Kuna, Middleton, and Star and the Star Sewer and Water District (collectively, "Eagle") filed a single *Motion Regarding Preliminary Procedural Issues*. The motion addresses Issues 1, 2 and 3. It also calls for re-publication of the IMAP based on UWID's recent resubmission of its applications.

UWID is filing this single, consolidated response to each of the above.

II. RESUBMISSION OF THE IMAP.

On February 28, 2003, UWID resubmitted its IMAP, consisting of 99 Transfer Applications and 9 Permit Applications,¹ to the Idaho Department of Water Resources ("IDWR" or the "Department"), accompanied by a bound volume entitled *Information and Documentation in Support of IMAP*.² UWID simultaneously filed a notice explaining the history of the IMAP submissions and withdrawals. It stated:

Although UWID remains un-persuaded that its original submission was difficult to follow, it nevertheless wishes to be responsive to the concerns raised by both parties and the Hearing Officer. Accordingly, all applications that remain active were re-submitted on February 28, 2003, each on a separate form of the Department.

¹ The ninth permit application (No. 63-12432) was inadvertently left out of the February 28, 2003 resubmission, and was resubmitted separately on March 20, 2003.

² This information was submitted separately because some of the Protestants contend that they have had difficulty distinguishing between the applications themselves and supporting materials. As noted in the accompanying *Notice of Re-Submission* at 4: "It bears emphasis that the information contained in the *Information and Documentation in Support of IMAP* is not a part of any application. Rather, it is offered in support of all the applications, together with briefs and other evidence and testimony that may be offered at hearing. The information contained in the Information Submission may be revised, updated and supplemented from time to time during the course of these proceedings."

ARGUMENT

I. PROTESTANTS' DUE PROCESS ALLEGATIONS HAVE NO FOUNDATION.

Each of the issues presented in Protestants' various motions amounts to an allegation of a due process violation (although only Pioneer properly characterizes it as such). Protestants assume that they have standing to raise these issues and that any deviation from statutory procedure equates to a due process violation. For a variety of reasons discussed below, this is not the case.

A. Protestants have not established that they are "persons" entitled to due process.

The state and federal constitutions extend due process protections only to "persons." Idaho Const. art. I, § 13; U.S. Const. amend. V & XIV. Governmental and quasi-governmental entities are typically not entitled to the same procedural protections as are individuals and their private corporations.

Numerous cases have held that municipal entities are not "persons" within the meaning of the Fourteenth Amendment and that they may not invoke the protection of the Fourteenth Amendment against the state. It seems clear that so far as the state and its instrumentalities are concerned, there is no scope for invoking the due process guarantee as against the action of the state itself.

16B Am. Jur. 2d *Constitutional Law* § 930 (1998) (footnotes omitted). The idea is that due process protections are personal freedoms, and were never intended to protect one governmental-type entity from another. *Spence v. Boston Edison Co.*, 459 N.E.2d 80, 84 (Mass. 1983)

³ On the previous day, the Hearing Officer issued his *Second Prehearing Order* which contained the instruction to review the entire IMAP with IDWR staff and to hand mark all changes to the IMAP. UWID determined, in consultation with IDWR staff, that resubmission of all applications would be preferable to hand marking. Ironically, many of the same Protestants who first complained that the original format was unacceptable are now complaining about this. Yet the resubmission of individual applications was directly in response their prior concerns that the organization of the first submission was difficult to follow.

“Agencies, which are creations of the State, may not challenge the constitutionality of State statutes. Neither may they challenge the constitutionality of the acts of another of the State’s agencies.”) (internal citation omitted); *City of Atlanta v. Spence*, 249 S.E.2d 554, 556 (Ga. 1978) (“A county or municipal corporation, created by the legislature, does not have standing to invoke the equal protection and due process clauses of the state or federal Constitution in opposition to the will of its creator.”); *Village of Arlington Heights v. Regional Transportation Authority*, 653 F.2d 1149, 1153 (7th Cir. 1981) (“Finally, the principle that a municipality may not challenge acts of the state under the Fourteenth Amendment applies ‘whether the defendant is the state itself or another of the state’s political subdivisions.’”).

Protestants have cited no authority from Idaho or elsewhere contradicting this case law.⁴ Nor have they offered a compelling argument that they should be treated differently from other governmental entities. For instance, irrigation districts have the power to tax and govern. Idaho Code §§ 43-301 to 43-343; Idaho Code §§ 43-701 to 43-732. That makes them very different from private corporations.

The cases cited by Pioneer dealing with the nature of irrigation districts are not on point. None of them arose in the context of due process. The other Protestants ignored the issue altogether.

B. Plaintiffs have identified no flaw in procedure that affects them and rises to the level of impairing fundamental fairness.

At the prehearing conference on February 21, 2003, the Hearing Officer urged all parties filing motions premised on alleged procedural defects to identify how they have been injured by the allegedly inadequate notice. In other words, before complaining of technical procedural

⁴ Pioneer offered two instances in which our Supreme Court has spoken about due process in cases including governmental or quasi-governmental parties. As Pioneer concedes, however, the applicability of due process protections to governmental entities was not before the Court. Consequently, these cases are not on point.

defects, Protestants should establish that the defects are of some consequence to them (or to someone that they have standing to represent).

A bald declaration of their “rights” cannot overcome the odd position Protestants are in: They are complaining that application forms and published notice were inadequate, when the Protestants’ very presence in this case (and the absence of anyone seeking intervention now) demonstrates that they were adequately notified of the proceeding.

Boise Project failed to address the issue altogether. Nampa & Meridian offered only the concern that “those entities not currently parties” might have a problem. *Nampa & Meridian Republication Brief* at 3. In a similar vein, Eagle’s fear is the “the IMAP process will have to be redone,” presumably because some unnamed third party will bring succeed in bringing a collateral action.⁵ The problem with this, of course, is that the desire to avoid future litigation does not create standing where there is none. The fact remains that Protestants lack standing to litigate speculative harm to unnamed persons. *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (mere allegation is insufficient to create standing).

C. Not every deviation from mandated procedures constitutes a violation of due process.

Protestants presume every deviation from mandated procedure, no matter how small, constitutes a *per se* due process violation and entitles them to a remedy. The black letter rule is the opposite. The complaining party must first demonstrate that the deprivation of process mattered in some fundamental way.

And violation of a state’s formal procedure does not in and of itself implicate constitutional due process concerns.

Existence of a detailed set of procedural rules is inadequate

⁵ If, on the other hand, Protestants’ point is the Hearing Officer should order republication at the Applicant’s expense in order to streamline the litigation and eliminate a possible issue on appeal, that is a strategic call only the Applicant can make.

to create a constitutionally protected property right for due process purposes; even though state law might command faithful adherence to the institution's mandatory rules and a violation may result in some remedy or sanction, violating a procedural rule alone does not accomplish the creation of a protectable constitutional interest. When a state provides a party with a notice and a hearing that comport with due process standards, the state's failure to follow its own rules is not a per se violation of substantive due process.

16B Am. Jur. 2d *Constitutional Law* § 908 at 498-99 (1998). The Ninth Circuit is in accord.

Goodisman v. Lytle, 724 F. 2d 818 (9th Cir. 1984); *Federal Deposit Insurance Corp. v.*

Henderson, 940 F.2d 465 (9th Cir. 1991); *Dorr v. County of Butte*, 795 F.2d 875 (9th Cir. 1986).⁶

Protestants have made no showing that the technicalities they raise have had any impact on their ability to discover the facts and present their case. That should be the end of the matter.

D. *Carey and Weinberg deal with the quantification of damages, not the question of whether a party has been denied due process in the first place.*

Citing *Carey v. Phipps*, 435 U.S. 247, 266-67 (1978) and *Weinberg v. Whatcom County*, 241 F.3d 746, 752 (9th Cir. 2001), Pioneer observes that it may prevail in a due process claim without any showing of quantifiable harm. These cases hold that plaintiffs who suffer an actual deprivation of liberty or property resulting from an undisputed and substantial denial of due process may recover “nominal damages, not to exceed one dollar” even when they fail to prove that the denial resulted in any quantifiable compensatory damages. *Carey*, 435 U.S. at 267.⁷ In

⁶ Our Supreme Court does not seem to have addressed the exact point, but it has observed broadly: “No one has a vested right in any given mode of procedure” *State v. Griffith*, 97 Idaho 52, 58, 539 P.2d 604, 610 (1975) (changes in rules of appellate procedure subsequent to complained-of offense do not constitute denial of due process, so long as defendant was provided a “substantial and efficient” appeal procedure).

⁷ One might ask, how is it that a plaintiff who has suffered a true due process violation (e.g., no hearing at all) coupled with an actual deprivation of liberty or property cannot also prove harm? This can arise in two circumstances. One is where the plaintiff would have lost his liberty or property even if a hearing had been provided (in other words his case was that bad). The other is where a plaintiff is unable (or unwilling) to place a dollar value on his or her loss. (For instance, the Chicago students who were suspended from school but failed to present evidence that this harmed them.) In sum, these nominal damage cases arise in very peculiar fact settings.

other words, the mere experience of the constitutional violation entitled plaintiffs to one dollar.

We have no quarrel with this proposition. It, too, is a black letter rule. 16B Am. Jur. 2d *Constitutional Law* § 902 at 488 (1998) (“A violation of due process may occur even where the damages are only nominal”). But it has nothing to do with the question presented here.

The question here is whether Protestants have been denied any process to which they are constitutionally entitled. As noted above (Part C at page 10), not every procedural glitch demands a remedy. Since it is established that Protestants received notice, they must demonstrate that something was so fundamentally unfair about the notice (or the application forms) that they have been denied an opportunity to effectively make their case before this Hearing Officer. 16B Am. Jur. 2d *Constitutional Law* § 902 at 487 (1998).

They have failed to show that. After all, they are here, participating fully. For these reasons alone, Protestants motions should be denied.

II. THE NOTICE IN THIS MATTER COMPORTED WITH REQUIREMENTS UNDER IDAHO CODE SECTION 42-203A.

A. Protestants lack standing.

Protestants contend that the notice published by the Department fell short of certain technical requirements in section 42-203A. As discussed in Part I (beginning on page 8), Protestants have not explained how such technical violations, if they exist, have harmed them. Consequently, they have no standing to raise a due process claim. Nevertheless, we address the merits below.

B. Minor discrepancies in the first publication, assuming they occurred, are irrelevant.

As has been fully disclosed from the outset, UWID worked with IDWR staff over a period of years in developing its IMAP application. Counsel for UWID believed that they would be given an opportunity to review and comment on the proposed notice prior to publication. As

it turns out, a draft copy of the notice was provided to counsel only shortly before submission. This resulted in the brief flurry of telephone, email and fax communications on the day notice went out.⁸

By the time the Department accepted a few of the most insignificant changes urged by UWID,⁹ the notice had already gone out. When the Department notified the various newspapers to switch to the revised version, apparently some complied and some did not on the first printing. On the second printing, every newspaper published the revised version. Pioneer contends that it was harmed, in ways never explained, by these alleged minor differences in the text.

This history might be of some consequence if the changes themselves were of some consequence. As a comparison of the materials presented in the Campbell affidavit amply demonstrates, however, the changes were not substantive. Pioneer has not pointed to any meaningful difference, or discernable injury.

C. The notice fully met the spirit of the statutory requirement, and is a model of clear explanation. Any technical shortcomings constitute harmless error.

Protestants have cited a variety of purported technical deficiencies in the published notice. In each case, the allegation is either not true, the information is not required, or the discrepancy is inconsequential.

In contrast to most legal notices, which are composed of difficult to decipher legalese, the public notice for the IMAP was a thoughtful, well-written explanation of what is at issue. That

⁸ Pioneer mentions, but does not develop the point that it is “troubled” that UWID was “permitted to alter a notice for publication.” As the facts plainly show, UWID was not permitted to alter anything. UWID, as the applicant, made suggestions regarding its own notice, most of which were rejected.

⁹ The thrust of the discussion focused on the words used to describe what the Department calls the “future needs component.” Counsel for UWID had urged to Department to adopt the terminology employed in materials submitted with the IMAP which substitutes the term “planning horizon component.” We offered a few other minor changes in wording, which we thought expressed the idea a bit more clearly. The differences, however, were cosmetic, not substantive.

Protestants are complaining about it underscores the paucity of legitimate issues on which they have to base a challenge.

We address each of their points in sequence.

1) Purpose of the IMAP

Eagle complains: “Furthermore, the published notice did not adequately describe what United Water Idaho (‘UWID’) was actually proposing to accomplish in the IMAP.” *Eagle Brief* at 2. In fact, the notice explained this quite clearly. It briefly reviews the 1996 Act,¹⁰ distinguishes between current demand and future needs, explains the change sought by way of IPD, and states that UWID intends to “conform UW water rights to the Act” with consistently a described nature, season and place of use. *Published Notice*.

2) Future needs.

Eagle further complains that the notice should have disclosed “the fact that UWID is seeking approval of the right to hold water for future needs.” *Eagle Brief* at 2. One wonders whether Eagle has read the notice, which states: “UW requests approval to hold about 160 cfs for future growth. ... About 50% of the total flow rate authorized by the rights will be dedicated to future water demand within the 50 year planning horizon.” *Published Notice*.

3) System-wide quantification

Eagle complains that UWID should have disclosed “the fact that UWID is seeking approval of certain quantities of water for future needs that is not associated with any water right or application for a permit to acquire a water right.” *Eagle Brief* at 2. It is true that the IMAP contemplates a system-wide quantification of future needs. That is the only meaningful way to describe future needs, and is how the 1996 Act operates. The notice, which plainly describes the

¹⁰ Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297 (codified at Idaho Code §§ 42-202(2), 42-202B, 42-217(“4.”), 42-219(1) & (2), 42-222(1), 42-223(2), 43-335, 43-338).

quantification on a system-wide basis, is fully consistent with this, and goes beyond what section 42-203A requires. If Eagle has a different view of how the 1996 Act works, it should litigate the merits.

4) Specific identification of future need rights

Eagle complains that UWID has failed to identify which of its water rights will be held for future needs.

How could it? UWID has presented its portfolio to the Department, disclosed its current demand and future needs. It is up to the Department to determine which, if any, of UWID's water rights have been forfeited. In any event, which water rights are used for current demand versus future needs will be constantly shifting. "Future needs" is a system-wide concept, not a water right by water right determination. Whatever Eagle may think about this, the published notice effectively flagged the issue. That is all that is required.

5) Interbasin transfers

Eagle alleges that UWID is proposing interbasin transfers, and that the notice should have disclosed this. *First*, UWID denies that it is proposing any interbasin transfers. If Eagle believes otherwise, and that it will be injured thereby, it may present its case at hearing. *Second*, the notice satisfies all statutory requirements. Moreover, notice was published on a statewide basis, so no one has been denied notice.

6) Integrated points of diversion ("IPD")

Eagle complains that UWID's applications for integrated points of diversion ("IPD") will result in injury. Eagle further complains that it does not understand proposed conditions aimed at preventing injury. This IPD issue was fully disclosed and explained in the notice. If Eagle still does not understand what IPD means, how it will work, or how it will be affected by proposed conditions, it should seek clarification. There is no defect in the notice.

7) Conditions

Eagle complains that the application should disclose all conditions proposed by UWID. Again, Eagle has the cart before the horse. UWID has proposed to Protestants a set of conditions now under consideration that emerged as a result of good faith negotiations with Protestants. Those conditions continue to be modified and expanded as talks progress. It would be unwise for an applicant to lock into a set of conditions at the time of application without benefit of discussions with opposing parties. Likewise, nothing requires the Protestants to lock into conditions at any particular point during the course of a contested case. This is a matter of negotiation and settlement, and is inherently fluid.

In any event, nothing in the statute requires proposed conditions to be published. Moreover, the statute reflects the give-and-take process of developing conditions by requiring that the Director impose conditions at the end of the process. *See* Idaho Code § 42-222(1).

8) Beneficial use

Nampa & Meridian complain that the notice “did not sufficiently specify that a portion of its portfolio could be held without beneficial use thereof during the ‘planning horizon’ sought by United Water Idaho.” *Nampa & Meridian Republication Brief* at 2 (emphasis supplied). **First**, the notice did thoroughly explain the planning horizon/future needs concept. **Second**, Nampa & Meridian is flat wrong when it says that UWID seeks to hold water without beneficial use. That would be unlawful. **Third**, water rights held by municipal providers for reasonably anticipated future needs are expressly recognized to serve a beneficial use. Idaho Code § 42-222.

9) Future acquisition

Nampa & Meridian complains that the notice “did not specify that United Water Idaho was, through this process, seeking a ‘planning horizon’ for water rights that United Water Idaho anticipated acquiring in the future.” *Nampa & Meridian Republication Brief* at 2. This is untrue.

The notice provides: “Approximately 100 to 120 additional cfs may need to be acquired by UW within the planning period, but that additional water is not sought by IMAP.” *Published Notice*. That statement is completely accurate and forthcoming.

10) Substantive information

Boise Project complains that the notice “did not provide enough clearly substantive information for adequate analysis of the application.” *Boise Project Brief* at 2. The purpose of notice is notice. The notice is not expected to provide all the technical and supporting information required to fully analyze an application. Boise Project is confusing the notice requirement with the discovery and hearing process.

11) Filing date

Pioneer complains that the notice did not disclose the date of filing.¹¹ It is difficult to imagine of what consequence this is. The information was readily available to anyone from the Department or via the Internet.

12) Points of diversion

Pioneer, Nampa & Meridian, and Eagle complain that the notice did not include the “approximate location of the point of diversion” per section 42-203A. This boils down to the word “approximate.” The notice described the points of diversion generally as being in the “Boise area” plus a few which “serve noncontiguous areas in and/or near Eagle, Meridian, Kuna and Nampa.”¹²

¹¹ Pioneer notes in passing that the notice did not state the application number. However, Pioneer acknowledges that this could not be included because the Department has not assigned application numbers. It appears that Pioneer is not pressing this point.

¹² Pioneer’s contention that, in its experience, the Department “generally” includes a legal description of each point of diversion is neither documented nor relevant. The statute contains no such requirement. Assuming for the moment that this seemingly trivial issue had any merit, it cannot properly be raised here. In other words, if the Department has gone beyond the statute and improperly imposed a procedural requirement on Pioneer in some other case, then Pioneer should raise that argument there.

It is the Department's prerogative to determine how to provide notice of the "approximate" location of the points of diversion.¹³ Where neither the statute nor interpretive case law gives specific direction—which is the case here—the reasonable interpretation of the agency charged with the statute's implementation should not be questioned. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 734, 947 P.2d 400, 407 (1997), citing *J.R. Simplot Co., Inc. v. Idaho State Tax Com'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991).

D. UWID has no objection to republishing the matter, at State expense, if the Hearing Officer determines that IDWR erred.

Protestants' argument that the IMAP notice was defective is really directed to IDWR (which prepared the notice). IDWR, not UWID, determined the format of the notice and the level of detail it would contain.

In the sections above, UWID nonetheless has defended IDWR's decisions in handling the notice of the IMAP. However, should the Hearing Officer determine that the original notice was defective, or even that it might be defective, UWID has no objection to the notice being republished, at state expense. Should any new parties seek to participate, however, UWID urges that they be required to immediately come up to speed.

