

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

RECEIVED
MAR 13 2003
WATER RESOURCES
WESTERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the Matter of United Water Idaho's	)	
Municipal Application Package, United Water	)	MOTION REGARDING
Idaho, Petitioner	)	PRELIMINARY PROCEDURAL
	)	ISSUES
	)	

The Cities of Eagle, Kuna, Middleton, Star, and the Star Sewer and Water District (collectively referred to as "Protestants"), by and through their counsel of record, MOORE SMITH BUXTON & TURCKE, CHARTERED, move the Hearing Examiner to resolve the "Preliminary Procedural Issues" as indicated below. The Protestants' Motion addresses the three (3) preliminary procedural issues identified in the Hearing Officer's Second Prehearing Order, in the order presented in that Prehearing Order. The Protestants request that these matters be scheduled for oral argument.

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

Idaho Code § 42-203A governs the mandatory publication of an application to appropriate water. Idaho Code §§ 42-211 and 42-222, the statutory provisions governing amendments to permits and applications for transfers, respectively, also require the publication of notice in accordance with Idaho Code § 42-203A. Section 203A states in relevant part that the Idaho Department of Water Resources ("IDWR"),

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 the water to be appropriated; (f) the general nature of the proposed use; (g) the approximate location of the point of diversion; (h) and the point of use.

A. The notice of the IMAP published in April 2002

The published notice of the original IMAP did not include all the information required by Idaho Code § 42-203A. Furthermore, the published notice did not adequately describe what United Water Idaho, Inc. (“UWID”) was actually proposing to accomplish by the IMAP. However, the original IMAP application no longer exists. An amended IMAP filed on February 27, 2003 replaced the original IMAP. Thus, the filing of the amended IMAP renders moot any deficiencies in the publication of notice of the original IMAP. The issue ripe for review is now the publication of the amended IMAP, which the Protestants address in the following section.

If the adequacy of the notice of the original IMAP is to be determined by the Hearing Officer, the Protestants believe that the IMAP must be republished because the original notice was deficient. However, the remedy, republication of the original notice, is moot because the original IMAP has been replaced by the amended IMAP. It would be wasteful to republish notice of an application that no longer exists. The notice of the amended IMAP application should be published for the reasons identified in the following section.

Any notice must contain adequate information for the public to understand what UWID is asking the IDWR to approve. The published notice should include: (1) the information required by Idaho Code § 42-203A; (2) the fact UWID is seeking approval of the right to hold water rights for future needs; (3) the fact 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; (4) the specific water rights currently held by UWID that it proposes to hold for

alleged future needs; (5) the fact UWID is proposing to transfer water rights from groundwater system(s) to other disconnected groundwater system(s) (inter-basin transfers); (6) the fact UWID's "integrated points of diversion" proposal would allow UWID to claim an earlier priority date if future regulatory action curtails uses within all or part of the aquifer system; (7) an explanation of the quantity limitations, if any, UWID's application imposes on integrated points of diversion (i.e. whether all of UWID's water rights could be pumped from one point of diversion; if not, describe the how quantity would be limited); (8) an explanation of the priority date limitations, if any, UWID's application imposes on integrated points of diversion (i.e. whether the priority date appurtenant to the move-from location would be moved to the move-to location); (9) any conditions on the IMAP that UWID proposes as part of its application.

B. The Amended IMAP applications filed on February 2003

UWID filed a Notice of Withdrawal of Four Applications for Amendment of Permit from the IMAP and Motion to Amend the IMAP on January 20, 2003. UWID then filed an amended IMAP incorporating the changes proposed in UWID's Notice and Motion, and identified the licenses approved since the original IMAP was filed. The amended IMAP does not, however include the conditions UWID identified as being applicable to the original IMAP. There is no dispute the notice of the amended IMAP has not been published, which it must be.

According to Idaho Code § 42-211, an amendment made after publication of the original application must be published. Idaho Code § 42-211. "If an amendment is made after publication of notice of the original application, said notice shall be republished following amendment...." Id. Accordingly, UWID's amended application would need to be published.

If publication of Notice of the amended IMAP is not completed as required by law, any subsequent action by the IDWR on the amended IMAP will be vulnerable to a challenge. Since the published notice of the original IMAP was not adequate, the publication of the Notice of the

amended IMAP is an opportunity to correct the deficiencies in the notice of the original IMAP. The Protestants have an interest in making certain that this process is completed in a lawful manner since the Protestants would be injured if the IMAP process had to be redone.

2. The Water Rights Described In Amended IMAP And The Original IMAP Involve Quantities Greater Than 50 Cfs Thus Requiring Legislative Approval.

Idaho Code § 42-108 requires legislative approval of “[a]ny permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs ... except that any temporary change within the state of Idaho for a period of less than three (3) years may be approved by the director without legislative approval.” There is no dispute that UWID’s applications collectively seek to change a quantity of water greater than 50 cfs. Furthermore, there is no dispute that UWID’s applications seek a permanent change to water rights.

Considered individually, the UWID’s applications would not require legislative approval. However, UWID’s original application compiled the water rights on one application.¹ In addition, under either IMAP application UWID seeks to change UWID’s water rights so they are collectively treated as one large pot of water, not individual water rights. The UWID’s “integrated points of diversion” proposal, if approved, would permit UWID to use any water right anywhere within its service area at anytime. Since the applications do not expressly limit the amount of water that could be diverted from any one point of diversion, the effect is to transfer UWID’s portfolio of water rights to each of UWID’s points of diversion. Accordingly, the UWID’s “newer wells” which are their “best and most efficient” could potentially pump 50 cfs or more at one time. Thus, as presented, the IMAP seeks to change the use of a quantity of water greater than 50 cfs and legislative approval is required.

¹ UWID filed one application for amendments to permits and one application for changes to water rights.

3. The IMAP Was Not Submitted “Upon Forms Furnished By The Department.”

When an applicant proposes to amend a permit or make a change to a water right license, claim or decree, that application shall be made upon forms furnished by the IDWR. Idaho Code §§ 42-211 and 42-222. There is no dispute that UWID did not file the original IMAP on forms furnished by the IDWR. The amended IMAP, however, was made using IDWR’s forms. The amended IMAP includes an individual application for each water right and water right permit that UWID seeks to change. Consequently, it would appear any objection to the forms used for the original IMAP have been mooted by the filing of the amended IMAP. If the Hearing Officer were to rule the original IMAP filing was defective, the remedy would be the re-filing of the IMAP on IDWR forms, something UWID has already done.

Conclusion

For the reasons described in the Protestants’ Motion, the Protestants respectfully request that the Hearing Officer order publication of notice of the amended IMAP and direct that the notice provide a sufficient description of all of the changes UWID is requesting through the amended IMAP so that the public has adequate notice of the same.

RESPECTFULLY SUBMITTED this 13 day of March, 2003.



TAMMY A. ZOKAN

MOORE SMITH BUXTON & TURCKE, CHARTERED

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of March, 2003, I caused to served a true and correct copy of the forgoing MOTION ON PRELIMINARY PROCEDURAL ISSUES by the U.S. mail, addressed to the following:

Kathleen Marion Carr
Office of the Field Solicitor
U.S. Department of the Interior
550 West Fort Street, MSC 020
Boise, ID 83724
208-334-1911-phone
208-334-1378- fax

Gary Spackman
Idaho Department of Water Resources
2735 Airport Way
Boise, ID 83705
208-327-5400- fax

United Water Idaho, Inc.
John M. Marshall
Givens Pursley, LLP
P.O. Box 2720
Boise, ID 83701
208-388-1300-fax

Nampa & Meridian Irrigation District
Charles L. Honsinger
Ringert Clark
P.O. Box 2773
Boise, ID 83701-2773
208-342-4657 Fax

City of Boise
Boise Public Works Department
Beth K. Baird
Environmental Programs Coordinator
P.O. Box 500
Boise, ID 83701-0500
208-384-3905

Boise Project Board of Control
Albert P. Barker
Barker Rosholt & Simpson
P.O. Box 2139
Boise, ID 83701-2139
208-342-4657

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

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

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

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

City of Meridian Public Works
Gary D. Smith
660 E. Watertower
Meridian, ID 83642
208-887-1297- fax

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

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

Boise-Kuna Irrigation District
Robert W. Talboy
Ellsworth, Kallas & Talboy
2402 W. Jefferson Street
Boise, ID 83702

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



TAMMY A. ZOKAN