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WATER RESOURCES
WESTERN REGION

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 PRELIMINARY RESPONSE TO
IRRIGATION PROTESTANTS' MOTION
FOR DISCOVERY ON DUE PROCESS
ISSUES

PRELIMINARY RESPONSE

I. INTRODUCTION

On September 23, 2002, Pioneer Irrigation District, Settlers Irrigation District, Nampa & Meridian Irrigation District, and the Boise Project Board of Control (collectively, "Irrigation Protestants") filed a joint *Motion for Order Authorizing Preliminary Discovery*. The motion has been held in abeyance pursuant to a *Stipulation to Stay Motion for Order Authorizing Preliminary Discovery* signed on October 7, 2002. On January 2, 2003, the Irrigation Protestants filed their *Notice Regarding Motion for Order Authorizing Preliminary Discovery* by which they have reactivated their prior motion.

The thrust of the Irrigation Protestants' motion is that the years of cooperation and communication between UWID and the Department leading up to the filing of the IMAP may constitute improper *ex parte* contacts resulting in the pre-judging of the IMAP by the Department. Apparently recognizing that such contacts prior to initiation of a contested case do not violate state statutes or departmental rules, the Irrigation Protestants instead contend that they violate fundamental guarantees of due process under the state and federal constitutions.

In the interest of a more effective exploration at the next status conference of the important procedural and substantive issues presented by this motion, United Water Idaho Inc. ("UWID" or "United Water") offers this preliminary response to the Irrigation Protestants' motion.

II. UWID HAS ALREADY PROVIDED THE INFORMATION SOUGHT BY THE MOTION.

The Irrigation Protestants' pending motion states: "[I]t is imperative that [Irrigation Protestants] be allowed to conduct preliminary discovery to ascertain the full extent of communications between UWID (or its counsel) and the Department prior to the time the final version of the IMAP was filed with the Department." Motion at 5 (emphasis supplied). This has already been accomplished.

On October 23, 2002, UWID provided to each Protestant and to the Department a compilation of twenty-five written communications in a bound volume entitled *Correspondence Dealing with Implementation of the 1996 Municipal Water Rights Act and United Water Idaho's Integrated Municipal Application Package (October 9, 1997 to April 26, 2002)*. The signed statement introducing the compilation provides:

This compilation of correspondence is provided by United Water Idaho Inc. ("UWID"), through its counsel, in response to a request by certain parties to proceedings in connection with its Integrated Municipal Application Package ("IMAP"). It is being

made available to all parties and to the Idaho Department of Water Resources ("IDWR").

This compilation includes all letters and memoranda (as well as other written communications, to the extent available) between UWID and IDWR dealing with UWID's IMAP and/or the implementation or administration of the Municipal Water Rights Act of 1996 ("1996 Act").

These communications document discussions over the course of several years in which UWID sought IDWR's guidance on how the Department would implement the 1996 Act. Much of the correspondence relates to UWID's anticipated IMAP filing. Other correspondence included here does not address the IMAP itself, but raises broader questions regarding administration of water rights under the 1996 Act. We have also included internal IDWR communications on the subject that have been made available to us.

This compilation begins on October 9, 1997, the date of the first written communication on this subject. The compilation ends on April 26, 2002, the date UWID was advised of the filing of protests in connection with the IMAP. Substantive communications from that time forward are subject to the IDWR's *ex parte* communication rules and have been served on all parties.

This production of documents responds fully and completely to the Irrigation Protestants stated needs, as set out in their motion and quoted above.¹

In recent weeks, we have had meetings with each of the Irrigation Protestants. None has expressed any concern about the adequacy or completeness of UWID's production. Nor have any of the Irrigation Protestants asked for additional information or explanation with respect to the nature or content of UWID's communications with the Department. In short, there is no pending request for information on this subject.

In light of the facts described above, the Hearing Officer's explicit instructions to the Parties to attempt to work out their information needs informally prior to initiation of formal

1.1.1.1. _____

¹ The Irrigation Protestants state in their motion that it was necessary to file public information requests to obtain certain of these documents. This exercise, as well as the motion itself, was entirely unnecessary. If Irrigation Protestants had simply requested the information from UWID, it would have been provided. Indeed, UWID was in the process of compiling the correspondence history at the time their motion was filed.

discovery requests, and the Irrigation Districts' failure to provide UWID with the courtesy of advance notice, UWID is surprised by the reactivation of the motion.

III. ANY LEGAL ISSUES REGARDING DUE PROCESS MAY BE RESOLVED ON THE BASIS OF THE FACTS THAT HAVE BEEN FULLY DISCLOSED AND DOCUMENTED.

The Department has ample facts on which to evaluate the Irrigation Protestants' due process legal theory. UWID has never made a secret of its interest in the effective implementation of the 1996 Municipal Water Rights Act. Nor has it made a secret of its meetings with the Department on that subject. From the start, its collegiate discussion with the Department with respect to implementation of the 1996 Municipal Water Rights Act has been documented and made a part of the public record through regular correspondence with the Department. The more significant communications are included in the *Handbook on Idaho Water Law*, provided to Protestants. The degree and nature of the communications, indeed, the very evolution of the thinking process, is laid out in detail in the above referenced compilation of correspondence. In essence, UWID has stipulated to the allegation that it engaged in pre-filing consultations with the Department. The only question is whether this multi-year discourse constitutes a violation of the constitution. The Irrigation Protestants need no further proof to make their case, and the Hearing Officer needs no further facts to answer the question of law presented. If the Irrigation Districts wish to press this claim, they may set up a motion to test the theory now. UWID agrees that the matter should be resolved at once.

IV. COUNSEL FOR THE DEPARTMENT SHOULD BE ADVISED.

The Irrigation Protestants' request for discovery is a direct challenge to the integrity of the Department and the Director himself. The Irrigation Protestants, apparently, desire to employ discovery to probe the decision-making processes of the Director and his staff. Such discovery constitutes an unprecedented and dangerous invasion of the Department's

management and decision-making process. The Department should be allowed defend its interests in this regard.

UWID is allied with the Department only in the sense that both have been accused of wrongdoing. Our interests are not identical. UWID cannot fully and properly defend the Department and the Director in this matter. We suggest that counsel for the Department be made aware of the reactivation of the motion and invited to attend and participate in the next status conference.

V. IF DISCOVERY IS ALLOWED, ITS SCOPE SHOULD BE CAREFULLY DRAWN.

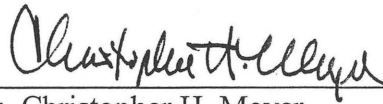
It is UWID's position that discovery on this subject is a costly and unnecessary fishing expedition whose sole stated objective is to prove the existence of communications that have already been fully disclosed.

If discovery is allowed, we urge that the Hearing Officer maintain a tight rein. Protestants should be required to explain what it is they need to find out, and who they need to hear from. Protestants should be barred from strategic ploys to turn opposing counsel into witnesses. Discovery should be narrowly targeted so as not to invade attorney-client privilege and other protected areas.

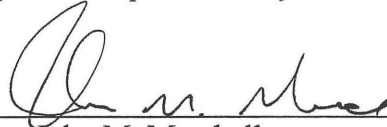
Lastly, UWID should be allowed to conduct its own discovery involving the Protestants and the Department to demonstrate that UWID's contacts with the Department are ordinary and consistent with customary practice.

DATED this 20th day of January, 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 20th day of January, 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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