III. NO LEGISLATIVE APPROVAL IS REQUIRED.

A. Protestants lack standing.

Protestants contend that the Department erred in failing to seek legislative approval of the IMAP prior to publishing public notice. UWID's first response is that the governing statute grants a right of approval to the Legislature, not to Protestants. Protestants have not explained

¹³ As a practical matter, neighbors of UWID wells have demonstrated over the years a keen understanding of where those wells are located. It is difficult to imagine that a water user potentially affected by any UWID well would have read this notice and believed it did not apply to him or her. If somehow they were uncertain, surely the proper course of action would be to inquire of the Department. No such inquiries were made. In any event, if this were a problem, would not these people have come forward by now, identified their confusion, and sought to intervene? None have.

how they have standing, or a cause of action, to seek redress on behalf of the Legislature. *See, Alexander v. Sandoval and the Incredible Disappearing Cause of Action*, 51 Catholic U. L. Rev. 1393 (2002). Nor, as discussed above, have they established a due process claim. Nevertheless, we address the merits below.

B. The sum of applications involving changes from non-municipal to municipal use is less than 50 cfs.

Protestants' argument is based on Idaho Code section 42-108, which provides in part:

Any permanent or temporary change in period or nature of use in or out-of-state for a quantity of greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the legislature”

Idaho Code § 42-108 (emphasis supplied).

The legislative approval requirement applies only to transfers involving a change in nature or period of use. Most of these water rights included in the IMAP were already municipal rights. Only 29 of those applications involve a change in use from non-municipal to municipal.¹⁴ Their total combined diversion rate is 49.13 cfs. As Pioneer and Boise Project acknowledge, UWID is now under the 50 cfs limit. *Pioneer Brief* at 16; *Boise Project Brief* at 2.¹⁵ The legislative approval claim may be disposed of on this basis, making the remaining arguments cumulative.

C. The 50 cfs rule in section 42-108 applies to individual applications. None of UWID's applications exceed 50 cfs.

None of UWID's water rights or permits exceed 50 cfs. Only Eagle contests this seemingly obvious statement.

Eagle argues that, as a purely theoretical matter, UWID could use its Integrated Points of

¹⁴ Although the nature of use is changing from common law municipal use to “Municipal use” as defined in the 1996 Act, this would not appear to qualify as a change in nature or period of use for purposes of section 42-108.

¹⁵ Nampa & Meridian, in contrast, takes the position UWID is seeking to change the nature of all its water rights, even those that have always been identified as municipal.

Diversion (“IPD”) authority to pump more than 50 cfs out of a given well. *First*, this is not true. UWID included in the IMAP from the outset a proposed condition to guard against using IPD to expand production. *IMAP* at 16 (May 4, 2001, as amended March 20, 2002); *Information and Documentation in Support of IMAP* at 5 (Feb. 28, 2003). Subsequent conditions to which UWID has agreed make this even more explicit. *Second*, this is not physically possible. UWID’s largest wells pump about 5 cfs. No well we are aware of can pump anywhere near 50 cfs. *Third*, it is premature to know what conditions may ultimately be imposed on these rights. As discussed below in Part F below, this is the reason why legislative approval should not be sought until processing of the right is complete. *Fourth*, and most important, even if UWID could pump 50 from a single well, this still would not trigger the 50 cfs rule. Section 42-108 applies to water rights, not wells. If the IMAP is approved, every water right will remain substantially below 50 cfs, regardless of which well it is pumped from.

D. UWID’s IMAP is a collection of individual water rights and permits, each of which is individually subject to the 50 cfs rule.

UWID has been clear and consistent from the outset that the IMAP is a set of individual applications, and should be treated as such.¹⁶ The Original IMAP stated:

(Definition of IMAP): This is a submission, such as this one, intended to change much or all of a municipal provider’s portfolio of water rights to bring them within the 1996 Act. It contains traditional change application materials as well as supporting documentation for the planning horizon component. This IMAP is really a collection of 93 applications for change of water right and 19 applications for amendment of permit.

Original IMAP, tab B, page 11 (emphasis supplied).

The following *Application for Transfer of Water Right* is really a

¹⁶ Eagle’s says that the Original IMAP contained only one transfer application and one permit application. *Eagle Brief* at 4, n.1. Eagle is confusing “forms” (a piece of paper) and “applications” (a request to change a water right or permit). Many applications may be submitted on a single form.

collection of 93 separate applications. For the convenience of the Department and the reader, we have submitted a single form, modeled on the Department's standard form, with corresponding spreadsheets containing information respecting each of the 93 water rights to be changed.

Original IMAP, tab H, first page (emphasis supplied).

The following *Application for Amendment of Permit* is really a collection of 19 separate applications. For the convenience of the Department and the reader, we have submitted a single form, modeled on the Department's standard form, with corresponding spreadsheets containing information respecting each of the 19 permits to be amended.

Original IMAP, tab I, first page (emphasis supplied).

Finally, the published notice on these applications begins:

United Water Idaho Inc. ... has filed 99 Applications for Transfer of Water Rights (Licenses and Statutory Claims) and 13 Applications for Amendment (Permits).

Campbell Affidavit at WIDWR00084.

Consistent with the position that these are separate applications, UWID filed separate filing fees for each of the applications, totaling over \$10,000.00.

E. UWID's water rights should not be summed for purposes of the legislative approval statute.

Protestants contend that the diversion rates from numerous individual applications may be summed together, if their associated water rights are related in some way, in order to trigger the approval requirement. UWID rejects this claim as contrary to the statute and inherently unworkable.

Protestants' contention is premised entirely on the observation that UWID's water rights are part of an integrated system. That is most certainly true; it has been for over a century. Nor is UWID unique in that regard. Many water rights (held by municipalities and non-municipalities) function in integrated systems.

But the integrated nature of UWID's water rights has no bearing here. The transfer statute applies to water rights, period. It contains no exception for small water rights that happen to operate within integrated systems of over 50 cfs.

Indeed, the amendment suggested by Protestants would be completely unworkable. The Department knows when it encounters a water right in excess of 50 cfs. That is black and white. But how would it know, and where would it draw the line, if the Department had to figure out whether every application for change entailed an integrated system in which the sum of all diversion rates exceeded 50 cfs? Would that mean that every water right transfer by a large irrigation district, or the Bureau of Reclamation, is subject to legislative approval? In the absence of a clear legislative mandate, there is no reason to go down this thorny path.

Moreover, when the Legislature enacted the Municipal Water Rights Act of 1996 it was undoubtedly aware that many municipal systems total over 50 cfs. The Legislature expressly contemplated that these water right portfolios be dealt with on an integrated basis based in the context of a system-wide planning horizon. If the Legislature wished to review and approve all such transactions, surely it would have said so when it addressed this subject 1996. Instead, the Legislature left section 42-108 unchanged. The logical conclusion is that legislative approval continues to be required only in cases involving a single water right or appropriation greater than 50 cfs. That is an arbitrary, but effective, rule.

F. In any event, legislative approval is not required until later, once the applications are approved.

Protestants insist that the legislative approval must occur at the outset of the application process, prior to public notice. This is wrong.

In the first place, it makes no sense to have legislative review precede departmental review. Protestants have repeatedly complained that the IMAP is complicated. One would

expect any water project involving a transfer of 50 cfs to be complicated. How is the Legislature supposed to evaluate a raw application that Protestants insist is too difficult for them to sort out without extensive discovery? How is the Legislature supposed to make a reasoned decision without knowing the Department's analysis of whether the application meets the numerous statutory requirements?¹⁷ Most importantly, how is the Legislature supposed to evaluate an application without knowing what conditions will be imposed? After all, it is the conditions of the approval that separate the wheat from the chafe.

More significantly, Protestants have misread the statutes. They acknowledge that section 42-108 (which contains the legislative approval requirement) is silent as to timing. They point instead to section 42-222(1) to support their argument that legislative approval must be obtained before the Department processes the application. It contains this sentence:

Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required under section 42-108, Idaho Code, and if otherwise proper to provide notice of such proposed change in the same manner as applications under section 42-203A, Idaho Code.

Idaho Code § 42-222(1) (emphasis supplied).

Protestants apparently assume that the above-quoted "consent" refers to the legislative "approval" required in section 42-108. They are incorrect. Section 42-108 contains a separate "consent" requirement for transfers of shares within irrigation districts:

"[I]f the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion, place of use, period of use, or nature of use of such water shall be made or allowed without the consent of such corporation or irrigation

¹⁷ The Legislature cannot call a hearing and ask the Director for his view. The Department would not have developed the facts at that point, before any discovery or hearing. Indeed, the Director cannot lawfully form a conclusion on the merits of the application until the contested case is concluded.

district.

Idaho Code § 42-108 (emphasis supplied). This is the “consent” which section 42-222(1) refers to. This is the “consent” which the Director is supposed to make sure has been provided before he publishes notice of the application.

We know this for three reasons.

First, that is what the statute says. Section 42-222(1) refers to “consent” required under section 42-108. The only “consent” discussed in section 42-108 is the consent of canal companies and irrigation districts.

Second, it makes sense. If the irrigation district will not allow the transfer, why should the Department go any further? After all, we are talking about run-of-the-mill sales of irrigation rights. The irrigation district can make up its mind about its consent without going through a contested case first. In contrast, as noted above, the Legislature is not likely to be in a position to judge a project involving a massive 50-plus cfs water right before the administrative review has been completed.

Third, the legislative history amply confirms this intent. Section 42-222(1) was amended to add the “consent” cross-reference in 1982. 1982 Idaho Sess. Laws, ch. 202 at 531 (H.B. 763) (legislative history reproduced under Tab B). The bill’s Statement of Purpose provides:

This legislation provides another criteria (sic) that the director must use in the change of nature of use, or point of diversion or period of use, making this Section of Code 42-222 compatible with legislation already on the statute 42-108. It specifically requires the obtaining of consent from affected parties.

Statement of Purpose, R.S. 8128 (emphasis supplied). The reference to “affected parties” plainly refers to the consent required from canal companies and irrigation districts. No one would refer to the Legislature as an “affected party” in a water right transfer.

Mr. Sherl Chapman explained that the bill was directed to irrigation districts, not the

Legislature:

Sherl Chapman told the committee that in the second section of the bill, “notification to the Board of Directors of an irrigation district in a particular area” was ommitted (sic) last year.

Minutes, House Resources and Conservation Committee (Feb. 19, 1982).

Finally, A. Kenneth Dunn, then Director of the Idaho Department of Water Resources, presented the measure to the Senate Committee. Mr. Dunn explained the sole purpose of the legislation:

This bill amends the code to make certain that in taking action on any change in nature of use of a water right, the Director of the Dept. of Water Resources considers the specific requirements in Section 42-108 which requires that he obtains consent from the affected parties. This makes it clear that he has to have that approval.”

Minutes, Senate Resources and Environment Committee (Mar. 12, 1982) (emphasis supplied.)

In sum, the bill is plain on its face, and the legislative history makes the conclusion even plainer. The code ties section 42-222 into section 42-108’s requirement for consent of affected parties (irrigation districts), not its legislative approval requirement. Moreover, where legislative approval is required, it may be acquired after the Department has reviewed and approved the application.

IV. THE IMAP WAS SUBMITTED UPON FORMS FURNISHED BY THE DEPARTMENT.

A. Protestants lack standing.

Various Protestants contend that the forms used by UWID in their original IMAP submission did not conform to “those furnished by the Department.” UWID denies this.¹⁸ Even if there were a violation, however, Protestants have no standing to raise it. The governing statute

¹⁸ Eagle states: “There is no dispute that UWID did not file the original IMAP on forms furnished by the IDWR.” Eagle brief at 5. In fact, this is very much in dispute, as noted in the identification of issues submitted to the Hearing Officer.

sets out rights and requirements between the Applicant and the Department. They would be proper parties to a dispute over forms. Protestants have failed to establish any due process violation, and consequently have no more legal interest in the matter than any passerby.

B. The original IMAP applications were submitted on IDWR forms.

The forms used (tabs H and I of the original IMAP) were ordinary Word Perfect computer documents modeled on the Department's official forms. This has been our practice for a decade. The purpose is to allow the information to be typed in and edited as necessary without making erasures on a hard copy. Any departures in format are minor and designed solely to facilitate the display of information in a readable format. Computers have virtually replaced typewriters and ink pens in all manner of government. We find it astonishing that we are called upon to justify the use of computer-generated documents, a practice the Department has welcomed for years.

In any event, once the Department reviews the submission, and accepts it for filing, it becomes a form of the Department.

Pioneer further complains: "The original version was composed largely of materials which provided support for the various components of the IMAP." *Pioneer Brief* at 16. Water right applications routinely are accompanied by such supporting materials. There is nothing in the statute that prohibits this, and common sense dictates that any conscientious applicant would include explanatory material with a complex application. The fact that Protestants are now claiming due process violations because this Applicant included too much explanatory material is frustrating, to say the least.

Pioneer next complains that the forms were defective because they did not display the points of diversion by section, township and range. *Pioneer Brief* at 16-17. This is wrong. This information was referenced on the form and set out in full under Tabs J, K and N of the original

IMAP. (Even if Pioneer's allegation were true, this would not support a claim that the form was defective, only that the information on the form was incomplete.)

Pioneer also complains that the forms were defective because the place of use should have been displayed by section, township and range. *Pioneer Brief* at 16-17. This ignores the fact that municipal water rights are described only by a more general description of service area.¹⁹

C. The resubmitted IMAP was submitted on departmental forms.

As noted above in introductory section II at page 7, the IMAP was resubmitted to satisfy concerns raised by the Protestants and the Hearing Officer. The resubmitted version was on departmental forms. In order to reduce confusion about what constitutes the various applications, and what constitutes supporting material, the submission was broken into separate documents. All supporting materials were removed from the binder containing the applications, and submitted separately under the heading *Information and Documentation in Support of IMAP*. So far as we understand, none of the Protestants claims any defect as to form or content in the resubmitted IMAP.

UWID wishes to underscore that the resubmission was offered as a convenience to the Parties and at the direction of the Hearing Officer. The Original IMAP was developed in close coordination with departmental staff. Indeed, earlier drafts were revised extensively to accommodate staff recommendations and requests. UWID vigorously contends that the original IMAP fully satisfied all format requirements. Indeed, the IMAP went far beyond statutory

¹⁹ Idaho Code § 42-202B(8) (definition of "service area"); "The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made." Idaho Code §§ 42-222(1), 42-202(2) (the identical language in sections dealing with changes and appropriations).

requirements, and is probably the most comprehensive, thoroughly documented, and elaborately explained application ever filed with the Department.

V. REPUBLICATION OF THE IMAP IS NOT REQUIRED OR APPROPRIATE.

Protestants urge that the Department should republish notice of the IMAP because (1) some applications have been withdrawn, resulting in fewer points of diversion on the remaining water rights, and (2) UWID resubmitted the IMAP in a revised format on February 28, 2003. Neither event merits republication.

A. The Hearing Officer may not have authority to order republication.

Before addressing the merits, we raise the threshold question of whether the Hearing Officer has authority to order republication of an application. The Hearing Officer does not have plenary jurisdiction over this matter. His function is to facilitate settlement, supervise discovery, conduct a hearing, and make a recommended decision. The scope of his authority is specifically set out in IDAPA 37.01.01.413. That list does not appear to include the authority to issue orders to the Department regarding publication.

B. Republication is not required.

As for the merits, Protestants' contention that republication is required is based on a misreading of the statute. Eagle, Pioneer, and Nampa & Meridian improperly rely on the second paragraph of Idaho Code section 42-211, which deals with amendments to permit applications before the permit has been issued. *Eagle Brief* at 3; *Pioneer brief* at 14; *Nampa & Meridian Republication Brief* at 2. That situation is not present here. Each of the permits involved in the IMAP already has been issued. Consequently, they are governed by the first paragraph of section 42-211. That paragraph requires only such notice as the Department "deems appropriate."

Nothing in section 42-211 deals with republication of previously published notices of

application for amendment of permit. Likewise, section 42-222 says nothing about republication of previously published notices of application for change of water right.

In sum, there is no statute on the subject. Nor is there any mention of the issue in IDAPA. However, the Department follows a longstanding policy on the subject. (See affidavit of Jeffrey M. Peppersack under Tab C). Plainly, this policy is built on the first paragraph of section 42-211 (the best analogy available) coupled with plain common sense. This interpretation is entitled to substantial deference. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho at 734, 947 P.2d at 407.

The Department's practice is this simple: If an applicant makes changes to a pending application (for either a permit or a water right change) republication will be required if and only if the change increased the impact of the requested use in a manner which might adversely impact any other water user. In short, if the applicant asks for "more" (*i.e.*, even potentially increases its impact on other uses) then notice must be republished. If it asks for something less, republication is not required.

In this case, the only change to the IMAP applications has been the withdrawal of a few applications resulting in the elimination of a few remote points of diversion from the request for integrated points of diversion. This change restricts and reduces the flexibility of the Applicant. This has no impact on the amount of potential draw on the remaining points of diversion. In other words, UWID has asked for "less," not "more." Consequently no republication is required.

The only other issue is the resubmission of the IMAP on February 28, 2003. Pioneer baldly asserts that "UWID fundamentally changed the IMAP." *Pioneer Brief* at 2. As discussed above in introductory section II at page 7, the resubmission was undertaken solely at the direction of the Hearing Officer and for the convenience of the Parties. It reflects no substantive

change in the applications. The only differences reflect cosmetic or organizational changes, the withdrawal of certain applications and corresponding reduction in the number of alternative points of diversion, and updates reflecting permits that are now licenses.²⁰ No person has been placed in a worse position as a result of these changes. Consequently, republication would serve no purpose and would be inconsistent with Departmental policy.

CONCLUSION

Pioneer correctly observes that “meaningful notice is at the heart of procedural due process.” *Pioneer Brief* at 9. Meaningful notice is exactly what the parties received. That is why they are in this case, and why no one has showed up at the door asking to be let in.

Pioneer also hits the mark when it observes that “due process is fundamentally the right to be heard.” *Pioneer Brief* at 9 (internal quotations omitted). Protestants are being heard. And heard. And heard.

Their claims that their rights have been denied are meritless, and their motions should be denied.

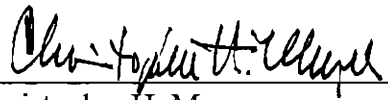
ORAL ARGUMENT

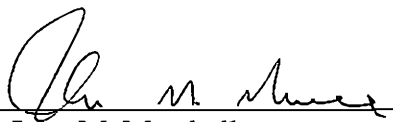
If the Hearing Officer believes that oral argument would be helpful, UWID urges that it be scheduled at the earliest possible date.

²⁰ Two years have elapsed since the original version of the IMAP was filed. During that time, several of UWID’s permits have moved through the administrative process and become licenses. The resubmitted version of the IMAP reflects this fact.

Respectfully submitted this 28th day of March, 2003.

GIVENS PURSLEY LLP

By: 
Christopher H. Meyer

By: 
John M. Marshall

Attorneys for Applicant
United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Water Resources
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☐ Overnight Mail

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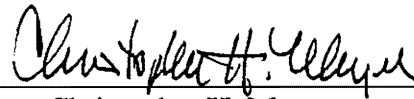
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Christopher H. Meyer

EXHIBITS

- Tab A. UWID's Notice of Re-Submission of Applications (Feb. 28, 2003).
- Tab B. Legislative History of H.B. 763.
- Tab C. Affidavit of Jeffrey M. Peppersack regarding Departmental policy on republication.



A

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**BEFORE THE
IDAHO DEPARTMENT OF WATER RESOURCES**

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

UWID's NOTICE OF RE-SUBMISSION
OF APPLICATIONS

NOTICE

On May 4, 2001, United Water Idaho, Inc. ("UWID") filed a package consisting of 112 applications for transfers of water rights and applications for amendment of permits. Various technical amendments were made on March 20, 2002. This package of applications, as amended, is known as the Integrated Municipal Application Package ("IMAP").

Although the IMAP contained consolidated application forms, it was plainly stated that they were, in fact, a collection of individual applications.

The following *Application for Transfer of Water Right* is really a collection of 93 separate applications. For the convenience of the Department and the reader, we have submitted a single form, modeled on the Department's standard form, with corresponding

spreadsheets containing information respecting each of the 93 water rights to be changed.

IMAP, Tab H, page 51.

The following *Application for Amendment of Permit* is really a collection of 19 separate applications. For the convenience of the Department and the reader, we have submitted a single form, modeled on the Department's standard form, with corresponding spreadsheets containing information respecting each of the 19 permits to be amended.

IMAP, Tab I, page 57.

UWID paid a separate filing fee for each of the 112 applications. As stated above, UWID filed in this way because doing so appeared to be simpler and easier to understand for the Department and interested parties.

Subsequently, UWID withdrew four of the applications and eliminated several points of diversion from the remaining applications.

Moreover, in the intervening months since the IMAP was filed, several permits have been proved up and approved as licenses. The original IMAP anticipated this, and provided as follows:

UWID is now in the process of proving up on these permits. If some or all of them are approved as licenses prior to the time the Department completes processing of this IMAP, we request that, in each case, the *Application for Amendment of Permit* be treated as an *Application for Transfer of Water Right*.

IMAP, Tab I, page 57.

Concerns have now been raised that it is becoming difficult to keep track of these modifications in the absence of individual application forms for each water right and permit. Consequently, at a prehearing conference on February 21, 2003, the Hearing Officer instructed

UWID to work with Department staff to better integrate and reflect made changes to date on the application forms.

Although UWID remains un-persuaded that its original submission was difficult to follow, it nevertheless wishes to be responsive to the concerns raised by both parties and the Hearing Officer. Accordingly, all applications that remain active were re-submitted on February 28, 2003, each on a separate form of the Department. These applications are reproduced under Tab A (water rights) and Tab B (permits).

The original IMAP submission included various explanatory materials and supporting information and documentation. In conjunction with the resubmission of applications on February 28, 2003, that information has been repackaged and resubmitted in a separate submission entitled *Information and Documentation in Support of IMAP* ("Information Submission"). This Information Submission is intended to satisfy requirements under both the Municipal Water Rights Act of 1996 and the Growing Communities Doctrine.

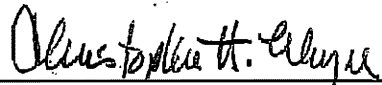
The Information Submission essentially consists of Tabs D, E and F of the original IMAP plus the two Appendices. Additional explanatory information contained in the original IMAP submission has been omitted because it contains obsolete references to the earlier filing, and is not required to be submitted with the Application.

In order to save reproduction costs, the map in Appendix B of the Information Submission has not been reproduced. Recipients of this Notice are asked to remove the map from Appendix B of the prior IMAP submission and insert it into the plastic map pocket under Appendix B of the Information Submission. Leave of the Hearing Officer was requested and received in this regard.

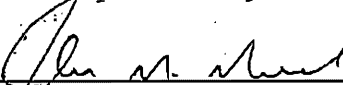
It bears emphasis that the information contained in the *Information and Documentation in Support of IMAP* is not a part of any application. Rather, it is offered in support of all the applications, together with briefs and other evidence and testimony that may be offered at hearing. The information contained in the Information Submission may be revised, updated and supplemented from time to time in during the course of these proceeding.

Respectfully submitted this 28th day of February, 2003.

GIVENS PURSLEY LLP



By: Christopher H. Meyer



By: John M. Marshall

Attorneys for Applicant
United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Water Resources
State Office
1301 N. Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

_____ U.S. Mail
_____ Facsimile
 x Hand Delivery
_____ Overnight Mail

Peter R. Anderson, Esq.
Hearing Officer
729 W. Braemere Rd.
Boise, ID 83702

_____ U.S. Mail
_____ Facsimile
 x Hand Delivery
_____ Overnight Mail

Gary L. Spackman
Regional Manager
Idaho Department of Water Resources
Western Regional Office
2735 Airport Way
Boise, ID 83705

_____ U.S. Mail
_____ Facsimile
 x Hand Delivery
_____ Overnight Mail

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

_____ U.S. Mail
_____ Facsimile
 x Hand Delivery
_____ Overnight Mail

Mr. Edward Squires
Hydro Logic, Inc.
1002 West Franklin St.
Boise, ID 83702-5431

_____ U.S. Mail
_____ Facsimile
 x 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
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 x 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

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_____ 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

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_____ 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

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 x 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

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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

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

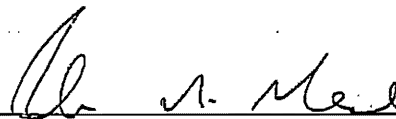
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Josephine P. Beeman, Esq.
Beeman & Associates PC
409 West Jefferson
Boise, ID 83702-6049

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☒ Hand Delivery
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Mr. Michael Chase
3482 Hwy. 30 W.
New Plymouth, ID 83655

☒ U.S. Mail
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John M. Marshall

EXHIBIT
(In Separate Binder)

Tab A. Applications for Transfer of Water Rights

Tab B. Applications for Amendment of Permits

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B

CHAPTER 202
(H.B. No. 763)

AN ACT

RELATING TO CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER; AMENDING SECTION 42-222, IDAHO CODE, TO PROVIDE THAT REQUIRED CONSENT MUST BE OBTAINED PRIOR TO GRANTING A CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-222, Idaho Code, be, and the same is hereby amended to read as follows:

42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION -- APPEALS. (1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required by section 42-108, Idaho Code, and if otherwise proper to cause notice of the proposed change to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation within the county where the water is diverted, if there is such paper, otherwise in a newspaper of general circulation within the county. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence.

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other

TOTAL

\$ 180.200

450.300

15.900

279.000

189.100

120.800

\$1,237.300

\$ 593.700

4.100

4,556.700

70.700

6.000

3.200

45.800

\$5,302.000

\$ 20.700

178.800

\$ 199.500

\$ 17.500

\$8,363.400

water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is in the local public interest as defined in section 42-203, Idaho Code; except the director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The director shall not approve such a change in nature of use of a water right if a change has previously been allowed except where the change is back to the original use. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

(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 through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter. Provided, further, that 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. Application for an extension shall be made before the end of the five (5) year period upon forms to be furnished by the department of water resources and shall fully describe the right on which an extension of time to resume the use is requested and the reasons for such nonuse and shall be accompanied by the statutory filing fee. Upon the receipt of such application it shall be the duty of the director of the department of water resources to examine same and to cause notice to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation within the county where the water has been diverted if there is such a paper, otherwise in a newspaper of general circulation within the county. The notice shall fully describe the right, the extension for which is requested and the reason for such nonuse and shall state that any person desiring to object to the requested extension may submit a protest to the director of the department of water resources within ten (10) days of the last date of publication. Upon receipt of a protest it shall be the duty of the director of the department of water resources to investigate and conduct hearing thereon as in this chapter provided. The director of the department of water resources shall find from the evidence presented in any hearing, or from information available to the department, the reasons for such nonuse of water and where it appears to the satisfaction of the director of the department of water resources that other rights will not be impaired by granting an extension of time within which to

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resume the use of the water and good cause appearing for such nonuse, he may grant one (1) extension of five (5) years within which to resume such use. In his approval of the application for an extension of time under this section the director of the department of water resources shall set the date when the use of water is to be resumed. Sixty (60) days before such date the director of the department of water resources shall forward to the applicant at his address of record a notice by certified mail setting forth the date on which the use of water is to be resumed and a form for reporting the resumption of the use of the water right. If the use of the water has not been resumed and report thereon made on or before the date set for resumption of use such right shall revert to the state and again be subject to appropriation, as provided in this section. In the event the director of the department of water resources determines that a proposed extension of time within which to resume use of a water right shall not be approved as provided in this section he shall deny same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

(3) Any person or persons feeling themselves aggrieved by the determination of the department of water resources in approving or rejecting an application to change the point of diversion, place, period of use or nature of use of water under an established right or an application for an extension of time within which to resume the use of water as provided in this section, may, if a protest was filed and a hearing held thereon, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If no protest was filed and no hearing held, the applicant may request a hearing pursuant to section 42-1701A(3), Idaho Code, for the purpose of contesting the action of the director and may seek judicial review of the final order of the director following the hearing pursuant to section 42-1701A(4), Idaho Code.

Approved March 29, 1982.

CHAPTER 203
(H.B. No. 760)

AN ACT

RELATING TO THE FORFEITURE, REINSTATEMENT AND TAXATION OF CORPORATIONS; REPEALING SECTIONS 30-1-130, 30-1-131, 30-1-132 AND 30-1-139, IDAHO CODE; REPEALING SECTIONS 63-3025, 63-3025A AND 63-3028, IDAHO CODE; REPEALING SECTIONS 30-1-129A, 30-1-133 AND 30-1-137A, IDAHO CODE; AMENDING SECTION 30-1-134, IDAHO CODE, TO REMOVE THE FORFEITURE PENALTY FOR THOSE CORPORATIONS WHO FAIL TO PAY THE FRANCHISE TAX; AMENDING SECTION 30-1-137, IDAHO CODE, TO PROVIDE A REINSTATEMENT FEE FOR FOREIGN CORPORATIONS AND TO REMOVE THE REQUIREMENT OF PAYING FRANCHISE TAXES; AMENDING CHAPTER 1,

STATEMENT OF PURPOSE

RS 8128

This legislation provides another criteria that the director must use in the change of nature of use, or point of diversion or period of use, making this Section of Code 42-222 compatible with legislation already on the statute 42-108. It specifically requires the obtaining of consent from affected parties.

FISCAL IMPACT

None

MINUTES

RESOURCES AND CONSERVATION COMMITTEE

DATE: FEBRUARY 19, 1982 at 1:45 P.M.

PRESENT: CHATBURN, CHAIRMAN STUCKI
WINCHESTER ORME
BRACKETT HIGGINS
JOHNSON TRILLHAASE
TIBBITTS STOICHEFF
BATEMAN MCLAUGHLIN
JONES ADAMS
STEPHENSON

ABSENT: LEWIS SCATES
PARKS HEDLUND

GUESTS: Dale Baird, Dept. of Fish and Game
Lynn Tominaga, Idaho Water User's Assoc.
Andy Andersen, Idaho Farm Bureau
Rene Quick, Idaho Conservation League
Jack Lavin, Supervisor, Boise National Forest
Mike Mogensen, Idaho Cattlemens Assoc.
Sherl Chapman, Dir., Idaho Water User's Assoc.
Bill Ringert, Consulting Assoc.
Ken Dunn, Dir., Dept. of Water Resources

MINUTES: Chairman Chatburn called the meeting to order at 1:45 p.m.
The first order of business was the reading and adopting of
the minutes from the previous meeting.

MOTION: It was moved by Rep. Stucki and seconded by Rep. Johnson that
the minutes be approved as they appeared. THE MOTION CARRIED.

H 639: RELATING TO FEES AND LICENSES OF THE FISH AND GAME COMMISSION.
Dale Baird reviewed this legislation with the committee.

MOTION: It was moved by Rep. Winchester and seconded by Rep. Brackett
that H 639 be sent to the floor with a DO PASS recommendation.
THE MOTION CARRIED.

Rep. Stoicheff voted No.

Sponsor: Rep. Winchester

H 679: RELATING TO OPERATING COMPANIES FURNISHING WATER TO THEIR
SHAREHOLDERS NOT FOR PROFIT OR HIRE; TO INCREASE THE RATE
OF INTEREST ON DELINQUENT ASSESSMENTS.

Lynn Tominaga spoke to the committee on this legislation.

MOTION: It was moved by Rep. Jones and seconded by Rep. Trillhaase
that H 679 be sent to the floor with a DO PASS recommendation.
THE MOTION CARRIED.

Representatives Winchester and Stoicheff voted No.

Sponsor: Rep. Jones

H 680: RELATING TO CONSENT TO PURCHASES OF LAND BY THE UNITED STATES
GOVERNMENT.

Andy Andersen spoke to the committee in favor of this bill.
Rene Quick spoke against H 680, and Jack Lavin spoke on the
concerns of the Forest Service relative to H 680.

FEBRUARY 19, 1982

RESOURCES AND CONSERVATION

Mike Mogensen said the Cattlemen's Association supports H 680. Rep. Tibbitts objects to the word "easement" in this bill.

MOTION: It was moved by Rep. Jones and seconded by Rep. Stephenson that H 680 be sent to the floor with a DO PASS recommendation.

MOTION: In a Substitute Motion, it was moved by Rep. Orme and seconded by Rep. Jones that H 680 be placed on General Orders for consideration.

MOTION: In a second Substitute Motion, it was moved by Rep. Tibbitts and seconded by Rep. Brackett that H 680 be held in committee until our next meeting. THE SECOND SUBSTITUTION MOTION CARRIED.

→ RS 8128: RELATING TO CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER.

Sherl Chapman told the committee that in the second section of the bill, "notification to the Board of Directors of an irrigation district in a particular area" was omitted last year.

MOTION: It was moved by Rep. Stucki and seconded by Rep. Stoicheff that a germaine committee be asked to study RS 8128. THE MOTION CARRIED.

RS 8129: RELATING TO CONSTRUCTION WORKS OF IRRIGATION DISTRICTS.

Bill Ringert spoke to the committee on this legislation and said he represents six irrigation districts.

MOTION: It was moved by Rep. Orme and seconded by Rep. Jones that RS 8129 be sent to a germaine committee with a recommendation for introduction. THE MOTION CARRIED.

MOTION: It was moved by Rep. Brackett and seconded by Rep. Winchester that the previous action taken on RS 8129 be reconsidered.

MOTION: In a Substitute Motion, it was moved by Rep. Winchester and seconded by Rep. Stoicheff that RS 8129 be redrafted replacing \$25,000 with \$15,000 and restructure the paragraph excluding repair work. THE SUBSTITUTE MOTION CARRIED.

RS 8177: RELATING TO THE POWERS AND DUTIES OF THE DEPARTMENT OF WATER RESOURCES.

Ken Dunn spoke to the committee relative to this legislation.

MOTION: It was moved by Rep. Bateman and seconded by Rep. Stucki that RS 8177 be sent to a privileged committee with a recommendation for introduction. THE MOTION CARRIED.

RS 8196C1: HOUSE JOINT MEMORIAL which would give siting and licensing authority over all aspects of hydro-electric generating projects with a nameplate capacity of fifteen megawatts or less to the states.

Rep. Jones presented this memorial to the committee.

MOTION: It was moved by Rep. Winchester and seconded by Rep. Stephenson that RS 8196C1 be sent to a privileged committee with a recommendation for introduction. THE MOTION CARRIED.

MOTION: It was moved by Rep. Jones and seconded by Rep. Trillhaase that the meeting be adjourned. THE MOTION CARRIED. Time - 3:45 p.m.

J. Ward Chatburn *Robin Traver*
WARD CHATBURN, Chairman ROBIN TRAVER, Secretary

MINUTES

RESOURCES AND CONSERVATION COMMITTEE

DATE: MARCH 3, 1982 at 3:20 P.M.

PRESENT: CHATBURN, CHAIRMAN STUCKI
LEWIS ORME
WINCHESTER HIGGINS
BRACKETT SCATES
JOHNSON TRILLHAASE
TIBBITTS HEDLUND
BATEMAN STOICHEFF
JONES MCLAUGHLIN
STEPHENSON ADAMS
PARKS

GUESTS: Sherl Chapman, Director, Idaho Water User's Assoc.
Norm Young, Dept. of Water Resources
Sharon Hubler, Exec. Sec., Idaho Park Foundation
Don McClenahan, Commissioner of Uniform State Laws

MINUTES: Chairman Chatburn called the meeting to order at 3:20 p.m.
The first order of business was the reading and adopting of
the minutes from the previous meeting.

MOTION: It was moved by Rep. Stephenson and seconded by Rep. Trillhaase
that the minutes be approved as they appeared. THE MOTION CARRIED.

→ H 763: AMENDING SECTION 42-222, IDAHO CODE, TO PROVIDE THAT REQUIRED
CONSENT MUST BE OBTAINED PRIOR TO GRANTING A CHANGE IN POINT
OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE
OF WATER.

Sherl Chapman presented this legislation to the committee.

MOTION: It was moved by Rep. Bateman and seconded by Rep. Stucki that
H 763 be sent to the floor with a DO PASS recommendation. THE
MOTION CARRIED.

Sponsor: Rep. Stucki

S 1246: RELATING TO APPLICATIONS FOR APPROPRIATION OF WATER; AMENDING
SECTION 42-204, IDAHO CODE, TO PROVIDE A PERIOD OF ONE YEAR FOR
THE COMMENCEMENT OF WORK UPON A PERMIT AND DIRECTING NOTIFICATION
OF HOLDERS OF EXISTING PERMITS.

Sherl Chapman and Norm Young spoke to the committee relative to
this legislation.

MOTION: It was moved by Rep. Jones and seconded by Rep. Stephenson that
S 1246 be sent to the floor with a DO PASS recommendation. THE
MOTION CARRIED.

Sponsor: Rep. Jones

S 1248: RELATING TO ADDITIONAL RIGHTS AND POWERS GRANTED IRRIGATION OR
CANAL COMPANIES; AMENDING SECTION 42-2401, IDAHO CODE, TO PROVIDE
AUTHORIZATION FOR AMENDMENT OR ADOPTION OF ARTICLES OF INCORPOR-
ATION BY IRRIGATION OR CANAL COMPANIES TO ALLOW STAGGERED TERMS
FOR THE DIRECTORS OF THE COMPANIES.

Sherl Chapman presented this bill to the committee.

MOTION: It was moved by Rep. Johnson and seconded by Rep. Winchester
that S 1248 be sent to the floor with a DO PASS recommendation.
THE MOTION CARRIED.

Sponsor: Rep. Johnson

WAYS AND MEANS COMMITTEE

February 23, 1982

The meeting was called to order by Chairman Brackett at 3:10 p.m.

Present: Kennevick, Lewis, Hammond, Horvath, Davidson

Absent: Little

Guests: Representatives Chatburn and Jones

RS8214 This resolution rejects policies 40 and 41 of the State Water Plan.
Representative Chatburn presented the resolution to the Committee.

MOTION: Moved by Hammond, seconded by Davidson, that the resolution be intro-
RS8214 duced for printing. The MOTION CARRIED.

RS8020c1 This memorial deals with land interchanges; 2-year moratorium
Representative Jones presented the memorial to the Committee.

MOTION: Moved by Kennevick, seconded by Lewis, that the memorial be intro-
RS8020c1 duced for printing. The MOTION CARRIED.

RS8196c1 This memorial deals with siting and licensing authority over hydro-
electric generating projects with a capacity of 15 megawatts or less
to states.

This memorial came to the Committee through Resources and Conservation
Committee with a unanimous request that it be printed.

MOTION: Moved by Lewis, seconded by Kennevick, that the memorial be introduced
RS8196c1 for printing. The MOTION CARRIED.

RS8177 This bill gives the Dept. of Water Resources the authority title to
lands patented to the state under the Carey Act.

This bill came to the Committee through Resources and Conservation
Committee with a unanimous request that it be printed.

MOTION: Moved by Kennevick, seconded by Lewis, that the bill be introduced for
RS8177 printing. The MOTION CARRIED.

RS8128

This bill authorizes that consent be required to change a point of diversion, place of use, period of use, or nature of use of water.

This bill came to the Committee through Resources and Conservation Committee with a unanimous request that it be printed.

MOTION: Moved by Kennevick, seconded by Hammond, that the bill be introduced
RS8128 for printing. The MOTION CARRIED.

MOTION: Moved by Lewis, seconded by Kennevick, that the meeting adjourn at
3:25 p.m. The MOTION CARRIED.

Ray Brackett
Ray Brackett, Chairman

Jo Anne Aschenbrener
Jo Anne Aschenbrener, Secretary

MINUTES

SENATE RESOURCES AND ENVIRONMENT COMMITTEE

March 12, 1982

MEMBERS PRESENT: Senators Williams, Chairman, Beitelspacher, Noh, Steen, Little, Kiebert, Bradshaw, Floyd, Peavey.

The minutes of March 1 were approved as written.

H 710
Ken Dunn

This bill amends the provision in the statute relating to ground water recharge districts so that it can be made applicable for any area in the state where such a district might be organized. The original statutes limited the creation of districts to the counties of Jerome, Lincoln, Gooding and Twin Falls. The Dept. of Water Resources has had requests from counties who want to form districts of their own. This bill will give local people one more vehicle to help solve some of our ground water shortage problems.

MOTION: Senator Little moved and Senator Bradshaw seconded we send out H 710 with a do pass recommendation. MOTION CARRIED. Senator Little will carry.

H 763
Ken Dunn

This bill amends the code to make certain that in taking action on any change in nature of use of a water right, the Director of the Dept. of Water Resources considers the specific requirements in Section 42-108 which requires that he obtains consent from the affected parties. This makes it clear that he has to have that approval.

MOTION: Senator Noh moved we send out H 763 with a do pass recommendation. Senator Beitelspacher seconded. MOTION CARRIED. Senator Noh will carry.

S 1443
Senator Steen

This proposed amendment provides that a timber protective association may be organized as a non-profit corporation so that members will not be personally liable for the debts or obligations of an association. The amendment also brings state law concerning distribution of assets upon dissolution of an association into conformity with the United States Internal Revenue Code so that associations may maintain their tax exempt status as a corporate entity.

MOTION: Senator Steen moved we send S 1443 out with a do pass recommendation. Senator Little seconded. MOTION CARRIED. Senator Steen will carry.

S 1441
Senator Steen

The true intent of this legislation is just to maintain the present parks in full operation before we expend any more funds developing new parks.

Discussion centered around the problems this legislation could cause if the state wanted to close a park for lack of use and perhaps wanted to open a new park in a populated area. They questioned whether the words any moneys being expended would include federal as well as state funds.

UNANIMOUS
CONSENT

Senator Steen asked for unanimous consent to hold 1441 until Monday. There being no objections, it was so ordered.

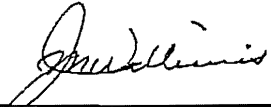
S 1423
Sen. Sverdsten

Senator Sverdsten thanked the committee for reconsidering this bill which they had voted to hold. This legislation would require land and water exchanges of the Fish and Game Dept. to go before the State Land Board. The Dept. is interested only in game management and there should be a multiple use concept on our Federal lands. If we allow large blocks of land to be traded without the consent of the land board, we will be tying up a large block of land for special interests. People having problems with the exchanges would have a sounding board to come to.

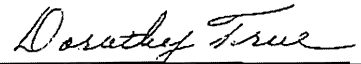
MOTION:

Senator Floyd moved and Senator Little seconded we send out S 1423 with a do pass recommendation. MOTION CARRIED. Senator Sverdsten will carry.

MEETING ADJOURNED.



Senator J. Marsden Williams, Chairman



Dorothy True, Secretary



C

Christopher H. Meyer, Esq. (Idaho Bar No. 4461)
John M. Marshall, Esq. (Idaho 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: chm@givenspursley.com; jmm@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.

**AFFIDAVIT OF JEFFREY M.
PEPPERSACK**

STATE OF IDAHO)

) ss

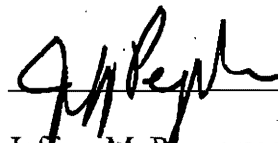
County of Ada)

JEFFREY M. PEPPERSACK being first duly sworn on oath, deposes and says:

1. I am the Section Manager for the Water Right Permits Section with the Idaho Department of Water Resources (the "Department"). In this capacity, I oversee review in the state office of the Department regarding applications for new appropriations, amendments, licenses, transfers and other water right matters.
2. I have been asked by United Water Idaho Inc. to describe the procedure the Department follows to determine whether an Application for Transfer of a Water Right or an Application to

Amend a Permit will be republished for public notice when the applicant amends the application after notice of the original application has been published.

3. Neither Idaho Code nor the Department's rules address the issue of republication of an amended application for transfer or application to amend a permit. Consequently, the Department as a general matter makes a decision at the regional office level as to whether republication of the amendment is necessary. The decision is fact specific and is generally guided by a determination as to whether the amendment makes changes to the application that could adversely affect water users or raise concerns not likely considered prior to the amendment. If the amendment will not increase the potential effect on other water users or the public, compared to the original application, then the application will not be republished. For example, if an application for transfer lists several points of diversion, and an amendment to the application is made only to remove one or more of those points of diversion, then the amended application likely would not be republished. On the other hand, if the amendment sought to move a previously identified point of diversion to a significantly different location, the application would be republished.



Jeffrey M. Peppersack

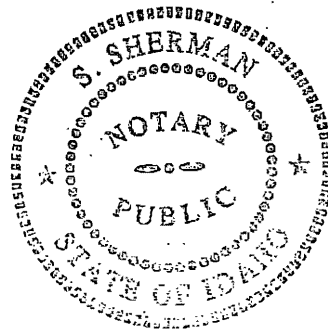
SUBSCRIBED AND SWORN to before me on this 27th day of March, 2003.

S. Sherman

Notary Public for Idaho

Residing at Boise, Idaho

My commission expires 11-14-2004



CERTIFICATE OF SERVICE

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

Idaho Department of Water Resources
State Office
1301 N. Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

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Hearing Officer
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Regional Manager
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Program Manager
Water Rights & Acquisitions
PN-3100
U.S. Bureau of Reclamation
Pacific Northwest Region
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Boise, ID 83706-1234

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Tammy Zokan, Esq.
Moore, Smith, Buxton & Turcke, Chtd.
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Boise, ID 83701-2139

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Ellsworth, Kallas & Talboy, PLLC
2402 West Jefferson Street
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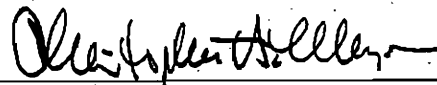
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Mr. Michael Chase
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Eagle, ID 83616-3802

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Office: 208-388-1200
Fax: 208-388-1300
Email: chm@givenspursley.com; jmm@givenspursley.com
Counsel for Applicant United Water Idaho Inc.

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MAR 28 2003

Department of Water Resources

BEFORE THE
IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF INTEGRATED
MUNICIPAL APPLICATION PACKAGE
("IMAP") OF UNITED WATER IDAHO
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AFFIDAVIT OF JEFFREY M.
PEPPERSACK

STATE OF IDAHO)

) ss

County of Ada)

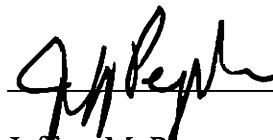
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Jeffrey M. Peppersack

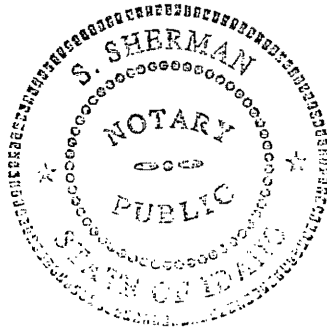
SUBSCRIBED AND SWORN to before me on this 27th day of March, 2003.

S. Sherman

Notary Public for Idaho

Residing at Burke, Idaho

My commission expires 11-14-2004



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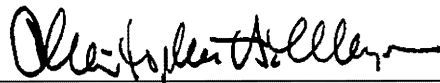
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Christopher H. Meyer



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MAR 24 2003

Department of Water Resources

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Thomas E. Dvorak
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Timothy P. Fearnside
Jeffrey C. Fereday
Steven J. Hippler
Karl T. Klein
Debora K. Kristensen
Anne C. Kunkel
Deborah E. Nelson
Franklin G. Lee

David R. Lombardi
D. David Lorello, Jr.
Kimberly D. Maloney
John M. Marshall
Kenneth R. McClure
Kelly Greene McConnell
Cynthia A. Melillo
Christopher H. Meyer
Kendall L. Miller
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery
Angela K. Nelson
W. Hugh O'Riordan
Michael C. Orr
Kenneth L. Pursley

Bradley V. Sneed
H. Barton Thomas**
Conley E. Ward
Robert B. White

Raymond D. Givens
James A. McClure
Stephanie C. Westemeier
OF COUNSEL

John A. Miller, LL.M. ***
TAX CONSULTANT

*Licensed in Oregon only
**Licensed in Washington, D.C. only
***Licensed in Kentucky only

March 20, 2003

Debbie Gibson
Idaho Department of Water Resources
1301 N. Orchard
Boise, Idaho 83706

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

Dear Debbie:

For the convenience of the Department and the parties, I am enclosing a document entitled "IMAP Index."

After we re-submitted Integrated Municipal Application Package ("IMAP") on February, 28, 2003, we noticed the order of the applications in the IMAP had been altered during the copying process. We had intended for the applications to be in sequential order, by water right number. Because that did not occur, we have prepared the enclosed index to assist the Department and parties in locating individual applications. We recommend that you place the index at the front of the loose-leaf IMAP folder.

In preparing this index, we noted that the *Application for Amendment of a Permit* for right no. 63-12432 had inadvertently been omitted from the IMAP even though this right has not been withdrawn from the IMAP. Please insert the enclosed application at the back of the IMAP binder.

Sincerely,

John M. Marshall

Encl: IMAP Index
Application for Amendment of a Permit for right no. 63-12432
cc: Service List
Scott Rhead
Chris Meyer

JMM:tma
S:\CLIENTS\3071\JM ltr-0003.DOC

MATT J. HOWARD

ATTORNEY AT LAW

P. O. BOX 190012

BOISE, IDAHO 83719

TELEPHONE (208) 333-0622

FACSIMILE (208) 333-8409

RECEIVED

MAR 18 2003
EMAIL: MHOWARD@FIBERPIPE.NET

Department of Water Resources

March 18, 2003

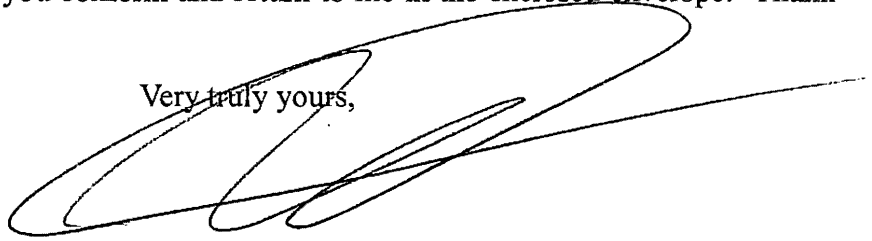
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706-2237

RE: IMAP in the Name of United Water of Idaho

Dear Clerk:

Enclosed for filing with the Idaho Department of Water Resources in the above-referenced matter is the following: *Withdrawal of Protest*. I have also enclosed an additional copy of that document that I would ask that you conform and return to me in the enclosed envelope. Thank you very much.

Very truly yours,



Matt J. Howard

Enclosures

Cc: Estate of Eleanor I. Chase (w/encls.)

Mike Chase (w/encls.)

Peter R. Anderson, Esq. (w/encls)

RECEIVED
MAR 19 2003
Department of Water Resources

MATT J. HOWARD
Attorney at Law
P. O. Box 190012
Boise, Idaho 83719
Telephone: (208) 333-0622
Facsimile: (208) 333-8409

Attorney for the Estate of Eleanor I. Chase

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER OF WATER RIGHTS IN THE)
NAME OF UNITED WATER OF IDAHO,) WITHDRAWAL OF PROTEST
INC., INTEGRATED MUNICIPAL)
APPLICATION PACKAGE (IMAP))

The Estate of Eleanor I. Chase, by and through its attorney, Matt J. Howard, hereby
withdraws with prejudice its protest in the above-captioned matter.

DATED this 18 day of March, 2003.


MATT J. HOWARD
Attorney for Protestant

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of March 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Water Resources
State Office
1301 N. Orchard Street
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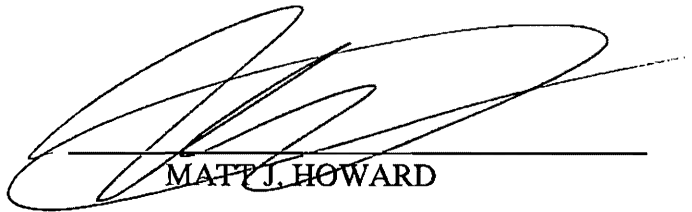
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MATT J. HOWARD

REC'D
MAR 18 2003
Department of Water Resources
Laura E. Burri
Jeffrey R. Christenson
David R. Claiborne
D. Blair Clark
Michael J. Doolittle
Shirley Farris
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
Daniel V. Sicenson
Allyn L. Sweeney
William F. Ringert, of Counsel
Samuel Kaufman (1921-1986)

March 17, 2003

Peter R. Anderson
729 W. Braemere Road
Boise, Idaho 83702

Re: United Water Idaho's Integrated Municipal Application Permit ("IMAP")

Dear Mr. Anderson:

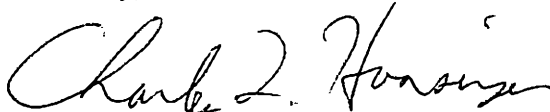
Enclosed please find the copies of the documents which we filed, on behalf of our clients, with the Department of Water Resources on Friday, March 14, 2003. A list of the documents enclosed is below. These documents were inadvertently not sent to you on Friday.

1. Statement of Additional Issues;
2. Motion to Require Publication of Notice of Amended Application; and
3. Motion to Require Legislative Approval.

Per the Department's instructions, you will be added to all of our future Certificates of Service in this matter.

Please contact me if you have any questions or comments.

Sincerely,


Charles L. Honsinger

CLH:kw
Enclosures

cc: Debbie Gibson, IDWR

RECEIVED

MAR 17 2003

Department of Water Resources

Kathleen Marion Carr
Office of the Field Solicitor
U.S. Department of the Interior
550 West Fort Street, MSC-020
Boise, ID 83724
Office: 208-334-1911 Fax: 208-334-1378
Email: kcarr@pn.usbr.gov
Attorney-Advisor for the U.S. Bureau of Reclamation

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER OF WATER RIGHTS	)	
IN THE NAME OF UNITED WATER	)	U.S. BUREAU OF RECLAMATION'S
IDAHO, INC. (UWID), INTEGRATED	)	CLARIFIED STATEMENT OF ISSUES
MUNICIPAL APPLICATION PACKAGE,	)	
("IMAP")	)	
_____	)	

The U.S. Bureau of Reclamation, by and through their representative of record,
Kathleen Marion Carr, submits its clarified statement of issues. Pursuant to its earlier response to
Statement of Issues, the Bureau of Reclamation identified the following issues of primary
concern:

1. Applicant's (United Water of Idaho), issue XII, whether "UWID's Request for Integrated Points of Diversion ("IPD") is Unlawful [under Idaho's Prior Appropriation Doctrine]."
2. Similarly, Protestants (Nampa Meridian Irrigation District, City of Caldwell, City of Meridian, Pioneer Irrigation District, and Settler's Irrigation District et al.) issue 12, wherein they state whether "the 'integrated points of diversion' approach in IMAP does comport with Idaho law, specifically the prior appropriation doctrine.

a. Senior water rights will not be protected from interference and injury under the approach outlined by UWID.

b. The integrated points of diversion approach in IMAP does not adequately protect senior water rights (whether ground or surface water, and not just from well interference).

c. Phrased differently, the integrated points of diversion approach in IMAP violates the prior appropriation doctrine and conjunctive administration of water rights."

Additionally, in the event the IMAP transfer request is approved, with or without conditions, the Bureau of Reclamation would like the following issue added for determination:

1. Who has the Burdens of Proof, Production and Persuasion for future cases of injury/interference to another water right.

This additional issue is consistent with its original protest.

In Barron v. Idaho Dept. of Water Resources, 18 P.3d 219 (Idaho 2001), a case wherein the applicant proposed to transfer a water right, the Supreme Court affirmed IDWR's decision to deny a transfer of a water right since there would be injury to other water rights even though none of these water right holders had protested the transfer and submitted evidence of injury. IDWR determined that the applicant had not provided sufficient evidence for it to approve the transfer application in light of testimony by the water master. The Supreme Court agreed and held that it was the applicant who bears the burden of proof and persuasion in providing IDWR with sufficient information to show *noninjury* to other water rights before IDWR could be poised to approve the transfer application.

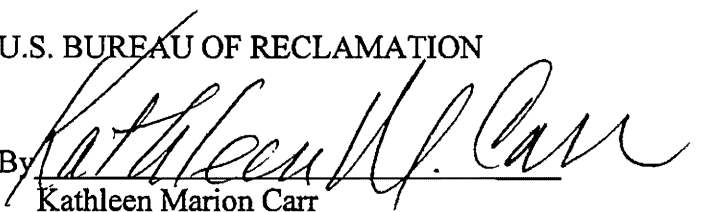
In the case of United Water's IMAP and its proposed Integrated Points of Diversion, the approval of the application as submitted could cause confusion as to which party (the senior surface user, another ground water user, or United Water) bears the burdens of proof, production, and persuasion to make the *prima facie* case of injury/interference in the future. In contrast, if it were made clear at this time: (1) which of United Water's well locations and/or which well areas would be principally utilized, (2) to what extent these locations will be used, then that burden would rest with United Water to prove *non-injury* to other users as provided by Barron. Nevertheless, it may be appropriate for United Water to have flexibility in its future integrated operations, but it should be clear who bears what burdens of proof, production and persuasion in future injury or interference cases.

Reclamation appreciates the opportunity to clarify its submission of issues.

RESPECTFULLY SUBMITTED this 14th day of March, 2003.

U.S. BUREAU OF RECLAMATION

By


Kathleen Marion Carr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of March, 2003, I caused to served a true and correct copy of the forgoing **U.S. BUREAU OF RECLAMATION'S CLARIFIED STATEMENT OF ISSUES** by the method indicated below, and addressed to the following:

cc: Director

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

☐ U.S. Mail
☒ Facsimile
☐ Hand Delivery
☐ Overnight Mail

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

☐ U.S. Mail
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Gary L. Spackman
Regional Manager
Idaho Department of Water Resources
Western Regional Office
2735 Airport Way
Boise, ID 83705
Fax: 334-2348

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

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Nampa & Meridian Irrigation District
City of Meridian, City of Caldwell,
Terteling Co., and Terteling Trust No. 7
Dan Steenson
Charles L. Honsinger
Ringert Clark
P.O. Box 2773
Boise, ID 83701-2773
Fax: 342-4657

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Boise City Attorney's Office
P.O. Box 500
Boise, ID 83701-0500
Fax: 384-4454

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Boise Public Works Department
Beth K. Baird
Environmental Programs Coordinator
P.O. Box 500
Boise, ID 83701-0500
Fax: 384-3905

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409 West Jefferson Street
Boise, ID 83702
Fax: 331-0954

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

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P.O. Box 190012
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Fax: 333-8409

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

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Pioneer & Settler's Irr. Districts
Scott L. Campbell
Moffatt, Thomas, Barrett, Rock &
Fields, Chtd.
101 S. Capital Boulevard, 10th Floor
P.O. Box 829
Boise, ID 83701
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City of Meridian Public Works
Gary D. Smith
660 E. Watertower
Meridian, ID 83642
Fax: 887-1297

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

☒ U.S. Mail
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☐ Overnight Mail

Interested Parties:
Ed Squires
988 S. Longmont Avenue, Suite 100
Boise, ID 83706

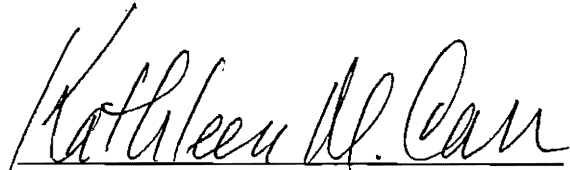
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Ellsworth Kallas Talboy, PLLC
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Boise, ID 83702

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☐ Hand Delivery
☐ Overnight Mail

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

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Kathleen Marion Carr

*John A. Rosholt
Albert P. Barker
John K. Simpson
Amy D. Chestnut
Travis L. Thompson*



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(208) 344-6034 facsimile
brs@idahowaters.com

233 Second Street North, Suite D
Twin Falls, ID 83301
(208) 733-0700 telephone
(208) 735-2444 facsimile

Albert P. Barker
apb@idahowaters.com

March 14, 2003

RECEIVED

MAR 17 2003

WATER RESOURCES
WESTERN REGION

Idaho Department of Water Resources
Western Regional Office
2735 Airport Way
Boise, ID 83705

RECEIVED

MAR 21 2003

Department of Water Resources

Re: United Water Idaho – Integrated Municipal Application Package (IMAP)

Ladies and Gentlemen:

Enclosed please find the original and one conforming copy of Boise Project's Motion to Dismiss. Also enclosed is a SASE for return of the conformed copy. ✓ *st 3-17-03*

Thank you,

Jaime Tucker
Assistant to Albert P. Barker

*cc'd Peter
3/28 ogy*

RECEIVED

MAR 17 2003

WATER RESOURCES
WESTERN REGION

Albert P. Barker ISB #2867
Barker, Rosholt & Simpson
P. O. Box 2139
Boise, ID 83701-2139
Telephone: 208-336-0700
Facsimile: 208-344-6034

Attorney for Boise Project Board of Control,
Wilder Irrigation District, and
Big Bend Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF 99	)	
APPLICATIONS FOR TRANSFER	)	
AND 13 APPLICATIONS FOR	)	
AMENDMENT OF PERMITS, KNOWN	)	
AS THE INTEGRATED MUNICIPAL	)	
APPLICATION PACKAGE (IMAP) BY	)	
APPLICANT UNITED WATER IDAHO,	)	
INC.	)	

**BOISE PROJECT'S
MOTION TO DISMISS**

The Boise Project Board of Control and its member districts hereby move for dismissal of the applications referenced herein and known as the Integrated Municipal Application Package (IMAP). In addition to the issues raised herein, the Boise Project Board of Control joins the other Protestants' filings pertaining to the motion to dismiss. This dismissal is respectfully requested based upon the following reasons:

(1) The notice in this matter did not comport with the requirements of Idaho Code section 42-203A.

The notice, although drafted by the Department, was not in the form prescribed by I.C. §42-

203A(1) and did not contain all the elements required of that section. It has been indicated that the Applicant worked with the Department and made changes to the notice. The notice violated the statutory requirements and did not provide enough clearly substantive information for adequate analysis of the application. Therefore, the IMAP should be dismissed for the procedural due process violations because the notice was insufficient.

(2) The water rights described in IMAP involve quantities greater than 50 cfs requiring legislative approval. The application, as initially filed, was for more than 50 cfs and legislative consent was never obtained.

Pursuant to I.C. §42-222(1), upon receipt of the application, the director has the duty to obtain any consent required in I.C. §42-108. If the application is otherwise proper, notice of the proposed change is to be provided as required in I.C. §42-203A. I.C. §42-108 requires the approval of the legislature for permanent or temporary change in period or nature of use for a quantity greater than 50 cfs.¹ IMAP sought both changes in period of use, place of use, point of diversion and nature of use for more than 50 cfs. Yet, legislative approval was never sought or obtained.

The Applicant has subsequently withdrawn portions of the application to result in less than 50 cfs being involved in the transfer proceeding. This modification was made to eliminate only the non-contiguous permits, as indicated by the Applicant, to ensure efficient operation of the system. As a result, the non-contiguous permits were withdrawn. The stated purpose of the withdrawal was not to bring the application within the 50 cfs requirement or to eliminate the need for legislative approval. This withdrawal was done after the notice for the initial application was published and does not cure the defective application. The application, when filed, was not in compliance with procedural requirements of Idaho law and the application

¹ The director may, without legislative approval, approve a temporary change within Idaho for a period of less than 3 years. I.C. §42-108.

should be dismissed in light of the Applicants failure to comply with this section.

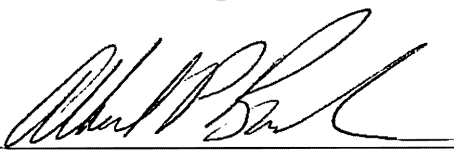
(3) *The IMAP was not submitted "upon forms furnished by the Department."*

I.C. §42-222(1) requires a person seeking to change elements of a water right to do so by submitting an application "upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are to be proposed..." UWID did not submit the application upon the department's forms and its submittal did not include all the information required by the forms. Again, the IMAP should be dismissed for this procedural due process violation.

This same argument is applicable to the motion to amend in that the amendments were not submitted on the department's forms. It was, therefore, too difficult to understand the changes and to determine how it modifies the application. The Applicant has not met its burden and complied with the statutory requirements in filing these applications. Therefore, the applications referenced herein should be dismissed.

DATED this 14th day of March 2003.

Barker, Rosholt & Simpson

By: 
Albert P. Barker

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March 2003, I served a copy of the foregoing BOISE PROJECT'S MOTION TO DISMISS, by mail to the following:

Idaho Department of Water Resources
Western Region
2735 Airport Way
Boise, ID 83705-5082

Christopher H. Meyer
Givens Pursley
P.O. Box 2720
Boise, ID 83701-2720

Cities of Eagle, Kuna, Meridian
& Star and Star Sewer District
Attn: Tammy A Zokan
225 N. 9th Street, Ste 420
Boise, ID 83702

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

City of Caldwell Engineering Dept.
Attn: Gordon Law
621 E. Cleveland Blvd
Caldwell, ID 83605

Boise Public Works Dept.
Attn: Beth Baird
P.O. Box 500
Boise, ID 83701-0500

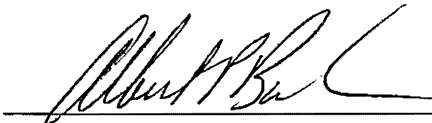
Steve Lester
Water Rights Supervisor
IDWR Western Regional Office
2735 Airport Way
Boise, ID 83705

Bureau of Reclamation
Attn: E. Gail McGarry
1150 N. Curtis Road, Ste 100
Boise, ID 83706-1234

Estate of Eleanor I. Chase
Attn: Matt J. Howard
P.O. Box 190012
Boise, ID 83719

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

Pioneer & Settlers Irrigation District
Attn: Scott Campbell
P.O. Box 829
Boise, ID 83701-0829





United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Northwest Region
Boise Field Office
Federal Building & U.S. Courthouse
MSC 020-550 West Fort Street
Boise, Idaho 83724-0020

RECEIVED
MAR 17 2003
WATER RESOURCES
WESTERN REGION

March 14, 2003

Chris Meyers, Esq.
John M. Marshall, Esq
Givens Pursley, LLP
Post Office Box 2720
Boise, ID 83701

Re: United Water Idaho - Integrated Municipal
Application Permit ("IMAP") and Map of United
Water's Well Locations

Dear Counsel:

This letter is to clarify the confidentiality requirements that the U.S. Bureau of Reclamation attached to the release of the draft map it developed related to the location of United Waters wells within the Treasure Valley.

As you may know, in order for United Water to protect its municipal water supply from terrorism or other serious acts of contamination, it has instituted security precautions just like every other water purveyor in the country. One of these necessary measures is the protection of information as to the actual location of its groundwater wells and a corollary protective measure of refusing to release an overall map that sites its groundwater wells.

As a consequence of United Waters precautionary measures and for its use in the IMAP proceedings, Reclamation officials decided to develop a draft map showing the approximate locations of United Waters wells within the Treasure Valley using legal descriptions posted on IDWR's website. In December, Chris Meyer requested copies of the map to distribute to the IMAP parties for their own use.

Pursuant to Mr. Meyer's request for copies, Reclamation undertook a security review of the map and its release. Reclamation determined that in the general interest of public safety, the map should be designated "Official Use Only/SENSITIVE" and provided to the IMAP participants on a "Need to Know" basis.

March 14, 2003

Page 2

In addition, the security review determined that the map should be furnished with the following statement:

The Bureau of Reclamation has determined that this document contains information considered to be "sensitive" and necessary to be appropriately safeguarded. It is intended for your use only. This document, or copies of it, are not to be distributed to any other entities, without prior consent and approval of the Bureau of Reclamation.

Based upon my understanding of Reclamation's security determination, I asked United Waters counsel to seek a confidentiality agreement from each map recipient. Because of the controversy that ensued from this request, Reclamation reexamined its earlier security determination and found that a confidentiality agreement is unnecessary since the release of the map has been (and will only be) provided to individuals on a "Need to Know Basis." Further, Reclamation has full confidence and trust that the individuals who receive the draft map will keep it safe.

We regret the confusion over the confidentiality agreement and hope this letter clarifies what has occurred.

Sincerely,



Kathleen Marion Carr

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

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

Gary L. Spackman
Regional Manager
Idaho Department of Water Resources
Western Regional Office
2735 Airport Way
Boise, ID 83705

IMAP Parties

UNITED STATES DEPARTMENT OF THE INTERIOR

**OFFICE OF THE FIELD SOLICITOR
550 WEST FORT STREET
BOISE, IDAHO 83724**

TELEFAX TRANSMISSION

To: **Director Karl Dreher**

Fax No(s): **327-5400**

From: **Kathleen Marion Carr
208-334-1911/work 208-334-1378/fax**

Number of Pages to Follow: 6

TRANSMISSION NOTICE: This fax is intended only for the addressee(s) shown above. It may contain information that is privileged or otherwise protected from disclosure. Any use of this fax or its contents by persons other than addressee(s) is strictly prohibited. If you received this fax in error, please notify sender immediately and mail back the original to us at the address above.

Comments/Message:

Kathleen Marion Carr
 Office of the Field Solicitor
 U.S. Department of the Interior
 550 West Fort Street, MSC-020
 Boise, ID 83724
 Office: 208-334-1911 Fax: 208-334-1378
 Email: kcarr@pn.usbr.gov
Attorney-Advisor for the U.S. Bureau of Reclamation

BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER OF WATER RIGHTS	)	
IN THE NAME OF UNITED WATER	)	U.S. BUREAU OF RECLAMATION'S
IDAHO, INC. (UWID), INTEGRATED	)	CLARIFIED STATEMENT OF ISSUES
MUNICIPAL APPLICATION PACKAGE,	)	
("IMAP")	)	
_____	)	

The U.S. Bureau of Reclamation, by and through their representative of record,
 Kathleen Marion Carr, submits its clarified statement of issues. Pursuant to its earlier response to
 Statement of Issues, the Bureau of Reclamation identified the following issues of primary
 concern:

1. Applicant's (United Water of Idaho), issue XII, whether "UWID's Request for Integrated Points of Diversion ("IPD") is Unlawful [under Idaho's Prior Appropriation Doctrine]."
2. Similarly, Protestants (Nampa Meridian Irrigation District, City of Caldwell, City of Meridian, Pioneer Irrigation District, and Settler's Irrigation District et al.) issue 12, wherein they state whether "the 'integrated points of diversion' approach in IMAP does comport with Idaho law, specifically the prior appropriation doctrine.

- a. Senior water rights will not be protected from interference and injury under the approach outlined by UWID.
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This additional issue is consistent with its original protest.

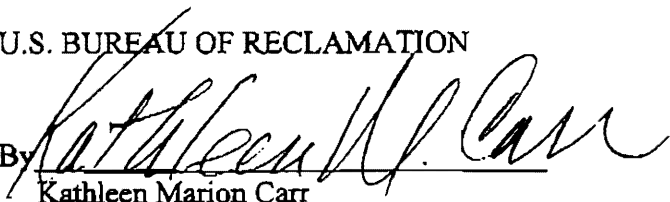
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Reclamation appreciates the opportunity to clarify its submission of issues.

RESPECTFULLY SUBMITTED this 14th day of March, 2003.

U.S. BUREAU OF RECLAMATION

By 
Kathleen Marion Carr

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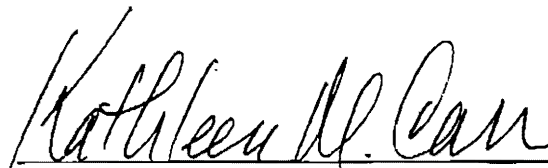
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☐ Overnight Mail


Kathleen Marion Carr

MAR 14 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.

MOTION TO DISMISS

Pioneer Irrigation District and Settlers Irrigation District, by and through their counsel of record Moffatt, Thomas, Barrett, Rock & Fields, Chtd., and in accordance with the Hearing Officer's Second PreHearing Order and Idaho Code sections 42-108, 42-203A, 42-211, and 42-222, hereby move the Hearing Officer for an order dismissing the IMAP proceedings.

This Motion is predicated upon the fact that when the IMAP was "originally" filed and noticed in 2002, the notice that was published failed to meet the requirements of Idaho Code section 42-203A. Further, that original version was not upon forms furnished by the Department,

and legislative approval was not obtained before notice of the IMAP was published. Notice should have been obtained because the quantity of the rights for which a change in the nature of use was sought exceeded 50 c.f.s.

On February 28, 2003, United Water Idaho ("UWID") filed an amended version of the IMAP, which fundamentally altered the IMAP. The changes cannot cure the originally deficiencies in the IMAP. For that reason, and because the most recent version of the IMAP represents a fundamental change to the nature of the IMAP, notice must be republished.

DATED this 14th day of March 2003.

**MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED**

By Scott L. Campbell
Scott L. Campbell - Of the Firm

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of March 2003, I caused a true and correct copy of the foregoing **MOTION TO DISMISS** to be served by the method indicated below, and addressed to the following:

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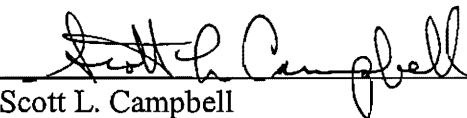
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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

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

**MEMORANDUM IN SUPPORT OF MOTION
TO DISMISS**

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I.

INTRODUCTION

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 Idaho Department of Water Resources’ Rules of Procedure, the Hearing Officer’s Second PreHearing Order, and other applicable law, hereby move to dismiss United Water Idaho, Inc.’s (“UWID”) Integrated Municipal Application Package (“IMAP”). The Motion to Dismiss is predicated upon the fact that the public notice of the IMAP did not comport with the requirements of Idaho Code section 42-203A; the water rights involved in the IMAP, for which the season of use or purpose of use is sought to be changed, exceed 50 cfs, thus requiring legislative approval which was not obtained; and because the IMAP was not submitted upon forms furnished by the Idaho Department of Water Resources (the “Department”). Each of those issues are discussed herein, following a discussion of certain pertinent factual matters and overreaching legal principles.

For the reasons set forth herein, the Districts respectfully request that the Hearing Officer dismiss the IMAP in its entirety.

II.

FACTUAL BACKGROUND

At the Second PreHearing Conference, and in his Second PreHearing Order, the Hearing Officer instructed UWID on how it should properly amend the IMAP. UWID had moved to change the IMAP by certain withdrawals, and had simply provided replacement pages to the IMAP. That made it difficult to determine the exact nature of the amendments. Therefore, the Hearing Officer mandated that:

The Applicant is ORDERED to review the entire IMAP with staff from IDWR and hand mark all changes to the IMAP, including the executive summary, necessitated by the proposed amendments and the withdrawal. Counsel for the Applicant and IDWR staff will initial and date all such changes and the Applicant shall deliver a copy of the amended IMAP . . . on all parties by February 28, 2003.

Second PreHearing Order, p. 3.

UWID failed to comply with that clear and direct order from the Hearing Officer.

The problems with the path chosen by UWID will be discussed in the context of the larger analysis of issues 1 and 3, herein, in accordance with the Second PreHearing Order.

At this point, however, the Districts note that the Hearing Officer directed UWID to take very specific steps regarding the IMAP. Those steps were designed to enable the Protestants and the Hearing Officer to easily see what changes had been made to the IMAP by virtue of UWID's requested amendments. Instead, what UWID produced is quite different, and in fact, UWID fundamentally changed the IMAP. UWID withdrew significant portions of the IMAP (formerly the Executive Summary, Tabs D, E and F, and Appendix A). that information has now been termed "Information and Documentation in Support of IMAP." The "new IMAP" now contains 99 individual (yet largely identical) Applications for Transfer and 8 individual Applications to Amend Permit. UWID disregarded the Hearing Officer's direct order to hand mark and initial discrete changes, and instead changed the IMAP essentially in its entirety.

In addition to being in direct contravention of the Hearing Officer's Order, the "new IMAP" does not contain the interlineation and hand marking required by the Hearing Officer. Thus, the fundamental goal of the relevant sections of the Hearing Officer's Second PreHearing Order has not been met: the Districts are still unable to discern exactly what the effect of the amendments on the IMAP might be. Moreover, the District's must contend with

what is essentially an entirely new IMAP, well after proceedings have begun. The Districts object to such actions.

III.

GENERAL PROCEDURAL DUE PROCESS CONSIDERATIONS

A. Irrigation Districts Are Entitled To Procedural Due Process Protections

The Motion to Dismiss is predicated on two bases: failure to follow statutes and procedural due process violations, with the latter being related to the former. A threshold issue, raised by the Hearing Officer, is whether the Districts are entitled to procedural due process protections.

Article I, § 13 of the Idaho Constitution provides, in pertinent part, that “[n]o person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law.” IDAHO CONST. Art. I, § 13. *See also* UNITED STATES CONST., 5th Amend. (providing in pertinent part that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”).

The Hearing Officer has requested that the parties filing a motion to dismiss show how they were harmed by any deficiencies in the notice or in the application filed in this matter. The Districts will discuss that issue below, as requested by the Hearing Officer. However, the Districts also want to clarify that they are indeed protected by the due process clause of the Idaho Constitution.

1. Due Process and Governmental Entities Generally

The Districts were able to find two cases in which the Idaho Supreme Court considered the due process claims of a governmental entity. In the first, the State Insurance Fund

("SIF") alleged that certain of the Idaho Industrial Commission's procedures violated SIF's due process rights. *In re Wilson*, 128 Idaho 161, 911 P.2d 754 (1996). The Court did not consider whether the SIF was entitled to due process protections. Instead, the Court considered the merits of the claim, and held:

due process is not a concept rigidly applied to every adversarial confrontation, but instead is a flexible concept calling for such procedural protections as are warranted by the particular situation. [Citation omitted]. Simply stated, procedural due process requires that a party be provided with an opportunity to be heard at a meaningful time and in a meaningful manner.

Id. at 167, 911 P.2d at 760. In that case, the Court apparently assumed that governmental entities were entitled to procedural due process protections.¹

The other case concerned a dispute between the City of Boise and the Industrial Commission. *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169 (1997). The City argued that it had been "denied procedural due process because it was not able to present any oral argument on the matter." *Id.* at 910, 935 P.2d at 174. The Idaho Supreme Court considered the merits of the City's argument, and as in *In re Wilson* (as cited above), seems to have assumed without deciding that governmental entities in Idaho are entitled to procedural due process protections under the Idaho Constitution. The Court quoted *In re Wilson*, but before doing so noted that "[p]rocedural due process is an essential requirement of the administrative process, and notice is a critical aspect of that due process." *Id.* (additional citations omitted).

2. The Nature Of Irrigation Districts

¹ The SIF is "an independent body corporate politic . . ." I.C. § 72-901. The governor appoints five board members, who are in charge of, *inter alia*, ensuring that SIF "maintains the public purposes for which the state insurance fund was created." *Id.* The state treasurer is the custodian of the fund. I.C. § 72-910.

Irrigation districts are unique creatures of statute, and courts have had a difficult time categorizing them. However, in 1933, the Idaho Supreme Court recognized that it is difficult to determine whether an irrigation district is a public corporation or a municipal (or quasi-municipal) corporation:

It follows that the primary purpose of an irrigation district is limited to the conducting of its business *for the private benefit of the landowners within the district* by the acquisition of water rights and the irrigation of lands within its boundaries; and that *the landowners within the district are the members of the corporation, control its affairs, and they are primarily benefited [sic] by its operations*. It is likewise true that irrigation districts have been endowed with certain incidental municipal powers necessary to its proper functioning, such as the election of its officers and directors, the levy of assessments for bond, interest, maintenance, and operation and other like authorized purposes, and the equalization and collection of such assessments, which incidental municipal powers have resulted in its classification as a quasi municipal or municipal corporation with the construction of statutes and constitutional provisions involving the exercise of such municipal powers.

Lewiston Orchard Irr. Dist. v. Gilmore, 53 Idaho 377, ___, 23 P.2d 720, 722 (1933) (emphasis added). The court then went on to make a more definitive characterization of an irrigation district, finding that it was “a public corporation having such incidental municipal powers as are necessary to its internal management and proper conduct of its business.” *Id.*

However,

Its primary purpose is the acquisition and operation of an irrigation system as a business enterprise for the benefit of landowners within the district, such property being held in trust for them in a proprietary capacity, while secondarily and incidentally certain municipal powers have been conferred for its government and regulation, and, when this is borne in mind, any seeming confusion in or conflict with the authorities holding that an irrigation district is a municipal or quasi municipal corporation within the meaning of certain statutes and constitutional provisions disappear.

Id. (Emphasis added). *See also Tingwall v. King Hill Irr. Dist.*, 66 Idaho 76, ___, 155 P.2d 605, 606 (1945) (stating that “[i]t is well settled in this jurisdiction that an irrigation district is not, strictly speaking, a municipal corporation, but a quasi-municipal corporation operating its irrigation system in a proprietary capacity, and such municipal powers as it may have are only secondary or incidental.”); *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 269 P.2d 755, 759 (1954) (quoting *City of Nampa v. Nampa & Meridian Irr. Dist.*, 19 Idaho 779, 787, 115 P. 979, 982 (1911) (stating that ““An irrigation district is a public quasi corporation, **organized, however, to conduct a business for the private benefit of the owners of the lands within its limits. * * *** It is, in the administration of its business, the owner of a system in a proprietary rather than in a public capacity, and must assume and bear the burdens of proprietary ownership.” (emphasis added))). Given that, irrigation districts should be entitled to procedural due process protections. That is especially true where, as here, the irrigation district is taking action for the private benefit of its landowners. While the Districts believe that governmental entities are entitled to procedural due process protections under the Idaho Constitution, the specific and unique nature of irrigation districts sets them apart from other types of quasi-governmental entities.

In another case, the court distinguished between irrigation districts and counties, cities, school boards and school districts. While the latter four categories “possess general governmental powers in the sense that their regulations and taxation apply to all persons located within their geographical boundaries,” irrigation districts were distinguishable. *Barker v. Wagner*, 96 Idaho 214, 217, 526 P.2d 174, 178 (1974). The differences lay in the fact that “[i]rrigation districts are organized for the benefit of water users only, and they raise funds to finance their operations through assessments of water users. The assessments are levied on the basis of benefits received by the land.” *Id.* *See also Brizendine v. Nampa Meridian Irr. Dist.*, 97

Idaho 580, 587, 548 P.2d 80, 87 (1976) (stating that “an irrigation district’s primary purpose is the acquisition and operation of an irrigation system as a business enterprise for the benefit of its shareholders.”).

The Districts are involved in the IMAP in order to protect the water rights which it holds for the benefit of the landowners within its boundaries. In effect, the District represents the landowners, who would certainly be entitled to procedural due process protections.

B. The Harm From A Procedural Due Process Violation Results From The Fact Of The Violation; No Additional Harm Need Be Shown

The Hearing Officer requested that when the parties address the alleged deficiencies in notice provided in this matter, as well as the issue of whether the appropriate forms were used, that they also indicate how they were harmed by those deficiencies. The Districts will attempt to comply with the Hearing Officer’s request when they discuss the specific deficiencies below in Section IV. The Districts wish to note, however, that the harm from a procedural due process violation results from the fact of the violation itself; no additional harm need be shown.

In a case in which students who had been subjected to school suspensions brought claims under 42 U.S.C. section 1983, the Court considered whether the plaintiffs would be entitled to damages under Section 1983 for procedural due process violations if they did not prove injury. *Carey v. Piphus*, 435 U.S. 247 (1978). The Court held that they were entitled to damages, because even if they did not suffer an actual injury, “[t]he fact remains that they were deprived of their right to procedural due process.” *Id.* at 266. While the Court would not allow compensatory damages,

[b]ecause the right to procedural due process is “absolute” in the sense that it does not depend upon the merits of a claimant’s substantive assertions, and because of the importance to organized

society that procedural due process be observed, [citations omitted], we believe the denial of procedural due process should be actionable for nominal damages without proof of injury.

Id. at 266. Similar rationale applies here: meaningful notice and a meaningful opportunity to be heard are absolute rights, and critical to a civilized society. Therefore, the fact that procedural due process protections have been violated is sufficient to warrant remedial actions.

The Ninth Circuit illustrated the sanctity of procedural due process, and why it is not necessary to prove injury when alleging that one's procedural due process rights have been violated:

A procedural due process claim, unlike negligence and takings claims, is not rooted in the notions of adequate compensation and economic restitution but is based on something more – ***an expectation that the system is fair and has provided an adequate forum for the aggrieved to air his grievance.*** Aspirations of ensuring procedural due process are founded on a hope that the process of dispute resolution will be just, even when the substantive outcome is not.

Weinberg v. Whatcom City, 241 F.3d 746, 752 (9th Cir. 2001) (emphasis added). *See also Carey*, 435 U.S. at 266 (stating that “[b]y making the deprivation of such rights actionable for nominal damages ***without proof of actual injury***, the law recognizes the importance to organized society that those rights be scrupulously observed; . . .”) (emphasis added).

Therefore, it is not necessary to prove that one has been injured by a procedural due process violation. The harm results from the very violation of the right; there can really never be a “no harm - no foul” determination when procedural due process compliance is lacking. To the extent there were procedural due process violations in this matter, the Districts should not have to prove any particular harm to themselves by virtue of any procedural due process violations. However, the Districts also believe that they were in fact harmed by the

procedural due process violations discussed herein, and will discuss that more particularized harm in the appropriate point of this memorandum.

IV.

THE NOTICE DID NOT COMPORT WITH THE STATUTES, AND, THUS, WITH PROCEDURAL DUE PROCESS

A. Meaningful Notice Is At The Heart Of Procedural Due Process

In order to satisfy the constitutional procedural due process requirements, the notice given must be meaningful. *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983) *See also Anderson v. Crapo*, 99 Idaho 805, 807, 589 P.2d 957, 959 (1978) (stating that “[n]otice is a fundamental element of due process, . . .”). While due process is “fundamentally the right to be heard,” that right “has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or consent.” *Hutchinson v. State*, 134 Idaho 18, 22, 995 P.2d 363, 367 (2000). That case was not an administrative action, but a civil rights matter heard in court.

Nevertheless, the principle applies in the context of an Idaho Department of Water Resources administrative proceeding: the Idaho Legislature has clearly mandated that an appropriate notice (delineated in Idaho Code section 42-203A) be provided. Unless the notice provided thereunder is full and accurate and accords with the law, a potentially affected party cannot accurately determine whether it should file a protest to protect its rights. Thus, the opportunity to be heard will not be meaningful. Stated plainly, if a meaningful notice is not provided, the opportunity to be heard is meaningless. Such is the case here.

B. The Notice In This Matter Did Not Comport With The Requirements Of Idaho Code § 42-203A

1. Differing Versions Of Notice Were Published Around The State

A memorandum from the Department's files illustrates the rather convoluted path taken by the notice in this matter. Ex. 1 to Campbell Affidavit. The memo reveals that in accordance with his job duties, Mr. Steve Lester prepared the notice for publication and sent it to newspapers for statewide publication. However, UWID's counsel demanded that it be allowed to make changes, apparently in order to allow the notice to conform more clearly with UWID's view of the IMAP. *Id.* Ex. 2 to Campbell Affidavit reflects the changes made by UWID's counsel, as well as Director Dreher.

The Districts are troubled by the fact that an Applicant was permitted to alter a notice for publication, particularly since it appears that the changes were made in order to make the notice consistent with UWID's particular positions regarding the IMAP. Even more significant for due process purposes, however, is the fact that it appears from IDWR records that the identical notice was not published in all newspapers. In other words, different newspapers published different versions of the notice. In fact, "[o]nly two papers published the final and correct version. Two other papers used the first version, and the remaining newspaper used the second version." Ex. 1 to Campbell Affidavit, p. WIDWR 00075. Moreover,

The last two newspapers [which had published the third version on April 4, 2002] are expected to publish the desired version on April 11. The other three newspapers were alerted today [4/5/02] (fax and emails) to disregard versions one and two but to publish the third and final edition of the notice on April 11.

Id. (Bracketed material added.) It is not clear whether the three newspapers did indeed publish the third version on April 11, 2002.

Either way, the notice publication does not comport with I.C. § 42-203A, which requires:

When the application proposes a diversion in excess of ten (10) c.f.s. . . . , the director shall cause the notice to be published in a newspaper or newspapers sufficient to achieve statewide circulation. Any notice shall be published at least once each week for two successive weeks.

I.C. § 42-203A(2). Publication of differing versions of a notice simply does not comply with that statutory mandate. And if the argument is made that the notices conveyed substantially the same information, one must remember that UWID viewed the changes important and substantial enough to demand that they be made.

2. The Notice Does Not Comport with the Idaho Code And, Therefore, Does Not Meet Procedural Due Process Standards

Idaho Code section 42-203A requires that:

[u]pon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying: (a) the number of the application; (b) the date of filing thereof; (c) the name and post-office address of the applicant; (d) the source of the water supply; (e) the amount of water to be appropriated; (f) in general the nature of the proposed use; (g) the approximate location of the point of diversion; (h) and the point of use. The department shall also state in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

I.C. § 42-203A(1). Notice of applications for transfer must be provided in the same manner, with the same information. I.C. § 42-222. Section 42-203A is written in mandatory, not permissive, terms.

A copy of the third version of the notice is Exhibit 1 to the Campbell Affidavit.

Ex. 1 to Campbell Affidavit, p. WIDWR 00076 - WIDWR 00077. The notice contains the name

and post-office address of the applicant and the source of the water supply. The notice does not contain the number of the application, although the Districts recognize that the Department has apparently not assigned a number, instead proceeding by referring to the package as the IMAP. The quantity of water is also stated in the notice.

The notice does not contain the date of filing of the IMAP, although that information is clearly required by the Idaho Code. More troubling is the fact that the “approximate location of the point of diversion” is not set forth in the notice, which is contrary to the Idaho Code. Instead, the general location of the wells is only vaguely described as serving “the Boise area . . . A few of the rights serve non-contiguous areas in and/or near Eagle, Meridian, Kuna and Nampa.” *Id.* at WIDWR 00076. In actuality, that almost seems like a description of the place of use rather than point of diversion at any rate. A well owner would have no way of determining, based on the notice, whether he or she should file a protest, since the well owner would not know whether a UWID well was located next to his or hers. The same is true for a water right holder with a water right from the Snake River; based upon the notice, a surface water right holder would not know whether any of the wells are located in such a way as to interfere with surface water rights.

The protections afforded by Idaho Code section 42-203A and by extension the due process clause of the Idaho Constitution have not been provided. The fact that this information was not provided also highlights an equal protection problem. In counsel’s experience, notice of applications for transfer or to amend a permit generally include a legal description of the point of diversion. This applies to virtually every water holder other than UWID. The fact that UWID’s notice did not contain legal descriptions of the points of diversion, even though such information is required for others, raises serious due process considerations.

There may be two potential justifications offered for failure to provide a legal description of the points of diversion. First, there may be security issues. However, the location of UWID's wells is a matter of public record, and not a secret at any rate. Moreover, the destruction of crops and/or food supplies via irrigation water contamination is just as strong a possibility, with serious consequences, yet legal descriptions of points of diversion for those water supplies is published. The same is true of points of diversion for domestic and industrial water rights.

The second potential justification would be the time and money required to include all of the points of diversion in the notice. From a more philosophical perspective, one must ask whether it is appropriate to limit procedural due process merely because it might cost more and take up more space. Granted, the process due can vary according to the property interest at stake, and the risk of erroneous deprivation of that property interest. However, the relationship is a direct one – the greater the property interest at issue, the higher the level of procedural due process. The IMAP is of such a nature and magnitude as to constitute a potentially significant effect on the property interests (*e.g.*, water rights of others). In situations such as this, particularly, the answer to the philosophical question posed above is most clearly “no.”

As to the more practical perspective, Section 42-203A requires that the notice provide “the approximate location of the point of diversion.” The notice published in this matter (regardless of which version) simply did not meet that requirement.

The same is true with regard to the place of use description in the notice. The notice described the place of use as “*the UW expanding service area.*” The same potential justifications and philosophical considerations apply. As to the practical points, Section 42-203A

requires that the notice *specify* the point of use. The generalized description provided in the notice is not sufficient.

C. The New Version Of The IMAP Requires Republication Of Notice

The version of the IMAP which UWID provided on February 28, 2003, fundamentally altered the IMAP, as described *supra*. Significant material was removed, and the form of the IMAP certainly changed. These changes necessitate republication of the notice.

Idaho Code section 42-211 pertains to amended permits. That section provides that if an application to amend a permit is filed before the permit has been issued, but after original notice has been published, “such notice shall be republished following amendment, upon payment by the applicant of the statutory fee for republication as in this act provided.” I.C. § 42-211. That situation is present here, with a twist. UWID already filed an application to amend several permits, but before those amended permits were issued, UWID amended the application. Therefore, republication is required.

While Idaho Code section 42-222, pertaining to transfers, does not speak specifically to the issue of republication, there is no reason why the standard should be different. UWID amended the transfer application (*e.g.*, the IMAP) before an order approving the transfer application was issued, and using Section 42-211 as a guide, the notice of the IMAP should be republished.

V.

UWID DID NOT OBTAIN NECESSARY LEGISLATIVE APPROVAL

Once again, the February 28, 2003 version of the IMAP affects analysis of this issue. When the original IMAP was filed, the quantity of the rights (permit amendments and transfer applications) for which UWID sought to change the nature of use totaled 52.63 cfs by the

District's count. Now that UWID has decided to remove the "non-contiguous" permits, the quantities for which a change in the purpose of use is sought is 49.13 cfs.

Idaho Code section 42-108 provides, in pertinent part, that:

Any permanent or temporary change in period or nature of use in or out of state for a quantity of greater than 50 cfs . . . shall require the approval of the legislature . . .

I.C. § 42-108. By the District's count the original version of the IMAP included changes in the purpose of use for 52.63 cfs of water, which would require legislative approval.

That legislative approval is mandatory, and should have been obtained before notice was published. Idaho Code section 42-222 provides that upon receipt of a transfer application, "it *shall be the duty* of the director of the department of water resources to examine the same, *obtain any consent required in section 42-108, Idaho Code*, and if otherwise proper to provide notice of the proposed change . . ." I.C. § 42-222. Thus, legislative approval should have been obtained *before* notice of the IMAP was ever published. The failure to do so is in direct contravention of the Idaho Code. The mandatory condition precedent in Section 42-222 and 42-108 has not been fulfilled.

UWID may argue that the IMAP is really a series of individual transfers and permit amendments, and that none of the individual rights have a quantity of 50 cfs or more. However, UWID has consistently maintained that the IMAP is an *integrated* application package, and that if the IMAP is approved, UWID intends to operate its system in an integrated manner. Each water right would be used at any point of diversion owned by UWID (the "integrated points of diversion" concept) and the water rights would be used throughout UWID's "service area." Clearly, this is more than a series of individual transfers and permit applications, and legislative approval must be obtained. Because the Idaho Legislature has not provided its

consent to the IMAP proceeding, no other proceedings can take place until legislative approval is obtained.

Now, of course, UWID has amended the IMAP in such a way that it is barely under the 50 cfs limit. However, that does not change the fact that legislative approval should have been obtained at the outset. Moreover, the fact that the changes inherent in the new version of the IMAP are so fundamental shows, yet again, that notice should be republished.

VI.

THE IMAP WAS NOT SUBMITTED UPON FORMS FURNISHED BY THE DEPARTMENT

Both Idaho Code section 42-203A and section 42-222 require that when an application is submitted thereunder, it be made upon forms furnished by the Department. The possible reasons for that requirement are sound: it ensures that all applicants will be required to submit the same information (thus, alleviating one potential equal protection concern) and also ensures that those examining the application to determine whether it will affect them will more easily be able to find the information which they seek. However, UWID did not submit the IMAP upon forms furnished by the Department

A. The Original Version Of The IMAP Did Not Comport With The Idaho Code

By the term "original version," the Districts mean that version of the IMAP for which notification was published in April 2002. The original version was composed largely of materials which provided support for the various components of the IMAP. The IMAP did include an application for transfer form and an application to amend permit form, but those were not official Department forms. Even more troubling, the forms apparently created by UWID did not contain the information contained in the Department's official forms. They did not adequately define the place of use, and the map attached was woefully deficient - it did not

indicate the new points of diversion or place of use, “clearly depict[ed] . . . by section, township and range number.” IDWR’s Application for Transfer of Water Right form, Part 3.

The forms did not comport with the Idaho Code, and deficiency renders the IMAP invalid. Moreover, these deficiencies equate to procedural due process violations, because it is difficult, if not impossible, for protestants (or potential protestants) to determine what it is that the IMAP seeks to accomplish. Therefore, potential protestants are deprived of their opportunity to be heard in a meaningful manner. After all, it is impossible to accurately articulate one’s concerns if one is unable to fully understand the proposed changes because statutorily mandated data has not been provided.

The IMAP is far more than a run-of-the-mill transfer application (which in this day and age are complicated enough). What UWID seeks to do is factually complex and legally precedent-setting. The confusion inherent in such a process is only compounded when the proper forms are not used.

B. The New Version Of The IMAP Does Not Comport With The Spirit Or The Substance Of The Idaho Code

By the term “new version,” the Districts refer to the new version of the IMAP which was served on the parties on or about February 28, 2003. The changes between the old and new version were previously described in this Memorandum. The Districts assume that the changes were made, in part, to address the concerns of the Districts and others that the IMAP was not submitted upon forms furnished by the Department. The Districts appreciate that recognition, but this is really a case of “too little, too late.”

The IMAP continues to lack a sufficient description of the points of diversion, although a specific description of the points of diversion has been provided upon Department forms. The real problem is that, now, nearly one year after notice was originally published and

protests filed, UWID has changed the playing field. This change is unfair at this stage, not only because it requires parties such as the Districts to go back and reevaluate the IMAP, but also because it is unfair to those who may have reviewed (or attempted to review) the original version of the IMAP. After such a review, the reviewing party may have decided not to protest (or may have given up in frustration). Now, however, parties who conducted an initial review may very well wish to have an opportunity to review the new IMAP, and perhaps participate.

The Districts have been harmed because they, and/or their representatives, have expended time and money in attempting to flesh out some of the information now contained in the new version of the IMAP. Moreover, other individuals or entities who are not parties may have been harmed by virtue of the fact that they, too, may have had difficulty understanding the IMAP due to the complicated form of the application originally used by UWID. Now a potentially simpler version of the IMAP is available, but the potential parties may be completely unaware of the document.

VII.

CONCLUSION

The notice published in this matter did not comport with the Idaho Code, and did not provide adequate notice as contemplated by the Idaho Constitution's due process guarantee. Moreover, the recently resubmitted IMAP requires republication of notice. In addition, legislative approval was not obtained prior to publication of notice, contrary to Idaho Code § 42-108 and 42-222. Finally, the IMAP, as originally submitted and for which notification was provided was not submitted on forms furnished by the Department, and the forms which were used did not contain all of the requisite information. The revised IMAP does not resolve the problem.

For the reasons just summarized, as more fully discussed above, the District's respectfully request that the Hearing Officer grant their Motion to Dismiss.

DATED this 14th day of March 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 14th day of March 2003, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** to be served by the method indicated below, and addressed to the following:

Director
Idaho Department of Water Resources
1301 N. Orchard Street
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Boise, ID 83720
Fax: 327-5400

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Boise, ID 83702

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Gary L. Spackman, Regional Manager
Idaho Department of Water Resources
Western Region Office
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Nampa & Meridian Irrigation District,
City of Meridian, City of Caldwell, Terteling
Company, and Terteling Trust No. 7
Charles L. Honsinger
Ringert Clark
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Boise, ID 83701-2773
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Barker Rosholt & Simpson
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Pacific Northwest Region , Boise Field Office
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Tammy A. Zokan
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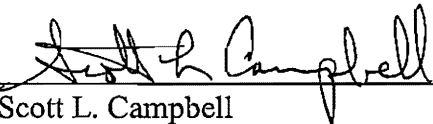
☒ U.S. Mail, Postage Prepaid
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Mr. Michael Chase
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Eagle, ID 83616-3802

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Scott L. Campbell

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

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Telephone: (208) 345-2000
Facsimile: (208) 385-5384
18946.26

RECEIVED

MAR 14 2003

Department of Water Resources

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

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

AFFIDAVIT OF SCOTT L. CAMPBELL

State of Idaho)
)ss.
County of Ada)

SCOTT L. CAMPBELL, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record providing legal representation to
Pioneer Irrigation District and Settlers Irrigation District ("Districts") in the above-captioned
matter.

2. I have knowledge of the files pertinent to this matter, and I make this affidavit based upon personal knowledge.

3. Appended hereto as Exhibit 1 is a true and correct copy of a memorandum dated April 5, 2002, from Steve Lester to the IDWR file. This document was obtained during the course and scope of a public records review my office conducted on behalf of the Districts in this matter.

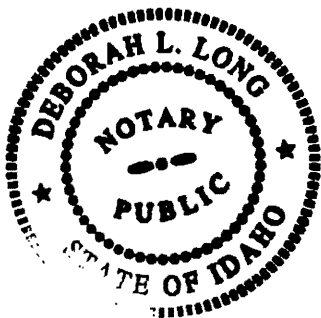
4. Appended hereto as Exhibit 2 is a true and correct copy of correspondence from Christopher Meyer, counsel for UWID, to Steve Lester of IDWR, regarding changes to the IMAP's notice for publication. The correspondence is dated March 28, 2002, and was obtained during the course and scope of a public records review my office conducted on behalf of the Districts in this matter.

DATED this 14th day of March 2003.

By Scott L. Campbell
Scott L. Campbell

SUBSCRIBED AND SWORN to before me this 14th day of March 2003.

S
E
A
L



Deborah Long
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 10/10/07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of March 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

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☐ Facsimile

Peter Anderson, Hearing Officer
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Boise, ID 83702

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Gary L. Spackman, Regional Manager
Idaho Department of Water Resources
Western Region Office
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United Water Idaho Inc.
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Givens Pursley, LLP
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Boise, ID 83701
Fax: 388-1300

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Nampa & Meridian Irrigation District,
City of Meridian, City of Caldwell, Terteling
Company, and Terteling Trust No. 7
Charles L. Honsinger
Ringert Clark
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Boise Project Board of Control
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Barker Rosholt & Simpson
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Office of the Solicitor
Pacific Northwest Region , Boise Field Office
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Boise, ID 83724-0020
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Star Sewer District
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Tammy A. Zokan
Moore Smith Buxton & Turcke
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Ed Squires
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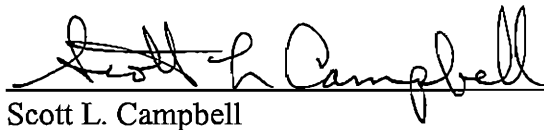
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Mr. Michael Chase
70 W. Floating Feather Road
Eagle, ID 83616-3802

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☐ Facsimile



Scott L. Campbell

Affidavit of Scott L. Campbell

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.

Exhibit 1

MEMORANDUM

TO: IMAP File
FROM: Steve Lester 
DATE: April 5, 2002
RE: Legal Notice

This memo summarizes publication of legal notices for United Water's IMAP. Publication was scheduled for the first two weeks of April in five newspapers: two local ones plus three out of area papers to complete statewide publication required in this case.

I completed the legal notice by March 26. To honor a previous request, an email including the notice was sent to UW attorney John Marshall that day. Western Region distributed the notice to the newspapers via a combination of email and regular mail by early afternoon on March 27, the deadline for sending notices for publication on April 4 and April 11.

Around 4:30 p.m. on March 27, Marshall and his colleague, Chris Meyer, called me. They wanted to change some language in the notice, mostly to avoid use of the word "future", apparently for reasons involving the PUC. They also noted the legal notice had the incorrect zip code for UW, although the zip code matched the application information. They wondered how difficult it would be to retract the notice and replace it with a revised version by the next day.

I told them the matter would be discussed with the regional manager by the next morning and that Western Region would contact them on March 28. By late morning on March 28, a second version of the notice to correct the zip code and change some but not all of the language requested by the attorneys was sent to at least the Ada County newspaper. Before the corrected notice could be supplied to the other papers, more exchanges occurred between department staff and then between staff and UW attorneys, including telephone and fax contacts involving the attorneys, the State Office and Western Region.

The result by the close of business on March 28 was a third and final version of the notice. All five newspapers were provided this information by March 29 with instructions to disregard any prior versions. It was expected that legal notices of April 4 and April 11 would reflect the final information provided by this office to the newspapers.

MEMORANDUM

TO: IMAP File
FROM: Steve Lester 
DATE: April 5, 2002
RE: Legal Notice

*tracking the
legal notice
process*

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One should note past experience with similar last minute and/or multiple changes has not always been successful, lengthening the legal notice process. In any event, the die was cast by March 28.

The final and correct legal notice was added to the IDWR web site. The correct notice was included in hard copy IMAP notebooks provided to the State Office and the other regional offices.

Results of the first publication on April 4 are shown below. Only two papers published the final and correct version. Two other papers used the first version, and the remaining newspaper used the second version. This is an unfortunate but not surprising result.

<i>NEWSPAPER & LOCATION</i>		<i>VERSION PUBLISHED</i>
Statesman	Boise	Second
Press Tribune	Nampa	First
Times News	Twin Falls	First
Post Register	Idaho Falls	Third
Tribune	Lewiston	Third

The last two newspapers are expected to publish the desired version on April 11. The other three newspapers were alerted today (fax and emails) to disregard versions one and two but to publish the third and final edition of the notice on April 11.

In hindsight, it would have been better to cancel publication for early April and try again later. After years of work on IMAP, another two weeks probably would not matter.

Approximately two person-days of additional work by department staff for the above steps were required since initial mailing of the legal notice on March 27.

Version 3
is
correct

NOTICE OF PROPOSED CHANGE OF WATER RIGHTS AND WATER PERMITS

UNITED WATER IDAHO INC. (UW), PO Box 7488, Boise ID 83707 has filed 99 Applications for Transfer of Water Rights (Licenses and Statutory Claims) and 13 Applications for Amendment (Permits). For convenience, water rights and water permits are referred to as "rights" in this notice. The 112 applications are known as the Integrated Municipal Application Package (IMAP) and are based on existing uses and the Idaho Municipal Water Rights Act of 1996 (ACT). The Act allows municipal providers to hold water rights for "reasonably anticipated future needs" within a planning period to accommodate growth in municipal service areas. IMAP will conform UW rights to the Act. IMAP also makes minor corrections to a few of the rights.

UW documented a 50 year planning period for IMAP, including estimates of population growth and increased water needs. UW anticipates a water demand of about 420 cfs within 50 years. Existing UW rights describe about 310 cfs, although current peak demand is about 150 cfs. The difference between the rate currently described by the rights (about 310 cfs) and the current peak flow (about 150 cfs) is about 160 cfs. UW requests approval to hold about 160 cfs for future growth. Approximately 100 to 120 additional cfs may need to be acquired by UW within the planning period, but that additional water is not sought by IMAP.

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If approved, IMAP will change the rights as follows. Each well in the municipal system will provide an alternate point of diversion for each ground water right. In other words, each ground water right will list all the wells as possible points of diversion, but each well will retain its original priority date for purposes of well interference. The Boise River right will be diverted at Marden Street and/or at an existing pump station by the Hwy 21 bridge near Diversion Dam.

WIDWR00076

Third & correct version

Nature of use for all rights will be municipal. Season of use for all rights will be all year. Place of use for all rights will be the UW expanding service area. Diversion rates for rights presently limited by annual volume will be adjusted downward to a continuous flow rate sufficient to produce the annual volume. About 50% of the total flow rate authorized by the rights is required to meet demand today. The balance will serve long-term water demand within the 50 year planning horizon.

Total amount of water to be authorized for use under the rights will be about 295 cfs, a slight reduction in the amount presently authorized for use. The river permit will provide up to 24.8 cfs of the proposed total, with the balance to be provided from wells. Two new well sites are proposed in Boise: near Hwy 21 southeast of Harris Ranch, and near the Maple Grove/Franklin intersection.

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Karl J. Dreher, Director

Published on April 4 and 11, 2002.



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region, 2735 Airport Way, Boise, Idaho 83705-5082 - (208) 334-2190

FAX (208) 334-2348

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

FAX TRANSMITTAL COVER SHEET

FAX NUMBER (208) 334-2348

DATE: 4-5-02

TO: Ruby

FROM: Aue T.

DOCUMENT DESCRIPTION/NOTES: legal ad changes

TOTAL PAGES SENT: 2 + COVER SHEET

CONTACT: Aue T.

for 4/11/02

WIDWR00078

(c) Times News, Twin Falls
Press Tribune, Arapahoe

Correct info provided
to Press Tribune &
ID. Statehouse w/ email

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Karl J. Dreher, Director

Published on April 4 and 11, 2002.

Taylor, Sue

From: Legals [legals@idahopress.com]
Sent: Friday, April 05, 2002 12:02 PM
To: Taylor, Sue
Subject: Re: NOTICE OF PROPOSED CHANGE OF WATER

on 4/5/02 11:49 AM, Taylor, Sue at staylor@idwr.state.id.us wrote:

Hi Tracy, The Department of Water Resources ran an ad yesterday and will run again next Thursday. It was for United Water Idaho. I have attached the ad with 5 changes that we need to have made. Will you let me know if this can be done. Please call me if you have questions.

Thanks for your help.

Sue T.

Sue,
Your changes will be made as requested. Thank you!

--

Traci Griffin
Legals Clerk
Idaho Press Tribune
(208) 465-8128
legals@idahopress.com

FAX**DATE:** Thurs April 4, 2002**TO:** Sue Taylor, ID Dept. of Water**FAX:** 208 334-2348**FROM:** Classified-Legals**PAGES:** 3**MEMO**

Sue,
Here is a copy of your ad as you had
requested. Please call if you have any
questions. Thank you!

Traci

*Press Tribune
Version 1 published*

WIDWR00083

**NOTICE OF PROPOSED
CHANGE OF WATER
RIGHTS AND WATER PERMITS**
UNITED WATER IDAHO INC.
(UW), PO Box 7488, Boise ID
83709-4165 has filed 99 Applications for Transfer of Water Rights (Licenses and Statutory Claims) and 13 Applications for Amendment (Permits). For convenience, water rights and water permits are referred to as "rights" in this notice. The 112 applications are known as the Integrated Municipal Application Package (IMAP) and are based on the Idaho Municipal Water Rights Act of 1996 (ACT). The Act allows municipal providers to reserve rights and associated water for future use within a planning period to accommodate growth in municipal service areas. IMAP will conform UW rights to the Act. IMAP also makes minor corrections to a few of the rights.

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Nature of use for all rights will be municipal. Season of use for all rights will be all year. Place of use

-Classified-Legals ,

467-1863

Apr. 4, 2002

4:20 PM

3/3

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Total amount of water to be authorized for use under the rights will be about 295 cfs, a slight reduction in the amount presently authorized for use. The river permit will provide up to 24.8 cfs of the proposed total, with the balance to be provided from wells. Two new well sites are proposed in Boise: near Hwy 21 southeast of Harris Ranch, and near the Maple Grove/Franklin intersection.

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Karl J. Dreher, Director

April 4, 11, 2002

04507086

WIDWR00085

The Times-News

Publishers of:

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Voice (208) 733-0931 • Fax (208) 734-5538

Visit Our Web Site @ www.magicvalley.com

Facsimile Cover Sheet

Date: 4-4-02

To: Sue

Company Id Dept of Water Resources

Fax # 208-334-2348

Phone # 208-334-2190

From Ruby

Number of pages to follow _____

If you are having difficulty receiving this transmission,
please call, _____ at (208) 733-0931, Ext. _____

Message: _____

Version 1 published

**NOTICE OF PROPOSED CHANGE OF
WATER RIGHTS AND WATER PERMITS**

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Karl J. Dreher, Director

WIDWR00087

Lester, Steve

From: Spackman, Gary
Sent: Thursday, April 04, 2002 2:47 PM
To: Lester, Steve
Subject: FW: UWI Legal Twin Falls Paper

Steve,
Looks like the Times News printed the first legal notice.
Gary

-----Original Message-----

From: Larsen, Dick
Sent: Thursday, April 04, 2002 2:33 PM
To: Spackman, Gary
Subject: UWI Legal Twin Falls Paper

Gary:

Here's what appeared today in the Twin Falls Times News.

Dick Larsen
Public Information Officer
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706
Tel - (208) 327-7933

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From: Spackman, Gary
Sent: Thursday, April 04, 2002 2:45 PM
To: Lester, Steve
Subject: FW: Legal Notice

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Gary

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From: Larsen, Dick
Sent: Thursday, April 04, 2002 2:20 PM
To: Spackman, Gary
Subject: Legal Notice

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Tel - (208) 327-7933

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Karl J. Dreher, Director

April 4, 11, 2002 04507086

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
EASTERN REGION
IDAHO FALLS, ID
ph. (208) 525-7161

FAX NO. (208) 525-7177

TRANSMITTAL COVER SHEET

OMNIFAX

TO: Gary Spackman FROM: Sharla Cox

DOCUMENT DESCRIPTION: _____

TOTAL NUMBER OF PAGES (Including this page): 3

* BILLING ADDRESS: _____
* _____
* _____
* NO. OF PAGES _____ COST/PAGE _____ TOTAL CHARGE _____
* _____

IMAP ad - correct in Id. Falls

For Lewiston paper: I saw a fax received 4/5/02
showing that & correct version published 4/4/02 but
I... to the fax to include here.

WIDWR00091

**NOTICE OF OPPORTUNITY
FOR PUBLIC COMMENT
ON A PERMIT APPLICATION
WITH THE OPTION TO
REQUEST A PUBLIC
COMMENT PERIOD ON
THE PROPOSED
PERMIT TO CONSTRUCT**

SUBJECT: Application for a permit to construct an air pollution-emitting source and proposed action: Busch Agricultural Resources, Inc.

PURPOSE: The Department of Environmental Quality has scheduled a period to receive public comments on the air quality aspects of the project application.

AUTHORITY: In compliance with Section 58.01.01.209, Rules For The Control of Air Pollution in Idaho, notice is hereby given that Busch Agricultural Resources Inc., Idaho Falls, Idaho, has applied for a permit to construct an air pollution source located at 2121 W. 145 N.

PUBLIC COMMENT PERIOD: Pursuant to Section 58.01.01.209, a public comment period on the proposed permit may be provided if written requests are submitted to the undersigned on or before May 6, 2002.

DESCRIPTIVE SUMMARY: Busch Agricultural Resources Inc. is proposing permit modifications to increase the permanent storage capacity of the grain elevator. The company has not requested an increase in production or emissions limits set by the current permit.

AVAILABILITY OF MATERIALS: The permit application materials submitted by Busch Agricultural Resources Inc. will be available for public review at the following location:

Department of
Environmental Quality
Idaho Falls Regional Office
900 Skyline, Suite B
Idaho Falls, Idaho

SUBMISSION OF WRITTEN COMMENTS, ASSISTANCE ON TECHNICAL QUESTIONS: Anyone may submit written comment regarding the project application. To be most effective, comments should address air quality considerations and include support materials where available. Comments, requests, and questions regarding the public comment process should be directed to Chris Ramsdell, Department of Environmental Quality, 1410 N. Hilton, Boise, ID 83706-1255, cramsdel@deq.state.id.us, or (208) 373-0237. Please reference the company name and project when sending comments or requesting information on an application.

For technical assistance on questions concerning this application or the permitting process, please contact Dan Salgado at (208) 373-0502.

All written comments and data concerning this application must be directed to and received by Dan Salgado on or before 5:00 p.m. MDT, May 6, 2002.

DATED this 1st day of April 2002.

Christopher P. Ramsdell
Air Quality Division
Published: April 4, 2002

**NOTICE OF
TRUSTEE'S SALE**

Trustee's Sale No. 02-CL-25530
NOTICE IS HEREBY GIVEN that, FIRST AMERICAN TITLE INSURANCE COMPANY, the duly appointed Successor Trustee, will on July 11, 2002, at the hour of 11:00 AM, of said day, AT THE OFFICE OF FIRST AMERICAN TITLE COMPANY, 2004 JENNIE LEE DRIVE, IDAHO FALLS, ID, sell at public auction to the highest bidder, for cash, in lawful money of the United States, all payable at the time of sale, the following described real and personal property (hereafter referred to collectively as the "Property"), situated in the County of BONNEVILLE, State of Idaho, to-wit:

Beginning at the Southeast corner of the Northwest Quarter of the Northeast Quarter of SECTION 14, TOWNSHIP 3 NORTH, RANGE 38, East of the Boise Meridian, Bonneville County, Idaho, and running thence North 12 rods; thence West 16 rods, thence South 12 rods, thence East 16 rods to the point of beginning.

LESS AND EXCEPTING THEREFROM THE FOLLOWING:

Beginning at the Southeast corner of Lot 1, Block 3, Woodland Park Subdivision, Division No. 2, to the City of Ucon, Bonneville County, Idaho, running thence North 0°04'47" West 163.00 feet to the Southwest Corner of Lot 7, in said Block 3, thence North 89°34'30" East 124.00 feet to the true point of beginning; running thence North 89°34'30" East 140.00 feet; thence South 0°04'47" East 163.00 feet; thence South 89°34'30" West 140.00 feet; thence North 0°04'47" West 163.00 feet to the true point of beginning.

The Trustee has no knowledge of a more particular description of the above-referenced Property but, for purposes of compliance with Section 60-113 of Idaho Code, the Trustee has been informed that the address of 4239 EAST 109TH NORTH, UCON, ID 83454, is sometimes associated with said real property.

Said sale will be made without covenant or warranty regarding title, possession or encumbrances to satisfy the obligation secured by and pursuant to the power of sale conferred in the Deed of Trust executed by KERRY L. STRUHS AND CARA L. STRUHS, HUSBAND AND WIFE, as Grantor, to FREDERIC V. SHOEMAKER, as Trustee, for the benefit and security of AAMES CAPITAL CORPORATION, A CALIFORNIA CORPORATION, as Beneficiary, dated 5/1/2000, recorded 5/5/2000, under Instrument No. 1021929. Mortgage records of BONNEVILLE County, IDAHO, the beneficial interest in which is presently held by CALMCO SERVICING LT.

THE ABOVE GRANTORS ARE NAMED TO COMPLY WITH SECTION 45-1506(4)(A), IDAHO CODE. NO REPRESENTATION IS MADE THAT THEY ARE, OR ARE NOT, PRESENTLY RESPONSIBLE FOR THIS OBLIGATION.

The default for which this sale is made is the failure to pay when due under the Deed of Trust Note dated 5/1/2000, THE MONTHLY PAYMENT WHICH BECAME DUE ON 10/1/2000 AND ALL SUBSEQUENT MONTHLY PAYMENTS, PLUS LATE CHARGES AND OTHER COSTS AND FEES AS SET FORTH.

**NOTICE OF PROPOSED
CHANGE OF WATER
RIGHTS AND WATER PERMITS
UNITED WATER IDAHO INC.**

(UW), PO Box 7488, Boise ID 83707 has filed 99 Applications for Transfer of Water Rights (Licenses and Statutory Claims) and 13 Applications for Amendment (Permits). For convenience, water rights and water permits are referred to as: "rights" in this notice. The 112 applications are known as the Integrated Municipal Application Package (IMAP) and are based on existing uses and the Idaho Municipal Water Rights Act of 1996 (ACT). The Act allows municipal providers to hold water rights for "reasonably anticipated future needs" within a planning period to accommodate growth in municipal services areas. IMAP will conform UW rights to the Act. IMAP also makes minor corrections to a few of the rights.

UW Documented a 50 year planning period for IMAP, including estimates of population growth and increased water needs. UW anticipates a water demand of about 420 cfs within 50 years. Existing UW rights describe about 310 cfs, although current peak demand is about 150 cfs. The difference between the rate currently described by the rights (about 310 cfs) and the current peak flow (about 150 cfs) is about 160 cfs. UW requests approval to hold about 160 cfs for future growth. Approximately 100 to 120 additional cfs may need to be acquired by UW within the planning period, but that additional water is not sought by IMAP.

All of the rights described a ground water source except one Boise River right for 24.8 cfs diverted at the Marden Street Treatment Plant near Municipal Park in Boise. The rights bear priority dates from 1934 through 1999. About 75% of the rights describe municipal use in variously described service areas such as the City of Boise, within city limits of Boise and vicinity, and so forth. About 25% of the rights list various combinations of domestic, irrigation and fire protection uses in specific locations or in generally described service areas. Most ground water rights include a single well although some include multiple wells. UW currently has about 107 authorized well sites for its 111 ground water rights. Most of the sites already have a well drilled under prior Idaho Department of Water Resources (IDWR) approval. Most of the rights serve the Boise area. A few of the rights serve non-contiguous areas in and/or near Eagle, Meridian, Kuna and Nampa.

PROPOSED CHANGE

If approved, IMAP will change the rights as follows. Each well in the municipal system will provide an alternate point of diversion for each ground water right. In other words each ground water right will list all the wells as possible points of diversion, but each well will retain its original priority date for purposes of well interference. The Boise River right will be diverted at Marden Street and/or at an existing pump station by the Hwy 21 bridge near Diversion Dam.

Nature of use for all rights will be

**Steel Belted
GREAT BUY!**



155/R12	\$29 ⁹⁵
155/R-13	\$29 ⁹⁵
155/80R-13	\$29 ⁹⁵
165/R-13	\$32 ⁹⁵
175/70R-13	\$36 ⁹⁵
185/70R-13	\$37 ⁹⁵
185/70R-14	\$41 ⁹⁵
195/70R-14	\$42 ⁹⁵
205/70R-14	\$44 ⁹⁵
185/75R-14	\$39 ⁹⁵
195/75R-14	\$41 ⁹⁵
205/70R-15	\$44 ⁹⁵
205/75R-15	\$47 ⁹⁵
215/75R-15	\$51 ⁹⁵
235/75R-15	\$54 ⁹⁵
185/65R-14	\$49 ⁹⁵
195/65R-14	\$51 ⁹⁵
205/65R-15	\$52 ⁹⁵

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185/75R-14	\$64 ⁹⁵	235/
195/75R-14	\$65 ⁹⁵	235/
205/75R-14	\$67 ⁹⁵	175/
215/75R-14	\$69 ⁹⁵	185/
185/70R-14	\$67 ⁹⁵	195/
195/70R-14	\$69 ⁹⁵	195/
205/70R-14	\$67 ⁹⁵	205/
215/70R-14	\$69 ⁹⁵	215/
205/70R-15	\$69 ⁹⁵	225/
215/70R-15	\$71 ⁹⁵	

FREE REP

WIDWR00092

Affidavit of Scott L. Campbell

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.

Exhibit 2

FAX COVER SHEET

DATE: Thursday, March 28, 2002

PAGES (INCLUDING COVER): 3

ORIGINAL TO FOLLOW: No

From:

CHRISTOPHER H. MEYER
GIVENS PURSLEY LLP
Suite 200, Park Place
277 North Sixth Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1236
Fax: 208-388-1300
Email: chm@givenspursley.com
Web: www.givenspursley.com

RE: United Water Idaho – IMAP
Our File No. 30-71

TO: Phil Rassier	327-7866
Steve Lester	334-2348
Gary Spackman	334-2348

MESSAGE:

Gentlemen:

Thanks very much for hearing me out on this. I very much appreciate the time you've taken at the last minute. I am sending along a copy of the further edits which I understand Mr. Dreher has suggested. It is his hope and mine that you will be able to get this out this morning in order to avoid a delay in the timing of the notice.

— Chris

cc: Scott Rhead (via Facsimile – 362-3858)
Joe Miller (via Facsimile – 336-6912)
John M. Marshall

**If this fax does not transmit fully or is difficult to read, please contact
me or my secretary, Katrina Thomas, at (208) 388-1227.**

CONFIDENTIALITY NOTICE

This facsimile may contain confidential information that is protected by the attorney-client or work product privilege. It is intended only for the use of the individual(s) named above. If you are not a named recipient or an employee responsible for delivering the facsimile, you are instructed not to deliver, distribute or copy this facsimile, nor should you disclose its contents or take any action in reliance on the information it contains. If you have received this facsimile in error, please notify us immediately by telephone to arrange for the return of the transmitted documents to us. Thank you.

WINWR000095

3-28-2002

*Edits to Notice by Chris Meyer
- With further edits by K. Doherty**existing
uses***NOTICE OF PROPOSED CHANGE OF WATER
RIGHTS AND WATER PERMITS**

UNITED WATER IDAHO INC. (UW), PO Box 7488, Boise ID 83707 has filed 99 Applications for Transfer of Water Rights (Licenses and Statutory Claims) and 13 Applications for Amendment (Permits). For convenience, water rights and water permits are referred to as "rights" in this notice. The 112 applications are known as the Integrated Municipal Application Package (IMAP) and are based on the Idaho Municipal Water Rights Act of 1996 (ACT). The Act allows municipal providers to ~~reserve rights and associated water for future use~~ within a planning period to accommodate growth in municipal service areas. IMAP will conform UW rights to the Act. IMAP also makes minor corrections to a few of the rights.

*hold
water*

increased UW documented a 50 year planning period for IMAP, including estimates of population growth and ~~future~~ water needs. UW anticipates a water demand of about 420 cfs within 50 years. Existing UW rights describe about 310 cfs, although current peak demand is about 150 cfs. The difference between the rate currently described by the rights (about 310 cfs) and the current peak flow (about 150 cfs) is about 160 cfs. UW requests approval to hold about 160 cfs for future growth. Approximately 100 to 120 additional cfs may need to be acquired by UW within the planning period, but that additional water is not sought by IMAP.

"reasonably anticipated future needs"

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expanding
Nature of use for all rights will be municipal. Season of use for all rights will be all year. Place of use for all rights will be the UW service area. Diversion rates for rights presently limited by annual volume will be adjusted downward to a continuous flow rate sufficient to produce the annual volume. About 50% of the total flow rate authorized by the rights ~~will be dedicated to future~~ water demand within the 50 year planning horizon.

is required to meet demand today. The balance will serve long term

Total amount of water to be authorized for use under the rights will be about 295 cfs, a slight reduction in the amount presently authorized for use. The river permit will provide up to 24.8 cfs of the proposed total, with the balance to be provided from wells. Two new well sites are proposed in Boise: near Hwy 21 southeast of Harris Ranch, and near the Maple Grove/Franklin intersection.

More information about IMAP can be obtained from IDWR Western Region, 2735 Airport Way, Boise, ID 83705-5082 or via the Internet (see "Special Interest" items at IDWR homepage www.idwr.state.id.us). Printed copies of IMAP can be reviewed at any IDWR office. Protests may be submitted based on the criteria of Sections 42-222 (transfers) or 42-211 (amendments), Idaho Code. Any protest against the proposed change must be filed, together with a protest fee of \$25, at the IDWR Western Region office on or before April 22, 2002. The protestant must also send a copy of the protest to the applicant.

Karl J. Dreher, Director

Published on April 4 and 11, 2002.

RECEIVED

MAR 14 2003

Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

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

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

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

COMES NOW, protestants Nampa & Meridian Irrigation District, the cities of Meridian and Caldwell, and the Terteling entities, by and through their counsel of record Ringert Clark, Chartered, and, pursuant to the Second Prehearing Order entered herein on February 27, 2003 hereby file this statement of additional issues. Because discovery in this matter has not been formalized, is ongoing, and may result in identification of additional issues, protestants hereby reserve the right to amend this statement as more information is acquired.

Additional Issues

1. Although the protestants believe that the issues of injury to their water rights caused by this proposed transfer application are already before the hearing officer, they are concerned that

the list of issues distributed by the hearing officer at the February 21, 2003 Prehearing Conference specifically mentioned potential injury to only certain protestants' water rights.

Therefore, protestants raise the following additional issue:

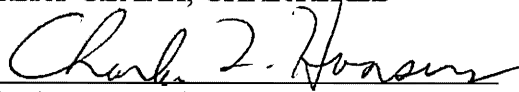
The IMAP may injure the water rights of Nampa & Meridian Irrigation District, Meridian, Caldwell, and the Terteling Entities.

2. It may be necessary to place a volumetric cap on water rights subject to IMAP to prevent enlargement.
3. Notice of United Water Idaho's amended IMAP has not been published pursuant to the requirements of I.C. §42-211 and I.C. §42-203A

Dated this 14th day of March, 2003.

RINGERT CLARK, CHARTERED

By


Charles L. Honsinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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

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

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

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

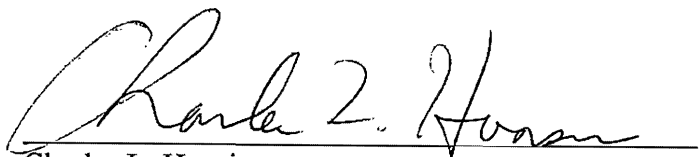
Josephine P. Beeman
Beeman & Associates PC
409 W. Jefferson
Boise, Idaho 83702

Matt J. Howard
P.O. Box 190012
Boise, Idaho 83719

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

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

Matt Wilde
City of Boise
P.O. Box 500
Boise, Idaho 83701-0500


Charles L. Honsinger

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
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455 S. Third, P. O. Box 2773
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Facsimile: (208) 342-4657

RECEIVED

MAR 14 2003

Department of Water Resources

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

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

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

MOTION TO REQUIRE PUBLICATION
OF NOTICE OF AMENDED
APPLICATION

COMES NOW, protestants Nampa & Meridian Irrigation District, the cities of Meridian and Caldwell, and the Terteling entities, by and through their counsel of record Ringert Clark, Chartered, and hereby file this Motion to Require Publication of Notice of the Amended Applications filed by United Water Idaho herein on February 28, 2003. This motion is made pursuant to the Second Prehearing Order entered herein on February 27, 2003, IDAPA 37.01.01.260, and I.C. §§42-203A, 42-211 and 42-222 and is supported by the record herein and the argument below.

ARGUMENT

I.C. §42-222 provides in relevant part that upon his receipt of an application to transfer water rights, "it shall be the duty of the director of the department of water resources to . . . provide notice

of the proposed change in the same manner as applications under Section 42-203A, Idaho Code.”

I.C. §42-203A specifies how publication of notice of an application by IDWR shall occur. In particular, I.C. §42-203A provides that the notice published must contain a number of items including: “(f) in general the nature of the proposed use;” and “(g) the approximate location of the point of diversion.” Finally, I.C. § 42-211 provides in relevant part when referring to applications to appropriate water rights that “[i]f amendment is made after publication of notice of the original application, said notice shall be republished following amendment.”

The obvious purpose behind the notice requirements of Chapter 2, Title 42 are to ensure that members of the public, including those that may be affected by a new appropriation, or a change in a water right, have an opportunity to file a protest or an appearance, and subsequently have an opportunity to be heard as to the application. The original notice of the IMAP proceeding published by the Department was defective in that it did not list the numerous points of diversion which United Water Idaho is attempting to integrate; did not sufficiently specify that a portion of its portfolio could be held without beneficial use thereof during the “planning horizon” sought by United Water Idaho; and did not specify that United Water Idaho was, through this process, seeking a “planning horizon” for water rights that United Water Idaho anticipated acquiring in the future. Obviously, without this type of information, parties cannot determine whether they will be affected by the approval of IMAP.

I.C. § 42-211, while not specifically providing for republication of amended transfer applications, is part of a unified legislative scheme which insures that the provisions of Chapter 2 are applicable to all applications filed thereunder, including transfers which are filed under I.C. § 42-222. *See Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

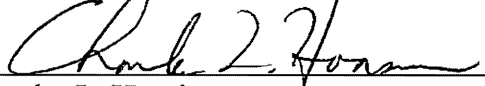
The concern of the protestants with respect to their request for publication of notice is the

possibility that failure to publish notice may at sometime in the future be raised by those entities not currently parties to this proceeding as a basis for reopening and relitigating this case. Such a result would be injurious to the protestants (and to the applicant), and should be avoided.

Accordingly, protestants hereby request that the hearing officer require that notice of United Water Idaho's Amended Application be filed, and require that the notice contain specific, detailed information which notifies parties of the potential effects of IMAP on their water rights and interests..

Dated this 14th day of March, 2003.

RINGERT CLARK, CHARTERED

By 
Charles L. Honsinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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

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

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

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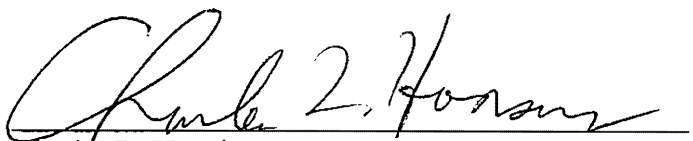
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Matt J. Howard
P.O. Box 190012
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Bruce Smith
Moore Smith Buxton & Turcke
255 N. 9th St., Ste. 420
Boise, Idaho 83702

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

Matt Wilde
City of Boise
P.O. Box 500
Boise, Idaho 83701-0500


Charles L. Honsinger

RECEIVED

MAR 14 2003

Department of Water Resources

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CHARLES L. HONSINGER (ISB #5240)
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Attorneys for Nampa & Meridian Irrigation District,
City of Caldwell, City of Meridian, and the Terteling entities

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

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

COMES NOW, protestants Nampa & Meridian Irrigation District, the cities of Meridian and Caldwell, and the Terteling entities, by and through their counsel of record Ringert Clark, Chartered, and hereby file this Motion to Require Legislative Approval of IMAP. This motion is made pursuant to the Second Prehearing Order entered herein on February 27, 2003, IDAPA 37.01.01.260, and I.C. §42-108, and is supported by the record herein and the argument below.

ARGUMENT

I.C. §42-108 provides in relevant part that “[a]ny permanent or temporary change in period of nature of use in or out-of-state for a quantity greater than fifty (50) cfs . . . shall require the approval of the legislature.” Pursuant to the representation of applicant’s counsel at the February 27,

2003 hearing, and pursuant to the IMAP application submitted, which establishes that United Water Idaho seeks to change the purpose of use of a substantial portion of its water right portfolio, and seeks to bring its entire portfolio within the Municipal Water Rights Act of 1996, the IMAP application seeks a change in the nature of use of substantially more than 50 cfs.

Essentially, United Water Idaho seeks to entirely change the nature of its water right portfolio such that all water rights can be held without risk of forfeiture, whether such water rights are used or not. Both the spirit and the letter of I.C. §42-108 require that the Idaho legislature approve a change in the nature of use of such a massive quantity of water rights. Accordingly, protestants respectfully request that the hearing officer determine that legislative approval of IMAP is required before any further proceedings herein.

Pursuant to IDAPA 37.01.01.260, protestants hereby request that oral argument be held on their motion.

Dated this 14th day of March, 2003.

RINGERT CLARK, CHARTERED

By Charles L. Honsinger
Charles L. Honsinger

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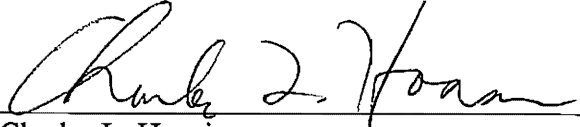
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