BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 72036 IN THE NAME OF UNITED WATER, IDAHO INC.	)))))	**ORDER DENYING MOTION FOR DECLARATORY ORDER**

On May 18, 2005, United Water Idaho, Inc. (United Water) filed application for transfer no. 72036 with the Idaho Department of Water Resources (the "Department"). Application for transfer no. 72036 proposed adding a point of diversion to water right no. 63-12363. The existing authorized point of diversion for water right no. 63-12363 is located in the NENESE[1], Section 16, T3N, R2E, in Ada County, and is referred to by United Water as the "Cassia 2 well." The proposed additional point of diversion is an existing well located in the SWSESE, Section 6, T3N, R2E, in Ada County, and is referred to by United Water as "the Fisk well." The Fisk well is also described as a point of diversion by water right no. 63-11558 held by United Water. The Cassia 2 well and the Fisk well are located approximately two miles apart.

The Department published notice of application for transfer no. 72036. Pioneer Irrigation District ("Pioneer") protested the application for transfer.

Prior to filing application for transfer no. 72036, United Water filed applications for transfer and for amendment of permits, generally referred to by United Water, the Department, and other parties as the "Integrated Municipal Application Package," abbreviated as "IMAP." The IMAP applications identify the "portfolio" of water rights held by United Water and seek significant changes to the cumulative body of United Water's water rights. The IMAP applications identify water right nos. 63-11558 and 63-12363 with the other water rights sought to be transferred.

On December 18, 2003, the Director of the Department issued an interlocutory order titled *Order re Motion for Stay* ("the Stay Order"). The Stay Order interrupted the processing of the IMAP applications "in full pending the issuance of partial decrees for [United Water's] water right claims by the SRBA District Court."

An issue was raised in the contested case for application for transfer no. 72036 about whether the previous IMAP filings and the stay issued by the Director prevent consideration of application for transfer no. 72036. As a result, on December 21, 2005, United Water filed *United Water's Motion for Declaratory Order Respecting its Right to Proceed.* The filing will be referred to hereafter as the "Petition for Declaratory Ruling"). Pioneer and United Water filed responses and replies following the filing of the Petition for Declaratory Ruling.

[1] In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. For instance, in this example, the full description would be the SW1/4SE1/4SE1/4, Section 16, Township 3 North, Range 2 East, Boise Meridian.

Appropriateness of Filing a Petition for Declaratory Ruling

Rule 400 of the Department's Rules of Procedure states that a petition for a declaratory ruling should seek an interpretation "on the applicability of a statute, rule or order administered by the agency." As part of its request for relief, the Petition for Declaratory Ruling seeks an interpretation of the Stay Order.

Under Rule 402 of the Department's Rules of Procedure, when the Department issues a declaratory ruling, Rule 402 requires that the ruling be a "final agency action." Rule 402 requires that the ruling state that it is a "final agency action," and that "any party aggrieved by the declaratory ruling may appeal to district court . . .."

In contrast, the Director issued the Stay Order as an interlocutory order. Interlocutory orders cannot be appealed unless certified for appeal. The Stay Order stated that the Director could review the Stay Order at any time. The Stay Order does not qualify as an order that, if subsequently interpreted by the Director, could result in a final order prompting opportunity for independent judicial review.

The issues in question arose in a contested case before the Department. While the existence of another remedy should not bar a petition for declaratory ruling (*See* Rule 57 of the Idaho Rules of Civil Procedure), if an issue can be adequately addressed within the framework of an existing contested case, consideration of a separate petition for declaratory ruling is not appropriate. United Water's Petition for Declaratory Ruling should be denied.

Processing Application for Transfer no. 72036

The Director should determine whether the contested case created by protests to application for transfer no. 72036 should go forward. The Director can decide the matter because the Director has not appointed a hearing officer to the contested case.

Consideration of an application for transfer for a water right that is already the subject of a pending contested case for an earlier-filed application for transfer can create conflicts in the earlier filed contested case. Changes proposed by the later-filed application for transfer, if approved, could improve or degrade the positions of the parties in the earlier-filed application for transfer without the parties having participated in the administrative process. If components of the water rights are changed by a subsequent transfer approval, the changed components would be incorporated into the earlier-filed application for transfer without notice to the parties to the associated contested case.

