

Attorneys for Pioneer Irrigation District  
and Settlers Irrigation District

Scott L. Campbell, ISB No. 2251  
Angela Schaer Kaufmann, ISB No. 5436  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Boulevard, 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone: (208) 345-2000  
Facsimile: (208) 385-5384  
18946.26

RECEIVED  
FEB 03 2003  
WATER RESOURCES  
WESTERN REGION

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

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

**PIONEER IRRIGATION DISTRICT AND  
SETTLERS IRRIGATION DISTRICT'S  
RESPONSE TO UWID'S SUMMARY OF THE  
ISSUES**

Pioneer Irrigation District and Settlers Irrigation District (collectively the  
"Districts"), by and through their counsel of record Moffatt, Thomas, Barrett, Rock & Fields,  
Chtd., hereby provide this response to United Water Idaho's "Summary of the Issues." As  
explained in the Statement of the Issues, filed concurrently herewith, Pioneer and Settlers are  
filing this Response because they are concerned that they will lose their opportunity to respond to  
the explanations provided in the "Summary of the Issues" if they do not respond at this time.  
The Districts also wish to note that the Statement of the Issues from the Districts has been

provided with no additional comment. It is a mere recitation of the Districts' statement of the issues.

The Districts also reiterate that they do not, at this time, intend to waive any issues. The Districts remain open to discussions, but wish to preserve the listed issues at this time. Moreover, they reserve the right to provide additional analysis and argument on these points at an appropriate time, and/or as ordered by the Hearing Officer.

### RESPONSE

In this Response, the Districts will simply list the issue, followed by their view of the issue, in response to UWID's "Summary of the Issues."

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

*The Districts' concerns include the fact that in their view, the notice does not accurately reflect all of the aspects of the IMAP. Moreover, the Districts' remain concerned about the participation by UWID in drafting the notice.*

**Issue 2**      The water rights described in IMAP involve quantities greater than 50 cfs. Legislative approval, as required by I.C. section 42-108 appears to be a pre-condition to processing of the IMAP application.

*While individual water rights may be involved, the clear intent of the Applicant (and of the IMAP) is to operate its system in an integrated manner, with integrated points of diversion. The very title of the underlying application is the **Integrated Municipal Application Package**. This is one application involving over 100 water rights. The total quantity of the water rights at issue clearly exceeds 50 cfs, and legislative approval is required.*

**Issue 3**      The IMAP was not submitted "upon forms furnished by the Department;" that failure constitutes a procedural due process defect which invalidates the IMAP process.

*Tabs H & I of the IMAP may have been modeled upon Department forms, but a careful review shows that they do not contain all of the information required by the Department forms.*

**Issue 4** I.C. section 42-222 cannot be used when the municipal provider is *not* changing the nature of use to municipal. In other words, the statute does not allow a municipal provider to bring existing water rights under the umbrella of the municipal water rights act, when the current nature of use of the water rights is municipal.

Idaho Code section 42-222 provides that:

When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definition and requirements specified in this chapter.

I.C. § 42-222(1) (emphasis added).

*UWID urges that “[t]he spirit of the 1996 Act is plainly to provide a comprehensive, but incremental replacement of the common law protections accorded under the Growing Communities Doctrine.” First, the Districts dispute the extent to which the Growing Communities Doctrine, as described by UWID, may have existed in Idaho prior to the 1996 Municipal Water Rights Act. Second, the canons of statutory construction dictate that Section 42-222 be read according to its plain meaning. The plain meaning of Section 42-222 is that in order for the 1996 MWRA to apply, the nature of use of each water right must be undergoing a change to the nature of use.*

**Issue 5** The IMAP application does not provide a sufficient description of the service area “to identify the general location where the water right is to be used and the types and quantity of uses that generally will be made.”

*As with many of the issues in this list, UWID suggests that it is the duty of the Districts or other Protestants to point out specific deficiencies. To the contrary, it is the duty of UWID, as the Applicant, to go forward with evidence that it has fully complied with Idaho Law.*

**Issue 6** The length of time, geographical area, population projections and other planning data for calculating reasonably anticipated future needs are limited to the comprehensive plans and planning horizons of cities within the service area. The IMAP exceeds these statutory parameters and fails to satisfy the mandates of I.C. section 42-202B(5).

*The relevant comprehensive plans cover a period of time far less than 50 years, the planning horizon requested by UWID. Therefore, it is difficult to see how the IMAP can be consistent with the relevant comprehensive plans. Additionally, the proposed 50 year service area of UWID extends far beyond the Boise City Area of Impact component of its Comprehensive Land Use Plan.*

**Issue 7**      The IMAP expansion of place of use and service area for the water rights, will cause expansion of the consumptive use component of the water rights due to lawn and landscape irrigation. This would constitute an improper enlargement in use of the original rights in violation of I.C. section 42-222(1).

*UWID has not provided comment to this particular issue.*

**Issue 8**      An application to amend a permit can not be considered under the Municipal Water Rights Act. No statutory provision allows this approach. Therefore, the permit amendment portion of IMAP should be separated and proceed as a distinct proceeding.

*UWID cites IDWR Guidance in support of its argument that it can amend permits under MWRA. That Guidance is not a duly-promulgated rule, nor is a judicial decision or even a decision made after a contested case with appropriate public notice. Therefore, its precedential value is highly uncertain at best.*

*Moreover, statutes must be construed according to their plain language. Under the plain reading of the Idaho Code, amendments to permits do not fall within the MWRA.*

**Issue 9**      As a matter of procedure, the validity of these proceedings due to the potentially inappropriate contact with the IDWR Director should be decided before any other issues are considered.

*UWID did not object to this approach.*

**Issue 10**      Forfeiture –

- a.      Municipal water rights can be forfeited. Some of the IMAP water rights have been forfeited.
  - (1)      The right associated with a particular well should be deemed forfeited when that well is abandoned, and the right was not transferred to another point of diversion.
  - (2)      Is the “stepwise function” an appropriate way to determine whether municipal water rights have been forfeited?

- (3) If the “stepwise function” is not an appropriate way to determine whether and when municipal water rights have been forfeited, should a “point by point” system be used?

*The Districts view this as a central part of the dispute in this matter. UWID has replied to the forfeiture issue in a general way. At this point, the Districts note that the forfeiture doctrine should apply with full force to municipal water rights prior to inclusion into the “reasonable future needs” protective status.*

**Issue 11** What is the appropriate length of time for reviewing and reevaluating the accuracy of the planning horizon and projected water needs (i.e., at the end of the planning horizon, every five years, every three years, etc.).

*UWID does not disagree that a period of review is appropriate, and suggests five years. The Districts believe a shorter period of time would be appropriate.*

**Issue 12** The “integrated points of diversion” approach in IMAP does not 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.

*In response to these issues, UWID cites to An Overview of United Water’s “IMAP” Including an Explanation of the “Integrated Points of Diversion” Issues (July 15, 2002). While that document may be part of IDWR’s file, it is **not** part of the official record in this matter.*

*That issue aside, after reviewing the Overview, the Districts remain concerned about the effect of the integrated points of diversion approach on conjunctively administered water rights, as well as on all water rights throughout Basin 63.*

**Issue 13** A municipal provider should not be allowed to obtain a water right in the amount of a particular well’s capacity, even though that amount of water is not diverted, and perhaps has never been diverted, from that well.

*In response to this issue, UWID cites its counsel's Handbook on Idaho Water Law, which is not part of the official record in this matter. UWID also cites to the "Department's guidance." That guidance is not a duly-promulgated rule, a duly-adopted statute, a judicial opinion, or even an official IDWR decision made in a contested case after proper public notice. The issue remains to be decided in an appropriate forum.*

**Issue 14** If the IMAP proceeding is completed before the water rights included within the IMAP reach the SRBA, review of the water rights in the SRBA may be precluded. This conflicts with the requirements of the SRBA statute.

*UWID asserts that this issue is not properly presented in this proceeding.*

**Issue 15** United Water Idaho violated the procedural and substantive due process rights of our clients by its extensive ex parte contacts with the Idaho Department of Water Resources Director and senior management officials concerning the legal and factual issues involving IMAP and interpretations of the statutory language of the Municipal Water Rights Act of 1996 and other provisions of Idaho law. Such actions resulted in pre-decisional interpretations or rulings by the Director and other senior management officials which directly impact the IMAP proceeding. In essence, United Water Idaho conducted an ex parte declaratory proceeding before the Department in violation of the Department's rules and our clients' constitutional and statutory rights.

*The Districts remain concerned about this issue. The proper forum to decide it is upon a briefing schedule in accordance with IDWR's Rules of Procedure.*

### CONCLUSION

Once again, this Response does not represent the Districts' full argument on these issues; many, if not all, of them deserved to be fully brief and argued. The Districts reserve their right to provide additional argument on any or all issues raised herein.

DATED this 31st day of January 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 31<sup>st</sup> day of January 2003, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT'S RESPONSE TO UWID'S SUMMARY OF THE ISSUES** to be served by the method indicated below, and addressed to the following:

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

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

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

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

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

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

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

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

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

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

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

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

Josephine P. Beeman  
Beeman & Associates P.C.  
409 W. Jefferson Street  
Boise, ID 83702  
Fax: 331-0954

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

City of Boise  
Boise Public Works Department  
Beth K. Baird  
Environmental Programs Coordinator  
150 N. Capitol Blvd.  
PO Box 500  
Boise, ID 83701-0500  
Fax: 384-3905

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

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

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

Bureau of Reclamation  
E. Gail McGarry, PN-3100  
1150 N. Curtis Road, Suite 100  
Boise, ID 83706-1234

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

Kathleen M. Carr  
U.S. Department of the Interior  
Office of the Solicitor  
Pacific Northwest Region , Boise Field Office  
550 West Fort Street, MSC 020  
Boise, ID 83724-0020

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

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

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

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

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

City of Meridian Public Works  
Gary D. Smith  
660 E. Watertower  
Meridian, ID 83642  
Fax: 887-1297

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

City of Caldwell Engineering Department  
Gordon Law  
621 E. Cleveland Blvd.  
Caldwell, ID 83605

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

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

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

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

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

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

☒ U.S. Mail, Postage Prepaid

☐ Hand Delivered

☐ Overnight Mail

☐ Facsimile

  
\_\_\_\_\_  
Scott L. Campbell