As a result, either the changes proposed by application for transfer no. 72036 should be incorporated into the earlier filed application for transfer, or the water right sought to be transferred by application for transfer no. 72036 should be removed from the earlier contested application for transfer so it can be considered separately. United Water understandably does not want to amend the IMAP to add a single point of diversion and wait for the expiration of the Stay Order and probable protracted administrative proceedings. As a result, if United Water wants the Department to consider application for transfer no. 72036, it must amend IMAP by withdrawing water right no. 63-12363 from IMAP. If United Water withdraws water right no. 63-12363 from the IMAP, water right no. 63-12363 will no longer be subject to the Stay Order.

The Stay Order expresses concerns about the transfer process for any of the water rights when imminent consideration by the SRBA Court of some of the water rights may affect the water rights sought to be transferred.

> The Director concludes that a stay of any further processing of UWID's water rights in this transfer proceeding pending the rights being decreed by the SRBA District Court is appropriate. UWID states that it supports the protestants' request for a stay of those transfer issues over which the SRBA District Court has jurisdiction and also those transfer issues that otherwise may be affected by the SRBA's determinations. (Citations omitted). These two categories of issues include an evaluation of UWID's pre-1987 water rights that will be reviewed by the SRBA District Court, and UWID's post-1987 water rights, which although not reviewed in the SRBA may be affected by the SRBA District Court's determinations. UWID agrees that these two categories of issues should not be addressed by IDWR for any of UWID's rights until after the SRBA District Court has issued partial decrees for UWID's pre-1987 claimed rights. (Citations omitted).

Upon withdrawal of water right no. 63-12363 from IMAP, the Department should delay consideration of application for transfer no. 72036 at least until the Department recommends related water rights to the SRBA Court and the Department evaluates how right no. 63-12363 will be affected by the recommendations.

ORDER

IT IS HEREBY ORDERED that *United Water's Motion for Declaratory Order Respecting its Right to Proceed* is **Denied**.

IT IS FURTHER ORDERED that, if United Water withdraws water right no. 63-12363 from IMAP, application for transfer no. 72036 shall be processed as a contested case before the Department. The Department may delay processing of transfer no. 72036 during the pendency of review and determination of related water rights by the SRBA Court.

IT IS FURTHER ORDERED that this is an interlocutory order, and the parties are not entitled to appeal the order until final disposition of the contested case for application for transfer no. 72036.

Dated this 15th day of February, 2007.

David R. Tuthill, Jr.
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 2007, 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:

CHRISTOPHER H MEYERS
JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701

E GAIL MC GARRY PN-3100
BUREAU OF RECLAMATION
1150 N CURTIS RD STE 100
BOISE ID 83706-1234

KATHLEEN MARION CARR
OFFICE OF THE FIELD SOLICITOR
US DEPT OF INTERIOR
960 BROADWAY STE 400
BOISE ID 83706

ALBERT BARKER
BARKER ROSHOLT & SIMPSON
PO BOX 2139
BOISE ID 83701-2139

CHARLES L HONSINGER
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

BRUCE M SMITH
TAMMY A ZOKAN
MOORE SMITH BUXTON & TURCKE
225 N 9TH ST STE 420
BOISE ID 83702

SCOTT L CAMPBELL
MOFFATT THOMAS
PO BOX 829
BOISE ID 83701-0829

MATT WILDE
CITY OF BOISE
PO BOX 500
BOISE ID 83701-0500

JOSEPHINE P BEEMAN
BEEMAN & ASSOCIATES PC
409 W JEFFERSON
BOISE ID 83702

ROBERT W TALBOY
ELLSWORTH KALLAS & TALBOY
2402 W JEFFERSON ST
BOISE ID 83702

ED SQUIRES
HYDRO LOGIC INC
1002 W FRANKLIN ST
BOISE ID 83702-5431

JOHN WESTRA
IDWR-WESTERN
REGION MANAGER
2735 AIRPORT WAY
BOISE ID 83705-5082

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources